No. 20-1088

In The Supreme Court of the United States

DAVID AND AMY CARSON,
as parents and next friends of O.C., et al.,
Petitioners,

v.

A. PENDER MAKIN, in her official capacity as Commissioner of the Maine Department of Education,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF CHRISTIAN LEGAL SOCIETY, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, THE ANGLICAN CHURCH IN NORTH AMERICA, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, COUNCIL FOR AMERICAN PRIVATE EDUCATION, COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, THE LUTHERAN CHURCH—MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, AND QUEENS FEDERATION OF CHURCHES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a state violate the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or "sectarian," instruction?

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INTEREST OF *AMICI CURIAE*[1]

The *amici* joining this brief are listed on the cover. *Amici* are religious, educational, and civil liberties organizations who endorse a vital principle: families that use private schools should not suffer government discrimination because their choice of school is religious. Several *amici* operate or support private religious schools. All *amici* agree that the First Circuit's decision permits unconstitutional discrimination against religion in government benefits, and gives states a roadmap for excusing such discrimination by limiting their benefits to "equivalents" of secular public services.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), this Court held: "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." *Id.* at 2261; see also *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019 (2017). Maine violates this rule. It authorizes tuition payments for students attending secular private schools but disqualifies schools that are "sectarian."

The First Circuit erroneously upheld this discrimination against religious schools and the families who

[1] This brief was prepared and funded entirely by *amici* and their counsel. No other person contributed financially or otherwise. Both parties have filed blanket consents.

use them. First, it erroneously held, resolving an issue reserved in *Espinoza*, that the state can discriminate against entities based on their religious "use" of funds: that is, on the basis that they include religious teaching with the secular education they provide. Pet. App. 39a, 40a n.7. Second, the First Circuit permitted the state to recast the tuition benefit as "a substitute for a free, secular public education," thereby permitting the state to aid only secular private schools and exclude religious schools. *Id*. 50a.

We write to make three points:

I. Exclusion of private religious schooling from a benefit available to private secular schooling violates the Free Exercise Clause not only when singling out religious status or identity, but also when singling out religious uses of the benefit. To distinguish "status-based" discrimination from "use-based" discrimination conflicts with constitutional text and this Court's jurisprudence, both of which protect not just the right to have a religious identity but to "exercise" it—here, by including religious teaching in education.

Moreover, the status-use distinction collapses in the context of religiously grounded K-12 education. Religious schools teach the same secular subjects as other schools; in providing benefits assisting the teaching of these subjects, the state cannot discriminate on the basis that some schools also teach religion. To teach religion is what it means to be a religious school; church-affiliated schools that teach no religion essentially do not exist. If there are any exceptions, they are odd

schools serving some special purpose, not K-12 schools in the United States. Barring schools from educational benefits because they teach religion is to bar them because of their religious status or identity. Some religious schools teach an essentially secular curriculum plus a religion course or chapel services. Other schools integrate religion into their secular subjects. These schools, and families who use them, do so because their religious identity permeates education; to exclude them is to do so based on the nature of their religious identity. Whether called "belief or status" or "use," "[i]t is free exercise either way" (*Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part)), and the state presumptively cannot discriminate against it.

This Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), provides no basis for the judgment below. *Espinoza* and *Trinity Lutheran* have essentially limited *Locke* to its facts, which are easily distinguishable from those here. But the Court may wish to overrule *Locke* altogether, because the decision was misguided at the outset and encourages states to concoct ways to describe their discrimination against religion as "use-based."

II. Nor can a state justify discrimination against religious schools with the ploy that the First Circuit permitted here: labeling the benefit as a "substitute" for, or "rough equivalent" of, a free "secular public education," and then arguing that religious schools can be excluded because such an education must by definition be secular. That ploy conflicts with *Espinoza* and would

allow easy evasion of *Espinoza* in the context of many government benefits.

Maine offers tuition benefits for students attending private schools, but it targets students in "sectarian" private schools for exclusion from this benefit. Regardless of how the state labels the benefit, that exclusion violates *Espinoza*'s express holding: Once a state decides to aid private schools, it cannot disqualify some schools because they are religious.

The discrimination here is especially clear because Maine does not actually require private schools receiving tuition benefits to be "substitutes" for or "equivalents" of public education. Maine does not impose all its public-school requirements on participating private schools, and almost all the requirements it does impose are already required—from religious as well as secular private schools—to receive state approval for attendance purposes. Private schools can also satisfy the requirements through a separate route: approval by a private-school accrediting agency. Virtually the only difference between state approval for compulsory-attendance purposes and state approval for tuition-assistance purposes—the one requirement that makes a private school a "substitute" for public education—is the "nonsectarian" requirement. By relabeling its benefit to justify singling out religious schools for exclusion, Maine has engaged in an unconstitutional gerrymander against religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

Permitting the state to label its benefit as the "rough equivalent" of a secular public education would authorize discrimination against religious providers in many other contexts. By requiring schools or social-service providers to be "rough equivalents" of a secular government-provided service, states could exclude religious providers from scholarship programs supported by tax credits (negating *Espinoza*), from aid for college students, and from aid for child care, mental health, substance-abuse treatment, adoption, foster care, or other social services.

III. Discrimination against religious use of general benefits presumptively offends basic principles underlying the Free Exercise Clause and the First Amendment's Religion Clauses as a whole—government neutrality toward religion and protection of private choice in matters of religion ("voluntarism"). In the context of government benefits available in both religious and nonreligious settings, all the basic constitutional principles point in the same direction: forbidding government from favoring either religious choices or secular choices. In this case, neutrality toward religion in the "formal" sense (giving aid on a religion-blind basis, i.e., without religious classifications) also embodies religious voluntarism and neutrality in the "substantive" sense (creating neutral incentives that neither discourage nor encourage individuals' religious choices).

Maine's exclusion of "sectarian" schools from otherwise available tuition benefits violates both formal neutrality and voluntarism or substantive neutrality.

Under that exclusion, families who choose schools that incorporate religious instruction entirely forfeit the benefits they would receive if they chose private secular schools. *Espinoza* and *Trinity Lutheran* make clear: such discrimination is impermissible.

ARGUMENT

I. Excluding Private Religious Schooling from Benefits Available to Private Secular Schooling Violates the Free Exercise Clause Not Only When Singling Out Religious "Status" or "Identity," but Also When Singling Out Religious "Use" of the Benefit.

Espinoza and *Trinity Lutheran* forbade discrimination on the ground of claimants' religious "status" or "identity." *Espinoza*, 140 S. Ct. at 2254-55; *Trinity Lutheran*, 137 S. Ct. at 2019. Both decisions reserved the question whether a state can discriminate on the ground that claimants would use the benefit for religious teaching. *Espinoza*, 140 S. Ct. at 2257; *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.

Exploiting this distinction, the First Circuit upheld Maine's discriminatory exclusion of "sectarian" schools on the ground that it targeted religious uses of government funds rather than religious status. The court held that the discrimination was use-based because, in defining which schools are sectarian and thus excluded, "[t]he [state's] focus is on what the school

teaches through its curriculum and related activities, and how the material is presented." Pet. App. 35a.

But a status-use distinction cannot be the proper constitutional line concerning discrimination against religion in student-aid programs. The distinction conflicts with the text of the Free Exercise Clause and decisions of this Court, and it collapses in the context of benefits to religiously grounded education.

A. Discrimination Against Religious Uses of Generally Available Public Benefits Conflicts with the Text of the Free Exercise Clause.

The constitutional text offers no basis for distinguishing a beneficiary's religious affiliation from its use of benefits. It is difficult to "see why the First Amendment's Free Exercise Clause should care" about a "status-use" distinction when "that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status)." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part) (emphasis in original). The First Amendment "protects not just the right to *be* a religious person, holding beliefs inwardly and secretly; it also protects the right to *act* on those beliefs outwardly and publicly." *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring) (emphases in original). The clause encompasses "two concepts,—freedom to believe and freedom to act." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). "[T]he 'exercise of religion' often involves not only belief and profession but the

performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." *Employment Division v. Smith*, 494 U.S. 872, 877 (1990).

It follows that "whether [a law] is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way, unless the State can show its law serves some compelling and narrowly tailored governmental interest." *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring). The "exercise of religion" covers not just having a religious identity but also living out that identity, including giving or receiving religious instruction in educational institutions. The constitutional text cannot support forbidding discrimination against religious affiliation but allowing discrimination against religious teaching and activities.

B. Discrimination Against Religious Use of Benefits Conflicts with This Court's Decisions.

Likewise, this Court's free-exercise decisions forbid discrimination not only against religious affiliation but also against those who live out their religious identity in actions. See, e.g., *Lukumi*, 508 U.S. 520; *Thomas v. Review Board*, 450 U.S. 707 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Sherbert v. Verner*, 374 U.S. 398 (1963).

When South Carolina denied unemployment benefits to Adele Sherbert, it did not penalize her because she was a Seventh-day Adventist. *Sherbert*, 374 U.S. at 404. It penalized her because she refused to work on her Sabbath in accordance with her religious identity and status. *Id*. This Court nonetheless found the denial of benefits unconstitutional.

Likewise, in *Thomas*, by denying unemployment benefits, the state did not penalize Eddie Thomas for being a Jehovah's Witness; it penalized him for acting on that identity and resigning from his job rather than produce armaments in violation of his beliefs. The government violates free exercise if, absent a compelling reason, it "conditions receipt of an important benefit upon *conduct* proscribed by a religious faith, or . . . denies such a benefit because of *conduct* mandated by religious belief, thereby putting substantial pressure on an adherent to modify his *behavior* and to violate his beliefs." *Thomas*, 450 U.S. at 717-18 (emphases added).

McDaniel v. Paty—a case sometimes cited as invalidating discrimination based on "status"—actually reflects a broader rule. *McDaniel* struck down a state constitutional provision barring clergy from serving in the state legislature or at a state constitutional convention. The plurality held that the state had placed an unconstitutional disability on McDaniel—ineligibility for office—because of his status as a "minister." 435 U.S. at 627. But the plurality immediately noted that Tennessee defined ministerial status "in terms of conduct and activity." *Id.* Tennessee's purported interest

against establishment could not justify discrimination against religious activity. *Id.* at 627-29.

Justice Brennan's influential concurring opinion made six votes for this clarification. (Justice Stewart's concurrence made seven. *Id*. at 643.) Justice Brennan noted that the state had defended the disqualification because it rested "not [on] religious belief, but [on] the career or calling, by which one is identified as dedicated to the full time promotion of the religious objectives of a particular religious sect." *Id.* at 630 (Brennan, J., concurring in the judgment) (brackets added, internal quotation marks omitted).

Justice Brennan rejected that basis for disqualification for reasons that are highly relevant here:

> Clearly freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief, even including doing so to earn a livelihood. One's religious belief surely does not cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.

Id. at 631. *McDaniel* thus illustrates that the state may not discriminate against a person's religious practice on the ground that the person pursues it seriously or pervasively. Justice Brennan continued (*id.* at 632):

> The provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity. Such a classification as much imposes

> a test for office based on religious conviction as one based on denominational preference. A law which limits political participation to those who eschew prayer, public worship, or the ministry as much establishes a religious test as one which disqualifies Catholics, or Jews, or Protestants.

McDaniel condemns placing a "unique disability" upon religious uses of a neutral educational benefit. Forbidding religious uses of such aid discriminates against those families and schools whose "intensity" of religious practice calls for integrating religion into the educational process. Such discrimination imposes a bar as much "based on religious conviction as one based on denominational preference" or religious affiliation. *Id.* at 632. The Free Exercise Clause forbids discrimination against schools (and their students) not only when it rests on mere religious affiliation, but also when it rests on the act of incorporating religious content into teaching.

C. The Status-Use Distinction Collapses in the Context of Religious Private Schools Because They Offer Education of Secular Value While Incorporating Their Religious Identity.

Even if a distinction between religious status and religious use of funds were ever valid, it collapses in the context of instruction in religious schools. See *Trinity Lutheran*, 137 S. Ct. at 2025-26 (Gorsuch, J., concurring in part) (arguing that the distinction is

unstable). It collapses for three related but independent reasons.

1. Religious schools typically provide instruction in the familiar range of secular subjects while also teaching a religion class or conducting chapel services or, in some cases, integrating relevant religious perspectives and teachings into the secular subjects. The religious elements could be characterized as religious "uses." But simultaneously, religious schools "teach the full secular curriculum and satisfy the compulsory education laws." Douglas Laycock, *Comment: Churches, Playgrounds, Government Dollars—And Schools?*, 131 Harv. L. Rev. 133, 162 (2017). All schools participating in the Maine tuition-assistance program must meet the state's minimum criteria for school approval and must teach certain core subjects required of a public school. Me. Stat. tit. 20-A, §§ 2901, 2902(3) (2018).

Since the religious schools meet the same school-approval requirements and teach the same core subjects as their secular counterparts, barring them from an education-benefits program bars them simply because they also provide religious instruction. "If we consider that [state aid] is funding the secular curriculum, [the schools are] excluded because of who and what they are—exactly what *Trinity Lutheran* says is unconstitutional." Laycock, *supra*, at 162.

2. The status-use distinction collapses here in another way. The exclusion of religious use of educational benefits especially burdens religious schools that incorporate faith into their secular instruction:

those that perceive most or all aspects of life from a religious lens. The religious identity of these schools is defined by such teaching. Denying benefits to the schools (and the students who attend them) simply because they incorporate such teaching imposes a penalty on "those who take their religion seriously, who think that their religion should affect the whole of their lives." *Mitchell v. Helms*, 530 U.S. 793, 827-28 (2000) (plurality opinion of Thomas, J., for four justices).

"[M]any of those who choose religious schools believe that secular knowledge cannot be rigidly separated from the religious without gravely distorting the child's education. . . . From this perspective, it is not sufficient to introduce religious education on the side." Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv. L. Rev. 989, 1017-18 (1991). To allow aid to religious schools but not when they engage in religiously grounded teaching "singles out those religions that cannot accept such 'bracketing' of religious teaching, and penalizes them by denying them the entire state educational benefit." Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. Cin. L. Rev. 151, 177 (2003). It imposes a "unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity." *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring in the judgment).

This point is reinforced by the Tenth Circuit's decision in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) (McConnell, J.), which

invalidated a provision that excluded students at "pervasively sectarian" institutions from otherwise available state scholarships. The Colorado provision defined "pervasively sectarian" based in part on possible religious uses of the funds, including factors such as "required attendance at religious convocations or services" and "required courses in religion or theology that tend to indoctrinate or proselytize." *Id*. at 1250-51.

Colorado Christian shows how the status-use distinction collapses. The category of excluded institutions was based in part on religious uses. But the exclusion also discriminated, the court held, "among religious institutions"—that is, among types of religious institutions "based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations, as defined by such things as the content of its curriculum." *Id.* at 1258, 1259; see *id.* at 1258 (provision "extended scholarships to students at some religious institutions, but not those deemed too thoroughly 'sectarian' by governmental officials"). It discriminated based on the status of being too religious, or too pervasively religious. Accord *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring in the judgment) (states may not discriminate based upon the "level of intensity of involvement in protected religious activity").

Maine commits the same discrimination against "sectarian" schools, based on the same determination that the schools actually teach religion. Maine defines a "sectarian" school as one "'which, in addition to teaching academic subjects, promotes the faith or

belief system with which it is associated.'" Pet. App. 35 (quoting former Education Commissioner Hasson); see *id.* ("'the Department's focus is on what the school teaches through its curriculum and related activities'"). But to teach religion or in some way "promote the faith" along with teaching "academic subjects" is what it means to be a religious school. And to bar schools from educational benefits because they promote faith or teach religion along with academic subjects is to bar them because of their religious status or identity: because they add religion to education of secular value, or because they are too intensely involved in religious activity, or because they are involved in religious activity at all.

3. Finally, the status-use distinction collapses because discrimination on either basis penalizes the religious decisions and religious exercise of families using the schools. Whether described as status-based or use-based, a discriminatory exclusion from benefits "puts families to a choice between sending their children to a religious school or receiving such benefits." *Espinoza*, 140 S. Ct. at 2257; see *id.* at 2261 (noting that the Court "ha[s] long recognized the rights of parents to direct 'the religious upbringing' of their children," including rights to send them to religious schools); see also *A.H. ex rel. Hester v. French*, 985 F.3d 165, 181 (2d Cir. 2021) (because burden "borne exclusively by students attending religious schools," Free Exercise Clause violated by Vermont system that paid students' dual-enrollment college tuition if students attended "publicly funded" high school under

Vermont's system which, like Maine's system, provided tuition for students to attend an extra-district public high school, or a secular private school, but not a religious private school). Whichever sort of religious school these families choose, they are " 'member[s] of the community too,' and their exclusion from the scholarship program here is 'odious to our Constitution' and 'cannot stand.' " *Id*. at 2262-63 (quoting *Trinity Lutheran*, 137 S. Ct. at 2023, 2025).

Thus, the context of religious schooling validates Justice Gorsuch's prediction that the distinction between status and use is unstable. "[T]he same facts can be described both ways." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part). It is untenable to prohibit a state from discriminating against schools because they are religious but allow it to discriminate against schools because they supplement secular instruction with religious teaching. Whatever "play in the joints" exists between the Religion Clauses (*Espinoza*, 140 S. Ct. at 2254), a status-use distinction cannot define the extent of that play.

D. *Locke v. Davey* Should Be Overruled and, in Any Event, Is Irrelevant to This Case.

The court of appeals relied on *Locke v. Davey* for the proposition that various provisions discriminating against religious uses can satisfy the Free Exercise Clause. Pet. App. 48a-52a. But *Espinoza* and *Trinity*

Lutheran have effectively narrowed *Locke* to its facts.

Espinoza did note that the restriction in *Locke* was based not on the school's status but on what the student "proposed to *do*—use the funds to prepare for the ministry." 140 S. Ct. at 2257 (emphasis in original; quotation omitted). But it added three other distinctions that further narrowed *Locke*—all of which make it inapplicable here.

First, as *Locke* itself said, the state there "had 'merely chosen not to fund a distinct category of instruction': the 'essentially religious endeavor' of training a minister 'to lead a congregation.' " *Espinoza*, 140 S. Ct. at 2257 (quoting *Locke*, 540 U.S. at 721). In contrast, excluding the full range of education provided by K-12 religious schools "does not zero in on any particular 'essentially religious' course of instruction," and it "puts families to a choice between sending their children to a religious school or receiving such benefits." *Id.* at 2257. That is because, as we emphasized *supra* pp. 11-15, religious K-12 schools "pursue not only religious instruction but also secular education": "excluding them excludes instruction that falls within the same category as secular schools." Thomas C. Berg and Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227, 248 (2004).

Relatedly, the program in *Locke* "allowed scholarships to be used at 'pervasively religious schools' that incorporated religious instruction throughout their

classes." 140 S. Ct. at 2257 (quoting *Locke*, 540 U.S. at 724-25). As *Locke* itself put it, the state went "a long way toward including religion in its benefits"; Joshua Davey suffered only the "minor burden" of not being able to major in devotional theology while receiving aid. 540 U.S. at 724. In contrast, Maine here broadly excludes families from a tuition benefit that supports basic education in the full range of secular subjects, simply because the school also incorporates religious instruction.

Finally, avoiding government funding for the training of clergy reflects an " 'historic and substantial state interest' " that was widely emphasized in "founding-era debates." *Id.* at 2257-58 (quoting *Locke*, 540 U.S. at 725, 722). But as *Espinoza* emphasized, aid to religious K-12 schools was common "[i]n the founding era and the early 19th century"; bans on such aid arose only later and were "checkered" with anti-Catholic elements; and "it is clear that there is no 'historic and substantial' tradition against aiding such schools comparable to the tradition against state-supported clergy invoked by *Locke*." *Id.* at 2258-59.

The Court could once again distinguish *Locke*. But overruling it would be more sensible. Even on its specific facts, *Locke* penalized the private choice of individuals to pursue training for the ministry—singling out that profession for discrimination among the scores of professions that students could pursue. Moreover, as the present case shows, *Locke* encourages state officials and lower courts to concoct ways of characterizing their discrimination as "use-based."

Part II discusses the particular manipulation that Maine employed here. Overruling *Locke* would greatly reduce the opportunity for such manipulations.

II. The Ruling Below, Which Allows the State to Discriminate Against Religious Schooling by Labeling Its Benefit as a "Secular Public Education," Permits Easy Evasion of *Espinoza*.

It is equally unconstitutional for a state to use the other ploy that the First Circuit permitted here: labeling its benefit as a "substitute" or "equivalent" for a "secular public education," and then arguing that because a public education must be secular, religious schools can be excluded.

Specifically, the First Circuit permitted Maine to characterize its program as "ensur[ing]" that students in a location without a public school can "get an education that is 'roughly equivalent to the education they would receive in public schools.'" Pet. App. 43a; see *id.* 29a, 49a (same); *id.* 47a, 49a (describing benefit as a "substitute" for free public education). But, the court said, "there is no question that Maine may require its *public* schools to provide a secular educational curriculum rather than a sectarian one," and the state had "permissibly concluded that the benefit of a free public education is tied to the secular nature of that type of instruction." *Id.* 44a (emphasis in original), 45a. Thus, the court held, families who would use tuition assistance at a "sectarian" school "are not seeking 'equal

access' to the benefit that Maine makes available to all others—namely, the free benefits of a *public* education." *Id.* 44a (emphasis in original).

This holding and reasoning violate *Espinoza*'s explicit ruling. *Espinoza*, 140 S. Ct. at 2261. And permitting the decision below to stand would authorize religious discrimination in many other public-benefit contexts, allowing easy evasion of this Court's rulings.

A. The State Singles Out Religious Schools for Discrimination in Violation of *Espinoza*.

Maine offers tuition benefits for students attending eligible private schools. Me. Stat. tit. 20-A, § 5204(4). But it targets "sectarian" private schools for exclusion from this benefit. *Id*. § 2951(2). Labeling the benefit a "substitute for a free, secular public education" (Pet. App. 50a) does not change these facts of religious discrimination.

Notwithstanding that label, the exclusion violates the express language of *Espinoza*: "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." 140 S. Ct. at 2261. (For the reasons given in Part I, there is no relevant distinction between excluding schools because they are religious and excluding schools because they include religious teaching with secular teaching.)

The "public equivalent" rationale is also illogical. The proposition that states can choose to fund only public schools, which must not engage in religious teaching, scarcely implies that states can fund secular private schools but exclude those that engage in religious teaching. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids"—or at least severely restricts in public schools—"and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion) (emphases in original). There are good reasons for treating public and private schools differently. Although public schools are barred from promoting religious ideas (but not from promoting secular ideas), the First Amendment also ensures that they observe religious neutrality. They cannot teach rejection of religious ideas, or discriminate against students' voluntary religious activity. See, e.g., *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (religious club for students). But the First Amendment does not limit secular private schools; they have power to discriminate against religious teaching and religious activity or to promote anti-religious teaching. The lack of safeguards for religious neutrality in secular private schools further confirms that funding students in those schools but not students in religious private schools is rank discrimination.

B. The Discrimination Against Religion Is Especially Clear Because the State Does Not Require Participating Private Schools to Be "Equivalents" for Public Education—Except for Requiring That They Be Nonreligious.

Maine claims that secular private schools are public-school "equivalents" or "substitutes." But the tuition-assistance program does not actually require them to be equivalents or substitutes. This is so for several reasons.

First, under Maine statutes, a number of curricular or other features required in public schools are not required in private schools, whether for satisfaction of compulsory-attendance laws or for participation in the tuition program. Private schools can satisfy attendance laws if they have some of the courses and programs required in public schools. Me. Stat. tit. 20-A, § 2902(3) (listing those requirements). The tuition program incorporates that provision. *Id.* § 2951(1). But those private-school requirements do not include the following features required of public schools:

- Special education, § 4702;
- Instruction in Braille, *id*. § 4709;
- Dyslexia screening, *id*. § 4710-B;
- Career and technical instruction, *id*. § 4725;
- World languages, *id*. § 4726;

- "[O]pportunities for learning in multiple pathways" such as alternative education programs, apprenticeships, advanced placements, or gifted and talented programs, *id*. § 4703; and
- "[A] system of interventions for kindergarten to grade 12" to assist "each student who is not progressing toward meeting . . . content standards [or] graduation requirements." *Id*. § 4710.

The state can hardly call secular private schools an "equivalent" of public schools when it does not require private schools to meet many of the standards for public schools.

Second, the features that Maine requires of public *and* private schools are required of *all* private schools merely to satisfy the compulsory-attendance laws. Religious private schools must likewise meet those requirements. The tuition program does not add those requirements; it adds only that the qualifying institution must be nonsectarian, comply with certain reporting requirements, and (for schools with especially large numbers of students receiving tuition assistance) meet state-assessment requirements. *Id*. § 2951(2), (5), (6). The basic requirements listed for attendance purposes, *id*. § 2902(3), apply to "sectarian" as well as secular private schools. If these generally applicable requirements make private schools "equivalents" of public schools, then "sectarian" schools are equivalents too. But the state excludes them.

Third, a private school need not even go through all of the above provisions to participate in the tuition program. To participate in the program, a private school must "mee[t] the requirements for basic school approval," Me. Stat. tit. 20-A, § 2951(1), which it can do by meeting the various applicable requirements under § 2902 (see *id.* § 2901(2)(B)). But alternatively, it can meet the approval requirement if it is "currently accredited by a New England association of schools and colleges." *Id.* § 2901(2)(A). The state accepts the judgment of private-school accrediting agencies in deciding whether private schools can receive tuition aid, just as it accepts their judgment in deciding whether private schools satisfy the compulsory-attendance laws. But religious schools are still barred, even if privately accredited. *Id.* § 2951(2).

Finally, the secular private schools in the tuition program also differ from the public schools because Maine does not directly operate or fully fund the private schools. See Me. Stat. tit. 20-A, § 1(22) (defining a private school as "an academy, seminary, institute or other *private corporation or body* formed for educational purposes" (emphasis added)).

Consequently, there is essentially one difference between the state's requirements for a private school to operate and the requirements for it to participate in the tuition-assistance program: namely, the requirement that the school be "nonsectarian." For Maine, what makes a private-school education the "equivalent" of a public education, rather than just an acceptable alternative to public education, is that it is strictly

non-religious. Maine excludes private schools from the tuition program based on a religious criterion and virtually no other.[2]

The state and the First Circuit give the game away by repeatedly referring to the state's interest as providing a "*rough* equivalent" to a public-school education, Pet. App. 39a n.6 (emphasis added); see *id.* 29a, 43a, 49a. That conveniently permits the state to accept various differences between secular private schools and public schools while rejecting "sectarian" schools as non-equivalent.

The state cannot shield its discrimination against religion by such a manipulable definition of "equivalents" to public education. This Court has barred attempts to evade the neutrality required under the Free Exercise Clause by "subtle" or "covert" means. *Lukumi*, 508 U.S. at 534. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id*. (quotation omitted). Maine has engaged in a religious gerrymander, attempting to justify excluding religious schools by defining all secular private schools—but no religious schools—as public-school equivalents.

This Court has rejected such manipulation of a "public" baseline to justify discrimination against religion. In *Mergens*, *supra*, a public high school denied a

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[2] The other criteria in § 2951 (see *supra* p. 23) do not affect this conclusion. Reporting requirements do not change the nature of the education; the assessment requirements apply only to some schools.

student Christian club permission to meet in classrooms on the same terms as other student clubs. The club's students sued under the Equal Access Act, 20 U.S.C. §§ 4071-4074, which prohibits discrimination against student clubs based on the content of their expression whenever the school permits one or more "noncurriculum related student groups to meet." 20 U.S.C. § 4071(b) (defining this as a "limited open forum"). The school claimed that, unlike the religious club, all existing student clubs were curriculum related. *Mergens*, 496 U.S. at 244. According to the school, the chess club promoted math and science, student government related to political science, and a scuba-diving club fostered physical education. *Id*.

This Court rejected the school's attempt to define "curriculum related" as "anything remotely related to abstract educational goals." *Id*. The Court explained: "To define 'curriculum related' in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory." *Id*.

Mergens forbade the state to label all non-religious clubs as broadly "related to" the public-school curriculum in order to single out the religious club for exclusion. Here, the state seeks to label all non-religious private schools as broadly "equivalent" to public schools in order to single out religious private schools for exclusion. The Court should again reject a ploy that would allow government "to evade the [Constitution]

by strategically describing" programs, "render[ing *Espinoza*] merely hortatory." *Id.* at 244.

C. The Decision Below Would Authorize States to Discriminate Against Religion in Many Other Contexts.

If the state can use such a loose definition to label its benefit as a "public equivalent" that must therefore be secular in content, then states will be able to discriminate against religious providers in the context of many government benefits. For example:

1. Under Maine's rationale, Montana could have described its tax-credit program as supporting organizations that provide funds to private schools that are "substitutes" or "rough equivalents" for public education. Because such "rough equivalents" must be secular, the state could say, no school that adds religious teaching to its secular education could participate. The evasion of *Espinoza* would be transparent.

2. States also could relabel their higher-education student aid as benefitting the "rough equivalent" of public-university education; because such public education must be "secular," the state could exclude religious institutions. In *Colorado Christian*, Colorado could have labeled its higher-education scholarships as a benefit for students receiving (secular) education at public colleges or its "rough equivalent" at (secular) private colleges—and thereby barred funds for students at "sectarian" institutions. Contra *Colorado*

Christian, *supra* (invalidating the exclusion of "pervasively sectarian" institutions).

3. Federal or state governments could exclude religious social-service providers from eligibility for generally available funds supporting services such as outpatient mental-health services, substance-abuse treatment, or adoption. Both government and private entities, secular and religious, provide such services. In such cases, government could say the benefit supports government-provided (secular) services or their "rough (secular) equivalents."

Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995), properly invalidated a provision that barred benefits for providers of childcare to Army families if the providers included religious activities in their programs. But under Maine's rationale, the government entity could label its benefit as supporting government-provided (secular) childcare or its "rough equivalent," namely, childcare provided with no religious elements, and thereby exclude religious providers no matter the secular value their childcare offered.

III. Discrimination Against Religious Choices in Generally Available Educational-Aid Programs Violates the Fundamental Principles of the Religion Clauses: Government Neutrality and Private Choice in Matters of Religion.

The constitutional prohibition of discrimination against religious uses is an application of larger

principles underlying the Religion Clauses. Those central principles include government neutrality toward religion and protection of private choice in religious matters.

A. The Religion Clauses Require Government Neutrality Toward Religious Activity in Order to Protect Private Religious Choice.

"The ultimate goal of the Constitution's provisions on religion is religious liberty for all—for believer and nonbeliever, for Christian and Jew, for Protestant and Catholic, for Western traditions and Eastern, for large faiths and small, for atheist and agnostic, for secular humanist and the religiously indifferent, for every individual human being in the vast mosaic that makes up the American people." Berg and Laycock, *supra*, 40 Tulsa L. Rev. at 232. The ultimate goal is that every American should be free to hold his or her own views on religious questions, and live the life that those views direct, with a minimum of government interference or influence. The fundamental principle to achieve that goal is government neutrality toward religion in the "substantive" sense.

> [S]ubstantive neutrality [means] this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. . . . [R]eligion [should] be left as wholly to private choice as anything can be. It

> should proceed as unaffected by government as possible. . . .
>
> This elaboration highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized.

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-02 (1990) (footnote omitted). Substantive neutrality requires neutral government incentives with respect to religion. It is distinct from "formal" neutrality, or religiously neutral categories in government programs. *Id.* at 999-1000.

In some contexts, the two versions of neutrality correspond with each other; eliminating religious categories sometimes creates neutral incentives. But when the two forms of neutrality diverge, substantive neutrality—that is, voluntarism or religious choice—is more fundamental.

Differently stated, the goal of the Religion Clauses is that religion in America should flourish or decline "according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). This formulation restates the principles of voluntarism and private choice, as Justice Brennan summarized in *McDaniel*: "Fundamental to the conception of religious liberty protected by the Religion Clauses is

the idea that religious beliefs are a matter of voluntary choice by individuals and their associations." 435 U.S. at 640 (Brennan, J., concurring in the judgment).

B. Discrimination Against Religious Educational Choices in Government Aid Programs Violates Both Formal and Substantive Neutrality.

This Court has repeatedly ruled that neutral educational aid directed by private choice is consistent with the Establishment Clause. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). These rulings directly reflect voluntarism and substantive-neutrality principles. In such programs, "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* at 649. A program whose terms are "neutral with respect to religion" creates no "financial incentive for parents to choose a religious school" over a nonreligious one. *Id.* at 652, 654. Individuals use their benefit based on their "zeal" for, or the "appeal" they find in, a particular school's education, ideology, or religious teaching. See *Zorach*, 343 U.S. at 313.

Thus, in the context of government benefit programs involving private choice, the Religion Clauses' core principles require that religious options be included equally with nonreligious options. Equal inclusion of religious options is "formally" neutral: it treats religious and secular schools identically, without religious classifications or categories. It is also

"substantively" neutral: it neither discourages nor encourages individuals' religious choices. "Financial aid can be distributed in a way consistent with individual choice": "[e]ach family receiving a government voucher can choose the school that it prefers among all the options available," and whatever that range of options may be, "there are more choices with the voucher than without it." Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 155, 157 (2004).

The Court's private-choice decisions hold that exclusion of religious choices is not required by the Establishment Clause, and they similarly show why such exclusion presumptively violates the Free Exercise Clause: the exclusion contravenes the fundamental principles of neutrality and religious choice. Accordingly, most cases where a state singles out private religious choices for exclusion from generally available benefits "should not be . . . difficult": such exclusion is invalid. *Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation*, 139 S. Ct. 909, 910-11 (2019) (statement of Kavanaugh, J., respecting denial of certiorari). "Barring religious organizations because they are religious from a general . . . program [of state benefits] is pure discrimination against religion." *Id.* at 911. Singling out religion for exclusion typically interferes with and distorts voluntary religious choice—here, the choice of families who wish to send their children to religious schools.

Maine's exclusion of "sectarian" schools from its tuition program penalizes private choice concerning religion in just this way. By offering benefits at secular private schools but not religious schools, Maine "puts families to a choice between sending their children to a religious school or receiving such benefits." *Espinoza*, 140 S. Ct. at 2257. The program's non-neutral terms create a "financial incentive for parents to choose" a secular school over a religious one. *Zelman*, 536 U.S. at 654.[3]

As in *Espinoza* and *Trinity Lutheran*, the state's asserted interest in keeping funding from benefiting religious schools "cannot qualify as compelling" under the "stringent," "rigorous" showing required to justify discrimination against religion. *Espinoza*, 140 S. Ct. at 2260; *Trinity Lutheran*, 137 S. Ct. at 2024. As in prior cases, the interest "'in achieving greater separation of church and State than is already ensured under the Establishment Clause'" cannot justify singling out *private* religious choices for discrimination. *Espinoza*, 140 S. Ct. at 2260 (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

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[3] In focusing on the fact that a particular program channels aid through explicit choices by beneficiaries, we do not mean to suggest that this is a constitutional prerequisite for the inclusion of religious providers. See *Trinity Lutheran*, 137 S. Ct. at 2023 (holding that state could not exclude institution from program of direct aid solely because it was religious). Including religious providers in well designed and formally neutral direct-aid programs is typically also substantively neutral and facilitates the choices of the ultimate beneficiaries. See *Mitchell v. Helms*, 530 U.S. 793, 810-14 (2000) (plurality opinion).

C. These Principles Also Explain Why Government Can and Sometimes Must Exempt Religious Conduct from Generally Applicable Laws.

Finally, the principles of substantive neutrality and respecting religious choice also explain why government may—and sometimes must—accommodate religious exercise in the face of generally applicable laws and regulations.

Applying a general law to a religiously motivated practice may be formally neutral, if the law treats religious and secular violations alike. But if the law significantly burdens religious practice, it violates the more fundamental requirement of substantive neutrality, by preventing people from exercising voluntary religious choice.

The threat of civil or criminal penalties or loss of government benefits profoundly discourages the prohibited religious practice. Exempting the religious practice from regulation eliminates that discouragement, and it rarely encourages the exempted practice. Nonbelievers will not suddenly start observing the Sabbath, or traveling by horse-and-buggy, or holding their children out of high school just because observant Jews or Adventists or Amish are permitted to do so. Cases in which religious claims align too closely with secular interests, such as religious objections to paying taxes, require separate treatment. But those are not the usual case.

Formal and substantive neutrality both suggest equal treatment of religious and secular schools with respect to financial aid, because money has the same value for everyone. But most exemptions of religious practices have value only for believers in some particular faith. So although an exemption is a form of religious category, religious exemptions create neutral religious incentives.

These principles explain why government may accommodate voluntary religious practice by exempting it from burdensome laws, even if such exemptions do not "come packaged with benefits to secular entities." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). Such an exemption is constitutional when it "does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice." *Thomas v. Review Board*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting on other grounds). Exemption preserves government "neutrality in the face of religious differences." *Sherbert*, 374 U.S. at 409.

Moreover, this Court has unanimously required exemptions when a generally applicable law "interferes with the internal governance of [a] church" or other religious organization, "depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188 (2012). The "ministerial exception" to nondiscrimination suits protects religious choice: "the interest of religious groups in choosing who will preach their beliefs, teach their

faith, and carry out their mission." *Id.* at 196 ("The church must be free to choose those who will guide it on its way.").

In cases not involving religious organizations' internal governance, this Court's decision in *Smith*, 494 U.S. 872, treats accommodation of religious choices as frequently a matter of government discretion rather than constitutional mandate. But that interpretation of the Free Exercise Clause has come in for substantial criticism on the Court. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1924 (2021) (Alito, J., concurring in the judgment, for three justices) ("*Smith* was wrongly decided [and] the Court's error . . . should now be corrected."); *id.* at 1882 (Barrett, J., concurring, for two justices) ("it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination"). And *Smith*'s interpretation stems from worries about judicial competence to decide when exemptions are appropriate, not from a rejection of the importance of religious choice. See *id.* at 890 ("to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that . . . the appropriate occasions for its creation can be discerned by the courts").

Whether or not concerns about the judicial role should override a constitutional requirement of substantive neutrality, no such concerns are present in cases like this one. A prohibition on religious discrimination in funding programs requires no such case-by-case judgments. Discrimination against religion in

funding programs violates formal neutrality, and it also constrains private religious choice, violating voluntarism and substantive neutrality. It is presumptively unconstitutional.

CONCLUSION

In Maine as elsewhere, parents who choose to send their children to religious schools are "'member[s] of the community too'"; "their exclusion from the [tuition-assistance] program here is 'odious to our Constitution' and 'cannot stand.'" *Espinoza*, 140 S. Ct. at 2262-63 (quoting *Trinity Lutheran*, 137 S. Ct. at 2023, 2025).

The judgment below should be reversed.

Respectfully submitted,

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