No. 20-1088

In the
Supreme Court of the United States

**DAVID and AMY CARSON, as parents 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 Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit*

# BRIEF *AMICI CURIAE* OF THE NATIONAL LEGAL FOUNDATION, ILLINOIS FAMILY INSTITUTE, AND THE FAMILY FOUNDATION

*in Support of Petitioner*


Steven W. Fitschen
James A. Davids
The National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322

David A. Bruce
205 Vierling Dr.
Silver Spring, Md. 20904

Frederick W. Claybrook, Jr.
*Counsel of Record*
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, D.C. 20001
(202) 250-3833
rick@claybrooklaw.com

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## INTERESTS OF *AMICI CURIAE*[1]

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Maine, seek to ensure that free speech and free exercise of religion are protected in all places.

The **Illinois Family Institute** (IFI) is a nonprofit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of IFI is to uphold religious freedom and conscience rights for all individuals and organizations.

**The Family Foundation** (TFF) is a Virginia non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia, and its interest in this case is derived directly from its members throughout Virginia who seek to advance a

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[1] The parties were provided appropriate notice and have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than A*mici* made a monetary contribution intended to fund the preparation or submission of this brief.

culture in which children are valued, religious liberty thrives, and marriage and families flourish.

## SUMMARY OF THE ARGUMENT

This Court should grant the petition to settle the status/use question it left for future consideration in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and *Espinoza v. Montana Department of Revenue,* 140 S. Ct. 2246 (2020). Settling this dispute will continue to harmonize this Court's Religion Clauses precedent by rejecting those cases that sowed confusion by using, in effect, the "pervasively sectarian" status of the ultimate recipient of the benefit and settle the split on this important issue between the First Circuit's decision in this case and the Tenth Circuit's decision in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008).[2]

## ARGUMENT

Thirty years ago, Professor Michael McConnell described this Court's Religion Clauses jurisprudence, including that related to government benefits that directly or indirectly benefitted schools operated by religious organizations, as a "mess":

> With [Religion Clauses] doctrine in such chaos, the Warren and Burger Courts

[2] Although the Circuit split between the present case and *Colorado Christian University* was also discussed in the Petition for Writ of Certiorari, this Amici Brief goes deeper into the conflict, it discusses the not-yet-buried pervasively sectarian test, and it discusses the proper standard of review to apply to future cases.

> were free to reach almost any result in almost any case. Thus, as of today, it is constitutional for a state to hire a Presbyterian minister to lead the legislature in daily prayers, but unconstitutional for a state to set aside a moment of silence in the schools for children to pray if they want to. . . . . It is constitutional for the government to give money to religiously-affiliated organizations to teach adolescents about proper sexual behavior, but not to teach them science or history. It is constitutional for the government to provide religious school pupils with books, but not with maps; with bus rides to religious schools, but not from school to a museum on a field trip; with cash to pay for state-mandated standardized tests, but not to pay for safety-related maintenance. It is a mess.

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 119–20 (1992) (footnotes omitted).

The main reason for this confusion was this Court's focus on whether the ultimate recipient of the government benefit was "pervasively sectarian," i.e., whether the school taught its religion in a consistent, exclusive, and thoroughgoing way, which is nothing more or less than the free exercise of religion. *See* James A. Davids, *Pounding a Stake in the Heart of the Invidiously Discriminatory "Pervasively Sectarian" Test*, 7 Ave Maria L. Rev. 59 (2008)

(chronicling the Court's chaotic Establishment Clause jurisprudence from 1971-2007).

## I. *Mitchell v. Helms* Began This Court's Retreat from Disqualifying Religious Institutions from Receipt of Governmental Benefits Due to Their Religious Status and Exercise

This Court began to back away from its "pervasively sectarian" cases in *Mitchell v. Helms,* 530 U.S. 793 (2000). Justice Thomas in his plurality opinion (joined by Chief Justice Rehnquist, and Justices Kennedy and Scalia) expressly repudiated the pervasively sectarian test. He noted that use of that test demonstrates "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." *Id.* at 827-28 (plurality). In other words, the seriously religious schools were being discriminated against because of their sincere exercise of religion. Justice Thomas further observed that the courts are neither equipped nor authorized to "troll[ ] through a person's or institution's religious beliefs," as application of the pervasively sectarian test requires. *Id.* at 828 (plurality). Noting the tension with this Court's decisions in *Rosenberger*, *Lamb's Chapel*, and *Widmar*, Justice Thomas wrote that the use of the pervasively sectarian test collided with "our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Id.* (plurality) (citing *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819 (1995); *Lamb's Chapel v.*

*Center Moriches Union Free School Dist.,* 508 U.S. 384 (1993); *Widmar v. Vincent,* 454 U.S. 263 (1981)).

Finally, Justice Thomas discussed briefly the deplorable history that undergirds the pervasively sectarian test. *Id.* at 828-29 (plurality). He noted, for instance, the anti-Catholic bias that led to the near passage of the Blaine Amendment, which would have deprived public aid to sectarian ("code" for Catholic) schools.[3] Justice Thomas concluded, "In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now." *Id.* at 829 (plurality).

Justice O'Connor, with Justice Breyer, concurred in the judgment in *Mitchell*, but they did not entirely jettison the pervasively sectarian test. Justice O'Connor still required an analysis of whether a neutral benefit would be used for purposes such as "religious indoctrination." *Id.* at 850-56 (O'Connor, J., concurring in judgment). Justice Souter in dissent argued that religious instruction in a pervasively sectarian school always pervaded the curriculum and so disqualified the school from

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[3] *Id.* Justice Thomas pointed out that Justice Souter almost exclusively referred to Catholic schools in the portion of his dissent devoted to the pervasively sectarian test, exemplifying the Court's almost exclusive application of the test to Catholic schools. *Id.* at 829 (plurality). Justice Alito provided a more detailed discussion on the anti-Catholic bias of the Blaine Amendments in his concurrence in *Espinoza v. Montana Department of Revenue,* ___ U.S. ___, 140 S. Ct. 2246, 2267 (Alito, J., concurring).

governmental assistance, i.e., simply by virtue of its exercise of its religion:

> [W]e have concluded that religious teaching in such schools is at the core of the instructors' individual and personal obligations, and that individual religious teachers will teach religiously. . . . [Accordingly,] as religious teaching cannot be separated from secular education in such schools or by such teachers, we have concluded that direct government subsidies to such schools are prohibited because they will inevitably and impermissibly support religious indoctrination.

530 U.S. at 886–87 (Souter, J., dissenting).

## II. This Court Rejects Discrimination Against Schools Because of Their Religious Character (Status)

Two decades later, in *Trinity Lutheran Church*, this Court firmly rejected Justice Souter's reasoning in his *Mitchell* dissent. Instead of the Establishment Clause forbidding an evenhanded application of governmental benefits to include religious organizations, the Court held that the Free Exercise Clause prohibits them from being discriminated against solely because of their religious status. *Trinity Lutheran Church of Columbia, Inc v. Comey,* 582 U.S. ___, 137 S. Ct. 2012 (2017). The majority opinion did not have to reach, and explicitly reserved, the issue presented by this petition: whether the Free Exercise Clause also

prohibits denial of a governmental benefit because of an organization's practice of religion. *Id.* at 2024 n.3. Justice Gorsuch, joined by Justice Thomas, expressed the opinion that discrimination because of the exercise of religion is exactly what the Free Exercise Clause reaches. *Id.* at 2025-2026 (Gorsuch, J., concurring).

Similarly, in *Espinoza* this Court again found that a state denying participation by religious schools in a generally applicable scholarship program because of their religious status violated the Free Exercise Clause, but reserved the issue of discrimination based on religious practice. 140 S. Ct. at 2256. And Justice Gorsuch again expressed that discrimination on either account violates the Free Exercise Clause: "Calling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same." *Id.* at 2278 (Gorsuch, J., concurring).

We agree with Petitioners that the present case, involving the eligibility of a religious school for receipt of public funds (tuition) through the independent choice of parents, directly presents the issue of whether discrimination based on religious activity (and therefore use of the public funds) can be tolerated under the Free Exercise Clause. In fact, the First Circuit, with Justice Souter sitting on the panel, distinguished *Trinity Lutheran* and *Espinoza* on exactly that basis, with the status/exercise (use) distinction forming the *ratio decidendi*. *Carson,* 979 F.3d 21, 40-45 (1st Cir. 2020).

Because the statute at issue requires private schools to qualify for scholarship money, even though

received indirectly through parental choice, to be "nonsectarian in accordance with the First Amendment" (Me. Stat. tit. 20-A § 2951 (2)), it appears to be a status-based restriction, falling under the direct holdings of *Trinity Lutheran* and *Espinoza*. But the Commissioner of Maine's Department of Education in answering interrogatories interpreted the quoted phrase, in essence, to adopt this Court's earlier, "pervasively sectarian" case law, stating that

> the Department considers a sectarian school to be one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith. While affiliation or association with a church or religious institution is one potential indicator of a sectarian school, it is not dispositive. *The Department's focus is on what the school teaches through its curriculum and related activities, and how the material is presented.*

*Carson*, 979 F.3d at 38 (emphasis in original). That is, according to the Commissioner, eligibility is directly tied to how a sectarian school practices its faith or belief system. A religious school is eligible if it doesn't teach religion or teach through the "lens of faith," but, presumably, if a religious school introduces a math course by instructing students that math reflects the orderliness of God's creation or if it teaches in a civics class that the separation of

powers in the Constitution is consistent with the Christian doctrine of the Fall and not placing too much power in one or a few individuals, then that school is ineligible.

This Court should accept this petition to clarify that disqualifying an organization from an otherwise generally applicable government benefit because of its practice of its religion violates the Free Exercise Clause. This Court's case law should once again make clear that free exercise of religion is protected under the Free Exercise Clause, rather than discriminated against. This result is also commanded because courts would otherwise be asked to determine when religious exercise becomes too "pervasive" to be treated like any other organization, and such an inquiry would automatically entangle the courts in the realm of theology, which the First Amendment forbids. That is a key point made by the Tenth Circuit in *Colorado Christian University*.

## III. The First Circuit's Decision Conflicts with That of the Tenth

*Colorado Christian University* involved a state scholarship program that granted scholarships to college students who attended in-state schools. *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2015). To be eligible for this program, a Colorado college could not be a "pervasively sectarian" school as defined by a Colorado statute. Colorado determined two religious schools—Regis University (a Roman Catholic college run by the Jesuits) and the University of Denver (a Methodist institution)—to be eligible because not pervasively sectarian, but Colorado Christian University not

eligible because it was. *Id.* at 1258. To make that determination, Colorado investigated CCU's theology courses syllabi and the religious beliefs of CCU's faculty, students, and trustees. After completing this investigation, the Commission found dispositive that CCU's theology courses impermissibly "tend[ed] to indoctrinate or proselytize," that CCU's trustees were limited to one religion (Christianity), and that CCU required some of its students to attend chapel. *Id.* at 1253. Then-Judge McConnell for the Tenth Circuit ruled that this deep dive into how religious schools put their beliefs into practice was unconstitutional, as it required the state to make religious judgments and decide winners and losers among sectarian organizations. *Id.* at 1258. This necessarily entailed, Judge McConnell continued, "discrimination 'on the basis of religious views or religious status' and is subject to heightened constitutional scrutiny." *Id.* (quoting *Employment Div. v. Smith,* 494 U.S. 872, 877 (1990).

Finally, this Court should grant the petition and decide this case in order to determine the level of review to apply in "use" cases. The First Circuit in *Carson* applied the rational basis test to the Petitioners' equal protection argument regarding the unequal treatment between sectarian and pervasively sectarian schools. 979 F. 3d at 46-47. The Tenth Circuit in *Colorado Christian University*, however, thought the equal protection challenge was subject to "heightened scrutiny" based on *Locke v. Davey*, 540 U.S. 712 (2004). *See* 534 F.3d at 1267. "Heightened scrutiny," of course, is less exact than intermediate review or strict scrutiny and, more importantly, discrimination between nominally religious institutions and seriously religious

institutions is still discrimination based on religion. Since a "penalty on the free exercise of religion . . . triggers the most exacting scrutiny," *Trinity Lutheran,* 137 S. Ct. at 2021, we respectfully suggest that the Court use the same review standard (strict scrutiny) for both "status" and "use" cases. Only this Court can resolve this split between the First and Tenth Circuits.

## CONCLUSION

This Court should grant the petition and reverse.

Respectfully submitted,
This 11th day of March, 2021,

/s/ Frederick W. Claybrook, Jr.
Frederick W. Claybrook, Jr.
*Counsel of Record*
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, D.C. 20001
(202) 250-3833
Rick@Claybrooklaw.com

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322

David A. Bruce
205 Vierling Dr.
Silver Spring, Md. 20904