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.

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

BRIEF OF *AMICUS CURIAE* PROTECT THE FIRST FOUNDATION IN SUPPORT OF PETITIONERS

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
JAMES C. PHILLIPS
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW
Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amicus Curiae

JANUARY 30, 2026

QUESTIONS PRESENTED

1. Whether proving a lack of general applicability under *Employment Division* v. *Smith* requires showing unfettered discretion or categorical exemptions for identical secular conduct.

2. Whether *Carson* v. *Makin* displaces the rule of *Employment Division* v. *Smith* only when the government explicitly excludes religious people and institutions.

3. Whether *Employment Division* v. *Smith* should be overruled.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

INTRODUCTION, SUMMARY, AND INTEREST OF *AMICUS CURIAE*[1]

The ability of parents to choose the education that best suits their children's needs, including a religious education, is an issue of overriding importance to many Americans' ability to exercise their First Amendment rights; and therefore it is important to *Amicus* Protect the First Foundation, a nonprofit, nonpartisan organization that advocates for First Amendment rights in all applicable arenas. Protect the First is committed to the principles of free speech, free association, and religious liberty enshrined in the First Amendment and supports educational choice as a vital means of exercising those freedoms. Protect the First does not oppose LGBTQ+ rights or behavior. But it supports the rights of religious organizations to make decisions about their membership that are consistent with their religious beliefs. *Amicus* urges this Court to protect those rights by reversing the erroneous decision below.

Petitioners—Catholic preschools and parents and the Archdiocese of Denver—seek to participate in a preschool program that Colorado describes as "universal." But because Catholic preschools can enroll only students whose families support the teachings of the Catholic church, Colorado will not allow them to participate in the state's program. First

---

[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel made a monetary contribution toward the brief's preparation or submission. Counsel of record for all parties received timely notice of *amicus'* intent to file this brief.

the district court, and then the Tenth Circuit, upheld that exclusion. For two reasons, that exclusion violates Petitioners' constitutional rights, contravenes this Court's precedent, and warrants this Court's review.

First, Colorado has violated Petitioners' free exercise rights by imposing a mandate that is not generally applicable and that cannot pass strict scrutiny. Colorado's asserted interests in its nondiscrimination mandate fail for the same reasons that the materially identical interests failed in *Fulton* v. *City of Philadelphia,* 593 U.S. 522 (2021). The Tenth Circuit's holding to the contrary was wrong, conflicts with this Court's precedent, and poses a danger of additional religious discrimination throughout the Tenth Circuit.

Second, Colorado has violated Petitioners' expressive association rights. Indeed, this case is materially indistinguishable from *Boy Scouts of America* v. *Dale*, where this Court held that the government burdens an organization's expressive associational rights by requiring it to accept leaders whose sexual orientation is inconsistent with the organization's values. 530 U.S. 640, 648 (2000). Whatever one may think about same-sex relationships or gender transitions, a religious institution has a constitutional right to decide whom to admit into its community and cannot be excluded from a publicly available benefit program for making those religion-based choices. The Tenth Circuit offered no meaningful reason to distinguish this case from *Dale*. And its rejection of Petitioners' expressive association claim was thus error, conflicted with this Court, and

could well lead to other infringements of First Amendment rights throughout the Tenth Circuit.

STATEMENT

Colorado funds a universal preschool program and allows both private and public schools to participate. App.6a. The state department responsible for implementing this program adopted regulations, including an equal opportunity mandate that families may enroll their children in participating schools without regard to any protected characteristic. App.6a.

Petitioner Archdiocese of Denver oversees nearly three dozen Catholic preschools that seek to fulfill a religious mission. App.235a. Parents seeking to enroll their children in one of these Catholic preschools must sign a statement which requires that "all Catholic school families must understand and display a positive and supportive attitude toward the Catholic Church, her teachings, her work, and the mission of the Catholic school." App.240a. (Those who teach and work at the schools must sign a similar statement. App.221a; App.228a; App.234a.)

This commitment by parents is crucial to the schools' fulfilling their religious mission because, if families oppose the Church, it will undermine the schools' ability to inculcate the faith in their students. App.240a; App.272a-275a; App.316a-318a. Thus, the Archdiocese has told school leaders that "[i]f [a] family doesn't see eye to eye on [the Church's teachings about biological sex and marriage], we ask our school leaders to please not admit the child out of abundant respect for the family." App.318a.

Given the universal preschool regulations and the Catholic Church's need to protect its preschools' religious mission, the Archdiocese sought an accommodation from the equal opportunity mandate. App.283a. The state department denied any accommodation. App.289a-290a. So Petitioners sued.

The district court ruled in Respondents' favor, noting that the challenged regulations were "neutral and generally applicable" under *Employment Division* v. *Smith*, 494 U.S. 872 (1990). See App.50a-172a. The Tenth Circuit affirmed, likewise relying on *Smith*. See App.1a-49a.

ADDITIONAL REASONS FOR GRANTING THE PETITION

Protect the First agrees with the reasons Petitioners offer as to why this Court should grant their petition. Furthermore, *amicus* adds two more reasons why this Court's review is necessary: the lower court's decision conflicts with this Court's free exercise and expressive association precedent, and therefore poses substantial risks to the exercise of those rights throughout the Tenth Circuit.

I. Review Is Necessary Because This Court's *Fulton* Decision Shows that the Government's Interests in This Case Cannot Justify Excluding Religious Preschools.

This case, like *Fulton*, is about the ability of a religious organization to receive a public benefit without violating its religious beliefs. Here Colorado seeks to do what this Court made clear Philadelphia could not: refuse to partner with Catholic

organizations because they cannot, consistent with their religious beliefs, provide their services to same-sex couples. See *Fulton*, 593 U.S. at 531, 542-543. *Fulton* is clear that in such cases, if the government offers exemptions for secular reasons, it cannot then refuse to accommodate religion. See *id.* at 533-534. But that is precisely what Colorado has done here. And the similarities between this case and *Fulton* compel the conclusion that Colorado violated Petitioners' free exercise rights.

Like Catholic Social Services, which sought to certify foster families in *Fulton*, Petitioners have "a particular understanding of marriage as being between a man and a woman[.]" App.314a. To enroll children of same-sex couples "is likely to lead to intractable conflicts" in the school environment between the beliefs taught at school and what children are taught at home regarding marriage. App.272a-273a. For that reason, such enrollment "[is] not * * * possible." App.317a. And thus, as in *Fulton*, "it is plain that the [government's] actions have burdened [Petitioners'] religious exercise by putting [them] to the choice of curtailing [their] mission or approving relationships inconsistent with [their] beliefs." *Fulton*, 593 U.S. at 532.

As Petitioners explain, Colorado has permitted exceptions to its nondiscrimination mandate, rendering its policy not generally applicable. See Pet.8-10. That triggers strict scrutiny. And Colorado's mandate cannot survive that test because it has failed to present a compelling interest in enforcing that mandate as to these schools.

Indeed, the compelling interests asserted by Colorado are the same as those proffered by the government in *Fulton*—and they fail here for the same reasons. The Tenth Circuit assessed only one purported interest to justify the exclusion of Catholic preschools from the universal preschool program: ensuring "'equal access' for all students." App.38a. The state department classified this as "seek[ing] to remove barriers to access" for children with "different protected characteristics." App.38a. Equal access is, of course, a worthy aim. But that interest is the same as Philadelphia's interest in "the equal treatment of prospective foster parents and foster children." *Fulton*, 593 U.S. at 542. And this Court made clear that the government's effort to pursue such an interest cannot pass strict scrutiny where the government permits secular exceptions to its nondiscrimination ordinances. *Ibid.*

Nor does any other compelling interest save Colorado's mandate. The district court erroneously reasoned that excluding Catholic preschools from the universal preschool program "prevents the burden of discrimination from continuing to be placed on [LGBTQ+] children and families by, for example, requiring them to find another preschool provider or to travel a greater distance to receive preschool services." App.145a. But that assertion is also inconsistent with *Fulton*'s rejection of a similar "compelling interest" asserted there: If a same-sex couple came to Catholic Social Services seeking to be certified as foster parents, they would have had to go to a different agency, just as a same-sex couple seeking to enroll their child at a Catholic preschool in this case

would need to find a different school. *Fulton*, 593 U.S. at 530.

In short, both Philadelphia and Colorado sought to partner with private organizations to provide public services. Catholic Social Services entered a voluntary contract with the government, just as Petitioners seek to do. But, just as in *Fulton*, that does not give the government license to discriminate against religion while reserving the right to provide exemptions for secular conduct. See *ibid.* Because Colorado's asserted interests in its mandate are indistinguishable from those rejected in *Fulton,* its refusal to allow Petitioners to participate in the universal preschool program violates the First Amendment.

And, because the Tenth Circuit's decision effectively allows Respondents to discriminate on the basis of religion in allocating universal preschool benefits, that decision is likely to lead to similar religious discrimination in other localities within that jurisdiction.

II. Review Is Also Necessary Because Requiring Catholic Preschools to Accept LGBTQ+ Students as a Condition of Universal Preschool Participation Impairs the Schools' Expressive Association Rights.

The Tenth Circuit's attempts to distinguish *Dale* are similarly unpersuasive. That decision governs here and makes clear that Colorado's refusal to permit Catholic preschools to participate in the universal preschool program violates their First Amendment right to expressive association.

Petitioners' preschools, like the Boy Scouts, exist to "instill values in young people[.]" *Dale*, 530 U.S. at 649. And just as requiring the Boy Scouts to admit homosexual members would "force the organization to send a message, both to [students] and the world, that the [school] accepts homosexual conduct as a legitimate form of behavior," *id.* at 653, so requiring Catholic preschools to enroll LGBTQ+ students or students from LGBTQ+ families would impair Petitioners' expressive association, see App.44a. Also, the values implicated by the membership decisions in this case are the same as those implicated in *Dale*: traditional views of human sexuality. 530 U.S. at 651-652. And just as New Jersey did in *Dale*, Colorado asserts that it may interfere in such membership decisions because of its interest in "remov[ing] barriers to access" for "children with different protected characteristics." App.38a. In *Dale*, such an interest was insufficient, 530 U.S. at 647, and the Tenth Circuit was wrong to credit that same interest below.

Given the significant similarities between this case and *Dale*, the Tenth Circuit's assertion that "[a]pplying *Dale* to this case would expand expressive association beyond its current limits" is at best puzzling. App.46a. The fact that this case concerns a government-funded program, rather than a public accommodations law, does not meaningfully distinguish *Dale* because the government cannot condition funding on grounds that it cannot constitutionally impose directly. See *National Rifle Ass'n of Am.* v. *Vullo*, 602 U.S. 175, 190 (2024) (noting the "principle that a government official cannot do

indirectly what she is barred from doing directly"). And none of the Tenth Circuit's other reasons for distinguishing *Dale* hold water.

First, *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), does not make *Dale* inapplicable here. The Tenth Circuit reasoned that *Rumsfeld* made *Dale* inapplicable because *Rumsfeld* held that the mere presence of someone who is not a member of a group does "not amount to expressive association." App.44a. But the very issue here is whether Petitioners are *required* to admit someone to their group. This is not a case about mere interaction with others, as in *Rumsfeld*. App.44a.

The Tenth Circuit also distinguished *Dale* claiming that expressive association does not apply here because "[n]o one would reasonably mistake the views of preschool students for those of their school." App.45a. But that misstates the reasoning behind the right to expressive association. Should Petitioners be forced to admit these students, it is the act of admission that would convey a message with which Petitioners disagree, not what the students might say, as in *Dale*. See *Dale,* 530 U.S. at 645-646. In other words, expressive association is violated by forcing unwanted members into the group, not necessarily by the words those unwanted members may speak.

The Tenth Circuit's reliance on *Runyon* v. *McCrary*, 427 U.S. 160 (1976), fares no better in distinguishing *Dale*. In fact, the Tenth Circuit seemingly ignored this Court's explicit instructions that its holding in *Runyon* "[did] not present any question of the right of a private social organization to

limit its membership on racial or any other grounds * * *[,] of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith[,] * * * [nor] the application of § 1981 to private sectarian schools." *Id.* at 167. The Court in *Runyon* only answered "whether § 1981 prohibits private*, commercially operated, nonsectarian schools* from denying admission to prospective students because they are [Black], and, if so, whether that federal law is constitutional as so applied." *Id.* at 167-168 (emphasis added). So *Runyon* by its own terms is inapplicable to sectarian schools. And it limited its holding to racial discrimination. Despite this, the Tenth Circuit still "[saw] no reason why [*Runyon*] should not apply to a law that prohibits discrimination in admissions based on sexual orientation and gender identity." App.46a. But that is wrong and in conflict with this Court's precedent.

Further, *Dale* cannot be distinguished on the basis that joining the Boy Scouts is elective because preschool is also voluntary. In any event, the fact that education is "strongly promoted by the State at the preschool stage * * * and thereafter is compulsory," App.155a-156a, is even more reason for requiring Colorado's program be consistent with the First Amendment. This Court has long made clear that the state's interest in compulsory education does not supplant constitutional rights. See *Wisconsin* v. *Yoder,* 406 U.S. 205, 221 (1972); *Pierce* v. *Society of Sisters of Holy Names of Jesus & Mary*, 268 U.S. 510, 534-535 (1925).

Nor does it matter that preschool children are not (yet) group leaders in their schools. In *Dale,* the Boy

Scouts revoked Dale's *membership*, not merely his leadership position, and the Court made clear that the Boy Scouts "specifically forb[ade] membership to homosexuals." *Dale*, 530 U.S. at 645. Moreover, this Court's caselaw consistently holds that it is not only leaders, but also members, that may impair an organization's expressive association. *Democratic Party of U.S.* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981) ("the freedom to associate * * * necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.").

Additionally, one cannot distinguish *Dale* because that case considered only sexual orientation, not gender identity. There is no reason to believe *Dale* would come out differently if the Boy Scouts had sought to exclude transgender scoutmasters. The right to expressive association does not turn on what characteristics an organization chooses to consider. And as at least one lower court has correctly recognized, requiring an organization to accept a transgender individual into its association may "fundamentally alter [its] expressive message in direct violation of the First Amendment." *Green* v. *Miss U.S. of Am., LLC*, 52 F.4th 773, 783 (9th Cir. 2022), *reh'g en banc denied mem.,* 61 F.4th 1095 (9th Cir. 2023).

Finally, any suggestion that *Dale* would come out differently today because of greater social acceptance for LGBTQ+ rights also fails. This Court addressed that argument head-on in *Dale*, when it *already* "appear[ed] that homosexuality ha[d] gained greater societal acceptance." 530 U.S. at 660. Today, no less than when this Court declared it two decades ago, that

"is scarcely an argument for denying First Amendment protection to those who refuse to accept these views." *Ibid.* After all, "[t]he First Amendment protects expression, be it of the popular variety or not." *Ibid.* (citing *Texas* v. *Johnson*, 491 U.S. 397 (1989); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (per curiam)).

Far from retreating from *Dale*, this Court has made clear that its protection for speech and association remains in full force. Indeed, in *Obergefell* v. *Hodges,* this Court reemphasized that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction" their beliefs regarding sexuality and gender, and that the First Amendment ensures they "are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths[.]" 576 U.S. 644, 679-680 (2015). The Tenth Circuit simply ignored that and other recent statements from this Court requiring that governments respect traditional Judeo-Christian views on sex-related matters. See, *e.g., Bostock* v. *Clayton County*, 590 U.S. 644, 681 (2020) (declaring, in the context of Title VII's antidiscrimination provisions, that "[w]e are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society"). *Obergefell, Bostock* and, most recently, *Fulton* make that clear.

In short, the Tenth Circuit offered no reason to reject *Dale*'s command that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of

that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648 (citing *New York State Club Ass'n, Inc.* v. *City of New York,* 487 U.S. 1, 13 (1988)). Admitting into a Catholic school those families where the parents or students are in same-sex relationships or have undergone gender transitions significantly affects the school's ability to express its view on human sexuality and gender identity. Colorado's nondiscrimination interests cannot justify such forced inclusion—either on these schools, or on countless others with similar policies located in the Tenth Circuit.

CONCLUSION

Colorado and many other governments have rightly sought to protect members of the LGBTQ+ community from invidious discrimination. But those efforts must be undertaken in a manner that accords with the federal Constitution. And here, under this Court's precedent, Colorado has violated Petitioners' First Amendment rights to free exercise and expressive association. The Tenth Circuit's attempts to distinguish those precedents are unpersuasive and pose an enormous danger to a wide variety of private schools throughout that Circuit.

The petition for certiorari should be granted.

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
JAMES C. PHILLIPS
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amicus Curiae

JANUARY 30, 2026