No. 20-1088

In the
Supreme Court of the United States

DAVID AND AMY CARSON, AS PARENTS AND NEXT FRIENDS OF O.C., ET AL.,
Petitioners,

v.

A. PENDER MAKIN,
Respondent.

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

BRIEF *AMICI CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AND OTHER ORTHODOX JEWISH ORGANIZATIONS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Free Exercise Clause permits the State of Maine to deny public funding for education to parents of children between the ages of 6 and 17, who are required by Maine law to be enrolled in a "public day school," if the religious beliefs of the parents obligates them to enroll their children in an academically qualified "sectarian" school that provides an intensive religious training together with the secular education that the law prescribes.

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INTEREST OF THE *AMICI CURIAE*[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") has spoken on behalf of America's Orthodox Jewish community for more than half a century. COLPA's first amicus brief in this Court was filed in 1967 in *Board of Education v. Allen*, 392 U.S. 236 (1968). Since that time, COLPA has filed more than 40 amicus briefs to convey to this Court the position of leading organizations representing Orthodox Jews in the United States. The following national Orthodox Jewish organizations join this amicus brief:

▪Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization that articulates and advances the position of the Orthodox Jewish community on a broad range of issues affecting religious rights and liberties in the United States.

▪Agudas Harabbonim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

▪Coalition for Jewish Values ("CJV") is a national rabbinic public policy organization that represents

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[1] Pursuant to Supreme Court Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part. No person or party other than the amici has made a monetary contribution to this brief's preparation or submission. The parties have filed blanket consents.

more than 1,500 traditional Orthodox rabbis and advocates for classical Jewish ideas and standards in matters of American public policy.

▪Orthodox Jewish Chamber of Commerce is a global umbrella of businesses of all sizes, bridging the highest echelons of the business and governmental worlds together stimulating economic opportunity and positively affecting public policy of governments around the world.

▪Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 950 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

▪Rabbinical Council of America ("RCA") is the largest Orthodox Jewish rabbinic membership organization in the United States comprised of nearly one thousand rabbis throughout the United States and other countries. The RCA supports the work of its member rabbis and serves as a voice for rabbinic and Jewish interests in the larger community.

▪Torah Umesorah (National Society for Hebrew Day Schools) serves as the preeminent support system for Jewish Day Schools and yeshivas in the United States providing a broad range of services. Its membership consists of over 675 day schools and yeshivas with a total student enrollment of over 190,000.

SUMMARY OF ARGUMENT

The Jewish faith obligates parents to ensure that their children are educated in religious observance in order to carry out the Torah's commandment in Deuteronomy (VI:7) to "teach diligently unto thy children." See, *e.g.*, "Jewish Education," 6 Encyclopedia Judaica 169-172 (2d ed. 2007). The *amici* seek to convey to the Court how this case affects that religious observance.

Recent decisions of this Court have evaluated the impact of local laws and regulations on the liberty of churches, schools, and other religious institutions. *Amici* submit that the central issue in this case should be resolved by considering how individual parents are affected by Maine's law.

Maine law requires parents to enroll children between the ages of 6 and 17 in schools that will educate them in a range of secular fields. If a child is enrolled in a school that teaches only secular subjects, the child's education is subsidized from public funds. If, however, a child is enrolled in a "sectarian" school – one that teaches religious observance as well as a legally adequate secular curriculum – public funds are denied. In such circumstances, the expense of ***both*** the secular and religious programs must derive from private funds such as tuition or voluntary contributions.

Imposing such a financial burden on parents who are obliged by religious conscience to enroll their children in "sectarian" schools is an obvious burden and disincentive for religious observance. It requires otherwise committed Jewish parents to forego the

intensive religious education that their faith prescribes. Hence the Maine law is unconstitutional under the Free Exercise Clause.

A comparable obstacle to religious observance is the continuing validity of this Court's much-discredited 1971 decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). It effectively bars local legislatures from enacting laws that would subsidize all or part of the expense of the secular curriculum in a school that also provides religious instruction. Although a majority of Justices have, at various times over the past decades, rejected *Lemon* vigorously, this Court has never wiped away its precedential impact. This case is an opportunity to erase it as a deterrent to equitable legislation and regulation and thereby implement the religious liberty protected by the Free Exercise Clause.

ARGUMENT

I. THE CONSTITUTIONAL ISSUE IN THIS CASE SHOULD BE MEASURED BY THE IMPACT OF MAINE LAW ON PARENTS RATHER THAN ON INSTITUTIONS

In both *Eulitt v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004), and in its decision in this case the First Circuit decided whether the constitutionally protected right to the free exercise of religion was impaired by measuring the impact on ***sectarian schools***, not on the ***parents*** of the children who, out of religious conviction, enroll their children in schools that provide an intensive religious education. We urge the Court to consider the effect of

Maine's law on Jewish families whose religious observance compels them to give their children a primary and secondary education in a "sectarian" school that meets the State's secular educational standards and simultaneously emphasizes religious learning and observance.

Maine has only one such school. It is located in Portland. But the issue presented by this case affects Jewish education across the country. Parents whose religious observance requires them to enroll their children in Jewish Day Schools acknowledge the constitutional principle that imposes on them the financial burden of paying for their children's religious training. This case presents the critical issue whether the Constitution allows a State to mandate that such parents must also pay privately for the secular education that all 50 States require them to give their children and that is governmentally subsidized if the children are taught in schools that are not "sectarian."

The parties and the court of appeals cast the central issue in this case in terms of the effect of the Free Exercise Clause on religious schools because the most recent decisions of this Court have addressed and invalidated rulings that interpreted state laws to disqualify religious institutions from receipt of governmental benefits. *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). In the final analysis, however, the actual cost of the lower-court rulings that declared the religious institutions ineligible for governmental financing was imposed on the private parties who were donating funds for their support. The primary

constitutional violation in this case is its impact on individuals whose religious convictions permit them to comply with State law governing the education of their children only by enrolling the children in "sectarian" schools. Consequently, the effect of Maine's law on individual parents should be the focus of the constitutional inquiry.

II. GOVERNMENT MAY NOT IMPOSE A LEGAL OBLIGATION AND MAKE COMPLIANCE FREE TO ALL EXCEPT THE RELIGIOUSLY OBSERVANT

Maine's law orders all parents in the State to educate their children between the ages of 6 and 17 in a "public day school." Me. Stat. tit. 20-A, Section 5001-A(1). The Maine law that is challenged in this case provides total governmental financing for a child's education if the child is enrolled in a school that is not "sectarian." But if the school provides intensive religious training, the supporters of the school and the parents who pay tuition must pay not only for their children's religious education but also for the education the children receive in secular subjects such as English, mathematics, science, history, foreign languages, and civics.

It is hard to conceive of a more direct and severe discouragement of a parent's religious obligation to give children a thorough education in religious observance and tradition than to direct that not only the religious education but also the child's secular education – mandated by local law – must be privately funded. Such a rule "inevitably deters or discourages the exercise of First Amendment rights." *Trinity*

Lutheran, 137 S. Ct. at 2022, quoted in *Espinoza*, 140 S. Ct. at 2256, quoting *Sherbert v. Verner*, 374 U.S. 398, 405 (1963).

It is surely impermissible for government to command that an act be done and also declare that government will subsidize fully those who comply with that directive in a secular manner but will require those who, while complying fully with the legal duty, contemporaneously engage in religious observance to pay privately not only for the religious ritual but also for the secular component. Yet that is the sum and substance of Maine's law.

III. THIS IS THE COURT'S OPPORTUNITY FINALLY TO OVERRULE *LEMON v. KURTZMAN*

Jewish parents of children enrolled in "sectarian" schools offering a full secular program that meets the standards prescribed by law or regulation combined with intensive religious education and indoctrination encounter a hardship similar to that of the petitioners. The expenses of the ***secular*** curriculum, including the salaries of teachers of science, English, math, world history, and foreign languages in Jewish Day Schools are not paid from the public treasury. The States of Pennsylvania and Rhode Island remedied this patent inequity with legislation that provided governmental subsidies for the salaries of teachers of secular subjects in nonpublic elementary and secondary schools. This Court declared these statutes unconstitutional half a century ago because "church-related" parochial schools were among the

beneficiaries. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

For more than a decade after it was announced, *Lemon v. Kurtzman* was the constitutional litmus test which judges, including this Court, employed to evaluate Religion Clause challenges to governmental measures. Its validity was seriously questioned by several of the Justices in *Wallace v. Jaffree*, 472 U.S. 38 (1985), and in *Mitchell v. Helms*, 530 U.S. 793 (2000). It was severely criticized and ridiculed, most famously by Justice Scalia's description of it as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398 (1993). See also Justice Scalia's dissent in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 890 (2005) ("a majority of the Justices on the current Court . . . have, in separate opinions, repudiated the brain-spun '*Lemon* test' that embodies the supposed principle of neutrality between religion and irreligion"). In *American Legion v. American Humanist Association,* 139 S. Ct. 2067, 2080 (2019), seven Justices agreed that "[i]n many cases this Court has either expressly declined to apply the test or has simply ignored it" because of its "shortcomings."

Because *Lemon* has never been explicitly overruled, no legislature dares to enact laws like Pennsylvania's and Rhode Island's to remedy the patent burden on religious exercise that results when nonpublic religious schools must boost tuitions paid by parents so as to afford a curriculum that includes both

secular studies that the law prescribes and religious instruction. If *Lemon* were finally and authoritatively entombed as it should have been years ago, the constitutionality of such legislation could be determined by contemporary constitutional standards free of the horror its shadow continues to cast.

It is significant, we submit, that Maine does not even cite *Lemon v. Kurtzman* in its Brief in Opposition even though the result of *Lemon v. Kurtzman* parallels the result of the decision of the First Circuit – *i.e.*, secular education in "sectarian" schools must be financed by private funds. Although petitioners should prevail in this case even if *Lemon v. Kurtzman* is not overruled, this Court should clear the decks and render *Lemon v. Kurtzman* irrelevant hereafter.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the First Circuit should be reversed with an opinion that explicitly overrules *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Respectfully submitted,

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