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Report

The Persistence of Religious Discrimination in Publicly Funded Pre-K Programs

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Executive Summary

When the government chooses to cooperate with private organizations to provide public services, the Supreme Court has made clear that the First Amendment prohibits religious discrimination. Three cases—*Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017), *Espinoza v. Montana Department of Revenue* (2020), and *Carson v. Makin* (2022)—illuminate this concept. In *Trinity Lutheran*, the Court held that Missouri unconstitutionally excluded a faith-based preschool from receiving state-funded playground resurfacing. In *Espinoza*, it found that Montana's supreme court unconstitutionally invalidated a private-school-choice program because it included faith-based schools. And in *Carson*, the Court held that Maine violated the Constitution when it excluded religious schools from a rural scholarship program.

Read together, these three cases establish a clear nondiscrimination mandate: when the government establishes programs that extend public benefits to private organizations, it cannot exclude religious organizations from participating. Nor can it condition their participation on secularizing their

programmatic content. Unfortunately, despite the Court's holdings in *Trinity*, *Espinoza*, and *Carson*, many dozens—likely, hundreds—of public programs continue to unconstitutionally discriminate against religious providers and religious conduct. In a previous report,[1] we examined examples of unconstitutional religious discrimination across a range of public programs in the states. This report provides a more in-depth examination of religious discrimination in publicly funded pre-K programs. Given the perceived importance of early childhood education to later academic success, publicly funded pre-K programs have become a priority for many education reformers.[2] And given the lack of capacity in government institutions, including public schools, educating our youngest children requires enlisting private providers on a relatively wide scale.

Although churches, synagogues, mosques, and other religious entities have long provided pre-K education, their participation in public pre-K programs is often severely curtailed, despite a demonstrated record of success and expertise in the field. Many programs enlist private entities to provide pre-K education for young children. Some exclude religious providers altogether or, most commonly, prohibit them from engaging in "sectarian" or "religious" activities or teaching religion at all, if they accept public funds. These restrictions run afoul of the First Amendment's mandate against religious discrimination.

This report details unconstitutional religious discrimination in public pre-K programs. While our report is not comprehensive—undoubtedly, religious discrimination persists in many programs that we do not discuss here—we hope that this report will draw attention to pre-K programs that fail to comply with the Free Exercise Clause's nondiscrimination principle.

Introduction

The First Amendment's religion clauses require equal treatment of religious institutions and religious persons. The Supreme Court's recent jurisprudence—including the important recent decisions in *Trinity Lutheran*,[3] *Espinoza*,[4] and *Carson*[5]—provides the following guidance. First, the Establishment Clause does not preclude religious institutions from cooperating with the government to advance the public good through participation in public programs that extend benefits to private providers on a religion-neutral basis. Second, when the government adopts a program that extends public funding to secular private providers, the Free Exercise Clause prohibits the government from excluding religious organizations or requiring them to secularize to participate.

Notwithstanding the fact that the Court has now made it abundantly clear that the First Amendment requires government neutrality, not hostility, toward religious institutions and believers, many state programs continue to treat religion as something to be stamped out of public programs. As the Becket Fund for Religious Liberty recently observed:

> Despite these developments, lower courts and government officials at many levels seem to have a shag-carpet understanding of the Establishment Clause: one that is stuck in the 1970s and has not been updated since. Under this view, allowing religious speech [and organizations] . . . in government-funded programs is constitutionally dangerous, and the safest course for local officials is to exclude [them]. That mistaken view . . . has consequences.[6]

One consequence of this view, documented here, is that religious providers are all too often excluded from participating in public pre-K programs where the government refuses benefits to organizations because they are religious or because they conduct sectarian activities.

To understand the scope of the problem, we searched state statutes establishing public pre-K programs—and regulations governing them—for the terms "religious," "sectarian," "secular," "nonideological," and "faith-based." We also reviewed information about pre-K programs on websites of state departments of education and several major school districts.

These searches suggest that exclusion of religious providers is pervasive, and we suspect that these problems exist in many other programs that we did not identify. Other than regulations that require religious providers to secularize as a condition of participating in a pre-K program, we did not examine, at a granular level, regulations governing religious participants. Some of those regulations may have the effect of dissuading religious providers from participating. For example, two federal judges in Colorado recently found that certain regulations governing the state's pre-K program violated the Free Exercise Clause. Namely, the regulations prohibited preschools in the program from preferring coreligionists in their hiring and admissions and precluded the preschools from expressing their views on human sexuality.[7] Although we tried to ensure that all the restrictions discussed here remain "on the books," it is possible that some are currently not enforced. In such cases, eliminating them legislatively—or securing an official legal opinion about their unenforceability—is preferable to nonenforcement.[8]

The Constitution Demands Neutrality, Not Hostility, Toward Religion

In the latter half of the twentieth century, the Court issued several opinions that called into question the constitutionality of extending government benefits to religious institutions. Although the Court never imposed a categorical ban on such church–state cooperation, the constitutional scale tipped in favor of denying religious organizations access to benefits from public programs.

Following *Lemon v. Kurtzman* (1971),[9] the question of whether a government program violated the Establishment Clause was subject to the tripartite "*Lemon* test." A government program satisfied the Establishment Clause if it: (1) had a secular purpose; (2) did not have the primary effect of advancing religion; and (3) avoided "excessive entanglement" between government and religion.

In the intervening years, the Court incrementally replaced the *Lemon* test with a neutrality requirement. For example, in *Zelman v. Simmons-Harris* (2002), the Court upheld a publicly funded private-school-choice program, even though 95% of participating students attended religious schools. And in 2022, the Court announced that it had abandoned the *Lemon* test altogether in *Kennedy v. Bremerton School District*.[10]

Assistant Coach Joseph Kennedy customarily prayed on the football field after each game. When the school failed to renew his contract, Kennedy sued. The Court stated that, instead of the *Lemon* test, courts should interpret the Establishment Clause with "reference to historical practices and understandings."[11] Writing for the majority, Justice Gorsuch criticized the school's actions, noting that "the 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."[12]

In *Zelman*, the Court held that the Establishment Clause did not require the exclusion of religious organizations from programs that extend benefits to private organizations on a religion-neutral basis. However, it was silent as to whether the Free Exercise Clause required their inclusion. This

question was answered in *Trinity Lutheran*, *Espinoza*, and *Carson*. In *Trinity Lutheran Church, Inc. v. Comer* (2017), Missouri unconstitutionally excluded a faith-based preschool from receiving state-funded playground resurfacing. Chief Justice John Roberts concluded that Missouri's policy gave Trinity Lutheran preschool an impossible choice: "It may participate in an otherwise available benefit program or remain a religious institution." In *Espinoza v. Montana Department of Revenue* (2020), Montana unconstitutionally invalidated a private-school-choice program that included faith-based schools. Roberts observed: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[13]

Trinity Lutheran and *Espinoza* left open a potential loophole. Although both *Trinity Lutheran* and *Espinoza* concluded that the challenged policies discriminated against recipients based on their religious character (or status), they declined to say whether a state could refuse to provide funds that might be put to religious uses (for example, religious instruction). Chief Justice Roberts acknowledged the so-called "status/use" distinction might not exist but decided not to address it at that time.

In *Carson v. Makin* (2022), the Court rejected the status/use distinction. Maine's private-school-choice program allowed rural students to use the public funds allocated for their secondary education at any school, public or private, as long as it was "nonsectarian." Maine contended that the exclusion of "sectarian" schools was not religious discrimination but rather reflected a desire not to fund religious instruction. Justice Roberts observed that the Court has "never suggested that use-based discrimination is any less offensive to the Free Exercise Clause" than status-based discrimination.[14]

The *Carson* Principle

We refer to the nondiscrimination rule articulated in *Trinity Lutheran*, *Espinoza*, and *Carson* as the "*Carson* principle." Under the *Carson* principle, the government may not exclude private organizations from participating in public benefit programs because they are religious or engage in religious conduct.

Some questions remain: Are there exceptions to this rule? Must the government fund religious organizations to the maximum extent permitted by the Constitution? Is there wiggle room between what the Establishment Clause prohibits and what the Free Exercise Clause requires? This report does not attempt to answer those questions. Instead, it offers observations and caveats about the application of the *Carson* principle.

Observations:

- The government is not required to extend public benefits to private organizations at all. The Free Exercise Clause's nondiscrimination principle is triggered only when the government extends benefits to private secular organizations. However, once the government does so, it must also extend those benefits to qualifying religious organizations and must permit them to remain religious.

- The nondiscrimination principle applies to the exclusion of private organizations for both their religious status and their religious use. Rules that limit public funding to a religious organization's "secular" or "nonsectarian" activities are as constitutionally problematic as rules that exclude religious organizations altogether.

Caveats:

- The Supreme Court has narrowed, but has declined to overrule, *Locke v. Davey* (2004).[15] *Locke* rejected a Free Exercise challenge to a Washington program that prohibited college scholarship recipients from using public funds to pursue ministerial studies. In *Carson*, the Court characterized Locke as reflecting the "historic and substantial state interest" against using "taxpayer funds to support church leaders." This interest is not implicated in pre-K programs.

- In *Zelman*,[16] funds flowed to religious schools only as the indirect result of parents' independent decisions. Some contend that, pursuant to *Zelman*, the government may fund religious activities only when the program involves private choice.[17] This is an incorrect reading of the law. The First Amendment requires government neutrality toward religion. The lack of an independent decision-maker neither precludes the government from supporting religious providers in a public benefit program nor justifies their exclusion. In fact, the program at issue in *Trinity Lutheran* was a direct funding program, and, more recently, billions of dollars in Covid relief funds flowed to religious organizations through a variety of state and federal programs. Furthermore, a reading of the Establishment Clause that results in the government funding religious institutions, but not religious conduct, is directly contradicted by *Carson*'s rejection of the status-use distinction as a justification for religious discrimination.

To summarize, the government may neither exclude religious organizations from otherwise available public-benefit programs, nor limit funding to secular activities as a condition of participating. We next identify pre-K programs that run afoul of the Free Exercise Clause.

The Public Pre-K Landscape

Publicly funded universal pre-K has become a priority in education. As a result, many states offer public pre-K programs. However, because the government does not mandate pre-K for children, there is significantly less enrollment space in pre-K programs than in public K–12 schools.

Most pre-K programs offer preference to those children in low-income households for parents who might otherwise be unable to afford it. In order to expand access to high-quality providers, many programs operated by states and public-school districts enlist private preschools, making them eligible to receive some public funding, be it in the form of grants, special-education funding, low-income benefits, or other allocations. A great number of these private schools are religious.

In pre-K programs across the U.S., many policies adhere to an outdated understanding of the Establishment Clause and, thus, deny funding grants to religious pre-K providers. A few states, such as Oregon, do this directly by refusing to fund any program affiliated with or run by any religious organization. However, the vast majority of programs fund religious providers provided that they do not engage in any religious activity or instruction during the school day. But they have no constitutional justification for doing so. The Supreme Court has made clear that the government may enlist private religious providers to accomplish goals like preschool education without running afoul of the Establishment Clause. Because these providers are private institutions, the government is not responsible for what is taught. States are merely responsible for enforcing such scholarly standards as they may choose, or not choose, to adopt, such as allocation of school licenses or approval. Denying funding to these schools on the basis that they are religious is unjust discrimination and a violation of the Free Exercise Clause of the Constitution.

In addition to statutory research, we reviewed the websites of the education departments of the 50 states to find the most recent guidelines governing publicly funded private pre-K providers. In some cases, we were unable to find the policies (if any) governing the funding of private pre-K providers, and we discovered that several states do not fund private preschools at all. However, many states do fund private preschools, and the overwhelming majority of those that do fund them discriminate on the basis of religious affiliation of the provider or require religious providers to scrub their program of all religious content in order to participate.

The problematic pre-K regulations often fall into one or more of the following categories: religious activities, religious instruction, curriculum, or funding. A few notable examples:

- While Alaska's statutes and regulatory codes did not explicitly discriminate based on religion, the state's website includes a nonregulatory guidance directing school boards to refuse funding to private schools that include material that is not "secular, neutral, and non-ideological."[18]

- Arizona's Department of Education's pre-K funding includes four grants under which a "Disallowable Cost" for the grant is "Religion."[19]

- Regulations governing Arkansas's "A Better Chance (ABC) Pre-K Program" provides that "all ABC instruction and instruction materials must be secular and neutral with respect to religion. . . . No religious activity may occur during any ABC day, and no ABC funds may be used to support religious services, instruction or programming at any time."[20]

- California's State Preschool Terms and Conditions state: "Contractors shall not provide nor be reimbursed for preschool services which include religious instruction or worship."[21]

- Georgia's "Bright from the Start" program details its curriculum: "No part of the Pre-K instructional day may be religious in nature. If an approved curriculum has both a secular and religious version, the secular version must be utilized in the Pre-K program. . . . No Pre-K funding may be utilized for religious instruction."[22]

- Hawaii specifies that its pre-K programs "may not contain religious observances, such as prayer, grace, confession, church attendance, religious instruction."[23]

- Illinois's Preschool for All Program guidelines state: "Faith-based organizations are eligible to be funded for Preschool for All, but may not use state funds to support religious instruction."[24]

- Iowa's State Voluntary Preschool Program's FAQs instruct that "all faith-based partners must ensure that, from the time instruction supported by Statewide Voluntary Preschool Program funds starts until the time such instruction ends, no religious instruction takes place. There is to be no interruption (no 'sprinkling') of such religious instructional time for any faith-based purpose."[25]

- Kentucky regulations state: "State preschool funds may be used in a private program if a signed contract or cooperative agreement is on file in the district which documents that: (a) The program is separately incorporated from a religious institution; (b) The program maintains a nonsectarian board of directors; . . . and (e) The program's curriculum is not religious in nature."[26]

- Maryland's prekindergarten program states: "Religious-based programs may not provide religious activities during the . . . PreK day."[27]

- While technically not a pre-K program, New Hampshire allows school districts to contract with "one or more non-sectarian schools" to provide kindergarten education.[28]

- New Mexico's pre-K standards require that "PreK funds shall not be used for any religious, sectarian, or denominational purposes; instruction; or material."[29]

- Similarly, North Carolina's pre-K program requirements enumerate: "[N]o subcontractor (service provider) may use its NC pre-K funding to pay for . . . religious worship, instruction or proselytization."[30]

- Oregon bans religious preschools from advocating for any religious beliefs during school hours: "Grantees may not advance any religion or religious beliefs during the instructional hours designated as Preschool Promise Program." It further advises: "Any religious symbols located in or around the classroom do not need to be removed; however, they may not be incorporated or used in the curriculum or teaching program."[31]

- South Carolina's funding manual states: "Disallowed expenditures and activities include costs [that] . . . provide or support religious activities."[32]

- Vermont requires the secretary of education to identify the private preschool providers that districts contract with and to ensure that the religious content of these providers, if any, does not violate the state constitution's Blaine Amendment.[33]

- Washington requires every community preschool program to demonstrate that it "maintains control of the federal funds, ownership of materials, equipment, and property purchased with those funds, and ensures that funds are not used for religious purposes."[34]

- The Wisconsin Department of Public Instruction mandates, for pre-K program private partners: "The district must ensure a non-sectarian environment, curriculum, and program for all students during the '4K' part of the day at the faith-based program."[35]

The above examples of religious discrimination may or may not be currently enforced; nonetheless, they are still on public record.

School Districts' Role in Explicit and Implicit Discrimination

Many state pre-K programs are implemented through school districts.[36] Some school districts also operate their own pre-K programs. Our research therefore examined the publicly available policies in some of the most populated school districts in the United States. However, this research was far from exhaustive. Investigating school districts' policies proved far more challenging than reviewing state laws and regulations. Websites of some districts are silent about whether they fund private preschools at all and, if so, how providers are regulated.[37] However, a few school districts were explicit in their discrimination.

The most prominent examples are New York City's Pre-K for All program and New York State's Universal Pre-K program (UPK). Pre-K for All is a universal eligibility program that enlists hundreds of private providers, including religious institutions such as churches, mosques, and synagogues that run preschools. To participate in Pre-K for All, religious providers must agree to refrain from religious instruction or observance of religious holidays, cover all religious symbols, and, if the preschool operates in a religious school, use a separate entrance.[38] If instructors utilize religious texts, such as the Bible, they must ensure that "at least three (3) different cultures or traditions are

represented as part of a developmentally appropriate and secular education program that advances the New York State Preschool Learning Standards (NYSPLS). Instruction may not promote or inhibit any particular religion, or religion generally."[39]

To participate in UPK, religious providers must "remove or cover any and all religious signs, names, identification, symbols or insignias on the exterior entrance designated to be used by students and in those parts of the interior of the building to be used by the students in connection with the UPK."[40] An exception is made for "mezuzahs that do not, on their face, feature religious symbols."[41] Religious providers must also refrain from religious instruction.[42]

Similarly, Denver Public Schools conditionally offer funding to faith-based preschools, so long as no religion is involved.[43] Baltimore County Public Schools state: "An eligible prekindergarten provider may not engage in explicitly religious activities during school hours."[44]

Beyond this explicit discrimination, many other school districts, such as Fort Worth (Texas) Independent School District, refer their private providers, which include pre-K providers, to the federal Elementary and Secondary Education Act (ESEA).[45] This act states: "Nothing contained in this Act shall be construed to authorize the making of any payment under this Act for religious worship or instruction."[46] Despite the language of ESEA, Texas considers faith-based organizations to be eligible government-funded providers of pre-K.[47]

Two Disconnects

As our discussion of the Fort Worth Independent School District highlights, when states depend on school districts to implement a pre-K program—a common model—a disconnect sometimes arises between the state laws that are nondiscriminatory and local implementation imposing discriminatory program requirements. A school district might be authorized by state law to welcome the full participation of religious providers but nonetheless exclude them or require them to secularize to participate. Local implementation makes the task of identifying and rooting out religious discrimination more challenging because many districts' websites are silent about the programmatic restrictions that they impose on private providers (and, indeed, whether they enlist them at all).

There is also a disconnect in many states between religion-neutral K–12 parental-choice policies and discriminatory pre-K programs. Many states that explicitly discriminate against religious pre-K providers have embraced school-choice mechanisms that allow K–12 students to spend public funds on religious education. All told, 34 states, the District of Columbia, and Puerto Rico have one or more private-school-choice programs that empower parents to choose K–12 religious schools for their children, without restriction on religious instruction. Since 2020, 12 states have extended eligibility to participate in these programs to all or most families. Only two states—Maine and Vermont—have ever excluded religious schools from participating in private-school-choice programs. All private-school programs in the U.S. currently allow parents to use the public resources allocated for their children's education to attend a religious school. [48]

Nevertheless, several states with large religion-neutral school-choice programs for K–12 students, including Arizona, Alabama, Iowa, and Wisconsin, continue to prohibit religious content in publicly funded preschools. The incongruence may be attributable to the fact that many state pre-K programs were adopted earlier than the K–12 programs, causing the pre-K legislation to reflect an older, excessively "separationist," understanding of the First Amendment that has yet to

be updated in light of recent Supreme Court decisions clarifying that the Constitution prohibits, rather than requires, religious discrimination. Most new parental choice programs do not, for a variety of reasons, extend eligibility to pre-K students.

These two disconnects could be addressed by clear guidance from the state attorneys general—both to state education officials and local district officials administering pre-K programs—that restrictions on religious providers are unconstitutional and should not be enforced.

Programs That Get It Right

Though we have thus far focused on programs that disregard the *Carson* principle, some programs might be considered models for states seeking to conform their pre-K programs to the law. These programs treat all private schools equally, regardless of religious affiliation or activities. Most notable is Florida's Voluntary Prekindergarten (VPK) education program.[49] Florida contains five of the top 10 most populous school districts in the country (Miami-Dade, Broward, Hillsborough, Orange, and Palm Beach), reaching vast numbers of children. The VPK program defines eligible providers: "To be eligible to deliver the VPK Program, PROVIDER must be either a public school or a private provider (. . . faith-based childcare provider exempts from licensure)." Clearly stated is the eligibility of faith-based or religious providers to participate in this public pre-K program. Every Florida district that we researched acknowledged its practice of using the state VPK program and policy, ensuring continuity across levels of public-school administration.

Also upholding the *Carson* principle is the Indiana Department of Education's policy, which states in Section 4 of the Voucher Program Provider Eligibility: "In determining whether a provider meets the requirements of this chapter, the division may not consider religious instruction or activities."[50] And, promisingly, Alabama recently changed the guidelines for the First Class pre-K to permit religious instruction and activities.[51] As late as 2021, the state's guidelines directed that "[a]ctivities religious in nature must take place outside of the … Pre-K school day." The current year's guidelines indicate that "[r]eligious instruction or other religious activity is permitted during the [school day]."

Florida, Indiana, and Alabama do not stand alone, but they outline their laws more clearly than any other state, city, or district program in the documentation made available on their websites. Programs such as these reflect the Free Exercise Clause's nondiscrimination principle. More states and school districts should make efforts to conform their pre-K programs to that principle.

Conclusion

Carson, *Espinoza*, and *Trinity Lutheran* have clarified that, when public funds are allocated to private institutions, the government must extend the invitation to participate fully to religious institutions. The First Amendment's religion clauses demand government neutrality, not hostility, to religion.

Public pre-K programs, which further the important goal of preparing young children for later academic success, are not exempt from this nondiscrimination mandate. They ought not—indeed, cannot—discriminate against religious providers and religious instruction. Unfortunately, as this report documents, many state programs (and undoubtedly, many local ones as well) continue the unconstitutional practices of either excluding religious providers altogether or requiring them to scrub all religious content from their pre-K programs as a condition of participating.

These practices are not only unconstitutional, but they also deprive parents of the opportunity to choose religious pre-K providers—many of which excel at the task of educating young hearts and minds—for their children. State and local officials should carefully review their pre-K programs to ensure their conformity with the *Carson* principle and take necessary steps to reform those that discriminate against religious providers. Failing to do so invites advocates to force them to do so in court. A federal district judge recently observed: "Time and again the First Amendment rights of American citizens has been the subject of litigation in Federal court. Organizations must continually sue to keep the . . . government from infringing on basic and well-settled rights to freedom of religion."[52] This report invites government officials to reform pre-K programs to eliminate the need for such litigation.

About the Authors

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Prior to joining the faculty at Notre Dame in 1999, Garnett served as a law clerk for Associate Justice Clarence Thomas of the Supreme Court of the United States and Judge Morris S. Arnold of the U.S. Court of Appeals for the Eighth Circuit. She also practiced law at the Institute for Justice, a non-profit public interest law firm in Washington, D.C., where she helped to defend the inclusion of faith-based schools in private-school choice programs. She holds a B.A. in political science, with distinction, from Stanford University and a J.D. from Yale Law School.

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Endnotes

1 Nicole Stelle Garnett and Tim Rosenberger, "Unconstitutional Religious Discrimination Runs Rampant in State Programs," Manhattan Institute, December 14, 2023.

2 See, e.g., Andrew Pendola et al., "Early Opportunities and Fourth-Grade Success: State Pre-K Funding, Quality, and Access on Student Achievement," *Education Policy Analysis* 30, no. 126 (August 2022); Lynn A. Karoly et al., "Understanding the Cost to Deliver High-Quality Publicly Funded Pre-Kindergarten Programs," RAND, May 6, 2021; Sarah Kabay, Christina Weiland, and Hirokazu Yoshikawa, "Costs of the Boston Public Prekindergarten Program," *Journal of Research on Educational Effectiveness* 13, no. 4 (2020).

3 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017).

4 *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020).

5 *Carson v. Makin*, 142 S. Ct. 1987 (2022).

6 "Brief of Amicus Curiae of the Becket Fund for Religious Liberty in Support of Petitioners," 3; *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022) (No. 20-1800).

7 See *Darren Patterson Christian Academy v. Roy*, 699 F. Supp. 3d 1163-Dist. Court, D. Colorado (2023).

8 Proactively rectifying unconstitutional aspects of a state's laws saves state resources that might otherwise be deployed defending or settling doomed lawsuits. Furthermore, these regulations are often rooted in a distasteful legacy of Blaine Amendments, which emerged in the late nineteenth century during a period of anti-Catholic bigotry. The current Supreme Court considers these laws to violate the Free Exercise Clause.

9 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

10 *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022).

11 Ibid., 530.

12 Ibid., 536–37.

13 *Espinoza*, 2261–62.

14 *Carson*, 2001.

15 *Locke v. Davey*, 540 U.S. 712 (2004).

16 *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

17 "What Are the Rules on Funding Religious Activity with Federal Money?" U.S. Dept. of Health and Human Services (HHS), accessed Sept. 29, 2024. The Biden administration has proposed regulations that would narrow the definition of "indirect aid" to further narrow the scope of the right to operate without secularizing; see Dept. of Education et al.,

"Partnerships with Faith-Based and Neighborhood Organizations," *Federal Register* 88, no. 9 (Jan. 13, 2023): 2395; Nicole Stelle Garnett and Meredith Holland Kessler, "Biden Boils the Religious Liberty Frog," *Wall Street Journal*, Apr. 13, 2023.

18 State of Alaska Dept. of Education and Early Development, "Guidance for Special Education Personnel," February 2020.

19 Arizona Dept. of Education, "Supporting and Sustaining Early Learning: Funding Options for Early Childhood Education in Arizona," 2012.

20 Arkansas Division of Child Care and Early Childhood Education, "Arkansas Better Chance Program Manual," 2012.

21 California Dept. of Education, "California State Preschool Contract Terms and Conditions," 2024–25.

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23 Hawaii Executive Office on Early Learning, "Private Providers in the State's Early Learning System," 2013.

24 Illinois State Board of Education, "Preschool for All Funding Report," 2009.

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26 704 Ky. Admin. Regs. 3:410(4).

27 Maryland State Dept. of Education, "Prekindergarten Programs Operating Manual," 2024–25.

28 N.H. Revised Statutes, 198:48-a.

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30 North Carolina Division of Child Development and Early Education, "North Carolina Pre-Kindergarten Program Requirements and Guidance," 2024.

31 Oregon Dept. of Early Learning Care, "Preschool Promise Grant Manual," June 2022.

32 South Carolina Dept. of Education, "Funding Manual," 2023–24.

33 "[T]he Secretary of Education shall identify the private prekindergarten education programs to which school districts are paying tuition on behalf of resident prekindergarten children, determine the extent to which any program provides religious prekindergarten education, and establish the steps the Agency will take to ensure that public funds are not expended in violation of Chapter I, Article 3 of the Vermont Constitution and the Vermont Supreme Court's decision in *Chittenden Town School District v. Vermont Department of Education*, 169 Vt. 310 (1999) or in violation of the Establishment Clause of the U.S. Constitution": Vermont Leg #301082 v. 1, Act 166 (H.270), 2013–14 session.

34 Washington Office of Superintendent of Public Instruction, "Funding Early Learning Activities in Washington State with Title I, Part A," July 2023.

35 Wisconsin Dept. of Public Instruction, "Policy and Information Advisory," 2017.

36 See, e.g., Emily Parker, Louisa Diffey, and Bruce Atchison, "How States Fund Pre-K: A Primer for Policymakers," Education Commission of the States, February 2018; "Great Start Readiness Program (GSRP) PreK for All," Marquette-Alger RESA ("The Great Start Readiness Program [GSRP] is . . . administered by the Michigan Department of Education, Office of Great Start. Funding is allocated to each intermediate school district to administer the program locally"); "PreK Enrollment," Cleveland Metropolitan School District (CMSD).

37 See, e.g., Cobb County Public Schools, "Cobb County Schools Georgia Pre-K Program."

38 NYC Dept. of Education, "3-K for All & Pre-K for All Handbook for District Schools and Pre-K Centers," 2018.

39 NYC Dept. of Education, "Birth-to-Five Policy Handbook for New York City Early Education Centers (NYCEECs)."

40 Orthodox Union Advocacy Center, "Guidance on Administration of UPK by Religious Schools and Other Faith-Based Organizations."

41 Ibid., 1n1.

42 Ibid., 1.

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