In the

Supreme Court of the United States

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF THE AMICI CURIAE

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

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

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

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

SUMMARY OF ARGUMENT

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

Maine's policy should be

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ernments." *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*

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

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

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

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

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

This Court has long recognized that the particular state and local policy decisions associated with public education in America require a level of knowledge and expertise that typically extend beyond the role of federal courts. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J. concurring in part and concurring in the judgment) (recognizing the "discretion and expertise" of school officials); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (citations omitted) ("There is no doubt as

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

omitted) (recognizing basis for school districts to prohibit vulgar speech in light of the necessity of "inculcat[ing] the habits and manners of civility"

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

Maine's policy judgment warrants discretion

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

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

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

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

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

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

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

Likewise, this Court has recognized that the state's constitutionally recognized interest in avoiding entanglement with religion advances core state interests under the First Amendment's Establishment Clause. Reflective of this Court's "particular[] viligan[ce] in monitoring compliance with the Establishment Clause in elementary and secondary education," *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987), states—and their officials responsible for providing

of Maine's interest in assuring that its students are afforded a nonsectarian, no

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

CONCLUSION

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

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[6] This Court in *Ambach* acknowledged the scientific recognition of "public schools as an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a

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