

No. 20-1088

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**In the Supreme Court of the United States**

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DAVID AND AMY CARSON, *et al.*, *Petitioners*,

*v.*

A. PENDER MAKIN

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

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**BRIEF FOR  
PROTECT THE FIRST FOUNDATION  
AS *AMICUS CURIAE*  
SUPPORTING PETITIONERS**

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## TABLE OF CONTENTS

	Page
INTRODUCTION AND INTEREST OF <i>AMICUS</i> ....	1
STATEMENT .....	3
SUMMARY OF ARGUMENT .....	4
ARGUMENT.....	5
I. For Many Families, Laws Denying Otherwise Available Public Funds To Students Attending Religious Schools Substantially Burden Religion.....	6
A. Many faith groups encourage (or even require) parents to educate their children in schools that teach the principles of the faith. ....	6
B. For these families, the exclusion of religious schools means that parents must pay the entire cost of their children’s education in addition to taxes supporting public education and tuition assistance programs from which they are excluded. ....	13
C. This differential burden typically amounts to thousands of dollars per year—and is therefore “substantial.”.....	15
II. Because Such Laws Are Not Neutral With Respect To Religion, They Must Be Subject To Strict Scrutiny—A Requirement The State Here Has Not Even Attempted to Satisfy. ....	19
CONCLUSION .....	21

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).....	2, 19
<i>Emp. Div. v. Smith</i> , 494 U.S. 872 (1990).....	19
<i>Espinoza v. Montana Department of Revenue</i> , 140 S. Ct. 2246 (2020).....	1, 5, 19, 20
<i>Fulton v. City of Phila.</i> , 141 S. Ct. 1868 (2021).....	19
<i>Locke v. Davey</i> , 540 U.S. 712 (2004).....	20
<i>Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n</i> , 138 S. Ct. 1719 (2018).....	19
<i>Pierce v. Society of the Sisters of the Holy Names of Jesus &amp; Mary</i> , 268 U.S. 510 (1925).....	5
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	14
<i>Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.</i> , 450 U.S. 707 (1981).....	14
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 137 S. Ct. 2012 (2017).....	1, 20
<i>Westchester Day Sch. v. Vill. of Mamaroneck</i> , 417 F. Supp. 2d 477 (S.D.N.Y. 2006).....	10

<i>Westchester Day Sch. v. Vill. of Mamaroneck</i> , 504 F.3d 338 (2d Cir. 2007) .....	10
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	1, 5, 6, 12
<b>Other Authorities</b>	
1983 <i>Codex Iuris Canonici</i> .....	6
Al-Huda School, <i>Fee Schedule</i> (2021) .....	17
Alisha Abboudi, <i>The High Cost of Jewish Continuity: Affording a Jewish Day School Education</i> , Jeducation World .....	16
Br. of <i>Amicus Curiae</i> Agudath Israel of America, <i>Espinoza v. Mont. Dep’t of Revenue</i> , No. 17-0492 (Mont. Sup. Ct. Jan. 19, 2018), 2018 WL 7351702.....	9
Br. of <i>Amicus Curiae</i> Jewish Coalition of Religious Liberty in Support of Petitioners, <i>Espinoza v. Mont. Dep’t of Revenue</i> , 140 S. Ct. 2246 (2020) (No. 18-1195) .....	10
<i>Catechism of the Catholic Church</i> (1994) .....	7
Center on Budget and Policy Priorities, <i>Policy Basics: Where Do Our State Tax Dollars Go?</i> (July 25, 2018).....	17
Hussam S. Timani, <i>Islamic Schools in America: Islam’s Vehicle to the Future?</i> , <i>The Forum on Public Policy</i> 6 (2006) .....	9

Hussein Abdulwaheed Amin, <i>Why we should send our Children to a Muslim School</i> , Seasons-nidur (Dec. 4, 2009) .....	9
Letter from Moishe Bane, Pres, Orthodox Union Advocacy Center, to Dr. Christina Coughlin, N.Y. Educ. Dept. (Aug. 28, 2019).....	10
Melanie Hanson, <i>Average Cost of Private School</i> , EducationData.org (Aug. 2, 2021) .....	16
Melanie Hanson, <i>U.S. Public Education Spending Statistics</i> , EducationData.org (Aug. 2, 2021) .....	15, 16
Mennonite Church USA, <i>Confession of Faith In a Mennonite Perspective: Article 2. Jesus Christ</i> , Mennonite Church USA (2020).....	8
Mennonite Education Agency, <i>About Mennonite Education Agency</i> (2018) .....	8
Muhsin S. Mahdi, <i>Islam</i> , Britannica .....	10
National Center for Education Statistics, <i>Private School Universe Survey (PSS): Search for Private Schools</i> .....	11
National Center for Education Statistics, <i>Private School Universe Survey (PSS): Table 2. Number and Percentage Distribution of Private Schools, Students, and Full-time equivalent (FTE) Teachers, by Religious or Nonsectarian Orientation of School: United States, 2017-18</i> (2019).....	11, 12

Noor-Ul-Iman School, <i>Tuition &amp; Fees (2021)</i> .....	17
Pew Research Center, <i>Frequency of Prayer</i> .....	10
Pew Research Center, <i>Religious Landscape Study</i> .....	11
Presbyterian Church U.S.A, <i>What We Believe: Education</i> .....	7
Private School Review, <i>California Religiously Affiliated Schools: Seventh Day Adventist</i> .....	16
Private School Review, <i>New York Religiously Affiliated Schools: Christian</i> .....	16
Private School Review, <i>Top New York Religiously Affiliated Schools</i> .....	12
Rona Sheramy, <i>The Day School Tuition Crisis: A Short History, Jewish Review of Books</i> .....	10
Seventh-day Adventist Church, <i>Education</i> .....	8
Seventh-day Adventist Church, <i>Seven Reasons Why I Send My Child to an Adventist School</i> .....	8
Southern Baptist Convention, <i>The Baptist Faith and Message (June 14, 2000)</i> .....	7

Tax Policy Center – Urban Institute & Brookings Institution, <i>State and Local General Expenditures as a Percentage of Personal Income</i> (Aug. 27, 2021).....	18
Tax Policy Center – Urban Institute & Brookings Institution, <i>State and Local General Expenditures, Per Capita</i> (Aug. 27, 2021).....	13, 18
Tax Policy Center – Urban Institute & Brookings Institution, <i>State and Local General Revenue, Per Capita</i> (Aug. 27, 2021).....	17
Tenth Biennial Churchwide Assembly of the Evangelical Lutheran Church in America, <i>A Social Statement on: Our Calling in Education</i> (2007).....	8
U.S. Dep’t of Educ., <i>The Federal Role in Education</i> .....	17
U.S. Gov’t Accountability Off., <i>Defense Budget: Opportunities Exist to Improve DOD’s Management of Defense Spending</i> (Feb. 24, 2021).....	15
Vatican Council II, <i>Gravissimum educationis</i> (1965).....	6
Zakiyyah Muhammad, <i>Islamic Education in America: An Historical Overview with Future Projections</i> , 25 <i>Religion &amp; Educ.</i> 87 (1998).....	8, 9

**Scriptural Authorities**

Deuteronomy 6:7 .....	10
Joshua 1:8 .....	10



## INTRODUCTION AND INTEREST OF *AMICUS*<sup>1</sup>

For many families, attendance at religious schools is not a matter of personal preference, but rather a decision driven by “deep religious conviction.” *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). Yet Maine forbids parents from using publicly available aid to send their children to schools that would satisfy both the state’s educational requirements *and* the parents’ religious obligation to ensure their children receive a religious education. It does so for no other reason than that those schools teach religious principles. *Amicus* Protect the First Foundation (PT1) agrees with Petitioners that singling out religious schools for disfavor constitutes unconstitutional discrimination against religion in violation of this Court’s decisions in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

But that’s not the only reason Maine’s law violates the First Amendment. Families have a free exercise right to educate their children in religious schools quite apart from their right not to be discriminated against on the basis of religious status. And excluding them from a publicly available benefits program—to which they have contributed tax dollars and which would be available to them but for their desire to

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

educate their children at a school that teaches about their faith—places a substantial burden on that right.

As this Court has long held, moreover, “[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). For this law and others that “target[] religious conduct for distinctive treatment” to pass constitutional muster, the state must show that the substantial burden it imposes on families’ free exercise of religion serves “interests of the highest order” and that the prohibition of otherwise publicly available aid at religious schools is “narrowly tailored in pursuit of those interests.” *Ibid.* Maine cannot meet that burden, and indeed, has not attempted to do so.

PT1 has a strong interest in protecting the free-exercise rights of all parents who, for reasons of faith, choose to send their children to religious private schools. PT1 is a non-profit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable arenas and areas of law, including legal disputes over school choice. PT1 is concerned about all facets of the First Amendment and advocates on behalf of people of all religions and no religion, people across the ideological spectrum, and people who may not even agree with the organization’s views. PT1 respectfully asks this Court to end Maine’s violation of religious families’ First Amendment rights.

## STATEMENT

Most of Maine's school districts do not operate a public secondary school, and many of those do not contract with *any* secondary school to provide education for their residents. In those districts, families may send their children to private schools of their choice and the district is obligated to pay the tuition, up to a statutory limit. But families who choose to send their children to schools that teach from a religious perspective are barred from receiving the public assistance to which they would otherwise be entitled.

Petitioners are two such families. The Nelsons want their son to attend Temple Academy, a school that "aligns with their sincerely held religious beliefs." Pet'rs' Br. 6. But even though Temple meets all other criteria for participation in the state's student aid program, Maine will not approve Temple for tuition assistance because of its "Christian and Biblical world view" and "biblically-integrated education." *Ibid.* The Nelsons thus send their son to a secular private high school because they cannot afford Temple's tuition if Maine (1) taxes them to support the school system and (2) refuses to allow them to use otherwise publicly available aid at a school that meets their religious needs. *Ibid.*

Similarly, the Carsons send their daughter to Bangor Christian School "because the school's worldview aligns with their sincerely held religious beliefs." Pet'rs' Br. 7. Although Bangor Christian is fully accredited and satisfies Maine's compulsory attendance laws, Maine denies the Carsons tuition assistance because the school seeks to "instill[] a Biblical worldview in its students." *Ibid.*

## SUMMARY OF ARGUMENT

I. Maine's law substantially burdens parents' free exercise right to send their children to religious schools. In many faiths, educating children in religious schools is a duty, not a preference. For these families, excluding religious schools from tuition-assistance programs means that parents must shoulder the entire cost of their children's education without the public funding to which they would otherwise be entitled. They are thus faced with paying private-school tuition to further their religious convictions, as well as the taxes that support both local public schools (in most cases) *and* the school choice programs from which they are excluded. That burden—usually amounting to thousands of dollars per year—is a substantial burden on these families' free exercise of religion.

II. Because Maine's burdensome laws and others like it are not neutral with respect to religion, they must satisfy strict scrutiny. Yet here, Maine has not even attempted to meet that rigorous standard. For that reason, this Court should end Maine's violation of parents' First Amendment rights and reverse the First Circuit's decision.

**ARGUMENT**

The ability to educate one’s children in the faith—including sending them to a faith-run school—has long been recognized as an important aspect of the free exercise of religion protected by the First Amendment. This Court has made clear that the Free Exercise Clause protects parents’ right to “direct the religious upbringing” of their children and to exercise that right by enrolling their children in religious schools. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972); *accord Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925) (holding that “the child is not the mere creature of the state” and that “[t]he fundamental theory of liberty \* \* \* excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”). More recently, this Court held in *Espinoza* that parents have the right to send their children to religious schools, and that excluding such schools from a tuition assistance program based on their religious character violates the First Amendment. 140 S. Ct. at 2263. This Court has thus put the states on notice that laws burdening parents’ ability to send their children to religious schools burden religion and thus are constitutionally suspect.

Maine did not heed that warning. By denying otherwise publicly available tuition assistance to religious schools, Maine has placed a substantial burden on families’ free exercise right to send their children to such schools. And it has not even attempted to satisfy the strict scrutiny triggered by such burdens.

**I. For Many Families, Laws Denying Otherwise Available Public Funds To Students Attending Religious Schools Substantially Burden Religion.**

There can be no doubt that Maine’s exclusion of faith-based schools from its tuition-assistance program places a substantial burden on many families’ free exercise right to send their children to religious schools.

**A. Many faith groups encourage (or even require) parents to educate their children in schools that teach the principles of the faith.**

For many Americans, providing religious education for their children is “not merely a matter of personal preference, but one of deep religious conviction.” *Yoder*, 406 U.S. at 214.

1. As Petitioners note, members of various faiths, such as Roman Catholics and Orthodox Jews, consider it a duty to educate children in religious schools. Pet’rs Br. 32. That is true across an even wider range of faiths than those discussed by Petitioners. And the teachings of these and other faith groups effectively confer on their adherents a religious calling, wherever possible, to entrust their children’s education to schools that will teach consistently with the parents’ faith.

Catholics, for example, are charged with “the duty of entrusting their children to Catholic schools wherever and whenever it is possible.” Vatican Council II, *Gravissimum educationis* § 8 (1965); see also 1983 *Codex Iuris Canonici* c.798 (stating that “[p]arents are to

entrust their children to those schools which provide a Catholic education” when able). The duty to pick religious schools is a logical extension of Catholic parents’ own sacred duty to teach their children in righteous living. *Catechism of the Catholic Church* pt. 3, sec. 2, ch. 2, art. 4, 2229 (1994) (“As far as possible parents have the duty of choosing schools that will best *help them* in their task as Christian educators.”) (emphasis added).

Other Christian groups have similar beliefs. The Southern Baptist Convention, for example, teaches that “an adequate system of Christian education is necessary to a complete spiritual program for Christ’s people” and that Christian schools should receive “liberal support.” Southern Baptist Convention, *The Baptist Faith and Message* art. XII (June 14, 2000). The Presbyterian Church (U.S.A.) embraces the ancient ideal of “a school in every parish” and teaches that “[p]art of the mission of the church in education is the building of nurturing educational communities” including the creation of “educational settings outside of church.”<sup>2</sup>

Similarly, the Seventh-day Adventist Church states that “education should change and cultivate every aspect of our lives, bringing us that much closer to what God originally planned for us to have and to be” and that “[t]he Adventist education system reflects

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<sup>2</sup> Presbyterian Church U.S.A, *What We Believe: Education*, <https://www.presbyterianmission.org/what-we-believe/social-issues/education/>.

the heavenly ‘society’ God intended.”<sup>3</sup> The Evangelical Lutheran Church in America (the “ECLA”) likewise calls parents to help children “develop a vibrant faith” through education and to “claim and support” the mission of ECLA early childhood education centers and schools.<sup>4</sup> And the Mennonite Church USA supports religious education through the Mennonite Education Agency, which provides educational resources and programming to affiliate schools in order to help students become both “Christ followers” and “rigorous learners” consistent with the church’s core beliefs.<sup>5</sup>

Members of many non-Christian groups are also effectively called to send their students to religious schools. For example, in 1975, Muslim community leader Imam W. Deen Mohammed declared education the “#1 Priority” for the Nation of Islam.<sup>6</sup> The number

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<sup>3</sup> Seventh-day Adventist Church, *Education*, <https://www.adventist.org/education/>; see also Seventh-day Adventist Church, *Seven Reasons Why I Send My Child to an Adventist School*, <https://www.adventist.org/education/seven-reasons-why-i-send-my-child-to-an-adventist-school/> (describing reasons an Adventist education is encouraged over public education for Adventist children).

<sup>4</sup> Tenth Biennial Churchwide Assembly of the Evangelical Lutheran Church in America, *A Social Statement on: Our Calling in Education 2*, 20 (2007).

<sup>5</sup> See Mennonite Education Agency, *About Mennonite Education Agency* (2018), <https://tinyurl.com/mennoniteeduc>; Mennonite Church USA, *Confession of Faith In a Mennonite Perspective: Article 2. Jesus Christ*, Mennonite Church USA (2020), <https://tinyurl.com/fjtcdbb9>.

<sup>6</sup> See Zakiyyah Muhammad, *Islamic Education in America: An Historical Overview with Future Projections*, 25 *Religion & Educ.* 87, 90 (1998).



of Islamic schools subsequently grew substantially.<sup>7</sup> And that growth has continued into the 21<sup>st</sup> century as some Muslim organizations encourage parents to choose Islamic schools in order to avoid the “dire consequences of sending their children to public schools” and to preserve Muslim community identity and beliefs.<sup>8</sup> In addition to mandates from Muslim leadership, Islamic schools are often promoted by laypeople as a favorable alternative to public education because they teach the basics of Islam while providing an environment in which Islamic attire can be worn and there is less pressure towards un-Islamic behavior.<sup>9</sup>

Orthodox Jews have similar beliefs. They “believe that there is a strong religious obligation to ensure that their children receive a Jewish education.” Br. of *Amicus Curiae* Agudath Israel of America at 8, *Espinoza v. Mont. Dep’t of Revenue*, No. 17-0492 (Mont. Sup. Ct. Jan. 19, 2018), 2018 WL 7351702. That belief cannot be furthered solely by the work done in the home. Instead, for the goal of fulfilling that duty to “be fully accomplished,” Orthodox Jews must send their children to “full-time Orthodox Jewish schools.” *Ibid.* The requirement to “transmit[] Jewish values through education is one of the central and timeless

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<sup>7</sup> See *id.* at 87.

<sup>8</sup> Hussam S. Timani, *Islamic Schools in America: Islam’s Vehicle to the Future?*, *The Forum on Public Policy* 6, 7 (2006).

<sup>9</sup> Hussein Abdulwaheed Amin, *Why we should send our Children to a Muslim School*, *Seasons-nidur* (Dec. 4, 2009), <https://tinyurl.com/islfuture1>.

imperatives captured in Judaism’s most sacred texts.”<sup>10</sup> Indeed, “for modern Orthodox Jews, enrolling their children in a dual curriculum Jewish day school is ‘virtually mandatory.’” *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 497 (S.D.N.Y. 2006) (citing multiple expert witnesses who testified to that effect), *aff’d*, 504 F.3d 338 (2d Cir. 2007). As a result of such teachings, in 2008, there were “eight hundred” such schools and “more than two hundred and twenty-five thousand youth” attending them.<sup>11</sup>

The need for those schools becomes apparent with only a cursory review of Jewish beliefs. It would be impossible for Jewish schoolchildren at secular schools to participate in daily prayers, eat outdoors during the holiday of Sukkot, and restrict travel during other Jewish holidays. Br. of *Amicus Curiae* Jewish Coalition of Religious Liberty in Support of Petitioners at 6-7, *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020) (No. 18-1195). Other religious groups, such as Muslims, teach prayer, holiday observance, and other practices that are similarly difficult to observe in public school.<sup>12</sup>

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<sup>10</sup> Letter from Moishe Bane, Pres, Orthodox Union Advocacy Center, to Dr. Christina Coughlin, N.Y. Educ. Dept. (Aug. 28, 2019), <http://bit.ly/3q8A6dz> (citing Joshua 1:8; Deuteronomy 6:7).

<sup>11</sup> Rona Sheramy, *The Day School Tuition Crisis: A Short History*, *Jewish Review of Books* (Fall 2013), <https://tinyurl.com/jewishbookrev>.

<sup>12</sup> See Muhsin S. Mahdi, *Islam*, Britannica, <https://tinyurl.com/islamprayer> (stating that the second pillar of Islam “consists of five daily canonical prayers”); see also Pew Research Center, *Frequency of Prayer*, <https://tinyurl.com/freqprayer>

2. Even if a religious group does not explicitly encourage religious education, the prevalence of religious schools representing diverse religions demonstrates that religious education is important to groups even in the absence of a direct spiritual mandate.<sup>13</sup> In 2017-2018, an astonishing 21,548 private schools serving 3,819,450 students were operated nationwide by religious groups.<sup>14</sup> Groups from 27 named religious orientations, including the Roman Catholic, Amish, Baptist, Episcopal, Friends, Greek Orthodox, Jewish,

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(stating that 69% of Muslims, 43% of Buddhists, and 51% of Hindus pray daily).

<sup>13</sup> The fact that some faith organizations lack a requirement for religious education should not be taken to imply apathy towards such education. To the contrary, the importance of sharing the faith with the next generation is nearly universally recognized among religious groups. The lack of a formal requirement may instead relate to a religious group's small size, newness, or financial limitations. See Pew Research Center, *Religious Landscape Study*, <https://tinyurl.com/pewrelandscape> (last visited Sept. 9, 2021).

<sup>14</sup> National Center for Education Statistics, *Private School Universe Survey (PSS): Table 2. Number and Percentage Distribution of Private Schools, Students, and Full-time equivalent (FTE) Teachers, by Religious or Nonsectarian Orientation of School: United States, 2017-18* (2019), <https://tinyurl.com/37cddn2t> (The table describes the orientation of a school, rather than the specific faith group operating a school. For example, schools of the "Calvinist" orientation include the "Calvin Christian School" of Illinois, the "Cornerstone Christian School" of Washington, and other schools operated by faith groups and congregations with whose beliefs are broadly characterized as "Calvinist." Individual schools pertaining to orientations described in the table can be viewed at National Center for Education Statistics, *Private School Universe Survey (PSS): Search for Private Schools*, <https://tinyurl.com/3w4c28fe>).

Pentecostal, Presbyterian, African Methodist Episcopal, Calvinist, Mennonite, and Islamic orientations operated more than 21,000 of these schools, while an untold number of groups from unnamed orientations operated 278 more.<sup>15</sup>

In New York alone, the most common religious private schools include Roman Catholic (532), Jewish (304), non-denominational Christian (109), Baptist (59), Islamic (31), Seventh-day Adventist (29), Lutheran Church Missouri Synod (29), Episcopal (14), and Mennonite (14) schools, alongside schools from 15 other religious groups.<sup>16</sup> The very existence of those schools suggests a widespread demand for schools that are willing to do the hard work of infusing secular learning with scriptural truths. And the success of these schools—in New York and elsewhere—shows that substantial numbers of parents feel a strong, faith-based desire to ensure that their children are educated in a manner consistent with their religious beliefs.

But whatever the reason for seeking religious education, the religious significance of faith-based education to those who seek it cannot be overstated. See *Yoder*, 406 U.S. at 216.

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<sup>15</sup> National Center for Education Statistics, *Private School Universe Survey (PSS): Table 2. Number and Percentage Distribution of Private Schools, Students, and Full-time equivalent (FTE) Teachers, by Religious or Nonsectarian Orientation of School: United States, 2017-18* (2019), <https://tinyurl.com/37cddn2t>.

<sup>16</sup> Private School Review, *Top New York Religiously Affiliated Schools*, <https://tinyurl.com/privschooNY>.

**B. For these families, the exclusion of religious schools means that parents must pay the entire cost of their children’s education in addition to taxes supporting public education and tuition assistance programs from which they are excluded.**

Like similar laws in other states, Maine’s exclusionary law forces families who, based on a religious calling or mandate, send their children to religious schools to shoulder the cost of tuition without the public assistance to which they would otherwise be entitled. They face that burden in addition to the taxes they pay in support of the tuition assistance program from which they are excluded. And in most states, such parents face the added burden of supporting public schools through their tax dollars.<sup>17</sup> As explained previously, but for their decision to exercise their First Amendment right to send their children to religious schools, these families would be entitled to public funding to defray the costs of their education.

Moreover, being forced to pay for religious education out of family funds when state funds would otherwise be available is a clear burden on religious exercise. As this Court held in *Sherbert v. Verner*, “the disqualification for benefits imposes [a] burden on the free exercise of religion.” 374 U.S. 398, 403 (1963). Forcing individuals to “choose between following the precepts of [their] religion and forfeiting benefits” puts “the same kind of burden upon the free exercise of

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<sup>17</sup> Tax Policy Center – Urban Institute & Brookings Institution, *State and Local General Expenditures, Per Capita* (Aug. 27, 2021), <https://tinyurl.com/educpercapita>.

religion as would a fine imposed” against them for their religious exercise. See *id.* at 404.

Since *Sherbert*, this Court has reaffirmed that principle. In *Thomas v. Review Board of the Indiana Employment Security Division*, this Court found a substantial burden based on the denial of unemployment benefits to a Jehovah’s Witness who terminated his job at an armaments factory based on his religious beliefs. 450 U.S. 707 (1981). Where the state denies a public benefit “because of conduct mandated by religious belief,” it puts “substantial pressure on an adherent to modify his behavior and to violate his beliefs.” *Id.* at 718. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial. *Ibid.*

Maine’s denial of an otherwise publicly available school choice benefit based on families’ decision to send their children to religious schools—“conduct mandated by religious belief”<sup>18</sup>—is the same kind of substantial burden on free exercise that this Court recognized in *Sherbert* and *Thomas*. And the burden Maine and states with similar laws place on religious education is particularly substantial for families who, because they are paying substantial sums to educate other people’s children through their tax payments, cannot afford to shoulder the added financial burden of private school tuition.

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<sup>18</sup> See *Thomas*, 450 U.S. at 718. For a discussion of religious mandates to educate children in religious schools, see *supra* Section I.A.

**C. This differential burden typically amounts to thousands of dollars per year—and is therefore “substantial.”**

The resulting burden on religious practice is substantial. Education is an expensive proposition—and every U.S. taxpayer picks up the bill. But taxpayers whose faiths encourage or compel them to send their children to religious schools are effectively forced to pay that bill twice. And the burden of sending children to private school without otherwise available public assistance typically amounts to thousands of dollars per year—certainly enough to qualify as “substantial” under any standard.

1. The aggregate cost of K-12 education in the United States is enormous. For example, public K-12 school systems collectively budget \$742 billion annually.<sup>19</sup> For perspective, that figure exceeds the entire annual U.S. defense budget.<sup>20</sup>

And that number translates into significant spending per student. Texas, for example, spends \$9,600 per student annually.<sup>21</sup> California’s annual expenditure

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<sup>19</sup> Melanie Hanson, *U.S. Public Education Spending Statistics*, EducationData.org (Aug. 2, 2021), <https://tinyurl.com/uspubliceducationspend>.

<sup>20</sup> See U.S. Gov’t Accountability Off., *Defense Budget: Opportunities Exist to Improve DOD’s Management of Defense Spending* (Feb. 24, 2021), <https://tinyurl.com/usdefspend>.

<sup>21</sup> Hanson, *supra* note 19.

per student is \$12,700.<sup>22</sup> And Maine spends \$15,100 every year for every student in its school system.<sup>23</sup>

2. Without aid from state governments, private school tuition similarly costs families thousands of dollars. Nationwide, the average yearly tuition for a private school exceeds \$12,000.<sup>24</sup> In New York, for instance, the average annual cost of a Christian school is \$7,438,<sup>25</sup> while sending a child to a Seventh-day Adventist school in California costs \$6,729 a year in tuition alone.<sup>26</sup> The typical Catholic private school costs nearly \$5,000 annually.<sup>27</sup> Jewish private schooling can come at a price as high as \$30,000 per year, or \$10,000-\$15,000 in lower cost-of-living areas.<sup>28</sup> And a sampling of private Islamic schools indicates that parents desiring to instruct their children in this faith

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> Melanie Hanson, *Average Cost of Private School*, EducationData.org (Aug. 2, 2021), <https://tinyurl.com/privateschoolcost>.

<sup>25</sup> Private School Review, *New York Religiously Affiliated Schools: Christian*, <https://tinyurl.com/NYChrisSchool>.

<sup>26</sup> Private School Review, *California Religiously Affiliated Schools: Seventh Day Adventist*, <https://tinyurl.com/CA7thDayAdv>.

<sup>27</sup> Hanson, *supra* note 24.

<sup>28</sup> Alisha Abboudi, *The High Cost of Jewish Continuity: Affording a Jewish Day School Education*, Jeducation World, <https://tinyurl.com/jewisheduccost>.



tradition may face tuition bills between \$8,990<sup>29</sup> and \$12,500<sup>30</sup> annually.

Families who bear the cost of sending their own children to religious schools also bear the tax burden of educating other people's children through public schools and the school choice programs from which they are excluded. The federal government funds only 8% of the aggregate U.S. public education budget, which leaves the states responsible for cobbling together the remaining 92% of the budget.<sup>31</sup> To meet that funding requirement, the average state allocates a quarter of its total revenues to fund K-12 education.<sup>32</sup> On a per-capita basis, each resident of a state will pay an average of about \$10,000 to the state through various revenue streams (e.g., property tax, sales tax, income tax, and fees) every year.<sup>33</sup> Again on a per-capita basis, as of fiscal year 2019, the average state spends \$2,186 on elementary and secondary

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<sup>29</sup> Noor-Ul-Iman School, *Tuition & Fees* (2021), <https://tinyurl.com/nuituition>.

<sup>30</sup> Al-Huda School, *Fee Schedule* (2021), <https://tinyurl.com/AHSTuition>.

<sup>31</sup> U.S. Dep't of Educ., *The Federal Role in Education*, <https://tinyurl.com/federaleducfunding>.

<sup>32</sup> Center on Budget and Policy Priorities, *Policy Basics: Where Do Our State Tax Dollars Go?* (July 25, 2018), <https://tinyurl.com/statetaxallocation>.

<sup>33</sup> Tax Policy Center – Urban Institute & Brookings Institution, *State and Local General Revenue, Per Capita* (Aug. 27, 2021), <https://tinyurl.com/stateandlocalrev>.

education.<sup>34</sup> That expenditure is nearly 4% of average personal income per person per year.<sup>35</sup>

3. Regardless of whether a state chooses to fund its education-related fiscal liabilities through property tax, sales tax, or income tax dollars, the financial burden on the individual taxpayer is sizeable. And under Maine's statutory scheme, that burden is effectively increased by nearly 100% for parents who prefer a religious education for their children.

While Maine parents with no religious preference can receive state aid to defray the cost of private education, parents who seek a religious education for their children are denied that assistance. They must pay the full price of their children's education, in addition to the taxes they pay the state to support the public program from which the state excludes them. That is not only a burden on such parents' religious practice, it is a substantial burden.

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<sup>34</sup> Tax Policy Center – Urban Institute & Brookings Institution, *State and Local General Expenditures, Per Capita* (Aug. 27, 2021), <https://tinyurl.com/educpercapita>.

<sup>35</sup> Tax Policy Center – Urban Institute & Brookings Institution, *State and Local General Expenditures as a Percentage of Personal Income* (Aug. 27, 2021), <https://tinyurl.com/educpercentincome>.

**II. Because Such Laws Are Not Neutral With Respect To Religion, They Must Be Subject To Strict Scrutiny—A Requirement The State Here Has Not Even Attempted to Satisfy.**

The existence of this substantial burden means that, even without the rank religious discrimination present here, Maine’s exclusion of families who send their children to religious schools violates the First Amendment. As discussed above, the state’s law “burden[s] religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). And even under *Employment Division v. Smith*, laws that burden religion and are not neutral (or are not generally applicable) must satisfy strict scrutiny. 494 U.S. 872, 878 (1990); accord *Lukumi*, 508 U.S. at 546.

1. PT1 agrees with Petitioners that Maine’s law is not neutral (or generally applicable) because it withholds an otherwise available public benefit based on religion. Pet’rs’ Br. 17 (citing *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021)). As this Court held in *Fulton*, “[g]overnment fails to act neutrally when it \* \* \* restricts practices because of their religious nature.” 141 S. Ct. at 1877 (citing *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1730-1732 (2018); *Lukumi*, 508 U.S. at 533). But that is what Maine has done here: It has “disqualif[ied] otherwise eligible recipients from a public benefit” because of their religious exercise. *Espinoza*, 140 S. Ct. at 2255.

Because that disqualification operates as a substantial burden on some families’ religious exercise

(quite apart from its discriminatory effect), Maine's restriction cannot stand without undergoing "the most exacting scrutiny." *Espinoza*, 140 S. Ct. at 2255. *Accord Locke v. Davey*, 540 U.S. 712, 727 (2004) (Scalia, J., dissenting) (explaining that where a state "has created a generally available public benefit, whose receipt is conditioned only on" objective criteria such as accreditation and satisfaction of compulsory attendance requirements and "carved out a solitary [class of school] for exclusion" based on religion, the law violates the Free Exercise clause).

2. The substantial burden Maine imposes on families' free exercise of religion thus violates the First Amendment unless it serves "interests of the highest order" and is "narrowly tailored in pursuit of those interests." *Espinoza*, 140 S. Ct. at 2260. Maine cannot meet that burden, see Pet'rs' Br. 36-44, and indeed, has not even attempted to do so.

Accordingly, regardless whether the law at issue here runs afoul of the antidiscrimination doctrine recognized in *Espinoza* and *Trinity Lutheran*, that law also violates the Free Exercise Clause because it imposes an unjustified burden on the free-exercise rights of the excluded families.

**CONCLUSION**

This Court should hold that tuition-assistance laws excluding from otherwise available public assistance programs families who for religious reasons send their children to religious schools place a substantial burden on those families' free exercise of religion and must pass strict scrutiny. Because Maine has not even attempted to meet that burden, the law at issue here violates the Free Exercise Clause, and the judgment of the First Circuit should be reversed.

Respectfully submitted.

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