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UNITED STATES DISTRICT COURT

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; BRIAN DETMAN, Director of the Youth Development Division, in his individual and official capacities; and CORD BUEKER, JR., Deputy Director of the Youth Development Division, in his individual and official capacities,

Defendants.

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

**PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

Defendants' Response to Plaintiff's Motion for Preliminary Injunction, ECF 31 ("Resp."), does nothing to refute 71Five's right to an injunction. The Response misses its mark by mischaracterizing the relief sought, overlooking allegations in the Complaint, relying on outdated precedent, and analyzing this case as a facial challenge when 71Five only challenges the New Rule as applied to its religious practices. 71Five is likely to succeed on the merits of its claims, and deprivation of its constitutional rights constitutes irreparable harm.

The balance of the equities and public interest also tip sharply in favor of an injunction. The State singled out 71Five for unique scrutiny and punishment while giving a pass—and over $1.5 million—to secular applicants who publicly admit that they discriminate in the provision of services. Yet, incredibly, the State says there is nothing this Court can do about it. The State contends that even if it violated 71Five's constitutional rights, the Court can neither order reinstatement of the grants, Resp. 31–33, nor award any damages, *see* Defs.' Mot. to Dismiss, ECF 34. But the Court's power is not so limited; nothing in the law requires it to be a passive spectator to ongoing constitutional violations. The Court should restore justice and issue a preliminary injunction at its earliest opportunity.

## ARGUMENT

### I. 71Five seeks a prohibitory—not mandatory—injunction.

Defendants argue that 71Five requests a disfavored mandatory injunction because it seeks an order requiring Defendants to reinstate grant awards that were wrongfully rescinded. Resp. 7–9, 31–33. Defendants say that such relief "goes well beyond simply maintaining the status quo. . . ." *Id.* at 8. But this argument "severely mischaracterizes" the relevant status quo. *GoTo.com, Inc. v. Walt Disney*

*Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000). In fact, the Ninth Circuit recently held that applying a heightened mandatory-injunction standard in a situation like this amounts to reversible error. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.* ("*FCA*"), 82 F.4th 664, 685 (9th Cir. 2023) (en banc).

The purpose of a preliminary injunction is to preserve the "status quo *ante litem*." *Regents of Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 514 (9th Cir. 1984). "The status quo ante litem refers not simply to any situation before the filing of a lawsuit, but instead to the last uncontested status which preceded the pending controversy." *GoTo.com*, 202 F.3d at 1210 (internal citation omitted). "Actions required to reinstate the status quo ante litem do not convert prohibitive orders into mandatory relief." *E.g., Al Otro Lado v. Wolf*, 497 F. Supp. 3d 914, 926–27 (S.D. Cal. 2020); *see GoTo.com*, 202 F.3d at 1210. When the government rescinds a policy or benefit, an order reversing the rescission and reinstating the last uncontested status is not mandatory relief. *See S.A. v. Trump*, Case No. 18-cv-03539-LB, 2019 WL 990680, at *14 (N.D. Cal. Mar. 1, 2019).

Here, 71Five merely seeks to reinstate the last uncontested status, when the ministry was participating in the grant program and had two awards for the 2023-25 grant cycle. To be sure, Defendants may need to "perform several actions," Resp. 32, but treating reinstatement of the status quo ante litem as mandatory relief "would lead to absurd situations, in which plaintiffs could never bring suit once infringing conduct had begun." *GoTo.com*, 202 F.3d at 1210. Thus, 71Five only seeks a prohibitory injunction and its motion is not subject to an elevated standard.[1]

[1] 71Five would also satisfy the standard for a mandatory injunction because "the facts and law clearly favor the moving party." *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979) (citation omitted).

## II. 71Five is likely to succeed on the merits of its claims.

The ministry is likely to succeed on its claims under the First Amendment.

### A. Defendants' actions violate the Free Exercise Clause.

#### 1. The *Trinity Lutheran* line of cases control.

The Supreme Court's decisions in *Trinity Lutheran*, *Espinoza*, and *Carson* control, and Defendants cannot evade their application here. These cases affirm that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits" because of their "religious character," "religious activity," or "religious exercise." *Carson v. Makin*, 596 U.S. 767, 778–81 (2022) (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 476 (2020)).

Defendants admit that the grant program offers a benefit "to the public" and that they condition eligibility upon applicants' conduct "with respect to religion." Resp. 2, 11. Defendants also concede that they excluded 71Five because it requires employees and volunteers to "share its religious beliefs." *Id.* at 5–6. But they argue that the *Trinity Lutheran* line of cases does not apply because the New Rule does not impose a "categorical ban" on "any and all" religious applicants or expressly refer to the "religious character, affiliation, beliefs, or activities of the applicant itself." Resp. at 10–12. These arguments fail for two reasons.

*First*, it is no defense that Defendants permit *some* religious applicants to participate while excluding others with beliefs and practices that the government disfavors. In *Carson*, the State of Maine argued that its funding condition was constitutional because it did not exclude all religious applicants, but only those engaged in prohibited religious activity. 596 U.S. at 786–87. Defendants recycle Maine's argument, touting that they allowed four other "faith-based organizations"

to participate in the grant program and only excluded those engaged in a *practice* of preferring employees based on religion. Resp. 11.

But the Supreme Court rejected this argument, stating that it "misreads our precedents." *Carson*, 596 U.S. at 787. "[T]he prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination." *Id.* at 788. And the activity at issue here—maintaining a ministry composed of coreligionists—is not merely incidental to religion; it is a defining characteristic of religious organizations. *See, e.g.*, *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (one key factor in determining whether an organization is "religious" is "whether its membership is made up by coreligionists"); *E.E.O.C. v. Kamehameha Schs./Bishop Estate*, 990 F.2d 458, 462 (9th Cir. 1993) (considering whether schools inquired "into the substance of a teacher's beliefs" or required "teachers to maintain active membership in a church").

Defendants cannot evade the *Trinity Lutheran* line of cases simply because they exclude applicants based on this archetypal religious activity, not on religious status alone. *Carson*, 596 U.S. at 788. "Any attempt to give effect to such a distinction," the Supreme Court explained, would "raise serious concerns about state entanglement with religion and denominational favoritism." *Id.* at 787. Such concerns were realized when Defendants punished applicants with coreligionist beliefs and favored others without such convictions. *See* Pl.'s Verified Compl. ¶¶ 101–105, ECF 1.

*Second*, Defendants focus on the language of the New Rule while ignoring how they applied it. But 71Five does not assert a facial challenge; it challenges the New Rule *as applied* to its faith-based practice of preferring coreligionists. ECF 1 at

28. This is critical because the undisputed facts belie Defendants' assertion that the "beliefs of the various applicants made no difference" and that they "do[] not exclude applicants based on the religious character of the applicants or their activities." Resp. 11.

The truth is that 71Five's religious activities made *all* the difference. In fact, Defendants admit that they excluded 71Five from the grant program because it chooses to minister and speak through coreligionists. Resp. 6. And they further admit that the decision was made only after "a member of the [Medford] community" complained that "71Five has requirements *related to religion* for all employees and volunteers and required them to agree to a Statement of Faith." *Id.* (emphasis added). Defendants' generalized references to "hiring practices" or "employment practices" cannot obscure the fact that 71Five's religious beliefs and exercise both prompted and determined their application of the New Rule here.

Simply put, Defendants cannot limit this line of cases to facial challenges with strictly identical facts. The Supreme Court reiterated the general principle of these cases three times within five years, concluding its most recent decision by emphasizing that "*[r]egardless of how the benefit and restriction are described*," a policy violates the Free Exercise Clause if it "operates to identify and exclude otherwise eligible [applicants] on the basis of their religious exercise." *Carson*, 596 U.S. at 789 (emphasis added). These cases are decisive, and 71Five is likely to succeed on the merits of its Free Exercise Claim.

**2. Defendants' application of the New Rule also was not neutral or generally applicable.**

Defendants next argue that 71Five's stance on neutrality and general applicability departs from *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings*

*Coll. of Law v. Martinez*, 561 U.S. 661 (2010). Resp. 12–13. But last year an en banc panel of the Ninth Circuit declined to apply *Martinez* because it "says little about the Free Exercise Clause analysis at all," and "runs headlong into more recent Supreme Court authority refining what it means to be 'generally applicable.'" *FCA*, 82 F.4th at 685.

According to the Ninth Circuit's en banc decision in *FCA*, recent Supreme Court authority "sets forth three bedrock requirements of the Free Exercise Clause that the government may not transgress, absent a showing that satisfies strict scrutiny." *Id.* at 686. "First, a purportedly neutral generally applicable policy may not have a mechanism for individualized exemptions." *Id.* (quoting *Fulton v. City of Phila.*, 593 U.S. 522, 533 (2021)) (cleaned up). "Second, the government may not treat . . . comparable secular activity more favorably than religious exercise." *Id.* (quoting *Tandon v. Newsom*, 593 U.S. 61, 62 (2021)) (cleaned up). "Third, the government may not act in a manner hostile to religious beliefs or inconsistent with the Free Exercise Clause's bar on even subtle departures from neutrality." *Id.* (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 638 (2018)) (cleaned up). Defendants' application of the New Rule violated all three.

***System of Individualized Exemptions***. Defendants say that their application of the New Rule is generally applicable because they do not negotiate or allow any exceptions during the application process. Resp. 13–15. While Defendants admit that they *do* negotiate exceptions during the final grant agreement process, they argue that applicants who prefer coreligionists cannot "even get to that stage in the first place" because they are weeded out in the application process. *Id.* at 14. Defendants admit that they can "dispense" with certain requirements, but only do so in rare situations not applicable here. *Id.*

These arguments miss the point: Defendants' line-drawing decisions about when they will (or will not) dispense with evaluation rules, which requirements they will (or will not) negotiate, and at which parts of the process, are *themselves* purely discretionary, creating a *system* of individualized exemptions. Defendants unilaterally decide that some items—like insurance, budget, or regional matters—"may be negotiated," while other items like 71Five's constitutional rights "will not be negotiated." Decl. of Philip Hofmann in Supp. of Defs.' Resp. to Pl.'s Mot. for Prelim. Inj. ¶ 6, ECF 33. But these distinctions are not grounded in any statute or regulation; they were created at Defendants' discretion and could change at Defendants' whim. *See* ECF 1 ¶ 92. Because Defendants have unbridled discretion to draw these lines wherever they wish, a "system of individual exemptions" destroys general applicability and triggers strict scrutiny. *Fulton*, 593 U.S. at 535. Contrary to Defendants' argument, Resp. 15, this is true "regardless [of] whether any exceptions have [actually] been given." *Fulton*, 593 U.S. at 537.

***Unequal Treatment***. In any event, though the State claims "it has not yet exercised its discretion to grant exemptions, the record is replete with instances in which [it] has actually done so, and done so in a viewpoint-discriminatory manner." *FCA*, 82 F.4th at 688. Consider the successful applicants for the 2023-25 grant cycle. *See* Intent to Award, attached as Exhibit 1.[2] While Defendants scrutinized 71Five's website for any signs of religious discrimination (and punished 71Five for

[2] The Court can take judicial notice of documents published on government-run websites. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). The State published the list of successful applicants on its public website. *2023-2025 Youth Community Investment Grants*, OREGON.GOV, https://www.oregon.gov/youthdevelopmentdivision/communityinvestmentss/pages/2325cigrants.aspx (publishing a link to the list of successful applicants attached as Exhibit 1) (last visited May 3, 2024).

what they found), Resp. 6, they have allowed many successful applicants to openly discriminate in the provision of services based on race, ethnicity, gender, and national origin, in violation of the New Rule:

- Defendants awarded $220,000 to Ophelia's Place even though its mission is limited to helping girls. The FAQ section of its website poses the question, "Why not boys?" and explains that the organization serves "youth who have experienced girlhood at some point in their lives."[3]
- Defendants awarded $220,000 to the Black Parent Initiative even though its youth programs "serve African and African American families with children,"[4] and are "designed to 'Be the Healing' by empowering Black students and their families . . . ."[5]
- 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)."[6]
- Defendants awarded $75,479 to the Center for African Immigrants and Refugees Organization (CAIRO) even though its mission is to offer

[3] *Questions People Ask*, OPHELIA'S PLACE, https://www.opheliasplace.net/op-faqs (last visited May 3, 2024), attached as Exhibit 2.
[4] *Together We Can*, THE BLACK PARENT INITIATIVE, https://www.thebpi.org/together-we-can (last visited May 3, 2024), attached as Exhibit 3.
[5] *Sawubona*, THE BLACK PARENT INITIATIVE, https://www.thebpi.org/sawubona (last visited May 3, 2024), attached as Exhibit 3.
[6] *About Us*, CAPECES LEADERSHIP INSTITUTE, https://capacesleadership.org/about/ (last visited May 3, 2024), attached as Exhibit 4.

"programs, services, community organizing and collaborative leadership that create equitable opportunities for African refugees and immigrant children, youth and families to thrive."[7]

- Defendants awarded $220,000 to Adelante Mujeres even though its mission is to "focus on the needs of marginalized immigrant Latine women," touting that "[m]ore than 80% of Adelante Mujeres staff identify as Latine."[8]
- Defendants awarded $220,000 to Girls Inc. of the Pacific Northwest even though its "programming is designed for those who identify as girls regardless of their assigned sex at birth, those who are exploring their gender identity or expression, and/or those who are gender non-conforming or non-binary."[9]

Defendants went out of their way to scrutinize the statements on 71Five's website, Resp. 6, while giving the benefit of the doubt—and over $1.5 million—to secular organizations whose discrimination was on full display in their websites and organizational names. That triggers strict scrutiny.

***Lack of Neutrality***. The Free Exercise Clause "forbids subtle departures from neutrality." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (citation omitted). Defendants argue that the New Rule is facially

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[7] *Our Mission*, CTR. FOR AFRICAN IMMIGRANTS AND REFUGEES ORG., https://cairopdx.org/about-whoweare/#mission (last visited May 3, 2024), attached as Exhibit 5.
[8] *Our Story & Values*, ADELANTE MUJERES, https://www.adelantemujeres.org/our-story-and-values (last visited May 3, 2024), attached as Exhibit 6.
[9] *Leadership Council*, GIRLS INC. OF THE PACIFIC NORTHWEST, https://girlsincpnw.org/what-we-do/programs/leadership-council/ (last visited May 3, 2024), attached as Exhibit 7.

neutral and that the circumstances surrounding its adoption do not show religious hostility. Resp. 15–16. But once again, these arguments overlook the fact that 71Five challenges Defendants' *application* of the New Rule to its practice of preferring coreligionists. And the circumstances surrounding that application show a lack of neutrality.

For starters, the nondiscrimination condition is not grounded in any statute or regulation, and it omits religious protections found in analogous provisions governing Oregon employers. *See* 42 U.S.C. § 2000e-1(a) (religious exemption from Title VII); O.R.S. § 659A.006(4) (religious exemption from Oregon's employment nondiscrimination law). Defendants also acted on an informant's tip that 71Five requires employees and volunteers to agree with its statement of faith, Resp. 6, but they didn't apply similar scrutiny to ensure compliance from other applicants. And the State specifically called out 71Five's religious hiring practices as the sole reason for its decision. *Id.* at 6–7. It is simply wrong to say, as the State does, that the decision to rescind the grants "ma[de] no reference to the applicant's own religious practices or beliefs." *Id.* at 16. That's the *only* thing the State referenced; punishing the ministry for its religious practices was the whole point.

In the end, secular applicants got a pass even though they publicly admit to discrimination based on non-religious characteristics. And religious applicants can participate if they are willing to work and speak through people who lack—or even disagree with—their religious convictions. Defendants applied the New Rule in a way that only punished religious applicants who require faithful emissaries. Government action that imposes "gratuitous restrictions on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Lukumi*, 508 U.S. at 538 (cleaned up).

### 3. Defendants cannot satisfy strict scrutiny.

Defendants do not even try to argue that their actions can withstand strict scrutiny. *See* Resp. 18–20. For the reasons above, strict scrutiny applies and the State's actions "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Carson*, 596 U.S. at 780 (cleaned up). Defendants cannot rely on a "broadly formulated" interest in "equal treatment" or in "enforcing its non-discrimination policies generally," but must establish a compelling interest "in denying an exception" to 71Five Ministries in particular. *Fulton,* 593 U.S. at 541. Defendants did not carry that burden.

Instead, Defendants argue that they trigger only rational basis review and that the New Rule is rationally related to the State's "interest in ensuring that the programs and services it funds are delivered to youth in an inclusive environment." Resp. 18, 30. Providing youth with an inclusive environment may explain why the State applies a nondiscrimination rule to service delivery. Unlike the secular organizations identified above, this is not a problem for 71Five because it welcomes everyone to participate in its activities and services. ECF 1 ¶ 90. But applying that requirement to 71Five's *employment* practices does not advance the State's asserted interest in providing inclusive services to young people. To suggest that Christian employees and volunteers are incapable of providing such an environment just reveals Defendants' hostility toward religion. Thus, Defendants' actions do not even satisfy rational basis review, let alone strict scrutiny.

### B. Defendants' actions violate the church autonomy doctrine.

The New Rule violates the church autonomy doctrine by (1) interfering with 71Five's right to select *ministerial* employees and volunteers, and (2) prohibiting the ministry from preferring coreligionists for *non-ministerial* positions.

#### 1. Defendants punished 71Five for exercising its ministerial hiring rights.

Defendants argue that the ministerial exception is limited to an "affirmative defense" that only "a defendant" can invoke in response to a "claim or enforcement action." Resp. 20–22. Defendants also argue that 71Five suffers only indirect burdens and "fails to show that any of its staff or volunteer positions come within the exception, especially those charged with carrying out the programs funded by the Grants." *Id.* at 23. These arguments fall flat for three reasons.

*First*, Defendants mischaracterize the ministerial exception. The church autonomy doctrine and its ministerial component describe certain "rights" that the Religion Clauses jointly "protect." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188–89 (2012); *see Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).[10] Section 1983 authorizes a plaintiff to assert an "action at law" against governmental officials who cause a "deprivation of any rights . . . secured by the Constitution . . . ." 42 U.S.C. § 1983. This allows a plaintiff to vindicate "any" constitutional rights, including those protected by the

[10] The Supreme Court explained that "[b]y imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor*, 565 U.S. at 188–89. And allowing the government "to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.*

ministerial exception. 71Five may assert an action to vindicate these rights, and it properly did so here. *See* ECF 1 at 23 (citing § 1983).

Of course, if a religious organization finds itself as a defendant in a lawsuit or enforcement action, it may also assert the church autonomy doctrine or the ministerial exception as an "affirmative defense." *See Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017). But neither the Supreme Court nor the Ninth Circuit have ever held that these rights can *only* be asserted by a defendant as an affirmative defense. *See InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 413 F. Supp. 3d 687, 694 (E.D. Mich. 2019) (rejecting argument that the ministerial exception operates only as an affirmative defense and cannot support a cause of action). To the contrary, the Supreme Court has stated that "[t]he First Amendment outlaws" "*any* attempt by government to dictate *or even to influence*" a religious organization's internal affairs, including the selection of its ministers. *Our Lady*, 140 S. Ct. at 2060 (emphasis added). Defendants' proposed restriction on when and how 71Five can resist such governmental interference cannot be reconciled with the "broad principle" of religious autonomy recognized by the Supreme Court. *Id.* at 2061.[11]

*Second*, Defendants argue that the New Rule imposes only "indirect, conditional burdens on employment decisions involving ministers," Resp. 21, but this admission is fatal because "[t]he 'unconstitutional conditions' doctrine limits the government's ability to exact waivers of rights as a condition of benefits, even

[11] To support the proposition that the "ministerial exception is an affirmative defense," the Ninth Circuit in *Puri* cited a footnote from *Hosanna-Tabor* that addressed a separate question entirely: whether the ministerial exception deprives courts of jurisdiction or goes to the merits. *See Puri*, 844 F.3d at 1158 (citing *Hosanna-Tabor*, 132 S. Ct. at 709 n.4).

when those benefits are fully discretionary." *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006) (citations omitted); *see Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013) ("[W]e have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights.").

*Third*, Defendants say that 71Five claims "total immunity" from State laws, so 71Five must prove that "each particular position" qualifies for the ministerial exception. Resp. 22–23. But this is exactly backward. 71Five *does not* claim that every employee or volunteer is ministerial. *See* ECF 1 ¶¶ 158–159 (acknowledging that some positions may not qualify as "ministerial"). Yet even *one* ministerial position would require an injunction because the State forbids 71Five from preferring coreligionists for *any* position.

At a minimum, 71Five's Executive Director qualifies as a ministerial employee because the person in that position must "direct the entire program of 71Five," be the spiritual "embodiment of 71Five in the local community," and "maintain on all levels, the character of a sincere and mature Christian." ECF 1 ¶ 52; *see also* Compl. Ex. 5 at 2–5, ECF 1-5 (describing Executive Director's religious job duties and functions). And Defendants do not dispute that 71Five's board members and other employees—all of whom must affirm the ministry's Statement of Faith and undertake religious Core Responsibilities—have "job duties reflect[ing] a role in conveying the [ministry's] message and carrying out its mission." *Our Lady*, 140 S. Ct. at 2062 (quoting *Hosanna-Tabor*, 565 U.S. at 191–92). At this stage, it is enough that 71Five is likely to show that it has at least *some* ministerial employees.

#### 2. Defendants punished 71Five for exercising its right to prefer coreligionists in nonministerial positions.

Defendants violated the church autonomy doctrine beyond the ministerial exception. The church autonomy doctrine also broadly protects the ministry's freedom to make "internal management decisions," like personnel selection, based on its religious beliefs. *Our Lady*, 140 S. Ct. at 2060. The doctrine thus protects a religious organization's freedom to select personnel even when a position is non-ministerial. *See Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 656–57, 660 (10th Cir. 2002) (recognizing that the doctrine's "constitutional protection extends beyond the selection of clergy" to non-ministerial matters).

Defendants do not dispute that their application of the New Rule interferes with 71Five's selection of personnel—including *volunteers*. *See* Resp. 23–25. But again they argue that the church autonomy doctrine is a mere *defense* that limits the role of civil courts to decide "religious controversies." *Id.* at 24. No so. For the reasons explained above, *supra* Section I.B.1, the ministry may assert an action under § 1983 to protect its First Amendment rights, including those secured by the church autonomy doctrine. If 71Five were forced to work through individuals who reject its faith—as the New Rule requires—the ministry could no longer advance its mission or control its internal religious affairs. So the New Rule violates both the ministerial exception and the church autonomy doctrine more broadly. *Cf. Korte v. Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013) (Title VII's religious employer exemption is a "legislative application[ ] of the chuch-autonomy doctrine.").

### C. Defendants actions violate 71Five's right to expressive association.

Defendants' decision to condition participation upon the forced inclusion of nonbelievers likewise infringed on 71Five's First Amendment right "to associate

with others in pursuit of . . . educational [and] religious . . . ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000). The right to expressive association includes the "freedom not to associate" with people who "may impair the [group's] ability" to express its views. *Id.* at 647–48. So when an association expresses a collective message, the First Amendment prohibits the government from forcing the association to admit those who disagree with its message, seek to change that message, or express a contrary view. *Id.* at 647. The right applies if (1) "the group engages in 'expressive association,'" and (2) "[t]he forced inclusion" of a person "affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648. 71Five satisfies both elements.

Defendants do not dispute that "[r]eligious groups" like 71Five Ministries "are the archetype of" expressive associations. *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). And Defendants do not deny that application of the New Rule would force 71Five to work and speak through people who do not hold the same religious views and thus cannot express the same message. Courts must "give deference to an association's view of what would impair its expression," *Dale*, 530 U.S. at 653, and the ministry here sincerely believes that it can express its message "only through staff and volunteers who are willing and able to faithfully teach the Bible and relationally share the Gospel," ECF 1 ¶ 40.

The Response's arguments stumble out of the gate because 71Five's claim is governed by the general expressive-association analysis announced under *Dale*, not the unique test for limited public fora described in *Martinez*. *See Martinez*, 561 U.S. at 661, 680 (noting that "a less restrictive level of scrutiny" applies to speech in "limited public forums"). The State has not created a discrete limited public forum like a college campus in which 71Five's expression was restricted; rather, the New

Rule interferes with 71Five's expressive association in *any* forum, putting it to an ever-present choice between betraying its message or foregoing public benefits. *See Darren Patterson Christian Acad. v. Roy*, Civil Action No. 1:23-cv-01557-DDD-STV, 2023 WL 7270874, at *15 (D. Colo. Oct. 20, 2023) (applying strict scrutiny under *Dale* to a state funding condition).

In any event, *Martinez* does not contradict 71Five's claim. Unlike the law school's application of the "all-comers policy" in *Martinez*, here, Defendants have "singled out religious organizations for disadvantageous treatment." 561 U.S. at 684–85 (analyzing free speech and association claims together and describing cases in which "student groups had been unconstitutionally singled out because of their points of view"). In *Martinez*, the law school's "all-comers requirement dr[ew] no distinction between groups based on their message or perspective." *Id.* at 694. Here, Defendants have drawn distinctions based on 71Five's religious perspective. Defendants applied the New Rule to 71Five because the ministry chooses to express its message only through staff and volunteers who share its beliefs. But, as explained above, Defendants did not apply the New Rule to secular and religious groups that do not make that choice. Defendants are "impermissibly picking and choosing which viewpoints are acceptable and which are not under the pretext of prohibiting 'discriminatory acts.'" *FCA*, 82 F.4th at 712 (Forrest, J., concurring).

Simply put, "[t]he right to expressive association allows [the ministry] to determine that its message will be effectively conveyed only by employees who sincerely share its views." *Slattery v. Hochul*, 61 F.4th 278, 288 (2d Cir. 2023). Defendants' actions violated this right and triggered strict scrutiny by compelling 71Five to hire employees (and accept volunteers) who reject or oppose its message.

## III. 71Five satisfies the other preliminary injunction factors.

In First Amendment cases like this, 71Five Ministries' likelihood of success on even one of its claims is "determinative" and the Court may "confine [its] analysis to that factor." *Mobilize the Message, LLC v. Bonta*, 50 F.4th 928, 934 (9th Cir. 2022). But the remaining preliminary injunction factors—irreparable harm, balance of equities, and public interest—also all favor an injunction.

***Irreparable Harm.*** In their Response, Defendants ignore 71Five's primary argument that its "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). This harm independently warrants relief.

Instead, Defendants try to belittle the related harms that 71Five suffers, but these arguments miss the mark. To begin, Defendants argue that 71Five's exclusion doesn't cause prospective harm because the ministry allegedly "does not allege whether it plan [sic] to apply for future grants from [the State]." Resp. 32. But this overlooks 71Five's allegation that the ministry "has for years participated in grant programs administered by [Defendants], including the Youth Community Investment, and it intends to apply for and participate in future grant programs." Decl. of Bud Amundsen in Supp. of Pl.'s Mot. for Prelim. Inj. ¶ 92, ECF 20-1; *see also* ECF 1 ¶ 135. Defendants' own declarations affirm that the New Rule will be added to the certification page for future grants and that the State intends to solicit applications for Community Investment Grants again in 2025. Decl. of Brian Detman in Supp. of Defs.' Resp. to Pl.'s Mot. for Prelim. Inj. ¶¶ 13, 21, ECF 32. An injunction is required to ensure that 71Five can participate in future grants.

Next, Defendants argue that injunctive relief is unnecessary because the Court might issue a final decision on the merits of its 2023-2025 exclusion before

the application process begins for the *next* grant cycle. Resp. 33. But this does nothing to rectify Defendants' decision to strip 71Five of more than $400,000 in grant awards for the current grant cycle. 71Five cannot get through the current 2-year grant cycle without reducing its programs, staff, or both. Amundsen Decl. ¶ 97. The Court should issue a preliminary injunction to prevent Defendants from further "curtailing [the ministry's] mission." *Fulton*, 593 U.S. at 532.

***Balance of Equities and Public Interest.*** Defendants argue that the equities and public interest disfavor an injunction because they already disbursed grant funds, so reinstating 71Five's awards would require the State to come up with more money. Resp. 33. But Defendants do not dispute that it is "always in the public interest to prevent the violation of a party's constitutional rights." *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023) (citation omitted). And when a plaintiff has "raised serious First Amendment questions," the balance of hardships "tips sharply in the plaintiffs' favor." *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1154 (D. Or. 2020) (quoting *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007)) (cleaned up).

To be sure, protecting the public fisc is a matter of interest for every citizen, but courts have held that fiscal concerns do not trump the public interest served by protecting constitutional rights. *See Curtis v. Oliver*, 479 F. Supp. 3d 1039, 1147–48 (D.N.M. 2020) (holding that the state's interest in "avoiding drain on the public fisc" did not outweigh plaintiff's interest in "vindicating their constitutional rights"). And it is not uncommon for a court to order the government to make an unbudgeted payment to rectify a wrong, including attorneys' fees in constitutional cases. *See* 42 U.S.C. § 1988(b).

Finally, a superlative injustice would result if Defendants were allowed to apply the New Rule to unlawfully exclude 71Five but refuse to rectify that injury because the relevant funds have already been awarded to secular organizations that *openly discriminate in violation of the very same policy*. *See supra*, Section I.A.2. Defendants' sudden concern for the public fisc rings hollow when the State awarded $1.5 million to such organizations and, upon information and belief, has taken no action to recover those funds even though the State "monitors the grantee's programs" for compliance. Detman Decl. ¶ 11. The balance of equities and public interest favor an injunction.

## CONCLUSION

For these reasons, the Court should grant the motion and issue the requested preliminary injunction.

Respectfully submitted this 3rd day of May, 2024.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel of record who are registered users of the ECF system:

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 5,605 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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