No. 25-581

In the Supreme Court of the United States

St. Mary Catholic Parish, Littleton, Colorado, et al.,
Petitioners,

v.

Lisa Roy, in Her Official Capacity as Executive Director of the Colorado Department of Early Childhood, et al.,
Respondents.

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

BRIEF OF THE NOTRE DAME EDUCATION LAW PROJECT, ISLAM AND RELIGIOUS FREEDOM ACTION TEAM, JEWISH COALITION FOR RELIGIOUS LIBERTY, AND MANHATTAN INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are several organizations that work to advance religious freedom and other constitutionally protected liberties, promote educational opportunity, and protect the rights of religious educators and the families they serve.

The **Notre Dame Law School Education Law Project** is an academic program that seeks to enhance civil society, promote educational opportunity, and protect religious liberty by supporting educational pluralism through research, scholarship, and advocacy. Its work focuses in particular on parental choice and faith-based schools, domestically and abroad.[2]

The **Islam and Religious Freedom Action Team**, a part of the Religious Freedom Institute, amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims and people of all faiths. RFI more broadly engages in research, education, and advocacy on core issues like religious freedom and the freedom to live out one's faith.

The **Jewish Coalition for Religious Liberty** is an incorporated group of rabbis, lawyers, and professionals who practice Judaism and are committed to defending religious liberty. JCRL aims to foster cooperation between Jewish and other faith

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[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, and their counsel made a monetary contribution to its preparation or submission.

[2] The views expressed here do not necessarily reflect those of the University of Notre Dame or Notre Dame Law School.

communities in the public square. Representing members of the legal profession and as adherents of a minority religion, JCRL has a unique interest in ensuring that the First Amendment protects the diversity of religious viewpoints and practices in the United States.

The **Manhattan Institute for Policy Research** is a nonpartisan public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs supporting constitutionally protected liberties and opposing governmental overreach. MI files this brief because educational freedom—including access to religious schools—is key to the success of America's great cities.

* * *

Amici submit this brief to address the lower court's constrained view of the First Amendment and to raise attention to a growing tactic through which many states are seeking to undermine this Court's cases addressing religious discrimination in public-benefit programs. Colorado conditions participation in its universal preschool program in ways that force out many faith-based schools based on their religious exercise. This Court has repeatedly held that states may not exclude religious schools from otherwise available public aid. Laws like Colorado's reflect a coordinated effort to evade that command simply by excluding religious schools more subtly than in the past. *Amici* urge this Court to put an end to these ongoing efforts to minimize the Court's decisions and the constitutional principles on which they stand.

SUMMARY OF ARGUMENT

Three times in the last nine years, this Court has struck down efforts to exclude religious institutions from otherwise available funding programs. Each time, opponents of the Court's decisions have sought to riddle them with holes, requiring the Court to intervene to prevent its rulings—and the First Amendment's command against religious discrimination—from being so easily evaded. Regrettably, some states, like Colorado, still have not gotten the message. This Court must once again affirm that the First Amendment does not allow a state to deny otherwise available benefits to religious schools simply because it disagrees with how they live out their faith.

The rule announced in *Trinity Lutheran*, *Espinoza*, and *Carson* is straightforward: A state may not target "the religious for disfavored treatment" or "penalize religious activity" by denying organizations otherwise available benefits simply because of their religious exercise. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460-62 (2017) (quotation omitted). Yet, every step of the way, this Court has been required to reject efforts to reduce that rule to nothing more than the narrow facts of each case. In *Trinity Lutheran*, the Court invalidated Missouri's denial of state aid to religious schools for playground improvements. Three years later, the Court had to reject the idea that this announced only a bespoke First Amendment rule good for the playground resurfacing program in that case alone. *See Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464, 476-78 (2020). In *Espinoza*, the Court held that Montana could not deny school-choice scholarship money to children who

wished to attend religiously affiliated schools. Two years later, the Court had to return to reject the facile argument that states could nonetheless deny such aid to schools that actually taught in religious ways. *Carson v. Makin*, 596 U.S. 767, 789 (2022).

Now four years later, this case represents the latest—and an increasingly common—line of attack against those decisions. As Petitioners demonstrate, Pet. Br. 27-31, Colorado's universal preschool program denies access to otherwise available funding "on the basis of [Petitioners'] religious exercise." *Carson*, 596 U.S. at 789. It should therefore be subject to strict scrutiny. But the Tenth Circuit held that this burden on religious exercise does not implicate *Carson* and its predecessors based on a new distinction: Unlike those cases, Colorado's rules do not exclude schools "on the *explicit* basis that they [are] religious." Pet. App. 21a (emphasis added); *see also* Pet. 26-28 (noting similar moves in other courts). The Tenth Circuit is certainly right that these earlier cases dealt with laws that made religious discrimination explicit. But that is not an invitation for states to enact the same discriminatory exclusions more subtly.

Allowing Colorado's gambit would threaten to dramatically minimize this Court's recent cases. Indeed, this very tactic has been hailed as "a model for lawmakers" who find themselves "on the losing end" of *Carson* and wish to "avoid the consequences of [that] ruling."[3] From Colorado to Maine, Vermont, Maryland, New Hampshire, and elsewhere, lawmakers around the country have sought to

[3] Aaron Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, N.Y. Times (June 23, 2022), https://bit.ly/44mJt00.

"outmaneuver"[4] this Court, and the dictates of the First Amendment, by attaching a variety of religiously onerous—but supposedly neutral—conditions that would drive religious schools out of aid programs. Many of these restrictions supposedly fight discrimination and promote educational opportunity. But by restricting the ability of some religious schools to participate, these laws threaten critical educational opportunities for religious communities and the children in need they serve. States may have valid interests in regulating schools in certain ways or in preventing discrimination within them. But those seemingly benign ends cannot prevent a law from being subject to the scrutiny that this Court's cases demand. Nor may those goals be held up as a mask to hide the very same hostility to religious schools that this Court worked to eradicate in *Trinity Lutheran*, *Espinoza*, and *Carson*.

As Justice Kavanaugh described at oral argument in a case last year, *Trinity Lutheran*, *Espinoza*, and *Carson* "are some of the most important cases [this Court has] had." Tr. of Oral Argument 106, *Okla. Statewide Charter Sch. Bd. v. Drummond*, No. 24-394 (Apr. 30, 2025). Unfortunately, laws like Colorado's reflect a movement by hostile legislators to gerrymander public programs in ways to get around those cases once again. This Court must ensure that its cases and the First Amendment may not be evaded simply by clever legislative drafting.

[4] *Id.*

ARGUMENT

I. This Court Has Repeatedly Rejected States' Shifting Efforts To Exclude Religious Schools From Funding Programs.

Colorado's attempt to circumvent recent precedents is yet another example of a state trying to get around this Court's protections for religious liberty. For more than a hundred years, many states have sought to keep religious schools from taking part in public-benefits programs.[5] Over the past quarter century, this Court has worked repeatedly to end that unconstitutional discrimination. And, repeatedly, the Court has reinforced those decisions against efforts to evade them each step of the way.

The earliest and most sweeping efforts to deny public funding to religious schools emerged in the late nineteenth and early twentieth centuries, when many states adopted so-called Blaine amendments—no-aid provisions fueled by anti-Catholic bigotry and designed to exclude religious schools from all public

[5] *See, e.g.*, 105 Ill. Comp. Stat. 5/22-10 (1961) (prohibiting the payment of public funds to schools "controlled by any church or sectarian denomination"); Ga. Code Ann. § 20-2-642 (1961) (repealed 2005) (authorizing state tuition grants for only "nonsectarian" private schools); Ala. Code § 16-33A-7 (1978) (prohibiting funds for student grant program from being used "for religious, sectarian or denominational purposes"); Cal. Educ. Code § 56366.1 (1993) (permitting only "nonsectarian" schools to participate in publicly funded special education placements); *see also* Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 495 (2003) (describing anti-Catholic-school state laws from the nineteenth century).

support.[6] Legislatures and state courts routinely invoked these provisions to justify policies that allowed public funds to flow to virtually any private institution *except* religious ones. States also defended these exclusions by relying on the mistaken premise that the Establishment Clause demanded a rigid separation between public funds and religious institutions—a view this Court has since rejected. Whatever theory states offered, the result was the same: they systematically singled out religious schools for disfavored treatment.

This Court began to dismantle those discriminatory barriers to public funding more than twenty years ago. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court rejected the idea that the Establishment Clause prohibits states from allowing public money to support religious schools. There, the Sixth Circuit had struck down a modest school-voucher program for low-income families in Cleveland, solely because it allowed parents to choose to spend those vouchers on tuition at religious schools. *Id.* at 643-48. This Court disagreed. It held that when a state provides a neutral benefit that families may direct to any school of their choice—whether religious or not—"the program does not offend the Establishment Clause." *Id.* at 662-63.

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[6] *See* U.S. Commission on Civil Rights, *School Choice: The Blaine Amendments & Anti-Catholicism* 35-36 (2007). Members of this Court have long recognized the bigoted origins of state Blaine amendments. *See, e.g.*, *Espinoza.*, 591 U.S. at 497-508 (Alito, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting); *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality op.).

Zelman thus removed any doubt that states could permissibly offer benefits to both secular and religious schools alike. Yet some states still refused to do so and insisted on limiting funding programs to only non-religious schools. In a series of recent decisions, this Court made clear that inviting religious institutions to take part in neutral aid programs is not just constitutionally permissible; it is, in fact, constitutionally required. Nonetheless, after each decision, states continued to resist.

In 2012, when a Lutheran preschool in Missouri applied for a grant to resurface its playground, it was stymied by anti-religious animus deriving from that state's Blaine amendment. Missouri's Department of Natural Resources offered such grants through a program that was open to all qualifying nonprofit organizations—but a department official denied Trinity Lutheran Church's application out of fear that Missouri's Blaine amendment prohibited it from giving financial assistance to a religious school. *Trinity Lutheran*, 582 U.S. at 455-56. This Court held that such blatant religious discrimination violated the Free Exercise Clause. Once a state offers a benefit, the Court explained, it may not deny an applicant "simply because of what it is—a church." *Id.* at 464. The Court held that the First Amendment "protects religious observers against unequal treatment" in such aid programs and defends them from "laws that target the religious for special disabilities." *Id.* at 458 (alteration and quotation omitted).

Despite the broad terms of that rule, opponents of the Court's decision worked to limit *Trinity Lutheran* to its facts. Seizing on a footnote in which the Court reiterated the limited nature of the funding program

challenged in that case, *see id.* at 465 n.3, opponents insisted that states could still keep faith-based schools from receiving benefits that went to more "religious" aspects of a school than its playground.[7] Only a few years later, in *Espinoza v. Montana Department of Revenue*, the Supreme Court of Montana did just that—invoking that state's Blaine amendment to strike down a private-school tuition scholarship program because it allowed families to direct money to religious schools.[8] 591 U.S. at 470-73.

Montana defended that decision as ostensibly compatible with *Trinity Lutheran* because that case concerned only "the completely non-religious benefit of playground resurfacing" and not more centrally "religious" benefits like assistance paying tuition at a religiously affiliated school. *Id.* at 477 (quotation

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[7] *See, e.g.*, Alice O'Brien, *Symposium: Playground Resurfacing Case Provides Soft Landing for State "No Aid" Provisions*, SCOTUSblog (June 28, 2017), bit.ly/4pvJEP6; Press Release, ACLU Statement on Supreme Court Ruling in Case Involving Government Support for Church (June 26, 2017), https://bit.ly/4og2fxi ("We're disappointed in today's decision. . . . The court's ruling, however, focuses specifically on grants for playground resurfacing, . . . [not] religious activity."); Freedom From Religion Foundation, Tell the Department of Education that You Do Not Want to Pay for Religious Education (Sept. 13, 2018), https://bit.ly/45306y7 ("The Supreme Court's recent decision in *Trinity Lutheran* does not require or allow the Department of Education to fund religious education or religious activities.").

[8] The Montana Solicitor General tried unsuccessfully to persuade the Director of the Montana Department of Revenue that "categorically exclud[ing] religious entities from a neutral generally available benefit violates the religion clauses of the First Amendment." Letter from Dale Schowengerdt, Solic. Gen. of Mont., to Mike Kadas, Dir., Mont. Dep't of Revenue (Nov. 17, 2015), https://bit.ly/48AChQn.

omitted). Once again, this Court disagreed. It rejected Montana's maneuver and reiterated the breadth of the First Amendment's anti-discrimination rule: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 487. That rule, the Court explained, applies regardless whether a state has denied religious schools more auxiliary benefits (like playground resurfacing) or benefits that might be spent directly on the heart of their educational mission (like tuition). *Id.* at 477-78.

Notwithstanding the renewed clarity of the Court's rule, opponents again resisted it. Many seized on a potential distinction—noted but not endorsed by this Court in *Espinoza*, *see id.*—between states' refusal to offer aid based on an organization's religious *status* and their refusal to offer aid that an organization would put to religious *uses*.[9] Of course, even many critics of the Court's decision in *Espinoza* recognized that its constitutional rule was not likely limited to discrimination based on religious "status" alone.[10]

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[9] *See, e.g.*, Michael Bindas, *The Status of Use-Based Exclusions & Educational Choice After* Espinoza, 21 Fed. Soc. Rev. 204, 214 (2020) (discussing early reactions to *Espinoza*).

[10] *See, e.g.*, Nelson Tebbe, *Five Thoughts on* Espinoza, Am. Const. Soc. Expert F. (July 1, 2020), https://bit.ly/48xSvtP. Even dissenting members of this Court did not appear to see this as a meaningful distinction between *Espinoza* and a future case. As Justice Breyer wrote, joined by Justice Kagan, even if Montana law disqualified schools from state aid based on their religious identity, the question in the case ultimately "boil[ed] down to what the schools would *do* with state support." 591 U.S. at 527 (Breyer, J., dissenting); *see also id.* at 510-11 (Gorsuch, J., concurring) (criticizing status/use distinction as irrelevant).

Nonetheless, that is exactly how the State of Maine sought to cabin the ruling. For over 150 years, Maine has operated a tuition program that provides funds that allow families to send their children to schools of their choice.[11] Beginning in 1981, however, Maine required participating schools to be "nonsectarian." *Carson*, 596 U.S. at 774. Once *Espinoza* all but outlawed that religious exclusion, Maine pivoted in a last-ditch effort to retain it. Arguing that *Espinoza* had technically outlawed only discrimination based on a school's religious "identity" (or "status"), Maine redefined its concept of "sectarian" schools to focus on their religious *conduct*. "Sectarian" schools, Maine argued, were specifically those that taught "through the lens of [a particular] faith." *Id.* at 787. Thus, Maine argued that a school could "be" religious (e.g., associated with a church) and still receive funds; it just could not use that money to "do" religious things, like offer a genuinely faith-based education. *See generally* Br. of Resp't at 35-36, *Carson*, No. 20-1088.

Yet again this Court intervened to reject that ruse. In *Carson*, the Court held that Maine's purported distinction between a school's religious identity and the school's choice to teach in a religious way was artificial. Because providing a religious education "lie[s] at the very core of the mission of a private religious school," Maine's attempt to distinguish between religious status and religious conduct lacked any "meaningful application." *Id.* at 787-88. Maine's law—whether articulated in terms of a school's religious character or the school's religious actions—

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[11] Frank Heller, *Lessons from Maine: Education Vouchers for Students Since 1873*, at 1 (Cato Institute, Briefing Paper No. 66, 2001), https://perma.cc/TZL7-2AK3.

operated "to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 789. Under either formulation, "[t]hat is discrimination against religion" that the Constitution prohibits. *Id.* at 781.

* * *

In the face of repeated efforts to limit the consequences of the First Amendment's demands, this Court's response has always been the same: States must justify under strict scrutiny any effort to structure their benefit programs to have the "effect" of "'disqualify[ing] some private schools' from funding 'solely because they are religious.'" *Id.* at 780 (quoting *Espinoza*, 591 U.S. at 487).

II. This Court Must End A Widespread Tactic Designed To Evade This Court's Decisions.

Despite the Court's consistent instruction against forcing religious schools out of public-aid programs, opponents of that rule persist in their efforts to evade it. As with *Trinity Lutheran* and *Espinoza* before it, Colorado and many other states now strain to confine *Carson*'s rule narrowly to its facts—searching for new ways to deny religious schools otherwise available aid. Done in the name of a seemingly benign interest in preventing discrimination, these denials actually stifle the goal of inclusion by excluding certain kinds of schools altogether. These efforts appear only to be accelerating, and this Court must again uphold the First Amendment's protections.

A. Since *Carson*, States Like Colorado Have Reworked Their Public-Aid Programs To Exclude Religious Schools.

In the wake of *Carson*, states across the country have pursued a variety of supposedly neutral methods to keep religious schools out of funding programs. Many opponents of the decision insisted that states should simply abandon private-school funding programs altogether rather than let religious schools take part in them. Illinois, for example, allowed its school-voucher program to lapse following *Carson*—a move urged by state representatives and others who insisted that public money must not be used to "fund religion."[12] Similarly, in New Jersey and Pennsylvania, opponents successfully defeated private school-choice bills by warning of the supposed

[12] Press Release, Rep. Jan Schakowsky, Schakowsky Leads Members of IL Cong. Delegation in Joint Statement Urging State Lawmakers to Oppose Any Extensions of the Inv. in Kids Tax Credit Scholarship Program (Nov. 6, 2023), https://bit.ly/3KlExSm; *see, e.g.*, Memorandum from Benjamin M. Campbell & Caitlyn Galloway to Carol Ammons, State Rep. (Nov. 6, 2023), https://bit.ly/4rjRGvJ (urging end to program because most money went to "religious schools" that "discriminate"); *Take Action: Sunset Invest in Kids*, League of Women Voters of Ill. (Oct. 26, 2023), https://bit.ly/4ooc78h (similar).

dangers in allowing public aid to flow to religious schools.[13] Calls like these echoed elsewhere.[14]

Of course, not all opponents of *Carson* have been willing to dismantle school-choice programs in order to keep out the religious. Instead, momentum has quickly gained to find ways that states can minimize the impact of *Carson* by following only its narrowest terms. Days after the decsion, one prominent essay in the *New York Times* urged states that had funding programs to simply "outmaneuver the court and avoid the consequences of [the] ruling" by finding new ways to limit the participation of religious schools.[15] The tactic advocated there—and seized on by others—is to narrowly interpret *Carson* in the same way as the

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[13] Hannah Gross, *Tax Credits for Private School Tuition Plan Scrapped*, NJ Spotlight News (June 17, 2024), https://bit.ly/3KfhVD5; *see also* Dana DiFilippo, *"School Choice" Bill Is Effort to Create a Voucher Program in New Jersey, Critics Say*, N.J. Monitor (Apr. 4, 2024), https://bit.ly/3YtU8Tj (noting concerns that "schools can impose their religious beliefs on [others]"); Julie Borst, *We Oppose the School Voucher Bill A4144/S3035*, Save Our Schs. NJ (Apr. 2, 2024), https://bit.ly/3LYGODv (similar); Brooke Shultz, *Pennsylvania School Choice Program Criticized as 'Discriminatory' as Lawmakers Return to Session*, WESA (Dec. 12, 2023), https://bit.ly/3KaNbDi.

[14] *See, e.g.*, *Wisconsin's Voucher Fetish Leaves Public Schools to Fend for Themselves*, Freedom From Religion Found. (Oct. 30, 2024), https://bit.ly/4puL5wK (criticizing Wisconsin's school-voucher spending because it funds "sectarian instruction" by "religious schools [that] discriminate on their arbitrary principles and waste taxpayer dollars"); Sara Hutchinson, *Supreme Court Ruling Brings an Altered Legal Landscape for School Choice*, The Hechinger Report (July 1, 2022), https://bit.ly/4q4DWUl (reporting efforts to end programs in Maine, Vermont, and New Hampshire).

[15] Tang, *supra* n.3.

decision below: as applying only to instances of *explicit* religious discrimination. Pet. App. 21a. Specifically, the suggestion is that states who resist *Carson* may still pressure religious schools out of funding programs by imposing religiously onerous conditions on them—that is, to do "indirectly" exactly what this Court prohibited states from doing directly.[16] That strategy, in the words of one proponent, might ensure that *Carson* becomes "less of a blessing for religious organizations[] than it at first appears."[17]

Supposedly neutral nondiscrimination laws like Colorado's have become a primary tool in this arsenal. Maine's own response to its loss in *Carson* has led the way. Even as *Carson* was pending, Maine worked to undercut the expected decision. Anticipating that it would no longer be able to ban religious schools from its tuition program explicitly, Maine shifted to doing so more subtly. It amended the nondiscrimination laws that apply to schools participating in the program to impose a series of untenable conditions that severely restrict the ability of religious schools to take part. It added conditions barring admissions or financial-aid decisions made on the basis of religion,[18] requiring schools to allow students to express dissenting religious views in the classroom,[19] and

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[16] Derek W. Black, *When Religion and the Public-Education Mission Collide*, 132 Yale L.J. F. 559, 563 (2022); *see also* Tang, *supra* n.3.

[17] James G. Dwyer, *Pushing States to Attach Regulatory Strings to Vouchers*, Canopy F. (Nov. 4, 2022), https://bit.ly/48dkm0U.

[18] *See* An Act to Improve Consistency in Terminology and Within the Maine Human Rights Act, 2021 Me. Laws 761, § 19 (as codified at Me. Rev. Stat. tit. 5 § 4602(1)(D), (E)).

[19] *See id.* (as codified at Me. Rev. Stat. tit. 5 § 4602(5)(D)).

eliminating a long-standing exemption that allowed religious organizations to operate in accordance with their beliefs regarding sexuality and gender.[20]

Added up, Maine's new restrictions do exactly what *Carson* forbade: They "operate[] to . . . exclude otherwise eligible schools [from the tuition program] on the basis of their religious exercise." *Carson*, 596 U.S. at 789. That was their very point. Indeed, Maine's political leaders openly advertised that the goal of these amendments was to dodge the effects of *Carson*. In its brief to this Court, Maine opined that those changes meant it was "purely speculative as to whether any religious school would accept public funds" even if it lost the case. Br. of Resp't at 54, *Carson*, No. 20-1088. The day *Carson* was decided, Maine's Attorney General denounced the ruling, condemned schools that "promote a single religion," and accused them of fostering "bigotry."[21] He promised to work with political leaders "to address the Court's decision and ensure that public money" would not flow to such schools.[22] Days later, Maine's Speaker of the House boasted that legislators had already done so by changing these rules in "anticipat[ion of] the ludicrous decision from the far-right SCOTUS."[23]

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[20] *See id.* (repealing Me. Rev. Stat. tit. 5 § 4602(4)).

[21] Press Release, Statement of Maine Att'y Gen. Aaron Frey on Supreme Court Decision in *Carson v. Makin* (June 21, 2022), https://bit.ly/3JVqymf.

[22] *Id.*

[23] *St. Dominic Acad. v. Makin*, 744 F. Supp. 3d 43, 54 (D. Me. 2024). These amendments are currently the subject of litigation challenging them as violations of the Free Exercise Clause. *See St. Dominic Acad. v. Makin*, No. 24-1739 (1st Cir. filed Aug. 16, 2024).

Maine's response to *Carson* has been hailed as "a model for lawmakers elsewhere" who find themselves "on the losing end of [the] case" and wish to avoid its consequences.[24] Other states proposed bills to the same effect. Maryland, for example, passed supposedly neutral antidiscrimination rules much like Maine's, which were similarly praised for limiting *Carson*'s reach.[25] As *Carson* was pending, Democratic legislators in New Hampshire mirrored these same approaches by introducing a bill that would have eliminated an exemption for religious organizations from certain antidiscrimination laws—an exemption that is necessary to prevent many schools from having to choose between participating in funding programs or exercising their religious beliefs.[26] That bill was defeated in the Republican-controlled legislature out of concern that it impermissibly "target[ed] religious schools,"[27] though some legislators in the state continue their efforts to limit the participation of religious schools in funding programs.[28]

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[24] Tang, *supra* n.3; *see also* Aidan Reid, *Protecting Students Following the* Makin v. Carson *Decision*, The Century Found. (Sept. 13, 2022), https://bit.ly/48H3sI9 ("[F]or those who did not welcome the Supreme Court's ruling, Maine lawmakers' workaround of *Makin v. Carson* proves to be a useful lesson in policy adaptation.").

[25] Aaron Tang, *Who's Afraid of* Carson v. Makin*?*, 132 Yale L.J. F. 504, 527 (2022).

[26] *See* Ethan Dewitt, *Bill to Expand Anti-Discrimination Statute to Private Schools Hits Opposition*, New Hampshire Bulletin (Feb. 22, 2022), https://bit.ly/4rmjIXu.

[27] *Id.*

[28] *See, e.g.*, Mitchell Scacchi, *Regulatory Creep Is Coming for EFAs*, Josiah Bartlett Ctr. for Pub. Policy (Jan. 12, 2024), https://bit.ly/3KE6FjW.

Elsewhere, opponents of *Carson* have turned to other ostensibly neutral conditions to keep out the religious. Vermont—whose tuition program closely mirrors Maine's—is a telling case. There, like in Maine, legislators first attempted to stymie religious schools by imposing nondiscrimination provisions and restrictions on religious instruction as *Carson* was pending.[29] But supporters rightly noted that those efforts "risk[ed] possible judicial invalidation."[30] They urged lawmakers to "table any legislation" until after the decision, when "the legal landscape—and the roadmap to enacting a durable" barrier against "subsidize[d] religious instruction"—would be clearer.[31]

After *Carson*, Vermont legislators reacted with the same outrage as those in Maine.[32] Months after the decision, local news reported that the Vermont statehouse was "gearing up for a pitched debate over how best to respond to [the] ruling," as "the prospect of public dollars going to religious schools is an uncomfortable one" for many in the state.[33] The chair

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[29] *See* Letter from Harrison Stark, Staff Att'y, ACLU of Vermont, to Vermont House Comm. on Educ. (Apr. 5, 2022), https://bit.ly/3JYl4qR.

[30] *Id.*

[31] *See id.*; Letter from Sue Ceglowski, Exec. Dir., Vermont Sch. Bds. Ass'n, et al. to Senate Educ. Comm. (Feb. 23, 2022), https://bit.ly/3XihQ4s (warning of "morass" of legal problems).

[32] And the state, like Maine, now faces a lawsuit for targeting religious schools. *See Mid Vermont Christian School v. Saunders*, 151 F.4th 86, 96 (2d Cir. 2025) (remanding with instructions to grant a preliminary injunction to the plaintiff religious school on its First Amendment free-exercise claim).

[33] Peter D'Auria, *What Will Vermont Lawmakers Do About Religious Schools?*, VTDigger (Dec. 28, 2022), https://bit.ly/49BxDTi.

of the state's Senate Committee on Education opined, "I believe the majority of Vermonters do not want public dollars going to religious schools."[34] A number of responses were proposed by advocates—including eliminating Vermont's program, allowing in only a narrow set of tightly regulated schools that would closely resemble secular public schools, or attaching religiously onerous nondiscrimination conditions like in Maine and Maryland.[35] Ultimately, Vermont added a grandfather clause that had the effect of removing *all* religious schools from the program. Namely, it passed a law excluding schools from the tuition program unless at least twenty-five percent of their student body had received publicly funded tuition benefits during the 2023–2024 school year—that is, shortly after religious schools became eligible to participate in the first place.[36] That eliminated every single religious school from the program, leaving a small group of only secular private schools instead.[37] And elsewhere, states are considering other supposedly neutral methods to limit *Carson* by

[34] *Id.* (quoting Sen. Brian Campion).

[35] Letter from Falko Schilling, Advoc. Dir., ACLU of Vermont, to Vermont House Comm. on Educ. (Jan. 11, 2023), https://bit.ly/4aFVp0L.

[36] Vt. Stat. Ann. tit. 16 § 828(a)(2)(D).

[37] Corey McDonald, *Vermont's New Education Law Signals an End to State Funding for Religious Schools*, VTDigger (Aug. 20, 2025), https://bit.ly/4aclrsf (all 12 previously participating religious schools rendered ineligible, leaving 18 secular schools); *see also Act 73 of 2025*, State of Vermont Agency of Education https://bit.ly/48nZHHB (last visited June 23, 2026).

pressuring many religious schools out of funding programs.[38]

Colorado's own program does just that. *See* Pet. Br. 14-15; Pet. App. 11a. To be sure, the Tenth Circuit is right that, in the wake of *Carson*, legislative efforts like Colorado's are not so brazen as to *explicitly* exclude religious schools from public funding programs.[39] But nothing in this Court's cases—or the

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[38] Legislators in Iowa and Tennessee, for example, recently proposed amendments to school-choice laws that would require schools to employ state-licensed teachers, a requirement that would threaten faith-based schools that employ clergy or other unlicensed instructors for certain courses. *See* S.B. 1249, 114th Gen. Assemb., Reg. Sess. §§ 2, 3 (Tenn. 2025); S.F. 485, 91st Gen. Assemb., Reg. Sess. § 3 (Iowa 2025). Minnesota has even tried to defend a rule denying certain funding to schools that require statements of faith because it does not "categorically" exclude all religious schools. *See Loe v. Jett*, 796 F. Supp. 3d 541, 568-69 (D. Minn. 2025). That ruse has failed thus far, and it obviously violates *Carson*—a case which itself rejected Maine's exclusion of some, even if not all, schools based on their religious exercise. *See id.*

[39] Remarkably, there are also still dozens of explicit restrictions against religious activities in publicly funded pre-K programs around the country, as well. *See* Nicole Stelle Garnett, et al., *The Persistence of Religious Discrimination in Publicly Funded Pre-K Programs*, Manhattan Institute (Jan. 21, 2025), https://bit.ly/4pECM2e; *see also* Protecting Religious Organizations from Discrimination, ReligiousEquality.net (last visited June 23, 2026) (cataloging hundreds of religious exclusions in public-benefits programs following *Carson*).

When challenged, some states have defended even these explicit exclusions by attempting to limit *Carson* in various ways. *See, e.g.*, *Loffman v. Cal. Dep't of Educ.*, 119 F.4th 1147, 1168-69 (9th Cir. 2024) (rejecting California's effort to "distinguish between government contracting and the provision of public benefits" for purposes of *Carson*). These defenses only underscore

First Amendment—invites states to push religious believers out of these programs by simply acting covertly. Just as the Court rejected superficial efforts to cabin *Trinity Lutheran* and *Espinoza* to their facts, it must do so again here. And it must make clear that the First Amendment offers no less protection against religious discrimination that is accomplished covertly.

B. The Damaging Effects Of Laws Like Colorado's Betray Their Invidious Goals.

As in Colorado, a number of these new restrictions are defended on the notion that they fight discrimination and promote equality in educational opportunity. But by severely restricting the ability of religious schools to participate in funding programs, these laws in fact *inhibit* those very goals. Indeed, the demands states like Colorado make effectively prevent many religious schools from accessing vital resources offered to others—and directly threaten educational opportunities that cannot be replaced for many communities and the children they serve.

Religious schools are vital pillars of faith communities. Consider, for example, the Catholic tradition of St. Mary's. According to Catholic teaching, parents have an obligation to educate their children in the Catholic faith from "the child's earliest years"—a duty which includes a calling to "choos[e] schools that

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the resistance in many states to actually upholding this Court's First Amendment rulings. *See also* Press Release, Becket Fund for Religious Liberty, Wisconsin High Court Ends State's Crusade Against Catholic Charities (Dec. 15, 2025), https://bit.ly/48QbQXn (reporting rejection of Wisconsin's efforts to further litigate against this Court's decision in *Catholic Charities Bureau, Inc. v. Wis. Labor & Indus. Review Comm'n*, 605 U.S. 238 (2025)).

will best help them in their task as Christian educators."[40] Catholic schools, correspondingly, must provide "the principal assistance to parents in fulfilling" this duty.[41] Indeed, Catholic schools are part of "the life of the Church" itself, and the "Church's mission" is to "penetrate[] and inform[] every moment of [the school's] educational activity."[42] In the United States in particular, Catholic schools have long stood as a bulwark against outright hostility that Catholic children suffered in public schools in many communities, particularly in the 19th century as their families immigrated to the young country.[43]

This calling to religious education is shared by many other faiths, including other minority religions whose schools have been vital to their very preservation. "Transmitting Jewish values through education," for example, "is one of the central and timeless imperatives captured in Judaism's most sacred texts."[44] Thus, for over a century, Orthodox day schools have served as the American Orthodox Jewish community's "critical setting for the transmission" of Judaism and Jewish values.[45] Indeed, Orthodox day schools have been "far and away the greatest

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[40] Catechism of the Catholic Church ¶¶ 2223, 2226, 2229.

[41] Code of Canon Law, Can. 796.

[42] Holy See, Congregation for Catholic Education, *The Identity of the Catholic School for a Culture of Dialogue* ¶ 21 (2022).

[43] *See, e.g.*, Margaret F. Brinig & Nicole Stelle Garnett, Lost Classroom, Lost Community: Catholic Schools' Importance in Urban America 11-18 (2014).

[44] Letter from Orthodox Union to N.Y. Educ. Dep't 2 (Aug. 28, 2019), https://perma.cc/7PV3-4RV4 (citing Deuteronomy 6:7).

[45] Jack Wertheimer, *Jewish Education in the United States: Recent Trends and Issues*, 99 Am. Jewish Year Book 3, 17 (1999).

guarantor of Jewish continuity" in the United States.[46] The same is true for Islamic schools, which since the earliest days of colonial America, grew informally to "teach, learn, and maintain the integrity of Islam," even "within [the] brutal system of slavery" in which Muslims from Africa lived.[47] Today, Islamic schools are central not only to teaching Islam but indeed to preserving Islamic identity and combatting the alienation that Muslim children often experience in other schools.[48]

Laws like Colorado's threaten to deny religious communities access to these schools by effectively forcing many of them out of public-support programs. The central purpose of a religious school is to integrate faith with learning. Indeed, "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of . . . a private religious school." *Carson*, 596 U.S. at 787 (quotation omitted). In the Catholic tradition, for example, the "special character of the Catholic school . . . is precisely the quality of the religious instruction integrated into the education of the pupils."[49] So too for Islamic schools, whose "very

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[46] Mordechai Besser, A Census of Jewish Day Schools in the United States 2018–2019, at 4-5 (2020), https://bit.ly/3mOD2xW.

[47] Zakiyyah Muhammad, *Islamic Schools in the United States: Perspectives of Identity, Relevance and Governance*, *in* Muslims in the United States 95, 109-10 (2003).

[48] *See* Charles L. Glenn, Muslim Educators in American Communities 117-22 (2018).

[49] Pope John Paul II, *Catechesi Tradendae: On Catechesis in Our Time* ¶ 69 (1979).

essence" is "the teaching of Islam."[50] The same holds for Jewish schools.[51] And likewise for many others.[52]

Although the many ways a religious school might pursue that goal vary widely, each school must have the ability to shape the core structures that fulfill its religious mission—including decisions about who will lead the school, how the school will teach, what students it will serve, and how those within the school community are expected to comport themselves. To pursue a *religious* educational mission, a school must be able to make these decisions *in accordance with that religion*. A religious school cannot simply refrain from making the faith-based choices that states like Colorado now deny it.

Take one example. Colorado and other states have imposed nondiscrimination conditions barring admissions decisions made on the basis of religion or otherwise requiring participating schools to give all students an "equal opportunity" to enroll. *See, e.g.,* Pet. Br. 5. These ostensibly neutral conditions uniquely deprive a religious school of the basic freedom to ensure that its community of learners aligns with the school's religious mission. That demand is particularly onerous for schools whose

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[50] Karen Keyworth, *Inst. for Soc'l Policy & Understanding, Islamic Schools in the United States* 5 (2011), https://bit.ly/3jUMSMR.

[51] *See*, e.g., Gilbert Klaperman, The Story of Yeshiva University 20-21 (1969) (discussing synthesis of Judaic and secular studies in Orthodox schools).

[52] *See, e.g.*, Aum School, https://aum.school (last visited June 23, 2026) (non-profit Hindu-American organization dedicated to "fill[ing] the need for Dharmic values in early childhood and elementary education by designing a curriculum integrated with mainstream subjects").

mission includes preserving a religious tradition not otherwise represented in the broader community. Jewish day schools, for example, retain exclusively Jewish enrollment with few exceptions.[53] This is not done to "discriminate against" other communities. Rather, it is because a central, necessary purpose of Jewish education is to "ensur[e] the continuity of Jewish life and culture" in the United States.[54] Many schools from other faith traditions share a similar religious need.[55] And even schools that enroll children of all faiths must be able to ensure that their families understand and support the school's particular religious mission, Pet. Br. 12-14, lest it be undermined by those opposed to it.[56]

Decisions like these are inextricably linked to what it means to be a religious school in the first place. By denying religious schools the ability to make those central decisions, laws like Colorado's effectively order them to forgo valuable aid or stop being religious. That demand is no less discriminatory because it does not

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[53] Alex Pomson & Jack Wertheimer, *Inside Jewish Day Schools: Leadership, Learning & Community* 2, at 1 (2022).

[54] *Id.* at 4.

[55] *See, e.g.*, Sufia Azmat & Leila H. Shatara, Practitioners Note: *The Council of Islamic Schools in North America*, 4 J. Educ. in Muslim Societies 116, 117 (2023) (discussing mission of Islamic schools to "strengthen their children's Muslim identity"); Kathleen Porter-Magee, *Catholic on the Inside: Putting Values Back at the Center of Education Reform* 6 (2019), https://bit.ly/3A1zFHS (discussing growth of Catholic schools in response to open Catholic hostility in 19th century public schools).

[56] *See, e.g.*, *The Identity of the Catholic School for a Culture of Dialogue*, *supra* n.42, at ¶¶ 38–44 (discussing requirements to ensure that the "whole school community is responsible for implementing the school's Catholic educational project").

explicitly deny religious schools the right to participate. And, worse still, that exclusion cannot be squared with the very justifications many states offer for imposing these supposedly neutral requirements: promoting educational access for students and families of *all* stripes.

Ultimately, no one benefits from these efforts to deny religious schools otherwise available aid. Of course, those schools—and the religious groups who depend on them—suffer. So, too, do their broader communities for whom religious schools provide great benefit, even for nonbelievers.[57] And so does the First Amendment itself, which specifically aims "to foster a society in which people of all beliefs can live together harmoniously." *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 38 (2019). Discriminating against religious schools does exactly the opposite by treating the faithful as second-class citizens and limiting educational opportunities. The First Amendment does not tolerate that result. *See generally Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 852-53 (1995) (describing "our Nation's long tradition of allowing religious adherents to participate on equal terms in neutral government programs").

CONCLUSION

This Court has repeatedly worked to ensure that states do not exclude religious schools from public-

[57] *See, e.g.*, Brinig & Garnett, *supra* n.43; Michael Bindas, *The Once and Future Promise of Religious Schools for Poor and Minority Students*, 132 Yale L.J. F. 529 (2022); *cf. Zelman*, 536 U.S. at 682 (Thomas, J., concurring) ("school choice programs . . . provide the greatest educational opportunities for . . . children in struggling communities," including those "most in need of educational opportunity").

benefits programs "because of their religious exercise." *Carson*, 596 U.S. at 781. This Court should safeguard that rule and prevent the many ongoing efforts to outfox this Court by simply discriminating more subly than states might have done in the past.

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