

No. 20-1088

IN THE
Supreme Court of the United States

DAVID CARSON, as Parent
and Next Friend of O.C., et al.,
Petitioners,
v.

A. PENDER MAKIN,
in her Official Capacity as Commissioner
of the Maine Department of Education,
Respondent.

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

**BRIEF OF AMERICAN ATHEISTS
AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT**

ALISON M. GILL
AMERICAN ATHEISTS, INC.
1100 15th St. NW
4th Floor
Washington, D.C. 20005
agill@atheists.org

GEOFFREY T. BLACKWELL
Counsel of Record
AMERICAN ATHEISTS, INC.
1201 S. Courthouse Rd., #425
Arlington, VA 22204
(908) 276-7300, ext. 310
legal@atheists.org

Counsel for Amicus Curiae

October 29, 2021

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT.....	3
I. WORD GAMES.....	4
II. MAINE’S TUITION ASSISTANCE PRO- GRAM IS NEUTRAL TOWARD RELI- GION	7
III. MAINE’S TUITION ASSISTANCE PRO- GRAM IS NOT HOSTILE TOWARD RELIGION	9
IV. PETITIONERS’ ARGUMENTS ENDORSE A LONGSTANDING HOSTILITY TO- WARD ATHEISTIC BELIEF SYSTEMS	12
A. The “secularist” strawman.....	13
B. The demonization of secular human- ists.....	15
V. PETITIONERS’ CONCEPTION OF FREE EXERCISE HARMS ATHEIST FAMILIES AND STUDENTS.....	19
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Bd. of Educ. v. Grumet</i> , 512 U.S. 687 (1994).....	6
<i>Bowen v. Roy</i> , 476 U.S. 693 (1986).....	8, 11, 18
<i>Braunfeld v. Brown</i> , 366 U.S. 599 (1961).....	11, 18
<i>Church of Lukumi Babalu Aye v.</i> <i>City of Hialeah</i> , 508 U.S. 520 (1993).....	9
<i>Citizens for Parental Rights v. San Mateo</i> <i>County Bd. of Education</i> , 124 Cal. Rptr. 68 (Cal. Dist. Ct. App. 1975).....	14
<i>Cornwell v. State Board of Education</i> , 314 F. Supp. 340 (D. Md. 2969).....	14
<i>Crowley v. Smithsonian Institution</i> , 636 F.2d 738, 740 (D.C. Cir. 1980).....	14, 18
<i>Epperson v. Ark.</i> , 393 U.S. 97 (1968).....	11
<i>Espinoza v. Mont. Dep't of Revenue</i> , 140 S. Ct. 2246, 2270 (2020).....	7
<i>Everson v. Bd. of Educ.</i> , 330 U.S. 1 (1947).....	11
<i>Fink v. Board of Education</i> , 442 A.2d 837 (Pa. Commw. Ct. 1982)	14, 18
<i>Greater Houston Chapter of ACLU v.</i> <i>Eckels</i> , 589 F. Supp. 222 (S.D. Tex. May 22, 1984)	14, 15

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Grove v. Mead School District</i> , 753 F.2d 1528 (9th Cir. 1985)	5, 7, 15
<i>Jaffree v. Bd. of Sch. Comm'rs</i> , 554 F. Supp. 1104 (S.D. Ala. 1983), aff'd in part and rev's in part, 705 F.2d 1526 (11th Cir. 1983).....	18-19
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992).....	6
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961).....	11, 18
<i>Our Lady of Guadalupe Sch. v. Morrissey- Berru</i> , ___ U.S. ___, 140 S. Ct. 2049 (2020).....	7
<i>Panarella v. Birenbaum</i> , 296 N.E.2d 238 (N.Y. 1973).....	14
<i>Penkoski v. Bowser</i> , No. 20-cv-1519 (TNM), 2021 U.S. Dist. LEXIS 128819 (D.D.C. July 12, 2021)	17
<i>Sch. Dist. of Abington Twp. v. Schempp</i> , 374 U.S. 203 (1963).....	13
<i>Smith v. Ricci</i> , 446 A.2d 501 (N.J. 1982)	14
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985).....	6
<i>Welsh v. United States</i> , 398 U.S. 333 (1970).....	2, 6
<i>Wright v. Houston Independent School Dist.</i> , 366 F. Supp. 1208 (S.D. Tex. 1972)	14

TABLE OF AUTHORITIES—Continued

CONSTITUTION	Page(s)
U.S. Const. amend. I	<i>passim</i>
Me. Const. Art. VIII, § 1.....	3
STATUTES	
Me. Rev. Stat. tit. 20-A, § 2951 (2021)	7
STATE LEGISLATIVE MATERIALS	
H.B. 2318, 88th Leg., Reg. Sess. § 1(b) (Kan. 2019).....	15
H.B. 2318, 88th Leg., Reg. Sess. §§ 2:18-38 (Kan. 2019)	16
H.B. 2320, 88th Leg., Reg. Sess. (Kan. 2019)	15
§ 2(g)	16, 17
§ 5(a).....	16
H.B. 65, 2019-20 Leg., Reg. Sess. §§ 1:31-34 (N.C. 2019).....	16
H.B. 65, 2019-20 Leg., Reg. Sess. §§ 2:12-16 (N.C. 2019).....	17
H.B. 1476, 67th Leg. Assemb., § 4 (N.D. 2021).....	16, 17
H.B. 596-FN, 2021 Leg. Sess., § XXIII (N.H. 2021).....	16
Assemb. B. 8077, 242d Leg., Reg. Sess. (N.Y. 2019).....	15-16
§ 2:32-54	16

TABLE OF AUTHORITIES—Continued

	Page(s)
Assemb. Res. 293, 242d Leg., Reg. Sess. (N.Y. 2019)	16
S.B. 778, 57th Leg., 1st Reg. Sess. § 2(12) (Okla. 2019)	16
S.B. 778, 57th Leg., 1st Reg. Sess. §§ 2(15)-(20) (Okla. 2019)	16
S.B. 778, 57th Leg., 1st Reg. Sess. § 5(C)(2)-(7) (Okla. 2019)	16
H.B. 7879, 2019-20 Leg., Reg. Sess. §§ 2:23-26 (R.I. 2019)	16
H.B. 7879, 2019-20 Leg., Reg. Sess. §§ 3:16-19 (R.I. 2019)	16
H.B. 7879, 2019-20 Leg., Reg. Sess. §§ 4:6-7 (R.I. 2019)	16
H.B. 1215, 95th Gen. Assemb., 2020 Reg. Sess. § 2(3) (S.D. 2020)	16
H.B. 3508, 124th Gen. Assemb., § 2 (S.D. 2020)	16, 17
H.B. 1490, 111th Gen. Assemb., Reg. Sess. §§ 3(11)-(12) (Tenn. 2019)	16
H.B. 1490, 111th Gen. Assemb., Reg. Sess. §§ 3(15)-(20) (Tenn. 2019)	16
H.B. 1490, 111th Gen. Assemb., Reg. Sess. §§ 6(3)-(7) (Tenn. 2019)	16
S.B. 1208, 112th Gen. Assemb. Reg. Sess. (Tenn. 2021)	16, 17
H.B. 2935, 66th Leg., 2020 Reg. Sess. (Wash. 2020)	16

TABLE OF AUTHORITIES—Continued

	Page(s)
§ 1(29).....	16
§ (6)(3)(e)(ii) (Wash. 2020)	17
H.C.R. 95, 84th Leg., 1st Reg. Sess. (W. Va. 2020)	16,16-17, 17

OTHER AUTHORITIES

Attorney General William P. Barr Delivers Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame, U.S. Dept. of Justice (Oct. 11, 2019), https://www. justice. gov/opa/speech/attorney-general- william-p-barr-delivers-remarks-law- school-and-de-nicola-center-ethics	19
Brian Montopoli, <i>Texas Gov. Rick Perry proclaims “Days of Prayer for Rain,”</i> CBS News (Apr. 22, 2011, 12:11 PM), https://www.cbsnews.com/news/texas- gov-rick-perry-proclaims-days-of-prayer- for-rain/	11-12
Carter Williams, <i>Cox calls for prayers for rain as more Utah communities issue emergency declarations, restrictions,</i> KSL.com (June 4, 2021, 9:23 AM), https://www.ksl.com/article/50179221/cox- calls-for-prayers-for-rain-as-more-utah- communities-issue-emergency-declarat ions-restrictions	12

TABLE OF AUTHORITIES—Continued

	Page(s)
Diane M. Quinn, <i>Issue Introduction: Identity Concealment: Multilevel Predictors, Moderators, and Consequences</i> , 73 <i>Journal of Social Issues</i> 230 (2017).....	22
Diane M. Quinn & S. R. Chaudoir, <i>Living with a Concealable Stigmatized Identity: The Impact of Anticipated Stigma, Centrality, Salience, and Cultural Stigma on Psychological Distress and Health</i> , 97 <i>Journal of Personality and Social Psychology</i> 634 (2009).....	21-22
Diane M. Quinn, Valerie A. Earnshaw, <i>Concealable Stigmatized Identities and Psychological Well-Being</i> , 7 <i>Social and Personality Psychology Compass</i> 40 (2013).....	22
<i>Humanism and Its Aspirations: Humanist Manifesto III, a Successor to the Humanist Manifesto of 1933</i> , American Humanist Association (2003), https://americanhumanist.org/what-is-humanism/manifesto3/	6
James Madison, <i>Memorial and Remonstrance against Religious Assessments</i> , National Archives (accessed Oct. 20, 2021), https://founders.archives.gov/documents/Madison/01-08-02-0163	10
John C. Danforth, <i>Faith and Politics</i> (2006).....	4
Noah Webster, <i>An American Dictionary of the English Language</i> (1830).....	7

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Religion</i> , Merriam-Webster (Oct. 10, 2021), https://www.merriam-webster.com/dictionary/religion	6
<i>Religion</i> , Oxford English Dictionary (Sept. 2021), https://www.oed.com/viewdictionaryentry/Entry/161944	6
Samuel Smith, <i>Robert P. George Warns: Militant Secularists ‘Want Your Kids,’</i> Christian Post (Oct. 25, 2017), https://www.christianpost.com/news/robert-p-george-warns-militant-secularists-want-your-kids.html	12
<i>Sect</i> , Merriam-Webster (Oct. 15, 2021), https://www.merriam-webster.com/dictionary/sect	7
<i>Sectarian</i> , Merriam-Webster (Oct. 16, 2021), https://www.merriam-webster.com/dictionary/sectarian	7
Somjen Frazer, Abby El-Zhifei, & Alison M. Gill, <i>Reality Check: Being Nonreligious in America</i> (2020)	3
Somjen Frazer, Abby El-Shafei, & Alison M. Gill, <i>The Tipping Point Generation: America’s Non-religious Youth</i> (2020)..	3, 21, 22
Steven Pfaff, Charles Crabtree, Holger L. Kern & John B. Holbein, <i>Do Street-Level Bureaucrats Discriminate Based on Religion? A Large-Scale Correspondence Experiment among American Public School Principals</i> , American Society for Public Administration, Aug. 30, 2020.....	21

TABLE OF AUTHORITIES—Continued

	Page(s)
Thomas Jefferson, <i>82. A Bill for Establishing Religious Freedom, 18 June 1779</i> , National Archives (accesses Oct. 20, 2021), https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-00	
82	10
U.S. Secular Survey (Nov. 2, 2019)	3, 20

INTEREST OF *AMICUS CURIAE*¹

Amicus, American Atheists, Inc., is a non-profit corporation and has been granted 501(c)(3) status by the IRS. Amicus has no parent company nor has it issued stock.

American Atheists, Inc., is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the “wall of separation” between government and religion created by the First Amendment. American Atheists strives to promote understanding of atheists through education, advocacy, and community-building; works to end the stigma associated with atheism; and fosters an environment where bigotry against our community is rejected.

SUMMARY OF THE ARGUMENT

Petitioners contend that the State of Maine discriminates against them by requiring them choose between paying for a religious education for their children or providing them with a secular education, paid for by tax dollars. (Pet. Br. 5-6). Petitioners’ contention is false on its face.

Petitioners’ deliberate use of vague terminology lends their argument a false veneer of reasonableness. Read in the context of a claim for the violation of the First Amendment’s Free Exercise Clause, the argument collapses. Every American holds to some

¹ The parties have consented to the filing of *amicus curiae* briefs in this matter. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

system of “moral, ethical, or religious beliefs about what is right and wrong . . . with the strength of traditional religious convictions.” *Welsh v. United States*, 398 U.S. 333, 340 (1970). Every Maine resident has a choice between a sectarian education that endorses or inculcates their belief system or a secular education free of bias toward any such system. Petitioners believe they are discriminated against by such a system (though they do not identify anyone whom the state treats differently) because they contend that “secular” schools actually take a religious position—that they are “atheistic.” That is not what “secular” means and the education Maine strives to provide is not “atheistic” but religiously neutral.

Every resident of Maine is presented the same choice, regardless of belief. The state’s tuition assistance program is studiously neutral, applies to every child, and is hostile to no one for their beliefs. Preserving governmental neutrality between systems of belief is not evidence of hostility toward any one of them, or all of them together.

The Petitioners have equated the government’s religious neutrality with an endorsement of atheistic belief systems and a hostility toward theistic belief systems. In doing so, they have adopted the fallacious arguments of a vocal segment of the population that demands the government favor their particular beliefs and construes any failure to do so as hostility. This dualistic thinking is, ironically, rooted in a long-standing hostility to those who do not share their beliefs. The Court should avoid adopting such arguments, lest it inadvertently endorse the same hostility toward atheistic beliefs that other government entities have recently exhibited.

If the Court were to adopt the Petitioners' argument and require Maine to undermine its neutral system of education, it would inflict a serious and quantifiable harm on the families of Maine that hold atheistic or theistic-minority beliefs. Religious bias in the education system is correlated to a startling level of discrimination, harassment, and stigmatization of atheist young people. That treatment leads many to conceal their beliefs, leading in turn to increased depression, difficulty bonding with peers, social isolation, and decreased psychological well-being.

This Court should recognize the Petitioners' fallacious arguments for what they are—sophistry and word games intended to make a neutral position seem polarized—and avoid needlessly inflicting harm on those who do not share the majority's religious beliefs.

ARGUMENT

“My 8-year-old child was told by an educator that if you don't get baptized you will go to hell.” U.S. Secular Survey (Nov. 2, 2019) (on file with author). That was how one Mainer described their experience with education discrimination as a nonreligious American. This parent was far from alone. Young adults living in very religious communities (and nearly half (49.6%) of nonreligious residents living in rural areas across the United States described their communities as “very religious”, Somjen Frazer, Abby El-Shafei, & Alison M. Gill, *Reality Check: Being Nonreligious in America*, 8 (2020)) are “more than three times as likely to experience discrimination [in the education system] than their counterparts” living in less religious communities. Somjen Frazer, Abby El-Shafei, & Alison M. Gill, *The Tipping Point Generation: America's Nonreligious Youth*, 15 (2020).

There is no factual basis for Petitioners' claim that "Maine's sectarian exclusion discriminates against families who are eligible for the tuition assistance program and believe that a religious education is the best option for their child." (Pet. Br. 5-6). Maine's decision (indeed its constitutional obligation, Me. Const. Art. VIII, § 1) to provide its children with the opportunity to receive an education using a curriculum *that takes no position on religious matters* is not hostile toward families that would prefer religious education. It does not discriminate against them nor does it establish some incoherent "religion of secularism." (Pet. Br. at 45-46). Rather, it is the only option constitutionally available to the state.

Moreover, the arguments advanced by the Petitioners align them with a movement that has shown itself to be openly hostile toward anything that does not conform to their own religious beliefs. This hostility has increasingly taken the form of efforts to define the belief systems of others, notably secular humanists, as synonymous with any number of ridiculous practices and then ascribe to that community all manner of ills that these religious extremists and their allies perceive to be afflicting society.

I. WORD GAMES

"The old adage that polite conversation should not include talk of politics or religion is understandable because both subjects are so heavily laden with emotion that discussion can quickly turn to shouting." John C. Danforth, *Faith and Politics* 215 (2006). Our societal inability to engage in polite, thoughtful conversation about religious matters has resulted in vague, often conflicting language that can easily lead to confusion, division, and acrimony as a result of miscommunication.

Ninth Circuit Judge William Canby recognized the problem posed by this lack of clarity in 1985. In his concurring opinion in *Grove v. Mead School District*, Judge Canby noted the plaintiffs' "fail[ure] to distinguish the process of *secularization* from the promotion of *secularism*." 753 F.2d 1528, 1538 n.12 (9th Cir. 1985) (Canby, J., concurring) (emphasis added). "Secular" has many meanings and so it is important to be explicit about one's intended meaning, especially in the legal context. Failing to do so can easily lead one into the trap the plaintiffs in *Grove* stumbled into:

Plaintiffs frequently seem to regard "secular" and "humanist" as synonyms for "anti-religious." The common meaning of those terms does not support the assumption. "Humanism," for example, is not necessarily incompatible with religion generally or with theistic commitments, including Christianity, in particular. We assume, however, that the thrust of plaintiffs' attack is against nontheistic humanism, which they might label "secular humanism."

The analytical difficulty with plaintiffs' approach is that it tends to divide the universe of value-laden thought into only two categories -- the religious and the anti-religious. By adopting this dualistic social outlook, and by denominating the anti-religious half of their universe as "secular," plaintiffs erect an insurmountable barrier to meaningful application of the [religion clauses] to controversies like this one.

Id. at 1535-36. In order to avoid confusion of the type Judge Canby noted in *Grove*, amicus has endeavored to be careful and intentional in its definitions for the arguments herein.

This Court has long recognized the inadequacy of the colloquial definition of religion² for First Amendment purposes and adopted a more inclusive definition: A sincerely held system of “moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.” *Welsh v. United States*, 398 U.S. 333, 340 (1970). This definition, though flawed in its circularity, meets a need demanded by our pluralistic, free, and fair society: it encompasses the beliefs of all individuals, whether they hold to theistic or atheistic belief systems. See *Bd. of Educ. v. Grumet*, 512 U.S. 687, 715-16 (1994) (O’Connor, J., concurring); *Lee v. Weisman*, 505 U.S. 577, 628-29 (1992) (Souter, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 52-54 (1985). It is in this sense that amicus use “religion” herein. Further, except in the specific case of “secular humanism,”³ amicus uses “secular” herein to refer to that which takes no position on, or has no relation to, religious belief systems. Conversely, “sectarian” as

² “5. a. Belief in or acknowledgement of some superhuman power or powers (esp. a god or gods) which is typically manifested in obedience, reverence, and worship; such a belief as part of a system defining a code of living, esp. as a means of achieving spiritual or material improvement.” *Religion*, Oxford English Dictionary (Sept. 2021), <https://www.oed.com/viewdictionaryentry/Entry/161944>. “2: a personal set or institutionalized system of religious attitudes, beliefs, and practices,” *Religion*, Merriam-Webster (Oct. 10, 2021), <https://www.merriam-webster.com/dictionary/religion>.

³ “Secular humanism” is an atheistic belief system that “affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity” without reliance on the supernatural. *Humanism and Its Aspirations: Humanist Manifesto III, a Successor to the Humanist Manifesto of 1933*, American Humanist Association (2003), <https://americanhumanist.org/what-is-humanism/manifesto3/>.

used herein refers to that which is comprised of, endorses, or promotes a religious belief system.⁴

The Petitioners and their supporting amici have muddled their arguments through their choices of words. Like the misinformed plaintiffs in *Grove*, they use “secular” to mean both neutrality between belief systems—a necessary trait for a state-run education system—and an imaginary “religion of secularism,” a *tabula rasa* created by those who, while advocating for government support of theistic belief systems, seek to obfuscate their own hostility toward those who hold atheistic beliefs. (Pet. Br. at 45-46.) See Part IV, below.

II. MAINE’S TUITION ASSISTANCE PROGRAM IS NEUTRAL TOWARD RELIGION

“Getting an education” is not a religious exercise. “Getting a religious education,” on the other hand, is a religious exercise. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, ___ U.S. ___, 140 S. Ct. 2049, 2064-66 (2020). In First Amendment terms, a religious

⁴ This definition is in accord with both the current, prevailing definition of “sect” and the adjective form of “sectarian,” see *Sect*, Merriam-Webster, 1(b) (Oct. 15, 2021), <https://www.merriam-webster.com/dictionary/sect>; *Sectarian*, Merriam-Webster, 1 (Oct. 16, 2021), <https://www.merriam-webster.com/dictionary/sectarian>, as well as historic definitions dating back to at least 1830, when Webster defined a “sect” as “[a] body or number of persons united in tenets, chiefly in philosophy or religion, but constituting a distinct party by holding sentiments different from those of other men” and the adjective “sectarian” as “[p]ertaining to a sect.” Noah Webster, *An American Dictionary of the English Language* 735 (1830). In prior cases, some have chosen to focus on alternate definitions that carry negative connotations, *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2270, 2273 (2020) (Alito, J., concurring), but those are not the prevailing definitions today, nor were they in 1981 when the nonsectarian requirement was added to Maine’s statute. Me. Rev. Stat. tit. 20-A, § 2951 (2021).

education includes both a theistic education like what the Petitioners seek to give their children as well as an atheistic education (i.e., an education that affirmatively teaches students that there are no gods and espouses the principles of secular humanism, nontheistic Buddhism, or any other atheistic belief system) that many other Maine residents may wish to provide to their children. Maine's tuition assistance program places no burden on anyone seeking a religious education, nor does it place any burden on an organization seeking to provide such an education. Contrary to what the Petitioners would have this Court believe, Maine's tuition assistance program does not "discriminate against religion on its face" (Pet. Br. at 18 (cleaned up)) but rather is part of a system designed to ensure that all of Maine's school-age children are treated equally by providing access to an education that takes no position—theistic or atheistic—on religious matters.

The hallmark of religious neutrality is religious equality in the eyes of the government. *Bowen v. Roy*, 476 U.S. 693, 703 (1986). The state may not treat its residents differently based on their religion or on how closely they adhere to their religion. The Petitioners' arguments that Maine's school funding statute is not neutral fail at the start. Maine's education system is studiously neutral, providing equal opportunities to all: a taxpayer funded education (through either public schools or contracts with private schools providing a secular education) that endorses no religious view or a privately funded education that might or might not endorse a religion. All of Maine's parents have the same choice and are free to act according to their preference. The Petitioners are no more or less capable of providing their children with a Christian education than Buddhists are capable of providing their children

with a Buddhist education, or atheist parents an education that includes critiques of theistic belief systems.

III. MAINE'S TUITION ASSISTANCE PROGRAM IS NOT HOSTILE TOWARD RELIGION

Perhaps recognizing the neutrality of Maine's law, the Petitioners invoke the concept of a "religious gerrymander." (Pet. Br. at 44). They mistakenly construe Maine's exclusion of sectarian education programs as a breakdown in the neutrality required by the First Amendment. (Pet. Br. at 44.) Nothing could be further from the truth.

Hostility arises when the government imposes special burdens on particular belief systems, or privileges one system of beliefs over all others. This Court first applied the "religious gerrymander" concept to a free exercise claim of religious hostility in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993). The City of Hialeah enacted a series of ordinances designed to target and prohibit the practice of Santería, and *only* Santería, without explicitly identifying Santería. *Id.* at 536. The government took care to ensure that practitioners of other religions were not impacted by the new restrictions. *Id.* The city's actions drew careful lines (each facially neutral) between a number of religious and secular practices, which it permitted, and the practices of a specific religious sect, which it prohibited. *Id.* at 533-35. In so doing, the city erected a regime that subjected its residents to drastically different requirements based on the religious beliefs they sought to practice. *Id.* at 535. In drawing such lines, the city engaged in a religious gerrymander. *Id.*

Preserving governmental neutrality between systems of belief is not evidence of hostility toward any one of

them, or all of them together. It would have surprised Thomas Jefferson to learn he was being hostile to or discriminating against religion when he, in drafting the Virginia Statute for Religious Freedom, endeavored to prohibit the government from levying taxes from anyone for the support of religion generally, going so far as to argue “that even the forcing [a person] to support this or that teacher of *his own religious persuasion*, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness.” Thomas Jefferson, *82. A Bill for Establishing Religious Freedom, 18 June 1779*, National Archives (accesses Oct. 20, 2021), <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082> (emphasis added). James Madison was not hostile toward religion when he counseled neutrality and opposed a tax assessment that would have collected funds for distribution to Christian churches and teachers in Virginia, warning that such a bill would “destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects.” James Madison, *Memorial and Remonstrance against Religious Assessments*, National Archives (accessed Oct. 20, 2021), <https://founders.archives.gov/documents/Madison/01-08-02-0163>. Nor were Jefferson, Madison, and the other Founders hostile to religion when they ratified the First Amendment, declaring that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” U.S. Const., Amend 1. This Court was not engaging in religious discrimination or exhibiting hostility when it determined that the language of the First Amendment mandated government neutrality between theistic

and atheistic belief systems, *Epperson v. Ark.*, 393 U.S. 97, 103-04 (1968), or prohibited any tax from being imposed “to teach or practice religion.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947). Nor was this Court hostile to theistic or atheistic beliefs when it concluded that a state action is not invalid under the Free Exercise Clause merely because it happens to indirectly align or conflict with a particular tenet of a religion. See *McGowan v. Maryland*, 366 U.S. 420, 445 (1961); *Braunfeld v. Brown*, 366 U.S. 599, 606-07 (1961); *Bowen v. Roy*, 476 U.S. 693, 712 (1986).

Petitioners and supporting amici contend that Maine engages in a hostile religious gerrymander when it provides all its residents with the opportunity to receive a publicly funded education that is religiously neutral. (Pet. Br. at 44.) This is absurd. Maine’s communities provide their residents with numerous secular services. Doing so does not obligate it to provide subsidies for religious analogs to those who would prefer them.

Fire departments, like public schools, benefit everyone in the community, even those who never utilize their services. If budgetary requirements meant it made more sense to contract with a private entity for fire control or provide funds for residents to directly contract with independent service providers, none would doubt that the state may limit the use of those funds to services equivalent to those the state could itself provide. Doing so would not result in the state impermissibly discriminating against those who would rather hire someone to regularly pray for rain.⁵ That

⁵ Government officials around the country have recently incorporated prayers for rain into fire suppression and prevention efforts. Brian Montopoli, *Texas Gov. Rick Perry proclaims “Days of Prayer for Rain,”* CBS News (Apr. 22, 2011, 12:11 PM),

is not a “religious gerrymander.” Rather, that is simply not the service the government is providing.

IV. PETITIONERS’ ARGUMENTS ENDORSE A LONGSTANDING HOSTILITY TOWARD ATHEISTIC BELIEF SYSTEMS

Paradoxically, by misconstruing a neutral government program as a form of atheistic belief system hostile toward their beliefs, the Petitioners ask this Court to engage in a different form of hostility. There is a deep and abiding irony in the recent push by theistic religious extremists and their allies to invalidate any government action that doesn’t preserve their religion’s privileged place in our society to the detriment of those who hold other beliefs. These efforts to cast a religiously neutral government—a singular achievement of the Founders—as an agent of “secular progressives” or secular humanists, a nefarious specter that some believe is literally after their children, Samuel Smith, *Robert P. George Warns: Militant Secularists ‘Want Your Kids,’* Christian Post (Oct. 25, 2017), <https://www.christianpost.com/news/robert-p-george-warns-militant-secularists-want-your-kids.html>, parallels efforts to define everything that is not fawning praise for their point of view as religious hostility. Their own hostility toward their neighbors who hold atheistic beliefs has painted them into a corner: the government may not act out of religious animosity, yet so much of what those in the movement

<https://www.cbsnews.com/news/texas-gov-rick-perry-proclaims-days-of-prayer-for-rain/>; Carter Williams, *Cox calls for prayers for rain as more Utah communities issue emergency declarations, restrictions*, KSL.com (June 4, 2021, 9:23 AM), <https://www.ksl.com/article/50179221/cox-calls-for-prayers-for-rain-as-more-utah-communities-issue-emergency-declarations-restrictions>.

demand of the government is motivated by their animus toward others for their different beliefs.

A. The “secularist” strawman

Petitioners and several amici decry Maine’s decision not to provide affirmative support for their religious exercise as the establishment of a “religion of secularism.” (Pet. Br. at 42, 46; Brief for Georgia Goal Scholarship Program, Inc. as Amicus Curiae in Support of Petitioners at 18-19). Arguments like this are nothing new. A substantial number of Americans have imagined that the “secularists” were coming for their children at least as early as 1963, when this Court was presented with the argument that invalidating state laws mandating Christian religious exercise in public schools would create a “religion of secularism.” *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963). This Court easily disposed of the argument, stating:

[W]e cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority’s right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.

Id. at 225-26.

Nevertheless, those who objected to any government action that did not align with their own religious views continued to warn of the “secularist” boogeyman. In 1969, it came in the form of basic sex education.

Cornwell v. State Board of Education, 314 F. Supp. 340, 342 (D. Md. 1969) (“plaintiffs assert that . . . the teaching of sex in the Baltimore County Schools will in fact establish religious concepts”); see also *Citizens for Parental Rights v. San Mateo County Bd. of Education*, 124 Cal. Rptr. 68, 86-88 (Cal. Dist. Ct. App. 1975); *Smith v. Ricci*, 446 A.2d 501, 506-07 (N.J. 1982). In 1972, it took the form of teaching the theory of evolution by natural selection in science class. *Wright v. Houston Independent School Dist.*, 366 F. Supp. 1208, 1209 (S.D. Tex. 1972); see also *Crowley v. Smithsonian Institution*, 636 F.2d 738, 740 (D.C. Cir. 1980). In 1973, litigants alleged that a college student newspaper’s decision to publish articles critical of a religious viewpoint was establishing a “secular religion.” *Panarella v. Birenbaum*, 296 N.E.2d 238, 242 (N.Y. 1973). And, in 1983, a teacher fired for engaging in out-loud prayers and bible readings in the classroom, when state law provided only for “a brief period of silent prayer or meditation,” contended that his termination showed impermissible hostility for religion. *Fink v. Board of Education*, 442 A.2d 837, 843 (Pa. Commw. Ct. 1982).

An episode that took place in Harris County, Texas, between 1980 and 1982 is particularly illustrative of the dualistic thinking adopted by many who are offended whenever the government does not affirmatively support their particular religious perspective. A Harris County Commissioner, Robert Eckels, decided to devote a portion of Bear Creek Park, which lay partly within his county precinct, purely to passive “personal reflection and meditation.” *Greater Houston Chapter of ACLU v. Eckels*, 589 F. Supp. 222, 224 (S.D. Tex. May 22, 1984). Three Christian crosses were erected in that section of the park at the Commissioner’s direction and, at least initially, at

county expense. *Id.* Those were soon joined by a Star of David. *Id.* When challenged, Commissioner Eckels contended that removing the religious symbols he had so recently installed in the park would result in the establishment of humanism and exhibit hostility toward religion. *Id.* at 239. His attitude that a parcel of empty parkland that did not affirmatively endorse his own view necessarily endorsed some other view was undermined by several witnesses—two ministers and a rabbi—who each testified what should be obvious: “an affirmative belief such as [h]umanism is not established by saying nothing about it.” *Id.*

As Judge Canby pointed out in 1985, this inclination to confuse the process of secularization (i.e., removing religious biases from government) with an endorsement of some “religion of secularism” “erect[s] an insurmountable barrier to meaningful application of the [religion clauses].” *Grove*, 753 F.2d at 1536.

B. The demonization of secular humanists

Petitioner’s arguments are inextricably bound up in a persistent effort to label any government act that does not advance or favor Christian beliefs as establishing a “religion of secularism,” which is itself hostile toward those who hold secular humanist beliefs. Too many are more than willing to place all of society’s ills, real or imagined, at the feet of secular humanists.

Lawmakers around the country have, in recent legislative sessions, introduced dozens of bills that are expressly hostile to secular humanism. Many of these bills, in a perverse, disingenuous, and ham-fisted attempt to avoid an Establishment Clause violation, purport to *define the tenets* of secular humanism. H.B. 2318, 88th Leg., Reg. Sess. § 1(b), (Kan. 2019); H.B. 2320, 88th Leg., Reg. Sess. (Kan. 2019); Assemb. B.

8077, 242d Leg., Reg. Sess. (N.Y. 2019); Assemb. Res. 293, 242d Leg., Reg. Sess. (N.Y. 2019); H.B. 65, 2019-20 Leg., Reg. Sess. §§ 1:31-34 (N.C. 2019); H.B. 1476, 67th Leg. Assemb., § 4 (N.D. 2021); H.B. 596-FN, 2021 Leg. Sess., § XXIII (N.H. 2021); S.B. 778, 57th Leg., 1st Reg. Sess. §§ 2(12), 5(C)(2)-(7) (Okla. 2019); H.B. 7879, 2019-20 Leg., Reg. Sess. §§ 2:23-26, 4:6-7 (R.I. 2019); H.B. 3508, 124th Gen. Assemb., § 2 (S.D. 2020); S.B. 1208, 112th Gen. Assemb. Reg. Sess. (Tenn. 2021); H.B. 1490, 111th Gen. Assemb., Reg. Sess. §§ 3(11)-(12) (Tenn. 2019); H.B. 2935, 66th Leg., 2020 Reg. Sess. (Wash. 2020); H.C.R. 95, 84th Leg., 1st Reg. Sess. (W. Va. 2020); *see also* H.B. 1215, 95th Gen. Assemb., 2020 Reg. Sess. § 2(3) (S.D. 2020). These bills go on to expressly denounce secular humanism as a religion that “tends to erode community standards of decency,” H.B. 2318, 88th Leg., Reg. Sess. §§ 2:18-38 (Kan. 2019); H.B. 2320, 88th Leg., Reg. Sess. §§ 2(g), 5(a) (Kan. 2019); H.B. 1476, 67th Leg. Assemb., § 4 (N.D. 2021); H.B. 596-FN, 2021 Leg. Sess., § XXIII (N.H. 2021); Assemb. B. 8077, 242d Leg., Reg. Sess. § 2:32-54 (N.Y. 2019); Assemb. Res. 293, 242d Leg., Reg. Sess. (N.Y. 2019); S.B. 778, 57th Leg., 1st Reg. Sess. §§ 2(15)-(20) (Okla. 2019); H.B. 7879, 2019-20 Leg., Reg. Sess. §§ 3:16-19 (R.I. 2019); H.B. 3508, 124th Gen. Assemb., § 2 (S.D. 2020); H.B. 1490, 111th Gen. Assemb., Reg. Sess. §§ 3(15)-(20), 6(3)-(7) (Tenn. 2019); H.B. 2935, 66th Leg., 2020 Reg. Sess. (Wash. 2020); H.C.R. 95, 84th Leg., 1st Reg. Sess. (W. Va. 2020), “promote[s] licentiousness,” H.B. 1476, 67th Leg. Assemb., § 4 (N.D. 2021); H.B. 596-FN, 2021 Leg. Sess., § XXIII (N.H. 2021); H.B. 3508, 124th Gen. Assemb., § 2 (S.D. 2020); H.B. 2935, 66th Leg., 2020 Reg. Sess. § 1(29) (Wash. 2020), or “desensitize[s], divides, dehumanize[s], depersonalize[s], and has been shown to increase[] suicide rates[,]” H.C.R. 95, 84th

Leg., 1st Reg. Sess. (W. Va. 2020), and accuse secular humanists of engaging in a campaign to “persecute nonobservers of the religion of secular humanism and to infiltrate public schools with the intent to indoctrinate minors to the [s]ecular [h]umanist worldview[,]” H.B. 65, 2019-20 Leg., Reg. Sess. §§ 2:12-16 (N.C. 2019); H.B. 1476, 67th Leg. Assemb. § 4 (N.D. 2021); *see also* S.B. 1208, 112th Gen. Assemb. Reg. Sess. (Tenn. 2021). Some of these bills disparage secular humanism by expressly equating it with “zoophilia and objectophilia.” H.B. 2320, 88th Leg., Reg. Sess. § 2(g) (Kan. 2019); *see also* H.C.R. 95, 84th Leg., 1st Reg. Sess. (W. Va. 2020). Some lawmakers, in introducing these bills, even make explicit what the others left unsaid, declaring that “secular humanism is a *disfavored* religion,” H.B. 3508, 124th Gen. Assemb., § 2 (S.D. 2020); H.B. 2935, 66th Leg., 2020 Reg. Sess. § (6)(3)(e)(ii) (Wash. 2020) (emphasis added), a characterization that should be anathema to any government entity bound by the First Amendment.

These efforts by religious extremists and their allies to define secular humanism to include whatever they happen to disagree with have not been limited to legislatures. Earlier this year, the D.C. District Court disposed of a case in which a litigant attempted to define secular humanism to include the Black Lives Matter (BLM) movement in order to challenge a street mural in Washington, D.C. as an establishment of religion. *Penkoski v. Bowser*, No. 20-cv-1519 (TNM), 2021 U.S. Dist. LEXIS 128819, *23 (D.D.C. July 12, 2021). Previously, proponents of “scientific creationism” challenged evolution-related exhibits at the Smithsonian Museum of Natural History as an

unconstitutional establishment of secular humanism. *Crowley*, 636 F.2d at 740.⁶

Nor are members of the judiciary immune to this confusion. In *Fink*, the Commonwealth Court of Pennsylvania took up the case of a teacher fired for repeatedly utilizing the state's statutory moment of silence to engage in out-loud prayers and bible readings in his classroom. 442 A.2d at 839. In his opinion for the panel, Judge MacPhail mischaracterized secular humanism, conflating it with a "religion of secularism": "The philosophy of 'secular humanism' or 'religion of secularism' as it is also known, refers to the sense of affirmatively opposing or showing hostility to religion thus preferring those who believe in no religion over those who do believe in religion." 442 A.2d 837, 843 (Pa. Commw. Ct. 1982). The following year, Judge William Hand of the Alabama Southern District Court was decent enough to recognize an actual central tenet of secular humanism—that people should look to the qualities of humanity itself, rather than some higher power, for solutions to the challenges they face—but in the same breath, he misconstrued that tenet as encompassing all activities a school might engage in that do not affirmatively acknowledge a deity. *Jaffree v. Bd. of Sch. Comm'rs*,

⁶ Amicus does not contend that the theory of evolution by natural selection is a stranger to secular humanism. On the contrary, secular humanism embraces that theory, just as it does the germ theory of disease or the theory of gravity: as triumphs of the application of human reason to matters once shrouded in mystery. As stated above, however, the mere fact that a policy or action incidentally aligns with a particular tenet of a belief system does not render it unconstitutional. See *McGowan v. Maryland*, 366 U.S. 420, 445 (1961); *Braunfeld v. Brown*, 366 U.S. 599, 606-07 (1961); *Bowen v. Roy*, 476 U.S. 693, 712 (1986).

554 F. Supp. 1104, 1129 n.41 (S.D. Ala. 1983), *aff'd* in part and *rev'd* in part, 705 F.2d 1526 (11th Cir. 1983).

Former Attorney General William Barr was quite explicit in his animosity toward secular humanists, claiming in a speech at the University of Notre Dame that “militant secularists today do not have a live and let live spirit—they are not content to leave religious people alone to practice their faith.” Attorney General William P. Barr Delivers Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame, U.S. Dept. of Justice (Oct. 11, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics>. He blamed “modern secularists” for “the wreckage of the family,” “soaring suicide rates, increasing numbers of angry and alienated young males, an increase in senseless violence, and a deadly drug epidemic,” among other societal ills. *Id.*

This Court should not propagate this clear error by entertaining Petitioners’ misconception that religiously neutral education is somehow religious or discriminatory simply because it sometimes aligns with the values of secular humanists or others who hold atheistic belief systems (as well as the majority of theistic Americans).

V. PETITIONERS’ CONCEPTION OF FREE EXERCISE HARMS ATHEIST FAMILIES AND STUDENTS

Maine’s residents are not religiously monolithic, even in the most rural of counties. Maine’s current tuition assistance program assures that, where there are a limited number of schools (or only one school) available to a family, the school will at least provide a religiously neutral program. An atheist family may

not want to send their child to a school affiliated with a Christian church—even one that provides a religiously neutral education—but they, like every other family that wants their child to receive an education that conforms to their beliefs, must accept this compromise so that the state can provide what it is obligated to under its constitution.

Were this Court to accept Petitioners' arguments and force the State of Maine to abandon its requirement that government supported private schools provide a secular education it would force taxpayers to provide financial support for the inculcation of theistic or atheistic belief systems that may be diametrically opposed to their own beliefs. That outcome could not but breakdown the neutrality that Jefferson, Madison, the Founders, and generations of American legal minds have endeavored to maintain and strengthen. Such a system will inevitably inure to the benefit of larger, wealthier sects with the resources to establish private schools, to the detriment of families who hold atheistic or less widely accepted theistic beliefs.

As a result, an atheistic or theistic-minority family in rural Maine would likely find that the only schools reasonably available to them provide theistic curricula at odds with their beliefs. Such circumstances give rise to significant levels of religious discrimination to the detriment of the education, health, and well-being of all involved. Atheist young people face a startling level of discrimination, harassment, and stigmatization in education as a result of their atheistic beliefs. Of the 3,421 Americans between the ages of 18 and 24 who participated in the 2019 U.S. Secular Survey, one in three (33.6%) “who attend school or who have children attending school reported having had negative experiences in an educational setting within the past three

years because of their [atheist] identity.” Frazer, et al., *Tipping Point* at 9. These findings are supported by a recent study that found that school officials around the country were significantly less likely to respond to emails received from atheist (and Muslim) parents, in part because they are perceived as “difficult.” Steven Pfaff, Charles Crabtree, Holger L. Kern & John B. Holbein, *Do Street-Level Bureaucrats Discriminate Based on Religion? A Large-Scale Correspondence Experiment among American Public School Principals*, American Society for Public Administration, Aug. 30, 2020, at 9-11. “As a result of these high levels of discrimination and stigma, youth [with atheistic beliefs] had disparate negative outcomes, particularly with regard to concealment of their [atheistic] beliefs and increased levels of loneliness and depression.” Frazer, et al., *Tipping Point* at 12.

Nearly half of participants (47.4%) reported at least sometimes concealing their atheistic beliefs from others at school. Though this constitutes a substantial degree of concealment, it is a significantly lower prevalence than in several other settings, “which may indicate that school communities are an important source of support for [atheist] young people.” *Id.* at 12-13. A breakdown in the religious neutrality of Maine’s public education system would have a substantial impact on the health of young people holding atheistic beliefs. “Significant research demonstrates that concealment can lead people to feel a lack of authenticity, to have difficulty establishing close ties with others, to experience more social isolation, and to have lower feelings of belonging and psychological wellbeing.” *Id.* at 13 (citing Diane M. Quinn & S. R. Chaudoir, *Living with a Concealable Stigmatized Identity: The Impact of Anticipated Stigma, Centrality, Salience, and Cultural Stigma on Psychological Distress and Health*, 97 *Journal*

of Personality and Social Psychology 634 (2009); Diane M. Quinn, Valerie A. Earnshaw, *Concealable Stigmatized Identities and Psychological Well-Being*, 7 Social and Personality Psychology Compass 40 (2013); Diane M. Quinn, *Issue Introduction: Identity Concealment: Multilevel Predictors, Moderators, and Consequences*, 73 Journal of Social Issues 230 (2017)). Among the U.S. Secular Survey's atheistic participants, incidents of religious discrimination in education correlated to a 13.6% higher likelihood that the participant would screen positive for depression. Frazer, et al., *Tipping Point* at 14.

Overturning the decisions below and thereby forcing Maine to divert taxpayer funds from schools providing a secular education to those providing sectarian curricula will undermine the neutrality of Maine's education system and result in quantifiable harms to families and children with atheistic belief systems, as well as those who hold less widely accepted theistic beliefs.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court AFFIRM the decision of the First Circuit Court of Appeals.

Respectfully submitted,

ALISON M. GILL
AMERICAN ATHEISTS, INC.
1100 15th St. NW
4th Floor
Washington, D.C. 20005
agill@atheists.org

GEOFFREY T. BLACKWELL
Counsel of Record
AMERICAN ATHEISTS, INC.
1201 S. Courthouse Rd., #425
Arlington, VA 22204
(908) 276-7300, ext. 310
legal@atheists.org

Counsel for Amicus Curiae

October 29, 2021