No. 20-1088

IN THE

Supreme Court of the United States

DAVID CARSON, AS PARENT AND NEXT FRIEND OF O.C., ET AL.,

Petitioners,

v.

A. PENDER MAKIN,

Respondent.

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

BRIEF OF *AMICUS CURIAE* DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES, INC.

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INTEREST OF *AMICUS CURIAE*[1]

The Defense of Freedom Institute for Policy Studies is a nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker, and to protecting civil and constitutional rights at schools and in the workplace. The Institute places a particular focus on increasing educational choice and defending faith-based educational institutions from efforts to force changes in their policies and activities that conflict with their religious missions. That is exactly the danger posed by Maine's discriminatory education funding regime—discrimination that will quickly infect other education programs if the Court adopts Maine's novel status/use theory of free exercise.

SUMMARY OF THE ARGUMENT

Maine administers a program to fund students' attendance at private schools. It targets one type of school for exclusion from this funding: "[]sectarian." Me. Stat. tit. 20-A, § 2951(2). This religious discrimination violates the Free Exercise Clause because a "person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981).

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* or its counsel, contributed money to fund the brief's preparation or submission. All parties lodged letters of consent to the filing of *amicus* briefs.

Maine contends—and the First Circuit held—that the State's discrimination is permissible because it targets religious "use" rather than religious "status." This Court should squarely reject this theory. First, such a distinction would sap all meaning from the right to free *exercise*, and would stand in sharp contrast to the well-established principle that substituting use as a proxy for status does not save a discriminatory regime. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination") (emphasis added). Second, the status/use dichotomy would place courts in the position of "inquir[ing]" as to how religious persons "perceive the commands of their … faith," even though "[c]ourts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. Third, the status/use dichotomy would enshrine denominational discrimination into law, which the Free Exercise prohibits. *See Larson v. Valente*, 456 U.S. 228, 244 (1982). Finally, the status/use dichotomy, if adopted, would invite the exclusion of religious institutions from public programs in which they have long participated—especially in the realm of education.

ARGUMENT

I. The First Amendment Bars Maine's Discrimination Against Religion.

A. The First Amendment Prohibits Religious Coercion through Denial of Public Benefits and Funding.

The State of Maine runs a school funding program in which it "pay[s] the tuition … at … the approved private school of the parent's choice at which the student is accepted." Me. Stat. tit. 20-A, § 5204(4). The State explicitly bars from this program one type of private school: "[]sectarian." Me. Stat. tit. 20-A, § 2951(2).

This Court has repeatedly held—and as recently as last Term reaffirmed—that the First Amendment prohibits such blatant discrimination against religion. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) ("The Free Exercise Clause … 'protects religious observers against unequal treatment….'") (quoting *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2019 (2017) (alteration adopted)); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (the state has a "duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint"); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107

(2001) ("exclusion … based on … religious nature … constitutes viewpoint discrimination"); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 542 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs…."); *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) ("If the purpose or effect of a law is to impede the observance of one or all religions … that law is constitutionally invalid….") (plurality opinion).

The First Amendment's antidiscrimination command applies not just to direct regulation of religious activity, as in *Lukumi*, but also to "the denial of or placing of conditions upon a benefit or privilege," such as government funding. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). A "person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas*, 450 U.S. at 716; *see also Trinity Lutheran*, 137 S. Ct. at 2019 (2017) ("this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion"); *Espinoza*, 140 S. Ct. at 2256 ("The Free Exercise Clause protects against even indirect coercion, and a State punishe[s] the free exercise of religion by disqualifying the religious from government aid….") (internal quotation marks omitted); *cf. Romer v. Evans*, 517 U.S. 620, 633 (1996) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

Maine violates the Free Exercise Clause's anti-coercion protections because, to access private-school funding made available as a benefit to the general public, it requires either: (A) a religious student to abandon his or her convictions and attend a "nonsectarian" school, *see* Me. Stat. tit. 20-A, § 2951(2), or (B) a religious school to abandon its religious teaching and activities, *see* BIO i ("religious organizations that are willing to provide nonsectarian education … are eligible to receive public funds…."). Thus, Maine "condition[s] the availability of benefits … upon … willingness to violate a cardinal principle of … religious faith [by surrendering … religiously impelled ministry]"—and such a policy is impermissible because it "'effectively penalizes the free exercise of … constitutional liberties.'" *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (quoting *Sherbert*, 374 U.S. at 406) (second alteration in original); *see also Sherbert*, 374 U.S. at 404 ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."); *Thomas*, 450 U.S. at 717. As *Sherbert* explained, [g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed … [on] worship." 374 U.S. at 404.

B. Targeting Religious "Use" Instead of "Status" Does Not Render State Discrimination Constitutional.

The State argues that its discrimination and coercion are permissible because the law targets religious "use" rather than religious "status." As

Respondent puts it: "[s]ectarian schools are not denied funds because of who they are, but because of what they would do with the money—use it to further religious purposes…." BIO 22. This semantic distinction between status and use makes no constitutional difference.

First, and "[m]ost importantly, … it is not as if the First Amendment cares." *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring). A distinction between status and use would render meaningless the right to "free *exercise*," U.S. Const. Amend. I (emphasis added), as a matter of both text and substance. As a matter of text, at the time of ratification of the First Amendment, to "exercise" religion meant "outward performance,"[2] "use or actual application and practice,"[3] and to engage in an "act of divine worship."[4] As a matter of substance, "[t]he right to *be* religious without the right to *do* religious things would hardly amount to a right at all." *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring) (emphasis in original). Thus, far from endorsing discrimination against religious use, this Court has, many times over, explained that "religious *activity* occupies … [a] high estate under the First Amendment," *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943) (emphasis added), which protects the right

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[2] *Exercise*, Samuel Johnson, A Dictionary of the English Language (London, J.F. & C. Rivington et al., 10th ed. 1792).

[3] *Exercise*, James Barclay, Complete and Universal English Dictionary (London, J.F. & C. Rivington et al. 1792) ("Use or actual application and practice of a thing").

[4] *Exercise*, Thomas Sheridan, A Complete Dictionary of the English Language (London, Charles Dilly, 3d ed. 1790).

to engage in "*overt acts* prompted by religious beliefs or principles," *Sherbert*, 374 U.S. at 403 (emphasis added), the right to "*perform* … religious functions," *McDaniel*, 435 U.S. at 626 (emphasis added), and the right to pursue "*efforts* with religious editorial viewpoints," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (emphasis added). As Justice Brennan explained:

> [F]reedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief.… A law which limits … 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, 435 U.S. at 632 (Brennan, J., concurring); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). In short, the "principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on *conduct motivated by religious belief* is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Lukumi*, 508 U.S. at 543 (emphasis added).[5]

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[5] Congress has likewise recognized that religious discrimination occurs regardless of whether status or activity is targeted. *See* 42 U.S.C. § 2000e(j) (defining "religion" as "all aspects of religious observance and practice, as well as belief").

This protection of religious use and activity applies just as fully in the context of access to public benefits: "Where the state conditions receipt of an important benefit upon *conduct* proscribed by a religious faith, or where it denies such a benefit because of *conduct* mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas*, 450 U.S. at 717–18 (emphasis added); *see also Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (reaffirming *Thomas*).

Nothing in *Espinoza* or *Trinity Lutheran* can be read, as Respondent contends, to have retreated from this long line of precedent, or "leave open the alternative" that a state can discriminate against religion if it "does not focus 'solely' on status, but instead on the use of public funds." BIO 21. To the contrary, the Court in *Espinoza* was careful to say that its focus on status discrimination, given the facts of that case, was *not* "meant to suggest … that some lesser degree of scrutiny applies to discrimination against religious uses of government aid." *Espinoza*, 140 S. Ct. at 2257 (citing *Lukumi*, 508 U.S. at 546); *see also Trinity Lutheran*, 137 S. Ct. at 2021 ("Nor may a law regulate or outlaw *conduct* because it is religiously motivated.") (emphasis added). Because *Espinoza* and *Trinity Lutheran* involved naked status discrimination, there was no need to examine whether religious activity was burdened, which can sometimes involve a more intricate inquiry if the use prohibition is facially neutral and thus a pretext for, or veiled

effort at, religious discrimination.[6] *See, e.g.*, *Sherbert*, 374 U.S. at 403–04; *Thomas*, 450 U.S. at 717. But the Court's proceeding no further than necessary in *Espinoza* and *Trinity Lutheran* was hardly an invitation to states to discriminate based on religious use.

Indeed, underscoring that *Espinoza* did not usher in a new era of religious discrimination based on some lesser First Amendment protection for religious use, this Court decided *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), just one week after deciding *Espinoza*. In *Our Lady*, the Court, in holding that a religious teacher fell within the ambit of the First Amendment's ministerial exception, declined to elevate the teacher's title (status) over her function (use), explaining that "[w]hat matters, at bottom, is what an employee does." 140 S. Ct. at 2064; *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192 (2012) (holding that the protections of the Free Exercise Clause turn, in part, on "the important religious functions [a minister] performed for the Church").

Second, a status/use dichotomy for religious discrimination is irreconcilable with antidiscrimination jurisprudence more generally, which "decline[s] to distinguish between status and conduct." *Christian Legal Soc'y v. Martinez*, 561 U.S.

[6] Here, there is no need to determine if a facially neutral law burdens religious use. Religious use is the explicit and only target of the law at issue.

661, 689 (2010).[7] For example, in *Lawrence v. Texas*, this Court held that "[w]hen homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination both in the public and in the private spheres." 539 U.S. at 575 (emphasis added). As Justice O'Connor explained in her opinion concurring in the judgment in *Lawrence*, a state cannot mask discrimination by arguing that it applies only to conduct when that very conduct "is closely correlated with being homosexual." *Id.* at 583 (O'Connor, J., concurring in judgment). Such laws "are targeted at more than conduct," and are "[i]nstead directed toward gay persons as a class." *Id.*;

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[7] In support of this point, the Court in *CLS* approvingly cited pages 7–20 of an *amicus* brief that had been filed in the case. *See Christian Legal*, 561 U.S. at 689. The cited passage specifically argued that a status/use distinction has no place in religious antidiscrimination law:

> [R]eligious affiliations are inextricably linked to faith-specific conduct in the form of rituals, ceremonial dress, and other observances. A group obviously would not succeed in arguing that it does not discriminate against Muslims, but merely excludes those who pray toward Mecca five times a day; that it does not discriminate against Jews, but merely excludes individuals who wear yarmulkes; or that it does not discriminate against Christians, but only excludes those who partake in communion. Yet this is precisely the kind of Orwellian distinction Petitioner would have the Court draw.

Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., et al. in Support of Respondents at 13–14, *Christian Legal Soc'y*, 561 U.S. 661 (No. 08-1371).

see also Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) (rejecting argument that "Proposition 8 does not target gays and lesbians because its language does not refer to them" on the ground that "[h]omosexual conduct and identity together define what it means to be gay or lesbian").

Likewise, in the context of racial discrimination, a distinction between conduct and status finds no purchase. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) ("a ban on intermarriage or interracial dating [that] applies to all races … is a form of racial discrimination"); *Loving v. Virginia*, 388 U.S. 1, 8, 11 (1967) (same); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). So, too, for sex discrimination. *See PriceWaterhouse v. Hopkins*, 490 U.S. 228, 234–36, 251 (1989) (plurality opinion) (stereotyping based on conduct can be evidence of gender-status discrimination); *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1737 (2020) ("An employer who fires an individual for being homosexual or transgender fires that person for traits or *actions* it would not have questioned in members of a different sex.") (emphasis added). Ditto for discrimination based on marital status. *See, e.g.*, *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1151 (D. Or. 2017) ("the conduct/status correlation here is close enough that a policy against extramarital sex/cohabitation effectively discriminates on the basis of marital status").

Thus, "discrimination based on religious 'use'" is not, as the First Circuit held, "distinct from" discrimination "based solely on religious 'status.'" *Carson v. Makin*, 979 F.3d 21, 34 (1st Cir. 2020). It is a subset of status-based discrimination, and an actor intent on discrimination—as Maine is here—can almost always recast its target as conduct rather than status. For an antidiscrimination protection to have any real force, it must reject such meaningless distinctions.

Third, the status/use dichotomy for religious discrimination is judicially unenforceable. Many religious adherents consider such a distinction meaningless, as religious acts help to define and actualize their religious status.[8] And "it is not within the judicial function and judicial competence to inquire" as to how religious persons "perceive the commands of their … faith," as "[c]ourts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. Respondents thus offer no workable method for courts to police the line (if there is one) between religious status and use. *See Trinity Lutheran*, 137 S. Ct. at 2025–26 (Gorsuch, J., concurring in part) (doubting "the stability of such a line"); *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J.,

[8] *See, e.g.*, *James* 2:14–26 ("What good is it, my brothers, if someone says he has faith but does not have works?... For as the body apart from the spirit is dead, so also faith apart from works is dead."); *Ezekiel* 18:5–9 ("Suppose there is a righteous man who does what is just and right.… He follows my decrees and faithfully keeps my laws. That man is righteous; he will surely live, declares the Sovereign Lord."); *Quran* 2:82 ("And those who believed and did good works, they are the inhabitants of Paradise, abiding therein eternally.").

concurring) ("any jurisprudence grounded on a status-use distinction seems destined to yield more questions than answers").

Finally, a status/use dichotomy permits and promotes discrimination among and within religions. As Justice Gorsuch observed in his *Espinoza* concurrence, under a status/use regime religious "winners and losers would soon emerge," with those "passive in its practice" being advantaged. *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring). Accordingly, a status/use theory of free exercise fails because the First Amendment prohibits states from "preferring some religious groups over" others. *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953); *see also Larson*, 456 U.S. at 244 (the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another").

II. The First Circuit's Direct "Target[ing]" and "Baseline" Doctrines Would Eviscerate Antidiscrimination Protections.

To avoid the strict scrutiny that applies to state discrimination against religion, the First Circuit concluded that use-based discrimination may be permissible if it *directly*, rather than "nominally," "target[s] … religious conduct" by applying only to "what the benefit itself would be used to carry out." *Carson*, 979 F.3d at 41. To access this loophole, so goes the First Circuit's reasoning, a state merely need define the "baseline" for its public benefit as "secular" so that a religious person or group could be deemed as

"not seeking 'equal access' to the benefit that [the state] makes available to all others." *Id.* at 41–42. This loophole, if permitted to take root, would eviscerate antidiscrimination protections.

First, given that a used-based restriction can violate antidiscrimination protections even when it also applies to unprotected activity, *see Lukumi*, 520 U.S. at 533–40, the First Circuit's position that a *targeted* restriction somehow passes muster finds no support in precedent or logic. Indeed, most use-based discrimination could be recast as targeting "what the benefit itself would be used to carry out." Adell Sherbet could be said to have used her unemployment benefits as financial support to carry out her observance of the Saturday Sabbath. *Sherbert*, 374 U.S. at 399–401, 404. Eddie Thomas could be said to have used his unemployment benefits "to facilitate changing employment" to a job that did not violate his religious beliefs. *Thomas*, 450 U.S. at 712 (quotation marks omitted). Ronald Rosenberger sought to use school funding for "journalistic efforts with religious viewpoints." *Rosenberger*, 515 U.S. at 825–27, 831. The Good News Club sought after-school access to school facilities to teach Bible verses. *Good News Club*, 533 U.S. at 103. James Obergefell and his fellow petitioners sought access to a state-issued marriage license or state recognition solely for their same-sex marriages. *Obergefell v. Hodges*, 135 U.S. 644, 656 (2015).

Second, and relatedly, the First Circuit's baseline-setting exercise (with the baseline here being "secular instruction"), would nearly always permit religious (and other) discrimination by a sufficiently

clever government entity. A "baseline" could always be set that would permit discrimination by simply defining the government benefit to exclude the disfavored use. Indeed, in *Espinoza*, Montana asserted that its "no-aid provision serves Montana's interest in separating church and State 'more fiercely' than the Federal Constitution" and has the "goal or effect of ensuring that government aid does not end up being used for 'sectarian education' or 'religious education.'" 140 S. Ct. at 2256, 2260. But as the Court held, Montana's interest "cannot qualify as compelling" because a "State's interest 'in achieving greater separation of church and State … is limited by the Free Exercise Clause.'" *Id.* at 2260 (quoting *Trinity Lutheran*, 137 S. Ct. at 2024). "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private [religious] schools" by narrowing its baseline to exclude the disfavored use of a sectarian education. *Id.* at 2261. "[I]t's irrelevant what [a state] might call its discriminatory practice, [or] how others might label it"—what matters is that the state "necessarily and intentionally discriminates … because of" religion. *Bostock*, 140 S. Ct. at 1744.

This Court has rejected similar efforts to justify discrimination by setting a baseline that automatically excludes the disfavored use or group. In *Obergefell,* for example, the Court specifically rejected an attempt to define the issue as the "right to same-sex marriage" rather than the "right to marry." 576 U.S. at 671 ("*Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about 'a right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support

duties to marry.'"). The Court held that the appropriate inquiry was whether "there was a sufficient justification for excluding the relevant class" from the generalized benefit, not the benefit as defined by the very exclusion at issue. *Id.*; *see also Bostock*, 140 S. Ct. at 1744–47 (rejecting arguments to set baseline for sex discrimination as not including discrimination against homosexuality or transgenderism).

Advancing the baseline argument, Maine classifies the private funding at issue here as "not an alternative to [a] public [program] but as part of it." BIO 19. That formulation, however, can be applied to nearly all government funding and would thus permit the virtual elimination of religious groups from participation in programs in which they have historically participated and that have come to dominate American life. Indeed, because "hundreds of federal agencies pok[e] into every nook and cranny of daily life," *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting)—and administer billions of dollars for public programs that permeate American life—a rule that permits these agencies to discriminate against religious use could be used to exclude religious groups from much of the civic life of this country.

For example, last Term, this Court considered the "Philadelphia foster care system," which—much like the Maine education system and private schools—"depends on cooperation … [with] private foster agencies." *Fulton*, 141 S. Ct. at 1875. The Court invalidated Philadelphia's attempt to expel Catholic Social Services (CSS) from the foster-care program—

an attempt which the city based on how CSS employed its "religious views [to] inform its work in this system." *Id.* The Court held that the exclusion served to "discriminate against religion" and could not withstand strict scrutiny. *Id.* at 1878, 1881–82. But if the First Circuit's baseline dodge is permitted, Philadelphia could simply claim that its foster-care program is "not an alternative to [a] public [foster-care] program, but part of it"—and thus only agencies that employ secular views to inform their work are permitted.[9] It would be passing strange if CSS's free exercise protections turned solely on the words Philadelphia uses to describe its foster-care program.

Thus, if the "baseline" exception is permitted to take hold, it could fundamentally alter the role religious education plays in American life, by blocking those institutions from accessing the funding upon which they have come to rely. For example:

- The William D. Ford Federal Direct Loan Program allows students and parents to borrow directly from the U.S. Department of Education to fund post-secondary education, including at private colleges and universities.

[9] The First Circuit's baseline setting—moving from the specific to the general to avoid the appearance of discrimination—is also at odds with *Fulton*'s holding that the "question … is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS" specifically. *Fulton*, 141 S. Ct. at 1881.

- The Federal Pell Grant Program awards grants to post-secondary students to fund post-secondary education, including at private colleges and universities.

- The D.C. Opportunity Scholarship Program is a federal program for low-income District residents, which provides parents with vouchers that can be used to fund attendance at elementary and secondary private schools in the District, including religious schools.[10]

Currently, all of these education programs (and many more) permit students and families to use this government funding at "sectarian" schools. For example, the Council for Christian Colleges and Universities estimated that in 2015 undergraduates enrolled at its member institutions received $1.32 billion in federal loans, $470 million in federal grants, and $231 million in state and local grants.[11] But under the First Circuit's "baseline" test, these religious schools could easily be cut out of these programs, as the government could "'condition the

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[10] *See Participating School List, D.C. Opportunity Scholarship Program 2020–2021*, SERVING OUR CHILDREN (July 2020), https://servingourchildrendc.org/wp-content/uploads/2020/07/Participating-School-List-2020-2021-English-6.24.20-1.pdf (listing participating schools, including many religious schools).

[11] *See Building the Economy & the Common Good: The National Impact of Christian Higher Education in the United States*, COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES (March 2018), https://www.cccu.org/wp-content/uploads/2018/03/CCCU-National-Impact-FINAL-2.pdf.

availability of benefits … upon [students'] willingness to … surrender[] [their] religiously impelled'" educational activities. *McDaniel*, 435 U.S. at 626 (quoting *Sherbert*, 374 U.S. at 406). All the federal government would have to do is say that this funding is now part of a "public program of education."

That the federal government might someday exhibit such hostility to religion in education is no remote possibility, because, in recent years, it has done so in other areas. For example, in implementing the Patient Protection and Affordable Care Act of 2010 ("ACA"), the Department of Health and Human Services illegally "demand[ed] that … closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 689–90 (2014). HHS also demanded that "religious nonprofit organizations and educational institutions across the country" objecting to the contraception mandate submit a certification that would trigger "payments to beneficiaries for contraceptive services separate from the health plan." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2375 (2020). This triggered a "spate of lawsuits" that resulted in these groups, for seven years, having "to fight for the ability to continue their noble work without violating their sincerely held religious beliefs." *Id.* at 2376, 2386.

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This Court has repeatedly struck down attempts to target religious beliefs as a violation of the Free Exercise clause. The First Circuit's baseline-

setting exercise is simply an end-run around the well-established rule that a state cannot deny "a generally available benefit solely on account of religious identity." *Trinity Lutheran*, 137 S. Ct. at 2019. Although Maine cannot create religiously affiliated public schools, and need not fund private schools, once the State decides to do the latter, it cannot discriminate on the basis of religion.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that this Court should reverse the First Circuit and hold that Maine's discrimination against religion in its funding of private schools violates the Free Exercise Clause.

September 10, 2021

Respectfully submitted,

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