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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Do the Religion Clauses allow governments to categorically exclude religious families and schools from an otherwise-available government-created benefit?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in litigation, including in multiple cases at the United States Supreme Court. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Holt* v. *Hobbs*, 574 U.S. 352 (2015); *Zubik* v. *Burwell*, 578 U.S. 932 (2016); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor Sts. Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367 (2020); *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868 (2021).

Becket has long been involved in litigation to protect religious organizations barred from public benefits because of their religious status. See, *e.g.*, *Morris Cnty. Bd. of Chosen Freeholders* v. *Freedom From Religion Found.*, 139 S. Ct. 909, 909 (2019) (statement of Kavanaugh, J.) (churches denied historic preservation grants); *Harvest Family Church* v. *FEMA*, No. 17A649 (churches denied disaster recovery grants). Becket has also long defended the right to religious education. See, *e.g.*, *New Mexico Ass'n of Non-public Sch.* v. *Moses*, 137 S. Ct. 2325 (2017) (mem.) (granting certiorari, vacating, and

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission. Petitioners and Respondent have consented to the filing of this brief.

remanding); *Center for Inquiry, Inc.* v. *Jones*, No. 2007-CA-1358, slip op. at 18 n.61 (Fla. Cir. Ct. Jan. 20, 2016) (unpublished judgment), https://perma.cc/4MJT-FZRD; *Oliver* v. *Hofmeister*, 368 P.3d 1270 (Okla. 2016); *Independent Sch. Dist. No. 5 of Tulsa Cty.* v. *Spry*, 292 P.3d 19 (Okla. 2012); *Lebovits* v. *Cuomo*, No. 1:20-cv-01284 (N.D.N.Y. filed Oct. 16, 2020) (in-person religious education at Orthodox Jewish girls' school); *Danville Christian Acad.* v. *Beshear*, 141 S. Ct. 527 (2020) (amicus).

Becket offers this brief to situate the question at issue here—categorical exclusion of religious entities from a government benefit—within the broader architecture of the Religion Clauses.

INTRODUCTION AND SUMMARY OF ARGUMENT

Twenty-one years after *Employment Division* v. *Smith* was decided, its author Justice Scalia shocked the courtroom during the *Hosanna-Tabor* oral argument when he revealed his view that *Smith* was far narrower than the scholarly consensus of the time had it. In response to the government lawyer's contention that the ministerial exception was subject to the rule of *Smith*, he exclaimed, "*Smith* didn't involve employment by a church. It had nothing to do with who the church could employ. I don't -- I don't see how that has any relevance to this." The Court went on to hold unanimously that *Smith* indeed "had nothing to do" with the ministerial exception, leading to a revolution in the way academics think about *Smith* and the Free Exercise Clause.

But the belated Free Exercise epiphanies did not stop with *Hosanna-Tabor*. It turns out that *Smith*

"had nothing to do" with a great many other claims brought under the Free Exercise Clause. In the decade since that oral argument, the Court has gone on to clarify that *Smith*'s rational basis standard doesn't apply to laws rooted in hostility or intolerance (*Masterpiece*; *Fulton*), to laws that burden religion by means of discretionary or individualized exemptions (*Fulton*), to laws that burden religion by means of categorical exemptions (*Tandon*), to laws that deny religion otherwise-available benefits (*Trinity Lutheran*; *Espinoza*), or to laws that impinge on church autonomy (*Our Lady of Guadalupe*). These areas where *Smith*'s writ did not run came in addition to other areas of Free Exercise jurisprudence where it was already clear that *Smith* was not relevant—for example, laws that force someone to participate in a ceremony against her conscience (*Barnette*) or laws that touch on the right of parents to provide a religious education (*Yoder*).

Thus, over the last decade it has become apparent that far from being an across-the-board rule governing any kind of Free Exercise claim brought by any kind of Free Exercise plaintiff, the scope of *Smith*'s unadorned general applicability/neutrality rule is smaller than most had assumed for two decades. Properly understood, and as applied by this Court, *Smith* is now a residual rule, not a general rule. That of course does not mean *Smith* is harmless or ought to be saved: It is still a wrongly-decided case that harms religious believers—particularly in the lower courts—and deserves to be overruled for a host of reasons already familiar to the Court. But *Smith*'s narrowed scope does mean that when the time to replace *Smith* comes, the effects of overruling it will be even smaller

than they were just a few years ago.

This Court's recent Free Exercise decisions thus change the parameters of this case. Properly situated within the post-*Hosanna-Tabor* architecture of the Free Exercise Clause, it is clear that Maine's categorical exclusion of religious schools from a government benefit program must fall under the rules of *Yoder*, *Lukumi*, and *Espinoza*, each of which triggers strict scrutiny when applied to the facts here. And in Justice Scalia's words, *Smith* has nothing to do with it.

The Establishment Clause also has nothing to do with it. Maine cannot save its discriminatory treatment of religious schools by invoking (as the First Circuit did) antiestablishment interests. Since providing the benefit here shares none of the hallmarks of a historic religious establishment, Maine's student-aid program does not offend the Establishment Clause or a broader interest in antiestablishment. And as *Espinoza* pointed out, "there is no 'historic and substantial' tradition against aiding such schools." *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020). Indeed, recent scholarship shows that for the founding generation, there was a historic and substantial tradition *for* aiding religious schools.

Locke v. *Davey* does not counsel otherwise, both on its own terms—no one at Maine religious secondary schools is being educated for the ministry—and because what we have learned about the history of the Establishment Clause since *Locke* shows that *Locke* itself rests on shaky historical premises.

In short, the Religion Clauses are in firm agreement that extending Maine's student-aid program to children who happen to attend religious schools is both required by the Free Exercise Clause and something the Founders would have seen as a boon, not a bane.

ARGUMENT

I. The Free Exercise Clause prohibits Maine's exclusion of religious schools from the student-aid program.

How this Court decides the Free Exercise Clause claim in this case is almost as important as *what* result it reaches. In particular, when or whether to consider *Smith* in the process of resolving this appeal will be of crucial importance to both these litigants and the lower courts who need guidance on how to decide Free Exercise claims. Here the distinction between general rules and residual rules is pivotal. Last Term, this Court contrasted the two kinds of rules in the context of federal common law: "Although our decision in [*Erie*] denied the existence of any federal general common law, we suggested that a limited, residual amount remained to create causes of action for violations of international law." *Nestlé USA, Inc.* v. *Doe*, 141 S. Ct. 1931, 1938 (2021) (cleaned up).

Smith is in this sense like federal common law—a residual rule that applies only in a discrete set of situations. Thus, instead of looking to *Smith* in the first instance to decide this case, the Court should instead start with the array of Free Exercise rules already recognized by the Court. And under those rules, Maine's exclusion of religious students and

schools from the student-aid program cannot be upheld.

A. *Smith* is a residual rule, not a general rule.

Smith is often thought of as the leading rule in Free Exercise jurisprudence—one test to rule them all. But *Smith* itself never purported to be a comprehensive, one-stop-shop for all Free Exercise claims, and even a basic review of the caselaw reveals that it never was.[2] As *Smith* acknowledged, in 1990 there were already a number of specialized rules that the Court had recognized for discrete categories of Free Exercise disputes. *Smith* affirmed it was not changing these pre-existing rules. For example, *Smith* said it did not govern disputes over unemployment benefits. *Employment Div.* v. *Smith,* 494 U.S. 872, 883 (1990). *Smith* also expressly left to one side "the right of parents * * * to direct the education of their children," recognizing that these claims still receive heightened scrutiny. *Id.* at 881 (citing *Yoder* and *Pierce*). And it disclaimed any change to the rule against government involvement "in controversies over religious authority or dogma." *Id.* at 877.

More importantly, in the three decades since it was decided, the Court has recognized that *Smith* simply does not apply in a host of different factual scenarios. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 190 (2012) (*Smith* does not apply to "an internal church decision"); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020) (making no mention of

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[2] Indeed, *Smith* itself repeatedly remarked that the case was about an "across-the-board criminal prohibition." *Employment Div.* v. *Smith*, 494 U.S. 872, 884 (1990).

Smith); *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) ("falls outside *Smith*"). Thus, whatever *Smith* was the day it was decided, this Court's precedents demonstrate that today it is a residual rule, not a general rule for deciding Free Exercise Clause claims.

And that makes all the difference. Since *Smith*'s main rule—no strict scrutiny where a rule is both generally applicable and neutral—applies in so few factual scenarios, it is illogical and unwise to start judicial analysis of a Free Exercise claim with *Smith*. Instead, courts should first look to see which of the array of other Free Exercise rules best fits the fact pattern before the court, turning to *Smith* only as a last resort.

That approach better matches what this Court has done: starting with straightforward questions like "does this employee perform religious functions?" or "does this interfere with religious education?" or "does this law categorically exempt secular but not religious actors?" and only discussing *Smith* after those questions are resolved. This Court has developed the law of the Free Exercise Clause substantially in the decades since *Smith* was decided, and a rubric that begins with *Smith* skips thirty years of doctrinal development.

Moreover, for the lower courts, deciding Free Exercise claims within the bounds of discrete factual contexts means that the stakes for each decision are lower because the rule does not result in knock-on effects across all of First Amendment jurisprudence. In this sense, the Free Exercise Clause looks more like the Free Speech Clause: Modern Speech Clause jurisprudence is widely understood to encompass

various rules for discrete types of claims. For example, a prior restraint decision is about prior restraints, not about every species of Free Speech claim there is. That makes the scope of the known unknowns smaller for the deciding judge and renders both the particular subset of Free Speech doctrine and the broader family of Free Speech doctrines more judicially manageable.

Moreover, just as it would be absurd for every discussion of diversity jurisdiction in the federal courts to begin with a recitation of what causes of action are and are not governed by federal common law, it makes little sense to start the process of deciding a Free Exercise claim by trying to apply the residual (and ill-functioning) rule of *Smith*. This is apparent from the ministerial exception cases, where both the lower courts and this Court held that *Smith* was irrelevant. Now when a district court decides a Free Exercise Clause claim rooted in the ministerial exception, it looks to *Hosanna-Tabor* and *Our Lady* for guidance; *Smith* is rightly irrelevant.

Yet for many other Free Exercise Clause claims, *Smith* continues to lie at the wrong end of most judicial decisionmaking flowcharts. This Court should therefore provide guidance to the lower courts that *Smith* is a residual rule, not a general one, and that the lower courts should therefore begin their analysis not with *Smith*, but by asking what type of Free Exercise claim has been asserted.

Amicus continues to believe that *Smith* was wrongly decided and should be overruled, particularly because it is so often misapplied by the lower courts, causing harm to religious believers. But the Court can do something in this case to provide much-needed guidance to the lower courts now. By outlining the

proper sequence of judicial decisionmaking on Free Exercise claims, along with the array of Free Exercise rules this Court has already recognized during the preceding decades, this Court will help lower courts decide Free Exercise cases in a more orderly fashion and reduce the overall amount of religion-related conflict within American society.

B. The set of recognized Free Exercise Clause rules

Over the past 150 years, this Court has recognized an array of different Free Exercise rules that apply to different kinds of litigants bringing different kinds of claims. The varied nature of these rules reflects the varieties of religious experience in the United States—one of the most religiously diverse polities in the world. We describe several of these rules below, but the list is by no means exhaustive.[3]

1. The church autonomy rule

The church autonomy rule is one of the oldest Free Exercise standards to be recognized by the Court. Going back to at least *Watson* v. *Jones* in 1871, the Court has consistently recognized that churches, synagogues, mosques, and other religious organizations must have a sphere of autonomy concerning their internal affairs, such as control over their doctrines, offices, and internal functioning. And just as the sphere of the individual's mind must be left "absolute[ly]" inviolate so that she can freely determine what she believes to be true with respect to the transcendent, *Cantwell* v. *Connecticut*, 310 U.S.

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[3] For example, we do not address *Smith*'s separate rule governing unemployment benefits claims.

296, 303 (1940), the *mens ecclesiae* must also be left inviolate so that the Church can freely determine what it believes.

The Court has repeatedly recognized the church autonomy rule in a host of different contexts. In *Watson* v. *Jones*, the Court held that civil courts must defer to religious bodies on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law[.]" 80 U.S. (13 Wall.) 679, 727 (1871). Years later, in *Gonzalez* v. *Roman Catholic Archbishop of Manila*, the Court recognized that because decisionmaking about who could be appointed to the office of Catholic chaplain was a "purely ecclesiastical" matter, civil courts could not intervene. 280 U.S. 1, 16 (1929). And a few decades after that, the Court decided a pair of cases concerning New York's interference with the polity of the Russian Orthodox Church, ruling that churches must have a sphere of "independence from secular control" in "matters of church government." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); see also *Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (same principles applied to common-law claims). The Court similarly reaffirmed that civil courts have no writ over matters of "internal [church] discipline and government" in *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 724 (1976).

After *Smith* was decided, the Court gave express recognition to one subset of the church autonomy family of doctrines—the ministerial exception—in *Hosanna-Tabor*, relying extensively on the line of church autonomy precedents that began with *Watson*. 565 U.S. at 185-187. And in *Our Lady* it recognized that under the "general principle of church autonomy,"

the Religion Clauses broadly protect a religious organization's "independence in matters of faith and doctrine and in closely linked matters of internal government." 140 S. Ct. at 2061.[4]

As Justice Scalia recognized so forcefully at the *Hosanna-Tabor* oral argument, *Smith* has nothing to do with this separate line of Free Exercise doctrine, and neither this Court nor the lower courts have decided that it does. Indeed, attempts to import *Smith* into the field of church autonomy have quickly been rejected. See, *e.g.*, *Hosanna-Tabor*, 565 U.S. at 190 (rejecting application of *Smith*); *Demkovich* v. *St. Andrew the Apostle Parish*, 973 F.3d. 718, 735 (7th Cir. 2020) (citing *Smith* to deny ministerial exception defense), vacated and disagreed with by en banc court, 3 F.4th 968, 980 (7th Cir. 2021) (en banc) (ministerial exception defense unaffected by *Smith*).[5]

2. The rule against forced participation in ceremonies

In 1943, *West Virginia Board of Education* v. *Barnette* set out a different Free Exercise Clause rule—one focused on whether government officials could require a "conscientious child to stultify himself in public" by participating in a ceremony that went

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[4] That the doctrine is still sorely needed is apparent from the cases in the lower courts. See, *e.g.*, *Belya* v. *Kapral*, No. 21-1498 (2d. Cir., stay entered Sept. 2, 2021) (Russian Orthodox priest suing highest-ranking American hierarch in the Russian Orthodox Church for defamation due to letter sent recommending that plaintiff not be ordained bishop).

[5] Although the ministerial exception is also rooted in the Establishment Clause, each Religion Clause is separately sufficient to support the rule.

against his religious beliefs. 319 U.S. 624, 635 n.15 (1943). The Court held that they could not, and that "compelling the flag salute and pledge * * * invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642.

Although typically thought of as a Free Speech case, *Barnette* reached this Court solely as a Free Exercise case. In their amended complaint, the Jehovah's Witness plaintiffs complained principally of violations of freedom of worship and religious conscience, but also referred to other First Amendment freedoms. See First Amended Complaint, *Barnette* v. *West Va. State Bd. of Educ.*, No. 242 (S.D. W. Va., filed September 19, 1942), https://catalog.archives.gov/id/279136 at 8 ("violate their conscience by participating in said flag ceremony"), 19 ("right to exercise and enjoy freedom to worship"). The three-judge district court based its ruling solely on the religious freedom claim: "the flag salute here required is violative of religious liberty[.]" *Barnette* v. *West Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D. W.Va. 1942).

Writing for this Court, Justice Jackson sought to impose a "broader definition of issues in this case" on appeal, stating that the case ought not "turn on one's possession of particular religious views or the sincerity with which they are held." *Barnette*, 319 U.S. at 634-636. But the Court could not and did not *replace* the religious freedom claim appealed to it with a free speech claim, as shown by the Court's references to

freedom of worship. See *id.* at 638, 639.[6] Indeed, the Court recognized as much a year later in *United States* v. *Ballard*, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men.") (citing *Barnette*). And for its part, *Smith* did not purport to alter *Barnette*'s continuing validity. See *Smith*, 494 U.S. at 882.

3. The religious education rule

Another discrete Free Exercise rule recognized before *Smith* concerns religious education. In *Wisconsin* v. *Yoder*, this Court held that a rule impinging on parents' rights to control "the religious upbringing and education of their minor children" triggered strict scrutiny under the Free Exercise Clause. 406 U.S. 205, 231 (1972). *Yoder* drew on two earlier cases that may be thought of as proto-Free Exercise cases because they predated incorporation of the Free Exercise Clause against the states: *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) and *Pierce* v. *Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925). *Meyer* and *Pierce* were thus decided on due process grounds, but both nevertheless later supported *Yoder*'s conclusion that parents have a "fundamental" interest "with respect to the religious upbringing of their children. 406 U.S. at 213-214. See, *e.g.*, *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965) (discussing *Meyer* and *Pierce* as First Amendment cases).

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[6] This also means *Smith*'s reliance on *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940), was premised on the incorrect conclusion that *Barnette* was "decided exclusively upon free speech grounds" and thus did not overrule *Gobitis* as to Free Exercise claims. See *Smith*, 494 U.S. at 882.

Smith left this line of precedent untouched, describing "the right of parents * * * to direct the education of their children," recognizing that these claims still receive heightened scrutiny, and citing *Yoder* and *Pierce* for the point. 494 U.S. at 881.

More recently, the Court has repeatedly reaffirmed the unique role of religious education. For example, *Espinoza* reaffirmed as an "'enduring American tradition' * * * the rights of parents to direct 'the religious upbringing' of their children." 140 S. Ct. at 2261 (quoting *Yoder*, 406 U.S. at 213-214). Likewise, *Our Lady* surveyed the crucial role that religious education plays for many different religious communities. 140 S. Ct. at 2064-2066.

4. The rule against burdening activity because it is religious

There is also a recognized Free Exercise rule against burdening religious beliefs or practice *because* they are religious. In *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, the Court explained that "if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," then it triggers strict scrutiny. 508 U.S. 520, 532 (1993). Put another way, "[A] law targeting religious beliefs as such is never permissible[.]" *Id.* at 533 (citing *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978)). *Smith* itself recognized this rule. 494 U.S. at 877 ("special disabilities on the basis of religious views or religious status" are impermissible). Government officials are thus "obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of [religious actors'] religious beliefs." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138

S. Ct. 1719, 1731 (2018). And it also means that government may not "restrict[] practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877.

One key to applying this rule is history. Courts should assess "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Masterpiece*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 540 (op. of Kennedy, J.)). And where the history shows government action directed at religious practice, strict scrutiny applies.

5. The individualized or discretionary exemptions rule

The Court has also recognized several rules concerning government-created burdens. Where government imposes a burden—for example, a restriction or prohibition of some sort—on a large category of people but then creates a mechanism for individually exempting some people from the ambit of the burden, the exemption must be extended to religious people as well, unless the government has compelling reason not to. Relying on *Bowen* v. *Roy*, 476 U.S. 693 (1986), and *Smith*, the *Lukumi* Court held that "in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason." 508 U.S. at 537 (cleaned up).

In *Fulton*, the Court further explained that where a law "incorporates a system of individual

exemptions," or includes "a formal system of entirely discretionary exceptions," strict scrutiny is triggered. 141 S. Ct. at 1878. Importantly, it does not matter whether the system of exceptions has ever been used: "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given[.]" *Id.* at 1879.

6. The categorical exemptions rule

The Court has also recognized a Free Exercise rule concerning *categorical* exemptions from government-created burdens. The *Lukumi* Court called this the problem of "underinclusiv[ity]": "categories of selection are of paramount concern" when a law burdens religious practice. 508 U.S. at 542, 543. In *Lukumi*, the Court found Hialeah's rules governing animal killing substantially "underinclusive" and thus not generally applicable with regard to conduct that undermined the government's asserted interests "in a similar or greater degree." *Id.* at 543-544. And the *Lukumi* Court additionally found the law not "neutral" because it accomplished a "religious gerrymander"—that is, it burdened "Santeria adherents but almost no others." 508 U.S. at 535-538.

Similarly, in *Tandon* v. *Newsom* the Court recognized that government actions—like selective burdens on home worship—that "treat *any* comparable secular activity more favorably than religious exercise" trigger strict scrutiny under the Free Exercise Clause. 141 S. Ct. 1294, 1296 (2021) (per curiam) (citing *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 67-68 (2020) (per curiam)). And also like *Lukumi*, *Tandon* judged "whether two activities are comparable for purposes of the Free

Exercise Clause" "against the asserted government interest that justifies the regulation at issue." *Ibid.*

7. The rule against categorical exclusions from government-created benefits

As with burdens, so with benefits. The rule against categorical imposition of burdens on religion is mirrored by the rule against selective exclusion of religion from otherwise available benefits, recognized by the Court in both *Trinity Lutheran* and *Espinoza*. In *Trinity Lutheran*, the Court evaluated "a policy of categorically disqualifying churches and other religious organizations from receiving grants," holding that "the State's decision to exclude [the church] for purposes of this public program must withstand the strictest scrutiny." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2017, 2022 (2017). The Court rooted this observation in citations to *Smith*, *Lukumi*, and *McDaniel*, 435 U.S. 618 (plurality), and their teaching that "special disabilities on the basis of religious views or religious status" triggers strict scrutiny. *Trinity Lutheran*, 137 S. Ct. at 2019-2021.

And in *Espinoza*, the Court recognized that "Montana's no-aid provision impose[d] a categorical ban" excluding religious entities from state benefits, triggering strict scrutiny. *Espinoza*, 140 S. Ct. at 2261. Indeed, "religious schools and the families whose children attend them" "are members of the community too, and their exclusion from the scholarship program here is odious to our Constitution and cannot stand." *Id.* at 2262-2263 (cleaned up). The decision made no mention of *Smith*. In short, categorical exclusion of religious people from government benefit programs triggers strict scrutiny.

C. Maine's program violates the Free Exercise Clause under three separate rules.

Applying the decisionmaking sequence described above to the facts in this case is straightforward. In Justice Scalia's words, *Smith* has nothing to do with this case. Instead the Court should look first to the Court-recognized Free Exercise rules that govern this discrete category of claim. Here, three of the Free Exercise rules described above apply: (1) the rule against interference with the right under *Yoder*, *Meyer*, and *Pierce* of parents to provide their children with a religious upbringing; (2) the rule against burdening religion because it is religious; and (3) the rule against categorically excluding religious people from otherwise available government benefits.

Each of these rules separately triggers strict scrutiny. Maine's exclusion of religious families from the student-aid program plainly interferes with those parents' ability to provide their children with a religious upbringing by disqualifying them from a generous benefit. The exclusion of religious schools and families was also done *because* they are religious. As the "administrative history" shows, *Masterpiece*, 138 S. Ct. at 1731, the 1980 Attorney General opinion rested entirely on the schools' religious nature. Pet.Br.36-37. And the Maine exclusion policy also runs afoul of the rule against categorical exclusions from otherwise-available government benefits—religious entities are excluded as a category.

Finally, for the reasons explained in Petitioners' brief, Maine's religious exclusion cannot withstand strict scrutiny. Pet.Br.36-44.

* * *

Smith would also provide a path to the same conclusion. But it would take the Court on a much more tortuous route. Given the existence of well-recognized Free Exercise Clause rules that allow the Court to resolve this decision more straightforwardly, it should formally recognize that *Smith* does not apply to most Free Exercise cases, and take the direct route to a resolution of Petitioners' claim.

II. The Establishment Clause does not justify Maine's program because providing funds to religious schools does not involve any of the characteristics of a historic establishment.

In this case, there is no "internal tension * * * between the Establishment Clause and the Free Exercise Clause." *Hosanna-Tabor*, 565 U.S. at 181. The Establishment Clause does not justify Maine's exclusion of religious schools from the tuition assistance program, because providing funding to religious schools as part of an otherwise available program is not an establishment of religion as the Founders understood it. Indeed, the founding generation often used public funds to provide education through religious schools.

A. The founding generation frequently provided government funds to religious schools.

This Court has held that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece* v. *Galloway*, 572 U.S. 565, 576 (2014). Because the Founders knew establishments of religion well, both

in England and in nine of the thirteen colonies, we can look to the founding generation for evidence of what the First Amendment meant when it forbade establishments of religion.[7]

The first consideration in determining what the Founders understood as an element of a religious establishment is to observe what the founding generation did and did not do. As the Court recognized in *Espinoza*, religious schools in the founding era were often supported by government financial aid, even in "states with bans on government-supported clergy, such as New Jersey, Pennsylvania, and Georgia," and even after disestablishment had been accomplished. 140 S. Ct. at 2258 (collecting examples). There is thus no "historic and substantial" tradition of denying aid to religious schools. *Id.* at 2259.

As states began removing elements of their established religions, they increasingly diverted taxes away from churches, but religious schools continued to benefit from the public coffer. Indeed, "virtually every state that ended church taxes also provided tax money to religious schools—including schools directly affiliated with a church." Mark Storslee, *Church Taxes*

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[7] Massachusetts (which then included Maine), Connecticut, and New Hampshire allowed each town to select the minister of the denomination it chose. Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2110-2111 (2003). In Maryland, Virginia, North Carolina, South Carolina, and Georgia, the Church of England was officially established by law. *Id.* at 2110. New York had no official establishment, but four counties of metropolitan New York maintained a loose establishment of the Church of England. *Ibid.* Pennsylvania, Delaware, New Jersey, and Rhode Island had no official establishment. *Id.* at 2111.

and the Original Understanding of the Establishment Clause, 169 U. Pa. L. Rev. 111, 118 (2020). For example, before the revolution, the Anglican College of William and Mary received a designated award of land surveyor fees imposed by the Commonwealth of Virginia. *Id.* at 130. That award lasted until 1819, but after Virginia passed Thomas Jefferson's Bill for Religious Freedom in 1786, ending Virginia's establishment, religious schools of other denominations sought and received funds from the same surveyor fees. *Id.* at 130-131. In New York, where schools operated only with the Church of England's approval before disestablishment, by 1805, there were schools run by at least five different denominations, all publicly sponsored. McConnell, 44 Wm. & Mary L. Rev. at 2173-2174. The federal government also continued funding religious schools after the founding, including religious schools for Native Americans, schools for emancipated freemen in the Reconstruction South, and religious schools in the District of Columbia. *Espinoza*, 140 S. Ct. at 2246.

Public sentiment in the founding generation supported public funding for religious schools. A corpus linguistics analysis of popular and public language at the time of the founding revealed only one instance of controversy involving publicly-funded schools and establishment. Stephanie H. Barclay et al., *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 Ariz. L. Rev. 505, 548 (2019). There, the objection was a law that required all teachers to be part of the Church of England, meaning a lack of choice for parents who wanted to educate their children according to their own faith. *Ibid.* Even Quakers and Baptists, the "most

vigorous advocates of religious liberty during the Founding period * * * did not object to funding religious schools." Storslee, 169 U. Pa. L. Rev. at 136. The founding generation thus did not consider it an establishment when public funding went to religious schools.

B. The historic characteristics of an "establishment of religion" are not present here.

The founding generation's tolerance for public funding of religious schools can be explained by a broader summary of the elements of an established religion. This Court has explained that "where history shows that the specific practice is permitted," "it is not necessary to define the precise boundary of the Establishment Clause." *Town of Greece*, 572 U.S. at 577. But a historical approach does help explain the boundaries around public funds to religious schools.

At the time of the founding, the "essential * * * ingredients" of an establishment took one of six forms: (1) government financial support of the church; (2) government control of the doctrine and personnel of the church; (3) compulsory church attendance; (4) prohibitions on worship in dissenting churches; (5) restriction of political participation to members of the established church; and (6) government assignment of important civil functions to church authorities. McConnell, 44 Wm. & Mary L. Rev. at 2118, 2131. Within all these categories, "the key element of establishment" was state "control" of religious groups. *Id.* at 2131.

1. Among the six features of an establishment, public financial support of the church is most relevant

here. In the founding era, public financial support of the established church included compulsory tithing, land grants, and even direct financial support of churches. McConnell, 44 Wm. & Mary L. Rev. at 2147. But as evidenced by the ongoing support of religious schools after disestablishment, every instance of state funding to religious institutions did not automatically fall into the category of an establishment. See Barclay, *Original Meaning,* 61 Ariz. L. Rev. at 550 ("the presence of such [public financial] support, alone, does not capture the characteristic associated with an establishment."). The types of funding that did constitute an establishment were "paired with other relevant characteristics." *Id.* at 558. The funding decisions that *did* cause controversy were exclusive taxes going specifically to churches, state funding invoked to maintain control over a religious institution, and favoring some churches over others. See Stephanie H. Barclay, *Untangling Entanglement*, 97 Wash. U. L. Rev. 1701, 1724 & n.190 (2020).

The most famous example of financial support that was eradicated in the years following the Revolution was compulsory tithes from church taxes. Virginia considered making its compulsory tithe to the Anglican Church a "general assessment" that would have allowed citizens to designate their funds toward a church of their choice. Storslee, 169 U. Pa. L. Rev. at 121. But Thomas Jefferson, supported by James Madison, argued that even this choice constituted compulsion, "because it forced citizens to engage in a state-mandated religious observance." *Id.* at 124-125. Instead of the general assessment, the Virginia legislature banned church taxes in Thomas Jefferson's Bill for Establishing Religious Freedom but left in

place government funds that were going to religious schools. *Id.* at 129-130; Section II.A, *supra*. The most famous debate over state funding of religion, then, did not affect funding for religious schools. When public funding for religious schools did become controversial, it was much later and "in response to intense Protestant-Catholic conflict," and schools were defunded based on anti-Catholic sentiment. Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 Harv. L. Rev. 133, 145 (2017); see *Espinoza*, 140 S. Ct. at 2259 (no-aid provisions in the 1870s belonged to "checkered tradition" that was "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church").

That is consistent with this Court's finding violations of the Establishment Clause in government funding. In *Texas Monthly Inc.* v. *Bullock*, the Court struck down a program that provided a sales tax exemption for religious publications but not for secular publications. 489 U.S. 1 (1989). Despite the ahistorical approach adopted in *Lemon* v. *Kurtzman*, the Court there did accurately consider one of the problems of government funding to be "state inspection and evaluation of the religious content" taught at the school. 403 U.S. 602, 620 (1971) (plurality).

Here, however, "state inspection and evaluation" of the content of the schools' curriculum is exactly what Maine does to determine whether a school can participate. The lower court credited Maine's admission that in order to determine whether a school was sufficiently "nonsectarian," it would have to inspect and evaluate the religious content of the program. Pet.App.35. The solution to both the problems of "evaluation" of religious beliefs and

practice and of discriminating against certain religious belief, *supra* Section I, is to admit religious schools to the program regardless of the religious content of the program. That avoids invoking the "shameful pedigree" of attempting to determine whether a school is "pervasively sectarian." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality).

Unlike church tithes of the founding era, the student-aid program does not involve "state-mandated religious observance." Storslee, 169 U. Pa. L. Rev. at 125. Nor does including religious schools in the student-aid program favor an established religion by picking and choosing which churches qualify. Parents may choose a secular or religious school, and "the state gets full secular value for its money" in educating its children. Laycock, 131 Harv. L. Rev. at 143.

2. This Court has also consistently prevented states from interfering in "matters of church government." *Hosanna-Tabor*, 565 U.S. at 186 (2012). This contrasts with many pre-Revolutionary governments' practices of appointing and removing clergy from the church. McConnell, 44 Wm. & Mary L. Rev. at 2132. That dynamic created an atmosphere where political "loyalty * * * exceeded spirituality as a qualification" for holding religious office. *Id.* at 2137. Here, the *current* program interferes with church government by mandating an inquiry into whether a school is "sectarian"—a pejorative word. By contrast, including religious schools in the program on equal terms complies with the Establishment Clause's command that government not interfere with internal church affairs. See Pet.Br.47.

3. Nor does allowing parents to choose a religious school to send their children to secondary school

constitute compulsory church attendance. In the colonies, there were significant financial and physical penalties for failing to attend church with a prescribed frequency. McConnell, 44 Wm. & Mary L. Rev. at 2144. In *Engel* v. *Vitale*, 370 U.S. 421, 424 (1962), *School District of Abington* v. *Schempp*, 374 U.S. 203 (1963), *Lee* v. *Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), this Court struck down religious exercises sponsored by public schools on the ground that minor students would feel compelled to participate. But here, there is no pressure on anyone to attend a religious school over a secular school. To the extent minors would be participating in religious activities, that would be the choice of the minors and their parents, not the government or government-employed teachers. The government may require education and allow secular and religious choices within that requirement, even while it is forbidden from pressuring or requiring religious observance.

4. The student-aid program involves no prohibitions on worship in dissenting churches. In establishment governments, this often involved laws banning heresy, which were used to punish preachers in dissenting churches. McConnell, 44 Wm. & Mary L. Rev. at 2160-2068. While selectively excluding some religious schools but not others from the student-aid program *could* turn into a heresy hunt, including religious schools in the program on the same criteria as secular schools involves no such prohibitions.

5. The student-aid program does not limit political participation to members of a certain church. In the colonies, this involved limitations on the right to vote and the right to hold political office without

membership in the established church, and sometimes even religious oaths. McConnell, 44 Wm. & Mary L. Rev. at 2176-2177; see *McDaniel*, 435 U.S. 618. Here, the only limitation on civic participation is the prohibition of religious schools from the student-aid program. Where the government is allowing a choice of private schools, parents and students should be able to pursue their education at a school that allows them to exercise their faith.

6. Finally, the student-aid program does not cede government functions to religious organizations. In the early colonies, this meant requiring teachers to be approved by the established church and employing the local minister as teacher and schoolmaster. McConnell, 44 Wm. & Mary L. Rev. at 2171-2172.

A related historical concern over funding religious schools is a government-imposed monopoly provided to one religious group, an arrangement that would cede government control over education to the church. See Barclay et al., *Original Meaning*, 61 Ariz. L. Rev. at 510. In *Larkin* v. *Grendel's Den Inc.*, for example, this Court struck down a state law that gave religious organizations the power to veto liquor licenses for third parties. 459 U.S. 116 (1982). And in *Board of Education of Kiryas Joel Village School District* v. *Grumet*, the Court struck down the creation of a special school district for a religious group because it "grant[ed] political control" to that group. 512 U.S. 687, 689 (1994).

Here, allowing students and parents to choose a school does not give a religious school exclusive power over the government function of ensuring that students receive an education. Maine has already acknowledged that reality by outsourcing education to

private schools. Including religious schools of various denominations as some of the options among private schools by no means provides a monopoly to religious schools, let alone to one religion.

7. *Locke*, to the extent it is still relevant, is not to the contrary. *Locke* held that a state scholarship program could, consistent with the Free Exercise Clause, exclude students who sought to attend a divinity program for the training of clergy due to a historical antiestablishment interest in avoiding funding the training of clergy. For historical support of this interest, *Locke* pointed to "formal prohibitions against using tax funds to support the ministry" in the early United States. *Locke* v. *Davey*, 540 U.S. 712, 723 (2004). But the above examples of support for religious schools shows that this did not apply to *any* religious use. See Storslee, 169 U. Pa. L. Rev. at 189 ("that reading of the history was very likely incorrect").

Furthermore, *Locke*'s analysis does not apply here. In *Trinity Lutheran*, the Court noted that "*Locke* took account of Washington's antiestablishment interest only after determining, as noted, that the scholarship program did not 'require students to choose between their religious beliefs and receiving a government benefit.'" 137 S. Ct. at 2023. But here, that is exactly what the student-aid program does. See Pet.Br.30-31. And in *Espinoza*, the Court explained that *Locke* allowed a restriction on funding for a "distinct category of instruction," not schools "that incorporated religious instruction throughout their classes," and that there is no historical state interest in disqualifying all religious schools from public funding, as described above. 140 S. Ct. at 2257. Here, just as the *Espinoza* Court recognized that there was no

antiestablishment interest in scholarships to religious schools, there is no incremental antiestablishment interest in scholarships to religious schools that teach religion in their programs. The founding generation knew no such distinction. *Locke* therefore does not control here.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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