



**COMMONWEALTH of VIRGINIA**  
*Office of the Attorney General*

**Jason S. Miyares**  
Attorney General

202 North Ninth Street  
Richmond, Virginia 23219  
(804) 786-2071  
Fax (804) 786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

February 18, 2022

Honorable Scott S. Harris  
Clerk  
Supreme Court of the United States  
Washington, D.C. 20543

Re: David and Amy Carson, as parents and next friends of O.C., et al. v. A. Pender Makin, in her official capacity as Commissioner of the Maine Department of Education, No. 20-1088.

Dear Mr. Harris:

This case involves a challenge to the “sectarian” exclusion in Maine’s tuition assistance program, which provides that “[a] private school may be approved for the receipt of public funds for tuition purposes only if it . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution.” *See Me. Stat. tit. 20-A, § 2951(2)*. The District Court held that the sectarian exclusion does not violate the Free Exercise Clause of the First Amendment. *See Carson v. Makin*, 401 F. Supp. 3d 207 (D. Me. 2019). The First Circuit affirmed. *See Carson as next friend of O.C. v. Makin*, 979 F.3d 21 (CA1 2020). This Court granted certiorari on the question whether a state violates the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or “sectarian,” instruction. 141 S. Ct. 2883 (July 2, 2021) (No. 20-1088).

Virginia, joined by a group of eight other states and the District of Columbia, submitted an amicus brief contending that Maine’s sectarian exclusion is consistent with the Free Exercise Clause, and that “States have a strong interest in maintaining the ‘play in the joints’ between the Establishment and Free Exercise Clauses that govern their respective funding choices for religious schools that use the funds for religious purposes.” *See Brief for Commonwealth of Virginia, et al. as Amici Curiae, Carson v. Makin*, No. 20-1088 (Oct. 29, 2021).

Following the change in Administration on January 15, 2022, the Attorney General has reconsidered Virginia's position in this case. The purpose of this letter is to notify the Court that Virginia no longer adheres to the arguments contained in its previously filed brief. Virginia is now of the view that Maine's sectarian exclusion discriminates against religious schools in violation of the Free Exercise Clause.

Virginia now urges this Court to reverse the First Circuit. The sectarian exclusion discriminates against religious schools on the basis of their religious status, *see Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring in part) ("I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way."), and is therefore not neutral toward religion and not generally applicable to both religious and secular schools. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Nor is the exclusion narrowly tailored to serve a compelling government interest. *Ibid.* Numerous other States have school voucher or scholarship programs similar to Maine's, and yet do not exclude religious schools from those programs. *See* Brief for the State of Arkansas, *et al.* as Amici Curiae in Support of Petitioner 19-23, *Carson v. Makin*, No. 20-1088 (Mar. 11, 2021). Clearly, those States have found ways to accommodate their compelling interests in providing for the education of children and the safeguarding of public funds without burdening the free exercise of religion.

"Religious education is vital to many faiths practiced in the United States." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020). It is Virginia's position that the Free Exercise Clause protects religious schools, and religious citizens, from the discriminatory treatment represented by Maine's sectarian exclusion. Because the exclusion discriminates against religion, is not narrowly tailored, and does not serve a compelling interest, it violates the Free Exercise Clause.

I would appreciate it if you would circulate this letter to the Members of the Court.

Sincerely,

*/s/ Andrew N. Ferguson*

Andrew N. Ferguson  
Solicitor General of Virginia

CC: See attached service list.

20-1088

**SERVICE LIST:**

Michael Eugene Bindas  
Institute for Justice  
600 University Street, Suite 1730  
Seattle, WA 98101  
mbindas@ij.org  
*Counsel for David Carson, et al.*

Sarah Ann Forster  
Office of the Attorney General  
6 State House Station  
Augusta, ME 04333  
Sarah.forster@maine.gov  
*Counsel for A. Pender Makin*

Elizabeth B. Prelogar  
Solicitor General  
United State Dept. of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001  
SupremeCtBriefs@USDOJ.gov  
*Counsel for United States*