No. 25-581

In the Supreme Court of the United States

ST. MARY CATHOLIC PARISH, LITTLETON, COLORADO ET AL., PETITIONERS

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF EARLY CHILDHOOD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Like many nondiscrimination laws, Colorado's equal-opportunity mandate for participants in its universal preschool program lacks exemptions for religious conduct, but exempts certain secular conduct and allows for discretionary exceptions. The question presented is whether, under the Free Exercise Clause of the First Amendment, such laws qualify as neutral and generally applicable under *Employment Division* v. *Smith*, 494 U.S. 872 (1990), so long as the exemptions are not for identical secular conduct and do not involve unfettered discretion.

STATEMENT OF COMPLIANCE WITH SUPREME COURT RULE 37.2

The counsel of record for all parties received timely notice of the United States' intent to file this amicus curiae brief at least ten days before the due date.

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INTEREST OF THE UNITED STATES

This case concerns the application of the Free Exercise Clause to a state nondiscrimination law that contains exemptions that allow government funding recipients to give preferential treatment to beneficiaries based on certain characteristics (income level and disability) and empowers the state to create additional, discretionary exemptions, but prohibits religious exercise. The United States has a substantial interest in the preservation of the free exercise of religion. It also has a substantial interest in the enforcement of rules prohibiting discrimination by government funding recipients. The United States has participated as amicus curiae in many of this Court's Free Exercise cases, including *Fulton* v.

City of Philadelphia, 593 U.S. 522 (2021), and *Mahmoud* v. *Taylor*, 606 U.S. 522 (2025). The government's decision to file an uninvited certiorari-stage amicus brief reflects its views about the severity of the court of appeals' error, the recurrence of the question presented, and the significant benefit that further clarity in this area of the law would provide to the lower courts, federal and state governments, and the public.

INTRODUCTION

In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court held that neutral, generally applicable laws—even those that severely burden religious exercise—do not violate the Free Exercise Clause if they are rationally related to a legitimate government interest. *Id.* at 878-879. By contrast, laws that "treat *any* comparable secular activity more favorably than religious exercise" "are not neutral and generally applicable, and therefore trigger strict scrutiny." *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021) (per curiam); see also *Fulton* v. *City of Philadelphia*, 593 U.S. 522 (2021).

In most cases, this threshold classification as to whether *Smith* applies is dispositive. If the law is deemed neutral and generally applicable, it generally survives rational-basis review. See, *e.g.*, *Smith*, 494 U.S. at 878; *Slattery* v. *Hochul*, 61 F.4th 278, 292-294 (2d Cir. 2023); *Foothills Christian Ministries* v. *Johnson*, 148 F.4th 1040, 1051-1052 (9th Cir. 2025), petition for cert. pending, No. 25-802 (filed Jan. 5, 2026). But if the law is non-neutral or selectively applicable, strict scrutiny generally dooms the provision. See, *e.g.*, *Mahmoud* v. *Taylor*, 606 U.S. 522, 565-569 (2025); *Carson* v. *Makin*, 596 U.S. 767, 780-781 (2022); *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 526-527 (2022). This threshold question whether *Smith* applies has often recurred in Free Ex-

ercise cases—both in the ordinary course and in the emergency litigation over state COVID-19 vaccine mandates. See *Dr. A* v. *Hochul*, 142 S. Ct. 2569, 2570 (2022) (Thomas, J., dissenting from the denial of certiorari).

As members of this Court have acknowledged, courts of appeals have divided over how to tell whether a law is neutral and generally applicable for Free Exercise Clause purposes. See *Dr. A*, 142 S. Ct. at 2570 (Thomas, J., dissenting from the denial of certiorari). The Court has explained that laws are not generally applicable if secular exemptions "undermine[] the government's asserted interests in a similar way" that a religious exemption would. See *Fulton*, 593 U.S. at 534. But the Tenth Circuit below interpreted that test to require *identical* secular and religious conduct for a secular exemption to take a law outside *Smith*. The Second Circuit has taken the same approach, and some state courts embrace similar reasoning.

Thus, the Tenth Circuit held below, Colorado's nondiscrimination law for preschools is neutral and generally applicable even though it has a secular exception allowing preschools to treat some characteristics differently—for instance, by allowing preferences for low-income or disabled students at the expense of higher-income or non-disabled ones. Because Catholic schools, based on their religious convictions, provide differential treatment based on *other* characteristics—namely, sexual orientation and gender identity—and no secular exception covers those characteristics, Colorado's law, in the Tenth Circuit's view, is generally applicable. Catholic preschools thus must forgo state subsidies if they want to prefer families who follow Catholic teachings on those subjects.

That approach squarely conflicts with the en banc Ninth Circuit, which holds that any exception from a nondiscrimination policy—"[w]hether * * * based on gender, race, or faith"—poses "an identical risk" to the government's interest in "equal access." *Fellowship of Christian Athletes* v. *San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 689 (9th Cir. 2023) (*FCA*) (en banc). Under that test, such an exemption always renders the law not neutral or generally applicable, even if the exemption does not involve conduct identical to the religious exercise at issue. Other courts, including the First Circuit, the Sixth Circuit, and the Louisiana Supreme Court, have likewise adopted a broader understanding of which secular activities are comparable to religious exercise and which provisions of law are relevant to that inquiry.

Compounding the problem, the Tenth Circuit, the Second Circuit, and the Connecticut Supreme Court refuse to treat mechanisms for further exemptions as fatal to general applicability unless they provide discretion that could extend to the religious conduct at issue. Under that approach, even if the state can create discretionary exceptions, if there are limits on that discretion (for instance, exceptions to a nondiscrimination rule must benefit historically disadvantaged groups), and those limits would exclude the religious conduct at issue (say, a preference for coreligionists), the exceptions do not undermine general applicability. By contrast, the Ninth Circuit recognizes that the mere existence of a discretionary mechanism—even if cabined—undermines general applicability. See *FCA*, 82 F.4th at 687-688.

This "widespread, entrenched" division among the courts is "worth addressing" now even more than in 2022 when three members of this Court urged review.

See *Dr. A*, 142 S. Ct. at 2570 (Thomas, J., dissenting from the denial of certiorari). This Court should not allow widely diverging views about what makes a law neutral and generally applicable under *Smith* to stymie religious exercise in major portions of the country.

This case is a particularly suitable vehicle for resolving this important, recurring question. The Tenth Circuit below widened an existing circuit split in a way that will subject many laws with secular exceptions but no religious exceptions to mere rational basis review under *Smith*. That court addressed both express secular exceptions and discretionary, ad hoc exceptions and did so in the oft-recurring context of nondiscrimination laws.[1] If this Court is looking for a vehicle to address this threshold question, this petition appears to present the cleanest option.

Finally, resolving the question presented could obviate the need to confront at this juncture whether *Smith* itself retains vitality, as petitioner urges in a separate question presented. See Pet. 30-35; *Fulton*, 593 U.S. at 545-618 (Alito, J., concurring in the judgment). If, as petitioner and the United States contend, courts of appeals are improperly classifying too many laws as neutral and generally applicable, the result will be fewer cases within the *Smith* framework and additional data points regarding the workability of applying strict scrutiny in such cases. Cf. *Fulton*, 593 U.S. at 543-544 (Barrett, J., concurring).

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[1] See, *e.g.*, *General Conference of Seventh-day Adventists* v. *Horton*, 787 F. Supp. 3d 99 (D. Md. 2025), appeal filed, No. 25-1735 (4th Cir.); *St. Dominic Academy* v. *Makin*, 744 F. Supp. 3d 43 (D. Me. 2024), appeal filed, No. 24-1739 (1st Cir.); *Emilee Carpenter, LLC* v. *James*, 107 F.4th 92 (2d Cir. 2024); *FCA*, 82 F.4th at 664.

STATEMENT

A. Colorado's Universal Preschool Program

Since 2022, Colorado has offered 15 weekly hours of free preschool to Colorado children. Pet. App. 5a-7a, 61a. The Colorado Department of Early Childhood implements the program by reimbursing public and private preschools that choose to participate. *Id.* at 61a. Any public or private preschool can choose to participate if it agrees to meet the Department's quality standards. *Id.* at 6a-7a.

The Department prescribes various quality standards for participating preschools' classroom sizes, teacher qualifications, and other requirements. Pet. App. 6a. Relevant here, by state statute, the Department's quality standards must include an equal-opportunity mandate, which is echoed in Department regulations and in the State's contracts with participating preschools. Colo. Rev. Stat. Ann. § 26.5-4-205(2)(b). That mandate requires participating preschools to provide an "equal opportunity" for children to enroll "regardless of" the child's or parents' "race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability." *Ibid.*

The Department uses an algorithm to match children with participating preschools. Pet. App. 7a-9a. Families rank their top five preschools, and the Department allows preschools to express "preferences" for certain students or families. *Id.* at 7a-8a. The algorithm accounts for these preferences and family rankings when matching children with preschools. *Ibid.*

Three such preferences are relevant here. First, the Department allows preschools to reserve seats for disabled children with Individualized Education Programs. Pet. App. 8a. Second, preschools can prioritize

low-income children who are enrolled in a Head Start program. *Ibid.* Third, as a catchall, preschools can request permission from the Department to prioritize children whose families belong to a "specific community." *Id.* at 9a. The Department has discretion to grant those requests, and it has authorized 17 "specific community" preferences, including preferences for only children of teen mothers, children with certain disabilities, or fully vaccinated children. *Id.* at 32a, 73a. The Director of Colorado's Universal Preschool Program testified that this exception might also allow preschools to prioritize "gender-nonconforming children" or "children of color from historically underserved areas." *Id.* at 353a-354a.

B. Procedural History

1. Petitioners are the Archdiocese of Denver, two associated parish preschools, and two parishioners who would like to enroll their children in a state-funded preschool. Pet. App. 10a-11a.

Petitioners believe, in keeping with the teachings of the Catholic Church, that marriage is exclusively between a man and a woman; that there are two sexes, male and female, determined by biological sex and created by God; and that acting contrary to those teachings is sinful. Pet. App. 11a. They also believe that parish schools are vital to the Church's mission. Pet. 6. Petitioners recognize that families may disagree with Church teachings; to avoid conflicts and respect diverging views, the preschool petitioners consider families' sexual orientation and gender identity when deciding whether to admit their children. Pet. App. 11a. The preschool petitioners do not categorically ban same-sex or transgender-identifying parents from enrolling their children. *Ibid.* But petitioners' religious beliefs require

them to make clear "what the school[s] teach[] on matters of faith, and specifically on sexual orientation and gender identity," and to make admissions decisions consistent with "'the Catholic Church's teachings regarding biological sex and marriage.'" Pet. 7 (citation omitted).

2. Fearing that the equal-opportunity mandate would prevent the parish petitioners from aligning admissions decisions with the Catholic Church's teachings, the Archdiocese directed its preschools not to participate in the Department's program. Pet. App. 80a. The Archdiocese also asked Colorado for an exemption from the equal-opportunity mandate for its preschools. *Id.* at 12a. Respondent Lisa Roy, the Department's director, denied the Archdiocese's request, on the ground that "no provider may discriminate against children or families in violation of" the equal-opportunity mandate. *Id.* at 12a, 289a-290a.

3. Petitioners then sued Roy and respondent Dawn Odean, who directs Colorado's universal preschool program. Pet. App. 13a. As relevant here, petitioners claimed that the equal-opportunity mandate violates their Free Exercise rights by forcing them to choose between receiving government benefits and the central tenets of their faith. *Ibid.* They sought an injunction barring enforcement of the mandate against them so they could participate in Colorado's universal preschool program. *Ibid.*

After a bench trial, the district court ruled against petitioners on the Free Exercise claim relevant here.[2]

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[2] Below, petitioners also raised a Free Exercise challenge to the nondiscrimination provision's ban on "religious affiliation" discrimination, citing regulations that Colorado then revised to eliminate an exception allowing a preference for congregation members. Pet.

The court held that the equal-opportunity mandate is neutral and generally applicable and therefore subject to rational-basis review under *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Pet. App. 137a. The court added that even if strict scrutiny applied, the equal-opportunity mandate was constitutional. *Id.* at 137a-138a. The court then entered final judgment against petitioners. *Id.* at 184a-186a.

4. On appeal, the Tenth Circuit panel affirmed.

The court of appeals first determined that *Smith*'s general-applicability framework applied. The court rejected the argument that Colorado's program expressly discriminates against religious schools or beliefs like the programs at issue in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017), and *Carson* v. *Makin*, 596 U.S. 767 (2022). The court reasoned that those decisions form "an independent line of precedent" that applies only when a state "prohibit[s] funds from being used for religious purposes." Pet. App. 19a, 22a.

The court of appeals then determined that the equal-opportunity mandate is neutral and generally applicable under *Smith*. On neutrality, the court found that the equal-opportunity mandate was enacted for neutral reasons and had not been enforced with hostility toward religion. Pet. App. 28a.

On general applicability, the court of appeals held that the categorical exemptions allowing preschools to prioritize disabled and low-income children did not un-

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App. 171a-172a. Respondents have not sought review of the district court's ruling regarding religious-affiliation discrimination. Nor do petitioners seek review of the district court's denial of their challenge to the equal-opportunity mandate on church autonomy and Free Speech grounds. See *id.* at 94a-100a.

dermine the provision's general applicability. The court recognized that Colorado enacted the equal-opportunity mandate to ensure "equal access to preschools." Pet. App. 39a. But, the court reasoned, "the barriers to equal access" are "completely different" for disabled and low-income children than for children from same-sex and gender-nonconforming families. *Id.* at 40a. The court concluded that the income and disability exemptions do not undermine Colorado's equal-access interest "in a similar way" as petitioners' proposed consideration of sexual orientation and gender identity. *Id.* at 38a (quoting *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 534 (2021)) (emphasis omitted).

As to discretion, the court of appeals conceded that the Department's discretionary authority to authorize "specific community" preferences "looks a bit like a system of individual exemptions." Pet. App. 9a, 29a. But, according to the court of appeals, the preference system could not provide exemptions from the equal-opportunity mandate because the relevant regulations require preschools to "'still comply with the nondiscrimination provision.'" *Id.* at 29a. (citation omitted). As a result, the court reasoned that this preference system does not undermine the general applicability of the equal-opportunity mandate. *Ibid.*

Finally, the court of appeals held that the provision survives rational-basis review because the equal-opportunity mandate was rationally related to Colorado's goal of "protecting equal access to preschool education for Colorado children." Pet. App. 47a. Unlike the district court, the court of appeals did not address whether the provision could survive strict scrutiny. See *ibid.*

ARGUMENT

Among other guarantees, the Free Exercise Clause of the First Amendment "protect[s] religious observers against unequal treatment." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542 (1993) (citation omitted; brackets in original). *Employment Division* v. *Smith*, 494 U.S. 872 (1990), holds that no such unequal treatment occurs if the law regulating religious exercise is neutral and generally applicable, even if the law severely burdens religious exercise. But that exception does not apply "whenever" government regulations "treat *any* comparable secular activity more favorably than religious exercise"; such disparate treatment triggers strict scrutiny. *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021) (per curiam).

The court below seriously erred in adopting a rule that would treat countless laws as generally applicable, no matter how many secular or discretionary exemptions they contain, so long as those exemptions do not permit the exact same conduct as the religious exercise at issue. The decision below also deepened a clear split with the en banc Ninth Circuit as to the same type of law. This oft-recurring question about what framework governs Free Exercise challenges—rational-basis review of neutral, generally applicable laws or strict scrutiny of selective ones—is exceptionally important. And this case is an excellent vehicle for deciding the question presented. This Court should grant the petition for certiorari.

A. The Decision Below Is Incorrect

The Tenth Circuit erred in holding that a law barring religious exercise remains generally applicable even when it contains secular and discretionary exemptions, so long as those exemptions do not cover the precise

conduct involved in the forbidden religious exercise. That approach contravenes this Court's instructions regarding when religious and secular conduct are comparable and when a "'mechanism for individualized exemptions'" renders the law non-generally applicable. See *Fulton*, 593 U.S. at 533 (citation omitted).

1. As to secular exemptions, the Tenth Circuit reasoned that if a state grants an exemption from a nondiscrimination law, that law remains neutral and generally applicable in all its applications except for the precise ground on which that exemption is granted, because "different aspects of the nondiscrimination requirement are only relevant if they are comparable." Pet. App. 38a-39a.

The court thus deemed Colorado's nondiscrimination law—which requires that preschools provide an "equal opportunity" for admission without regard to various characteristics—generally applicable. Pet. App. 47a. Though Colorado's law has secular exemptions allowing preschools to prefer low-income and disabled students (at the expense of higher-income and non-disabled students), the court reasoned that the conduct authorized by those exemptions was not "comparable" to petitioners' religious conduct (preferring families who follow Catholic teachings on sex and gender) because each of those characteristics—income, disability, sexual orientation, and gender identity—addresses different "barriers to equal access." *Id.* at 38a, 40a. The court added that the "unique nature" of income and disability status makes them inapt comparators to sexual orientation and gender identity. *Id.* at 38a-39a. Further, the court believed, mandating equal access regardless of sexual orientation and transgender identification was meant to "eras[e] barriers to equal access caused by social stigma,"

and the exceptions for preschools to treat low income and disability preferentially "simply do not" undermine that interest. *Id.* at 39a.

That logic runs headlong into *Tandon*, which instructs that comparability depends on the "government interest that justifies the regulation at issue." 593 U.S. at 62. Here, as the court of appeals acknowledged, "the record indicates the Colorado General Assembly passed, and the Department implemented, the nondiscrimination requirement to prevent discrimination on any grounds, secular or religious." Pet. App. 28a. The statute itself treats all characteristics—race, ethnicity, religion, sexual orientation, gender identity, housing status, income, and disability status—as equally off-limits for consideration in preschool admissions, whether as plus or minus factors.

Thus, granting an exemption that denies equal access on *any* ground covered by the equal-opportunity mandate—whether it is extending a preference to Jewish or Protestant families, families with a particular ethnic background, or families of one race or another—necessarily undermines that law's purpose. Cf. *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023). Here, Colorado's exemptions allow differential treatment for some groups, *e.g.*, low-income families or disabled children, but not others. Having departed from universal even-handedness, Colorado cannot claim that allowing Catholic preschools to apply a preference based on Catholic teachings on sexual orientation and gender identity would uniquely undermine its law. If a law "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a

similar way," that law "lacks general applicability." *Fulton*, 593 U.S. at 534; *Tandon*, 593 U.S. at 62.

Rather than judging the secular exemptions "against the asserted government interest that justifies the regulation," *Tandon*, 593 U.S. at 62, the court of appeals erroneously tried to discern the purported *reason* for the secular exemptions. The court asserted that "'all discrimination is not the same.'" Pet. App. 39a (citation omitted). And the court stated that preferences for students with disabilities and low-income students "simply do not" "undermine the government's interest in erasing barriers" "because disability and income level are fundamentally different from other suspect classifications," while the preschools' religious exemption would not promote equal access. *Id.* at 38a-41a.[3]

That approach is deeply problematic. First, it credits extraneous justifications for treating various characteristics in the equal-opportunity mandate differently when the mandate's central command—equal access—treats all characteristics the same. Second, zeroing in on each characteristic to discern grounds for treating that characteristic differently invites States to use

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[3] The court of appeals relied on legislative findings that Colorado wanted to "expand the number of disabled and low-income students attending preschool" to support its view that the income and disability components of the equal-opportunity mandate should be read differently from other components. Pet. App. 36a (citing Colo. Rev. Stat. § 26.5-4-202(3) and (4)); *id.* at 36a-38a. That reading is implausible. The equal-opportunity mandate makes no distinctions among included characteristics, and the cited legislative findings do not reference the equal-opportunity mandate. Indeed, a separate portion of the legislative findings notes that "economically disadvantaged children derive greater benefits from * * * universal programs than * * * preschool programs specifically for economically disadvantaged children." Colo. Rev. Stat. § 26.5-4-202(1)(a)(IV).

"clever drafting" to "divvy up its exemption regimes" and avoid strict scrutiny, *Smith* v. *City of Atlantic City*, 138 F.4th 759, 772 (3d Cir. 2025). No matter how many exemptions Colorado created—for everything *except* sexual orientation and gender identity—the Tenth Circuit would apparently still treat the law as generally applicable. What is more, on the court's reasoning, Colorado could presumably justify a secular exemption for affirmative action benefitting LGBT families on the ground that such an exemption would serve an interest in addressing social stigma, while a religious exemption would not. Such piecemeal analysis would create an unworkable framework in which a single law could be generally applicable as to some religious exemptions but not others. Cf. *Carson* v. *Makin*, 596 U.S. 767, 784-785 (2022) (states may not "'manipulate[]'" "'the definition of a particular program'" to get around the First Amendment's requirements) (citation omitted).

2. The Tenth Circuit further held that Colorado's discretionary preference system did not undermine general applicability. The catchall preference allows preschools to limit their admissions to children and families who are "part of a specific community." 8 Colo. Code Regs. § 1404-1:4.109(A)(9). To do so, preschools must apply for "an individualized addition to the list of preferences" used in the matching algorithm. Pet. App. 29a. The Department then decides, in its discretion, whether to allow the addition. That catchall preference scheme is "'a mechanism for individualized exemptions'" that "'invites' the government to consider the particular reasons for a person's conduct," and thus independently shows that Colorado's law "is not generally applicable." *Fulton*, 593 U.S. at 533 (brackets and citation omitted).

The court of appeals nonetheless held otherwise because Colorado has not yet used the catchall preference provision to authorize preferences that would violate the equal-opportunity mandate and because the hypotheticals posed at trial were "unexpected[]" and, in the court's view, not what Colorado might actually do. Pet. App. 31a-32a. But the regulation authorizing the catchall preference identifies "families who are receiving a specific public assistance benefit(s) such as housing assistance"—that is, a group defined by income—as an "example[] of approved preferences." 8 Colo. Code Reg. § 1404-1:4.109(A)(9)(c). Regardless, whether preschools have pursued such exemptions to date does not decide whether "a system of individual exemptions" exists. *Smith*, 494 U.S. at 884. Rather, "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 593 U.S. at 537 (brackets and citation omitted).

The court also suggested that the catchall preference could not authorize admissions policies that account for race, sexual orientation, or transgender identification as respondent Odean suggested because "regulations," including the catchall preference, "cannot be used as an exception to the nondiscrimination requirement." Pet. App. 30a; see 8 Colo. Code Reg. § 1404-1:4.109(A)(9)(b) and (B). But that is not how the Colorado official charged with running the program understood it; she testified that the catchall preferences could "prioritize[] families who have historically been discriminated against." Pet. App. 337a. And in its briefing below, Colorado maintained that at least as to some characteris-

tics (disability and income), "prioritizing children" based on those characteristics "is consistent with—not an exception to—[the equal-opportunity mandate's] requirements." Resp. C.A. Br. 39-40. Colorado cannot, consistent with the Free Exercise Clause, embrace mechanisms for granting some exceptions but not others based on which reasons Colorado deems "worthy of solicitude"—for example, by approving an income-based preference for families who receive particular public assistance benefits. *Fulton*, 593 U.S. at 537; see 8 Colo. Code Reg. § 1404-1:4.109(A)(9)(c). And it cannot accomplish the same objective by redefining an "exception" to encompass only departures from equal opportunity for disfavored reasons.

B. The Decision Below Warrants This Court's Review

1. The decision below deepens a square, post-*Fulton* split between the Second and en banc Ninth Circuits on a recurring and important constitutional question—whether, if a state grants an exemption from a nondiscrimination law, that law remains neutral and generally applicable so long as the exemption is not for identical secular conduct.

a. The Tenth Circuit below aligned itself with the Second Circuit in *Emilee Carpenter, LLC* v. *James*, 107 F.4th 92 (2024). Both courts hold that a nondiscrimination law remains generally applicable even when a state creates an exemption from one component of that law, unless the exemption applies to conduct identical to the regulated religious exercise.

Thus, the Second Circuit deemed New York's nondiscrimination law, which required the plaintiff photographer to serve clients regardless of their sexual orientation, neutral and generally applicable. *James*, 107 F.4th at 98, 111. New York's law, like Colorado's, con-

tained exceptions for some included characteristics (there, sex and gender identity), but not the characteristic that implicated the photographer's religious conduct (sexual orientation). *Id.* at 110-111. The photographer argued that the law was not generally applicable because those exceptions undermined the government's asserted interest in ensuring "equal access" to goods and services. *Id.* at 96, 98, 111.

Like the Tenth Circuit below, the Second Circuit rejected that argument by reasoning that the characteristics included in the law are each "different" and "unique," such that exceptions allowing consideration of sex and gender identity do not undermine the government's interest in preventing discrimination based on sexual orientation. *James*, 107 F.4th at 111. It thus held that the challenged law was generally applicable because it contained no exceptions from the sexual orientation component of the law specifically. *Ibid.*

b. In sharp contrast, the Ninth Circuit, sitting en banc, held that when the government grants any exemption from a nondiscrimination policy but denies an exemption for religious exercise, the law is not neutral and generally applicable and strict scrutiny applies. *FCA* v. *San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 679, 687-688 (2023).

Like the Colorado and New York laws, *FCA* also involved a nondiscrimination mandate. There, a school district required student groups to make membership and leadership positions available to all comers, without any preferences regarding particular characteristics. *FCA*, 82 F.4th at 678. This policy prevented a Christian student group from considering faith and sexual orientation when selecting its leaders. *Ibid.* Meanwhile, the district allowed other groups, including the Senior

Women Club and the South Asian Heritage Club, to exclude students of a particular ethnicity or sex. *Id.* at 688-689. Given those exceptions, the Christian student group argued that the nondiscrimination policy was not generally applicable. *Ibid.*

The Ninth Circuit agreed. It found "no meaningful constitutionally acceptable distinction between the types of exclusions at play." *FCA*, 82 F.4th at 689. It explained that any exemption to a nondiscrimination policy—whether it is "based on gender, race, or faith"—poses an "identical risk" to the government's interest in ensuring equal access. *Ibid.* The court thus held that a nondiscrimination policy that contains exceptions for some designated characteristics but not others is not generally applicable. *Ibid.*

The Tenth Circuit below attempted to distinguish the en banc Ninth Circuit's decision by asserting that income and disability status are fundamentally different from race, sex, and sexual orientation. Pet. App. 40a. But that reasoning just underscores the sharp divide with the en banc Ninth Circuit's holding. In all three cases, a nondiscrimination policy contained exceptions for some otherwise-included characteristics, but not others. In all three cases, government officials refused to exempt a religious plaintiff from the nondiscrimination policy. And in all three cases, the government's asserted interest in enforcing the policy was to ensure "equal access" to goods or a government benefit. Pet. App. 39a; *James*, 107 F.4th at 96; *FCA*, 82 F.4th at 689. In those circumstances, the Ninth Circuit deemed the law not generally applicable because allowing consideration of *any* characteristics protected by a nondiscrimination policy undermines the government's interest in the same way. The Second Circuit and the court

below instead held that allowing a party to discriminate based on one characteristic does not undermine the law's neutrality and general applicability as to other designated characteristics. This clean circuit conflict alone warrants review.

c. The decision below also creates broader tension with the reasoning of other circuits and state supreme courts about when exempted secular conduct is comparable to regulated religious conduct. See *Fulton*, 593 U.S. at 610-611 (Alito, J., concurring in the judgment) (highlighting this tension). Unlike the Second and Tenth Circuits, most other courts of appeals, and several state supreme courts, deem secular conduct comparable whenever it undermines the government's asserted interest in regulating religious conduct—whether or not the secular and religious conduct involve "similar forms of activity." *Monclova Christian Academy* v. *Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 480 (6th Cir. 2020).

The reasoning of those courts sits in tension with the Tenth Circuit's approach below. For example:

- The Sixth Circuit refused to limit the comparability analysis to "only the secular actors" who engage in the same type of conduct or are regulated by the same "specific provision" as the religious plaintiff. *Christian Academy*, 984 F.3d at 481. It thus deemed a COVID shutdown restriction not generally applicable when the restriction shuttered religious and secular schools alike, but allowed gyms and tanning salons to remain open. *Ibid.*
- The First Circuit recognized that secular conduct can be comparable even if the government deems it "fundamentally different" from the regulated

religious conduct. *Lowe* v. *Mills*, 68 F.4th 706, 715 (2023) (citation omitted), cert. denied, 144 S. Ct. 345 (2023). The First Circuit held that the plaintiffs had a plausible claim that a vaccine mandate was not generally applicable because it contained a medical exemption that undermined the State's interest in reducing infections—even though the government argued that the medical exemption would affect public health differently than a religious exemption. See *ibid.*

- The Louisiana Supreme Court held that comparability turns on whether the secular conduct poses similar "risks" to the government's interest, "not the reasons why people" engage in the secular conduct. *State* v. *Spell*, 339 So. 3d 1125, 1133 (2022). Thus, in evaluating a COVID gathering restriction, the court deemed office buildings and churches comparable, even though individuals use them for different purposes. See *id.* at 1135-1137.[4]

3. Separately, the Tenth Circuit's refusal to consider the discretionary-exemption scheme sufficiently discretionary to render Colorado's law non-generally applicable is in tension with other decisions regarding when a system of discretionary exemptions undermines general applicability.

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[4] See *Mitchell Cnty.* v. *Zimmerman*, 810 N.W.2d 1, 15 (Iowa 2012) (deeming Mennonites' steel wagon wheels and school buses' tire studs comparable because both undermine the government's interest in protecting the road); cf. *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004) (treating private clubs and churches as comparable under the Religious Land Use and Institutionalized Persons Act), cert. denied, 543 U.S. 1146 (2005).

Three courts—the Second Circuit, the Tenth Circuit, and the Connecticut Supreme Court—have held that the "mere existence of an exemption procedure" is "not enough to render a law not generally applicable." *We The Patriots USA, Inc.* v. *Hochul*, 17 F.4th 266, 288-289 (2d Cir.) (per curiam), cert. denied, 142 S. Ct. 734 (2021); *303 Creative LLC* v. *Elenis*, 6 F.4th 1160, 1187 (10th Cir. 2021), rev'd on other grounds, 600 U.S. 570 (2023); *Spillane* v. *Lamont*, 323 A.3d 1007, 1024-1025 (Conn. 2024). According to those courts, a law with a mechanism for exemptions remains generally applicable if the law provides "objectively defined" criteria to limit or guide discretion. *We The Patriots*, 17 F.4th at 288 (citation omitted); *303 Creative*, 6 F.4th at 1187; *Spillane*, 323 A.3d at 1024-1025. Consistent with those courts' reasoning, the Tenth Circuit below suggested that such a law remains generally applicable if exemptions have not been created "[i]n practice" or if a single official does not have "sole" unfettered discretion to grant exemptions. Pet. App. 31a-32a.

By contrast, the en banc Ninth Circuit finds the "mere existence of a discretionary mechanism" dispositive, "regardless of the actual exercise." *FCA*, 82 F.4th at 687-688. That court similarly rejected a focus on only "'unfettered' discretion" as "overly narrow." *Id.* at 687.

This additional tension, which the decision below compounds, demonstrates that "considerable confusion" still exists over whether a law with a system of individualized exemptions can remain generally applicable. *Dr. A* v. *Hochul*, 142 S. Ct. 2569, 2570 (2022) (Thomas, J., dissenting from the denial of certiorari). This case presents an opportunity for this Court to provide much-needed clarity.

4. Granting review in this case would allow this Court to provide useful guidance on a subject that lower courts frequently confront.

Numerous states have enacted nondiscrimination statutes that apply to participants in government programs, recipients of government funds, or public accommodations. And many of those statutes burden religious exercise but do not restrict similar secular conduct. See W. Va. Amicus Br. 16-21. Maryland, for example, prevents the administrative arm of the Seventh-day Adventist Church from preferentially hiring Seventh-day Adventists—but imposes no such restriction on other employers like private clubs. *General Conference of Seventh-day Adventists* v. *Horton*, 787 F. Supp. 3d 99, 107-108, 119 (D. Md. 2025), appeal filed, No. 25-1735 (4th Cir.). Maine bars Catholic schools—but not out-of-state schools—that receive certain state funding from considering students' religion in admissions decisions. *St. Dominic Academy* v. *Makin*, 744 F. Supp. 3d 43, 72 (D. Me. 2024), appeal filed, No. 24-1739 (1st Cir.).

Moreover, this Court currently has two petitions—from the Tenth Circuit alone—that involve the general applicability analysis. See Pet., *Renteria* v. *New Mexico Office of the Superintendent of Ins.*, No. 25-113 (filed July 28, 2025). This issue is frequently recurring and lower courts would benefit from additional guidance.

5. This case is a particularly good vehicle for deciding the question presented and for clarifying when secular conduct is comparable for purposes of general applicability. It comes to this Court after final judgment, petitioners preserved their challenge in the lower courts, and the lower courts addressed the merits of that challenge. Pet. App. 15a-16a, 22a-43a, 100a-150a. And Colorado's law would give the Court a full opportunity to

address two of the most pressing points of disagreement among the lower courts: (1) how to tell whether secular exemptions defeat general applicability, and (2) how to tell whether an exception is sufficiently discretionary to render the law non-generally applicable. Those features differentiate this petition from others in the pipeline and make this petition the best apparent vehicle for reviewing the oft-recurring question about when *Smith*'s framework governs.

Further, resolving the question presented as to general applicability could obviate any need to resolve at this juncture whether *Smith* itself retains vitality, as petitioners urge in their third question presented. See Pet. 30-35; *Fulton*, 593 U.S. at 545-618 (Alito, J., concurring in the judgment). If this Court agrees with petitioner and the United States that courts of appeals are improperly classifying numerous laws as neutral and generally applicable, then going forward, courts will resolve fewer cases within the *Smith* framework and instead apply strict scrutiny. That would provide additional information as to the workability of that framework for this Court's future consideration. Cf. *Fulton*, 593 U.S. at 543-544 (Barrett, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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