

No. 20-1088

IN THE
Supreme Court of the United States

DAVID CARSON, AS PARENT
AND NEXT FRIEND OF O. C., ET AL.,
Petitioners,

v.

A. PENDER MAKIN,
Respondent.

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

**BRIEF OF THE CATO INSTITUTE
AS AMICUS CURIAE SUPPORTING PETITIONERS**

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

September 10, 2021

QUESTION PRESENTED

Whether a state violates the religion or equal protection clauses of the Constitution when it prohibits students participating in an otherwise generally available student-aid program from choosing to spend aid on schools that provide religious instruction.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	1
ARGUMENT	3
I. MAINE’S DECISION TO DEFINE PUBLIC EDUCATION AS SECULAR ENCROACHES ON THE RIGHT TO DIRECT THE RELIGIOUS UPBRINGING OF ONE’S CHILDREN, A BASIC COMPONENT OF FREE EXERCISE.....	3
II. PUBLIC EDUCATION AND RELIGION ARE INEXTRICABLY AND UNAVOIDABLY ENTWINED.....	8
III. ANTI-ESTABLISHMENT INTERESTS DO NOT JUSTIFY MAINE’S DECISION TO DEFINE PUBLIC EDUCATION AS A NECESSARILY SECULAR ENDEAVOR.....	17
CONCLUSION	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Doe v. Reg'l Sch. Unit 26</i> , 86 A.3d 600 (Me. 2014).....	12, 13
<i>Edwards v. Aguillard</i> , 482 U.S. 578 (1987).	13, 19
<i>Espinoza v. Mont. Dep't of Revenue</i> , 140 S. Ct. 2246 (2020)	4, 18
<i>Good News Club v. Milford Cent. Sch.</i> , 533 U.S. 98 (2001)	8
<i>Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.</i> , 508 U.S. 384 (1993).....	8
<i>Locke v. Davey</i> , 540 U.S. 712 (2004).....	4, 18
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925).....	3
<i>Rosenberger v. Rector & Visitors of the Univ. of Va.</i> , 515 U.S. 819 (1995)	8
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 137 S. Ct. 2012 (2017).....	4
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	3
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002)	3, 5, 7
Constitutional Provisions	
Me. Const. art. VIII, pt. 1, § 1.....	6
Statutes	
L.D. 1422, An Act To Prepare Maine People for the Future Economy (125th Legis. 2012)	9
Me. Rev. Stat. Ann. tit. 20-A, § 2951 (2)	7

Other Authorities

“Maine School Defends Birth Control Program,” <i>CBS News</i> , Oct. 19, 2017.....	11
Abigail Curtis, “State Rules in Favor of Young Transgender,” <i>Bangor Daily News</i> , Dec. 2, 2014.....	12
Beth Brogan, “ACLU to Brunswick: Don’t Teach ‘Intelligent Design’ as Science,” <i>Bangor Daily News</i> , Apr. 7, 2015,.....	14
Br. of Major Religious Organizations as <i>Amici Curiae</i> Supporting Petitioner, <i>Gloucester Cty. Sch. Bd. v. G.G.</i> , 137 S. Ct. 1239 (2017) (No. 16-273).....	13
Charlie Smith, “School Committee to Vote on Sex Ed Curriculum,” <i>Portland (Me.) Press Herald</i> , May 23, 2006.....	10, 11
Christopher Levenick, “An Episcopalian, an Atheist, and a Jew Walk into a Catholic School. . .,” <i>Philanthropy</i> (Spring 2010)	7
Christopher W. Hammons, <i>School Choice Issues in Depth: The Effects of Town Tuitioning in Vermont and Maine</i> (2019).....	1
<i>Common Core State Standards for English Language Arts & Literacy in History/Social Studies, Science, and Technical Subjects, Appendix B: Text Exemplars and Sample Performance Tasks,</i> <i>provided by Me. Dep’t of Educ.</i>	9

Diane Macedo, “Maine Commission Shelves Move to Ban Gender Specific Bathrooms,” Sports Teams in Schools,” <i>Fox News</i> , Apr. 15, 2010	14
Judy Harrison, “Transgender Student’s Lawsuit Ends with \$75K award, Order Telling Orono Schools to Allow Bathroom Access,” <i>Bangor Daily News</i> (Dec. 1, 2014)	13
Maine Constitutional Convention, <i>Constitution for the State of Maine</i> (1819)	6
Me. Dep’t of Educ., “Maine Health Education Standards”	10
Me. Dep’t of Educ., “The Guiding Principles of the Maine Learning Results”	9
Me. Dep’t of Educ., “Understanding Maine’s Guiding Principles, Maine Learning Results” (2015)	9
Me. Dep’t of Educ., Standards & Instruction – Science & Engineering”	10
Me. Op. Atty. Gen. No. 80-2 (Jan. 7, 1980)	2
Nick Sambides, Jr., “Yearbook Quote Reinstated After Gay Student Complains of Discrimination,” <i>Bangor Daily News</i> , Mar. 23, 2016	12
Scott Thistle, “Dozens Testify in Opposition to Bills to Ban Female Transgender Athletes,” <i>Portland (Me.) Press Herald</i> , May 6, 2021	14
Seth Adam, “Maine Education Officials Dispute Claim that Marriage for Same-Sex Couples Will Be Taught in Schools,” <i>GLAAD</i> , Sept. 25, 2009..	13

Sol Steinmetz, <i>Semantic Antics: How and Why Words Change Meaning</i> (2008)	6
Thomas C. Berg & Douglas Laycock, Espinoza, <i>Government Funding, and Religious Choice</i> , 35 J.L. & Religion 161 (2020).....	4
“Toni Richardson Case,” <i>First Liberty Inst.</i> ,	15, 16
U.S. Comm’n on Civil Rights, <i>School Choice: The Blaine Amendments & Anti-Catholicism</i> (2007) ...	5

INTEREST OF *AMICUS CURIAE*¹

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

This case is of interest to Cato because it advocates for a wide range of First Amendment protections, as well as educational freedom.

**INTRODUCTION AND
SUMMARY OF ARGUMENT**

Maine's public-school tuitioning program began in 1873 and is one of the oldest of its kind in the nation. See Christopher W. Hammons, *School Choice Issues in Depth: The Effects of Town Tuitioning in Vermont and Maine* 1 (2019), <https://bit.ly/3zLYIOK> ("To provide educational opportunities for its children, many of whom live in rural and non-urban areas, Vermont and Maine long ago instituted a practice known as 'town tuitioning.'"). For over a century, students in Maine were allowed to direct student-aid towards religious schools. In 1980, the Maine legislature asked state attorney general James

¹ Rule 37 statement: All parties have filed blanket letters of consent to the filing of *amicus* briefs. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

Tierney for his opinion on whether state funding of private religious schools violated the Establishment Clause, which he affirmed. Me. Op. Atty. Gen. No. 80-2 (Jan. 7, 1980). In response, the legislature passed Me. Rev. Stat. Ann. tit. 20-A, § 2951(2), which prohibited “sectarian” schools from receiving aid.

Even after *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), in which this Court held that a state may subsidize religious education without running afoul the Establishment Clause, Maine’s legislature declined to repeal the nonsectarian requirement. The state claims that its decision to define public education as a necessarily secular endeavor renders the nonsectarian requirement consistent with *Zelman* and other precedents of this Court. In other words, Maine avers that this is not a traditional school-choice program, but the state’s contracting private schools to provide public education—which it defines as necessarily secular.

That’s a meaningless distinction. Under the guise of providing a “religiously neutral” education, Maine discriminates against religious families whose children attend or hope to attend private religious schools. Public schools are, however, anything but religiously neutral. Maine cannot cleanly separate public education from religion; it has merely elevated the secular above the religious. Indeed, secularism in public schools has become akin to a state-established religion: the secular values that the state promotes conflict with deeply and sincerely held religious beliefs, so classroom conflicts often arise. Maine unjustly alienates religious individuals, treating them as second-class citizens in the context of school tuitioning for merely living as their faith demands.

Moreover, parents' rights to direct their children's religious upbringing is well established and not in question here. Yet Maine attempts to circumvent those rights, protected though they may be by the Free Exercise Clause and this Court's precedents. Free Exercise and Equal Protection are mere platitudes if states may withhold otherwise neutral public benefits based on the religious character of a would-be recipient. Indeed, if religious freedom means anything, it is the right to practice religion free of unlawful government coercion. When the state conditions the receipt of a generally available benefit on the cabining of religious practice, it discriminates against religion. The only constitutionally sound solution here is to allow education dollars to flow where students and families direct them.

ARGUMENT

I. MAINE'S DECISION TO DEFINE PUBLIC EDUCATION AS SECULAR ENCROACHES ON THE RIGHT TO DIRECT THE RELIGIOUS UPBRINGING OF ONE'S CHILDREN, A BASIC COMPONENT OF FREE EXERCISE

The right to direct the spiritual upbringing of one's children is an indispensable and long-recognized component of religious free exercise. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Zelman v. Simmons-Harris*, the Court recognized that parental choice attenuates any unlawful link between government and religion when a state decides to subsidize private education. 536 U.S. 639 (2002). The Court further recognized that the Free Exercise Clause forbids

states from denying such public benefits based solely on the religious status of a would-be recipient. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017). The Court expounded on that fundamental constitutional requirement of religious equality in the distribution of public benefits when it held that a state may not categorically exclude religious schools from a generally available student-aid program. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020).

Zelman, *Trinity Lutheran*, and *Espinoza* are modern cases that demarcate the space required today by the “play in the joints between what the Establishment Clause permits and what the Free Exercise Clause compels.” *Id.* at 2254; *see also Locke v. Davey*, 540 U.S. 712, 715 (2004). When government denies religious families the right to direct otherwise neutral student-aid towards religious schools of their choice, the joints have locked up. Maine’s nonsectarian requirement is no different from the no-aid provision in *Espinoza* or the denial of recycled tires in *Trinity Lutheran*. Each instance is an act of religious discrimination odious to our Constitution, violating the Free Exercise Clause.

Maine’s argument relies on an unworkable distinction drawn in *Trinity Lutheran* between religious status and religious use. *See* Opp. Br. at 16; *Trinity Lutheran*, 137 S. Ct. at 2024 n.3. The First Amendment, however, “does not care.” *Id.* at 2026 (Gorsuch, J., concurring in part). *See also* Thomas C. Berg & Douglas Laycock, *Espinoza, Government Funding, and Religious Choice*, 35 J.L. & Religion 161 (2020) (discussing why the status-use distinction doesn’t matter when analyzing free-exercise claims).

Maine claims that, “[e]ven if the Constitution does not prohibit including religious schools in the tuition program, Maine has continued the nonsectarian requirement not because of any animus toward religion, but because of what it believes to be the critical features of a system of public education: diversity, tolerance, and inclusion.” Opp. Br. at 18. In what might be characterized as animosity towards religion, the state claims to believe that such wholesome values are impossible to achieve when students and families are allowed to direct education dollars towards religious schools.

Curiously, Maine does not have a “Blaine amendment,” despite James G. Blaine’s having been a senator from that state. *See* Opp. Br. at 3; U.S. Commission on Civil Rights, *School Choice: The Blaine Amendments & Anti-Catholicism* 17 (2007). Blaine’s proposed federal amendment, later adopted by many states, would have barred any government funding from going directly or indirectly to “sectarian” schools. *Id.* at 23. At the time, “the term sectarian both expressed and implemented hostility to the faiths of those immigrants (especially, but not only, Catholics) who resisted assimilation to the ‘nonsectarian’ Protestantism then taught as the ‘common faith’ in the ‘common schools.’” *Id.* at 7. Indeed, for most of American history, including in Blaine’s time, many public schools were de facto religious institutions, teaching at least the rudiments of Protestant Christianity, including reading from the King James Bible. *See Zelman*, 536 U.S. at 720.

While it lacks a Blaine amendment, Maine’s constitution does require the legislature to provide a system of public education:

A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people . . . 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; *and it shall further be their duty to encourage and suitably endow, from time to time, as the circumstances of the people may authorize, all academies, colleges and seminaries of learning within the State. . .*

Me. Const. art. VIII, pt. 1, § 1 (emphasis added); *cf.* Opp. Br. at 1 (emphasized part omitted from brief).

Indeed, Maine’s constitution itself recognizes that the state must fund religious schools where appropriate. Maine drafted its constitution in 1819. Maine Constitutional Convention, *Constitution for the State of Maine* (1819), <https://bit.ly/2WONVoH>. At the time, the original public meaning of “seminary” included religious schooling. *See* Sol Steinmetz, *Semantic Antics: How and Why Words Change Meaning* 205 (2008) (“In Roman Catholic usage, seminary has been used since 1581 to mean ‘a school or college for training students for the priesthood.’ In the 1800s, such an institution came to be called a theological seminary, a term used also for a school or college for training students to be ministers or rabbi.”). From 1874 until 1980, Maine allowed aid to flow to sectarian schools. Opp. Br. at 3–4. Yet the state now posits that a private school must be “a nonsectarian school in accordance with the First Amendment of the United States Constitution” to receive student-aid from families participating in the

state’s otherwise neutral student-aid program. *See* Me. Rev. Stat. Ann. tit. 20-A, § 2951 (2). Notwithstanding the Court’s decisions in *Zelman*, *Trinity Lutheran*, and *Espinoza*, the nonsectarian requirement has remained in place.

The practical effect of the nonsectarian requirement is to “deny emancipation” to students—religious or not—located within underserved areas who hope to attend religious schools. *See Zelman*, 536 U.S. at 676 (Thomas J., concurring).² Justice Thomas’s invocation of abolitionist Frederick Douglass in *Zelman* is particularly prescient:

[E]ducation . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free.’ Today many of our inner-city public schools *deny emancipation* to urban minority students.

Id. (emphasis added).

Today, Maine denies emancipation to students in rural areas without educational options. *See* Opp. Br. at 20. Banning religious schools from student aid denies families whose children hope to attend religious private schools the same opportunity the state affords those who choose a secular education for their children. That is religious discrimination.

² *See generally* Christopher Levenick, “An Episcopalian, an Atheist, and a Jew Walk into a Catholic School. . .,” *Philanthropy* (Spring 2010), <https://bit.ly/3yHIQvi> (discussing the benefits of faith-based education for secular students and the non-Catholic patron-donors of Catholic schools in inner-city New York).

II. PUBLIC EDUCATION AND RELIGION ARE INEXTRICABLY AND UNAVOIDABLY ENTWINED

Public education in Maine is anything but religiously neutral. The Court has long applied the bedrock principle of religious equality to protect the religious liberty of public-school students against coercive state action. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (finding that anti-establishment interests did not justify excluding a religious club from a public-school forum); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (finding that anti-establishment interest did not justify refusal to pay the printing costs of a student publication with religious editorials); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (finding impermissible religious discrimination where a school allowed presentation of all views about family issues and child rearing besides those coming from a religious standpoint). Evidently, religion finds its way into public schools no matter how hard government tries to separate the two.

Maine's curriculum standards require students to learn about morality, ethics, and personal beliefs. When Maine mandates secular curriculum, all the while forbidding even neutral discussion of religious perspectives, the state could be thought of as promoting a type of "religious" establishment of its own: secularism. When the state posits that the role of public school is to convene diverse children in open, *secular* institutions, it elevates secular morality and ethics over religious morality and ethics. Public schooling thus discriminates against religion by

requiring all Maine citizens to pay for secular schools while de facto saying “secularism is the mainstream, and official, worldview of the state.”

Proficiency standards set by the legislature determine the criteria for students in Maine seeking to attain a diploma. L.D. 1422, An Act To Prepare Maine People for the Future Economy (125th Legis. 2012). Summarized in Maine’s “Guiding Principles,” this includes a determination of whether the student “demonstrates ethical behavior and the moral courage to sustain it.” See Me. Dep’t of Educ., “The Guiding Principles of the Maine Learning Results”, <https://bit.ly/38xfyoN> (last visited Sept. 9, 2021). Although the bounds of morals and ethics are tricky and often dictated by religion for many, the department’s guidelines for interpreting the Guiding Principles conspicuously fails to mention “morals” or “ethics” even once. See generally Me. Dep’t of Educ., “Understanding Maine’s Guiding Principles, Maine Learning Results” (2015), <https://bit.ly/3t7qrai>. While not necessarily required, reading standards in Maine include books to which parents have expressed moral objections, including Toni Morrison’s *The Bluest Eye*, Julia Alvarez’s *In the Time of Butterflies*, and Cristina Garcia’s *Dreaming in Cuban*. See *Common Core State Standards for English Language Arts & Literacy in History/Social Studies, Science, and Technical Subjects, Appendix B: Text Exemplars and Sample Performance Tasks*, provided by Me. Dep’t of Educ., <https://bit.ly/3zFQZSt>, (last visited Sept. 7, 2021).

Meanwhile, the state’s health education standards require students to “demonstrate healthy practices and behaviors to maintain or improve the health of self and others” regarding the prevention of STDs,

HIV, and unintended pregnancy—directly implicating religious values in family planning. *See* Me. Dep’t of Educ., “Maine Health Education Standards”, <https://bit.ly/3kMoGLY>, (last visited Sept. 7, 2021). Students are further required to analyze and evaluate how culture, personal values, and beliefs influence individual health behaviors. *Id.* The state’s science and engineering standards require students to grapple with the Big Bang and Darwinian evolution, two theories that are directly at odds with the creationist perspective. *See* Me. Dep’t of Educ., Standards & Instruction – Science & Engineering”, <https://bit.ly/3mXDRVi>, (last visited Sept. 7, 2021). These standards engender an educational culture that is directly opposed to religion.

The recurring conflicts involving religious beliefs that arise out of Maine public schools are indicative of the state’s exclusion of religion. Although a secular, one-size-fits-all school system may have once been thought to promote social cohesion, diversity, and pluralism, the opposite is often the unintended consequence. Public schools promote secular values that are in direct conflict with certain religious teachings. Conflicts thus arise, implicating deeply held personal beliefs and guaranteeing that when one fundamental value wins, another loses.

In 2006, Maine’s Westbrook School District voted on changes to the sex education curriculum that would require teaching eighth graders about contraception. Charlie Smith, “School Committee to Vote on Sex Ed Curriculum,” *Portland (Me.) Press Herald*, May 23, 2006, <https://bit.ly/2WRSoax>. Parents retained the right to opt-out of their child receiving these classes. Despite this

accommodation—and perhaps signifying the inherent divisiveness of teaching sensitive issues in public schools—many parents spoke out both in support and in opposition to the change. *Id.*

In 2007, school officials in Portland, Maine, voted to provide birth control for girls as young as 11:

King Middle School will become the first middle school in Maine, and apparently one of only a few in America, to make a full range of contraception available, including birth-control pills and patches. Students would need parental permission to use the city-run health center in the school, but they would not have to tell them they were seeking birth control.

“Maine School Defends Birth Control Program,” *CBS News*, Oct. 19, 2017, <https://cbsn.ws/3kUMxc7>. Bishop Richard Malone, the head of Maine’s Roman Catholic diocese at the time, expressed concern that the decision would, “inevitably lead to more sexual experimentation among younger children,” and that it “sends a message that the government should replace parents in certain parts of the child’s life, even without the parents’ knowledge.” *Id.* Indeed, a supporter of the bill claimed, “it’s not enough to depend on parents to protect their children because there may be students who can’t discuss things with their parents.” *Id.* Supporters of mandatory secular education would thus rather the state act *in loco parentis* than have parents raise their own children.

Public schools are now a battleground in which religious beliefs are tested against the state’s preferred secular system of belief. Schools become engulfed in this cultural warfare precisely because

children and families are denied emancipation from schools the state locks them into. The unemancipated fight to impose their personal beliefs on others so that they may not see or feel their own chains.

For example, at Penobscot Valley High School, in Howland, Maine, the principal removed a student's senior quote from the school's yearbook for containing "connotations" of gay pride. Nick Sambides, Jr., "Yearbook Quote Reinstated After Gay Student Complains of Discrimination," *Bangor Daily News*, Mar. 23, 2016, <https://bit.ly/3mTq8ic> ("No wonder I dress so well. I didn't spend all that time in the closet for nothing."). The principal stated that she found the quote offensive and that the yearbook should not contain anything that "we could regret or change our minds about later." *Id.* The school superintendent ultimately reinstated the quote, claiming that school principals are "not supposed to have bias against anybody or any particular group." *Id.*

And conflicts over the imposition of personal values have cost school districts in litigation. For example, in 2008, a student's grandfather complained that Asa C. Adams Elementary School allowed a 10-year-old biological male with gender dysphoria use the girls' bathrooms. *See Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014). He believed that "[l]ittle boys do not belong in the little girls' room, and vice versa." Abigail Curtis, "State Rules in Favor of Young Transgender," *Bangor Daily News*, Dec. 2, 2014, <https://bit.ly/3BCrr9q>. Indeed, at least nine major religious traditions hold that "personal identity as male or female is a divinely created and immutable characteristic." *See Br. of Major Religious Organizations as Amici Curiae Supporting Petitioner*,

Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (No. 16-273). Under pressure from parents, the school eventually reversed course, requiring the transgender child, Nicole Maines, to use a single-stall faculty bathroom once again. 86 A.3d at 603.

When Maine appealed the school's transgender bathroom decision, the Maine Human Rights Commission (MHRC) unanimously found it discriminatory to not let the student use the girls' restroom. *See id.* The state supreme court agreed, holding that denying a public-school student access to the appropriate bathroom constitutes sexual-orientation discrimination where it is "clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity." *Id.* at 607. On remand, the Penobscot County Superior Court ordered the school district to pay \$75,000 for attorney's fees. Judy Harrison, "Transgender Student's Lawsuit Ends with \$75K award, Order Telling Orono Schools to Allow Bathroom Access," *Bangor Daily News* (Dec. 1, 2014), <https://bit.ly/3mXfUgQ>.

Such conflicts aren't a new phenomenon. When Maine first contemplated legalizing gay marriage in 2009, opponents ran ads out of fear that same-sex marriage would be taught as proper in public schools. Seth Adam, "Maine Education Officials Dispute Claim that Marriage for Same-Sex Couples will be Taught in Schools," *GLAAD*, Sept. 25, 2009, <https://bit.ly/38z9Rq6>. Most recently, state legislators sponsored a bill that would ban female transgender athletes from competing with biological females in public school sports. Scott Thistle, "Dozens Testify in

Opposition to Bills to Ban Female Transgender Athletes,” *Portland (Me.) Press Herald*, May 6, 2021, <https://bit.ly/3n4k6v0>. Conflicts over sexuality and the institution of marriage implicate core religious values about personal identity and faith.

In 2010, the MHRC proposed controversial guidelines for how schools should accommodate transgendered students, including a ban on single-gender restrooms and sports teams. Diane Macedo, “Maine Commission Shelves Move to Ban Gender Specific Bathrooms, Sports Teams in Schools,” *Fox News*, Apr. 15, 2010, <https://fxn.ws/2W0cGRx>. Those guidelines were ultimately withdrawn after considerable outrage from concerned citizens.

Bias against teachers who discuss religion merely for learning purposes is evident. Lou Sullivan, a fifth-grade teacher at Harriet Beecher Stowe Elementary in Brunswick, Maine, came under fire for discussing intelligent design alongside the Big Bang and other creation theories. Beth Brogan, “ACLU to Brunswick: Don’t Teach ‘Intelligent Design’ as Science,” *Bangor Daily News*, Apr. 7, 2015, <https://bit.ly/3gYs7y1>. When asked about the lesson, Sullivan explained,

the ‘Intelligent Design’ discussion is something I include each year when I present my lesson on the Big Bang and other theories. I began the discussion after years of speaking with families [who] have very different beliefs about how the universe was created. I often heard concerns about how this lesson was presented. I try to allow all students to share what they believe about the creation of the universe.

Id.

Meanwhile, Catherine Gordon, a math teacher at Bangor High School had been decorating her classroom with a pink Hello Kitty Christmas tree for 30 years until the school's principal found it inappropriate and ordered her to take it down. Judy Harrison, *Bangor teacher says she was ordered to remove Christmas tree from classroom*, Bangor Daily News (Dec. 21, 2015), <https://bit.ly/3n7DHKR>. Gordon's comments on the school's sudden change of heart encapsulate an increasing animosity towards religion: "When I first started teaching, we had parties the last day of school before vacation and the kids would bring in cookies and we played holiday music—none of that is allowed now." *Id.* That same school year, the same principal failed to remove a senior yearbook quote attributed to Adolf Hitler. Nick McCrea et al., "Regrettable' Oversight Leads to Hitler Quote in Bangor High Yearbook," *Bangor Daily News*, June 2nd, 2016 ("Anyone who sees and paints a sky green and the fields blue ought to be sterilized."). That "regrettable oversight" allowed publication of a quote attributed to a man who slaughtered millions of those he considered the wrong religion, but there is never such a lack of oversight when it comes to the heavy-handed regulation of religious public-school teachers in Maine.

Bias against religion is present even in private interactions between teachers in which no students are present. Toni Richards, an education technician who works with special needs students in Augusta, Maine, told a coworker and fellow churchgoer in a private conversation that she "would pray for them." "Toni Richardson Case," *First Liberty Inst.*, (last visited Sept. 7, 2021, <https://bit.ly/2WRyg8p>. In

response, school officials ordered her to never tell anyone that she would pray for them, or to make “faith-based” statements on campus ever again under threat of disciplinary action. *Id.*

Public schools cannot operate without dealing with topics, either curricular or administrative, that implicate religion. Indeed, basic rules prohibiting lying or stealing implicate religion, in that they have a moral basis, and many people believe that one cannot have morality without religion: a God that defines what is or is not okay. More specifically, school policies such as bathroom and locker room access involve religious ramifications for many people. Teaching history involves discussion of religion and religious groups, often with judgments attached. And assigned readings often deal with religion or behaviors with immediate religious implications.

In sum, it is impossible to study personal values, culture, or beliefs without including the influence of religion. The state cannot reasonably define “ethical behavior” or “the moral courage to sustain it” in its curriculum standards as purely secular. Ethics and morality are nebulous and malleable subject matter that are pervasively entwined with religious beliefs. When the state takes sex education into its own hands, such as by teaching students about STDs or contraception, it is encroaching on religious beliefs about ethics and morality and religious conceptions of the meaning and sanctity of life. Similarly, Darwinian evolution is directly at odds with the creationist point of view. When the state posits that its chosen theories are the preferred curricula that should be taught in public school, it is exhibiting an ideological bent of its own—not unlike religious conviction.

III. ANTI-ESTABLISHMENT INTERESTS DO NOT JUSTIFY MAINE'S DECISION TO DEFINE PUBLIC EDUCATION AS A NECESSARILY SECULAR ENDEAVOR

Maine argues that the nonsectarian requirement is consistent with *Trinity Lutheran* and *Espinoza* in that the state is not subsidizing private education, but rather utilizing private schools to provide a public education, which it defines as a necessarily secular endeavor. *See* Opp. Br. at 18, 20. The state claims that the program “is not designed as an alternative to Maine’s public education system but as a part of it.” *Id.* at 19. Maine’s argument fails for several reasons: (1) public schools in Maine exhibit an ideological bent comparable to religious institutions like those barred from receiving aid; (2) religion and education are inextricably entwined, such that mandating a secular education while denying religious options necessarily discriminates against religion; and (3) private choice in the hands of parents attenuates any unlawful entanglement between government and religion when the state decides to subsidize private education. In other words, the “religiously neutral” public education engendered by the nonsectarian requirement is anything but. The provision blatantly discriminates against families whose children attend or hope to attend private religious schools in Maine.

More importantly, the Court should not permit Maine’s strategic end-run around the Free Exercise Clause’s requirement of religious equality in the distribution of neutral public benefits. Accepting the state’s argument here would enable government to discriminate against religion wholesale under the guise of promoting neutral values. Such a result

would essentially sanction the establishment of secularism as the state's preferred belief system.

Just like the Montana Department of Revenue in *Espinoza*, Maine seeks to avoid application of *Trinity Lutheran*, contending that this case is instead governed by *Locke v. Davey*. See *Espinoza*, 140 S. Ct. at 2257; Opp. Br. at 5. This argument fails for the same reason it did in *Espinoza*: *Locke* implicated Establishment Clause concerns because Joshua Davey sought to use state funds to become a minister—but he was still permitted to use those funds at pervasively religious schools. *Locke*, 540 U.S. at 715. Nothing in the record suggested animosity towards religion. *Id.* The Court added:

Given the historic and substantial state interest at issue, it cannot be concluded that the denial of funding for *vocational* religious instruction alone is inherently constitutionally suspect. . . . The State's interest in not funding the pursuit of devotional degrees is substantial, and the exclusion of such funding places a relatively minor burden on [the tuition program]. If any room exists between the two Religion Clauses, it must be here.

Id. (emphasis added).

Locke thus involved vocational religious education, not a general K-12 public education that Maine now seeks to deny religious students and families. The Promise Scholarship in *Locke* was “religiously neutral” because all vocational religious higher education was prohibited, and the prohibition was justified by legitimate anti-establishment interests. One could not use the Promise Scholarship

to become a Buddhist Monk, a Catholic Minister, or a Jewish Rabbi but, unlike in Maine's program, one could use those funds to attend a Buddhist monastery school, a Catholic academy, or a Jewish day school. The anti-establishment interests present in *Locke* are thus totally absent when Maine decides to categorically exclude private religious schools from their student-aid program for teaching students about their faith.

Religious schools excluded from Maine's tuitioning program are not training ministers, but simply providing education with a religious perspective. Ironically, Maine cites *Edwards v. Aguillard* to assert 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." Opp. Br. at 25; see *Edwards v. Aguillard*, 482 U.S. at 584. Not only does the date of that case show how recently religion was still overtly in some public schools—in part because many believe religion is integral to education—but the quote ignores the basic reality of religious and value-laden conflicts in public schools to suggest that removing overt religion would somehow "keep out divisive forces." Instead, it merely moves the controversial status quo from public schools promoting religion to discriminating against it.

Unless all people cease to be religious, religion cannot be separated from public schooling. Religious people will thus either be forced to fight to make their values the ones districts follow—perhaps by not explicitly mentioning their religious basis—or to pay

for schools that violate their convictions and treat them as second-class citizens.

CONCLUSION

Maine is discriminating against religion, in violation of the First and Fourteenth Amendments, by allowing parents living in districts without public schools to choose any private school except those that teach religious values. The state's nonsectarian requirement is inconsistent with the Court's opinions in *Zelman*, *Trinity Lutheran*, and *Espinoza*, and ignores a fundamental reality of public education: it cannot avoid decisions of religious importance.

By demanding secularism, the state is simply deciding that overt religious beliefs lose out. That is discrimination, not neutrality. Accordingly, the judgment below should be reversed.

Respectfully submitted,

Ilya Shapiro

Counsel of Record

Trevor Burrus

CATO INSTITUTE

1000 Mass. Ave., N.W.

Washington, D.C. 20001

(202) 842-0200

ishapiro@cato.org

September 10, 2021