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

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Respondent (hereinafter "Commissioner") acknowledges that this case squarely presents the religious use-based discrimination issue that this Court flagged, but declined to resolve, in *Espinoza v. Montana Department of Revenue*, ___ U.S. ___, 140 S. Ct. 2246 (2020). Her arguments as to why the Court should also decline to resolve it here are unavailing.

First, this case is not, as she contends, an "outlier," BIO 18; a decision in it would have wide-ranging, national implications for school-choice and other student-aid programs. Second, Maine's tuition assistance program does not convert participating private schools into "*de facto* public schools," BIO 23; it offers private alternatives to public schools and allows those private alternatives to *remain* private. Third, the cases in which the Sixth and Tenth Circuits invalidated religious use-based exclusions are not distinguishable from this one, *see* BIO 26-28; the decision below is in square conflict with those decisions, and there is no reason to let the issue percolate any longer. Fourth, there is no "question" as to standing in this case, BIO 28; the Commissioner claimed there was below, and the First Circuit roundly rejected her argument. Fifth, this case is not, as the Commissioner pretends, about discriminatory beliefs, practices, and policies of certain private schools, *see* BIO 7-13, 20; it is about *Maine's* discrimination against students who desire a religious education.

I. Maine's Tuition Assistance Program Is Not An "Outlier."

Hoping to diminish the importance of this case, the Commissioner insists that Maine's tuition assistance program is *sui generis*—unlike the Montana and Ohio school-choice programs at issue in *Espinoza* and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and unlike the school-choice programs in 27 other states and the District of Columbia. *See* BIO 2, 18-19, 23.[1] The uniqueness of Maine's program, she says, "make[s] this case an outlier" and "unworthy of further review," because "[a]ny decision in [it] will be of little consequence outside of Maine." BIO 18. The Commissioner is wrong: Maine's tuition assistance program *is* a school-choice program like dozens of others throughout the country, and a decision addressing the constitutionality of its sectarian exclusion will have national reach.

What, according to the Commissioner, is the difference between Maine's program and virtually every other school-choice program? It "use[s] private schools *in place of*, and not as an *alternative to*, public schools," she claims. BIO 18 (emphasis added). That description, however, contravenes the very text of the statute creating the program, which states that a school district "shall pay the tuition . . . at the public school *or* the approved private school of the parent's choice." Me. Stat. tit. 20-A, § 5204(4) (emphasis added). That is a school-choice program no matter how you skin it, offering

[1] For a complete list of programs, *see* EdChoice, *School Choice in America Dashboard*, https://www.edchoice.org/school-choice/school-choice-in-america/.

private schools as an alternative to—not in place of—public schools.

If a school district instead chooses to contract with a single private school to educate its resident students, *see id.* §2701, that school might well be viewed as operating "in place of" a public school. But that is not the tuition assistance program, and that is not this case. Districts that offer the tuition assistance program make the legislative determination to offer public *and* private options. Once a district makes that determination, it must remain neutral between secular and religious private options.

The First Circuit's decision to the contrary, if allowed to stand, will provide a roadmap for any state with a school-choice or other student-aid program to exclude religious options. By simply characterizing the program as using private schools "in place of" public schools, a state could insulate a religious exclusion, whether use- or status-based, from constitutional scrutiny. The Montana Department of Revenue, for example, could justify the religious status-based discrimination that this Court held unconstitutional in *Espinoza* by simply describing Montana's scholarship program as using private schools "in place of," not as an "alternative to," public schools. A family's Free Exercise rights should not turn on wordplay.

II. Participating Private Schools Are Not "*De Facto* Public Schools."

The Commissioner's insistence that private schools operate in place of—and are thus "*de facto*"—public schools is meant not only to diminish the significance of this case, but also to legitimize the discrimination in which Maine is engaged. After all, she observes, "there is no question that Maine may require its *public* schools to provide a secular education." BIO 15 (quoting App. 43-44). Of course Maine can require its public schools to provide a secular education, and the tuition assistance program ensures that students have a secular public education available to them. But it does so by allowing students to *attend public schools*—not by converting private options into "*de facto* public schools." BIO 23; *cf. Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) ("[T]he fact that virtually all of [a] school's income [i]s derived from government funding, . . . does not make [its] discharge decisions acts of the State").

Indeed, if the private schools that students may choose under the program truly were "*de facto* public schools," then the program would contain provisions to ensure they operate like public schools. For example, it would prohibit private schools from charging a student more than her tuition benefit, as public schools cannot charge students for attendance. Yet the program *allows* private schools to charge more than a student's benefit. Me. Stat. tit. 20-A, § 5806(3). The Commissioner's claim that the "the public benefit bestowed by

the program [is] a *free* public education" rings hollow. BIO 23 (emphasis added).

Likewise, if the program truly were using private schools as public schools, it would require them to accept all comers. Yet the program allows private schools to maintain their ordinary admissions policies, *see* Me. Stat. tit. 20-A, § 5204(4) (App. 82), and participating private schools routinely consider admissions factors such as academic achievement[2] and sex.[3]

So, no, the program does not transform participating private schools into "*de facto* public schools." BIO 23. It allows parents to choose the school, whether public *or* private, that will best meet their child's needs. If parents opt for a private school, that school *remains* private.

Of course, one type of private school is off-limits: any school that "promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." App. 35. This Court should grant certiorari to make clear that such discrimination is unconstitutional.

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[2] School districts have paid for students to attend the most elite, academically selective prep schools in the nation. Pet. 5.

[3] *See* Stipulated Record Ex. 2, at 11, *Carson v. Makin*, No. 1:18-CV-00327-DBH (D. Me. Mar. 12, 2019), ECF No. 24-2 (listing all-boys Avon Old Farms and Fishburne Military School, as well as all-girls Miss Porter's and Miss Hall's, as approved for tuition purposes).

III. The First Circuit's Decision Conflicts With Sixth And Tenth Circuit Decisions, And There Is No Reason To Let The Question Presented Percolate.

In her next argument against certiorari, the Commissioner claims "[t]he decision of the Court of Appeals does not conflict with the decision of any other appellate court." BIO 26. It does. The Sixth and Tenth Circuits have held it unconstitutional to bar participants in student-aid programs from using their benefits at schools that provide religious instruction. Pet. 18-21. Here, meanwhile, the First Circuit joined the Vermont Supreme Court in upholding such exclusions. That conflict, which has been deepening since the 1990s, is mature, and there is no reason to let the issue percolate any longer.

The Commissioner's attempt to distinguish the cases invalidating religious use-based exclusions in student-aid programs is unavailing. She insists, for example, that the Tenth Circuit's decision in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), is inapposite because Colorado's religious exclusion "attempted to distinguish between sectarian and pervasively sectarian institutions"—not sectarian and non-sectarian institutions. BIO 27. Yet she ignores *how* Colorado distinguished between sectarian and pervasively sectarian institutions: by inquiring into the religiosity of a school's curriculum and activities to determine whether it "required courses in religion or theology that tend to indoctrinate or proselytize" or "required attendance at religious convocations or services."

Colo. Christian, 534 F.3d at 1250-51, 1253. That is precisely what Maine does to determine whether a student's chosen school is sectarian: The State's "focus is on what the school teaches through its curriculum and related activities, and how the material is presented." App. 35.

Undeterred, the Commissioner notes that *Colorado Christian* itself distinguished Maine's exclusion from Colorado's on the ground that Maine "excluded *all* religious schools without . . . using any intrusive inquiry to choose among them." BIO 27 (quoting *Colo. Christian*, 534 F.3d at 1256-57). But Maine's construction of its exclusion has changed since *Colorado Christian* was decided. As the Tenth Circuit explained, Maine at that time excluded schools "based on their religious *affiliation*." *Colo. Christian*, 534 F.3d at 1256 n.4 (emphasis added). Now that such status-based discrimination is clearly unconstitutional, Maine excludes schools based on the religious "use" to which a student's tuition assistance might be put. The First Circuit "accept[ed]" Maine's "use-based construction" of the exclusion, App. 37, and that is how the case comes to this Court: The exclusion now operates precisely how Colorado's did. The Tenth Circuit held such discrimination unconstitutional, while the First Circuit upheld it. That is a conflict, and it warrants this Court's attention.

The Commissioner's attempt to distinguish the Sixth Circuit's decision in *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), is equally unavailing. The Commissioner acknowledges that the Army regulations at

issue in that case "prohibited . . . childcare providers from including religious information or activities as part of their care." BIO 26. Nevertheless, she insists that the Sixth Circuit did not "consider the issue of religious use" of government funds, because the governmental aid that day-care providers received was "indirect aid" akin to that in this Court's precedent concerning "indirect aid to sectarian schools"—specifically, *Board of Education v. Allen*, 392 U.S. 236 (1968). BIO 26, 27.

The Commissioner's distinction is no distinction at all, because Maine's tuition assistance program also involves, at most, "indirect" aid to schools. *See Espinoza*, 140 S. Ct. at 2254 (noting Montana's school-choice program provided, at most, "indirect government support" to schools). As in *Allen*, "the financial benefit" offered by the program "is to parents and children, not to schools." *Allen*, 392 U.S. at 243-44.[4]

Given that *Colorado Christian* and *Hartmann* are indistinguishable, there is no reason to let the question presented by this case percolate any longer. Although the Commissioner urges caution because "*Espinoza* is so new," she readily acknowledges that *Espinoza* did not examine the question and "explicitly leaves [it] open." BIO 21, 28. There is no reason to let an issue that has plagued the lower courts for a quarter-century percolate in light of a decision that, by its own terms,

[4] Any aid to schools is not even indirect, but rather "incidental" to parental choice. *Zelman*, 536 U.S. at 652; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993).

did "not examine" that issue. *Espinoza*, 140 S. Ct. at 2257.

IV. The Carsons And Nelsons Have Standing.

Equally baseless is the Commissioner's claim that there is "a serious question as to whether Petitioners have Article III standing." BIO 28. She argues that invalidating Maine's sectarian exclusion will not necessarily redress the Carsons and Nelsons' injury, because it is not certain that Bangor Christian and Temple Academy would agree to educate children receiving tuition assistance. BIO 28-34. The Commissioner asserted the same argument below, and the First Circuit roundly rejected it.

As the First Circuit held, whether Bangor Christian or Temple Academy would agree to participate in the tuition assistance program is irrelevant, because the Carsons and Nelsons' injury "inheres in their having lost the *opportunity* to find religious secondary education for their children that would qualify for" tuition assistance. App. 17 (internal quotation marks omitted; emphasis added). Because "invalidation of" the sectarian exclusion "would restore" that opportunity, "it is not merely likely that the relief" they "seek would redress their injury, it is certain that it would." App. 18, 19.

The Commissioner cites several of this Court's decisions in arguing to the contrary, *see* BIO 31, but the First Circuit considered every one of them and determined they had no bearing on this case because:

(1) they "did not involve—as this one does—an injury in fact that inhered in a lost opportunity to seek a government benefit," (2) "[n]or did they involve—as this one does—an injury in fact traceable to the challenged governmental action." App. 19. The Commissioner does not even attempt to dispute these differences.

Meanwhile, those twin features *were* present, the First Circuit noted, in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), where this Court held that an organization representing private contractors had standing to challenge a city's minority set-aside provision. *Id.* at 658-59, 669. The Court did not require the organization to demonstrate that the city would have—or was even likely to have—exercised its discretion to contract with any of those private contractors if the set-aside were invalidated. Rather, the Court held that "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.* at 666; *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___ U.S. ___, 137 S. Ct. 2012, 2022 (2017) ("The express discrimination against religious exercise is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.").

The Commissioner insists that *Northeastern Florida Chapter* "is inapposite," because "the plaintiff contractors were the objects of the regulation," whereas, here, "sectarian schools, not [parents]," are the object of the sectarian exclusion. BIO 33, 34. That argument is baseless. The tuition assistance program exists for the benefit of parents and students—not schools. Under it, a school district must "pay the tuition . . . at the public school or the approved private school *of the parent's choice*," and the sectarian exclusion bars the Carsons and Nelsons' choice of any school that teaches religion.[5]

Thus, the supposedly "serious question" regarding standing is no question at all. BIO 28. Maine is engaged in religious use discrimination, and the Carsons and Nelsons can challenge it.[6]

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[5] On June 4, the Carsons' daughter graduates from Bangor Christian. This is no obstacle to their Petition, because the Nelsons still have school-aged children eligible for the tuition assistance program and injured by its sectarian exclusion. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

[6] The Commissioner's standing argument is also based on a false premise: that Bangor Christian and Temple Academy are "unlikely" to participate in the program because they "*likely* would no longer be free to refuse to hire homosexuals." BIO 10 n.1, 28 (emphasis added). Note the term "likely"—not even the Commissioner is convinced her argument is correct. That is because it turns on cherry-picked language from the Maine Human Rights Act. In a provision the Commissioner ignores, the Act provides that "a religious organization may require that all applicants and employees conform to the religious tenets of that organization." Me. Stat. tit. 5, § 4573-A(2). The Commissioner

V. This Case Concerns Maine's Discrimination Against Students Who Choose Religious Schools, Not The Positions Those Schools Take On Hot-Button Social Issues.

Of a piece with the Commissioner's standing argument is her final tactic: misdirecting the Court's attention from Maine's discrimination against students who desire a religious education to the supposed discrimination of certain religious schools in their beliefs, teachings, and policies. The Court should not be distracted by this obfuscation.

The Commissioner spends six and a half pages trolling through the beliefs, teachings, and policies of Bangor Christian and Temple Academy, declaring that they "discriminate" against "homosexuals, individuals who are transgender, and non-Christians." BIO 7-13, 20. The relevance of that charge is hardly clear, given that the statute at issue does not ask whether schools discriminate against homosexuals, transgendered individuals, or non-Christians. Rather, it asks whether a school teaches religion or engages in religious activities—that is, whether it "educat[es] young people in their faith, inculcate[es] its teachings, and train[s] them to live their faith." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, ___ U.S. ___, 140 S. Ct. 2049, 2064 (2020). Those are the "responsibilities that lie at the very core of the mission of a private religious school,"

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herself cited this provision below, explaining that "[r]egardless of whether a religious organization accepts public funds, it may require that all employees conform to its religious tenets." Defs.' Mot. Summ. J., Doc. No. 29, at 13 n.3.

id., and a religious school that teaches that its faith embraces homosexuality, gender fluidity, or denominational pluralism is *just as excluded* as Bangor Christian and Temple Academy.

If Maine wants to amend its tuition assistance program to exclude schools that consider certain factors in employment or admissions, it can do so. Such an exclusion might or might not be constitutional, but that is beside the point, because that is not the exclusion in this case, no matter how much the Commissioner pretends otherwise. The exclusion here asks whether a student's chosen school "promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." App. 35. That is the exclusion at issue, and this Court should review the First Circuit's decision upholding it.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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