No. _____

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 Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), this Court held that a state may not exclude families and schools from participating in a student-aid program because of a school's religious *status*. This Court acknowledged, but did not resolve, the question of whether a state may nevertheless exclude families and schools based on the religious *use* to which a student's aid might be put at a school. In the decision below, the First Circuit upheld a religious exclusion in Maine's tuition assistance program on the ground that the exclusion does not bar students from choosing to attend schools with a religious status, but rather bars them from using their aid to attend schools that provide religious, or "sectarian," instruction.

The question presented is:

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?

PARTIES TO THE PROCEEDING

The Petitioners, who were the appellants in the United States Court of Appeals for the First Circuit, are 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. The Respondent, who was the appellee in the First Circuit, is A. Pender Makin, in her official capacity as Commissioner of the Maine Department of Education.

RELATED PROCEEDINGS

Carson v. Makin, No. 1:18-CV-327-DBH (D. Me.) (granting judgment on stipulated record to defendant and denying it to plaintiffs) (opinion issued and judgment entered June 26, 2019) (App. 63-75).

Carson v. Makin, No. 19-1746 (1st Cir.) (affirming judgment of district court) (opinion issued and judgment entered October 29, 2020) (App. 1-62).

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PETITION FOR A WRIT OF CERTIORARI

In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), this Court held that states may not exclude families and schools from participating in a student-aid program solely because of a school's religious status. In so holding, the Court flagged, but did not resolve, a related question: May a state nevertheless exclude families and schools based on the religious *use* to which a student's aid might be put at a school? This petition raises that question.

In the decision below, the First Circuit seized on what it called *Espinoza*'s "use/status distinction" to uphold a religious exclusion in Maine's tuition assistance program for high school students. Under that program, eligible students may attend the public or private school of their parents' choice, whether inside or outside of Maine. But they may not receive tuition assistance if they attend schools that Maine deems "sectarian."

According to the First Circuit, this sectarian exclusion is permissible because it turns not on an excluded school's religious status, but rather "on what the school teaches through its curriculum and related activities, and how the material is presented." App. 35 (emphasis omitted). Tuition assistance may not be "used" to attend a school that, "in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." App. 35, 36. This "use-based restriction," App. 35, according to the

First Circuit, is perfectly permissible, even if status-based exclusions are not.

In so holding, the First Circuit exacerbated a longstanding split of authority on whether government may bar families participating in student-aid programs from choosing to use their benefits to attend schools that provide religious instruction. The Sixth and Tenth Circuits have held such exclusions unconstitutional, while the Vermont Supreme Court has upheld them. This split, which preceded *Espinoza*, also survived it: The exclusion in *Espinoza*, after all, turned on religious status, not whether "the funds would be used" for "religious education," and the Court therefore declared that it "need not examine" the "religious use[]" issue in that case. *Espinoza*, 140 S. Ct. at 2255, 2257 (internal quotation marks omitted).

The Court should grant certiorari to examine the issue—and resolve it—here. Whether there is a constitutionally significant difference between discrimination based on "religious status" and discrimination based on "religious use" is a profoundly important question, especially in the context of student-aid programs—programs that operate on the private choice of individuals. In such programs, any religious *use* of a benefit "is reasonably attributable to the individual recipient, not to the government." *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). States should not be permitted to withhold an otherwise available education benefit simply because a student would make the private and independent choice to use that benefit to

procure an education that includes religious instruction.

By allowing such discrimination, the decision below resuscitates the long discarded "pervasively sectarian" doctrine: the doctrine that although nominally religious schools can participate in public benefit programs, pervasively religious schools—those that actually *do* religious things—cannot. This Court has spent the last several decades distancing itself from this sordid doctrine but has never put it to rest. It is time to do so. "This doctrine, born of bigotry, should be buried now," *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality), and this case is the right vehicle for doing so.

OPINIONS BELOW

The First Circuit's opinion (App. 1-60) is reported at 979 F.3d 21 (2020). The district court's opinion (App. 63-73) is reported at 401 F. Supp. 3d 207 (2019).

JURISDICTION

The First Circuit entered judgment on October 29, 2020. Under this Court's COVID-19-related order dated March 19, 2020, the deadline to file a petition for a writ of certiorari was extended to 150 days from the date of the judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that a State shall not "deny to any person within its jurisdiction the equal protection of the laws."

The sectarian exclusion in Maine's tuition assistance program provides that "[a] private school may be approved for the receipt of public funds for tuition purposes only if it. . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution." Me. Stat. tit. 20-A, § 2951(2). Additional statutes relevant to Maine's tuition assistance program are reproduced at App. 76-82.

STATEMENT

A. Maine's Tuition Assistance Program

Because 143 of its 260 school administrative units (hereinafter "school districts") do not operate a public secondary school, the State of Maine operates a tuition assistance program. App. 5, 64. Under the program, districts that neither operate their own secondary school nor contract with a particular secondary school for the education of their resident secondary students

are statutorily obligated to pay tuition, up to a statutory limit, "at the public school or the approved private school of the parent's choice at which the student is accepted." Me. Stat. tit. 20-A, § 5204(4) (App. 82); *see also* App. 5; Me. Stat. tit. 20-A, §§ 5805–5806.

Participating families may send their children to schools inside or outside Maine. *See* Me. Stat. tit. 20-A, § 2951(3) (App. 80). School districts, for example, have paid for students to attend Avon Old Farms, the Taft School, Miss Porter's, and other elite prep schools around New England and, indeed, the country. *See* Stipulated Record Ex. 2, at 11, *Carson v. Makin*, No. 1:18-CV-00327-DBH (D. Me. Mar. 12, 2019), ECF No. 24-2 (hereinafter "Stipulated Record"). Parents may even send their children to schools in other countries. *See* Me. Stat. tit. 20-A, § 5808.

Parents may not, however, choose schools that Maine deems "sectarian." Before 1980, students *could* use the tuition assistance program to attend sectarian[1] schools. Joint Stipulated Facts ¶ 18, *Carson v. Makin*, No. 1:18-CV-00327-DBH (D. Me. Mar. 15, 2019), ECF No. 25 (hereinafter "Jt. Stipulated Facts"). Indeed, in the 1979-80 school year, hundreds of students received funding for tuition at sectarian secondary schools selected by the students' parents. Jt. Stipulated Facts ¶ 19. But sectarian schools were barred after a 1980 Maine Attorney General opinion

[1] Petitioners use the term "sectarian," rather than religious, because it is the operative language of the challenged statute. The statute does not define the term.

concluded that permitting parents to choose such schools and still receive the tuition assistance benefit violated the Establishment Clause of the First Amendment to the U.S. Constitution. Me. Op. Att'y Gen. No. 80-2 (Jan. 7, 1980). This bar was codified the next year in a statute providing 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) (App. 80)).[2]

When there is a question about whether a school is "nonsectarian" and, thus, a permissible choice for parents and students receiving tuition assistance, the Maine Department of Education (hereinafter "Department") examines the school's curriculum and activities to assess whether the school promotes faith or presents its teaching through a faith-based lens. Association or affiliation with a faith, church, or religious institution does not, in itself, render a school ineligible. App. 35. Rather, eligibility "depends on the sectarian nature of the educational instruction that the school will use the tuition assistance payments to provide." App. 35. The Department inquires as to whether, "in addition to teaching academic subjects," the school "promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." App. 35 (quoting interrogatory response of

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[2] Maine also has a tuition assistance program for elementary school students, *see* Me. Stat. tit. 20-A, § 5203(4), and the "sectarian" exclusion in Section 2951(2) applies to that program, as well.

Maine Commissioner of Education). "The Department's focus is on what the school teaches through its curriculum and related activities, and how the material is presented." App. 35 (emphasis omitted) (quoting interrogatory response of Maine Commissioner of Education).

B. The Effects of Maine's Sectarian Exclusion

Maine's sectarian exclusion directly harms families such as the Petitioners: the Carsons and Nelsons.[3] Both families live in a school district that neither operates a public secondary school nor contracts with a particular secondary school for the education of its resident secondary students. App. 6. Accordingly, the Carsons and Nelsons are entitled to the tuition assistance benefit. Because of the sectarian exclusion, however, neither family can use the benefit at the school they believe is best for their child.

The Carsons send their daughter to Bangor Christian School, a private, nonprofit school in Maine. App. 8. They selected Bangor Christian "because the school's worldview aligns with their sincerely held religious beliefs and because of the school's high academic standards." App. 8 (internal quotation marks omitted). The Department classifies Bangor Christian, which is

[3] A third family—the Gillises—were plaintiffs in the district court and appellants in the First Circuit. Their daughter, however, has since graduated from high school and is no longer eligible for the tuition assistance program. Thus, the Gillises have not petitioned this Court for certiorari.

fully accredited by the New England Association of Schools and Colleges, as a "private school approved for attendance purposes" and, thus, in satisfaction of Maine's compulsory attendance laws. *See* App. 8; Me. Stat. tit. 20-A, § 2901 (App. 77); *id.* § 5001-A(3)(A)(1)(a) (App. 81). But because the school is "sectarian," "instilling a Biblical worldview in its students" and "intertwin[ing]" religious instruction with its curriculum, it cannot be approved for tuition assistance purposes. App. 10 (internal quotation marks omitted); *see also* Jt. Stipulated Facts ¶¶ 67, 68, 129. As a result, the Carsons must pay their daughter's tuition out-of-pocket. Jt. Stipulated Facts ¶ 30.

The Nelsons send their children to Erskine Academy, a secular private high school that is approved for tuition assistance purposes. App. 8. However, they would prefer to send the children to Temple Academy, a school that "aligns with their sincerely held religious beliefs." App. 9 (internal quotation marks omitted). Temple is fully accredited by the New England Association of Schools and Colleges and is "recognized by the [D]epartment as providing equivalent instruction" in satisfaction of Maine's compulsory attendance laws. Me. Stat. tit. 20-A, § 5001-A(3)(A)(1)(b) (App. 81); Jt. Stipulated Facts ¶ 132. Temple, however, is a "sectarian" school; it operates from "a thoroughly Christian and Biblical world view" and provides a "biblically-integrated education." App. 10 (internal quotation marks omitted); *see also* Jt. Stipulated Facts ¶ 130. Because Maine deems it "sectarian," it cannot be approved for tuition assistance purposes.

App. 10; *see also* Jt. Stipulated Facts ¶¶ 67, 185.[4] Because the Nelsons cannot afford tuition at Temple, App. 9, their children remain at Erskine Academy, despite the Nelsons' firm conviction that Temple would better meet their educational needs and align with the family's beliefs.

In short, because of the sectarian exclusion, families must either forgo an education benefit to which they are statutorily entitled, as in the Carsons' case, or resign themselves to using the benefit at a school that will not best meet their child's needs, as in the Nelsons' case. And this dilemma is forced on them simply because their preferred school, "in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." App. 35.

Meanwhile, private schools that are only nominally religious are perfectly free to participate in the tuition assistance program, and parents are perfectly free to choose them. For example, Cardigan Mountain School—a private school in New Hampshire that purports to teach "*universal* . . . spiritual values," both "in and out of the classroom" and at its "required . . . weekly Chapel meetings"—was approved by Maine to participate in the program. Stipulated Record Ex. 2, at

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[4] To be approved for tuition assistance purposes, Temple would also need to be formally "approved" for attendance purposes under Me. Stat. tit. 20-A, § 2901. *See* Me. Stat. tit. 20-A, § 2951(1). Although it has not yet sought this approval, the First Circuit recognized that it "meets the requirements to be 'approved.'" App. 9, 44.

17, 24 (emphasis added).[5] Yet a student cannot attend a Jewish day school, her Catholic parish's school, or an Islamic school with her tuition assistance benefit.

C. The Legal History of the Sectarian Exclusion in the First Circuit

Before this case, Maine's sectarian exclusion had been challenged twice in federal court—in the 1990s and again in the early 2000s. The First Circuit upheld the exclusion in both instances.[6]

The first of these challenges was *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999). *Strout* was filed in 1997, on the heels of a trio of decisions from this Court that had upheld the inclusion of religious options (alongside non-religious ones) in a variety of student-aid programs. *See Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). Despite those decisions, the First Circuit upheld Maine's "sectarian" exclusion, rejecting the plaintiffs' free exercise and equal protection claims and holding that the Establishment Clause *required* the exclusion to "avoid[]

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[5] *See also* Me. Dep't of Educ., *2015-16 Tuition Rates for Private Schools*, *available at* https://www.maine.gov/doe/sites/maine.gov.doe/files/inline-files/FY16_PrivateSchoolsApprovedTuition_14Jan2019.pdf.

[6] The exclusion was also challenged and upheld twice in state court. *See Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999); *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006), *cert. denied*, 549 U.S. 1051 (2006).

an entangled church and state." *Strout*, 178 F.3d at 61; *see also id.* at 65-66.

The second challenge was *Eulitt ex rel. Eulitt v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004). *Eulitt* was filed in the wake of this Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which had held that the inclusion of religious options in a tuition assistance program for elementary school students in the Cleveland City School District was permissible under the Establishment Clause. Although the First Circuit recognized that its earlier decision in *Strout* had been "call[ed] into legitimate question" by *Zelman*, the court held that it was still "fairly debatable whether or not the Maine tuition program could . . . allow[] sectarian schools to receive tuition funds" and that, regardless, a student's "free exercise rights are not implicated" by the State's exclusion of such options. *Eulitt*, 386 F.3d at 349, 350, 356.

D. This Action

The present action was filed in the wake of yet another of this Court's Religion Clause decisions: *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), in which the Court held that the Free Exercise Clause prohibits government from denying an otherwise-available public benefit on the basis of religious status. The Carson and Nelson families alleged that by denying them the ability to use their tuition assistance benefit at religious schools, Maine's sectarian exclusion violated their rights under the

Free Exercise Clause, as well as the Establishment and Equal Protection Clauses.[7] The primary impetus for the challenge was the *Trinity Lutheran* decision, which, they maintained, called the First Circuit's decision in *Eulitt* into question.

The case was submitted on cross motions for judgment on a stipulated record, and the district court rendered its judgment on June 26, 2019. App. 63, 74. After rejecting the Commissioner's argument that the Carsons and Nelsons lacked standing to bring their challenge, App. 70, the court simply "appl[ied] *Eulitt*" to uphold the sectarian exclusion. App. 72. According to the court, *Trinity Lutheran* had not "unmistakably cast *Eulitt* into disrepute." App. 71. Although "[i]t is certainly open to the First Circuit" to revisit *Eulitt*, the court added, "it is not my role to make that decision." App. 72. This refusal to review the sectarian exclusion anew in the light of *Trinity Lutheran* was "no great loss for either the parties or the *amici*," the district court explained, because "this case is destined to go to the First Circuit on appeal, maybe even to the Supreme Court." App. 73.

The Carsons and Nelsons appealed. Two weeks after the First Circuit heard oral argument, this Court heard argument in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), concerning the constitutionality of Montana's bar to religious schools' participation in an elementary and secondary tuition

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[7] The families also alleged Due Process and Free Speech Clause violations.

assistance program. App. 14. On June 30, 2020, this Court decided *Espinoza*, holding that Montana's bar violated the Free Exercise Clause because it "discriminate[d] against schools and parents based on the religious character," or "status," of the schools that parents chose for their children. *Espinoza*, 140 S. Ct. at 2260.

The Carsons and Nelsons submitted a Rule 28(j) letter to the First Circuit, apprising the court of the *Espinoza* decision, its discussion of the proper level of scrutiny in reviewing Free Exercise Clause claims, and its holding that an exclusion of religious schools from a student-aid program is unconstitutional. *See* Letter from Timothy D. Keller to Maria R. Hamilton, Clerk (June 30, 2020). The Commissioner filed a letter in response, insisting that *Espinoza* had no bearing on the outcome of this case. Montana had excluded schools based on their religious "status," she explained, while Maine's exclusion allows religiously affiliated schools to participate, "so long as the schools themselves do not promote or advance any particular religion." Letter from Christopher C. Taub to Maria R. Hamilton, Clerk (July 3, 2020).

On October 29, 2020, the First Circuit upheld Maine's sectarian exclusion for the third time. After agreeing with the district court that the Carsons and Nelsons had standing to challenge the exclusion, App. 21, the court proceeded to the merits.

The court began by considering the effect of *Trinity Lutheran* and *Espinoza* on its prior decision in *Eulitt*. "In *Eulitt*," the court explained, "we did not focus on"

whether the sectarian exclusion turned on a school's "religious 'status' or instead on the religious use" to which tuition assistance is put. App. 24. "In both *Trinity Lutheran* and *Espinoza*," however, that question was "of central importance," according to the First Circuit. App. 24. "*Espinoza* clarified . . . that discrimination based solely on religious 'status' . . . is distinct from discrimination based on religious 'use,'" and this "use/status distinction," the First Circuit determined, was "clearly potentially relevant" to the constitutionality of Maine's exclusion. App. 25, 27.

Espinoza and *Trinity Lutheran* were germane in another respect, the First Circuit noted: They "offer[ed] significant commentary on" the "scope" of *Locke v. Davey*, 540 U.S. 712 (2004), in which this Court upheld the exclusion of "devotional theology" majors from a state post-secondary scholarship program. App. 27. *Eulitt*, the First Circuit noted, had read *Locke* "broadly" for the proposition that "state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with religion." App. 28 (quoting *Eulitt*, 386 F.3d at 355). But "*Espinoza* suggests that *Locke* is a narrower ruling than *Eulitt* understood it to be," the First Circuit observed. App. 48.

In this light, the First Circuit concluded that it had to consider the constitutionality of Maine's sectarian exclusion "afresh in the light of" *Espinoza* and *Trinity Lutheran*. App. 21. Yet the court then upheld the exclusion for the third time.

Unlike the religious exclusions at issue in *Espinoza* and *Trinity Lutheran*, the First Circuit noted, Maine's exclusion does not turn solely on religious "status"—that is, "the aid recipient's affiliation with or control by a religious institution." App. 33; *see also* App. 34-35. Rather, it "focus[es] . . . on what the school teaches through its curriculum and related activities, and how the material is presented." App. 35 (quoting interrogatory response of Maine Commissioner of Education). In other words, "[s]ectarian schools are denied funds not because of who they are but because of what they would do with the money—*use* it to further the religious purposes of inculcation and proselytization." App. 35-36 (emphasis added) (quoting Br. of Appellee at 39); *see also* App. 39 ("[T]his restriction . . . bar[s] [Bangor Christian] and [Temple] from receiving the funding based on the religious use that they would make of it in instructing children in the tuition assistance program.").

After determining that Maine's exclusion falls on the "use" side of the "use/status distinction," the First Circuit considered the appropriate level of scrutiny to apply in reviewing its constitutionality. The court noted that although *Espinoza* had held that strict scrutiny applies to *status*-based exclusions, it "expressly left unaddressed the level of scrutiny applicable to a use-based restriction." App. 27. (The First Circuit acknowledged, however, that some of the Justices in *Espinoza* had questioned whether the "use/status distinction" is meaningful at all—and had suggested that

it should not affect "the level-of-scrutiny determination." App. 40, 41.)

Ultimately, the First Circuit determined that strict scrutiny was not warranted in reviewing Maine's religious use-based exclusion. App. 40. Nor was the exclusion required to be supported by an "historic and substantial state interest" as this Court had required of Washington's "devotional theology" exclusion in *Locke v. Davey*. *Locke*, 540 U.S. at 725; *see also* App. 47-48. Rather, the First Circuit subjected the exclusion "only to rational basis review because it is use based." App. 40 n.7. The court concluded that the exclusion survived such review, because it serves the "legitimate end" of "ensuring the distribution of the benefits of a free public education" while avoiding "'legitimate concerns about excessive entanglement with religion.'" App. 47, 60 (quoting *Eulitt*, 386 F.3d at 355); *see also* App. 48-49 (holding that the exclusion "permissibly restrict[s]" participation "to those schools . . . that provide, in the content of their educational instruction, a rough equivalent of the public school education that Maine may permissibly require to be secular").

The court also upheld the sectarian exclusion against the Carsons and Nelsons' Establishment and Equal Protection Clause claims. App. 52-59. As to the former, the court recognized that the exclusion could entangle the State in assessing the religiosity of the curriculum and activities of schools to determine whether they should be permitted to educate students receiving tuition assistance. But this was not an Establishment Clause problem, according to the court,

because "schools seeking to be 'approved' generally self-identify as 'sectarian' or 'nonsectarian,'" and to the extent there are questions, the State's inquiry turns on "objective factors," such as "mandatory attendance at religious services and course curricula." App. 57-58. Finally, the court rejected the equal protection claim under the same rational basis analysis it applied to dispose of the free exercise claim. App. 53, 55.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Exacerbates a Longstanding, Entrenched Conflict Regarding the Constitutionality of Religious Use-Based Exclusions in Student-Aid Programs—a Conflict this Court Declined to Resolve in *Espinoza*.

There is a longstanding, entrenched split among the Courts of Appeals and state courts of last resort on whether government may bar participants in student-aid programs from choosing to use their benefit to attend schools that provide religious instruction. The Sixth and Tenth Circuits have held such religious "use-based" exclusions unconstitutional, while the Vermont Supreme Court and now the First Circuit have upheld them.

It appeared this Court might resolve the issue in *Espinoza v. Montana Department of Revenue*, but it declined to do so. Although *Espinoza* held a religious exclusion in a Montana student-aid program

unconstitutional under the Free Exercise Clause, this Court specifically determined that the exclusion in that case turned on the religious *status* of the excluded schools and not the religious *use* to which student aid might be put—*i.e.*, procuring religious instruction. The Court specifically declined to address the constitutionality of the latter type of exclusion, leaving the longstanding split in place.

In the decision below, the First Circuit seized on what it called *Espinoza*'s "use/status distinction." App. 27, 37. While the court acknowledged that an exclusion based on the religious status, or identity, of a school is constitutionally impermissible under *Espinoza*, it also recognized that *Espinoza* left the constitutionality of religious use-based exclusions an open question. Emboldened by *Locke v. Davey*—the lone instance in which this Court upheld a religious use-based exclusion—the First Circuit concluded that Maine is perfectly free to bar students from choosing to use their tuition assistance benefit at schools that provide religious instruction. In so doing, the First Circuit joined the Vermont Supreme Court in a position opposite that of the Sixth and Tenth Circuits, thereby exacerbating a preexisting split among the lower courts.

1. The Sixth Circuit was first to wade into this issue in *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), which involved a Free Exercise Clause challenge to federal regulations barring providers that "teach or promote religious doctrine" from a federal child-care program. *Id*. at 977. The regulations did not exclude providers because they *were* religious, but rather

barred them from engaging in religious conduct. Providers, for example, could maintain "religious decorations and symbols," but only "so long as they [we]re not *used* in a 'proselytizing manner.'" *Id.* (emphasis added); *see also id.* (noting that the program "[d]oes not permit religious Bible stories, pictures, [or] prayers"). The Sixth Circuit concluded that the exclusion was not neutral toward religion, as it "ban[ned] all religious practice" by providers, *id.* at 978, and accordingly subjected it to strict scrutiny under this Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The exclusion could not survive such scrutiny, the Sixth Circuit held, and the court accordingly invalidated it under the Free Exercise Clause. *Hartmann*, 68 F.3d at 979-84, 986.

In reaching its decision, the Sixth Circuit stressed that day-care providers participating in the program were privately chosen by parents, *id.* at 981, 983, 985, and that, according to this Court's decision in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a child's education is "an area traditionally reserved for, and uniquely suited to, parental authority." *Id.* at 985. The government's ban on religious instruction thus effected "a significant interference with the chosen family life of both the Provider and the child," the Sixth Circuit explained, and it would be "an extraordinary and unprecedented expansion of governmental . . . authority to allow the direct and unequivocal regulation, and even prohibition, of private acts of religious conscience and practice . . . under the guise of regulating day-care." *Id.* at 985-86.

The Tenth Circuit came to a similar conclusion regarding an exclusion from a postsecondary scholarship program in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). Like the exclusion in *Hartmann*, the exclusion in *Colorado Christian* turned on religious use, not status: Religious schools could participate, *id.* at 1253, 1258, but those deemed "pervasively sectarian," including those that "required courses in religion or theology that tend to indoctrinate or proselytize" or "required attendance at religious convocations or services," were excluded. *Id.* at 1250-51. The exclusion, the Tenth Circuit explained, raised two problems under the Religion and Equal Protection Clauses. First, it discriminated *among* religious schools by "extending scholarships to students at some religious institutions, but not those deemed too thoroughly 'sectarian' by governmental officials." *Id.* at 1258. Second, it required the State to make intrusive judgments regarding religion in order to determine whether a school could participate. *Id.* at 1261. "[I]f the State wishes to choose among otherwise eligible institutions," the court held, "it must employ neutral, objective criteria rather than criteria that involve the evaluation of contested religious questions and practices." *Id.* at 1266.

Because of these problems, the Tenth Circuit determined that some form of "heightened scrutiny" of the exclusion was required. *Id.* at 1266. Ordinarily that would be strict scrutiny, it noted, but it added that this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), had "introduce[d] some uncertainty about the level of

scrutiny applicable to discriminatory funding" by suggesting that an "historic and substantial," rather than "compelling," governmental interest might suffice to uphold an exclusion like Colorado's. *Colo. Christian Univ.*, 534 F.3d at 1267; *see also id.* at 1255-56. The Tenth Circuit, however, concluded that it "need not decide precisely what level of scrutiny applie[d]," because "the State scarcely ha[d] any justification at all." *Id.* at 1267. It accordingly invalidated Colorado's exclusion under the Religion and Equal Protection Clauses. *Id.* at 1269.

2. The Vermont Supreme Court, meanwhile, has come to a conclusion opposite that of the Sixth and Tenth Circuits. In *Chittenden Town School District v. Department of Education*, 738 A.2d 539 (Vt. 1999), *cert. denied*, 528 U.S. 1066 (1999), it held that the Free Exercise Clause *allowed* Vermont to exclude, from a high school tuition-assistance program, schools that provide religious instruction. The program, the court repeatedly noted, could (and did) allow religiously affiliated schools, including "institution[s] operated by a religious enterprise," to participate. *Id.* at 550; *see also id.* at 562, 563. But the Vermont Constitution required a bar on "the *use* of public money to fund religious education"—specifically, "religious instruction" or "religious worship." *Id.* at 562 (emphasis added); *see also id.* at 563 (noting Vermont Constitution required "restrictions on the *purpose or use* of the tuition funds" (emphasis added)). In other words, "the fact that the recipient of government support [wa]s a religious organization [wa]s not itself determinative" in *Chittenden*; "whether the

funds [we]re used to support religious worship"—including "religious instruction"—"[wa]s the critical question." *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 23, 178 A.3d 313, 320 (Vt. 2017).[8]

This state constitutional bar on the use of the tuition-assistance program to procure a religious education, the Vermont Supreme Court held, "plainly does not" violate—indeed, "does not [even] implicate"—"the Free Exercise Clause of the First Amendment." *Chittenden*, 738 A.2d at 563-64. While the court recognized that the "touchstone" of this Court's Free Exercise jurisprudence is "'neutrality toward religion,'" *id.* at 563 (quoting *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994)), it insisted that the bar mandated by the Vermont Constitution "requires no one 'to choose between following the precepts of [his or her] religion and forfeiting benefits' that would otherwise be available from the government." *Id.* at 563 (alteration in original) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). "[C]hildren who attend religious schools" can receive "public educational funding," the court noted; they just cannot use the funding to procure an education that includes religious worship or instruction. *Id.*

3. This is where the conflict stood when this Court decided *Espinoza*, concerning Montana's bar to religious options in an elementary and secondary

[8] The Vermont Constitution's proscription speaks in terms of "religious worship," Vt. Const. ch. I, art. 3, but *Chittenden* held there was "no way to separate religious instruction from religious worship." *Chittenden*, 738 A.2d at 562.

student-aid program. The Petitioners in *Espinoza*, in seeking this Court's review, noted a then-existing split involving *Hartmann*, *Colorado Christian*, *Chittenden*, and seven other decisions on the question of "[w]hether the government may bar *religious options* from otherwise neutral and generally available student-aid programs." Pet. for Cert. at 15, *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020) (No. 18-1195) (emphasis added). The Petitioners in *Espinoza* did not distinguish between bars that turned on the religious *use* of the benefit, as in *Hartmann*, *Colorado Christian*, and *Chittenden*, and those that turned on the religious *status* of the excluded schools, as was the case in the other seven decisions. In their view, religious discrimination was religious discrimination.

In resolving the case and invalidating Montana's exclusion, however, this Court did distinguish between status- and use-based discrimination. The Court held that Montana's bar "hinged solely on [the] religious status" of the excluded schools and specifically rejected the State's argument that it instead applied "because of how the funds would be used—for 'religious education.'" *Espinoza*, 140 S. Ct. at 2255, 2256. While the State had insisted that the bar was meant to ensure that public funds would not be "used for religious ends by . . . schools that believe faith should 'permeate[]' everything they do," this Court concluded that it "turn[ed] expressly on religious status and not religious use." *Id.* at 2256.

In that regard, the Court noted, the exclusion differed from the exclusion it had upheld in *Locke v.*

Davey. There, the Court explained, Washington had barred, from a postsecondary scholarship program, students pursuing a degree in "devotional theology." *Espinoza*, 140 S. Ct. at 2257. Students were permitted, however, to attend religious schools, including those that "incorporated religious instruction." *Id.* The exclusion, *Espinoza* explained, thus turned only on what the student "proposed *to do*—use the funds to prepare for the ministry." *Id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2023-24). Montana's exclusion, by contrast, turned solely on "the religious character of the school" a student wished to attend. *Id.* at 2255. The exclusion was therefore subject to strict scrutiny under *Trinity Lutheran*—scrutiny the exclusion could not survive. *Espinoza*, 140 S. Ct. at 2257, 2262-63.

Although *Espinoza* differentiated between religious "status" and religious "use" in student-aid programs, the Court "acknowledge[d]" that some of its members "have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status." *Id.* at 2257 (citing *Trinity Lutheran*, 137 S. Ct. at 2025 (Gorsuch, J., joined by Thomas, J., concurring in part)). But the Court concluded that it did not need to resolve that question in *Espinoza*, given that the discrimination at issue in the case turned on religious status alone. *See id.* ("We acknowledge the point but need not examine it here.").

Consequently, *Espinoza* only partially resolved the split of authority that had prompted the Court to grant certiorari in the first place. Although the decision resolved the split insofar as it involved the seven lower-

court decisions concerning religious status-based exclusions, it left unresolved the conflict between *Hartmann* and *Colorado Christian*, on one hand, and *Chittenden*, on the other, concerning religious use-based exclusions in student-aid programs.

4. In the decision below, the First Circuit expressly recognized that *Espinoza* did not resolve the latter issue. It seized on that fact to uphold Maine's "sectarian" exclusion, thereby compounding the conflict among the Sixth and Tenth Circuits and the Vermont Supreme Court.

The First Circuit repeatedly invoked what it called the "use/status distinction," App. 27, 37, 41, to justify its decision upholding Maine's sectarian exclusion. According to the First Circuit, "*Espinoza* clarified" that "discrimination based solely on religious 'status' . . . is distinct from discrimination based on religious 'use.'" App. 25. More specifically, the decision "made clear," in the First Circuit's view, "that discrimination in handing out school aid based on the recipient's affiliation with or control by a religious institution differ[s] from discrimination in handing out that aid based on the religious use to which the recipient would put it." App. 33-34.

The First Circuit concluded that Maine's exclusion falls on the "use" side of the supposed "use/status distinction." The exclusion does not turn on "the aid recipient's affiliation with or control by a religious institution," the First Circuit asserted, but rather "focus[es] . . . on what the school teaches through its

curriculum and related activities, and how the material is presented." App. 33, 35 (quoting interrogatory response of Maine Commissioner of Education).[9] In other words, "[s]ectarian schools are denied funds not because of who they are but because of what they would do with the money—use it to further the religious purposes of inculcation and proselytization." App. 35-36 (quoting Br. of Appellee at 39).

The determination that Maine's exclusion falls on the use side of the "use/status distinction," the First Circuit explained, was "relevant to the determination of the level of scrutiny that must be applied" in reviewing the exclusion. App. 27. For while *Espinoza* held that "solely status-based religious discrimination . . . trigger[s] strict scrutiny," it "expressly left unaddressed the level of scrutiny applicable to a use-based restriction." App. 27.

Faced with this open question, and contrary to the Sixth and Tenth Circuit decisions in *Hartmann* and *Colorado Christian*, the First Circuit held that Maine's use-based exclusion was not subject to strict scrutiny or even the seemingly less demanding "historic and substantial state interest" test that this Court

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[9] *See also* App. 36-37 ("[T]he inquiry into whether a school is 'nonsectarian' does not turn solely on whether it is religiously affiliated or controlled but depends instead on the sectarian nature of the instruction that it will provide to tuition assistance beneficiaries."); App. 35 ("[T]he determination whether a school is 'nonsectarian' depends on the sectarian nature of the educational instruction that the school will use the tuition assistance payments to provide.").

appeared to apply to the religious use-based exclusion in *Locke v. Davey*. *See Locke*, 540 U.S. at 725. Rather, the First Circuit subjected the exclusion "only to rational basis review because it is use based." App. 40 n.7. The First Circuit concluded that the exclusion easily satisfied this deferential level of scrutiny (which it applied in resolving Petitioners' Free Exercise and Equal Protection claims, App. 40 n.7, 53 & n.13), because the exclusion served the "legitimate end" of "ensuring the distribution of the benefits of a free public education" while avoiding "concerns about excessive entanglement with religion." App. 47 (emphasis omitted) (quoting *Eulitt*, 386 F.3d at 355), 60.[10]

As for Petitioners' Establishment Clause claim, the First Circuit rejected their argument—and thus the holding of *Colorado Christian*—that an exclusion that turns on whether the benefit is used for religious instruction requires government officials to engage in intrusive inquiries to assess the religiosity of private schools. App. 56-57. According to the First Circuit, "schools seeking to be 'approved' generally self-identify as 'sectarian' or 'nonsectarian.'" App. 57. When there have been questions, the court added, "the determination of whether a school is secular could readily be made by looking at objective factors such as mandatory attendance at religious services and course curricula." App. 58 (internal quotation marks omitted). Contrary to the Tenth Circuit's decision in *Colorado Christian*,

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[10] The First Circuit fully acknowledged, however, that "the Establishment Clause may not require" the exclusion. App. 47 (quoting *Eulitt*, 386 F.3d at 355).

which recognized the intrusive and entangling nature of such judgments by government officials, 534 F.3d at 1261-66, the First Circuit held that this type of governmental "inquiry" is a constitutionally permissible means of "ensuring the educational instruction provided by an applicant will mirror the secular educational instruction provided at Maine's public schools." App. 58.

5. In so holding, the First Circuit compounded the longstanding split regarding the constitutionality of exclusions that bar participants in student-aid programs from choosing to use their benefit to attend schools that provide religious instruction. According to the Sixth and Tenth Circuits, government may not, consistent with the Religion or Equal Protection Clauses, bar such options unless doing so is the least restrictive means of achieving a compelling governmental interest (or, at the very least, an "historic and substantial state interest" under *Locke*). According to the Vermont Supreme Court and now the First Circuit, however, such bars are permissible, subject, at most, to the extraordinarily deferential rational basis test.

II. The First Circuit's Decision Involves Profoundly Important Constitutional Issues and Resolves Them in a Profoundly Unconstitutional Way.

The decision below involves profoundly important federal constitutional issues and resolves those issues wrongly. The decision turns on a supposed distinction

in this Court's jurisprudence between religious status discrimination and religious use discrimination. This Court, however, has not held that there *is* a constitutionally determinative difference between the two. *Espinoza* acknowledged that the issue is an open one, but it declined to resolve the issue. The Court should resolve it here.

Whether there is a constitutionally significant difference between status and use discrimination is a fundamentally important question—particularly in the context of student-aid programs that operate on the *private choice of individuals*. This Court, after all, has long held that "the link between government funds and religious training is broken by the independent and private choice of recipients," *Locke*, 540 U.S. at 719, and that, therefore, any "advancement of a religious mission . . . is reasonably attributable to the individual recipient, not to the government." *Zelman*, 536 U.S. at 652. Yet until the "use/status" issue is resolved, states will continue to deny educational opportunity to students simply because they would "use" an otherwise available benefit to procure an education that includes religious instruction. No student—preschool, elementary, secondary, or post-secondary—should be denied opportunity on that basis.

Such a state of affairs—in which a state cannot deny a benefit to a student because she wishes to attend a school that *is* religious, but can deny it because the school *does* religious things—is unstable and untenable, as Justice Gorsuch explained in his *Espinoza* and *Trinity Lutheran* concurrences. "Often enough the

same facts can be described both ways," Justice Gorsuch observed, and that is precisely what happened here. *Trinity Lutheran*, 137 S. Ct. at 2025-26 (Gorsuch, J., concurring in part); *see also Espinoza*, 140 S. Ct. at 2275-76 (Gorsuch, J., concurring). The malleability that Justice Gorsuch described allowed the First Circuit to label an exclusion as use-based and deem it constitutional under cursory review, when it could have been just as readily viewed as status-based and necessarily *un*constitutional under *Espinoza*. After all, schools that provide religious instruction (the religious "use" targeted by Maine's exclusion) are, hardly surprisingly, religious schools (schools with a religious "status"). States and courts will continue to take advantage of this malleability until this Court squarely resolves the constitutionality of use-based exclusions in student-aid programs.[11]

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[11] The First Circuit described not only the exclusion, but also the *benefit*, in calculated terms. It described the benefit as "a substitute" for a "secular public education," then tautologically declared that a "pervasively sectarian education" is an "inadequate substitute" for a "secular" education. App. 47 n.11, 49, 50. This move is troublesome for two reasons. First, it purposely defines the benefit in a way aimed at justifying the discrimination Maine is engaged in. *See Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (holding a state may not define a right deliberately narrowly to justify its unconstitutional denial of that right to the excluded class). Second, the schools Maine excludes, including Bangor Christian and Temple Academy, satisfy the State's compulsory-attendance laws and thus provide all the secular instruction the State demands as an adequate "substitute" for a public school education. *See supra* pp. 7-8; App. 7-9, 44; *see also Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 245-46 (1968) ("[T]he State's interest in education [can] be served sufficiently by

And it is not just a problem of malleability; oftentimes, religious status and religious use are *inseparable*. Petitioners' "desire for religious educational options flows from, and is inextricably intertwined with, their religious status." App. 31. Selecting a religious school for their children is, in this Court's words, "not merely a matter of personal preference, but one of deep religious conviction." *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

And that is true for *many* families shut out of Maine's tuition assistance program. Catholic families, for example, have a "duty"—set forth in canon law, the Catechism of the Catholic Church, and the documents of the Second Vatican Council—"of entrusting their children to Catholic schools wherever and whenever it is possible." Vatican Council II, *Gravissimum educationis* (1965); *see also Codex Iuris Canonici 1983* c.798 (stating that "[p]arents are to entrust their children to those schools which provide a Catholic education" so long as they are able); *Catechism of the Catholic Church* ¶ 2229 (1994) ("As far as possible parents have the duty of choosing schools that will best help them in their task as Christian educators."). The largest Protestant denomination in the United States affirms, as part of its statement of faith, that "[a]n adequate system of Christian education is necessary to a complete spiritual program for Christ's people." Southern Baptist Convention, *The Baptist Faith and Message* art. XII (June 14, 2000). And "Orthodox Jews believe

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reliance on the secular teaching that accompanie[s] religious training. . . .").

that there is a strong religious obligation to ensure that their children receive a Jewish education, which can only be fully accomplished by sending their children to full-time Orthodox Jewish schools." Brief of Amicus Curiae Agudath Israel of America at 8, *Espinoza v. Dep't of Revenue*, No. 17-0492 (Mont. Sup. Ct. Jan. 19, 2018).

For members of these faiths, providing a religious education for their children is not a matter of desire—it is an obligation or commitment that flows directly from their status as adherents of their respective religions. Thus, barring such families from Maine's tuition assistance program based on the religious use to which they would put their aid necessarily discriminates based on their religious status, as well. *Cf. Espinoza*, 140 S. Ct. at 2256 ("Status-based discrimination remains status based *even if* one of its goals or effects is preventing religious organizations from putting aid to religious uses.").

Status and use, in short, are not binary concepts—they are often inseparable. Yet so long as states may continue to define religious exclusions as "use-based" and thereby escape meaningful constitutional scrutiny, families who believe that a religious education is the best option for their child will continue to be shut out of student-aid programs.[12]

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[12] Moreover, "it is not as if the First Amendment cares" whether discrimination is based on religious status or, instead, use. *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring). After all, "[t]he Constitution forbids laws that prohibit the free exercise

Finally, by placing constitutionally determinative significance on the *use* to which tuition assistance would be put, the First Circuit's decision breathes new life into the noxious "pervasively sectarian" doctrine: the principle that *pervasively* religious (rather than nominally religious) schools must be barred from otherwise-available benefit programs. Thankfully, this Court has discarded the "pervasively sectarian" doctrine, but it has never declared the doctrine dead. *See Colo. Christian Univ.*, 534 F.3d at 1258 (calling the doctrine "now-discarded"); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 (4th Cir. 2001) (acknowledging this Court's abandonment of the doctrine). The doctrine still lingers in the jurisprudential shadows, like a zombie that refuses to die, and it reared its ugly head in the decision below. "[W]e do not see," the First Circuit declared, "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." App. 49.

A rule of law like the First Circuit's—under which nominally religious schools may participate in student-aid programs, but schools that actually practice their religion may not—is nothing more than the pervasively sectarian doctrine in new clothes. The Tenth Circuit recognized as much in *Colorado Christian* and for that reason invalidated the exclusion of schools that "required courses in religion or theology." *Id.* at

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of religion," and "[t]hat guarantee protects not just the right to *be* a religious person," but also "the right to *act* on those beliefs." *Id.*

1251, 1258-59, 1261. Like the Tenth Circuit, this Court should not allow the pervasively sectarian doctrine to regain its hold under the guise of "use-based restriction."[13] Rather, it should grant review to do what a four-Justice plurality urged it to do two decades ago: "bur[y]" the pervasively sectarian doctrine "now." *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality) ("This doctrine, born of bigotry, should be buried now.").

III. This Case Is the Right Vehicle at the Right Time for Resolving the Constitutionality of Religious Use-Based Exclusions in Student-Aid Programs.

Finally, this case is an ideal vehicle for resolving whether states may bar participants in a student-aid program from using their benefit to attend schools that provide religious instruction. The First Circuit's decision presents the "use-based" discrimination issue squarely, which is hardly surprising, given that the decision was in reaction to, and an attempt to navigate around, *Espinoza*, which had placed "status-based" discrimination off-limits.

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[13] Indeed, this Court has recognized that governmental line-drawing between permissible and impermissible degrees of religious content is at loggerheads with the Establishment Clause. *See Town of Greece v. Galloway*, 572 U.S. 565, 581 (2014) ("To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters. . . .").

Because the decision below comes on the heels of *Espinoza*, this Court's instinct might be to let the issue percolate a bit more in the wake of that decision. That would be a mistake. For one thing, *Espinoza* expressly *declined* to address the constitutionality of use-based exclusions and therefore has little, if anything, to say on the matter.

Moreover, the lower courts have already been wrestling with this issue for a quarter century, ever since the Sixth Circuit's 1995 decision in *Hartmann*. If anything, the proper resolution of the issue has become *more* clouded, as the lower courts have struggled to make sense of *Locke v. Davey*—a seeming outlier in this Court's jurisprudence that even the Court itself has taken pains to cabin in recent years. *See*, *e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2022-24; *Espinoza*, 140 S. Ct. at 2257-59.

And it is not just the ultimate constitutionality of exclusions like Maine's that is unclear—even the level of scrutiny courts should apply in reviewing such exclusions is anyone's guess. While *Locke* reviewed Washington's use-based exclusion with an eye for an "historic and substantial state interest," *Locke*, 540 U.S. at 725, this Court in *Espinoza* stressed that nothing in its opinion was "meant to suggest that . . . some lesser degree of scrutiny" than " 'the strictest scrutiny' " applies to "discrimination against religious uses of government aid." *Espinoza*, 140 S. Ct. at 2257 (quoting *Trinity Lutheran*, 137 S. Ct. at 2022). Lower courts will undoubtedly continue to struggle with the

constitutionality of use-based exclusions when even the applicable level of scrutiny is such a mystery.

Lastly, as discussed above, the decision below resuscitates the "pervasively sectarian" doctrine that this Court has spent decades distancing itself from, and that is part of a consistent pattern in the First Circuit's jurisprudence. For four decades, the arc of this Court's Religion Clause jurisprudence has bent toward neutrality. From *Mueller v. Allen*,[14] *Witters v. Washington Department of Services for the Blind*,[15] and *Zobrest v. Catalina Foothills School District*,[16] through *Zelman*, *Locke*, and *Espinoza*, the Court has made clear that religiously neutral student-aid programs are perfectly permissible under the Establishment Clause, and that deviating from religious neutrality in such programs violates the Free Exercise Clause. Over the same time, however, there has been a countervailing arc in the First Circuit's jurisprudence, and it has bent consistently toward discrimination:

- Despite *Mueller*, *Witters*, and *Zobrest*, which had held that including religious options in student-aid programs is permissible under the Establishment Clause, the First Circuit upheld Maine's exclusion in *Strout v. Albanese*, claiming the Establishment Clause justified *barring* religious options. *Strout*, 178 F.3d at 61.

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[14] 463 U.S. 388 (1983).

[15] 474 U.S. 481 (1986).

[16] 509 U.S. 1 (1993).

- Despite *Zelman* and *Locke*, which had held that the private and independent choice of students breaks the link between government and religious instruction, *Zelman*, 536 U.S. at 652; *Locke*, 540 U.S. at 719, the First Circuit *again* upheld Maine's exclusion in *Eulitt v. Maine Department of Education*, insisting the exclusion did not even implicate a student's free exercise rights. *Eulitt*, 386 F.3d at 356.

- And despite *Espinoza*'s holding that religion-based exclusions in student-aid programs violate the Free Exercise Clause, the First Circuit has now upheld Maine's exclusion a *third* time—on the dubious proposition that although discrimination based on a school's religious identity is constitutionally proscribed, discrimination based on the religious things it does is just fine.

At every turn, Maine and the First Circuit have resisted this Court's jurisprudence, veering from the neutrality that its opinions have increasingly commanded. Four decades is too long. This Court should act now so yet another generation of schoolchildren is not deprived of desperately needed educational opportunity or the right to freely exercise their religion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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