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

BRIEF OF NATIONAL ASSOCIATION OF EVANGELICALS; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE LUTHERAN CHURCH-MISSOURI SYNOD; THE COALITION FOR JEWISH VALUES; THE JURISDICTION OF THE ARMED FORCES AND CHAPLAINCY OF THE ANGLICAN REFORMED CATHOLIC CHURCH; AND NATIONAL APOSTOLIC CHRISTIAN LEADERSHIP CONFERENCE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici represent diverse faiths—Latter-day Saint, Evangelical, Baptist, Lutheran, Anglican, Apostolic Pentecostal Christian, and Jewish—who share a profound commitment to preserving religious freedom under the Constitution. Each of our faith communities has suffered unequal treatment by government officials who have disregarded the Constitution's guarantee of religious equality. That experience teaches us that freedom from religious discrimination ought to be the irreducible minimum secured by the First Amendment. We submit this brief to defend that principle, just as some *amici* previously did in the cases culminating in *Carson* v. *Makin*, 596 U.S. 767 (2022).

SUMMARY OF ARGUMENT

Review has been granted to decide "[w]hether *Carson* v. *Makin* displaces the rule of *Employment Division* v. *Smith* only when the government explicitly excludes religious people and institutions." Pet.ii. We join petitioners in rejecting that misreading of the Free Exercise Clause. The Constitution "protects against policies that impose more subtle forms of interference" with religious practice. *Mahmoud* v. *Taylor*, 606 U.S. 522, 548 (2025). Colorado does not have to exclude Catholics by name to exclude them in fact.

We write to approach the question from a different perspective. Colorado's denial of funding to petitioners because of their religious beliefs and practices is not subject to *Smith*'s neutral-and-generally-applicable-

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

law standard. See *Emp. Div.* v. *Smith*, 494 U.S. 872, 877 (1990) (Under the Free Exercise Clause, "[t]he government may not * * * impose special disabilities on the basis of religious views or religious status."). By conditioning eligibility for public benefits on a nondiscrimination rule that contradicts petitioners' religion, Colorado has discriminated because of religion. Religious discrimination is governed by the First Amendment's categorical rule against religious discrimination—not by *Smith*. Constitutional text, original understanding, historical background, and judicial precedent confirm that religious discrimination offends the Religion Clauses. This Court has never approved government-sponsored religious discrimination. Embracing a categorical rule against religious discrimination here would reflect this Court's established practice.

Colorado engaged in religious discrimination when it denied petitioners a grant for preschool education only because their Catholic convictions preclude them from accepting the State's LGBT policy. That denial treats petitioners unequally because of their faith. Colorado has thus engaged in religious discrimination formally indistinguishable from civil disabilities the Founding generation expressly rejected as odious.

The Tenth Circuit was mistaken to hold that a claim of religious discrimination demands proof of animus or hostility. Religious discrimination is wrong in itself. Excluding a person or institution from a widely available government program because of religious beliefs and practices denies them their share of American citizenship and defies the Constitution's guarantee of religious freedom.

Religious discrimination is not only a matter of constitutional principle. Religious parents educate

their children at religious schools out of a sense of religious duty. Discriminating against religious schools because of their faith inflicts serious practical harms on religious people and institutions alike. When religious schools carry out religious standards in admissions and employment, they sometimes collide with State officials who apply pressure to conform with State policy. Schools that do not bend sometimes break. Here, the record shows that Colorado's denial of preschool funding to petitioners led more than one school to close its doors. Unequal treatment destroyed educational institutions, to the detriment of the religious children and families they served. Petitioners' experience is not isolated. Other decisions catalog the tangible harms that follow religious discrimination.

Colorado's denial of funding to petitioners violates the First Amendment and cannot stand. The Tenth Circuit's contrary decision should be reversed.

ARGUMENT

I. THE FIRST AMENDMENT CATEGORICALLY PROHIBITS RELIGIOUS DISCRIMINATION.

A. The First Amendment Was Originally Understood as a Prohibition Against Religious Discrimination.

1. The First Amendment declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Those words convey a "common purpose"—"to secure religious liberty." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 313 (2000) (internal quotation marks omitted) (quoting *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962)). For too long, it was believed that the Religion Clauses were "frequently in tension." *Locke* v. *Davey*, 540 U.S. 712, 718 (2004). That

outmoded approach has given way to a more "natural reading" that "the Clauses have 'complementary' purposes, not warring ones." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 510 (2022). The Religion Clauses work in tandem—not in tension.

Both Clauses forbid religious discrimination. A law "*respecting* an establishment of religion" extends beyond the creation of a state church to cover laws historically associated with suppressing religious denominations or beliefs other than the government's favored ones. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2110–30 (2003). Among such laws are civil disabilities, laws denying civil rights because of religious belief, practice, or affiliation. (More on civil disabilities below.) And since the "exercise" of religion must be "free"—that is, unconstrained—laws that attach special burdens or penalties because of religious belief or practice wrongly curtail that freedom.

2. A close inquiry into the First Amendment's original understanding confirms that textual interpretation. State conventions debating whether to ratify the 1787 Constitution proposed amendments aimed at securing religious freedom. See Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 508–25 (detailing the state-by-state ratification of the Constitution). Six States—Massachusetts, New Hampshire, New York, North Carolina, South Carolina, and Virginia—proposed amendments to Congress before the First Congress met in 1789. *Id.* at 511. All but those from Massachusetts and South Carolina sought to fortify religious freedom. See *id.* at 511 n.a1. Minority coalitions in Maryland,

Massachusetts, and Pennsylvania offered similar amendments. See *The Complete Bill of Rights* 12 (Neil H. Cogan ed., 2d ed. 2015). Four of these proposals expressly prohibited religious discrimination. See *ibid.*

Take Virginia. It offered an amendment declaring that "all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others." Va. Ratifying Convention, Proposed Amendments, June 27, 1788, *reprinted in id.* at 13. The concluding clause, forbidding religious favoritism, also appeared in a proposal from North Carolina.[2] See *id.* at 12–13.[3]

New York's proposal likewise guaranteed religious equality. "[T]he People have an equal, natural, and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience, and * * * no Religious Sect or Society ought to be favoured or established by Law in preference of others." N.Y. Ratifying Convention, Proposed Amendments, July 26, 1788, *reprinted in id.* at 12.

Maryland's Antifederalist minority submitted an amendment providing that "all persons [are] equally entitled to protection in their religious liberty." Md.

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[2] North Carolina initially rejected the Constitution "until a declaration of rights and other amendments were laid before Congress or a new convention." Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788*, at 423 (2010). But the State still conveyed amendments to Congress "almost identical to those proposed by Virginia." *Ibid.*

[3] Rhode Island offered an amendment virtually identical to that advanced by Virginia and North Carolina in May 1790, nearly a year after Madison introduced the Bill of Rights. See *The Complete Bill of Rights* at 13.

Ratifying Convention, Minority Proposals, Apr. 26, 1788, *reprinted in ibid.*

3. These State proposals influenced Madison as he drafted what became the Bill of Rights. See Stuart Leibiger, *James Madison and Amendments to the Constitution, 1787–1789: "Parchment Barriers*," 59 J. S. Hist. 441, 460 (1993) (describing how Madison "stud[ied] the two hundred or so amendments recommended by the various state conventions" while preparing constitutional amendments to present in Congress); William Lee Miller, *The Business of May Next: James Madison & the Founding* 252 (1992) (describing Madison's use of a pamphlet collecting the amendments submitted by ratifying conventions).

On June 8, 1789, Madison offered nine amendments in the House of Representatives. In language mirroring the State proposals, he articulated a sweeping vision of religious freedom:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

1 *Annals of Cong.* 451 (Joseph Gales ed., 1834).

The House referred the amendments to a Select Committee of eleven members, including Madison. They revised the proposal to read, "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 757; see also *id.* at 699 (report by Rep. Vining for the Select Committee).

During floor debate, Madison explained that he took these words to mean that "Congress should not establish a religion, and enforce the legal observation

of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.* at 758. He reminded his fellow representatives that such protection "had been required by some of the State Conventions," who feared that the Necessary and Proper Clause "enabled [Congress] to make laws of such a nature as might infringe the rights of conscience, and establish a national religion." *Ibid.* Madison viewed the amendment as a way "to prevent these effects." *Ibid.* He feared both the abuse of federal power and burdens on "the rights of conscience" from the lawful exercise of federal power. *Ibid.*

Following debate, the House and Senate approved separate amendments protecting religion. See *id.* at 796; S. Journal, 1st Cong., 1st Sess. 77 (1820). A conference committee reformulated the draft into the familiar words of the First Amendment: "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof." *The Complete Bill of Rights* at 8 (Oliver Ellsworth's handwritten notes). The requisite two-thirds majority of both houses of Congress approved the Amendment in that form. See 1 *Annals of Cong.* at 948; S. Journal at 88.

Congress then passed a joint resolution transmitting twelve proposed amendments (including two that were rejected) for ratification by the State legislatures. See 1 Stat. 97 (1789). After that, the historical record regarding the Bill of Rights all but vanishes. "We know almost nothing about what the state legislatures thought concerning the meanings of the various amendments, and the press was perfunctory in its reports, if not altogether silent." Leonard W. Levy, *Origins of the Bill of Rights* 43 (1999). Records of State ratifying convention amendments to the 1787

Constitution and the congressional debates on the Bill of Rights are the best primary evidence we have of the First Amendment's original meaning.

4. Other contemporaneous sources confirm that the First Amendment was originally understood to entail categorical protection against religious discrimination. Alexander Hamilton compared the governments of the old world with the "more equal government" of this country. Alexander Hamilton, *Report on Manufactures*, Dec. 5, 1791, *reprinted in Alexander Hamilton: Writings* 662 (Joanne B. Freeman ed., 2001). He singled out "what is far more precious than mere religious toleration—a perfect equality of religious privileges." *Ibid.*

An early constitutional scholar, William Rawle, agreed that under the Constitution, "the equality of all our citizens" precludes "the denial of the smallest civic right" out of "religious intolerance." William Rawle, *A View of the Constitution of the United States of America* 117 (1825). Justice Story likewise perceived that the First Amendment "sought to cut off the means of religious persecution * * * and the power of subverting the rights of conscience in matters of religion." Joseph Story, *Commentaries on the Constitution of the United States* 701 (Carolina Acad. Press 1987) (1833).

5. Religious equality persisted as a central feature of constitutional discourse when the Fourteenth Amendment extended the Constitution's shelter for religious freedom to the States. See Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1152 (1994). Writing near the adoption of the Fourteenth Amendment, Thomas Cooley equated religious discrimination with persecution.

"Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and if based on religious grounds, is religious persecution." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 469 (2d ed. 1871). He stressed that "[i]t is not mere toleration which is established in our system, but religious equality." *Ibid.*

6. Religious discrimination is repugnant to the First Amendment. Originalist history says so. So did Madison, Hamilton, Story, and Cooley. They read the Religion Clauses as a right to untrammeled religious equality. See, *e.g.*, Hamilton, *Writings* at 662; Rawle, *A View of the Constitution* at 119; Story, *Commentaries* at 701; Cooley, *Constitutional Limitations* at 469. No American should lose the right and privilege of equal citizenship because of religious belief, practice, or affiliation. The First Amendment makes freedom from religious discrimination an irreducible minimum.

B. Experience with Civil Disabilities Under English and Colonial Law Led Americans to Reject Religious Discrimination.

The First Amendment's prohibition on religious discrimination reflects centuries of experience. Hardships suffered by religious minorities under English and colonial laws imposing civil disabilities were still fresh in the minds of the Founding generation. These laws conditioned civil rights on religious affiliation, belief, or conduct. They were notorious.

1. Take English law. It imposed civil disabilities on non-conformists (Christians outside the Church of England). Catholics were the most visible target. Failure to take an oath renouncing certain Catholic

doctrines, including transubstantiation, disqualified a person from holding public office, sitting in Parliament, or bringing a lawsuit. See, *e.g.*, Second Test Act 1678, § III, 30 Car. II, stat. 2, cap. 1, *reprinted in English Historical Documents 1660–1714*, at 391–94 (Andrew Browning ed., 1953). Civic and military officials—even schoolteachers—had to take Anglican communion or lose their jobs. See Corporation Act 1661, § IX, 13 Car. II, stat. 2, cap. 1, *reprinted in id.* at 376.

In a volume well-known to the founding generation, Blackstone described how Catholic believers could "bring no action at law, or suit in equity," or "travel above five miles from home" without a license, at the risk of "forfeiting all their goods." 4 William Blackstone, *Commentaries* 55 (1769). They could not even be married or buried, or have a child baptized, except by an Anglican minister. See *ibid.*

A distinguished First Amendment scholar suggests that civil disabilities were unevenly applied and that Catholics outside of Ireland seldom experienced these laws' full force. See Michael W. McConnell, *Establishment and Toleration in Edmund Burke's "Constitution of Freedom*," 1995 Sup. Ct. Rev. 393, 402–03. Even so, civil disabilities marginalized non-Anglicans for their faith and stigmatized them as inferior.

2. American colonies also deployed civil disabilities. Massachusetts Bay's mistreatment of religious dissidents is well known. See, *e.g.*, Samuel Eliot Morison, *Builders of the Bay Colony* 126 (1930). But the imposition of civil disabilities was not confined to the Puritan establishment. They appeared in other colonies—up to the eve of the American Revolution:

> In 1763, Roman Catholics as well as non-Christians, including Jews, were denied the franchise and other rights of citizenship even in Rhode Island * * * [.] Nor was religious freedom of Catholics protected in Massachusetts Bay under its charter, while in the province of Maryland a harsh code directed toward the complete suppression of their religion still remained on the statute books. In Connecticut men were being haled into court and fined or imprisoned for the crime of separatism; neither "unitarians" nor "deists" were capable of holding any office. In Virginia, Baptist and other dissenting preachers were liable to persecution for carrying on their activities, and so late as 1768 many of them were actually imprisoned as disturbers of the peace.

Lawrence Henry Gipson, *The Coming of the Revolution, 1763–1775*, at 13 (1954) (citations omitted).

Revolutionary-era Americans came to loathe civil disabilities. "[T]he bulk of complaints about infringement of religious liberty during the preconstitutional period apparently concerned outright discrimination against dissenters from the dominant sect." David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888*, at 440 (1985).

3. The First Amendment thus reflects a history of religious discrimination that Americans of the Founding era rejected. Personal and historical experience taught them that the line between religious discrimination and religious persecution is thin—and they rejected both. A categorical rule against religious discrimination therefore fits both text and history. It also fits this Court's precedents.

C. This Court's Decisions Affirm That the Religion Clauses Prohibit Religious Discrimination.

Decisions under the First Amendment hold that it forecloses government-sponsored religious discrimination.

Consider *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017). It reversed Missouri's rejection of a church's application for a State subsidy to resurface a school playground. *Id.* at 454–56, 467. That decision breached the rule that "[t]he Free Exercise Clause 'protects religious observers against unequal treatment.'" *Id.* at 458 (cleaned up) (quoting *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533, 542 (1993)). As the Court explained, "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand." *Id.* at 467.

Trinity Lutheran's use of the word *odious* appears in a quotation by H.M. Brackenridge, a nineteenth-century Maryland lawmaker who advocated "end[ing] the State's disqualification of Jews from public office." *Id.* at 467. Sounding like Cooley, see Cooley, *Constitutional Limitations* at 469, Brackenridge proclaimed that "[a]n odious exclusion from any of the benefits common to the rest of my fellow-citizens, is a persecution, differing only in degree, but of a nature equally unjustifiable with that, whose instruments are chains and torture." *Trinity Lutheran*, 582 U.S. at 467 (internal quotation marks omitted) (quoting Speech by H.M. Brackenridge, Dec. Sess. 1818, *reprinted in* H. Brackenridge et al., *Speeches in the House of Delegates of Maryland* 64 (1829)).

In a similar vein, *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020), reversed a Montana Supreme Court decision eliminating a scholarship program on the ground that it violated a no-aid provision of the State constitution. *Id.* at 471–73, 489. The same "rule against express religious discrimination" controlled. *Id.* at 484. And the same conclusion followed—that such discrimination is "'odious to our Constitution' and 'cannot stand.'" *Id.* at 489 (quoting *Trinity Lutheran*, 582 U.S. at 467).

Carson v. *Makin*, 596 U.S. 767 (2022)—directly implicated in this case—followed the same pattern. *Carson* rejected Maine's denial of tuition assistance to families whose chosen schools the State deemed "sectarian." *Id.* at 775, 789. That conclusion stands on this "unremarkable" principle, *id.* at 779 (quoting *Trinity Lutheran*, 582 U.S. at 462): "the Free Exercise Clause [does] not permit [a State] to 'expressly discriminate against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.'" *Ibid.* (cleaned up) (quoting *Trinity Lutheran*, 582 U.S. at 462). Echoing earlier precedents, *Carson* added that "[s]uch discrimination" is "'odious to our Constitution' and [cannot] stand." *Ibid.* (quoting *Trinity Lutheran*, 582 U.S. at 467).

All three decisions describe religious discrimination as *odious*. In Brackenridge's day, the word meant "[h]ateful; deserving hatred." *Odious*, 2 Noah Webster, *An American Dictionary of the English Language* (1828). So too, today. By using *odious* to describe laws that discriminate based on religion, decisions from *Trinity Lutheran* to *Carson* call to mind the history of civil disabilities canvassed above and reinforce the

repugnance of religious discrimination to the Constitution.

Understanding religious discrimination as completely barred by the First Amendment reflects other precedents too. They declare that "[t]he Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978) (plurality opinion). Or, the cases say, "a law targeting religious beliefs as such is never permissible." *Lukumi*, 508 U.S. at 522. Encompassed within that rule is any law that "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532. This "fundamental nonpersecution principle of the First Amendment" is "so well understood that few violations are recorded in [the Court's] opinions." *Id.* at 523. Other decisions on the point are equally forceful. See *Niemotko* v. *Md.*, 340 U.S. 268, 272 (1951); *Fowler* v. *R.I.*, 345 U.S. 67, 69 (1953).

Religious discrimination likewise offends the Establishment Clause. Only last year, this Court unanimously reaffirmed that "'[t]he clearest command of the Establishment Clause' is that the government may not 'officially prefer' one religious denomination over another." *Cath. Charities Bureau, Inc.* v. *Wis. La. & Indus. Rev. Comm'n*, 605 U.S. 238, 247 (2025) (cleaned up) (quoting *Larson* v. *Valente*, 456 U.S. 228, 244 (1982)). Government favoritism toward certain religions "convey[s] to members of other faiths that 'they are outsiders, not full members of the political community.'" *Id.* at 248 (quoting *Santa Fe Indep. Sch. Dist.* 530 U.S. at 309). Forbidden are "laws establish[ing] a preference for certain religions based on the content of their religious doctrine, namely, how

they worship, hold services, or initiate members and whether they engage in those practices at all." *Id.* at 248–49. "Such official differentiation on theological lines is fundamentally foreign to our constitutional order." *Id.* at 249. This ban on religious discrimination squarely applies when the government administers benefits like the preschool funding program here.

Precedent thus joins constitutional text and history in establishing that laws discriminating on the basis of religious belief, practice, or affiliation categorically violate both Religion Clauses. This Court has never approved government-sponsored religious discrimination. Recognizing the categorical rule against religious discrimination simply acknowledges in name what the Court has long done in fact.

Some say that religious discrimination should be merely subject to strict scrutiny. Not so. The Religion Clauses properly recognize other categorical rules, including the proscriptions on religious tests for public office and interference in a religious organization's selection of its minister. See *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC,* 565 U.S. 171, 196 (2012). The same holds true for religious discrimination. No reason, however superficially compelling, can justify a law that treats people and institutions worse because of their religion.[4] When "the First Amendment

[4] A categorical proscription on religious discrimination does not impede the government from adopting laws and policies to prevent imminent physical harm. See *State ex rel. Swann* v. *Pack*, 527 S.W.2d 99 (Tenn. 1975) (underage snake handling), *cert. denied*, 424 U.S. 954 (1976); *People ex rel. Wallace* v. *Labrenz*, 104 N.E.2d 769 (Ill. 1952) (child's blood transfusion). But that qualification does not require a lawmaker to classify based on religion when the lawmaker can classify based on physical harm.

has struck the balance for us," it is *that* balance—not a case-by-case evaluation—that should prevail. *Hosanna-Tabor*, 565 U.S. at 196.[5]

Freedom from religious discrimination is, in short, the irreducible minimum guaranteed by the First Amendment.

D. Excluding Petitioners from Colorado's Program Because of Their Religion Is Religious Discrimination.

Colorado violated the First Amendment ban on religious discrimination when it excluded petitioners from the State preschool education funding program. It makes no difference that the State would allow funding for religious schools that subscribe to its LGBT nondiscrimination policy. The Free Exercise Clause guards against the "covert suppression of particular religious beliefs." *Lukumi*, 508 U.S. at 534 (internal quotation marks omitted) (quoting *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986) (plurality opinion)). And there's nothing covert about Colorado's demand. It requires Catholic schools to alter their admissions and employment practices despite contrary Catholic religious beliefs, or the schools will get no State preschool funding. To their credit, the schools chose conscience.

In any event, the public safety qualification is immaterial here, since Colorado does not allege imminent physical harm as its rationale for withholding State funding from petitioners.

[5] Judicial balancing is, of course, appropriate in other contexts. Decades of experience under RFRA and RLUIPA demonstrate "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

An unseen line connects England's Second Test Act with Colorado's LGBT nondiscrimination rule. Religious beliefs regarding homosexuality and gender identity are deeply rooted in Catholic scripture, practice, centuries of moral teaching, and canon law. Forcing a Catholic school to accept Colorado's LGBT policy resembles English law's notorious demand for Catholics to forswear the doctrine of transubstantiation or lose their civil rights. The State has put these schools to a choice between widely available government aid and practicing their religion. And that, the Constitution forbids.

Colorado's exclusion of petitioners from a statewide program because of their faith violates the First Amendment's categorical rule against religious discrimination. Colorado's decision is therefore void.

II. THE FIRST AMENDMENT'S CATEGORICAL RULE AGAINST RELIGIOUS DISCRIMINATION APPLIES WITHOUT PROOF OF HOSTILITY.

A. Discrimination Means Unequal Treatment—Not Merely Hostile Treatment.

The Tenth Circuit required petitioners to provide proof of "hostility" to establish a free exercise violation. Pet.App.24a–28a. But religious discrimination offends the First Amendment by itself. Overt hostility toward religious beliefs, practices, and affiliations indisputably transgresses "the neutrality required by the Free Exercise Clause." *Masterpiece Cakeshop* v. *Colo. Civ. Rights Comm'n*, 584 U.S. 617, 619 (2018). But proof of hostility is unnecessary to establish a claim of religious discrimination. Unequal treatment violates the Free Exercise Clause, without more.

1. Decisions under the Free Exercise Clause consistently zero in on disparate treatment based on religion, not on hostile treatment. When government treats a person or group worse because of religion, the constitutional injury is complete.

Consider *Fowler*. There, the Court reversed the conviction of a Jehovah's Witness minister for preaching in a public park when other denominations "could conduct their church services" in the park "without violating the ordinance." 345 U.S. at 69. Singling out the minister in this way amounted to "discrimination * * * barred by the First and Fourteenth Amendments." *Ibid.*

Or *McDaniel*. There, the Court invalidated a Tennessee statute that barred ministers from serving as delegates to a State constitutional convention. 435 U.S. at 620, 629. The statute "discriminated against McDaniel by denying him a benefit solely because of his 'status as a minister.'" *Trinity Lutheran*, 582 U.S. at 459 (emphasis omitted) (quoting *McDaniel*, 435 U.S. at 627).

Trinity Lutheran confirms that unequal treatment based on religion contravenes the First Amendment regardless of hostility. There, the constitutional objection was not hostility toward religious schools, but rather the denial of "a generally available benefit solely on account of religious identity." *Id.* at 458. In "expressly discriminat[ing] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character," the State "impose[d] a penalty on the free exercise of religion." *Id.* at 462. Unequal treatment, not religious animus, was the State's fatal error. Later decisions following *Trinity Lutheran* reached the same conclusion. See *Espinoza*, 591 U.S. 464; *Carson*, 596 U.S. 767.

Tandon v. *Newsom*, 593 U.S. 61 (2021), adopted a similar approach. There, California's COVID-19 restrictions limited at-home religious gatherings to only three households but permitted a variety of indoor businesses—including hair salons, retail stores, and indoor restaurants—to bring together larger groups of people. *Id.* at 63. There were no expressions of hostility toward religion, just unequal treatment. Yet discrimination, without more, supported a likely free exercise violation. *Id.* at 63–65. The Court was unsparing: government action raises serious free exercise concerns "whenever [it] treat[s] *any* comparable secular activity more favorably than religious exercise." *Id.* at 62.

2. Equal protection doctrine illustrates how other areas of constitutional law do not require evidence of animus or hostility to claim discrimination.

Start with economic discrimination. *Allegheny Pittsburgh Coal Co.* v. *County Commissioner of Webster County*, 488 U.S. 336 (1989), struck down a property tax scheme that assessed recently purchased properties based on their purchase price but assessed other properties based on outdated prior-year assessments. *Id.* at 344–46. Over time, this caused disparities in tax assessments for similarly situated properties based on how recently the property had been sold. *Id.* at 341–42. The Court held that the differential treatment lacked a rational basis and struck down the law. *Id.* at 344–46. There was no suggestion that the unequal assessments were motivated by animus toward recent property purchasers.

Or consider sex discrimination. In *Reed* v. *Reed*, 404 U.S. 71 (1971), the Court invalidated an Idaho law that gave automatic preference to men over women when persons of different sexes were equally qualified to

administer an estate. *Id.* at 75–77. The law's differential treatment of men and women lacked any "fair and substantial relation to the object of the legislation" and therefore, in the Court's view, represented "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." *Id.* at 76. Hostility toward women took no role in the analysis.

So too with the admissions policies in *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982), and *United States* v. *Virginia*, 518 U.S. 515 (1996). Both cases confronted discrimination unsupported by any substantial relationship to the policies' putative objectives—not animus against the disfavored sex. See *Mississippi Univ.*, 458 U.S. at 723–31; *Virginia*, 518 U.S. at 531–46.

Petitioners have shown that Colorado has discriminated against them because of religion. Proof of animus or hostility is unnecessary to that claim—and the Tenth Circuit was wrong to say otherwise.

B. This Court Should Affirm the Categorical Rule Against Religious Discrimination to Correct Lower Courts.

Carson makes clear that *Trinity Lutheran*'s prohibition on denying public benefits based solely on religion is categorical. A State may not "exclude some members of the community from an otherwise generally available public benefit because of their religious exercise," regardless of whether the benefit is ultimately put to a religious or secular use. *Carson*, 596 U.S. at 781.

The Tenth Circuit brushed aside *Carson* as inapplicable, writing that Colorado's universal preschool (UPK) program does not exclude *all* "faith-based

preschools" from the program—only faith-based schools that decline the State's LGBT nondiscrimination requirement. Pet.App.21. Colorado's exclusion of schools that reject its LGBT policy, however, *is* religious discrimination—and *Carson* explains why.

There, Maine defended its denial of tuition funding to parents wishing to educate their children at religious schools on the ground that the State "offers a benefit limited to private secular education." 596 U.S. at 784. That formulation was "just another way of saying that Maine does not extend tuition assistance payments" to such parents. *Ibid.* Discerning that "the definition of a particular program can always be manipulated to subsume the challenged condition," the Court rejected the State's attempt to "recast a condition on funding" in a way that would see "the First Amendment reduced to a simple semantic exercise." *Ibid.* (cleaned up) (quoting *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 215 (2001)).

Permitting a State to manipulate legislative classifications on ostensibly neutral and general grounds would be dangerous. Because religious discrimination falls outside *Smith*'s neutral-and-generally-applicable-law standard, it is immaterial whether a law discriminating against religion can be framed in neutral and generally applicable terms. See *Smith*, 494 U.S. at 877. Likewise, "[t]he Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination" to proscribe "covert suppression of particular religious beliefs." *Lukumi*, 508 U.S. at 534 (internal quotation marks omitted) (quoting *Bowen*, 476 U.S. at 703). Otherwise, *Carson* and related decisions would be rendered a dead letter. After all, State officials can easily reframe law and policy in

superficially benign terms. But the First Amendment is "more than a pleading requirement, and compliance with it * * * more than an exercise in cleverness and imagination." *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987).

Here, Colorado has borrowed a page from Maine's playbook. Eligibility for funding under the UPK program is framed in terms of all qualified schools who accept the State's LGBT nondiscrimination policy. By excluding religious schools whose religious beliefs preclude acceptance of that condition, the State "manipulate[s]" its programmatic definition "to subsume the challenged condition." *Carson*, 596 U.S. at 784. Colorado cannot sidestep the right to free exercise by structuring eligibility to include some faith-based schools while excluding others. As in *Carson*, the funding condition reveals the program's unconstitutionality. To say that petitioners are ineligible for UPK funding because their longstanding religious beliefs and practices run afoul of the State's LGBT policy is to say that they are ineligible because of their religion. That is religious discrimination.

Nor is the Tenth Circuit alone in misapplying *Carson*. Two later decisions from Maine involved district courts that sustained the State's discriminatory policies on the same ground rejected in *Carson*. *St. Dominic Academy* v. *Makin*, 744 F. Supp. 3d 43 (D. Me. 2024), concluded that the same Maine tuition assistance program at issue in *Carson* does *not* discriminate based on religion. This, even though the Maine program requires participating schools to adopt LGBT nondiscrimination policies like Colorado's here. *Id.* at 68–77. The court found *Carson* inapplicable because the State's policies "appl[y] not just to religious schools, but to all 'educational institutions'

that 'permit religious expression.'" *Id.* at 77 (cleaned up) (quoting 5 Me. Rev. Stat. § 4602(5)(D)). Similarly, in *Crosspoint Church* v. *Makin*, 719 F. Supp. 3d 99 (D. Me. 2024), the court perceived no First Amendment objection to the same State funding condition because the nondiscrimination requirement does not "restrict[] practices *because* of their religious nature," even though the practical effect is that "some religious institutions [will] not * * * apply for tuition funding." *Id.* at 122 (emphasis added) (quoting *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 533 (2021)).

And in *Woolard* v. *Thurmond*, 170 F.4th 701 (9th Cir. 2026), the Ninth Circuit held that *Carson* does not apply to funding for homeschool programs operated by public charter schools. *Id.* at 707–10. The court of appeals reasoned that because states may offer "strictly secular" public education, they may decline to subsidize homeschool materials with religious content. *Id.* at 708 (internal quotation marks omitted) (quoting *Carson*, 596 U.S. at 785). Yet that reasoning overlooks the obvious constitutional defect that parents in such programs are denied access to a public benefit based solely because of their religion.

These cases demonstrate the need for this Court to reaffirm *Carson*'s central holding—that government policies denying public benefits because of religious beliefs and practices are no less unconstitutional than policies that deny benefits because of religious character. A religious institution exercises its faith through its beliefs and practices. Excluding a religious institution from a government program because of its beliefs or practices is no different than excluding it because of its religion. Both offend the First Amendment.

III. RELIGIOUS DISCRIMINATION HARMS RELIGIOUS PEOPLE AND INSTITUTIONS.

A. Religious Education Reflects the Exercise of First Amendment Rights.

1. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children." *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972). "This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Ibid.*[6] Parental authority necessarily "include[s] the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Id.* at 233. To that end, the Free Exercise Clause safeguards "the rights of parents to direct 'the religious upbringing' of their children." *Espinoza*, 591 U.S. at 486 (quoting *Yoder*, 406 U.S. at 213). Not only that. "[T]hose rights are violated by government policies that 'substantially interfere with the religious development' of children." *Mahmoud*, 606 U.S. at 546 (cleaned up) (quoting *Yoder*, 406 U.S. at 218). Governmental interference with a parent's religious upbringing of a child "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Ibid.* (internal quotation marks omitted) (quoting *Yoder*, 406 U.S. at 218).

2. The practice of educating children in their parents' religion is "vital to many faiths." *Our Lady of*

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[6] A related line of decisions under the Due Process Clause affirms "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000); accord *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Meyer* v. *Neb.*, 262 U.S. 390 (1923).

Guadalupe Sch. v. *Morrissey-Berru*, 591 U.S. 732, 754 (2020). For some, "the religious education of children is not merely a preferred practice but rather a religious obligation." *Mahmoud*, 606 U.S. at 547.

Take Roman Catholicism. It teaches that "[t]he right and the duty of parents to educate their children are primordial and inalienable." *Catechism of the Catholic Church* § 2221 (2d ed. 2019). "Parents have the first responsibility for the education of their children." *Id.* § 2223. And "[a]s those first responsible for the education of their children, parents have the right to *choose a school for them* which corresponds to their own convictions." *Id.* § 2229. "This right is fundamental." *Ibid.* Given these beliefs, it should be unsurprising that for the individual petitioners, the Sheleys, their "Catholic faith directs them to provide a Catholic education for their children." Pet.8. Nor are the Sheleys alone in believing that educating their children in the faith is a religious duty. Many religions teach the same precept.

"Protestant churches, from the earliest settlements in this country, viewed education as a religious obligation." *Our Lady of Guadalupe*, 591 U.S. at 754. More recently, "non-denominational Christian schools have proliferated with the aim of inculcating Biblical values in their students." *Id.* at 754–55. "Many such schools expressly set themselves apart from public schools that they believe do not reflect their values." *Id.* at 755.

"The Church of Jesus Christ of Latter-day Saints has a long tradition of religious education, with roots in revelations given to Joseph Smith." *Id.* at 756. Those revelations command parents to "bring up your children in light and truth." Doctrine & Covenants 93:40. And Latter-day Saints are enjoined to "seek ye

out of the best books words of wisdom; seek learning, even by study and also by faith." Doctrine & Covenants 88:118. Brigham Young University, the Church's flagship school, and its sister universities and colleges within the Church Educational System, are living monuments to those doctrines. So too are the Church's seminary and institute programs, which educate young Church members in the Gospel of Jesus Christ.

"Religious education is a matter of central importance in Judaism." *Our Lady of Guadalupe*, 591 U.S. at 755. In particular, "the Torah is understood to require Jewish parents to ensure that their children are instructed in the faith." *Ibid.* To that end, "[t]he contemporary American Jewish community continues to place the education of children in its faith and rites at the center of its communal efforts." *Ibid.* (internal quotation marks omitted) (quoting Brief for *Amici Curiae* Church of God in Christ, Inc. and Union of Orthodox Jewish Congregations of America in Support of Petitioners at 15, *Our Lady of Guadalupe*, 591 U.S. 732 (No. 19-267)).

These examples from "the rich diversity of religious education in this country" demonstrate that "educating the young in the faith" is fundamental for many religions. *Id.* at 756. No wonder. Without religious education, no religion can survive to the next generation.

3. The Sheleys' claim to constitutional protection for their decision to educate their children in Catholic schools finds deep roots in this Court's decisions under the Free Exercise Clause.

In *Mahmoud*, religious parents challenged a school district's reading program that used LGBT-themed storybooks for elementary-aged schoolchildren. 606 U.S. at 528–30. The Court agreed that denying the

parents prior notice and opt-outs inflicted a substantial burden on their religious exercise. *Id*. at 569.

Mirabelli v. *Bonta*, 607 U.S. 492 (2026) (per curiam), involved California policies that "prevent[ed] schools from telling [parents] about their children's efforts to engage in gender transitioning at school unless the children consent to parental notification." *Id.* at 493. There, parents seeking religious exemptions were found "likely to succeed on the merits of their Free Exercise Clause claim." *Id.* at 496. In fact, the Court adjudged that "the intrusion on parents' free exercise rights here—unconsented facilitation of a child's gender transition—is greater than the introduction of LGBTQ storybooks we considered sufficient to trigger strict scrutiny in *Mahmoud*." *Ibid.* And the Court added that "California's policies will likely not survive the strict scrutiny that *Mahmoud* demands." *Ibid.*

The Sheleys' free exercise claim is fully consistent with *Mahmoud* and *Mirabelli*. If anything, they ask less of the State. They seek only religious equality—that the tenets of their faith not be the reason for denying their chosen schools the same public funding available to comparable schools. In that, they stand on solid ground. Colorado's contrary policy flies in the face of the First Amendment.

B. Denying Public Funding for Education Because of a School's Religion Harms the School and the Families It Serves.

Excluding religious schools from public benefits not only offends the Constitution. It inflicts concrete harms on the school and the families it serves.

Consider such harms in this case. Colorado's condition on UPK funding—compliance with the State's LGBT policy—drove Catholic schools to close

their doors. Without the State financial support available to comparable schools, Wellspring Catholic Academy and Guardian Angels Catholic School lost enrollment and had to close. Pet.12. Across the Archdiocese, enrollment in parish preschools has dropped nearly 20% since UPK was enacted. *Ibid.* The district court found that "Plaintiff Preschools have experienced harm from not participating in the UPK program." Pet.App.83a.

The consequences of religious discrimination are tangible in other cases, too. *Carson* voided a condition in Maine's tuition subsidy program that limited benefits to "nonsectarian" schools. 596 U.S. at 789. The lead plaintiffs, the Carsons, sent their daughter to a Christian school because its "worldview aligns with their sincerely held religious beliefs." Petition for Writ of Certiorari at 7, *Carson*, 596 U.S. 767 (No. 20-1088). Yet because of the State's exclusionary policy, "the Carsons [had to] pay their daughter's tuition out-of-pocket." *Id.* at 8. Another family, the Nelsons, were forced by the lack of State support to send their child to a secular high school "despite the Nelsons' firm conviction that [a Christian school] would better meet their educational needs and align with the family's beliefs." *Id.* at 9.

Espinoza involved similar injuries. There, the Montana Department of Revenue denied scholarship funds to any school "owned or controlled in whole or in part by any church, religious sect, or denomination." 591 U.S. at 470 (internal quotation marks omitted) (quoting Mont. Admin. R. § 42.4.802(1)(a) (2015)). An administrative assistant at a Catholic high school testified that "[t]he students with these scholarships are all lower income." Appendix to Petition for Writ of Certiorari at 129, *Espinoza*, 591 U.S. 464 (No. 18-1195).

"This means that they come from families that make $25,000 or less each year." *Id.* at 129–30. The State's discriminatory policy withheld scholarship funds from families least able to bear the loss.

Then there's *Trinity Lutheran*. It held that Missouri's refusal to consider a church's application for a State subsidy for playground resurfacing violated the free exercise rights of a Lutheran preschool. 582 U.S. at 466. The preschool documented that the existing pea gravel playground surface "continually erodes" and "creates a trip hazard." Petition for Writ of Certiorari at 6, *Trinity Lutheran*, 582 U.S. 449 (No. 15-577). In its application for State funding, the preschool explained that the pea gravel is "unforgiving if/when a child falls and thereby poses a basic safety hazard." *Id.* at 6–7. Rejecting the church's application because it is a church risked injuries to young children that a resurfaced playground would have eliminated.

Lower court decisions further demonstrate how religious discrimination in public funding causes tangible harms.

In *InterVarsity Christian Fellowship / USA* v. *University of Iowa*, 5 F.4th 855 (8th Cir. 2021), a Christian student club required leadership applicants to affirm that same-sex relationships contradict the Bible. *Id.* at 860. "[E]mployees of the University of Iowa targeted" the organization for alleged violations of the university's Human Rights Policy, leading to the loss of "money, participation in University publications, use of the University's trademark, and access to campus facilities." *Id.* at 859. *Business Leaders in Christ* v. *University of Iowa*, 991 F.3d 969 (8th Cir. 2021), arose from the same conflict. Students belonging to a different religious organization lost access to "several benefits, including eligibility to apply for funds from

mandatory Student Activity Fees, inclusion in University publications, utilization of the University's trademarks, and eligibility to use campus meeting facilities and outdoor spaces." *Id.* at 972.

Or take *Loffman* v. *California Department of Education*, 119 F.4th 1147 (9th Cir. 2024). There, California denied funding for disabled children from Orthodox Jewish families because they did not attend "nonsectarian" schools. *Id.* at 1153. The families explained that "for modern Orthodox Jews, enrolling their children in a dual curriculum Jewish day school is 'virtually mandatory'" to fulfill their "duty to transmit Jewish religious beliefs and practices to their children." *Ibid.* Jewish students with developmental disabilities lost access to speech therapy, kosher meal plans, and special education and related services. *Id.* at 1153, 1168–69.

None of these harms is the inevitable consequence of administering complex public programs. Concrete injuries arise from disregarding a principle this Court articulated decades ago. Under the First Amendment, a State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947). That non-discrimination rule necessarily bars exclusion based on basic elements "of their faith," such as ancient Christian and Jewish doctrines and standards related to sexuality and gender. Colorado breached that principle by denying petitioners State preschool funding because of their religion. That exclusion not only offends the Constitution—it inflicts concrete harms as well.

CONCLUSION

The text and history of the First Amendment affirm that the Religion Clauses categorically prohibit religious discrimination. Laws withholding government benefits because of a recipient's religious beliefs, practices, or affiliations are indistinguishable from the civil disabilities universally condemned at the Founding. Colorado's UPK program discriminates against petitioners by putting them to the choice of abandoning their faith or forfeiting equal treatment. And that, the Constitution forbids. The Tenth Circuit's decision should be reversed.

Respectfully submitted,

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