No. 20-1088

IN THE
# Supreme Court of the United States

DAVID AND AMY CARSON, AS PARENTS AND NEXT FRIENDS OF O.C., ET AL.,

*Petitioners,*

v.

A. PENDER MAKIN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE DEPARTMENT OF EDUCATION,

*Respondent.*

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

## BRIEF OF THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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September 10, 2021

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

STATUTES AND REGULATIONS Page



LEGISLATIVE MATERIAL

TABLE OF AUTHORITIES—continued



OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

## INTEREST OF *AMICUS CURIAE*[1]

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. The Orthodox Union, through its OU Advocacy Center, has participated in many cases before this Court that, like this one, raise issues of importance to the Orthodox Jewish community, including *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Locke* v. *Davey*, 540 U.S. 712 (2004); and *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). Through *amicus curiae* briefs, the Orthodox Union seeks to inform the Court of the perspective of our community and the impact a ruling will have. The overwhelming majority of the Orthodox Union's constituents, as well as an increasing number of Jewish parents who are not affiliated with the Orthodox Union, choose to send their children to Jewish schools as well as attend prayer services and educational programs at synagogues. The Orthodox Union is concerned that if the decision below is permitted to stand, it would perpetuate discrimination against minority faiths, and license

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amicus curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that counsel for all parties have filed letters granting blanket consent to the filing of *amicus* briefs.

the greatest discrimination against faiths such as Orthodox Judaism that observe religious rules and rituals in nearly every facet of everyday life.

The Orthodox Union thus has a strong interest in this Court's reversal of the decision below. In particular, this case affords the Court an opportunity to end once and for all the discrimination against religious minorities perpetuated by state Blaine Amendments and similar enactments and hold that states may not discriminate against faith-based institutions in administering neutral and generally available government funding programs. Amicus respectfully requests that this Court reverse the decision below.

## SUMMARY OF ARGUMENT

For Orthodox Jews, "[t]he right to *be* religious without the right to *do* religious things would hardly amount to a right at all." *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring). The essence of Orthodox Judaism is conducting one's life in accordance with *halacha*, the millennia-old body of Jewish law that governs how Jews should pray, eat, dress, conduct business, care for themselves and others, and carry out innumerable other activities of daily life, big and small. For Orthodox Jews, *halacha*'s comprehensive regulation of everyday life makes the performance of all manner of seemingly secular activities a matter of religious obligation and practice.

It is for this reason that the status-use distinction adopted in the decision below poses a particular threat to Orthodox Jews. Respondent's view that the Free Exercise Clause permits states to discriminate against religious uses of government aid, BIO i, would open the door to systemic discrimination

against the Orthodox Jewish community. Under the status-use distinction, Orthodox Jews could face exclusion from government funding programs related to healthcare, building safety, social services, and myriad other activities that Orthodox Jews regard as religious obligations and carry out in accordance with Jewish law. Religious communities that give religious observance a narrower scope, meanwhile, would not face such discrimination. This Court should not adopt a rule that would allow government to both discriminate against religion generally and burden some faith communities more than others.

The status-use distinction also serves no practical interests. Religious institutions have long been able to participate in many generally available government funding programs, such as Medicare, Medicaid, and grants for higher education, and this has allowed Americans of all faiths to better pursue their own visions of a good, meaningful life. Events in recent years have only underscored the value and importance of including religious institutions in government funding programs. In the Nation's responses to the COVID-19 pandemic, hurricanes, and hate crimes, the federal government has recognized that including religious institutions in aid programs is vital to fully achieving the programs' objectives. In short, both religious Americans and society overall have benefited from treating religious institutions as equal participants in civil society.

Accordingly, this Court should hold that when the government works to achieve secular policy objectives by funding private entities, it may not discriminate against religious institutions that otherwise meet applicable criteria for participation. Such a rule would honor the text of the Free Exercise Clause and safeguard religious liberty, all without opening the

door to government funding of religion for the sake of funding religion. Both Religion Clauses of the First Amendment are bulwarks of religious freedom, and both deserve equal respect.

## ARGUMENT

### I. THE STATUS-USE DISTINCTION LICENSES DISCRIMINATION AGAINST ORTHODOX JEWS AND OTHER COMMUNITIES WHOSE RELIGIOUS OBSERVANCE IS BASED ON RELIGIOUS PRACTICE.

In the decision below, the First Circuit held that although the Free Exercise Clause prohibits states from discriminating in government funding programs based on a recipient's religious *status*, it does not restrict discrimination "based on the religious *use*" a recipient would make of the funds. Pet. App. 39 (emphasis added). This Court has never endorsed the notion "that some lesser degree of scrutiny applies to discrimination against religious uses of government aid," *Espinoza*, 140 S. Ct. at 2257, and it should not do so here. The status-use distinction is not only incoherent and inconsistent with the text of the Free Exercise Clause, but would write into constitutional law systemic discrimination against faith communities, such as Orthodox Jews, whose theology infuses a wide range of human activities with religious meaning. Because Orthodox Jews view all sorts of conduct as religiously mandated, the status-use distinction would allow government to exclude them from a wide variety of government funding programs that would remain available to other faith communities. The Free Exercise Clause does not allow governments to impose the "greatest disabilities" on minority faith communities "who

think that that their religion should affect the whole of their lives." *Id.* at 2277 (Gorsuch, J., concurring) (internal quotation marks omitted). Under the Constitution, Americans of all faiths "stand[] in the same relationship with [their] country, with [their] state and local communities, and with every level and body of government." *Town of Greece* v. *Galloway*, 572 U.S. 565, 615 (2014) (Kagan, J., dissenting).

### A. Orthodox Jews Observe Jewish Law in All Aspects of Their Lives, Infusing Everyday, Secular Activities with Religious Significance.

The essence of Orthodox Judaism is living according to the requirements of *halacha*, or Jewish law. Derived from the Torah's 613 commandments, and developed through an ongoing, millennia-old process of rabbinic interpretation, *halacha* is a comprehensive regulatory system that "governs virtually every aspect of the life practiced by observant Jews for centuries." Chaim N. Saiman, *Halakhah: The Rabbinic Idea of Law* 3 (2018). For example, The Code of Jewish Law ("Shulchan Aruch"), an influential 16th-century treatise, "covers everything from the laws of childbirth to the laws of mourning. . . . what to wear and when to wear it, how to do business and with whom—not to mention the laws of Shabbat (the Sabbath), Jewish holidays, prayers, blessings, marriage, divorce, inheritance, and thousands of other familiar and lesser known Jewish practices." Saiman, *supra*, at 3.

For Orthodox Jews, "[t]he task of the religious individual is bound up with the performance of commandments" embodied in *halacha*. Joseph B. Soloveitchik, *Halakhic Man* 33 (1983). "All the faith and all the love in the world remain insignificant

until they are actualized in a regular routine, in the Halakhah, which transforms faith and love into reality." Norman Lamm, *The Illogic of Logical Conclusions*, in *Derashot Shedarashti: Sermons of Rabbi Norman Lamm*, https://bit.ly/3jhnAbB (last visited Sept. 7, 2021). Accordingly, "[t]he daily lives of Orthodox Jews are regulated by religious practices, beginning with benedictions uttered when they first arise in the morning and stretching to evening and bedtime prayers." Jack Wertheimer, *The New American Judaism: How Jews Practice Their Religion Today* 68 (2018). In this way, *halacha's* "enumerated obligations provide a means for acknowledging God in every area of human activity." Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 Hous. L. Rev. 1337, 1352 (2004).

Indeed, because *halacha* applies "to the entire gamut of human behavior," it includes rules that are "religious as well as 'secular.'" Aaron Kirschenbaum, *Modern Times, Ancient Laws—Can the Torah Be Amended? Equity as a Source of Legal Development*, 39 St. Louis U. L.J. 1219, 1219 (1995). *Halacha* in fact draws no distinction between these categories, treating "'[r]eligious' law and 'legal' law" as being "of one piece." 1 Menachem Elon, *Jewish Law: History, Sources, Principles* 111 (1994). Thus, *halacha* imposes religious obligations with respect to matters that are typically viewed as outside the province of religion. It contains "extensive doctrine concerning property, tort, inheritance, unjust enrichment, contract, competition, sales, and judicial procedure, as well as matters of religious ritual." Neil W. Netanel & David Nimmer, *Is Copyright Property?—*

*The Debate in Jewish Law*, 12 Theoretical Inq. L. 241, 245 (2011). It regulates the delivery of healthcare, the construction of buildings, and the provision of general education and social services. See *infra* Section I.B.1. It also includes "criminal laws that protect society as a whole, and governmental laws that encompass legislative, judicial, and executive functions of government." Donna Litman, *Jewish Law: Deciphering the Code by Global Process and Analogy*, 82 U. Det. Mercy L. Rev. 563, 563 (2005). For both Orthodox Jews and Orthodox Jewish institutions, complying with *halachic* rules "within the realm of secular law," *id.*, is as much a religious obligation as complying with rules governing prayer and rituals. Cf. *Shaliehsabou* v. *Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 309 (4th Cir. 2004) ("Jews view their dietary laws as divine commandments, and compliance therewith is as important to the spiritual well-being of its adherents as music and song are to the mission of the Catholic church.").

### B. Because They Must Comply with Rituals and Practices Throughout Everyday Life, Orthodox Jews Will Be Harmed by a Status-Use Distinction Far More than Adherents of Religions Less Focused on Everyday Practice.

It is precisely because Orthodox Jews "take their religion seriously" and "think that their religion should affect the whole of their lives" that the status-use distinction threatens them so gravely. *Mitchell* v. *Helms*, 530 U.S. 793, 827-28 (2000) (plurality opinion). Respondent contends that the status-use distinction permits her to "declin[e] to fund explicitly religious activity" as part of a state student-aid program. BIO i. But for Orthodox Jews, the rule

Respondent invokes would sweep far more broadly than education. All manner of government programs involve activities that are subject to Jewish laws and values and that Orthodox Jews, accordingly, approach through a lens of religious obligation. Under the status-use distinction, governments could exclude Orthodox Jews from funding for such activities on the ground that, for Orthodox Jews, the activities represent a "religious use."

There is no question that the government would violate the Establishment Clause by allocating funds solely for religious uses or religious purposes, but not for analogous secular uses or purposes as well. See *Epperson* v. *Arkansas*, 393 U.S. 97, 103-04 (1968). But this Court adopting the status-use distinction will do something very different and pernicious. Simply put, for Orthodox Jews, the status-use distinction would license systemic discrimination. It would authorize excluding Orthodox Jewish institutions from government funding programs aimed at achieving valid objectives simply because Orthodox Jews view 'secular' conduct as having theological import. Thus, under the status-use distinction, Orthodox Jews and other religious communities that incorporate religious practice throughout human activity would face greater burdens than communities that give religious observance a narrower scope. This Court has rejected doctrines that would "risk privileging" some "religious traditions" over others, *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020), and should do the same here.

### 1. The Status-Use Distinction Would Permit Discrimination Against Orthodox Jews Across a Wide Range of Government Programs.

As discussed above, *halacha* elevates a wide range of important, typically secular activities into explicitly religious obligations, including activities related to healthcare, construction, social services, and food. A few examples will illustrate the scope of discrimination the status-use distinction would permit against Orthodox Jews.

#### a. Healthcare

First, the status-use distinction would open the door to excluding Orthodox Jews and Orthodox Jewish institutions from a wide range of government healthcare programs. For the Jewish people, both providing and seeking out medical care are essential religious commandments. The Bible commands Jews to "take heed to thyself, and take care of thy life," Deuteronomy 4:9, and "take good care of your lives," Deuteronomy 4:15, verses that express the fundamental value placed on human life and the attendant obligation to care for it. See Immanuel Jakobovits, *Jewish Medical Ethics: A Brief Overview*, 9 J. Med. Eth. 109, 109 (1983) (describing the biblical foundations of Jewish medical ethics as including "the sanctity and dignity of human life" and "the religious duty to preserve health").

These Biblical precepts provide the foundation for Jewish law's corpus of rules, "which has guided Jews in their every decision—both minor and significant—[with respect to] medical decisions." Jason Weiner, *Jewish Guide to Practical Medical Decision-Making* 11 (2017). In turn, "the Talmud . . . established the legal framework in virtually all fields of medical

ethics," and then "the voluminous rabbinical responsa . . . interpret[ed] and appl[ied] these principles in the light of contemporary conditions and the advance of medical knowledge and techniques." Jakobovits, *supra*, at 109-10. Indeed, as medical knowledge has accelerated in recent years, Jewish medical ethics has exploded, addressing a host of complex questions at the intersection of science, ethics, and Jewish law.[2]

Orthodox Jews carry out their religious obligation to protect health through a variety of institutions. Take Hatzalah, a nationwide network of all-volunteer emergency medical services organizations staffed by

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[2] *See, e.g.*, Sharon Galper Grossman & Shamai Grossman, *The Unique Obligation of Healthcare Workers to Receive the COVID-19 Vaccine*, Lehrhaus (Jan. 24, 2021), https://bit.ly/3yoG0eK; John D. Loike & Moshe D. Tendler, *Molecular Genetics, Evolution, and Torah Principles*, 14 Torah U-Madda J. 173 (2007); Jeremy Brown, *Prenatal Screening in Jewish Law*, 16 J. Med. Eth. 75 (1990); Zev Schostak, *Precedents for Hospice and Surrogate Decision-Making in Jewish Law*, 34 Tradition 40 (2000); J. David Bleich, *Survey of Recent Halakhic Periodical Literature: Stem Cell Research*, 36 Tradition 56 (2002); Edward Reichman, *The Halakhic Chapter of Ovarian Transplantation*, 33 Tradition 31 (1998); Steven H. Resnicoff, *Jewish Law Perspectives on Suicide and Physician-Assisted Dying*, 13 J.L. & Rel. 289 (1998); Avraham Steinberg, *Human Cloning—Scientific, Moral and Jewish Perspectives*, 9 Torah U-Madda J. 199 (2000); Elli Fischer, *What You're Getting Wrong About Abortion and Judaism*, The Forward (Aug. 1, 2018), https://bit.ly/3kubriT; Jason Weiner, *Deactivating a Total Artificial Heart: A Preliminary Halachic Analysis*, 70 J. Halacha & Contemporary Soc'y 5 (2015); Herschel Schechter, *Halachic Aspects of Family Planning*, 4 J. Halacha & Contemporary Soc'y 5 (1982); David Shabtai, *Defining the Moment: Understanding Brain Death in Halakha* (2012). In sum, "[v]irtually every topic of medical ethics has been dealt with extensively in Jewish sources." Avraham Steinberg, *Encyclopedia of Jewish Medical Ethics*, at lxxix (2003).

Orthodox Jewish physicians, paramedics, and emergency medical technicians. See Antonia Farzan, *Inside Brooklyn's Orthodox Jewish Ambulance Corps*, EMS1 (Nov. 21, 2015), https://bit.ly/3gz2MdH. Hatzalah chapters in New York, Chicago, California, and elsewhere carry out the *halachic* commandment of *pikuach nefesh*, which holds that the duty to save a life overrides other aspects of Jewish law. Hatzalah volunteers are knowledgeable about Jewish law and specially trained to handle life-threatening emergencies on the Sabbath, when Orthodox Jews cannot ordinarily drive and may resist traveling to a hospital. See, *e.g.*, Hatzolah EMS of North Jersey, *About Hatzolah EMS*, https://bit.ly/38gV9UU (last visited Sept. 7, 2021). Furthermore, Hatzalah volunteers also fulfill the biblical commandment of "Ve'havta Le'rayecha Komocha"—love thy neighbor as thyself—by serving all members of their communities, regardless of race, religion, or ability to pay. See Chevra Hatzalah of Crown Heights, *History of Hatzalah of Crown Heights*, https://bit.ly/3BlgcCd (last visited Sept. 7, 2021).

Jewish nursing homes are another means by which Orthodox Jews can receive healthcare in the manner Jewish law prescribes. For example, the Bedford Center for Nursing and Rehabilitation in Brooklyn makes observance of Jewish law "an important part of daily life" by offering rabbinical services, daily prayer services, a strictly kosher menu, and the ability to observe the Sabbath. Bedford Ctr. for Nursing & Rehabilitation, *Jewish Traditions*, https://bit.ly/2WkfEO5 (last visited Sept. 7, 2021). Such institutions allow Orthodox Jews in need of assisted living facilities to continue living their daily lives according to *halacha*. Cf.

*Shaliehsabou*, 363 F.3d at 310-11 (recognizing a nursing home as a Jewish "religious institution" where "its mission is to provide elder care to 'aged of the Jewish faith in accordance with the precepts of Jewish law and customs'" and where it "maintained a rabbi on its staff, employed mashgichim to ensure compliance with the Jewish dietary laws, and placed a mezuzah on every resident's door").

Finally, for Orthodox Jews, the very act of receiving healthcare fulfills a religious commandment. Thus, in December 2020, Amicus issued guidance instructing its members that "the Torah obligation to preserve our lives and the lives of others requires us to vaccinate for COVID-19 as soon as a vaccine becomes available." Orthodox Union & Rabbinical Council of Am., *COVID-19 Vaccine Guidance* (Dec. 15, 2020), https://bit.ly/2WgkhIZ. The guidance explained that "Halacha obligates us to care for our own health and to protect others from harm and illness," and that "Halacha directs us to defer to the consensus of medical experts in determining and prescribing appropriate medical responses to both treating and preventing illness." *Id.*

In each one of these examples, Orthodox Jews and the institutions serving them have benefited from participating in government funding programs. Many Hatzalah chapters receive funding from local governments. See, *e.g.*, The City Council of the City of New York, *Fiscal Year 2020 Adopted Expense Budget Adjustment Summary / Schedule C* (June 19, 2019), https://on.nyc.gov/3zpaqPo (providing funding for Haztoloh Incorporated). Nursing homes such as Bedford Center participate in Medicare and Medicaid—public benefit programs that, like Respondent's tuition assistance program, are

mediated by private choice. See U.S. Ctrs. for Medicare & Medicare Servs., *Nursing Home: Bedford Center for Nursing and Rehabilitation*, https://bit.ly/389rGfs (last visited Sept. 7, 2021). And, of course, COVID-19 vaccines have been funded by the federal government. See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, tit. III, §§ 3203, 3713, 134 Stat. 281, 367-68, 423-24 (2020).

Yet in each one of these cases, Orthodox Jews have used the government funds to fulfill religious obligations to preserve life and follow *halacha*, transforming what many would consider secular conduct into religious activity. On this basis, the status-use distinction would allow the government to "cut [Orthodox Jews] off from participation in . . . general program[s] designed to secure or to improve . . . health and safety." *Trinity Lutheran*, 137 S. Ct. at 2027 (Breyer, J., concurring in the judgment). Consider whether a state, committed to excluding religious use from government funding, could have chosen to offer cost-free vaccines through Medicare except where used by Jews in fulfillment of a Jewish obligation. The question answers itself.

**b. Safety Regulations**

The status-use distinction would also permit discrimination against Orthodox Jews with respect to government funding of safety improvements in construction, another important area of secular concern that *halacha* infuses with religious meaning. The Code of Jewish Law prescribes a "positive duty to remove and guard oneself against any life-threatening obstacle," warning that "[i]f one did not remove said obstacles, one has negated a positive

commandment and transgressed 'do not bring bloodguilt.'" Shulchan Aruch, Choshen Mishpat 427:8. Among its "many prohibitions" to protect against conditions that endanger public health, Aruch HaShulchan, Choshen Mishpat 427:8, Jewish law imposes a variety of building code-like requirements for mitigating construction and property-related hazards. For example, Jewish law imposes "a positive commandment to make a fence on one's roof," *id.* 427:1, prescribing a minimum height for the fence, see Maimonides, Mishneh Torah, *Laws of Murder and the Preservation of Life* 11:1, and requiring that it be strong enough to keep someone from falling, see Kitzur Shulchan Aruch 190:1, *available at* https://bit.ly/3jVtXkU (last visited Sept. 9, 2021); Orthodox Union Kosher, *What Is the Mitzvah of "Ma'akeh" (Making a Guardrail)*, https://bit.ly/38mqrtr (last visited Sept. 7, 2021). It similarly imposes obligations to erect a fence of a certain height around open pits. Kitzur Shulchan Aruch 190:1.

Unsurprisingly, these requirements have secular analogues in government funding programs. For example, the Secretary of the Interior's Guidelines for Historic Preservation, which govern how recipients of various historic preservation grants may spend government funds, recommend that recipients comply with life safety building code requirements by, among other things, "[p]roviding workers with appropriate personal equipment for protection from hazards on the worksite," "[u]pgrading historic stairways and elevators to meet life-safety codes so that they are not damaged or otherwise negatively impacted," and "[r]emoving building materials only after testing has been conducted to identify any hazardous materials."

U.S. Dep't of the Interior, *The Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings* 71 (2017), https://bit.ly/3jjKcZ1. And, in fact, a number of Orthodox synagogues, such as the Touro Synagogue in Newport, Rhode Island, have received historic preservation grants subject to these guidelines. See Press Release, U.S. Dep't of the Interior, *Secretary Norton Announces Grants to Rhode Island's Touro Foundation, N.Y.'s Eldridge Street Project and Texas' Mission Concepcion* (Nov. 13, 2003), https://on.doi.gov/3ziOzsN. Under the status-use distinction, however, the federal government could exclude Orthodox synagogues from such programs on the ground that *halacha* transforms compliance with safety codes into a religious use—a fate faith traditions that do not regulate construction under religious law would not face. Such an outcome would be ironic as well as tragic: It was to the congregants of Touro Synagogue that George Washington wrote his famous letter opposing those who speak of "toleration . . . as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights." *From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 Aug. 1790*, National Archives, https://bit.ly/3Bgiylt (last visited Sept. 7, 2021); see *Town of Greece*, 572 U.S. at 637 (Kagan, J., dissenting) (describing Washington's letter as embodying "America's promise in the First Amendment: full and equal membership in the polity for members of every religious group").

### c. Social Services

Finally, the status-use distinction would license discrimination against Jewish social services organizations. For kosher soup kitchens and food banks, for example, feeding the hungry is an activity that not only fulfills the religious commandment of *tzedakah*, or charity, but that is regulated in minute detail by the Jewish laws of kashrut. See, *e.g.*, *Tzedakah: The Jewish Take on Donating Money to Charity Organizations and Sharing with the Needy and Hungry*, Masbia, https://www.masbia.org/tzedakah (last visited Sept. 7, 2021) (website of Masbia, a food pantry with kosher certification from the Orthodox Union); KiwiKids Agudath Israel in Illinois, *About Us*, https://www.kiwikids.org/aboutus (last visited Sept. 7, 2021) (website of organization providing kosher school lunches in communities across United States). Biblically-rooted values similarly guide the Hebrew Immigrant Aid Society (HIAS), a more than century-old organization dedicated to resettling refugees in the United States. Each of its six foundational values derive from the "traditions, texts, and history of the Jewish people." HIAS, *Mission and Values*, https://www.hias.org/who/mission-and-values (last visited Sept. 7, 2021) ("We are told 36 times in the Torah to love those who are strangers. For HIAS, welcome begins at our door and extends through our work with refugees, partners, and allies around the globe.").

Both kosher food pantries and HIAS currently receive government funding to support their valuable work. See HIAS, *Consolidated Financial Statements and Independent Auditors' Report* 6 (2020), https://bit.ly/3yllOdw; see KiwiKids, *supra* (noting

KiwiKids' participation in U.S. Department of Agriculture programs). But the status-use distinction would allow the government to exclude such organizations from generally available funding programs on the grounds that they would use the funds for activities that, to them, have religious meaning.

**2. Jewish Values Shape the Entire Curriculum of Orthodox Jewish Day Schools, Including Both Jewish and General Studies.**

In the educational context, the status-use distinction would also "single out" Orthodox Jews and other devoutly religious communities "for disfavored treatment." *Trinity Lutheran*, 137 S. Ct. at 2020. Transmitting Jewish values through education is one of the central and timeless imperatives captured in Judaism's most sacred texts. The Bible instruct Jews not only to remain dedicated and steadfast to the constant pursuit of study and learning, see Joshua 1:8 ("This book of the Torah shall not leave your mouth; you shall meditate therein day and night."), but to seize all opportunities to transmit our amassed knowledge and central values to each subsequent generation, see Deuteronomy 6:7 ("And you shall teach them to your sons and speak of them when you sit in your house, and when you walk on the way, and when you lie down and when you rise up.").

For nearly a century, Jewish 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). Indeed, over eighty percent of Orthodox Jews in the United States have at least one child enrolled in a Jewish day school. See Pew Research Ctr., *A Portrait of American Orthodox Jews* (Aug. 26, 2015), https://www.pewforum.org/2015/08/26/a-portrait-of-american-orthodox-jews/.

The central feature of contemporary Orthodox Jewish day schools is their dual curriculum, in which the school day is divided between Jewish studies (*e.g.*, Bible and Talmud) and general studies (*e.g.*, math, science, and English language arts). See *Westchester Day Sch.* v. *Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 497 (S.D.N.Y. 2006) (summarizing expert testimony explaining that "for modern Orthodox Jews, enrolling their children in a dual curriculum Jewish day school is 'virtually mandatory'"), *aff'd*, 504 F.3d 338 (2d Cir. 2007). While there remain differences within Orthodox Judaism towards curricular integration, for much of the American Orthodox Jewish community, Jewish studies and general studies are not intended to live in isolation. Indeed, on some accounts, religious study is incomplete without complementary instruction in general studies. See Norman Lamm, *Torah Umadda: The Encounter of Religious Learning and Worldly Knowledge in the Jewish Tradition* 236 (1990) ("Torah, faith, religious learning on one side, and Madda, science, worldly knowledge on the other, together offer us a more overarching and truer vision than either set alone."); Samson Raphael Hirsch, *The Relevance of Secular Studies*, in 7 *The Collected Writings of Rabbi Samson Raphael Hirsch*, at 99

(1997) ("Indeed, this devoted attention to general education is a sacred duty also from the strictly religious point of view because it can make important contributions to our Jewish studies."). Accordingly, "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),[3] viewing such integration as "world-redeeming," Aharon Lichtenstein, *A Consideration of Synthesis from a Torah Point of View,* The Commentator (Apr. 27, 1961), https://bit.ly/3zmEFGv.

Thus, for Orthodox Jewish day schools, there is no distinction between religious status and religious use; identity consists in practice. The status-use distinction would therefore allow states to put Orthodox Jewish day schools to the same "choice" faced by the petitioner church in *Trinity Lutheran*: They "may participate in an otherwise available

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[3] The method and manner of curricular integration continues to be one of the most discussed and debated topics in the broader field of Jewish education. *See* Stan Peerless, *Digest of Literature on Curriculum Integration*, Lookstein Ctr. Jewish Educ., https://www.lookstein.org/curriculum-integration-introduction/ (last visited Sept. 7, 2021). For more recent discussion, see Moshe Krakowski, *Developing and Transmitting Religious Identity: Curriculum and Pedagogy in Modern Orthodox Jewish Schools*, 37 Contemporary Jewry 433 (2017); David Stein, *Compartmentalization and Synthesis in Modern Orthodox Jewish Education*, Lehrhaus (May 6, 2019), https://www.thelehrhaus.com/commentary/compartmentalization-and-synthesis-in-modern-orthodox-jewish-education/).

benefit program or remain . . . religious institution[s]." *Trinity Lutheran*, 137 S. Ct. at 2021-22. As *Trinity Lutheran* recognized, the Free Exercise Clause restricts states from imposing that choice. See *id.* at 2024-25.

To be sure, not all religious schools necessarily would face this dilemma; Respondent states that she would award tuition assistance to attend a religiously-affiliated school that did not make "religious use" of the funds, BIO 16-17, and arguably has already done so, see Pet. 9; Pet. App. 37, 48-49. But this possibility only aggravates the problems with the status-use distinction by privileging faith communities that are "passive in [religion's] practice" over those "who think that their religion should affect the whole of their lives," including the whole of their educations. *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring). This Court should not adopt a doctrine that would impose unique burdens on religious communities that worship God through action as well as prayer. See *Epperson*, 393 U.S. at 104 ("The First Amendment mandates governmental neutrality between religion and religion . . . ."); *Locke*, 540 U.S. at 731 (Scalia, J., dissenting) ("The indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial.").[4]

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[4] Respondent's approach would also imbue officials such as herself with shockingly broad discretion to make judgments as to what does and what does not constitute religious use, an exercise this Court has warned is fraught with peril. *See Our Lady of Guadalupe*, 140 S. Ct. at 2069; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 205-06 (2012) (Alito, J., concurring).

## II. THE UNITED STATES HAS BENEFITED FROM INCLUDING RELIGIOUS INSTITUTIONS IN GOVERNMENT FUNDING PROGRAMS.

In addition to being unlawful, the status-use distinction would, in fact, undermine government policy. American society has benefited from allowing religious institutions to participate in a wide range of government funding programs, including in such "well-established parts of our social welfare system" as Medicare, Medicaid, Pell Grants, and the G.I. Bill. *Zelman*, 536 U.S. at 666-67 (O'Connor, J., concurring). Such policies of inclusion have allowed these programs to reach more people and to better achieve the government's aims. In recent years, the federal government has opened even more funding programs to religious institutions, recognizing that they should be permitted to participate in generally available government programs on equal footing with other members of civil society and that the government's secular goals often can be accomplished only by including faith-based institutions. Collectively, these policies "place[] in broader perspective alarmist claims about implications" of rejecting the status-use distinction and respecting the full set of rights guaranteed by the Free Exercise Clause. *Id.* at 668.

### A. Disaster Relief

The United States, through the Federal Emergency Management Agency (FEMA), has long provided recovery assistance to communities struck by natural disasters. See Stafford Disaster Relief and Emergency Assistance Act, Pub. L. 100-707, 102 Stat. 4689 (1988). Until 2018, however, FEMA limited disaster relief to state governments, local

governments, and secular nonprofit organizations; when FEMA determined that an organization was primarily engaged in religious activities, it would decline to provide assistance. See, *e.g.*, Final Decision, *Chabad of the Space Coast, Inc.* (FEMA June 27, 2012), https://www.fema.gov/appeal/219590?appeal_page=letter (denying disaster aid following Tropical Storm Faye because the facility's "activities appeared to be geared to the development of the Jewish faith"). As a result, churches, synagogues, and other houses of worship damaged during disasters often received no federal relief.

FEMA changed course in the wake of devastating hurricanes in 2018, when synagogues and churches damaged by Hurricanes Harvey and Irma challenged its policy under the Free Exercise Clause. See Compl., *Chabad of Key West, Inc.* v. *FEMA*, No. 4:17-cv-10092-JLK (S.D. Fla. Dec. 4, 2017), ECF No. 1; Am. Compl., *Harvest Family Church* v. *FEMA*, No. 4:17-cv-2662 (S.D. Tex. Sept. 12, 2017), ECF No. 11. The houses of worship claimed (correctly) that this Court's decision in *Trinity Lutheran* barred FEMA from withholding disaster-relief funds from houses of worship simply because of their religious character. Although FEMA initially defended its policy, it reversed course after the Texas churches sought an injunction pending appeal in this Court, and the Court requested a response from FEMA. See *Harvest Family Church* v. *FEMA*, No. 17A649 (Dec. 15, 2017); *id.* (Dec. 21, 2017).

FEMA's revised Public Assistance Program and Policy Guide explains that, in light of *Trinity Lutheran*, "nonprofit houses of worship will not be singled out for disfavored treatment." FEMA, *Public Assistance Program and Policy Guide, FP-104-00902*,

at vii (3d ed. Jan. 2018); see Revisions to the Public Assistance Program and Policy Guide, 83 Fed. Reg. 472, 473 (Jan. 4, 2018). On a broad bipartisan vote, Congress subsequently codified this position by amending FEMA's governing statutes to provide that "[a] church, synagogue, mosque, temple, or any other house of worship, educational facility, or any private nonprofit facility" can qualify for disaster relief "without regard to the religious character of the facility or the primary religious use of the facility." Bipartisan Budget Act of 2018, Pub. L. No. 115-123, div. B, tit. VI, § 20604(b), 132 Stat. 64, 86 (codified at 42 U.S.C. § 5172(a)(3)(C)).

This policy shift has yielded tangible benefits for religious institutions, including synagogues. Multiple synagogues in Houston sustained significant damage in Hurricane Harvey. See Jewish Federations of N. Am., *Responding to Hurricane Harvey*, https://bit.ly/38trc45 (last visited Sept. 7, 2021). According to news reports, a number of "Houston's Jewish institutions," including "two major synagogues, a day school, the [Jewish Community Center] and the senior residential center," "suffered $50 million worth of damage." See Deborah Fineblum, *Jewish Houston one year after Hurricane Harvey*, S. Fla. Sun Sentinel (Sept. 6, 2018), https://bit.ly/3mypEOd. The Beth Yeshurun congregation, for example, sustained around $3 million in damage during the storm. See Ben Sales, *How Houston's Synagogues Are Handling the High Holidays after Harve*y, Jewish Telegraphic Agency (Sept. 18, 2017), https://bit.ly/2UN4rEO. In 2020, FEMA provided over $2.4 million to the congregation for repairs. See Press Release, *Congresswoman Lizzie Fletcher Announces More than $2.4 Million for*

*Congregation Beth Yeshurun* (June 12, 2020), https://bit.ly/3jgibkQ.

### B. COVID Relief Legislation

The federal government's responses to the COVID-19 pandemic have also recognized the value of extending relief to religious organizations. In March 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which created the $350 billion Paycheck Protection Program (PPP). See Pub. L. No. 116-136, § 1102, 134 Stat. at 286 (amending 15 U.S.C. § 636(a)). The PPP authorized the Small Business Administration (SBA) to guarantee loans to small businesses to help fund payroll expenses, pay rent or mortgage costs, or satisfy other business needs.

Before the CARES Act, SBA's loan-guaranty program extended only to small, for-profit businesses. Its regulations barred "[b]usinesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting," from receiving loans through the programs administered by the agency. 13 C.F.R. § 120.110(k). The CARES Act, however, declared that "any business concern . . . shall be eligible," for PPP relief along with all "nonprofit organizations," without any religion-related limitations. 134 Stat. at 288-89. Indeed, the act's legislative history makes clear that members of Congress of both parties understood this extension to allow religious organizations to benefit from the PPP. See 166 Cong. Rec. H1732, H1833 (daily ed. Mar. 27, 2020) (statement of Rep. Jackson Lee) ("Now we have . . . $350 billion for small businesses, which includes . . . faith institutions and nonprofits."); *id.* at H1861 (statement of Rep. Smith) (asserting that the CARES Act "provides our best available opportunity

to help Americans get through this difficult period and return to their jobs, schools, churches, friends, and regular daily lives in the shortest time possible"). SBA subsequently issued guidance confirming that "no otherwise eligible organization will be disqualified from receiving a loan because of the religious nature, religious identity, or religious speech of the organization." U.S. Small Bus. Admin., *Frequently Asked Questions Regarding Participation of Faith-Based Organizations in the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan Program (EIDL)* (Apr. 3, 2020), https://bit.ly/3BbnDM2. And Congress formally barred the SBA's exclusion of religious organizations from applying to PPP loans in the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act. See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. III, § 311(c)(2), 134 Stat. 1182, 1465 (2020).

Allowing religious institutions to participate in the PPP helped save hundreds of thousands of jobs. See Ryan P. Burge, *665K Ministry Jobs Covered by Paycheck Protection Program Funds*, Christianity Today (July 8, 2020), https://bit.ly/2WkTV8e. According to research from the Jewish Federations of North America, 573 Jewish organizations sought PPP funds in the first month of the program and received $276 million in funds. See Christina Capatides, *More than 12,000 Catholic Churches in the U.S. Applied for PPP Loans—And 9,000 Got Them*, CBS News (May 8, 2020), https://cbsn.ws/3Dl4Qjp. Of these organizations, 219 synagogues "received just over $50 million in loans." *Id.* In addition to allowing these institutions to preserve jobs and continue operating, these funds allowed them to continue serving their communities during the height of the COVID-19

pandemic. Niraj Warikoo, *Michigan Churches, Synagogues, Mosques Get Millions in Federal PPP Loans*, Detroit Free Press (July 10, 2020), https://bit.ly/38gvT0I.

When Congress, again on a broad bipartisan basis, passed another massive COVID relief package in December 2020, it again recognized the practical benefits of including religious institutions. The $900 billion Consolidated Appropriations Act, 2021 allocated $2.75 billion to fund COVID response and safety measures in non-public K-12 schools, including Jewish, Catholic and other faith-based schools. See Pub. L. No. 116-260, § 312(d), 134 Stat. at 1925-28. Congress rightly understood that combating the pandemic and keeping students and faculty safe were not possible without providing funds to religious as well as secular schools for COVID-related costs. Just three months later, the newly elected Congress passed another COVID relief package, President Biden's "American Rescue Plan," and allocated $2.75 billion more for the same Emergency Assistance to Nonpublic Schools program. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2002, 135 Stat. 4, 23; see also Erica L. Green, *Schumer and a Teachers' Union Leader Secure Billions for Private Schools*, N.Y. Times (Mar. 13, 2021), https://www.nytimes.com/2021/03/13/us/politics/schumer-weingarten-stimulus-private-schools.html.

### C. Security Grants

Both federal and state governments have also recognized the importance of including religious institutions in security grant programs to combat a rising tide of anti-religious violence. In January 2020, in response to "an increase of violence and threats of violence against nonprofit institutions," H.R. Rep. No. 116-92, at 2 (2019), Congress enacted the Securing

American Nonprofit Organizations Against Terrorism Act of 2019, Pub. L. No. 116-108, 133 Stat. 3294 (2020). The Act formally established the Nonprofit Security Grant Program (NSGP) within the Department of Homeland Security (DHS) and authorized $75 million annually for DHS to disburse in grants to nonprofit organizations to undertake physical and cybersecurity improvements. *Id.* § 2. This represented a significant expansion of DHS's existing security grant program, through which, since 2005, it had annually distributed tens of millions of dollars in NSGP grants to organizations overwhelmingly affiliated with sectarian causes. See, *e.g.*, FEMA, *Final Allocation and Award Announcement Fiscal Year (FY) 2018* (Aug. 24, 2018), https://bit.ly/3gzo8ro (listing synagogues, Jewish day schools, Jewish community centers, churches, mosques, and other religious institutions as grant recipients).

Several states have also authorized similar grant initiatives in recent years. See, *e.g.*, Cal. Gov't Code § 8588.9(a) (California State Nonprofit Security Grant Program to "improve[s] the physical security of nonprofit organizations, including . . . churches, synagogues, mosques, temples, and similar locations that are at a high risk for violent attacks or hate crimes due to ideology, beliefs, or mission"); Gov. Ned Lamont, *Governor Lamont Announces Release of $3.8 Million to Improve Security Protections at the Facilities of 97 Nonprofits in Connecticut* (July 28, 2021), https://bit.ly/2UR1Vxt ($3.8 million awarded in grants to 97 nonprofits "that are at heightened risk of being the target of a terrorist attack, hate crime, or violent act"); Gov. Andrew M. Cuomo, *Apply to the Securing Communities Against Hate Crimes Grant Program* (Jan. 29, 2020), https://on.ny.gov/38iml5m

(New York grant program distributing $65 million in FY 2019/2020 "to boost safety and security at New York's nonprofit organizations at risk of hate crimes or attacks because of their ideology, beliefs or mission").

These grant programs are of particular importance to Jewish religious institutions, which are disproportionately targeted for religious violence. Although the total number of religion-motivated hate crimes has remained steady over the past five years, the number motivated by anti-Jewish animus has risen precipitously. See Secure Community Network, *Summary of Open Source Anti-Semitic Incident Statistics* (Dec. 2020), https://bit.ly/3ygKnZi. In 2019 alone, nearly 60 percent of all religion-motivated hate crimes were associated with an antisemitic motive. See FBI, *2019 Hate Crime Statistics*, https://bit.ly/3sMwaCc (last visited Sept. 7, 2021). Recent years have also seen particularly violent attacks at synagogues on both coasts, including the October 2018 shooting at the Tree of Life Congregation in Pittsburgh, in which 11 people died, and the April 2019 shooting at Poway synagogue in San Diego, which killed one congregant and injured three. See H.R. Rep. No. 116-92, at 2; Deanna Paul & Katie Mettler, *Authorities Identify Suspect in 'Hate Crime' Synagogue Shooting that Left 1 Dead, 3 Injured*, Wash. Post (Apr. 28, 2019), https://wapo.st/3mzwjYE; Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. Times (Oct. 27, 2018), https://nyti.ms/3yjcBlZ. Against this background, federal and state security grants play a vital role in protecting synagogues and in preserving the religious pluralism that our society rightly cherishes.

### D. Climate Change

Finally, as this brief goes to press, the bipartisan Infrastructure Investment and Jobs Act has passed the Senate and is awaiting a vote in the House of Representatives. See H.R. 3684, 117th Cong. (2021). Among its provisions, the legislation includes a new $50 million pilot grant program to support non-profit entities upgrading their buildings to be more energy efficient. H.R. 3684, § 40542. The legislation makes these grants available to religious nonprofits, including churches and synagogues, as well as secular ones. See *id.*; Yonat Shimron, *Infrastructure Bill Includes Energy Efficiency Grants for Houses of Worship*, Religion News Service (Aug. 13, 2021) https://bit.ly/3DAS4gy. Here, too, policymakers recognize that we cannot accomplish important civic goals, such as combatting climate change, if we leave religious institutions out of government programs.

## III. PROHIBITING DISCRIMINATION BASED ON RELIGIOUS USE UPHOLDS THE PRINCIPLE OF NEUTRALITY UNDERLYING THE RELIGION CLAUSES.

As Petitioners explain, the conclusion that the status-use distinction violates the Free Exercise Clause follows inexorably from the Clause's text and this Court's precedents. Br. for Petitioners 22-36. "The Free Exercise Clause protects religious observers against unequal treatment," *Trinity Lutheran*, 137 S. Ct. at 2019 (cleaned up), and "the minimum requirement of neutrality is that a law not discriminate [against religious conduct] on its face," *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993). Maine's policy plainly fails this test. In excluding sectarian schools, it excludes religious observers from the tuition assistance program for observing their religion.

This principle of neutrality, which has served as the Court's lodestar in both Free Exercise and Establishment Clause cases, helps delineate when funding for religious organizations would be forbidden and when it would be required. The Court has long recognized, for example, that the principle of neutrality forbids the government from funding religion for the sake of funding religion. "[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion," *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 114 (2001), and funding that lacks any secular policy objective clearly would not meet that standard, cf. *Espinoza*, 140 S. Ct. at 2254 ("We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.").

Of course, those are not the circumstances at issue here. The principle of neutrality works differently where, instead of funding only religion, the government offers aid on the same terms to all who further some legitimate secular objective. In that context, not only does government funding not undermine the principle of neutrality, but the principle of neutrality *requires* allowing the participation of qualified religious organizations because, as both this Court and policymakers have recognized, religious organizations are as capable as secular ones of advancing legitimate government objectives. See *Mitchell*, 530 U.S. at 810 (plurality opinion) ("[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has

the effect of furthering that secular purpose." (citation omitted)); *Bd. of Educ. of Cent. Sch. Dist. No. 1* v. *Allen*, 392 U.S. 236, 245-48 (1968); *supra* Part II. Thus, not only does the Establishment Clause allow the government to include religious organizations in such programs, but the Free Exercise Clause requires it. See *Espinoza*, 140 S. Ct. at 2254. As the Court observed long ago, the principle of neutrality means the government may not "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Trinity Lutheran*, 137 S. Ct. at 2020 (quoting *Everson* v. *Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947)).

## CONCLUSION

For the foregoing reasons, the judgment of the First Circuit should be reversed.

Respectfully submitted,

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September 10, 2021

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