No. 20-1088

In the Supreme Court of the United States

DAVID CARSON,
as parent and next friend of O.C., et al.,

Petitioners,

v.

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

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE STATES OF ARKANSAS, ALABAMA, ARIZONA, GEORGIA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[*]

Amici are the States of Arkansas, Alabama, Arizona, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia. Like Maine, many of these States partner with private schools to empower parents to make the educational choices they think best for their families. The details of these partnerships vary. But they are united in recognizing religious and nonreligious schools as valid educational partners. Unlike Maine, these States do not condition participation on a school's religiousness.

This openness to partnering with religious schools furthers the States' goal of providing an array of education choices. It also protects their citizens' constitutional rights. For discrimination against schools that teach religious things is simply discrimination against religious schools. And discriminating against religious schools also discriminates against the families who wish to send their children to those schools. As the experience elsewhere shows, a State need not discriminate on the basis of religion to serve its undoubtedly compelling interest in educating children.

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[*] Parties' counsel of record received timely notice of *amici*'s intent to file this brief, for which neither consent nor a motion for leave to file is required. *See* Sup. Ct. R. 37.2(a), 37.4, 37.6.

SUMMARY OF THE ARGUMENT

I. Strict scrutiny applies here. Maine excludes religious schools from generally available benefits solely because they are religious schools. Contrary to the First Circuit's conclusion, however, Maine's exclusion is based on the religious *status* of these schools, not their *use* of public funds. The history of Maine law makes this clear.

History aside, strict scrutiny applies anyway, because this Court has not held that use-based restrictions on religion avoid strict scrutiny. Discrimination against sectarian schools is no different than discrimination against schools that include sectarian instruction. Either way, Maine excludes schools based on religion, and that triggers strict scrutiny.

II. Maine's religious exclusion is not tailored to any compelling interest, as demonstrated by inclusive programs in other States. Maine certainly has a compelling interest in educating its citizens. But it does not have an independent interest in limiting religious schools' involvement in education, an interest it has claimed throughout this litigation. And as many other States' experience demonstrates, to serve Maine's general interest in education, the State does not need to exclude religious schools.

III. Finally, this case is an ideal vehicle to resolve a split in authority between the First and Second Circuits about the standard that applies to programs like Maine's. Indeed, shortly after the decision below the Second Circuit invalidated Vermont's substantially similar school-funding exclusion.

ARGUMENT

I. Strict scrutiny applies to Maine's school-funding exclusion, which excludes religious schools from generally available benefits solely because they are religious schools.

No one disputes that Maine excludes schools from a generally available program based solely on religion. The decision below to uphold this exclusion hinged on the conclusion that Maine "imposes a use-based restriction" rather than a status-based one. App. 35. As a result, the First Circuit was "not persuaded" that "the 'nonsectarian' requirement is subject to strict scrutiny." App. 40. But the history of Maine's religious exclusion makes clear that its discrimination turns on religious status, not use. And in any event, this Court has not held that use-based restrictions avoid strict scrutiny.

A. History shows Maine excludes schools based solely on their religious status, triggering strict scrutiny.

Under both Religion Clauses, this Court looks to the history of a challenged law to inform its analysis. *See, e.g.*, *Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2258-59 (2020) (describing "checkered tradition" of provisions like law challenged under Free Exercise Clause); *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (deeming " 'reasonable observer' " to be " 'aware' of the 'history and context' underlying a challenged program" in Establishment Clause cases (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S.

98, 119 (2001))). The history of Maine's religious exclusion makes clear that it is status based, contrary to the First Circuit's conclusion.

1. The school-funding program here arose out of the geography and culture of New England. Maine's early settlers, mostly Protestants, were religiously committed to education as, "in essence, part of human salvation." Christopher W. Hammons, Milton & Rose D. Friedman Found., *The Effects of Town Tuitioning in Vermont and Maine*, School Choice Issues in Depth, Jan. 2002, at 6.[1] But Maine's sizable "rural and non-urban areas" made "traditional school districts less efficient." *Id.* at 5.

Cultural factors compounded the barriers created by Maine's geography. In 19th-century New England, "the basic governmental unit responsible for providing education was the town." John Maddaus & Denise A. Mirochnik, *Town Tuitioning in Maine: Parental Choice of Secondary Schools in Rural Communities*, 8 J. Rsch. in Rural Educ., Winter 1992, at 27, 31.[2] Because of this emphasis on "local autonomy," "small towns throughout the countryside" independently "establish[ed] small academies"—"most of them private." Hammons, *supra*, at 6-7. Later in the 19th century, amid "the push for compulsory education," many towns "found it less expensive to ship students to existing private academies rather than build public

[1] https://www.edchoice.org/research/the-effects-of-town-tuitioning-in-vermont-and-maine/.

[2] https://jrre.psu.edu/sites/default/files/2019-08/8-1_3.pdf.

schools to accommodate local students." *Id.* at 7.

This evolved into a practice known as "town tuitioning," which involves "towns paying tuition for their resident students to attend schools not directly managed by those towns." Maddaus & Mirochnik, *supra*, at 27. Towns that rely on town tuitioning usually "have their own public elementary schools and tuition their high school students only." *Id.*

Town tuitioning grew in importance with the rise of "the free high school movement." *Id.* at 31. In Maine, this culminated in 1873 with the institution of statewide town tuitioning for high school. *Id.*; *see* Free High School Act of 1873, ch. 124, sec. 7, 1873 Me. Laws 78, 80 (Feb. 24, 1873).

The importance of town tuitioning peaked in the 1950s and began to wane in 1957, when Maine enacted legislation that "allowed towns to join together to form unified school administrative districts (SADs)." Maddaus & Mirochnik, *supra*, at 31. One well-established recipient of town-tuitioning students, Higgins Classical Institute, saw 50% of its feeder towns join SADs between 1954 and 1968. *Id.* Higgins would eventually close in 1975. *Id.*

Higgins, like other private academies attended by town-tuitioning students, was a religious institution. *See Squires v. Inhabitants of Augusta*, 153 A.2d 80, 114 (Me. 1959). At some points, "most communities" had access to secondary education only via "private academies, run mostly by local clergy and business leaders." Maddaus & Mirochnik, *supra*, at 31. Some

academies had even begun "under religious sponsorship." *Id.* at 32.

As late as 1979, over 300 students were attending "religiously operated" elementary or secondary schools with funding from Maine's town-tuitioning program. Me. Op. Att'y Gen., No. 80-2, 1980 WL 119258, at *3 n.2 (Jan. 7, 1980). Thus, for over a century, Maine allowed private schools to participate in the town-tuitioning program without regard to religion. *See* Maddaus & Mirochnik, *supra*, at 31-32.

2. Maine changed course in the early 1980s, when Maine State Senator Howard M. Trotzky, then the Senate Chair of the Committee on Education, asked for an attorney-general opinion. *See Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 131 (Me. 1999). Senator Trotzky asked whether the town-tuitioning program "violate[d] the First Amendment of the U.S. Constitution inasmuch as it allow[ed] individuals in school administrative districts to attend privately operated religious schools at public expense." Op. No. 80-2, *supra*, 1980 WL 119258, at *1.

At that time, the law did not refer to schools' religion, and as part of the town-tuitioning program, just over 300 hundred students attended "religiously operated" schools "at public expense." *Id.* at *3 n.2. Yet applying the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the attorney-general opinion concluded that continuing to include religious schools would violate the First Amendment. *See* Op. No. 80-2, *supra*, 1980 WL 119258, at *5-12. *But see Zelman*,

536 U.S. at 643-44 (reaching essentially opposite conclusion about 20 years later).

The town-tuitioning program had an obvious secular purpose—namely, "general education." Op. No. 80-2, *supra*, 1980 WL 119258, at *10. Nevertheless, applying *Lemon* required the attorney-general opinion to analyze schools' religious status. *See id.* at *8 ("[T]he focus of the 'primary effect' test is upon *the character* of the religious institutions involved." (emphasis added)); *id.* at *10 n.10 (defining "sectarian" to "refer[] to those institutions which are *characterized* by a pervasively religious atmosphere and whose *dominant purpose* is the promotion of religious beliefs" (emphasis added)).

According to the opinion, it would be "practically impossible" for any school that "exist[s] for the very purpose of teaching and promoting the tenets of a particular religious faith"—that is, any school that is *actually religious*—to "isolate" its religious and secular functions. *Id.* at *8-9; *see id.* at *11 (arguing that a "sectarian school" could not "separate[]" its "secular functions" and "religious purpose"). Therefore, the opinion determined that allowing parents to independently choose to spend a religiously neutral state subsidy at such a school would be constitutionally problematic. *Id.* at *8.

Beyond analyzing the school's religious status, the attorney-general opinion also inquired into the religious status of its teachers. In *Lemon* it saw a concern "that a teacher in a non-public school will have difficulty in preventing his religious beliefs from 'seeping'

into his course of instruction." *Id.* at *9 (citing 403 U.S. at 618-19). Indeed, *Lemon* itself invalidated a statute in part out of concerns about how "a dedicated religious person" might behave as a teacher. 403 U.S. at 618. Such concerns arguably derive from the Court's language in *Lemon*. But that fact does not make them any less based on religious status.

Lemon's status-based analysis led the attorney-general opinion to conclude that Maine must exclude religious schools from the town-tuitioning program, solely based on their status as religious schools. *See* Op. No. 80-2, *supra*, 1980 WL 119258, at *12. Despite the lack of any textual basis in Maine law for excluding religious schools, the opinion invoked constitutional avoidance and interpreted the program to exclude religious schools. *See id.* at *3, 13.

3. In 1981, Maine's legislature responded by amending the town-tuitioning program to add the current religious exclusion. *See* Act effective July 1, 1983, ch. 693, sec. 5, 1981 Me. Laws 2063, 2177 (enacting 20-A Me. Rev. Stat. Ann. 2951(2)). The circumstances leading to Chapter 693's enactment leave no doubt that the religious exclusion amounts to status-based religious discrimination.

As already discussed, prior to Chapter 693, the town-tuitioning program had no provision excluding religious schools. Chapter 693 added such a provision for the first time in Maine history. *See* 20-A Me. Rev. Stat. Ann. 2951(2). Yet its supporters repeatedly referred to it as "a recodification and a reorganization of all the education laws," lacking "any substantive

changes whatsoever." 110 Me. Legis. Rec. 229 (2d Reg. Sess., House, Mar. 9, 1982) (statement of Rep. Connolly); *accord, e.g.*, 110 Me. Legis. Rec. 315 (2d Reg. Sess., House, Mar. 23, 1982) (statement of Rep. Connolly); 110 Me. Legis. Rec. 539 (2d Reg. Sess., House, Apr. 5, 1982) (statement of Rep. Connolly).

Statements that Chapter 693 made no substantive changes only make sense against the background of the 1980 attorney-general opinion that interpreted prior Maine law to exclude religious schools, even without a textual basis for that exclusion. So Chapter 693 must be understood to adopt the 1980 opinion's status-based approach to excluding religious schools. In fact, Maine has long acknowledged as much. *See Bagley*, 728 A.2d at 130-31 (noting Maine's concession that it "made religious schools ineligible for the program . . . . in response to an Opinion of the Attorney General"). It is not disputed, therefore, that the sole impetus for enacting the religious exclusion was the 1980 attorney-general opinion's *status-based distinction*—drawn from *Lemon*—between religious and nonreligious schools. *See id.* at 131 (describing 1980 opinion's rationale as the "only justification for excluding religious schools").

Religious schools recognized that Chapter 693 was a threat. *See* 110 Me. Legis. Rec. 315 (2d Reg. Sess., House, Mar. 23, 1982) (statement of Rep. Armstrong) (noting local Christian school's opposition); 110 Me. Legis. Rec. 483 (2d Reg. Sess., Senate, Mar. 31, 1982) (statement of Sen. Trotzky) (noting Maine Association of Christian Schools' opposition). At least

one Christian school feared the legislation would "jeopardize[] their existence." 110 Me. Legis. Rec. 315 (2d Reg. Sess., House, Mar. 23, 1982) (statement of Rep. Armstrong). Indeed, when it passed, the status-based exclusion caused one of Maine's four Roman Catholic high schools to close. *Bagley*, 728 A.2d at 138 n.19.

4. Since enacting the status-based religious exclusion, Maine rebuffed at least one opportunity to end it. In 2003, a bill was introduced to repeal Maine's exclusion of religiously affiliated schools. *See* H.P. 141, Legislative Document (L.D.) 182, 2003 1st Reg. Sess., 121st Me. Legis. (introduced Jan. 21, 2003) (proposing repeal of 20-A Me. Rev. Stat. Ann. 2951(2)). It passed neither chamber of the Maine Legislature. *See* 121 Me. Legis. Rec. H-589 (1st Reg. Sess., May 13, 2003); 121 Me. Legis. Rec. S-641 (1st Reg. Sess., May 14, 2003).

The legislators' comments on that bill make clear the consistent status-based interpretation of the religious exclusion. For one thing, they continued to take the position that the religious exclusion adopted the reasoning of the 1980 attorney-general opinion, which focused on the religious status of a school. *See* 121 Me. Legis. Rec. H-589 (1st Reg. Sess., May 13, 2003) (statement of Rep. Millett) (recalling that the religious exclusion was created "in strict concurrence with the Attorney General's recommendations").

More explicit status-based rhetoric against including religious schools permeated the floor debates.

One opponent feared "giving up the rights for the education of our children to entities whose overwhelming mission is religious," without reference to any supposed religious use of state funds. *Id.* at H-584 (statement of Rep. Cummings). Another opponent seemed troubled by the fact that passing the bill would end the exclusion of *all* religions based solely on their religious status, mentioning "Muslims," "Buddhists," "Hindus," "Protestants," "Catholics," and "Jewish children." *Id.* at H-585 (statement of Rep. Davis);[3] *see also id.* at H-584 ("We don't support private schools, parochial private schools. It is not right.").

One opponent suggested that only "public schools and private non-religious schools" could be trusted to teach "the appropriate cultural morals and values of America." 121 Me. Legis. Rec. S-640 (1st Reg. Sess., May 14, 2003) (statement of Sen. Martin); *cf. Espinoza*, 140 S. Ct. at 2271 (Alito, J., concurring) (noting that common-school movement's "goal was to 'Americanize' the incoming Catholic immigrants"). Because religious schools will, by definition, include "religious teachings," the thinking went, they should never receive any state funding, even indirectly as a result of true private choices. 121 Me. Legis. Rec. S-640 (1st Reg. Sess., May 14, 2003) (statement of Sen. Martin). But excluding only schools that include religious teachings is simply another way of saying that the

[3] This line of reasoning echoes Justice Souter's dissent in *Zelman*—not the Court's opinion. *See Zelman*, 536 U.S. at 687 (Souter, J., dissenting) (discussing effect of *Zelman* in "Jewish," "Catholic," "Protestant," and "Muslim" schools).

government may exclude religious people or their institutions because they are, in fact, religious. It is a status-based exclusion.

Still other legislators argued that, because "religious schools" can "discriminate in hiring," repealing the religious exclusion would amount to "subsidiz[ing]," "condon[ing]" or "promot[ing] discrimination." 121 Me. Legis. Rec. H-583 (1st Reg. Sess., May 13, 2003) (statement of Rep. Fischer); *see id.* at 587-88 (statement of Rep. Cummings). As with religious teachings, excluding a religious school because it hires religious people amounts to excluding that school based on its religious status. *Cf. Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (holding that First Amendment guarantees religious institutions "autonomy" in "the selection of the individuals who play certain key roles").

These comments during the 2003 floor debate make clear that Maine excludes religious schools from participation in the town-tuitioning program because of their status as religious schools—not because of any supposed religious use of state funds.

* * *

From Maine's first exclusion of religious schools in the early 1980s, it has consistently interpreted its exclusion as based on religious status. The First Circuit concluded otherwise based on nothing more than Respondents' made-for-litigation representations. *See* App. 35-36; *cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50

(1983) (rejecting "appellate counsel's *post hoc* rationalizations" in the administrative-law context).

Even taken at face value, Respondents' representations below cannot change the history of Maine's religious exclusion: it excludes schools based on religious status. *See Espinoza*, 140 S. Ct. at 2259 (rejecting Montana's argument that re-adopting its no-aid provision meant the Court should overlook the historical basis of that provision).

B. Strict scrutiny additionally applies because Maine excludes schools based on their religious use of funds.

Much of the First Circuit's analysis depends on its characterization of Maine law as a use-based exclusion. *See* Pet. 25-28. As explained, that holding is wrong. But more fundamentally, from that holding it does not follow that any standard less than strict scrutiny applies.

This Court has not adopted the proposition "that some lesser degree of scrutiny applies to discrimination against religious uses of government aid." *Espinoza*, 140 S. Ct. at 2257. After all, a "religious use[] of government aid" will by definition be religious conduct. *See id.* And it is well-settled that "[a] law that targets religious conduct for distinctive treatment" receives "strict scrutiny," which it "will survive . . . only in rare cases." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

To leverage the use–status distinction, Respondents argued below that Maine's exclusion "depends on

the sectarian nature of the educational instruction" at a given school. App. 35. That is, Respondents would distinguish discrimination against sectarian schools (status based) from discrimination against schools that provide "educational instruction" of a "sectarian nature" (use based). *See* App. 34-35; *see also* Pet. 29-34; *cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring in part) (seeing no meaningful distinction between "describ[ing] [a] benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use)"). It is unclear "whether th[at] is a meaningful distinction." *Espinoza*, 140 S. Ct. at 2257. In either formulation, Maine excludes schools that are, in its estimation, too religious.

The First Circuit thought this argument showed the purpose of the religious exclusion—that Maine wishes to exclude sectarian schools only to prevent families from using their town-tuitioning payments to fund "the sectarian nature of the instruction that [such schools] will provide." App. 37. But "[s]tatus-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses." *Espinoza*, 140 S. Ct. at 2256.

Because Maine law excludes a school from receiving otherwise-available funds on the sole basis of its religious identity—whether determined by its "affiliation with a religious institution" or by "the sectarian nature of the instruction it will provide," App. 36-37—this law receives strict scrutiny. The decision below

incorrectly understood *Espinoza* and *Trinity Lutheran* to require less-exacting judicial scrutiny because it characterized Maine's religious exclusion as use based. *See* App. 38-42. This Court should grant the petition and clarify the standard that applies in cases like this one.

II. Maine's religious exclusion is not narrowly tailored to any compelling interest, as demonstrated by inclusive programs in other States.

To receive "public funds for tuition" under the town-tuitioning program, a private school must be "nonsectarian." 20-A Me. Rev. Stat. Ann. 2951(2). This "explicitly excludes religious schools"—and by extension, the religious families who would use the program to send their children to such schools—"from receipt of state funds" on the basis of their religion. *Bagley*, 728 A.2d at 130; *see Espinoza*, 140 S. Ct. at 2255. In other words, Maine law "by [its] terms impose[s] disabilities on the basis of religion." *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring in part) (emphasis omitted). Therefore, Petitioners have shown "that the challenged restrictions violate 'the minimum requirement of neutrality' to religion." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (quoting *Lukumi*, 508 U.S. at 533).

As a result, "the 'strictest scrutiny' is required." *Espinoza*, 140 S. Ct. at 2260. Maine must show that its religion-based exclusion is " 'narrowly tailored' to serve a 'compelling' state interest." *Cuomo*, 141 S. Ct.

at 67 (quoting *Lukumi*, 508 U.S. at 546). Though the First Circuit held this test did not apply, App. 40-42, it suggested that the religious exclusion would survive even if it did, *see* App. 48-49.

That suggestion is wrong. Apart from Maine's general interest in providing for education, it has no standalone interest in restricting religious schools' provision of education. And excluding religious schools from the town-tuitioning program is not narrowly tailored to Maine's interest in education.

A. Historically, Maine has argued that the religious exclusion serves its interest in complying with the Establishment Clause. *See Bagley*, 728 A.2d at 131 ("The State does not dispute that its only justification for excluding religious schools from the tuition program was compliance with the Establishment Clause."). Insofar as that argument remained open after *Zelman*, *see* 536 U.S. at 653, *Espinoza* certainly foreclosed it, *see* 140 S. Ct. at 2254, 2260.

1. In this litigation, therefore, Maine has switched focus. Rather than focus on its general interest in education, Maine claims an interest in "defin[ing] a public education to mean a secular education." Appellee's Br. 32, *Carson ex. rel O.C. v. Makin*, 979 F.3d 21 (1st Cir. 2020) (No. 19-1746), 2019 WL 5692831 [hereinafter, First Circuit Appellee's Br.]; *see id.* 29 (claiming interest in "maintaining a statewide system of *secular* public education" (emphasis added)). The decision below also invoked this putative interest. *See* App. 43 (finding "it significant, too, for purposes of defining the baseline, that the

state defines the kind of educational instruction that public schools provide as secular instruction").

Claiming such a state interest, however, is tantamount to claiming that a State has a freestanding interest in excluding religious actors from its education system—even when their inclusion would indisputably comport with the Establishment Clause. It is to claim, in other words, that religious non-neutrality itself is a state interest. This Court's cases do not grant States such an interest. *See, e.g.*, *Lukumi*, 508 U.S. at 533 (condemning laws that "target[] religious beliefs," or that "infringe upon or restrict practices because of their religious motivation").

A variation on this claim argues that Maine must exclude religious schools to ensure equal educational opportunity across the State. Otherwise, the argument goes, town-tuitioning students would have opportunities that are lacking for students who live in towns with public high schools. *See* First Circuit Appellee's Br. 31-32. But excluding religious schools does not give town-tuitioning students the same opportunities as other students. By definition, town-tuitioning students live in towns with "no public secondary school of their own." App. 6. Whether or not the town-tuitioning program includes religious schools, therefore, students in the program will have different educational opportunities than their peers elsewhere.

To ensure those differences do not become disparities, Maine did not have to "subsidize private education" as an alternative to building public high schools.

Espinoza, 140 S. Ct. at 2261. But because it has "decide[d] to do so, it cannot disqualify some private schools solely because they are religious." *Id.*

2. For similar reasons, Maine's interest in preserving "limited public funds" does not justify the religious exclusion. App. 49. Because funding is a finite resource, the First Circuit did "not see why the Free Exercise Clause compels Maine either to forego relying on 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." *Id.*

Espinoza rejected a nearly identical argument. *See* 140 S. Ct. at 2261 ("According to the Department, the no-aid provision safeguards the public school system by ensuring that government support is not diverted to private schools."). Just as with the no-aid provision there, preserving scarce resources through the religious exclusion "is fatally underinclusive because" Maine's objective is " 'not pursued with respect to analogous nonreligious conduct.' " *Id.* (quoting *Lukumi*, 508 U.S. at 546). Maine's interest in preserving scarce resources "cannot justify" the religious exclusion, which "requires only religious schools to 'bear [its] weight.' " *Id.* (quoting *Lukumi*, 508 U.S. at 547); *cf.* 121 Me. Legis. Rec. H-586 (1st Reg. Sess., May 13, 2003) (statement of Rep. Glynn) (noting Maine has "a law on the books that says that you can send your children to a private school, but if they are going to be taught by a bunch of Catholics, then that is a problem").

The State undoubtedly has an interest in ensuring adequate funding for its public schools. But Maine has already made the choice that some public funds will flow to private schools. Using religion as the criterion for selecting which private schools will then receive those funds does nothing to preserve funds for public schools.

B. Other States pursue similar goals through comparable private-school-funding programs yet see no need to exclude religious schools. Though the details of these other programs differ, they illustrate that Maine's broad-based exclusion of religious schools is not tailored to the interests that town tuitioning aims to serve.

1. No less than when this Court decided *Espinoza*, "many States today . . . provide support to religious schools through vouchers, scholarships, tax credits, and other measures." *Espinoza*, 140 S. Ct. at 2259 (citing Br. for Oklahoma et al. as *Amici Curiae* 29-31, 33-35, *Espinoza* (No. 18-1195), 2019 WL 4640375).

As discussed above, *see supra* pp. 4-6, town tuitioning as it exists in Maine is unique to northern New England. But States around the Nation have enacted similar programs to address the conditions of their own local education systems—without imposing a similar religious exclusion. The programs in other States differ from town tuitioning and each other on the margins but share key features: providing funds for tuition (and sometimes other expenses) to attend a private school chosen by a student's family. These are

often called "voucher" or "scholarship" programs. Along with Puerto Rico and the District of Columbia, about a dozen States have such a program, some with multiple programs that each serve different student populations.[4]

The population each program serves is the key distinguishing feature. Whereas Maine's program conditions student eligibility on public-school availability, other programs condition it on family income.[5] Some provide scholarships to a parent-chosen private school for students with exceptional needs.[6] Still oth-

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[4] Ark. Code Ann. 6-41-901(b); D.C. Code 38-1853.07(a)(1), 38-1853.13(3); Fla. Stat. 1002.39(1), 1002.394(3); Ga. Code Ann. 20-2-2114(a); Ind. Code 20-51-4-2(a), 20-51-4-4.3(3); La. Stat. Ann. 17:4013(2), 17:4017(A), 17:4031(A); Budget Bill (FY 2021), ch. 19, sec. 1, R00A03.05, 2020 Md. Laws 116, 268 (Mar. 18, 2020); Miss. Code Ann. 37-173-3, 37-175-3; N.C. Gen. Stat. 115C-112.5(2)(f)(4), 115C-562.1(3), 115C-562.2(a); Ohio Rev. Code Ann. 3310.03, 3310.41(B), 3310.51(C), 3310.51(F), 3310.52(A), 3313.975(A); 70 Okla. Stat. 13-101.2(A); Puerto Rico Education Reform Act, Act 85, sec. 14.01, 2018 Sess., 18th Puerto Rico Legis. (Mar. 29, 2018); Tenn. Code Ann. 49-10-1402(3), 49-10-1403, 49-10-1404; Utah Code Ann. 53F-4-302(1), 53F-4-302(2); Wis. Stat. Ann. 115.7915(2), 118.60(2)(a), 119.23(2)(a).

[5] *See, e.g.*, Fla. Stat. 1002.394(3); Ind. Code 20-51-1-4.3(3); La. Stat. Ann. 17:4013(2), 4017(A).

[6] *See, e.g.*, Ark. Code Ann. 6-41-901(b); Fla. Stat. 1002.39; Ga. Code Ann. 20-2-2114(a); Ind. Code 20-51-1-4.3(3); La. Stat. Ann. 17:4031(A); Miss. Code Ann. 37-173-3, 37-175-3; Ohio Rev. Code Ann. 3310.41(B), 3310.51(C), 3310.52(A); 70 Okla.

ers focus funding on students assigned to school districts that have not hit certain state achievement targets.[7]

Despite the variability in the details, these programs are nearly uniform in one way: They lack any provision comparable to Maine's exclusion of schools based on their religion. Some programs contain provisions that expressly provide for religious schools' participation,[8] or that imply such schools will participate.[9] Others simply make no mention of eligible schools' religiousness.[10] For many programs in this

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Stat. 13-101.2(A); Tenn. Code Ann. 49-10-1402(3); Utah Code Ann. 53F-4-302(1), 53F-4-302(2).

[7] *See, e.g.*, Ohio Rev. Code Ann. 3310.03.

[8] *See, e.g.*, Fla. Stat. 1002.39(7), 1002.394(2)(c), 1002.395(8), 1002.421; Ga. Code Ann. 20-2-2112(4), 20-2-2112(6), 20-2-2115(a); Ind. Code 20-51-4-1(a)(1); Budget Bill (FY 2021), ch. 19, sec. 1, R00A03.05(1)(d), 2020 Md. Laws 116, 268 (Mar. 18, 2020); N.C. Gen. Stat. 115C-112.5(3), 115C-551, 115C-562.1(5); Ohio Rev. Code Ann. 3310.08(A)(2), 3313.978(D)(2); Utah Code Ann. 53F-4-302(9); Wis. Stat. Ann. 115.7915(2)(c), 118.60(1)(ab), 118.60(7)(c), 119.23(1)(ab), 119.23(7)(c).

[9] *See, e.g.*, D.C. Code 38-1853.02(5), 38-1853.08(b)(1), 38-1853.08(d)(1); Puerto Rico Education Reform Act, Act 85, sec. 14.01, 2018 Sess., 18th Puerto Rico Legis. (Mar. 29, 2018) (statement of purpose).

[10] *See, e.g.*, Ark. Code Ann. 6-41-903; La. Stat. Ann. 17:4021(A), 17:4031(D); Miss. Code Ann. 37-173-17, 37-175-17; Okla. Stat. 13-101.2(H) ; Tenn. Code Ann. 49-10-1402(6)), 49-10-1404(b).

last category, state documentation shows that religious schools in fact participate—and often predominate. *See, e.g.*, House & Senate Comms. on Educ., Ark. Gen. Assemb., *Biennial Report on the Succeed Scholarship Program* 27 (Mar. 1, 2020);[11] Okla. State Dep't of Educ., *Lindsay Nicole Henry Approved Schools* (Jan. 12, 2021).[12]

The nationwide prevalence of religious schools in scholarship and voucher programs makes sense, because of the predominance of religious schools in American private education. Nationally, 67% of private schools are religiously affiliated. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stat., *The Condition of Education 2020*, at 49 (May 2020).[13] And religiously affiliated private schools educate about 4.3 million American students. *Id.* at 28; *see* U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stat., *Digest of Education Stat.*, Table 205.20 (Aug. 2019) (providing data underlying this figure).[14]

The evidence that diverse States enjoy fruitful partnerships with their religious private schools un-

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[11] https://www.arkleg.state.ar.us/Bureau/Document?type=pdf&source=blr/Research/Publications/Other&filename=19-095_Act827Rept-SucceedScholarshipEval.

[12] https://sde.ok.gov/sites/default/files/Approved%20Private%20Schools%20for%20LNH%20Edited%2020210112.pdf.

[13] https://nces.ed.gov/pubs2020/2020144.pdf.

[14] https://nces.ed.gov/programs/digest/d19/tables/dt19_205.20.asp.

dercuts the First Circuit's suggestion that Maine's religious exclusion is narrowly tailored to that State's interest in education funding. *See* App. 49.

2. It also highlights a troubling retrogression in the decision below. Despite *Zelman* and the line of precedent that led to it, the First Circuit suggested that including religious schools in Maine's town-tuitioning program might violate the Establishment Clause. *See* App. 30 n.2. It distinguished *Zelman* because "the Maine program is 'substantially narrower' " and "serves as a backstop for children who have no opportunity to attend a public school." *Id.*

The decision below cited nothing in *Zelman*, however, to support this distinction. Which is unsurprising, given *Zelman*'s focus on parental choice. *See* 536 U.S. at 653 ("We believe that the program challenged here is a program of true private choice . . . and thus constitutional."). And scholarship and voucher programs, essentially by definition, are "program[s] of true private choice." *Id.*; Off. of Non-Public Educ., U.S. Dep't of Educ., *Education Options in the States* 1 (2009) (defining "scholarship" or "voucher" programs).[15] But the First Circuit's abbreviated Establishment Clause analysis made no mention of the fact that the town-tuitioning program also allows parents the freedom to direct tuition funds as they see fit. *See* App. 30 n.2.

If left to stand, the decision below threatens not

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[15] https://www2.ed.gov/parents/schools/choice/educationoptions/educationoptions.pdf.

just the freedom of religious schools and families in Maine but also the flexibility of the States to partner with religious schools. This Court should grant the petition and clarify the analysis that applies to programs like Maine's under the Religion Clauses.

III. This case is an ideal vehicle to address a question this Court recently left open that is already dividing the lower courts.

Maine does not stand entirely alone in excluding schools from its town-tuitioning program solely based on religion. Two other States, Vermont and New Hampshire, have similar town-tuitioning programs with similar religious exclusions. *See* N.H. Rev. Stat. Ann. 193:4 (allowing only "nonsectarian private school[s]" to participate in town tuitioning); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 541-42 (Vt. 1999) (holding that it violates Vermont Constitution when school district "reimburses tuition for a sectarian school . . . in the absence of adequate safeguards against the use of such funds for religious worship"); *see also* Maddaus & Mirochnik, *supra*, at 27; *Education Options in the States*, *supra*, at 19-20, 28-29. A recent decision by the Second Circuit that Vermont's exclusion likely violates the Free Exercise Clause has created a divide about how *Espinoza* applies to New England's town-tuitioning programs.

Among the Vermont plaintiffs were families who qualified for that State's town-tuitioning program and wished to send their children to a local Roman Catholic school with their tuition subsidy. *See A.H. ex rel.*

Hester v. French, No. 2:20-CV-151, 2021 WL 62301, at *4 (D. Vt. Jan. 7, 2021). Finding that Vermont prohibited them from using their subsidy at the school "solely because of that school's religious affiliation," *id.*, the district court applied *Espinoza* and enjoined Vermont from denying tuition solely based on religion, *id.* at *12-13. But it refused to "order [Vermont] to honor Plaintiffs' [Catholic-school] tuition requests," because "at least some of the courses offered by [the school] consist[] of religious education." *Id.* at *12.

In expedited appellate proceedings, the Second Circuit ordered Vermont to do just that. On the plaintiffs' motion, Judge Menashi issued an emergency injunction "ending [the plaintiffs'] exclusion from the Town Tuition Program" to ensure they obtained relief before "the new school semester start[ed]" on January 25. Order, *A.H. ex rel. Hester v. French*, No. 21-87 (2d Cir. Jan. 22, 2021), Doc. No. 40.

Afterwards, a three-judge panel treated the plaintiffs' motion as a mandamus petition and granted it. Order, *A.H. ex rel. Hester v. French*, No. 21-87 (2d Cir. Feb. 3, 2021), Doc. No. 59. The Second Circuit agreed with the district court's conclusion that, under *Espinoza*, Vermont's "exclusion violates the First Amendment." *Id.* at 1. Yet it held that the district court should have "provide[d] the full relief the appellants requested," instead of "defer[ring] to the appellees' desire to develop new criteria for [town-tuitioning-program] eligibility that would satisfy Vermont's constitution." *Id.* Thus the Second Circuit ordered the dis-

trict court "to amend its preliminary injunction to prohibit the appellees from continuing to deny the appellants' requests for tuition reimbursement under the [program], regardless of the appellants' chosen school's religious affiliation or activities." *Id.* at 1-2.

The divide between the First and Second Circuits' decisions demonstrates the need for further guidance from this Court. Like the First Circuit, the Vermont district court understood Vermont's exclusion to "prohibit[] only religious use" and therefore not to "conflict with *Espinoza*." *French*, 2021 WL 62301, at *11; *see* App. 33-35. The Second Circuit disagreed. *See* Order, *French*, *supra*, Doc. No. 59 at 1.

This divide results from the fact that *Espinoza* concluded that it "need not examine" the "distinction between discrimination based on use or conduct and that based on status," nor whether "some lesser degree of scrutiny applies to discrimination against religious uses of government aid." 140 S. Ct. at 2257.

The Court should wait no longer to examine this distinction and to clarify the appropriate level of scrutiny. The First Circuit's decision examined this issue extensively. *See* App. 31-49. Its result hinged on the determination that Maine's religious exclusion is use based, and that such use-based exclusions do not receive strict scrutiny. *See* App. 38-42. And the case comes to this Court after the district court granted Respondents summary judgment on a stipulated record. App. 11. This case presents an ideal vehicle for clarification.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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