No. 20-1088

In the
Supreme Court of the United States

David and Amy Carson, as Parents and Next Friends of O.C., et. al.,
Petitioners,
v.

A. Pender Makin,
Respondent.

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

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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 and *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246.

The Foundation believes it is time for this Court to say to the lower courts once and for all that equal access and equal protection apply equally to religious persons and institutions, and that the terms mean exactly what they say.

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[1] Petitioners and Respondents 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.

SUMMARY OF THE ARGUMENT

Suppose that you are a 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 them 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 secular public schools or funding for secular private schools. Even though you pay the same tax everyone else pays to fund education, you must either (1) send your children to secular public schools; (2) send your children to secular private schools with state funding; or (3) send your children to religious schools at your own expense. For some with limited income and/or multiple children, the last of these options may be impossible. And if you have several children but moderate financial means, you may be 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 would consider yourself marginalized as a second-class citizen because the state has displayed animus toward you and your religion.

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

students. In doing so, the State clearly burdens their free exercise of religion.

But Maine has gone even further. The State has arrogated to itself the power to determine whether a school is "sectarian," not by its objective name or church affiliation, but by a subjective and invasive examination of its curriculum. This is excessive entanglement of government with religion at its worst.

The basic principle of "equal access" – that government may not discriminate against religion – has been articulated by this Court for decades: *Widmar v. Vincent,* 454 U.S. 263 (1981) (a state university may not deny religious organizations equal use of school facilities); *Witters v. Washington,* 474 U.S. 481 (1986) (a state may not refuse aid to a handicapped student solely because he attends a religious institution to train for a religious vocation); *Westside School District v. Mergens,* 496 U.S. 226 (1990) (Equal Access Act of 1984 does not violate the Establishment Clause); *Rosenberger v. Rector,* 515 U.S. 819 (1995) (university may not deny funding to student publication solely because it has religious content); *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993) (school may not refuse to rent auditorium to a religious organization for a religious program); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (state may not exclude a pre-school from playground assistance program solely because it is church-affiliated); and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020) (state may not discriminate against religious parents and students by limiting state aid to secular private schools).

Especially after *Espinoza,* one would think the equal access issue is settled. But Maine has tried to distinguish between religious affiliation and religious use. The Foundation believes this distinction is invalid and constitutes excessive entanglement in violation of the Establishment Clause.

ARGUMENT

The Maine legislature enacted a statute that establishes School Administrative Units ("SAU"). Pursuant to this statute, the Maine Department of Education has divided the State into 260 different SAUs 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 pays 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. The money is paid only after the parent has chosen the school. 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 condition, § 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 requisite not only because nothing in the First Amendment obligates private schools to be nonsectarian, but also because it forbids discrimination against religious schools. Furthermore, this means that the determination of nonsectarianism must be based on the First Amendment and not on any state policies, statutes, or constitutional provisions.

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 because of the statutory prohibition, 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 – *Trinity Lutheran Church of Columbia, Inc. v.*

Comer, 137 S.Ct. 2012 and *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246. – 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" 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* ("*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."). As a corollary, they held that the restriction at issue is not religious status-based discrimination that is subject to exacting scrutiny but a restriction that is religious use-based which, therefore, does not trigger the same level of scrutiny. But why a religious use-based discrimination, which requires intensive entanglement to determine the use of the funds, should trigger less scrutiny than religious status-based discrimination, remains a mystery.

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 essentially similar to public education. As the First Circuit opinion noted, quoting Appellee's Brief at 39, "Sectarian schools are denied funds not because of who they are but because of what they would do with the money -- use it to further the religious purposes of inculcation and proselytization."[2] *Carson as next friend of O.C. v. Makin*, 979 F.3d 21 at 38 (1st Cir. 2020).

However, this Court in *Trinity Lutheran* and *Espinoza* in no way limited its rulings to schools that were only religiously affiliated. Schools that integrate religion into their teaching were not excluded from the ruling. Nor are they excluded from the protection of the First Amendment. As originally proposed, the First Amendment protected "liberty of conscience," but that term was expanded to "free exercise." As Justice Gorsuch wrote in *Espinoza* at 2276, the First Amendment "protects not just the right to be a religious person, holding beliefs inwardly and secretly; it also protects the right to act on those beliefs outwardly and publicly."

As the Tenth Circuit held in *United States v. Friday,* 525 F.3d 938, 950 (10th Cir. 2008), "Freedom of religion, no less than freedom of speech, is a promise of the 'First Amendment ... essential to the common quest for truth and the vitality of society as a whole." Free exercise of religion should therefore be afforded the highest protection.

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[2] This is like refusing to give Social Security checks to Roman Catholics because they would use the checks to make donations to the Roman Catholic Church.

II. Trying to distinguish between religious affiliation and religious use is invalid and dangerous.

When the State of Maine undertakes to determine whether a school is too "religious" to qualify for aid, it is treading on a constitutional minefield.

This "pervasively religious" 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 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. As Judge Kenneth Ripple noted, "The excessive entanglement concept tends to confine rather than enlarge the area of permissible state involvement with religious institutions. The objective was to prevent, as far as possible, the intrusion of either into the precincts of the other."[3]

The provision requires the Department to decide whether the school is nonsectarian. The pertinent

[3] Kenneth Ripple, "The Entanglement Test of the Religion Clauses – A Ten Year Assessment", 27 UCLA L. Rev. 1195 (1979-1980). Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/457

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 38 (emphasis added by Court).

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 make this determination, 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. To gain a full understanding of "how the material is presented," they may also have to visit the classrooms and observe the actual teaching and interaction with the students 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.

In making these determinations, state officials would necessarily bring their own beliefs and values into play. For example, to be sufficiently nonsectarian, would a school's science courses have to teach only Darwinian evolution? Would a school that taught creation be excluded, even if it taught only the scientific evidence rather than the Bible? What about a school that presented evidence for both theories? What about a school that taught that Sir Isaac Newton's views of the laws of science were based on his beliefs about the laws of God and the Bible?

In teaching history, if a school taught that the Framers of the Declaration of Independence and the Constitution were influenced by Christianity and the Bible, would that be sectarian? Would this be prohibited, while it would be acceptable to teach (erroneously) that the Framers were Deists and skeptics?[4]

In teaching about human sexuality, could a school qualify if it teaches that sex is to be confined to marriage and that marriage is to be between one man and one woman? Would it matter whether the school teaches these positions based on the Bible, on church doctrine, or on secular moral considerations?

And are schools considered pervasively religious if the have prayer in the classroom, include "under God" in the Pledge of Allegiance, read the Bible, hold chapel services, have extracurricular religious organizations, or proselytize?

These are just a few examples of the quagmire the State enters when it tries to determine what is

[4] John Eidsmoe, *Christianity and the Constitution: The Faith of Our Founding Fathers* (Baker 1987).

religious and what is not. 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."[5]

As this Court said in *Mitchell v. Helms,* 530 U.S. 793, 827-28 (plurality opinion of Thomas, J., for four Justices), denying benefits to schools, parents, and children just because they incorporate religious teaching imposes a penalty on "those who take their religion seriously, who think that their religion should affect the whole of their lives."

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

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[5] *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/jlewis-ARTICLE%20-%20The%20Doctrine%20of%20%20Pervasive%20Sectarianism-complete.pdf#:~:text=If%20an%20entity%20is%20pervasively%20sectarian%20%28a%20determination,such%20aid%20create%20political%20divisiveness%20and%20excessive%20entanglement.

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. And for families with limited income and/or many children, it may make the exercise of their religion impossible.

James Madison, who introduced the First Amendment on the floor of Congress in 1789, effectively argued against excessive entanglement when he opposed a bill that established a tax for the support of teachers of the Christian religion. Patrick Henry supported the bill because it included all Christian teachers, but speaking against the bill in 1784, Madison argued that this would require the State to define "Christian" and determine who is and is not a Christian pastor. Here are his notes for his speech:

v. Probable effects of Bill,

1. limited.
2. in particular.
3. What is Xnty [Christianity]? Courts of law to Judge.
4. What edition: Hebrew, Septuagint, or Vulgate? What copy what translation?
5. What books are canonical, what apocryphal? the papists holding to be the former what protestants the latter, the Lutherans the latter what the protestants & papists ye former.
6. In what light are they to be viewed, as dictated every letter by inspiration, or the essential parts only? Or the matter in general, not the words?
7. What sense the true one for if some doctrines

are essential to Xnty those who reject these, whatever name they take are no Xn Society?
8. Is it Trinitarianism, Arianism, Socinianism? Is it salvation by faith or works also, by free grace or by will, &c., &c.
9. What clue is to guide (a) Judge thro' this labyright [labyrinth] when ye question when ye question comes before them whether any particular society is a Cn [Christian] society?
10. Ends in what is orthodoxy, what heresy, Dishonors Christianity. panegyric on it, on our side. Decl. Rights.[6]

Madison's point is that civil government has neither the jurisdiction nor the competence to determine who or what is Christian and who or what is not Christian. Yet the State of Maine would arrogate to itself the power to determine whether a school's curriculum is too "religious" to qualify for the subsidy.

III. 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

[6] James Madison, Notes for 1784 Speech, reprinted by Norman Cousins, *In God We Trust* (New York: Harper and Brothers, 1958), pp. 302-04. These are not the notes for his 1785 Memorial and Remonstrance.

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. As this Court said in *Torcaso v. Watkins,* 367 U.S. 488, 495 (1961), Fn 11: 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.[7]

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" will risk losing state

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[7] *See* Washington Ethical Society v. District of Columbia, 101 U.S.App.D.C. 371, 249 F.2d 127; *Fellowship of Humanity v. County of Alameda*, 153 Cal.App.2d 673, 315 P.2d 394*; II Encyclopaedia of the Social Sciences* 293; 4 *Encyclopaedia Britannica* (1957 ed.) 325 327; 21 id., at 797; Archer, *Faiths Men Live By* (2d ed. revised by Purinton), 120—138, 254—313; 1961 *World Almanac* 695, 712; *YearBook of American Churches for 1961,* at 29, 47.

assistance, will opt to "secularize" their educational program. This is especially true of schools that are struggling financially.

Furthermore, a state's determination that a private school is eligible for state assistance will be perceived by many as a 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, because its primary effect is to inhibit religion. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988); accord, e.g., *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981): there must be protection against laws that penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.

Mitchell v. Helms, 530 U.S.793 at 827-28 (2001) (plurality opinion of four Justices), held that so long as the aid program is available to a wide variety of schools, the fact that a recipient school teaches religion cannot be imputed to the State:

> [T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose. ... If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and it is

> most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.

Citing *Mitchell,* the Second Circuit in *A.H. v. French,* 985 F.3d 165 (2nd Cir. 2021), held that a Vermont program which provided tuition assistance that excluded religious schools was unconstitutional, holding at 180:

> In these circumstances, the State's reliance on the "publicly funded" requirement as a condition for DEP eligibility imposes a "penalty on the free exercise of religion." It forces Rice to choose whether to "participate in an otherwise available benefit program or remain a religious institution." At the same time, the requirement puts A.H.'s family to a choice "between sending their child to a religious school or receiving such benefits." As the Supreme Court explained in Trinity Lutheran, the denial of a generally available benefit solely on account of religious identity "can be justified only by a state interest 'of the highest order.'" The AOE has not identified any compelling interest that could survive strict scrutiny. It has not even argued that it could. [citations omitted]

IV. 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 a 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 the free exercise of religion and the parental right to control the education of his/her children.

What the State may not do by coercive regulation, the State also may not do by offering state benefits and conditioning them on compliance with unconstitutional conditions. As this Court said in *United States v. Butler,* 297 U.S. 1, 71 (1936), "The power to confer or withhold unlimited benefits is the power to coerce or destroy."

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.

V. Maine's program constitutes content discrimination and viewpoint discrimination that violate 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, and must perpetually guess at their peril as to what is "too much."

* 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 under Maine's policy, the religious viewpoint is singled out for censorship.

If legal censorship is based on content or especially on viewpoint, it is automatically suspect. "Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." See *Simon & Schuster,* 502 U.S., at 115, 112 S.Ct., at 507–08; *id.,* at 125–126, 112 S.Ct., at 513 (Kennedy, J., concurring in judgment); *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45, 103 S.Ct. 948, 954–955, 74 L.Ed.2d 794 (1983)." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642, 114 S. Ct. 2445, 2459, 129 L. Ed. 2d 497 (1994).

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, the 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, 92 S. Ct. 2286, 2290, 33 L. Ed. 2d 212 (1972) (citations omitted).

This discrimination must be subject to the highest scrutiny and is not likely to pass the test, especially in an educational context because it is 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 narrow secular worldview selected by the State.

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather than through any kind of authoritative selection. *Schempp* at 218 (quoting *Cantwell v. Connecticut,* 310 U.S. 296, 303-04 (1940)).

VI. Maine's program violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause prohibits treating people differently without a sufficient reason for doing so. *Regents of University of California v. Bakke,* 438 U.S. 265 (1978).

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, and there has been no suggestion that Maine's religious schools do not fulfill the State's interest in giving children an education.

VII. 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 similar '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 as next friend of O.C. v. Makin*, 979 F.3d 21, 45 (1st Cir. 2020).

But Maine's lack of a Blaine Amendment in no way strengthens Maine's argument. Montana's Blaine Amendment was the one thing Montana thought might save its discriminatory program. This Court held that Montana's Blaine Amendment was no defense against a Free Exercise violation, and Maine does not even have that defense.

Furthermore, Maine § 2951(2) requires the private school to be a "nonsectarian school in accordance with the First Amendment." The nonsectarian requirement must therefore be interpreted exclusively under the First Amendment, not under any additional state

requirements that, Maine might argue, give the State additional reasons to oppose aid to religion above and beyond the Establishment and Free Exercise Clauses. Thus *Eulitt ex Rel. Eulitt v. Maine Dept of Education,* 386 F.3d 344 (1st Cir. 2004), and *Strout v. Albanese,* 178 F.3d 57 (1st Cir. 1999), add nothing further to the determination of this case, since "Maine had shown a compelling interest in avoiding an Establishment Clause violation", *Eulitt* at 348, has clearly been superseded by this Court's rulings in *Trinity Lutheran, Espinoza, Mitchell,* and a host of other cases.

VIII. 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. cc[8] This sheds a whole lot of light on 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

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

the definition of the word "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.

Petitioners do not ask that they be given a State benefit that others do not receive. They ask only that the State benefit that is given to those who choose secular education, be made available to them as well -- and not just to those of their particular religious persuasion, but to those of all religions.

The historical definitions of "religion" and "public" lead us to conclude that their request is consistent with the United States Constitution.

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 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.

The Foundation believes this Court has been sending an "equal access" message at least since *Widmar v. Vincent,* 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 protections apply to religious persons and institutions and mean exactly what they say.

Respectfully submitted,

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