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,
Respondent.

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

BRIEF OF *AMICI CURIAE* WORLD FAITH FOUNDATION AND INSTITUTE FOR FAITH AND FAMILY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae respectfully urge this Court to reverse the decision of the First Circuit.

World Faith Foundation is a California non-profit, tax-exempt corporation established to preserve and defend the customs, beliefs, values, and practices of religious faith, as guaranteed by the First Amendment, through education, legal advocacy, and other means. WFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA).

Institute for Faith and Family ("IFF") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including religious liberty and parental rights. This Court's decision will help the State of North Carolina preserve its Opportunity Scholarship Program, which provides scholarships to low-income children throughout the state. See https://iffnc.com.

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[1] The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Maine's tuition assistance program has created a conundrum under both Religion Clauses. Parents choose the schools their children will attend. Under this Court's existing precedent, any school that satisfies the state's compulsory education requirement should be eligible to receive payments. Instead, the government uses an intrusive examination of curriculum to eliminate academically qualified schools that take their faith seriously and integrate it into the entire curriculum, based on a fine-line distinction between religious *status* and religious *use* (Sect. I). The procedure raises blatant entanglement concerns (Sect. II) and revives the "pervasively religious" factor this Court rejected decades ago (Sect. III).

Over the past several decades, this Court has shifted from a strict "no aid" policy to a flexible position applying nondiscrimination principles in cases involving government aid to religious organizations (Sect. IV). Although *Trinity Lutheran* and *Espinoza* continued this trend, both left open the status-use distinction for another day. That day has come. This Court should continue down the path of nondiscrimination, reverse the First Circuit, and hold that Maine cannot discriminate against otherwise qualified schools that take religion seriously.

I. RELIGIOUS "STATUS" AND RELIGIOUS "USE" ARE INEXTRICABLY INTERTWINED, MUCH LIKE THE FREEDOM TO HOLD RELIGIOUS BELIEFS AND THE FREEDOM TO ACT ON THOSE BELIEFS.

Maine has crafted a tuition assistance program that poses no threat to "[t]hose apathetic about religion or passive in its practice" but denies participation to "those with a deep faith that requires them to do things" like incorporating their faith into all of life. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2277 (2020) (Gorsuch, J., concurring). Maine's exclusion of otherwise qualified schools discriminates against schools and families "who take their religion seriously" and believe it "should affect the whole of their lives." *Mitchell v. Helms*, 530 U. S. 793, 827-828 (2000) (plurality opinion).

This case turns on a hair-splitting distinction between *status* and *use*. When this Court overturned the bar against clergy serving in a statute legislature, "conduct lurked just beneath the surface" of a seemingly status-based ban. *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring), citing *McDaniel v. Paty*, 435 U. S. 618 (1978) (plurality opinion). But the Free *Exercise* Clause "guarantees the free *exercise* of religion, not just the right to inward belief (or status)." *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2026 (2017) (Thomas, J., concurring) (emphasis added). Individuals are free to *believe* religious doctrine, but increasingly coerced not to *act* on those beliefs in public life. "Even today . . . people of faith are made to choose

between receiving the protection of the State and living lives true to their religious convictions." *Espinoza*, 140 S. Ct. at 2278 (Gorsuch, J., concurring). Such censorship cuts against the Constitution's guarantee of the right "not just . . . to *be* a religious person, holding beliefs inwardly and secretly" but "the right to *act* on those beliefs outwardly and publicly." *Id.* at 2276 (Gorsuch, J., concurring); see *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940) ("freedom to act" and "freedom to believe" are both protected).

Today the Court must differentiate religious *status* and religious *use*, a task as futile as drawing a line in the sand on a windy day. "The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long . . . ." *Trinity Lutheran*, 137 S. Ct. at 2025 (Gorsuch, J., concurring). "[A]ny jurisprudence grounded on a status-use distinction seems destined to yield more questions than answers." *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J., concurring). Even if the goal or effect of status-based discrimination is "preventing religious organizations from putting aid to religious uses," it is still status-based. *Id.* at 2256. Maine is concerned that some religious schools would *use* public funds to further their religious purposes. But just as belief and action are inseparable in the life of an individual, *status* and *use* are inseparable in operating a religious organization. *Trinity Lutheran* did not address "religious uses of funding," leaving that for another day. *Trinity Lutheran*, 137 S. Ct. at 2024 n. 3. *Espinoza* noted the matter but did not settle it. "This case also turns expressly on religious status and not religious

use." *Espinoza*, 140 S. Ct. at 2256. But the time has now come to grapple with the issue.

This Court's decisions have long "prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell*, 530 U.S. at 828; *Trinity Lutheran*, 137 S. Ct. at 2019 ("religious identity"); *id.* at 2022 ("religious control or affiliation"); *Espinoza*, 140 S. Ct. at 2255 ("religious character"). Discrimination "solely because of . . . religious character" "*punishe[s]* the free exercise of religion" and imposes a penalty that warrants "the most exacting scrutiny." *Id.* at 2255, 2256; *Trinity Lutheran*, 137 S. Ct. at 2021, 2022; *Carson v. Makin*, 979 F.3d 21, 34 (1st Cir. 2020); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 533, 542 (1993) (strict scrutiny applied to laws that target religion for "special disability"). The freedom to continue operating as a religious organization, whether a church or a school, "comes at the cost" of "exclusion from the benefits of a public program . . . for which the [organization] is otherwise fully qualified." *Trinity Lutheran*, 137 S. Ct. at 2022. The government generally may not force a choice between "participation in a public program" and the "right to free exercise of religion." *Id.* at 2026 (Thomas, J., concurring); *see Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 716 (1981); *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947); *Carson*, 979 F.3d at 34 (such a choice is "not free from coercion").

Locke v. Davey does not alter the analysis. That case involved a narrow, specific ban on the use of funding

for the training of ministers, based on founding era debates over state-supported clergy. *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J., concurring). The ban fell within an otherwise widely available scholarship program that allowed funds to be used even at "pervasively religious" schools. *Id*. at 2257; *Locke v. Davey*, 540 U.S. 712, 724-725 (2004).

A. Religious *use* that results from private choice is not attributable to the state.

Even under the widely criticized *Lemon* test, "[f]or a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Mitchell*, 530 U.S. at 809, quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 337 (1987). When government aid is available to religious schools, the question of governmental indoctrination "is ultimately . . . whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809; *see also Agostini v. Felton*, 521 U.S. 203, 230 (1997) (question is whether "any use of [governmental] aid to indoctrinate religion could be attributed to the State"). In *Zobrest v. Catalina Foothills Sch. Dist.*, the presence of a sign-language interpreter in a religious school was not the result of state action. 509 U.S. 1, 10 (1993). The interpreter was not inculcating religious teachings herself, so "no *government* indoctrination took place." *Agostini*, 521 U.S. at 224 (emphasis added). Where the state aid *itself* is not "unsuitable for use in the public schools because of religious content . . . any use of that

aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern." *Mitchell*, 530 U.S. at 820 (internal citations and quotations omitted). In earlier cases (*Zobrest*, *Witters*, *Mueller*), this Court did not demand that the state demonstrate the aid was "only for the costs of education in secular subjects." *Mitchell*, 530 U.S. at 821.

In *Mitchell*, this Court emphasized "the principle of neutrality," where aid is "offered to a *broad range* of groups or persons without regard to their religion." 530 U.S. at 809 (emphasis added). Maine offers tuition aid to a "broad range" of private schools to benefit a "broad range" of citizens, without respect to religion in either group. Where recipients "provide . . . a broad range of indoctrination, the *government itself* is not thought responsible for any particular indoctrination." *Id*. at 809-810 (emphasis added). That succinctly describes the situation in Maine.

Even in *Locke v. Davey*, upholding a narrow, specific ban on using public funds to train clergy, "the link between government funds and religious training [wa]s broken by the independent and private choice of recipients." 540 U.S. at 719 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); *Zobrest,* 509 U.S. at 13-14; *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481, 487 (1986); *Mueller v. Allen*, 463 U.S. 388, 399-400 (1983)).

B. This case is about equal treatment, not an unqualified right for the government to subsidize a fundamental right.

The government does not penalize a fundamental right by declining to subsidize it, and "nothing in either of Justice Gorsuch's concurrences" (*Trinity Lutheran* or *Espinoza*) suggests otherwise. *Carson*, 979 F.3d at 41. But the First Circuit misses the point. This Court acknowledged that "a state need not subsidize private education." *Espinoza*, 140 S. Ct. at 2261. "But once a State decides to do so, it cannot disqualify some private schools solely because they are religious" (*id.*)—as Montana did in *Espinoza* and Maine does here. In Maine, the tuition subsidy is available to families who live in an area that lacks a public secondary school. The government has assumed an obligation to provide a free public education, and in areas without public schools it has chosen to finance private education. *Espinoza* supports Petitioners' position. This Court declined to agree with Montana that "some lesser degree of scrutiny" should apply to "discrimination against religious uses of government aid," noting that several Justices have questioned whether there is a "meaningful distinction" between status and use. "We acknowledge the point but need not examine it here." *Espinoza*, 140 S. Ct. at 2257.

The First Circuit upheld Maine's restriction that "limits the benefit to only those who would use it for nonsectarian instruction." *Carson*, 979 F.3d at 41. The court admits it would be unconstitutional to discriminate based on a recipient school's "affiliation with or control by a religious institution." *Id.* at 37-38.

But it is not so easy to thread the needle. It is natural that a school affiliated with or controlled by a religious institution would offer an education infused with the institution's religious doctrine, worldview, and mission. Maine's tuition funding is not *based on* the school's religious use of the funds. The state is not giving the money *for the purpose of* promoting religious indoctrination. On the contrary, the state discriminates based on religion where it withholds a benefit based on either the school's religious status or its incorporation of religious doctrine into the curriculum.

II. THE MAINE TUITION ASSISTANCE PROGRAM CREATES PROHIBITED GOVERNMENT ENTANGLEMENT WITH RELIGION.

The Religion Clauses of the First Amendment guard against state interference with religious practice and foreclose the establishment of a state religion. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122-23 (1982). The line between church and state, "far from being a 'wall,' is a blurred, indistinct, and variable barrier." *Lemon v. Kurtman*, 403 U.S. 602, 615 (1973). Although "limited and incidental entanglement . . . is inevitable in a complex modern society" (*id.*), Maine's program demands a level of entanglement that transgresses both Religion Clauses. It is not only the state's rejection of particular schools that "may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry" leading to such exclusion. *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 502 (1979).

This case is framed as a Free Exercise challenge to Maine's requirement that a private school be

nonsectarian to qualify for tuition assistance. *Carson*, 979 F.3d at 25. But as in other Free Exercise cases, "'the modern understanding of the Establishment Clause is a 'brooding omnipresence,' *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 222 (1917) (Holmes, J., dissenting), ever ready to be used to justify the government's infringement on religious freedom." *Espinoza*, 140 S. Ct. at 2263 (Thomas, J., concurring). The state's procedure to identify and disqualify "sectarian" schools creates the very entanglement the Establishment Clause was designed to prevent and simultaneously infringes Free Exercise rights.

Concern about "excessive government entanglement with religion" predates *Lemon*. *See, e.g., Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). Courts recognize preventing entanglement as a compelling state interest. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981); *Strout v. Albanese*, 178 F.3d 57, 61 (1st Cir. 1999); *see Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 356 (1st Cir. 2004). But "[a] program that violates the Free Exercise Clause cannot be saved by relying on implausible Establishment Clause concerns." *Hartmann v. Stone*, 68 F.3d 973, 979 (6th Cir. 1995). The Maine program is a quintessential example. The State Department of Education examines curriculum and disqualifies a religious school if it "promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." *Carson*, 979 F.3d at 38. "*The Department's focus is on what the school teaches through its curriculum and related activities, and how the material is presented.*" *Id*. (emphasis in original). It is difficult to conceive of a more blatant entanglement.

A. Prior case law does not support the First Circuit ruling.

Petitioners correctly argue that the statute (Me. Stat. tit. 20-A, § 2951(2)) excessively entangles the state with religion and therefore violates the Establishment Clause. *Carson*, 979 F.3d at 48. The First Circuit dismissed the argument, claiming that "cases like *Zelman* . . . merely rejected attempts to use that Clause as a sword" and do not prohibit "an inquiry into whether a proposed use" of government benefits "would be secular." *Id*. But here, Maine itself wields the Clause "as a sword."

Earlier decisions of this Court do not support the First Circuit. In *Mueller*, this Court upheld a state tax deduction that provided no more than an "attenuated financial benefit, ultimately controlled by the choices of individual parents," to parochial schools. 463 U.S. 388, 400 (1983). In *Mitchell*, this Court concluded that "trolling through a person's or institution's religious beliefs" to determine whether a school is "pervasively sectarian" is "not only unnecessary but also offensive." 530 U.S. at 828. In *New York v. Cathedral Academy,* this Court struck down a state statute that conditioned reimbursement for the cost of state-mandated examinations and teaching activities on a determination that the materials were devoid of religious content. 434 U.S. 125, 132 (1977) ("this sort of detailed inquiry . . . would itself constitute a significant encroachment" on the First Amendment).

Relevant decisions of other circuits do not support the First Circuit. *Hartmann* involved a child day-care program for military families that "prohibit[ed]

Providers from having any religious practices, such as saying grace or reading Bible stories, during their day-care program," regardless of the wishes of the families themselves. 68 F.3d at 975. Such burdensome regulation does not "require (*or even allow*) a *ban* on religious activity to prevent entanglement." *Id*. at 981 (first emphasis added). The Sixth Circuit concluded that this "extensive array of regulations," "ironically . . . put the Army at great risk of unconstitutionally entangling itself with religion." *Id*. at 981. The same is true here. Maine creates unconstitutional entanglement by rummaging through the curriculum of private religious schools.

This case finds many parallels in the college scholarship program the Tenth Circuit examined in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) ("*CCU*"). Like Colorado, Maine "expressly discriminates *among* religions," allowing participation by nominally religious schools but not those that incorporate faith into the entire curriculum, and it employs "criteria that entail intrusive governmental judgments regarding matters of religious belief and practice." *Id.* at 1256. Proper application of the entanglement doctrine "protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices," whether to qualify for benefits or as a basis for exclusion. *Id*. at 1261. Instead, the Colorado provisions required officials to determine whether a required course "tend[ed] to indoctrinate or proselytize." *Id*. The Maine statute, similarly, is "fraught with entanglement problems." *Id*.

B. Maine should employ neutral, objective criteria rather than a process that trolls through a school's religious doctrine and curriculum.

The Maine program "expressly discriminates among religions" using "unconstitutionally intrusive scrutiny of religious belief and practice" rather than neutral criteria. *CCU*, 534 F.3d at 1250. If Maine "wishes to choose among otherwise eligible institutions"—and both schools clearly qualify—"it must employ *neutral, objective* criteria rather than criteria that involve the evaluation of contested religious questions and practices." *Id*. at 1266 (emphasis added). The schools preferred by Petitioners (Bangor Christian School and Temple Academy) are academically qualified and fully satisfy compulsory school-attendance laws. The state should not inquire any further into the content of the school's curriculum.

Instead of objective, religiously neutral criteria, Maine utilizes a "comprehensive, discriminating, and continuing state surveillance" (*Lemon*, 403 U.S. at 619) to determine whether a school is eligible for tuition assistance. Even *Locke v. Davey* "permit[ted] students to attend pervasively religious schools, so long as they [were] accredited." *CCU*, 534 F.3d at 1255, quoting *Locke v. Davey*, 540 U.S. at 724.

C. Private choice ensures neutrality and guards against entanglement.

A child's enrollment in a particular school is the result of *private* parental choices. The state has no legitimate interest in obstructing access to private

religious education. Its sole interest is ensuring the government *itself* is not engaged in religious indoctrination. "[N]eutrality and private choices" work together to serve that interest and eliminate any possible attribution to the government." *Mitchell*, 530 U.S. at 811. Maine's extensive entanglement is anything but neutral and hinders free choice among academically qualified schools.

Private choice is a critical factor this Court often considers. *Mueller*, 463 U.A. at 399 ("public funds become available only as a result of numerous private choices," so there is no "imprimatur of state approval," quoting *Widmar*, 454 U.S. at 274). "[N]o reasonable observer" would consider that a "neutral program of private choice . . . carries with it the imprimatur of government endorsement." *Zelman*, 536 U.S. at 655; *see also Mitchell*, 530 U.S. at 842-843 (O'Connor, J., concurring in judgment); *Witters,* 474 U.S. at 488-489; *Zobrest,* 509 U.S. at 10-11. Maine unwittingly creates an "imprimatur of state approval" (or disapproval) through its extensive excursion into religious school curriculum.

Maine's tuition program is not a voucher or school choice program where parents select a school other than the public school their child would otherwise attend. *Carson*, 979 F.3d at 36. Such programs typically offer parents financial assistance that enables them to forego the public school system. Under Maine's program, private schools are the only option because of the absence of public secondary schools. This distinction is irrelevant. The school is nevertheless chosen by the parents, and the law excludes—*solely*

based on religion—schools that are otherwise "roughly equivalent" (*id.*).

III. MAINE'S NON-SECTARIAN MANDATE RESURRECTS THIS COURT'S DISCARDED "PERVASIVELY RELIGIOUS" DOCTRINE.

Petitioners challenge the Maine statutory requirement (Me. Stat. tit. 20-A, § 2951(2)) that a private school be "nonsectarian" to qualify for tuition assistance that would be available if they chose a secular or nominally religious institution. This mandate, and the entangling procedures to comply with it, are nothing more than a resurrection of the "pervasively sectarian" factor long ago discarded by this Court.

A state "follows the best of our traditions" when it "encourages religious instruction." *Zorach v. Clauson,* 343 U.S. 306, 313-314 (1952). Maine's intrusive nonsectarian mandate defies those traditions and discourages instruction state officials determine is "too" religious. "[N]othing in the Establishment Clause requires the exclusion of *pervasively sectarian* schools from otherwise permissible aid programs." *Mitchell*, 530 U.S. at 829 (emphasis added). This doctrine is "born of bigotry" and "should be buried now." *Id*. The "pervasively religious" concept, long ago discarded by this Court, is like a "ghoul in a late-night horror movie" that now "sits up in its grave and shuffles abroad." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist*., 508 U.S. 384, 398 (1993). The Court must not allow this "ghoul"—which the First Circuit revives and

repackages as "nonsectarian"—to "stalk[] [its] Establishment Clause jurisprudence once again." *Id.*

This Court coined the term "pervasively sectarian" in 1973, the same year it created the *Lemon* test. *Hunt v. McNair,* 413 U.S. 734, 743 (1973) ("an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission"). At that time, the term "could be applied almost exclusively to Catholic parochial schools." *Mitchell*, 530 U.S. at 829. Some cases applied the "pervasively sectarian" factor to either uphold or deny aid: *Roemer v. Maryland Public Works Board, 426 U.S. 736, 758-759 (1976) (grants permitted because the institutions were not "pervasively sectarian"); Aguilar v. Felton*, 473 U.S. 402, 411 (1985) ("inculcation of religious values" was a substantial purpose of many of the schools); *Sch. Dist. v.*, 473 U.S. 373, 379 (1985) ("the purposes of these schools is to advance their particular religions"). But the term clashes with later decisions that prohibited "discriminating in the distribution of public benefits based upon religious status or sincerity" (*Mitchell*, 530 U.S. at 828) and the broad trend in this Court to apply nondiscrimination principles in Establishment Clause cases (see Sect. IV). *Agostini* overruled *Aguilar* in full and *Ball* in part—and in *Mitchell*, this Court thoroughly repudiated the concept. 530 U.S. at 826 ("we have not struck down an aid program in reliance on this factor since 1985"—"that period is one that the Court should regret, and it is thankfully long past"). The programs this court upheld in *Zobrest* and *Agostini* assisted children attending "schools that were not only pervasively sectarian but also were primary and

secondary." *Mitchell*, 530 U.S. at 827. These later cases "were merely returning to the approach of *Everson* and *Allen*, *in which the Court upheld aid programs to students at pervasively sectarian schools*." *Id*. (emphasis added). The Tenth Circuit decided *CCU* in line with this precedent. Not only does federal law not *require* the state to discriminate against "pervasively religious" schools—it does not even *allow* such exclusion. *CCU v. Weaver*, 534 F.3d at 1253.

A. The non-sectarian mandate is hostile to religious schools that take faith seriously, contrary to the "benevolent neutrality" the Constitution requires.

"[I]t is most bizarre that the [First Circuit] would . . . reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children." *Mitchell*, 530 U.S. at 827-828. Maine's tuition assistance program allows parents to choose nominally religious schools, but not those that take their faith seriously and integrate it into the curriculum. Yet these disqualified schools are academically qualified and fully satisfy Maine's compulsory education requirements. In contrast, this Court did "not hesitate to disavow" the "shameful pedigree" of "hostility to aid to pervasively sectarian schools." *Id*. at 828. This Court should reaffirm this prior position and reject Maine's conclusion that "the benefit of a free public education" must be "tied to the secular nature of that type of instruction." *Carson*, 979 F.3d at 43. This statement drips with hostility. The nonsectarian mandate targets

schools that integrate a religious worldview into the entire curriculum, in contrast to nominally religious schools. The law is not neutral because its object is to restrict an otherwise widely available benefit based on the religious motivation of the excluded schools. "The First Amendment forbids an official purpose to disapprove of a particular religion, or of religion in general." *Church of the Lukumi Babalu Aye*, 508 U.S. at 532; *Hartmann*, 68 F.3d. at 978. Maine disapproves of religious schools that take their faith seriously.

It is not sufficient to respond that "any 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." *Carson*, 979 F.3d at 49. Of course they can. And Maine has the option to build additional public schools and eliminate all funding for private education. But having chosen to finance private schooling—including some with religious affiliation—the state may not scrutinize a school's religious doctrine and practices to exclude those that take religion seriously.

B. The non-sectarian mandate creates a risk of viewpoint discrimination and unfettered government discretion.

Maine's exclusion of the schools chosen by Petitioners is based solely on the religious viewpoint of those schools—their "teaching through a faith-based lens." Pet. 6. This policy is comparable to *Rosenberger v. Rector & Visitors of University of Virginia*, where a student organization was denied payment for printing costs because it promoted a Christian viewpoint. This

Court found that the University's program was "neutral toward religion" and "distinguished it from a tax *levied* to directly support a church." 515 U.S. 819, 840 (1995). The University could not discriminate against a Christian viewpoint and deny funding. Here, there is no "tax levied" to support religion. Tax revenues are used to provide education, and it is parents who select the school for their children.

The First Circuit contends that Petitioners are "wrong to argue" that a school approved for *attendance* purposes "offers a type of educational instruction that is so like what a *public* school provides that it is necessarily a good substitute for a *public* school education." *Carson*, 979 F.3d at 42 (emphasis in original). But if a school satisfies Maine's academic and attendance requirements, it is not the state's business to evaluate the school's religious viewpoint and decide whether it is "good." There is an implicit evaluation here that a religious education is inferior to a religion-free, secular education. Such line drawing is "highly subjective and susceptible to abuse." *CCU*, 534 F.3d at 1262. It is classic viewpoint discrimination facilitated by unfettered government discretion. Maine's program should be neutrally applied to include all academically qualified schools, just as this Court required the University in *Rosenberger* to provide equal funding for all student groups.

C. The non-sectarian mandate discriminates against parents who choose a school that takes religion seriously.

Parents have both the responsibility and constitutional right to direct the education of their children. Maine's tuition program is fully available to finance secondary education for families that have no interest in providing their children with an education infused with religious values. Yet it discriminates not only against schools *but also parents* who take their faith seriously. There is no constitutionally valid rationale for such discrimination. As this Court observed, where a "program ensure[s] that parents [a]re the ones to select a religious school as the best learning environment" for their child, "the circuit between government and religion [is] broken, and the Establishment Clause [is] not implicated." *Zelman*, 536 U.S. at 652 (discussing *Zobrest*). In *Hartmann*, the government's unconstitutional regulation of religious practices in the context of child daycare encroached "in an area traditionally reserved for, and uniquely suited to, parental authority." 68 F.3d at 985.

D. Nonsectarian mandates are unconstitutional in other contexts where private choice is a significant factor.

Maine's nonsectarian mandate is reminiscent of the legislative prayer cases. As this Court held in *Town of Greece v. Galloway*, "[a]n insistence on nonsectarian or ecumenical prayer . . . is not consistent with the tradition of legislative prayer outlined in the Court's

cases." 572 U.S. 565, 578 (2014). Maine's nonsectarian school mandate is no more constitutional than a mandatory nonsectarian policy for legislative prayer.

If legislative invocations are considered *government* speech, entanglement issues arise. The government may not "prescribe[e] prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior." *Id.* at 581, quoting *Engel v. Vitale*, 370 U.S. 421, 430 (1962). Nor may the government "mandate a civil religion that stifles any but the most generic reference to the sacred." *Town of Greece*, 572 U.S. at 581. Similarly, the government may neither prescribe nor proscribe religious orthodoxy in a private school classroom. Maine puts its thumb on the scale, blatantly preferring a "sanitized" education purged of religious influence. The state's procedure for approving schools is tainted by unconstitutional entanglement. This is surely a step toward establishing a "civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

On the other hand, looking at legislative invocations as *private* speech, Free Exercise concerns emerge if government controls the content. Those concerns mirror the ones presented by this case. Maine's tuition program provides for *parents* to select the schools for their children. Payments are made based on *private* choices. Just as the government would violate the Free Exercise Clause by interfering with the private speech of an invocation speaker, Maine transgresses religious liberty by disqualifying the schools Petitioners have chosen for their children.

IV. MAINE'S NONSECTARIAN MANDATE CONFLICTS WITH THIS COURT'S TREND TO APPLY NON-DISCRIMINATION PRINCIPLES IN ESTABLISHMENT CLAUSE JURISPRUDENCE.

Both Religion Clauses stand guard over religious liberty. The Establishment Clause limits government but also complements the Free Exercise Clause. Taken to extremes and wrenched from its context, the Clause morphs into a sword attacking religious freedom instead of a shield protecting it. Maine tramples religious freedom, excluding schools that take religion seriously by integrating it into their entire curriculum.

This Court's ongoing trend is to apply nondiscrimination principles in Establishment Clause cases. Nondiscrimination promotes the "benevolent neutrality" that "permit[s] religious exercise to exist without sponsorship [or] interference." *Walz*, 397 U.S. at 669. Facilitating parental choice in education is far removed from "[t]he coercion that was a hallmark of historical establishments . . . coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Van Orden v. Perry,* 545 U.S. 677, 693 (2005) (Thomas, J., concurring), citing *Lee v. Weisman,* 505 U.S. at 640 (Scalia, J., dissenting).

Exclusion is the antithesis of religious liberty and equal protection. Maine's exclusion is neither benevolent nor neutral and it cannot survive a nondiscrimination analysis. Maine fails to "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs." *Zorach,* 343 U.S. at 313.

A. This Court has shifted from a strict "no aid" position to a flexible standard grounded in nondiscrimination principles.

Government aid to religion has generated heated debate over the course of American history. This Court once hesitated to approve anything but remote, incidental, indirect, inconsequential benefits. *See, e.g., Lynch v. Donnelly,* 465 U.S. 668, 683 (1984); *Widmar,* 454 U.S. at 273-274; *Comm. for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973). There was seemingly a pervasive paranoia that a penny of public money might inadvertently confer a slight benefit on religion. But under this Court's current approach, that anxiety is no longer warranted.

This nation's robust protection for religious liberty guards against both government compulsion and interference. Since absolute separation is neither wise nor feasible, courts have tried to flesh out the appropriate church-state relationship through the fires of litigation. A strict "no-aid" position prevailed after this Court inaugurated *Lemon*'s tripart test in 1973. That approach was slowly replaced by a growing trend to revive and strengthen the weak nondiscrimination principle evident in earlier cases, particularly *Everson*, 330 U.S. 1. Since *Witters*, this Court gradually progressed from a strict "no aid" stance to a point where "federal constitutional restrictions on funding religious institutions have collapsed." Douglas Laycock, Comment, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty,* 118 Harv. L. Rev.

155, 156 (2004). This trend has key implications for resolving this case, as it did in *Trinity Lutheran* and *Espinoza.*

Private choice. Nondiscrimination principles developed mostly in the context of taxpayer challenges. A strong consensus emerged that the Constitution permitted state funds to reach religious organizations under limited conditions—often as the result of private choices. *See, e.g.*, *Mueller*, 463 U.S. at 400 ("attenuated financial benefit, ultimately controlled by the private choices of individual parents"); *Witters*, 474 U.S. at 487 ("genuinely independent and private choices of aid recipients"); *Agostini*, 521 U.S. at 226 (same); *Mitchell*, 530 U.S. at 810 (same); *Zobrest*, 509 U.S. at 9 ("numerous private choices"); *Zelman*, 536 U.S. at 662 ("genuine choice among options public and private, secular and religious"); *Hartmann*, 68 F.3d at 975 ("on-base day-care program" at "parent's choice and expense"); *Espinoza,* 140 S. Ct. at 2254 (Montanans independently choose where to spend their scholarships).

Cases typically addressed what the government was *permitted* to do, not what it was *required* to do. This Court's "new middle ground [was] to *permit* most funding but to *require* hardly any." Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 161 (emphasis added). This "maximizes government discretion and judicial deference," but also "threatens religious liberty" and tends to expand government power over religious institutions. *Id.* This line of authority failed to articulate exactly if or when the state *must* include religious organizations among eligible recipients. *Locke*

v. Davey may appear to say "no," but its narrow parameters discourage extending its conclusion to other circumstances.

The scholarship program in *CCU* reflects efforts to craft programs with an eye toward this Court's developing jurisprudence. The state established a "safe harbor" to make funds available "as broadly as was thought permissible under [this] Court's then-existing Establishment Clause doctrine." *CCU v. Weaver*, 534 F.3d at 1251. Although this Court had scrupulously avoided "direct funding of pervasively sectarian institutions" in past decisions (*id.* at 1245), that approach was modified to discard the absolute prohibition evident in earlier cases. Instead, this Court recognized that the "pervasively sectarian" framework "collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Id.* at 1258, quoting *Mitchell,* 530 U.S. at 828 (plurality).

Pre-*Lemon*. Decades ago, this Court warned that there is "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach,* 343 U.S. at 313-314. The Court began to consider state programs funding both religious and secular education. Both "no aid" and nondiscrimination principles were evident in *Everson*, when this Court upheld state-funded bus rides that included a Catholic high school. 330 U.S. 1. New Jersey could not exclude individuals of a particular faith from receiving the benefits of public

welfare legislation (*id*. at 16), essentially applying a "weak form of the nondiscrimination principle" that "permitted equal funding, but did not require it." Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 164. At that point, "[f]ew judges took seriously the possibility that equal funding might be constitutionally required." *Id*. Four dissenting justices insisted the Establishment Clause "broadly forbids state support, financial or other, of religion in any guise, form or degree" and "outlaws all use of public funds for religious purposes." *Everson*, 330 U.S. at 33 (Rutledge, Frankfurter, Jackson, Burton, J.J., dissenting).

Everson involved a religiously neutral benefit (transportation) that hardly raised establishment concerns. A few years later, this Court approved a program to loan textbooks to both public and parochial schools. Building on *Everson*, the Court found this program furthered educational opportunities and did not advance religion. *Allen*, 392 U.S. at 243. Again, a strong dissent objected to using tax funds "even to the extent of one penny" to support religious schools. *Id*. at 253-254 (Black, J., dissenting). Following these early decisions, this Court "struggled to reconcile two competing intuitions"—the rigid no aid position that prevailed from *Lemon* through the mid-1980's and the nondiscrimination approach that later won the day. Laycock, Douglas, *Why the Supreme Court Changed Its Mind*, 2008 BYU L. Rev. at 276.

"No Aid" Era (1971-1985). *Lemon* ushered in a series of taxpayer challenges. This era was dominated by a strict "no aid" policy striking down many forms of aid to religious schools: *Lemon*, 403 U.S. 602 (teacher

salaries); *Hunt v. McNair*, 413 U.S. 734 (state revenue bonds for Baptist college upheld because school was not "pervasively sectarian"); *Meek v. Pittinger*, 421 U.S. 349 (1975) (materials and services); *Wolman v. Walter*, 433 U.S. 229 (1977) (same); *Sch. Dist. v. Ball*, 473 U.S. 373 (enrichment courses); *Aguilar*, 473 U.S. 402 (remedial instruction and guidance).[2] "The no-aid principle derived from eighteenth-century debates over earmarked taxes levied exclusively for the funding of churches." Laycock, *Why the Supreme Court Changed Its Mind*, 2008 BYU L. Rev. at 276. The policy "predominated from [*Lemon*] until its high-water mark in *Aguilar v. Felton* in 1985." *Id.* at 277. Reasons included lingering anti-Catholic sentiment and concerns about "white flight" to private schools in response to desegregation mandates. *Id.* at 285-288. Eventually, a broad Protestant-Catholic coalition reframed the issue in terms of private choice and neutrality. *Id.* at 292.

Even during the *Lemon* era, this Court occasionally approved financial aid: *Meek*, 421 U.S. at 359-62 (transportation); *Wolman*, 433 U.S. at 241-244, 244-248 (testing and remedial instruction); *Mueller*, 463 U.S. at 394-403 (state tax deductions). In fact, this Court "never squarely repudiated the nondiscrimination principle," resulting in an incoherent body of law and leaving the no-aid position "vulnerable to new Justices measuring neutrality from a different baseline." Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 166.

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[2] *Meek*, *Wolman*, *Ball*, and *Aguilar* have been subsequently overruled in whole or in part by *Mitchell* and/or *Agostini*.

Transition. Beginning with its 1986 unanimous *Witters* decision, "[this] Court progressively elevated the nondiscrimination principle while subordinating the no-aid principle." Laycock, *Why the Supreme Court Changed Its Mind*, 2008 BYU L. Rev. 275 at 278. As in *Locke v. Davey*, *Witters* involved an individual denied funding because he sought religious training. This Court expressed "no opinion" on whether the Free Exercise Clause mandated the vocational aid (474 U.S. at 489-490) but cited nondiscrimination principles to support its conclusion that the program was "available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited . . . and is in no way skewed towards religion." *Witters*, 474 U.S. at 487-488. Since *Witters*, this Court has upheld five additional programs allowing funds to reach religious institutions (*Bowen v. Kendrick*, 487 U.S. 589 (1988)*, Zobrest, Agostini, Mitchell, Zelman*), partially or wholly overruling several *Lemon* era rulings (*Meek*, *Wolman*, *Aguilar*, *Ball*). *Id*.

Nondiscrimination (1986 forward). The tide eventually turned. This Court began to apply nondiscrimination principles to funding cases, facilitating greater equality between religious and secular organizations. Several landmark cases inaugurated an era where religious and secular private schools began to enjoy equal access to funding opportunities, particularly where the services funded were unrelated to religion or private choices directed the funds. In 1993, this Court reversed a ruling that denied sign-language interpreter services to a deaf student at a Catholic high school—services required by the Individuals With Disabilities Educational Act.

Zobrest, 509 U.S. at 10. In 1997, this Court overruled *Aguilar* and *Ball*, and implicitly overruled *Meek*, rejecting a taxpayer challenge to a program allowing public school teachers to provide remedial education to low-income students in public and private schools. The program did not define recipients with reference to religion. *Agostini*, 521 U.S. at 234. Three years later, this Court expressly endorsed nondiscrimination principles and condemned hostility to religion when it upheld a federally funded program distributing equipment to public and private schools on a per-student basis without reference to religion. *Mitchell*, 530 U.S. at 827-828.

Finally, *Zelman* upheld a program providing tuition and tutorial aid based on financial need and residence, explaining that "government programs that neutrally provide benefits to a broad class of citizens *defined without reference to religion* are not readily subject to an Establishment Clause challenge." 536 U.S. at 651 (emphasis added) (internal citations and quotation marks omitted); *see Zobrest*, 509 U.S. at 8-9; *Mueller*, 463 U.S. at 397 (deduction available to "*all* parents," whether their children attend public, nonsectarian private, or sectarian private schools). *Zelman*'s program allowed "the participation of all schools within the district, religious or nonreligious." *Zelman*, 536 U.S. at 653. *Zelman* and other cases are "evidence of [this] Court's shift from a focus on effects and perceptions" to "the principle that government decisions which do not utilize religion as a standard for action or inaction do not violate the Establishment Clause." Ryan A. Doringo, *Comment: Revival: Toward a Formal Neutrality Approach to Economic*

Development Transfers to Religious Institutions, 46 Akron L. Rev. 763, 794 (2013).

More recently, *Trinity Lutheran* reaffirmed the nondiscrimination approach applied in *Witters*, *Zobrest*, *Agostini, Mitchell*, and *Zelman*. The Court struck down a policy that "expressly discriminate[d]" against an "otherwise eligible recipient[]"by excluding it from participation in a competitive program to improve playground safety "solely because of [its] religious character." *Trinity Lutheran*, 137 S. Ct. at 2021. The church was "not claiming any entitlement to a subsidy" (*id*. at 2022) but merely the "right to participate in a government benefit program without having to disavow its religious character." *Id*.

B. This Court should apply nondiscrimination principles to resolve this case in favor of Petitioners.

Nondiscrimination promotes government neutrality by eliminating the threat that religious entities could be denied generally available government benefits dispensed according to neutral criteria. The Constitution "requires the state to be a neutral" with respect to believers and non-believers—"*it does not require the state to be their adversary*." *Everson*, 330 U.S. at 18 (emphasis added). Maine has become an adversary. Its nonsectarian mandate and intrusive approval procedure "communicates a message that religion is dangerous and in need of policing, which in turn has the effect of tilting society in favor of devaluing religion." *Espinoza*, 140 S. Ct. at 2266 (Thomas, J., concurring). This exclusion cannot withstand a nondiscrimination analysis.

The Court's shift to nondiscrimination principles began with challenges that did not address the question of mandatory inclusion. "*Zelman* held that a state is *entitled* to offer school vouchers that can be cashed at sectarian schools but not that it is *required* to do so." *Badger Catholic, Inc. v. Washington*, 620 F.3d 775, 779 (7th Cir. 2010). The Tenth Circuit, recognizing "the Establishment Clause permits evenhanded funding of education—religious and secular—through student scholarships," took the next logical step. *CCU*, 534 F.3d at 1253. Colorado's discrimination was "expressly based on the degree of religiosity" of a school "and the extent to which that religiosity affects its operations," including "the content of its curriculum" (*id*. at 1259), much like the Maine program. It was "undisputed that federal law [did] not *require* Colorado to discriminate" against a religious university, but neither could the state "choose to exclude pervasively sectarian institutions" from the program. *Id*. The Fourth Circuit reached a similar conclusion in finding the Maryland Higher Education Commission's "pervasively sectarian" test to be unconstitutionally discriminatory. *Columbia Union College v. Oliver,* 254 F.3d 496, 502-504 (4th Cir. 2001).

In 1999, the Vermont Supreme Court admitted that this Court could potentially rule that the "intervention of unfettered parental choice" between public funding and a school would "eliminate any First Amendment objection to the flow of public money to sectarian education." *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 563 (Vt. 1999). The First Circuit, similarly, acknowledged that if this Court decided it was *permissible* for Maine to include

sectarian schools in its tuition assistance program, then "the legislative basis for the exclusion of sectarian schools - the fear that the establishment clause bars their inclusion - will have been negated." *Strout*, 178 F.3d at 68 (Campbell, J., concurring). In fact, the Maine court had already suggested that "if allowing tuition benefits to the sectarian schools would *not* violate the establishment clause, then denying such benefits would violate the equal protection clause." *Id.* at 66. But a few years later, the First Circuit read *Locke v. Davey* broadly and declined to recognize "an affirmative requirement." *Eulitt*, 386 F.3d at 354-355.

Trinity Lutheran and *Espinoza* have recently altered the landscape. But this Court did not venture beyond Missouri's playground resurfacing program in *Trinity Lutheran* and declined to "address religious uses of funding or other forms of discrimination." 137 S. Ct. at 2024 n. 3. But as Justice Gorsuch observed, the "general principles" that controlled *Trinity Lutheran* "do not permit discrimination against religious exercise—whether on the playground or anywhere else." *Id.* at 2026 (Gorsuch, J., concurring). The Montana Department of Revenue in *Espinoza* objected to the state scholarship program "because of *how the funds would be used*—for 'religious education.'" 140 S. Ct. at 2255 (emphasis added). The Court reached a decision upholding the program without deciding the status-use distinction that it must now address.

Equality is deeply embedded in America's history and Constitution. "The '*supreme* law of the land' condemns discrimination against religious schools and

the families whose children attend them." *Espinoza*, 140 S. Ct. at 2262, quoting *Marbury v. Madison*, 5 U.S. 137, 180 (1803). If a state enacts a funding program to assist private educational institutions, "it would seem that the principle of nondiscrimination requires [it] to extend that aid to organizations [that] identify themselves as religious." Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J. L. & Pub. Pol'y 551, 608 (2003). Maine's exclusion of religious schools solely because of their religious character "is not only offensive to fundamental principles of equality of citizenship, liberalism, and distributive justice, but also deeply offensive to the Constitution's guarantee of religious liberty." *Id*. at 613.

CONCLUSION

The First Circuit decision should be reversed.

Respectfully submitted,

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