

No. 25-581

In the Supreme Court of the United States

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

v.

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

*On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit*

**BRIEF FOR LIBERTY COUNSEL
AS AMICUS CURIAE SUPPORTING
PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

Amicus Liberty Counsel is a nonprofit public interest legal organization dedicated to advancing religious liberty, the freedom of speech, and the sanctity of human life. Liberty Counsel has represented churches, religious schools, and individuals in litigation under the Free Exercise and Establishment Clauses in federal and state courts nationwide, including before this Court. See *Shurtleff v. City of Boston*, 596 U.S. 243 (2022); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021).

Liberty Counsel has a direct interest in this Court's resolution of how the Constitution protects religious adherents marginalized by state laws and regulations, and submits this brief to bring to the Court's attention that the Equal Protection Clause provides a surer path to strict scrutiny for cases otherwise stymied by *Employment Division v. Smith*, 494 U.S. 872 (1990).

¹ No counsel for any party authored this brief in whole or in part, and no person other than Amicus or its counsel made a monetary contribution intended to fund this brief's preparation or submission.

SUMMARY OF ARGUMENT

This case concerns whether an arguably neutral and generally applicable regulation can be subject to strict scrutiny.² Because of *Employment Division v. Smith*, it cannot—at least under the Free Exercise Clause. Although “[f]ormal legal neutrality, Smith style,” has “diminishe[d] the Free Exercise Clause to a constitutional trifle,” Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi*, 69 Tul. L. Rev. 335, 350 (1994), this Court has had occasion to revisit *Smith*, including in this case, but it has repeatedly declined to do so.

The consequence: “Protection for religious liberty under *Smith* and *Lukumi* is incomplete.” Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 27 (2016). The constitutional analysis only “gets harder when courts are asked to assess a facially neutral and generally applicable law that lacks any specific anti-religious intent but which uniquely burdens religion.” Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 Fla. L. Rev. 909, 1015 (2013). After all, “some laws really are generally applicable,” Laycock & Collis, 95 Neb. L. Rev. at 27, and some laws really are neutral on their face

² Amicus joins petitioners in full and agrees that the court of appeals erred in finding the UPK’s nondiscrimination requirement neutral and generally applicable under *Employment Division v. Smith*. For purposes of its argument, however, Amicus will assume that the court of appeals’ interpretation of this Court’s Free Exercise jurisprudence in light of *Smith* is correct, but only to show that the Equal Protection Clause is a viable path to strict scrutiny for claimants stymied by *Smith*’s formal-neutrality rule.

and do not have as their direct object the suppression of religious practices.

The court of appeals found that Colorado’s nondiscrimination requirement for its universal preschool program was such a law. *St. Mary Cath. Par. in Littleton v. Roy*, 154 F.4th 752, 765–66 (10th Cir. 2025). So it applied *Smith*—and that was the end of the matter. No Free Exercise violation.

But the Constitution requires more. “It is quite reasonable to worry that anti-religious animus in society could seep into the legislative process and lead to the passage of neutral, generally applicable laws that have a discriminatory impact on religion.” Calabresi & Salander, 65 Fla. L. Rev. at 1008. That concern is present here. In both purpose and effect, the nondiscrimination requirement excludes and marginalizes religious objectors and no one else. And state officials knew beforehand that it would do so. Yet, because of *Smith*’s formal-neutrality rule, the requirement evades strict scrutiny even though it effectively carves out a “religious gerrymander” against preschools with traditional Christian beliefs about human sexuality and biology. That cannot be right.

Until this Court revisits *Smith*, it should open another door to strict scrutiny for religious claimants: the Fourteenth Amendment’s Equal Protection Clause. Religion is a suspect classification. And a facially neutral law that discriminates against religious objectors—namely, by marginalizing them or otherwise operating as a “religious gerrymander”—should be presumptively unconstitutional unless it is narrowly tailored to achieve a compelling government interest.

Under the Equal Protection Clause, plaintiffs need not show that the law is not formally neutral or gen-

erally applicable. Nor must they show that the government's direct object was to target religion. The equal protection evidentiary toolbox is more expansive than the factors discussed in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993); at a minimum, it is enough that the law's discriminatory effect was reasonably foreseeable and disproportionate.

Strict scrutiny is warranted here. In enacting and enforcing the nondiscrimination requirement, 8 Colo. Code Regs. § 1404-1:4.110(B), the State itself discriminated against petitioners, effectively carving out a "religious gerrymander" that excludes them from participating in Colorado's Universal Preschool Program (UPK) solely because of their religious objections to the requirement. During UPK's development, the Colorado Department of Early Childhood learned firsthand from its own working groups that certain faith-based preschools objected to the requirement. Yet state officials proceeded without change, knowing that the requirement would foreseeably exclude certain preschools from participating in the program. That is sufficient to infer discriminatory intent under the Equal Protection Clause.

States are increasingly enacting nondiscrimination provisions that reflect the modern approach to sexual orientation and gender identity, a stance many religious adherents do not share. Each time such a requirement is dressed in neutral language and imposed as a condition to participate in a government program, *Smith* seriously hampers Free Exercise review of its exclusionary or marginalizing effect on religious objectors.

In light of *Smith*'s "devaluation" of the Free Exercise Clause, Amicus urges this Court to turn to "the

equality principle of the equal protection clause as an additional source to protect religious liberty.” James A. Kushner, *Government Discrimination: Equal Protection Law and Litigation* §5:21 (2007).

This Court should vacate the judgment below and remand with instructions that strict scrutiny be applied to the nondiscrimination requirement in the first instance.

ARGUMENT

A. Shackled by *Smith*, the Free Exercise Clause does not protect religious objectors marginalized by formally neutral and generally applicable laws.

The Free Exercise Clause, applicable to the States through the Fourteenth Amendment, guards against religious discrimination in allocating benefits or administering government programs. See *Carson v. Makin*, 596 U.S. 767, 778 (2022). But that guarantee comes with a caveat: *Smith*.

Under *Smith*, neutral and generally applicable laws that incidentally burden religion ordinarily are not subject to strict scrutiny. 494 U.S. at 878–79. In other words, a State *can* discriminate against religious adherents—so long as a court finds that the law is “neutral” and “generally applicable.” Such a holding is untenable with this Nation’s commitment to religious liberty.

1. *So long as Smith remains good law, formally neutral laws that foreseeably discriminate against religious objectors can evade strict scrutiny.*

Members of this Court have described *Smith*'s holding as "fundamentally wrong," with its interpretation leading to "startling consequences." *Fulton v. City of Philadelphia*, 593 U.S. 522, 545 (2021) (Alito, J., concurring in the judgment, joined by Thomas and Gorsuch, JJ.); see also *id.* at 618 (Gorsuch, J., concurring in the judgment, joined by Thomas and Alito, JJ.) ("*Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice.").

Smith's "greatest failing" is that it "shuts off all inquiry into a law's historical and social context." Karst, 69 Tul. L. Rev. at 348. Under *Smith*, "the 'object' of a law has nothing to do with the actual objectives of its authors, nothing to do with the history and the immediate political and social context that produced its enactment, and nothing to do with its actual effects on people's lives." *Id.* (quoting *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring)); see also *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring) ("In my view, the defect of lack of neutrality applies primarily to those laws that by their terms impose disabilities on the basis of religion (e.g., a law excluding members of a certain sect from public benefits...."). The consequence is that *Smith* "exalts ideal form over reality, sealing off the judiciary from the real experience of real people that gives meaning to human behavior." Karst, 69 Tul. L. Rev. at 348.

Smith's formal-neutrality framework is particularly troublesome in cases where (as here) a law's ob-

ject is unrelated to religious practices, because “courts often implicitly assume the neutrality of the challenged laws” when in fact “those laws make inherent moral judgments, instantiate particular philosophies, and often verge on imposing secularism.” Kelsey Curtis, *The Partiality of Neutrality*, 41 Harv. J.L. & Pub. Pol’y 935 (2018). This “problem of status domination” is what one scholar characterizes as “the dark side of the Free Exercise Clause.” Karst, 69 Tul. L. Rev. at 351.

Discrimination tends to “take place within a larger societal milieu of group discrimination,” Thomas F. Pettigrew et al., Prejudice, in *Prejudice* 1, 21 (Stephen Thernstrom et al. eds., 1982), brought about by the “mutually reinforcing behavior of private and governmental actors,” Karst, 69 Tul. L. Rev. at 361. “Status domination is a zero-sum game, and one group’s achievement of dominance is matched by a ‘status harm’ to another group.” *Id.* at 351 (quoting Owen Fiss, *Groups and the Equal Protection Clause*, 5 Phil & Pub. Aff. 107, 157 (1976)).

Relevant here, “an environment of group discrimination is especially likely to influence legislators whose business it is to follow the pulse of majority opinion....” Karst, 69 Tul. L. Rev. at 354. Indeed, a democratically elected lawmaking body like the Colorado General Assembly reflects the convictions of its constituency: naturally, it will legislate according to that constituency’s convictions, including crafting laws that address perceived social ills.³

³ For example, a 2025 poll of Colorado residents conducted by the Public Religion Research Institute showed that 54% of Coloradans oppose, and 27% strongly oppose, “religiously based re-

In the context of conflicting antidiscrimination requirements, the result of this group domination is a *status harm* to religious adherents that may be characterized as “the hurt of exclusion,” Karst, 69 Tul. L. Rev. at 351, or “marginalization,” Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. Pa. J. Const. L. 665, 667–68 (2008). This harm may occur “where lawmakers make conscious or unconscious judgments that one racial, sex-based, or religious group is more valuable or worthy of consideration than another.” Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 Duke L.J. 1493, 1546 (2023). Religious objectors thus suffer a form of devaluation when the State allocates benefits and burdens according to whose interests lawmakers find worth protecting. *Id.*

Rarely are religious adherents targeted as in *Lukumi*, or in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018); increasingly claims arise out of a different mechanism of prejudice: “simple indifference and an absence of human sympathy.” Karst, 69 Tul. L. Rev. at 353 (quoting Pettigrew et al., *Prejudice* at 21). This prejudice is precisely what *Smith* leaves unaddressed. *Smith* asks whether a government action is neutral and generally applicable, and absent a showing that state officials acted out of hostility to a religious belief, or at least to suppress a religious practice, the inquiry ends. See 494 U.S. at 878–79. That framework presupposes that discrimination against religious minorities takes the form of

refusals” on the basis of sexual orientation. Pub. Religion Rsch. Inst., *American Values Atlas*, Religiously Based Refusals (Colorado) (2025), https://ava.prii.org/lgbtq/2025/lgbt_srvref/1/state (last visited June 26, 2026).

conscious targeting, the express object of “prohibiting the exercise of religion.” *Id.* at 878. It does not account for when decisionmakers “impose value judgments unintentionally by unconsciously devaluing the interests of disfavored groups.” Portuondo, 72 Duke L.J. at 1564.

Is such marginalization simply an “unavoidable consequence of democratic government?” *Smith*, 494 U.S. at 890. We think not. But *Smith* “has not provided a clear-cut rule that is easy to apply,” *Fulton*, 593 U.S. at 554 (Alito, J., concurring), thus the Free Exercise Clause offers no sure path to strict scrutiny of formally neutral and generally applicable laws that exclude religious objectors or otherwise create a “religious gerrymander.” As we see in this case, so long as *Smith* is on the books, governments are free to impose laws and policies that foreseeably discriminate against religious objectors all the while evading strict scrutiny.

“By happy contrast,” and as argued below, “the path to the challenger-friendly strict scrutiny standard is much easier under the Fourteenth Amendment Equal Protection Clause, sometimes even a matter of bright line.” Gellman & Susan Looper-Friedman, 10 U. Pa. J. Const. L. at 707. While *Lukumi* asks whether the government meant to target religious practice, the Equal Protection Clause calls for a more expansive inquiry. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

2. *Lukumi's application of Smith applies only to laws that target religion, not to formally neutral laws of general application.*

At this point, one might argue that *Lukumi* already supplies the test for analyzing facially neutral laws, even going so far as to employ “an equal protection mode of analysis.” 508 U.S. at 540 (quoting *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring opinion)).

But *Lukumi* concerns “[o]fficial action that *targets* religious conduct for distinctive treatment.” 508 U.S. at 524 (emphasis added). Under *Lukumi*, a court asks whether “the object” of a facially neutral law “is to infringe upon or restrict practices because of their religious motivation.” *Id.* at 533. Drawing on the factors set out in *Arlington Heights*—the historical background of the challenged decision, the sequence of events preceding its enactment, and decisionmakers’ contemporaneous statements—this Court concluded that the Hialeah ordinances were not neutral because “the city council’s object” in adopting them was to suppress Santeria worship. *Id.* at 540 (citation omitted).

Although *Lukumi* “left the meaning of a rule’s ‘object’ up in the air,” *Fulton*, 593 U.S. at 606 (Alito, J., concurring), its analysis is certainly inapplicable in cases where a challenged law’s text and background reveal no object to target religion at all, yet the law still falls with disproportionate and foreseeable force on particular religious beliefs or practices. The upshot is that a facially neutral law may operate as an unconstitutional “religious gerrymander” yet still satisfy *Smith* and *Lukumi* so long as it has no object of targeting religion.

3. *This Court’s public-benefit cases offer no guidance for when a neutral, generally applicable law excludes or marginalizes religious claimants.*

At first glance, this case resembles this Court’s line of public-benefit cases because it concerns a government program offering a benefit (here, subsidized preschool coverage) on terms a religious provider cannot accept consistent with its faith. But neither *Trinity Lutheran*, *Espinoza*, nor *Carson* confront a “religious gerrymander” carved out by a formally neutral, generally applicable law.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), Missouri’s Department of Natural Resources “had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity.” *Id.* at 455. The exclusion was the Department’s own imposition of a special disability on the basis of religious status, which thus warranted strict scrutiny. See *id.* at 462.

Espinoza v. Montana Department of Revenue, 591 U.S. 464 (2020), presented a similar problem. Montana’s Constitution expressly barred public aid to any school “controlled in whole or in part by any church, sect, or denomination.” *Id.* at 470. The scholarship disqualification was categorical, expressly written into the State’s constitution, and thus it required strict scrutiny because it “bar[red] religious schools from public benefits solely because of the religious character of the schools.” *Id.* at 476.

Carson involved a narrower but equally explicit exclusion. Maine withheld its tuition-assistance program from “sectarian” schools, which state officials considered to be “associated with a particular faith or belief system.” 596 U.S. at 775. This Court held that

the program was subject to strict scrutiny because it disqualified sectarian schools from funding solely because they are religious. *Id.* at 780.

What unites these cases is that each State’s law or policy expressly discriminated on the basis of religious status. They provide no guidance for laws (as here) that operate as a “religious gerrymander” under the guise of formal neutrality and general applicability.

* * *

Thanks to *Smith*, “[this] Court’s attempted devaluation of the free exercise clause to challenge religious discrimination, at least in cases not presenting outrageous facts of religious intolerance, may signal the need to focus on the equality principle of the equal protection clause as an additional source to protect religious liberty.” Kushner, *Government Discrimination* § 5:21. As discussed below, that need is now.

B. The Equal Protection Clause provides an additional and independent path to strict scrutiny in religious-discrimination cases otherwise stymied by *Smith*.

Litigants should not wait for this Court to overrule *Smith* to challenge formally neutral laws of general application that marginalize or otherwise exclude religious objectors. “It is simply a matter of using the right tool for the job. Like a Phillips head screwdriver for a Phillips head screw, the Equal Protection Clause, designed from the ground up to address disparate treatment by government, is a better tool for the job.” Gellman & Looper-Friedman, 10 U. Pa. J. Const. L. at 668; Calabresi & Salander, 65 Fla. L. Rev. at 1025 (“In future cases, the Supreme Court should invoke the Fourteenth Amendment’s ban on discrim-

ination on the basis of religion.... This would allow the Court to avoid the Smith rule entirely without directly overruling a landmark precedent that it has relied upon for over twenty years.”).

1. Religion is a suspect classification, and laws that marginalize religious objectors are subject to strict scrutiny.

In the equal protection context, courts apply strict scrutiny to government action that either intentionally discriminates against a “suspect class” or interferes with a “fundamental right.” *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Religion is a suspect class, and the free exercise of religion is a fundamental right. See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (referring to “inherently suspect distinctions such as race, religion, or alienage” in explaining when strict scrutiny is applied); *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (“Unquestionably, the free exercise of religion is a fundamental constitutional right.”). Therefore, a law that discriminates on the basis of religion is presumptively unconstitutional; it must be invalidated unless it is narrowly tailored to achieve a compelling government interest. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (applying strict scrutiny to laws that classify by race, alienage, or national origin).

Although an Equal Protection violation requires proof of an intent to discriminate, *Arlington Heights*, 429 U.S. at 265, that “does not necessarily mean having intent to harm,” Gellman & Looper-Friedman, 10 U. Pa. J. Const. L. at 721. “The ‘intent to discriminate’ forbidden under the Equal Protection Clause is merely the intent to treat differently.” *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (McConnell, J.). “It implies that the deci-

sionmaker * * * selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

Discriminatory intent “is generally proved through a causal inference,” Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 *Geo. L.J.* 279, 291 (1997), and such proof “must necessarily usually rely on objective factors,” *Feeney*, 442 U.S. at 279 n.24 (citing *Arlington Heights*, 429 U.S. at 266.) Factors may include the “historical background of the decision,” the “specific sequence of events leading up to the challenged decision,” “[d]epartures from the normal procedural sequence,” and “[t]he legislative or administrative history.” *Arlington Heights*, 429 U.S. at 267–68.

Also bearing on the existence of discriminatory intent—although not dispositive standing alone—is “the inevitability or foreseeability of consequences of a neutral rule.” *Feeney*, 442 U.S. at 279 n.25. As this Court explained, “when the adverse consequences of a law” on “an identifiable group” are “inevitable,” courts can reasonably draw “a strong inference that the adverse effects were desired.” *Ibid.*

Courts relatedly can infer a decisionmaker’s intent by applying the common law standard of intentional tort liability: an actor is “responsible for the natural and probable consequences of acts knowingly done or knowingly omitted.” *Berry v. Sch. Dist. of City of Benton Harbor*, 494 F. Supp. 118, 121 (W.D. Mich. 1980). In this context, “intent” refers “to the *consequences* of an act rather than the act itself.” Restatement (Second) of Torts § 8A cmt. a (1965) (emphasis added).

Critically, intent is not limited to *desired* consequences. “If the actor *knows* that the consequences are certain, or substantially certain, to result from his act, *and still goes ahead*, he is treated by the law *as if he had in fact desired* to produce the result.” Restatement (Second) of Torts § 8A cmt. b (emphasis added); accord *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 487 (1997) (“[T]he *impact* of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions.” (citing *Arlington Heights*, 429 U.S. at 266)) (emphasis added). At bottom, “[t]he inquiry is practical.” *Feeney*, 442 U.S. at 279 n.24.

2. *Facially neutral laws can operate as a “religious gerrymander” to exclude or otherwise marginalize religious objectors from public participation.*

The practical operation of a law—what it actually does to identifiable groups—can be the most telling evidence of the purpose behind its enactment or enforcement. See *Feeney*, 442 U.S. at 279 (“What a legislature or any official entity is ‘up to’ may be plain from the results its actions achieve, or the results they avoid.”); see generally Portuondo, 72 Duke L.J. at 1493 (arguing that “recent free exercise law makes a powerful case that a law’s effects both can and should play a meaningful role in triggering equal protection scrutiny”). Thus, in analyzing whether a facially neutral law is motivated at least in part by a religiously discriminatory purpose, an important starting point is whether the law operates as a “religious gerrymander.”

In the equal protection or free exercise context, a “religious gerrymander” means much the same thing it means in the voting context: to put a particular

group on the wrong side of the line.⁴ The line need not be on a map; it can be a category or condition carved out so that almost nothing stands on the outside except the particular religious belief or practice. In practical terms, to prove the existence of a “religious gerrymander,” a plaintiff would have to show that the challenged law or policy separates the permissible from the impermissible in a way that almost exclusively burdens that particular religious belief or practice.

That is generally not difficult to do. Indeed, “[b]ecause the discriminatory impact certain laws will have on a known religion is so obvious and inescapable, discriminatory intent can be more easily inferred in cases involving discrimination on the basis of religion than in cases involving discrimination on the basis of race.” Calabresi & Salander, 65 Fla. L. Rev. at 1019.

3. Colorado’s enactment and enforcement of the UPK nondiscrimination requirement triggers strict scrutiny.

Bound by *Smith*, the court of appeals found that UPK’s nondiscrimination requirement was neutral and therefore subject only to rational basis review. The court framed the inquiry as whether Colorado

⁴ To “gerrymander” is “[t]o divide or arrange (a territorial unit) into election districts in a way that gives one political party an unfair advantage.” Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/gerrymander>. In 1812, “the notoriously outrageous political districting in Massachusetts * * * gave the gerrymander its name—an amalgam of the names of Massachusetts Governor Elbridge Gerry and the creature (‘salamander’) which the outline of an election district he was credited with forming was thought to resemble.” *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004) (citation omitted).

adopted the requirement to suppress religious views or conduct, *St. Mary*, 154 F.4th at 766, examined the record for hostility, found none, *id.* at 766–67, and concluded that the Department had demonstrated the law’s neutrality, *id.* at 768.

That was error. Under a full equal protection analysis, the court of appeals should have assessed whether the nondiscrimination requirement, in both purpose and effect and regardless of its object, carved out a “religious gerrymander” or otherwise marginalized petitioners.

The court of appeals found that “[n]othing 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*.” 154 F.4th at 768. That conclusion demonstrates the need for a broader equal protection inquiry. The requirement’s “administrative history” and the “specific sequence of events” leading up to UPK’s enactment show that the Department *knew* that the requirement would have a discriminatory impact on petitioners. *Arlington Heights*, 429 U.S. at 267–68. Before the UPK took final form, the Department convened a working group of faith-based providers and invited them to the table. *St. Mary*, 154 F.4th at 760. *St. Mary*’s took a seat in that group and informed the Department, in advance, that the sexual-orientation and gender-identity provisions could not be reconciled with its faith-based admissions practices. *Id.*

State officials thus heard the objection from the affected community at the drafting stage and understood precisely whom the nondiscrimination requirement would exclude. Cf. Calabresi & Salander, 65 Fla. L. Rev. at 1019 (“[D]isparate impact analysis in cases

where discrimination on the basis of religion is alleged must take account of the fact that it is often well known how a facially neutral law will impact religion prior to its enactment.”). Yet the Department nevertheless imposed the requirement on petitioners.

To be sure, petitioners sought an accommodation. But the State refused. The Archdiocese and other faith groups wrote to the Governor requesting exemptions for faith-based providers. *St. Mary*, 154 F.4th at 760. Director Roy answered that the Department could not grant one because the requirement was enshrined in state law. *Id.* When the foreseeable exclusion was placed squarely before the responsible officials, the State left the requirement untouched and pointed to the statute as the reason its hands were tied.

The consequence was inevitable. *See Feeney*, 442 U.S. at 279 n.25. The Archdiocese instructed its preschools not to register in UPK, and the families who depend on those preschools, the Sheleys among them, were left without the school they would choose. *St. Mary*, 154 F.4th at 760. That result was certain from the moment Department officials refused the requested accommodation. A State that “knows that the consequences are certain, or substantially certain, to result” from closing a public benefit program to an identifiable religious community, and “still goes ahead,” has done more than incidentally burden religion. Restatement (Second) of Torts § 8A cmt. a. It has effectuated a “religious gerrymander” whose harm falls disproportionately on particular religious objectors.

The court of appeals read the Department’s creation and later withdrawal of the congregation preference as evidence of seeking to accommodate “faith-

based providers.” *St. Mary*, 154 F.4th at 770. In the equal protection context, that same action is proof of discriminatory intent. The Department created the congregation preference because it *understood* that, left as written, the nondiscrimination requirement would exclude certain faith-based providers. Its effort to soften the exclusion at the margins proves its knowledge of the exclusion, which is sufficient to infer discriminatory intent.

More broadly, the “historical background of the decision,” *Arlington Heights*, 429 U.S. at 267, including the social conditions during which it was made, shows that the practical harm of a sexual-orientation and gender-identity nondiscrimination requirement falls on an identifiable group. The Court need not take judicial notice that rare is the school in America that operates as a breeding ground of hatred towards individuals with same-sex attraction or gender dysphoria. The providers that cannot comply with the requirement are, without exception, traditional religious schools whose tenets do not conform to the prevailing understanding of human biology and sexuality. Whatever the requirement’s stated object, the set of providers it excludes from UPK consists of religious objectors and no one else.

This speaks to the “group domination” that this Court’s Free Exercise Clause jurisprudence cannot meaningfully appreciate. The court of appeals treated the absence of any hostility in the record as sufficient to demonstrate neutrality, *St. Mary*, 154 F.4th at 768, but that missed the broader picture. A legislative body can disregard the interests of a religious minority without ever expressing hostility toward it, simply by enacting the preferences of the constituency to

which it is politically accountable, and without regard to the costs imposed on objectors.

The nondiscrimination requirement's history reflects that dynamic. UPK originated in a voter-approved proposition, *St. Mary*, 154 F.4th at 756, was enacted by the General Assembly, *ibid.*, and is administered by a Department that, when presented with a request to accommodate faith-based providers, responded that the governing statute permitted no exception, *id.* at 760. At each stage, the requirement embodies the considered judgment that Colorado's electorate and legislature had already reached concerning sexual orientation and gender identity. And whatever its drafters intended, its operation in effect falls on religious objectors and on no one else.

The asymmetry is concrete. The Sheleys are denied access to the preschool they would otherwise choose, while families served by the providers that agree to the nondiscrimination requirement bear no comparable loss. That asymmetry is what the court of appeals' neutrality analysis does not capture, because that analysis asks only whether the State expressed hostility or a "general undercurrent of animus" toward petitioners' faith. *St. Mary*, 154 F.4th at 768. It does not ask whether the State enacted a rule reflecting its own constituents' views while marginalizing a community that did not share those views.

That is the inquiry the Equal Protection Clause requires. A facially neutral law whose adverse consequences fall almost entirely on one protected group works as a classification of that group, and the inference of purpose strengthens as harm becomes more clear. In *Feeney*, the inference did not hold because the veterans' preference disadvantaged a large number of men in addition to women, so its effect could not

be attributed to sex. 442 U.S. at 275. The nondiscrimination requirement presents the converse. Its burden does not fall on a variety of preschools and families—it falls on religious objectors and on virtually no one else.

Heightened scrutiny is warranted in precisely that circumstance. The Equal Protection Clause secures discrete religious minorities against majorities that legislate without regard to interests they do not share. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). A religious community whose view of human sexuality the surrounding majority has devalued is such a minority, and it cannot protect its interests through the political process. When that majority conditions a public benefit on terms it knows only the dissenting religious community will be unable to meet, the political process has produced a result that warrants searching judicial review.

Although Justice Scalia’s principal objective in *Smith* may have been to rein in judicial overreach, see generally Amul R. Thapar, *Smith, Scalia, and Originalism*, 68 *Cath. U. L. Rev.* 687 (2019), vigorous judicial review of laws that marginalize religious objectors advances the Constitution’s protections for religious minorities. The Equal Protection Clause provides that framework.

C. This Court should vacate and remand for the lower courts to apply strict scrutiny in the first instance.

Because the nondiscrimination requirement itself discriminates against petitioners on the basis of religion, this Court should hold that the lower courts erred in applying rational-basis review and that strict scrutiny applies. Correcting that error would ensure

that, however it resolves the questions presented, petitioners' constitutional rights are vindicated.

If the Court wishes to offer further guidance, amicus suggests that respondents are unlikely to meet their burden under strict scrutiny.

Strict scrutiny requires that the State "specifically identify an 'actual problem' in need of solving," *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822 (2000)), and that the nondiscrimination requirement's exclusionary operation "must be actually necessary to the solution," *id.* The State can identify no widespread discrimination against preschool applicants on the basis of sexual orientation or gender identity. Indeed, the record shows only a single instance in which a parish preschool declined to admit a child of same-sex parents. See *St. Mary*, 154 F.4th at 759. The State's "broadly formulated interests" in preventing sexual orientation and gender identity (SOGI) discrimination are insufficient to justify both its exclusionary rule and "denying specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). In short, the State must show that SOGI discrimination in preschool admissions is an actual, identifiable problem, and that exempting petitioners would make that problem worse. The record contains neither showing.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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