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 MASSACHUSETTS, MINNESOTA, SIXTEEN OTHER STATES, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

Regulations:

Books:

Other Authorities:

Massachusetts, Minnesota, California, Delaware, the District of Columbia, Hawai'i, Illinois, Maine, Maryland, Michigan, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington respectfully submit this brief as amici curiae in support of respondents.

INTRODUCTION AND INTEREST OF AMICI CURIAE

Almost every state uses a "mixed-delivery" model to structure at least some government programs, particularly childcare and early-education programs. A program of this kind relies on private providers rather than traditional state-run agencies to deliver services—an arrangement that has benefits for both states and their residents. By working with private entities, states can reach more people and offer a greater variety of services. Recipients of the services, for their part, enjoy greater choice and flexibility.

Despite the involvement of private entities, mixed-delivery programs still furnish fundamentally *public* services. As a result, states have a strong interest in holding providers to minimum standards—including, as relevant here, protections against invidious discrimination. When a private entity supplies a government service, the state has an interest in making sure the provider does not turn away participants on the basis of race, sex, religion, or other protected characteristics. To that end, states routinely require mixed-delivery providers to adhere to the same nondiscrimination rules that bind the states themselves.

This case threatens to disturb the legal framework that governs mixed-delivery programs. Petitioners challenge a policy that requires schools in Colorado's universal preschool program to "accept any applicant without regard to a student or family's religion, sexual orientation, or gender identity." Am. Compl. ¶ 8, D. Ct. Doc. 30. Before this Court, petitioners lead with—and devote most of their time to—the argument that *Carson* v. *Makin*, 596 U.S. 767 (2022), compels the application of strict scrutiny to Colorado's nondiscrimination rule. But *Carson* involved a program that excluded religious entities *because of* their religious character; it did not address a program, like Colorado's, whose neutral rules only incidentally burden the activities of religious entities. When it comes to such incidental burdens, the decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), still controls. Petitioners' argument to the contrary would dramatically alter settled First Amendment law.

Adopting petitioners' argument would also have significant practical consequences. Over the years, mixed-delivery programs have taken root under a legal regime that allows states to set neutral rules that treat all participating providers, secular and religious, equally. If accepted, petitioners' sweeping reading of *Carson* would require states to rethink how—and even whether—they could continue to partner with private providers while still enforcing minimum standards. Petitioners offer no good reason to disrupt the stable, administrable, and fair framework that has allowed mixed-delivery programs to flourish.

SUMMARY OF THE ARGUMENT

Petitioners make two arguments: first, that Colorado's nondiscrimination rule is subject to strict scrutiny under *Carson* because it conflicts with their religious beliefs (Br. 20-35), and second, that the rule is not "generally applicable" under *Smith* because Colorado recognizes certain exceptions to it (Br. 35-48). The latter argument—which corresponds to the first question presented—largely turns on the specifics of Colorado's universal preschool regime. But the former argument—which corresponds to the second question presented—has implications well beyond this case. This amicus brief focuses on that second question presented, explaining why petitioners' reading of *Carson* is both doctrinally unsound and practically unworkable.

I. Adopting petitioners' reading of *Carson* would dramatically reshape First Amendment law. *Carson* and its predecessors held that strict scrutiny applies when a law expressly targets an entity for disfavored treatment *because of* its religious charact. Colorado's nondiscrimination policy does not fit that description. In nevertheless seeking *Carson*'s application, petitioners conflate disparate treatment and disparate impact. *Carson* makes clear that a law that imposes disparate treatment on religious institutions is subject to strict scrutiny. But a law that merely has a disparate impact on religious institutions (like the statute in *Smith* itself) remains subject to *Smith*'s rule. Petitioners and their amici argue that this framework is too easy to evade, but their stated anticircumvention concerns are already addressed by existing doctrine. Their proposed expansion of *Carson* is a solution in search of a problem.

II. A broad reading of *Carson* will also have significant practical consequences and frustrate important state interests in equal opportunity. States have a compelling interest in protecting their residents from status-based discrimination. That interest has special force when public funds are involved. Expanding *Carson* will limit states' ability to further that compelling interest by limiting their authority to impose nondiscrimination conditions on the use of public funds.

And expanding *Carson* will have detrimental consequences on public programs that states administer in partnership with faith-based and other community providers.

ARGUMENT

I. Petitioners' arguments on the second question presented, if accepted, would upend settled First Amendment law.

A. *Carson* involved a law that expressly targeted entities because of their religious character.

1. This Court has long held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Emp't Div.* v. *Smith*, 494 U.S. 872, 879 (1990) (quotation marks omitted). With respect to the second question presented, the crux of the parties' dispute is what it means for a law to be "neutral."

The Court has addressed that issue before, largely by identifying the kinds of laws that it does *not* consider "neutral." For example, the Court has held that a statute is not neutral—and is therefore subject to strict scrutiny—if it operates as a "religious gerrymander." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 535 (1993). The Court found such a gerrymander in *Lukumi* itself: although the challenged municipal ordinances were facially neutral, their manifest "object," the Court recognized, was to prohibit certain identified practices of the Santería religion. *Id.* Similarly, the Court has set aside state action without applying *Smith* when confronted with evidence of agency decisionmakers' religious animus. *See Masterpiece Cakeshop* v. *Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 634-640 (2018). In *Masterpiece*, for example, the Court concluded that a state agency's treatment of a business owner was tainted by "clear and impermissible hostility toward [his] sincere religious beliefs." *Id.* at 634.

2. The trio of decisions that petitioners invoke—*Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017); *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020); and *Carson* v. *Makin*, 596 U.S. 767 (2022)—define a related but distinct category of non-neutral laws: those that *expressly* target an entity for disfavored treatment *because of* the entity's religious character.

In *Trinity Lutheran*, for example, the Court held that Missouri's "express policy of denying [playground-resurfacing] grants to any applicant owned or controlled by a church, sect, or other religious entity" violated the First Amendment. 582 U.S. at 455, 467. In reaching that conclusion, the Court declined to apply *Smith* because the challenged policy "single[d] out the religious for disfavored treatment." *Id.* at 460. As the Court explained, the policy "*expressly* discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely *because of* their religious character." *Id.* at 462 (emphasis added).

Similarly, in *Espinoza*, the Court invalidated a Montana regulation that forbade the recipients of certain state-supported scholarships from using their awards to attend religious schools. *See* 591 U.S. at 469-470. The state had promulgated the regulation to comply with a provision of the Montana Constitution that barred public aid to "any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." 591 U.S. at 470 (quoting Mont. Const. art. X, §6(1)). Citing *Trinity Lutheran*, this Court explained that the no-aid provision was subject to strict scrutiny because it "bar[red] religious schools from public benefits solely *because of* the religious character of the schools." *Id.* at 476 (emphasis added); *see id.* at 475-479.

Most recently, in *Carson*, the Court struck down a Maine statute that outlawed the provision of state aid to any school "associated with a particular faith or belief system" that "promote[d] the faith or belief system with which it [was] associated and/or present[ed] the material taught through the lens of this faith." 596 U.S. at 775. According to the Court, "the unremarkable principles applied in *Trinity Lutheran* and *Espinoza* suffice[d] to resolve th[e] case": Maine's law was subject to strict scrutiny because it "disqualified [religious schools] from [a] generally available benefit solely *because of* their religious character." *Id.* at 780 (emphasis added; quotation marks omitted). In applying the principles of these earlier cases, the *Carson* majority rejected the principal dissent's argument that Maine's law was distinguishable from those in *Trinity Lutheran* and *Espinoza* because it restricted funds based on their intended religious *use* rather than the recipient's religious *status*. *Compare id.* at 787-788, *with id.* at 796-797 (Breyer, J., dissenting). Importantly, however, the Court made clear that the First Amendment problem with use-based restrictions lay in "use-based *discrimination*"—that is, discrimination *because of* the funds' proposed religious use. *Id.* at 787-788 (emphasis added).

As the foregoing discussion makes clear, each of the above cases shared two salient facts (both of which, as explained in the next section, are absent here). First, the challenged state laws singled out religious institutions *because of* their religious character or activities. And second, the laws did so *expressly*.

B. The reasoning of *Carson* does not apply to Colorado's law, which does not target entities because of their religious character.

1. Petitioners challenge a Colorado policy that requires providers in its universal preschool program to (1) "accept any applicant without regard to a student or family's religion, sexual orientation, or gender identity" and (2) refrain from "discriminat[ing] against any person on the same bases." Am. Compl. ¶ 8, D. Ct. Doc. 30 (alteration in original). That policy does not contain either of the features that triggered strict scrutiny in *Trinity Lutheran*, *Espinoza*, and *Carson*. Colorado's policy obviously does not *expressly* target religious institutions or activities. And, even setting aside its facial neutrality, the policy does not "*single out* the religious for disfavored treatment" or "disqualify[] [applicants] from a public benefit solely *because of* their religious character." *Trinity Lutheran*, 582 U.S. at 460, 462 (emphasis added).

The history of nondiscrimination laws in this country confirms the point. Prohibitions against status-based discrimination have coexisted with our nation's robust free-exercise norms for generations. Today, nondiscrimination laws are a ubiquitous feature of American law: federal and state statute books are replete with provisions that bar private parties from discriminating on the basis of a range of protected characteristics.[1] *See 303 Creative LLC* v. *Elenis*, 600 U.S.

[1] *See, e.g.*, 42 U.S.C. §§ 2000a(a), 2000e-2(a) to (e), 2000e-16(a), 2000e-16b(a)(1); Cal. Civ. Code § 51; Cal. Educ. Code § 200; Cal. Gov't Code §§ 11135, 12940, 12955; Del. Code tit. 6, § 4500 *et*

570, 591 (2023) (describing such laws as "unexceptional"). Indeed, numerous federal statutes mirror Colorado's rule, barring recipients of federal funds from discriminating on the very same grounds—religion, sexual orientation, and gender identity—as those at issue here. *See, e.g.*, 47 U.S.C. §1726(a)(1) (prohibiting recipients of certain federal telecommunications grants from discriminating on the basis of "religion," "sexual orientation," and "gender identity" in "any program or activity that is funded in whole or in part with" those grants).[2] Against this backdrop, a policy that bars *every* provider in a government-funded program from discriminating on the basis of religion or sexual orientation cannot reasonably be said to exclude religious entities "*because of* their religious character." *Carson*, 596 U.S. at 780 (emphasis added).

2. Petitioners' argument to the contrary rests on a misunderstanding of *Carson* and a mischaracterization of Colorado's nondiscrimination rule.

Doctrinally, petitioners elide the distinction between laws that impose *disparate treatment* on religious entities and laws that have a *disparate impact* on religious entities. As discussed above (*supra*, at 5-

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seq.; Haw. Rev. Stat. §489-3; Md. Code Ann., State Gov't §26-606; Md. Code Ann., Educ. §26-704; Mass. Gen. Laws c. 151B, §4; Minn. Stat. §§363A.08-.19; N.J. Stat. Ann. §10:5-1 *et seq.*; N.Y. Exec. Law §§291, 296; Or. Rev. Stat. §659A.030; Vt. Stat. Ann. tit. 9, §4502; Vt. Stat. Ann. tit. 21, §495.

[2] *See also, e.g.*, 42 U.S.C. §10406(c)(2)(B)(i) (prohibiting recipients of certain federal grants from discriminating on the basis of "religion" or "sex"; 49 U.S.C. §5332(b) (same); *cf. Bostock* v. *Clayton County*, 590 U.S. 644, 662 (2020) (holding that Title VII's prohibition of discrimination "because of . . . sex" bars discrimination on the basis of sexual orientation and gender identity).

7), *Carson* requires laws in the former category to survive strict scrutiny. But laws in the latter category remain subject to *Smith*'s rule. *See* 494 U.S. at 879 (explaining that a law can be "neutral" even if it "proscribes . . . conduct that [the plaintiff's] religion prescribes"). That should come as no surprise: the law in *Smith* itself had a disparate impact by punishing a practice—consumption of peyote—that some churches consider sacramental. *See id.* at 874.

The Court reiterated this distinction between disparate treatment and disparate impact in *Christian Legal Society* v. *Martinez*, 561 U.S. 661 (2010) (*CLS*). There, a public university refused to recognize a Christian student group that excluded individuals because of their religion or sexual orientation. *See id.* at 672-673. Like Colorado here, the university had a policy that barred student groups from discriminating on the basis of various protected traits. *Id.* at 670. Applying *Smith*, the Court rejected the student group's free-exercise claim without applying strict scrutiny, because "the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct." *Id.* at 697 n. 27.

Petitioners' position on the second question presented is inconsistent with this settled law. If petitioners are right that *Carson* subjects every state law with a disparate impact on religion to strict scrutiny, then *Carson* has swallowed the rest of this Court's free-exercise jurisprudence. At the very least, petitioners' reading of *Carson* is flatly inconsistent with *Smith* and *CLS*: there is no principled way to hold that Colorado's nondiscrimination policy "targets" entities "because of" their faith while reaffirming *Smith*'s treatment of Oregon's facially neutral anti-drug policy and *CLS*'s treatment of the university's facially neutral student-group policy.

Beyond the doctrinal problems with their arguments, petitioners also distort the facts. In an effort to shoehorn this case into the *Carson* line, petitioners claim (Br. 29-30) that Colorado's policy "denies [funding] to families who choose Catholic preschools" and "bar[s] Archdiocesan schools from participating" in the universal preschool program. That characterization is inaccurate. As petitioners' own complaint acknowledges, the challenged policy "require[s] *all* preschool providers to accept an[] applicant without regard to [the] student or family's religion, sexual orientation, or gender identity." Am. Compl. ¶ 8, D. Ct. Doc. 30 (emphasis added). That evenhanded policy may well "conflict[] with [petitioners'] religious beliefs." *Id.* ¶ 9. But a law that clashes with a party's religious beliefs is not tantamount to a law that targets a party *because of* those beliefs. *See Lukumi*, 508 U.S. at 535 (explaining that a law's "adverse impact will not always lead to a finding of impermissible targeting").

3. Petitioners and their amici raise a variety other misguided arguments in support of their reading of *Carson*, several of which warrant a response.

a. Petitioners suggest (Br. 35) that the Court should expand *Carson* to cover disparate-impact claims because otherwise that decision would be "trivially easy to avoid." In advancing this argument, however, petitioners ignore the rest of this Court's free-exercise jurisprudence. As discussed above (*supra*, at 4), precedent makes clear that, even if a state law is cast in religiously neutral terms, it is still subject to strict scrutiny if it operates as a "religious gerrymander." The same is true when a state's efforts to enforce a facially neutral statute are tainted by religious animus. *See supra*, at 4. These doctrinal safeguards prevent the kind of circumvention that petitioners fear.

Tellingly, petitioners do not invoke these safeguards; they do not claim, for example, that Colorado has gerrymandered its policy to cover their religious practices (as in *Lukumi*), or that religious animus marred Colorado's decisionmaking (as in *Masterpiece*). But the fact that these protections do not apply here is no reason to pretend they do not exist. The Court need not reinvent *Carson* to address a putative problem that current doctrine already solves.

b. The United States argues (Amicus Br. 25-36) that *Smith* does not apply (1) in "public benefits" cases or (2) absent "an across-the-board criminal prohibition." Neither of those distinctions holds up.

The first distinction is a curious one, because *Smith* itself was a public-benefits case. As discussed, the ultimate issue there was whether Oregon could constitutionally deny the respondents' request for unemployment benefits on the basis of their prior peyote use. 494 U.S. at 874-876. For this reason, the United States' first proposed ground for cabining *Smith* is inconsistent with *Smith* itself.

The second one is, too. The United States argues (Br. 30) that *Sherbert* v. *Verner*, 374 U.S. 398 (1963), "continues to supply the operative framework" in cases that do not involve freestanding criminal conduct. But *Smith* distinguished *Sherbert* and its progeny on the ground that the unemployment programs in those earlier cases called for an "individualized governmental assessment of the reasons for the relevant conduct." 494 U.S. at 884. In other words, the salient distinction was not that the peyote-use law in *Smith* was a criminal statute, or that it was enacted separately from the Oregon law that governs unemployment assistance, but that it required no individualized determinations (a consideration that is separately addressed by *Smith*'s "generally applicable" prong). *Id.* At bottom, the United States is asking the Court to craft a new carve-out—not to apply existing law.

c. Finally, West Virginia and several other states contend (Amicus Br. 20-32) that policies like Colorado's should be subject to strict scrutiny because "[a]ntidiscrimination law" has become a "tool used to punish unpopular religious exercise." In support of that argument, West Virginia claims (Br. 20-25) that Colorado's nondiscrimination policy is cut from the same cloth as Blaine Amendments and other historical examples of "majoritarian hostility towards disfavored religious minorities." But a standard-issue nondiscrimination policy—whose relevant protections track those found in countless other state and federal statutes (*see supra*, at 7-8 & nn. 1-2)—hardly compares to those examples of expressly codified religious bigotry. Faced with that problem, our sister states pivot to the concern (Br. 25-32) that some states will wield "superficially neutral . . . nondiscrimination provision[s]" in a "covert" attempt to disfavor religious entities.[3] But, again, precedent already prohibits that kind of circumvention. Like petitioners, our sister states fail to identify a problem that would justify their proposed restructuring of settled free-exercise law.

[3] West Virginia's brief maintains (at 28-32) that four states have already enacted policies that achieve this kind of covert discrimination. While we dispute our sister states' characterization of the cited policies and the enacting states' motivations, a point-by-point response is beyond the scope of this brief.

West Virginia's brief also ignores the legitimate interest that a state has in guaranteeing that its programs remain open to all comers. When a provider partners with the state to deliver public services like schooling or childcare, the provider essentially steps into the state's shoes. In that context, the state has an obvious interest in ensuring that the provider is not disfavoring minority communities or turning away participants on grounds the government itself could not employ. This concern is especially significant when providers of a particular public service are few and far between, leaving recipients of those services with limited options. To be sure, not every state gives the same weight to this interest; some have chosen to allow state-funded programs to exclude otherwise-eligible participants based solely on their religion or sexual orientation. *See generally* W. Va. Amicus Br. But nothing in *Carson* suggests that this Court has constitutionalized that choice.

II. Petitioners' arguments on the second question presented, if accepted, would frustrate important state interests.

Expanding *Carson* to the facts here would not only create significant doctrinal instability, but it would also have harmful practical consequences for amici and their residents. For one thing, petitioners' argument, if adopted, would limit the government's longstanding authority to impose routine nondiscrimination conditions on the use of public funds. For another, petitioners' reading of *Carson* would disrupt a vast array of state programs that leverage the resources and expertise of private providers—including faith-based providers—to deliver public services.

A. Petitioners' approach would limit states' ability to impose neutral nondiscrimination rules on publicly funded programs.

1. As previewed above (*supra*, at 13), petitioners cannot dispute that states have a strong and legitimate interest in protecting people from status-based discrimination. *See, e.g.*, *Masterpiece*, 584 U.S. at 632 (noting that religious objections generally "do not allow business owners . . . to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law"). This interest is particularly strong when public funds are involved: "It is beyond dispute that any public entity . . . has a compelling interest in assuring that public dollars . . . do not serve to finance the evil of private prejudice." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 492-493 (1989). In other words, the fact "[t]hat the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." *Norwood* v. *Harrison*, 413 U.S. 455, 463 (1973).

In keeping with these principles, many states have codified into law an obligation of equal treatment in employment, housing, public services, education, and other areas. *See supra,* at 7-8 n. 1 (collecting state civil-rights laws). These civil-rights statutes typically prohibit discrimination based on a range of protected characteristics, including those at issue here (religion, sexual orientation, and gender identity). *See id.* The nondiscrimination rule for Colorado's universal preschool program stems from exactly this kind of law. The policy was not merely the product of a discretionary decision by state officials: it comes directly from a statute duly enacted by the Colorado General Assembly. *See* Colo. Rev. Stat. §26.5-4-205(2)(b).

Laws like these reflect the value judgments and policy determinations of democratically accountable state legislatures about the best way to advance nondiscrimination interests that this Court has identified as compelling. They are, as this Court has explained, "well within the State's usual power to enact" and "do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 572 (1995).

2. States should not be expected to shed this commitment to equal treatment when funding public services. Yet that is exactly what petitioners' expansive reading of *Carson* would do: limit states' ability to apply routine nondiscrimination laws to publicly funded programs. Adopting petitioners' argument, in other words, would potentially require states with mixed-delivery programs to finance differential treatment on the basis of protected characteristics, including religion, sexual orientation, gender identity, and more.

That outcome is particularly perverse in the context of a voluntary public program, like Colorado's, in which providers knowingly choose to participate. States are entitled to some leeway when they enact and enforce nondiscrimination rules for such programs. *See CLS*, 561 U.S. at 682-683 (noting that the Court has distinguished, in "diverse contexts," between state action that "dangl[es] the carrot of subsidy" and state action that "wield[s] the stick of prohibition"); *cf. Bob Jones Univ.* v. *United States*, 461 U.S. 574, 603 (1983) ("[N]ot all burdens on religion are unconstitutional."). Petitioners' expansive reading of

Carson would restrict that leeway and potentially require a state to privilege some rights over others, and some people over others, when a provider of public services asserts religious beliefs that conflict with the state's neutral codification of equality under the law.

B. Petitioners' approach would impede public programs that states administer in conjunction with private providers.

In addition to disturbing the state laws prohibiting discrimination, petitioners' reading of *Carson* would also disrupt countless public-benefits programs that states currently offer, in whole or in part, through private providers. Among other things, petitioners' approach could force states to choose between continuing these programs or adhering to their promise of equal treatment.

1. The mixed-delivery model—in which government partners with private entities to deliver services to residents—has become a common way to organize public programs.

This model is particularly prevalent in educational programs. Today, every state enshrines a right to public education in its constitution. *See* Derek W. Black, *The Fundamental Right to Education*, 94 Notre Dame L. Rev. 1059, 1093-1094 & fig. 1 (2019). But states make good on that promise in different ways. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991) (describing states' role in federalist system as fonts of "innovation and experimentation" that address the "diverse needs of a heterogenous society"); *see also generally* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018). As relevant here, many states fulfill their educational obligations through a mixed-delivery system. In this case, for example, when the voters of Colorado sought to capitalize on the benefits of universal preschool education, they determined by a nearly two-to-one margin that a "mixed delivery system of preschool providers" would "increase[] the ultimate social and economic benefits of high-quality preschool programming for the state as a whole." Colo. Rev. Stat. §26.5-4-202(1)(a)(V), (VI). The state therefore partnered with private providers—including faith-based providers—to implement its universal preschool program.

But the mixed-delivery model is not limited to public education: faith-based and other community providers play a critical role throughout the social-service ecosystem. States and municipalities partner with such providers to deliver services ranging from child-care assistance, disaster relief, and homeless shelters to soup kitchens, job training, and addiction recovery programs. *See, e.g.*, Lutheran Soc. Serv. of Minn., *Responding to Minnesota's Changing Needs*, https://perma.cc/3JLQ-4PEN (noting that Lutheran Social Service is "one of the state's largest nonprofit social service organizations"); Jewish Fam. & Children's Serv. of Greater Bos., *2025 Annual Report*, https://perma.cc/2Z5X-3TUD (detailing extensive services and noting that over 50% of revenue is from government).

States and their residents benefit from these public-private partnerships. The states benefit from the expertise and reach of a vast network of non-profits—faith-based and secular. And states' residents benefit from the flexibility and choice that accompanies a mixed-delivery system for public services.

2. Despite the involvement of private providers, the services that states and their partners deliver in a mixed-delivery system are still *public* services. For that reason, states have a strong interest in applying the same nondiscrimination rules that govern their own in-house programs and conduct. *See supra*, at 13. And beyond these civil-rights guarantees, states also need to ensure that providers who serve the public—using the public's money—do so in accordance with minimum standards of competence, safety, and quality. In the context of a state-funded preschool program, for example, a state has an obvious interest in setting neutral ground rules for things like curriculum content, teacher qualifications, and facility cleanliness. *See generally, e.g.*, 8 Code of Colo. Regs. § 1404-1.

Petitioners' expansive reading of *Carson* would potentially subject all of those ground rules to strict scrutiny. The inevitable result: instead of administering a single rulebook for their mixed-delivery programs, states would have to grapple with a provider-by-provider patchwork of rules and exceptions. Forced to choose between partnering with private providers and controlling how their money is spent, many states may opt to bring mixed-delivery services fully in-house, sacrificing the choice and flexibility that their residents have, until now, enjoyed.

As discussed above (*supra*, at 7-13), the First Amendment does not compel those consequences. The federal government has long used its power over the public purse to require equal access to education, housing, employment, and public accommodations. *See, e.g.*, *U.S. Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986) (describing how "the recipient's acceptance of the funds triggers coverage under the nondiscrimination requirement" in Title VI, Title IX, and other federal civil-rights laws); *see also supra*, at 8 & n. 2 (cataloguing federal statutes that place nondiscrimination conditions on the use of federal funds). State governments are part of that same tradition. Again, not every state places the same weight on these nondiscrimination principles. *See supra*, at 12-13. But the First Amendment does not require a state to abandon its nondiscrimination laws every time it engages a private entity to perform a public service.

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The Court should not expand *Trinity Lutheran*, *Espinoza*, and *Carson* in a way that undermines states' ability to develop and design public programs to best serve—and best protect—their diverse communities. If accepted, petitioners' arguments will transform free-exercise arguments into constitutional aces, a significant advantage in any claim against a government entity. States will be pressured to choose, both unfairly and unnecessarily, between serving all people equally and partnering with private providers at all. The Constitution does not command that choice, and neither should this Court.

CONCLUSION

The Court should affirm the Tenth Circuit's judgment as to the second question presented.

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