NO. 20-1088

In the Supreme Court of the United States

DAVID AND AMY CARSON,
AS PARENTS AND NEXT FRIENDS 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 Fifth Circuit

BRIEF OF AMICI CURIAE EDUCATION AND CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF RESPONDENT

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OCTOBER 29, 2021

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

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INTEREST OF THE AMICI CURIAE

As Amici Curiae, the Education and Constitutional Law Scholars listed in the Appendix (the "Education Law Scholars") submit this brief in support of Respondent.[1] They are scholars of constitutional and education law who believe strongly in upholding a proper role for courts in enforcing constitutional rights where majoritarian democratic processes may have caused violations of the rights of disfavored minorities. At the same time, the Education Law Scholars recognize that the scope of judicial review is subject to important limitations that protect the constitutional separation of powers and ensure that courts do not improperly intrude on other branches' choices, and instead allow for judicial review of the acts of legislatures, elected officials, and local administrators only where doing so is appropriate to protect and vindicate the constitutional rights of the actual litigants before a court.

The Education Law Scholars have been immersed in the study of these core principles of judicial review through their scholarship and teaching, particularly as these principles relate to constitutional guarantees concerning education. They seek to assist this Court by explaining, in a historical, legal, and social science

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[1] The parties have filed blanket consents to amicus briefs. No counsel for any party authored this brief in whole or in part; and no persons other than amici or their counsel made any monetary contribution to fund the preparation or submission of this brief.

context, how these principles apply to the issues presented by this appeal.

SUMMARY OF ARGUMENT

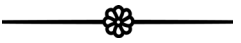
This case involves the question of whether the federal constitution requires the State of Maine to alter its policy decision regarding how best to discharge its state constitutional obligation in public education. Plaintiffs seek to compel a material change in that policy and require Maine to provide public funding to private schools that infuse religious instruction as part of their program. Maine is entitled to maintain its longstanding policy regarding how best to create and provide a system of education that satisfies its context-specific objectives and state constitutional obligations.

Maine's policy should be upheld by this Court because:

1. Maine's state education policy is an element of an overall statutory regime designed to fulfill Maine's constitutional duty to provide a free public nonsectarian and nondiscriminatory education to all of its students. In Maine's fulfillment of its public duty to establish and support a public school system that satisfies its educational interests and reflects its geographic realities, Maine allows, under narrow circumstances, private schools to assist the state in executing its constitutional obligation. Maine's policy neither penalizes private schools that are not otherwise eligible for participation, nor renders judgment regarding school

eligibility based on the status designation of private schools as sectarian. Thus, Maine's policy is not subject to strict scrutiny.

2. Even were strict scrutiny applicable to Maine's state policy, the record reflects that Maine's interest in providing a free public secular education is both fundamental and compelling, in line with historical precedent and this Court's recognition of the special role that states play in making policy judgments regarding the delivery of a public service upon which self-government and civil society rest. Maine's core policy judgments embedded in the design of its state-wide policy regarding the provision of a free nonsectarian, nondiscriminatory public education to all students reflects the complexities of policy-making in a unique context, for which limited deference is appropriate.



ARGUMENT

I. MAINE'S JUDGMENT TO ENSURE NONSECTARIAN EDUCATION IN THE IMPLEMENTATION OF ITS PUBLIC SYSTEM OF EDUCATION DOES NOT WARRANT STRICT SCRUTINY REVIEW.

The Free Exercise Clause of the First Amendment "protect[s] religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of . . . religious status." *Trinity Lutheran, Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2015, 2019 (2017) (citations omitted). As the state law challenged in this matter does neither, it should not be subject to strict scrutiny review.

Maine's policy with respect to limitations regarding religious instruction involves the conditions upon which its *public system of education* is designed, which allows for the inclusion of private schools that may assist in the execution of a public function in light of its population patterns. Thus, this case is not about the discharge of state-funded private benefits to private parties, as with voucher programs in some states. Rather, this case is only about the state's exercise of its constitutional and statutory obligations in the provision of a free public education for all students. *See* Me. Const. art. VIII., pt. 1, sec.1.

At core, plaintiffs in this case challenge the conditions Maine has established as intrinsic to its state-wide governance of curriculum and pedagogy. In line with decades of this Court's precedent, however, plaintiffs are not entitled to compel the alteration of the instruction that students are to receive as part of Maine's public system of education.

Indeed, plaintiffs in this case seek more than equal access; they ask that this Court impose on state actors the requirement that they integrate religiously intertwined education within the state sanctioned public school framework. That action would run afoul of this Court's long-standing precedents. *See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 440 (1988) (the Free Exercise Clause "is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government"); *Norwood v. Harrison*, 413 U.S. 455, 462 (1973) (parochial schools are not entitled "to share with public schools in state largesse, on an equal basis or otherwise"); *see also Sloan v. Lemon,* 413 U.S. 825, 834-35 (1973) (State may fund private secular

school but not religious private schools through tuition reimbursement program without violating the Equal Protection Clause). A "state need not subsidize private education," *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246, 2261 (2020), but that, in essence, is the action plaintiffs impermissibly seek to compel in this case. *See also Mozert v. Hawkins Cnty Bd. of Educ.,* 827 F.3d 1058 (6th Cir. 1987) (recognizing that states must necessarily make decisions as part of providing a system of education that will not be satisfactory to all religious beliefs and practices).

Moreover, the state's policy judgments regarding the intrinsic design and operation of its single public-school system penalizes no party based on its status. Religious schools willing to deliver a nonsectarian education in Maine may operate as part of the state's system of public education. Indeed, unchallenged evidence in the record establishes that the state determines compliance with the relevant state law with a "focus . . . on what the school teaches through its curriculum and related activities, and how that material is presented." *Id.* And, the inculcation of religion into the private schools' curriculum in this matter, as well as their proselytization, is not in dispute. *See., e.g.,* Jt. Stipulated Facts at ¶ ¶ 84-86, 95-96, 98, 118, 120, 144-147. Thus, the decision rule affecting the state's judgment to exclude the private schools from funding eligibility is not "status-based discrimination [that] is subject to 'the strictest scrutiny.'" *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246, 2257 (2020) (citations omitted).

II. MAINE'S STATE LAW ASSURING THAT ALL STUDENTS BENEFIT FROM A FREE PUBLIC NONSECTARIAN AND NONDISCRIMINATORY EDUCATION ADVANCES FUNDAMENTAL AND COMPELLING INTERESTS THAT SHOULD NOT BE OVERTURNED.

A. Public Education Is Central to Our Nation's History and the Function of Our State Governments.

Integral to the operation of our constitutional republic, public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler v. Doe,* 457 U.S. 202, 221 (1982) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 35 (1973)). To the contrary, education is a matter "of supreme importance . . . . [serving] a fundamental role in maintaining the fabric of our society." *Id; Grutter v. Bollinger,* 539 U. 539 U.S. 306, 330–331 (2003) (similar).

From our Nation's founding to the present, education has been deemed integral and essential to the success of our republic. In *Wisconsin v. Yoder,* in fact, this Court recognized:

> Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

In corresponding fashion, in his last annual message to Congress, President George Washington reflected the views of our Nation's founders, for example, urging that "a primary object of . . . a national institution should be the education of our youth in the science of government." George Washington, Annual Message to Congress, December 7, 1796, "*American History from Revolution to Reconstruction and Beyond, www.let.rug.nl/usa/presdents/george-washington/annual-message-1796-12-07.php*. *See also* From Thomas Jefferson to George Wythe, August 13, 1786, *Founders Online,* https://founders.archives.gove/documents/Jefferson/01-12-02-0454. *See generally* Derek W. Black, SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY (2020) at Chapter 2.

That view of our Nation's founders has remained "deeply rooted in [our] Nation's history and tradition," *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997) (quoting other cases). During the period following the Civil War, Congress "directly linked the ratification of the Fourteenth Amendment to Southern states' readmission to the Union, as well as to new commitments in their state constitutions to provide education." Derek Black, *The Fundamental Right to Education*, 94 NOTRE DAME LAW REV. 1059, 1063 (2019).[2] During that period, Congress invested heavily

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2 By the time of the Ratification of the Fourteenth Amendment, "nine of ten states seeking readmission [to the United States] had rewritten their constitutions to guarantee education . . .[recognizing that] education was necessary for a republican form of government. *Id.* at 1067 (citations omitted.). *See also* Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70

in education, devoting land and money, *e.g.* An Act to Establish a Department of Education, ch. 158, sec. 1, 14 Stat. 434 (1867) (monitoring whether states were satisfactorily implementing their education obligations); and established the Freedmen's Bureau, which heavily supported the provision of education of formerly enslaved persons and eventually facilitated the transition of Bureau funded schools into state and locally funded public education. *See* Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507 (expanding education funding throughout the South after the Civil War); Oliver O. Howard, Commissioner Bureau of Refugees, *Freedman, and Abandoned Lands*, Circular No. 2 (May 19, 1865) (explaining that the Bureau's role was to assist benevolent societies and "State authorities in the maintenances of good schools (for refugees and freedmen), until a system of free schools can be supported by the re-organized local governments"). Furthermore, as discussed below, all 50 states have constitutions that reflect their obligation to provide public education to their citizenry. *See* n.4, *infra.*

Aligned with the reality that the "right to education is fundamental . . . to the structure of our constitutional system of government," Derek Black, *Freedom, Democracy, and the Right to Education,* 116 NORTHWESTERN UNIV. LAW REV. (forthcoming 2022)[3], this Court has recognized that public education is essential: [1] to our democratic form of government,

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STAN. L. REV. 735, 778-83 (2018) (detailing the terms of confederate states' readmission and the requirement of public education in state constitutions).

[3] The prepublication draft of this article is available at available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3920427. The quote is at page 61 of that draft.

Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (education is a "vital civic institution for the preservation of a democratic system of government"); and [2] in transmitting values on which society rests, *Plyler v. Doe*, 457 U.S. 202, 221, (1982). In short, public education is interwoven within our system of representative government, which depends on an educated citizenry.

This Court's precedents firmly demonstrate that rather than raising Free Exercise issues, public school systems are central to reinforcing the citizenship and norms that lie at the heart of the Nation's democracy. Government has an affirmative obligation to provide public education, which "fulfills a most fundamental obligation of government to its constituency." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (citations omitted). It must do so on religiously neutral, nondiscriminatory grounds. *See Norwood v. Harrison,* 413 U.S. 455, 469 (1973) ("discriminatory treatment exerts a pervasive influence on the entire educational process.").

B. Maine Discharges Its Public Function of Providing Nonsectarian, Nondiscriminatory Education Opportunities for All Its Students by Requiring That All Participating Entities Comply with Rules Essential to Its Public Function.

From our Nation's founding to today, the special role of education in our governmental system has been continuously affirmed, reflecting the recognition of a national imperative that is principally the responsibility of state and local governments. As this Court has long recognized, public education is "perhaps the most important function of state and local gov-

ernments." *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 493 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955); s*ee also United States v. Lopez,* 514 U.S. 549, 564 (1995) (recognizing the historical role of states in public education.) Indeed, all states, including Maine, provide for public education through their own constitutions.[4] *See* Me. Const. art. VIII, pt. 1, sec. 1. (establishing the state and local duty for the "support and maintenance of public schools.")

To assure that that all persons within specified age limits "receive the benefits of a free public education." Jt. Stipulation of Facts, ¶ 1, Maine law vests

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[4] All states provide for public education in their state constitutions. Ala. Const. art. XIV, § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, §§ 1, 5; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1, ¶ I; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, 2nd, §§ 1, 3; Kan. Const. art. VI, §§ 1, 6; Ky. Const. § 183; La. Const. art. VIII, §§ 1, 11 & 13; Maine Const. art. VIII, Pt. 1, § 1; Md. Const. art. VIII, §§ 1, 3; Mass. Const. Pt. 2, Ch. 5, § 2; Mich. Const. art. 8, §§ 1, 2; Minn. Const. art. XIII, § 1; Miss. Const. art. 8, §§ 201, 206 & 206A; Mo. Const. art. IX, §§ 1(a), 3(a) & 3(b); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; Nev. Const. art. XI, §§ 1, 2 & 6; N.C. Const. art. IX, §§ 1, 2; N.D. Const. art. VIII, §§ 1–4; N.H. Const. Pt. 2, art. 83; N.J. Const. art. VIII, § 4, ¶¶ 1, 2; N.M. Const. art. XII, §§ 1, 4; N.Y. Const. art. XI, § 1; Ohio Const. art. VI, § 2; Okla. Const. art. XIII, §§ 1, 1a; Or. Const. art. VIII, §§ 3, 4 & 8; Pa. Const. art. III, § 14; R.I. Const. art. XII, §§ 1, 2; S.C. Const. art. XI, § 3; Tenn. Const. art. XI, § 12; Texas Const. art. VII, §§ 1, 3 & 5; Utah Const. art. 10, §§ 1, 2 & 5; Vt. Ch. II, § 68; Va. Const. art. VIII, § 1, 2; W.Va. Const. art. 12, §§ 1, 5 & 12; Wash. Const. art. IX, § 1, 2; W.Va. Const. art. 12, §§ 1, 5 & 12; Wis. Const. art. X, § 3; Wyo. Const. art. 7, §§ 1, 8 & 9.

the "control and management" of public schools in its state legislature, the Department of Education, its commissioner, and the governing bodies of its "local school administrative units" ["SAUs"]. *See, e.g.,* Me. Rev. Stat. tit. 20-A, §§ 2; 201; and 251-A.

Given the sparse population in many areas of the State and the practical implications associated with providing a public education for all of its students, over half of Maine's SAUs do not operate a public secondary school. Those SAUs without a public secondary school must fulfill their state obligations in one of two ways: either by contracting with a secondary school (a nearby public school or an approved private school) for those services; or by paying the tuition charged by the public or private school selected by parents of students served. Me. Stat. tit. 20-A, §§ 2701-02; 5204. In either instance, the point is to ensure the provision of an education equivalent to the public education the students are otherwise constitutionally entitled to in their district. Jt. Stipulated Facts, ¶ 11.

Maine has designed its education system to reflect its demographic reality, satisfy its constitutional obligations, and advance educational goals of school quality. *See* Me. Rev. Stat. tit. 20-A §§ 4502 (school approval requirements); 4511 (accreditation requirements); s*ee also Blount v. Dep't of Educ. & Cultural Servs.*, 551 A.2d 1377, 1381 (Me. 1988) (recognizing Maine's compelling public interest in educational quality). This includes its legal interests and responsibility for assuring that all students within its public school system have access to an education that is neither impermissibly intertwined with religion nor

discriminatory. *See, e.g.,* Jt. Stipulated Facts, ¶¶ 193, 196, and 201.

The uniqueness of Maine's system—tailored to serve its particular and unique interests—does not obviate the fact that, like its sister states, Maine must consider a wide array of factors and interests as it seeks to provide quality educational opportunities for all of its secondary students, just as "[e]xecutive and legislative branches . . . for generations . . . have considered [a wide range] of policies and procedures" in satisfaction of their policy and legal roles. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy J., concurring in part and concurring in the judgment).

Maine's public education system, reflective of its particular state context and setting, is a product of the State's execution of its duty, through its elected representatives, to assure that students have equal access to a nonsectarian and nondiscriminatory learning environment in which they may learn and thrive. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("[p]roviding public schools ranks at the very apex of the function of a State."); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J. concurring in part and concurring in the judgment) ("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.").

C. Maine Is Entitled to Limited but Important Discretion When Making Policy Judgments That Reflect Its Stewardship of Taxpayer Funds to Advance a Quality Nonsectarian and Nondiscriminatory Education for All of Its Secondary Students.

This Court has long recognized that the particular state and local policy decisions associated with public education in America require a level of knowledge and expertise that typically extend beyond the role of federal courts. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J. concurring in part and concurring in the judgment) (recognizing the "discretion and expertise" of school officials); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (citations omitted) ("There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (recognizing that education is not primarily the responsibility of federal judges); *see also Connecticut Coal. for Just. in Educ. Funding, Inc. v. Rell*, 295 Conn. 240, 306 (2010) (State must set and supervise implementation of academic standards and goals associated with constitutionally required education); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 216 (Ky. 1989) (State's duty to provide for education requires the State to implement, control, and maintain the education system).

In matters in elementary, secondary, and post-secondary education, in fact, this Court has on repeated occasions acknowledged the wisdom of tailoring the

application of constitutional rules to reflect the unique context and interests present in cases involving public education. In *Parents Involved,* in fact, Justice Kennedy recognized the complexities of school assignment decisions as the essential contextual factors that could inform lawful school district judgments. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Kennedy, J., concurring in part and concurring in the judgment). *See also Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) (conferring deference to institutional judgments regarding mission-related aims associated with the educational benefits of diversity); *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 298 (2013) (recognizing appropriate deference is properly afforded to a university regarding the establishment of its goals when those mission-related diversity goals reflect a "reasoned, principled explanation" that is based on its "experience and expertise"); *Fisher v. Univ. of Texas at Austin*, 136 S.Ct. 2198, 2208 (2016) (similar).

Correspondingly, in a range of constitutional challenges implicating the First, Fourth, and Fourteenth Amendments, this Court has expressly infused as part of its overall constitutional analysis the legitimate interests of school officials involved in setting policy or pursuing practices affecting students. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271, 273 (1988) (authorizing educators to "exercise greater control over [curricular-related] expression" to assure that students learned "whatever lessons the activity [was] designed to teach" and recognizing the realm of authority for school officials to act on "legitimate pedagogical concerns"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (citations

omitted) (recognizing basis for school districts to prohibit vulgar speech in light of the necessity of "inculcat[ing] the habits and manners of civility" associated with the "maintenance of a democratic political system"); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (integrating into constitutional analysis the public schools' substantial interest in maintaining order and an educational environment in which learning can take place). In sum, this Court has recognized that constitutional rights "are different in public schools than elsewhere: the 'reasonableness' inquiry [related to school officials' actions] cannot disregard the schools' custodial and tutelary responsibility for children," *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995), just as mission-related policy aims merit appropriate deference.

It follows, then, that Courts are obligated to examine challenged state education policies "under judicial principles sensitive to the nature of the state's efforts and the rights reserved to the states under the Constitution." *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 39 (1973).

Maine's judgment regarding the design of its unique secondary school system, including its prohibition on the use of public funds for religious purposes, is squarely within its authority relating to the establishment of elementary and secondary policies. *See, e.g.,* Me. Rev. Stat. tit. 20-A, §§ 4722 (high school diploma standards); 6209 (system of learning results established). Moreover, the Court's deference in this area is arguably at its height as to such matters as curriculum and the inculcation of civic values. As the Court held in *Hazelwood*, the state has the authority to exercise enormous discretion on matters of curri-

culum, including against competing First Amendment claims by students. *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 271 (1988); s*ee also Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986) (holding that the state could limit a students' speech in school sponsored activity when in the service of inculcating civic values).

Maine's policy judgment warrants discretion afforded to states on curricular and related matters. Maine's requirement does no more than ensure that the curriculum provided by private schools assisting the state in discharging its public education function does not run afoul of the curriculum the state mandates in all SAUs. Indeed, state governments can seek to fulfill their policy goals through secular means. Even in the absence of a non-establishment mandate, they may prioritize secular policies and operations out of a concern that the alternative would succumb to religious preferences and invite religious divisiveness. This is particularly true within the realm of education. As Justice Jackson observed in *Everson v. Bd. of Ed. of Ewing Twp*, 330 U.S. 1, 23-24 (1947) (Jackson, J. dissenting), public schools are organized "on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion."

As a result, "[t]o hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not . . . manifest a governmental hostility to religion or religious teachings . . . . For the First Amendment rests upon the premise

that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *People of State of Ill. Ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cty., Ill.,* 333 U.S. 203, 211 (1948).

To preclude Maine from carefully considering the mix of policy elements that must be evaluated when developing policies that will assure nondiscriminatory, nonsectarian and quality school environments for students would permit certain religious schools to demand state funding despite non-adherence to educational standards, and to operate outside of the realm of meaningful accountability. Maine would be left with but two choices: exclude private entities from its education programs altogether lest it be required to fund religious instruction, or include private entities but lose control over the type of education those private entities deliver. A state committed to nondiscriminatory, nonsectarian education would be inclined to opt for the former.

Thus, the effect of depriving the state of its policy discretion would not expand education or religious choice for anyone, but rather eliminate it. Were a state to choose the later option, it would eviscerate any credible systemic approach to quality education and equally open to all and undermine long-recognized efforts by our "Nation's schools [that] strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom for all." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

D. Maine's Interest in Providing for a Nonsectarian, Nondiscriminatory Education to All of Its Students Is Compelling.

Even if Maine's policy that excludes schools that infuse religious teaching into curriculum and pedagogy is subject to strict scrutiny, this Court's precedents affirm Maine's compelling interest in providing a free public nonsectarian and nondiscriminatory education to its students eligible for secondary education. Maine's policy is one designed to assure its students both equal access *and* equal opportunity to curriculum and instruction that is not inextricably intertwined with religious teaching.

Grounded in the special position education serves in our constitutional republic, this Court has recognized on many occasions the compelling educational interests integral to assuring that equal opportunity and nondiscrimination are a reality for all students in our systems of education. In *Parents Involved in Community Schools,* for example, Justice Kennedy's controlling opinion on the issue recognized, in the context of student assignment policies, that a "compelling interest exists in avoiding racial isolation" and "achiev[ing] a diverse student population" so as to "ensur[e] equal opportunity for all" students. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797–798 (2007) (Kennedy, J. concurring in part and concurring in judgment). *See also Blount v. Dep't of Educ. & Cultural Servs.*, 551 A.2d 1377, 1381 (Me. 1988) (recognizing the State of Maine's interest in "the quality of education" as compelling). Correspondingly, in a string of Court decisions spanning decades, this Court has in higher education recognized the compelling interests of postsecondary

institutions in pursuing the educational benefits of diversity associated with (among other things) improved teaching and learning and the inculcation of enhanced civic values. *See, e.g., Fisher v. Univ. of Texas at Austin*, 136 S.Ct. 2198, 2210, (2016)*; Grutter v. Bollinger*, 539 U.S. 306, 328, (2003); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 315 (1978). In short, educational institutions' interest in ensuring equal and high-quality education is sufficiently compelling to overcome challenges under strict scrutiny.

Likewise, this Court has recognized that the state's constitutionally recognized interest in avoiding entanglement with religion advances core state interests under the First Amendment's Establishment Clause. Reflective of this Court's "particular[] viligan[ce] in monitoring compliance with the Establishment Clause in elementary and secondary education," *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987), states—and their officials responsible for providing public elementary and secondary education to students—may not:

- Require Bible reading and the recitation of the Lord's prayer at the start of each school day, *Sch. Dist. of Abington Township v. Schempp,* 374 U.S. 203, 223 (1963);
- Advance religion by promoting the teaching of creationism, *Edwards v. Aguillard,* 482 U.S. 578, 593 (1987); or
- Bar teaching evolution science because of its conflict with certain religious views, *Epperson v. Arkansas,* 393 U.S. 97, 109 (1968).

In combination, these educationally grounded principles affirm the compelling nature of the State

of Maine's interest in assuring that its students are afforded a nonsectarian, nondiscriminatory, education. *See also Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (rejecting university's free exercise of religion claim in view of the government's "fundamental, overriding interest in eradicating racial discrimination in education"); *Runyan v. McCrary,* 427 U.S. 160, 176 (1976) (citations omitted) (upholding application of a nondiscrimination law to a private school that accepted only white students, recognizing that "private discrimination" has "never been accorded affirmative constitutional protections").[5]

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[5] Although not central to the resolution of this case, the prospects of private school discrimination—and corresponding violations of federal and state laws—are evident in the record. Bangor Christian Schools ["BCS"], one of the schools at issue in this case, believes that God has ordained distinct and separate spiritual functions for men and women, and men are to be the leaders of the church (Jt. Stipulated Facts, ¶ 79), and teaches children that the husband is the leader of the household (Jt. Stipulated Facts, ¶ 102). Before a student is admitted, school officials meet with the student's family to explain BCS's mission and goal of instilling a Biblical worldview in BCS' students (Jt. Stipulated Facts, ¶ 86). The school also 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 (Jt. Stipulated Facts, ¶ 89). Temple Academy ["TA"], another school included in the lawsuit, has a written admission policy, "students from homes with serious differences with the school's biblical basis and/or its doctrines will not be accepted" (Jt. Stipulated Facts, ¶ 155). A Muslim family would have serious differences with TA's biblical basis and its doctrines (Jt. Stipulated Facts, ¶ 156). The school will not admit a child who lives in a two-father or a two-mother family (Jt. Stipulated Facts, ¶ 159). Similar to BCS, TA takes a Biblical worldview that is present throughout its curriculum.

In fact, nondiscriminatory education open to all is inherent to the very concept of public education. As the Court in *Amback v. Norwick* recognized, public education uniquely brings "diverse and conflicting elements in our society . . . together on a broad but common ground" *Ambach v. Norwick*, 441 U.S. 68, 77 (1979).[6]

CONCLUSION

First Amendment neutrality operates within and is consistent with our constitutional regime and structure regarding education; and, for the reasons explained above, it should afford the State of Maine breathing room to affirmatively promote its civic and constitutional norms in its design of policies governing the administration of its public school system. For the foregoing reasons, amici respectfully request that this Court affirm the judgment of the First Circuit Court of Appeals in this case.

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[6] This Court in *Ambach* acknowledged the scientific recognition of "public schools as an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground . . . . necessary to the maintenance of a democratic political system." *Id.* at 77.

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