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

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

Dear Mr. Harris:

This case involves a challenge to the "sectarian" exclusion in Maine's tuition-assistance program. That program pays for children in rural areas that are not served by public schools to attend a private school of their choice so long as that school is "a nonsectarian school in accordance with the First Amendment of the United States Constitution." *See* Me. Stat. tit. 20-A, § 2951(2). In practice, Maine understood this requirement to permit the payment of tuition-assistance funds to religious schools only if those schools did not provide "sectarian," or religious, instruction. *See Carson as next friend of O.C.* v. *Makin*, 979 F.3d 21, 38 (CA1 2020).

The District Court held that the sectarian exclusion does not violate the Free Exercise Clause of the First Amendment. *See Carson* v. *Makin*, 401 F. Supp. 3d 207 (D. Me. 2019). The First Circuit affirmed. *See Carson*, *supra*, 979 F.3d at 21. This Court granted certiorari on the question whether a state violates the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or 'sectarian,' instruction. 141 S. Ct. 2883 (July 2, 2021) (No. 20-1088).

Virginia, joined by a group of eight other states and the District of Columbia, submitted an amicus brief contending that Maine's sectarian exclusion is consistent

with the Free Exercise Clause, and that "[s]tates have a strong interest in maintaining the 'play in the joints' between the Establishment and Free Exercise Clauses that govern their respective funding choices for religious schools that use the funds for religious purposes." *See* Virginia Amicus Br. 1.

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

Virginia now urges this Court to reverse the First Circuit. *First*, the sectarian exclusion discriminates against religious schools on the basis of their religious status, as the history of the exclusion makes clear.[1] *See Bagley* v. *Raymond Sch. Dep't*, 728 A.2d 127, 131 (Me. 1999); Me. Op. Att'y Gen. No. 80-2 (Jan. 7, 1980), 1980 WL 119258. Because the exclusion therefore is not neutral toward religion, it is subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993).

Maine's proposed distinction between impermissible discrimination on the basis of religious *status* and permissible discrimination on the basis of the religious *use* of funds is illusory and finds no support in the text of the First Amendment. The Free Exercise Clause "protects not just the right to *be* a religious person, holding beliefs inwardly and secretly; it also protects the right to *act* on those beliefs outwardly and publicly." *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2276 (2020) (Gorsuch, J., concurring). "[W]hether [the exclusion] is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way, unless the State can show its law serves some compelling and narrowly tailored governmental interest." *Ibid*; *see also Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring in part) ("I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.").

Second, the sectarian exclusion does not advance a compelling interest. *Lukumi*, 508 U.S. at 546. Any interest Maine may once have asserted in complying with the

[1] The Maine Legislature enacted the sectarian exclusion in response to a 1981 Maine Attorney General opinion that determined, under the test this Court articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), that religious schools should be excluded from the tuition assistance program, *see Bagley*, 728 A.2d at 131. Of course, "[t]he long-discredited test set forth in *Lemon* v. *Kurtzman* . . . is not good law," as this Court's more recent Establishment Clause opinions indicate. *Am. Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. 2067, 2097–98 (2019) (Thomas, J., concurring in the judgment).

Establishment Clause is no longer compelling after this Court's decisions holding that government aid which "makes its way to religious schools only as a result of" the choices of individual parents and students—as is true in Maine—does not violate the Establishment Clause. *Espinoza*, 140 S. Ct. at 2254; *see also Zelman* v. *Simmons-Harris*, 536 U.S. 639, 653 (2002) ("[W]e have never found a program of true private choice to offend the Establishment Clause."). "Private decisions to attend religious schools are not government decisions, and equal treatment of religious schools by government is not 'establishment' of religion . . . . The government and its programs must be disinterested, not hostile or suspicious, when it comes to the religiously inspired conduct and choices of its citizens." Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 Tex. Rev. L. & Pol. 301, 335 (2000).

Finally, the sectarian exclusion is not narrowly tailored. Numerous other States maintain school voucher or scholarship programs similar to Maine's, but do not exclude religious schools from those programs. *See ibid.*; Arkansas Amicus Br. 19–23. Clearly, those States have found ways to accommodate their compelling interests in providing for the education of children and the safeguarding of public funds without burdening the free exercise of religion.

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

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

Sincerely,

/s/ Andrew N. Ferguson

Andrew N. Ferguson
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CC: See attached service list.

20-1088

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