No. 20-1088

In The
Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION AND CENTER FOR INQUIRY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

PATRICK ELLIOTT
Counsel of Record
SAMUEL T. GROVER
FREEDOM FROM RELIGION FOUNDATION, INC.
P. O. Box 750
Madison, WI 53701
(608) 256-8900
pelliott@ffrf.org
Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICI[1]

The Freedom From Religion Foundation ("FFRF")—a national educational nonprofit organization based in Madison, Wisconsin—is the largest association of freethinkers in the United States, representing more than 35,000 atheists, agnostics, and other nonreligious Americans. FFRF has 21 local and regional chapters across the country, including an FFRF Maine chapter. Today nearly one in four U.S. adults identifies as religiously unaffiliated.[2] Founded nationally in 1978, FFRF has members in every state, the District of Columbia, and Puerto Rico. FFRF's two primary purposes are to educate the public about nontheism and to defend the constitutional principle of separation between state and church.

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to promoting and defending science, reason, humanist values, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine, health, religion, and ethics.

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[1] All parties consented to the filing of this amicus brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

[2] Robert P. Jones & Daniel Cox, America's Changing Religious Identity, Public Religion Research Institute (Sept. 6, 2017), www.prri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf.

CFI advocates for public policy rooted in science, evidence, and objective truth, and works to protect the freedom of inquiry that is vital to a free society.

SUMMARY OF THE ARGUMENT

Maine has adopted a limited program to allow private educational institutions to receive direct grants of taxpayer money in certain communities that lack equivalent public schools due to low student population. To qualify for these grants, Maine requires, among other things, that the private schools be "nonsectarian." *See* 20–A M.R.S. § 2951(2). Section 2951(2)'s "nonsectarian" requirement protects and fosters the religious freedom of *all* citizens. It does so by ensuring that the State does not wield its taxing power to benefit religious schools or fund religious education. In this way, no taxpayer is compelled to financially support any religious ideology that runs counter to their personal beliefs.

This most basic religious liberty protection has been drowned out in this case by three families of Maine Christians—who are members of the state's majority religion—claiming discrimination. Their attempts to secure government funding to subsidize religious education are a direct assault on the very right to religious liberty they claim to support. The constitutional prohibition on states taxing citizens for the benefit of religion, directly or indirectly, guarantees religious liberty for all. As Thomas Jefferson explained

in the Virginia Statute on Religious Freedom, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical. . . ." 2 THOMAS JEFFERSON, *82. A Bill for Establishing Religious Freedom, 18 June 1779*, *in* THE PAPERS OF THOMAS JEFFERSON, 545–53 (Julian P. Boyd ed., 1950). James Madison called the statute "a true standard of Religious liberty." 1 JAMES MADISON, *Detached Memoranda, Ca. 31 January 1820*, *in* THE PAPERS OF JAMES MADISON, RETIREMENT SERIES, 4 MARCH 1817—31 JANUARY 1820, 600–27 (David B. Mattern et al. eds., 2009). He did so because it stood as "the great barrier [against] usurpations on the rights of conscience." *Id.*

To open up Maine's school funding scheme to religiously-segregated schools would imperil, not protect, religious liberty. The Petitioners argue otherwise because they have failed to correctly identify who possesses that right. The religious liberty at issue here does not lie with Christian parents or religious schools, for they remain free to operate and attend private religious schools absent government aid. The rights jeopardized in this case lie with every Maine citizen and taxpayer.

A state's taxing power is inherently coercive. When that power is used directly, or even indirectly, to benefit religious education, it violates the rights of conscience of all citizens. As James Madison put it:

> The Religion then of every man must be left to the conviction and conscience of every man;

> and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men. . . .").

8 JAMES MADISON, *Memorial and Remonstrance against Religious Assessments, [ca. 20 June] 1785*, *in* THE PAPERS OF JAMES MADISON, 10 MARCH 1784—28 MARCH 1786, 295–306 (Robert A. Rutland & William M. E. Rachal eds., 1973) (hereinafter "MADISON, *Memorial and Remonstrance*"). To employ a state's taxing power in such a manner is to permit the very tyranny that Jefferson and Madison sought to restrain with the Virginia Statute for Religious Freedom. *That* is the evil that Section 2951(2) seeks to avoid: state encroachment on the right of citizens not to subsidize a religion that is not their own. If this Court accepts the Petitioners' invitation to abandon this basic principle of religious freedom, we will have reached a disastrous moment in American history: the era of government-compelled tithing.

Reflecting on the legislative history of Section 2951(2), the First Circuit recognized three important state interests advanced by excluding religious schools from receiving taxpayer money meant to fund the provision of secular education to Maine students. "These reasons include Maine's interests in concentrating limited state funds on its goal of providing secular education, avoiding entanglement, and allaying concerns

about accountability that undoubtedly would accompany state oversight of parochial schools' curricula and policies (especially those pertaining to admission, religious tolerance, and participation in religious activities)." *Eulitt v. Maine Dept. of Educ.*, 386 F.3d 344, 356 (1st Cir. 2004).

This brief first discusses another much more fundamental and essential state interest protected by the statute: protecting the religious freedom of its taxpayers by ensuring that they will not be compelled to fund religious education. The brief then highlights the additional state interest in avoiding the government oversight of private religious schools that would be needed were those schools receiving state funds. Finally, the brief addresses how the erosion of the state's interest in funding secular education would be more than just a byproduct of eliminating Section 2951(2), for that result is a desirable goal unto itself for many in the "school choice" movement.

ARGUMENT

I. The Founders wrote the First Amendment to ensure that taxpayers are not compelled to subsidize a religion that is not their own.

The legitimate purpose behind Section 2951(2)'s prohibition on public funding to private religious schools (the "no aid" principle) is the same fundamental purpose embodied in the First Amendment's

religion clauses: to protect religious freedom. Failing to enforce this "no aid" requirement would erode religious liberty.

A. The "no aid" principle—that the government must not subsidize religious teaching or worship—is fundamental to the U.S. Constitution.

The Founders of the United States expressly wrote the "no aid" principle into the First Amendment to prevent the government from using tax money to benefit any particular religion. Religious worship, religious education, and maintaining places of worship should be the result of free and voluntary support given by believers in that sect of the religion. James Madison, the Father of the Bill of Rights and the Constitution, explained this purpose well in his condemnation of a three-penny tax to support Christian preachers and churches: "The Religion then of every man must be left to the conviction and conscience of every man," not the taxing power of the state. MADISON, *Memorial and Remonstrance*, *supra.*

Religious duty, including financial support of religion, is a personal duty over which governments can have no jurisdiction. "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him," as Madison put it. *Id.* American governments simply do not have the power to tax citizens to fund churches and religious education. Alexander Hamilton explained this in The

Federalist No. 69: referring to the president, he wrote that the government "has no particle of spiritual jurisdiction." This principle is vital to ensure true religious freedom.

The compulsory support of a religion that is not one's own is anathema to American principles. Religious liberty cannot exist when the government can force citizens to donate to a sect that promises them, for example, eternal damnation and torture for exercising that freedom of religion. The Virginia Statute for Religious Freedom also recognized that compelled government support to one's *own* religion is a violation of one's rights of conscience: "[E]ven the forcing him 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." 2 THOMAS JEFFERSON, *82. A Bill for Establishing Religious Freedom, 18 June 1779*, *in* THE PAPERS OF THOMAS JEFFERSON, 545–53 (Julian P. Boyd ed., 1950). Thus, striking down "no aid" clauses, or statutes like Maine's Section 2951(2) that embody the "no aid" principle, would jeopardize the religious freedom of every United States citizen, including religious adherents.

It is not just direct taxes that violate religious liberty but employing the taxing power in any manner to fund sectarian education. Daniel Carroll, a Catholic representative to the Constitutional Convention from Maryland, put it best during the congressional debates on the First Amendment when he said that "the rights of conscience are, in their nature, of peculiar delicacy,

will little bear the gentlest touch of the governmental hand." 1 ANNALS OF CONG. 729–31 (1789). The government hand at issue here is not the one refusing to slip cash to Christian schools, but the hand reaching into every citizen's pocket to extract that cash—and it's not particularly gentle.

The Founders determined that the government could not subsidize religion and the Supreme Court reaffirmed that principle when it first applied the Establishment Clause to the states. In *Everson v. Board of Education of Ewing Township*, the Court wrote, "The 'establishment of religion' clause of the First Amendment means at least this. . . . *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion*. . . ." 330 U.S. 1, 15–16 (1947) (emphasis added). The Court ruled just one year later that allowing religious instructors from various denominations into public schools violated the Establishment Clause. *McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948). The Court expressly relied upon *Everson* and the use of taxpayer money, saying, "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." *Id.* at 210. The school system argued in *McCollum* that the program was permissible because the First Amendment "was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." *Id.* at 211. The Court soundly

rejected this argument and found that rather than "manifest[ing] a governmental hostility to religion," the First Amendment *protected* religious free exercise by erecting "a wall between Church and State which must be kept high and impregnable." *Id.* 211–12.

The Supreme Court later reiterated a strong commitment to the religious liberty principles in *Everson*, including the prohibition on giving public aid to religion. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216–17 (1963) (discussing the majority and dissenting opinions in *Everson*); *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961) (recalling that the Court was "urged to repudiate" the principles in *Everson* in the *McCollum* case and noting it "declined to do this, but instead strongly reaffirmed what had been said in *Everson* . . . "). The Court's lengthy discussions of the meaning and purposes of the First Amendment's religion clauses in these cases focus on separating religion and government—to the benefit of both. The Court could not have more resoundingly rejected the argument now advanced by the Petitioners, that the religion clauses actually *require* taxpayers to fund religion. That notion is completely foreign to the Constitution.

Our nation, our Founders, and the Justices of the Supreme Court have always understood that religious liberty flourishes when government does not tax citizens to aid religion. It is no surprise then that many U.S. states have clarified the protection for religious liberty by statute or through state constitutional "no aid" provisions. The additions of "no aid" provisions to

a state's school funding scheme are consistent with this fundamental truth, learned over the course of our nation's history. Each state's interest in protecting its citizens' religious liberty by maintaining a strict separation between religious education and state funding could not be higher.

B. The "no aid" principle dates to America's founding and was uniformly accepted after years of experience.

Though opponents to the separation of state and church recently have used revisionist history in an attempt to rewrite state-church relations, the federal government's early history of embracing state-church separation has been well-established and acknowledged by the Supreme Court for half a century at least. "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, *financial support*, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 668 (1970) (emphasis added).

The history of the states is more varied, each adopting disestablishment principles at different times and to varying degrees. New Jersey, Pennsylvania, Maryland, North Carolina, and Virginia began disestablishment in the year of American independence, 1776. Other states took longer to realize the severe problems with sponsoring or financially supporting religion, disestablishing up through the 1830s. *See*

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2032–36 (2017) (Sotomayor, J., dissenting). But regardless of the timeline, in the case of disestablishment, America's "laboratories of democracy" yielded remarkably consistent results. Looking to the federal model, *every* state ultimately codified this self-evident truth: there is no freedom *of* religion without a government that is free *from* religion. States that funded churches via established religions changed course. "Every state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. And as the States all disestablished, one by one, they all undid those laws." *Id.*

This history is crucial to the issue now before this Court. These states experienced religious establishments and after lengthy and careful debates decided to stop taxing citizens to support religion because doing so violated the civil rights and religious liberty of those citizens. The states learned this hard lesson over decades of living in a pluralistic America, which has only become more diverse nearly two centuries later. Maine's Section 2951(2) is a recognition of this well-established history, within the specific context of a school funding scheme.

This history seems distant today but was the result of centuries—millennia—of oppression by religion embedded in the government. Thanks to the constitutional principle of separation between state and church, Americans have been spared that oppressive experience. And some, as a result, have become complacent. We are, in some sense, victims of the successful

American experiment in keeping state and church separate. Many Americans lack a basic understanding of how these provisions protect religious freedom. That has led some, including the well-meaning parents in this case, to question whether the provisions are still valuable. They are. This Court ought not to rule against them when they have served this country so well in protecting religious liberty.

Several *amici* who filed in support of the Petitioners in this case submit lengthy, tangential historical accounts of anti-Catholic bigotry in a variety of contexts in an attempt to cloud the unimpeachable intent behind Maine's "no aid" law. EdChoice, for instance, points to anti-Catholic bigotry in the mid-1800s, brought to light during a dispute over which bible to read in public schools in Ellsworth, Maine. *See* Br. for EdChoice & Maine Pol'y Inst. as Amici Curiae Supporting Petitioners at 9–16. But rather than applauding Maine's decision to disentangle public education from religious indoctrination, EdChoice instead suggests that Maine's current school choice program is tainted by anti-Catholic bigotry that supposedly existed more than a century prior to its adoption. None of these historical accounts draws a direct connection between alleged anti-Catholic bigotry and Maine's present program. Moreover, none of these historical accounts even attempts to address the racial discrimination that fueled the modern wave of private schools and the voucher schemes that now support them, in the wake of desegregation. *See*, *e.g.*, Chris Ford, Stephenie Johnson, and Lisette Partelow, "The Racists Origins of

Private School Vouchers," *Center for American Progress* (July 12, 2017), https://cdn.americanprogress.org/content/uploads/2017/07/12184850/VoucherSegregation-brief2.pdf; Joseph Crespino, In Search of Another Country: Mississippi and the Conservative Counterrevolution (Princeton Univ. Press, 2021); David Nevin & Robert E. Bills, The Schools That Fear Built: Segregationist Academies in the South (1976). Indeed, it is curious to make the argument that a foundational constitutional principle should be undone due to a fabricated discriminatory history in a brief supporting voucher schemes, when voucher programs are themselves born of bigotry and segregation.

Upholding Maine's modern school-funding scheme, complete with its "no aid" provision, will not communicate an anti-Christian message. But striking Section 2951(2) from Maine's program would have immediate, disastrous results, including compromising the religious freedom of every State citizen. Minority religious and nonreligious citizens would be immediately coerced into subsidizing religious education with which they fundamentally disagree. That result would be, as Thomas Jefferson wrote, "sinful and tyrannical." The rights of the state's Christian taxpayers—the majority religion—would be similarly infringed, as Jefferson noted in that same document. 2 THOMAS JEFFERSON, *82. A Bill for Establishing Religious Freedom, 18 June 1779*, *in* THE PAPERS OF THOMAS JEFFERSON, 545–53 (Julian P. Boyd ed., 1950). Finally, if they begin receiving state funding, religious schools will likely be subjected to the state regulation that must necessarily

follow—although they may well fight in court for the special privilege of receiving state funding without the concomitant oversight, in which case it will be the students who suffer most.

II. The "no aid" principle avoids government entanglement with religious education and the government oversight that must necessarily be coupled with state funding.

Granting religious schools a right to access the public purse will inevitably lead to government regulation of religious schools. It must. Where public money goes, public accountability must follow. State governments have generally had a "hands-off" approach to religious institutions, including private religious schools, which are largely unregulated by state education agencies. That will have to change if private schools receive public money.

The special concerns over state separation and intervention in religion were highlighted by Supreme Court Justice Robert Jackson, a titan of the Court whose exemplary dissent in *Korematsu v. United States*, 323 U.S. 214 (1944) is widely considered one of history's greatest dissents for its condemnation of America's WWII internment camps for citizens of Japanese ancestry. In a less famous though similarly powerful dissent, he explained how the Constitution protects religious freedom—he wrote that the First Amendment "take[s] every form of propagation of religion out of the realm of things which could directly or indirectly

be made public business and thereby be supported in whole or in part at taxpayers' expense." *Everson*, 330 U.S. at 26–27 (Jackson, J., dissenting). He further noted, "That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, *a difference which goes to the very root of religious freedom*. . . ." *Id.* (emphasis added).

Justice Jackson also highlighted the paramount rationale underlying the religious freedom protections in the First Amendment:

> This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and *above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse.*

Id. (emphasis added).

State-church separation gives religion significant benefits—preventing courts from adjudicating church ministerial disputes, for instance. *See*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012) (holding that state resolution of a ministerial dispute violated the Free Exercise and Establishment clauses). Attached to these benefits are relatively few conditions, but one of those few is, most importantly, that taxpayers will not fund religion. By seeking an end to Section 2951(2), Petitioners seek to

augment the benefits religious institutions receive under the separation of state and church while eliminating the essential conditions. The Petitioners want to have their cake—which they think Maine taxpayers must buy—and eat it too. But if they are successful, this will lead to additional state oversight and control of religious schools.

When public money flows to private schools, however indirect the route, regulation is necessary and sensible because the unregulated flow of funds to unaccountable organizations guarantees abuse. Not surprisingly, the country's longest-lived private voucher program is bloated with such abuse. In Milwaukee, Wisconsin, over a ten-year period, more than $139 million in taxpayer funds went to voucher schools that were kicked out of the program for failing to meet basic requirements. Molly Beck, *State paid $139 million to schools terminated from voucher program since 2004*, WISCONSIN STATE JOURNAL (Oct. 12, 2014), *available at* https://bit.ly/2NlL9zI.

The abuse is startling. One school run by a preacher, LifeSkills Academy, collected more than $200,000 in state subsidies for the 2012–13 academic year before closing abruptly "in the dead of night" in December, leaving seventy students without a school to attend. Erin Richards, *Milwaukee voucher school LifeSkills Academy closes 'in the dead of the night*, MILWAUKEE JOURNAL SENTINEL (Jan. 14, 2014), *available at* https://bit.ly/2oAnm5b. State records documented alarming conditions, including allegations that the school falsified records of National School Lunch

Program meals, served expired food, served "Ramen noodles with hot sauce and a cup of water for lunch," and "cut" whole milk with water. *See Amicus Curiae* FFRF's Letter to the Florida Department of Education (Jan. 30, 2014), *available at* https://bit.ly/2Nghnwv.; *see id.* at Ex. 10, *available at* https://bit.ly/2JL4wQv. A former employee charged that the preacher falsified state records and believed he would get away with it because, "Can't nothing touch him but God." *Id.* Over its six years, LifeSkills collected more than $2.3 million in public money before shutting down and leaving families of students scrambling to find a new school. The preacher fled to a gated community in Florida, where he opened LifeSkills Academy II. Erin Richards, *Leaders of closed Milwaukee voucher school are now in Florida*, MILWAUKEE JOURNAL SENTINEL (Jan. 15, 2014), *available at* https://bit.ly/32nQT0m.

Alex's Academic of Excellence—"Academic" is indeed how this school spelled its name—raked in more than $3.5 million in taxpayer funds over five years before closing. Evicted for code violations from two locations, the school ended up in a storefront. According to reports, "children departed through the back entrance on Thursday afternoon and stood beside a trash receptacle overflowing with refuse—including the box spring for a bed—while they waited for buses to arrive." Sarah Carr, *Who cleans up problem choice schools?*, MILWAUKEE JOURNAL SENTINEL (Sept. 15, 2003), https://goo.gl/zoCc45. The principal saw employees smoking marijuana in school and saw a staffer with a bag of crack cocaine. The school's founder and

CEO was a convicted rapist who received a thirty-year prison term and served nine years. *Id*.

There are plenty of other examples from Milwaukee alone. Some private schools receiving voucher money failed to provide textbooks to students. Erin Richards, *Former Employees Cast Doubt on Voucher School's Operations*, MILWAUKEE JOURNAL SENTINEL (Dec. 15, 2014), *available at* https://bit.ly/2n7I9Nf. Others taught subjects from fundamentalist Christian textbooks that claimed things like "a belief in Darwinian evolution" was a cause of World War II and that through spirituals, "slaves developed the patience to wait on the Lord and discovered that the truest freedom is freedom from the bondage of sin." Frances Paterson, *Building a Conservative Base: Teaching History and Civics in Voucher-Supported Schools*, 82 THE PHI DELTA KAPPAN, 150, 151–52 (2000), www.jstor.org/stable/20439835.

While public schools have elected school boards, there is little-to-no public oversight of private schools receiving public money. The citizens who subsidize the schools end up with no say in even minimal academic or safety regulations. The solution to these problems is inevitable if private religious schools receive public funding: accountability through government oversight.

Religious schools will resist any attempt by the state to hold them to the standards that apply to public schools, including, concerningly, the requirements in the Maine Human Rights Act (MHRA) that schools receiving state funding not discriminate in hiring

decisions based on sexual orientation. *See*, *e.g.*, Amicus Brief of the American Center for Law and Justice to the First Circuit Court of Appeals, Doc. No. 00117498984 at 5 (Oct. 7, 2019) ("Any requirements that condemned as 'discrimination' a religious school's adherence to its mission integrity, and in particular to religious doctrines on sexuality and human nature, would essentially put the religious school to the choice of changing its doctrines or disqualifying itself from otherwise available public benefits."). Citizens should not have to condone such discriminatory hiring practices through taxpayer subsidies.

If religious schools continue to insist on a constitutional right to dip into the public purse, and if this Court should agree, state-church relations will be altered in fundamental ways for which nobody is prepared. Ultimately, accepting public money *will* open private schools to public oversight. And while that oversight can be accomplished without entangling the government in religious practice, the necessity of such regulation will invite entanglement. Keeping religious schools out of the public treasury allows them to remain free from government regulation and public accountability—another way that the "no aid" statutes fosters religious freedom.

CONCLUSION

The religious liberty interest that is primarily threatened in this case lies not with the Petitioners, but with Maine taxpayers, and it dates back to America's founding. The principle that the state must not fund religious instruction at taxpayer expense is among our most fundamental and essential rights. Over our long history, there has never been any indication that religious liberty protections actually require the government to financially support religion. The cost of revisiting that principle now will be felt by every citizen in the state.

This Court should not undo the Maine Legislature's decision not to subsidize sectarian education. Neither the parents seeking public money, nor the religious schools, have a right to taxpayer funds, directly or indirectly. The State's decision is the only path consistent with fundamental principles of religious liberty. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

PATRICK ELLIOTT
Counsel of Record
SAMUEL T. GROVER
FREEDOM FROM RELIGION
FOUNDATION, INC.
P. O. Box 750
Madison, WI 53701
(608) 256-8900
pelliott@ffrf.org

Counsel for Amici Curiae