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,

Respondent.

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

BRIEF OF PUBLIC FUNDS PUBLIC SCHOOLS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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OCTOBER 29, 2021

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INTEREST OF THE AMICUS CURIAE[1]

Public Funds Public Schools ("PFPS") is a national campaign to ensure that public funds for education are used to maintain, support, and strengthen public schools. PFPS opposes all forms of private school vouchers and other diversions of public funds from public education. PFPS uses a range of strategies to protect and promote public schools and the rights of all students to a free, high-quality public education, including participation in litigation challenging vouchers and other diversions of public funds to private schools.

PFPS is a partnership between Education Law Center ("ELC") and the Southern Poverty Law Center ("SPLC"), which have participated as *amici curiae* or as counsel in cases promoting public education rights in states across the United States. ELC, based in Newark, New Jersey, is a nonprofit organization founded in 1973 that advocates on behalf of public school children to enforce their right to education under state and federal laws across the United States. SPLC, based in Montgomery, Alabama, is a nonprofit civil rights organization founded in 1971 that serves as a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance human rights.

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[1]All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party other than *amicus* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Maine's tuition program—in effect for over 125 years—ensures that all students across the State can receive the public education guaranteed to them by Article VIII, pt. 1, § 1 of the Maine Constitution. Through the tuition program, the Maine Legislature has authorized private schools that meet specified criteria to stand in for Maine's public schools where students live in rural areas of the State without a public school.

1. This Court has made clear that the regulation of public education falls squarely within the authority of the states and need only satisfy rational basis review. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 39–40 (1973). The Federal Constitution neither addresses nor guarantees public education; instead, the provision of public education is an affirmative obligation enshrined in the constitutions of all fifty states. Accordingly, states are afforded great deference in their decisions regarding the delivery of public education. Those determinations must 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," *id.* at 39, and are "an inappropriate candidate for strict judicial scrutiny," *id.* at 44.

2. Maine's tuition program easily satisfies rational basis review. The program is rationally related to Maine's legitimate—indeed core—interest in providing public education. Because of Maine's distinct history and geography, school districts in some sparsely populated, rural areas do not operate their own public schools. The tuition program enables those school districts to provide students with a public education by paying tuition either to another public school district or to private schools that choose to participate in the program. The participating private schools must satisfy Maine's carefully designed criteria for what constitutes an appropriate public education for its children. Among other things, Maine requires participating private schools to be nonsectarian—just as Maine's conventional public schools must be. That is a rational decision entitled to deference.

States have broad control over the operation of their public schools, including what is taught and how the education is delivered. Indeed, one of the few restrictions on states' authority over their public schools is the Establishment Clause prohibition against offering a curriculum that is tailored to the religion of a particular sect. *See, e.g.*, *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963). Accordingly, Maine could not support religious curricula or otherwise promote religious rules of conduct within its public schools. For the same reason, Maine can—if not must— require that

private schools participating in the tuition program be "nonsectarian" in order to stand in for its secular public schools.

In sum, the Maine tuition program does nothing more than to require that private schools choosing to participate in a program whereby they stand in for public schools be nonsectarian. That is a rational decision entitled to deference.

3. Maine's tuition program does not unconstitutionally discriminate against religion by requiring that participating private schools be nonsectarian. Unlike a "voucher" or "school choice" program, Maine's program does not subsidize private education as an alternative to an available public school. Instead, the tuition program enables rural school districts without their own public schools to provide their children with a public education by utilizing their public school funding to pay tuition at private schools that meet Maine's specified criteria. Those criteria ensure that private schools choosing to stand in for public schools meet the standards Maine has determined to be appropriate for *all* schools providing the public education guaranteed by Maine's Constitution. Moreover, because the Maine tuition program is designed to fulfill an affirmative constitutional obligation of the State, its tuition program is readily distinguishable from the discretionary grant programs at issue in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.

Ct. 2012 (2017) and *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020).

In sum, Maine's tuition program is rationally related to its legitimate interest in providing a public education for students across the State, specifically those in school districts where public schools are not available. And just as Maine can (indeed, must) ensure its public schools are nonsectarian, Maine does not unconstitutionally discriminate against religion by imposing the requirement that private schools agreeing to stand in the shoes of its public schools by way of the tuition program offer a nonsectarian education as well.

Accordingly, the Court should affirm the judgment of the Court of Appeals for the First Circuit.

ARGUMENT

Since the nineteenth century, the Maine Legislature has authorized local school districts to pay tuition to private schools in limited circumstances where access to a public school is not readily available. This tuition program is part of the law governing Maine's public school system.

Maine's tuition program is not a "voucher" or a "school choice" initiative through which students are offered financial assistance to attend a private school as an alternative to an available local public school. Rather, the tuition program allows Maine school districts with no public school to utilize public education funding to pay tuition for students to attend private schools that agree to meet state-mandated criteria required for the provision of public education. In other words, the participating private schools agree to stand in the shoes of public schools for students in school districts where no public school is available.

Subject only to rational basis review under the Federal Constitution, the Maine Legislature has the same broad authority to determine how best to implement its duty to provide a suitable public education through the tuition program as it does to regulate its own public schools directly. Maine's decision to include only secular private schools in the tuition program easily satisfies the rational basis test.

I. Maine's tuition program is rationally related to a legitimate state interest.

A. Providing public education is a core state function subject to rational basis review.

As this Court has noted, "education is the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 US 483, 493 (1954); *see also Martinez v. Bynum*, 461 U.S. 321, 329 (1983). Education "is not among the rights afforded explicit or implicit protection under the Federal Constitution. Nor [does the Court] find any basis for saying it is implicitly so protected." *Rodriguez*, 411 U.S. at 35 (1973). Recognizing that education is a critical state obligation and function, this Court has held that the states' decisions regarding the provision of public education are subject only to rational basis review. *Id.* at 39–40.

Every state recognizes the critical importance of making a free public education universally available to all resident children. In fact, each state constitution expressly recognizes a right to public education. Educ. Comm'n of the States, 50-State Review 9–22 (2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf (detailing an affirmative constitutional obligation in all fifty states to provide a free public education).

Maine's Constitution, like those of other states, affirmatively obligates the State Legislature to make "suitable provision" to maintain and support public schools:

> 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. As codified in its constitution, Maine has a fundamental interest in ensuring an educated populace, and its Legislature has a paramount duty to make public education available to all resident children.

Likewise, the Maine judiciary has long recognized that "the constitution of this State imposes on the Legislature the duty to make suitable provisions for the support and maintenance of the public schools" precisely because "[t]he education of the people is regarded as so much a matter of public concern, and of such paramount importance." *Donahoe v. Richards*, 38 Me. 379, 391 (1854); *see also*

Blount v. Dep't of Educ. & Cultural Servs., 551 A.2d 1377, 1381 (Me. 1988); Jeremiah Perley, *Debates, Resolutions, and Other Proceedings of the Convention of Delegates* 211–12 (1820).

Recognizing that state and local governments are best suited to decide how to fulfill their affirmative obligation to provide public education, this Court has consistently deferred to their determinations. *See, e.g.*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."). As Justice Thomas noted, "[f]ederal courts do not possess the capabilities of state and local governments in addressing difficult educational problems." *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring).

In the same vein, this Court made clear in *Rodriguez* that "[q]uestions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny." 411 U.S. at 44 (declining to apply strict scrutiny where the Court would be forced to "abrogate systems of financing public education presently in existence in virtually every State"). These federalism concerns have led the Court to grant significant deference to states, particularly related to decisions on education

policies and budgetary priorities. *See id.* at 58 ("The consideration and initiation of fundamental reforms with respect to state . . . education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand."); *see also Horne v. Flores*, 557 U.S. 433, 448 (2009) ("Federalism concerns are heightened when . . a federal-court decree has the effect of dictating state or local budget priorities.").

This Court thus has cautioned that the federal judiciary "is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *Rodriguez*, 411 U.S. at 43. As this Court has held, the determination of what constitutes appropriate education "remains the province of the States and the local schools." *Horne*, 557 U.S. at 469; *see Martinez*, 461 U.S. at 329 ("[L]ocal autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.") (quoting *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974)).

Consistent with these principles, this Court has recognized "the very complexity of the problems of financing and managing a statewide public school

system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect." *Rodriguez*, 411 U.S. at 42 (citing *Jefferson v. Hackney*, 406 U.S. 535, 546–47 (1972)).

In sum, there is no right or guarantee to public education under the Federal Constitution. *Id.* at 35. Rather, public education is an affirmative state constitutional obligation and therefore "should 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." *Id.* at 38 (distinguishing affirmative rights from instances in which states "deprive[]," "infringe[]," or "interfere[]" with the free exercise of some such fundamental personal right or liberty). Thus, rational basis is the appropriate standard for federal courts when reviewing the means by which states comply with their state constitutional duty to provide and deliver public education to their children. *Id.* at 44. (stating that the determinations by states of how to fulfill their obligation to provide public education is "an inappropriate candidate for strict judicial scrutiny"). As such, this Court need only determine whether a state's public education decision "bears some rational relationship to a legitimate state purpose." *Id.*

Accordingly, Maine's decisions concerning its provision of public education, including those

regarding the tuition program at issue in this case, are subject to rational basis review. So long as its determinations are rationally related to Maine's legitimate state interest in the "suitable provision" of public education, Me. Const. Art. VIII, pt. 1, § 1, Maine's determinations do not run afoul of the Federal Constitution.

B. Maine's tuition program is rationally related to its legitimate state interest in providing public education.

Maine's tuition program, which is a longstanding component of the State's public school system, easily satisfies the rational basis test. The program is rationally related to Maine's legitimate— indeed, core — interest in providing an appropriate education for all of the State's children.

To implement its constitutional duty to ensure "suitable provision . . . for the support and maintenance of public schools," Me. Const. art. VIII, pt. 1, § 1, the Legislature has created local school administrative units ("school districts") to control and manage Maine's public schools. *See* Me. Stat. tit. 20-A, § 2(1). Given Maine's unique history and geography, some school districts in rural areas with small populations do not have their own public schools. Under Maine education law, the tuition program authorizes those school districts to provide

their children a public education by paying tuition to any approved public school in an adjoining school district or to an approved private school. *Id.* §§ 5203–5204. Private schools may choose to qualify for and participate in the program, thereby agreeing to accept public funds to provide children living in an area without a local public school the public education required by Maine's constitution. *See id.* § 1(23) ("'Private school approved for tuition purposes' means a private school approved for the receipt of public funds.").

Under the statutory provisions governing Maine's tuition program, a school district that does not operate its own public schools can contract with either an out-of-district public school or a private nonsectarian school to provide a public education for all children in the school district. *Id.* §§ 5203(3) (elementary), 5204(3) (secondary); *see also id.* 2701 (authority to contract for school privileges). If the school district decides not to enter into such an exclusive contract, the law allows the district to fund attendance at public or nonsectarian private schools selected by parents, provided that any such private school is approved by the State. *Id.* §§ 5203(4) (elementary), 5204(4) (secondary). A school district thus satisfies its statutory obligation to afford its children a public education by paying tuition to participating public and private schools. *Id.* §§ 5203(2)–(4) (elementary), 5204(2)–(4) (secondary).

Under Maine's formula for funding its public schools, school districts receive state funding based on "pupil count," among other factors. *Id.* §§ 15671, 15674. School districts must also contribute a local share. *Id.* §15671-A. In a school district that does not operate a public school, the pupil count includes those children covered by the tuition program. *Id.* § 15674(2). The school district receives state funding for those children and uses that funding, together with its local contribution, to pay tuition to the public or private schools attended by children from the school district. *Id.* §§ 5203(2)–(4), 5204(2)–(4).

The tuition rate paid by the school districts is the statewide average per-pupil cost in public schools under Maine's school funding formula. *Id.* § 15676-A. As with the funding of public schools, the state and local share of private school tuition that the school district pays under the tuition program is determined through the public-school funding formula enacted by the Legislature. *Id.* §§15671–15695. Thus, the tuition program is an integral part of Maine's provision and financing of public education.

To assure that the private schools approved to utilize the tuition program provide what Maine deems an adequate and appropriate education for children receiving their public education at a participating private school, Maine has established criteria that these schools must satisfy. In addition to being "nonsectarian" under Section 2951(2), a private school

must comply with the requirements for basic school approval under Section 2901 by adhering to the State's hygiene and health and safety laws, and also either be (1) accredited by the New England Association of Schools and Colleges or (2) approved "for attendance purposes." *Id.* § 2901(2).

To be approved "for attendance purposes," a private school must satisfy multiple requirements, such as course and curriculum obligations. *Id.* § 2902. Those requirements include offering a set of courses prescribed by the Maine Commissioner of Education in the areas of reading, mathematics, science (specifically, "in those content areas concerning cells and continuity and change"), world languages, social studies, and health, physical education and wellness. *Id.* §§ 4704, 6209. The Maine Department of Education sets parameters for these areas of essential instruction, while stipulating "accommodation provisions for instances where course content conflicts with sincerely held religious beliefs and practices of a student's parent or guardian." *Id.* § 6209.

Private schools approved for attendance purposes must also meet the State's public education requirements regarding accountability standards, teacher certification, length of school years and days, class size, and other standards governing the substance and quality of education for Maine students. *Id.* § 2902. Additionally, unlike other private schools, those private schools participating in

the tuition program must comply with the antidiscrimination requirements contained in the Maine Human Rights Act. Me. Stat. tit. 5, §§ 4552, 4602. The Maine Commissioner of Education closely monitors participating private schools through reporting and auditing requirements to ensure compliance with the requirements set by the State. Me. Stat. tit. 20-A, §§ 2952, 2954.

In short, participating private schools agree with districts to provide education up to the same standard as all Maine public schools—satisfying the State's basic education requirements, including that public schools be secular and otherwise meet the quality and accountability standards enumerated above. Those specifications are objective and unambiguous, evidencing the Legislature's clear intent to provide equal public education opportunities to all Maine children using standards that Maine has determined will accomplish that goal.[2]

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[2] As the First Circuit observed in its 2004 ruling upholding the secular-school limitation on the tuition program, "the legislative history [of Section 2951(2)] clearly indicates" that a key reason for this limitation was the State's "interest[] in concentrating limited state funds on its goal of providing secular education." *Eulitt ex rel. Eulitt v. Me., Dep't of Educ.*, 386 F.3d 344, 356 (1st Cir. 2004); *see also, e.g.*, 121 Me. Legis. Rec. H-584 (1st Reg. Sess., May 13, 2003) (statement of Representative Cummings) ("The resources . . . to drain off from public schools to [repeal the tuition program's secular school limitation] will be an endangerment to the quality of our public schools").

The critical point is that Maine's tuition program is a means of providing an essential public service affirmatively mandated by Maine's constitution. The private schools that agree to participate in the tuition program do not provide an alternative to an otherwise available public education. To the contrary, those private schools, pursuant to Maine's state statute, directly provide public education for children in districts that do not have their own public school.

This carefully crafted tuition program to utilize approved private schools to provide a public education for children in school districts with no public school is rationally related to Maine's legitimate interest in providing what the State deems to be an appropriate public education for its children. For the reasons this Court has emphasized, Maine has broad discretion in determining the content and means of delivering that public education to communities throughout the State. That discretion includes determining what criteria must be met by private schools that agree to participate with school districts in the delivery of public education on behalf of the State. Maine's decision to exclude schools that incorporate religion into their daily curricula—just as Maine prohibits its public schools from incorporating religion into their

daily curricula—is a rational decision entitled to deference.[3]

II. Maine's tuition program does not unconstitutionally discriminate against religion.

In providing public education, Maine is not obligated—and indeed, is not permitted—to include religion in its public schools' curricula. For similar reasons, Maine is not constitutionally obliged to allow private schools that provide religious instruction to be part of the State's system of public education through its tuition program. Accordingly, by imposing nonsectarian conditions for participation, Maine does not unconstitutionally discriminate against religion.

A. In providing public education, Maine is not obliged to support religious curricula or rules of conduct within its schools.

As explained in detail in Part I, states have broad discretion in determining how to operate their public schools. *See Milliken*, 418 U.S. at 741–42. Robust public debate surrounds what subjects should

[3] Maine's tuition program would also pass strict scrutiny review as the tuition program is narrowly tailored to advance a government interest of the "highest order." *Espinoza*, 140 S. Ct. at 2260. However, this Court need not reach that issue in this case.

be taught in schools and with what emphasis. *See* Chief Justice John G. Roberts Jr., *2019 Year-End Report on the Federal Judiciary* 2 (2020), https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf (noting that "civic education has fallen by the wayside"). Central to state control over the public education is the state's ability to select the subjects taught in its classrooms and the specifics of how those subjects are conveyed to its children. *See, e.g.*, *Rodriguez*, 411 U.S. at 49; *Epperson v. Ark.*, 393 U.S. 97, 107 (1968).[4]

Thus, a state may insist, for example, that its public elementary schools teach arithmetic, language, arts, and social studies, and require its public high schools to teach more advanced math, chemistry, and history. Subject only to Federal Constitutional and statutory limitations, a state can even mandate that its public schools not offer classes on particular topics, such as fashion, criminal procedure, and as more

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[4] Justice Powell, who served as a member and president of the Richmond Public School Board and as a member of the Virginia Board of Education, repeatedly articulated the importance of state control over its public school curriculum. *See Edwards v. Aguillard*, 482 U.S. 578, 597 (1987) (Powell, J., concurring) ("[N]othing in the Court's opinion diminishes the traditionally broad discretion accorded state and local school officials in the selection of the public school curriculum."); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 893 (1982) (Powell, J., dissenting) ("States and locally elected school boards should have the responsibility for determining the educational policy of the public schools").

recent controversies show, critical race theory. *See, e.g.,* Tenn. Code Ann. § 49-6-1019 (2021) (prohibiting Tennessee public schools from teaching in their curricula that a person "is inherently privileged, racist, sexist, or oppressive").

Similarly, a state can—and must—prohibit its schools from offering classes that teach religious beliefs or offer religious instruction. By doing so, a state does not unconstitutionally discriminate against religion, just as a state does not unconstitutionally discriminate on the basis of gender by opting not to offer women's studies. *See 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. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.").

This autonomy is not to say that the Federal Constitution imposes no limitations on a state's ability to operate its public schools. In particular, the Establishment Clause limits public schools from offering a curriculum that is tailored a particular religious sect. A public school class on religion or on the Bible may be appropriate, but only if the class is

"presented objectively as part of a secular program of education." *See, e.g.*, *Schempp*, 374 U.S. at 225.

In *Epperson*, for example, this Court struck down an Arkansas law prohibiting the teaching of human evolution in Arkansas' public schools as violative of the First Amendment because states cannot tailor curricula to "the principles or prohibitions of any religious sect or dogma." 393 U.S. at 106. Similarly, in *Aguillard*, this Court struck down a Louisiana law requiring that creationism be taught in public schools because the law was specifically intended to advance a particular religion. 482 U.S. at 580-81; *see also Schempp*, 374 U.S. at 226 ("In the relationship between man and religion, the State is firmly committed to a position of neutrality."). Needless to say, these cases do not suggest that states must support religion in public schools. To the contrary, this Court's precedents establish that the Federal Constitution strictly limits the ability of states to advance any and all particular religious beliefs in their public schools.

The same analysis applies to Maine's tuition program. That program is a means by which Maine delivers public education. Under the program, Maine provides a free public education for some children—specifically, those in a school district without a public school—by paying tuition to private schools capable of, and willing to, accept the State's criteria for approval. Those approved private schools receive

public school funding in exchange for their agreement to effectively function as Maine public schools for certain students; those willing private schools provide the public schooling that school districts would otherwise provide. Accordingly, just as Maine may close a public school that fails to meet state requirements, Maine may refuse to include in the tuition program schools that fail to meet the secular specifications for a curriculum the State has prescribed for its public schools as well as the private schools that choose to participate in its tuition program.

Moreover, permitting private schools accepting public funds to discriminate against students on account of religious identity or sexual orientation would directly undermine Maine's stated public policy "to prevent discrimination in . . . access to public accommodations on account of race, color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin." Me. Stat. tit. 5, § 4552. In fact, Maine's Human Rights Act specifically prohibits this discrimination within all public educational programs in the State—including "any private school or educational program approved for tuition purposes." *Id.*, §§ 4553(2-A), 4602. Maine's laws therefore honor non-discrimination principles that are central to the State's vision of an appropriate public education.

To illustrate, Bangor Christian Schools, which Petitioners Carson and Gillis seek to have their children attend by way of Maine's tuition program, does not believe there is any way to separate its religious instruction from its 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." J.A. at 85–86. For example, one of the Bangor Christian Schools' objectives in its fifth-grade social studies class is to "[r]ecognize God as Creator of the world." J.A. at 87. Likewise, its ninth-grade social studies class seeks to "[r]efute the teachings of the Islamic religion with the truth of God's Word." J.A. at 88. Pursuant to Bangor Christian Schools' religious objectives, an openly gay student would be subject to expulsion. J.A. at 83–84.

Similarly, the educational philosophy of Temple Academy, which Petitioners Nelson seek to have their children attend through the tuition program, "is based on a thoroughly Christian and Biblical world view" and its academic growth objectives include "provid[ing] a sound academic education in which the subject areas are taught from a Christian point of view[.]" J.A. at 92–93. Temple Academy's written admissions policy states that "students from homes with serious differences with the school's biblical basis and/or its doctrines will not be accepted." J.A. at 94. Thus, Temple Academy would not admit a student who resides in a two-father

or two-mother household and likely would not admit a student from a Muslim household. J.A. at 94–95.

Assuredly, Maine could not support in its public schools a religious curriculum or school policies such as those at Bangor Christian Schools or Temple Academy. In fact, a public school is prohibited from infusing religion into its curriculum like Bangor Christian Schools. Similarly, a public school cannot expel a student on the basis of the student's sexual orientation; public schools are open to all students. Thus, it is entirely rational for Maine to choose to not approve for participation in the tuition program a private school similar to Bangor Christian Schools or Temple Academy that teaches religious beliefs or engages in discrimination, so that Maine can provide the publicly funded education the State owes to all of its children.

B. Maine's tuition program is readily distinguishable from *Espinoza* and does not unconstitutionally discriminate against religion.

Petitioners and their *amici* suggest that Maine's tuition program violates the Federal Constitution because the tuition program impermissibly discriminates against religion. That assertion is not correct.

It is true, of course, that states cannot discriminate on the basis of religion when states decide, as a discretionary matter, to disburse financial assistance to entities that provide various services. Thus, for example, this Court's precedents imply that states choosing to provide financial assistance programs cannot exclude religious schools solely on the basis of their religious status. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 653–54 (2002) (involving an Ohio voucher program permitting public funds to be used for religious schools); *Trinity*, 137 S. Ct. 2021 (involving a Missouri program that denied religious schools grants for playground resurfacing solely on account of the schools' religious status, while providing grants to similarly situated non-religious groups).

Applying this principle in *Espinoza v. Montana Department of Revenue,* 140 S. Ct. 2246 (2020), the Court struck down a Montana program that provided scholarships for children to attend private schools but forbade the children from using the scholarships to attend private religious schools. *Id.* at 2251. The Court explained that the prohibition unlawfully discriminated against religion because it limited use of the scholarships "solely because of the religious character of [a] school." *Id.* at 2255.

In contrast to the scholarship program at issue in *Espinoza,* Maine's tuition program does not subsidize *private* education as an alternative to an

available public school. Rather, Maine's program makes available a *public* education for all children by paying tuition to private schools that agree to accept the conditions that Maine attaches to permitting private schools to educate public school students. In other words, Maine's program provides tuition payments to private schools to deliver the public education guaranteed under Maine's constitution. For children in school districts without a public school, the tuition program is the *only* option for a publicly funded education, and the private schools participating in the program must meet curricular requirements and other standards equivalent to what students are guaranteed in a public school.

As the Court explained in *Espinoza*, "[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." *Id.* at 2261. Here, Maine has not decided to subsidize private education. Maine's tuition program serves a wholly different function of enabling school districts to pay private schools—using public school funding—to educate children where no public school is available to do so. Effectively, the tuition program is a fundamental component of the State's public education system, operating to provide the public education that Maine must offer for all its children. Viewed in this proper context, Maine has ample authority to limit private school participation to those

that provide secular education consistent with Maine's public education standards.

Thus, unlike the scholarship program in *Espinoza*, which subsidized private education as an alternative to public schools, the purpose of Maine's program is to allow local school districts with no public school to use their public school funding to make tuition payments to private schools that agree to deliver education under public school standards. Maine's program ensures that those students receive the *same* benefits of a secular, public education as do students in school districts with their own public schools.

Nor does the tuition program interfere with the ability of private schools to practice religion. Private schools may choose to adopt a religious curriculum or promote other religious practices. Those schools simply forego the option to participate in the tuition program. By excluding schools that infuse religion into their curricula from its tuition program, Maine is ensuring that the State provides an appropriate public education for children with no local public school. The private schools that choose to seek approval to educate publicly-funded students are "standing in the shoes" of the Maine public schools and are ultimately providing this core public function on Maine's behalf—an arrangement fundamentally different from the scholarship program at issue in *Espinoza*.

Another meaningful difference between the Montana scholarship program at issue in *Espinoza* and Maine's tuition program is that the Maine tuition program does not exclude a private school "solely because of the religious character of the school." *Espinoza*, 140 S. Ct. at 2255. Maine's program does not automatically exclude schools with a religious affiliation—i.e., a religious *status*. To the contrary, in certifying private schools for its tuition program, Maine focuses on the substance of the education provided by a private school's education to determine whether the school incorporates religion in its curriculum—in other words, Maine focuses on the *use* of the public funds, not the religious identity or *status* of the private school.

Indeed, schools with religious affiliations that meet Maine's criteria can be approved for participation in the tuition program. Specifically, in addressing the "nonsectarian" requirement in Section 2951(2), Maine's Commissioner of Education explained, "[w]hile 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 the material is presented." Pet. App. at 35. Maine's Attorney General has confirmed the Commissioner's statement. Pet. App. at 35.

Proving this point, Maine has certified Cardigan Mountain School for purposes of the tuition program. Cardigan Mountain School is a private school in New Hampshire that teaches "universal moral and spiritual values," both "in and out of the classroom" and even has compulsory weekly Chapel meetings. Notwithstanding Cardigan Mountain School's integration of a religious component in its operation, Maine approved the private school to participate as an adequate "stand-in" for a Maine public school.

In short, even if the Federal Constitution forbids Maine from refusing to certify a school solely because of its religious status, Maine's tuition program does not discriminate in that way. Religiously affiliated private schools can participate, so long as the schools meet the requirements specified by Maine law.

CONCLUSION

The judgment of the Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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OCTOBER 29, 2021