NO. 25-581

IN THE
Supreme Court of the United States

ST. MARY CATHOLIC PARISH IN LITTLETON, ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD, DANIEL SHELEY, LISA SHELEY, AND THE ARCHDIOCESE OF DENVER,

Petitioners,

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF EARLY CHILDHOOD, AND DAWN ODEAN, IN HER OFFICIAL CAPACITY AS DIRECTOR OF COLORADO'S UNIVERSAL PRESCHOOL PROGRAM,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE PIONEER NEW ENGLAND LEGAL FOUNDATION AND MASSACHUSETTS FAMILY INSTITUTE IN SUPPORT OF PETITIONERS

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PioneerLegal, LLC (PioneerLegal), doing business as Pioneer New England Legal Foundation (the "Legal Foundation"), is a nonprofit, nonpartisan legal research and litigation entity[1]. The Legal Foundation seeks to promote open and accountable government, free enterprise, property rights, and educational opportunities, through legal action and public education.

The Legal Foundation has a longstanding commitment to protecting educational opportunities, promoting parental choice, and ensuring that public programs operate in a manner consistent with constitutional guarantees of equal treatment and religious neutrality. The Legal Foundation has worked extensively across New England on legal and policy issues affecting school choice, including the treatment of religious schools within publicly funded education programs. Because the proper resolution of this case will directly affect whether families may choose religious preschools without forfeiting access to public benefit, the issues presented fall squarely within the Legal Foundation's mission and expertise.

Massachusetts Family Institute, Inc. (MFI) is a nonprofit, nonpartisan organization dedicated to strengthening families in Massachusetts. Through

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1 Pursuant to Supreme Court Rule 37.6, the Legal Foundation states that neither the plaintiff-appellee, nor its counsel, nor any individual or entity other than amicus, has authored this brief in whole or in part, or has made any monetary contribution to its preparation or submission.

research, education, and advocacy efforts, MFI seeks to promote the well-being, health, and safety of families – its individual members and the collective unit. As part of this mission, MFI has strongly supported educational choice for families. MFI also supports the religious liberties of private religious schools. MFI believes that states like Massachusetts are strongest when parents have the right to send their children to schools that best suit their needs, and when those schools can receive the same public benefits regardless of their religious affiliations.

SUMMARY OF ARGUMENT

In *Carson v. Makin*, 596 U.S. 767, 789, 142 S. Ct. 1987, 2002, 213 L. Ed. 2d 286 (2022), this Court announced a constitutional promise: a state may not prohibit families that participate in educational choice programs from selecting schools that provide religious instruction. But that promise has not been consistently kept. Certain states have responded to *Carson* not with compliance, but with circumvention.

The fundamental problem is the continuing validity of this Court's discredited but not yet overruled decision in *Employment Div., Dep't of Human Res. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, (1990); see generally *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021).

Smith permits governments to burden religious exercise as long as the statutes that impose that burden are facially neutral and generally

applicable (the "*Smith* Test"). The *Smith* Test enables state actors to craft statutes that function as end runs around this Court's holding in *Carson*. The tattered legacy of *Smith* should not be permitted to allow states to avoid this Court's precedent in recent Free Exercise cases. Indeed, there is an even larger issue here, rooted in our constitutional democracy. It is time for this Court to make clear that states may not evade this Court's rulings that protect fundamental rights by clever "sleight of hand" lawmaking. *Smith* should be overruled to prevent states from using the *Smith* Test to circumvent this Court's precedent.

One of the main points of Petitioner's brief is that lower courts continue to apply *Smith*, even though this Court has largely abandoned it. Petitioner's Brief, pp. 20-27. Petitioners persuasively argue that Smith should be overruled and the Tenth Circuit's application of *Smith* to Colorado's universal pre-kindergarten program should be reversed. Those arguments need not be repeated here.

Instead, this brief will examine the legislative attempts to circumvent *Carson*, and the litigation arising out of those statutes, in two New England States: Maine and Vermont. In each State, the legislature has crafted school tuition assistance programs that do not expressly exclude religious schools, but instead impose conditions and qualifications on participation in the tuition assistance programs that have the practical effect of excluding religious schools. The United States District Courts in each state have applied the *Smith* Test to uphold these statutes. Those decisions are

now on appeal in the First and Second Circuits.

By reversing the present case, and expressly overruling *Smith*, this Court can ensure that state legislatures will not enact, and lower courts will not uphold, statutes that violate *Carson* by requiring families and schools to surrender their right to religious exercise in order to receive government benefits.

ARGUMENT

I. Maine and Vermont are attempting to circumvent *Carson* by means of generally applicable statutes that have the effect of preventing families that choose religious schools from receiving valuable governmental benefits.

Maine and Vermont, like Colorado, are circumventing this Court's holding in *Carson* and continuing to exclude religious schools, and the families of children who attend them, from generally available public benefits because of the families' decision to exercise their constitutional right to attend a religious school. The Court should bear in mind that the schools in Maine and Vermont are the same types of religious schools and programs that the Court deemed worthy of protection in *Carson*.

In these two predominantly rural States, many municipalities are too small and do not have enough school-age children to operate schools of their own, so the States have authorized "school tuitioning"

programs whereby children in these small towns attend a school outside of the community, and the town makes tuition payments to the operators of the schools that the children choose to attend. The student may choose to attend either a public school or a private school, as long as the school meets a set of criteria established by the state and approved by the state.[2]

Prior to *Carson*, Maine and Vermont expressly prohibited religious schools from participating in the school tuitioning program. In light of *Carson*, both States recognized the need to eliminate the express exclusion of religious schools from the school tuitioning programs, and did so. Their school tuitioning programs now appear on the surface to comply with *Carson* by imposing conditions on a school's eligibility to participate in their school tuitioning program that does not refer to religion. Yet somehow, these new statutes have the same impact as the old statutes – religious schools do not qualify under the new criteria and cannot participate in the school tuitioning programs.

Maine employed a strategy similar to that employed by Colorado to exclude St. Mary Catholic Parish and the other Petitioners from participating in Colorado's universal preschool program – requiring schools to agree to non-discrimination policies which

[2] The foregoing background facts are summarized in the U.S. District Court cases discussed below. See generally *St. Dominic Academy v. Makin*, 744 F.Supp.3d 43, 70 (D. Me. 2024); *Mid-Vt. Christian Sch. v. Saunders*, No. 2:23-cv-652, 2026 WL 1296339 (D. Vt. May 12, 2020).

are inconsistent with the religious beliefs of the schools, and which the religious schools cannot accept without relinquishing the ability to practice their religion. Vermont took a different approach and imposed a set of criteria relating to issues including class size, geographic location, and prior participation in the school tuitioning program. As a result of these criteria, not a single religious school in Vermont qualified for participating in the school tuitioning program.

II. Maine restructured its tuition program to include provisions which directly conflict with the beliefs of religious schools, forcing schools to surrender their religious principles as a condition of receiving government benefits.

Carson arose from a challenge to Maine's exclusion of religious schools. This Court held that "Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." 596 U.S. at 789, 142 S. Ct. at 2002.

In June 2021, while *Carson* was under advisement in this Court, Maine enacted "An Act to Improve Consistency in Terminology and Within the Maine Human Rights Act," P.L. 2021, Ch. 366, §19, (Legislative Document 1688) (the "Act"). The Act revised the Maine Human Rights Act ("MHRA") to address concerns raised by the plaintiffs in *Carson*.

Specifically, the amendments were intended to revise the so-called town tuition conditions as they apply to religious schools. *See* 5 M.R.S. § 4553(2-A).

The Act modified the MHRA in several ways, two of which can be found in the section addressed to "educational discrimination". 5 M.R.S § 4602. The ban on educational discrimination was modified for the first time in its history to include "religion" as a category. This seemingly innocuous amendment was anything but. After the amendment religious schools can no longer limit "admission" or "financial assistance" on the basis of "religion." *Id.* § 4602(1)(A), (D), (E).

The Act went much further than merely targeting admissions and financial aid. Maine also mandated the creation of a new "religious expression" rule. 5 M.R.S. § 4602(5)(D). According to this rule, "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." M.R.S. § 4602(5)(D).

Finally, the Act repealed a religious exemption that sought to protect religious schools on matters of sexual orientation and gender identity. That exemption, before being repealed, provided: "The provisions in this subsection relating to sexual orientation do not apply to any education facility owned, controlled or operated by a bona fide religious corporation, association or society." 2005 Me. Laws 12-13, https://perma.cc/FX4T-64N8 (Ch. 10, sec. 21, § 4602(4)).

The repeal of this exemption is, plain and

simple, a broadside against *Carson*. Not only did the Act strike the religious exemption, it also added a new prohibition on "gender identity" discrimination for "religious" schools that "receive public funding." 5 M.R.S. § 4602(1), 5(C). This amendment requires religious schools to make a choice. They can either surrender their ability to handle issues of sexual orientation and gender identity according to their firmly-held religious beliefs, or they can choose to forego participation in the tuition assistance program. That unconstitutional condition is a violation of the principles of *Carson*.

Certain statements by Maine officials reveal open hostility to *Carson* and an intent to evade it. This Court has previously held that "Facial neutrality is not determinative. . . Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility, which is masked, as well as overt." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 113 S. Ct. 2217, 2227, 124 L. Ed. 2d 472 (1993). "[S]tate actors cannot show hostility to religious views; rather, they must give those views neutral and respectful consideration." *Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 584 U.S. 617, 640, 138 S. Ct. 1719, 1732, 201 L. Ed. 2d 35 (2018) (Kagan, J., concurring). If a state official undertakes official actions because he finds someone's religious beliefs to be "offensive", "[t]hat kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular

religious exercises from the condemnation of civil authorities. It protects them all." *Id.*, 584 U.S. at 644, 138 S. Ct. at 1734.

Maine's highest public officials have not merely disagreed with *Carson*; they have used their political platforms to cultivate public animosity toward the decision, toward religious schools, and toward the families who seek to exercise their rights under it.

The Court need look no further than the State of Maine's briefing to this Court and the First Circuit to see this animus. The Maine Attorney General's merits brief on behalf of the Commissioner of Education in *Carson* closed by highlighting that the Act's changes had become effective just days prior and would deter religious schools from applying to the program even "if" the petitioners were to "prevail." Br. of Resp't at 54, *Carson*, 596 U.S. 767, 2021 WL 4993533. Then, after oral argument in *Carson*, the Attorney General issued a press statement explicitly connecting the purposes of the sectarian exclusion with the Act's amendments to the MHRA. The Attorney General explained that religious schools were "excluded [from the program] because the education they provide is not equivalent to a public education,". Br. for Appellant at 11, *St. Dominic Acad. v. Makin*, No. 24-1739 (1st Cir. filed 10/08/2024).

Immediately after this Court issued its *Carson* decision, Maine Attorney General Aaron Frey publicly condemned the ruling as leaving him "terribly disappointed and disheartened." He

criticized the religious schools involved as "inimical to public education," asserting that they "promote a single religion to the exclusion of all others," and "openly discriminate in hiring teachers and staff." He further objected that the Court had allowed parents "to force the public to pay for an education that is fundamentally at odds with values we hold dear." *See* Maine Office of the Attorney General (June 21, 2022), *Statement of Maine Attorney General Aaron Frey on Supreme Court Decision in Carson v. Makin*, https://www.maine.gov/ag/news/article.shtml?id=8075979

Most significantly, Attorney General Frey announced his intent to work with the Governor and Legislature to pursue "statutory amendments to address the Court's decision and ensure that public money is not used to promote discrimination, intolerance, and bigotry." *Id.*

This resistance is not limited to the Attorney General. The Speaker of the Maine House publicly attacked *Carson* as a "ludicrous decision from the far-right SCOTUS," further confirming that Maine's legislative leadership shares a deliberate objective of resisting and undermining the ruling. *See* First Liberty Institute, (Mar. 31, 2023), *Maine Keeps Trying to Exclude Religious Schools from State School Choice Program*, https://firstliberty.org/news/maine-keeps-trying-to-exclude-religious-schools.

These statements clearly show that Maine's political leadership is not attempting to comply with *Carson* in good faith. Instead, they reflect an explicit

commitment to restoring, through new statutory or regulatory mechanisms, the exclusion of religious schools from neutral public benefits that *Carson* squarely held unconstitutional.

Because state officials are openly seeking to craft workarounds that reintroduce the very discrimination *Carson* prohibits, this Court should clarify and reinforce *Carson's* holding. Doing so is essential to ensure that states cannot accomplish indirectly, through legislative hostility or newly devised statutory exclusions, what *Carson* forbids them from doing directly: disqualifying religious schools from public benefits solely because they are religious.

Post-*Carson* litigation in Maine confirms that lower courts are continuing to apply the principles of *Smith* to uphold statutes that are inconsistent with *Carson*. These decisions also demonstrate the practical difficulty of applying the *Smith* Test, because one judge applied strict scrutiny and another judge applied rational basis review to the same statute and on essentially identical facts, yet both concluded that the statute was constitutional.

St. Dominic Academy which operated Catholic schools in Lewiston and Auburn, Maine, filed suit in U.S. District Court seeking declaratory and injunctive relief that would allow it to consider religious criteria in admissions, a practice that lies at the heart of maintaining a Catholic educational mission. The District Court acknowledged that the MHRA is not generally applicable, thus triggering

strict scrutiny. *St. Dominic Academy v. Makin*, 744 F.Supp.3d 43, 70 (D. Me. 2024) The Court stated 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 applicable." *Id.*, quoting *Fulton, supra,* and also citing *Smith*. Nevertheless, the District Court upheld non-discrimination provisions of the revised MHRA, finding that Maine had a "compelling interest" in preventing discrimination in publicly funded programs and finding that the statute was narrowly tailored, and concluding that the statute survives strict scrutiny. *Id.*, 744 F.Supp.3d at 79

The denial of injunctive relief in *St. Dominic* is now on appeal to the First Circuit, *St. Dominic Academy v. Makin, 1st Cir., Case no. 24-1739,* but the litigation already demonstrates a broader pattern. Maine is attempting to circumvent *Carson* by restructuring its tuition program in ways that will inevitably exclude religious schools unless they forfeit their religious identity. If allowed to stand, this strategy invites other states to follow suit, nominally complying with *Carson* by avoiding explicit religious-status bars while achieving the same prohibited outcome through the imposition of regulatory conditions that suppress religious practice.

The foregoing evasions have real world consequences. St. Dominic High School announced that it will not open for the 2026 school year as a result of lack of funding and enrollment. The 80 year old school could not meet fundraising goals. *See* WMTW (March 19, 2026) *St. Dominic Regional High*

School will not open this fall, https://www.wmtw.com/article/st-dominic-regional-high-school-will-not-open-this-fall/70786302. The affront to free religious exercise, as promised in the First Amendment, is obvious.

Crosspoint Church, which operates a Christian school in Bangor, Maine, filed suit in United States District Court to seek an injunction against the application of the anti-discrimination provisions of the school tuitioning program. After a thorough review of the record, the District Court denied the injunction and "framed its opinion as a prelude to a challenge to the Court of Appeals for the First Circuit for a more authoritative ruling." *Crosspoint Church v. Makin*, 719 F. Supp. 3d 99, 103 (D. Me. 2024), judgment entered, No. 1:23-CV-00146-JAW, 2024 WL 2830931 (D. Me. June 4, 2024).

The Court recognized that the "MHRA's antidiscrimination provisions — which would effectively prohibit Crosspoint from enforcing several of its religiously motivated policies relating to sexual orientation and gender identity—burden Crosspoint's religious exercise." 719 F. Supp. 3d at 119.

The District Court found that the statute was generally applicable and neutral:

> Even accepting Crosspoint's assumption that the Maine Legislature passed Chapter 366 in anticipation of the Supreme Court striking down the sectarian exclusion, the Court does not find significant evidence that this

> legislation's objective was "to impede or constrain religion" as opposed to ensuring uniformity in a legislative scheme that already prohibited these types of discrimination by organizations receiving public funds in the housing and employment contexts.

719 F. Supp. 3d at 121.

The District Court upheld Maine's enforcement of the MHRA against Crosspoint. It ruled that the MHRA is a neutral and generally applicable law regulating conduct, not speech, and therefore subject only to rational-basis review. *Id.*, 719 F.Supp.3d at 123. While the Court did not expressly rely on Smith, it cited portions of the *Fulton* decision that adopt the *Smith* Test. 719 F.Supp.3d at 118-119. Under that standard, the District Court accepted Maine's asserted interest in preventing discrimination in publicly funded programs and concluded that Crosspoint must comply with the statute if it wishes to participate. 719 F.Supp.3d at 123. The District Court rejected Crosspoint's free exercise, free-speech, and church-autonomy claims and denied relief, reasoning that Maine's conditions do not unconstitutionally burden Crosspoint's religious exercise but represent permissible terms of participation in a public program. 719 F.Supp.3d at 103.

These cases reveal a systematic effort by Maine to accomplish indirectly what *Carson* squarely forbids. Rather than accepting this Court's holding that religious schools may not be excluded from the

tuitioning program because of their religious identity or exercise, Maine has simply shifted to new regulatory mechanisms that achieve the same unconstitutional result. The state now conditions participation on compliance with requirements that directly suppress core religious practices, from religious admissions to the ability to teach and operate consistently with sincere beliefs regarding sexual orientation and gender identity. The record in *St. Dominic Academy* and *Crosspoint Church* makes clear that these conditions are not incidental or inadvertent; they reflect a deliberate post-*Carson* strategy to introduce religious-status discrimination as "neutral" regulation while preserving the very exclusion that *Carson* condemned.

If allowed to stand, Maine's approach provides a ready blueprint for states seeking to evade this Court's holding that religious schools must be permitted to participate on equal terms in generally available public-benefit programs. Religious discrimination disguised as regulatory compliance will become the preferred mechanism for undermining Free Exercise protections.

The Court need not wait for *St. Dominic Academy* and *Crosspoint Church* to reach this Court before putting an end to Maine's efforts to circumvent *Carson*. The present case involves the same issues, and presents this Court with an ideal opportunity to reaffirm and clarify *Carson's* core principle: that the Constitution prohibits not only express exclusions based on religious status, but also regulatory schemes designed to suppress religious exercise at the price of equal access to public benefits. Intervention is

necessary now to ensure that *Carson* is not reduced to a hollow promise, and that religious schools and families receive the full constitutional protection that the Free Exercise Clause guarantees.

III. Vermont replaced its unconstitutional prohibition on sectarian schools with new, ostensibly facially neutral qualification provisions designed to achieve the same discriminatory outcome.

In 2025, the Vermont legislature enacted Act 73, a sweeping education reform bill that, following Maine, effectively prohibits religious schools from participating in the tuition assistance program. Rather than condition eligibility on an express "nonsectarian" requirement, Vermont rewrote the Town Tuition Program to narrow the category of approved independent schools that may receive public tuition. Specifically, under Act 73, a school must now: (1) be located in Vermont; (2) been approved as an independent school on or before July 1, 2025; (3) be located in a school district (or supervisory union with a school district) that does not operate a public school for some or all grades as of July 1, 2024; (4) have had at least 25% of their enrollment be publicly funded during the 2023–2024 school year; (5) comply with class-size minimums regardless of school size unless granted a waiver by the State Board of Education. An Act Relating to Transforming Vermont's Education Governance, Quality, and Finance Systems, § 21, 2025 Vt. Acts & Resolves 73. These requirements appear neutral in isolation, but the timing and structure make them anything but neutral in

operation: these requirements measure eligibility by criteria religious schools were predictably least able to satisfy after decades of exclusion from the very program at issue. As lawmakers were no doubt aware, these new restrictions have the effect of preventing religious schools in Vermont from participating in the program since religious schools are unable to meet these arbitrary thresholds, while many secular schools are still able to participate.

Mid-Vermont filed suit to challenge Act 73, but the U.S. District Court for Vermont denied the school's motion for an injunction. *Mid-Vt. Christian Sch. v. Saunders*, No. 2:23-cv-652, 2026 WL 1296339, at *1 (D. Vt. May 12, 2020). The District Court acknowledged the burden on the plaintiff's exercise of religion:

> The amended complaint alleges that Nathan Partington wishes to send his child to a religious school as part of the free exercise of his religious beliefs. Act 73 disqualifies the school he has chosen from his town's tuition payments. The denial of payment makes it more difficult for him to practice his faith, thereby placing a burden on his free exercise. Plaintiffs have supplied evidence of similar burdens for other observant families in the state.

2026 WL 1296339 at *11.

Nevertheless, the District Court declined to

grant the injunction. The Court expressly relied upon *Smith* as the basis for government encroachment on religious exercise:

> [A] state statute may limit or encroach on religious practice if it is a neutral law of general application. The critical case establishing this legal standard in the modern era is *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878 (1990).

Id. The District Court found that Act 73 was "neutral as to religion" and thus subject to rational-basis review under *Smith*. 2026 WL 1296339 at *15. The Court found that Act 73 was "likely to pass" rational basis review and denied the requested injunction. 2026 WL 1296339 at *17. This decision has been appealed to the Second Circuit, sub. nom. *Mid Vermont Christian Academy v. Bouchey*, 2nd Cir., Case No. 26-1416.

By treating Act 73 as a neutral law of general applicability and therefore only subject to rational basis review, the District Court's reasoning runs contrary to the framework the Supreme Court has developed through *Carson*, *Espinoza*, and *Trinity Lutheran* and would allow the state to accomplish indirectly what it can no longer do directly. States should not be permitted to evade this precedent by shifting from exclusion based on religious status to seemingly neutral conditions that impose the same practical effect of exclusion.

CONCLUSION

These post-*Carson* statutes and cases in Maine and Vermont provide a clear example of how States can nullify this Court's religious-liberty precedents through facially neutral statutory revisions that are antithetical to the very Free Exercise rights enumerated in *Carson*. By restructuring their programs, states have recreated the very exclusion that *Carson* struck down. The resulting frameworks burden religious exercise, distort the meaning of neutrality, and threaten to turn *Carson* into a hollow promise; an outcome already reflected in the divergent and permissive decisions of the lower courts. Only this Court can restore coherence and prevent further erosion of its precedent.

The Court should reverse the decision of the Tenth Circuit in the present case, and expressly overrule *Smith*. By doing so, the Court will reaffirm that states may not avoid constitutional limits by shifting from overt religious-status exclusions to covert use-based restrictions, and to ensure that families and religious schools receive the full protections that the First Amendment guarantees. This case also allows this Court to underscore the dignity of its rulings and to make plain that states may not avoid application of core Constitutional Principles by subterfuge.

Respectfully submitted,

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