No. 25-581

In the Supreme Court of the United States

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

v.

LISA ROY, in her official capacity as Executive Director of the Colorado Department of Early Childhood, et al.,
Respondents.

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

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 20 OTHER STATES IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Colorado created a universal preschool funding program—then barred Catholic-affiliated preschools from participating. The State believes that key tenets of Catholic theology, including core beliefs on matters like marriage and biological sex, are nothing more than discrimination. It has thus declared that Catholic preschools can receive funding only if they admit families who oppose these aspects of the Catholic faith. In short, Colorado calls the preschools' fidelity to their religious beliefs unlawful bigotry.

The State's exclusion of Catholic preschools violates the Free Exercise Clause. State-level "hostility" toward religious practice—and particularly toward "aid to pervasively sectarian schools"—has a long and "shameful pedigree" in America. *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). And regrettably, a new brand of anti-religious lawmaking—applying "non-discrimination" provisions like these to exclude religious organizations—is coming into vogue. States like Colorado may be savvy enough to avoid express religious targeting. But this more subtle religious discrimination is unconstitutional all the same.

Colorado's exclusion serves no legitimate interest. For one, it harms the very children that the State designed the preschool program to serve. By excluding Catholic schools, Colorado has denied Catholic families equal access to quality preschool education, defeating the program's central aim of "universal" access. For another, by smearing Catholicism as prejudice, it has stamped a disfavored label on people of faith.

It makes no difference that Colorado has acted under the guise of non-discrimination. Conditioning funds on agreement to state-approved, anti-religious orthodoxy is a First Amendment violation, full stop. After all, religious schools need to maintain religious cohesion and doctrinal clarity; antidiscrimination laws that require religious schools to admit religious dissidents stifle these First Amendment protected goals. So a Catholic school like St. Mary's cannot admit someone who disavows Catholic teachings without undermining its free exercise of religion—along with that of all its members.

Of course, in many instances, antidiscrimination laws further legitimate state interests. States often pursue worthy goals of ending status-based discrimination. And most groups lack a constitutionally legitimate reason to distinguish persons based on protected characteristics.

But these laws can also pose a special danger: Overly rigid antidiscrimination requirements may appear facially neutral, but they inescapably disqualify disfavored religious exercise. Just so here. Because antidiscrimination laws often impose no similar burden on secular conduct, they have proven to be effective for covertly excluding disfavored religious groups. So Colorado is no outlier. Across the country, legislatures hostile to religion have taken note, and a growing number of States have adopted the same strategy.

If this Court sanctions the decision below, this constitutional workaround will become par for the course. The First Amendment demands better. The Court should reverse.

SUMMARY OF ARGUMENT

I. Although the statute does not explicitly target religion, the First Amendment does not protect against 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. The State also acts unconstitutionally when it pursues its interests against religion while permitting comparable secular conduct to go unregulated.

Here, 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. It did so in a way that's inconsistent with its treatment of secular groups, too. But this time, it tried to use the State's antidiscrimination law as a shield. The nondiscrimination label makes no difference. Again: Under the First Amendment, covert exclusion fares no better than overt exclusion.

II. American history is scarred by a recurring pattern: majorities using the law to discriminate against religious minorities who hold unpopular religious viewpoints. Over time, this Court has rebuked many of those attempts. But when one door closes, another one opens. So legislatures antagonistic toward religion always seem to find new ways to accomplish the same old discriminatory aims. The Court must therefore remain vigilant.

In the context of education, States have long discriminated against religion. Often, States accomplished this discrimination through nonsectarian or other similarly overt requirements—requirements that, on their face, excluded religious people and groups. But

after this Court's firm and repeated free exercise guidance, those approaches are off the table.

So now that openly anti-religious legislation is foreclosed, governments who oppose traditional religious views have gotten creative. The new trend wields antidiscrimination requirements as weapons to take out religious groups that hold unpopular beliefs, especially on marriage or sexuality. Colorado's actions fit that pattern. Hostile governments, then, can apply technically neutral criteria in a way that inevitably punishes those religious beliefs.

This attempted 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 can continue circumventing free exercise rights by pursuing the strategy Colorado has displayed here.

III. The ripple effects of endorsing Colorado's law won't stop with education. States can weaponize the same tactic against any religious organization that receives government funding for any public benefit program. Religious groups play an enormous role in social service programs. So if States can exclude them, religious institutions *and* the public will suffer.

ARGUMENT

I. Colorado's exclusion of St. Mary's violates the Free Exercise Clause.

Colorado insists that it "welcomes faith-based providers" into its preschool program. BIO.1. It can only

make this claim by willfully ignoring the actual effects of its legislative choices. But First Amendment protections do not hinge on bare text. The Free Exercise Clause requires more.

A. States may not circumvent the First Amendment using requirements that are only superficially neutral.

1. 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 Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947). Any other rule 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 (cleaned up).

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) (cleaned up). 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 practice their faiths. *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 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" often fall "beyond the power of the State to control." *Id.* Especially when a State has demonstrated that it can make accommodations to its asserted policies, it 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) (cleaned up).

2. 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). The Court stressed how 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." *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 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* too were "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). 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 (cleaned up). Otherwise, this Court's First Amendment jurisprudence "would be rendered essentially meaningless." *Id.* So the free exercise inquiry turns on "substance," not on "the presence or absence of magic words." *Id.* at 785.

Trinity Lutheran, *Espinoza*, *Fulton*, and *Carson* 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.

3. By the same token, a State's religious hostility 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 "subtle departures from neutrality," "covert suppression of particular religious beliefs," and 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" does not determine whether a law is constitutional. *Lukumi*, 508 U.S. at 534. 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. "[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas* v. *Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715-16 (1981). Regardless of whether a particular religion finds favor in a particular community, 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).

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

4. Free exercise principles likewise bar selectively burdening religious exercise while leaving comparable secular activities untouched.

A law is not generally applicable if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534. So, for instance, government action fails to be generally applicable when the State does not "appl[y] [a requirement] in an evenhanded, across-the-board way." *Kennedy* v.

Bremerton Sch. Dist., 597 U.S. 507, 527 (2022). Similarly, when the government "pursues [its] … interests only against conduct motivated by religious belief," it falls below the general applicability standard. *Lukumi*, 508 U.S. at 545.

"[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest" justifying the regulation. *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021). How the State "categoriz[es]" different conduct carries little weight, as regulatory lines may themselves be gerrymandered against religion. *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 17 (2020). So facially different types of conduct will be comparable if they implicate the State's interest in similar ways. See *Tandon*, 593 U.S. at 63-64. In *Lukumi*, for example, the Court compared fishing, hunting, and pest extermination to ritual animal sacrifice because they all implicated the State's interests of "protecting the public health and preventing cruelty to animals." 508 U.S. at 543-45. The State failed to meet the general applicability standard when it "decide[d] that [its] interests … [were more] worthy of being pursued … against conduct with a religious motivation." *Id.* at 542-43.

The First Amendment is also not a sort of least-favored-nations clause. 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*, 593 U.S. at 62. That conception gets the standard backwards. The relevant question, instead, is whether the government treats *any* secular conduct better than the religious conduct at issue when both implicate the State's asserted interests.

Discretion to grant an exemption also independently defeats general applicability. Any "mechanism for granting exceptions renders a policy not generally applicable, regardless [of] whether any exceptions have been given." *Fulton*, 593 U.S. at 537. Indeed, a law is not generally applicable if it leaves open even the possibility of granting "exemptions based on the circumstances underlying each" request. *Id.* at 534. A government actor exercising unfettered "discretion" provides one extreme example of non-generally applicable action. See *id.* at 535. But more bounded discretion, too, can defeat general applicability. *Id.* (discussing *Sherbert*'s "good-cause" discretion standard).

Altogether, general applicability demands two things: that statutory schemes foreclose discretion to selectively grant exemptions *and* that the government pursues its interests evenhandedly—not in a way that targets religion but passes over comparable secular conduct.

B. Despite its facial neutrality, Colorado's exclusion targets religion in a non-generally applicable way.

These free exercise principles resolve this case. Colorado has tried to repackage its religious exclusion in antidiscrimination terms, but it is unconstitutional just the same. Colorado has impermissibly conditioned a benefit—participation in the universal pre-K program—on St. Mary's willingness to violate its faith.

The actions Colorado attacks are central to St. Mary's religious practice. St. Mary's holds traditional views on sexuality and marriage. Pet.App.313a-314a. These views inform how the school runs its preschool and other education programs. See Pet.App.308a-320a. Admitting students whose families disagree with its teachings would

undermine its religious mission, Pet.App.240a, 272a-275a, and create conflict within the family unit, Pet.App.316a-318a. For the benefit of all students, St. Mary's thus admits only those who can support Catholic teachings, particularly on these key principles. See Pet.App.240a, Pet.App.316a-317a. Cf. *Yoder*, 406 U.S. at 217-18 (explaining that, by forcing the Amish to be "expos[ed] … to worldly influences" that "contravene[d] the basic religious tenets and practice of the Amish faith," the State had offended the Amish's religious liberty).

But Colorado won't allow St. Mary's to keep this religious cohesion *and* take part in the universal pre-K program. Pet.App.289a-290a. "The decision to exclude someone from participation in a religious organization is itself a religious decision." *McRaney* v. *N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 157 F.4th 627, 654 (5th Cir. 2025). But Colorado purports to direct that decision anyway. And this "forced inclusion of … unwanted person[s]"—that is, those opposing the Catholic faith—also undermines the ability of the church to communicate its religious principles to the world at large. *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000) (addressing similar conceptions in associative-speech context); see also, *e.g.*, *Meriwether* v. *Hartop*, 992 F.3d 492, 516 (6th Cir. 2021) (Thapar, J.) ("[T]he application of a nondiscrimination policy could force a person to endorse views incompatible with his religious convictions.").

Colorado's insistence places "unmistakable" "pressure" on St. Mary's to abandon its religious views on marriage and sexuality. *Sherbert*, 374 U.S. at 404, 410. Indeed, these circumstances might be better called an "economic dragooning," *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 582 (2012), seeing as how many families will be unwilling to turn down the thousands of

dollars they'll receive if they choose a non-Catholic preschool instead, See Press Release, Colo. Dep't of Early Childhood, Saving Coloradans an Average of $6,300 Per Year, Colorado's Universal Preschool Program Opens Enrollment for Upcoming 2026-27 Program Year While Current Year Enrollment Continues (Dec. 9, 2025), https://tinyurl.com/4zxdfjw9. Colorado might believe these outcomes are acceptable because it thinks St. Mary's religious views constitute merely a choice "to discriminate." Pet.App.367a. But that antagonistic characterization doesn't license it to penalize the school.

In excluding St. Mary's, Colorado has violated the principles laid down in *Trinity Lutheran*, *Espinoza*, *Fulton*, 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; see also *Fulton*, 593 U.S. at 532. Aside from the conflict between those views and the State's antidiscrimination statute, St. Mary's is "otherwise fully qualified" to participate. *Trinity Lutheran*, 582 U.S. at 462; see Pet.App.280a-282a. Though Colorado did not have 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. And 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).

Colorado's exclusion of St. Mary's also discriminates against Catholic families "whose children attend or hope to attend" school there. *Espinoza*, 591 U.S. at 486; see Pet.App.12. These families seek the same quality preschool education Colorado promises every other family by way of a "universal" program. But instead, they must

pay a hefty financial penalty or forgo the religious cohesiveness and community that drew them to a Catholic school in the first place. That tradeoff is no more acceptable at the individual level than it is at the institutional one.

So Colorado's law, though facially neutral, does not meet the demands of the Free Exercise Clause. See *Yoder*, 406 U.S. at 220. The First Amendment 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 Pet.App.367a. St. Mary's does not seek a license to "discriminate," contra Pet.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) (cleaned up). To call this discrimination is *itself* hostile towards religion. Religion necessarily opposes non-sectarianism. But that Colorado views this practice as discriminating—instead of as maintaining religious cohesion necessary for the religious institution to meaningfully exist at all—demonstrates its antagonism towards St. Mary's free exercise. That partiality becomes even more obvious considering that Colorado views secular schools' discrimination based on other characteristics as "erasing barriers to equal access caused by social stigma." Pet.App.39a. The First Amendment forbids this kind of "covert suppression" of St. Mary's religious views. *Lukumi*, 508 U.S. at 534.

Colorado also cannot hide behind the cloak of general applicability. It has already accommodated analogous conduct from secular preschools in any number of ways. Colorado waives away prohibitions—such as consideration of income, race, or gender identity—for schools that fall more in line with its preferred policy

views. Pet.App.8a, 35a-37a, 347a, 353a-55a. Yet, the relevant statute treats all these characteristics *identically*. Pet.App.6a (requiring preschools to "provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability" (quoting COLO. REV. STAT. § 26.5-4-205(2)(b))). More damning still, Colorado admits its "interest in enforcing each of the Mandate's protected characteristics is 'the *same*.'" Pet.App.5 (emphasis added). The implication of the State's own concession, then, is that it "permit[s] secular conduct that undermines … [its] interests in a similar way." *Fulton*, 593 U.S. at 534.

In holding otherwise, the Tenth Circuit confused the standard. It concluded that "discrimination based on sexual orientation and gender identity [and] discrimination based on disability and income level" pose "completely different" "barriers to equal access to preschool education." Pet.App.30a-40a. But that conclusion derives from a sub-"categorization[]" that itself treats secular conduct "less harshly" than comparable religious conduct. *Roman Cath. Diocese*, 592 U.S. at 17. And Colorado may not "pursue[] [its] … interests only against conduct motivated by religious belief" without violating the requirement of general applicability. *Lukumi*, 508 U.S. at 545; see *Fellowship of Christian Athletes* v. *San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 687 (9th Cir. 2023). Even if Colorado did not admit its interest in preventing each type of discrimination was "the same," Pet.App.5., this Court could not blindly accept its arbitrary line-drawing. Deference to the State's self-serving, post-hoc rationale would be particularly inappropriate here: That rationale conflicts with the statute's plain text *and* inherently

affords secular conduct leniency not given to religious conduct.

Nor can Colorado escape constitutional scrutiny because a few religious schools can still participate in the program. The Tenth Circuit concluded that *Smith* governed—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. Pet.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" on marriage and sexuality, *Cath. Charities Bureau*, 605 U.S. at 248. If anything, this state-sponsored favoritism of some religious institutions over others only makes the law's constitutional problems worse.

Colorado's discretion in applying the statute—manifest in at least three different ways—also defeats general applicability. See *Fulton*, 593 U.S. at 537. First, in practice, Colorado exercises discretion by allowing preschools to "set different preferences" "to help match [them] with specific groups of students that they are designed to serve." Pet.App.7a. Under this preference system, Colorado can approve a preschool's decision to "decline to enroll children they are matched with who do not fit their enrollment preference"—including declining a child based on disability status or their being "part of a specific community." Pet.App.7a-9a. Second, the program administrator's testimony shows that the regulation's final "catchall" preference permits sweeping exceptions: Preschools could admit only "gender-nonconforming children," or "children of color from

historically underserved areas," Pet.App.353a-354a—even though the statute bars discrimination based on race or gender identity, Pet.App.6a. Finally, the statute expressly permits Colorado to grant "limited time" exceptions to the antidiscrimination requirements. Pet.App.33a.

These record facts confirm that Colorado has "mechanism[s] for granting exceptions." *Fulton*, 593 U.S. at 537. Indeed, Colorado is willing to grant secular schools—but not St. Mary's—an exception to its mandate to maintain community cohesiveness.

At bottom, Colorado treats its nondiscrimination mandate as "a flexible provision that allows [it] to take into consideration all kinds of *other* important interests … while nevertheless refusing to accommodate sincere religious exercise." Pet.23. That "renders [its] policy not generally applicable." *Fulton*, 593 U.S. at 537.

C. Colorado's exclusion fails strict scrutiny.

Each of this Court's free exercise precedents points the same way: Colorado's law must face strict scrutiny. And it fails. Colorado's religious-hostility-fueled policies don't advance "interests of the highest order." *Fulton*, 593 U.S. at 541 (cleaned up). Nor has Colorado "narrowly tailored [its action] to achieve" its alleged interests. *Id.*

Colorado asserts an interest in "protecting equal access to preschool education for Colorado children." Pet.App.47a. But even a "compelling interest in eliminating discrimination" still must yield to respect free exercise rights. *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 590 (2023) (cleaned up). And Colorado doesn't really take these antidiscrimination goals seriously: It does not pursue its equal access "objectives" for "analogous non-

religious conduct." *Lukumi*, 508 U.S. at 546. It allows preschools to discriminate based on income, race, and gender identity—all in violation of the statute. See Pet.App.8a, 35a-37a, 347a, 353a-55a. That under-inclusivity is decisive. See *Lukumi*, 508 U.S. at 546. "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547 (cleaned up).

Colorado's goal of increasing "access to voluntary, high-quality, universal preschool services free of charge" suffers from a similar tailoring problem. Its decision to oust a qualified school like St. Mary's from the program betrays its goal of expanding access. Pet.App.5a. Granting St. Mary's an exception would "increase, not reduce" the number of available preschool options overall—even with any limitations in St. Mary's admissions policy. *Fulton*, 593 U.S. at 542. And its decision to exclude St. Mary's makes even less sense considering Colorado's "shortage of licensed preschools" in the program. Pet.6. Artificially depressing the supply of qualified preschools because of hostility towards certain religious beliefs is not a narrowly tailored way to expand preschool access.

Looking behind the curtain, it seems Colorado may also intend "to help match preschools with specific groups of students that they are designed to serve." Pet.App.7a. This goal of matching *based on* protected characteristics directly conflicts with the statute's plain text *preventing consideration of* these same characteristics. That internal contradiction makes it unlikely that Colorado can satisfy strict scrutiny. See *Lukumi*, 508 U.S. at 546. Even if this goal were a "commendable" one, it is "not sufficiently coherent" or measurable "for purposes of strict scrutiny."

SFFA v. *Harvard*, 600 U.S. 181, 214 (2023). But anyway, Colorado's hostility towards St. Mary's undermines this "best fit" goal, too. St. Mary's wants to admit Catholic students, and Catholic families want to attend St. Mary's preschools. See Pet.App.12. But Colorado "cut[s] [these] families off from otherwise available benefits" because it involves disfavored religious schools. *Espinoza*, 591 U.S. at 486. If Colorado truly wanted to "match preschools with specific groups of students that they are designed to serve," it would allow Catholic families to participate in the program at their preferred Catholic school. Pet.App.7a. Depriving St. Mary's of the same autonomy Colorado makes "available to others" undermines its aims in a way fatal to tailoring. *Fulton*, 593 U.S. at 542.

These goals—universal access on the one hand and status-based matchmaking on the other—also contradict each other. This internal conflict suggests the stated interests are pretextual. See *Lukumi*, 508 U.S. at 546. And because this internal contradiction exists, the means that further one goal undermine the other—and vice versa. So relying on inconsistent rationales creates an underinclusivity problem for *both* interests.

Lastly any concerns about the allegedly unique harm caused by discrimination based on sexuality, see Pet.App.39a, are also unavailing. No parish has "any history of a complaint from an LGBTQ family or other person alleging LGBTQ-based discrimination." Pet.App.306a. And "[s]uch speculation is insufficient to satisfy strict scrutiny." *Fulton*, 593 U.S. at 542. Plus, even if someone *did* complain about St. Mary's admission practices deriving from its sincere religious beliefs, Colorado would have to show the "harm of granting [a] specific exemption[] to" St. Mary's. *Id.* at 541. It could not make that showing. Most other preschools could

accept, and may even give preferential treatment to, applicants in those groups. Pet.App.353a-355a. When Colorado could "direct [an applicant St. Mary's could not admit] to one of the more than [2,000] other [preschools] in the [State]," it lacks a compelling interest in denying St. Mary's an exemption. See *Fulton*, 593 U.S. at 530; see also Press Release, Colo. Governor Jared Polis, Colorado's Universal Preschool Program Opens Enrollment for Upcoming 2025-26 School Year While Current Year Enrollment Continues (Dec. 17, 2024), https://tinyurl.com/52rje4ku.

Under any of Colorado's alleged rationale, its decision to exclude St. Mary's fails strict scrutiny.

* * *

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 explicitly discriminates against religion, Pet.App.21a, or whether it does so more covertly. Colorado seeks to create a "simple" "rule": "No churches [with traditional views of marriage] need apply." *Trinity Lutheran*, 582 U.S. at 465. But that "rule" violates the First Amendment.

II. Antidiscrimination law is the latest—and perhaps most potent—tool used to punish unpopular religious exercise.

A. In the First Amendment context, "historical background" matters. *Masterpiece Cakeshop*, 584 U.S. at 639; see also *Kennedy*, 597 U.S. at 536. Unfortunately, anti-religious sentiment of the sort seen here has a lengthy track record of infecting state action. Colorado has just weaponized the latest iteration of that hostility.

Many times, this Court has corrected state attempts to punish certain religious beliefs—more than once, in Colorado. It should do the same here.

American history is littered with "many dramatic clashes and confrontations between religious and political authority." Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of* Trinity Lutheran, 2017 CATO SUP. CT. REV. 105, 105. Early on, those clashes typically reflected majoritarian hostility towards disfavored religious minorities. More recently, these disputes have arisen when governments give preferential treatment to secular over religious conduct. Both embody impermissible government hostility towards religion.

To start, the Blaine amendments of the late 1800s were "prompted by virulent prejudice against immigrants, particularly Catholic immigrants." *Espinoza*, 591 U.S. at 498 (Alito, J., concurring). These amendments typically barred state aid to "sectarian" institutions, especially schools. "Dictionaries [at the time] defined a 'sectarian' as a member 'of a party in religion which has separated itself from the established church, or which holds tenets different from those of the prevailing denomination.'" *Id.* at 501 (Alito, J., concurring) (cleaned up). But "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S. at 828 (plurality opinion). And anti-Catholic laws have long sought to "impose special legal disadvantages on Catholics because their beliefs were feared or hated by a sufficient majority." Garnett & Blais, *supra*, at 109 n.20 (cleaned up).

Catholics weren't the only religious group singled-out for discriminatory treatment. The "term [sectarian] was likewise used against Mormons and Jews." *Espinoza*, 591 U.S. at 501 (Alito, J., concurring). Blaine amendments

proved to be a useful tool for legislatures who wanted to "penalize a disfavored religious group." Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 497 (2003). These amendments translated "intense anxiety" about religious minorities into law. *Espinoza*, 591 U.S. at 500 (Alito, J., concurring) (cleaned up). And this "sectarian" exclusion even migrated from legislative provisions into judicial doctrine. See *Comm. For Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 772-80 (1973); *Meek* v. *Pittenger*, 421 U.S. 349, 364-66 (1975), overruled by *Mitchell*, 530 U.S. 793.

At times, legislative hostility towards minority faiths became even more grotesque. "[T]he Mormons[, for example,] were … subject to massive and brutal persecution by state authorities." *Wagering on Religious Liberty*, 116 HARV. L. REV. 946, 949 (2003). This campaign climaxed when an 1838 Missouri executive order demanded that "members of the Mormon faith … be executed or driven from the state." Spencer T. Proffitt, *Gods Behind Bars: How Religious Liberty Has Been Sent Directly to Jail, and How to Get Out of Jail Free*, 40 ARIZ. ST. L.J. 1401, 1421 (2008). The state also weaponized its authority against Native Americans: Later criminal codes directly targeted their religious exercise. The Indian Religious Crimes Code of 1883 "established a series of criminal offenses" intended to "stamp out Native American religious practices." Lee Irwin, *Freedom, Law, and Prophecy: A Brief History of Native American Religious Resistance*, 21 AM. INDIAN Q. 35, 36 (1997), https://tinyurl.com/5685hxy6. These regulations represented "a determined policy to reconstruct Native religious in conformity with dominant … majority values." *Id.*

A few decades after the Blaine amendment era, state ire turned towards Jehovah's Witnesses. "Their refusal to salute the flag, to perform military service, and their insistence on carrying on a sometimes tactless campaign of door-to-door preaching caused them to get into serious trouble with both the public and law-enforcement agencies." M. JAMES PENTON, APOCALYPSE DELAYED: THE STORY OF JEHOVAH'S WITNESSES 117 (3d ed. 2015). Many laws of the time burdened the denomination's religious exercise—from permit requirements for literature distribution, *Lovell* v. *City of Griffin*, 303 U.S. 444, 451 (1938), to license taxes on door-to-door evangelism, *Murdock* v. *Pennsylvania*, 319 U.S. 105, 106-08 (1943), to compulsory flag pledge and salute laws, *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 627-29 (1943).

Some regulations explicitly targeted Jehovah's Witnesses. See *Fowler*, 345 U.S. at 69 (ordinance barring a Jehovah's Witness sermon in the park, but not a Catholic mass or a Protestant service); *Niemotko* v. *Maryland*, 340 U.S. 268, 272 (1951) (permit denied because of local authority's "dislike for or disagreement with the Witnesses"). Conflict between those laws and the sect's beliefs led to the arrest of over 18,000 Jehovah's Witnesses during a twenty-year period. M. JAMES PENTON, *supra*, at 117. This Court was compelled to step in. See, *e.g.*, *Barnette*, 319 U.S. at 642; *Fowler*, 345 U.S. at 69-70.

Later on, "[l]and use regulation bec[a]me the most widespread obstacle to the free exercise of religion." Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 783 (1999). Local zoning authorities targeted minority religions in particular—both "on the face of zoning codes" and in "the highly individualized and discretionary" permitting

processes. 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy), https://tinyurl.com/3dt6jskh; see Laycock, *State RFRAs*, *supra*, at 771 ("Religious groups accounting for only 9% of the population account for 50% of the reported litigation involving [discriminatory zoning decisions.]"). Under this discriminatory regime, "places of secular assembly [were] often not subject to the same rules." Laycock, *State RFRAs*, *supra*, at 776. So, for example, "banquet halls, clubs, [or] community centers … [were] often permitted as of right in zones where churches require a special use permit." *Id.* Or these secular buildings were "permitted on special use permit where churches [were] wholly excluded." *Id.*

Worse still, this religious discrimination was often "covert." 146 Cong. Rec. at S7775. It "lurk[ed] behind such vague and universally applicable reasons as traffic, aesthetics, or 'not [being] consistent with the city's land use plan.'" *Id.* at S7774. Although Congress eventually stepped in to protect religious minorities from authoritarian local governments, covert discrimination became a new pathway for anti-religious animus. See 42 U.S.C. § 2000cc *et seq.*

Fast forward to COVID, when governments again "single[d] out houses of worship for especially harsh treatment." *Roman Cath. Diocese*, 592 U.S. at 17. New York, for example, exempted secular businesses from capacity limits, while subjecting churches to strict limits of ten or fifteen people—regardless of building size or precautions in place. *Id.* California did the same. Its regulations "treat[ed] some comparable secular activities [significantly] more favorably than at-home religious exercise." *Tandon*, 593 U.S. at 63. Across the country, "[a]t the flick of a pen, [States] … asserted the right to

privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples." *Roman Cath. Diocese*, 592 U.S. at 22 (Gorsuch, J., concurring).

Other cases further highlight the ongoing pattern of government preference for secular activity over religious exercise. See *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 850 (1995) (O'Connor, J., concurring) (university refusing to fund a student journal that shared a Christian message but funding a "magazine that … targeted Christianity as a subject of satire"); *Kennedy*, 597 U.S. at 527 (school imposing "bespoke requirement[s]" on religious exercise but not similar secular conduct); *Lukumi*, 508 U.S. at 533-40 (city outlawing religious conduct but not analogous secular conduct). Nothing suggests that opponents of religious practices are letting up anytime soon.

All in all, this history teaches a simple lesson: Even after legislative or judicial correction, adversaries of religion always find new ways to punish protected religious exercise.

B. Legislatures know they may no longer get away with explicitly excluding religious groups from public benefit programs—so they have pivoted to disqualifying them using antidiscrimination laws. Though not an entirely new phenomenon, this strategy of covert religious discrimination is gaining traction. See, *e.g.*, John W. Whitehead, *The Conservative Supreme Court and the Demise of the Free Exercise of Religion*, 7 TEMP. POL. & CIV. RTS. L. REV. 1, 1 (1997) (attributing a weakening of minority religious protections to "deference to facially neutral statutes" and "an unwillingness to undertake case-by-case analysis"). And as America experiences a "shift [in] cultural views about antidiscrimination norms," the "growing strength" of those norms could continue to put

"increased pressure on the free exercise right." John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 522 (2014). This Court should shut that backdoor gateway to religious discrimination.

Post-*Carson*, opponents of religion were scrambling. They 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 "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).

These proponents encouraged legislatures 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.* States and scholars alike understand the current state of affairs: The "existing doctrine poses *no* limitation on [S]tates' ability" to oust religious schools

from public programs by conditioning participation on strict adherence to "non-discrimination principles." *Id.* (emphasis added). So 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.

This latest strategy proves particularly dangerous because it's facially neutral but *inevitably* disqualifying for religion. Unduly rigid antidiscrimination requirements unavoidably penalize much religious exercise for two reasons.

First, the religious discrimination component of antidiscrimination law asymmetrically burdens religion. These provisions have many valid applications: Indeed, most groups have no need to exclude someone based on religion. But all types of organizations, religious ones included, recognize that admitting dissidents often "impede[s] the organization's ability to engage in [its First Amendment] protected activities." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 627 (1984). That goal of institutional cohesiveness, though, looks slightly different inside versus outside religion. Maintaining cohesion within *religion* requires "discriminating" based on religious ideology while maintaining cohesion within *secular groups* requires "discriminating" based on some other secular ideology. Antidiscrimination laws tend to prohibit only the former. So governments hostile to religion can quash First Amendment protections for religious groups while leaving secular groups' same rights unscathed.

The sexual discrimination part of antidiscrimination law poses parallel problems. It comes as no surprise that a "gap … has emerged between the state's sexual ethics and religious norms." Helen M. Alvaré, *Religious Freedom As Freedom*, 50 B.Y.U. L. REV. 1191, 1192

(2025). As with the generally protected characteristic of religion, many groups lack a legitimate reason to exclude someone based on sexual orientation or gender identity. But religious groups have a non-discriminatory, First-Amendment-protected reason for making membership decisions on this basis: maintaining their core principles of "faith and doctrine without government intrusion." *Our Lady of Guadalupe*, 591 U.S. at 746 (cleaned up). So here, too, antagonistic legislatures can apply gender or sexuality-based components of nondiscrimination law in technically evenhanded ways that, practically speaking, only burden religion.

This asymmetry creates the perfect cover for governments hostile to religion. On constitutional doctrine, *Carson* addressed explicit burdens—leaving ambiguity about covert exclusions. And on the facts, antidiscrimination law poses unique burdens to religion that it does not pose to secular groups. Together, these principles invite hostile legislatures to work around free exercise protections by excluding covertly in ways they can no longer do overtly. In the few years since *Carson*, at least four States have pursued this alternate discriminatory strategy.

A few examples paint the picture.

Maine, as before, portrays facial constitutional compliance while still excluding disfavored religious exercise. While *Carson* was still pending before this Court, Maine modified its tuition conditions to exclude religious schools in a new way. L.D. 1688, 130th Leg., 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, An Act to Extend Civil Rights Protections to All People Regardless of Sexual Orientation, ch. 10, § 21, 2005 Me. Laws 70, 76 (2005), https://tinyurl.com/5at4km62, repealed by An Act to Improve Consistency in Terminology and within the Maine Human Rights Act, ch. 366, § 19, 2021 Me. Laws 761, 767 (2021), https://tinyurl.com/37tybkc5. So before this Court could correct its last unconstitutional effort, the State made sure it had a new way to accomplish the same goal. A federal district court later found that even this new iteration of the law was subject to strict scrutiny. *St. Dominic Acad.* v. *Makin*, 744 F. Supp. 3d 43, 73 (D. Me. 2024). But it concluded at the preliminary-injunction stage that the law was likely to satisfy strict scrutiny because, among other things, Catholic schools were still free to conduct morning prayers and teach from a Catholic perspective. *Id.* at 79. So even strict scrutiny became not so strict.

Vermont likewise is taking advantage of this purported constitutional loophole. It runs a similar tuition program to Maine. Wood, *supra*, at 446-47. After *Carson*, then Secretary of Education issued a letter to superintendents instructing they could no longer "deny tuition payments to religious approved independent schools." Letter from Daniel M. French, Vermont Sec'y of Educ., to Superintendents, on Tuition Payments 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—to

be approved—schools may not "discriminate" based on religion, sexual orientation, or gender identity. 22-004 VT. CODE R. § 2223.2, https://tinyurl.com/5ass3se9 (Nondiscrimination Requirement for Approved Independent Schools). So as in Maine, religious schools receiving public funds must admit religious dissenters and not hold traditional views of marriage and sexuality. The message from local officials was clear: Apply facially neutral criteria to continue discriminating against religious schools.

Vermont is capitalizing on the perceived doctrinal gap in even more covert ways, too. The State felt uncomfortable that "religious schools in Vermont ha[d] been receiving an increasing amount of money through [its] school tuitioning program." 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 three "neutral" criteria for public funding eligibility. *Id.* But these three criteria—a funding floor, a geographic restriction, and class-size minimums—work in concert to ensure no religious school can qualify for public funds. So *all* fifteen religious schools that became eligible post-*Carson* have once more been exiled. *Mid Vt. Christian Sch.* v. *Saunders*, No. 2:23-CV-652, 2026 WL 1296339, at *17 (D. Vt. May 12, 2026). The State has, yet again, "gerrymander[ed] out … all religious schools from public benefits." Associated Press, *Vermont Christian School Challenges State's New Education Funding Law in Court*, U.S. NEWS (Nov. 5, 2025), https://tinyurl.com/mprpt2ch. And the district court—after distinguishing away *Trinity Lutheran* and its successors, and then complaining that this Court had (apparently) provided "very little authoritative guidance" on the question—refused a preliminary injunction against

enforcement of the law. *Mid Vt. Christian*, 2026 WL 1296339, at *10-17.

Minnesota has also tried to exploit this purported doctrinal silence. 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, in application, these requirements forced 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 burdened religious groups and "almost no others." *Lukumi*, 508 U.S. at 536. This time, at least, a federal district court found the law unconstitutional and ordered the 2023 amendment to be "stricken." *Loe*, 796 F. Supp. 3d at 572-73.

And Maryland, as well, has learned it can flout *Carson*—and free exercise protections generally. "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 H.B. 850, 2022 Leg., Reg. Sess. (Md. 2022) (passed May 29, 2022). Here, too, legislation unconstitutionally "penalize[s]" religious schools and families for not surrendering their unpopular beliefs. *Sherbert*, 374 U.S. at 406. And Maryland has more recently debated extending these prohibitions even to religious schools that receive no public funding at all. See Colleen Hroncich, *Curtailing Religious Liberties at*

Maryland Private Schools Is No April Fool's Day Prank, CATO INST.: CATO AT LIBERTY (Mar. 31, 2026 3:22 PM), https://tinyurl.com/mpzzs22d.

The current doctrine, as embraced by some lower courts, thus encourages unfriendly legislatures to more discreetly punish religious people for their unpopular viewpoints. Antagonistic legislatures need pass an only superficially neutral and purportedly exceptionless nondiscrimination provision. Then they can wield the provision so that "the burden of the ordinance, in practical terms, falls on [certain religious] adherents [and] almost no others." *Lukumi*, 508 U.S. at 536. This strategy renders *Carson* "essentially meaningless." *Carson*, 596 U.S. at 784.

The Tenth Circuit hailed Colorado's program as "a model example" for States to follow. Pet.App.42a. In all the wrong ways, it is. This Court should make clear that the First Amendment doesn't permit that workaround.

III. Finding covertly discriminatory laws to be constitutionally permissible would threaten the system of public-religious partnerships.

It also helps to be clear-eyed about the broader practical consequences of Colorado's methods. Religious groups serve as indispensable partners in administering government-funded social services. That's to be expected, considering how "[t]he nonsectarian aims of government and the interests of religious groups often overlap." *Tex. Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 10 (1989). But if the government can reduce free exercise protections to a "simple semantic exercise," *Carson*, 596 U.S. at 784 (cleaned up), then this mutually beneficial relationship will suffer—and in contexts well beyond education.

Across the country, religious organizations rely on government funding to run all types of programs. Religious groups help 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?*, WAR CRY, https://tinyurl.com/mwnf36sf (last visited June 30, 2026); *Volunteers of America*, FORBES, https://tinyurl.com/4ms2dnw3 (last visited June 30, 2026); *Cooperative Agreement between HHS and Lutheran Immigration and Refugee Services Inc*, USASPENDING, https://tinyurl.com/2hwwesxt (last visited June 30, 2026). The scale of this service is staggering. Catholic Charities alone served more than 28 million meals, provided basic needs and emergency services to 2.8 million people, and furnished 2.8 million nights of emergency shelter in a single year. CATHOLIC CHARITIES USA, PATHWAYS FORWARD: 2024 ANNUAL REPORT 18 (2024), https://tinyurl.com/bddrxcec.

Faith-based organizations are similarly central to disaster relief. "About 80 percent of all [disaster] recovery happens because of nonprofits, and the majority of them are faith-based." *Faith groups provide the bulk of disaster recovery, in coordination with FEMA*, RELIGION NEWS SERV. (Sept. 11, 2017), https://tinyurl.com/59d7vyen. FEMA cannot do its work "without the cooperation of faith-based nonprofit organizations and churches." *Id.*; see also *Voluntary, Faith-based and Non-Governmental Organizations Help Communities After Severe Winter Weather*, FEMA (last updated Feb. 3, 2026), https://tinyurl.com/ypzkjsvu.

Likewise, in achieving social welfare goals, the government and religious groups work in a symbiotic relationship. For example, approximately 35-40% of Catholic Charities funding comes from the government. Brief of Catholic Charities USA as *Amicus Curiae* in Support of Petitioner at 9 n.5, *Catholic Charities Bureau, Inc.* v. *Wisc. Labor & Industry Review Commission*, No. 24-154 (U.S. Feb. 3, 2025). And in just one year, Lutheran Immigration and Refugee Services received over $220 million in federal government grants—representing about 96% of its total funding. LUTHERAN IMMIGRATION AND REFUGEE SERVICE, INC, CONSOLIDATED FINANCIAL STATEMENTS AND INDEPENDENT AUDITOR'S REPORT 4 (2023), https://tinyurl.com/yjpd47um. In return, faith-based projects have produced positive results for their communities. See, *e.g.*, Mark J. DeHaven, et al., *Health Programs in Faith-Based Organizations: Are They Effective?*, 94 AM. J. PUB. HEALTH 1030, 1033 (2004).

This partnership is no modern innovation. Cooperation between government and religious institutions in meeting social needs traces to the Founding itself. The same Congress that drafted the Religion Clauses contemplated that the government would encourage religion and education alike in the Northwest Ordinance. *See* NORTHWEST ORDINANCE OF 1787, art. III. And in many other ways, "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). What Colorado attacks, then, is not some recent or constitutionally suspect entanglement, but a tradition as old as the Republic. And the modern stakes have only grown: As

the partnership has expanded, so has the number of vulnerable people whose access to food, shelter, and care now depends on whether religious providers may serve on equal terms. Excluding religious organizations from government programs would thus not merely burden those groups; it would dismantle the system on which millions of vulnerable Americans depend.

Yet if this Court blesses Colorado's discriminatory strategy, then States could use the same covert tactic—applying "neutral" antidiscrimination laws to oust religious organizations—in all these areas, too. Though Colorado insists this forecast is "conjur[ing] a crisis where none exists," BIO.32, some States have already begun down this path. Oregon, for instance, stripped a Christian youth ministry of grants serving at-risk teens for the sole reason that it hires coreligionists. See *Youth 71Five Ministries* v. *Williams*, 160 F.4th 964, 975 (9th Cir. 2025). Multiply Colorado's logic across the country and faith-based organizations—and the millions who rely on them—are pushed out of the public square one 'neutral' rule at a time. The First Amendment forbids States from dismantling that partnership—and circumventing free exercise protections—through a semantic sleight of hand.

CONCLUSION

The Court should reverse.

Respectfully submitted.

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