

No. 20-1088

IN THE
Supreme Court of the United States

DAVID AND AMY CARSON, 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 LIBERTY JUSTICE CENTER,
AMERICAN FEDERATION FOR CHILDREN,
AND ATLANTIC LEGAL FOUNDATION AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

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September 9, 2021

QUESTION PRESENTED

Does a state violate the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that include religious elements in their educational programs?

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<i>Cochran v. Louisiana State Bd. of Educ.,</i> 281 U.S. 370 (1930).....	16
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ACADEMIC ARTICLES & RESEARCH

<i>2015 School Crime Supplement (SCS) to the National Crime Victimization Survey (NCVS)</i> , U.S. Dept. of Ed., (Dec. 2016)	7
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Ashley Berner, <i>Pluralism in American School Systems</i> , Johns Hopkins School of Educ. Institute for Educ. Policy (Jan. 2018)	17
Charles A. Goldman, et al., “Options for Educating Students Attending Department of Defense Schools in the United States,” Rand Corp. (2016)	12
“Early Implementation of Public Single-Sex Schools: Perceptions and Characteristics” U.S. Dept. of Ed. (2008).....	12
Margaret F. Brinig & Nicole S. Garnett, <i>Catholic Schools, Urban Neighborhoods, and Education Reform</i> , 85 NOTRE DAME L. REV. 887 (2010)	17
Nadia S. Ansary, “Religious-Based Bullying: Insights on Research and Evidence-Based Best Practices from the National Interfaith Anti-Bullying Summit,” Institute for Social Policy and Understanding (2018)	9
Paul Horwitz, <i>Institutional Pluralism and the (hoped-for) effects of candor and integrity in legal scholarship</i> , 101 MARQ. L. REV. 925 (2008)	16
<i>Private Universe School Survey, 2015-16</i> , U.S. Dept. of Ed., National Center for Education Statistics (Sept. 2017)	3, 9

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Annie Bullins-Jones, “Bullying victims should have education options,” <i>The Stuart News</i> (Jan. 3, 2018),	

https://www.stepupforstudents.org/published-opinion/annie-bullins-jones-bullying-victims-should-have-education-options/	6
Arianna Prothero, “In Florida, Bullied Students Will Get Vouchers to Attend Private School,” <i>Educ. Week</i> (March 8, 2018), https://www.edweek.org/ew/articles/2018/03/08/in-florida-bullied-students-will-get-vouchers.html	7
Association of Boarding Schools, http://www.boardingschools.com/media/148588/tabs2018memberssubscriberlist.pdf	13
Association of Military Colleges & Schools of the United States, https://amcsus.org/schools/	14
Denisa Superville, “Single-Gender Schools Prove Best for Some Students,” <i>Educ. Week</i> (Sept. 30, 2016), https://www.edweek.org/ew/articles/2016/10/05/single-gender-schools-prove-best-for-some-students.html	13
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“Gov. Ducey signs Empowerment Scholarship Account law benefiting all Native American students on tribal lands,” <i>Am. Fed. for Children</i> (April 7, 2015), https://www.federationforchildren.org/gov-ducey-signs-empowerment-scholarship-account-law-benefiting-native-american-students-tribal-lands/	10

International Boys School Coalition, https://www.theibsc.org/page.cfm?p=38&max=1000	13
“John Balsamo,” Am. Fed. for Children, https://www.federationforchildren.org/voices-for-choice/john-balsamo/	5
Kevin Currie-Knight & Jason Bedrick, “Can School Choice Keep Children Safe from Bullying?” EdChoice (Sept. 26, 2017), https://www.edchoice.org/blog/can-school-choice-keep-children-safe-from-bullying/	7
Lisa Eliot, “Single-sex schools are on the rise for kids of color,” The Atlantic (Jan. 8, 2017), https://www.salon.com/2017/01/08/single-sex-schools-are-on-the-rise-for-kids-of-color_partner/	13
Livi Stanford, “Muslim schools share concerns about security,” RedefinED (May 22, 2017), https://www.redefinedonline.org/2017/05/muslim-schools-refuge/	8
Naomi Schaefer Riley, “Catholic schools for Native Americans, known for abuse and assimilation, try to do good,” Wash. Post (Aug. 12, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/08/02/catholic-schools-for-native-americans-known-for-abuse-and-assimilation-try-to-do-good/?utm_term=.815ed2327e02	10
National Coalition for Girls Schools, https://ncgs.memberclicks.net/index.php?option=com_mcsearchresults&view=search&uuid=41eee324-c1b7-4772-9945-fdc850acad76#/	13

Perry West, “Pennsylvania diocese opening faith-based addiction recovery high school,” Catholic News Agency (Dec. 17, 2018), <https://www.catholicnewsagency.com/news/pennsylvania-diocese-opening-faith-based-addiction-recovery-high-school-18179> 14

Rob O’Dell & Yvonne Wingett Sanchez, “Arizona taxpayer-funded vouchers benefiting students in more-affluent areas,” Arizona Republic (March 30, 2017), <https://www.azcentral.com/story/news/politics/arizona-education/2017/03/30/arizona-taxpayer-funded-vouchers-benefiting-students-more-affluent-areas/99707518/> 11

“School Bullying Report Card,” Niche (2015), <https://rvsd-outliers.com/school-bullying-report-card-public-vs-private/> 7

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INTEREST OF THE *AMICI CURIAE*¹

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest legal aid firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (representing petitioner Mark Janus). The Liberty Justice Center advocates for parents and schools in a number of cases supporting educational choice. *See, e.g., Adams v. McMaster*, 2020 S.C. LEXIS 154; *Metro. Gov't of Nashville v. Tenn. Dep't of Educ.*, 2020 Tenn. App. LEXIS 434 (appeal granted); Okla. Atty. Gen. Op. No. 2020-13, 2020 Okla. AG LEXIS 83.

The American Federation for Children is a leading national advocacy organization promoting school choice with a specific focus on school vouchers, scholarship tax credit programs, and Education Savings Accounts (“ESAs”). The American Federation for Children seeks to improve our nation’s K-12 education by advancing public policy that empowers parents, particularly those in low-income families, to choose the education they determine is best for their children.

Established in 1977, the Atlantic Legal Foundation (atlanticlegal.org) is a national, nonprofit, public interest law firm whose mission is to advance the rule of

¹ Pursuant to Rule 37, no counsel for any party authored any part of this brief, and no person or entity other than amici funded its preparation or submission. All parties received timely notice and consented to the filing of this brief.

law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. On the crucial subject of parental school choice, the Foundation has continued to promote the effective education of the nation's young students on behalf of charter schools with distribution of the Foundation's *Leveling the Playing Field* series of state-specific guides for charter school leaders.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

“Today many of our inner-city public schools deny emancipation to urban minority students.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring). Sadly, the State of Maine has taken the initiative to erect regulatory barriers that also deny emancipation to thousands of rural students across the Pine Tree State. Enforcing a confused view of the Establishment Clause, Maine law says that children may only use tuition assistance to attend “a nonsectarian school in accordance with the First Amendment of the United States Constitution.” 1981 Me. Laws 2177 (codified at Me. Stat. tit. 20-A, § 2951(2) (App. 80)). Children who wish to attend a school labeled “sectarian” by the Maine bureaucracy are out of luck.

Contrary to the statute's suggestion, the Establishment Clause does not require this type of discrimination. "If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be." *Mitchell v. Helms*, 530 U.S. 793, 827 (2000) (plurality opinion). In fact, by discriminating against religious exercise, the statute *violates* the First Amendment's Religion Clauses. And not only does Maine's limitation on religious use of funds violate the Constitution, it hurts diverse students who rely on religious schools to receive a good education.

When it comes to education, one size does not fit all. The heartbeat of the school choice movement is compassion for children in difficult circumstances: not just minority children stuck in failing inner-city schools, but students who may have access to generally good public schools but find themselves with an individual need for an alternative educational setting. Students with special physical or intellectual challenges, victims of bullying, children of active-duty military, religious minorities, girls, or boys who do best in a single-sex learning environment—all benefit from the many options created by school choice. Their stories, recounted below, not only inspire, but show the compelling need for these options and the integral nature of religious institutions in these programs.

Our states and nation benefit as well, as the panoply of distinctive educational institutions expands and reinforces the rich mosaic of diversity. These values of

diversity, pluralism, and the freedom to choose one's associations lie at the heart of our social order. Maine's decision to undermine those values and deny these opportunities to thousands of its children is unconstitutional.

ARGUMENT

I. This case can open doors of opportunity for millions of students nationwide.

The exclusion of faith-based schools from choice programs severely curtails the educational options available to families.² Across our nation, about two-thirds of private schools are religious in character or background. *Private Universe School Survey, 2015-16*, U.S. Dept. of Ed., National Center for Education Statistics (Sept. 2017) (C-62)³. See *Zelman*, 536 U.S. at 656-57 (recounting data showing substantial majorities of private schools in Cleveland's choice program were religiously affiliated).

Maine's history of independent, town-based schools results in a different ratio. In Maine, the state Depart-

² Though "sectarian" has come to mean faith-based, or now enthusiastic about being faith-based, the term itself has an ugly history reflecting anti-Catholic prejudice. *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion).

³ Available online at <https://nces.ed.gov/pubs2017/2017160.pdf>.

ment of Education classifies 30 as private non-sectarian and eligible for town tuitioning.⁴ The Department classifies 15 schools as “private sectarian,”⁵ rendering them ineligible. The “private sectarian” schools included 10 Catholic diocesan schools, 1 Catholic non-diocesan (Jesuit) school, and 4 Protestant Christian schools.

In state after state, efforts to give children educational options beyond the traditional public school have run into restrictions that prevent worthy schools like these from serving children in need. *See, e.g., Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Duncan v. New Hampshire*, 102 A.3d 913, 916-17 (N.H. 2014); *Schwartz v. Lopez*, 382 P.3d 886, 890 (Nev. 2016) (en banc). Just last year, this Court recognized that this sort of discrimination against religious schools was unconstitutional. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020). But that decision would mean little if states can impose discriminatory conditions on religious use of school funding, thereby avoiding the “religious status” bar discussed in *Espinoza* but accomplishing essentially the same discrimination. *See id.* at 2256. A school’s religious exercise should be no less constitutionally protected than its religious status.

⁴ “Private Schools Approved for the Receipt of Public Funds from Maine School Units,” available online at https://www.maine.gov/doe/sites/maine.gov.doe/files/inline-files/FY21_PrivateSchoolsApprovedTuition_27May2021.pdf.

⁵ Available online at <https://neo.maine.gov/DOE/neo/Supersearch/ContactSearch/SearchForMaineSchools>.

As this Court has recognized, educational choice is a lifeboat for children from “low-income and minority families” who lack the “means to send their children to any school other than an inner-city public school.” *Zelman*, 536 U.S. at 644. Excluding schools that live out their religious faith from participating in a choice program slams the door shut on the substantial majority of options for those families. *See id.* at 657 (noting that 82 percent of Cleveland’s participating private schools are religious schools). But educational choice benefits more than just urban, low-income, or racial-minority students; as this brief shows, many other children choose to learn through nonpublic, religious schools made possible by state-sponsored programs.

A. Students with physical or intellectual needs

One child with special physical or intellectual needs who exemplifies how such children benefit from school choice is John. In the words of his mom Cristin, John is “talented, he’s brilliant, he’s loving, and he’s autistic.” His mom explains, “We recognized very early on that John was not like all of the other kids. By the time he was three, he had taught himself to read. He was already displaying photographic memory abilities. He could tell you, for hours and hours, all you ever wanted to know about space, weather phenomena, and dinosaurs.”

Unfortunately, even with an individualized education plan (IEP) in place, John did not fit in at a series of local public schools. His parents reached the point of exasperation until they discovered that the Nevada Opportunity Scholarship program made possible a dif-

ferent choice: a school where, his mom says, “[t]hey encourage patience, kindness, and that every child is important. And better yet? He was happy again. He loved school again. He believed in himself again. Everything went from being ‘I can’t’ to ‘I can.’” For John, school choice and private, faith-based Far West Academy made all the difference. “John Balsamo,” Am. Fed. for Children, “Voices for Choice.”⁶ Rules like Maine’s would have prevented John from attending Far West Academy. *See id.*

The scholarship program in Nevada, where John lives, includes 93 participating private schools, including many from diverse faith backgrounds (Baptist, Catholic, Lutheran, Islamic, Jewish, and many more) that would be classified as “sectarian.” “2018-2019 Registered Schools Opportunity Scholarship,” Nevada Dept. of Ed.⁷

Nevada is not unique. The John McKay Scholarships for Students with Disabilities Program in Florida is the oldest and largest of the school choice programs serving students with special needs. About 56 percent of the schools participating in the McKay Scholarship program are religious, including schools identifying as Baptist, Catholic, Jewish, Islamic, Pentecostal, and Seventh Day Adventist. Florida Private

⁶ Available online at <https://www.federationforchildren.org/voices-for-choice/john-balsamo/>.

⁷ Available online at http://www.doe.nv.gov/uploaded-Files/ndedoenvgov/content/Private_Schools/Scholarship_Grants/RegisteredSchoolsrev1.pdf.

Schools Directory, Florida Dept. of Ed.⁸ (about 1070 of 1900 schools accepting the McKay Scholarship are religiously affiliated). If Florida were to implement the sort of restriction Maine has adopted, parents of children with special needs would see their options cut in half.

B. Victims of bullying

Walter is a victim of bullying who exemplifies how such children can survive and thrive with school choice. Walter started school with an Attention Deficit Hyperactive Disorder (ADHD) diagnosis and quickly fell two grades behind in reading and math. He says he had to focus on just surviving rather than learning: “I remember coming home from school multiple times with ripped clothing and bruises from other students bullying me. My grades were as low as my motivation, and there didn’t seem to be any signs of change.” Then Walter’s mom applied for an EdChoice Ohio scholarship so he could attend Tree of Life Christian School, where he thrived, taking part in sports, music, drama, and student council. He graduated and is a graduate in journalism from Mount Vernon Nazarene University. “Walter Blanks,” Am. Fed. for Children, “Voices for Choice.”⁹ Walter’s school would almost certainly be cut out of a program like Maine’s. See “Who We Are,” Tree of Life Christian Schools¹⁰ (“The primary purpose

⁸ Available online at <https://www.floridaschool-choice.org/Information/privateschooldirectory/default.aspx?prgmtype=2>.

⁹ Available online at <https://www.federationforchildren.org/voices-for-choice/walter-blanks/>.

¹⁰ Available online at <https://tolcs.org/about/>.

of the school was (and remains to this day) to assist parents and the Church in educating and nurturing young lives in Christ.”).

Another victim of bullying is Emily. Her mom, Annie, says the verbal and physical abuse began as soon as she enrolled at her local public high school: “On a daily basis, male students called her derogatory names and groped her in hallways.” Complaints to school authorities went nowhere, and her grades started sliding. Then Annie secured a tax-credit scholarship for Emily to enroll at John Carroll Catholic High School. She writes, “The harassment ended, students treated each other with respect, and my child blossomed.” Annie Bullins-Jones, “Bullying victims should have education options,” *The Stuart News* (Jan. 3, 2018).¹¹ Emily’s school would almost certainly have been excluded from a program like Maine’s. *See* “About,” John Carroll High School¹² (“Guided by our Catholic faith and tradition, we recognize Jesus Christ as the model for the whole person we seek to develop.”).

Parents like Walter’s mom and Emily’s mom often find that school choice is their only alternative when their child has been consistently, even violently, bullied at school. Kevin Currie-Knight & Jason Bedrick,

¹¹ Available online at <https://www.stepupforstudents.org/published-opinion/annie-bullins-jones-bullying-victims-should-have-education-options/>.

¹² Available online at <https://www.johncarrollhigh.com/about/>.

“Can School Choice Keep Children Safe from Bullying?” EdChoice (Sept. 26, 2017).¹³ A national survey of students in private and public schools found that the students in private schools felt greater enforcement of the school’s anti-bullying policy, greater acceptance of students from minority groups, and greater social inclusivity. “School Bullying Report Card,” Niche (2015)¹⁴ (aggregating responses from over 185,000 student users). Students at religious schools also report lower levels of bullying than students in public schools. *2015 School Crime Supplement (SCS) to the National Crime Victimization Survey (NCVS)*, U.S. Dept. of Ed. (Dec. 2016) (Table 2.2).¹⁵ Foreclosing these options by allowing discrimination against schools that live out their religious identity would trap bullied students in schools that are failing to protect them.

Florida enacted legislation to extend school choice specifically to students who have been bullied. Arianna Prothero, “In Florida, Bullied Students Will Get Vouchers to Attend Private School,” *Educ. Week* (March 8, 2018).¹⁶ Just over 900 schools accept this “Hope Scholarship.” Over 550 of them are religious. *Florida Private Schools Directory*, Florida Dept. of

¹³ Available online at <https://www.edchoice.org/blog/can-school-choice-keep-children-safe-from-bullying/>.

¹⁴ Available online at <https://rvsd-outliers.com/school-bullying-report-card-public-vs-private/>.

¹⁵ Available online at <https://nces.ed.gov/pubs2017/2017015.pdf>.

¹⁶ Available online at <https://www.edweek.org/policy-politics/in-florida-bullied-students-will-get-vouchers-to-attend-private-school/2018/03>.

Ed.¹⁷ As with Florida's scholarship for special needs, students who are victims of bullying would lose more than half their options if on-mission religious schools were excluded as they are in Maine.

C. Religious minorities

Schools like the Muslim Academy of Greater Orlando are often a refuge for Muslim students fleeing harassment, bullying, and isolation at their public schools. Once there, students find a welcoming community with high academic standards. Low-income students enrolled through the Florida scholarship program make significant learning improvements compared to other similarly situated students. Principal Jameer Abass says, “[W]hat I am trying to teach the kids is you are part of a larger society. You are American. We do fundraising for the Leukemia society and try to be as much as possible part of the community. We have kids involved in Jewish Boy Scouts.” Livi Stanford, “Muslim schools share concerns about security,” *RedefinED* (May 22, 2017).¹⁸ The Muslim Academy would presumably be excluded from programs like Maine's. *See* Muslim Academy of Greater Orlando¹⁹ (“As Muslims we understand that bona fide dedication to authentic Islam is borne from an Islamic education”).

¹⁷ Available online at <https://www.floridaschool-choice.org/Information/privateschooldirectory/default.aspx?prgmttype=2>.

¹⁸ Available online at <https://www.redefine-online.org/2017/05/muslim-schools-refuge/>.

¹⁹ Available online at <https://magorlando.net/>.

Our nation’s private, religious schools are a wonderful reflection of our country’s diverse religions. Not only Catholic and Lutheran, but Amish, Quaker, Islamic, Jewish, Seventh Day Adventist—all these faiths sponsor private schools that offer parents additional choices for their children’s education. *See Private Universe School Survey, 2015-16*, U.S. Dep’t of Ed., National Center for Education Statistics (Sept. 2017) (C-63)²⁰ (listing the religious affiliations of private schools). For some parents from minority religious faiths, especially recent immigrants, a choice scholarship is the only way they can send their child to a school that reinforces, rather than undermines, that faith. In other circumstances, school choice may be essential to safeguard children from a hostile environment where they are targeted for wearing unusual head-gear or not cutting their hair like most of their classmates. *See* Nadia S. Ansary, “Religious-Based Bullying: Insights on Research and Evidence-Based Best Practices from the National Interfaith Anti-Bullying Summit,” Institute for Social Policy and Understanding (2018)²¹ (finding young “Muslims and Jews experience disproportionately high rates of hate speech and bullying”). Yet Maine’s policy would exclude these schools precisely because they serve minority religious communities.

D. Tribal students

²⁰ Available online at <https://nces.ed.gov/pubs2017/2017160.pdf>.

²¹ Available online at <http://icnacsj.org/wp-content/uploads/2018/11/ISPU-AMHP-Religious-Based-Bullying.pdf>.

Former Arizona Democratic State Senator Carlyle Begay of Ganado represented nine tribal communities. In his words, expanding Arizona’s Empowerment Scholarship Accounts to children from reservations “means so much to families living in my district and throughout all of Arizona’s tribal communities. Native American parents went from having almost no options to having a mechanism to build their child’s education around their child’s learning needs. It is an exciting first step toward fixing education on tribal lands!” “Gov. Ducey signs Empowerment Scholarship Account law benefiting all Native American students on tribal lands,” Am. Fed. for Children (April 7, 2015).²²

Senator Begay’s tribal constituents can use their Arizona scholarships at any private school in Arizona willing to accept the tuition rate. Seventy-two percent of Arizona private schools are religious in character (166 of 230 schools). Andrew D. Catt, *Exploring Arizona’s Private Education Sector*, EdChoice (Dec. 2016), at 42.²³ If Arizona had adopted the rule in Maine, Native American students would lose three-quarters of their ESA options. The historical geography of these religious schools makes the loss of options all the more compelling: “One reason the Catholic Church is still running schools like St. Labre is that in many Indian communities, the Church is the only game in town.”

²² Available online at <https://www.federationforchildren.org/gov-ducey-signs-empowerment-scholarship-account-law-benefiting-native-american-students-tribal-lands/>.

²³ Available online at <https://www.edchoice.org/wp-content/uploads/2016/12/2016-12-AZ-Private-School-Survey.pdf>.

Naomi Schaefer Riley, “Catholic schools for Native Americans, known for abuse and assimilation, try to do good,” Wash. Post (Aug. 12, 2016).²⁴ See American Indian Catholic Schools Network.²⁵ St. Labre would be excluded from programs like Maine’s. See “Our Mission,” St. Labre Indian School²⁶ (“To proclaim the Gospel of Jesus Christ according to Catholic Tradition by providing quality education which celebrates our Catholic faith and embraces Native American cultures”).

E. Children in military families

Samuel exemplifies the children of military parents who benefit from school choice. His father, Daniel, defends our nation in the United States Navy. While Daniel was deployed to the Middle East, Samuel was getting bullied on the bus and at school. Daniel says hearing reports from home about his son’s difficulties was “very hard for me because while I was fulfilling my commitment to protect the nation, my family needed protection as well.” He says the “ESA program has been a huge relief” for their family. Samuel is now enrolled in a school with a zero-tolerance policy on bullying. He and his three siblings all attend private schools thanks to Arizona’s ESA program. Daniel finds

²⁴ Available online at https://www.washingtonpost.com/news/acts-of-faith/wp/2016/08/02/catholic-schools-for-native-americans-known-for-abuse-and-assimilation-try-to-do-good/?utm_term=.815ed2327e02.

²⁵ Available online at <https://ace.nd.edu/american-indian-catholic-schools-network/about-the-network>.

²⁶ Available online at <https://www.stlabre.org/about-us/>.

them “a better fit because the schools we have chosen have more of a small community atmosphere with heavy structure,” which are essential attributes to support a military family through a deployment.

Hundreds of students enrolled in Arizona’s empowerment savings accounts are dependents of service personnel stationed in Arizona. Rob O’Dell & Yvonne Wingett Sanchez, “Arizona taxpayer-funded vouchers benefiting students in more-affluent areas,” *Arizona Republic* (March 30, 2017)²⁷ (13% of the 3,360 enrolled in the program came from military families). The program offers an important alternative for families who live near bases; a nationwide 2016 study by the Rand Corporation found that public schools near stateside military installations tend to be low-performing districts. Charles A. Goldman, et al., “Options for Educating Students Attending Department of Defense Schools in the United States,” *Rand Corp.* (2016).²⁸ As noted above, three-quarters of the schools military families can choose in Arizona would be excluded based on the Maine rule.

F. Children in single-sex schools

Dominique is one of many children who use school choice to select a single-sex learning environment. She attended the historically black, all-girls St. Mary’s

²⁷ Available online at <https://www.azcentral.com/story/news/politics/arizona-education/2017/03/30/arizona-taxpayer-funded-vouchers-benefiting-students-more-affluent-areas/99707518/>.

²⁸ Available online at https://www.rand.org/pubs/research_reports/RR855.html.

Academy in New Orleans. Thanks to Louisiana's Student Scholarships for Educational Excellence Program, she says, "I formed bonds that I'm not sure I would have made had I gone somewhere else. . . . My school offers a very familial atmosphere. The people here truly care for me, and they motivate me rather than try to change or discourage me." "Dominique Hagens," Am. Fed. for Children, "Voices for Choice."²⁹ Dominique could not have chosen to go to St. Mary's under Maine's rule. See "Mission Statement," St. Mary's Academy³⁰ ("We strive to promote an integration of religious truths and values as we work toward building a Faith Community.").

Though academics argue about the value of single-sex schools, the U.S. Department of Education concluded after an exhaustive literature review that "single-sex schooling can be helpful, especially for certain outcomes related to academic achievement and more positive academic aspirations." "Early Implementation of Public Single-Sex Schools: Perceptions and Characteristics" U.S. Dept. of Ed. (2008).³¹ As single-sex, religious schools deliver results, more and more are opening, especially in urban and minority communities. Lisa Eliot, "Single-sex schools are on the rise for

²⁹ Available online at <https://www.federationforchildren.org/voices-for-choice/dominique-hagens/>.

³⁰ Available online at <https://smaneworleans.com/mission-statement/>.

³¹ Available online at <https://files.eric.ed.gov/fulltext/ED504174.pdf>.

kids of color,” *The Atlantic* (Jan. 8, 2017)³²; Denisa Superville, “Single-Gender Schools Prove Best for Some Students,” *Educ. Week* (Sept. 30, 2016).³³ Many of these single-sex schools would be excluded by Maine’s policy because of their religious character. *See* National Coalition for Girls Schools³⁴ (listing over 200 members in the United States, many of which are private and religious); International Boys School Coalition³⁵ (listing just under 100 members in the United States, many of which are private and religious).

G. Children in Alternative Educational Settings

There are also educational options that may be less generally available, but still may be the best choice for certain students. Some students may wish to use a voucher or scholarship towards tuition at a boarding school, with its immersive nature that combines the

³² Available online at https://www.salon.com/2017/01/08/single-sex-schools-are-on-the-rise-for-kids-of-color_partner/.

³³ Available online at <https://www.edweek.org/ew/articles/2016/10/05/single-gender-schools-prove-best-for-some-students.html>.

³⁴ Available online at https://ncgs.memberclicks.net/index.php?option=com_mcsearchresults&view=search&uuid=41eee324-c1b7-4772-9945-fdc850acad76#.

³⁵ Available online at <https://www.theibsc.org/page.cfm?p=38&max=1000>.

social, athletic, educational, and religious. *See* Association of Boarding Schools³⁶ (listing over 200 members, many of which are religious). Others may prefer to enroll at a military academy. *See* Association of Military Colleges & Schools of the United States³⁷ (listing 27 junior and high school-level military academies, several of which are private and religious). Yet other young people may be best served by a faith-based recovery high school, which focuses on serving students struggling with heroin, opioids, and other addictions. *See, e.g.*, Perry West, “Pennsylvania diocese opening faith-based addiction recovery high school,” Catholic News Agency (Dec. 17, 2018).³⁸ These options, though less common than other types of schools, may be the right fit for children from troubled families, children dealing with discipline issues, or children struggling to maintain sobriety. These options would also see schools pushed out of the program by Maine’s policy writ large.

There is “no one way to school” in this country. ASHLEY BERNER, *PLURALISM AND AMERICAN PUBLIC EDUCATION: NO ONE WAY TO SCHOOL* (2017). While everyone agrees that all children should have equal access to education, virtually no one thinks the way we educate all children should be uniform, as though we were putting

³⁶ Available online at <http://www.boarding-schools.com/media/148588/tabs2018memberssubscriberlist.pdf>.

³⁷ Available online at <https://amcsus.org/schools/>.

³⁸ Available online at <https://www.catholicnewsagency.com/news/pennsylvania-diocese-opening-faith-based-addiction-recovery-high-school-18179>.

children on an education assembly line. People understand that different children have different needs, preferences, strengths, and weaknesses. School choice is a tool to provide children equal access to education while recognizing that all children are unique in the way they learn. Putting barriers to the access that children have to diverse learning experiences, by prohibiting children from using public money for on-mission religious schools, denies these children the ability to have their unique educational needs met.

Each of the children whose stories are included above personify in their own way the reality that every child has their own individual educational needs. Each of them learns best and thrives socially and personally in a particular setting. And each of them relies on the state to support their education through some version of school choice.

But if these children lived in Maine, they all would have been denied those opportunities—just as many students in Maine are even now denied similar opportunities to learn at schools that actively live out their religious mission. By holding that the First Amendment prohibits so-called religious-use discrimination as well as religious-status discrimination, the Court can provide certainty to millions of students and parents nationwide, reassuring them that they can continue in the school setting they think is best. And the Court can open the possibility for many more families to find schools that are a better fit for their children, each of whom has a particular combination of educational needs and promise that is unique to him or her.

II. Educational pluralism promotes core democratic values.

The stories above are not simply feel-good anecdotes about school choice. They also represent a deeper, broader reality about diversity among our educational institutions and the need for a pluralism to protect minorities. When institutions are given the space to be unique, to serve particular populations, to establish internal cohesion through a shared vision or affiliation, then our broad spectrum of institutions taken together are wonderfully diverse. This diversity serves the students drawn to particular types of institutions, especially vulnerable and minority students like those described above, but it also contributes to a broader array of voices and ideas within our society and communities as a whole. It is pluralism between and among institutions that brings its only kind of diversity. See Paul Horwitz, *Institutional Pluralism and the (hoped-for) effects of candor and integrity in legal scholarship*, 101 MARQ. L. REV. 925, 925 (2008). Precisely by being authentic to themselves, with communities committed to a singular mission internally, can these schools create a broader diversity across institutions.

Education may well be “the most important function of state and local governments.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). But that has never meant that it is the exclusive responsibility of government to provide every child’s education. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925). Rather, Americans rightly recognize that “private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience.” *Bd. of Educ. v. Allen*, 392 U.S. 236, 247 (1968).

This court has witnessed a “persistent desire of a number of States to find proper means of helping sectarian education,” *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part and dissenting in part), from *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930), to *Espinoza* (2020). The score of cases in this category all stem from the fact that legislators and citizens wish to see their states support parents and children who choose private, religious schools in their communities.

This pluralism of educational institutions in our nation finds deep roots in our past: it is a practice both historical and healthy for our polity. “School systems in the United States used to be plural, too, funding Catholic, Congregationalist and de-facto Jewish schools alongside nonsectarian ‘common schools’ until the end of the 19th century, when several factors converged to create the impetus for uniform, district schools—including anti-immigrant (and anti-Catholic) political movements, local control, and the professionalization of teachers.” Ashley Berner, *Pluralism in American School Systems*, Johns Hopkins School of Educ. Institute for Educ. Policy (Jan. 2018).³⁹ Though John Dewey’s disciples pushed nationwide for uniform schools, the resilience of our diverse schools, including private and religious schools, carries through to this day.

These schools are a blessing to many within our communities. Institutional pluralism in education

³⁹ Available online at <http://edpolicy.education.jhu.edu/wp-content/uploads/2018/01/PluralismBrief-Jan2018.pdf>.

works. It works for all the children whose stories are shared above, children who need schools as unique as they are. It works according to the research: “Evidence from around the world suggests that studying within ‘distinctive educational communities in which pupils and teachers share a common ethos’ vastly increases the odds of students’ acquiring academic and civic knowledge, skills, and sensibilities.” *Id.* It works for more than test scores and graduation rates; these distinctive educational institutions are the bulwarks of order and civil society in many neighborhoods and communities. Margaret F. Brinig & Nicole S. Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 NOTRE DAME L. REV. 887 (2010).

CONCLUSION

We are an incredibly diverse people, and our education systems reflect the many religions, cultures, and populations that have sought the sanctuary of these shores over the centuries. When our states embrace the diversity of our schools, when they celebrate and empower rather than punish distinctive educational institutions, they embrace the best of our country, its heritage, and its hope for the future. This pluralism of local schools is as important to our social order as a pluralism of distinctive institutions in the press, higher education, or the political process. It’s important to children like John, Walter, Emily, Dominique, the students of the Muslim Academy of Greater Orlando, and the children on Senator Begay’s reservations because it offers them schools that let them be their best. For all their sakes, and considering compelling precedents, the Court should hold that the

Constitution prohibits discrimination based on religious exercise, such as has been the practice of the bureaucracy in Maine under its 1981 law discriminating against “sectarian” schools.

Respectfully submitted,

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September 9, 2021