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 OF WORLD FAITH FOUNDATION AND NC VALUES INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES..................................... iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT...2

ARGUMENT 3

I. THE MANDATE WEAPONIZES ANTI-DISCRIMINATION PROVISIONS AS A TOOL OF DISCRIMINATION..................................3

A. The definition of "discrimination" and the scope of anti-discrimination laws must be examined in the context of religious liberty concerns. 5

B. Anti-discrimination provisions have expanded to cover more places and protect more groups—complicating the legal analysis and triggering collisions with the First Amendment. 10

II. THE MANDATE UNDERMINES EQUAL RIGHTS 14

A. The Mandate undermines the government's own interest in ensuring equal access to preschool services. 15

B. The Mandate undermines the rights of the Parish Preschools............................. 15

C. The Mandate undermines the parental rights of religious families by denying them equal access to the funding. 16

1. Parents have the primary right and responsibility for the religious upbringing of their children, including the decision to enroll them in a religious school program.........18

2. As a voluntary religious association, the Archdiocese has the right to establish its own religious doctrine and policies for the education of its children.....................................19

III. THE MANDATE UNDERMINES THE RELIGIOUS AUTONOMY OF THE ARCHDIOCESE IN CORE MATTERS OF FAITH AND DOCTRINE.............................21

IV. THE MANDATE IS NEITHER NEUTRAL NOR MERELY INCIDENTAL IN ITS BURDEN ON RELIGIOUS RIGHTS 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

Bates v. Little Rock,
361 U.S. 516 (1960)..2

Boy Scouts of Am. v. Dale,
530 U.S. 640 (2000)..12

Carson v. Makin,
596 U.S. 767 (2022)......................18, 20, 21, 24, 25

Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Review Comm'n,
605 U.S. 238 (2025)..................................15, 17, 19

Central Rabbinical Cong. of U.S. & Canada v. New York City Dep't of Health & Mental Hygiene,
763 F.3d 183 (2d Cir. 2014) 4

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993)..4

Corporation of the Presiding Bishop of Jesus Christ of Latter-Day Saints v. Amos,
483 U.S. 327 (1987)..22

EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.,
597 F.3d 769 (6th Cir. 2010)....................................16

Emp't Div. v. Smith,
494 U.S. 872 (1990) 7, 9, 16, 24, 26

Espinoza v. Mont. Dep't of Revenue,
591 U.S. 464 (2020) 19, 20, 24

First Choice Women's Res. Ctrs., Inc. v. Davenport,
2026 U.S. LEXIS 1949 2

Foothills Christian Ministries v. Johnson,
148 F.4th 1040 (9th Cir. 2025) 17

Fulton v. City of Philadelphia, Pennsylvania,
593 U.S. 522 (2021) 25

Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.,
536 A.2d 1 (D.C. 1987) 13

Heart of Atlanta Motel v. United States,
379 U.S. 241 (1964) 12

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
565 U.S. 171 (2012) 15

Hsu v. Roslyn Union Free Sch. Dist. No. 3,
85 F.3d 839 (2d Cir. 1996) 5

Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston,
515 U.S. 557 (1995) 6, 11

Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church,
344 U.S. 94 (1952) 21

Lyng v. Northwest Indian Cemetery Protective Assn.,
485 U.S. 439 (1988) 21

Mahmoud v. Taylor,
606 U.S. 522 (2025) 16, 19

Matal v. Tam,
582 U.S. 218 (2017) 7

Miller v. Amusement Enters., Inc.,
394 F.2d 342 (5th Cir. 1968) 11

North Coast Women's Care Medical Group v. Superior Court,
189 P.3d 959 (Cal. 2008) 24

Norwood v. Harrison,
413 U.S. 455 (1973) 26

Obergefell v. Hodges,
576 U.S. 644 (2015) 2, 6, 9, 10, 25

Ord. of St. Benedict v. Steinhauser,
234 U.S. 640 (1914) 20

Our Lady of Guadalupe Sch. v. Morrissey-Berru,
591 U.S. 732 (2020) 18, 23

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 19

Reynolds v. United States,
98 U.S. 145 (1878) 26

Schneiderman v. United States,
320 U.S. 118 (1943) 7

Serbian Eastern Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) 22

Sherbert v. Verner,
374 U.S. 398 (1963) 22

Snyder v. Phelps,
562 U.S. 443 (2011) 7

St. Mary Cath. Par. v. Roy,
154 F.4th 752 (10th Cir. 2025) 2, 14, 17, 22, 23, 24, 26

Stormans, Inc. v. Wiesman,
579 U.S. 942 (2016) 8

The Civil Rights Cases,
109 U.S. 3 (1883) 11

Thomas v. Collins,
323 U.S. 516 (1945) 8

Trinity Lutheran Church of Columbia, Inc. v. Comer,
582 U.S. 449 (2017) 20, 24

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 7

United States v. Ballard,
322 U.S. 78 (1944) 9

Ward v. Polite,
667 F.3d 727 (6th Cir. 2012) 6

Watson v. Jones,
80 U.S. 679 (1872) 17, 19, 22, 23

West Va. State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 6, 7, 8

Wisconsin v. Yoder,
406 U.S. 205 (1972) 16, 19

Wooley v. Maynard,
430 U.S. 705 (1977) 6, 7-8

Statutes

Civil Rights Act of 1875, ch. 114,
18 Stat. 335 (1875) 11

Civil Rights Act of 1964, 42 U.S.C. § 2000a 11

8 Code of Colorado Regulations 1404-1 § 4.110 14

Colo. Rev. Stat. § 26.5-4-204(1)(a), (d) 14

D.C. Code § 2-1402.31(a) 11

Other Authorities

David E. Bernstein, *Defending the First Amendment From Antidiscrimination*,
82 N.C. L. Rev. 223 (2003) 10

Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*,
5 Alb. Govt. L. Rev. 552 (2012) 10

James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*,
64 Vand. L. Rev. 961 (2011) 10, 11, 12

Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*,
57 U. Chi. L. Rev. 1109 (1990) 5

Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*,
1993 BYU L. Rev. 163 (1993) 6, 13

INTEREST OF *AMICI CURIAE*[1]

Amici curiae respectfully urge this Court to reverse the Tenth Circuit ruling.

World Faith Foundation ("WFF") is a California religious non-profit corporation established to preserve and defend the customs, beliefs, values, and practices of religious faith and speech, as guaranteed by the First Amendment, through education, legal advocacy, and other means. James L. Hirsen, WFF's founder, has served as professor of law at Trinity Law School and Biola University in Southern California and is the author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. WFF has made numerous appearances in this Court as *amicus curiae*.

NC Values Institute, formerly known as the Institute for Faith and Family, is a North Carolina nonprofit corporation that works in various arenas of public policy to protect faith, family, and freedom, including the right to school choice. See https://ncvi.org.

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[1] *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Tenth Circuit assures us its ruling does not mean it "shirk[s] [its] constitutional duty to protect the Parish Preschools' freedom of worship." *St. Mary Cath. Par. v. Roy*, 154 F.4th 752, 774 (10th Cir. 2025). The Preschools may continue "to adhere to religious doctrines" and "to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Ibid.*, citing *Obergefell v. Hodges*, 576 U.S. 644, 679 (2015). "[T]his case does not involve the presence of persons who might affect the Parish Preschools' ability to advocate for their viewpoint." *St. Mary*, 154 F.4th at 776. The court insists it is simply saying that "when a school takes money from the state that is meant to ensure universal education, then its doors must be open to all." *Ibid.*

But as this Court recently reminded us, "[a] government that takes three limbs but spares the last imposes an injury all the same." *First Choice Women's Res. Ctrs., Inc. v. Davenport*, 2026 U.S. LEXIS 1949, *29. The Constitution prohibits "subtle . . . interference" with protected liberties no less than it does "heavy-handed frontal attack[s]." *Id.* at *30, quoting *Bates v. Little Rock*, 361 U.S. 516, 523 (1960).

The State of Colorado takes "three limbs" – the religious autonomy of the Archdiocese and the Parish Preschools it oversees; the religious and parental rights of families who enroll their children in the Preschools; and the preschool funding that would

otherwise benefit both the Preschools and the families they serve.

ARGUMENT

I. THE MANDATE WEAPONIZES ANTI-DISCRIMINATION PROVISIONS AS A TOOL OF DISCRIMINATION.

The Constitution broadly guarantees liberty of religion and conscience to citizens and organizations who participate in public life according to their moral, ethical, and religious convictions. It is not quarantined inside the walls of a church sanctuary. But anti-discrimination laws and policies are increasingly deployed as a weapon attacking traditional religious doctrines about the nature of marriage and sexuality. This *discriminatory* approach infringes bedrock rights the First Amendment explicitly protects and cuts against the very values anti-discrimination laws are enacted to promote—tolerance, diversity, inclusion, equality. Ministries operated by religious organizations, like the Parish Preschools, are excluded from full participation in the public square while the government compels uniformity of thought on controversial social issues. The resulting inequality is alarming. As the Petition warns, "[t]he Tenth Circuit's opinion paves the way for governments to exclude religious groups with politically unpopular beliefs from any of these programs—simply by invoking 'nondiscrimination.'" Pet. 35.

Ironically, Colorado's *anti-discrimination* provision imposes a substantial burden on religious

liberty by *discriminating* against religious doctrine. Even though the law may not facially target religion, it is not neutral in its practical operation—it functions as a categorical exclusion primarily or even *only* of religious agencies that hold traditional views of sexuality. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535-536 (1993); *Central Rabbinical Cong. of U.S. & Canada v. New York City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 194-195 (2d Cir. 2014). Even a law "religiously neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids." *Lukumi*, 508 U.S. at 561 (Souter, J., concurring). That is true here. Colorado requires the Archdiocese to alter its policies to conform to "something that religion forbids," namely the state's view of sexual orientation and gender identity.

Colorado law treats the Archdiocese's application of its religious doctrine as prohibited "discrimination." But a religious organization that follows its core religious doctrine is not engaged in the invidious, irrational, arbitrary discrimination that may be proscribed by constitutional principles or civil right laws. It is hardly "discrimination" to decline to advance a viewpoint or to refuse to act against religious conscience. The Archdiocese's refusal to compromise the admission and personnel policies of the Parish Preschools is a constitutionally protected exercise of religious autonomy—not unlawful discrimination.

A. The definition of “discrimination” and the scope of anti-discrimination laws must be examined in the context of religious liberty concerns.

Many decisions necessitate selection criteria. Discrimination may or may not be appropriate, depending on the context and the identity of the one who discriminates. Employers "discriminate" when they select employees from a pool of applicants. Students experience "discrimination" in admissions, honor rolls, sports teams, or activities requiring a certain grade point average. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996). It is impossible to eradicate every form of discrimination. Anti-discrimination policies are reasonable where selection criteria are truly irrelevant. But when a religious organization sets policies for operating its ministry, religious doctrine is not only relevant but indispensable.

The Free Exercise Clause “strives to allow individuals of different religious faiths to maintain their differences in the face of powerful pressures to conform.” Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1139 (1990). But laws that prohibit sexual orientation or gender identity discrimination tend to demand uniformity of thought on deeply personal religious subjects (marriage and sexuality), resulting in the exclusion of those who cannot in good conscience conform.

Intolerance. Colorado refuses to tolerate disagreement with the state-sanctioned view of

marriage. The state vilifies a religious organization "unwilling to assent to the new orthodoxy." *Obergefell*, 576 U.S. at 741 (Alito, J., dissenting). Colorado "put[s] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id*. at 672.

"Tolerance is a two-way street." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). Colorado's policy "mandates orthodoxy, not anti-discrimination." *Ibid*. The Sixth Circuit warned about the dangers of failing to apply an anti-discrimination policy "in an even-handed, much less a faith-neutral, manner." *Id.* at 739. Where a policy protects a category defined by conduct that many religious traditions consider sinful, faith-neutral application is virtually impossible. Such intolerance is intolerable in a country devoted to liberty. But in a post-*Obergefell* world, secular ideologies increasingly employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while ruthlessly suppressing others. Liberty collapses in this toxic atmosphere. Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 186-188 (1993). The First Amendment protects against government coercion to endorse or subsidize a cause or particular viewpoint. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 575 (1995). But that is exactly what Colorado has done, forcing the Archdiocese to endorse the state's viewpoint as a condition of otherwise generally available funding.

Uniformity. America has always valued diversity. No government official may "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette*, 319 U.S. at 642. Colorado destroys diversity by demanding uniformity about marriage and sexuality. By silencing one side of a hotly contested issue, the state engages in forbidden viewpoint discrimination and improperly lends its power to one side of a *religious* controversy. *See Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990) (collecting cases).

No one escapes offense in a free society. No official may determine what shall be offensive—that would be "the essence of viewpoint discrimination." *See Matal v. Tam*, 582 U.S. 218, 249 (2017). This Court has flatly rejected the argument that "[t]he Government has an interest in preventing speech expressing ideas that offend." *Id.* at 246; *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (even hurtful or outrageous speech is protected). The Tenth Circuit ruling would virtually ensure the government's ability to freely engage in constitutionally prohibited viewpoint discrimination. Colorado may not agree with the Archdiocese's doctrine, but the Constitution demands that courts protect a religious organization's freedom to decide for itself "the ideas and beliefs deserving of expression, consideration, and adherence. . . ." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 646 (1994).

Freedom of thought undergirds the Bill of Rights. *Schneiderman v. United States*, 320 U.S. 118, 144 (1943). The Constitution protects the right to advance ideological causes and "*the concomitant right to decline to foster such concepts*." *Wooley v. Maynard*,

430 U.S. at 714 (emphasis added). These complementary rights are components of the "individual freedom of mind." *Barnette*, 319 U.S. at 637. Colorado contravenes "[t]he very purpose of the First Amendment . . . to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

Exclusion. The Constitution is an inclusive document protecting the life, liberty, religion, and viewpoint of all within its realm. *Inclusion* is trumpeted as a key rationale for anti-discrimination provisions, but Colorado punishes the Archdiocese for its religious view of marriage by *excluding* the Parish Preschools from the supposedly "universal" preschool funding program unless they adopt admission policies that conflict with their core religious doctrine. The Tenth Circuit ruling enables states to punish persons who hold traditional beliefs about sexuality by excluding them from participation in a generally available public benefit. The same was true for pharmacists in Washington who were forced to provide abortifacient drugs. "The dilemma this creates for the Stormans family and others like them is plain: Violate your sincerely held religious beliefs or get out of the pharmacy business." *Stormans, Inc. v. Wiesman*, 579 U.S. 942, 944 (2016) (Alito, J., dissenting). The message to the Archdiocese is the same: "Violate your sincerely held religious beliefs or [be excluded from Colorado's Universal Preschool Program]." Colorado compels the Archdiocese to choose between its religious doctrine and participating in the state's "universal" preschool

program, all because it refuses to sacrifice faith on the altar of an agenda it cannot support.

Anti-discrimination laws should provide a shield that promotes inclusion—so that no one is arbitrarily excluded based on irrelevant criteria. Instead, it is used here as a sword that cuts off people of faith and religious organizations. Sadly, *Smith* is used to sanction laws, like this one, that "make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community"—provided they do not directly target religion. *Smith*, 494 U.S. at 897 (O'Connor, J., concurring).

Inequality. Equality is another common "buzzword." Some use the phrase "marriage equality" to describe *Obergefell*. Legal advocates have not only achieved their goals but far exceeded them. Same-sex couples enjoy broad legal protection and have a wide array of options for public services—in this case, the many other preschools willing to sign on to Colorado's anti-discrimination policy without reservation.

The government may not punish religious doctrine it believes to be false. *United States v. Ballard*, 322 U.S. 78, 86-88 (1944). Colorado punishes the Archdiocese for adhering to its religious doctrine, creating invidious *inequality*. This blatant viewpoint discrimination is anathema to the First Amendment and ultimately destroys liberty for everyone. "If Americans are going to preserve their civil liberties . . . they will need to develop thicker skin. . . . A society that undercuts civil liberties in pursuit of the 'equality' offered by a statutory right to be free from

all slights will ultimately end up with neither equality nor civil liberties." David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 245 (2003).

The *Obergefell* majority assured dissenters their First Amendment rights would remain intact (576 U.S. at 679), but that case has triggered multiple threats to the liberty to think, speak, and live according to conscience. This case is just one example. Even some LGBT advocates have admitted that judicial redefinition of marriage might impose a social view not shared by a majority of citizens by creating "a disquieting new breed—a 'right' to a *word*, *an unprecedented notion having inauspicious potential for regulating speech and thought*." Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 Alb. Govt. L. Rev. 552, 599-600 (2012) (emphasis added). The First Amendment implications are frightening.

B. Anti-discrimination provisions have expanded to cover more places and protect more groups—complicating the legal analysis and triggering collisions with the First Amendment.

Anti-discrimination policies have ancient roots. Early American laws were carefully crafted with narrow definitions of the people and places regulated. These laws mostly targeted racial discrimination. James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 Vand. L.

Rev. 961, 965 (2011). Primary responsibility shifted to the states after this Court invalidated the Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875). *The Civil Rights Cases*, 109 U.S. 3 (1883). *See Just Shoot Me,* 64 Vand. L. Rev. at 965 n. 7. Later federal attempts succeeded but again highlighted racial equality. The Civil Rights Act of 1964 "was enacted with a spirit of justice and equality in order to remove racial discrimination from certain facilities which are open to the general public." *Miller v. Amusement Enters., Inc*., 394 F.2d 342, 352 (5th Cir. 1968); *see* Civil Rights Act of 1964, 42 U.S.C. § 2000a.

As anti-discrimination provisions expanded over the years, the potential encroachment on religious liberty increased. The Massachusetts law at issue in *Hurley* was derived from the common law principle that innkeepers and others in public service could not refuse service without good reason. *Hurley*, 515 U.S. at 571. But like many other states today, Massachusetts had broadened the scope to add more categories and places. *Id*. at 571-572. Such vast expansion of covered categories often occurs with little analysis of the difference between race and newly protected classes—or as to how or when the criteria might be legitimately applied. A current District of Columbia statute, e.g., prohibits discrimination based on "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual." D.C. Code § 2-1402.31(a); *see Just Shoot*

Me, 64 Vand. L. Rev. 961 at 966; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 n. 2 (2000).

Early anti-discrimination laws narrowly defined "places of public accommodation" in terms of transient lodging, theaters, restaurants, and places of public entertainment. *Just Shoot Me*, 64 Vand. L. Rev. 961 at 966. Eventually these traditional "places" expanded beyond inns and trains to commercial entities and even membership associations—escalating the potential collision with First Amendment rights. *Dale*, 530 U.S. at 657. Even today, federal law remains comparable to common law rather than broadly sweeping in *any* establishment that offers *any* goods or services to the public. 42 U.S.C. § 2000a(b). State and local laws may or may not have exemptions for religious organizations. Here, Colorado has broken into the sanctuary and invaded religious territory where it has no business.

It is hardly "arbitrary" to avoid promoting a cause for reasons of religious conscience. Discrimination is arbitrary where irrelevant factors are used to exclude an entire class of people. When widespread refusals deny an entire group access to basic public goods and services—lodging, food, and transportation—protective measures are reasonable. This Court rightly upheld the civil rights legislation Congress passed to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But as protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants.

Religious liberty is particularly susceptible to infringement—"advocates of social change are anything but indifferent toward the teachings of traditional religion—and since they are not indifferent they are not tolerant." McConnell, *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 187. Political and judicial power can be used to squeeze religious views out of public debate about controversial social issues. Religious voices have shaped views of sexual morality for centuries. These views about right and wrong are deeply personal convictions that shape the way people of faith live their daily lives, privately and in public. Government has no right to legislate a view of sexual morality and then demand that even religious organizations facilitate it.

The clash between anti-discrimination rights and religious liberty places competing cultural values squarely before the courts. When the D.C. Circuit addressed the question "of imposing official orthodoxy on controversial issues of religious, moral, ethical and philosophical importance, upon an entity whose role is to inquire into such matters" it concluded that "[t]he First Amendment not only ensures that questions on difficult social topics will be asked, it also *forbids government from dictating the answers*." *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.,* 536 A.2d 1, 24 (D.C. 1987) (emphasis added). Anti-discrimination rights, whether statutory or derived from constitutional principles, may conflict with core religious liberty rights—as they do in this case.

The growing conflict between religion and anti-discrimination principles emerges in many contexts. Protection of one group may alienate another. Solutions are difficult to craft, particularly in the wake of expanding privacy rights. But protection of private sexual conduct from government intrusion does not trump the First Amendment rights of those who cannot conscientiously endorse it. Colorado's law extends far beyond the "meal at the inn" promised by common law and encroaches on the Archdiocese's right to operate religious preschools and participate in public life free of legal mandates that trample its religious doctrine.

II. THE MANDATE UNDERMINES EQUAL RIGHTS.

The stated purpose of the law at issue is to "provide children in Colorado access to voluntary, high-quality, universal preschool services free of charge" and to "establish quality standards for publicly funded preschool providers that promote children's early learning and development, school readiness, and healthy beginnings." *St. Mary*, 154 F.4th at 757; *see* Colo. Rev. Stat. § 26.5-4-204(1)(a), (d). Each eligible preschool must provide an "equal opportunity to enroll" on a nondiscriminatory basis and may not exclude a child based on certain protected characteristics of the child (or parents), including "religious affiliation, sexual orientation, [or] gender identity" (the "Mandate"). *St. Mary*, 154 F.4th at 757; 8 Code of Colorado Regulations 1404-1 § 4.110. But this *nondiscrimination* Mandate *discriminates* against the Parish Preschools and the families who

want to enroll their children in them. The rights heralded by the statute are anything but equal.

A. The Mandate undermines the government's own interest in ensuring equal access to preschool services.

Theoretically, *any* preschool child may enroll in *any* preschool the family chooses. But religious families may be left with no viable, affordable choice if their preferred preschool is excluded from eligibility based on its religiously motivated admission policies. Families who enroll in other preschools face no comparable requirement to sacrifice their core convictions. This transparent *inequality* cuts against Colorado's stated interest in free-of-charge, *equal* access.

B. The Mandate undermines the rights of the Parish Preschools.

Inequality is present not only with respect to the families who want to enroll their children in the Parish Preschools, but also the schools themselves. Colorado's treatment of the schools is "untenable . . . hard to square with the text of the First Amendment itself, which gives *special solicitude* to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188-189 (2012) (emphasis added); *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Review Comm'n*, 605 U.S. 238, 257 (2025) (Thomas, J., concurring) (same). The lower court in *Hosanna* had only required equality, reasoning that "Congress intended the ADA to

broadly protect employees of religious entities from retaliation on the job, subject only to a narrowly drawn religious exemption." *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.,* 597 F.3d 769, 777 (6th Cir. 2010). In reversing the Sixth Circuit, this Court distinguished *Smith*, which did not involve "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna*, 565 U.S. at 190. This case, similarly, pits broadly worded statutory coverage against the internal decision-making rights of a religious organization. The Archdiocese's decisions concerning the education of its youth, as affirmed by parents who voluntarily enroll their children, are central to its religious mission.

C. The Mandate undermines the parental rights of religious families by denying them equal access to the funding.

This Court has emphatically made clear that access to public benefits cannot be conditioned "on parents' willingness to accept a burden on their religious exercise." *Mahmoud v. Taylor*, 606 U.S. 522, 561 (2025). But that is precisely what this Mandate does. As a condition of the "universal" preschool program, Colorado "requires families to submit their children to instruction that poses 'a very real threat of undermining' the religious beliefs and practices that the parents wish to instill." *Id.* at 530, citing *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). Rather than respecting bedrock First Amendment rights, Colorado is more concerned that granting relief to the Parish Preschools "would undermine the government's interest in erasing barriers to equal

access caused by social stigma" associated with sexual orientation and gender identity. *St. Mary*, 154 F.4th at 773. That approach gives short shrift to the rights of religious citizens.

"The free exercise rights of individuals"—the parents and families impacted by the Mandate—"cannot be adequately protected unless the autonomy of religious institutions is also protected." *Cath. Charities*, 605 U.S. at 257 (Thomas, J., concurring). An organization's religious autonomy is not merely the accumulation of its members' individual rights. Religious associations enjoy the right to organize, formulate and disseminate their doctrine, and create internal policies procedures. Individuals voluntarily join "with an implied consent" to submit to the association's government. *See Watson v. Jones*, 80 U.S. 679, 728-729 (1872).

This case involves families who voluntarily enroll their children in the Parish Preschools and consent to its religiously motivated policies. The Archdiocese's religious ministry to children through the Parish Preschools is a matter that "affects the faith and mission of the church itself." *Hosanna*, 565 U.S. at 190. A church's commitment to educating its children is a core component of its overall ministry and admittedly a "constitutionally protected activity." *Foothills Christian Ministries v. Johnson*, 148 F.4th 1040, 1051 (9th Cir. 2025). The state may not override the rights of fit parents to make decisions for their children, including their enrollment in the Parish Preschools. Colorado frustrates those rights.

1. Parents have the primary right and responsibility for the religious upbringing of their children, including the decision to enroll them in a religious school program.

"The religious education and formation of students is the very reason for the existence of most private religious schools . . . ." *Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 591 U.S. 732, 738 (2020) ("*OLG*"). Much like the ministerial exception that protects the church's right to select its leaders, this Court should "preserve a church's independent authority to determine" (*id*. at 747) how to educate its young members in the faith. The recognition of that core purpose—"educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities"—was "implicit" in *Hosanna*. *Id*. at 753-754. *OLG* and *Hosanna* were both concerned with *who* would be "entrusted with teaching and conveying the tenets of the faith to the next generation." *Hosanna*, 565 U.S. at 200 (Alito, J., concurring). This case addresses the underlying right to make the internal decisions needed to accomplish this critical task, including religious doctrine and setting policies for personnel and families. Government scrutiny over "whether and how a religious school pursues its educational mission" would violate the autonomy of the Archdiocese and "raise serious concerns about state entanglement with religion. . . ." *Carson v. Makin*, 596 U.S. 767, 787 (2022).

The religious education of children, like all religious acts and practices, is generously protected by

our Constitution. Parents have primary responsibility for the religious upbringing of their children. *Mahmoud*, 606 U.S. at 547. "Drawing on 'enduring American tradition,' we have long recognized the rights of parents to direct 'the religious upbringing' of their children." *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 486 (2020) (quoting *Wisconsin v. Yoder*, 406 U.S. at 213-214, 232). This is not merely a right to teach religion in the confines of one's own home but extends to the choices parents wish to make for their children outside the home, including parental decisions to send their children to a private religious preschool like those the Archdiocese oversees, rather than a public institution. *Pierce v. Society of Sisters*, 268 U.S. 510, 532-535 (1925).

2. As a voluntary religious association, the Archdiocese has the right to establish its own religious doctrine and policies for the education of its children.

"Religious groups are the archetype of associations formed for expressive purposes." *Hosanna*, 565 U.S. at 200 (Alito, J., concurring). Voluntary religious associations have the right to organize, disseminate their religious doctrine, and establish an internal government. "All who unite themselves to such a body do so with an *implied consent* to this government, and are bound to submit to it." *Watson v. Jones*, 80 U.S. at 728-729 (emphasis added); *Cath. Charities*, 605 U.S. at 257 (Thomas, J., concurring) (same).

Colorado requires that the Parish Preschools sacrifice these fundamental rights as a condition of receiving a generally available public benefit. This demand defies this Court's rulings in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2020), *Espinoza*, 591 U.S. 464, *Carson*, 596 U.S. 767, and long-established principles of religious autonomy (Sect. III).

Parents voluntarily choose to enroll their children in the Parish Preschools. It is not the business of the state to intervene in the relationships between the enrolled families and the Preschools. Admission policies, curriculum, personnel and other matters are the sole responsibility of the Archdiocese, not the government. Those families who have voluntarily enrolled their preschool children "are bound to prior rules consensually entered." Carl H. Esbeck, *Church Autonomy, Textualism, and Originalism: SCOTUS's use of History to Give Definition to Church Autonomy Doctrine*, 108 Marq. L. Rev. 705, 712 n. 27 (Spring 2025), citing *Ord. of St. Benedict v. Steinhauser*, 234 U.S. 640, 647-51 (1914). They must affirm their agreement with the church's teachings, including doctrines related to human sexuality. Colorado does not deny parents the right to select a Parish Preschool but impedes that decision by denying them the financial assistance that would otherwise be readily available.

III. THE MANDATE UNDERMINES THE RELIGIOUS AUTONOMY OF THE ARCHDIOCESE IN CORE MATTERS OF FAITH AND DOCTRINE.

This Court has long recognized "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of . . . faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952). Indeed, "the autonomy of religious groups . . . has often served as a shield against *oppressive civil laws*." *Hosanna*, 565 U.S. at 199 (Alito, J., concurring) (emphasis added). This is not a church autonomy case per se, but Colorado's exclusion of the Parish Preschools is an "oppressive civil law" that intrudes on the schools' independence in matters of religious faith and doctrine. The schools' "faith and doctrine"—a core matter of religious autonomy—determines their eligibility for funding. This inquiry "scrutinize[es] whether and how a religious school pursues its educational mission" and "raise[s] serious concerns about state entanglement with religion." *Carson v. Makin*, 596 U.S. at 787.

The Mandate is not an "outright prohibition," but the state's pressure to compromise religious doctrine is surely "indirect coercion or [a] penalt[y]." *Carson*, 596 U.S. at 778, quoting *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988). "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of *or placing of conditions upon a benefit* or privilege." *Carson*, 596 U.S. at 778 (emphasis added), quoting

Sherbert v. Verner, 374 U.S. 398, 404 (1963). To receive the otherwise available funding, the Parish Preschools must dramatically revise their admission policies in conflict with their religious doctrine concerning human sexuality. "The Archdiocese does not recognize same-sex relationships or transgender status, and it states that enrolling a child of same-sex parents in a Catholic school is 'likely to lead to intractable conflicts.'" *St. Mary*, 154 F.4th at 759.

"The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned." *Watson v. Jones*, 80 U.S. at 728-729. *Watson* "radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation." *Hosanna,* 565 U.S. at 185-186. The First Amendment protects the right of the Parish Preschools "to establish their own rules and regulations for internal discipline and government." *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 724 (1976). Courts must accept these internal decisions of "discipline, or of faith, or ecclesiastical rule, custom, or law." *Id.* at 710.

The Archdiocese has authority to determine that "certain activities"—the maintenance of Parish Preschools to educate the young—"are in furtherance of [its] religious mission." *Corporation of the Presiding Bishop of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). The education of young people in the faith, "inculcating its teachings, and training them to live their faith," is a core responsibility of private religious

schools such as the Parish Preschools. *OLG*, 591 U.S. at 753-754.

Religious organizations are broadly protected concerning the admission, discipline, and removal of members. *Watson v. Jones*, 80 U.S. at 733 ("conformity of the members of the church to the standard of morals required of them"). In overseeing the Parish Preschools, the Archdiocese sets policies that comply with its religious doctrine, including the requirement that parents and personnel sign a "Statement of Community Beliefs" to affirm agreement with the Catholic Church's teachings. *St. Mary*, 154 F.4th at 759. Some of these teachings, beliefs, and policies reflect the Church's deep and longstanding religious convictions about human sexuality.

"[I]n a nation marked by the separation of church and state," the state may not take sides in what is essentially "a dispute over correct religious doctrine or practice." Esbeck, *Church Autonomy,* 108 Marq. L. Rev. at 708. "The law knows no heresy, and is committed to the support of no dogma . . . ." *Watson v. Jones*, 80 U.S. at 728. But Colorado takes sides, demanding that the Parish Preschools adopt policies that conflict with their religious doctrine and practice. This implicitly—and impermissibly—declares the Church's beliefs about sexuality to be "heresy." The state's demands improperly encroach on theological territory.

IV. THE MANDATE IS NEITHER NEUTRAL NOR MERELY INCIDENTAL IN ITS BURDEN ON RELIGIOUS LIBERTY.

The Tenth Circuit characterized the City's non-discrimination policy as "a neutral, generally applicable law" under *Smith*. The court cites the California Supreme Court, which "held in a single sentence" that California's public accommodations law (the Unruh Act) is neutral and generally applicable under *Smith* because its text requires equal services for all. *St. Mary*, 154 F.4th at 765, citing *North Coast Women's Care Medical Group v. Superior Court,* 189 P.3d 959, 965 (Cal. 2008). The court's cramped view of *Smith* would find an infringement of religious liberty *only if* religion is expressly targeted, as in *Trinity Lutheran*, 582 U.S. at 462 (religious identity), *Espinoza*, 591 U.S. at 487 (status-based discrimination), and *Carson*, 596 U.S. at 768 (religious use of funds). *St. Mary*, 154 F.4th at 763-764. Absent such explicit targeting, the Tenth Circuit would conclude that religion is merely "infringed incidentally" and thus *Smith*'s "neutral and generally applicable" standard is satisfied. *Id.* at 765.

But the demand to compromise religious doctrine is even more intrusive than the targeting present in *Trinity Lutheran*, *Espinoza*, and *Carson*. There is nothing "neutral" about a policy that openly and obviously defies time-honored religious convictions about the nature of human sexuality and brands such beliefs as "discrimination." People of faith will inevitably challenge laws forcing them to abandon their core religious convictions about sexuality. Even where the law does not facially target religion—or

where government officials successfully conceal their hostility—the inevitable conflict with religious liberty is foreseeable. Dissenting Justices in *Obergefell* sent a clarion call about the coming collision. Marriage is not merely a governmental institution but also a religious institution: "It appears all but inevitable that the two will come into conflict." *Obergefell*, 576 U.S. at 734 (Thomas, J., dissenting). The viewpoint of "good and decent people [who] oppose same-sex marriage as a tenet of faith" is protected and "actually spelled out" in the First Amendment—"unlike the right imagined by the majority." *Id.* at 711 (Roberts, C.J., dissenting).

"Government fails to act neutrally when it *proceeds in a manner intolerant of religious beliefs or* restricts practices because of their religious nature." *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 533 (2021) (emphasis added). The key word here is "or" – Colorado "proceeds in a manner intolerant of [the Parish Preschools'] religious beliefs." That is sufficient to find that neutrality is lacking. "Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their *religious exercise*." *Carson*, 596 U.S. at 789 (emphasis added).

The Mandate's burden on religious liberty, for both the Parish Preschools and the families it serves, is anything but "incidental." The *Obergefell* majority's reassurance falls flat and religious discrimination, thinly disguised, slides in through the back door. Respecting a religious organization's right to operate within its religious doctrine does not permit *any* citizen—let alone "every citizen"—"to become a law

unto himself." *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)). Nor is it tantamount to "requir[ing] state support for [private] discrimination." *St. Mary*, 154 F.4th at 774, citing *Norwood v. Harrison*, 413 U.S. 455, 463 (1973). It simply allows the organization to follow its own core beliefs without sacrificing generally available public benefits.

CONCLUSION

This Court should reverse the Tenth Circuit ruling.

Respectfully submitted,

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