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Legal Sidebar

Supreme Court Considers Religious Schools, Public Funding, and Nondiscrimination Law

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On November 3, 2026, the Supreme Court heard oral argument in *St. Mary Catholic Parish in Littleton v. Roy*. The plaintiffs are Catholic preschools that sought public funding through Colorado's universal preschool program but objected to signing a nondiscrimination agreement required under Colorado law to receive those funds. The case presents questions about the intersection of government and religion under the U.S. Constitution's First Amendment. At the Supreme Court, arguments have focused on the nuances of Free Exercise Clause doctrine—specifically, whether Colorado's nondiscrimination requirement triggers heightened constitutional scrutiny when applied to these Catholic schools.

The Supreme Court's ruling in *St. Mary's* could affect the federal government's ability to apply statutes, regulations, or even contract provisions that conflict with the religious beliefs of regulated entities or beneficiaries. Some Members of Congress have filed amicus briefs in the case. Supporting the preschools, some Members claim Congress has a longstanding tradition of supporting religion and school choice, and allowing states to impose additional nondiscrimination requirements will undermine this policy. Supporting Colorado, other Members raise concerns that siding with the preschools would allow "religious exemptions to swallow neutrally-applicable laws whole."

Facts of *St. Mary Catholic Parish in Littleton v. Roy*

Colorado offers universal preschool, known as UPK, through a "mixed-delivery system" that includes "licensed community-based programs, school-based programs, and licensed home providers." If preschools choose to participate in Colorado's UPK program and receive state funds, they must agree to adhere to specified quality standards. This includes a requirement that participating preschools 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."

Colorado's UPK program uses an online portal to match families with preschools and allows providers to express defined preferences. Certain preferences allow students with an Individualized Education Program (IEP) under the Individuals with Disabilities Education Act (IDEA) "and children from low-income families to match with the school district and Head Start preschools that provide specialized services for those children." (IDEA and Head Start are federal programs, discussed in the hyperlinked

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CRS products.) Colorado's matching system also contains a "catchall preference," allowing preschools to request a preference if the family has "a specific relationship to the provider" or participates "in a specific activity," among other stated reasons. Overall, however, the program clarifies that regardless of these preferences, providers must still comply with the nondiscrimination requirements.

Two Catholic parishes and their associated preschools sought religious exemptions from the nondiscrimination provision, objecting to the requirement to provide equal opportunity regardless of sexual orientation or gender identity. The state denied the request. The preschools sued, alleging the state violated their First Amendment rights. The trial court denied their request for an injunction that would have prevented the state from applying these nondiscrimination requirements, and the U.S. Court of Appeals for the Tenth Circuit affirmed that ruling.

Religion Clause Jurisprudence

Government funding for religious entities can raise constitutional issues under both the First Amendment's Establishment Clause, which prevents impermissible government support for religion, and under the Free Exercise Clause, which prevents the government from impermissibly discriminating against religion. The *St. Mary's* case involves the Free Exercise Clause. The Catholic preschools argue Colorado's UPK program excludes them "solely because of their religious exercise." They claim that this religious discrimination should trigger a heightened level of constitutional review: strict scrutiny. Laws rarely survive strict scrutiny, which the Supreme Court has said requires the government to "advance 'interests of the highest order' and … be narrowly tailored in pursuit of those interests."

Over the decades, the Supreme Court has applied different constitutional tests to evaluate Free Exercise Clause challenges. In some early cases, the Supreme Court rejected Free Exercise Clause challenges using a lower level of constitutional scrutiny. In other cases, the Court applied a heightened level of constitutional scrutiny. In a notable example of the latter—*Sherbert v. Verner*, issued in 1963—the Supreme Court held that a state acted unconstitutionally when it denied unemployment benefits to an employee who was fired after refusing to work on the Sabbath. The Court held that the state burdened the employee's free exercise of religion by forcing her "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." To justify this burden, rather than showing "merely … a rational relationship to some colorable state interest," the state had to demonstrate a "compelling state interest" and prove "that no alternative forms of regulation would" address that interest "without infringing First Amendment rights." Some later cases described *Sherbert* and some other Free Exercise Clause cases as applying strict scrutiny. Other cases described *Sherbert* as applying a "balancing test."

Thus, the Supreme Court historically did not apply one clearly articulated standard and struggled to elucidate what distinctions triggered different levels of scrutiny under the Free Exercise Clause. The Supreme Court's 1990 opinion in *Employment Division v. Smith* attempted to explain the doctrine, saying the Court's decisions "have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith* involved two members of a Native American church who were fired for using sacramental peyote in violation of state criminal drug laws and then denied unemployment benefits. The Court rejected their free exercise claim, holding their religious beliefs did not "excuse [them] from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."

The *Smith* Court declined to apply *Sherbert*, saying the Free Exercise Clause did not require heightened constitutional scrutiny "across the board." Instead, the Court suggested *Sherbert* might apply only in "the unemployment compensation field," and should "not apply … to require exemptions from a generally applicable criminal law." While *Smith* also involved unemployment benefits, the Supreme Court believed

it was relevant that the *Smith* plaintiffs violated a criminal law, saying the result in *Sherbert* "might well have been different if the employees had been discharged for engaging in criminal conduct." The Court reasoned that "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct." Lawyers sometimes refer to this type of reasoning as a "greater-includes-the-lesser argument." In *Smith*, the Court further explained that "the unemployment cases [like *Sherbert*] stand for the proposition that" heightened scrutiny applies "where the State has in place a system of individual exemptions."

As the Supreme Court described in 2025, *Smith* established that "the government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable." Congress also understood *Smith* as departing from *Sherbert*'s compelling interest test. In *St. Mary Catholic Parish in Littleton v. Roy*, the Tenth Circuit applied *Smith*'s general rule to hold that Colorado could require the preschools to comply with the state's "neutral and generally applicable" nondiscrimination requirement.

Nonetheless, after *Smith*, the Supreme Court has applied strict scrutiny to evaluate laws that are not neutral and generally applicable, but instead "target the religious for 'special disabilities' based on their 'religious status.'" Starting in 2017, the Court issued a series of three opinions (*Trinity Lutheran Church of Columbia, Inc. v. Comer*, *Espinoza v. Montana Department of Revenue*, and *Carson v. Makin*) holding that the government violated the Free Exercise Clause by expressly excluding religious entities from public benefits. The Supreme Court said in each case that this express religious discrimination triggered strict scrutiny and that the government failed to satisfy this standard. The Supreme Court has clarified that in addition to such express discrimination, a law might also be subject to strict scrutiny if it excludes religious entities but not comparable secular entities, if the government applies a law in a discriminatory way or, in some instances, if a law's exemptions create an *opportunity* for religious discrimination.

On this last point, the Supreme Court explained in *Smith* that "where the State has in place a system of individual exemptions"—such as in *Sherbert*—"it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." In a 2021 case, *Fulton v. City of Philadelphia*, the Supreme Court ruled in favor of a Catholic foster care agency that objected to a policy prohibiting city contractors from discriminating based on sexual orientation. In *Fulton*, the Court applied strict scrutiny to a contract provision that barred discrimination "unless" a city official granted an exception, "in his/her sole discretion." The Court held that this "system of individualized exemptions" failed to meet strict scrutiny: while the city might generally have compelling interests in nondiscrimination policies, it had not shown it had a compelling interest *specifically* in denying an exception to the plaintiff.

Arguments at the Supreme Court

In granting the petition for review in *St. Mary's*, the Supreme Court agreed to consider the scope of *Smith*'s rule allowing neutral and generally applicable government policies to burden religion. The petitioners had also asked the Court to overrule *Smith*. The Court did not agree to consider that question.

Applying *Smith* or *Sherbert*

One issue discussed at oral argument was whether the Supreme Court should apply strict scrutiny under *Sherbert* rather than apply *Smith*. The attorneys for the Catholic preschools and the United States Solicitor General, who joined the appeal to support the preschools, both argued that *Smith* should not apply in the public benefits context. They claimed that either *Sherbert* or the *Trinity Lutheran* line of cases required strict scrutiny instead. Towards the end of the arguments, Chief Justice Roberts asked the Colorado Solicitor General why *Sherbert* would not govern the case, asserting that "nothing in our precedent has backed away from *Sherbert*." In contrast, Justice Kagan asked whether this conclusion was consistent

with *Smith* itself, which she suggested "got rid of" the *Sherbert* analysis. The Colorado Solicitor General said *Smith* "explain[ed] *Sherbert* as a failure of general applicability," not as an exception to *Smith*'s framework. She also noted that *Smith* "itself was a public benefits case" because the plaintiffs were seeking unemployment benefits, indicating the *Smith* rule can apply to public benefits.

This line of argument prompted questions about when a condition is applied to a public benefit—that is, when a government action is in the public benefits context, rather than a different context. The Solicitor General's office said "public schools are … public benefits." The Catholic preschools' attorney claimed *Sherbert* would require strict scrutiny for religious objections to any conditions imposed on state funding, including general proficiency requirements for preschools. At the same time, he said *Sherbert* would not apply if the government was "using its regulatory power": for instance, if Colorado imposed an equal opportunity requirement as a condition to granting preschools a license to operate.

Neutrality and Nondiscrimination Under *Smith*

If *Smith* applies rather than *Sherbert*, the Catholic preschools argued that Colorado's UPK program is not neutral and should trigger strict scrutiny under that framework. The Catholic preschools claimed the program excludes them "solely because of their religious exercise—namely, their religious practices of ensuring that all enrolling families are supportive of the Catholic Church's teachings on sex and marriage and of treating enrolled four-year-olds in accordance with their biological sex." The preschools claimed that their exclusion should trigger strict scrutiny review under *Trinity Lutheran*, *Espinoza*, and *Carson*, the decisions mentioned above that expressly excluded religious entities or religious uses from public benefits. Their attorney argued that this line of cases should not be limited to express discrimination against religious entities or uses, saying that limit would make the "rule very easy to circumvent."

During oral argument, the Colorado Solicitor General agreed that it would be unconstitutional for the government to discriminate against religious entities "by stealth as opposed to doing so transparently" but maintained that Colorado had done neither. She said the state had intentionally opened the UPK program "to religious people and religious providers." Colorado asserted that the petitioner preschools "remain welcome to participate in UPK, subject to the same equal-opportunity requirements that apply to all other publicly funded preschools—public and private, secular and religious." In Colorado's view, Supreme Court precedent requires strict scrutiny only when the government "target[s] religion for disfavored treatment," which the state is not doing with its "impartial and uniform conditions." Justices Kagan, Sotomayor, and Jackson seemed sympathetic to that understanding, suggesting the Catholic preschools are asking for "a special rule" to avoid a uniform condition on the receipt of funds.

Nonetheless, Chief Justice Roberts viewed Colorado's law as having the same effect as an express exclusion from the program. Like the religious entities in *Trinity Lutheran*, *Espinoza*, and *Carson*, the preschools allegedly face impermissible "'pressure … to forgo' a religious practice in order to obtain a government benefit."

Exemptions and General Applicability Under *Smith*

The preschools also argued that under *Smith*, Colorado's nondiscrimination "mandate is not generally applicable" because of the program's preferences system. They objected first to the preferences based on income level and disability, which they say create exceptions to the equal opportunity requirement. The preschools claimed these preferences trigger strict scrutiny because they undermine the state's equal access interests in a way that is "comparable to Petitioners' requested religious accommodation." In addition, the Catholic preschools argued the program's catchall preference allows "case-by-case exemptions" and is therefore an individualized exemption that triggers strict scrutiny.

At oral argument, the Colorado Solicitor General maintained that the state does not allow exceptions to the equal opportunity requirements. The state disagreed that "allowing publicly funded preschools to

deliver specialized services to children with disabilities and to children living in poverty" denies equal opportunity, saying instead that this preference advances the state's interests in providing equal opportunity. Further, Colorado denied that their program allows individualized exemptions, saying the catchall preference does not allow any adjustments that would violate the equal opportunity requirement.

Ability to Satisfy Strict Scrutiny

The preschools asserted that, if strict scrutiny applies, Colorado does not satisfy the standard. Among other arguments, the preschools said there is no evidence "of an LGBTQ family's seeking admission to any one of Petitioners' preschools," so the state has not identified actual harm that would result from allowing the petitioners to discriminate. At oral argument, Justices Alito, Kavanaugh, and Barrett seemed to agree with the idea that there was no real issue if there was no evidence of families being turned away, or if families could attend another preschool. The Colorado Solicitor General pointed to evidence that one of the plaintiff schools had turned away a fifth-grader because he had same-sex parents. In addition, she discussed testimony that a same-sex family might prefer one of these Catholic schools because of their location or hours and would be willing to agree to the schools' statement of faith.

In its Supreme Court brief, the state said its "interest is not in ensuring that every child has some publicly funded preschool seat somewhere; it is in ensuring that a family's protected-class status does not deny them the ability to choose among available publicly funded preschools." Colorado claimed that its equal-opportunity requirements are "narrowly tailored" to this compelling interest.

Potential Outcomes and Implications for Congress

If the Court reasons that *Sherbert* survived *Smith* and that strict scrutiny applies whenever an entity raises a religious objection to a condition on government benefits, this may affect the government's ability to control and oversee funds. In the school context, religious entities participating in programs such as IDEA and Head Start could seek religious exemptions from a variety of funding conditions, not only nondiscrimination requirements but conditions defining the scope of the program. The federal government also provides public benefits outside the school context. In its brief, Colorado cited state-level funding conditions requiring teachers to be drug-free at school and imposing work requirements on public assistance benefits, saying the petitioners' rule would trigger strict scrutiny any time a claimant raises a sincere religious objection to such conditions. A 2026 Michigan ruling involved religious objections to state conditions on federal Medicaid funds and substance abuse block grants.

If the Supreme Court applies *Smith*, the implications could be distinct. If the Court rules that Colorado's UPK program is not neutral because the nondiscrimination requirement has the effect of excluding religious entities, the consequences could be similar to those described immediately above—and potentially even broader, because *Smith*'s framework has been understood to apply in the regulatory context, to criminal law and licensing. At the same time, rather than the blanket rule of strict scrutiny under the *Sherbert* approach, under *Smith*, courts would still have to determine whether any given condition is neutral. In its prior cases, this is where the Supreme Court has looked for evidence that the religious objector is being targeted or treated with hostility. If the Court instead rules that Colorado's UPK program is not generally applicable because its preference system triggers strict scrutiny, such an opinion might have less far-reaching consequences. That reasoning might only require constitutionally based religious exemptions if a statutory scheme already contains certain individualized or other exceptions.

If the Court applies strict scrutiny under any of these approaches, its ruling could also illuminate what evidence the federal government must provide to apply its laws to religious entities. In *Fulton*, the Supreme Court held that the government must show a compelling interest in applying the law to the *particular* religious plaintiff. In that case, it was not sufficient for the city to claim an interest in preventing discrimination against gay parents or maximizing the number of foster parents. In the Court's

view, the city failed to show that granting an exception to that *specific* religious foster care agency would sufficiently undermine these interests. At oral argument in *St. Mary's*, the attorneys for the Catholic preschools and the Solicitor General agreed that their approach would require strict scrutiny if, for instance, a school cited religious reasons for excluding Black students or for refusing to teach math to girls. Those attorneys suggested the government might satisfy strict scrutiny in those instances, saying, for example, that the government has "not just a compelling," but "an overriding interest" in preventing racial discrimination. The Supreme Court has previously rejected Free Exercise Clause objections to complying with racial nondiscrimination requirements in Title II of the Civil Rights Act of 1964 and in a federal tax exemption. It is not clear, however, whether those cases would satisfy *Fulton*'s requirement that the government must provide a compelling interest in applying the law to the particular religious plaintiff. In line with the apparent reasoning of some of the Justices at oral argument, it might be difficult for the government to satisfy *Fulton*'s approach to strict scrutiny if a Black student was excluded from one religious preschool because of his race but could attend a different school.

At oral argument in *St. Mary's*, some of the Justices questioned whether a constitutional rule of strict scrutiny would be "a sea change" if the federal government already has to satisfy strict scrutiny under the Religious Freedom Restoration Act (RFRA). As explained in a CRS In Focus, RFRA says that the federal government may not "substantially burden a person's exercise of religion" unless it can demonstrate that the burden "is the least restrictive means of furthering [a] compelling governmental interest." The Supreme Court said in 2020 that RFRA potentially could act as a "super statute" allowing religious exemptions to at least one federal nondiscrimination law "in appropriate cases." At the same time, there has been litigation over when the government imposes a substantial burden that triggers strict scrutiny under RFRA. Two federal courts of appeals have said that "[u]nder RFRA, a 'substantial burden' is imposed" (among other circumstances) "when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*)." It is therefore possible that religious entities could currently cite RFRA to obtain strict scrutiny review of federal funding conditions. In contrast, though, a different federal appellate decision rejected a challenge claiming the federal government violated RFRA when, under IDEA, it failed to provide "disabled children attending Catholic schools the same benefits as it provides to disabled public school children." That decision concluded "that the mere non-funding of private secular and religious school programs does not" impose a substantial burden on religion under RFRA. Thus, it is not entirely clear—particularly in advance of knowing what reasoning the Court might adopt in *St. Mary's*—that judicial review under RFRA would be identical to a strict scrutiny approach under the Free Exercise Clause.

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