No. 20-1088

IN THE

# Supreme Court of the United States

DAVID AND AMY CARSON, AS PARENTS AND NEXT FRIENDS OF O.C., AND TROY AND ANGELA NELSON, AS PARENTS AND NEXT FRIENDS OF A.N. AND R.N.,

*Petitioners*,

*v.*

A. PENDER MAKIN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE DEPARTMENT OF EDUCATION,

*Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF FOR PIONEER INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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## INTEREST OF AMICUS CURIAE[1]

Pioneer Institute ("Pioneer") is an independent, non-partisan, privately funded research organization that seeks to improve the quality of life in Massachusetts through civic discourse and intellectually rigorous, data-driven public policy solutions. Pioneer seeks to promote public policies that advance these goals and change those policies that negatively affect freedom of association, freedom of speech, economic freedom, and government accountability. Pioneer also believes strongly in both religious freedom and educational opportunity for children throughout our Nation. This case lies at the intersection of these interests.

Pioneer believes that a longstanding and major roadblock in our Nation to such greater opportunity for those who so desperately need it has been anti-Catholic and anti-religious bigotry. For over ten years Pioneer has produced many research papers on the role that anti-Catholic bigotry, and especially bigotry against both Catholic and religious education in general, has played in barring full educational opportunity for the low-income and the marginalized. As part of its ongoing effort to remove this roadblock Pioneer filed an amicus brief in support of petitioners in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). Justice Alito cited to Pioneer's amicus brief in his concurring opinion. *Id.,* at 2268 (Alito, J., concurring). Now Pioneer likewise comes before the Court to show the role that anti-religious

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

animus, and especially animus against religious education, has played in Maine. Pioneer shows below that the Maine statute in question, Me. Stat. tit. 20-A, § 2951(2), referred to here as the Sectarian Exclusion, is the product of animus against religion and use of Maine tuition program funds for religious education.

Pioneer also has a deep interest in its own research and those of many others showing superior educational outcomes in private - and especially religious - schools. Such religious schools outperform their public counterparts in metrics such as test scores, graduation rates, and college attendance rates. These achievement metrics are particularly notable for low-income students and students of color. Pioneer has below put such research before the Court.

*Background*

The State of Maine struggled for over one hundred years to keep anti-Catholic and anti-religious animus from crippling its tuition funding program, paying tuition at private as well as religious schools where an area lacked its own public schools. It finally failed in 1982 with the enactment of Me. Stat. tit. 20-A, § 2951(2) (again, the "Sectarian Exclusion"). The text of the Sectarian Exclusion states in part that, "A private school may be approved for the receipt of public funds for tuition purposes only if it: … Is a nonsectarian school in accordance with the First Amendment of the United States Constitution."

The history of animus in Maine against Catholic schools and religious education in general is long, not well known, and sordid. In the 1850's, after an influx of Irish Catholics fleeing the Potato Famine, the native Protestant population in Maine, hostile to

Catholics, sought to "protestantize the Catholic children" in public schools. *See Fr. John Bapst: A Sketch*, Woodstock Letters, col. 18, 134 (Woodstock College 1889). Such official efforts in the public schools came to a head after a priest in Ellsworth, Maine, namely, Father John Bapst, who earlier ministered to the Abenaki and the Penobscot Native Americans in Maine and later was the first President of Boston College, urged Catholic families to resist the required reading in public schools of the Protestant King James bible. The Catholic children sought to read from their own Catholic translation of the bible and so school officials expelled sixteen of them. Nancy Lusignan Schultz, "Cartography of Anti-Catholicism In the United Stated of America, 1800-1930," Chapter on Maine, 25-27 (Pioneer Institute August 2016) (hereafter "Schultz") available at https://pioneer institute.org/wp-content/uploads/Schultz-Research-final8.17.16-1.pdf. The Maine Supreme Court upheld the expulsions, noting that, "[l]arge masses of foreign population are among us, weak, in the midst of our strength." *Donahoe v. Richards*, 38 Me. 379, 413 (1854). At this time the Know Nothing party in Maine, whose motto was "to defend the virtues of the land and its natives," grew to great numbers. Schultz, 25-26. Subsequently, after Father Bapst founded Catholic schools, not controlled by the state, a mob led by the Know Nothings viciously stripped and then "tarred and feathered" him, leaving him barely alive, and burned the Catholic school in Ellsworth, Maine to the ground. Schultz, 26-27.

The Catholics rebuilt a network of their own schools and starting in 1873 benefitted from the enactment of the Maine school tuition program which paid tuition at private and religious schools where an area in Maine lacked a public school. It was at this

time that many states, but not Maine, passed what became known as "Blaine Amendments," named after Speaker of the U.S. House of Representatives and later presidential candidate James G. Blaine, who was from … Maine. Schultz, 30. Blaine's home in Augusta, Maine, referred to as Blaine House, is now the official residence of the Governor of Maine. The Blaine Amendments targeted for non-funding what they referred to as "sectarian schools," which, as this Court has noted, was "code for 'Catholic.'" *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). Without coincidence, the prohibitory language used in the Blaine Amendments was just the flip-side of that now used in Maine's Sectarian Exclusion. As this Court has also noted, the animus against Catholics and Catholic schools behind the Blaine Amendments was rank and vile. *See id.*, at 828-829.

The effort to shut Catholics out of the neutral Maine tuition funding program accelerated in the 1920's with the founding of many more Catholic schools. Alongside this growth in non-public religious schools was the growth of the Ku Klux Klan. By 1925 the *Washington Post* estimated the number of Klansman in Maine to be over 150,000. Mark P. Richard, "*Not a Catholic Nation: The Ku Klux Klan Confronts New England in the 1920's*," 4 (Univ. of Mass. Press, 2015). In 1921 the Imperial Wizard of the Klan, William J. Simmons of Atlanta, Georgia, during a Congressional investigation into the activities of the Klan, testified that, "It may surprise this committee to learn that the growth of the Klan in the North and East has been much larger than in the South." Mark P. Richard, "The Ku Klux Klan in 1920s Massachusetts." *Historical Journal of Massachusetts*, vol. 47, no. 1, Wntr 2019, 1. The Klan in Maine put its energy and effort into one main political issue: the

defunding of Catholic schools and the support of candidates who supported such defunding:

> The Klan's success coincided with proposals to bar state aid to sectarian institutions. Baxter, Brewster, and Representative Mark Barwise had each introduced bills to end school funding. The bills, obviously aimed at Maine's 156,000 Catholics—about 20 percent of the population.

John Syrett, "Principle and Expediency: The Ku Klux Klan and Ralph Own Brewster in 1924," Maine History 39, 4 (2001), 217-218, available at https://digitalcommons.library.umaine.edu/mainehistoryjournal/vol39/iss4/2. The anti-sectarian bills were ultimately defeated with the vocal support of the Bishop of the Catholic Diocese of Portland. Syrett, at 218.

The same animus against religious schools, and the funding of such schools through the tuition program, re-emerged in Maine fifty years later. In early 1979, the Maine Association of Christian Schools ("MACS"), consisting of twenty-three schools, was founded "to promote and improve Christian school education in Maine and to defend Christian schools against perceived encroachments by state regulation." *Bangor Baptist Church v. State of Me., Dep't of Educ. & Cultural Servs.*, 576 F. Supp. 1299, 1302–1303 & n.5 (D. Me. 1983). Legislation was filed in Maine to prevent the state from barring the operation of any religious school without state approval. *Id.* at 1319-1320. Maine state Senator Howard Trotzky, Chairman of the Joint Standing Committee on Education, declared, "This bill was brought by (MACS)." *Id.*, at 1315 n.28 and 1319.

Shortly thereafter, Senator Trotzky filed a request with the Maine Attorney General asking whether the neutral tuition funding program, permitting funding of private religious schools, "violate[s] the First Amendment of the U.S. Constitution." Me. Opp. Atty Gen. No. 80-2 (Jan. 7. 1980), 1980 WL 119258, at *1. However, Senator Trotzky's effort did not result in any actual change in the neutral tuition funding program. In 1982, having failed so far effectively to revoke funding of religious schools, Senator Trotzky's Education Committee filed a 400-page recodification of all of Maine education law, which he repeatedly claimed made no substantive change whatsoever, while deep within it was the Sectarian Exclusion. *Bangor Baptist Church*, 1315 n.28. The history of animus in Maine against religious education, and use of tuition program funds for religious education, started a new chapter.

## ARGUMENT

### I. The Overwhelming Evidence Demonstrates That The Object Of Maine's Sectarian Exclusion Was Anti-Religious Animus As Shown By Its Text, Its Background, Legislators' Demonstrably False Claims Of A Secular Purpose, And Derogatory Statements Directed Against Its Religious Opponents.

#### A. State Action Based On Anti-Religious Animus Violates the First And Fourteenth Amendments.

This Court has consistently held that any state action based on anti-religious animus violates the First and Fourteenth Amendments. *See, e.g.*, *McDaniel v. Paty*, 435 U.S. 618, 636 (1978) (Brennan, J., concurring); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993);

*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). "Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular." *Lukumi*, at 547. Even an assessment of whether a school is "pervasively sectarian … collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status *or sincerity*." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (italics added). "The Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop*, at 1731, quoting, *Lukumi*, at 534.

When hostility toward a particular religious group or groups is the motivation behind legislation or government actions, the Court should address the animosity rather than permitting unconstitutional harms to accrue. Just as anti-religious animus, and in particular anti-Catholic animus, motivated the enactment of the 19th century Blaine Amendments, the Maine Sectarian Exclusion was the product of anti-religious hostility and likewise produces unconstitutional harms. While this Court has begun the work of cutting back on such animus-based harm, such animus has not been completely rectified and such constitutional harms have continued far too long without being completely dealt with. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality opinion of Thomas, J.) ("Nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now."). We therefore ask the Court to rule in favor of Petitioners in order to

prevent harm by the Maine Sectarian Exclusion in this case and by other state laws in similar instances.

### B. Permissible Evidence Of Anti-Religious Animus Is Shown By The Object Or Purpose Of The Law Including By Its Text, Circumstantial Evidence, The Events Leading To Its Enactment, And Statements Made By Its Legislative Proponents.

This Court has made it very clear that while the central inquiry is whether "the object or purpose of a law is the suppression of religion or religious conduct," many kinds of evidence are relevant to this inquiry. *Lukumi*, 508 U.S. at 533. "To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* The Court in *Lukumi* also assessed the presence of animosity by looking to "both direct and indirect circumstantial evidence," such as "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body …. These objective factors bear on the question of discriminatory object." *Lukumi*, at 540; *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

This approach was reaffirmed by the Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, where the Court overturned a decision by the Colorado Civil Rights Commission because the Commission had displayed significant hostility toward the religion of the Petitioner, the owner of Masterpiece Cakeshop. *See Masterpiece Cakeshop,*

*Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). There, the Court looked at vitriolic statements made by various commissioners during the proceedings against Petitioner. *Id.* at 1729–1730. It was clear from the Commission's behavior throughout the process that its "hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id.* at 1732.

### C. That Evidence Conclusively Demonstrates That The Object Or Purpose Of The Sectarian Exclusion Was Discrimination Against And Suppression Of Religion Which Was All Driven By Anti-Religious Animus.

#### 1. The Text of the Sectarian Exclusion Is Blatantly Anti-Religious.

The text itself of the Sectarian Exclusion facially betrays blatant anti-religious animus. The text for the Sectarian Exclusion states in part that, "A private school may be approved for the receipt of public funds for tuition purposes only if it: … Is a nonsectarian school in accordance with the First Amendment of the United States Constitution." Me. Stat. tit. 20-A, § 2951(2). Obviously, right in its text § 2951(2) only permits use of Maine tuition program funds at "nonsectarian schools" and therefore prohibits their use at sectarian schools. And this Court has long understood that the term "sectarian" when used in the context of schooling "was code for 'Catholic.'" *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). And at the time of the enactment of the Sectarian Exclusion in 1982 at least the term "pervasively sectarian" in accordance with the First

Amendment meant "almost exclusively Catholic parochial schools." *Mitchell v. Helms*, at 829, citing, *Hunt v. McNair*, 413 U.S. 734, 743 (1973). Therefore, by its very text and the accepted definition of the terms used therein, § 2951(2), the Sectarian Exclusion, was blatantly anti-Catholic and anti-religious. Moreover, under this Court's current First Amendment jurisprudence, exclusion of a school from a public benefit merely because it is "pervasively sectarian" is a doctrine that "should be buried" and apparently was buried in *Mitchell v. Helms*, at 829 (Thomas, J., plurality opinion).

### 2. The Background Shows An Object Or Purpose Of Obliterating Maine's Longstanding Neutral Tuition Funding Laws.

Maine has had a tuition funding program dating back to 1873. From 1873 until enactment of the Sectarian Exclusion in 1982, the Maine laws providing for the tuition funding program were facially neutral and did not prohibit use of tuition program funds at religious schools.[2] The version of the tuition funding program in place just before 1982, enacted in 1979, was set forth in several places in Title 20 of the Maine Revised Statutes. These included: (1) Me. Stat. tit. 20-A, § 213-A (2)(D): "a district may meet the requirement of providing a secondary school facility by contracting with … a private academy …"; (2) § 912: "Children living remote from any public school … may be allowed to

[2] And, as noted above, this religious neutrality continued even in the face of the substantial effort in the 1920's by the then 150,000 members of the Maine Ku Klux Klan to bar use of the tuition program funds at "sectarian" Catholic schools.

attend .... an approved elementary school .... [t]he tuition payment to a private school shall not exceed the average cost per pupil in all public elementary schools of the State ..."; (3) § 1289: "Any administrative unit ... which does not maintain an approved secondary school may authorize its school committee to contract for one to 5 years with and pay ... the trustees of any academy located within the town or in any nearby town or towns ..."; (4) § 1291: "Any youth whose parent or legal guardian maintains a home for his family in any administrative unit which does not support or maintain an approved secondary school or does not contract to provide secondary school privileges for all of its pupils may attend any approved secondary school to which he may gain admission."; and (5) § 1454: "Any youth whose parent or legal guardian maintains a home for his family in the unorganized territory of this State and who may be judged by the commissioner qualified to enter an approved secondary school may attend any such school in the State to which he may gain entrance ..." In the 1979-80 school year in Maine, hundreds of students received tuition funding at sectarian secondary schools selected by the students' parents. Joint Appendix, Joint Stipulated Facts, ¶ 19.

As noted above, by 1979 Senator Howard Trotzky, Chairman of the Joint Standing Committee on Education,[3] was having disputes with the Maine Association of Christian Schools, known as MACS, over state regulation and control of religious schools. In late 1979 Senator Trotzky, apparently seeking a way to defund the MACS-associated and other religious schools in Maine, approached the Maine

[3] *Bangor Baptist Church v. State of Maine, Department of Educational and Cultural Services*, 576 F. Supp. 1299, 1315 n.28 (D. Me. 1983).

Attorney General, Richard S. Cohn. Senator Trotzky asked the Attorney General for an opinion as to whether the then-existing religiously neutral tuition funding program "violate[s] the First Amendment of the U.S. Constitution." Me. Op. Att'y Gen. No. 80-2 (Jan. 7, 1980), 1980 WL 119258, *1. Attorney General Cohn replied that, "[y]our question raises a broader issue, namely, whether public funds may be used to pay the tuition of children attending religiously operated elementary and secondary schools." *Id.* The Attorney General then referred to the applicable sections in Title 20 providing for such tuition funding program (all noted above) as §§ 213-A (2)(D), 912, 1289, 1291, and 1454. *Id.* at *1-2. The framework the Attorney General used to conduct his analysis included the purpose, effect, entanglement, and political divisiveness tests of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). 1980 WL 119528, *5-13. In doing so, the Attorney General answered Senator Trotzky saying, "In light of our conclusion that the practice of contracting with and paying the tuition for students at sectarian elementary and secondary schools is unconstitutional, we interpret … §§ 213-A, 912, 1289, 1291, and 1454 as not authorizing such a practice." *Id.* at 13.

Yet, even in light of the Attorney General's 1980 Opinion the Maine legislature made no immediate change to the neutral tuition funding program codified at Title 20. In 1981 the Joint Standing Committee on Education proposed Legislative Document No. 1554, entitled "An Act to Revise the Education Law," which would completely repeal Title 20 and replace it with Title 20-A. See 1982 Legislative Document ("L.D.") No. 1554, at 1. But proposed 20-A retained completely the entire neutral tuition funding program, while reorganizing,

revising, and renumbering the applicable sections: (1) old § 213-A became new § 1458; (2) old § 912 became new § 3105; (3) old § 1289 became new § 4051; (4) old § 1291 became new §§ 1152 and 4052: and (5) old § 1454 became new § 4253. See L.D. 1554, showing these particular transitions from old to new sections, at 280, 282, and 284. And in 1981 the Maine legislature considered but did not pass L.D. 1554. And so the religiously neutral tuition funding program remained in effect through 1981.

However, action in the Maine legislature in the following year, 1982, was vastly different. In 1982 Senator Trotzky's Education Committee dropped the recodification of Maine education law proposed in 1981 in L.D. 1554 and proposed another complete recodification. Me. Legis. Rec. - Senate, Mar. 8, 1982, at S-221: "An Act to Revise the Education Laws … L.D. 1554 … Reported that the Same Ought to Pass in New Draft under Same Title … [as] L.D. 2042 …." And for the first time ever in Maine law it contained the Sectarian Exclusion at Me. Stat. tit. 20-A, § 2951(2). Senator Trotzky knew in 1982 when L.D. 2042 was proposed that despite his 1980 effort with the Attorney General, and the proposed recodification of the education law as L.D. 1554 in 1981, and due to his position as Chairman of the Joint Education Committee, Maine law still contained the religiously neutral tuition funding program. In 1982 Senator Trotzky changed that with the completely revised L.D. 2042 because buried deep in its 400 pages, which he adamantly and repeatedly claimed made no substantive change (see below), and which he repeatedly claimed conformed to existing law, was the Sectarian Exclusion. And as Chairman of the Joint Education Committee and author of the 1980 inquiry to the Attorney General about the constitutionality of

the then-religiously neutral tuition funding program, he certainly knew or should have known the Sectarian Exclusion was in L.D. 2042 and he almost certainly agreed that it be put there as well. Accordingly, the conclusion is inescapable that Senator Trotzky's motive or object in the 1982 recodification, and specifically with respect to L.D. 2042 containing the Sectarian Exclusion, was to cement in Maine law - quietly and almost secretly - a bar against any funding for religious schools.

### 3. The Legislative Sponsors Of The Sectarian Exclusion Made Patently False Representations Claiming A Routine, Secular Purpose.

As part of the 1982 legislative debates concerning the proposed enactment of a "recodification" of Maine education law in L.D. 2042, labelled Title 20-A, which recodification included the Sectarian Exclusion, Me. Stat. tit. 20-A, § 2951(2), Senator Trotzky repeatedly and emphatically claimed that the overall recodification "does not have substantive changes." Me. Legis. Rec. - Senate, Apr. 1, 1982, at S-534. In other words, the recodification made no changes, was routine in all respects, and therefore was secular in purpose (and not anti-religious as it turned out to be). Senator Trotzky, Senate Chair of Education, and his co-sponsor, Representative Connolly, House Chair of Education,[4] made this same claim many times. Senator Trotzky: Me. Legis. Rec. - Senate, Mar. 31, 1982, at S-483 ("The key to recodifying a law is that there be no substantive changes. This is a major thing,"), and at S-484 ("At the same time, there are not substantive

[4] *Bangor Baptist Church,* 576 F. Supp. at 1315 n.28.

changes."), Me. Legis. Rec. - Senate, Apr. 1, at S-533 ("The main concern I have, Mr. President, was that there were no substantive changes."); Representative Connolly: Me. Legis. Rec. - House, Mar. 23, 1982, at H-315 ("It has not been the intention of the Education Committee to make any substantive changes at all in this recodification."), Me. Legis. Rec. - House, Apr. 5, 1982, at H-539 ("This draft, with the amendment that has been accepted, represents no substantive change in the education laws at all …."), Me. Legis. Rec. – House, Mar. 9, 1982, at H-229 ("It is merely a revision, a recodification and a reorganization of all the education laws."). Senator Trotzky even went so far as to claim that, "Whenever there was a question of a controversy in the [Education] Committee over substantive changes, we retained the wording of the law as it is presently in the books." Me. Legis. Rec. - Senate, Mar. 31, 1982, at S-483. Senator Trotzky's point in claiming the recodification made no change, and that it conformed with existing law, was to hide the change – in a 400-page bill - denying funding to religious schools, and therefore to claim that the recodification only had a routine and therefore secular purpose.

However, the claim that the recodification made no substantive change was completely false. The Sectarian Exclusion represented a complete reversal from the tuition funding law of more than one hundred years standing; formerly, religious schools could participate in the Maine tuition funding program, and now they could not. Perhaps fearing their subterfuge might be discovered, Senator Trotzky and Representative Connolly hedged their categorical statements that recodified Title 20-A contained no substantive changes from prior Title 20. Senator Trotzky admitted that people might "feel"

there have been changes: "The real issue here is you have, if you feel that there have been substantive changes in this, then I'd like to hear about them, and so would the Education Committee." Me. Legis. Rec. - Senate, Apr. 1, 1982, at S-533.[5]

#### 4. The Legislative Sponsors Of The Sectarian Exclusion Also Made Derogatory Statements Against Their Religious Opponents.

And then Senator Trotzky made derogatory remarks about religious opponents of the proposed recodified Maine education law. He directly stated that such opponents wanted changes in their favor. "There is another group that wants to see this sink. That is the Maine Association of Christian Schools." Me. Legis. Rec. - Senate, Mar. 31, 1982, at S-483. Senator Trotzky went on to claim that MACS, noted above, wanted to make "a substantive change in the present law" that would selfishly favor them, asserted these changes were not warranted, and finally dismissed MACS's proposed changes saying, "but the Committee has agreed that there would be no substantive changes." *Id.* As a result, Senator Trotzky made MACS look like bad faith and unreasonable special pleaders, when he was the actual special pleader who had already – in the draft recodification - completely barred any access of these religious groups to the tuition funding program. He had done this by including an extreme substantive change in the recodification, the Sectarian Exclusion,

[5] This is a "tell," an unconscious admission by Senator Trotzky that he knew the 1982 recodification contained a major substantive change, that is, the Sectarian Exclusion, when he repeatedly denied this stating the recodification made no substantive change.

which bar he never acknowledged in the legislative debates, all the while severely decrying the motives of the Christian group. He also described his opponents as unenlightened, saying, "People are afraid of change …" Me. Legis. Rec. - Senate, Apr. 1, 1982, at S-534.

In summary, Senator Trotzky and his allies did everything they could to conceal their true object or purpose which was to bar funding for religious schools. They made changes without announcing these publicly. They made false statements flatly denying what they actually did. They disingenuously claimed to want to hear their opponents' proofs of substantive changes. They derided their opponents as backwards, saying they were afraid of change. They made derogatory comments about the motives of their Christian/religious opponents, painting them as selfish special pleaders, when they themselves were the special pleaders. They needed to do all of this to conceal their true object or purpose which was anti-religious.

## II. Maine's Sectarian Exclusion Deprives Maine's Students Of Superior Educational Outcomes.

Despite the history recounted above, Maine's stated purposes for its tuition program is to "ensure that state-paid-for education at private schools … is roughly equivalent to the education students would receive in public schools but cannot obtain because it is not otherwise offered." *Carson, as Parent and Next Friend of O.C., et al. v. Makin, as Commissioner of the Maine Department of Education*, 979 F.3d 21, 36 (1st Cir. 2020) (quoting statement of Respondent, the Commissioner of the Maine Department of Education; internal quotations omitted). The First Circuit, in turn, credited Maine's interest in providing a "rough equivalent" to public education for participants in its

tuition program. *Id.* The Court proceeded to identify Maine's "interest in maintaining a religiously neutral public education system," and concluded from this principle that education at a religious school was not "equal" to a public education. *Id.* at 42.

But both Maine's and the First Circuit's reasoning rings hollow: research has consistently shown that religious schools, particularly Catholic schools, produce *equal or better student outcomes* across a slew of metrics as compared to public schools. Thus, rather than advance Maine's stated goal of ensuring a rough "equivalent" to public school education, in many cases Maine's sectarian exclusion *defeats* that very goal.

Specifically, religious schools — which, nationally, comprise nearly 70 percent of private schools[6] — have repeatedly been demonstrated to afford superior educational outcomes to public schools, and better instill the very inclusive and anti-discriminatory values used by Maine's legislators to justify discriminating against religious schools. Further, decades of studies consistently have shown that religious schools perform at, and frequently above, the level of public schools, and are particularly successful in educating students of color and other disadvantaged communities. Catholic schools, for example, have a long history of providing far more than a "rough[] equivalent," *see id.*, to the education students could expect to receive in public schools. Pioneer recently published research finding that Catholic schools in Massachusetts outperform their public-school peers on achievement tests. Cara

[6] "Statistics About Nonpublic Education in the U.S.," U.S. Dept. of Ed. (2016), https://www2.ed.gov/about/offices/list/oii/nonpublic/ statistics.html (last accessed Sept. 6, 2021).

Stillings Candal, "Four Models of Catholic Schooling in Massachusetts," in *A Vision of Hope: Catholic Schooling in Massachusetts* 51 (Chris Sinacola & Cara Stillings Candal, eds. 2021). Catholic school graduation and college matriculation rates in Greater Boston are higher than their public-school peers. *Id.* And, most strikingly, urban Catholic schools with racially diverse and low-income student bodies experience the same overperformance in test scores, graduation rates, and college attendance rates compared to public schools in the same jurisdiction. *Id.* Further, Catholic schools have proven capable of providing better per-dollar outcomes for taxpayers, as they produce these high achievement metrics at lower per-pupil costs than public schools. *Id.*

Catholic schools' overperformance is not limited to Massachusetts. Nor is it a recent phenomenon. A 1979 study commissioned by the U.S. Department of Education showed that "students in Catholic high schools both learned more and had higher graduation rates than their public-school peers. Minority students in particular appeared to benefit from the Catholic school experience." Martin R. West, "Schools of Choice Expanding Opportunity for Urban Minority Students," Education Next 48 (Spring 2016) (citing James S. Coleman, High School and Beyond (1979)). A 1987 study confirmed these results, finding that Black and Hispanic students in Catholic high schools had lower dropout rates and higher graduation and college attendance rates, and were more likely to take advanced courses and participate in community service than their peers in public schools. *Id.* at 50 (citing James S. Coleman & Thomas Hoffer, Public and Private High Schools: The Impact of Communities (1987)). In the decades since, scholarly research has continued to confirm that

Catholic schools often produce student outcomes superior to public schools. *See, e.g.*, Thomas Hoffer, "Social Background and Achievement in Public and Catholic High Schools," 2 Social Psych. of Ed. 7, 23 (1997) (finding that Catholic high schools in the early 1990s had positive effects on student achievement test score gains); Roseanne L. Flores, "The Benefits of Attending Catholic Schools: A Look at the Academic Achievement of African-American Boys in Elementary School," 8 Open J. Social Sci. 489, 495 (2020) (finding that African-American boys in Catholic schools have higher test scores, attendance records, and self-reported enjoyment of school than their peers in public schools).

More broadly, school-choice programs that include both religious and secular private schools have proven successful in promoting racial and socioeconomic equity. Pioneer's research suggests that students who attend a religious school are more likely to overcome racial divisions than those who attend a district public school. Theodor Rebarber & Neal McCluskey, "Common Core, School Choice, & Rethinking Standards-Based Reform" at 23-24, Pioneer Inst. No. 186 (2018) (citations omitted), *available at* https://files.eric.ed.gov/fulltext/ED593778.pdf. In several school districts, school choice programs have also reduced segregation in classrooms. Ken Ardon & Cara Stillings Candal, "Modeling Urban Scholarship Vouchers in Massachusetts" at 15, (Pioneer Inst. 2015) (citations omitted), *available at* https://files.eric.ed.gov/fulltext/ED565733.pdf. Further, students who attend a private or religious school "are more likely to disagree with anti-Semitic attitudes than students who attend public schools." Jay P. Greene and Ian Kingsbury, "The Relationship Between Public and Private

Schooling and Anti-Semitism," Journal of School Choice 11, no. 1 (2017). And Catholic schools have been shown to have positive effects on students' tolerance of those with differing political viewpoints compared to public schools. David E. Campbell, "The Civic Side of School Choice: An Empirical Analysis of Civic Education in Public and Private Schools," 2008 B.Y.U. L. Rev. 487, 510 (2008).

Pioneer's findings on the broad benefits of school choice, especially for disadvantaged students, should not be surprising. This Court has already recognized that "low-income and minority families" who lack "the means to send their children to any school other than an inner-city public school" are the primary beneficiaries of school-choice programs that permit parents to use vouchers at religious schools. *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) (upholding school choice program in which 96 percent of scholarship recipients enrolled in religious schools). The same is the case in Maine: the families who would benefit the most from the overruling of the state's unconstitutional policy are those most in need of the state's support, including plaintiffs Troy and Angela Nelson, who have access to a tuition voucher but are restricted from using it at their school of choice, where they cannot otherwise afford tuition. Pet. App. 8-9.[7]

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[7] The COVID-19 pandemic has further demonstrated the import of school choice. As a general matter, Catholic schools have offered a model for safe, effectively in-person learning over the last two years. See Avi Wolfman-Arent, "In Person Classes, Old Buildings, Almost No COVID: Are Philly Catholic Schools a Blueprint?," WHYY.org (Feb. 21, 2021), https://whyy.org/articles/in-person-classes-old-buildings-almost-no-covid-are-philly-catholic-schools-a-blueprint/ (examining successes of in-person learning with minimal COVID-19 transmission in Philadelphia's Catholic schools); Christine Rousselle, "Open For

In short, decades of scholarly research demonstrate that religious private schools provide far more than the "rough equivalent" of a public-school education. To the extent that the sectarian exclusion — and the First Circuit opinion upholding it — are based on a contrary view, neither can stand.

## III. Maine's Discrimination Based On Religious "Use" Is As Constitutionally Odious As Discrimination Based On Religious "Status."

### A. The Free Exercise Clause Does Not Recognize A Distinction Between Religious Status And Religious Activity.

Because the government "shall make no law ... prohibiting the free exercise" of religion, U.S. Const. amend. I, "government, in pursuit of legitimate

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Learning: How Boston Catholic Schools Keep Their Students Safe," Catholic News Agency (Feb. 10, 2021), https://www.catholicnewsagency.com/news/246450/open-for-learning-how-boston-catholic-schools-kept-their-students-safe (finding "few cases of COVID" after months of fully in-person learning in Boston Catholic schools). Accordingly, Catholic school enrollment rose dramatically during the 2020-21 school year. *See* Rousselle, *supra* (Boston Catholic schools gained "more than 4,000 students" from July to October 2020). Demand for private and religious education rose in Maine as well: as the state's public school enrollment fell by nearly 8,000 students, the number of students who withdrew from public schools to attend private and religious schools rose by nearly 300 percent. Eesha Pendharkar, "Maine Schools See Enrollment Plummet As Pandemic Upends Education," Bangor Daily News (Dec. 9, 2020), https://bangordailynews.com/2020/12/09/news/maine-schools-see-nearly-8000-fewer-students-as-pandemic-upends-school/. But the ability to make the switch depends in no small part on one's means. And for Maine's low-income families, the Sectarian Exclusion stood between their children and safe, in-person learning for their children, defeating Maine's interest in ensuring universal access to high-quality education.

interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993). Accordingly, this Court last year explained that no state may "disqualify" schools from public funding "solely because they are religious." *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2261 (2020). To do so would unconstitutionally put those schools "to the choice" between being religious "and receiving a government benefit." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2012). It inescapably follows that Maine's Sectarian Exclusion — which by design and purpose disqualifies "sectarian" schools from "the receipt of public funds for tuition purposes," Me. Stat. tit. 20-A, § 2951 — is unconstitutional.

According to the First Circuit, however, while it is odious to discriminate against an entity for *being* religious, it is permissible to discriminate against an entity for *doing* religious things. According to this faulty logic, it is thus permissible to deny tuition dollars to religious schools for no reason other than those schools' choice to practice, rather than merely believe, their faith.

The Free Exercise Clause permits no such thing, because "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). By guaranteeing a fundamental right to *exercise* religion, the Framers enshrined more than a mere

"right to inward belief (or status)." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring). Rather, the constitution "protects a right to act on those beliefs outwardly and publicly," because a "right to *be* religious without the right to *do* religious things . . . hardly amount[s] to a right at all." *Espinoza*, 140 S. Ct. at 2276-2277 (Gorsuch, J., concurring; italics in original).

These principles derive not just from settled law and ample precedent, *see id.* (collecting cases), but from the lived experience of the faithful. It is folly to attempt distinctions between one's mere identification with a faith and how that faith shapes one's interactions with the world. "Certainly, many religious believers would report that their religious beliefs are central to who they 'are,' but most would also say that their faith commitments require and inspire a range of actions, both pious and mundane, and are lived out in community and in public." Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of Trinity Lutheran*, Cato Sup. Ct. Rev., 2016-2017, at 105, 129. Indeed, in his Epistle, James asks: "What good is it, my brothers, if someone says he has faith but does not have works?" — and in reply, "For as the body apart from the spirit is dead, so also faith apart from works is dead." James 2:14, 26 (ESV). And when a woman suffering a crisis of faith approaches Father Zossima in Fyodor Dostoyevsky's *The Brothers Karamazov*, the elder's instruction is to seek out the experience of "active love. Strive to love your neighbor actively and indefatigably .... If you attain perfect self-forgetfulness in the love of your neighbor, then you will believe without doubt, and no doubt can possibly enter your soul. This has been tried. This is certain." The foundational (if not

universally moral) injunction to "love your neighbor as yourself," Leviticus 19:18 (ESV), speaks not in terms of passive, internal assent to a religious creed but rather in terms of action, movement, and expression.

There is, of course, no end of such admonitions within and across multiple faiths and religious traditions. That is because religious belief and religious action are inextricably entwined and cannot be amputated from one another — as demonstrated in the mission statements of the vast majority of religious schools, which proclaim that their religious mission is embedded within all they do. Nor should any court or government attempt that disaggregation. Doing so would not only steer federal courts towards "difficult and important question[s] of ... moral philosophy," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014), akin to those "not within the judicial function and judicial competence" to parse, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981), but also because, as Justice Gorsuch has observed, doing so could produce "winners and losers." *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring). "Those apathetic about religion or passive in its practice" may escape discrimination against the actively faithful, but "those who take their religion seriously, who think that their religion should affect the whole of their lives, and those whose religious beliefs and practices are least popular, would face the greatest disabilities." *Id.* (internal quotations and citations omitted). That secular schools operated by passively religious entities can receive public monies, but schools operated by actively religious entities cannot, proves the point: only the actively religious are punished.

Further, drawing a constitutional line — and placing religious "status" on one side and "use" on the other — will invite states to simply reinterpret statutes or policies that self-evidently discriminate based on religious "status" as targeting religious "use." Indeed, as envisioned by the First Circuit, any given law targeting religion can be easily described as either "status"-based or "use"-based depending on which result one wishes to reach. This Court struck Montana's no-aid provision for "plainly exclud[ing] schools from government aid solely because of religious status." *Id.*, 140 S. Ct. at 2255 (majority op.; brackets added). But Montana's no-aid provision (precisely like Maine's provision here) also forbade public funds to any school "that is 'sectarian,'" *id.*, which the First Circuit's opinion makes clear is a term just as easily cast as a "use"-based distinction. Indeed, Justice Breyer made this very point in his dissenting opinion in *Espinoza*, noting that *Espinoza* ultimately did not turn on "a claim of status-based discrimination" but rather on what the petitioners "propose[d] *to do* — use the funds to obtain a religious education." 140 S. Ct. at 2285 (Breyer, J., dissenting) (internal quotations and citations omitted); *see also id.* at 2275 ("[D]iscussion of religious activity, uses, and conduct — not just status — pervades this record.") (Gorsuch, J., concurring). Thus, Justice Breyer rightly observed: "Even if the schools' status were relevant, I do not see what bearing the majority's distinction could have here. There is no dispute that religious schools seek generally to inspire religious faith and values in their students." *Id.* at 2285 (Breyer, J., dissenting).

This history of the Sectarian Exclusion — and how it has long been understood — also demonstrates the malleability of the First Circuit's distinction. The

Maine Supreme Judicial Court explained that the Sectarian Exclusion "made *religious schools* ineligible" altogether for the tuition program "in response to an Opinion of the Attorney General …. [that] concluded that the inclusion of *religious schools* in Maine's tuition program violated the Establishment Clause[.]" *Bagley v. Raymond School Dept.*, 728 A.2d 127, 130-131 (Me. 1999) (emphases added). The Montana Supreme Court in *Espinoza* observed no distinction between "use" and "status" — just "religion" and the lack thereof. 435 P.3d 603, 613 (Mont. 2018). Nor did the First Circuit draw such a distinction when it first adjudicated the constitutionality of the Sectarian Exclusion. As Judge Campbell's concurring opinion explains: "The Maine tuition statute was narrowed in 1981 [*sic*] to exclude *religiously-affiliated* schools …" *Strout v. Albanese*, 178 F.3d 57, 66 (1st Cir. 1999) (Campbell, J., concurring) (emphasis added).

Now, in the wake of *Espinoza*, Maine stresses that the Sectarian Exclusion cares not whether a reimbursed school is "religiously-affiliated," *id.* — only whether it *does* religious things. However, as demonstrated by differing prior interpretations of identical statutory language, the linguistic capacity to describe the same provision either way — without reference to a "status" v. "use" distinction when that distinction did not matter, and then with strident emphasis on that distinction the moment it does matter — proves the distinction is without meaningful difference.

At bottom, whether Maine chooses to exclude religious schools for being themselves or for acting as themselves, it will still be treating those schools differently, and worse than their nonreligious counterparts. "[T]he sole reason advanced that

explains the difference is faith" — in the case of the "sectarian" schools excluded in this case, a lived faith, but faith nonetheless. *Trinity Lutheran,* 137 S. Ct. at 2027 (Breyer, J., concurring). The First Amendment does not tolerate discrimination of this kind. The Sectarian Exclusion must fall.

### B. Inquiry Into Religious "Use" Entangles The State With Religious Institutions.

The Sectarian Exclusion does not merely violate the Free Exercise Clause. The invasive inquiry necessary in order to determine whether an institution's use of public funds is "sectarian" violates the Establishment Clause as well.

Respondent, the Commissioner of the Maine Department of Education, made this clear: The Commissioner stated that the Department assesses whether an institution "promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." *Carson*, 979 F.3d at 38. The Department does so by examining "what the school teaches through its curriculum and related activities, and how the material is presented." *Id.* The Department cannot make these kinds of determinations without deciding what constitutes a "faith or belief system," investigating with which "faith or belief system" an institution is "associated," and assessing the degree to which an institution "promotes" that "faith or belief system" or uses it as the "lens" through which to educate its students. Such judgments necessarily are premised on the Department's subjective understanding of the tenets of various "faith[s]" and "belief system[s]," and how those tenets may be "promote[d]" or used to frame the presentation of the

innumerable topics that primary and secondary schools teach.

What would it mean, for instance, for Judaism, Catholicism, or Buddhism to be the "lens" through which the material in a middle school algebra class is presented to students? How could one make that determination without both an understanding of the fundamental teachings of those faiths, and how (if at all) those teachings are being put into practice in the classroom? Maine provides no answer. Yet resolving such questions is precisely the task with which the Department — by its own admission — is faced. That exercise on its face violates the First Amendment's prohibition on "excessive entanglement," which "protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices . . . as a basis for regulation or exclusion from benefits …" *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008).

This Court repeatedly has condemned intrusive probing into individuals' and entities' religious beliefs. Such inquiry, the Court has observed, is "profoundly troubling." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality); *see also, e.g.*, *Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (holding that "the very process of inquiry" necessary to resolve whether teachers' "actions were mandated by their religious creeds" "presents a significant risk that the First Amendment will be infringed"); *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not

have religious meaning touches the very core of the constitutional guarantee against religious establishment …").

This Court's views — and the risk that delving too deeply into religious practices could violate the First Amendment — were not lost on Maine's legislature. The Maine AG Opinion recognizes that ensuring "religious instruction" does not "'seep' into the secular educational curriculum" requires "constant … excessive surveillance which entangles the state in the affairs of church-related schools such that the First Amendment is violated." Me. Op. Att'y Gen. No. 80-2, 1980 WL 119258, at *11 (Jan. 7, 1980). In other words, in the view of the Maine Attorney General, determining whether an institution puts religious belief into practice forces the state to entangle itself in the affairs of religious institutions in a manner that violates the First Amendment. Rather than heed its Attorney General's advice, however, Maine veered in the opposite direction, implementing its Secular Exclusion in a way that requires the Department to "pick and choose among eligible religious institutions" based on subjective "judgments regarding contested questions of religious belief or practice." *Weaver*, 534 F.3d at 1261.

The First Circuit's rejoinder to this concern — that there exist "objective factors" that facilitate the Department's task, *Carson*, 979 F.3d at 48 — is beside the point. Even if it were possible for the Department to investigate matters such as whether an institution "promotes the faith or belief system with which it is associated" using objective criteria, "the very process of inquiry" violates the First Amendment. *Catholic Bishop of Chicago*, 440 U.S. at 502. That, no doubt, is why Maine's Attorney General warned against

engaging in the type of analysis that Maine now contends is required.

The nature of this analysis is even more pernicious than may at first be evident. Assessing whether an institution "promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith" is no different than asking whether that institution is so "pervasively sectarian," *Carson*, 979 F.3d at 45, that it may be denied public funds. The Maine AG Opinion makes this plain. Specifically, in concluding that it would be unconstitutional for the state to use public funds to send students to "sectarian" institutions, the Opinion defines "sectarian" institutions as those that "are characterized by a *pervasively religious* atmosphere and whose dominant purpose is the promotion of religious beliefs." Me. Op. Att'y Gen. No. 80-2, 1980 WL 119258, at *14 (Jan. 7, 1980) (emphasis added). Determining whether an institution is (in the Maine Attorney General's words) "pervasively sectarian" requires individualized inquiry. *Id.* That, of course, is the task taken on by the Department — as the First Circuit tacitly recognized. *See Carson*, 979 F.3d at 45 (observing that the First Amendment does not require Maine to "treat *pervasively sectarian* education as a substitute" for "a free public education" (emphasis added)).

This Court and numerous others have denounced the "pervasively sectarian" doctrine. For good reason: the doctrine "has a shameful pedigree" rooted in "pervasive hostility to the Catholic Church and to Catholics in general." *Mitchell*, 530 U.S. at 828. In practice, it invites discrimination among religious institutions by allowing those that are only nominally "sectarian" — as subjectively determined

by a government agent — to receive public funds while their "pervasively sectarian" counterparts are excluded. *See Weaver*, 534 F.3d at 1258 ("By giving scholarship money to students who attend sectarian — but not 'pervasively' sectarian — universities, Colorado necessarily and explicitly discriminates among religious institutions …").

The illusory "use/status distinction" that the First Circuit endorsed — and, in particular, the necessity of assessing whether a "use" is sufficiently religious to withhold public funding — is merely the latest thinly veiled attempt to continue an odious history of unlawfully discriminating against institutions that states deem *too* religious, and, all too frequently, *too* Catholic — or in the future, *too* Muslim or *too* Buddhist or *too* Hindu. *See* Me. Legis. Rec. – House, May 13, 2003, at H-858 (statement of Rep. David). Or perhaps even *too* Jewish. It requires little imagination to see that, left undisturbed, the First Circuit's decision and the law it upholds will provide cover for states impermissibly to "intrude . . . in matters of faith," *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring), and to engage in the type of invasive inquiry into religious belief and conduct that this Court has called "profoundly troubling," *Mitchell*, 530 U.S. at 828. Maine's Sectarian Exclusion must not stand.

## CONCLUSION

For the foregoing reasons, and those presented by Petitioners, this Court should rule in favor of Petitioners in all respects and grant the relief they seek.

Respectfully submitted,

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