No. 20-1088

In The Supreme Court of the United States

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

v.

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

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

BRIEF OF CHRISTIAN LEGAL SOCIETY, AGUDATH ISRAEL OF AMERICA, AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, THE ANGLICAN CHURCH IN NORTH AMERICA, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, COUNCIL FOR AMERICAN PRIVATE EDUCATION, COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, THE LUTHERAN CHURCH – MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, AND QUEENS FEDERATION OF CHURCHES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONS, STATUTES, AND RULES

TABLE OF AUTHORITIES—Continued

SECONDARY AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

The *amici* joining this brief are listed on the cover. *Amici* are religious and civil liberties organizations who all endorse a vital principle: that families that use private schools should not suffer government discrimination because their choice of school is religious. *Amici* include Christian organizations, associations, and denominations, as well as an Orthodox Jewish organization with members, constituent religious bodies, and affiliated synagogues. Some *amici* operate or support private religious schools that families choose for their children. All *amici* agree that the First Circuit's decision warrants this Court's review because it permits unconstitutional discrimination against religion in government benefits, and because it gives states a roadmap for attempting to excuse such discrimination by labeling their benefits as "equivalents" of secular public services.

INTRODUCTION AND SUMMARY OF ARGUMENT

Last term, in *Espinoza v. Montana Department of Revenue*, this Court held: "A State need not subsidize private education. But once a State decides to do so, it

[1] This brief was prepared and funded entirely by *amici* and their counsel. No other person contributed financially or otherwise. Pursuant to Rule 37.2(a), all parties' counsel of record received timely notice of the intent to file this brief. Petitioners filed a blanket consent with the Clerk, and Respondent provided written consent.

cannot disqualify some private schools solely because they are religious." 140 S. Ct. 2246, 2261 (2020); see also *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019 (2017). Maine violates this rule. It authorizes tuition payments for students attending secular private schools but disqualifies schools that are "sectarian."

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

Amici agree with petitioners that the decision below deepens a circuit split, and that this case presents the proper vehicle for addressing this important issue, Pet. 17-28, 34-37. We write to make two points.

I. Exclusion of private religious schooling from a benefit available to private secular schooling violates the Free Exercise Clause not only when singling out religious status or identity, but also when singling out religious uses of the benefit. To

distinguish "status-based" discrimination from "use-based" discrimination conflicts with constitutional text and this Court's jurisprudence, both of which protect not just the right to have a religious identity but to "exercise" it—here, by including religious teaching in the education that a school provides and a family chooses.

Moreover, the status-use distinction collapses in the context of religiously grounded K-12 education. Religious schools teach the same secular subjects as other schools; in providing benefits assisting the teaching of these subjects, the state cannot discriminate on the basis that some schools also teach religion. To teach religion is what it means to be a religious school; church-affiliated schools that teach no religion do not exist. Barring schools from educational benefits because they teach religion is to bar them because of their religious status or identity. Some religious schools teach an essentially secular curriculum plus a religion course or chapel services. Other schools integrate religion into their secular subjects. These schools—and families who use them—do so because their religious identity permeates education. Whether called "belief or status" or "use," "[i]t is free exercise either way" (*Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part)), and the state presumptively cannot discriminate against it.

Finally, *amici* give additional reasons why the First Circuit's approval of "use-based" discrimination conflicts with *Hartmann v. Stone*, 68 F.3d 973 (6th Cir.

1995), and *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008).

II. Nor can a state justify discrimination against religious schools with the ploy that the First Circuit permitted here: labeling its benefit as a "substitute" for, or "rough equivalent" of, a free "secular public education," and then arguing that such an education must be secular, so religious schools can be excluded. That result and rationale conflict with this Court's ruling in *Espinoza* and would allow easy evasion of *Espinoza* in the context of many government benefits. This Court must reject that rationale before other states attempt to capitalize on it.

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

The discrimination is especially clear here because the state does not actually require private schools participating in the program to be "substitutes" for or "equivalents" of public education. Maine does not impose all of its public-school requirements on participating private schools; and almost all the requirements it does impose are already required—from religious as well as secular private schools—as part of state approval for attendance purposes. Private

schools can also satisfy the requirements through approval by a private-school accrediting agency. Virtually the only difference between state approval for compulsory-attendance purposes and state approval for tuition-assistance purposes—the one requirement that makes a private school a "substitute" for public education—is the "nonsectarian" requirement. The state's attempt to relabel its benefit to justify singling out religious schools for exclusion is an unconstitutional gerrymander against religion. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993).

Finally, permitting the state to label its benefit as the "rough equivalent" of a secular public education would authorize discrimination against religious providers in many other contexts. By defining benefits for education or social-service providers as "rough equivalents" of a secular government-provided service, states could justify excluding religious providers from scholarship programs supported by tax credits (negating *Espinoza*), from aid for college and university students, and from aid for child care, mental health, substance-abuse treatment, or other social services. The First Circuit's holding and rationale subvert *Espinoza* and penalize the free exercise of religion.

ARGUMENT

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

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

Exploiting the "status" versus "use" distinction, the First Circuit upheld Maine's discriminatory exclusion of "sectarian" schools on the ground that it targeted religious uses rather than religious status. The court held that the discrimination was use-based because in defining what schools are sectarian and thus excluded, "[t]he [state's] focus is on what the school teaches through its curriculum and related activities, and how the material is presented." Pet. App. 35a.

But a "status-use" distinction cannot be the proper constitutional line concerning discrimination against religion in student-aid programs. The distinction conflicts with the text of the Free Exercise Clause

and decisions of this Court; it collapses in the context of benefits to religiously grounded education; and it contradicts decisions of the Sixth and Tenth Circuits.

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

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

modes of transportation." *Employment Division v. Smith*, 494 U.S. 872, 877 (1990).

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

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

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

When South Carolina denied unemployment benefits to Adele Sherbert, it did not penalize her because she was a Seventh-day Adventist. *Sherbert*, 374 U.S. at 404. It penalized her because she refused

to work on her Sabbath in accordance with her religious identity and status. *Id*. This Court nonetheless found the denial of benefits unconstitutional.

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

Moreover, *McDaniel v. Paty*—a case sometimes cited as invalidating discrimination based on "status"—actually reflects a broader rule. *McDaniel* struck down a state constitutional provision barring clergy from serving in the state legislature or at a state constitutional convention. The plurality held that the state had placed an unconstitutional disability on McDaniel—ineligibility for office—because of his "status as a 'minister.'" 435 U.S. at 627. But the plurality immediately noted that Tennessee defined ministerial status "in terms of conduct and activity." *Id.* Tennessee's purported interest against establishment could not justify discrimination against religious activity. *Id.* at 627-29.

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

Justice Brennan rejected that distinction for reasons that are highly relevant here:

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

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

> The provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity. Such a classification as much imposes a test for office based on religious conviction as one based on denominational preference. A law which limits political participation to

> those who eschew prayer, public worship, or the ministry as much establishes a religious test as one which disqualifies Catholics, or Jews, or Protestants.

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

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

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

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

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

2. The status-use distinction collapses here in another way. As already discussed, the exclusion of religious use of educational benefits especially burdens religious schools that incorporate faith into their secular instruction: those that perceive most or all aspects of life from a religious lens. See pp. 10-11 *supra*. The religious identity of these schools is defined

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

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

3. Finally, the status-use distinction collapses because discrimination on either basis penalizes the religious decisions and religious exercise of families using the schools. Whether described as status-based or use-based, a discriminatory exclusion from benefits "puts families to a choice between sending their

children to a religious school or receiving such benefits." *Espinoza*, 140 S. Ct. at 2257 (quotation omitted); see *id.* at 2261 (noting that the Court "ha[s] long recognized the rights of parents to direct 'the religious upbringing' of their children," including rights to send them to religious schools). Whichever sort of religious school these families choose, they are "'member[s] of the community too,' and their exclusion from the scholarship program here is 'odious to our Constitution' and 'cannot stand.'" *Id*. at 2262-63 (quoting *Trinity Lutheran*, 137 S. Ct. at 2023, 2025).

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

D. The Decision Below Conflicts with Decisions of the Sixth and Tenth Circuits.

We agree with the petition that the First Circuit's decision conflicts with *Hartmann v. Stone*, 68 F.3d 973

(6th Cir. 1995); and *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). Both of those decisions invalidated provisions that excluded providers from benefits because those providers included religious elements in their activities.

In *Hartmann*, the Sixth Circuit invalidated an Army regulation that barred service members from using Army childcare benefits at providers whose programs included religious elements such as "[t]he dissemination of religious information (e.g., grace) or materials" and "program activities that teach or promote religious doctrine." 68 F.3d at 977 (citation omitted). The exclusion unquestionably discriminated on the basis of religious use; the Sixth Circuit, in contrast with the First Circuit here, applied the compelling-interest test and invalidated the exclusion. *Id*. at 979.

In *Colorado Christian*, the Tenth Circuit similarly invalidated a provision that excluded students at "pervasively sectarian" institutions from otherwise available state scholarships. The Colorado provision defined "pervasively sectarian" based in part on possible religious uses of the funds, including factors such as "required attendance at religious convocations or services" and "required courses in religion or theology that tend to indoctrinate or proselytize." *Id*. at 1250-51. The court, in an opinion by Judge McConnell, found that the latter criterion created unconstitutionally "intrusive," "subjective," and "entangl[ing]" inquiries into religious doctrine. *Id.* at 1261-62; accord *Hartmann*, 68 F.3d at 981-82 (holding that the

exclusion threatened excessive entanglement by requiring determinations of "exactly how much religion is too much" and whether religious elements constituted "proselytizing"). Here, however, the court of appeals permitted Maine to determine a school's "sectarian" nature based on the same elements, "such as mandatory attendance at religious services and course curricula." Pet. App. 58a (quotation marks omitted). The conflicts in result and reasoning are plain.

Colorado Christian also shows that the status-use distinction collapses. The category of excluded institutions was based in part on religious uses, as noted. The court not only held that Colorado discriminated against religion, but also that it "necessarily and explicitly discriminates *among* religious institutions, extending scholarships to students at some religious institutions, but not those deemed too thoroughly 'sectarian' by governmental officials." 534 F.3d at 1258 (emphasis added); see *id.* at 1259 (the exclusion unconstitutionally discriminated "based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations"). Accord *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring in the judgment) (states may not discriminate based upon the "level of intensity of involvement in protected religious activity"). Again, the status-use distinction is

unstable and cannot mark the constitutional line. See *supra* pp. 11-14.[2]

II. The Court of Appeals' Ruling, Which Allows the State to Discriminate Against Religious Schooling by Labeling Its Benefit as a "Secular Public Education," Conflicts with *Espinoza* and Allows Easy Evasions of It.

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

Specifically, the First Circuit permitted Maine to characterize its program as "ensur[ing]" that students in a location without a public school can "get an

[2] The First Circuit's decision is also in tension with the more recent decision in *A.H. v. French*, 985 F.3d 165 (2d Cir. 2021). Vermont has a system quite similar to Maine's, in which some public-school districts pay tuition to send their students to secular private schools. Students attending religious schools are ineligible, and this exclusion makes them also ineligible for another program, in which the state pays tuition for high-school students to take two college courses during their senior year. *A.H.* invalidated this collateral consequence because the burden was "borne exclusively by students attending religious schools." *Id.* at 181. Maine's exclusion likewise imposes a burden solely on students attending "sectarian" schools. The Second Circuit described Vermont's discrimination as status-based (*id.* at 182-83); but because the status-use distinction collapses (*supra* pp. 11-14), it cannot distinguish excluding "religious" schools from excluding "sectarian" schools.

education that is 'roughly equivalent to the education they would receive in public schools.'" Pet. App. 43a; see *id.* 29a, 49a (same); *id.* at 47a, 49a (describing it as "substitute" for free public education). But, the court said, "there is no question that Maine may require its public schools to provide a secular educational curriculum rather than a sectarian one," and the state had "permissibly concluded that the benefit of a free public education is tied to the secular nature of that type of instruction." *Id.* 44a, 45a. Thus, the court held, families who would use tuition assistance at a "sectarian" school "are not seeking 'equal access' to the benefit that Maine makes available to all others—namely, the free benefits of a *public* education." *Id.* 44a (emphasis in original).

This holding and reasoning violate *Espinoza*'s explicit ruling that once the state subsidizes private schools, it cannot exclude schools because they are religious. *Espinoza*, 140 S. Ct. at 2261. And permitting the decision below to stand would authorize religious discrimination in many other public-benefit contexts, allowing easy evasion of this Court's rulings.

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

The bottom line is this: Maine offers tuition benefits for students attending eligible private schools. Me. Stat. tit. 20-A, § 5204(4). But it targets "sectarian" private schools for exclusion from this benefit. *Id*.

§ 2951(2). Calling the benefit a "substitute for a free, secular public education" (Pet. App. 50a) does not change these facts of religious discrimination.

Regardless of how the state labels the benefit, its exclusion violates this Court's express language in *Espinoza*: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." 140 S. Ct. at 2261. (And for the reasons given in Part I, there is no relevant distinction between discriminating against schools "because [they] are religious" and discriminating against them "because they include religious teaching with secular teaching.")

The "public equivalent" rationale is also illogical. The proposition that states can fund only public schools, which must not engage in religious teaching, in no way implies that states can fund secular private schools but exclude those that engage in religious teaching. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids"—or at least severely restricts in public schools—"and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion) (emphases in original). And there are good reasons for treating public and private schools differently. Among other things, even though public schools are barred from promoting religious ideas (but not from promoting secular ideas), the First Amendment also

ensures that they observe some degree of religious neutrality, because they cannot discriminate against students' voluntary religious activity. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) (holding that a school committed unconstitutional viewpoint discrimination when it barred a religious club from meeting after hours at the school). But the First Amendment does not limit secular private schools; therefore, they have the ability to discriminate in various ways against religious teaching and religious activity or to promote anti-religious teaching. The lack of safeguards for religious neutrality in secular private schools confirms the point: Funding students in those schools but not students in religious private schools is rank discrimination.

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

The discrimination here is especially clear because, although Maine claims that secular private schools are public-school "equivalents" or "substitutes," the tuition-assistance program does not actually require them to be equivalents or substitutes. This is so for several reasons.

First, under Maine statutes, a number of curricular or other features required in public schools

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

- Special education, § 4702;
- Instruction in Braille, *id*. § 4709;
- Dyslexia screening, *id*. § 4710-B;
- Career and technical instruction, *id*. § 4725;
- World languages, *id*. § 4726;
- "[O]pportunities for learning in multiple pathways" such as alternative education programs, apprenticeships, advanced placements, or gifted and talented programs, *id*. § 4703; and
- "[A] system of interventions for kindergarten to grade 12" to assist "each student who is not progressing toward meeting . . . content standards [or] graduation requirements." *Id*. § 4710.

The state can hardly call secular private schools a "substitute" for public education when the statutes do

not require private schools to meet many of the standards for public schools.

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

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

it accepts them on whether private schools satisfy the compulsory-attendance laws.

Finally, Maine does not directly operate or fully fund the private schools in the tuition program, as it does with public schools. See Me. Stat. tit. 20-A, § 1(22) (defining a private school as "an academy, seminary, institute or other *private corporation or body* formed for educational purposes" (emphasis added)). Under the tuition program, Maine merely provides public funds to qualified institutions for purposes of a student's tuition. *Id*. § 2951.

Consequently, there is essentially only one difference between the state's requirements for a private school to operate and the requirements for it to participate in the tuition assistance program: namely, the requirement that the school be "nonsectarian."[3] For Maine, what makes a private-school education the "equivalent" of a public education, rather than just an acceptable alternative to public education, is that it is strictly non-religious. Maine excludes private schools from the tuition-assistance program based on a religious criterion and virtually no other.

The court of appeals gives the game away by repeatedly referring to the state's interest as providing a "*rough* equivalent" to a public-school education, Pet. App. 29a (emphasis added); see *id.* 39a n.6, 43a,

[3] The other criteria in § 2951 (see *supra* p. 22) do not affect this conclusion. Reporting requirements do not change the nature of the education; the assessment requirements apply only to some schools.

48a-49a. That convenient qualifier permits the state to accept multiple differences between secular private schools and public schools while still claiming that "sectarian" schools are non-equivalent.

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

This Court has rejected exactly this sort of manipulation of a "public" baseline to justify discrimination against religion. In *Mergens*, *supra*, a public high school denied permission for a student Christian club to meet in schoolrooms, on the same terms as other student clubs, for prayer, fellowship, and Bible study. 496 U.S. at 232. The club's students sued under the Equal Access Act, 20 U.S.C. §§ 4071-4074, which prohibits discrimination against student clubs based on the content of their expression whenever the school permits one or more "noncurriculum related student groups to meet." 20 U.S.C. § 4071(b) (defining this as a "limited open forum"). The school defended its discrimination against the religious club by claiming that, unlike a possible religious club, all existing

student clubs were curriculum related. *Mergens*, 496 U.S. at 244. According to the school, the chess club promoted math and science, student government clubs related to political science, and a scuba-diving club fostered physical education. *Id*.

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

Mergens forbade the state to label all non-religious clubs as broadly "related to" the public-school curriculum in order to single out the religious club for exclusion. Here, the state seeks to label all non-religious private schools as broadly "equivalent" to public schools in order to single out religious private schools for exclusion. The Court must again forbid that maneuver. Like the ploy in *Mergens*, it would allow government "to evade the [Constitution] by strategically describing" programs, "render[ing this Court's rulings] merely hortatory." *Id.* at 244.

C. The Decision Below Would Authorize States to Discriminate Against Religion in Many Other Contexts, Evading This Court's Decisions.

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

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

2. Under the loose standard the First Circuit approved, states also could relabel their higher-education student aid as benefitting the "rough equivalent" of public-university education; since such public education must likewise be "secular," the state could discriminate against students attending religious institutions. In *Colorado Christian*, Colorado could have labeled its higher-education tuition-aid programs as a benefit for students receiving (secular) education at public colleges or its "rough equivalent" at

(secular) private colleges. And Colorado could have barred funds for students who would use them at "sectarian" institutions. Contra *Colorado Christian*, *supra* (invalidating the exclusion of "pervasively sectarian" institutions).

3. Under the same standard, federal or state governments could exclude religious social-service providers from eligibility for generally available funds supporting services such as outpatient mental-health services or substance-abuse treatment. Both government and private entities, secular and religious, provide such services. A state could label its benefit as supporting government-provided (secular) services or their "rough [secular] equivalents." Similarly in *Hartmann*, *supra*—subsidy of childcare for children of government employees—the government entity can label its benefit as supporting government-provided [secular] childcare or its "rough equivalent," namely, childcare provided without any religious elements. By that ploy, the government could exclude religious providers that incorporate any religious elements into their childcare, no matter the secular value that such care provides. Contra *Hartmann*, 68 F.3d at 975 (invalidating provision that barred childcare providers from benefits if the providers included religious activities in their programs).

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CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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