No. 20-1088

IN THE
Supreme Court of the United States

DAVID CARSON,
AS PARENT AND NEXT FRIEND OF O.C., *et al.*,
Petitioners,

v.

A. PENDER MAKIN, 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 *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a state violate the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or "sectarian," instruction?

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and education institution—a "think tank"—to formulate and promote free-market public policy in the States. The staff at The Buckeye Institute accomplish the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policies, and promoting those solutions for implementation in Ohio and replication across the country. Through its Legal Center, The Buckeye Institute engages in litigation in support of the rights and principles enshrined in the United States Constitution.

The Buckeye Institute supports the principles of limited government and individual liberty. It has a strong interest in ensuring the proper interpretation of the Religion Clauses and the Equal Protection Clause. Additionally, The Buckeye Institute supports educational choice, and believes that parents and families are best positioned to make determinations regarding students' education.

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[1] Petitioners and Respondent have each given blanket consent to the filing of briefs *amici curiae* without regard to the position taken in the briefs or the party supported. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Maine's exclusion of "sectarian" schools from its program is incompatible with both the Constitution's text and this Court's precedents. The Free Exercise Clause generally prohibits discrimination on the basis of religious status in the distribution of public benefits, including tuition assistance programs like the one at issue here. In fact, the core constitutional issues before this Court have been asked and answered many times. Yet the First Circuit has nonetheless upheld this statutory scheme several times by sidestepping relevant precedent. Such is the case here, where the circuit court relied on the alleged distinction between religious "status" and "use" to avoid the import of this Court's decision in *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020).

Amicus curiae The Buckeye Institute writes to highlight two issues. First, Maine's "nonsectarian" school provision violates the First Amendment's Free Exercise Clause. *See* U.S. CONST. amend. I. This statutory scheme denies generally available benefits on the basis of religion.

The historical record demonstrates that the Framers adopted the Free Exercise Clause in part to prevent such abuses. Likewise, this Court has consistently held that government cannot exclude individuals from civil and political benefits due to their religious beliefs. A proper application of this Court's precedents requires the conclusion that Maine's imposition of special disabilities on religious

schools—because they are religious—runs afoul of the Free Exercise Clause's protections. The State's inquiry into school curricula and faith is likewise unconstitutional. Government is neither equipped nor permitted to determine whether a religious school is "too religious" to receive generally available student aid.

Next, *amicus* respectfully submits that Maine's exclusion of "sectarian" schools from its tuition assistance program should be subject to strict scrutiny. The First Circuit incorrectly applied rational basis review even though the statute is facially discriminatory and is neither neutral nor of general application. This Court should correct the First Circuit's error and review the exclusion under the correct level of scrutiny.

However, Maine's exclusion cannot withstand *any* level of scrutiny. The passage of the challenged law, Me. Stat. tit. 20-A, §2951(2), was prompted by a 1980 Maine Attorney General opinion which incorrectly concluded that allowing families who choose religious schools to receive tuition assistance violates the Establishment Clause. Of course, in the years since then this Court held essentially the opposite in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The justification for the law—an erroneous interpretation of the Establishment Clause—does not survive any level of scrutiny and cannot serve as a basis for the State's unconstitutional actions.

ARGUMENT

I. Maine's "Nonsectarian" School Provision Discriminates On The Basis Of Religion, In Violation Of The Free Exercise Clause.

Maine's "nonsectarian" school provision denies generally available benefits on the basis of religion, whether on the basis of a school's religious status or its alleged religious use of funds. Such restrictions violate the Free Exercise Clause and they "cannot stand." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017).

The First Amendment provides that "Congress shall make no law …. prohibiting the free exercise of religion." *See* U.S. CONST. amend. I. The Fourteenth Amendment makes this limitation applicable to the States as well. *See* U.S. CONST. amend. XIV, § 1; *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). Importantly, this Court has long recognized that the Free Exercise Clause embraces not just freedom of conscience, but also the "freedom to act." *Id.* at 303.

Among other protections, the First Amendment generally prohibits laws that disqualify religious entities, because of their religious character, from benefits that are available to the rest of the public. The Religion Clauses were intended to protect "against governmental intrusion on religious liberty." *Everson v. Bd. of Educ.,* 330 U.S. 1, 13 (1947). The Framers of the Bill of Rights were familiar with religious persecution and the denial of civil and

political privileges on the basis of religion, and they specifically sought to preclude such abuses in the new nation.

English law imposed numerous political and civil disabilities on religious dissenters. In the early 17th Century, for example, the English Parliament denied naturalization to those who would not join the Church of England. *See* Naturalization and Restoration of Blood Act, 1609, 7 Jac. 1, c. 2 (Eng.), *reprinted in* 4 STATUTES OF THE REALM 1157 (1963). Another English law prevented persons from holding civil or military office, or receiving "any Pay, Salary, Fee or Wages by reason of any Patent or Grant from his Majestie," on account of religious status. *See* Test Act, 1673, 25 Car. 2, c. 2, § 1 (Eng.), *reprinted in* 5 STATUTES OF THE REALM 782–83 (1963). Religious dissenters were also disqualified by various laws from serving as legal guardians to orphans, sitting in Parliament, and teaching at certain universities.[2]

As this Court has recognized, many early settlers came to the Colonies to escape such laws. *See Everson*, 330 U.S. at 8; *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961) ("a great many of the early colonists left Europe and came here hoping to worship in their own way"). And yet similar laws arose in the in the Colonies as well, "imposing burdens and disabilities of various kinds upon varied beliefs depending largely

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[2] *See* Brief for the United States as *Amicus Curiae* at 13-14 & n.3, *Carson as next friend of O.C. v. Makin*, No. 19-1746 (1st Cir.) (filed Oct. 7, 2019) (collecting English statutes).

upon what group happened to be politically strong enough to legislate in favor of its own beliefs." *Id.*

The Free Exercise Clause was designed to prevent such abuses and to prohibit government from withholding rights or benefits on the basis of one's beliefs or conduct. Contemporaneously with the debates over the Bill of Rights, twelve of the thirteen state constitutions contained provisions protecting religious freedom. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455-57 & n.242 (1989) [hereinafter "McConnell, *Historical Understanding of Free Exercise*"]. Eight of these States and the Northwest Ordinance protected religious worship. *Id.* at 1460. Four States—Virginia, Georgia, Maryland, and Rhode Island—took an even broader approach and specifically protected religiously-required conduct as well. *Id.* at 1459. For example, Virginia and Georgia protected the "free exercise" of religion. *See* Va. Bill of Rights of 1776 § 16 ("all men are equally entitled to the free exercise of religion"); GA. CONST. of 1777, art. LVI ("All persons whatever shall have the free exercise of their religion ...."). Maryland protected not only one's "religious persuasion or profession," but also "religious practice." Md. Declaration of Rights of 1776, art. XXXIII.

The language eventually adopted as the First Amendment followed the latter, more protective approach, and included the words "free exercise." This was not an accident of history. The language

was chosen deliberately, after Congress considered several different versions but decided to protect *conduct* and not merely the rights of conscience. *See* McConnell, *Historical Understanding of Free Exercise*, 103 HARV. L. REV. at 1483-84 (quoting the legislative history).

The contemporaneous Virginia Act for Establishing Religious Freedom also provides insight into the intentions of the Framers. The Act declared that "laying upon [a person] an incapacity … unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right." Virginia Act for Establishing Religious Freedom (1785), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 84-85 (Kurland and Lerner eds., 1987). Importantly, this Court has long recognized that the provisions of the First Amendment "had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson*, 330 U.S. at 13.

Consistent with this history and this understanding of the First Amendment's text, this Court has long affirmed that government cannot exclude individuals from civil and political benefits due to their religious beliefs, or even a lack thereof. *See, e.g.*, *Everson*, 330 U.S. at 16; *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (collecting cases where this Court has "prohibited governments from

discriminating in the distribution of public benefits based upon religious status or sincerity").

This Court most recently applied these principles in *Trinity Lutheran* and *Espinoza*. In *Trinity Lutheran*, the Court invalidated a Missouri policy that prevented religiously-affiliated nonprofits from participating in a program to aid playground resurfacing, holding that such discrimination was "odious to our Constitution." 137 S. Ct. at 2025. And in *Espinoza*, the Court held that a Montana policy prohibiting religious schools from benefitting from a general scholarship program was a violation of the Free Exercise Clause. 140 S. Ct. at 2256-57. These holdings were, in the Court's own words, "unremarkable," because it is well established that "disqualifying otherwise eligible recipients 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.'" *Id.* at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021).

In short, this Court's precedents make clear that government may not "condition the availability of benefits" upon one's willingness to surrender principles of her religious faith. *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion) (quoting *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)). Doing so penalizes the free exercise of constitutionally-protected liberties. *Id.* Yet that is precisely what Maine's statutory scheme does here.

Respondent's brief in opposition to a writ of certiorari actually underscores this point. Respondent's brief highlights the various schools' beliefs and policies that the State apparently finds problematic. *See* Br. in Opp. for Resp. at 7-13. For example, Respondent points to Bangor Christian Schools' "goal of instilling a Biblical worldview," and its objective to prepare each student for "the important position in life of spiritual leadership in school, home, church, community, state, nation and world." *Id.* at 7-8. The brief highlights that the Head of School at Bangor Christian Schools also serves as the "Connections Pastor" for Crosspoint Church. *Id.* at 7. Likewise, Respondent notes that Temple Academy is governed by Centerpoint Community Church's board of deacons, and its superintendent is the church's lead pastor. *Id.* at 10. The brief emphasizes that Temple Academy "provides a 'biblically-integrated education.'" *Id.* 12. Respondent points out that each school follows hiring policies consistent with its religious views. *See id.* at 9, 12.

None of these facts provides a constitutional basis for prohibiting students from choosing to use a generally available student-aid program to attend these schools. To the contrary, conditioning the receipt of public benefits on these factors puts "substantial pressure" on Petitioners and these schools to modify their behavior and violate their beliefs. *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981). "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* Schools are incentivized or

pressured to abandon the religious elements of the educational experience.

Equally important is the unconstitutional nature of the State's inquiry into the schools and their curricula. Maine's statutory scheme empowers its Department of Education to determine whether a school uses public funds for religious purposes or teaches "through the lens of [its] faith." *See Carson as next friend of O.C. v. Makin*, 979 F.3d 21, 38 (1st Cir. 2020) (Pet. App. 35) (quoting interrogatory response of former Commissioner of the Maine Department of Education). Yet this Court has consistently rejected such inquiry, by government agencies and even by the courts themselves. In *Mitchell v. Helms*, for example, the Court cautioned against courts "trolling through a person's or institution's religious beliefs." 530 U.S. at 828. This Court found that such inquiry "is not only unnecessary but also offensive." *Id.* In *New York v. Cathedral Academy*, 434 U.S. 126 (1977), the Court invalidated a law that allowed reimbursement for private schools' educational activities as long as they excluded religious content, finding that the government's inquiry into curricula violated the First and Fourteenth Amendments. *Id.* at 132. Other cases are in accord. *See, e.g.*, *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

Maine's exclusion of "sectarian" schools from its tuition assistance program discriminates against religious families and schools by denying them a generally available public benefit. This is precisely the sort of discrimination that the Free Exercise Clause was designed to prevent. The constitutional text, history, and this Court's precedents make clear that Maine's imposition of special disabilities on religious schools runs afoul of the First Amendment's protections. The decision below should be reversed.

II. Maine's Exclusion Of "Sectarian" Schools Cannot Withstand Any Level Of Scrutiny.

Maine's exclusion should be subject to strict scrutiny, and the First Circuit erred in applying the lower bar of rational basis review. *See Carson*, 979 F.3d at 40–41 & n.7 (Pet. App. 40) (subjecting Maine's exclusion "only to rational basis review because it is use based"). The First Circuit's reliance on the alleged status/use distinction does not lessen the protections that are due under the Free Exercise Clause.

Maine's law is facially discriminatory against schools deemed to be "sectarian." *See* Me. Stat. tit. 20-A, §2951(2) ("a private school" may participate in the tuition assistance program "only" if it is "a nonsectarian school"). However, even if the statute were not facially discriminatory, it is well established that a "law burdening religious practice that is not neutral or not of general application must undergo *the most rigorous of scrutiny*." *Church of the Lukumi*

Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (emphasis added).

It is clear that Maine's statutory scheme is neither neutral nor generally applicable. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1730–1732 (2018); *Church of the Lukumi*, 508 U.S. at 533. This Court has likewise emphasized that the principle underlying the general applicability requirement is that government "cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Church of the Lukumi*, 508 U.S. at 543; *see also Fulton*, 141 S. Ct. at 1877 (a law is not "generally applicable" if it invites the government "to consider the particular reasons for a person's conduct"). Yet Maine's law does precisely that: it empowers and even requires a government agency to effectively decide when a school is "too religious" to participate in the program. It should be subject to the most rigorous scrutiny. *Church of the Lukumi*, 508 U.S. at 546.

While Maine's exclusion should be subject to strict scrutiny, *amicus* writes separately to underscore that the law cannot withstand *any* level of scrutiny. The basis for the discriminatory law was an erroneous belief that the exclusion of religious schools was necessary in order for the State to comply with Establishment Clause. That belief was incorrect, and

any such notions were dispelled by this Court nearly two decades ago. It cannot provide a basis for continued discrimination by the State today.

The history of this statutory scheme is clear. Prior to 1980, parents participating in the tuition assistance program could send their children to religious schools. *See* J.A. 72 § 19. However, the law was changed following a 1980 Maine Attorney General opinion which concluded that allowing families to choose religious schools violates the Establishment Clause. Me. Op. Att'y Gen. No. 80-2 (1980) (J.A. 35-68). Relying heavily on this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Maine Attorney General erroneously opined that using public funds to "pay for the tuition of students at sectarian elementary and secondary schools … violates the Establishment Clause." J.A. 65; *see also* J.A. 62 ("the practice of paying the tuition of students attending sectarian elementary and secondary schools violates the Establishment Clause").

The state legislature enacted the present exclusion in response to the Maine Attorney General's opinion. The legislature made clear that it was doing so because of its erroneous belief that the Establishment Clause prohibited the State's prior practice. The new law specifically provided that a student's chosen school must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." 1981 Me. Laws 2177 (codified at Me. Stat. tit. 20-A, § 2951(2)). In later ruling on a challenge to the statute, the Maine

Supreme Court found that the change had been "enacted in response" to the Maine Attorney General's opinion. *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 130-31 (Me. 1999) (citing Me. Op. Att'y Gen. No. 80-2). The Maine Supreme Court recognized that Maine's "*only justification* for excluding religious schools from the tuition program was compliance with the Establishment Clause." *Id.* at 131 (emphasis added).

The State's "only justification" for the exclusion of religious schools was in error. The Establishment Clause does not prohibit Maine from including religious schools alongside non-religious ones in its tuition assistance program. Any doubts about this were put to rest nearly twenty years ago, when this Court squarely rejected a similar argument in *Zelman v. Simmons Harris*, 536 U.S. 639 (2002). In *Zelman*, this Court held that a government aid program is permissible where it "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" as a result of their own choice. *Id.* at 652.

Nor was *Zelman* breaking new ground at the time it was decided. In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court held that a Minnesota statute did not violate the Establishment Clause even though the State provided financial assistance to sectarian institutions. Because public funds become available "only as a result of numerous, private choices of individual parents," this Court found no "imprimatur

of State approval" that would violate the Establishment Clause. *Id.* at 399 (quoting *Widmar*, 454 U.S. at 274).

In *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986), the Court rejected 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. The Court emphasized 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." *Id.* at 487. Likewise, in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), the Court rejected an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools. The Court found that the program's "primary beneficiaries" were the children, not the schools. *Id.* at 12.

In short, there is no Establishment Clause bar to tuition assistance programs that include religious schools. Yet that was the specific justification—the "only justification"—underlying Maine's statutory exclusion. *See Bagley*, 728 A.2d at 131.

Under any level of scrutiny, Maine does not have a valid interest in a policy adopted to remedy Establishment Clause violations that did not exist. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001) (finding "no valid Establishment Clause interest" in complying with an erroneous

interpretation of the Clause); *accord Christian Science Reading Room Jointly Maintained v. City & Cty. of San Francisco*, 784 F.2d 1010, 1016 (9th Cir.) (where a policy was adopted in order to remedy violations of the Constitution, "but in fact there were no violations to be remedied, it cannot be said that the policy … furthers the governmental purpose in any way"), *amended*, 792 F.2d 124 (9th Cir. 1986); *see also Espinoza*, 140 S. Ct. at 2260 (a State's interest "in achieving greater separation of church and State" than required by the Establishment Clause "is limited by the Free Exercise Clause") (quoting *Trinity Lutheran*, 137 S. Ct. at 2024). Without a compelling state interest, or even a rational basis, Maine's discriminatory law cannot stand.

Maine now offers another justification for its law: that the State supposedly has an "interest in ensuring that the public's funds go to support only the rough equivalent of a public education." *Carson*, 979 F.3d at 47 (Pet. App. 55). The First Circuit accepted this rationale, alluding to—but not actually citing—legislative history that purportedly supports its conclusion. *Id.* at 47-48 (Pet. App. 55-56).[3]

Of course, both the text of the law and the Maine Supreme Court's holding in *Bagley* indicate the

[3] The decision below quotes the First Circuit's decision in *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004), for the proposition that the "legislative history clearly indicates" multiple bases for Maine's exclusion of religious schools from the tuition assistance program. *Carson*, 979 F.3d at 47 (Pet. App. 55) (quoting *Eulitt*, 386 F.3d at 356). However, neither the decision below nor the decision in *Eulitt* cites that history.

State's true interest, rather than this *post hoc* rationale. *See* 1981 Me. Laws 2177 (a student's chosen school must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution"); *Bagley*, 728 A.2d at 131 (Maine's "only justification for excluding religious schools" was compliance with its interpretation of the Establishment Clause). When assessing a discriminatory law, this Court looks to the legislature's "actual purpose" for enacting the provision. *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996). The government's justification for the exclusion must be the "genuine" statutory purpose, and not one that was "invented *post hoc*." *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) ("although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification").

CONCLUSION

For the reasons set forth above, as well as in the Brief for Petitioners, the decision of the court of appeals should be reversed.

Respectfully submitted,

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