

No. 25-581

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IN THE  
**Supreme Court of the United States**

ST. MARY CATHOLIC PARISH IN LITTLETON, ST.  
BERNADETTE CATHOLIC PARISH IN LAKEWOOD, DANIEL  
SHELEY, LISA SHELEY, AND THE ARCHDIOCESE OF  
DENVER,

*Petitioners,*

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS EXECUTIVE  
DIRECTOR OF THE COLORADO DEPARTMENT OF EARLY  
CHILDHOOD, AND DAWN ODEAN, IN HER OFFICIAL  
CAPACITY AS DIRECTOR OF COLORADO'S UNIVERSAL  
PRESCHOOL PROGRAM,

*Respondents.*

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

**BRIEF OF THE UNION OF ORTHODOX JEWISH  
CONGREGATIONS OF AMERICA AS *AMICUS  
CURIAE* IN SUPPORT OF PETITIONERS**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
INTERESTS OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	4
I. THE GOVERNMENT MAY NOT CONDITION PUBLIC BENEFITS ON SURRENDERING RELIGIOUS LIBERTIES .....	4
II. THE FREE EXERCISE CLAUSE PROTECTS THE RIGHT OF RELIGIOUS SCHOOLS TO SELECT STUDENTS BASED ON ADHERENCE TO RELIGIOUS DOCTRINE .....	8
A. The church autonomy doctrine protects religious schools' decisions about which students to admit. ....	8
B. Admissions criteria to Orthodox Jewish schools implicate matters of religious doctrine.....	14
III. COLORADO UNLAWFULLY CONDITIONS PUBLIC FUNDS ON RELIGIOUS SCHOOLS SURRENDERING THEIR AUTONOMY. ..	19
A. The UPK program overrides participat- ing schools' admissions policies.....	19
B. Colorado's compulsory placement re- quirement forces Orthodox Jewish schools to choose between public funds and religious autonomy. ....	20

TABLE OF CONTENTS—continued

C. Deciding on church-autonomy grounds would better protect the rights of religious schools.....	22
IV. ALLOWING STATES TO CONDITION PUBLIC BENEFITS ON RELINQUISHING CHURCH AUTONOMY WOULD INCREASE THE RISK OF HARM—INCLUDING PHYSICAL HARM TO—AMERICAN JEWS. ....	24
A. Antisemitic violence is a persistent and growing threat that has created an acute funding need.....	25
B. Jewish schools rely on government funds to keep students and employees safe.....	26
CONCLUSION .....	28

## TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.</i> , 570 U.S. 205 (2013).....	4
<i>Am. Union of Baptists, Inc. v. Trs. of Particular Primitive Baptist Church at Black Rock, Inc.</i> , 644 A.2d 1063 (1994)....	10
<i>Ambellu v. Re’ese Adbarat Debre Selam Kidist Mariam</i> , 387 F. Supp. 3d 71 (D.D.C. 2019).....	10
<i>Bouldin v. Alexander</i> , 82 U.S. (15 Wall.) 131 (1872).....	9
<i>Burgess v. Rock Creek Baptist Church</i> , 734 F. Supp. 30 (D.D.C. 1990).....	10
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014).....	1
<i>Carson ex rel. O.C. v. Makin</i> , 596 U.S. 767 (2022).....	1, 3, 7, 11
<i>Democratic Party v. Wisconsin ex rel. La Follette</i> , 450 U.S. 107 (1981).....	10
<i>EEOC v. Cath. Univ. of Am.</i> , 83 F.3d 455 (D.C. Cir. 1996).....	22
<i>Emp. Div., Dep’t of Hum. Res. of Oregon v. Smith</i> , 494 U.S. 872 (1990).....	18
<i>Espinoza v. Mont. Dep’t of Rev.</i> , 591 U.S. 464 (2020).....	1, 3, 6
<i>Everson v. Bd. of Educ.</i> , 330 U.S. 1 (1947)..	5
<i>Hosanna-Tabor Evangelical Lutheran Church &amp; Sch. v. EEOC.</i> , 565 U.S. 171 (2012).....	2, 8, 23, 24
<i>Hurley v. Irish-Am. Gay, Lesbian &amp; Bisexual Grp. of Bos.</i> , 515 U.S. 557 (1995).....	10
<i>Hutterville Hutterian Brethren, Inc. v. Waldner</i> , 791 N.W.2d 169 (S.D. 2010).....	11

## TABLE OF AUTHORITIES—continued

<i>In re Congregation Yetev Lev D'Satmar, Inc. v. Kahana</i> , 9 N.Y.3d 282 (N.Y. 2007)	11
<i>Jones v. Wolf</i> , 443 U.S. 595 (1979)	10, 17
<i>Locke v. Davey</i> , 540 U.S. 712 (2004)	1
<i>Mahmoud v. Taylor</i> , 606 U.S. 522 (2025)	11
<i>McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.</i> , 157 F.4th 627 (5th Cir. 2025)	10
<i>Our Lady of Guadalupe Sch. v. Morrissey-Berru</i> , 591 U.S. 732 (2020)	8, 11, 12, 13, 18, 20, 21, 22, 23
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972)	4, 5
<i>Rentz v. Werner</i> , 232 P.3d 1169 (Wash. Ct. App. 2010)	11
<i>Serbian E. Orthodox Diocese for U. S. of Am. &amp; Canada v. Milivojevich</i> , 426 U.S. 696 (1976)	9, 18
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	21
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 582 U.S. 449 (2017)	1, 2, 5, 6, 24
<i>Watson v. Jones</i> , 80 U.S. 679 (1872)	9, 12, 18
<i>Weare Bible Baptist Church, Inc. v. Fuller</i> , 172 N.H. 721 (N.H. 2019)	11
<i>Westchester Day Sch. v. Village of Mamaroneck</i> , 417 F. Supp. 2d 477 (S.D.N.Y. 2006)	1
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	16
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002)	1

## STATUTES

Cal. Gov't Code § 8588.9	27
Colo. Rev. Stat. § 24-33.5-1810(3)	27
Colo. Rev. Stat. § 24-33.5-2104(1)	27
Colo. Rev. Stat. § 26.5-4-204	18

## TABLE OF AUTHORITIES—continued

Colo. Rev. Stat. § 26.5-4-205.....	19
8 Colo. Code Regs. § 1404-1-4.106.....	18
8 Colo. Code Regs. § 1404-1-4.107.....	18
8 Colo. Code Regs. § 1404-1-4.109.....	19
8 Colo. Code Regs. § 1404-1-4.110.....	19
Fla. Stat. § 252.3712.....	27
Md. Code Ann., Educ. § 5-317.....	27
N.Y.C. Admin. Code § 10-172.....	27
24 Pa. Stat. and Cons. Stat. § 13-1306.1-B.	27
35 Pa. Cons. Stat. §§ 5601–5604.....	27

## LEGISLATIVE AUTHORITIES

H.B. 96, 136th Gen. Assemb., Reg. Sess. (Ohio 2025).....	27
S.B. 101, 2025 Gen. Assembly, Reg. Sess. (Cal. 2025).....	27
Staff of H. Comm. on Appropriations & S. Comm. on Appropriations, 119th Cong., <i>Joint Explanatory Statement, Division A—Commerce, Justice, Science, and Related Agencies Appropriations Act, 2026</i> (Comm. Print 2026), <a href="https://perma.cc/2WC9-6CTU">https://perma.cc/2WC9-6CTU</a> .....	26

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Michael A. Helfand, <i>Mapping Carson: New Frontiers of Religious Exclusion in Government Programs</i> , 101 Notre Dame L. Rev. (forthcoming 2026).....	7
Douglas Laycock, <i>Hosanna-Tabor and the Ministerial Exception</i> , 35 Harv. J.L. & Pub. Pol’y 839 (2012).....	23

## TABLE OF AUTHORITIES—continued

Molly E. Swartz, cmt., <i>By Birth or by Choice?: The Intersection of Racial and Religious Discrimination in School Admissions</i> , 13 J. Const. L. 229 (2010) ....	15
Lael Weinberger, <i>The Limits of Church Autonomy</i> , 98 Notre Dame L. Rev. 1253 (2023).....	2

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Anti-Defamation League, <i>Anti-Jewish Hate Crimes Comprised Nearly 70% of All Religion-Based Hate Crimes in 2024, FBI Reports</i> , (Aug. 5, 2025), <a href="https://perma.cc/Y5ET-X2DX">https://perma.cc/Y5ET-X2DX</a> .....	25
Anti-Defamation League, <i>Audit of Antisemitic Incidents 2025</i> (May 6, 2026), <a href="https://perma.cc/66QW-EV69">https://perma.cc/66QW-EV69</a> .....	25
<i>Babylonian Talmud, Eruvin</i> .....	14
<i>Babylonian Talmud, Kiddushin</i> .....	14, 17
J. David Bleich, 2 <i>Contemporary Halakhic Problems</i> .....	14, 15
Shlomo Brody, <i>A Guide to the Complex: Contemporary Halakhic Debates</i> (2014)...	14
Chaim of Volozhin, <i>Nefesh HaChayim</i> 4:6 .....	14
1983 Code of Canon Law c. 796 § 2, <a href="https://perma.cc/49S2-UXE7">https://perma.cc/49S2-UXE7</a> .....	12

## TABLE OF AUTHORITIES—continued

FEMA, <i>FY 2025 Nonprofit Security Grant Program Fact Sheet</i> , <a href="https://perma.cc/F8EM-KR36">https://perma.cc/F8EM-KR36</a> .....	26
Governor Kathy Hochul, <i>Governor Hochul Announces \$70 Million Available to Help Protect Community-Based Organizations from Hate Crimes and Attacks</i> (Apr. 15, 2026), <a href="https://perma.cc/5F82-369W">https://perma.cc/5F82-369W</a> .....	27
Jewish Leadership Acad., <i>Admissions</i> , <a href="https://perma.cc/DBD2-A25V">https://perma.cc/DBD2-A25V</a> .....	15
Moshe Krakowski, <i>3 Torah U'maada as Socialization, Not Education</i> , <i>The Azrieli Papers</i> (2022).....	15
Aharon Lichtenstein, <i>Study in CONTEMPORARY JEWISH RELIGIOUS THOUGHT: ORIGINAL ESSAYS ON CRITICAL CONCEPTS, MOVEMENTS, AND BELIEFS</i> (Arthur A. Cohen & Paul Mendes-Flohr eds., 1987).....	14
Melvin J. Berman Hebrew Acad., <i>Admissions</i> , <a href="https://perma.cc/K2BM-93Y7">https://perma.cc/K2BM-93Y7</a>	15
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<i>Shulchan Aruch, Yoreh De'ah</i> 268.....	17
Meir Soloveichik, “The Jewish Mother: A Theology,” <i>20 Azure</i> 99 (Spring 2005) .....	17

## TABLE OF AUTHORITIES—continued

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Union of Orthodox Jewish Congregations of America, Orthodox Union Advoc. Ctr., <i>Orthodox Union Position Paper on Government Aid to Jewish Day Schools</i> (2012), <a href="http://bit.ly/3qi3Tkd">http://bit.ly/3qi3Tkd</a> .....	15
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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The Union of Orthodox Jewish Congregations of America (Orthodox Union) is the nation’s largest Orthodox Jewish synagogue organization, representing nearly 2,000 congregations across the United States. With its Teach Coalition, the Orthodox Union also represents the interests of nearly 250 non-public Jewish K-12 schools before state governments.

The Orthodox Union, through its OU Advocacy Center, has participated in many cases before this Court that, like this one, raise issues of importance to the Orthodox Jewish community, including *Carson ex rel. O.C. v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Mont. Dep’t of Rev.*, 591 U.S. 464 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Locke v. Davey*, 540 U.S. 712 (2004); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Through *amicus curiae* briefs, the Orthodox Union seeks to inform the Court of the perspective of our community and the impact the Court’s rulings will have.

“[F]or modern Orthodox Jews, enrolling their children in a dual curriculum Jewish day school is ‘virtually mandatory.’” *Westchester Day Sch. v. Village of Mamaroneck*, 417 F. Supp. 2d 477, 497 (S.D.N.Y. 2006), *aff’d*, 504 F.3d 338 (2d Cir. 2007). Thus, the overwhelming majority of the Orthodox Union’s constituents, as well as an increasing number of Jewish

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amicus curiae* made any monetary contribution toward the preparation and submission of this brief.

parents who are not affiliated with the Orthodox Union, choose to send their children to Jewish schools. The Orthodox Union is concerned that if the decision below is permitted to stand, it would license government to condition public benefits on the surrender of church autonomy—a rule that would perpetuate discrimination against minority faiths and greatly burden faiths such as Orthodox Judaism that rely on government funds to address acute threats of antisemitic violence and terrorism.

The Orthodox Union thus has a strong interest in this Court’s reversal of the decision below.

### SUMMARY OF ARGUMENT

The Religion Clauses of the First Amendment “protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring). For houses of worship, this sphere of “church autonomy” includes a right to determine their membership. For religious schools, it includes a parallel right to determine which students to admit. The State of Colorado nevertheless insists that if religious schools wish to accept the same public-benefit dollars that flow freely to every other preschool, they must first abandon the autonomy to decide who may sit in their classrooms. This Court should confirm that the First Amendment does not permit such a condition.

Colorado’s Universal Preschool (UPK) program’s mandate to enroll all students assigned by the state is the latest iteration of the practice this Court rejected in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Espinoza v. Mont. Dep’t*

*of Rev.*, 591 U.S. 464 (2020); and *Carson ex rel. O.C. v. Makin*, 596 U.S. 767 (2022). In each of those cases, the State conditioned access to a public benefit on recipients abandoning their exercise of religion. And in each of those cases, this Court held that government may not dangle a public benefit before a religious entity and demand that it surrender a constitutionally protected right as the price of admission. Yet Colorado's law here makes that very demand: To obtain public tuition assistance, religious schools must forfeit their constitutionally-protected autonomy over selecting their students.

The power to determine who may enroll in a school dedicated to transmitting religious teachings, religious values, and ultimately a religious way of life is quintessentially ecclesial. Nowhere is that clearer than in the Orthodox Jewish context, where Jewish education is regarded as a form of worship in and of itself and where exclusively Jewish day schools are increasingly seen as an indispensable aid to Jewish continuity. Many Jewish schools therefore admit only Jewish children. For many of these schools, decisions about whether a prospective student may be admitted turn on millennia-old Jewish laws establishing the principle of matrilineal descent and determining the requirements of conversion. Forcing a Jewish school into different criteria is a form of theological compulsion.

By making state funding contingent on religious schools surrendering the right to select which students join their religious communities, Colorado imposes precisely the sort of unconstitutional condition *Carson*, *Espinoza*, and *Trinity Lutheran* forbid. The structure of the law is no different from one compelling the Catholic Church to distribute the Eucharist

to those outside the faith as a pre-requisite to receiving asbestos-removal grants, or from one conditioning homeland-security funds on the Church of Jesus Christ of Latter-day Saints opening its temples to the general public, in contravention of Church doctrine. Simply put, the state may not weaponize public coffers to reset ecclesial boundary markers. Importantly, states may not invade church autonomy in this way *even if* they do so through ostensibly neutral and generally applicable laws.

The ramifications for vulnerable minority communities of upholding Colorado’s policy would be profound. Like many Jewish institutions, Orthodox Jewish schools rely on government grants to secure their facilities against escalating antisemitic threats and violence. If Colorado’s bargain is constitutional, the same demand to abandon religious screening could be applied to those lifesaving security grants, forcing Jewish schools, synagogues, and other institutions to choose between protecting their conscience and safeguarding their membership.

The judgment below should be reversed.

## ARGUMENT

### I. THE GOVERNMENT MAY NOT CONDITION PUBLIC BENEFITS ON SURRENDERING RELIGIOUS LIBERTIES.

It is well settled that, although the government need not create a funding program, once it does, it “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests,” including First Amendment rights. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); see also *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013) (“[T]he First Amendment supplies ‘a

limit on [government’s] ability to place conditions on the receipt of funds.” (quoting *Rumsfeld v. Forum for Academic & Inst. Rights*, 547 U.S. 47, 59 (2006))). This doctrine of “unconstitutional conditions” flows logically from the principle that government cannot do by subsidy what it is forbidden from doing by mandate. See *Perry*, 408 U.S. at 597 (explaining that unconstitutional funding condition “would allow the government to ‘produce a result which it could not command directly’” (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (citation modified)).

This Court has long made clear that the unconstitutional conditions doctrine protects religious liberty interests. A state “cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

This Court’s recent trilogy of public-funding cases brought under the Free Exercise Clause—*Trinity Lutheran*, *Espinoza*, and *Carson*—reaffirm the longstanding principle the unconstitutional conditions doctrine protects religious liberty.

In *Trinity Lutheran*, Missouri’s exclusion of a religiously affiliated preschool from a generally available public grant for playground resurfacing “expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.” 582 U.S., at 462. It was no answer that the State did not ban worship or directly compel the church to alter its religious beliefs as a condition of funding. “[T]he Free Exercise Clause protects against ‘indirect coercion or penalties on the

free exercise of religion, not just outright prohibitions.” *Id.* at 463 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450 (1988)). Disqualifying a religious institution from receiving public funds unless it “disavow[s] its religious character”—for instance, by requiring the institution to believe in or accept something contrary to its faith—is an unconstitutional condition. *Id.* at 451. And “the imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights.” *Id.* (alteration in original) (quoting *Sherbert v. Verner*, 374 U.S. 398, 405 (1963)); see also *id.* at 462 (“To condition the availability of benefits ... upon [a recipient’s] willingness ... to surrender[] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties.” (alteration in original) (citation omitted)).

In *Espinoza*, Montana “bar[red] religious schools from public benefits solely because of the religious character of the schools” and likewise “bar[red] parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school.” *Espinoza*, 591 U.S. at 476. Because that policy “condition[ed] the availability of [public] benefits upon a recipient’s willingness to surrender its religiously impelled status,” and thus “punishe[d] the free exercise of religion,” this Court subjected it to “the strictest scrutiny” and found it invalid. *Id.* at 475, 485–86 (citation modified); see also *id.* at 478 (“Placing such a condition on benefits or privileges ‘inevitably deters or discourages the exercise of First Amendment rights.’” (citation omitted)). While a “State need not subsidize private education,” the Court explained, once it decides to do

so, “it cannot disqualify some private schools solely because they are religious.” *Id.* at 487.

Most recently, in *Carson*, this Court applied the same “unremarkable’ principles.” 596 U.S. at 780. “[L]ike the program in *Trinity Lutheran*,” the Maine program at issue in *Carson* “effectively penalize[d] the free exercise’ of religion” by “condition[ing] the availability of benefits” on surrendering religious identity or use. *Id.* (alteration in original) (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion)). The Court again held such a condition to be unconstitutional. See *id.* at 778 (reaffirming that “a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits”). The violation did not vanish because the State framed its rule as avoiding funding “religious uses” while tolerating religious “status.” *Id.* at 787; see also *id.* at 789 (reasoning that a State may not “exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits.”). “[U]se-based discrimination,” this Court explained, is at least as “offensive to the Free Exercise Clause.” *Id.* at 787. And trying to police a religious school’s “use” would entangle the State in religious questions and invite denominational favoritism. *Id.*

*Carson* thus made clear “that government may not use the leverage of public benefits to require participants to sacrifice otherwise protected religious exercise.” Michael A. Helfand, *Mapping Carson: New Frontiers of Religious Exclusion in Government Programs*, 101 Notre Dame L. Rev., at \*13 (forthcoming 2026). The government may no more use public benefits to induce claimants to relinquish their religious liberty than it may invade those rights directly.

## II. THE FREE EXERCISE CLAUSE PROTECTS THE RIGHT OF RELIGIOUS SCHOOLS TO SELECT STUDENTS BASED ON ADHERENCE TO RELIGIOUS DOCTRINE.

The Orthodox Union agrees with Petitioners that the Tenth Circuit erred when it said that Colorado’s law satisfies the demands of neutrality and general applicability. But irrespective of the resolution of that issue *and even if* the compulsory placement policy of Colorado’s UPK law were made neutral and generally applicable, that policy would be unconstitutional for a distinct reason: It conditions access to public funds on recipients’ surrender of their constitutionally-protected right to church autonomy.

### A. The church autonomy doctrine protects religious schools’ decisions about which students to admit.

This Court has long “recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their beliefs.” *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). This private sphere—now called the “church autonomy doctrine”—“protects the right of religious institutions ‘to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 737 (2020) (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

Among other things, the church autonomy doctrine protects religious institutions from government interference in the selection of ministers, teachers, and other leaders, *e.g.*, *Hosanna-Tabor*, 565 U.S. 171

(2012); forbids government from determining the meaning of religious beliefs and doctrines, see *Watson v. Jones*, 80 U.S. 679, 733 (1872); and bars government from meddling in internecine disputes such as those regarding the religious polity, membership, matters of discipline and excommunication, matters of good standing, and what constitutes the “true religion” amidst schism, e.g., *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696 (1976).

The logic of these decisions—and of the church autonomy doctrine more broadly—also compels the conclusion that government may not dictate to a religious school whom it must admit.

1. The church autonomy doctrine allows a religious institution to determine its membership free from state interference. As the Court explained in *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131 (1872), “we cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off.” *Id.* at 139–40. Such matters regarding “the conformity of members ... to the standard of morals required of them” belong exclusively to religious institutions. *Watson*, 80 U.S. at 733.

The protection of religious institutions’ autonomy to decide their own membership serves many of the purposes of the church autonomy doctrine and the First Amendment more broadly. For one thing, the question of who qualifies for inclusion in a religious community—whether by birth, by conversion, by profession of faith, or by adherence to a religious code of conduct—can typically be answered only by reference to religious teaching, so to decide questions of membership a civil authority would need to “resolve a re-

ligious controversy,” which the church autonomy doctrine forbids it from doing. *Jones v. Wolf*, 443 U.S. 595, 604 (1979). At the same time, a religious institution’s right to determine its own membership is also a function of the basic right of association recognized by the First Amendment. See *Democratic Party v. Wisconsin ex rel. La Foullette*, 450 U.S. 107, 123 n.25 (1981) (“[T]he stringency, and wisdom, of membership requirements is for the association and its members to decide—not the courts.”). And that right is only heightened because religious institutions are expressive in nature. As this Court has recognized, the compelled inclusion of participants in an expressive undertaking can alter the message conveyed by the organizer because each participant affects the overall message communicated to the audience. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73, 576–77 (1995).

The principle that membership is a matter of church autonomy has been firmly established across jurisdictions. See, e.g., *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 157 F.4th 627, 639 (5th Cir. 2025) (Oldham, J.) (“The church autonomy doctrine also forbids courts from adjudicating matters of church governance, including ... the church’s understanding of its own membership.”); *Ambellu v. Re’ese Adbarat Debre Selam Kidist Mariam*, 387 F. Supp. 3d 71, 80 (D.D.C. 2019) (“Whether someone may worship at a church is plainly a matter of ecclesiastical cognizance.”); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 33 (D.D.C. 1990) (church autonomy prohibits governments from “interfer[ing] with the fundamental ecclesiastical concern of determining who is and who is not a[] ... member” of a faith community.); *Am. Union of Baptists, Inc. v. Trs. of Particular Primitive Baptist Church at Black*

*Rock, Inc.*, 644 A.2d 1063, 1069 (1994) (“[T]he determination of a membership in a church is a question well embedded in the ‘theological thicket.’”); *Weare Bible Baptist Church, Inc. v. Fuller*, 172 N.H. 721, 727 (N.H. 2019) (church autonomy doctrine prevents courts from interpreting “the procedures and conditions necessary to become a new member” in the church); *In re Congregation Yetev Lev D’Satmar, Inc. v. Kahana*, 9 N.Y.3d 282, 287 (N.Y. 2007) (“It is well settled that membership issues such as those that are at the core of this case are an ecclesiastical matter.”); *Hutterville Hutterian Brethren, Inc. v. Waldner*, 791 N.W.2d 169, 179 (S.D. 2010) (“[M]atters of membership are shielded from judicial scrutiny under the First Amendment.”); *Rentz v. Werner*, 232 P.3d 1169, 1178 (Wash. Ct. App. 2010) (“[D]ecisions concerning membership . . . are also ecclesiastical in nature.”).

2. The constitutionally-protected autonomy over membership applies not only to houses of worship, but also to religious schools. “[T]here are few religious acts more important than the religious education of . . . children.” *Mahmoud v. Taylor*, 606 U.S. 522, 547 (2025). Indeed, admissions to a religious school invite the same questions of “faith and doctrine” implicated in church membership. *Our Lady of Guadalupe*, 591 U.S. at 737 (citation omitted); see *infra* pp. 14–18. Like houses of worship, religious schools are engaged in the vital—and inherently expressive—work of forming students’ faith and character. And like houses of worship and other ecclesial institutions, religious schools constantly communicate their doctrinal commitments, including through the composition and ethic of their communities. See *Our Lady of Guadalupe*, 591 U.S. at 738; *Watson*, 80 U.S. at 733; cf. *Carson*, 596 U.S. at 787 (“Any attempt to . . . scrutinize[e] whether and how a religious school

pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism.”).

This Court has already recognized that a “component” of the church autonomy doctrine, the “ministerial exception,” applies to religious schools with the same force as it applies to houses of worship. *Our Lady of Guadalupe*, 591 U.S. at 746. Because “educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school,” *Id.* at 753–54, the ministerial exception protects the freedom of religious schools “to choose the personnel who are essential to the performance of [key religious] functions,” *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring); see *id.*

Admissions decisions are simply the other side of the coin for the interests the ministerial exception protects. Catechist and catachumen are equally “vital part[s]” “of the mission of a private religious school.” *Our Lady of Guadalupe*, 591 U.S. at 757. The point of religious education is not simply for teachers to *teach* religious precepts, but for students to *learn* them. In *Our Lady of Guadalupe*, for example, the teachers “prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities.” *Id.* The moral and spiritual formation such activities aim to cultivate—often the central mission of religious schools—may require not just teachers the school deems religiously suitable but students as well. It depends on willing and receptive students, supportive families, and a school community that fosters these aims rather than undermines them. Cf. 1983 Code of Canon Law c. 796 § 2, <https://perma.cc/49S2-UXE7> (“Parents must co-

operate closely with the teachers of the schools to which they entrust their children to be educated; moreover, teachers in fulfilling their duty are to collaborate very closely with parents.”). A religious school therefore cannot fulfill its mission of “educating young people in their faith, inculcating its teachings, and training them to live their faith,” *Our Lady of Guadalupe*, 591 U.S. at 753–54, if the government overrides the school’s religiously grounded judgments about the composition of its student body.

**B. Admissions criteria to Orthodox Jewish schools implicate matters of religious doctrine.**

For Orthodox Jews, the question of who may be admitted to a religious school is as much a matter “of faith and doctrine” as the question of who may take communion is to Catholics or the question of who may enter a dedicated temple is for members of the Church of Jesus Christ of Latter-day Saints. *Our Lady of Guadalupe*, 591 U.S. at 737 (citation omitted). The admissions policies of Orthodox Jewish schools thus illustrate how a religious school’s admissions decisions involve “internal management decisions that are essential to the institution’s central mission” and so are protected by the church autonomy doctrine. *Id.* at 746.

1. Judaism considers *talmud Torah*—the study of Torah<sup>2</sup>—to be a form of divine service. Study provides more than the knowledge necessary to live a life in conformance with the intricacies of Jewish law; it is

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<sup>2</sup> “Torah” here means both the Hebrew Bible, sometimes called the “Written Torah,” and the “Oral Torah,” which refers to Judaism’s entire interpretive and legal tradition, of which the Talmud is the most famous example.

also “a prime vehicle” for a Jew’s “encounter” with the lawgiving God. Aharon Lichtenstein, *Study in CONTEMPORARY JEWISH RELIGIOUS THOUGHT: ORIGINAL ESSAYS ON CRITICAL CONCEPTS, MOVEMENTS, AND BELIEFS* 931, 933 (Arthur A. Cohen & Paul Mendes-Flohr eds., 1987); see also Joseph B. Soloveitchik, *Torah and Shekhinah in FAMILY REDEEMED: ESSAYS ON FAMILY RELATIONSHIPS* 158, 177 (David Shatz & Joel B. Wolowelsky eds., 2000) (“[T]almud Torah begins as an intellectual activity ... However, once the activity is initiated it turns into a great total experience ... of having a rendezvous with God.”); Chaim of Volozhin, *Nefesh HaChayim* 4:6 (A Jew “should intend to attach himself, through his learning, to God through the Torah ... because He and His will are one.”). Indeed, Jewish tradition considers the study of Torah to be the *highest* form of divine service, even exceeding worship and action. See *Babylonian Talmud, Eruvin* 63b (“Torah study is greater than the offering of daily sacrifices.”); *Babylonian Talmud, Kiddushin* 40b (“Is study greater or is action greater? ... Study is greater ... as study leads to action.”).

Given that the study of Torah is not only an intellectual and educational exercise, but a form of religious worship, the inclusion of non-Jews in a Jewish house of learning can pose theological and practical difficulties. See J. David Bleich, 2 *Contemporary Halakhic Problems* 311–40 (surveying Jewish sages’ debates concerning whether a non-Jew can be included in *talmud Torah*); Shlomo Brody, *A Guide to the Complex: Contemporary Halakhic Debates* 180–82 (2014) (same). Many Orthodox Jewish authorities have accordingly taken the position that “as a matter of policy, non-Jewish children should not ... be granted admission to Day Schools and *Yeshivot*.” Bleich,

*supra*, at 337. And indeed many schools that are members of the Orthodox Union’s Teach Coalition—an umbrella advocacy group of Jewish day schools and yeshivas—have exactly such policies.<sup>3</sup>

More fundamentally, a Jewish school will limit admissions to Jewish students for the sake of the school’s mission to transmit Jewish identity and form Jewish adults.

As countless surveys have demonstrated, Jewish day schools are “the mode of Jewish education which yields the deepest and longest impact in shaping committed Jews.” Orthodox Union Advocacy Center, *Orthodox Union Position Paper on Government Aid to Jewish Day Schools* (2012), <http://bit.ly/3qi3Tkd>. That is at least in part because Jewish day schools provide a comprehensively Jewish environment that ensures religious *socialization* in addition to religious knowledge. “It is through the process of religious socialization, as schools set and model religious expectations, that Jewish schools move from a place where students learn about religion, to one where they are engaged in religion itself.” Moshe Krakowski, 3 *Torah*

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<sup>3</sup> See, e.g., Jewish Leadership Acad., *Admissions*, <https://perma.cc/DBD2-A25V> (last visited June 4, 2026) (“While JLA welcomes Jewish students from all backgrounds irrespective of their observance level or background knowledge, students must have been born to a Jewish mother as defined by Orthodox Judaism, or must have converted with a reputable Orthodox Beit Din.”); Melvin J. Berman Hebrew Acad., *Admissions*, <https://perma.cc/K2BM-93Y7> (last visited June 4, 2026) (“Admission is open to Jewish children from 2 year old Preschool through Grade 12.”); see also Molly E. Swartz, cmt., *By Birth or by Choice?: The Intersection of Racial and Religious Discrimination in School Admissions*, 13 J. Constitutional L. 229, 258 nn.189–91 (2010) (collecting other similar school policies).

*U'maada as Socialization, Not Education*, The Azrieli Papers, 19–23 (2022).

Control over admissions is necessary for the school to be able to provide that kind of religious socialization. As a small minority within American society, Jews face unique challenges to the transmission of their way of life, and exclusively Jewish day schools play a pivotal role in overcoming those challenges. Unless enrolled in an exclusively Jewish school, a Jewish child may need to contend with strong pressures to engage in behavior inconsistent with Jewish observance—for example, to play in youth sports leagues on Saturdays in violation of Shabbat, to eat the non-Kosher food her non-Jewish peers are eating, or to participate in (even the secularized) public celebration of Christian holidays. Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 217–18 (1972) (crediting Old Order Amish view that “secondary schooling, by exposing Amish children to worldly influences ... interfer[es] with the religious development of the Amish child”). Shielding children from those assimilatory pressures is an imperative of Orthodox Jews in particular, and so is reflected in their approach to admissions. See Haym Soloveitchik, *Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy*, 28:4 Tradition 64, 93 (1994) (“Jewish identity is not inevitable. It is not a matter of course, but of choice: a conscious preference of the enclave over the host society.”).

2. For Orthodox Jewish institutions, determining an individual’s Jewish status is a matter of Jewish law or *halakha*.

According to *halakha*, Jewish status is obtained in one of two ways.

First, one can be born Jewish. Under *halakha*, Jewish status passes down solely through the mother: if one's mother was Jewish, one is also Jewish. *Kiddushin* 68b; see also Meir Soloveichik, "The Jewish Mother: A Theology," 20 *Azure* 99 (Spring 2005) (arguing that matrilineal descent follows from Judaism's conception of the Jewish People as a covenantal family). Orthodox Judaism's commitment to the principle of matrilineal descent has been contested by more liberal Jewish denominations, which do not follow it. *E.g.*, Union of American Hebrew Congregations, *Report of the Committee on Patrilineal Descent* (Mar. 15, 1983). The question of who is Jewish by birth is thus precisely the kind of "religious controversy" the church autonomy doctrine prohibits a civil court from resolving. *Jones*, 443 U.S. at 603.

Second, an individual may convert to Judaism. That too implicates questions of doctrine and practice. Whether someone has in fact joined the Covenant of Abraham depends on whether they have fulfilled *halakha's* requirements of Jewish conversion, including circumcision (for men), full immersion in a *mikveh* or ritual bath, and acceptance of the commandments. See *Shulchan Aruch, Yoreh De'ah* 268; The Network of Regional Batei Din for Conversion under the auspices of The Rabbinical Council of America and The Beth Din of America, *Geirus Policies & Standards: Policies and Procedures* § 6(g) (rev. Nov. 28, 2007), <https://perma.cc/6GWH-B29J>. Whether these criteria are met is determined by a panel of three rabbinic judges, who themselves must meet religious qualifications for the role. *Id.* § 2(d).

Thus, for Orthodox Jewish schools, whether to admit a prospective student often is an intrinsically ecclesiastical question. Not only may such schools limit

admission to Jewish students for reasons of “faith and doctrine,” *Our Lady of Guadalupe*, 591 U.S. at 737, but the underlying question of whether a student is Jewish itself raises “questions of discipline, or of faith, or ecclesiastical rule, custom, or law,” *Serbian E. Orthodox Diocese*, 426 U.S. at 710 (quoting *Watson*, 80 U.S. at 727). Government intrusion on these admissions decisions would therefore deny to Orthodox Jewish schools the “autonomy with respect to internal management decisions that are essential to the institution[s]’ central mission.” *Our Lady of Guadalupe*, 591 U.S. at 746.

### **III. COLORADO UNLAWFULLY CONDITIONS PUBLIC FUNDS ON RELIGIOUS SCHOOLS SURRENDERING THEIR AUTONOMY.**

Colorado’s UPK program conditions a public benefit on a religious institution surrendering its autonomy over admissions. Even if the program could be restructured to be a “neutral law of general applicability,” that funding condition is unconstitutional. *Emp. Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990).

#### **A. The UPK program overrides participating schools’ admissions policies.**

Passed in a public referendum and then codified by the Colorado General Assembly, the UPK program covers the cost of fifteen hours a week of preschool services for all Colorado children. See Colo. Rev. Stat. § 26.5-4-204; 8 Colo. Code Regs. 1404-1-4.106–4.107. Rather than build a new preschool system from scratch, Colorado chose to leverage existing preschools, including private and religious preschools. But private preschools may participate only if they

comply with mandatory standards. See Colo. Rev. Stat. § 26.5-4-205(1)(a).

One of those standards goes directly to admissions. Each participating school must give eligible children the “opportunity to enroll and receive preschool services regardless of ... religious affiliation,” among other “characteristics and circumstances.” Colo. Rev. Stat. § 26.5-4-205(2)(b). The Department of Early Childhood’s regulations repeat this requirement, and the UPK provider agreement likewise incorporates the requirement as a condition of participation. 8 Colo. Code Regs. 1404-1-4.110(B); Pet. App. 82a.

Importantly, Colorado controls the matching process that determines which participating preschool a child is assigned to. Families enroll through the Department’s UPK portal, rank up to five participating preschools, and are then matched by the Department’s algorithm to one of those choices. Pet. App. 7a. The regulations allow certain “programmatically preferences” to be built into that algorithm, but even when a provider uses those preferences, it “must still comply” with the equal-opportunity rule.<sup>4</sup> 8 Colo. Code Regs. 1404-1-4.109(A)–(B). Thus, once the State’s system matches an eligible child to a UPK provider, the provider may not refuse the child admission on the basis of religious affiliation—or any other protected characteristic listed in the statute and regulations—without risking loss of funding.

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<sup>4</sup> Although initial regulations allowed congregational schools to give preference to their own congregants in the matching system, that allowance has since been withdrawn. Pet. App. 16a. The regulations also never permitted religious schools that are independent of any congregation, as most Jewish day schools are, to give preference to their coreligionists.

The UPK program therefore requires religious schools to enroll even children who do not satisfy the school's religious criteria for admission. Colorado makes no exception for faiths, like Judaism, whose admissions rules rest on doctrinal and theological judgments about who is included within the religious community.

**B. Colorado's compulsory placement policy forces Orthodox Jewish schools to choose between public funds and religious autonomy.**

The UPK regime puts Orthodox Jewish schools that limit admission to Jews to a choice. They may open themselves up to families who are not Jewish according to *halakha*, notwithstanding the doctrinal, theological, and mission-driven reasons why Jewish schools limit admission to Jewish children. Or they may adhere to their religious convictions and forgo the funds Colorado has otherwise made available.

The unconstitutional conditions doctrine prohibits Colorado from using public funds to force that choice on Jewish schools. As explained above, for many Orthodox Jewish schools, the decision whether to admit a prospective student is an intrinsically ecclesiastical question. The job of a Jewish day school is not only to add to its students' knowledge of Jewish observance and Jewish history, not only to facilitate the unique encounter with God that is possible through the spiritual act of study, but also to foster a rich and comprehensive Jewish environment capable of *socializing* religion. That starts as early as preschool. A Jewish school's admissions thus bear directly on its missions of "educating young people in their faith, inculcating its teachings, and training them to live their faith." *Our Lady of Guadalupe*, 591 U.S. at 753–54. And a

necessary question in admissions—whether the applicant is Jewish—turns on principles of “faith and doctrine.” *Id.* at 737.

Fundamentally, Colorado is claiming a power to determine the enrollment of any religious school, at any level, as a condition of public funding. See Pet. App. 43a (“[W]hen a school takes money from the state that is meant to ensure universal education, then its doors must be open to all.”). That determination properly belongs to the religious institution itself and only to the religious institution. It is part of the basic “right of religious institutions ‘to decide for themselves ... matters of church government as well as those of faith and doctrine.’” *Our Lady of Guadalupe*, 591 U.S. at 737 (citation omitted). That right flows from the Religion Clauses, and Colorado may no more induce religious institutions to sacrifice the right as a condition of receiving public funds than it may invade the right directly.

Yet that is exactly what the UPK condition does. A Jewish school that participates on equal footing with other private schools must give up its autonomy over a religious admissions decision. In this manner, Colorado aims to “produce a result”—the loss of church autonomy—that it “could not command directly.” *Speiser*, 357 U.S. at 526. The unconstitutional conditions doctrine forbids this maneuver.

**C. Deciding on church-autonomy grounds would better protect the rights of religious schools.**

Petitioners advocate either of two ways of deciding this case.

Petitioners’ primary argument is that *Smith*’s general applicability framework does not apply. Pet. Br.

26. But, as a fallback argument, Petitioners ask this Court to decide that the UPK’s compulsory placement policy is not generally applicable, fails strict scrutiny, and so violates the Free Exercise Clause as expounded by *Smith*. See Pet. Br. 35–42.

Respectfully, this Court should take the first path. A *Smith*-based ruling would not protect religious schools’ fundamental autonomy to decide which students to admit. Nothing would prevent the state of Colorado from continuing to dictate religious schools’ admissions in violation of the First Amendment. Colorado would need only to revise the compulsory placement policy to remove all secular carveouts and individualized discretion; it could still subject religious schools to a mandatory student-allocation process that those schools cannot control.

Petitioners identify at least eight distinct exceptions to *Smith*: “public benefits” are one, see Pet. Br. 25–26, but “church autonomy” is another and it independently applies, see Pet. Br. 22.

As Petitioners rightly explain, it is incontrovertible that *Smith* “does not control Free Exercise Clause claims or defenses involving ‘matters of church government as well as those of faith and doctrine.’” Pet. Br. (quoting *Our Lady of Guadalupe*, 591 U.S. at 737). The church autonomy doctrine provides special protection for unique categories of religious exercise. The “burden on free exercise” that is addressed by the church autonomy doctrine “is of a fundamentally different character from that at issue in *Smith*.” *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996). While “government regulation of only outward physical acts” are reviewed under *Smith*, “government interference with an internal church decision that affects the faith and mission of the church itself”

is not. *Hosanna-Tabor*, 565 U.S. at 190; cf. Lael Weinberger, *The Limits of Church Autonomy*, 98 Notre Dame L. Rev. 1253, 1274 (2023) (“*Smith* by itself doesn’t tell us how to think about religious liberty in the role of a structural constraint on the government, which is what church autonomy requires.”); Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 Harv. J.L. & Pub. Pol’y 839, 856 (2012) (similar).

A ruling based on church autonomy grounds would protect the core right being invaded by the UPK program in a way a ruling applying *Smith* would not. Because church autonomy is separate from *Smith*, a State may not condition public funds on the forfeiture of church autonomy *even if* the condition is cast in terms that appear neutral or generally applicable for *Smith* purposes. Indeed, this Court’s church-autonomy cases confirm that even the most familiar and broadly applicable civil-rights laws must yield when they intrude into the constitutionally protected sphere of religious self-governance. See, e.g., *Our Lady of Guadalupe*, 591 U.S. at 742 (Age Discrimination in Employment Act); *Hosanna-Tabor*, 565 U.S. at 179 (Americans with Disabilities Act). Colorado therefore could not evade a church-autonomy-based ruling by eliminating the UPK program’s two secular exemptions from its compulsory placement requirement (for schools to select students based on income or disability) and by better cabining the administrators’ discretion. Cf. Pet. Br. 36–48 (explaining that these features of the law make it not generally applicable).

Whether neutral or not and whether generally applicable or not, Colorado’s UPK program conditions access to a public benefit on a religious school’s relin-

quishing the church-autonomy right to determine its own student body. That is unconstitutional.

**IV. ALLOWING STATES TO CONDITION PUBLIC BENEFITS ON RELINQUISHING CHURCH AUTONOMY WOULD INCREASE THE RISK OF HARM—INCLUDING PHYSICAL HARM—TO AMERICAN JEWS.**

The stakes in this case extend far beyond Colorado’s UPK program and government-funded schooling more broadly. American Jews face a surge in antisemitic threats and attacks without precedent in American history, and rely on government funds to protect their communities from these threats and this violence. Permitting Colorado’s UPK policy would license the federal government and the states to force Orthodox Jewish institutions to choose between their conscience and their members’ safety.

Jewish schools, like many private religious institutions, frequently rely on generally available government aid programs to protect their students’ access to education and their health. See Br. of The Union of Orthodox Jewish Congregations of America as *Amicus Curiae* 6–9, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (No. 15-577) (identifying vital health, safety, and education funding programs relied upon by religious institutions).

But one of the most critical—and often overlooked—ways in which Jewish schools and other religious institutions rely on government funds is to keep themselves safe from antisemitic violence and terrorism. Permitting the federal government or the states to condition access to such funds on sacrificing church autonomy would force Orthodox Jewish institutions to choose between adhering to their religious beliefs

and keeping their students safe from increasingly prevalent antisemitic violence.

**A. Antisemitic violence is a persistent and growing threat that has created an acute funding need.**

Regrettably, Jews account for a disproportionate share of hate crime victims, and Jewish institutions often rely on government funds to keep their communities safe. Jews represent just 2% of the U.S. population but account for 16% of all reported hate crimes. Anti-Defamation League, *Anti-Jewish Hate Crimes Comprised Nearly 70% of All Religion-Based Hate Crimes in 2024, FBI Reports*, (Aug. 5, 2025), <https://perma.cc/Y5ET-X2DX>. These crimes target Jewish individuals and institutions alike. Anti-Defamation League, *Audit of Antisemitic Incidents 2025*, (May 6, 2026), <https://perma.cc/66QW-EV69>. In addition, Jewish institutions face a unique and acute threat from terrorist cells and radicalized individuals aligned with Al-Qaida, ISIS, and the Islamic Republic of Iran. In one highly publicized incident in early 2026, a Hezbollah-inspired gunman, armed with a rifle and explosive devices, drove into the preschool at the largest synagogue in Michigan and was stopped only by the efforts of several security guards. Barbara Sprunt, *'The Aftermath Is Just Devastating': Temple Israel Rebuilds After Terror Attack*, NPR (May 10, 2026), <https://perma.cc/M6SG-QENP>.

Antisemitic violence has become even more widespread following Hamas's October 7, 2023, attack on Israel. Jewish schools have accordingly reported an 82% increase in average security spending since October 7. Gabriel Aaronson & Ben Hutt, *The Cost of Securing Jewish Schools: Security Expenditures Before and After October 7* 8, Teach Coalition Office of

Jewish Education Policy and Research (April 2025), <https://perma.cc/9X74-PKRP>. Jewish schools now spend, on average, more than \$800 per pupil on security. *Id.*

**B. Jewish schools rely on government funds to keep students and employees safe.**

Recognizing the severity of the threat to American Jews and other religious communities, the federal government provides several sources of public funding for student safety. Most significantly, the Non-profit Security Grant Program (“NSGP”), administered by FEMA, provides grants for “target hardening and other physical security enhancements and activities to nonprofit organizations that are at high risk of terrorist or other extremist attack.” FEMA, *FY 2025 Nonprofit Security Grant Program Fact Sheet*, <https://perma.cc/F8EM-KR36>. Last year the federal government has awarded \$94 million of NSGP funds to over 512 Jewish faith-based organizations in order to counter “the deeply disturbing rise in antisemitic attacks across the United States.” U.S. Dep’t of Homeland Sec., *DHS Awards \$94 Million in Grants to Help Protect 512 Jewish Faith-Based Organizations from Targeted Violence and Terrorism* (June 27, 2025), <https://perma.cc/L49K-42PT>. For FY 2026, Congress appropriated \$300 million to NSGP.

In addition to NSGP funds, Jewish communities rely on other federal security programs. For example, the Department of Justice’s FY 2026 appropriations include “not less than \$5 million” for state and local law enforcement to protect “at-risk religious institutions and to address the precipitous increases in hate crimes targeting individuals on the basis of religion.” Staff of H. Comm. on Appropriations & S. Comm. on

Appropriations, 119th Cong., *Joint Explanatory Statement, Division A—Commerce, Justice, Science, and Related Agencies Appropriations Act, 2026* (Comm. Print 2026), <https://perma.cc/2WC9-6CTU>.

Moreover, many state and local governments, including Colorado's, provide parallel support. See, e.g., Cal. Gov't Code § 8588.9; S.B. 101, 2025 Gen. Assembly, Reg. Sess. (Cal. 2025) (funding state-level Nonprofit Security Grant Program); Colo. Rev. Stat. §§ 24-33.5-1810(3), 24-33.5-2104(1) (funding emergency response training, security equipment, and equipment for communicating with first responders); Fla. Stat. § 252.3712 (Florida Nonprofit Security Grant program); Md. Code Ann., Educ. § 5-317 (providing security grants to public and nonpublic schools and childcare centers at risk of hate crimes or bias-motivated attacks); Governor Kathy Hochul, *Governor Hochul Announces \$70 Million Available to Help Protect Community-Based Organizations from Hate Crimes and Attacks* (Apr. 15, 2026), <https://perma.cc/5F82-369W>; N.Y.C. Admin. Code § 10-172 (Nonpublic School Security Guard Reimbursement Program); H.B. 96, 136th Gen. Assemb., Reg. Sess. (Ohio 2025) (funding school safety grants); 24 Pa. Stat. and Cons. Stat. § 13-1306.1-B (Pennsylvania Targeted School Safety Grants for Nonpublic Schools program); 35 Pa. Cons. Stat. §§ 5601–5604 (Pennsylvania Nonprofit Security Grant Fund program).

Today, these public funds are vital resources for Jewish communities. They help ensure that children in these communities can learn in an environment safe from the threat of antisemitic violence.

If the federal government or the states can require Jewish schools to sacrifice their autonomy over mat-

ters of faith to receive these funds, Jewish schools could face an impossible, existential dilemma. They can maintain the right to decide for themselves the composition of their religious community—while losing the public funds that allow children to attend school safe from antisemitic violence. Or they can accept the government’s doctrinal dictates in order to adequately protect students from violent attacks. No religious school should be forced into this choice. And through the unconstitutional conditions doctrine, the Constitution ensures that they can’t be.

### **CONCLUSION**

For the foregoing reasons, the judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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