

No. 20-1088

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**In the Supreme Court of the United States**

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DAVID AND AMY CARSON, as Parents and next Friends of  
O.C., and TROY AND ANGELA NELSON, as Parents and  
next Friends of A.N. and R.N.,  
*Petitioners,*

v.

A. PENDER MAKIN, in Her Official Capacity as  
Commissioner of the Maine Department of Education,  
*Respondent.*

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

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**BRIEF FOR THE PARTNERSHIP FOR INNER-CITY  
EDUCATION, COUNCIL OF ISLAMIC SCHOOLS IN  
NORTH AMERICA, AND NATIONAL COUNCIL OF  
YOUNG ISRAEL AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONERS**

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September 10, 2021

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* operate, represent, and support elementary and secondary schools in three faith traditions: Catholic (Partnership for Inner-City Education), Islamic (Council of Islamic Schools in North America), and Jewish (National Council of Young Israel). Students attending many of the schools that are operated or supported by *amici* participate in publicly funded private-school-choice programs—or would participate in such programs if they were made available in their states. Central to these schools’ religious and educational missions is the integration of faith throughout all aspects of their educational programs, making the religious status/religious use distinction employed by the First Circuit below both unworkable and discriminatory.

The Partnership for Inner-City Education (“Partnership Schools” or the “Partnership”) is a non-profit organization that operates nine urban Catholic pre-K–8 schools in Harlem, the South Bronx, and Cleveland. Partnership Schools’ mission is to revive struggling Catholic schools serving disadvantaged children financially, spiritually, and academically such that these schools are able to provide students from these underserved communities with the academic preparation, values, and skills they need to break the cycle of poverty and lead fulfilling,

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<sup>1</sup> Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

productive lives. Their nine schools serve over 2,300 students in congressional districts with three of the highest rates of child poverty in the United States.<sup>2</sup>

Partnership Schools has worked for almost a decade “to change the story of Catholic school sustainability in neighborhoods that need them the most,” and has achieved incredible success for the communities it serves. *Lessons on Equity, Accessibility, and Demand for Urban Catholic Education: An Enrollment Report from Partnership Schools*, Partnership Schools (Feb. 11, 2021), <http://bit.ly/3l0imQB>. To achieve its mission, Partnership Schools integrates the Catholic faith into every aspect of the school—delivering a rigorous education that is grounded in content, character, *and* faith. By “weaving together our faith, values, and character education” along with effective instruction, Partnership Schools has helped urban students close “the content and skills gaps with which” they originally enrolled. Partnership Schools, *Our Approach* 3 (2017), <https://bit.ly/3qzvmOh>. Partnership Schools credits “these historic successes” as a product of “the strong, intentional, and faith-filled cultures and values that are central to urban Catholic education.” *Id.*

The Council of Islamic Schools in North America (“CISNA”) is a non-profit organization dedicated to its

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<sup>2</sup> As of 2017, New York Congressional District 15 (South Bronx) had the highest percentage of child poverty in the nation (47.6%), New York Congressional District 13 (Harlem) had the fifth-highest percentage (38.6%), and Ohio Congressional District 11 (Cleveland) had the seventh-highest (38.4%). *Number of Children Below Poverty by Congressional District, 2017*, Food Research & Action Center (2019), <https://bit.ly/3h944fR>.



vision of a world in which all students have access to the highest quality Islamic education. CISNA partners with Islamic schools to provide a rigorous accreditation process that ensures excellence in the academic and Islamic aspects of schools, thorough accreditation visits by experienced Islamic school professionals, and ongoing support through resources and professional development. In the United States, more than one hundred CISNA member schools serve more than 20,000 students.

A key goal in Islamic schools is the continuity between faith, culture, and education. While secular subjects may be taught by non-Islamic lay teachers, the ideal CISNA member school fully integrates Islam throughout its curriculum so that all subjects are taught through an Islamic lens. CISNA's accreditation criteria aim to ensure that all faculty and staff support the school's religious mission. See Council of Islamic Schools in North America, *CISNA Accreditation Standards* (2020), <http://bit.ly/2MHoZKY>. CISNA-accredited schools offer classes in Arabic, Quran, and Islamic Studies. Students also engage in midday prayer in the school or at a mosque associated with the school. Many parents choose Islamic schools to ensure that their children receive an education that provides a firm foundation in Islam and that helps foster a positive identity for students who may face discrimination in their larger communities. Students at Islamic schools come from a wide variety of backgrounds and cultures but share a common identity in their faith. See Charles L. Glenn, *Muslim Educators in American Communities* 41–63 (2018).

The National Council of Young Israel (“Young Israel”) is a Jewish synagogue organization that provides resources and services to more than 100 synagogues and their more than 25,000 member families throughout the United States. Young Israel was born over a century ago primarily to foster Torah-true Judaism in North America against increasing assimilation. While Young Israel provides an array of services to support its members, the organization is grounded in the importance of Jewish education and was founded to be a bulwark against the trend of dwindling Jewish educational opportunities in early 20th century America. This focus on education is firmly rooted in Jewish theology; indeed, for Orthodox Jews, a Jewish day school education is “virtually mandatory.” Marvin Schick, *A Census of Jewish Day Schools in the United States 2003–2004*, at 1 (2005), <https://bit.ly/3gTbEew>. Thus, a significant majority of Young Israel’s constituents send their children to Jewish day schools, as do more than 80% of Orthodox Jews in America, see Benjamin Wormald, *A Portrait of American Orthodox Jews*, Pew Research Center (Aug. 26, 2015), <https://pewrsr.ch/3rHPUpk>.

As in Catholic and Islamic schools, the integration of faith into secular educational programs is a key component of Orthodox day schools. For over a century, Orthodox day schools have served as the American Orthodox Jewish community’s “critical setting for the transmission” of Jewish values. Jack Wertheimer, *Jewish Education in the United States: Recent Trends and Issues*, 99 *Am. Jewish Year Book* 3, 17 (1999). Although Orthodox day schools provide a “dual curriculum”—which includes both religious (e.g., the Bible and Talmud) and general

studies (e.g., math, science, language arts)—these two areas of study nonetheless “live together.” Norman Lamm, *Torah Umadda: The Encounter of Religious Learning and Worldly Knowledge in the Jewish Tradition* 3 (1990). Indeed, deriving from a theological conviction that religious and secular knowledge are interrelated, a dual curriculum recognizes that Judaic and secular studies are complementary and are both necessary to live a complete Jewish life. Thus, the pedagogy in Jewish day schools integrates secular and religious studies in order to “establish[] a rich education as the basis of a rich life” in which “[t]he final word is with integration and harmony.” Rabbi Aharon Lichtenstein, *A Consideration of Synthesis from a Torah Point of View*, *The Commentator* (Apr. 27, 1961), <https://bit.ly/38SiL2a>. This model has worked for the Orthodox Jewish community, as “an abundance of studies over the past quarter-century [have demonstrated] that day school education is far and away the greatest guarantor of Jewish continuity.” Mordechai Besser, *A Census of Jewish Day Schools in the United States 2018–2019*, at 4–5 (2020), <https://bit.ly/3mOD2xW>.

### INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should reverse the decision below and hold that the First Amendment permits no distinction between discrimination against religious groups based on their religious *status* and discrimination based on their religious *use* of generally available state benefits. While holding that status-based religious discrimination is subject to strict scrutiny under the Free Exercise Clause, this Court’s decisions in *Trinity*

*Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), declined to “address religious *uses* of funding or other forms of discrimination.” 137 S. Ct. at 2024 n.3 (emphasis added). The Court pointedly did not endorse any such distinction. But the decision below treated this Court’s reservation of the question as license to hold that the exclusion of faith-based schools from Maine’s Town Tuitioning Program was not subject to strict scrutiny because it was “use-based” rather than “status-based.” Under bedrock free exercise principles, that ruling was incorrect: Any discrimination on the basis of religious status *or* religious use is subject to “the most exacting scrutiny.” *Trinity Lutheran*, 137 S. Ct. at 2021.

The lived realities of *amici* illustrate the unworkability of the lower court’s status/use distinction. The Free Exercise Clause “protects not just the right to *be* a religious person, holding beliefs inwardly and secretly; it also protects the right to *act* on those beliefs outwardly and publicly.” *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring). Indeed, the schools supported by *amici* demonstrate that to *be* a religious educator is to *act on* those beliefs by providing a religiously grounded education. Schools in the CISNA and Partnership Schools networks and those attended by Young Israel families thus all integrate their respective faith traditions with secular academic content. For these organizations, the integration of faith into all aspects of schooling is an indispensable element of what it means to *be* a religious school. To discriminate against these religious schools on the basis of use therefore *is* to

discriminate against religious schools on the basis of their status—and thus should trigger strict scrutiny. The lower court’s status/use distinction ignores that reality and serves to benefit only those religious schools “apathetic about religion” while requiring “those with a deep faith” like *amici* to “face the greatest disabilities.” *Id.* at 2277.

The distinction is not only unworkable; it also threatens dire consequences for schools like those supported by *amici*. Many of the families whose children attend *amici*’s schools would not have the financial means to do so without the critical assistance provided by school-choice programs like Maine’s. The lower court’s reasoning, if repeated in other states, would unconstitutionally restrict that critical funding based on religious exercise and thus deprive families and students of the opportunity to attend the schools that are best for them. In short, such a distinction threatens the continued existence of these schools and, in the process, undermines the growing and increasingly popular school choice movement across the country.

Finally, this Court has itself recognized the fallacy of the status/use distinction in related contexts and has observed that a key attribute of religious schools is that they *perform* religious work through the integration of their faith into their educational mission. In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020)—decided within a week of *Espinoza*—the Court emphasized that “educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core

of the mission of a private religious school.” *Id.* at 2064. Likewise, in the context of the so-called “ministerial exception,” multiple lower courts have recognized the importance for religious schools of integrating faith with academic study. This Court should not now endorse a distinction between a school maintaining a religious *identity* and engaging in religious *activity* that would undermine a core premise of those decisions.

Because the status/use distinction would disadvantage religious schools like those supported by *amici* and would prevent them from fully exercising their religious convictions, the Court should hold that *any* discrimination on the basis of religious status or use is subject to “the most exacting scrutiny.” *Trinity Lutheran*, 137 S. Ct. at 2021.

## ARGUMENT

### **I. The Lower Court’s Reliance On A Status/Use Distinction Generates Confusion And Encourages Discrimination Against Faith-Based Schools.**

In *Trinity Lutheran*, this Court held that a government policy that “expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character” imposes “a penalty on the free exercise of religion that triggers the most exacting scrutiny.” *Trinity Lutheran*, 137 S. Ct. at 2021. Because the Missouri program in question in *Trinity Lutheran* discriminated on the basis of religious *status*, the Court declined to “address religious *uses* of funding or other forms of

discrimination.” *Id.* at 2024 n.3 (emphasis added). Likewise, in *Espinoza*, the Court again declined to resolve the question of “whether there is a meaningful distinction between discrimination based on [religious] *use* or conduct and that based on [religious] *status*.” *Espinoza*, 140 S. Ct. at 2257 (emphases added). But the Court pointedly emphasized that its holding was “[not] meant to suggest that . . . some lesser degree of scrutiny applies to discrimination against religious uses of government aid.” *Id.*

Unfortunately, the decision below interpreted this Court’s explicit refusal to endorse a status/use distinction as license to impose it here. Even though Maine’s program is not neutral to religion, the lower court concluded that the State’s decision to exclude religious schools was constitutionally permissible because it discriminated on the basis of the religious *use* to which state funds would be put rather than on the religious *status* of the excluded schools. Pet. App. 35. Claiming to rely on this Court’s decision in *Espinoza*, the lower court found this status/use distinction determinative. *Id.* at 33–35. “*Espinoza* clarified,” the court incorrectly suggested, that “discrimination based solely on religious ‘status’ . . . is distinct from discrimination based on religious ‘use.’” *Id.* at 25.

That is a patent misunderstanding of this Court’s decisions and of basic constitutional principles. In *Espinoza*, the Court expressly did *not* hold that the Free Exercise Clause distinguishes between discrimination based on one’s religious *identity* and discrimination based on one’s religious *activity*. Nor should the Court now. As Petitioners ably explain, the

First Amendment permits no such distinction. Indeed, it defies constitutional logic to suggest that the First Amendment's mandate of neutrality toward religion somehow grants governments more leeway to discriminate against religious entities when they are actually practicing their faith.

The decision below illustrates the unnecessary confusion and impracticality of the supposed status/use distinction. Where a group is religious, when exactly does its use of government funds tip from non-religious to religious use? Rather than clarifying any line-drawing, the distinction leaves open difficult—in many cases *impossible*—questions about when the protections of the Free Exercise Clause will or will not apply. As Justice Gorsuch's concurrence in *Trinity Lutheran* noted:

Does a religious man say grace before dinner?  
Or does a man begin his meal in a religious  
manner? Is it a religious group that built the  
playground? Or did a group build the  
playground so that it might be used to advance  
a religious mission? The distinction blurs in  
much the same way the line between acts and  
omissions blurs when stared at too long . . . .

137 S. Ct. at 2025 (Gorsuch, J., concurring). And those unanswerable questions are not merely academic. If allowed to stand, the distinction would hinder the mission of thousands of religious schools like CISNA's members, the Partnership Schools, and Orthodox Jewish day schools. Rather than allow this artificial and ill-defined distinction to persist, the Court should prevent further discrimination against faith-based schools and the children they serve.



## II. The Lived Realities Of *Amici* Demonstrate The Unworkability Of The Status/Use Distinction.

For schools like CISNA's member schools, Orthodox Jewish day schools, and the Partnership Schools, the integration of their respective faith traditions with secular academic content is an essential component of the schools' religious mission and character. For these schools, the ostensible status/use distinction simply ignores reality. The integration of faith into their educational programs lies at the heart of *who they are* and what it means for them to *be* religious schools that aspire to educate children to their full potential and to live out their missions as faith-based institutions.

The Partnership Schools believe that in order to thrive, Catholic schools need both "academic excellence" and "joyous, productive, faith-filled school cultures." Partnership Schools, *Partnership Schools Enrollment Report 6* (2021), <https://bit.ly/3sWXpJ8>. The organization's Superintendent has argued that "[t]here is no such thing as a values-neutral school." Kathleen Porter-Magee, *Catholic on the Inside: Putting Values Back at the Center of Education Reform 6* (2019), <https://bit.ly/3A1zFHS>. The values that are communicated to the students are informed by both the content taught in the classroom and the culture that animates the institution. *Id.* Ms. Porter-Magee argues that the elements of the Catholic education model that make schools "Catholic on the inside" are the objectivity of truth, the belief that every human person is made in God's image, the importance of forming virtuous habits, and the

happiness that comes from using one's free will to choose the good. *Id.* at 8–10. In remarking on the purpose of Catholic schools, Pope John Paul II emphasized that the “special character of the Catholic school, the underlying reason for it . . . is precisely the quality of the religious instruction integrated into the education of the pupils.” Pope John Paul II, *Catechesi Tradendae: On Catechesis in Our Time* ¶ 69 (1979). The academic model espoused by Partnership Schools is exemplary of this mission. The Code of Canon Law of the Catholic Church defines “true education” as one in which students are “able to develop their physical, moral, and intellectual talents harmoniously, acquire a more perfect sense of responsibility and right use of freedom, and are formed to participate actively in social life.” Code of Canon Law, Can. 795. The witness to the Christian message by the adult staff at the school “is what makes the difference between a school whose education is permeated by the Christian spirit and one in which religion is only regarded as an academic subject like any other.” The Sacred Congregation for Catholic Education, *The Catholic School* ¶ 43 (1977), <https://bit.ly/3E1Xcuk>.

The commitment to integrating faith within all aspects of education is not unique to Catholic schools, as demonstrated by the cross-section of *amici* in this brief. For the CISNA-accredited schools—and the more than 20,000 students they serve—the integration of faith and secular content lies at the core of their identity as a religious educational institution. In fact, “[t]he very essence of Islamic schools is the teaching of Islam.” Karen Keyworth, Inst. for Soc’l Policy & Understanding, *Islamic Schools*

*in the United States* 5 (2011), <https://bit.ly/3jUMSMR>. Education in the Islamic tradition is considered a process in which teachers have “roles in the formative process of their students and its effect on their identity and character as contrasted with their role in imparting content knowledge”—the *Ta’aleem* (instruction) and *Tarbiyah* (education) components. Glenn, *supra*, at 122. In this holistic education model, the relationship between student and teacher is critical, with the teacher serving as role model. See Zakiyyah Muhammad, *Islamic Education in America: An Historical Overview with Future Projections*, 25 Religion & Educ. 87, 89 (1998). To receive accreditation, a CISNA school must comply with a number of standards, including requirements that “[s]chool faculty incorporate Islamic values that are aligned with the school’s mission & vision in *all* subjects” and that “[t]he school fosters a positive Islamic identity among students.” *CISNA Accreditation Standards, supra* (emphasis added). MCC Academy, a CISNA-accredited Islamic school in Morton Grove, Illinois, for example, provides “a top-notch secular education complemented by contemporary coursework in Islamic studies designed to build and refine character among our students, helping them develop a beautiful Muslim-American identity and the knowledge to help them positively impact the culture in which they live.” *Mission & Vision*, MCC Academy, <http://bit.ly/3q7VCz1> (last visited Sept. 8, 2021). Leaders Preparatory School, also CISNA-accredited, likewise describes its mission as developing students with “high morals and strong character based on an understanding of themselves in relationship to Allah

and society.” *Home*, Leaders Preparatory School, <http://bit.ly/3kDZLJT> (last visited Sept. 8, 2021).

Similarly, Young Israel is dedicated to the robust integration of the Jewish faith into the daily life of its members, including in the education context. “Transmitting Jewish values through education is one of the central and timeless imperatives captured in Judaism’s most sacred texts,” and this goal is a lived reality for the more than 250,000 students enrolled in the Jewish day school network. *Letter from Orthodox Union to N.Y. Educ. Dep’t 2* (Sept. 6, 2019), <https://bit.ly/3l9uwqC>. Teaching Judaism is prescribed by the Torah, which “commands Jews to seize all opportunities to transmit [their] amassed knowledge and central values to each subsequent generation.” *Id.* (citing Deuteronomy 6:7). The “general studies” and “Jewish studies” curricula at Jewish day schools are not meant to be separate, but rather combined in such a way as achieve “integration and harmony” in order to establish “a rich education as the basis for a rich life.” Lichtenstein, *supra*. Indeed, “Jewish all-day schools have widely aspired to the curriculum integration of Jewish and general studies.” Alex D.M. Pomson, *Knowledge That Doesn’t Just Sit There: Considering a Reconception of the Curriculum Integration of Jewish and General Studies*, 96 *Religious Educ.* 528, 528 (2001). This integration effectively means that “various learning objectives typically associated with general studies education—such as language arts or social studies—are often pursued under the Jewish studies umbrella.” *Letter from Orthodox Union to N.Y. Educ. Dep’t, supra*, at 4.

Further, even when religious and secular studies are taught separately through a “dual curriculum,” it is critical to Young Israel families that both subjects be taught in the same school. In those schools, students are taught how to *synthesize* Judaic and secular knowledge, for the schools believe that “Torah, faith, religious learning on one side, and . . . science, worldly knowledge on the other, together offer us a more over-arching and truer vision than either set alone.” Lamm, *supra*, at 236. The ability to synthesize these seemingly competing sources of knowledge is an important part of religious identity and practice for Young Israel families. By teaching students that the “Jewish faith . . . and the universal concerns and preoccupations of humanity” are “part of one continuum,” *id.* at 142–43, Jewish schools produce graduates who are likely to keep their Orthodox Jewish faith. Indeed, Orthodox day schools are “far and away the greatest guarantor of Jewish continuity,” Besser, *supra*, at 4–5, and their synthesis of religious and secular studies has long “prove[n] [to be] the most practical manner of securing the Jewish heritage,” Gilbert Klaperman, *The Story of Yeshiva University* 20 (1969). This model of Jewish education is “firmly rooted in American soil today” specifically because competing models—in which Judaic studies were taught wholly apart from secular schooling—proved unable to secure the continuity of the Jewish faith in this way. *See id.* at 20–21. Thus, Orthodox Jewish parents insist on such an education not only so that their children will *learn* about the Jewish faith, but to ensure that future generations will continue to fully *be* Jewish and to maintain their identity as Orthodox Jews.

These faith groups are far from alone in their mission to integrate their religious faith deeply into their educational endeavors. Many other denominations' schools exhibit a similarly strong commitment. For instance, the Association of Christian Schools International—the largest Protestant school organization in the world—“integrate[s] faith and learning so that one day students will integrate faith and life.” *CAPE Member Organizations*, Council for American Private Education, <https://bit.ly/3kOOLDQ> (last visited Sept. 8, 2021). Similarly, the Evangelical Lutheran Church in America, which has more than 1,400 congregations that provide some form of schooling, views its school programs as “an integral element in the ministry of the congregation as it carries out its mission in developing the intellectual skills of youngsters as well as nurturing spiritual formation.” *Id.* In the words of the Lutheran Church—Missouri Synod, which operates more than 2,000 Lutheran Schools, “It is assumed that the Christian faith is shared, as opportunities arise, throughout the school day in all subjects by Lutheran Christian teachers.” *Id.* The more than 400 Wisconsin Evangelical Lutheran Synod Schools likewise “exist to educate children, strengthen families, and serve the church with the power of teaching that is deeply rooted in the Bible and fully expresses the love of Jesus.” *Id.*; see also *WELS School Statistics 2020–2021*, Wisconsin Evangelical Lutheran Synod, <https://bit.ly/3DBRorq> (last visited Sept. 8, 2021). The National Association of Episcopal Schools similarly views its roughly 1,200 schools as “embodiments of the Christian faith . . . created to be communities that honor, celebrate and worship God as

the center of life.” *CAPE Member Organizations, supra*; see also *About NAES*, National Association of Episcopal Schools, <https://bit.ly/38v1AUd> (last visited Sept. 8, 2021). And in a similar vein, the “primary aim” of the Seventh-Day Adventist Board of Education’s 1,150 schools is to provide an opportunity for its nearly 90,000 students “to accept Christ as their Savior and to provide a climate of warmth and caring where faith can develop and mature.” *CAPE Member Organizations, supra*.

For deeply religious schools of many faith traditions—including Orthodox day schools like those supported by Young Israel, CISNA-accredited Islamic schools, Partnership’s Catholic schools, and many more—the supposed status/use distinction is unworkable, discriminatory, and incomprehensible. Their lived realities illustrate that the integration of faith into every aspect of schooling is part and parcel of what it means to *be* a religious school. To discriminate against these schools on the basis of use *is* therefore to discriminate against them on the basis of their religious status—and should thus trigger this Court’s “most exacting scrutiny.” *Trinity Lutheran*, 137 S. Ct. at 2021.

### **III. Any Status/Use Distinction Would Deprive Families Of Access To Religious Schools And Undermine The Growing School Choice Movement In This Country.**

In recent years, school choice programs have achieved an “unexpected ascendancy” in the United States. Nicole Stelle Garnett, *Parental Choice and the Future of Faith-Based Schools*, in *The Oxford Handbook of U.S. Education Law* (Kristine L. Bowman ed., 2021), <https://bit.ly/3zUhBiA>. “Since the enactment of the first private school choice legislation in Wisconsin in 1990, more than half of states have created at least one program that provides some public subsidies for children attending private school.” *Id.* And the trend is rapidly accelerating: According to the American Federation for Children, twenty-one states *this year alone* have “voted to create, expand, or improve school choice programs.” *Expanding Choice During a Pandemic*, American Federation for Children (Aug. 31, 2021), <https://bit.ly/38Ql0mD>. This should be no surprise, given the critical need that school-choice programs serve to address. As Justice Thomas has previously observed, failing public schools disproportionately affect those children “most in need of educational opportunity,” and “school choice programs . . . for . . . children in struggling communities” provide exactly that. *Zelman v. Simmons-Harris*, 536 U.S. 639, 681–82 (2002) (Thomas, J., concurring).

Religious schools are a critical component of these expanded educational opportunities. In *Zelman*, for instance, “82 percent of schools participating in the voucher program were religious and . . . 96 percent of



participating students enrolled in religious schools.” *Id.* at 663–64. The discrimination against religious schools authorized by the lower court’s artificial distinction, however, threatens to undermine much of this progress and voters’ growing demand for school-choice options. Indeed, allowing any such discrimination would directly affect the educational prospects of the children who attend many thousand religious schools operated and supported by organizations like *amici*. Many of those families would be unable to afford to enroll their children in these successful schools, eliminating them as a realistic educational option for many in the United States.

For example, eighty percent of Partnership families attend these schools on scholarships, and the median yearly income for scholarship families is only \$29,295. Partnership Schools, *2019-2020 Annual Report* 4 (2021), <http://bit.ly/3bkyFVl>. Partnership Schools’ study of its own enrollment trends has led the organization to conclude that “[p]ublic funding is *essential* to meet the demand for equitable access” to Catholic schools for disadvantaged families. *Partnership Schools Enrollment Report*, *supra*, at 6 (emphasis added). Luckily, many Partnership students currently do have access to public funding. For example, tuition is “completely covered” for eligible families at Partnership’s Cleveland schools through Ohio’s Cleveland Scholarship Program—the program upheld by this Court in *Zelman*—and EdChoice Scholarship Program. *See Scholarships*, Archbishop Lyke School, <http://bit.ly/3kMyVzs> (last visited Sept. 8, 2021); *Scholarships*, St. Thomas Aquinas School,

<http://bit.ly/3c52KXR> (last visited Sept. 8, 2021). Access to funding like this is crucial for the families served by Partnership Schools—“without access to programs that give low-income parents the same school choices as wealthier ones,” most students at Partnership Schools would be unable to enroll. *Partnership Schools Enrollment Report, supra*, at 6.

Likewise, many Orthodox Jewish parents rely on public funding to send their children to Jewish day schools. Pennsylvania, for example, offers tax credits to corporations that go towards funding nonpublic school scholarships. Because of this program, the Jewish Federation of Philadelphia has been able to consistently increase its support of Jewish day schools. Nathan J. Diament, *Public Funding for Non-Public Schools*, Jewish Action (Fall 2005), <http://bit.ly/306EgYU>. Similarly, New Jersey law requires busing or transportation funding for students attending nonpublic schools. Busing has benefited hundreds of students attending Orthodox Jewish day schools in the state. Mike Davis, *Jackson to Provide Buses to Orthodox Jewish Schools in Lakewood*, Asbury Park Press (Aug. 6, 2018), <http://bit.ly/3bVYWIq>. Without these programs, Orthodox Jewish families would have to face the “staggering cost of Jewish education” alone. Shira Hanau, *Allen Fagin, Head of the Orthodox Union, Reflects on How the Pandemic has Changed Orthodox Life*, Jewish Telegraphic Agency (June 25, 2020), <http://bit.ly/2NXYPUI>. This has only been exacerbated by the economic dislocation caused by the coronavirus pandemic, and applications for tuition assistance at many Jewish day schools have recently

reached record levels. *Id.* There is thus concern that “parents might get priced out of the ability to provide the Jewish education for their children that they desperately want to provide.” *Id.*

The ability of many Muslim families to send their children to Islamic schools also relies on school choice funding programs. For example, the largest recipient during the first year of North Carolina’s Opportunity Scholarship Grant Program was Greensboro Islamic Academy—which had nearly 300 students aided by the program during its first three years. Duke Law School Children’s Law Clinic, *School Vouchers in North Carolina: The First Three Years* 9–10 (2017), <https://bit.ly/3t1AF6N>. Numerous CISNA accredited schools likewise receive funding from private school choice programs. Students at the Leaders Preparatory School in Orlando, Florida, for example, can apply for the Florida Tax Credit Scholarship. *Admissions*, Leaders Preparatory School, <http://bit.ly/2NTToPRg> (last visited Sept. 8, 2021). And many students at CISNA accredited schools are eligible to reclaim state tax credits for education expenses.

In sum, the endorsement of any status/use distinction would deny the critical funding needed for many families to continue sending their children to the successful religious schools that are best for them. In turn, that loss of funding would threaten to close many religious schools themselves—and, in the process, short circuit voters’ increasingly preferred school choice programs. To preserve these schools and the right of voters to facilitate families’ freedom to take advantage of the valuable opportunities they

provide, this Court should clarify that such a distinction is incompatible with the protections of the First Amendment.

#### **IV. In Related Contexts, This Court Has Acknowledged The Inseparability Of Faith And Learning In Religious Schools.**

Finally, in related contexts, this Court has itself recognized the fallacy of the lower court's status/use distinction and has acknowledged that a key component of *being* a religious school is *doing* religious work through the integration of faith and learning. Within a week of its decision in *Espinoza*, the Court stressed in *Our Lady of Guadalupe* that “educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.” 140 S. Ct. at 2064. Highlighting the necessity of fully integrating the faith in religious schools—including Catholic, Protestant, Jewish, Islamic, Church of Jesus Christ of Latter-day Saints, and Seventh-day Adventist—this Court recognized that there is a “close connection” drawn by religious institutions “between their central purpose and educating the young in the faith.” *Id.* at 2064–66.

Largely in recognition of this close connection, the Court held that the teachers in *Our Lady of Guadalupe* performed important religious work even though they lacked formal “ministerial” titles and had relatively little formal religious training. Still, those teachers were “expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith.” *Id.* at 2066. Further, both

teachers were expressly regarded by their schools as “playing a vital part in carrying out the mission of the church, and the schools’ definition and explanation of their roles is important.” *Id.* In the case of Agnes Morrissey-Berru, that definition and explanation required that she perform “[a]ll her duties”—not just the overtly religious ones—“within [the school’s] overriding commitment” to “develop and promote a Catholic School Faith Community.” *Id.* at 2056 (internal quotation marks omitted). In the case of Kristen Biel, her school expressly required that she “integrat[e] Catholic thought and principles into secular subjects.” *Id.* at 2059; *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) (“What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident.”).

Even before *Our Lady of Guadalupe*, many lower courts had recognized the importance of a religious school’s integration of faith and learning in this same context. For example, the Seventh Circuit previously held that a teacher of Hebrew language in a Jewish day school qualified as a “minister” under the ministerial exception. *See Grussgott v. Milwaukee Jewish Day Sch.*, 882 F.3d 655 (7th Cir. 2018) (per curiam). Even assuming that the teacher there had the “purely secular” title of “grade school teacher,” and despite the fact that “[o]ne might have this same title at a public school and perform a completely secular job,” the court applied the ministerial exception in part because “the school expected its Hebrew teachers to integrate religious teachings into their lessons.” *Id.* at 659. Similarly, the Second Circuit has concluded

that a Catholic school’s “lay principal,” whose job description included an admonition to “help students ‘integrat[e] . . . the Gospel’ into daily life,” was a “minister” for purposes of the exception. *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 194 (2d Cir. 2017). Despite the individual’s formal title of “lay principal,” the Court found “the substance reflected in that title . . . entails proficiency in religious leadership”—demonstrating the difficulty in bifurcating the “secular” from the “religious” in school leadership roles. *Id.* at 208. Further, the Sixth Circuit has held that a spiritual director at a Christian school—whose work was mostly “secular in nature”—qualified as a “minister” because she led “others toward Christian maturity” and had a “duty to ‘cultivate ‘intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines.’” *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015).

The theory underlying these ministerial exception cases conflicts with a status/use distinction. Indeed, what these courts appreciated—and what this Court has explicitly recognized—is that, for many religious schools, “being religious” entails a complete integration of faith formation and the secular components of education. The decision below ignores this reality. And the adoption of an artificial status/use distinction would favor only those religious schools “apathetic about religion” while requiring “those with a deep faith” to “face the greatest disabilities.” *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring).

Rather than allowing that misguided rule to inflict unconstitutional discriminatory treatment on

religious schools like those supported by *amici*, this Court should make clear that *any* discrimination against religious organizations—whether defined on the basis of religious “status” or religious “use”—is subject to “the most exacting scrutiny.” *Trinity Lutheran*, 137 S. Ct. at 2021.

### CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to reverse the decision below.

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SEPTEMBER 10, 2021