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.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* THOMAS MORE SOCIETY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, the Thomas More Society ("TMS"), is a not-for-profit, national public interest law firm based in Chicago, Illinois, dedicated to restoring respect in law for human life, family, and religious liberty. TMS regularly advocates for the rights of religious schools to operate according to their Gospel missions and to fully participate in school choice programs, consistent with parents' primordial right to direct the religious education and upbringing of their children. TMS thus has a distinct interest in the protection of these rights pursuant to the Free Exercise Clause's text, history, and jurisprudence. TMS also has an ongoing interest in this Court overruling *Employment Division v. Smith* and thereby restoring *substantive* equality for religious believers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below turned in part on a familiar canard. Specifically, the Tenth Circuit opined that if the First Amendment requires accommodating the religious petitioners here, it would effectively protect "beliefs that are commonly described as secular" under a modern understanding of "religion." *St. Mary Catholic Parish in Littleton v. Roy*, 154 F.4th 752, 764 (10th Cir. 2025) (citing *Welsh v. United States*, 398 U.S. 333, 340 (1970), and

1. No party's counsel authored this brief in whole or part; no party or party's counsel contributed money intended to fund the brief; and no person other than *Amicus Curiae*, their members, or their counsel contributed money intended to fund the brief. Counsel for all parties were timely notified of this filing pursuant to Supreme Court Rule 37.2.

United States v. Seeger, 380 U.S. 163, 176 (1965)). Thus, the Court alleged, it would mean that states are prevented "from placing almost any condition on school funds." *Id.*

That is fundamentally false. Even under *Welsh* and *Seeger*, courts can (and must) determine whether the exercise at issue is actually *religious* rather than purely secular, given this Court's more recent recognition that "philosophical and personal rather than religious" beliefs are not cognizable under the Free Exercise Clause. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). Although the meaning of "religion" is still broad and "delicate," it is not unlimited. *See infra*. And courts have consistently shown the ability to weed out sincerely held *alleged* religious beliefs that are not in fact religious, even under modern standards, including, e.g., beliefs in the "Church of Marijuana," the Flying Spaghetti Monster, and the Ku Klux Klan. *See infra*.

Further, this Court would do well to restore the original, historic meaning of the free exercise of *religion*, which was consistently defined in the Founding era to mean one's *duty to, and reverence for, God*. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 163 (1878) (citing Madison's "Memorial and Remonstrance Against Religious Assessments"). The modern shift away from that definition stems largely from this Court's decisions in *Welsh* and *Seeger*. But those decisions turned on this Court's *statutory* interpretation of particular text in the Universal Military Training and Service Act (i.e., the phrase "in a relation to a Supreme Being") that is found nowhere in the First Amendment. *See infra*. A historic, original understanding of religion would provide yet more stability and predictability to free exercise jurisprudence going forward.

Additionally, this Court should reverse *Employment Division v. Smith* and restore equal treatment for religious believers. The decision below is a transparent work-around of this Court's decisions in *Trinity Lutheran*, *Espinoza*, and *Carson*, which ensure that religious schools and parents can participate equally in school choice programs. Assuming, arguendo, that Colorado's sexual orientation and gender identity conditions for participating in its universal preschool program are generally applicable, the program would reflect what Professor McConnell has rightly called "bare . . . formal neutrality" that effectively strips "minority religions" of "equal consideration from the state." McConnell, "Free Exercise Revisionism and the Smith Decision," 57 U. Chi. L. Rev. 1109, 1153 (1990) (McConnell, Free Exercise Revisionism). In reality, *Smith*'s promise of equal treatment for religious exercise has the exact opposite effect, and this case is a prime example.

Alternatively, this Court should at minimum grant the petition, vacate the decision below, and remand in light of this Court's decision in *Mahmoud v. Taylor*, 606 U.S. 522 (2025). *Mahmoud* recognized that if "a *law*" substantially interferes with or threatens to undermine the religious development and upbringing of parents' children, it must undergo strict scrutiny. *See id.* at 565 (emphasis added). Here, petitioners include two religious parents seeking to ensure their children can attend St. Mary's preschool in accord with their Catholic beliefs. *See* Cert. Pet. at 8. Because Colorado law substantially interferes with and undermines the parent petitioners' ability to do so, *see, e.g.*, *id.* at 12, it must undergo strict scrutiny pursuant to *Mahmoud*—contrary to the decision below. Thus, at minimum, this Court should vacate the lower court

decision and remand in light of *Mahmoud*. *Accord Miller v. McDonald*, No. 25-133, 2025 WL 3506969 (U.S. Dec. 8, 2025).

ARGUMENT

I. The Free Exercise Clause protects only *religious* exercise.

Contrary to the 10th Circuit's concern that accommodating the indisputably religious petitioners here would effectively protect an unlimited number of "secular" beliefs, *St. Mary*, 145 F.4th at 764 n.9, the Supreme Court has made clear "the very concept of ordered liberty *precludes* allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Yoder*, 406 U.S. at 215-16 (emphasis added). Thus, a belief that is "philosophical and personal *rather than religious* . . . does not rise to the demands of the [First Amendment's] Religion Clauses." *Id.* at 216 (emphasis added).

To be sure, current Free Exercise doctrine protects a wide swath of sincerely held beliefs. But, as noted, courts have recognized the Amendment has important limits that prevent extending protection to a wide range of "secular" beliefs. Further, this Court would do well to restore the historical understanding of cognizable "religious" exercise, which, until the modern era, was limited only to acts arising from one's understanding of his or her "duties to God."

A. Courts can (and must) determine whether the relevant exercise is *religious*.

Because the Free Exercise Clause forbids government from prohibiting the free exercise of "*religion*," courts are obliged to determine whether the claimant's relevant conduct is in fact "religious." Specifically, courts' task in free exercise cases "is to decide whether the beliefs avowed are: (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things." *Africa v. Pennsylvania*, 662 F.2d 1025, 1030 (3d Cir. 1981); *accord Moore-King v. Cnty. of Chesterfield, Va.*, 708 F.3d 560, 570-71 (4th Cir. 2013).

While a claimant's "sincerity" is a "question of fact," whether a person's belief is "religious" is "essentially an objective" inquiry. *United States v. Seeger*, 380 U.S. 163, 184 (1965); *see also Yoder*, 406 U.S. at 215-16 (protecting *religious* exercise does not "allow[ ] every person to make his own standards" of religion).

The objective inquiry is a "delicate" one, *Yoder*, 406 U.S. at 215, because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds," *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). The inquiry is thus individualistic: "Men may believe what they cannot prove," and thus "[t]hey may not be put to the proof of their religious doctrines and beliefs." *United States v. Ballard*, 322 U.S. 78, 86 (1944); *accord Thomas v. Rev. Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

But, as others have noted, "[t]here is a distinct difference . . . between questioning the veracity or reasonableness of a claim and questioning whether the belief is objectively 'religious.'" *Watts v. Fla. Intern. Univ.*, 495 F.3d 1289, 1304 (11th Cir. 2007) (Tjoflat, J., dissenting). "The latter is a foundational component of determining whether a plaintiff has pleaded a First Amendment free exercise claim." *Id.*

This Court recognized the same in *Yoder*. There, it noted that had the Amish claimants' objection to regular public education been more akin to "Thoreau's . . . philosophical and personal" objections to "the social values of his time," "rather than religious," they would have lacked First Amendment protection. *Yoder*, 406 U.S. at 216; *accord Africa*, 662 F.2d at 1033-34 (where motivating belief is "far more the product of a secular philosophy than of a religious orientation," there is no cognizable "religious" exercise). Accordingly, courts *must* determine whether the beliefs at issue are *religious*, rather than secular, in order to determine whether the Free Exercise Clause applies.

Lower courts often rely on the Third Circuit's decision in *Africa* as describing three "useful indicia" of "religion": (1) it "addresses fundamental and ultimate questions having to do with deep and imponderable matters"; (2) it "is comprehensive in nature" rather than an "isolated teaching"; and (3) it has "the presence of certain formal and external signs." *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 829 (D. Neb. 2016) (citing *Africa*, 662 F.3d at 1032); *accord Love v. Reed*, 216 F.3d 682, 687 (8th Cir. 2000); *United States v. Meyers*, 95 F.3d 1475, 1483 (10th Cir. 1996). "Although these 'indicia' certainly do not

represent an exhaustive list of features defining a religious belief, it is important to have some *objective* guidelines in order to avoid *Ad hoc* justice." *Watts*, 495 F.3d at 1304 (Tjoflat, J., dissenting) (internal quotes omitted); *accord Cavanaugh*, 178 F. Supp. 3d at 829 ("[T]hat is not a rigid test for defining a religion, and flexibility and careful consideration of each belief system is needed.").

In short, the Free Exercise Clause protects only *religious* exercise. Purely self-referential *secular* beliefs are not protected, contrary to the Tenth Circuit's intimation below.

B. Courts have rightly declined First Amendment protection for numerous secular beliefs.

While it's true that courts have broadly construed the meaning of "religion" in recent decades, they have nonetheless rejected First Amendment protection for a variety of purely secular beliefs that claimants sincerely *alleged* were "religious."

This Court's decisions in *Seeger* and *Welsh* set forth exceedingly broad definitions of "religion." They provided that "religion" means "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God." *Seeger*, 380 U.S. at 176; *Welsh*, 398 U.S. at 340 ("If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but nevertheless impose upon him a duty of conscience to refrain from participating in war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by * * * God' in

traditionally religious persons.").[2] Lower courts have applied that definition to "belief systems [that], although not theistic, still deal with issues of 'ultimate concern' and take a position 'on religion, the existence and importance of a supreme being, and a code of ethics.'" *Cavanaugh*, 178 F. Supp. 3d at 829 (quoting *Kaufman v. McCaughtry*, 419 F.3d 678, 681-82 (7th Cir. 2005)); *accord Fields v. Speaker of Pennsylvania House of Representatives*, 936 F.3d 142, 153 (3d Cir. 2019) (stating this Court's "understanding of 'religion' now includes nontheistic and atheistic beliefs, as well as theistic ones").

But courts have nonetheless denied protection for numerous sincerely held—but purely personal and secular—beliefs. These include sincere, allegedly religious beliefs in:

- The Church of Marijuana. *U.S. v. Meyers*, 906 F. Supp. 1494 (D. Wyo. 1995);

- The Flying Spaghetti Monster. *Cavanaugh*, 178 F. 3d at 823-25;

- Kozy Kitten Cat Food's contribution to well-being. *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977);

- The Ku Klux Klan. *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025, 1026 (E.D. Va. 1973);

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2. Notably, *Seeger* and *Welsh* interpreted only the scope of the Universal Military Training and Service Act, not the First Amendment. *See infra*. Many courts have nonetheless adopted these *statutory* definitions in construing the First Amendment.

- Secular humanism. *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521-22 (9th Cir. 1994); *Smith v. Bd. of Sch. Com'rs of Mobile Cnty.*, 827 F.2d 684, 690-95 (11th Cir. 1987);

- Evolutionism. *Peloza*, 37 F.3d at 521-22; and

- Scientism. *Daniel Chapter One v. F.T.C.*, 405 F. App'x 505, 506 (D.C. Cir. 2010).

All of this accords with *Yoder*'s recognition that a generally secular "way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation." 406 U.S. at 215. Or, as another court put it, "*Yoder* teaches that [one] must offer some organizing principle or authority other than herself that prescribes her religious convictions." *Moore-King*, 708 F.3d at 571 (4th Cir. 2013). Even then, "an asserted belief might be so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Frazee v. Illinois Dep't of Emp't Sec.*, 489 U.S. 829, 834 n.2 (1989) (internal quotes omitted); *accord Cavanaugh*, 178 F. Supp. 3d at 829-30 (finding belief in Flying Spaghetti Monster, or "FSMism," to be "a satirical rejoinder" to religious belief in intelligent design and thus a mere "secular argument").

Notably, the foregoing principles squarely contradict a key underlying premise in the decision below—i.e., that if the First Amendment's protections extend to the petitioners here, it would effectively "permit every citizen to become a law unto himself." *St. Mary*, 154 F. 4th at 765 (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990)); *see id.* at 764 n.9. On the contrary, this Court's precedents (and

myriad lower court decisions) show that if a person acts according to *own purely personal, internal* directives, it is *not* a cognizable "religious" exercise under the First Amendment. That's because (at minimum) the action lacks any *external* reference point lifting it to the realm of the "spiritual or other-worldy" and pursuant to the authority of a higher power *outside* oneself. *See Africa*, 662 F.2d at 1032-33.

True, current doctrine requires asking whether one's actions are religious in his or her "own scheme of things." *Seeger*, 380 U.S. at 185. But Professor McConnell has rightly observed "that the definition and enforcement of the boundary is entrusted to the arm of the government most likely to perform the function dispassionately and best equipped to consider the specifics of the case. **The individual believer is not judge in his own case**." McConnell, Free Exercise Revisionism, at 1150 (emphasis added).

Thus, discerning non-religious from religious exercise—and protecting only the latter—is *consonant with*, not contrary to, the rule of law. The Free Exercise Clause recognizes that "**[t]he individual is not free from law**; he is subject to two potentially conflicting sources of law, spiritual and temporal." McConnell, Free Exercise Revisionism, at 1151 n.182 (emphasis added). And "the established tenets of a religious tradition have their own dynamic safeguards of order and good sense, *superior to individual will*." *Id.* (emphasis added).

Accordingly, this Court's broad definition of "religion" is not without limits, and courts have shown their ability to discern and enforce those limits in recent decades. The Tenth Circuit's conclusion to the contrary was no less

erroneous as it was dangerous, given the Free Exercise Clause's essential role in preserving the *true* rule of law.

C. Restoring the original meaning of "religion" would add yet more stability to Free Exercise jurisprudence.

Although modern precedent extends Free Exercise protection even to *non*-theistic beliefs, it was not always so. Founding-era definitions of "religion" were limited to actions motivated by *duty to God*. And this Court's early decisions recognized the same. However, Free Exercise jurisprudence strayed from a strictly *theistic* view of religion especially following this Court's decisions in *Seeger* and *Welsh*, which, in turn, merely interpreted a *statutory* phrase found nowhere in the First Amendment. Given the Tenth Circuit's (misguided) slippery slope concerns below, this Court would do well to restore the historical, original understanding of "religion" and thus better ensure common sense and predictable applications of the Free Exercise Clause—both in this case and beyond.

1. The original *theistic* meaning of "religion"

Beginning with dictionary definitions, Samuel Johnson's *Dictionary of the English Language* (1755), defined religion as: "1. Virtue, as founded upon reverence of God, and expectation of future awards and punishments. 2. A system of divine faith and worship as opposite to others." DeVito, *The Original Meaning of Religion*, No. 65 (Winter 2025).[3] The same dictionary defined "divine" as "1. Partaking of the nature of God. 2. Proceeding from God;

3. https://nationalaffairs.com/publications/detail/the-original-meaning-of-religion.

not natural; not human." *Id.* The 18th century dictionary *Universal Etymological English Dictionary*, by Nathan Bailey, defined religion as "the worship of a Deity, Piety, Godliness," and as "a general Habit of Reverence towards the divine nature, by which we are both enabled and inclined to worship and serve God. . . ." *Id.*

Founding fathers recognized the same. In Memorial and Remonstrance, Madison equated "religion" with "the duty we owe the Creator." *Reynolds*, 98 U.S. at 163 (quoting Semple's Virginia Baptists, Appendix); *see also Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Rev. Comm'n*, 605 U.S. 238, 258 (2025) (Thomas, J., concurring) ("According to Madison, man's 'duty towards the Creator … is precedent, both in order of time and in degree of obligation, to the claims of Civil Society'.") (quoting Memorial and Remonstrance (1785)). Blackstone similarly defined "religion" as "the duty we owe to our Creator, and the manner of discharging it." St. George Tucker, Blackstone's Commentaries, 1:App. 296-97, 2:App. 3-11, Doc. 59 (1803).[4] Jefferson, too, construed "religion" in the Virginia Statute for Religious Freedom as a reference to "Almighty God" and the "Holy author of our religion, who [is] Lord of both body and mind." Thomas Jefferson and the Virginia Statute for Religious Freedom, Virginia Museum of History & Culture.[5]

Early state charters reflected the same views. For example, like Madison and Blackstone, the influential

4. https://press-pubs.uchicago.edu/founders/documents/amendI_religions59.html.

5. https://virginiahistory.org/learn/thomas-jefferson-and-virginia-statute-religious-freedom (last visited Dec. 15, 2025).

Virginia Declaration of Rights based its protection for religious exercise on "religion, or the duty we owe to our Creator, and the manner of discharging it." *See* DeVito, The Original Meaning of Religion. And the New Hampshire and Pennsylvania constitutions likewise predicated the "freedom of conscience" on man's "natural and unalienable right to worship God." *Id.*

In short, Founding-era dictionaries, legal commentaries, and state declarations and constitutions all recognized that protected "religious" beliefs were inherently *theistic*.

2. Early precedent on the meaning of "religion"

This Court's early jurisprudence unsurprisingly recognized the same. In *Davis v. Beason*, this Court observed that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for [H]is being and character, and of obedience to [H]is will." 133 U.S. 333, 342 (1890). Relying on *Davis*, Justices Hughes, Holmes, Brandeis, and Stone later observed that "**[o]ne cannot speak of religious liberty, with proper appreciation of its essential and historical significance, without assuming the existence of a belief in supreme allegiance to the will of God.**" *United States v. Macintosh*, 283 U.S. 605, 634 (1931) (Hughes, J., dissenting) (emphasis added), *overruled by Girouard v. United States*, 328 U.S. 61 (1946).

3. The judicial shift away from the original meaning of religion

This Court began to veer from its theistic view of religion in *Torcaso v. Watkins*, 367 U.S. 488 (1961). There, this Court held the Constitution's bar on religious tests, including via the Establishment Clause, prohibited Maryland from requiring a notary public to profess a belief in God. *Id.* at 492-96. The Court observed in a footnote that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Id.* at 495 n.11. Yet, by 1972, this Court reaffirmed that merely "philosophical and personal" "choice[s]" are not cognizable exercises of religion. *Yoder*, 406 U.S. at 216. And in more recent times, courts from coast-to-coast have recognized that "secular humanism" is not a protected "religion." *See Peloza*, 37 F.3d at 521; *Smith*, 827 F.2d at 690-95. Even today, courts instinctively understand the meaning of "religious" exercise in reference to God. *See, e.g.*, *Peloza*, 37 F.3d at 521 (concluding "evolutionism . . . has nothing to do with *how* the universe was created; it has nothing to do with whether or not there is a divine Creator").

As noted, however, courts today also generally construe the Free Exercise Clause as protecting even non-theistic beliefs in light of *Seeger* and *Welsh*. But those decisions hinged only on the statutory interpretation of the Universal Military Training and Service Act—and particularly whether its textual allowance for conscientious objection to military service extended to non-theistic beliefs. *See Seeger*, 380 U.S. at 164-65; *Welsh*, 398 U.S. at 335. The Act included an exemption

for those conscientiously opposed to war "by reason of their religious training and belief." *Seeger*, 380 U.S. at 165. And it specifically defined "religious training and belief" as "an individual's belief *in relation to* a Supreme Being involving duties superior to those arising from any human relation, but (not including) essentially political, sociological, or philosophical views or a merely personal moral code." *Id.* (emphasis added) (quoting 50 U.S.C. App. § 456(j) (1958)). In *Seeger*, this Court avoided answering whether the statute violated the First Amendment and instead held as a matter of statutory interpretation that the phrase "in a relation to a Supreme Being" covered beliefs that, "in the life of [their] possessor," are merely "parallel to that filled by the orthodox belief in God." 380 U.S. at 165-66 (holding the statutory exemption covered "a religious faith in a purely ethical creed" based on the philosophies of "Plato, Aristotle and Spinoza"). This Court held similarly in *Welsh*. *See* 398 U.S. at 340-43.

However, aside from the fact *Seeger* and *Welsh* seemed to contradict the very statute they interpreted—*see* § 456(j) (1958) (stating exemption did *not* apply to "essentially . . . philosophical views")—they both studiously *avoided* construing the Free Exercise Clause itself. Instead, they relied on a single statutory phrase ("in a relation to a Supreme Being") that appears nowhere in the First Amendment. And, indeed, it can perhaps fairly be said that belief merely in "relation to a Supreme Being" very well includes *opposition* to such a Being. *See, e.g.*, Fulton Sheen, Passion Week, "Seven Last Words – 4th Word, Did Christ Think of Atheists?" at 08:22-08:42 ("How can you be an atheist unless there is something to atheate?").[6] Or

6. https://www.youtube.com/watch?v=2pzjOwYhGbg.

as the Seventh Circuit has put it, "[i]f we think of religion as *taking a position on divinity*, then atheism is indeed a form of religion." *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) (emphasis added). But the Free Exercise Clause protects only *religious* exercise—not beliefs that are merely "in relation to" (whether for *or against*) God or an amorphous "Supreme Being."

Similarly, cases holding that atheism is protected by the *Establishment Clause* do not support extending *Seeger* and *Welsh* to the free exercise context. *Cf. Kaufman*, 419 F.3d at 682. This Court has recognized the Establishment Clause prohibits government from forcing atheists to adopt a religious creed. *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985). But the very basis for that principle is the mutual exclusivity of religion and non-religion—that is, government may not establish a *religion* by forcing the *non-religious* (including atheists) to adopt *religious* beliefs. *See id.* It does not follow that atheism is therefore transformed into a "religion" for purposes of the Free Exercise Clause (which would render that Clause both superfluous and absurd, given the Establishment Clause's protection of the same beliefs precisely because they are *not* religious). The Establishment Clause does all the work—and reinforces the real distinction between religion and non-religion (including atheism).

Accordingly, the Free Exercise Clause's protection for *religious* exercise extends only to beliefs and actions motivated by *religion*. And the original, historical understanding of "religion" is unquestionably one's *duty to, and reverence for, God*. *See also, e.g.*, *Peloza*, 37 F.3d at 521 n.4 ("According to Webster's, religion is the 'belief in and reverence for a supernatural power accepted

as the creator and governor of the universe.") (quoting *Webster's II New Riverside University Dictionary* 993 (1988)). This Court would do well to clarify that *Seeger* and *Welsh* are not authoritative interpretations of the First Amendment—and to further stabilize free exercise jurisprudence going forward by restoring the historical, original meaning of the free exercise of "religion."

II. *Smith* fails to ensure *substantive* equality for religious observers and should be overruled.

Additionally, assuming *arguendo* Colorado's challenged law is generally applicable, this Court should simply reverse *Smith* and end transparent work-arounds of its prior decisions in *Trinity Lutheran*, *Espinoza*, and *Carson*, as occurred in the decision below. Indeed, *Smith* "relegate[d] a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already prohibits." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring); *see also M.A. on behalf of H.R. v. Rockland Cnty. Dep't of Health*, 53 F.4th 29, 42 (2d Cir. 2022) (Park, J., concurring) (criticizing *Smith*'s "inflexible," "all-or-nothing" general applicability test). But this Court has long "recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause," including because "the language of the Clause itself makes clear" that "an individual's free exercise of religion is a *preferred* constitutional activity." *Smith*, 494 U.S. at 901-02 (O'Connor, J., concurring) (emphasis added).

As Professor McConnell has recognized, *Smith* wrongly transformed the Free Exercise Clause into a rule of formal equality, ensuring only that secular and

religious actors are subject to the same burdens *from the government's perspective*. *See* McConnell, Free Exercise Revisionism, at 1153 ("[T]he *Smith* opinion substitutes a bare requirement of formal neutrality," and "[t]he needs of the minority religion are no longer to be legally entitled to equal consideration from the state"). But as a rule of religious *liberty*, the Free Exercise Clause is inherently ordered toward "reliev[ing] [religious] individuals of a *special burden* that others do not suffer." *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO*, 643 F.2d 445, 454 (7th Cir. 1981) (emphasis added) (interpreting Title VII's analogous religious accommodation requirement); *see also* 118 Cong. Rec. 705 (1972) (statement of Sen. Randolph explaining that Section 701(j), codified at §2000e(j), reflects "the same concepts as are included in the first amendment").

As Justices Alito, Thomas, and Gorsuch have noted, "the absence of any language referring to equal treatment" in the Free Exercise Clause "is striking." *Fulton v. City of Philadelphia*, 593 U.S. 522, 569 (2021) (Alito, J., concurring, joined by Thomas, J., Gorsuch, J.). Indeed, "[t]he Founders understood that the right to free exercise would require more than simple neutrality toward religion," but rather "that the government *accommodate* the religious practice, rather than the reverse." *Horvath v. City of Leander*, 946 F.3d 787, 796 (5th Cir. 2020) (Ho, J., partially concurring). Congress adopted this precise concept into Title VII, *see E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015) ("Title VII requires otherwise-neutral policies to give way to the need for an accommodation"), further evincing that the Free Exercise

Clause protects more than merely formal equality.[7] *See also* Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, 3 U. Pa. J. Cons. L. 850, 880 (2001) ("*Smith* and *Lukumi* have transformed the Free Exercise Clause from a liberty rule . . . to an equality rule.").

In reality, restoring the Free Exercise Clause's liberty rule would paradoxically restore *substantive* equality for religious believers. During the Prohibition, for example, the government exempted "the sacramental use of wine by the Roman Catholic Church." *Smith*, 494 U.S. at 913 n.6 (Blackman, J., dissenting). Absent an exemption, the general ban on wine would have undoubtedly burdened Catholics *more* than non-Catholics. The same was true in *Yoder*, where the state's compulsory education law plainly burdened members of the Amish religion *more* than others. *Yoder*'s enforcement of the Free Exercise Clause's liberty rule restored the Amish to equal footing with other members of society whose philosophical or religious beliefs were not burdened by the challenged law. *Accord* McConnell, Free Exercise Revisionism, at 1134-35.

The same is true here. Treating the Free Exercise Clause as a liberty rule would remove the special burdens imposed by Colorado law on petitioners' deeply held religious beliefs—or at least require Colorado to show it has a sufficiently tailored compelling interest to override those beliefs—regardless of whether the law is "neutral

7. That Justice Scalia (who authored *Abercrombie*) so clearly perceived the insufficiency of neutral rules in the Title VII context confirms the error of his contrary conclusion in the Free Exercise context in *Smith*.

and generally applicable" in a formal sense. The *free exercise* of religion requires nothing less. This Court should overturn *Smith*.

III. At minimum, this Court should vacate and remand in light of *Mahmoud*.

Notably, two of the petitioners in this case are religious parents seeking to send or keep their children in St. Mary's preschool. Cert. Pet. at 8. Yet, Colorado's refusal to exempt St. Mary's from its sexual orientation and gender identity requirements threatens the school's ability to keep its doors open, and robs the petitioner parents of "thousands of dollars of state funding solely because they chose a Catholic preschool for their children." *Id.* at 12.

But this Court's decision in *Mahmoud* makes clear that "when *a law* imposes a burden of the same character as that in *Yoder*, strict scrutiny is appropriate regardless of whether the law is neutral or generally applicable." 606 U.S. at 565 (emphasis added). And a burden is of the "same character" as in *Yoder* when it "substantially interfere[s] with the religious development of the parents' children" or "poses a very real threat of undermining the religious beliefs and practices the parents wish to instill in their children." *Id.* (internal quotes omitted).

Here, Colorado's refusal to accommodate St. Mary's and the Archdiocese of Denver's other Catholic preschools threatens their very existence—and thus the petitioner "parents' ability to direct the religious upbringing of their children." *Id.* at 554 (internal quotes omitted). Accordingly, strict scrutiny must apply, contrary to the

decision below. This Court should thus, at minimum, grant the petition, vacate the decision below, and remand for reconsideration in light of *Mahmoud*. *Accord Miller*, 2025 WL 3506969, at *1 (GVR'ing in light of *Mahmoud* where Amish religious parents sought religious accommodation from state mandatory vaccine requirement).

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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Amicus Curiae