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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QUESTION PRESENTED

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

The question presented is:

Does a state violate the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or "sectarian," instruction?

PARTIES TO THE PROCEEDING

The Petitioners, who were the appellants in the United States Court of Appeals for the First Circuit, are David and Amy Carson, as parents and next friends of O.C., and Troy and Angela Nelson, as parents and next friends of A.N. and R.N. The Respondent, who was the appellee in the First Circuit, is A. Pender Makin, in her official capacity as Commissioner of the Maine Department of Education.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

Page

CODES, STATUTES, AND RULES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

INTRODUCTION

In the 19th century, Maine's public schools expelled students for adhering to their faith. *See Donahoe v. Richards*, 38 Me. 376, 377-78 (1854) (upholding expulsion of Catholic student for refusing to engage in Protestant religious exercises). Today, the state denies benefits to students if they attend *private* schools that align with their faith. The times are different, but the result is the same: denial of educational opportunity through religious discrimination.

In this case, the First Circuit gave its imprimatur to Maine's discrimination. It upheld the state's exclusion of so-called "sectarian" options from a tuition assistance program that allows high school students to attend the private or public school of their choice.

The First Circuit recognized that this Court's precedents foreclose discrimination based on religious "status," or identity, in public benefit programs. In its view, however, Maine's exclusion does not turn on the religious *status* of the excluded schools, but rather on the religious *use* to which a student's tuition benefit might be put—namely, religious instruction. Such discrimination, it held, is constitutionally permissible.

The First Circuit claimed cover for its "use/status distinction" in this Court's precedent, but there is no basis for it. Discrimination is discrimination, whether the government claims to target those who *are* religious or those who *do* religious things.

OPINIONS BELOW

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

JURISDICTION

The First Circuit entered judgment on October 29, 2020. The petition was timely filed on February 4, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

STATEMENT OF THE CASE

A. Maine's Tuition Assistance Program

Maine has a tuition assistance program for all students who live in school administrative units ("school districts") that neither operate their own secondary school nor contract with a particular private or public secondary school for the education of their resident secondary students. Under the program, such school districts must pay tuition, up to a statutory limit, "at the public school or the approved private school of the parent's choice at which the student is accepted." Me. Stat. tit. 20-A, § 5204(4); *see also id.* §§ 5805, 5806.

To participate in the tuition assistance program, a private secondary school must meet the requirements of "basic school approval" for attendance purposes and, thus, Maine's compulsory education law. *Id.* § 2951(1); *see also id.* §§ 2901, 5001-A(3)(A); Pet. App. 7. To satisfy those requirements, a school must either: (1) be "[c]urrently accredited by a New England association of schools and colleges," Me. Stat. tit. 20-A, § 2901(2)(A); or (2) demonstrate compliance with certain state requirements, including certain state curricular requirements, *id.* §§ 2901(2)(B), 2902(3).[1]

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[1] The state curricular requirements for a school following the second path to basic school approval include some of the curricular requirements applicable to public schools and school districts. *See* Me. Stat. tit. 20-A, § 2902(3); Pet. App. 7-8. For a school following the first path (accreditation), there are no state curricular requirements for basic school approval. *See* Me. Stat. tit. 20-A, § 2901(2)(A); Stipulated Record Ex. 2, at 7-8 (ECF 24-2). And once a private school obtains basic school approval, there are no other

Participating families may send their children to schools inside or outside the state. *Id.* § 2951(3). School districts, for example, have paid for students to attend Avon Old Farms, the Taft School, Miss Porter's, and other elite prep schools around New England and, indeed, the country. *See* Stipulated Record Ex. 2, at 11 (ECF 24-2). Parents may even send their children to schools in other countries. Me. Stat. tit. 20-A, § 5808.

But parents may not choose schools that Maine deems "sectarian." Before 1980, parents *could* choose such schools, and hundreds of students attended them annually under the program. J.A. 72 ¶ 19. But the state barred sectarian options after the Maine Attorney General, in 1980, opined that including them as a choice in the program violated the federal Establishment Clause. Me. Op. Att'y Gen. No. 80-2 (1980) (J.A. 35-68). The legislature codified this bar in a statute providing that a student's chosen school must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." 1981 Me. Laws 2177 (codified at Me. Stat. tit. 20-A, § 2951(2)).[2]

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curricular requirements for the school to participate in the tuition assistance program, unless 60 percent or more of its students receive funding under the program. *See* Me. Stat. tit. 20-A, § 2951(6); Stipulated Record Ex. 2, at 9.

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

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

B. The Effects of the Sectarian Exclusion

Maine's sectarian exclusion discriminates against families who are eligible for the tuition assistance program and believe that a religious education is the best option for their child. The exclusion forces such families to choose between a public benefit to which they

are entitled and their right to send their child to a religious school.

The Nelsons, for example, use the tuition assistance benefit to send their sophomore son (and previously used it to send their recently graduated daughter) to Erskine Academy, a secular private high school. However, they believe that Temple Academy, a school that "aligns with their sincerely held religious beliefs" and that their son attended at the elementary level, is the best choice for their family. Pet. App. 9 (internal quotation marks omitted); J.A. 78-79 ¶¶ 62-65. Temple is fully accredited by the New England Association of Schools and Colleges and is "recognized by the [D]epartment as providing equivalent instruction" in satisfaction of Maine's compulsory education law. J.A. 90 ¶¶ 131, 132; Pet. App. 9; Me. Stat. tit. 20-A, § 5001-A(3)(A)(1)(b).[3] Temple, however, is deemed a "sectarian" school; it operates from "a thoroughly Christian and Biblical world view" and provides a "biblically-integrated education." J.A. 90, 92, 96 ¶¶ 130, 144, 164. For that reason, it cannot be approved for tuition assistance purposes. Pet. App. 10; J.A. 90 ¶ 130. Because the Nelsons cannot afford to forgo the tuition assistance benefit, Pet. App. 9, they have had to forgo the school that would best meet their children's educational needs and best align with their family's beliefs.

The Carsons, meanwhile, sent their daughter to Bangor Christian School, a private, nonprofit school.

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[3] Temple also meets the requirements for basic school approval but has not yet sought approval. Pet. App. 44.

Pet. App. 8; J.A. 74 ¶ 27.[4] They selected Bangor Christian "because the school's Christian worldview aligns with their sincerely held religious beliefs and because of the school's high academic standards." J.A. 74 ¶ 29. Bangor Christian is fully accredited by the New England Association of Schools and Colleges and approved for basic school approval purposes; it thus satisfies Maine's compulsory education law. J.A. 80 ¶¶ 72-73; Pet. App. 8; Me. Stat. tit. 20-A, § 5001-A(3)(A)(1)(a). But because the school is "sectarian," "instilling a Biblical worldview in its students" and "intertwin[ing]" religious instruction with its curriculum, it cannot be approved for tuition assistance purposes. Pet. App. 10 (internal quotation marks omitted); *see also* J.A. 80 ¶ 68. As a result, the Carsons had to pay their daughter's tuition out-of-pocket, even though she was entitled to the tuition assistance benefit. J.A. 74 ¶ 30.

In short, because of the sectarian exclusion, families must either forgo an education benefit to which they are entitled, as in the Carsons' case, or resign themselves to using the benefit at a school that will not best meet their child's needs, as in the Nelsons' case.

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[4] The Carsons' daughter recently graduated. That is no obstacle to their petition, because the Nelsons' son is still eligible for the tuition assistance program and injured by its sectarian exclusion. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

C. The Legal History of the Exclusion

Before this case, Maine's sectarian exclusion had been challenged twice in federal court—in the 1990s and again in the early 2000s. The First Circuit upheld the exclusion in both instances.[5]

The first of these challenges was *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999). *Strout* was filed in 1997, on the heels of a trilogy of decisions from this Court that had upheld the inclusion of religious options (alongside non-religious ones) in student-aid programs. *See Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). Despite those decisions, the First Circuit upheld Maine's sectarian exclusion, rejecting the plaintiffs' free exercise and equal protection claims and holding that the Establishment Clause *required* the exclusion to "avoid[] an entangled church and state." *Strout*, 178 F.3d at 61.

The second challenge was *Eulitt ex rel. Eulitt v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004). *Eulitt* was filed in the wake of this Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which had held that the inclusion of religious (alongside non-religious) options in a tuition assistance program is permissible under the Establishment Clause. Although the First Circuit recognized that its earlier

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[5] It was also challenged and upheld twice in state court. *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999); *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006).

decision in *Strout* had been "call[ed] into legitimate question" by *Zelman*, the court held that a student's "free exercise rights are not implicated" by the state's exclusion of religious options. *Eulitt*, 386 F.3d at 349, 350, 356.

D. This Action

The present action was filed in the wake of yet another of this Court's Religion Clause decisions: *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), in which the Court held that the Free Exercise Clause prohibits government from denying an otherwise-available public benefit based on religious status. Believing that *Trinity Lutheran* called the First Circuit's *Eulitt* decision into question, the Carson and Nelson families challenged Maine's sectarian exclusion anew. J.A. 11-34.

The case was submitted on cross motions for judgment on a stipulated record, and the district court rendered judgment on June 26, 2019. Pet. App. 63, 74. After concluding that *Trinity Lutheran* had not "unmistakably cast *Eulitt* into disrepute," the court simply "appl[ied] *Eulitt*" to uphold the exclusion. Pet. App. 71, 72. Although "[i]t is certainly open to the First Circuit" to revisit *Eulitt*, the court added, "it is not my role to make that decision." Pet. App. 72.

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

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

The Carsons and Nelsons submitted a Rule 28(j) letter to the First Circuit discussing the relevance of the *Espinoza* decision to their challenge. J.A. 2. The Commissioner responded with her own letter, insisting *Espinoza* had no bearing because Maine's exclusion turns not on religious "status," but rather on whether a school "promote[s] or advance[s] any particular religion." *See* J.A. 2-3.

On October 29, 2020, the First Circuit upheld Maine's sectarian exclusion for the third time. The court began by considering the effect of *Trinity Lutheran* and *Espinoza* on its prior decision in *Eulitt*. "In *Eulitt*," the court explained, "we did not focus on" whether the sectarian exclusion turned on a school's "religious 'status' or instead on the religious use" to which tuition assistance is put. Pet. App. 24. "In both *Trinity Lutheran* and *Espinoza*," however, that question was "of central importance," according to the First Circuit. Pet. App. 24. "*Espinoza* clarified . . . that discrimination based solely on religious 'status' . . . is distinct from discrimination based on religious 'use,'" and this "use/status distinction," the First Circuit

determined, was "clearly potentially relevant" to the constitutionality of Maine's exclusion. Pet. App. 25, 27.

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

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

Unlike the religious exclusions in *Espinoza* and *Trinity Lutheran*, the First Circuit asserted, Maine's exclusion does not turn solely on religious "status"—that is, "the aid recipient's affiliation with or control by a religious institution." Pet. App. 33; *see also* Pet. App. 34-35. Rather, it "focus[es] . . . on what the school teaches through its curriculum and related activities, and how the material is presented." Pet. App. 35 (quoting interrogatory response of Maine Commissioner of

Education). In other words, schools are barred "based on the religious *use* that they would make of" a student's aid. Pet. App. 39 (emphasis added).

After determining that Maine's exclusion falls on the "use" side of a supposed "use/status distinction," the First Circuit considered the appropriate level of scrutiny to apply in reviewing its constitutionality. The court noted that although *Espinoza* held that strict scrutiny applies to *status*-based exclusions, it "expressly left unaddressed the level of scrutiny applicable to a use-based restriction." Pet. App. 27. The First Circuit acknowledged, however, that some of the Justices in *Espinoza* had questioned whether the "use/status distinction" is meaningful at all—and had suggested that it should not affect "the level-of-scrutiny determination." Pet. App. 40, 41.

Ultimately, the First Circuit determined that strict scrutiny was not warranted in reviewing Maine's exclusion. Pet. App. 40. Rather, the court subjected the exclusion "only to rational basis review because it is use based." Pet. App. 40 n.7. The court concluded that the exclusion survived such review, holding that it "permissibly restrict[s]" participation "to those schools—whether or not religiously affiliated or controlled—that provide, in the content of their educational instruction, a rough equivalent of the public school education that Maine may permissibly require to be secular." Pet. App. 48-49.

The court also upheld the sectarian exclusion under the Establishment and Equal Protection Clauses.

Pet. App. 52-59. Regarding the former, the court recognized that the exclusion could entangle the state in assessing the religiosity of the curriculum and activities of schools to determine whether they should be permitted to educate students receiving tuition assistance. But this was not an Establishment Clause problem, according to the court, because "schools seeking to be 'approved' generally self-identify as 'sectarian' or 'nonsectarian,'" and to the extent there are questions, the state's inquiry turns on "objective factors," such as "mandatory attendance at religious services and course curricula." Pet. App. 57-58. Finally, the court rejected the equal protection claim under the same rational basis analysis it applied to dispose of the free exercise claim. Pet. App. 53, 55.

SUMMARY OF THE ARGUMENT

Maine's exclusion of "sectarian" options from its tuition assistance program violates the Free Exercise, Establishment, and Equal Protection Clauses. This is so regardless of whether the exclusion is viewed as turning on the religious "status" of the excluded schools or the religious "use" to which a student's aid would be put at an excluded school.

The exclusion is neither neutral toward religion nor generally applicable, and this Court has long held that a law lacking *either* characteristic is subject to strict scrutiny under the Free Exercise Clause. The First Circuit, however, seized on what it called a

"use/status distinction" to avoid strict scrutiny and subject Maine's exclusion to rational basis review. It claimed support for this supposed distinction in this Court's precedent—specifically, *Locke v. Davey*, as subsequently interpreted by *Espinoza v. Montana Department of Revenue* and *Trinity Lutheran Church of Columbia, Inc. v. Comer*.

There is no basis for such a distinction, either in the text of the Free Exercise Clause or in this Court's precedent. In fact, the Framers chose to protect religious "exercise," as opposed to mere belief or conscience, to ensure that Americans would be free to live out their faith. This Court, moreover, has never endorsed a distinction between religious status and use as grounds for eluding strict scrutiny of laws that discriminate based on religion. To the extent *Locke* intended to *imply* such a distinction, it was wrongly decided and should be overruled.

But even if *Locke* remains good law and warrants a departure from strict scrutiny for religious exclusions in certain circumstances, this is not one of them. Maine's exclusion, after all, is unlike the exclusion in *Locke* in every significant respect. It forces students to choose between their free exercise rights and receipt of a public benefit. It discriminates based on religious use and status in equal measure. And it is not narrowly targeted at an essentially religious endeavor.

Even assuming, however, that *Locke* does entail that something other than strict scrutiny should apply here, that something is *not* rational basis review, as the

First Circuit applied. Rather, Maine would have to proffer, at a minimum, a state interest that is both *historic* and *substantial*—specifically, one rooted in the founding era. There is no such interest here. To the contrary, Maine's exclusion is premised on an opinion from the state's Attorney General that "sectarian" options must be excluded from the tuition assistance program to comply with the Establishment Clause. That opinion was wrong, as this Court's decision in *Zelman v. Simmons-Harris* made clear, and an erroneous interpretation of the Establishment Clause cannot justify a religiously discriminatory law under *any* level of scrutiny.

Of course, that is why Maine asserted another interest, *post hoc*: an "interest in ensuring that the public's funds go to support only the rough equivalent of a public education." Pet. App. 55. Even crediting this late-asserted interest, Maine's exclusion still cannot withstand scrutiny. Such an interest is neither compelling nor historic and substantial. Nor does the exclusion advance any such interest. For these reasons, the exclusion violates the Free Exercise Clause.

Maine's exclusion also violates the Establishment Clause. It lacks a secular purpose, has a principal effect of inhibiting religion, and, perhaps most problematically, requires excessive government entanglement with religion. To determine whether a student may attend her chosen school, the state must make intrusive inquiries and judgments regarding the school's religious curriculum and activities. The fact of such inquiry is problematic enough. It is only compounded by

the discrimination *among* religious schools that results: Nominally religious schools—those religious in "status" alone—can participate in the tuition assistance program, but those that put their faith into practice may not.

Finally, Maine's exclusion violates the Equal Protection Clause. The framers of that clause were particularly concerned with ensuring that religious educators supported by the Freedmen's Bureau could continue their efforts to educate the freedmen in the wake of the Civil War. It would be perverse to conclude, as the First Circuit did, that the clause offers no meaningful protection to students who seek a religious education today.

ARGUMENT

I. Maine's Exclusion Violates The Free Exercise Clause.

Maine's exclusion violates the Free Exercise Clause. It is neither religiously neutral nor generally applicable and, in that light, must be subjected to strict scrutiny, which it cannot survive.

Contrary to the decision below, there is no basis for abandoning strict scrutiny on the ground that the exclusion discriminates based on religious "use," rather than religious "status." Neither the text of the Free Exercise Clause nor this Court's jurisprudence—including its decision in *Locke v. Davey*—warrants such a

"use/status distinction." To the extent *Locke* intended to *imply* a constitutionally meaningful distinction, it was wrongly decided and should be overruled.

Yet overruling *Locke* is not necessary to invalidate Maine's exclusion. Even if *Locke* remains good law, and even if it does warrant a departure from strict scrutiny for certain "use"-based exclusions in public benefit programs, a departure is not warranted here, where Maine's exclusion sweeps far more broadly than the narrow exclusion at issue in that case. And, in the end, Maine's sectarian exclusion cannot withstand *any* level of scrutiny—whether strict, some lesser level under *Locke*, or even rational basis review.

A. Maine's exclusion is subject to strict scrutiny because it is neither religiously neutral nor generally applicable.

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny"—specifically, strict scrutiny—and "will survive [such] scrutiny only in rare cases." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). The Court reiterated these criteria only last term in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021), and made clear that they apply where, as here, the burden on religious exercise results from the withholding of an otherwise available public benefit. *Id.* (explaining that the Court applied strict scrutiny in reviewing the denial of unemployment benefits in *Sherbert v. Verner*, 374 U.S. 398

(1963), because the unemployment law at issue was not generally applicable); *see also Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990) (same).

Neutrality and general applicability in public benefit programs ensure that government does not do what this Court long ago said it may not do: "exclude[] members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947). Simply put, "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981).

Maine's sectarian exclusion forces such a choice. Families must choose between (1) "the rights of parents to direct 'the religious upbringing' of their children" and (2) a tuition assistance benefit to which they are entitled. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (quoting *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). And the exclusion forces this choice precisely because it is neither neutral nor generally applicable.

"[T]he minimum requirement of neutrality is that a law not discriminate [against religion] on its face." *Lukumi*, 508 U.S. at 533. Yet that is precisely what Maine's exclusion does. It declares that "[a] private school" may participate in the tuition assistance program "only if it . . . [i]s a *nonsectarian* school." Me. Stat. tit. 20-A, § 2951(2) (emphasis added).

Of course, the command of neutrality "extends beyond facial discrimination." *Lukumi*, 508 U.S. at 534. "[T]he effect of a law in its real operation is [also] strong evidence of its object" and, thus, of whether it is neutral toward religion. *Id.* at 535. Here, the operation of Maine's exclusion confirms the lack of neutrality evinced in its text. As the First Circuit explained, the determination of whether a family's chosen school is excluded "depends on the sectarian nature of the educational instruction that the school will use the tuition assistance payments to provide." Pet. App. 35. Specifically, the Maine Department of Education asks whether, "in addition to teaching academic subjects," the school "promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." *Id.* (quoting interrogatory response of Maine Commissioner of Education). The exclusion thus turns on the "religious motivation" of the school, *Lukumi*, 508 U.S. at 533, as well as the "religious nature" of its curriculum and activities, and therefore "fails to act neutrally." *Fulton*, 141 S. Ct. at 1877.

Maine's exclusion, however, does not lack neutrality alone; it also lacks general applicability. "The principle underlying the general applicability requirement" is that government "cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543; *cf. Fulton*, 141 S. Ct. at 1877 ("A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for

individualized exemptions.'" (quoting *Smith*, 494 U.S. at 884)). Yet Maine's exclusion does just that. It requires the Department of Education to make judgment calls based on the *degree* of a religious school's religiosity. Specifically, the Department must determine whether a student's chosen school: (1) is sufficiently *irreligious* (*i.e.*, merely "religiously affiliated or controlled") and, thus, eligible to participate; or, instead, (2) engages in some level of religious "instruction" and/or activity that renders it "sectarian" and, thus, *too* religious to participate. Pet. App. 37.

"A law also 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. Maine's exclusion does this, too. The state's claimed interest for the exclusion is "in ensuring that the public's funds go to support only the rough equivalent of a *public* education." Pet. App. 55 (emphasis added). Yet the private schools that the state allows to participate are under no obligation to provide an education that mirrors a public education. For example, a participating private school may retain its ordinary admissions policies and, thus, consider such factors as sex, academic achievement, and family legacy in admissions. *See* Me. Stat. tit. 20-A, § 5204(4); Stipulated Record Ex. 2, at 11 (listing all-boys Avon Old Farms and Fishburne Military School, as well as all-girls Miss Porter's and Miss Hall's, as approved for tuition purposes). A participating private school may charge tuition above the amount of a student's benefit. Me. Dep't of Educ., *Approval for Receipt of Public Funds by Private Schools*,

https://www.maine.gov/doe/funding/reports/tuition/year-end-private/eligibility. And a private school can participate without offering all the instruction that a public school or district must make available. *See supra* note 1.

A private school can be *unlike* a public school in every one of these respects, yet it will still be deemed to provide the "rough equivalent of [a] public school education" and, thus, be eligible to participate in the tuition assistance program. Pet. App. 39 n.6, 49. Meanwhile, a private school that *mirrors* a public school in every one of these respects is excluded from the program if it also happens to teach religion. The exclusion thus "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interest[ ] in a similar way." *Fulton*, 141 S. Ct. at 1877. That "underinclusiveness" renders the exclusion "not generally applicable." *Id.*

In short, Maine's sectarian exclusion is neither neutral nor generally applicable. Under *Fulton*, *Lukumi*, and *Sherbert*, it should face strict scrutiny.[6]

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[6] Even if Maine's exclusion *were* neutral and generally applicable, it would still face strict scrutiny. "[U]nder this Court's precedents, even neutral and generally applicable laws are subject to strict scrutiny where (as here) a plaintiff presents a 'hybrid' claim—meaning a claim involving the violation of the right to free exercise *and* . . . the right of parents 'to direct the education of their children.'" *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting from denial of application to vacate stay) (quoting *Smith*, 494 U.S. at 881).

B. Neither the text of the Free Exercise Clause nor *Locke* warrants a religious "use"-based departure from strict scrutiny.

The First Circuit, however, read this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004)—as well as the subsequent discussion of *Locke* in *Espinoza* and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017)—as warranting a departure from strict scrutiny. Pet. App. 40-49. *Espinoza* and *Trinity Lutheran*, it claimed, (1) "distinguished" *Locke* "in consequence of the fact that the restriction" in that case "was use based" and (2) "clarified . . . that discrimination based solely on religious 'status' . . . is distinct from discrimination based on religious 'use.' " Pet. App. 25, 47. The First Circuit relied on this supposed "use/status distinction" to avoid subjecting Maine's exclusion—which, in its view, was solely "use-based"—to the strict scrutiny that would have applied were it instead status-based. Pet. App. 27, 37.

In *Espinoza* itself, however, this Court warned that nothing in its decision 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. And the Court provided that warning for good reason: The text of the Free Exercise Clause does not tolerate a "use"-based departure from strict scrutiny. Nor does this Court's decision in *Locke*.

1. The text of the Free Exercise Clause does not tolerate a "use"-based departure from strict scrutiny.

There is no room for a constitutionally determinative "use/status distinction" in the text of the Free Exercise Clause. Under its original (and current) public meaning, the clause "protects not just the right to *be* a religious person, holding beliefs inwardly and secretly," but also "the right to *act* on those beliefs outwardly and publicly." *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring). Thus, "whether [a law] is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way, unless the State can show its law serves some compelling and narrowly tailored governmental interest." *Id.*

As Justice Gorsuch noted in his *Espinoza* concurrence, when the First Amendment was adopted, "exercise" meant "some '[l]abour of the body,' a '[u]se,' as in the 'actual application of any thing,' or a '[p]ractice,' as in some 'outward performance.'" *Id.* at 2276 (quoting 1 S. Johnson, *A Dictionary of the English Language* (4th ed. 1773)). This common understanding of the word remains unchanged. *See Oxford English Dictionary Online* (Dec. 2020) (defining "exercise" as "the action of employing in its appropriate activity," "the use of," "[t]he practice and performance of rites and ceremonies, worship, etc." (emphasis omitted)). Appropriately, then, this Court has long read the clause to "embrace[ ] two concepts": "freedom to believe and freedom to act." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *see*

also Smith, 494 U.S. at 877 (holding "the 'exercise of religion' often involves not only belief and profession," but also "performance" of "physical acts").

The history of the adoption of the Free Exercise Clause reinforces the natural reading of its text. *See* Merits Amicus Br. Professor Michael McConnell. In the process of ratifying the original Constitution, several states proposed amendments to protect the "exercise" of religion. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1459, 1481 (1990). Yet in his first draft of the Bill of Rights, Madison included protection only for "full and equal rights of *conscience*." 1 *Annals of Cong.* 451 (Joseph Gales ed., 1834) (emphasis added). Then, as now, the term "conscience" was understood as encompassing private thought and belief—not conduct or activity. *See* 1 S. Johnson, *A Dictionary of the English Language* (4th ed. 1773) (defining "conscience" as "knowledge or faculty by which we judge of the goodness or wickedness of ourselves," "real sentiment, veracity; private thoughts").

The Georgia Charter of 1732 is particularly helpful in understanding the difference at that time between protection for "conscience," as Madison had proposed, and protection for the "exercise" of religion, as several states had proposed. The Charter guaranteed that

> there shall be a *liberty of conscience* allowed in the worship of God*, to all persons* inhabiting, or which shall inhabit or be resident

> within our said province, *and* that *all such persons, except papists*, shall have a *free exercise* of their religion.

Ga. Charter of 1732, *reprinted in* 2 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies* 773 (Francis Newton Thorpe ed., 1909) (emphasis added). By excluding "papists" from the guarantee of "free exercise" but still granting them "liberty of conscience," the Charter "permitted Catholics to believe what they wished (and possibly to worship as they liked, though that is more doubtful), but did not permit them to put their faith into action." McConnell, *supra*, at 1490. In this respect, the Charter drew a belief/conduct dichotomy disturbingly similar to that which Cromwell had drawn a century earlier:

> I meddle not with any man's *conscience*. But if by liberty of conscience, you mean a liberty to *exercise* the Mass, I judge it best to use plain dealing, and to let you know, Where the Parliament of England have power, that will not be allowed. . . .

1 Thomas Carlyle, *Oliver Cromwell's Letters and Speeches* 395 (1845) (emphasis added and omitted).

Thankfully, the First Congress recognized the shortcomings of Madison's "conscience" proposal and the importance of including broader protection for religious "exercise." The House and Senate each proposed language for an amendment addressing religious freedom. While the proposals differed, both included

protection for the "free exercise" of religion. 1 *Annals of Cong.* 796 (Joseph Gales ed. 1834) (Aug. 20, 1789); S. Journal, 1st Cong., 1st Sess. 77 (1789). A Conference Committee, which included Madison, was charged with resolving the differences between the proposals, and the Committee produced the language that was ultimately adopted. McConnell, *supra*, at 1484. Of course, it retained the protection for "free exercise" that had been common to both House and Senate versions.

"By using the term 'free exercise,'" rather than mere "conscience," Congress and the ratifying states "extended the broader freedom of *action* to all believers" and "ma[de] clear that the clause protects religiously motivated conduct as well as belief." McConnell, *supra*, at 1488, 1490 (emphasis added). In that light, there is no basis to rely, as the First Circuit did, on a supposed "use/status distinction" to avoid applying strict scrutiny to Maine's sectarian exclusion.

2. *Locke* does not warrant a religious "use"-based departure from strict scrutiny.

As noted above, the First Circuit claimed cover for its "use/status distinction" in *Locke*. Although *Locke* did inject uncertainty regarding the level of scrutiny applicable to laws that discriminate against religion, it provides no basis for eschewing strict scrutiny here.

Locke upheld a Washington law that excluded students majoring in "devotional theology"—*i.e.*, "religious instruction that will prepare students for the

ministry"—from a state-funded, postsecondary scholarship program. *Locke*, 540 U.S. at 719. The Court began its review of the exclusion by noting that, unlike the public benefit laws at issue in *Sherbert* and *Thomas*, Washington's scholarship program "d[id] not require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720-21. Scholarship recipients, after all, could "still use their scholarship to pursue a secular degree at a different institution from where they [we]re studying devotional theology." *Id.* at 721 n.4.

The Court also noted that Washington's devotional theology exclusion precluded only one particular "use" of the scholarship: obtaining "[t]raining . . . to lead a congregation," which the Court described as "an essentially religious endeavor." *Id.* at 715, 717, 721. Apart from that narrow exclusion, the scholarship program went "a long way toward including religion in its benefits," allowing students to "attend pervasively religious schools" and "take devotional theology courses," including those "required" by their schools. *Id.* at 724-25.

With that much established, the Court addressed "the only [state] interest at issue" in the case: Washington's "historic and substantial state interest" in "not funding the religious training of clergy." *Id.* at 722 n.5, 725. That interest, according to the Court, was rooted in the founding era. "Since the founding of our country," it explained, "there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an

'established' religion." *Id.* at 722. The Court likewise noted that many states "around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Id.* at 722-23.

In the light of that founding-era tradition, the Court upheld the devotional theology exclusion. In so doing, however, it "refrained from stating what level of scrutiny it was applying." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1267 (10th Cir. 2008); *see also Locke*, 540 U.S. at 730 (Scalia, J., dissenting) (noting "the opinion is devoid of any mention of standard of review"). Yet because the Court described Washington's interest as "historic and substantial," rather than compelling, *Locke*, 540 U.S. at 725 (majority opinion), and because it "reject[ed] [Davey's] claim of presumptive unconstitutionality," *id.* at 720, some commentators and lower courts have concluded that the decision marked a departure from strict scrutiny—at least for reviewing some (unspecified category of) religion-based exclusions in public benefit programs. "The Court," however, "never sa[id] whether it deem[ed] [Washington's] interest compelling," so the decision does not *necessarily* entail such a departure. *Locke*, 540 U.S. at 730 (Scalia, J., dissenting).

To the extent that *Locke did* intend to abandon strict scrutiny for certain laws targeting religion, it is an anomaly in this Court's free exercise jurisprudence, was wrongly decided, and should be overruled. Indeed, the Court itself has taken pains to cabin the decision in recent years. *Trinity Lutheran*, 137 S. Ct. at

2022-24; *Espinoza*, 140 S. Ct. at 2257-59. The decision, moreover, has proven inscrutable to lower courts and the most eminent religion law scholars. *E.g.*, *Colo. Christian Univ.*, 534 F.3d at 1254 (opinion of then-Judge Michael McConnell for the Tenth Circuit: "The precise bounds of the *Locke* holding . . . are far from clear."). It has engendered no significant reliance interests that would militate in favor of its preservation. And it is premised on a reading of founding-era history that has since been called into question. *E.g.*, Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. Pa. L. Rev. 111, 189-92 (2020). Thus, if *Locke* marked a departure from strict scrutiny, it is time for *Locke* to go.

But overruling *Locke* is not necessary to invalidate Maine's sectarian exclusion. Even if its characterization of Washington's interest as "historic and substantial," rather than "compelling," were meant to imply that something other than strict scrutiny can justify certain religion-based exclusions in public benefit programs, this unspecified "other" level of scrutiny would not apply in reviewing *all* religion-based exclusions. Given that the opinion was "devoid" of any discussion of the level of scrutiny it was applying, *Locke*, 540 U.S. at 730 (Scalia, J., dissenting), the most that could plausibly be read into it is that a departure from strict scrutiny is warranted only where a religious exclusion shares the characteristics of the exclusion in *Locke* itself—that is, (1) where the exclusion "does not require [individuals] to choose between their religious beliefs and receiving a government benefit," *id.* at 720-21

(majority opinion); (2) where the exclusion targets only a particular religious "use," *id.* at 715, 717; and (3) where the targeted use is an "essentially religious endeavor," *id.* at 721.

Absent these characteristics, there is no basis for invoking *Locke* to elude the strict scrutiny that has traditionally applied to non-neutral and non-generally-applicable laws that burden religion. And Maine's exclusion shares none of these characteristics.

a. Maine's exclusion requires students to choose between free exercise rights and receipt of a public benefit.

First, unlike students eligible for a scholarship in *Locke*, students eligible for Maine's tuition assistance program are "require[d] . . . to choose between their religious beliefs and receiving a government benefit." *Id.* at 720-21. In *Locke*, the Court noted, students did not face such a choice because they could pursue a devotional theology degree on their own dime and a secular degree at another college with their scholarship. *Id.* at 721 n.4. A tenth-grader like the Nelsons' son, however, cannot spend seven hours a day at a religious high school on his parents' dime, then head off for a second course of study at a non-religious high school with his tuition assistance benefit that evening. Nor can he spend four years (and his parents' money) on secondary education at a religious high school, followed by

another four years on secondary education at a non-religious high school with his tuition assistance benefit.

No, in Maine, families must choose: their right to tuition assistance or their right to freely exercise their religion. This Court has repeatedly held that government may not put citizens to such a choice. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988) (noting government may not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens"); *Thomas*, 450 U.S. at 716 ("[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."); *Sherbert*, 374 U.S. at 404 ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

b. Maine's exclusion does not target religious "use" alone.

Moreover, unlike the exclusion in *Locke*, which this Court has described as targeted solely at a particular religious "use," *Trinity Lutheran*, 137 S. Ct. at 2022-23; *Espinoza*, 140 U.S. at 2257, Maine's exclusion targets religious use *and* status in equal measure. After all, in the context of elementary and secondary religious education, religious status and use are often inseparable, and any distinction between them is illusory.

Consider the Nelsons and Carsons, whose "desire for religious educational options flows from, and is inextricably intertwined with, their religious status." Pet. App. 31. Selecting a religious school for their children is "not merely a matter of personal preference, but one of deep religious conviction." *Yoder*, 406 U.S. at 216.

And that is true for many families shut out of Maine's tuition assistance program. Many parents have an obligation to provide a religious education for their children (*i.e.*, to engage in a religious use), and that obligation flows directly from their *status* as members of their respective faiths. Catholic families, for example, have a "duty of entrusting their children to Catholic schools wherever and whenever it is possible." Vatican Council II, *Gravissimum educationis* (1965); *see also Codex Iuris Canonici* 1983 c.798 (stating that "[p]arents are to entrust their children to those schools which provide a Catholic education," so long as they are able). Likewise, Orthodox Jews believe there is an obligation to ensure their children receive Judaic instruction, which can only be fully accomplished by sending their children to Orthodox Jewish schools. *See* Cert. Amici Br. Council of Islamic Schools in N. Am. et al. 11-12.

For members of these and other faiths, providing a religious education for their children is an obligation that flows directly from their *status* as members of their respective faiths. Excluding them because of the religious "use" to which they would put their tuition benefit discriminates not only against that religious

use, but also against the religious status that impels it.

And the same is true from the excluded schools' perspective. As this Court held last term, "educating young people in their faith, inculcating its teachings, and training them to live their faith" are part and parcel of *being* a religious school; they "are responsibilities that lie at the very core of the mission of a private religious school." *Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2064 (2020); *see also* Cert. Amici Br. Council of Islamic Schools in N. Am. et al. 9 (noting that for amici Islamic, Orthodox Jewish, and Catholic schools, "the integration of their respective faith traditions with secular academic content . . . lies at the heart of *who they are*"). To discriminate against such schools because of the religious use to which a student's aid might be put there is to discriminate against them because of their religious status.[7]

Thus, even if the exclusion in *Locke* is accurately described as targeting a particular religious "use" alone (which is doubtful), Maine's exclusion cannot be so described. "[T]he conduct targeted by [Maine's] law"—religious instruction—"is conduct that is closely

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[7] This Court has recognized that religious use and status are not binary. *Espinoza*, 140 S. Ct. at 2256 ("Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses."); *McDaniel v. Paty*, 435 U.S. 618, 627 (1978) (plurality opinion) (noting that, under Tennessee's ministerial exclusion, "ministerial status [wa]s defined in terms of conduct and activity").

correlated with *being*" religious. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring). The exclusion, therefore, "is targeted at more than conduct"; it is also "directed toward [religious] persons as a class." *Id.*

c. Maine's exclusion does not target an "essentially religious endeavor."

Finally, unlike the devotional theology exclusion in *Locke*, Maine's sectarian exclusion is not narrowly targeted at an "'essentially religious endeavor,'" such as "training a minister 'to lead a congregation.'" *Espinoza*, 140 S. Ct. at 2257 (quoting *Locke*, 540 U.S. at 721). Rather, it is a blanket ban on the entire course of instruction—instruction that satisfies every secular requirement of Maine's compulsory education law—at schools that happen to teach religion.

That is a far cry from *Locke*. "Apart from th[e] narrow restriction" on training for the ministry, the scholarship program there went "a long way toward including religion in its benefits." *Locke*, 540 U.S. at 724. "The program permit[ted] students to attend pervasively religious schools" and "take devotional theology courses," including required courses in the Bible, spiritual development, evangelism, and religious doctrine. *Id.* at 724-25. Here, by contrast, Maine flatly bars students from choosing a school that teaches even *one* such course (or that engages in any other religious activity that triggers a "sectarian" designation by state regulators). The exclusion certainly "does not zero in

on" an "'essentially religious endeavor.'" *Espinoza*, 140 S. Ct. at 2257 (quoting *Locke*, 540 U.S. at 721).

In short, none of the characteristics of the "devotional theology" exclusion that arguably caused this Court to depart from strict scrutiny in *Locke* is found in Maine's exclusion of "sectarian" schools. Thus, even if *Locke* did signal a departure from strict scrutiny for certain "use"-based religious exclusions in public benefit programs (again, doubtful), it does not warrant a departure here.

Finally, even if it did, the result would not be rational basis review, as the First Circuit applied below. Rather, Maine would have to proffer an interest that is at least "substantial," but also "historic"—specifically, rooted *in the founding era*. *Locke*, 740 U.S. at 722-23.[8] Indeed, in *Espinoza*, this Court rejected Montana's invocation of *Locke* because there was "no comparable 'historic and substantial' tradition [that] support[ed] Montana's decision to disqualify religious schools from government aid." *Espinoza*, 140 S. Ct. at 2258 (quoting *Locke*, 540 U.S. at 725). Rather, the Court noted that "[i]n the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones." *Id.* Although "a tradition *against* state support for religious schools arose" later, in the second half of the 19th century, the Court held that "such evidence . . . cannot create" an "early

[8] Of course, Maine would also have to prove that the exclusion satisfies some degree of tailoring to the interest—another point on which *Locke* was silent.

practice" or "establish an early American tradition" as contemplated by *Locke*. *Id.* at 2258-59; *see also id.* at 2258 n.3.

C. Maine's exclusion cannot survive strict scrutiny or a "historic and substantial" state interest test.

Regardless of whether strict scrutiny or a *Locke*-based "historic and substantial state interest" test applies, Maine's exclusion does not withstand scrutiny. The state's actual justification for the exclusion—compliance with the Establishment Clause—is no justification at all: The Establishment Clause permits, not prohibits, "sectarian" schools in the tuition assistance program. And even if this Court were to entertain the *post hoc* interest that Maine proffers—an "interest in ensuring that the public's funds go to support only the rough equivalent of a public education," Pet. App. 55—that interest is neither compelling nor "historic and substantial." Nor, for that matter, does the exclusion advance any such interest.

1. The actual justification for Maine's exclusion—compliance with the Establishment Clause—cannot support it.

First, the true justification for the exclusion cannot support it. That justification is a 1980 Maine Attorney General opinion "conclud[ing] that the practice of paying the tuition of students attending sectarian

elementary and secondary schools violates the Establishment Clause of the First Amendment." J.A. 62. Based on that opinion, the legislature amended the relevant statute to require that a participating private school be "*nonsectarian* . . . in accordance with the First Amendment." Me. Stat. tit. 20-A, § 2951(2). And when this "nonsectarian" requirement was first challenged, the Maine Supreme Court recognized "compliance with the Establishment Clause" as the "*only* justification" for it. *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 131 (Me. 1999) (emphasis added).

Of course, there *is no* Establishment Clause bar to including religious options, alongside non-religious ones, in a student-aid program like Maine's. It is perfectly permissible, so long as the program is: (1) "neutral with respect to religion," allowing religious and non-religious schools to participate; and (2) a program of "true private choice," providing a benefit "to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice." *Zelman v. Simmons-Harris*, 536 U.S. 639, 652, 653 (2002). The Maine Attorney General's contrary opinion was wrong, and an interest in complying with an erroneous interpretation of the Establishment Clause cannot satisfy strict scrutiny or constitute a historic and substantial state interest. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (rejecting Establishment Clause justification for the exclusion of religious uses of otherwise available public-school facilities).

That should be the beginning and end of this Court's inquiry. The concern, after all, is "the legislature's *actual* purpose for [a] discriminatory classification"—not "speculation about what may have motivated the legislature." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (emphasis added) (internal quotation marks omitted); *see also Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 & n.16 (1982) (refusing to consider asserted purpose for discriminatory classification because government had "failed to establish" that it was "the actual purpose"). The government's "justification," in other words, "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Here, the "genuine" justification for Maine's exclusion cannot sustain it, no matter what level of scrutiny applies. *Christian Sci. Reading Room Jointly Maintained v. City & Cty. of San Francisco*, 784 F.2d 1010, 1016 (9th Cir.) (holding that a governmental policy adopted to remedy Establishment Clause violations that did not exist could not "further[] the governmental purpose in any way"), *as amended*, 792 F.2d 124 (9th Cir. 1986).

2. Even if this Court considers Maine's *post hoc*, public-school-"equivalent" justification, the sectarian exclusion cannot withstand scrutiny.

Of course, that is why Maine attempted—and the First Circuit allowed it—to support the exclusion with a *post hoc* justification: an alleged "interest in ensuring

that the public's funds go to support only the rough equivalent of a public education." Pet. App. 55. As the First Circuit noted, "Maine may require its *public* schools to provide a secular educational curriculum rather than a sectarian one." Pet. App. 44. Accordingly, it viewed the sectarian exclusion as "permissibly restrict[ing]" a student's choice "to those schools—whether or not religiously affiliated or controlled—that provide, in the content of their educational instruction, a rough equivalent of [a] public school education." Pet. App. 48-49.

Even if this Court concludes it is appropriate to review the exclusion in the light of this *post hoc*-asserted interest, the exclusion *still* cannot withstand constitutional scrutiny. The asserted interest, after all, is neither compelling nor "historic and substantial." *Locke*, 540 U.S. at 725. Moreover, the exclusion is not at all tailored to, and does not advance, the interest.

a. Maine's asserted interest is not sufficiently weighty.

First, an "interest in ensuring that the public's funds go to support only the rough equivalent of a public education," Pet. App. 55—meaning, specifically, a "nonsectarian" education—is not a compelling interest in the context of Maine's tuition assistance program. Like the program at issue in *Zelman*, Maine's program aids students, not the schools they choose to attend. It "provide[s] aid directly to a broad class of individuals," and "the government['s] . . . role ends with the

disbursement of benefits." *Zelman*, 536 U.S. at 649, 652. Where the benefits are used is the "result of the numerous independent decisions of private individuals." *Id.* at 655. If a student were to choose a school that the state deems "sectarian," that choice would be "attributable to the [student], not to the government." *Id.* at 652. In other words, "the link between government funds and [sectarian education]" would be "broken by . . . independent and private choice." *Locke*, 540 U.S. at 719. There can be no compelling (or *any*) interest in ensuring that government funds are not used for sectarian education when there is no link between the government funds and sectarian education.[9]

Nor is such an interest "historic and substantial." *Id.* at 725. After all, "[i]n the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones." *Espinoza*, 140 S. Ct. at 2258. The Court surveyed this history in *Espinoza*, recounting the many ways in which federal, state, and local governments commonly gave direct financial assistance to religious schools for the education of the poor, Native Americans, residents of the District of Columbia, the freedmen, and others. *Id.*; *see also* Storslee, *supra*, at 150-69, 189-92; Richard J. Gabel, *Public Funds for Church and Private Schools*

[9] This is not to say government can *never* have a compelling interest in restricting public funds to nonsectarian education. If instead of offering the tuition assistance program, a school district contracted with a single private school to educate all its resident students, *see* Me. Stat. tit. 20-A, § 2701, then Maine and the district would have a compelling interest in ensuring the education provided was nonsectarian.

147-262 (1937). Maine was no exception: While it was part of Massachusetts and after it gained statehood in 1820, government provided support, through appropriations and land grants, to religious schools. Gabel, *supra*, at 63, 183-84 & n.16, 185, 189-91 (discussing Massachusetts' public support of Congregational and Quaker schools, as well as religious "private academies"); *id.* at 190, 337 (discussing Maine's post-statehood support of academies and Congregational, Wesleyan, Methodist, Baptist, and Universalist schools); Merits Amicus Br. Charles Glenn.

The schools that received this public support, meanwhile, were not religious in "status" only. They engaged in—and the government supported—religious "uses," including religious instruction. *E.g.*, Storslee, *supra*, at 152-54 & nn.231, 239; Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 Notre Dame L. Rev. 677, 681 & n.20, 728 & nn.410-11 (2020); Gabel, *supra*, at 185; Ava Harriet Chadbourne, *A History of Education in Maine* 123-24 (1936).

In the light of this widespread, founding-era tradition of *direct* governmental support for religious schooling, it is simply untenable to suggest that there is a compelling state interest—or a "historic and substantial state interest," *Locke*, 540 U.S. at 725—in prohibiting students from making the "independent and private choice[]" of using a publicly funded tuition benefit to obtain such schooling. *Zelman*, 536 U.S. at 651.

b. Maine's exclusion is not sufficiently tailored to its asserted interest.

But even if Maine's asserted interest were sufficiently weighty, the exclusion still is not sufficiently tailored to that interest. And that is so regardless of what degree of tailoring this Court might require, because the exclusion does not advance the asserted interest at all.

Religious schools such as Bangor Christian and Temple Academy satisfy *every secular curricular 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. *Supra* pp. 3, 6-7 & notes 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 the instruction in secular subjects that they would receive at a public school. As this Court has held, "the State's interest in education [can] be served sufficiently by reliance on the secular teaching that accompanie[s] religious training." *Bd. of Educ. v. Allen*, 392 U.S. 236, 245 (1968).

It is no answer to say that religious instruction can be barred under the program because *public* schools cannot engage in it. Public schools must not engage in religious instruction because they are *public—i.e.*, government—schools. The teaching that goes on in them

is government speech, and the Establishment Clause forbids "government speech endorsing religion." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995) (emphasis omitted) (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 235, 250 (1990) (opinion of O'Connor, J.)). The same is not true regarding "private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* To argue otherwise is to ignore the "crucial difference between government speech . . . and private speech"—and, indeed, between public schools and private schools. *Id.* (emphasis omitted).

Of course, when it comes to matters *other* than religion, Maine *honors* the difference between public and private schools. As discussed above, a private school can be unlike a public school in a whole host of respects—its admission policies, the tuition it charges, the instruction it offers—and still participate in the tuition assistance program. *See supra* pp. 20-21. It is only when religion enters the picture that the state throws up its arms and says, "Enough!" That Maine allows participating private schools to remain private in every respect save religion betrays its assertion that the program "uses private schools to deliver a public education." BIO i.

And that is why the First Circuit hedged in its description of the exclusion, repeatedly characterizing it as restricting use of the tuition benefit to schools that provide the "*rough* equivalent" of a public-school education. Pet. App. 39 n.6, 49, 55 (emphasis added). "Rough" classifications, however, do not cut it when

fundamental rights such as the free exercise of religion are at stake. When free exercise rights are involved, courts "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Lukumi*, 508 U.S. at 534.

A religious gerrymander is precisely what Maine has effected here. And at the end of the day, "[c]alling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same." *Espinoza*, 140 S. Ct. at 2278 (2020) (Gorsuch, J., concurring).

II. Maine's Exclusion Violates The Establishment Clause.

Maine's sectarian exclusion also violates the Establishment Clause. It does so under any test this Court might apply.

Given the questionable validity of the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court now applies Establishment Clause tests that "focus[ ] on the particular issue at hand." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion); *see also id.* at 2090 (Breyer, J., concurring) ("[T]here is no single formula for resolving Establishment Clause challenges."). When the issue at hand has been the *inclusion* of religious options in student-aid programs like Maine's, the Court has applied the two-part test enunciated in *Zelman*, requiring religious neutrality and private choice. *Am. Legion*, 139 S. Ct. at 2081 n.16 (plurality opinion); *Zelman*, 536 U.S.

at 652-53. The same test should apply in reviewing the *exclusion* of religious options; after all, a lack of neutrality and denial of private choice can as readily "inhibit[]" religion as "advanc[e]" it. *Id.* at 649.

Maine's exclusion clearly fails the *Zelman* test: It is the antithesis of neutrality, excluding only religious private schools, and it severely restricts parental choice; indeed, parents get *one* choice—secularism. The exclusion also fails any test that "looks to history for guidance," *Am. Legion*, 139 S. Ct. at 2087 (plurality opinion), for history indicates that the Establishment Clause, as originally understood, prohibited the denial of otherwise-available funding based on a school's religious activity. Storslee, *supra*, at 119, 189-92.

The exclusion fails under *Lemon*, as well. It lacks a "secular purpose," has a "'principal or primary effect'" that "'inhibits religion,'" and "foster[s] 'an excessive government entanglement with religion.'" *Am. Legion*, 139 S. Ct. at 2079 (majority opinion) (quoting *Lemon*, 403 U.S. at 612-13).

First, the exclusion lacks a "secular purpose." *Id.* This may seem counterintuitive, given that it restricts students to choosing "a secular education at a private school." Pet. App. 31. But while the exclusion guarantees a secular *education*, it is not secular in its *purpose*. The Establishment Clause's requirement of a secular governmental purpose "aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987). It is not license for government to

"show a callous indifference to religious groups." *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). Thus, government "may not," consistent with the secular purpose requirement, "establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963). Yet that is what Maine's exclusion does.

Second, the exclusion has the "principal or primary effect" of "inhibit[ing] religion." *Am. Legion*, 139 S. Ct. at 2079 (quoting *Lemon*, 403 U.S. at 612). Although the Carsons could afford to send their child to a religious private school without the tuition assistance benefit, the Nelsons could not and, thus, sent their children to a secular private high school instead. In other words, these families, like countless others who believe a religious school is best for their children, were forced to choose: forgo a public benefit to which they are entitled, as the Carsons did, or resign themselves to using the benefit at a non-religious school, as the Nelsons did. That is an inhibition of religion.

Were there any doubt, consider what happened in the immediate wake of Maine's ban on religious options four decades ago. John Bapst High School—a Catholic school that enrolled more students receiving the tuition assistance benefit than any other religious high school in the state—was forced to close and reopen as a secular school, stripped of its Catholic identity, so that those students were not denied the opportunity of an outstanding education. John Maddaus & Denise A. Mirochnik, *Town Tuitioning in Maine: Parental*

Choice of Secondary Schools in Rural Communities, 8 J. Res. Rural Educ. 27, 32 (1992); *Bagley*, 728 A.2d at 138 n.19.

Third, the exclusion "foster[s] 'an excessive government entanglement with religion.'" *Am. Legion*, 139 S. Ct. at 2079 (quoting *Lemon*, 403 U.S. at 613). Ironically, given the First Circuit's upholding of the exclusion as a permissible "use"-based restriction, it is the exclusion's targeting of religious "uses" that gives rise to these entanglement problems. *See* Stephanie H. Barclay, *Untangling Entanglement*, 97 Wash. U. L. Rev. 1701, 1726 (2020) ("[T]he heightened risk of government entanglement may be another reason for the Court to eschew [a use/status] distinction altogether.").[10]

To determine whether a student may attend her chosen school—that is, to determine whether the school is sufficiently irreligious to be an acceptable choice or, instead, too religious to participate—the Department of Education makes intrusive inquiries and judgments regarding the school's curriculum and activities. As the First Circuit explained, the exclusion "does not turn solely on whether [a school] is religiously affiliated or controlled but depends instead on the sectarian nature of the instruction that it will provide to tuition assistance beneficiaries." Pet. App. 37.

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[10] Without explanation, the First Circuit suggested there might be entanglement and Establishment Clause problems if Maine *allowed* religious schools—even those religious in *status* only—to participate in the program. Pet. App. 47 & n.11. *Zelman* dispels that suggestion.

Specifically, the Department inquires as to whether, "in addition to teaching academic subjects," the school "promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." Pet. App. 35 (quoting interrogatory response of Maine Commissioner of Education).

Yet this Court has warned that when "a statute requires that public officials determine whether some . . . activity is consistent with 'the teaching of the faith,'" the "prospect of inconsistent treatment and government embroilment in controversies over religious doctrine [is] especially baleful." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 20 (1989). The record makes this clear. Cardigan Mountain School, a private school in New Hampshire, applied to participate in the program in 2015. Stipulated Record Ex. 2, at 17-24. The school, which has a "chaplain," purports to teach "universal . . . spiritual values" both "in and out of the classroom," including at its "required . . . weekly Chapel meetings," where students "participate in activities that help them learn and practice the moral and spiritual values they are being taught in school." *Id.* at 17, 20, 24. The school's application to participate in the program triggered a governmental inquiry into the precise nature of the school's activities. After receiving adequate assurances from the school that the "spiritual values" it teaches were "universal" and that its activities—particularly the chapel program—were "non-sectarian," the school was allowed to participate. *Id.* at 17, 20.

Of course, an Islamic school, Jewish day school, or Catholic parish school would not fare as well; they are excluded. And "[i]t is not only the conclusion[]" that such schools are excluded, "but also the very process of inquiry leading to [that] conclusion[]" that is the problem. *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979). As then-Judge McConnell wrote for the Tenth Circuit, "if the State wishes to choose among otherwise eligible institutions, it must employ neutral, objective criteria rather than criteria that involve the evaluation of contested religious questions and practices." *Colo. Christian Univ.*, 534 F.3d at 1266. A four-justice plurality of this Court likewise opined, in *Mitchell v. Helms*, 530 U.S. 793 (2000), that "courts should refrain from trolling through a person's or institution's religious beliefs" to determine their eligibility to participate in an otherwise available public benefit program. *Id.* at 828.

Yet those are precisely the types of entangling inquiries and judgments that Maine's exclusion, with its focus on the religious "use" to which a student's aid might be put, demands. The prohibition against entanglements "protects religious institutions" from this sort of "governmental monitoring or second-guessing" of "religious beliefs and practices . . . as a basis for . . . exclusion from benefits." *Colo. Christian Univ.*, 534 F.3d at 1261.[11]

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[11] The First Circuit shrugged off the danger of entanglement, insisting that schools "generally self-identify as 'sectarian' or 'nonsectarian,'" and that, if there are questions, the state's inquiry turns on "objective factors." Pet. App. 57-58. There is nothing "objective" in determining whether "material [is] taught

In fact, by placing determinative significance on the *use* to which tuition assistance would be put, Maine's exclusion and the First Circuit's decision upholding it breathe new life into the noxious "pervasively sectarian" doctrine: the principle that pervasively religious schools must be barred from otherwise-available public benefit programs, even if nominally religious schools need not. Under the First Circuit's decision, schools that are merely "religiously affiliated or controlled" may participate in the tuition assistance program, Pet. App. 37, 48-49, but schools whose religion impels them to pass on their faith may not. In this respect, the exclusion impermissibly discriminates "between religion and religion"—not merely "between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

This Court has seemingly abandoned the "pervasively sectarian" doctrine but has never declared it dead. The First Circuit certainly did not think it was dead. "[W]e do not see," it asserted, "why the Free Exercise Clause compels Maine either to forego relying on

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through the lens of . . . faith," or whether "how the material is presented" tends to "promote[ ]" a "belief system." Pet. App. 35. Cardigan Mountain's experience, meanwhile, demonstrates that "self-identification" does *not* stave off further inquiry. Well after the school informed the state that its chapel program was "nonsectarian," the state followed up with what it called "clarifying questions" to assess whether there were any "religious purposes" to the mandatory chapel meetings. Stipulated Record Ex. 2, at 18, 20. And the Kent School was excluded from the program—despite self-identifying as *non*-sectarian—because of its Episcopalian tradition. *Id.* at 12-14.

private schools to ensure that its residents can obtain the benefits of a free public education or to treat pervasively sectarian education as a substitute for it." Pet. App. 49.

A rule of law like the First Circuit's—under which nominally religious schools may participate in student-aid programs, but schools that practice their faith may not—is nothing more than the pervasively sectarian doctrine in new clothes. This Court should do what a four-Justice plurality urged it to do two decades ago: "bur[y]" the doctrine "now." *Mitchell*, 530 U.S. at 829 (plurality).

III. Maine's Exclusion Violates The Equal Protection Clause.

Finally, Maine's exclusion violates the Equal Protection Clause. Distinctions based on religion are "inherently suspect," *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam), and, in that light, should trigger strict scrutiny. Yet the First Circuit declined to apply strict scrutiny in resolving Petitioners' equal protection claim, subjecting the exclusion to rational basis review instead. Pet. App. 53. It was wrong to do so.

According to the First Circuit, rational basis review was warranted under *Locke*, which held that because Washington's "devotional theology" exclusion did not violate the Free Exercise Clause, "rational-basis scrutiny [applied] to [Joshua Davey's] equal protection claim." *Locke*, 540 U.S. at 720 n.3. But the religious

exclusion in *Locke* did not burden "the right of parents . . . to direct the education of their children." *Smith*, 494 U.S. at 881. Here, Maine's exclusion, "drawn upon inherently suspect" lines of religion, *Dukes*, 427 U.S. at 303, burdens this fundamental liberty interest. Strict scrutiny is therefore warranted.

In fact, the framers of the Equal Protection Clause were particularly concerned with protecting access to education, including religious education. Prior to the Civil War, largely in reaction to the activities of preachers such as Nat Turner and Denmark Vesey, "[s]outhern state legislatures enacted laws restricting slave religion and literacy out of fear that the Bible offered a moral foundation for emancipation." Nicholas May, *Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia*, 49 Am. J. Legal Hist. 237, 237 (2007). "Teaching slaves to read (even *The Bible*) was a criminal offense punished severely in some states." Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1216 (1992).

Because of the low literacy rate among southern blacks, the Freedmen's Bureau, during Reconstruction, "coordinated and financed schools in cooperation with the educational activities of northern missionary societies," which "sent missionaries into the South to uplift the freed slaves and their children through religion, education, and material assistance." Julian B. Roebuck & Komanduri S. Murty, *Historically Black Colleges and Universities: Their Place in American Higher Education* 23 (1993). These "[n]orthern white missionaries

. . . opened schools that taught blacks liberal curricula and equal rights." *Knight v. Alabama*, 787 F. Supp. 1030, 1073 (N.D. Ala. 1991), *vacated in part and rev'd in part on other grounds*, 14 F.3d 1534 (11th Cir. 1994). "During the interval from 1865 to 1890, more than two hundred black private institutions"—"largely elementary and secondary schools"—"were founded in the South with the help of northern churches[,] missionary groups[,] . . . and the Freedmen's Bureau." Roebuck & Murty, *supra*, at 25.

But these "'[northern missionary schools] were highly unpopular with [a] considerable number of whites,'" who "used violence to discourage any kind of education for blacks." *Knight*, 787 F. Supp. at 1073 (first alteration in original) (quoting testimony of historian Dr. J. Mills Thornton). Indeed, the Report of the Joint Committee on Reconstruction is replete with instances of Southerners threatening and harassing teachers for educating the freedmen. Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess. pt. I, at 112; *id.* pt. II, at 43, 47, 86, 112, 150, 154, 183, 203, 254-55, 267-68; *id.* pt. III, at 115, 146; *id.* pt. IV, at 63, 67, 79, 82.

Compounding this problem was President Johnson's hostility to the educational efforts of the Freedmen's Bureau and the missionary educators it supported. Purportedly on constitutional grounds, he twice vetoed bills to extend the Freedmen's Bureau in 1866. 8 *Messages and Papers of the Presidents* 3596, 3620 (1897).

Before overriding the second veto, Congress approved the Fourteenth Amendment and proposed it to the states. The debates over the amendment make clear that its object, in part, was to provide a constitutional footing for the Freedmen's Bureau Act of 1866 and the efforts of the Bureau itself: "The one point upon which historians of the Fourteenth Amendment agree, and, indeed which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills . . . beyond doubt." Jacobus tenBroek, *Equal Under Law* 201 (1965); *see also* Cong. Globe, 39th Cong., 1st Sess. 1092 (1866) (statement of Rep. Bingham) (discussing opposition to the Freedmen's Bureau as evidence of the need for the amendment).

In this light, it would be perverse to conclude that this constitutional amendment—adopted in part to ensure government could support the efforts of private religious educators—does not offer robust protection for private religious educators and the students they educate. Yet that is what the First Circuit held below. Pet. App. 53 n.13 (discussing the "hopelessness of any effort to suggest that those who choose to send their children to religious schools comprise a suspect class" (quoting *Eulitt*, 386 F.3d at 353 n.3)).

But even if Maine's exclusion is subject only to rational basis review under the Equal Protection Clause, it cannot survive, because it suffers the same defect as the state constitutional provision at issue in *Romer v. Evans*, 517 U.S. 620 (1996). Applying rational basis review, this Court invalidated that provision, which

prohibited municipalities from extending certain benefits and protections to gays and lesbians. "Central . . . to the . . . Constitution's guarantee of equal protection," the Court explained, "is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Id*. at 633. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.*

Maine's exclusion is such a law. It excludes families who desire religious schooling, and *only* families who desire religious schooling, from a public benefit to which they are otherwise entitled, making it "more difficult"—nay, impossible—"for [this] one group of citizens than for all others to seek aid from the government." *Id*. It is "a denial of equal protection of the laws in the most literal sense." *Id*.

CONCLUSION

For these reasons, this Court should reverse.

Respectfully submitted,

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