No. 20-1088

In the
Supreme Court of the United States

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

v.

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

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

BRIEF OF *AMICI CURIAE* CONCERNED WOMEN FOR AMERICA, THE CONGRESSIONAL PRAYER CAUCUS FOUNDATION, THE FAMILY FOUNDATION, ILLINOIS FAMILY INSTITUTE, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, THE NATIONAL LEGAL FOUNDATION, AND PACIFIC JUSTICE INSTITUTE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. *Mitchell v. Helms* Began This Court's Retreat from Disqualifying Religious Institutions from Receipt of Governmental Benefits Due to Their Pervasively Sectarian Religious Exercise 5

II. The Pervasively Sectarian Test Was Further Eroded by Decisions Explaining That Private Choices Determining the Recipient of Generally Available Public Funds Eliminate the Applicability of the Establishment Clause 12

III. *Trinity Lutheran* and *Espinoza* Further Eroded the Pervasively Sectarian Test 18

IV. This Court Should Also Reject the Pervasively Sectarian Test in the Context of a Religious School's *Use* of Generally Available Benefits 19

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Agostini v. Felton, 521 U.S. 203 (1997) 7, 8-9,13

Aguilar v. Felton, 473 U.S. 402 (1985), *overruled*, *Agostini v. Felton*, 521 U.S. 203 (1997) 8

Bd. of Educ. of Cent. Sch. Dist. No. 1 v. *Allen,* 392 U. S. 236 (1968) 12

Bowen v. Kendrick, 487 U.S. 589 (1988) 8

Bradfield v. Roberts, 175 U.S. 291 (1899).....6, 10

Carson v. Makin, 979 F.3d 21 (1st Cir. 2020).....19

Colorado Christian Univ. v. Weaver, 534 F.3d 1245 (10th Cir. 2008).....22

Comm. for Pub. Ed. v. Nyquist, 413 U.S. 756 (1973) 8

Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) 8

Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) 14

Cnty. of Allegheny v. ACLU of Pittsburgh, 492 U.S. 573 (1989) 24

Espinoza v. Mont. Dept. of Rev., 140 S. Ct. 2246 (2020) .....*passim*

Everson v. Board of Education, 330 U.S. 1 (1947) ..5, 7

Hunt v. McNair, 413 U.S. 734 (1973) 8

Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952) ..22

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 11

Larson v. Valente, 456 U.S. 228 (1982) 23

Lemon v. Kurtzman, 403 U.S. 602 (1971) 8

Lynch v. Donnelly, 465 U.S. 668, 687 (1984) 24

Meek v. Pittenger, 421 U.S. 349 (1975) 7, 8

Mitchell v. Helms, 530 U.S. 793 (2000) ..... *passim*

Mueller v. Allen, 463 U.S. 388 (1983) ..... *passim*

Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) 25

Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736 (1976) 7, 8

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) 11, 13

Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), *overruled*, *Agostini v. Felton*, 521 U.S. 203 (1997) 7, 8

Serbian E. Orthodox Diocese for the U.S. & Can. v.Milivojevich, 426 U.S. 696 (1976) 22

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) ..... *passim*

Troxel v. Granville, 530 U.S. 57 (2000) 25

Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) 22

Widmar v. Vincent, 454 U.S. 263 (1981) 10, 14

Witters v. *Wash. Dept. of Servs. for Blind,* 474 U. S. 481 (1986) 8, 14, 15, 17

Wolman v. Walter, 433 U.S. 229 (1977), *overruled*, *Mitchell v. Helms*, 530 U.S. 793 (2000) 8

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) ..... *passim*

Zobrest v. *Catalina Foothills Sch. Dist.,* 509 U. S. 1 (1993) ..... *passim*

Statutes

Me. Stat., tit. 20-A, § 2951(2) 20

Other Authorities

James A. Davids, *Pounding a Final Stake in the Heart of the Invidiously Discriminatory "Pervasively Sectarian" Test,* 7 Ave Maria L. Rev. 59 (2008) 8

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115 (1992) 4

INTERESTS OF THE *AMICI CURIAE*[1]

Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare, including religious liberties. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

The **Congressional Prayer Caucus Foundation** (CPCF) is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government censorship or coercion. CPCF reaches across all denominational,

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

socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from forty-one states.

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

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

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for all.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of

First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Maine, seek to ensure that the free exercise of religion is protected in all places.

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As such, PJI has a strong interest in the development of the law in this area. PJI often represents religious organizations whose congregations wish to worship consistently with their religious beliefs and without unconstitutional, discriminatory restrictions.

SUMMARY OF THE ARGUMENT

This Court should settle the status/use question it left for future consideration in *Trinity Lutheran*[2] and *Espinoza*[3] by recognizing that the Free Exercise Clause requires—and the Establishment Clause does not prohibit—a "pervasively sectarian" school to be able not just to attain, but also to use, a generally applicable public benefit, particularly when private individuals, exercising their independent choices, decide on whom that benefit ultimately is bestowed. In the process, this Court should overrule its decisions

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[2] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 n.3 (2017).

[3] *Espinoza v. Mont. Dept. of Rev.,* 140 S. Ct. 2246, 2256-57 (2020).

to the extent they articulate a "pervasively sectarian" analysis.

ARGUMENT

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

> With [Religion Clauses] doctrine in such chaos, the Warren and Burger Courts were free to reach almost any result in almost any case. Thus, as of today, it is constitutional . . . for the government to give money to religiously-affiliated organizations to teach adolescents about proper sexual behavior, but not to teach them science or history. It is constitutional for the government to provide religious school pupils with books, but not with maps; with bus rides to religious schools, but not from school to a museum on a field trip; with cash to pay for state-mandated standardized tests, but not to pay for safety-related maintenance. It is a mess.[4]

The main reason for the confusion was this Court's pitting the Establishment Clause against the Free Exercise Clause. It (wrongly) thought the Establishment Clause foreclosed schools deemed by

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

government officials to be "pervasively sectarian" from enjoying government benefits available to others even though a religious school teaching its precepts and worldview "pervasively" is a prototypical example of the free exercise of religion.

A plurality in *Mitchell v. Helms*,[5] aptly criticized the "pervasively sectarian" case law, and this case demonstrates the wisdom of those critiques. This Court further eroded the "pervasively sectarian" rationale in its decisions recognizing that the Establishment Clause is not implicated when private individuals make the decision to where public benefits go. Most recently, this Court in *Trinity Lutheran* and *Espinoza* reaffirmed that the Establishment Clause provides no defense when the government violates the Free Exercise Clause by refusing to grant a generally available benefit to a religious organization simply because it is religious. This Court should take the next logical step by embracing the reasoning of the plurality decision in *Mitchell*, overruling its "pervasively sectarian" case law, and affirming that the Free Exercise Clause prohibits governments from depriving religious institutions of a generally available public benefit because of the organization's religious practices.

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

Prior to the 1947 decision in *Everson* that

[5] 530 U.S. 793 (2000).

incorporated the Establishment Clause, this Court rarely had occasion to consider the constitutionality of federal funding of religious organizations. But one such occasion was *Bradfield v. Roberts*,[6] an Establishment Clause challenge to a federal appropriation for healthcare given to a Roman Catholic hospital, incorporated by an act of Congress, for the construction of a facility for indigents. In a unanimous decision, this Court noted that both the hospital's incorporating charter and Congress's appropriation served secular purposes and, thus, held that the Establishment Clause was not offended because the funds would go to, and be used by, a hospital owned and managed a religious institution:

> Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church . . . [that] exercises great and perhaps controlling influence over the management of the hospital.[7]

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[6] 175 U.S. 291 (1899).

[7] *Id.* at 298. This Court went on to explain that issuing charters of incorporation to corporations managed by religious bodies does not raise an Establishment Clause

In 1947, this Court in *Everson v. Board of Education*,[8] while broadening coverage of the Establishment Clause to apply it to the states, approved public funding for transportation of children to religious schools, including ones that later Courts would have deemed to be "pervasively sectarian." It thereby reinforced that the Establishment Clause does not prohibit government from granting generally available public benefits to religious organizations due to their status.[9] The *Everson* Court emphasized that the First Amendment "does not require the state to be the[ ] adversary" of religious organizations,[10] but its dicta that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion"[11] led later Courts to the "pervasively sectarian" test that caused the "mess" cited by Professor McConnell above.[12]

For the next several decades, this Court intruded into the affairs of sincerely religious schools to determine their eligibility for public funding. For example, finding it necessary to examine the

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issue, as the charters are available to all on a non-religious basis. *Id.*

[8] 330 U.S. 1 (1947).

[9] *Id.* at 16.

[10] *Id.* at 18.

[11] *Id.* at 16.

[12] *See, e.g.*, *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 381 (1985) (quoting the *Everson* passage), *overruled*, *Agostini v. Felton*, 521 U.S. 203 (1997); *see also Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736 (1976); *Meek v. Pittenger*, 421 U.S. 349 (1975).

character and purpose of Roman Catholic schools that benefitted from a public program, Chief Justice Burger in *Lemon v. Kurtzman*,[13] examined the proximity between the churches and the religious schools, the religious symbols in the school buildings, the time spent daily in direct religious instruction, the clerical nature of the teachers (two-thirds of the teachers in the parochial schools were nuns), the "atmosphere" of the school, and the school's governance.[14]

These areas of inquiry were changed and expanded in other cases,[15] but one thing remained constant—

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[13] 403 U.S. 602 (1971).

[14] *Id.* at 615-18. In applying the newly formulated *Lemon* test, the Court determined that giving aid to the Roman Catholic schools in Rhode Island with this level of control would result in "excessive entanglement." *Id. at* 619-20.

[15] *See* James A. Davids, *Pounding a Final Stake in the Heart of the Invidiously Discriminatory "Pervasively Sectarian" Test,* 7 Ave Maria L. Rev. 59 (2008), for a chronology of the "pervasively sectarian" cases. They include, in addition to *Lemon*, the following: *Hunt v. McNair*, 413 U.S. 734 (1973); *Comm. for Pub. Ed. v. Nyquist,* 413 U.S. 756 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976); *Wolman v. Walter,* 433 U.S. 229 (1977), *overruled*, *Mitchell v. Helms*, 530 U.S. 793 (2000); *Comm. for Pub. Educ. & Religious Liberty v. Regan,* 444 U.S. 646 (1980); *Mueller v. Allen*, 463 U.S. 388 (1983); *Aguilar v. Felton,* 473 U.S. 402 (1985), *overruled*, *Agostini v. Felton*, 521 U.S. 203 (1997); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *overruled*, *Agostini v. Felton*, 521 U.S. 203 (1997); *Witters v. Wash. Dep't of Servs. for the Blind,* 474 U.S. 481 (1986); *Bowen v. Kendrick,* 487 U.S. 589 (1988); *Zobrest v. Catalina Foothills Sch Dist.,* 509 U.S. 1 (1993); *Agostini v.*

the public schools were never subjected to the type of examination routinely imposed on religious schools. There may have been financial audits to ensure that both public and religious schools actually bought computers as required by the government grant, but while computers were physically audited to ensure no religious material was being accessed on the computers at a sectarian school, as in *Mitchell*,[16] there is no record that audits were conducted of public school computers to ensure that students did not access objectionable porn sites or that lessons were not being taught from an anti-religious slant.

This Court began to back away from its "pervasively secular" test in *Mitchell*. The plurality opinion (written by Justice Thomas and joined by Chief Justice Rehnquist and Justices Kennedy and Scalia) expressly repudiated it, for four distinct reasons.

First, the plurarlity observed that "the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose."[17] It noted, "If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the

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Felton, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002).

[16] *See Mitchell*, 530 U.S. at 862-63 (O'Connor, J., concurring).

[17] *Id*. at 827.

constitutional violation would be."[18]

This is eminently logical. If the government institutes a grant program to stimulate literacy for which both public and private schools compete but it then disqualifies a yeshiva because it is "pervasively sectarian," it manifests "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."[19] Although the plurality did not express this concept as embedded in the Free Exercise Clause,[20] that is where it resides: seriously religious schools were suffering discriminatory treatment precisely because of their exercise of their religion.

Second, the *Mitchell* plurality noted that the inquiry into the practice of religious schools deemed pervasively sectarian "was not only unnecessary but also offensive."[21] Implicitly invoking the church autonomy doctrine, they deemed "well established" the principle that "courts should refrain from trolling through a person's or institution's religious beliefs," an analysis required under the pervasively sectarian test and "profoundly troubling."[22] Combining its first two points, the plurality wrote that the use of the pervasively sectarian test collided with "our decisions that have prohibited governments from

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[18] *Id.*; *see Bradfield*, 175 U.S. at 298.
[19] 530 U.S. at 827-28.
[20] *But see id.* at 868 (Souter, J., dissenting) (recognizing the free exercise dimension).
[21] *Id.* at 828.
[22] *Id.*

discriminating in the distribution of public benefits based upon religious status or sincerity."[23]

Third, the *Mitchell* plurality discussed briefly the deplorable history that undergirds the pervasively sectarian test.[24] It noted, for instance, the anti-Catholic bias that led to the near passage of the federal Blaine Amendment, which would have deprived public aid to sectarian ("code" for Catholic) schools.[25] The plurality concluded, "In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now."[26]

Fourth, the *Mitchell* plurality responded to the worry of Justice Souter in dissent that the

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[23] *Id.* at 828 (*citing Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993); *Widmar v. Vincent,* 454 U.S. 263 (1981)). Of course, *Trinity Lutheran* and *Espinoza* fully support the "status" prong of the plurality's statement. *See Trinity Lutheran*, 137 S. Ct. at 2019-25; *Espinoza*, 140 S. Ct. at 2053-57.

[24] 530 U.S. at 828-29.

[25] *Id.* The plurality pointed out that Justice Souter almost exclusively referred to Catholic schools in the portion of his *Mitchell* dissent devoted to the pervasively sectarian test, exemplifying the Court's almost exclusive application of the test to Catholic schools. *Id.* at 829. Justice Alito provided a more detailed discussion on the anti-Catholic bias of the Blaine Amendment and its state-level counterparts in his concurrence in *Espinoza.* 140 S. Ct. at 2267-74 (Alito, J., concurring).

[26] 530 U.S. at 829.

government aid could be diverted by the religious schools to impermissible (i.e., pervasively sectarian) uses.[27] The plurality stated, "So long as the governmental aid is not itself 'unsuitable for use in the public schools because of religious content' and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern."[28] It labeled a rule that disallowed aid because it was "divertible" to religious purposes to be "unworkable."[29]

II. The Pervasively Sectarian Test Was Further Eroded by Decisions Explaining That Private Choices Determining the Recipient of Generally Available Public Funds Eliminate the Applicability of the Establishment Clause

Another series of this Court's decisions also eroded the (supposed) Establishment Clause underpinnings of the pervasively sectarian test. Those cases assume generally available government aid, if distributed to religious insitutions, may well be used for religious purposes without implicating the Establishment Clause because private parties, by their independent choices, directed the aid to the institution. These personal, independent choices break the causal chain

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[27] *Id.* at 890-95 (Souter, J. dissenting).

[28] *Id.* at 818-20 (citing *Bd. of Educ. of Cent. Sch. Dist. No. 1* v. *Allen,* 392 U. S. 236, 245 (1968)). The aid in *Mitchell* was money for computers, computer software, and library books. *Id.* at 802. The government program providing this aid required that the items be secular, *id.*, and there was no challenge to that in *Mitchell.*

[29] *Id.* at 820.

between the state and the religious school.

This Court explained this case law in some detail in *Zelman v. Simmons-Harris*.[30] *Zelman* concerned a multifaceted plan by the Cleveland school system that included providing scholarship assistance to allow parents to send their children to private schools. That part of the plan was attached because many of the schools selected by parents to receive public aid were "pervasively sectarian."

This Court rebuffed the Establishment Clause challenge to the plan. By reviewing in particular three precedents that are also directly relevant here, this Court emphasized that, when it comes to the Federal Constitution, there is a critical difference between government particularly directing expenditures to religious institutions for religious purposes and systems in which private choice determines where generally available funds are spent:

> [O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, *Mitchell* v. *Helms,* 530 U.S. 793, 810-814 (2000) (plurality opinion); *id.,* at 841-844 (O'Connor, J., concurring in judgment); *Agostini* [*v. Felton*, 521 U.S. 203 (1997)], *supra,* at 225-227; *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 842 (1995) (collecting cases), and programs of true private choice, in which government aid reaches religious schools only

[30] 536 U.S. 639 (2002). This Court in *Agostini v. Felton*, 521 U.S. at 225-32, also recognized that cases in this series undercut the "pervasively sectarian" test.

> as a result of the genuine and independent choices of private individuals, *Mueller* v. *Allen,* 463 U.S. 388 (1983); *Witters* v. *Wash. Dept. of Servs. for Blind,* 474 U.S. 481 (1986); *Zobrest* v. *Catalina Foothills Sch. Dist.,* 509 U.S. 1 (1993). . . . Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.[31]

The Court went on to explain that, in

> *Mueller,* we rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools. . . . [V]iewing the program as a whole, we emphasized the principle of private choice, noting that public funds were made available to religious schools "only as a result of numerous, private choices of individual parents of school-age children." 463 U.S., at 399-400. This, we said, ensured that "no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.,* at 399 (quoting *Widmar*

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[31] 536 U.S. at 649; *cf. Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) ("A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose.").

> [*v. Vincent,* 454 U.S. 263 (1981)], *supra,* at 274). We thus found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools . . . . 463 U.S., at 401. That the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause.[32]

The *Zelman* Court next discussed its prior decision in *Witters*, in which the Court

> used identical reasoning to reject an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor. Looking at the program as a whole, we observed that "[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S., at 487. We further remarked that, as in *Mueller,* "[the] program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." 474 U.S., at 487 (internal quotation marks omitted). In light of these factors, we held that the program was not inconsistent with the Establishment Clause. *Id.,* at 488-489.

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[32] 536 U.S. at 649-50.

> Five Members of the Court, in separate opinions, emphasized the general rule from *Mueller* that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry. 474 U.S., at 490-491 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring) (citing *Mueller, supra,* at 398-399); 474 U.S., at 493 (O'Connor, J., concurring in part and concurring in judgment); *id.,* at 490 (White, J., concurring). Our holding thus rested not on whether few or many recipients chose to expend government aid at a religious school but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing.[33]

Third, the *Zelman* Court explicated its ruling in *Zobrest*, in which it rejected an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools:

> We further observed that "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." [509 U.S.] at 10. Our focus again was on neutrality and the principle of private choice, not on the number of program beneficiaries attending religious schools. *Id.,* at 10-11. . . . Because the program ensured that

[33] *Id.* at 650-51.

> parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated.[34]

The *Zelman* Court summed up the holdings of those cases as follows:

> *Mueller, Witters,* and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.[35]

In short, no Establishment Clause claim lies when "pervasively secular" schools receive generally available public aid through the selection of parents of the schools attended by their children.

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[34] *Id.* at 651-52.
[35] *Id.* at 652.

III. *Trinity Lutheran* and *Espinoza* Further Eroded the Pervasively Sectarian Test

Two decades later, in *Trinity Lutheran Church*, this Court firmly rejected Justice Souter's reasoning in his *Mitchell* dissent. Instead of the Establishment Clause forbidding an evenhanded application of governmental benefits to a pervasively sectarian school, this Court held that the Free Exercise Clause prohibits the government from discriminating against church schools solely because of their religious status.[36]

Similarly, in *Espinoza* this Court found that denying religious schools participation in a generally applicable, public scholarship program because of their religious status violated the Free Exercise Clause.[37] Montana asserted that it was not discriminating against the religious schools because of their *status* as religious institutions, but because of their *use* of public funds for religious education (i.e., because they were "pervasively sectarian").[38] The state claimed that the "no-aid provision has the goal or effect of ensuring that government aid does not end up being used for 'sectarian education' or 'religious education,'" noting that it could be used for religious ends by "schools that believe faith should '*permeate*[]' everything they do."[39] Rejecting this argument, this Court noted that the Montana Supreme Court had repeatedly held that the state's Blaine Amendment barred aid based on status and that this required a

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[36] 137 S.Ct. at 2019-25.
[37] 140 S. Ct. at 2256.
[38] 140 S. Ct. at 2255-57.
[39] *Id.* at 2256 (emphasis in original).

school to remove itself from any religious control to become eligible for the scholarship program.[40] Placing a condition on benefits deters the exercise of First Amendment rights and subjects the status-based discrimination to "the strictest scrutiny."[41]

IV. This Court Should Also Reject the Pervasively Sectarian Test in the Context of a Religious School's *Use* of Generally Available Benefits

This Court in *Espinoza* and *Trinity Lutheran* reserved the "use vs. status" issue.[42] The present case, involving as it does the eligibility of a religious school for receipt of public funds for tuition through the independent choice of parents, directly presents the issue of whether discrimination based on religious activity can be tolerated under the Free Exercise Clause. Indeed, the First Circuit, with Justice Souter sitting on the panel, distinguished *Trinity Lutheran* and *Espinoza* on exactly that basis, with the status/exercise distinction forming the *ratio decidendi* of the circuit court.[43]

The Maine statute, as administered, brings to the fore the issue of whether a school that has a pervasively sectarian curriculum may constitutionally be denied participation in the program. It requires private schools, to qualify for

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[40] *Id.*
[41] *Id.* at 2256-57 (*quoting Trinity Lutheran*, 137 S. Ct. at 2022).
[42] *See id.* at 2257; *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.
[43] *Carson v. Makin*, 979 F.3d 21, 40-45 (1st Cir. 2020) (emphasis in original).

scholarship money, even though received through parental choice, to be "nonsectarian in accordance with the First Amendment,"[44] an obvious attempt to adopt this Court's eroded "pervasively sectarian" case law. Moreover, the authorized Maine official in interrogatory responses interpreted the quoted phrase, in essence, to adopt that case law, stating,

> [T]he Department considers a sectarian school to be one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith. While affiliation or association with a church or religious institution is one potential indicator of a sectarian school, it is not dispositive. *The Department's focus is on what the school teaches through its curriculum and related activities, and how the material is presented.*[45]

That is, Maine ties eligibility directly to how a sectarian school *practices* its faith and belief system. A religious school is eligible, despite its sectarian status, if it does not teach religion in a proselytizing manner or does not teach subjects through the "lens of faith." But, presumably, if a religious school introduces a math course by instructing students that math reflects the orderliness of God's creation or if it teaches in a civics class that the separation of powers in the Constitution is consistent with the Christian

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[44] Me. Stat., tit. 20-A, § 2951(2).
[45] *Carson*, 979 F.3d at 38.

doctrine of the Fall by not placing too much power in one or a few individuals, then that school is ineligible.

Disqualifying an organization from an otherwise generally applicable government benefit because of its *exercise* of its religion violates the Free *Exercise* Clause; it is hard to see how any other conclusion could be drawn. This Court's case law should once again make clear that governments may not discriminate against a religious institution solely because it practices its religion, which is another way of stating that it *is* religious, i.e., has a religious status.

Review and application of the four objections to the "pervasively sectarian" test articulated by the plurality in *Mitchell* show why this is so. First, the *Mitchell* plurality instructs that, if the government program is motivated by a valid, secular purpose, it is irrelevant that some (or all) of the beneficiaries might happen to be religious and wrong to discriminate against them because of how they practice their faith.[46] Here, Maine has a valid, secular purpose of educating its children, particularly in areas in which no public schools exist. It is not singling out for special treatment religious schools, and that works both ways: it may not *favor* religious schools, but it also may not *disfavor* religious schools.

Second, the *Mitchell* plurality noted that, to determine whether a particular school is "pervasively sectarian," government officials, including judicial officers, must probe into the religious beliefs and practices of a particular institution, violating the

[46] 530 U.S. at 827-28.

church autonomy doctrine.[47] That is exactly what Maine has done here. It is not just the *status* of a school as purportedly religious that disqualifies the school; a further inquiry is necessary to determine how rigorously it puts its faith into *use*. This quickly leads to hair-splitting by government officials that predictably leads to the benefit of some religious institutions over others.

A good example of this playing out was provided by *Colorado Christian University v. Weaver*.[48] That case involved a state scholarship program that granted scholarships to college students who attended in-state schools, public or private. However, as in the Maine program, to be eligible for the program, a Colorado school could not be "pervasively sectarian." Colorado officials determined, after looking at their curricula, faculty, and other practices, that two religious schools (a Roman Catholic college run by the Jesuits and a Methodist institution) were *not* pervasively sectarian, and, thus, eligible, but that CCU was ineligible because it was.[49] The state officials found dispositive that CCU's theology courses impermissibly "tend[ed] to indoctrinate or proselytize," that CCU's trustees were limited to one religion (Christianity), and that CCU required some of its students to attend chapel.[50]

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[47] *Id.* at 528; *see generally Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 713 (1976); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871).

[48] 534 F.3d 1245 (10th Cir. 2008).

[49] *Id.* at 1258.

[50] *Id.* at 1253.

The Tenth Circuit, relying on the *Mitchell* plurality opinion, found this intrusiveness into the religious teaching and practices of the schools "offensive."[51] For state officials to determine whether a school teaches "primarily," "exclusively," or "predominantly" of a "particular religion,"—and is thus "pervasively sectarian"—"threatens to embroil the government in line-drawing and second-guessing regarding matters about which it has neither competence nor legitimacy."[52] Colorado's picking of winners and losers on the "pervasively sectarian" scale, instead of being required by the Establishment Clause, violated its rule of "equal treatment of all religious faiths without discrimination or preference."[53] Maine has the same practice, and it has the same infirmities.

Third, the *Mitchell* plurality noted that the "pervasively sectarian" test had roots in anti-religious bias.[54] It is not just its historical roots that show this, however; it is baked into the very concept. It springs from a theory, as is demonstrated by the Maine program, that the Constitution is anti-religion and must protect against people who take their faith too seriously.

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[51] *Id.* at 1261 (quoting *Mitchell*, 530 U.S. at 828).
[52] *Id.* at 1265.
[53] *Id.* at 1257 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). The Tenth Circuit noted that this same principle is inherent in the Free Exercise and Equal Protection Clauses. *Id.*
[54] 530 U.S. at 828-29.

This completely miscomprehends the purpose of the Religion Clauses. Those clauses are no more anti-religion than the Free Speech Clause is anti-speech or the Free Press Clause is anti-press. To the contrary, the Religion Clauses are pro-religion. These freedoms have practical limits for the common good and welfare, but they cannot properly be restrained simply because someone talks or prints "too much" on a particular topic. Nor does the First Amendment allow religious practice to be penalized because it is "too sincere" or "too pervasive."

Maine here, by applying the "pervasively sectarian" test, has made parents who send their children to religious schools second-class citizens because of their religious beliefs and practices. But "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[55] Maine's law diminishes these parents' "standing in the political community," sending a message "that they are outsiders, not full members of the political community."[56] This does not further the purposes of the Establishment Clause and the Free Exercise Clause, but subverts them.

Fourth, the *Mitchell* plurality rejected as "unworkable" a test that would deny religious

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[55] *Cnty. of Allegheny v. ACLU of Pittsburgh*, 492 U.S. 573, 593-94 (1989) (quoting *Lynch v Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

[56] *Id*. at 595 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

organizations of generally available, secular aid because the aid might be diverted to religious purposes.[57] Similarly here, Maine is not providing "religious" funding; it is providing funding to educate its children, which is a legitimate secular purpose. To attempt to parse whether a particular dollar is used for instruction deemed "too religious," in addition to such an attempt's other infirmities, would be a practical nightmare.

Finally, the Maine system, based as it is on this Court's "pervasively sectarian" case law of decades ago, is inconsistent with the opinions of the Court in *Zobrest* and like cases that have explained that the Establishment Clause is not implicated when generally available public funds are distributed to religious organizations via the choices of private individuals. Here, the funding follows the child. But it is not Maine that decides where the child goes to school; it is the child's parents. This breaks the causal chain, isolating the state from the decision of where the funding is spent. Recognizing this causal break has a secondary, laudatory effect of giving support to the fundamental right of parents to direct the education of their children, itself a legitimate secular purpose.[58]

CONCLUSION

It is time to inter the "pervasively sectarian" test, once and for all. Maine improperly applies it to deny generally available funding, appropriated for a

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[57] 530 U.S. at 820.

[58] *See Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

legitimate secular purpose, because parents have selected a school for their children that the state deems "too religious" in its instruction. This it may not do. The Free Exercise Clause protects exactly what it says, the free *exercise* of religion. The Establishment Clause does not work at cross-purposes with the Free Exercise Clause, but, rather, buttresses it.

Respectfully submitted
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