No. 24-1739

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ST. DOMINIC ACADEMY, d/b/a ROMAN CATHOLIC BISHOP OF PORTLAND, et al.,
Plaintiffs-Appellants,

v.

A. PENDER MAKIN, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Maine
Hon. John A. Woodcock, Jr.
(2:23-cv-00246-JAW)

BRIEF OF NATIONAL COUNCIL OF YOUNG ISRAEL AND NOTRE DAME EDUCATION LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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The National Council of Young Israel is a nonprofit organization that does not have a corporate parent and does not issue stock. The Notre Dame Education Law Project is not a corporate entity, does not issue stock, and operates within the Notre Dame Law School at the University of Notre Dame, a nonprofit educational institution organized exclusively for charitable, religious, and scientific purposes within the meaning of section 501(c)(3) of the Internal Revenue Code. *See* Fed. R. App. P. 26.1.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are two organizations committed to promoting educational opportunity, advancing religious liberty, and protecting the rights of religious educators to serve their communities. They submit this brief to address the lower court's flawed understanding of religious education and the discriminatory and damaging effects of Maine's continued exclusion of religious schools from its town tuitioning program.

The National Council of Young Israel ("Young Israel") is a Jewish organization that provides resources and services to more than 100 synagogues and their more than 25,000 member families throughout the United States. Young Israel was founded in 1912 primarily to foster Torah-true Judaism in North America and protect against increasing assimilation. While Young Israel provides an array of services to support its members, the organization is grounded in the importance of Jewish education and was created to be a bulwark against the trend of dwindling

[1] Counsel for all parties consented to the filing of this brief. No party or party's counsel authored the brief in whole or in part or contributed money intended to fund preparing or submitting the brief. No person other than *amici curiae*, their members, or their counsel contributed money intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a).

Jewish educational opportunities in early 20th century America. Today, Young Israel remains dedicated to fostering quality Jewish education and the vast majority of Young Israel's constituents send their children to Jewish day schools.

The Notre Dame Education Law Project seeks to enhance civil society, promote educational opportunity, and protect religious liberty by supporting educational pluralism through research, scholarship, and legal advocacy. The Education Law Project's work focuses in particular on parental choice and faith-based schools, both domestically and abroad.

SUMMARY OF THE ARGUMENT

This case addresses the latest episode in Maine's decades-long effort to exclude religious schools from its town tuitioning program. Although the mechanism of that exclusion has changed, the consequence has not—and the constitutional rights of religious educators demand that this discrimination finally end.

More than fifty years ago, Maine explicitly excluded schools that were "sectarian" in character, a form of blatant religious discrimination that the Supreme Court struck down in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), and *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020). When Maine tried to find a way around those cases by denying funds specifically to schools that *taught* through the lens of a particular faith, the Supreme Court rebuffed it in *Carson v. Makin*, 596 U.S. 767 (2022). Still not content to follow the dictates of the Constitution, Maine has now returned with a new attempt to exclude religious schools from its program.

This time, Maine hopes to achieve through indirect means what the Supreme Court stopped it from doing directly. *Carson* made clear that Maine may not exclude schools from its tuition program simply because

they "educat[e] young people in their faith, inculcat[e] its teachings, and train[] them to live their faith." 596 U.S. at 787 (quotation omitted). But Maine's recently retooled human rights law does exactly that. That law denies schools that participate in the tuition program the central freedom to build an educational community rooted in faith. It constrains schools' ability to incorporate faith into core organizational decisions like student admissions or faculty hiring. Worse still, it denies faith-based schools the basic right to control what religious views are discussed in the classroom.

These new restrictions are incompatible with a religious education. As the experience of schools from a variety of faiths demonstrates, the entire point of a religious school is to integrate faith and learning. But Maine's new law takes choices critical to that mission completely off the table for any school that wishes to participate in the tuition program. That law, in short, eliminates many schools' ability to *actually be religious* and partake in the program.

This is precisely what the Supreme Court told Maine it could not do in *Carson*. To uphold that ruling, to vindicate the constitutional rights of religious educators, and to ensure that Maine finally opens its tuition program to schools of all faiths, this Court should reverse.

ARGUMENT

I. *Carson* held that Maine may not exclude schools from the tuition program simply because they provide an education rooted in a particular faith.

For over 150 years, Maine's tuition program has provided funds that allow families to send their children to the school of their choice. Frank Heller, *Lessons from Maine: Education Vouchers for Students Since 1873*, at 1 (Cato Institute, Briefing Paper No. 66, 2001), https://perma.cc/TZL7-2AK3. Maine allowed religious schools to participate in the program until 1981, when the State imposed a new restriction: to receive funding, a school had to be "nonsectarian." *Carson*, 596 U.S. at 774. For years, that restriction stood despite its open hostility to religious schools. Beginning in 2017, however, a trio of Supreme Court cases put an end to Maine's efforts to enforce that discriminatory exclusion.

First, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court held that Missouri could not deny playground resurfacing grants to preschools "because of their religious character." 582 U.S. at 462. The Court confirmed that a State's supposed interest in "skating as far as possible from religious establishment concerns" could not justify such a

discriminatory rule. *Id.* at 466. Then, in *Espinoza v. Montana Department of Revenue*, the Court made clear that the same principle protected the rights of religious schools to participate in a program that helped pay for students to attend a private school of their choice. 591 U.S. at 478. The Court invalidated Montana's effort to ensure that scholarship money would not go to any school "controlled . . . by [a] church[]." *Id.* at 477. Just as Missouri could not deny a grant to a preschool because it was religious, the Court held that Montana could not discriminate against religious schools when it offered to help pay the cost of receiving a private education. *Id.*

Trinity Lutheran and *Espinoza* all but outlawed Maine's religious exclusion. Indeed, the rule of those cases was straightforward: "A State need not subsidize private education. But once a state decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 487. Yet, after *Espinoza*, Maine persisted in doing just that, hoping to exploit a loophole left open in those cases. Seizing on a footnote in *Trinity Lutheran*, Maine believed that decision could be cabined to "discrimination based on a school's religious *identity*." 582 U.S. at 455 n.3 (emphasis added). Thus, Maine argued, it could still deny

funding to a school based on the school's plan to put that funding to religious *uses*. *Carson*, 596 U.S. at 786–87. Maine therefore defined the "sectarian" schools excluded from its tuition program as those that taught "through the lens of [a particular] faith." *Id.* at 787. Maine argued that a school could "be" religious (*e.g.*, associated with a church) and still participate; it just could not "do" religious things, like offer a genuinely faith-based education.

In *Carson v. Makin*, the Supreme Court rejected Maine's ruse. *Id.* at 787–88. The Court held that Maine's purported distinction between a school's religious identity and the school's choice to teach in a religious way was artificial. As the Court explained, because providing a religiously integrated education "lie[s] at the very core of the mission of a private religious school," any distinction between a school's religious identity and how it teaches "lack[ed] [any] meaningful application." *Id.* at 787–88. (quotation omitted)[2] Maine's law—whether articulated in

[2] Previously, Justice Gorsuch had foreshadowed the decision in *Carson*, unpacking the flaw in any supposed distinction between one's religious identity and the religious nature of one's actions. *See, e.g.*, *Espinoza*, 591 U.S. at 513 (Gorsuch, J., concurring) ("The First Amendment protects religious uses and actions for good reason. What point is it to tell a person that he is free to be Muslim but he may be

terms of a school's religious "character" or the school's religious "actions"—"operate[d] to . . . exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 789. Under either formulation, "[t]hat is discrimination against religion" that the Constitution prohibits. *Id.* at 781.

After *Trinity Lutheran*, *Espinoza*, and *Carson*, the Supreme Court's message to Maine was clear: The State must stop excluding schools from its tuition program simply because they offer an educational environment that is rooted in faith.

II. Maine now attempts to open a new loophole in *Carson* to further the same discrimination outlawed in that case.

Despite the clarity of the Supreme Court's ruling in *Carson*, Maine has acted again to keep religious schools out of its tuition program—this

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subject to discrimination for doing what his religion commands, attending Friday prayers, living his daily life in harmony with the teaching of his faith, and educating his children in its ways? What does it mean to tell an Orthodox Jew that she may have her religion but may be targeted for observing her religious calendar? Often, governments lack effective ways to control what lies in a person's heart or mind. But they can bring to bear enormous power over what people say and do. The right to be religious without the right to do religious things would hardly amount to a right at all.").

time scheming to do indirectly exactly what the Supreme Court just prohibited it from doing directly.

Maine's latest maneuvering began even before *Carson* was decided, as the State worked to undercut the Court's expected decision. Anticipating that it would no longer be allowed to ban religious schools from its program explicitly, Maine shifted to doing so more subtly. Specifically, the State amended the Maine Human Rights Act (MHRA)—which applies to schools that participate in the tuition program, 5 M.R.S, § 4553(2-A)—to pressure religious schools to abandon their convictions through a series of untenable conditions. *See* An Act to Improve Consistency in Terminology and Within the Maine Human Rights Act, 2021 Me. Laws 761.

As detailed by St. Dominic, Opening Br. 7–12, Maine's extensive reworking of the MHRA enacts several key changes that severely restrict the ability of religious schools to participate in the program. First, the law expanded "unlawful educational discrimination" to include the category of *religious* discrimination, prohibiting admissions or financial-aid decisions made "on the basis of . . . religion." 5 M.R.S. § 4602(1). Second, Maine eliminated a longstanding exemption from the MHRA's

"subsection relating to sexual orientation" for religious organizations—thus enforcing for the first time a number of provisions relating to human sexuality or gender that may stand in opposition to the beliefs of many religious schools. Act to Improve Consistency, *supra*, at § 19 (repealing 5 M.R.S. § 4602(4)). Third, and most alarmingly, Maine severely restricted schools' ability to shape religious *instruction and expression* in the classroom. Under the amended MHRA, any school that "permits religious expression" cannot "discriminate between religions in so doing." 5 M.R.S. § 4602(5). In other words, faith-based schools must allow students to express "dissenting religious views," even when those views might be antithetical to the school's underlying mission. ADD46–47. Finally, on top of these legislative changes, Maine's Human Rights Commission changed its position on religious hiring, banning for the first time religiously motivated hiring in faith-based schools. *See* Opening Br. 10; 5 M.R.S. §§ 4572, 4573-A(2).

These new rules strip a religious school of its ability to craft an academic environment that aligns with the school's religious beliefs. Maine's new rules trample that central freedom by ordering state regulators to "scrutiniz[e] whether and how a religious school pursues its

educational mission," raising "serious concerns about state entanglement with religion" along the way. *Carson*, 596 U.S. at 787. Maine undermines a school's ability to shape which religious beliefs are presented in its classrooms, denying it the "power to decide for [itself], free from state interference, matters . . . of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Indeed, Maine denies a religious school the simple right to deliver its own religious messages, untainted by the "inclu[sion of] other ideas . . . that [the school] would prefer not to include." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023). It prevents a religious school from deciding what beliefs its community of learners should share—a "clear intrusion" into a school's organizational structure that threatens the expressive purpose for which the school was created, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express."). And Maine even purports to tell a religious school whom it must hire to teach that faith, impermissibly "depriving [it] of control over the selection of those

[leaders] who will personify its beliefs." *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171, 188 (2012).

There is no escaping the conclusion that Maine's new restrictions do exactly what *Carson* forbade and "operate[] to . . . exclude otherwise eligible schools [from the tuition program] on the basis of their religious exercise." *Carson*, 596 U.S. at 789. Nor is the discriminatory result of these amendments any surprise. It is their very point. Indeed, Maine's political leaders openly advertised that the purpose of these amendments was to dodge the consequences of *Carson* by finding a new way to prevent religious schools from participating in the program.[3] Others interested

[3] The same day the Supreme Court decided *Carson*, Maine's Attorney General stated that he was "terribly disappointed and disheartened" by the decision, criticized schools that "promote a single religion," accused them of fostering "discrimination, intolerance, and bigotry," and vowed to "explore with Governor Mills' administration and members of the Legislature statutory amendments to address the Court's decision and ensure that public money" would not go to such schools. Statement of Maine Attorney General Aaron Frey on Supreme Court Decision in *Carson v. Makin* (June 21, 2022), https://perma.cc/544J-DAFN.

At the same time, Maine's Speaker of the House boasted that Maine changed the MHRA because it "[a]nticipated the ludicrous decision from the far-right SCOTUS." Ryan Fecteau (@SpeakerFecteau), Twitter (June 26, 2022, 8:51 AM), https://twitter.com/SpeakerFecteau/status/1541041572636237826.

in circumventing *Carson* similarly celebrated Maine's move to "outmaneuver the court and avoid the consequences of a ruling." Aaron Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, N.Y. Times (June 23, 2022), https://perma.cc/YUR2-YYZX.

Maine might have "avoided" *Carson* in the narrow sense that these new restrictions are not the self-same law struck down in that case. But, try as it might, Maine cannot outfox the rule of *Carson* or the constitutional principles on which it stands. Under *Carson*, the State may not exclude schools "from the enjoyment of [the] public benefits" offered through its tuition program merely because they offer an education rooted in a "particular faith," teach "through the lens of [that] faith," or craft a learning environment to "promote that faith." 596 U.S. at 775, 789 (quotations omitted). Maine's effort to exclude religious schools by denying them the basic ability to build an educational community that will achieve such goals plainly violates this rule.

III. Maine's new restrictions are incompatible with the mission of religious education, as evidenced across a variety of faiths.

Not only does Maine's law violate the core holding of *Carson*; it is also fundamentally at odds with the central purpose of a religious

education. The experience of religious educators from a variety of faiths demonstrates that these new restrictions are simply incompatible with the foundational mission of many religious schools.

A. The purpose of a religious school is to integrate faith with learning.

In the words of the Supreme Court, "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Carson*, 596 U.S. at 787 (quotation omitted). The "religious education and formation of students is the *very reason* for the existence of most private religious schools." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 738 (2020) (emphasis added). Although the particular ways in which a school might pursue that goal vary widely, the genuine integration of faith and learning is the essence of religious education. Indeed, this call to integrate faith and learning is evident across faith traditions.

Consider the Catholic educational tradition of St. Dominic. St. Dominic's own mission of integrating faith into "every aspect of the school" is plain. Opening Br. 13. In the Catholic tradition more broadly, the "special character of the Catholic school . . . is precisely the quality of

the religious instruction integrated into the education of the pupils." Pope John Paul II, *Catechesi Tradendae: On Catechesis in Our Time* ¶ 69 (1979). A Catholic education is one in which students are "able to develop their physical, moral, and intellectual talents harmoniously, acquire a more perfect sense of responsibility and right use of freedom, and are formed to participate actively in social life." Code of Canon Law, Can. 795. Catholic schools are part of "the life of the Church" itself, and thus the "Church's mission" is to "penetrate[] and inform[] every moment of [the school's] educational activity." Holy See, Congregation for Catholic Education, *The Identity of the Catholic School for a Culture of Dialogue* ¶ 21 (2022).

A similar mission lies at the heart of Jewish schools. "Transmitting Jewish values through education is one of the central and timeless imperatives captured in Judaism's most sacred texts." *Letter from Orthodox Union to N.Y. Educ. Dep't* 2 (Aug. 28, 2019), https://perma.cc/7PV3-4RV4. Teaching Judaism is prescribed by the Torah, which "commands Jews to seize all opportunities to transmit [their] amassed knowledge and central values to each subsequent generation." *Id.* (citing Deuteronomy 6:7). Thus, for over a century,

Orthodox day schools have served as the American Orthodox Jewish community's "critical setting for the transmission" of Jewish values. Jack Wertheimer, *Jewish Education in the United States: Recent Trends and Issues*, 99 Am. Jewish Year Book 3, 17 (1999). Jewish law requires not merely that children be educated "to aid in the acquisition of knowledge," but more specifically that their education include "the study of religious texts" and "Jewish philosophy and theology," so that they may prepare to uphold the commandments of religious law to which they will be bound as adults. Rabbi Michael J. Broyde, *Why Educate?: A Jewish Law Perspective*, 44 J. Catholic Legal Studies 179, 182, 184 (2005) (quotation omitted). Orthodox day schools thus provide a "dual curriculum" in which both religious studies (*e.g.,* the Bible and Talmud) and general studies (*e.g.,* math, science, and language arts) "live together." Norman Lamm, *Torah Umadda: The Encounter of Religious Learning and Worldly Knowledge in the Jewish Tradition* 3 (1990). These schools seek to "establish[] a rich education as the basis of a rich life" in which "[t]he final word is with integration and harmony." Rabbi Aharon Lichtenstein, *A Consideration of Synthesis from a Torah Point of View*, The Commentator (Apr. 27, 1961), https://bit.ly/38SiL2a.

Schools of other faiths share similar missions. *See, e.g.*, Karen Keyworth, *Inst. for Soc'l Policy & Understanding, Islamic Schools in the United States* 5 (2011), https://bit.ly/3jUMSMR ("The very essence of Islamic schools is the teaching of Islam. It is what defines us."); Aum School, https://aum.school (last visited Oct. 10, 2024) (non-profit Hindu-American organization dedicated to "fill[ing] the need for Dharmic values in early childhood and elementary education by designing a curriculum integrated with mainstream subjects"); Lutheran Church-Missouri Synod, *About Lutheran Schools*, https://bit.ly/4h9lCpi (last visited Oct. 10, 2024) ("Lutheran schools equip children to become Christian leaders in the congregation" and to lead "a life of Christian citizenship and discipleship" through "a Christ-centered religiously integrated curriculum").

B. Religious schools cannot fulfill their mission without the freedom to make choices that Maine's law denies.

To pursue its particular educational mission, *any* school—religious or secular—must have the ability to shape the core structures that will fulfill that mission, including decisions about who will lead the school, what and how the school will teach, what population of students it will serve, and how those within the school community are expected to

comport themselves. *Cf. Circle Schs. v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004) ("By nature, educational institutions are highly expressive organizations [whose] philosophy and values are directly inculcated in their students."); Kathleen Porter-Magee, *Catholic on the Inside: Putting Values Back at the Center of Education Reform* 6 (2019), https://bit.ly/3A1zFHS ("There is no such thing as a values-neutral school. . . . [E]very day, decisions need to be made about what children should learn, what books they should read, and how content should be presented."). And to pursue a *religious* educational mission, a school must be able to make these decisions *in accordance with that religion*. Thus, a religious school cannot simply "refrain" from making the faith-based choices that Maine denies it; rather, such choices are inextricably linked to what it means to be a religious school in the first place.

First, a school cannot provide an education rooted in religion without the basic ability to determine what religious views are—or are not—presented in the classroom. This point can hardly be disputed. A school cannot "educat[e] young people in their faith, inculcat[e] its teachings, and train[] them to live [that] faith" without the simple right to decide what tenets that faith holds and how children ought to be

taught them. *Carson*, 596 U.S. at 787. As Justice Alito recently observed, it would be "shocking" to allow a state to mandate that a religious school give support to "an interpretation of [scripture] with which the [school] disagrees." *Yeshiva Univ. v. YU Pride Alliance*, 143 S. Ct. 1, 2 (2022) (Alito, J., dissenting from denial of stay).

A Jewish school, for example, cannot fulfill its religious "duty to educate . . . children in religious law, religious observances, ethical principles, and theology," Broyde, *supra*, at 186, if it must *also* devote equal time to the study of religious beliefs, religious traditions, or religious views that are antithetical to those commands. An Orthodox school can hardly pass on "central [Jewish] values" through daily prayer and study of the Torah, *Letter from Orthodox Union*, *supra*, if it must also open its classrooms to daily Christian and Muslim prayer or to study of the New Testament, the Catechism of the Catholic Church, or the Qur'an. For many Jewish schools, this is not simply a practical point; it is a religious command. *See, e.g.*, Maimonides, *Mishneh Torah, Foreign Worship and Customs of the Nations* 2:3 ("[W]e are warned not to consider any thought which will cause us to uproot one of the fundamentals of the

Torah. We should not turn our minds to these matters, think about them, or be drawn after the thoughts of our hearts.").

Nor could other faiths sacrifice basic control over their religious teachings. "[E]very official act of [a Catholic] school must be in accordance with its Catholic identity," including its "curriculum, [through which] the school's cultural and pedagogical identity are made manifest." *The Identity of the Catholic School for a Culture of Dialogue*, *supra*, at ¶ 49. A Catholic school, therefore, cannot simply invite the equal discussion of any and all religious views in its classrooms, including those directly antagonistic to its own Catholic identity. Indeed, Catholic schools are called to "intervene" in appropriate ways "when teachers or pupils do not comply with the criteria required by the universal, particular or proper law of Catholic schools." *Id.* ¶ 51. Likewise, a school that believes it must foster Islamic identity and must transmit Islamic values, Keyworth, *supra*, at 5, may find that mission unattainable if it were forced to allow the display of profane images of the Prophet Muhammad alongside studies in Islamic history and theology. Or a Lutheran elementary school that teaches "age-appropriate" curriculum on the sanctity of human life beginning with "God's development of a

child in the womb" may find that goal defeated if it were forced to allow equal discussion of antithetical views of human personhood and abortion. *See* Lutheran Church-Missouri Synod, *Pro-life Educational Materials*, https://bit.ly/48aXeiY (last visited Oct. 13, 2024).

In short, to educate and form children in accordance with any set of religious beliefs, a school must have the ability to make classroom decisions that prioritize those beliefs.

Second, a religious school must have the basic freedom to make admissions or financial-aid decisions in a way that will ensure that its community of learners aligns with the school's religious mission. There is perhaps no better example than Jewish day schools, which, with a few exceptions, retain exclusively Jewish enrollment. Alex Pomson & Jack Wertheimer, *Inside Jewish Day Schools: Leadership, Learning & Community* 2, at 1 (2022). This is not done to "discriminate against" other communities. Rather, it is because a central, necessary purpose of Jewish education is to "ensur[e] the continuity of Jewish life and culture" in the United States. *Id.* at 4. Indeed, Orthodox Jewish day schools were established "to serve as a 'fortress' or 'bulwark' against the ravages of assimilation" for a population of new immigrants. *Id.* at 4. This is hardly

an American phenomenon; the existence of Jewish community schools "was the main cause for Jewish survival through the ages of severe persecutions." Salo W. Baron, *The Jewish Community and Jewish Education*, in *Judaism and the Jewish School* 5 (Judah Pilch & Meir Ben-Horin, eds., Bloch Publ'g Co. 1966). Today, Orthodox day schools are still seen as "far and away the greatest guarantor of Jewish continuity." Mordechai Besser, *A Census of Jewish Day Schools in the United States* 2018–2019, at 4–5 (2020), https://bit.ly/3mOD2xW. Yet this central aspect of Jewish education would be lost if these schools could not factor religion into student enrollment decisions.

Schools from other faith traditions have their own approach to religious preferences in enrollment. Many share a religious need to take into account students' religion—including St. Dominic, which gives admissions preference to Catholic students in pursuit of its mission to assist Catholic parents in educating their children in the faith. *See* Opening Br. 13; ADD49; *see also, e.g.*, Sufia Azmat & Leila H. Shatara, *Practitioners Note: The Council of Islamic Schools in North America*, 4 J. Educ. in Muslim Societies 116, 117 (2023) (discussing mission of Islamic schools to "strengthen their children's Muslim identity"); Porter-Magee,

supra, at 6 (discussing growth of Catholic schools in response to open Catholic hostility in 19th century public schools). Of course, other schools might pursue missions that lead them *not* to exercise the same preferences—such as some Catholic schools, particularly in urban areas, that are called to serve marginalized students regardless of their religious backgrounds. Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 Notre Dame L. Rev. 887, 901 (2010); *see also, e.g.*, *About Lutheran Schools*, *supra* ("Lutheran schools . . . enroll children from all parts of the community [to] provide new and varied opportunities for evangelism . . . ."). But even schools (again, like St. Dominic) that enroll children of all faiths must be able to ensure that their students "agree to support the school's [particular religious] mission," Opening Br. 39, lest that mission be undermined by those opposed to it. *See, e.g.*, *The Identity of the Catholic School for a Culture of Dialogue*, *supra*, at ¶¶ 38–44 (discussing requirements to ensure that the "whole school community is responsible for implementing the school's Catholic educational project"). Regardless, decisions like these necessarily impact the school's mission

and identity, and faith-based schools must therefore have the right to decide what approach their religious beliefs require.

Finally, a religious school must be able to factor religious belief into its selection of the people who will lead and teach within the school. Today, that basic right of religious institutions is beyond debate. *See Hosanna-Tabor*, 565 U.S. at 188 (religious schools must have right to "determine which individuals will minister to the faithful" and "who will personify its beliefs"); *Our Lady of Guadalupe*, 591 U.S. at 756–57 (religious schools have right to determine which personnel are "entrusted . . . with the responsibility of educating their students in the faith"). Denying that central freedom would undermine the "core of the mission" of a religious school and threaten to allow a "wayward" teacher to "contradict the church's tenets and lead the congregation away from the faith." *Our Lady of Guadalupe*, 591 U.S. at 747, 756; *see, e.g.*, The AVI CHAI Foundation, *A Framework for Effective Jewish Educational Leadership* (Mar. 6, 2012), http://tinyurl.com/ms2wppkz (leaders in Jewish schools must "view all their goals and actions through the prism of their Jewish mission"); *The Identity of the Catholic School for a Culture*

of Dialogue, *supra*, at ¶ 24 ("The life of the Catholic teacher must be marked by the exercise of a personal vocation in the Church . . . .").

None of this is to say that all religious schools—or even all schools of the same religious background—will reach the same conclusions on how these choices ought to be made. They will not. Some schools might find their missions perfectly compatible with some of the requirements Maine now imposes. For many other schools, however, the new provisions are untenable. And the mere fact that not *all* religious schools will find the particular conditions objectionable is no response to the fatal flaw in imposing these intrusive restrictions in the first place. *Cf.* *Espinoza*, 591 U.S. at 513 (Gorsuch, J., concurring) ("[The First Amendment protects] those with a deep faith that requires them to do things passing legislative majorities might find unseemly or uncouth . . . . [Otherwise,] those who take their . . . religion seriously, who think that their religion should affect the whole of their lives, and those whose religious beliefs and practices are least popular, would face the greatest disabilities. A right meant to protect minorities instead could become a cudgel to ensure conformity.").

Maine cannot demand that, in order to participate in its tuition program, religious schools must sacrifice the autonomy that is key to their religious identity in these core areas. That demand, in the end, is no different than the one struck down in *Carson*. Whether directly or indirectly, Maine cannot exclude schools from its tuition program simply because they pursue a mission, and provide an education, that is religious.

CONCLUSION

The district court's approval of Maine's latest efforts to exclude religious schools from its tuition program threatens to render *Carson* a dead letter. Any fair understanding of faith-based education demonstrates the incompatibility between the new requirements of the MHRA and the right to craft a religious learning environment. To vindicate these rights, and to protect the freedom of religious schools to participate in the tuition program, *amici curiae* respectfully urge this Court to reverse the decision below.[4]

[4] *Amici* thank students Simon Brake, Veronica Maska, Annie Ortega, and Sean Tehan for their assistance in preparing this brief.

Dated: October 15, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus* brief complies with Federal Rule of Appellate Procedure 29(a)(5) as it does not exceed 6,500 words. According to the word-count feature of the program used to prepare the brief, the brief contains 5,191 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f).

The brief's typesize and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in 14-point Century Schoolbook, a proportionally spaced font.

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Dated: October 15, 2024

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief using the Court's CM/ECF system. I further certify that counsel for all parties are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Dated: October 15, 2024