NO. 20-1088

IN THE
Supreme Court of the United States

DAVID CARSON, ET AL.,
Petitioners,

v.

A. PENDER MAKIN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE DEPARTMENT OF EDUCATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE JEWISH COALITION OF RELIGIOUS LIBERTY AS AMICUS CURIAE SUPPORTING PETITIONERS

KRISTEN K. WAGGONER
JOHN J. BURSCH
Counsel of Record
DAVID A. CORTMAN
ERIN MORROW HAWLEY
ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Jewish Coalition for Religious Liberty is a nonprofit organization—a group of lawyers, rabbis, and professionals who practice Judaism and defend religious liberty. The Coalition's members have written on the role of religion in public life. Representing members of the legal profession, and adherents of a minority religion, Amicus has a unique interest in ensuring the flourishing of diverse religious viewpoints and practices. The Coalition advocates for people of faith who practice their faith in religious services, schools, and the public square.

Amicus urges this Court to reverse the First Circuit's decision and hold that there is no meaningful distinction between discrimination based on religious use or conduct and discrimination based on religious status. In *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020), this Court reaffirmed that governmental acts that discriminate against religion are subject to "the strictest scrutiny" but left open the possibility that "some lesser degree of scrutiny applies to discrimination against religious uses of government aid." *Id.* at 2257. In this case, the First Circuit demonstrated why this Court should answer that question and confirm that discrimination based on religious use or conduct is subject to the same level of scrutiny as discrimination based on religious status.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2, and all parties consented to its filing.

The First Circuit held that discrimination based on religious use was only subject to rational basis review. It then adopted such an expansive definition of religious use that it would exclude every Orthodox Jewish school from the protections that this Court articulated in *Espinoza*. Amicus urges this Court to reverse the First Circuit and affirm that the First Amendment protects Orthodox Jewish parents and schools even if they "promote[ ]" Judaism "and/or present[] the material taught through the lens of" Judaism. *Cf. Carson as next friend of O.C.* v. *Makin*, 979 F.3d 21, 38 (1st Cir. 2020).

SUMMARY OF THE ARGUMENT

In the decision below, the First Circuit provides a roadmap for states and localities looking to discriminate against religious institutions. According to the lower court, this Court's decision in *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020), has nothing to say about Maine's policy of discriminating against religious schools—at least those that are *too* religious or pervasively sectarian—because the State is discriminating based on "use," rather than "status." *Carson*, 979 F.3d at 38-40. But that distinction is wholly unmoored from constitutional text and history.

The Framers drafted the Free Exercise clause to protect not only the right to *be* religious in some metaphysical sense but also the practical right to participate in religious activity. The First Amendment's text does not contemplate any distinction between status and use. And for good reason. There is a long history of governments paying lip-service to religious freedom while denying people of faith the ability to engage in religious activities like worship and prayer. Indeed, "[t]he right to *be* religious without the right to *do* religious things would hardly amount to a right at all." *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring). And accepting the First Circuit's religious-use distinction would put Orthodox Jewish schools to the same unconstitutional choice this Court repudiated in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*: whether to "participate in an otherwise available benefit program or remain a religious institution." 137 S. Ct. 2012, 2021–22 (2017).

Maine overtly discriminates against schools that foster a religious curriculum and environment. In determining whether a school is "sectarian," and thus ineligible for state aid, the State considers not only whether a school is "associated" with a particular faith but also whether the school "promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." *Carson*, 979 F.3d at 38. Maine, in other words, punishes religious schools that actually behave like religious schools. But to exclude a religious school because such school means something when it calls itself religious and thus feels compelled to incorporate a religious worldview into its curriculum "punishe[s] the free exercise of religion." *Espinoza*, 140 S. Ct. at 2256 (alteration in original) (quoting *Trinity Lutheran*, 137 S. Ct. at 2022).

Further, the First Circuit's status-use distinction "yield[s] more questions than answers." *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J., concurring). As this Court has recognized, in the schooling context, "belief and action cannot be neatly confined in logic-tight compartments." *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972). It is impossible to distinguish between religious status and religious use in schools. Line drawing problems will abound until this Court clarifies that discrimination based on religious use is just as unconstitutional as that based on religious status.

Another way to view the First Circuit's religious-use rule is that it allows Maine to discriminate based on status. Maine singles out only one kind of religious school—those that tangibly manifest their faith on a daily basis. That creates two problems. Punishing only the most religious of religious schools is itself

discrimination based on religious status. *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion); *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008); *Univ. of Great Falls* v. *N.L.R.B.*, 278 F.3d 1335, 1342 (D.C. Cir. 2002). And such status-based punishment requires a state to differentiate between religious schools and schools that are *too* religious, creating intractable Establishment Clause problems.

The First Circuit's status-use distinction renders *Espinoza* a dead letter as applied to most religious schools. Take Orthodox Jewish schools. There are no religious-in-name only Orthodox Jewish day schools—all incorporate Jewish teaching into their curriculum, and some present all education "through the lens" of Judaism. Jewish parents send their children to such schools to receive a stellar education in an environment that also facilitates their religious education and development. As a plurality of this Court has recognized, there is no reason for a state to "reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children." *Mitchell*, 530 U.S. at 827–28.

Under such a regime, it is the faithful who will suffer most. Those who are nonchalant about faith will "suffer little in a world where only inward belief or status is protected." *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring). But those who believe that faith should inform "'the whole of their lives,'" could be singled out for disfavored treatment. *Ibid.* (quoting *Mitchell*, 530 U.S. at 827-28 (plurality opinion)). That the Constitution does not allow.

ARGUMENT

I. There is no constitutional distinction between religious status and religious use, especially when it comes to Orthodox Jewish day schools.

A. The Free Exercise Clause does not distinguish between belief and action.

The Free Exercise Clause protects the free exercise of religion—a guarantee that encompasses not only the right to *be* religious and hold certain beliefs, but also the right to *act* on those beliefs. *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring). The Clause's text makes clear that the First Circuit's status-use distinction is wildly out-of-step with the Constitution.

Indeed, the Framers chose to substitute a right of "free exercise" for a right "of conscience," making "clear that the clause protects religiously motivated conduct as well as belief." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1488 (1990). While the founding generation might have understood a right of "conscience" to include only personally held beliefs, the term "exercise" was widely understood to mean "use" or "practice." *Id.* at 1489 (citing, among others, James Buchanan's 1757 dictionary). By using the term "free exercise," the Framers thus expressly extended "the broader *freedom of action* to all believers." *Id.* at 1490 (emphasis added).

The Founders' elevation of exercise over conscience was purposeful as they understood that "[t]he right to *be* religious without the right to *do* religious things would hardly amount to a right at all." *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring). They recognized the cruelty of prohibiting individuals of faith from acting on their conscience. Oliver Cromwell, for instance, infamously promised religious "freedom" to Catholics in Ireland: "'As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted.'" *Espinoza*, 140 S. Ct. at 2278 (Gorsuch, J., concurring) (quoting *McDaniel* v. *Paty*, 435 U.S. 618, 631 n.2 (1978) (opinion of Brennan, J.)).

The status-use distinction continued to be used at the time of the Founding to perpetuate discrimination against disfavored religions. The Georgia Charter of 1732, for example, employed the distinction to provide lesser protections for Catholic believers. It stated: "there shall be a liberty of conscience allowed in the worship of God, to all persons inhabiting, or which shall inhabit or be resident within our said province, and that all such persons, except papists, shall have a free exercise of religion." McConnell, *supra* at 1489. The "most plausible" reading of that provision is to "permit[ ] Catholics to believe what they wished" but not "to put their faith into action." *Id.* at 1490.

The Founders thus intentionally drafted the First Amendment to protect the "freedom to act" as well as the "freedom to believe." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). After all, it is the Free *Exercise* Clause, not the Free *Status* Clause. That is why this Court's decision in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah* struck down an ordinance banning a religious *practice* and explained that laws "target[ing] religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases." 508 U.S. 520, 546 (1993).

This Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), does not support a status-use distinction. As this Court recognized in *Espinoza*, "*Locke* invoked a 'historic and substantial' state interest in not funding the training of clergy." 140 S. Ct. at 2257 (quoting *Locke*, 540 U.S. at 725). As in that case, "no comparable 'historic and substantial' tradition supports [Maine's] decision to disqualify religious schools from government aid." *Id.* at 2257–58.[2] Indeed, the opposite historical tradition exists as founding-era governments routinely provided financial support to private schools, including religious ones. *Id.* at 2258. Accord, *e.g.*, *A.H. by and through Hester* v. *French*, 985 F.3d 165, 188–89 (2nd

[2] In any event, *Locke* was wrongly decided and should be overturned for the reasons stated in Justice Scalia's dissent. This case highlights the prescience of Justice Scalia's warning that "[h]aving accepted" the desire to avoid funding the training of clergy as a legitimate reason to discriminate in *Locke*, the Court "is less well equipped to fend [discrimination] off in the future." It is never permissible for a state to discriminate against religious people simply for acting religious. 540 U.S. at 734 (Scalia, J. dissenting).

Cir. 2021) (Menashi, J., concurring) (concluding that Vermont's use-based restrictions to avoid funding college dual enrolment "would violate the Free Exercise Clause" to the extent such avoidance was based on how pervasively sectarian the religious high school the student attended).

If the First Circuit's status-use distinction is correct, this Court's seminal decision protecting religious schooling would have come out the other way. In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this Court recognized that the very conduct at issue here—parents' decisions about the education of their children—"can constitute protected religious *activity*." See *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring) (emphasis added). The state can no more punish parents who choose to send their children to religious schools by denying them access to generally available funds than it could compel religious families to send their children to a public school in violation of their faith.

The First Circuit's cramped reading of the Free Exercise Clause also conflicts with one of this Court's most recent decisions protecting religious schools from government discrimination. In *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017), the Court invalidated Missouri's use of a Blaine Amendment to disqualify a Lutheran school from participating in a playground resurfacing program. In explaining the constitutional violation of that disqualification, the Court said that Missouri had put the school to an untenable choice: "It may participate in an otherwise available benefit program or remain a religious institution." *Id.* at 2021–22.

And that untenable choice is even more glaring here. If an Orthodox Jewish school wishes to be eligible for Maine's funding, it must choose to act *less Jewish*. Parents who choose to send their children to religiously affiliated schools are entitled to government benefits, but parents who choose to send their children to Orthodox (and many Conservative) schools are denied those same benefits. It is difficult to imagine a more discriminatory regime.

In short, the Free Exercise Clause prevents discrimination based on religious use.

B. The First Circuit's status-use distinction is question-begging.

The First Circuit's status-use distinction "yield[s] more questions than answers." *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J., concurring). As this Court previously has explained, a Free Exercise case "does not become easier" because a state targets action rather than belief. *Yoder*, 406 U.S. at 220. Rather, in the religious education context, "belief and action cannot be neatly confined in logic-tight compartments." *Ibid.*

It is often impossible to distinguish between discrimination based on religious status and discrimination based on religious use. *E.g.*, *Trinity Lutheran*, 137 S. Ct. at 2025 (discrimination could be categorized as either use or status based) (Gorsuch, J., concurring). So too here. Does Maine—as the plain text of its tuition statute seems to require—"seek to prevent religious parents and schools from participating in a public benefits program (status)?" *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J., concurring). Or does the State aim "to bar public benefits from being employed to support religious education (use)?" *Ibid.*

These sorts of line-drawing questions will arise in every Free Exercise case until this Court clarifies that discrimination based on use is just as unconstitutional as discrimination based on status. *E.g.*, *French*, 985 F.3d at 188 (Menashi, J., concurring) (although in practice Vermont denied dual-enrollment funds based entirely on a school's religious status, it tried to justify that discrimination based on "religious uses").

Further, it is possible to view the religious discrimination at issue here as status-based. *Cf. Trinity Lutheran*, 137 S. Ct. at 2025-26 (Gorsuch, J., concurring) (noting that the discrimination at issue could be categorized as either use based or status based), and *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J., concurring) (same). Maine law provides that an otherwise generally available tuition benefit may only be awarded to a "nonsectarian school," ME. STAT. tit. 20-A, § 2951(2) (App. 80), and interprets that provision to focus on whether an applicant school is "sectarian," *Carson*, 979 F.3d at 38. The nonsectarian requirement is overtly focused on religious *status* and as such constitutionally suspect. *Espinoza*, 140 S. Ct. at 2257 (status-based discrimination is subject to "the strictest scrutiny").

The State argues its nonsectarian requirement is not actually about status because it has interpreted state law to allow tuition funds to flow to a religious school—so long as that school is not *too* religious. A school may be "associated" with a particular faith but must not "promote[ ] the faith or belief system with which it is associated and/or present[ ] the material taught through the lens of this faith." *Carson*, 979 F.3d at 38.

But the exclusion of certain types of schools—*i.e.*, those that see the promotion and promulgation of their faith as a core part of their mission—from an otherwise generally available benefit is itself "discrimination on the basis of religious status." *French*, 985 F.3d at 186 (Menashi, J., concurring). "When a state conditions eligibility for public benefits '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 and the religious composition of its governing board,' it discriminates *on the basis of religious status* because it 'discriminates among religious institutions on the basis of the pervasiveness or intensity of their belief.'" *Ibid.* (emphasis added) (quoting *Colo. Christian Univ.*, 534 F.3d at 1259).

Here, Maine's denial of tuition benefits to parents who choose to send their students to a religious school that allows faith to inform its curriculum (heaven forbid) "collides with [this Court's] decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell*, 530 U.S. at 828 (plurality opinion). As the Tenth Circuit has held, to award tuition money "to students who attend sectarian—but not 'pervasively' sectarian—[schools], [a state] necessarily and explicitly discriminates among religious institutions . . . 'on the basis of religious views or religious status.'" *Colo. Christian Univ.*, 534 F.3d at 1258 (footnote omitted) (quoting *Emp. Div.* v. *Smith*, 494 U.S. 872, 877 (1990)); see also *Univ. of Great Falls*, 278 F.3d at 1342 (to deny benefits only to "pervasively sectarian" schools would "raise First Amendment concerns—discriminating

between kinds of religious schools."). And of course, a state may not deny aid to "schools that believe faith should permeate everything they do" because the aid "could be used for religious ends." *Espinoza*, 140 S. Ct. at 2256 (cleaned up).

C. The First Circuit's status-use distinction raises serious questions under the Establishment Clause.

To make matters worse, the First Circuit's conclusion that a state may deny tuition benefits to *some* religious schools hopelessly entangles the state in religious matters. After all, "[i]t is not only the conclusions that may be reached by [officials] which may impinge on" First Amendment rights, "but also the very process of inquiry." *N.L.R.B.* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979).

To avoid the obvious entanglement in religious affairs caused by Maine's scheme, the State says that most schools self-identify as sectarian and that religious schools do not ordinarily seek funding. *Carson*, 979 F.3d at 48. That's hardly surprising given that Maine's statute discriminates *on its face* against religious schools. And when a religiously affiliated school *does* apply for tuition benefits, the government wades into its curriculum, assessing whether the school promotes a "faith or belief system" or "presents the material taught through the lens of . . . faith." *Id.* at 38. If Maine finds that a religious school is more than religious in name only and that faith actually informs its curriculum and environment, the State denies otherwise available tuition benefits. This is the

very definition of constitutionally prohibited "unequal treatment." *Trinity Lutheran*, 137 S. Ct. at 2019.[3]

Maine may not have its discriminatory cake and eat it too. Either there is a distinction between religious-status and religious-use schools—in which case Establishment Clause concerns abound—or there is no constitutional distinction between religious faith and action and Maine's scheme violates the Free Exercise Clause.

D. The First Circuit's status-use distinction renders *Espinoza* a dead letter as to Orthodox Jewish schools.

The First Circuit distinguished this case from *Espinoza* on the ground that Maine is discriminating based on religious use rather than religious status. *Carson*, 979 F.3d at 38-40. As explained above, the Constitution does not "care." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring). Equally important, there is no viable distinction between religious use and status when it comes to Orthodox Jewish schools.

In practice, Maine's unequal treatment of private schools based on whether the school engages in religious activities—*i.e.*, use-based discrimination—allows the state to deny funding to every single Orthodox Jewish school in the State. By definition, Orthodox Jewish day schools "promote[ ]" a Jewish

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[3] Ironically, the First Circuit based its holding, in part, on avoiding entanglement, *Carson*, 979 F.3d at 48, making this Court's review particularly pressing. If the lower court is correct that use-based discrimination is subject only to rational basis review, then nearly any purported justification will do.

"belief system" and/or "present[ ] the material taught through the lens of this faith." *Carson*, 979 F.3d at 38. There is no such thing as a religious-in-name-only Orthodox Jewish school. For Orthodox Jewish parents, sending children to such schools is "the sine qua non of 'serious Jewish child-rearing.'" Rona Sheramy, *The Day School Tuition Crisis: A Short History*, Jewish Review of Books (Fall 2013).

Jewish parents choose to send their children to Orthodox Jewish schools for a whole host of intertwined religious and educational reasons. These schools provide half a day of Judaic instruction, which includes classes in Hebrew language, Jewish History, and biblical studies. This instruction is vital in preparing Jewish students to live life as faithful Jews and to take on leadership roles in the Jewish community. The other half of the day covers secular instruction.

Jewish day schools facilitate Jewish children's ability to flourish, both as students and as observant Jews. Parents choose Orthodox Jewish schools in part because they are closed on Jewish holidays. An Orthodox Jewish student in a public school would have to miss approximately 12 days of school every year to observe Jewish holidays, holidays on which Jewish students are not allowed to write, use electricity, or travel by bus or car. Jewish students who attend public schools will miss class time and accrue absences which may create issues. AntiDefamation League, *School & Workplace Accommodations for the Jewish High Holidays*, available at https://perma.cc/5UDV-VB7F.

Other days on the Jewish calendar pose different difficulties. On certain dates, an observant Jewish student could go to school, but she would nevertheless face difficulties due to specific religious practices. For example, on the intermediate days of the Holiday of Sukkot, Orthodox Jews eat all their meals in an outdoor booth known as Sukkah. If a Jewish day school is open on those days, it will provide a Sukkah in which to eat. A student attending a secular school would be unable to observe this practice while at school. Similarly, Jewish day schools provide Kosher meals that some public schools do not offer.

Jewish day schools partner with parents in providing an educational environment that allows students to learn and practice their faith. These schools hire teachers who model proper Jewish behavior, teach the oral and written law from a Jewish perspective, and observe and teach students about Jewish holidays and practices. For instance, Jewish students are required to pray three times a day, and Jewish day schools incorporate prayer-time into the school day. Further, after Jewish men reach the age of 13, they must hear readings from the Torah on Monday and Thursday mornings. While Jewish day schools incorporate Torah reading into their schedule, public school Jewish students must attend synagogue before school, imposing a significant burden on both parents and children.

In sum, Jewish day schools are uniquely harmed by the First Circuit's status-use distinction. There is no reason to deny otherwise available tuition benefits to parents simply because they choose educational environments that incorporate religious activities into their daily curriculum. But Maine's no-aid provision "penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason." *Espinoza*, 140 S. Ct. at 2261. Because Maine's law "targets religious conduct for distinctive treatment," the scheme must (but cannot) survive strict scrutiny. See *Lukumi*, 508 U.S. at 546.

II. A state may not discriminate against schools that are *too* religious in providing a tuition subsidy for public education.

A. A state may not disqualify a religious school from government aid.

The First Circuit apparently believed that whether Maine's tuition program confers a public benefit matters for First Amendment purposes. *Carson*, 979 F.3d at 41 ("[N]othing in either one of Justice Gorsuch's concurrences suggests that the government penalizes a fundamental right simply because it declines to subsidize it."). It does not.

At its most basic, the Free Exercise Clause "protect[s] religious observers against unequal treatment." *Trinity Lutheran*, 137 S. Ct. at 2019. Thus, this Court has long held that the Free Exercise Clause protects against laws that "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."

Lyng v. *Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 449 (1988); accord, *e.g.*, *Thomas* v. *Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it 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, a burden upon religion exists."); *Everson* v. *Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947) (a state cannot exclude individuals of faith "from receiving the benefits of public welfare legislation").

A state "punishe[s] the free exercise of religion" "by disqualifying the religious from government aid." *Espinoza*, 140 S. Ct. at 2256-57 (quoting *Trinity Lutheran*, 137 S. Ct. at 2022). This is because excluding people of faith from otherwise available benefits "inevitably deters or discourages the exercise of First Amendment rights." *Trinity Lutheran*, 137 S. Ct. at 2022 (cleaned up). The Free Exercise Clause "protects against even 'indirect coercion'"—like the denial of a benefit. *Espinoza*, 140 S. Ct. at 2256–57 (quoting *Trinity Lutheran*, 137 S. Ct. at 2022). As a result, "[w]hat benefits the government decides to give, whether meager or munificent, it must give without discrimination against religious conduct." *Id.* at 2277 (Gorsuch, J., concurring).

Indeed, the very question at issue in *Trinity Lutheran* and *Espinoza* was whether a state might exclude religious schools from a public benefit program. *Espinoza*, 140 S. Ct. at 2254; *Trinity Lutheran*, 137 S. Ct. at 2022. The answer from this Court was a resounding no: "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." *Espinoza*, 140 S. Ct. at 2261.

Perhaps recognizing that a state cannot "disqualify[ ] the religious from government aid," *Espinoza*, 140 S. Ct. at 2256–57 (quoting *Trinity Lutheran*, 137 S. Ct. at 2022), the First Circuit postulated that the relevant benefit "baseline" was a "public education," and concluded that fully accredited religious schools are not "necessarily a good substitute for a public school education," *Carson*, 979 F.3d at 42 (emphasis omitted).

At the outset, that "baseline" is wrong: the Maine tuition program expressly subsidizes *private* schools. The only reason that some are excluded is because they happen to offer religious teaching. The "baseline" is only relevant if a religious perspective somehow renders a school's teaching inferior—a determination that the State may not make. This Court has "long recognized the rights of parents to direct 'the religious upbringing' of their children," *Espinoza*, 140 S. Ct. at 2261 (quoting *Yoder*, 406 U.S. at 213–14, 232), including by sending their children to religious schools, *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925). Parents "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Ibid.*

Jewish parents who choose Jewish day schools exercise that "high duty." See *Pierce*, 268 U.S. at 535. They seek a high-quality, secular education in an environment that fosters a religious upbringing. Orthodox Jewish parents would face a difficult dilemma if forced to choose between a first-rate secular education and proper religious upbringing. Jewish day schools prevent Orthodox parents from having to face such a choice.

Yet Maine refuses to offer Jewish parents the same tuition subsidy available to secular parents. This puts parents to an unconstitutional choice "between their religious beliefs and receiving a government benefit." *Trinity Lutheran*, 137 S. Ct. at 2023. By denying tuition benefits to parents who want to send their children to Orthodox Jewish schools, the State engages in constitutionally-prescribed "unequal treatment." *Id.* at 2019. And for Orthodox Jewish schools, the State "punishe[s] the free exercise of religion." *Id.* at 2022.

B. The First Circuit's ruling impermissibly dismissed religious education as a proper substitute for public education.

Maine's tuition subsidy is meant to ensure that students who live in a district without a public school nevertheless receive an education "roughly equivalent to the education they would receive in public schools." *Carson*, 979 F.3d at 42. To be eligible for a tuition subsidy, a private school must either be accredited or approved by the State. ME. STAT. tit. 20-A § 2901. But religious schools—or at least those that are *too* religious—need not apply.

Unless the State is motivated by anti-religious animus, it should not matter whether parents choose to send their children to a fully accredited school that also prioritizes Judaism or any other faith. Indeed, this Court has long recognized that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Yoder*, 406 U.S. at 213–14. Yet the State denies tuition assistance to parents who choose fully accredited Jewish day schools because those schools also happen to engage in religious education and practices. That is exactly the sort of discrimination *Espinoza* prohibits.

The lower court intimates that adding a religious component to an otherwise first-rate secular education somehow makes that education worse. *Carson*, 979 F.3d at 42. Incredibly, the First Circuit believes that religious schools offering the highest quality secular educations—while also having a religious component—are *not* "a good substitute for a public school education." *Ibid.* (emphasis omitted).

The First Amendment prohibits such open anti-religious bigotry. It is unconstitutional to "reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children." *Mitchell*, 530 U.S. at 827-28 (plurality opinion).

* * *

This Court should grant review, answer the important question left open by *Espinoza*, and clarify that discrimination based on religious use is subject to the same level of scrutiny as discrimination based on religious *status*. At day's end, whether this Court calls Maine's discrimination against religious schools, including Orthodox Jewish schools, "discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same." *Espinoza*, 140 S. Ct. at 2278 (Gorsuch, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KRISTEN K. WAGGONER
JOHN J. BURSCH
Counsel of Record
DAVID A. CORTMAN
ERIN MORROW HAWLEY
ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

MARCH 2021