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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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On June 2, 2021, after Petitioners (hereinafter "the Carsons and Nelsons") sent their Reply Brief to the printer for filing in this Court, the Second Circuit held that Vermont's exclusion of sectarian schools from that state's tuition assistance program violated the Free Exercise Clause. *A.H. v. French*, No. 21-87, 2021 WL 2213292 (2d Cir. June 2, 2021). Pursuant to Rule 15.8, the Carsons and Nelsons file this Supplemental Brief to bring that decision to this Court's attention, to address its relevance to their Petition, and to explain that it confirms the need to resolve the question presented by this case now.

I. The Second Circuit Invalidated A Religious Exclusion From Vermont's Tuition Assistance Program In *A.H. v. French*.

On June 2, the Second Circuit issued an opinion on a writ of mandamus regarding the sectarian exclusion in Vermont's tuition assistance program. *Id.*[1] This is the same program that was at issue in *Chittenden Town School District v. Department of Education*, 738 A.2d 539 (Vt. 1999), which the Carsons and Nelsons discussed in their Petition and Reply Brief. *See* Pet. 21-22, 23, 25; Reply Br. 6. It is also the same program

[1] The Second Circuit granted the writ, without an opinion, by order dated February 3, 2021. *A.H.*, 2021 WL 2213292, at *2. The opinion filed on June 2 "explains the reasons for that order." *Id.*

that Respondent (hereinafter "the Commissioner") recognizes as akin to Maine's tuition assistance program. *See* Br. in Opp'n (hereinafter "BIO") 18.

As the Carsons and Nelsons noted in their Petition, Pet. 22-23, the Vermont Supreme Court in *Chittenden* held that:

- the Vermont Constitution allows religiously affiliated schools, including "institution[s] operated by a religious enterprise," to participate in its tuition assistance program, *Chittenden*, 738 A.2d at 550; *see also id.* at 562, 563;
- the Vermont Constitution, however, prohibits "the *use* of public money to fund religious education"—specifically, "religious instruction" or "religious worship," *id.* at 562 (emphasis added); *see also id.* at 563 (noting Vermont Constitution requires "restrictions on the *purpose or use* of the tuition funds" (emphasis added)); and
- this bar on the use of the tuition assistance program to procure a religious education "plainly does not" violate "the Free Exercise Clause of the First Amendment," *id.* at 563-64.

As the Second Circuit noted in its June 2 opinion, however, Vermont has, for two decades, banned *all* religious or pervasively religious schools from participating in the program based on their religious *status*—not the religious *use* to which a student's tuition benefit might be put. *A.H.*, 2021 WL 2213292, at *7. "One

might interpret *Chittenden Town* as requiring only a use-based restriction on [tuition] funds," the Second Circuit noted, "but the school districts and the [Agency of Education] have, for decades, applied *Chittenden Town* through status-based exclusion of all religious or pervasively sectarian schools from the [tuition assistance program]." *Id.*

This religious status-based discrimination, the Second Circuit held, is unconstitutional under this Court's decision in *Espinoza v. Montana Department of Revenue*, ___ U.S. ___, 140 S. Ct. 2246 (2020). *A.H.*, 2021 WL 2213292, at *1, *7. The district court had previously recognized as much, issuing a preliminary injunction that prohibited school districts from continuing to deny tuition assistance "solely on the basis of . . . religious status." *Id.* at *5. But the district court had also declined to order school districts to make funds available to the plaintiffs for use at their chosen schools. *Id.* at *2, *5. The district court, in effect, had "allowed the districts" time "to develop new use-based restrictions on [tuition assistance] funds" pursuant to *Chittenden*. *Id.* at *5; *see also id.* at *9 n.2 (Menashi, J., concurring).

The Second Circuit held that the district court erred in refusing to order the school districts to make immediate payment of the plaintiffs' tuition funds. Accordingly, it issued a writ of mandamus "ordering the district court 'to amend its preliminary injunction to prohibit the [school districts] from continuing to deny the [plaintiffs'] requests for tuition reimbursement under the [tuition assistance program].'" *Id.* at *2, *5

(quoting Order Granting Petition for Writ of Mandamus). "At this point," the Second Circuit held, the plaintiffs "are entitled to [tuition assistance] funding to the same extent as parents who choose secular schools for their children, regardless of [their chosen school's] religious affiliation or activities." *Id.* at *8.

In a concurring opinion, Judge Menashi stressed that any potential future attempt to exclude schools based on religious *use*, pursuant to *Chittenden*, would be just as constitutionally problematic as the religious status-based discrimination to which the plaintiffs had already been subjected. *Id.* at *10, *11 (Menashi, J., concurring). "Even a use-based restriction," he observed, "would be subject to strict scrutiny if it applied specifically to religious schools or to religious conduct because such a restriction would 'violate "the minimum requirement of neutrality" to religion.' " *Id.* at *10 (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, ___ U.S. ___, 141 S. Ct. 63, 66 (2020)). He noted that "[n]either the district court nor the [school districts] ha[d] identified any evidence of a historic tradition of use-based restrictions . . . surrounding religious education," and that *Chittenden* had "identified a historic state tradition only of avoiding 'public support of churches and ministers.' " *Id.* at *11 (quoting *Chittenden*, 738 A.2d at 553); *see also id.* ("*Espinoza* clarifies that, while there is 'a "historic and substantial" state interest in not funding the training of clergy,' there is no comparable interest or tradition of states declining to aid religious education more broadly understood." (quoting *Espinoza*, 140 S. Ct. at 2258)).

Finally, Judge Menashi observed how any use-based exclusion pursuant to *Chittenden* would conflict with the Tenth Circuit's decision in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). Quoting *Colorado Christian*, he noted that "an evaluation of [a school's] curriculum to determine which courses and activities qualif[y] as 'religious education' . . . would likely entail 'intrusive judgments regarding contested questions of religious belief or practice' and thereby raise additional concerns under the First Amendment." *A.H.*, 2021 WL 2213292, at *11 (quoting *Colo. Christian Univ.*, 534 F.3d at 1261); *see also id.* ("[C]ourts should refrain from trolling through a person's or institution's religious beliefs." (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality))).

II. The Second Circuit's Decision Confirms The Need To Resolve The Question Presented Now.

The Second Circuit's decision in *A.H.* confirms the need for certiorari in this case and resolution of the question it presents. Even the Commissioner concedes that Maine's tuition assistance program is akin to Vermont's, BIO 18, and it now appears that parents in Vermont may choose a religious school for their children (provided, of course, the state does not impose new, religious use-based restrictions). Parents in Maine, however, continue to be denied that choice. A parent's right to freely exercise her religion—and to choose the school that is best for her child—should not turn on the state or federal circuit in which she happens to reside.

To be sure, the holding of the Second Circuit in *A.H.* does not *directly* conflict with the holding of the First Circuit in this case. After all, the Second Circuit concluded that Vermont's two-decade-long practice of excluding religious options was unconstitutional because it turned on the religious *status* of the excluded schools. The court did not reach the question of whether a religious use-based exclusion—the type of exclusion that *Chittenden* held is required by the Vermont Constitution—would violate the Free Exercise Clause. Here, on the other hand, the First Circuit upheld Maine's religious exclusion precisely because it turned on religious use and not status.

Nevertheless, the Second Circuit's decision underscores the need to resolve the question presented in this case: *i.e.*, the constitutionality of prohibiting students participating in a school-choice or other student-aid program from choosing to use their aid at schools that provide religious instruction. After all, the consequence of the Second Circuit's not reaching the constitutionality of such use-based discrimination in *A.H.* means that *Chittenden* and *its* holding that such discrimination is permissible remain good law. Vermont thus remains free to go the way of Maine—to swear off the status-based discrimination in which it has engaged for decades and instead exclude schools based on the religious "use" to which a student's aid might be put there. *See* Reply Br. 7 (noting how "Maine's construction of its exclusion has changed" since *Espinoza* made clear that religious status-based exclusions are unconstitutional).

Whether Vermont will take that course remains to be seen, but there is no reason to wait to find out whether it will. The issue is presented squarely by this case, it has divided the lower courts for a quarter century, and there is no reason to postpone its resolution. This Court should grant certiorari to foreclose even the possibility of such discrimination in Vermont and, more immediately, to end the actual, ongoing discrimination that students in Maine are suffering.

But perhaps the most compelling reason to grant certiorari in this case is the utter disarray of the law in this area. After realizing that its previously status-based exclusion of religious schools was unconstitutional, Maine turned to a use-based exclusion. After realizing that the use-based exclusion mandated by its state constitution was difficult to administer, Vermont turned to a status-based exclusion. A federal court of appeals upheld Maine's use-based exclusion. A federal district court invalidated Vermont's status-based exclusion but gave the state time to develop a use-based exclusion in its place. Another federal court of appeals ordered Vermont to disburse tuition assistance funds to students attending a religious school but did not opine on whether the state could withhold such funds in the future based on any use-based exclusion it might later develop. And two other courts of appeals have long held that excluding religious options based on the use to which a student's aid might be put violates the Free Exercise Clause.

Only this Court can resolve this mess. It should do so now.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition and Reply, the Court should grant the petition.

Respectfully submitted,

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