NO. _____

IN THE

Supreme Court of the United States

YOUTH 71FIVE MINISTRIES,

Petitioner,

v.

CHARLENE WILLIAMS, Director of the Oregon Department of Education, in her individual and official capacities, et al.,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES A. CAMPBELL
DAVID A. CORTMAN
JACOB P. WARNER
RYAN TUCKER
JEREMIAH GALUS
MARK LIPPELMANN
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260

JOHN J. BURSCH
Counsel of Record
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@adflegal.org

Counsel for Petitioner

QUESTIONS PRESENTED

For years, Petitioner Youth 71Five Ministries received grant funds from Oregon's Youth Community Investment Grants program. One year, 71Five even had a top-rated application. But that all changed when Respondents added a new eligibility rule that prohibits grantees from "discriminating" in employment based on religion. That rule stripped 71Five of already-awarded grants and disqualified it from further grants because the Christian ministry requires all employees to sign a statement of faith.

A Ninth Circuit motions panel granted 71Five an injunction pending appeal. But the merits panel disagreed and affirmed the district court's denial of an injunction as to grant-funded initiatives and dismissal of 71Five's damages claim, finding the new grant rule neutral and generally applicable. The merits panel further held that the religious-autonomy doctrine can only be asserted as an affirmative defense to a lawsuit, not to stop unconstitutional government action when it occurs. That ruling presents two questions for the Court's review:

1. Whether a religious organization can raise the First Amendment right to religious autonomy as an affirmative claim challenging legislative or executive action under 42 U.S.C. 1983, like other constitutional right, or whether the doctrine may only be asserted as an affirmative defense after a suit has been filed, as the Ninth Circuit held here.

2. Whether a state violates the First Amendment by conditioning access to a public grant program on a religious organization waiving its right to employ coreligionists, including for ministerial positions.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioner is Youth 71Five Ministries and the plaintiff-appellant below. 71Five is incorporated as a 501(c)(3) religious organization under the laws of Oregon. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are Charlene Williams, Director of the Oregon Department of Education; Brian Detman, Director of the Department's Youth Development Division; and Cord Bueker, Jr., Deputy Director of the Department's Youth Development Division. Respondents were sued in their individual and official capacities and were the defendants-appellees below.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit, No. 24-4101, *Youth 71Five Ministries* v. *Williams*, judgment entered August 18, 2025, amended judgment entered November 26, 2025.

U.S. Court of Appeals for the Ninth Circuit, No. 24-4101, *Youth 71Five Ministries* v. *Williams*, order granting an injunction on appeal entered August 8, 2024.

U.S. District Court for the District of Oregon, No. 1:24-cv-00399, *Youth 71Five Ministries* v. *Williams*, order denying motion for preliminary injunction and granting motion to dismiss for qualified immunity entered June 26, 2024.

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The Ninth Circuit motions panel's order granting 71Five's request for an emergency injunction pending appeal, 2024 WL 3749842, is reprinted at App.110a–121a. The merits-panel opinion curtailing that injunction is reported at 153 F.4th 704 and reprinted at App.41a–85a. The amended opinion and denial of 71Five's petition for rehearing, 2025 WL 3438455, is reprinted at App.1a–40a.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on August 18, 2025, and denied 71Five's petition for rehearing on November 26, 2025. App.5a. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"

42 U.S.C. 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

INTRODUCTION

This dispute arose from Oregon's exclusion of Petitioner Youth 71Five Ministries from the State's Youth Community Investment Grants program, a program generally available to all applicants. 71Five has received grants and provided exemplary program services for many years without issue. But Oregon recently changed its grant application and implemented a Coreligionist Group Exclusion by requiring applicants to certify that they do not "discriminate" in their "employment practices" or "service delivery" based on various classes, including "religion."

That Exclusion was a problem for 71Five, which hires only employees who share its religious beliefs and agree to 71Five's statement of faith. When an anonymous person complained that 71Five's website says the ministry hires only coreligionists—which has always been true—Oregon invoked the Exclusion, rescinded the grants 71Five had been awarded for the next funding cycle, and kicked 71Five out of the program altogether. Yet Oregon allowed secular organizations to discriminate against who they serve.

A Ninth Circuit motions panel held Oregon's Exclusion unconstitutional and entered an injunction pending appeal. But the merits panel disagreed. It first announced that the Coreligionist Group Exclusion was neutral and generally applicable. App.14a–21a. Next, it held that a religious organization's First Amendment right to religious autonomy can only be vindicated as an affirmative defense to a lawsuit, not as a "standalone" Section 1983 "claim[ ] challenging legislative or executive action." App.24a.

The Ninth Circuit's ruling strips churches and religious organizations of their autonomy when the government interferes through executive or legislative action instead of a court proceeding. It makes no sense that 71Five could invoke religious autonomy if sued by an atheist turned down for a ministerial position but have no recourse when Oregon requires 71Five to hire atheists as a condition of participating in a program available to all comers. The decision also conflicts with this nation's history of religious autonomy, the Court's religious-autonomy precedents, Section 1983's plain language authorizing lawsuits for the deprivation of "any rights" "secured by the Constitution," and many lower-court decisions. The Court should grant the petition and reverse, reaffirming religious-autonomy precedents like *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), which allowed an affirmative religious-autonomy claim.

The Court should also grant the petition to resolve multiple mature splits of authority and hold on the merits that the government cannot condition participation in a public-benefit program on a religious organization's willingness to waive its First Amendment rights to hire ministers and coreligionists. Such conditions are flagrant violations of this Court's decisions in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017), *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464 (2020), and *Carson* v. *Makin*, 596 U.S. 767 (2022). And they are becoming all too common. *E.g.*, *St. Mary Parish, Littleton, Colorado* v. *Roy*, No. 25-581 (petition pending); *Darren Patterson Christian Acad.* v. *Roy*, 699 F. Supp. 3d 1163 (D. Colo. 2023). Review is warranted.

STATEMENT OF THE CASE

I. Factual Background

A. 71Five is a Christian, youth-mentoring ministry that employs coreligionists to advance its mission and message.

71Five serves at-risk youth in Oregon. Its name derives from Psalm 71:5: "Lord God, you are my hope. I have trusted you since I was young." Consistent with this theme verse, 71Five teaches young people they can experience a lifetime of hope by learning to trust God. And the ministry fulfills its mission by providing youth with free mentoring, vocational training, and recreational activities. While 71Five strives to meet the physical, mental, and emotional needs of those it serves, its "primary purpose" is "to teach and share about the life of Jesus Christ." ROA.195–96.

71Five relies on staff to teach and model its Christian message. So it hires only those who share its faith, ROA.196–97, and expects all employees to "[p]articipat[e] in regular times of prayer, devotion, and worship," ROA.199. This ensures that 71Five's representatives can articulate and advance its religious messages and beliefs to youth, parents, and the broader community. ROA.200; see also ROA.285–319 (position descriptions showing religious job duties and functions). 71Five also fosters discipleship among staff and volunteers, creating an environment of spiritual growth and accountability vital to the ministry's success. ROA.200.

B. 71Five participates successfully in Oregon's grant program for many years.

71Five has participated in Oregon's Youth Community Investment Grant program without issue since 2017. ROA.201–02. That program, administered by the state's Department of Education, provides reimbursement grants to support existing services for youth who are at risk of disengaging from school, work, and community. ROA.23, 201.

Prior awards have reimbursed 71Five for personnel and operating costs and the purchase of supplies and equipment, among other things. ROA.202. No one questions that 71Five has fulfilled the program's objectives in exemplary fashion.

C. Oregon abruptly excludes 71Five and rescinds over $400,000 in grants because 71Five hires those who share its faith.

71Five applied for, and was awarded, grants for the 2023–25 cycle to purchase needed supplies and equipment, underwrite administrative costs, and provide direct support to youth. 71Five also planned to reimburse a portion of some existing staff salaries, as the grant terms allowed. ROA.340, 366 (listing Youth Center Coordinator, Mentor Coordinator, Parent Coordinator, and Justice Coordinator positions). Those positions are responsible for "facilitating weekly youth gatherings," providing "trauma-informed" support and mentoring, and offering "outreach and services to pregnant and parenting teens," among other things. ROA.340, 366. The people who hold those positions must "[a]ccurately handle Biblical truth" and "teach[] young people and volunteer staff to apply it in their lives." ROA 290, 294, 301, 307.

Based on these applications, Oregon awarded two reimbursement grants totaling $340,000. ROA.202–03, 205. 71Five was also set to receive an additional $70,000 as subgrantee to a separate grant awarded to another organization. ROA.205.

Yet for the first time, Oregon implemented a Coreligionist Group Exclusion by requiring applicants to certify that they do not "discriminate" in their "employment practices" or "service delivery" based on various classes, including "religion." ROA.204, 345. 71Five made the certification: It serves everyone, and its religious hiring practices are not "discrimination" but legally protected under state and federal law. ROA.234–35. But when an anonymous person complained that 71Five's website says the ministry hires only coreligionists (which has always been true), Oregon invoked the Coreligionist Group Exclusion, rescinded the grant awards, and kicked 71Five out of the program. ROA.180, 236–38.

Failing to act evenhandedly, Oregon turned a blind eye to secular grantees whose websites admit they discriminate based on race and gender in employment and even in the provision of services. ROA.101–44. For example, one grantee's website says the organization serves "youth who have experienced girlhood" and restricts some positions to "female-identifying staff to maintain [its] mission of providing a safe space for girls." ROA.103, 110 ("Why not boys?"). Another, Black Parent Initiative, is "focused *solely* on supporting Black/African American families." Black Parent Initiative, About BPI, https://perma.cc/7LSW-6CFP (emphasis added); ROA.101, 113.

Oregon celebrates the secular grantees' practices as "culturally responsive." ROA.90. But the State demeans 71Five's faith commitments as discriminatory. State officials told 71Five that it was disqualified under the Coreligionist Group Exclusion for asking "all staff and volunteers to affirm a 'Statement of Faith'" and asking applicants to "discuss their 'Church' affiliation and attendance." App.136a–137a. 71Five responded by noting that its religious employment practices are legally protected, that the ministry's success depends on staff alignment with its religious mission, and that 71Five had always been up front about those facts. App.135a. None of that mattered to Oregon.

Oregon made its "final" decision in November 2023, more than four months after the grant cycle began. App.132a–133a. The Oregon official conveying the decision asked for "patience" while he "work[ed] on a more detailed, thoughtful, and meaningful response," App.130a, but such a response never came. This forced 71Five to sue to vindicate its First Amendment right to hire only co-religionists, consistent with its religious mission.

II. Procedural Background

71Five's complaint alleged violations of its First Amendment rights to the free exercise of religion, religious autonomy (including its religious hiring rights), and expressive association. ROA.241–46. The complaint sought declaratory and injunctive relief, plus nominal and compensatory damages, and named the relevant officials in their individual and official capacities. ROA.222–23, 247.

71Five moved for a preliminary injunction to reinstate itself into the program and prevent Oregon from enforcing the Coreligionist Group Exclusion against 71Five in current and future grant programs. The state officials moved to dismiss *only* the individual-capacity damages claims based on qualified immunity. ROA.423–27. The district court denied 71Five's motion, granted the officials' motion, and dismissed the entire case with prejudice—even the official-capacity claims. App.86a–107a.

71Five quickly sought an injunction pending appeal. Along with detailing the constitutional violations, the emergency motion explained that Oregon's actions kept it from seeking reimbursement for over $145,000 spent to continue critical grant-related programs and services, forcing the nonprofit to forgo other ministry opportunities. ROA.24–25. A Ninth Circuit motions panel unanimously granted the injunction. It held that 71Five was likely to succeed on its free-exercise claim because Oregon did not act "neutrally." App.111a. The injunction resulted in 71Five receiving the previously awarded grants in full but did not account for all of 71Five's damages.

But the merits panel disagreed. It held that 71Five is unlikely to succeed on its free-exercise claim because the Coreligionist Group Exclusion is "neutral and generally applicable." App.22a. The panel refused to consider the secular grantees' websites because 71Five first introduced them in the district court through a reply brief. App.58a–60a. The majority went on to consider that argument's merits, however, and said the evidence wouldn't change the outcome. App.60a–64a. Judge Rawlinson would've sided with the motions panel on that point. App.84a–85a.

The panel then rejected 71Five's claim that the Exclusion impermissibly interfered with its religious autonomy and ministerial hiring rights. According to the panel, the religious-autonomy doctrine—including its protection of ministerial hiring decisions—serves only as a restraint on "*judicial* authority." App.24a. So the doctrine cannot be raised as a "stand-alone claim[ ]" under Section 1983 against legislative or executive action but can only be pled as an affirmative defense. App.23a–25a.

The panel also rejected 71Five's argument that Oregon excluded it from a public benefit based solely on its religious character and exercise, violating *Trinity Lutheran*, *Espinoza*, and *Carson*. App.15a–16a. The panel said those cases must be "situated" within the "ordinary framework for free-exercise claims under *Smith*." App.15a. It insisted the Coreligionist Group Exclusion does not "deny funding based on a practice exclusive to religious organizations" and thus does not "discriminate" against religion. App.16a.

On expressive association, the panel held the Exclusion permissible for grant-funded employees but likely unconstitutional for other employees. App.25a–35a. The panel ordered a narrow injunction that only protects 71Five's religious hiring for "initiatives" that receive no grant funding, App.40a, forcing 71Five to choose between receiving grants and religious hiring.

Finally, the panel upheld the district court's dismissal of 71Five's damages claims based on qualified immunity. Because the panel believed the religious-autonomy doctrine may not be asserted affirmatively, it concluded that the officials had not violated any "clearly established" right. App.37a–39a.

71Five filed a petition for rehearing en banc. In response, Oregon for the first time claimed it had amended the Coreligionist Group Exclusion and does not currently require applicants to certify nondiscrimination in employment. But there is nothing preventing Oregon from re-introducing the Exclusion. And Oregon's fleeting change of heart does nothing to remedy the damages 71Five has already suffered.

The panel denied 71Five's petition but amended its opinion to remove the analysis that tried to explain why the description of discriminatory services on secular grantees' websites would not alter the outcome. Judge Rawlinson also withdrew her concurring opinion. App.4a. The rest of the opinion was unchanged.

REASONS FOR GRANTING THE WRIT

For 150 years, this Court has recognized religious organizations' right to control their internal affairs. *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 728–29 (1871). That right includes an organization's ability to select its religious leaders. *Kedroff*, 344 U.S. at 116; *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732 (2020). Vindicating that right, this Court (in *Kedroff*) and lower courts (in many other cases) have consistently allowed religious organizations to protect their religious autonomy by suing legislatures or executive officials who interfere in it.

That unanimity is now over. The Ninth Circuit alone now holds that the religious-autonomy doctrine cannot be "the basis for standalone claims challenging legislative or executive action, rather than as defenses against or limits upon plaintiffs' invocation of *judicial* authority." App.24a.

That decision creates jarring results. If Oregon had simply renewed 71Five's grant funding, and an atheist sued after 71Five declined to hire him, 71Five could have defended the lawsuit by asserting its religious autonomy. But because Oregon executive-branch officials excluded 71Five on the front end, based on its coreligionist hiring practices, 71Five lost its First Amendment right to vindicate its religious autonomy. Recognizing First Amendment rights in the first situation but not the second makes no sense.

The Ninth Circuit panel said it was unaware of any "opinion from the Supreme Court, th[e Ninth Circuit], or another court of appeals suggesting that plaintiffs may assert ecclesiastical abstention or the ministerial exception as § 1983 claims, nor any historical practices or understandings that would justify … recognition of these novel claims under the Religion Clauses." App.24a–25a (citation modified). But there's an abundance of such caselaw and history.

Start with history. There is substantial evidence, dating to the First Amendment's ratification, that illustrates the Founders' understanding that government officials cannot interfere in religious organizations' personnel decisions.

Next are this Court's decisions. In *Kedroff* and in its follow-up case, *Kreshik* v. *Saint Nicholas Cathedral*, 363 U.S. 190 (1960) (per curiam), this Court established that religious-autonomy claims can be asserted affirmatively, not just defensively, and against executive or legislative actions, not just judicial actions.

As for Section 1983, its text includes government officials' violations of "any rights" "secured by the Constitution." There is no exception for religious-autonomy rights secured by the First Amendment.

Finally, numerous lower courts have allowed plaintiffs to affirmatively assert religious-autonomy claims just like 71Five's. *E.g.*, *Christian Healthcare Ctrs., Inc.* v. *Nessel*, 117 F.4th 826, 852–55 (6th Cir. 2024) (allowing religious-autonomy claim challenging a state law that forbids hiring coreligionists). That includes previous decisions of the Ninth Circuit. *E.g.*, *Seattle Pac. Univ.* v. *Ferguson*, 104 F.4th 50 (9th Cir. 2024) (same); *Union Gospel Mission of Yakima Wash.* v. *Ferguson*, No. 23-2606, 2024 WL 3755954 (9th Cir. Aug. 12, 2024) (same).

The Ninth Circuit's decision strips 71Five of constitutional protection for its religious hiring practices as a punishment for participating in a public benefit program. This highlights significant conflicts among the circuits over constitutional protections for coreligionist hiring and with this Court's decisions in *Trinity Lutheran*, *Espinoza*, and *Carson* regarding public-funding conditions.

This case is an ideal vehicle to resolve those conflicts and provide guidance on questions of utmost importance to churches and religious organizations in this religiously hostile age. The petition should be granted.

I. The Court should grant the petition and hold that the religious-autonomy doctrine can be asserted as an affirmative claim.

The Ninth Circuit reduced religious autonomy to a mere legal defense in a lawsuit. That holding authorizes executive and legislative interference in church or religious-organization affairs with no recourse. And it conflicts sharply with history, this Court's precedents, Section 1983's plain language, and numerous decisions in other courts.

A. The decision below conflicts with this nation's history of shielding religious organizations' internal affairs from executive and legislative interference.

From the time of Blackstone to today, religious autonomy "has long meant … that religious communities and institutions enjoy meaningful autonomy and independence with respect to their governance, teachings, and doctrines." Thomas C. Berg et al., *Religious Freedom, Church-State Separation & the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 175 (2011). This autonomy, rooted in both Religion Clauses, "protect[s] the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Our Lady of Guadalupe*, 591 U.S. at 746 (citation modified).

History immediately following the First Amendment's ratification confirms that religious-autonomy principles forbid executive and legislative interference in religious organizations' internal affairs, including the selection of ministers.

After the Louisiana Purchase, Roman Catholic Bishop John Carroll wrote Secretary of State James Madison, seeking to confer with Madison about the appointment of a new Catholic bishop in the territory. Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J.L. & Pub. Pol'y 821, 830 (2012). After discussing with President Thomas Jefferson, Madison responded that the "selection of [religious] functionaries"—i.e., not just bishops or priests—was an "entirely ecclesiastical matter" beyond the federal government's jurisdiction. Berg, 106 Nw. U. L. Rev. Colloquy at 181. "[T]he scrupulous policy of the Constitution in guarding against a political interference in religious affairs," Madison explained, prohibited the federal government from approving or disapproving a religious appointment. *Ibid.* (citation omitted).

When Madison later became President, he vetoed a bill incorporating an Episcopal church in the District of Columbia. *Ibid.* His objection was based on the religious-autonomy doctrine: the bill was beyond the federal government's competence because it enacted "sundry rules and proceedings relative purely to the organization and polity of the church incorporated, and comprehend[ed] even the election and removal of the Minister." *Ibid.* (citation modified). Madison understood such actions to be beyond the federal government's power. *Id.* at 181–82.

Jefferson's thinking was the same. The Ursuline Sisters of New Orleans wrote to him during his time as President, seeking reassurance that the Louisiana Purchase would not undermine their rights. Jefferson wrote back that the Constitution's principles "are a sure guaranty to you … that your Institution will be permitted to govern itself according to its own

voluntary rules without interference from the civil authority." *Id.* at 182 (citation modified). In other words, the First Amendment ensured "autonomy, independence, and freedom of religious organizations—not just churches." *Ibid.*

B. The Ninth Circuit's decision conflicts with this Court's precedents, which have long safeguarded religious autonomy from executive and legislative actions.

This Court first recognized the religious-autonomy doctrine in *Watson* v. *Jones*, holding that courts must accept as final a church's answer to questions of religious discipline, faith, rule, custom, or law. 80 U.S. (13 Wall.) 679. The doctrine matured as a restraint on the judiciary deciding the internal governance of churches in *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012); accord *Our Lady of Guadalupe*, 591 U.S. 732. But the doctrine's use has never been limited to an affirmative defense in another party's lawsuit.

Indeed, the Ninth Circuit's decision conflicts directly with one of this Court's seminal religious-autonomy-doctrine cases, *Kedroff*, which involved a legislative attempt to alter the polity of a church. 344 U.S. 94. There, a New York law purported to transfer control of New York Russian Orthodox churches from the governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod, to the Russan Church in America. A church subjected to the law brought an affirmative claim challenging this legislative action. *Id.* at 96.

In applying the religious-autonomy doctrine, this Court never suggested that the plaintiff church had no autonomy unless it was first subjected to a lawsuit. Instead, the Court applied *Watson* and invalidated New York's exercise of legislative authority. 344 U.S. at 115–21; accord *id.* at 123 (Frankfurter, J., concurring) ("A legislature is not free to vest in a schismatic head the means of acting under the authority of his old church.").

Kedroff's sequel—*Kreshik*—explicitly announced that the doctrine's protection extends to legislative and judicial action alike. On remand in *Kedroff*, a New York state court did not give constitutional deference to the Patriarch of Moscow because the Patriarch was controlled by the Soviet government. *Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.* v. *Kedroff*, 114 N.E.2d 197, 205 (N.Y. 1953). This Court quickly rebuked that decision in *Kreshik*, declaring it of no moment "that the State has here acted solely through its judicial branch, for *whether legislative or judicial*, it is still the application of state power which we are asked to scrutinize." 363 U.S. at 191 (emphasis added, quotation omitted).

In other words, no state official—whether judicial, legislative, or executive—may interfere in questions of religious doctrine or personnel. *Id.* at 190–91. It should make no difference here that it is Oregon via executive action—rather than a court adjudicating a private plaintiff's lawsuit—that seeks to dictate 71Five's choice of religious employees.

C. The Ninth Circuit's decision rewrites Section 1983.

Section 1983 authorizes plaintiffs to assert an "action at law" against state officials who cause a "deprivation of *any* rights … secured by the Constitution." 42 U.S.C. 1983 (emphasis added). Carving out the First Amendment right to religious autonomy from Section 1983 contradicts the statute's plain terms and relegates the rights of religious institutions to "second-class." *Shurtleff* v. *City of Bos.*, 596 U.S. 243, 261 (2022) (Kavanaugh, J., concurring).

Religious autonomy is indisputably a right secured by the Constitution. While religious organizations do not "enjoy a general immunity from secular laws," the First Amendment "does protect their 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. "[A]ny attempt by government to dictate *or even to influence* such matters would constitute one of the central attributes of an establishment of religion." *Ibid.* (emphasis added).

Two components of that autonomy apply here. First, 71Five's "independence on matters of faith and doctrine requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." *Id.* at 747. Because Oregon's Coreligionist Group Exclusion applies to all employees, it necessarily implicates the ministerial exception because many of 71Five's employees are "entrusted with the responsibility of transmitting the [Christian] faith to the next generation." *Id.* at 754 (citation modified).

And it makes no difference that the Coreligionist Group Exclusion results in "indirect coercion or penalties" rather than "outright prohibitions." *Carson*, 596 U.S. at 778 (citation modified). The religious-autonomy doctrine forbids government action that "would operate as a penalty" on a religious organization's ministerial choices, not just government action "overturning" a "termination." *Hosanna-Tabor*, 565 U.S. at 194.

Second, the religious-autonomy doctrine protects 71Five's freedom to hire coreligionists for all positions (not just ministers), though it shields employment decisions for non-ministers only when rooted in the organization's religious beliefs. *E.g.*, *Bryce* v. *Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657–58 (10th Cir. 2002). 71Five's "primary purpose" is to share its faith, ROA.196, 252, and it has determined that every position is essential to that mission. ROA.197.

But instead of vindicating 71Five's constitutional claim, the Ninth Circuit "narrow[ed] the scope" of Section 1983's "express authorization" by reading "the Constitution" to mean every constitutional right *except* the right of religious autonomy. Contra *Health & Hosp. Corp. of Marion Cnty.* v. *Talevski*, 599 U.S. 166, 175 (2023). That's improper. "[A] straightforward reading of the 'plain language' of § 1983 is required," and Congress "attached no modifiers to the" word Constitution. *Ibid.* Indeed, this Court has "rejected attempts to limit the types of constitutional rights that are encompassed within [Section 1983's] phrase 'rights, privileges, or immunities.'" *Dennis* v. *Higgins*, 498 U.S. 439, 445 (1991). The Court should grant review and do so again here.

D. Other circuits allow affirmative religious-autonomy claims.

This Court's primary concern in recent religious-autonomy cases is the government arrogating to itself "the power to determine which individuals will minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 188–89. When government officials do that, it violates the Religion Clauses. See *ibid.*

Such a violation is not confined to judicial action. When government officials violate a religious organization's autonomy, that's always a constitutional problem, even in the absence of judicial action. To protect the right to select its own ministers or co-religionists, a religious organization must be able to raise what the Ninth Circuit called a "[s]tandalone claim[ ] challenging legislative or executive action." App.24a. If anything, religious-autonomy principles should apply with even *more* force when the government initiates the action through executive or legislative action than when it acts through judges in response to a lawsuit. So it is not surprising that, aside from the decision below, the courts of appeals have never questioned religious organizations' ability to bring—and those courts have regularly allowed—affirmative religious-autonomy claims.

Beginning with the Fifth Circuit, the court in *Northside Bible Church* v. *Goodson* ruled for the plaintiff church, holding unconstitutional a statute allowing a "sixty-five percent majority group of a local church congregation" to withdraw local church property from the parent church if the parent church changed its "social policies." 387 F.2d 534, 535 (5th Cir. 1967). Because a legislatively enacted statute—

not a court ruling—"brazenly intrude[d] upon [a] very basic and traditional practice of The Methodist Church," it violated the First Amendment. *Id.* at 538.

Moving to the Sixth Circuit, in *Christian Healthcare Centers, Inc.* v. *Nessel*, the court allowed a religious-autonomy claim to proceed against a state law that forbids hiring coreligionists by prohibiting "discrimination" based on sexual orientation and gender identity. 117 F.4th at 852–55. The Sixth Circuit also addressed the merits of a religious-autonomy claim in *Commonwealth* v. *Beshear*, 981 F.3d 505 (6th Cir. 2020). There, private religious schools challenged a state executive order prohibiting instruction at public and private elementary schools due to COVID-19. The court never suggested the schools couldn't bring their suit, though the court ultimately ruled against them on the merits. *Id.* at 510.

The story is the same in other circuits. In *Dixon* v. *Edwards*, the Fourth Circuit allowed the plaintiff, an Episcopalian Bishop, to assert a religious-autonomy claim and obtain a declaratory judgment that the defendant was not the "Rector of St. John's Parish." 290 F.3d 699, 703–04 (4th Cir. 2002). And the Ninth Circuit itself allowed religious-autonomy claims to proceed in *Seattle Pacific University* v. *Ferguson*, 104 F.4th 50 (9th Cir. 2024), and *Union Gospel Mission of Yakima Washington* v. *Ferguson*, No. 23-2606, 2024 WL 3755954 (9th Cir. Aug. 12, 2024).

Similar cases abound in the district courts. *E.g.*, *Darren Patterson Christian Acad.*, 699 F. Supp. 3d at 1184 (holding that application of a state nondiscrimination rule to a religious school's hiring

policies likely violated religious autonomy); *Gordon Coll.* v. *U.S. Small Bus. Admin.*, No. 23-614 (BAH), 2024 WL 3471261, at *14 (D.D.C. July 18, 2024) (addressing merits of religious college's claim that federal funding condition violated its religious autonomy); *Spencer* v. *Nigrelli*, 648 F. Supp. 3d 451, 464–66 (W.D.N.Y. 2022) (enjoining a state law forbidding firearms in churches because, among other reasons, it violated religious autonomy) (subsequent history omitted).

Religious-autonomy claims provide indispensable protection for religious organizations in many contexts. *E.g.*, *Gracehaven, Inc.* v. *Montgomery Cnty. Dep't of Job & Fam. Servs.*, No. 3:24-cv-325-MJN-CHG (S.D. Ohio filed Dec. 9, 2024) (challenging a county's decision not to renew a contract with a Christian nonprofit because the ministry hired coreligionists); *General Conf. of Seventh-day Adventists* v. *Horton*, No. 8:24-cv-02866-GLS, (D. Md. filed Oct. 2, 2024) (challenging state law that interferes with religious hiring practices); *U.S. Conf. of Cath. Bishops* v. *EEOC*, No. 2:24-cv-00691-DCJ-TPL (W.D. La. filed May 22, 2024) (challenging EEOC rule that requires Catholic employers to accommodate employees seeking abortion); *Loe* v. *Jett*, No. 23-cv-1527-NEB-JFD (D. Minn. filed May 24, 2023) (challenging state funding condition that prohibited religious schools from hiring based on religion); *Cedar Park Assembly of God of Kirkland, Wash.* v. *Kreidler*, No. 3:19-cv-05181 (W.D. Wash. filed Mar. 8, 2019) (challenging state abortion-coverage requirement applied to a church). The Court should grant the petition and recognize 71Five's right to raise its religious autonomy in this context too.

II. The Ninth Circuit's decision creates multiple conflicts with decisions of this Court and other circuits.

A. The ruling below creates a 5-3 conflict in principle over whether there is a First Amendment right to hire coreligionists.

By rejecting 71Five's religious-autonomy claim, the ruling below requires the ministry, as a condition of participating in a public grant program, to forfeit its right to hire only those who share its faith. That creates a 5–3 conflict in principle over whether the First Amendment protects religious nonprofits' autonomy to hire coreligionists for all positions, not just ministers. Five circuits—the Third, Fourth, Fifth, Sixth, and Eleventh Circuits—accept the coreligionist doctrine as a constitutional bedrock. See *Seattle's Union Gospel Mission* v. *Woods*, 142 S. Ct. 1094 (2022) (mem) (*SUGM*) (Alito, J., statement respecting the denial of certiorari). The Washington Supreme Court, Maryland Supreme Court, and Ninth Circuit do not.

Start with some important background. Consistent with the religious-autonomy doctrine, Congress has long excepted religious employers from federal employment laws that would otherwise interfere with their ability "to define and carry out their religious missions" by imposing "potential liability" for hiring practices that favor co-religionists. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 335–36 (1987); see *id*. at 342–43 (Brennan, J., concurring) ("[A] religious organization should be able to require that only members of its community perform" activities that are part of its religious practice.).

Because of such federal statutory exceptions and their state analogs, this Court has "yet to confront whether freedom for religious employers to hire their co-religionists is constitutionally required." *SUGM*, 142 S. Ct. at 1094 (Alito, J., statement respecting the denial of certiorari). It had one chance recently, when the Washington Supreme Court held that the First Amendment does not guarantee a religious nonprofit's right to hire only coreligionists for positions beyond its ministers. *Woods* v. *Seattle's Union Gospel Mission*, 481 P.3d 1060, 1064–70 (Wash. 2021). But due to "threshold issues," and because the plaintiff admitted "there is no prospect that this Court would be precluded from reviewing" the issue after final judgment, the Court let it pass while multiple Justices said the issue "may warrant … review" at the appropriate time. *SUGM*, 142 S. Ct. at 1096–97 (Alito, J., statement respecting the denial of certiorari). The plaintiff later dismissed that case, cementing the ruling and preventing this Court's review. Order, *Woods* v. *Seattle's Union Gospel Mission*, No. 17-2-29832-8 SEA (Wash. Super. Ct. Sep. 1, 2022). And the Maryland Supreme Court in *Doe* v. *Catholic Relief Services*, 300 A.3d 116 (Md. 2023), also narrowed Maryland's religious hiring protection so that it doesn't safeguard religious organizations' ability to hire coreligionists for all positions.

Unlike the Washington Supreme Court, the Maryland Supreme Court, and the Ninth Circuit ruling below, which effectively reject the coreligionist doctrine, five circuits have "protected the autonomy" of religious organizations "to hire personnel who share their beliefs." *SUGM*, 142 S. Ct. at 1094 (Alito, J., statement respecting the denial of certiorari).

Consider the Third Circuit, which upheld a Catholic school's right not to renew a teacher's contract after she divorced. *Little* v. *Wuerl*, 929 F.2d 944, 945–46 (3d Cir. 1991). Applying Title VII to interfere with that decision would "arguably violate both" Religion Clauses, so the court barred Title VII claims brought by "non-minister employees where the position involved has any religious significance." *Id.* at 947–48. The court found it "difficult to imagine an area of the employment relationship *less* fit for scrutiny by secular courts" than the question of whether an "employee's beliefs or practices make her unfit to advance" a religious nonprofit's mission. *Id.* at 949. So in the Third Circuit, religious organizations may "employ only persons whose beliefs and conduct are consistent with [their] religious precepts." *Id.* at 951.

The Fourth Circuit agrees. It has held that based in part on "the doctrine of *constitutional* avoidance," courts cannot apply Title VII to punish religious groups for terminating an employee whose conduct is inconsistent with its beliefs. *Kennedy* v. *St. Joseph's Ministries, Inc.*, 657 F.3d 189, 195 (4th Cir. 2011). It relied on *Little* to uphold a Catholic group's right to dismiss a nursing assistant for wearing expressive attire that impugned the group's religious beliefs. The court refused to second-guess this religious decision.

The Fifth Circuit has similarly barred an EEOC sex-discrimination probe into a religious college involving a professor denied a full-time position. *EEOC* v. *Mississippi Coll.*, 626 F.2d 477, 479–80 (5th Cir. 1980). To avoid "conflicts [with] the religion clauses," the court held that if a religious organization "presents convincing evidence that the challenged employment practice resulted from discrimination on

the basis of religion," the EEOC lacks jurisdiction to investigate "whether the religious discrimination was a pretext." *Id*. at 485. That intrusion was barred.

The Sixth Circuit has likewise ruled against a student-services specialist who was let go by a religious college after disclosing her ordination by an LGBT-affirming church and declining to accept a different position. *Hall* v. *Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 622–23 (6th Cir. 2000). The court reasoned that (1) religious groups have a "constitutionally-protected interest … in making religiously-motivated employment decisions," *id*. at 623, and (2) courts cannot "dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices," *id*. at 626. These are matters that government can't address.

Finally, the Eleventh Circuit has held that Title VII "allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying on the institution's activities." *Killinger* v. *Samford Univ.*, 113 F.3d 196, 200–01 (11th Cir. 1997). To that court, embracing a broad view of Title VII's religious exception "avoid[ed] the First Amendment concerns which always tower over [courts] when [they] face a case that" concerns ministry employment decisions. *Ibid*.

In sum, five federal appeals courts would protect 71Five's right to employ coreligionists for its positions. But the Washington Supreme Court, Maryland Supreme Court, and the Ninth Circuit would not.

B. The ruling below creates a 3-1 conflict in principle over whether a religious organization can waive its religious-autonomy rights.

Many circuits hold that the religious-autonomy doctrine operates as a structural restraint on the government that guards against state entanglement with religion. These circuits recognize that the First Amendment prevents the government from dictating a religious organization's selection of ministers even if the organization invites that interference or otherwise waives its religious-autonomy rights.

But the Ninth Circuit's decision necessarily rejected that important structural principle, allowing the government to interfere with 71Five's ministerial hiring decisions merely because the ministry participates in a public benefit program. That decision conflicts in principle with the three courts of appeals holding that religious organizations *cannot* waive their religious autonomy, plus statements made by two more courts of appeals supporting that rule.

Begin with the Third Circuit. In *Lee* v. *Sixth Mount Zion Baptist Church of Pittsburgh*, the court affirmed summary judgment against a pastor suing his former church for breach of contract. 903 F.3d 113, 119–23 (3d Cir. 2018). It ruled on religious-autonomy grounds even though the district court—not the church—"first" invoked that doctrine. *Id.* at 118 n.4. The church could not waive its religious-autonomy rights, the court held, because those rights are "rooted in constitutional limits" on government authority. *Ibid*.

The Sixth Circuit followed suit in *Conlon* v. *InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015). There, the plaintiff argued that a religious nonprofit had waived its religious-autonomy rights by posting employment non-discrimination language in its job posting. Applying this Court's precedents, the Sixth Circuit held that the First Amendment "forecloses such waiver" because this constitutional protection is "structural" and "categorically prohibits" interference in religious hiring. *Ibid*.

The Seventh Circuit said the same in *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006), abrogated on other grounds by *Hosanna-Tabor*, 565 U.S. at 194–95. That court affirmed the dismissal of a music director's age-discrimination claim against his former employer, a Catholic diocese, despite the diocese's advertisements announcing that it was an "'equal opportunity' employer … with respect to age." *Id.* at 1041. No matter what the diocese said or meant, religious-autonomy rights are "not subject to waiver." *Id*. at 1042.

Other courts of appeals have expressed support for this principle despite not resolving whether religious-autonomy rights are waivable. The Fourth Circuit, for example, has declined to resolve this issue but held that courts may invoke the religious-autonomy doctrine even if all parties deem it "waived." *Billard* v. *Charlotte Cath. High Sch.*, 101 F.4th 316, 325 (4th Cir. 2024). Courts must have this authority, it reasoned, to avoid "structural concerns regarding separation of powers," for the religious-autonomy doctrine not only protects religious organizations but also "confines the state … to [its] proper role[ ]." *Ibid*. (citation modified).

The Fifth Circuit has also suggested religious-autonomy rights cannot be waived. *McRaney* v. *North Am. Mission Bd. of the S. Baptist Convention, Inc.*, 157 F.4th 627, 646 n.6 (5th Cir. 2025). "Unwaivability more neatly reconciles [religious] autonomy's two pillars—respect for religious self-determination and restraint of" government from intruding on religious affairs. *Ibid*. The doctrine "reflects an independent limitation on courts sticking their noses in the church door, even when/if asked to do so." *Ibid*.

To put it another way, "dismissing a case asking a court to *protect* the religious entity's authority to make [hiring] choices for itself would jeopardize the '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.'" *SMU* v. *South Central Jurisdictional Conference of the United Methodist Church*, 716 S.W.3d 475, 502–03 (Tex. 2025) (Young, J., concurring) (quoting *Kedroff*, 344 U.S. at 115–16, quoting *Watson*, 80 U.S. at 727).

Applying the same reasoning here, 71Five does not waive its religious autonomy by accessing a public benefit program. The First Amendment prohibits Oregon from dictating 71Five's religious hiring practices, and the ministry's decision to participate in a public program doesn't change that.

Religious autonomy protects faith-based organizations while preventing governments from becoming excessively entangled in religious matters. Review is needed to ensure that the religious-autonomy doctrine continues to further these essential purposes.

C. The decision below conflicts with this Court's *Trinity Lutheran*, *Espinoza*, and *Carson* line of cases.

The Ninth Circuit's opinion also conflicts with this Court's decisions forbidding the exclusion of religious groups or adherents from public benefit programs based on their religious status or exercise.

The Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988). This Court has repeatedly applied that principle to hold that states may not exclude religious observers from generally available public benefits based on their religious character or exercise. *Trinity Lutheran*, 582 U.S. at 466–67; *Espinoza*, 591 U.S. at 487–88; *Carson*, 596 U.S. at 789.

In *Trinity Lutheran*, the Court struck down Missouri's denial of playground-resurfacing grants to any applicant "owned or controlled by a church, sect, or other religious entity." 582 U.S. at 455. Such "discrimination against religious exercise," the Court concluded, was "odious to our Constitution." *Id.* at 463, 467. *Espinoza* likewise held that Montana violated the Free Exercise Clause by barring religious schools and families from a public benefit "solely because of [their] religious character." 591 U.S. at 476. And in *Carson*, the Court made explicit what its precedents already implied: a state may not "exclude some members of the community" from a public benefit program because of their "religious exercise" or "anticipated religious use" of the benefit. 596 U.S. at 781, 789.

Those "unremarkable principles" should have resolved this case. *Id.* at 780 (citation modified). Oregon has chosen to support private youth organizations through a competitive grant program. But it excludes 71Five—an otherwise eligible organization with a demonstrated record of success—solely because the ministry advances its religious mission by employing only people who share its faith. In other words, Oregon "identif[ies] and exclude[s]" 71Five based on religion. *Id.* at 789. That's exactly what this Court has said the Free Exercise Clause forbids. Yet the Ninth Circuit allowed that exclusion.

The Ninth Circuit reached that result by reducing the *Trinity Lutheran-Espinoza-Carson* trilogy to nothing more than applications of *Smith*'s "ordinary framework." App.15a. It then deemed Oregon's Co-religionist Group Exclusion "neutral" because it does not deny funding based on a practice "exclusive to religious organizations." App.16a–17a. That reasoning cannot be reconciled with this Court's precedents.

A condition on a public benefit need not burden only religious actors to violate the Free Exercise Clause. That principle has been settled for decades. *E.g.*, *Thomas* v. *Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716–17 (1981) (government cannot force a person to "choose between [religious] exercise" and "participation in an otherwise available public program," even when the restriction is facially "neutral"). And just last Term, this Court reaffirmed in *Mahmoud* v. *Taylor* that the government may not condition the "availability" of a public benefit on accepting a "burden" on "religious exercise"—even under a neutral, generally applicable policy. 606 U.S. 522, 561 (2025) (citing *Trinity Lutheran*, 582 U.S. at 462).

That the Coreligionist Group Exclusion nominally applies to "secular corporations" does not save it. App.16a. The relevant question is whether the Exclusion "operates to identify and exclude" 71Five from the grant program based on its "religious character," "religious exercise," or "anticipated religious use" of the benefit. *Carson*, 596 U.S. at 780–81, 789. It undeniably does.

The Ninth Circuit's contrary conclusion elevates form over substance. Although the terms of the Coreligionist Group Exclusion apply to secular grantees, the Exclusion imposes no meaningful burden on them. A secular organization's mission does not depend on employees with shared faith commitments. Nor may a secular employer lawfully restrict hiring based on religion, regardless of its participation in the grant program. Or. Rev. Stat. § 659A.030. For secular grantees, the Exclusion changes nothing.

Yet for religious organizations like 71Five, the burden is profound. The ability to hire coreligionists is not incidental—it is mission critical and expressly protected by law. 42 U.S.C. 2000e-1(a); Or. Rev. Stat. § 659A.006(4). 71Five can carry out its religious mission both internally and externally only through employees who share its faith convictions. Those who do not share 71Five's beliefs cannot be expected to live, teach, or transmit them—much less do so accurately and persuasively. *Our Lady of Guadalupe*, 591 U.S. at 747. Oregon's Exclusion forces 71Five to surrender its religious character and exercise as the price of participation in a public benefit program—while asking nothing comparable of secular applicants. That is precisely the kind of coercive penalty the Free Exercise Clause forbids.

This case is not an outlier. The Ninth Circuit's decision reflects a growing and dangerous trend in the lower courts: recasting this Court's free-exercise precedents as protecting against only express or overt religious discrimination. *E.g.*, *St. Mary Cath. Par.* v. *Roy*, 154 F.4th 752, 764 (10th Cir. 2025), cert. pending, No. 25-581 (excluding plaintiff Catholic school from a "universal" preschool program using a facially neutral and generally applicable policy that punishes schools that admit only families who support Catholic beliefs); *Kim* v. *Board of Educ. of Howard Cnty.*, 93 F.4th 733, 748 (4th Cir. 2024) (applying neutral and generally applicable law to exclude private-school religious students from membership on county board of education). But that view, if allowed to prevail, would drain the *Trinity Lutheran-Espinoza-Carson* line of cases of any practical significance.

In short, the Ninth Circuit has hollowed out the *Trinity Lutheran-Espinoza-Carson* trilogy, reducing those cases to empty promises. By allowing Oregon to exclude 71Five for exercising a right that "lie[s] at the very core" of its religious identity, *Carson*, 596 U.S. at 787, the decision invites officials far and wide to condition public benefits on the abandonment of protected religious practices. That threat is neither speculative nor confined to Oregon. *E.g.*, *Moody Bible Inst. of Chi.* v. *Board of Educ. of the City of Chi.*, No. 1:25-cv-13500 (N.D. Ill. Nov. 4, 2025), perma.cc/5RGF-EE37 (challenging city's exclusion of a religious university's students from the city's student-teaching program because of the university's religious-based hiring practices).

III. This case is an ideal vehicle to decide questions of national importance.

The questions presented are critical to religious organizations. Faced with *Trinity Lutheran*, *Espinoza*, and *Carson*'s protection for religious groups, government officials are increasingly using policies like the Coreligionist Group Exclusion to bar faith-based organizations from public programs by conditioning participation in public-benefit programs using facially neutral and generally applicable rules that have a disproportionate impact on religious organizations. *Supra*, § I, II.C. Immediate review is necessary.

This case is also an ideal vehicle to decide those questions. The Ninth Circuit's outlier decision creates a "Religion Clauses" exception to Section 1983 that flaunts statutory text and this Court's decisions. And the ruling punishes 71Five not because it discriminates in its delivery of publicly funded services (it serves everyone) but because it must retain its Christian character by hiring only coreligionists. It would be difficult to find a public-funding case with a greater infringement on religious autonomy.

Finally, this case was decided on a clean record with no fact disputes. And if the Court denies review, 71Five will potentially be excluded from Oregon's grant programs in the future and will certainly lose any opportunity to recover the damages it has suffered for Oregon's discriminatory conduct. Certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES A. CAMPBELL
DAVID A. CORTMAN
JACOB P. WARNER
RYAN TUCKER
JEREMIAH GALUS
MARK LIPPELMANN
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260

JOHN J. BURSCH
Counsel of Record
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@adflegal.org

DECEMBER 2025

APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YOUTH 71FIVE MINISTRIES,

Plaintiff - Appellant,

v.

CHARLENE WILLIAMS, Director of the Oregon Department of Education, in her individual and official capacities; BRIAN DETMAN, Director of the Youth Development Division, in his individual and official capacities; CORD BUEKER, Jr., Deputy Director of the Youth Development Division, in his individual and official capacities,

Defendants - Appellees.

No. 24-4101

D.C. No. 1:24-cv-00399-CL

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Oregon
Mark D. Clarke, Magistrate Judge, Presiding

Argued and Submitted November 20, 2024
Pasadena, California

Filed August 18, 2025
Amended November 26, 2025

Before: Johnnie B. Rawlinson, Morgan B. Christen, and Anthony D. Johnstone, Circuit Judges.

Order;
Opinion by Judge Johnstone

SUMMARY*

First Amendment

In a case in which Youth 71Five Ministries alleges that the Oregon Department of Education, through its Youth Development Division, violated 71Five's First Amendment rights when the Division withdrew its conditional award of a grant to 71Five, the panel (1) amended its opinion filed August 25, 2025; (2) withdrew Judge Rawlinson's separate concurrence; (3) denied the petition for rehearing en banc; and (4) affirmed in part and reversed in part the district court's denial of 71Five's request for a preliminary injunction and its dismissal of 71Five's claims based on qualified immunity.

The Division added a new grant eligibility Rule that prohibits grantees from discriminating based on religion, and withdrew 71Five's conditional grant award after discovering that 71Five imposes religious requirements on all employees and volunteers.

The panel affirmed the district court's decision not to enjoin the Division's enforcement of the Rule as to 71Five's grant-funded initiatives. 71Five was unlikely to succeed on the merits of its claim that the Rule violates the First Amendment right to the free

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

exercise of religion because the Rule is neutral and generally applicable, and likely satisfies rational-basis review. Nor was 71Five likely to succeed on the merits of its novel religious autonomy claims that conditioning grant funding on compliance with the Rule impermissibly interferes with its choice of ministers and faith-based hiring of non-ministers.

Addressing 71Five's claim that the Rule abridges its expressive association by requiring it to accept employees and volunteers who disagree with its message, the panel held that the Rule was likely permissible as a reasonable and viewpoint-neutral regulation as to Division-funded initiatives. But to the extent that Rule restricts 71Five's selection of speakers to spread its Christian message through initiatives that receive no Division funding, the Rule likely imposes an unconstitutional condition. Accordingly, the panel directed the district court to enter an order enjoining enforcement of the Rule as to initiatives that do not receive grant funding from the Division.

The panel affirmed the district court's dismissal of 71Five's claims for damages because 71Five did not allege any violation of a clearly established right, and therefore defendants were entitled to qualified immunity. However, the panel reversed the district court's dismissal of 71Five's claims for declaratory and injunctive relief, against which qualified immunity does not protect.

COUNSEL

Jeremiah Galus (argued), James A. Campbell, Mark Lippelmann, and Ryan J. Tucker, Alliance Defending Freedom, Scottsdale, Arizona; David A.

Cortman, Alliance Defending Freedom, Lawrenceville, Georgia; John J. Bursch, Alliance Defending Freedom, Washington, D.C.; for Plaintiff-Appellant.

Kirsten M. Naito (argued), Assistant Attorney General; Benjamin Gutman, Interim Deputy Attorney General; Ellen F. Rosenblum and Dan Rayfield, Attorneys General; Oregon Department of Justice, Salem, Oregon; for Defendants-Appellees.

Michael P. Farris, National Religious Broadcasters, Washington, D.C., for Amicus Curiae National Religious Broadcasters.

Barbara A. Smith, Seth M. Reid, and Kolten C. Ellis, Bryan Cave Leighton Paisner LLP, St. Louis, Missouri; Christian M. Poland, Bryan Cave Leighton Paisner LLP, Chicago, Illinois; for Amici Curiae Christian Legal Society, Council of Christian Colleges and Universities, Religious Freedom Institute, Coalition of Virtue, Cardinal Newman Society, Great Northern University, International Alliance for Christian Education, American Association of Christian Schools, Association of Classical Christian Schools, Association of Christian Schools International, and Association for Biblical Higher Education in Canada and the United States.

ORDER

The opinion filed August 25, 2025, and reported at 153 F.4th 704, is hereby amended, and Judge Rawlinson's separate concurrence is withdrawn. The amended opinion will be filed concurrently with this Order.

The panel has voted unanimously to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40. Accordingly, Appellant's petition for rehearing en banc (Dkt. No. 49) is **DENIED**. Further petitions are permitted pursuant to FRAP 40.

OPINION

JOHNSTONE, Circuit Judge:

Oregon's Department of Education, through its Youth Development Division, runs a Youth Community Investment Grant Program. The Program funds community organizations that serve at-risk youth in furtherance of the Division's statutory goals to support educational success, prevent crime, and reduce high-risk behaviors. The Division awards grants through a competitive application process that requires applicants to certify compliance with the Division's policies. To ensure that its grants benefit Oregonians of all backgrounds, the Division implemented a new policy for the 2023–2025 grant cycle requiring applicants to certify that they "do[] not discriminate . . . with regard to," among other protected characteristics, religion.

Since 2017, Youth 71Five Ministries ("71Five") has received funding from the Division for several of its initiatives. While it serves all youth who choose to participate, 71Five's "primary purpose" is "to teach and share about the life of Jesus Christ." To that end, 71Five requires that its board members, employees,

and volunteers agree to a Christian Statement of Faith and be involved in a local church. Because 71Five's hiring practices violate the Division's antidiscrimination policy, the Division withdrew its conditional award of a grant for 2023–2025. 71Five sued for equitable and monetary relief and sought a preliminary injunction. It claims that the Division's enforcement of the antidiscrimination policy violates its free-exercise, religious-autonomy, and expressive-association rights under the First Amendment. The district court declined to grant the preliminary injunction and dismissed 71Five's claims based on qualified immunity. We affirm in part, reverse in part, and remand.

Though 71Five advances several claims, most of them boil down to an argument that the Division treats it worse than secular grantees because of its religious exercise or message. If that is true, then the Division almost certainly violates the First Amendment. But the district court did not abuse its discretion in determining that—on the current record—71Five has yet to show any such discrimination. We therefore affirm the district court's decision not to enjoin the Division's enforcement of its policy as to 71Five's grant-funded initiatives. Even absent discrimination, however, the Constitution does not permit the Division to leverage its grants to restrict 71Five's expression in initiatives that receive no public funds. To the extent that the Division's nondiscrimination policy applies beyond 71Five's grant-funded initiatives, the policy likely violates 71Five's right of expressive association. At this early stage, 71Five is entitled to a preliminary injunction on that basis, and it can continue to pursue

final declaratory and injunctive relief for all its claims. But because 71Five does not allege a violation of any "clearly established" right, qualified immunity bars its claims for damages.

I. 71Five challenges the Division's religious non-discrimination Rule.

Oregon's Department of Education created its Youth Development Division "to invest in communities to ensure equitable and effective services for youth." As part of that mission, the Division administers the Youth Community Investment Grant Program, which funds community-based initiatives serving youth at risk of disengaging from school or work. The Program serves the Division's statutory goal of "[p]rovid[ing] services to children and youth in a manner that supports educational success, focuses on crime prevention, reduces high risk behaviors," and generally "improve[s] outcomes for youth[.]" To ensure that its grants benefit communities across Oregon, the Division funds grantees that work in different regions, provide a wide array of services, and offer "culturally responsive" programs tailored to the "perceptions and behaviors unique to [the] specific culture" of various groups.

The Division awards grants through a competitive application process, which requires applicants to certify that they meet certain eligibility requirements. For the 2023–2025 cycle, the Division added a new eligibility Rule requiring every grant applicant to certify that it "does not discriminate in its employment practices, vendor selection, subcontracting, or service delivery with regard to

race, ethnicity, religion, age, political affiliation, gender, disability, sexual orientation, national origin or citizenship status." The Division added the Rule to align with other state agencies' practices and to further its "commitment to equitable access, equal opportunity, and inclusion."

Youth 71Five Ministries is a nonprofit Christian ministry that "exists to share God's Story of Hope with young people." 71Five fulfills this mission by offering youth-oriented programs that "provide social interaction, vocational training, and meaningful relationships, all while emphasizing the importance of having a relationship with Jesus Christ." The ministry's services include youth centers, apprenticeship and career programs, camps, conflict-resolution workshops, and mentoring. While these various services "strive to meet participants' physical, mental, emotional, and social needs," 71Five's "primary purpose" is "to teach and share about the life of Jesus Christ."

71Five does not discriminate in its vendor selection, subcontracting, or service delivery. But because it "depends on its staff and volunteers to fulfill the ministry's distinctly Christian mission and purpose," by "articulat[ing] and advanc[ing] its Christian messages," 71Five "requires all board members, employees and volunteers 'to be authentic followers of Christ.'" Officers, staff, and volunteers must "subscribe and adhere" to a "Statement of Faith" reflecting "the beliefs of historic Christianity" and "must also be actively involved in a local church." And although it serves students and families regardless of their religion, 71Five "encourage[s] [them] to be involved in a local church too."

From 2017 to 2023, the Division awarded seven grants to 71Five. In 2023, after the Division implemented the Rule, 71Five again applied for grants to fund its youth centers and "Break the Cycle," a mountain-biking initiative that serves youth in juvenile correction facilities. Though it discriminates in employment based on religion, 71Five certified in its applications that it complied with the Rule because it believed its religious hiring practices were constitutionally exempt. In July 2023, the Division conditionally awarded 71Five grants totaling $410,000.

Four months later, the Division received an anonymous report that, according to its website, 71Five discriminates in hiring on the basis of religion. In response, the Division reviewed 71Five's website and discovered that 71Five imposes religious requirements on all employees and volunteers. The Division then wrote to 71Five to confirm what its website suggested: that 71Five discriminates based on religion in apparent violation of the Rule. 71Five's executive director confirmed that the ministry requires applicants for staff and volunteer positions to affirm its Statement of Faith and expects them to be affiliated with a local church. As a result, the Division withdrew the conditional awards.

71Five sued several state officials under 42 U.S.C. § 1983. 71Five claimed that the Defendants' enforcement of the Rule violates its First Amendment rights to the free exercise of religion, religious autonomy, and expressive association. 71Five sought declaratory and injunctive relief against the Defendants in their official capacities, as well as damages from the Defendants in their individual capacities.

71Five also moved for a preliminary injunction to reinstate its conditionally awarded grants and to enjoin the Division from refusing to award future grants based on 71Five's religious hiring practices. The Defendants opposed the motion and moved to dismiss 71Five's claims for damages based on qualified immunity. In its reply brief in support of the motion for a preliminary injunction, 71Five argued—for the first time and based on new factual assertions—that the Division allows secular grantees to violate the Rule by "openly discriminat[ing] in the provision of services based on race, ethnicity, gender, and national origin[.]"

The district court denied the preliminary injunction because it found that 71Five was unlikely to succeed on the merits, any past monetary harm would be reparable without an injunction, and neither the balance of equities nor public interest favored an injunction. For the same reasons it deemed 71Five unlikely to succeed on the merits, the district court determined that the Defendants were entitled to qualified immunity. Though the Defendants moved to dismiss only the damages claims, the district court dismissed all claims with prejudice. After 71Five timely appealed, a motions panel of this Court granted an emergency injunction and set the case for argument on an expedited basis.

We have jurisdiction to review the denial of a preliminary injunction under 28 U.S.C. § 1292(a)(1), and we review such decisions for abuse of discretion. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.* ("*FCA*"), 82 F.4th 664, 680 (9th Cir. 2023) (en banc). "A district court abuses its discretion when it utilizes 'an erroneous legal

standard or clearly erroneous finding of fact.'" *Id.* (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)).

II. The district court abused its discretion only in declining to enjoin the Rule's application beyond Division-funded initiatives.

71Five seeks a preliminary injunction on the grounds that the Division's enforcement of the Rule violates its religious and expressive freedoms under the First Amendment. To obtain a preliminary injunction, 71Five must establish that (1) it "is likely to succeed on the merits," (2) it "is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [its] favor," and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "Where, as here, the party opposing injunctive relief is a government entity, the third and fourth factors—the balance of equities and the public interest—'merge.'" *FCA*, 82 F.4th at 695 (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

Likelihood of success is the most important factor in the analysis, particularly where a plaintiff alleges a constitutional violation. *Meinecke v. City of Seattle*, 99 F.4th 514, 521 (9th Cir. 2024). And here, it is the only factor we need to consider at any length because the other three factors favor an injunction. First, if 71Five shows that it is likely to succeed on the merits, it has "demonstrate[d] the existence of a colorable First Amendment claim" and established the requisite irreparable injury. *See FCA*, 82 F.4th at 694–95 (quoting *Cal. Chamber of Com. v. Council for*

Educ. & Rsch. On Toxics, 29 F.4th 468, 482 (9th Cir. 2022)). Similarly, if "we find that [the Rule] offends the First Amendment, . . . the balance of hardships favors" 71Five. *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 749 (9th Cir. 2012); *but cf. Dep't of Educ. v. California*, 145 S. Ct. 966, 968–69 (2025) (noting that the government's inability to recover grant funds after they are disbursed weighs against compelling immediate disbursement). And "it is always in the public interest to prevent the violation of a party's constitutional rights." *FCA*, 82 F.4th at 695 (quoting *Am. Beverage Ass'n v. City of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019)).

One last note on the applicable standard: we have so far assumed that 71Five must show only that it is *likely* to succeed on the merits. This standard applies to prohibitory injunctions, which aim to preserve the status quo by preventing a party from taking action. *FCA*, 82 F.4th at 684 (quoting *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014)). The Defendants argue, and the district court concluded, that the standard for mandatory injunctions applies. A mandatory injunction alters the status quo by requiring a party to take action and thus "place[s] a higher burden on the plaintiff to show 'the facts and law *clearly* favor the moving party.'" *Id.* (quoting *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994)). But we determine the status quo based on "the legally relevant relationship between the parties before the controversy arose," that is, before the action challenged in the complaint occurred. *Ariz. Dream*, 757 F.3d at 1061 (emphasis omitted). Here, the challenged action is the Division's enforcement of the Rule against 71Five; before that, 71Five had a

conditional grant award and was eligible for future Division funding. "Because it was the [Division]'s action that 'affirmatively changed' that status quo and [71Five's] motion for a preliminary injunction seeks to restore that status quo, the relief sought is properly viewed as a prohibitory injunction." *FCA*, 82 F.4th at 685. We therefore disagree with the district court and decline the Defendants' request to apply the heightened standard for mandatory injunctions.

We turn to 71Five's likelihood of success on the merits of its First Amendment claims. The district court did not abuse its discretion in concluding that 71Five is unlikely to succeed on its free-exercise and religious-autonomy claims, and the Rule's application to Division-funded initiatives is likely a permissible burden on 71Five's expressive association. But applying the Rule to initiatives that receive no grant funding likely violates 71Five's right of expressive association. Denying a preliminary injunction as to those initiatives was an abuse of discretion.

A. The Rule likely does not prohibit the free exercise of religion.

The Free Exercise Clause of the First Amendment, applicable to the states under the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I; U.S. Const. amend XIV. But not all laws that burden religious exercise presumptively violate this mandate. "[L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 593 U.S.

522, 533 (2021) (citing *Emp. Div., Dep't. of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 878–82 (1990)). The Defendants do not dispute that the Rule burdens 71Five's religious exercise, so our analysis turns on whether the Rule is both neutral and generally applicable. Although 71Five claims that the Rule is neither, the district court did not abuse its discretion in determining that the Rule is both.

1. The Rule is likely neutral.

"[I]f it is to respect the Constitution's guarantee of free exercise," the Division "cannot impose regulations that are hostile to . . . religious beliefs" or engage in "even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 638 (2018) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)). We may infer hostility from "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *FCA*, 82 F.4th at 690 (quoting *Masterpiece Cakeshop*, 584 U.S. at 639).

71Five does not contend that any historical background or events leading to the Division's adoption of the Rule show hostility to religion. Nor does 71Five contend that Division officials made any statements of the kind courts have found to show hostility to religion. *See FCA*, 82 F.4th at 692; *Masterpiece Cakeshop*, 584 U.S. at 634–36; *Lukumi*, 508 U.S. at 541–42. Instead, 71Five's motion argued that the Division's hostility toward religion was

reflected in its "target[ed]" enforcement of the Rule against 71Five while excepting secular groups, which operated to "single out the ministry's religious beliefs and practices." But as we discuss below, the district court did not clearly err in finding that the Division did not and could not grant such exceptions. 71Five also asserts that the Division "went out of its way to scrutinize 71Five's website" without inspecting secular organizations' websites, showing animus toward religion. Yet 71Five admits that the Division first reviewed 71Five's website based on an anonymous complaint. And the record contains no evidence that the Division received similar complaints about any secular grantee.

71Five next argues that the Rule is hostile toward religion because "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion'" that is not neutral. *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 475 (2020) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017)). It styles this argument as a distinct claim, but we have situated this analysis within our ordinary framework for free-exercise claims under *Smith*. *See Loffman v. Cal. Dep't of Educ.*, 119 F.4th 1147, 1166–69 (9th Cir. 2024). In *Carson ex rel. O.C. v. Makin*, the Supreme Court held that denying public funds based on an entity's religious use for those funds is no different than denying funds based on religious status because, in practice, only religious entities use funds for religious purposes. 596 U.S. 767, 787–88 (2022). So 71Five contends that, in disqualifying potential grantees who discriminate in hiring based on religion,

the Rule effectively "exclude[s] otherwise eligible organizations because of their religious character and exercise."

But unlike the religious-use prohibition at issue in *Carson*, the Rule does not deny funding based on a practice exclusive to religious organizations. Government agencies, secular corporations, and religious ministries alike might engage in religion-based employment discrimination. *See*, *e.g.*, *Bolden-Hardge v. Off. of Cal. State Controller*, 63 F.4th 1215, 1219–20 (9th Cir. 2023) (government); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 770–71 (2015) (private retailer). So the Rule does not discriminate based on religious status or exercise; it merely disqualifies a class of potential grantees—those who discriminate based on religion—that includes both secular and religious organizations.

Nor does the Rule "grant[] a denominational preference by explicitly differentiating *between* religions based on theological practices." *Catholic Charities Bureau, Inc. v. Wisc. Lab. & Indus. Rev. Comm.*, 605 U.S. 238, 250 (2025) (emphasis added). 71Five contends that the Rule does so because it permits the Division to fund religious grantees whose beliefs, unlike 71Five's, do not require them to hire only co-religionists. While that may be the Rule's result, it is not due to any "explicit [or] deliberate distinctions between different religious organizations" that would render the Rule presumptively unconstitutional. *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982). Rather, it is the indirect consequence of the Rule's general prohibition on religious exclusion by all grantees, whether faith-based or not. Such "'secular criteria' that 'happen to

have a 'disparate impact' upon different religious organizations" do not contravene the First Amendment's mandate of denominational neutrality. *Catholic Charities*, 605 U.S. at 250 (quoting *Larson*, 456 U.S. at 246 n.23). The Rule is therefore neutral as to religion.

2. The Rule is likely generally applicable.

A policy is not generally applicable if the government can or does apply it in a way that disfavors religious activity. *FCA*, 82 F.4th at 686. So the policy may not have any discretionary "mechanism for individualized exemptions" that "invites the government to consider the particular reasons for a person's conduct." *Id.* at 687 (quoting *Fulton*, 593 U.S. at 533). And "the government may not 'treat . . . comparable secular activity more favorably than religious exercise.'" *Id.* at 686 (omission in original) (quoting *Tandon v. Newsom*, 593 U.S. 61, 62 (2021)). The district court did not abuse its discretion in determining that the Rule likely satisfies both requirements.

a. The Rule does not provide for individualized exemptions.

71Five has not shown that the Rule contains any "mechanism for individualized exemptions" that gives the Division discretion to discriminate against religious conduct. *Fulton*, 593 U.S. at 533 (citation omitted). Under the Rule, an "Applicant must complete all . . . Certification information." That language is mandatory, leaving the Division no room to make exceptions. 71Five recognizes as much, conceding that a "failure to check the box" confirming

compliance with the Rule "would have caused 71Five's [grant] application . . . [not] to be considered."

Unable to show that the Rule itself contains a mechanism for exemptions, 71Five points to a separate policy providing that "[i]t may be possible" for grant recipients "to negotiate some provisions of the final Grant," including the scope of work to be funded. 71Five argues that, under this separate policy, the Division may waive grantees' compliance with the Rule. But on its face, that policy allows the Division only to negotiate the terms of its agreements with applicants who have already satisfied baseline eligibility requirements like the Rule. And the Division's director confirmed that those eligibility requirements cannot be waived or negotiated. In any case, the policy notes that "many provisions cannot be changed," and 71Five offers no evidence that the Rule is among the negotiable provisions. The district court thus did not clearly err in finding that the Rule has no mechanism for individualized exemptions.

b. The Division likely treats comparable religious and secular activity the same.

It was also within the district court's discretion to find that, in enforcing the Rule, the Division does not treat 71Five's religious exercise less favorably than comparable secular activity. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the [policy] at issue." *Tandon*, 593 U.S. at 62 (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17–18 (2020) (per curiam)). The Division's interest is its

"commitment to equitable access, equal opportunity, and inclusion" in the programs it funds. Neither 71Five's complaint nor its motion for a preliminary injunction identified any secular activity funded by the Division that undermines the Division's commitment to equity and inclusion like 71Five's religious hiring practices do. Instead, 71Five's motion argued that the Rule triggers strict scrutiny under the Free Exercise Clause only for the reasons we have already rejected: that the Rule is not generally applicable due to a "[s]ystem of [i]ndividualized [e]xemptions" and is not neutral because it "[t]argeted" 71Five's religious beliefs. So the district court concluded that the Division does not favor comparable secular activity over 71Five's religious exercise.

71Five asks us to reverse based on a new argument and new factual assertions in its reply brief in district court in support of the motion for a preliminary injunction. There, for the first time, 71Five attached screenshots of several secular grantees' websites, which state that the grantees: "serve African and African American families" through programs "designed to . . . empower[] Black students"; "serve & work with . . . Latin/e/o/a/x, immigrant, Indigena, [and] Afrodescendiente" communities; "create equitable opportunities for African refugees and immigrant[s]"; "focus on the needs of . . . immigrant Latine women"; and are "committed to providing a pro-girl and girl-centered environment" through "programming . . . designed for those who identify as girls," are "exploring their gender identity," or "are gender non-conforming." The

website of one grantee featured a page addressing common questions, including "Why not boys?"

Based on these screenshots, 71Five raised a new argument that the Division allows secular grantees to categorically deny services to particular demographic groups. The reply brief further argued, again for the first time, that the secular grantees' alleged discrimination in service provision is akin to 71Five's admitted discrimination in hiring, as both violate the Rule. Because, the reply brief contended, the Division has not revoked funding from these secular grantees, it treats comparable secular activity more favorably than 71Five's religious exercise.

71Five faults the district court for rejecting its belated argument based on the court's concerns about "depriving Defendants of notice and an opportunity to respond." But a "district court need not consider arguments raised for the first time in a reply brief." *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). So it did not abuse its discretion by declining to do so. And now, on appeal, 71Five asks us to consider more screenshots of secular grantees' websites that were not included even in its reply brief to the district court. We decline to consider this evidence in the first instance. *See* Fed. R. App. P. 10(a)(1); *Martinez v. Newsom*, 46 F.4th 965, 975 (9th Cir. 2022). Based on the evidence properly before the district court, it was not an abuse of discretion to conclude that the Division likely treats comparable secular and religious activity the same.

c. On this record, we affirm the district court's preliminary conclusion that the Rule is likely generally applicable.

At this early stage, the record supports the district court's determination that the Rule is generally applicable. To be clear, we do not foreclose the possibility that 71Five may prove on remand that some secular grantees refuse to serve individuals outside their target demographics. In that case, the Division's continued funding of those secular grantees could reveal that it has discretion to grant exemptions from the Rule. *See Fulton*, 593 U.S. at 533. And if 71Five shows that such refusals of service are comparable to its own exclusionary hiring practices, that would doubly trigger strict scrutiny, as the Division would be favoring comparable secular activity over religious exercise. *FCA*, 82 F.4th at 686. As is often the case "at a very preliminary stage of the proceedings, . . . [f]urther development of the record . . . as this case progresses," such as the timely presentation of screenshots of secular grantees' websites, "may alter [the district court's] conclusions." *In re Creech*, 119 F.4th 1114, 1119 (9th Cir. 2024) (alteration in original; citation omitted); *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court [deciding] a preliminary injunction are not binding at trial on the merits."). But under our deferential standard of review, the district court did not abuse its discretion in refusing to consider 71Five's new arguments and evidence in its reply brief. So we must affirm the district court's preliminary conclusion.

3. The Rule likely satisfies rational-basis review.

Because the Rule is neutral and generally applicable, it is subject only to rational-basis review. *Tingley v. Ferguson*, 47 F.4th 1055, 1084 (9th Cir. 2022). "States carry a 'light burden' under this review"—a "law is 'presumed to be valid and will be sustained' . . . if it is 'rationally related to a legitimate state interest.'" *Id.* at 1077–78 (quoting *Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon*, 880 F.3d 450, 457 (9th Cir. 2018)). The Division adopted the Rule to, among other reasons, better reflect its "commitment to equitable access, equal opportunity, and inclusion." That is a legitimate interest. *Cf. Doe v. Horne*, 115 F.4th 1083, 1112 (9th Cir. 2024) (explaining that "[s]tates have important interests in inclusion, nondiscrimination, . . . [and] ensuring equal athletic opportunities"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). The Rule rationally furthers that interest by ensuring that Division-funded initiatives are equally open to employees, volunteers, and participants regardless of race, sex, religion, or any other protected characteristic. The district court therefore did not abuse its discretion in determining that 71Five is not likely to succeed on the merits of its free-exercise claim.

B. The district court did not abuse its discretion in concluding that 71Five's religious-autonomy claims are unlikely to succeed.

In addition to guaranteeing the free exercise of religion, the First Amendment prohibits laws "respecting an establishment of religion[.]" U.S.

Const. amend. I. Together, "the Religion Clauses protect the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012)). That broad principle of religious autonomy has given rise to two related doctrines. *See id.* at 747. First, ecclesiastical abstention "limit[s] the role of civil courts in the resolution of religious controversies that incidentally affect civil rights." *Puri v. Khalsa*, 844 F.3d 1152, 1162 (9th Cir. 2017) (quoting *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 710 (1976)). Second, the ministerial exception "precludes application of [certain] legislation to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor*, 565 U.S. at 188. 71Five argues that these doctrines prevent the Division from conditioning grant funding on compliance with the Rule, as doing so impermissibly interferes with 71Five's choice of ministers and faith-based hiring of non-ministers.

The district court declined to address the merits of 71Five's argument. Instead it determined that 71Five is unlikely to succeed because ecclesiastical abstention and the ministerial exception are "affirmative defense[s] against suit" and not "standalone right[s] that can be wielded against a state agency." Indeed, we have consistently described and applied the ministerial exception as an affirmative defense. *Puri*, 844 F.3d at 1157–58; *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d

940, 945–51 (9th Cir. 1999), *overruled on other grounds by Markel v. Union of Orthodox Jewish Congregations of Am.*, 124 F.4th 796, 810 n.6 (9th Cir. 2024). And we have explained that the ecclesiastical-abstention doctrine limits civil courts' redetermination of inherently religious decisions. *See Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 878 n.1 (9th Cir. 1987); *Puri*, 844 F.3d at 1162–64. The Supreme Court has similarly characterized these doctrines. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871) (first articulating the principle of religious autonomy as requiring "civil courts" to defer to ecclesiastical authorities on questions of "theological controversy, church discipline, [and] ecclesiastical government"); *Milivojevich*, 426 U.S. at 710–14; *Hosanna-Tabor*, 565 U.S. at 195 n.4 (recognizing the ministerial exception "as an affirmative defense to an otherwise cognizable claim"). And we are aware of no court of appeals that treats the religious-autonomy doctrines as the basis for standalone claims challenging legislative or executive action, rather than as defenses against or limits upon plaintiffs' invocation of *judicial* authority. *See*, *e.g.*, *O'Connell v. U.S. Conf. of Cath. Bishops*, 134 F.4th 1243, 1253–54 (D.C. Cir. 2025); *Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021, 1028–29 (10th Cir. 2022); *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 977 (7th Cir. 2021) (en banc); *McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc.*, 966 F.3d 346, 348 n.1 (5th Cir. 2020).

71Five has identified no opinion from the Supreme Court, this Court, or another court of appeals suggesting that plaintiffs may assert ecclesiastical abstention or the ministerial exception

as § 1983 claims, nor any "historical practices [or] understandings" that would justify our recognition of these novel claims under the Religion Clauses. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535–36 (2022) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). Without more, we cannot say that the district court abused its discretion in concluding that 71Five' religious-autonomy claims are unlikely to succeed.

C. The Rule's application beyond grant-funded activities likely violates 71Five's right of expressive association.

The Free Speech Clause of the First Amendment protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends[,]" which "plainly presupposes a freedom not to associate." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984)). 71Five claims that the Rule abridges its expressive association by requiring it to accept employees and volunteers "who disagree" with its message "or would express a contrary view." "Even though the district court did not address this argument, we consider it in the first instance because [71Five] raised the argument before the district court." *Rosales-Martinez v. Palmer*, 753 F.3d 890, 897 n.7 (9th Cir. 2014). We hold that 71Five has established that it is likely to succeed, at least in part. As to Division-funded initiatives, the Rule is likely permissible as a reasonable and viewpoint-neutral regulation of expressive association in a limited public forum—the Grant Program. But to the extent that it restricts 71Five's selection of speakers to

spread its Christian message through initiatives that receive no Division funding, the Rule likely imposes an unconstitutional condition.

1. The Rule likely burdens 71Five's expressive association.

To establish that the Rule likely burdens its expressive associational right, 71Five first must show that, as a group, it "engage[s] in some form of expression." *Dale*, 530 U.S. at 648, 650 (citing *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988)). It has done so. The ministry is a nonprofit organization incorporated for the purely expressive purpose of "teach[ing] and shar[ing] about the life of Jesus Christ." 71Five presented evidence that it relies on employees and volunteers to fulfill that "overriding religious purpose and mission" by "communicat[ing] and introduc[ing] the Gospel of Jesus Christ to young people and their families." As its executive director explained, 71Five provides "a wide range of voluntary programs" through its employees and volunteers to "guide young people and to help them develop the spiritual, mental, physical, and social components of their lives[.]" "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Dale*, 530 U.S. at 650 (citing *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring)).

Second, 71Five must show that compliance with the Rule would likely affect that expression "in a significant way." *Id.* at 648, 650 (citing *N.Y. State Club Ass'n*, 487 U.S. at 13). An organization cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from

a particular group would impair its message." *Id.* at 653. Instead, the right of expressive association protects an organization's decisions to choose its messengers based only on what a person expresses. *Id.*; *see also Roberts*, 468 U.S. at 647–48. So when a law compels an organization to accept a messenger who expresses views inconsistent with the core values the organization promotes, the law may impose a cognizable burden on expressive association. *Dale*, 530 U.S. at 654; *see also Roberts*, 468 U.S. at 627–28 (1984); *N.Y. State Club Ass'n*, 487 U.S. at 13. The key inquiry for finding a burden is whether the law would "require the [organization] 'to abandon or alter'" its protected expressive activities. *N.Y. State Club Ass'n*, 487 U.S. at 13 (quoting *Bd. of Dirs. of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987)).

71Five has established that complying with the Rule would likely alter its expression "in a significant way." *Dale*, 530 U.S. at 648. The ministry's executive director attested that 71Five selects employees and volunteers to carry out its expressive mission by "shar[ing] God's Story of Hope" with those it serves. Though 71Five imposes several religious requirements on employees and volunteers, its core demand is that they "subscribe and adhere" to a "Statement of Faith, which reflects the beliefs of historic Christianity" that 71Five hopes to spread. In essence, 71Five wants its spokespeople to affirm the very message they are tasked with communicating on its behalf. Yet the Rule likely prohibits it from doing so. In 71Five's view, the Rule thus compels it not just to use imperfect messengers, but to speak through individuals who reject its message. The Defendants have offered no evidence at the preliminary injunction

stage to rebut 71Five's assertion that all its employees and volunteers contribute to its expressive mission, nor 71Five's argument that the Rule requires it to hire speakers who disavow its religious views.

The Supreme Court found a similar requirement to significantly alter an organization's expressive activity in *Dale*. There, a state antidiscrimination law required the Boy Scouts to accept as an adult leader an outspoken gay-rights activist whose public statements were "inconsistent with the values [the Boy Scouts sought] to instill in its . . . members." *Id.* at 654. Because accepting the activist as a spokesperson would have "force[d] the organization to send a message . . . that the Boy Scouts accept[ed] homosexual conduct as a legitimate form of behavior," contrary to the organization's actual views, the Court held that the law burdened the Boy Scouts' expressive association. *Id.* at 653. On the record before us, the Rule would likely burden 71Five's expressive association in a similar way by forcing it to speak through individuals who reject its Statement of Faith and thereby express their disagreement with 71Five's message.

2. The Rule is likely a permissible regulation of 71Five's expressive association within Division-funded initiatives.

That the Rule burdens 71Five's expressive association does not end our inquiry—we next consider whether that burden is permissible. 71Five insists that any regulation of expressive association is subject to strict scrutiny. But as for all expression, the appropriate standard depends on context. *See*

Sullivan v. Univ. of Wash., 60 F.4th 574, 580–81 (9th Cir. 2023) (analyzing the expressive association of appointees to a public committee as the speech of public employees "pursuant to their official duties" under *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

In *Dale*, the antidiscrimination law under challenge was subject to heightened scrutiny because it directly regulated the expression of organizations like the Boy Scouts, regardless of whether those organizations received government funding. *See* 530 U.S. at 659. That is not the case here. Instead, the Rule affects only those who seek grant funding from the Division. In cases challenging expressive regulations attached to government grants, we usually must decide whether the government is using the grants to facilitate private expression, or whether it is merely hiring private speakers to spread its own message. *See*, *e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833–34 (1995). Where the government itself is speaking, even through private contractors, the First Amendment affords it a freer hand to control such expression. *See id.*; *Boquist v. Courtney*, 32 F.4th 764, 779 (9th Cir. 2022). That is what the Division appears to be doing. It does not award grants simply to enable independent speech—it uses them to enlist grantees in carrying out its own statutory mandate of supporting at-risk youth in Oregon, and it selects its preferred conduits through a competitive application process. So the Rule is perhaps best analyzed as a regulation of government speech, *see Rosenberger*, 515 U.S. at 833 (citing *Rust v. Sullivan*, 500 U.S. 173, 194, 196–200 (1991)), or speech by government contractors, *see Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668,

673–81 (1996); *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1258–63 (10th Cir. 2016).

But the Defendants do not argue that the Rule simply shapes the Division's own speech. Instead, they argue, the Rule regulates grantees' use of public funding to facilitate the grantees' independent expression. When the government creates a forum to enable private speech, the applicable free-speech standard depends on the government's purpose for opening its doors or, in this case, its purse. *See Koala v. Khosla*, 931 F.3d 887, 900 (9th Cir. 2019). Where the government holds its resources "open for indiscriminate public use for communicative purposes," the result is a traditional or designated public forum, in which content-based restrictions on expression are subject to strict scrutiny. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993); *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009). The Division's grant program does not, however, facilitate just any speech. It funds speech only by "certain groups" (*i.e.*, select community initiatives) and only on "certain subjects" (*i.e.*, supporting youth development and reducing high-risk behaviors). *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (quoting *Pleasant Grove City*, 555 U.S. at 470). As the Defendants argue, the grant program thus looks more like a limited public forum, so "a less restrictive level of scrutiny" applies. *Id.* at 680. To pass constitutional muster, the Rule need only be "reasonable and viewpoint neutral." *Koala*, 931 F.3d at 900.

a. Reasonableness.

For the same reasons the Rule satisfies rational-basis review, it is reasonable. The program's funding of "community-based youth development programs and services," aims to support the Division's overall mission of "invest[ing] in communities to ensure equitable and effective services for youth." In prohibiting certain forms of exclusion from grant-funded projects, the Rule rationally aligns the grant program with that mission, ensuring that the initiatives it funds are equally accessible to and can effectively serve all Oregonians. *Cf. Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 799 (9th Cir. 2011) (finding a university's policy prohibiting discrimination based on religion reasonable in light of the program's purpose "to promote diversity and nondiscrimination"), *abrogated on other grounds by FCA*, 82 F.4th 686.

b. Viewpoint Neutrality.

The Rule is also likely viewpoint neutral. The government discriminates based on viewpoint where it "targets not merely a subject matter, 'but particular views taken by speakers on a subject.'" *Vidal v. Elster*, 602 U.S. 286, 293 (2024) (quoting *Rosenberger*, 515 U.S. at 829). Even where there is no intent to suppress a particular message about a topic, a law is viewpoint discriminatory if it treats speech differently "based on the specific motivating ideology or perspective of the speaker." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 899 (9th Cir. 2018) (quoting *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1277 (9th Cir. 2017)).

Here, the Rule prohibits grantees from excluding employees, vendors, subcontractors, or clients based on their religious expression. But the Rule neither singles out any viewpoint about religion nor favors expressive associations that lack any religious perspective. That distinguishes this case from others in which restrictions on "religious activity" did not merely "exclude religion as a subject matter" but "select[ed] for disfavored treatment those [speakers] with religious . . . viewpoints." *Rosenberger*, 515 U.S. at 831. In *Lamb's Chapel*, for example, the Supreme Court held that a school district's rule was viewpoint discriminatory because it "permit[ted] school property to be used for the presentation of all views" about certain family issues "except those dealing with the subject matter from a religious standpoint." 508 U.S. 384, 393 (1993). And in *Rosenberger*, the Supreme Court held that a university discriminated based on viewpoint where it refused to fund student publications that "primarily promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality" but funded publications expressing no view on such metaphysical topics. 515 U.S. at 831–32, 836–37. The Court explained that religion is not only "a vast area of inquiry," but also "provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. And in *Rosenberger*, "[t]he prohibited perspective, not the general subject matter, resulted in the refusal to make . . . payments," resulting in viewpoint discrimination. *Id.*

By contrast, the Division does not deny funding to all organizations that express a religious viewpoint: it

awarded grants to support 71Five's religious programming for five years and continues to fund at least four other faith-based grantees. Nor does the Division treat those organizations differently based on their religious messages. The Rule equally burdens the expressive association of grantees that seek to promote a religious perspective, an antireligious perspective, or no perspective on religion at all. An atheist organization that refuses to employ anyone who professes a belief in God is also disqualified from receiving grant funding under the Rule. And an organization that wishes not to speak about religion and excludes all who express a viewpoint on the topic, whether positive or negative, cannot receive grant funding either. For example, to avoid offending any of its clients, an organization that provides counseling to families of diverse religious backgrounds might want to prohibit its employees from commenting on the propriety or impropriety of different family structures. But the Rule would bar it from excluding employees who, for religious reasons, refused to sign a statement personally affirming that all family structures should be equally accepted.

The Rule simply disqualifies all potential grantees, regardless of viewpoint, that exclude anyone based on personal religious beliefs. It is therefore viewpoint neutral on its face, even if in practice "it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992). Of course, "a policy that is 'viewpoint neutral on its face may still be unconstitutional if not applied uniformly.'" *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1162 (9th Cir. 2022)

(quoting *Alpha Delta*, 648 F.3d at 803). But the district court did not abuse its discretion in finding that the Division has not enforced the Rule in a discriminatory manner. So the Rule is, on this record, likely viewpoint neutral as enforced. *Cf. FCA*, 82 F.4th at 711–12 (Forrest, J., concurring) (stating that a nondiscrimination policy was viewpoint discriminatory due only to its "selective application" to a religious club).

3. The Rule is likely an unconstitutional condition on 71Five's expressive association outside Division-funded initiatives.

Though the Rule is likely a permissible restriction on expressive association within the limited public forum of the Program, that does not justify the separate burden it imposes on 71Five as a whole. When a policy attaches strings not only to government-funded speech, but to the speaker itself, we must further scrutinize the constitutionality of those strings. *See California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1093 (9th Cir. 2020). Even a valid condition on government funding may not "interfere with a recipient's conduct outside the scope of the [government] funded program." *Id.* at 1093 n.24 (citing *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013)).

As 71Five argues, the "Rule does precisely that" by "extending to all 71Five's employees and every aspect of its ministry," including projects that receive no grant funding. At oral argument, the Defendants conceded that the Rule's prohibition on discrimination is not limited to the particular initiatives the

Division funds. It applies to grantees as a whole, leaving them no room "to conduct [expressive] activities through programs that are separate and independent from the project that receives [Division] funds." *Rust*, 500 U.S. at 196. Because 71Five seeks Division funds for only some of its projects, requiring it to certify that it does not discriminate in *any* of its projects is likely an unconstitutional condition. This is because the Division "seek[s] to leverage funding to regulate [expressive association] outside the contours of the [Division-funded] program itself." *Agency for Int'l Dev.*, 570 U.S. at 214–15. The Defendants in theory could justify that extra-programmatic burden on 71Five by showing that it satisfies heightened scrutiny. *See Crowe v. Or. State Bar*, 112 F.4th 1218, 1233 (9th Cir. 2024). But they have not yet tried to do so.

71Five's expressive-association claim is therefore likely to succeed only as much as it challenges the Rule's application to its expressive association in initiatives that receive no Division funding. Because the remaining factors also support granting injunctive relief, 71Five is entitled to a preliminary injunction on that limited basis. *See Flathead-Lolo-Bitterroot Citizen Task Force v. Montana*, 98 F.4th 1180, 1195 (9th Cir. 2024) ("The scope of the [injunction] must be no broader and no narrower than necessary to redress the injury shown by the plaintiff[s]." (alterations in original) (quoting *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018))).

III. The district court erred in dismissing 71Five's claims for declaratory and injunctive relief but not its claims for damages.

Finally, we turn from 71Five's motion for a preliminary injunction to the Defendants' motion to dismiss. 71Five challenges the district court's dismissal of all its claims—both for declaratory and injunctive relief and for damages—based on qualified immunity. We have jurisdiction to review that decision under 28 U.S.C. § 1291 and review it de novo, "accepting as true all well-pleaded allegations of material fact and construing them in the light most favorable to the non-moving party." *Hyde v. City of Willcox*, 23 F.4th 863, 869 (9th Cir. 2022) (citing *Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012)). In contrast to our analysis of 71Five's motion for a preliminary injunction, this inquiry "consider[s] only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Mendoza v. Amalgamated Transit Union Int'l*, 30 F.4th 879, 884 (9th Cir. 2022) (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam)).

"In § 1983 actions, 'qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sampson v. County of Los Angeles ex rel. L.A. Cnty. Dep't of Child. & Fam. Servs.*, 974 F.3d 1012, 1018 (9th Cir. 2020) (internal quotation marks omitted) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). But "[q]ualified immunity does not apply to claims for

declaratory or injunctive relief." *Shinault v. Hawks*, 782 F.3d 1053, 1060 n.7 (9th Cir. 2015) (citing *Hydrick v. Hunter*, 669 F.3d 937, 939–40 (9th Cir. 2012)). So the dismissal of 71Five's claims for declaratory and injunctive relief was error. Still, we agree with the district court that qualified immunity bars 71Five's damages claims.

"To be entitled to qualified immunity at the motion to dismiss stage, an [official] must show that the allegations in the complaint do not make out a violation of a constitutional right or that any such right was not clearly established at the time of the alleged misconduct." *Hampton v. California*, 83 F.4th 754, 765 (9th Cir. 2023) (citing *Pearson*, 555 U.S. at 232–36). Courts "have discretion to address the questions in reverse order." *Sampson*, 974 F.3d at 1018. The district court did so here, dismissing 71Five's claims under the "clearly established" prong.

The complaint does not make out any clearly established violation of 71Five's free-exercise right. 71Five's claim rests on its argument that the Rule is neither neutral nor generally applicable. Yet 71Five does not allege any facts from which we can reasonably infer a lack of neutrality. The complaint alleges that the Division "retained discretion to create exceptions" from the Rule. As the exhibits to the complaint show, however, the alleged waiver provisions do not apply to the Rule. *See Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1117 (9th Cir. 2018) (explaining that, in ruling on a motion to dismiss, we "can consider 'exhibits attached to the Complaint'" (quoting *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010))). And while the complaint vaguely alleges that the Rule "has not been applied or

enforced consistently," it fails to "identify comparable secular activity that undermines" the Division's interest. *Tingley*, 47 F.4th at 1088.

71Five also fails to establish any clear violation of its right to religious autonomy. Neither the Supreme Court nor we have ever held that the rights protected by the ministerial exception and ecclesiastical abstention may be asserted as standalone claims challenging executive action, rather than as defenses to the invocation of judicial authority. A reasonable official would therefore lack notice that enforcing the Rule against 71Five, without resort to litigation, might violate constitutional protections for religious autonomy.

Finally, whether or not the complaint makes out a violation of 71Five's right of expressive association, that right was not clearly established. 71Five's complaint claims that the Rule violates the First Amendment by attaching nondiscrimination requirements to government grants that are awarded only to select organizations. We are aware of no case, either in this Court or the Supreme Court, clearly establishing that such a requirement impermissibly infringes a grantee's right of expressive association. 71Five relies solely on *Dale*, but that case involved a law forbidding discrimination wholly apart from any government funding scheme. *See* 530 U.S. at 644–45. Our cases finding violations of plaintiffs' expressive association also involve contexts quite different from the grant program at issue here. *See*, *e.g.*, *Crowe*, 112 F.4th at 1233–40 (compelled membership in state bar); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1163–65 (9th Cir. 2010) (compelled disclosure of ballot-measure campaign's internal communications that

chilled plaintiffs' expressive association); *White v. Lee*, 227 F.3d 1214, 1226–29 (9th Cir. 2000) (sweeping government investigation that chilled plaintiffs' expressive association). None of these cases would put the Defendants on notice that requiring recipients of competitive Division grants not to discriminate violates the First Amendment. *See District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018); *Moore v. Garnand*, 83 F.4th 743, 750 (9th Cir. 2023).

71Five's complaint does not allege a violation of any clearly established right under the First Amendment, so the Defendants are entitled to qualified immunity, and the district court did not err in dismissing 71Five's damages claims with prejudice. *See Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 616–17 (9th Cir. 2018) (holding that plaintiff was likely to succeed on the merits of its constitutional claims and that the doctrine of qualified immunity protected defendants from damages liability).

IV. Conclusion

We hold that, on this record, the Division's Rule prohibiting religious discrimination by grantees does not itself violate the First Amendment's prohibitions on religious discrimination. Because the district court did not abuse its discretion in finding that the Division applies the Rule neutrally and without exception to prohibit comparable discrimination by all grantees, 71Five is not likely to succeed on its free-exercise claim as presented in its motion. Nor is 71Five's religious-autonomy claim likely to succeed, as we have never held the ministerial exception or ecclesiastical abstention to be standalone claims.

But 71Five has established that—though the Rule permissibly regulates expressive association within Division-funded initiatives—it likely imposes an unconstitutional condition to the extent that it applies beyond those projects to regulate 71Five's independent speech. The remaining preliminary-injunction factors are also satisfied. Therefore, we reverse the district court's denial of 71Five's motion for a preliminary injunction and direct the district court to enter an order enjoining enforcement of the Rule as to initiatives that do not receive grant funding from the Division. Because 71Five does not allege any violation of a clearly established right, we also hold that the Defendants are entitled to qualified immunity and affirm the dismissal of 71Five's claims for damages. And we reverse the district court's dismissal of 71Five's claims for declaratory and injunctive relief, against which qualified immunity does not protect.

AFFIRMED in part, REVERSED in part, and REMANDED.[1]

[1] The emergency injunction, Dkt. No. 18, shall remain in effect until issuance of the mandate. Each party shall bear its own costs on appeal.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YOUTH 71FIVE MINISTRIES,

Plaintiff – Appellant,

v.

CHARLENE WILLIAMS, Director of the Oregon Department of Education, in her individual and official capacities; BRIAN DETMAN, Director of the Youth Development Division, in his individual and official capacities; CORD BUEKER, Jr., Deputy Director of the Youth Development Division, in his individual and official capacities,

Defendants – Appellees.

No. 24-4101

D.C. No. 1:24-cv-00399-CL

OPINION

Appeal from the United States District Court for the District of Oregon
Mark D. Clarke, Magistrate Judge, Presiding

Argued and Submitted November 20, 2024
Pasadena, California

Filed August 18, 2025

Before: Johnnie B. Rawlinson, Morgan B. Christen, and Anthony D. Johnstone, Circuit Judges.

Opinion by Judge Johnstone;
Concurrence by Judge Rawlinson

SUMMARY*

First Amendment

In a suit brought by Youth 71Five Ministries alleging that the Oregon Department of Education, through its Youth Development Division, violated 71Five's First Amendment rights when the Division withdrew its conditional award of a grant to 71Five, the panel affirmed in part and reversed in part the district court's denial of 71Five's request for a preliminary injunction and its dismissal of 71Five's claims based on qualified immunity.

The Division added a new grant eligibility Rule that prohibits grantees from discriminating based on religion, and withdrew 71Five's conditional grant award after discovering that 71Five imposes religious requirements on all employees and volunteers.

The panel affirmed the district court's decision not to enjoin the Division's enforcement of the Rule as to 71Five's grant-funded initiatives. 71Five was unlikely to succeed on the merits of its claim that the Rule violates the First Amendment right to the free exercise of religion because the Rule is neutral and generally applicable, and likely satisfies rational-basis review. Nor was 71Five likely to succeed on the

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

merits of its novel religious autonomy claims that conditioning grant funding on compliance with the Rule impermissibly interferes with its choice of ministers and faith-based hiring of non-ministers.

Addressing 71Five's claim that the Rule abridges its expressive association by requiring it to accept employees and volunteers who disagree with its message, the panel held that the Rule was likely permissible as a reasonable and viewpoint-neutral regulation as to Division-funded initiatives. But to the extent that Rule restricts 71Five's selection of speakers to spread its Christian message through initiatives that receive no Division funding, the Rule likely imposes an unconstitutional condition. Accordingly, the panel directed the district court to enter an order enjoining enforcement of the Rule as to initiatives that do not receive grant funding from the Division.

The panel affirmed the district court's dismissal of 71Five's claims for damages because 71Five did not allege any violation of a clearly established right, and therefore defendants were entitled to qualified immunity. However, the panel reversed the district court's dismissal of 71Five's claims for declaratory and injunctive relief, against which qualified immunity does not protect.

Judge Rawlinson concurred in the judgment only because of this court's truncated review of a district court's decision granting or denying injunctive relief, and obligatory deference to a district court's discretionary decision to decline consideration of the arguments and evidence presented in a Reply Brief. Otherwise, she would conclude that the State of

Oregon's application of the rules governing its grant program violated 71Five's right to the free exercise of religion.

COUNSEL

Jeremiah Galus (argued), James A. Campbell, Mark Lippelmann, and Ryan J. Tucker, Alliance Defending Freedom, Scottsdale, Arizona; David A. Cortman, Alliance Defending Freedom, Lawrenceville, Georgia; John J. Bursch, Alliance Defending Freedom, Washington, D.C.; for Plaintiff-Appellant.

Kirsten M. Naito (argued), Assistant Attorney General; Benjamin Gutman, Solicitor General; Ellen F. Rosenblum, Attorney General; Oregon Department of Justice, Salem, Oregon; for Defendants-Appellees.

OPINION

JOHNSTONE, Circuit Judge:

Oregon's Department of Education, through its Youth Development Division, runs a Youth Community Investment Grant Program. The Program funds community organizations that serve at-risk youth in furtherance of the Division's statutory goals to support educational success, prevent crime, and reduce high-risk behaviors. The Division awards grants through a competitive application process that requires applicants to certify compliance with the Division's policies. To ensure that its grants benefit Oregonians of all backgrounds, the Division implemented a new policy for the 2023–2025 grant cycle requiring applicants to certify that

they "do[] not discriminate . . . with regard to," among other protected characteristics, religion.

Since 2017, Youth 71Five Ministries ("71Five") has received funding from the Division for several of its initiatives. While it serves all youth who choose to participate, 71Five's "primary purpose" is "to teach and share about the life of Jesus Christ." To that end, 71Five requires that its board members, employees, and volunteers agree to a Christian Statement of Faith and be involved in a local church. Because 71Five's hiring practices violate the Division's antidiscrimination policy, the Division withdrew its conditional award of a grant for 2023–2025. 71Five sued for equitable and monetary relief and sought a preliminary injunction. It claims that the Division's enforcement of the antidiscrimination policy violates its free-exercise, religious-autonomy, and expressive-association rights under the First Amendment. The district court declined to grant the preliminary injunction and dismissed 71Five's claims based on qualified immunity. We affirm in part, reverse in part, and remand.

Though 71Five advances several claims, most of them boil down to an argument that the Division treats it worse than secular grantees because of its religious exercise or message. If that is true, then the Division almost certainly violates the First Amendment. But the district court did not abuse its discretion in determining that—on the current record—71Five has yet to show any such discrimination. We therefore affirm the district court's decision not to enjoin the Division's enforcement of its policy as to 71Five's grant-funded initiatives. Even absent discrimination, however, the

Constitution does not permit the Division to leverage its grants to restrict 71Five's expression in initiatives that receive no public funds. To the extent that the Division's nondiscrimination policy applies beyond 71Five's grant-funded initiatives, the policy likely violates 71Five's right of expressive association. At this early stage, 71Five is entitled to a preliminary injunction on that basis, and it can continue to pursue final declaratory and injunctive relief for all its claims. But because 71Five does not allege a violation of any "clearly established" right, qualified immunity bars its claims for damages.

I. 71Five challenges the Division's religious non-discrimination Rule.

Oregon's Department of Education created its Youth Development Division "to invest in communities to ensure equitable and effective services for youth." As part of that mission, the Division administers the Youth Community Investment Grant Program, which funds community-based initiatives serving youth at risk of disengaging from school or work. The Program serves the Division's statutory goal of "[p]rovid[ing] services to children and youth in a manner that supports educational success, focuses on crime prevention, reduces high risk behaviors," and generally "improve[s] outcomes for youth[.]" To ensure that its grants benefit communities across Oregon, the Division funds grantees that work in different regions, provide a wide array of services, and offer "culturally responsive" programs tailored to the "perceptions and behaviors unique to [the] specific culture" of various groups.

The Division awards grants through a competitive application process, which requires applicants to certify that they meet certain eligibility requirements. For the 2023–2025 cycle, the Division added a new eligibility Rule requiring every grant applicant to certify that it "does not discriminate in its employment practices, vendor selection, subcontracting, or service delivery with regard to race, ethnicity, religion, age, political affiliation, gender, disability, sexual orientation, national origin or citizenship status." The Division added the Rule to align with other state agencies' practices and to further its "commitment to equitable access, equal opportunity, and inclusion."

Youth 71Five Ministries is a nonprofit Christian ministry that "exists to share God's Story of Hope with young people." 71Five fulfills this mission by offering youth-oriented programs that "provide social interaction, vocational training, and meaningful relationships, all while emphasizing the importance of having a relationship with Jesus Christ." The ministry's services include youth centers, apprenticeship and career programs, camps, conflict-resolution workshops, and mentoring. While these various services "strive to meet participants' physical, mental, emotional, and social needs," 71Five's "primary purpose" is "to teach and share about the life of Jesus Christ."

71Five does not discriminate in its vendor selection, subcontracting, or service delivery. But because it "depends on its staff and volunteers to fulfill the ministry's distinctly Christian mission and purpose," by "articulat[ing] and advanc[ing] its Christian messages," 71Five "requires all board

members, employees and volunteers 'to be authentic followers of Christ.'" Officers, staff, and volunteers must "subscribe and adhere" to a "Statement of Faith" reflecting "the beliefs of historic Christianity" and "must also be actively involved in a local church." And although it serves students and families regardless of their religion, 71Five "encourage[s] [them] to be involved in a local church too."

From 2017 to 2023, the Division awarded seven grants to 71Five. In 2023, after the Division implemented the Rule, 71Five again applied for grants to fund its youth centers and "Break the Cycle," a mountain-biking initiative that serves youth in juvenile correction facilities. Though it discriminates in employment based on religion, 71Five certified in its applications that it complied with the Rule because it believed its religious hiring practices were constitutionally exempt. In July 2023, the Division conditionally awarded 71Five grants totaling $410,000.

Four months later, the Division received an anonymous report that, according to its website, 71Five discriminates in hiring on the basis of religion. In response, the Division reviewed 71Five's website and discovered that 71Five imposes religious requirements on all employees and volunteers. The Division then wrote to 71Five to confirm what its website suggested: that 71Five discriminates based on religion in apparent violation of the Rule. 71Five's executive director confirmed that the ministry requires applicants for staff and volunteer positions to affirm its Statement of Faith and expects them to be affiliated with a local church. As a result, the Division withdrew the conditional awards.

71Five sued several state officials under 42 U.S.C. § 1983. 71Five claimed that the Defendants' enforcement of the Rule violates its First Amendment rights to the free exercise of religion, religious autonomy, and expressive association. 71Five sought declaratory and injunctive relief against the Defendants in their official capacities, as well as damages from the Defendants in their individual capacities.

71Five also moved for a preliminary injunction to reinstate its conditionally awarded grants and to enjoin the Division from refusing to award future grants based on 71Five's religious hiring practices. The Defendants opposed the motion and moved to dismiss 71Five's claims for damages based on qualified immunity. In its reply brief in support of the motion for a preliminary injunction, 71Five argued—for the first time and based on new factual assertions—that the Division allows secular grantees to violate the Rule by "openly discriminat[ing] in the provision of services based on race, ethnicity, gender, and national origin[.]"

The district court denied the preliminary injunction because it found that 71Five was unlikely to succeed on the merits, any past monetary harm would be reparable without an injunction, and neither the balance of equities nor public interest favored an injunction. For the same reasons it deemed 71Five unlikely to succeed on the merits, the district court determined that the Defendants were entitled to qualified immunity. Though the Defendants moved to dismiss only the damages claims, the district court dismissed all claims with prejudice. After 71Five timely appealed, a motions panel of this Court

granted an emergency injunction and set the case for argument on an expedited basis.

We have jurisdiction to review the denial of a preliminary injunction under 28 U.S.C. § 1292(a)(1), and we review such decisions for abuse of discretion. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.* (*"FCA"*), 82 F.4th 664, 680 (9th Cir. 2023) (en banc). "A district court abuses its discretion when it utilizes 'an erroneous legal standard or clearly erroneous finding of fact.'" *Id.* (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)).

II. The district court abused its discretion only in declining to enjoin the Rule's application beyond Division-funded initiatives.

71Five seeks a preliminary injunction on the grounds that the Division's enforcement of the Rule violates its religious and expressive freedoms under the First Amendment. To obtain a preliminary injunction, 71Five must establish that (1) it "is likely to succeed on the merits," (2) it "is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [its] favor," and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "Where, as here, the party opposing injunctive relief is a government entity, the third and fourth factors—the balance of equities and the public interest—'merge.'" *FCA*, 82 F.4th at 695 (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

Likelihood of success is the most important factor in the analysis, particularly where a plaintiff alleges a constitutional violation. *Meinecke v. City of Seattle*,

99 F.4th 514, 521 (9th Cir. 2024). And here, it is the only factor we need to consider at any length because the other three factors favor an injunction. First, if 71Five shows that it is likely to succeed on the merits, it has "demonstrate[d] the existence of a colorable First Amendment claim" and established the requisite irreparable injury. *See FCA*, 82 F.4th at 694–95 (quoting *Cal. Chamber of Com. v. Council for Educ. & Rsch. On Toxics*, 29 F.4th 468, 482 (9th Cir. 2022)). Similarly, if "we find that [the Rule] offends the First Amendment, . . . the balance of hardships favors" 71Five. *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 749 (9th Cir. 2012); *but cf. Dep't of Educ. v. California*, 145 S. Ct. 966, 968–69 (2025) (noting that the government's inability to recover grant funds after they are disbursed weighs against compelling immediate disbursement). And "it is always in the public interest to prevent the violation of a party's constitutional rights." *FCA*, 82 F.4th at 695 (quoting *Am. Beverage Ass'n v. City of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019)).

One last note on the applicable standard: we have so far assumed that 71Five must show only that it is *likely* to succeed on the merits. This standard applies to prohibitory injunctions, which aim to preserve the status quo by preventing a party from taking action. *FCA*, 82 F.4th at 684 (quoting *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014)). The Defendants argue, and the district court concluded, that the standard for mandatory injunctions applies. A mandatory injunction alters the status quo by requiring a party to take action and thus "place[s] a higher burden on the plaintiff to show 'the facts and law *clearly* favor the moving party.'" *Id.* (quoting

Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994)). But we determine the status quo based on "the legally relevant relationship between the parties before the controversy arose," that is, before the action challenged in the complaint occurred. *Ariz. Dream*, 757 F.3d at 1061 (emphasis omitted). Here, the challenged action is the Division's enforcement of the Rule against 71Five; before that, 71Five had a conditional grant award and was eligible for future Division funding. "Because it was the [Division]'s action that 'affirmatively changed' that status quo and [71Five's] motion for a preliminary injunction seeks to restore that status quo, the relief sought is properly viewed as a prohibitory injunction." *FCA*, 82 F.4th at 685. We therefore disagree with the district court and decline the Defendants' request to apply the heightened standard for mandatory injunctions.

We turn to 71Five's likelihood of success on the merits of its First Amendment claims. The district court did not abuse its discretion in concluding that 71Five is unlikely to succeed on its free-exercise and religious-autonomy claims, and the Rule's application to Division-funded initiatives is likely a permissible burden on 71Five's expressive association. But applying the Rule to initiatives that receive no grant funding likely violates 71Five's right of expressive association. Denying a preliminary injunction as to those initiatives was an abuse of discretion.

A. The Rule likely does not prohibit the free exercise of religion.

The Free Exercise Clause of the First Amendment, applicable to the states under the Fourteenth Amendment, provides that "Congress

shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I; U.S. Const. amend XIV. But not all laws that burden religious exercise presumptively violate this mandate. "[L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021) (citing *Emp. Div., Dep't. of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 878–82 (1990)). The Defendants do not dispute that the Rule burdens 71Five's religious exercise, so our analysis turns on whether the Rule is both neutral and generally applicable. Although 71Five claims that the Rule is neither, the district court did not abuse its discretion in determining that the Rule is both.

1. The Rule is likely neutral.

"[I]f it is to respect the Constitution's guarantee of free exercise," the Division "cannot impose regulations that are hostile to . . . religious beliefs" or engage in "even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 638 (2018) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)). We may infer hostility from "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *FCA*, 82 F.4th at 690 (quoting *Masterpiece Cakeshop*, 584 U.S. at 639).

71Five does not contend that any historical background or events leading to the Division's adoption of the Rule show hostility to religion. Nor does 71Five contend that Division officials made any statements of the kind courts have found to show hostility to religion. *See FCA*, 82 F.4th at 692; *Masterpiece Cakeshop*, 584 U.S. at 634–36; *Lukumi*, 508 U.S. at 541–42. Instead, 71Five's motion argued that the Division's hostility toward religion was reflected in its "target[ed]" enforcement of the Rule against 71Five while excepting secular groups, which operated to "single out the ministry's religious beliefs and practices." But as we discuss below, the district court did not clearly err in finding that the Division did not and could not grant such exceptions. 71Five also asserts that the Division "went out of its way to scrutinize 71Five's website" without inspecting secular organizations' websites, showing animus toward religion. Yet 71Five admits that the Division first reviewed 71Five's website based on an anonymous complaint. And the record contains no evidence that the Division received similar complaints about any secular grantee.

71Five next argues that the Rule is hostile toward religion because "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion'" that is not neutral. *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 475 (2020) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017)). It styles this argument as a distinct claim, but we have situated this analysis within our ordinary framework for free-exercise claims under *Smith*. *See Loffman v. Cal.*

Dep't of Educ., 119 F.4th 1147, 1166–69 (9th Cir. 2024). In *Carson ex rel. O.C. v. Makin*, the Supreme Court held that denying public funds based on an entity's religious use for those funds is no different than denying funds based on religious status because, in practice, only religious entities use funds for religious purposes. 596 U.S. 767, 787–88 (2022). So 71Five contends that, in disqualifying potential grantees who discriminate in hiring based on religion, the Rule effectively "exclude[s] otherwise eligible organizations because of their religious character and exercise."

But unlike the religious-use prohibition at issue in *Carson*, the Rule does not deny funding based on a practice exclusive to religious organizations. Government agencies, secular corporations, and religious ministries alike might engage in religion-based employment discrimination. *See*, *e.g.*, *Bolden-Hardge v. Off. of Cal. State Controller*, 63 F.4th 1215, 1219–20 (9th Cir. 2023) (government); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 770–71 (2015) (private retailer). So the Rule does not discriminate based on religious status or exercise; it merely disqualifies a class of potential grantees—those who discriminate based on religion—that includes both secular and religious organizations.

Nor does the Rule "grant[] a denominational preference by explicitly differentiating *between* religions based on theological practices." *Catholic Charities Bureau, Inc. v. Wisc. Lab. & Indus. Rev. Comm.*, 605 U.S. 238, 250 (2025) (emphasis added). 71Five contends that the Rule does so because it permits the Division to fund religious grantees whose beliefs, unlike 71Five's, do not require them to hire

only co-religionists. While that may be the Rule's result, it is not due to any "explicit [or] deliberate distinctions between different religious organizations" that would render the Rule presumptively unconstitutional. *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982). Rather, it is the indirect consequence of the Rule's general prohibition on religious exclusion by all grantees, whether faith-based or not. Such "'secular criteria' that 'happen to have a 'disparate impact' upon different religious organizations" do not contravene the First Amendment's mandate of denominational neutrality. *Catholic Charities*, 605 U.S. at 250 (quoting *Larson*, 456 U.S. at 246 n.23). The Rule is therefore neutral as to religion.

2. The Rule is likely generally applicable.

A policy is not generally applicable if the government can or does apply it in a way that disfavors religious activity. *FCA*, 82 F.4th at 686. So the policy may not have any discretionary "mechanism for individualized exemptions" that "invites the government to consider the particular reasons for a person's conduct." *Id.* at 687 (quoting *Fulton*, 593 U.S. at 533). And "the government may not 'treat . . . comparable secular activity more favorably than religious exercise.'" *Id.* at 686 (omission in original) (quoting *Tandon v. Newsom*, 593 U.S. 61, 62 (2021)). The district court did not abuse its discretion in determining that the Rule likely satisfies both requirements.

a. The Rule does not provide for individualized exemptions.

71Five has not shown that the Rule contains any "mechanism for individualized exemptions" that gives the Division discretion to discriminate against religious conduct. *Fulton*, 593 U.S. at 533 (citation omitted). Under the Rule, an "Applicant must complete all . . . Certification information." That language is mandatory, leaving the Division no room to make exceptions. 71Five recognizes as much, conceding that a "failure to check the box" confirming compliance with the Rule "would have caused 71Five's [grant] application . . . [not] to be considered."

Unable to show that the Rule itself contains a mechanism for exemptions, 71Five points to a separate policy providing that "[i]t may be possible" for grant recipients "to negotiate some provisions of the final Grant," including the scope of work to be funded. 71Five argues that, under this separate policy, the Division may waive grantees' compliance with the Rule. But on its face, that policy allows the Division only to negotiate the terms of its agreements with applicants who have already satisfied baseline eligibility requirements like the Rule. And the Division's director confirmed that those eligibility requirements cannot be waived or negotiated. In any case, the policy notes that "many provisions cannot be changed," and 71Five offers no evidence that the Rule is among the negotiable provisions. The district court thus did not clearly err in finding that the Rule has no mechanism for individualized exemptions.

b. The Division likely treats comparable religious and secular activity the same.

It was also within the district court's discretion to find that, in enforcing the Rule, the Division does not treat 71Five's religious exercise less favorably than comparable secular activity. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the [policy] at issue." *Tandon*, 593 U.S. at 62 (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17–18 (2020) (per curiam)). The Division's interest is its "commitment to equitable access, equal opportunity, and inclusion" in the programs it funds. Neither 71Five's complaint nor its motion for a preliminary injunction identified any secular activity funded by the Division that undermines the Division's commitment to equity and inclusion like 71Five's religious hiring practices do. Instead, 71Five's motion argued that the Rule triggers strict scrutiny under the Free Exercise Clause only for the reasons we have already rejected: that the Rule is not generally applicable due to a "[s]ystem of [i]ndividualized [e]xemptions" and is not neutral because it "[t]argeted" 71Five's religious beliefs. So the district court concluded that the Division does not favor comparable secular activity over 71Five's religious exercise.

71Five asks us to reverse based on a new argument and new factual assertions in its reply brief in district court in support of the motion for a preliminary injunction. There, for the first time, 71Five attached screenshots of several secular

grantees' websites, which state that the grantees: "serve African and African American families" through programs "designed to . . . empower[] Black students"; "serve & work with . . . Latin/e/o/a/x, immigrant, Indigena, [and] Afrodescendiente" communities; "create equitable opportunities for African refugees and immigrant[s]"; "focus on the needs of . . . immigrant Latine women"; and are "committed to providing a pro-girl and girl-centered environment" through "programming . . . designed for those who identify as girls," are "exploring their gender identity," or "are gender non-conforming." The website of one grantee featured a page addressing common questions, including "Why not boys?"

Based on these screenshots, 71Five raised a new argument that the Division allows secular grantees to categorically deny services to particular demographic groups. The reply brief further argued, again for the first time, that the secular grantees' alleged discrimination in service provision is akin to 71Five's admitted discrimination in hiring, as both violate the Rule. Because, the reply brief contended, the Division has not revoked funding from these secular grantees, it treats comparable secular activity more favorably than 71Five's religious exercise.

71Five faults the district court for rejecting its belated argument based on the court's concerns about "depriving Defendants of notice and an opportunity to respond." But a "district court need not consider arguments raised for the first time in a reply brief." *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). So it did not abuse its discretion by declining to do so. And now, on appeal, 71Five asks us to consider more screenshots of secular grantees' websites that were

not included even in its reply brief to the district court. We decline to consider this evidence in the first instance. *See* Fed. R. App. P. 10(a)(1); *Martinez v. Newsom*, 46 F.4th 965, 975 (9th Cir. 2022). Based on the evidence properly before the district court, it was not an abuse of discretion to conclude that the Division likely treats comparable secular and religious activity the same.

c. Considering the arguments and assertions in 71Five's reply brief to the district court would not change the outcome.

In any event, considering the new argument and assertions in 71Five's reply brief to the district court would not alter our highly deferential review of the district court's finding that secular grantees comply with the Rule. 71Five's argument turns on inferences drawn from the statements on secular grantees' websites that they "serve," "work with," "focus on the needs of," "create . . . opportunities for," and offer "programming . . . designed for" particular demographic groups. In 71Five's view, such statements must mean that the secular grantees deny services to anyone not in the specified demographic groups. If so, 71Five contends, the secular grantees violate the Rule just like 71Five, so the Division must either treat them the same or satisfy strict scrutiny. *FCA*, 82 F.4th at 686. Were this evidence properly before us, the Concurrence would reach the same conclusion based on the same premise. Yet the district court did not read the secular grantees' websites that way. It explained that "even if the facts alleged in [71Five]'s Reply were properly at issue . . . , none of the allegations" suggest that the secular grantees violate

the Rule. The district court instead found the statements on the secular grantees' websites to show only that the grantees "direct[] . . . services to particular demographics in the community," without refusing service to others "who fall outside the target demographics."

The Concurrence, with 71Five, sees these findings as "mistaken." But on abuse-of-discretion review we do not "automatically *reverse* a district court's factual finding if we decide a 'mistake has been committed.'" *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). Instead, we can reverse a district court's factual finding only for clear error—that is, only if it was "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *FCA*, 82 F.4th at 680 (quoting *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012)). That is not the case here. Unlike 71Five's publicly posted hiring policy, none of the secular grantees' websites expressly state that they serve *only* their target demographics or refuse to serve individuals outside those groups. Even the statement that comes closest—"Why not boys?"—is ambiguous. It is possible to read that statement, as 71Five does, to mean that the grantee does not serve boys. Or the statement could mean that the grantee does not focus on boys but still allows them to access the organization's girl-centered programming. For example, the grantee's website also explained that "each gender engages . . . differently" with "issues while growing up," so the grantee aims to "help youth who have experienced girlhood" but "understand[s] that to help girls, all genders . . . must be part of the conversation." While we may draw different inferences from this limited

information, and the district court may make different findings with a fuller record on remand, its findings are logically coherent, plausible, and supported by the record as it now stands.

Our decision in *Fellowship of Christian Athletes* is not to the contrary. *See* 82 F.4th at 687–90. There, a school district revoked its recognition of a Christian student club because the club required its student leaders to affirm a statement of faith, which violated the district's nondiscrimination policy. *FCA*, 82 F.4th at 672–75. Sitting en banc, we reversed the district court's denial of a preliminary injunction, holding that the school district had likely violated the Free Exercise Clause because its enforcement of the policy was neither neutral nor generally applicable. *Id.* at 695–96. Our analysis turned, in large part, on our determination that the school district continued to recognize secular clubs with discriminatory membership policies. *Id.* at 687–90.

Unlike in this case, though, the record before our en banc court included some evidence that we interpreted as showing that secular clubs expressly excluded individuals based on protected characteristics. *See*, *e.g.*, *id.* at 689 (noting statement on club application form that a "student shall no longer be considered a member if the student . . . does not identify as female" (omission in original)). We also pointed to a school district official's statement that we took as an acknowledgment that other groups could limit their membership with impunity. *Id.* at 678. Here, the district court found that the secular grantees did not categorically exclude based on protected characteristics, and there is no evidence in the record clearly establishing that they do. Quite the

opposite: every secular grantee has certified that it does *not* discriminate, as is required to receive funding.

Recognizing that even its reply-brief attachments do not conclusively show that secular grantees deny service based on protected characteristics, 71Five argues that merely tailoring services to a target demographic is comparable to 71Five's categorical exclusion of non-Christians. We disagree. The sole basis for that argument is *FCA*'s holding that a South Asian Heritage club's policy "'prioritiz[ing]' acceptance of south Asian students" was likely comparable to a Christian club's denial of leadership positions to all non-Christians. *Id.* at 678, 688. But in *FCA*, we read that policy prioritizing "acceptance" of members from a particular ethnic group not just to inform program design, but also to "limit . . . membership" based on ethnicity. *Id.* at 678. Thus, FCA held that secular and religious organizations' exclusions are comparable when they both restrict who gets in the door. Yet, as the district court found, 71Five did not conclusively show that the secular grantees exclude anyone. And *FCA* does not suggest that tailoring services to meet the needs of a particular demographic, while allowing everyone to access those services, is somehow comparable to shutting out an entire protected class. 71Five offers no other explanation to support that proposition. *See Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1176–77 (9th Cir. 2021) (noting that a free-exercise plaintiff seeking a preliminary injunction bears the burden of establishing a likelihood that the challenged policy is not generally applicable).

Nor does the record reflect that the Division ever treats service-tailoring as contrary to its interests, let alone a violation of the Rule. That makes sense: the Program aims to fund initiatives that are accessible to as many Oregonians as possible. The Division allows grantees to accommodate "perceptions and behaviors unique to a specific culture" to ensure that many different communities can receive services that suit their particular needs. For example, the Division took no issue with 71Five's tailoring of its services to promote uniquely Christian values—those projects likely serve people of faith who would not access less "culturally responsive" secular resources. And the Division continues to fund other faith-based groups. It revoked funding only after learning that 71Five denies employment and volunteer opportunities to non-Christians, which limits the number of Oregonians who can be involved in Division-funded initiatives. Service-tailoring does not similarly threaten the Division's interests, so allowing it does not favor comparable secular activity over 71Five's religious exercise.

d. On this record, we affirm the district court's preliminary conclusion that the Rule is likely generally applicable.

At this early stage, the district court did not abuse its discretion in concluding that the Rule is generally applicable. To be clear, we do not foreclose the possibility that 71Five may prove on remand that some secular grantees refuse to serve individuals outside their target demographics. In that case, the Division's continued funding of those secular grantees could reveal that it has discretion to grant exemptions from the Rule. *See Fulton*, 593 U.S. at 533. And if

71Five shows that such refusals of service are comparable to its own exclusionary hiring practices, that would doubly trigger strict scrutiny, as the Division would be favoring comparable secular activity over religious exercise. *FCA*, 82 F.4th at 686. As is often the case "at a very preliminary stage of the proceedings, . . . [f]urther development of the record . . . as this case progresses," such as the timely presentation of screenshots of secular grantees' websites, "may alter [the district court's] conclusions." *In re Creech*, 119 F.4th 1114, 1119 (9th Cir. 2024) (alteration in original; citation omitted); *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court [deciding] a preliminary injunction are not binding at trial on the merits."). But under our deferential standard of review, the district court did not abuse its discretion in refusing to consider 71Five's new arguments and evidence in its reply brief. Nor did it clearly err in finding, in the alternative, that 71Five has thus far not shown categorical exclusion by the secular grantees. So we must affirm the district court's preliminary conclusion.

3. The Rule likely satisfies rational-basis review.

Because the Rule is neutral and generally applicable, it is subject only to rational-basis review. *Tingley v. Ferguson*, 47 F.4th 1055, 1084 (9th Cir. 2022). "States carry a 'light burden' under this review"—a "law is 'presumed to be valid and will be sustained' . . . if it is 'rationally related to a legitimate state interest.'" *Id.* at 1077–78 (quoting *Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon*, 880 F.3d 450, 457 (9th Cir. 2018)). The Division adopted

the Rule to, among other reasons, better reflect its "commitment to equitable access, equal opportunity, and inclusion." That is a legitimate interest. *Cf. Doe v. Horne*, 115 F.4th 1083, 1112 (9th Cir. 2024) (explaining that "[s]tates have important interests in inclusion, nondiscrimination, . . . [and] ensuring equal athletic opportunities"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). The Rule rationally furthers that interest by ensuring that Division-funded initiatives are equally open to employees, volunteers, and participants regardless of race, sex, religion, or any other protected characteristic. The district court therefore did not abuse its discretion in determining that 71Five is not likely to succeed on the merits of its free-exercise claim.

B. The district court did not abuse its discretion in concluding that 71Five's religious-autonomy claims are unlikely to succeed.

In addition to guaranteeing the free exercise of religion, the First Amendment prohibits laws "respecting an establishment of religion[.]" U.S. Const. amend. I. Together, "the Religion Clauses protect the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012)). That broad principle of religious autonomy has given rise to two related doctrines. *See id.* at 747. First, ecclesiastical abstention "limit[s] the role of civil courts in the resolution of religious controversies that incidentally affect civil rights." *Puri v. Khalsa*, 844

F.3d 1152, 1162 (9th Cir. 2017) (quoting *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 710 (1976)). Second, the ministerial exception "precludes application of [certain] legislation to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor*, 565 U.S. at 188. 71Five argues that these doctrines prevent the Division from conditioning grant funding on compliance with the Rule, as doing so impermissibly interferes with 71Five's choice of ministers and faith-based hiring of non-ministers.

The district court declined to address the merits of 71Five's argument. Instead it determined that 71Five is unlikely to succeed because ecclesiastical abstention and the ministerial exception are "affirmative defense[s] against suit" and not "standalone right[s] that can be wielded against a state agency." Indeed, we have consistently described and applied the ministerial exception as an affirmative defense. *Puri*, 844 F.3d at 1157–58; *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 945–51 (9th Cir. 1999), *overruled on other grounds by Markel v. Union of Orthodox Jewish Congregations of Am.*, 124 F.4th 796, 810 n.6 (9th Cir. 2024). And we have explained that the ecclesiastical-abstention doctrine limits civil courts' redetermination of inherently religious decisions. *See Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 878 n.1 (9th Cir. 1987); *Puri*, 844 F.3d at 1162–64. The Supreme Court has similarly characterized these doctrines. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871) (first articulating the principle of religious autonomy as requiring "civil courts" to

defer to ecclesiastical authorities on questions of "theological controversy, church discipline, [and] ecclesiastical government"); *Milivojevich*, 426 U.S. at 710–14; *Hosanna-Tabor*, 565 U.S. at 195 n.4 (recognizing the ministerial exception "as an affirmative defense to an otherwise cognizable claim"). And we are aware of no court of appeals that treats the religious-autonomy doctrines as the basis for standalone claims challenging legislative or executive action, rather than as defenses against or limits upon plaintiffs' invocation of *judicial* authority. *See*, *e.g.*, *O'Connell v. U.S. Conf. of Cath. Bishops*, 134 F.4th 1243, 1253–54 (D.C. Cir. 2025); *Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021, 1028–29 (10th Cir. 2022); *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 977 (7th Cir. 2021) (en banc); *McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc.*, 966 F.3d 346, 348 n.1 (5th Cir. 2020).

71Five has identified no opinion from the Supreme Court, this Court, or another court of appeals suggesting that plaintiffs may assert ecclesiastical abstention or the ministerial exception as § 1983 claims, nor any "historical practices [or] understandings" that would justify our recognition of these novel claims under the Religion Clauses. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535–36 (2022) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). Without more, we cannot say that the district court abused its discretion in concluding that 71Five' religious-autonomy claims are unlikely to succeed.

C. The Rule's application beyond grant-funded activities likely violates 71Five's right of expressive association.

The Free Speech Clause of the First Amendment protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends[,]" which "plainly presupposes a freedom not to associate." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984)). 71Five claims that the Rule abridges its expressive association by requiring it to accept employees and volunteers "who disagree" with its message "or would express a contrary view." "Even though the district court did not address this argument, we consider it in the first instance because [71Five] raised the argument before the district court." *Rosales-Martinez v. Palmer*, 753 F.3d 890, 897 n.7 (9th Cir. 2014). We hold that 71Five has established that it is likely to succeed, at least in part. As to Division-funded initiatives, the Rule is likely permissible as a reasonable and viewpoint-neutral regulation of expressive association in a limited public forum—the Grant Program. But to the extent that it restricts 71Five's selection of speakers to spread its Christian message through initiatives that receive no Division funding, the Rule likely imposes an unconstitutional condition.

1. The Rule likely burdens 71Five's expressive association.

To establish that the Rule likely burdens its expressive associational right, 71Five first must show that, as a group, it "engage[s] in some form of

expression." *Dale*, 530 U.S. at 648, 650 (citing *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988)). It has done so. The ministry is a nonprofit organization incorporated for the purely expressive purpose of "teach[ing] and shar[ing] about the life of Jesus Christ." 71Five presented evidence that it relies on employees and volunteers to fulfill that "overriding religious purpose and mission" by "communicat[ing] and introduc[ing] the Gospel of Jesus Christ to young people and their families." As its executive director explained, 71Five provides "a wide range of voluntary programs" through its employees and volunteers to "guide young people and to help them develop the spiritual, mental, physical, and social components of their lives[.]" "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Dale*, 530 U.S. at 650 (citing *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring)).

Second, 71Five must show that compliance with the Rule would likely affect that expression "in a significant way." *Id.* at 648, 650 (citing *N.Y. State Club Ass'n*, 487 U.S. at 13). An organization cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Id.* at 653. Instead, the right of expressive association protects an organization's decisions to choose its messengers based only on what a person expresses. *Id.*; *see also Roberts*, 468 U.S. at 647–48. So when a law compels an organization to accept a messenger who expresses views inconsistent with the core values the organization promotes, the law may impose a cognizable burden on expressive association. *Dale*,

530 U.S. at 654; *see also Roberts*, 468 U.S. at 627–28 (1984); *N.Y. State Club Ass'n*, 487 U.S. at 13. The key inquiry for finding a burden is whether the law would "require the [organization] 'to abandon or alter'" its protected expressive activities. *N.Y. State Club Ass'n*, 487 U.S. at 13 (quoting *Bd. of Dirs. of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987)).

71Five has established that complying with the Rule would likely alter its expression "in a significant way." *Dale*, 530 U.S. at 648. The ministry's executive director attested that 71Five selects employees and volunteers to carry out its expressive mission by "shar[ing] God's Story of Hope" with those it serves. Though 71Five imposes several religious requirements on employees and volunteers, its core demand is that they "subscribe and adhere" to a "Statement of Faith, which reflects the beliefs of historic Christianity" that 71Five hopes to spread. In essence, 71Five wants its spokespeople to affirm the very message they are tasked with communicating on its behalf. Yet the Rule likely prohibits it from doing so. In 71Five's view, the Rule thus compels it not just to use imperfect messengers, but to speak through individuals who reject its message. The Defendants have offered no evidence at the preliminary injunction stage to rebut 71Five's assertion that all its employees and volunteers contribute to its expressive mission, nor 71Five's argument that the Rule requires it to hire speakers who disavow its religious views.

The Supreme Court found a similar requirement to significantly alter an organization's expressive activity in *Dale*. There, a state antidiscrimination law required the Boy Scouts to accept as an adult leader

an outspoken gay-rights activist whose public statements were "inconsistent with the values [the Boy Scouts sought] to instill in its . . . members." *Id.* at 654. Because accepting the activist as a spokesperson would have "force[d] the organization to send a message . . . that the Boy Scouts accept[ed] homosexual conduct as a legitimate form of behavior," contrary to the organization's actual views, the Court held that the law burdened the Boy Scouts' expressive association. *Id.* at 653. On the record before us, the Rule would likely burden 71Five's expressive association in a similar way by forcing it to speak through individuals who reject its Statement of Faith and thereby express their disagreement with 71Five's message.

2. The Rule is likely a permissible regulation of 71Five's expressive association within Division-funded initiatives.

That the Rule burdens 71Five's expressive association does not end our inquiry—we next consider whether that burden is permissible. 71Five insists that any regulation of expressive association is subject to strict scrutiny. But as for all expression, the appropriate standard depends on context. *See Sullivan v. Univ. of Wash.*, 60 F.4th 574, 580–81 (9th Cir. 2023) (analyzing the expressive association of appointees to a public committee as the speech of public employees "pursuant to their official duties" under *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

In *Dale*, the antidiscrimination law under challenge was subject to heightened scrutiny because it directly regulated the expression of organizations like the Boy Scouts, regardless of whether those

organizations received government funding. *See* 530 U.S. at 659. That is not the case here. Instead, the Rule affects only those who seek grant funding from the Division. In cases challenging expressive regulations attached to government grants, we usually must decide whether the government is using the grants to facilitate private expression, or whether it is merely hiring private speakers to spread its own message. *See*, *e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833–34 (1995). Where the government itself is speaking, even through private contractors, the First Amendment affords it a freer hand to control such expression. *See id.*; *Boquist v. Courtney*, 32 F.4th 764, 779 (9th Cir. 2022). That is what the Division appears to be doing. It does not award grants simply to enable independent speech—it uses them to enlist grantees in carrying out its own statutory mandate of supporting at-risk youth in Oregon, and it selects its preferred conduits through a competitive application process. So the Rule is perhaps best analyzed as a regulation of government speech, *see Rosenberger*, 515 U.S. at 833 (citing *Rust v. Sullivan*, 500 U.S. 173, 194, 196–200 (1991)), or speech by government contractors, *see Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 673–81 (1996); *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1258–63 (10th Cir. 2016).

But the Defendants do not argue that the Rule simply shapes the Division's own speech. Instead, they argue, the Rule regulates grantees' use of public funding to facilitate the grantees' independent expression. When the government creates a forum to enable private speech, the applicable free-speech standard depends on the government's purpose for

opening its doors or, in this case, its purse. *See Koala v. Khosla*, 931 F.3d 887, 900 (9th Cir. 2019). Where the government holds its resources "open for indiscriminate public use for communicative purposes," the result is a traditional or designated public forum, in which content-based restrictions on expression are subject to strict scrutiny. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993); *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009). The Division's grant program does not, however, facilitate just any speech. It funds speech only by "certain groups" (*i.e.*, select community initiatives) and only on "certain subjects" (*i.e.*, supporting youth development and reducing high-risk behaviors). *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (quoting *Pleasant Grove City*, 555 U.S. at 470). As the Defendants argue, the grant program thus looks more like a limited public forum, so "a less restrictive level of scrutiny" applies. *Id.* at 680. To pass constitutional muster, the Rule need only be "reasonable and viewpoint neutral." *Koala*, 931 F.3d at 900.

a. Reasonableness.

For the same reasons the Rule satisfies rational-basis review, it is reasonable. The program's funding of "community-based youth development programs and services," aims to support the Division's overall mission of "invest[ing] in communities to ensure equitable and effective services for youth." In prohibiting certain forms of exclusion from grant-funded projects, the Rule rationally aligns the grant program with that mission, ensuring that the initiatives it funds are equally accessible to and can

effectively serve all Oregonians. *Cf. Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 799 (9th Cir. 2011) (finding a university's policy prohibiting discrimination based on religion reasonable in light of the program's purpose "to promote diversity and nondiscrimination"), abrogated on other grounds by *FCA*, 82 F.4th 686.

b. Viewpoint Neutrality.

The Rule is also likely viewpoint neutral. The government discriminates based on viewpoint where it "targets not merely a subject matter, 'but particular views taken by speakers on a subject.'" *Vidal v. Elster*, 602 U.S. 286, 293 (2024) (quoting *Rosenberger*, 515 U.S. at 829). Even where there is no intent to suppress a particular message about a topic, a law is viewpoint discriminatory if it treats speech differently "based on the specific motivating ideology or perspective of the speaker." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 899 (9th Cir. 2018) (quoting *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1277 (9th Cir. 2017)).

Here, the Rule prohibits grantees from excluding employees, vendors, subcontractors, or clients based on their religious expression. But the Rule neither singles out any viewpoint about religion nor favors expressive associations that lack any religious perspective. That distinguishes this case from others in which restrictions on "religious activity" did not merely "exclude religion as a subject matter" but "select[ed] for disfavored treatment those [speakers] with religious . . . viewpoints." *Rosenberger*, 515 U.S. at 831. In *Lamb's Chapel*, for example, the Supreme Court held that a school district's rule was viewpoint

discriminatory because it "permit[ted] school property to be used for the presentation of all views" about certain family issues "except those dealing with the subject matter from a religious standpoint." 508 U.S. 384, 393 (1993). And in *Rosenberger*, the Supreme Court held that a university discriminated based on viewpoint where it refused to fund student publications that "primarily promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality" but funded publications expressing no view on such metaphysical topics. 515 U.S. at 831–32, 836–37. The Court explained that religion is not only "a vast area of inquiry," but also "provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. And in *Rosenberger*, "[t]he prohibited perspective, not the general subject matter, resulted in the refusal to make . . . payments," resulting in viewpoint discrimination. *Id.*

By contrast, the Division does not deny funding to all organizations that express a religious viewpoint: it awarded grants to support 71Five's religious programming for five years and continues to fund at least four other faith-based grantees. Nor does the Division treat those organizations differently based on their religious messages. The Rule equally burdens the expressive association of grantees that seek to promote a religious perspective, an antireligious perspective, or no perspective on religion at all. An atheist organization that refuses to employ anyone who professes a belief in God is also disqualified from receiving grant funding under the Rule. And an organization that wishes not to speak about religion

and excludes all who express a viewpoint on the topic, whether positive or negative, cannot receive grant funding either. For example, to avoid offending any of its clients, an organization that provides counseling to families of diverse religious backgrounds might want to prohibit its employees from commenting on the propriety or impropriety of different family structures. But the Rule would bar it from excluding employees who, for religious reasons, refused to sign a statement personally affirming that all family structures should be equally accepted.

The Rule simply disqualifies all potential grantees, regardless of viewpoint, that exclude anyone based on personal religious beliefs. It is therefore viewpoint neutral on its face, even if in practice "it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992). Of course, "a policy that is 'viewpoint neutral on its face may still be unconstitutional if not applied uniformly.'" *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1162 (9th Cir. 2022) (quoting *Alpha Delta*, 648 F.3d at 803). But the district court did not abuse its discretion in finding that the Division has not enforced the Rule in a discriminatory manner. So the Rule is, on this record, likely viewpoint neutral as enforced. *Cf. FCA*, 82 F.4th at 711–12 (Forrest, J., concurring) (stating that a nondiscrimination policy was viewpoint discriminatory due only to its "selective application" to a religious club).

3. The Rule is likely an unconstitutional condition on 71Five's expressive association outside Division-funded initiatives.

Though the Rule is likely a permissible restriction on expressive association within the limited public forum of the Program, that does not justify the separate burden it imposes on 71Five as a whole. When a policy attaches strings not only to government-funded speech, but to the speaker itself, we must further scrutinize the constitutionality of those strings. *See California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1093 (9th Cir. 2020). Even a valid condition on government funding may not "interfere with a recipient's conduct outside the scope of the [government] funded program." *Id.* at 1093 n.24 (citing *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013)).

As 71Five argues, the "Rule does precisely that" by "extending to all 71Five's employees and every aspect of its ministry," including projects that receive no grant funding. At oral argument, the Defendants conceded that the Rule's prohibition on discrimination is not limited to the particular initiatives the Division funds. It applies to grantees as a whole, leaving them no room "to conduct [expressive] activities through programs that are separate and independent from the project that receives [Division] funds." *Rust*, 500 U.S. at 196. Because 71Five seeks Division funds for only some of its projects, requiring it to certify that it does not discriminate in any of its projects is likely an unconstitutional condition. This is because the Division "seek[s] to leverage funding to regulate

[expressive association] outside the contours of the [Division-funded] program itself." *Agency for Int'l Dev.*, 570 U.S. at 214–15. The Defendants in theory could justify that extra-programmatic burden on 71Five by showing that it satisfies heightened scrutiny. *See Crowe v. Or. State Bar*, 112 F.4th 1218, 1233 (9th Cir. 2024). But they have not yet tried to do so.

71Five's expressive-association claim is therefore likely to succeed only as much as it challenges the Rule's application to its expressive association in initiatives that receive no Division funding. Because the remaining factors also support granting injunctive relief, 71Five is entitled to a preliminary injunction on that limited basis. *See Flathead-Lolo-Bitterroot Citizen Task Force v. Montana*, 98 F.4th 1180, 1195 (9th Cir. 2024) ("The scope of the [injunction] must be no broader and no narrower than necessary to redress the injury shown by the plaintiff[s]." (alterations in original) (quoting *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018))).

III. The district court erred in dismissing 71Five's claims for declaratory and injunctive relief but not its claims for damages.

Finally, we turn from 71Five's motion for a preliminary injunction to the Defendants' motion to dismiss. 71Five challenges the district court's dismissal of all its claims—both for declaratory and injunctive relief and for damages—based on qualified immunity. We have jurisdiction to review that decision under 28 U.S.C. § 1291 and review it de novo, "accepting as true all well-pleaded allegations of

material fact and construing them in the light most favorable to the non-moving party." *Hyde v. City of Willcox*, 23 F.4th 863, 869 (9th Cir. 2022) (citing *Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012)). In contrast to our analysis of 71Five's motion for a preliminary injunction, this inquiry "consider[s] only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Mendoza v. Amalgamated Transit Union Int'l*, 30 F.4th 879, 884 (9th Cir. 2022) (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam)).

"In § 1983 actions, 'qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sampson v. County of Los Angeles ex rel. L.A. Cnty. Dep't of Child. & Fam. Servs.*, 974 F.3d 1012, 1018 (9th Cir. 2020) (internal quotation marks omitted) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). But "[q]ualified immunity does not apply to claims for declaratory or injunctive relief." *Shinault v. Hawks*, 782 F.3d 1053, 1060 n.7 (9th Cir. 2015) (citing *Hydrick v. Hunter*, 669 F.3d 937, 939–40 (9th Cir. 2012)). So the dismissal of 71Five's claims for declaratory and injunctive relief was error. Still, we agree with the district court that qualified immunity bars 71Five's damages claims.

"To be entitled to qualified immunity at the motion to dismiss stage, an [official] must show that the allegations in the complaint do not make out a violation of a constitutional right or that any such right was not clearly established at the time of the

alleged misconduct." *Hampton v. California*, 83 F.4th 754, 765 (9th Cir. 2023) (citing *Pearson*, 555 U.S. at 232–36). Courts "have discretion to address the questions in reverse order." *Sampson*, 974 F.3d at 1018. The district court did so here, dismissing 71Five's claims under the "clearly established" prong.

The complaint does not make out any clearly established violation of 71Five's free-exercise right. 71Five's claim rests on its argument that the Rule is neither neutral nor generally applicable. Yet 71Five does not allege any facts from which we can reasonably infer a lack of neutrality. The complaint alleges that the Division "retained discretion to create exceptions" from the Rule. As the exhibits to the complaint show, however, the alleged waiver provisions do not apply to the Rule. *See Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1117 (9th Cir. 2018) (explaining that, in ruling on a motion to dismiss, we "can consider 'exhibits attached to the Complaint'" (quoting *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010))). And while the complaint vaguely alleges that the Rule "has not been applied or enforced consistently," it fails to "identify comparable secular activity that undermines" the Division's interest. *Tingley*, 47 F.4th at 1088.

71Five also fails to establish any clear violation of its right to religious autonomy. Neither the Supreme Court nor we have ever held that the rights protected by the ministerial exception and ecclesiastical abstention may be asserted as standalone claims challenging executive action, rather than as defenses to the invocation of judicial authority. A reasonable official would therefore lack notice that enforcing the Rule against 71Five, without resort to litigation,

might violate constitutional protections for religious autonomy.

Finally, whether or not the complaint makes out a violation of 71Five's right of expressive association, that right was not clearly established. 71Five's complaint claims that the Rule violates the First Amendment by attaching nondiscrimination requirements to government grants that are awarded only to select organizations. We are aware of no case, either in this Court or the Supreme Court, clearly establishing that such a requirement impermissibly infringes a grantee's right of expressive association. 71Five relies solely on *Dale*, but that case involved a law forbidding discrimination wholly apart from any government funding scheme. *See* 530 U.S. at 644–45. Our cases finding violations of plaintiffs' expressive association also involve contexts quite different from the grant program at issue here. *See*, *e.g.*, *Crowe*, 112 F.4th at 1233–40 (compelled membership in state bar); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1163–65 (9th Cir. 2010) (compelled disclosure of ballot-measure campaign's internal communications that chilled plaintiffs' expressive association); *White v. Lee*, 227 F.3d 1214, 1226–29 (9th Cir. 2000) (sweeping government investigation that chilled plaintiffs' expressive association). None of these cases would put the Defendants on notice that requiring recipients of competitive Division grants not to discriminate violates the First Amendment. *See District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018); *Moore v. Garnand*, 83 F.4th 743, 750 (9th Cir. 2023).

71Five's complaint does not allege a violation of any clearly established right under the First Amendment, so the Defendants are entitled to

qualified immunity, and the district court did not err in dismissing 71Five's damages claims with prejudice. *See Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 616–17 (9th Cir. 2018) (holding that plaintiff was likely to succeed on the merits of its constitutional claims and that the doctrine of qualified immunity protected defendants from damages liability).

IV. Conclusion

We hold that, on this record, the Division's Rule prohibiting religious discrimination by grantees does not itself violate the First Amendment's prohibitions on religious discrimination. Because the district court did not abuse its discretion in finding that the Division applies the Rule neutrally and without exception to prohibit comparable discrimination by all grantees, 71Five is not likely to succeed on its free-exercise claim as presented in its motion. Nor is 71Five's religious-autonomy claim likely to succeed, as we have never held the ministerial exception or ecclesiastical abstention to be standalone claims.

But 71Five has established that—though the Rule permissibly regulates expressive association within Division-funded initiatives—it likely imposes an unconstitutional condition to the extent that it applies beyond those projects to regulate 71Five's independent speech. The remaining preliminary-injunction factors are also satisfied. Therefore, we reverse the district court's denial of 71Five's motion for a preliminary injunction and direct the district court to enter an order enjoining enforcement of the Rule as to initiatives that do not receive grant funding from the Division. Because 71Five does not allege any

violation of a clearly established right, we also hold that the Defendants are entitled to qualified immunity and affirm the dismissal of 71Five's claims for damages. And we reverse the district court's dismissal of 71Five's claims for declaratory and injunctive relief, against which qualified immunity does not protect.

AFFIRMED in part, REVERSED in part, and REMANDED.[1]

Rawlinson, Circuit Judge, concurring in the judgment:

I concur in the judgment because, and only because, of our truncated review of a district court's decision granting or denying injunctive relief, and our obligatory deference to a district court's discretionary decision to decline consideration of arguments and evidence presented in a Reply Brief. *See Harris v. Board of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004); *see also Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). Otherwise, I would agree with the motions panel, and conclude that the State of Oregon's application of the rules governing its grant program violated Youth 71Five Ministries' right to the free exercise of religion in violation of the First Amendment to the United States Constitution. *See Tingley v. Ferguson*, 47 F.4th 1055, 1088 (9th Cir. 2022) (holding that a law is not one of "generally applicability (neutrality) . . . if the law. . . treat[s] any

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[1] The emergency injunction, Dkt. No. 18, shall remain in effect until issuance of the mandate. Each party shall bear its own costs on appeal.

comparable secular activity more favorably than religious exercise").

I decline to join the majority opinion's analysis because it relies heavily on the premise (mistaken, in my view), that Youth 71Five's website evidenced discrimination, while websites from the secular organizations applying for grants did not evidence discrimination. Keeping in mind that this analysis is conducted in light of "the government's interest in enacting the law," *see id.*, I cannot agree with this premise.

The State of Oregon's stated purpose for the grant program is to "[p]rovide services to children and youth in a manner that supports educational success, focuses on crime prevention, reduces high risk behaviors and is integrated, measurable and accountable."

Nothing on Youth 71Five's website indicates exclusion of any group from the provision of the services delineated by the State in its grant application solicitation. In contrast, several of the other grant applicants indicated on their websites a focus on some populations to the exclusion of others, including based on gender, race and ethnicity. On these facts, I would conclude that Youth 71Five established a likelihood of success on the merits of its free exercise claim. *See Meinecke v. City of Seattle*, 99 F.4th 514, 521 (9th Cir. 2024) (observing that "likelihood of success on the merits . . . is the most important factor in the preliminary injunction" analysis, and that "[i]t is all the more critical when a plaintiff alleges a constitutional violation") (citation and internal quotations omitted).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

YOUTH 71FIVE MINISTRIES,

Plaintiff,

v.

CHARLENE WILLIAMS, *Director of the Oregon Department of Education, in her individual and official capacities, et al.*,

Defendants.

Case No. 1:24-cv-00399-CL

OPINION AND ORDER

CLARKE, Magistrate Judge.

Plaintiff Youth 71Five Ministries brings this cause of action, alleging claims of religious discrimination against officials of the Oregon Department of Education and the Youth Development Division of Oregon. Plaintiff moves the Court for a preliminary injunction, and the Defendants move to dismiss the case based on qualified immunity. Full consent to magistrate jurisdiction was entered on March 22, 2024 (#20). For the reasons below, the motion for a preliminary injunction (#20) is DENIED, and the motion to dismiss for qualified immunity (#34)is GRANTED.

BACKGROUND

The Oregon Department of Education (ODE) through the Youth Development Division (YDD)

provides funding for community-based youth development programs and services through the Youth Community Investment Grants. Complt. at ¶ 22 (#1). To be eligible for a grant, an applicant must meet several requirements and must submit a new application for each cycle of grants, which take place every two years or so. *See id.* at ¶ 71, 75; Detman Decl. at ¶ 13. A variety of different types of organizations are eligible, including "faith-based organizations." Complt. Ex. 9 at p. 5. For the first time, in the March 1, 2023 grant cycle, required applicants to certify that they do not discriminate in certain employment or service delivery practices. Complt. at ¶ 89; Complt. at ¶ 23. The 2023 Request for Grant Applications ("RFA") form,"Certification" states in relevant part:

> By checking boxes below applicant understands and agrees to following statements:
>
> …
> Applicant does not discriminate in its employment practices, vendor selection, subcontracting, or service delivery with regard to race, ethnicity, religion, age, political affiliation, gender, disability, sexual orientation, national origin, or citizenship status.

Complt. Ex. 9 at 23.

Plaintiff admits that it discriminates in its hiring practices by requiring that all employees and volunteers "subscribe and adhere without mental reservation" to a statement of Christian faith. Complt. at ¶ 45. Despite this practice, Plaintiff certified on the 2023 RFA form that it met the

nondiscrimination eligibility condition for the RFA. *Id.* at ¶ 93. Based in part on this misrepresentation, YDD conditionally awarded grant funding to Plaintiff for multiple proposed programs. Detman Decl. at ¶ 17.

Months later, while finalizing the agreements for the grant funding, YDD discovered that Plaintiff's employment practices did not meet the RFA's new nondiscrimination requirement. *Id.* at ¶18; Hofmann Decl. at ¶ 10. YDD terminated further progress on the grant agreements and withdrew its offer to provide funding to Plaintiff's programs. *Id.* at ¶ 12; Detman Decl. at ¶ 19.

DISCUSSION

Plaintiff seeks preliminary injunctive relief exempting it from the nondiscrimination eligibility requirement and requiring YDD to reinstate and fund the withdrawn grants. Defendants seek to dismiss Plaintiff's case on the basis of qualified immunity. For the reasons below, Plaintiff's motion is denied, and Defendants' motion is granted.

I. Plaintiff's motion for a preliminary injunction is denied.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). All four elements must be satisfied. *See*, *e.g.*, *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d

1046, 1057 (9th Cir. 2009). Here, Plaintiff cannot satisfy any of the four elements to be entitled to a preliminary injunction.

A. Plaintiff has not established that it is likely to succeed on the merits.

Plaintiffs lawsuit claims that the YDD's nondiscrimination requirement violates the Free Exercise and Free Speech clauses of the First Amendment, as well as the ministerial exception and church autonomy doctrine under the religion clauses of the First Amendment. Complt. at ¶¶ 145-183 (#1). Plaintiff is not likely to succeed on these claims.

1. Plaintiff cannot show a likelihood of success on the merits of its Free Exercise claims.

The Free Exercise and Establishment Clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. amend. I. The Free Exercise Clause prohibits government action that is "hostile to the religious beliefs of affected citizens ... and that passes judgment upon or presupposes the illegitimacy of religious beliefs or practices." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). Indeed, "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("*Smith*").[1] "A

[1] In the aftermath of the *Smith* decision, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) and its sister statute the Religious Freedom

State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits" because of their "religious character" or "religious exercise." *Carson v. Makin*, 596 U.S. 767, 778–81 (2022).

However, while the constitution protects sincerely held religious beliefs, it does not guarantee an unlimited right to religious practice. *See Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994) (weighing sincerely held religious beliefs against penological interests). "[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability[.]" *Smith*, 494 U.S. at 879 (quotation marks omitted).

The Court finds that Plaintiff is unlikely to succeed on the merits of its Free Exercise claims because the nondiscrimination requirement is neutral and generally applicable and because YDD did not excluded Plaintiff from grant funding "solely because of religious character or exercise."

a. Defendants' nondiscrimination requirement is a valid and neutral law of general applicability.

As stated above, *Smith* held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause, so long as they are neutral and generally

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Restoration Act of 1993 (RFRA). *Ramirez v. Collier*, 595 U.S. 411, 424, 142 S. Ct. 1264, 1277, 212 L. Ed. 2d 262 (2022). Both statutes aim to ensure "greater protection for religious exercise than is available under the First Amendment." *Holt v. Hobbs*, 574 U.S. 352, 357, 135 S. Ct. 853, 860, 190 L. Ed. 2d 747 (2015). Neither statute is applicable to the issues in this case.

applicable. 494 U.S. at 879. Plaintiff concedes that the nondiscrimination requirement is facially neutral, but it argues that it is not generally applicable.

"Broadly speaking, there are two ways a law is not generally applicable." *Tingley v. Ferguson*, 47 F.4th 1055, 1087–88 (9th Cir. 2022) (citing *Fulton*, 593 U.S. at 533). "The first is if there is a 'formal mechanism for granting exceptions' that 'invite[s] the government to consider the particular reasons for a person's conduct.'" *Id.* (citing *Fulton*, 593 U.S. at 537). "The second is if the law 'prohibits religious conduct while permitting secular conduct' that also works against the government's interest in enacting the law." *Id.* at 1088 (citing Fulton, 593 U.S. at 534). If neither applies, the law is generally applicable. *See id.* 8 882.

First, here, there is no formal or informal mechanism for granting exceptions to the nondiscrimination requirement at all, let alone one that invites the government to consider particular reasons for a person's conduct. Each applicant "must complete and submit all Applicant Information and Certification information," including the certification that the "Applicant does not discriminate in its employment practices, vendor selection, subcontracting, or service delivery with regard to race, ethnicity, religion, age, political affiliation, gender, disability, sexual orientation, national origin or citizenship status." Complt. Ex. 9 at 13 (RFA, "Application Requirements," including the "Applicant Information and Certification Sheet"); Complt. Ex. 7 at 23 (Plaintiff's application, "Certification" section). If the application does not comply with all Application Requirements, including submission of the nondiscrimination certification, it is deemed "non-

responsive," and it does not proceed to the "evaluation" stage. *See* Complt. Ex. 9 at 17 ("Responsive Applications meeting the requirements outlined in the Application Requirements section will be evaluated by an Evaluation Committee."). No waiver of this certification exists. Plaintiff's own allegations state that "a failure to check the box on the electronic-only application would have caused 71Five's application to be 'considered non-responsive,' meaning it would 'not be considered further.'" Complt ¶ 95. Thus, even on the face of the Complaint, the RFA does not permit applicants to opt out of the nondiscrimination requirement for any reason.

Second, Plaintiff argues in its Reply Brief that YDD permits secular conduct as an exception to the nondiscrimination requirement by "allow[ing] many successful applicants to openly discriminate in the provision of services based on race, ethnicity, gender, and national origin." Plf. Reply pg. 8. Plaintiff gives the following examples, among others:

> Defendants awarded $220,000 to Ophelia's Place even though its mission is limited to helping girls.
>
> Defendants awarded $220,000 to the Black Parent Initiative even though its youth programs "serve African and African American families with children."
>
> Defendants awarded $560,000 to the CAPECES Leadership Institute even though its website lists "[w]ho we serve & work with" as "Latin/e/o/a/x, immigrant, Indigena, Afrodescendiente, and farmworker children, youth, adults, and elders in rural and urban

> communities of the Mid-Willamette Valley (Marion, Polk, Yamhill)."
>
> Defendants awarded $75,479 to the Center for African Immigrants and Refugees Organization (CAIRO) even though its mission is to offer "programs, services, community organizing and collaborative leadership that create equitable opportunities for African refugees and immigrant children, youth and families to thrive."

Id. Plaintiff cites to these organizations' public websites as evidence of these allegations in support of their argument that secular "discrimination" is permitted in the provision of services. The Court does not find this argument persuasive for three reasons.

First, Plaintiff only raised this argument in its Reply brief, depriving Defendants of the opportunity to substantively respond. Second, Plaintiff fails to allege these facts in the Complaint, thus failing to provide notice pleading as required by the federal rules and, again, depriving Defendants of notice and an opportunity to respond. Third, even if the facts alleged in Plaintiff's Reply were properly at issue before the Court in either the Complaint or the Plaintiff's Motion, none of the allegations allow the Court to find that simply directing an organization's services to particular demographics in the community, in culturally responsive ways, constitutes "discrimination" as contemplated by the nondiscrimination clause. For instance, there is no evidence or even an allegation that people who fall outside the target demographics of each organization are refused services for discriminator reasons or are otherwise

unlawfully excluded. Similarly, there is no evidence or allegation that any other organization or successful grant applicant discriminates in its hiring practices. By contrast, Plaintiff admits that it discriminates by refusing to hire employees who do not sign an attestation of faith.

Neither of the *Tingley* factors apply here. The nondiscrimination requirement is neutral and generally applicable and, therefore, it is not subject to strict scrutiny.

b. Defendants' nondiscrimination requirement does not turn on an applicant's religious character or religious exercise.

Plaintiff argues that the nondiscrimination requirement should be struck down based on a similarity to the funding restrictions that were struck down in the *Trinity Lutheran* line of cases. The Court disagrees.

In the *Trinity Lutheran* line of cases, the Supreme Court struck down funding restrictions that categorically denied benefits to certain institutions based solely on the religious character of the institutions or their religious activities. In *Trinity Lutheran*, the Court held that a church could not be excluded from a public benefit "solely because it [was] a church." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017). In *Espinoza*, the Court held that a state could not impose a "categorical ban" on aid to "religious schools," "solely because they are religious." *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 485, 487 (2020). Similarly, in *Carson*, the Court struck down a funding restriction that "rigidly

exclude[d] any and all sectarian schools." *Carson*, 596 U.S. at 781. In all three cases, the Court concluded that the funding restrictions excluded recipients "solely because of their religious character." *Id.* at 780 (quoting *Trinity Lutheran*, 582 U.S. at 462); *Espinoza*, 591 U.S. at 487 (same). The Court in *Carson* also made clear that excluding a recipient based on how they would use the funding – *i.e.*, for religious purposes, was not a proper distinction. 596 U.S. at 788 ("In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination").

Here, YDD's grant program does not exclude applicants based on the religious character of the applicants or the religious use of the funds being granted. Plaintiff alleges that four other faith-based organizations received grants under the program the same year that Plaintiff's application was denied. Complt. ¶ 101-02. The nondiscrimination requirement did not disqualify those organizations because those organizations do not discriminate in their employment practices with regard to any of the listed characteristics. *See* Complt. ¶ 103.

Plaintiff's own application experience demonstrates that the denial of funding had nothing to do with Plaintiff's religious character or its planned use of the funds – both of these factors were known to the agency during the entire pendency of Plaintiff's application, and neither factor precluded an award of funding. It is clear from the face of the Complaint that Plaintiff was disqualified and the funding was denied because Plaintiff discriminates in its employment practices. Complt. ¶ 90. Unlike any of the *Trinity Lutheran* line of cases, Plaintiff was not denied

funding or eligibility because of its religious character or its use of funds.

2. Plaintiff cannot show a likelihood of success on the merits of its church autonomy claims.

Plaintiff's church autonomy claims are unlikely to succeed on the merits because the church autonomy doctrine is an affirmative defense. Therefore, these claims fail to state a cognizable claim for relief.

Courts have held that churches have autonomy in making decisions regarding their own internal affairs. This "'church autonomy doctrine" prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116–17, 73 S.Ct. 143, 97 L.Ed. 120 (1952). The doctrine is rooted in the First Amendment's Free Exercise and Establishment Clauses. *Bollard v. Cal. Province of the Soc'y of Jesus*, 211 F.3d 1331, 1332 (9th Cir. 2000) (order denying rehearing en banc) (Wardlaw, J., dissenting) ("Though the concept originated through application of the Free Exercise Clause, the Supreme Court has held that the Establishment Clause also protects church autonomy in internal religious matters."). The doctrine is also rooted in "a long line of Supreme Court cases that affirm the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C.Cir.1996) (quoting *Kedroff*, 344 U.S. at 116, 73 S.Ct. 143).

The principles articulated in the church autonomy line of cases also apply to civil rights cases. For example, courts have recognized a ministerial exception that prevents adjudication of Title VII employment discrimination cases brought by ministers against churches. *E.g.*, *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C.Cir.1996); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.1972). *See also Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir.1985) (The right to choose ministers is an important part of internal church governance and can be essential to the well-being of a church, "for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large").

However, the church autonomy doctrine, or ministerial exception, is an affirmative defense against suit by a disgruntled church employee, not a standalone right that can be wielded against a state agency. *See Puri v. Khalsa*, 844 F.3d 1152, 1158 (9th Cir. 2017) ("The ministerial exception is an affirmative defense") (internal citations omitted). Not a single case in the precedent discussed above expanded the church autonomy doctrine into an affirmative claim.[2] In other words, while the church

[2] Plaintiff cites to two out-of-Circuit cases to support its church autonomy claims. In *Darren Patterson Christian Academy*, the plaintiff won a preliminary injunction by default: the court concluded that the plaintiff was likely to succeed on the merits when the defendants made no substantive arguments on the merits, and the court declined to "make [the] [d]efendants' arguments for them." *Darren Patterson Christian Academy v.*

autonomy doctrine may be used as a shield, it has not been allowed to be used as a sword. These claims therefore fail to state a cognizable claim for relief and are unlikely to succeed on the merits.

3. Plaintiff is seeking a mandatory injunction, which is disfavored by the courts and results in a higher burden.

Finally, even if Plaintiff could show a likelihood of success on the merits, the mandatory injunction that it seeks requires an even higher burden. Mandatory injunctions are "particularly disfavored," *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009), and place a higher burden on the plaintiff to show not only that he is likely to succeed on the merits, but also that "the facts and law clearly favor the moving party." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (cleaned up). ·

The distinction between the two types of injunctions[, mandatory vs. prohibitory,] can fairly be categorized as one of action versus inaction. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd of Educ.*, 82 F.4th 664, 684 (9th Cir. 2023) (citing *Ariz. Dream Act Coal. v. Brewer*, 757

Roy, 2023 WL 7270874, at *14-15 (D. Colo. Oct 20, 2023). In *Inter Varsity*, the court acknowledged that a claim based on the ministerial exception was "novel" and that it was "unclear" whether such a claim could be brought at all. *Inter Varsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 413 F.Supp.3d 687,694 (E.D. Mich. 2019). Neither opinion is binding on this Court, and this Court does not find the reasoning in either case to be persuasive or applicable here.

F.3d 1053, 1060 (9th Cir. 2014). "A mandatory injunction orders a responsible party to take action, while [a] prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits." *Ariz. Dream*, 757 F.3d at 1060 (cleaned up)). The difference is legally significant because mandatory injunctions are "particularly disfavored," *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009), and place a higher burden on the plaintiff to show "the facts and law clearly favor the moving party." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (cleaned up).

The inquiry is whether the party seeking the injunction seeks to alter or maintain the status quo. *Fellowship of Christian Athletes*, 82 F.4th at (citing *Arizona Dream*, 757 F.3d at1060-61 (9th Cir. 2014)). The status quo refers to "the legally relevant relationship between the parties before the controversy arose," *id.* (emphasis omitted), or "to the last uncontested status which preceded the pending controversy." *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000).

Here, Plaintiff argues that it seeks "to reinstate the last uncontested status, when the ministry was participating in the grant program and had two awards for the 2023-2025 grant cycle." Plf Reply (#35) p.2. However, this characterization of "the last uncontested status" ignores the undisputed timing of the events at issue. The policy change that implemented the nondiscrimination requirement took place at the beginning of the 2023 RFA grant cycle, on March 1, 2023. Plaintiff did not contest the policy at

the time of application.[3] Instead, Plaintiff certified compliance with the new policy and proceeded to file an application notwithstanding Plaintiff's true employment practices. Plaintiff did not contest YDD's policy until the grant funding was denied. At that time, Plaintiff was clearly ineligible for the grant under the terms of the RFA, and had been for many months, no Grant Agreement had been entered, and YDD had not finalized the award or disbursed any of the funds. Therefore, restoring the "status quo" or the "last uncontested status prior to the controversy" would not grant Plaintiff the relief it seeks.

Additionally, Plaintiff concedes that YDD "may need to perform several actions" if the preliminary injunction is granted. In fact, Plaintiff does not

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[3] It is possible that, if Plaintiff had filed this lawsuit at the time of application, seeking only eligibility to apply for the grant, the outcome might have been different. Essentially, Plaintiff could have argued that the "last uncontested status" was that it was eligible for the grant, as it had been in years past, and therefore a preliminary injunction would merely preserve the status quo of prior eligibility. This would have been similar to the plaintiffs in *Arizona Dream Act Coalition*, who became suddenly ineligible for a driver's license due to a new policy requirement. *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014). However, in that case, the plaintiffs were simply challenging their change in eligibility status; they were not asking the court to affirmatively award them a driver's license. *See id.* Here, Plaintiff does not merely challenge eligibility, it requests an affirmative award of an individual grant. This posture is distinguishable from *Arizona Dream*. Plaintiff also missed the chance to make this argument by waiting until after the grant had been denied because now Plaintiff's status as eligible is no longer the status quo. Thus, the case at bar is distinguishable both for the timing and for the substance of the requested injunction.

dispute Defendants' contention that granting the motion would require the following steps to award the grants to Plaintiff: the Procurement department would have to negotiate the proper Grant Agreements, which are negotiated prior to each award being finalized. Assuming such agreements could be negotiated, funds would have to be disbursed to Plaintiff that have already been awarded to another applicant and fully allocated under Grant Agreements that already exist. This would require YDD to add additional funds to the grant programs and then, over time, disburse it to Plaintiffs. Def. Resp. (#31) p. 31. Mandating all of these actions would require imposing a mandatory injunction. This results in a higher burden on Plaintiff. Plaintiff must show not only a likelihood of success on the merits, but also that "the facts and law clearly favor" Plaintiff's claims. For all of the reasons already discussed, Plaintiff cannot do so.

B. Plaintiff has not alleged irreparable harm.

First, "monetary injury is not normally considered irreparable." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). Nonetheless, "[t]he threat of being driven out of business is sufficient to establish irreparable harm." *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985). As the Second Circuit has explained, "[t]he loss of ... an ongoing business representing many years of effort and the livelihood of its ... owners, constitutes irreparable harm. What plaintiff stands to lose cannot be fully compensated by subsequent monetary damages." *Roso-Lino Beverage Distributors, Inc. v.*

Coca-Cola Bottling Co. of New York, Inc., 749 F.2d 124, 125–26 (2d Cir. 1984) (per curiam). Thus, showing a threat of "extinction" is enough to establish irreparable harm, even when damages may be available and the amount of direct financial harm is ascertainable. *Am. Passage Media Corp.*, 750 F.2d at 1474.

Here, Plaintiff has alleged monetary damage, but not extinction of the organization:

> 71Five Ministries cannot get through the 2-year grant cycle without reducing its programs, staff, or both. Amundsen Decl. ¶ 97. As a direct result of Defendants' actions, 71Five staff have already had to take time away from mission-critical programs to focus on fundraising. *Id.* ¶ 96. This reduction of mission-critical work will continue without an injunction. *Id.* And Defendants' actions will likely affect 71Five's ability to pay its employees, some of whom had their salaries partially funded by previous grants awarded by Defendants. *Id.* ¶ 98.

Plf. Mtn. Prelim. Inj. (#20) p. 24. Without the threat of complete closure of the organization, Plaintiff has not alleged monetary damage that constitutes irreparable harm.

Second, other courts in this district have determined that the alleged unequal treatment of a plaintiff's grant funding application "constitutes a discrete past harm." *Cocina Cultura LLC v. Oregon*, 2020 WL 7181584, at *2 (D. Or. Dec. 7, 2020) (citing *Great N. Res., Inc. v. Coba*, 2020 WL 6820793, at *2 (D. Or. Nov. 20, 2020) ("Plaintiff applied for a grant

from the Oregon Cares Fund, which applicants know they may only apply for once."). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, ... if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

Here, Plaintiff faced the alleged unconstitutional barrier when it its application for a grant was denied on November 14, 2023. Complt. at ¶¶ 112-113. Plaintiff's alleged constitutional harm therefore occurred on that date. Defendants have submitted evidence stating that the grant funds allocated for Plaintiff's application were awarded to the next highest scoring applicants eligible for the grants: "all of those funds have been allocated to those grant awardees and are subject to Grant Agreements." Detman Decl. at ¶ 20; Hofmann Decl. at ¶ 16. Some of the funds have been disbursed in reimbursement for project expenses. Detman Decl. at ¶ 20.

By contrast, Plaintiff has not proffered any evidence or allegation that it is experiencing, or will likely experience, any on-going harm or damage to constitute irreparable injury. Plaintiff's only allegations in this regard state:

> Grantors often ask about 71Five Ministry's successful participation in Defendants' grant program, and this successful participation has been instrumental to other foundations' and agencies' decisions to fund the ministry. [Amundsen Decl. 98.] The ministry's Executive Director expects that agencies and

> foundations will no longer support 71Five when they learn that Defendants have disqualified the ministry from the State's grant program. *Id.*

Plf. Mtn P.I. (#20) at 23. The Executive Director's "belief" about what might happen with other grantors and funders is insufficient to state a claim for an ongoing or irreparable injury. *See Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250–51 (9th Cir. 2013) (explaining that "[t]hose seeking injunctive relief must proffer evidence sufficient to establish a likelihood of irreparable harm").

Plaintiff's claims of irreparable harm are further undercut by its delay in seeking relief. *See Cocina Cultura LLC*, 2020 WL 7181584, at *4 ("Plaintiff's nearly three-month delay in seeking injunctive relief "implies a lack of urgency and irreparable harm."). "A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its rights, a plaintiff demonstrates the lack of need for speedy action." *Lydo Enters., Inv. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (quoting *Gillette Co. v. Ed Pinaud, Inc.*, 178 F. Supp. 618, 622 (S.D.N.Y. 1959)).

Here, Plaintiff's application for a grant was denied on November 14, 2023. This lawsuit was filed on March 4, 2024, and the motion for the preliminary injunction was filed on March 20, 2024. Plaintiff's four-month delay in seeking injunctive relief demonstrates a lack of urgency and a lack of irreparable harm.

C. The balance of equities and the public interest do not weigh in favor of an injunction.

"When the government is a party, these last two factors [of the injunction analysis] merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). It is "always in the public interest to prevent the violation of a party's constitutional rights." *See, e.g.*, *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023) (citations omitted). However, in this case, the balance of equities and public interest do not weigh in favor of the Plaintiff. Plaintiff's requested relief asks the Court to require the YDD to enter into an agreement with Plaintiff for grant funding, to disburse money, and to engage in multiple steps to monitor a currently unfunded grant award. The grant funds that Plaintiff seeks have already been awarded and allocated to other applicants. This type of mandatory injunction is disfavored by the courts. Considering the lack of urgency, the failure to show irreparable harm, and the failure to show a likelihood success on the merits, the balance of equities and public interest here weigh in favor of denying the injunction.

II. Defendants are entitled to qualified immunity.

Qualified immunity shields government officials from section 1983 liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The qualified immunity analysis requires a court to address two questions: (1) whether the facts

alleged or shown by the plaintiff establish a constitutional violation, and (2) whether the right at issue was clearly established at the time. *Saucier v. Katz*, 533 U.S. 194, 201, (2001); *see also Pearson v. Callahan*, 555 U.S. 223 (2009) (overruling *Saucier's* requirement that qualified immunity analysis proceeds in a particular sequence). The right must have been clearly established at the time of the defendant's alleged misconduct, so that reasonable official would have understood that what he or she was doing under the circumstances violated that right. *Wilson v. Layne*, 526 U.S. 603, 615 (1999). Courts have discretion in deciding which prong to address first, depending on the circumstances of the case. *Pearson*, 555 U.S. at 242-43.

In this case, the Court has already determined that Plaintiff is unlikely to succeed on the merits of their claims because the nondiscrimination clause is neutral and generally applicable and does not turn on Plaintiff's religious exercise, and because there is no precedent determining that a religious organization's right to use discriminatory employment practices can be the basis for an affirmative claim against a government agency who denies grant funding for that reason. Lacking such a precedent, and lacking clarity as to whether a constitutional violation even exists here, the Court finds that the rights claimed by the Plaintiff are not "clearly established," such that Defendants should have known that requiring grant applicants to certify nondiscriminatory employment practices could be a constitutional violation.

ORDER

For the foregoing reasons, Defendants' Motion to Dismiss (#34) is granted, and Plaintiff's Motion for a Preliminary Injunction (#20) is denied. Defendants are entitled to qualified immunity. Plaintiff's Complaint is dismissed with prejudice. Judgment shall be entered for the Defendants.

DATED this 26 day of June, 2024.

/s/ Mark D. Clarke
MARK D. CLARKE
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

YOUTH 71FIVE MINISTRIES,

Plaintiff,

v.

CHARLENE WILLIAMS, *Director of the Oregon Department of Education, in her individual and official capacities, et al.*,

Defendants.

Case No. 1:24-cv-00399-CL

OPINION AND ORDER

CLARKE, Magistrate Judge.

Plaintiff Youth 71 Five Ministries brings this cause of action, alleging claims of religious discrimination against officials of the Oregon Department of Education and the Youth Development Division of Oregon. Full consent to magistrate jurisdiction was entered on March 22, 2024 (#20). On June 26, 2024, the Court denied Plaintiff's motion for a preliminary injunction and granted Defendants' motion for qualified immunity (Opinion and Order #39). On July 1, 2024, judgment was entered, and the case was dismissed. Plaintiff filed a notice of appeal to the Ninth Circuit on July 1, 2024, and two days later Plaintiff filed a Motion for Injunction Pending Appeal (#43). For the reasons below, this Motion (#43) is DENIED.

DISCUSSION

In the Court's Opinion and Order (#39) denying the prior Motion for Preliminary Injunction, the Court determined that Plaintiff was not likely to succeed on the merits of its claims, that Plaintiff was not being irreparably harmed by Defendants' conduct, and that an injunction would not protect its constitutional rights, nor be in the public interest. Plaintiff's Motion for Injunction Pending Appeal (#43) reprises every single argument made in the prior motion. No new facts, law, or arguments are raised.

After reviewing the Motion (#43) and Defendants' Response (#44), the Court agrees with Defendants that Plaintiff fails to meet the burden necessary to justify the extraordinary relief of an injunction pending appeal, especially one that requires mandatory relief.

ORDER

For these reasons, Plaintiff's Motion for an Injunction Pending Appeal (#43) is denied.

DATED this 18 day of July, 2024.

Mark D. Clarke
MARK D. CLARKE
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YOUTH 71FIVE MINISTRIES, Plaintiff - Appellant, v. CHARLENE WILLIAMS, Director of the Oregon Department of Education, in her individual and official capacities; et al., Defendants - Appellees.	No. 24-4101 D.C. No. 1:24-cv-00399-CL District of Oregon, Medford ORDER

Before: BADE, LEE, and FORREST, Circuit Judges.

LEE, Circuit Judge:

Youth 71Five Ministries (71Five) is a Christian organization that serves and mentors at-risk youths of all backgrounds, including those who are not Christian. But 71Five hires only those who share its faith and can thus advance the group's mission and message. Once the state of Oregon learned of this hiring practice, it canceled $410,000 in grants to 71Five, asserting that the group violated the state's non-discrimination policy. The district court denied 71Five's motion for a preliminary injunction, and 71Five has now filed an emergency motion seeking an injunction pending appeal of the district court's order.

We grant the injunction and set an expedited briefing schedule for the appeal. We hold that 71Five is likely to succeed on the merits. Under the Free

Exercise Clause of the First Amendment, the government must treat secular and religious groups equally. But Oregon has not applied its non-discrimination policy neutrally, as it continues to fund secular organizations that favor certain groups based on race and gender identification in violation of the same non-discrimination policy that Oregon relied on in denying funding to 71Five. We also find that 71Five will likely suffer irreparable harm, and that the equities and public interest favor an injunction.

BACKGROUND

71Five is a nonprofit, Christian ministry in Medford, Oregon that provides services and mentoring to at-risk youth. Its name derives from Psalm 71:5, which says, "Lord God, you are my hope. I have trusted you since I was young." 71Five provides youth centers in two southern Oregon counties "where students can have a safe and supportive place to hang out and develop meaningful relationships" and enjoy free meals and team activities. It also sponsors a community-based ministry to "transform the lives of inner-city youth" by having them "know God and . . . serve their communities." In addition, 71Five provides "voluntary Bible studies," "one-to-one visits and mentoring," and "group discussions" for youths in detention centers, group homes, and emergency shelters.

While it serves youths of all backgrounds without regard to religion, 71Five requires that its employees and volunteers "subscribe and adhere without mental reservation" to a statement of Christian faith. As 71Five puts it, it strives to meet the youth's "physical,

mental, emotional and social needs," but its main goal is for the youth to "have an opportunity of having a personal relationship" with Jesus Christ.

To help fund its charitable activities, 71Five has applied for and received grants through Oregon's Youth Community Investment Grant Program (the Program). The Program, which awards grants in two-year cycles, supports youth services by giving money to charities that meet certain requirements. 71Five received one award for the 2017-19 cycle, three awards for 2019-21, and three awards for 2021-23.

In March 2023, Oregon added a new eligibility requirement to the Program, which we will call the "Certification Rule." The Certification Rule requires a grant applicant to certify that it "does not discriminate in its employment practices, vendor selection, subcontracting, or service delivery with regard to race, ethnicity, religion, age, political affiliation, gender, disability, sexual orientation, national origin, or citizenship status." This was the first time that Oregon required such a certification.[1]

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[1] Oregon argues that the Certification Rule "is consistent with the state's and [Youth Development] Division's commitment to equitable access, equal opportunity, and inclusion." Oregon law generally prohibits "discrimination against any of its inhabitants because of race, color, religion, sex, sexual orientation, gender identity, national origin, marital status, age, disability or familial status." Or. Rev. Stat. § 659A.006(1) (2023). But this same law expressly provides that it is not unlawful "for a bona fide church or other religious institution . . . to prefer an employee, or an applicant for employment" that belongs to the same religious sect as the institution if the institution concludes "the preference will best serve the purposes of the church or institution" and "[t]he

71Five applied for grants in 2023 and was conditionally awarded about $410,000 for the 2023-25 cycle. But after Oregon received an anonymous tip complaining about 71Five's hiring practices, the state rescinded the grants, stating that 71Five violated the Certification Rule by incorrectly certifying that it does not discriminate. As a result of the rescission, 71Five has not been able to, among other things, hire more staff, expand its apprenticeship career exploration program, or repair equipment at its youth centers.

Although Oregon strictly enforced the Certification Rule against 71Five, it has looked the other way with secular groups that also receive state funding. The record indicates that the state continues to fund many groups that discriminate—by providing services to only subsets of the population—in violation of the Certification Rule. For example, a group named Ophelia's Place continues to receive funds even though it provides services only to "girl-identifying youth." And another group called the Black Parent Initiative receives funds, despite only serving African and African American families.

After 71Five lost its funding, it sued the relevant state officials and sought a preliminary injunction to restore its grants for the 2023-25 cycle. The district court denied the motion for preliminary injunction, and 71Five now seeks an emergency injunction pending appeal.

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employment involved is closely connected with or related to the primary purposes of the church or institution." *Id.* § 659A.006(4).

DISCUSSION

To obtain a preliminary injunction, the plaintiff must establish (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Of these factors, likelihood of success on the merits is the "most important" and "is all the more critical when a plaintiff alleges a constitutional violation and injury." *Meinecke v. City of Seattle*, 99 F.4th 514, 521 (9th Cir. 2024) (internal quotation marks and citation omitted).

We review a district court's denial of a preliminary injunction for abuse of discretion. *Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020) (per curiam). A district court abuses its discretion if it bases its decision "on an erroneous legal standard or on clearly erroneous factual findings." *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 475 (9th Cir. 2022) (citation omitted). A factual finding is clearly erroneous if it is "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012) (citation omitted).

1. 71Five is seeking a prohibitory injunction.

A preliminary injunction is either "prohibitory" or "mandatory." *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.* ("*FCA*"), 82 F.4th 664, 684 (9th Cir. 2023) (en banc). The distinction depends on whether "the party seeking the injunction seeks to alter or maintain the status quo."

Id. If the preliminary injunction would preserve the status quo before the controversy arose, then it is a prohibitory injunction. *See id.* at 684–85. If the preliminary injunction would alter that status quo, then it is a mandatory injunction. *Id.*

Here, the district court erred in holding that 71Five is seeking a mandatory injunction. 71Five participated in the Program without issue for years. Oregon's adoption and selective enforcement of the Certification Rule "affirmatively changed" the legal relationship between the parties and created the current controversy. *See id.* at 685. Because 71Five's motion for a preliminary injunction seeks to restore the parties' relationship to its status before Oregon took these actions, it is seeking a prohibitory injunction. *See id.* The district court thus erred in applying the heightened standard applicable to mandatory injunctions.

2. 71Five is likely to succeed on its Free Exercise claim because Oregon has not neutrally applied the Certification Rule.

The Free Exercise Clause of the First Amendment provides that the government "shall make no law . . . prohibiting the free exercise" of religion. Besides forbidding "outright prohibitions," this clause also proscribes "indirect coercion or penalties on the free exercise of religion." *Carson ex rel. O.C. v. Makin*, 596 U.S. 767, 778 (2022) (citation omitted). "To avoid strict scrutiny, laws that burden religious exercise must be both neutral and generally applicable." *FCA*, 82 F.4th at 685 (citation omitted).

We have distilled three "bedrock requirements of the Free Exercise Clause." *Id.* at 686. First, the

government's "purportedly neutral" policy "may not have a mechanism for individualized exemptions." *Id.* (internal quotation marks omitted) (quoting *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021)). "Second, the government may not treat comparable secular activity more favorably than religious exercise." *Id.* (ellipsis and internal quotation marks omitted) (quoting *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam)). And third, the government may not act "hostile to . . . religious beliefs or inconsistent with the Free Exercise Clause's bar on even subtle departures from neutrality." *Id.* (internal quotation marks omitted) (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 638 (2018)). If the government transgresses any of these requirements, strict scrutiny applies. *Id.*[2]

Oregon's actions here likely violated the second bedrock principle because the state has treated comparable secular groups more favorably than 71Five. State policies "are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 688 (quoting *Tandon*, 593 U.S. at 62). As evidenced by their websites, many other participants in the Program discriminate in violation of the Certification Rule. Take a few examples: Ophelia's Place and Girls Inc. only serve girls or those

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[2] Oregon's reliance on *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 561 U.S. 661 (2010), is misplaced. As we explained in *FCA*, "*Martinez* says little about the Free Exercise Clause analysis" and "runs headlong into more recent Supreme Court authority refining what it means to be 'generally applicable.'" *FCA*, 82 F.4th at 685.

identifying as girls, even though the Certification Rule states that a group cannot discriminate based on gender in providing services. The Black Parent Initiative only serves African and African American families, despite the Certification Rule's prohibition on race-based distinctions. And Adelante Mujeres only serves Latina women and families in violation of the Certification Rule's prohibitions on both gender and race-based discrimination. Yet the state continues to fund these groups while it has revoked 71Five's grants.

The Free Exercise Clause bars the government from treating religious groups worse than secular ones—but Oregon has apparently done just that in selectively enforcing its Certification Rule against 71Five. *See id.* at 688–90. This case falls well within the heartland of our en banc decision in *FCA* in which we held that a public school district could not enforce its non-discrimination policy against the Fellowship of Christian Athletes but not against other secular clubs at the school. *See id.* at 689 ("Simply put, there is no meaningful constitutionally acceptable distinction between the types of [discrimination] at play here.").

The district court erred in holding that Oregon's actions were neutral. First, it incorrectly believed that the secular groups' exclusionary policies did not violate the Certification Rule because these groups were acting "in culturally responsive ways." The district court apparently believed that these secular groups were, at worst, guilty of only benign discrimination. But we rejected that argument in *FCA*: good intentions cannot justify the unequal treatment of religious organizations. *See id.* at 688 (A

state's "alleged good intentions do not change the fact that it is treating comparable secular activity more favorably than religious exercise."). Second, the district court also mistakenly found that there was "no evidence" that the secular programs "refused services for discriminator[y] reasons." This finding ignores the programs' own websites that explicitly admit that they discriminate in the provision of their services. The district court's contrary finding is thus "without support in inferences that may be drawn from the facts in the record." *M.R.*, 697 F.3d at 725.

To be sure, these groups' preferences for serving only certain segments of society may "serve important purposes." *FCA*, 82 F.4th at 689. But that is also true of 71Five's hiring practices, which serve its primary purpose of sharing its faith. "Whether they are based on gender, race, or faith, each group's exclusionary" practices violate the Certification Rule. *See id.* But Oregon has chosen to enforce the rule only against 71Five. Strict scrutiny thus applies. *See id.* at 689–90.

To survive strict scrutiny, Oregon's "action must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Carson*, 596 U.S. at 780 (internal quotation marks omitted) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). Oregon does not contend that its actions survive strict scrutiny. And in any event, we conclude that the Certification Rule, which reaches even beyond the strictures of Oregon's anti-discrimination policy, likely is not narrowly tailored to serve its asserted

interests. We thus find that 71Five is likely to succeed on the merits.[3]

3. The remaining factors also favor an injunction.

71Five has shown that, absent an injunction, it is likely to suffer irreparable harm. The Supreme Court has stated that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam) (citation omitted). We have similarly held that this factor is "relatively easy to establish in a First Amendment case" because the plaintiff "need only demonstrate the existence of a colorable First Amendment claim." *Cal. Chamber of Com.*, 29 F.4th at 482 (citations omitted).

As explained earlier, 71Five has shown a "colorable" claim that Oregon's enforcement of the Certification Rule violated its Free Exercise rights and will continue to violate its rights absent an injunction. The state argues that 71Five has not shown irreparable harm because it has only suffered mere economic harm that will not endanger its existence. But 71Five has stated that revocation of the grant will hamper its ministry and mission in

[3] 71Five also argues that Oregon violated its constitutional rights by: (1) excluding it from a public benefit solely because of its religious character and exercise, (2) violating the ministerial exception, and (3) violating its right to expressive association. Because we find that Oregon has likely not enforced the Certification Rule in a neutral manner, we do not reach these other arguments.

violation of its First Amendment rights. That is enough to show irreparable harm at this stage. *See id.*

When a government entity is the party opposing injunctive relief, "the third and fourth factors—the balance of equities and the public interest—'merge.'" *FCA*, 82 F.4th at 695 (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Because "it is always in the public interest to prevent the violation of a party's constitutional rights," *Am. Bev. Ass'n v. City & County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc) (citation omitted), these factors also favor an injunction.

CONCLUSION

"Anti-discrimination laws and policies serve undeniably admirable goals, but when those goals collide with the protections of the Constitution, they must yield—no matter how well-intentioned." *FCA*, 82 F.4th at 695 (citing *303 Creative LLC v. Elenis*, 600 U.S. 570, 591–92 (2023)). We thus grant the motion for injunctive relief, Dkt. No. 12, and issue an injunction that: (1) allows 71Five to participate in the 2023-25 Program such that it can seek reimbursement for eligible costs and expenses, and (2) prohibits the state from requiring 71Five to abide by the Certification Rule to the extent that it bars 71Five from only hiring people of its own faith.

We also grant the request to expedite this appeal. The opening brief is due August 26, 2024. The answering brief is due September 13, 2024. The optional reply brief is due September 23, 2024. No streamlined extensions of time to file a brief will be approved. *See* 9th Cir. R. 31-2.2(a)(1).

The Clerk will place this case on the calendar for November 2024. *See* 9th Cir. Gen. Ord. 3.3(g).

Emails Regarding Youth 71Five Ministries Application for Community Investment Grant Program

From: Bud Amundsen bud@71five.org
Subject: Re: Youth 71Five Ministries Application for the Community Investment Grant Program
Date: December 22, 2023 at 10:15 AM
To: Cord Bueker cord.bueker@ode.oregon.gov
Cc: MORELAND Bethany * ODE Bethany.Moreland@ode.oregon.gov, Rick Moir rick@paperandstring.com, Teresa Tonini TeresaTonini@71Five.org

Hello Cord,

I appreciate you taking the time to respond and clarify our situation. Thank you.

Have a blessed holiday season!

BUD AMUNDSEN, *Executive Director*
Youth 71Five Ministries | TRUST TO HOPE
529 Edwards Street | Medford, Oregon 97501 |
www.71Five.org
office (541) 779-3275 | *cell* (541) 301-0897 |
bud@71Five.org

"Lord God, you are my hope. I have trusted you since I was young." Psalm 71:5 icb

On Dec 15, 2023, at 3:10 PM, BUEKER Cord <cord.bueker@ode.oregon.gov> wrote:

Hi Bud,

Thank you for reaching out to me. I can understand your surprise and disappointment in ODE's decision.

Philip is the Deputy Director of Procurement and is acting on the behalf of the Youth Development Division and ODE in this matter. At this time all I can confirm is that the information you sent in the email chain is correct, and is the decision of ODE/the state and not Philip acting alone. Further communication on this issue should be sent directly to Philip; he will continue to consult with Bethany and me as needed.

Thanks,
Cord

Cord Bueker he/him
Deputy Director
Youth Development Oregon
503.576.9751 | cord.bueker@ode.oregon.gov

<image002.png>

From: Bud Amundsen <bud@71five.org>
Sent: Thursday, December 14, 2023 11:09 AM
To: MORELAND Bethany * ODE <Bethany.Moreland@ode.oregon.gov>; BUEKER Cord <cord.bueker@ode.oregon.gov>
Cc: Rick Moir <rick@paperandstring.com>; Teresa Tonini <TeresaTonini@71Five.org>
Subject: Fwd: Youth 71Five Ministries Application for the Community Investment Grant Program

You don't often get email from bud@71five.org. Learn why this is important

Hello Bethany and Cord,

I hope you're enjoying this holiday season. Due to the fact you have not been on any of the correspondence related to this situation, I wanted to check in with you both. This email strand that I am forwarding and the position it reflects has been a surprise and disappointment due to our long-standing collaboration with ODE. Again, since you have not been a part of the conversation at Philip's strong directive, I'm wondering if this is the position of ODE beyond Philip. Also, as you see in the conversation, there is a question regarding federal funding due to the protections the federal government affords religious organizations. Would you please speak to Philip's assertion that there are no federal funds in the Youth Community Investment Grants?

I've included Rick Moir, my Board Chair, and Teresa Tonini, my Development Director who are involved in the conversation on our end.

Thanks so much for your consideration and all you do for kids in our State!

Best regards,

BUD AMUNDSEN, *Executive Director*
Youth 71Five Ministries | TRUST TO HOPE
529 Edwards Street | Medford, Oregon 97501 |
www.71Five.org
office (541) 779-3275 | *cell* (541) 301-0897 |
bud@71Five.org

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"Lord God, you are my hope. I have trusted you since I was young." Psalm 71:5 icb

Begin forwarded message:

From: HOFMANN Philip * ODE <Philip.Hofmann@ode.oregon.gov>
Subject: RE: Youth 71Five Ministries Application for the Community Investment Grant Program
Date: December 7, 2023 at 10:01:28 AM PST
To: Bud Amundsen <bud@71five.org>
Cc: Teresa Tonini <teresatonini@71five.org>

Good Morning Bud,

The SIF is an internal work order document used by our Grant Analysts to build the records in the Electronic Grant Management System –EGMS. It is based on approved program amounts in the agency budget. It is not for external distribution.

If the intent of the request for the SIF is that you are looking for additional confirmation that these grant programs are state funded, the most concrete proof would likely be found in the Department of Education's budget which is available via a public records request. More information about public records requests may be found on the Department of Education's website.

Thank you,

Philip (Phil) Hofmann (he/him)
Deputy Director of Procurement
Phone: (503) 559-2192
Clifton Strengths: Restorative | Learner | Analytical | Input | Strategic

Philip.hofmann@ode.oregon.gov |
www.oregon.gov/ode
Work Schedule: Mon-Fri 7-3:30

From: Bud Amundsen <bud@71five.org>
Sent: Thursday, December 7, 2023 9:26 AM
To: HOFMANN Philip * ODE
<Philip.Hofmann@ode.oregon.gov>
Cc: Teresa Tonini <teresatonini@71five.org>
Subject: Re: Youth 71Five Ministries Application for the Community Investment Grant Program

Hello Philip,

Thanks for the information. Could you please send me the SIF?

Regards,

BUD AMUNDSEN, *Executive Director*
Youth 71Five Ministries | TRUST TO HOPE
529 Edwards Street | Medford, Oregon 97501 |
www.71Five.org
office (541) 779-3275 | *cell* (541) 301-0897 |
bud@71Five.org

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"Lord God, you are my hope. I have trusted you since I was young." Psalm 71:5 icb

On Dec 5, 2023, at 9:49 AM, HOFMANN Philip * ODE <Philip.Hofmann@ode.oregon.gov> wrote:

Good Morning Bud,

Please see attached for the breakdown of the funding streams for the grants that your organization had previously been awarded. Both of the Community Investment ("CI") Grant awards were funded via State General Fund Dollars.

There are a couple terms in the document that are defined as follows:

- YDO Youth Development Oregon
- SM Apply SurveyMonkey Apply
- CI Community Investment
- SFMA Statewide Financial Management Application
- SIF Subgrant Information Form

Please note that, as your organization has been determined to be ineligible to receive state funding through these grant programs, your organization is also ineligible to receive state funds as a subgrantee or subcontractor to another organization receiving state funds through these grant programs. I am working on putting together the information showing that those awards are also state funded, but I will likely need to send that information over tomorrow.

Thank you,

Philip (Phil) Hofmann (he/him)
Deputy Director of Procurement
Phone: (503) 559-2192
Clifton Strengths: Restorative | Learner | Analytical | Input | Strategic
Philip.hofmann@ode.oregon.gov |
www.oregon.gov/ode
Work Schedule: Mon-Fri 7-3:30

From: Bud Amundsen <bud@71five.org>
Sent: Monday, December 4, 2023 3:52 PM
To: HOFMANN Philip * ODE <Philip.Hofmann@ode.oregon.gov>
Cc: Teresa Tonini <teresatonini@71five.org>
Subject: Re: Youth 71Five Ministries Application for the Community Investment Grant Program

Hello Philip,

Thank you for getting back to me. Would you please pass along the documentation showing that no federal dollars were a part of the funding for these grants?

Thanks,

BUD AMUNDSEN, *Executive Director*
Youth 71Five Ministries | TRUST TO HOPE
529 Edwards Street | Medford, Oregon 97501 |
www.71Five.org
office (541) 779-3275 | *cell* (541) 301-0897 |
bud@71Five.org

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"Lord God, you are my hope. I have trusted you since I was young." Psalm 71:5 icb

On Nov 29, 2023, at 2:32 PM, HOFMANN Philip * ODE <Philip.Hofmann@ode.oregon.gov> wrote:

Hi Bud,

Apologies for the delay in responding to you. Thank you for your response to my prior email and continuing the dialogue so that ODE and Youth 71Five. The requirements of the RFA reflect the minimum qualifications for a recipient of the state

funds in question and apply to all applicants, regardless of religious affiliation. The grant in question does not involve any federal funds and so the RFRA does not apply.

Thank you,

Philip (Phil) Hofmann (he/him)
Deputy Director of Procurement
Phone: (503) 559-2192
Clifton Strengths: Restorative | Learner | Analytical | Input | Strategic
Philip.hofmann@ode.oregon.gov |
www.oregon.gov/ode
Work Schedule: Mon-Fri 7-3:30

From: Bud Amundsen <bud@71five.org>
Sent: Friday, November 17, 2023 4:40 PM
To: HOFMANN Philip * ODE <Philip.Hofmann@ode.oregon.gov>
Cc: Teresa Tonini <teresatonini@71five.org>
Subject: Re: Youth 71Five Ministries Application for the Community Investment Grant Program

Hello Philip,

Thank you for your last email. Could you give me a timeframe regarding your response? I want you to have the time to respond thoughtfully but I also want to let you know the waiting continues to put us in a challenging position. It's a serious issue that needs to be resolved for us but we also have two sub-recipients who have made commitments since receiving the award announcements and this puts them in a very tough position financially given their small size and budget.

Thanks,

BUD AMUNDSEN, *Executive Director*
Youth 71Five Ministries | TRUST TO HOPE
529 Edwards Street | Medford, Oregon 97501 |
www.71Five.org
office (541) 779-3275 | *cell* (541) 301-0897 |
bud@71Five.org

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"Lord God, you are my hope. I have trusted you since I was young." Psalm 71:5 icb

On Nov 14, 2023, at 6:32 PM, HOFMANN Philip * ODE <Philip.Hofmann@ode.oregon.gov> wrote:

Hello Bud,

Thank you for your response. I ask for your patience while I work on a more detailed, thoughtful, and meaningful response.

Until otherwise noted, the original termination of the award stands. If that decision changes, a formal notification will be provided.

All my best,

Philip (Phil) Hofmann (he/him)
Deputy Director of Procurement
Phone: (503) 559-2192
Clifton Strengths: Restorative | Learner | Analytical | Input | Strategic
Philip.hofmann@ode.oregon.gov |
www.oregon.gov/ode
Work Schedule: Mon-Fri 7-3:30

From: Bud Amundsen <bud@71five.org>
Sent: Tuesday, November 14, 2023 4:34 PM
To: HOFMANN Philip * ODE <Philip.Hofmann@ode.oregon.gov>
Cc: Teresa Tonini <teresatonini@71five.org>
Subject: Re: Youth 71Five Ministries Application for the Community Investment Grant Program

Hello Philip,

Please explain how the Oregon Department of Education working through the Youth Development Division is not discriminating against us as a protected religious organization when the structure of the question on this application is unanswerable for an organization that has legal protection to discriminate. If we answer, yes, we discriminate, we are removed from the application process. If we answer, no, we don't discriminate, then you claim we have made an inaccurate certification.

Also, please explain why the RFRA does not apply to these federal pass-through funds.

Thanks,

BUD AMUNDSEN, *Executive Director*
Youth 71Five Ministries | TRUST TO HOPE
529 Edwards Street | Medford, Oregon 97501 | www.71Five.org
office (541) 779-3275 | *cell* (541) 301-0897 | bud@71Five.org

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"Lord God, you are my hope. I have trusted you since I was young." Psalm 71:5 icb

On Nov 14, 2023, at 12:08 PM, HOFMANN Philip * ODE <Philip.Hofmann@ode.oregon.gov> wrote:

Good Afternoon Bud,

Based on your response and the terms of employment for Youth 71Five Ministries, the Oregon Department of Education working though the Youth Development Division has determined that your application did not meet minimum requirements.

The terms of the RFA required applicants to certify that it "does not discriminate in its employment practices, vendor selection, subcontracting, or service delivery with regard to race, ethnicity, religion, age, political affiliation, gender, disability, sexual orientation, national origin or citizenship status." It also required applicants to certify that the certifications made as part of the application "are truthful and accurate."

As ODE/YDD noted previously, your organization requires all staff and volunteers to affirm a "Statement of Faith" and to both "agree with" and "adhere to" that Statement of Faith. Your organization further requires that applicants for employment discuss their "Church" affiliation and attendance. You responded that "71Five does not discriminate in any way except as protected by law in the Religious Freedom Restoration Act for religious organizations."

However, the RFRA does not apply to this RFA, the RFA does not make any exceptions for RFRA, and your application did not include accurate certifications.

Because your application included inaccurate certifications and ODE/YDD's decision to award was based on inaccurate certifications, ODE/YDD will not proceed with an agreement with Youth 7iFive Ministries.

While this decision is final, ODE/YDD recognizes that Youth 71Five Ministries may have questions about ODE/YDD's decision. There is a strong preference for communication to be in writing and directed to me moving forward.

All my best,

Philip

Philip (Phil) Hofmann (he/him)
Deputy Director of Procurement
Phone: (503) 559-2192
Clifton Strengths: Restorative | Learner | Analytical | Input | Strategic
Philip.hofmann@ode.oregon.gov |
www.oregon.gov/ode
Work Schedule: Mon-Fri 7-3:30

From: Bud Amundsen <bud@71five.org>
Sent: Friday, October 13, 2023 11:01 AM
To: HOFMANN Philip * ODE <Philip.Hofmann@ode.oregon.gov>
Cc: Teresa Tonini <teresatonini@71five.org>
Subject: Re: Youth 71Five Ministries Application for the Community Investment Grant Program

Thank you, Phil.

I appreciate your work in bringing crucial support to young people!

Best Regards,

BUD AMUNDSEN, *Executive Director*
Youth 71Five Ministries | TRUST TO HOPE
529 Edwards Street | Medford, Oregon 97501 |
www.71Five.org
www.71Five.org
office (541) 779-3275 | *cell* (541) 301-0897 |
bud@71Five.org

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"Lord God, you are my hope. I have trusted you since I was young." Psalm 71:5 icb

On Oct 11, 2023, at 11:13 AM,
HOFMANN Philip * ODE
<Philip.Hofmann@ode.oregon.gov
> wrote:

Good Morning Bud,

Thank you for that information. I will be in contact with your team on any additional questions. I appreciate the timely response.

All my best,

Philip (Phil) Hofmann
(he/him)
Deputy Director of Procurement
Phone: (503) 559-2192
Clifton Strengths: Restorative | Learner | Analytical | Input | Strategic
Philip.hofmann@ode.oregon.gov |
www.oregon.gov/ode
Work Schedule: Mon-Fri 7-3:30

From: Bud Amundsen <bud@71five.org>
Sent: Tuesday, October 10, 2023 4:04 PM
To: HOFMANN Philip * ODE <Philip.Hofmann@ode.oregon.gov>
Cc: Teresa Tonini <teresatonini@71five.org>
Subject: Re: Youth 71Five Ministries Application for the Community Investment Grant Program

Hello Phil,

Thanks for reaching out for clarity. 71Five does not discriminate in any way except as protected by law in the Religious Freedom Restoration Act for religious organizations. Each item you mention is important to align ministerial staff and volunteers. We have been clear on this point in our interactions with staff, starting with Brenda Brooks, and have been welcomed into the work of improving the lives of Oregon's Opportunity and Priority Youth since 2017.

Best regards,

BUD AMUNDSEN, *Executive Director*
Youth 71Five Ministries | TRUST TO HOPE
529 Edwards Street | Medford, Oregon 97501 |
www.71Five.org
office (541) 779-3275 | cell (541) 301-0897 |
bud@71Five.org

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"Lord God, you are my hope. I have trusted you since I was young." Psalm 71:5 icb

On Oct 9, 2023, at 2:55 PM, HOFMANN Philip * ODE <Philip.Hofmann@ode.oregon.gov> wrote:

Good Afternoon Bud and Teresa,

I wanted to take a brief moment to introduce myself. My name is Philip Hofmann, and I am the Deputy Director of Procurement for the Oregon Department of Education ("ODE"). I am assisting my team member Bethany Moreland and our partners with the Youth Development Division ("YDD") in discussing a couple of items with your organization.

Your organization submitted an application for a grant under the Community Investment Request for Application and was conditionally awarded two grants. Under the terms of that grant application, YDD required all applicants to certify that, "Applicant does not discriminate in its employment practices, vendor selection, subcontracting, or service delivery with regard to race, ethnicity, religion, age, political affiliation, gender, disability, sexual orientation, national origin or citizenship status." A failure to provide that certification renders a grant application nonresponsive.

Your organization requires all staff and volunteers to affirm a "Statement of Faith" and to both "agree with" and "adhere to" that Statement of Faith. Your organization further requires that applicants for employment discuss their "Church" affiliation and attendance.

If any of the above information is incorrect, please let me know.

Taken individually and as a whole, your organization's terms of employment appear to violate

the certification that your organization provided as part of the grant application process. Under the terms of the application, that disqualifies your organization from receipt of a grant.

ODE Procurement Services strongly recommends that all activities that are or may take place under the pending grant awards be suspended until this concern has been resolved. Expenses for which you planned to be reimbursed under the pending grant awards may not be eligible to be compensated if the pending awards are terminated. While Brian and Paul are cc'd on this email, there is a strong preference for communication to be sent directly to myself and from there I will partner with YDD moving forward.

All my best,

Philip

Philip (Phil) Hofmann, MBA, OPBC (he/him)
Deputy Director of Procurement
Procurement Services | Office of Finance and Information Technology
Phone: (503) 559-2192
Clifton Strengths: Restorative | Learner | Analytical | Input | Strategic
Philip.hofmann@ode.oregon.gov |
www.oregon.gov/ode
Work Schedule: Mon-Fri 7-3:30

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Oregon achieves . . . together!