No. 24-1739

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ST. DOMINIC ACADEMY, D/B/A ROMAN CATHOLIC BISHOP OF PORTLAND, A CORPORATION SOLE; ROMAN CATHOLIC BISHOP OF PORTLAND; KEITH RADONIS, ON THEIR OWN BEHALF AND AS NEXT FRIEND OF CHILDREN K.Q.R, L.R.R., AND L.T.R; VALORI RADONIS, ON THEIR OWN BEHALF AND AS NEXT FRIEND OF CHILDREN K.Q.R, L.R.R., AND L.T.R.,

Plaintiffs-Appellants,

v.

A. PENDER MAKIN, IN THEIR PERSONAL AND OFFICIAL CAPACITY AS THE COMMISSIONER OF THE MAINE DEPARTMENT OF EDUCATION; JEFFERSON ASHBY, IN THEIR PERSONAL AND OFFICIAL CAPACITY AS THE COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION; EDWARD DAVID, IN THEIR PERSONAL AND OFFICIAL CAPACITY AS THE COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSIONER; JULIE ANN O'BRIEN, IN THEIR PERSONAL AND OFFICIAL CAPACITY AS THE COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION; MARK WALKER, IN THEIR PERSONAL AND OFFICIAL CAPACITY AS THE COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION; THOMAS L. DOUGLAS, IN THEIR PERSONAL AND OFFICIAL CAPACITY AS THE COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maine
The Honorable John A. Woodcock, Jr.
Case No. 2:23-cv-00246-JAW

BRIEF OF *AMICI CURIAE* ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, ASSOCIATION FOR BIBLICAL HIGHER EDUCATION, INTERNATIONAL ALLIANCE FOR CHRISTIAN EDUCATION, AND THE CARDINAL NEWMAN SOCIETY IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Under FED. R. APP. P. 26.1 and 29(a)(4)(a), and 1ST CIR. R. 26.1, *amici curiae* the Association of Christian Schools International, the American Association of Christian Schools, the Association for Biblical Higher Education, the International Alliance for Christian Education, and The Cardinal Newman Society state that they do not have a parent corporation and do not issue any stock.

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INTEREST OF *AMICI CURIAE*[1]

The Association of Christian Schools International (ACSI) is a nonprofit association that supports 25,000 Christian schools in over 100 countries. ACSI serves member schools worldwide, including 2,200 Christian preschools, elementary, and secondary schools and 60 post-secondary institutions in the United States. ACSI provides pre-K–12 accreditation, professional development, curricula, and other services that cultivate a vibrant Christian faith that embraces all of life.

The American Association of Christian Schools (AACS) is an association of 40 state, regional, and international associations that promote high-quality Christian education. AACS represents more than 700 schools. AACS seeks to integrate faith into scholarship and form the next generation of Christian leaders.

The Association for Biblical Higher Education (ABHE) is an association of more than 150 institutions of biblical higher education, which enroll more than 63,000 students. ABHE offers undergraduate and graduate educational opportunities through traditional residential, extension, and distance learning models. Its member schools have diverse histories and affiliations, but they are all centered on promoting a Christian education and biblical worldview in their students.

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[1] *Amici* may file this brief under FED. R. APP. P. 29(a)(2) because all parties have consented to its filing. No counsel for a party authored this brief in whole or in part; no one, other than amici and counsel, made a monetary contribution for its preparation or submission.

The International Alliance for Christian Education (IACE) promotes biblical orthodoxy, scholarship, and cultural witness at all levels of education. It serves diverse entities, including seminaries, colleges and universities, parachurch organizations, and other education providers. IACE helps member-schools promote biblical leadership, foster intellectual discipleship, and cultivate worldview formation.

The Cardinal Newman Society promotes faithful Catholic education throughout the nation, including in this Circuit. It supports schools at all levels, promotes best practices for Catholic education, and recognizes teachers and institutions exemplifying faithful Catholic teaching that promotes the integral formation of their students.

These organizations, their members, and the students that they serve have a unique interest in the outcome of this case. *Amici* serve schools and students in the First Circuit, many of which participate in publicly funded private-school-choice programs. These schools' religious and educational missions include the integration of faith throughout all aspects of their educational programs, making the district court's decision below both unworkable and discriminatory. They desire to see strong protections for religious liberty that safeguard religious schools' ability to participate in public benefit programs like everyone else, free from religious discrimination and fear of government punishment.

INTRODUCTION

For more than 60 years, the Supreme Court has taught that the government may not burden religious exercise by denying or placing conditions upon public benefits. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege"). The Supreme Court has refined and reiterated that principle three times in the last seven years alone. *Carson as next friend of O.C. v. Makin*, 596 U.S. 767, 778–80 (2022) (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017); *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 475–76 (2020)). As if the Court had grown weary of repeating this principle, the Court concluded its opinion in *Carson* by emphasizing that "*[r]egardless of how the benefit and restriction are described*," Maine officials violate the Free Exercise Clause when their actions "operate[] to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 789 (emphasis added).

Maine officials still aren't getting the message. And neither did the district court. Although the district court agreed that the Maine Human Rights Act (MHRA) operates to exclude St. Dominic Academy from a public benefit program and conditions its eligibility upon betraying its faith, the court still declined to apply strict scrutiny without a separate finding that the law was not neutral or generally

applicable. That meaningfully departs from the Supreme Court's teachings and example, and this Court should correct the error.

The district court then purported to apply strict scrutiny for other reasons, but it blundered that analysis. Far from treating strict scrutiny as "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), the district court upheld the law by inverting the burden of proof, accepting impossibly broad governmental interests, and overlooking the fatal effect of the law's underinclusiveness. This Court should rectify these errors and reverse the district court's judgment.

ARGUMENT

I. The district court erred when it failed to apply *Carson*, which controls and triggers strict scrutiny regardless of whether the Act is neutral and generally applicable.

The district court correctly held that recent amendments to the MHRA trigger strict scrutiny because they are not generally applicable under *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Order on Pls.' Mot. for Prelim. Inj. (Order) at 49–52, ECF No. 50. This is because the MHRA prohibits St. Dominic's religious conduct without proscribing the same conduct for secular out-of-state or private postsecondary schools. Order at 50–51.

But the district court should have applied strict scrutiny for another, more controlling reason: the MHRA excludes otherwise eligible religious schools from a public benefit program based on their religious

exercise. *Carson*, 596 U.S. at 780. The district court's *Smith* analysis was superfluous, and the court erred by suggesting that St. Dominic's exclusion based on religious exercise was not itself sufficient to trigger strict scrutiny.

A. The *Carson* principle independently warrants the application of strict scrutiny.

In *Smith*, the Supreme Court held that laws incidentally burdening religion are subject to strict scrutiny under the Free Exercise Clause if they are not neutral and generally applicable. 494 U.S. at 878–82 (1990). But *Smith*'s test doesn't control every case, and even "a valid and neutral law of general applicability" is not "necessarily constitutional under the Free Exercise Clause." *Trinity Lutheran*, 582 U.S. at 461 n.2 (2017) (citing *Hosanna–Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012)). Indeed, the Supreme Court has "been careful to distinguish [neutral and generally applicable] laws from those that single out the religious for disfavored treatment." *Trinity Lutheran*, 582 U.S. at 460.

Long before *Smith*, the Supreme Court established that the government may not "impose special disabilities" based on religion. *Smith*, 494 U.S. at 877 (citing *McDaniel v. Paty*, 435 U.S. 618, 628 (1978); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953)). Applying this principle before *Smith*, the Supreme Court "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers

from otherwise available public benefits." *Carson*, 596 U.S. at 778 (citing *Sherbert*, 374 U.S. at 404; *Everson v. Board of Ed. of Ewing Twp.*, 330 U.S. 1, 16 (1947)). This is because the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988).

The Supreme Court recently "distilled" these decisions into the "unremarkable principle" that disqualifying otherwise eligible recipients from a public benefit because of their religion imposes a penalty on free exercise that "triggers the most exacting scrutiny." *Espinoza*, 591 U.S. at 475 (citation omitted). Three times in the past seven years, the Supreme Court applied this principle to strike down "state efforts to withhold otherwise available public benefits from religious organizations." *Carson*, 596 U.S. at 780, 778 (citing *Trinity Lutheran*, 582 U.S. at 499; *Espinoza*, 591 U.S. at 475–76).

First, in *Trinity Lutheran*, the Court held that Missouri's exclusion of churches from a playground resurfacing grant program violated the Free Exercise Clause because it disqualified otherwise-eligible recipients "from a public benefit solely because of their religious character," imposing a "penalty on the free exercise of religion that triggers the most exacting scrutiny." 582 U.S. at 462. While the restriction in *Trinity Lutheran* was based on religious status, multiple

Justices agreed that the Free Exercise Clause also prohibits restrictions based on religious "exercise." *Id.* at 469 (Gorsuch, J., concurring).

Next, in *Espinoza*, the Court struck down the Montana constitution's no-aid provision because it barred religious schools from participating in the state's scholarship program "because of the religious character of the schools." 591 U.S. at 476. The Court explained that states need not extend public resources to programs and platforms that benefit private schools, but if they do, states cannot "disqualify some private schools solely because they are religious." *Id.* at 487. Again, the restriction in *Espinoza* turned on religious status, but the Court clarified that its focus on identity-based discrimination was not "meant to suggest that we agree[d] with [Montana] that some lesser degree of scrutiny applies to discrimination against religious uses of government aid." *Id.* at 478; *id.* at 509–510 (Gorsuch, J., concurring).

And most recently, in *Carson*, the Court held that Maine could not exclude religious private schools from the state's tuition assistance program. 596 U.S. at 788–89. Trying to avoid *Trinity Lutheran* and *Espinoza*, Maine argued it did not exclude religious schools based on religious *status*, but excluded schools based on religious *use* of state benefits. *Id.* at 787. The Court rejected that argument, noting that schools *exercise* their religion precisely by forming and educating young people. *Id.* As if the Court had grown weary of repeating this general principle, the Court concluded its opinion in *Carson* by emphasizing

that "*[r]egardless of how the benefit and restriction are described*," state officials violate the Free Exercise Clause when their actions "operate[] to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 789 (emphasis added).

In each of these recent cases, the Supreme Court applied strict scrutiny without separately analyzing whether the challenged laws were neutral and generally applicable under *Smith*. *See Trinity Lutheran*, 582 U.S. at 462–63; *Espinoza*, 591 U.S. at 475–79; *Carson*, 596 U.S. at 780. Indeed, *Carson* did not mention *Smith* a single time. *See Carson*, 596 U.S. at 771–89. And in *Smith* itself, the Supreme Court described the line of cases prohibiting "special disabilities" on religion right next to the line of cases supporting the church autonomy doctrine, which triggers strict scrutiny without a separate analysis of neutrality or general applicability. *See Smith*, 494 U.S. at 877.

Simply put, a law independently triggers "the strictest scrutiny" when it operates to "disqualify some private schools" from public funding or programs based on their religious exercise. *Carson*, 596 U.S. at 780 (quotation omitted). This Court should follow the Supreme Court's teachings and example to clarify that the MHRA triggered strict scrutiny by excluding St. Dominic from the tuitioning program based on its religious exercise, and no further analysis is required.

B. The *Carson* principle controls here.

These "unremarkable principles" are decisive here. The district court began its Free Exercise analysis by acknowledging the cases and principles that led to *Carson*. Order at 43–44. There is no question that the tuitioning program is a public benefit. *Carson*, 596 U.S. at 780 ("Maine offers its citizens a benefit: tuition assistance payments for any family whose school district does not provide a public secondary school"). That brings this case within *Carson*'s purview.

The district court agreed that the MHRA excludes St. Dominic from the tuitioning program based on its religious exercise and conditions its eligibility upon the school's willingness to abandon faith-based policies. Order at 35–37. "St. Dominic may now apply for tuitioning, but its [faith-based] policies plainly run afoul of the MHRA's antidiscrimination provisions." *Id.* at 37. "St. Dominic is thus fairly stuck between the Scylla of intentionally flouting state law and the Charybdis of foregoing what it believes to be constitutionally protected activity." *Id.* (citation omitted). This is enough to trigger strict scrutiny under *Carson*, making additional inquiry under *Smith* superfluous.

This Court should apply *Carson* where the district court did not. In *Trinity Lutheran* and *Espinoza*, the Court addressed laws excluding religious organizations "solely" because of their religious *status*. *Trinity Lutheran*, 582 U.S. at 462; *Espinoza*, 591 U.S. at 476. But in *Carson*, the Court rejected the artificial distinction between religious status and

use, stating the principle in broader terms: officials cannot "exclude otherwise eligible schools on the basis of their religious exercise." *Carson*, 596 U.S. at 789. Thus, under *Carson*, courts must ask whether St. Dominic would have been approved to participate but for its religious character or exercise. If so, strict scrutiny applies. *Id.*

That is what the challenged provisions do here. The ban on "educational discrimination" excludes St. Dominic by prohibiting the school from limiting "admission" or "financial assistance" based on "religion." 5 M.R.S. § 4602(1)(A), (D), (E). And the new "religious expression" provision, *id.* § 4602(5)(D), excludes St. Dominic by requiring it to allow students to express dissenting religious views, even when doing so is contrary to the school's religious mission.

The MHRA's provisions on sexual orientation and gender identity fare no better. The employment discrimination provision excludes St. Dominic by forbidding enforcement of faith-based employment policies necessary to maintain its religious mission and message. *See* 5 M.R.S. § 4572(1)(A). And the education discrimination provision excludes St. Dominic by forbidding enforcement of faith-based policies regarding what students may wear and be called at school, whether parents' wishes are honored, and whether students and staff must be disciplined for failing to follow the Commission's guidance on these questions. 5 M.R.S. § 4602(1), 5(C). It does not matter whether these provisions expressly mention religion; it is enough that St. Dominic could remain

in the tuitioning program but for its faith-based policies, which are themselves an exercise of religion. Because these provisions exclude St. Dominic based solely on its religious exercise, they trigger strict scrutiny under *Carson*.

II. The district court's strict scrutiny analysis was flawed.

Although the district court purported to apply strict scrutiny, Order at 61–64, its review was anything but strict. The district court dedicated just over three pages of its 75-page ruling to "the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. And it held that Maine satisfied strict scrutiny without citing a single piece of evidence explaining why excluding religious schools like St. Dominic is necessary to fulfill the purposes of the tuitioning program. *See* Order at 61–64.

The cursory review is troubling. The government can survive strict scrutiny "only in rare cases," *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), and a court's review "must not be strict in theory but feeble in fact," *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 314 (2013). Otherwise, "judicial review [ceases] to be meaningful." *Id.* Yet that is what happened here, with the district court glossing over Maine's long history of religious discrimination.

Although the district court's errors were many, three are worth highlighting. *First*, the district court erred by holding that Maine satisfied strict scrutiny even though the State does not enforce its

asserted interest against out-of-state or private postsecondary schools that receive state funds. *Second*, the district court erred by evaluating Maine's asserted interest at too high a level of generality, which prevented any meaningful review. *Third*, the district court erred by concluding that a lack of evidence on narrow tailoring favored the government rather than the plaintiffs.

A. Maine cannot satisfy strict scrutiny when the challenged provisions are underinclusive.

Under strict scrutiny, Maine must show that the challenged provisions advance a compelling governmental interest in the most tailored way possible. A law fails if it is underinclusive. *Lukumi*, 508 U.S. at 546.

Here, Maine asserted "a compelling interest in eliminating discrimination, especially with respect to publicly funded institutions." Order at 61. But the record shows that the State does not pursue this interest against all schools. As the district court recognized, the challenged provisions do not apply to "private postsecondary institutions" or "schools located outside of Maine in the tuitioning program." *Id.* at 50. So those schools can "adopt any of St. Dominic's policies or practices that allegedly violate the [challenged provisions] without fear of enforcement actions or risk of losing access to public funds from Maine." *Id.* at 51. The district court correctly held that this makes the provisions "underinclusive" and not generally applicable, *id.*

at 50–51, but it failed to grasp the fatal effect of this holding for purposes of strict scrutiny.

In the district court's view, the exceptions for out-of-state schools and private postsecondary institutions neither undermine the government's asserted interest nor reveal a lack of narrow tailoring because they are not explicitly referenced in "the text of the MHRA." Order at 62–63. But that makes no difference. Strict scrutiny requires a "searching examination," *Fisher*, 570 U.S. at 310, and courts should not confine their inquiry to the challenged law's text but must instead consider the entire statutory and regulatory regime, *see, e.g.*, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011) (law banning the sale of violent video games to minors was fatally underinclusive because children could still access materials); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104–05 (1979) (state's decision to prohibit newspapers, but not electronic media, from releasing the names of juvenile defendants suggested that the law did not advance its stated purpose of protecting youth privacy).

Consider *Lukumi*. In that case, the Supreme Court invalidated a city's ban on ritual animal sacrifices because the city failed to regulate other conduct that similarly diminished its asserted interests in public health and animal welfare. 508 U.S. at 543–47. Likewise, in *Reed v. Town of Gilbert*, the Supreme Court struck down a local sign ordinance that imposed more stringent restrictions on temporary directional signs

than it did on signs conveying other messages. 576 U.S. 155, 159 (2015). The Court there rejected the town's argument that the distinctions were necessary to "preserving the Town's aesthetic appeal and traffic safety" because the government could not "claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem." *Id.* at 171–72.

So too here. Maine cannot claim a compelling "interest in eliminating discrimination, especially with respect to publicly funded institutions," Order at 61, when it does not forbid out-of-state schools participating in the tuitioning program or private postsecondary schools that receive government funding from discriminating. These exceptions—written or unwritten—raise "serious doubts about whether [Maine] is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802. And their "consequence" is that Maine's "regulation is wildly underinclusive when judged against its asserted justification," which is "enough to defeat it." *Id.*

Simply put, courts applying strict scrutiny must consider the entire statutory and regulatory regime in deciding whether the government has left "appreciable damage to [its] supposedly vital interest unprohibited." *Espinoza*, 591 U.S. at 486 (cleaned up). Because the district court failed to do that here, this Court should reverse.

B. Maine's interest in "eliminating discrimination" was stated too broadly to withstand strict scrutiny.

The district court also erred by accepting Maine's assertion that it has a compelling interest in "the broad application of its anti-discrimination laws," Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 24, ECF No. 25; *see* Order at 62 ("Maine's asserted interest in eliminating discrimination within publicly funded institutions is compelling"). That is not enough. When applying strict scrutiny, courts must look beyond "broadly formulated interests" and instead "scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Fulton v. City of Phila.*, 593 U.S. 522, 541 (2021) (cleaned up). The district court failed to follow that rule—a significant error because it is often "crucial" to a case's outcome "how the government's interest is defined." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1323 (2007).

Fulton is illustrative. In that case, the City of Philadelphia defended its nondiscrimination policies by claiming that the policies served three compelling interests: (1) maximizing the number of foster parents, (2) protecting the city from liability, and (3) ensuring equal treatment. *Fulton,* 593 U.S. at 541. But the Supreme Court found that those "objectives" were stated "at a high level of generality," and concluded that "the First Amendment demands a more precise analysis." *Id*. The question was "not whether the City has a compelling

interest in enforcing its non-discrimination policies generally, but whether it has such an interest i*n denying an exception to [the religious claimant]*." *Id.* (emphasis added). So while maximizing the number of foster parents and minimizing liability might be "important goals," the Court held that the government could not withstand strict scrutiny because it "fail[ed] to show that granting [the religious claimant] an exception w[ould] put those goals at risk." *Id.* at 541–42.

Most relevant here, the Court recognized the City's interest in equal treatment as a "weighty one," *id.* at 542, but concluded that interest could not justify the City denying the religious claimant an exception for its religious exercise, *id.* The City's systems of exceptions under its contract with providers "undermine[d] the government's "sole discretion." *See id.* "City's contention that its non-discrimination policies can brook no departures." *Id.* (citing *Lukumi*, 508 U.S. at 542). The City offered "no compelling reason why it has a particular interest in denying an exception to [the religious claimant] while making them available to others." *Id.*. The same is true here when Maine gives exceptions to out-of-state schools participating in the tuitioning program or private postsecondary schools that receive government funding from the same rule Maine insists St. Dominic Academy must follow here.

No less precision is required here. It is not enough to say, as the district court did, that Maine has a compelling interest in "eliminating

discrimination" and that the challenged provisions are narrowly tailored because they "prohibit only discriminatory conduct." Order at 62–63. The Supreme Court has rejected that sort of "circular" logic. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991). The government cannot "take[ ] the *effect* of the statute and posit[ ] that effect as the State's interest." *Id.* Otherwise, "all statutes" would "look narrowly tailored" because, by definition, a law achieves what it achieves. *Id.* If courts in this circuit begin accepting such broadly stated interests, it will allow government officials to "sidestep judicial review of almost any statute." *Id.* This Court should not allow it. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) ("invocation" of "general interests, standing alone, is not enough").

Of course, the Supreme Court has said that states can have a "substantial" or "compelling" interest in stopping discrimination. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 609-10 (1982); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see* Dft's Opp. to Pls.' Mot. for Prelim. Inj. at 21, ECF No. 25 (citing those two cases). But those decisions must be read through the lens of *Fulton*, which clarified that the government must satisfy strict scrutiny through the application of the challenged law to the particular claimant. Neither Maine nor the district court made that showing here.

What's more, the Supreme Court qualified its holdings in those cases, explaining that the state's interest is in eliminating the "unique evils" of "*invidious* discrimination in the distribution of publicly available goods [and] services." *Roberts*, 468 U.S. at 628 (emphasis added); *see also Alfred L. Snapp & Son*, 458 U.S. at 609 (identifying the "evil of invidious discrimination"). But the religious beliefs held by St. Dominic's and the parents who send their children there are not invidious. They are "decent and honorable" beliefs, as the Supreme Court has recognized. *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). And a private school—with its "customized and selective" assessments of potential families and students—is not analogous to a place of public accommodation. *Fulton*, 593 U.S. at 539. The district court considered none of that, relying instead on the broad phrase "eliminating discrimination," Order at 61–62, to reach its desired result.

This Court should not repeat the error. It should instead follow the Supreme Court and clarify that a broadly formulated interest in stopping discrimination is not, by itself, enough to overcome strict scrutiny. As the en banc Ninth Circuit recently put it, "[a]nti-discrimination laws and policies serve undeniably admirable goals, but when those goals collide with the protections of the Constitution, they must yield—no matter how well-intentioned" or broadly stated. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 695 (9th Cir. 2023) (en banc); *accord 303 Creative*

LLC v. Elenis, 600 U.S. 570, 592 (2023) ("When a state public accommodations law and the Constitution collide, there can be no question which must prevail.").

C. Maine carries the burden of strict scrutiny, so a lack of evidence favors the plaintiffs, not the government.

Finally, the district court assumed that the challenged provisions were narrowly tailored, and thus satisfied strict scrutiny, "in the absence of any evidence to the contrary." Order at 63-64. But it is the government's burden to satisfy strict scrutiny, not the plaintiffs' burden to prove that the government cannot. This Court should correct the district court for improperly shifting the burden.

The Supreme Court has been clear that "the government has the burden to establish that the challenged law satisfies strict scrutiny." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). So the plaintiffs need not "introduce, or offer to introduce, evidence that their proposed alternatives are more effective. The Government has the burden to show they are less so." *Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004). This applies at the preliminary-injunction stage. *Id.*

Yet the district court "excuse[d]"here "excused" Maine from "shoulder[ing] its full constitutional burden of proof." *Id.* at 671. By pointing to a lack of evidence as a reason the resolve the strict scrutiny analysis in favor of the State, the district court got it backward. "In the absence of proof, it is not for the [c]ourt to assume" that Maine is right.

United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 824 (2000). And because the government "bears the risk of uncertainty," *Brown*, 564 U.S. at 799–800, it is Maine's problem if information is unavailable, not the plaintiffs', *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

The lack of evidence on narrow tailoring just shows that Maine has not met its burden, so the Court should reverse for this reason as well. *See Ashcroft*, 542 U.S. at 670 ("[T]he Government has failed to show, at this point, that the proposed less restrictive alternative will be less effective."); *Playboy Ent. Grp.*, 529 U.S. at 826 (reversing because "[t]he record is silent as to the comparative effectiveness of the two alternatives").

CONCLUSION

This Court should reverse the judgment below and remand for further proceedings.

Respectfully submitted,

Dated: October 15, 2024,

By: */s/ Mark Lippelmann*

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CERTIFICATE OF COMPLIANCE

Under Fed. R. App. P. 29(a)(4)(G), I certify that this amicus brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, according to the word-count feature of the program used to prepare it and excluding the items listed in Fed. R. App. P. 32(f), it contains 4512 words and does not exceed 6,500 words. Thus, this brief contains no more than half of the 13,000 words allowed for a principal brief under Fed. R. App. P. 32(a)(7)(B)(i).

This amicus brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font, exactly double spaced.

/s/ *Mark Lippelmann*
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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2024, I electronically filed this brief with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that counsel for all parties are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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