No. 25-802

In the Supreme Court of the United States

FOOTHILLS CHRISTIAN MINISTRIES, ET AL.,
Petitioners,

v.

KIM JOHNSON, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL.,
Respondents.

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

BRIEF OF NOTRE DAME EDUCATION LAW PROJECT, NOTRE DAME PROGRAM ON CHURCH, STATE & SOCIETY, AND LINDSAY AND MATT MOROUN RELIGIOUS LIBERTY CLINIC *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Richard W. Garnett
Counsel of Record
Nicole Stelle Garnett
John A. Meiser
NOTRE DAME LAW SCHOOL
3117 Eck Hall of Law
Notre Dame, IN 46556
574.631.6981 | rgarnett@nd.edu

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes, Rules and Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

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

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

The **Notre Dame Program on Church, State & Society** focuses on how law shapes the relationship among religious institutions, government, and the broader social order. The Program advances the University's distinctive Catholic mission through scholarship, conferences, workshops, and lectures that bring together diverse perspectives to sharpen debate and build community.

Notre Dame Law School's **Lindsay and Matt Moroun Religious Liberty Clinic** is an academic institution and teaching law practice that promotes and defends the freedom of religion for all people. It advocates for the right of all people to exercise,

---

[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice of *amici*'s intention to file this brief at least ten days prior to the deadline.

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

express, and live according to their beliefs and defends individuals and organizations against interference with these fundamental liberties.

SUMMARY OF ARGUMENT

The First Amendment guarantees religious institutions the power to conduct their internal affairs. *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732, 746 (2020). *See also Cath. Charities Bureau, Inc. v. Wisconsin Lab. & Indus. Review Comm'n*, 605 U.S. 238, 249 (2025); *id.* at 255 (Thomas, J., concurring). This principle of self-governance, known as the church autonomy doctrine, is an essential feature of the Constitution's protection of religious liberty. Despite this Court's consistent guidance, lower courts have implemented a myopic conception of the doctrine, allowing state executive and legislative branches to use non-discrimination law, licensing requirements, and other forms of regulatory enforcement to meddle in the internal governance of churches.

California's Child Day Care Facilities Act is a particularly egregious example of unconstitutional interference with church autonomy. Under the guise of regulating health and safety, California intrudes on the most fundamental aspects of internal church governance. The licensing regime gives comprehensive state control over church-operated day care operations, allowing it to search church property without notice and warrant, seize church records without judicial oversight, interrogate church staff, interrogate children without parental notice, and, perhaps most problematically, mandate that church-operated day cares permit the children that they serve to opt out of religious activities and worship, even when these activities are required by sincerely-held religious beliefs.

Further, the Act illustrates a key move in what has become religious liberty opponents' playbook in the wake of *Carson v. Makin*, which affirmed the rule that the First Amendment prohibits religious discrimination in public programs. *See* Aaron Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, N.Y. Times (June 23, 2022), https://bit.ly/44mJt00. Specifically, state and local governments preserve formal access to otherwise generally available public programs and then pile on conditions that, in operation, force religious institutions to secularize or exit. That structure squarely violates *Carson*'s categorical rule that "the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination." *Carson v. Makin*, 596 U.S. 767, 788 (2022). Yet, states continue to persist in efforts to circumvent this rule. California's licensing scheme is but another example of this same, unconstitutional, maneuver.

ARGUMENT

I. The church autonomy doctrine is a structural limitation on all branches of government, not merely a judicial abstention doctrine.

The Religion Clauses jointly forbid interference with religious institutions' internal governance, faith, and mission. Wielding its regulatory might, California does exactly that—forcing church-operated day cares to allow the state to conduct unannounced searches of church property, seize internal church documents, interrogate church staff, and, most egregiously, dictate worship attendance requirements. All of these matters fall squarely within the sphere of church autonomy protected by the First Amendment. Unfortunately, lower courts have not yet gotten this Court's message about the fundamental nature of the doctrine but have instead misconstrued (and narrowed) the nature of church autonomy.

Most courts, including the Ninth Circuit in this case, treat the principle as merely a judicial abstention doctrine preventing courts from resolving ecclesiastical disputes, particularly those related to the so-called "ministerial exception." This narrow understanding misses the constitutional forest for the trees. Church autonomy is a structural principle inherent in the First Amendment that prohibits all branches of civil government—legislative, executive, and judicial—from interfering with matters of religious doctrine and governance. Absent this Court's guidance, this approach, vividly illustrated by the lower courts' decisions in this case, would constitute a dramatic erosion of religious liberty.

A. California's day care licensing regime unconstitutionally intrudes on church autonomy.

This case exemplifies the pervasive misunderstanding of the church autonomy doctrine. Through its executive and legislative arms, California implemented a day care licensing regime that grants the state extraordinary control over church property, personnel, policy, and even religious worship. The state's audacious intrusion into internal church government contravenes this Court's repeated instructions regarding church autonomy and creates a timely opportunity for this Court to correct an error that is, unfortunately, not unique to California.

Since the first iteration of the Child Day Care Facilities Act in 1984, the Department of Social Services ("the Department") has implemented a comprehensive licensing regime for day care facilities and preschools. From regulating "napping space" to the fat content in milk, this byzantine set of regulations seeks to ensure the health and safety of day care facilities. Cal. Code Regs. § 101230(b); Cal. Health & Safety Code § 1596.808(a)(1). Indeed, the Department's only lawful prerogative is the regulation of health and safety. Cal. Health & Safety Code § 1596.878. However, under the pretense of regulating health and safety, the Department has implemented regulations that directly interfere with internal church governance.

California strips religious organizations of the autonomy to define their own communal worship practices, and forces them to convey a message that may contradict their theological beliefs, in clear violation of the church autonomy doctrine. As a

condition on licensure, religious day cares and preschools must allow their students "[t]o be free to attend religious services or activities of [their] choice." Cal. Code Regs. tit. 22, § 101223(a)(5).

To enforce this intrusive regime, the state deputizes the public. "Any person" may submit a tip of noncompliance, prompting a mandatory state investigation without warrant or forenotice. Cal. Health & Safety Code § 1596.853. Of course, a tip is not required as "any" "agent of the department may . . . enter and inspect any place . . . at any time, with or without advance notice." *Id.* at § 1596.852. Moreover, the Department may "remove[]," "inspect, audit, and copy" records "upon demand." Cal. Code Regs. § 101200(c). Penalties for violations include loss of licensure—that is, the loss of the right for religious communities to educate their children—and a misdemeanor conviction punishable by up to a $1,000 fine and 180 days in prison. Cal. Health & Safety Code § 1596.890(a).

To be sure, religious institutions can protect their autonomy by forgoing the operation of day cares and preschools. But this Court has invalidated similar schemes that "give[] the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Nat'l Inst. of Fam. & Life Advocates v. Becerra*, 585 U.S. 755, 773 (2018). Despite the "tremendous shortage" of childcare in the state, California forces religious institutions to make the following choice: compromise sincerely-held religious beliefs to receive state licensure or forgo religious education of their young. Cal. Health & Safety Code § 1596.72(f). In other words, the licensure

regime permits religious institutions to participate only if they waive their First Amendment rights.

To be clear, attendance at a religious day care, and participation in the religious activities they provide, involves no element of compulsion. The only children in religious day cares in California are those whose parents have chosen religious day cares. Parents often select these programs specifically for their religious identity—a choice that inheres in the "liberty of parents . . . to direct the upbringing and education of [their] children[.]" *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925). While the First and Fourteenth Amendments restrain the conduct of public schools as state actors, a church-operated day care—as a religious entity—is "protected, not regulated, by the Constitution." Richard W. Garnett, *Religious Schools and Religious Rites*, SCOTUSblog (Dec. 2, 2025), https://www.scotusblog.com/2025/12/religious-schools-and-religious-rites/. In short, religious schools have the right to be "authentically and pervasively religious." *Id.* Of course, non-state schools may be reasonably regulated. Nevertheless, states may not—under the guise of health and safety regulations—pretextually interfere with religious institutions' constitutionally protected zone of autonomy.

Unfortunately, the narrow conception of the church autonomy doctrine adopted below—and increasingly by lower courts nationwide—leaves religious institutions subject to the whims of hostile democratic forces. The Ninth Circuit's only passing reference to the doctrine came in a footnote dismissing the applicability of the ministerial exception outside of employment disputes. *Foothills v. Johnson*, 148 F.4th 1040, 1052 n.6 (9th Cir. 2025). But "the church

autonomy doctrine is broader than the ministerial exception." *Union Gospel Mission of Yakima WA v. Brown*, 162 F.4th 1190, 1203 (9th Cir. 2026); *see also McRaney v. N. Am. Mission Bd.*, 157 F.4th 627, 636 (5th Cir. 2025) (the ministerial exception "is one 'component' of the church autonomy doctrine" (quoting *Our Lady,* 591 U.S. at 746)).

Though the lower court acknowledged the ministerial exception as a limit on judicial power, it saw no constitutional deficiency in California's intrusion into churches' protected sphere of autonomy. This Court has held that the "very process of inquiry" into a church's internal affairs can "impinge on rights guaranteed by the Religion Clauses." *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979). The process involved in "mere adjudication" of a church's sincerity "would pose grave problems for religious autonomy." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 205–06 (2012) (Alito, J., concurring). It defies logic to conclude that such constitutional limitations on the civil authority only apply to the courts. Under the Ninth Circuit's reasoning, the licensing regime which empowers California to seize a religious institution's records, interview its staff without prior notice, and search its property without warrant or warning is constitutional because it is an administrative agency—not the courts through their power to enforce discovery—exercising its authority. That cannot be right. Unfortunately, the Ninth Circuit exemplifies a widespread misunderstanding among the circuit courts.

B. Lower courts have misconstrued the church autonomy doctrine.

Lower courts have inconsistently applied and developed approaches wholly inconsistent with the purposes of the church autonomy doctrine. *See* Lael Weinberger, *The Limits of Church Autonomy*, 98 Notre Dame L. Rev. 1253, 1270–86 (2023) ("[T]he doctrinal analysis in the courts is in chaos, and . . . there are a number of approaches being employed by lower courts that are in tension with the Supreme Court's precedents or inconsistent with the purposes of church autonomy doctrine."); *see also* Carl H. Esbeck, *Church Autonomy, Textualism, and Originalism: SCOTUS's Use of History to Give Definition to Church Autonomy Doctrine*, 108 Marq. L. Rev. 705, 707 n.2 (2025) ("[W]hen confronted with a church autonomy defense, intermediate appellate courts are tacitly struggling").

Moreover, as this case illustrates, the doctrinal chaos is not confined to the courts. While the broader principle—that no branch of government may dictate to religious institutions how to direct their internal affairs—appears throughout this Court's precedents, it has been systematically ignored by the political branches. Indeed, unconstitutional non-discrimination laws and onerous licensing requirements crafted by the legislative branch, enforced by the executive, and unchallenged by the judiciary are the primary threats to religious freedom. Without clear guidance from this Court, the promise of religious freedom risks becoming an empty formality, honored in this Court's opinions but routinely circumvented in practice. This case presents

an opportunity to clarify the doctrine's scope and reaffirm its constitutional foundations.

C. The church autonomy doctrine is deeply embedded in our constitutional heritage and functions as a structural restraint on the state.

The church autonomy doctrine has deep historical roots. Indeed, church autonomy "was the first kind of religious freedom to appear in the western world." Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol'y 821, 836 (2012) (footnote omitted). Reflecting the mandates of both the Free Exercise Clause and the Establishment Clause, the church autonomy doctrine "guarantees to religious institutions broad autonomy to conduct their internal affairs and govern themselves." *Cath. Charities*, 605 U.S. at 255 (Thomas, J., concurring). Recognizing that "'Religion is wholly exempt from [Civil Society's] cognizance,'" the doctrine operates as a structural limitation on the state's power over religious institutions. *Id.* at 258 (quoting Memorial and Remonstrance Against Religious Assessments (1785), in 8 Papers of James Madison 295, 299 (R. Rutland, W. Rachal, B. Ripel, & F. Teute eds. 1973)). Put simply, "[w]here the church autonomy doctrine applies, its protection is total." *McRaney,* 157 F.4th at 641.

From the earliest days of the republic, the principle that the civil authority lacks the competence to intervene in ecclesiastical matters was observed in various policies and practices. *See id.* at 634–35; *see also* Richard W. Garnett, *Religious Freedom, Church Autonomy, and Constitutionalism*, 57 Drake L. Rev.

901, 903 (2009) ("And, *our* tradition of constitutionalism was made possible . . . by the independence of the church from secular control"). In their positions of formal leadership, the architects of the Constitution established clear precedents regarding the independent spheres of political and religious authority. Consider the following three framing-era episodes.

First, in 1783, the Vatican proposed an agreement with Congress to approve a Bishop-Apostolic for the new nation. Since the proposed candidate was French, the proposal was initially sent to the ambassador to France, Benjamin Franklin. He reflected, "[i]t would be absolutely useless to send it to Congress, which, according to its power and constitution, cannot and should not in any case intervene in the ecclesiastical affairs of any sect or religion established in America." Peter Guilday, *The Appointment of Father John Carroll as Prefect-Apostolic of the Church in the New Republic*, 6 Cath. Hist. Rev. 204, 217 (1920). Indeed, Congress responded that the subject, "being purely spiritual, is without the jurisdiction and powers of Congress, who have no authority to permit or refuse it." *Id.* at 226.

Second, pursuant to European practice, the Roman Catholic Bishop John Carroll sought to consult Secretary of State James Madison regarding the appointment of a church leader over the newly-acquired Louisiana Territory. After conferring with President Thomas Jefferson, Madison explained that the decision was entirely entrusted to the Catholic Church. He noted, "[A]s the case is entirely ecclesiastical it is deemed most congenial with the scrupulous policy of the Constitution in guarding

against a political interference with religious affairs, to decline" the invitation to advise. Letter from James Madison to Bishop John Carroll (Nov. 20, 1806), *in* 20 Records of the American Catholic Historical Society of Philadelphia 63–64 (1909).

Third, following the Louisiana Purchase, the Ursuline nuns of New Orleans wrote to President Jefferson seeking assurance that the Purchase would not undermine their legal rights. President Jefferson replied, "[t]he principles of the constitution of the United States are a sure guaranty to you that [they] will be preserved to you sacred and inviolate, and that your Institution will be permitted to govern itself according to its voluntary rules without interference from the civil authority." 1 Anson Phelps Stokes, Church and State in the United States 678 (1950).

As these framing-era episodes illustrate, the church autonomy doctrine, properly understood, restricts all three branches of government. The doctrine is not cabined to the non-justiciability of church-related controversies. Rather, the principles that motivate the judicial jurisdictional bar apply with equal force to the political branches.

This Court has drawn on the church autonomy doctrine to prevent executive agency intrusion in religious institutions' constitutionally protected sphere of independence before. Consider *NLRB v. Catholic Bishop of Chicago* where this Court barred an attempt by the National Labor Relations Board to assert jurisdiction over Catholic school teachers. *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490 (1979). The "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" directly related to the protected autonomy of the

church. *Id.* at 507. If granted jurisdiction, the NLRB's resolution of labor disputes would impermissibly and "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.* at 502. As Judge Rao articulated, "[a]lthough decided on constitutional avoidance grounds, the Court reasoned that allowing the Board to resolve labor disputes within religious schools 'would implicate the guarantees of the Religion clauses.'" *O'Connell v. United States Conf. of Cath. Bishops*, No. 23-7173, 2025 WL 3082728, at *14 (D.C. Cir. Nov. 4, 2025) (Rao, J., dissenting from the denial of rehearing en banc) (quoting *id.* at 507).

This Court's church autonomy cases affirm that the state—whether in its judicial capacity or otherwise—has "no legitimate role in defining the structure of [church] polity." *Cath. Charities,* 605 U.S. at 260 (Thomas, J., concurring). The doctrine stands for the simple truth that "religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free" to run their own institutions. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring in the judgment). The doctrine "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952). This Court prefaced its survey of its precedents by noting, "Our decisions in [matters relating to a church's ability to select its own ministers] confirm that it is impermissible for *the government* to contradict a church's determination of who can act as its

ministers." *Hosanna-Tabor*, 565 U.S. at 185 (emphasis added). Whether through non-discrimination law, licensures, or other regulatory action, the government is categorically prohibited from interfering with religious institutions' faith, doctrine, or internal governance.

II. California's licensing scheme also reflects how states seek to circumvent the First Amendment's religious non-discrimination principle.

This Court's precedents have made clear that the Free Exercise Clause prohibits discrimination against religious institutions in government programs. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 464 (2017); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 475 (2020); *Carson*, 596 U.S. at 789. This Court also has rejected states' efforts to evade this non-discrimination principle by playing semantic games. *Carson* is particularly instructive here: Maine tried to evade the non-discrimination mandate by rebranding the exclusion of faith-based schools from a parental choice program as a prohibition based upon the religious "uses" of the funds at issue rather than the religious "status" of the schools. *Id.* at 786–87. This Court emphatically rejected the maneuver. *Id.* at 789.

Nevertheless, states are now attempting a new version of the same semantic move: Avoiding explicit religious discrimination while imposing eligibility conditions that force religious schools to dilute religious exercise or exit public programs. California's licensing regime fits that pattern. That regime

conditions the right to operate a preschool on compliance with rules that regulate religious activity. In short, the label has changed, but the exclusionary effect has not.

A. The First Amendment clearly prohibits religious discrimination in public programs, including California's day care licensure regime.

This Court's standard is clear: A state may not exclude religious organizations from otherwise available public benefits "simply because of what [they are]." *Trinity Lutheran,* 582 U.S. at 464. This principle extends to education benefits, *see Espinoza,* 591 U.S. at 475, and forecloses "use-based discrimination" as a workaround. *Carson,* 596 U.S. at 789.

Accordingly, a state may not accomplish religious discrimination through deceptive design: calling the restriction "neutral," calling the benefit a "contract," calling the disqualifier a "licensing condition," or canceling a program altogether once religious participants seek entry. *See Espinoza,* 591 U.S. at 475. The ultimate question under this Court's cases is whether a state has structured participation so that religious providers must either abandon religious exercise or exit the program. *See, e.g.*, *Carson*, 596 U.S. at 789.

B. Even after *Carson*, states are still engineering religious exclusions.

This Court has ruled that states cannot structure public programs to exclude religious participants.

However, many states are still trying. The tactic, illustrated by this case, is to impose eligibility conditions so intrusive on religious freedom that religious institutions cannot participate. This strategy has been broadcast openly: "[O]utmaneuver" this Court, "avoid the consequences" of *Carson*, and make the decision "less of a blessing" than it appears. Tang, *supra*; James G. Dwyer, *Pushing States to Attach Regulatory Strings to Vouchers*, Canopy F. (Nov. 4, 2022). In many states, this discriminatory strategy has come to fruition. Specifically, states are openly defying *Carson* by engineering regulatory schemes that are so intrusive on religious exercise as to make participation by religious schools—and other religious institutions—untenable.

Maine's regulatory antics illustrate this strategy. Even when *Carson* was pending, Maine moved to undercut the expected decision. Specifically, Maine amended the non-discrimination laws applicable to schools participating in the challenged program. These amendments added conditions which barred admissions or financial-aid decisions from being made on the basis of, among other things, religion. The regulations also, remarkably, required schools to allow students to express dissenting religious views in the classroom, and eliminated a long-standing exemption that allowed religious organizations to operate in accordance with their beliefs regarding sexuality and gender. *See* An Act to Improve Consistency in Terminology and Within the Maine Human Rights Act, 2021 Me. Laws 761, § 19 (as codified at Me. Rev. Stat. tit. 5 § 4602(1)(D), (E), (5)(D)) (repealing Me. Rev. Stat. tit. 5 § 4602(4)).

Maine made its anti-religious motivations clear. In its brief to this Court, Maine opined that those changes meant it was "purely speculative as to whether any religious school would accept public funds" even if it lost the case. Br. of Resp't at 54, *Carson*, No. 20-1088. The day *Carson* was decided, Maine's Attorney General denounced the ruling, condemned schools that "promote a single religion," and accused them of fostering "bigotry." Statement of Maine AG Aaron Frey (June 21, 2022). He vowed to ensure "public money" would not flow to such schools. *Id.* Days later, Maine's Speaker of the House boasted that legislators had already accomplished that goal by changing the rules in "anticipat[ion of] the ludicrous decision from the far-right SCOTUS." *St. Dominic Acad. v. Makin*, 744 F. Supp. 3d 43, 54 (D. Me. 2024). Subsequently, Maine's response to *Carson* was hailed as "a model for lawmakers elsewhere" who find themselves "on the losing end of [the] case" and wish to avoid its consequences. Tang, *supra*.

Other states have followed Maine's lead. In fact, religious discrimination continues to pervade public programs. *See* Nicole Stelle Garnett et al., *The Persistence of Religious Discrimination in Publicly Funded Pre-K Programs*, Manhattan Institute (Jan. 21, 2025), https://bit.ly/4pECM2e; Nicole Stelle Garnett & Tim Rosenberger, *Unconstitutional Religious Discrimination Runs Rampant in State Programs*, Manhattan Institute (Dec. 14, 2023), https://bit.ly/4ql7Pzz; ReligiousEquality.net (last visited Feb. 1, 2026) (cataloging hundreds of religious exclusions in public-benefits programs), https://bit.ly/4r0pSwc.

Consider the following examples: Colorado built religious discrimination into its "universal" preschool program. The program funds families to send children to the public or private preschool of their choice including, theoretically, religious preschools. Pet. for Writ of Cert. at 4–5, *St. Mary Catholic Parish in Littleton v. Roy*, No. 24-1267 (U.S. filed Nov. 13, 2025). However, the regulations governing the program conditions participation on religious preschools agreeing to enroll families regardless of "religious affiliation," "sexual orientation," and "gender identity." *Id.* at 5. Colorado grants exemptions to these non-discrimination requirements for favored groups: low-income families, disabled children, and a "catchall" exemption, which permits preschools to serve only "gender-nonconforming children," "children of color," or "the LGBTQ community." *Id.* at 8–10. Yet, Colorado denied Catholic preschools' request to favor Catholic families, and families who support Catholic teaching in admissions. *Id.* at 10–11. In upholding these regulations, the Tenth Circuit confined *Carson* to exclusions imposed "on the explicit basis" of religion, and called Colorado's scheme "a model example" of neutrality. *Id.* at 11–12.

New Hampshire attempted the same maneuver. Legislators unsuccessfully proposed extending similar non-discrimination requirements to private schools, which would have greatly burdened religious schools. Critics rightly warned this would impermissibly "target[] religious schools." Ethan Dewitt, *Bill to Expand Anti-Discrimination Statute to Private Schools Hits Opposition*, N.H. Bulletin (Feb. 22, 2022). Opponents of religious schools' participation in public programs had more success in Maryland, which adopted rules that impose the same kind of conditions

on any "nonpublic primary or secondary school that receives State funds." Md. Code Ann., Educ. § 26-704.

Minnesota refused to grant "dual enrollment" credit to any high school student taking classes at a college or university that requires undergraduate students to make a statement of faith. The state argued that the rule was constitutional because it does not "categorically exclude all religious schools." *See Loe v. Jett*, 796 F. Supp. 3d 541, 568–69 (D. Minn. 2025). A federal district court rejected that argument, holding that "the effect of the Faith Statement Ban is precisely that—it only excludes institutions from PSEO eligibility that require applicants to attest to their faith." *Id.*

Finally, Vermont, like Maine, attempted to restrict religious schools' access to public funds in a program almost identical to the program at issue in *Carson*. First, Vermont tried imposing non-discrimination provisions and restrictions on religious instruction while *Carson* was pending. But, supporters rightly noted that those efforts "risk[ed] possible judicial invalidation." So, they urged lawmakers to "table any legislation" until after the decision, when "the legal landscape—and the roadmap to enacting a durable" barrier against "subsidize[d] religious instruction"—would be clearer. Letter from Harrison Stark, Staff Att'y, ACLU of Vermont, to Vermont House Comm. on Educ. (Apr. 5, 2022). After *Carson*, the chair of the state's Senate Committee on Education opined, "I believe the majority of Vermonters do not want public dollars going to religious schools." Peter D'Auria, *What Will Vermont Lawmakers Do About Religious Schools?*, VTDigger (Dec. 28, 2022). Ultimately, Vermont adopted a participation threshold that, by

design and effect, removed every religious school from the program shortly after religious schools became eligible. Vt. Stat. Ann. tit. 16, § 828(a)(2)(D); *see also* Corey McDonald, *Vermont's New Education Law Signals an End to State Funding for Religious Schools*, VTDigger (Aug. 20, 2025).

In sum, in the wake of *Carson*, States have adopted regulatory schemes designed to deceptively discriminate against religion. However, neutral labels cannot disguise what *Trinity Lutheran*, *Espinoza*, and *Carson* forbid: the imposition of regulations and conditions that have the predictable—and often intended—effect of excluding religious schools from public programs.

C. California's licensing scheme is an example of this post-*Carson* playbook.

In this case, California's licensing regime is even more egregious than many other post-*Carson* workarounds. Numerous states have manipulated funding programs to prevent religious participants from receiving public aid (e.g., keeping programs nominally open but functionally closed to religious schools). Here, California not only abandons the pretense of neutrality, but inhibits religious preschools directly. Indeed, it bars religious preschools from the market entirely. In short, a religious school in California may open only by ceasing to be a religious school. *See* R. Garnett, "Religious Schools and Religious Rites," *supra*.

This case and *Carson* differ only in mechanism. In *Carson*, Maine's nominally open program imposed eligibility rules that forced religious schools out. Here,

California uses a universal licensure gate with a condition that directly limits church autonomy, including by restricting "religious services or activities." Cal. Code Regs. tit. 22, § 101223(a)(5). In both cases, the State leverages regulations to coerce religious schools into constraining their central religious exercise.

Below, the licensure requirement was treated as benign. The Ninth Circuit concluded that "[b]ecause the licensure requirement is neutral and generally applicable, rational basis review applies." App. to Pet. for Cert. at 13a, *Foothills Christian Ministries v. Johnson*, No. 24-1267 (U.S. filed Jan. 5, 2026). However, neutrality is hollow when the regime itself singles out religious exercise. And, as *Carson* warned, "the definition of a particular program can always be manipulated to subsume the challenged condition," and this Court refused to see "the First Amendment . . . reduced to a simple semantic exercise." 596 U.S. at 784. Here, California's neutrality defense relies on a similar move: It defines the relevant program as "licensure" in the abstract, references its broad sweep, and then claims neutrality. Yet, in operation, the State has done nothing more than bury discrimination against religious schools beneath a regulatory framework. California's tactic is a paradigmatic example of "use-based discrimination"—and it defies this Court's precedent. *Carson*, 596 U.S. at 788.

As Professor Richard Garnett has observed: "[T]he legally relevant right is not that of an objecting parent to change a religious school's program; it is the right of a religious school to be as religious as it likes." R. Garnett, "Religious Schools and Religious Rites,"

supra. The Free Exercise Clause forbids the government from intruding on the internal affairs of religious institutions, and it prohibits it from accomplishing indirectly—through regulatory conditions—what it cannot accomplish directly. See Carson, 596 U.S. at 778. California's licensing regime does both.

CONCLUSION

The church autonomy doctrine is in a state of jurisprudential disarray. Lower courts have constrained, ignored, and misapplied the Religion Clauses' joint guarantee, leaving religious institutions' right to shape their faith and mission more theoretical than real. Religious liberty is likewise imperiled by states' widespread efforts to evade this Court's guidance. States have implemented serpentine regulatory policies to nominally adhere to Court precedent while continuing to discriminate against religious groups. This Court should grant certiorari to prevent the many ongoing efforts to bypass this Court by substituting blatant religious bars with regulatory designs that achieve the same discriminatory ends.

Respectfully submitted,

Richard W. Garnett
Counsel of Record
Nicole Stelle Garnett
John A. Meiser
NOTRE DAME LAW SCHOOL
3117 Eck Hall of Law
Notre Dame, IN 46556
574.631.6981 | rgarnett@nd.edu

Counsel for Amici Curiae

February 6, 2026