

No. 20-1088

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In the  
**Supreme Court of the United States**

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DAVID AND AMY CARSON, AS PARENT AND  
NEXT FRIENDS OF O.C., ET AL.,  
*Petitioners,*

v.

A. PENDER MAKIN, IN HER OFFICIAL CAPACITY AS  
COMMISSIONER OF THE MAINE DEPARTMENT OF  
EDUCATION,  
*Respondent.*

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

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**BRIEF OF *AMICI CURIAE* THE MAINE SCHOOL  
MANAGEMENT ASSOCIATION, MAINE SCHOOL  
BOARDS ASSOCIATION, AND MAINE SCHOOL  
SUPERINTENDENTS ASSOCIATION  
IN SUPPORT OF RESPONDENT (AFFIRMANCE)**

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

This brief is submitted by *Amici Curiae* the Maine School Boards Association (“MSBA”)<sup>2</sup> and the Maine School Superintendents Association (“MSSA”), and the Maine School Management Association (“MSMA,” and with MSBA and MSSA, the “Amici”), of which both MSBA and MSSA are members.

**I. MSMA**

The purpose of the MSMA is to provide services to both the MSBA and the MSSA, including employment of executive directors and staff serving both organizations. Other major services provided by these not-for-profit organizations include legislative advocacy, policy development, training of board members and superintendents, personnel services and insurance services.

All school boards governing public school administrative units in Maine are eligible for

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<sup>1</sup> Pursuant to Rule 37.6 of the Rules of this Court, no counsel for either party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for each of the parties have consented to the filing of this amicus brief. S. Ct. R. 37.3(a).

<sup>2</sup> MSBA’s national parent association, the National School Boards Association (“NSBA”), has also filed an amicus brief in the above-captioned matter. The NSBA’s brief focuses on the constitutional issues presented by this case as well as the impact to the nation’s system of public education if Petitioners prevail. The Amici endorse the legal analysis set forth in the NSBA’s amicus brief.



membership in MSBA. State and private schools are eligible for associate membership, which does not include voting rights.

## **II. MSBA**

The Maine Legislature recognizes the MSMA and the MSBA “as nonprofit advisory organizations and declares these associations to be instrumentalities of their member school administrative units . . . .” Me. Stat. tit. 30-A § 5724(9).

The school boards of 252 Maine school administrative units, representing approximately 98% of all school administrative units in Maine, are members of the MSBA. The purposes of the MSBA include:

- to represent school boards who are members;
- to promote and maintain local control of public schools;
- to represent the interests of school boards in the legislative process; and
- to support programs that promote better public education in Maine.

## **III. MSSA**

MSSA is made up of 163 member superintendents, which constitute more than 99% of school superintendents in the State of Maine.<sup>3</sup> MSSA is committed to school leadership that promotes the

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<sup>3</sup> There are fewer superintendents than school administrative units in Maine because some superintendents serve more than one school administrative unit.

success of every student, develops excellent leaders, promotes community and legislative support for education, and advocates for public education and school superintendents. *See 2021-2022 Handbook 7, Me. Sch. Superintendents Ass'n*, <https://tinyurl.com/MSSAHandbook21>. MSSA believes that all of its members should “champion the advancement of public education.” *Id.* The paramount mission of Maine school boards and superintendents alike is to support and promote excellent, free public education for all children residing in Maine.

As Maine school boards and superintendents, the Amici are uniquely suited to provide an understanding of the relevant history of Maine’s system of public education, as well as a detailed legislative history of the law that requires school administrative units that do not maintain high schools to pay tuition for their high school students to attend school elsewhere.

### **SUMMARY OF THE ARGUMENT**

The Amici urge the Court to affirm the ruling of the United States Court of Appeals for the First Circuit in this case. Maine’s tuition provision was enacted in 1903 and exists solely to extend the benefits of free secondary education to students in towns without high schools (“Tuition Students”). Maine provides public-funded tuition payments on behalf of students whose home school administrative units have no public high schools. This is done so as to ensure that those students receive the benefits of a free public education equivalent to that available to students living in units that do have public high schools. The tuition provision seeks only to provide Tuition

Students the same opportunity that other students in Maine have to receive a free, secular, public education. It is not intended and cannot be read to afford such students an additional menu of educational options unavailable to students whose school units have high schools.

Petitioners seek to hijack Maine's tuition law and force Maine taxpayers to fund religious education for their children. Such extension of public funding to religious education is not required by the Constitution, and it will divert scarce public resources from Maine's system of public education. The Amici ardently oppose this assault on Maine's public education system.

This brief will provide a narrative of the legislative history of the tuition law, as well as its historical context, in order to support the Commissioner's powerfully stated argument that the tuition benefit properly and constitutionally implements Maine's undertaking to define the nature of public education that its taxpayers must support.

## **ARGUMENT**

### **I. THE ORIGINS OF MAINE'S SYSTEM OF PUBLIC EDUCATION**

The evolution of public education in Maine is a story of the gradual fulfillment of the Maine Constitution's dictate that there be a "general diffusion of the advantages of education" in the state. Me. Const. art. VIII, §1.

The means by which Maine children are afforded a free public education is deeply rooted in the history,

geography, and demographics of the state. Maine’s public education system is the product of its tradition—dating back to its history as part of the Massachusetts Bay Colony, the Commonwealth of Massachusetts, and its founding as a separate state in 1820—of highly localized government.<sup>4</sup> Maine, rural at its founding and still largely rural, is divided into hundreds of small municipalities<sup>5</sup> to which the Maine Constitution and the Legislature have delegated a large part of the governmental police power. *See* Me. Const. art. VIII, § 2 (municipal home rule); Me. Stat. tit. 30-A, §§ 2101-2109. Local control is and always has been a central value in Maine’s political culture.<sup>6</sup> The importance of local control explains why the drafters of the Maine Constitution did not require the Legislature to directly provide public education, but instead mandated that the Legislature “require[] the several towns” to provide education to their residents. Me. Const. art. VIII, §1.

In keeping with local control, education in Maine has always been regarded as a local function.<sup>7</sup> *See, e.g.,*

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<sup>4</sup> For a brief history of Maine education law, see *Maine School Law* 7-16 (Bruce W. Smith & Ann S. Chapman, eds., 6th ed. 2018).

<sup>5</sup> The least populous sections of the state have never been incorporated or chartered as municipalities, and remain “unorganized territory[ies].” *See* Me. Stat. tit. 20-A, § 3201(1).

<sup>6</sup> Michael L. Starn, *Municipal Home Rule: Grassroots or A Symbolic Gesture*, *Maine Townsman* (Jan. 1983), <https://tinyurl.com/MeTown83>.

<sup>7</sup> State regulation of public education has gradually expanded over the past two centuries, but the Legislature has nevertheless preserved local governance of education at the school administrative unit level.

*Solmitz v. Me. Sch. Admin. Dist. No. 59*, 495 A.2d 812, 816 (Me. 1985) (explaining that local control over education was derived from Maine’s constitution, and that local school boards have broad discretion over the management of school affairs); *see also* Me. Stat. tit. 20-A, § 2(2) (“It is the intent of the Legislature that the control and management of the public schools shall be vested in the legislative and governing bodies of local school administrative units, as long as those units are in compliance with appropriate state statutes”).

Maine’s first system of school organization consisted of tiny “districts,” each operating their own schools. In 1860, there were 4,146 school districts in the state and only 398 towns. *See* Ava Harriet Chadbourne, *A History of Education in Maine: A Study of A Section of American Educational History* 181 (1936). Districts were subject to the control of town school boards in which the districts were located. *Id.* The district system was ultimately abolished by the Legislature in 1893, and the town became the basic unit of school organization in the State. *See* 1893 Me. Laws 216.

The small size of many towns historically made it difficult for them to establish and maintain their own schools. Over time, the Legislature enacted a series of laws to encourage consolidation of towns into larger school administrative units, or to encourage towns to at least share superintendents and administrative services while retaining autonomy for purposes of governance. *See* 1897 Me. Laws 296, § 1 (establishing school unions); 1947 Me. Laws 357 (development of community school districts); 1957 Me. Laws 443, § 2 (formation of school administrative districts through the Sinclair Act); 2007 Me. Laws 240 (passage of the

“School Reorganization Law” creating larger units of school administration as either regional school units or alternative organizational structures). These measures have had limited success, however, and the town as the basic unit of local educational governance has persisted. Maine now has 252 public school administrative units: 162 of these are municipal units, 9 are community school districts, 4 are school administrative districts, and 77 are regional school units. See Me. Dept. of Educ., *2021/2022 SY Infrastructure Data*, <https://tinyurl.com/MEDOEXL1> (last accessed on Oct. 25, 2021).

In the nineteenth century, the towns met their constitutional mandate to provide public education by providing education for children age seven to fifteen in what were known as “common schools.” As economic development and population increased in Maine, secondary education assumed greater importance. The need for secondary education was met in substantial part by privately funded “academies.” Chadbourne, *supra*, at 110. Twenty-five such academies were incorporated in the District of Maine before its separation from Massachusetts.<sup>8</sup> *Id.* at 111. Chartered or incorporated by the State, the academies were generally privately funded. *Id.* at 113, 370.

As the nineteenth century continued, however, the state encouraged the development of free public high schools that would offer four-year programs for

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<sup>8</sup> A number of these academies still exist and, though still private, serve primarily Tuition Students, often under contracts with the students’ home school units.

education of children beyond the common school level. Towns were encouraged, but not required, to establish and maintain high schools, and many could not afford to do so or could not justify doing so because of their small size. Towns that did not have their own free high school were permitted, but not required, to contract with the academies to provide high school education for their resident students.<sup>9</sup>

## II. THE 1903 TUITION ACT

At the beginning of the twentieth century, students living in towns that did not have their own public high schools and did not contract with academies had no access to free public high school education.

To fill this gap, in 1903, the Maine Legislature enacted “An Act for the Better Education of Youth,” which, for the first time, sought to offer free public high school education to all students in Maine. In particular, the law provided:

Any youth who resides with parent or guardian in any town which does not support and maintain a free high school giving at least one four years’ course . . . may... attend any school in this state which does have a four years’ course...

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<sup>9</sup> Maine has nine private academies that have long existed to provide secondary education to students entitled to a free public education. As of October 1, 2020, 4,077 of the students enrolled in these academies were publicly funded. Me. Dept. of Educ., *2021 Public Funded Attending Counts by Grade, School and District*, <https://tinyurl.com/MEDOEXL2> (last accessed Oct. 25, 2021)

*provided said youth shall attend a school or schools of standard grade which are approved by the state superintendent of public schools.*

1903 Me. Laws 68 (emphasis added). The town in which the student resided was required to pay tuition (up to \$30 per month) to the receiving school. As explained by an historian of Maine education, this law:

made it possible for any child in the state who had reached the required stage of advancement, to have available either in his home town or elsewhere a standard high school course without expense to himself as regards tuition. . . . This law of 1903 was of great advantage to the smaller towns, since it provided advanced instruction without subjecting them to the expense of maintaining a free high school.

Chadbourne, *supra*, at 372.

The purpose of the 1903 tuition law, quite plainly, was to make free public high school education universal in Maine. Nothing in Maine history or the legislative history of this law indicates an intent to afford students and their parents an unfettered choice of high schools; its only purpose was to fill the gap left by those towns that did not (1) maintain public high schools or (2) contract with private academies to provide the equivalent of a public education.

In 1909, the Legislature added the express requirement that a private school must meet



designated state standards for public schools in order to receive public funds, emphasizing this point. 1909 Me. Laws 71, § 1. The basic approval requirements were most recently recodified in 1981, and now appear in Me. Stat. tit. 20-A § 2951 along with the prohibition on providing public funds to sectarian schools.

### **III. OTHER AMENDMENTS TO THE 1903 ACT**

The original secondary tuition law, 1903 Me. Laws 68, was amended a number of times over the years, but none of those amendments altered its two core elements: (1) the tuition benefit was only available to students who lived in towns that did not provide a free public secondary education, and (2) it could be used only at schools approved by the designated state official. *See* 1907 Me. Laws 73 (no substantive change); 1909 Me. Laws 116 (added requirement that student pass an examination prepared by the state superintendent); 1913 Me. Laws 58 (in lieu of examination, student may complete a standard common school course of study approved by the state superintendent of education); 1915 Me. Laws 223; 1917 Me. Laws 229; 1919 Me. Laws 96; 1931 Me. Laws 42; 1933 Me. Laws 63; 1942 Me. Laws 180; 1945 Me. Laws 120 (extending similar opportunity to children living on islands); 1945 Me. Laws 270; 1947 Me. Laws 237; 1947 Me. Laws 400; 1949 Me. Laws 443; 1951 Me. Laws 393; 1953 Me. Laws 21.

In 1955, the Maine Legislature passed “An Act Relating to Approval and Accreditation of Secondary Schools.” 1955 Me. Laws 369. This law established that secondary schools could be approved for attendance, tuition or subsidy purposes only if they met certain requirements, including a course of study

approved by the Commissioner of Education, a minimum weekly class time, a minimum of 180 school days in the school year, certified or licensed teachers, a maximum pupil teacher ratio of thirty to one, safety and hygiene standards, grade levels, and graduation requirements. *See id.*

The Legislature further amended the secondary school tuition law a number of times, while continuing to preserve the two core elements—that (a) it was available only to students living in school units that have no approved secondary school, and (b) that it could only be used at secondary schools that were approved by the State. *See* 1955 Me. Laws 369, § 6; 1959 Me. Laws 259, § 4; 1965 Me. Laws 319; 1971 Me. Laws 223; 1979 Me. Laws 431, § 5; 1980 Me. Laws 633, § 1; 1981 Me. Laws 693 (codified as Me. Stat. tit. 20-A § 5204(4) as part of complete recodification of Maine education laws in 1981 and adding “private school approved for tuition purposes”); 1985 Me. Laws 797, § 32; 1986 Me. Laws 693, § 30.

#### **IV. THE 2007 REORGANIZATION LAW**

Until 2007, Maine’s secondary school tuition law never used the word “choice” to describe the obligation of school units without secondary schools to pay tuition for their resident children to attend out-of-unit approved public or private schools. In 2007, the Legislature passed “An Act to Remove Barriers to the Reorganization of School Administrative Units,” a major law that created a new category of school unit (the “regional school unit”) and promoted consolidation of public schools. 2007 Me. Laws 668. The Act endeavored to require smaller school units to

merge into larger units that were more efficient and could offer a broader range of services to students.<sup>10</sup>

One of the most controversial aspects of the 2007 school reorganization law was the impact of combining school units lacking public secondary schools with units that had secondary schools.<sup>11</sup> Under the language of the secondary school tuition law that had long been in effect, once a unit without a secondary school merged into a larger unit that had a secondary school, students who had received the tuition benefit would no longer receive it. Students' opportunity to receive a free secondary education would be provided by the newly formed regional school unit that maintained a secondary school.

This anticipated outcome was met with vigorous opposition by private schools who were likely to lose tuition students due to the consolidation, as well as by parents who wished to be able to continue to receive the benefit of publicly funded tuition to an approved public or private school selected by the parents. As a result of this opposition, the proposed legislation was amended during the legislative process to preserve the

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<sup>10</sup> Me. Stat. tit. 20-A, § 1451 sets out “the policy of the State” with regard to reorganization, including the “greater uniformity of tax rates for the support of schools,” the “efficient use of limited resources,” the “[e]ffective use of the public funds expended for the support of public schools,” and the “maximization of opportunities to deliver services that can more effectively be provided in larger districts than from within smaller units or individual schools.” Me. Stat. tit. 20-A, §§ 1451(4)-(8).

<sup>11</sup> See, e.g., *How Consolidation Threatens School Choice*, Me. Heritage Policy Ctr. (Aug. 28, 2007), <https://mainepolicy.org/1100/>.

tuition benefit for families residing in school units where it had existed in the past, even those former school units which were to be merged into regional school units that included a public secondary school. *See, e.g.*, Comm. Amend A to L.D. 499, § XXXX-13 (123<sup>rd</sup> Leg. 2007). The enacted version of the law thus requires “preservation of opportunities for choice of schools[.]” Me. Stat. tit. 20-A, § 1451(7); *see also*, Me. Stat. tit. 20-A, § 1479(3)(A). In addition, Me. Stat. tit. 20-A, § 5204(4) was amended to say that a school unit that neither maintains a secondary school nor contracts for secondary school privileges shall pay tuition “at the public school or the approved private school *of the parent’s choice* at which the student is accepted.” 2007 Me. Laws 668, § 30 (emphasis added).

In short, the 2007 school reorganization law did not introduce or create a right to unfettered “school choice” for Maine students and their parents; it merely preserved the secondary school tuition benefit for those children living in school units in which it had been available before the reorganization law was enacted.

## V. PUBLIC EDUCATION AND TUITION STUDENTS IN MAINE TODAY

Currently, Maine has six different types of governance structures for public schools. *See* Me. Dept. of Educ., *Structure and Governance*, <https://www.maine.gov/doe/schools/structure> (last accessed Oct. 25, 2021). Four of those—the municipal school unit, the regional school unit, the school administrative district and the community school district—are discrete legal entities governed by local school boards. *See* Me. Stat. tit. 20-A, § 2305; Me. Stat.

tit. 20-A, § 1(24-C); Me. Stat. tit. 20-A, § 9922. Two of them—the alternative organizational structure and the school union<sup>12</sup>—provide for shared administration among two or more member school administrative units. *See* Me. Stat. tit. 20-A, § 1461-B.

The municipality still remains the most basic unit of school administration. Maine has 162 municipal school units, many of which are quite small and do not maintain their own high schools (or, in some cases, their own elementary schools). Maine has 77 regional school units<sup>13</sup> that comprise more than one municipality; most, but not all, of these regional school units have their own high schools. The state has 9 community school districts, in which municipalities have combined to operate some but not all grade levels.<sup>14</sup> *See* Me. Dept. of Educ., *2021/2022 SY Infrastructure Data*, <https://tinyurl.com/MEDOEXL1> (last accessed on Oct. 25, 2021). A number of units that do not operate schools for kindergarten through grade 12 have entered into contracts with other public school administrative units or private academies to provide

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<sup>12</sup> While the statute governing the formation of school unions has been repealed, *see* 2007 Me. Laws 240, § XXXX-18, some school unions still exist in Maine, *see* Me. Dept. of Educ., *Union Committees and Combined Boards FY 2021-22 Information* (Oct. 19, 2021), <https://tinyurl.com/MEDOEUNIONS>; Me. Stat. tit. 20-A, §§ 1902-1904.

<sup>13</sup> The 2007 reorganization law provided that all existing school administrative districts would become regional school units, but they could continue to use the name, “school administrative district.” Due to an anomaly in the law, a few school administrative districts remain in existence.

<sup>14</sup> There are two one-town community school districts.

their students a free public education meeting state standards. As of October 1, 2020:

- there were 601 public schools and 106 private schools operating in the State of Maine;<sup>15</sup>
- of the 172,474 publicly funded students, 164,457 of them attended public school units;<sup>16</sup> and
- 4,710 students attended private schools at public expense.<sup>17</sup>

Of the students attending private schools at public expense, the vast majority of these students (4,077) attended one of the nine chartered academies that have operated in Maine for the past two centuries to serve publicly funded students.<sup>18</sup> These private academies, which enroll 60% or more publicly funded students, are defined by Maine statute as “publicly supported secondary schools.” Me. Stat. tit. 20-A, § 1(23-B).

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<sup>15</sup> See Me. Dept. of Educ., 2021 *Quick Facts – School Types*, (Feb. 24, 2021), <https://tinyurl.com/MEDOEFF1>.

<sup>16</sup> See Me. Dept. of Educ., 2021 *Quick Facts – School Enrollments*, (Feb. 25, 2021), <https://tinyurl.com/MEDOEFF2>.

<sup>17</sup> *Id.*

<sup>18</sup> These institutes are: Erskine Academy, Foxcroft Academy, Fryeburg Academy, George Stevens Academy, Lee Academy, Lincoln Academy, Maine Central Institute, Thornton Academy, and Washington Academy. See Me. Dept. of Educ., *Publicly Funded Attending Counts by School and Grade*, <https://tinyurl.com/MEDOEXL4> (last accessed Oct. 25, 2021).

The Maine academies are recognized by Maine law for their unique purpose of providing publicly funded education to Maine Tuition Students. Because they are largely serving publicly funded students, they are subject to a higher degree of state regulation with respect to their educational programming and standards. *See, e.g.*, Me. Stat. tit. 20-A, § 2951. The academies fundamentally exist to provide public education to students residing in school administrative units that do not have high schools.

Most publicly funded Maine high school students attend public schools, with a significant minority served by the academies. A small minority attend private “special purpose” schools that provide services for students with disabilities that are generally not available at the public high schools or the academies. A few Tuition Students whose school administrative units do not contract with another unit or academy apply their tuition to other private schools that meet state standards.

## CONCLUSION

The purpose of Maine’s educational system is to provide a free *public* education, as required by the state Constitution and laws, to all of its children. The State of Maine and its school administrative units do so by operating public high schools that serve resident students, or, where high schools do not exist, contracting out the public education to secular private schools that meet state educational standards. The educational opportunity that Maine offers the Tuition Students is the *public* education that would otherwise be provided by the students’ respective communities if those communities had the resources to operate a

comprehensive public school system. The First Circuit Court of Appeals correctly recognized this purpose of the tuition program and that the restrictions under the tuition program are not based on a recipient's religious status. Instead, the focus of the program is to ensure that the approved private schools serving Tuition Students provide the *public* education required by state law.

To be clear, Petitioners are not seeking equal access to the benefits afforded under the tuition program, which is a *public* education. Petitioners, based on their misreading of the First Amendment and the Equal Protection clause, seek to compel the State of Maine to fund something very different from the public education required by its constitution and statutes. Reduced to its essence, their argument is that because Maine funds public education for students whose school units lack high schools, it must also fund religious education for that particular group of students. By funding public education but not religious education, the Petitioners argue, the State violates their rights to free exercise of religion and equal protection under the law. For all of the reasons stated in amicus brief filed by NSBA, this argument fails.

As pronounced by the framers of the Maine Constitution more than 200 years ago, the support and maintenance of our *public* schools is essential to “the preservation of the rights and liberties of the people[.]” Me. Const. art. VIII, §1. This Court has similarly recognized the profound importance our public schools play “in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests . . .” *Ambach v.*



*Norwick*, 441 U.S. 68, 76–77 (1979); *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (observing that “education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship . . . [and] a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”)

A public education, axiomatically, is a secular education, focused on the preparation of children to become successful, contributing members of both the workforce and the body politic. Consistent with the Free Exercise, Establishment, and Speech clauses of the First Amendment, public education has no business inculcating, promoting or discouraging students to have any particular religious belief.

For all the foregoing reasons, the decision of the First Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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