

No. 20-1088

In the Supreme Court of the United States

DAVID AND AMY CARSON, ET AL., PETITIONERS,

v.

A. PENDER MAKIN, RESPONDENT.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

**BRIEF OF *AMICI CURIAE* ADVANCEMENT PROJECT,
JOURNEY FOR JUSTICE ALLIANCE, ALLIANCE FOR
EDUCATIONAL JUSTICE, AND GSA NETWORK IN
SUPPORT OF RESPONDENT**

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STATEMENT OF INTEREST¹

Advancement Project National Office is a national multi-racial civil rights organization with a long history of racial justice work in the field of education. Rooted in the great human rights struggles for equality and justice, Advancement Project exists to fulfill the United States' promise of a caring, inclusive, and just democracy. For over 20 years, Advancement Project has, *inter alia*, worked to dismantle the “school-to-prison pipeline” and to ensure a liberatory public education for all children.

The Journey for Justice Alliance (“J4J”) consists of Black- and Brown-led, grassroots community organizations in over 30 U.S. cities that use community organizing as the primary methodology to win equity in public education. J4J was launched in 2012 in response to the growing problem of school privatization, including the starving of neighborhood schools and school closings.

The Alliance for Educational Justice is a national network of 35 youth and intergenerational organizing groups of color across 12 states and 14 cities fighting for education justice.

Genders & Sexualities Alliance Network (“GSA Network”) is a next-generation LGBTQ racial and gender justice organization that empowers and trains queer, transgender, and allied youth leaders to advocate, organize, and mobilize an intersectional movement for safer schools and healthier communities. GSA Network includes GSA Network of California, which connects more than 1,100 clubs across the State, and the National Association of GSA Networks, which unites 25 statewide

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties giving blanket consent to the filing of *amicus* briefs are on file with the Clerk.

networks representing over 3,000 GSA clubs. GSA Network supports student-led campaigns and days of action for transgender and queer youth across the country.

Amici submit this brief to provide their unique perspective on the issues presented. In particular, *amici* seek to highlight the importance of public education for students of color, students with disabilities, and LGBTQ students. *Amici* are concerned that requiring Maine to fund religious instruction will not only exacerbate the under-resourcing of public education; it will subject students in Maine to the distinct harms of state-sponsored bias and discrimination.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Maine has long recognized public education as an indispensable public good. As early as the 1820 Constitutional Convention, Maine's representatives expressed the belief that public education should be available to *all* children, no matter their circumstances, and should promote the values of inclusion and equality. Over time, Maine has codified that understanding of what a public education should be. The State has passed nondiscrimination laws that specifically protect students in public schools against discrimination on the basis of race, sex, sexual orientation, and disability. And, relevant here, the State has chosen *not* to fund schools that provide religious instruction as part of the tuition-assistance program that guarantees every child access to a public education. Maine has reasonably concluded that religious instruction is incompatible with the public education the State seeks to provide.

Maine's decision to exclude schools providing religious instruction from its public education system is not only reasonable; it is essential to prevent discrimination against the marginalized student groups that the State has otherwise sought to protect. Many of

the schools that teach religious curricula engage in policies and practices that discriminate against those student groups. These schools often make no effort to hide the connection between their discriminatory practices and their religious teachings. Many schools, for example, expressly describe as “sinful” any sexual activity outside of a marriage between a man and a woman. Consistent with that religious view, these schools expressly refuse to admit LGBTQ students and treat homosexuality and pregnancy as grounds for expulsion. Students of color have similarly been subjected to discrimination rooted in religious views, including through outright exclusion from private religious schools in the 1960s and 1970s and policies and practices including discriminatory dress codes today.

As Maine becomes increasingly diverse, it is more important than ever to respect the State’s judgment that an appropriate public education must be non-religious and must promote the values of inclusion and equality. Schools that provide religious instruction are simply not able to provide that type of education. The State should not be forced to spend limited public funds subsidizing private religious education that directly undermines its goals for the public education system. That would not only take resources away from the public schools that currently serve the overwhelming majority of students of color in the State; it would also subject vulnerable students to the distinct harms of state-sponsored discrimination.

ARGUMENT

I. Requiring Maine to Fund Religious Education Would Undermine the State's Strong Historical Commitment to Public Education

A. Maine Has Long Committed to Providing a Public and Nonreligious Education for All Children

Maine has long recognized the importance of educating its children. As early as 1789, Maine (at the time part of the Massachusetts Bay Colony) required public instruction for all children by law.² The expressed reason for adopting education as a public good in Maine was to serve *all students*, even though in this early era that did not include girls or Black children.³ However, this promise is a continued guidepost for the public education system Maine's children deserve.

The Maine Constitution, adopted in 1820, embodies this commitment to public education. It declares “[a] general diffusion of the advantages of education [to be] essential to the preservation of the rights and liberties of the people . . .” Me. Const. art. VIII, pt. 1, § 1. And it affirmatively requires the State Legislature to ensure that “the several towns . . . make suitable provision . . . for the support and maintenance of public schools . . .” *Id.*

The delegates to Maine's Constitutional Convention repeatedly affirmed the significance of public education. One delegate stated that the Constitution would be “materially deficient” unless “it contain[ed] ample provision for the education of our youth . . .”⁴ Another

² See Portland Public Schs., *Our History* (Aug. 2014), <https://bit.ly/3F0pzxa>.

³ See *id.*

⁴ J. Perley, Debates, Resolutions, and Other Proceedings of the Convention of Delegates 206 (1820).

explained that the town schools contemplated by the Constitution would be places where “the children of the poor, the unfortunate, as well as of the competent and wealthy, will be associated and taught together.”⁵ These children would receive instruction both in “useful learning” and in other “great principles,” including the vital principle of “equality.”⁶

The Maine Legislature has consistently adhered to these founding principles. By law, every child in the State must have “an opportunity to receive the benefits of a free public education.” Me. Stat. tit. 20-A, § 2(1). Throughout the State’s history, however, many school districts have not operated their own public high schools, particularly districts in small towns and rural areas. *See Hallissey v. Sch. Admin. Dist. No. 77*, 755 A.2d 1068, 1073 (Me. 2000). To fulfill its constitutional obligation, the Legislature has long permitted school districts to pay for students to attend local private schools instead.

In 1873, for example, the Legislature provided state funding for each town to establish and maintain a “free high school.” P.L. 1873, c. 124, § 4.⁷ The law required the “course of study” at each high school to “embrace the ordinary academic studies, especially the natural sciences in their application to mechanics, manufactures and agriculture.” *Id.* But the law also acknowledged that some towns were unlikely to establish their own schools. In those circumstances, a town could “authorize its superintending school committee to contract with and pay the trustees of any academy in said town, for the tuition of scholars within such town, *in the studies contemplated by this act*, under a standard of scholarship to be

⁵ *Id.* at 207.

⁶ *Id.*

⁷ The full text of the 1873 statute is available at <https://bit.ly/2ZnLudY>.

established by such committee” *Id.* § 7 (emphasis added). In other words, Maine allowed towns to fulfill their commitment to public education by partnering with private schools, but required those schools to provide the course of study that the State had deemed appropriate for public education.

Over time, Maine legislators made clear that public education should be secular in nature. In 1970, for example, the Legislature considered another bill that would have allowed school districts to contract with private schools to educate their students. Critically, the contracts could only extend to “*secular* educational services,” because only those services were compatible with the public education Maine was constitutionally obligated to provide. The legislative findings in the proposed bill made this point clear:

[T]he governmental duty to support public education generally may be in part fulfilled through the government support of those *purely secular educational subjects and objectives* achieved through nonpublic education.

Opinion of the Justices, 261 A.2d 58, 62 (Me. 1970) (quoting L.D. 1761 (1970)) (emphasis added); *id.* at 63 (defining “secular subject” to exclude “any subject matter expressing religious teaching, or the morals or forms of worship of any sect”). The bill ultimately failed after the Supreme Judicial Court advised that it would be unconstitutional. *See id.* at 66. Both the text of the bill and the ultimate outcome illustrate the State’s longstanding commitment to nonreligious public education.

This history forms the backdrop to the provision at issue in this case. In 1981, the Legislature determined once again that taxpayers should only be responsible for funding public education or an equivalent course of study at a private school. The Legislature thus made clear that a private school could only be “approved” for tuition-

assistance payments if it is a “nonsectarian school in accordance with the First Amendment.” Me. Stat. tit. 20-A, § 2951(2). This limitation assured that state funds could not be used to fund religious education.

Members of the Legislature reaffirmed these principles in 2003, when they considered and rejected a bill that would have eliminated the nonsectarian requirement. Senator John L. Martin began the debates by invoking “the sovereign prerogatives of the people of Maine regarding how and in what manner public funds can and should be used in supporting public education for the children of Maine.” 1 Legis. Rec. S-640 (1st Reg. Sess. 2003).⁸ He argued that “[p]ublicly funding the education of our children is the most important and vital function of our state,” and that legislators should not “abandon [their] responsibility to decide what is best for our children.” *Id.*

Senator Martin then explained the features of public education that the Legislature had long considered the appropriate form of education for the State’s children:

[O]ur publicly funded education system works best when the education is one of diversity and assimilation. An educational system that promotes tolerance and assimilation by educating all of our children together, without regard to religious affiliation and without promoting religious view points, is preferred. Non-religious publicly funded education has been the norm in Maine and elsewhere in our country, and the ‘melting pot’ effect of this, on our children is what makes this state and this country great.

Id.; see also 1 Legis. Rec. H-587 (1st Reg. Sess. 2003) (Representative Glenn Cummings stating that “a

⁸ The records of the 2003 legislative debates in both the House and the Senate are available at <https://bit.ly/3pGyr2f>.

religiously neutral classroom is the best if funded by public dollars”). The Legislature thus adhered to its previous determination that public funds should not be used for religious education.

The State retains this system today, and it works. Many of the original “town academies” from the 1790s and early 1800s—including Berwick Academy, Lincoln Academy, and Thornton Academy—have long operated as secular institutions and thus are eligible to participate in the tuition-assistance program; indeed, these academies account for nearly all students in the program, *see* Resp. Br. 7. The John Bapst Memorial High School, formerly a Catholic school, has likewise participated in the tuition program since 1980; during that time, “the school has grown steadily, retaining and enhancing its college-preparatory mission.”⁹ And schools that remain religiously affiliated can participate in the program as well, so long as they do not provide religious education. *See* Pet. App. 35. These restrictions ensure that Maine only funds education that promotes inclusion and equality and does not advance any particular religious views.

B. Public Education in Maine Is Particularly Important for Students of Color, LGBTQ Students, and Students with Disabilities

Today, public education in Maine is particularly important for the equitable and inclusive education of students of color, LGBTQ students, and students with disabilities. Although it initially excluded these students, *see supra* p. 4, Maine’s concept of public education has evolved to include all populations. In fact, Portland, the largest city in the state, became one of the first cities in

⁹ John Bapst Memorial High Sch., *Mission and History*, <https://bit.ly/30A2VIV> (last visited Oct. 29, 2021).

the country to spend public money educating Black children.¹⁰

Maine’s public schools now operate from the core value that “[e]very student deserves a safe and equitable school environment.”¹¹ This belief is codified in Maine’s non-discrimination laws, including the Maine Human Rights Act. That law guarantees students at “educational institution[s]” the “opportunity . . . to participate in all educational” programs and “all extracurricular activities without discrimination because of sex, sexual orientation or gender identity, a physical or mental disability, ancestry, national origin, race, color or religion . . .” Me. Stat. tit. 5, § 4601. “Educational institution[s]” are defined to include “any public school or educational program,” including those that are private but are “approved for tuition purposes if both male and female students are admitted . . .” *Id.* § 4553(2)(A). Thus, *all* students in Maine’s public school system are assured that the State must provide them with an education free of discrimination.

Public education is particularly vital to the education of students of color. Even though Maine’s students are predominantly white,¹² the vast majority—more than 94%—of Black, Latinx, and Native American students in

¹⁰ See Portland Public Schs., *supra*.

¹¹ Me. Dep’t of Educ., *LGBTQ+ and Gender Expansive Resources* (2020), <https://bit.ly/3AIyuMI> (last visited Oct. 29, 2021).

¹² See Office for Civil Rights, U.S. Dep’t of Educ., *Civil Rights Data Collection: 2017-2018 State and National Data Estimations*, <https://bit.ly/3mq7jCy> (last visited Oct. 29, 2021) [hereinafter 2017-2018 State Enrollment Data] (noting that 89.3% of public school students in Maine are white in chart entitled “2017-18 Estimations for Enrollment”).

the State attend public schools.¹³ Portland Public Schools offers an example of a district where there is a relatively higher population of Black students in the district than in public schools statewide (26% compared to approximately 4% statewide).¹⁴ By contrast, Black students make up only about 5% of the student population in Portland’s private religious schools.¹⁵

LGBTQ students also depend on public education and rely on the State’s legally enforceable obligation to provide a nondiscriminatory education for all students. In Maine, LGBTQ students—a “significant population” in the State—are more likely to be bullied or harassed and report more anxiety and depression than students who do not identify as LGBTQ.¹⁶ These experiences are “directly related to their experience of pervasive, negative cultural stigmas and stereotypes created about their identity, compounded with less acceptance and support from their friends, family and community than their non identifying

¹³ To derive this figure, *amici* first calculated the total number of Black, Latinx, and Native American students at public schools in Maine (11,934), using the 2017-2018 State Enrollment Data. *Amici* then calculated the total number of Black, Latinx, and Native American students at private schools in Maine (735), using a database maintained by the National Center for Education Statistics (“NCES”). That database is available at <https://bit.ly/3mn5s00> and includes enrollment data for 118 private schools in Maine.

¹⁴ See 2017-2018 State Enrollment Data (noting that 3.8% of public school students in Maine are Black); Office for Civil Rights, U.S. Dep’t of Educ., *Civil Rights Data Collection: Portland Public Schools, Portland, ME*, <https://bit.ly/3mo9nuI> (last visited Oct. 29, 2021) (noting that 26% of students enrolled in Portland school district are Black).

¹⁵ To derive this figure, *amici* searched the NCES database for religiously affiliated schools in Portland. Of 1,001 students enrolled in the city’s five religious schools, 49 were Black.

¹⁶ See *LGBTQ+ and Gender Expansive Resources, supra*.

peers.”¹⁷ These challenges highlight the importance of public education for LGBTQ students. Unlike private religious schools, public school districts can be held accountable for discrimination and inequity through both legal and political processes. Advocates can improve conditions for LGBTQ students in public schools by enforcing state and federal antidiscrimination protections and by supporting the election of school board members committed to making improvements.

Access to public education is also essential for students with disabilities. Indeed, a public education is a service that the State *must* provide to comply with federal laws that specifically protect these students, including the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400. The IDEA requires the State “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . .” *Id.* § 1400(d)(1)(A). This mandate is particularly vital in Maine, which had the highest percentage of students receiving IDEA services of all 50 States in the 2017-2018 school year.¹⁸ The Maine Department of Education fulfills its obligations by engaging in the oversight and monitoring of special education services in public schools—services that are often entirely unavailable in private schools. *See infra* pp. 25-26.

Finally, public education also provides the medium through which the State can further its vital interest in promoting inclusive education. The Portland school district, for example, uses public education to welcome

¹⁷ *Id.*

¹⁸ *See* 2017-2018 State Enrollment Data (noting that 17.8% of public school students in Maine receive services under the IDEA, a higher percentage than in any other State).

immigrants to its diverse community. The district provides adult education to over 4,000 students, many of them immigrants.¹⁹ The State also uses public education to foster an informed and dedicated citizenry. In 2001, for example, the Legislature required all public schools to teach Maine’s Native American history. *See* Me. Stat. tit. 20-A, § 4706. For many students in Maine, Native American people and culture are often invisible, which has led to experiences of racism for Native American students.²⁰ Advocates see the mandated curriculum as necessary to do “real, meaningful equity work” to combat the “entrenched invisibility of Native people in our curriculum and in our schools”²¹ And the State recently reiterated its commitment to addressing these problems by amending the law to add two more mandatory subject areas—African American studies and the history of genocide.²²

In short, Maine’s public schools provide the kind of education that the State’s representatives have long deemed appropriate. Public schools welcome students of all backgrounds and circumstances, and they promote inclusion and equality through their curricula, nondiscrimination policies, and robust special education services.

¹⁹ *See* Portland Adult Educ., *Our History*, <https://bit.ly/3mUxsZf> (last visited Oct. 29, 2021).

²⁰ *See* Robbie Feinberg, *A 2001 Law Says Maine Schools Must Teach Native American History, But Many Still Don’t*, *Maine Public* (Feb. 7, 2019), <https://bit.ly/3AUdl2x>.

²¹ *Id.*

²² *See* Anne Berleant, *Genocide, Black history bill is signed into law*, *The Ellsworth American* (June 23, 2021), <https://bit.ly/3FQWvVF>.

C. Requiring Maine to Fund Religious Education Would Divert Resources from the Public Education Maine Is Obligated to Provide

Despite its obvious importance to the State, public education in Maine has been underfunded for many years. In 2004, state voters adopted a referendum requiring the State to finance 55% of the costs of education statewide.²³ But the State fell short of that threshold every year between 2004 and 2020.²⁴

As the First Circuit acknowledged in *Eulitt ex rel. Eulitt v. Maine Department of Education*, 386 F.3d 344, 356 (1st Cir. 2004), the exclusion of religious schools from Maine’s tuition-assistance program enables the Legislature to concentrate limited public funds on financing public schools. During the debates on the 2003 attempt to repeal the exclusion, several legislators clarified this point. Representative (now Governor) Janet Mills noted that “there are a finite number of resources available to us.” 1 Legis. Rec. H-585 (1st Sess. 2003). She observed that she could not see “how, as a policy matter, it is possible to give non-secular schools or religious based schools dollars without taking those same dollars away from secular schools and public schools.” *Id.* Representative Cummings similarly warned that requiring the State to fund religious education would “drain” resources from public schools and create “an endangerment to the quality of our public schools.” 1 Leg. Rec. H-584 (1st Sess. 2003). And Representative Rosita Gagne-Friel stated bluntly that the State “can’t afford” to finance religious education. 1 Legis. Rec. H-588 (1st Sess.

²³ See Office of Governor Janet T. Mills, *Promise Kept: Governor Mills Signs Strong, Bipartisan Budget Achieving 55 Percent of Education Costs for First Time in Maine History* (July 1, 2021), <https://bit.ly/3GoE62Q>.

²⁴ *Id.*

2003). As noted, the attempt to repeal the exclusion ultimately failed.

The state of public school finance did not improve much in the years following those legislative debates. In 2013, a State-commissioned study found that the Legislature needed to increase funding for public education by \$260 million per year.²⁵ But in 2015, overall state funding per student in Maine remained significantly below the level of funding per student in 2008, even as the cost of providing an education has risen annually.²⁶

In the past few years, Maine's funding of K-12 public education has increased significantly, but this has merely illustrated the inherent uncertainty of state (and local) government budgeting. For example, Maine's recently approved budget for 2022-2023 will, for the first time, meet the State's voter-mandated 55% threshold.²⁷ But the budget increase depended in part on two sources of funds: federal pandemic relief funds and predicted revenues from an expected recovery in the state economy.²⁸ Neither is a reliable source of future state funds; pandemic relief funds will disappear soon and

²⁵ Christopher Cousins, *Study of Maine school funding recommends additional \$260 million*, Bangor Daily News (Oct. 29, 2013), <https://bit.ly/2CqPyLT>.

²⁶ Michael Leachman et al., Ctr. on Budget & Pol'y Priorities, *A Punishing Decade for School Funding* 4-5, 8 (Nov. 29, 2017), <https://bit.ly/2Jns0gS>.

²⁷ Scott Thistle & Kevin Miller, *Legislature passes \$900 million state budget update*, Portland Press Herald (June 30, 2021), <https://bit.ly/2YYmNVw>.

²⁸ See *Promise Kept*, *supra* (noting that budget draws on recently upgraded revenue forecast); U.S. Dep't of Educ., *U.S. Department of Education Approves Maine's Plan for Use of American Rescue Plan Funds to Support K-12 Schools and Students, Distributes Remaining \$137 Million to State* (Sept. 13, 2021), <https://bit.ly/3FRA6HJ>.

predicted revenues from an expected recovery could disappear at any time.

This chronic underfunding of Maine’s public schools affects opportunities for low-income students, students of color, LGBTQ students, and other students who rely on the State’s public schools to meet their needs. Maine’s schools have historically been “regressively” funded, spending greater resources on public schools serving lesser concentrations of students in poverty than on higher-poverty school districts. In the 2018 school year, for example, Maine devoted 13% fewer resources per pupil to high-poverty districts relative to low-poverty districts.²⁹ Yet studies continue to demonstrate that resources are critical to ensure meaningful opportunities to learn for all children.³⁰

Maine’s long-time struggles to adequately fund its education system provide crucial additional context for evaluating the Legislature’s decision to restrict schools that teach religious education from participation in the tuition-assistance program. The fiscal impact of striking down the exclusion of private religious schools would likely be substantial. As the legislators anticipated during the 2003 legislative debates, that sum would necessarily come, almost dollar-for-dollar, out of funds available for Maine’s public schools—the schools that provide important educational services to *all* students, including students of color, LGBTQ students, and students with disabilities.

²⁹ See Danielle Farrie & David G. Sciarra, Educ. Law Ctr., *Making the Grade 2020: How Fair Is School Funding in Your State?* 7 (2020) (per-pupil funding was \$13,846 in low-poverty districts and \$12,072 in high-poverty districts, making Maine the 43rd most regressive State), <https://bit.ly/3mwvhfH>.

³⁰ See, e.g., David L. Silvernail et al., Maine Educ. Policy Research Inst., *The Relationships Between School Poverty and Student Achievement in Maine* 29-30 (Jan. 2014), <https://bit.ly/3FQFIHH>.

D. To Fulfill Its Commitment to Public Education, Maine May Constitutionally Prohibit the Use of Public Funds for Religious Education

Maine’s tuition-assistance program is constitutional under this Court’s precedents. As explained, Maine seeks to provide every school-age child with “an opportunity to receive the benefits of a free public education . . . ,” Me. Stat. tit. 20-A, § 2(1)—including, if necessary, at a private school. But the State has taken steps to ensure that its limited resources are directed only to those private schools that are willing to provide an education comparable to the one students receive at public schools—namely, a nonreligious education that promotes inclusion and embraces diversity. *See supra* pp. 4-8.

Maine’s decision to limit its program to private schools providing a nonreligious education does not trigger strict scrutiny. That level of scrutiny applies when a State excludes religious schools from a state-funded program “solely because of [their] religious character” *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2255 (2020) (emphasis added); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). But here, the State excludes only those schools that are unwilling to *use* public funds for their stated purpose. Unlike in *Espinoza*, a school need not “divorce itself from any religious control or affiliation” in order to receive state funds. *Espinoza*, 140 S. Ct. at 2256. It must only agree to provide an education that is comparable in substance to the one provided by public schools.

The intended use of state funds is undeniably relevant to the analysis under the Free Exercise Clause. Otherwise, religious observers would have the power to fundamentally transform a state program by insisting on their ability to participate. Imagine a State offers grants to schools for the purpose of purchasing materials that promote Pride Month. If a religious school that opposes

LGBTQ rights applies for a grant in order to promote the *opposite* message—namely, that homosexuality is a sin—the State could obviously deny the application without running afoul of the Free Exercise Clause. The State in that situation has not excluded the school from the grant program because of its “religious character”; it has excluded the school because it does not intend to *use* the funds in a manner consistent with the State’s direction. So, too, here: Maine denies certain religious schools the ability to participate in the tuition program because those schools are not willing to use the funds to provide a nonreligious education that promotes inclusion, equality, and diversity.

Nothing in the Free Exercise Clause forbids state legislatures from ensuring that state funds serve their stated ends. The basic purpose of the clause is to guarantee that state programs are neutral toward religion, *i.e.*, to “protect[] religious observers against unequal treatment” *Id.* at 2254 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). The clause does *not* give religious observers special privileges in the administration of government programs and benefits. Accordingly, it does not entitle religious observers to obtain state funds when they refuse to use those funds in a manner consistent with the program’s basic purpose.

II. Requiring Maine to Fund Religious Education Would Cause Particular Harm to Marginalized Student Populations

Maine’s exclusion of private schools providing religious education from the tuition-assistance program is not only constitutional; it is necessary to avoid subjecting students to the distinct harms associated with state-sponsored discrimination. To be sure, not all private religious schools engage in discriminatory practices. But as this case illustrates, schools that teach from a religious perspective are considerably more likely to have admissions policies, hiring policies, and codes of conduct that explicitly discriminate against disfavored groups.

Maine should not be required to provide its limited state funds to schools that engage in the very conduct it otherwise seeks to prevent.

A. Many Schools That Provide a Religious Education Were Founded for Discriminatory Reasons

The rise of private schools in the United States, including many private religious schools, was directly tied to the desegregation of public schools. When this Court struck down *de jure* segregation in the landmark case *Brown v. Board of Education*, 347 U.S. 483 (1954), many opponents of integration chose to exit the public school system altogether rather than share schools with Black children, in what was later called “massive resistance.”³¹ Private schools dubbed “segregation academies” proliferated in an attempt to “preserve the Southern tradition of racial segregation in the face of the federal courts’ dismantling of ‘separate but equal.’”³²

Many private religious schools across the country trace their founding to this era. That includes “[n]early one-third of the schools within the Association of Christian Schools International (ACSI), the largest non-Catholic Christian school association in the U.S.”³³ Enrollment in these private religious schools exploded in the years leading up to and after *Brown*, not only in the Southern states but across the entire country.³⁴ The non-

³¹ Chris Ford et al., Ctr. for Am. Progress, *The Racist Origins of Private School Vouchers 2* (July 12, 2017), <https://ampr.gs/3jnvdp>.

³² Southern Educ. Found., *A History of Private Schools & Race in the American South*, <https://bit.ly/3lJKXvE> (last visited Oct. 29, 2021).

³³ Bekah McNeel, *Some Christian schools are finally grappling with their racist past and segregated present*, The Hechinger Report (Aug. 26, 2020), <https://bit.ly/2YT320Y>.

³⁴ *Id.*

Catholic Christian schools in particular doubled their enrollment between 1961 and 1971 and then doubled enrollment again in the following decade.³⁵ Many of these schools defended their racist policies under the guise of religious freedom.³⁶ For example, the second president and principal of Goldsboro Christian School in North Carolina claimed that racial segregation was one of the school's policies and that "God intended men to be separated."³⁷

Private religious schools also have a sordid history of discrimination against Native American people. Beginning in the late 1800s, Native American children across the country were forcibly sent to boarding schools, more than 300 of which were run by religious groups.³⁸ According to Richard Henry Pratt, the founder of "one of the most infamous institutions," the goal of these schools was to "Kill the Indian . . . and save the man."³⁹ Native

³⁵ Jonathan Merritt, *Segregation Is Still Alive at These Christian Schools*, The Daily Beast (July 12, 2017), <https://bit.ly/2YPZEUC>.

³⁶ *Id.*; see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 583 (1983) ("Since its incorporation in 1963, Goldsboro Christian Schools has maintained a racially discriminatory admissions policy based upon its interpretation of the Bible."); *id.* at 583 n.6 (noting Goldsboro's belief that "[c]ultural or biological mixing of the races is regarded as a violation of God's command").

³⁷ Amanda Beyer-Purvis, "Equal Rights, Which Equal Law Must Protect": Legal Challenges to Southern Segregationist Schools and Theological Racism in the South 213-14 (2017), <https://bit.ly/3GsWY0w>.

³⁸ Allison Winter, *Federal investigation seeks to uncover painful history of Native American boarding schools*, Maine Beacon (July 9, 2021), <https://bit.ly/3mYRIcj>.

³⁹ Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission, *Beyond the Mandate: Continuing the Conversation* 12 (June 14, 2015) [hereinafter Wabanaki-State Commission Report], <https://bit.ly/3BL29Gr>.

American children at the schools were not only neglected and abused; they were “punished for speaking their native languages, banned from conducting traditional or cultural practices, shorn of traditional clothing and identity of their native culture[,] . . . taught that their culture and traditions were evil and sinful, and taught that they should be ashamed of being Native American.”⁴⁰ Wabanaki children in Maine were sent to these boarding schools, and their descendants continue to note “the lasting effects of language and cultural loss.”⁴¹ Their experiences, along with the segregation academies, are a powerful reminder that discriminatory practices have often been rooted in religious beliefs.

B. Many Schools That Provide a Religious Education Currently Engage in Discriminatory Practices

Many private religious schools continue to engage in discrimination today—including the two schools that Petitioners’ children attend or desire to attend in this case. These practices often cannot be disentangled from the religious beliefs promoted by the schools, either historically or in the present day.

1. The policies, practices, and curricula at many private schools that provide a religious education reveal ongoing discrimination

As noted, many private religious schools were founded for the express purpose of resisting racial integration on religious grounds. Private religious schools continue to be among the most segregated schools

⁴⁰ National Native American Boarding School Healing Coalition, *For Churches*, <https://bit.ly/3BIP2FD> (last visited Oct. 29, 2021).

⁴¹ Wabanaki-State Commission Report, *supra*, at 15.

in the country.⁴² Although these schools may no longer explicitly discriminate on the basis of race, they often use policies like dress codes as a way to exclude and push out certain students. A Christian school in Ohio, for example, told a Black family that their son was not welcome at school because he wore his hair in locs.⁴³ Notably, some schools have justified their discriminatory dress codes and hair policies on expressly religious grounds. One school in Maine has suggested that it is not “Christian” to permit certain hairstyles.⁴⁴ Another school requires “modesty in dress” because it “want[s] . . . young ladies to be viewed as sisters in Christ” and thus asks them to avoid “tempt[ing]” boys to “sinful thoughts and desires.”⁴⁵

Private religious schools also frequently discriminate on the basis of sex, including sexual orientation and gender identity. Again, these schools often explicitly invoke their statements of faith as the reason for discrimination. The handbooks of several Christian schools in Maine state that “sexual immorality,” including “homosexuality, bisexual conduct, . . . any attempt to

⁴² *Religious private schools most segregated in U.S.*, Harvard Gazette (June 25, 2002), <https://bit.ly/3pGQGEW>.

⁴³ Max Londberg, ‘Supposed to be accepting’: Ohio private school forces out Black children with locks, parents say, USA Today (Aug. 18, 2020), <https://bit.ly/3aAXawe>; see also, e.g., Zeke Hartner, *Rockville Catholic school’s hairstyle policies face scrutiny for racial discrimination*, WTOP (July 8, 2021), <https://bit.ly/30t0oQB> (noting criticism of Catholic school dress banning braids, cornrows, twists, and locs code as racially discriminatory).

⁴⁴ Lisbon Falls Christian Academy, *Student Handbook 10* (updated Aug. 3, 2017), <https://bit.ly/3mp4Jg3> (stating that the school “supports the emphasis of the Christian home in matters of modesty of dress, hair styles, and good grooming”).

⁴⁵ Hartland Christian Academy, *2021-2022 School Handbook 19*, available at <https://bit.ly/3molPKY>.

change one's sex, or disagreement with one's biological sex, is sinful and offensive to God."⁴⁶

Unsurprisingly, many of these schools refuse to admit LGBTQ students or the children of LGBTQ parents. Pine Tree Academy in Maine, for example, states that it “does not admit individuals who engage in sexual misconduct, which includes . . . homosexual conduct.”⁴⁷ But the harms caused by discriminatory policies extend far beyond the admissions context. For example, a religious high school in California forbade gay Latina student Magali Rodriguez from being near her girlfriend and made her attend counseling sessions, without her parents' consent, under threat of outing her to her parents. A staff member berated her on campus, telling her she was going to hell.⁴⁸ This type of harassment and discrimination is not uncommon in private religious schools. A recent investigation of private religious schools participating in state voucher programs found that “at least 700 religious private schools receiving vouchers either openly oppose

⁴⁶ Lisbon Falls Christian Academy, *supra*, at 5; *see also* Greater Houlton Christian Academy, *GHCA Family Handbook* 3 (July 2021), <https://bit.ly/3mmQ0Cs> (“We also believe that any form of homosexuality, lesbianism, bisexuality, bestiality, incest, fornication, adultery and pornography are sinful perversions of God’s gift of sex[.]”).

⁴⁷ Pine Tree Academy, *Handbook* 8 (Sept. 10, 2021), <https://bit.ly/3EuPoB4>; *see also* Adam Mengler, Note, *Public Dollars, Private Discrimination: Protecting LGBT Students from School Voucher Discrimination*, 87 *Fordham L. Rev.* 1251, 1262 (2018) (discussing private schools’ denial of admission to children of LGBTQ parents).

⁴⁸ Claudia Koerner, *A Teen Says Her Catholic High School Forced Her Into Counseling For Being Gay. Her Parents Had No Idea.*, *Buzzfeed* (Nov. 7, 2019), <https://bit.ly/3FT4H87>.

LGBT issues or have policies discouraging or prohibiting homosexuality.”⁴⁹

A number of private religious schools also rely on “sexual immorality” clauses like the ones described above to expel or punish students for sexual activity. That includes students who have been the *victims* of sexual assault.⁵⁰ It also includes students who become pregnant. For example, one religious school in Maine states that “[p]ossible consequences” for student pregnancy include “suspension,” “expulsion,” or a requirement to complete all education from home, in which case the student must forfeit all leadership positions.⁵¹ That position is directly at odds with the policy in Maine’s public schools, which may not “exclude any person from any program or activity because of pregnancy or related conditions.” Me. Stat. tit. 5, § 4602(1)(C).

Many private schools also discriminate against and therefore systematically under-enroll students with

⁴⁹ Olivia Perry, *Learning to Discriminate: Vouchers and Private School Policies’ Impact on Homosexual Students*, 17 First Amend. L. Rev. 477, 485-86 (2019); see also Leslie Postal & Annie Martin, *Anti-LGBT Florida schools getting school vouchers*, Orlando Sentinel (Jan. 23, 2020), <https://bit.ly/3aElu05> (at least 14 percent of Florida students using school vouchers in 2019 “attended private schools where homosexuality was condemned or, at a minimum, unwelcome”).

⁵⁰ See Emma Brown, *Reporting a school sexual assault can increase a victim’s risk of punishment*, Wash. Post (Jan. 17, 2016), <https://bit.ly/3vbYpeR> (providing examples of K-12 students who reported sexual assaults and were punished for violating school policies on sexual activity); Corky Siemaszko, *BYU Student Says School Is Punishing Her for Reporting Rape*, NBC News (Apr. 19, 2016), <https://bit.ly/3FQkBA7> (describing student at religious university who reported her rape and was subsequently blocked from registering for classes due to an “honor code” investigation).

⁵¹ Greater Houlton Christian Academy, *supra*, at 26.

disabilities.⁵² A number of Maine’s religious schools have published policies in their handbooks that explicitly disallow students with disabilities from enrolling in their schools. One handbook states that the school does not accept “children with substantial learning disabilities, serious emotional or social problems, or severe physical disabilities.”⁵³ Another provides that “[n]o provisions are available for mentally handicapped children or children with severe learning or behav[i]orial (IEP) disabilities.”⁵⁴ And another indicates that “average and above average students” may enroll, but “[n]o provisions are available for mentally handicapped children or children with severe learning disabilities.”⁵⁵ These policies make clear that students with disabilities are not welcome in their classrooms; worse, they imply that students with disabilities are considered inferior, *i.e.*, below “average.” That is not the message Maine wishes to send. It is irreconcilable with the inclusion goals of a public education, *see supra* pp. 4-8, and with Maine’s policy

⁵² See ACLU, *Justice Department Says State Voucher Programs May Not Discriminate Against Students with Disabilities* (May 2, 2013), <https://bit.ly/3CmoGd0> (in response to ACLU complaint alleging that Wisconsin’s voucher program “systematically exclud[es] students with disabilities,” the Department of Justice reaffirmed States’ obligation to ensure that students “do not encounter discrimination on the basis of their disabilities”).

⁵³ Greater Portland Christian School, *Admissions Considerations (Gr. K-12)*, <https://tinyurl.com/9dckj3tc> (last visited Oct. 29, 2021).

⁵⁴ Sanford Christian Academy, *2020-2021 Parent-Student Handbook 3* (2020), <https://bit.ly/3jMb7fL>.

⁵⁵ Open Door Christian Academy, *2020-2021 Student Handbook 6* (2020), <https://bit.ly/3nyWLQW>; *see also* Pine Tree Academy, *supra*, at 6 (stating that the school cannot “handle students with serious behavioral, social, or emotional needs or learning disabilities requiring special-education classes”).

prohibiting educational discrimination on the basis of physical or mental disability, *see* Me. Stat. tit. 5, § 4602(1).

Like many private religious schools across the country, the two Maine schools at issue in this case both have openly discriminatory policies. Bangor Christian Schools' handbook defines marriage as between one man and one woman and states that "any other type of sexual activity, identity or expression that lies outside of this definition of marriage" is a "sinful perversion[] of and contradictory to God's natural design and purpose for sexual activity."⁵⁶ It further provides that "[a]ny deviation from the sexual identity that God created will not be accepted."⁵⁷ Temple Academy similarly states that any act of "sexual immorality" could lead to expulsion.⁵⁸ "Sexual immorality" could, presumably, encompass the act of not being heterosexual or cisgender. Being LGBTQ is a common basis for expulsion and other mistreatment in religious schools, such as through in-school conversion therapy. *See supra* pp. 22-23.

2. Existing state and federal civil rights law are inadequate to protect students from discrimination

Although students of color, LGBTQ students, and students with disabilities are more likely to be victims of discrimination at private religious schools, they are also *less* likely to have any meaningful recourse when they experience discrimination. Public schools—and in general, private schools receiving state and federal funds—are required to adhere to state and federal civil rights law, but private religious schools often do not face

⁵⁶ Bangor Christian Schools, *Student Handbook* 4 (revised Aug. 2, 2021), <https://tinyurl.com/wrd2jacp>.

⁵⁷ *Id.* at 5.

⁵⁸ Temple Academy, *Parent/Student Handbook 2018-2019* 25 (2018) (available at Dist. Ct. Dkt. 24-28).

the same requirements. For example, religious organizations, including schools, are not required to comply with the Americans with Disabilities Act. *See* 42 U.S.C. § 12187. And the Maine Human Rights Act similarly exempts religious schools from the provision prohibiting discrimination on the basis of sexual orientation. *See* Me. Stat. tit. 5, § 4602(4).

The State thus does not always have the mechanisms to prevent discrimination from occurring in private religious schools. That is why it is all the more important that Maine be able to choose not to provide direct financial support for such discrimination through its tuition-assistance program.

C. Funding Private Religious Education with Public Funds Would Subject Students to the Distinct Harm of Publicly Funded Discrimination

Requiring Maine to fund religious education would raise serious concerns about state-sponsored discrimination. Although not every school that is religious in status alone will discriminate against its students, religious *education* is far more likely to result in discrimination. This is because such education, as described above, is more likely to be fundamentally incompatible with state and federal anti-discrimination law. Temple Academy and Bangor Christian Schools are good examples: Both have expressly disclaimed any interest in participating in the state tuition program if doing so would require them to abide by the provisions of the Maine Human Rights Act that prohibit discrimination on the basis of sexual orientation and gender identity. *See* Pet. App. 10.

This Court long ago held that States must “steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.” *Norwood v. Harrison*, 413 U.S. 455, 467

(1973). Drawing on *Brown v. Board*, the Court explained that “discriminatory treatment exerts a pervasive influence on the entire educational process.” *Id.* at 469. Studies have confirmed this fact: Discrimination has a proven negative impact on student educational achievement and wellbeing.⁵⁹ Researchers have found, for example, that racial discrimination triggers physical and psychological stress responses that affect academic achievement.⁶⁰

Here, by their own admission, Temple Academy, Bangor Christian Schools, and many other private religious schools in Maine engage in discrimination. *See supra* pp. 21-25. The only remaining question is whether Maine must provide state funds to those schools to facilitate that discrimination. The answer to that question is no. As this Court recognized in *Brown*, the negative impact of discrimination on students is unquestionably “greater when it has the sanction of the law.” 347 U.S. at 494. That is because students will inevitably interpret state-sanctioned discrimination as “denoting the inferiority” of the targeted groups, which can affect their “educational and mental development” in myriad ways. *Id.* The State has a compelling interest of the highest order in not giving its stamp of approval to discriminatory educational practices that will cause its students affirmative harm.

⁵⁹ See Dorainne J. Levy et al., *Psychological and Biological Responses to Race-Based Social Stress as Pathways to Disparities in Educational Outcomes*, 71 AM. PSYCHOLOGIST 455 (2016); Shelley L. Craig & Mark S. Smith, *The Impact of Perceived Discrimination and Social Support on the School Performance of Multiethnic Sexual Minority Youth*, 46 YOUTH & SOCIETY 30 (2014); see also Melinda D. Anderson, *How the Stress of Racism Affects Learning*, The Atlantic (Oct. 11, 2016), <https://tinyurl.com/2kp3d669>.

⁶⁰ See Levy et al., *supra*.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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