No. 25-581

IN THE
Supreme Court of the United States

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

v.

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

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

Brief *Amicus Curiae* of America's Future in Support of Petitioners

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus America's Future is a nonprofit organization, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. This entity, *inter alia*, participates in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

In the 2023-2024 school year, Colorado implemented its "Universal Preschool Program" ("UPK"), which "provides at least 15 hours of free preschool per week for each eligible child in the state," and requires all participating preschools to "provide eligible children an equal opportunity to enroll and receive services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability." *St. Mary Cath. Par. in Littleton v. Roy*, 736 F. Supp. 3d 956, 963 (D. Colo. 2024) ("*St. Mary I*").

The program was challenged on Free Exercise, Free Speech, and Establishment Clause grounds by

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than this *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

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

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

The district court viewed *Carson* narrowly, as requiring only that government could not target religious entities for unfavorable treatment "'solely because of' their religious character." *St. Mary I* at 989. It then concluded that the Colorado law was "neutral" because it "appl[ied] the equal-opportunity requirement 'in spite of ' Plaintiffs' religious beliefs,

not because of them." *Id.* at 993. Since the requirement applied to all preschools, the court found it both "generally applicable" and "rationally related" to a legitimate government interest of preventing "discrimination." *Id.* at 1003.

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

SUMMARY OF ARGUMENT

Colorado's Universal Preschool Program was designed to allow both religious and secular preschools eligible to participate — but only if those applicants reject traditional Biblical morality and embrace the "sexual orientation" and "gender identity" religious doctrines favored by the State. Religious preschools which adhere to traditional Biblical morality are thus excluded, while religious preschools which are willing

to abandon traditional Biblical morality are eligible. Such state preferences can be seen to violate both establishment clause and free exercise principles.

The courts below relied on *Employment Division v. Smith*, arguing that the Colorado law applies a generally applicable rule with only incidental adverse effect on some schools, parents, and children. They argued that Colorado's allowing religious preschools to participate demonstrates the law is neutral toward religion. However, by excluding applicants who refuse to embrace the state's view of "sexual orientation" and "gender identity," Colorado is discriminating based on religious doctrine, which also interferes with the free exercise thereof. Additionally, under the establishment clause, no such state preferences of one religion over another are permissible.

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

The problems inherent in *Employment Division v. Smith* should be confronted by this Court. The far better approach is to adopt the text, history, and tradition approach to understanding the provisions in the Bill of Rights, as used recently in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

Applied here, that would require the Court to address the meaning of the term "religion" as it did in *Reynolds*. The Court would then find there are no relevant historical analogues to the distinctions on which Colorado bases its preschool program.

ARGUMENT

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

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

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

Biblical morality at the door. Thus, the Colorado rule allows participation only by what might be termed liberal "Christian" institutions.

With respect to the issue of same-sex marriage, the decisions below betray the promise made by Justice Kennedy in *Obergefell* that those who believe in traditional marriage would never face discrimination. *See Obergefell v. Hodges*, 576 U.S. 644, 679-80 (2015).[2]

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

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

> found the initial decisionmaking body **exhibited hostility to religion** because members of it "endorsed the view that religious beliefs cannot legitimately be carried

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

> into the public sphere or commercial domain," mentioned the religious justifications for slavery and the Holocaust, and **referred to religious beliefs as "one of the most despicable** pieces of rhetoric that people can use ... to hurt others." [*St. Mary I* at 992 (quoting *Masterpiece Cakeshop* at 634-635) (emphasis added).]

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

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

Petitioners argued that Colorado conceded that the "nondiscrimination" provisions in the UPK actually contained a "catchall **exemption** [which] could be used to allow preschools to admit **only 'gender-**

nonconforming children' and to **prioritize** serving 'children of color from historically underserved areas' and 'the **LGBTQ community**,'" while "nevertheless refusing to accommodate sincere religious exercise." Petition for Certiorari ("Pet.") at 23 (emphasis added).

Thus, in both the text of the law and how it was implemented, Colorado discriminated against Biblical Christianity in three ways. First, the basic qualifications excluded applicants embracing traditional Biblical morality. Second, while exemptions were allowed to opponents of Biblical morality, its exemption policy prevented those embracing traditional Biblical Christianity from receiving one.

And third, making the State's discriminatory purposes even more clear, preferences could be granted to those opposing, but not those supporting, traditional Biblical Christianity. The district court conceded that Dawn Odean, the director of the UPK program, testified that "a participating school could be just for 'gender-nonconforming children' ... or could grant preference to a child based on the child or family being part of the LGBTQ community." *St. Mary I* at 972.

B. The Tenth Circuit Decision Exhibited Somewhat Different Flaws.

The Tenth Circuit also concluded that *Masterpiece Cakeshop* applied only in the case of public expressions of "'clear and impermissible hostility toward the sincere religious beliefs' of the plaintiff." *St. Mary II* at

767-68 (quoting *Masterpiece Cakeshop* at 634). Like the district court, the Tenth Circuit was not concerned that the law was predicated on hostility to traditional Biblical Christianity so long as the discrimination was buried in the conditions on the funding, and not openly stated in a public forum. The lesson is that a state can prefer some religions over another so long as it bars them based on doctrine, not whether they had attributes of a religious organization. The Tenth Circuit actually found that here, "the record indicates that the Colorado General Assembly passed ... the nondiscrimination requirement **to prevent discrimination on any grounds**, secular or religious." *St. Mary II* at 768 (emphasis added). That is, "to prevent discrimination on any grounds" other than against traditional Biblical Christianity.

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

Also like the district court, the Tenth Circuit discounted Director Odean's testimony that a preschool could include only LGBTQ children — as if a toddler or young child in pre-school, before puberty, is capable of developing fixed views about their sexuality, unless those views are imposed on them by adults. The court stated that it would not invalidate a law based on "a series of hypotheticals posed unexpectedly to one witness at trial," despite conceding that the questions were posed on direct examination

by the state, not on cross-examination. *Id.* at 770, 769. "We do not interpret Director Odean's testimony to imply that the Department was using the catchall preference to violate the nondiscrimination requirement," the court insisted. *Id.* at 770. As Petitioners point out:

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

The roadmap the courts below have created, based on *Smith* and *Masterpiece*, to enable government preferences to all except those who embrace Biblical Christianity, follow this three-step plan. First, legislators must be careful to avoid any public statements that reveal the state's real intent and

hostility toward disfavored doctrines. Second, states must allow all religions to participate, but then impose a doctrine-based secondary test to weed out those who believe in disfavored doctrines. (Thus, a church that supports both same-sex marriage and transgender doctrine qualifies for its program, while a similar church down the street that either supports traditional marriage or opposes transgender doctrine is excluded.) Third, when challenged, the State argues there it is not religiously discriminating against anyone — so long as they have the right views on secular matters. By labeling these views as secular, the state hopes to mask its discrimination against religious doctrine. This last rationale is inconsistent with this Court's declaration that "secular humanism" is a religion. *See Torcaso v. Watkins*, 367 U.S. 488, 495, n.11 (1961).

Both courts below relied on *Smith* to treat Free Exercise as "'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 70 (2022). *Smith* should not go unreviewed.

II. THIS COURT SHOULD REJECT BOTH THE *SMITH* TEST AND THE "COMPELLING INTEREST" TEST, IN FAVOR OF THE TEXT AND HISTORY OF THE FIRST AMENDMENT.

A. Both the *Smith* Test and the "Compelling Interest" Test Represent Atextual "Baggage" this Court Should Jettison.

During 2008 oral argument in *District of Columbia v. Heller*, Chief Justice John Roberts pointedly noted, "these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up."[3] The Chief Justice was directly on target. The First Amendment simply states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." Nothing in the text suggests that the textual "no law" prohibition applies **unless** the law is "generally applicable." Neither does the text suggest that "no law" applies **unless** a "compelling government interest" overrides. Such a balancing test runs afoul of the principle Justice Scalia articulated for this Court in *Heller*, that each provision in the Bill of Rights is "the very *product* of an interest balancing by the people." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). There is no more interest balancing for the courts to do. The right to the "free exercise" of religion is not limited by the concerns of legislators or

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[3] Transcript of Argument, *District of Columbia v. Heller*, No. 07-290, at 44 (Mar. 18, 2008).

judges or even justices. As Justice Scalia explained, "[t]he very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634.

This Court has soundly rejected, in the Second Amendment context, a "judge-empowering 'interest-balancing inquiry'" whenever a new regulation is proposed. *Id.* Yet that is precisely the paradigm *Smith* creates. If a law designed to burden a religious practice facially prohibits both the religious and the non-religious from the practice, any rational basis is enough, the government wins, and Free Exercise is undermined. Instead, in *Heller* and *Bruen*, this Court adopted the constitutionally faithful interpretive method of "assess[ing] whether modern ... regulations are consistent with the ... Amendment's text and historical understanding." *Bruen* at 3. It is time to jettison the "baggage" of both the "generally applicable" and "compelling interest" tests, and return to a First Amendment jurisprudence guided by text and history.

B. *Reynolds v. United States* Provides a "Text and History" Model this Court Should Follow to Return to the Original Meaning of the Free Exercise Clause.

Fortunately, this Court has an existing model in *Reynolds v. United States*, 98 U.S. 145 (1879). The Court considered a free exercise challenge to a Utah law against bigamy, upholding the law. This Court's

analysis, based on the text and history of the First Amendment, was consistent with the methodology employed in *Heller* and *Bruen*.

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

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

> "Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." [quoting Virginia Declaration of Rights, art. 16]. The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because ...

> what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.... We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that **Religion is wholly exempt from its cognizance**.... [J. Madison, Memorial and Remonstrance (emphasis added).[4]]

This Court in *Reynolds* adopted Madison's definition of religion as "the duty which we owe to our Creator and the manner of discharging it." *See Reynolds* at 163. It also noted that the bill Madison opposed was defeated the following year, 1786, and Thomas Jefferson's "Virginia Statute for Religious Freedom" was passed instead. *Id.* The preamble to that Statute reads, "to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty...."[5] It continues, "it is time enough for the rightful purposes of civil government for its officers to interfere when

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

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

principles break out into overt acts against peace and good order...." *Id.*

The Virginia Statute for Religious Freedom then provides, "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, or shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion...." *Id.* The Statute remains enshrined today as Article I, Section 16 of the Virginia Constitution.

As applied in *Reynolds,* this Court noted that:

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

The *Reynolds* Court cited pagan religious practices such as human sacrifice and noted that these practices would constitute "overt acts against peace and good order," and thus could be banned without threatening

Free Exercise. *Id.* at 166. The Court then went on to consider the state of bigamy laws when the First Amendment was written:

> [I]t is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that "all men have an equal, natural, and unalienable right to the **free exercise of religion**, according to the dictates of conscience," the legislature of that State substantially enacted the [bigamy] statute of [King] James I., death penalty included.... From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. [*Reynolds* at 165 (emphasis added).]

Because there was a directly analogous Virginia statute against bigamy, passed the year after the Statute for Religious Freedom (the lineal ancestor of the Free Exercise Clause, which would be ratified four years later), and because bigamy prohibitions had been widespread among the states ever since, the

Court determined that the text and history of the Free Exercise Clause did not protect bigamy. Notably, the Court conducted no balancing tests. It did find marriage and family to be important state interests, but upheld the bigamy prohibition, not because the government interest outweighed the religious exercise of the plaintiff, but because the act of bigamy was subject to the authority of civil government, and not protected by those who framed the Free Exercise Clause.

The *Reynolds* Court did note that the Virginia Statute spoke of "opinion" and "belief" and suggested in dicta that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.... It matters not that his belief was a part of his professed religion: it was still belief, and belief only." *Id.* at 166-67. But the Free Exercise Clause itself makes no such distinction between "opinion" and "practice." Rather, it refers to affirmative "exercise" of religion, and belief and opinion require no "exercise."

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

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

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

Rather, as this Court noted as recently as 1986, "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws." *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986) (overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003)).

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

gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Lawrence* at 571-72.

The first state law prohibiting "discrimination" against homosexuals in employment or housing was passed in 1982, in Wisconsin.[6] There is no state law before 1982 that would even suggest any "government interest" in restricting the free exercise of religious persons or entities in favor of "sexual orientation" or "gender identity." Nothing in the text or history of the Free Exercise Clause even hints at permitting government to disfavor a religious entity because it holds to a position universal in American law at the time of the Framing.

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

Indeed, this Court just ruled earlier this year that "a government cannot condition the benefit of free public education on parents' acceptance of ...

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

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

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

Although this *amicus* primarily focuses on the UPK program's threat to Free Exercise, the program impermissibly violates the Establishment Clause as well, and review should also be granted to Petitioners on that basis.

Colorado is correct that Petitioners' position — that marriage and sexual activity should be confined to monogamous heterosexual relationships, and that the sexes are distinct and non-fungible and children should be taught accordingly — is rooted in religious belief. No less religious is Colorado's position that individual choices that support homosexuality and transgenderism. Both positions are moral assertions, inescapably rooted in religion. This Court has noted,

"[i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty ... those beliefs certainly ... function as a religion in his life...." *Welsh v. United States*, 398 U.S. 333, 340 (1970).

As this Court has repeatedly ruled, "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can ... pass laws which aid one religion ... or prefer one religion over another." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). "[T]he 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968). Accordingly, government may not "'impose[] special disabilities on the basis of ... religious status....'" *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993).

But Colorado's UPK permits the state to advance its religious values by calling them a ban on "discrimination." At the same time, the state imposes burdens on Petitioners for advancing their religious values that "[s]exual identity, embodiment as either a man or a woman is a gift that is given to us from the moment of creation," that "mothers and fathers are [not] interchangeable"[7] and children should have a right to be raised by both a mother and a father, and that (as this Court recognized in *Reynolds*) "[u]pon

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

[monogamous marriage] society may be said to be built," and upon it "the principles on which the government of the people, to a greater or less extent, rest[]." *Reynolds* at 165-66. This what the Establishment Clause plainly forbids.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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