

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

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are organizations that represent public educational leaders:

The National School Boards Association (“NSBA”) is a federation of state associations and the U.S. territory of the Virgin Islands. Through its member state associations that represent locally elected school board officials serving approximately 51 million public school students regardless of their disability, ethnicity, socio-economic status or citizenship, NSBA advocates for equity and excellence in public education through school board leadership. Through legal and legislative advocacy and public awareness programs, NSBA strives to promote public education, ensure equal educational access for all children, and further its members’ interests in effective school board governance.

AASA, the School Superintendents Association, founded in 1865, is the professional organization for more than 13,000 educational leaders in the United States. AASA’s mission is to advocate for equitable access for all students to the highest quality public education, and develops and supports school system leaders. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders. As school system leaders, AASA members

¹ No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have

help shape policy, oversee its implementation and represent school districts to the public at large.

The National Association of Elementary School Principals (“NAESP”) is the leading advocate for elementary and middle-level principals in the United States and worldwide. NAESP advocates for sufficient and equitable funding for public education, which is necessary to support an educated, skilled workforce that can compete in a global economy.

The National Association of Secondary School Principals (“NASSP”) is the leading organization of and voice for middle level principals, high school principals, and other school leaders across the United States. NASSP members believe that public funding for private schools drains money away from public schools; has not conclusively been proven to result in increased student achievement; reduces accountability in the education system; and ultimately harms public schools, which the vast majority of students attend.

The Council of Administrators of Special Education (“CASE”), a division of the Council for Exceptional Children, is an international nonprofit professional organization providing leadership, advocacy, and professional development to 5,000 administrators who work on behalf of students with disabilities and their families in public and private school systems and institutions of higher education. CASE holds the longstanding position that public funds should be used only for public education and that public schools should be open and equal for all children, regardless of status.

This Court has affirmed “the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child,” asserted that “education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all,” and recognized education’s “fundamental role in maintaining the fabric of our society.” *Plyler v Doe*, 457 US 202, 221 (1982).

At the same time, it is well-established that public education is a state and local responsibility. *U.S. v. Lopez*, 514 US 549, 580-581 (1995) (“... it is well established that education is a traditional concern of the States.”) (*citing Milliken v. Bradley*, 418 U.S. 717, S Tj-0.Tj0ed tha(,)Tj0.004 T

that public schools be open equally to all children of appropriate age and residency. Many require that public schools be free from sectarian control or sectarian instruction.³ And many require that public

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; 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.

³ *E.g.*, N.D. Const. art. VIII, §§ 1–4, Sec. 1:

A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without

funds be dedicated to public schools, not redirected to private and/or sectarian schools.⁴

Though states provide this crucial public benefit in a variety of settings – from densely populated cities to the sparsely populated Maine countryside –

public funds for use for the secular, equally accessible public education required by state constitutions.⁵ The federal government, too, encourages open, accessible public schools by attaching anti-discrimination standards to federal dollars. Prohibitions against race discrimination have been attached to federal dollars for education since 1964⁶ and sex discrimination standards to education funds since 1974.⁷

This case presents a question of vital importance to *amici*: whether the free public education available to all residents by their local school boards must include the option of a pervasively religious education or whether innovative methods of providing a secular public education that are necessitated by local district circumstances may lawfully exclude the sectarian alternative.

⁵ *Louisiana Federation of Teachers v. State*, 118 So.3d 1033, 1071 (La. 2017)(holding that vouchers unconstitutionally diverted funds to nonpublic entities in violation of state constitution, which required those funds to be allocated equitably to “parish and city school systems.”); *Cain v. Horne*, 202 P.3d 1178, 1174 (Ariz. 2009) (holding language and purpose of the state’s Aid Clause do not permit the appropriations certain voucher programs provided; to rule otherwise would allow appropriations that would amount to “aid of ... private or sectarian school[s]”); *Bush v. Holmes*, 919 So.2d 392, 407 (Fla. 2006)(invalidating program found to violate state constitution by devoting state resources to the education of children within the state through means other than a system of free public schools).

Maine, like many states, has developed a system of public education that strives to remain neutral toward religion, by not favoring one religion – or non-religion – over another. But Maine’s program, unlike the tax credit scholarship and voucher programs considered by this Court in *Espinoza v. Montana Dep’t of Revenue*, 140 S.Ct. 2246 (2020), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), is not a general public subsidy for private education. Rather, Maine designed its program to address the narrow circumstances in which the state cannot otherwise discharge its state constitutional duty to provide free public education because the school district does not have the resources to maintain schools at certain grade levels. The specific educational opportunity that the state is seeking to replace and procure for these students is as similar as possible to the open, free education the state would otherwise provide in public school.

religious neutrality in curriculum 9-1en5

may contract with another SAU or with a non-sectarian private school to serve its residents. In lieu of such an arrangement, Maine authorizes the SAU to make tuition payments for its residents to attend their choice of private schools but, consistent with the fundamental attributes of a public education, excludes sectarian schools from this program.

Here, Petitioners are parents eligible to participate in Maine's tuition program. They have challenged the program's exclusion of sectarian schools because it renders them unable to use public dollars to send their children to the private sectarian schools they would prefer. They challenge, in other words, how Maine's system of public education is

the importance of open, inclusive, and religiously-neutral public schools.

A. Longstanding Precedent Gives States Authority To Offer Public Education That Is Not Only Religiously Neutral, But Also Inclusive, Equitable, And Reflective Of Constitutional Norms.

States, not the federal government, are responsible for financing, managing, and supporting public education through locally chosen school boards that govern their community schools. From our nation's founding, public education was omitted from those functions delegated to the new central government as part of the effort to preserve a federal system of state sovereigns and to avoid a national government. Public education therefore is governed by 50+ state authorities. See Kern Alexander & M. David Alexander, *American Public School Law*, p.2 (Wadsworth Cengage Learning, 9th ed. 2019). In the mid-1880s, as states embraced common schools and started state-wide systems, their success hinged on raising new funds to grow those schools and preventing the diversion of funds to a private system. Prohibiting public aid to private schools—religious or otherwise—was a natural step in starting, expanding, and preserving public education. Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. REV. 295, 310-318 (2008).

States fulfill their public education mission in a variety of ways. Some operate county-based school districts of similar size, while others allow districts of

widely varying size.⁸ In some, like Pennsylvania, most school board members are elected. The Center For Public Justice, *What Is The Role Of School Boards?* (last accessed Oct. 25, 2021), https://www.cpjustice.org/public/page/content/cie_faq_school_boards. In others, like Michigan, some school board members are elected, and some are appointed. *Id.*

There are as many public school funding systems as there are states, each a product of its own geographic, political, and historical context. Absent a federally-recognized “fundamental” right to public education, federal courts are deferential to state school funding schemes. This Court has recognized that “the very complexity of the problems of financing and managing a statewide public school system suggests that ‘there will be more than one constitutionally permissible method of solving them,’ and that, within the limits of rationality, ‘the legislature’s efforts to tackle the problems’ should be entitled to respect.” *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)(citation omitted).

⁸ Maryland, for example, operates 24 county-

Indeed, states must retain this authority to control funding of public schools, as the

Washington has “historic and substantial state interest” in the matter, especially regarding “religious instruction.” *Id.* at 713, 725, 723.

Nor did the

religious considerations, and amounted to a forbidden

efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person.”

Zorach v. Clauson, 343 U.S. 306,

or student of any such institution shall ever be required to attend or participate in any religious service whatsoever.” Colo. Const. art. IX, § 8.

State anti-discrimination statutes across the country protect student access to public education by prohibiting discrimination based on characteristics this Court has recognized under the U.S. Constitution. Maine’s statute protects participants in educational programs, including those in private schools approved for the tuition program, from “discrimination because of sex, sexual orientation or gender identity, a physical or mental disability, ancestry, national origin, race, color or religion....” Me. Rev. Stat. Ann. tit. 5, §§ 4601-4602 (2021). It is precisely the applicability of these anti-discrimination provisions that prevent some private schools from participating in public funds programs with anti-discrimination strings attached, such as Maine’s tuition program, and give rise to the standing issue articulated by Respondents in this case. Brief of Respondent at 51-54. Schools receiving public dollars must agree not to discriminate to participate in the public program.

B. The state may design tciriTT12 Td(T)b0Tc. (n)-(i)f7(i it[R]2n)3(t)1.4

discrimination and indoctrination. A government requirement that those representing and carrying out its core functions adhere to government's non-discrimination and neutrality goals is entirely different from government subsidizing private education as in *Espinoza*. In this case, government is not denying access to a generally available benefit but rather deciding how to structure itself.

This Court's *Espinoza* decision does not prohibit this concept. By holding that a state does not have to support private schools at all, but if it does it must not discriminate based on religious status, this Court once again supported religious neutrality. That neutral stance with respect to religious status should have no effect on a state's control of its public education program, governed by local school boards. Here, the benefits that Maine does provide remain open to religious entities that are willing to deliver the secular education the state seeks to procure.

The state, in maintaining a religiously neutral public school program, is not denying petitioners the benefit offered by Maine based on their religion in any sense. To the contrary, the option of obtaining a secular education by attending non-sectarian private schools at public expense is made available to all residents on equal terms. The state provides its residents

portions for religious reasons, but it would be unworkable if individual families dictated individual curriculum for their children. Courts have consistently concluded that parents' rights "to direct

Locke

outcomes. If it is required, instead, to promote and subsidize religious instruction, its public education footprint likely will shrink.

Should this Court reject states' ability to regulate use of public funds for religious instruction in public school programs, states would face a stark value choice. A state would either need to eliminate vouchers altogether or accept that public money will finance religious education, in schools often closed off to students whose identifies or beliefs to not match that sect's. Some states, faced with an open and deregulated private school voucher system, will find such a system is counter to the public's interest in education and will choose to eliminate it to maintain tradition, constitutional norms, and equal access.

* * * * *

