No. 20-1088

IN THE

Supreme Court of the United States

DAVID and AMY CARSON, as parents and next friends 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 FOR THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; ISLAM AND RELIGIOUS FREEDOM ACTION TEAM, RELIGIOUS FREEDOM INSTITUTE; AND CHURCH OF GOD IN CHRIST, INC. AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are religious organizations with a shared commitment to defending religious freedom under the Constitution. Specifically, we have a surpassing interest in the correct interpretation and application of the Religion Clauses of the First Amendment. Some *amici* joined briefs supporting the religious claimants in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017) and *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

SUMMARY OF ARGUMENT

Laws burdening the exercise of religion often present difficult questions. Not here. Maine offers financial assistance to all students who have no local secondary school—except for students like petitioners who want to attend a school that includes religious instruction in its curriculum. By statute, the State denies this public benefit whenever an otherwise eligible student selects a school that the State deems *sectarian*.

Maine's exclusion of petitioners from a public subsidy solely because they would put it to both secular and religious uses offends both Religion Clauses of the First Amendment. The prohibition on "laws respecting an establishment of religion" and the right to "the free exercise of religion" entirely foreclose government-sponsored discrimination because of religious belief,

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[1] Pursuant to Supreme Court Rule 37.3, counsel for all parties have submitted letters to the clerk expressing their blanket consent to *amicus curiae* briefs. Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, besides *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

practice, or affiliation. U.S. Const. amend. I. The First and Fourteenth Amendments were originally understood as a bar on religious discrimination, and historical instances of religious discrimination include civil disabilities like Maine's denial of tuition benefits.

The doctrinal framework of *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990) does not apply to a law that discriminates against religion. *Smith* mandates strict scrutiny when a law burdening religious exercise lacks the requisite neutrality or general applicability. See *id*. at 877–78. That demanding standard requires courts to weigh the right to exercise religion against the State's competing interest. Properly applied, that standard can produce "sensible balances." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (quoting 42 U.S.C. 2000bb(a)(5)). But this Court's decisions demonstrate that religious discrimination triggers a per se rule. Like religious tests for public office and the ministerial exception, the bar against religious discrimination expresses an across-the-board rule that admits no balancing.

We stress that the Religion Clauses protect the full range of religious freedom and not merely freedom from official discrimination. See Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?*, 39 Wm. & Mary L. Rev. 819, 847 (1998). But safety from religious discrimination (or worse, persecution) ought to be the irreducible minimum guaranteed under the First Amendment.

Applying the rule against religious discrimination here is straightforward. Maine denies a tuition benefit to petitioners solely because they would use it to pursue an education at a school that offers religious

instruction. No matter how rigorous or competitive, no matter how many secular subjects are taught according to the highest academic standards, petitioners may not use State aid at a sectarian school solely because the State discriminates against religion. Under the First and Fourteenth Amendments, Maine's exclusion is "odious * * * and cannot stand." *Trinity Lutheran*, 137 S. Ct. at 2025.

ARGUMENT

THE COURT SHOULD APPLY A PER SE RULE AGAINST RELIGIOUS DISCRIMINATION.

A. The First Amendment Bans Laws that Discriminate Against Religion.

1. This Court has held that "[t]he Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978) (plurality op.). Nor does this holding stand alone. Another decision held that "a law targeting religious beliefs as such is never permissible." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 522 (1993). In fact, the rule encompasses any law that "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532 (citing *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953)).

Lukumi described this axiom as a "fundamental nonpersecution principle of the First Amendment"—a principle "so well understood that few violations are recorded in [the Court's] opinions." 508 U.S. at 523. There, members of the Santeria religion challenged city ordinances making animal sacrifice a crime while permitting animal slaughter by kosher butchers and for other purposes. See *id.* at 527–28. Although the

laws did not discriminate against religion on their face, that was insufficient because the Religion Clauses unitedly "extend[] beyond facial discrimination." *Id.* at 534. *Lukumi* purported to apply strict scrutiny, *id.* at 546, but its actual analysis suggests that the Court effectively applied a per se rule against religious discrimination. The critical fact for both the compelling-interest and narrow-tailoring prongs of strict scrutiny was the city's failure to regulate any conduct besides animal sacrifice by Santeria adherents. See *ibid.* (challenged laws are not narrowly tailored because "[t]he proffered objectives are not pursued with respect to analogous non-religious conduct"); *id.* at 546–47 (city's interests are not compelling because its laws "restrict[] only conduct protected by the First Amendment"). *Lukumi* rests on the Court's uncompromising rejection of religious gerrymanders (a kind of religious discrimination)—not on the fact-specific balancing of governmental interest against religious exercise.

Other decisions have repudiated religious discrimination no less decisively.

McDaniel invalidated a Tennessee statute precluding ministers from serving as delegates to the State constitutional convention. 435 U.S. at 620. Tennessee defended its exclusion as necessary to avoid the risk that a minister, once in public office, would "promote" the interests of his own faith community and "thwart" the interests of others. *Id.* at 629. But the Court found that rationale unpersuasive and voided the statute without further balancing. See *ibid.* Writing separately, Justice Brennan stressed that, other than when necessary to accommodate religion, "government may not use religion as a basis of classification

for the imposition of duties, penalties, privileges, or benefits." *Id.* at 639 (Brennan, J., concurring).

A pair of earlier decisions further illustrates the Court's intolerance of religious discrimination.

In *Niemotko* v. *Maryland*, 340 U.S. 268 (1951), the Court reversed the convictions of two men on a charge of disorderly conduct for preaching in a public park without a license. *Id.* at 269–70. The city's denial of a permit was "clearly an unwarranted discrimination." *Id.* at 272. Evidence showed that "permits had always been issued for religious organizations and Sunday-school picnics," and it turned out that "the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views." *Id.* at 272.

Fowler, 345 U.S. at 67 was remarkably similar. There, a Jehovah's Witness minister was convicted under a city ordinance that prohibited addressing a religious meeting in a public park. See *id.* at 67–68. Later the city conceded that "Catholics could hold mass" and "Protestants could conduct their church services" in the park without violating the ordinance. *Id.* at 69. Like *Niemotko*, permission to use the park was denied "because of the dislike which the local officials had of these people and their views." *Ibid.* This Court readily concluded that the city's action "was a discrimination * * * barred by the First and Fourteenth Amendments." *Ibid.*

More recently, *Trinity Lutheran*—the precedential foundation of this case—acknowledged the rule against religious discrimination. It quoted *Lukumi*'s holding that "a law targeting religious beliefs as such is never permissible." *Trinity Lutheran*, 137 S. Ct. at 2024 n.4. And the Court cited *McDaniel* for that same

principle. See *ibid.* But *Trinity Lutheran* declined to decide whether to apply the per se rule because Missouri's exclusion of religious applicants for a State benefit could not "survive strict scrutiny in any event." *Ibid.*

The per se rule does not belong to the Free Exercise Clause alone. Decisions under the Establishment Clause likewise repudiate religious discrimination. See *County of Allegheny* v. *Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989) (holding that government "may not discriminate among persons on the basis of their religious beliefs and practices"), *abrogated on other grounds by Town of Greece* v. *Galloway*, 572 U.S. 565, 579–81 (2014); see also *Larson* v. *Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). This rule naturally follows from the Establishment Clause's ban on laws that prefer some religions over others—or irreligion over religion. See *Wallace* v. *Jaffree*, 472 U.S. 38, 52–54 (1985).

From these precedents we derive the following rule: The First Amendment prohibits laws that discriminate on the basis of religious belief, practice, or affiliation. Such a law is void. Like the proscription on religious tests for public office and the ministerial exception, this per se rule reflects the combined force of the Religion Clauses. See *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961); *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *EEOC*, 565 U.S. 171, 196 (2012). A tightly bounded exception allows religious discrimination when mandated by the Establishment Clause. See *Espinoza*, 140 S. Ct. at 2258–59 (explaining the State's restriction in *Locke* v. *Davey*, 540 U.S.

712 (2004) as a function of "the 'historic and substantial' state interest in not funding the training of clergy"). But that rare exception has no application in this case.

2. Constitutional text and history confirm the per se rule against religious discrimination. The First Amendment begins with the words, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Both clauses forbid religious discrimination. Laws "respecting an establishment of religion" historically included measures granting preferences for the dominant faith community and imposing civil disabilities on religious minorities. See *Everson* v. *Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 8–10 (1947). Each kind of discrimination is void. And few laws are as effective in "prohibiting the free exercise" of religion as those that single out a person or institution for special burdens because of religious belief or practice. See *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

The First Amendment was originally understood as a bulwark against religious preferences or burdens. Concerns with religious discrimination arose from debates over the Religious Test Clause. See U.S. Const. art. VI (declaring that "no religious Test shall ever be required as a Qualification to any Office or Public Trust under the United States"). This solitary mention of religion in the unamended Constitution ignited debate in State ratifying conventions.

Reverend Daniel Shute of Massachusetts passionately defended the ban on religious tests. He described any attempt to deprive Americans of the right to hold federal office because of religion as "a privation of part of their civil rights." Daniel Shute, Statement in the Massachusetts Ratifying Convention, Jan. 31, 1788,

reprinted in 1 The Debate on the Constitution 919 (Bernard Bailyn ed., 1993). Shute acknowledged that "there are worthy characters among men of every other denomination" and pointed to the ban as a reason to support ratification. *Id.* at 920. "That as all have an equal claim to the blessings of the government under which they live, and which they support, so none should be excluded from them for being of any particular denomination in religion." *Ibid.*

North Carolina's James Iredell described the Religious Test Clause as "one of the strongest proofs * * * that it was the intention of those who formed this system to establish a general religious liberty in America." James Iredell, Statement in North Carolina Ratifying Convention, July 31, 1788, *reprinted in 2 The Debate on the Constitution* at 903. Iredell called test acts—laws requiring a public affirmation of religious belief—"a discrimination." *Id.* at 904. Prohibiting religious tests for federal office meant that "no sect here is superior to another." *Ibid.* And religious equality held profound implications. "As long as this is the case, we shall be free from those persecutions and distractions with which other countries have been torn." *Ibid.* But Iredell warned that with "the least difference" based on religion, "the door to persecution is opened." *Id.* at 905.

Amendments proposed by the State ratifying conventions (sometimes by Antifederalist minorities) illuminate the immediate background to the First Amendment. Ratification in several States prevailed only with James Madison's assurance that Congress would recommend a bill of rights once elected. See Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 508–25 (detailing the state-by-

state ratification of the 1787 Constitution). Six States sent proposed amendments to Congress. *Id.* at 511 (Massachusetts, New Hampshire, New York, North Carolina, South Carolina, and Virginia). All these but South Carolina proposed amendments guaranteeing religious freedom. See *id.* Minority coalitions also proposed such amendments in Pennsylvania and Maryland. See *id.* at 511 n.1. Five of these proposed amendments specifically banned religious discrimination.

Take Virginia. Its ratifying convention offered an amendment declaring that "all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular sect or society ought to be favored or established by Law in preference to others." Va. Ratifying Convention, Proposed Amendments, June 27, 1788, *reprinted in Complete Bill of Rights* 13 (Neil H. Cogan ed., 2d ed., 2015). The concluding clause, forbidding religious favoritism, appeared in similar proposals from North Carolina and Rhode Island. See *id.* at 12–13 (quoting proposed amendments).

New York's ratifying convention submitted a parallel amendment. It declared that "the People have an equal, natural, and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience, and that no Religious Sect or Society ought to be favoured or established by Law in preference of others." N.Y. State Ratification Convention, Proposed Amendments, July 26, 1788, *reprinted in id.* at 12. Again, religious discrimination was expressly prohibited.

Maryland Antifederalists wrote in the same vein. A minority of the ratifying convention submitted an amendment providing that "all persons [are]

equally entitled to protection in their religious liberty." Md. Ratifying Convention, Minority Proposal, Apr. 26, 1788, *reprinted in id.* at 11.

These proposals appear to have influenced the First Amendment. Madison had at hand a pamphlet compiling these amendments while preparing federal amendments for consideration by Congress. See Esbeck, 2011 Utah L. Rev. at 526. Evidently guided by State concerns, he framed the first draft of the First Amendment in part as an express ban on religious discrimination. Madison's proposal included guarantees that "[t]he civil rights of none shall be abridged on account of religious belief or worship" and that "the full and equal rights of conscience" would be secure. See 1 *Annals of Cong.* 451 (Joseph Gales ed., 1834). His effort to disempower the national government from engaging in religious discrimination was perfectly logical. Not only did it reflect State concerns, it was consistent with Madison's own understanding of religious freedom.

In his *Memorial and Remonstrance*, Madison argued that religious discrimination is akin to persecution. There, Madison criticized a bill proposed by Patrick Henry that would have conferred State-mandated financial support for Christian ministers. Madison decried the bill as "a departure from that generous policy, which offer[s] an Asylum to the persecuted and oppressed of every Nation and Religion." James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in Writings* 33 (Jack N. Rakove ed., 1999).

> Instead of holding forth an Asylum to the persecuted, [the bill] is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in

> Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance.

Ibid.

Madison's concerns bore fruit with the adoption of the First Amendment. Religious discrimination was widely understood at the Founding as a vice that the Constitution eliminated.

Like Madison, Alexander Hamilton saw the absence of religious distinction as a lure to immigration. He compared the burdensome governments of the old world with the "more equal government" of this country. Alexander Hamilton, *Report on Manufactures*, Dec. 5, 1791, *reprinted in Writings* 662 (Joanne B. Freeman ed., 2001). And he singled out "what is far more precious than mere religious toleration—a perfect equality of religious privileges." *Ibid.*

Tench Coxe, Hamilton's Assistant Secretary of the Treasury, drew a sharp contrast between religious toleration and full religious equality. "Mere toleration is a doctrine exploded by our general condition; instead of which have been substituted an unqualified admission, and assertion, that their own modes of worship and of faith equally belong to all the worshippers of God, of whatever church, sect, or denomination." Tench Coxe, *Notes Concerning the United States of America* (1790), *reprinted in 5 The Founders' Constitution* 94 (Philip B. Kurland & Ralph Lerner eds., 1987).

Scholars writing immediately after the Founding era echoed this view. William Rawle observed that

under the Constitution "legal persecution is unknown." William Rawle, *A View of the Constitution of the United States of America* 119 (1825). He explained that the Nation's commitment to "the equality of all our citizens" precludes "the denial of the smallest civic right" on the ground of "religious intolerance." *Id.* at 117. Justice Story also saw that the First Amendment "sought to cut off the means of religious persecution * * * and the power of subverting the rights of conscience in matters of religion." Joseph Story, *Commentaries on the Constitution of the United States* 701 (reprint ed., 1987) (1833).

Passage of the Fourteenth Amendment extended the Constitution's shelter for religious freedom to the States. See Kurt L. Lash, *The Second Adoption of the Free Exercise Clause*, 88 Nw. U.L. Rev. 1106, 1152 (1994) ("To the framers of the Fourteenth Amendment, freedom of belief included the freedom to act *publicly* upon that belief."). Writing immediately after adoption of the Fourteenth Amendment, Thomas Cooley denied any difference between religious discrimination and persecution. "Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and if based on religious grounds, is religious persecution." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 469 (2d ed. 1871). He added, "It is not toleration which is established in our system, but religious equality." *Ibid.* A comprehensive survey of our Nation's history of religious freedom, published in the first years of the twentieth century, concluded that "[p]ractically, religious liberty is complete." Sanford H. Cobb, *The Rise of Religious Liberty in America* 522 (1902). That means "to the individual, no curtailment of civil right

or privilege; to the Church, no interference with its faith, order, or spiritual function; and to the various Churches, no discrimination or preference by law of one before another." *Ibid.*

Religious discrimination was thus condemned repeatedly and forcefully by influential voices from the Founding to the twentieth century. Although the unequal treatment of minority Christian denominations was often the immediate concern, the deeper principle at work is the Constitution's promise of untrammeled religious equality. See, *e.g.*, Hamilton, *Writings* at 662; Rawle, *A View of the Constitution*, at 119; Cooley, *Constitutional Limitations* at 469. Judged by that principle, it makes no material difference whether discrimination favors Presbyterians over Baptists, Christians over Jews, or the secular over the religious. No American should be denied the full dignity of equal citizenship because of religious belief, practice, or affiliation. The First Amendment's guarantee of religious freedom encompasses far more than this, but equality is the irreducible minimum.

3. Religious persecution is the most severe denial of equality. Sometimes such persecution has included property confiscation, arbitrary imprisonment, and public execution. But more often civil disabilities—laws that condition civil rights on religion—have furnished the tools of religious oppression.

English law during the colonial period imposed a variety of civil disabilities on non-conformists (those not belonging to the Church of England). Failure to take an oath renouncing certain Catholic doctrines meant that a person could not hold public office, sit in Parliament, or bring a lawsuit. See, *e.g.*, Second Test Act 1678, § III, 30 Car. II, stat. 2, cap. 1, *reprinted in English Historical Documents 1660–1714*, at 393

(Andrew Browning ed., 1953). Civic and military officials—and even schoolteachers—had to take communion in the Anglican church or lose their positions. See Corporation Act 1661, § IX, 13 Car. II, stat. 2, cap. 1, *reprinted in id.* at 376.

English law continued to enforce civil disabilities on Catholics well into the eighteenth century. Blackstone described the burdens faced by Catholic recusants in stark terms. "They can hold no office or employment; they must not keep arms in their houses, but the same may be seized by the justices of the peace; they may not come within ten miles of London." 4 William Blackstone, *Commentaries* 55 (1769). These Catholic believers could "bring no action at law, or suit in equity" or "travel above five miles from home" without a license, at the risk of "forfeiting all their goods." *Ibid.* And no recusant could be married or buried, or have his child baptized, except by an Anglican minister. See *ibid.*

Historians suggest that these restrictions did not fall on nonconformists evenly and that Catholic dissenters outside of Ireland did not generally suffer the full force of these laws. See Michael W. McConnell, *Establishment and Toleration in Edmund Burke's "Constitution of Freedom"*, 1995 Sup. Ct. Rev. 393, 406–07. But even lightly enforced, these restrictions had devastating consequences. They put non-Anglicans to the choice between their faith and full participation in civic life, and they stigmatized as inferior those whose faith differed from the established church.

Early American governments unfortunately enacted civil disabilities too. Conflicts between religious dissidents and the Puritan establishment at Massachusetts Bay are well-known. See, *e.g.*, Samuel Eliot Morison, *Builders of Bay Colony* 126 (1930) ("Intolerance was

stamped on the very face of the Bay Colony by the conscious purpose of its founders to walk by the ordinances of God, as interpreted by themselves."). But civil disabilities were not only a relic of the Puritan establishment. They persisted throughout the colonies for more than a century:

> In 1763, Roman Catholics as well as non-Christians, including Jews, were denied the franchise and other rights of citizenship even in Rhode Island * * *. Nor was religious freedom of Catholics protected in Massachusetts Bay under its charter, while in the province of Maryland a harsh code directed toward the complete suppression of their religion still remained on the statute books. In Connecticut men were being haled into court and fined or imprisoned for the crime of separatism; neither "unitarians" nor "deists" were capable of holding any office. In Virginia, Baptist and other dissenting preachers were liable to persecution for carrying on their activities, and so late as 1768 many of them were actually imprisoned as disturbers of the peace.

Lawrence Henry Gipson, *The Coming of the Revolution: 1763–1775*, at 13 (1954).

Discrimination based on religious belief, practice, and denominational affiliation was a central feature of an established church, both in England and America. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2176–81 (2003) (describing restrictions on holding public office and voting based on religious affiliation); accord David P. Currie, *The Constitution in the Supreme Court: The*

First Hundred Years, 1789–1888, at 440 (1985) ("[T]he bulk of complaints about infringement of religious liberty during the preconstitutional period apparently concerned outright discrimination against dissenters from the dominant sect."). Religious preferences reflected special privileges for faith communities the government favored while civil disabilities reflected special burdens on groups the government disfavored.

Even after the Founding, States persisted in placing religious conditions on basic civil rights.

Consider North Carolina. Its 1776 Constitution permitted only Protestants to hold public office. See N.C. Const. of 1776, art. XXXII. Catholics did not get that right until 1835. *Id.* (amended 1835). Jews were not allowed to hold office until 1861. *Id.* (amended 1861). And other theists did not acquire that right until 1868. See N.C. Const. of 1868, art. VI, § 5.

Maryland followed much the same pattern. Until 1851, all office-holders had to declare a belief in Christianity. See Md. Const., art. XXXV (1776). Under this rule, "no Jew could qualify for even the smallest public office, nor practice law." B.H. Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 Yale L.J. 659, 672 (1930). In 1826, an exemption was granted for Jews who would "express belief in a future state of rewards and punishments." See *ibid.*

Moving into the nineteenth century, civil disabilities continued to be an all-too-ready instrument of religious suppression.

Nineteenth-century Catholic prejudice was responsible for the notorious Blaine Amendment. See *Espinoza*, 140 S. Ct. at 2268 (Alito, J., concurring). "In effect, the amendment would have 'bar[red] any

aid" to Catholic and other 'sectarian' schools." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality op.). And "it was an open secret that 'sectarian' was code for 'Catholic.'" *Ibid.* Congress rejected the Amendment. Yet it required new States, as a condition of entering the Union, to adopt mini-Blaine Amendments in their State constitutions. See Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551, 574 (2002).

During that same period, religious bigotry flared up into violence against members of The Church of Jesus Christ of Latter-day Saints (or Mormons as they were then known). See James A. Little, *From Kirtland to Salt Lake* 29 (1905) (describing an 1838 decree by the Missouri Governor ordering that "the Mormons must either leave the State or be exterminated"). Driven from State to State until their exodus to Utah, *id.* at 42, Latter-day Saints suffered from civil disabilities as well. Idaho, while still a federal territory, adopted a statute requiring citizens to take an oath disavowing membership in the Church, along with certain religious beliefs once held by Latter-day Saints. See Rev. St. Idaho § 504 (1887). Failure to take the oath deprived a person of the right to vote, hold civic office, or serve on a jury. *Id.* § 501. Like the English test laws condemned by the founding generation, this Idaho statute conditioned basic civil rights on disclaiming unpopular religious beliefs or affiliations. Still, the law survived constitutional challenge. See *Davis* v. *Beason*, 133 U.S. 333, 343–44 (1890).

During the twentieth century, Jehovah's Witnesses took the brunt of religious discrimination. In case after case, they challenged laws aimed at curtailing their

exercise of religion. Public preaching and door-to-door proselytizing were common targets of official ire. This Court often interpreted the First Amendment as a barrier to local religious prejudice. See, *e.g.*, *Schneider* v. *New Jersey*, 308 U.S. 147, 158–59 (1939); *Cantwell* v. *Connecticut*, 310 U.S. 296, 300 (1940); *Martin* v. *City of Struthers*, 319 U.S. 141, 142 (1943). This line of decisions culminated in Justice Jackson's masterful opinion in *W. Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). There, the Court relied on the First Amendment to shield Jehovah's Witness schoolchildren from being expelled for refusing to pledge allegiance to the flag. *Id.* at 641.

These episodes illustrate that religious discrimination and persecution inflict the same wrongs. Discriminatory laws single out and stigmatize a person or a faith community as unequal. They deny basic civil rights and personal dignity because of one's religious identity, thereby subordinating a person to second-class status in civic life. Cf. *Obergefell* v. *Hodges*, 576 U.S. 644, 672 (2015) (criticizing laws that "put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied"). And the exercise of religion then carries with it burdens that contradict the Constitution's guarantee of religious freedom. Besides the loss of equal citizenship, religious discrimination invites the dangerous abuse of government power. Madison's trenchant insight deserves repeating: religious discrimination is separated from out-and-out persecution "only in degree." Madison, *Writings* at 33; accord Iredell, *2 The Debate on the Constitution* at 905 (warning that "[i]f you admit the least difference" between Americans because of their faith "the door to persecution is opened").

Only a per se rule against religious discrimination can guard against these harms.

B. Anticipated Objections to a Rule Against Discrimination Are Unconvincing.

1. Some may argue that a law that discriminates against religion should be subject to strict scrutiny. But that approach is a mistake. Members of the Court have expressed concern about a wholesale return to strict scrutiny in all free exercise cases if *Smith* were overturned. *See Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring) ("But I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime."). Religious discrimination is an area where strict scrutiny is inappropriate.

Judicial balancing is wrong when the Constitution requires categorical protection. Per se rules govern certain claims regardless of how strong the government's interest might be. Permanent physical dispossession requires just compensation. See *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 358 (2015). Censoring speech because society finds your idea offensive always transgresses the right to free speech. See *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). And, closer to home, the Religion Clauses categorically deny government the power to prescribe a religious test for public office or to interfere in a religious organization's selection of its minister. See *Torcaso*, 367 U.S. at 495; *Hosanna-Tabor*, 565 U.S. at 196. A per se rule is just as necessary here. Laws that discriminate on the basis of religious belief, practice, or affiliation offend the Constitution's promise of complete equality in matters of religion. As elsewhere, when "the First Amendment has struck the balance for us," it is that balance and

not a case-by-case evaluation that should prevail. *Hosanna-Tabor*, 565 U.S. at 196.

However familiar, strict scrutiny as applied to religious discrimination has weak textual and historical roots. Strict scrutiny is not the product of original understanding. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1268 (2007). Rather, strict scrutiny stands at the apex of the tiers-of-scrutiny framework under which noneconomic rights have been adjudicated since the 1960s. See G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. Rev. 1, 2 (2005). That framework rests on a questionable policy that accords greater constitutional protection for noneconomic rights while allowing broad leeway for the regulation of private property. See *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152, 152 n.4 (1938).

We vigorously support strict scrutiny in other contexts where it secures a robust right to the free exercise of religion against the effects of neutral and generally applicable laws. Decades of experience under RFRA and RLUIPA demonstrate "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules." *Gonzales*, 546 U.S. at 436. Strict scrutiny may be the best available tool to resolve free exercise claims when a nondiscriminatory law incidentally creates a substantial burden on religion. But it should not crowd out the per se rule against religious discrimination given its support in constitutional text and history.

Others may argue that recent decisions mean that strict scrutiny applies to all laws that fall outside *Smith*. Not so. *Fulton* applied strict scrutiny because the challenged city actions fell within *Smith*'s exception for individualized exemptions. 141 S. Ct. at 1876–

77. *Tandon* v. *Newsom* likewise applied strict scrutiny to laws denying favorable treatment for religious gatherings that was available for comparable secular activities. See 141 S. Ct. 1294, 1296 (2021) (per curiam). Neither case undermines the per se rule against religious discrimination. *Fulton* expressly declined to consider evidence of religious discrimination, see 141 S. Ct. at 1877, and *Tandon* properly applied strict scrutiny because the challenged regulations deviated from *Smith* but did not discriminate against religion. See 141 S. Ct. at 1297–98.

2. *Locke* poses no obstacle to the rule against religious discrimination either. Twice this Court has rejected *Locke* as an impediment to free exercise claims founded on religious discrimination. See *Trinity Lutheran*, 137 S. Ct. at 2023–24; *Espinoza*, 140 S. Ct. at 2258–59. These decisions read *Locke* instead as a "narrow restriction" that honors the States' "historic and substantial" interest in not lending financial support for the training of professional ministers. *Espinoza*, 140 S. Ct. at 2257 (quoting *Locke*, 540 U.S. at 725). *Locke* is a rare instance where the Establishment Clause obligates the government to engage in religious discrimination. Since Maine's tuition assistance program involves only secondary school students, see Pet. 7, *Locke* has no bearing on this case.

3. Nor does the Establishment Clause entitle a State to discriminate against religion in the name of maintaining an unusually strict separation of church and state. Avoiding religious discrimination is implied by the Establishment Clause itself. And that Clause does not dictate hostility toward religion. See *Illinois ex rel. McCollum* v. *Bd. of Educ.*, 333 U.S. 203, 211–12 (1948). Rather, the Court interprets the Establishment Clause "by reference to historical practices and

understandings." *Town of Greece* v. *Galloway*, 572 U.S. 565, 576 (2014). It follows that States have no leeway to separate church and state at the expense of the right to exercise religion. Maine has a legitimate interest in complying with the Establishment Clause, of course. But that interest is fully satisfied when a State "provides benefits directly to a wide spectrum of individuals" and "permits such individuals to exercise genuine choice among options public and private, secular and religious." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 662 (2002). Any asserted interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution is limited by the Free Exercise Clause." *Trinity Lutheran*, 137 S. Ct. at 2024. Maine thus cannot cite the Establishment Clause to support religious discrimination contrary to the Free Exercise Clause.

4. The per se rule against religious discrimination does not bind government officials to award benefits to unqualified recipients. *Trinity Lutheran* illustrates the point. When Missouri excluded a church from receiving a subsidy to resurface a school playground, this Court stressed that the State's constitutional error was not in denying public support. It was "the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." *Trinity Lutheran*, 137 S. Ct. at 2022. Presumably, the church could not have insisted that its religious character required the State to relax its eligibility requirements. In short, a ban on religious discrimination is not a mandate for religious favoritism.

5. A rule against religious discrimination will not prevent government from protecting public health and safety. See *Sherbert*, 374 U.S. at 403. Laws prohibiting

human sacrifice and the handling of poisonous snakes are valid even though they ban religious activities. See *Reynolds* v. *United States*, 98 U.S. (8 Otto) 145, 166 (1878); *State ex rel. Swann* v. *Pack*, 527 S.W.2d 99 (Tenn. 1975), cert. denied, 424 U.S. 595 (1976). But a rule against discrimination may require government officials to change how they address threats to public health and safety. Such changes should not be controversial. "The Constitution * * * is concerned with means as well as ends." *Horne*, 576 U.S. at 362.

Two of this Court's recent decisions demonstrate how the rule against religious discrimination is consistent with an effective government response to public safety threats. They also illustrate where a per se rule is appropriate and where strict scrutiny should continue to apply.

In *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63 (2020), this Court confronted restrictions on religious gatherings "that single[d] out houses of worship for especially harsh treatment." *Id.* at 66. The ostensible purpose for the restrictions was preventing the spread of Covid-19, but the regulations discriminated against religion. For example, "[i]n a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as 'essential' may admit as many people as they wish," with the term "essential" including "things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential." *Id.* These regulations allowed a laundromat (where customers often wait for hours) to operate without any capacity limits but prohibited a 1,000-seat cathedral from holding a 30-minute daily

Mass with 11 parishioners.[2] Even in the less restrictive orange zone, "attendance at houses of worship [was] limited to 25 persons," while "even non-essential businesses [could] decide for themselves how many persons to admit." *Id.*

Judge Park opined that the State had "singl[ed] out 'houses of worship' for unfavorable treatment" and thereby "specifically and intentionally" discriminate[d] against "the exercise of religion." *Agudath Israel of Am.* v. *Cuomo*, 980 F.3d 222, 228 (2d Cir. 2020) (Park, J., dissenting), rev'd, *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 69. This Court agreed, characterizing New York's "disparate treatment" of religious gatherings as "striking." *Id*. at 66. Justice Gorsuch wrote that such treatment "is exactly the kind of *discrimination* the First Amendment forbids." *Id.* at 69 (Gorsuch, J., concurring) (emphasis added). Justice Kavanaugh likewise reasoned that "New York's restrictions on houses of worship not only are severe, but also are *discriminatory*." *Id.* at 73 (Kavanaugh, J., concurring) (emphasis added). As in *Lukumi*, this Court voided the law once it discovered religious discrimination.

Cuomo emphatically reached the correct result. But we are convinced that the per se rule against religious discrimination should have applied rather than strict scrutiny. See *id.* at 67; see also *id.* at 73 (Kavanaugh,

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[2] Social distancing requirements that might limit the number of people in a building did not make New York's regulatory scheme any less discriminatory. Take laundromats. Because social distancing does not apply to household members, a cramped laundromat in a red zone could host three households with six persons each (*e.g.*, mom, dad, and four children) but a cathedral could not host two households with six persons each—even if separated by 100 feet.

J., concurring). When the law discriminates against religion, the First Amendment demands a flat prohibition, not judicial balancing. That approach is essentially what this Court has been doing all along. See *Lukumi* 508 U.S. at 546–47 (effectively relying on a rule against religious discrimination); *Smith*, 494 U.S. at 877 (laws are not entitled to a lax standard when they "impose special disabilities on the basis of religious views or religious status.").

The per se rule against religious discrimination does not detract from government's unquestioned authority to prevent the spread of dangerous disease. To satisfy the rule, government can adjust the level of generality of any regulation so that it falls even-handedly on all activities that present the same threat to public safety. We cannot conceive of—and to our knowledge this Court's decisions do not supply—instances when even health and safety interests would necessitate religious discrimination. Religion may involve gathering, embracing, speaking, singing, dancing, and so forth, but so do many other categories of secular activity. General rules that apply equally to secular and religious activities—in the case of Covid-19, capacity limits, masks, social distancing, sanitizing, and ventilation—adequately mitigate risks created by religious exercise. There is no constitutional warrant to dignify religious discrimination with judicial balancing. Even the strictest balancing test could embolden hostile regulators to discriminate against all religions or, worse, against specific faith communities or religious practices they dislike, as occurred in *Cuomo* and regrettably in many other instances during the Covid-19 pandemic.

We do not suggest, however, that every nuance in health and safety regulations will trigger the per se

rule. *Tandon*, 141 S. Ct. 1294, illustrates how the Court should approach a regulatory regime that departs from *Smith* but does not discriminate against religion. There, in an effort to control Covid-19, California's Governor issued an executive order imposing restrictions on indoor and outdoor gatherings. "[I]ndoor and outdoor gatherings [were] limited to three households, but indoor gatherings [were] prohibited in Tier 1 and 'strongly discouraged' in the remaining tiers." *Tandon* v. *Newsom*, 992 F.3d 916, 918 (9th Cir. 2021). Although these regulations accorded formal equality to in-home religious gatherings, they severely limited the exercise of religion while providing "myriad exceptions and accommodations for comparable [secular] activities." *Tandon*, 141 S. Ct. at 1298. By denying an exemption available for comparable secular interests, California's regulatory scheme became subject to strict scrutiny. See *id*. California's restrictions on in-home worship ultimately fell short because the State did not "explain why it could not safely permit at-home worshipers to gather in larger numbers while using precautions used in secular activities." *Id.* at 1297.

But the Court in *Tandon* did not see California's restrictions as discriminatory. Rather, it found that the State had simply exempted comparable secular interests while disclaiming any duty to accommodate the exercise of religion. Without such accommodation, California could not claim the deference *Smith* affords. *Tandon* teaches that lack of neutrality or general applicability does not automatically trigger the per se rule against discrimination. But where a law discriminates against religion, the inquiry is at an end.

In sum, regulating health and safety without religious discrimination reflects the hard-and-fast limita-

tion placed on governmental power by both Religion Clauses. See *McDaniel*, 435 U.S. at 626; *County of Allegheny*, 492 U.S. at 590. It prevents government from trying to regulate religious activity directly. Government surely has a legitimate interest in controlling the spread of dangerous disease. But it has no business controlling the exercise of religion through discriminatory means. History bears witness that the power to discriminate against religion is the power ultimately to persecute religion. See Madison, *Writings* at 33. Any power so inimical to cherished First Amendment rights ought to be zealously rejected.[3]

C. Maine's Exclusion of Petitioners from the State Tuition Aid Program Violates the Rule Against Religious Discrimination.

1. Under *Smith*, the Free Exercise Clause permits neutral laws of general application. 494 U.S. at 879. But that rule—criticized as tragically unprotective of the right to exercise religion—has no purchase when a law discriminates against religion. *Smith* itself stressed that laws "impos[ing] special disabilities on the basis of religious views or religious status" are not subject to its neutral-and-generally-applicable-law standard. *Id.* at 877; accord *Lukumi*, 508 U.S. at 533 ("[I]f the object of a law is to infringe upon or restrict

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[3] Religious discrimination is likewise forbidden under the Equal Protection Clause of the Fourteenth Amendment. See *Locke*, 435 U.S. at 720 n.3 (citing *McDaniel*, 435 U.S. at 618)). Laws singling out people and institutions because of religious belief, practice, or affiliation may also offend the prohibition on bills of attainder. See *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866) (invalidating a statute under which a Catholic priest was imprisoned for preaching without submitting to a State-prescribed oath).

practices because of their religious motivation, the law is not neutral"); *Trinity Lutheran*, 137 S. Ct. at 2020 (*Smith* does not apply to measures that "single out the religious for disfavored treatment").

2. *Smith* does not apply here because Maine law discriminates against religion. The challenged statute provides that "[a] private school may be approved for basic school approval only if it * * * [is] a nonsectarian school in accordance with the First Amendment of the United States Constitution." Maine Rev. Stat. 20-A, § 2951(1)–(2). To police this restriction, "the Maine Department of Education * * * examines the school's curriculum and activities to assess whether the school promotes faith or presents its teaching through a faith-based lens." Pet. 6; accord App. 35. It is undisputed that the lack of a secondary school in their area qualifies petitioners for tuition assistance. See Pet. 7. But Maine law denies these parents that subsidy for use "at the school they believe is best for their child." *Ibid.* The State "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of" the religious use to which they would put it. *Trinity Lutheran*, 137 S. Ct. at 2021.

Maine's tuition aid program is void because it discriminates among its citizens based on their religious faith and practice, without any justification under the Establishment Clause.

The First Circuit quibbled that *Trinity Lutheran* and *Espinoza* do not control because they involved restrictions based on religious *status* while Maine law turns on the religious *use* of State funds. See App. 25–27. Members of the Court have questioned whether "the Free Exercise Clause should care" about the distinction between status and use. *Trinity Lutheran*, 137

S. Ct. at 2026 (Gorsuch, J., joined by Thomas, J., concurring). We agree that it should make no difference. The line between status and use is inherently unstable: "the same facts can be described both ways." *Ibid.* But also, making the outcome turn on the difference between status and use misses the point. Surely, there was no reason to probe how Mrs. Sherbert used her unemployment benefits or how the Yoder children used their freedom from compulsory high school attendance. See *Sherbert*, 374 U.S. at 409–10; *Wisconsin* v. *Yoder*, 406 U.S. 205, 234–35 (1972). It was enough to see that the challenged law forced Americans to choose between equal citizenship and their faith. So too, here.

Maine's denial of tuition assistance to petitioners is a civil disability based on a citizen's exercise of religion. Like the statutes enforced against English Catholics or the restrictions placed on Jews in the new Republic, Maine law singles out petitioners for special legal burdens because of their faith. See *McDaniel*, 435 U.S. at 639–40 (Brennan, J., concurring). It is true that Maine does not punish students or their families for seeking an education that includes religious instruction. Nor does the State deprive petitioners and similarly situated Mainers of the right to vote or stand for public office. At most, petitioners will have to incur the cost of a private religious education or make do with a secondary education that lacks the religious guidance they seek. But the results of Maine's policy should not be underestimated. It stigmatizes petitioners as unequal by denying them a State benefit for which they qualify solely because they will use it to exercise their religion. Under the First Amendment, that discrimination renders the challenged statute invalid. Like Missouri's denial of a subsidy for resurfacing playgrounds and Montana's

denial of scholarship money to religious schools, Maine's denial of a tuition subsidy to petitioners because of the religious use to which they would put it "cannot stand." *Trinity Lutheran*, 137 S. Ct. at 2025.

CONCLUSION

For these reasons, the Court should reverse the judgment below.

Respectfully submitted,

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