No. 20-1088

In the
Supreme Court of the United States

DAVID CARSON, as Parent
and Next Friend of O.C., et al.,
Petitioners,

v.

A. PENDER MAKIN, IN HER OFFICIAL CAPACITY
as Commissioner of the Maine Department of
Education,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION, THE SCHOOL SUPERINTENDENTS ASSOCIATION, THE NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS, THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, AND THE COUNCIL OF ADMINISTRATORS OF SPECIAL EDUCATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations that represent public educational leaders:

The National School Boards Association ("NSBA") is a federation of state associations and the U.S. territory of the Virgin Islands. Through its member state associations that represent locally elected school board officials serving approximately 51 million public school students regardless of their disability, ethnicity, socio-economic status or citizenship, NSBA advocates for equity and excellence in public education through school board leadership. Through legal and legislative advocacy and public awareness programs, NSBA strives to promote public education, ensure equal educational access for all children, and further its members' interests in effective school board governance.

AASA, the School Superintendents Association, founded in 1865, is the professional organization for more than 13,000 educational leaders in the United States. AASA's mission is to advocate for equitable access for all students to the highest quality public education, and develops and supports school system leaders. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders. As school system leaders, AASA members

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

help shape policy, oversee its implementation and represent school districts to the public at large.

The National Association of Elementary School Principals ("NAESP") is the leading advocate for elementary and middle-level principals in the United States and worldwide. NAESP advocates for sufficient and equitable funding for public education, which is necessary to support an educated, skilled workforce that can compete in a global economy.

The National Association of Secondary School Principals ("NASSP") is the leading organization of and voice for middle level principals, high school principals, and other school leaders across the United States. NASSP members believe that public funding for private schools drains money away from public schools; has not conclusively been proven to result in increased student achievement; reduces accountability in the education system; and ultimately harms public schools, which the vast majority of students attend.

The Council of Administrators of Special Education ("CASE"), a division of the Council for Exceptional Children, is an international nonprofit professional organization providing leadership, advocacy, and professional development to 5,000 administrators who work on behalf of students with disabilities and their families in public and private school systems and institutions of higher education. CASE holds the longstanding position that public funds should be used only for public education and that public schools should be open and equal for all children, regardless of status.

Amici share a commitment to supporting and preserving free, equitable, well-funded public schools in every state in the nation. For that reason, *amici* are deeply concerned that a decision in favor of Petitioners would weaken states' and local school districts' authority to define the contours of public education within their borders. They write to share their perspective as representatives of school boards, superintendents, principals, and special education administrators, and to convey to this Court the significant repercussions that may flow from a decision in favor of petitioners.

All five organizations have frequently participated as *amici* in other cases of this Court. *See, e.g.*, *Mahanoy Area School District v. B.L.*, 141 S.Ct. 2038 (2021), *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246 (2020); *Department of Homeland Security v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891 (2020); *Department of Commerce v. State of New York*, 139 S.Ct. 2551 (2019); *Fry v. Napoleon Community Schs.*, 137 S. Ct. 743 (2017); and *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

INTRODUCTION AND SUMMARY OF ARGUMENT

Public education is unlike any other function of state and local government, and "perhaps the most important …." *Brown v. Board of Ed. of Topeka,* 347 U.S. 483, 493 (1954). Its importance arises from the way in which public education is interwoven with the operation of our system of representative government. That system, as theorized at the nation's founding, depends on the participation of an informed and educated populace.

This Court has affirmed "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child," asserted that "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all," and recognized education's "fundamental role in maintaining the fabric of our society." *Plyler v Doe*, 457 US 202, 221 (1982).

At the same time, it is well-established that public education is a state and local responsibility. *U.S. v. Lopez*, 514 US 549, 580-581 (1995) ("... it is well established that education is a traditional concern of the States.") (*citing Milliken v. Bradley*, 418 U.S. 717, 741-742 (1974) and *Epperson v. Arkansas*, 393 U.S. 97 (1968)). States delegate responsibility for operating public schools to local school boards, which are accountable to their communities.

Every state in the nation has established public education as a primary public priority.[2] All require

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[2] All states provide for public education in their state constitutions. Ala. Const. art. XIV, § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, §§ 1, 5; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1, ¶ I; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, 2nd, §§ 1, 3; Kan. Const. art. VI, §§ 1, 6; Ky. Const. § 183; La. Const. art. VIII, §§ 1, 11 & 13; Maine Const. art. VIII, Pt. 1, § 1; Md. Const. art. VIII, §§ 1, 3; Mass. Const. Pt. 2, Ch. 5, § 2; Mich. Const. art. 8, §§ 1, 2; Minn. Const. art. XIII, § 1; Miss. Const. art. 8, §§ 201, 206 & 206A; Mo. Const. art. IX, §§ 1(a), 3(a) & 3(b); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; Nev. Const. art. XI, §§ 1, 2 & 6; N.C. Const. art. IX, §§ 1, 2; N.D. Const. art.

that public schools be open equally to all children of appropriate age and residency. Many require that public schools be free from sectarian control or sectarian instruction.[3] And many require that public

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VIII, §§ 1–4; N.H. Const. Pt. 2, art. 83; N.J. Const. art. VIII, § 4, ¶¶ 1, 2; N.M. Const. art. XII, §§ 1, 4; N.Y. Const. art. XI, § 1; Ohio Const. art. VI, § 2; Okla. Const. art. XIII, §§ 1, 1a; Or. Const. art. VIII, §§ 3, 4 & 8; Pa. Const. art. III, § 14; R.I. Const. art. XII, §§ 1, 2; S.C. Const. art. XI, § 3; Tenn. Const. art. XI, § 12; Texas Const. art. VII, §§ 1, 3 & 5; Utah Const. art. 10, §§ 1, 2 & 5; Vt. Ch. II, § 68; Va. Const. art. VIII, § 1, 2; Wash. Const. art. IX, § 1, 2; W.Va. Const. art. 12, §§ 1, 5 & 12; Wis. Const. art. X, § 3; Wyo. Const. art. 7, §§ 1, 8 & 9.

[3] *E.g.*, N.D. Const. art. VIII, §§ 1–4, Sec. 1:

A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.

Ohio Const. art. VI, § 2, Sec. 2:

The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

Wis. Const. art. X, § 3:

The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian

funds be dedicated to public schools, not redirected to private and/or sectarian schools.[4]

Though states provide this crucial public benefit in a variety of settings – from densely populated cities to the sparsely populated Maine countryside – all retain authority to provide it equitably, without discrimination, and without favoritism with regard to race, sex, disability, religion, or other protected categories. State supreme courts have recognized states' authority to protect

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instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.

Wyo. Const. art. 7, §8:

Provision shall be made by general law for the equitable allocation of such income among all school districts in the state. But no appropriation shall be made from said fund to any district for the year in which a school has not been maintained for at least three (3) months; nor shall any portion of any public school fund ever be used to support or assist any private school, or any school, academy, seminary, college or other institution of learning controlled by any church or sectarian organization or religious denomination whatsoever.

[4] Twenty-three states have placed limits on public funding to private and/or religious schools. Ala. Constitution art. XIV, § 263; Ark. Const. art. 14, § 2; Cal. Const. art. 9, § 8; Colo. Const. art. IX, § 7; Del. Const. art. X, § 3; Ga. Const. art. 8, § 5, Par. VII; Haw. Const. art. X, § 1; Ky. Const. § 189; Mass. Const. Amend. art. XVIII; Mich. Const. art. I. § 4 and art. VIII, § 2; Minn. Const. art. XIII, § 2; Miss. Const. art. 8, § 208; Mo. Const. art. IX, § 8; Mont. Const. art. V, §11(5) & art. X, §6; Neb. Const. art. VII, § 11; N.C. Const. art. II, § § 6,7; N.H. Const. Part II, art. 83; N.M. Const. art. XII, § 3; R.I. Const. art. XII §§ 2, 4; S.C. Const. art. XI, § 4; Tex. Const. art. VII, § 5; Va. Const. art. VIII, §10; Wyo. Const. art. 7, § 8.

public funds for use for the secular, equally accessible public education required by state constitutions.[5] The federal government, too, encourages open, accessible public schools by attaching anti-discrimination standards to federal dollars. Prohibitions against race discrimination have been attached to federal dollars for education since 1964[6] and sex discrimination standards to education funds since 1974.[7]

This case presents a question of vital importance to *amici*: whether the free public education available to all residents by their local school boards must include the option of a pervasively religious education or whether innovative methods of providing a secular public education that are necessitated by local district circumstances may lawfully exclude the sectarian alternative.

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[5] *Louisiana Federation of Teachers v. State*, 118 So.3d 1033, 1071 (La. 2017)(holding that vouchers unconstitutionally diverted funds to nonpublic entities in violation of state constitution, which required those funds to be allocated equitably to "parish and city school systems."); *Cain v. Horne*, 202 P.3d 1178, 1174 (Ariz. 2009) (holding language and purpose of the state's Aid Clause do not permit the appropriations certain voucher programs provided; to rule otherwise would allow appropriations that would amount to "aid of ... private or sectarian school[s]); *Bush v. Holmes*, 919 So.2d 392, 407 (Fla. 2006)(invalidating program found to violate state constitution by devoting state resources to the education of children within the state through means other than a system of free public schools).

[6] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

[7] Title IX of the Education Amendments of 1974, 20 U.S.C. § 1681-§ 1688.

Maine, like many states, has developed a system of public education that strives to remain neutral toward religion, by not favoring one religion – or non-religion – over another. But Maine's program, unlike the tax credit scholarship and voucher programs considered by this Court in *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246 (2020), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), is not a general public subsidy for private education. Rather, Maine designed its program to address the narrow circumstances in which the state cannot otherwise discharge its state constitutional duty to provide free public education because the school district does not have the resources to maintain schools at certain grade levels. The specific educational opportunity that the state is seeking to replace and procure for these students is as similar as possible to the open, free education the state would otherwise provide in public school.

This Court has never held that a state must fund a pervasively religious program of instruction as part of its own education offerings. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017), and *Espinoza*, this Court held that religious entities "otherwise eligible" for public benefits had the right to participate on the same terms as others. States need not create voucher or choice programs at all, but once they do, they cannot exclude participants based solely on religion. That principle does not preclude states from shaping programs in ways that ensure public dollars only support publicly sanctioned goals. In neither case did the Court hold that states must use public funds to spread a religious message. Nor did the Court reject states' important interests in anti-discrimination and

religious neutrality in curriculum or hold that an individual's right to free exercise of religion outweighs those interests. States still cannot endorse or promote religion in their public education programs and must follow state and federal requirements for open, non-discriminatory access.

Requiring the compulsory funding of sectarian education would remove a state's ability to craft solutions to geographic or other important barriers to the delivery of public instruction. A one-size-fits-all mandate of this sort is contrary to long-established principles of federalism, and risks states opting to bar private education concerns from needed state programs.

Whether the Court clarifies or retires the religious status-versus-use distinction articulated in *Locke v. Davey*, 540 U.S. 712 (2004) and upheld in *Trinity Lutheran* and *Espinoza*, it can still decide that a state may define the contours of its public education system by requiring that it remain neutral with respect to religion, and open to all. *Amici* urge the Court to consider how a broader ruling will adversely impact public education.

ARGUMENT

I. States and Local School Districts May Design Their Public Education Programs To Be Inclusive And Religiously Neutral.

Maine has a unique method for ensuring that its local school administrative units ("SAUs") are able to furnish a free public education to all of its residents. Because some SAUs for historical and/or geographic reasons do not operate schools at all grade levels, Maine provides for two alternatives. First, the SAU

may contract with another SAU or with a non-sectarian private school to serve its residents. In lieu of such an arrangement, Maine authorizes the SAU to make tuition payments for its residents to attend their choice of private schools but, consistent with the fundamental attributes of a public education, excludes sectarian schools from this program.

Here, Petitioners are parents eligible to participate in Maine's tuition program. They have challenged the program's exclusion of sectarian schools because it renders them unable to use public dollars to send their children to the private sectarian schools they would prefer. They challenge, in other words, how Maine's system of public education is structured and funded. This case therefore addresses how Maine funds public education, not how it supports private education through a subsidy program like the tax credit scholarship program considered in *Espinoza* or the school voucher program challenged in *Zelman*.

As Respondent ably argues, students in states that provide public education exclusively through public schools do not have a constitutional right to a sectarian education at public expense. Brief of Respondent at 2. In Maine, students who live in SAUs that provide public education in public schools do not have a such a right, either. The Maine statute simply makes that true for students served by SAUs that, due to geographic and financial realities, do not operate a secondary program.

If this Court requires Maine to fund religious education as part of its public education options, it will shift significantly from its precedent recognizing

the importance of open, inclusive, and religiously-neutral public schools.

A. Longstanding Precedent Gives States Authority To Offer Public Education That Is Not Only Religiously Neutral, But Also Inclusive, Equitable, And Reflective Of Constitutional Norms.

States, not the federal government, are responsible for financing, managing, and supporting public education through locally chosen school boards that govern their community schools. From our nation's founding, public education was omitted from those functions delegated to the new central government as part of the effort to preserve a federal system of state sovereigns and to avoid a national government. Public education therefore is governed by 50+ state authorities. *See* Kern Alexander & M. David Alexander, *American Public School Law*, p.2 (Wadsworth Cengage Learning, 9th ed. 2019). In the mid-1880s, as states embraced common schools and started state-wide systems, their success hinged on raising new funds to grow those schools and preventing the diversion of funds to a private system. Prohibiting public aid to private schools—religious or otherwise—was a natural step in starting, expanding, and preserving public education. Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. REV. 295, 310-318 (2008).

States fulfill their public education mission in a variety of ways. Some operate county-based school districts of similar size, while others allow districts of

widely varying size.[8] In some, like Pennsylvania, most school board members are elected. The Center For Public Justice, *What Is The Role Of School Boards*? (last accessed Oct. 25, 2021), https://www.cpjustice.org/public/page/content/cie_faq_school_boards. In others, like Michigan, some school board members are elected, and some are appointed. *Id*.

There are as many public school funding systems as there are states, each a product of its own geographic, political, and historical context. Absent a federally-recognized "fundamental" right to public education, federal courts are deferential to state school funding schemes. This Court has recognized that "the very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect." *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)(citation omitted).

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[8] Maryland, for example, operates 24 county-based school districts. Maryland Department of Education, http://www.marylandpublicschools.org/about/Pages/directory.aspx. Florida operates 67. Florida Department of Education, http://www.fldoe.org/core/fileparse.php/7507/urlt/1718Profiles.pdf. Illinois operates over 850 school districts of varying sizes. Illinois State Board of Education, https://www.isbe.net/Documents/reorg_history.pdf. The largest Illinois district serves over 350,000 students, Chicago Public Schools, CPS Stats and Facts, https://cps.edu/About_CPS/At-a-glance/Pages/Stats_and_facts.aspx, and the smallest serves 33. Regional Office of Education #28, Ohio Community High School District #505, http://www. bhsroe.org/public-schools/ohio505/.

Indeed, states must retain this authority to control funding of public schools, as the Constitution forms a federal, not national, government which reserves to the states and the people "[t]he powers not delegated to the United States by the Constitution." US Const Am X. As such, "states retain broad autonomy […] in structuring their governments and pursuing legislative objectives." *Shelby County v. Holder*, 570 U.S. 529, 530 (2013). "Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred [by the Constitution], is withheld, and belongs to the state authorities." *New York v. United States*, 505 U.S. 144, 156 (1992). In fact, "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Alden v. Maine*, 527 U.S. 706, 727 (1999), quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238, n. 2 (1985).

States have wide latitude to draft their state constitutions to suit the policy concerns of their own populace. Indeed, they must make policy choices to address the "wide range of matters assigned to them by their citizens and left open to them by the very incompleteness of the U.S. Constitution." Advisory Commission on Intergovernmental Relations, *State Constitutions in the Federal System: Selected Issues and Opportunities for State Initiatives,* (July 1989), available at https://library.unt.edu/gpo/acir/Reports/policy/a-113.pdf, at 8.

> State constitutions reflect varying approached to government, are more frequently amended than the U.S.

> Constitution, often allow for citizen participation in amendment, and tend to amass a large number of detailed provisions, including bills of rights that differ slightly from the U.S. Constitution.

Id. at 1.

But all states have adopted an approach to public education that insists it be "available to all on equal terms." *Brown*, 347 U.S. at 493. States require by constitution and statute that public education be provided without discrimination based on race, sex, disability, religion and other categories enshrined in federal law, as well as additional categories found in state law. State and local governments have authority to carry out this and other crucial functions with an affirmative bias in favor of goals like equality, fairness, democracy, and religious neutrality through generally-applicable rules. *See Fulton v. Philadelphia*, 141 S.Ct. 1868 (2021). Secular public schools (historically referred to as "common") schools, rather than raising First Amendment problems, are central to reinforcing the citizenship and norms that lie at the heart of the nation's democratic project. *See* Derek Black, *Schoolhouse Burning: Public Education and the Assault on American Democracy*, 113-133, Public Affairs (2020).

In upholding Washington's constitutional prohibition on providing scholarship funds to students to pursue degrees that are "devotional in nature or designed to induce religious faith," *Locke*, 540 U.S. at 716, this Court recognized that the state did not violate the U.S. Constitution by drawing "a more stringent line" than that drawn by the Free Exercise and Establishment Clauses, noting that

Washington has "historic and substantial state interest" in the matter, especially regarding "religious instruction." *Id.* at 713, 725, 723.

Nor did the *Espinoza* decision purport to require the state to allow religious entities to stand in the shoes of the government and use those shoes to carry out a religious mission. To the contrary, bedrock Establishment Clause principles dictate that the state cannot establish, coerce, directly fund, endorse, or purposely advance religion. This Court has made it clear that the Constitution commits the government to a "position of neutrality" in respect to religion. *Lee v. Weisman*, 505 U.S. 577 (1992) (invalidating prayer because of coercive effect); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating the mandate to teach "creation science" in public schools); *Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (invalidating bible reading and school prayer). *See also*, *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246 (2020)(Breyer, J., dissenting)("our history and federal constitutional precedent reflect a deep concern that state funding for religious teaching, by stirring fears of preference or in other ways, might fuel religious discord and division and thereby threaten religious freedom itself.") (Citations omitted).

For more than 50 years, this Court has held that it violates the Establishment Clause to tailor a public school's curriculum or establish special schools to satisfy the principles or prohibitions of any religion. *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 702 (1994)(striking down New York statute creating a special school district for a religious enclave of one sect of Orthodox Jews, ruling that the establishment of the school district was unconstitutionally driven by

religious considerations, and amounted to a forbidden "fusion of governmental and religious functions;" (citation omitted)); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

This Court similarly has held that the government may not involve itself in the composition or encouragement of religious worship in public schools, even if students who do not wish to participate are excused from doing so, and even though the government's composition and encouragement of comparable secular ceremonies, such as recitation of the Pledge of Allegiance, is constitutionally unproblematic. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Sch. Dist. of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963). These decisions reflect a value intrinsic to state-church separation enshrined in the Religion Clauses – that one religious sect should not control government in the form of public schools. Nearly 70 years ago, this Court determined that a school district could allow students release time to attend religious instruction during the school day without violating the Establishment Clause, noting that accommodating religious instruction is very different from financing it.

> Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against

> efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person."

Zorach v. Clauson, 343 U.S. 306, 314 (1952). At least one circuit has determined that a school district provided a student with equal access to an education, on the same basis as it provided to all other students with disabilities, even though it did not include provide religious and cultural instruction in the student's program, as the district did not provide such instruction to its students with or without disabilities. The court determined that the district had no duty under the federal special education statute to do so. *M.L. v. Smith*, 867 F.3d 487 (4th Cir. 2017).

The historic commitment by states throughout the nation to maintain public school systems neutral toward religion is part of a broader effort to keep schools open and welcoming to all. Many states have enshrined in their constitutions the principle that public education is to be provided to all eligible students without regard to protected characteristics including race, and sex, but also religion. Michigan requires its legislature to "maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin." MI CONST Art. 8, § 2. Colorado prohibits sectarian teachings in its public schools, and any "religious test or qualification" to be required for admission to "any public educational institution of the state, either as a teacher or student; and no teacher

or student of any such institution shall ever be required to attend or participate in any religious service whatsoever." Colo. Const. art. IX, § 8.

State anti-discrimination statutes across the country protect student access to public education by prohibiting discrimination based on characteristics this Court has recognized under the U.S. Constitution. Maine's statute protects participants in educational programs, including those in private schools approved for the tuition program, from "discrimination because of sex, sexual orientation or gender identity, a physical or mental disability, ancestry, national origin, race, color or religion…." Me. Rev. Stat. Ann. tit. 5, §§ 4601-4602 (2021). It is precisely the applicability of these anti-discrimination provisions that prevent some private schools from participating in public funds programs with anti-discrimination strings attached, such as Maine's tuition program, and give rise to the standing issue articulated by Respondents in this case. Brief of Respondent at 51-54. Schools receiving public dollars must agree not to discriminate to participate in the public program.

B. The state may design the contours of its public education system without implicating Free Exercise rights.

To sustain their free, open public school systems, states must have authority to define their contours to keep them neutral and nondiscriminatory. Maine's tuition program is no different. By including a tuition program in its public school offerings, the state is not giving up authority to ensure students who use the program experience an education free from

discrimination and indoctrination. A government requirement that those representing and carrying out its core functions adhere to government's non-discrimination and neutrality goals is entirely different from government subsidizing private education as in *Espinoza*. In this case, government is not denying access to a generally available benefit but rather deciding how to structure itself.

This Court's *Espinoza* decision does not prohibit this concept. By holding that a state does not have to support private schools at all, but if it does it must not discriminate based on religious status, this Court once again supported religious neutrality. That neutral stance with respect to religious status should have no effect on a state's control of its public education program, governed by local school boards. Here, the benefits that Maine does provide remain open to religious entities that are willing to deliver the secular education the state seeks to procure.

The state, in maintaining a religiously neutral public school program, is not denying petitioners the benefit offered by Maine based on their religion in any sense. To the contrary, the option of obtaining a secular education by attending non-sectarian private schools at public expense is made available to all residents on equal terms. The state provides its residents the unfettered freedom to choose, instead, an education which is sectarian in all respects; but that education properly is not available in the public school program.

Applicants who seek a benefit distinct from the one the state has offered have not been excluded based on religious status simply because the program does not facilitate the pursuit of their personal

religious preferences. They simply want something other than what the state is offering. This Court has held that a statute does not impinge on a constitutional right merely because it does not subsidize that right. *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) ("[A]lthough the liberty protected by the Due Process Clause affords protection against unwanted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id*. at 317-318. . .").

This Court has recognized, too, that local school boards play an important role in public education by determining curriculum and operating school facilities. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both in the maintenance of community concern and support for schools and the quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-742 (1974). *See also Board of Education v. Pico*, 457 U.S. 853, 863 (1982)("local school boards have a substantial legitimate role to play in the determination of school library content"); *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) ("States and local school boards are generally afforded considerable discretion in operating public schools.").

School boards must, and do, make decisions about curriculum materials based on state guidelines, as well as community input and values. Parents are crucial partners and stakeholders, providing input to board decisions. Once decisions are made about curriculum materials, families may opt out of certain

portions for religious reasons, but it would be unworkable if individual families dictated individual curriculum for their children. Courts have consistently concluded that parents' rights "to direct the education and upbringing of [their] children" allow parents to choose whether to send their children to public or private school. However, parents "do not have a fundamental right generally to direct how a public school teaches their child." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005) (citations omitted).

Maine places local boards on the front line of implementing the delivery of a "free public education" to "every person" in their SAUs. Me. Rev. Stat. Ann. tit. 20 §§ 2(1) and (2). To that end, and among numerous other important tasks, the local boards must "adopt policies that govern" the SAUs; must "adopt the courses of study in alignment with the system of learning results" established by the State; must "adopt a policy governing the selection of educational materials and may approve educational materials"; and must "adopt a district-wide student code of conduct consistent with the statewide standards." *Id.* at §§ 1001(1-A), (6), (10-A), and (15). Petitioners' theory, if accepted, would remove these boards from their important local oversight function of ensuring that the fundamental elements of a public, open education are made available to all their residents.

Assuming the private schools sought by Petitioners decided to accept public funds, they would be subject to state non-discrimination and accountability requirements. They would not be able to restrict, as they currently may, Brief of Respondent

at 11-13 and 14-16, attendance and employment at the schools to those of the same religious faith and stated beliefs on topics including sexual orientation. Public entities and religious organizations that accept state funds in Maine may not discriminate in employment based on sexual orientation. Brief of Respondent at 54, citing Me. Rev. Stat. Ann. tit. 5, § 4572(1)(A) and § 4553(10)(G). Similarly, religious schools that accept public funds may not discriminate against students based on sexual orientation and gender identity. *Id*., citing P.L. 2021, ch. 366, sec. 19.

States retain authority to limit the type of curriculum public dollars support within the setting options available in its public school system. By retaining the crucial authority to define the contours of its own program of study, Maine defines the use of its public dollars as well. If the Court finds that it can no longer do this with respect to maintain religious neutrality, the authority of public school systems throughout the nation is at risk.

II. A Decision Requiring Maine To Change Its Public Education Program As Sought By Petitioners Would Undermine Support Of Public Education Throughout The Nation.

If this Court requires Maine and its local SAUs to fund pervasively religious instruction, which it has never held is required by the Free Exercise Clause, it would call into question similar provisions in other jurisdictions and would remove a means by which those jurisdictions support their public schools. Such a ruling would render meaningless the religious status-versus-use distinction applied by this Court in

Locke, *Trinity Lutheran*, and *Espinoza*, opening the gate for widespread public funding of private schools. The harm to public education could be significant.

Although this case is not about voucher, or other subsidy programs as *Espinoza* was, it could have significant effects on such programs. Twenty-three states have placed some kind of limit on public funding for private and/or religious schools.[9]

The number and size of voucher programs has grown in recent years. Today, more than half the states operate some form of private school tuition assistance, and legislatures regularly consider bills to expand them. Twenty-six states, Puerto Rico and Washington, D.C. have private school choice programs; twelve states plus Puerto Rico & Washington, D.C. have voucher programs; eighteen states have tax credit scholarship programs; and six have education savings account programs.[10]

Expanded voucher and other "choice" programs, far from expanding educational opportunity, have

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[9] Ala. Constitution art. XIV, § 263; Ark. Const. art. 14, § 2; Cal. Const. art. 9, § 8; Colo. Const. art. IX, § 7; Del. Const. art. X, § 3; Ga. Const. art. 8, § 5, Par. VII; Haw. Const. art. X, § 1; Ky. Const. § 189; Mass. Const. art. XVIII; Mich. Const. art. I. § 4 and art. VIII, § 2; Minn. Const. art. XIII, § 2; Miss. Const. art. 8, § 208; Mo. Const. art. IX, § 8; Mont. Const. art. V, §11(5) & art. X, §6; Neb. Const. art. VII, § 11; N.C. Const. art. II, § § 6,7; N.H. Const. Part II, art. 83; N.M. Const. art. XII, § 3; R.I. Const. art. XII §§ 2, 4; S.C. Const. art. XI, § 4; Tex. Const. art. VII, § 5; Va. Const. art. VIII, §10; Wyo. Const. art. 7, § 8.

[10] American Federation for Children Growth Fund, 2020 *School Choice Guidebook an Annual Publication* (2020) https://www.federationforchildren.org/wp-content/uploads/2020/11/Guidebook-20Nov13singles.pdf#page=6.

been shown to exacerbate inequality by making public schools less uniform, and to lead to a decrease in state support for public education. School districts with substantial voucher programs have seen per-pupil revenues in traditional public schools decline by 10% to 20% in just a few years. Derek Black, *Preferencing Educational Choice*, 103 Cornell Law Review 1353, 1427 (2018) (citations omitted). Social science and states' own calculations indicate these decreases are sufficient to deprive students of adequate and equal educational opportunity. *Id*. In this way, many are creating a preference for private schooling via public funding that is undermining public education. *Id*. at 1424. By creating "choice" programs in direct competition with public education, and reducing financial support for public educational opportunities, states are creating a harmful cycle where underfunded public schools cannot compete, creating an artificial demand for "choice" programs that subsidize private schools.

A ruling in this case requiring states to fund religious education as part of their public education offerings removes any "play in the joints" between what the Establishment Clause allows and the Free Exercise Clause requires and would shift decades of precedent under which states have operated their public school systems. States faced with the prospect of being required to fund religious education through their choice or voucher programs would likely expand them dramatically or shut them completely. In this case, the state of Maine funds equivalent public education in the private sector, ensuring equal opportunity and access through accountability requirements, thereby improving education

outcomes. If it is required, instead, to promote and subsidize religious instruction, its public education footprint likely will shrink.

Should this Court reject states' ability to regulate use of public funds for religious instruction in public school programs, states would face a stark value choice. A state would either need to eliminate vouchers altogether or accept that public money will finance religious education, in schools often closed off to students whose identifies or beliefs to not match that sect's. Some states, faced with an open and deregulated private school voucher system, will find such a system is counter to the public's interest in education and will choose to eliminate it to maintain tradition, constitutional norms, and equal access.

* * * * *

A state has a significant, even compelling, interest in ensuring its public school system remains equally open to all. A ruling in this case that states must fund religious education as part of its public education program runs contrary to that interest. States and local school districts must be able to continue to define the contours of their public schools, as this Court has long recognized, to fulfil their duty to provide open public education, so vital in a free, democratic society.

CONCLUSION

The First Circuit's decision should be affirmed.

Respectfully submitted,

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