No. 24-1739

United States Court of Appeals for the First Circuit

ST. DOMINIC ACADEMY, d/b/a Roman Catholic Bishop of Portland, a corporation sole; ROMAN CATHOLIC BISHOP OF PORTLAND; KEITH RADONIS, on their own behalf and as next friend of children K.Q.R., L.R.R., and L.T.R.; VALORI RADONIS, on their own behalf and as next friend of children K.Q.R., L.R.R., and L.T.R.,
Plaintiffs - Appellants,

v.

A. PENDER MAKIN, in their personal capacity and official capacity as the Commissioner of the Maine Department of Education; JEFFERSON ASHBY, in their personal capacity and official capacity as the Commissioner of the Maine Human Rights Commission; EDWARD DAVID, in their personal capacity and official capacity as the Commissioner of the Maine Human Rights Commission; JULIE ANN O'BRIEN, in their personal capacity and official capacity as the Commissioner of the Maine Human Rights Commission; MARK WALKER, in their personal capacity and official capacity as the Commissioner of the Maine Human Rights Commission; THOMAS L. DOUGLAS, in their personal capacity and official capacity as the Commissioner of the Maine Human Rights Commission,
Defendants - Appellees.

On Appeal from the United States District Court for the District of Maine

BRIEF OF THE SEYMOUR INSTITUTE FOR BLACK CHURCH AND POLICY STUDIES AND THE RELIGIOUS FREEDOM INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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Dated: October 15, 2024

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Seymour Institute For Black Church And Policy Studies, a corporation, and the Religious Freedom Institute, are both non-profits, they have no parent corporations and do not issue any stock.

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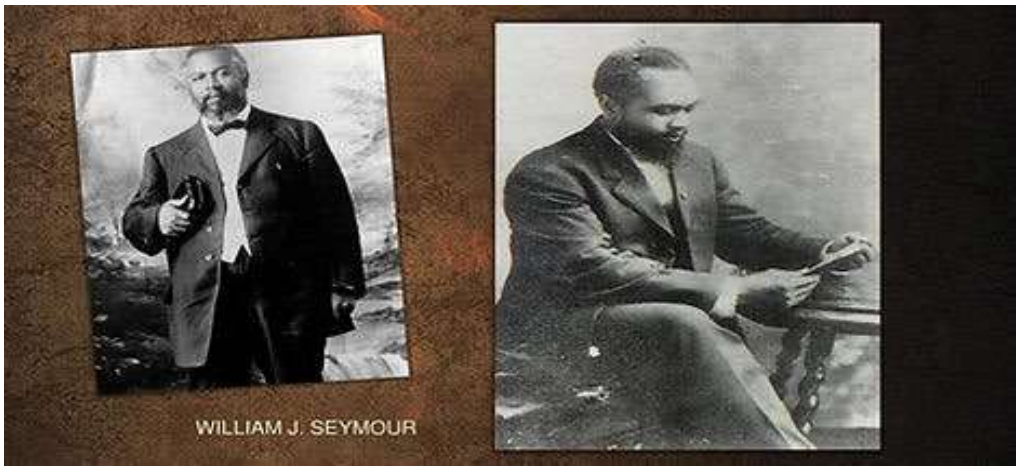
INTEREST OF AMICUS CURIAE[1] – THE SEYMOUR INSTITUTE FOR BLACK CHURCH AND POLICY STUDIES



The Seymour Institute for Black Church and Policy Studies arose from the legacy of William J. Seymour, a black man born a few years after the Civil War to parents who had been enslaved. He burst forth from that experience through education to become a founding figure in the Pentecostal movement, which has had a major impact on the Christian community in America and around the world.

The Seymour Institute is also the offspring of two earlier organizations honoring William Seymour: The William J. Seymour Society at Harvard University in 1980-1987, and the Seymour Institute for Advanced Church Studies (SIACS), an initiative of the Azusa Christian Community from 1990-2005.

At Harvard the Seymour Society was run by black undergraduates who conducted peer-led study groups, sponsored lectures by distinguished scholars of

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

black life and inequality, operated programs to benefit the black poor, and published the *Bulletin of The Seymour Society* at Harvard University. SIACS, which sponsored the 21st Century Group, was a study and networking group for young black professionals interested in using their intellectual gifts in service of the black community. SIACS also published a prescient monograph entitled *God's Gift: a Christian Vision of Marriage and the Black Family* on the biblical meaning of family in light of the black experience.

The Seymour Institute for Black Church and Policy Studies was incorporated in 2014 when it launched a series of seminars for church and lay leaders at Princeton Theological Seminary with presentations on religious liberty by leading scholars such as John J. DiIulio, Jr. (Frederic Fox Leadership Professor of Politics, Religion, and Civil Society at the University of Pennsylvania), David D. Daniels (Professor of Church History at McCormick Theological Institute), Cheryl J. Sanders (Professor of Christian Ethics at Howard School of Divinity), and Robert P. George (McCormick Professor of Jurisprudence at Princeton University). The Institute played a key role in an international symposium on marriage and the family, Humanum, hosted by the Vatican in 2014.

Current projects focus on expanding the seminar series including planning a Conference in Africa to celebrate the 30th anniversary of *Evangelium Vitae*; publishing a monograph on post-secular science and scientism; collaborating on joint projects with a wide variety of partners such as the American Enterprise Institute, the Center for Shared Civilizational Values, the de Nicola Center for

Ethics and Culture, Princeton Theological Seminary, and the Religious Liberty Initiative at Notre Dame School of Law; lecturing domestically and internationally in locations such as Indonesia and Ethiopia, and operating summer academic programs for black and minority middle and high school students.

Uplift for black and minority children through excellence in education in a spiritual and moral context is an important goal of the Seymour Institute. One of the policy pillars of the organization involves working on urgent social issues of particular importance to the black community: including improved availability of quality education. The Institute believes that substantial evidence shows that low-income students and students of color achieve superior educational, spiritual, and moral outcomes in religious schools. Seymour Institute puts that evidence and its case for excellence in education for poor and minority children in a religious context before the Court.

INTEREST OF AMICUS CURIAE – THE RELIGIOUS FREEDOM INSTITUTE

The Religious Freedom Institute (RFI) has roots in the Religious Freedom Research Project at Georgetown University's Berkley Center. In 2016, that project's founders created an independent non-profit organization, bringing to bear their combined years of experience and scholarship on religious liberty in order to advance religious freedom around the world, and to help those persecuted for their religious beliefs.

RFI believes that religious freedom is a fundamental human right because human beings are innately religious. Our nature impels us to seek answers to profound questions about ultimate things. If we are not free to pursue those answers, and to live according to the truths we discover, we cannot live a fully human life.

Accordingly, RFI is committed to achieving broad acceptance of religious liberty as a fundamental human right, a source of individual and social flourishing, the cornerstone of a successful society, and a driver of national and international security. RFI works to make religious freedom a priority for government, civil society, religious communities, businesses, and the general public.

RFI envisions a world that respects religion as an indispensable societal good and which promises religious believers the freedom to live out their beliefs fully and openly. RFI is thus committed to advancing and defending religious freedom under the United States Constitution. Specifically, we have a surpassing interest in ensuring that our judicial system correctly interprets and applies the Religion Clauses of the First Amendment. That includes ensuring that states do not exclude individuals and institutions from public benefits on the basis of their religion.

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 20-A, M.R.S. § 2951(2) (the "1982 Sectarian Exclusion"). The text of the 1982 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." Shortly before oral argument in the Supreme Court case of *Carson v. Makin*, 596 U.S. 767 (2022), where the Court ruled that Maine's 1982 Sectarian Exclusion violated the Free Exercise Clause and the Establishment Clause of the First Amendment, the Maine Legislature enacted a new provision as part of the Maine Human Rights Act, 5 M.R.S. § 4602(5)(D), using different wording but still -- by definition -- excluding pervasively sectarian schools from the Maine tuition program (the "New Sectarian Exclusion").

In August 2024, the U.S. District Court for the District of Maine denied a preliminary injunction against enforcement of Maine's New Sectarian Exclusion in part holding that the plaintiffs there, now the Appellants here, were unlikely to succeed on the merits of their constitutional challenges to the New Sectarian Exclusion. The Appellants now raise their constitutional challenges to the New Sectarian Exclusion in this Court. The Amici, Seymour Institute for Black Church and Policy Studies and the Religious Freedom Institute now join the Appellants and submit their own brief as part of this long rear-guard struggle of pervasively religious institutions and families to maintain their pervasively

religious character while still obtaining equal access to otherwise generally available public benefits.

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://pioneerinstitute.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 the Supreme 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 precursor of that which came to be used in Maine's 1982 Sectarian Exclusion. As the Supreme Court has 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 and religious schools 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 though 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, 1302–03 & 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 1982 Sectarian Exclusion. *Bangor Baptist Church*, 1315 n. 28.

As noted above, the U.S. Supreme Court in *Carson v. Makin* struck down the 1982 Sectarian Exclusion. Justice Alito, in his concurring opinion in *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 497-508, 140 S. Ct. 2246, 2267-2274, 207 L.Ed.2d 679 (2020), noted the sordid animus behind the Blaine Amendments

and said that, "the provision's origin is relevant under the decisions we issued this Term…" But Maine was not done.

ARGUMENT

I. Overwhelming Evidence Demonstrates That The Object Of Maine's 1982 Sectarian Exclusion Was Anti-Religious Animus.

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

The Supreme 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*, 584 U.S. 617, 638 (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 638, 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 1982 Sectarian Exclusion was the product of anti-religious hostility and likewise produces unconstitutional harms. While the Supreme 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.").

B. Substantial Evidence Shows The Anti-Religious Animus Leading To The 1982 Sectarian Exclusion; The New Sectarian Exclusion Is The Close Progeny Of The 1982 Sectarian Exclusion.[2]

The Supreme 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

[2] For more on this relationship, see below at Section II.

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*, 584 U.S. at 639.

The text itself of the 1982 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." 20-A M.R.S. § 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 the Supreme 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 (2000), 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 1982 Sectarian Exclusion, was blatantly anti-Catholic and anti-religious. Moreover, under the Supreme 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).

Maine has had a tuition funding program dating back to 1873. From 1873 until enactment of the 1982 Sectarian Exclusion, the Maine laws providing for the tuition funding program were facially neutral and did not prohibit use of tuition program funds at religious schools.[3] 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) 20 M.R.S. § 213-A(2)(D) ("a district may … contract[] with … a private academy …"); (2) § 912 ("Children … may be allowed to attend …. an approved elementary school ….");
and (3) § 1291 ("Any youth … may attend any approved secondary school to which he may gain admission."). In the 1979-80 school year in Maine, hundreds of students received tuition funding at sectarian secondary schools selected by the students' parents.

As noted above, by 1979 Senator Howard Trotzky, Chairman of the Joint Standing Committee on Education,[4] 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

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[3] 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 of members of the Maine Ku Klux Klan to bar use of the tuition program funds at "sectarian" Catholic schools.

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

way to defund the MACS-associated and other religious schools in Maine, approached the Maine 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 (some 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.

In 1982 Senator Trotzky changed Maine's prior neutral tuition funding program with the complete revision of Maine education law set forth in L.D. 2042. Me. Legis. Rec. - Senate, Mar. 8, 1982, at S-221: (new draft Senate law titled as "L.D. 2042."). Buried deep within L.D. 2042's 400 pages, which Senator

Trotzky adamantly and repeatedly claimed made no substantive change (see below), and which he repeatedly claimed conformed to existing law, was the 1982 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 1982 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 1982 Sectarian Exclusion, was to cement in Maine law - quietly and almost secretly - a bar against any funding for religious schools.

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 1982 Sectarian Exclusion, 20-A M.R.S. § 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,[5] made this same

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

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 changes."), Me. Legis. Rec. - Senate, Apr. 1, 1982, at S-533 ("The main concern I have, Mr. President, was that there were no substantive changes."); Representative Connolly: 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 a secular purpose.

However, the claim that the recodification made no substantive change was completely false. The 1982 Sectarian Exclusion represented a complete reversal from the neutral 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.[6]

And then Senator Trotzky made negative remarks about religious opponents of the proposed recodified Maine education law. "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 in reality he was the special pleader.

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

In summary, Senator Trotzky and his allies did everything they could to conceal their true object or purpose which was anti-religious, to bar funding for religious schools.

And, as noted above and below, the New Sectarian Exclusion simply carries over the animus of the 1982 Sectarian Exclusion, just with new words, perhaps prettier in form, but with precisely the same meaning.

II. The New Sectarian Exclusion Violates The Free Exercise Clause Because By Definition It Operates To Bar Pervasively Sectarian Schools, Whose Religious Character Is Protected By The Free Exercise Clause.

"The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, 'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status.'" *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 475, 140 S. Ct. 2246, 2254, 207 L.Ed.2d 679 (2020) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 461, 137 S. Ct. 2012, 2021, 198 L.Ed.2d 551 (2017)). The Supreme Court in *Espinoza* went on to hold that "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* The Supreme Court concluded not only in *Espinoza*, but also in *Carson v. Makin*, 596 U.S. 767, 781, 142 S.Ct. 1987, 1998, 213 L.Ed.2d 286 (2022), and in *Trinity Lutheran,* 582 U.S. at 466, 137 S.Ct. at 2024, that a state's "interest in separating church and state more fiercely than the Federal

Constitution … cannot qualify as compelling in the face of the infringement of free exercise," and therefore must be held unconstitutional.

The exclusion of certain types of religious institutions—pervasively sectarian schools—is discrimination on the basis of religious status. As a plurality of the Supreme Court has explained, "the application of the 'pervasively sectarian' factor" in dispensing public benefits "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, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (plurality opinion) (emphasis added).

The Court in *Carson v. Makin* also rejected any argument that while discrimination on the basis of religious *status* was a constitutional violation, discrimination on the basis of religious *use,* or religious practice, was still permissible. *Carson v. Makin*, 596 U.S. at 788, 142 S.Ct. at 2001 ("In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination."). The Supreme Court reasoned that protected religious use or practice included, "[e]ducating young people in their faith, inculcating its teachings, and training them to live their faith" and that these "are responsibilities at the very core of the mission of a private religious school." *Id*., 596 U.S. at 787, 142 S.Ct. at 2001.

The Supreme Court in *Carson v. Makin*, went on to hold that Maine's 1982 Sectarian Exclusion, providing that, "[a] private school may be approved for the

receipt of public funds for tuition purposes only if it: … Is a nonsectarian school …", "violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restrictions are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.,* 596 U.S. at 789, 142 S.Ct. at 2002.

Now before this Court is Maine's New Sectarian Exclusion, put in place just before oral argument before the Supreme Court in *Carson v. Makin*, which provides that, "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in doing so." 5 M.R.S. § 4602(5)(D). But the prohibited discrimination by an educational institution between religions is, by definition, the same as a prohibition against a "pervasively sectarian" school, a prohibition which, as shown above, is a clear constitutional violation. The Supreme Court in *Carson v. Makin* in stating that use-based religious discrimination is also prohibited, illustrated that use-based discrimination directed at a religious school cannot prohibit that school from "educating," "inculcating," and "training" its students in "their faith," which is all at the "very core" of the mission of such a school, a school which is essentially, and by definition, "pervasively sectarian." *See Id*., 596 U.S. at 787, 142 S.Ct. at 2001.

And there are other ways of arriving at the same conclusion. According to *Black's Law Dictionary* (12th Ed. 2024), the word "sectarian" means "[o]f, relating to, or involving a particular sect, esp. supporting a particular religious

group and its beliefs." And the word "pervasive," according to the *Merriam-Webster Dictionary*, means "existing or spreading through every part of something." Thus, a pervasively sectarian school, by common usage means a school run by a sect, supporting its beliefs, whose beliefs then exist or spread through every part of the school.

Section 4602(5)(D), by barring any discrimination by a school "between religions," by its very terms, by definition, bars "sectarian schools." It is the New Sectarian Exclusion. However, as seen above, in *Mitchell v. Helms*, such a bar against participation by pervasively sectarian schools in a public benefit that is generally available to all others is a violation of the Free Exercise Clause and therefore unconstitutional. The decisions in all related recent Supreme Court decisions such as *Trinity Lutheran*, *Espinoza v. Montana*, and *Carson v. Makin*, support the exact same conclusion and the exact same result. And any effort to claim that any justification for such discrimination against pervasively sectarian schools somehow serves a legitimate and compelling state interest, and therefore survives constitutional strict scrutiny, has already been barred by the Supreme Court. *Carson v. Makin*, 596 U.S. at 781 ("cannot qualify as compelling"); *Trinity Lutheran*, 582 U.S. at 466 ("cannot qualify as compelling"); see also *Widmar v. Vincent*, 454 U.S. 263, 276, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) ("state interest in achieving greater separation … is limited by the Free Exercise Clause.")

In conclusion, the New Sectarian Exclusion is no different than the old one, the 1982 Sectarian Exclusion; it violates the Free Exercise Clause and therefore is unconstitutional.

III. Maine's New Sectarian Exclusion Deprives Maine's Students Of Superior Educational Outcomes.

Despite the history recounted above, Maine has often stated that the purpose of 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).

But Maine'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[7]—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. Recently published research finds that Catholic schools in Massachusetts outperform their public-school peers on achievement tests. Cara 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

[7] "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).

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. 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)).

These findings on the broad benefits of school choice, especially for disadvantaged students, should not be surprising. The Supreme 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 Appellants.

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 Maine's New Sectarian Exclusion—and the District of Maine opinion upholding it—are based on a contrary view, neither can stand.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,308 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type.

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CERTIFICATE OF SERVICE

I hereby certify that on this fifteenth day of October 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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