

No. 20-1088

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

DAVID AND AMY CARSON, AS PARENTS AND NEXT
FRIENDS OF O.C., AND TROY AND ANGELA NELSON, AS
PARENTS AND NEXT FRIENDS OF A.N. AND R.N.,
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 ADVANCING AMERICAN FREEDOM AS
AMICUS CURIAE SUPPORTING PETITIONERS**

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**STATEMENT OF INTEREST
OF AMICUS CURIAE**

Founded by Vice President Mike Pence, Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom to engage in religious worship and the ability of parents to decide where their children attend school. AAF defends, promotes, and amplifies policies adopted in recent years that protect religious observation against unequal treatment and that empower parents—not bureaucrats, formulas, zip codes, or family income—to determine the best school for their children.¹

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *Amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Like many other states, Maine has determined that the education of many Mainer children is promoted by tuition assistance programs that empower parents to choose between multiple public or private schools.² Every parent knows that each child is unique, and copious data shows that providing parents the resources required to freely choose schools that fit their children's needs, rather than jamming them into poorly tailored one-size-fits-all solutions, strongly fosters educational attainment.

But while Maine's inspiration to create a tuition assistance program that expands educational options is commendable, Maine does not empower all of its parents equally. Parents that prefer secular educational options for their children can use Maine's tuition assistance to send them to the school of their choice. But parents who determine their children will best learn and thrive in a school with a curriculum that adopts a religious worldview are prohibited from using public tuition assistance at the school that will best meet their children's needs.

As Petitioner's opening brief explains, Maine's prohibition unconstitutionally discriminates against religious exercise and religious worldviews. *See e.g.*,

² Maine's tuition assistance program is available to all students who live in school administrative units that do not operate a public secondary school or do not contract with a secondary public or private school. Brief for Petitioners, *Carson v. Makin*, No. 20-1088, at 3.

Brief for Petitioners, *Carson v. Makin*, No. 20-1088, at 16-44. But as this brief further explains, Maine’s prohibition also deprives multitudes of parents—particularly those of modest means—of the ability to provide their children an education that is best suited to their particular needs.

Indiana’s open-ended school choice program, by contrast, contains no such prohibition. By broadly expanding the schooling options available to parents, Indiana’s Choice Scholarship Program has reaped significant educational benefits for Hoosier schoolchildren—benefits that highlight the deep cost to children of permitting invidious hostility to religion to irrationally limit parents’ choice of schools. By upholding the principles of free exercise of religion on which this country was founded and striking down Maine’s unconstitutional bar, this Court will both literally and figuratively deliver the best possible lessons to Mainer children.

ARGUMENT

I. Maine’s Discrimination Against Religious Schools Deprives Parents of Their Fundamental Ability to Decide How to Best Educate Their Children

For many individuals with sincerely held religious beliefs, their faith is lived out in every aspect of their life. Faith is pervasive; it is a central component of daily decisions and interactions. For this reason, parents of faith often determine that their children’s

educational needs will best be met by a curriculum that adopts a religious worldview. This Court has previously stated that “the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.” *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972).

The First Amendment’s Free Exercise Clause recognizes that being a religious person often involves more than “holding beliefs inwardly and secretly,” it also includes “act[ing] on those beliefs outwardly and publicly.” *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2276 (2020) (Gorsuch, J., concurring); see *Yoder*, 406 U.S. at 220 (noting specifically in the education context that “belief and action cannot be neatly confined in logic-tight compartments.”). Recognizing that free exercise of religion and the ability to put sincere faith into daily practice were at the core of America’s founding and remain central to our nation’s rich lifeblood, this Court has repeatedly held that government cannot discriminate against the faithful “solely because of their religious character[.]” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017).

In *Espinoza v. Montana Dep’t of Revenue*, this Court applied that principle to invalidate the State of Montana’s no-aid provision, which barred religious schools from receiving public benefits such as student aid or tuition assistance solely because of the religious status of the school. *Espinoza*, 140 S. Ct. at

2255. The Court found that the provision “bar[red] religious schools from public benefits solely because of the religious character of the schools” and “also bar[red] parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school.” *Id.* See also *id.* at 2277 (Gorsuch, J., concurring) (“The right to *be* religious without the right to *do* religious things would hardly amount to a right at all.”) (emphasis in original).

The State of Maine’s prohibition similarly bars parents who determine that a school with a religious worldview will best meet their children’s educational needs from using publicly provided tuition assistance at the school of their choice. Maine considers a parent’s preferred school to be impermissibly sectarian if it 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 this faith.” *Carson v. Makin*, 979 F.3d 21, 38 (1st Cir. 2020). Maine thus singles out parents who conclude their children would best be served by a school dedicated to teaching from a religious perspective for deprivation of the full use of publicly available tuition assistance benefits to deliver their children an education best suited to their needs. See *Mitchell v. Helms*, 530 U.S. 793, 827-28 (2000) (plurality opinion) (criticizing the dissent for “reserve[ing] special hostility for those who take their religion seriously, who think that their religion should affect

the whole of their lives, or who make the mistake of being effective in transmitting their views to children.”).

The individuals most impacted by Maine’s unconstitutional tuition assistance limitation are those of modest means. The wealthy typically can afford to send their children to a school of their choice without public financial assistance, but families with more limited means often cannot. Under Maine’s discriminatory rule, children of such families may remain stuck attending schools that are not the best fit for their educational needs. In Maine, this meaningful educational disadvantage is the product of a state-adopted invidious religious criterion that allows parents who determine a secular education is the best fit for their children to attend any qualified school they want, while limiting and even eliminating the optimal school choices of parents who conclude that their children would best thrive with a curriculum that integrates a religious worldview.

II. School Choice Programs that Include a Full Array of Educational Options, Including Schools that Teach from a Religious Worldview, Empower Families to Send Their Children to the Best Fit School and Produce Strong Educational Outcomes

The State of Indiana’s school choice program, known as the Choice Scholarship Program, is open to a wide array of families, does not bar families from

using the scholarships at religious schools, and has demonstrated a strong record of academic success.

The Choice Scholarship Program, which permits parents to use scholarships at any eligible secular or nonsecular school, has been expanded on numerous occasions to make its benefits available to a wider and wider array of students. See Indiana Department of Education, *Choice Scholarship Program Annual Report 4-8* (2021), available at <https://www.in.gov/doe/files/2020-2021-Annual-Report.pdf> (hereinafter “Indiana Department of Education 2021 Report”); The Indiana Department of Education Office of School Finance, *Choice Scholarship Program Annual Report: Participation and Payment Data 4-6* (2016), available at <https://www.in.gov/doe/files/2015-2016-Annual-Report.pdf> (hereinafter “Indiana Department of Education 2016 Report”); see also *2021-2022 Participating Choice Schools*, available at <https://www.in.gov/doe/students/indiana-choice-scholarship-program/2021-2022-participating-choice-schools/> (hereinafter “Participating Choice Schools”) (last visited Sept. 8, 2021). Indiana’s program has a proven record of success, with scholarship recipients either performing equally or better academically, and attending college at equal or better rates, as compared to their public-school counterparts. Institute of Education Sciences, *Do College and Career Readiness and Early College Success in Indiana Vary Depending on Whether Students Attend Public, Charter, or Private High Schools?* 5-6 8-11 (2021), available at

https://ies.ed.gov/ncee/edlabs/regions/midwest/pdf/REL_2021071.pdf (hereinafter “Institute of Education Sciences Report”).

A. *Expansive School Choice Programs like Indiana’s Choice Scholarship Program Ensure that All Families Have the Opportunity to Send Their Children to the Best Fit School*

It is quintessentially American that parents should be able to choose where their children attend school, not “bureaucrats, or formulas, or their ZIP Code, or their family’s income[.]” Vice President of the United States Mike Pence, Remarks by the Vice President on School Choice in Philadelphia, Pennsylvania (Feb. 5, 2020) (transcript available at <https://www.presidency.ucsb.edu/documents/remarks-the-vice-president-school-choice-philadelphia-pennsylvania-2>). Indiana’s Choice Scholarship Program provides families precisely that ability by offering scholarships to eligible individuals to offset tuition costs at participating schools. *Indiana Choice Scholarship Program, available at* <https://www.in.gov/doe/students/indiana-choice-scholarship-program/>. Unlike Maine’s tuition assistance program, Indiana permits use of its scholarships at any participating secular or nonsecular school, *see* Participating Choice Schools, *supra*, ensuring that parents may select the best fit school for their children.

Indiana’s Choice Scholarship Program is available to families (1) with incomes not greater than 300% of

the amount necessary to qualify for a Federal Free or Reduced Lunch and (2) who meet one of several eligibility tracks.³ Margaret Menge, *Indiana expands school voucher program to include most middle-class families* (Apr. 23, 2021), available at https://www.thecentersquare.com/indiana/indiana-expands-school-voucher-program-to-include-most-middle-class-families/article_32683b9a-a47b-11eb-a897-f3fa80ecee15.html (hereinafter “Menge”); Jennifer Wagner, *Indiana’s expanded voucher, tax-credit programs and new special needs ESA signed into law* (Apr. 29, 2021), available at <https://www.edchoice.org/media/indianas-expanded-voucher-tax-credit-programs-and-new-special-needs-esa-signed-into-law/>. In total, approximately 80% of families—about one million students—are eligible for scholarships. *Id.* There is no cap on the number of Choice Scholarships available. Indiana Department

³ These eligible tracks, which have been expanded over time, include prior attendance at public schools for two semesters, previous receipt of a Choice Scholarship or a scholarship from a specific organization, individuals in foster care, recipients of early education grants, siblings of current Choice Scholarship recipients, special education students, and students assigned to public schools that have received an “F” grade by the State. Indiana Department of Education 2021 Report, *supra*, at 4-6; Jennifer Wagner, *Indiana’s expanded voucher, tax-credit programs and new special needs ESA signed into law* (Apr. 29, 2021), available at <https://www.edchoice.org/media/indianas-expanded-voucher-tax-credit-programs-and-new-special-needs-esa-signed-into-law/>; *Indiana Choice Scholarship Program*, available at <https://www.in.gov/doe/students/indiana-choice-scholarship-program/>.

of Education 2016 Report, *supra*, at 4. Thus, any family who meets the income and eligibility requirements can obtain financial assistance for their child to attend the school of their choice.

Indiana's expansive eligibility requirements for its Choice Scholarship Program ensure that an array of families, including those who live out a sincere faith that intertwines with children's educational needs, can participate and select the best fit school for their child, without affordability concerns. Parents of faith are not presented with the dilemma of being required to forego a publicly financed educational benefit (the Choice Scholarship) in order to send their children to the school that best meets their needs. And parents of limited means are presented with the fullest possible array of choices in schools to find the best educational fit for their children.

For the 2021-2022 school year, Indiana parents have a plethora of educational options to select from: 330 schools are participating in the Choice Scholarship Program.⁴ Participating schools include Catholic, Baptist, Presbyterian, Lutheran, and other Christian schools, as well as Hebrew and Islamic academies, and several nonsectarian independent private schools. Participating Choice Schools, *supra*; Menge, *supra*. This extensive assortment of

⁴ The number of schools participating in the program increased from 241 in the 2011-2012 school year, Indiana Department of Education 2016 Report, *supra*, at 8, to 330 schools in the 2021-2022 school year, Participating Choice Schools, *supra*.

educational options ensures that Indiana parents can find the right school for their children. Common sense dictates—and data shows—that the more choices parents have available to them, the greater the opportunity they will have to find the best school for their children.

According to a study published by the Institute of Education Sciences,⁵ private school Choice Scholarship recipient students in Indiana were more likely than traditional public-school students to be (1) a racial or ethnic minority; (2) from low-income households; and (3) English language learners. Institute of Education Sciences Report, *supra*, at 5-6.⁶ Thus, Indiana's program not only helps students in the most need attend the school that is the right fit

⁵ The sample for this study included students in 9th grade between 2010-2011 and 2013-2014 who attended private voucher schools (84 schools), traditional public schools (405 schools), and charter schools (34 schools). The study included 340,737 grade 9 students. Of these students 317,367 were in traditional public schools, 5,820 were in charter schools, 2,021 received vouchers, and 15,529 did not receive vouchers. Institute of Education Sciences Report, *supra*, at 5; *see also id.* 4-5 (discussing the study's data sources and methodology).

⁶ Indeed, according to the Institute of Education Sciences study, 30% of Choice Scholarship recipients identify as Black compared to 11% of traditional public-school students, 16% of Choice Scholarship recipients identify as Hispanic compared to 8% of traditional public-school students, 53% of Choice Scholarship recipients are eligible for the national school lunch program compared to 35% of traditional public-school students, and 14% of Choice Scholarship recipients identify as English Language Learners compared to 7% of traditional public-school students. Institute of Education Sciences Report, *supra*, at 5-6.

for them, but also fosters diversity in private education. During the 2020-2021 school year, student participation in the Choice Program was almost 36,000 students, and students from ethnicities other than white accounted for approximately 45% of all Choice Scholarship recipients.⁷ Indiana Department of Education 2021 Report, *supra*, at 13-14.

Maine, by contrast, renders a wide array of educational options economically unviable for many parents. Any school that integrates religious studies into its curriculum, for example, is excluded from the program. These significant exclusions give parents many fewer options for their children's education, and significantly less ability to send their children to the school of their choice. Lower income children and the disadvantaged are especially impacted. Many parents will have no choice but to select a school that may be less academically rigorous, that is not reflective of their values, or that is otherwise a poorer fit for their children's needs than an otherwise

⁷ Nine studies have found that school choice programs help diversify the classroom by moving students from more segregated to less segregated schools. See Greg Forster, *A Win-Win Solution, The Empirical Evidence on School Choice*, 1 (2016), available at <http://www.edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf> ("Ten empirical studies have examined school choice and racial segregation in schools. Of those, nine find school choice moves students from more segregated schools into less segregated schools, and one finds no net effect on segregation. No empirical study has found that choice increases racial segregation.").

available religious school. In sum, Maine's unconstitutional application of an invidious religious criterion to its publicly provided tuition assistance consigns many students, especially the disadvantaged, to a less effective, less fulfilling, and less successful educational experience.

B. Choice Scholarship Students Have Excelled Academically

By prohibiting parents from using public tuition assistance benefits at schools with religious curricular elements, Maine not only unconstitutionally discriminates against religious exercise, but also foregoes the demonstrated educational benefits that flow from empowering parents with the widest possible selection of schools. *See e.g.*, EdChoice, *The 123s of School Choice* (2021), available at https://www.edchoice.org/wp-content/uploads/2021/04/2021-123s-SlideShare_FINAL.pdf. Studies have repeatedly shown the overwhelmingly positive educational benefits to children when parents are given more choice in the schools at which their children will be educated. *Id.* at 7. For example, empirical evidence demonstrates the positive effects of school choice programs on academic outcomes and graduation, college enrollment, and college completion rates. *Id.* at 7, 9-18, 25-30. Research has also demonstrated that choice programs have significant positive effects on children and the community. *See id.* at 7, and 31-40.

The positive effects of providing parents a diverse array of school options is not limited solely to private schools. See Greg Forster, *A Win-Win Solution, The Empirical Evidence on School Choice*, 1 (2016), available at <http://www.edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf> (“Thirty-three empirical studies . . . have examined school choice’s effect on students’ academic outcomes in public schools. Of those, 31 find choice improved public schools. One finds no visible effect. One finds a negative effect.”). The empirical data convincingly shows that providing parents more educational choices, rather than fewer, delivers meaningful educational benefits to participating students.

Indiana’s experience is but one example of the principle that broadening parental choice in schools improves academic outcomes for participating students. See *id.* at 1 (“Eighteen empirical studies have examined academic outcomes for school choice participants Of those, 14 find choice improves student outcomes: six find all students benefit and eight find some benefit and some are not visibly affected. Two studies find no visible effect, and two studies find Louisiana’s voucher program—where most of the eligible private schools were scared away from the program by an expectation of hostile future action from regulators—had a negative effect.”).

A recent study in Indiana sponsored by the U.S. Department of Education’s Institute of Education Sciences has found that Indiana students who

received Choice Scholarships outperformed their public-school counterparts on several key academic metrics.⁸ Institute of Education Sciences Report, *supra*, at 6 and 8.

The empirical evidence shows that on the grade 8 state achievement test, Choice Scholarship students outperformed their public-school peers in both math standards and English language arts standards. 79% of Choice Scholarship students either met or exceeded grade 8 state standards in math compared to 72% in traditional public schools. The results were similar in English language arts, with 76% of Choice Scholarship students meeting or exceeding grade 8 state standards compared to 67% of students in public schools. Institute of Education Sciences Report, *supra*, at 6-7.

Choice Scholarship students were also less likely to fail a course in high school or be suspended in high school as compared to their public-school counterparts. *Id.* at 8. Choice Scholarships students had 30% probability of failing a course compared to 41% probability for students in traditional public schools. *Id.* at 8-9. In terms of suspensions, Choice Scholarships students had 8% probability of being suspended compared to 24% probability for students in traditional public schools. *Id.*

⁸ Footnote 5 discusses the sample for this study. *See id.* 4-5 (discussing the study's data sources and methodology).

The empirical data also revealed that Choice Scholarship recipients are more likely to attend college and attend a four-year college when compared to students in traditional public schools.

Students who received a Choice Scholarship had a 61% probability of enrolling in college within one year of high school graduation compared with 53% for students in traditional public schools. *Id.* at 11. For those Choice Scholarship students that enrolled in an Indiana public college or university, the probability of enrolling in a four-year college rather than two-year college was 78% for Choice Scholarship students and 71% for traditional public-school students.⁹ *Id.*

⁹ These results are based upon students that enrolled in an Indiana public college or university and “for whom early college success indicators were available.” Institute of Education Sciences Report, *supra*, at 5. The study examined a total of 120,649 students. Of these 111,174 were students in public school, 1,876 attended charter schools, 779 received Choice Scholarships, and 6,820 attended private school but did not receive financial assistance. *Id.*

CONCLUSION

For the reasons set forth above, the Court should reverse the decision of the First Circuit, and should hold that Maine's prohibition that bars parents from using publicly financed tuition assistance to enroll their children at schools with a religious perspective is unconstitutional.

Respectfully submitted,

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