No. _____

In The
Supreme Court of the United States

KEVIN AND JULIA ANDERSON, DALE AND BETHANY DANIELS, LIONEL AND JILL GUAY III, STEPHEN AND SHARON JEROME, CHRISTINE KOZA, LAWRENCE AND KATHRYN RUGAN, MICHAEL AND JENNIFER VAN DER WERF, MICHAEL AND JERILYN WARD,

Petitioners,

v.

DURHAM SCHOOL DEPARTMENT, SUPERINTENDENT SHANNON WELSH, MINOT SCHOOL DEPARTMENT, SUPERINTENDENT ROBERT WALL, RAYMOND SCHOOL DEPARTMENT, SUPERINTENDENT SANDRA CALDWELL, MAINE DEPARTMENT OF EDUCATION, COMMISSIONER SUSAN GENDRON,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. *Weinberger v. Wiesenfelder*, 420 U.S. 636 (1975), teaches that when the government's true reason for treating citizens unequally is known, courts should not accept post hoc justifications that were not the goal of the challenged legislation. In light of *Weinberger*, may the state of Maine justify the unequal treatment of religion in a high school education program on grounds that plainly were not an actual goal of legislators who enacted the program?

2. Until 1980, Maine had a long history of including religious options in its high school "tuitioning" program and there is nothing in the state constitution that even arguably requires the exclusion of religious options from that program. Does this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), permit Maine to exclude religious options entirely from an otherwise neutral educational aid program based solely on a misinterpretation of the Federal Establishment Clause?

LIST OF PARTIES

The parties to the proceeding below were petitioners Kevin and Julia Anderson, Dale and Bethany Daniels, Lionel and Jill Guay III, Stephen and Sharon Jerome, Christine Koza, Lawrence and Kathryn Rugan, Michael and Jennifer VanDerWerf, Michael and Jerilyn Ward; and respondents Durham School Department, Superintendent Shannon Welsh, Minot School Department, Superintendent Robert Wall, Raymond School Department, Superintendent Sandra Caldwell, Maine Department of Education, Commissioner Susan Gendron; and intervenor-respondents Maine Civil Liberties Union, David Currier, Timothy Fitzgerald, Lois Kilby-Chesley, Tim and Joan Morin, Howard Reben, W W Reily, Ken and Barbara Williams.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Maine Supreme Judicial Court Sitting As The Law Court, entered in the above-entitled proceeding on April 26, 2006.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court Sitting As The Law Court has been reported at 895 A.2d 944 and is reprinted in the appendix hereto, p.1, *infra.*

The opinion of the Cumberland County Superior Court has been reported at 2004 Me. Super. LEXIS 206 and is reprinted in App. 41, *infra.*

JURISDICTION

The judgment of the Maine Supreme Judicial Court Sitting As The Law Court was entered on April 26, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution provides in pertinent part as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The Fourteenth Amendment of the United States Constitution provides in pertinent part as follows: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The texts of 20-A M.R.S.A. §§ 2951 and 5204(4) are reproduced in App. 64-65, *infra*.

STATEMENT OF THE CASE

A. Statement of Facts

During the height of the anti-Catholic Know Nothing hysteria in 1854, the Maine Supreme Court upheld the Ellsworth School Committee's expulsion of fifteen year-old Roman Catholic Amanda Donahoe for refusing to read from the Protestant King James Bible.[1] Amanda regarded it as sinful to do so, on the advice of her priest, Father John Bapst. Noting that "[l]arge masses of foreign population are among us, weak in the midst of our strength," the Court held that her religious scruples could not justify her refusal.[2]

Father Bapst began teaching Amanda and several other expelled Catholic children in a chapel in Ellsworth that was used on Sundays for religious services, until a mob of Ellsworth Know Nothings burned down the chapel, tarred and feathered Father Bapst, rode him out of town

[1] *Donahoe v. Richards*, 38 Me. 379 (1854).

[2] *Donahoe*, 38 Me. at 413. Maine continued to require Bible reading in its public schools until this Court held in 1963 that the practice violated the Establishment Clause in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). See also Ernst Helmreich, *Religion and the Maine Schools: An Historical Approach* (1960).

on a rail, and threatened to burn him at the stake.[3] For his safety, the Catholic authorities moved him north to Bangor, Maine. John Bapst Catholic High School in Bangor, one of Maine's four Catholic high schools in 1980, was named in memory of Father Bapst and his steadfastness in the face of Protestant persecution.

In 1980, John Bapst Catholic High School was forced to close, after Maine's Attorney General advised its principal that a legal opinion that he was about to issue concluded that religious schools could no longer receive tuition payments from towns that did not maintain their own public high school. These towns tuitioned their students to whatever public or private high school the students' families selected.[4] Despite religious high schools having participated in this tuitioning system from its inception in 1879, when all or virtually all of the private schools in Maine were religious (albeit overwhelmingly Protestant),[5] the Attorney General concluded that such participation violated the Federal Establishment Clause and that the existing statute had to be construed to exclude the choice of religious schools.[6] Although by 1980

[3] Nor was the Ellsworth attack an isolated incident: the Old South Church in Bath, Maine, which was rented for Catholic religious services, was burned to the ground by another Know Nothing mob the same year. William David Barry, *Fires of Bigotry*, Down East Magazine (Oct. 1989).

[4] Plaintiffs' Statement of Material Facts ¶¶ 2, 3, Tab 6 in Appendix to Petitioner's Brief below (hereinafter "App. Below").

[5] Maine districts have paid tuition for their resident students to attend private elementary schools for over 200 years, Ava Harriet Chadbourne, *History of Education in Maine* 31-39 (1936), a practice extended to secondary schooling in 1879, at which time most of the private academies were religious, *id*. at 281-84; William Stetson, *A Study of the History of Education in Maine* 86 (1902).

[6] Op. Me. Att'y Gen. 80-2 (1980), App. 68.

only a very small number of students attended religious schools on such tuition payments, a substantial proportion of the students at John Bapst Catholic High School did so.[7]

The Attorney General's Opinion (hereinafter "AG Opinion") was legally flawed. It failed to treat separately two very different types of tuition payments made by districts that did not maintain their own high schools. Such districts could either contract with a private school for schooling privileges for all its resident high school students or allow families to choose the private or public school of their choice. Under the first or "contract" option, students are compelled to attend the private school, and the Attorney General quite properly found it would violate the Establishment Clause to force students to attend a religious school. But he failed to analyze separately the statutory provision allowing parents to choose their children's school and receive what amounts to a scholarship from their district, which presents a markedly different constitutional context. The Attorney General lumped together the two distinct programs in his analysis.[8]

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[7] In 1979-80, 124 of John Bapst's 308 students were attending on tuition from their towns, out of a total of 211 students tuitioned statewide to sectarian schools. The 211 students constituted a mere 1.1-1.2% of students tuitioned at that time. Joint Stipulation of Facts ¶¶ 15, 16, Tab 5 in App. Below.

[8] Among the cases the AG relied on for his analysis was *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), but he failed to notice that in that decision this Court *expressly reserved judgment* on the question of "a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id*. at 782 n.38. This Court specifically distinguished *Nyquist* in *Zelman v. Simmons-Harris* on the basis of that note. 536 U.S. 639, 661-62 (2002).

The Maine Department of Education implemented the AG Opinion for the 1980-81 school year.[9] The Attorney General had prepared his Opinion for Senator Howard Trotsky, chairman of the Maine Legislature's Joint Education Committee, which was preparing a complete revision of Maine's education laws. This revision, passed in 1982 and made effective in 1983, incorporated the Opinion's conclusion by modifying the tuitioning statute to specifically exclude any school that was not a "nonsectarian school in accordance with the First Amendment of the United States Constitution." 20-A M.R.S.A. § 2951(2).[10]

Besides forcing John Bapst Catholic High School to close, the implementation of the Opinion by the Education Department and its incorporation into the Maine statutes denied tuition payments to students attending several other religious schools that formerly received them. These included Cheverus High School and St. Dominic's High School, Catholic schools, and Pine Tree Academy, a Seventh Day Adventist school. In 1997, families in the tuitioning town of Raymond, Maine with high school students attending Cheverus High School filed a lawsuit in state court challenging the constitutionality of their school district's denial of tuition payments.

The plaintiffs argued that the 1980 AG Opinion misinterpreted the Establishment Clause and that incorporating its erroneous conclusion into the tuitioning law failed both strict scrutiny and rational basis review under the Equal Protection Clause. The Maine Supreme Court in

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[9] Affidavit of James Watkins, Jr. ¶ 29, Joint Exhibit 5 to the Joint Stipulation of Facts, Tab 5 of App. Below.

[10] A copy is attached at App. 64.

Bagley v. Raymond Sch. Dep't, 728 A.2d 127, *cert. denied*, 528 U.S. 947 (1999), while acknowledging that an erroneous interpretation of the Establishment Clause could not supply a rational basis for religious discrimination, rejected the idea that the Attorney General had misinterpreted the Establishment Clause. The Court held that even though the tuition payments were directed by the free and independent choices of the parents they nonetheless had a primary effect of advancing religion under *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and that compliance with the Establishment Clause was a compelling basis for discriminating against parents selecting religious schools.

Three years after denying certiorari in *Bagley*, this Court decided *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). *Zelman* laid to rest the idea that it violates the Establishment Clause to allow parents a free and independent choice of schools under a religiously-neutral school choice program, even where a large majority of families choose religious schools. After the Maine Attorney General issued a cursory letter to the Maine Commissioner of Education directing him to continue applying § 2951(2)'s exclusion of religious schools after *Zelman*,[11] parents in three tuitioning towns (Raymond, Durham, and Minot) with children attending St. Dominic's High School and Pine Tree Academy filed suit in state court seeking to have § 2951(2) overturned on the basis of *Zelman*.

[11] This letter is attached at App. 66.

B. Proceedings Below

After holding that the districts' actions denying tuition payments on behalf of petitioners' children pursuant to § 2951(2) was not action taken under color of state law under 42 U.S.C. § 1983 and dismissing the districts from the suit,[12] the trial court held that the state defendants had not violated the Free Exercise, Establishment, or Equal Protection Clauses of the Federal Constitution.[13] Recognizing that the trial court had to follow the Maine Supreme Court's erroneous resolution of the similar Free Exercise and Establishment claims in *Bagley*,[14] petitioners focused primarily on their Equal Protection claim that § 2951(2) did not satisfy rational basis review, let alone the compelling interest test normally applied to non-neutral religious classifications. The trial court rejected that claim, finding it irrelevant that § 2951 was based on a misunderstanding of the Establishment Clause because the state had asserted new rationales, including that § 2951 promoted the compelling state interest of religious diversity in public schools. These new rationales were put forward by individual state legislators opposed to legislation designed to repeal § 2951(2) that was introduced after

[12] The *Anderson* court declined to rule on the appeal of this issue deeming it a moot point. 895 A.2d at 950 n.5.

[13] Petitioners dropped a claim under the Free Speech Clause after this Court rejected a Free Speech claim in *Locke v. Davey*, 540 U.S. 712, 721 n.3 (2004).

[14] Petitioners preserved these claims and subsequently argued them to the Maine Supreme Court, seeking to have it overrule its prior resolution of them in *Bagley*. The Court declined to do so on the merits and consideration of the Free Exercise and Establishment claims would be properly before this Court on certiorari.

this lawsuit was filed in 2002.[15] The legislation failed, but the trial court used the diversity rationale given by some of the legislators rather than evaluating the actual reason § 2951(2) was adopted in 1982 – namely, to comply with the state's mistaken understanding of the Federal Establishment Clause.[16]

On appeal, the Maine Supreme Court affirmed by a 6-1 vote. The Court began its analysis by rejecting petitioners' argument that the 1980 AG Opinion was poorly reasoned, concluding that the Attorney General "gave good advice" and that the Maine Legislature "acted prudently and responsibly in taking that advice and enacting section 2951(2)." The court also stated that the Attorney General and Legislature were motivated by a desire to respect and comply with the Establishment Clause, rather than any religious animus.[17]

Relying upon this Court's rejection in *Locke* of the idea that a statute is presumptively unconstitutional when it is not neutral with respect to religion, *Anderson* rejected petitioners' Free Exercise and Establishment Clause

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[15] *Anderson* mistakenly states this lawsuit arose after the legislation was defeated. 895 A.2d at 949.

[16] Petitioners objected to the consideration of these rationales as incapable of justifying a statute passed more than 20 years before for another reason. Petitioners also noted that the state failed to mention a number of other rationales given by legislators in 2003 that were less "noble" than diversity, such as the cost savings the state derived from the religious discrimination, a continued belief that the Establishment Clause required the discrimination, and a fear that religious neutrality might allow unpalatable religions to open schools. Transcript of House Debate on LD 182 (May 13, 2003), in App. Below at 169-178 (comments of Reps. Cummings, Mills, Davis and Gagne-Friel).

[17] *Anderson*, 895 A.2d at 958.

claims. It held that § 2951(2) does not substantially burden a religious practice,[18] merely prohibiting the state from funding parents' school choice without "burden[ing] or inhibiting religion in a constitutionally significant manner." 895 A.2d at 959. *Anderson* concluded that "*Locke* recognizes that states have some leeway to choose not to fund religious education even if a choice to fund religious education indirectly might not violate the Establishment Clause." *Id*. at 954.

Anderson then applied the rational basis test to reject petitioners' Equal Protection claim, relying on *Locke* and the First Circuit's decision in *Eulitt v. Maine Department of Education*, 386 F.3d 344 (2004).[19] It characterized that

[18] Although the Maine Court recognized that several of the petitioners had religious motivations for sending their children to religious schools, it found that since their religions did not *mandate* that they do so, their religious practices were not substantially burdened. Most of the petitioners are Catholics, and while Catholic doctrine states that Catholics should send their children to Catholic schools like St. Dominic's, it recognizes this is sometimes impossible and does not make it an inflexible requirement. See *Gravissimum Educationis* in *Documents of Vatican II* 637 (Walter M. Abbot, S.J. ed. 1965) ("Catholic parents are reminded of their duty to send their children to Catholic schools wherever this is possible"). The substantial burden requirement is inconsistent with this Court's decisions in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Employment Div. v. Smith*, 494 U.S. 872 (1990), as well as *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 170-71 (3rd Cir. 2002); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364-67 (3rd Cir. 1999); *Hartmann v. Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995); and *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3rd Cir. 1994). Both the D.C. and Third Circuits have rejected any requirement that a religious practice must be mandatory before it can be protected. *Levitan v. Ashcroft*, 281 F.3d 1313, 1319 (D.C. Cir. 2002), and *Tenafly*, 309 F.3d at 171.

[19] *Eulitt* was a parallel lawsuit filed in federal court challenging the constitutionality of § 2951(2).

test as "requir[ing] only that a fairly conceivable set of facts establish a legitimate government interest that would support the challenged classification" and noted that the state had offered several conceivable justifications: avoiding excessive entanglement between religion and state, concerns about maintaining religious diversity in the public schools, and avoiding involvement in discrimination in admissions and hiring by religious schools.[20] The Court rejected petitioners' argument that *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), barred the state from offering additional rationales for the statute when the actual rationale is known. The Court found the state's newly proffered reasons to be "not inconsistent with or contradictory to prior stated goals," and in particular found a concern with excessive entanglement to be both an original justification for the AG Opinion and a conceivable justification even after *Zelman*'s vindication of school vouchers.[21]

REASONS FOR GRANTING THE WRIT

I. STATE AND FEDERAL COURTS ARE DIVIDED ON WHETHER THE RATIONAL BASIS TEST PERMITS CONSIDERATION OF CONCEIVABLE RATIONALES WHEN THE ACTUAL PURPOSE OF CHALLENGED LEGISLATION IS KNOWN.

Weinberger teaches that when the government's true reason for treating citizens unequally is known, courts should not accept *post hoc* justifications that were not the

[20] 895 A.2d at 960.

[21] *Id*.

goal of the challenged legislation. The Maine Supreme Court's treatment of the *Weinberger* decision clearly and directly conflicts with the interpretation of *Weinberger* by both the Third and Ninth Circuits. It opined that under *Weinberger* it was not "bound by the justification proffered by the State in support of the statute in *Bagley*, or offered in support of the legislation in 1981 [sic]." *Anderson*, 895 A.2d at 960. Earlier in the decision, the court rejected any implication that the Attorney General and the Legislature were motivated by religious animus, specifically finding that they "were motivated by a desire to respect and comply with the requirements of the Establishment Clause as then interpreted and applied by the United States Supreme Court." *Id*. at 958. Thus, the justification the *Anderson* court refuses to be bound by is the very justification it recognizes actually motivated the Attorney General in his Opinion and the Maine Legislature, namely, compliance with the Establishment Clause. In a very similar case involving a challenge to state action taken to comply with an erroneous understanding of the Establishment Clause, the Ninth Circuit held that *Weinberger* did *not* permit consideration of other possible justifications where the actual justification was known, *i.e*., where the asserted purpose could not have been a goal of the policy. *Christian Science Reading Room v. City of San Francisco*, 784 F.2d 1010 (9th Cir.), *as amended*, 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1997). *Accord Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth.*, 641 F.2d 1087, 1097 (3rd Cir. 1981).

Moreover, to the extent *Anderson* tries to avoid its failure to follow this Court's decision in *Weinberger* by asserting that a desire to avoid excessive entanglement was an original justification for the statute, the Maine

Court is being disingenuous. Excessive entanglement is, of course, an aspect of this Court's test for compliance with the Establishment Clause and was discussed in the 1980 AG's Opinion, but its discussion of excessive entanglement is as patently flawed as the Opinion's discussion of whether sending tuition payments to religious schools had a primary effect of advancing religion. The Attorney General reached the erroneous – and frankly insupportable – conclusion that the Establishment Clause would require the state to engage in a program of constant surveillance to be "certain" that non-public school teachers were not allowing religious instruction to "seep" into the secular educational curriculum.[22] In reality, no such "surveillance" is, nor ever has been, required for true school choice programs like Maine's tuitioning option, as *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), and *Zelman* make clear. To the extent the Maine Supreme Court continues to be concerned about preventing religious education from taking place in religious schools chosen by tuitioned students, its decision conflicts with *Witters* and *Zelman* and the Third Circuit's decision in *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002).

Finally, this Court's decisions, such as *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), rejecting erroneous Establishment Clause interpretations as justifications for discriminating against religious activities, implicitly disallow such misunderstandings from serving as legitimate justifications for classifications that, like

[22] AG Opinion at App. 91.

Maine's, discriminate against religious perspectives and organizations on their face.

A. *ANDERSON*'S APPLICATION OF THE RATIONAL BASIS TEST DIRECTLY CONFLICTS WITH THIS COURT'S APPLICATION OF THAT TEST IN *WEINBERGER V. WIESENFELD* AND WITH DECISIONS OF THE THIRD AND NINTH CIRCUITS APPLYING *WEINBERGER*.

Although it acknowledged that § 2951(2) was enacted to incorporate the Attorney General's erroneous conclusion that the Establishment Clause forbade families in tuitioning towns from choosing sectarian schools, *Anderson* nonetheless concluded that it could consider other "conceivable rationales" that the legislature could have *but did not* consider at the time. This approach to rational basis review under the Equal Protection Clause conflicts with this Court's decision in *Weinberger* and the decisions of two federal circuit courts. In those three cases, where the *actual* reason for adoption of a statute is known, other reasons that might have been *but were not considered* cannot justify the challenged classification.

In *Weinberger*, this Court stated that a court "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." 420 U.S. 636, 648 n.16 (1975). *Anderson* interpreted the *Weinberger* "could not have been" language as permitting consideration of "conceivable" justifications the state offered 25 years after the discriminatory exclusion was effected, but which were clearly not considered by either

the Attorney General or the Education Department in implementing the exclusion of religious schools from Maine's tuitioning program in 1980,[23] or the legislature in 1982 in incorporating the exclusion into the revised education code.[24] According to *Anderson*, so long as the new justifications are "not inconsistent with or contradictory to prior stated goals" they can be considered.

This approach obviously misunderstands *Weinberger*, because in that case the government offered a justification of a classification challenged under the Equal Protection Clause that was neither inconsistent with nor contradictory to what the Court found to be the actual purpose underlying the statutory scheme. Rather, the Court found

[23] Uncontested evidence shows that the Attorney General met with the principal of Bapst to tell him the effects of his opinion before it was issued in 1980 and that the Education Department implemented the exclusion required by the AG Opinion in the 1980-81 school year. Affidavit of Joseph Sekera, Joint Exhibit 4 to the Joint Stipulation of Facts, Tab 5 of the App. Below.

[24] The language of § 2951(2) plainly reflects the conclusion of the AG Opinion by requiring that a participating school be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." The legislative history of the enactment of the revised education code in which § 2951(2) appeared for the first time demonstrates conclusively that no substantive changes were intended by the enactment of the new code, which was held in abeyance for a year until 1983 to give the public time to find any substantive changes inadvertently included. *Bangor Baptist Church v. Maine Dep't of Educ. and Cultural Servs*., 576 F. Supp. 1299, 1315 n.28 (D. Me. 1983). During the 2003 debate over possible repeal of § 2951(2), a member of the revision committee from 1982 confirmed that § 2951(2) "came about as a result of an Attorney General Opinion requested by Howard Petrosky [sic]," and "caused a change in 1981 . . . in the recodification of Title 20A," which was "done in strict concurrence with the Attorney General's recommendations" in his Opinion. App. Below at 176; Transcript of House Debate on LD 182 at H-589 (May 13, 2003) (comments of Rep. Millett).

it "apparent both from the statutory scheme and from the legislative history" that the justification offered by the government was not the actual purpose behind the statute. 420 U.S. at 642. Thus, where, as in this case, *the actual justification for a classification is known*, *Weinberger* stands for the proposition that conceivable justifications not actually considered at the time of enactment should not be accepted as potential justifications by a reviewing court. However appropriate it may be to accept conceivable hypothetical justifications when the actual reasons for a classification are unclear or unknown in order to give effect to the strong presumption of validity deriving from respect for the legislature's role in enacting legislation, *see FCC v. Beach Communications*, 508 U.S. 307, 314-15 (1993), ignoring the known actual reason behind an enactment in favor of conceivable justifications does not respect the legislature's proper role and constitutes judicial abdication of its responsibility to provide meaningful review.

In *Christian Science Reading Room, Inc. v. City of San Francisco*, the Ninth Circuit addressed a situation similar to *Anderson*. Defendants offered a mistaken interpretation of the Establishment Clause as a rational basis for a policy of excluding religious entities from renting space in a public airport. Relying on *Weinberger*, the court refused to consider two justifications the state defendants offered at trial because it found that the airport did not consider those purposes in adopting its new policy, and was instead motivated solely by a perceived need to correct an Establishment Clause violation. Since there was no Establishment Clause violation, remedying such a violation could not supply a rational basis for the religious classification. In its decision, the Ninth Circuit recognized that the two

asserted rationales it refused to consider might have been legitimate justifications, but nevertheless rejected them because the evidence made clear the actual reason for the challenged classification. *Christian Science Reading Room*, 784 F.2d at 1073.

The Ninth Circuit cited an earlier Third Circuit decision interpreting *Weinberger* as support for refusing to consider conceivable rationales when the actual rationale is known: *Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth.*, 641 F.2d 1087 (3rd Cir. 1981). In that case, the Third Circuit concluded that its ability to consider purposes for classifications advanced by counsel or by itself was limited by *Weinberger* to those situations where it was not attributing to the government "purposes which it cannot reasonably be understood to have entertained." 641 F.2d at 1097. In other words, conceivable justifications can be used to fill in for actual justifications only where the justifications actually entertained are not known. Where the actual justifications are known the government cannot reasonably be understood to have entertained others. Thus, in a situation like *Anderson* where we know the purpose of § 2951(2) was remedying a perceived violation of the Establishment Clause, the *Delaware River Basin Commission* and *Christian Science Reading Room* cases interpret *Weinberger* to preclude consideration of any other justifications, in direct conflict with *Anderson*.

B. *ANDERSON*'S INTERPRETATION OF EXCESSIVE ENTANGLEMENT CONFLICTS WITH *WITTERS*, *ZELMAN*, AND THE THIRD CIRCUIT'S *TENAFLY* DECISION

Perhaps recognizing the weakness of its application of *Weinberger*, the *Anderson* Court also asserts that

"excessive entanglement between religion and state, a component of Establishment Clause analysis, was an original justification for the statute and is asserted by the State" in *Anderson.* 895 A.2d at 960. The Court finds that "[i]t remains conceivable, even after *Zelman*, that under some set of facts funding tuition for sectarian schools would run afoul of the Establishment Clause on excessive entanglement grounds." *Id.* That conclusion represents a fundamental misunderstanding of this Court's application of the excessive entanglement component of the *Lemon* test for Establishment Clause violations.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court articulated a three-part test for Establishment Clause challenges, the third part of which required that a challenged program be capable of being administered without excessively entangling the state with religion. It then used the excessive entanglement prong to strike down a program of subsidies for private school teachers teaching secular subjects. The program required that the subsidized courses had to be secular to avoid advancing religion. This Court found that an excessive entanglement of the state with religion would result from the continuing surveillance necessary to ensure that teachers under religious control and discipline did not bring religion into the secular subjects the government was paying them to teach.

In *Agostini v. Felton*, 521 U.S. 203 (1997), this Court addressed a program in which publicly-employed teachers were sent into private religious schools to teach secular remedial courses and found that such aid would not excessively entangle the state with religion because the supervision necessary to ensure that religion did not seep into the remedial classes was not excessive. In so holding,

Agostini distinguished between direct aid cases that support religious schools as institutions and indirect aid cases that aid students and where any benefit to the schools they attend occurs incidentally to the receipt of aid by the students. In direct aid cases, supervision is necessary to ensure that the aid does not support the religious functions of the schools. In indirect aid cases such supervision is unnecessary, because any aid to the religious function of the school is incidental and permissible.

Accordingly, in *Zelman*, as in *Witters*,[25] decided 16 years earlier, this Court was not concerned with the issue of excessive entanglement because it had concluded that the *Zelman* program was an indirect aid program, *i.e.*, one that was religiously-neutral in structure and where whatever benefits flowed to religious schools did so as a result of the free and independent choices of the students' families. Such programs do not require the state to police the program to prevent aid to the religious function of the schools attended by the program's beneficiaries, and pervasively sectarian schools and universities may participate on an equal basis.

[25] In *Witters* this Court unanimously upheld the provision of government aid to a student attending a pervasively religious college to pursue a religious vocation, noting that whatever benefit accrued to the school was incidental to his free and independent choice of the school. Because the aid to the school was indirect, no ongoing surveillance was necessary to ensure the effects of the aid were limited to secular functions or activities. If such surveillance were required in indirect aid cases, it would inevitably be excessive because virtually all aspects of a pervasively-sectarian school's activities are imbued with religion, because that is the definition of a pervasively sectarian institution. As *Anderson* found, all the schools the petitioners' children attend are pervasively sectarian. 895 A.2d at 950.

The excessive entanglement concerns discussed in the 1980 AG Opinion were premised on the improper view of the program as providing direct assistance. As previously noted, the Opinion mistakenly treated the relationship between the tuitioning districts and the schools receiving tuition payments on behalf of the students who choose them as one of direct aid to the schools. (This is, of course, part and parcel of the general failure of the Opinion to recognize the proper legal differences between paying tuition pursuant to a contract with a private school to educate all of a district's high school students and paying tuition in towns that allow parents to choose the schools their children attend.) The Opinion mistook the parent-directed tuition payments to the schools for direct aid. Consequently, the Opinion discusses excessive entanglement in the context of a direct aid program in which all aided activities must be secular and policed. The AG Opinion and its subsequent enshrinement in the education code were in no way premised on excessive entanglement concerns relevant to indirect aid programs.

In *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002), the Third Circuit, by contrast with the decision below, followed the correct approach toward the entanglement prong of the *Lemon* test. Addressing the local government's argument that continuing to let a religious group use its telephone poles to create an "eruv," a religious zone for Sabbath purposes, would constitute an actual violation of the Establishment Clause, the court stated that entanglement only "matters . . . in the context of direct aid to parochial schools, where the Court subsumes it within the 'effect' analysis, see *Agostini v. Felton*, and in the rare case where government delegates civic power to a religious group." *Tenafly*, 309 F.3d at 175

n.36 (citations omitted). See also *L. M. v. Evesham Twp. Bd. of Educ.*, 256 F. Supp.2d 290, 305 (D. N.J. 2003) ("Entanglement is not an issue in indirect aid cases like the one presented here").

C. THIS COURT'S PRECEDENTS DO NOT ACCEPT ERRONEOUS INTERPRETATIONS OF THE ESTABLISHMENT CLAUSE AS EXCUSES FOR DISCRIMINATION AGAINST RELIGION

In her concurring opinion in *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 717 (1994), Justice O'Connor stated that "[t]he Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion." It should go without saying that an erroneous interpretation of the Establishment Clause is even less of a warrant for discriminating against religion, but *Anderson* disagrees. This Court has confronted many instances where governments have claimed the Establishment Clause requires that they exclude or otherwise discriminate against religious participants in some manner. Where this Court has concluded that in fact the Establishment Clause does not require discrimination, it has not hesitated to strike down those classifications. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); and *Widmar v. Vincent*, 454 U.S. 263 (1981). Implicit in these cases is the understanding that a mistaken interpretation of the Constitution does not provide a legitimate basis for religious discrimination. In all of these cases, the results of this Court's decisions were that

religious entities would receive benefits amounting to subsidies for activities containing religious elements, but under religiously-neutral criteria. Only very recently has this Court allowed a state to discriminate against religion without the Establishment Clause requiring it, and then only in very limited circumstances. *Locke v. Davey*, 540 U.S. 712 (2004). *Anderson* misreads that decision to justify Maine's continuing discrimination against parents seeking to use the tuitioning program to send their children to religious schools.

II. ANDERSON'S MISINTERPRETATION OF *LOCKE V. DAVEY* UNDERCUTS THE FEDERAL RELIGION CLAUSES

In *Locke*, this Court addressed an indirect aid program for the first time since upholding the Cleveland Program in *Zelman*. Although finding that *Locke*'s Promise Scholarship Program comported with *Zelman*'s Establishment Clause standards, this Court nevertheless permitted the state to invoke a more restrictive religion clause of the Washington Constitution to deny Promise Scholarships to students pursuing degrees in "devotional theology" leading to religious vocations. This Court found that the program's exclusion fell into an area between the two Federal Religion Clauses, holding that not all actions permitted by the Establishment Clause are required by the Free Exercise Clause. Quoting from *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970), which upheld against Establishment Clause challenge the widespread practice of tax exemptions for charitable bodies, including religious entities, this Court said "we have long said that 'there is room for play in the joints' between [the Clauses]." *Locke*,

540 U.S. at 718. Based on an historical analysis of the efforts of many states to avoid state funding of ministers and their training as manifested in their state constitutions, *Locke* concluded by stating that "[i]f any room exists between the two Religion Clauses, it must be here." *Id.* at 725.

This Court's "play in the joints" metaphor implies that the room between the two religion Clauses is quite narrow, and much of the *Locke* opinion is concerned with emphasizing how narrow its holding is. The opinion is replete with limiting language concerning the uniqueness of the ministerial training exclusion and the extent to which the program includes religious benefits despite the exclusion of devotional theology majors. *Anderson*, however, and the First Circuit in *Eulitt* (on which the *Anderson* court relies heavily), ignore the limitations emphasized in *Locke* and extend its holding to the point where the "play in the joints" exception is no longer narrow at all, but separates the two Religion Clauses so far that they can no longer perform their joint function of protecting religious liberty.

Far from being premised on a longstanding state constitutional tradition similar to avoiding the funding of ministers and their training, Maine's exclusion of students choosing religious schools is based on a 25-year-old misunderstanding of the Establishment Clause. Maine's Constitution not only lacks both the sort of religion clauses this Court relied on in *Locke*[26] and the Blaine Amendments properly disparaged by the plurality in *Mitchell v. Helms*,

[26] The eight state constitutions cited in *Locke*, 540 U.S. at 723, all contain "compelled support clauses" stating that no one shall be compelled to support or attend any religious ministry without his or her consent.

530 U.S. 793, 829 (2000), as "born of bigotry" toward Catholics,[27] it contains an education article enacted in 1819 authorizing state grants for the founding of private – including religious – schools and permitting the tuitioning of students to such schools.[28] Thus, unlike *Locke* where the refusal to fund ministerial training reflected Washington's longstanding state constitutional tradition, in Maine the exclusion of families choosing religious schools contradicted a much older state constitutional tradition of supporting students attending private schools on a religion-neutral basis.

Unlike the "relatively minor burden on Promise Scholars" that Washington's ministerial training exclusion imposed, *Locke*, 540 U.S. at 725, Maine's § 2951(2) denies petitioners a state-funded high school education for their children at the school of their choice – simply because the school happens to be religious. Each family will spend well over $20,000 for each child's high school education, and each couple works three, and sometimes four, jobs in order to pay the tuition denied them by § 2951(2).

Finally, while this Court could say in *Locke*, "we believe that the entirety of the Promise Scholarship Program goes a long way to including religion in its benefits," § 2951(2) excludes religion entirely from its

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[27] Blaine Amendments, which are found in some 37 state constitutions, generally prohibit appropriations for the aid or support of sectarian schools. See, *e.g.*, Mark DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551 (2003); and Joseph Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657 (1998).

[28] Article VIII, pt. 1, § 1, attached at App. 63.

benefits. It excludes all students choosing a religious high school from the tuitioning program. Whereas Promise Scholars in Washington can "attend pervasively religious schools, so long as they are accredited," *id.* at 724, petitioners' children cannot. Promise Scholars can even take devotional theology courses, so long as they do not major in devotional theology, *id.*, but petitioners' children cannot take any devotional religion classes.

These factors led this Court in *Locke* to reject Davey's presumption of unconstitutionality under the Free Exercise Clause. In *Anderson*, these same factors should have led not only to a presumption of unconstitutionality, but to a finding of a violation of both Religion Clauses.

A. UNLIKE IN *LOCKE*, NO HISTORICAL TRADITION SUPPORTS PREVENTING PARENTS FROM USING STATE AID TO ATTEND RELIGIOUS SCHOOLS

In their decisions in *Anderson* and *Eulitt*, the Maine Supreme Court and the First Circuit greatly expanded *Locke*'s scope from a refusal to fund students training for religious vocations to a refusal to fund students choosing to attend religious secondary schools. Even though *Locke* is replete with statements that it involves the narrow issue of training for the ministry, these courts have taken out of context the single instance where the decision uses arguably broader language: "The State has merely chosen not to fund a distinct category of instruction." *Locke*, 540 U.S. at 944. While in context it is clear this Court was referring to religious vocational training as the "distinct category of instruction," these lower courts have chosen to read the phrase as allowing Maine to exclude the very forms of religious education this Court specifically noted

the Washington Program allowed participants to obtain. If this over-reading of *Locke* is allowed to stand, every state could exclude families choosing religious schools from any school choice program. While school choice programs are still rare at the elementary and secondary education levels, virtually all states provide student assistance grants and subsidized loans at the postsecondary level. Modeled on the religiously-neutral federal higher education student assistance programs such as the GI Bill, Pell Grants, and Guaranteed Student Loans, these state programs have traditionally permitted students to select religious colleges and universities, but *Anderson* would support extending *Locke*'s exclusion to all such colleges.

Neither the United States in general nor Maine in particular have an historical tradition justifying the broad exclusion of religion from publicly-funded elementary and secondary education analogous to the historical tradition of not funding the salaries and religious training of ministers. On the contrary, the public or common schools were originally conceived and operated as generically (nondenominationally) Protestant institutions, which is why Roman Catholics such as Amanda Donahoe found them so inhospitable, leading to the creation of Catholic parochial schools.[29] This also explains why this Court had to devote such a large proportion of its modern Religion Clause jurisprudence to purging religion from the public schools in pursuing the principle of religious neutrality. But neutrality does not mean hostility. When this Court upheld releasing public school students on school time to

[29] Lloyd Jorgenson, *The State and the Non-Public School 1825-1925* 111-145 (1987).

go off-site to religious centers for religious instruction in *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952), it said:

> When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Prior to 1980, Maine's tuitioning system epitomized a publicly-funded but religiously-neutral system. While traditional public schools continued into modern times to include generically Protestant religious exercises, Maine allowed families to choose what sort of school to which to send their children. The state's interest in a well-educated citizenry was met through requiring these schools to meet various curriculum and certification requirements, while parents' desires for an exclusively secular or religious education were also met. Indeed, the irony that Maine, the home state of James G. Blaine for whom the Blaine Amendments are named, does not have a Blaine Amendment in its constitution while 37 other states do, is explained by the fact that in 1924 the Maine legislature rejected a proposed Blaine Amendment because some 42 Protestant and two Catholic schools received state subsidies.[30]

Thus, whatever the significance of this Court's finding that there existed a longstanding historical tradition of

[30] Helmreich, *supra* note 2, at 50.

prohibiting vocational training for the ministry to the Promise Scholarship Program in *Locke*, no such similar tradition justifies broadening the application of *Locke* to include school choice programs like Maine tuitioning. Limited to vocational training for the ministry, the discrimination against a "specific category of instruction" permitted by *Locke* creates a narrow exception to the general principle that government classifications should not discriminate for or against religion that is embodied in the federal Religion Clauses. *Anderson* and *Eulitt*'s expansive gloss on *Locke* to include all education with religious components plainly infringes on religiously-motivated activity in violation of the Free Exercise Clause and inhibits or hinders religion in violation of the Establishment Clause.

B. CONTRARY TO *LOCKE*, § 2951(2) PROVIDES NO BENEFITS TO RELIGION AND IMPOSES MORE THAN A "RELATIVELY MINOR BURDEN"

In distinguishing *Locke* from *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), this Court reasoned that the fact that Washington's "Promise Scholarship Program goes a long way toward including religion within its benefits" negated an inference of hostility towards religion. *Locke*, 540 U.S. at 724. This Court emphasized that Promise Scholars could attend pervasively religious colleges and take religion courses, including courses in devotional theology. With respect to Maine's tuitioning program, however, attending a pervasively religious high school and taking required religion courses means students are disqualified from having their tuition

paid. Because of § 2951(2), religion receives absolutely no benefits under the program.

Lukumi focused on hostility towards religion, because the challenged actions were facially neutral and the defendant's motivation converted an ostensibly neutral act into one hostile to religion. In this case, § 2951(2) on its face singles out religion for adverse treatment, and there is no need to seek out the motivation of its creators to make it an action based on religion. Similarly, *McDaniel v. Paty*, 435 U.S. 618 (1978), did not require that Tennessee's disqualification of ministers for state elective office be based on hostility or animus before it found a Free Exercise violation. What is common to these cases is that they all specifically and deliberately placed religion at a disadvantage not justified by Establishment Clause concerns.

If Maine had simply ordered John Bapst Catholic High School to close because it was a religious school, this Court would not have inquired as to whether that was a hostile act: it would have applied the *Lemon* test and found that closing the school had a primary effect of inhibiting or hindering religion.[31] That effect is in no way lessened by the fact that Maine killed Bapst by denying tuition payments to its students because it was a religious school. The effect is the same, closure of the school; the reason is the same, that it was religious. Before 1980

[31] This hypothetical is not quite as farfetched as it may sound. In *Bangor Baptist Church v. Maine Dep't of Educ. and Cultural Servs.*, 576 F. Supp. 1299 (D. Me. 1983), the federal district court rebuffed efforts by Maine's Attorney General and Education Commissioner *to close all unapproved religious schools*, at precisely the same time they told John Bapst Catholic High School and the other religious schools approved for tuition payments that they could no longer receive such payments.

Maine's tuitioning program included religion in its benefits, and afterwards it did not. Section 2951(2) treats religious schools and families like petitioners as second-class citizens by denying them the benefit of a publicly-funded secondary education at the school of their choice, while extending that benefit to others.

Locke found the loss of the scholarship imposed a relatively minor burden on Promise Scholars. This referred to the modest size of the scholarships ($2,667) and to the fact that one could retain the scholarship and still take devotional theology courses and attend religious colleges, as long as one did not declare a religion major. In *Anderson*, § 2951(2) denies the petitioners tuition payments, for four years of high school worth over $20,000. Moreover, secondary school attendance is compulsory and part of students' entitlement to a publicly-supported education. Thus, the benefit denied by § 2951(2) is both quantitatively larger and qualitatively different. To send their children to their high school of choice petitioners must sacrifice their entitlement to a state-supported secondary education, unlike parents preferring secular private or public schools.

CONCLUSION

In 1854 the Maine Supreme Court failed to protect Amanda Donahoe, a member of a newly-arrived religious minority, from religious discrimination. For refusing to participate in a religious exercise, she was expelled from school and denied a free public education. In 1980 the Maine Attorney General misapplied the principle of religious neutrality underlying the Establishment Clause

and caused a religious high school to close and students attending religious schools to lose their entitlement to tuition payments. In *Anderson* the Maine Supreme Court has again failed a religious minority, those individuals who prefer to send their children to religious schools. This denial discriminates against religion on its face and lacks a rational basis. As such, *Anderson* conflicts with decisions of this Court and two federal Circuit Courts, and egregiously overextends *Locke v. Davey*.

Petitioners respectfully request that this Court issue a writ of certiorari to review, reverse, and remand *Anderson*.

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