

No. 20-1088

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IN THE  
*Supreme Court of the United States*

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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 Commis-  
sioner of the Maine Department of Education,  
*Respondent.*

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

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**BRIEF OF INNOVATIVE SCHOOLS  
AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONERS**

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## **QUESTION PRESENTED**

Does a state violate the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or “sectarian,” instruction?

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

Build UP is the Nation’s first and only workforce development model that provides low-income youth career-ready skills through paid apprenticeships with industry-aligned secondary and early-postsecondary academic coursework, leading them to become educated, credentialed, and empowered civic leaders, professionals, homeowners, and landlords. Founded in 2018, Build UP operates two campuses in Birmingham, Alabama, and is in the process of opening a third in Cleveland, Ohio. It currently has 65 students enrolled for the 2020–2021 school year.

Kuumba Preparatory School for the Arts is an African-centered private school located in southeast Washington, D.C. The school offers a year-round non-traditional program to toddlers, pre-schoolers, intermediate, and high-school students in an intimate setting for academics, culture, and the arts. Its goal is to assist children in developing their character and artistic talent through holistic education, and to develop students’ self-awareness through historical and cultural linkages that will fulfill their sense of purpose.

*Amici* have an interest in this case because they employ innovative and nontraditional methods to ed-

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<sup>1</sup> Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part and no one other than the *amici* and its counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel for *amici curiae* states that counsel for Petitioners and Respondent received timely notice of intent to file this brief, and each has consented in writing to the filing of this brief.

ucate the whole student, emphasizing not only academic performance, but also character development and community engagement. Many of their students depend on government tuition assistance.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

It is no secret that the United States' educational system is underperforming. The number of students who graduate high school ready for college is nearing historic lows. Elin Johnson, *Another Drop in College Readiness*, Inside Higher Ed (Nov. 4, 2019), <https://tinyurl.com/52vm8htt>. America continues to lag other developed countries academically, with one recent survey of 15-year-olds in 71 countries ranking the United States 38th in mathematics, 24th in science, and 24th in reading. Drew DeSilver, *U.S. Students' Academic Achievement Still Lags That of Their Peers in Many Other Countries*, Pew Research Center (Feb. 15, 2017), <https://tinyurl.com/2mzw9nw8>. Meanwhile, educational achievement varies widely within the country, with Black and Hispanic students consistently trailing White and Asian students in reading and mathematics. See *K-12 Disparity Facts and Statistics*, UNCF, <https://tinyurl.com/tyb8r7vm>.

There is no easy way to reverse this disturbing trend. And there is no one policy program that can be expected to work for each of the Nation's 56.4 million school-age children in each of our 13,688 school districts. See *Back to School Statistics*, National Center for Education Statistics, <https://tinyurl.com/5aw5wvav>; *Digest of Education Statistics*, National Center for Education Statistics, <https://tinyurl.com/9sm34f92>. For precisely this reason, it is



crucial that educators have the flexibility to experiment with new methods for reaching those students who are being left behind, and that parents have the freedom to select the schools that give their children the best chance to achieve their full potential.

*Amici* operate innovative schools founded on the principle that different students learn differently, and that it is the responsibility of educators to embrace students' unique capacities as a tool for learning, not an obstacle to it. One *amicus*, for example, incorporates into its curriculum African-centered concepts, including African history and culture, as a means to build the character and develop the self-awareness of its largely African-American student body. Another *amicus* supplements in-class learning with paid apprenticeships in students' neighborhoods, providing students not only practical learning and an income, but a connection to—and investment in—their communities.

Despite *amici's* divergent approaches, each has had remarkable success preparing students to thrive in an increasingly diverse and demanding world. But the greatest challenge remains ensuring that parents and students can take advantage of the educational opportunities that are best suited to their needs. Unfortunately, the First Circuit's decision imposes unnecessary and artificial constraints on families' access to these opportunities by excluding from tuition assistance programs any school that is deemed insufficiently secular. And the adverse effects of this decision will be most acutely felt by those who already have the fewest opportunities open to them.

For these reasons, the Court should grant certiorari and reverse the decision below.

## ARGUMENT

### I. CHILDREN HAVE UNIQUE LEARNING STYLES AND EDUCATIONAL NEEDS.

As any parent knows, every child is different. This commonsense observation extends not only to interests and inclinations, but also to what children bring to the classroom and how they learn once they are there. While schools across the country have taken steps to tailor instruction to the particular needs of individual students *within* the classroom, structural hurdles—from class size to resource constraints to concerns about quality control—have limited their ability to do so in a widespread and effective way. As a result, it is crucial to promote differentiation and specialization *among* schools as well, allowing different schools to adopt different techniques aimed at different students with different needs.

Although researchers have posited various taxonomies to describe students' learning styles, they all agree that students learn in different ways. One prominent approach, for example, “portrays two dialectically related modes of grasping experience . . . and two dialectically related modes of transforming experience.” Alice Y. Kolb & David A. Kolb, *The Kolb Learning Style Inventory 4.0: A Comprehensive Guide to the Theory, Psychometrics, Research on Validity and Educational Applications* 7–8 (2013), <https://tinyurl.com/49msknck>. Based on “one’s genetic makeup, particular life experiences, and the demands of the present environment, a preferred way of choosing among these four learning modes is developed,” *id.*

at 9, resulting in nine different learning styles: Initiating, Experiencing, Imagining, Reflecting, Analyzing, Thinking, Deciding, Acting, and Balancing, *id.* at 14–15. Another common typology, “VARK,” classifies students as Visual Learners, Auditory Learners, Reading/Writing Learners, or Kinesthetic Learners based on how they most effectively internalize information. *See 4 Different Learning Styles You Should Know: The VARK Model*, University of Kansas (July 31, 2019), <https://tinyurl.com/p96njfd6>.

A student’s academic achievement is highly correlated to the match between his learning style and the teaching methods employed by his educators. Research confirms “that teachers and administrators are able to improve the quality of instruction in their schools when they are aware of the learning styles of their students.” Rahmatullah Bhatti & William M. Bart, *On the Effect of Learning Style on Scholastic Achievement*, 16 *Current Issues in Education* 1 (Aug. 19, 2013). And as two scholars have observed, “knowing one’s learning style can be beneficial if learners take the next step, and consider how and when they learn, as part of a reflective, metacognitive process, with action to follow.” Neil Fleming & David Baume, *Learning Styles Again: VARKing Up the Right Tree!*, *Educational Developments* 3 (2006), <https://tinyurl.com/557y3vs9>; *see also* Stephen Petrina, *Curriculum and Instruction for Technology Teachers* 125 (2004), <https://tinyurl.com/6w933zf9> (“We have learned quite a bit about accommodating the variability of students through research into instructional methods and learning styles. If we vary our methods, we have learned, we accommodate a wider range of

learning styles than if we use one method consistently.”).

In response to this research, schools across the country have endeavored to incorporate differentiated instruction, tailored to the individual needs of students, into the classroom. In New York City, for example, the City’s Department of Education “launched iZone, a community of over 300 schools to test innovative classroom methods and technologies with the goal of ‘designing schools around the needs, interests, and motivations of individual students, by personalizing rather than standardizing the model of schooling and learning.’” Gng, *Education: One Size No Longer Has to Fit All*, Harvard Business School (Nov. 17, 2016), <https://tinyurl.com/19t3jda7>. In Connecticut, “[t]eachers in Stamford Public Schools practice differentiated instruction,” in which “[e]very student is a unique learner with academic strengths and weaknesses” and “[c]lassrooms are designed to foster individual exploration, continued growth and educational independence.” *What Is Differentiated Instruction?*, Stamford Public Schools, <https://tinyurl.com/s9zpe2cn>. These schools are not outliers.<sup>2</sup>

While these developments are promising, there are limits on teachers’ ability to tailor education for the divergent needs of students *within* a classroom.

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<sup>2</sup> See, e.g., *Differentiated Instruction*, Wilmette Public Schools, <https://tinyurl.com/1u9ti17r> (“In differentiating instruction, teachers address student learning differences by modifying content, process, product, and environment.”); *What Is Differentiated Instruction?*, San Francisco Unified School District, <https://tinyurl.com/52zyheab>; *Differentiated Instruction*, Hamburg Central School District, <https://tinyurl.com/38ncbwac>.

Among other things, resource constraints make it difficult for teachers to provide tailored instruction to large and heterogeneous classes comprising many different students with many different needs. See Rebekah Clayton, *The Case Against a One-Size-Fits-All Education*, EF Academy Blog, <https://tinyurl.com/qyvzllch> (“Many schools use only a single mode of teaching because, in practice, the resource[s] required to create a varied learning experience is different from that of writing a lecture or creating a PowerPoint.”). And concerns about quality control create an incentive for administrators to maintain fixed standards across classrooms at the expense of individualization. See Valerie Strauss, *Teacher: A One-Size-Fits-All Approach to Instruction Is Stifling Our Classrooms*, Washington Post (Dec. 23, 2016), <https://tinyurl.com/nklk75w0> (“In an effort to minimize gaps in teacher quality, some education reformers are pushing a routinized, one-size-fits-all approach to instruction and classroom culture.”).

And of course, even similar *types* of learners will come to the classroom with different backgrounds and aptitudes. A brilliant student will struggle to keep up in a classroom where she is not fluent in the language of instruction. And a student who struggled in one subject in a prior school or in a prior year will require additional attention to get up to speed. Thus, as one commentator observed: “The challenge . . . for school leaders is to address both equity and excellence in today’s schools. How can you provide access for struggling learners to high-level, potent and engaging learning opportunities without denying the needs of highly able learners to work at a pace and level of complexity appropriate to their special learning needs?”

Carol Ann Tomlinson, *Leadership for Differentiated Classrooms*, AASA, The School Superintendents Association, <https://tinyurl.com/2bf5dzby>; see also *SFUSD Veers Away from Honors Classes*, San Francisco Examiner (Feb. 12, 2012), <https://tinyurl.com/rchzv8> (“In diverse classes, teachers can adjust lessons to fit different children, whether they need enrichment or extra help with the basics. But this approach, called ‘differentiated instruction,’ can be difficult when class-sizes are large and the range of abilities wide.”).

As a result, it is imperative to foster differentiation *among* schools, and to allow parents to select the school that best fits the needs of their children. Some public school systems have already taken steps to do this. In Massachusetts, which has extended to public schools the flexibility typically afforded to charter schools, one district school “has used its flexibility to create a bilingual high school for a predominantly Latino student body, giving immigrant students a way to excel academically while they learn English and American-born Latinos a way to connect with their culture through language.” Tara Garcia Mathewson, *States Increasingly Extend Charter-Like Flexibility to District Schools*, Hechinger Report (Aug. 15, 2019), <https://tinyurl.com/345eh9z4>. Another “adopted a trimester system to accept kindergartners three times per year, once they turn 5, changing a traditional cut-off that requires kids turning 5 after Sept. 1 to wait an entire year to start school.” *Id.*

But such experimentation is still the exception rather than the rule within traditional schools. As a result, most innovation aimed at providing targeted education is occurring in the private sphere—including in innovative schools like those operated by *amici*.

## **II. INNOVATIVE SCHOOLS PROVIDE OPPORTUNITIES TO THOSE LEFT BEHIND BY TRADITIONAL SCHOOLING.**

*Amici* operate innovative schools that deploy cutting-edge methods to get the most out of their unique student populations. Although they take different approaches to their educational mission, they have each had remarkable success preparing a new generation of leaders to thrive in our increasingly complex world.

Kuumba Preparatory School of the Arts is an African-centered private school located in southeast Washington, D.C. that enrolls children from toddlers to high-school seniors. Taking its name from the Swahili word for “creativity,” Kuumba’s mission is “to develop the Artist/Scholar” by using the arts to stimulate learning and harnessing the power of theater, music, dance, poetry, and song to develop the whole child.

Serving a predominantly African-American population, Kuumba aims to develop students’ self-awareness through historical and cultural linkages that will fulfill their sense of purpose and prepare them to play an intricate role in a diverse and socially complex world. To this end, the school incorporates African concepts into its core curriculum—including mathematics, engineering, technology, and social studies—and teaches African languages and culture. And while Kuumba’s year-round program is rigorous, the school takes a holistic approach to education by prioritizing not only academic performance, but artistic talent and character development as well, supplementing classroom learning with daily meditation, exercise, and a 100 percent vegan diet.

Kuumba parents gush over the school's success at fostering the values of community, culture, and character in their children. As one parent reports, "[t]his school is a village, teaching community and collectivity" and "instill[ing] cultural pride and African centered appreciation" in students. Another parent recounts that, "[b]eing from East Africa, it was important for me to find a school that teaches African History, African American History, [and] World History," and "love[s] the fact that [her son] is learning how to grow his own food, how to be responsible for his community." According to another parent: "Kuumba has given my son more self-confidence since he has been at the school. The experiences we have had together exploring our history and culture has been eye-opening as well as life changing." And yet another parent states that "Kuumba has changed my children's lives[,] making them more confident and focused on what is important in life."

Build UP, a private school headquartered in Alabama, is the Nation's first and only workforce development high school that provides low-income youth with career-ready skills through paid apprenticeships, leading them to become educated, credentialed, and engaged civic leaders, workers, homeowners, and landlords. Over the course of six years following the eighth grade, a new cohort of students enters Build UP's full-time program, spending half their time in an academic setting gaining knowledge directly applicable to paid apprenticeships in the real estate and construction sectors, and half their time rehabilitating blighted and abandoned homes into like-new single-family homes and duplexes. At the end of the six-year



program, each student earns both a high school diploma and an associate's degree in his or her chosen field—and also purchases the deed to at least one of the properties he or she has rehabilitated with a zero-interest mortgage.

Build UP's unique model is built on the premise that combating longstanding systemic inequities requires not just educating individual students, but reversing the vicious cycle whereby struggling communities fall ever farther behind as their most promising young leaders “escape” to greener pastures elsewhere. By rehabilitating blighted houses, Build UP's students revitalize communities and prevent the further erosion of surrounding property values. And by taking ownership of those properties upon graduation, students gain an important link to—and investment in—their neighborhoods. In the words of Build UP's CEO, Mark Martin, “the real innovation behind Build UP is that our youth are solving their own communities' problems.”

Although Build UP is just three years old, it has already enrolled 65 students at two campuses in Birmingham, Alabama, and is in the process of opening a third campus in Cleveland, Ohio. As one student at Build UP's Ensley campus in Birmingham said after transferring from a school at which he was struggling, “it really gives me a lot of hope for the future because I'm getting rid of the blight in my neighborhood. I see it as an opportunity in life.”

Needless to say, these schools are not for everybody. But that is precisely the point: *No* school is for *everybody* because each student has unique needs. The innovative schools operated by *amici*—and the

countless other innovative schools operating throughout the country—simply provide another option to parents and students who are not getting what they need from more traditional options. Their ability to take advantage of these options is often the difference between a high school diploma, economic independence, and a feeling of membership in a community, on the one hand, and another generation being caught in the poverty trap, on the other.

### **III. PARENTS OUGHT NOT BE UNDULY CONSTRAINED IN IDENTIFYING AND SELECTING THE BEST SCHOOL FOR THEIR CHILDREN’S UNIQUE NEEDS.**

The First Circuit’s decision in this case imposes artificial and unnecessary constraints on parents’ ability to choose the school best suited to their children’s individualized needs by denying access to generally available tuition assistance when that assistance will be used to send a child to a school deemed by the government to be insufficiently secular. This decision will have the perverse effect of hurting those who are most likely to benefit from innovative schools, and it will chill creativity and experimentation by schools that fear such experimentation may cause their students to lose access to critical tuition assistance.

While debates have raged for decades concerning the efficacy of nontraditional schooling models in general, the evidence is clear that they have had positive impacts on disadvantaged and marginalized communities. See Stavros Yiannouka & Zineb Mouhyi, *There Is No One-Size-Fits-All School Model: Developing a Flexible and Innovative Education Ecosystem*, Brook-

ings Institution (Apr. 3, 2018), <https://tinyurl.com/4rukj5db> (“[A]lthough U.S. charter schools have on average not delivered better results than public schools, a growing body of evidence indicates that urban charter schools have had large positive effects on the test scores of disadvantaged students.”). One reason for this is that schools in these communities are more likely to reach beyond pure academics and focus on developing students’ character, identity, and sense of community—whether by connecting students to their cultural heritage (as at the Kuumba Preparatory School for the Arts) or by fostering investment in their neighborhoods (as at Build UP). *See also id.* (“A likely reason [for these schools’ success] is that charter schools targeting disadvantaged students have devised specific strategies to address their students’ needs—including, longer school hours, higher standards, and emphasis on character development.”).

But precisely because these schools go beyond traditional academics to cultivate character and community, they are less amenable to bright-line divides between the secular and the religious. While neither *amicus* is strictly sectarian, each builds upon the moral and religious precepts of the communities it serves to instill integrity and a sense of belonging in its students. And they often work in close collaboration with sectarian enterprises to advance their educational mission. For example, Build UP’s classrooms are located in the Abyssinia Missionary Baptist Church, where students help maintain the building in lieu of paying rent.

Of course, the underserved and marginalized communities that have the most to gain from innovative

schools that emphasize character development alongside academic achievement are also those least able to access these options without government assistance. Most of Build UP's students receive financial assistance from state-approved Scholarship Granting Organizations under the Alabama Accountability Act of 2013, and many K–12 students at Kuumba receive assistance through Washington, D.C.'s Opportunity Scholarships. Limiting these programs to schools that conform to their respective jurisdiction's standards of secularity may well force parents to move their children into schools that are less well suited to their families' needs.

But it will not only be the particular students that lose. Innovative schools are a proving ground for new pedagogical methods that could, if successful, expand to new contexts. But if these schools fear that their innovative methods may compromise their students' ability to secure vital tuition assistance from public sources, they will likely abandon those plans to the detriment of the broader education community.

There is no reason to invite these adverse consequences. Parents are more than capable of evaluating the needs of their children and selecting the best school to meet those needs. In some cases, those needs will be best served by traditional public schools; in others, they will be better served by secular private or charter schools; and in still others, students will thrive in religious or innovative schools. The government should not force parents to choose one type of school over another, but nor should it deny parents access to a school that presents their children with the greatest opportunity to reach their full potential.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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