Nos. 24-394, 24-396

In the Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, ET AL.,
Petitioners,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA, *EX REL.* STATE OF OKLAHOMA,
Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA, *EX REL.* STATE OF OKLAHOMA,
Respondent.

ON WRITS OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the academic and pedagogical choices of a privately owned and run school constitute state action simply because it contracts with the state to offer a free educational option for interested students.

2. Whether a state violates the Free Exercise Clause by excluding privately run religious schools from the state's charter-school program solely because the schools are religious, or whether a state can justify such an exclusion by invoking anti-establishment interests that go further than the Establishment Clause requires.

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INTEREST OF *AMICUS CURIAE*[1]

The Union of Orthodox Jewish Congregations of America (Orthodox Union) is the nation's largest Orthodox Jewish synagogue organization, representing more than 2,000 congregations as well as more than 400 Jewish non-public K-12 schools across the United States. The Orthodox Union, through its OU Advocacy Center, has participated in many cases before this Court that, like this one, raise issues of importance to the Orthodox Jewish community, including *Groff* v. *DeJoy*, 600 U.S. 447 (2023); *Carson* v. *Makin*, 596 U.S. 767 (2022); *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464 (2020); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017); *Locke* v. *Davey*, 540 U.S. 712 (2004); and *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002).

The Orthodox Union is concerned that the decision below, if left uncorrected, will have a profoundly negative impact on Jewish day schools. "Religious education is a matter of central importance in Judaism." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 755 (2020). Indeed, "for modern Orthodox Jews, enrolling their children in a dual curriculum Jewish day school is 'virtually mandatory.'" *Westchester Day Sch.* v. *Village of Mamaroneck*, 417 F. Supp. 2d 477, 497 (S.D.N.Y. 2006), aff'd, 504 F.3d 338 (2d Cir. 2007). Many Orthodox Jewish families rely, in part, on public funding to send their children to Jewish day schools. *Orthodox Union Position Paper on Government Aid to*

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

Jewish Day Schools, Orthodox Union Advocacy Center (May 2, 2012), https://perma.cc/4NRA-9LG5. And many Jewish schools rely on state and federal funding to offset high security costs—costs which have increased by 50% following the tragic events of October 7 2023. Jewish schools also rely on government funding to offset other costs like disaster relief, historic preservation, and asbestos abatement. If those schools were treated as state actors because of these interactions, and thus subject to rules governing state actors, Orthodox Jewish education would be close to impossible in this country. *Amicus* therefore submits this brief to explain why the Court should reject the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since this Court's decisions in *Trinity Lutheran*, *Espinoza*, and *Carson*, state and local officials have dodged applying what should be a simple standard. Rather than invalidate patently unconstitutional provisions, states have found ways to give them new life. Here, the Oklahoma Supreme Court revived the state's no-aid provision to block St. Isidore's charter. Other states have used similar tactics against a variety of religious state aid recipients.

These religious exclusions take several forms. First, some states continue to defend plainly unconstitutional no-aid provisions as if *Espinoza* and *Carson* were never decided. New Jersey is using one zombie no-aid provision to block houses of worship from receiving historic preservation grants. California and New York have tried to use their no-aid provisions to block Orthodox Jewish schools from receiving funds to care for students with disabilities.

Second, perhaps even more troubling, some states have manipulated their state laws after *Carson* to exclude religious participants. Some, like Minnesota, now claim for the first time that recipients of longstanding funding programs are state actors. Others, like Maine, have added non-discrimination provisions that prevent religious groups from engaging in core and longstanding religious exercises. Their stated purpose might be non-discrimination, but their acknowledged effect is to exclude disfavored religious groups. This is not incidental. As a New York Times headline declared shortly after *Carson*, "There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It."

These maneuvers demonstrate the danger of allowing states to manipulate the definition of state action to deem government grantees or contractors to be state actors, depriving them of Free Exercise protections. When considering state action in this case, this Court should be aware of the problems that lurk if officials can manipulate state-action doctrine and stretch it beyond its settled bounds. Some have already tried to use this approach to circumvent the Free Exercise Clause and more would surely follow if the state-action standard were relaxed.

States cannot be allowed to continue trying to "outmaneuver" the First Amendment. This case presents the opportunity both to reinforce the constitutional guidance given in *Trinity Lutheran*, *Espinoza*, and *Carson*, and to warn government officials against further gamesmanship. *Amicus* respectfully urges this Court to reverse the decision below.

ARGUMENT

I. States continue to apply zombie no-aid provisions after *Carson*.

Although this Court has abandoned *Lemon* and explained in detail the reach of the Free Exercise Clause in *Trinity Lutheran*, *Espinoza*, and *Carson*, state and local officials have not yet conformed their laws to precedent. States' disregard of this Court's decisions takes several forms. The most common tactic has been to limit *Carson* to its facts, presuming that even slightly different funding programs should be analyzed under some older standard. Other states apply *Lemon*-era laws that should have long ago been abandoned.

A. *Trinity Lutheran*, *Espinoza*, and *Carson* could not be clearer that publicly funded programs cannot exclude participants simply because they are religious.

This Court has rejected Blaine Amendments three times over, each time distilling the standard. First, it made clear that "[t]o condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties." *Trinity Lutheran Church of Columbia* v. *Comer*, 582 U.S. 449, 462 (2017) (alterations in original) (quoting *McDaniel* v. *Paty*, 435 U.S. 618, 626 (plurality opinion)). Next, it explained that "Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses." *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 478 (2020). Finally, the Court confirmed that clever recasting of a

benefits program could not serve as the basis for excluding religious applicants: "Regardless of how the benefit and restriction are described" a program that "operates to identify and exclude otherwise eligible schools on the basis of their religious exercise" violates the Free Exercise Clause. *Carson* v. *Makin*, 596 U.S. 767, 789 (2022).

The Court's decisions cover a wide range of public benefit programs, from tuition assistance to recycled scrap tires. In each case, the Court recognized that individuals and organizations cannot be excluded from public benefits programs because they are religious. This should have been the end of the matter. But it was not.

B. Despite the Court's clear repudiation of Blaine Amendments, state governments throughout the country are still barring funding for religious institutions.

Around the country, state and local governments continue to exclude religious applicants from state funding programs. Their reasons vary, but the bottom line is the same: they maintain that their system is just different enough that *Carson* need not apply.

Consider New Jersey. There, after *Trinity Lutheran* but before *Espinoza* or *Carson*, the New Jersey Supreme Court ruled that churches were ineligible for historic preservation funds because of the state's no-aid provision. The court reasoned that *Trinity Lutheran* did not apply because the churches "all hold 'regular worship services in one or more of the structures that they have used, or will use,' taxpayer-funded grants to repair." *Freedom From Religion Found.* v. *Morris Cnty. Bd. of Chosen Freeholders*, 181

A.3d 992, 1009 (N.J. 2018). Even before *Espinoza* and *Carson*, three members of this Court observed that the ruling "is in serious tension with this Court's religious equality precedents." *Morris Cnty. Bd. of Chosen Freeholders* v. *Freedom From Religion Found.*, 586 U.S. 1213, 1214, 139 S. Ct. 909, 909 (2019) (statement of Kavanaugh, J., respecting denial of certiorari).

Yet the rule is still on the books, and because of the New Jersey Supreme Court's ruling, the New Jersey Attorney General is still trying to enforce it. In Morris County, a group of churches applied for historic preservation funds made available for repair of historic buildings. "From 2003 to 2017, churches and religious organizations with historical significance were eligible for and received funding." *Mendham Methodist Church* v. *Morris County*, No. 2:23-cv-2347, 2024 WL 4903677, at *1 (D.N.J. Nov. 27, 2024). When the churches reapplied, local officials "rejected the Churches' applications because a church is ineligible for funding if it is currently used for religious purposes or functions." *Id.* at *3 (internal quotation marks omitted). After the churches sued in federal district court, the court granted a preliminary injunction, applying *Carson*.

The New Jersey Attorney General intervened in the action to mount a full-scale defense of the State's no-aid provision. He maintains that *Carson* does not apply because the subject is houses of worship, rather than religious schools: "while a government may make historic grant funding generally available, it is not thereby constitutionally required to finance the repair of an active church." State Defs.' Br. in Opp'n to Mot. for Prelim. Inj. at 30, *Mendham Methodist Church* v. *Morris County*, No. 2:23-cv-2347 (D.N.J. July 12,

2024), ECF No. 62. He relies on the decision in this case for this point: "a municipality may make funding available for charter schools but is not thereby required to establish a charter yeshiva just because it has a large Orthodox Jewish population." *Ibid.* (citing *Drummond*).

Similarly, after *Espinoza* and *Carson*, California's Department of Education continued to apply a Blaine-derived law prohibiting education funding for disabled students at religious schools—the functional equivalent of the no-aid provision rejected in *Espinoza*. In *Loffman* v. *California Department of Education*, 119 F.4th 1147 (9th Cir. 2024), California forced families to choose between an Orthodox Jewish education and substantial state assistance for their disabled children. California disbursed federal funds under the Individuals with Disabilities Education Act (IDEA) in order to provide disabled students with the "free appropriate public education" they are guaranteed under IDEA. 20 U.S.C. 1412(a)(1). Students could use those funds at the best school for meeting their needs, including private schools—so long as those schools were not religious. California regulations required any nonpublic school that wished to qualify for IDEA funds to attest to its "Nonsectarian status." Cal. Code Regs. tit. 5, § 3060(d)(6); see also Cal. Code Regs. tit. 5, § 3001(p) ("'Nonsectarian' means a private, nonpublic school or agency that is not owned, operated, controlled by, or formally affiliated with a religious group or sect.").

Rather than recognize that the state law is invalid under this Court's precedents, the California Department of Education defended it, drawing "a distinction between public grants and benefits—like those in

Trinity Lutheran, *Espinoza*, and *Carson*—and government contracting opportunities like California's master contracts with private schools in its [non-public schools] program." See *Loffman*, 119 F.4th at 1168. The state went on to explain that the schools—defined by code as "nonpublic," "private" schools, Cal. Educ. Code § 56034—are distinct from those in *Carson* because they are providing a "public education." State Defs.' Br. in Opp'n to Mot. for Prelim. Inj. at 11-12, *Loffman* v. *California Dep't of Educ.*, No. 2:23-cv-1832 (C.D. Cal. June 30, 2023), ECF No. 38. The district court dismissed the parents' case.

Happily, the Ninth Circuit, relying on *Carson*, reversed the decision, ruling that "the statute on its face burdens the free exercise rights of parents." *Loffman*, 119 F.4th at 1153 (Wardlaw, J.). But that the case proceeded as far as it did, with a full-throated defense by California, demonstrates just how much work remains to be done.

Some of that work remains in New York. The New York City Department of Education has also attempted to deny IDEA funds to children attending religious schools. The Department is currently seeking to recoup IDEA funds from a family that enrolled their autistic son in a Jewish day school. The Department claims it can recoup funds for the time the child spent in a Judaic Studies class. See Compl., *Board of Educ. of City Sch. Dist. of City of N.Y.* v. *E.L.*, No. 1:24-cv-1176 (S.D.N.Y. Feb. 16, 2024), ECF No. 1. It does not matter to the Department that the Judaic Studies classes include instruction and practice in core academic skills, such as reading comprehension. See Def.'s Mot. for Summ. J. at 8, *Board of Educ.*, No. 1:24-

cv-1176 (S.D.N.Y. Oct. 25, 2024), ECF No. 28. The Department claims that the funding violates the New York Constitution's prohibition on "indirect aid" to "parochial schools." Pls.' Mot. for Summ. J. at 15-16, *Board of Educ.*, No. 1:24-cv-1176 (S.D.N.Y. Sept. 13, 2024), ECF No. 22. Despite *Carson*, the New York City Department of Education still attempts to apply New York's no-aid law.

Similarly, in this case, the Oklahoma Attorney General and Oklahoma Supreme Court make clear they don't believe *Carson* and *Espinoza* apply to charter school education. 24-394 Pet.App.27a-28a. The Oklahoma Supreme Court deemed the state's charter school laws sufficient to render St. Isidore a state actor. This determination allowed the Oklahoma Supreme Court to give full force and effect to the state's no-aid provision. The court's reasoning sounds in pre-*Carson* cases: "The expenditure of state funds for St. Isidore's operations constitutes the use of state funds for the benefit and support of the Catholic church. It also constitutes the use of state funds for 'the use, benefit, or support of . . . a sectarian institution.'" Pet.App.13a. Therefore, according to Oklahoma, "The St. Isidore Contract violates the plain terms of Article 2, Section 5 of the Oklahoma Constitution." Pet.App.13a. In other words, *Carson* does not apply.

Oklahoma, California, New Jersey, and New York are not the only states still applying no-aid laws despite *Carson*. Indeed, more than thirty zombie laws

across multiple states are still in force.[2] Many states aren't even complying in the very context addressed in *Espinoza* and *Carson*: private religious schools' participation in publicly funded programs.[3]

Despite the Court's emphatic pronouncements that religious discrimination in public funding is "odious to our constitution," states continue to discriminate. *Trinity Lutheran*, 582 U.S. at 467. They continue to cling to no-aid requirements as Boston's municipal officials clung to *Lemon* in *Shurtleff*. See *Shurtleff* v. *City of Boston*, 596 U.S. 243, 277 (2022) (Gorsuch, J., concurring in judgment) (explaining that although it had been repudiated, "the city chose to follow *Lemon* anyway"). As in *Shurtleff*, this Court's correction is needed here and may be needed again if state leaders refuse to do the serious legal analysis required by *Trinity Lutheran*, *Espinoza*, and *Carson*.

II. States are adopting shadow over substance to circumvent *Carson*.

While some states have continued to cling to old laws and *Lemon*-era legal arguments, others have adopted even more troubling strategies to avoid complying with *Carson* and the Free Exercise Clause. First, some states are adding antidiscrimination rules that effectively exclude many religious institutions from public programs. Second—as in this case—some states have begun relabeling private religious organi-

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[2] *See* Nicole Stelle Garnett and Tim Rosenberger, *Unconstitutional Religious Discrimination Runs Rampant in State Programs*, Manhattan Institute (Dec. 14, 2023), https://perma.cc/YW3A-364X.

[3] *Id.* at 7-8.

zations as state actors that are subject to the Establishment Clause. The Court should cut off these efforts to circumvent *Carson* and clarify, again, that "[w]hat cannot be done directly cannot be done indirectly"—and that "the prohibition against [religious] discrimination is 'levelled at the thing, not the name.'" *Students for Fair Admissions, Inc.* v. *Presidents and Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (quoting *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

A. States have openly defied this Court's ruling in *Carson* under the banner of anti-discrimination.

Some states—including Maine itself—are attempting an end run around *Carson* by creating new rules designed to deny religious groups funding, this time dressed up as anti-discrimination efforts. These states have enacted laws that prevent otherwise publicly available funding from going to recipients that "discriminate" on the basis of religion, sexual orientation, or gender identity, when in reality these religious organizations are simply asking employees or other members of their religious communities to share their faith.

Maine is the prime example. The week *Carson* was decided, the Speaker of the Maine House of Representatives boasted that lawmakers had "[a]nticipated" the "ludicrous decision from the far-right SCOTUS" and

changed the law.[4] The amendments to Maine's Human Rights Law stripped out an exemption that would have protected religious schools, added "religion" as a ground of prohibited discrimination, and created a new "religious expression" rule that required all schools to allow all religious expression equally.[5] The same week, the New York Times published a law professor's essay entitled, "There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It."[6]

Concretely, this means that an Orthodox Jewish school that participates in the program could not incorporate religious studies into the curriculum unless it also allowed Christian or Muslim students to express their own faiths' contrasting views about the Torah. Nor could the school give admissions preferences to Jewish students, as all Orthodox Jewish schools do.

Once again, Maine is "condition[ing] the availability of benefits" in a manner that "'effectively penalizes the free exercise' of religion." *Carson*, 596 U.S. at 780. But this time, rather than claiming that the exclusion prevents the state from "fund[ing] religious education," *id.* at 785, Maine claims that the exclusion is required lest "public money" be "used to fund discrimination," *St. Dominic Acad.*, 744 F. Supp. 3d at 74.

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[4] See *St. Dominic Acad.* v. *Makin*, 744 F. Supp. 3d 43, 54 (D. Me. 2024) (quoting now-deleted June 26, 2022 tweet by Ryan Fecteau, Speaker of the Maine House of Representatives); see also *id.* at 52-53 (chronicling changes).

[5] *Id.* at 53.

[6] Aaron Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine has Found It*, N.Y. Times, June 23, 2022, https://perma.cc/YUR2-YYZX.

Minnesota is using a similar tactic. The state has a longstanding benefit, called the Postsecondary Enrollment Options (PSEO) program, that allows high school students to use public funds to pay for college classes at the school of their choice. Private religious schools participated in this program for years—until *Carson*. After this Court's decision in *Carson*, Minnesota amended its law to exclude colleges that consider "gender, or sexual orientation or religious beliefs or affiliations" in admissions. See Minn. Stat. § 124D.09, subd. 3(a).

The post-*Carson* version of Minnesota's law prohibits religious schools from asking their students to share the school's faith if the schools want to participate in the program. Two religious colleges—who were among the largest participants in the program—sued, and Minnesota defended the law by claiming it is necessary to prevent the schools from engaging in "express and unabashed discrimination" against students "based on religion and LGBTQ+ status." See Defs.' Mem. in Supp. of Mot. Summ. J. at 19, 28, *Loe* v. *Jett*, No. 0:23-cv-1527 (D. Minn. Sept. 3, 2024), ECF No. 78.

Similarly, Oregon recently revoked grant funding from Youth 71Five Ministries, a Christian program for at-risk youth. Although Youth 71Five Ministries serves youth of all faiths and none, it asks its employees and volunteers to "subscribe and adhere without mental reservation" to a statement of Christian faith. *Youth 71Five Ministries* v. *Williams*, No. 24-4101, 2024 WL 3749842, at *1 (9th Cir. Aug. 8, 2024). After *Carson*, Oregon enacted new rules requiring grant recipients to certify that, among other things, they do not discriminate on the basis of religion in their hiring practices. *Ibid.* Oregon then revoked the $410,000

grant provided to Youth 71Five Ministries after the state received an anonymous tip complaining that the program did not meet the grant's new certification requirements. *Id.* at *2.

Colorado has also tried this move. It excluded many religious preschool providers from its universal prekindergarten funding program, which offers funding to private preschools, under an "equal opportunity" requirement. Among other things, the requirement prohibits participating preschools from considering a student's or family's "religious affiliation, sexual orientation, [or] gender identity" in the admissions process. *St. Mary Catholic Parish in Littleton* v. *Roy*, 736 F. Supp. 3d 956, 976 (D. Colo. 2024) (citing Colo. Rev. Stat. § 26.5-4-205(2)(b)), appeal docketed, No. 24-1267 (10th Cir. June 24, 2024). While the effect of this requirement is again to exclude religious preschools that ask families who attend the school to support their religious missions, Colorado acknowledges this religious exclusion but claims it is necessary to ensure preschool students "receive publicly-funded * * * preschool services that are safe, healthy, and free from discrimination." The Colorado district court agreed. *Id.* at 980, 1005.

Maryland took a similar tack while the *Espinoza* and *Carson* cases were ongoing. In 2016, the Maryland Legislature established a scholarship program for low-income students to attend private schools. *Bethel Ministries, Inc.* v. *Salmon*, No. 1:19-cv-1853, 2022 WL 111164, at *2 (D. Md. Jan. 12, 2022). The law prohibited participating schools from discriminating based on, among other things, sexual orientation in admissions. In 2019, Maryland expanded that requirement

to include student retention and disciplinary requirements. *Id.* at *2-4. The state then removed Bethel Christian Academy from the program solely because its handbook stated it "supports the biblical view of marriage defined as a covenant between one man and one woman," which the state claimed "leaves the door wide open to discrimination." *Id.* at *1, *3. Maryland stood by the exclusion even though it was undisputed that Bethel had never "denied admission, expelled, or disciplined a student on the basis of sexual orientation." *Id.* at *6. The district court granted summary judgment in favor of the school on the grounds that the state violated its free speech rights.

State officials are not trying to hide the ball: many openly admit that their new nondiscrimination rules are intended to circumvent *Carson*. In Maine, the defiance was overt. Maine's Attorney General criticized the schools involved in *Carson* as "inimical" to Maine's "values" because they "promote a single religion," "refuse to admit gay and transgender children," and "discriminate in hiring teachers and staff."[7] After this Court's decision in that case, he vowed to use "statutory amendments" to prevent such schools from receiving "public money," and again warned that any school seeking tuition funds must now "comply with anti-discrimination provisions of the Maine Human Rights Act, and that this would require some religious schools to eliminate their current [religiously motivated] practices."[8] Subtlety was not Maine's strategy.

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[7] *Statement of Maine Attorney General Aaron Frey on Supreme Court Decision in* Carson *v.* Makin, Office of the Maine Attorney General (June 21, 2022), https://perma.cc/544J-DAFN.

[8] *Ibid.*

In Minnesota, those opposed to the PSEO amendment pointed out that the non-discrimination provision violated this Court's decisions in *Trinity Lutheran*, *Espinoza*, and *Carson*.[9] Yet Minnesota legislators were undeterred. In fact, the sponsor of the non-discrimination provision lauded the fact that the bill would exclude two schools which share "a particular understanding of the Christian faith."[10]

These statements leave little doubt that states are using the language of non-discrimination to shield their own *religious* discrimination in offering public benefits. But "[e]liminating * * * discrimination means eliminating all of it." *Students for Fair Admissions*, 600 U.S. at 206. States may not recast their no-aid provisions as "non-discrimination" provisions to exclude religious entities from public benefits.

B. States have tried to evade *Carson* by labelling private government contractors as state actors.

While some states have responded to *Carson* by piling on new nondiscrimination requirements, others have attempted to change the legal characterization of aid recipients themselves. The Oklahoma Supreme Court's decision below exemplifies the trend: relabeling private religious institutions as state actors. See Pet.App.27a ("The Free Exercise Trilogy cases do not apply to the governmental action in this case."). By applying this new "state actor" label, courts transform

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[9] See Minnesota House of Representatives, *House Floor Session 4/20/23 – Part 2*, at 3:30:20-3:31:50, YouTube (Apr. 21, 2023), https://www.youtube.com/watch?v=Klc95g-ovm4&t=12620s.

[10] *Id.* at 3:25:00-3:25:20.

religious institutions that participate in public programs into lawbreakers because, just by retaining their religious character, they are now violating the bedrock commands of the Establishment Clause. Pet.App.26a (declaring that, as "a governmental entity and a state actor, St. Isidore cannot ignore the mandates of the Establishment Clause").

Although states cannot directly exclude religious institutions from their programs under *Carson*, relabeling religious institutions as arms of the state allows state governments to force them to choose between retaining their religious identity and continuing to participate in generally available benefit programs.

This is currently playing out in Minnesota. As discussed above, Minnesota's post-*Carson* law is being challenged by two Christian schools, who allege that this new prohibition infringed their Free Exercise rights. Minnesota counterclaimed, alleging that the religious *schools* were the ones violating the First Amendment by using faith-based admissions criteria. See Defs.' Am. Answer and Def. Minn. Dep't of Educ.'s Countercl. at 64, *Loe* v. *Jett*, No. 0:23-cv-1527 (D. Minn. July 7, 2023), ECF No. 27. At summary judgment, Minnesota relied heavily on the Fourth Circuit's decision in *Peltier* v. *Charter Day School, Inc.*, 37 F.4th 104 (4th Cir. 2022), cert. denied, 143 S. Ct. 2657 (2023) (mem.), and the Oklahoma Supreme Court's decision in this case, to argue that the schools were state actors. See Defs.' Mem. in Supp. of Mot. Summ. J. at 24-25, *Loe* v. *Jett*, No. 0:23-cv-1527 (D. Minn. Sept. 3, 2024), ECF No. 78. From there, Minnesota insisted that, "[a]s state actors, the [s]chools lack[ed] constitutionally-protected rights when providing PSEO." *Id.* at 34. In

other words, the schools must, in the state's view, either give up their religious practices or leave the program.

At bottom, the state actor arguments advanced by Minnesota and adopted by the Oklahoma Supreme Court below are nothing more than the old Establishment Clause arguments from *Carson* in sheep's clothing. In *Carson*, Maine asserted that it couldn't allow religious schools into its tuition program because the education that the program was intended to fund was "public." 596 U.S. at 782-784. This Court rejected that argument, recognizing the potential for gamesmanship that it would invite. *Carson* held that the analysis "turned on the substance of free exercise protections, not on the presence or absence of magic words," or "a party's reconceptualization of the public benefit." *Id.* at 785.

The same is true whether the magic words are "free public education" (as in *Carson*) or "state actor" as here. Under both arguments, states have tried to force otherwise-qualified religious institutions out of programs solely because of their religious identities or practices. But our "Constitution deals with substance, not shadows." *Students for Fair Admissions*, 600 U.S. at 230. And the substance of the First Amendment is clear: "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits," regardless of the costume that discrimination wears. *Carson*, 596 U.S. at 778.

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Whatever the label—preventing public funding of pervasively sectarian entities, stopping purported

state actors from violating constitutional rights, or engaging in religious discrimination in the name of nondiscrimination—excluding religious entities from public benefits solely because they are religious remains "odious to our Constitution." *Carson*, 596 U.S. at 779. This Court should reject states' attempts to reinvigorate their now-defunct no-aid provisions through "simple semantic exercise." *Id.* at 784.

III. If left unchecked, these tactics will threaten historical religious practices.

This Court should curb the States' attempts to avoid complying with the First Amendment. While *Amicus* does not take a position on state action analysis generally, it does oppose the manipulation of legal standards to exclude religious schools from otherwise generally available programs. Rejecting the Oklahoma Supreme Court's state action analysis in this case would cut off one of the primary methods for evading the holdings in *Trinity Lutheran*, *Espinoza*, and *Carson*. The Court should make clear that Oklahoma's efforts to make an end run around these cases violate the First Amendment.

A. Jewish day schools and synagogues frequently rely on government aid to protect student access, health, and safety.

Jewish day schools, like many private religious schools, frequently rely on generally available government aid programs intended to protect students' access to education, health, and safety. Imposing Establishment Clause obligations as a result of this aid will effectively destroy schools' ability to carry out their religious mission—with devastating effects on the communities they serve.

"Religious education is a matter of central importance in Judaism. * * * [T]he Torah is understood to require Jewish parents to ensure that their children are instructed in the faith." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 755 (2020). Thus, "for modern Orthodox Jews, enrolling their children in a dual curriculum Jewish day school is 'virtually mandatory.'" *Westchester Day Sch.* v. *Village of Mamaroneck*, 417 F. Supp. 2d 477, 497 (S.D.N.Y. 2006), aff'd, 504 F.3d 338 (2d Cir. 2007). Against this background, it is not surprising that many Orthodox Jewish families across America rely in part on public funding to send their children to Jewish day schools. *Orthodox Union Position Paper on Government Aid to Jewish Day Schools*, Orthodox Union Advocacy Center (May 2, 2012), https://perma.cc/4NRA-9LG5. Education is a basic necessity. State support should thus take forms that allow families to use funds in a format which best addresses their needs. *Ibid.*

Beyond tuition assistance, Jewish day schools and synagogues also participate in a wide variety of generally available government aid programs.

Security grants. Because of the lamentable history of violence against American Jews, Orthodox Jewish schools and synagogues frequently rely on government grants and direct funding to enhance their security. Multiple federal programs provide such funds.[11] So do

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[11] See, *e.g.*, 42 U.S.C. 5172(a)(3) (providing federal disaster funds directly to entities that deliver "critical services" including "education"); *FY 2024 Nonprofit Security Grant Program Fact Sheet*, FEMA (updated Jan. 21, 2025), https://perma.cc/85SL-PFUZ (providing grants for "facility hardening and other physical

several similar state programs.[12] These programs are more vital than ever: following Hamas's October 7 attack on Israel, Jewish schools reported a 47% increase in average security spending. Gabriel Aaronson & Tzvi Kiwala, *Jewish School Security Expenditures Report* at 4, Teach Coalition Office of Jewish Education Policy and Research (Jan. 2024), https://perma.cc/5Y2P-KP5E.

Disaster relief. Following a natural disaster, Jewish schools and synagogues—like other religious schools and houses of worship—are eligible to apply for disaster assistance from the federal government.[13]

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and cyber security enhancements and activities to nonprofit organizations that are at high risk of terrorist or other extremist attack"); Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, 109 Stat. 194, 253-254 (authorizing funds for repair of religious facilities damaged by an explosion).

[12] See, *e.g.*, *Nonpublic School Safety Equipment (NPSE) Grant*, New York State Education Department, https://perma.cc/Q7P3-7JRQ (providing security grants to religious institutions); *New Jersey Nonprofit Security Grant Program (NJ NSGP)*, New Jersey Office of Homeland Security and Preparedness, https://perma.cc/6PCB-DM5L (same); *Nonprofit Security Grant Fund Program*, Commonwealth of Pennsylvania, https://perma.cc/US74-9MBW (same); *Security Funding for Jewish Day Schools*, Florida Department of Education, https://perma.cc/DN7R-C388 (same).

[13] *Fact Sheet, FEMA Public Assistance: Private Nonprofit Organizations* at 2, FEMA (Oct. 2022), https://perma.cc/XGB5-AGMB; *FAQs: How Schools and Institutions of Higher Education Can Utilize FEMA's Public Assistance Program to Recover from Disasters* at 4, U.S. Department of Education & FEMA (2024), https://perma.cc/S75L-6B7F.

Historic preservation. Jewish congregations that worship in historic properties may receive federal grants for historic preservation through the Save America's Treasures Grant program.[14]

Health and safety. Federal laws like the Asbestos School Hazard Abatement Act help religious nonprofit schools, including Jewish day schools, address health hazards sometimes present in aging school buildings. 20 U.S.C. 4011-4022.

The possibility of being deemed a "state actor" as a result of accepting government funds thus puts Jewish schools in an impossible position. The central feature of contemporary Orthodox Jewish day schools is their dual curriculum, in which the school day is divided between Jewish studies (primarily Torah and Talmud) and general studies (*e.g.*, math, science, and English). The "general studies" and "religious studies" curricula at Jewish day schools are not meant to be separate, but rather combined in such a way as to achieve "integration and harmony" in order to establish "a rich education as the basis of a rich life." Aharon Lichtenstein, *A Consideration of Synthesis from a Torah Point*

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[14] *Save America's Treasures Grants*, U.S. National Park Service, https://perma.cc/V3VQ-532R; see also *Secretary Norton Announces Grants to Rhode Island's Touro Foundation*, Department of Interior, Nov. 13, 2003, https://perma.cc/QX57-W7G5 (announcing a federal historic preservation grant award to help preserve Touro Synagogue, the nation's oldest synagogue); *National Park Service Awards $10 Million to Historic Sites and Structures in 9 States to Celebrate America's 250th Anniversary*, National Park Service, Aug. 22, 2024, https://perma.cc/XXH3-KNSN (announcing a federal historic preservation grant award to San Xavier del Bac, a nearly 250-year-old Catholic mission in Arizona "still ministering to the descendants of the indigenous community that built it").

of View, The Commentator, Apr. 27, 1961, http://bit.ly/2Pu3qP1. The study of Torah is itself a form of religious worship. See Chaim N. Saiman, *Halakhah: The Rabbinic Idea of Law* 6 (2018) ("For as the Talmud sees it, the study of Torah, a study often centered on picayune particulars of halakhah, is one of the most pristine forms of divine worship"). These devotional religious practices, so central to Orthodox Jewish education, would be forbidden in a public school. See *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 223 (1963) (Bible readings in public schools); *Engel* v. *Vitale*, 370 U.S. 421, 424 (1962) (public school sponsored prayers).

In short, thrusting state actor status on an Orthodox Jewish school would strip it of the ability to maintain its religious identity. Yet refusing all state funding—including vital security funding—would put staff and students at tremendous risk. Nevertheless, under the Oklahoma Supreme Court's reasoning, Jewish schools could end up facing impossible choices like these. States could manipulate the definition of state actors to sweep in Orthodox Jewish schools and a host of private religious institutions.

B. This Court should prevent state courts from reclassifying schools and other religious organizations as state actors.

The opinion below illustrates three routes to reclassifying religious entities as state actors. This Court should block all three.

First, states could redesignate certain types of entities (*e.g.*, all schools receiving state funds, all foster care contractors, all hospitals, etc.) as "public" entities. Pet.App.17a-18a. This approach is particularly easy to

abuse because it requires very little effort from the state to carry out. As discussed above, Maine at least tentatively attempted this in *Carson* when it argued that all private schools participating in its tuitioning program were providing a "free public education." 596 U.S. at 782. Minnesota likewise argued that *all* schools receiving state funds—not just charter schools—had been designated as "public" under state law and were therefore state actors.[15] And California took the position that "nonpublic" schools receiving IDEA funds were nevertheless providing a "public education." See *supra* at 7-8.

Second, states could claim that any entity performing a function that the state is obligated to perform under its state constitution is acting on the state's behalf—in other words, that the "government has outsourced one of its constitutional obligations to the entity." Pet.App.21a. While this Court has recognized that such outsourcing can, in very limited circumstances, transform a private entity into a state actor, it has done so only where the function itself was already a traditionally exclusive one. See *Manhattan Cmty. Access Corp.* v. *Halleck*, 587 U.S. 802, 809-810, 810 n.1 (2019).

This point is especially important for education. All fifty states have a constitutional obligation to provide

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[15] See Defs.' Opp'n to Pls.' Mot. for Summ. J. at 23, *Loe* v. *Jett*, No. 0:23-cv-1527 (D. Minn. Sept. 24, 2024), ECF No. 113 (arguing that under Minnesota law "[a]ll schools supported in whole or in part by state funds are public schools.").

education to their citizens.[16] And yet, as multiple Circuits have recognized, "[e]ducation has never been a state monopoly in this country, even at the primary or secondary levels[.]" *Powe* v. *Miles*, 407 F.2d 73, 80 (2d Cir. 1968); accord *Logiodice* v. *Trustees of Me. Cent. Inst.*, 296 F.3d 22, 27 (1st Cir. 2002) ("Obviously, education is not and never has been a function reserved to the state."); *L.P. ex rel. Patterson* v. *Marian Catholic High Sch.*, 852 F.3d 690, 697 (7th Cir. 2017) ("education as a whole" does not "fall[ ] solely in the province of the state."). Thus, private schools that receive funding from the state have historically not been considered state actors. See *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982). Yet the Oklahoma Supreme Court held the opposite—that because Oklahoma had chosen to execute one of its non-exclusive duties by partnering with private parties, those entities had donned the visage of the state itself. See Pet.App.21a. This opens the door for similar moves by other states.

Third, a state could create such significant regulatory oversight of private entities that they become "entwined with the State" and thus subject to its control. Pet.App.21a. States could easily use that opening to expand their control over religious entities that they partner with to provide essential public services.

If the Court were to expand the reach of the state actor doctrine in this way, it could threaten the practices, and even the existence, of many religious organizations. Religious institutions have historically pro-

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[16] Emily Parker, *50-State Review: Constitutional obligations for public education* at 1, Education Commission of the States (Mar. 2016), https://perma.cc/5362-GGEV.

vided important public services as a part of their religious practices—services such as foster care,[17] education, [18] refugee and humanitarian aid, [19] medical care,[20] and many others. Adopting the Oklahoma Supreme Court's analysis in this case would open the door for state governments to improperly interfere with, or even outright prohibit, a religious institution's provision of these services by reclassifying those services as state action.

The City of Philadelphia attempted something similar in *Fulton* v. *City of Philadelphia*, 593 U.S. 522, (2021). There, Philadelphia argued that its exclusion of Catholic Social Services was justified because "governments should enjoy greater leeway under the Free Exercise Clause when setting rules for contractors than when regulating the general public." *Id.* at 535. In the city's view, foster care agencies were "potential

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[17] Byron Johnson et al., *Religious foster care plays a vital role for our most vulnerable children*, Deseret News, June 18, 2021, https://perma.cc/39RZ-MJRS ("Faith-based agencies pioneered foster care in the U.S.").

[18] See Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 663 (1998) ("Education, not yet conceived as a state function, was usually administered by the clergy and combined with religious instruction.").

[19] See Elizabeth Ferris, *Faith-based and secular humanitarian organizations*, 87 Int'l Rev. of Red Cross 311, 313-317 (June 2005), https://perma.cc/9H6A-6EYJ.

[20] See Maryam Guiahi et al., *Patient Views on Religious Institutional Health Care*, JAMA Network Open (Dec. 27, 2019), https://perma.cc/22LF-SKU6 (approximately 1 in 5 hospitals in the U.S. are religiously affiliated).

state actors" due to their role in the state's child welfare system. Br. for City Resp'ts. at 25, *Fulton*, 593 U.S. 522 (No. 19-123) (cleaned up). This Court unanimously rejected Philadelphia's attempt to conflate private religious exercise with government action. See *Fulton*, 593 U.S. at 536, 542.

If the Oklahoma Supreme Court's reasoning in this case stands, states will have new opportunities to circumvent this Court's free exercise precedent by redefining religious entities as state actors. And if the religious institutions refuse to give up their religious exercise, then their licenses or contracts could be revoked—all because their religious practices were intolerable to the government. That would enable states like Maine, Minnesota, and California to get around this Court's clear guidance in *Trinity Lutheran*, *Espinoza*, and *Carson*. The First Amendment neither requires nor permits such a result.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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