**No. 25-1187**
**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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**DARREN PATTERSON CHRISTIAN ACADEMY,**

***Plaintiff-Appellee*,**

**v.**

**LISA ROY, *et al*.,**

***Defendants-Appellants.***

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On Appeal from the
United States District Court for the District of Colorado
Case No. 1:23-cv-1557, Hon. Daniel D. Domenico

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# BRIEF OF *AMICUS CURIAE* LORICA INSTITUTE FOR FREEDOM OF EXPRESSION AND RELIGION IN SUPPORT OF AFFIRMANCE OF THE DECISION BELOW

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## FRAP 26.1 DISCLOSURE STATEMENT

The Lorica Institute for Freedom of Expression and Religion is a not-for-profit corporation incorporated under the laws of Missouri. It issues no stock and has no parent corporation.

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## I. Identity and Interest of the Amicus, Statement of the Parties' Non-Opposition

*Amicus curiae* Lorica Institute for Freedom of Expression and Religion is a not-for-profit corporation incorporated under the laws of Missouri, and a charitable private foundation under sections 501(c)(3) and 509(a) of the U.S. Internal Revenue Code, 26 U.S.C. 501 and 509. Its principal mission is to vindicate—by education, legal advocacy, and respectful participation in public debate—the rights of free expression and free exercise of religion guaranteed by the Constitution of the United States and other constitutional and positive law of the United States and her several federated states.[1]

Counsel of record for all the parties have communicated to undersigned counsel for *amicus* Lorica that they do not oppose the filing of this brief.

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[1] This brief has been authorized by Lorica's governing agents. No counsel for any of the parties, nor any person or entity outside of Lorica and its corporate agents, has participated in the preparation or funding of this brief.

## II. Summary of Argument

The Supreme Court's most recent foray into First Amendment Free Exercise doctrine occurred only a few months ago, in *Catholic Charities Bureau v. Wisconsin Labor & Industry Review Comm'n*, 605 U.S. 238 (2025). The appellants do not argue or even cite that decision in their lead brief, but the *amici* Religious and Civil Rights Organizations do both cite and very briefly (and very defensively) argue *Catholic Charities* in a footnote.[2] Brief as that treatment is, though, it

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[2] That note says:

"The fact that the Academy objects to the equal-opportunity requirement while other religious providers do not does not mean there is a denominational preference that would trigger heightened scrutiny under the Supreme Court's recent decision in *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, 605 U.S. 238 (2025). In Catholic Charities, the Court held that a Wisconsin unemployment insurance regime that "explicitly differentiat[ed] between religions based on theological practices" enacted a "denominational preference" and thus violated the Establishment Clause. *Id.* at 250. Importantly, though, the Court affirmed that evaluating eligibility for a public benefit based on "secular criteria"—even secular criteria that "happen to have a disparate impact upon different religious organizations"—does not raise constitutional concerns. *Id.* (citation modified). Here, the equal-opportunity requirement is just such a secular criterion; it is of no constitutional

manages to pack in at least three material errors that need to be corrected, namely: (1) that *Catholic Charities* is purely an Establishment Clause, and not a Free Exercise case; (2) that the conditions appellants have tried to impose on the behavior of Patterson Academy are purely "secular criteria," without any religious effect, and so (3) are of no "constitutional moment."

To the contrary, however, *Catholic Charities Bureau* is material to the analysis of this case precisely because it is explicitly grounded on the Free Exercise clause (as well as the Establishment Clause), just as Patterson Academy has grounded the claims in its Complaint, and also because it explicitly forbids what appellants have done, and their *amici* bless, here: Profess by regulatory *fiat* what behavior is purely "secular," and so constitutionally licit, even if the behavior has been a "religious" concern long before it became subject to regulatory notice.

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moment that the requirement happens to be consistent with some religious providers' beliefs and inconsistent with the Academy's beliefs." Brief of *Amici curiae* Religious and Civil Rights Organizations at 17-18, n. 6

## III. Argument

### a. Conditioning receipt of public funds on a religious service-organization's conforming its practices to the theological doctrine of one "competing sect" over another regarding gender-dysphoric persons is denominational-preferencing that *both* the Free Exercise and Establishment Clauses of the First Amendment forbid. *Catholic Charities v. Wisconsin.*

In *Catholic Charities Bureau* a unanimous Supreme Court held that:

> "The clearest command of the Establishment Clause" is that the government may not "officially prefe[r]" one religious denomination over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982). This principle of denominational neutrality bars States from passing laws that "aid or oppose" particular religions, *Epperson v. Arkansas*, 393 U.S.97, 106 (1968), or interfere in the "competition between sects," *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

*Catholic Charities Bureau v. Wisconsin Labor and Industry Review Comm'n*, 605 U.S. 238, 247-248 (2025).

And such denominational-preferencing, the Court also held, is not barred *solely* by the motive and language of the Establishment Clause but:

> The Establishment Clause's "prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause," too. *Larson*, 456 U.S., at 245. That is because the "fullest realization of true religious liberty requires that government" refrain from "favoritism among sects." *Id.*, at 246 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 305(1963). Government actions that favor certain religions, the Court has warned, convey to members of other faiths that "they are outsiders, not full members of the political community." *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309 (2000).

*Ibid.*

It is thus simply incorrect to circumscribe the holding of *Catholic Charities* within the doctrine and language of the Establishment Clause alone, as *amici* Civil Rights Organizations do, and not acknowledge that its holding is grounded in the Free Exercise Clause, too.

**b. The manner in which members of a religious organization deal with gender dysphoric persons whom they serve and whom they encounter is an undeniably "theological" issue whose resolution divides religious denominations in the United States—as recent, widely reported actions by the worldwide United Methodist Church and the U.S. Conference of Catholic Bishops famously illustrate.**

It is also simply incorrect to characterize, as *amici* Civil Rights Organizations also do, constraints imposed by a state on a religious school's treatment of its gender dysphoric students and their families as

a purely "secular" criterion for its receiving a public subsidy available to others.

As has been widely reported by American news media, the United States Conference of Catholic Bishops met at their annual Baltimore convention last week and, among other things, updated the seventh edition of their *Ethical and Religious Directives for Catholic Health Care Services* to forbid surgical transitioning of gender dysphoric patients at Catholic hospitals:

> [T]he bishops said that while Catholic health care providers must employ "all appropriate resources" to mitigate the suffering of such patients, they can use "only those means that respect the fundamental order of the human body." The new rule makes into explicit USCCB policy what the bishops expressed in a **doctrinal** note in 2023 when they said Catholic providers must not take part in procedures that "aim to transform the sexual characteristics of a human body into those of the opposite sex."

*National Catholic Register,* "U.S. Bishops Pass Directive Forbidding Transgender Surgeries at Catholic Hospitals," November 13, 2025 (emphasis supplied), online edition, published at: www.ncregister.com/cna/u-s-bishops-pass-directive-forbidding-transgender-surgeries-at-catholic-hospitals; *see also* the Associated

Press's November 12, 2025 article on the subject, "U.S. bishops officially ban gender-affirming care at Catholic hospitals," at:

www.npr.org/2025/11/12/g-s1-97651/gender-affirming-care-ban-catholic-hospitals (asserting also that "The Catholic Church is not monolithic when it comes to transgender rights. Some parishes and priests welcome trans Catholics into the fold, while others are not as accepting.")

And that currently roiling "doctrinal" debate within the U.S. Catholic Church about the theologically proper manner of dealing with gender dysphoric persons whom believing, practicing Catholics encounter is not unique among American Catholics. In the spring of 2024, the General Conference of the United Methodist Church met and, among other things, amended the centuries-old Methodist Book of Discipline to affirm that "'certain basic human rights and civil liberties are due all persons,' and the church is committed to supporting these rights regardless of sexual orientation or gender identity." *Human Rights Campaign*, "Stances of Faiths on LGBTQ+ Issues: The United Methodist Church," published online at: www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-united-methodist-church (noting also that

"[t]ransgender ministers have served United Methodist churches" and that the action amends centuries of prior doctrine that "the practice of homosexuality was incompatible with Christian teaching" ). In at least one Colorado Methodist congregation, that change was celebrated by its pastor as creating "a church where those who are in the LGBTQ community can walk into the church holding hands, can sit in the pews in each other's arms, just like those who are heteronormative … There are so many things about being LGBTQ that we have to give up ..." *PBS News*, "Methodist pastor [Valerie Jackson of Park Hill United Methodist Church in Denver] discusses major shift in church over LGBTQ+ inclusion" (May 17, 2024), published online at: www.pbs.org/newshour/show/methodist-pastor-discusses-major-shift-in-church-over-lgbtq-inclusion. Park Hill United Methodist Church, Dr. Jackson's church, is also a licensed provider of preschool services to Colorado families, and so quite literally is a competitor of appellee. See its website here: www.parkhillchildrenscenter.com/programs

Two conclusions, then, about these recent Christian doctrinal debates are undeniable: First, the matter of how properly to deal with gender dysphoric members of a church, and how members of a church

properly deal with gender dysphoric persons in their missional activity, are *not* matters of purely "secular" concern. They are matters of theological doctrine, currently controversial and currently creating conflicting theological approaches among American christian denominations, and even conflict within disagreeing sects of those individual denominations. Second, the approach of the United Methodist Church's faction, exemplified by Denver's Park Hill UMC is more congenial to the preferences of State appellants here, who have now employed their office to try to settle that doctrinal conflict for the daily activities of religious preschool education in Colorado themselves.

**c. A state authority's *fiat* characterization of behavior by a religious organizations as "secular" and not theological or doctrinal does not make it so, as the U.S. Supreme Court explicitly holds in *Church of the Lukumi Babalu-Aye* and *Catholic Charities Bureau.***

*Catholic Charities*, a matter on writ of *certiorari* to the Wisconsin Supreme Court, concerned a Wisconsin statute that exempted "organizations operated primarily for religious purposes" from paying taxes to fund the state unemployment compensation regime. 605 U.S. at 241. The Wisconsin Supreme Court, however, embedded a judicial gloss onto the "religious purposes" element requiring that an exempt

organization must "engage in proselytization" to be truly religious – failing to do so rendered its purposes "secular" as a matter of state law. *Id.,* 605 U.S. at 249 ("The court … deemed petitioners ineligible for the exemption … because they do not [try to] imbue program participants with the Catholic faith … Put simply, petitioners could qualify for the exemption while providing their current charitable services if they engaged in proselytization").

Such an attempt to create *state*-imposed elements of "religious" content in an organization's behavior, however—content opposed to the organization's code of behavior, mandated by "religious doctrine prohibiting Catholic bodies from misusing works of charity for purposes of proselytism' [605 U.S. at 244]—made the matter a "paradigmatic form of denominational discrimination" barred by the Religion Clauses. *Id.* at 249.

In *Church of the Lukumi Babalu-Aye v. City of Hialeah*, 508 U.S. 520 (1993) the Court analyzed under Free Exercise doctrine a set of municipal ordinances that banned "ritual sacrifice" within city limits. Although the "words 'sacrifice' and 'ritual' have a religious" element, the Court said, they had been adopted into secular usage, too, and so were

not a dispositive proof that the ordinances were targeted at religion. But that did not render the ordinances neutral as to religion, either, the Court held because the "Free Exercise Clause protects against governmental hostility which is masked, as well as overt." 508 U.S. at 534. The contemporary controversies surrounding the regulation's consideration and adoption bear on a reviewing court's analysis of whether or not the affected behavior is sufficiently "religious" to be protected by the Free Exercise clause. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.,* 508 U.S. at 535 (citation cleaned up).

So, too, the contemporary controversies relevant here, playing out in the decision-making bodies of Christian denominations and widely reported in the popular press (see section III.b., above), belie any claim that treatment of gender dysphoric children among religious providers of charitable and social services is a matter of purely "secular" concern in the United States today.

A further observation about *Lukumi Babalu-Aye* is worthwhile. Although the Hialeah ordinances' use of the terms "ritual" and

"sacrifice" may not have been dispositive proof of the religious animus of the ordinances, it was relevant, the Court held—a sort of linguistic "tell," if not dispositive confession—which other evidence dispositively did prove.

There is likewise a tell in the appellants' effectuation of their delegated duty in the language of the Equal Opportunity provision. That provision, as the District Court noted, was bottomed on the proposition that all preschool providers getting state benefits should "'comply with all applicable federal and State laws, rules, and regulations,' including all laws 'applicable to discrimination and unfair employment practices'." *Darren Patterson Academy v. Roy*, D. Col. No. 23-cv-01557-DDD-STV, February 24, 2025, slip opinion at 4. But the "public accommodation" provisions of Colorado's Anti-Discrimination Act (CADA) say explicitly that "[a]s used in this part 6, 'place of public accommodation' means any place of business engaged in any sales to the public and … an educational institution … [but]… '**Place of public accommodation' does not include a church, synagogue, mosque, or other place that is principally used for religious purposes.**" Col. Rev. Stats. 24-34-601(a).

CADA itself, therefore, the exemplar and parent *legislative* announcement of the state policy appellants are to effectuate, exempts *tout court*, and without tortured ad hoc revision, organizations like Patterson Academy offering services sponsored by, and on the premises of, religious denominations. Appellants' failure to adopt the simple expedient of repeating the same exception, or incorporating it by reference, into the language of an Equal Opportunity provision, is a tell by omission as conspicuous as the tell by commission of the city of Hialeah.

## Conclusion

For all of these reasons, the Lorica Institute urges that this court affirm the order of the District Court.

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## CERTIFICATE OF WORD LIMIT AND TYPE-STYLE COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29 and 32 because this brief contains 2320 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f), as counted by the "Word Count" feature of Word 365, the processing software with which it was prepared.

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Dated: November 17, 2025

/s./ Martin Whittaker
*Counsel for Amicus*

## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) no privacy redactions needed to have been made per 10th Cir. R. 25.5, because *amicus* is not privy to any private information in this matter; (2) if and when required to file additional hard copies, that those documents will be an exact copy of this ECF submission; (3) the

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/s./ Martin Whittaker
*Counsel for Amicus*

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I hereby certify that on November 17, 2025, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and so service will be accomplished by the CM/ECF system.

/s./ Martin Whittaker
*Counsel for Amicus*