NO. 25-581

IN THE

# Supreme Court of the United States

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

*v.*

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

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

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

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## INTEREST OF AMICI CURIAE

PioneerLegal, LLC (PioneerLegal), doing business as Pioneer New England Legal Foundation (the Legal Foundation), is a nonprofit, nonpartisan legal research and litigation entity.[1] PioneerLegal began operating under its new name, the Legal Foundation, after forming a strategic alliance with the New England Legal Foundation (NELF) in May 2025. The Legal Foundation seeks to continue its pre-existing work, as well as NELF's mission.

PioneerLegal was founded by its nonprofit, nonpartisan member, the Pioneer Institute, Inc., in 2022, to promote open and accountable government, economic opportunity, freedom of speech, freedom of association, and education opportunities across the country, through legal action and public education.

NELF has been a nonprofit, public interest law foundation, incorporated in Massachusetts in 1977. NELF's members and supporters have included large and small businesses in New England, other business and nonprofit organizations, law firms, and individuals, all of whom believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic and property rights.

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored this brief, in whole or in part, and that no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief. Counsel for amicus timely notified all known parties of its intention to file a brief of amicus curiae in this case.

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

For these and other reasons discussed below, the Legal Foundation believes that its brief will assist the Court in deciding on the issue presented in this case.

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

## SUMMARY OF ARGUMENT

Certiorari should be granted because further clarification is necessary to secure the constitutional promise announced in *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 789, 142 S. Ct. 1987, 2002, 213 L. Ed. 2d 286 (2022). Maine has responded to *Carson* not with compliance, but with circumvention.

Although *Carson* held that Maine may not exclude religious schools from its tuition program solely because of their religious exercise, the State quickly replaced its unconstitutional "nonsectarian" requirement with new, ostensibly facially neutral antidiscrimination provisions designed to achieve the same discriminatory outcome. Maine accomplished this by amending the Maine Human Rights Act (MHRA) during the pendency of *Carson*. The State legislature added "religion" to the educational discrimination ban, imposed a new "religious expression" requirement, and repealed longstanding religious exemptions related to sexual orientation and gender identity. In practice, these changes mean that religious schools can participate in the tuition program only if they abandon admissions, hiring, and conduct standards central to their religious mission, precisely the exclusion that *Carson* forbids.

The State's actions were not accidental and were certainly not in good faith. Statements by Maine's highest officials prove this animus. Those public statements show utter hostility to the *Carson* decision and toward religious schools seeking equal access to public benefits. Anticipating that *Carson* would invalidate Maine's "non-sectarian"

requirement as a violation of the Free Exercise Clause, these officials publicly vowed to craft statutory "fixes" to prevent religious schools from benefiting from the program even if they prevailed before this Court. They also characterized faith-based education as harmful, discriminatory, or contrary to public values. Such statements demonstrate a deliberate effort to undermine *Carson*, confirming that the MHRA amendments were not neutral measures, but targeted responses designed to preserve the exclusion of religious schools under a different label.

Litigation following *Carson* underscores the need for this Court's intervention. In *St. Dominic Academy v. Makin*, the district court acknowledged that Maine's new framework is not generally applicable, yet still upheld it under strict scrutiny standards, allowing the State to impose conditions that effectively bar religious schools from the program unless they forfeit core religious practices. In *Crosspoint Church v. Makin*, the lower court deemed the MHRA neutral and generally applicable, again permitting Maine's discriminatory strategy to stand. These cases reveal a pattern: by shifting from explicit religious-status exclusions to regulatory conditions that penalize religious use, Maine has replicated the very discrimination *Carson* prohibits. Only this Court can close this loophole, reaffirming that states cannot accomplish indirectly, through ostensibly facially neutral conditions, what the Constitution forbids them from doing directly.

## ARGUMENT

### I. This case presents the opportunity for the Court to ensure that states do not evade the ruling in *Carson*.

In *Carson v. Makin*, this Court held that "Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 789, 142 S. Ct. 1987, 2002, 213 L. Ed. 2d 286 (2022). That ruling is clear and unequivocal, and it should be enforced with full vigor. Unfortunately, Maine is not enforcing the law as explained by the Court; it is engaged in a transparent game to avoid it.

At the center of this problem is the continuing validity of *Employment Div., Dep't of Human Res. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, (1990). This decision permits governments to enforce facially neutral and generally applicable laws that burden religious exercise. That framework has enabled state actors to craft statutes that function as end runs around this Court's holding in *Carson*.

That is exactly what has occurred in Maine, the State where *Carson* arose. The Maine Legislature revised its school tuitioning statute to remove the explicit exclusion of sectarian schools invalidated in *Carson*, but replaced it with a purportedly facially neutral nondiscrimination provision that, in practice,

bars participation by schools that maintain religiously based standards concerning sexual orientation and gender identity. The effect of this is that the same schools that were barred from participating in the school tuition program because they were sectarian are now barred from participating in the program unless they adopt admissions and hiring practices which conflict with their deeply held religious beliefs and values. Like Petitioners in the present case, these schools in Maine are subject to a statute that precludes religious entities and families from obtaining generally available government benefits solely because of their religious character.

This Court's intervention is especially warranted because lower courts have permitted Maine's post-*Carson* maneuvering to stand, effectively allowing the State to thumb its nose at this Court's holding. As this Court has made clear, lower courts "cannot create prophylactic supervisory rules that circumvent or supplement legal standards set out in decisions of this Court." *United States v. Payner*, 447 U.S. 727, 733–37, 100 S. Ct. 2439, 65 L. Ed. 2d 468 (1980), cited by *United States v. Tsarnaev*, 595 U.S. 302, 142 S. Ct. 1024, 1027, 212 L. Ed. 2d 140 (2022). That is precisely what has happened here: through deference to Maine's new statutory framework, the lower courts have allowed the State to resuscitate the pernicious behavior that *Carson* invalidated. Only this Court can restore *Carson*'s teaching by setting a strong precedent in religious education choice cases, clarifying that its protections cannot be avoided and ensuring that States do not

impose unconstitutional burdens on religious exercise under the guise of general applicability.

In short, the tattered legacy of the *Smith* decision should not be permitted to allow states to avoid this Court's precedent in recent Free Exercise cases.

### a. The Maine Legislature Amended the MHRA to Undermine *Carson* Even Before the Court Issued Its Decision

In June 2021, while *Carson* was under advisement in this Court, a fact that bears directly on legislative intent, Maine enacted "An Act to Improve Consistency in Terminology and Within the Maine Human Rights Act," P.L. 2021, Ch. 366, §19, (Legislative Document 1688) (the "Act"). The Act revised the MHRA to address concerns raised by the plaintiffs in *Carson*. Specifically, the amendments were intended to revise the so-called town tuition conditions as they apply to religious schools. *See* 5 M.R.S. § 4553(2-A).

To this end, the Act modified the MHRA in several ways, two of which can be found in the section addressed to "educational discrimination." 5 M.R.S § 4602. The ban on educational discrimination was modified for the first time in its history to include "religion" as a category. This seemingly innocuous amendment was anything but. After the amendment religious schools can no longer limit "admission" or "financial assistance" on the basis of "religion." *Id.* § 4602(1)(A), (D), (E). *St. Dominic Acad. v. Makin*, at 8, No. 24-1739 (1st Cir. filed 10/08/2024).

This makes it unlawful, for example, for a Catholic school to prefer Catholic students in admissions or financial aid—as St. Dominic and many other Catholic schools do. It also makes it unlawful for St. Dominic to require its admitted students to agree to support the school's Catholic mission.

As part of the amendments, Maine mandated the creation of the new "religious expression" rule. 5 M.R.S. § 4602(5)(D). According to this rule, "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." M.R.S. § 4602(5)(D). Maine, in the development of the *St. Dominics* case, acknowledged that religious schools are obliged to allow students to express "dissenting religious views," even when doing so is contrary to the school's religious mission. Br. for Appellant at 11, *St. Dominic Acad. v. Makin*, No. 24-1739 (1st Cir. filed 10/08/2024).

Finally, The Act repealed a religious exemption that sought to protect religious schools on matters of sexual orientation and gender identity. This came as no surprise considering that during the *Carson* litigation, Maine identified "sectarian" schools as those that incorporated religious perspectives in class, asked families to support their religious mission, and held traditional beliefs about sex, gender, and marriage. *Carson*, 596 U.S. at 789, 142 S. Ct. at 2002.

That exemption, before being repealed, provided: "The provisions in this subsection relating

to sexual orientation do not apply to any education facility owned, controlled or operated by a bona fide religious corporation, association or society." 2005 Me. Laws 12-13, https://perma.cc/FX4T-64N8 (Ch. 10, sec. 21, § 4602(4)).

The repeal of this exemption is a clear attempt to circumvent *Carson*. Not only did the Act strike this exception but the Act added a new prohibition on "gender identity" discrimination for "religious" schools that "receive public funding." 5 M.R.S. § 4602(1), 5(C).

Consequently, the amendments condition program participation on religious schools' surrender of their ability to address matters of sexual orientation and gender identity in accordance with their sincerely held beliefs. In practical terms, this would prevent a Catholic school from asking students and staff to uphold Catholic moral teachings in their personal conduct. Hence, participating religious schools must instead (1) facilitate a student's gender transition even over parental objection and (2) discipline students or staff who decline to use a student's preferred pronouns, even when doing so would conflict with the school's religious mission. Br. for Appellant at 9, *St. Dominic Acad. v. Makin*, No. 24-1739 (1st Cir. filed Oct. 8, 2024).

**b. Maine Officials' Statements Reveal Open Hostility to *Carson* and an Intent to Evade It**

This Court has previously held that "Facial neutrality is not determinative. . . Official action that

targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility, which is masked, as well as overt." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 113 S. Ct. 2217, 2227, 124 L. Ed. 2d 472 (1993). In determining if the object of a law is a neutral one under the Free Exercise Clause, courts will consider "the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id.,* 508 U.S. at 540, 113 S. Ct. at 2230–31. "[S]tate actors cannot show hostility to religious views; rather, they must give those views neutral and respectful consideration." *Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 584 U.S. 617, 640, 138 S. Ct. 1719, 1732, 201 L. Ed. 2d 35 (2018) (Kagan, J., concurring). If a state official undertakes official actions because he finds someone's religious beliefs to be "offensive," "[t]hat kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all." *Id.,* 584 U.S. at 644, 138 S. Ct. at 1734.

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

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

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

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

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

These statements clearly show that Maine's political leadership is not attempting to comply with *Carson* in good faith. Instead, they reflect an explicit commitment to restoring, through new statutory or regulatory mechanisms, the exclusion of religious schools from neutral public benefits that *Carson* squarely held unconstitutional.

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

### c. Maine's Post-*Carson* Litigation Strategy Confirms That the State Is Structuring Its Tuition Program to Evade This Court's Mandate

#### 1. *St. Dominic Academy v. Makin,* pending in the First Circuit

Maine's treatment of St. Dominic Academy illustrates the State's deliberate pivot from the religious-status exclusion struck down in *Carson* to a new mechanism designed to achieve the same unconstitutional end. Although *Carson* unequivocally held that Maine may not deny participation in its tuitioning program on the basis of a school's religious mission, the State has now reconstructed the program to impose regulatory restrictions that functionally disqualify religious schools from participation unless they abandon core religious practices. Br. for Appellant, *St. Dominic Acad. v. Makin*, No. 24-1739 (1st Cir. filed 10/08/2024).

Under the post-*Carson* framework, Maine conditions participation on full compliance with the MHRA antidiscrimination provisions, which include requirements concerning religion, sexual orientation, and gender identity. M.R.S. § 4602(5). St. Dominic Academy, an admittedly Catholic school, sought an exemption that would allow it to consider religious criteria in admissions, a practice that lies at the heart of maintaining a Catholic educational mission. The district court acknowledged that the MHRA is not

generally applicable, thus triggering strict scrutiny. *St. Dominic Academy v. Makin*, 744 F. Supp. 3d 43, 70 (D. Me. 2024). Yet the court nevertheless upheld the State's conditioning scheme created by the revised MHRA, finding that Maine had a "compelling interest" in preventing discrimination in publicly funded programs and finding that the statute was narrowly tailored, and concluding that the statute survives strict scrutiny. *Id.*, 744 F. Supp. 3d at 79.

This reasoning confirms that Maine has now replaced religious-status discrimination with a form of regulatory-use discrimination, a requirement that religious schools must surrender ordinary religious admissions practices in order to participate. Such conditions directly target religious exercise in the State's tuitioning scheme, not merely religious status, and therefore raise even more serious concerns than those in *Carson*. The categorical exclusion of religious schools has been replaced with a set of "neutral" regulations that operate as a de facto bar to religious participation. Br. for Appellant, *St. Dominic Acad. v. Makin*, No. 24-1739 (1st Cir. filed 10/08/2024).

The denial of injunctive relief to St. Dominic is now on appeal, but the litigation already demonstrates a broader pattern: Maine is attempting to circumvent *Carson* by restructuring its tuition program in ways that will inevitably exclude religious schools unless they forfeit their religious identity. If allowed to stand, this strategy invites other states to follow suit, nominally complying with *Carson* by avoiding explicit religious-status bars while achieving the same prohibited outcome through the imposition

of regulatory conditions that suppress religious practice.

2. *Crosspoint Church v. Makin,* pending in the First Circuit

Crosspoint Church operates a Christian school that seeks to participate in Maine's town-tuition program following *Carson v. Makin*. But participation requires full compliance with the MHRA, including prohibitions on religious criteria in admissions and prohibitions relating to sexual orientation and gender identity. Crosspoint argues that these requirements directly conflict with its religious beliefs, including its desire to admit students and hire staff who share their faith and to maintain conduct standards consistent with its doctrine. Because Crosspoint cannot comply without abandoning its religious mission, it is effectively barred from the program. Br. for Appellant, *Crosspoint Church v. Makin*, No. 24-1590 (1st Cir. filed 09/19/2024).

Crosspoint argues that Maine has replaced the unconstitutional "nonsectarian" bar struck down in *Carson* with a new mechanism that achieves the same exclusion under the guise of general antidiscrimination law. The brief filed by Crosspoint Church contends that the MHRA is not neutral or generally applicable, because it targets religious schools by forbidding religious admissions and by compelling recognition of sexual-orientation and gender-identity practices that contradict Crosspoint's religious doctrine. Crosspoint argues that this violates the Free Exercise Clause, compels speech,

burdens church autonomy, and imposes unconstitutional conditions on participation in a public benefit program. The State's own statements, Crosspoint asserts, show hostility toward religious schools and a deliberate plan to circumvent *Carson*. Br. for Appellant, *Crosspoint Church v. Makin*, No. 24-1590 (1st Cir. filed 09/19/2024).

The district court upheld Maine's enforcement of the MHRA against Crosspoint. *Crosspoint Church v. Makin*, 719 F. Supp. 3d 99 (D. Maine 2024). It ruled that the MHRA is a neutral and generally applicable law regulating conduct, not speech, and therefore subject only to rational-basis review. *Id.*, 719 F. Supp. 3d at 123. Under that standard, the court accepted Maine's asserted interest in preventing discrimination in publicly funded programs and concluded that Crosspoint must comply with the statute if it wishes to participate. *Id.* The court rejected Crosspoint's free exercise, free-speech, and church-autonomy claims and denied relief, reasoning that Maine's conditions do not unconstitutionally burden Crosspoint's religious exercise but represent permissible terms of participation in a public program. *Id.*, 719 F. Supp. 3d at 103.

## II. This Court's Intervention Is Required to Prevent the Ongoing Evasion of *Carson v. Makin*.

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

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

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

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

a hollow promise and that religious schools and families receive the full constitutional protection that the Free Exercise Clause guarantees.

## CONCLUSION

Maine's post-*Carson* strategy provides a clear example of how states can nullify this Court's religious-liberty precedents through facially neutral statutory revisions that are antithetical to the very Free Exercise rights enumerated in *Carson*. By restructuring its tuition program to impose regulatory conditions that religious schools cannot accept without abandoning core aspects of their faith, Maine has recreated the very exclusion that *Carson* struck down. The resulting framework burdens religious exercise, distorts the meaning of neutrality, and threatens to turn *Carson* into a hollow promise, an outcome already reflected in the divergent and permissive decisions of the lower courts. Only this Court can restore coherence and prevent further erosion of its precedent.

Granting review will allow the Court to reaffirm that states may not avoid constitutional limits by shifting from overt religious-status exclusions to covert use-based restrictions, and to ensure that families and religious schools receive the full protections that the First Amendment guarantees. Review of this case will also allow the Court to underscore the dignity of its rulings and to make plain that states may not avoid application of core Constitutional Principles by subterfuge.

For the reasons stated above, the Legal Foundation and Massachusetts Family Institute respectfully requests that this Court grant certiorari and review the case.

Respectfully submitted,
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