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

BRIEF *AMICI CURIAE* OF NATIONAL LEGAL FOUNDATION, ILLINOIS FAMILY INSTITUTE, WISCONSIN FAMILY ACTION, DELAWARE FAMILY POLICY COUNCIL, CONCERNED WOMEN FOR AMERICA, CHAPLAIN ALLIANCE FOR RELIGIOUS LIBERTY, and INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS *in Support of Petitioners*

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnston Road
Chesapeake, Va. 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org

Frederick W. Claybrook, Jr.
(Counsel of Record)
Claybrook LLC
655 15th St., NW, Ste. 425
Washington, D.C. 20005
(301) 622-0360
rick@claybrooklaw.com

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENTS OF INTEREST[1]

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties (including the freedoms of speech, assembly, and religion) and parental rights. The NLF and its donors and supporters, in particular those from Colorado, are vitally concerned with the outcome of this case because of its effect on religion-based rights.

The **Illinois Family Institute** (IFI) is a non-profit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of IFI is to uphold religious freedom and conscience rights for all individuals and organizations.

Wisconsin Family Action (WFA) is a Wisconsin not-for-profit organization dedicated to strengthening, preserving, and promoting marriage, family, life, and religious freedom. WFA has a unique and significant statewide presence with its educational and advocacy work in public policy and the culture. WFA's interest in this case stems directly from its core issues, in particular its long-sustained efforts to protect and promote religious freedom.

---

[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* have given timely notice to both parties.

The **Delaware Family Policy Council** (DFPC) is a non-partisan, non-profit organization based in Delaware committed to rebuilding a culture of life, marriage, family, and religious freedom. DFPC works to preserve and defend the God-ordained institution of the family.

Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare, including religious liberties. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

Chaplain Alliance for Religious Liberty ("CALL") is an organization of chaplain endorsers, the faith groups that provide chaplains for the U.S. military and other agencies. CALL speaks for more than 2,600 chaplains serving the Armed Forces from many different denominations. Since 2011, we have led the effort to secure the religious liberties of chaplains and those whom they serve. We enable all chaplains to serve to the broadest extent of their constitutional mission and endorsement, and we nurture and support an environment that cherishes the role of chaplains in American culture. CALL exists to ensure that chaplains can defend and provide for the freedom of religion and conscience that the

Constitution guarantees all chaplains and those whom they serve. We join together to pursue a nation where all chaplains, and those whom they serve, freely exercise their God-given and constitutionally protected religious liberties without fear of reprisal.

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for all.

SUMMARY OF THE ARGUMENT

The Tenth Circuit was wrong even to have considered *Employment Division v. Smith*, 494 U.S. 872 (1990). This case falls squarely in the *Trinity Lutheran-Espinoza-Carson* line of cases, as Colorado withheld a generally applicable government benefit from the Petitioners due to their religious status and observance. *Smith* simply does not apply in those situations.

Your *Amici* also agree with Petitioners that, even if *Smith* applies, the Tenth Circuit wrongly applied it here. The State cannot grant exemptions for other classes of individuals and deny them for religious individuals. The State's bias is more than transparent here—it's historically blind. It grants exemptions for LGBTQ- and race-restricted enrollments because such individuals have been "historically discriminated against." So, of course,

have individuals in religious sects of all stripes, many adherents of which helped found the colonies and, ultimately, this nation. Indeed, that is in large part why the Religion Clauses appear in the First Amendment. *See generally Hosanna-Tabor Evan. Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182-85 (2012).

Your *Amici* do not write to repeat the Petitioners' prose. They write to urge this Court to take the third question presented, whether to overrule *Smith*. In addition to the points made by the Petitioners, your *Amici* set out another way in which the lower courts in their discretion have used *Smith* to discriminate against religious individuals and institutions—by refusing to look behind seemingly neutral language to the real-world result of regulation that predominantly affects people of faith.

ARGUMENT

This Court has recognized that facially neutral laws can disproportionately target religious beliefs and conduct. It used the egregious situation presented in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), to warn against religious targeting hiding behind facially neutral language. But not all such cases are as egregious or transparent as *Lukumi*, and that has caused further divisions among the lower courts in similar cases.

A prime example involves regulation with an avowed purpose of protecting LGBTQ individuals from discrimination. *Carson* itself provides a case in point. After this Court enjoined Maine from discriminating against private schools due to their religious practice

and with an eye to *Fulton v. Philadelphia*, 593 U.S. 522 (2021), the State simply tweaked its law to forbid discrimination against LGBTQ individuals by schools and eliminated the law's exception for same-sex schools. The State then disqualified the religious schools because they do not admit as students those who engage in homosexual and transgender behaviors, behaviors that the schools believe are sinful. The district court found this regulation neutral and generally applicable under *Smith*. *See Crosspoint Church v. Makin*, 719 F. Supp. 3d 99, 119-23 (D. Me. 2024), *appeal argued*, No. 24-1590 (1st Cir. Jan. 7, 2025).

A Ninth Circuit panel majority in *Bates v. Pakseresht,* 146 F.4th 772 (9th Cir. 2025), struck down an analogous attempt by Oregon to deny foster care licensing to a widowed mother who would not agree in advance to help a child subject to her care exhibit as transgender or to use non-biological, "preferred" pronouns of such a child. The panel majority, to its credit, noted that such a requirement to serve as a foster parent predominantly disqualified religious individuals, such that the regulation did not meet *Smith*'s neutrality and general applicability prongs. *Id.* at 791-98. It concluded, "Oregon's policy as a whole stands most obviously in opposition to more traditional understandings of sexuality and gender. And those more traditional understandings are often held by persons with religious viewpoints." *Id.* at 794; *see also State v. Loe*, 692 S.W.3d 215, 239-40 (Tex. 2024) (Blacklock, J., concurring) (observing that the "Transgender Vision" and the "Traditional Vision," at their core, contradict each other on moral and religious grounds). The panel majority rejected the views of other courts that *Smith* applied unless there

was a finding of anti-religious animus by the State and that the regulation had to target religious individuals exclusively. 146 F.4th at 794-95.

The dissenting member of the *Bates* panel, however, relying on other Ninth Circuit precedent, argued that the law was neutral on its face and, because non-religious individuals would also be denied a foster parent license if they refused to use a child's preferred pronouns, *Smith* controlled. *Id.* at 816-17 (Clifton, J., dissenting) (citing *Olympus Spa v. Armstrong,* 138 F.4th 1204 (9th Cir. 2025) (holding that a law prohibiting gender identity discrimination could be enforced as neutral and generally applicable against a women's nude spa that objected on religious grounds to servicing transgender women with male genitalia); *Stormans, Inc. v. Wiesman,* 794 F.3d 1064 (9th Cir. 2015) (holding that a law requiring pharmacists to dispense abortifacients was neutral and generally applicable and so could be enforced against religious objectors).

The dissent's reading of *Smith* in *Bates* was duplicated by the district court in *Polk v. Montgomery County Public Schools*, 2025 WL 240996 (D. Md. Jan. 17, 2025) *appeal argued*, No. 25-1136 (4th Cir. Oct. 23, 2025). That case involved the school district firing a teacher because she, for religious reasons, refused to agree to use "preferred pronouns" with students exhibiting as transgender or to hide what was happening at school in that regard from parents. While acknowledging the burden on her religious exercise, the district court held that the school policy was both neutral and generally applicable because it did not mention religion on its face and because others could refuse to obey the policy on non-religious

grounds. The district court operated with blinders, refusing to acknowledge, without hard proof of religious animus by the regulators, what should have been obvious: that the policy predominantly targeted those of traditional religious beliefs. *Id.* at *7.

Regulators are seldom shortsighted enough these days to espouse openly that they are targeting religious views, especially with *Masterpiece Cakeshop* close in the rearview mirror. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Division*, 584 U.S. 617 (2018); *see also Fulton*, 593 U.S. at 625-26 (2021) (Gorsuch, J., concurring). Targeting traditional religious views with respect to sexuality under a "nondiscrimination" label is no more "neutral" and "generally applicable" than prohibiting any gathering of more than five people on Sundays would be a legitimate time, place, and manner restriction. However, regulators are usually sophisticated enough to keep any thoughts about their enacting policies to outlaw traditional religious beliefs to themselves, and it takes little effort or sophistication to make a policy neutral on its face. *See id.* at 694.

All this is to say that, in this respect as well, *Smith* has been anything but consistently interpreted and applied by the lower courts. It was wrongly decided, and it has caused much mischief by throwing legitimate religious concerns to the curb under rational basis review. In *Fulton*, Justice Alito in his concurring opinion laid out why *Smith* should be overruled. *Id.* at 545-618. Justice Gorsuch in his concurrence stated simply that "*Smith* committed a constitutional error," remarked, "Only we can fix it," and prognosticated, "Dodging the question today

guarantees it will recur tomorrow. These cases will keep coming . . . ." *Id.* at 627. Indeed, they have.

CONCLUSION

This Court should grant the petition, reconsider *Smith*, and overrule it.

Respectfully submitted this
17th day of December 2025,

/s/ Frederick W. Claybrook, Jr.
Frederick W. Claybrook, Jr.
(Counsel of Record)
Claybrook LLC
655 15th St., N.W., Ste. 425
Washington, D.C. 20005
(301) 622-0360

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322
(757) 650-9210
sfitschen@nationallegalfoundation.org

Counsel for *Amici Curiae*