

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*

**BRIEF OF PROF. ASHLEY R. BERNER
AS AMICUS CURIAE IN SUPPORT
OF PETITIONERS**

Dominic E. Draye
Counsel of Record
William E. Eye
GREENBERG TRAUERIG LLP
2101 L Street, NW
Washington, DC 20037
(202) 331-3168
drayed@gtlaw.com

Counsel for Professor Ashley R. Berner

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
INTERESTS OF <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT.....	3
I. Pluralism Was the Norm at the Founding and Continues Today in Other Developed Democracies.....	4
A. The Rise and Fall of American Educational Pluralism.....	4
B. Educational Pluralism Is the Norm in Other Democratic Countries.....	11
II. Against the Neutrality Myth: District Schools Are Not Value Neutral.....	14
A. Education Is Inherently Normative	15
B. A Plurality of School Choices Better Serves the State’s Asserted Interest.....	17
III. The Scholarly Literature and Empirical Data Belie the State’s Asserted Rationale for Discriminating against Sectarian Schools.....	18
A. Against the Diversity Myth: Private and Sectarian Schools Are as Good as—if not Better than—District Schools at Instilling Democratic Virtues.....	19

B.	Against the Achievement Myth: Private and Religious Schools Per- form as Well, if not Better, than District Schools Academically	22
CONCLUSION		25

TABLE OF AUTHORITIES

CASES

<i>Bethel Sch. Dist. No. 403 v. Frazier</i> , 478 U.S. 675 (1986)	18
<i>Chamberlin v. Dade Cty. Bd. of Pub. Instruction</i> , 377 U.S. 402 (1964)	9
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962)	9
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	9
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	9
<i>Pennsylvania v Schemp</i> , 374 U.S. 203 (1963)	9
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	9

STATUTES

Me. Stat. tit. 20-A, § 2951(2)	3, 7
--------------------------------------	------

OTHER AUTHORITIES

Kathleen Abowitz & Jason Harnish, <i>Contemporary Discourses of Citizenship</i> , 76 Rev. of Educ. Res. 653 (2006)	5
Ashley R. Berner, “ <i>Good Schools, Good Citizens: Do Independent Schools Contribute to Civic Formation?</i> ” (June 2021), https://www.cardus.ca/research/education/reports/good-schools-good-citizens/	20

- Ashley R. Berner, “*Metaphysics in Educational Theory: Educational Philosophy and Teacher Training in England (1839-1944)*” (Univ. of Oxford, 2008)..... 13
- Ashley R. Berner, *No One Way to School: Pluralism and American Public Education* (2017) *passim*
- Ashley R. Berner, “*Would School Inspections Work in the United States?*,” Johns Hopkins Inst. for Educ. Policy (blog) (Sept. 14, 2017), <https://edpolicy.education.jhu.edu/would-school-inspections-work-in-the-united-states> 11
- Steven Brint et al., *Socialization Messages in Primary Schools*, 74 Soc. of Educ. (July 2001)..... 16
- Albert Cheng et al., “*The Protestant Family Ethic: What Do Protestant, Catholic, Private, and Public Schooling Have to Do with Marriage, Divorce, and Non-Marital Childbearing?*,” Institute for Family Studies (American Enterprise Institute 2020) 22
- Matthew Chingos, Tomas Monarrez, & Daniel Kuehn, “*The Effects of the Florida Tax Credit Scholarship Program on College Enrollment and Graduation*” (Washington, D.C.: Urban Institute, February 4, 2019), <https://www.urban.org/research/publication/effects-florida-tax-credit-scholarship-program-college-enrollment-and-graduation> 25
- Moshe Cohen-Eliya & Amos Zehavi, “Israel,” in Charles L. Glenn & Jan De Groof, *Balancing Freedom, Autonomy, and Accountability in Education* (2012) 13

Corey DeAngelis & Patrick Wolf, <i>Private School Choice and Character: More Evidence from Milwaukee</i> , SSRN Scholarly Paper (Feb. 26, 2019)...	22
K. Donnelly, <i>Regulation and Funding of Independent Schools: Lessons from Australia</i> , Fraser Inst. (Jan. 10, 2017)	12
Jasp Dronkers, “Do Public and Religious Schools Really Differ? Assessing the European Evidence,” in <i>Educating Citizens: International Perspectives on Civic Values and School Choice</i> (2004).....	24
David Figlio & Cassandra Hart, “Competitive Effects of Means-Tested Vouchers,” 1 <i>Am. Econ. J.: Applied Econ.</i> 6, 133–156 (Jan. 2014), https://doi.org/10.1257/app.6.1.133	25
William A. Galston, <i>Anti-pluralism: The Populist Threat to Liberal Democracy</i> (2018)	19
William A. Galston, “Political Knowledge, Political Engagement, and Civic Education,” 4 <i>Ann. Rev. of Pol. Sci.</i> (2001)	19
Charles L. Glenn, <i>Contrasting Models of State and School: A Comparative Historical Study of Parental Choice and State Control</i> (2011).....	12, 13
Charles L. Glenn, <i>The Discriminatory Origins of New Hampshire’s ‘Blaine’ Amendment, Unpublished Testimony</i> (April 2013).....	6, 8
Charles L. Glenn, <i>The Myth of the Common School</i> (2002).	5, 8

Charles L. Glenn, “What the United States Can Learn from Other Countries,” in <i>What Americans Can Learn from School Choice in Other Countries</i> (Cato Institute, 2005).....	12
Philip Hamburger, <i>Separation of Church and State</i> (2002)	7
David T. Hansen, “From Role to Person: The Moral Layerdness of Classroom Teaching.” 30 Am. Educ. Res. J. (1993)	16
Amy von Heyking, “Alberta, Canada: How Curriculum and Assessments Work in a Plural School System” (June 2019).....	14
Pope Leo XIII, <i>Spectata Fides</i> , Papal Encyclical (1885)	9
M.K. The, et al., “Singapore,” in Charles L. Glenn & Jan De Groof, <i>Balancing Freedom, Autonomy, and Accountability in Education</i> (2012)	13
Stephen Macedo et al., “Introduction: School Choice, Civic Values, and Problems of Policy Comparison,” in <i>Educating Citizens: International Perspectives on Civic Values and School Choice</i> (2004).....	24
Ron Matus, “Miami’s Choice Tsunami: Carvalho, Competition, and Transformation in Miami-Dade,” <i>Education Next</i> 20 (Winter 2020), https://www.educationnext.org/miami-choice-tsunami-carvalho-competition-transformation-miami-dade/	24, 25
Kevin McNamara, “ <i>Debate on Denominational Schools, Hansard</i> ” (House of Parliament, United Kingdom, July 20, 2004)	14

Helena Miller, “ <i>Meeting the Challenge: The Jewish Schooling Phenomenon in the UK</i> ,” <i>Oxford Rev. of Educ.</i> 27:4 (2001).....	13
OECD, <i>PISA 2018 Results (Volume I): What Students Know and Can Do</i> (OECD 2019).....	23
Ray Pennings, <i>Cardus Education Survey 2011</i> (2011).....	22
Andreas Schleicher, “PISA 2018 Insights and Interpretations” (OECD, 2019).....	23, 24
W. Schulz et al., <i>Becoming Citizens in a Changing World</i> (2018).....	20
W. Schulz et al., <i>ICCS 2009 International Report: Civic Knowledge, Attitudes, and Engagement among Lower-Secondary School Students in 38 Countries</i> (IEEA 2010).....	19
Elmer Thiessen, <i>Teaching for Commitment: Liberal Education, Indoctrination, and Christian Nurture</i> (1993).....	15
John Witte & Joel Nichols, <i>Religion and the American Constitutional Experiment</i> (2016).....	7
Patrick Wolf, “Civics Exam: Schools of Choice Boost Civic Values,” <i>7 Education Next</i> (2007).....	21
Patrick Wolf, “Myth: Public Schools Are Necessary for a Stable Democracy,” in <i>School Choice Myths: Setting the Record Straight on Education Freedom</i> (2020).....	21, 22
P.J.J. Zoontjens & Charles L. Glenn, “The Netherlands,” in Charles L. Glenn & Jan De Groof, <i>Balancing Freedom, Autonomy, and Accountability in Education</i> (2012).....	12

INTERESTS OF *AMICUS CURIAE*[†]

Amicus Ashley R. Berner, Ph.D. is Director of the Johns Hopkins Institute for Education Policy and Associate Professor of Education. Among other things, she focuses her scholarship on educational pluralism. Her book, *No One Way to School: Pluralism and American Public Education*, was published in 2017. She has published numerous articles, book chapters, and op-eds on citizenship formation, academic outcomes, and the political theories of education.

As a scholar who has dedicated her career to studying democratic school systems, Dr. Berner urges the Court to reexamine several assumptions underlying the First Circuit’s decision, which in turn bear on the constitutionality of Maine’s exclusion of what it deems to be overly religious schools. Maine’s tuition-assistance program erroneously assumes that “non-sectarian” schools are value-neutral and more apt to promote democratic virtues and academic excellence. The data do not support those assumptions. Rather, all schools imbue students with values; “nonsectarian” schools do not outpace “sectarian” schools academically; and there is no clear advantage to either “sectarian” or “nonsectarian” schools in promoting political tolerance.

[†] No party or counsel for a party has authored any portion of this brief, and no one other than Amicus has funded the preparation or submission of this brief. See Sup. Ct. R. 37.6. Counsel for petitioners and respondents have provided blanket consent to all timely filed *amicus* briefs.

SUMMARY OF THE ARGUMENT

The Maine tuition-assistance program underscores cultural consequences of political battles fought long ago. Pitched battles of the 19th century concluded with the assumption that only one type of school—the district school—is truly “public.” Even those who advocate other models, such as tax-credit-funded private schools, largely accept this framework and ask merely for an exception to it.

But the majoritarian views of the late 19th century were not inevitable, and they certainly are not beyond reconsideration. They reflect beliefs—such as the assumption that Roman Catholics could not become able citizens—which are no longer palatable. The conclusions of that historical debate, however, influence three assumptions underlying Respondent’s position in the current case: *first*, that only district schools are neutral with respect to values; *second*, that only district schools create able citizens; and *third*, that only district schools offer academic opportunity to all.

These assumptions are not theoretical. They animate the State’s rationale for discriminating against “sectarian” schools. For instance, in Respondent’s brief in opposition to certiorari, the Commissioner asserts that “Maine has continued the nonsectarian requirement not because of any animus toward religion, but because of what it believes to be the critical features of a system of public education: diversity, tolerance, and inclusion.” Opp. Br. at 18. Elsewhere, she states: “Legislative statements about not wanting to ‘fund discrimination’ or teaching of ‘intolerant views’ do not demonstrate a hostility to

religion Rather, they simply demonstrate the view that public schools should be open to all, and that a public education is both defined by inclusion and tolerance, and reflective of the diversity of our students and our community.” *Id.* at 20.

Empirical data from democratic school systems around the world refute those claims. In light of that data and a large body of research analyzing it, the State’s reasons for discriminating against “sectarian” schools cannot hold.

ARGUMENT

Education in the United States has not always looked like its current incarnation. The current model, which treats district schools as the norm and repudiates educational pluralism, developed in the United States as a consequence of political and cultural anxieties and in contrast to our democratic peers around the world.

More importantly, one of the driving forces behind this development is the mistaken assumption that “nonsectarian” schools are neutral with respect to values. Central to the Maine statutory scheme is the purported distinction between “sectarian” and “nonsectarian” schools, Me. Stat. tit. 20-A, § 2951(2), which the State contends, and the First Circuit held, turns on the purported distinction between religious “status” and “use,” Opp. Br. at 23; Pet. App. 35. These distinctions are illusory. Even nominally “nonsectarian” schools instill normative principles that belie a claim to neutrality. Such inevitable inculcation is not problematic in its own right; it

becomes so only when the State forgets that latent orthodoxies are orthodoxies nonetheless.

Finally, and contrary to the Commissioner’s assertion, “nonsectarian” schools are *not* categorically more apt to promote civic virtues or academic excellence. To the contrary, empirical data from school systems around the world indicate that pluralistic educational systems are as likely as uniform systems to educate students and instill the democratic value of political tolerance—if not more so.

I. Pluralism Was the Norm at the Founding and Continues Today in Other Developed Democracies.

The Commissioner asserts that “[a] free public education has long been equated with a secular instruction.” Opp. Br. at 25. Not exactly. From the nation’s founding through the 19th century, the American public education system was pluralistic and included many schools that Maine would deem “sectarian” and thus undeserving of tuition assistance. And although cultural conflict in the 19th century resulted in the uniform model of state-run district schools, a pluralistic structure remains the norm in most modern democracies.

A. The Rise and Fall of American Educational Pluralism.

From the nation’s founding until the end of the 19th Century, cities and towns throughout the United States levied taxes for a plurality of schools—Catholic, Protestant (in various forms), and nonsectarian—as their demography dictated. In places with too few families to support separate schools based on (for

example) Calvinist, Lutheran, and Episcopal tenets, so-called “common schools” developed that embodied a generalized Protestant Christianity. See Ashley R. Berner, *No One Way to School: Pluralism and American Public Education* (2017) [hereinafter *No One Way*] at 41; see generally Charles L. Glenn, *The Myth of the Common School* (2002).

In the 1830s, a group of reformers pushed for uniform instead of plural school systems. Horace Mann, chairman of the Massachusetts Board of Education, led the charge based on a view of civic republicanism that favored unity over difference and viewed religion with suspicion. Schools that provided a common, non-creedal experience for America’s youth, he argued, would promote civic harmony and democratic loyalty. See Kathleen Abowitz & Jason Harnish, *Contemporary Discourses of Citizenship*, 76 *Rev. of Educ. Res.* 653–690 (2006). Yet Mann had little immediate influence on education; most Americans remained committed to funding a variety of schools that reflected local demography and distinctive beliefs. See Glenn, *Myth of the Common School*, at 120–35; Berner, *No One Way* at 41.

In the middle of the 19th Century, something happened that made uniform school systems more appealing: millions of Catholic immigrants arrived on America’s shores. Between 1845 and 1854, three million immigrants—many of them Catholic—joined the 17 million Americans already in the country. By midcentury, the Catholic population had grown to 17.6 percent of the population. See Berner, *No One Way*, at 41. In New Hampshire, the Catholic population grew from 1,370 to 85,000 (or 22 percent of the

population) between 1844 and 1894. See Charles L. Glenn, *The Discriminatory Origins of New Hampshire's 'Blaine' Amendment, Unpublished Testimony* (April 2013). Many towns and cities supported Catholic education alongside of Baptist, Congregationalist, and (in Manhattan) de-facto Jewish schools. By 1869, fully 20 percent of New York City's excise taxes were allocated to Catholic schools. *Id.* at 14; Berner, *No One Way*, at 42. Some lawmakers, including the California legislature, funded Catholic education directly, while others allowed Catholic nuns and priests to teach in majority-Catholic public schools. See Glenn, *Discriminatory Origins*, at 26, 33–34.

Educational pluralism was what immigrants had experienced in Europe, and it is what they found in the United States. See Berner, *No One Way*, at 41.

The Anglo-Saxon Protestant majority, however, felt besieged in the face of these numbers. What would the impact be on American identity, they feared, given this wave of foreigners who worshiped within a hierarchical structure, answered to a foreign power, and spoke languages other than English? From this anxiety arose a nativism that drove legislatures to end tax-payer funding for distinctive schools. *Id.* at 41–42.

The nativist movement was strong. It succeeded politically through the mid-century American (“Know-Nothing”) Party and then the post-Civil-War Republican Party, and via strategic alliances with others (secularists, Baptists) who rejected state funding for religious institutions on other grounds. *Id.* at 42. The nativist legislative agenda included outlawing foreign-language

instruction and the de-funding of “sectarian” schools (which was code for “Catholic”). *Ibid.* At the grass-roots level, nativism sparked Protestant fearmongering in New England pulpits, public marches in mid-sized cities, and Ku Klux Klan-led firebombs of Catholic neighborhoods. See Philip Hamburger, *Separation of Church and State* 211–213 (2002).

These diverse strands (nativism, anti-Catholicism, secularism, pietism) created the context in which Congress considered amending the Constitution to prohibit States from funding religious schools—an effort led by James Blaine of Maine, who was in turn Speaker of the House of Representatives, U.S. Senator, Secretary of State, and presidential candidate. Berner, *No One Way*, at 42. The so-called Blaine Amendment passed the House but narrowly failed in the Senate, so the U.S. Constitution remained as it was. *Ibid.* But those of the States did not.

Three dozen States amended their constitutions between 1870 and 1900 with so-called “Blaine Amendments.” See John Witte & Joel Nichols, *Religion and the American Constitutional Experiment*, 300–02 (2016) (listing state constitutional amendments). They vary in detail but have collectively been the primary legal impediment to state funding of non-public, particularly religious, schools. See *ibid.*; Berner, *No One Way*, at 42. Maine does not have a Blaine Amendment, but its statutory exclusion of sectarian schools reflects the same cultural currents and accomplished the same ends. Me. Stat. tit. 20-A, § 2951(2).

The Blaine Amendments had both immediate and long-term consequences. First, Protestant hegemony in schools grew. The same legislatures that removed funding from other religious schools required a generalized Protestantism in the common or district schools.¹ State after State passed laws requiring that the Protestant Bible be read in public schools: Pennsylvania in 1913, Delaware and Tennessee in 1916, Alabama in 1919, Georgia in 1921, Maine in 1923, Kentucky in 1924, Florida and Ohio in 1925, and Arkansas in 1930. Somewhat ironically, America's uniform schools were uniform *Protestant* schools for many decades.² See Glenn, *Discriminatory Origins*, at 29.

Second, and by design, state funding for non-public schools withered, as did public debate about which types of schools to fund. Methodists, Presbyterians, Catholics, and Jews had negotiated for a share of public school funds in 1850, but by 1900, the Blaine Amendments ended these debates. Common schools, which promoted assimilation and stressed uniformity, became the dominant educational model. See Berner, *No One Way*, at 42–43.

¹ This brief uses the term “district schools” to refer to the former common schools and more current public schools.

² Although there is evidence that *some* contemporaries noticed the striking juxtaposition of education laws that forbade funding for sectarian schools with laws that required Protestant sensibilities, the majority's voice prevailed. See Glenn, *The Myth of the Common School*, at 27 (citing 1878 article in the *San Francisco Chronicle*).

Cultural minorities were torn. Many Catholic families continued to enroll their children in local common schools, but mindful of papal teachings on the inseparability of intellectual and spiritual formation, see, e.g., Pope Leo XIII, *Spectata Fides*, Papal Encyclical (1885), others chose Catholic schools run by the diocese or a religious order. A scaling-up of community-funded Catholic education ensued, with some four million students enrolled by the 1960s. Some state legislatures went further than de-funding schools that did not fit the common school norm by, for instance, forbidding the use of foreign languages in school instruction—an anti-immigrant maneuver—or requiring parents to enroll their children in common schools—an anti-Catholic one. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Third, the uniform model set up another cultural conflict. The overtly Protestant atmosphere in district schools ended in the 1960s, when this Court interpreted the First Amendment to preclude public prayer and moments of silence in schools, Bible-reading as a source of moral inspiration rather than as a literary resource, and teaching creationism. See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962); *Pennsylvania v. Schemp*, 374 U.S. 203 (1963); *Chamberlin v. Dade Cty. Bd. of Pub. Instruction*, 377 U.S. 402 (1964); *Epperson v. Arkansas*, 393 U.S. 97 (1968). These decisions effectively secularized district schools. For religious minorities, the recognition that these schools were sectarian came as little surprise, but for many Protestants, the Court's represented an upheaval.

Evangelical groups viewed the rulings as a direct cause of “America’s moral decline.” One 1981 fundraising appeal for the Moral Majority linked the secularization of district schools to the rise of drug addiction, criminal behavior, and welfare-dependency. A typical editorial from the 1980s put it this way:

America’s moral decline rapidly accelerated following one event – the U.S. Supreme Court’s removal of prayer from our nation’s schools. On June 25, 1962, 39 million students were forbidden to do what they and their predecessors had been doing since the founding of our nation – publicly calling upon the name of the Lord at the beginning of each school day.

The nineteenth-century culture wars and their solution (structural uniformity) thus set the stage for the culture wars of the twentieth century.

The fourth and perhaps most profound consequence of educational uniformity is its influence over our cultural imaginations and the notion of what constitutes public education in the first place. Whether district schools are characterized by Protestant or secular uniformity, “public education” has come to mean schools that are funded, regulated, and delivered by the State.

The shift from state-financed to state-provided education means that any movement towards diversifying public education appears radical. Uniform delivery in the form of the traditional district school has become so normalized that many cease to

question it. Indeed, for many Americans in the early 21st century, “public education” means one thing: state-funded and state-delivered secular schools. What was once contested is now assumed.

B. Educational Pluralism Is the Norm in Other Democratic Countries.

Meanwhile, the United States has become an outlier among democratic nations in its commitment to a uniform school system. Elsewhere, including in the United Kingdom, Germany, France, the Netherlands, Sweden, Denmark, and most provinces in Canada, the state either operates a wide array of secular and religious schools, or funds all schools but operates only a portion of them. These systems are not designed to be uniform; they are intentionally pluralistic. See Berner, *No One Way*, at 29.

Democracies with pluralistic school systems tend neither to demean entire school sectors, nor to pit one type of school against another. They are structured to support schools with distinctive cultures and to set a uniformly high bar for academic results for all of them. For instance, most OECD countries rely on a sector-agnostic inspections regime to ensure educational quality. See Ashley R. Berner, “*Would School Inspections Work in the United States?*,” Johns Hopkins Inst. for Educ. Policy (blog) (Sept. 14, 2017), <https://edpolicy.education.jhu.edu/would-school-inspections-work-in-the-united-states>. To be clear, these are not laissez-faire models; pluralistic systems do not fund every school that parents desire and subsequently withdraw from accountability. Rather, while plural systems support parental choice by design, they also impose academic quality control.

Educational pluralism is a “civil society” model for education, in which the common good justifies public accountability, and viewpoint diversity justifies the funding of a wide range of school types.

Below are a few representative examples:

Australia – Education operates at the provincial rather than the federal level. Despite this, in recent years, Australia’s federal government has become the top funder of non-state schools, because of those schools’ capacity to close the achievement gaps between high- and low-income students. Half of the independent-school students in Australia are from the lowest economic quartile of the population. Charles L. Glenn, “What the United States Can Learn from Other Countries,” in *What Americans Can Learn from School Choice in Other Countries*, 79–90 (Cato Institute, 2005); K. Donnelly, *Regulation and Funding of Independent Schools: Lessons from Australia*, Fraser Inst. (Jan. 10, 2017).

The Netherlands – The Dutch constitution guarantees the right to educational freedom. As a result, the state currently funds 36 different kinds of schools on equal footing, from Montessori and secular to Jewish reform, Jewish orthodox, Catholic, Islamic, and anthroposophic. All schools must teach the national curriculum, and all students must undertake content-specific assessments in addition to their schools’ unique, worldview-driven examinations. P.J.J. Zoontjens & Charles L. Glenn, “The Netherlands,” in Charles L. Glenn & Jan De Groof, *Balancing Freedom, Autonomy, and Accountability in Education*, 2:333–62 (2012); Charles L. Glenn, *Contrasting Models of State*

and School: A Comparative Historical Study of Parental Choice and State Control (2011).

Israel – Israel funds a diverse range of school types within its public education system: Arabic-language, Hebrew-language, religious, and secular. Even independent schools outside of these options—especially the Haredi, run by the ultra-orthodox—receive funding from the state. (Funding Haredi schools is contested and has echoes in New York State’s relationship with the Yeshivas.) Moshe Cohen-Eliya and Amos Zehavi, “Israel,” in *Balancing Freedom*, 3:229–42).

Singapore – Singapore is a multi-ethnic, multilingual society with a high-performing school system. The state funds a wide range of schools to reflect its diverse population, including multiple denominations of Christian (Anglican, Methodist, Catholic), Islamic, and Buddhist. Funded schools must adhere to open admission policies, the national curriculum, and common academic examinations. M.K. The, et al., “Singapore,” *Balancing Freedom* at 4:227–38.

The United Kingdom – England began funding religious schools in 1834 and secular schools in 1870. Ashley R. Berner, “*Metaphysics in Educational Theory: Educational Philosophy and Teacher Training in England (1839-1944)*” (Univ. of Oxford, 2008). Its pluralist approach remains in place, such that the percentage of Jewish children in Jewish day schools increased from 20% to more than 60% between 1975 and 1990, Helena Miller, “*Meeting the Challenge: The Jewish Schooling Phenomenon in the UK*,” *Oxford Rev. of Educ.* 27:4, 501–13 (2001), and a Parliamentary debate in 2004 referred to the task of creating a

“pluralist, rather than a secular,” education system. Kevin McNamara, “*Debate on Denominational Schools, Hansard*” (House of Parliament, United Kingdom, July 20, 2004), Kevin McNamara, “*Denominational Schools*,” § 1 House of Commons (2004).

Alberta, CA – One of the highest-performing school systems in the world, Alberta funds secular, Catholic, Protestant, Islamic, Jewish, Inuit, and home schooling. Each is subject to the provincial curriculum and assessments. Amy von Heyking, “*Alberta, Canada: How Curriculum and Assessments Work in a Plural School System*” (June 2019). Alberta is an excellent example of how academic accountability and structural pluralism can work hand in hand.

Other examples abound. They illustrate that educational pluralism is the democratic norm. And as discussed below, in terms of academic performance and political tolerance, the outcomes pluralistic systems yield are just as good, if not better, than uniform systems. *See infra* 19–24.

II. Against the Neutrality Myth: District Schools Are Not Value Neutral.

One assumption underlying Maine’s decision to exclude “sectarian” schools from its tuition-assistance program and fund only district and “nonsectarian” schools is that only the latter schools are ideologically neutral. Indeed, the Commissioner asserts that “Maine has continued the nonsectarian requirement not because of any animus toward religion,” but because religious schools cannot—presumably by dint of their religiosity—tolerate a “diversity” of views. Br. in Opp. at 18. The State’s message is clear: secular

schools can accommodate a diversity of opinions; sectarian schools cannot. But secular district schools are not value-neutral, including with respect to religion.

A. Education Is Inherently Normative.

No school can be value-neutral. Formal education initiates children into a view of the world and their place in it.

A school's traditions, its disciplinary code, the content of the curriculum, and the way adults in the building relate to one another all inform students' experience of the world. So, too, do a school's hiring requirements for new faculty, its geographical boundaries, its investment in different extracurricular activities, and parents' role in the school community. Even what the school *cannot* discuss is instructive for young people. Not discussing religious and philosophical beliefs, for instance, is teaching students something about the merits or appropriateness of commitment (whether to Buddhist or to Marxist principles), and the influence of beliefs on human behavior. See Berner, *No One Way*, at 7. In other words, every aspect of school life is potentially instructive about the human person, the good society, the nature of authority and the purpose of life itself. Such instruction need not be intentional; it can occur tacitly. See *id.* at 7–8; see also Elmer Thiessen, *Teaching for Commitment: Liberal Education, Indoctrination, and Christian Nurture*, at 78 (1993).

Largely as a result of the alignment of district schools with majoritarian culture—first Protestant, now secular—Americans have forgotten the

normative claims that all schools make. Moreover, the structure of uniform, geographically determined schools has removed decision-making from families. Parents do not ask, for instance, *what kind of person* a school aims to form and why; the values children will learn along with the multiplication tables; how different schools understand success and failure; or what vision of patriotism a school endorses. The prevalence of zoned district schools makes these questions irrelevant for most families. That lack of decision-making also obscures the fact that all schools make value judgments that implicate deeper questions of the good life, the just society, human agency, and human nature.

Indeed, normative claims abound. State constitutions, school board funding decisions, and federal anti-discrimination policies inevitably touch on morally prescriptive claims about human nature and what a just community looks like. Berner, *No One Way*, at 9–10.

Classroom practices, too, communicate value judgments. Even such routine classroom interactions as how students take turns reflect moral considerations. See David T. Hansen, “*From Role to Person: The Moral Layeredness of Classroom Teaching*.” 30 *Am. Educ. Res. J.* at 656 (1993). Educational sociologists refer to this undercurrent of moral judgments as “the hidden curriculum.” See Steven Brint et al., *Socialization Messages in Primary Schools*, 74 *Soc. of Educ.* at 167 (July 2001).

In ways both large and small, therefore, schools of all types make and convey value judgments. In fact, district schools inevitably communicate their own

judgments on the very topics that allegedly make religious schools non-neutral.

B. A Plurality of School Choices Better Serves the State's Asserted Interest.

The inherent normativity of education is not problematic *per se*. Most democracies honor the variety of value judgments by funding a variety of schools while holding them accountable for academic outcomes. These countries' experience undermines Respondent's stated reason for excluding religious schools.

Maine defends its exclusion in the name of supporting schools that are "reflective of the diversity of our students and our community." Br. in Opp. at 20. This position does not match the value-neutrality the State also defends. An institution cannot be both value-specific and value-neutral. A rational approach to Maine's articulated interest would be to fund a diversity of schools and require all of them to achieve benchmarks of academic excellence. This pluralistic approach would necessarily result in a system that reflects the "diversity of [Maine's] students and [] community." That approach prevailed in the beginning of our nation's history, see *supra* 3–9, and succeeds today in other modern democracies, see *supra* 10–13. By contrast, the State's current approach fails to honor a diversity of viewpoints.

III. The Scholarly Literature and Empirical Data Belie the State's Asserted Rationale for Discriminating against Sectarian Schools.

If no school is value-neutral and some families in a pluralistic society would choose a religious school that reflects their values, then the only rationale for excluding such schools from a generally available benefit is that they are academically and civically unacceptable. The Commissioner's two alleged deficiencies are demonstrably false.

The Commissioner asserts that Maine excludes "sectarian" schools from its tuition-assistance program because district and "nonsectarian" schools are better at promoting diversity, tolerance, and inclusion." Br. in Opp. at 18. Diversity, tolerance, and inclusion are laudable goals that resonate with this Court's precedent. See, e.g., *Bethel Sch. Dist. No. 403 v. Frazier*, 478 U.S. 675, 681 (1986) (noting that the objectives of public education are to "inculcate the habits and manners of civility" which "must, of course, include tolerance of divergent . . . religious views. . ."). But the State's claim that nonsectarian and district schools are more apt to achieve that goal is an empirical claim subject to verification. The data do not support this view.

There is no evidence that district schools are inherently superior to non-district schools in forming democratic citizens. Likewise, there is no evidence that uniform systems inevitably produce better academic achievement than do plural systems.

A. Against the Diversity Myth: Private and Sectarian Schools Are as Good as—if not Better than—District Schools at Instilling Democratic Virtues.

A primary justification of state-funded education is preparation for democratic citizenship—the knowledge and habits that allow for the faithful exercise of civic responsibilities. Precise definitions of civic formation differ, but a generally accepted understanding is that used by the International Association for the Evaluation of Educational Achievement’s (IEEA): “[H]elping students develop relevant knowledge and understanding, and form positive attitudes toward being a citizen and participating in activities related to civic and citizenship education.” W. Schulz et al., *ICCS 2009 International Report: Civic Knowledge, Attitudes, and Engagement among Lower-Secondary School Students in 38 Countries*, at 15 (IEEA 2010).

Political scientists evaluate the efficacy of civic formation based on four key measures: political knowledge, political skills, civil tolerance, and the habit of community involvement. William A. Galston, “*Political Knowledge, Political Engagement, and Civic Education*,” 4 *Ann. Rev. of Pol. Sci.* 217–41 (2001). These capacities are learned rather than innate. The Brookings Institution’s William Galston put it this way in *Anti-pluralism: The Populist Threat to Liberal Democracy* (2018): “The desire to suppress speech and behavior one finds offensive is instinctive. Restraining oneself from doing so goes against the grain and requires training and indoctrination.”

A perfect comparison between entire school systems' success in civic formation is not methodologically possible because of the number of variables involved (e.g., financial resources, teacher quality, disciplinary atmosphere, as well as broader social currents like income inequality). Nevertheless, in aggregate terms, the most extensive study of young people's civic knowledge—the IEEA's International Civics and Citizenship Education Survey—finds no inherent advantage to uniform over plural school systems. The IEEA's surveys are designed by country-specific experts. The survey questions are extensive and include items on civic knowledge, civic principles, civic participation, and civic identity and attachment. Researchers then score the results on three levels that indicate general to advanced understanding of the facts and theories of governance. See W. Schulz et al., *Becoming Citizens in a Changing World*, xv (2018) (describing methodology); see also Ashley R. Berner, "Good Schools, Good Citizens: Do Independent Schools Contribute to Civic Formation?" (June 2021), <https://www.cardus.ca/research/education/reports/good-schools-good-citizens/>.

In the 2009 data set from thirty-six countries, six of the ten top-scoring countries had plural systems. In the 2016 data set from twenty-four countries, the highest-performing countries with respect to civic knowledge again were plural (Sweden, Denmark, Taiwan, Norway and Finland). The 2016 data represents responses from 94,000 students in more than 3,800 schools and, as before, the methodology included contextual knowledge from 37,000 teachers and principals and from research teams within each nation.

School sector analysis within the United States shows the same pattern as system-level comparison across countries.

In 2007, education scholar Patrick Wolf analyzed 21 quantitative studies on the effects of independent and state schools on civic outcomes, yielding 59 discrete findings and controlling for family background. See Patrick Wolf, “Civics Exam: Schools of Choice Boost Civic Values,” 7 *Education Next*, 67–72 (2007). Almost all (56 out of 59) findings indicated a neutral-to-positive effect of independent schools on civic outcomes. *Id.* at 71. Among the most rigorous subset of studies, only one of 22 metrics found a state-school advantage: heightened patriotism. *Id.* at 68.

In 2020, Wolf updated his 2007 review to include 34 studies with 86 separate findings. See Patrick Wolf, “Myth: Public Schools Are Necessary for a Stable Democracy,” in *School Choice Myths: Setting the Record Straight on Education Freedom*, (2020). Of the 86 findings measuring civic formation, 50 showed a clear independent-school advantage, 33 found neutral effects, and only three showed a state-school advantage. *Id.* at 56. The same results persist across “conceptual groupings.” In terms of political tolerance—defined as supporting the free-speech rights and civil liberties of those with whom you most strongly disagree—13 show that independent schools do a better job; 10 show “no significant difference”; and one shows a state-school advantage. *Id.* at 59. In political participation: again, an independent-school advantage (none show a state-school advantage). *Id.* at 60. In imparting civic knowledge and skills, not a single study showed a state-school advantage, but ten

found a clear independent-school advantage (six findings showed no difference between the two sectors). *Id.* at 60.

Other studies in the United States identify additional, socially desirable outcomes associated with private and sectarian school attendance, such as lower rates of criminal behavior and higher rates of intact marriages. See, e.g., Ray Pennings, *Cardus Education Survey 2011* (2011); Albert Cheng et al., “*The Protestant Family Ethic: What Do Protestant, Catholic, Private, and Public Schooling Have to Do with Marriage, Divorce, and Non-Marital Childbearing?*,” Institute for Family Studies (American Enterprise Institute 2020); Corey DeAngelis and Patrick Wolf, *Private School Choice and Character: More Evidence from Milwaukee*, SSRN Scholarly Paper (Feb. 26, 2019).

At a minimum, there is no evidence that district schools are superior to non-district schools in forming politically tolerant, democratic citizens.

B. Against the Achievement Myth: Private and Religious Schools Perform as Well as—or Better than—District Schools Academically.

In addition to civic formation, a State’s primary interest in administering a school system is academic. Maine does not address the issue of religious schools’ academic performance. Compared to district schools, religious schools are at least as capable at accomplishing the State’s interest in educating children. If anything, including religious schools in

generally available benefits would advance rather than impede the State's interests.

The Organisation for Economic Cooperation and Development ("OECD") administers the most recognized international assessment of educational outcomes and equity. The Programme for International Student Assessment ("PISA"), which measures Reading, Math, and Science, is given to a representative sample of 15-year-olds in participating countries every three years. The 2018 administration included 600,000 students who "represented about 32 million 15-year-olds in the schools of the 79 participating countries and economies." OECD, *PISA 2018 Results (Volume I): What Students Know and Can Do*, at 27 (OECD 2019).

As with the IEEA surveys above, PISA did not set out to compare uniform and plural systems as such. But the PISA does show that uniform school systems are not inherently superior to plural. Of the top ten performers in 2018 in reading, three were uniform, and the other seven were plural. *Id.* at 57. In math, four were uniform and the other six were plural. *Ibid.* Moreover, the OECD data show that many pluralistic systems can deliver excellent educational outcomes without compromising equity. "In Australia, Canada, Denmark, Estonia, Finland, Hong Kong (China), Japan, Korea, Macao (China), Norway and the United Kingdom, for example, average reading performance was higher than the OECD average while the relationship between socio-economic status and reading performance was weaker than the OECD average." Andreas Schleicher, "PISA 2018 Insights and Interpretations," at 20 (OECD,

2019). Eight out of these eleven countries have plural systems.

The same socioeconomic effects often hold for comparisons between school sectors within individual countries. For instance, in seven European countries with plural systems, after controlling for family background, students in religious schools outperformed those in state schools, and with less funding. See Jasp Dronkers, “Do Public and Religious Schools Really Differ? Assessing the European Evidence,” in *Educating Citizens: International Perspectives on Civic Values and School Choice*, at 306–07 (2004).

Interestingly, the advantage that sectarian schools enjoy in academic outcomes might be more attributable to the distinctiveness of their mission rather than their religiosity per se. As one scholarly summary of international findings reported, studying within “distinctive educational communities in which pupils and teachers share a common ethos” vastly improves the odds of students’ reaching higher academic outcomes and stronger civic formation. Stephen Macedo et al., “Introduction: School Choice, Civic Values, and Problems of Policy Comparison,” in *Educating Citizens: International Perspectives on Civic Values and School Choice*, at 1–30 (2004). This result suggests that districts might well benefit from enabling their schools to differentiate from one another in meaningful ways—a path that Miami-Dade is currently pursuing. Ron Matus, “Miami’s Choice Tsunami: Carvalho, Competition, and Transformation in Miami-Dade,” *Education Next* 20, no. 1 (Winter 2020), <https://www.educationnext.org/miami-choice->

tsunami-carvalho-competition-transformation-miami-dade/. Analyses of the effects of Florida’s corporate tax credit upon eligible low-income students found a positive academic effect upon the state test scores of students who left and students who stayed in the district schools. See David Figlio & Cassandra Hart, “*Competitive Effects of Means-Tested Vouchers*,” 1 *Am. Econ. J.: Applied Econ.* 6, 133–156 (Jan. 2014), <https://doi.org/10.1257/app.6.1.133>. Scholarship recipients were also more likely to attend and persist in higher education. Matthew Chingos, Tomas Monarrez, & Daniel Kuehn, “*The Effects of the Florida Tax Credit Scholarship Program on College Enrollment and Graduation*” (Washington, D.C.: Urban Institute, February 4, 2019), <https://www.urban.org/research/publication/effects-florida-tax-credit-scholarship-program-college-enrollment-and-graduation> Such findings indicate that providing a spectrum of (high-quality) options for low-income students can benefit *all* students.

In sum, religious schools as a whole deliver academic results that equal or surpass those of secular and district schools, and for students across the socioeconomic spectrum. Since Maine’s primary interest in supporting schools is the education of children, its exclusion of religious schools is incompatible with the overriding state interest.

CONCLUSION

The Court should reverse the judgment of the First Circuit.

Respectfully submitted,

Dominic E. Draye
Counsel of Record
William E. Eye
GREENBERG TRAURIG LLP
2101 L Street, NW
Washington, DC 20037
(202) 331-3168
drayed@gtlaw.com

Counsel for Professor Berner