No. 25-802

In the Supreme Court of the United States

FOOTHILLS CHRISTIAN MINISTRIES, ET AL.,
Petitioners

v.

KIM JOHNSON, ET AL.,
Respondents

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

BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of religious freedom and constitutional liberties secured by law. ACLJ attorneys have appeared often before this Court as counsel for parties, *e.g.*, *Trump v. Anderson*, 601 U.S. 100 (2024); *McConnell v. FEC*, 540 U.S. 93 (2003); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); or for amicus, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). The proper resolution of this case is a matter of utmost concern to the ACLJ because of its dedication to religious freedom, church autonomy, and parental rights in education.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision below threatens to disrupt settled understandings of church autonomy, parental rights, and the limits of government regulation of religious institutions. A state may not commandeer religious schools to undermine their own religious missions. It may not dispatch licensing inspectors to audit whether religious schools are making children feel too religious. And it may not force houses of worship to advertise that their core

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[1] 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 no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, amicus states that timely notice was given to all requisite parties.

religious practices are optional. Yet that is precisely the regime the Ninth Circuit has blessed.

Four lines of doctrine foreclose California's scheme.

First, religious autonomy. This Court's decisions establish a bright-line principle: religious institutions possess constitutional authority over matters central to their faith and mission. *Hosanna-Tabor* and *Our Lady of Guadalupe* held that religious schools control who teaches the faith—the selection of ministers and teachers performing vital religious duties. The logic extends inexorably to what and how the faith is taught. If the First Amendment protects choosing the messenger, it necessarily protects controlling the message itself and the circumstances of its delivery. California's religious services provision threatens this autonomy. It threatens to forbid religious schools from requiring—of those families voluntarily attending—participation of students in communal worship and shared religious practice—the very activities that constitute religious formation.

Second, parental rights. Just last year, in *Mahmoud v. Taylor,* this Court reaffirmed that parents possess fundamental rights to direct their children's religious upbringing, and that government policies substantially interfering with children's religious development trigger heightened scrutiny. The case for constitutional protection here is as strong or stronger than in *Mahmoud* itself. There, parents sought to shield their children from objectionable public school instruction. Here, parents have made an affirmative choice and selected religious education precisely to ensure their children receive religious

formation within a coherent faith tradition. Parents choose Foothills *because* of its religious program, not *despite* it. If *Mahmoud* protects parents who remove children from conflicting content, it must protect parents who choose schools offering the religious formation they seek.

Third, government entanglement. California's law requires licensing officials to ensure schools "allow" children to opt out of religious services. How could inspectors enforce this? They must evaluate whether religious schools create environments where participation feels expected and whether formation crosses the line into coercion. These determinations require theological and pedagogical judgments about the nature of religious education itself.

Fourth, compelled speech. In *NIFLA*, this Court held that compelled disclosures receive strict scrutiny unless they involve purely factual and uncontroversial information. California's mandatory notice—stating that children have a right to "be free to attend religious services or activities of his/her choice"—turns religious schools into ventriloquists for the state's message on a matter that goes to the heart of the schools' mission. Yes, the notice describes California law. So did the disclosure in *NIFLA*—it informed women about state-sponsored services established by statute. This Court held that compulsion unconstitutional because the message was controversial, not because California lacked authority to create the programs. The notice embodies a theory of religious autonomy that contradicts the theological convictions of petitioners. Forcing Foothills to post prominent signs and distribute

materials advertising a right to opt out of religious services is indistinguishable from forcing crisis pregnancy centers to advertise abortion services. Both compel institutions to undermine their own missions.

The Ninth Circuit's decision authorizes states to dictate the terms on which religious education may be offered and to compel religious institutions to contradict their own teachings. This Court should grant review, reverse the Ninth Circuit, and restore the constitutional boundaries that safeguard religious liberty, parental rights, and institutional autonomy from state overreach.

ARGUMENT

I. THE DECISION BELOW MISAPPLIES CORE FREE EXERCISE PRINCIPLES GOVERNING RELIGIOUS EDUCATION AND PARENTAL RIGHTS.

The Ninth Circuit's Free Exercise analysis rests on a fundamental error: it treated this case as ordinary economic regulation subject only to rational basis review under *Employment Division v. Smith*, 494 U.S. 872 (1990). It is anything but ordinary. California has inserted itself into the heart of religious formation to dictate whether religious schools may require children to participate in the communal worship that defines those schools' missions. The court below failed to recognize that religious schools possess constitutional autonomy over spiritual formation, ignored this Court's decisions protecting parental rights to direct

children's religious upbringing, failed to acknowledge the manner that Foothills' rights were substantially burdened, and approved a regime of pervasive government entanglement in religious practice. Each error is reversible. Together, these errors reveal a decision that cannot be reconciled with the First Amendment's protection of religious exercise, parental authority, and the separation of church and state.

A. Religious schools possess constitutionally protected autonomy over the spiritual formation of enrolled children.

The relationship between a religious school and the children entrusted to its care is fundamental to religious faith. For faith communities across the religious spectrum, the formation of children in the faith tradition is among the most sacred responsibilities. As this Court recognized in *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732, 754 (2020), "[r]eligious education is vital to many faiths practiced in the United States."

This Court has long recognized special constitutional protection for the relationship between religious institutions and their core religious functions, such as education. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), this Court held that the First Amendment bars government interference with a religious institution's selection of its ministers who teach religion. The Court explained that religious groups have a right "to shape their own faith and mission through their appointments," and that this

autonomy forbids "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so." *Id.* at 188-89.

Our Lady of Guadalupe reaffirmed and extended *Hosanna-Tabor*'s principle, emphasizing that what matters is not the employee's title, but whether the position involves "vital religious duties." 591 U.S. at 756. Elementary school teachers, the Court held, perform such duties because "their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools' definition and explanation of their roles is important." *Id.* at 757.

This Court has emphasized that "churches, from the earliest settlements in this country, viewed education as a religious obligation." *Id.* at 754. Religion underlies many educational enterprises, with the express goal of passing along set religious values: "Most of the oldest educational institutions in this country were originally established by or affiliated with churches[.]" *Id.* at 754-55. For almost every religion, there is a "close connection that religious institutions draw between their central purpose and educating the young in the faith." *Id.* at 756.

The principle animating *Hosanna-Tabor* and *Our Lady of Guadalupe* applies with even greater force to the religious formation of students themselves. The very reason religious institutions possess constitutional autonomy over the selection of those who transmit the faith to children is because they necessarily must enjoy autonomy over the content and manner of that transmission. The right to select the messenger flows from the right to control the

message and the circumstances in which it is delivered. As this Court has acknowledged, religious schools assume a major role in teaching religious faith and values to the next generation. *NLRB v. Cath. Bishop of Chicago*, 440 U.S. 490, 503 (1979) ("[T]he *raison d'etre* of parochial schools is the propagation of a religious faith.") (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971) (Douglas, J., concurring)). And it is the teachers who fulfill "the critical and unique role" of both teaching and modeling the faith to the schools' students. *NLRB*, 440 U.S. at 501. Teachers at many religious educational institutions are expected to integrate their faith with any subject they teach, whether theology, math, or physical education. *See, e.g.*, *Wolman v. Walter*, 433 U.S. 229, 253-54 (1977); *Meek v. Pittenger*, 421 U.S. 349, 370-71 (1975). "Religious authority necessarily pervades the [religious] school system." *NLRB*, 440 U.S. at 501.

Religious autonomy is, at a minimum, "a principle of deference[.]" Christopher C. Lund, *In Defense of The Ministerial Exception*, 90 N.C.L. Rev. 1, 17 (2011). Grounded as it is in the First Amendment, religious autonomy safeguards "a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor*, 565 U.S. at 173. Religious autonomy is the "flagship" religious liberty issue and the "litmus test" of the Nation's "commitment to genuine spiritual freedom." Gerard V. Bradley, *Forum Juridicum: Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 La. L. Rev. 1057, 1061 (1989). Accordingly, this Court's religious autonomy decisions recognize a "spirit of freedom for religious organizations, an independence from secular control or manipulation--

in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186 (citing *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

This vital interest extends beyond the selection of teachers or the content of religion classes. It encompasses the entire enterprise of creating an environment where children are formed in the faith, where they learn not merely about religious doctrine, but how to live as members of a religious community. For many religious traditions, this formation is inseparable from communal worship, shared religious practices, and immersion in the faith community's way of life.

California's religious services provision obliterates this autonomy. The DSS regulation at the center of this litigation, in the religious services provision, requires licensed facilities to "ensure" the right of a child to "be free to attend religious services or activities of his/her choice," and provides that the "child's authorized representative shall make decisions about the child's attendance at religious services." CAL. CODE REGS. tit. 22, § 101223(a). It requires religious schools to permit children to opt out of religious services, opting out of the very communal worship and shared religious practice that constitute the school's religious mission. For religious schools like Foothills, this mandate is not a mere *burden* on religious exercise—it is a *prohibition* of religious exercise itself. Spiritual formation of children is at the heart of church preschools. A government opt-out

requirement coupled with a written and signed notice to parents of the power to decline this spiritual formation constitutes State intrusion into what the Constitution reserves for houses of worship as their exclusive domain, and prohibits religious educational institutions from operating according to their mission (of course subject to parental choice of where to place their children).

The Ninth Circuit failed to grapple with this reality. Instead, it treated the religious services provision as merely regulating the school's relationship with parents, not the school's religious practice. But this is a distinction without a difference. When the State *mandates* that a religious school must allow children to opt out of religious services, it is regulating what the school may require as part of its religious mission. It is telling religious communities that their understanding of religious formation is impermissible, rather than leaving that call to the parents.

B. The Ninth Circuit's failure to consider parental rights conflicts with *Mahmoud v. Taylor*.

In dismissing Foothills' Free Exercise challenge to the licensure requirement, the Ninth Circuit applied *Employment Division v. Smith*'s general applicability test. The application of that test here had a number of problems, and amicus focuses on one in particular: the Ninth Circuit failed to consider the substantial interference with parental rights to direct their children's religious upbringing; an interference that necessarily triggers strict scrutiny. The court held that because the licensing requirement was

"neutral and generally applicable," only rational basis review applied. The Ninth Circuit did not address *Wisconsin v. Yoder*, 406 U.S. 205 (1972), or the line of cases protecting parental rights in religious education. This Court's recent decision in *Mahmoud v. Taylor* demonstrates that this analysis was fundamentally incomplete.

In *Mahmoud v. Taylo*r, 606 U.S. 522 (2025), this Court held that public schools substantially burden parents' free exercise of religion when they compel children to participate in instruction that "poses 'a very real threat of undermining' the religious beliefs and practices that parents wish to instill in their children." *Id.* at 530 (quoting *Yoder*, 406 U.S. at 218). In reaching this conclusion, the Court emphatically rejected the notion that *Yoder* is limited to its facts. "*Yoder* is an important precedent of this Court, and it cannot be breezily dismissed as a special exception granted to one particular religious minority. It instead embodies a principle of general applicability[.]" *Id.* at 558.

That principle is this: Parents have a fundamental right "to direct 'the religious upbringing' of their children," and this right is violated by government policies that "substantially interfer[e] with the religious development" of children. *Id.* at 565 (quoting *Yoder*, 406 U.S. at 218). Critically, this analysis does not require proof of direct coercion or compulsion. *Mahmoud* made clear that even instruction that does not compel students to "commit some specific practice forbidden by their religion" can violate the Free Exercise Clause if it creates "an environment hostile to [religious] beliefs" and exerts

"psychological 'pressure to conform' to [contrary] viewpoints." *Id.* at 549-50 (quoting *Yoder*, 406 U.S. at 218). What matters is whether the policy "'substantially interfer[es] with the religious development' of the child." *Id.* at 556 (quoting *Yoder*, 406 U.S. at 218).

This same analysis governs here—and with even greater force. In *Mahmoud*, the parents sought to protect their children from exposure to ideas that conflicted with their religious beliefs within the public school system. Here, parents have affirmatively chosen religious education precisely to ensure their children are formed within a particular faith tradition. They have selected Foothills not despite its religious character, but because of it. California's religious services provision undermines this parental choice by requiring Foothills to permit opt-outs from the very religious practices that define its mission. If parents in *Mahmoud* have a constitutional right to remove their children from public school instruction that conflicts with their faith, parents who choose religious education have at least as strong a claim to ensure their children receive the religious formation they seek.

The Ninth Circuit suggested that because parents retain ultimate authority to withdraw their children from Foothills entirely, the Act does not burden parental rights. But this reasoning inverts the constitutional analysis. The question is whether the State may condition access to licensed religious education on surrendering the religious character that makes such education distinctive. The answer must be no. As this Court held in *Mahmoud*, when

"education is compulsory," the State cannot "condition" the "availability" of public education "on parents' willingness to accept a burden on their religious exercise." *Mahmoud*, 606 U.S. at 561. The same principle applies here. Parents who choose religious education do not thereby waive their constitutional rights. They retain the right to select religious education that aligns with their faith—education where religious practices are not optional, but integral.

C. The religious services provision substantially interferes with Foothills' religious exercise.

Foothills believes, as a matter of religious conviction, that the spiritual formation of young children requires participation in communal worship within a cohesive faith community.

The religious services provision on its face forbids this form of religious education. It mandates that children retain the right to opt out of religious services "of his/her choice," with that choice determined by "the child's authorized representative"—a representative who may not share, or may actively oppose, the religious mission of the school. The provision thus requires religious schools to permit the fragmentation of their religious community, allowing some children to participate in religious services while others abstain.

For Foothills, this mandate is theologically unacceptable. It cannot exist and fulfill its religious mission if children are permitted to treat religious services as optional. The State's insistence that

children retain "personal religious autonomy" is thus fundamentally incompatible with Foothills' religious understanding of education.

This substantial burden on religious exercise triggers strict scrutiny. *Mahmoud*, 606 U.S. at 565. California cannot meet this demanding standard. The State has failed to identify any compelling interest that requires prohibiting religious schools from maintaining religious cohesion among enrolled students. To the contrary, California's own regulatory scheme undermines any claim of compelling necessity. The State exempts numerous categories of child care programs from licensure entirely. *See* CAL. HEALTH & SAFETY CODE §§ 1596.792, 1596.793. If these programs can operate without the protections the Act supposedly provides, the State cannot credibly claim that religious schools pose unique risks that justify overriding their religious autonomy.

D. The decision below permits impermissible government entanglement with religion.

The Free Exercise problem in this case has an Establishment Clause corollary: the Establishment Clause prohibits government practices that impermissibly involve the government in making religious classifications or evaluating religious claims. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality). ("It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs.") The religious services provision on its face requires the Department of Social Services to evaluate and monitor the religious practices of religious schools to

ensure that those schools "ensure" a child's right to "be free to attend religious services or activities of his/her choice." CAL. CODE REGS. tit. 22, § 101223(a). This places state officials in the position of determining what forms of religious education and formation are permissible—a quintessentially religious matter that the State lacks both competence and constitutional authority to control.

Consider the practical implications of enforcing this provision. A licensing inspector might visit Foothills and observe that all children participate in chapel services and religious instruction. The inspector must determine: is this voluntary participation reflecting genuine religious choice, or is it coerced participation violating children's autonomy rights? The answer would seem to require polling the students, a deeply intrusive operation, as well as assessing the degree of voluntariness. The latter question in turn requires an evaluation of whether pressure—perhaps theological, perhaps parental, perhaps peer group—has influenced the child's participation to an impermissible degree, whatever that means. These are not neutral regulatory determinations. They instead would require extraordinary entanglement between state officials, the religious schools, and the students—precisely the kind of entanglement the Establishment Clause forbids.

By vesting in the Department of Social Services the authority to determine what constitutes appropriate religious education for children, California has created a regime in which bureaucrats decide matters of theology and religious pedagogy, not

to mention psychology. This exceeds the State's constitutional authority and violates the fundamental principle that "it 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 decision below authorizes a regime of pervasive government entanglement with religion—one in which state officials monitor, evaluate, and ultimately control how religious schools approach the spiritual formation of children. This violates the Establishment Clause.

II. THE NINTH CIRCUIT MISAPPLIED *NIFLA* AND COMPELLED SPEECH DOCTRINE.

The Ninth Circuit's compelled speech analysis compounded its Free Exercise errors. The court held that California's notice requirement—mandating that Foothills post a sign and provide parents with written notice of the religious services provision—is constitutional because it requires only the disclosure of purely factual and uncontroversial information. *Foothills Christian Ministries v. Johnson*, 148 F.4th 1040, 1054-55 (9th Cir. 2025). This holding fundamentally misapplies *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018) (hereinafter *NIFLA)*, and trivializes the burden on religious speech.

A. The compelled notice is controversial.

In *NIFLA*, this Court addressed California's attempt to compel crisis pregnancy centers to provide

notices about state-sponsored services, including abortion. The Court made clear that compelled speech receives strict constitutional protection: "By compelling individuals to speak a particular message, such notices 'alte[r] the content of [their] speech.'" 585 U.S. at 766 (quoting *Riley v. Nat'l Fed'n of Blind Inc.*, 487 U.S. 781, 795 (1988)). The Court held that content-based regulations of speech "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

The Court emphasized that *Zauderer*'s more lenient standard, developed in the context of the closely regulated legal profession rather than areas of religious practice, applies only to "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *NIFLA*, 585 U.S. at 768 (citing *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)). California's notice requirement did not qualify because it concerned "abortion—anything but an 'uncontroversial' topic." *Id.* at 769.

The notice that California requires Foothills to post and distribute, that children have the right to "be free to attend religious services or activities of his/her choice," CAL. CODE REGS. tit. 22, § 101223(a), is no mere statement of an uncontroversial fact. It is a normative statement taking a position on a contested question in contemporary religious liberty debates: the nature of religious formation and the proper relationship between children, parents, and religious

communities.

The notice embodies a particular theory of religious autonomy—that even young children enrolled in religious schools possess personal religious sovereignty that supersedes the religious mission of the community to which their parents have deliberately entrusted them. This understanding directly contradicts the theological convictions of countless religious traditions. For these communities, religious education is not about presenting children with a buffet of religious options from which to choose; it is about formation within a coherent faith tradition.

By compelling Foothills to post and distribute this notice, California forces the institution "to convey a message fundamentally at odds with its mission." *CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 845 (2019). California and the courts below insist that this is not compelled speech because it is "literally true." *Foothills Christian Ministries v. Johnson*, 148 F.4th at 1054. But this argument fundamentally misunderstands *NIFLA*. The crisis pregnancy centers in that case were likewise required to inform clients about services established by California law—yet this Court held the compulsion unconstitutional precisely because the required message was controversial.[2]

If compelled speech qualifies as "factual" and "uncontroversial" merely because it describes legal rights or statutory obligations, *NIFLA*'s holding

[2] Even disclosure of facts can unconstitutionally compel speech when it mandates a message; for example, requiring a speaker to utter disparaging facts about oneself, even if those facts are true.

would be meaningless. Every compelled disclosure describes some legal requirement or established program. What matters is whether the message itself takes sides on a controversial question or distorts the exchange between independent parties.

The Ninth Circuit's contrary conclusion rests on a sleight of hand. The court characterized the notice as merely informing parents "of their children's rights" without conveying "a message fundamentally at odds with [Foothills'] mission." *Foothills Christian Ministries*, 148 F.4th at 1054-55. But whether children possess a right to opt out of religious services at a religious school is precisely what Foothills disputes on religious grounds. Compelling Foothills to state affirmatively that such a right exists—prominently, in posted signage and written materials that parents must acknowledge—is not neutral disclosure. It is forcing Foothills to take the State's side in a profound theological and constitutional controversy about the nature of religious education and parental authority.

Foothills' core religious mission is the spiritual formation of children through participation in communal worship and religious practice. Forcing Foothills to advertise a purported right to opt out of these very activities is analogous to forcing crisis pregnancy centers to advertise abortion services. In both cases, the compelled speech advertises a practice that is fundamentally inconsistent with the institution's religious mission and *raison d'être*.

B. The notice compels speech that contradicts Foothills' religious mission and is unduly burdensome.

Even if the notice could somehow be characterized as "factual," it fails *Zauderer*'s requirement that compelled disclosures be "reasonably related" to a substantial government interest and not "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651.

The notice here serves no legitimate informational purpose. Parents enrolling their children in Foothills are fully aware that they are choosing a religious school. They understand that religious education involves religious services and activities. No parent voluntarily enrolls a child in a private school while simultaneously lacking knowledge of the ability to end enrollment. And parents are free to ask about any details that would matter to them. Compelling Foothills to provide additional notice that children may opt out of these services does not inform parents of anything they do not already know or could easily find out—it requires Foothills to undermine its own religious mission.

The State could achieve its asserted interest through far less burdensome means. If California truly believes that parents need to be informed of children's statutory rights, it could inform parents directly through a public information campaign, mailings, or online resources—methods that do not require religious institutions to contradict their own missions. The compulsion here fails not only because the message is controversial, but because it is wholly unnecessary to achieve any legitimate state purpose.

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The Ninth Circuit's decision threatens fundamental principles of religious liberty, parental rights, and institutional autonomy that lie at the heart of the First Amendment. It permits states to impose secular understandings of autonomy and freedom on religious institutions, to compel religious organizations to advertise views that contradict their religious mission, and to place government officials in the position of evaluating and controlling the content and propriety of religious education. The decision below cannot be reconciled with *Mahmoud*'s defense of parental rights, with this Court's church autonomy jurisprudence in *Hosanna-Tabor* and *Our Lady of Guadalupe*, or with the compelled speech protections articulated in *NIFLA*.

CONCLUSION

This Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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