No. 25-802

In the Supreme Court of the United States

FOOTHILLS CHRISTIAN MINISTRIES, ET AL.,

PETITIONERS,

v.

KIM JOHNSON, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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I. The State's last-hour changes to its Personal Rights form do not divest this Court of jurisdiction to grant the petition.

The pupil Personal Rights form discloses that parents can opt their children out of religious services and activities, as well as bring an outside spiritual advisor onto a church preschool campus. The primary opposition is that—less than three weeks before the Churches filed their petition—the State changed the contents of the Personal Rights form. This tactic fails.

First, the language in the regulation sits as unchanged for nearly thirty years. The text states that a preschool "shall inform each child's [parent] of the [pupil's personal] rights . . ." How are the parents to be informed of those rights? The regulation tells us: "The center shall give each [parent] a copy of the Personal Rights form (**LIC 613A [9/96]**)." 22 Cal. Code of Regulations § 101223(b)(1) (emphasis added). In the State's opposition brief, a footnote provides a link to the new form. CA BIO n. 1. The form cited to is LIC 613A **[12/25]**. Stated simply, the regulation mandates the Personal Rights form from September 1996; it is that form that is operative here. Without going through California's statutory procedures for amending a regulation (Cal. Gov. Code §§ 11340 et seq.), the State is attempting to evade review of the law by changing the challenged text on the courthouse steps.

The chronology of the State's machinations is important. On June 2, 2025, just three days before oral argument in the Ninth Circuit (06/05/2025), the State changed the Personal Rights form to strike the language giving parents the right to bring in an outside spiritual advisor to a church preschool campus. Pet. 9–10. Now, eighteen days before the Churches' petition seeking a writ of certiorari was due, the State changed the form again to evade judicial review, or at the least introduce an element of confusion into the litigation.[1]

This is a litigation tactic that this Court has seen California use before. *Tandon v. Newsom*, 593 U.S. 61, 63 (2021); *Gateway City Church v. Newsom*, 592 U.S. ___, 141 S. Ct. 160 (2021). In dealing with such maneuvers, this Court explained that "[s]o long as the plaintiff is under constant threat that government officials will use their power to reinstate the regulation, the case is not moot." *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 20 (2020) (per curiam). Thus, the State's cessation of its challenged practice cannot be used as a means of depriving a federal court of its "power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982).

Here, in anticipation of the petition for relief, California once again changed the language regarding religious services opt-out and bringing in outside spiritual advisors on the Personal Rights form. One would think these types of last-gasp efforts to evade judicial review would have ended with the

[1] The State changed the Personal Rights form on December 18, 2025. The Churches' petition was due January 5, 2026.

demise of the pandemic. Yet here California is attempting to breathe new life into this tactic. It will not work. This Court has made plain that withdrawal or removal of a challenged law in the course of litigation will not moot the case. *Roman Catholic* (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)); *see also*, *United States v. W.T. Grant Co.,* 345 U.S. 628, 632 (1953).

Finally, the State's attempt to moot the free exercise and free speech issues by merely changing language on a website does no more than highlight the capriciousness of the administrative state and underscores how easily the threat to religious preschools can resurface. Moreover, the last-hour changes in the forms indicate that the State realizes that the challenged regulation is legally indefensible. Whatever the stratagem, this Court has not been robbed of jurisdiction to grant this petition.

II. The opt-out is at issue, not parochial schools' freedom to select religious curriculum.

The Ninth Circuit and the State have attempted a sleight of hand to transform the religious services provision into a question of curriculum. CA BIO 6 (citing Pet. 7a and 21a), 11, and 18. True—neither the Act nor the regulations restrict the content of instructional material, religious or otherwise. But that is not the challenge brought by the Churches. The challenge is to the regulatory authority that requires notice of parental opt-out of

religious services or activities. Chapel attendance is a religious service, not an instructional material. Moreover, religious activities include exercises such as prayer, singing Christian children's songs, and Bible stories. Consider Bible stories which are part of the preschool curriculum. Though the State does not restrict that instruction, the regulation enables the parents to opt their child out of that teaching. Therein lies the problem.

The State and the lower courts misapprehend the concerns of these parochial schools. Church-run preschools retain plenary authority over the spiritual formation of children enrolled in a religious program on a church campus. Yes, this includes curriculum which the State does not control. But it also encompasses the services and spiritual activities for which the State has instituted a regulatory parental opt-out.

Related to this, the State is dismissive of the *amici* that address church autonomy, claiming that issue was never argued in the petition. CA BIO n. 4.[2] Far from it. This is part and parcel of the second question presented. Pet. i.[3] The petition is honeycombed with the discussion of the plenary authority of a church over spiritual formation. Pet. 13,

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[2] Br. Notre Dame Education Law Project, et al. 5-14; Br. NC Values Institute 2-21; Br. Am. Ctr. For Law & Justice 5-8.

[3] "Does the religious services provision with the spiritual advisor notice interfere with the free exercise rights of a parochial school to have plenary over spiritual formation of children while on a church campus."

26–27, and 36–40. This is an inextricable part of the doctrine of church autonomy.

III. Instead of defending the decision below on categorizing the disclosure as "commercial speech," the State claims *Zauderer* unity among the circuits.

The petition sets forth the 7–5 split between the circuits and the 4–3 split between the highest state courts on the interpretation of *Zauderer* disclosures. The State's opposition puts forward three new—but tepid—points in an attempt to claim judicial unity on the scope and application of *Zauderer*.

1. First, the State notes a denial of a petition for writ of certiorari regarding *Zauderer* coming out of the Ninth Circuit from more than six years ago. CA BIO 15. Based on that sole denial, the State declares that there "was no conflict then, and there is no conflict now" between the circuits. *Id*. Then the State proclaims that "[e]very federal circuit and state court of last review" addressing whether *Zauderer* "is limited to the prevention of consumer deception has held—like the court below—that it is not." *Id*. This bold proclamation is trumpeted without the benefit of supporting authorities.

Besides failing to provide authority for that statement, the State declines to address what the Ninth Circuit in this case actually held regarding the preschooler "personal rights" regulation; namely, that

the disclosure is "compelled commercial speech." App. 16a. Mysteriously, one searches in vain for the term "commercial speech" in the State's brief. In sum, other than making a claim of unity among the courts, the State refuses to defend the Ninth Circuit's fundamental premise on the free speech claim.

To this point it must be added that the issue regarding free speech in this litigation cannot be cleanly segregated from the issue of the free exercise of religion, for the challenged compelled speech in the regulation explicitly deals with religion. The Churches take issue with the speech that informs parents that they can opt their child out of religious services and activities and bring in an outside spiritual advisor. Here the liberties of speech and free exercise most obviously overlap and should be analyzed as interdependent. Pet. 22 and 36.

2. The State's next point is not really a point at all. Not willing to address compelled commercial speech, the opposition brief follows with a lengthy string cite paragraph for the proposition that "[s]tate and federal appellate courts have applied *Zauderer* to a wide variety of regulations, from health and safety warnings to security disclosures to conflict-of-interest disclaimers." CA BIO 15–16. To the extent that this is a new point raised in the opposition, it hardly merits a reply because it does nothing more than state a truism—namely, that state laws requiring disclosures appear in a variety of regulatory settings. That point is conceded but not particularly germane to whether there is a significant circuit split

on the interpretation and application of compelled commercial speech disclosures under *Zauderer*.

In addition to the cases cited in the petition demonstrating a circuit split, the scholarship cited by *amici* leaves little doubt that the courts are divided. *See*, *generally*, West Virginia Attorney General *Amici Curiae* Brief joined by ten additional State Attorneys General ("AGs' Br.") 5–8 and 11–14 (citing eight law review articles in which the authors review the caselaw and find the inconsistencies in the lower courts).

To the extent that the State attempts to dispute a circuit split, it takes issue with the holding from *Nat'l Ass'n of Mfrs. v. S.E.C.*, 800 F.3d 518 (D.C. Cir. 2015) (*see*, Pet. 22), where the D.C. Circuit confined *Zauderer* to advertising. *Id*. at 522. The State proffers that in a subsequent case that court clarified that "it has not so limited the standard" to advertising. CA BIO 16 (quoting *Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 541 (D.C. Cir. 2017)). The D.C. Circuit's ping-ponging of positions on *Zauderer* (*see*, *Nat'l Ass'n of Mfrs. v. S.E.C.*, 748 F.3d 359, 371 (D.C. Cir. 2014); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014) (en banc)) demonstrates the need for clarity. Granting this petition provides that opportunity to bring order to the chaos.

3. The State raises the claim that the Ninth Circuit followed the normal course under *Zauderer*, finding that the religious provision disclosure is literally what the law says and is thus "factual"; this is incorrect for three reasons. First, the

State's non-textually-based interpretation of the regulation is that a religious preschool and the parents can make a side agreement apart from the regulation. CA BIO 4. If this is true, then the religious services disclosure regulation is not factually accurate. Second, since the State capriciously changes the form in a manner that respondents admit is "not grounded in the Act or any regulation," *id.*, then there can be little doubt that the disclosure falls short of factual accuracy. Third, California allegedly claims it disavows enforcement—though it tenaciously holds onto the regulation rather than repealing it. CA BIO 11. If this is to be believed, then for that reason the compelled disclosure would be false, not factual. *See*, NIFLA *Amicus Curiae* Brief 3.

As pointed out by *amici*, not only is the disclosure not factually true, but also it is deceptive. It infers that "parents have a constitutional right to insist that churches not require students to attend religious services" in a parochial preschool where they have enrolled their children. Br. Nat. Legal Found. 4.

This issue is intertwined with standing for the free exercise claim. The State is caught on the horns of a dilemma. If the disclosure is not factual, then the Churches prevail on the free speech claim. On the other hand, if the disclosure is indeed factual such that there are enforceable rights as against the Churches, then there is injury and therefore Article III standing under the free exercise claim. Whatever the case may be, the petition should be granted to

determine if a disclosure requiring the verbatim recitation of a law is per se factual under *Zauderer*.

4. Besides making the claim that the disclosure here is factual, the State asserts that the disclosure is not controversial. CA BIO 10. Like the Ninth Circuit, the State provides no explanation of why that is so or what constitutes "controversy." Though not entirely clear on this point, the State appears to take the Ninth Circuit's position. In sum, relaying the actual content of a regulation that pupils have a number of rights under state law is literally true. Thus, by extension, that disclosure is not controversial. App. 17a.

That view of *controversy* is not shared by all the circuits. As one of the *amici* explains, the circuits are not in agreement on what makes a disclosure under *Zauderer* controversial. Does *controversial* mean ideological content, political bias, or a subject like abortion or climate change? "Ultimately, *NIFLA* has left us with a solid circuit 'split' over 'when commercial speech is' controversial." AGs' Br. 14. The term *controversial* either needs a court-made definition, or the *Zauderer* rule itself needs further refinement. This petition is a good vehicle to that end.

IV. Under general applicability analysis, whether an exception is comparable, the burden of proof regarding relative risk rests with the government.

1. The State claims that the exceptions allowed under the Act are not comparable to church

preschools because they are government entities and use differing regulatory schemes. CA BIO 13. Without explanation, the State does not provide a hint of how those regulatory schemes actually mitigate the risk.

This Court has made clear that the comparability of activities turns on "the risks various activities pose," not the nature of the activities, even if regulated. *Tandon*, 593 U.S. at 62. Nor does *Tandon* measure the amount of time spent on an activity. To be clear, it is the government's burden "to show that measures less restrictive of the First Amendment activity could not address its interest." *Id.* at 63. Yet in its opposition brief the State fails to provide any legal or evidentiary citations to shoulder this burden. The Ninth Circuit's opinion did not cite anything in the record, regulation, or statute to lend the State a hand to carry this load other than restating the proposition. App. 12a.

In addition, the State acknowledges, as it must, that there are numerous unregulated exceptions to licensure in the Act. CA BIO 2. *See*, Cal. Health & Safety Code § 1596.792 (d)–(f) and (j)–(l). These are exceptions that church preschools cannot enjoy. What is more, a secular preschool is exempt from licensure, but not parochial preschools. *Id.* at § 1596.792(o). "A law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021). Whatever these exempt entities do to keep children safe, surely church-run preschools could do the same.

2. Further, both the State's and the Ninth Circuit's position is belied by the fact that once-per-week programs—such as Sunday school—are already exempted. Cal. Health & Safety Code § 1596.792(j). CA BIO 12. Although in its opposition brief the State recognizes this exception to licensure, it cannot articulate why the health and safety protocols used during Sunday school cannot be implemented Monday through Saturday. Like the Ninth Circuit, the State merely says that more than one time per week is not safe; that falls short of carrying its burden under a comparability analysis. Moreover, the panel's hypothetical preschool that operates up to twenty-four hours a day (App. 12a) is pure fiction. The Ninth Circuit pointed to no such preschool because none exist.

3. Although the State properly identifies Sunday schools as coming within the one-time-per-week statutory exception (§ 1596.792(j)), it omits the undisputed fact that the petitioners are large churches with multiple services spread out over the weekend. For example, Foothills Christian Ministries not only has two Sunday services with Sunday school, but it also conducts worship services on Friday and Saturday night with the children's programs in operation. Pet. 11. Similarly, besides classes for children on Sundays, both the Grove Church and Journey Community Church have Friday classes for children during that evening's worship service. Pet. 13. Per the Act, the Churches fall within the licensure requirement because they have children's programs more than once a week. Cal. Health & Safety Code § 1596.792(j). What is more, the petitioners' midweek

programs for children also sail them outside of the statutory exemption harbor.

The parties agree that *Tandon* provides the rule. But the fact that the lower court could reach the result here, despite the various exceptions under this Act, illustrates the need for clarity of the application of the *Tandon* rule.

Finally, the State asserts that "there is nothing stopping petitioners from applying for and obtaining a license." CA BIO 18. But under the Act these Churches—and probably most large churches in California with multiple services during the week—would find themselves compelled to obtain a license to operate their children's ministries, whether they have a parochial preschool or not. Consider that licensure would require posting signage of children's "personal rights" and distribution of the form which includes the religious services provision and outside spiritual advisors provision. Contrary to the State's claim that the Churches do not object to the Personal Rights signage and forms (CA BIO 10), the petitioners most certainly oppose communicating the government message that runs counter to the Churches' mission. The petition should thus be granted because of the substantial burden on a wide swath of churches.

CONCLUSION

This Court should grant the Churches' petition.

Respectfully submitted this seventeenth day of April 2026,

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