NO. 20-1088

IN THE

# Supreme Court of the United States

DAVID CARSON, AS PARENT AND NEXT FRIEND 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 THE JEWISH COALITION OF RELIGIOUS LIBERTY AS *AMICUS CURIAE* SUPPORTING PETITIONERS


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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 conduct and discrimination based on religious status. In *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020), this Court reaffirmed that state discrimination against religion is subject to "the strictest scrutiny" but reserved the question whether "some lesser degree of scrutiny applies to discrimination against religious uses of government aid." *Id.* at 2257. In this case, the First Circuit demonstrated exactly why this Court should confirm that discrimination based on religious 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 *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus* briefs at the merits stage.

The First Circuit held that discrimination based on religious use was subject only to rational basis review. It then adopted an expansive definition of religious use that would exclude every Orthodox Jewish day 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. Pet. App. 35.

## SUMMARY OF ARGUMENT

This Court's landmark decision in *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020), established that states cannot discriminate against religion by excluding religious schools from subsidy and scholarship programs that benefit other private schools. That ruling promotes the flourishing of religious exercise in this country by ensuring that parents who wish to educate their children in a faith-based environment are not financially disadvantaged or deterred by arbitrary government exclusions.

Yet in the decision below, the First Circuit provided a roadmap for states and localities who want to evade *Espinoza* and to discriminate against religious institutions. According to the lower court, *Espinoza* does not invalidate Maine's exclusion of "sectarian" schools from its tuition subsidy program, because the program is discriminating based only on religious "use" or conduct, rather than religious "status." Pet. App. 34–39. By that, the court meant that Maine is allowed to exclude sectarian schools from its subsidy program so long as it only does so if they actually *act* religious to a sufficient degree, and not if they are merely "religious" in name only.

The Court should reverse, because that distinction is illusory and would render *Espinoza* a dead letter, especially for Orthodox Jewish schools. The conduct-status distinction is also irreconcilable with the Free Exercise Clause (which protects religious *conduct*, not just religious *affiliation*), and raises serious concerns under the Establishment Clause (which forecloses judicial line-drawing that requires evaluating religious practices or situating them on a "sectarian" spectrum).

**I.** To start, the First Circuit's distinction is illusory and, as Justice Gorsuch foresaw in *Espinoza*, "yield[s] more questions than answers." 140 S. Ct. at 2275 (Gorsuch, J., concurring). Because state money is fungible, forbidden discrimination against religious status could easily be disguised as "permissible" discrimination against religious use: As below, the State could argue it is not excluding schools because they *are religious*; but because they *do religious things*. And it is equally effortless to reclassify discrimination against religious conduct as discrimination against religious status. In this case, for example, a court could readily describe Maine's exclusion of "sectarian" schools as stripping funding based on religious status. In short, the use-status distinction reduces *Espinoza* from a serious constitutional principle to a semantic game.

And that leaves Orthodox Jewish schools and parents especially vulnerable. There are no religious-in-name-only Orthodox Jewish day schools—all incorporate Jewish teaching into their curriculum and provide education "through the lens" of Judaism. Cf. Pet. App. 35. That is why Jewish parents send their children to those schools: to receive a strong education in an environment that facilitates their spiritual leaning and development. Yet even when those Orthodox schools satisfy all the State's accreditation rules, the First Circuit's distinction would allow the State to unconstitutionally exclude them from equal access to state subsidies because they *also* teach the Talmud, celebrate Jewish holidays, or conduct prayer.

**II.** The status-conduct distinction is also in conflict with constitutional text and history, because the Free Exercise Clause prohibits discrimination on the basis of both belief *and* action. The Framers drafted the Clause to protect not only the right to *be* religious but also the practical right to participate in religious activity. 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). To exclude a religious school from subsidies just because the school acts in accord with its religious beliefs, or incorporates those beliefs into its curriculum, "punishe[s] the free exercise of religion." *Id.* at 2256 (quoting *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2022 (2017)). Accepting the First Circuit's status-use distinction would thus put Orthodox Jewish schools to the same unconstitutional choice rejected in *Trinity Lutheran*.

Moreover, trying to apply the status-use distinction would violate the Establishment Clause in many cases. The status-use distinction would allow the State to favor some religions over others (like Orthodox Judaism) based on how they manifest their beliefs in the school context. Asking whether a school promotes its "faith or belief system" or "presents the material taught through the lens of this faith," Pet. App. 35, implicates religious line-drawing that is beyond the constitutional reach of secular courts.

**III.** Ironically, it was the lower court's misguided attempt at avoiding similar concerns that caused it to treat religious education as inferior to public education. But that premise is foreclosed by Maine's scheme and this Court's precedents alike.

## ARGUMENT

### I. There is no meaningful distinction between religious *status* and *conduct*, especially for Orthodox Jewish schools.

In *Espinoza*, this Court held that a state cannot discriminate against religious schools in the provision of public benefits "solely because of the religious character of the schools." 140 S. Ct. at 2255. The First Circuit has now held that "religious character" means only some abstract religious *affiliation* (what the lower court called religious "status"). Meanwhile, if a state treats a religious school unfavorably because it *acts* in a religious way (what the lower court called religious "use" of the state aid), the constitutional problem disappears. Pet. App. 35. As a result, Maine may exclude sufficiently "sectarian" schools from a program that subsidizes tuition at accredited private schools in districts with no public schools.

At the outset, this Court should reverse because the status-use distinction is illusory. Nearly any exclusion from a state tuition program could readily be characterized either way, depending on the result a judge wants to reach. That devalues the critical constitutional principle of *Espinoza*: Private schools cannot be treated worse because they are Christian rather than Montessori, because they follow Islamic teachings rather than the Waldorf philosophy, or because they include prayer rather than yoga. For Orthodox Jewish day schools in particular, there is no practical distinction between conduct and status, and the First Circuit's approach would entirely eliminate *Espinoza*'s protection for those schools.

### A. The First Circuit's distinction is illusory.

The First Circuit's status-use distinction "yield[s] more questions than answers." *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J., concurring). Virtually every example of religious-status discrimination could be recharacterized as discrimination based on religious conduct or use, which would nullify *Espinoza* under the First Circuit's approach. On the flip side, nearly every religious-conduct restriction could be viewed as status discrimination, including the Maine regime here. See, e.g., *Trinity Lutheran*, 137 S. Ct. at 2025 (Gorsuch, J., concurring in part). This malleability exposes the conceptual flaw in using the use-status dichotomy as the constitutional test.

To start with the first point, there is hardly any discrimination against religious status that could not be reclassified as "permissible" use-based discrimination under the First Circuit's rule. For example, a rule excluding Jewish schools from a state benefits program (impermissible status-based discrimination) could alternatively be framed as a rule against using state funds for prayer (permissible use-based discrimination). Since money is fungible, any exclusion of a religious institution from a benefits program could simply be described instead as a rule against using the state funds for religious activities—even if the religious school also teaches math, science, social studies, and everything else that other schools do and that the program is intended to support. Indeed, in this case, Maine followed the logic of prohibiting "religious use" to its natural and predictable conclusion and entirely banned from participation any school deemed by state education

bureaucrats to be engaged in "too much" religious conduct.

Conversely, a rule limiting religious "conduct" or "use" by beneficiaries of a state program could readily be characterized as religious-status discrimination. Cf. *Trinity Lutheran*, 137 S. Ct. at 2025–26 (Gorsuch, J., concurring in part); *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J., concurring). Maine's own scheme demonstrates as much. Although Maine claims (and the First Circuit agreed) that its eligibility determinations for tuition assistance turn on religious *use*, the framework could easily be understood to turn on an institution's *status*. 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); Pet. App. 80, and interprets that provision to focus on whether an applicant school is "sectarian," Pet. App. 35. The nonsectarian requirement is, on its face, focused on religious *status*. In other words, the Maine statute asks whether a private school *is* "sectarian" (status)—not *how* it uses the particular tuition dollars it would receive from parents who elect to send their children to that school with the benefit of the state assistance (conduct or use). This is not some quirk of Maine's system; any attempt to discriminate based on religious use inevitably will end up discriminating based on the status of schools deemed "too religious."

To be sure, Maine argues that its nonsectarian rule 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 does not act *too* religiously. A school may be "associated" with a 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." *Ibid.* But excluding schools from benefits because the promotion and promulgation of their faith is a core part of their mission is itself "discrimination on the basis of religious status." *A.H. ex rel. Hester* v. *French*, 985 F.3d 165, 186 (2d Cir. 2021) (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.* v. *Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008)).

Thus, for example, if a tuition subsidy program excludes an Orthodox Jewish school because it begins the school day with prayer—even though the school is satisfying the curricular and other requirements applicable to all private schools—that is discrimination based on religious status, since prayer is part of the school's religious identity and beyond the proper purview of the state program (since the school still provides the requisite services).

The takeaway is that the use-status distinction is not a viable constitutional framework. It is subject to manipulation and to semantic line-drawing that bear no substantive connection to the constitutional values at play. If the Court endorses this dichotomy, any state seeking to exclude particular (or all) religions could simply characterize its discrimination as use-

based to avoid triggering strict scrutiny. See *Espinoza*, 140 S. Ct. at 2261; 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"). That would engender protracted litigation and reduce *Espinoza* to a nullity.

The Court should look past this artificial construct and confirm that states cannot discriminate based on religious status *or* religious conduct. Rather, as in all First Amendment condition cases, the critical question is whether the state is seeking to leverage its benefits program to deter or to punish constitutionally privileged conduct that is not meaningfully related to the program's religion-neutral purpose. See *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214–16 (2013); *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 399–401 (1984). That is clearly the case in tuition subsidy cases, where religious schools already satisfy any legitimate state objectives through their accreditation. Simply put, a state that treats a religious school as a substitute for public education cannot then deny equivalence to exclude the school from public benefits. And if the schools are indeed equivalent, exclusion based on religious status *or* religious use is unconstitutional. See Part III, below.

### B. The status-use distinction renders *Espinoza* a dead letter for Orthodox Jewish schools.

The status-use distinction is especially pernicious in the context of Orthodox Jewish day schools. In fact, the distinction cannot apply to such schools in any

meaningful way other than by excluding all of them. The First Circuit's approach would cut off *all* Orthodox schools from *Espinoza*'s core protections—a result that cannot be tolerated under the First Amendment. See Part II, below.

In practice, Maine's unequal treatment of private schools based on whether they engage in religious activities—what the lower court called use-based discrimination—would allow denial of funding to every Orthodox Jewish day school in the State. By definition, Orthodox Jewish day schools "promote[ ]" a Jewish "belief system" and/or "present[ ] the material taught through the lens of this faith." Pet. App. 35. Said otherwise, there is no such thing as a religious-in-name-only Orthodox Jewish day school.

For Orthodox Jewish parents, sending children to religious 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 (2013), https://jewishreviewofbooks.com/articles/511/the-day-school-tuition-crisis-a-short-history. This Court has recognized as much. See *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2065 (2020) (calling religious education "of central importance in Judaism" and quoting "Maimonides's statement that religious instruction 'is an obligation of the highest order, entrusted only to a schoolteacher possessing "fear of Heaven"'").

Parents send their children to Orthodox Jewish day schools for a host of intertwined religious and educational reasons. Typically, these schools provide a half-day of Judaic instruction, which may include Hebrew language, Jewish history, Bible classes, and (for older students) rigorous Talmud study. Notably,

the school day is often far longer than in public school to accommodate these extra subjects of instruction. This education is vital in preparing Jewish students to live life as faithful Jews and to take on leadership roles in the Jewish community.

Jewish day schools engage in other religious practices that facilitate Jewish children's ability to flourish, both as students and as observant Jews. For example, Orthodox Jewish day schools are closed on Jewish holidays. An Orthodox student in a public school would have to miss approximately 12 days of school every year to observe these holidays—not only the High Holy Days like Rosh Hashanah and Yom Kippur, but also the lesser known but equally important festivals of Sukkot, Shemini Atzeret, and Passover—on which Jews are prohibited to write, use electricity, or travel by bus or car. Jewish students who attend public schools will miss class time and accrue absences that could give rise to discipline. See Anti-Defamation League, *School & Workplace Accommodations for the Jewish High Holidays*, https://www.adl.org/education/resources/tools-and-strategies/school-workplace-accommodations-for-jewish-high-holidays (last visited Sept. 8, 2021) [https://perma.cc/5UDV-VB7F].

Other days on the Jewish calendar pose different challenges. For example, an observant student could attend school on the intermediate days of Sukkot—known as "Chol HaMoed"—but would be required to eat her meals in a temporary outdoor dwelling known as a Sukkah, which any Jewish school that remained open on the holiday would build. (The intricate laws of Sukkot comprise an entire tractate of the Talmud.) Attending school during the intermediate days of the

Passover holiday would also create difficulties, since there are strict restrictions on the types of foods Jews may eat during that period and where those foods can be prepared. And, on the topic of food more generally, Orthodox day schools typically provide kosher meals—which would apparently be a verboten religious "use" of school funding under the First Circuit's test.

Beyond curriculum and accommodation of ritual needs, Jewish schools partner with parents to provide an educational environment that allows students to learn and to practice their faith. For example, Orthodox Jewish schools incorporate daily prayer into the school-day schedule; morning prayer is often the first order of the day (before public schools are even open), and afternoon prayer takes place in between classes or after they finish. On Mondays and Thursdays, morning prayer for older students includes a reading from the Torah (required for those who have reached the age of Bar-Mitzvah, or 13). Grace After Meals may be recited by the student body after lunch. Gym may be deferred on religious fasts. On the festive Purim holiday, the school might hold a carnival. Other days of note to the Jewish community—such as Yom Ha'Shoah (Holocaust Remembrance Day) or Yom Ha'atzmaut (Israel's Independence Day)—might be marked by schoolwide assemblies. And, of course, these schools hire teachers who model proper Jewish behavior and law at all times, including when teaching secular subjects. Cf. *Our Lady*, 140 S. Ct. at 2064 ("[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.").

For all these reasons and others, Orthodox Jewish parents choose to send their children to schools that provide the education and way of life that they believe is dictated by their faith. This decision is not merely one of preference; it follows from central religious tenets. The intertwined nature of religious *belief* and religious *practice* in the educational context renders the status-conduct distinction meaningless as applied to Orthodox Jewish day schools. And imposing this artificial distinction, as the First Circuit did, would in practice exclude *every* Orthodox Jewish day school from *Espinoza*'s protection, even though those schools satisfy all the curricular and other requirements of Maine law. That reality underscores how the First Circuit's misguided and malleable framework would extinguish *Espinoza*'s promise.

## II. A status-conduct distinction is irreconcilable with the Free Exercise Clause and would violate the Establishment Clause.

The First Amendment cannot tolerate the status-conduct distinction. The Constitution protects *both* "freedom to act" *and* "freedom to believe." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). It does not "care[ ]" whether discrimination is based on conduct or on status. *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring). Whether the State discriminates based on religious status or religious conduct "makes no difference"; it is unconstitutional all the same. *Ibid.* Furthermore, distinguishing status from conduct would violate the Establishment Clause too, by preferring certain faiths over others, and by forcing courts to make intrusive judgments on matters of faith. The Court should reverse for these reasons as well.

### A. The Free Exercise Clause prohibits anti-religious discrimination whether it targets belief or action.

Maine's discriminatory regime violates the Free Exercise Clause by coercing religious persons and schools "into violating their religious beliefs" or "penaliz[ing] religious activity by denying [them] an equal share of the rights, benefits, and privileges enjoyed by other[s]." *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). The use-status distinction the First Circuit proposes to escape this conclusion cannot be squared with the original meaning of the constitutional text, the values of the Clause, or this Court's precedent.

**1.** Before the Founding, the status-conduct distinction was used to perpetuate discrimination against disfavored religions. 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) (Brennan, J., concurring in the judgment)). The Georgia Charter of 1732, likewise, employed the distinction to provide lesser protections for Catholics. While it allowed "a liberty of conscience" for "all persons inhabiting ... our said province," it provided the "free exercise of religion" to "all such persons, *except papists*." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1489 (1990)

(emphasis added). 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. To fast forward to today, the First Circuit might have called that ban on the exercise of Catholic faith a mere restriction on religious conduct, not status. (Of course, it is just that, showcasing again the gossamer nature of the dichotomy.)

To end that type of discrimination, the Founders intentionally drafted the First Amendment to protect the "freedom to act" and the "freedom to believe." *Cantwell*, 310 U.S. at 303. After all, it is the Free *Exercise* Clause, not the Free *Conscience* Clause. 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." McConnell, *supra*, at 1488. 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, J. Buchanan, *Linguae Britannicae Vera Pronunciatio* (R. Alston ed. 1967) (London 1757)). By employing the phrase "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 beliefs. And they squarely rejected that cramped view of religious freedom.

**2.** Maine's program further violates Free Exercise principles because it forces religious schools into a dilemma: "participate in an otherwise available benefit program or remain a religious institution," *Trinity Lutheran*, 137 S. Ct. at 2021–22. It also puts *parents* to a choice between their religious beliefs and receiving a public benefit. See *id.* at 2023.

Making matters worse, the Maine regime coerces religious schools and parents to act *less religious* to qualify for public benefits. To appear less "sectarian," an Orthodox Jewish school might make pre-class morning prayer "optional," give up communal Grace After Meals in favor of individual recitation, or call its Talmud class "comparative law." Or a Catholic high school that requires its students to volunteer at a homeless shelter or soup kitchen might call that "community service" instead of "corporal works of mercy" to obscure its religious core. Such incentives exist because Maine allows participating schools to *be* religious provided they do not *act* religious.

By conditioning public benefits on not acting "too" religious, Maine's program exemplifies to an even greater extent the coercion this Court in *Trinity Lutheran* decried. The "sectarian" restriction induces schools to downplay their religious features and to conceal their religious practices so that they could be perceived as acceptably religious-in-name-only. That is unconstitutional. See *id.* at 2020 (free exercise violation exists where "affected individuals [are] 'coerced by the Government's action into violating their religious beliefs'").

For the reasons explained above and others, Orthodox Jewish parents exercise their "high duty" to send their children to Orthodox Jewish day schools—

schools in which these practices and teachings are part and parcel of the educational formation provided to their students. See *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925). But, under Maine's regime, the more an Orthodox Jewish day school fulfills its faith-derived function and obligations to educate, the more parents are punished by the State for choosing to send their children to that school. This perversely incentivizes Orthodox Jewish day schools to become less like the schools that Orthodox Jews believe are required by their faith and more like the schools of some other faith or another branch of Judaism—or, perhaps, to *pretend* to be so to be accessible to parents who rely on the tuition benefit program and wish to send their children to a faith-based school. Maine's regime undercuts the ability of Orthodox Jewish day schools to fulfill an important obligation to their faith community, and cannot be reconciled with the Free Exercise Clause.

**3.** This Court's precedent confirms that the status-conduct distinction carries no constitutional weight. For example, in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, this Court invalidated 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); see also *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972) (explaining that a Free Exercise case "does not become easier" because a state targets action rather than belief, since "belief and action cannot be neatly confined in logic-tight compartments," particularly in the school context).

In short, religious *conduct* is protected by the First Amendment, and excluding those who engage in such conduct from otherwise-available public benefits "inevitably deters or discourages the exercise of First Amendment rights." *Trinity Lutheran*, 137 S. Ct. at 2022 (cleaned up). Consequently, "[w]hat benefits the government decides to give, whether meager or munificent, it must give without discrimination against religious conduct." *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring). And in deciding what restrictions qualify as discriminatory (versus merely being limits on the scope of the program), this Court's unconstitutional conditions precedent points the way. See *Agency for Int'l Dev.*, 570 U.S. at 214–16; *supra* at 10.

* * *

Ultimately, whether Maine's regime is purportedly use-based or status-based is merely the flip side of the same discriminatory coin. Seen one way, Maine excludes schools for *acting* in accord with religious tenets; seen the other, it would exclude schools for *being* religious. Either way, this discrimination violates the text and original meaning of the Free Exercise Clause and this Court's precedents.

### B. The First Circuit's approach also violates the Establishment Clause.

The conduct-status distinction also runs directly into the Establishment Clause—both by favoring certain religions or denominations over others, and by compelling judicial inquiry into ecclesiastical matters. This is yet another, independent basis on which the First Circuit's framework is unconstitutional.

**1.** To start, the First Circuit's framework would permit the State to exclude *all* Orthodox Jewish schools while favoring other religious schools (including other streams of Judaism) that do not follow the same type of pervasive ritual practices. Unlike Orthodox Judaism, those other faiths may allow for "religious" schools that comply with Maine's nonsectarian rule and qualify for assistance.

The problem is that the First Amendment does not allow the government to "prefer one religion over another" for any reason—let alone because its members lead less pervasively faithful lives. *Everson* v. *Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947). Rather, the Constitution "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968). A scheme that benefits only more commonly practiced or more secularized religions does not comply with this principle because it discriminates against parents whose religion requires an integrated, faith-driven education of their children. Cf. *Yoder*, 406 U.S. at 216 ("[T]he traditional way of life of [certain religious communities] is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.").

**2.** The First Circuit's conclusion that a state may deny tuition benefits to *some* religious schools also hopelessly entangles the state in religious matters, which is itself a serious Establishment Clause problem. "It 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." *NLRB* v. *Cath. Bishop of Chi.*, 440 U.S. 490,

502 (1979). Here, the inquiry contemplated by state law and the First Circuit—asking which schools' instruction crosses the highly subjective line to being "sectarian"—requires state officials or courts to make intrusive judgments about religious matters.

Determining that a school is "sectarian" boils down to a determination that, in the State's view, the school is *too* religious to qualify to receive tuition assistance from the parents who choose them. In doing so, the State must necessarily make judgments on matters of faith and doctrine—namely, which elements of a religious school's instruction are infused with or informed by its religion—and then somehow decide where a school's degree of religiosity falls on a vague and subjective spectrum of sectarianism. This not only invites but requires state bureaucrats and courts to trespass into forbidden ecclesiastical territory.

Recalling the hypotheticals above, *supra* at 17, does it matter if students pray silently or aloud in unison? Does it matter if certain rituals are deemed optional or voluntary? Can a Talmud class be rationalized as comparative legal study? If a school requires volunteer service at a hospital or homeless shelter to satisfy the Catholic tradition of Corporal Works of Mercy, does it matter that secular schools often require analogous community service for non-religious reasons? In all these instances, the State or the court would have to inquire into whether the school's practices are informed by a "faith or belief system," and if so, to what degree. Pet. App. 35.

The Constitution protects religious institutions from these kinds of intrusive judgments by a state or the judiciary. "[A]ny attempt by government to dictate or even to influence … matters [of faith and doctrine]

would constitute one of the central attributes of an establishment of religion"—an "intrusion" that is "outlaw[ed]" by the First Amendment. *Our Lady*, 140 S. Ct. at 2060; see also *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (observing that the Court's Establishment Clause jurisprudence "radiates … a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"). Decisions about what a particular faith requires of its schools and the education of young faithful are for religious entities or spiritual leaders to decide; the government may not "'troll[ ] through the beliefs of'" a religious school, "making determinations about its religious mission." *Duquesne Univ. of the Holy Spirit* v. *NLRB*, 947 F.3d 824, 835 (D.C. Cir. 2020); accord *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 188–89 (2012) ("Establishment Clause … prohibits government involvement in … ecclesiastical decisions").

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. Pet. App. 57–58. This is unsurprising given that Maine's statute discriminates on its face against religious schools by requiring that schools be "nonsectarian" to qualify. But when a religiously affiliated school *does* apply for tuition benefits, the State admittedly *must* wade into its curriculum, assessing whether the school promotes a "faith or belief system" or "presents the

material taught through the lens of … faith." Pet. App. 35. That is unconstitutional.

In short, a regime like Maine's that categorizes schools by their level of perceived religiosity violates these basic principles of religious freedom and runs afoul of the Establishment Clause.

## III. The lower court's rationalizations for Maine's discriminatory regime are misguided.

The First Circuit dismissed these First Amendment concerns, concluding that Maine is permissibly "ensuring the educational instruction provided by an applicant will mirror the secular educational instruction provided at Maine's public schools." Pet. App. 58. That reasoning fails.

For one, this rationale ignores that "[t]he State contributes no money to the schools," but rather "does no more than provide a general program to help parents," *Everson*, 330 U.S. at 18, to enroll their children in the school that best meets their needs in districts where no public option is available.

More fundamentally, this analysis ignores that Maine has already concluded that religious schools that satisfy its compulsory-attendance requirements are permissible alternatives to public education. Maine requires *all* schools to "meet the requirements for basic school approval—and thus the state's compulsory school attendance requirements"—and to employ only certified teachers. Pet. App. 7; Me. Stat. tit. 20-A, §§ 2901–2902 ("[p]rivate schools approved for attendance purposes" must "[p]rovide instruction in the basic curriculum established by … the commissioner" of department of education, and

"[e]mploy only certified teachers"). Despite treating religious private schools as substitutes for public schools, the State wants to punish parents for sending their children to those schools if they act religious—or at least act *too* religious. And the First Circuit agreed, insinuating that adding religious components to an otherwise first-rate secular education makes that education worse from the State's perspective. See Pet. App. 44 (calling religious schools not "a good substitute for a public school education" (emphasis omitted)).

That makes no sense: Excluding a school that teaches religious studies *in addition to* the required basic curriculum is no more constitutionally permissible than excluding a school because of its religious "status" or affiliation. In either case, the school is performing the task that the subsidy is designed to accomplish: providing the equivalent of a public education. Religious conduct or religious affiliation are both separate layers on top of the subsidized service. Unless the State is motivated by anti-religious animus—which would itself be a basis for invalidation, *Masterpiece Cakeshop, Ltd.* v. *Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1731–32 (2018)—it should not matter whether parents choose to send their children to a fully accredited school that *also* prioritizes Judaism, includes prayer, teaches the Talmud, or offers kosher food.

Further, the court below failed to distinguish a program that offers *only* public (and thus secular) educational options from one that provides tuition assistance for parents to choose among *private* schools for their children. Cf. Pet. App. 59 ("[A]ny family in Maine that prefers a sectarian education for their children to the secular one Maine provides as a public

option can pay the tuition for their child to receive such an education."). To be sure, a state that provides public education with no private tuition subsidies may not be constitutionally obligated to subsidize tuition for religious schools. Cf. *Everson*, 330 U.S. at 16 ("[W]e do not mean to intimate that a state could not provide transportation only to children attending public schools[.]"). But a state that *chooses* to subsidize private schools (and some religious ones) may not exclude other religious schools for being *too* religious. See *id.* at 16, 18 (state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation" because the First "Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers"). 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* v. *Helms*, 530 U.S. 793, 827–28 (2000) (plurality).

Ironically, the court below framed its decision to uphold the Maine regime as *avoiding* entanglement with religious matters. Pet. App. 56–59. But what the Maine program does is discriminate both against and between religions. It facially prefers non-religious schools over religious ones, and in application, favors religions that do not require adherents to saturate their lives (and education) with their faith over those that do. Further, the State forces unconstitutionally intrusive inquiries into the nature of a school's

religious practices and how they stack up on a subjective spectrum of sectarianism. Far from avoiding entanglement, the Maine scheme requires it. See Part II.B, above.

## CONCLUSION

This Court should reject the distinction between discrimination based on religious conduct and discrimination based on religious status, which is especially harmful for Orthodox Jewish schools.

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