No. 25-581

In the Supreme Court of the United States

ST. MARY CATHOLIC PARISH IN LITTLETON, 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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, ADVOCATES FOR FAITH AND FREEDOM, CALVARY CHAPEL SAN JOSE, AND PASTOR MIKE MCCLURE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of religious liberty and parental rights. The ACLJ has appeared before this Court in many cases advocating for religious liberty, as counsel for a party, *e.g., Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); or for amicus, *e.g., Carson v. Makin*, 596 U.S. 767 (2022).

Advocates for Faith & Freedom is a religious, nonprofit legal organization dedicated to protecting the fundamental constitutional liberties that have long defined the United States as a beacon of freedom. These include the rights to the free exercise of religion and freedom of speech.

Calvary Chapel San Jose is a Bible-believing, non-denominational Christian church located in San Jose, California. Since 2003, Michael McClure has led the Church as its Senior Pastor.

Calvary Chapel and Pastor McClure, represented by ACLJ and Advocates for Faith and Freedom attorneys, are the petitioners in *Calvary Chapel San Jose v. California*, U.S. No. 25-703, a case which, like the present case, involves *inter alia* the analysis of when and how exemptions to a government rule trigger strict scrutiny under the Free Exercise Clause. This Court has apparently placed the *Calvary Chapel San Jose* petition on hold pending disposition of the

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[1] No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

present case. Amici therefore have a strong interest in having petitioner St. Mary Catholic Parish prevail and, at the least, this Court then grant the petition in *Calvary Chapel*, vacate the decision below, and remand for further consideration in light of the forthcoming decision in *St. Mary Catholic Parish*.

SUMMARY OF ARGUMENT

Colorado's Universal Preschool Program (UPK) forces religious schools to choose between religious fidelity and participation in an otherwise available government educational program. UPK invites private providers to participate in a generally available public benefit, and UPK expressly permits those providers to employ a wide range of admissions preferences to preserve secular priorities. But Colorado forbids religious schools from using comparable preferences to preserve their religious identity, mission, and community. That is precisely the kind of unequal treatment of religious exercise that triggers strict scrutiny under this Court's Free Exercise precedents. *Infra* § I(A).

That burden is especially serious in the context of religious education. *Infra* § I(B). This Court has repeatedly recognized that religious schools do not merely transmit information; they carry out a faith community's responsibility to form children in religious belief, practice, and identity. The First Amendment protects that autonomy. A religious school's ability to maintain the religious character of its educational community is therefore not peripheral to its mission. It is central to it.

Colorado nevertheless treats secular admissions preferences more favorably than religious ones. Preschools may prefer children based on school-

district boundaries, family relationships, continuity of care, employee relationships, participation in cooperatives, language needs, community affiliation, interests, activities, and similar secular considerations. Yet Colorado eliminated the congregational preference and refuses to allow religious schools to give comparable weight to faith-based considerations. The resulting rule is not neutral or generally applicable. It subjects religious choices to disfavored treatment while permitting analogous secular choices to control admissions decisions.

Nor can Colorado avoid strict scrutiny by noting that preferential admissions decisions remain subject to departmental review. A regime that permits individualized approval or disapproval of departures from a general rule is the opposite of general applicability. Such discretionary review only confirms that strict scrutiny applies. *Infra* § I(C).

Finally, *Christian Legal Society v. Martinez* should not alter the analysis. *Infra* § I(D). To the extent that decision suggested government may condition public benefits on a religious organization's willingness to disregard religious standards central to its identity, it is inconsistent with this Court's broader Free Exercise and religious-autonomy jurisprudence. At a minimum, *CLS* should be confined to its facts and should not be extended to allow a state to compel religious schools to surrender mission integrity as the price of participating in a public preschool program.

Because Colorado permits secular preferences while disallowing religious preferences, its program is neither neutral nor generally applicable. The Tenth Circuit therefore erred by applying rational-basis review. This Court should reverse and make clear that Colorado must satisfy strict scrutiny before burdening religious schools in this way.

ARGUMENT

Under this Court's teachings, a government program that allows private parties to prioritize *secular* goals but not *religious* goals triggers strict scrutiny review. *Tandon v. Newsom*, 593 U.S. 61 (2021) (*per curiam*); *Employment Division v. Smith*, 494 U.S. 872 (1990). Under that rule, the disposition of the present case is straightforward. The Colorado Universal Preschool Program (UPK) lets preschools adopt a variety of *secular* "preferences" – e.g., geographical location, blood relationships, continuity of placement, common interests – to govern the admission of students. But schools – here, *religious* schools – are not allowed to prefer adherence to the *religious* school's *faith* or *religious* mission. That disparity disfavors religious values relative to secular values and thus triggers strict scrutiny. The Tenth Circuit, however, applied only a "rational basis standard of review." Pet. App. 47a. That was error. This Court should reverse.

I. COLORADO'S PRESCHOOL PROGRAM ELEVATES SECULAR "PREFERENCES" FOR STUDENT ADMISSIONS OVER RELIGIOUS PREFERENCES AND THUS MUST UNDERGO STRICT SCRUTINY.

Petitioner religious schools want to maintain mission integrity and coherence, including in their student admissions policies. The state, while allowing preschools to pursue a variety of other, secular priorities, nevertheless requires religious schools to disregard theological coherence in the name of a nondiscrimination rule. The conflict and consequent burden on religious beliefs is not in dispute. *See*

Fulton v. City of Philadelphia, 593 U.S. 522, 532 (2021) ("it is plain that the [government's] actions have burdened [plaintiff's] religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs"). The question is whether imposition of that burden violates the Free Exercise Clause. And under *Smith* and a host of this Court's other Free Exercise decisions, a threshold inquiry is whether Colorado's regulatory limits are "neutral and generally applicable." *Trinity Lutheran Church v. Comer*, 582 U.S. 449, 460 (2017). If not, strict scrutiny applies. *Tandon*, 593 U.S. at 62).

Colorado's response is to deny that there are any exceptions to its rule. Br. in Opp. at 1 ("Colorado's law . . . does not allow for *any* exceptions") (emphasis in original). But that badly misdescribes the state's preschool program. Colorado's UPK program expressly allows schools to implement a variety of "preferences" in their admissions policies – just not *religious* preferences. That suffices to trigger strict scrutiny. As this Court phrased it, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62) (emphasis in original).

A. Colorado Expressly Allows Preschools to Implement *Secular* Preferences in the Admissions Process.

Colorado lets preschools participate in the UPK program while implementing a variety of secular

priorities in the admissions process. The Tenth Circuit detailed Colorado's preference system:

> [T]he Department added a function where preschools can set different preferences in how the algorithm matches them with students (hereinafter the preference system). This preference system was designed to help match preschools with specific groups of students that they are designed to serve. For instance, preschools can prefer to be matched with students in a way that is consistent with school district boundaries. *Preschools are allowed to decline to enroll children* they are matched with *who do not fit their enrollment preference,* although their choice to decline a student is subject to Department review.

Pet. App. 7a (emphasis added). As the Tenth Circuit detailed, the preference system originally included "ten different preferences that could be selected," Pet. App. 8a:

> 1. Faith-based providers granting preference to members of their congregation;
> 2. Cooperative preschool providers requiring participation in the cooperative;
> 3. School districts maintaining enrollment consistent with their established boundaries;
> 4. Participating preschool providers reserving placements for a student(s) with an Individualized Education Program (IEP) . . .;
> 5. Head Start programs' adhering to any applicable federal law requirements including eligibility requirements;

> 6. Participating preschool providers granting preference to an eligible child of one (1) of their employees;
> 7. Participating preschool providers granting preference to an eligible child to ensure continuity-of-care for that child;
> 8. Participating preschool providers granting preference to an eligible child to keep siblings similarly located;
> 9. Participating preschool providers granting preference to an eligible child who is multilingual, to ensure proper delivery of services to that child[; and]
> 10. Participating preschool providers may grant preference to an eligible child based: on the child and/or family being a part of a specific community; having specific competencies or interests; having a specific relationship to the provider, provider's employees, students, or their families; receiving specific public assistance benefits; or participating in a specific activity.

Pet. App. 8a-9a.

Two conclusions follow immediately from this remarkable list. First, this is *not* an all-comers policy. Second, Colorado has prioritized accommodation of a host of *secular* concerns – geographical proximity (#3), blood relations (#6, #8), participation in a voluntary association (a co-op, #2), language skills (#9), "interests" (#10), etc. But, aside from the congregational preference (#1) – which the state later removed – there is *no* accommodation for *religious* concerns. In other words, the state has loudly and clearly stated that there are many values the state considers important enough to warrant deviation

from an all-comers policy, but *religion, even for a religious school,* is not one of those values.

The state's intentional removal of the congregational preference, Pet. App. 16a & n.8,[2] only underscores that disparity. The state did not just overlook the desire of religious preschools to maintain a coherent religious identity by preferring members of their faith community. Rather, the state affirmatively abrogated that option.

Importantly, Colorado's intentional revocation of the congregational preference does not "fix" the program by removing an exception. Rather, this revocation itself independently violates the Free Exercise Clause. Under the revised rules, preschools can prioritize participation in a co-op, but not participation in a house of worship; geographical boundaries, but not theological or doctrinal boundaries; relationships with teachers or siblings, but not relationships with God; having "specific competencies or interests" that are secular, but not a competency or interest in religious fidelity. This blatant double standard for secular versus religious values epitomizes the lack of "neutrality" and "general applicability" which *Smith* and subsequent cases hold subjects a restriction to strict scrutiny.

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[2] Colorado removed the congregational preference "to comply with state law," Pet. App. 16a n.8, namely, the statutory nondiscrimination provision. This was backwards. The state should have modified the state statute to comply with the Free Exercise Clause, instead of modifying the program to make it even less compatible with the Free Exercise Clause. But in any event, the state's removal of the congregational preference – and only that preference – shows that the state considers all of the remaining preferences to be consistent with the nondiscrimination rule. In other words, Colorado takes the position that, as a matter of state law, its laundry list of preferences is fully consistent with the nondiscrimination statute.

B. Colorado's Disfavoring of Religious Values over Secular Values Is Especially Egregious in the Context of Religious Education.

Colorado's elevation of secular preferences over religious preferences suffices to trigger strict scrutiny. Here, moreover, the Free Exercise problem is particularly "odious to our Constitution," *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 489 (2020) (internal quotation marks and citation omitted), because it strikes at the autonomy of religious schools to define and pursue their mission.

"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). In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), this Court held that the First Amendment bars government interference with a religious institution's selection of its ministers who teach religion. The Court explained that religious groups have a right "to shape [their] own faith and mission," and hence this autonomy forbids "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so." *Id.* at 188-89.

Our Lady of Guadalupe reaffirmed and extended *Hosanna-Tabor*'s principle, emphasizing that what matters is not the employee's title, but whether the position involves "vital religious duties." 591 U.S. at 756. Elementary school teachers, the Court held, perform such duties because "their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools' definition and explanation of their roles is important." *Id.* at 757.

The principle animating *Hosanna-Tabor* and *Our Lady of Guadalupe* applies not only to teachers but to a school's efforts in general to maintain theological coherence and mission integrity. This Court's religious autonomy decisions recognize 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 church government as well as those of faith and doctrine.'" *Hosanna-Tabor*, 565 U.S. at 186 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

Colorado's exclusion of religious preferences from its preschool admissions regime therefore strikes at the heart of religious autonomy. Religious schools can participate in the UPK program – but *only* if they surrender their ability to insist upon mission integrity.

A religious school's ability to form children in the faith cannot be severed from its ability to preserve the religious character of the community in which that formation occurs. By permitting secular preferences while forbidding religious schools from giving comparable weight to faith-based considerations, Colorado does not just discriminate against religious participants; it unconstitutionally conditions a public benefit upon forfeiture of the religious autonomy which the First Amendment protects. *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) ("a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program").

C. Colorado's Power to "Review" Preferential Admissions Does Not Change the Applicability of Strict Scrutiny.

Under the Colorado program, "[p]reschools are allowed to decline to enroll children . . . who do not fit their enrollment preference," Pet. App. 7a. To be sure, "their choice to decline a student is subject to Department review." *Id*. But such individualized review of exceptions does not alter the calculus. To the contrary, this Court has squarely held that a system of individualized exemptions itself renders a law not generally applicable. *Fulton*, 593 U.S. at 533. All the more does a system of individualized *disallowances* of exemptions make a law not generally applicable. Again, strict scrutiny applies.

D. The Erroneous Decision in *CLS v. Martinez* Should Not Alter the Analysis.

One decision of this Court stands in tension with these important principles, namely, *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). In *CLS*, a government entity imposed the requirement that, as a condition of the benefits available to student clubs, every club must adopt a policy of indifference regarding religion and religious norms for behavior. *Id*. at 669-73. In other words, student groups were relegated to second-class status unless they in effect professed that a member's failure to adhere to religious and moral standards was irrelevant to the identity and effectiveness of a religious club.

If *CLS* were taken at face value, Colorado would have a stronger case here. Obviously, if a government body can require a private club to set aside its moral

and religious criteria for membership, even in the context of access to a speech forum, then arguably the government can require the operators of a private school similarly to turn a blind eye to speech, conduct, or situations they may regard as inimical to their faith. But because *CLS* is so profoundly inconsistent with broader, preexisting First Amendment principles – principles *CLS* did not purport to overturn – this Court should not rely upon *CLS* here, but rather should either ignore or disavow its pernicious holding.

The policy requirement in *CLS* was not limited to participation in a particular, discretionary program – e.g., a student work camp project. Nor was the requirement limited to a small subset of the population – e.g., those applying for an assistantship position in the "diversity office" or campus chaplaincy. Instead, the rule was imposed upon the entire relevant universe – all students attending the state law school – as a condition of a standard, generally available benefit – forming a recognized club. Furthermore, the requirement was not directly linked to the program at issue. A policy on religion or moral behavior generally has nothing to do with student club activities as such (e.g., chess, gaming, drama, photography, foreign languages), and where such a policy might be relevant, it could as easily be completely counterproductive, indeed nonsensical – e.g., forcing a Jewish club to allow Muslim or Christian officers.

To the extent that *CLS* stands for the proposition that government has the power to impose ideological strings on benefits even when those strings are destructive of the recipient's mission integrity, *CLS* must be disavowed. To the extent that *CLS* says a government body can extract a pledge of submission

to the currently regnant ideology or else impose second-class status upon the population it governs, the *CLS* decision is deeply and fundamentally inconsistent with liberty in general and the free exercise of religion in particular (not to mention free speech).

At a minimum, *CLS* must be read as limited to its peculiar facts. The *CLS* Court observed that, while a Christian group bizarrely had to agree that its officers need not be Christian and need not profess to follow Christian norms, such a group could nevertheless adopt "generally applicable membership requirements unrelated to status or beliefs." *Id*. at 671 n.2 (internal quotation marks omitted). If these permissible "good-behavior," "attendance, [and] skill measurements" requirements, *id*., allow a club to maintain its identity and integrity – e.g., by treating profound ignorance or disregard of the club's Christian-based norms as a disqualifier – then *CLS* would stand only for the dangerous, but more narrow, proposition that clubs must *profess* indifference to their group's identity but may nevertheless *maintain* group mission coherence through conduct and skill requirements.

There is an essential distinction between government requiring purportedly nonpartisan, nonideological programs like state colleges to provide access neutrality, on one hand, and government imposing such rules on mission-driven entities like private religious schools, on the other. The latter triggers strict scrutiny (and is plainly unconstitutional), and this Court should say so.

CONCLUSION

This Court should reverse the judgment of the Tenth Circuit.

Respectfully submitted,

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