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 Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

Maine is a lightly populated, predominantly rural state with less than 180,000 publicly educated K-12 students spread out across 260 local school administrative units (SAUs). More than half of Maine's SAUs do not operate public secondary schools. To solve this problem, Maine uses private schools to deliver a public education in place of public schools. Because these private schools are entrusted with providing a public education that would otherwise be unavailable, Maine has a compelling interest in ensuring that the instruction students receive at these private schools is the substantive equivalent of what students would have received if they attended a public school. Accordingly, Maine law permits only nonsectarian schools to receive public funds for tuition purposes. To be clear, religious organizations that are willing to provide a nonsectarian education *(i.e.*, an education comparable to the education students would receive if their community operated a public school) are eligible to receive public funds through Maine's tuition program. It is not the religious status of an organization that determines whether they are eligible to receive public funds, but the use to which they will put those funds that dictates the result. In excluding sectarian schools, Maine is declining to fund explicitly religious activity that is inconsistent with a free public education.

The question presented is: Does either the First or Fourteenth Amendment to the United States Constitution require Maine to include sectarian schools in a

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program designed to provide a free public education to students who live in SAUs which neither operate public schools nor contract for schooling privileges?

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STATEMENT OF THE CASE

A. Public Education in Maine

Maine's Constitution requires the towns to provide 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; . . . .

Me. Const. art. VIII, pt. 1, § 1. Pursuant to Me. Rev. Stat. Ann. tit. 20-A, § 2(1), "[i]t is the intent of the Legislature 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." Further, "[i]t is the intent of the Legislature that control and management of the public schools shall be vested in the legislative and governing bodies of local school administrative units, as long as those units are in compliance with appropriate state statutes." Me. Rev. Stat. Ann. tit. 20-A, § 2(2).

Each school administrative unit (SAU) "shall either operate programs in kindergarten and grades one to 12 or otherwise provide for students to participate in those grades as authorized elsewhere [by statute]." Me. Rev. Stat. Ann. tit. 20-A, § 1001(8). Maine law provides two alternatives for an SAU to provide a public education to its resident students when it does not

operate a public school for one or more grades. First, an SAU may contract with another public or approved private school for schooling privileges for some or all of its resident students in those grades. Me. Rev. Stat. Ann. tit. 20-A, §§ 2701, 2702. Second, an SAU "that neither maintains a secondary school nor contracts for secondary school privileges pursuant to chapter 115 shall pay the tuition, in accordance with chapter 219, at the public school or the approved private school of the parent's choice at which the student is accepted." Me. Rev. Stat. Ann. tit. 20-A, § 5204(4).

Me. Rev. Stat. Ann. tit. 20-A, § 2951 contains the requirements for a private school to be approved to receive public funds for tuition purposes. Those schools must, *inter alia*, meet the requirements for basic school approval contained in statute, agree to comply with reporting and auditing requirements, and, at the center of the current dispute, be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." Me. Rev. Stat. Ann. tit. 20-A, § 2951(1), (2), (5).

The tuition program is not a "school choice" or "voucher" program akin to the Ohio program reviewed by this Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) or the Montana scholarship program in *Espinoza v. Montana Department of Revenue,* ___ U.S. ___, 140 S. Ct. 2246 (2020). Maine's Law Court has explained:

> The Legislature endeavors to ensure that each child will be entitled to an *opportunity* to

> receive a free public education, not to guarantee children a free education at any public or private school of their choice. Within the statutory scheme, section 5204(4)'s function is limited to authorizing the provision of tuition subsidies to the parents of children who live within school administrative units that simply do not have the resources to operate a public school system, and whose children would otherwise not be given an opportunity to receive a free public education.

Hallissey v. Sch. Admin. Dist. No. 77, 755 A.2d 1068, 1073 (Me. 2000) (emphasis in original).

Maine has 260 local SAUs, defined by statute as the state-approved unit of school administration, serving nearly 180,000 students in grades K-12 at public expense. Pet. App. 5; Joint Stipulated Facts, ¶¶ 3, 4, 20, *Carson v. Makin*, No. 1:18-CV-00327-DBH (D. Me. Mar. 15, 2019), ECF No. 25 (hereinafter "JSF"). More than half of the SAUs do not operate secondary schools. Pet. App. 5. In 2017-2018, 4,546 secondary students attended private schools through either a contract for schooling privileges or through the tuition program. JSF, ¶ 21.

B. Prior Legal Challenges to Maine's Tuition Program

Maine's Constitution has never had a so-called "Blaine Amendment" or any other provision prohibiting public funds from being provided to religious entities or used for religious purposes. Prior to 1980, some

sectarian schools received public funds for tuition purposes. JSF, ¶ 18. In January of 1980, in response to a request from a legislator, the Attorney General issued an opinion that thoroughly reviewed the existing First Amendment jurisprudence and concluded that the public funding of religious schools would violate the Establishment Clause. Me. Op. Atty. Gen. No. 80-2 (Jan. 7, 1980). Subsequently, the Legislature enacted the provision currently codified at Me. Rev. Stat. Ann. tit. 20-A, § 2951(2) ("Section 2951(2)"). 1981 Me. Laws 2177. More than 15 years later, two separate groups of parents filed lawsuits challenging the constitutionality of Section 2951(2). Both the Maine Law Court and the Court of Appeals for the First Circuit agreed with the reasoning of the Attorney General and held that the Establishment Clause prevented Maine from allowing payments to sectarian schools. *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999). The *Bagley* parents petitioned for certiorari. This Court declined to hear the case. 528 U.S. 947 (1999).

That was not the end of the Legislature's consideration of the use of public tuition dollars for sectarian education. In 2002, this Court decided *Zelman v. Simmons-Harris*. *Zelman* held, for the first time, that it was possible for a state to develop a so-called "voucher" program designed to provide school choice that would allow parents to use public money to pay for sectarian schools without violating the Establishment Clause. 536 U.S. at 662-63. Presented with the opportunity to consider public tuition payments for sectarian

education anew, a bill was introduced in 2003 to repeal Section 2951(2). JSF, ¶ 189. The bill was rejected. JSF, ¶ 202.

At around the same time, two sets of parents again challenged the constitutionality of Section 2951(2), contending that since Maine's defense in *Bagley* and *Strout* focused on its concern about violating the Establishment Clause and that concern had been addressed by *Zelman*, there was no longer a justification for the continued exclusion of sectarian schools. Again the parents were unsuccessful – both Maine's Law Court and the United States Court of Appeals for the First Circuit held that while *Zelman* created the possibility that Maine could design a program that would allow parents to direct public dollars to sectarian schools without violating the Establishment Clause, a second intervening Supreme Court case, *Locke v. Davey*, 540 U.S. 712 (2004), made clear that nothing in the Constitution required Maine to do so. *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004); *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006). The *Anderson* parents petitioned for certiorari. This Court again declined to hear the case. 549 U.S. 1051 (2006).

C. The Present Challenge to Maine's Tuition Program

In the wake of this Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), Petitioners filed a complaint in the

District of Maine alleging that the tuition program violates the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Pet. App. 12.

1. The Petitioners

David and Amy Carson send their daughter, O.C. to Bangor Christian Schools ("BCS"). Pet. App. 8. The Carsons send O.C. to BCS because the school's Christian worldview aligns with their sincerely held religious beliefs and because of the school's high academic standards. *Id.* The Carsons' religion neither requires them to send their daughter to a Christian school nor prevents them from sending her to a public school. JSF, ¶ 36.

Troy and Angela Nelson's daughter, A.N., is attending Erskine Academy through the tuition program. JSF, ¶¶ 25, 60. The Nelsons do not dispute the quality of the secular education their daughter receives at Erskine. JSF, ¶ 61. The Nelsons send their son, R.N., to Temple Academy ("TA") because they believe it offers him a great education that aligns with their sincerely held religious beliefs. JSF, ¶ 62. The Nelsons would like to send their daughter, A.N., to TA, because of the quality of education and the discipline, but cannot afford the cost of tuition for both of their children. JSF, ¶ 65.

2. The Schools

a. Bangor Christian Schools (BCS)

BCS is a sectarian school for purposes of Section 2951(2). JSF, ¶ 68. It was founded in 1970 as a ministry of the Bangor Baptist Church (now Crosspoint Church), and "is now into its fifth decade of training young men and women to serve the Lord." JSF, ¶¶ 69-70. The Head of School's employment agreement is with Crosspoint Church and he also serves as the Connections Pastor for the church. JSF, ¶¶ 80-81. He reports to Crosspoint's Senior Pastor and Deacon Board. JSF, ¶ 76. BCS believes that God has ordained distinct and separate spiritual functions for men and women, and men are to be the leaders of the church. JSF, ¶ 79. BCS teaches children that the husband is the leader of the household. JSF, ¶ 102.

Prior to admitting any student, BCS officials meet with the student and his or her family to explain BCS's mission and goal of instilling a Biblical worldview in BCS' students to try and determine if the school is a good fit for the student.

JSF, ¶ 86. BCS believes that a student who is homosexual or identifies as a gender other than on his or her original birth certificate would not be able to sign the agreement governing codes of conduct that BCS requires as a condition of admission. JSF, ¶ 89.

At BCS, presenting oneself as a gender other than what is listed on one's original birth certificate, whether done on or off school grounds, "may lead to

immediate suspension and probable expulsion." JSF, ¶ 90. If a student presented himself or herself as a gender other than that on his or her original birth certificate and refused to stop presenting himself or herself as a different gender after conversations and counseling with school staff, the student would not be allowed to continue attending BCS – just as a student who insisted on drinking every weekend would not be allowed to continue attending the school. JSF, ¶ 91. If a student was openly gay and regularly communicated that fact to his or her classmates, "that would fall under an immoral activity" under BCS' Statement of Faith and if "there was no change in the student's position" after counseling, the student would not be allowed to continue attending BCS. JSF, ¶ 92. An openly gay student who regularly communicated that fact in the school environment to his or her classmates would receive counseling, but if the student was "entrenched in this is who I am, I think it is right and good" the student would not be allowed to continue attending BCS because "it clearly goes against [BCS'] Biblical beliefs" – even if the student was celibate and did not engage in homosexual acts. JSF, ¶ 93.

Among BCS' educational objectives are to: 1) "lead each unsaved student to trust Christ as his/her personal savior and then to follow Christ as Lord of his/her life;" 2) "develop within each student a Christian world view and Christian philosophy of life;" and 3) "prepare each student for the important position in life of spiritual leadership in school, home, church, community, state, nation, and the world." JSF, ¶ 96.

Students at BCS are placed on academic probation if they receive an F in any course, unless the course is Bible, in which case a grade below 75% results in probation. JSF, ¶ 97. Bible is subject to this more stringent standard because "that is the primary thing in our school." JSF, ¶ 98.

BCS believes that the main reason parents send their children to BCS is to develop a biblical worldview. JSF, ¶ 99. BCS does not believe there is any way to separate the religious instruction from the academic instruction – religious instruction is "completely intertwined and there is no way for a student to succeed if he or she is resistant to the sectarian instruction." JSF, ¶ 101. For example, one of the objectives in the fifth-grade social studies class is to "[r]ecognize God as Creator of the world." JSF, ¶ 114. One of the objectives in the ninth-grade social studies class is to "[r]efute the teachings of the Islamic religion with the truth of God's Word." JSF, ¶ 116. Attending chapel is mandatory. JSF, ¶ 103.

To be a teacher at BCS, one must affirm that "he/she is a 'Born Again' Christian who knows the Lord Jesus Christ as Savior." JSF, ¶ 123. Moreover, every employee of BCS "[m]ust be born again" and "[m]ust be an active, tithing member of a Bible believing church." JSF, ¶ 124. BCS will not hire teachers who identify as a gender other than on their original birth certificates, nor will it hire homosexual teachers. JSF, ¶¶ 125-26.

BCS has not indicated that it would participate in the tuition program, even if Section 2951(2) were

eliminated. BCS testified that it would consider accepting public funds only if it did not have to make "any changes in how it operates." JSF, ¶ 127.[1] Even then, there is "no way to predict" whether BCS' governing body – the Deacon Board of Crosspoint Church – would approve accepting public funds. JSF, ¶ 128.

b. Temple Academy (TA)

TA is a sectarian school for purposes of Section 2951(2). JSF, ¶ 130. It is an "integral ministry" and essentially an "extension" of Centerpoint Community Church. JSF, ¶ 134. Its governing body is Centerpoint's Board of Deacons. JSF, ¶ 135. The superintendent of TA is Centerpoint's lead pastor. JSF, ¶ 139. While TA has a school board, it is only advisory and operates entirely under the authority of Centerpoint's Board of Deacons. JSF, ¶¶ 137-38. The Board of Deacons has the authority to dictate the curriculum for the school. JSF, ¶ 140.

Under TA's admission policy, a student would most likely not be accepted if he or she comes from a family that does not believe that the Bible is the word of God.

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[1] Accepting public funds would result in a significant change to how BCS and TA operate – at the very least, they likely would no longer be free to refuse to hire homosexuals. Under the Maine Human Rights Act ("MHRA"), it is unlawful to refuse to hire a person because of his or her sexual orientation. Me. Rev. Stat. Ann. tit. 5, § 4572(1)(A). While there is an exception that allows religious organizations to discriminate against homosexuals, it applies only to religious organizations "that do[ ] not receive public funds." Me. Rev. Stat. Ann. tit. 5, § 4553(10)(G).

JSF, ¶ 152. TA has a "pretty hard lined" written policy that states that only Christians will be admitted as students, though exceptions have been made, and might be made in the future, to admit students of different faiths. JSF, ¶ 153. Under TA's written admission policy, "students from homes with serious differences with the school's biblical basis and/or its doctrines will not be accepted." JSF, ¶ 155. A Muslim family would have serious differences with TA's biblical basis and its doctrines. JSF, ¶ 156. TA will not admit a child who lives in a two-father or a two-mother family. JSF, ¶ 159. TA will not admit a student who is homosexual, though there are students presently enrolled who "struggle" with homosexuality. JSF, ¶ 157. A child who identifies with a gender that is different than what is listed on the child's original birth certificate would not be eligible for admission. JSF, ¶ 158.

As a condition of enrollment, the student's parents must sign a Family Covenant in which they affirm that they are in agreement with TA's views on abortion, the sanctity of marriage, and homosexuality and in which they acknowledge that TA may request that the student withdraw if "the student does not fit into the spirit of the institution regardless of whether or not he/she conforms to the specific rules and regulations." JSF, ¶ 161. Students in grades 7 to 12 must sign a covenant in which the student affirms that he or she "will seek at all times, with the help of the Holy Spirit, to live a godly life in and out of school in order that Jesus Chris will be glorified." JSF, ¶ 162.

TA's educational philosophy "is based on a thoroughly Christian and Biblical world view," and a "world view" "is a set of assumptions that one holds about the basic makeup of his world and forms the basis for all that one does and thinks." JSF, ¶ 144. TA's "academic growth" objectives include "provid[ing] a sound academic education in which the subject areas are taught from a Christian point of view" and "help[ing] every student develop a truly Christian world view by integrating studies with the truth of Scripture." JSF, ¶ 146.

TA provides a "biblically-integrated education," which means that the Bible is used in every subject that is taught. JSF, ¶ 164. Teachers "are expected to integrate Biblical principles with their teaching in every subject taught at Temple Academy." JSF, ¶ 168. TA urges students to obey the Bible and accept Christ as their personal savior. JSF, ¶ 174. Students are required to attend a religious service once a week. JSF, ¶ 163.

A person must be a born-again Christian to be eligible for all staff positions at TA, including custodial positions. JSF, ¶ 179. Affirming that "he/she is a born-again Christian who knows the Lord Jesus Christ as Savior" is a necessary qualification to be a teacher. JSF, ¶ 176. Homosexuals are not eligible for employment as teachers at TA. JSF, ¶ 177. In their employment agreements, teachers must acknowledge that the Bible says that "God recognize[s] homosexuals and other deviants as perverted" and that "[s]uch deviation from Scriptural standards is grounds for termination." JSF, ¶ 178.

TA would refuse to accept public money if it meant that it could no longer exclude homosexuals from teaching positions. JSF, ¶ 184. And even if TA had "in writing" that it would not have to alter its admission standards, hiring criteria, or curriculum, it would then only consider whether to accept public money. JSF, ¶ 182.

3. Procedural History

The case was submitted on cross-motions for judgment on the stipulated record, and the District Court rendered judgment in the Commissioner's favor, concluding that the First Circuit's *Eulitt* decision "has certainly not been revoked" and that because there have been no material changes to the tuition program since *Eulitt*, that precedent controlled. Pet. App. 13.

Petitioners appealed to the Court of Appeals for the First Circuit. Pet. App. 14. After the appeal had been fully briefed and argued, this Court issued its decision in *Espinoza*. Pet. App. 14-15. As a result, the Court of Appeals was fully able to consider the impact of *Espinoza* on the pending appeal. The Court of Appeals began its analysis by acknowledging *Espinoza* as offering "the clearest guidance as to what constitutes, with respect to doling out aid, solely status-based religious discrimination as opposed to discrimination based on religious use." Pet. App. 32-33. Per *Espinoza*, the critical feature of status-based discrimination is that it is based "solely on the aid recipient's affiliation with or control by a religious institution." Pet. App. 33.

The Court of Appeals then turned to the specifics of the tuition program and concluded that it did not constitute status-based discrimination for three reasons. First, the testimony of former Commissioner Hasson, affirmed by Commissioner Makin and the Maine Attorney General's Office in their briefing, stated that while a school's affiliation or association with a church or religious institution is a potential indicator of a sectarian school, it is not dispositive. Pet. App. 35. "The Department's focus is on what the school teaches through its curriculum and related activities and how the material is presented." *Id.* Second, the plain language of Section 2951(2) itself does not make control or affiliation dispositive, and the inclusion of the trailing phrase "in accordance with the First Amendment" serves to ensure, in light of *Espinoza*, that it is not. Pet. App. 36-37. Finally, while the Court of Appeals recognized the potential for a restriction that was nominally based on use to be one based on status in disguise, the Court concluded that the record supported the Commissioner's representations and the Petitioners had not developed an argument otherwise. Pet. App. 38.

Turning next to the contention that the distinction between status and use is not relevant from a Constitutional perspective, the Court of Appeals noted that plaintiffs pointed to no controlling Supreme Court authority on that point. Pet. App. 40. Nonetheless, the Court carefully examined Justice Gorsuch's concurrences in both *Trinity Lutheran* and *Espinoza* in which he questions the legitimacy of such a distinction

because the Free Exercise Clause protects the religious in both their inward beliefs (*i.e.*, status) and their exercise (*i.e.*, use). Pet. App. 41. The Court of Appeals agreed with Justice Gorsuch's premise with respect to the scope of the Free Exercise Clause, but concluded that the tuition program's limitations serve to allay his concerns because "it does not target any religious activity apart from what the benefit itself would be used to carry out." Pet. App. 42. As "nothing in either one of Justice Gorsuch's concurrences suggests that the government penalizes a fundamental right simply because it declines to subsidize it," the Court found that it must first determine the "baseline" benefit set by the tuition program in order to determine "whether the 'nonsectarian' requirement merely reflects Maine's refusal to subsidize religious exercise . . . or instead penalizes religious exercise." *Id.*

In this regard, the Court "found significant" that the tuition program "is designed to 'ensur[e],' . . . that students who cannot get a public school education from their own SAU can nonetheless get an education that is 'roughly equivalent to the education they would receive in public schools.'" Pet. App. 43. The Court also "found significant" that Maine's interest in aligning the tuition program with its religiously neutral public education system was "wholly legitimate" as "there is no question that Maine may require its *public* schools to provide a secular education rather than a sectarian one." Pet. App. 43-44 (emphasis in original). The Court concluded that "given the baseline that Maine has set through the benefit provided by the tuition assistance

program, the plaintiffs in seeking publicly funded 'biblically-integrated' or religiously 'intertwined' education are not seeking 'equal access' to the benefit Maine makes available to all others – namely the free benefits of a *public* education." Pet. App. 44 (emphasis in original). In other words, Maine's tuition program does not act as a penalty for religious exercise, it merely declines to subsidize it.

REASONS FOR DENYING THE PETITION

Nothing about this case makes it appropriate for certiorari. Factually, Maine's tuition program is nearly unique in its use of private schools in place of public schools, as opposed to as an alternative to them. Nor is this a case involving an overarching "Blaine Amendment" or "no aid" clause or where there is any evidence of religious animus. It is simply a situation where Maine is using private schools to provide a free public education to a small subpopulation of students who would otherwise be without one.

Given the unique facts of Maine's tuition program, the Court of Appeals correctly held that the differential treatment of sectarian schools based on religious use, not religious status, is constitutional. The purpose of the program is to engage private schools willing to deliver a specific service: an education that is substantively akin to that which a student would receive if their community operated a public school. A religious organization that is willing to provide the service

sought is treated no differently than any other organization. The exclusion in Section 2951(2) prevents only schools that are interested in providing something else – a sectarian education, which the two schools to which the Petitioners seek to send their children openly acknowledge is different than a public education, or even a secular private education – from participating in the tuition program.

Coming just four months after the *Espinoza* decision, the decision of the Court of Appeals below is the first, and as of this date the only, final appellate decision to apply *Espinoza* to a public program that allows religious entities to participate but disallows religious use of public funds. Nor is there a long-standing division of authority as Petitioners allege. Contrary to Petitioners' suggestion, the Court of Appeals has faithfully applied precedent each time it has addressed the tuition program. Lastly, the inability of the Petitioners to identify a single sectarian school likely to participate in the tuition program raises a significant issue of standing in this matter.

I. The unique facts of this case make it inappropriate for certiorari.

In their rush to encourage the Court to examine, and eliminate, the distinction between differential treatment based on religious status versus religious use, Petitioners largely ignore the facts. Maine has created a unique solution to an unusual situation: a small number of Maine families would otherwise have no

ability to access a public education because the SAU in which they reside has neither built a public school, nor contracted with a nearby public or approved private school. In the absence of a Blaine Amendment or other state constitutional prohibition, Maine's Legislature has carefully considered the evolution of the law with respect to the use of public funds for sectarian education. Even if the Constitution does not prohibit including religious schools in the tuition program, Maine has continued the nonsectarian requirement not because of any animus toward religion, but because of what it believes to be the critical features of a system of public education: diversity, tolerance, and inclusion.

These factors make this case an outlier, and unworthy of further review. Any decision in this matter will be of little consequence outside of Maine as there is no reason to anticipate that any other state will close its public schools in order to replace them with private schools as opposed to adopting or continuing "voucher" or "school choice" programs that have been fully addressed, and approved, by this Court in *Zelman* and *Espinoza*.

Maine is one of only two states (Vermont is the other) that use private schools in place of, and not as an alternative to, public schools.[2] The tuition program

[2] While 18 states – Vermont is not among them – have filed an amicus brief in support of Petitioners, they clearly misunderstand Maine's tuition program. They state: "Like Maine, many of these States partner with private schools to empower parents to make the educational choices they think best for their families." But as a matter of fact, none of them have a program "like Maine"

ensures that students of compulsory school age in an SAU that neither operates a public secondary school nor contracts for schooling privileges have a free public education available to them. The tuition program is not a "voucher" program or another vehicle for school choice, such as the scholarship program in *Espinoza*, where parents are given money to spend on the private education of their choosing as an alternative to a public education. Maine's program is narrowly limited both in the scope of the recipients – families who live in SAUs without public schools or contracts for schooling privileges – and in the scope of the benefit – an education that is substantively similar to the education provided by a public school.

Unlike *Espinoza* and other cases addressing so-called "Blaine Amendments" or "no aid" clauses, this matter involves a single public program with a specific limitation that the record reflects has nothing to do with the religious hostility or animus connected with those constitutional restrictions. The tuition program is the result of a specific legislative determination that a sectarian education is not equivalent to a public education. The tuition program is not designed as an alternative to Maine's public education system but as a part of it. In the wake of this Court's decision in *Zelman* that a State could design a voucher program that included sectarian schools without violating the Establishment Clause, the Maine Legislature specifically considered whether to repeal Section 2951(2)

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as described above, as outlined in Maine's statutes, and as interpreted by Maine's highest court.

and decided not to. Evidence of the Legislature's rationale is found in statements made by legislators while considering (and rejecting) a repeal of the exclusion. JSF, ¶¶ 189-02 ("Bringing all of our children together, no matter what their religious affiliation or background, promotes democracy, tolerance, and what is best in all of us." "A publicly funded education system works best when the education is one of diversity and assimilation, religiously neutral, and not a 'separate and sectarian' one.")

Legislative statements about not wanting to "fund discrimination" or the teaching of "intolerant" views do not demonstrate a hostility to religion, as suggested below by the Petitioners. Rather, they simply demonstrate the view that public schools should be open to all, and that a public education is both defined by inclusion and tolerance, and reflective of the diversity of our students and our community. BCS and TA candidly admit that they discriminate against homosexuals, individuals who are transgender, and non-Christians with respect to both who they admit as students and who they hire as teachers and staff. This case is not about whether the schools have the right to behave in this manner as it is beyond dispute that they do; it is only about whether Maine must fund their educational program as the substantive equivalent of a public education. The Court of Appeals below reiterated what it found in *Eulitt*, "[t]here is not a shred of evidence than any . . . animus fueled the enactment of the challenged Maine statute" and in reference to *Locke*'s "test for smoking out an anti-religious animus . . . the statute

here passes . . . with flying colors." Pet. App. 50-51 *quoting* 386 F.3d at 355.

II. Given these unique facts, the Court of Appeals correctly held that Maine's exclusion of sectarian schools based on use, not status, is constitutional.

This case stands not as an example of why the status/use distinction is meaningless or should be eliminated, but of why it is a necessary and appropriate example of the "play in the joints" articulated by this Court in *Locke, Trinity Lutheran*, and *Espinoza*. Absent the ability for a state to decline to fund explicitly religious uses of public funds, while recognizing the right of otherwise qualified religious applicants to participate in a public benefit program on exactly the same terms as non-religious applicants in an area as significant as public education, there is no play at all. The joints have snapped shut.

As the Court of Appeals explained, *Espinoza* is clear that status-based discrimination occurs when a restriction is based "solely on the aid recipient's affiliation with or control by a religious institution." Pet. App. 33; *Espinoza*, 140 S. Ct. at 2261 ("[a] State need not subsidize private education, but once a state decides to do so, it cannot disqualify some private schools *solely* because they are religious" (emphasis added)). However, *Espinoza* explicitly leaves open the alternative: a program that does not focus "solely" on status, but instead on the use of the public funds. The tuition

program is just such a program. As then-Commissioner Hasson stated in response to Petitioners' interrogatories,

> In making the determination whether a particular school is in compliance with Section 2951, the Department considers a sectarian school to be one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of that faith. *While affiliation or association with a church or religious institution is one potential indicator of a sectarian school, it is not dispositive. The Department's focus is on what the school teaches through its curriculum and related activities, and how that material is presented.*

Pet. App. 35 (emphasis added). Sectarian schools are not denied funds because of who they are, but because of what they would do with the money – use it to further the religious purposes of inculcation and proselytization. These are purposes that BCS and TA candidly acknowledge. JSF, ¶¶ 95, 96, 104, 145, 147, 171, 174.

Petitioners never challenged the Commissioner's statement, and only belatedly combed the record in order to dredge up a situation where the Department even had to make a determination as to whether a school was nonsectarian. Neither BCS nor TA has any doubt that they are sectarian schools.

Because public benefits come in myriad shapes and forms, in order to properly analyze the constitutionality of Maine's tuition program, it is essential to start by clearly defining the public benefit bestowed by the program: a free public education. Me. Rev. Stat. Ann. tit. 20-A, §§ 2(1), 5204. It is equally important to state what Maine's tuition program is not: a "voucher" or "school choice" program where parents are given the opportunity to select a school other than the local public school that their child would otherwise attend. It is this distinction between Maine's use of secular private schools as *de facto* public schools and the opportunity to use public funds to choose an alternative to an otherwise available public school that justifies Maine's decision to exclude sectarian schools.

Each school administrative unit in Maine is charged with providing a public education in one of three ways: operating a public school, contracting with a public or approved private school for schooling privileges, or paying tuition to the public or approved private school of the parent's choice. Me. Rev. Stat. Ann. tit. 20-A, §§ 1001(8), 5204(4). There is no dispute that Maine students who receive a public education from a public secondary school or pursuant to a contract between their SAU and a public or approved private school receive a non-sectarian education. If students reside in an SAU that operates a public high school or that has a contract for secondary school privileges, the students are not entitled to a sectarian education at public expense. With respect to students who live in an SAU that neither operates a public high school nor

contracts for schooling privileges, Maine's Supreme Judicial Court has explained that the tuition program is "limited to authorizing the provision of tuition subsidies to the parents of children who live within school administrative units that simply do not have the resources to operate a public school system, and whose children would otherwise not be given an opportunity to receive a free public education." *Hallissey*, 755 A.2d 1068 at 1073. Thus, the tuition program is simply a vehicle for students in this third category to receive a free public education that is consistent with, and no broader than, the benefit provided by the first two options. As there is no dispute that students in the first two categories cannot and do not receive sectarian instruction at public expense, Section 2951(2) applies that same rule to the third.

Maine's tuition program is the result of carefully considered legislative judgment as to what constitutes a public education**.** No case has ever held, or even suggested, that a state's decision to define a public education to mean a secular education raises any constitutional concerns. This is unsurprising given the considerable state interest in public education as well as the primary role of the state in this area. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (describing public education as "perhaps the most important function of state and local governments"); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("providing public schools ranks at the very apex of the function of a State"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 39 (1973) (with respect to public education, a

state's efforts "shall be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution").

A free public education has long been equated with a secular instruction. *See Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 226 (1963); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("Free public education, if faithful to the ideal of secular instruction . . . will not be partisan or enemy of any . . . creed"); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (striking down religiously motivated instruction in public secondary schools and stating that "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools. . . ." (citation omitted)); *see also Bethel Sch. Dist. No. 403 v. Frazier*, 478 U.S. 675, 681 (1986) (noting that the objectives of public education are to "inculcate the habits and manners of civility" which "must, of course, include tolerance of divergent . . . religious views. . . .").

In contrast, "voucher" programs such as the one reviewed by this Court in *Zelman* and the scholarship program in *Espinoza* involve a different type of program: one that provides not the basic access to a free public education, or that reflects the substance of a public education at all, but the option to use public funds to reject or avoid the free public education offered by a local public school in favor of some alternative. Instead of equalizing educational access to a

public education, it represents a legislative determination to allow parents to reject it while receiving financial support for their preferred alternative.

III. There is no "long standing, entrenched conflict" in the lower courts.

The decision of the Court of Appeals does not conflict with the decision of any other appellate court. Coming just four months after the *Espinoza* decision, it is the first, and as of this date the only, final appellate decision to apply *Espinoza* to a public program that allows religious entities to participate but disallows religious use of public funds. And it does so by paying strict attention to *Espinoza* and applying it to a set of circumstances that is almost incapable of repetition.

Petitioners' attempt to demonstrate a long-standing split on the issue of use-based exclusions in student-aid programs fails. Neither of the two cases they cite for one arm of the split even fully presents the issue. *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) predates all three challenges to Maine's tuition program yet has never been used as part of the argument made by the complaining parents. This is hardly surprising since it does not concern the religious use of public funds at all. *Hartmann* involved an Army regulation that prohibited on-base family childcare providers from including religious information or activities as part of their care. *Id.* at 977. The Sixth Circuit explained that despite the government's attempt to tie the childcare providers to the Army financially, there

was no evidence that any of the program's funding actually went from the Army to the providers. *Id.* at 982. Any other benefits the providers received from the Army were either generally available to all servicemembers, such as housing, or consistent with longstanding precedent with respect to indirect aid to sectarian schools, such as reimbursement for meals from the USDA (akin to participation in the school lunch program) or the use of a "community toy box" (akin to a state loan of textbooks to parochial schools). *Id.* at 982-83 (citing *Board of Educ. of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968)). With no public funds in play, there was no basis to even consider the issue of religious use.

Colorado Christian University v. Weaver, 534 F.3d 1245 (10th Cir. 2008) is also unavailing. While the Colorado program at issue did involve the use of public funds, the crux of the problem according to the Tenth Circuit was that it attempted to distinguish between sectarian and pervasively sectarian institutions, leading the court to conclude that it impermissibly discriminated among religions and involved unconstitutionally intrusive scrutiny of religious beliefs and practices. *Id.* at 1256. The Tenth Circuit explicitly distinguished the First Circuit's *Eulitt* decision as "[t]he program at issue in *Eulitt* excluded all religious schools without discriminating among them or (so far as Eulitt discusses) using any intrusive inquiry to choose among them. By contrast, Colorado's system does both." *Id.* at 1256-57 (internal citation omitted). In sum, neither of the circuit decision cited by

Petitioners conflicts with either the First Circuit in *Eulitt* and below, or with the Supreme Court of Vermont in *Chittenden Town School District v. Department of Education* 738 A.2d 539 (1999), both of which held that it is constitutionally permissible for states to authorize public funding for private schools in lieu of public schools while simultaneously refusing to fund explicitly religious activities – *i.e.*, sectarian education.

Finally, given that the decision in *Espinoza* is so new that the Court of Appeals' decision below is the only final appellate decision to apply it in the context of a public benefit program that distinguishes based on religious use and not religious status, this issue would benefit from being allowed to percolate among the lower courts. While Maine's tuition program is *sui generis* and the lower courts are unlikely to have a factually similar program before them, it is likely that challenges to other public benefit programs that distinguish among potential recipients based on religious use will arise.

IV. This case presents a serious question as to whether Petitioners have Article III standing.

It is unlikely that either of the schools to which Petitioners wish to send their children would be willing to participate in Maine's tuition program. Nor is there evidence in the record that *any* sectarian secondary school is likely to participate in the tuition program if Section 2951(2) is eliminated. The failure of

Petitioners to identify a single sectarian school likely to participate in the tuition program renders them unable to establish standing.

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[T]he irreducible constitutional minimum . . . [requires that] . . . it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id*. at 560-61 (citations omitted).

When the plaintiff is itself the subject of the challenged governmental action, there is usually "little question" that a judgment preventing the action will redress the injury. *Id*. at 561-62.

> When, however . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," . . . and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or

> will be made in such manner as to produce causation and permit redressability of injury. . . . Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.

Id. at 562 (citations omitted) (emphasis in original). "[T]he Supreme Court has consistently said that a plaintiff . . . lacks standing if, notwithstanding the relief sought, the third parties would retain discretion to continue their harmful behavior or, alternatively, if it is too speculative to conclude that they would modify their behavior in the way the plaintiff desires." *Desert Water Agency v. U.S. Dep't of the Interior*, 849 F.3d 1250, 1257 (9th Cir. 2017); *see also Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs*., 489 F.3d 1267, 1274 (D.C. Cir. 2007) (referring to "*Lujan* as well as several other Supreme Court decisions holding that standing . . . cannot be founded merely on speculation as to what third parties will do in response to a favorable ruling").

For example, in *Simon v. E. Kentucky Welfare Rights Org*., 426 U.S. 26 (1976), indigents and representative organizations sought to challenge an Internal Revenue Service rule giving favorable tax treatment to a nonprofit hospital that offered only emergency room services to indigents. They argued that the IRS rule was unlawful and that hospitals are not entitled to favorable tax treatment unless they broadly serve the indigent. *Id*. at 33. The "injury" that

plaintiffs alleged was that the tax rule encouraged hospitals to deny non-emergency services to indigents, and they argued that striking down the ruling would discourage the denial of services. *Id*. at 42.

The Court held that this was insufficient to establish standing as it was "purely speculative" whether the denials of service could be traced to the tax treatment or whether "court's remedial powers in this suit would result in the availability to respondents of such services." *Id*. at 42-43. Because the plaintiffs' complaint did not allege facts suggesting a "substantial likelihood" that a favorable judgment would provide them with the medical care they sought, the Court held that the complaint should be dismissed for lack of standing. *Id*. at 44-46; *see also Allen*, 468 U.S. at 737 (plaintiffs lacked standing where it was "entirely speculative" whether withdrawal of tax exemption would cause racially discriminatory private schools to change their policies); *Warth v. Seldin*, 422 U.S. 490 (1975) (plaintiffs did not have standing to challenge a town zoning ordinance that allegedly prevented the construction of affordable housing because there was no evidence that striking down the ordinance would cause builders and developers to construct such housing); *Linda R.S. v. Richard D*., 410 U.S. 614 (1973) (mother lacked standing to bring action challenging constitutionality of child support statute because even if mother were granted the requested relief and father was subject to prosecution, it was speculative whether this would result in the father paying child support); *Nat'l Wrestling Coaches Ass'n v. Dept. of Educ.*, 366 F.3d 930 (D.C. Cir.

2004) (plaintiffs lacked standing to challenge Title IX policy because even if policy is vacated, decision to eliminate or curtail wrestling opportunities remained the independent decisions of the educational institutions).

The Petitioners bear the burden of proving each element of the standing inquiry. *Lujan*, 504 U.S. at 561. Because the matter was decided below on cross-motions for judgment on a stipulated record, Petitioners were required to identify specific facts in the stipulated record that support a finding that a sectarian school to which they would send their children was "likely" to accept public funds. *Id.*; *see also Boston Five Cents Sav. Bank v. Sec'y of the Dep't of Housing and Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985) (difference between a decision on a stipulated record and motion for summary judgment is that the former allows the judge to decide any issue of material fact they discover while the latter does not). They did not make such a showing with respect to the two sectarian schools to which Petitioners send, or wish to send, their children. To the contrary, both schools testified that they would not participate in the program if it required them to change anything about how they operate, and even if they did not have to change a thing, they would only *consider* accepting public funds. JSF, ¶¶127-28, 182, 184. Nor did Petitioners make such a showing with respect to any other sectarian school.

The Court of Appeals erroneously concluded that Petitioners had standing. The Court focused on what it viewed as a critical distinction between the Petitioners

and the complaining parties in the cases cited by the Respondent: the Petitioners' standing rested on their "lost [ ] 'opportunity' to find religious secondary education for their children that would qualify for public funding." Pet. App. at 18 citing *Eulitt*, 386 F.3d at 353. As a result, the Court concluded, the mere restoration of that opportunity, regardless of whether it ultimately led to the Petitioners actually finding a sectarian secondary school that would participate in the tuition program, provided the redressability required by law.

The case primarily relied upon by the Court of Appeals, *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), is inapposite, as it does not present a factually similar situation. The case involved a challenge by a group of contractors to a city ordinance giving preference to minority-owned businesses in the award of city contracts. This Court held that to have standing, the plaintiff did not need to prove that its members would actually receive a contract if the ordinance were struck down but instead "need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id*. at 666. Unlike the present case, the plaintiff contractors were the objects of the regulation, and, in such cases, there is "ordinarily little question" that a favorable judgment will redress the injury. *Lujan*, 504 U.S. at 561-62.

The Court of Appeals cited *Northeastern Florida Chapter* with approval for detailing "a number of 'cases [that] stand for the following proposition: When the

government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing'." Pet. App. at 21. But the Court failed to recognize that in the current matter, it is the sectarian schools, not the Petitioners, that are akin to the members of the "former group," *i.e.*, the plaintiff contractors. *Northeastern Florida Chapter* leads to the conclusion that the sectarian schools would have standing to challenge Section 2951(2) even if they could not identify a parent who wanted to use the tuition program to send their child to a sectarian school. It does not support the proposition that Petitioners have standing despite being unable to identify a single sectarian school that is "likely" to participate in the tuition program. Petitioners have failed to establish standing, and the Court should decline to hear this case on that basis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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