FILED
United States Court of Appeals
Tenth Circuit

September 30, 2025

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ST. MARY CATHOLIC PARISH IN LITTLETON; ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD; LISA SHELEY; DANIEL SHELEY; ARCHDIOCESE OF DENVER,

Plaintiffs - Appellants,

v.

LISA ROY, in her official capacity as Executive Director of the Colorado Department of Early Childhood; DAWN ODEAN, in her official capacity as Director of Colorado's Universal Preschool Program,

Defendants - Appellees,

THE JEWISH COALITION FOR RELIGIOUS LIBERTY; THE ROCKY MOUNTAIN DISTRICT LUTHERAN CHURCH MISSOURI SYNOD; THE COLORADO ASSOCIATION OF PRIVATE SCHOOLS; EDCHOICE, INC.; THE CONSCIENCE PROJECT; ANDY ABOLS; KARINA RAMIREZ; ANA KAREN MEIER; JILL HALL; MELISSA DE LA CRUZ; PROTECT THE FIRST FOUNDATION;

No. 24-1267

LAWRENCE G. SAGER; NELSON TEBBE; SCHOLARS FOR THE ADVANCEMENT OF CHILDREN'S CONSTITUTIONAL RIGHTS; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN CIVIL LIBERTIES UNION; ACLU OF COLORADO; CENTRAL CONFERENCE OF AMERICAN RABBIS; INTERFAITH ALLIANCE; INTERFAITH ALLIANCE OF COLORADO; KESHET; LAMBDA LEGAL DEFENSE AND EDUCATION FUND; THE SIKH COALITION; UNION FOR REFORM JUDAISM; WOMEN OF REFORM JUDAISM; FIRST AMENDMENT SCHOLAR,

Amici Curiae.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:23-CV-02079-JLK)

Nicholas R. Reaves, (Eric C. Rassbach, Mark. L. Rienzi, Joseph C. Davis, Jordan T. Varberg, and Amanda G. Dixon with him on the briefs), The Becket Fund for Religious Liberty, Washington, District of Columbia for Plaintiffs - Appellants.

Helen Norton, Deputy Solicitor General (Philip J. Weiser, Attorney General, Virginia R. Carreno, Second Assistant Attorney General, Janna K. Fischer, Senior Assistant Attorney General II with her on the brief), Colorado Department of Law, Denver, Colorado, for Defendants - Appellees.

Andrew M. Nussbaum, First and Fourteenth PLLC, Colorado Springs, Colorado, filed an amicus curiae brief for The Jewish Coalition for Religious

Liberty, the Rocky Mountain District Lutheran Church Missouri Synod, and the Colorado Association of Private Schools.

Thomas M. Fisher, EdChoice Legal Advocates, Indianapolis, Indiana, filed an amicus curiae brief for EdChoice, Inc.

Gene C. Schaerr and James C. Phillips, Schaerr | Jaffe, LLP, Washington, D.C., filed an amicus curiae brief for Protect the First Foundation.

Andrea Picciotti-Bayer, The Conscience Project, Mclean, Virginia, filed an amicus curiae brief for The Conscience Project and individuals Andy Abols, Karina Ramirez, Ana Karen Meier, Jill Hall, and Melissa De La Cruz.

G.S. Hans, Civil Rights and Civil Liberties Clinic, Cornell Law School, Ithaca, New York, filed an amicus curiae brief for Professors Lawrence G. Sager and Nelson Tebbe.

Lauren Fontana, University of Colorado, Aurora, Colorado, filed an amicus curiae brief for Scholars for the Advancement of Children's Constitutional Rights.

Alex J. Luchenitser and Scott Lowder, Americans United for Separation of Church and State, Washington, D.C.; Timothy R. Macdonald, Sara R. Neel, and Anna I. Kurtz, American Civil Liberties Union Foundation of Colorado, Denver, Colorado; Daniel Mach, American Civil Liberties Union Foundation, Washington, District of Columbia; Karen L. Loewy and Kenneth D. Upton, Lambda Legal Defense and Education Fund, Inc., Washington, District of Columbia, filed an amicus curiae brief for Americans United for Separation of Church and State, American Civil Liberties Union, American Civil Liberties Union of Colorado, Central Conference of American Rabbis, Interfaith Alliance, Interfaith Alliance of Colorado, Keshet, Lambda Legal Defense and Education Fund, Inc., The Sikh Coalition, Union for Reform Judaism, and Women of Reform Judaism.

Amalia Sax-Bolder, Craig M. Finger, and Lance T. Collins, Brownstein Hyatt Farber Schreck, LLP, Denver, Colorado, filed an amicus curiae brief for First Amendment scholar Amanda Shanor.

Before **PHILLIPS**, **ROSSMAN**, and **FEDERICO**, Circuit Judges.

FEDERICO, Circuit Judge.

In 2020, Colorado voters approved a proposition that created a dedicated source of public funding for voluntary, universal preschool in the state. Following this vote, Colorado passed legislation and established a Universal Preschool Program (UPK). Appellants are the Archdiocese of Denver, two Catholic parishes, and two parents of preschool-age children, challenging a section of UPK that requires all preschools receiving state funds to sign a nondiscrimination agreement. They argue that this requirement violates their rights under the First Amendment to the United States Constitution and seek an injunction preventing the nondiscrimination requirement from being applied to them. After a three-day trial, the district court found that the nondiscrimination requirement does not run afoul of the First Amendment, denied injunctive relief, and entered final judgment. This timely appeal follows, and we have jurisdiction under 28 U.S.C. § 1291.

Our opinion will proceed as follows. In Section I, we begin by detailing Colorado UPK, discussing its legislative and regulatory structure and how it works for preschools and families. Next, we describe the plaintiffs and their lawsuit, the district court's findings, and the arguments on appeal. In Section II, we briefly explain why we need not decide one issue raised on

appeal: the standing of the Archdiocese of Denver. In Section III, we explain the standard of review when a party seeks a preliminary injunction while raising a First Amendment challenge. Section IV is the heart of this appeal, where we dive into First Amendment doctrine and apply it to Colorado's UPK program. We reach our conclusion in Section V, affirming the district court's decision to deny injunctive relief.

I

A

In 2020, Colorado voters passed proposition EE to provide state funding for UPK. Colo. Rev. Stat. § 26.5-4-202(1)(a)(V). The Colorado General Assembly then implemented UPK by passing the Early Childhood Act (the Act). H.B. 21-1304, 73rd Gen. Assemb. (Colo. 2021). The purposes of this law are to "provide children in Colorado access to voluntary, high-quality, universal preschool services free of charge" and to "establish quality standards for publicly funded preschool providers that promote children's early learning and development, school readiness, and healthy beginnings." Colo. Rev. Stat. § 26.5-4-204(1)(a), (d). The Act, along with additional legislation passed the next year, established a "[m]ixed delivery system" where a variety of different kinds of preschools, public and private, would be supported by state funds. *Id.* § 203(12). The implementation of the law was given to the executive director of the newly

created Colorado Department of Early Childhood (the Department). *Id.* § 26.5-1-104(1).

To meet the goals of the Act, the General Assembly tasked the executive director of the Department with prescribing uniform quality standards for all preschools funded through UPK. *Id.* § 26.5-4-204(4)(a)(V). These standards would govern the minimum number of teaching hours, classroom sizes, teacher qualifications, and so forth. *Id.* § 205(2)(b). The legislature stated that, at a minimum, these quality standards must include a nondiscrimination requirement for all participating schools.[1] *Id.* Under the nondiscrimination requirement, each preschool must "provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family." *Id.* § 205(2)(b). This requirement was also codified as a final regulation by the Department. 8 Code of Colorado Regulations 1404-1 § 4.110.

Colorado preschools are not required to participate in UPK. But those that wish to participate in UPK and receive state funds are required to sign an agreement stating that they will adhere to the Act's quality standards,

[1] Plaintiffs refer to this as "the Mandate" while the Department calls it the "equal-opportunity requirements." Op. Br. at 10; Resp. Br. at 17.

including the nondiscrimination requirement. These standards are absolute. UPK only has discretion to grant waivers "for a limited time" to preschools that do not meet its standards, so long as those schools are actively "working toward compliance with the quality standards" and the unmet standard does not relate to "health and safety[.]" *Id.* § 205(1)(b)(II).

Starting in 2022, preschools began registering with UPK to receive state funds. Families enroll their children in UPK preschools through an online portal. Families can select up to five registered preschools on Colorado's UPK website and then rank them in order of preference. An algorithm then matches families with one of their ranked choices.[2] Initially, some participating preschools thought this kind of ranking system was too haphazard because schools had no control over which students they were matched with. In response, the Department added a function where preschools can set different preferences in how the algorithm matches them with students (hereinafter the preference system). This preference system was designed to help match preschools with specific groups of students that they are designed to serve. For instance, preschools can prefer to be matched with students in a way that is consistent with school district boundaries. Preschools are allowed to decline to enroll children they are matched with who do not fit their enrollment

[2] If none of these five choices ends up being available, families can select additional preschools. Aplt. App. II at 171.

preference, although their choice to decline a student is subject to Department review.

When the preference system was first codified in the Code of Colorado Regulations, it listed ten different preferences that could be selected:

> 1. Faith-based providers granting preference to members of their congregation;
>
> 2. Cooperative preschool providers requiring participation in the cooperative;
>
> 3. School districts maintaining enrollment consistent with their established boundaries;
>
> 4. Participating preschool providers reserving placements for a student(s) with an Individualized Education Program (IEP) to ensure conformity with obligations incurred pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 (2004), or the Exceptional Children's Education Act, Article 20 of Title 22, C.R.S.;
>
> 5. Head Start programs' adhering to any applicable federal law requirements including eligibility requirements;
>
> 6. Participating preschool providers granting preference to an eligible child of one (1) of their employees;
>
> 7. Participating preschool providers granting preference to an eligible child to ensure continuity-of-care for that child;
>
> 8. Participating preschool providers granting preference to an eligible child to keep siblings similarly located;
>
> 9. Participating preschool providers granting preference to an eligible child who is multilingual, to ensure proper delivery of services to that child[; and]
>
> 10. Participating preschool providers may grant preference to an eligible child based: on the child and/or family being a part of a specific community; having specific competencies or

> interests; having a specific relationship to the provider, provider's employees, students, or their families; receiving specific public assistance benefits; or participating in a specific activity.

Aplt. App. II at 172–73.[3]

The final preference is a catchall, allowing for individual preschools to request a new matching preference from the Department. Preschools that seek a specific preference under the catchall preference can request it through a separate online form. However, the catchall preference has several restrictions:

> Participating preschool providers seeking to utilize this preference, must ensure:
>
> a. That the specific community, competencies or interests, relationship, public assistance benefit, or activity being required of children and/or families who attend, is a requirement of all participating children and/or families.
>
> b. That implementation of requiring the specific community, competencies or interests, relationship, public assistance benefit, or activity does not conflict with any other provision of the Colorado Universal Preschool Program statutes at sections 26.5-4-201 through 26.5-4-211, C.R.S., nor with any other applicable law or regulation.
>
> c. Examples of approved preferences include, but are not limited to: participating preschool providers who require a focus in a certain knowledge area (such as science, technology,

[3] As discussed in greater depth below, these regulations have since been changed. One preference has been removed and the others are codified in a different section. Hereinafter, all citations are to the latest version of the regulations contained in 8 Code of Colorado Regulations 1404-1, effective as of April 24, 2025.

> engineering, and math ("STEM")); providers who serve families with a family member who works or attends school at a specific site(s) or location(s); providers who serve families within a specific geographical catchment area; providers who require a certain amount of volunteering or participation by the participating family; providers who require certain vaccinations for the health and safety of its staff and students; and providers who serve families who are receiving a specific public assistance benefit(s) such as housing assistance.

8 Colo. Code Reg. 1404-1 § 4.109(A)(9). Finally, after listing these preferences, Colorado regulations state that "[i]n utilizing these programmatic preferences, eligible preschool providers must still comply with [the nondiscrimination provision]." *Id.* § 4.109(B).

B

Plaintiffs are two catholic parishes, St. Mary Catholic Parish and St. Bernadette Catholic Parish, and their associated preschools, St. Mary's Catholic Preschool and Wellspring Catholic Academy, the Archdiocese of Denver, along with Daniel Sheley and Lisa Sheley, parents who hope to enroll their children in a UPK-eligible preschool. St. Mary's Catholic Preschool and Wellspring Catholic Academy are a part of the Catholic Church under the authority of the Archdiocese, which oversees thirty-six Catholic preschools in Colorado. These schools are expected to "adhere[] to Catholic faith, morals, [and] the building up of Catholic culture within the school[.]" Aplt. App. III at 44. Likewise, teachers, staff, and the parents of children at these schools are

required to sign a "Statement of Community Beliefs" broadly affirming that they will live in accordance with the teachings of the Catholic Church. *Id.* at 50–51.

Plaintiffs (hereinafter collectively referred to as "the Parish Preschools") hold a sincere belief that Catholic teaching requires them to consider the sexual orientation and gender identity of a student and their parents before admitting them to a Catholic school. The Archdiocese does not recognize same-sex relationships or transgender status, and it states that enrolling a child of same-sex parents in a Catholic school is "likely to lead to intractable conflicts." Aplt. App. V at 116. The Parish Preschools do not categorically ban the children of same-sex parents, but Wellspring has declined to admit an elementary school student in the past for this reason. Regardless, the Parish Preschools state that their beliefs are incompatible with the part of the nondiscrimination requirement stating that schools must "provide eligible children an equal opportunity to enroll and receive preschool services regardless of . . . sexual orientation [or] gender identity . . . as such characteristics and circumstances apply to the child or the child's family."

Soon after UPK was passed, the Parish Preschools and others expressed concerns about the nondiscrimination requirement. During UPK's development, the Department organized working groups with different preschool providers to solicit input at regular meetings. Among these was a

working group for faith-based preschool providers, which included representatives from religious groups, interfaith groups, and faith-based preschools. One of the preferences in the preference system – a preference for faith-based providers to enroll members of their congregation (the congregation preference) – was created as a result of conversations with this working group. St. Mary's participated in the faith-based working group and raised concerns about the nondiscrimination requirement.

In 2023, the Archdiocese of Denver instructed its preschools not to register with UPK so that they would not have to agree to the nondiscrimination requirement. However, the Archdiocese did permit several preschools affiliated with Catholic Charities and aimed at low-income families to participate in UPK.[4] The Archdiocese and several other faith groups sent a letter to Governor Jared Polis requesting "exemptions for faith-based religious providers" from the nondiscrimination requirement. Aplt. App. V at 221. Lisa Roy, executive Director of the Department, sent a reply, informing the Archdiocese that the Department could not create an exemption from the

[4] According to the Parish Preschools, Catholic preschools operate under "two different ministries within the Archdiocese of Denver." Aplt. App. III at 72. The Office of Catholic Schools, which manages most of the Archdiocese's preschools, is distinct from Catholic Charities, which runs some Early Head Start and Head Start programs. These two programs have distinct theological purposes and thus are different ministries within the Archdiocese.

nondiscrimination requirement because it is enshrined in state law. But she reassured the Archdiocese that "faith-based providers can reserve all or a portion of their seats for their members, and decline a match from a family that is not part of the congregation." *Id.* at 223.

The Parish Preschools then sued Director Roy and Dawn Odean, Director of Colorado's Universal Preschool Program, in their official capacities under 42 U.S.C. § 1983 for infringing upon their rights under the First Amendment as applied to the states through the Fourteenth Amendment. The Parish Preschools brought seven claims and sought an injunction prohibiting enforcement of the nondiscrimination requirement against them with respect to religious affiliation, sexual orientation, and gender identity. They argued that the nondiscrimination requirement triggered strict scrutiny, which the government could not satisfy.

Three of the Parish Preschools' arguments are relevant on appeal.[5] First, they claim that the nondiscrimination requirement "precludes religious entities and families from obtaining generally available state benefits solely because of their religious character" in violation of the Free Exercise Clause. Aplt. App. I at 48. Second, they claim that UPK has created both discretionary and categorical exemptions to the nondiscrimination requirement that make the law "not neutral and generally applicable[,]" entitling them to an exemption under the Free Exercise Clause. *Id.* at 53. Finally, they claim that the nondiscrimination requirement violates the Free Speech Clause by "forcing a group formed for expressive purposes to accept members who oppose those purposes." *Id.* at 56.

[5] The Parish Preschools' complaint contained seven separate First Amendment claims in total: Count One: violation of the Free Exercise Clause by exclusion from a government benefit based on religion; Count Two: violation of the Free Exercise Clause by ignoring the ministerial exception to employment discrimination law; Count Three: violation of the Free Exercise Clause by interfering with church autonomy; Count Four: violation of the Free Exercise Clause by refusing to grant an exemption to a law not of general applicability that burdens religious practice; Count Five: violation of the Free Exercise Clause by not treating religious practices as equal to comparable secular activities; Count Six: violation of the Free Speech Clause by compelled speech and expressive association; and Count Seven: violation of the First Amendment by denominational favoritism. Some of these claims were found to be moot by the district court because they were based on a separate employment agreement that the Department later eliminated and disavowed. On appeal, we are asked to consider only parts of Counts One, Four, Five, and Six.

The Department moved to dismiss the complaint on the grounds that the Parish Preschools lacked standing and that their claims were not ripe. After ordering supplemental briefing, the district court granted the motion to dismiss only with respect to the Archdiocese. The district court held that "the Archdiocese has failed to allege a sufficient injury to have standing in its own right and has not established it has standing as a representative of the Archdiocesan preschools" because those preschools are "legally independent" and the Archdiocese itself "does not seek to participate in UPK[.]" Aplt. App. II at 43.

In January 2024, the district court held a three-day bench trial to determine whether to grant injunctive relief, including hearing testimony from both expert and fact witnesses. In its findings of fact, conclusions of law, and order for entry of judgment, the district court concluded that the application of UPK's nondiscrimination requirement to the Parish Preschools with respect to sexual orientation and gender identity should not be subjected to strict scrutiny.[6] As part of its analysis, the district court stated that the nondiscrimination requirement "does not exclude [the Parish Preschools] from

[6] The district court also stated that "even if strict scrutiny applied, it would be satisfied." Aplt. App. II at 231. Because we ultimately find that rational basis review should apply, we do not conduct a strict scrutiny analysis here.

the UPK Program solely because of their religious status or exercise." *Id.* at 205. The court also found that "the Department has applied the [nondiscrimination] requirement in a neutral and generally applicable manner, as dictated by the statute[.]" *Id.* at 161. It also held that "Plaintiffs' free-speech claim is entirely without merit as Plaintiffs ignore applicable doctrines and attempt to stretch precedent beyond recognizability." *Id.* Accordingly, the district court applied rational basis review to deny injunctive relief with respect to the sexual orientation and gender identity provisions of the nondiscrimination requirement.[7]

The district court did, however, find that UPK had created an unlawful exception to its requirement for nondiscrimination on the basis of religion by creating the congregation preference. As a result, it enjoined UPK from requiring the Parish Preschools to "agree to provide [preschool enrollment] regardless of religious affiliation for as long as the Department allows exceptions from the religious affiliation aspect of the nondiscrimination

[7] A separate case from the District of Colorado has come out the opposite way. In *Darren Patterson Christian Academy v. Roy*, the district court found that the nondiscrimination requirement infringed on the free exercise rights of a private faith-based preschool seeking to participate in UPK. 2025 WL 700268 (D. Colo. Feb. 24, 2025). The district court in that case permanently enjoined UPK from enforcing that portion of the nondiscrimination requirement against that school. *Id.* That case was appealed, and the appeal remains pending.

requirement[.]"[8] *Id.* at 258–59. This ruling is not challenged on appeal, and UPK has since updated its regulations to remove the congregation preference. 8 Colo. Code Reg. 1404-1 § 4.109(A).

The district court then entered final judgment, and the Parish Preschools timely appealed. The Parish Preschools appeal two decisions of the district court. First, they appeal the denial of a permanent injunction with respect to the nondiscrimination requirement. Second, they appeal the dismissal of the Archdiocese from the case for lack of standing.

We will address these arguments in reverse order. First, we decline to decide whether the Archdiocese has standing. We then turn to the heart of the Parish Preschools' appeal and ask whether the nondiscrimination requirement triggers strict scrutiny under the Free Exercise Clause. Finally, we examine the Parish Preschools' argument that the nondiscrimination requirement triggers strict scrutiny by infringing on their expressive association.

[8] Because the Parish Preschools were always able to utilize the congregation preference, this injunction appears to have had no direct effect. The Parish Preschools' effort in this regard apparently stemmed from a concern that UPK's congregation preference might not allow them to prioritize the admission of Catholic families from other parishes. But based on Director Odean's testimony, the Department had always interpreted "congregation" broadly such that it could be used to cover Catholic students from other parishes. Aplt. App. IV at 65–66. Regardless, after the district court's decision, the Department eliminated the congregation preference to comply with state law mandating the nondiscrimination requirement.

II

The Parish Preschools urge us to reverse the district court's finding that the Archdiocese lacked standing, but we decline to address this question. The Department does not contest the standing of the other four plaintiffs on appeal, and we do not independently hold that they lack standing, so there is no constitutional bar to this court considering this case based upon the standing of the remaining plaintiffs. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."); *Biden v. Nebraska*, 600 U.S. 477, 489 (2023) ("Because we conclude that the Secretary's plan . . . directly injures Missouri—conferring standing on that State—we need not consider the other theories of standing raised by the States.").

If an injunction were granted, the presence of the Archdiocese as a party with standing would likely affect the number of preschools impacted by that relief. However, the relief sought by the Parish Preschools is subsumed by the relief sought by the Archdiocese, and we discern no material differences in the parties' arguments for relief. The outcome is the same regardless of whether the Archdiocese remains a party to this litigation because we are affirming the district court's denial of injunctive relief to the Parish Preschools. Because it makes no difference to the bottom

line, we decline to consider the district court's dismissal of the Archdiocese from the case for lack of standing. *Citizens for Const. Integrity v. United States*, 57 F.4th 750, 759 (10th Cir. 2023) ("If one appellant has standing, we need not worry about the standing of another appellant raising the same issues and seeking the same relief."); *see also Thiebault v. Colorado Springs Utilities*, 455 F. Appx. 795, 802 (10th Cir. 2011) (unpublished).

III

"For a party to obtain a permanent injunction, it must prove: '(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest.'" *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007) (quoting *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003)). The parties do not discuss the latter three factors on appeal. As such, we confine our analysis to a consideration of the merits of the Parish Preschools' First Amendment claims.

"We review the district court's decision to deny a permanent injunction for abuse of discretion." *United States v. Uintah Valley Shoshone Tribe*, 946 F.3d 1216, 1222 (10th Cir. 2020). "An abuse of discretion occurs when the district court 'commits an error of law or makes clearly erroneous factual findings.'" *Att'y Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 775 (10th

Cir. 2009) (quoting *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007)). In general, when reviewing for an abuse of discretion, "we examine the district court's legal determinations de novo, and its underlying factual findings for clear error." *Id.* at 776. However, "[i]n a First Amendment case, we have an obligation to make an independent examination of the whole record" and "review the district court's findings of constitutional fact and its ultimate conclusions of constitutional law de novo." *Revo v. Disciplinary Bd. of the Supreme Ct. for the State of N.M.*, 106 F.3d 929, 932 (10th Cir. 1997).

IV

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. amend. I. "[A] plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise [Clause]." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). If a plaintiff meets that burden, "the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law." *Id.* "[A] plaintiff may carry the burden of proving

a free exercise violation in various ways," *Id.* at 525, two of which the Parish Preschools argue here.

A

The Supreme Court has held that when a state offers subsidies for private education, it cannot categorically withhold those funds from religious institutions. This principle comes from three cases: *Carson v. Makin*, 596 U.S. 767, 768 (2022), *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 487 (2020), and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017). These cases form an independent line of precedent in the Supreme Court's Free Exercise case law, and the Parish Preschools allege that they control the outcome here.

We disagree. The religious exclusions addressed by the Supreme Court in these three cases are different from the nondiscrimination requirement in Colorado's UPK statute. Before we explain why, we briefly describe each of the three cases in chronological order.

First, in *Trinity Lutheran*, the Court addressed a Missouri program that gave grants to nonprofits to install playgrounds with rubber made from recycled tires. 582 U.S. at 454. Pursuant to the state constitution, Missouri refused to give these grants to "any applicant owned or controlled by a church, sect, or other religious entity." *Id.* at 455. The Court found that this violated the Free Exercise Clause on the principle that "denying a generally

available benefit solely on account of religious identity imposes a penalty on the free exercise of religion[.]" *Id.* at 458.

Later, in *Espinoza*, the Montana Supreme Court struck down a tuition assistance program that could be used to fund students at private religious schools on the grounds that the state constitution barred aid to institutions "controlled in whole or in part by any church, sect, or denomination." 591 U.S. at 470 (quoting Mont. Const., Art. X, § 6(1)). The Court again found that this violated the Free Exercise Clause on the basis of "status-based discrimination" against religious institutions. *Id.* at 478.

Finally, in *Carson*, Maine enacted a tuition assistance program that only reimbursed students who attended "nonsectarian" schools that did not "promote" a "faith or belief system[.]" 596 U.S. at 775. The Court concluded that this limitation violated the Free Exercise Clause because it discriminated against the "religious use" of funds in the same way the prior cases involved discrimination against "religious status[.]" *Id.* at 786–87.

This case is different from these three cases. The Department did not exclude faith-based preschools from participating in UPK. Indeed, they welcomed and actively solicited their participation. The only relevant limitation on any preschool's participation is the nondiscrimination requirement, which applies to all preschools regardless of whether they are religious or secular. Thus, the inclusion of religious schools as welcome

participants in Colorado's UPK program distinguishes this case from Supreme Court decisions where the plaintiffs were excluded from participation based upon their religious exercise and status.

The Parish Preschools attempt to blur this distinction by equating the nondiscrimination requirement with a restriction on public funds being used for religious purposes, arguing that both limit their religious exercise.[9] But the *Carson* line of cases addressed laws that targeted "religious status" and "religious use" on the explicit basis that they were religious and not secular. *Id.* at 786–87; *see also id.* at 780 ("While the wording of the Montana and Maine provisions is different, their effect is the same: to disqualify some private schools from funding *solely because they are religious*." (emphasis added) (citation and internal quotation marks omitted)); *Trinity Lutheran*, 582 U.S. at 463 ("The express discrimination

[9] The Parish Preschools' logic would mean that whenever a state conditions school funding on any activity, courts would have to ask if that activity is secular or religious to ensure the condition does not violate *Carson*. But so long as a plaintiff is sincere, beliefs that are commonly described as secular can warrant religious status under the law. *See Welsh v. United States*, 398 U.S. 333, 340 (1970) ("If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience . . . those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by God' in traditionally religious persons.") (quoting *United States v. Seeger*, 380 U.S. 163, 176 (1965)). In practice, the Parish Preschools' interpretation would mean that *Carson* prevents states from placing almost any condition on school funds.

against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—*solely because it is a church*—to compete with secular organizations for a grant." (emphasis added)); *Kim v. Bd. of Educ. of Howard Cnty.*, 93 F.4th 733, 748 (4th Cir. 2024) ("These cases stand only for the point that religious schools cannot be excluded from grant programs solely because of their religious character.").

Colorado is not attempting to prohibit funds from being used for religious purposes. Unlike in *Carson*, preschools funded through UPK may use those funds to educate students on matters of faith. The restrictions imposed by the nondiscrimination requirement universally cover enrollment policies and conduct, but they are not a targeted burden on religious use. The Parish Preschools allege, of course, that this universal restriction nonetheless infringes upon their ability to exercise their religious beliefs. But when a particular religious practice is alleged to be infringed incidentally, rather than religious status or use being specifically targeted, the Supreme Court requires that the law at issue be neutral and generally applicable. *See Trinity Lutheran*, 582 U.S. at 460–61 (discussing *Emp. Div., Dept. of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990)). We turn to this inquiry next.

B

The Free Exercise Clause does not prevent individuals from being subject to a "valid and neutral law of general applicability" that incidentally conflicts with their religion. *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).[10] While the Constitution protects religious freedom, courts have long recognized the simple reality that the government must be able to enforce the law equally against everyone, no matter an individual's beliefs, lest we "permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)). Thus, we ask if the law is neutral and generally applicable to assess if the law is holding everyone to the same standard, regardless of their religion.

If a law is neutral and generally applicable, it "need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006). "On the other hand, if a law that burdens a religious practice is not neutral or generally applicable, it is subject to strict scrutiny," and must be "narrowly tailored to advance a compelling governmental interest." *Id.* Which is to say, the neutrality and general

[10] The Parish Preschools also argue, for preservation purposes, that *Smith* was wrongly decided.

applicability inquiry guides the standard of judicial review to determine whether the law violates the Constitution.

Our question, then, is whether the nondiscrimination requirement is a neutral law of general applicability. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 533 (2021). "A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions[,]'" *id.* (first alteration in original) (quoting *Smith*, 494 U.S. at 884), or if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," *id.* at 534. We now examine each of these standards in turn.

1

Neutrality is, essentially, a question of intent. "A law is neutral so long as its object is something other than the infringement or restriction of religious practices." *Grace United Methodist Church*, 451 F.3d at 649–50. Did Colorado implement the nondiscrimination requirement to try and suppress religious views or conduct?

First, we look at the nondiscrimination requirement itself. "A law lacks facial neutrality if it refers to a religious practice without a secular

meaning discernable from the language or context." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). The nondiscrimination requirement does not. Rather, it applies to all preschools and does not mention religion except to prohibit discrimination based on religious affiliation.

But a lack of neutrality is not always obvious. The government can also violate the Free Exercise Clause through "subtle departures from neutrality" and "covert suppression of particular religious beliefs[.]" *Id.* at 534 (internal citations and quotation marks omitted). While the nondiscrimination requirement appears neutral, the Parish Preschools argue that the Department has taken actions that "evidence religious hostility." Op. Br. at 46. Examining the record, however, we find no support for this claim.

The Parish Preschools first accuse the Department of a lack of neutrality because they "compared [the Parish Preschools] to 1970s segregation academies in the South and characterized [the Parish Preschools'] millennia-old religious beliefs as stigmatization and bullying." *Id.* But the only reference to segregation academies occurs in the context of legal arguments citing *Runyon v. McCrary*. 427 U.S. 160 (1976). *Runyon* is relevant to the Parish Preschools' free association argument, and the

comparison is a purely legal one.[11] As for bullying and stigmatization, the Department appears to raise these issues only to demonstrate the reasoning behind the nondiscrimination requirement and their concerns about admissions policies that violate the requirement. They make no claim as to whether the Parish Preschools' religious beliefs themselves are right or wrong. As such, the Parish Preschools cannot point to any part of the record where the Department has disparaged their preschools or their religion.

Second, the Parish Preschools argue there is evidence of religious hostility because the Department has "repeatedly recalibrated their policies in a manifest attempt to gerrymander around [the Parish Preschools'] claims" including by "tweaking the scope of the congregation preference[.]" Op. Br. at 47. If anything, the congregation preference shows the opposite. The Department created the congregation preference to address the concerns of the working group it convened with faith-based preschools. One of those preschools was St. Mary's itself. When faith groups raised concerns

[11] Many lawsuits arise out of difficult circumstances and unsavory contexts. Lawyers should not be penalized for arguing and applying the legal rules that arise from any case, no matter its context. We likewise cite to *Runyon* here because it helps us understand how the First Amendment right to expressive association, as interpreted in binding precedent by the Supreme Court, applies to school admissions. *See infra* Section IV.C. This is part and parcel of legal analysis and does not disparage the Parish Preschools or equate their character or beliefs with that of other parties in other cases.

about the nondiscrimination requirement, Director Roy tried to use the congregation preference to assuage those concerns and ensure the participation of faith-based preschools. In doing so, she was clear that "faith-based providers can, and are encouraged to, participate in the UPK program." Aplt. App. V at 222.

After the Parish Preschools sued and the district court enjoined the use of the congregation preference, it was dropped from state regulations. 8 Colo. Code Reg. 1404-1 § 4.109(A). But far from suggesting a "gerrymander" around their claims, this shows that the Department has consistently sought to follow the letter of the nondiscrimination requirement as enshrined in state law. "[R]epeated changes in position" and "evolving policy" can sometimes be evidence of non-neutrality. *Meriwether v. Hartop*, 992 F.3d 492, 515 (6th Cir. 2021). But not where, as here, those changes came from attempts to try and accommodate the plaintiffs.

Compare this case with *Church of Lukumi Babalu Aye*, where the City of Hialeah, Florida, passed ordinances against animal sacrifice to target the practice of the Santeria religion. 508 U.S. at 534. There, the Supreme Court found that "[t]he record . . . compel[led] the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances." *Id.* Hialeah never considered ordinances against animal sacrifice until a Santeria house of worship announced that it would be

opening in the city. *Id.* at 541. The city decided to impose these ordinances after city council meetings where local officials called Santeria "abhorrent[,]" an "abomination[,]" and "in violation of everything this country stands for." *Id.* at 541–42. The city council president even asked, "[w]hat can we do to prevent the Church from opening?" *Id.* at 541. The answer was a series of ordinances prohibiting the killing of animals that nonetheless allowed "almost all killings of animals except for religious sacrifice[.]" *Id.* at 536. However, these ordinances contained exemptions that would allow for the kosher slaughter of animals consistent with other religious traditions. *Id.* at 536–37. In simple terms, the Supreme Court found the ordinances were not neutral because they were blatantly intended to prohibit a specific religious practice and tradition.

Our analysis is also guided by *Masterpiece Cakeshop*, which dealt with Colorado's prohibition on discrimination based on sexual orientation in places of public accommodation. 584 U.S. 617, 627 (2018). The Colorado Civil Rights Commission found that a bakery had unlawfully discriminated against a same-sex couple trying to order a cake for their wedding. *Id.* at 628–29. But the Supreme Court held that the Commission violated the Free Exercise Clause because its decision contained "elements of a clear and impermissible hostility toward the sincere religious beliefs" of the plaintiff. *Id.* at 634. In the Commission's public hearings on the case, commissioners

made "inappropriate and dismissive comments" and described the plaintiff's rhetoric as "despicable[.]" *Id.* at 635. Even after the hearings concluded, the government never disavowed "official expressions of hostility to religion[.]" *Id.* at 639. Criticism of the plaintiff's religious practices demonstrated that Colorado failed to act neutrally towards him.

Nothing about this case – neither the nondiscrimination requirement nor the record of its implementation – looks anything like the clear religious suppression displayed in *Church of Lukumi Babalu Aye*. It does not even resemble the general undercurrent of animus the Supreme Court highlighted in *Masterpiece Cakeshop*.[12] Rather, the record indicates that the Colorado General Assembly passed, and the Department implemented, the nondiscrimination requirement to prevent discrimination on any grounds, secular or religious. And in implementing UPK, the Department made every effort to encourage faith-based preschools to participate (short of violating state law by granting exceptions to the nondiscrimination requirement). Many faith-based preschools – including Catholic preschools under the Catholic Charities of the Archdiocese of Denver – currently participate in

[12] The Court also found an unwarranted disparity in how the Colorado Civil Rights Commission treated other cases where bakers had refused to make cakes seen as derogatory towards same-sex couples. *See Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 584 U.S. 617, 636–37 (2018). There is nothing in the record here to indicate any kind of disparate enforcement.

UPK. The Department has not been "intolerant of religious beliefs" and has not restricted certain practices "because of their religious nature." *Fulton*, 593 U.S. at 533. As such, it has demonstrated the law's neutrality, as required by the Free Exercise Clause.

2

While neutrality is a question of a law's intent, general applicability is a question of a law's structure and implementation. "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Smith*, 494 U.S. at 884 (internal citation and quotation marks omitted). The Parish Preschools identify two alleged systems of individual exemptions: the catchall preference and the temporary waiver provision.

At first blush, the catchall preference looks a bit like a system of individual exemptions. Rather than simply providing an option for preschools to prefer being matched with certain categories of students, it allows preschools to request a unique preference through an online form, with the Department deciding whether to approve it. As such, the catchall preference is an individualized addition to the list of preferences.[13] But the

[13] As Appellants note, the Department's online form used the phrase "[e]xception [r]equested" to describe these unique preferences. Aplt. App. VII at 245–46. However, such labels do not tell us whether the preferences are a legally significant exception to the challenged part of the law.

preference system is merely a way of adjusting the algorithm that the UPK website uses to match preschools with students. It does not give preschools the authority to reject certain classes of students if doing so would contravene state law. And the regulation itself notes that "eligible preschool providers must still comply with" the nondiscrimination provision. 8 Colo. Code Reg. 1404-1 § 4.109(B). So, the catchall preference is not a system of individualized exemptions from the nondiscrimination requirement, which is what counts.

The Parish Preschools' argument relies on case law concerning policies that contained built-in exemptions. In *Fulton*, Philadelphia's foster care referral contract had a nondiscrimination clause that prevented discrimination based upon the prospective foster parents' sexual orientation. 593 U.S. at 535. But that nondiscrimination requirement stated that it applied "unless an exception is granted by" the city's Commissioner of the Department of Human Services at their "sole discretion." *Id.* The Commissioner was authorized by the policy itself to grant individual exemptions. *Fulton*'s holding, finding the law was not generally applicable, is based on *Sherbert v. Verner*, which concerned a work requirement for public benefits that was only implicated if a citizen failed to accept work without good cause. *See* 374 U.S. 398, 400 n.3 (1963). It was the state Employment Security Commission's failure to consider a religious

objection to working on Saturday a good cause that implicated the plaintiff's free exercise rights. *Id.* at 403. Again, this was contained within the law itself, giving government officials the power to make individual exemptions by deciding what constitutes good cause.

The preference system regulations, in contrast, explicitly state that the regulations cannot be used as an exception to the nondiscrimination requirement. Unrelated exceptions do not mean that the challenged portion of a law lacks general applicability. *See Grace United Methodist Church*, 451 F.3d at 654. ("Although the City of Cheyenne's zoning ordinance allows for limited objective exceptions . . . (such as churches, schools, and other similar uses) the regulation bars any organization or individual from operating a daycare center in this residential zone, for either secular or religious reasons.").

The Parish Preschools frame this as mere doublespeak: the Department facially insisting that they will comply with the nondiscrimination requirement while still blatantly discriminating through the preference system. This argument hinges in part on the testimony of Director Odean. She was asked on direct examination whether, hypothetically, a preschool could request a preference for "gender-nonconforming children," "children of color from historically underserved areas[,]" or the children of parents that are part of "the LGBTQ community"

because these groups are part of a "specific community[.]"[14] Aplt. App. IV at 70–72. Odean testified that these preferences could be given, but only "[a]s long as there wasn't discrimination that was aligned to the [non]discrimination provision[.]" *Id.* at 71. While these preferences would certainly seem to violate the nondiscrimination requirement, Director Odean clarified that these hypotheticals had never been considered by the Department. She also did not have sole discretion over these preferences: they would not be granted without consulting others at the Department, including counsel.

We do not interpret Director Odean's testimony to imply that the Department was using the catchall preference to violate the nondiscrimination requirement. If anything, Director Odean's insistence that the Department follow the nondiscrimination requirement when considering a requested catchall preference suggests the opposite: that the

[14] The Parish Preschools call this a "categorical exception" for "sexual orientation, gender identity, and race[.]" Op. Br. at 36–37. They argue that this "categorical exception" is comparable to their requested religious exception because it "undermines the government's interest" similarly. *Id.* at 37. But Odean's testimony on this point concerned the catchall preference, which (if it overrode state law) would be an individual exemption, not a categorical one. The real question raised by Director Odean's testimony on this point is whether the Department has created a system of individual (not categorical) exemptions to the prohibition on discriminating based on sexual orientation and gender identity. It has not, and thus the law is still generally applicable.

statutory nondiscrimination requirement is a hard limit. This not a situation where one part of the law renders another "a nullity." Op. Br. at 43 (quoting *Fulton*, 593 U.S. at 537). Rather, this is a common situation where an agency regulation is limited by state law.

In practice, we can see that the Department has followed state law on nondiscrimination. The record shows that the Department has approved individual preferences under the catchall preference seventeen times. These include admissions preferences such as "teen parents/students in [a] building that will need to be placed together[,]" "fully [v]accinated [c]hildren[,]" and "families who live in the Blue Lake Subdivision." Aplt. App. VII at 273–74. None of these approved preferences concern sexual orientation or gender identity or otherwise implicate the nondiscrimination provision in admissions. Finding a system of individual exemptions would require that we invert a clear reading of the Department's regulations based not on their language or operation, but a series of hypotheticals posed unexpectedly to one witness at trial.

Likewise, as evidence of compliance, we can look at the fate of the congregation preference. The Department added this preference to accommodate faith-based providers. However, once the district court determined that this preference was incompatible with the nondiscrimination requirement, it was removed. The Department has tried

repeatedly to accommodate faith-based providers, but when it comes to the nondiscrimination provision, it can make no exceptions because the provision is required by statute.

Simply put, the nondiscrimination requirement is a matter of state law, and any regulations must comply with that law. By challenging the provider agreement, the Parish Preschools are challenging state law itself as infringing on their right to free exercise. But because state law gives no room to the Department to make exceptions, it stays generally applicable, and thus does not implicate the Free Exercise Clause. *See Fulton*, 593 U.S. at 544 (Barrett, J., concurring) ("A longstanding tenet of our free exercise jurisprudence—one that both pre-dates and survives *Smith*—is that *a law burdening religious exercise* must satisfy strict scrutiny *if it gives government officials discretion* to grant individualized exemptions." (emphases added)).

The Parish Preschools also argued that the temporary waiver provision defeats general applicability. Colorado law states that "if necessary to ensure the availability of a mixed delivery system within a community, the [D]epartment may allow a preschool provider that does not meet the quality standards to participate in the preschool program for a limited time while working toward compliance with the quality standards[.]" Colo. Rev. Stat. § 26.5-4-205(1)(b)(II). However, no waiver can

be granted for "quality standards relating to health and safety as a condition of participating in the preschool program." *Id.* The Parish Preschools argue that because the nondiscrimination requirement is a quality standard, the Department's ability to temporarily waive these standards constitutes a system of individualized exemptions. Again, we disagree.

The temporary waiver provision cannot be reasonably understood to authorize even a temporary exception to the nondiscrimination requirement. Preschools must be "working toward compliance with the quality standards" to be eligible for a temporary waiver. *Id.* For some quality standards relating to school operations, a preschool might need to take some time to meet state quality standards. For instance, smaller preschool providers might need time to adequately train their staff on required childcare practices. *See* Aplt. App. IV at 34. But when it comes to ensuring nondiscrimination based on gender identity and sexual orientation, there is no way a preschool could be out of compliance while simultaneously working toward compliance. A school that is out of compliance could simply choose to change its admissions policies. Following the nondiscrimination requirement is a matter of intent and practice, not simply about effort. As such, the Department has no discretion to waive the nondiscrimination requirement even on a temporary basis.

The Department also argues that the nondiscrimination requirement is a "health and safety" quality standard that is unwaivable. The district court agreed. Based on expert testimony, it found that "discrimination can be harmful, both mentally and physically" to children. Aplt. App. II at 215. The Parish Preschools respond that "health and safety" is not clearly defined in the statute, but that it should only apply to physical conditions at a preschool and not be broadened to include admissions decisions. We do not find it necessary to decide this issue by interpreting the meaning of "health and safety." Even without that limitation, the temporary waiver provision cannot be reasonably understood to give the Department discretion to allow a preschool to ignore the nondiscrimination requirement. And the Parish Preschools cannot point to any actual example of the temporary waiver provision being used this way. Thus, there is no system of individualized exemptions at play that defeats the law's general applicability.

3

Finally, the Parish Preschools argue that there are categorical secular exceptions to the nondiscrimination requirement that "undermine[] the government's asserted interests in a similar way" to the religious exception that they have been denied. *Fulton*, 593 U.S. at 534. The Parish Preschools' claim that the preference system allows for discrimination based on

disability and income level, thus undermining the government's interest in nondiscrimination for secular reasons.[15] Specifically, they point to two preferences: one for "[p]articipating preschool providers reserving placements for a student(s) with an Individualized Education Program (IEP) to ensure conformity with obligations incurred pursuant to the Individuals with Disabilities Education Act . . . or the Exceptional Children's Education Act" (the IEP preference) and one preferring "Head Start programs' adhering to any applicable federal law requirements including eligibility requirements" (the Head Start preference). 8 Colo. Code Reg. 1404-1 § 4.109(A)(3), (4). The Parish Preschools argue that allowing preschools to prefer enrolling children placed in IEPs and Head Start programs denies other students an "equal opportunity to enroll and receive

[15] This is an issue of categorical exceptions. A system of individualized exceptions only exists to the extent that officials apply a "subjective test" to grant particular claimants exceptions. *Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998). That differs from a categorical system that grants "only recognized exceptions" to "strict categories" of people. *Id.*

preschool services regardless of . . . income level[] or disability[.]"[16] Colo. Rev. Stat. § 205(2)(b).

There are several reasons why this claim fails. First, we are not persuaded that the IEP and Head Start preferences amount to a violation of the nondiscrimination requirement. The Department interprets the nondiscrimination requirement to prevent preschools from denying admissions to children because they are disabled or from a low-income family. It does not, however, protect children without disabilities or children from high-income families. Disability and income level are treated differently from other protected classes in light of the Colorado General Assembly's substantive goals in implementing UPK. The General Assembly specifically declared its intention to try and expand the number of disabled and low-income students attending preschool. Colo. Rev. Stat. § 26.5-4-202(3), (4). Other provisions of the law state that "a child with disabilities must be offered preschool services" in accordance with their IEP and that low-income children may be entitled to additional hours of preschool. *See* Colo. Rev. Stat. § 26.5-4-204(3)(a)(II), (III).

[16] The Parish Preschools also made this same argument with respect to the congregation preference and religious affiliation. We need not consider this argument because the congregation preference no longer exists, and thus cannot undermine the law's general applicability.

These provisions do not speak in general terms about ignoring disability status or income level. They specifically concern children who *have* a disability or *are* low-income. And the IEP and Head Start preferences were developed to help preschools comply with federal laws that specifically protect disabled and low-income children. *See* 20 U.S.C. § 1400(d)(1)(A) (Individuals with Disabilities Education Act) ("The purposes of this chapter [include] . . . to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs[.]"); 42 U.S.C. § 9831 (Head Start) ("It is the purpose of this subchapter to promote the school readiness of low-income children[.]"). The Supreme Court has long advised that the state must consider disability and income level to make social policy, and so these categories are distinct from other protected classes and do not trigger heightened scrutiny. *See Harris v. McRae*, 448 U.S. 297, 323 (1980)*; City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440–42 (1985). It is farcical to say that non-disabled children are being discriminated against by being denied special education designed for

disabled students,[17] or that high-income students are being discriminated against by preschools participating in Head Start. Given the unique nature of these protections, preferences for IEPs and Head Start are not exceptions to the nondiscrimination requirement.

Even assuming, arguendo, that the Parish Preschools are correct, and these preferences constitute discrimination based on disability and income level, that does not necessarily remove the general applicability of the nondiscrimination requirement as it relates to sexual orientation and gender identity. These different aspects of the nondiscrimination requirement are only relevant if they are comparable. The state may not treat "comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021); *see also Does 1-11 v. Bd. of Regents of Univ. of Colorado*, 100 F.4th 1251, 1277 (10th Cir. 2024) ("When a [p]olicy makes a value judgment in favor of secular motivations, but not religious motivations, it is not generally applicable." (citation and internal quotation marks omitted)). "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted

[17] When Director Odean was asked whether any schools had exercised a preference to only serve children with specific disabilities, she testified that "[w]e have school district-based providers that have specific programs for specific needs that are aligned to their federal mandate" but that these providers "serve all children, but they might have a specific location that's resourced for a special classroom." Aplt. App. VII at 134.

government interest that justifies the regulation at issue." *Tandon*, 593 U.S. at 62; *see also Fulton*, 593 U.S. at 534.

The Parish Preschools broadly characterize Colorado's interest as being "equal access" for all students. Op. Br. at 39–40. The Department agrees that "[e]ach of the eight equal-opportunity requirements seeks to remove barriers to access experienced by children with different protected characteristics." Resp. Br. at 57. But not all barriers are the same. The real question is if the Parish Preschools' requested relief "*undermines* the government's asserted interests *in a similar way*" as the IEP and Head Start preferences. *Fulton*, 593 U.S. at 534 (emphases added). To answer that question, we must examine the way each part of the nondiscrimination requirement is intended to promote equal access.

Nothing about the IEP preference or the Head Start preference undermines the government's asserted interest in ensuring equal access to preschools. The district court found, based on expert testimony, that there were "specific barriers" to preschool access faced by the children of same sex and transgender couples. Aplt. App. II at 222–23. As the district court stated, "all discrimination is not the same." *Id.* at 223. That is certainly the case when comparing discrimination based on sexual orientation and gender identity with discrimination based on disability and income level. Allowing some schools to ignore the nondiscrimination requirement with

respect to sexual orientation and gender identity would undermine the government's interest in erasing barriers to equal access caused by social stigma in a way that the IEP and Head Start preferences simply do not.[18]

The Parish Preschools' reliance upon *Tandon* does not change this point. The Supreme Court in *Tandon* found that California's restrictions on at-home religious gatherings during the COVID–19 pandemic were not generally applicable. 593 U.S. at 63. The problem with those restrictions was that California still allowed secular gatherings in hair salons, retail stores, movie theaters, etc. *Id.* Those activities comparably undermined the government's interest in preventing the spread of disease because they acted as similar vectors to transmit COVID–19. *Id.* at 64. But the barriers to equal access to preschool education here are completely different and thus not comparable.

The Parish Preschools' reliance on *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.* is equally misplaced. 82 F.4th 664

[18] Of course, as previously noted, the IEP and Head Start preferences do not actually undermine the state's interest in the nondiscrimination requirement even with respect to disability and income level. The General Assembly was particularly concerned that disabled and low-income children lacked opportunities to attend preschool. Not every preschool can accommodate special needs children, and the Department implemented the IEP preference to try and ensure those children were accommodated. Likewise, low-income families may need to rely on Head Start to provide their children a preschool education.

(9th Cir. 2023). That case concerned a school district that revoked the student club status of the Fellowship of Christian Athletes (FCA) for requiring its members to sign a statement against same-sex marriage. *Id.* at 671. The revocation was justified based on a school district policy prohibiting discrimination "on the basis of race, sex, sexual orientation, religion, and other criteria." *Id.* at 687. However, the school district allowed other clubs to discriminate based on sex and race, such as a club for Senior Women and South Asian Heritage. *Id.* at 688. Thus, the Ninth Circuit concluded that the school district's nondiscrimination policy was not generally applicable because the school district allowed secular exceptions that comparably undermined the interests of its nondiscrimination policy. *Id.* at 689.

We are not bound by this case, but even so, it can be distinguished for two reasons. First, the IEP and Head Start preferences do not undermine the interests of the nondiscrimination requirement because disability and income level are fundamentally different from other suspect classifications. Second, the school district in *FCA* was freely granting exemptions at its discretion, while the Department does not have the discretion to make exceptions to the nondiscrimination requirement.

It is also instructive for us to remember that this aspect of our general applicability analysis originally comes from *Church of Lukumi Babalu Aye*,

where the ordinances passed by the City of Hialeah permitted essentially every kind of animal slaughter except for the sacrifices central to the plaintiffs' religion. *See Fulton*, 593 U.S. at 534 (discussing *Church of Lukumi Babalu Aye*, 508 U.S. at 542–46). The law was self-defeating regarding its stated goals because of how much comparable secular conduct it allowed. The Supreme Court concluded that the law must not have been generally applicable or applicable to anyone except for the plaintiffs in that case. But nothing in the preference system here allows a backdoor for discrimination based on sexual orientation or gender identity on secular grounds. Even if the Parish Preschools are correct (which we do not decide that they are), and the IEP and Head Start preferences are unlawful under the nondiscrimination requirement, it simply means that those preferences could possibly be challenged separately. It does not mean that all other protected classes should then be denied the benefit of the nondiscrimination requirement.

Ultimately, we do not see any First Amendment concerns raised by the preference system. It was designed, and later implemented, as an algorithmic means of making sure that UPK's website matched families with the right preschools for their children. There are almost 2,000 different preschools participating in UPK, and if the system matched children with preschools at random, it would be an ineffective system. Children would be

sent to schools too far away. Siblings would be separated unnecessarily. Special needs children would not be matched with teachers who know how to work with them. What matters is not whether individuals are given specific options, but whether the challenged policy is applied equally to everyone and all schools. In other words, could a state official approve the Parish Preschools' requested religious exemption without violating state law?

Here, the answer is no. No preschool participating in UPK is allowed to take sexual orientation or gender identity into account when making admissions decisions, for any reason. Likewise, any preschool can use any of the other preferences as they wish. The same options apply to everyone. Meanwhile, the Department has made every effort to encourage faith-based preschools to participate in UPK short of granting them an unlawful exemption from the nondiscrimination requirement. As a result, forty faith-based preschools are currently part of UPK. The program is a model example of maintaining neutral and generally applicable nondiscrimination laws while nonetheless trying to accommodate the exercise of religious beliefs.

As such, we can find no reason to rule that the Department has violated the Parish Preschools' free exercise rights. This ruling does not mean that we shirk our constitutional duty to protect the Parish Preschools'

freedom of worship. *Cf. Obergefell v. Hodges*, 576 U.S. 644, 679 (2015) ("[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."). It simply means that when a school takes money from the state that is meant to ensure universal education, then its doors must be open to all. *See Norwood v. Harrison*, 413 U.S. 455, 463 (1973) ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.").

C

The Parish Preschools' other First Amendment claim is that the nondiscrimination requirement violates their freedom of expressive association. The First Amendment implicitly "protects acts of expressive association." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023). This includes the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). But it also includes a corollary "freedom not to associate" and a recognition that "[f]orcing a group to accept certain

members may impair the ability of the group to express those views, and only those views, that it intends to express." *Id.* at 648.

Even if a group is engaged in expressive association, its expressive association rights are not infringed upon by the mandated inclusion of a person unless "the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* Whether a person's presence has such an effect is highly contextual.

The Parish Preschools primarily rely on a comparison to *Dale*, where the Supreme Court assessed the Boy Scouts' "desire to not promote homosexual conduct as a legitimate form of behavior" by not allowing openly gay scoutmasters. *Id.* at 653 (internal quotation marks omitted). The New Jersey Supreme Court held that the state's public accommodations law prohibited the Boy Scouts from revoking the membership of James Dale because he was openly gay and an activist for gay rights. *Id.* at 644. But the Supreme Court found that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653. But even in *Dale* itself, the Supreme Court limited the breadth of its holding, stating that a group cannot "erect a shield against antidiscrimination laws simply by asserting

that mere acceptance of a member from a particular group would impair its message." *Id.*

Soon after, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Supreme Court took a far more limited view of expressive association. 547 U.S. 47, 68 (2006). The plaintiffs in that case challenged the Solomon Amendment, a federal law requiring that universities receiving federal funds allow military recruiters access to campus equal to that of nonmilitary job recruiters. *Id.* at 55. The Court ruled that the presence of military recruiters did not amount to expressive association because they were not "part of" universities, they merely "interact[ed] with them." *Id.* at 69.

Unlike in *Dale*, this case does not involve the presence of persons who might affect the Parish Preschools' ability to advocate for their viewpoint.[19]

[19] The Parish Preschools also cite to *Dale*'s predecessor, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995). That case is even more distinct. *Hurley* addressed whether the organizers of Boston's St. Patrick's Day parade had to include an Irish American gay rights group (GLIB) under Massachusetts' public accommodations law. *Id.* at 560. The court found that the organizers of the parade could exclude groups based on expressive association in light of the "inherent expressiveness of marching to make a point[.]" *Id.* at 568. To state the obvious, the inherently expressive role of a marcher in a parade is very different from the role of a preschool student. And unlike here, "the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (discussing *Hurley*).

James Dale was a "gay rights activist" in a leadership position as an assistant scoutmaster who openly advocated positions opposite those of the Boy Scouts. 547 U.S. at 653. This is a case about preschoolers.[20] No one would reasonably mistake the views of preschool students for those of their school. And while we must "give deference to an association's view of what would impair its expression[,]" that does not mean that we must buy that "mere acceptance of a member from a particular group" is enough. *Id.* Teachers and staff are the ones responsible for disseminating a preschool's message and developing the curriculum, not the preschool children they teach.

Applying *Dale* to this case would expand expressive association far beyond its current limits and undermine a long history of nondiscrimination laws that apply to school admissions. It would also contradict the Supreme Court's holding in *Runyon v. McCrary* that expressive association does not protect a school's right to discriminate in admissions. 427 U.S. at 175–76. Indeed, the Court explicitly differentiated between the right of private

[20] Because this is a case about preschool age children, the practical effect of the Parish Preschools' requested exemption from the nondiscrimination requirement would be to allow them to consider the sexual orientation and gender identity of a student's parents. That is yet another degree of separation from the potential effect that their admission might have on the school's expressive association.

schools to teach what they wish and the government's ability to require that those schools not exclude anyone. *Id.* We see no reason why this principle should not apply to a law that prohibits discrimination in admissions based on sexual orientation and gender identity.

Further, unlike in *Dale*, the law merely conditions funds based on the nondiscrimination requirement, rather than forcing Catholic preschools to follow the nondiscrimination requirement under threat of a civil penalty. In general, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 210 (2003) (citation and internal quotation marks omitted). But the Supreme Court has distinguished the kind of compelled association in *Dale* from the mere withholding of a subsidy. *See Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 682 (2010); *see also Rumsfeld*, 547 U.S. at 59. Whether a condition on funds impermissibly infringes on the First Amendment is highly contextual, but under these facts we conclude that no violation of the First Amendment has occurred.

D

The Parish Preschools have not met their burden to show that their First Amendment rights have been violated and that strict scrutiny applies,

and so we apply a rational basis standard of review. Under rational basis review, we will uphold government action "so long as it is rationally related to a legitimate government purpose[.]" *Christian Heritage Acad. v. Oklahoma Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1032 (10th Cir. 2007). The Parish Preschools do not argue that the application of the nondiscrimination requirement fails to meet this standard, nor is there any basis for them to do so. The government has articulated not only a legitimate purpose, but an extraordinarily weighty one in protecting equal access to preschool education for Colorado children. And the application of the nondiscrimination requirement to all preschool providers, as mandated by state law, is rationally related to this purpose.

V

Colorado's UPK program went to great effort to be welcoming and inclusive of faith-based preschools' participation. The nondiscrimination requirement exists in harmony with the First Amendment and does not violate the Parish Preschools' First Amendment rights. The district court correctly denied the Parish Preschools an injunction. The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

September 30, 2025

Joseph Davis
Amanda Gray Dixon
Eric C. Rassbach
Nicholas Robert Reaves
Mark Rienzi
Jordan Varberg
Becket Fund for Religious Liberty
1919 Pennsylvania Avenue NW, Suite 400
Washington, DC 20006

RE: 24-1267, St. Mary Catholic, et al v. Roy, et al
Dist/Ag docket: 1:23-CV-02079-JLK

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(d)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rule 40 and 10th Cir. R. 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Virginia Rose Carreno
Lance Tyler Collins
Craig M. Finger
Janna K. Fischer
Thomas Molnar Fisher
Lauren L Fontana
Gautam Hans
Annie Kurtz
Karen Loewy
Scott Lowder
Alexander Joseph Luchenitser
Timothy Macdonald
Sara R. Neel
Helen Norton
Andrew Nussbaum
James Cleith Phillips
Andrea M Picciotti-Bayer
Amalia Y. Sax-Bolder
Gene C. Schaerr
Kenneth D. Upton Jr.

CMW/jm