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 PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 21 OTHER STATES IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Education is "of supreme importance." *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923). And preschool can be a valuable first step in that education. Indeed, "[s]tudies now show several long-term benefits" from preschool for children, parents, and the broader community alike. Alex Raskin, *The Right to Preschool: Once A Wartime Necessity, Now A Fundamental Step Towards Educational Equity*, 32 J.L. & POL'Y 199, 223 (2024). Unfortunately, though, observers of all political stripes have noted how "the shortage of quality preschool programs is very real." Elizabeth Warren, *Families Alone: The Changing Economics of Rearing Children*, 58 OKLA. L. REV. 551, 572 (2005).

One would expect States who chose to fund preschool education to enlist help from wherever it might be found—religious institutions included. Indeed, as many of the Amici States have explained elsewhere, "religious preschools play an important role in meeting the needs of families" nationwide. Br. of South Carolina, et al. as Amici Curiae In Support of Pl.-Appellee at 2, *Darren Patterson Christian Acad.* v. *Roy*, No. 25-1187 (10th Cir. Nov. 17, 2025), ECF No. 62. No less than public schools, religiously affiliated preschools can help transmit "the values on which our society rests"—the "fundamental values necessary to the maintenance of a democratic political system." *Ambach* v. *Norwick*, 441 U.S. 68, 76-77 (1979).

But Colorado sees things differently. After creating a universal preschool funding program, it barred Catholic-

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[*] Under Supreme Court Rule 37, *amici* timely notified counsel of record of their intent to file this brief.

affiliated preschools from participating. It decided that key tenets of Catholic theology—core beliefs on matters like marriage and biological sex—were discrimination. The Catholic preschools could receive funding only if they agreed to admit students and families that opposed these aspects of the Catholic faith. It didn't matter to Colorado that "shared values" are one of the benefits of faith-based preschools. BIPARTISAN POLICY CENTER, EXAMINING THE ROLE OF FAITH-BASED CHILD CARE 8 (2021), https://tinyurl.com/2tnaes7u. The preschools' fidelity to their religious beliefs was labeled unlawful bigotry.

Colorado's exclusion of Catholic preschools from its universal preschool program violated the Constitution's Free Exercise Clause, and the lower court erred in signing off on it. State-level "hostility" toward religious practice—and particularly toward "aid to pervasively sectarian schools," like Catholic schools—has a long and "shameful pedigree" in America. *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000). And regrettably, a new brand of anti-religious lawmaking—wielding a "non-discrimination" provision as a de facto exclusion of religious organizations—is coming into vogue. Some courts think it's fine even if the State concededly offers exceptions to its non-discrimination rules for State-favored reasons. And other courts think it's permissible because the State is savvy enough to avoid express religious-targeting. But under any reasonable reading of the Free Exercise Clause, these courts are wrong.

The Court should grant the Petition and reverse. Conditioning funds on agreement to state-approved, anti-religious orthodoxy is one of the more troubling First Amendment violations one can imagine. But if the decision below stands, then such conditions will likely become par for the course. Our children deserve better.

SUMMARY OF ARGUMENT

I. The decision below approved of a straightforward First Amendment violation, even though the statute does not explicitly target religion. The First Amendment does not protect against overt and express religious discrimination alone. Government hostility towards religious institutions violates the Constitution even if the State employs a little subtlety in achieving its discriminatory aim.

And make no mistake: Colorado violated St. Mary's First Amendment rights. As in many of this Court's earlier free exercise cases, Colorado has excluded St. Mary's from a public benefit program. But this time, it excluded St. Mary's on account of its religious beliefs under the guise of applying the State's antidiscrimination law. The nondiscrimination label makes no difference. Again: Under the First Amendment, covert exclusion fares no better than overt exclusion.

II. The Court should grant this petition to put a stop to a worsening trend of dressing up religious discrimination in ostensibly neutral language.

For a long while, States discriminated against religion primarily through nonsectarian or other similar requirements—requirements that, on their face, excluded religious people and groups. But after this Court's firm and repeated free exercise guidance, such obviously wrongheaded approaches are off the table.

So now that openly anti-religious legislation is foreclosed, States who oppose religious people and their views have gotten creative. The new trend wields antidiscrimination requirements as weapons to take out any religious group that hasn't fallen in line with

majoritarian groupthink on certain political issues, like gender identity.

That constitutional workaround is gaining steam. It is no secret that traditional, religious views on marriage, gender, and sexuality are no longer politically popular in certain quarters. But those views still merit First Amendment protection when bound up with religion. Without redirection from this Court, States who scorn those religious beliefs will continue pursuing the strategy Colorado has displayed here.

The ripple effects won't stop with education. States can weaponize the same tactic against any religious organization that receives government funding for any social service or public benefit program. Religious institutions *and* the public will suffer.

III. This conflict stems from *Smith*. Free exercise rights are not something to "balance" against state antidiscrimination interests. And the abstract question of whether a law is "neutral" and "generally applicable" often leads courts to dismiss real harms to religious people and organizations in this context. The First Amendment affords special protection for religious exercise, and *Smith* flips that principle on its head. This Court should say goodbye to *Smith* once and for all.

ARGUMENT

I. States may not circumvent the First Amendment through superficially neutral requirements.

A. The First Amendment forbids States from "discriminat[ing] against individuals or groups because they hold religious views abhorrent to the authorities."

Sherbert v. *Verner*, 374 U.S. 398, 402 (1963). The government likewise may not declare people ineligible for a benefit based on the practice of their religion. *Id.* at 404; *Everson* v. *Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 16 (1947). Anything else would allow the government to place an "unmistakable" "pressure" on individuals to surrender "precepts of [their] religion." *Sherbert*, 374 U.S. at 404. And that pressure would unconstitutionally "penalize" people for exercising their First Amendment rights. *Id.* at 406.

Even a modest articulation of free exercise rights protects "religious observers against unequal treatment." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah.*, 508 U.S. 520, 542 (1993). States are not to be an "adversary" of religion, nor can States wield their power to "handicap religions." *Everson*, 330 U.S. at 17, 18. The "purpose of the First Amendment" is "obviously not" to "make it … more difficult" for religious groups to operate. *Id.* at 18. So even under the narrow view of what the Free Exercise Clause demands, States "may not constitutionally apply … eligibility provisions" in a way that constrains people "to abandon [their] religious convictions." *Sherbert*, 374 U.S. at 410.

But really, any understanding of the Free Exercise Clause that stopped there would be too narrow; in truth, the First Amendment goes further. It gives "special solicitude to the rights of religious" groups and individuals. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 189 (2012). And even when a State exercises its "broad police power" to further important government interests, the First Amendment imposes stiff limits. *Wisconsin* v. *Yoder*, 406 U.S. 205, 214, 220 (1972). "[A]reas of conduct protected by the Free Exercise Clause" are often "beyond the power of

the State to control." *Id.* at 220. So especially when a State has already demonstrated that it can make accommodations to its asserted policies, the First Amendment says that States *must* offer similar accommodations to religious practitioners and their "religious organizations." *Duquesne Univ. of the Holy Spirit* v. *NLRB*, 947 F.3d 824, 828 (D.C. Cir. 2020).

B. The strong prohibitions against laws disfavoring religious organizations have remained even after *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Indeed, this Court has always "been careful to distinguish [neutral and generally applicable] laws from those that single out the religious for disfavored treatment." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 460 (2017). A few recent cases show how this principle applies in practice.

Take *Trinity Lutheran* first. There, this Court held that Trinity Lutheran had a First Amendment right "to participate in [Missouri's] government benefit program"—a playground grant program—"without having to disavow its religious character." 582 U.S. at 463. Because "[t]he Department's policy expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character," it was subject to "the most exacting scrutiny." *Id.* at 462. And under that scrutiny, the policy crumbled. *Id.* at 466.

Espinoza extended *Trinity Lutheran*'s rule to a different context: private education. Although States "need not subsidize private education," once they do, they "cannot disqualify some private schools solely because they are religious." *Espinoza* v. *Mont. Dep't of Revenue*, 591 U.S. 464, 487 (2020). This idea held particularly true because discrimination against religious *institutions* also

works discrimination against religious *people*: Laws like Montana's "burden[ed] not only religious schools but also the families whose children attend or hope to attend them." *Id.* at 486. And religious people "are members of the community too, [so] their exclusion from the scholarship program … [was] odious to our Constitution and [could not] stand." *Id.* at 488-89 (cleaned up).

Fulton examined the principle in the face of a nondiscrimination clause. Catholic Social Services believed that "marriage [was] a sacred bond between a man and a woman," and therefore that it could not certify same-sex couples for foster care. *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 530 (2021). But—in the name of enforcing its nondiscrimination provision—the City refused to enter a contract with CSS unless CSS surrendered that belief. *Id.* at 531. This Court held that the City "burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." *Id.* at 532. And that burden, which derived from a policy that was not generally applicable, was unconstitutional. *Id.* at 542.

Tracking some of the ideas from *Fulton*, *Carson* followed the same trajectory as *Trinity Lutheran* and *Espinoza*—and went a few steps further. The schools in *Carson* were once more "disqualified from [a] generally available benefit"—tuition assistance—"solely because of their religious character." *Carson* v. *Makin*, 596 U.S. 767, 780 (2022) (cleaned up). And the tie to *Espinoza* was particularly unmistakable; although "the wording of the Montana and Maine provisions [was] different, their effect [was] the same." *Id.* "[N]othing neutral" can be found in a program that operates to exclude only religious groups. *Id.* at 781.

This Court also rejected Maine's attempts to distinguish *Carson* from *Trinity Lutheran* and *Espinoza*. 596 U.S. at 782. Of most relevance here, it repudiated the idea that States can "recast a condition on funding" in a way that would reduce the First Amendment analysis "to a simple semantic exercise." *Id.* at 784. The free exercise inquiry turns on "substance" not on "the presence or absence of magic words." *Id.* at 785. Otherwise, this Court's First Amendment jurisprudence "would be rendered essentially meaningless." *Id.* at 784. So "formal distinctions" do not "affect the application of the [substantive] free exercise principles." *Id.* at 782.

Trinity Lutheran, *Espinoza*, *Fulton*, and *Carson* thus come together to shape a straightforward rule: No matter how a State frames a program or policy, it may not operate to exclude religious institutions on account of their religious exercise without violating the First Amendment.

C. By the same token, a State's exclusion of religious groups does not become constitutional just because it becomes more clandestine.

The Free Exercise Clause protects against more than "facial discrimination." *Lukumi*, 508 U.S. at 534. It bars any "subtle departures from neutrality," "covert suppression of particular religious beliefs," or concealed "governmental hostility." *Id.* (cleaned up); see also *Masterpiece Cakeshop* v. *Colo. C.R. Comm'n*, 584 U.S. 617, 634 (2018). So "[f]acial neutrality is not determinative" of whether a law is constitutional. *Id.* For example, a silent-on-religion policy designed to "'disrupt' children's thinking about sexuality and gender" can unduly burden religion when it does not provide opt-outs to accommodate free-exercise rights. *Mahmoud* v. *Taylor*, 606 U.S. 522, 529, 538, 561 (2025). So courts must "meticulously" "survey" government action to bar any

"religious gerrymanders." *Walz* v. *Tax Comm'n of City of N.Y.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

Free exercise protections also extend just as strongly to religious views held by only a minority. *Thomas* v. *Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715-16 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."). So "[i]t is no answer that a State treats some comparable secular [groups] or other [religious] activit[y] as poorly as or even less favorably than the religious exercise at issue." *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021). States may not "prefer[] some religious groups over" others, *Fowler* v. *Rhode Island*, 345 U.S. 67, 69 (1953), "based on the content of their religious doctrine," *Cath. Charities Bureau, Inc.* v. *Wisc. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 248 (2025).

At bottom, covert government hostility towards religion still violates the Constitution. And States are not off the First Amendment hook because they let a few preferred religious institutions walk away scot-free.

D. These foundational free exercise principles resolve this case. Colorado's attempt to repackage forbidden religious discrimination in antidiscrimination terms is unconstitutional.

Here, Colorado has unconstitutionally conditioned a benefit—participation in the universal pre-K program—on St. Mary's willingness to violate its faith. St. Mary's holds traditional views on sexuality and marriage. App313a-314a. These views inform how they operate their preschool and other education programs. See App.308a-320a. The school recognizes that admitting students whose families disagree with its teachings would undermine its religious mission, App.240a, 272a-275a, and

create conflict within the family unit, App.316a-318a. For the benefit of all students, St. Mary's thus admits only students who can support Catholic teachings, particularly on these key principles. See App.240a, App.316a-317a. But Colorado won't allow St. Mary's to maintain this religious cohesion *and* participate in the universal pre-K program. App.289a-290a. This insistence places "unmistakable" "pressure" on St. Mary's to abandon its religious views regarding sexuality and marriage. *Sherbert*, 374 U.S. at 404, 410. Colorado might believe these "religious views [are] abhorrent," *id.* at 402, constituting merely a choice "to discriminate," App.367a. But it still may not penalize St. Mary's on that basis.

In excluding St. Mary's, Colorado has violated the principles laid down in *Trinity Lutheran*, *Espinoza*, and *Carson*. St. Mary's has the right to participate in Colorado's program "without having to disavow its religious [views]." *Trinity Lutheran*, 582 U.S. at 463. Aside from the conflict between those views and the State's antidiscrimination statute, St. Mary's is "otherwise fully qualified" to participate. *Id.* at 462; see App.280a-282a. Although Colorado was not required to "subsidize private [preschool]," now that it has, it "cannot disqualify some private schools solely because" they hold certain religious beliefs. *Espinoza*, 591 U.S. at 487. Colorado's exclusion of St. Mary's also discriminates against Catholic families "whose children attend or hope to attend" school there. *Id.* at 486; see App.12. Although Colorado's statute uses different wording than Montana's or Maine's, the "effect is the same: to disqualify" some disfavored religious groups. *Carson*, 596 U.S. at 780 (cleaned up). And the free exercise analysis does not turn on "the presence or absence of magic words," but instead on the "substance" of First Amendment protections. *Id.* at 785.

Colorado has also run afoul of *Fulton*. It has "burdened [St. Mary's] religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." 593 U.S. at 532. But St. Mary's First Amendment rights trump Colorado's alleged nondiscrimination interests. See *id.* at 541-42. And Colorado cannot hide behind the cloak of general applicability because it has already accommodated secular preschools in any number of ways. It waives away certain prohibitions—such as consideration of income, race, or gender identity—for schools that fall more in line with Colorado's preferred policy views. App.8a, 35a-37a, 347a, 353a-55a. Indeed, it has treated its nondiscrimination mandate as "a flexible provision that allows [Colorado] to take into consideration all kinds of *other* important interests … while nevertheless refusing to accommodate sincere religious exercise." App.23.

Colorado's law may be facially neutral, but that surface-level view does not mean it satisfies the demands of the Free Exercise Clause. See *Yoder*, 406 U.S. at 220. The First Amendment also protects St. Mary's against Colorado's thinly veiled "governmental hostility," *Lukumi*, 508 U.S. at 534, towards its religious beliefs about marriage and sexuality, see App.367a. St. Mary's does not seek a license to "discriminate," contra App.367a, but instead wants to "convey[] the Church's message and carry[] out its mission," *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 752 (2020). To call this discrimination would allow governments to label *any* religious practice discrimination; religion necessarily opposes non-sectarianism, for example. But the First Amendment forbids Colorado's "covert suppression" of such religious views. *Lukumi*, 508 U.S. at 534.

Nor can Colorado escape constitutional scrutiny just because a few religious schools can still participate in the preschool program. The Tenth Circuit concluded that this Court's non-*Smith* precedent was inapposite—and therefore that Colorado's law did not violate the First Amendment—because at least some other "religious schools [are] welcome participants" in the program. App. 21a. That illusory distinction is wrong. "It is no answer that a State treats some" religious activity better than others. *Tandon*, 593 U.S. at 62. "That amounts to the [S]tate preferring some religious groups over [St. Mary's]," *Fowler*, 345 U.S. at 69—"based on the content of their religious doctrine" regarding marriage and sexuality, *Cath. Charities Bureau*, 605 U.S. at 248.

All this Court's free exercise precedent points the same way: Colorado's law must face strict scrutiny. And it fails.

Colorado asserts an interest in "protecting equal access to pre-school education for Colorado children." App47a. But it denies equal access to many Catholic children by preventing them from participating in the program at their preferred school. See *Espinoza*, 591 U.S. at 486; see also App.12. Meanwhile, its concerns about the parishes discriminating based on sexuality are unfounded as no parish has "any history of a complaint from an LGBTQ family or other person alleging LGBTQ-based discrimination." App.306a. "Such speculation is insufficient to satisfy strict scrutiny." *Fulton*, 593 U.S. at 542. Without any "evidence in the record" to substantiate Colorado's concerns, *Thomas*, 450 U.S. at 719, its decision to exclude St. Mary's fails strict scrutiny and violates the Constitution.

* * *

The First Amendment bars Colorado from excluding St. Mary's from its universal pre-K program because of its sincerely held religious beliefs. That command applies whether Colorado discriminates "on the explicit basis" of religion, App.21a, or whether it does so more covertly. Colorado seeks to create a "simple," albeit unconstitutional, "rule": "No churches [with traditional views of marriage] need apply." *Trinity Lutheran*, 582 U.S. at 465.

II. The decision below emboldens States to continue excluding religious groups.

A. The decision below encourages States to mask forbidden religious discrimination as antidiscrimination requirements—and religious schools and children who attend them will hurt the most.

Religious people with deeply held views on marriage and sexuality have increasingly been bombarded by a "society exerting a hydraulic insistence on conformity to majoritarian standards" on these issues. *Yoder*, 406 U.S. at 217. And because of "[t]oday's cultural-political debates," "[o]pponents of the [Catholic] Church" have seemed particularly prone to "move beyond criticism and take illiberal measures against the Church." Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 168 (2001). Unsurprisingly, then, many of this Court's recent First Amendment cases address conflicts between those measures and religious practice. See *Masterpiece Cakeshop*, 584 U.S. at 621-22 (opposition to same-sex marriage); *Fulton*, 593 U.S. at 527 (same); *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 580 (2023) (same); *Mahmoud*, 606 U.S. at 529-30 (opposition to certain gender ideology).

Conflicts between majoritarian views (backed by the power of the State) and religious mandates have thus permeated the lower courts. *Olympus Spa* v. *Armstrong*, 138 F.4th 1204, 1218-20 (9th Cir. 2025) (dismissing a spa's claim that Washington's antidiscrimination enforcement action required it to "renounce its Christian faith by its deeds" by "permitting the mixing of nude persons of the opposite sex"); *Bates* v. *Pakseresht*, 146 F.4th 772, 792-95 (9th Cir. 2025) (granting a prospective foster parent preliminary injunctive relief from Oregon's policy requiring applicants to commit to affirm a child's gender identity); *Emilee Carpenter, LLC* v. *James*, 107 F.4th 92, 109-11 (2d Cir. 2024) (dismissing a photographer's claim that New York's public accommodations law burdened her religious beliefs by requiring her to endorse same-sex marriage through her photography); *Fellowship of Christian Athletes* v. *San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 672-73, 685-90 (9th Cir. 2023) (en banc) (awarding preliminary relief because the school district—by demonstrating hostility towards the Christian group's views on marriage and granting other groups exceptions from the all-comers policy—failed to act in a way that was neutral and generally applicable); *Bus. Leaders In Christ* v. *Univ. of Iowa*, 991 F.3d 969, 973-74, 988 (8th Cir. 2021) (granting university defendants qualified immunity where the university refused to give the Christian student club an exemption from its antidiscrimination provision while giving other clubs exemptions); *Lasche* v. *New Jersey*, No. 20-2325, 2022 WL 604025, at *4-6 (3d Cir. Mar. 1, 2022) (holding that plaintiff foster parents plausibly alleged a First Amendment retaliation claim when New Jersey suspended the parents' foster care license for sharing their religious views on same-sex marriage with the child they fostered).

That tension is not going away. The Tenth Circuit's decision encourages States to circumvent the First Amendment's commands—using rigid nondiscrimination requirements to discriminate against religious groups with views that States dislike. Left untouched, the holding below will render this Court's "decision in [*Carson*] … essentially meaningless." *Carson*, 596 U.S. at 784. States who despise religious people and their traditional beliefs need only pass a facially neutral and (purportedly) exceptionless nondiscrimination provision—all the while knowing and intending that "the burden of the ordinance, in practical terms, falls on [these religious] adherents [and] almost no others." *Lukumi*, 508 U.S. at 536.

But "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. Were it otherwise, Catholicism would have fallen victim to government suppression long ago, as anti-Catholic laws have long sought to "impose special legal disadvantages on Catholics because their beliefs were feared or hated by a sufficient majority." Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of* Trinity Lutheran, 2017 CATO SUP. CT. REV. 105, 109 n.20 (cleaned up). And this Court has oft reaffirmed that religious people should be "given proper protections" as they "continue to advocate with the utmost, sincere conviction" on matters of dispute. *Obergefell* v. *Hodges*, 576 U.S. 644, 679-80 (2015); see *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 681 (2020); *Mahmoud*, 606 U.S. at 552. It is time to again make good on that promise.

State tactics to suppress unwanted religious views will hit religious schools and attendees hardest. Religious education is "vital to many faiths practiced in the United

States." *Guadalupe*, 591 U.S. at 754. And parents have a right to direct "the religious upbringing" of their children. *Yoder*, 406 U.S. at 213-14. Many parents may want to send their children to religious schools—especially when many public schools champion hotly contested progressive ideology and degrade religious people who disagree, see *Mahmoud*, 606 U.S. at 533-40. When Colorado decided to make private schools more accessible, it could not then handicap only certain religious private schools (and the students who want to attend them) based on their religious beliefs.

B. Colorado's strategy of covert religious discrimination in education is already gaining traction.

Post-*Carson*, proponents of gender ideology were scrambling. They mournfully realized that "*Carson* created an impossible situation for [S]tates that do not want to fund religious private schools." Lindsey M. Wood, *Free Exercise or Forced Establishment? Why the Supreme Court Got* Carson *v.* Makin *Wrong and What Vermont Can Do About It*, 49 VT. L. REV. 424, 454 (2025). Indeed, they ruminated on how "compliance with *Carson*" was something they could "balance" with their rich "tradition" of excluding religious schools from government programs. *Id.* at 446. Cases that duly respected free exercise rights were labeled as presenting "significant reasons for concern," Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113, 1176 (2024), and merely a product of "Christian victimhood," Hannah Bailey, A *New Minority in the Courts: How the Rhetoric of Christian Victimhood and the Supreme Court Are Transforming the Free Exercise Clause*, 73 SYRACUSE L. REV. 199, 239 (2023).

Idealogues thus encouraged States not to "abandon creativity" in the effort to stomp out religion. Derek W.

Black, *Religion, Discrimination, and the Future of Public Education*, 13 UC IRVINE L. REV. 805, 830 (2023). "[T]he point [was] simply to articulate what the [S]tate is buying and thereby exclude certain things it does not want to buy: religion, conspiracy theory, and anti-science." *Id.* For who could object to a mission described in those terms? Meanwhile, opposition to such laws could be dismissed as an effort by "the Religious Right" to "leverage case law and the constitution to establish *its* religious belief as normative." Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 53 (2016).

So the crusade continued. Maine, as before, stayed at the forefront. While *Carson* was still pending before this Court, Maine modified its tuition conditions to exclude religious schools in a new way. L.D. 1688, 1st Spec. Sess. (Me. 2021), https://tinyurl.com/3fstyva8. It subjected all private schools to the Maine Human Rights Act, 5 M.R.S. § 4553(2-A); altered its definition of "educational discrimination" to include the category of religion, so that a Catholic school, for example, couldn't prefer Catholic students for admission or financial aid, *id.* § 4602(1)(A), (D), (E); added a "religious expression" rule that requires schools to allow oppositional religious views that undermine its religious message, *id.* § 4602(5)(D); and repealed a religious exemption that permitted schools to handle issues related to gender and sexuality in a manner consistent with their faith, 2005 Me. Laws 12-13, https://perma.cc/FX4T-64N8 (ch. 10, sec. 21, § 4602(4)) (repealed). So before this Court could correct Maine's last unconstitutional effort, the State made sure it had a new way to accomplish the same goal.

Other States followed suit.

Take Vermont. It has a similar tuition program to Maine. Wood, *supra*, at 446-47. After *Carson*, then Secretary of Education issued a letter to superintendents instructing them that they could no longer "deny tuition payments to religious approved independent schools." Daniel M. French, *Letter: Tuition Payment to Religiously-Affiliated Approved Independent Schools*, at 1 (Sept. 13, 2022), https://tinyurl.com/mr6r6x2h. But in the same breath, the Secretary reminded superintendents that "tuition can only be paid" to "approved independent school[s]." *Id.* And to be approved, schools may not "discriminate" based on religion, sexual orientation, or gender identity. Section 2223.2: Nondiscrimination Requirement for Approved Independent Schools, https://tinyurl.com/5ass3se9. So as in Maine, religious schools receiving public funds must admit religious dissenters and approve of gender ideology.

The message from Vermont officials was clear: This Court had told States to stop discriminating against religious schools, but—wink, wink—press onward.

Vermont's hostility towards these religious groups later became even more overt. When a Christian school's girls' basketball team forfeited a game against a school with a biological male on its team, Vermont retaliated. Two days after the forfeited game, the Executive Director of the Vermont Principals' Association (VPA) testified in support of a bill that would codify the antidiscrimination requirements into statute. *Mid Vt. Christian Sch.* v. *Saunders*, 151 F.4th 86, 90 (2d Cir. 2025). He complained that this Court, apparently, had "put [Vermont] in a box" with its recent free exercise cases, but nonetheless that if "parents want to send their children to private schools that discriminate," they shouldn't be able to use tax dollars to do it. Jay Nichols, *The Vermont Principals'*

Association supports school leaders to improve the equity and quality of educational opportunities for all students, VPA, at 1 (Feb. 22, 2023), https://tinyurl.com/yb3dud4b. For good measure, Vermont also expelled the school from participating in "*any* VPA extracurricular activity," from sports to spelling bees to science fairs. *Mid Vt. Christian Sch.*, 151 F.4th at 90. The whole saga was saturated with "governmental hostility" towards these religious beliefs. *Lukumi*, 508 U.S. at 534.

And Vermont has a back-up plan, too. Because "religious schools in Vermont have been receiving an increasing amount of money through Vermont's school tuitioning program," the State got antsy. Corey McDonald, *Vermont's new education law signals an end to state funding for religious schools*, VTDIGGER (Aug. 20, 2025), https://tinyurl.com/3r5mazhx. So the legislature passed Act 73, which imposes two "neutral" criteria for public funding eligibility. *Id.* And by happenstance, those criteria exclude *all* twelve religious schools that have received funding since *Carson*. *Id.*

Minnesota is also getting in on the action. Minnesota administers a similar tuition reimbursement program at the college level. *Loe* v. *Jett*, 796 F. Supp. 3d 541, 550 (D. Minn. 2025). But in 2023, the legislature amended the definition of "eligible institutions," to impose "two new requirements on participating institutions": "(1) the Faith Statement Ban and (2) the Nondiscrimination Requirement." *Id.* As one might guess, these requirements purported to ban discrimination based on religion and gender identity. *Id.* But in application, they require religious schools to admit religious dissidents and disavow their beliefs on marriage and sexuality to participate in the program. So "in practical terms," the

policies burden religious groups and "almost no others." *Lukumi*, 508 U.S. at 536.

Add Maryland to the list. "Maryland lawmakers enacted a bill that, like Maine's, prohibits any nonpublic primary or secondary school that receives state funds from discriminating based on sexual orientation or gender identity." Aaron Tang, *Who's Afraid of* Carson *v.* Makin*?*, 132 YALE L.J. FORUM 504, 527 (2022) (cleaned up); see 2022 MD H.B. 850 (NS) (May 29, 2022). It is only a matter of time before religious schools and families in Maryland realize that this legislation unconstitutionally "penalize[s]" them for not ditching their beliefs and jumping on the majoritarian bandwagon. *Sherbert*, 374 U.S. at 406.

So in the few years since *Carson*, at least four States have gone full throttle on this alternate strategy to discriminate against religious people and schools. "[T]wenty-seven [S]tates [already] operate some form of private school tuition assistance." Black, *supra*, at 828. So for any other State that views religion as nothing more than a force that "eviscerates" "marginalized" people's "rights to liberty, equality, and nondiscrimination," Berta Esperanza Hernández-Truyol, *Awakening the Law: Unmasking Free Exercise Exceptionalism*, 72 EMORY L.J. 1061, 1070-71 (2023), they can hop on board this new unconstitutional trend, too.

States and scholars alike understand the current state of affairs: "Whatever challenges a [S]tate might face" in explicitly excluding religious schools, the "existing doctrine poses *no* limitation on [S]tates' ability to attach non-discrimination principles as conditions to a private school's participation in a state program" to achieve the same result. Black, *supra*, at 830 (emphasis added). So—without this Court's correction—any State can circumvent

the First Amendment by "more carefully" "craft[ing] their programs" to "indirectly limit religious instruction through more general prescriptions." *Id.* at 828. That backdoor gateway to religious discrimination is wrong.

C. If States are permitted to reduce free exercise protections to a "simple semantic exercise," *Carson* 596 U.S. at 784, more than education will suffer.

Religious organizations across the country receive government funding for all types of programs. Religious groups assist States and the federal government in running soup kitchens, food pantries, homeless shelters, transitional housing, substance abuse programs, adoption agencies, and more. See *Fulton*, 593 U.S. at 528-32; *Cath. Charities*, 605 U.S. at 243-44; Jenny Ortman, *How is the Salvation Army Funded?*, THE WAR CRY, https://tinyurl.com/mwnf36sf; *Volunteers of America*, FORBES, https://tinyurl.com/4ms2dnw3; Cooperative Agreement between HHS and Lutheran Immigration and Refugee Service Inc, USASPENDING, https://tinyurl.com/2hwwesxt. In short, "religious organizations have long played a central role in social service provision and civil society more broadly in the United States." Lance D. Laird & Wendy Cadge, *Negotiating Ambivalence: The Social Power of Muslim Community-Based Health Organizations in America*, 33 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 225, 228 (2010). They should continue to do so.

Yet if the Tenth Circuit's decision stands, then States can use the same covert strategy—applying "neutral" antidiscrimination laws to oust religious organizations—in all these areas, too. Some States have already begun. See, *e.g.*, *Youth 71Five Ministries* v. *Williams*, No. 24-4101, 2025 WL 3438455, at *2 (9th Cir. Nov. 26, 2025) (Oregon withdrawing a "Youth Community Investment Grant"

from a Christian program because it requires its "board members, employees, and volunteers [to] agree to a Christian Statement of Faith"). Soon enough, religion will be all but exiled from the public square. The First Amendment does not permit that result.

* * *

The decision below threatens painful consequences for religious freedom. The Tenth Circuit hailed Colorado's program as "a model example" for other States to follow. App.42a. In all the wrong ways, it is.

III. *Smith* must go.

"[T]his conflict between anti-discrimination laws and people with sincerely held religious beliefs exposes a deeper issue: a serious flaw in the United States Supreme Court's Free Exercise Clause jurisprudence." Tiffany Dunkin, *Bearing Another's Burden: Why the Supreme Court Still Needs to Revisit* Employment Division *v.* Smith, 76 BAYLOR L. REV. 440, 441 (2024). At bottom, "balancing" religious liberty with other state interests stems from *Smith*'s faulty premise. After many decades of charting atextual and ahistorical territory, it is time to correct course.

Smith was wrong when it was decided—and it's wrong now. "As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination." *Fulton*, 593 U.S. at 543 (Barrett, J., concurring). Religious exemptions under *Smith* effectively depend on "constitutional luck" hinging on "more-or-less random factors." Christopher C. Lund, *Second-Best Free Exercise,* 91 FORDHAM L. REV. 843, 869-70 (2022). And the threshold inquiry into a law's neutrality

and general applicability also "complicates" and "prolongs" litigation. Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020-2021 CATO SUP. CT. REV. 33, 39. For no good reason, then, *Smith* "repudiated the method of analyzing free-exercise claims that had been used" in all earlier free exercise cases. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). It's no wonder that much of this Court agrees that *Smith* is wrong. *Fulton*, 593 U.S. at 543 (Barrett, J., concurring) (joined by Kavanaugh, J.); *id.* at 545 (Alito, J., concurring) (joined by Thomas, J., and Gorsuch, J.).

Shortly after the Court decided *Smith*, scholars predicted the regulatory behemoth would come for religious liberty. See Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 2 ("It is entirely foreseeable that … various interest groups will see *Smith* as an invitation to impose their regulatory agenda on churches."). That day is here. The Court should thus rollback *Smith*, just as many *Amici* States urged it to do years ago. See generally Br. for the States of Texas, et al. as Amici Curiae in Support of Pet., *Fulton* v. *City of Philadelphia*, 593 U.S. 522 (2021) (No. 19-123), 2020 WL 3078498.

This Court should overturn *Smith* and return the Free Exercise Clause to its textual and historical roots.

CONCLUSION

The Court should grant the petition and reverse.

Respectfully submitted.

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