No. 20-1088

In The Supreme Court of the United States

DAVID CARSON, as Parent and Next Friend of O.C., et al.,

Petitioners,

v.

A. PENDER MAKIN, in her Official Capacity as Commissioner of the Maine Department of Education,

Respondent.

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

BRIEF OF RESPONDENT

AARON M. FREY
Attorney General

SARAH A. FORSTER
Assistant Attorney General
Counsel of Record
CHRISTOPHER C. TAUB
Chief Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
Six State House Station
Augusta, ME 04333-0006
(207) 626-8800
sarah.forster@maine.gov

Counsel for Respondent A. Pender Makin

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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). Less than 5,000 of those students live in SAUs that neither operate public secondary schools nor contract for schooling privileges with nearby schools. Maine allows those students to attend the public or approved private schools of their choice at public expense. To be eligible for public funding the private schools must be nonsectarian. This is because the purpose of Maine's program is to ensure that every child has access to a free public education – *i.e.*, a religiously-neutral education where subject matter is not taught through the lens of any particular faith. To be clear, religious organizations that are willing to provide education comparable to a public education are eligible to receive public funds through Maine's tuition program. In excluding sectarian schools, Maine is declining to fund a single explicitly religious use: an education designed to proselytize and inculcate children with a particular faith.

The question presented is: Do either the First or Fourteenth Amendment to the United States Constitution require Maine to include sectarian schools in a program designed to provide a free public education to students who live in SAUs which neither operate public schools nor contract for schooling privileges?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

This case is about public education. This Court has repeatedly recognized that public education is one of the most important functions of state and local governments and is the very foundation of democracy and good citizenship. Maine's constitution reflects the primacy of public education, and Maine's statutes guarantee a free public education to every child in Maine. Maine has appropriately determined that a public education should be a nonsectarian one that exposes children to diverse viewpoints, promotes tolerance and acceptance, teaches academic subjects in a religiously-neutral manner, and does not promote a particular faith or belief system. While typically a public education would be provided through public schools, the lack of public schools in some parts of Maine means that this not always possible. So, a small number of children are eligible to attend an approved private school of their choosing at public expense. This is not a voucher, scholarship, or subsidy program. Rather, it is simply a method to deliver a free public education. And because Maine is using private schools as part of its public education system, schools that promote a particular religion or present material through a religious lens are not eligible. The education provided in such sectarian schools is simply not comparable to a public education.

Once Maine's public education system is properly understood, it is clear why Petitioners' claims fail. They are not being denied a generally available public benefit because of their religious status. The public

benefit Maine is offering is a free public education. Petitioners want an entirely different benefit – a publicly subsidized sectarian education. Children who live in states that provide a public education exclusively through public schools do not have a constitutional right to attend sectarian schools at public expense. The result should be no different here simply because Maine sometimes makes use of privately-owned schools to provide a public education. Put another way, there is no question that Maine may require its public schools to provide a nonsectarian education, and the same should be true when it comes to private schools providing the public education.

Moreover, Maine is not discriminating based on the religious status of families or schools. Parents who want to send their children to a sectarian school for religious reasons are treated precisely the same as parents who want to send their children to a sectarian school for academic, athletic, social, or other reasons. Similarly, a school's eligibility does not turn on its religious status. As long as the school provides a nonsectarian (*i.e.*, public) education, it may receive public funds. Rather than discriminating based on religious status, Maine is imposing a use-based restriction. It is prohibiting public funds from being used to promote and inculcate religious beliefs. In other words, Maine is declining to subsidize religious exercise. While the Establishment Clause might permit such subsidization, the Free Exercise Clause does not require it.

STATEMENT OF THE CASE

A. Public Education in Maine and the Role of Private Schools.

Maine's Constitution requires local governments to provide a public education, a mandate the state legislature has implemented. Article VIII, pt. 1, § 1 of the Maine Constitution states:

> 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. "It is the intent of the Legislature that every person within the age limitations prescribed by state statues shall be provided an opportunity to receive the benefits of a free public education." Me. Rev. Stat. Ann. tit. 20-A, § 2(1). 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 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) ("Section 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. These schools must, *inter alia*, meet the requirements for basic school approval contained in statute and agree to comply with reporting and auditing requirements. Any private school approved for the receipt of public funds for tuition purposes must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." Me. Rev. Stat. Ann. tit. 20-A, § 2951(2).[1]

---

[1] At the same time, pursuant to *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), Maine statutes give parents broad discretion to choose alternatives to a public education for their children. Non-tuition eligible private schools can seek basic school approval

The Maine Department of Education ("Department") is responsible for approving private schools for receipt of public funds for tuition purposes. Schools seeking approval provide assurances that correspond to the statutory and regulatory requirements for approval. The schools self-identify as nonsectarian. A question about whether a school is or is not sectarian is extremely rare. If forced to make a determination, 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 this faith. While affiliation or association with a church or religious institution is one

---

so that their students meet the requirements of compulsory school attendance described in Me. Rev. Stat. Ann. tit. 20-A, § 5001-A(1-A) and § 5001-A(3)(A)(1)(a). BCS has basic school approval. Maine law also provides an alternative for private schools that do not wish to seek approval from the State: private schools may be recognized by the Maine Department of Education as providing equivalent instruction. Me. Rev. Stat. Ann. tit. 20-A, § 5001-A(3)(A)(1)(b). Although clearly permitted by *Pierce*, there are no statutory or regulatory requirements for recognized schools. TA is a recognized school. Students who attend both approved and recognized private schools satisfy Maine's compulsory attendance law if the school files a certificate with the administrative unit where the student resides showing the name, residence, and attendance of the student at the school. Me. Rev. Stat. Ann. tit. 20-A, § 5001-A(3)(A)(2). Finally, if a parent wants to provide instruction to their children in the home without any school at all, Maine permits home instruction with only minimal requirements. Me. Rev. Stat. Ann. tit. 20-A, § 5001-A(3)(A)(4).

> 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. 35.

The tuition program established by Section 5204(4) 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 anything at all like the Montana scholarship program reviewed in *Espinoza v. Montana Department of Revenue*, 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). Simply put, Maine does not offer parents a choice of publicly funded alternatives to public schools; rather, Maine allows parents who live in SAUs without public schools

or contracts for schooling privileges to obtain a public education for their children by choosing from among a small group of private schools who demonstrate to the State that the educational program they provide is a suitable equivalent to a public education.

Maine has 260 SAUs serving nearly 180,000 students in grades K-12 at public expense. JA 4,73. More than half of the SAUs do not operate secondary schools. JA 70. In 2017-2018, 4,546 secondary students attended private schools through either a contract for schooling privileges or through the tuition program. JA 73. Almost all of these students attended a handful of private schools informally referred to as the "town academies" or the "Big 11." JA 73. According to data compiled by the Department from information submitted by these private schools, the actual percentage of publicly-funded students at the academies in 2020-21 ranged from 80% to 99%. https://www.maine.gov/doe/sites/maine.gov.doe/files/inline-files/60PercentSchoolEnrollmentsByFiscalResponsibility.xlsx. Because these schools enroll more than 60% publicly funded students, they must participate in the statewide assessment program, and, starting in the 2022-23 school year, satisfy all health and safety requirements that apply to public schools and align their curricula with Maine's system of learning results. Me. Rev. Stat. Ann. tit. 20-A, § 2951(6), *as amended by* P.L. 2021, ch. 386.

B. The Attorney General's Opinion and the Legislature.

Maine's Constitution has never had a so-called "Blaine Amendment," "no-aid clause," or any other provision specifically 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. JA 72. In January of 1980, in response to a request from a legislator, Maine's Attorney General issued an opinion reviewing the existing First Amendment jurisprudence and concluding that the public funding of religious schools would violate the Establishment Clause. JA 35-68. Subsequently, the Legislature enacted the provision currently codified at Me. Rev. Stat. Ann. tit. 20-A, § 2951(2) ("Section 2951(2)"), limiting the provision of public funds to nonsectarian private schools. 1981 Me. Laws 2177.

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 beyond the existing public education system 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). JA 100.

Several legislators articulated the important rationales for continuing the exclusion of sectarian schools from the public education system, including:

- It is the sovereign prerogative of the people of the State of Maine to determine how public funds can and should be used in supporting public education for the children of this state. JA 100-01.
- 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. JA 105.
- 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. JA 104-05.
- The government has an important oversight role with respect to what is taught in schools but cannot, and should not, oversee the religious components of any school. Because of that, public funds should not pay for an education over which the state cannot have oversight. JA 103, 105.
- Religious schools can, and reserve the right to, discriminate in favor of those of their own religion and the state should not fund discrimination. JA 100-03.

The bill was rejected. JA 108.

C. The Present Challenge.

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. JA 11-34.

1. The Petitioners

David and Amy Carson send their daughter, O.C., to Bangor Christian Schools ("BCS"). JA 74. The Carsons send her there 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. JA 75.

Troy and Angela Nelson's daughter, A.N., is attending Erskine Academy through the tuition program. JA 78. The Nelsons do not dispute the quality of the secular education their daughter receives at Erskine. JA 78. 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. JA 78. The Nelsons would like to send their daughter, A.N., to TA because of the quality

of education and the discipline, but they cannot afford the cost of tuition for both of their children. JA 79.[2]

2. The Schools

a. Bangor Christian Schools (BCS)

BCS is a sectarian school for purposes of Section 2951(2). JA 80. It was founded in 1970 as a ministry of the Bangor Baptist Church (now Crosspoint Church) and is "into its fifth decade of training young men and women to serve the Lord." JA 80. 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. JA 81. BCS teaches children that the husband is the leader of the household. JA 86.

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's students to try and determine if the school is a "good fit" for the student.

JA 82. 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. JA 83.

At BCS, presenting oneself as a gender other than what is listed on one's original birth certificate,

---

[2] Both O.C. and A.N. have now graduated from high school and R.N. currently attends Erskine Academy at public expense. Pet. Br. 6 and n.4.

whether done on or off school grounds, "may lead to immediate suspension and probable expulsion." JA 83. If a student presented as a gender other than that on his or her original birth certificate and refused to stop presenting as a different gender after 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. JA 83. 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's 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. JA 83. 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. JA 84.

Among BCS's 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." JA

84-85. 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. JA 85. Bible is subject to this more stringent standard because "that is the primary thing in our school." JA 85.

BCS believes that the main reason parents send their children to BCS is to develop a biblical worldview. JA 85. 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." JA 85-86. For example, one of the objectives in the fifth-grade social studies class is to "[r]ecognize God as Creator of the world." JA 87. 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." JA 88. One of the objectives for students in the tenth-grade government class is to "[d]etermine a Christian framework for determining and executing foreign policy." JA 88. Attending chapel is mandatory. JA 86.

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." JA 89. Moreover, every employee of BCS "[m]ust be born again" and "[m]ust be an active, tithing member of a Bible believing church." JA 89. BCS will not hire teachers who identify as a gender other than on their original birth certificates, nor will it hire homosexual teachers. JA 89.

b. Temple Academy (TA)

TA is a sectarian school for purposes of Section 2951(2). JA 90. It is an "integral ministry" and essentially an "extension" of Centerpoint Community Church. JA 91. Its governing body is Centerpoint's Board of Deacons. App 91. The superintendent of TA is Centerpoint's lead pastor. JA 91.

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. JA 94. 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. JA 94. 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." JA 94. A Muslim family would have serious differences with TA's biblical basis and its doctrines. JA 94. TA will not admit a child who lives in a two-father or a two-mother family. JA 95. TA will not admit a student who is homosexual, though there are students presently enrolled who "struggle" with homosexuality. JA 95. 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. JA 95.

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." JA 95. 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." JA 95-96.

TA's educational philosophy "is based on a thoroughly Christian and Biblical world view;" 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." JA 92. 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." JA 93.

TA provides a "biblically-integrated education," which means that the Bible is used in every subject that is taught. JA 96. Teachers "are expected to integrate Biblical principles with their teaching in every subject taught at Temple Academy." JA 96-97. TA urges students to obey the Bible and accept Christ as their personal savior. JA 97. Students are required to attend a religious service once a week. JA 96.

A person must be a born-again Christian to be eligible for all staff positions at TA, including custodial positions. JA 98. Homosexuals are not eligible for employment as teachers at TA. JA 98. 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." JA 98.

3. Procedural History

The case was submitted on cross-motions for judgment on a 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 United States 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. The court of appeals began 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 the Department's former Commissioner, as affirmed by the current Commissioner and the Maine Attorney General's Office, 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 to the contention that the distinction between status and use is not relevant from a constitutional perspective, the court of appeals noted that Petitioners 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* questioning 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.

SUMMARY OF THE ARGUMENT

Maine's tuition program does not violate the Free Exercise Clause. The public benefit at issue is not an education but a *public* education. What Petitioners want is a different benefit – a religious education. This Court has repeatedly recognized the significance of public education and has never suggested that a state's establishment of a secular public education system raises any constitutional concern. A religious education is nothing like a public education, as this Court has recognized and as the factual record demonstrates. An education that includes proselytization and inculcation in specific religious beliefs and supports the exclusion of some children and families is antithetical to a public education. While families are certainly entitled to send their children to religious schools (and Maine law respects that choice by declaring that enrollment in religious schools satisfies attendance requirements), the Free Exercise Clause does not demand that public dollars be used to support it.

This Court has recognized that while the Free Exercise Clause is implicated when a government denies a benefit solely based on the religious status of an entity, the same is not true when it denies a benefit based on the religious use to which the benefit will be put. Maine's system of public education is an example of why the status/use distinction matters. It is a perfect example of what this Court has described as the "play in the joints" between what the Establishment Clause allows and the Free Exercise Clause requires. In order to maintain a secular public education system that relies upon private schools to ensure universal access, Maine allows any entity, religious or not, to participate, but excludes only schools that serve to proselytize and inculcate by promoting a particular faith and presenting academic material through the lens of that faith.

Finally, even if the Free Exercise Clause were implicated, Maine's tuition program would satisfy strict scrutiny. A secular public education system is a compelling state interest, and Maine has tailored its tuition program narrowly to exclude only that which in substance is wholly inconsistent with a public education.

With respect to the Equal Protection Clause, any alleged discrimination is fully disposed of by the resolution of the free exercise claim. Petitioners' argument with respect to the Establishment Clause would turn that clause on its head. Any Establishment Clause concerns weigh heavily in favor of the State, not Petitioners.

Finally, Petitioners do not have standing because, at best, it is speculative whether a favorable ruling will result in the relief they seek – the ability to send their children to sectarian schools at public expense.

ARGUMENT

I. Maine's Tuition Program Does Not Violate the Free Exercise Clause.

The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This Court has recognized "that there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran*, 137 S. Ct. at 2019 (2017) (quoting *Locke v. Davey*, 540 U.S. 712 (2004)). "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Id.* (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993)). "Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Id*. (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion)). Maine's tuition program does not penalize

the free exercise of religion; Maine is merely refusing to subsidize a single explicitly religious use.

A. The benefit being offered is public education; petitioners want an entirely different benefit – publicly-funded religious instruction.

The first step in deciding whether Petitioners are being denied a "generally available benefit" is to carefully define the benefit at issue. Here, the benefit is a free public education. This is not a school choice program where public funds are available to families who for academic, religious, athletic, or other reasons want to opt out of the public education system and send their children to private schools. Rather, public funds are available only to children who live in SAUs that neither have a public school nor contract for schooling privileges to ensure that they are able to access a free public education. Simply put, it is not a program to subsidize private education, but a program to provide a public education. Nonsectarian private schools are eligible because the education they provide is consistent with a public education. Sectarian schools, on the other hand, provide something entirely different – religious instruction. In short, because Petitioners seek a benefit that is different than the one that is generally available, they are not entitled to it under the Free Exercise Clause.

1. Public Education is a vital obligation and "not merely some governmental 'benefit.'"

As an initial matter, it is important to stress that the benefit at issue here – public education – is no ordinary one. Public education forms the backbone of an inclusive society where children have the opportunity to access all that our country has to offer. It plays a fundamental role in the maintenance of our democratic government. As this Court said in 1954:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Bd. of Ed., 347 U.S. 483, 493 (1954).

This Court's "abiding respect for the vital role of education in a free society" both predates and postdates *Brown*. *San Antonio Sch. Dist. v. Rodriguez*,

411 U.S. 1, 41 (1973). In *Rodriguez*, this Court declared that despite its conclusion that education was not a fundamental right because it is not included in the Constitution, "[n]othing this Court holds today in any way detracts from our historic dedication to public education." *Id.; see also Plyler v. Doe*, 457 U.S. 202, 221 (1982) (while education is not a fundamental right, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction."); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State.") *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.").

The impact of public education on both the children who receive it and on our society at large is so great that this Court has found no rational basis to exclude any child living in our nation from receiving a public education. Reviewing a Texas statute that denied access to public education to children of adults who were in the country illegally, this Court rejected purported government interests based in federal immigration law and preservation of limited state resources while observing:

> [E]ducation provides the basic tools by which individuals might lead economically productive

> lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

Plyler, 457 at 221, 224-31.

Public education is so important – and so central – to the role of state and local governments that education appears in state constitutions nationwide. Maine's constitution is no exception, declaring that "[a] general diffusion of the advantages of education [is] essential to the preservation of the rights and liberties of the people." Me. Const. art. VIII, pt. 1, § 1. This constitutional directive contains the foundational principles for public education in Maine: it is available to all, and it is essential to the preservation of our most fundamental rights and liberties. Maine's statutes reflect these principles. 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."

2. Maine has properly concluded that a public education is a nonsectarian one.

This Court has long equated public education with secular instruction. *See People ex rel. McCollum v. Bd.*

of Ed., 333 U.S. 203, 213-20 (1948) (tracing the history of the deliberate secularization of public education); *see also 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)); *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, . . . "); *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.").

At the same time, this Court has repeatedly articulated what makes religious instruction different than public education. "The *raison d'être* of parochial schools is the propagation of a religious faith." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971) (Douglas, J., concurring)); *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970) (acknowledging that "an affirmative if not dominant policy of church schools" is "to assure future adherents to a particular faith by having control of their total education at an early age").

Twice in the past decade, this Court has applied the so-called "ministerial exemption" to educators in religious schools regardless of whether they carried a ministerial title because "[t]he religious education and formation of students is the very reason for the existence of most private religious schools." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). "Educating young people in their faith, inculcating it teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Id.* at 2064; *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) (teacher was entrusted with the responsibility of "transmitting the Lutheran faith to the next generation") In so explaining, this Court has specifically recognized the recent "proliferat[ion]" of "non-denominational Christian schools . . . with the aim of inculcating Biblical values in their students. Many such schools *expressly set themselves apart from public schools* that they believe do not reflect their values." *Our Lady of Guadalupe School*, 140 S. Ct. at 2065 (emphasis added).

The factual record here confirms the stark differences between a public education and religious instruction. BCS's very mission is to train children to serve the Lord, and its objectives include instilling a "Christian world view and Christian philosophy of life" and preparing children for spiritual leadership. Children who are homosexual or transgender children are essentially ineligible for admission (and would be expelled if discovered). Religious and academic

instruction are "completely intertwined." BCS teaches children to "[r]efute the teachings of the Islamic religion," to use a "Christian framework for determining and executing foreign policy," and that the husband is the leader of the household. Its only teachers are those who affirm that they are born-again Christians.

TA considers itself an "extension" of Centerpoint Community Church. Under its written policy, only Christian children will be admitted. It refuses to admit homosexual or transgender children, as well as children with homosexual parents. Students must sign a covenant promising to lead a life glorifying Jesus Christ. It teaches from a "Christian point of view" and provides a "biblically-integrated education" in which the Bible is used in every subject taught. Children are instructed to obey the Bible and accept Christ as their personal savior. As with BCS, its only teachers are born-again Christians.

To be clear, parents in Maine are entitled to send their children to religious schools, regardless of what may be taught there. And Maine accommodates that by deeming enrollment in religious schools as satisfying mandatory school attendance requirements. At the same time, there can be no reasonable dispute that the education children receive at religious schools is markedly different than what students receive at public schools and nonsectarian private schools. The legislature's policy decision that a public education can properly be provided by either public or nonsectarian private schools – but not sectarian private schools – is reflected in the debate over the proposed removal of

the restriction against public funds going to sectarian schools:

> Because we retain a responsibility of a publicly funded education, we must look carefully at what we believe is an appropriate form of education for our children. I submit that our publicly funded education system works best when the education is one of diversity and assimilation. An educational system that promotes tolerance and assimilation by educating all of our children together, without regard to religious affiliation and without promoting religious viewpoints, is preferred. Non-religious publicly funded education has been the norm in Maine and elsewhere in our country, and the 'melting pot' effect of this, on our children is what makes this state and this country great. Religious neutrality in the classroom is best.
>
> * * *
>
> While citizens most certainly have the right to attend [sectarian] schools, I do not believe that we should spend our tax dollars to fund the schools. Rather, we should use our limited dollars for schools, whether the public or private under our tuition programs, that are non-religious and that are neutral on religion.

JA 105-06; *see also* JA 104 ("From a public policy position, we must believe that a religiously neutral classroom is the best if funded by public dollars."); JA 101 (referring to the "sovereign prerogative of the people of the State of Maine regarding how public

funds can and should be used in supporting public education for the children of this state"). In sum, Maine has appropriately determined that a public education is a nonsectarian one.

3. Maine has developed a system that ensures that all students receive a free public education, while no student receives religious instruction at public expense.

Maine's tuition program is not a school choice program, nor is it intended to "subsidize private education." *See Espinoza*, 140 S. Ct. at 2261. Rather, it is a program ensuring that all children may receive a free public education, even if they live in an SAU that neither operates a public school nor contracts with a public or approved private school for schooling privileges. Those children – and *only* those children – are eligible to attend a public or approved private school of the parent's choice at public expense.

Maine's highest court has explained that this 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 who in live in SAUs that neither operate a school nor contract for

schooling privileges to receive a free public education that is consistent with, and no broader than, the benefit provided to students who live in other SAUs.

4. Petitioners' arguments that the benefit is simply an "education" are without merit.

Presumably recognizing that their claims fail if the benefit is defined as a "public education," Petitioners make a number of arguments that the benefit is simply an "education," but all of these are belied by the facts and the law. Petitioners conflate being a part of Maine's educational system *writ* large and being part of Maine's system of public education. Petitioners assert that Maine's statute is "not narrow enough" because it is a "blanket ban" on an entire course of instruction that "satisfies every secular requirement of *Maine's compulsory education law* – at schools that happen to teach religion." Pet. Br. 34 (emphasis added). There is no question that sectarian schools, including BCS and TA, satisfy Maine's compulsory education law. But that does not mean they are a proper part of Maine's *public* education system.

Petitioners argue that the benefit cannot be a public education because the nonsectarian private schools that are eligible to receive tuition are not enough like public schools. Pet. Br. 20. Some of this argument is factually wrong. For example, Petitioners protest that nonsectarian private schools are not like public schools because they can give preference to

"legacy" students. Maine's public charter schools are allowed to give admissions preference to children of the schools' founders and employees and to siblings of current students. Me. Rev. Stat. Ann. tit. 20-A, §§ 2404(2)(H) & (I). Petitioners complain that private schools have competitive admission policies. Maine's two magnet schools are allowed to choose their students based on academic merit. Me. Rev. Stat. Ann. tit. 20-A, §§ 8201, 8231.

Other parts of this argument are misleading. Petitioners argue that private schools do not have to follow the same curriculum as public schools because they can be accredited by the regional accreditation entity. Pet. Br. 21. While partially true – the academies will have to align their curriculum starting in 2022 – it misses the point. By including the accreditation option, the legislature determined that the academic components of accreditation for nonsectarian schools are enough like the state curriculum requirements to make an accredited school an appropriate substitute for a public school within the public education system. Accreditation of sectarian schools simply does not provide the same equivalency: both BCS and TA are accredited, but the education they provide is in no way similar to that provided in a public school. Petitioners note that private schools can charge more than the state approved tuition if they wish. Pet. Br. 20. Again, while factually true, nothing requires a parent to select a school that charges additional tuition or fees. Nor does Maine's public education system eliminate the possibility that parents can choose an option that

requires them to pay transportation, room and board, or other costs.

Petitioners' examples of alleged deviations by other private schools from the public school norm are aimed toward supporting their most extraordinary claim: that religious schools are just like the other schools that are eligible for public funds, except that they are religious. Pet. Br. 21. But as detailed above, the differences between religious schools and nonsectarian private schools are both vast and fundamental, as this Court has found and as the record here demonstrates.

5. The benefit at issue – a free public education – is equally available to all.

Once the benefit is properly defined – a free public education – it is clear that there is no discrimination. Every child in Maine, regardless of his or her religious status or beliefs, is entitled to a free public education. What Petitioners want, though, is a different benefit. They want Maine to provide their children, at public expense, with religious instruction. That is a benefit that is not available to anyone, and the Free Exercise Clause does not require Maine to provide it.

That this must be true can be demonstrated by a considering a state that provides public education solely through operating public schools. It cannot be the case that such a state, having chosen to provide the benefit of a public education, must subsidize the

preferences of families who would prefer to send their children to private religious schools at public expense. Turning to Maine, it is also impossible to see why where a family lives in Maine or how an SAU has decided to provide a free public education should affect application of the Free Exercise Clause. Petitioners argue only that families who live in SAUs that neither have a public school nor contract for schooling privileges are entitled to send their children to religious schools at public expense. Why should Petitioners be able to send their children to religious schools at public expense but not families who live in other SAUs?

Petitioners suggest that the difference is that public education in public schools is government speech and by including other private schools the government is no longer the speaker. But this Court has never limited government speech to speech directly from the mouths of government employees. For example, in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the monuments in the public park contained the speech of the individual organizations that donated them, but the government's role in selecting the monuments that were accepted in the park was government speech. Here, Maine is speaking by choosing which private schools are providing educational instruction that is sufficiently aligned with what the state believes constitutes a public education.

A. Maine's Tuition Program Is Permissibly Based on Religious Use, Not Religious Status.

Maine's inclusion of only nonsectarian private schools as a substitute for public schools is not based on religious status, but on religious use, and, under this Court's precedent, it does not violate the Free Exercise Clause to prohibit public funds from being used for the advancement of religion. In *Locke v. Davey*, 540 U.S. 712 (2004), a state prohibited publicly funded college scholarships from being used to pursue a degree in theology. The Court rejected a Free Exercise challenge, noting that the state was "not require[ing] students to choose between their religious beliefs and receiving a government benefit" but instead had "merely chosen not to fund a distinct category of instruction." *Id*. at 720-21. The same is true here. Maine is choosing not to fund a category of education – religious instruction – as part of a program designed to provide a free public education.

In *Trinity Lutheran*, the Court again recognized the distinction between denying benefits based on religious status and denying them based on religious use. There, a state provided grants to help nonprofit organizations resurface playgrounds but disqualified any organization "owned or controlled by a church, sect, or other religious entity." 137 S. Ct. at 2014. The Court distinguished this from *Locke*: "Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do – use the funds to prepare for the ministry. Here there

is no question that Trinity Lutheran was denied a grant simply because of what it is – a church." *Id*. at 2023. Because eligibility was based on religious status, as opposed to use, Trinity Lutheran would have had to "renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified." *Id*. at 2024. Such a condition, the Court concluded, "imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny." *Id*. (quoting *Lukumi*, 508 U.S. at 546). The prohibition on grants to religious entities for playground resurfacing failed this standard. *Id*. at 2024-25. In contrast, Maine is not conditioning eligibility for public tuition funds on whether the parent is religious or whether the school at issue is operated by a church or religious institution. It is making the distinction based on the provision of a religious education as opposed to nonsectarian public or private education.

Most recently, the Court considered a state program that provided tax credits to individuals who donated to scholarship organizations but prohibited the scholarships from being used at any school "controlled in whole or in part by any church, sect, or denomination." *Espinoza*, 140 S. Ct. at 2255. The Court found that just as in *Trinity Lutheran*, the case "turn[ed] expressly on religious status and not religious use." *Id*. at 2256. So, just as in *Trinity Lutheran*, "a school must divorce itself from any religious control or affiliation" to be eligible for public funds. The Court expressly declined to consider

"whether there is a meaningful distinction between discrimination based on use or conduct and that based on status." *Id*. at 2257.

This case stands not as an example of why the status/use distinction is meaningless or should be eliminated, but of why it is sometimes a necessary and appropriate example of the "play in the joints" articulated by this Court in *Locke, Trinity Lutheran*, and *Espinoza*. Maine's statutory scheme ensures that a public education is available to all, while publicly funded religious instruction is available to none. 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, how can it be said that there is any play in the joints at all?

Petitioners argue that because Maine's program is not exactly like the situation addressed by this Court in *Locke*, no "use based departure" should apply. But nothing about *Locke* suggests that it is the only possible situation that would justify a use-based exception. And while this Court may view *Locke* as being constrained by the unusual nature of the exclusion of religious use, Maine's interest in its system of public education has its own compelling bases for excluding this one specific religious use.

First, this Court has recognized the primary role of the State in designing a public education system.

Rodriguez, 411 U.S. at 39 (with respect to public education, a state's efforts "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"); *Yoder*, 406 U.S. at 213 ("providing public schools ranks at the very apex of the function of a State"); *Brown*, 347 U.S. at 493 (describing public education as "perhaps the most important function of state and local governments"). If there is any example of a public benefit program where a state should have room for "play in the joints" it is with respect to public education. That Ohio, Montana, or any other state chooses to provide public funding for "vouchers" or scholarships that allow parents to access religious instruction *outside* of the public education system should have no bearing on Maine's decision not to fund religious education *within* its public education system.

Second, the public education system plays a unique role in American society with a corresponding unique need to be free from religious instruction. As this Court has explained:

> Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the

> State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

McCollum, 333 U.S. 203 at 216-17. This is fully consistent with *Espinoza*. The scholarship program in *Espinoza* had nothing to do with how Montana provides a public education, so there was no need to consider the relationship between religious instruction and public education. At most, *Espinoza* prevents a state from offering a program that subsidizes attendance at private schools chosen by parents but excludes religious schools separate and apart from a public education. It does not lead to the conclusion that a state program that provides a public education through private nonsectarian schools must include sectarian schools.

Third, there is no dispute that the *Locke* Court considered the historical and substantial interest in not using public funds for the training of the clergy and that interest is equally present here. As will likely be explained in the briefs of *amici*, at the time of the adoption of the Constitution the authors would not have supported requiring public funding of religious instruction in the guise of a public education. And that does not tell the whole story when it comes to public education. Public education, to the extent that it existed and in the form that it existed at an earlier point in history, is in no way comparable to the public education of today. Public education has evolved from basic instruction in reading, writing and arithmetic to a minimum thirteen year (K-12) course progression in

multiple academic subjects accompanied by a panoply of co-curricular and extra-curricular activities.[3] It has evolved from a privilege enjoyed only by white children whose families did not need them to help in the fields or in the home to a right enjoyed by every child of every race, class, gender, identity, ability, and faith. As the scope of public education has expanded, so have the laws governing public education. For example, Maine has a substantial body of antidiscrimination law that applies to public education and to private schools that accept public funds. Including religious schools in the public education system will inevitably cause conflicts with those laws.

Fourth, as in *Locke*, nothing about Maine's system makes it impossible for students to take advantage of a free public education and still receive religious instruction. In *Locke*, this Court noted that a student

---

[3] Maine's history with respect to the provision of secondary education exemplifies this evolution. Until 1903, students who lived in towns that did not operate a high school had no access to a free secondary education. *See* Ava Harriet Chadbourne, *A History of Education in Maine: A Study of a Section of American Educational History* 372-73 (1936). In 1903 the Legislature first made provision for all Maine students to receive a free secondary education by providing that: "Any youth who resides with a parent or guardian in any town which does not support and maintain a free high school . . . may attend any school in this state which does have a four years' course . . . , provided said youth shall attend a school or schools of standard grade which are approved by the state superintendent of public schools." 1903 Me. Laws 68. Six years later, the Legislature added an express requirement that private schools meet designated state standards applicable to public schools in order to receive public funds. 1909 Me. Laws 71, § 1.

could use his or her scholarship to pursue a secondary degree and also obtain a devotional theology degree at the student's own expense. Unlike the college student, Petitioners allege, a secondary student can neither attend both a non-sectarian secondary school and a religious high school in the same day nor spend eight years in high school attending them sequentially. But that assumes that attending a full day religious secondary school is the only way that parents can provide religious instruction to their children. Secondary school students can engage in religious study in ways other than attending a religious secondary school such as bible study groups, attending religious instruction on weekends, or in connection with the religious services that the family attends.

Finally, Respondent argued below that Maine's system is spurred by anti-religious animus. Nothing could be further from the truth. Maine has never had a so-called "Blaine Amendment" or similar no-aid clause. When the Attorney General determined in 1980 that the inclusion of sectarian schools in the tuition program would violate the Establishment Clause, the citations to the then-current law were indisputable; it is unlikely that any court would have disagreed with his conclusion. 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) 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. JA 100-05 ("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. 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* 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).

B. Maine's Tuition Program Would Survive Strict Scrutiny.

At the end of the day, it is largely irrelevant whether Maine's exclusion of sectarian schools from its public education program constitutes the kind of discrimination at issue in *Espinoza* and *Trinity Lutheran* triggering the "strictest scrutiny" or is instead simply a restriction on public funds being used for religious purposes like that in *Locke* triggering some degree of lesser scrutiny. Under either test, the exclusion is valid because it is narrowly tailored to advancing a government interest of the "highest order." *Espinoza*, 140 S. Ct. at 2260.

As discussed above, it is beyond dispute that Maine's interest in providing a free public nonsectarian education to all children is compelling. Indeed, this Court has recognized that public education is "perhaps the most important function of state and local governments." *Brown*, 347 U.S. at 493; *see also Yoder*, 406 U.S. at 213. Maine's legislature has appropriately determined that Maine children are best served by a nonsectarian education that does not promote one religion to the exclusion of others, creates a "melting pot" of diverse individuals, and promotes tolerance and acceptance. While the number and capacity of public high schools across the state has grown over time, Maine must sometimes rely on nonsectarian private schools to fill in the gaps. Not using private schools at all is not an option because some children would then not receive (at least not without significant hardship) their guaranteed free

public education. Pet. App. 49 ("[W[e do not see why the Free Exercise Clause compels Maine either to forego (sic) relying on private schools to ensure that its residents can obtain the benefits of a free public education or to treat pervasively sectarian education as a substitute for it.").

Given the reality that Maine must sometimes deliver a public education through private schools, Maine has narrowly tailored the program to exclude only those schools that are necessarily not providing the equivalent of a public education. Maine has not broadly excluded private schools simply because they are affiliated with or controlled by a religious organization. Rather, a school is excluded only if it promotes a particular faith and presents academic material through the lens of that faith. Necessarily, such a school is not providing a public education. To the contrary, it is providing an education antithetical to a public education. Given that the use of private schools is sometimes necessary, it is impossible to see how Maine could more narrowly tailor its program of delivering a free public education to all children.

Maine's statutes ensure that religious education remains separate from public education in the most narrowly tailored manner possible, by explicitly excluding sectarian schools from the tuition program while allowing religious organizations to participate so long as they are willing to provide the same non-sectarian instruction as provided in public or

non-sectarian private schools. In short, whatever level of scrutiny applies, Maine's program passes.[4]

II. Maine's Tuition Program Does Not Violate the Equal Protection Clause.

Petitioners' equal protection claim has been decided in the State's favor by the First Circuit three times. Relegated to the final pages of their brief, Petitioners' arguments fail to cite a single case that demonstrates that the First Circuit was wrong.

As with Petitioners' free exercise claim, the resolution of the equal protection claim hinges on correctly identifying the governmental program or benefit that Petitioners are arguing is being administered in a discriminatory manner. The benefit is access to a free public education, and not an education of the parents' choosing. Me. Rev. Stat. Ann. tit. 20-A, §§ 2(1), 5204(4); *Hallissey*, 755 A.2d at 1073.

Petitioners are not being treated differently than other parents because they are religious. Their children have the same right to a free public education as any other child who resides in their respective towns. All parents have the same options available to them

---

[4] Petitioners' quibbles about whether nonsectarian private schools are enough like public schools misses the point: neither provides religious instruction in the guise of public education. Nor, on the record presented here, is there any reason to suggest that that religious inculcation can be separated from the study of the core high school curriculum. Both BCS and TA have been clear that this would be impossible.

for obtaining a public education, and conversely, no family in their respective towns, whether they identify as religious or not, or whether they would like to send their children to a sectarian school or not, has the opportunity to obtain a sectarian education at public expense. Simply put, every family has the same choice: obtain a nonsectarian public education for their children at public expense or obtain a sectarian education for their children at private expense.

Moreover, as explained by this Court in *Locke*, the failure of the free exercise claim effectively forecloses any religious discrimination claim and leaves the statute subject to rational basis review. Petitioners' attempt to distinguish *Locke* by alleging that unlike in *Locke*, the Maine statute burdens "the right of parents to . . . direct the education of their children" is unavailing; parents in Maine have the nearly unequivocal right to direct the education of their children by sending them to the private school of their choice. *See* n.1 *supra*. What they do not have is a right to public funding for any private school of their choice: "[t]he fact that the state cannot interfere with a parent's fundamental right to choose religious education for his or her child does not mean that the state must fund that choice." *Eulitt*, 386 F.3d at 354 (citing *Maher v. Roe*, 432 U.S. 464, 475-77 (1977)) (fundamental right to abortion does not equate to a right to a state-financed abortion).

Statements from the Legislative Record provide insight into the specific rationales of the Legislature in deciding to retain Section 2951(2), each of which

provides a rational policy basis for the decision. For example, "[b]ringing 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;" "[t]he government has an important oversight role with respect to what is taught in schools but cannot, and should not, oversee the religious components of any school. Because of that, public funds should not pay for an education over which the state cannot have oversight;" and "[r]eligious schools can, and reserve the right to, discriminate in favor of those of their own religion and the state should not fund discrimination." JA 100-07. Section 2951(2) does not violate the Equal Protection Clause.

III. Maine's Tuition Program Does Not Violate the Establishment Clause.

Petitioners' argument with respect to the Establishment Clause is baseless. The First Circuit rejected the parents' argument that Maine's tuition program violated the Establishment Clause 20 years ago in *Strout*, stating:

> [W]e are at a loss to understand why plaintiff-appellants believe that the Establishment Clause gives them a basis for recovery. The Establishment Clause forbids the making of a law respecting the establishment of any

> religion. There is *no* relevant precedent for using its negative prohibition as a basis for extending the right of a religiously affiliated group to secure state subsidies.

178 F.3d 57, 64 (emphasis in original). Petitioners provide no such precedent here.

Petitioners' attempt to shoehorn Maine's program into either *Zelman* or the test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), fails. *Zelman* addressed the issue of whether the inclusion, not the exclusion, of religious schools in a program that gave parents the opportunity to choose an alternative to a public education violated the Establishment Clause; it addressed not what a state must do consistent with the Clause, but what it may do. 536 U.S. at 662-63. No court has ever suggested that a state's decision to have a religiously neutral public education system implicates the Establishment Clause. Nor does anything this Court said in *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019) bear on the issue of exclusion – that case was about whether maintaining a 32-foot Latin cross on government property with government funds violated the Establishment Clause, not removing it.

With respect to *Lemon*, there can be no doubt that limiting the private schools to those providing nonsectarian instruction serves a secular purpose: the sole purpose of the tuition program is to provide a free public education for students who live in towns that do not operate secondary schools or contract for school

services. Petitioners' argument that Section 2951(2) violates the Establishment Clause because it has a principal or primary effect of inhibiting religion is equally unavailing. Petitioners cite no precedent supporting the novel proposition that refusing to fund sectarian schools inhibits religion. Nor does such a proposition make any sense. Petitioners are free to practice their religion however they see fit. There is no evidence in the record suggesting that the Petitioners' religion requires them to send their children to religious schools. But even if attending a religious school were a necessary part of a person's religion, that would not mean that the State would be inhibiting religion if it failed to subsidize it.

Nor does Section 2951(2) violate the Establishment Clause by causing the State to become excessively entangled with religion. Maine simply looks at whether the school promotes a particular faith and/or teaches through the lens of that faith. *See* Stipulated Record Ex. 3 at 5. Schools generally self-identify themselves, and, if there is ever a question, the determination of whether a school is secular can be made by looking at objective factors such as mandatory attendance at religious services and course curricula.

Petitioners' assertion that Maine is unconstitutionally inserting itself into religious questions and practices is belied by the facts. In approving Cadigan Mountain School, the lone example cited by Petitioner in support of this excessive entanglement argument, the Department simply inquired about the requirement of attending "chapel" and accepted Cadigan's

assertion that its reference to "chapel" was not to a mandatory religious service but to examination of the school's core values of compassion, honesty, respect, integrity and fairness. Stipulated Record Ex. 2 at 17-18. In the end, Petitioners offer no support for the contention that Maine must blindly accept a school's assertion that it complies with the nonsectarian requirement because questioning a school's eligibility leads to an Establishment Clause violation. As the First Circuit concluded "[g]iven that the inquiry is undertaken for the purpose of ensuring the educational instruction provided by an applicant will mirror the secular educational instruction provided at Maine's public schools, such evidence cannot suffice to supply evidence of the kind of entanglement that could rise to the level of an Establishment Clause violation in this context, if any could." Pet. App. 58.

To the extent there are any Establishment Clause concerns with respect to the tuition program, they weigh in favor of the State. As the First Circuit observed below and in *Eulitt*, "[e]ven after *Zelman* and [*Locke*], it is fairly debatable whether or not the Maine tuition program could survive an Establishment Clause challenge if the state eliminated section 2951(2) and allowed sectarian schools to receive tuition funds given that Maine's program is 'substantially narrower' than the school-choice program under scrutiny in *Zelman* because it serves as a backstop for children who have no opportunity to attend a public school." Pet. App. 30 n.2 quoting 386 F.3d at 349 & n.1.

IV. Petitioners Do Not Have Standing Because a Favorable Ruling Would Not Redress Their Injuries Since There is No Evidence That Any Sectarian School Would Accept Public Funds.

Rather than reach the merits, the Court could simply find that Petitioners lack standing. The relief that Petitioners seek is to send their children to sectarian schools at public expense. That relief, though, depends on the willingness of a either BCS or TA to accept public funds, and the evidence is that this is unlikely.[5] A favorable ruling, then, would not redress Petitioners' alleged injuries.

"[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

[5] Nor is there evidence that any other sectarian school in Maine is likely to participate in the tuition program.

> *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. . . . 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 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. . . .

Id. at 562 (citations omitted) (emphasis in original). This Court has found that plaintiffs lacked standing when their ability to obtain relief depended on the actions of a third-party and it was speculative as to whether a favorable ruling would result in any relief. *Allen v. Wright*, 468 U.S. 737 (1984) (plaintiffs lacked standing where it was "entirely speculative" whether withdrawal of tax exemption would cause racially discriminatory private schools to change their policies); *Simon v. E. Kentucky Welfare Rights Org*., 426 U.S. 26 (1976) (plaintiffs lacked standing where it was "purely speculative" as to whether decision regarding tax treatment for hospitals would result in hospitals providing more indigent care); *Warth v. Seldin*, 422 U.S. 490 (1975) (plaintiffs lacked 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).

The Petitioners bear the burden of proving each element of the standing inquiry. *Lujan*, 504 U.S. at 561. Here, the relief Petitioners seek is to send their children to religious schools at public expense. Their ability to obtain that relief depends on the willingness of the religious schools to accept public funds. Not only did Petitioners fail to present any evidence demonstrating that any schools are so willing, but the record supports the conclusion that this is highly unlikely. BCS testified that it would consider accepting public funds only if it did not have to make "any changes in how it operates." JA 90. Even then, there is "no way to predict" whether BCS's governing body – the Deacon Board of Crosspoint Church – would approve accepting public funds. JA 90. TA would refuse to accept public money if it meant that it could no longer exclude homosexuals from teaching positions. JA 99. Presumably, the same would apply if it meant that they could not exclude homosexual or transgender students. 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. JA 99.

Accepting public funds would result in a significant change in how BCS and TA operate. First, 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). Second, BCS and TA would not be able to discriminate against students who are homosexual or transgender. Effective October 18, 2021, religious schools that accept public funds are prohibited from discriminating against students based on sexual orientation and gender identity. P.L. 2021, ch. 366, sec. 19. At best, then, it is purely speculative as to whether any religious school would accept public funds if Petitioners prevail, and Petitioners thus lack standing.

CONCLUSION

The decision of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

AARON M. FREY
Attorney General

SARAH A. FORSTER
Assistant Attorney General
Counsel of Record
CHRISTOPHER C. TAUB
Chief Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
6 State House Station
Augusta ME 04333-0006
(207) 626-8866
sarah.forster@maine.gov
christopher.c.taub@maine.gov

October 22, 2021