No. 25-581

In the Supreme Court of the United States

ST. MARY CATHOLIC PARISH IN LITTLETON, 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 CROSSPOINT CHURCH AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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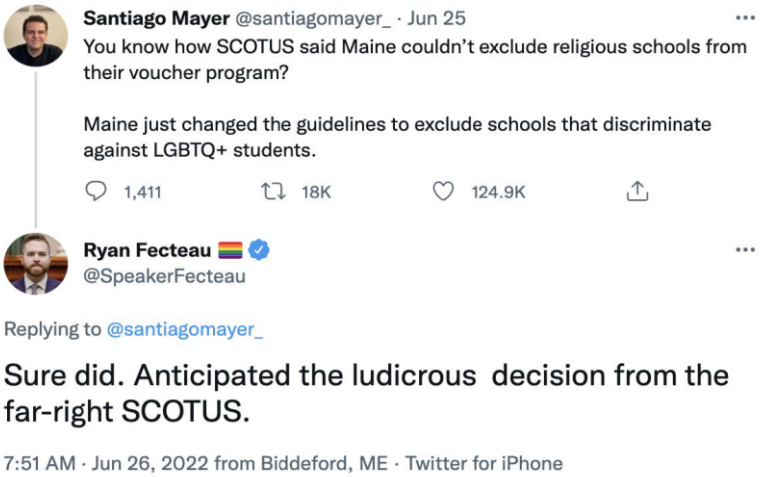
INTEREST OF AMICUS CURIAE[1]

Crosspoint Church runs Bangor Christian School (BCS), one of the schools at issue in *Carson v. Makin*, 596 U.S. 767, 775 (2022). Many amici have alluded to widespread attempts by various States to skirt this Court's decision in *Carson* and the Free Exercise Clause. Of those States, Maine's conduct following its loss in *Carson* cannot be described as anything other than open defiance. Despite the Carson family's hard-won victory, BCS is *still* excluded from Maine's tuition program—all because of Maine's new poison-pill law that looks a lot like Colorado's law, which Maine specifically passed in anticipation of, and to end-run, *Carson*.



[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

J.A.280, *Crosspoint Church v. Makin*, No. 24-1590 (1st Cir. Sept. 24, 2024) (herein after "*Crosspoint* CA.1.J.A."). Maine is even trying to persuade the First Circuit to use Colorado's law and the Tenth Circuit's decision on review here as a reason to approve its exclusion of BCS and other religious schools from its tuition program. Maine 28(j) Ltr., *Crosspoint Church v. Makin*, No. 24-1590 (1st Cir. Oct. 2, 2025).

Crosspoint Church is currently challenging Maine's continued violations of the Free Exercise Clause in court. For that reason, Crosspoint Church is uniquely and well positioned to make this Court fully aware of the on-the-ground situation in Maine, show how religious schools are still not being accorded full protections under the Free Exercise Clause, and explain why the Court should rule in petitioners' favor in this case.

SUMMARY OF ARGUMENT

Petitioners have cogently explained how Colorado is unconstitutionally excluding religious schools from otherwise available public benefits—under the guise of purportedly neutral and generally applicable laws—all while granting exemptions to others, but not to Catholic preschools. *See* St. Mary.Br.20-53. Numerous amici also point out how other States are trying to do the same. *See, e.g.*, 22-States.Cert.Br.16-21; USCCB.Cert.Br.13-14.

Maine is one of those States. Crosspoint Church is all too familiar with what's happening in Maine. Crosspoint Church runs Bangor Christian School, one of the two Christian schools at issue in *Carson*, 596 U.S. at 775. The Carson family sent their daughter to BCS but couldn't obtain Maine's tuition funds because of the State's so-called sectarian-school ban. The Carson family—along with the Nelson family who wanted to send their children to Temple Academy, another Christian school in Maine—had to bring their case all the way up to this Court to vindicate their free-exercise rights.

One might think that, after losing in *Carson*, Maine would have opened up its tuition program to religious schools. But none of that happened. Anticipating losing, Maine changed its laws with amendments designed to keep religious schools out. Maine expanded the list of protected classes applicable to tuition-accepting schools to include gender identity and religion. And it narrowed the exemption for religious schools from sexual-orientation discrimination

claims. Worse yet, while Maine takes an absolutist approach to excluding nonconforming religious schools in Maine from the tuition program, it exempts out-of-state private schools that accept Maine's money.

Maine's goal is obvious: These conditions will keep out religious schools in Maine who want to teach their students in a manner consistent with their religious beliefs about marriage and gender—the same so-called "sectarian" schools that Maine tried to keep out. Crosspoint Church runs BCS according to its statement of faith, which adheres to "decent" and "honorable" Christian beliefs about marriage and gender. *Cf. Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). For BCS to accept Maine's money, it must give up its Christian beliefs about marriage and gender. And because BCS adheres to its beliefs—even four years after *Carson*—BCS is still excluded from Maine's tuition program. Now, before the First Circuit, Maine is defending its continued exclusion of BCS by invoking Colorado's law and the Tenth Circuit's flawed decision on review in this case.

Whether it's Colorado's exclusion of Catholic preschools from the universal pre-K funds unless they conform to Colorado's views on marriage and gender—or Maine's exclusion of BCS unless it conforms to Maine's views—this Court's decisions require such coercive conditions on generally available benefits to survive strict scrutiny. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Carson*, 596 U.S. at 778 (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

And whether it's Colorado's refusal to grant exemptions to Catholic preschools when it grants exemptions based on income level, disability, or other individualized considerations—or Maine's refusal to grant exemptions to religious schools when it grants exemptions to out-of-state schools—this Court's decisions require strict scrutiny. Strict scrutiny is the only proper standard when the State "treat[s] *any* comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 593 U.S. 61, 62 (2021), or creates "a mechanism for individualized exemptions," *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021).

Religious schools across this country—in Maine, Colorado, and elsewhere—are still not accorded the full promise of the Free Exercise Clause. This Court (yet again) needs to make it abundantly clear to the States and lower courts that strict scrutiny applies.

ARGUMENT

This Court's free-exercise decisions make at least two things clear. First, when a State disqualifies a religious person from generally available public benefits because of that person's religious exercise, strict scrutiny applies. That's because such conditions coerce her to "choose between following the precepts of her religion and forfeiting benefits" and "abandoning one of the precepts of her religion in order to accept" the benefits. *Sherbert*, 473 U.S. at 404; *see also Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981); *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. 449, 462 (2017); *Espinoza v. Mont.*

Dep't of Revenue, 591 U.S. 464, 480 (2020); *Carson*, 596 U.S. at 778.

Second, strict scrutiny is triggered also when the State refuses to exempt religious persons from legal and regulatory demands if the State "treat[s] *any* comparable secular activity more favorably than religious exercise," *Tandon*, 593 U.S. at 62, or has "a mechanism for individualized exemptions." *Fulton*, 593 U.S. at 533.

These principles require reversing the Tenth Circuit in this case. Colorado coerces Catholic parishes to choose between adhering to their religious beliefs about marriage and gender in their preschools (while forgoing Colorado's money) and forfeiting their beliefs to accept Colorado's money. And Colorado refuses to exempt Catholic preschools from its so-called equal-opportunity mandate even though it gives exemptions for comparable secular conduct and based on other individualized considerations. And for the reasons petitioners convincingly explained, Colorado cannot satisfy strict scrutiny. *See* St. Mary.Br.48-53.

Religious schools across this country badly need this Court's clear repudiation of the Tenth Circuit's decision and Colorado's exclusion of Catholic preschools. Many States are continuing to defy the Free Exercise Clause with coercive conditions and under the pretense of neutral and generally applicable laws—all while giving out exemptions for secular conduct but not for religious exercise.

Maine is a prime example. After losing *Carson*, it specifically and purposefully enacted coercive conditions designed to keep religious schools out of its tuition program. And Maine is now relying on the Tenth Circuit decision to persuade the First Circuit to approve its exclusion of religious schools from its tuition program. To vindicate the free-exercise rights of religious persons and institutions everywhere, the Court should reverse the judgment here.

I. Strict scrutiny applies when the government coerces religious persons to give up their beliefs to accept otherwise available benefits.

A. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Free Exercise Clause protects religious exercise from encroachment by the States through the Fourteenth Amendment. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022).

The Free Exercise Clause's protections are intentionally broad. "[T]he ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practices or worship." *Fulton*, 593 U.S. at 567 (Alito, J., concurring in judgment). At a minimum, the Clause protects more than "the right to harbor religious beliefs inwardly and secretly." *Kennedy*, 597 U.S. at 524.

The Clause "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily

life through 'the performance of (or abstention from) physical acts.'" *Id.* Indeed, the "right to *be* religious without the right to *do* religious things would hardly amount to a right at all." *Espinoza*, 591 U.S. at 513 (Gorsuch, J., concurring). The Clause also protects religious exercise from not just "outright prohibitions" but also "indirect coercion or penalties on the free exercise of religion." *Lyng v. Nw. Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 450 (1998).

B. The Free Exercise Clause protects religious persons from indirect coercion by subjecting conditions on public benefits that infringe on religious exercise to strict scrutiny.

1. Start with *Sherbert*. There, a Seventh-day Adventist who was fired from her job for declining to work on Saturday (the Sabbath day of her faith) was subsequently denied South Carolina's unemployment-compensation benefits for not being "available for work." 374 U.S. at 399-400. The Court found it "clear" that "the disqualification for benefits impose[d] [a] burden on the free exercise of [Sherbert's] religion." *Id.* at 403. Not only did Sherbert's ineligibility for the benefits "derive[] solely from the practice of her religion," but also "the pressure upon her to forego that practice [was] unmistakable." *Id.* at 404.

Sherbert, in other words, was put to a choice: Either "follow[] the precepts of her religion and forfeit[] benefits," or "abandon[] one of the precepts of her religion in order to accept work" and unemployment benefits. *Id.* As this Court explained, "condition[ing] the availability of benefits upon [Sherbert's] willingness

to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 405. This Court then applied strict scrutiny: "whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifie[d] the substantial infringement of [Sherbert's] First Amendment right." *Id.* at 406; *see also Fulton*, 593 U.S. at 556 (Alito, J., concurring in judgment) (explaining that the "test distilled from *Sherbert*" is "that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest").

In *Thomas*, this Court again applied the principle that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." 450 U.S. at 716. There, Thomas, a Jehovah's Witness factory worker whose religious beliefs forbade his participation in the production of armaments, quit his job after being transferred to the factory's military-tank production line. *Id.* at 709. Thomas was subsequently denied his state-funded unemployment benefits because he, according to Indiana courts, "voluntarily" quit his job. *Id.* at 712.

But this Court took a more protective approach to Thomas's religious convictions. Thomas's termination "flowed from the fact that the employment, once acceptable, became religiously objectionable because of changed conditions." *Id.* at 718. "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such

a benefit because of conduct mandated by religious belief," it "put[s] substantial pressure on an adherent to modify his behavior and to violate his belief." *Id.* at 717-18. The Court observed that "the compulsion may be indirect," but "the infringement upon free exercise is nonetheless substantial." *Id.* at 718. Such a substantial burden on free exercise needed to survive strict scrutiny—by "showing that it is the least restrictive means of achieving some compelling state interest." *Id.*

This Court also subjected Missouri's exclusion of a church from a publicly available program that provided recycled rubber tires for playgrounds to strict scrutiny. *Trinity Lutheran*, 582 U.S. at 453-54, 464. Missouri took the view that churches and religious non-profits were categorically ineligible to participate in the program because they were religious. *Id.* at 455. In other words, Missouri was putting that church to a choice: "[D]isavow its religious character" to participate in a government-benefit program that was available to other members of the community. *Id.* at 463. Invoking *Sherbert*, this Court observed that it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* (quoting *Sherbert*, 374 U.S. at 404). Missouri's "decision to exclude [the church] for purposes of this public program" then needed to "withstand the strictest scrutiny." *Id.*

Strict scrutiny likewise applied to Montana's termination of a scholarship program under the State's

no-aid constitutional provision, which prevented certain parents from accessing the scholarship funds to fund their children's religious education. *Espinoza*, 591 U.S. at 468, 484. The Montana Supreme Court's application of the no-aid provision that prompted the State's termination of the scholarship "hinged solely on religious status." *Id.* at 478. Again, echoing *Sherbert*, this Court reiterated that requiring a school to "divorce itself from any religious control or affiliation" as "a condition on benefits or privileges" "'inevitably deters or discourages the exercise of First Amendment rights.'" *Id.* (quoting *Trinity Lutheran*, 582 U.S. at 463); *accord Sherbert*, 374 U.S. at 405. Montana engaged in "indirect coercion" that "'punish[ed] the free exercise of religion' by disqualifying the religious from government aid." *Id.* Strict scrutiny applied. *Espinoza*, 591 U.S. at 478.

2. Against this backdrop, this Court's decision in *Carson* was "unremarkable." 596 U.S. at 779. Under the Maine Constitution, the legislature must require each town to maintain public schools. *Id.* at 773. Because Maine is the most rural State in the Union, many towns found it difficult to operate a public secondary school of their own, and fewer than half of the school administrative units did so. *Id.* Maine sought to address this problem, in part, by creating a tuition program with which families from the rural areas without public secondary schools could send their children to approved private schools of the parents' choice. *Id.*

Before 1981, parents in Maine could use the tuition assistance to send their children to religious

schools. *Id.* at 774. But that changed when Maine's Attorney General issued an opinion (incorrectly) asserting that giving public funds to parents who then send their children to private religious schools violated the Establishment Clause. *Id.* at 774-75; *but see Zelman v. Simmons-Harris*, 536 U.S. 639, 652-53 (2002) (a neutral benefit program in which public funds flow to religious organizations through independent choices of private benefit recipients does not offend the Establishment Clause). Subsequently, the legislature imposed an additional requirement that the tuition assistance can only be used at "a nonsectarian school." *Carson*, 596 U.S. at 774. Because of this sectarian-school ban, parents living in areas without a public school who wished to send their children to religious schools (like the Carson family who wished to send their daughter to BCS) could not obtain the tuition assistance. *Id.* at 775.

This Court repeated the principle—while citing *Sherbert*, *Thomas*, *Trinity Lutheran*, and *Espinoza*—that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Id.* at 778; *see id.* at 778-79. Religious schools whom Maine deemed sectarian—including BCS—were "disqualified from this generally available benefit 'solely because of their religious character.'" *Id.* at 780. Religious schools were put to a choice: Keep your religious character and forgo the tuition funds, or give it up to accept the tuition funds. This "conditioning" of the benefits, "like the program in *Trinity Lutheran*," "effectively penalize[d] the free exercise of religion." *Id.* (cleaned up). Maine's exclusion

of religious schools from the tuition program needed to survive "strict scrutiny." *Id.*

The upshot of *Carson* and the cases that predate it—*Sherbert*, *Thomas*, *Trinity Lutheran*, and *Espinoza*—is that the Free Exercise Clause requires strict scrutiny when the State puts a religious person to a choice between adhering to his beliefs and forgoing an otherwise available public benefit, and disavowing his beliefs to obtain the public benefit. *See also* St. Mary.Br.28-31.

C. The Tenth Circuit erred by failing to apply strict scrutiny to Colorado's exclusion of Catholic preschools. It's undisputed that providing religious education is a quintessential religious exercise. "Religious education is vital to many faiths practiced in the United States." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 754 (2020). Parents exercise their faith "by sending their children to religious schools." *Espinoza*, 591 U.S. at 486; *see* Pet.App.84a (petitioner parents consider it their religious "directive" to provide a religious education to their children). Religious institutions, like Catholic schools and preschools, also exercise their faith by providing religious instructions or other instructions through the lens of faith. *See* St. Mary.Br.12 ("these schools carry out their religious mission by bringing children to Jesus Christ through the family." (cleaned up) (quoting Pet.App.235a)). It's also undisputed that Colorado's universal pre-K funding is a public benefit. That benefit is provided to over 2,000 preschools in Colorado. Pet.App.69a. Also undisputed is the fact that the

Catholic preschools here would be otherwise eligible for the benefits. Pet.App.11a-13a.

Nevertheless, the Catholic preschools in Colorado are excluded from the universal pre-K benefits solely because of their religious exercise. These Catholic preschools wish to educate children in a manner consistent with Catholic teachings on sex and marriage. But Colorado considers the Catholic preschools' beliefs discriminatory under its equal-opportunity mandate and deems them ineligible for the universal pre-K benefits.

Colorado, in other words, puts Catholic preschools to a choice: "[F]ollow[] the precepts of [your] religion and forfeit[] benefits," *or* "abandon[] one of the precepts of [your] religion in order to accept" the universal pre-K funding. *Sherbert*, 374 U.S. at 404. Colorado thus puts "substantial pressure" on petitioners "to modify [their] behavior and to violate [their] belief." *Thomas*, 450 U.S. at 718. Because Colorado "denies" the universal pre-K funding "because of conduct mandated by religious belief" of petitioners—namely, to educate children consistent with Catholic teachings—strict scrutiny applies. *Id.*

The Tenth Circuit's attempted to "distinguish[]" these principles by cabining the *Carson* line of cases to only when religion is "specifically targeted." Pet.App.21a-22a. But that contradicts these decisions. *Sherbert* and *Thomas* notably did *not* involve situations where the State specifically targeted religious persons. Instead, they involved unemployment-benefit schemes and exclusion of religious persons from

benefits that were facially "neutral." *Thomas*, 450 U.S. at 717; *see also Sherbert*, 374 U.S. at 400-02 (describing a nearly identical scheme to that in *Thomas*). South Carolina and Indiana did not target Sherbert's and Thomas's "religious status or use." Pet.App.22a. Indeed, only Sherbert's and Thomas's "particular religious practice"—of Saturday Sabbath observance and religious objections to producing armaments—were "alleged to be infringed incidentally," Pet.App.22a. Nevertheless, this Court applied strict scrutiny in *Sherbert* and *Thomas*, thereby confirming that "[t]he Free Exercise Clause . . . extends beyond facial discrimination. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993)

And this Court repeatedly invoked *Sherbert* and *Thomas* in subsequent cases, confirming that it was the coercion imposed by the conditions on the benefits that triggered strict scrutiny. *See* St. Mary.Br.28-29; *Trinity Lutheran*, 582 U.S. at 463 (requiring a church to "disavow its religious character" as a condition "upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment right" (quoting *Sherbert*, 374 U.S. at 405)); *Espinoza*, 591 U.S. at 478 (requiring a school to "divorce itself from any religious control or affiliation" as a condition on benefits "inevitably deters or discourages the exercise of First Amendment rights" (quoting *Trinity Lutheran*, 582 U.S. at 463, which quotes *Sherbert*, 374 U.S. at 405)); *Carson*, 596 U.S. at 780 ("[W]e have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." (citing *Sherbert*, 374

U.S. at 404; *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947); *Thomas*, 450 U.S. at 709).

The Tenth Circuit's avoidance of strict scrutiny is deeply flawed. This Court should apply strict scrutiny because Colorado excludes Catholic preschools from universal pre-K funding because of their religious exercise. And for all the reasons given by petitioners, Colorado cannot satisfy strict scrutiny. *See* St. Mary.Br.48-53.

II. Strict scrutiny applies when the government gives exemptions to some but not to religious persons.

The Free Exercise Clause separately requires strict scrutiny when a State refuses to grant exemptions from its legal and regulatory demands to religious institutions *if* the State grants exemptions for comparable secular conduct or based on individualized considerations.

A. Although the Constitution gives "special protection to the exercise of religion," *Thomas*, 450 U.S. at 713, this Court in *Employment Division v. Smith* created a controversial rule that a "neutral law of general applicability" that burdens religion does not trigger strict scrutiny, no matter how devastating that law could be for religious exercise, 494 U.S. 872, 879 (1990). No fewer than 10 Justices of this Court have criticized *Smith*. *See Fulton*, 593 U.S. at 626 (Gorsuch, J., concurring in judgment). And Congress swiftly enacted the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq., to repudiate—and mitigate the adverse effects of—*Smith*. This Court came close

to overruling *Smith* in *Fulton*. And petitioners here also asked this Court to overrule *Smith*, though the Court declined to grant certiorari on that question.

But even with *Smith* still on the books, this Court applies strict scrutiny if the law is "not neutral" or "not of general application." *Lukumi*, 508 U.S. at 546.

For instance, government regulations are "not neutral and generally applicable, and therefore trigger strict scrutiny … whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. Whether two activities are comparable "must be judged against the asserted government interest that justifies the regulation at issue." *Id.* In *Tandon*, California imposed severe COVID-related restrictions on "at-home religious" gatherings, while giving greater leeway for "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants." *Id.* at 63. California's "myriad exceptions and accommodations for comparable activities"—but failure to accommodate religious activities—required strict scrutiny. *Id.* at 64.

In addition, a law is "not generally applicable" if the government institutes "a mechanism for individualized exemptions." *Fulton*, 593 U.S. at 533. This rule was a "longstanding tenet of our free exercise jurisprudence" even pre-dating *Smith*. *Id.* at 544 (Barrett, J., concurring). In *Fulton*, Philadelphia refused to grant an exemption to Catholic Social Services from certain nondiscrimination requirements in the city's foster-care services contract. *Id* at 531, 535 (majority

op.). The Court observed that the city's contract incorporated "a system of individual exemptions" but nevertheless refused to grant one to Catholic Social Services. *Id.* at 535. The city's refusal to grant an exemption through this individualized mechanism warranted strict scrutiny, which the city could not satisfy. *Id.* at 535, 541-42.

B. Applying these principles, Colorado's exclusion of Catholic preschools triggers strict scrutiny.

First, Colorado exempts some comparable secular preschools from the equal-opportunity mandate but doesn't do so for Catholic preschools. Colorado's equal-opportunity statute states that a preschool shall provide services "regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, *income level*, or *disability*." Pet.App.204a (emphasis added). Nevertheless, by regulation—and perhaps creative interpretations of the statute, *see* Pet.App.26a-38a—Colorado has created exemptions from the income-level and disability equal-opportunity mandate. *See also* St. Mary.Br.38-39. Specifically, Colorado permits funding-recipient preschools to deny families enrollment based on income level and to give preference based on disability. Pet.App.8a, 35a-36a.

Yet, Colorado refuses to grant a similar exemption for religious schools based on their religious exercise. St. Mary.Br.40-41. In other words, Colorado is treating some "comparable secular activity" (schools prioritizing low-income families and students with disability) "more favorably than religious exercise" (schools

wishing to educate children consistent with religious beliefs). *Tandon*, 593 U.S. at 62. This treatment warrants strict scrutiny. Prohibiting religious conduct "while permitting secular conduct … undermines" Colorado's asserted, supposed interest in taking an absolutist approach to the statute's equal-opportunity mandate. *Fulton*, 593 U.S. at 534.

Second, Colorado, by regulation, has created a mechanism for individualized exemptions through its "catchall" exemption. Pet.App.29a. Colorado permits preschools to give preferences for being part of a specific community, even if that would mean the preschools are effectively exempted from the equal-opportunity statute's mandate. For instance, Colorado's official testified that the catchall-exemption mechanism could be used to permit preschools to admit only "gender-nonconforming children," give preference to "children of color from historically underserved areas," and prioritize "LGBTQ community." J.A.315-19; *see* St. Mary.Br.10. Yet again, Colorado refuses to grant an individualized exemption for Catholic preschools through this catchall mechanism. Just like in *Fulton*, this refusal to grant an individualized exemption for religious exercise triggers strict scrutiny. 593 U.S. at 533.

The Tenth Circuit's refusal to apply strict scrutiny despite Colorado's exemption for comparable secular activity and based on individualized consideration flouts this Court's decision in *Tandon* and *Fulton*. The lower court's maneuver—through misapplying this Court's decisions and ignoring undisputed testimony,

see St. Mary.Br.46-48—is not persuasive on its own terms and should be reversed.

III. Only a clear repudiation of Colorado's exclusion of Catholic preschools will vindicate the free-exercise rights of religious schools everywhere.

Colorado's exclusion of Catholic preschools from universal pre-K funding because of their religious exercise, despite the raft of decisions from this Court, is especially concerning. That's because Colorado is not alone in attempting to skirt this Court's decisions and the Free Exercise Clause.

Maine is a prime example of a State defying this Court and the Free Exercise Clause after *Carson*. Maine was the first mover of these States. *See* 22-States.Cert.Br.17. After *Carson*, Maine is *still* excluding religious schools like BCS from its tuition program (as though it didn't just lose *Carson*). And Maine does so by conditioning its benefits upon BCS not adhering to its beliefs about marriage and gender. (Never mind *Sherbert*, *Thomas*, *Trinity Lutheran*, *Espinoza*, and, again, *Carson*). Maine has purposefully and specifically changed its laws with amendments designed to keep religious schools out. (But see *Lukumi*). Like Colorado's law, Maine's law pretends to apply a neutral and generally applicable law while granting exemptions to some secular schools but not religious schools (contra *Tandon* and *Fulton*).

Only a clear and unambiguous repudiation of Colorado's exclusion and the Tenth Circuit's decision by

this Court will vindicate the free-exercise rights of religious schools, not just in Colorado or Maine, but everywhere.

A. Maine's poison-pill amendment

1. Crosspoint Church founded BCS in 1970 "to assist families in educating the whole child by encouraging spiritual maturity and academic excellence in a supportive environment." *Crosspoint* CA.1.J.A.83. Given BCS's religious mission, the school asks parents to agree to support and cooperate with its Christian mission and educational philosophy. *Id.* at 89-90. Because they serve as Christian role models to the students and are responsible for inculcating BCS's religious beliefs and values, Crosspoint employees must be co-religionists—that is, they must agree with the school's statement of faith and religious and educational objectives. *Id.* at 127-34.

Crosspoint Church believes the Bible is inerrant and the "final authority in all matters." *Id.* at 83, 86-87. It believes that the only method of salvation is by grace, through repentance and faith in Jesus Christ. *Id.* at 85. Crosspoint Church believes that marriage is defined by God to join one man and one woman in a covenantal union and that sexual activity is not to occur outside of marriage. *Id.* at 86-87. And it also believes that a person's "gender is both sacred and established by God's design." *Id.* at 89. Accordingly, BCS's code of conduct prohibits students from, among other things, engaging in sexual activity outside of marriage (as defined in the statement of faith) or identifying as a gender other than their biological sex. *Id.* at 89. A student who persistently advocates beliefs

contrary to BCS's statement of faith is considered not to agree and cooperate with BCS's mission and is subject to removal from the school. *Id.* at 90.

Maine considered BCS a "sectarian" school that could not qualify for assistance under Maine's tuition program. *Carson*, 596 U.S. at 775-76.

2. While *Carson* was still pending before this Court, Maine anticipated a cert grant, losing, and seeing its sectarian-school ban declared unconstitutional. So Maine went about changing its law.

Previously, while Maine banned so-called "sectarian" religious schools from its tuition program, the Maine Human Rights Act's provisions concerning schools "approved for tuition purposes," 5 M.R.S. §4553(2-A), did not include gender identity or religion as protected classes, *Crosspoint Church v. Makin*, 719 F. Supp. 3d 99, 106 (D. Me. 2024). And the provision prohibiting sexual-orientation discrimination did not apply to "any education facility owned, controlled or operated by a bona fide religious corporation, association or society." *Id.* So if the sectarian ban didn't exist, BCS could have accepted the tuition funds without having to give up its beliefs about marriage or gender.

In June 2021, while cert was pending in *Carson*, the Maine legislature enacted a law entitled "An Act to Improve Consistency in Terminology and within the Maine Human Rights Act," P.L. 2021, Ch. 366, §19. Under this amendment, Maine added gender identity and religion as protected classes for purposes of the education-discrimination provisions. *Crosspoint*, 719

F. Supp. 3d at 106; P.L. 2021, Ch. 366, §19, *codified at* 5 M.R.S §4602(5)(C). And Maine drastically narrowed the preexisting exemption to say that only the religious schools "that do[] not receive public funding" are exempt from provisions concerning sexual-orientation and gender-identity discrimination. *Crosspoint*, 719 F. Supp. 3d at 106; P.L. 2021, Ch. 366, §19, *codified at* 5 M.R.S. §4602(5)(C). The amended law also provides no exemptions for religious schools from religious-discrimination claims. "[T]o the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." P.L. 2021, Ch. 366, §19, *codified at* 5 M.R.S. §4602(5)(D).

The purpose of this amendment is obvious. If this Court were to declare Maine's sectarian ban unconstitutional, Maine needed another way to keep BCS and other religious schools out of the tuition program. So Maine enacted a poison pill that the religious schools must swallow to accept the tuition funds.

Maine's Attorney General Aaron Frey admitted as much. Frey explained to this Court in *Carson* that the amendment would "result in a significant change in how BCS . . . operate[s]" if it accepted public funds. Resp.Br.53, *Carson v. Makin*, 596 U.S. 767, 2021 WL 4993533. "Effective October 18, 2021, religious schools that accept public funds are prohibited from discriminating against students based on sexual orientation and gender identity," Frey wrote. *Id.*

Shortly after this Court's decision in *Carson*, Frey issued a press release. *Crosspoint* CA.1.J.A.274-75.

Frey denigrated BCS as "inimical to a public education" because, according to him, BCS "promote[s] a single religion to exclusion of all others, refuse[s] to admit gay and transgender children, and openly discriminate[s] in hiring teachers and staff." *Id.* at 275. This Court's decision in *Carson*, according to Frey, was "disturbing." *Id.* Frey stated that he "intend[ed] to explore … statutory amendments to address the Court's decision and ensure that public money is not used to promote discrimination, intolerance, and bigotry." *Id.* Yet he referred back to the recently amended Maine law and stated that the law will "require some religious schools to eliminate their current discriminatory practices." *Id.*

Maine's Speaker of the House Ryan Fecteau also confirmed the State's targeting of religious schools in an X post.

> @santiagomayer_: You know how SCOTUS said Maine couldn't exclude religious schools from their voucher program? Maine just changed the guidelines to exclude schools that discriminate against LGBTQ+ students.
>
> @SpeakerFecteau: Sure did. Anticipated the ludicrous decision from the far-right SCOTUS.

Crosspoint CA.1.J.A.280. In the New York Times, U.C. Davis Law Professor Aaron Tang wrote: "Anticipating this week's decision [in *Carson*], Maine lawmakers en-

acted a crucial amendment to the state's antidiscrimination law last year in order to counteract the expected ruling." Aaron Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, N.Y. Times (June 23, 2022), bit.ly/4eNznd2. He opined that this "legislative fix" by the Maine legislature "offers a model for lawmakers elsewhere who are alarmed by the court's aggressive swing to the right." *Id.* Indeed, he concluded that "Maine's example shows that those on the losing end of a case can often outmaneuver the court and avoid the consequences of a ruling." *Id.*

B. Maine's invocation of Colorado's law and the Tenth Circuit's decision

Maine's new law had the predictable effect of keeping religious schools like BCS and others—whom Maine previously considered ineligible, sectarian schools—out of the tuition program. *See Crosspoint*, 719 F. Supp. 3d at 105; *St. Dominic Acad. v. Makin*, 744 F. Supp. 3d 43, 63 (D. Me. 2024). Crosspoint Church filed suit in March 2023, and St. Dominic Academy, a Catholic school, along with several parents and the Diocese of Portland, filed a separate suit in June 2023. *Crosspoint*, 719 F. Supp. 3d at 103; *St. Dominic*, 744 F. Supp. 3d at 48.

The unconstitutionality of Maine's exclusion of religious schools from its tuition program is obvious. Most obviously, Maine is singling out religious schools with its poison-pill amendments. A law is not "neutral if it is 'specifically directed at … religious practice,'" such as "if it 'discriminate[s] on its face,' or if a religious exercise is otherwise its 'object.'" *Kennedy*, 597

U.S. at 526 (quoting *Smith*, 494 U.S. at 877; *Lukumi*, 508 U.S. at 533). Maine's law was expressly designed to exclude BCS and other religious schools from the tuition program after *Carson*, as Speaker Fecteau's post confirms. *Crosspoint* CA.1.J.A.280. And the Maine Attorney General's own words disparaging BCS's and other religious schools' beliefs as "inimical to a public education" and "promot[ing] discrimination, intolerance, and bigotry" confirm Maine's targeting of religious schools. *Crosspoint* CA.1.J.A.275; *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16-17 (2020) ("[S]tatements made in connection with the challenged rules can be viewed as targeting the ultra-Orthodox [Jewish] community."); *Lukumi*, 508 U.S. at 540-42 (considering city council members' hostile statements towards religious group in finding ordinance not neutral); *Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 584 U.S. 617, 635 (2018) (noting that civil rights commissioner's disparagement of plaintiff's religious beliefs as bigoted "is inappropriate").

And like Colorado's exclusion at issue here, Maine clearly conditions eligibility for public benefits on the religious schools' conformity with the State's views on marriage and gender. Like the Catholic preschools in Colorado, religious schools in Maine are given a choice: "[F]ollow[] the precepts of [your] religion and forfeit[] benefits," *or* "abandon[] one of the precepts of [your] religion in order to accept" the tuition. *Sherbert*, 374 U.S. at 404.

And just as Colorado refuses to grant exemptions to religious preschools here, Maine refuses to grant

exemptions to religious schools in Maine. Specifically, Maine allows families to use the State funding to send their children to private schools *outside* Maine. *St. Dominic*, 744 F. Supp. 3d at 52. However, these out-of-state private schools are exempt from the requirements of Maine's antidiscrimination laws. *Id.* In other words, Maine grants exemptions for "comparable secular activity" (out-of-state private schools) "more favorably than religious exercise" (religious schools in Maine). *Tandon*, 593 U.S. at 62.[2]

The district court in Maine rejected Crosspoint Church's neutrality-and-general-applicability arguments, applied *Smith*, and entered final judgment in Maine's favor. *Crosspoint*, 719 F. Supp. 3d at 126. A few months later, in St. Dominic's case, the same judge applied strict scrutiny, nonetheless held that Maine's exclusion survived, and denied a preliminary injunction. *St. Dominic*, 744 F. Supp. 3d at 78-79. Crosspoint Church and St. Dominic plaintiffs are currently appealing the district court's rulings in a consolidated appeal before the First Circuit. The court heard oral argument on January 7, 2025, but has not yet issued a ruling.

Most alarmingly, Maine has invoked the Tenth Circuit's decision in this case to persuade the First Circuit to allow the State to keep excluding BCS from the tuition program. Within days of the issuance of the

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[2] Before Crosspoint Church filed suit, Maine also exempted single-sex private schools from its antidiscrimination provision. But after the suit was filed, Maine's legislature removed that exemption. *Crosspoint*, 719 F. Supp. 3d at 107.

Tenth Circuit's decision, Maine submitted that decision to the First Circuit in a Rule 28(j) letter. *See* Maine 28(j) Ltr.

Maine saw similarity between its own exclusion of religious schools and Colorado's exclusion of Catholic preschools. "There, a law required preschools, as a condition for receiving state funds, to not discriminate on various bases, including religion, sexual orientation, and gender identity." *Id.* at 1. Maine highlighted that the Tenth Circuit "distinguished" this Court's decisions in *Carson*, *Espinoza*, and *Trinity Lutheran* by saying that the Catholic preschools were "not excluded from receiving public funds, but instead were simply subject to the nondiscrimination requirement." *Id.* at 1-2. Maine also highlighted how the Tenth Circuit found Colorado's law neutral and generally applicable. *Id.* at 2.

*

As Crosspoint Church's experience in Maine shows, the issues raised in this case are not limited to Colorado. Religious schools in other States are subjected to the same post-*Carson* maneuvers designed to keep religious schools out from public benefits. These States pretend that their laws are neutral and generally applicable even though they single out religious schools and refuse to grant them exemptions despite loosely granting exemptions for comparable secular schools. And in Maine's case, the State is expressly relying on the Tenth Circuit's faulty decision as a justification for continuing to keep religious schools away from public benefits.

At a minimum, the Court should reject the Tenth Circuit's refusal to apply strict scrutiny for all of the reasons explained by petitioners and Crosspoint Church. *See* St. Mary.Br.27-48; *supra* at 5-19. And for all the reasons petitioners explained, the Court should proceed to hold that Colorado's (and other States') exclusion of religious schools from public benefits—under the false pretense of generally applicable laws—cannot satisfy strict scrutiny. *See* St. Mary.Br.48-53.

Only such a thorough repudiation of the Tenth Circuit's errors from this Court will send a clear message to all the States (and lower courts) and safeguard the free-exercise rights of religious schools.

CONCLUSION

The Court should reverse the judgment below.

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