No. 20-1088

In The
Supreme Court of the United States

DAVID CARSON,
as Parent and Next Friend of O. C., et al.,

Petitioners,

v.

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

Respondent.

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

BRIEF OF PROFESSOR MICHAEL W. MCCONNELL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

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SUMMARY OF ARGUMENT

For more than eighty years, the Court has recognized that the Free Exercise Clause "embraces two concepts—freedom to believe and freedom to act." *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940) (applying the Free Exercise Clause to protect door-to-door evangelization). Even *Smith*—a decision criticized by *amicus*—acknowledged that laws or policies targeting religious conduct as such would violate the First Amendment. *See Emp. Div., Dep't of Hum.*

[1] Consistent with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties consented to this filing. Their letters of consent are on file with the Clerk as required by Rule 37.3(a).

Res. of Oregon v. Smith, 494 U.S. 872, 877 (1990) ("[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts.").

This is the only understanding of the Clause permitted by its original public meaning. The Framers of the First Amendment adopted the view of James Madison and his evangelical supporters, who favored broad protection for conduct required by religious belief, and rejected the view of Thomas Jefferson, who advocated a narrower belief-action distinction. *Exercise*, the word chosen to enshrine a broad view of the right to religious liberty, meant at the Founding much as it does today, *activity*.

Yet the First Circuit in the decision below took the side of Jefferson, adopting a narrow status-use distinction that mirrors the belief-conduct line debated, and rejected, at the Founding. The court below ruled that Maine's denial of public funds for use at private "sectarian" schools does not violate the First Amendment because Maine's scheme discriminates against religious use, not religious status. *Carson v. Makin*, 979 F.3d 21, 46 (1st Cir. 2020). According to the First Circuit, the First Amendment prohibits Maine from discriminating against a school because of their association with or adherence to a particular faith (belief), but permits discrimination against a school that uses public funds in accordance with its faith (conduct).

Not only does this distinction lack support from the original meaning and history of the Free Exercise Clause, it is incoherent. Religious status is defined by religious conduct. The Test Act of 1672, for example, restricted public and military office in England to Anglicans, a religious status which the Act defined by, among other things, religious conduct: taking communion within the preceding year according to the rites of the Church of England. *Historical Understanding of Free Exercise*, 103 Harv. L. Rev. at 1421–22 (citations omitted). The Founders surely would be puzzled by the First Circuit's assumption that a school's religious activities are analytically distinct from its religious status. Similarly, an organization applying for tax exempt "status" provides proof of its religious conduct. See Charles Whalen, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 Fordham L. Rev. 885, 887, 892 (1977).

The First Circuit's decision also condoned the aspects of Maine's tuition-assistance program similar to Colorado's college scholarship program found to violate the Establishment Clause in *Colorado Christian University*. To administer its program, Maine employs an intrusive religious inquiry, examining coursework and extracurricular activities, to answer a question the State in our liberal tradition is neither competent nor permitted to answer: does the school applying for funds "promote[] the faith or belief system with which it is associated and/or present[] the material taught through the lens of this faith?" *Carson v. Makin*, 979 F.3d 21, 38 (1st Cir. 2020).

This inquiry forces the State to engage in illegal inter-religious discrimination. On one hand, Petitioners were precluded from enrolling their children in religious schools whose curricula inculcated a biblical worldview, because those schools were too "sectarian." On the other hand, Maine approved public funds for a school where students attend mandatory chapel services to learn "moral and spiritual values" such as compassion, honesty, integrity, and fairness for the purpose of developing "meaningful lives in a global society," apparently because those values are presented in a "non-sectarian" manner. Stipulated Record Ex. 2, at DC000012, DC000015, *Carson v. Makin*, No. 1:18-CV-00327-DBH (D. Me. Mar. 12, 2019), ECF No. 24-2. This favoritism for sects that claim to preach a (perhaps) more universal and rationalist approach over those that draw brighter dogmatic lines is precisely what the First Amendment rejected.

Drafted to protect low-church innovators whose fervent religious beliefs commanded social action beyond the walls of staid mainline churches, the First Amendment abhors precisely what the First Circuit approved: asking what kind of religious use is *too* religious and favoring those religions that cloak their proselytization in secular-rationalist values. The Court should vindicate the twin pillars of the Religion Clauses—the shield against laws burdening free exercise and the sword requiring government neutrality in matters of religion—and reverse the decision below.

ARGUMENT

I. The Free Exercise Clause, as originally understood, protects religious conduct as well as religious status.

The First Amendment provides in part, "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. I. In the decision below, the First Circuit held that the Free Exercise Clause, which has been incorporated against the States, *Cantwell*, 310 U.S. at 303, merely prohibits a state from discriminating against religious status, but not religious use. *Carson*, 979 F.3d at 36–46. The First Circuit concluded that Maine's exclusion of "sectarian" schools that teach their students "through the lens of faith" from its tuition-assistance program for private schools does not violate the First Amendment because the exclusion is based on religious conduct, not religious status. *Id.*

Setting aside whether Maine's scheme is not actually status-based (a premise more than adequately refuted by Petitioners), the First Circuit's holding rests on an imaginary status-versus-use line that contradicts the original public meaning of the Free Exercise Clause, the debates surrounding its adoption, and the very nature of religious faith. As originally understood, the free exercise of religion included conduct required by a person's religious identity, such as religious education. The Free Exercise Clause was adopted to ensure that the theological currents of the era—which refused to confine religious practice to association with a denomination or within the four walls of a mainline

church—were protected. To the extent the Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004) encouraged the First Circuit's mistaken understanding of the Clause, the Court should correct the record and vindicate the original meaning of free exercise in this case.

A. The original public meaning of free exercise is action, performance, and conduct.

Start with the late-Eighteenth Century meaning of the key word in the Clause: exercise. Founding-era dictionaries connoted exercise with conduct and action. The 1805 American edition of Samuel Johnson's *Dictionary of the English Language* defined "exercise" as "Labour of the body"; "Use; actual application of any thing"; "Practice; outward performance"; "Task; that which one is appointed to perform"; and "Act of divine worship, whether publick or private." Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785). Noah Webster's 1806 dictionary likewise explained that "exercise" meant "to employ, practice, use, labor, train." Noah Webster, *A Compendious Dictionary of the English Language* (1806). Thomas Sheridan's 1790 dictionary defined "exercise" as "practice; outward performance." Thomas Sheridan, *A Complete Dictionary of the English Language* (3d ed. 1790). And Nathan Bailey's *Universal Etymological Dictionary* defined "exercise" to mean, "Labour, Pains, Practice, the Function or Performance of an Office." Nathan Bailey, *An Universal Etymological English Dictionary* (1763). Indeed, the meaning of exercise has not changed since the First

Congress. Today, exercise means "to put into action; use; employ"; "to carry out (duties, etc.)." *Webster's New Twentieth Century Dictionary* 640 (2d ed. 1975). A common speaker of late-Eighteenth Century English would thus have understood "exercise" in reference to religion to mean conduct motivated or required by religion, not merely religious belief or identity—*i.e.* status.

The next best evidence of the original meaning of the Free Exercise Clause comes from similar clauses in state constitutions adopted during and after the Revolutionary War. Twelve of the thirteen state constitutions (Connecticut being the lone holdout) in effect during the debates over the Bill of Rights contained provisions protecting religious freedom. *Historical Understanding of Free Exercise*, 103 Harv. L. Rev. at 1455. These state provisions provide helpful insight into what the drafters of the First Amendment thought free exercise meant. *Id.* at 1456.

Like the Free Exercise Clause, none of the state constitutional provisions limited their protections to religious status alone. *Id.* at 1458–59. New York's Constitution of 1777 declared, for example:

> [T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify

> practices inconsistent with the peace or safety of this State.

Benjamin Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 1328, 1338 (2d ed. 1878) ("*Federal and State Constitutions*") (quoting N.Y. Const. of 1777, art. XXXVIII). Maryland's constitution likewise "prohibited punishment of any person 'on account of his religious persuasion or profession, or for his religious practice.'" *Id.* at 817, 819 (quoting Md. Declaration of Rights of 1776, art. XXXIII). And Georgia's provision—the closest to the Free Exercise Clause adopted by the First Amendment—read, "[a]ll persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State." *Id.* at 377, 383 (quoting Ga. Const. of 1777, art. LVI).

These provisions protected rights of conscience or status to be sure. New Hampshire's religious liberty clause began, for example, "Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason." *Id.* at 1280–81 (quoting N.H. Const. of 1784, pt. I, art. V). But they also protected religious conduct and "actions that flow from th[e] conscience." *Historical Understanding of Free Exercise*, 103 Harv. L. Rev. at 1459. New Hampshire's free exercise clause continued, "no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, . . . provided he doth not disturb the public peace, or disturb others, in their religious

worship." *Federal and State Constitutions* at 1280–81 (quoting N.H. Const. of 1784, pt. I, art. V). And Virginia's Declaration of Rights of 1776 defined religion as "the duty which we owe to the Creator and the manner of *discharging* it." *Id.* at 1908–09 (quoting Va. Bill of Rights of 1776, § 16 (emphasis added)).

The state free exercise provisions in effect at the time thus refused to define the scope of the right to religious liberty protected in the negative, "as a sphere of otherworldly concern that does not affect the public interest." *Historical Understanding of Free Exercise*, 103 Harv. L. Rev. at 1459. They instead defined it affirmatively, as extending to the duties demanded by God of the individual, or as Rhode Island's charter put it, to all matters of "religious concernment." *Id.* (citation omitted).

Examination of these state-law provisions reveals, however, a split in the scope of the conduct protected. On the one hand, eight states (New York, New Hampshire, Delaware, Massachusetts, New Jersey, North Carolina, Pennsylvania, and South Carolina) and the Northwest Ordinance limited the conduct protected to "worship." *Id.* at 1460. On the other hand, four states (Virginia, Georgia, Maryland, and Rhode Island) protected all religiously required conduct, subject to specific limitations. *Id.* at 1459. Virginia's Bill of Rights, for example, stated "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." *Federal and State Constitutions* at 1908–09 (quoting Va. Bill of Rights of 1776, § 16). "Religion," according to the Virginia provision, is "the duty which

we owe to our Creator, and the manner of discharging it." *Id.*

Notably, the First Amendment did not limit its protection of religious exercise to acts of "worship." It instead adopted the approach of states like Virginia, protecting the "free exercise" of religion full stop. *Historical Understanding of Free Exercise*, 103 Harv. L. Rev. at 1460. This drafting choice was consonant with the evangelical spirit of the time. "One of the main elements of the Great Awakening was the insistence that duties to God extend beyond the four walls of the church and the partaking of the sacraments." *Id.*

The proviso clauses of the state free exercise provisions further suggest that the Framers of the First Amendment believed the right encompassed religious activity in addition to religious belief. Nine of the state constitutions in effect at the time limited the right to religious conduct that was "peaceable." *Historical Understanding of Free Exercise*, 103 Harv. L. Rev. at 1461. Four of the provisions also prohibited acts of immorality or licentiousness. *Id.* at 1462. Two others excluded conduct that interfered with others' religious practices. *Id.* And one each forbade: "civil injury or outward disturbance of others," acts contrary to "good order," and conduct contrary to "happiness." *Id.* (citations omitted). Were these provisions limited to belief or religious status, there would be no need to carve out specific categories of conduct from their reach. They instead underline the fact that protection of activity motivated by religion was the goal of these provisions and the First Amendment.

B. The framers of the Free Exercise Clause rejected status-alone protection.

The term "free exercise" made its first appearance on American shores in 1648. Lord Baltimore directed the Protestant governor of Maryland not to trouble Christians, including Catholics, in the "free exercise" of their religion. *Historical Understanding of Free Exercise*, 103 Harv. L. Rev. at 1425 (citations omitted). The term "free exercise" contrasts with a narrower construction also abroad in the American colonies at the time: "liberty of conscience." Rhode Island's Charter of 1663 was the first charter to use that formulation of the right to religious liberty, defining its necessity and scope as follows:

> because some of the people [in Rhode Island] cannot, in theire private opinions, conforme to the publique exercise of religion, according to the liturgy, forms and ceremonyes of the Church of England, . . . our royall will and pleasure is, that noe person within the sayd colonye, at any time hereafter shall be any wise molested, punished disquieted or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may . . . enjoye his and theire owne judgments and consciences, in matters of religious concernments.

Federal and State Constitutions at 1596–97 (quoting R.I. Charter of 1663). To understand the distinction between these terms, and why free exercise was

ultimately adopted by the Constitution, it is helpful to first consider the debate about the proper scope of an individual's natural right to religious liberty. That debate pit John Locke and Thomas Jefferson, whose desire to quell the fervor of non-rationalist religion led them to advocate a narrow right prohibiting belief-only discrimination, against James Madison and his evangelical constituents who favored a broader right which encompassed religious belief, worship, *and* conduct. This history clarifies the Framers' decision to identify the right with exercise, not simply conscience.

1. Locke and Jefferson advocated toleration of religious belief but not conduct.

John Locke's work provided the theoretical basis for defining the individual right to religious liberty narrowly as protection of belief and perhaps extending to worship for some non-Anglican protestants (but not Catholics or non-Christians). *Historical Understanding of Free Exercise*, 103 Harv. L. Rev. at 1430–35; *see also* Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 819 (1998) (examining Locke's views on religious freedom). At the outset of his career, Locke was an advocate for state-enforced religious unity but later came to the opposite conclusion. *Id.* at 1432. In his *Letter Concerning Toleration*, Locke argued that "refusal of toleration" of varied religious opinions was a key source of religious strife: "It is not

the diversity of opinions, which cannot be avoided; but the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the Christian world, upon account of religion." *Id.* (quoting J. Locke, *A Letter Concerning Toleration*, in 6 J. Locke, *The Works of John Locke* at 53 (1962) ("A Letter Concerning Toleration")). Locke viewed formal religious toleration as the antidote to the problem of religious *and* governmental leaders intermeddling in the affairs of the other: "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other." *Id.* (quoting *A Letter Concerning Toleration* at 9). And so the solution was to keep religion in its lane (which Locke defined as "the public worship of God") and civil government in its lane (defined as the "care of the things of this world," not "the world to come"). *Id.* (quoting *A Letter Concerning Toleration* at 12–13, 15–16). A definition of religious liberty as a right of belief and perhaps worship, but not conduct that would interfere with traditional concerns of a civil government, flowed naturally from Locke's view that religious conduct need not be protected to the extent it exceeded its domain and interfered with civil government. Locke's view likely included religious *worship* within its bounds, as did the phrase "liberty of conscience." *Id.* at 1452.

Thomas Jefferson, who was deeply influenced by Locke, appeared to advocate for protection of belief but not conduct. *Id.* at 1430–31. Like Locke, Jefferson

viewed non-rationalist religions that advocated a robust view of the reach and demands of faith as a principal reason for religious discord. *Id.* at 1449–50 (citations omitted). Indeed, Jefferson famously denied much of Christian orthodoxy, including the divinity of Christ and the biblical miracles as the result of fanaticism, not a rational deism. *Id.* And so while with respect to an established church Jefferson had advanced well beyond Locke's views, he had a more limited perspective than Locke on the right to free exercise. *Id.* at 1450–51. In some of his writings, Jefferson explicitly distinguished between belief and conduct: "the legislative powers of government reach actions only, and not opinions. . . . Man . . . has no natural right in opposition to his social duties." *Id.* at 1451 (quoting Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1820)). Jefferson apparently held that the right to religious liberty extended only to religious belief or status, not the conduct demanded of a believer. *Id.*

2. Madison advocated protection of religious belief and conduct.

Unlike Jefferson and Locke, James Madison never publicly disdained individuals who wished to live an active faith. It was the plight of six Baptist ministers, imprisoned in a Culpepper County jail in Virginia, for carrying out their religious faith in the public square by publishing their religious sentiments that was a formative experience for Madison and "sparked his concern for religious freedom." *Id.* at 1452–53. "The

usually soft-spoken Madison described such persecution as a 'diabolical Hell conceived principle,'" and state[d] that it "vexes me the most of any thing whatsoever." *Id.* (quoting Letter from James Madison to William Bradford (Jan. 24, 1774), in 1 *The Papers of James Madison* 104, 106 (R. Rutland & C. Hobson eds. 1977)).

In his famous *Memorial and Remonstrance against Religious Assessments*, Madison argued that the "the Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 *The Writings of James Madison* at 183, 188 (G. Hunt ed. 1901). For Madison, the scope of the right to religious liberty was circumscribed not by the domain granted civil authorities, but by the duties each person owes God. When George Mason proposed "toleration" or religion in the seminal moment for Virginia's constitutional protection of religious liberty, Madison objected and proposed a broader phrase that was ultimately adopted by the Virginia legislature: "the full and free exercise of religion." *Historical Understanding of Free Exercise*, 103 Harv. L. Rev. at 1463. Madison's view of religious liberty dictated protection of religious conduct or uses, not mere toleration of religious beliefs or status.

An expansive view of religious liberty that encompassed religious conduct broadly understood also followed from the evangelical movements contemporary with adoption of the First Amendment. A central innovation of the mid-Eighteenth Century's Great

Awakening was its insistence that a believer's duties to God went beyond religious worship. *Historical Understanding of Free Exercise*, 103 Harv. L. Rev. at 1460. Baptist modes of worship were typically "enthusiastic," sometimes marked by emotional outbursts, crying, barking like dogs, trembling, and jerking. *Id.* at 1438 (citation omitted). Evangelical denominations were also notable for proselytizing, especially those on the lowest rungs of society. *Id.* Baptists, for example, converted large numbers of slaves in contravention of the largely Anglican (and often rationalist, a la Jefferson) slaveholding class. *Id.* Religious services during the Great Awakening often took place out-of-doors and outside the purview of any organized "church," but they were religious "exercise" nonetheless. *Id.*

Many religious minorities opposed the Constitution because "religious freedom was 'not sufficiently secured.'" *Id.* at 1476 (quoting 4 Documentary History of the Constitution of the United States of America at 528 (U.S. Dep't of State ed. 1905)). It was these low-church evangelical voters who delivered Madison victory over James Monroe for a seat in the first Congress. *Id.* at 1477–78. His Baptist constituents initially were inclined to support Monroe because of Madison's hesitancy to support a Bill of Rights. *Id.* In response, Madison agreed to support amendments to the Constitution, including a strong provision protecting the right to religious liberty. *Id.* He came to understand that the lack of a provision protecting the rights of conscience had "alarmed many respectable Citizens," and thus agreed to work for "the most satisfactory

provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c.'" *Id.* at 1480 (quoting Letter from James Madison to the Rev. George Eve (Jan. 2, 1789)).

3. The First Amendment provides a conduct-protective right to religious liberty.

The drafting history of the Free Exercise Clause and the debates surrounding religious liberty of the time confirm the clause's plain meaning. The Framers considered protecting a right to conscience alone, but in the end adopted the broader construction: "free exercise" of religion.

Madison wrote the first draft of the religion clauses for the House, "[t]he civil rights of none shall be abridged on account of religious belief or worship, [n]or shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext, infringed." 1 Annals of Cong. at 451 (J. Gales ed. 1834) (June 8, 1789). The House Select Committee responded with a much shorter proposal: "no religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 757. Neither proposal, however, sufficed to protect free exercise on their face.

The House then adopted language proposed by Massachusetts Representative Fisher Ames, which came closer to the final version of the First Amendment:

"Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.* at 796. It was Ames's version that for the first time used the phrase "free exercise," which had been present in many of the state constitutional protections at the time. *Historical Understanding of Free Exercise*, 103 Harv. L. Rev. at 1483. Ames was a careful draftsman, and his addition of the phrase "free exercise" suggests that he understood protection for religious conscience to be narrower than protection of free exercise. *Id.*

A slightly different version was transmitted to the Senate: "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *Id.* (quoting 1 Documentary History of the First Federal Congress of the United States of America at 136 (L. De Pauw ed. 1972) (Senate Journal); *id.* at 159 (House Journal)). In addition to what the House transmitted, the Senate considered at least three versions of the religion clauses. *Id.* at 1483–84. The first version protected "the rights of conscience," while the latter two protected "free exercise" of religion. *Id.* (citations omitted). The version it settled on protected "free exercise," not conscience, similar to the version proposed by the Conference Committee and ultimately ratified. *Id.* at 1483–84.

This history suggests at least two points for the question whether the Free Exercise Clause prohibits discrimination against religious conduct as much as religious status or belief. First, the drafters of the First

Amendment viewed the concepts of conscience and free exercise as distinct or at least sufficiently different denotatively as to have different scopes. The decision to remove any reference to conscience suggests that the idea of free exercise was broader, encompassing more than mere belief. Second, the history confirms the plain-text meaning of free exercise discussed above. Whereas conscience meant "the knowledge or faculty by which we judge the goodness or wickedness of ourselves," Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785), free exercise of religion meant the conduct or activity demanded by the conscience.

4. The Free Exercise Clause protects both status and conduct.

The original public meaning of the Free Exercise Clause can be summed up as follows. The key word of the Clause is exercise, which according to contemporary definitions, meant activity or conduct. This is confirmed by state constitutional provisions in force at the time of the Founding. Those provisions unanimously protected some form of religious conduct—from worship alone to a broader view encompassing religious conduct beyond the confines of a church service. Influenced by the evangelical currents of the time, the First Amendment codified the former understanding of the right and protected religious conduct broadly understood, not merely religious worship.

The First Circuit's position, by contrast, harkens to the narrow, Lockean-Jeffersonian view of the right to religious liberty. The First Circuit conceded that Maine could not refuse to provide public funds to its citizens who are religious, but it could refuse public funds to Mainers who wished to use those funds for education with a religious component. *Carson*, 979 F.3d at 41. This distinction between the religious "status" of the school and the way it deploys its resources is simply the belief-conduct distinction in a different guise. If it is unconstitutional to deny families an otherwise available benefit because they choose a school that is religious, it must be equally unconstitutional to deny them that benefit because their school does religious things. Religious use is simply a subset of religious conduct, the means by which a churchgoer carries out his religious identity or beliefs. Whether framed as belief versus conduct or status versus use, the Free Exercise Clause was crafted to overcome precisely this kind of blinkered view of religious freedom.

As Justice Gorsuch noted in his concurrence in *Espinoza*, one of the great foes of religious liberty, Oliver Cromwell, understood precisely the difference between free exercise on one hand and liberty of conscience on the other:[2] "I meddle not with any man's

[2] Justice Gorsuch's concurrence in *Espinoza* quotes a different version of Cromwell's letter. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2278 (2020) (Gorsuch, J., concurring) (quoting S. Hook, Paradoxes of Freedom 23 (1962)). The version reprinted here shows, however, that Cromwell understood precisely the terms at issue in the framing of the Free Exercise Clause: conscience versus free exercise.

conscience. But if by liberty of conscience, you mean a liberty *to exercise* the [Catholic] Mass, I judge it best to use plain dealing, and to let you know, [w]here the Parliament of England have power, *that* will not be allowed of." 1 Thomas Carlyle, *Oliver Cromwell's Letter and Speeches* 395 (1845) (letter from Oliver Cromwell to Governor of Ross (Oct. 19, 1649) (emphasis added)). For, as Justice Gorsuch explained and the Framers understood, protection of religious status or conscience could be construed quite narrowly, even though religious conscience necessarily entails more than mere protection of belief. And indeed, the Court itself has recognized that the Free Exercise Clause embraces religious action as much as religious belief. *Smith*, 494 U.S. at 877; *Cantwell*, 310 U.S. at 303.

Apart from being the only understanding supported by original public meaning, it is also the only definition supported by the nature of religious faith itself. Faith communities have long refused to separate religious conduct from religious belief. *See Micah* 6:8 (New International Version) ("And what does the Lord require of you? To act justly and to love mercy and to walk humbly with your God."); *The Koran* 3:113 (N.J. Dawood transl. 2003) ("There are among the People of the Book some upright men who all night long recite the revelations of God and worship Him; who believe in God and the Last Day; who enjoin justice and forbid evil and vie with each other in good works."); *James* 2:17 (New International Version) ("[F]aith by itself, if it is not accompanied by action, is dead."); *James* 2:18 ("But someone will say, 'You have faith; I have deeds.'

Show me your faith without deeds, and I will show you my faith by my deeds."); Thomas Aquinas, *Summa Theologiae*, pt. I, quest. 79, art. 13 (2d and rev'd ed., transl. Fathers of the English Dominican Province, 1920) ("[C]onscience is not a power, but an act."); Robert Louis Wilken, *Liberty in the Things of God* 163 (2019) ("Conscience is the 'application of knowledge to some special act'; [it] designates the act itself; . . . The territory of conscience is not confined to 'man's thoughts' "); *id.* at 112 ("[N]o one has been executed on the grounds of belief alone."). The Framers of the First Amendment understood this and so decided to protect not only religious status or belief, but works too.

II. Maine's exclusion of "sectarian" schools entails inter-religious discrimination and entangling inquiries regarding religious matters found unconstitutional in *Colorado Christian University*.

In *Colorado Christian University*, the Tenth Circuit held that Colorado's exclusion of "pervasively sectarian" universities and colleges from its higher-education scholarship program violated the First Amendment's Free Exercise and Establishment Clauses, as well as the Fourteenth Amendment's Equal Protection Clause. 534 F.3d at 1257–66. Colorado's scheme was unconstitutional for two reasons. First, it required the state to discriminate between religions, permitting public funds to be used at some religious schools (Jesuit Regis University and Methodist Denver University) but not religious schools that "proselytized"

their students (Evangelical Colorado Christian University and Buddhist Naropa University). *Id.* at 1257–60. Second, Colorado's scheme required an entangling inquiry by state officials to determine what kinds of curricula "tend to indoctrinate or proselytize." *Id.* at 1251, 1261.

Maine's exclusion of "sectarian" schools from its tuition-assistance program has the same vices as Colorado's exclusion of "pervasively sectarian" schools. First, Maine discriminates between different forms of religious practice, allowing public funds to flow to a private school that mandates weekly chapel to inculcate moral and spiritual development of its students in universalist values, but not schools whose curricula inculcate moral and spiritual development through biblically-based curricula. Second, Maine's scheme tasks its Department of Education to ask a question it is incompetent to answer: what kinds of curriculum tend to proselytize?

A. Schools that inculcate universalist values through mandatory chapel services pass muster under Maine's scheme; schools with biblically-based curricula do not.

First, consider Maine's decision to accept Cardigan Mountain School into the public assistance program but not Bangor Christian School or Temple Academy.

In 2015, Cardigan, a private school in New Hampshire, applied to the Maine Department of Education

to become an approved private school in the tuition-assistance program. Stipulated Record Ex. 2, at DC000012–19, *Carson v. Makin*, No. 1:18-CV-00327-DBH (D. Me. Mar. 12, 2019), ECF No. 24-2. Cardigan mandates that its students attend weekly chapel services "where the students participate in activities that help them learn and practice the moral and spiritual values they are being taught in school." *Id.* at DC000012. These services reflect Cardigan's identity as a "school where universal moral and spiritual values are taught both in and out of the classroom." *Id.* The goal of weekly chapel at Cardigan is to form students "in mind, body, and spirit for responsible meaningful lives in a global society." *Id.* "In Chapel, the students work on better understanding the core values of Cardigan, Compassion, Honesty, Respect, Integrity and Fairness." *Id.*

The chapel requirement concerned the Department as potentially violating its non-sectarian requirement. *Id.* at DC000019. The Department responded to Cardigan's application asking whether students could opt out of chapel attendance. *Id.* at DC000016. Cardigan replied that although students could not opt out, its Chapel program was "non-sectarian" and that students of various faiths participated. *Id.* at DC000015–16, DC000019. Cardigan's chapel services instead trained its students to be members of a global society as part of the school's "Global Community Initiative." *Id.* at DC000015. Apparently satisfied that Cardigan was not proselytizing or teaching material through the lens of faith, the Department approved Cardigan for

participation in the tuition-assistance program. *Id.* at DC000012.

By contrast, the schools favored by petitioners, Bangor Christian School and Temple Academy, cannot receive tuition assistance because they are "sectarian." Bangor instills "a Biblical worldview in its students." App. 10 (internal quotation marks omitted); *see also* Jt. Stipulated Facts ¶¶ 67, 68, 129. And Temple provides a "biblically-integrated education." App. 10; *see also* Jt. Stipulated Facts ¶ 130.

Maine's discrimination in favor of Cardigan and its universalist chapel program, and against Bangor and Temple's biblically-based curricula violates "[t]he clearest command of the Establishment Clause" that one set of religious practices not "be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Maine's program likewise violates the Free Exercise Clause, because it too prohibits inter-religious discrimination. *Id.* ("This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."). As the Tenth Circuit explained in *Colorado Christian University*, the prohibition against inter-religious discrimination enshrines Madison's view that "equality" between religions "ought to be the basis of every law." *Colorado Christian University*, 534 F.3d 1245, 1257 (10th Cir. 2008) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785) *reprinted in* 5 *The Founders' Constitution* 82–84 (Philip B. Kurland & Ralph Lerner, eds., 1987)).

To be sure, Cardigan calls itself "non-sectarian." But this simply reverses the facts in *Colorado Christian University*. There, universities that were affiliated with religious denominations, but did not "indoctrinate" their students in those denominations were sufficiently non-sectarian to satisfy Colorado law. *Colorado Christian University*, 534 F.3d at 1258. By contrast, here, Cardigan is not affiliated with a specific denomination but requires its students to attend chapel services to "learn and practice the moral and spiritual values they are being taught in school." Stipulated Record Ex. 2, at DC000012. Point being, Maine's "sectarian" standard permits public funds to flow to a school whose mission is the moral and spiritual formation of its students through, among other things, regular chapel services, but not to schools whose mission is the moral and spiritual formation of its students through a biblically-based curriculum.[3] This

[3] Maine's discrimination in favor of a school proselytizing universalist principles would not surprise the Framers of the First Amendment. Although religious rationalists "are often credited with the leading intellectual role in the movement for religious freedom," they "were far more likely than [members of enthusiastic sects] to side with the established church." *Historical Understanding of Free Exercise*, 103 Harv. L. Rev. at 1439. "The established religions—the Congregational churches of New England and the Anglican churches of the South—tended to be far more intellectual, uninspired, and agreeable to rationalist sensibilities, in contrast to the disturbing enthusiasm of the upstart denominations." *Id.* at 1440. And so, for example, it was the "enthusiastic" Baptists, not the Unitarians, who sought to end the established church in Massachusetts. *Id.* That Maine now uses public funds to help schools that form students in universal moral and spiritual values, but refuses those same funds to schools like

kind of distinction, as explained below, turns largely on what Maine classifies as sectarian, not any meaningful distinction mandated (or permitted) by the First Amendment. *Colorado Christian University* found this kind inter-religious discrimination to be unconstitutional, and the Court should do so here.

B. Maine decides what kind of education "proselytizes."

Next, consider Maine's framework for determining whether a school is sectarian and thus excludable from the tuition-assistance program. The Commissioner of Maine's Department of Education explained that affiliation with a church or religious institution "is not dispositive" of the question whether the school is "sectarian" in violation of Me. Stat. tit. 20-A, § 2951(2). *Carson*, 979 F.3d at 38. The material question is instead whether the school uses public funds "to further the religious purposes of inculcation and proselytization." *Id.* As the First Circuit explained, Maine asks whether the school teaches material "through the lens of . . . faith." *Id.*

But this inquiry, which the First Circuit approved, contradicts a long line of Supreme Court decisions holding "that courts should refrain from trolling through a person's or institution's religious beliefs" to determine whether it was properly excluded from a public program. *Mitchell v. Helms*, 530 U.S. 793, 828

Bangor and Temple, proves the adage that while history may not repeat itself, it often rhymes.

(2000) (plurality opinion); *N.L.R.B. v. Cath. Bishop of Chicago*, 440 U.S. 490, 502, 507–08 (1979) (same); *Colorado Christian University*, 534 F.3d at 1261 (collecting cases). "Most often, this principle has been expressed in terms of a prohibition of 'excessive entanglement' between religion and government." *Colorado Christian University*, 534 F.3d at 1261 (collecting cases). "Properly understood, the doctrine protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits (as in *Lemon*) or as a basis for regulation or exclusion from benefits (as here)." *Id.* (citation omitted).

Applying this principle, *Colorado Christian University* explained that the principal entanglement problem posed by Colorado's program was the state's "criterion requiring Commission staff to decide whether any theology courses required by the university 'tend to indoctrinate or proselytize.'" *Id.* Whether a school indoctrinates or proselytizes is the precise question that Maine asks of religious schools that apply for tuition assistance. Take, for example, the interaction between Maine's Department of Education and representatives of Cardigan discussed above. Maine requested detailed information about Cardigan's chapel requirement and whether it in fact proselytized students. Cardigan conceded that the point of its chapel program was to inculcate moral and spiritual values, but nevertheless claimed that its program was not sectarian. And for reasons only known to the Department,

the Department decided that Cardigan's chapel services were non-sectarian.

Maine's inquiry into the content of a religious school's curricula and beliefs, like Colorado's in *Colorado Christian University*, runs afoul of this Court's decisions in *New York v. Cathedral Academy*, 434 U.S. 125 (1977) and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

Cathedral Academy invalidated a New York statute that reimbursed private schools for certain educational activities as long as the activities were without religious content. 434 U.S. at 131. New York's process for examining a school's curricula for religious content was unconstitutional because "this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments." *Id.* at 132. "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *Id.* at 133. "In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials." *Id.* at 132–33. These would all have a chilling effect on religious exercise.

And in *Rosenberger*, the Court rejected the dissent's argument that a state university must not extend benefits of a neutral subsidy to a student publication that contained religious "indoctrination" and

"evangelis[m]," as opposed to "descriptive examination of religious doctrine." 515 U.S. at 867, 877 (Souter, J., dissenting) (internal quotation marks omitted). Such a requirement would require the university to "scrutinize the content of student speech, lest the expression in question . . . contain too great a religious content." *Id.* at 844. "That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy." *Id.*

Maine's scheme suffers these same flaws. Like *Cathedral Academy*, Maine's religious schools are incentivized to disavow the religious content of their education to obtain public funds. A school must follow Cardigan's playbook, claiming a hallmark religious practice like weekly chapel serves purely secular purposes. Then, the Maine Department of Education—along with the courts—must test whether it believes that assertion to be true. And as in *Rosenberger*, Maine has tasked itself with determining what kind of education indoctrinates or proselytizes. That inquiry largely depends on the eye of the beholder: "Whether an outsider will deem their efforts to be 'indoctrination' or mere 'education' depends as much on the observer's point of view as on any objective evaluation of the educational activity." *Colorado Christian University*, 534 F.3d at 1263. Precisely because this kind of question is subjective, the "Constitution interposes its protection." *Id.* "The First Amendment does not permit government officials to sit as judges of the 'indoctrination' quotient of theology classes." *Id.* So too here. Maine inquests religious schools to the detriment of the beating heart of the First Amendment—formal religious neutrality,

avoidance of state entanglement with religion, and the protection of religious *exercise*.

CONCLUSION

Consistent with its original public meaning, the Free Exercise Clause protects not only religious status and belief but also religious exercise, conduct, and use. Maine's program imposes burdens based on religious status and use. In addition, it requires the state to assess whether a school's curricula and teaching methods tend to inculcate religious belief and proselytize. This entangling inquiry is beyond the state's competence, and it led the state impermissibly discriminating between types of religious schools—qualifying one that imparts universalist values and disqualifying another that imparts biblically-based values. For these reasons, the Court should reverse the decision of the First Circuit and find for the petitioners.

Respectfully submitted,

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