No. 25-581

IN THE
Supreme Court of the United States

ST. MARY CATHOLIC PARISH,
LITTLETON, COLORADO, et al.,
Petitioners,

v.

LISA ROY, in Her Official Capacity as Executive Director of the Colorado Department of Early Childhood, et al.,
Respondents.

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

Brief *Amicus Curiae* of America's Future, Public Advocate of the United States, Public Advocate Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Petitioners

RICK BOYER
INTEGRITY LAW FIRM
P.O. Box 10953
Lynchburg, VA 24506

Attorneys for Amici Curiae

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com

**Counsel of Record*

July 2, 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae America's Future, Public Advocate of the United States, Public Advocate Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. *Amicus* America's Future filed an *amicus* brief in support of the Petition for Certiorari in this case.

STATEMENT OF THE CASE

In the 2023-2024 school year, Colorado implemented its "Universal Preschool Program" ("UPK"), which "provides at least 15 hours of free preschool per week for each eligible child in the state," and requires all participating preschools to "provide eligible children an equal opportunity to enroll and receive services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability." *St. Mary Cath.*

---

[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Par. in Littleton v. Roy, 736 F. Supp. 3d 956, 963 (D. Colo. 2024) ("*St. Mary I*").

The program was challenged on Free Exercise, Free Speech, and Establishment Clause grounds by two Catholic schools and parents barred from participation based on their rules requiring participating families to sign their agreement with Catholic teachings that marriage is limited to monogamous heterosexual relationships, and that there are only two sexes, male and female, that are not interchangeable. *Id.* at 974-75. Pursuant to that policy, in 2023, "Wellspring Catholic Academy declined to enroll a fifth grader with same-sex parents." *Id.* at 975.

Petitioners relied on this Court's decision in *Carson v. Makin*, 596 U.S. 767, 778 (2022), which declared unconstitutional a similar Maine UPK that explicitly reserved public funds to "nonsectarian" schools, ruling that the Free Exercise Clause "protects against 'indirect coercion or penalties on the free exercise of religion.'" *Id.* at 778. Nonetheless, the district court for the District of Colorado dismissed the schools' free exercise claim, relying on this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). There, this Court stated that "if prohibiting the exercise of religion ... is not the object ... but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878.

The district court believed *Carson* only required that government could not target religious entities for

unfavorable treatment "'solely because of' their religious character." *St. Mary I* at 989. It then concluded that the Colorado law was "neutral" because it "appl[ied] the equal-opportunity requirement 'in spite of' Plaintiffs' religious beliefs, not because of them." *Id.* at 993. Since the requirement applied to all preschools, the court found it both "generally applicable" and "rationally related" to a legitimate government interest of preventing "discrimination." *Id.* at 1003.

The Tenth Circuit affirmed. *St. Mary Cath. Par. in Littleton v. Roy*, 154 F.4th 752 (10th Cir. 2025) ("*St. Mary II*"). Like the district court, the Tenth Circuit discarded "the *Carson* line of cases" as addressing only "laws that targeted 'religious status' and 'religious use' on the explicit basis that they were religious and not secular." *Id.* at 764. The Tenth Circuit ruled that the Colorado law revealed no "general undercurrent of animus" against religion, and that because Colorado "has not restricted certain practices 'because of their religious nature,'" the state had "demonstrated the law's neutrality." *Id.* at 768. The court then ruled that because "[n]o preschool participating in UPK is allowed to take sexual orientation or gender identity into account when making admissions decisions, for any reason," the law was generally applicable. *Id.* at 775.

SUMMARY OF ARGUMENT

Colorado's Universal Preschool Program was designed to allow both religious and secular preschools eligible to participate — but only if those applicants

reject traditional Biblical morality and embrace the "sexual orientation" and "gender identity" religious doctrines favored by the State. Religious preschools which adhere to traditional Biblical morality are thus excluded, while religious preschools which are willing to abandon traditional Biblical morality are eligible. Such state preferences can be seen to violate both establishment clause and free exercise principles.

The courts below relied on *Employment Division v. Smith*, arguing that the Colorado law applies a generally applicable rule with only incidental adverse effect on some schools, parents, and children. They asserted that Colorado's allowing religious preschools to participate demonstrates that the law is neutral toward religion. However, by excluding applicants who refuse to embrace the state's inherently religious view of "sexual orientation" and "gender identity," Colorado is discriminating based on religious doctrine, which also interferes with the free exercise thereof. The courts below viewed *Carson* narrowly, as requiring only that government not target religious entities for unfavorable treatment "'solely because of' their religious character." Language in the *Carson* case was used by both courts below to justify use of an atextual interest balancing test by which indirect targeting of Biblical Christianity was deemed permissible, without regard to the original public meaning of the Free Exercise clause. It is time for this Court to make clear that "interest balancing" can never empower judges to disregard the original public meaning of the Constitution.

Colorado's handling of both exemptions and preferences in administering its program further evidences that Colorado is picking winners and losers based on the religious doctrine of the applicant. A preschool for only LGBTQ children is acceptable, but not a preschool which rejects the notion of "gender identity," especially for toddlers and young children well before puberty.

The view most consistent with the religion clauses is that the early years of education are inherently intertwined with religion, and thus outside the jurisdiction of the state. However, if government is to fund such early and primary education, it cannot do so by excluding those who embrace Biblical Christianity.

The problems that have arisen from the application of *Employment Division v. Smith* should be confronted by this Court. The far better approach is to adopt the text, history, and tradition approach to understanding the provisions in the Bill of Rights, as used recently in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). Applied here, that would require the Court to address the meaning of the term "religion" as it did in *Reynolds v. United States*, 98 U.S. 145 (1879). The Court would then find there are no relevant historical analogues for discrimination against Biblical Christianity.

ARGUMENT

I. COLORADO'S EXCLUSIONS FROM THE UNIVERSAL PRESCHOOL PROGRAM VIOLATE THE TEXT, HISTORY, AND TRADITION OF THE FIRST AMENDMENT.

A. *Carson* Demonstrates the Confusion and Failure Produced by Atextual "Balancing" Tests.

In challenging the Colorado UPK law below, Petitioners invoked *Carson v. Makin*, 596 U.S. 767, 778 (2022). *See* Petitioners' discussion of their reliance on *Carson* below in Petitioners' Brief at 15-16. In *Carson*, this Court ruled that the Maine UPK program that allowed only "nonsectarian" schools to participate violated the Free Exercise Clause which "protects against 'indirect coercion or penalties on the free exercise of religion.'" *Carson* at 778. In reaching that conclusion, this Court based its opinion on history and tradition, examining whether there was an **"historic and substantial" tradition."** *Carson* at 788 (emphasis added). However, in that decision, this Court also noted that a law that would "'disqualify some private schools' from public funding 'solely because they are religious' ... must be subjected to 'the **strictest scrutiny**.'" *Id.* at 780 (emphasis added).

These *amici* believe that by focusing on text, history, and tradition, this Court used the correct methodology in *Carson*, but then introduced unnecessary confusion by invoking strict scrutiny. As demonstrated by the opinions below, this Court's

continuing use of interest balancing empowers the lower courts to substitute their own judgment to evade the "text, history and tradition" of the free exercise clause. Thus, these *amici* urge this Court to decide the present case without any reliance on or invocation of what Justice Scalia described as a "judge-empowering 'interest-balancing inquiry.'" *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). To avoid cases such as this continuing to come to this Court, lower court judges should not be empowered with the tool of interest-balancing to evade the original public meaning of the Constitution.

B. The Decisions of the Courts Below Were Replete with Balancing.

The district court clearly considered its job was to apply an interest balancing test:

> "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." ... In contrast, as the Court in *Lukumi* instructed, a law that is not neutral or generally applicable must pass strict scrutiny, meaning it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." [*St. Mary I* at 987 (internal citation omitted).]

The district court conclusion was pure interest balancing:

> Because I find that the first State interest Defendants identify — ensuring eligible children and their families do not face discriminatory barriers — is compelling and that Defendants' conduct was narrowly tailored in pursuit of that interest, I do not assess whether the second State interest — protecting children from discrimination — likewise satisfies strict scrutiny. [*Id*. at 1005.]

The Circuit Court affirmed based on a balancing approach, without consideration of the text, history, or tradition of the free exercise clause.

> If a law is neutral and generally applicable, it "need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006). "On the other hand, if a law that burdens a religious practice is not neutral or generally applicable, it is subject to strict scrutiny," and must be "narrowly tailored to advance a compelling governmental interest." *Id.* Which is to say, the neutrality and general applicability inquiry guides the standard of judicial review to determine whether the law violates the Constitution. [*St. Mary II* at 765.]

Reliance on interest balancing allowed the lower courts to reach the decision they preferred, rather than the original public meaning of the clause, and both

courts decided that balance against the free exercise of religion.

C. Chief Justice Roberts Explained that Interest Balancing Is Never Constitutionally Required.

During oral argument in *Heller*, Chief Justice Roberts posed an insightful question with respect to how the Court should understand the scope of the Second Amendment — a question which these *amici* believe has equal application to searching out the scope of the free exercise clause:

> [T]hese various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," **none of them appear in the Constitution**; and I wonder why in this case we have to articulate an all-encompassing standard.[2]

The Chief Justice offered his own answer to that question when he proposed that balancing tests should be jettisoned in deciding *Heller*, in favor of a search for the original public meaning of the Second Amendment:

> Isn't it enough to **determine the scope** of the existing right that the amendment refers to, look at the various **regulations that were**

---

[2] Statement of Roberts, C.J., Tr. of Oral Arg., *District of Columbia v. Heller*, No. 07-290, at 44, *ll.* 5-10 (Mar. 18, 2008) (emphasis added).

> **available at the time**, including you can't take the gun to the marketplace and all that, and determine how these — how this restriction and the scope of this right looks in relation to those?[3]

In wrapping up, the Chief Justice rightly described how the interest balancing "standards that apply to the First Amendment just kind of developed over the years as sort of **baggage that the First Amendment picked up**."[4]

These *amici* believe that this case presents an excellent opportunity for this Court to jettison the atextual "baggage" of interest balancing in determining the scope of the Free Exercise Clause. These *amici* urge this Court to employ the same approach adopted in *Heller* for the Second Amendment — a search for the text, context, history, and tradition of the First Amendment and its protection of the free exercise of religion. Justice Scalia's opinion for the Court followed the suggestion of the Chief Justice, that there was no interest balancing to be done by the lower courts:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the

---

[3] *Id.* at 44, ll. 10-16 (emphasis added).

[4] *Id.* at 44, ll. 18-21 (emphasis added).

> hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. **A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.** Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. [*Heller* at 634-35 (bolding added).]

Lest there be any confusion, Justice Scalia explained that there was no "interest balancing" for judges to do, because "[t]he Second Amendment ... [l]ike the First, ... is the very product of an interest balancing by the people." *Id.* at 635. The constitutional text, as understood based on the history and tradition of the founding era, determines its scope, not the opinion of a judge who believes the government has a good reason to violate the Constitution's protections. The "text, history and tradition" test leads the lower courts to constitutionally faithful decisions, while any "judge-empowering interest-balancing inquiry" can never be trusted to be faithful to the Constitution's framers.

D. In Other Constitutional Contexts since *Heller*, this Court Has Rightly Rejected Balancing Tests for Some Version of "Text, History and Tradition."

There is reason to believe that this Court has been moving in the direction suggested by the Chief Justice and Justice Scalia in *Heller*. Indeed, since enunciating the "text and history [and] historical tradition" test in *Heller* (at 595, 627) and continuing in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 19 (2022), this Court has begun to jettison the atextual "baggage" of interest balancing in other areas of constitutional interpretation.

1. *Giles v. California*

The same year this Court decided *Heller*, it also applied a version of a text, history, and tradition analysis to understanding the Confrontation Clause. "[T]he Confrontation Clause is 'most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established **at the time of the founding**.'" *Giles v. California*, 554 U.S. 353, 358 (2008) (*quoting Crawford v. Washington*, 541 U.S. 36, 54 (2004)) (emphasis added).

2. *Kennedy v. Bremerton School District*

With respect to the Establishment Clause, this Court has explicitly repudiated the 1971 *Lemon* rule which involved balancing. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances

nor inhibits religion ... finally, the statute must not foster 'an **excessive** government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (emphasis added). From *Lemon* in 1971 through 2021, this Court has often acted expressly to disfavor religion in order to avoid such "excessive entanglement."

In 2022, this Court applied a version of the text, history, and tradition test to the Establishment Clause as well. "In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to **historical practices and understandings**.'" *Kennedy v. Bremerton School District*, 597 U.S. 507, 535 (2022) (*quoting Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (emphasis added).

In *Town of Greece*, this Court properly noted that "[t]he line we must draw between the permissible and the impermissible is one which accords with **history** and faithfully reflects the **understanding of the Founding Fathers**." *Id.* at 577 (*quoting School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)) (emphasis added). However, the *Town of Greece* Court had also credited "political change" as somehow being relevant, ruling that "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece* at 577. The *Bremerton School District* decision focused only on the practices of the Founders: "An analysis focused on **original meaning and history** ... has long represented the

rule rather than some exception within the Court's Establishment Clause jurisprudence." *Bremerton School District* at 536 (internal quotation omitted) (emphasis added).

3. *Dobbs v. Jackson Women's Health Org.*

Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 235 (2022) began with the text of the Constitution: "Constitutional analysis must begin with 'the language of the instrument,' ... which offers a 'fixed standard' for ascertaining what our founding document means, 1 J. Story, Commentaries on the Constitution of the United States §399, p. 383 (1833)." The *Dobbs* Court then looked at the time of the Framing as the relevant time for determining "history and tradition":

> A similar inquiry was undertaken in *McDonald* [*v. Chicago,* 561 U.S. 742 (2010)], which held that the Fourteenth Amendment protects the right to keep and bear arms. The lead opinion surveyed the origins of the Second Amendment, the debates in Congress about the adoption of the Fourteenth Amendment, the state constitutions in effect when that Amendment was ratified (at least 22 of the 37 States protected the right to keep and bear arms), federal laws enacted during the same period, and other relevant historical evidence.... Only then did the opinion conclude that "the Framers and ratifiers of the Fourteenth Amendment counted the right to

> keep and bear arms among those fundamental rights necessary to our system of ordered liberty." [*Id.* at 238.]

Dobbs rejected "the critical scrutiny of time and political change" and "judge-empowering balancing tests" as having any relevance to the "text, history and tradition" analysis. *Dobbs* said that the Court "must guard against the natural human tendency to confuse what [the Fourteenth] Amendment protects with our own ardent views about the liberty that Americans should enjoy." *Id.* at 239.

4. *National Republican Senatorial Comm. v. FEC.*

In a campaign finance case decided just two days ago, this Court seemed to acknowledge the tension between a "text and history" and an "interest balancing" approach.

> As a matter of **text and history**, therefore, the restriction on political-party coordinated expenditures would appear to violate the First Amendment. But the Court's **precedents** — particularly *Colorado II* in 2001 [involving a type of interest balancing] — **cloud the issue** and require additional and more nuanced analysis. [*Nat'l Republican Senatorial Comm. v. FEC*, 2026 U.S. LEXIS 2886, *14-15 (June 30, 2026) (emphasis added).]

A clear statement from this Court that the First Amendment should be interpreted without respect to

interest balancing could "uncloud" much First Amendment analysis.

E. *N.Y. State Rifle & Pistol Ass'n v. Bruen* and Beyond.

It is worth noting that the *Bruen* decision reiterated and clarified *Heller's* approach: "*Heller* does not support applying means-end scrutiny." *Bruen* at 19. The Court stated that the preferred balancing approach of many circuits, a "two-step approach, ... is one step too many.... Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* And the relevant time period for examination is "'founding-era historical precedent.'" *Id.* at 22. This Court properly noted that "not all history is created equal. '**Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them***.'" *Id.* at 34 (quoting *Heller* at 634-35) (bolding added).

Like *Dobbs*, the *Bruen* Court also rejected the "scrutiny of time and political change." The Court reminded lower courts that "to the extent later history contradicts what the text says, the text controls.... '[P]ostratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text.'" *Id.* at 36. "'The belated innovations of the mid- to late-19th-century courts come too late to provide insight into the meaning of [the Constitution in 1787].'" *Id.* at 36-37.

Atextual tests are inherently confusing and inherently subject to abuse by judges who are determined to be a law unto themselves. As Chief Justice Marshall put it, "The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed.... [C]ourts, as well as other departments, are bound by that instrument." *Marbury v. Madison*, 5 U.S. 137, 176, 180 (1803). "Judge-empowering balancing tests" are an open invitation to judicial lawmaking — instead of interpretation. Only the "text, history and tradition" test respects the Constitution. As Chief Justice Marshall also stated, "the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824).

This Court reiterated this just last year: "Observing the limits on judicial authority ... is required by a judge's oath to follow the law.... [E]veryone, from the President on down, is bound by law.... That goes for judges too." *Trump v. CASA, Inc.*, 606 U.S. 831, 858-59 (2025) (internal quotation omitted).

These *amici* urge this court to reject all atextual balancing tests with respect to the Free Exercise Clause, and return courts to the one task which Chief Justice Marshall described as saying "what the law is." The text, history, and tradition approach accomplishes this objective.

II. THE COURTS BELOW HAVE CREATED A ROADMAP TO USE THE *SMITH* TEST TO STIFLE THE FREE EXERCISE OF DISFAVORED RELIGIONS.

The decisions of the courts below validate Colorado's clever strategy to appear religiously neutral while discriminating against Biblical morality. Using this Court's test in *Employment Div. v. Smith*, 494 U.S. 872 (1990), the rulings of the courts below have encouraged other jurisdictions and other courts to manipulate *Smith* to suppress whatever religious doctrine may be disfavored in that locale.

Under *Smith*, if a law is "neutral" and "generally applicable," infringements on free exercise are permissible, despite the clear textual command of the Free Exercise Clause that "Congress shall make no law ... prohibiting ... free exercise...." Under the *Smith* test, governments like Colorado have declared open season not on all religion, but on selected religious doctrine disfavored by the state. While this Court has attempted in some recent cases to place guardrails to prevent misuse of *Smith*, those were circumvented. Under the Colorado rule, religious institutions of all sorts may participate, if they are willing to leave their Biblical morality at the door. Thus, the Colorado rule allows participation only by what might be termed liberal "Christian" institutions.

With respect to the issue of same-sex marriage, the decisions below betray the promise made by Justice Kennedy in *Obergefell* that those who believe in

traditional marriage would never face discrimination. *See Obergefell v. Hodges*, 576 U.S. 644, 679-80 (2015).[5]

A. The District Court Opinion Sanctioned Discrimination against Traditional Biblical Christianity.

In employing the *Smith* test to find the UPK law "neutral and generally applicable," the district court cited this Court's decision in *Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 584 U.S. 617 (2018). The court asserted that this Court's decision only addressed situations where civil authorities openly and flagrantly exhibited animus to certain religions, believing that the Court there:

> found the initial decisionmaking body **exhibited hostility to religion** because members of it "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain," mentioned the religious justifications for slavery and the Holocaust, and **referred to religious beliefs as "one of the most despicable** pieces of rhetoric that people can use ... to hurt others." [*St. Mary I* at 992

[5] As decisions such as those below compound on each other, it demonstrates how grievously in error was this Court's *Obergefell* decision. See how cases like this were predicted by one of these *amici* in an *amicus* brief filed in *Obergefell*. *See Obergefell v. Hodges*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.* (Apr. 3, 2015) at 26-41.

(quoting *Masterpiece Cakeshop* at 634-35) (emphasis added).]

Thus, the district court assumed that *Masterpiece Cakeshop* should have no application where "[t]he record contains no evidence that Defendants have passed judgment on or presupposed the illegitimacy of Plaintiffs' religious beliefs and practices." *Id.* at 993. Absent open hostility, it was no problem that the statute openly targeted Petitioners' religious beliefs by disqualifying them from the program.

The court also cited this Court's decision in *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522 (2021). The court noted that in *Fulton*, this Court tried to narrow *Smith* by ruling that "[a] law is not generally applicable if it invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for **individualized exemptions**." *St. Mary I* at 994 (quoting *Fulton* at 533) (cleaned up) (emphasis added). Yet, for the courts below, *Fulton* proved no more of a barrier to Colorado than had *Masterpiece Cakeshop*.

Petitioners argued that Colorado conceded that the "nondiscrimination" provisions in the UPK actually contained a "catchall **exemption** [which] could be used to allow preschools to admit **only 'gender-nonconforming children'** and to **prioritize** serving 'children of color from historically underserved areas' and 'the **LGBTQ community**,'" while "nevertheless refusing to accommodate sincere religious exercise." Petition for Certiorari ("Pet.") at 23 (emphasis added).

Thus, in both the text of the law and how it was implemented, Colorado discriminated against Biblical Christianity in three ways. First, the basic qualifications excluded applicants embracing traditional Biblical morality. Second, while exemptions were allowed to opponents of Biblical morality, its exemption policy prevented those embracing traditional Biblical Christianity from receiving one. And third, making the State's discriminatory purposes even more clear, preferences could be granted to those opposing, but not those supporting, traditional Biblical Christianity. The district court conceded that Dawn Odean, the director of the UPK program, testified that "a participating school could be just for 'gender-nonconforming children' ... or could grant preference to a child based on the child or family being part of the LGBTQ community." *St. Mary I* at 972.

B. The Tenth Circuit Decision Exhibited Somewhat Different Flaws.

The Tenth Circuit also read *Masterpiece Cakeshop* narrowly to apply only in the case of public expressions of "'clear and impermissible hostility toward the sincere religious beliefs' of the plaintiff." *St. Mary II* at 767-68 (quoting *Masterpiece Cakeshop* at 634). Like the district court, the Tenth Circuit was not concerned that the law was predicated on hostility to traditional Biblical Christianity so long as the discrimination was buried in the conditions on the funding, and not openly stated in a public forum. The lesson is that a state can prefer some religions over another so long as it bars them based on doctrine, not whether they had

attributes of a religious organization. The Tenth Circuit actually found that here, "the record indicates that the Colorado General Assembly passed ... the nondiscrimination requirement **to prevent discrimination on any grounds**, secular or religious." *St. Mary II* at 768 (emphasis added). Actually, the purpose was "to prevent discrimination on any grounds" other than against traditional Biblical Christianity.

The Tenth Circuit echoed the district court's treatment of *Fulton*'s "individualized exemptions" as well. The court ruled that "[u]nrelated exceptions [on the basis of income or disability] do not mean that the challenged portion of a law lacks general applicability." *St. Mary II* at 769.

Also, like the district court, the Tenth Circuit discounted Director Odean's testimony that a preschool could include only LGBTQ children — as if a toddler or young child in pre-school, before puberty, is capable of developing fixed views about their sexuality, unless those views are imposed on them by adults. The court stated that it would not invalidate a law based on "a series of hypotheticals posed unexpectedly to one witness at trial," despite conceding that the questions were posed on direct examination by the state, not on cross-examination. *Id.* at 770, 769. "We do not interpret Director Odean's testimony to imply that the Department was using the catchall preference to violate the nondiscrimination requirement," the court insisted. *Id.* at 770. As Petitioners pointed out in their Petition:

> The Department consistently treats the Mandate not as a strict obligation, but as a flexible provision that allows it to take into consideration all kinds of *other* important interests (*e.g.*, helping kids with disabilities and prioritizing historically discriminated against communities), while nevertheless refusing to accommodate sincere religious exercise. Respondents believe these preferences are permissible because they interpret the Mandate "to ensure that these children and their families who historically have been discriminated against aren't." [citation omitted] ... But "that is word play." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) (rejecting attempt to use clever drafting and interpretation to get around practical impact of the law). What matters is the real operation of the law. [Pet. at 23-24.]

The roadmap the courts below have created, based on *Smith* and *Masterpiece*, to enable government preferences to all except those who embrace Biblical Christianity, follows this three-step plan. First, state officials must be careful to avoid any public statements that reveal the state's real intent and hostility toward disfavored doctrines. Second, states must allow all religions to participate, but then impose a doctrine-based secondary test to weed out those who believe in disfavored doctrines. (Thus, a church that supports both same-sex marriage and transgender doctrine qualifies for its program, while a similar church down the street that either supports traditional marriage or

opposes transgender doctrine is excluded.) Third, when challenged, the State argues that it is not religiously discriminating against anyone — so long as they have the right views on secular matters. By labeling these views as secular, the state hopes to mask its discrimination against religious doctrine. This last rationale is inconsistent with this Court's declaration that "secular humanism" is a religion. *See Torcaso v. Watkins*, 367 U.S. 488, 495, n.11 (1961).

III. *REYNOLDS V. UNITED STATES* PROVIDES A "TEXT AND HISTORY" MODEL THIS COURT SHOULD FOLLOW TO RETURN TO THE ORIGINAL MEANING OF THE FREE EXERCISE CLAUSE.

Fortunately, this Court has an existing model to follow in *Reynolds v. United States*, 98 U.S. 145 (1879). The Court considered a free exercise challenge to a Utah law against bigamy, upholding the law. This Court's analysis, based on the text and history of the First Amendment, was consistent with the methodology employed in *Heller* and *Bruen*.

This Court in *Reynolds* first sought to define what free exercise protects. "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed." *Id.* at 162.

The Court expressly adopted the definition of religion posited by James Madison in 1785, in his famous Memorial and Remonstrance Against Religious Assessments. Opposing a bill to collect taxpayer money for the support of preachers, Madison championed a jurisdictional separation between the powers of civil government and those matters of conscience that must be left between man and God. He wrote:

> "Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." [quoting Virginia Declaration of Rights, art. 16]. The Religion then of every man 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. This right is in its nature an unalienable right. It is unalienable; because ... what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.... We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that **Religion is wholly exempt from its**

> **cognizance**.... [J. Madison, Memorial and Remonstrance (emphasis added).[6]]

This Court in *Reynolds* adopted Madison's definition of religion as "the duty which we owe to our Creator and the manner of discharging it." *See Reynolds* at 163. It also noted that the bill Madison opposed was defeated the following year, 1786, and Thomas Jefferson's "Act for Establishing Religious Freedom" was passed instead. *Id.* The preamble to that Act reads, "to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty...."[7] It continues, "it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order...." *Id.*

The Act then provides, "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, or shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of

---

[6] II The Writings of James Madison at 184-85, G. Hunt, ed. (G.P. Putnam's Sons: 1901).

[7] Thomas Jefferson, The Jeffersonian Cyclopedia: A Comprehensive Collection of the Views of Thomas Jefferson at 976, J. Foley, ed. (Funk & Wagnalls: 1900).

religion...." *Id.* The Act remains enshrined today as Article I, Section 16 of the Virginia Constitution.

The *Reynolds* Court incorporated Madison's definition of "religion" as the best expression of the intent of the Framers of the Free Exercise Clause. As applied in *Reynolds,* this Court noted that:

> after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distin[c]tion between what properly belongs to the church and what to the State. [*Reynolds* at 163.]

The *Reynolds* Court cited pagan religious practices such as human sacrifice and noted that these practices would constitute "overt acts against peace and good order," and thus could be banned without threatening Free Exercise. *Id.* at 166. The Court then went on to consider the state of bigamy laws when the First Amendment was written:

> [I]t is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an

> amendment to the Constitution of the United States the declaration in a bill of rights that "all men have an equal, natural, and unalienable right to the **free exercise of religion**, according to the dictates of conscience," the legislature of that State substantially enacted the [bigamy] statute of [King] James I., death penalty included.... From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. [*Reynolds* at 165 (emphasis added).]

Because there was a directly analogous Virginia statute against bigamy, passed the year after the Statute for Religious Freedom (the lineal ancestor of the Free Exercise Clause), and because bigamy prohibitions had been widespread among the states ever since, the Court determined that the text and history of the Free Exercise Clause did not protect bigamy. Notably, the Court conducted no balancing tests. It did find marriage and family to be important state interests, but upheld the bigamy prohibition, not because the government interest outweighed the religious exercise of the plaintiff, but because the act of bigamy was subject to the authority of civil

government, and not protected by those who framed the Free Exercise Clause.

Madison and Jefferson would consider the entire modern paradigm of compulsory, government-funded primary education as intruding the state into the field of "religion," thereby violating the Free Exercise Clause. As law professor Jeffrey Tuomala explains: "Madison defines 'religion' in a legal context and is not giving it a theological definition.... **The jurisdiction of religion** includes not only prayer, Bible reading, worship, and proselytizing, but also **education**, charity, and more. Religion includes any thought, speech, or action not properly within the jurisdiction of civil government to sanction." By Madison's definition, "[i]f the state has no legitimate interest in punishing an action, it is within the jurisdiction of religion, i.e., the freedom of conscience."[8] Jefferson's Virginia Statute for Religious Freedom reinforces this view, that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of ... liberty...."[9] However, under the very different modern, atextual view that it is possible to have such a thing as "secular" education, the rule must be that the state may not discriminate against disfavored religious

---

[8] Jeffrey Tuomala, "Is Tax-Funded Education Unconstitutional?" 18 Liberty U. L. Rev. 1009, 1026, 1030 (Mar. 2024).

[9] Francis Hirst, Life and Letters of Thomas Jefferson 139 (MacMillan Co. 1926).

doctrines such as Biblical Christianity, as occurred here.

The *Reynolds* Court was entirely correct in looking to the text and history of the Free Exercise Clause, as this Court did in *Bruen*, to determine whether a given restriction had a historical analogue in the founding era. This Court should jettison both the "generally applicable" and "compelling interest" tests, and follow *Reynolds* in assessing the text and history of the Free Exercise Clause in the context of Colorado's law here. Once that assessment is done, the UPK's exclusion of religious schools cannot stand.

IV. VIEWED IN THE LIGHT OF THE TEXT AND HISTORY OF THE FREE EXERCISE CLAUSE, COLORADO'S UPK RESTRICTION ON CERTAIN RELIGIOUS SCHOOLS CANNOT STAND.

There are no relevant historical analogues from the Founding era allowing states to discriminate against religious entities based on whether their doctrine is consistent with Colorado's position in recognizing and protecting the "sexual orientation" of same-sex attracted persons, and giving individuals the ability to deny the created order based on modern notions of "gender identity."

Rather, as this Court noted as recently as 1986, "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of

the 37 States in the Union had criminal sodomy laws." *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986) (overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003)).

It is utterly impossible to construct a reality in which the Founding generation would have penalized a religious institution for taking a public position against homosexuality, same-sex marriage, or "transgender" ideology. Indeed, when this Court saw fit to override *Bowers*, it explicitly rejected looking to Founding-era history and tradition in interpreting the Constitution, stating "[o]ur laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Lawrence* at 571-72.

The first state law prohibiting "discrimination" against homosexuals in employment or housing was passed in 1982, in Wisconsin.[10] There is no state law before 1982 that would even suggest any "government interest" in restricting the free exercise of religious persons or entities in favor of "sexual orientation" or "gender identity." Nothing in the text or history of the Free Exercise Clause even hints at permitting government to disfavor a religious entity because it holds to a position universal in American law at the time of the Framing.

---

[10] Milwaukee Public Library, "First in the Nation - Wisconsin's Gay Rights Law," *MPL.org* (June 18, 2015).

This Court should not follow the *Lawrence* Court's error of finding that "laws and traditions in the past half century are of most relevance here." As this Court rightly noted in *Bruen*, "late-19th-century evidence cannot provide much insight into the meaning of the [Constitution] when it contradicts earlier evidence." *Bruen* at 66. Rather, this Court should heed Chief Justice Roberts' warning and jettison the "baggage that the First Amendment picked up," in favor of a careful assessment of the scope of the right as understood by the Framers.

Indeed, this Court ruled just last year that "a government cannot condition the benefit of free public education on parents' acceptance of … instruction" that poses "'a very real threat of undermining' the religious beliefs and practices that the parents wish to instill." *Mahmoud v. Taylor*, 606 U.S. 522, 530 (2025) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)). "Public education is a public benefit, and the government cannot 'condition' its 'availability' on parents' willingness to accept a burden on their religious exercise." *Id.* at 561. Colorado has instead imposed the burden on the religious exercise of religious schools, as well as the schools' children and their parents, by requiring schools to drop their religious opposition to homosexuality and admit children of practicing homosexuals in order to receive equal access to state funds.

V. THE UPK RESTRICTION AGAINST CERTAIN RELIGIOUS SCHOOLS ALSO VIOLATES THE ESTABLISHMENT CLAUSE.

Although this *amicus* brief primarily focuses on the UPK program's threat to Free Exercise, the program impermissibly violates the Establishment Clause as well.

Colorado is correct that Petitioners' position — that marriage and sexual activity should be confined to monogamous heterosexual relationships, and that the sexes are distinct and non-fungible and children should be taught accordingly — is rooted in religious belief. No less religious is Colorado's support for homosexuality and transgenderism. Both positions are moral assertions, inescapably rooted in religion. This Court has noted "[i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty ... those beliefs certainly ... function as a religion in his life...." *Welsh v. United States*, 398 U.S. 333, 340 (1970).

As this Court has repeatedly ruled, "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can ... pass laws which aid one religion ... or prefer one religion over another." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). "[T]he 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas,*

393 U.S. 97, 104 (1968). Accordingly, government may not "'impose[] special disabilities on the basis of ... religious status....'" *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993).

But Colorado's UPK permits the state to advance its religious values by calling them a ban on "discrimination." At the same time, the state imposes burdens on Petitioners for advancing their religious values that "[s]exual identity, embodiment as either a man or a woman is a gift that is given to us from the moment of creation," that "mothers and fathers are [not] interchangeable"[11] and children should have a right to be raised by both a mother and a father, and that (as this Court recognized in *Reynolds*) "[u]pon [monogamous marriage] society may be said to be built," and upon it "the principles on which the government of the people, to a greater or less extent, rest[]." *Reynolds* at 165-66. This is what the Establishment Clause plainly forbids.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

---

[11] *St. Mary I* at 975.

Respectfully submitted,

RICK BOYER
INTEGRITY LAW FIRM
P.O. Box 10953
Lynchburg, VA 24506

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*
Attorneys for Amici Curiae
July 2, 2026