

In the Supreme Court of the United States

**ST. MARY CATHOLIC PARISH
IN LITTLETON, *et al.*,**

Petitioners,

v.

**LISA ROY, IN HER OFFICIAL CAPACITY AS
EXECUTIVE DIRECTOR OF THE COLORADO
DEPARTMENT OF EARLY CHILDHOOD, *et al.***

Respondents.

*On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit*

**BRIEF *AMICI CURIAE* OF
THE NATIONAL LEGAL FOUNDATION,
CONCERNED WOMEN FOR AMERICA,
ILLINOIS FAMILY INSTITUTE, WISCONSIN
FAMILY ACTION, DELAWARE FAMILY POLICY
COUNCIL, CHAPLAIN ALLIANCE FOR
RELIGIOUS LIBERTY, and INTERNATIONAL
CONFERENCE OF EVANGELICAL CHAPLAIN
ENDORSERS**

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STATEMENTS OF INTEREST¹

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties (including the freedoms of speech, assembly, and religion) and parental rights. The NLF and its donors and supporters, in particular those from Colorado, are vitally concerned with the outcome of this case because of its effect on religion-based rights.

Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare, including religious liberties. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

The **Illinois Family Institute** (IFI) is a non-profit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of

¹ No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

IFI is to uphold religious freedom and conscience rights for all individuals and organizations.

Wisconsin Family Action (WFA) is a Wisconsin not-for-profit organization dedicated to strengthening, preserving, and promoting marriage, family, life, and religious freedom. WFA has a unique and significant statewide presence with its educational and advocacy work in public policy and the culture. WFA's interest in this case stems directly from its core issues, in particular its long-sustained efforts to protect and promote religious freedom.

The **Delaware Family Policy Council (DFPC)** is a non-partisan, non-profit organization based in Delaware committed to rebuilding a culture of life, marriage, family, and religious freedom. DFPC works to preserve and defend the God-ordained institution of the family.

Chaplain Alliance for Religious Liberty ("CALL") is an organization of chaplain endorsers, the faith groups that provide chaplains for the U.S. military, and other agencies. CALL speaks for more than 2,600 chaplains serving the Armed Forces from many different denominations. Since 2011, CALL has led the effort to secure the religious liberties of chaplains and those whom they serve. CALL enables all chaplains to serve to the broadest extent of their constitutional mission and endorsement, and CALL nurtures and supports an environment that cherishes the role of chaplains in American culture. CALL exists to ensure that chaplains can defend and provide for the freedom of religion and conscience that the Constitution guarantees all chaplains and those whom they serve. We join together to pursue a nation

where all chaplains, and those whom they serve, freely exercise their God-given and constitutionally protected religious liberties without fear of reprisal.

The **International Conference of Evangelical Chaplain Endorsers (ICECE)** has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for all.

SUMMARY OF THE ARGUMENT

The Tenth Circuit was wrong even to have considered *Employment Division v. Smith*.² This case falls squarely in the *Trinity Lutheran-Espinoza-Carson* line,³ as Colorado withheld a generally applicable government benefit from the Petitioners due to their religious status and observance. *Smith* simply does not apply in such situations.

Your *Amici* write to stress that the *Trinity Lutheran* line of cases, culminating in *Carson*, has put to bed the earlier “strict separation” line of cases that allowed discrimination against “pervasively sectarian” organizations in the administration of generally applicable benefits due to their religious beliefs and practices. Colorado has attempted an end

² 494 U.S. 872 (1990).

³ See *Trinity Lutheran Church of Colum., Inc. v. Comer*, 582 U.S. 449 (2017); *Espinoza v. Mont. Dept. of Rev.*, 591 U.S. 464 (2020); *Carson v. Makin*, 596 U.S. 767 (2022).

run here by using another label to discriminate against religious organizations; it simply disqualifies those with the religious beliefs and practices with which it disagrees. Such anti-religious discrimination cannot be excused by the expedient of repackaging. It is simply an unwelcome attempt to resuscitate the “pervasively sectarian” and “strict separation” precedents now abandoned by this Court.

ARGUMENT

I. ***Carson* and Its Kin Reject Discrimination Against Free Exercise by “Pervasively Sectarian” Schools to Advance “Strict Separation”**

This Court over the last few decades has repudiated the theory that the Establishment Clause demands “strict separation” between state action and religious exercise, such that “pervasively sectarian” schools cannot receive any government funding. Colorado is trying to get to the same result by another avenue. This Court should not allow this end run.

A. ***Mitchell v. Helms* Began This Court’s Retreat from Disqualifying Religious Institutions from Receipt of Governmental Benefits Due to Their Pervasively Sectarian Religious Exercise**

Prior to the 1947 decision in *Everson* that incorporated the Establishment Clause, this Court rarely had occasion to consider the constitutionality of federal funding of religious organizations. But one

such occasion was in *Bradfield v. Roberts*:⁴ an Establishment Clause challenge to a federal appropriation for the construction of a facility for indigents given to a Roman Catholic hospital that had been incorporated by an act of Congress. In a unanimous decision, this Court noted that both the hospital's incorporating charter and Congress's appropriation served secular purposes and, thus, held that the Establishment Clause was not offended because the funds would go to, and be used by, a hospital owned and managed by a religious institution:

Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church . . . [that] exercises great and perhaps controlling influence over the management of the hospital.⁵

⁴ 175 U.S. 291 (1899).

⁵ *Id.* at 298. This Court went on to explain that issuing charters of incorporation to corporations managed by religious bodies does not raise an Establishment Clause issue, as the charters are available to all on a non-religious basis. *Id.*

In 1947, this Court in *Everson v. Board of Education*,⁶ while broadening coverage of the Establishment Clause to apply it to the States, approved public funding for transportation of children to religious schools, including ones that later Courts would have deemed to be “pervasively sectarian.” It thereby reinforced that the Establishment Clause does not prohibit government from granting generally available public benefits to religious organizations due to their status.⁷ The *Everson* Court emphasized that the First Amendment “does not require the state to be the[] adversary” of religious organizations,⁸ but its dicta that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion”⁹ led later Courts to the “pervasively sectarian” test.¹⁰

For the next several decades, this Court intruded into the affairs of sincerely religious schools to determine their eligibility for public funding. For example, finding it necessary to examine the character and purpose of Roman Catholic schools that benefitted from a public program, Chief Justice Burger in *Lemon v. Kurtzman*,¹¹ examined the

⁶ 330 U.S. 1 (1947).

⁷ *Id.* at 16.

⁸ *Id.* at 18.

⁹ *Id.* at 16.

¹⁰ See, e.g., *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 381 (1985) (quoting the *Everson* passage), *overruled*, *Agostini v. Felton*, 521 U.S. 203 (1997); see also *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736 (1976); *Meek v. Pittenger*, 421 U.S. 349 (1975).

¹¹ 403 U.S. 602 (1971).

proximity between the churches and the religious schools, the religious symbols in the school buildings, the time spent daily in direct religious instruction, the clerical nature of the teachers (two-thirds of the teachers in the parochial schools were nuns), the “atmosphere” of the school, and the school’s governance.¹²

These areas of inquiry were changed and expanded in other cases,¹³ but one thing remained constant—the public schools were never subjected to the type of examination routinely imposed on religious schools. There may have been financial audits to

¹² *Id.* at 615-18. In applying the newly formulated *Lemon* test, the Court determined that giving aid to the Roman Catholic schools in Rhode Island with this level of control would result in “excessive entanglement.” *Id.* at 619-20.

¹³ See James A. Davids, *Pounding a Final Stake in the Heart of the Invidiously Discriminatory “Pervasively Sectarian” Test*, 7 Ave Maria L. Rev. 59 (2008), for a chronology of the “pervasively sectarian” cases. They include, in addition to *Lemon*, the following: *Hunt v. McNair*, 413 U.S. 734 (1973); *Comm. for Pub. Ed. v. Nyquist*, 413 U.S. 756 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976); *Wolman v. Walter*, 433 U.S. 229 (1977), *overruled*, *Mitchell v. Helms*, 530 U.S. 793 (2000); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980); *Mueller v. Allen*, 463 U.S. 388 (1983); *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled*, *Agostini v. Felton*, 521 U.S. 203 (1997); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *overruled*, *Agostini v. Felton*, 521 U.S. 203 (1997); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

ensure that both public and religious schools actually bought computers as required by the government grant, but while computers were physically audited to ensure no religious material was being accessed on the computers at a sectarian school, as in *Mitchell v. Helms*,¹⁴ there is no record that audits were conducted of public school computers to ensure that students did not access objectionable porn sites or that lessons were not being taught from an anti-religious slant.

This Court began to back away from its “pervasively secular” test in *Mitchell*. The plurality opinion (written by Justice Thomas and joined by Chief Justice Rehnquist and Justices Kennedy and Scalia) expressly repudiated it, for four distinct reasons.

First, the plurality observed that “the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government’s secular purpose.”¹⁵ It noted, “If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be.”¹⁶

This is eminently logical. If the government institutes a grant program to stimulate literacy for which both public and private schools compete but it then disqualifies a yeshiva because it is “pervasively sectarian,” it manifests “special hostility for those who

¹⁴ See 530 U.S. at 862-63 (O’Connor, J., concurring).

¹⁵ *Id.* at 827.

¹⁶ *Id.*; see *Bradfield*, 175 U.S. at 298.

take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.”¹⁷ Although the plurality did not express this concept as embedded in the Free Exercise Clause,¹⁸ that is where it resides: seriously religious schools were suffering discriminatory treatment precisely because of their exercise of their religion.

Second, the *Mitchell* plurality noted that the inquiry into the practice of religious schools deemed pervasively sectarian “was not only unnecessary but also offensive.”¹⁹ Implicitly invoking the church autonomy doctrine, they deemed “well established” the principle that “courts should refrain from trolling through a person’s or institution’s religious beliefs,” an analysis required under the pervasively sectarian test and “profoundly troubling.”²⁰ Combining its first two points, the plurality wrote that the use of the pervasively sectarian test collided with “our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.”²¹

¹⁷ 530 U.S. at 827-28.

¹⁸ *But see id.* at 868 (Souter, J., dissenting) (recognizing the free exercise dimension).

¹⁹ *Id.* at 828.

²⁰ *Id.*

²¹ *Id.* at 828 (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981)). Of course, *Trinity Lutheran* and *Espinoza* fully support the “status” prong of the plurality’s statement. See *Trinity Lutheran*, 582 U.S. at 458-67; *Espinoza*, 591 U.S. at 473-80.

Third, the *Mitchell* plurality discussed briefly the deplorable history that undergirds the pervasively sectarian test.²² It noted, for instance, the anti-Catholic bias that led to the near passage of the federal Blaine Amendment, which would have deprived public aid to sectarian (“code” for Catholic) schools.²³ The plurality concluded, “In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.”²⁴

Fourth, the *Mitchell* plurality responded to the worry of Justice Souter in dissent that the government aid could be diverted by the religious schools to impermissible (i.e., pervasively sectarian) uses.²⁵ The plurality stated, “So long as the governmental aid is not itself ‘unsuitable for use in the public schools because of religious content’ and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government

²² 530 U.S. at 828-29.

²³ *Id.* The plurality pointed out that Justice Souter almost exclusively referred to Catholic schools in the portion of his *Mitchell* dissent devoted to the pervasively sectarian test, exemplifying the Court’s almost exclusive application of the test to Catholic schools. *Id.* at 829. Justice Alito provided a more detailed discussion on the anti-Catholic bias of the Blaine Amendment and its state-level counterparts in his concurrence in *Espinoza*. 591 U.S. at 497-508 (Alito, J., concurring).

²⁴ 530 U.S. at 829.

²⁵ *Id.* at 890-95 (Souter, J. dissenting).

and is thus not of constitutional concern.”²⁶ It labeled as “unworkable” a rule that disallowed aid because it was “divertible” to religious purposes.²⁷

B. The “Pervasively Sectarian” Test Was Further Eroded by Decisions Explaining That Private Choices Determining the Recipient of Generally Available Public Funds Eliminate the Applicability of the Establishment Clause

Another series of this Court’s decisions also eroded the (supposed) Establishment Clause underpinnings of the pervasively sectarian test. Those cases assume generally available government aid, if distributed to religious institutions, may well be used for religious purposes without implicating the Establishment Clause because private parties, by their independent choices, directed the aid to the institution. These personal, independent choices break the causal chain between the State and the religious school.

This Court explained this case law in some detail in *Zelman v. Simmons-Harris*.²⁸ *Zelman*

²⁶ *Id.* at 818-20 (citing *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U. S. 236, 245 (1968)). The aid in *Mitchell* was money for computers, computer software, and library books. *Id.* at 802. The government program providing this aid required that the items be secular, *id.*, and there was no challenge to that in *Mitchell*.

²⁷ *Id.* at 820.

²⁸ 536 U.S. 639 (2002). This Court in *Agostini* also recognized that cases in this series undercut the “pervasively sectarian” test. 521 U.S. at 225-32.

concerned a multifaceted plan by the Cleveland school system that included providing scholarship assistance to allow parents to send their children to private schools. That part of the plan was attacked because many of the schools selected by parents to receive public aid were “pervasively sectarian.”

This Court rebuffed the Establishment Clause challenge to the plan. By reviewing in particular three precedents that are also directly relevant here, this Court emphasized that, when it comes to the Federal Constitution, there is a critical difference between government particularly directing expenditures to religious institutions for religious purposes and systems in which private choice determines where generally available funds are spent:

[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, *Mitchell v. Helms*, 530 U.S. 793, 810-814 (2000) (plurality opinion); *id.*, at 841-844 (O’Connor, J., concurring in judgment); *Agostini [v. Felton]*, 521 U.S. 203 (1997), *supra*, at 225-227; *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995) (collecting cases), and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals, *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dept. of Servs. for Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). . . . Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly

to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.²⁹

The Court went on to explain that, in

Mueller, we rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools. [V]iewing the program as a whole, we emphasized the principle of private choice, noting that public funds were made available to religious schools "only as a result of numerous, private choices of individual parents of school-age children." 463 U.S., at 399-400. This, we said, ensured that "no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.*, at 399 (quoting *Widmar [v. Vincent]*, 454 U.S. 263 (1981)), *supra*, at 274). We thus found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools. 463 U.S., at 401. That the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was

²⁹ 536 U.S. at 649; *cf. Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) ("A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose.").

sufficient for the program to survive scrutiny under the Establishment Clause.³⁰

The *Zelman* Court next discussed its prior decision in *Witters*, in which this Court

used identical reasoning to reject an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor. Looking at the program as a whole, we observed that “[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.” 474 U.S., at 487. We further remarked that, as in *Mueller*, “[the] program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.” 474 U.S., at 487 (internal quotation marks omitted). In light of these factors, we held that the program was not inconsistent with the Establishment Clause. *Id.*, at 488-489.

Five Members of the Court, in separate opinions, emphasized the general rule from *Mueller* that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry. 474 U.S., at 490-491 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring) (citing *Mueller*, *supra*, at 398-399); 474 U.S., at 493 (O’Connor,

³⁰ 536 U.S. at 649-50.

J., concurring in part and concurring in judgment); *id.*, at 490 (White, J., concurring). Our holding thus rested not on whether few or many recipients chose to expend government aid at a religious school but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing.³¹

Third, the *Zelman* Court explicated its ruling in *Zobrest*, in which it rejected an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools:

We further observed that “[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents.” [509 U.S.] at 10. Our focus again was on neutrality and the principle of private choice, not on the number of program beneficiaries attending religious schools. *Id.*, at 10-11. . . . Because the program ensured that parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated.³²

The *Zelman* Court summed up the holdings of those cases as follows:

³¹ *Id.* at 650-51.

³² *Id.* at 651-52.

Mueller, Witters, and Zobrest thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.³³

In short, no Establishment Clause claim lies when “pervasively secular” schools receive generally available public aid through the selection of parents of the schools attended by their children.

C. *Trinity Lutheran* and *Espinoza* Further Eroded the Pervasively Sectarian Test

Two decades later, in *Trinity Lutheran*, this Court firmly rejected Justice Souter’s reasoning in his *Mitchell* dissent. Instead of the Establishment Clause forbidding an evenhanded application of governmental benefits to a pervasively sectarian school, this Court held that the Free Exercise Clause

³³ *Id.* at 652.

prohibits the government from discriminating against church schools solely because of their religious status.³⁴

Similarly, in *Espinoza* this Court found that denying religious schools participation in a generally applicable, public scholarship program because of their religious status violated the Free Exercise Clause.³⁵ Montana asserted that it was not discriminating against the religious schools because of their *status* as religious institutions, but because of their *use* of public funds for religious education (i.e., because they were “pervasively sectarian”).³⁶ The state claimed that the “no-aid provision has the goal or effect of ensuring that government aid does not end up being used for ‘sectarian education’ or ‘religious education,’” noting that it could be used for religious ends by “schools that believe faith should ‘permeate[]’ everything they do.”³⁷ Rejecting this argument, the *Espinoza* Court noted that the Montana Supreme Court had repeatedly held that the State’s Blaine Amendment barred aid based on status and that this required a school to remove itself from any religious control to become eligible for the scholarship program.³⁸ Placing a condition on benefits deters the exercise of First Amendment rights and subjects the status-based discrimination to “the strictest scrutiny.”³⁹

³⁴ 582 U.S. at 458-67.

³⁵ 591 U.S. at 477.

³⁶ *Id.* at 476-79.

³⁷ *Id.* at 477 (emphasis in original).

³⁸ *Id.*

³⁹ *Id.* at 478 (quoting *Trinity Lutheran*, 582 U.S. at 462-63).

D. *Carson* Completed the Rejection of the Pervasively Sectarian Test in the Context of a Religious School’s Receipt of Generally Available Benefits

This Court in *Espinoza* and *Trinity Lutheran* reserved the “use vs. status” issue.⁴⁰ It resolved that issue in *Carson*,⁴¹ at the same time effectively interring the pervasively sectarian test.

The Maine statute required private schools, to qualify for scholarship money, even though received through parental choice, to be “nonsectarian in accordance with the First Amendment,”⁴² an obvious attempt to adopt this Court’s “pervasively sectarian” case law. Maine tied eligibility directly to how a sectarian school *practiced* its faith and belief system. A religious school remained eligible, despite its sectarian status, only if it did not teach religion in a proselytizing manner or other subjects through the “lens of faith.”⁴³

Maine’s approach foundered on the Free Exercise Clause: “The Free Exercise Clause of the First Amendment protects against ‘indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.’”⁴⁴ This Court confirmed that disqualifying an organization from an otherwise generally applicable government benefit because of its

⁴⁰ See *id.* at 478-79; *Trinity Lutheran*, 582 U.S. at 465 n.3.

⁴¹ 596 U.S. 767 (2022).

⁴² Me. Stat., tit. 20-A, § 2951(2).

⁴³ 596 U.S. at 775.

⁴⁴ *Id.* at 778 (quoting *Lyng v. Nw. Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988)).

exercise of its religion violates the Free *Exercise* Clause. Besides the textual overlap, it is hard to see how any other conclusion could have been drawn. The way an organization practices its religion is just another way of stating that it *is* religious, i.e., has a religious status.

Indeed, this Court in *Carson* found the “status” cases of *Trinity Lutheran* and *Espinoza* to be dispositive. A wide range of schools was eligible to receive tuition benefits, including some religious schools that were not “pervasively sectarian,” but the statute still fell because Maine conditioned the disqualification on the religious character of the excluded schools, i.e., “solely because they are religious,”⁴⁵ and, in particular, how they practiced their religion. It did not matter that some churches no longer adhered to a traditional view of sex and so were not pervasively sectarian and did qualify for the tuition grant.

To the extent that anything but smoke was left of the “pervasively sectarian” precedents, this Court blew it away in *Kennedy v. Bremerton School District*.⁴⁶ The dissenters in *Carson* continued to make recourse to that precedent, and, in particular, its foundational assumption that the Establishment Clause somehow trenches on the protections of the Free Exercise Clause, giving States the ability to restrict free exercise because of the “play in the joints” between the clauses, putting one in tension with the other. The *Carson* dissenters reference that “play” no less than nine times

⁴⁵ *Id.* at 780 (quoting *Espinoza*, 591 U.S. at 486).

⁴⁶ 597 U.S. 507 (2022).

in their two opinions.⁴⁷

In *Kennedy*, the school board justified its disciplining of a public school football coach who prayed by himself on school property and in public view on the Establishment Clause, which, the school board urged, allowed the school district to restrict Coach Kennedy’s free exercise of religion. This Court firmly rejected that contention and its implication that the Religion Clauses are in tension. After labeling the *Lemon* test as abandoned and inconsistent with a historical understanding of the clauses,⁴⁸ this Court reached a conclusion just as applicable here as there: “In truth, there is no conflict between the constitutional commands before us. There is only the ‘mere shadow’ of a conflict, a false choice premised on a misconstruction of the Establishment Clause.”⁴⁹ It continued, “[T]he only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.”⁵⁰

Carson and *Kennedy* properly put to bed the “pervasively sectarian” case law and its “play in the joints” theory that the Establishment Clause somehow justifies restrictions on free exercise. The Establishment Clause is no more anti-religion than

⁴⁷ 596 U.S. at 789-806 (Breyer, J., dissenting) (seven times); *id.* at 806-10 (Sotomayor, J., dissenting) (two times).

⁴⁸ 597 U.S. at 534.

⁴⁹ *Id.* at 543 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 308 (Goldberg, J., concurring)).

⁵⁰ *Id.* at 543-44.

the Free Speech Clause is anti-speech or the Free Press Clause is anti-press. To the contrary, the Religion Clauses are both pro-religion. These freedoms have practical limits for the common good and welfare, but they cannot properly be restrained simply because someone talks or prints “too much” on a particular topic. Nor does the First Amendment allow religious practice to be penalized because it is “too sincere” or “too pervasive.”

II. **The *Trinity Lutheran* Line of Cases Cannot Be Avoided by the State Repackaging Anti-religious Discrimination as Protecting Against Discrimination of Another Type**

Is it as easy to circumvent the *Trinity Lutheran-Espinoza-Carson* rule that a generally available public benefit cannot be denied due to religious exercise simply by rewording the law to avoid an openly religious word or phrase? Maine thinks so.

After this Court in *Carson* struck down Maine’s law excepting schools that were “too religious” from receiving funds otherwise available, Maine simply forbade such funds going to schools that “discriminate” by word or deed against homosexuality or transgenderism.⁵¹ Of course, it is known to all that the schools that do that are the “too religious” schools, those who hold to the exercise of their traditional

⁵¹ See *Crosspoint Church v. Makin*, 719 F. Supp. 3d 99, 119-23 (D. Me. 2024), *appeal argued*, No. 24-1590 (1st Cir., Jan. 7, 2025).

beliefs.⁵² The obvious upshot of this is that religious schools that enforce and inculcate traditional sexual mores fall under the Maine law’s new exclusion and are disqualified from receiving the benefit because of their religious beliefs and practices that discriminate against sexual orientation and transgenderism.

Colorado has tried the same tactic. It was thwarted in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Division*⁵³ when its legislators were too open about their anti-religious bias. So, this time, they kept quiet about it. Colorado freely funds kindergartens that restrict students to those who are homosexual and transgender (because they are identifiable groups that Colorado finds have suffered discrimination), but it refuses to fund schools restricted by their religion from accepting such conduct as normative (even though such discrimination against them is because the schools are exercising their religious beliefs).

The Tenth Circuit bought it. It held that all the legislature had to do was to avoid mentioning religious organizations or practices explicitly (even though everyone knows whom it disqualifies). The Tenth Circuit reasoned that the *Trinity Lutheran-Espinoza-Carson* line of cases only covers “laws that targeted ‘religious status’ and ‘religious use’ on the

⁵² See *Bates v. Pakseresht*, 146 F.4th 772, 794 (9th Cir. 2025) (finding that such nondiscrimination labels target most specifically those with traditional religious views).

⁵³ 584 U.S. 617 (2018).

explicit basis that they were religious and not secular.”⁵⁴

This is too clever by half. As this Court recently reinforced, courts must apply “commonsense inferences” about how state action will “impose on protected First Amendment rights.”⁵⁵ Justice Blacklock of the Texas Supreme Court aptly noted that “the core of the matter” between what he termed the “Transgender Vision” and the “Traditional Vision” is a moral and religious dispute.⁵⁶ Similarly, the Ninth Circuit recently observed that provisions prohibiting discrimination based on sexual orientation and gender identity fall almost exclusively on those who hold traditional religious views of sexuality.⁵⁷

If this repapering exercise by Maine and Colorado works, then it is hard to understand what is left of the *Trinity Lutheran-Espinoza-Carson* line of cases. All a State has to say is, “Thou shalt not discriminate on the basis of gender and sexual orientation.” Then a religious organization needs to decide whether (a) to stay true to its traditional religious beliefs and forego the public benefit or (b) to ditch its beliefs and take the money.

⁵⁴ *St. Mary Cath. Parish v. Roy*, 154 F.4th 752, 764 (emphasis added).

⁵⁵ *First Choice Women’s Res. Ctrs., Inc. v. Davenport*, 146 S. Ct.1114, 1125 (2026).

⁵⁶ *State v. Loe*, 692 S.W.3d 215, 239-40 (Tex. 2024) (Blacklock, J., concurring).

⁵⁷ *Bates*, 146 F.4th at 794.

At the end of the day, this “anti-discrimination” maneuver by Colorado is an attempt to roll back the clock and reimpose the “strict separation” and “pervasively sectarian” case law that this Court has effectively repudiated over the last several decades. *Carson* was the culmination of that roll-back. This Court should not retreat now. It should not turn a blind eye to Colorado’s transparent attempt to make it more expensive for parents to choose a traditionally religious school for their child than one that aligns with the State’s embrace of more modern ideology about gender and sexual relations. When a State law targets traditional religious beliefs and exercise by outlawing or otherwise burdening them, that is a free exercise violation requiring justification by strict scrutiny, even when the law does not explicitly mention religion but only beliefs the religious hold. *Carson* reaffirms that indirect, as well as direct, coercion runs afoul of the Free Exercise Clause.⁵⁸

CONCLUSION

Colorado has not found an acceptable way around the *Trinity Lutheran-Espinoza-Carson* line of cases which prohibits discrimination against religion in the administration of generally applicable benefits. It does not suffice to take a traditional religious belief and practice and outlaw it as prohibited “discrimination” by another name. The law deals with the substance of the matter, not the terminology.⁵⁹

⁵⁸ 596 U.S. at 778.

⁵⁹ *Students for Fair Admission, Inc. v. Pres. and Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (the law is “levelled at the thing, not the name”).

This Court should reverse the Tenth Circuit.

Respectfully submitted,
this 26th day of June, 2026,

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