No. 25-1187

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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–Appellants,

v.

DARREN PATTERSON CHRISTIAN ACADEMY
Plaintiff–Appellees.

On Appeal from the United States District Court
for the District of Colorado
Case No. 1:23-cv-01557-DDD-STV – Hon. Daniel D. Domenico

BRIEF OF PROFESSORS NELSON TEBBE AND LAWRENCE G. SAGER, AS *AMICI CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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INTEREST OF AMICI CURIAE[1]

Amici are preeminent professors of law and religion who study the First Amendment's Free Exercise and Establishment Clauses.

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[1] Counsel for all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. This brief was prepared with the assistance of Jason Blau, Marieya Jagroop, Shaina Zargari, and Matthew Zucker, Cornell Law School students enrolled in the Civil Rights and Civil Liberties Clinic.

[2] Institutional affiliations are provided for identification purposes only. This brief reflects the signatories' personal views only and not the views, if any, of these institutions.

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INTRODUCTION

Free exercise doctrine embodies the fundamental values of fairness and equality for religious faith and practice. The principle of religious equality was interpreted by the Supreme Court when it adopted the rule in *Tandon v. Newsom*, 593 U.S. 61 (2021), namely that government regulation that "treat[s] any comparable secular activity more favorably than religious exercise" is subject to strict scrutiny. *Id*. at 62.

Colorado's Universal Preschool Program ("UPK" or the "UPK Program") strictly conforms to the principle of religious equality and is a model for early education. Colorado does not limit its preschool program to public schools, but invites many private institutions, including scores of faith-based preschools. It administers a mixed delivery system to provide publicly-funded education for young children in environments that are safe, healthy, and free from

discrimination. Colorado's program thus is unusually inclusive of religious organizations, and it refrains from imposing any special burdens on them.

DPCA argues that either (1) a repealed congregation preference or (2) a temporary waiver clause is sufficient to trigger strict scrutiny. This is not so, under *Tandon.* Neither provision violates neutrality or general applicability.

First, the congregation preference argument fails on both procedural and substantive grounds. Previously, Colorado allowed UPK providers to employ a congregational preference. This enabled faith-based providers to prefer their own congregants in preschool admissions. Colorado has voluntarily repealed this regulation and will not reinstate it. This preference no longer presents a live controversy and is therefore moot. Regardless, DPCA argues that this former accommodation somehow shows religious discrimination, despite it demonstrating Colorado's high regard for free exercise.

Second, the statutory clause allowed CDEC to temporarily waive certain quality standards during implementation of the highly complex, UPK mixed-delivery system. This provision does not grant CDEC the authority to waive the equal opportunity standard. Supposedly, this measure created a discretionary-exemption mechanism to burden religious actors. Yet, even putting aside CDEC's real-world lack of discretion, such authority would not devalue religious actors.

Appellee's arguments can be understood in one of two ways, neither of which accords with *Tandon*. DPCA now demands religiously-motivated actors receive special exemptions from equal opportunity requirements that others must obey. Alternatively, it contends that Colorado's interest in equal opportunity is contradicted by both (1) Colorado's initial attempt to assist religious institutions and (2) an unrelated, time-limited statutory waiver. This is a fundamental misreading of *Tandon*. Colorado effectively rebuts DPCA's first argument, explaining that special religious exemptions from general laws are not available under governing free exercise doctrine. Appellant's Br. 58-63.

As to the second argument, Appellees misconstrue *Tandon* and its goals. Properly understood, *Tandon* requires Colorado to treat all religious and nonreligious people with equal regard. If Colorado complies with this rule of equal regard or equal value, then its actions are constitutional under *Tandon*. Because Colorado has treated religious actors with utmost consideration, it cannot have violated the holding of *Tandon*, understood correctly.

DISCUSSION

I. The UPK Statute Does Not Devalue Religious Belief and Therefore Does Not Trigger Strict Scrutiny under *Tandon*

A. Colorado's UPK's Congregation Preference Has Been Repealed, Rendering This Suit Moot

Colorado's Universal Preschool Program (the "UPK" Program) initially allowed preschools operated by faith-based providers to reserve seats for members of their own congregations (the "congregation preference"). Appellant's Br. 12-13. The district court held that this provision constituted an exception from the "quality standards" promulgated in Colo. Rev. Stat. ("C.R.S.") § 26.5-4-205(1) *et seq*., rendering the program not "generally applicable" under *Tandon*, 593 U.S. at 62. *Id.* at 2. On this basis, the lower court analyzed the program to strict scrutiny and granted Appellees a permanent injunction. *Id.* at 16. The Colorado Department of Early Childhood (CDEC) repealed the congregation preference on Nov. 21, 2024, and the repeal went into effect on Jan. 14, 2025. *See Code of Colorado Regulations eDocket: Details of Tracking Number 2024-00528*, Colo. Sec'y of State (Feb. 4, 2025), https://www.sos.state.co.us/CCR/eDocketDetails.do?trackingNum=2024-00528.

Appellees invoke *Tandon* at the district court level in order to apply strict scrutiny. 3.App.593. However, since the congregation preference provision has been rescinded, the issue is moot and appellees cannot invoke *Tandon*. Mootness is

a threshold issue where a live case or controversy is a necessary constitutional prerequisite to federal court jurisdiction. *Defunis v. Odegaard*, 416 U.S. 312 (1974); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 (10th Cir. 2010) (quoting *Disability Law Ctr. v. Millcreek Health Ctr.*, 428 F.3d 992, 996 (10th Cir. 2005)). A case is live if "granting a present determination of the issues offered will have some effect in the real world." *Fleming v. Gutierrez*, 785 F.3d 442, 444-45 (10th Cir. 2015). A court will find that there is still a live controversy in cases of a defendant's voluntary cessation of an alleged illegal practice to render a suit moot and the defendant would be able to resume the alleged conduct after litigation ends. *Rio Grande*, 601 F.3d at 1115. Defendants bear the burden of proving that the voluntary cessation constitutes more than a promise or assurance on behalf of the defendants that the action will cease and cannot reasonably be expected to reoccur. *St. Mary Cath. Par. in Littleton v. Roy*, 736 F. Supp. 3d 956, 984-85 (D. Colo. 2024) (quoting *Burbank v. Twomey*, 520 F.2d 744, 748 (7th Cir. 1975)).

Here, Appellant has clearly and repeatedly indicated that it does not wish to reinstate the congregation preference, as it was never intended to create any exception from the nondiscrimination requirements or in any way undermine their general applicability. *See* Appellants' Br. at 40 ("Committed to complying with all statutory requirements, CDEC initiated a Notice of Proposed Rulemaking to repeal

the congregation preference to eliminate its inadvertent exception from the religious-affiliation provision when the statute permits no exceptions from the equal-opportunity provisions."). Furthermore, Appellant has never sought to exempt providers from the nondiscrimination requirements. *See* Defs' Resp. to Mot. Summ. J., 9.App.1827 ("None of the preferences allow providers to discriminate on bases prohibited by the nondiscrimination requirements: Defendants testified they have not approved, and will not approve, any preference that would violate those requirements."); *see also id.* at 9.App.1824 ("The Department has never exempted any provider from the statutory provision protecting children from discrimination based on gender identity."); *id.* at 9.App.1829 ("Defendants testified they . . . wouldn't approve preferences that violated any of the nondiscrimination requirements.").

These indications are sufficient to support mootness. There is no substantial likelihood that the congregation preference—or any equivalent exception to the nondiscrimination requirements' general applicability—will be reinstated after its voluntary cessation. Because "the possibility of recurrence of the challenged conduct" is "only a speculative contingency," this case "ceases to be a live controversy" and has been rendered moot. *Rio Grande Silvery Minnow*, 601 F.3d at 1117 (cleaned up and internal quotation marks and citation omitted). The district court in *St. Mary Cath. Par. in Littleton* applied this very concept regarding a

challenge to provision 18(B) of the UPK program. That court was correct in finding Defendants' disavowal to be sincere, thus mooting Plaintiffs' claims regarding it, because there would no longer be an effect in the real world. *See St. Mary Cath. Par. in Littleton v. Roy*, 736 F. Supp. 3d at 986.

The high bar of *Tandon* should not be invoked when the provision at issue ceases to exist. *Tandon* contemplates that the government's withdrawal or modification of a challenged policy during the course of litigation will sometimes, but not always, serve to moot the case. *See Tandon v. Newsom*, 593 U.S. 61, 63, 141 S. Ct. 1294, 1297, 209 L. Ed. 2d 355 (2021) (per curiam) ("[E]ven if the government withdraws or modifies a COVID restriction in the course of litigation, that *does not necessarily* moot the case" (emphasis added).). In *Tandon*, California's modification of its challenged policy did not suffice to moot the case because "previous restrictions remain[ed] in place . . . and officials with a track record of 'moving the goalposts' retain[ed] authority to reinstate those heightened restrictions at any time." *Tandon v. Newsom*, 593 U.S. at 64 (citation omitted). Therefore, "the applicants 'remain[ed] under a constant threat' that government officials [would] use their power to reinstate the challenged restrictions." *Id.* at 63 (citation omitted). Here, in contrast, no provision equivalent to the congregational preference remains in the UPK, the relevant officials bear no history of similarly "moving the goalposts" and have no intent to restore the congregation preference,

and the "constant threat" is accordingly absent. Similarly, whereas California's system of restrictions on assembly under COVID "contain[ed] myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny," *Tandon v. Newsom*, 593 U.S. at 64, Colorado's UPK—stripped of the congregational preference at issue—no longer contains any exceptions or accommodations that serve to "treat any comparable secular activity more favorably than religious exercise." *Id.* at 62. As the provision at the heart of this case no longer exists, *Tandon* no longer operates to trigger strict scrutiny.

II. Even if the Issue is not Moot, the UPK's Congregation Preference Does Not Trigger Strict Scrutiny

A. *Tandon* Requires Governments to Treat Religious Exercise with Equal Regard, and Colorado Demonstrates Care for Religious Freedom.

In *Tandon*, the Court adopted an equal-value approach to free exercise. During the height of the COVID-19 pandemic, California implemented a rule limiting at-home gatherings to three households, while allowing exceptions for secular activities such as retail shopping and using hair salons. *Tandon*, 593 U.S. at 61. A minister and a congregant who wished to hold larger at-home religious gatherings challenged the restrictions, arguing that California had unlawfully imposed stricter limitations on religious practices than on comparable secular activities. *See* Emergency Application at 8, *Tandon v. Newsom,* No. 20A151 (Apr.

2, 2021). The Court held that "government regulations are not neutral and generally applicable . . . whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. The decision established that regulations devaluing religion trigger heightened scrutiny.

The Court then set out the standard determining when two activities are comparable, explaining that refusal to exempt religious activity must be "judged against the asserted government interest that justifies the regulation at issue." *Id.* at 62. If the existing exemption compromises that interest in the same way as the requested religious exemption, then the two are comparable, and strict scrutiny is triggered. Applying this standard, the Court found that secular activities—such as visiting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants—were treated more favorably than gatherings in homes for religious exercise. *Id.* The Court deemed these activities "comparable" because there was no demonstration that the secular activities posed a lesser risk of COVID-19 transmission than the applicants' religious gatherings. *Id.* In other words, the restricted religious activity did not, in the Court's view, undermine the government's public health interest any more than the permitted secular activities did. (The dissent, by contrast, argued that California had found a difference in transmission. *Id*. at 65-66 (Kagan, J., dissenting).) Absent a transmission-based justification for allowing larger secular gatherings while

restricting religious ones, the Court concluded that the regulation reflected a devaluation of religious exercise. This perceived devaluation triggered strict scrutiny and ultimately led to the invalidation of California's COVID-19 policy. *Id.* at 64.

The development of the equal-value principle, which underpins the Court's decision in *Tandon*, can be traced back to several key free exercise cases. The foundation was first laid in *Employment Division v. Smith*, 494 U.S. 872 (1990), where the Court significantly redefined its approach to laws affecting religious practices. *Smith* held that laws that are "neutral" and "generally applicable" do not need to satisfy strict scrutiny, even if they incidentally affect religious practices. *Id.* at 886. Under that rule, which remains in place today, only laws targeting religious practices would face heightened scrutiny. Although *Smith* emphasized neutrality, it foreshadowed a deeper constitutional concern with laws that devalue religion by granting preferential treatment to secular activities.

This concern was more explicitly addressed in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), where the Court struck down city ordinances that devalued the religious exercise of Santeria Church members. In *Lukumi*, the City passed an ordinance that prohibited the slaughter of animals but included a variety of both secular and religious exemptions. *Id.* at 535. As a result, the conduct prohibited was almost exclusively the ritual slaughter practiced

by Santeria church members. *Id.* at 535-36. The government's stated interest—"protecting the public health and preventing cruelty to animals"—was thus only strongly promoted when it came to Santeria practices. *Id.* at 538. The Court held that the government's evaluation of which purposes for killing animals constituted a necessity "devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons." *Id.*

In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), then-Judge Alito illustrated the equal-value principle and how comparability must be determined against the baseline of New Jersey's government interest. In *Fraternal Order*, two Muslim police officers whose Islamic beliefs obligated them to grow beards challenged the Newark police department's policy prohibiting officers from growing beards. *Id.* at 360-61. The police department, however, was willing to make exceptions for officers who could not shave for medical reasons and for officers who were undercover. *Id.* at 366. Though both exceptions were secular, the court concluded that only the medical exemption triggered heightened scrutiny. The exemption for undercover officers was not comparable because it did "not undermine the Department's interest in uniformity." *Id.* That exemption therefore, did not amount to a value judgment. However, the medical exemption treated secular activity better than religious

activity, even though both of them implicated the government's interest in uniformity in the same way. *Id.*

The development of the equal-value approach, crystallized in *Tandon,* reflects the Court's evolving effort to ensure that laws do not devalue religious practices when compared to secular activities. The key decisions came during the COVID-19 pandemic. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020), the Court evaluated a New York executive order restricting the capacity of religious facilities in certain zones, while allowing other secular businesses to operate without such restrictions, because they were deemed essential. In *Roman Catholic Diocese of Brooklyn*, the Court recognized that the disparate treatment of religious and secular regulations amounted to an incorrect value judgment. *Id.* at 16-17. Finally, in *Tandon*, the Court formalized this shift by holding that regulations which treat comparable secular activity more favorably than religious exercise must be subject to heightened scrutiny. 593 U.S. at 62. The equal value approach best reflects *Tandon's* holding because it focuses on the constitutional harm, which is inflicted when the government devalues religious activities. The *Tandon* test is a heuristic device that facilitates judicial consideration of whether religious people and groups have been devalued or disregarded.

B. The Court Should Not Adopt a Mechanistic Approach to *Tandon*.

Apparent differences in treatment across religious fault lines should invite closer examination, but *Tandon* does not require that every such law *automatically* be subject to strict scrutiny. Instead, courts should consider the goal of *Tandon* and free exercise doctrine more broadly and evaluate whether challenged laws fail to show equal regard toward religious faith.

Appellees argue for a mechanistic application of *Tandon* that would effectively overrule *Smith* and allow religious groups to win judicially manufactured exemptions from generally applicable laws, even ones that do not devalue religious belief. Plaintiff's Mot. Summ. J., 3.App.594. Rather than guaranteeing equality for religious faith, such a mechanistic approach to *Tandon* would subject *any* law that provides exemptions to strict scrutiny, regardless of whether it actually devalues religious liberty. This reading of *Tandon* would transform *Smith's* requirement that laws be generally applicable to instead require that laws be universally applicable, leaving the government with little space to legislate. Such an expansive reading of the Free Exercise Clause would significantly hinder Colorado's ability to govern and it would lead to systemic undervaluing of the government's interests.

A key feature of *Tandon* is that the comparability of exemptions must be determined by reference to the government's interest. *Tandon*, 593 U.S. at 62. A

mechanistic approach to *Tandon*, one that finds that *any* exemption, secular or religious, requires more religious exemptions, would systematically fail to appreciate the government's interest. For example, consider challenges to vaccine mandates, which often include medical exemptions for individuals whose health might be threatened by particular vaccines. Under a mechanistic reading of *Tandon*, a state law that includes medical exemptions but not religious exemptions would be subject to strict scrutiny. But *Tandon* does not *necessarily* require such an outcome.

Under *Tandon*, if the government's interest is articulated as promoting health and safety, then a medical exemption *advances* that interest rather than undermining it. Under this reading, mandates and their exemptions would likely be upheld under rational basis review. *See, e.g.*, *Spivack v. City of Philadelphia*, 109 F. 4th 158 (3d Cir. 2024) (finding no Free Exercise violation under vaccine mandate that included religious exemptions); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021) (same). An equal value approach to the *Tandon* rule would adequately account for the various government interests that might motivate state action *and* would enable a state to pursue crucial legislative outcomes when it is not seeking to devalue religious faith. Admittedly, if a state's interest is in increasing vaccination rates or decreasing transmission rates, then strict scrutiny may be appropriate. At least in theory, a medical exemption may undermine these

goals just as much a religious exemption would. *See, e.g.*, *Lowe v. Mills*, 68 F. 4th 706 (1st Cir. 2023) (finding health care workers plausibly pled a free exercise challenge to a vaccine mandate). But that shows precisely why the mechanistic reading is so fundamentally flawed: because a state government does not devalue religious beliefs simply by exempting people to whom inoculation would cause serious harm.

Additionally, a mechanistic reading of *Tandon* may create perverse incentives for legislatures that may in fact harm religion. A government program might include religious exemptions in one area to accommodate free exercise, but the government may choose not to incorporate such an accommodation in another area for perfectly legitimate reasons. For example, a public museum may offer religious exemptions to a volunteer docent who wants to skip leading an exhibit dealing with human evolution, yet refuse to let a volunteer docent skip staff training that covers nude sculptures. The rationale is that exhibit assignments can be reassigned without undermining the museum's educational mission, but training ensures every docent is prepared to interpret the collection as a whole.

III. The UPK Statute Does Not Devalue Religious Belief and Therefore Does Not Trigger Strict Scrutiny Under *Tandon*

A. Colorado's UPK Funding and Matching Scheme Does Not Trigger a Free Exercise Inquiry Because It Values Religion Equally.

The Colorado UPK statute does not provide for exceptions that would trigger a free exercise inquiry. Appellant's Br. 34. Not only does UPK evenly apply its equal opportunity requirement with respect to sexual orientation and gender identity, but even if somehow could be understood to have created an exemption, it extends full regard to religious organizations. Colorado thus honored the constitutional principle of religious equality articulated in *Tandon*. In addition, the temporary exemptions to the quality-standards requirements do not trigger strict scrutiny.

The Colorado statute stipulates an "equal opportunity requirement" that participating preschools "provide eligible children with an equal opportunity, regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability." C.R.S. § 26.5-4-205(2)(b)). The *St. Mary* court found that the requirement was a general regulation of neutral applicability that did not "treat *any* comparable secular activity more favorably than religious exercise." 2.App.544 (quoting *Tandon*, 563 U.S. at 62). Indeed, that court found that this preference was in fact one designed to *accommodate* religious

groups by allowing religiously affiliated preschools to show preference to children from families who were members of that school's particular congregation. 2.App.557. Here, Colorado voluntarily repealed that specific aspect of this regulation and is not reinstating it. What is more, the congregational preference never exempted anyone from the equality requirement, and it did not evidence anything other than equal regard for religion. Therefore, the remaining parts of the statute are permissible under *Tandon*. *See supra* Part I.A.

Nevertheless, at the district court level, Appellees contend that the Department's enacted preferences allow for "categorical exceptions" to *every* aspect of the equal opportunity requirements, claiming that such exceptions are comparable to their desired religious exception, thereby triggering strict scrutiny under *Tandon*. Appellant's Br. 55. Even if the Department's preferences were in fact exceptions to the requirements—which they are not, *see* Appellant's Br. 31-38—they do not violate *Tandon*, properly understood. On the contrary, *Tandon* asks whether Colorado, in enacting the congregational preference, devalued Appellees' beliefs. Such a devaluation simply does not exist.

To start, consider the purpose of the congregational preference. The congregational exception proves that Colorado is in fact *valuing* religious exercise. At the very least, it indicates that Colorado wants to allow religious groups to promote and perpetuate the civic values arising from the community bonds created

by congregational membership. It cannot be said that the presence of such an exception indicates that Colorado is devaluing other religious practices such that free exercise would be implicated.

Under Appellees' mechanical reading of *Tandon*, however, Colorado's willingness to permit a religious exception absurdly subjects the entire matching regime to strict scrutiny. This understanding renders every equal opportunity characteristic vulnerable to an examination of whether Colorado is impermissibly disfavoring religious practice. This cannot be.

Nor can it be that Colorado's application of the congregational preference amounts to *Colorado* favoring one *kind* of religious practice over another. Rather, that distinction is demarcated by how and why religious communities constitute congregational membership and has no bearing on the comparability of such practices for the purposes of the *Tandon* analysis. "Comparability is concerned with the risks various activities pose [to the asserted government interest that justifies the regulation], not the reasons why people gather." *Tandon*, 593 U.S. at 62.

Here, none of the matching preferences pose any risk to Colorado's stated and lawful interest in protecting the "health and safety" of eligible children and families participating in UPK. Allowing a congregational community to prefer its own members entails the same amount of non-risk to the health and safety of

children as does allowing a specialized educational facility to prioritize students with particular Individualized Education Programs, as does allowing a participating preschool to prefer children and families who are part of a specific community whose risk for harm may be elevated in another educational setting or who would benefit from increased resources in a certain knowledge area. *See* 2.App.489.

Again, the key inquiry is whether Colorado is approaching religious actors with equal regard. Colorado has not treated "comparable secular activity more favorably than religious exercise." *Tandon,* 593 U.S. at 62. If anything, it has attempted to treat religious practice *more* favorably in its provider matching scheme. That favorable treatment cannot sensibly be used to mandate *further* favorable treatment for another religious practice in opposition to Colorado's compelling interest.

Indeed, far from advancing religious practice, Appellees' in-for-a-penny, in-for-a-pound conception of the Free Exercise Clause could perversely lead to *fewer* accommodations for religious practice. If every such accommodation opened the door for an argument that the government must enact carveouts from other equal opportunity regulations for religious practice of a different character, governments might respond by being *less* charitable to religion in their regulatory approach so as to avoid a wholesale run on accommodations.

B. Temporary Waivers Do Not Amount to a Secular Dispensation to Discriminate.

DPCA contends that C.R.S. § 26.5-4-205(1)(b)(II) (the "temporary waiver provision") permits individualized exceptions from the equal-opportunity requirements by allowing CDEC to "grant temporary exemptions to the quality-standards requirements as 'necessary to ensure the availability of a mixed delivery system within a community.'" Appellant's Br. 33; Plaintiff's Mot. Summ. J., 3.App.596 (citing C.R.S. § 26.5-4-205(1)(b)(II)). This mixed-delivery system "[provides] preschool services through a combination of school- and community-based preschool providers, which include family child care homes, child care centers, and head start agencies, that are funded by a combination of public and private money." *Id.* § 26.5-4-203(12). Supposedly, this time-limited waiver is a discretionary exemption that renders the scheme not generally applicable and invites strict scrutiny. *Fulton v. City of Phila.*, 593 U.S. 522, 533–34 (2021). According to the lower court's mechanistic understanding of *Tandon*, this supposed exemption is comparable to a secular dispensation to discriminate against DPCA. That claim fails on three grounds.

First, there is no such exception to Colorado's health and safety standards. The trial court misunderstood the statutory language in § 26.5-4-205(1)(b)(II). 10.App.2206. Colorado's temporary waiver provision has no exception for health and safety quality standards, of which equal-opportunity requirements are a part of.

C.R.S. § 26.5-4-205(1)(b)(II); Appellant's Br. 33-34; 9.App.1830. As Judge Kane noted in *St. Mary*, the "interpretation of the equal-opportunity requirement [as non-waivable] is 'consistent with the statute's purpose, language, structure, and legislative history.'" *St. Mary Catholic Parish in Littleton v. Roy*, 736 F.Supp.3d 956, 995 (D. Colo., 2024). Even under the mistaken reading of *Tandon*, an exception is necessary to trigger strict scrutiny.

Second, even if this temporary waiver clause *was* an exception to Colorado's equal-opportunity standard, the lower court did not even suggest that this administrative provision accorded DPCA's beliefs less regard. 10.App.2206. It is unclear why an actor violating Colorado's equal opportunity requirement would request a waiver, as Colorado would then require it to "work[] towards compliance with the quality standards." § 26.5-4-205(1)(b)(II). Properly understood, *Tandon* protects religion by subjecting Colorado to strict scrutiny when it devalues religion. Colorado simply has not done so here.

Third, Colorado is interested in equal access for all eligible children. A prerequisite for all state action is implementation. A time-limited waiver to best expedite a mixed-delivery program of universal preschool devalues neither secular nor religious interests. In other words, the means of mixed-delivery rollout, necessarily aligned with Colorado's aims, is in no way comparable to the Plaintiffs' desire to violate Colorado's interest in equal access. Nor does it betray

any hint of devaluing religious communities. Far from undermining Colorado's interest in equal opportunity, this transitional waiver underscores the legislature's legitimate interest. Colorado wants to offer preschool to all its children and thinks a time-limited waiver will help make it possible.

CONCLUSION

The Court should affirm that *Tandon* safeguards religious liberty by requiring the government to treat religious exercise with equal regard, not by transforming every administrative accommodation or transitional waiver into a trigger for strict scrutiny. Properly understood, Free Exercise Clause jurisprudence embodies an equal-value principle: religion may not be devalued relative to comparable secular activity. That insight ensures a time-limited dispensation and a defunct regulation accommodating religious actors do not shred a statutory scheme statewide. Because Colorado's preschool program respects religious providers just as much as secular ones and does not treat them with lesser regard, strict scrutiny has no place here. Rational-basis review suffices, and Colorado's equal-opportunity requirement should be upheld.

Respectfully submitted,

Date: June 23, 2025

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 32(a)(7)(B) and 32 (g)(1) the undersigned certifies that this brief:

i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Rule 29(a)(5) because it contains 4,999 words, including footnotes and excluding the parts of this brief exempted by Rule 32(f); and

ii) complies with the typeface requirements of Tenth Circuit R. 32(A) and the type-style requirements of Rule 32(a)(5) because it has been prepared using Microsoft Office Word, set in Times New Roman 14 size font.

Date: September 15, 2025

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CERTIFICATE OF SERVICE

I certify that on September 15, 2025, the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit using the Court's CM/ECF system and was served through CM/ECF upon the attorneys of record in this matter, who are registered with the Court's CM/ECF system.

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