No. 20-1088

IN THE

# Supreme Court of the United States

CARSON, ET AL.,
*Petitioners*,
v.
A. PENDER MAKIN, in her official capacity as Commissioner of the Maine Department of Education
*Respondent*.

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

**Brief for *Amicus Curiae* FOUNDATION FOR MORAL LAW In Support of Petitioners**

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## INTEREST OF AMICUS CURIAE[1]

The Foundation for Moral Law is an Alabama-based legal organization dedicated to religious liberty and to the strict interpretation of the Constitution as intended by its Framers. The Foundation believes religious liberty is the God-given right of all people claimed in the Declaration of Independence and protected by the First Amendment.

The Foundation believes the Maine law requiring that parent-selected private schools be nonsectarian in order to be approved for receipt of public funds for tuition purposes, violates the Free Exercise, Establishment, and Freedom of Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment in light of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

"There is a time for everything, and a season for every activity under the heavens." *Ecclesiastes 3:1.* We believe that it is "time" for this Court to rise and say to the lower courts once and for all that equal access and

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[1] *Amicus* provided notice of *amicus's* intent to file this brief to all parties on March 9, 2021. Respondent has consented, and Petitioners have given blanket consent to all *amicus* briefs. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

equal protection mean exactly what it says. "But let justice run down like waters, and righteousness like a never-failing stream." *Amos 5:24*.

## SUMMARY OF THE ARGUMENT

Suppose that you are a law observing citizen of Maine who assumes all the duties and obligations of citizenship (including paying taxes), and a parent who wants the best education for his or her children. You want your children to receive a good academic education, but you believe based on your religious convictions that your children should be educated in accordance with the tenets and the worldview of your Christian (Jewish, or Muslim, or other) religion.

However, the State provides only strictly secular-based public education claiming that it has a substantial interest to avoid excessive entanglement with religion. Although you pay the same tax that funds the same public education, your religious conviction compels you to send your children to expensive private schools at your own additional expense or compromise your faith. And if you have several children but limited financial means, you are forced to decide which children may attend a religious school and which may not.

How would you react to this? You would consider this a "message of exclusion," and you would consider yourself marginalized as a second-class citizen, because the state has displayed animus toward you and your religion.

You are then faced with a difficult choice: You must either exceed your family budget in order to send your

children to a religious school, or you must compromise your religious convictions and send your children to a school that the state approves as "nonsectarian."

This is exactly the dilemma the Maine Department of Education has imposed upon religious parents and students.

## ARGUMENT

The Maine legislature enacted a statute that requires School Administrative Units ("SAU") – The Maine Department of Education has divided the State into 260 different units to provide free public education to the pupils of the State and to make suitable provisions so children who cannot receive public education may have an opportunity to receive the benefits of education.

Toward this end, Maine provides by statute that each SAU may either contract with a secondary school or pay the tuition at the public school or the approved private school of the parent's choice at which the student is accepted. In turn, the pertinent SAU has decided to pay the tuition at the public school or the approved private school of the parent's choice at which the student is accepted.

The tuition assistance program requires parents first to select a private school they wish their child to attend. Second, the school needs to be "approved" by the Department under § 5204. If the school is approved, the SAU must pay the child's tuition costs up to the legal tuition rate established in § 5806 by making the tuition payments directly to the school.

However, there is an additional requirement, § 2951(2), which requires the private school to be a "nonsectarian school in accordance with the First Amendment" and comply with certain separate reporting and auditing requirements. *Id.* § 2951(2), (5). This is an unusual requirement not only because nothing in the First Amendment requires private schools to be nonsectarian, but also because the First Amendment forbids discrimination against religious schools.

The respective schools of the parents' choice, Bangor Christian School ("BCS") and Temple Academy ("TA"), satisfy the qualification criteria for approval except for the nonsectarian requirement. Knowing that their request for approval would be meaningless, they brought this action alleging that the Maine law violates the Free Exercise, Establishment, Freedom of Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment in light of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

They initially sued in the District Court of the First Circuit but lost. Then they appealed to the First Circuit Court of Appeals which affirmed the District Court's judgment. In holding that the law did not violate any of the alleged constitutional rights, the First Circuit Court of Appeals ruled that the new precedents of the United States Supreme Court – namely *Trinity Lutheran Church* and *Espinoza* – did not effectively overrule *Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004) and therefore that it should control.

## I. The First Circuit erred in trying to distinguish *Carson* from *Espinoza.*

The First Circuit Court of Appeals erred in concluding that *Trinity Lutheran Church v. Comer* and *Espinoza v. Montana Department of Revenue* do not control the outcome of this case. It ruled that *Espinoza* clearly "provided a more focused direction than was available to the *Eulitt* panel", *id.* at 29, and concluded accordingly that religious status-based discrimination should be distinguished from religious use-based restrictions. *Carson as next friend of O.C. v. Makin*, 979 F.3d 21 (1st Cir. 2020). *See id.* at 35 ("*Espinoza* made clear, moreover, that discrimination in handing out school aid based on the recipient's affiliation with or control by a religious institution differed from discrimination in handing out that aid based on the religious use to which the recipient would put it.")[2] As a corollary, they held that the restriction at issue is not a religious status-based discrimination which is subject to exacting scrutiny but a restriction that is religious use-based which, therefore, does not trigger the same level of scrutiny. In other words, the First Circuit held that Montana had prohibited tuition assistance for religious schools based on their status as being religious (such as church-affiliated) schools, whereas the Maine program prohibited assistance to religious schools based on the pervasively-religious nature of their teaching. In the Maine program, a school that has a church affiliation or a religious name might still be eligible if its actual education program is

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[2] Please note that, although *Trinity Lutheran* and *Espinoza* prohibited discrimination against religious institutions based on status, they in no way indicated that discrimination against religious institutions based on use was permissible. *Locke v. Davey,* 540 U.S. 712 (2004), is distinguishable because of the unique history and issues involved in training clergy.

essentially similar to public education.

This distinction is invalid and dangerous because it requires the court and/or state education officials to scrutinize the curriculum, teaching, texts, activities, and other aspects of the education of religious schools to determine how "religious" the school actually is. State officials have neither the jurisdiction nor (in many instances) the competence to make this determination. Furthermore, if courts or state officials immerse themselves in religious school curricula to scrutinize it for religious content, they are engaged in the very "excessive entanglement" that the third prong of the *Lemon* test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), was intended to prohibit.

The provision requires the Department to decide whether the school is nonsectarian. The pertinent language of the same is as follows:

> In making its determination whether a particular school is in compliance with Section 2951, the Department considers a sectarian school to be one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith. While affiliation or association with a church or religious institution is one potential indicator of a sectarian school, it is not dispositive. The Department's focus is on what the school teaches through its curriculum and related activities, and how the material is presented.

*Carson* at 36-37 (emphasis added).

And how do Maine state officials determine whether and to what extent a particular school is engaged in religious use by integrating religion with its curriculum? To do so, Maine state officials must first gain a thorough understanding of the religious beliefs of the institution, its staff, and its teachers. Then, they must painstakingly examine the texts, assignments, and other elements of the curriculum to determine how thoroughly those religious beliefs are integrated into the curriculum, and to gain a true picture they may also have to observe the actual teaching in the classroom. In doing so, they are engaging in exactly the "excessive entanglement" of government with religion that the First Amendment was intended to avoid, something state officials have neither the jurisdiction nor the competence to do. For this reason, recent courts have strongly criticized the "pervasively sectarian" distinction; note especially the plurality opinion of *Mitchell v. Helms,* 530 U.S. 793, 829 (2001), in which the plurality denounced the pervasively sectarian doctrine as "shameful," having been "born in bigotry." *See Agostini v. Felton,* 521 U.S. 203 (1997); *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002); *Virginia College Building Authority v. Lynn,* 538 S,E. 2d 682 (2000); *see also* Jeffrey O. Lewis, *The Doctrine of 'Pervasive Sectarianism' and the Bond Lawyer's Dilemma,* September 24, 2002, http://www.icemiller.com/publications/107/jlewisARTICLE%20%20The%20Doctrine%20of%20%20Pervasive%20Sectarianismcomplete.pdf#:~:text=If%20an%20entity%20is%20pervasively%20sectarian%20%28a%20determination,such%20aid%20create%20political%20divisiveness%20and%20excessive%20entanglement.

The "pervasively sectarian" approach unfairly discriminates in favor of secular schools, fosters excessive entanglement of government with religion, and is increasingly disfavored by the courts.

Furthermore, it forces the parent to either (1) give up his parental and free exercise right to determine the education of his children; or (2) give up a substantial state benefit, the state tuition aid. As this Court recognized in *Sherbert v. Verner,* 374 U.S. 398 (1963), and *Thomas v. Review Board,* 450 U.S. 707 (1981), placing a person in this kind of dilemma is a free exercise violation.

## II. The First Circuit analysis unfairly discriminates in favor of secular schools.

Financing public schools while allowing government aid to private secular schools but disallowing government aid to private religious schools has the principal or primary effect of advancing those religions that are compatible with secularism and inhibiting those religions that are incompatible with secularism.

As this Court said in *Abington v. Schempp,* 374 U.S. 203 (1963), "the State may not establish the 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe."

And while some equate secularism with believing in "no religion," this Court has called Secular Humanism a religion. "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Torcaso v. Watkins,* 367 U.S. 488, 496 n.11 (1967) (citations omitted).

Maine's program would advance secularism and

inhibit religion in a number of ways. Informed that if they send their children to a secular private school they will receive tuition assistance but if they send their children to a "religious" private school they will not receive tuition assistance, many parents will opt for the more secular private school, or for a public school. This is especially true for economically disadvantaged parents, and for parents who have many children, both of which categories include many minority children.

Also, private schools, knowing that if they make their program more "religious" they will risk losing state assistance, will opt to "secularize" their educational program. This is especially true of schools that are struggling financially.

Furthermore, a state determination that a private school is eligible for state assistance will be perceived by many as state endorsement of that school, whereas finding a school ineligible for assistance will be interpreted by some as a mark of disfavor.

Maine's program therefore violates the Establishment Clause as well as the Free Exercise Clause.

## III. Maine's program violates parental rights as well as free exercise rights.

As early as 1923, in *Meyer v. Nebraska,* 262 U.S. 390 (1923), this Court recognized a Fourteenth Amendment "liberty" right of parents to send their children to private schools to receive instruction in the German language, as well as the right of the school to offer such instruction and the right of a teacher to

engage in such instruction.

Two years later, in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), this Court declared that the state had no power to

> ...standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

And in 1927, in *Farrington v. Tokushige,* 273 U.S. 284 (1927), this Court struck down regulations that would force a school for Japanese children to become substantially like public schools:

> Enforcement of the act probably would destroy most, if not all, of them; and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.

More recently, in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), this Court held that Amish children must be exempted from portions of Wisconsin's compulsory school attendance law, based upon both free exercise of religion and the parental right to control the education of his/her children.

Maine's program places an excessive burden upon parents' right to determine the education of their children, a burden that many economically disadvantaged parents with multiple children will be unable to meet.

## IV. Maine's program violates the free speech rights of school officials, teachers, children, and parents.

The protection of First Amendment rights is nowhere more vital than in American schools. But in order to be eligible for Maine's program of tuition assistance, those who wish to be involved with religious schools must bow to the state's secular requirements:

* School administrators must plan curricula and programs that are at most only minimally religious.

* Teachers must refrain from emphasizing religion too much in their classrooms.

* Students must refrain from talking about religion too much in their classrooms.

* Parents must agree to these restrictions or lose tuition assistance for these schools.

The program therefore exerts a chilling effect on free speech for administrators, teachers, students, and parents.

The nonsectarian requirement is both content-based and viewpoint-based restriction. It is content-based because it allows discussion of other subjects but not of religion. But it is also viewpoint-based, because on any given subject it excludes the religious viewpoint. On many subjects in school – the significance of

historical events, the interpretation of great literature, sociological issues, sex education, and many others – there are many viewpoints to be considered. But the religious viewpoint is singled out for censorship.

If a law censors based on content or a viewpoint, it is automatically suspect and requires exacting scrutiny. The Supreme Court "appl[ies] the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) (citation omitted). Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views . . . There is an 'equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

This discrimination must be subject to strict scrutiny and is not likely to pass the test, especially in an education context because education should be a field where many ideas should be able to compete. Students who are the next generation of our body politic should be provided with the whole body of knowledge (including various viewpoints on worldview) and not only a part of it selected by the state and therefore, given the choice to decide for themselves which must prevail.

## V. Maine' program violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause prohibits treating people differently without a rational basis for doing so.

For some suspect classes, strict scrutiny applies, and differential treatment can be justified only by a compelling interest that cannot be achieved by less restrictive means. *Regents of University of California v. Bakke,* 438 U.S. 265 (1978).

This Court's language in *Espinoza* strongly suggests that strict scrutiny applies to religious discrimination: "It is enough in this case to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status." *Espinoza* at 2257. But whatever level of scrutiny is applied to religious discrimination, Maine's program cannot meet the test. There is no reason for treating religious schools and the children of religious parents differently from others. Like everyone else, they need an education.

## VI. Maine's lack of a Blaine Amendment is no basis for distinguishing this case from *Espinoza* and *Trinity.*

In *Espinoza,* Montana argued that its "Blaine Amendment" provided a basis for denying tuition assistance to parents who send their children to religious schools. This Court rejected that argument, noting that "The Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general'; many of its state counterparts have a similarly 'shameful pedigree." *Espinoza* at 2259.

However, as the First Circuit noted, "the Blaine Amendment is not at issue here, and, in fact, Maine's constitution never contained such a "no-aid" clause." *Carson* at 52-53. But Maine's lack of a Blaine Amendment in no way strengthens Maine's argument. The one thing Montana thought might save its

discriminatory program was held to be no defense, and Maine does not even have that defense.

## VII. The First Circuit decision is based on a mistaken interpretation of the Establishment Clause.

The history of the Establishment Clause establishes that its Framers and expositors intended a broader meaning than the First Circuit utilized.

According to the Senate Judiciary Committee in its 1853 study of the Establishment Clause, the Framers of the First Amendment did not wish to be viewed as "an irreligious people." It was said, "They had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their 'public' character as legislators." Senate Judiciary Committee, S. Rep. No. 32-376, at 1, 4 (1853) (emphasis added.).

. The plain meaning of the phrase "public character as legislators" is a reference to their role as representatives of the "people," which includes everyone. *Id.* Moreover, the foregoing statement in the Senate Judiciary Committee study clearly shows that the Framers did not intend to inhibit religion from being a part of our public affairs. Therefore, applying the interpretation of the Constitution in a consistent manner with the Founders intent, the word public must be understood as all of the people, not just those who want secular education. Accordingly, the State cannot unilaterally define public education in an arbitrary, partial manner (excluding sectarian or religious education and imposing only secular-based education) which does not represent the will of the whole public.

Moreover, after introducing the Bill of Rights on the floor of Congress in 1789, James Madison was asked what the amendment that became the First Amendment meant. He answered that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in "any" manner contrary to their conscience. 1 Annals of Congress 730 (August 15, 1789).[3] This sheds a whole lot of light to what the framers meant when they referred to religion. If freedom of religion meant that men could not be compelled to worship God in any manner contrary to their conscience, it must have also meant that men were free to believe in a doctrine that presupposes a Supreme Being, if that is what their conscience was compelling them to believe.

The well-established *Oxford English Dictionary* defines religion first as "The belief in and worship of a superhuman controlling power, especially a personal God or gods." However, it renders two other definitions to help the reader comprehend the full meaning of the word. The first of the two defines religion as "a particular system of faith and worship" and the other one says that religion is "a pursuit or interest followed with great devotion."

The *Oxford English Dictionary* sheds some light on the definition of public as well. It defines public as "of or concerning the people as a 'whole.'" Therefore, as a natural corollary "public education" must represent the "whole" people and not just people who believe in the "religion" of secular humanism. Moreover, this is consistent with the usage of the word public in the foregoing study of the Senate Judiciary Committee.

The historical definitions of "religion" and "public"

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[3] There is no verbatim transcript of the proceedings of the First Session of Congress.

lead us to conclude that the Maine program would not violate the Establishment Clause if it made its benefits available to the entire public, including people with all varieties of religious beliefs.

## CONCLUSION

By discriminating against those who want to send their children to religious schools, the Maine program violates not only the Free Exercise Clause but also the Establishment Clause, the Free Speech Clause, the "Liberty" guarantee of parental rights, and the Equal Protection Clause. It is time to make "equal access" mean exactly what it says and to stop sending a message of exclusion to religious persons as though they were a suspect class of second-class citizens who are not fully part of the community.

This law is wounding to us all as a whole. Although it will injure the believers first, it will gradually destroy the nonbelievers and finally the State itself. If the State is able to exclude and discriminate against "her" people on an arbitrary basis like the one manifested in this case, there is no guarantee that "her" people who were protected "this" time will be the ones that will be protected in the future. Martin Niemoeller who was a German pastor at the time of Hitler's reign wrote a famous poem called "First they came" which puts this in a nutshell.

> "They came first for the Communists, and I didn't speak up because I wasn't a Communist.
>
> Then they came for the Jews, and I didn't speak up because I wasn't a Jew.
>
> Then they came for the trade unionists,

> and I didn't speak up because I wasn't a trade unionist.
>
> Then they came for the Catholics, and I didn't speak up because I was a Protestant.
>
> Then they came for me, and by that time no one was left to speak up."

Martin Niemoeller, *Holocaust Encyclopedia*, United States Holocaust Museum

If the nonbelievers do not speak up for believers who were the victims this time, there will be no one to speak up for nonbelievers when "their hour comes." Moreover, this kind of arbitrary discrimination will make the victims bitter and full of resentment which will lead to further division of the public. Ultimately, this will end up stirring up an atmosphere of distrust and lack of confidence upon the government. If people are not able to trust the government, will a government last? It will lead to a state of anarchy and disaster.

Lastly, the Framers of the Constitution carefully framed the Constitution so that the government would be a limited government in nature as well as the people would be limited in their freedom. We must be careful in deeming ourselves to be heads and shoulders above their wisdom before jumping into unwise conclusions that entail serious consequences.

Accordingly, we strongly urge the Court to reconsider whether there is an animus and hostility behind this law and whether there are other laws of the country which are (like this one) "technically" not direct descendants of the Blaine Amendment but "are" to that effect.

The Foundation believes this Court has been sending an "equal access" message at least since *Widmar v. Vincent,* 454 U.S. 263 (1981), but lower courts and officials seem not to get the message. It is time for this Court to make clear, once and for all, that equal access and equal protection apply to religious persons and institutions and mean exactly what they say.

We close with the words of Mordecai to Esther in *Esther* 4:14, "For if thou altogether holdest thy peace at this time, then shall there enlargement and deliverance arise to the Jews from another place; but thou and thy father's house shall be destroyed: and who knoweth whether thou art come to the kingdom for such a time as this?"