No. 20-1088

In the Supreme Court of the United States

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.

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

BRIEF FOR THE STATES OF ARKANSAS, ALABAMA, ARIZONA, FLORIDA, GEORGIA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Amici are the States of Arkansas, Alabama, Arizona, Georgia, Florida, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia.* Many of these States partner with private schools to empower parents to make the educational choices they think best for their families. Like Maine, these other States have designed their public–private partnerships informed by local history and responsive to local needs. Thus, the details of these partnerships vary. But these States are united on one front: They recognize religious and nonreligious schools alike as valid educational partners. Unlike Maine, they do not condition partnership on a school's religiousness.

As the experience elsewhere shows, a State need not discriminate on the basis of religion to serve its undoubtedly compelling interest in educating children. Just the opposite, openness to partnering with religious schools furthers the States' goals by providing an array of educational choices.

Fully including religious schools also protects the constitutional rights of a State's citizens. Whether a State excludes schools based on their religious *status* or on their *use* of funds, it makes no difference. For discrimination against schools that will use funds to

* Neither a Rule 37.6 disclosure, consent, nor a motion for leave to file is required for this brief. *See* Sup. Ct. R. 37.4, 37.6.

teach religious things is simply discrimination against religious schools. And discriminating against religious schools also discriminates against the families who send their children to those schools.

SUMMARY OF THE ARGUMENT

The decision below allowed Maine to exclude religious schools from generally available benefits solely because they are religious schools. This Court should reverse.

I. Strict scrutiny applies here, because, contrary to the First Circuit's conclusion, Maine's exclusion is based on the religious status of these schools, not their use of public funds. The history of Maine's law makes this clear.

That history also makes clear why this Court ought to finally discard the status–use distinction that animated the First Circuit's analysis. The proponents of Maine's law openly intended to exclude schools that might offer any religious instruction. That is no different than intending to exclude religious schools. Either way, Maine excludes schools because of religion. Characterizing this exclusion as use based should not suffice to avoid strict scrutiny.

II. Many other States have programs that provide families public funds to attend private schools of their choice—programs that, unlike Maine's, allow religious schools to participate.

The experience in these other States demonstrates that Maine's religious exclusion is not tailored

to any compelling interest. Maine certainly has a compelling interest in educating its citizens. But it does not have an independent interest in limiting religious schools' involvement in education, which is the interest Maine has claimed throughout this litigation. To serve its general interest in education, Maine does not need to exclude religious schools. Therefore, its religious exclusion fails strict scrutiny.

ARGUMENT

I. Excluding religious schools from generally available benefits solely because they are religious schools triggers strict scrutiny.

No one disputes that Maine excludes schools from a generally available benefit based solely on religion. The decision below upheld this exclusion based on the conclusion that Maine "imposes a use-based restriction" rather than a status-based one. Pet. App. 35. As a result, the First Circuit was "not persuaded" that "the 'nonsectarian' requirement is subject to strict scrutiny." *Id.* at 40.

Contrary to the First Circuit's conclusion, however, the history of Maine's religious exclusion makes clear that it turns on religious status, not use. Maine's arguments to this Court further clarify the same point. Although Maine disclaims any "religious hostility or animus," BIO 19, it admits that it finds the religious beliefs of Bangor Christian Schools and Temple Academy objectionable and these schools thus unworthy of public funds, *see id.* at 20.

In any event, this Court has never held that use-based restrictions avoid strict scrutiny. And the ease with which the decision below cast Maine's status-based exclusion as a use-based exclusion demonstrates the elusiveness of the "distinction between discrimination based on use or conduct and that based on status." *Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2257 (2020). Whether based on use or status, Maine's law receives strict scrutiny, because religious discrimination is religious discrimination—however it's characterized.

A. History shows Maine excludes schools based solely on their religious status, which triggers strict scrutiny.

Under both Religion Clauses, this Court looks to the history of a challenged law to inform its analysis. *See, e.g.*, *Espinoza*, 140 S. Ct. at 2258-59 (describing "checkered tradition" of provisions like law challenged under Free Exercise Clause); *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (holding " 'reasonable observer' " is " 'aware' of the 'history and context' underlying a challenged program" in Establishment Clause cases (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001))). The history of Maine's religious exclusion makes clear that it is based on religious status, contrary to the First Circuit's conclusion.

1. The school-funding program here arose out of the geography and culture of New England. Maine's early settlers, mostly Protestants, were religiously

committed to education as, "in essence, part of human salvation." Christopher W. Hammons, Milton & Rose D. Friedman Found., *The Effects of Town Tuitioning in Vermont and Maine*, School Choice Issues in Depth, Jan., 1 2002, at 6.[1] But Maine's sizable "rural and non-urban areas" made "traditional school districts less efficient." *Id.* at 5.

Cultural factors compounded these geographical barriers. In 19th-century New England, "the basic governmental unit responsible for providing education was the town." John Maddaus & Denise A. Mirochnik, *Town Tuitioning in Maine: Parental Choice of Secondary Schools in Rural Communities*, 8 J. Rsch. in Rural Educ., Winter 1992, at 27, 31.[2] Because of this emphasis on "local autonomy," "small towns throughout the countryside" independently "establish[ed] small academies"—"most of them private." Hammons, *supra*, at 6-7. Later in the 19th century, amid "the push for compulsory education," many towns "found it less expensive to ship students to existing private academies rather than build public schools to accommodate local students." *Id.* at 7.

This evolved into a practice known as "town tuitioning," which involves "towns paying tuition for their resident students to attend schools not directly managed by those towns." Maddaus & Mirochnik, *supra*, at 27. Towns that rely on town tuitioning usually

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[1] https://www.edchoice.org/research/the-effects-of-town-tuitioning-in-vermont-and-maine/.

[2] https://jrre.psu.edu/sites/default/files/2019-08/8-1_3.pdf.

"have their own public elementary schools and tuition their high school students only." *Id.*

Town tuitioning grew in importance with the rise of "the free high school movement." *Id.* at 31. In Maine, this culminated in 1873 with the institution of statewide town tuitioning for high school. *Id.*; *see* Free High School Act of 1873, ch. 124, sec. 7, 1873 Me. Laws 78, 80 (Feb. 24, 1873).

The importance of town tuitioning peaked in the 1950s yet had begun to wane by 1957, when Maine enacted legislation that "allowed towns to join together to form unified school administrative districts (SADs)." Maddaus & Mirochnik, *supra*, at 31; *see* Sinclair Act of 1957, ch. 364, 1957 Me. Laws 369 (eff. Aug. 28, 1957). One well-established recipient of town-tuitioning students, Higgins Classical Institute, saw 50% of its feeder towns join SADs between 1954 and 1968. Maddaus & Mirochnik, *supra*, at 31. Higgins would eventually close in 1975. *Id.*

Higgins, like other private academies attended by town-tuitioning students, was a religious institution. *See Squires v. Inhabitants of Augusta*, 153 A.2d 80, 114-15 (Me. 1959) (Duford, J., dissenting) (suggesting that Higgins's "religious foundation" may have motivated state-law challenge to local ordinance funding students' transportation there), *partially abrogated as recognized by Sch. Comm. of York v. Town of York*, 626 A.2d 935, 940 (Me. 1993). At some points in Maine's history, "most communities" had access to secondary education only via "private academies, run mostly by

local clergy and business leaders." Maddaus & Mirochnik, *supra*, at 31. Some academies had even begun "under religious sponsorship." *Id.* at 32.

As late as 1979, over 300 students were attending "religiously operated" elementary or secondary schools with funding from Maine's town-tuitioning program. Me. Op. Att'y Gen., No. 80-2, 1980 WL 119258, at *3 n.2 (Jan. 7, 1980) (hereinafter, "Op. No. 80-2"); *see* J.A. 35-68 (reproducing Op. No. 80-2). Thus, for over a century, Maine allowed private schools to participate in the town-tuitioning program without regard to religion. *See* Maddaus & Mirochnik, *supra*, at 31-32.

2. Maine changed course in the early 1980s, when State Senator Howard M. Trotzky, then the Senate Chair of the Committee on Education, asked for an attorney-general opinion. *See Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 131-32 (Me. 1999). Senator Trotzky asked whether the town-tuitioning program "violate[d] the First Amendment of the U.S. Constitution inasmuch as it allow[ed] individuals in school administrative districts to attend privately operated religious schools at public expense." Op. No. 80-2, *supra*, 1980 WL 119258, at *1.

At that time, Maine was indifferent to schools' religiousness. Thus, as part of the town-tuitioning program, just over 300 hundred students attended "religiously operated" schools "at public expense." *Id.* at *3 n.2. Yet applying the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the attorney-gen-

eral opinion concluded that continuing to include religious schools would violate the First Amendment. *See* Op. No. 80-2, *supra*, 1980 WL 119258, at *5-12. (Of course, this Court reached essentially the opposite conclusion about 20 years later. *See Zelman*, 536 U.S. at 643-44.)

The town-tuitioning program had an obvious "secular purpose"—namely, "general education." Op. No. 80-2, *supra*, 1980 WL 119258, at *10. Nevertheless, applying *Lemon* required the attorney-general opinion to analyze schools' religious status. *See id.* at *8 ("[T]he focus of the 'primary effect' test is upon *the character* of the religious institutions involved." (emphasis added)); *id.* at *10 n.10 (defining "sectarian" to "refer[] to those institutions which are *characterized* by a *pervasively religious* atmosphere and whose *dominant purpose* is the promotion of religious beliefs" (emphasis added)).

According to the opinion, it would be "practically impossible" for any school that "exist[s] for the very purpose of teaching and promoting the tenets of a particular religious faith"—*i.e.*, any school that is *actually religious*—to "isolate" its religious and secular functions. *Id.* at *8-9; *see id.* at *11 (arguing that a "sectarian school" could not "separate[]" its "secular functions" and "religious purpose"). The opinion therefore determined that allowing parents to independently choose to spend a religiously neutral state subsidy at such a school would be constitutionally problematic. *Id.* at *12.

Beyond analyzing a school's religious status, the

attorney-general opinion also inquired into the religious status of its teachers. It saw a concern in *Lemon* "that a teacher in a non-public school will have difficulty in preventing his religious beliefs from 'seeping' into his course of instruction." *Id.* at *9 (citing 403 U.S. at 618-19). Indeed, *Lemon* itself invalidated a statute in part out of concerns about how "a dedicated religious person" might behave as a teacher. 403 U.S. at 618. Such concerns may arguably derive from this Court's language in *Lemon*, but that does not make them any less based on religious status.

Lemon's status-based analysis led the attorney-general opinion to conclude that Maine must exclude religious schools from the town-tuitioning program, solely based on their status as religious schools. *See* Op. No. 80-2, *supra*, 1980 WL 119258, at *12. Despite the lack of any textual basis in Maine law for excluding religious schools, the opinion invoked constitutional avoidance and interpreted the program to exclude religious schools. *See id.* at *3, 13.

3. In 1981, Maine's legislature responded by amending the town-tuitioning program to add the current religious exclusion. *See* Act effective July 1, 1983, ch. 693, sec. 5, 1981 Me. Laws 2063, 2177 (enacting 20-A Me. Rev. Stat. Ann. 2951(2)). The circumstances leading to Chapter 693's enactment leave no doubt that the religious exclusion amounts to status-based religious discrimination.

As already discussed, prior to Chapter 693, the town-tuitioning program had no provision excluding religious schools. Chapter 693 added such a provision

for the first time in Maine history. *See* 20-A Me. Rev. Stat. Ann. 2951(2). Yet its supporters repeatedly referred to it as "a recodification and a reorganization of all the education laws," lacking "any substantive changes whatsoever." 110 Me. Legis. Rec. 229 (2d Reg. Sess., House, Mar. 9, 1982) (statement of Rep. Connolly); *accord, e.g.*, 110 Me. Legis. Rec. 314-15 (2d Reg. Sess., House, Mar. 23, 1982) (statement of Rep. Connolly); 110 Me. Legis. Rec. 539 (2d Reg. Sess., House, Apr. 5, 1982) (statement of Rep. Connolly).

Statements that Chapter 693 made no substantive changes only make sense against the background of the 1980 attorney-general opinion that interpreted prior Maine law to exclude religious schools, even without a textual basis for that exclusion. So Chapter 693 must be understood to adopt the 1980 opinion's status-based rationale for excluding religious schools. In fact, Maine has long acknowledged as much. *See Bagley*, 728 A.2d at 130-31 (noting Maine's concession that it "made religious schools ineligible for the program . . . . in response to an Opinion of the Attorney General"). It is not disputed, therefore, that the sole impetus for enacting the religious exclusion was the 1980 attorney-general opinion's *status-based distinction*—drawn from *Lemon*—between religious and nonreligious schools. *See id.* at 131 (describing 1980 opinion's rationale as the "only justification for excluding religious schools").

Religious schools immediately recognized Chapter 693 as a threat. *See* 110 Me. Legis. Rec. 315 (2d Reg.

Sess., House, Mar. 23, 1982) (statement of Rep. Armstrong) (noting local Christian school's opposition); 110 Me. Legis. Rec. 483 (2d Reg. Sess., Senate, Mar. 31, 1982) (statement of Sen. Trotzky) (noting Maine Association of Christian Schools' opposition). At least one Christian school feared the legislation would "jeopardize[] their existence." 110 Me. Legis. Rec. 315 (2d Reg. Sess., House, Mar. 23, 1982) (statement of Rep. Armstrong). Indeed, when it passed, the status-based exclusion caused one of Maine's four Roman Catholic high schools to close. *Bagley*, 728 A.2d at 138 n.19.

4. Since enacting the status-based religious exclusion, Maine rebuffed at least one opportunity to end it. In 2003, a bill was introduced to repeal Maine's religious exclusion. *See* H.P. 141, Legislative Document (L.D.) No. 182, 2003 1st Reg. Sess., 121st Me. Legis. (introduced Jan. 21, 2003) (proposing repeal of 20-A Me. Rev. Stat. Ann. 2951(2)). It passed neither chamber of the Maine Legislature. *See* 121 Me. Legis. Rec. H-589 (1st Reg. Sess., May 13, 2003); 121 Me. Legis. Rec. S-641 (1st Reg. Sess., May 14, 2003).

The legislators' comments on that bill make clear the consistent status-based interpretation of the religious exclusion. For one thing, they continued to take the position that the religious exclusion adopted the reasoning of the 1980 attorney-general opinion, which focused on the religious status of a school. *See* 121 Me. Legis. Rec. H-589 (1st Reg. Sess., May 13, 2003) (statement of Rep. Millett) (recalling that the religious exclusion was created "in strict concurrence with the

Attorney General's recommendations").

More explicit status-based rhetoric against including religious schools permeated the floor debates. One opponent feared "giving up the rights for the education of our children to entities whose overwhelming mission is religious," without reference to any supposed religious use of state funds. *Id.* at H-584 (statement of Rep. Cummings). Another opponent seemed troubled by the fact that passing the bill would end the exclusion of *all* religions based solely on their religious status, mentioning "Muslims," "Buddhists," "Hindus," "Protestants," "Catholics," and "Jewish children." *Id.* at H-585 (statement of Rep. Davis);[3] *see also id.* at H-584 (statement of Rep. Sullivan) ("We don't support private schools, parochial private schools. It is not right.").

One opponent suggested that only "public schools and private non-religious schools" could be trusted to teach "the appropriate cultural morals and values of America." 121 Me. Legis. Rec. S-640 (1st Reg. Sess., May 14, 2003) (statement of Sen. Martin); *cf. Espinoza*, 140 S. Ct. at 2271 (Alito, J., concurring) (noting that common-school movement's "goal was to 'Americanize' the incoming Catholic immigrants"). Because religious schools will, by definition, include "religious teachings," the thinking went, they should never receive any state funding, even indirectly as a result of

[3] This line of reasoning echoes Justice Souter's dissent in *Zelman*—not the Court's opinion. *See Zelman*, 536 U.S. at 687 (Souter, J., dissenting) (discussing effect of *Zelman* in "Jewish," "Catholic," "Protestant," and "Muslim" schools).

true private choices. 121 Me. Legis. Rec. S-640 (1st Reg. Sess., May 14, 2003) (statement of Sen. Martin). But excluding only schools that offer religious instruction is simply another way of saying that the government may exclude religious people or their institutions because they are, in fact, religious. It is a status-based exclusion.

Still other legislators argued that, because "religious schools" can "discriminate in hiring," repealing the religious exclusion would amount to "subsidiz[ing]," "condon[ing]" or "promot[ing] discrimination." 121 Me. Legis. Rec. H-582-83 (1st Reg. Sess., May 13, 2003) (statement of Rep. Fischer); *see id.* at 587-88 (statement of Rep. Cummings). Maine continues to press this argument today. *See, e.g.*, BIO 20 (arguing that Maine need not "fund the[] educational program" at Bangor Christian Schools or Temple Academy, because they "discriminate . . . with respect to . . . who they hire as teachers and staff").

To be clear, what Maine means by "discrimination" is that religious schools hire religious people. But personnel is policy, as the Washington dictum goes. A school, like any other organization, is defined by its people. Thus, excluding a school based on its religiously motivated hiring practices is excluding that school based on its religious status. *Cf. Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (holding that First Amendment guarantees religious institutions "autonomy" in "the selection of the individuals who play certain key roles").

Legislators' comments during the 2003 floor debate—comments echoed in Maine's briefing here—clarify that Maine excludes religious schools from participation in the town-tuitioning program because of their status as religious schools, not because of any supposed religious use of state funds.

* * *

From the start, Maine argued its exclusion was based on religious status. The First Circuit concluded otherwise based on nothing more than Maine's made-for-litigation representations. *See* Pet. App. 35-36; *cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (rejecting "appellate counsel's *post hoc* rationalizations" in the administrative-law context).

Even taken at face value, Maine's representations below cannot change the history of Maine's religious exclusion: Maine excludes schools based on religious status. *See Espinoza*, 140 S. Ct. at 2259 (rejecting argument that re-adoption of no-aid provision meant the Court should overlook the historical reasons for that provision's adoption).

B. Strict scrutiny additionally applies because Maine excludes schools based on their religious use of funds.

Much of the First Circuit's analysis depended on its characterization of Maine law as a use-based exclusion. *See* Pet. App. 25-28. Maine supports that analysis here. *See* BIO 16 ("[T]he Court of Appeals

correctly held that the differential treatment of sectarian schools based on religious use, not religious status, is constitutional."). As just explained, that characterization is unsupported by the historical record. More fundamentally, however, it does not follow from that characterization that anything less than strict scrutiny applies.

This Court has not held "that some lesser degree of scrutiny applies to discrimination against religious uses of government aid." *Espinoza*, 140 S. Ct. at 2257. After all, a "religious use[] of government aid" will by definition be religious conduct. And it is well-settled that "[a] law that targets religious conduct for distinctive treatment" receives "strict scrutiny," which it "will survive . . . only in rare cases." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Ultimately, *Espinoza* did "not examine" the question "whether there is a meaningful distinction between discrimination based on use or conduct and that based on status." 140 S. Ct. at 2257. Because the decision below rested on this distinction, the time has come to examine it.

1. Maine's arguments for excluding religious schools show why the Court should now examine the status–use distinction and hold that it is no basis for avoiding strict scrutiny. Although Maine admittedly excludes religious schools from receiving public funds, it argues such "differential treatment of sectarian schools" is okay, BIO 16, because it is based on "what they would do with the money"—not "who they are," *id.* at 22. But what would religious schools do that

should disqualify them from receiving public funds? They would "promote[] the faith or belief system with which [they are] associated," or "present[] the material taught through the lens of that faith." *Id.* (quoting Pet. App. 35).

Promoting a faith and presenting material taught through the lens of that faith are defining features of religious schools. Contrary to Maine's position, excluding religious schools based "on the sectarian nature of the[ir] educational instruction" and excluding them because they are religious are the same. Pet. App. 35. Discrimination against sectarian schools (status based) is no different than discrimination against schools that provide "educational instruction" of a "sectarian nature" (use based). *See id.* at 34-35; *see also* Pet'r Br. 23-26; *cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring in part) (seeing no meaningful distinction between "describ[ing] [a] benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use)"). In either formulation, Maine excludes schools that are, in its estimation, too religious.

Maine has thus drawn a line between schools that would promote their faith or teach through its lens—presumably putting state funds at least partially to a religious use—and those that wouldn't. Following this line reveals that the status–use distinction resembles the "pervasively sectarian" doctrine that this Court has long criticized. *See Wolman v. Walter*, 433 U.S. 229, 247 (1977) (citing *Lemon*, 403 U.S. at 618-

19), *overruled by Mitchell v. Helms*, 530 U.S. 793, 835 (2000) (plurality op.); *id.* at 837 (O'Connor, J., concurring in the judgment). The two analyses resemble each other so closely that the First Circuit at times found itself slipping from the language of religious uses of public funds, to the language of "pervasively sectarian" schools. Pet. App. 49.

By inquiring into whether a particular school teaches through the lens of its faith, Maine has revived the practice of "trolling through a person's or institution's religious beliefs" to determine eligibility for a public benefit. *Mitchell*, 530 U.S. at 828 (plurality op.). Like "the application of the 'pervasively sectarian' factor," this practice "collides with [this Court's] decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Id.*; *see In re A.H.*, 999 F.3d 98, 108-10 (2d Cir. 2021) (Menashi, J., concurring) (explaining how Vermont's religious exclusion resembled the "pervasively sectarian" doctrine). Twenty years ago, a plurality of this Court said the time had come for the "pervasively sectarian" doctrine to be "buried. *Mitchell*, 530 U.S. at 829 (plurality op.). Maine's reliance on the status–use distinction shows why this doctrine should now suffer that same fate.

2. The First Circuit's defense of Maine's focus on the role of religion in a school's instruction offers no reason to save the status–use distinction. It thought Maine's focus showed the purpose of the religious exclusion—that Maine wishes to exclude sectarian

schools only to prevent families from using their town-tuitioning payments to fund "the sectarian nature of the instruction that [such schools] will provide." Pet. App. 37; *see* BIO 21 (supporting "the ability for a state to decline to fund explicitly religious uses of public funds"). But "[s]tatus-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses." *Espinoza*, 140 S. Ct. at 2256.

Because Maine's law excludes a school from receiving otherwise-available funds on the sole basis of the school's religious identity—whether determined by "affiliation with a religious institution" or by "the sectarian nature of the instruction it will provide," Pet. App. 36-37—this law receives strict scrutiny. The decision below incorrectly understood *Espinoza* and *Trinity Lutheran* to require less-exacting judicial scrutiny by characterizing Maine's religious exclusion as use based. *See* Pet. App. 40-49. Because of the First Circuit's emphasis on the status–use distinction, this Court should clarify that discriminating against people who do religious things is the same as discriminating against religious people. The Court should hold that there is no "meaningful distinction between discrimination based on use or conduct and that based on status" and reverse. *Espinoza*, 140 S. Ct. at 2257.

II. Maine's religious exclusion is not narrowly tailored to any compelling interest, as demonstrated by other States' programs.

To receive "public funds for tuition" under the

town-tuitioning program, a private school must be "nonsectarian." 20-A Me. Rev. Stat. Ann. 2951(2). This "explicitly excludes religious schools"—and by extension, the religious families who would use the program to send their children to such schools—"from receipt of state funds" on the basis of their religion. *Bagley*, 728 A.2d at 130; *see Espinoza*, 140 S. Ct. at 2255. A religious school is thus treated less favorably than a nonreligious school on account of religion, regardless of any other characteristic. Maine may purport to determine whether a school is religious based on "what [it] propose[s] *to do*." *Trinity Lutheran*, 137 S. Ct. at 2023. Nevertheless, this determination results in a "simple" rule: "No [religious schools] need apply." *Id.* at 2024.

Therefore, "the challenged restrictions violate 'the minimum requirement of neutrality' to religion." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (*per curiam*) (quoting *Lukumi*, 508 U.S. at 533). And "the 'strictest scrutiny' is required." *Espinoza*, 140 S. Ct. at 2260; *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (*per curiam*) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."). Maine must show that its religion-based exclusion " 'advance[s] "interests of the highest order," ' " and is " 'narrowly tailored in pursuit of those interests.' " *Espinoza*, 140 S. Ct. at 2260 (quoting *Lukumi*, 508 U.S. at 546). Though the First Circuit held this

test did not apply, Pet. App. 40-42, it also suggested that the religious exclusion would survive even if it did, *see id.* at 48-49.

That suggestion is wrong. Although Maine has a compelling interest in funding the education of young Mainers—an interest surely furthered by the town-tuitioning program, as a general matter—it has no separate interest in excluding religious schools from that funding. Regardless, many other States have functionally similar programs that allow parents to direct state funds to parent-chosen private schools, and that do not exclude religious schools. These other successful programs show that Maine's religious exclusion is not narrowly tailored to its compelling interest in education.

A. States have a compelling interest in funding education but not in excluding religious schools from funds.

Historically, Maine has argued that the religious exclusion serves its interest in complying with the Establishment Clause. *See Bagley*, 728 A.2d at 131 ("The State does not dispute that its only justification for excluding religious schools from the tuition program was compliance with the Establishment Clause."). Insofar as that argument remained open after *Zelman*, *see* 536 U.S. at 653, *Espinoza* foreclosed it, *see* 140 S. Ct. at 2254, 2260.

1. As a result, Maine has switched its focus. Rather than focus on its general interest in education,

Maine claims an interest in "defin[ing] a public education to mean a secular education." BIO 24; *see* Appellee's Br. 32, *Carson ex. rel O.C. v. Makin*, 979 F.3d 21 (1st Cir. 2020) (No. 19-1746), 2019 WL 5692831 [hereinafter, "First Circuit Appellee's Br."] (same); *id.* at 29 (claiming interest in "maintaining a statewide system of *secular* public education" (emphasis added)); *see also* BIO 19 (claiming "that a sectarian education is not equivalent to a public education"). The decision below also invoked this putative interest. *See* Pet. App. 43 (finding "it significant, too, for purposes of defining the baseline, that the state defines the kind of educational instruction that public schools provide as secular instruction").

Claiming such a state interest, however, is tantamount to claiming that a State has a freestanding interest in excluding religious actors from its education system—even when their inclusion would indisputably comport with the Establishment Clause. It is to claim, in other words, that religious non-neutrality itself is a state interest. This Court's cases do not grant States such an interest. *Cf., e.g.*, *Espinoza*, 140 S. Ct. at 2260 ("A State's interest 'in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause.' " (quoting *Trinity Lutheran*, 137 S. Ct. at 2024) (ellipsis in *Espinoza*)); *Lukumi*, 508 U.S. at 533 (condemning laws that "target[] religious beliefs," or that "infringe upon or restrict practices because of their religious motivation").

A variation on this claim argues that Maine must

exclude religious schools to ensure equal educational opportunity across the State. Otherwise, the argument goes, town-tuitioning students would have opportunities that are lacking for students who live in towns with public high schools. *See* BIO 23-24; *see also* First Circuit Appellee's Br. 31-32. But excluding religious schools does not give town-tuitioning students the same opportunities as other students. By definition, town-tuitioning students live in towns that have "neither built a public school, nor contracted with a nearby public or approved private school." BIO 18; *see* Pet. App. 6. Whether or not the town-tuitioning program includes religious schools, therefore, students in the program will have different educational opportunities than their peers elsewhere.

To ensure those differences do not become disparities, Maine did not have to "subsidize private education" as an alternative to building public high schools. *Espinoza*, 140 S. Ct. at 2261. But because it has "decide[d] to do so, it cannot disqualify some private schools solely because they are religious." *Id.*

2. For similar reasons, Maine's interest in preserving "limited public funds" does not justify the religious exclusion. Pet. App. 49. Because funding is a finite resource, the First Circuit did "not see why the Free Exercise Clause compels Maine either to forego relying on private schools to ensure that its residents can obtain the benefits of a free public education or to treat pervasively sectarian education as a substitute for it." *Id.*; *see* BIO 20 ("This case . . . is only about

whether Maine must fund [religious schools'] educational program as the substantive equivalent of a public education.").

Espinoza rejected a nearly identical argument. *See* 140 S. Ct. at 2261 ("According to the Department, the no-aid provision safeguards the public school system by ensuring that government support is not diverted to private schools."). Just as with the no-aid provision there, preserving scarce resources through the religious exclusion "is fatally underinclusive because" Maine's objective is " 'not pursued with respect to analogous nonreligious conduct.' " *Id.* (quoting *Lukumi*, 508 U.S. at 546). Maine's interest in preserving scarce resources "cannot justify" the religious exclusion, which "requires only religious private schools to 'bear [its] weight.' " *Id.* (quoting *Lukumi*, 508 U.S. at 547) (alteration in *Espinoza*).

Worse, there are signs Maine meant to saddle *particular* religious schools with the weight of its interest in preserving scarce resources. These signs include "[l]egislative statements about not wanting to 'fund discrimination' or the teaching of 'intolerant' views." BIO 20. Indeed, Maine itself suggests that religious schools lack "inclusion and tolerance" and are not "reflective of the diversity of our students and our community." *Id.* (Maine has not explained how *excluding* religious schools *increases* the diversity of Maine's education system.) And after detailing the beliefs of Bangor Christian Schools and Temple Academy, *see id.* at 7-13, Maine implies that it has an interest in

excluding these schools *because of* their particular beliefs, *see id.* at 20. If Maine "cannot disqualify some private schools solely because they are religious," *Espinoza*, 140 S. Ct. at 2261, then it certainly cannot disqualify some religious schools because of their beliefs, *cf.* 121 Me. Legis. Rec. H-586 (1st Reg. Sess., May 13, 2003) (statement of Rep. Glynn) (noting Maine has "a law on the books that says that you can send your children to a private school, but if they are going to be taught by a bunch of Catholics, then that is a problem").

The State undoubtedly has an interest in ensuring adequate funding for its public schools. But Maine has already made the choice that some public funds will flow to private schools. Using religion as the criterion for selecting which private schools will receive those funds does nothing to preserve funds for public schools. As one legislator said in the 2003 debates over the religious exclusion, "[t]hat is unconstitutional and" where Maine's "law has gone astray." *Id.*

B. Other States' programs show that the religious exclusion is not narrowly tailored to any state interest.

1. No less than last year, "many States today . . . provide support to religious schools through vouchers, scholarships, tax credits, and other measures." *Espinoza*, 140 S. Ct. at 2259 (citing Br. for Oklahoma et al. as *Amici Curiae* 29-31, 33-35, *Espinoza* (No. 18-1195), 2019 WL 4640375). Though the details of these other programs differ, they illustrate that Maine's exclusion

of religious schools is not tailored to the interests that town tuitioning aims to serve.

As discussed, *see supra* pp. 4-7, town tuitioning as it exists in Maine is unique to northern New England, a local solution to a local problem. But States around the Nation have enacted other school-funding programs to address the conditions of their own local education systems—without imposing a similar religious exclusion. The programs in other States differ from town tuitioning and each other on the margins, but they all share a key feature: They provide funds for tuition (and sometimes other expenses) to attend a private school chosen by a student's family. These are often called "voucher" or "scholarship" programs. Along with Puerto Rico and the District of Columbia, about a dozen States have such a program, some with multiple programs that each serve different student populations.[4]

Maine objects that its town-tuitioning program "is

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[4] *See, e.g.*, Ark. Code Ann. 6-41-901(b); D.C. Code 38-1853.07(a)(1), 38-1853.13(3); Fla. Stat. 1002.39(1), 1002.394(3); Ga. Code Ann. 20-2-2114(a); Ind. Code 20-51-4-2(a), 20-51-1-4.3(3); La. Stat. Ann. 17:4013(2), 17:4017(A), 17:4031(A); Budget Bill (FY 2022), ch. 357, sec. 1, R00A03.05 (Md. Apr. 2, 2021); Miss. Code Ann. 37-173-3, 37-175-3; N.C. Gen. Stat. 115C-112.5(2)(f)(4), 115C-562.1(3), 115C-562.2(a); Ohio Rev. Code Ann. 3310.03, 3310.41(B), 3310.51(C), 3310.51(F), 3310.52(A), 3313.975(A); 70 Okla. Stat. 13-101.2(A); Puerto Rico Education Reform Act, Act 85, sec. 14.01, 2018 Sess., 18th Puerto Rico Legis. (Mar. 29, 2018); Tenn. Code Ann. 49-10-1402(3), 49-10-1403, 49-10-1404; Utah Code Ann. 53F-4-302; Wis. Stat. Ann. 115.7915(2), 118.60(2)(a), 119.23(2)(a).

not a 'school choice' or 'voucher' program." BIO 2. That is so, says Maine, because it "use[s] private schools in place of, and not as an alternative to, public schools." *Id.* at 18; *accord id.* at 2, 19. But Maine does not explain what difference this distinction makes, nor even why it is really a distinction at all.

Operationally, the town-tuitioning program is identical to voucher programs elsewhere, except for the population it serves. A certain class of Maine citizens—those who live in a school administrative district with no public high school—may receive public funds to pay private-school tuition. *See id.* at 1-3. Other States provide public funds for private-school tuition to a different class of their own citizens. Some provide funds to a class defined by family income.[5] Many offer scholarships to a parent-chosen private school for students with exceptional needs.[6] Still others focus funding on students assigned to school districts that have not hit certain state achievement targets.[7] Maine may have chosen to serve a different population than these other States, *see* BIO 18-19 & n.2, but Maine has not explained why this choice

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[5] *See, e.g.*, Fla. Stat. 1002.394(3); Ind. Code 20-51-1-4.3(3); La. Stat. Ann. 17:4013(2), 4017(A).

[6] *See, e.g.*, Ark. Code Ann. 6-41-901(b); Fla. Stat. 1002.39; Ga. Code Ann. 20-2-2114(a); Ind. Code 20-51-1-4.3(4)(A); La. Stat. Ann. 17:4031(A); Miss. Code Ann. 37-173-3, 37-175-3; Ohio Rev. Code Ann. 3310.41(B), 3310.51(C), 3310.52(A); 70 Okla. Stat. 13-101.2(A); Tenn. Code Ann. 49-10-1402(3); Utah Code Ann. 53F-4-302.

[7] *See, e.g.*, Ohio Rev. Code Ann. 3310.03.

should exempt it from the First Amendment's requirement of religious inclusion.

In fact, since the petition in this case was filed, even the two States (New Hampshire and Vermont) with programs most analogous to Maine's have ceased enforcing their own religious exclusions. *Cf.* BIO 18-19 (acknowledging the similarity of Vermont's town-tuitioning program). This summer, New Hampshire's legislature repealed its religious exclusion. *See* Act of July 6, 2021, 2021 N.H. Laws ch. 106:3, 106:5 (eff. Aug. 5, 2021) (repealing religious exclusion in N.H. Rev. Stat. 193:4, 194:27). And the Second Circuit recently ordered Vermont to stop enforcing its own exclusion. *See In re A.H.*, 999 F.3d 98, 100-01 (2d Cir. 2021) (issuing writ of mandamus that ordered district court to preliminarily enjoin Vermont's religious exclusion).

These developments bring New Hampshire and Vermont in line with the tuition-funding programs in many other States. Some programs contain provisions that expressly provide for religious schools' participation,[8] or that imply such schools will

[8] *See, e.g.*, Fla. Stat. 1002.39(7), 1002.394(9), 1002.395(8); Ga. Code Ann. 20-2-2112(6); Ind. Code 20-51-4-1(a)(1); Budget Bill (FY 2022), ch. 357, sec. 1, R00A03.05(1)(d) (Md. Apr. 2, 2021); N.C. Gen. Stat. 115C-112.5(3), 115C-551, 115C-562.1(5); Ohio Rev. Code Ann. 3310.08(A)(2), 3313.978(D)(2); Utah Code Ann. 53F-4-302(9); Wis. Stat. Ann. 115.7915(2)(c), 118.60(1)(ab), 118.60(7)(c), 119.23(1)(ab), 119.23(7)(c).

participate.[9] Others simply make no mention of eligible schools' religiousness.[10] For many programs in this last category, state documentation shows that religious schools in fact participate—and often predominate. *See, e.g.*, House & Senate Comms. on Educ., Ark. Gen. Assemb., *Biennial Report on the Succeed Scholarship Program* 27 (Mar. 1, 2020);[11] Okla. State Dep't of Educ., *Lindsay Nicole Henry Approved Schools* (Jan. 12, 2021).[12]

The nationwide prevalence of religious schools in scholarship and voucher programs makes sense, because of the predominance of religious schools in American private education. Nationally, 67% of private schools are religiously affiliated. U.S. Dep't of

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[9] *See, e.g.*, D.C. Code 38-1853.02(5), 38-1853.08(b)(1), 38-1853.08(d)(1); Puerto Rico Education Reform Act, Act 85, sec. 14.01, 2018 Sess., 18th Puerto Rico Legis. (Mar. 29, 2018) (statement of purpose).

[10] *See, e.g.*, Ark. Code Ann. 6-41-903; La. Stat. Ann. 17:4021(A), 17:4031(D); Miss. Code Ann. 37-173-17, 37-175-17; 70 Okla. Stat. 13-101.2(H); Tenn. Code Ann. 49-10-1402(6), 49-10-1404(b).

[11] https://www.arkleg.state.ar.us/Bureau/Document?type=pdf&source=blr/Research/Publications/Other&filename=19-095_Act827Rept-SucceedScholarshipEval.

[12] https://sde.ok.gov/sites/default/files/Approved%20Private%20Schools%20for%20LNH%20Edited%2020210112.pdf.

Educ., Nat'l Ctr. for Educ. Stat., *The Condition of Education 2020*, at 49 (May 2020).[13] And religiously affiliated private schools educate about 4.3 million American students. *Id.* at 28; *see* U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stat., *Digest of Education Stat.*, Table 205.20 (Aug. 2019) (providing data underlying this figure).[14]

The evidence that diverse States enjoy fruitful partnerships with their religious private schools undercuts the First Circuit's suggestion that Maine's religious exclusion is narrowly tailored to that State's interest in education funding. *See* Pet. App. 49.

2. It also highlights a troubling retrogression in the decision below. Despite *Zelman* and the line of precedent that led to it, the First Circuit suggested that including religious schools in Maine's town-tuitioning program might violate the Establishment Clause. *See id.* at 30 n.2. It distinguished *Zelman* because "the Maine program is 'substantially narrower' " and "serves as a backstop for children who have no opportunity to attend a public school." *Id.*

The decision below cited nothing in *Zelman*, however, to support this distinction—unsurprising, given *Zelman*'s focus on parental choice. *See* 536 U.S. at 653 ("We believe that the program challenged here is a

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[13] https://nces.ed.gov/pubs2020/2020144.pdf.

[14] https://nces.ed.gov/programs/digest/d19/tables/dt19_205.20.asp.

program of true private choice . . . and thus constitutional."). And scholarship and voucher programs, essentially by definition, are "program[s] of true private choice." *Id.*; U.S. Dep't of Educ., Off. of Non-Public Educ., *Education Options in the States* 1 (2009) (defining "scholarship," or "voucher," programs).[15] But the First Circuit's abbreviated Establishment Clause analysis made no mention of the fact that the town-tuitioning program similarly allows parents the freedom to direct tuition funds as they see fit. *See* Pet. App. 30 n.2.

If left to stand, the decision below threatens not just the freedom of religious schools and families in Maine but also the flexibility of other States to partner with religious schools. This Court should clarify the standard that applies to programs like Maine's under the Religion Clauses and reverse.

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[15] https://www2.ed.gov/parents/schools/choice/educationoptions/educationoptions.pdf.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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