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 *AMICUS CURIAE*
INDEPENDENT WOMEN'S LAW CENTER
AND INDEPENDENT WOMEN'S FORUM
IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Independent Women's Law Center ("IWLC") is a project of Independent Women's Forum ("IWF"), a nonprofit, nonpartisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic issues. IWF promotes policies that advance women's interests by expanding freedom, encouraging personal responsibility, and limiting the reach of government. IWLC supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for individual liberty, equal opportunity, and respect for the American constitutional order.

As an organization comprised primarily of women, many of whom are mothers, IWF and IWLC value the different learning styles of all children and believe that parents should enjoy a full range of options when deciding which schools their children should attend.

IWF and IWLC are particularly concerned that Maine's tuition-assistance program unreasonably and unconstitutionally restricts those options. Specifically, its prohibition on tuition assistance for private sectarian schools drowns out a critical

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amicus curiae and its counsel made any monetary contribution toward the preparation and submission of this brief. On July 9, 2021, the Respondent filed a blanket consent to the filing of amicus briefs. On July 14, 2021, counsel for the Petitioner gave blanket consent to the filing of amicus briefs.

message that should remain available to parents who want their daughters to hear it—that of all-girls religious institutions. Given IWF's decades-long commitment to women's advancement in all aspects of American life, as well as the unique perspective that the women of IWF and IWLC bring to the national conversation, IWLC offers this brief to aid the Court's analysis.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The parents of Maine's children have a constitutional right "to direct the education and upbringing of [their] children." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)). Maine, however, has sharply curtailed this right. By statutorily guaranteeing tuition assistance for parents who choose to send their children to private *secular* schools while refusing to do the same for those who choose private *religious* schools, the State has violated the First Amendment's Religion Clauses. *See, e.g.*, *Espinoza v. Mont. Dep't of Revenue,* 140 S. Ct. 2246, 2278 (2020) (Gorsuch, J., concurring) ("Calling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same."). For the reasons discussed in Petitioners' Brief, the Court should conclude the same and reverse the contrary decision of the United States Court of Appeals for First Circuit below.

It should be noted, however, that the constitutional infirmities plaguing Maine's exclusion of religious schools from its tuition-assistance program extend beyond the First Amendment's Religion Clauses. By blocking the message offered by "sectarian" learning institutions from those families who wish their children to hear it, Maine's prohibition similarly offends the First Amendment's Free Speech Clause. And nowhere is that stifling felt more acutely than by the families who wish to send their daughters to all-girls religious schools.

To be certain, all-girls religious schools offer a unique, and uniquely valuable, message that cannot be replicated at secular schools—even private or single-sex institutions. Indeed, studies have shown both that (1) all-girls schools respond to the distinctive ways in which girls learn much better than coeducational schools and (2) children who attend religious institutions perform far better than their secular-school peers on most objective academic criteria. Combining these twin advantages should be an option afforded to Maine's parents. Maine's decision to foreclose this message is as unwise as it is unconstitutional.

The First Circuit provided little more than a cursory analysis of the Freedom of Speech question, finding itself bound by earlier Circuit precedent that this Court's recent jurisprudence had not called into question.[2] This Court, however, labors under no similar restraints. Because all-girls religious schools provide a unique and exceptional message, foreclosing this message from the families that seek it offends the First Amendment's Free Speech Clause. Given the numerous all-girls religious institutions that, but-for Maine's unconstitutional sectarian-school prohibition, would qualify for the tuition-assistance program, the Court should reverse the First Circuit's erroneous decision and, in so doing, safeguard the constitutionally protected right

[2] *See* Pet. App. 52 ("[T]he plaintiffs' contention that the 'nonsectarian' requirement violates the Free Speech Clause of the First Amendment" has "no merit to it. The barrier here is *Eulitt* [*v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004)] . . . . Given that the plaintiffs point to no post-*Eulitt* developments that call it into question, that prior precedent of ours controls here").

of Maine's families to send their daughters to the institutions providing the message they believe will best serve their daughters.

ARGUMENT

I. Religious all-girls education has been, and remains, a critical part of the American educational experience.

From roughly the time of the American founding, until the 1920s, single-sex schools predominated, relative to their coeducational counterparts. *See* FRANCIS R. SPIELHAGEN, DEBATING SINGLE-SEX EDUCATION; SEPARATE AND EQUAL? v-vi (2013). During the Progressive Era, however, "comprehensive coeducational high school" became "a welcome innovation to the early feminist community," *id.* at vi, and coeducational secondary education became the norm. When Congress enacted Title IX in 1972, it "virtually assured that single-sex education" would become "the domain of the private, usually elite, schools and," critically, "parochial or religious schools." *Id.* at 10.

Even so, interest in determining whether single-sex education results in a better educational experience, particularly for girls, never waned. Leading up to the Title IX amendments in 2006, "several prominent reports emerged that highlighted the educational disadvantages that females in public schools experienced." *Id.* at 11. During that time, "new research on the brain emerged, using technological advances like magnetic resonance imaging, that suggest[ed] fundamental differences in males and females," particularly regarding "hearing, vision, and brain functioning." *Id.*

Simply put, research increasingly suggests that there exist "structural differences between the brains of males and females" along with "variations in how boys and girls use their brains to process information." *Id.* at 27. In areas such as language processing, spatial processing, use of senses in learning, and brain chemistry, it is becoming more apparent that young men and women develop, and learn, differently. *Id.* at 26-29. For this reason, the one-size-fits-all coeducational approach has remained the subject of considerable debate.

Similarly, the social complexity that arises during the adolescent years can inform whether same-sex or coeducational schools result in better academic outcomes. "Adolescence is . . . a time when girls begin to face greater challenges in academic subjects that require them to employ their spatial skills and understanding," and this can prove especially true "as they deal with higher-level math, hands-on science, and technology." *Id.* at 33. And, "when trying to cope with all of" the stressors of the secondary-school experience, "girls typically respond differently than boys do." *Id.* at 34.

For this reason, research has suggested that a "girls-only classroom . . . can be a place where girls get involved, ask important questions, and gain the confidence to excel, especially in areas where they may previously have been challenged." *Id.* As time has progressed, research has further suggested that "[w]hen compared to coeducated peers, graduates of girls' schools are more likely to" develop:

- greater cultural competency;
- stronger community involvement;

- increased civic and political engagement;
- a stronger voice;
- greater leadership skills;
- higher self-confidence; and, critically,
- amplified academic achievement.

QUICK FACTS, NAT'L COAL. OF GIRLS' SCHOOLS, https://www.ncgs.org/research/quick-facts/ (last visited Sept. 9, 2021).

This last point bears emphasizing. One study, conducted in Great Britain, concluded that young women at single-sex schools are "substantially more likely—all else equal—than their coeducated peers to achieve a high level of examination success at age 16." Alice Sullivan et al., *Single-Sex Schooling and Academic Attainment at School and Through the Lifecourse*, 47 AM. EDUC. RSCH. J. 6, 25 (Mar. 2010). This same study also found that young women at single-sex schools are more likely to (1) "gain their highest qualification by age 33 in a male-dominated field," *id.* (2) gain post-school qualifications in traditionally male dominated disciplines, *id.* at 25; and (3) excel at math and science than their peers at coeducational schools, *id.* at 26. Indeed, studies of students in South Korea found that young women attending single-sex schools scored 4-to-7 percent higher on exams than their counterparts at coeducational institutions.[3]

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[3] Christian Dustmann, et al., *Why Single-Sex Schools are More Successful*, CTR. FOR ECON. POL'Y RSCH. (Sept. 28, 2017)

In the United States (and in New England), many all-girls schools are religious, which means that Maine's choice not to allow religious schools to participate in the tuition-assistance program, by implication, deprives young women of a greater opportunity to reap these benefits. That, however, is not the only detriment. Research further supports the idea that religious schools, when compared to their public or non-religious-private counterparts, turn out students who achieve greater academic success on nearly every objective measure of scholastic achievement.

Social scientists have begun examining specifically whether "students who attend religious schools actually perform better academically than do students who attend nonreligious schools." William H. Jeynes, *Educational Policy and the Effects of Attending a Religious School on the Academic Achievement of Children*, 16 EDUC. POL'Y, No. 3, 406-07 (Jul. 2002) (hereinafter Jeynes, *Educational Policy*). Using the 1992 National Education Longitudinal Survey data set,[4] Professor William H. Jeynes, during his tenure at the University of Chicago, concluded, after conducting several linear regression analyses, that "children attending

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available at https://voxeu.org/article/why-single-sex-schools-are-more-successful (last visited Sept. 8, 2021).

[4] Sponsored by the U.S. Department of Education's National Center for Statistics and designed by the National Opinion Research Center, the National Education Longitudinal Survey used a series of achievement tests to assess a nationally representative sample of schools and students. *See* Jeynes, *Educational Policy*, at 409-10.

religious schools achieve at higher levels academically than do their counterparts who are not attending religious schools, even after controlling for race and gender." *Id.* at 412; *see also id.* at 414 ("12th-grade students attending religious schools out-perform their counterparts attending nonreligious schools.").

Standing alone, these objective benchmarks provide ample reason why parents may favor single-sex religious schools for their children. But parents are not only concerned with test scores and college acceptances. They also want their children to cultivate their character and to develop into conscientious citizens.[5] Attending religious schools helps with both. *See generally*, Albert Chang et al., *The Protestant Family Ethic*: *What do Protestant, Catholic, Private, and Public Schooling Have to do With Marriage, Divorce, and Non-Marital Childbearing*, AM. ENTER. INST., INST. FOR FAM. STUD. (2020).

For example, students at religious schools are more likely not to divorce as adults. *Id.* at 4. High school students who attend religious school are more likely to regularly attend religious services. *Id.* at 7.

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[5] Rick Hess, *What do Parents Look For When Choosing a School*, EDUC. WK. (Sept. 7, 2021) *available at* https://www.edweek.org/policy-politics/opinion-what-do-parents-look-for-when-choosing-a-school/2021/09 (last visited Sept. 8, 2021) (noting that 30 percent of parents who send their children to private school said character and values instruction was significant consideration in where to send their child; similarly 26 percent of parents wanting to send their children to charter schools saw character and values as a significant consideration).

Furthermore, drug use and premarital sex among high school students who attend religious schools occurs less often than at non-religious schools. *Id*.

At bottom, research suggests that (1) all-girls schools benefit their students, and (2) religious schools benefit their students. It follows, then, that many parents might, quite reasonably, wish to send their daughters to all-girls religious schools, given the expectation that both characteristics better prepare their daughters for life beyond the secondary-school experience. Maine's decision to remove all-girls religious institutions from participation in its tuition-assistance program violates the constitutional right of parents to choose which educational experience makes the most sense for their daughters.

II. Maine's "sectarian" exclusion unconstitutionally muffles this essential voice.

Throughout this case, Maine has justified its religious-school prohibition by insisting that it "use[s] private schools in place of, and not as an alternative to, public schools." Br. in Opp. at 18. Stated more succinctly, Maine claims that any school participating in its tuition-assistance program is a "*de facto* public school[]." *Id.* at 23. An implicit premise in Maine's assertion of the prerogative to "define a public education to mean a secular education," *id.* at 24, is the notion that private schools participating in its tuition-assistance program are subject to the same constitutional metes and bounds as state-run public schools.

In this regard, Maine is mistaken, both as to matters of law and fact. Although Maine's constitution requires "the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools," ME. CONST. art. VIII, pt. 1, § 1, Maine's legislature has expressly allowed "the parent's *choice*" to dictate whether a child will attend a "public school *or* [an] approved private school . . . at which the student is accepted," ME. STAT. tit. 20-A, § 5204(4) (2021) (emphases added).[6] In other words, Maine is wrong to argue that its "tuition program . . . is *not* a . . . 'school choice' program where parents are given the opportunity to select a school other than the public school that their students would otherwise attend." Pet. App. 29. In contrast, the *choice* is written directly into the statute at issue. *See* ME. STAT. tit. 20-A, § 5204(4) (2021). Similarly, the First Circuit was wrong to accept this argument. *See* Pet. App. 43-49.[7]

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[6] *See also* Pet. App. 7 ("The tuition assistance program works as follows. Parents first *select* the school they wish their child to attend." (emphasis added)).

[7] *See also* Pet. App. 43 ("[T]he program is designed to ensur[e], as [Maine] puts it, that students who cannot get a public school education from their own SAU can nonetheless get an education that is roughly equivalent to the education they would receive in public schools." (citing *Hallissey v. Sch. Admin. Dist. No. 77*, 755 A.2d 1068, 1073 (Me. 2000) (internal quotation marks omitted))); *id.* ("[T]he state defines the kind of educational instruction that public schools provide as secular instruction, based on its interest in maintaining a religiously neutral public education system in which religious preference is not a factor." citing 121 Me. Legis. Rec. S-640 (1st Reg. Sess. May 14, 2003) (statement of Sen. Martin) (internal quotation marks omitted))); *id.* at 45 ("Maine has permissibly concluded

Stated bluntly, Maine's tuition-assistance program expressly allows parents to *choose* between schools that are necessarily and qualitatively different—*i.e.*, public or private (so long as the private schools are not religious). As discussed above, private schools (and, in particular, all-girls private schools) differ from public schools by design; they offer an exceptional experience based on the unique needs of young women. Because they are not, as a matter of law or fact, *de facto* public schools, they are not subject to the same constitutional strictures under which public schools labor.

The First Circuit's contrary conclusion renders its opinion incorrect as a matter of the First Amendment's Religion Clauses. While public schools may not, consistent with the Establishment Clause, engage in religious instruction, *see Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995) (emphasis omitted) (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.)), the same is not true of private schools, even those receiving government funds, *see Espinoza*, 140 S. Ct. at 2258. As this Court has recognized in an analogous case, if an "aid program . . . provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

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that the benefit of a free public education is tied to the secular nature of that type of instruction.").

The question of whether private schools participating in Maine's tuition-assistance program are *de facto* public schools is also relevant for purposes of the First Amendment's Free Speech Clause. While public—*i.e.*, government—schools may not, consistent with the First Amendment, endorse or advance a religious message, the "private" religious "speech" offered by private religious schools is indeed, protected by "the Free Speech and Free Exercise Clauses." *Pinette*, 515 U.S. at 765. Because Maine's tuition-assistance program, as currently administered, forecloses the ability of private religious schools, and *only* private religious schools, to participate in the marketplace of educational ideas, the tuition-assistance program should be held unconstitutional as perpetuating viewpoint discrimination without any hint of a compelling governmental interest that could conceivably justify it.

"Private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Id.* at 760. "Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Id.* And, as this Court has long recognized, the First Amendment protects not just the right to speak but also the right to receive that speech. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976).

In *Rosenberger v. Rectors and Visitors of the University of Virginia*, this Court held that the First

Amendment's Free Speech Clause is violated when a State provides government funds for educational purposes but excludes religious speech from access to those funds. 515 U.S. 819, 832 (1995). In so holding, the Court reiterated that "[d]iscrimination against speech because of its message is presumed to be unconstitutional," *id.* at 828 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994)); "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression," *id.* (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991)); and "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant," *id.* at 829 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). *Rosenberger*, standing alone, demonstrates that Maine's prohibition on the participation of sectarian schools in its tuition-assistance program cannot survive Free Speech Clause scrutiny.

Rosenberger, however, is not the end of the story. Indeed, in recent years, the Court has added teeth to its content- and viewpoint-based First Amendment jurisprudence. In *Reed v. Town of Gilbert*, the Court explained that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." 576 U.S. 155, 163 (2015). "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563-65 (2011)). And, naturally,

"[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* (citing *R.A.V.*, 505 U.S. at 395; *Simon & Schuster, Inc.*, 502 U.S. at 115, 118); *see also Rosenberger*, 515 U.S. at 832 ("[D]iscriminating against religious speech [i]s discriminating on the basis of viewpoint" and is "presumed to be unconstitutional").

In *Locke v. Davey*, Chief Justice Rehnquist (in a footnote) held that the college-scholarship program at issue in that case was "not a forum for speech" because "[t]he purpose of" it was "to assist students from low- and middle-income families with the cost of postsecondary education, not to 'encourage a diversity of views from private speakers.'" 540 U.S. 712, 735 n.3 (2004) (citing *United States v. Am. Library Ass'n*, 539 U.S. 194, 206 (2003). For that reason, Chief Justice Rehnquist, without providing any further analysis, stated that the Court's "cases dealing with speech forums are simply inapplicable" *Id.* (citing *Am. Libr. Ass'n*, 539 U.S. at 206; *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 805, (1985)). The First Circuit relied on this language to hold that, because "Maine's tuition assistance program 'deals with the provision of secular secondary educational instruction to its residents" and "does not commit to providing any open forum to encourage diverse views from private speakers," the religious-school prohibition does not violate "the Free Speech Clause of the First Amendment." Pet. App. 52 (citing *Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004)).

Subsequent precedent, however, has removed the foundation on which Chief Justice Rehnquist's conclusion relied. Justice Thomas's majority opinion in *Reed* never mentioned the word "forum"; instead, it concluded, simply and straightforwardly, that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional." 576 U.S. at 163. And in *Holder v. Humanitarian Law Project*, the Court held that law burdening a particularized message is content based and, therefore, subject to strict scrutiny, even though that case had nothing to do with a government-created speech forum. 561 U.S. 1, 27-28 (2010); *see id.* at 7, 27-28 (noting that First Amendment challenge involved law banning the provision of "material support or resources" to certain foreign organizations that engage in terrorist activity but nonetheless subjecting law to content-based strict scrutiny) (citing 18 U.S.C. § 2339B(a)(1)). At a minimum, this recent precedent shows that Chief Justice Rehnquist's *Locke* footnote has not aged well, and because viewpoint discrimination of the sort inflicted by Maine is "an egregious form of content discrimination," *Rosenberger*, 515 U.S. at 829, the Court should take this opportunity to overrule it on the basis of *Reed* and *Humanitarian Law Project*.

As noted above, all-girls religious schools offer a unique, and uniquely valuable, message that benefits them in ways that coeducational and secular education do not. Because this religious message emanates from private schools (and *not* from *de facto* public educational institutions), it is fully protected under the First Amendment's Freedom of Speech guarantee. *See Pinette*, 515 U.S. at 765. Because

Maine has foreclosed the ability of willing listeners to receive this message, *see Va. State Bd. of Pharmacy*, 425 U.S. at 756-57, it has engaged in impermissible viewpoint-based discrimination, *Rosenberger*, 515 U.S. at 832. And because Maine can offer no conceivable government interest (compelling or otherwise) to justify this "egregious form of content discrimination," *Rosenberger*, 515 U.S. at 829, its sectarian-school prohibition must be stricken as violative of the First Amendment's Free Speech Clause.

III. The negative effects of Maine's prohibition are real and acute.

A cursory look at the current participants in Maine's tuition-assistance program demonstrates the harm caused by Maine's suppression of educational speech.

The interest that Maine families have in the message offered by all-girls educational institutions is so acute that many have chosen to send their daughters to high schools out of state in order to receive it. For example, during the 2019-20 and 2020-21 school years, young women from Maine attended Dana Hall, an all-girls academy in Massachusetts.[8] In fact, during the pre-pandemic

[8] *See* State of Maine Department of Education, Private School Approved for the Receipt of Public Funds from Maine School Units 2019-20, *available at* https://www.maine.gov/doe/sites/maine.gov.doe/files/inline-files/FY20_PrivateSchoolsApprovedTuition_19Jun2020.pdf; *see also* State of Maine Department of Education, Private School Approved for the Receipt of Public Funds from Maine School Units 2020-21, *available at* https://www.maine.gov/doe/sites/maine.gov.doe/

2018-19 school year, Maine residents attended thirteen different out-of-state schools in eight different states using Maine's tuition-assistance program, at least three of which were all-girls schools.[9]

In other words, Maine families place enough importance on the benefit to girls of single-sex education that they are willing to send their daughters to all-girls schools outside of Maine. This case, along with the series of cases challenging Maine's prohibition on religious-school participation, further demonstrates that Maine families are acutely aware of the benefits that sectarian schools offer their children. It follows, then, that some families, if given the opportunity, would indeed choose to send their daughters to all-girls religious schools. The First Amendment's Free Speech Clause enshrines their right to make this choice.

While secular New England schools may accept students from Maine under that state's tuition assistance program, every all-girls religious high school in New England is barred from accepting such students. These schools represent lost opportunities for the Maine families who ascribe to the value inherent in all-girls religious education and would otherwise choose to send their daughters to one of these schools. The First Amendment's Free Speech Clause protects their choice to do so, and the Court

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files/inline-files/FY21_PrivateSchoolsApprovedTuition_27May2021.pdf.

[9] *See* https://www.maine.gov/doe/sites/maine.gov.doe/files/inline-files/FY18_PrivateSchoolsApprovedTuition_28Nov2018.pdf.

should take this occasion to make this point expressly.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the First Circuit.

Respectfully submitted,

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