

No. 25-581

---

---

**In the Supreme Court of the United States**

ST. MARY CATHOLIC PARISH IN LITTLETON,  
ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD,  
DANIEL SHELEY, LISA SHELEY, AND  
THE ARCHDIOCESE OF DENVER,  
*Petitioners,*

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS EXECUTIVE  
DIRECTOR OF THE COLORADO DEPARTMENT OF  
EARLY CHILDHOOD, AND DAWN ODEAN, IN HER OFFICIAL  
CAPACITY AS DIRECTOR OF COLORADO'S UNIVERSAL  
PRESCHOOL PROGRAM,  
*Respondents.*

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

**REPLY BRIEF FOR PETITIONERS**

MARK L. RIENZI  
ERIC C. RASSBACH  
*Counsel of Record*  
JOSEPH C. DAVIS  
NICHOLAS R. REAVES  
JORDAN T. VARBERG  
AMANDA G. DIXON  
THE BECKET FUND FOR  
RELIGIOUS LIBERTY  
1919 Pennsylvania Ave. NW  
Suite 400  
Washington, D.C. 20006  
(202) 955-0095  
erassbach@becketfund.org  
*Counsel for Petitioners*

---

---

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	2
I. There is a square split over the general-applicability standard.....	2
II. Governments should not be allowed to circumvent <i>Carson v. Makin</i> .....	8
III. <i>Employment Division v. Smith</i> should be overruled.....	11
IV. The questions presented have nationwide importance.....	12
CONCLUSION .....	13

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Carson v. Makin</i> , 596 U.S. 767 (2022) .....	8, 9, 10
<i>Catholic Charities Bureau, Inc. v. Wisconsin Labor &amp; Indus. Rev. Comm’n</i> , 605 U.S. 238 (2025) .....	9
<i>Dr. A v. Hochul</i> , 142 S. Ct. 2569 (2022) .....	4
<i>Employment Div. v. Smith</i> , 494 U.S. 872 (1990) .....	1, 2, 8, 9, 10, 11, 12
<i>Espinoza v. Montana Dep’t of Revenue</i> , 591 U.S. 464 (2020) .....	9
<i>Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.</i> , 82 F.4th 664 (9th Cir. 2023) .....	3, 6
<i>Fulton v. City of Philadelphia</i> , 593 U.S. 522 (2021) .....	5, 11, 13
<i>Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep’t</i> , 984 F.3d 477 (6th Cir. 2020) .....	3
<i>Our Lady of Guadalupe Sch. v. Morrissey-Berru</i> , 591 U.S. 732 (2020) .....	12

*Smith v. City of Atlantic City*,  
138 F.4th 759 (3d Cir. 2025) ..... 3, 4

*Trinity Lutheran Church of  
Columbia, Inc. v. Comer*,  
582 U.S. 449 (2020) ..... 7

*Yellowbear v. Lampert*,  
741 F.3d 48 (10th Cir. 2014) ..... 7

**Other Authorities**

Christopher C. Lund, *Second-Best Free  
Exercise*, 91 Fordham L. Rev. 843  
(2022) ..... 11

H.B. 26-1292, 75th Gen. Assemb.,  
2d Reg. Sess. (Colo. 2026) ..... 10

## REPLY BRIEF

Colorado's brief illustrates better than any law review article how *Smith* has created a jurisprudence of moral hazard, inviting governments and lower courts to become ever more sophisticated in excusing direct interference with religious exercise. Colorado doesn't disagree it is interfering with the religious exercise of parents and schools. Instead, it says it is perfectly fine to exclude Catholic preschools while letting in preschools preferring those with disabilities, limited income, or LGBTQ identity. That's because, under *Smith*, Colorado thinks it can manipulate the law in question—if one squints hard enough—to exclude only those entities Colorado is determined to disfavor.

If governments (aided by lower courts) can manufacture “general applicability” and “neutrality” merely by careful drafting or creative interpretation, the Free Exercise Clause is of little import. And *Smith* invites this manipulation by pointing the judicial eye in the wrong direction. Instead of asking judges to look first at the real-world interference with religious exercise, *Smith*'s general-applicability analysis tells them to look at how the law applies in the abstract to others who lack a religious objection to complying with it—a question orthogonal to the Free Exercise Clause and one whose answer lies primarily in the government's hands.

The Court can of course decide this case without overruling *Smith*. The general-applicability question presented involves as clear a split as one can imagine. And Colorado's thumbing of its nose at the rule of *Trinity Lutheran*, *Espinoza*, and *Carson* violates a line of precedent already outside *Smith*. Answering either

question presented would be enough to resolve this case.

But eventually the Court will need to take a case very like this one—where a government offers ever more preposterous reasons why its interference with religious exercise is permissible—to stop the ongoing church-state conflicts *Smith* inevitably engenders. Until this Court excises it, *Smith* will remain a malignancy within the First Amendment. For the sake of those whose religious freedom is being infringed today and will be in coming years, the Court ought to undertake the necessary surgery now.

## ARGUMENT

### **I. There is a square split over the general-applicability standard.**

This case presents an acknowledged and certworthy split over how to apply *Smith*'s general-applicability rule. Pet.15-21. As the United States explains, the split is especially “clear” in cases involving “a nondiscrimination policy that contains exceptions for some designated characteristics but not others”—with “this petition appear[ing] to present the cleanest option” for addressing the split. U.S.Br.11, 17-20.

1. Respondents don't dispute the split. BIO.16 n.2. Nor do they dispute that resolving it is important. Instead, they assert “the Tenth Circuit interpreted the [UPK] statute as allowing *no* exceptions and *no* discretion to create exceptions,” so this case “does not implicate” the split. BIO.16.

That misses the mark. Not even Respondents can claim the Tenth Circuit avoided the split altogether.

Rather, they concede the court alternatively “as-sum[ed]” exceptions permitting preschools to make enrollment decisions based on disability and income, but nonetheless said these exceptions didn’t defeat general applicability because they didn’t apply to sexual orientation or gender identity. BIO.27-28 (citing Pet.App.38a-40a). That sides with the Second Circuit but “squarely conflicts with the en banc Ninth Circuit, which holds that any exception from” an equal-access policy triggers strict scrutiny. U.S.Br.3-4; see *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.*, 82 F.4th 664, 689 (9th Cir. 2023) (en banc) (all exceptions “pose an identical risk”).

More fundamentally, far from avoiding the split, the Tenth Circuit’s “no exceptions” rationale exacerbates it. Pet.23-24. That is because it conflates questions of state law (*e.g.*, whether something is a formal “exception”) with what the Free Exercise Clause’s general-applicability analysis demands—and in doing so adopts the very “myopic approach” to general applicability courts on the other side of the split reject. *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep’t*, 984 F.3d 477, 481-482 (6th Cir. 2020) (“relevant inquiry” turns on substance, not labels). As those courts hold, general applicability isn’t lacking only when there are “specific, enumerated exceptions” written into a law. *Smith v. City of Atlantic City*, 138 F.4th 759, 771 (3d Cir. 2025). Instead, courts must ask whether the government has “permitted” (or has discretion to permit) “conduct that undermine[s] its interest while disfavoring religious conduct undermining the same interest.” *Ibid.* Any narrower inquiry would “allow for easy evasion of the Free Exercise guarantee of equal treatment,” *Monclova*, 984 F.3d at 481, permitting “governments to subvert free exercise

through” formalism and “clever drafting,” *Atlantic City*, 138 F.4th at 772.

In jurisdictions applying the correct rule, Colorado’s regime would fail general applicability. Regardless of whether the preferences granted to other preschools are viewed as “exceptions” or instead as exclusions from the Mandate’s scope (BIO.2-3), they undermine the government’s asserted interest in the law. Colorado’s Mandate articulates a clear interest: ensuring “an equal opportunity to enroll and receive preschool services regardless of” all specified protected characteristics. Pet.App.204a; see also Pet.5, Pet.App.28a, 58a-59a (affirming identical, undifferentiated interest). Yet Colorado permits (and has discretion to permit) conduct undermining that interest. All agree, for example, that Colorado permits preschools to limit enrollment to low-income families or students with disabilities (Pet.8-9; BIO.9; U.S.Br.13-15) even though “income level” and “disability” are explicitly covered by the Mandate. See also Pet.22-24 (discretion). Whether Colorado characterizes these as exceptions or as an atextual gloss on the Mandate *for purposes of state law* is irrelevant to whether Respondent’s gerrymandered interpretation is generally applicable *for purposes of the Free Exercise Clause*. See Pet.21-22. Colorado is thus wrong to suggest the constitutional analysis here turns on “state statutory interpretation.” BIO.16.

In short, the split implicated by this case “is widespread, entrenched, and worth addressing.” *Dr. A v. Hochul*, 142 S. Ct. 2569, 2570 (2022) (Thomas, J., dissenting). And this case is an ideal vehicle for addressing it.

2. In any event, Respondents’ labored efforts to harmonize these exceptions with the Mandate “as a matter of state law” (BIO.16-27) fail. No “deference” (BIO.1) is due a facially implausible reading of a straightforward provision. If it were, *Lukumi* and *Fulton* would have come out the other way. *E.g.*, *Fulton v. City of Philadelphia*, 593 U.S. 522, 540 (2021) (“We respectfully disagree with the view of the City” regarding Philadelphia’s ordinance). And Respondents’ distorted interpretation of the Mandate cannot withstand any level of scrutiny.

First, Respondents claim allowing preschools to “prioritize children from low-income families and children with disabilities” is consistent with the Mandate because the law protects only “children *with* disabilities” and “children from *low-income* families” from “being discriminated against.” BIO.2, 17-18. By its plain terms, the Mandate does no such thing. It never uses the words “discriminate,” “*low-income*,” or even “*with*.” Rather, it requires an equal opportunity to enroll “*regardless of*” “*income level*” (high or low) or “*disability*” (existent or not). Pet.App.204a (emphasis added); *contra* BIO.2. Nor is there any textual justification for reading the Mandate differently for some protected characteristics—all appear in a single list. Tellingly, the one-way-ratchets Respondents cite use different language or include defined terms. BIO.21. And the Mandate itself confirms Colorado’s legislature knows how to draft a one-way-ratchet. Pet.App.6a (“*lack of housing*”).

Nor do any of the other provisions of the UPK statute change this outcome. That the statute contemplates participation by children with disabilities and “head start program[s]” doesn’t give anyone license to

ignore the Mandate. BIO.18. And that the Legislature made children with disabilities and low-income families eligible for additional hours (BIO.18) is irrelevant.

Like the policy in *Fellowship of Christian Athletes*, the Mandate’s text “does not provide exceptions for ‘benign’ discriminatory membership rules.” 82 F.4th at 693. And while there are good reasons for laws accommodating those with disabilities and low incomes, there are also good reasons to permit religious schools to maintain their religious identity.

Second, Colorado says the Court should discount Respondent Odean’s testimony that UPK-participating preschools could prioritize “gender-non-conforming children,” “children of color,” and “the LGBTQ community,” because she and Colorado’s other witnesses also testified that Respondents “would not approve a request that violates the equal-opportunity requirements.” BIO.22-23. This is just more formalistic quibbling about the meaning of an “exception.” The UPK director testified that such preschools are free to participate in UPK, because, in her view, they favor “historically \* \* \* discriminated against” communities, while the Mandate is meant only to “ensure[] that children aren’t discriminated against who historically have been.” Pet.App.342a-343a, 354a. Colorado’s lawyers haven’t disavowed this understanding of the Mandate—they’ve endorsed it. *E.g.*, Colo. C.A. Br.32.

Third, Colorado asserts the Mandate isn’t “eligible for waiver” under the UPK statute’s expressly discretionary waiver provision. BIO.25-27; see Pet.10. But Colorado’s mid-litigation claim that a rule governing enrollment is a non-waivable “health and safety” requirement defies ordinary meaning and would render virtually every obligation non-waivable. “At some

great height, after all, almost any state action might be said to touch on \* \* \* health and safety.” *Yellowbear v. Lampert*, 741 F.3d 48, 57 (10th Cir. 2014) (Gorsuch, J.). And Colorado’s suggestion that “it takes no time to repeal” a policy motivated by millennia-old religious beliefs underscores the religious insensitivity that triggered this dispute. BIO.25-26.

In the end, it should be no surprise that Respondents’ actions aren’t generally applicable: While “roughly 1,900” preschools participate in UPK, Pet.App.61a, the *only* preschools the Mandate excludes in practice (as Respondents don’t contest) are those with traditional religious beliefs about marriage. Pet.23-24. That Respondents claim to reach this result by creatively interpreting state law, see BIO.8 (harmonizing “multiple directives”), makes no difference. Seven other jurisdictions would apply strict scrutiny.

3. Unable to escape the split, Colorado nit-picks. First, it second-guesses Petitioners’ understanding of why some of their preschools have closed. BIO.33-34. But even the report Colorado cites attributes closures first to “serious financial challenges”—which plainly include being shut out of UPK. And insofar as the number of Colorado school-aged children has declined, that only makes it *more* important for Archdiocesan preschools to be able to “compete with secular” preschools on equal footing. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2020).<sup>1</sup>

---

<sup>1</sup> That Archdiocesan preschool enrollment was “probably still holding steady,” BIO.34, shortly after UPK began is hardly surprising. Equally unsurprising is that it’s no longer true. Pet.12 (nearly 20% decline).

Next, Colorado mischaracterizes Petitioners’ religious exercise. BIO.12. Petitioners’ enrollment policies require *all* families to support Catholic teachings, declining to admit those who do not “out of abundant respect for the family.” App.318a; Pet.7.

Finally, Colorado proudly announces that “an interfaith working group” helped it design the UPK program. BIO.33. But if “working groups” were all a hostile government needed to immunize itself from constitutional scrutiny, the Religion Clauses would be a dead letter.

## **II. Governments should not be allowed to circumvent *Carson v. Makin*.**

Under the line of benefits cases culminating in *Carson*, strict scrutiny applies when the government denies otherwise-available public benefits “based on a recipient’s religious exercise”—no *Smith* inquiry needed. *Carson v. Makin*, 596 U.S. 767, 785 (2022); see also *id.* at 781, 789. The Tenth Circuit rejected this rule, holding that *Carson* applies only when the exclusion is “on the explicit basis” that the relevant exercise was religious. Pet.App.21a-22a. Certiorari is warranted to stop this *Carson* defiance—already adopted by two other circuits—before it metastasizes further. Pet.24-30.

Colorado’s response is to defend the Tenth Circuit, claiming UPK doesn’t “intentional[ly] exclu[de]” religious preschools as such but “welcomes” them—provided they abandon disfavored religious practices. BIO.35. This flouts *Carson*. Maine said the same thing: it didn’t exclude all religious schools, only those engaged in the disfavored religious exercise—“present[ing] the material taught through the lens” of their

faith. 596 U.S. at 775. This Court rejected that argument as “offensive to the Free Exercise Clause.” *Id.* at 787.

In fact, Colorado’s eagerness to include other religious preschools with state-favored religious beliefs makes the problem worse. As *Carson* says, “[a]ny attempt to” distinguish religious status from exercise “by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism.” 596 U.S. at 787. On Colorado’s theory, governments can pick religious “winners and losers”—financially incentivizing the religious practices it approves while making it more costly to adhere to those that “legislative majorities might find unseemly or uncouth.” *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464, 513-14 (2020) (Gorsuch, J., concurring).

Indeed, on Colorado’s own account, while a preschool’s eligibility for UPK might not explicitly turn on a school’s religiosity (BIO.37 n.10), it does “ultimately turn[] on inherently religious choices”—like “whether to \* \* \* serve only” families who support its faith. *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Indus. Rev. Comm’n*, 605 U.S. 238, 250 (2025). That the exclusion here doesn’t refer to these choices in expressly religious terms makes no difference; the effect on the religious exercise (give it up or no benefit) is identical. See *Carson*, 596 U.S. at 785 (benefits cases “turn[] on the substance of free exercise protections, not on the presence or absence of magic words”).

Next, Colorado disputes there is any “separate public benefits line of cases,” claiming the Free Exercise Clause is *Smith* all the way down. BIO.35-36. Not

even the Tenth Circuit bought that. Pet.App.19a (“independent line of precedent”). And for good reason: Among other things, *Carson* explicitly grounded its reasoning in pre-*Smith* benefits cases like *Sherbert* and *Thomas*, without citing *Smith*. And while Colorado invokes *Smith*’s attempt to reconcile *Sherbert*, BIO.36, that played no role in *Carson*’s explanation of *Sherbert*. See 596 U.S. at 778 (state could not withhold benefits because “individual lost his job for refusing to abandon the dictates of his faith” (citing *Sherbert* and *Thomas*)).

Indeed, Colorado’s purported distinction of *Carson* is just the latest attempt by “opponents of the Court’s” benefits decisions “to riddle them with holes”—the same stratagem they tried after *Trinity Lutheran* and *Espinoza*. Notre Dame Br.3-4. As *amici* explain, the pivot from explicit exclusions of religious schools (*à la Espinoza*) to “[s]upposedly neutral” but “religiously onerous conditions” (this case) is part of a conscious effort to—in proponents’ words—“outmaneuver the [C]ourt and avoid the consequences of [*Carson*]’ by finding new ways to limit the participation of religious schools.” *Id.* at 12-20; Pioneer Br.9-12. In just the “few years since *Carson*, at least four States have gone full throttle on this alternate strategy,” including Maine itself. States Br.16-21. And, absent review, more will follow, particularly after the Tenth Circuit has touted Colorado as a “model example.” Pet.App.42a.<sup>2</sup>

---

<sup>2</sup> Colorado is now trying to impose a similar non-discrimination requirement on a newly-enacted federal education tax-credit. See H.B. 26-1292, 75th Gen. Assemb., 2d Reg. Sess. (Colo. 2026). Presumably another “model” for other states.

### III. *Employment Division v. Smith* should be overruled.

Colorado’s response illustrates the manifold problems with *Smith*. Colorado’s contrived “state law” maneuvering—though incorrect—underscores the gulf between the purported simplicity of *Smith*-in-theory and the tangled reality of *Smith*-in-practice. See *supra* 2-8; Robertson Center Br.6-9.

It also highlights *Smith*’s divergence from the core meaning of the Free Exercise Clause. That is, even if Colorado’s general-applicability arguments were right (they aren’t), it’s hard to see why that should matter. The burden on Petitioners’ religious exercise is *the same* regardless of whether, say, other preschools can prioritize children with disabilities. Here, as elsewhere, *Smith* threatens to make the Free Exercise Clause inquiry turn not on “the religious claimant’s interest in getting an exemption or the government’s interest in denying one” but on the government’s regulation of *other* actors who don’t share the religious exercise at issue—*i.e.*, on “constitutional luck.” Barclay Br.7 (quoting Christopher C. Lund, *Second-Best Free Exercise*, 91 Fordham L. Rev. 843, 869-870 (2022)); Thomas More Br.17-20.

Colorado’s gamesmanship is also standard-issue under *Smith*. See USCCB Br.12-14; States Br.16-23. When faced with a neutrality-and-general-applicability problem, *Smith* encourages governments not to accommodate religion but to close “loophole[s]” and send the claimant “back where it started.” *Fulton*, 593 U.S. at 624-625 (Gorsuch, J., concurring). Indeed, when Colorado’s original “no exceptions” claim failed in the district court, it simply had another go, revising its regulations to replace the congregation exception with

another preference designed to achieve the same ends without running afoul of the district court’s reasoning—while still excluding Petitioners. Pet.9-10, 9 n.3; BIO.13 n.1. See also Notre Dame Br.12-20.

This Court has ample resources to undertake the inquiry into the proper understanding of the Free Exercise Clause—an inquiry *Smith* hardly tried. See, e.g., Barclay Br.11-23 (collecting scholarship on original meaning and application). Colorado’s response confirms it is time to do so.

#### **IV. The questions presented have nationwide importance.**

As the United States stresses, the petition presents not only “an excellent vehicle” to address these important issues but also “the best apparent” one in the pipeline. U.S.Br.11, 23-24. Colorado, meanwhile, doesn’t dispute the exceptional importance of the questions presented or their nationwide import. Rightly so: Catholic and other religious schools across the country play a crucial role in providing high-quality education. See USCCB Br.15-20; Ed. Choice Br.24-25; Colo. Ass’n Br.6-8. And the existence of religious schools is indisputably “vital to many faiths practiced in the United States.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 754 (2020).

Yet the rulings below give hostile states a playbook for leveraging their vast and growing government funding programs to pressure religious schools and other ministries to abandon their religious practices or else be excluded from the arena. See Pet.34; U.S.Br.23; States Br.15-22; USCCB Br.12-14. Many states are already doing so. See U.S.Br.23; States Br.15-22;

USCCB Br.12-14; Notre Dame Br.12 (“widespread tactic”). And while Colorado says some other states’ exclusions are “expressly” based on religion, BIO.32-33, that only underscores the continued urgency of this Court’s intervention in this area. These exclusions benefit no one: “If anything,” including Catholic preschools “seems likely to increase, not reduce,” opportunities for all families. *Fulton*, 593 U.S. at 542; see also USCCB Br.14; Ctr. for Am. Liberty Br.11-12.

### CONCLUSION

The Court should grant the petition.

Respectfully submitted.

MARK L. RIENZI  
ERIC C. RASSBACH  
*Counsel of Record*  
JOSEPH C. DAVIS  
NICHOLAS R. REAVES  
JORDAN T. VARBERG  
AMANDA G. DIXON  
THE BECKET FUND FOR  
RELIGIOUS LIBERTY  
1919 Pennsylvania Ave. NW,  
Suite 400  
Washington, D.C. 20006  
(202) 955-0095  
erassbach@becketfund.org

*Counsel for Petitioners*

MARCH 2026