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Brief of Amici Curiae Jewish Coalition for Religious Liberty, Islam & Religious Freedom Action Team of the Religious Freedom Institute, and Notre Dame Law School Religious Liberty Clinic in Support of Petitioners

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Nicole Stelle Garnett

No. 22-238

In the
Supreme Court of the United States

Charter Day School, Inc., et al.,
Petitioners,

v.

Bonnie Peltier, as Guardian of A. P., a Minor Child, et al.,
Respondents.

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

BRIEF OF *AMICI CURIAE* JEWISH COALITION FOR RELIGIOUS LIBERTY, ISLAM & RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE, AND NOTRE DAME LAW SCHOOL RELIGIOUS LIBERTY CLINIC IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are three organizations that work to promote and protect the fundamental right to religious freedom for all people.

The Jewish Coalition for Religious Liberty is a non-denominational organization of Jewish communal and lay leaders who seek to protect the ability of all Americans to freely practice their faith and to foster cooperation between Jewish and other faith communities in the public square.

The Islam and Religious Freedom Action Team of the Religious Freedom Institute explores and supports religious freedom from within the traditions of Islam, including by amplifying Muslim voices on religious freedom and seeking a deeper understanding of the support for religious freedom inside the teachings of Islam.

The Notre Dame Law School Religious Liberty Clinic advocates for the right of all people to exercise, express, and live according to their religious beliefs and defends individuals and organizations of all faith traditions against interference with these vital liberties.

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[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, and their counsel made a monetary contribution to its preparation or submission.

Counsel of record for all parties received notice of *amici curiae*'s intention to file this brief at least ten days prior to the due date. All parties have consented in writing.

SUMMARY OF ARGUMENT

The Fourth Circuit's gross misapplication of state-action doctrine contradicts decades of precedent and expands the doctrine beyond its breaking point. If not corrected, that analysis would also endanger many vital public services provided by religious charitable groups and undermine this Court's recent free-exercise cases in the process.

I. It is "fundamental" that the Constitution "applies to acts of the [government], not to acts of private persons or entities." *Rendell-Baker v. Kohn*, 457 U.S. 830, 837–38 (1982). Acts of a private entity may be subject to constitutional constraint "if, though only if, there is such a close nexus between the State and the challenged action that [it] may be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quotation omitted). State-action analysis thus asks: Who is "*responsible* for the specific conduct of which the plaintiff complains"? *Id.*

The answer here is simple: the State had no role in designing or administering the school policy challenged here, and thus the policy was not the result of "state action." But the Fourth Circuit held the opposite by ignoring the central question and instead focusing on artificial indications of state action including that the school generally helps the State fulfill an important obligation, is supported by state funding, and has been given the label "public."

These factors have no place in state-action analysis, and they have been rejected by this Court and other federal circuits. Worse, the decision below knows few bounds. If left to stand, the opinion would

sweep well beyond this case and would designate as "state action" an array of quintessentially private conduct. Governments partner with nearly countless private groups to serve important public goals—often with the State's extensive financial support. But that does not turn private charitable groups into arms of the State. Nor is the problem alleviated by inviting States to pick and choose how constitutional doctrine applies by attaching the label "public" to private groups when it wishes.

II. The Fourth Circuit's capacious state-action analysis presents especially grave consequences for the many religious organizations that partner with the government to serve the public. For a religious entity, a state-actor designation poses an existential threat. Because the government must exercise its authority in a way that is religiously neutral, declaring the programs of a religious group to be "state action" forces the group to choose between secularizing those programs or ceasing to participate in state initiatives that support and fund them. In many cases, that means either denying the religious identity of their charitable programs or ending them.

Many faith-based organizations will choose the latter, rather than attempt to divorce their beliefs—"the very reason for [their] existence"—from the ways in which they serve. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). That would be devastating both for the groups that close and for the public. Communities across the country depend on a multitude of faith-based groups to provide vital services related to child welfare, healthcare, shelter, and much more. If religious organizations are

required to retreat from public service, these resources will be lost to those who need them most.

III. Finally, the decision below is also at odds with this Court's recent decisions interpreting the Free Exercise Clause. This Court has repeatedly made clear that the Free Exercise Clause forbids the government from "exclud[ing] some members of the community" from a public benefit program because of "their anticipated religious use of the benefits." *Carson v. Makin*, 142 S. Ct. 1987, 1998, 2002 (2022). Nor may "the government . . . discriminate against religion when acting in its managerial role" or overseeing a government contractor. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021).

But the Fourth Circuit's expansive state-action analysis reopens the door to that discrimination. Any State could exclude religious organizations from a program that subsidizes private activity by simply designing the program so that it bears the same superficial signs of state action that the Fourth Circuit found relevant here. And because those signs do not require the State to actually exert any control over the entity in question, a State that is hostile to religious organizations need not assume any greater management of its public-benefit programs to do so.

This Court has gone to great lengths to ensure that governments do not force religious believers to either "[g]ive up [their] sincerely held religious beliefs or give up serving" their communities or participating in public life. *Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring). The Court should grant certiorari to ensure that States may not now do indirectly what the Constitution prevents them from doing explicitly.

ARGUMENT

I. The Fourth Circuit's misguided state-action analysis sweeps in a multitude of private conduct.

It is "fundamental" that the Constitution generally "applies to acts of the [government], not to acts of private persons." *Rendell-Baker*, 457 U.S. at 837–38. As this Court has explained, "state action [by a private entity] may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad.*, 531 U.S. at 296 (quotation omitted). The government must be "*responsible* for the specific conduct of which the plaintiff complains." *Id.* (quotation omitted). Normally, this means that the State "has exercised coercive power or provided such significant encouragement . . . that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Or, if such direct control cannot be shown, the Court has sometimes found state action where a private entity exercises powers that are "traditionally *exclusively* reserved to the State." *Jackson v. Metro. Edison Co.,* 419 U.S. 345, 352 (1974).

The Fourth Circuit ignored these bedrocks of state-action analysis and instead focused on circumstances that say little about whether the challenged conduct is actually the State's. Here, North Carolina did not direct, coerce, or influence Charter Day School's choice of dress code. Indeed, North Carolina's charter-school system is explicitly designed to expand educational choice by encouraging "different and innovative"

schools, and the State does not design or approve school budgeting decisions, curriculum, or operating policies and procedures. Pet. App. 57, 66. And educating children is hardly the exclusive domain of the government. Yet the Fourth Circuit held that the school was nonetheless a state actor because: (1) North Carolina has a general duty to ensure that its citizens have access to K-12 education; (2) Charter Day School received substantial state funding; and (3) the State's charter school program labels such schools "public." *See* Pet. App. 14–17.

These factors have no place in state-action analysis. Indeed, this Court and federal circuits across the country have rejected similar factors in other cases. And the Fourth Circuit's analysis knows few bounds. It sweeps in far more than charter schools and threatens to designate as "public" a vast array of quintessentially private conduct.

A. Private entities regularly help States fulfill important obligations.

First, the Fourth Circuit grounded its state-action analysis in an observation that is entirely beside the point: that North Carolina "bears an affirmative obligation under the state constitution to educate North Carolina's students." Pet. App. 16 (quotation omitted). The simple fact that the State has an obligation to ensure access to education says nothing about whether the State is responsible for the policies and operations of any particular school. Indeed, as outlined above, here the State surely is not.

The Fourth Circuit seems to have confused the situation in which a State is obliged provide some service *generally* with the question of whether that

service is *exclusively* the prerogative of the State. *See Rendell-Baker*, 457 U.S. at 842; Pet. App. 16. To be sure, the State's delegation of a function that is *solely* the government's to perform can signal state action. *See, e.g.*, *West v. Atkins*, 487 U.S. 42, 55 (1988) (doctor hired to provide constitutionally required medical care to state prisoners); *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978) (discussing administration of elections). But the appropriate question is not whether a private actor performs a service that is "aimed at a proper public objective" or that "confer[s] a public benefit"—it is whether that service "was exclusively and traditionally public." *Brentwood*, 531 U.S. at 302–03. And "very few [functions] have been exclusively reserved" to the government. *Flagg Bros.* 436 U.S. at 158 (quotation omitted).

While the North Carolina constitution makes clear that education is important to the State, educating children is very far from the exclusive domain of the government.[2] Thus, when a State partners with private organizations to expand educational options,

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[2] This is laid bare by the many thousands of private K-12 schools that have operated across the country for centuries. Indeed, well into the nineteenth century, "American education was almost without exception under private sponsorship and supervision." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 238 n.7 (1963) (Brennan, J., concurring); *see also* Michael W. McConnell, *Scalia and the Secret History of School Choice*, *in Scalia's Constitution* 72–73 (Peterson & McConnell eds., 2018) (discussing the history of education in America).

The Fourth Circuit elided this point by concluding that operating "public schools" is an exclusively public function. Pet. App. 18–19. But that begs the question; the entire inquiry is designed to assess *whether* Charter Day School meaningfully operates as a "public school" in the first place.

the State is not delegating power over an area of exclusive state control. The fact that a privately run school—which *no children* are compelled to attend—helps accomplish the State's goals does not mean its actions should be treated as the State's.

The Fourth Circuit's transformation of a general State duty into an exclusive State prerogative would sweep well beyond this case. Governments bear legal obligations to provide a tremendous variety of services for their citizens. Every State constitution includes an educational provision similar to North Carolina's.[3] At least a dozen include a duty to provide to healthcare.[4] States and cities bear obligations to provide shelter,[5] foster care,[6] universal pre-K,[7] or even a "clean and

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[3] Educ. Comm'n of the States, *50-State Review: Constitutional Obligations for Public Education* (Mar. 2016), https://bit.ly/3rYVHIN.

[4] *See* Elizabeth Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. Pa. J. Const. L. 1325, 1402–06 (2010) (14 state constitutions list healthcare as a right or a "public concern").

[5] *See, e.g.*, Mass. Gen. Laws Ch. 23B, § 30 (2015); "The Callahan Legacy," Coalition for the Homeless, https://bit.ly/3UrrP4P (discussing New York right to shelter); *see also Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019) (prohibiting States within the Ninth Circuit from criminalizing sleeping in public unless the government can ensure adequate shelter for all).

[6] *See generally* Child Welfare Info. Gateway, *State Laws on Child Welfare*, https://bit.ly/3SUllKA (last visited Oct. 11, 2022).

[7] *See, e.g.*, Seattle City Council, Ordinance 124509 (June 30, 2014); D.C. Code § 38-273.01 (2022) ("Expansion to Universal Pre-K"); Multnomah Cnty. Dep't of County Human Servs., *Preschool for All*, https://bit.ly/3g8Hx4W (last visited Oct. 11, 2022); Ga. Dep't of Early Care and Learning, 25 Year

healthful environment."[8] The State of Wyoming has the even broader obligation to protect the "health and morality of the people."[9]

Countless private organizations provide services toward these important ends—often with the State's encouragement and financial support.[10] Indeed, a vast network of private hospitals, clinics, daycares, homeless shelters, halfway houses, foster care agencies, environmental groups, and many other organizations partner with governments to serve critical public goals and even affirmative state obligations like these. But that does not transform these many groups into arms of the government.

This Court should grant certiorari to make clear that the question for state-action analysis is not whether the government solicits private organizations to help serve important duties. The question must instead be whether such services are *solely* the State's to perform or to otherwise delegate. *See Brentwood*, 531 U.S. at 302.

Anniversary, https://bit.ly/3SUg2dF; Dep't Early Childhood and Universal Preschool Program, Colorado Gen. Assembly, HB22-1295 (April 25, 2022).

[8] Mont. Const. art II, § 3.

[9] Wy. Const. art. III, § 20.

[10] *See, e.g.*, Mary Bryna Sanger, *When the Private Sector Competes: Providing Services to the Poor in the Wake of Welfare Reform*, Brookings Institution (Oct. 1, 2001), https://brook.gs/3MjHeQR (discussing shift toward "private firms and nonprofit agencies . . . delivering more and more of the nation's public services, especially in programs designed to help families and children living in poverty").

B. A vast array of private conduct receives government funding.

The Fourth Circuit's observation that Charter Day School receives substantial public funding is equally unremarkable and should receive equally little attention in state-action analysis. This Court long ago determined that whether the government *funds* an action says little about whether that action is the State's. Indeed, in *Rendell-Baker*, the Court held that "dependen[ce] on the State for funds" does not demonstrate state action and concluded that even a school which received 99% of its funding from the State was not a public actor. 457 U.S. at 840–41, 843. As Judge Quattlebaum correctly observed below, the unmistakable lesson from *Rendell-Baker* is that "near-total or even total state funding carries little weight" in state-action analysis. Pet. App. 64 (Quattlebaum, J., dissenting).

And for good reason. Focusing on state funding is not only wrong under *Rendell-Baker*, but it makes no sense in light of the way governments spend their money. Governments subsidize nearly every aspect of private enterprise today. Indeed, the government itself lacks the capacity perform every function in which the public has an interest, and a State may reasonably conclude that private organizations are better situated to do so in many areas. Thus, governments regularly fund entities that never have been—and never should be—considered state actors. Consider, for example, the vast sums of public money that facilitate private, for-profit industry, including funding given to: oil and gas companies like Valero

Energy and Phillips 66;[11] financial services providers like JPMorgan Chase, Wells Fargo, and PNC;[12] automotive manufacturers like Ford, General Motors, and Volvo;[13] retailers like Amazon, Walmart, and Macy's;[14] healthcare providers like Centene and Mayo Clinic;[15] information technology companies like IBM, Google, and Facebook;[16] airlines like United and American;[17] agribusinesses like Archer Daniels Midland, Deere, Cargill, and countless individual farmers and ranchers;[18] and nearly every other imaginable area of commerce.

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[11] In 2021, Valero received $32,485,776, and Phillips 66 received $1,702,457. *See* Good Jobs First, *Subsidy Tracker*, https://bit.ly/3rtuCx2 (last visited Oct. 12, 2022).

[12] In 2021, the federal government awarded the following in loans/loan guarantees: JPMorgan Chase received $15,525,000, Wells Fargo received $19,350,000, and PNC received $40,847,096. *See id.*

[13] In 2021, Ford received $1,325,230,761, General Motors received $169,881,943, and Volvo received $87,469,425. *See id.*

[14] In 2021, Amazon.com received $22,880,000 from various States, Walmart received 3,000,000 from Kentucky, and Macy's received $1,855,000 from Ohio. *See id.*

[15] In 2021, Centene received $450,000,000 from North Carolina, and Mayo Clinic received $2,110,431 the federal government. *See id.*

[16] In 2021, IBM received $49,276,525, Google received $54,335,376, and Facebook received an undisclosed amount from the State of Oregon. *See id.*

[17] In 2021, United Airlines received $32,267,444, and American Airlines received $25,855,237. *See id.*

[18] In 2021, Archer Daniels Midland received $417,705,586. In 2020, Deere received $12,821,163 from Iowa, and Cargill received $11,660,318. *See id.*; *see also* EWG, *EWG's Farm Subsidy Database*, https://bit.ly/3fFNtCn (last visited Oct. 12, 2022).

Of course, governments also provide substantial and critical funding to non-profit groups that help perform important public services. Governments supply needed funding to groups like homeless shelters,[19] refugee assistance organizations,[20] childcare providers,[21] medical facilities,[22] foster-care agencies,[23] food pantries,[24] and many other social welfare organizations.

In short, governments heavily subsidize all manner of private activity, and the fact of such funding is neither remarkable nor entitled to any weight in state-action analysis. Other courts of appeals have come to this same conclusion.[25] The law

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[19] *See* HUD, *HUD Renews Funding for Thousands of Local Homeless Programs* (Jan. 29, 2021), https://bit.ly/3TdMN5O.

[20] *See* Dan Kosten, *The President's Budget Request for Refugee and Asylum Services: Fiscal Year (FY) 2021*, Nat'l Immigr. F. (Mar. 3, 2020), https://bit.ly/3EtHVoZ.

[21] *See* HHS, Off. of Child Care, *Resources for Child Care Providers*, (updated May 19, 2022) https://bit.ly/3MmgfUO; HHS, Off. of Child Care, *Federal and State Funding for Child Care and Early Learning*, (Dec. 2014) https://bit.ly/3EuUpg9.

[22] *See* Nat'l Ass'n of Cmty. Health Ctrs, *Federal Grant Funding*, https://bit.ly/3TawTcj (last visited Oct. 12, 2022).

[23] *See* Cong. Rsch Serv., *Child Welfare: Purposes, Federal Programs, and Funding* (Oct. 7, 2022).

[24] *See* USDA, *Fact Sheet: USDA Support for Food Banks and the Emergency Food System*, https://bit.ly/3eoLq5y (last visited Oct. 12, 2022).

[25] *See, e.g.*, *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 268–69 (2d Cir. 2014); *Logiodice v. Trs. of Maine Cent. Inst.*, 296 F.3d 22, 29 (1st Cir. 2002); *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 166 (3d Cir. 2001) (Alito, J.); *Lansing v. City of Memphis*, 202 F.3d 821, 830 (6th Cir. 2000); *Gilmore v. Salt Lake Cmty. Action Program*, 710 F.2d 632, 637

in the Fourth Circuit should be brought into line, as well.

C. Labelling private conduct "public" does not transform it into state action.

Finally, the Fourth Circuit's observation that Charter Day School was nominally a "public" school does nothing to rectify or constrain its analysis.

Just last Term, this Court reiterated that the substance of constitutional law does not turn "on the presence or absence of magical words." *Carson*, 142 S. Ct. at 2000. Indeed, this Court has rejected the importance of labels in a variety of constitutional areas. *See, e.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 564 (2012) (statutory label "penalty" does not "determine whether the payment may be viewed as an exercise of Congress's taxing power"); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996) (observing that constitutional claims do not depend on "state law labels" and collecting cases); *City of Detroit v. Murray Corp. of Am.*, 355 U.S. 489, 492 (1958) ("[I]n determining . . . constitutional immunity we must look . . . behind labels to substance."). And this Court has specifically rejected the notion that the label "public" should control whether an entity performs state action. *See Jackson v. Metro. Edison Co.,* 419 U.S. 345, 353–54 (1974) (public utility); *Polk County v. Dodson*, 454 U.S. 312 (1981) (public defender).

As this Court has cautioned, deferring to such labels would be ripe for abuse, as it would allow a State to simply pick and choose how constitutional

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(10th Cir. 1983); *Musso v. Suriano*, 586 F.2d 59, 61 n.4 (7th Cir. 1978).

doctrine applies based on the names it attaches to its actions. *See Carson*, 142 S. Ct. at 2000; *Umbehr*, 518 U.S. at 679. This Court must again make clear that critical constitutional underpinnings—like the requirement of state-action for constitutional torts—cannot be so easily manipulated.

II. The decision below poses special threats to faith-based charitable groups that provide critical public services.

The Fourth Circuit's capacious state-action analysis presents especially grave consequences for the many thousands of religious organizations that serve the public. For a religious entity, a state-actor designation does not simply open up new possibilities for tort liability—it poses an existential threat. The government, this Court has held, must exercise its "civil power . . . in a manner neutral to religion." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 704 (1994). Thus, declaring the programs of a religious organization to be "state action" forces it to choose between stripping those programs of their religious character or ceasing to participate in state initiatives that support and fund them. In many cases, that will mean choosing between denying the religious identity of their charitable programs or ending them. *See, e.g.*, *Fulton*, 141 S. Ct. at 1876.

But this is really no choice at all. For many faith-based social-service organizations, their religious convictions are "the very reason for [their] existence." *Our Lady of Guadalupe*, 140 S. Ct. at 2055. Many such organizations therefore *cannot* divorce their religious beliefs from the ways in which they serve. *See id.*; *see also, e.g.*, *Fulton* 141 S. Ct. at 1884–85

(Alito, J., concurring) (discussing religious missions to care for orphaned and abandoned children); *Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952, 954 (2022) (Alito, J., concurring in denial of certiorari) (discussing integration of religion into education at some religious colleges). If religious organizations like these are stripped of that core reason for their work, many might cease to perform it.

The consequences of the Fourth Circuit's misguided state-action analysis for faith-based social service providers are therefore immense. And they are for the general public, as well. If religious organizations are required to retreat from public service, critical resources will be lost in places and for people who depend on their partnership in public-service programs. These, to name only a few, include:

Adoption and Foster Care Agencies: Since the twentieth century, "an influx of federal money spurred States and local governments to take a more active role" in funding or licensing the centuries-old work of private organizations who care for children in need of homes. *Fulton*, 141 S. Ct. at 1885 (Alito, J., concurring). States regularly rely on religious organizations in particular to perform this critical work. *See id.* (discussing long history of "care of orphaned and abandoned children" by religious organizations). According to one count, there are more than 8,000 faith-based foster care and adoption agencies in the United States,[26] which in some States

[26] Emilie Kao, *Religious Discrimination Makes Children Pay the Price*, Heritage Found. (Nov. 16, 2020), https://herit.ag/3rImZ5Q.

are responsible for facilitating more than 25% of foster care adoptions.[27]

Childcare and Early Learning Centers: Faith-based organizations also serve families by caring for and educating young children. Indeed, one recent poll found that, of the 31% of working-parent households who depend on center-based childcare, more than half send their children to one that is affiliated with a faith-based organization.[28] Many States specifically fund and rely on these providers to serve at-risk or underprivileged children.[29] And across the country, States are increasingly partnering with private and religiously affiliated schools to establish a universal pre-K network that will provide all children with access to early learning resources.[30]

Emergency Shelters: Faith-based organizations also "serve as the backbone of the emergency shelter system in this country."[31] Faith-based groups are estimated to operate between thirty and sixty percent of emergency shelter beds in the United States—what one report describes as the "safety net of all safety nets

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[27] Natalie Goodnow, *The Role of Faith-Based Agencies in Child Welfare*, Heritage Found. (May 22, 2018), https://herit.ag/3RKcPwg.

[28] Suzann Morris & Linda K. Smith, *Examining the Role of Faith-Based Child Care*, Bipartisan Policy Center, May 2021, at 3.

[29] *See id.*; Emily Parker et al., *How States Fund Pre-K: A Primer for Policymakers* 4 (2018); *see also* Goodnow, *supra* n.27.

[30] *See generally id.*

[31] Nat'l All. to End Homelessness, *Faith-Based Organizations: Fundamental Partners in Ending Homelessness* 1 (2017).

for the homeless."[32] In some cities, like Omaha, Nebraska, faith-based groups provide as many as 90% of beds.[33] As in other areas of service, the government provides millions of dollars in funding to support these organizations—which ultimately results, according to one study, in an estimated $9.42 in taxpayer savings for every dollar of government spending.[34]

Food Pantries: Governments regularly subsidize and rely on private organizations—and especially religious organizations—to provide food to those in need. Indeed, a recent study of food pantries across twelve States found that nearly two-thirds of them are operated by faith-based organizations, a number that the authors cautioned might be an *under*estimate.[35] The study further found that "volunteerism in food banks and pantries is often motivated by faith and has an important role in building community."[36] And faith-based food pantries may be particularly important for food security in religious communities that must observe strict dietary guidelines, such as those pantries that provide kosher or halal certified meals.[37]

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[32] Byron Johnson et al., *Assessing the Faith-Based Response to Homelessness in America: Findings from Eleven Cities* 20 (2017) (estimating nearly 60%); *see also* Nat'l All. to End Homelessness, *supra* n.31, at 1 (estimating 30%).

[33] Johnson, *supra n.*32, at 20.

[34] *Id.* at 25.

[35] Natalie D. Riediger et al., *A Descriptive Analysis of Food Pantries in Twelve American States* 6-8 (2022).

[36] *Id.* at 7.

[37] *See generally* Met Council, *Virtual Listening Session on Food Insecurity in Kosher- and Halal-Observant Communities* (2022), https://bit.ly/3CpzOqL.

Healthcare Providers: Governments at all levels rely overwhelmingly on the work of private medical facilities to provide much-needed access to healthcare. According to one recent report, the average U.S. hospital receives nearly half of its funding from the government.[38] And a significant portion of those facilities are faith-based. Nearly one in five hospitals in the United States is religiously affiliated,[39] and in many rural States or in geographically isolated communities, the reliance on religious healthcare providers is even greater.[40] Indeed, because they view their service as a religious ministry rather than a profit-seeking venture, religious doctors and healthcare organizations are often motivated to serve in areas where for-profit facilities find little financial incentive.[41]

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[38] *See* David L. Archer, Essay, *Will Catholic Hospitals Survive Without Government Reimbursements?*, 84 Linacre Q. 23 (2017).

[39] Maryam Guiahi et al., *Patient Views on Religious Institutional Health Care*, JAMA Network Open, Dec. 2019, at 2.

[40] In five States (each with significant rural populations) more than 40% of acute care hospital beds are religiously affiliated and in another five States, more than 30% are. *See* Joseph Robert Fuchs *Patient Perspectives on Religiously Affiliated Care in Rural and Urban Colorado*, 12 J. Primary Care & Cmty. Health (Jan.–Dec. 2021). Further, the Centers for Medicare and Medicaid Services has identified fifty-two Catholic hospitals as the "sole community hospital" for their regions. Tess Solomon et al., *Bigger and Bigger: The Growth of Catholic Health Systems*, Community Catalyst, 2020, at 16.

[41] *See, e.g.*, *History*, Trinity Health, https://bit.ly/3EHmMb2 (last visited Oct. 3, 2022) (describing Catholic health system's historical commitment to serving poor and disadvantaged

Refugee Assistance Organizations: The State Department relies on and provides significant funding to support private organizations that serve and help resettle new refugees in the country, including by providing housing, food, clothing, medical services, training in English or job skills, and connections with refugees or others in the local community. Religious communities have, for centuries, led this vital cause to welcome and support refugees, and today the majority of these organizations are religiously affiliated.[42] According to one report, faith-based organizations have been instrumental in resettling 70% of all refugees arriving in the United States today, including individuals from all geographic, ethnic, and religious backgrounds.[43]

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Governments at all levels—and people in all communities—depend on the charitable work of these and many other faith-based organizations. It is not simply religious believers who would suffer if such groups were driven away from public service. And this Court should ensure that the Fourth Circuit's

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communities); *Our History*, Bon Secours Mercy Health, https://bit.ly/3RZNn5V (last visited Oct. 3, 2022) (same).

[42] *See* Stephanie J. Nawyn, *Faithfully Providing Refuge: The Role of Religious Organizations in Refugee Assistance and Advocacy* (Ctr. For Compar. Immigr. Stud., Working Paper, Paper No. 115, 2005), https://bit.ly/3exnP2o; *R&P Affiliate Directory*, Refugee Processing Center, https://bit.ly/3EhWtHZ (last updated Mar. 2022).

[43] *See* Jessica Eby et al., *The Faith Community's Role in Refugee Resettlement in the United States*, 24 J. Refugee Stud. 586 (2011).

unbound state-action analysis does not compel such a retreat.

III. The decision undermines this Court's recent cases interpreting the Free Exercise Clause.

Finally, the Fourth Circuit's decision not only conflicts with settled state-action doctrine but is also at odds with this Court's recent decisions interpreting the Free Exercise Clause.

In recent years, this Court has repeatedly made clear that the Free Exercise Clause forbids the government from requiring religious entities to "choose between their religious beliefs and receiving a government benefit." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017) (quotation omitted). Once a State elects to fund private activity, "it cannot disqualify some [organizations] solely because they are religious." *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020). In short, a State cannot "exclude some members of the community" from a public benefit program "because of their religious exercise" or because of "their anticipated religious use of the benefits." *Carson*, 142 S. Ct. at 1998, 2002.

Nor may the government discriminate against organizations that contract to perform important public services merely because they are religious. Just last year, this Court unanimously rejected the argument that "the government may discriminate against religion when acting in its managerial role." *Fulton*, 141 S. Ct. at 1878. The Court made clear that the government has no more ability to discriminate on the basis of religious exercise when overseeing a

government contractor than when distributing government benefits. *Id.*

But the Fourth Circuit's expansive state-action analysis reopens the door to exactly that kind of discrimination. As described above, many programs through which States partner with private groups may already require secularization under the Fourth Circuit's theory—whether the State wishes to do so or not. And, certainly, any State that *did* wish to exclude religious organizations from a program that subsidizes private activity could do so by simply designing the program so that it bears the same superficial signs of state action that the Fourth Circuit found relevant here. Because those signs do not require the State to actually exert any control over the entity in question, a State that is hostile to religious organizations need not assume any greater management of its public-benefit programs to do so.

In recent years, the Court has gone to great lengths to ensure that governments do not force religious believers to either "give up [their] sincerely held religious beliefs or give up serving" their communities or participating in public life. *Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring in the judgment). The Court should grant certiorari here to ensure that States do not now do indirectly what the Constitution prevents them from doing explicitly.

CONCLUSION

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

Respectfully submitted,

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