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 THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS[1]

The Catholic League for Religious and Civil Rights is the nation's oldest and most prominent Catholic civil rights organization. The Catholic League participates in the Public Square, defending the constitutional rights of Catholics everywhere, especially those rights guaranteed under the Free Speech Clause and the Free Exercise Clause of the First Amendment. The Catholic League also fights discriminatory actions, statements, and trite stereotypes emanating from both public officials and the media.

Accordingly, the Catholic League submits this brief to provide an accurate history of discrimination against Catholics and how Colorado's law here is simply a new variant of past discriminatory practices against Catholics.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Recently, this Court has found that Colorado has violated the First Amendment free speech rights of religious believers. In 2018, for example, towards a man of good conscience and sincere religious faith, this Court recognized that Colorado's Civil Rights Commission displayed blatant hostility. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. 617, 638-39 (2018). Since then, Colorado has defended its ability to both compel and prohibit speech whether the speaker designs websites or is a licensed counselor. *303 Creative v. Elenis*, 600

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[1] No party or counsel for a party authored this brief in whole or in part. No person, other than Amicus, made any financial contribution to the preparation or the submission of this brief. *See* Sup. Ct. R. 37.6.

U.S. 570 (2023); *Chiles v. Salazar*, 146 S. Ct. 1010 (2026).

Despite these decisions, Colorado persists in displaying hostility towards religious people and organizations. Accordingly, this brief makes the following points:

1. Colorado passed a ballot proposition requiring the State to fund 15 hours of free preschool for every four-year-old in Colorado. In furtherance of this requirement, Colorado mandates that participating schools ensure that parents of preschool students have an equal opportunity to receive a preschool education "regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability." Colorado, however, carves out a series of case-by-case exemptions allowing preschools to "grant preference to an eligible child based on the child and/or family being a part of a specific community." This exemption permits preschools to screen for families who are from communities that have been historically discriminated against. According to Colorado officials, this includes LGBTQ families but it does not include Catholic families.

2. Both before and after this Nation's founding, however, the Catholic Church and its adherents have suffered extensive and intense discrimination. The colony of Maryland, for example, imposed double taxes on land owned by Roman Catholics. Later, Catholic students were compelled to learn Protestant doctrines and read the King James Bible, a practice that continued into the twentieth century. The Know-Nothing Party rose to prominence seeking to limit the civil rights of Catholics, including prohibiting Catholics from holding public office and holding

government jobs. President Grant himself said that the Nation must prohibit government aid to Catholic schools because Catholic schools taught "superstition, ignorance, and ambition[]" and further, the government must protect the people from "priestcraft." The Colorado Constitution's No Aid To Sectarian Institutions Clause and Its Impact on Civil Rights at 9 (Sept. 2018). Perhaps seeing the signs, when Colorado sought admission to the Union shortly after Grant's speeches, Colorado too enacted a provision in its state constitution that was passed due to anti-Catholic bigotry.

3. Colorado's universal preschool program is a more recent example of discrimination against Catholics. Colorado permits exemptions for some but not for others. This free exercise for me but not for thee approach to exemptions is prohibited under the First Amendment. *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021). Additionally, Colorado compels the Catholic Petitioners to make an unconstitutional choice: the Petitioners can receive public funds only if Petitioners violate the tenets of their faith. This is unconstitutional. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017).

4. Lastly, Colorado interferes with the Catholic Petitioners' ability to exercise their associational rights. Colorado seeks to compel Petitioners to accept as members of its association those persons who disagree with Petitioners' teachings. Compounding the problem is that the very goal of the association—Catholic schools—is to transmit those teachings to the next generation. This too violates the First Amendment. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

ARGUMENT

I. COLORADO PERMITS EXEMPTIONS FROM ITS ANTI-DISCRIMINATION MANDATE FOR THOSE STUDENTS FROM HISTORICALLY MARGINALIZED GROUPS.

Six years ago, Colorado voters passed a ballot proposition requiring the State to offer free preschool to every Colorado four-year-old. The Colorado legislature implemented the referendum by enacting a "mixed-delivery" approach, meaning that the people of Colorado can choose to send their children to a public preschool or a private preschool, including religious preschools. Col. Rev. Stat. § 26.5-4-202(1)(b); *see also* Resps.' Opp.'n Br. at 4-5. Colorado pays 15 hours per week for preschool, for most students. Pet. Br. at 5.

Colorado also imposed requirements on the participating preschools, including that all children receive "an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability…". Col. Rev. Stat. § 26.5-4-205(2)(b). Accordingly, although Colorado does not regulate the curriculum of private preschools, "no publicly-funded preschool, however, can turn away children and families based on their protected-class status." Resps.' Opp.'n Br. at 6.

The Tenth Circuit described the equal opportunity mandate as a "hard limit" requiring the State to follow the letter of the law. App. 32a. Colorado has, however, granted many exemptions from this supposed hard limit.

The first category of exemptions permits participating preschools to consider income level and whether the child has disabilities. For the latter,

participating preschools may reserve seats for children with an Individualized Education Program. Pets.' Pet. for Cert. at 9. For the former, Colorado permits some preschools to "prioritize low-income families." *Id*.

The second category of exemptions allows preschools to "grant preference to an eligible child based on the child and/or family being a part of a specific community." *Id*. This exemption is meant to be "inclusive of different types of communities." *Id*. Under oath, the director of Colorado's preschool program testified that this exemption allows preschools "to admit only gender-nonconforming children and to prioritize serving children of color from historically underserved areas, and the LGBTQ community." *Id*. at 9-10. Pet. Br. at 2. Thus, the statute permits preschools to screen for whether a child or family member is part of a specific community, is vaccinated, or has a "specific relationship to the provider." Pet. Br. at 43.

The third exemption is a temporary exemption that permits preschools that are not currently in compliance with Colorado's quality standards to participate in the program while "working toward compliance." Colo. Rev. Stat. § 26.5-4-205(1)(b)(II).

The second category of exemptions does not impose an exception to a hard limit but rather confers broad discretion to serve Colorado's favored interests. Respondent Odean testified that participating preschools could choose to admit "gender non-conforming children" only. Pet. Br. at 44. Odean further testified that preschools could also choose to prioritize admitting "children of color from historically underserved areas," "the LGBTQ community," and "children of veterans or current service members." *Id*. Accordingly, Respondent Odean sees the anti-discrimination provision as

permitting the Department to contract with preschools that "prioritize families who have historically been discriminated against." *Id*. at 45. Respondent Odean insisted that the statute permits the Department to give "preferential treatment to those she views as disadvantaged, and that this was the yardstick she used to decide whether a UPK preschool would be permitted to apply specific admissions priorities via the catchall." *Id*.

For Respondent Odean, however, Catholics do not merit a religious accommodation because Respondent Odean does not consider Catholics as part of a historically marginalized group.

II. BOTH PRIOR TO AND AFTER THE CONSTITUTION'S RATIFICATION, CATHOLICS HAVE SUFFERED PERVASIVE DISCRIMINATION.

Premised on a fear of governmental power, the First Amendment declares in no uncertain terms that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…". U.S. Const. amend. I; *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). The Framers of the First Amendment's Free Exercise Clause purposefully chose the term "free exercise" because the Framers understood that individuals needed more than just freedom of conscience. The Framers understood that the Amendment must also protect the freedom to exercise one's conscience.

In a letter from James Madison to William Bradford, Madison wrote of five or six men that he saw in Culpeper, Virginia, who were imprisoned for nothing more than "publishing their religious Sentiments which in the main are very orthodox." Michael

McConnell, The Origins And Historical Understanding Of Free Exercise Of Religion, 103 Harv. L. Rev. 1409, 1452 (1990). Madison's witness of this "diabolical Hell conceived principle" is what "sparked his concern for religious freedom." *Id*. Thus, in his Memorial and Remonstrance Against Religious Assessments, Madison declared that religion must be left "to the conviction and conscience of every man; and it is the right of every man *to exercise it* as these may dictate." *Id*. (emphasis added) (quoting J. MADISON, Memorial and Remonstrance Against Religious Assessments, in 2 THE WRITINGS OF JAMES MADISON 183-84 (G. Hunt ed. 1901)). Accordingly, as this Court recently recognized, the Free Exercise Clause protects religious exercises, both communicative and non-communicative. *See Kennedy v. Bremerton Sch. Dist*., 597 U.S. 507, 523 (2022). Of course, Madison was not the first to use the term "exercise" in this context.

This term "free exercise" has a uniquely Catholic-American provenance. The term first appeared in the United States in 1648 when the Catholic Lord Baltimore, Cecilius Calvert, wrote the governor and councilors of Maryland requesting that they promise "not to disturb Christians (and in particular no Roman Catholic) in the free exercise of their religion." *Id*. at 1425 (internal quotation marks omitted). The following year, Maryland became the first colony on the continent to enact a "free exercise clause." *Id*.

Though required as a matter of natural right, the free exercise protection was necessary for Catholics. The Maryland Assembly demonstrated this need because approximately 40 years later, in 1689, the Maryland Assembly undid the Acts of Toleration. The Protestant majority in the Assembly replaced the Acts

of Toleration with laws prohibiting Catholic participation in the military, civil matters, and participating in the Assembly. The discrimination did not stop there. Between 1704 and 1758, the Maryland Assembly closed the doors of St. Mary's Catholic Church, the original Catholic Chapel in Maryland; imposed taxes that were higher for Irish Catholics than for Protestants; imposed a double tax on lands held by Roman Catholics; and substantially regulated Catholic schools. *See* Bradley J. Birzer, *American Cicero: The Life of Charles Carroll*, 44-45, 48 (ISI Books 2009).

Maryland was not alone in its discrimination against Catholics during the colonial era. The Georgia Charter of 1732 declared that all persons "shall have free exercise of religion." The Charter was explicit, however, in excluding "papists" from the right to free exercise. The Origins And Historical Understanding Of Free Exercise Of Religion, 103 Harv. L. Rev. at 1489. In fact, Catholics were excluded from the colony entirely. *Id*. at 1489 n.414. Those Catholics that did live in Georgia were prohibited from "receiv[ing] land grants, inherit[ing] property, or hold[ing] public office." *Id*. Later, Georgia even denied Catholics any "liberty of conscience" protections." *Id*. Rhode Island too, otherwise a haven for religious dissenters, prohibited Catholics from holding public office. *Id*. at 1425-26. New York also banned Catholics from holding public office. *Id*. at 1474 n.325.

The freedom of exercise protection for Catholics was therefore necessary because Catholics were a small minority in this Nation. By the time of the Revolution, a mere 30,000 Catholics lived in the thirteen colonies, "barely one percent of the population." John C. Jeffries, Jr., James E. Ryan, *A Political History of the*

Establishment Clause, 100 Mich. L. Rev. 279, 299 (2001). The number grew exponentially after the Revolutionary War. By the dawn of the Civil War, Catholics numbered approximately 3.2 million. *Id*. By 1900, Catholics in the United States numbered twelve million. *Id*. As the number of Catholics grew, however, so too did the prejudice against Catholics.

One of the early clashes between Catholics and Protestants was over compelled reading of the King James Bible in majority Protestant public schools. *Id.* at 300. Catholics objected because the only Bible that the Catholic Church approved of was the Douay Bible. This Bible contained the Church's authoritative annotations. *Id*. When Catholic students objected to reading the King James Bible in school, students were expelled and beaten. When Catholics sought redress in the courts, the courts instead upheld both actions. *Id*. at 300 n.105 (citing *Donahoe v. Richards*, 38 Me. 379, 391-92, 398-400 (1854) (holding that public school officials were empowered to expel Catholic students who refused to read the King James Bible) and *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Mass. Police Ct. 1859) (holding that public school officials were vested with the power to beat students who refused to read the King James Bible)). In Philadelphia, where a public school exempted Catholic students from reading the King James Bible, the people of Philadelphia rioted. During these riots, the Protestant majority burned Catholic homes and churches. *Id*; *see also* Br. of *Amici Curiae* The Becket Fund for Religious Liberty, The Catholic League for Religious and Civil Rights, and Historians and Legal Scholars, *Locke v. Davey*, No. 02-1314, 2003 WL 22118852 *11 (U.S. Sept. 8, 2003) ("Becket Br.").

In summary, public schools in the United States from the late 18th century through the mid-19th century "were Protestant in character" and thus recited Protestant prayers and read the King James Bible. *Zelman v. Simmons-Harris*, 536 U.S. 639, 720 (2002) (Breyer, J., dissenting). As immigration increased, bringing in more Catholics to the United States, relations between Catholics and Protestants "grew tense." *Id*. at 720-21. Thus, beginning in approximately 1840, Catholics decided to form their own schools and sought treatment equal to public schools by seeking public funding. *Id.* at 721. By contrast, Protestants fought to keep public schools "non-sectarian," meaning public schools would read the King James Bible and say Protestant prayers, while no public funds could be spent on "sectarian" (i.e., Catholic) schools. *Id*; *see also* Becket Br. 2003 WL 22118852 *6.

During this same period, the 1850s, the United States saw the rise of the Know-Nothing Party, a virulently anti-Catholic political party. The party was formed to fight "immigration and Catholic influence." *A Political History of the Establishment Clause*, 100 Mich. L. Rev. at 301. On schools, the Know-Nothing Party fought to keep the Bible in schools, advocated for compulsory reading of the King James Bible in public schools while simultaneously fighting to prevent public funds from going to Catholic schools. *Id*; *see also Lemon v. Kurtzman*, 403 U.S. 602, 629 (1971). The National Teachers Association also took this position. *A Political History of the Establishment Clause*, 100 Mich. L. Rev. at 301.

The Know-Nothing Party achieved significant political success in Massachusetts, winning a majority of seats in both the Massachusetts House and Senate.

Becket Br. 2003 WL 22118852 *11. With this power, in approximately 1855, the Know-Nothings introduced a constitutional amendment to the Massachusetts Constitution, which passed both houses of the legislature, that would have prohibited Catholics from holding public office. *Id*. The Know-Nothings also passed an amendment to the Massachusetts State Constitution that permitted taxpayer dollars to go to majority Protestant public schools but prohibited taxpayer dollars from going to sectarian (i.e., Catholic) schools. *Id.* It was clear that this amendment was targeted at Catholics. *Id*. Perhaps suffering from their own echo-chamber, the Know-Nothings then established a "Joint Special Committee on the Inspection of Nunneries and Convents." *Id*. The Committee "was charged with liberating women thought to be captive in convents and stamping out other acts of villainy, injustice, wrong…perpetrated with impunity within the walls of said institutions." *Id*.

Abraham Lincoln witnessed the Know-Nothing party's xenophobic and anti-Catholic statements and actions as an attack on this Nation's great creed: that we are all created equal. In his 1855 letter to Joshua Speed, he stated:

> As a nation, we began by declaring that "*all men are created equal*." We now practically read it "all men are created equal, *except negroes*." When the Know-Nothings get control, it will read "all men are created equal, except negroes, *and foreigners, and Catholics*." When it comes to this I should prefer emigrating to some country where they make no pretence of loving liberty-to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocracy [sic].

Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855) *reprinted in* Abraham Lincoln: His Speeches and Writings, 332, 335-36 (R. Basler ed., Da Capo Publishing 1990) (emphasis added).

It is thus within this fetid swamp of discrimination that the Blaine Amendment was conceived, a time period that a plurality of this Court has characterized as one of "pervasive hostility" towards Catholics. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). This hostility was exemplified by President Grant's September 1875 address calling for Congress to enact a constitutional amendment prohibiting government aid to Catholic schools. To President Grant, Catholic schools taught "superstition, ignorance, and ambition." The Colorado Constitution's No Aid to Sectarian Institutions Clause and Its Impact on Civil Rights, U.S. Commission on Civil Rights at 9 (Sept. 2018) ("Colorado Civil Rights Report"). To remove all doubt that President Grant was referring to Catholics, a few months later in his State of the Union Address, President Grant stated that the Blaine Amendment was needed to protect the Nation from "priestcraft." *Id*. One week later, in December of 1875, the former Speaker of the House James G. Blaine of Maine introduced his eponymous and infamous Amendment. Undoubtedly the actions of President Grant and James Blaine contributed to the perception that Catholics were un-American. *A Political History of the Establishment Clause*, 100 Mich. L. Rev. at 302. In fact, in a best-selling book in 1885, the author, Josiah Strong stated that among the seven things imperiling the future of the United States, immigration was the most threatening, followed by Catholicism. *Id.* at 303.

Although the Blaine Amendment passed the House but failed to achieve the two-thirds majority required

in the Senate, several states adopted "little Blaine" amendments prohibiting the government from paying for "sectarian (i.e., Catholic) schooling for children." *Zelman*, 536 U.S. at 721. In fact, despite losing, Congress required that as a condition of admission to the Union, new states must insert Blaine-like provisions into their state constitutions. Becket Br. 2003 WL 22118852 *13-14. Within 15 years, 29 states had adopted Blaine amendments. *See id*. at *14. The Blaine Amendment and its state progeny were efforts to prevent the Catholic Church from participating in the Public Square on equal footing. While public schools were permitted to teach Protestant doctrine and read from the King James Bible, all with public funds, the Catholic schools could not receive a dime. The principle: free exercise for me but not for thee.

This Court has recognized and condemned the anti-Catholic bigotry that so characterized much of this Nation's relationship with Catholics, but especially in this period. *Mitchell*, 530 U.S. at 828-29 (finding that the Blaine Amendment has a "shameful pedigree" that was born of bigotry); *Zelman*, 536 U.S. at 721 (finding that the Blaine amendment promoted "discrimination against religious minorities"); *Locke v. Davey*, 540 U.S. 712, 723 n. 7 (2004) (recognizing that the Blaine Amendments were linked with anti-Catholicism). The Blaine Amendment and its state counterparts "represented a doctrine born of bigotry, [that] should be buried now." *Mitchell*, 530 U.S. at 829 (plurality op.).

Just as Blaine introduced his Amendment, Colorado was applying for admission into the Union. Colorado Civil Rights Report at 9. Accordingly, it is unsurprising that Colorado adopted in its original Constitution a Blaine-style provision. *See id*. ("[I]t would have been foolhardy for [the people of Colorado]

to fail to consider the wishes of [President Grant] and of a powerful leader of House Republicans [James Blaine].”). This provision prohibited Colorado from using public funds to aid “any church or sectarian society, or for any sectarian purpose…” or to support any school “controlled by any church or sectarian denomination…”. Colo. Const. art. IX, § 7. And just as other states used similar provisions to discriminate against Catholics, so too did Colorado. Colorado Civil Rights Report at 15 (concluding that art. IX, § 7 was “at least partly rooted in bigotry.”); *see id*. at 16-17 (concluding that the term “sectarian” is used in Colorado’s constitution with a negative connotation and that “sectarian” was not synonymous with religion or religious: these latter two terms refer to all religions while sectarian refers to religions that are “fanatical” or “heretical”). In fact, the Colorado Civil Rights Report found that its No Sectarian Aid Clause in its Constitution “embraced discrimination against religions that were not considered to be part of the mainstream[]” and thus treated “non-mainstream religions differently.” *Id*. at 34.

Similar to the majority of public schools across the Nation in the 19th century, Colorado’s “predominant model” for public education at its founding included daily recitations from the King James Bible. Colorado Civil Rights Report at 13. Although Catholics advocated for an end to Bible reading in public schools, Colorado seems to have declined due in part to the recent history of anti-Catholic riots, e.g., Philadelphia in 1844. *Id*. at 13 and n. 36. Even still, when Catholic students complained that their local public schools taught and used the Protestant Bible and taught Protestant doctrine, Colorado courts provided minimal relief. Despite recognizing that the Catholic Church prohibited the King James Bible, Colorado courts held

that compelled reading of the King James Bible was not sectarian and therefore permissible. The Court did, however, permit the Catholic student to be excused from the daily Bible readings. *People ex rel. Vollmar v. Stanley*, 255 P. 610, 617 (Colo. 1927). Colorado's Supreme Court did not overrule this decision until 1983. *See Conrad v. City of Denver*, 656 P.2d 662 (Colo. 1983). Thus, in 1889, the Catholic Bishop for Colorado, Nicholas Chrysostom Matz, rigorously enforced the rule—promulgated in 1884 by a council of American Catholic leaders—that Catholic parents must send their children to Catholic schools. Colorado Civil Rights Report at 13-14 and n. 34.

Colorado's constitution permitted public funds to flow to public schools despite teaching the King James Bible as well as to mainstream Protestant schools, including Lutheran schools which had an extensive presence in Colorado. Colorado Civil Rights Report at 18. But no money could flow to Catholic schools.

Free exercise for me but not for thee.

Accordingly, Catholics have suffered significant discrimination in this Nation beginning in the 17th century and carrying into the 20th century. Accordingly, Colorado should have granted the requested exemption.

III. COLORADO'S DISCRIMINATORY ACTIONS TOWARD PETITIONERS VIOLATE THE FIRST AMENDMENT.

A. The Free Exercise Clause Prohibits Colorado From Discriminating Against The Catholic Petitioners For Their Sincerely Held Beliefs.

The Polaris of the First Amendment prohibits Colorado from declaring what is orthodox in matters of politics and religion. *West Virginia St. Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943). Especially in matters of religion, "the law knows no heresy…". *Watson v. Jones*, 80 U.S. 679, 728 (1871). Accordingly, the Free Exercise Clause prohibits Colorado from "regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978).

Colorado violates the Free Exercise Clause in two ways: Colorado plays favorites by granting exemptions to those whose public policy positions reflect Colorado's preferred positions; and second, Colorado compels the Catholic Petitioners to make an unconstitutional choice: exercise your faith and receive no benefits; or receive benefits but cease exercising your faith.

First, the First Amendment's Free Exercise Clause "protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Carson v. Makin*, 596 U.S. 767, 778 (2022). A state violates the Free Exercise Clause when it prohibits religiously observant persons and churches from receiving generally available public benefits. *See id*; *see also Trinity Lutheran*, 582 U.S. at 462 (holding that the Free Exercise Clause prohibited Missouri from

"expressly discriminating against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."). Essentially, in the public benefits context, states are not free to enact religious gerrymanders. *See Carson*, 596 U.S. at 784. Accordingly, the government must act neutrally and the "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 593 U.S. at 533.

Similar to *Carson*, the public benefit here is Colorado paying tuition at a preschool the parents freely choose and the private school agrees to accept. *Carson*, 596 U.S. at 782-83. Colorado violates the First Amendment by denying a public benefit to Catholic Petitioners because the Catholic Petitioners seek a religious-based exemption from Colorado's demand that Catholic schools accept parents who reject Catholic teachings. *See Mahmoud v. Taylor*, 606 U.S. 522, 561, 563 (2025).

In doing so, Colorado has put its thumb on the scale, granting exemptions to favored speakers but not to others. *Citizens United*, 558 U.S. at 340; *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (prohibiting under the Free Exercise Clause those schemes that treat secular activities more favorably than religious activities). As Petitioners demonstrate, under Colorado's universal preschool program Colorado has allowed over 1,000 preschools to claim exemptions. Pet. Br. at 36. These more than 1,000 exemptions allowed preschools to decline admission to different families for a plethora of reasons. *Id*. Colorado's mechanism for individualized exemptions, permitting case-by-case enrollment determinations, thus undermines the law's asserted general applicability. *Fulton*, 593 U.S. at 533; Pet. Br. at 43.

The most concerning exemption is Colorado's allowance for participating preschools to screen for the child's or parent's participation in a specific community. Pet. Br. at 43.

Under oath, Respondent Odean testified that this exemption permitted preschools to admit only those students from families in the "LGBTQ community." Pet. Br. at 44. Respondent Odean further testified that Colorado's statute permits participating preschools to "prioritize families who have historically been discriminated against." Pet. Br. at 45. Respondent Odean, however, consistently maintained that Catholic schools could not have a policy where the school admitted only those families who pledged to uphold Catholic teachings. *Id*. Nothing in the First Amendment permits one side of a public debate to fight freestyle—permitting schools to admit students from LGBTQ families only—while compelling the other side of the public policy debate—Catholic schools prohibited from admitting their adherents only—to fight by the Marquess of Queensberry Rules. *R. A. V. v. St. Paul*, 505 U.S. 377, 391-92 (1992); *see also Citizens United*, 558 U.S. at 340 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.").

The First Amendment's Free Speech Clause and the Free Exercise Clause work "in tandem." *Kennedy*, 597 U.S. at 523. In doing so, the Free Speech Clause provides overlapping protection for "expressive religious activities" providing double protection for religious speech. *Id*. The Framers did this intentionally because it "is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Id*. at 523-24. Accordingly, Colorado's practice of free speech and free exercise for

me but not for thee is contrary to the First Amendment. Instead, it is reminiscent of the very thing that the Blaine amendments permitted: public funds for public schools to teach Protestant doctrine through the Protestant Bible; but not a penny of public funds to sectarian, i.e., Catholic, schools. This is unconstitutional.

Second, Colorado compels the Catholic Petitioners to abandon their beliefs as the price of admission to receiving public benefits. This violates the Free Exercise Clause. *Trinity Lutheran*, 582 U.S. at 462; *Fulton*, 593 U.S. at 532 ("[I]t is plain that the City's actions have burdened [Catholic Social Services'] religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs."); *cf. Citizens United*, 558 U.S. at 351 ("It is rudimentary that the State cannot exact as the price of those special advantages [incorporation] the forfeiture of First Amendment rights.").

By denying Petitioners' requested exemption, Colorado is compelling Catholic schools to an unconstitutional choice. The primary mission of a Catholic school is to transmit the faith to the youth. *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732, 753-54 (2020). Yet, Colorado wishes to interfere with that goal as a price of admission to its universal preschool program. Colorado compels Catholic schools to either accept families who disagree with the fundamental tenets of the Catholic faith or forego public funding. This imposes an unconstitutional choice. *Trinity Lutheran*, 582 U.S. at 462 (holding that putting a church to the choice of freely exercising your religion at the cost of disqualification of a public benefits program or accepting a public benefit while ceasing to freely exercise your religion is

an unconstitutional choice). Conditioning participation in a public benefits program on a willingness to violate cardinal precepts of the Catholic Church's faith "effectively penalizes the free exercise of [its] constitutional liberties." *McDaniel*, 435 U.S. at 626.

Accordingly, this Court should declare Colorado's denial of the requested exemption unconstitutional.

B. Colorado Discriminates Against Catholic Petitioners By Compelling Them To Accept Into Their Association Parents Who Disagree With The Church's Teachings.

As this Court recognized in *Our Lady of Guadalupe School*, and Petitioners here recognize too, the very purpose of a private religious school is the education and cultivation of the faith in the next generation. 591 U.S. at 753-54. State interference with this principle vests the state with the perilous power to pick favorites among religious denominations. *Carson*, 596 U.S. at 787.

To enhance the rights guaranteed under the First Amendment, that Amendment also protects the right to associate. *Dale*, 530 U.S. at 647-48. Associational rights in the pursuit of, among other things, religious goals are "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Id*. Included within this right to associate is the ability to decide who can be a member of the association. *Id*. at 648. Government compulsion to accept members that an association does not desire to admit may "impair the ability of the group to express those views, and only those views, that it intends to express." *Id*. Stated

differently, forcing an association to accept members that do not share the same message as the association "affects in a significant way the group's ability to advocate public or private viewpoints." *Id*.

Colorado seeks to interfere with Petitioners' right to transmit the faith to the next generation, and to do so in the manner Petitioners see best. *See Riley v. National Federation of the Blind of N. C., Inc*., 487 U.S. 781, 791 (1988). Colorado instead compels Petitioners to admit students from families who disagree with the church's teachings. This negatively impacts the Church's ability to transmit its teachings. *See Dale*, 530 U.S. at 659. This imposes an obstacle to the Church from achieving its goal of transmitting the faith to the youth. *Our Lady of Guadalupe School*, 591 U.S. at 753-54.

Accordingly, this Court should declare Colorado's denial of the requested exemption unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should declare Colorado's denial of the requested exemption unconstitutional. Colorado's practice of exemptions for me but not for thee violates the First Amendment.

Respectfully submitted,

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