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 NATIONAL EDUCATION ASSOCIATION, AMERICAN FEDERATION OF TEACHERS, MAINE EDUCATION ASSOCIATION, SANFORD FEDERATION OF TEACHERS, AFT LOCAL 3711, AND THE SERVICE EMPLOYEES INTERNATIONAL UNION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici are committed to ensuring that public education remains the cornerstone of our nation's social, economic, and political structure, and that children of all backgrounds have the right to a public education that gives them a meaningful opportunity to succeed in school and in life.

The National Education Association (NEA) is a national membership organization of three million educators who serve our nation's students in public school districts, colleges, and universities. Since its founding over a century and a half ago, NEA and its affiliates have worked to create, expand and strengthen the quality of public education available to all children—including by defending, in several prior cases, the Maine statute at issue in this case. The Maine Education Association, an affiliate of NEA, represents 24,000 educators in Maine in the public schools and institutions of higher education, and has worked for the last century and a half to expand and fulfill the promise of public education in Maine.

The American Federation of Teachers (AFT), an affiliate of the AFL-CIO, was founded in 1916 and today represents 1.7 million members in more than 3,500 local affiliates nationwide. AFT members include educators and educational assistants, higher education faculty and administrative staff, nurses

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel contributed money to fund the brief's preparation or submission. All parties have lodged letters of blanket consent to the filing of amicus briefs.

and health care workers and public employees. AFT K-12 members are committed to providing their students the highest quality public education consistent with the standards set by the local, state and federal government. Among the AFT affiliates is the Sanford Federation of Teachers, AFT Local 3711, which represents educators, educational assistants and related staff in the public schools. In cases that directly impact public school education, AFT frequently submits amicus briefs in this Court.

The Service Employees International Union (SEIU) is a labor union of approximately two million women and men who provide healthcare, public services, and property services throughout the United States, Canada, and Puerto Rico. More than 150,000 of SEIU's members are public school educators and support staff. SEIU affiliate Maine Service Employees Association (MSEA), SEIU Local 1989, is committed to ensuring that the highest quality public services are provided to Maine's residents, and MSEA's membership includes educators, social workers, supervisors, and administrative and maintenance workers who provide and support public education.

SUMMARY OF ARGUMENT

I. States have long recognized the fundamental role of education in a democratic society and their special obligation to ensure that all children have access to this vital benefit. Maine is no different. From its inception, Maine's Constitution, like those of other states, has recognized that the State has a "duty" to ensure all children have access to a free public education. Me. Const. art. VIII (1820); Me. Const. art. VIII, Pt. 1, § 1 (2021). But Maine encountered a unique program in carrying out this constitutional mandate: over half of the school districts in Maine do not have their own public secondary school.

The tuition assistance program was enacted to fill this gap. It is an essential element of Maine's constitutional mandate to provide a free public education to its children. Notably, the tuition program is not a "school choice" or "voucher" program; it does not provide parents an alternative additional option to the public schools. Rather, it is the sole means by which the State provides a free public education in those school districts that otherwise lack a publicly funded school option.

Once placed in this proper context, Maine's decision to fund only secular education through the tuition program falls well within constitutional bounds. While Petitioners contend that it is unconstitutional to choose between accepting a taxpayer-funded secular education or obtaining a religious education on their own dime, the tuition program in fact simply places Petitioners on equal footing with all other parents in Maine. Those who live in a school district that operates its own public

high school must similarly choose between a free secular education at that public school or a religious education on their own dime. Thus, the tuition program offers Petitioners the same type of educational benefit that Maine offers the rest of its citizens: a free secular education funded by the State. Neither the First Amendment nor the Equal Protection Clause entitles Petitioners to a more generous public benefit than Maine provides to its other residents.

II. Maine's unique circumstances make this case a poor vehicle for resolving any broader questions about the federal Constitution's application to state funding of education, or to the myriad of differing state constitutional provisions governing that funding. But if the Court does offer guidance on States' authority to limit state funding for private schools, it should reaffirm four basic principles.

First, a "State need not subsidize private education." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020). Nothing in the text or history of the Free Exercise Clause precludes States from reserving public funds for public schools, as many States presently do.

Second, when States elect to provide financial assistance to private schools, they may impose neutral rules that limit the size of the program in order to control costs and mitigate the potential negative effects on public schools.

Third, States may condition public funding on private school's compliance with neutral, generally applicable curriculum and other quality standards, just as they may set standards for the medical care, housing, and other goods and services purchased with

public funds. The Free Exercise Clause does not require States to lower or alter neutral and generally applicable standards in order to accommodate private schools that prefer to provide a different kind of educational service than the State is looking to purchase. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."). Recent calls to revisit the standard of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), have no bearing on this question. *Smith* governs an individual's right to an accommodation from a unliateral state regulation of private conduct, not the Government's ability to decide what kinds of programs to fund with taxpayer dollars by attaching neutral, generally applicable conditions to government grants.

Fourth, in the same vein, States may condition receipt of public funds on private schools' compliance with neutral, generally applicable nondiscrimination standards. To be sure, the Government cannot apply nondiscrimination requirements unevenly, allowing exceptions for secular but not religious reasons, for example. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877-78 (2021). But so long as they are neutrally and generally applied, the Government may enact conditions on government funding. "As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). "This remains

true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights." *Id.*

In addition, States have a compelling interest in ensuring that the benefits of taxes collected without discrimination are available to constituents on a nondiscriminatory basis. And the Constitution does not compel States to associate themselves with, much less financially support, forms of discrimination the people's representatives deem incompatible with the community's values. While private schools are entitled to have different values, they are not entitled to the government's financial assistance in such discrimination. *See, e.g.*, *Rust*, 500 U.S. at 193 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." (alteration in original)).

ARGUMENT

I. Maine's Tuition Program Is An Integral Component In Fulfilling The State's Constitutional Mandate To Provide A Free Public Education To Its Children

A. Like all states, Maine recognizes the critical importance of education in a democratic society and the State's special obligation to ensure that all of its children have access to an education. The principle that the "advantages of education" are "essential to the preservation of the rights and liberties of the people" has been enshrined in the Maine Constitution from the beginning. Me. Const. art. VIII (1820); Me. Const. art. VIII, Pt. 1, § 1 (2021). To fulfill this promise, the Maine Constitution has also mandated from its inception the Legislature's "duty" to ensure

all children in the State have access to a free public education:

> A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools;

Id.

In accord with this constitutional mandate, the State enacted an express "Policy on public education," which sets forth the Legislature's intent that "every person within the age limitations prescribed by state statutes shall be provided an opportunity to receive the benefits of a free public education." Me. Rev. Stat. Ann. tit. 20-A, § 2. Every school district, known as school administrative units ("SAU") in Maine, is obligated to pay the cost of a public education for students residing within that district. *See* Me. Rev. Stat. Ann. tit. 20-A, § 4501.

Many SAUs comply with this mandate by operating their own system of public schools, which is open to all students residing within that SAU. Me. Rev. Stat. Ann. tit. 20-A, § 5202. Parents who live in a SAU with its own public school have the option of receiving a free education at that public school or sending their children to a different public or private school at their own expense. Me. Rev. Stat. Ann. tit. 20-A, § 5204, ¶ 1.

Other SAUs fulfill this education mandate by entering into contracts with another school to provide

schooling for their students. Me. Rev. Stat. Ann. tit. 20-A, § 2701. Similar to SAUs that operate their own public schools, parents who reside in a SAU that contracts with another school have the option of receiving a free education at the SAU-contracted school or sending their children to a different public or private school at their own expense. Me. Rev. Stat. Ann. tit. 20-A, § 5204, ¶ 3.[2]

But due in part to its geography, with a small population spread out across a relatively large area, as well as other historical factors, Maine was confronted with a unique problem in carrying out this otherwise straightforward constitutional mandate to provide a free public education to its children. More than half of the SAUs in Maine do not have their own public secondary school; nor do they contract with another secondary school. J.A. 70, ¶ 6. Thus, without additional legislative steps, high school students residing within these SAUs would lack access to the free public education the State is constitutionally obligated to provide to all of its children.

Maine's tuition program was enacted to fill this gap. Under the tuition program, a SAU that "neither maintains an elementary school nor contracts for elementary school privileges" will pay the cost for a student to attend an approved public or private elementary school of the parent's choice. Me. Rev. Stat. Ann. tit. 20-A, § 5203, ¶ 4. Similarly, and as relevant here, a SAU that "neither maintains a secondary school nor contracts for secondary school

[2] Petitioners acknowledge that if the SAU chooses to educate its students by contracting with one school, "then Maine and the district would have a compelling interest in ensuring the education provided was nonsectarian." Pet'rs' Br. at 40 n.9.

privileges" will pay the cost for a student to attend an approved public or private secondary school of the parent's choice. Me. Rev. Stat. Ann. tit. 20-A, § 5204, ¶ 4. Schools must apply to participate in the tuition program, and private schools must be approved for the receipt of public funds. Me. Rev. Stat. Ann. tit. 20-A, § 2951; Me. Rev. Stat. Ann. tit. 20-A, ch. 219. Notably, the tuition program benefit for secondary schooling is available only to parents who would otherwise lack *any* publicly funded education option to provide secondary schooling to their children.

Thus, it is important to recognize that Maine's tuition program is not, and was not intended to be, a "school choice" or "voucher" program. It does not provide parents an alternative education option in addition to attending a public school, nor was it enacted to address any deficiency in the quality of the public schools within the State. It is therefore unlike the programs that have previously come before this Court. *See*, *e.g.*, *Espinoza*, 140 S. Ct. at 2251-52 (private school voucher program enacted to provide "parental and student choice in education"); *Zelman v. Simmons-Harris*, 536 U.S. 639, 644-45 (2002) (voucher program for parents residing in districts with underperforming public schools).

B. Once placed in this proper context, Maine's decision to fund only secular education through the tuition program falls well within constitutional bounds. Petitioners contend that the State has unconstitutionally burdened their free exercise rights and discriminated against them on the basis of their religious beliefs because they must choose between accepting the taxpayer-funded secular education provided through the tuition program or obtaining a religious education that better aligns with their

personal beliefs "on their own dime." Pet'rs' Br. at 5-7, 30-31. But in this respect, the tuition program simply places Petitioners on equal footing with all other parents in Maine.

Parents residing in a SAU that operates its own public schools must choose between a free secular education at their SAU public school or a religious education on their own dime. Parents residing in a SAU that contracts with another school must choose between a free secular education at their SAU-contracted school or a religious education on their own dime. Similarly, Petitioners and other parents who live in a SAU that neither operates its own school nor contracts with another school must choose between a free secular education at an approved public or private school or a religious education on their own dime. Indeed, this is the same choice offered not only to all parents in Maine, but also to parents in every other state that fulfills its education obligation by providing its children access to a system of public schools. *See* n.3 *infra*.

Maine has not chosen to fund an additional alternative to the public schools. Rather, pursuant to its constitutional mandate, Maine seeks to provide all children "the benefits of a *free public education*." Me. Rev. Stat. Ann. tit. 20-A, § 2 (emphasis added). The tuition program is an essential component of fulfilling this obligation. Its purpose is to address a unique, but significant, problem resulting from the large number of SAUs that offer no free public secondary school option. Maine's decision to limit the tuition program to schools that provide a secular education simply means that Petitioners receive the same type of educational benefit that Maine provides to the rest of its citizens: a free secular education funded by the

State. Neither the First Amendment nor the Equal Protection Clause entitles Petitioners to a more generous public benefit than the State provides to its other residents.

II. The Court Should Reaffirm States' Constitutional Authority To Impose Neutral Limitations On Funding Of Private Schools.

Both Petitioners' challenge to, and Maine's defense of, the State's tuition assistance statute depend in large part on the unique circumstances of that particular program. *See, e.g.*, Pet'rs' Br. 20-21, 36-37, 42-44; Resp. Br. 30-34, 43-45. Accordingly, this Court can resolve this case without issuing any broad pronouncements that would apply beyond those special circumstances. Some of Petitioners' amici, however, clamor for a broader ruling, or urge the Court to establish First Amendment principles that may limit States' authority to control how public education funds are spent in other cases. *See, e.g.*, Cato Br. 2-3 (arguing that public schools "cannot cleanly separate public education from religion" and, therefore, the "only constitutionally sound solution here is to allow education dollars to flow where students and families direct them"); Freedom X Br. 17 (public schools are "not neutral with regard to religion" and suggesting that true neutrality requires "including more schools among the choices"); Prof. Berner Br. 17 (arguing that education is inherently "non-neutral" and that a "rational approach" to neutrality requires "fund[ing] a diversity of schools" including religious ones). The Court should resist those calls for a broader decision. But if the Court were to answer them, it should do so by reaffirming four basic principles.

A. Nothing In The U.S. Constitution Precludes States From Reserving Public Funds For Public Schools.

First, it should go without saying that a "State need not subsidize private education." *Espinoza*, 140 S. Ct. at 2261. The sole limitation the First Amendment imposes is that "*once* a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* (emphasis added).

Throughout our history, States have commonly elected to reserve public funding for public schools. At present, while some States provide vouchers or other direct funding for private education, many others do not.[3] Often, that is the result of policy decisions made by each State's elected representatives after vigorous public debate. In a number of States, the people themselves made the decision to restrict state funding of *any* private school (not just religious private schools) in their state constitutions. *See, e.g.*, Ala. Const. art. IV, § 73. ("No appropriation shall be made to any charitable or educational institution not under the absolute control of the state . . . except by a vote of two-thirds of all the members elected to each house."); Pa. Const. art. III, § 30 (same); Ga. Const. art. VIII, § 6, ¶ I(b) ("School tax funds shall be expended only for the support and maintenance of public schools. . . ."); Mich. Const. art. VIII, § 2 (no funding for any "nonpublic school"); Wyo. Const. art. III, § 36 ("No appropriation shall be made for charitable, industrial, educational or benevolent

[3] *See* Education Commission of the States, 50-State Comparison, *https://reports.ecs.org/comparisons/vouchers-01*. Some of these states provide tax credits for private schooling.

purposes to any person, corporation or community not under the absolute control of the state . . . .").[4]

At the same time, this Court has never even hinted that the U.S Constitution could compel States to enact voucher programs or provide other forms of financial support for private schools. Nor is there any basis in the text or history of the Constitution to support judicial discovery of such a principle for the first time more than two centuries after the Bill of Rights was ratified. As this Court has recognized, during the Founding era, the predominant feature of public funding of education was its "variety of approaches." *Espinoza*, 140 S. Ct. at 2259. Some state and local governments provided financial assistance to private schools, *id.* at 2258, but there is no evidence that they did so under the belief the new federal constitution required it. *See, e.g.*, Carl F. Kaestle, Pillars of the Republic: Common Schools and American Society, 1780-1860, at 167 (Eric Foner ed., 1st ed. 1983) ("The relevance of the federal constitution" to state funding of education "was asserted only in the twentieth century."). When

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[4] A number of other state constitutions prohibit state funding of any "private or sectarian school." Ariz. Const. art. IX, § 10; *see* Alaska Const. art. VII, § 1 ("religious or other private educational institution"); Cal. Const. art. IX, § 8 ("sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools"); Haw. Const. art. X, §1 ("any sectarian or nonsectarian private educational institution," with exception for one specified funding source); N.M. Const. art. XII, § 3 (any "sectarian, denominational or private school"); S.C. Const. Art. XI, § 4 ("any religious or other private educational institution"). These provisions are not so-called Blaine Amendments that single out religious private schooling – they limit state funding of *any* private schools.

States began systematic funding of public education starting in the 1830s and 1840s, they did so in order to enact a system of public schools under public control, accountable to public officials. *Id.* at ix-x, 105. While some may have objected to the exclusion of similar funding for private schools on policy grounds, *id.* at x, the courts never suggested that this was a matter for resolution by the judiciary rather than the political process.

To be sure, today there is a vigorous public debate over whether, and to what extent, States should subsidize private education. But absent proof of forbidden religious discrimination, our federal system leaves such questions to the political processes of the States. *Cf., e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973) (recognizing federal constitutional right to adequate educational funding would require "assuming a legislative role and one for which the Court lacks both authority and competence").

B. States May Constitutionally Limit The Size Of Any Financial Aid Program For Private Schools.

It should also go without saying that if a State elects to provide financial assistance for private schooling, the State may enact neutral rules to limit the size of the program and its potential negative effects on state budgets and public schools.

To amici's knowledge, every state voucher or similar funding program for private education is subject to significant fiscal and other neutral limitations on the size of the program. In *Espinoza*, for example, the State had capped its tax credit program to $3 million per year. *See* 140 S.Ct. at 2251. North

Carolina limits assistance to special needs students and low-income families. *See* N.C. Gen. Stat. Ann. §§ 115C-112.5(2), 115C-562.1(3), 115C-591(3). And in this case, Maine offers tuition assistance for secondary schooling only to students from districts without a public secondary school and only up to a specified amount. *See* Me. Stat. Ann. tit. 20-A, §§ 5204(4), 5805, 5806.

Petitioners do not challenge such restrictions, nor could they. Deciding the scope of the government's fiscal commitment to a program is a quintessential political decision that the U.S. Constitution leaves, almost without exception, to the political process. While such decisions may not discriminate on prohibited bases, they are otherwise questions for public debate, not private litigation.

In this context, States have a particularly compelling interest in limiting the size of voucher programs. To start, given their commitment to provide all students access to a public education – often an obligation written into the state constitution[5] – States may reasonably be concerned that expansive support for private schools will either require reductions in other vital state services (including not only public education, but also health care, public safety, etc.) or increases in taxes or deficits.[6] In addition, officials may well worry that a substantial tuition assistance program could reduce

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[5] *See, e.g.*, Me. Const. art. VIII, Pt. 1, § 1; Mont. Const. art. X, § 1; N.C. Const. art. I, § 15.

[6] *See, e.g.*, Stuart S. Yeh, *The Cost-Effectiveness of Five Policies for Improving Student Achievement*, 28 Am. J. Evaluation 416, 427 (2007).

attendance at the local public schools below the critical threshold necessary to support quality public education.

At the same time, there is a robust public and academic debate over whether voucher programs genuinely improve academic outcomes.[7] In the face of that debate, public officials may reasonably limit the scope of any voucher program they might elect to enact. Public officials may also legitimately take into account the social costs of voucher programs, including diminishing public schools' role as a foundation of our democracy, institutions in which children from all backgrounds and races come together and form common bonds.[8]

C. States May Limit Public Funding To Private Schools That Comply With Neutral, Generally Applicable Curricular And Other Quality Standards.

Petitioners make much of the fact that Maine has imposed relatively lax curricular requirements on the private institutions it will fund through its tuition assistance program. *See* Pet'rs' Br. 42-44 (arguing that this undermines asserted interest in duplicating the public education experience). As Maine explains,

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[7] *See, e.g.*, Christopher Lubienski & Joel Malin, *The New Terrain of the School Voucher Wars*, The Hill (Aug. 30, 2019), https://tinyurl.com/5yejzb8t; Mark Dynarski, *On Negative Effects of Vouchers, Evidence Speaks Reports* (Brookings: Washington, DC), May 26, 2016, at 1, 2, https://tinyurl.com/28s8ye2x.

[8] *See, e.g.*, Halley Potter, The Century Foundation, *Do Private School Vouchers Pose a Threat to Integration?* (Mar. 2017), https://tinyurl.com/4x7yhewt; Chris Ford et al., Ctr. for Am. Progress, *The Racist Origins of Private School Vouchers* 7 (2017), https://tinyurl.com/39recyef.

this argument has no merit. *See* Resp. Br. 32-33. But regardless of what the Court concludes about Maine's program on the facts of this case, it should make clear that nothing in the Constitution precludes States from imposing neutral curricular and other quality standards on any private education it helps fund, so long as it applies those standards evenhandedly to secular and religious schools alike. Importantly, this would be so even if this Court were to revisit the holding of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), as some members of the Court have recently suggested. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021).

As they do whenever they purchase goods or services with public funds, States reasonably impose minimum standards for the educational services they purchase on behalf of their schoolchildren. In this case, Maine's rules depend on the number of publicly financed students attending the school. When the State is funding 60 percent or more of the students, the school must "meet[] the applicable requirements of and ha[ve] a curriculum aligned with" the public schools. Me. Stat. Ann tit. 20-A, § 2951(6). Otherwise, Maine requires only that the school meet basic accreditation standards. *Id.* § 2902(3). The standards imposed by other States vary widely.[9]

Petitioners do not challenge Maine's requirements and there is no basis for anyone to call into question States' constitutional authority to impose similar, or

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[9] *See* U.S. Gov't Accountability Office, GAO-19-664, *Private School Choice: Accountability in State Tax Credit Scholarship Programs* 14–15 (2019), https://tinyurl.com/w8mauz7r.

even more demanding, standards for the private education the State is willing to finance or subsidize.[10] It is only natural that States should expect more of the education the public is paying for than it requires of schools run without government aid. When a State establishes basic accreditation standards, it is acting in its capacity as regulator, setting out what is required to fulfil the state's purposes in enacting its compulsory attendance laws. But when the State is paying for a service, it is also acting as a fiduciary of the public fisc, ensuring that the money it spends obtains a benefit sufficient to justify the use of taxpayer funds. In the same way, when the Federal Government pays for medical care through Medicaid or Medicare, it reasonably requires more than mere compliance with basic licensing and malpractice standards.

The Government is not required to compromise those educational standards to accommodate a private religious school's desire to provide a different educational experience at public expense. In general, "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust*, 500 U.S. at 193. That

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[10] Even in upholding the constitutional right of parents to send their children to private schools, this Court in *Pierce v. Society of Sisters* took pains to observe that "[n]o question is raised concerning the power of the state reasonably to regulate all schools," including to require that "certain studies plainly essential to good citizenship must be taught." 268 U.S. 510, 534 (1925). This, even though the private education at issue enjoyed no public financial support.

is because, while the Government may not unduly burden citizens' exercise of fundamental freedoms, it is generally under no obligation to fund private parties' exercise of those rights. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 316 ("[I]t does not follow that . . . freedom of choice carries with it a constitutional entitlement to the financial resources to avail [oneself] of the full range of protected choices."); *Rust*, 500 U.S. at 193 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.") (quoting *Regan v. Tax'n Without Representation of Wash.*, 461 U.S. 540, 549 (1983)). "To hold that the Government unconstitutionally discriminates . . . when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect." *Id.* at 194.

Accordingly, it is well established that States and the Federal Government may attach conditions to government grants that they could not impose unilaterally in their regulatory capacity. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537 (2012). "As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds." *Agency for Int'l Dev.*, 570 U.S. at 214.

"This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights." *Id.* (collecting cases); *cf. Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring) (noting "it is difficult to see why the Free Exercise Clause" should be treated differently from other "First Amendment freedoms").

Nor does the debate over whether to modify the rational basis standard of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), have any bearing here. *Smith* addresses the Government's power to unilaterally regulate private conduct; it does not govern conditions on public grants or other gratuities. 497 U.S. at 878. That is the province of decisions like *Open Society* and *Rust*, cited above.

The standards are different because of the "distinction between governmental compulsion and conditions relating to governmental benefits." *Bowen v. Roy*, 476 U.S. 693, 705 (1986) (plurality opinion). The Court "cannot ignore the reality that denial of [government] benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications." *Id.* at 704 (plurality opinion). After all, the First Amendment bars the government from "*prohibiting* the free exercise" of religion, U.S. Const. amend. 1 (emphasis added), language that is "written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988). While refusing to modify a neutral program requirement can burden religious exercise, the lesser degree of that burden has constitutional significance.

In addition, the State's interests in administering any government program, much less one weighted with such state constitutional significance as public education, are different from its interests as sovereign in regulating otherwise private conduct.

See Bowen, 476 U.S. at 707 (plurality opinion); *see also Fulton*, 141 S. Ct. at 1878 (acknowledging that the government "commands heightened powers when managing its internal operations" so long as it does not "discriminate against religion when acting in its managerial role"). When the government acts to provide services to its constituents – be it directly, through contractors, or via grant programs – its interests "in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one." *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion).

Those interests are at their apex here. After all, "education is perhaps the most important function of state and local governments." *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954). A half century ago, this Court said "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* That is as true today as ever. [11] And the state and local government interests in providing quality public education extend beyond ensuring the individual successes of the country's children. Public education is vital in "maintaining our basic institutions," *Plyler v. Doe*, 457 U.S. 202, 221 (1982), including our "democratic system of government" itself, *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

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[11] *See, e.g.*, U.S. Bureau of Labor Statistics, *Education Pays*, https://www.bls.gov/emp/chart-unemployment-earnings-education.htm (showing earnings and unemployment rates by educational attainment as of 2020).

In combination, the lesser Free Exercise burden and the heightened government interests require a constitutional standard that provides the Government greater flexibility than strict scrutiny allows. And under any reasonable standard, the Government should be entitled to dictate the kinds and quality of the services it pays for, rather than being forced to accept the alternative services some private schools might wish to provide at public expense.

D. The Free Exercise Clause Does Not Require Public Funding Of Discrimination Against Students Or Teachers.

Finally, the Federal Government and the States have long required that publicly funded programs not discriminate on the basis of race, color, national origin, sex, religion, disability, age, and in many cases sexual orientation and identity. *See, e.g.*, 42 U.S.C. §§ 2000d, 6102; 29 U.S.C. § 794; 20 U.S.C. § 1681(a); Exec. Order No. 12250, 45 Fed. Reg. 72995 (Nov. 4, 1980); Exec. Order No. 13160, 65 Fed. Reg. 39775 (June 27, 2000); Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 25, 2021); Pet. App. 17 (discussing Maine's prohibition on public funding of private schools that discriminate on the basis of sexual orientation in hiring). Just as a State may constitutionally condition tuition assistance on a private institution meeting curriculum standards, it may also condition state funding on the school's compliance with neutral, generally applicable nondiscrimination requirements.

Although States sometimes elect to exclude religious institutions from some nondiscrimination rules ordinarily attached to government funds, the

Free Exercise Clause does not compel them to do so. Whatever the Clause may require with respect to state laws regulating private discrimination, it is an entirely distinct question whether the State can be compelled to fund such discrimination itself. As just discussed, the Government has no obligation to fund the exercise of First Amendment rights and accordingly has broad discretion to condition the receipt of public funds to ensure they are used in a manner consistent with State policies. *See* § II.C *supra*. To be sure, the Government cannot apply nondiscrimination conditions unevenly, allowing exceptions for secular but not religious reasons, for example. *See Fulton,* 141 S. Ct. at 1877-78. But so long as nondiscrimination requirements apply generally and neutrally, the Government is not required to compromise its "weighty" interest in ensuring that the benefits of public funds are available on an equal basis to all schoolchildren and educators. *Id.* at 1882.

Prohibiting discrimination in state financed education programs is a particularly appropriate use of the State's power to impose conditions on government funding. This Court has repeatedly recognized that States have a compelling interest in protecting their citizens from invidious discrimination even by private parties. *See, e.g.*, *N.Y. State Club Ass'n v. New York City*, 487 U.S. 1, 14 n.5 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976). And States have an even greater interest in protecting children from discrimination in programs the Government itself

funds. To start, state funds are collected from all citizens, without regard to race, national origin, religion, sex, disability, or sexual orientation or identity. States are entitled to ensure that the benefits of that universal taxation are universally available to all citizens.

In addition, this Court has recognized that individuals and private institutions have an important interest in not being forced to associate themselves with, or facilitate, forms of conduct that violate their values. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). Public institutions likewise have a compelling interest in avoiding association with forms of discrimination that the people's representatives have deemed incompatible with the community's values. The public's interest in not *funding* that discrimination is even more compelling. The Government is the representative and guardian of all people. It betrays its most basic obligation to treat all its citizens as having equal status when it funds programs that treat some of its members "as social outcasts or as inferior in dignity and worth." *Fulton*, 141 S. Ct. at 1882.

Of course, private institutions are entitled to have their own values, and sincerely held religious beliefs are protected by the Free Exercise Clause. Cases like *Sherbert v. Verner*, 374 U.S. 398 (1963), therefore require the Government not to interfere with the private exercise of those beliefs in many circumstances. *See Fulton*, 141 S. Ct. at 1877. But even in that context, the cases *Sherbert* relied upon were quick to point out that the "freedom asserted by" the persons seeking accommodation did "not bring them into collision with rights asserted by any other

individual." *See Braunfeld v. Brown*, 366 U.S. 599, 604 (1961) (quoting *W. Va. State Bd. Of Ed. v. Barnette*, 319 U.S. 624, 630, 633 (1943)) (cited by *Sherbet*, 374 U.S. at 403). Private institutions that request release from nondiscrimination conditions seek not only to prevent government interference in their private discrimination, but to enlist the Government's financial *assistance* in inflicting discriminatory harm on fellow taxpayers. Nothing in the Free Exercise Clause requires that complicity.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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