No. 20–1088

IN THE

Supreme Court of the United States

CARSON *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 *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION AND YES. EVERY KID. IN SUPPORT OF PETITIONERS

CYNTHIA FLEMING CRAWFORD
Counsel of Record
CASEY MATTOX
CAUSE OF ACTION INSTITUTE
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-2227
cynthia.crawford@causeofaction.org
Counsel for Amici Curiae

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BRIEF OF *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION AND YES. EVERY KID. IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") and **yes. every kid.** respectfully submit this *amici curiae* brief in support of Petitioners.[1] *Amici* are both part of the Stand Together community.

INTEREST OF AMICI CURIAE

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is committed to ensuring the freedom of expression and association guaranteed by the First Amendment, particularly where the economic opportunity and well-being of children is dependent on a robust and diverse society.

Amicus curiae **yes. every kid.** believes the purpose of education is to help all students discover, develop, and apply their unique abilities, establishing a foundation for a life of fulfillment and success. **yes. every kid.** supports education policy that respects

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[1] All parties have consented to the filing of this brief after receiving timely notice. *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or its counsel made any monetary contributions to fund the preparation or submission of this brief.

the dignity of every student, fosters a diversity of approaches, and is open to the free flow of ideas and innovation.

Amici have a particular interest in this case because they are national organizations dedicated to ensuring families have every available educational option for their children. That includes the freedom to choose the education that best fits a student's needs, whether it is a public school, private school, charter school, or homeschool.

SUMMARY OF ARGUMENT

The First Amendment protects matters of conscience made manifest through speech and religious exercise. Government should bear the initial burden of justifying infringement of speech and religious exercise and may not discriminate against a speaker because of what the speaker believes. In neither should the victim's conscience be probed to establish constitutional protection or the infringement upheld because the infringer's state of mind is pure. Courts have upheld this principle in free speech cases, subjecting such discrimination to strict scrutiny. But government discrimination against religious exercise plaintiffs because of their beliefs is subject to less consistent scrutiny—with sundry tests and loopholes leading to inconsistent outcomes. Exercise of rights that stand on equal constitutional footing, a clause apart, should not be subject to such divergent treatment.

In Maine, a child who wants to use her tuition assistance to attend a religious school will be precluded by the express terms of the Maine statute.

One might expect such a law, which discriminates on its face against a First Amendment right, would be subject to strict scrutiny. Or at least that the government would bear the burden to defend its facial infringement of a First Amendment right. But unlike other constitutional protections, the scarlet label "sectarian" places the burden on the child to explain why the discrimination was unjustified.

Allocation of the burden is only the beginning. The nature of the burden—which can only be satisfied by exposing the most personal beliefs of the child and the wished-for school to searching inquiry and valuation by the government—differentiates this burden from other constitutional claims for which intentional infringement is enough. But religious exclusions from education are not only constitutionally anomalous because the student bears the burden, but because the applicable level of scrutiny is only determined after the dispositive issue has been decided. The First Circuit, relying on *Espinoza* and *Trinity Lutheran*, stated that discrimination that is solely status-based is subject to strict-scrutiny; but since the Maine statute, in that court's view, applies to religious use—a proxy for the school's religious viewpoint[2]—strict scrutiny did not apply. If so, what level of scrutiny does apply? The Court of Appeals did not say, identifying no alternative level of scrutiny applicable to use-based restrictions—not even applying rational basis review. Because status-based discrimination faces strict scrutiny, and use-based discrimination, at

[2] *See* App. 43–44 (distinguishing public school education taught from a secular perspective from private education taught from a religious perspective).

least here, is subject to no scrutiny, the outcome of the use/status test was dispositive.

And perhaps more significantly, the Court of Appeals identified no standard applicable to the State's purportedly fact-based designation[3] of schools as unacceptably sectarian or acceptably secular in the first place. The result of that test, from which all other results flow, was simply accepted at face value. Under *Fulton v. Philadelphia*, this invitation to the government to consider the particular reasons for a school's conduct to create an exemption from an otherwise general law, should subject the exemption to strict scrutiny. *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1876–77 (2021). Had *any* standard been applied to this designation, the State would have had to explain how attendance at an accredited school that satisfies Maine's compulsory education laws could fail to provide equivalent education to public schools.[4] It would also have to explain how, if the amount of compensation to private schools is pegged to the cost of public schooling, those funds would have been funneled into religious use *a la Locke v. Davey*, without the schools providing all mandatory education for free. This contention would struggle to satisfy any level of scrutiny, had any level of scrutiny been applied.

This case highlights the lack of consistent standards among free exercise cases and the

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[3] *See* App. 58 ("the determination of whether a school is secular could readily be made by looking at objective factors:").

[4] The Court of Appeals accepted that secular education is different from religious education. App.43–44. But that is simply begging the question.

persistent divergence between the strict scrutiny applied as a matter of course to free speech and the lesser, and messier, standards applied to free exercise. In education, both labels turn on viewpoint, which is beyond the ken of government. Where, as here, the education satisfies the obligation imposed by the state, that is where the state's inquiry should stop.

The Court's recent decision in *Fulton* should end the matter. Maine's treatment of education is not-generally-applicable on its face, and thus, under *Fulton*, should be subject to strict scrutiny—not some nuanced doctrine reserved for religious perspectives. The Court should close the loophole it left open in *Trinity Lutheran* and clarify that perspective-based tests have no more place in free exercise cases than they have in speech cases. Under either clause, strict scrutiny should apply.

ARGUMENT

I. FACIAL DISCRIMINATION AGAINST MATTERS OF CONSCIENCE PROTECTED BY THE FIRST AMENDMENT MERITS STRICT SCRUTINY.

The First Amendment is a single sentence that does not establish a hierarchy among its clauses. This Court has noted that "it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme." *Prince v. Massachusetts*, 321 U.S. 158 (1944). Yet the level of scrutiny applied to infringement of religious exercise is both inconsistent—subject to exceptions, burden shifts, and assessment of mental state—and dramatically different from the scrutiny routinely applied to free

speech, with speech more easily vindicated.[5] To the extent the discord should be harmonized, it is this Court's province to do so. The Court's recent ruling in *Fulton* may provide at least one means to narrow the gap by applying strict scrutiny to any law that fails to satisfy general-applicability by imposing additional burdens on religious exercise.

Justice Thomas highlighted the unexplained discrepancy in the treatment of the clauses in his concurrence in *United States v. Sineneng-Smith*.[6] Justice Gorsuch, concurring in *Trinity Lutheran*, also noted the arbitrary divisions within free exercise review, pondering whether the "First Amendment's

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[5] This Court's decision in *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) is an especially clear illustration of the error of rank ordering First Amendment freedoms, allowing a public law school to require waiver of core free exercise and free association rights in order to enter a public speech forum. This decision is inconsistent with the Court's precedents before and since and should be reconsidered in an appropriate case.

[6] "Such arguments are typically raised in free speech cases, but the Court has occasionally entertained overbreadth challenges invoking the freedom of the press, *see, e.g., Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940), and the freedom of association*, see, e.g., Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). Curiously, however, the Court has never applied this doctrine in the context of the First Amendment's Religion Clauses. In fact, the Court currently applies a far less protective standard to free exercise claims, upholding laws that substantially burden religious exercise so long as they are neutral and generally applicable. *See Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). The Court has never acknowledged, much less explained, this discrepancy." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1584 (2020) (Thomas, J. concurring).

Free Exercise Clause should care" about a distinction between "laws that discriminate on the basis of religious status and religious use." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017) (Gorsuch, J. concurring). "After all, that Clause guarantees the free exercise of religion, not just the right to inward belief (or status)." *Id*.

Justice Alito, concurring in *Fulton*, discussed the anomalous "hybrid-rights" theory of free-exercise jurisprudence in which a free-exercise claim, to merit full constitutional protection, must be joined with another independently viable constitutional claim, such as free speech. *Fulton*, 141 S.Ct. at 1918 (Alito, J. concurring). The hybrid-rights philosophy appears to be unique among constitutional models, imposing an additional burden solely on free exercise claims.

Taken together, assorted arbitrary differences inject substantial uncertainty and unequal treatment into freedoms that the First Amendment itself treats as equals.

A. The Level of Scrutiny Applicable to Free Exercise Claims is a Mystery this Court Must Solve.

Framing the question as a simple difference between religious use and status gives a patina of coherence to free exercise cases and provides an excellent vehicle for the Court to clarify the law. But the divergence in standards is not as easily catalogued as it may appear, with varying standards resulting in lopsided treatment for claims that are closely analogous.

Two prominent cases appear to stand for the proposition that non-neutral burdens on religious exercise must satisfy strict scrutiny regardless of whether they target activity or status. But the use of these cases in *Trinity Lutheran* shows how the slender distinction between activity and status can be pressed into contrary service when convenient.

In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the ordinances in question were described as having two salient characteristics:[7] (1) their texts and operation demonstrated that they had "as their object the suppression of Santeria's central element, animal sacrifice" and thus prohibited "sacrificial practice" and "religious conduct"; and (2) "the ordinances pursue[d] the city's governmental interests only against conduct motivated by religious belief." 508 U.S. 520, 521 (1993). These characteristics related to religious *activity*. They did not have anything to say about the status of the Church as a church. Likewise, the prohibitions distinguished between ritual animal sacrifice versus non-religious animal slaughter, a distinction based in activity. *Lukumi* is a religious *use* case, focusing on activity alone.

By contrast, the "Tennessee statute barring '[m]inister[s] of the Gospel, or priest[s] of any denomination whatever' from serving as delegates to

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[7] *Lukumi* was decided under the "neutral and of general applicability" standard of *Smith*, 494 U.S. 872, which does not appear to be pertinent here as the Maine statute is discriminatory on its face. The Court's application of *Smith* and *Lukumi*, in *Fulton*, is instructive, however, because lack of general applicability triggered strict scrutiny, which cannot be satisfied here, *infra* § I.D.

the State's limited constitutional convention," in *McDaniel v. Paty*, was status-based on its face. 435 U.S. 618, 620 (1978). But even this clear statement of status was subject to the caveat that "such authority as is available indicates that ministerial status is defined in terms of conduct and activity rather than in terms of belief." *Id.* at 627–28. Thus, even an express status-based exception was rooted in activity, showing that the distinction between activity and status is really no difference at all.

Taken together, these cases cover the field of religious exercise: identity and activity, with *Lukumi* subjecting restrictions on religious activity to strict scrutiny, 508 U.S. at 546, and *McDaniel* subjecting status-based restrictions to "close" or "careful" scrutiny.[8] 435 U.S. at 644–45.

And yet, *Trinity Lutheran* cites *Lukumi* for the proposition that the "Free Exercise Clause . . . subjects to the strictest scrutiny laws that target . . . 'religious status.'" 137 S. Ct. at 2019. If a case based *solely* on targeted religious activity falls on the status side of the use/status test, then what hope could there be for non-arbitrary application of strict scrutiny to "status" cases and not to "use" cases? The use/status test further muddles laws that are unclear, or that, as here, have clear text but are applied using an extra-textual classification.

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[8] *McDaniel* does not explain how these terms differ from strict scrutiny. It does require state interest of "the highest order" but does not require any element analogous to narrow tailoring. Thus "close scrutiny" is apparently a less exacting standard on at least one dimension.

Although predating *Trinity Lutheran* by a decade, *Colorado Christian University v. Weaver* identified the challenge courts face in selecting which level of scrutiny to apply. 534 F.3d 1245 (10th Cir. 2008). Like this case, the Colorado scholarship program in *Colorado Christian* provided money to students based on the viewpoint of the school, allowing scholarships to students "who attend sectarian—but not 'pervasively' sectarian—universities." *Id*. at 1258. The Tenth Circuit held that under *Smith* "[t]his is discrimination 'on the basis of religious views or religious status,' . . . and is subject to heightened constitutional scrutiny." *Id*. But what is the "heightened scrutiny" the court sought to apply? Even it was unsure, stating:

> As already discussed, *Locke v. Davey* introduces some uncertainty about the level of scrutiny applicable to discriminatory funding. The majority opinion refrained from stating what level of scrutiny it was applying to Joshua Davey's First Amendment claim, but dropped two hints that the proper level of scrutiny may be something less than strict. . . . While considerably more demanding than rational basis, this likely falls short of requiring that the government's interest be "compelling."

Id. at 1267 citing *Locke v. Davey*, 540 U.S. 712 (2004). In the end, the *Colorado Christian* court declined to decide "precisely what level of scrutiny applies" because "on any plausible level of scrutiny, the discriminatory nature of the exclusion provisions cannot be justified." *Id*. at 1267, 1269. While punting

was an option for the Tenth Circuit due to the egregious facts of the case, even more egregious facts here were not enough for the courts below to find infringement. This Court should resolve the issue and provide clarity for the courts below.

B. The Gap Between the Scrutiny Applied to Free Speech and Free Exercise Should be Closed.

Two key inquiries—burden and tailoring—may be dispositive in a First Amendment case based on perspective. But the outcome may vary depending on whether free speech or free exercise is implicated, with government bearing the initial burden to justify the infringement and show narrow tailoring in free speech cases but bearing a lesser and often unclear burden in free exercise cases.

1. In Free Speech Cases, the Burden is on the Government and Tailoring Must be Narrow.

If this case were evaluated under the free-speech rubric, the burden would fall squarely on the government to rebut the presumption that the infringement is unconstitutional. That is because "[d]iscrimination against speech [due to] its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 828–29 (1995). That the burden must be borne by the government would be pellucid given the viewpoint-specific nature of the infringement. "When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id*.

These standards reflect the principle that governments have "'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citation omitted).

To carry its burden under the free speech rubric, the government would have to demonstrate that the infringement passes strict scrutiny—that it "is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merch. Ass'n,* 564 U.S. 786, 799 (2011). This means the "State must specifically identify an actual problem in need of solving, . . . and the curtailment of free speech must be actually necessary to the solution." *Id*. (citations omitted). To be narrowly drawn, a restriction may not be overinclusive, prohibiting too much speech, or underinclusive, restricting too little speech to meet its goal. *City of Ladue v. Gilleo*, 512 U.S. 43, 50–51 (1994). "Underinclusiveness raises serious doubts about whether the government is . . . pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Entm't Merch. Ass'n*, 564 U.S. at 802.

Here, Maine had a long tradition of administering the tuition assistance program by allowing religious schools to participate. *See Anderson v. Town of Durham*, 895 A.2d 944, 948 (Me. 2006). The State identified no "actual problem in need of solving" that would explain its change in policy in the 1980s. Instead, that change was based on an erroneous legal opinion and the rationale provided in that opinion has since been abandoned. *Id.* at 948–49.

2. The First Amendment Does Not Require Guilty Intent.

Instead of placing the burden on the State to justify the infringement, the First Circuit bypassed the burden analysis and swept aside the unequal treatment of sectarian schools because Maine "betrays no hostility toward religion when it imposes a use-based 'nonsectarian' restriction on the public funds that it makes available for the purpose of providing a substitute for the public educational instruction that is not otherwise offered." App. 46–47.

Requiring the government to betray a culpable state of mind has no corollary in other First Amendment jurisprudence. Indeed, this Court has made clear that illicit intent "is not the *sine qua non* of a violation of the First Amendment." *Reed*, 135 S. Ct. at 2228. In cases of viewpoint suppression, the government must justify the infringement. At no time is the victim required to prove the government had guilty intent. Here, the First Circuit relieved the State of that burden.

The gap between a presumption of invalidity in cases of speech infringement and requiring proof of hostility in cases of religious infringement is not supported by the text and history of the First Amendment, does damage to the full protection of all of First Amendment freedoms, and misconstrues this Court's decisions.

While the Court has held that hostility may be sufficient to establish infringement in free exercise cases, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–30 (2018), such

hostility is not necessary. *Fulton*, 141 S.Ct. at 1918–21 (Alito, J. concurring) (discussing the difficulties inherent in determining whether a rule "targets" religion). Here, where religion is expressly targeted, whether that targeting was based on hostility is immaterial.

C. The Level of Scrutiny Should Not Vary Based on Viewpoint.

"Mathematics is the language in which God has written the universe."

— *Galileo Galilei*

"The science of pure mathematics, in its modern developments, may claim to be the most original creation of the human spirit."

— *Alfred North Whitehead*

God or human—who is the author of mathematics? As a philosophical matter, this question may be fodder for late-night dorm room debates, but it has no place in assessing whether an algebra class passes academic muster. And, if a child were lucky enough to have Galileo Galilei or Alfred North Whitehead as a math teacher, the legal status of the lesson should not turn on first asking whether the teacher believes math to be the work of God or of the human spirit.

But that is what the First Circuit has done here, asking first: "Who speaks and what do they believe?" before asking whether the educational service meets the objective standard set forth in the law.

1. Because the Viewpoint of the Student Can Never Really Be Known, Assigning Level of Scrutiny Based on Religious Use is Arbitrary.

Imagine two high school students. The first attends public school and is studying French in preparation for a post-high school religious mission abroad. The second, who is agnostic, is studying Italian at a private religious school in preparation for a career as a United Nations interpreter because Italian is not available at the public school. The conspicuous question is: which of these academic pursuits is a religious use? Less obvious but perhaps more troubling is: *How would you know?*

The motivation of the student, whether in preparation for a religious mission or a secular career, is information the state simply does not have. Nor could it get this information in any prudent and accurate way. Any attempt would be intrusive, speculative, and prone to bias; and the output of any such attempt would grow increasingly inaccurate with each passing day. Sorting and labeling students in this manner would offend the Constitution on multiple levels as well as pitting the state and students against each other for no purpose but to deprive certain students of benefits.

The State of Maine attempts to resolve this quandary by employing attendance at religious school as a proxy for religious use. But it is a fallacy to assume that studying at a religious school is a religious use for the student—regardless of the perspective of the school, just as it is a fallacy to assume that studying in public school is a secular use.

As a basis for differential legal treatment, it is arbitrary and defies equal protection.

2. Using Objective Criteria to Evaluate Education Would Eliminate Arbitrary Application of the Law.

There is a ready alternative to governmental mind-reading: using objective public measures to evaluate the legal sufficiency of the services provided. Maine, for example, has promulgated criteria for private schools to satisfy Maine's compulsory education laws:

> Requirement for basic school approval
>
> A private school may operate as an approved private school for meeting the requirement of compulsory school attendance under section 5001-A if it:
>
> 1. Hygiene, health, safety. Meets the standards for hygiene, health and safety established by applicable law and rule; and
>
> 2. Is either:
>
> A. Currently accredited by a New England association of schools and colleges; or
>
> B. Meets applicable requirements of this Title pertaining to private schools and the department's requirements for

> approval for attendance purposes adopted under section 2902.

App. 77, Me. Rev. Stat. tit. 20, §2901.[9]

These objective and measurable requirements are available on the State's website,[10] are generally applicable, and have already been determined to satisfy the State's interest in the child's education. No arbitrary sorting of students or teachers—or mindreading—is required.

3. Equal Enjoyment of Civil Benefits Should Not Turn on Government Cognizance of Religious Viewpoint.

Arbitrary application of legal standards to exclude equal access to civil benefits on the basis of religion could be avoided if the government humbly took no cognizance of religious viewpoint when divvying up government benefits. The error of government presuming to dictate religious qualifications for equal

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[9] *See also Anderson*, 895 A.2d at 948 ("School approval criteria include either accreditation by the New England Association of Colleges and Secondary Schools, or compliance with State requirements including basic instruction in designated curriculum, certification of teachers, length of school day, and student-teacher ratios."); New England Association of Schools and Colleges Standards for Independent School Accreditation, available at https://cis.neasc.org/standards2020 (last accessed August 13, 2021); App. 78, Me. Rev. Stat. tit. 20, §2902 (setting forth state requirements for private schools approved for attendance purposes by the Department of Education).

[10] https://www.mainelegislature.org/legis/statutes/20-a/title20-Ach117sec0.html (last accessed August 13, 2021).

participation in civil society drove the founders to divorce religious preference from government:

> James Madison . . . vigorously urged the position which in our view accurately reflects the spirit and purpose of the Religion Clauses of the First Amendment. . . . 'Does not The exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right? does it [not] violate another article of the plan itself which exempts religion from the cognizance of Civil power? does it not violate justice by at once taking away a right and prohibiting a compensation for it? does it not in fine violate impartiality by shutting the door [against] the Ministers of one Religion and leaving it open for those of every other.'

McDaniel, 435 U.S. at 623 (quoting Writings of James Madison 288 (G. Hunt ed. 1904)). These questions apply equally to punishing a religious child with the privation of a civil right where the state would best honor the First Amendment by taking no cognizance of religion at all.

D. Under *Fulton*, Lack of General Applicability Triggers Strict Scrutiny.

Under *Fulton*, strict scrutiny should be applied here because Maine's law is not generally-applicable.

In *Fulton*, the question was whether the City of Philadelphia's refusal to renew its foster care contract with Catholic Social Services unless the agency agreed to certify same-sex couples violated the Free Exercise Clause of the First Amendment. 141 S. Ct. 1868 (2021). Under *Smith*, "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton*, 141 S. Ct. at 1876 (citing *Smith*, 494 U.S. at 878–882). But, in *Fulton*, because exceptions to the law could be made for non-religious reasons but were denied for religious reasons, the law was not generally applicable and *Smith* did not apply. *Id*. at 1877.

"A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877. *See also Sherbert v. Verner*, 374 U.S. 398, 401 n. 4 (1963) (unemployment benefits law was not generally applicable because the government could grant exemptions for "good cause"). *Smith* held that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Fulton*, 141 S. Ct. at 1877 (citing *Smith*, 494 U.S. at 884).

Moreover, "[a] law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. *See also Lukumi*, 508 U.S. at 524–528, 544–545 (ordinance represented as necessary to protect public health, which was "threatened by the disposal of

animal carcasses in open public places" but that did not regulate hunters' disposal of their kills or improper garbage disposal by restaurants, both of which posed a similar hazard, was not generally applicable).

1. The Maine Program is not Generally Applicable.

Although the Maine law does not, like the law in *Fulton*, vest complete discretion in a single person, it does, like the laws in *Fulton*, *Sherbert*, and *Lukumi* impose a burden on religious exercise while imposing no comparable burden on secular activity. Moreover, it rests on subjective distinctions between whether a similar activity is religious or not. This operation puts the Maine program outside of *Smith* and triggers strict scrutiny. *Fulton*, 141 S. Ct. at 1877 ("This case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable.").

Moreover, religious schools in Maine can be deemed compliant with the program—unless they fall into the exception. As the First Circuit found, "The text of § 2951(2) . . . does not, by its terms, make control by or affiliation with a religious institution determinative of a school's eligibility to receive tuition assistance payments from an SAU. Nor does the inclusion of the word "nonsectarian" in § 2951(2) in and of itself reveal that Maine must have intended to impose a solely status- rather than use-based restriction in that provision." App. 36. It is only if the State determines that a school program involves the exercise of religion that the exclusion comes into play.

The default position appears to be that any accredited private school is eligible for the tuition assistance program, which is in force in over half of the school administrative units in the state. App. 5 ("Maine faces a practical problem, however, in making good on this commitment: more than half of its 260 school administrative units ("SAUs") do not operate a public secondary school of their own."). Accordingly, it is commonplace for a private school to deliver educational services the State has committed to provide. Nor is it the case that only a small subset of schools most closely resembling public schools can act as understudies for them. App. 45 n. 9 (citing Br. for Maine School Boards Assoc. & Maine School Superintendents Assoc. at 5-9) ("Maine has long relied on private academies to fill gaps where public secondary school education is not accessible."). Rather, the millrun case is that an accredited school is eligible to participate and only a disfavored few are subject to inquiry and exclusion.

How does the State determine whether to delve into school practices, probing for religious use? It appears that schools are first identified based on religious affiliation and then subject to further inquiry, with "secular" schools automatically excused from the second level of scrutiny.

> "[I]n response to the plaintiffs' interrogatories, Commissioner Hasson stated that the Department determines if a school satisfies § 2951(2)'s "nonsectarian" requirement in the following way: In making its determination whether a particular school is in compliance with Section

> 2951, the Department considers a sectarian school to be one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith. While affiliation or association with a church or religious institution is one potential indicator of a sectarian school, it is not dispositive. The Department's focus is on what the school teaches through its curriculum and related activities, and how the material is presented.

App. 35.

This process, which invites the government to consider the particular reasons for a person's conduct by providing "'a mechanism for individualized exemptions,'" is the very definition of "not generally applicable" under *Fulton* and *Smith*. *Fulton*, 141 S. Ct. at 1878; *Smith*, 494 U.S. at 884.

2. Maine Has Not Demonstrated a Compelling Interest in Excluding a Subset of Accredited Schools from the Tuition Assistance Program.

"A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. . . . Put another way, so long as the government can achieve

its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881.

Here, the State asserts that it "uses the tuition benefit to 'ensur[e]' that the state-paid-for education at private schools . . . is 'roughly equivalent to the education [students] would receive in public schools' but cannot obtain because it is not otherwise offered." App. 29. But like in *Fulton*, where the "City states these objectives at a high level of generality, . . . the First Amendment demands a more precise analysis." *Id*. at 1881 (citations omitted).

Rather than rely on "broadly formulated interests," courts must "scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." *Id*. at 1881 (quoting *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006)). The question here, then, is not whether the State has a compelling interest in ensuring roughly equivalent education generally, but whether it has an interest in excluding some, but not all, private schools on the basis of religion. Here, Maine's long tradition of administering the tuition assistance program by allowing religious schools to participate rebuts the unsubstantiated theory that somehow now—but not before the 1980s—religious schools—but only some of them—fail to satisfy the state's interest in roughly equivalent education.

Similarly, Maine's exclusion of certain private schools is not narrowly tailored to achieve its stated interest. Even if, as the First Circuit held, education "roughly equivalent to the education students would receive in public schools" was "secular education" the Maine program apparently takes no steps to ensure

that non-religiously-affiliated—and even some religiously-affiliated—schools provide no instruction of a sectarian nature (whatever that may mean). App 36–37 ("the inquiry into whether a school is 'nonsectarian' does not turn solely on whether it is religiously affiliated or controlled but depends instead on the sectarian nature of the instruction that it will provide to tuition assistance beneficiaries."). Moreover, as the First Circuit recognized, the program as a whole is not narrowly drawn: "To be sure, by making the free benefits of public education available to children in SAUs that do not operate their own public secondary schools, Maine makes tuition assistance available to some students who might have chosen a private secular education if they lived in an SAU with a public secondary school." App. 44 –45. Nor is the exclusion of certain schools based on religious "use" narrowly drawn, by excluding secular activities, such as teaching languages, math, physical education, science classes, etc. that are presented in a religious setting while making no attempt to exclude from public schools children who seek education for a religious purpose. App. 44.

II. DIMINISHING THE LEVEL OF SCRUTINY IN RELIGIOUS USE CASES PLACES CHILDREN SEEKING NON-DISCRIMINATORY EDUCATION AT AN IMMEDIATE DISADVANTAGE.

Fundamental rights do not exist in isolation; undermining one can have unanticipated effects elsewhere—such as by precluding racial minorities from taking advantage of opportunities for educational success. This unintentional outcome flows from erecting barriers to religious schools, which in

many jurisdictions are the best or only alternative to unsatisfactory public schools.

The benefits of religious schools to closing achievement gaps has been documented for decades. As early as 1979, a study performed for the Department of Education showed that "students in Catholic high schools both learned more and had higher graduation rates than their public-school peers. Minority students in particular appeared to benefit from the Catholic school experience."[11] Follow-on studies have shown analogous results,[12] with long term benefits such as increased high school graduation rates, increased college attendance rates, and increased participation in community service.[13]

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[11] Martin R West, *Schools of Choice Expanding opportunity for urban minority students*, Education Next, at 48 (Spring 2016) (citing James S. Coleman, *High School and Beyond* (1979)).

[12] *Id.* at 50 ("Thomas Hoffer in 1987, seemed to confirm Coleman's prior findings about Catholic schools' success in boosting the achievement of minority students. (Any test-score gains for white students were modest at best.) More important, the results showed that students in Catholic schools were far less likely to drop out of school before graduating, and these positive effects were again more pronounced for black and Hispanic students. Coleman and Hoffer showed that Catholic schools had stronger disciplinary standards than public schools and that their students were more likely to take advanced courses.").

[13] Catholic School FACT Sheet, available at: https://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/upload/Catholic-Schools-FACT-Sheet-2016.pdf

"For this reason, Catholic schools have favorable effects on equity."[14, 15]

Other non-protected, but still salient, characteristics such as socio-economic status may also be favorably implicated. *Id*. This should come as no surprise for schools that approach education as a ministry. But, under the First Circuit's decision, the government can block access to demonstrated benefits and escape scrutiny for burdening racial minorities, by simply muttering "religious use" to evade not just strict scrutiny, but any scrutiny at all. By using religion to block access to education with demonstrated benefits to racial equity and economic opportunity, the state creates an unnecessary tension between fundamental rights that could support each other if only the state would stay its hand. Achieving educational equity has already been lost for generations, how many more kids must lose their chance?

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[14] William Sander, *The Effects of Catholic Schools on Religiosity, Education, and Competition*, National Center for the Study of Privatization in Education Teachers College, Columbia University (August 2001).

[15] *See also* Brief of Black Alliance for Educational Options, Hispanic Council for Reform and Educational Options, Excellent Education for Everyone, Center for Education Reform and Reason Foundation as *Amici Curiae* in Support of Appellants, *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006) (Nos. SC04-2323, SC04-2324, SC04-2325) 2004 WL 3202636 *17–19 (providing analysis and citations to studies showing that access to private schools improves racial integration, increases tolerance, and improves other civic outcomes, such as volunteering and political participation).

Moreover, government scrutiny of provider motivation sets up a perverse result for non-religious children who want to attend religious school to better their situation in life. If under a Free Exercise test that only recognizes burdens on deeply-held religious beliefs, only the "sincere" believer may pass the schoolhouse gate, the non-believer—who may most need access to that school for reasons only tangentially related to religion—is doomed.[16] This is exactly what the First Amendment protects *against*: government discrimination between religious believers and non-believers.

The process of applying a lesser standard to religious exercise claims and then using that application to ratchet down the level of scrutiny of related equal protection or due process claims is demonstrated in *Anderson v. Town of Durham*, where the Supreme Court of Maine, addressing the same tuition assistance exclusion at issue here, found no free exercise violation; and then, relying on *Locke* and *Eulitt* held that associated due process and equal protection claims need only satisfy rational basis scrutiny. 895 A.2d at 956, 959–60 citing *Eulitt ex rel. Eulitt v. Me, Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004). The religion clauses were never intended as a sword for the government's use to cut off other constitutional provisions, such as equal protection.

Compare these real-world effects to the aspirational language of *Brown v. Board of Education* to provide education to "all on equal terms." 347 U.S.

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[16] *Anderson*, 895 A.2d at 959 (constitutionally significant burden on religion only for conditioning benefits on conduct "proscribed" by faith or punishing conduct "mandated" by faith).

483, 493 (1954). As a matter of legal theory, there are differences between *Brown* and equal access to school funding. But from the perspective of the child, both reflect government action that closes off the best chance at success for some children. Heaping injury upon insult, not only is the child unequal in the eyes of the law based on religion, being excluded from neutral benefits by being labelled sectarian,[17] but is also unable to successfully argue unequal treatment by the lower level of scrutiny that the underlying religious claim imposes on other claims.

The Court should mend the inexplicable gap between religious use and status that in practice creates the wedge between children and the education they have a right to access on equal terms.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the First Circuit.

[17] Of course, here, it is not the child who bears the stigma, but the school, leaving no recourse for the child whose only personal claim is lost opportunity.

Respectfully submitted,

CYNTHIA FLEMING CRAWFORD
Counsel of Record
CASEY MATTOX
CAUSE OF ACTION INSTITUTE
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-2227
cynthia.crawford@causeofaction.org

Counsel for Amicus Curiae

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