No. 20-1088

In The Supreme Court of the United States

DAVID and AMY CARSON, as parents and next friends of O.C., and TROY and ANGELA NELSON, as parents and next friends of A.N. and R.N.,

Petitioners,

v.

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

Respondent.

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

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INTRODUCTION

Maine's strategy for defending its sectarian exclusion is this: redefine the benefit in the tuition assistance program as a "public education" and—*voila!*—no more discrimination. *E.g.*, Resp't's Br. 19, 22-25. The state insists that private schools participating in the program—including private schools in Vermont, Michigan, New Hampshire, Pennsylvania, Connecticut, Virginia, Massachusetts, and California, *see* Stipulated Record Ex. 2, at 11 (ECF 24-2)—are part of "Maine's public education system." Resp't's Br. 1, 31, 32. It insists that the students who attend those schools receive a "public education." *See* Resp't's Br. 19, 22-34. And because public education and the public education system must be secular, the argument goes, participating private schools must be secular. *E.g.*, Resp't's Br. 19-20.

Jacqueline Bouvier Kennedy, Gloria Vanderbilt, and Princess Anastasia of Greece and Denmark did not receive a Maine "public education" at Miss Porter's. The Cate School in California is not part of the "public education system" of a state 3,000 miles away. No, these and the many other private schools that have participated in the tuition assistance program are just that—private—and they provide a private education.

While Maine now swears that the program does *not* offer private alternatives to public schools—that it "is not a school choice program," Resp't's Br. 22—the state tells the opposite to families interested in using the program. The Department of Education's website,

as well as Maine's statutes, consistently refer to the program as providing "school choice." *E.g.*, Me. Dep't Educ., *Approval for Receipt of Public Funds by Private Schools*, https://www.maine.gov/doe/funding/reports/tuition/year-end-private/eligibility; Me. Stat. tit. 20-A, § 2951(6)(D); *id.* § 1451(7); *id.* § 1479(4).

Despite Maine's efforts to recast this case, it is not about whether public education, or the public education system, must remain secular. It is about whether a state—in providing tuition assistance that families may use at the private (or public) school of their choice—can bar a family's choice of private school simply because that school "presents the material taught through the lens of . . . faith." Pet. App. 35. The answer to that question—the actual question in this case—is "No."

ARGUMENT

I. The Sectarian Exclusion Violates The Free Exercise Clause.

Maine's sectarian exclusion violates the Free Exercise Clause. The state offers a host of arguments to try to save the exclusion, but each one fails. First, the benefit at issue is not, as Maine contends, a "free public education"; it is tuition to use at the public *or private* school of a parent's choice. Second, the sectarian exclusion does not decline to subsidize free exercise rights, as Maine contends—it penalizes them. Third, the supposed "status/use distinction" cannot shield the

exclusion from meaningful scrutiny, as Maine argues; the exclusion must get strict scrutiny. And fourth, despite Maine's efforts to save it, the exclusion cannot survive such scrutiny.

A. The Benefit In Question Is Not A Free Public Education.

Maine is correct when it stresses the need "to carefully define the benefit at issue" in this case. Resp't's Br. 22. Unfortunately, it does not exercise the care it urges.

A good place to start in "carefully defin[ing] the benefit at issue" is the statute defining the benefit at issue. Here, it is quite clear: "tuition . . . at the public school or the approved private school of the parent's choice at which the student is accepted." Me. Stat. tit. 20-A, § 5204(4). *That* is the benefit at issue.

Maine, however, ignores the statute and baldly asserts that the benefit is instead a "free public education." Resp't's Br. i, 1-2, 22. While the benefit can be *used* for a free public education (by choosing to use it at a public school), that is not what the benefit is. The benefit is tuition—tuition that may be used at a public *or private* school.

The private schools that participate in the program, meanwhile, are not part of the state's "public education system," as Maine also contends. Resp't's Br. 1, 9, 18-20. They are private, and they remain so. Unlike public schools, they are not subject to the

Establishment Clause and its command of secularity in public education. Accordingly, there is no basis for Maine's assertion that excluding "sectarian" private schools is a permissible means of "maintain[ing] a secular public education system." Resp't's Br. 20.

Faced with this fact, Maine pretends that the education *provided* at participating private schools is a "free public education." It certainly is not "free." Participating private schools can (and do) charge students far more than the amount of the tuition benefit—tens of thousands of dollars more. Pet'rs' Br. 20-21; Resp't's Br. 32; Miss Porter's School, *Tuition and Fees for the 2021-2022 School Year*, https://www.porters.org/affordability/ (listing tuition as $66,400).

Nor, for that matter, is it a "public" education. After all, participating private schools:

- need not adhere to any of the curriculum requirements applicable to Maine's public schools, Resp't's Br. 32, Pet'rs' Br. 20;[1]

[1] Maine insists that focusing on the lack of curricular requirements "misses the point," because "the legislature determined that the academic components of accreditation for nonsectarian schools are enough like the state curriculum requirements to make an accredited school an appropriate substitute for a public school." Resp't's Br. 32. But the accrediting entity, the New England Association of Schools and Colleges (NEASC), has *no* curriculum requirements for accreditation; rather, it assesses *how* a school implements whatever curriculum it follows. NEASC, *Standards—20/20 Process*, https://cis.neasc.org/standards2020 (standards and indicators for independent school accreditation). Moreover, NEASC accredits religious schools, including Bangor Christian. J.A. 80, ¶ 72.

- need not follow the same anti-discrimination requirements that Maine's public schools must follow, *e.g.*, Me. Stat. tit. 5, § 4553(2-A) (exempting single-sex private, but not public, schools from the definition of "educational institution" under the Maine Human Rights Act); and
- need not hire state-certified teachers, as Maine's public schools must do, *compare* Me. Stat tit. 20-A, § 13003(1), *with* § 13003(3).

In fact, so long as they do not provide religious instruction, participating private schools may be owned and operated by religious organizations and orders. Resp't's Br. 20, 36. Needless to say, Maine's public schools may not.

In other words, when Maine says the program provides a "free public education," it means *any* education—public or private, free or costly, taught by any teacher covering any curriculum—*so long as it is devoid of religion.* But this simply redefines the benefit to align with the state's desire to discriminate—a trick this Court has regularly rejected. *E.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (holding a state may not define a right deliberately narrowly to justify its denial of that right to the excluded class); *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (holding a "benefit . . . cannot be defined in a way that effectively denies otherwise qualified . . . individuals the meaningful access to which they are entitled").

Allowing Maine to elude the Free Exercise Clause by redefining the benefit as a "public education" (read:

education free from religion) would be akin to allowing the government in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board*, 450 U.S. 707 (1981), to elude the Free Exercise Clause by redefining the benefit there as unemployment compensation for workers who lost their jobs for non-religious reasons. Antidiscrimination protections would "be emptied of meaning" if a "discriminatory policy" could be "collapsed into one's definition of . . . the relevant benefit." *Choate*, 469 U.S. at 301 n.21 (internal quotation marks omitted).

This Court should not allow Maine to justify facial discrimination against religion by recasting the tuition assistance benefit as something it isn't, or participating private schools as something they aren't.

B. The Exclusion Penalizes Free Exercise Rights.

Maine's next tack is to argue that the sectarian exclusion "does not penalize the free exercise of religion," but "merely refus[es] to subsidize" it. Resp't's Br. 21-22.[2] Just as the state attempted to recast the

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[2] Maine's assertion that it has "merely chosen not to fund a distinct category of instruction"—religious instruction—is untenable. Resp't's Br. 35 (quoting *Locke v. Davey*, 540 U.S. 712, 720-21 (2004)). The exclusion, after all, bars a student's chosen school *in its entirety*—including its secular curriculum—if it teaches even a single religion class. Moreover, the exclusion bars schools that teach *only* secular subjects if they do so "through the lens of . . . faith." Stipulated Record Ex. 3, at 5; *see also* Resp't's Br. 45 n.4 (stating there is no "reason to suggest" that "religious

relevant benefit, it attempts to recast Petitioners' argument as seeking a "constitutional right to attend sectarian schools at public expense." Resp't's Br. 2.

Petitioners seek nothing of the sort. Rather, they assert a right to not be denied a benefit—one they are statutorily (not constitutionally) entitled to—based on religion. *Compare Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) ("A State need not subsidize private education."), *with id.* ("But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."). "It is too late in the day to doubt that the libert[y] of religion . . . may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 U.S. at 404. It is also too late in the day to doubt that the denial of a benefit is a "penalty." This Court has "long explained [that] the government 'penalize[s] religious activity' whenever it denies to religious persons an 'equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988)).

Yet that is precisely what Maine's exclusion does. Parents have the right "to direct 'the religious upbringing' of their children," and "[m]any parents exercise that right by sending their children to religious schools." *Id.* at 2261 (majority opinion) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972)). The

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inculcation can be separated from the study of the core high school curriculum").

sectarian exclusion "penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason." *Id.*

The United States makes arguments similar to Maine's, and they are similarly unavailing. *See* Br. Amicus United States 9-26. It urges this Court to draw upon free speech jurisprudence—specifically, *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983)—in which the Court held that government's mere refusal to subsidize speech is not a penalty and, thus, not a constitutional violation. *Rust* and *Regan* have no application—directly or by analogy—to this case.

In *Rust*, doctors challenged provisions in a family-planning grant program that restricted use of the funds to "preconceptional counseling, education, and general reproductive health care." *Rust*, 500 U.S. at 179. Use of the funds for all other purposes, including abortion counseling, was prohibited. *Id.* But grant recipients could still engage in abortion counseling, so long as they did not use the grants to do so. They "simply [were] required to conduct those activities through programs . . . separate and independent from the project that receive[d] [the] funds." *Id.* at 196.

This Court rejected the doctors' challenge, holding that the program and its restrictions reflected a governmental "value judgment favoring childbirth over abortion." *Id.* at 192 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)). It was "not the case of a general law

singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* 194-95. As the Court later explained, the grant-funded "counseling activities . . . amounted to governmental speech," and "viewpoint-based funding decisions can be sustained" when governmental speech is involved. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

Unlike the program in *Rust*, the tuition assistance program does not involve governmental speech. It does not provide funds to promote a particular governmental message, from a particular governmental viewpoint, to the exclusion of all other messages and viewpoints. Indeed, no "reasonable and fully informed observer" would believe that a program that provides funds for *private* individuals to use at *private* schools based on *private* parental choice—and that imposes *no* curricular requirements on those private schools—is an "expression [of] government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring); *cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) ("[N]o reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private

individuals, carries with it the *imprimatur* of government endorsement.").[3]

Rather, the program funds families, and families may use the funds to select the public or private school of *their* choice—schools that provide a diversity of messages, from a diversity of viewpoints, with only one (religion) excluded. In that respect, this case is more akin to *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), and *Lamb's Chapel v. Central Moriches Union Free School District*, 508 U.S. 384 (1993), in which this Court forbade government from excluding religious messages and viewpoints alone from generally available public benefit programs.

Moreover, unlike the regulations in *Rust*, which did not require doctors to choose between their free speech rights and the government grant, *Rust*, 500 U.S at 181, 196, Maine's exclusion forces parents to choose between their free exercise rights and the tuition benefit. Maine and the United States disagree, asserting that students who participate in the program "can still obtain meaningful religious instruction through

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[3] Even if the program and exclusion *were* governmental speech, the exclusion would still be unconstitutional, because "government speech must comport with the Establishment Clause," *Pleasant Grove City*, 555 U.S. at 468, which prohibits expressions of "hostility to religion." *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963). In other words, if the exclusion truly is a governmental "value judgment" as in *Rust*—one favoring secular education over religious education—it is a value judgment the Establishment Clause prohibits.

afterschool, Saturday, and Sunday programs," Br. Amicus United States 25, as well as "bible study groups." Resp't's Br. 41. This argument is both insulting (it is not for government to tell parents what religious instruction is "meaningful" for their children) and misguided. It ignores the nature of both the benefit (a publicly funded secondary education) and the excluded religious activity (a secondary education at a sectarian school). A student cannot have both; it is one or the other.[4] To claim otherwise, the United States and Maine must pretend that a Sunday school class, afterschool program, or weekly Bible study is the equivalent of a secondary education. It is not equivalent in the eyes of parents exercising their constitutional right to choose a religious school for their child, and it is not equivalent in the eyes of Maine, which would never recognize those activities as satisfying the state's compulsory education law.

Like *Rust*, *Regan* is also inapplicable. There, a nonprofit organization argued that the federal prohibition on substantial lobbying activity by Section 501(c)(3) organizations "imposes an 'unconstitutional condition' on the receipt of tax-deductible contributions." *Regan*, 461 U.S. at 545. This Court rejected the challenge, holding that the restriction did "not deny [the organization] the right to receive deductible

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[4] In this respect, Maine's exclusion is also unlike the exclusion in *Locke*. There, Joshua Davey could pursue both the benefit (a publicly funded postsecondary education) *and* the excluded religious activity (a postsecondary education in devotional theology). *Locke*, 540 U.S. at 721 n.4.

contributions to support its non-lobbying activity, nor d[id] it deny [the organization] any independent benefit on account of its intention to lobby." *Id.* Instead, by adopting the common "dual structure," the organization could "obtain tax deductible contributions for its non-lobbying activity" under Section 501(c)(3), while also "qualify[ing] for a tax exemption under § 501(c)(4)" for its lobbying activities. *Id.* at 544. In other words, it could receive the government benefit *and* exercise its constitutional right to lobby.

Again, that is not an option here, where parents must choose between receipt of the public benefit and their constitutional right to select a religious school for their child. Some families, like the Nelsons, will choose the benefit out of financial necessity; others, like the Carsons, will choose the constitutional right. But *no* family can choose both.

C. A "Status/Use Distinction" Cannot Shield The Exclusion.

In *Espinoza*, immediately after holding that strict scrutiny applied to Montana's status-based exclusion, this Court stressed that nothing in its opinion was "meant to suggest . . . that some lesser degree of scrutiny applies to discrimination against religious *uses* of government aid." *Espinoza*, 140 S. Ct. at 2257 (emphasis added). Yet, here, Maine argues that the Free Exercise Clause is not even "implicated" when government "denies a benefit based on the religious use to which the benefit will be put." Resp't's Br. 20. In other words,

Maine's view is that *no* scrutiny is warranted. That cannot be the law.

Nor are religious "status" and "use" the mutually exclusive categories that Maine suggests. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *see also* Pet'rs' Br. 31-34. This Court has rejected similar attempts to avoid meaningful scrutiny in other discrimination contexts, and it should do so here. *E.g.*, *Christian Legal Soc'y Chapter v. Martinez*, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct in th[e] context [of sexual orientation]."). As Amicus Defense of Freedom Institute shows, "a status/use dichotomy for religious discrimination is irreconcilable with antidiscrimination jurisprudence more generally," including jurisprudence regarding sexual orientation, race, sex, and marital status. Br. Amicus Defense of Freedom Institute 9-11.

Of course, none of this is meant to suggest that government can *never* draw religion-based distinctions. It simply means that government cannot escape strict scrutiny—or, as Maine would have it, *any* scrutiny—by insisting that its discrimination falls in the "use," rather than "status," box. In other words, discrimination based on religion gets strict scrutiny—period.

D. The Exclusion Fails Strict Scrutiny.

The exclusion cannot survive such scrutiny. It is neither supported by a compelling governmental interest, nor narrowly tailored to any such interest.

1. There Is No Compelling Governmental Interest For The Exclusion.

Maine has no compelling interest for the sectarian exclusion. The actual justification for it is a Maine Attorney General opinion that excluding religious options is necessary to avoid an Establishment Clause violation. *See* Pet'rs' Br. 36-38; *see also* Resp't's Br. 8, 41; Br. Amicus United States 27. That conclusion was wrong, *see Zelman*, 536 U.S. at 662-63, and reliance on an erroneous constitutional interpretation is not a compelling governmental interest.

Maine seems to recognize as much and so offers another justification: It repeatedly invokes a generic interest in "public education" and the "public education system," as if those things carry with them some talismanic quality that can legitimize government discrimination against families who desire religious educational options. "Where fundamental claims of religious freedom are at stake," this Court has refused to accept "sweeping claim[s]" of a governmental interest in education as justification for the law. *Yoder*, 406 U.S. at 221.

Moreover, any interest in providing for public education is, at most, justification for the state's *inclusion*

of *public* schools in the tuition assistance program. It is no justification for the *exclusion* of religion from *private* schools in the program. Affording parents the choice of religious options, alongside the non-religious private options Maine already offers, would not undermine the state's commitment to public education.

In arguing otherwise, Maine insists it is rare among the states in its *reason* for providing private-school options, claiming it offers them "as a substitute" for insufficient public-school opportunities. Resp't's Br. 35; BIO 18. Yet Maine is hardly unique in that regard. Many states, for example, have school choice programs that offer private-school options to children in failing public schools; the program in *Zelman* was one. Such programs could equally be described as providing private options as a "substitute" for insufficient public-school opportunities and, under Maine's logic, a state would be perfectly warranted in excluding religious options from them. For that matter, under Maine's reasoning, the Montana Department of Revenue could end-run *Espinoza* by simply describing the scholarship program there as "a substitute for public schools." Presumably, this Court did not intend such a flimsy holding with such an easy workaround.

Maine next appeals to history, which, it contends, supports the state's claim to a compelling interest. "[A]t the time of the adoption of the Constitution," Maine argues, "the authors would not have supported requiring public funding of religious instruction in the guise of a public education." Resp't's Br. 39. The state immediately hedges on that claim, however, asserting

that "[p]ublic education, to the extent that it existed and in the form that it existed at an earlier point in history, is in no way comparable to the public education of today." Resp't's Br. 39. Maine is trying to have it both ways, saying, in effect, "There is *no way* the Founders would have countenanced public funding of religious education. And the reason they *did* countenance it was because things were different back then."

While Maine wants the best of both (supposedly secular) worlds, it cannot have either. First, federal, state, and local governments—including Maine itself—*commonly* funded religious education in the founding era and early 19th century, as this Court, Petitioners, and amicus Professor Charles Glenn have all documented. *Espinoza*, 140 S. Ct. at 2258; Pet'rs' Br. 40-41; Br. Amicus Charles L. Glenn. "[I]n the early Republic, 'there was no such thing as a secular school; all schools used curriculum that was embued with religion.'" *Id.* at 3 (quoting Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2171 (2003)).

And Maine's attempt to distinguish the past fares no better, because under *Locke* and *Espinoza*, the founding era *is* the temporal touchstone for assessing the state's asserted interest in excluding religion. *Locke*, 540 U.S. at 722-23; *Espinoza*, 140 S. Ct. at 2258-59 & n.3. There cannot be a historical interest in excluding religious options from a program that operates on private choice when even *direct* government

funding of religious education was the norm at the founding.

Finally, Maine enlists "diversity" and "tolerance" to help support the exclusion. Resp't's Br. 42. The argument is essentially this: "In order to promote the diversity and tolerance reflected in our public schools, we must exclude religious private schools and the parents who would choose them."

Apart from the obvious illogic of this discriminate-to-promote-diversity argument, there is a disturbing implication underlying it: that religious schools do not contribute to the "melting pot" and do not "promote[] tolerance and acceptance." Resp't's Br. 43. In fact, Maine's position on this point is puzzling: The state lets the most elite, selective prep schools in the nation participate in the tuition assistance program, but it excludes religious schools, which have long educated poor, minority students who could not find educational opportunity elsewhere. *See* Pet'rs' Br. 52-54.

Maine's argument also rests on a false premise: that public schools are bastions of tolerance and diversity. Public schooling in this nation historically has been plagued by bigotry and hostility toward minorities, including religious minorities. *See Espinoza*, 140 S. Ct. at 2259; *id.* at 2267-74 (Alito, J., concurring); Br. Amicus Professor Ashley R. Berner Br. 6-9. In many ways, public schooling can still be hostile to such minorities—sometimes tacitly, sometime intentionally. *Id.* at 3-4, 15-17; Br. Amicus Cato Institute 8-16. If Maine were truly concerned with diversity, it would

adopt a pluralistic approach to education like that which "prevailed in the beginning of our nation's history and succeeds today in other modern democracies." Br. Amicus Professor Ashley R. Berner 17. Instead, it discriminates.

Maine has no compelling—or any—interest for its discrimination. Its assertion of a generic interest in "public education" or the "public education system" does not justify a law that infringes fundamental religious freedoms. And the state's appeal to the history of public schools and the diversity supposedly found there fares no better. Because the state does not have a compelling interest for the exclusion, it is unconstitutional.

2. The Exclusion Is Not Narrowly Tailored.

But even if Maine did have the compelling interest it claims, the sectarian exclusion still could not survive scrutiny, because it is not narrowly tailored to that interest. Religious schools such as Bangor Christian and Temple Academy satisfy every secular requirement to participate in the tuition assistance program, to comply with Maine's compulsory education law, and thus to serve as an adequate alternative to a public school. Pet'rs' Br. 3, 6-7 & nn.1, 3; Pet. App. 7-9. Excluding such schools from the program simply because they also teach religion is thus irrational: It does nothing to further the state's purported interest in ensuring that

students receive an adequate substitute for a public-school education.

Maine insists, however, that it "has tailored its tuition program narrowly to exclude only that which in substance is *wholly inconsistent* with a public education." Resp't's Br. 20 (emphasis added). If Maine were correct that religious instruction is the "only" thing inconsistent with a public education, then that would mean that other characteristics, which the state *allows* in participating private schools, would be *consistent* with a public education—for example:

- tuition to the tune of $66,400 per year;
- discrimination based on sex;
- a complete lack of curricular oversight and accountability;
- non-certified teachers; and
- ownership and control by religious organizations.

Obviously, these characteristics are not the hallmarks of a public education, and Maine would not countenance them in its public schools. The state's claim that expunging religion is the "only" thing that needs to happen to make a private school part of the "public education system" is absurd.

In this light, the tuition assistance program is at once under- and overinclusive. If the purported government interest is providing a substitute for a public education, then the program is: (1) underinclusive in its *exclusion* of religious private schools, which

unquestionably provide an adequate substitute for a public education; and (2) overinclusive in its *inclusion* of private schools that are unlike public schools in countless respects. This utter lack of tailoring demonstrates that Maine is really just determined to ensure that religion is not a choice among the limitless other in-state, out-of-state, and international private options that students may select. The exclusion, in other words, reflects a naked disfavor of religion, and a naked disfavor of religion cannot satisfy strict scrutiny.[5]

II. The Sectarian Exclusion Violates The Establishment Clause.

As Petitioners demonstrated in their opening brief, Maine's exclusion also violates the Establishment Clause under any test this Court may apply. It lacks the neutrality demanded by *Zelman*. It fails any test that "looks to history for guidance." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019)

[5] The United States' suggestion that religious exclusions in various federal programs will fall if this Court rules for Petitioners is baseless. *See* Br. Amicus United States 19-21. The examples it cites involve programs that provide aid directly to institutions—not programs that, like Maine's, provide aid to individuals and operate on the "genuine and independent choices of [those] private individuals." *Zelman*, 536 U.S. at 649. In true private choice programs, "the link between government funds and [sectarian education]" is "broken by the independent and private choice of recipients." *Locke*, 540 U.S. at 719. By contrast, the absence of intermediating private choice in direct institutional aid programs may make religious exclusions more defensible in that context.

(plurality opinion). And it comes up short under *Lemon*, as well.

What does Maine say in response? As for *Zelman*, the state (astoundingly) insists that excluding "sectarian" options *is* "religiously neutral." Resp't's Br. 48. This warrants no response.

As for a test that looks to history, Maine says . . . nothing.

As for *Lemon*, Maine insists that the exclusion "serves a secular purpose," Resp't's Br. 48, even though it classifies squarely along religious lines. Maine likewise insists that the exclusion does not inhibit religion, despite its having forced the Nelsons to forgo a religious education for their children, and despite its having forced at least one religious high school in the state to shed its religiosity. *See* Pet'rs' Br. 6, 46-47. Finally, Maine insists that the exclusion does not foster excessive entanglement with religion because schools "generally" self-identify as sectarian or not, Resp't's Br. 49—this, notwithstanding the fact Cardigan Mountain School, which self-identified as non-sectarian, was only allowed to participate after a four-month inquiry into the school's religiosity, and despite the fact that the Kent School, which also self-identified as non-sectarian, was barred from the tuition assistance program altogether. Pet'rs' Br. 48, 49-50 n.11.

The United States, meanwhile, maintains that Maine's inquiry into the sectarian nature of schools is not problematic because it "mirrors—and is no more entangling than—the inquiry under the 'ministerial

exception.'" Br. Amicus United States 32. What the United States fails to recognize is that the inquiry in ministerial exception cases is undertaken (by a court) to protect free exercise rights. In Maine, it is undertaken (by bureaucrats) to abridge them.

In short, under no test that this Court might apply can Maine's sectarian exclusion withstand scrutiny under the Establishment Clause.

III. The Sectarian Exclusion Violates The Equal Protection Clause.

Maine's exclusion violates the Equal Protection Clause, as well. In arguing otherwise, Maine again recasts the benefit at issue as "a free public education," Resp't's Br. 45, by which Maine really means *any* education—whether or not free, whether or not public—so long as it is not religious. "[A]n equal protection mode of analysis," however, requires "survey[ing] meticulously the circumstances of governmental categories to eliminate [such] religious gerrymanders." *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring); *see also Lukumi*, 508 U.S. at 534.

Maine, as well as the United States, also recasts the very nature of Petitioners' equal protection claim. According to both, Petitioners' claim is merely the assertion of a constitutional right "to public funding for any private school of their choice." Resp't's Br. 46; *see also* Br. Amicus United States 34. But that is not Petitioners' claim. After all, they already have a *statutory* right to public funding for the "private school of [their]

choice" . . . provided it is not religious. Me. Stat. tit. 20-A, § 5204(4). Their equal protection claim simply challenges the denial of this statutory right on the basis of religion.

Finally, Maine and the United States ignore the historical evidence demonstrating the concern the Fourteenth Amendment's framers had for protecting access to education, particularly religious education. *See* Pet'rs' Br. 52-54. This Court should not ignore that history, but rather honor it.

IV. Petitioners Have Standing.

Just as Maine's argument on the merits depends on recasting the benefit at issue, its argument on standing depends on recasting the injury at issue. The state argues that invalidating the exclusion will not necessarily redress Petitioners' injury, because it is not certain that Bangor Christian and Temple Academy would participate in the tuition assistance program. But the injury is not simply the inability to attend Bangor Christian or Temple Academy. As the First Circuit correctly recognized, Petitioners' injury "inheres in their having lost the *opportunity* to find religious secondary education for their children" under the program. Pet. App. 17 (emphasis added) (internal quotation marks omitted). "[I]nvalidation of [the] 'nonsectarian' requirement would restore [this] now non-existent *opportunity* to *find* religious education," making it "not merely likely that the relief that [Petitioners] seek would redress their injury," but "certain

that it would." Pet. App. 18-19 (second emphasis added).

In arguing otherwise, Maine cites a handful of this Court's opinions for the proposition that "plaintiffs lack[] standing when their ability to obtain relief depend[s] on the actions of a third-party and it [i]s speculative as to whether a favorable ruling would result in any relief." Resp't's Br. 52. Yet the First Circuit considered every one of those opinions and correctly determined that they had no bearing on this case because: (1) they "did not involve—as this one does—an injury in fact that inhered in a lost opportunity to seek a government benefit," (2) "[n]or did they involve—as this one does—an injury in fact traceable to the challenged governmental action." Pet. App. 19. Maine does not even attempt to dispute these differences.

Meanwhile, those twin features *were* present, the First Circuit noted, in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), where this Court held that "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.* at 666. "The 'injury in fact,' " in that case, "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.*; *see also Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718

(2007) (holding parents had standing to challenge race-based high school assignment plan where the injury asserted was that their children "*may* be denied admission to the high schools of their choice when they apply for those schools in the future" (emphasis added) (internal quotation marks omitted)).

This means that questions regarding the willingness of schools to participate in the program in light of Maine's antidiscrimination laws are beside the point. Right now, parents are categorically barred from pursuing any religious options. Maine's argument, in essence, is that the Maine Human Rights Act (MHRA) may dissuade some (but not all[6]) religious schools from participating in the program even in the absence of that bar. *See* Resp't's Br. 51, 53-54. Perhaps this is true; perhaps not.[7] Either way, Petitioners' injury is their

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[6] The Kent School was excluded because the state deemed it "sectarian," Stipulated Record Ex. 2, at 12, even though it does "not tolerate discrimination against students or employees based on," among other grounds, "religious creed," "sex," "sexual orientation," and "gender identity." Kent School, *Welcome from Old Main*, https://www.kent-school.edu/admissions.

[7] More likely not. Maine's argument overlooks substantial religious exemptions in the MHRA. *E.g.*, Me. Stat. tit. 5, § 4573-A(2) (allowing a religious organization to require its employees to conform to the organization's religious tenets). Even the recent MHRA amendment that Maine cites, *see* Resp't's Br. 54—which took effect one-and-a-half months after Petitioners filed their opening brief—contains a religious exemption, the scope of which is yet unresolved. *Compare* Me. Stat. tit. 5, § 4602(5)(C) (providing exemption for religious schools that "do[ ] not receive public funding"), *with id.* tit. 20-A, § 1(23-B) (stating that a high school is not "publicly supported" unless it "enrolls 60% or more publicly funded students"). And as the First Circuit recognized, whether

inability to *seek out* religious options—to even *ask* religious schools to participate in the program. Right now, they are denied that ability for no better reason than that the state disfavors religion. That is unconstitutional, and this Court should say as much.

CONCLUSION

For these reasons, this Court should reverse.

Respectfully submitted,

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Maine *could* condition religious schools' participation on MHRA compliance is unclear given the "potentially fact-dependent free exercise concerns that might then arise." Pet. App. 18 (citing *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020)).

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