No. 20-1088

In the

Supreme Court of the United States

DAVID CARSON, AS PARENT AND NEXT FRIEND 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

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

ANTHONY T. CASO
Counsel of Record
CONSTITUTIONAL COUNSEL GROUP
174 W. Lincoln Ave., #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that Religion Clauses forbid official hostility toward religion. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020); *Espinoza v. Montana Dept. of Revenue*, 140 S.Ct. 2246 (2020); *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049 (2020); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); *Arlene's Flowers v. Washington*, 138 S.Ct. 2671 (2018); and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

SUMMARY OF ARGUMENT

In *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970), this Court noted "there is room for play in the joints" between the Free Exercise Clause and the Establishment Clause. This case is yet another in a line of cases where a state has attempted to use the so-called "play in the joints" as a cover for discrimination against religion. Yet properly

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[1] All parties consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

understood, there are no "joints" between the two religion clauses. They were understood by the founding generation to do completely different things.

The Establishment Clause neither authorizes nor permits states to discriminate against religion in the administration of a generally available state benefit. The Establishment Clause was meant as a federalism protection for states against the possibility that the new federal government would create an Establishment overriding state preferences.

The Free Exercise Clause, by contrast, was meant to protect against government hostility and discrimination against the exercise of the individual right of religion. Once incorporated against the states, the Free Exercise Clause prohibited official state policies of hostility toward religion, such as the program under review in this case. The Constitution does not sanction discrimination against religious thought, belief, or practice.

ARGUMENT

I. The Establishment Clause Neither Compels nor Permits Discrimination Against Religion in the Administration of Generally Available State Benefit Programs.

This Court in *Rosenberger* acknowledged that the "central lesson" in cases that involve an Establishment Clause challenge to the right of free exercise of religion is neutrality. *Rosenberger v. Rector and Visitors of U. of Virginia*, 515 U.S. 819, 839 (1995). Neutrality here prohibits the state from denying families the access of otherwise available benefits for the purpose of education, particularly when the state cannot provide a public-school option, is not only contrary to

the principle of neutrality, but it contradicts a philosophy that has informed this country's governance since its founding: "[r]eligion, morality, and knowledge ... being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Rosenberger*, 515 U.S at 862 (Thomas, J., concurring) (quoting Northwest Ordinance, Art. III (1787)).

A. The Establishment Clause was intended as a federalism protection for the states.

As Justice Scalia noted, "our Constitution cannot possibly rest upon the changeable philosophical predilections of the justices of this Court but must have deep foundations in the historic practices of our people." *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting). Much of this Court's Religion Clause jurisprudence, however, was constructed on an edifice of mistaken understanding (or studied ignorance) of the history of that Clause. A close look at the history demonstrates that the Establishment Clause was meant as a federalism protection for the states rather than as an individual right. *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring). If it does protect an individual right, it is a right against coercion, not a protection against a "personal sense of affront." *See Town of Greece v. Galloway*, 572 U.S. 565 , 589 (plurality opinion), 608 (Thomas, J. concurring) (2014). A government program that does not create or support a coercive establishment does not implicate the freedom enshrined in the Establishment Clause. *Van Orden v. Perry*, 545 U.S. 677, 693-94 (2005) (Thomas, J. concurring). Therefore, a program that offers students tuition assistance and allows them to choose either a sectarian or a secular private

school would involve no state coercion in violation of the Establishment Clause.

In colonial America, state establishments of religion were ubiquitous. While the Puritans ruled New England to advance their vision of a Christian commonwealth, the Church of England held the allegiances of colonies like Virginia and Georgia. Michael McConnell, *The Origins and Historical Understanding of Free Exercise Of Religion*, 103 Harv. L. Rev. 1409, 1422-23 (1990) [hereinafter McConnell, Origins of Free Exercise]. New York and New Jersey welcomed those that did not fit into the Puritan or Anglican tradition. *Id.* Pennsylvania and Delaware were founded as safe havens for Quakers, while Maryland was founded as a refuge for English Catholics who suffered persecution in Britain. *Id.* Most notably, Roger Williams founded Rhode Island as a colony for Protestant dissenters after the General Court banished him from Massachusetts. *Id.*

This variety of religious establishments allowed colonists to settle in a place that most accommodated their own religious preferences. Even as disestablishment took hold after the Revolution, states viewed religious belief and practice as essential to a civil society. See Mass. Const. of 1780, pt. 1, art. III ("[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality..."); Petition for General Assessment (Nov. 4, 1784), reprinted in C. James, Documentary History of the Struggle for Religious Liberty in Virginia 125, 125 (1900 and photo. reprint 1971) ("[B]eing thoroughly convinced that the prosperity and happiness of this country essentially de-

pends upon the progress of religion..."); G. Washington, Farewell Address (Sept. 17, 1796), reprinted in 1 Documents of American History 169, 173 (H. Commager 9th ed. 1973) ("[O]f all the dispositions and habits that lead to political prosperity, religion and morality are indispensible supports...").

This history of varied establishments and trend of disestablishment provided the impetus for the Religion Clauses. Antifederalists were alarmed at the Constitution's failure to secure the individual rights of Americans and were concerned that the federal government would have the power to declare a national religion, thus squelching the practices of religious minorities. *See* Letters from the Federal Farmer (IV) (Oct. 12, 1787), reprinted in 2 The Complete Anti-Federalist 245, 249 (Herbert J. Storing ed., 1981); *see also* Essay by Samuel, Indep. Chron. & Universal Advertiser (Boston), Jan. 10, 1788, reprinted in 4 The Complete Anti-Federalist, *supra*, at 191, 195. Though not hostile to state establishments, the antifederalists were concerned that a federal government might "[M]ake every body worship God in a certain way, whether the people thought it right or no, and punish them severely, if they would not." Letters from a Countryman (V), N.Y, J., (Jan. 17, 1788), reprinted in 6 The Complete Anti-Federalist, *supra*, 86, 87. As one antifederalist noted regarding the differences between different states, "It is plain, therefore, that we [Massachusetts citizens] require for our regulation laws, which will not suit the circumstances of our southern brethren, and the laws made for them would not apply to us." Letters of Agrippa (XII), Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, *supra*, 93, 94.

Acting upon these concerns, at least four states submitted amendments concerning religious liberty along with their official notice of ratification of the Constitution. *See* Declaration of Rights and Other Amendments, North Carolina Ratifying Convention (Aug. 1, 1788), reprinted in 5 The Founders' Constitution at 18 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter The Founders Constitution] ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion, according the dictates of his conscience"); New Hampshire Ratification of the Constitution (June 21, 1788), reprinted in 1 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 325, 326 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) ("Congress shall make no laws touching religion, or to infringe the rights of conscience"); New York Ratification of Constitution (July 26, 1788), reprinted in The Founders' Constitution, *supra* 11-12 ("That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."); Proposed Amendments to the Constitution, Virginia Ratifying Convention (June 27, 1788), reprinted in The Founders' Constitution, supra 15-16 ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion").

With these demands from various states in mind, the First Congress set to work to fashion an amendment that would appease these concerns. McConnell, *Origins of Free Exercise*, *supra*, at 1476-77. After debate over the exact wording of the Religion Clause in

the House and the Senate, both houses agreed to the final conference committee report. 1 Annals of Cong. 88 (Joseph Gales ed., 1789). From this committee emerged the Religion Clauses as they are known today: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I.

States that had establishments feared federal interference. Letters of Agrippa (XII), Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, supra, 93, 94. That fear was also shared by states that had no establishment. Because of the Supremacy Clause, states were concerned that Congress might impose a federal establishment that would overrule individual state rules. Thus, the First Amendment's "no law respecting an establishment of religion" provision had a clear federalism purpose. Therefore, incorporation of this provision against the states must be understood as protecting state authority to the maximum extent possible consistent with individual liberty lest it be interpreted to require the very thing that it forbids, federal interference with state support of religion. *Zelman v. Simmons-Harris*, 536 U.S. at 678, 679 (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. at 50 (Thomas, J., concurring). The individual liberty protected by the clause is freedom from government coercion of individual religious observance or interference with the form of religious worship. It does not mandate government prohibition of or interference with religious instruction.

The prohibition on any law "respecting an establishment of religion" was never meant to be a prohibi-

tion on public acknowledgement of religion. It was instead a ban on federal government coercion and federal intrusion on state authority. This distinction is clear from the rich history of religious acknowledgments and exercises by all three branches of government after adoption of the First Amendment.

B. If it includes an individual right, the Establishment Clause protects against coercion of individuals and religious institutions.

As noted above, the Congress that proposed the First Amendment and the states that ratified it had significant experience with the concept of religious establishments. Some establishments involved governmental coercion that compelled a form of religious observance. Thus, some states sought to control the doctrines and structure of the church. South Carolina did this through its 1778 Constitution requiring a church to ascribe to five articles of faith before being incorporated as a state church. S.C. Const. of 1778 art. XXXVIII, reprinted in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1626 (Ben Perley Poore ed., The Lawbook Exch. Ltd. 2d ed. 2001) (1878). Other states, like Virginia, sought to control the personnel of the church and vested the power of appointing ministers of the Anglican Church in local governing bodies known as vestries. Rhys Isaac, *Religion and Authority: Problems of the Anglican Establishment in Virginia in the Era of the Great Awakening and the Parsons' Cause*, 30 Wm. & Mary Q. 3 (1973).

The other type of government coercion at play in religious establishments involved coercion of the individual in his or her religious practice. Massachusetts,

for instance, prosecuted Baptists who refused to baptize their children or attend Congregationalist services. Michael McConnell, *Establishment & Dis-establishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev 2105, 2145 (2003) [hereinafter McConnell, Establishment & Dis-establishment]. Georgia supported the state church through a liquor tax. *Id*. at 2154. Other states limited political participation to members of the state church. *Id*. at 2178. The Establishment Clause was designed to protect these state choices and let the states choose the time and manner of disestablishment. If it protects an individual right at all, protects only against legal coercion of religious orthodoxy. *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring)

There is no coercion in offering tuition assistance that a student may use to attend an accredited sectarian school where no public schools are available. The state has no interest in disqualifying such schools because they include religious practice and teaching about faith. No one is coerced into religious practice. Instead, the state seeks to coerce families *away* from religious practice by prohibiting the use of this state aid to attend an accredited school operated by a religious organization. The prohibition announces a state policy of hostility toward religion.

II. The Free Exercise Clause Prohibits State Hostility Toward Religion

The Court below sought to distinguish the decision in *Espinoza*, arguing that that there the Court only ruled that states could not discriminate against religious *status*. Here, by contrast, the state is seeking to exclude religious *use* of the funds. Any other philosophical point of view is permitted – but the state

argues that it can bar religious thought (including prayer) because state money used for such purposes would violate the Establishment Clause. App. at 30, n.2, 47, n.11. But this official state hostility against private religious choices finds no warrant in the original public understanding of the Religion Clauses.

Time and again this Court has noted that government neutrality toward religion is required by the Constitution. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017); *Everson v. Board of Education of Ewing*, 330 U.S. 1, 16 (1947). The state is prohibited from subjecting religious observers to unequal treatment. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). This rule also prohibits discriminating in the provision of generally available benefits on account of religion. *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion). As this Court noted in *Trinity Lutheran*, the Court's decisions in this area make clear that a state policy imposing "a penalty on the free exercise of religion triggers the most exacting scrutiny." *Trinity Lutheran*, 137 S.Ct. at 2021. Justice Gorsuch explained, "the government may not force people to choose between participation in a public program and their right to free exercise of religion." *Id*. at 2026 (Gorsuch, J., concurring in part). The *Espinoza* Court noted that these decisions were in cases where the discrimination was on the basis of religious status. The Court cautioned, however, that there was no basis to conclude that "some lesser degree of scrutiny applies to discrimination against religious uses of government aid." *Espinoza*, 140 S.Ct. at 2257.

The Constitution requires accommodation of religious belief, and it prohibits hostility. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The *Lynch* Court noted that hostility toward religion "would bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Id.* (*quoting McCollum v. Board of Education*, 333 U.S. 203, 211-12 (1952)); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

Hostility toward religion is established when equal access to government facilities is denied. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 395-96 (1993); *see Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring ("Withholding access would leave an impermissible perception that religious activities are disfavored.")). It is also established where, as here, equal access to generally available state aid for education is denied where the individual would choose to use that aid at an accredited sectarian school.

CONCLUSION

Official hostility toward religious thought and practice has no place in our constitutional order. The state violates the Free Exercise Clause when it denies an otherwise generally available tuition benefit to an individual who would choose to use that benefit to attend an accredited sectarian school.

September 2021

Respectfully submitted,

ANTHONY T. CASO
Counsel of Record
CONSTITUTIONAL COUNSEL GROUP
174 W. Lincoln Ave., #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae