

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

**BRIEF FOR COUNCIL OF ISLAMIC SCHOOLS IN
NORTH AMERICA, PARTNERSHIP FOR INNER-CITY
EDUCATION, AND UNION OF ORTHODOX JEWISH
CONGREGATIONS OF AMERICA AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	7
I. The Lower Court’s Reliance On A Status/Use Distinction Generates Confusion And Encourages Discrimination Against Faith-Based Schools.	7
II. <i>Amici’s</i> Lived Realities Demonstrate The Unworkability Of The Status/Use Distinction.....	9
III. In Related Contexts, This Court Has Rejected A Similar Distinction.....	16
CONCLUSION	19

TABLE OF AUTHORITIES

Cases

<i>Carson v. Makin</i> , 979 F.3d 21 (2020).....	8
<i>Corp. of Presiding Bishop of Church of Jesus Latter-day Saints v. Amos</i> , 483 U.S. 327 (1987) ...	17
<i>Espinoza v. Montana Department of Revenue</i> , 140 S. Ct. 2246 (2020).....	5, 6, 7, 8, 18
<i>Fratello v. Archdiocese of N.Y.</i> , 863 F.3d 190 (2d Cir. 2017)	18
<i>Grussgott v. Milwaukee Jewish Day School</i> , 882 F.3d 655 (7th Cir. 2018).....	17, 18
<i>Hosanna-Tabor Evangelical Church & School v. EEOC</i> , 565 U.S. 171 (2012)	17
<i>Our Lady of Guadalupe v. Morrissey-Berry</i> , 140 S. Ct. 2049 (2020).....	6, 7, 16, 17
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 137 S. Ct. 2012 (2017)	5, 6, 7, 16, 18
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002).....	13

Other Authorities

<i>Admissions</i> , Leaders Preparatory School, http://bit.ly/2NTToPRg	13
Aharon Lichtenstein, <i>A Consideration of Synthesis from a Torah Point of View</i> , <i>The Commentator</i> (April 27, 1961), http://bit.ly/2Pu3qP1	5, 12

Alex D.M. Pomson, <i>Knowledge That Doesn't Just Sit There: Considering a Reconceptation of the Curriculum Integration of Jewish and General Studies</i> , 96 <i>Rel. Educ.</i> 528 (2001).....	12
Archbishop Lyke School, <i>Scholarships</i> , http://bit.ly/3kMyVzs	13
St. Thomas Aquinas School, <i>Scholarships</i> , http://bit.ly/3c52KXR	13
Benjamin Wormald, <i>A Portrait of American Orthodox Jews</i> , Pew Research Center (2015), https://pewrsr.ch/3rHPUpk	4
<i>Catechesi tradendae</i> (1979)	10
Charles L. Glenn, <i>Muslim Educators in American Communities</i> (2018)	4, 11
<i>CISNA Accreditation Standards</i> , http://bit.ly/2MHoZKY	3, 11
Code of Canon Law, Canon 795	10
Food Research & Action Center, <i>FRAC analysis of 2017 American Community Survey (ACS) data</i> , http://bit.ly/3bCANl2	2
Home, Leaders Preparatory School, http://bit.ly/3kDZLJT	13
Jack Wertheimer, <i>Jewish Education in the United States: Recent Trends and Issues</i> , 99 <i>Am. Jewish. Y.B.</i> 3 (1999).....	5
Karen Keyworth, <i>Islamic Schools in the United States</i> (Institute for Social Policy and Understanding 2011)	11

Kathleen Porter-Magee, <i>Catholic on the Inside: Putting Values Back at the Center of Education Reform</i> (Manhattan Institute 2019).....	9, 10
<i>Lessons on Equity, Accessibility, and Demand for Urban Catholic Education: An Enrollment Report from Partnership Schools</i> (Feb. 2021), http://bit.ly/3l0imQB	2
Mike Davis, <i>Jackson to Provide Buses to Orthodox Jewish Schools in Lakewood</i> , Asbury Park Press (Aug. 6, 2018), http://bit.ly/3bVYWIq	14
<i>Mission & Vision</i> , MCC Academy, http://bit.ly/3q7VCz1	14
Nathan J. Diament, <i>Public Funding for Non-Public Schools</i> , Jewish Action (Fall 2005), http://bit.ly/306EgYU	14
Orthodox Union Advocacy Center, <i>Accomplishments</i> , (June 30, 2020), http://bit.ly/304U4v5	15
Orthodox Union Advocacy Center, <i>Letter to NY Education Dept. re Substantial Equivalent Instruction for Nonpublic School Students</i> (2019), http://bit.ly/3q8A6dz	4, 5, 11, 12
Orthodox Union Advocacy Center, <i>Orthodox Union Position Paper on Government Aid to Jewish Day Schools</i> (2012), http://bit.ly/3qi3Tkd	4, 14
Orthodox Union Advocacy Center, <i>Union of Orthodox Jewish Congregations of America Applauds U.S. Supreme Court Ruling Upholding Religious Liberty, Overturning Montana’s “Blaine Amendment” that Enabled Anti-Religious Discrimination in Government School-Aid Program</i> (June 30, 2020), http://bit.ly/2Pnt5c1	15

Partnership Schools, <i>2019-2020 Annual Report</i> , http://bit.ly/3bkyFVl	12
<i>Partnership Schools Enrollment Report</i> (Feb. 2021), https://bit.ly/3sWXpJ8	9, 13
Partnership Schools, <i>Our Approach</i> , https://bit.ly/3qzvmOh	2
Sacred Congregation for Catholic Education, <i>The Catholic School</i> (1977)	10
Shira Hanu, <i>Allen Fagin, Head of the Orthodox Union, Reflects on how the Pandemic has Changed Orthodox Life</i> , Jewish Telegraphic Agency (June 25, 2020), http://bit.ly/2NXYPJ8	14, 15
Zakiyyah Muhammed, <i>Islamic Education in America: An Historical Overview with Future Projections</i> , 25 Religion & Educ. (1998)	11

INTEREST OF *AMICI CURIAE*¹

Amici curiae operate, represent, and support elementary and secondary schools in three faith traditions: Catholic (Partnership for Inner-City Education), Islamic (Council of Islamic Schools in North America), and Jewish (Union of Orthodox Jewish Congregations of America). Students attending many of the schools that are operated or supported by *amici* participate in publicly-funded private-school-choice programs. Central to these schools' religious and educational missions is the integration of faith throughout all aspects of their educational programs, making the status/use distinction employed by the court below both unworkable and discriminatory.

The Partnership for Inner-City Education ("Partnership Schools") is a non-profit organization that operates nine urban Catholic pre-K–8 schools in Harlem, the South Bronx, and Cleveland. Partnership Schools' mission is to revive struggling Catholic schools serving disadvantaged children financially, spiritually, and academically such that these schools are able to provide students from these underserved communities with the academic preparation, values, and skills they need to break the cycle of poverty and lead fulfilling,

¹ Pursuant to Rule 37.6, *amici curiae* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice of *amici curiae*'s intent to file this brief at least 10 days prior to the due date. All parties have consented to the filing of this brief.

productive lives. Their nine schools serve over 2,300 students within the geographic boundaries of congressional districts with three of the highest rates of child poverty in the United States.²

Partnership Schools has worked for almost a decade “to change the story of Catholic school sustainability in neighborhoods that need them the most,” and has achieved incredible success for the communities it serves. *Lessons on Equity, Accessibility, and Demand for Urban Catholic Education: An Enrollment Report from Partnership Schools* (Feb. 2021), <http://bit.ly/3l0imQB>. To achieve its mission, Partnership Schools integrates the Catholic faith into every aspect of the school—delivering a rigorous education that is grounded in content, character, *and* faith. By “weaving together [its] faith, values, and character education” along with effective instruction, Partnership Schools has helped urban students close “the content and skills gaps with which” they originally enrolled. Partnership Schools, *Our Approach 3*, <https://bit.ly/3qzvmOh>. Partnerships Schools view “these historic successes” as a product of “the strong, intentional, and faith-filled cultures and values that are central to urban Catholic education.” *Id.*

² New York Congressional District 15 (South Bronx) has the highest percentage of child poverty in the nation (47.6%); New York Congressional District 13 (Harlem) has the fifth-highest percentage (38.6%); Cleveland has the seventh-highest (38.4%). Food Research & Action Center, *FRAC analysis of 2017 American Community Survey (ACS) data*, Tbl. 2 (“Number of Children Below Poverty by Congressional District 2017”), <http://bit.ly/3bCANl2>.

The Council of Islamic Schools in North America (“CISNA”) is a non-profit organization dedicated to its vision of a world in which all students have access to the highest quality Islamic education. CISNA partners with Islamic schools to provide a rigorous accreditation process that ensures excellence in the academic and Islamic aspects of schools, through accreditation visits by experienced Islamic school professionals and ongoing support through resources and professional development. In the United States, 37 CISNA accredited schools and 112 member schools are currently in the CISNA network. These schools serve about 24,000 students.

A key goal in Islamic schools is the continuity between faith, culture, and education. While secular subjects may be taught by non-Islamic lay teachers, the ideal CISNA member school fully integrates Islam throughout the curriculum so that secular subjects are taught through an Islamic lens. And CISNA accreditation criteria looks to ensure that all faculty and staff support the school’s religious mission. *CISNA Accreditation Standards*, <http://bit.ly/2MHoZKY>. CISNA accredited schools offer classes in Arabic, Quran, and Islamic Studies. Students also engage in midday prayer in a prayer room in the school or at a mosque associated with the school. Many parents choose Islamic schools to ensure their children receive an education that provides a firm foundation in Islam and helps foster a positive identity for students who may face discrimination in their larger communities. Students at Islamic schools come from a wide variety of backgrounds and cultures but share a common

identity in their faith. See Charles L. Glenn, *Muslim Educators in American Communities* 41–63 (2018).

The Union of Orthodox Jewish Congregations of America (“Orthodox Union”) is the nation’s largest Orthodox Jewish synagogue organization, representing nearly 1,000 congregations as well as more than 400 Jewish non-public K-12 schools across the United States. “No issue unites [the Orthodox Union’s] constituency more than the importance of education.” Orthodox Union Advocacy Center, *Letter to NY Education Dept. re Substantial Equivalent Instruction for Nonpublic School Students* 1 (2019), <http://bit.ly/3q8A6dz>. This focus on education is firmly rooted in Jewish theology. Orthodox Jews in America take these commands seriously—more than 80% have at least one child enrolled in a Jewish day school. See Benjamin Wormald, *A Portrait of American Orthodox Jews*, Pew Research Center (2015), <https://pewrsr.ch/3rHPUpk>. And this model has worked for the Orthodox Jewish community, “surveys have demonstrated [that] the mode of Jewish education which yields the deepest and longest impact in shaping committed Jews is a K-12 Jewish day school education.” See Orthodox Union Advocacy Center, *Orthodox Union Position Paper on Government Aid to Jewish Day Schools* (2012), <http://bit.ly/3qi3Tkd>. This commitment to Jewish education is manifested in a network of over 850 Orthodox Days Schools, serving 150,000 students in the United States. *Letter to NY Education Dept., supra* at 2.

As in Catholic and Islamic schools, the integration of faith into secular educational programs is a key

component of Orthodox day schools. For over a century, Orthodox day schools have served as the American Orthodox Jewish community's "critical setting for the transmission" of Jewish values. Jack Wertheimer, *Jewish Education in the United States: Recent Trends and Issues*, 99 Am. Jewish. Y.B. 3, 17 (1999). While a central feature of the Orthodox day school is its "dual curriculum" system, which divides the school day between Jewish (*e.g.*, the Bible and Talmud) and "general" studies (*e.g.* math, science, language arts), "these areas of studies are not intended to live in isolation." *Letter to NY Education Dept., supra* at 2. Rather, deriving from a theology of Judaism as "world redeeming," the pedagogy in Jewish day schools integrates secular and religious studies in order to "establish[] a rich education as the basis of a rich life" in which "[t]he final word is with integration and harmony." Aharon Lichtenstein, *A Consideration of Synthesis from a Torah Point of View*, *The Commentator* (April 27, 1961), <http://bit.ly/2Pu3qP1>.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant certiorari in order to clarify that any discrimination on the basis of religious status *or* religious use is subject to "the most exacting scrutiny." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). While recognizing that status-based religious discrimination is subject to strict scrutiny under the Free Exercise Clause, this Court in *Trinity Lutheran* and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), declined to "address religious *uses* of funding

or other forms of discrimination.” *Trinity Lutheran*, 137 S. Ct. at 2024 n.3 (emphasis added). Unfortunately, in the decision below, the First Circuit interpreted this Court’s explicit refusal to endorse a status/use distinction as license to impose one, holding that the exclusion of faith-based schools from Maine’s Town Tuitioning Program was not subject to strict scrutiny because it was “use-based” rather than “status-based” discrimination.

Amici’s lived realities illustrate the unworkability of the lower court’s status/use distinction. Schools in the CISNA, Orthodox Union, and Partnership Schools networks all integrate their respective faith traditions with secular academic content. For these organizations, integration of faith into all aspects of schooling is an indispensable element of what it means to *be* a religious school. To discriminate against these religious schools on the basis of use *is* to discriminate against them on the basis of their religious status—and should thus trigger strict scrutiny. Indeed, the First Circuit’s status/use distinction only serves to benefit those religious schools “apathetic about religion” while requiring “those with a deep faith” like *amici* to “face the greatest disabilities.” *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring).

In related contexts, this Court has recognized that a primary value of religious schools is that they integrate their faith into their educational mission. In *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), decided within a week of *Espinoza*, this Court emphasized that “educating young people in their faith, inculcating its teachings, and training

them to live their faith are responsibilities that lie at the very core of a private religious school's mission." *Id.* at 2064. Multiple Circuits have also recognized the importance of integrating faith with secular studies.

Because the decision below permits discrimination against religious schools like *amici* from exercising their religious convictions, this Court should grant certiorari and hold that *any* discrimination on the basis of religious status *or* use is subject to "the most exacting scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2021.

ARGUMENT

I. The Lower Court's Reliance On A Status/Use Distinction Generates Confusion And Encourages Discrimination Against Faith-Based Schools.

In *Trinity Lutheran*, this Court held that a government policy which "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2021. Because the Missouri program in question in *Trinity Lutheran* discriminated on the basis of religious *status*, the Court declined to "address religious *uses* of funding or other forms of discrimination." *Id.* at 2024 n.3 (emphasis added). Likewise, in *Espinoza*, the Court again declined to resolve the question of "whether there is a meaningful distinction between discrimination based on [religious] *use* or conduct and that based on

[religious] *status*.” *Espinoza*, 140 S. Ct. at 2257 (emphases added). In doing so, however, this Court emphasized that its holding was “[not] meant to suggest that . . . some lesser degree of scrutiny applies to discrimination against religious uses of government aid.” *Id.*

Unfortunately, the First Circuit interpreted this Court’s explicit refusal to endorse a status/use distinction as license to impose it here. In the decision below, the First Circuit found that the exclusion of faith-based schools like those supported by *amici* from Maine’s Town Tuitioning Program was not subject to strict scrutiny because it was “use-based” rather than “status-based.” The lower court therefore upheld the program, despite the fact that it enables parents to send their children to secular—but not religious—private schools, and thus deprives parents who choose religious schools from enjoying the public education funding allocated to their children. Even though the program is not neutral to religion, the First Circuit concluded that the State’s decision to exclude religious schools was constitutionally permissible because it discriminated on the basis of the religious *use* to which state funds would be put rather than on the religious *status* of the excluded schools. Pet.App.34–35. Claiming to rely on this Court’s decision in *Espinoza*, the lower court found this status/use distinction determinative. *Id.* at 27. “*Espinoza* clarified,” the court supposed, that “discrimination based solely on religious ‘status’ . . . is distinct from discrimination based on religious ‘use.’” *Id.* at 25.

The decision below thus creates doctrinal confusion and endorses religious discrimination based on a patent misreading of this Court’s statements in

Espinoza and *Trinity Lutheran* that it was *not* adopting any status/use distinction. The lower court's test undermines the Free Exercise Clause's mandate of neutrality toward religion and that hinders the mission of tens of thousands of religious schools like CISNA's members, the Partnership Schools, and Orthodox day schools. Rather than allow that view to metastasize any further, the Court should grant certiorari to resolve the confusion and prevent further discrimination against faith-based schools and the children they educate.

II. *Amici's* Lived Realities Demonstrate The Unworkability Of The Status/Use Distinction.

For schools like CISNA's member schools, Orthodox day schools, and the Partnership Schools, the integration of their respective faith traditions with secular academic content is an essential component of the schools' mission and character. For these schools, the lower court's ostensible status/use distinction simply ignores reality. The integration of faith into every aspect of their educational program lies at the heart of *who they are* and what it means to *be* a religious school that aspires to educate children to their full potential and to live out their mission as faith-based institutions.

Partnership Schools believes that in order to thrive, its Catholic schools need both "academic excellence" and "joyous, productive, faith-filled school cultures." *Partnership Schools Enrollment Report 6* (Feb. 2021), <https://bit.ly/3sWXpJ8>. The organization's Superintendent, Kathleen Porter-Magee, has argued that "[t]here is no such thing as a values-neutral school." Kathleen Porter-Magee,

Catholic on the Inside: Putting Values Back at the Center of Education Reform 6 (Manhattan Institute 2019). The values that are communicated to the students in Partnership Schools are informed by both the content taught in the classroom and the culture that animates the institution. *Id.* Ms. Porter-Magee argues that the elements of the Catholic education model that make schools “Catholic on the inside” are the objectivity of truth, the belief that every human person is made in God’s image, the importance of forming virtuous habits, and the happiness that comes from using one’s free will to choose the good. *Id.* at 8–10. In remarking on the purpose of Catholic schools, Pope John Paul II emphasized that the “special character of the Catholic school, the underlying reason for it . . . is precisely the quality of the religious instruction integrated into the education of the pupils.” *Catechesi tradendae* ¶ 69 (1979). The Code of Canon Law of the Catholic Church defines “true education” as one in which students are “able to develop their physical, moral, and intellectual talents harmoniously, acquire a more perfect sense of responsibility and right use of freedom, and are formed to participate actively in social life.” Code of Canon Law, Can. 795. And the academic model espoused by Partnership Schools is exemplary of this commission. The witness to the Christian message by the adult staff at the school “is what makes the difference between a school whose education is permeated by the Christian spirit and one in which religion is only regarded as an academic subject like any other.” Sacred Congregation for Catholic Education, *The Catholic School* ¶ 43 (1977).

Likewise, for the CISNA accredited schools—and the nearly 24,000 students they serve—the integration of faith and secular content lies at the core of their identity as a religious educational institution. In fact, “[t]he very essence of Islamic schools is the teaching of Islam.” Karen Keyworth, *Islamic Schools in the United States* 5 (Institute for Social Policy and Understanding 2011). Education in the Islamic tradition is considered a process in which teachers have “roles in the formative process of their students and its effect on their identity and character as contrasted with their role in imparting content knowledge”—the *Ta’aleem* (instruction) and *Tarbiyah* (education) components. Glenn, *supra* at 122. In this holistic education model, the relationship between student and teacher is critical with the teacher serving as a role model. See Zakiyyah Muhammed, *Islamic Education in America: An Historical Overview with Future Projections*, 25 Religion & Educ. 87, 89 (1998). To receive accreditation from CISNA, a school must comply with CISNA’s accreditation standards, which require that “[s]chool faculty and staff incorporate Islamic values that are aligned with the school’s mission & vision in all subjects” and that “[t]he school fosters a positive Islamic identity among students.” *CISNA Accreditation Standards, supra*.

Similarly, schools in the Orthodox Union are dedicated to integrating faith in all aspects of their educational programs. “Transmitting Jewish values through education is one of the central and timeless imperatives captured in Judaism’s most sacred texts,” and this goal is a lived reality for the more than 250,000 students enrolled in the Jewish day school network. *Letter to NY Education Dept., supra* at

2. Teaching Judaism is prescribed by the Torah, which “commands Jews to seize all opportunities to transmit our amassed knowledge and central values to each subsequent generation.” *Id.* (citing Deuteronomy 6:7). The “general studies” and “Jewish studies” curricula at Jewish day schools are not meant to be separate, but rather combined in such a way as achieve “integration and harmony” in order to establish “a rich education as the basis for a rich life.” Lichtenstein, *supra*. Indeed, “Jewish all-day schools have widely aspired to the curriculum integration of Jewish and general studies.” Alex D.M. Pomson, *Knowledge That Doesn’t Just Sit There: Considering a Reconception of the Curriculum Integration of Jewish and General Studies*, 96 *Rel. Educ.* 528, 528 (2001). This integration effectively means that “various learning objectives typically associated with general studies education—such as language arts or social studies—are often pursued under the Jewish studies umbrella.” *Letter to NY Education Dept., supra* at 4.

The discrimination authorized by the lower court’s status/use distinction has real-world consequences for, and affects the educational prospects of, the children who attend the schools operated and supported by *amici*. If the lower court’s discriminatory test was adopted in other jurisdictions, many families would be unable to afford to enroll their children in these successful schools. For example, eighty percent of Partnership families attend these schools on scholarships, and the median yearly income for scholarship families is \$29,295. Partnership Schools, *2019-2020 Annual Report* 4, <http://bit.ly/3bkyFVl>. Partnership Schools’ study of its

own enrollment trends has led the organization to conclude that “[p]ublic funding is *essential* to meet the demand for equitable access” to Catholic schools for disadvantaged families. *Partnership Schools Enrollment Report, supra* at 6 (emphasis added). Luckily, many Partnership students currently do have access to public funding. For example, tuition is “completely covered” for eligible families at Partnership’s Cleveland schools through Ohio’s Cleveland Scholarship Program—the program upheld by this Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)—and EdChoice Program. See Archbishop Lyke School, *Scholarships*, <http://bit.ly/3kMyVzs>; St. Thomas Aquinas School, *Scholarships*, <http://bit.ly/3c52KXR>. Access to funding is absolutely crucial for the families served by Partnership Schools; “without access to programs that give low-income parents the same school choices as wealthier ones,” most students at Partnership Schools would be unable to enroll. *Partnership Schools Enrollment Report, supra* at 6.

Numerous CISNA accredited schools also receive funding from private school choice programs. Students at the Leaders Preparatory School in Orlando, Florida, for example, can apply for the Florida Tax Credit Scholarship. *Admissions*, Leaders Preparatory School, <http://bit.ly/2NTtoPRg>. The mission at the Leaders Preparatory School is to develop students with “high morals and strong character based on an understanding of themselves in relationship to Allah and society.” *Home*, Leaders Preparatory School, <http://bit.ly/3kDZLJT>. Additionally, many students at CISNA accredited schools are eligible to reclaim state tax credits for education

expenses. For instance, MCC Academy in Morton Grove, Illinois provides “a top-notch secular education complemented by contemporary coursework in Islamic studies designed to build and refine character among our students, helping them develop a beautiful Muslim-American identity and the knowledge to help them positively impact the culture in which they live.” *Mission & Vision*, MCC Academy, <http://bit.ly/3q7VCz1>.

Likewise, Orthodox Jewish families across America rely, in part, on public funding to send their children to Jewish day schools. See *Orthodox Union Position Paper on Government Aid to Jewish Day Schools*, *supra*. Pennsylvania, for example, offers tax credits to corporations that go towards funding nonpublic school scholarships. Because of this program, the Jewish Federation of Philadelphia has been able to consistently increase its support of Jewish day schools. Nathan J. Diament, *Public Funding for Non-Public Schools*, Jewish Action (Fall 2005), <http://bit.ly/306EgYU>. Similarly, New Jersey law requires busing or transportation funding for students attending nonpublic schools. That program has benefited hundreds of students attending Orthodox Jewish day schools in the state. Mike Davis, *Jackson to Provide Buses to Orthodox Jewish Schools in Lakewood*, Asbury Park Press (Aug. 6, 2018), <http://bit.ly/3bVYWIq>. Without these programs, Orthodox Jewish families would have to face the “staggering cost of Jewish education” alone. Shira Hanu, *Allen Fagin, Head of the Orthodox Union, Reflects on how the Pandemic has Changed Orthodox Life*, Jewish Telegraphic Agency (June 25, 2020), <http://bit.ly/2NXYPUI>.

As explained by Orthodox Union Vice President Allen Fagin, “[o]ver the past decade, the Orthodox Union’s advocacy work has spearheaded the creation or expansion of many state aid programs to support parental choice in education.” Orthodox Union Advocacy Center, *Union of Orthodox Jewish Congregations of America Applauds U.S. Supreme Court Ruling Upholding Religious Liberty, Overturning Montana’s “Blaine Amendment” that Enabled Anti-Religious Discrimination in Government School-Aid Program* (June 30, 2020), <http://bit.ly/2Pnt5c1>. The Orthodox Union advocated for the successful implementation of school choice programs in Florida, Louisiana, New York, and Pennsylvania. Orthodox Union Advocacy Center, *Accomplishments*, (June 30, 2020), <http://bit.ly/304U4v5>. The Orthodox Union also filed an amicus brief in the *Espinoza* case and praised the Court’s decision. *Union of Orthodox Jewish Congregations of America Applauds U.S. Supreme Court Ruling Upholding Religious Liberty, Overturning Montana’s “Blaine Amendment” that Enabled Anti-Religious Discrimination in Government School-Aid Program, supra*. Especially in light of the economic dislocation caused by the coronavirus pandemic, Mr. Fagin noted that applications for tuition assistance at Jewish day schools were above record levels and continuing to increase. There is thus concern that “parents might get priced out of the ability to provide the Jewish education for their children that they desperately want to provide.” *Hanu, supra*.

For Orthodox day schools, CISNA, and Partnership Schools, the supposed status/use

distinction is unworkable, discriminatory, and illogical. Their lived realities illustrate that, for these organizations, the integration of faith into every aspect of schooling is part and parcel of what it means to *be* a religious school. To discriminate against these religious schools on the basis of use *is* to discriminate against religious schools on the basis of their status—and should thus trigger “the most exacting scrutiny.” *Trinity Lutheran*, 137 S. Ct. at 2021.

III. In Related Contexts, This Court Has Rejected A Similar Distinction.

Consistent with the lived realities of Partnership Schools, Orthodox Union, and CISNA that illustrate the inseparable nature of religious status and education at religious schools, this Court has itself acknowledged that a primary value of religious schools is that they integrate their faith into their educational mission. Within a week of its decision in *Espinoza*, this Court’s decision in *Our Lady of Guadalupe* stressed that “educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of a private religious school’s mission.” 140 S. Ct. at 2064. Highlighting the necessity of fully integrating the faith in religious schools—ranging from Catholic, Protestant, Jewish, Islamic, Church of Jesus Christ of Latter-day Saints, to Seventh-day Adventist—this Court recognized that there is a “close connection” drawn by religious institutions “between their central purpose and educating the young in the faith.” *Id.* at 2064–66.

Indeed, it was largely in recognition of this close connection that the Court held that the teachers in

Our Lady of Guadalupe were “ministers” within the meaning of the “ministerial exception.” Because of the faith-based nature of their schools, the teachers were “expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith.” *Id.* at 2066. Further, they were both expressly regarded by their schools as “playing a vital part in carrying out the mission of the church, and the schools’ definition and explanation of their roles is important.” *Id.* In the case of the first teacher, that definition and explanation required that she perform “[a]ll her duties”—not just the religious ones—“within [the school’s] overriding commitment” to “develop and promote a Catholic School Faith Community.” *Id.* at 2056 (internal quotation marks omitted). For the second teacher, her school expressly required that she “integrat[e] Catholic thought and principles into secular subjects.” *Id.* at 2059; *see also Corp. of Presiding Bishop of Church of Jesus Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring in judgment) (“What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident.”).

Several Circuits have likewise recognized the integration of religious and secular content within religious schools in similar cases. For instance, applying this Court’s earlier decision in *Hosanna-Tabor Evangelical Church & School v. EEOC*, 565 U.S. 171 (2012), the Seventh Circuit held that a teacher of Hebrew language in a Jewish day school qualified as a “minister” under the ministerial exception. *See Grussgott v. Milwaukee Jewish Day School*, 882 F.3d 655 (7th Cir. 2018) (Barrett, J.). Even assuming that the teacher there had the

“purely secular” title of “grade school teacher,” and despite the fact that “[o]ne might have this same title at a public school and perform a completely secular job,” the court applied the ministerial exception in part because “the school expected its Hebrew teachers to integrate religious teachings into their lessons.” *Id.* at 659. Similarly, the Second Circuit concluded that a “lay principal,” whose job description included an admonition to “help students ‘integrat[e] . . . the Gospel’ into daily life,” qualified under the ministerial exception. *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 193 (2d Cir. 2017).

The very premise of this Court’s observation in *Our Lady of Guadalupe* and these lower court decisions belies the First Circuit’s effort to erect a status/use distinction. What the First Circuit failed to appreciate—and what this Court has explicitly recognized—is that for many religious schools, the status of “being religious” entails a complete integration of faith formation and the secular components of education. The status/use distinction thus would paradoxically favor religious schools “apathetic about religion” while requiring “those with a deep faith” to “face the greatest disabilities.” *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring).

Rather than allowing the First Circuit’s misguided rule to inflict unconstitutional discriminatory treatment on religious schools like *amici*, this Court should grant certiorari and hold that *any* discrimination on the basis of religious status *or* use is subject to “the most exacting scrutiny.” *Trinity Lutheran*, 137 S. Ct. at 2021.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge the Court to grant certiorari and reverse.

Respectfully submitted,

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