No. 20-1088

In the Supreme Court of the United States

DAVID CARSON,
as Parent and Next Friend of O.C., et al.,
Petitioners,

v.

A. PENDER MAKIN, in her official capacity as Commissioner of the Maine Department of Education,
Respondent.

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

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF RELIGIOUS AND CIVIL-RIGHTS AND ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that share a commitment to the free exercise of religion and the separation of religion and government. *Amici* believe that religious freedom flourishes best when religion is funded privately, and that governmental funding of religious activities does a disservice to both government and religion.

The *amici* are:

- Americans United for Separation of Church and State;
- American Civil Liberties Union;
- American Civil Liberties Union of Maine;
- ADL (Anti-Defamation League);
- American Humanist Association;
- Baptist Joint Committee for Religious Liberty;
- Catholics for Choice;
- Central Conference of American Rabbis;
- Evangelical Lutheran Church in America;

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

- General Synod of the United Church of Christ;
- Global Justice Institute, Metropolitan Community Churches;
- Hindu American Foundation;
- Interfaith Alliance Foundation;
- Jewish Social Policy Action Network;
- Men of Reform Judaism;
- Methodist Federation for Social Action;
- National Council of Jewish Women;
- National Council of the Churches of Christ in the USA;
- People For the American Way;
- Reconstructionist Rabbinical Association;
- Texas Impact;
- The Sikh Coalition;
- Union for Reform Judaism; and
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020), this Court held that the Free Exercise Clause prohibited Montana's exclusion of religious schools, "solely because of their religious character," from a program that was designed to aid private education and was funded through voluntary, tax-credit-backed contributions. *Id.* at 2255 (quoting *Trinity Lutheran Church of Columbia* v. *Comer*, 137 S. Ct. 2012, 2021 (2017)). Maine's program here restricts funding based on religious *use*, not status; it is designed to extend *public* rather than private education; and it is funded by *mandatory* taxation rather than by tax credits. Petitioners are thus seeking a substantial expansion of *Espinoza* that would for the first time *require* taxpayers to support a specifically religious activity—religious instruction.

This unwarranted expansion of *Espinoza* would be contrary to the Court's precedent, which has long permitted states to decline to fund distinctly religious activities. See *Locke* v. *Davey*, 540 U.S. 712 (2004). And it would contradict the original meaning and purposes of the Free Exercise Clause. Historical evidence, from the founding era through the adoption of the Fourteenth Amendment, makes clear that the Free Exercise Clause does not *require* states to fund religious instruction—an activity central to the maintenance and growth of ministries—on an equal basis with secular education.

The Free Exercise Clause, rather, respects and reinforces two core antiestablishment principles. First, the state may not "compel" anyone "to furnish contributions of money for the propagation of [religious] opinions which he disbelieves." Thomas Jefferson, *The*

Virginia Statute for Establishing Religious Freedom (1786), *reprinted in Founding the Republic: A Documentary History* 95 (John J. Patrick ed., 1995). Second, government must not be involved in specifically religious activities. See James Madison, *A Memorial and Remonstrance Against Religious Assessments* ¶¶ 2, 4 (1785), *reprinted in Selected Writings of James Madison* 21-27 (Ralph Ketcham ed., 2006). Maine's program, which avoids tax funding and governmental sponsorship of distinctly religious activity, thus constitutionally vindicates the long-standing principle that "[t]he Religion * * * of every man must be left to the conviction and conscience of every man" (*id.* ¶ 1).

ARGUMENT

I. Invalidating Maine's law would contravene this Court's precedent.

Over the last two decades, the Court has repeatedly addressed the extent to which the First Amendment permits, prohibits, or requires states to direct funds to religious institutions and for religious uses. See *Locke*, 540 U.S. 712; *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125 (2011); *Trinity Lutheran*, 137 S. Ct. 2012; *Espinoza*, 140 S. Ct. 2246. Read together, the cases affirm Maine's right to protect its taxpayers from coerced funding of religious instruction. Holding Maine's program unconstitutional would disregard this precedent in a manner wholly unsupported by the purposes and history of the Free Exercise Clause.

A. While this Court's decisions do not permit denial of governmental subsidies based on religious *status*, they allow states to deny tax dollars for specifically religious *uses*.

This Court has long respected the rights of religious persons and institutions to enjoy the full benefits of a civil society free from discriminatory treatment. At the same time, the Court has consistently sought to protect religious dissenters' freedom of conscience and has accordingly recognized the constitutional import of historic antiestablishment interests. The Court also has emphasized the distinctions between use-based and status-based restrictions on public funding, as well as the differences between mandatory and voluntary funding for religious exercise. And the Court has long treasured the maintenance of religious neutrality in public education.

1. *Locke* v. *Davey* established that states may deny taxpayer funding for distinctly religious uses. On free-exercise grounds, a college student challenged a Washington State program that prohibited students from using scholarships to "pursu[e] a degree in devotional theology." *Locke*, 540 U.S. at 717-718. Citing the "historic and substantial state interest" in not using taxpayer funds to support the ministry, this Court upheld Washington's program in a 7-2 decision. *Id.* at 725. As Chief Justice Rehnquist explained for the Court, while Washington "could, consistent with the Federal Constitution, permit [scholarship recipients] to pursue a degree in devotional theology," the First Amendment did not require the state to do so. *Id.* at 719. In other words, the program fell within the permissible "play in the joints" between the Free Exercise and Establishment Clauses. *Ibid.*

2. *Flast* v. *Cohen*, 392 U.S. 83 (1968), and *Winn* highlighted the distinct antiestablishment concerns raised by programs that involve the use of coerced taxpayer funding to support religious education. *Flast* held that taxpayers have standing, in certain circumstances, to object to governmental spending that supports religious activities. 392 U.S. at 105-106. But, in *Winn*, taxpayers were denied standing when they challenged a program that provided tax credits for voluntary contributions to school-tuition organizations that used the contributions to provide scholarships at both religious and nonreligious private schools. 563 U.S. at 129-130.

Unlike in *Flast*, the *Winn* plaintiffs did not challenge any actual "'extract[ion] and spend[ing]' of 'tax money' in aid of religion." *Winn*, 563 U.S. at 140 (quoting *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 348 (2006)). When a scholarship program is funded by voluntary contributions that do not pass through the public treasury or intermingle with other state funds, the Court reasoned, the state has not "force[d] a citizen to contribute * * * his property" to support any religion. *Id.* at 142 (quoting Madison, *Memorial and Remonstrance* ¶ 3). The Court thus concluded in *Winn* that while the extraction of tax payments to fund religion forces "dissenter[s] * * * to contribute to an establishment in violation of conscience," similar concerns are not raised by programs that rely on voluntary donations rather than the public treasury. *Ibid.*

3. This Court's decisions in *Trinity Lutheran* and *Espinoza* held that states improperly excluded religious institutions from aid programs because of their religious *status*, but both cases expressly distinguished programs that denied governmental funds for religious *uses*. In *Trinity Lutheran*, the Court

invalidated a Missouri policy that "categorically disqualif[ied] churches and other religious organizations" from receiving grants for playground resurfacing. 137 S. Ct. at 2017, 2025. Key to the decision was the fact that Missouri excluded a church that operated a preschool "from a public benefit solely because of [its] religious character," that is, "simply because of what it [was]—a church." *Id.* at 2021, 2023. Moreover, the preschool's playground was not used for any religious activity. See *id.* at 2017–2018; *id.* at 2024 n.3 (plurality opinion). The Court distinguished *Locke* based on what the plaintiff there "proposed *to do*—use the funds to prepare for the ministry." *Id.* at 2023. The Court stressed in *Trinity Lutheran* that the case before it "involve[d] express discrimination based on religious identity" and that its decision did not "address religious *uses* of funding or other forms of discrimination" *Id.* at 2024 n.3 (plurality opinion) (emphasis added).

In *Espinoza,* the funding limitation was likewise status-based. Montana had established a *Winn*-like program that granted tax credits to individuals who voluntarily donated to organizations that awarded scholarships for private-school tuition, but the state limited those scholarships to schools not "controlled in whole or in part by any church, religious sect, or denomination." *Espinoza*, 140 S. Ct. at 2252 (quoting Mont. Admin. Rule § 42.4.802(1)(a)). Montana thus barred "religious schools from public benefits solely because of the religious character of the schools." *Id.* at 2255. *Espinoza*, like *Trinity Lutheran*, therefore turned "expressly on religious status and not religious use." *Id.* at 2256. *Espinoza* also affirmed, moreover, that "[a] State need not subsidize private education" just because it funds public education. *Id.* at 2261.

Thus, this Court's decisions have drawn three important distinctions. First, while programs based on voluntary contributions do not always implicate states' traditional antiestablishment interest in avoiding coercion of taxpayers to support religion, programs that are funded by mandatory taxes do. Second, while states may not deny general subsidies to institutions solely because of their religious status, states may—and sometimes must (see, *e.g.*, *Bowen* v. *Kendrick*, 487 U.S. 589, 621-622 (1988))—decline to provide governmental funding for specifically religious uses. Third, while status-based discrimination in programs intended to support private education is prohibited, a state's funding of public education does not require it to fund religious or other private education at all. Here, Maine permissibly sought to vindicate its state interests by limiting the use of taxpayer funds in a public-education program to nonreligious activities.

B. Holding Maine's program unconstitutional would depart from this Court's precedent and undermine the right of states to protect their taxpayers from coerced funding of distinctly religious activities.

Maine's program differs from the one in *Espinoza* in three critical ways. First, Maine defines schools' eligibility based on the uses to which program funds will be put rather than the religious or nonreligious identity of the funded entity. See Pet. App. 34-39. Second, Maine's program is financed through coercive tax levies rather than through voluntary contributions. See Pet. App. 4-5. Third, the program is designed to provide an essentially public education, not to subsidize or promote private education. See Pet. App. 5.

Requiring Maine to fund religious instruction here would eliminate the distinction between impermissibly discriminating against a religious institution based on its status and permissibly choosing not to provide taxpayer funds for specifically religious uses. See *Trinity Lutheran*, 137 S. Ct. at 2024 n.3 (plurality opinion); *Espinoza*, 140 S. Ct. at 2255-2256. It would run roughshod over Maine's pursuit of its "historic and substantial" antiestablishment interest (*Locke*, 540 U.S. at 725) in avoiding tax funding of religious teaching. And, in a program designed to extend Maine's public-education system, it would force the state to become involved with the "'entirely ecclesiastical' matter" (*Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 184 (2012) (quoting James Madison, *Letter from James Madison to Bishop Carroll* (1806))) of religious instruction, despite Maine's understanding that such instruction is a fundamentally religious activity in which the state should not participate (Madison, *Memorial and Remonstrance* ¶ 1; see also, *e.g.*, *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 224-227 (1963)).

What is more, a decision in favor of petitioners would cause little, if anything, to be left of the "play in the joints" that has long defined the relationship between the two Religion Clauses and governed the spheres of permissible state action. See, *e.g.*, *Locke*, 540 U.S. at 719 ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."); *Cutter* v. *Wilkinson*, 544 U.S. 709, 719 (2005); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970). While that "play in the joints" cannot justify discrimination based on religious status (see *Espinoza*, 140 S. Ct. at 2255-2256), the clauses should not be treated as inevitably in conflict and read to eliminate the space between them. Rather, the two

clauses have a "common purpose"—"to secure religious liberty"—and work together toward the pursuit of that fundamental goal. See *Wallace* v. *Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring in the judgment). Maine's program, which accurately recognizes that religious instruction plays a critical role for faith communities and is significantly different from secular education (see *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2064-2066 (2020)), respects religion's singular treatment in the constitutional order and the purposes of the Religion Clauses.

This Court's precedent accordingly supports the constitutionality of Maine's program. Maine permissibly chose, in a program intended to further public education, to prohibit the use of coerced taxpayer funds for religious instruction. It did not discriminate based on religious status.

II. Nothing from the founding era through the Fourteenth Amendment's adoption suggests that the Free Exercise Clause was interpreted as requiring public funding for religious education.

Relevant historical records—from the founding era through the adoption of the Fourteenth Amendment, the basis of the Free Exercise Clause's incorporation against the states—demonstrate that the Clause was never intended to prohibit programs like Maine's.[2]

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[2] Historical analysis is important here, given the ambiguities in the text of the Free Exercise Clause. Cf. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1485-1486 (1990) (noting difficult interpretive issues concerning the Free Exercise Clause's text

Indeed, the Clause was based on previously enacted state constitutional provisions, some of which expressly *forbade* public aid for religious instruction. Maine's program—which is financed by taxpayer dollars—implicates founding-era concerns about state support for religious teaching in a way that the voluntarily funded program in *Espinoza* did not. And those concerns are significant, as they were for the Founders, even where private decisions by individual parents affect the specific allocation of state funds.

Post-founding history through the passage of the Fourteenth Amendment only strengthens the conclusion that Maine's program is constitutional. After the Bill of Rights' ratification, most new states that joined the Union enacted constitutional provisions prohibiting compelled taxpayer support for religious instruction, and states that had originally funded religious teaching stopped that practice. Isolated examples of state funding for religious education do not demonstrate that such funding was *required* at the time, or that a program like Maine's would have been viewed as unconstitutional in the eighteenth or nineteenth centuries. Maine's program should not be held unconstitutional today.

A. Founding-era documents and practices show that the Free Exercise Clause was not understood to require the government to fund specifically religious instruction.

1. Because "Americans in 1789 largely believed that issues of Church and State had been satisfactorily settled by the individual states," state

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and relying partially on "context" to untangle the Clause's meaning).

constitutions guided the drafting of the federal Bill of Rights. See Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 193-194 (1986). There is widespread agreement that "the free exercise clause at the federal level" was "modeled on free exercise provisions in the various state constitutions." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1485 (1990).

Understanding the federal Free Exercise Clause, therefore, starts with the state constitutional clauses on which it was based. Those constitutions used various formulations to protect religious freedom. Some forbade anyone's being "molested * * * on account of his religious persuasion or profession, or for his religious practice." Md. Const. of 1776, pt. XXXIII, https://bit.ly/3nfDio6; see also, *e.g.*, N.H. Const. of 1784, art. I, § 5, https://bit.ly/3vwRPQ5. Others protected rights of "conscience." *E.g.*, N.J. Const. of 1776, art. XVIII, https://bit.ly/3DX28A0. Still others contained the "free exercise" phrasing later used in the federal First Amendment. *E.g.*, Pa. Const. of 1776, art. II, https://bit.ly/30L04wJ.[3]

Regardless of the exact language that they used to protect against encroachments on religious freedom, many founding-era state constitutions explicitly viewed compelled support for religion—especially religious instruction and ministry—as antithetical to that fundamental freedom. Twelve states—Vermont and each of the original colonies except Rhode Island

[3] Some states combined several of these phrases to express the religious-freedom ideal. See, *e.g.*, N.Y. Const. of 1777, pt. XXXVIII, https://bit.ly/2Z4zHRt (characterizing "the free exercise and enjoyment of religious profession and worship" as a guarantee of "liberty of conscience").

and Connecticut[4]—had full written constitutions by the 1791 ratification of the Bill of Rights. Seven of those included provisions barring compelled support for any particular ministry;[5] four more (including the constitutions of newly admitted Kentucky and Tennessee) would feature similar clauses by the turn of the century.[6] Under all these provisions, the rights to freedom of conscience, to be free from molestation for

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[4] Connecticut technically enacted a constitution in 1776, but it was a one-page document that continued a 1662 charter as the law in force in the state. See Conn. Const. of 1776, https://bit.ly/3b0YOYg. Connecticut's first full written constitution was ratified in 1818. See Conn. Const. of 1818, https://bit.ly/3pjPYx4.

[5] Md. Const. of 1776, pt. XXXIII; N.J. Const. of 1776, art. XVIII; N.C. Const. of 1776, pt. II, § XXXIV, https://bit.ly/3E14D4i; Mass. Const. of 1780, pt. I, art. III, https://bit.ly/3E2U6FP; N.H. Const. of 1784, art. I, §§ 5-6; Vt. Const. of 1786, ch. I, pt. III, https://bit.ly/3jmVjQi; Pa. Const. of 1790, art. IX, § III, https://bit.ly/3Gbp14L. While Rhode Island did not enact a state constitution until 1842 (see R.I. Const. of 1842, https://bit.ly/2ZffgBy), it had followed a strong tradition of exclusively private support for the ministry since the seventeenth century (see Curry 89, 211). That tradition was drawn from its founding charter, which prohibited anyone from being "molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion" (Charter of Rhode Island and Providence Plantations (1663), https://bit.ly/3pldfi9), and from the anti-compulsion views of state founder Roger Williams (see, *e.g.*, Roger Williams, *The Bloudy Tenent of Persecution for the Cause of Conscience* (1644), *reprinted in* 3 *Complete Writings of Roger Williams* 50-51 (Samuel L. Caldwell ed., 1963)) ("[T]he *Church of Christ* doth not use the Arme of *Secular Power* to compell men to the *Faith*, or profession of the *Truth*; for this is to be done by *Spirituall weapons*.").

[6] Del. Const. of 1792, art. I, § 1, https://bit.ly/3E2yDN5; Ky. Const. of 1792, art. XII, § 3, https://bit.ly/3pmIycf; Tenn. Const. of 1796, art. XI, § 3, https://bit.ly/2ZaBZ1m; Ga. Const. of 1798, art. IV, § 10, https://bit.ly/3G5wqlY.

one's religious beliefs, and to the free exercise of religion were violated if one was "compelled to * * * pay Tithes, Taxes, or any other Rates * * * for the Maintenance of any Minister or Ministry, contrary to what he believes to be right" (N.J. Const. of 1776, art. XVIII).

And while not every state constitution made explicit what maintenance of a ministry entailed, some specifically emphasized that compelled support for teachers of religion violated religious-freedom guarantees. For instance, the 1777 Georgia Constitution provided that "[a]ll persons whatever shall have the free exercise of their religion * * * and shall not, unless by consent, support any teacher or teachers except those of their own profession." Ga. Const. of 1777, art. LVI, https://bit.ly/3jlyOLs. Similarly, New Hampshire's 1784 constitution, in protecting each person's "natural and unalienable right to worship GOD according to the dictates of his own conscience," shielded any "portion of any one particular religious sect or denomination" from being "compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination." N.H. Const. of 1784, art. I, §§ 5-6. These state constitutions, which expressly prohibited compelled support for religious instruction as part of their protection for religious exercise, could not have been understood to *require* state funding for religious instruction—the position petitioners advance here.

Even in states that did not include in a constitutional provision an explicit prohibition on governmental funding of religious education, the practice was understood to violate rights of conscience. Take Virginia, arguably the state with the most rigorous debates on religious freedom. In 1784, Patrick Henry proposed to

use property taxes to fund religious education in the form of "learned teachers" of "Christian knowledge." Patrick Henry, *A Bill Establishing a Provision for Teachers of the Christian Religion* (1784), *reprinted in Everson* v. *Board of Educ.*, 330 U.S. 1, 72-74 (1947) (appendix to dissent of Rutledge, J.).

The legislature rejected Henry's bill for two related but distinct reasons. First, the bill inappropriately compelled support for religious teaching. In his *Memorial and Remonstrance* objecting to Henry's proposal, James Madison argued that "Teachers of Christianity * * * depend[ ] on the voluntary rewards of their flocks" rather than on the compelled support of the polity. Madison, *Memorial and Remonstrance* ¶ 7. Madison and others then worked to defeat Henry's proposal and to pass *The Virginia Statute for Establishing Religious Freedom* instead. That statute, previously written by Thomas Jefferson, inveighed against "compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves," because compelled support is "sinful and tyrannical." Jefferson, *Virginia Statute* 95.

Moreover, opponents of Henry's bill viewed it as improperly coercive even though it did not require taxpayers to support any specific denomination: Believers could designate their tax payments to support whatever sect they preferred, and objectors' payments would be spent by the legislature on secular education. See Henry, *A Bill Establishing a Provision for Teachers of the Christian Religion*; Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 896-897 (1986). Virginians still defeated the proposal because even requiring a taxpayer "to support this or that teacher of his own religious persuasion * * *

depriv[es] him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Jefferson, *Virginia Statute* 95. In other words, even the limited coercion of taxpayers in Henry's proposal was unacceptable because "[t]here should be no room for 'Compulsion' in matters of religion." Thomas E. Buckley, *Church and State in Revolutionary Virginia: 1776–1787* at 151 (1977) (citing a citizen's petition submitted against Henry's bill). By enacting Jefferson's *Virginia Statute* in 1786, the Commonwealth and its citizenry thus expressed strong opposition to mandated, generalized funding of any particular religious teachings.

The second main concern that Madison and his allies expressed in opposition to Henry's bill was that it would have allowed "the Civil Magistrate" to "employ Religion as an engine of Civil policy" even though such a magistrate is not "a competent Judge of Religious Truth." Madison, *Memorial and Remonstrance* ¶ 5. Among the objections of Madison and the Baptists, Presbyterians, and others who petitioned against the bill was that the "separate natures of religion and government" meant that religious enterprises "should not be made 'the Object of Human Legislation.'" See Buckley 148, 150 (quoting another citizen petition against Henry's bill). In rejecting Henry's bill, therefore, Virginians expressed opposition not only to taxpayer compulsion but also to any suggestion that civil authorities had "control of religious matters." *Ibid.*

Other states similarly rejected general-assessment bills that would have used taxes to support religious ministries or instruction. See Curry 154-157 (chronicling Maryland's mid-1780s rejection of a general-assessment bill); *id.* at 189 (noting that Baptist opposition to a general-assessment bill defeated the

concept in Vermont). While those who successfully opposed these bills had diverse motivations, the animating concerns—as in Virginia—were preventing "fallible men" from collecting compulsory taxes for propagation of "their own opinions" on religion (*id.* at 182 (quoting John Leland, *The Rights of Conscience Inalienable* 10 (1791), https://bit.ly/3EnBlNq)) and vindicating the principle that "the state had no power in religious matters" (*id.* at 191). Across states at the time when the Bill of Rights was drafted, there was thus a widespread and successful movement to bar government from subsidizing religious teaching.

Compelled support for religious teaching, in particular, was understood to be compelled support for religious ministry because religious instruction is integral to the maintenance of a ministry. As John Witherspoon, Protestant leader and then-President of Princeton University (at the time, a Protestant institution) put it, "early education" is the basis for "pious youth * * * in pious families" and cannot be said to "have no effect on religion." John Witherspoon, *On the Religious*, *in The Works of the Reverend John Witherspoon* 402 (John Witherspoon & John Rodgers eds., vol. 2 1800). Then, as now, the purpose of many Christian schools was to serve as ministries for the church. See, *e.g.*, J.A. 80 (Bangor Christian is a "ministry" of Crosspoint Church); J.A. 91 (Temple Academy is an "integral ministry" and "extension" of Centerpoint Community Church).

This Court's ministerial exception cases have recognized this deep connection between ministry and religious instruction. In *Hosanna-Tabor*, the Court held that a "called teacher" who taught both secular and religious subjects was a minister, and that she was therefore precluded from bringing an employment-

discrimination suit against her employer, a church-operated school, for firing her. 565 U.S. at 177, 181. Essential to that ruling was the fact that the teacher's "job duties reflected a role in conveying the Church's message and carrying out its mission." *Id.* at 192.

Elaborating on the scope of the ministerial exception in *Morrissey-Berru*, the Court noted that "[r]eligious education is vital to many faiths practiced in the United States" and that "'the whole of [a] Church's life'" "'is intimately bound up with'" educating young people religiously. 140 S. Ct. at 2064-2065 (quoting Catechism of the Catholic Church 8 (2d ed. 2016)); accord *id.* at 2071 (Thomas, J., concurring) (noting that "'Catholic teachers play a critical role' in the Church's ministry" (quoting an *amicus* brief)). This "close connection that religious institutions draw between their central purpose and educating the young in the faith" (*id.* at 2066) echoes the founding-era understanding that religious instruction and the ministry are inextricably linked. Compelling people to support religious instruction with tax dollars thus compels them to support the ministry itself—compulsion that was widely rejected when the Bill of Rights was adopted.

2. Three features of Maine's program cause it to implicate these founding-era concerns in a manner that Montana's program in *Espinoza* did not.

First, the restrictions in Maine's program are based specifically on religious instruction, not on religious affiliation or identity. That is, they are based on *use*, not status.

Montana's program in *Espinoza* distinguished eligible schools from ineligible ones "expressly [based] on religious status and not religious use"; any school controlled by a church was prohibited from receiving

funding regardless of the uses to which the funding was put. 140 S. Ct. at 2256. Maine, by contrast, determines whether a school is eligible based on "what the school teaches through its curriculum and related activities, and how the material is presented." Pet. App. 35 (emphasis omitted). "[T]his restriction, unlike the one at issue in *Espinoza*, does not bar schools from receiving the funding simply based on their religious identity" but rather "bar[s schools] from receiving funding based on the religious use that they would make of it in instructing children." Pet. App. 39.

To be sure, some members of this Court have "harbor[ed] doubts" about the constitutional differences between status-based and use-based discrimination. See *Trinity Lutheran*, 137 S. Ct. at 2025 (Gorsuch, J., concurring). But the Founders themselves were particularly concerned about religious uses: the extraction of money for "the *propagation of opinions* which [the taxpayer] disbelieves." Jefferson, *Virginia Statute* 95 (emphasis added); see also Leland, *The Rights of Conscience Inalienable* 10 (emphasizing importance of propagation of religious doctrines).

Here, the specific education that petitioners wish to have funded is designed to propagate religious views that—though dear to some—will necessarily be at odds with other taxpayers' beliefs: The curricular aim of Bangor Christian is to "lead each unsaved student to trust Christ as his/her personal savior" (J.A. 84); similarly, Temple Academy seeks "to lead every student to a personal, saving knowledge of Christ" (J.A. 93). See also J.A. 85 (at Bangor Christian, "religious [and nonreligious] instruction [are] completely intertwined"); J.A. 96 (describing Temple Academy's use of "the Bible * * * in every subject that is taught"). By contrast, some schools operated by religious

entities may provide instruction that is completely within the scope of a public-school education. Maine's decision to make funding determinations based on religious use allows it to differentiate between these situations. In doing so, the state narrowly addresses founding-era leaders' specific concerns about state funding for religious instruction and avoids punishing any church-affiliated school merely for "what it is" (*Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2023)).

Moreover, because Maine's use-based funding distinctions reflect legitimate, fundamental differences between religious and nonreligious instruction, they do not violate the Free Exercise Clause's core protection for "religious observers against unequal treatment" (*Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542 (1993))). Unequal treatment, this Court has emphasized, exists only where two "similarly situated" activities or entities are treated differently. See, *e.g.*, *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020).

Status-based discrimination creates unequal treatment because it differentiates based on religious identity alone. But religious and nonreligious instruction are not similarly situated when, as is often the case, they serve dissimilar purposes. A curriculum focused on "training young men and women to serve the Lord" (J.A. 80) serves the primary goal of furthering the "ministry" of religious institutions (*ibid.*; J.A. 91). See also, *e.g.*, Southern Baptist Convention, Resolution on the Importance of Christ-Centered Education (2014) (noting that the goal of some religious instruction is to "win students to salvation" and "make disciples"). By contrast, nonreligious instruction is aimed

at "meeting the learning needs and improving the academic performance of all students." See Me. Stat. tit. 20-A, § 8. Maine's different rules for religious and nonreligious instruction simply reflect the real differences between the two and do not represent unequal treatment based on religious status or belief. And they are consistent with the founders' recognition that religious liberty requires both that religious and nonreligious people have equal rights under the law and that religious activity—given its distinct nature—be funded solely with private money. See, *e.g.*, *Everson*, 330 U.S. at 13-18.

The second constitutionally meaningful difference between Maine's and Montana's programs is the coercive nature of Maine's funding mechanism. Montana funded scholarships with voluntary contributions supported by tax credits. *Espinoza*, 140 S. Ct. at 2251. By contrast, Maine's program provides tax dollars to pay for tuition at schools. See Me. Stat. tit. 20-A, § 5204(4). If those funds were to be used for religious instruction, the money paying for that instruction would come from the compelled contributions of Maine taxpayers.

This difference, explained by the Court's *Flast* and *Winn* decisions, means that Maine's program directly implicates founding-era coercion concerns reflected in the many state constitutional clauses—most obviously the ones that contained compelled-support prohibitions—that served as models for the Free Exercise Clause. See *supra* at 12-14. This Court has reasoned that taxpayers are "made to contribute to an establishment in violation of conscience" when "tax dollars are 'extracted and spent,'" not when donations are made voluntarily. *Winn*, 563 U.S. at 142 (quoting *Flast*, 392 U.S. at 106). And the Founders

drew a line in the sand against forcing taxpayers to fund religion: If a citizen is forced to contribute a mere "three pence only of his property for the support of any one establishment," James Madison cautioned, the government could then require a citizen "to conform to any other establishment in all cases whatsoever." Madison, *Memorial and Remonstrance* ¶ 3; see also Jefferson, *Virginia Statute* 94-95. The structure of Maine's program means that the State's exercise of its taxing and spending authority to support religious instruction would compel taxpayers to violate their consciences.

The final major difference between Maine's and Montana's programs is that Maine's is intended to support public, not private, education. See Pet. App. 5. Members of the founding generation believed that civil government must not become enmeshed in religious matters. See, *e.g.*, *Hosanna-Tabor*, 565 U.S. at 183-184; Madison, *Memorial and Remonstrance* ¶¶ 2, 4, 5; see also *supra* at 16-17. Mixing public education with religious education would violate that core principle. See, *e.g.*, *Schempp*, 374 U.S. at 225-226.

3. That Maine's program allows parents to direct program funds to eligible schools of their choice should not affect the free-exercise analysis. It is true that private choice can matter under the Establishment Clause. For instance, when a governmental program that results in aid to religion relies on "genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 652 (2002). But while private choice *permits* governmental aid for religious use under the Establishment Clause, the Free Exercise Clause does not *require* that aid.

The historical record accords with this reading. State constitutional provisions forbidding compelled support for the ministry contained no exceptions for funding distributed based on individual citizens' decisions. See *supra* at 12-14. And as noted *supra* at 15-16, Madison and others rejected Henry's proposed system even though it would have allowed taxpayers to direct their tax payments to their preferred denomination. See Laycock, 27 Wm. & Mary L. Rev. at 896-897.

In fact, requiring Maine to fund religious instruction would go further than Henry's bill in violating taxpayers' conscience rights. Under Maine's program—unlike what Henry proposed—individual citizens from whom tax dollars are exacted have no say as to where their tax payments go or what instruction they fund (see Me. Stat. tit. 20-A, § 5204(4)); hence there is no mechanism by which they can ensure that their money is not spent for instruction in religious beliefs to which they might vigorously object (see, *e.g.*, J.A. 88 (an objective of a Bangor Christian social-studies class is to "[r]efute the teachings of the Islamic religion" (alteration in original))). If Maine is required to fund religious instruction, taxpayers will be forced to support religious "opinions which [they] disbelieve[]" to an even greater degree than Henry's repudiated bill would have required of Virginians. See Jefferson, *Virginia Statute* 95.

4. Because the federal Free Exercise Clause was based on state understandings of religious freedom, it cannot be the case that the Clause *required* something that many states expressly *forbade*—namely, compelled taxpayer support for religious instruction. Yet petitioners' case depends on exactly that contention. The historical record from the founding era simply

does not support such an expansive reading of what the Free Exercise Clause means.

B. Post-founding history through the adoption of the Fourteenth Amendment reinforces that the Free Exercise Clause does not require funding of religious instruction.

Because the Fourteenth Amendment made the Free Exercise Clause applicable to the states (*Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940)), how "the Framers and ratifiers of the Fourteenth Amendment" interpreted the Clause in 1868 is also relevant to understanding its scope (see *McDonald* v. *City of Chicago*, 561 U.S. 742, 775-778 (2010) (analyzing the Second Amendment's application to state governments by determining understandings of the right to bear arms when the Fourteenth Amendment was adopted)).

Between the founding and reconstruction eras, opposition to compelled support for religious instruction only grew. Vestiges of older traditions, such as state-established churches, dried up; Massachusetts was the final state to disestablish its state church, which it did in 1833. See Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* 38 (1986). And as new states joined the Union, most of their constitutions included clauses forbidding compelled support for the ministry.

When the Fourteenth Amendment was ratified in 1868, therefore, twenty-three of the thirty-six state constitutions then in effect included some version of

that restriction.[7] Some specifically prohibited anyone from being "compelled to * * * maintain any minister of the gospel or teacher of religion," thereby expressly barring any compelled support for religious instruction. Mo. Const. of 1865, art. I, § 10, https://bit.ly/2Z7W6xi; accord Mich. Const. of 1850, art. IV, § 39, https://bit.ly/3b0cEtK ("The Legislature shall pass no law to * * * compel any person to * * * pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion."). Others—like a provision enacted in Maine—protected taxpayers against being compelled to support teachers outside their preferred religion. See Me. Const. of 1820, art. I, § 3, https://bit.ly/3jkYY0T; Conn. Const. of 1818, art. VII, § 1, https://bit.ly/3pjPYx4. And some states that had allowed compelled support for the ministry at the founding changed their constitutions

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[7] Mass. Const. of 1780, pt. I, art. III; N.H. Const. of 1792, pt. I, art. 6, https://bit.ly/2ZgMvES; Vt. Const. of 1793, ch. I, art. III, https://bit.ly/3aXl0T5; Conn. Const. of 1818, art. VII, § 1; Me. Const. of 1820, art. I, § 3, https://bit.ly/3jkYY0T; Del. Const. of 1831, art. I, § 1, https://bit.ly/3E4ouzu; Tenn. Const. of 1834, art. I, § 3, https://bit.ly/3GbYWlM; Pa. Const. of 1838, art. IX, § 3, https://bit.ly/2XCzYea; R.I. Const. of 1842, art. I, § 3; N.J. Const. of 1844, art. I, § 3, https://bit.ly/2ZkQiAV; Ill. Const. of 1848, art. XIII, § 3, https://bit.ly/3vwKtw9; Wis. Const. of 1848, art. I, § 18, https://bit.ly/3jpbTPu; Mich. Const. of 1850, art. IV, § 39, https://bit.ly/3b0cEtK; Ind. Const. of 1851, art. I, § 4, https://bit.ly/3m2vOFF; Ohio Const. of 1851, art. I, § 7, https://bit.ly/3C6nOcf; Iowa Const. of 1857, art. I, § 3, https://bit.ly/3G8R9Fx; Minn. Const. of 1857, art. I, § 16, https://bit.ly/3G5UCVv; Kan. Const. of 1859, Bill of Rts., § 7, https://bit.ly/3pqXMgE; W. Va. Const. of 1863, art. II, § 9, https://bit.ly/3E9EaSl; Va. Const. of 1864, art. IV, § 15, https://bit.ly/3lZgV78; Mo. Const. of 1865, art. I, § 10, https://bit.ly/2Z7W6xi; Neb. Const. of 1866, art. I, § 16, https://bit.ly/3C86ZOm; Md. Const. of 1867, art. 36, https://bit.ly/3jrNOYn.

to prohibit those practices. See, *e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2034 (Sotomayor, J., dissenting) (chronicling Maryland's 1810 constitutional amendment, after a failed general-assessment proposal, to "revoke[ ] the authority to levy religious assessments"). These provisions all reflected the increasingly predominant view that the principle of free religious exercise barred government from compelling taxpayers to support religious education against their will.

In addition to ratifying constitutional prohibitions against compelled support, many states took statutory and other actions between ratification of the First and Fourteenth Amendments to limit taxpayer funding for religious instruction. To be sure, schools founded in the late eighteenth and early nineteenth centuries "were not 'public' in the modern sense" and "commonly involved a hybrid of public and private-religious cooperation." Steven K. Green, *The Bible, the School, and the Constitution* 13 (2012). But during the first half of the nineteenth century, free "charity" and "common" schools were established as "public schools open to all children." *Id.* at 20. States therefore enacted laws that forbade the teaching of religious doctrines or using religious textbooks in these schools. *Id.* at 20-24 (citing Massachusetts' 1827 passage of a law creating free, nonreligious public high schools).[8] And many states that had initially funded religious

[8] This movement toward public, nonreligious education was "not chiefly an effort by dominant Protestant groups to maintain theological control over public education at the expense of Catholics, Jews, and other religious minorities" but rather was "designed to [defuse] conflict among Protestant sects and to attract children excluded from Protestant denominational schools." Green, *The Bible, the School, and the Constitution* 19; see also Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65, 69-81 (2002).

education, either directly or indirectly, ceased to do so. See Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1760–1860* at 166-168 (1983).

It was against this backdrop that states began adopting "no-aid" clauses requiring funds for public schools to remain under public control or to be restricted for public uses. Before the Fourteenth Amendment's passage, for example, seven states—starting with Michigan in 1835—enacted new constitutional provisions restricting funding for religious education.[9] While these education-focused provisions referred to religious instruction more explicitly than earlier constitutional mandates, they were motivated by the same long-standing antiestablishment principle that had inspired compelled-support clauses since the founding era: the recognition that government "had [no] right to take the public money, contributed by the people, of all creeds and faith[s], to pay for religious teachings" (*The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* at 305 (Charles Henry Carey ed., 1926)).

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[9] Mich. Const. of 1835, art. I, § 5, https://bit.ly/3pptnPG; Wis. Const. of 1848, art. I, § 18; Ind. Const. of 1851, art. I, § 6; Ohio Const. of 1851, art. VI, § 2; Mass. Const. of 1855, amend. art. XVIII, https://bit.ly/3B3pBh7; Minn. Const. of 1857, art. I, § 16; Or. Const. of 1857, art. I, § 5, https://bit.ly/3aWkpRD; Kan. Const. of 1859, art. VI, § 8. Another state constitution did not expressly mention funding for religious schooling but said that school funds could be used at common schools and for no other purposes. Ky. Const. of 1850, art. XI, § 1, https://bit.ly/3m4dH2a. And several states without no-aid constitutional clauses enacted statutes prohibiting funding of religious schools. *E.g.*, 1843 N.Y. Laws, ch. 216, § 15, https://bit.ly/3mfsK9c; 1852 Cal. Stat., ch. 53, art. VI, § 1, https://bit.ly/2XMsTYx.

Although this Court has viewed some no-aid clauses as "belong[ing] to a more checkered [anti-Catholic] tradition shared with the Blaine Amendment of the 1870s" (*Espinoza*, 140 S. Ct. at 2259), many early no-aid clauses predate the advent of widespread Catholic immigration in the 1840s and the despicable anti-Catholic animus that followed (see Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 504 (2003) (noting that Catholics represented only 3.3% of the U.S. population in 1840)). And as chronicled above, no-aid provisions did not emerge suddenly in response to Catholic immigration; they instead were a continuation of the founding-era opposition to compelled funding for religious instruction. See *supra* at 27. Because they differ in their motives and origins, no-aid clauses cannot be dismissed *en masse* as products of religious bigotry. See Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle*, 2 First Amend. L. Rev. 107, 126 (2003) (explaining that "[e]ven if nativist[ ] [sentiments] were partially responsible for" some no-aid provisions, "that impulse does not explain the basis for * * * earl[y] enactments" of no-aid clauses in states "without significant religious dissension or nativist activity").

In other words, whatever limited "[g]overnmental financial support for voluntary (including denominational) schools" there was at the founding, that support diminished over the course of the nineteenth century. Lloyd P. Jorgenson, *The State and the Non-Public School, 1825–1925* at 3-7 (1987). And by the time of the Fourteenth Amendment's adoption in 1868, it was widely understood that among "[t]hose things which [were] not lawful under any of the American constitutions" was "[c]ompulsory support, by taxation

or otherwise, of religious instruction." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 469 (1868), https://bit.ly/2OW1Djf. There is no reason to believe that the Fourteenth Amendment silently and secretly nullified these widespread, fundamental prohibitions.

C. Isolated examples of governmental funding for religious instruction do not establish that the practice was or is required by the Free Exercise Clause.

That "governments provided financial support to private schools, including denominational ones," "[i]n the founding era and the early 19th century" (*Espinoza*, 140 S. Ct. at 2258) does not call for invalidation of Maine's program. On the contrary, the examples cited in *Espinoza* show merely that there has always been "play in the joints" between the First Amendment's two religion clauses. See *Locke*, 540 U.S. at 718; *Walz*, 387 U.S. at 669. While those examples may have been relevant in *Espinoza*'s unique context—where traditional antiestablishment interests were not as strong because Montana's program was voluntarily funded and its restrictions were purely status-based—the same cannot be said about Maine's coercively funded program and use-based restrictions.

And even if a few historical events suggest that not all funding of religious education was understood to violate applicable federal or state constitutional clauses, they do not demonstrate that, before adoption of the Fourteenth Amendment, the Free Exercise Clause was understood as *requiring* support for religious instruction. Thus, examples of public funding for some religious education show only that some jurisdictions treated taxpayer-financed religious

instruction as *permissible* during that era.[10] They do not prove that such funding was ever constitutionally *mandated*. Cf. *Espinoza*, 140 S. Ct. at 2259 (recognizing that "the historical record is 'complex'" (quoting a party's brief)).[11]

Indeed, it would be surprising if the "play in the joints" enjoyed by the states since the founding to "accommodate religion beyond free exercise requirements, without offense to the Establishment Clause" (*Cutter*, 544 U.S. at 709 (citing *Walz*, 397 U.S. at 669)) did *not* result in some divergent state practices. The Court's decisions have long reflected this principle and allowed states to take different approaches to governmental funding for religious enterprises. Thus, in decisions upholding governmental aid for religious schools against Establishment Clause challenges, the Court did not suggest that the aid was required under the Free Exercise Clause, or that every state must

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[10] Moreover, the examples cited in *Espinoza* do not demonstrate that the applicable federal or state constitutional provisions allowed the funding. Rather, the funding may have been provided in violation of relevant laws, as history is unfortunately replete with governmental actions taken in violation of legal mandates. See, *e.g.*, *Marbury* v. *Madison*, 5 U.S. 137, 147, 176 (1803) (striking down the section of the Judiciary Act of 1789 purporting to give this Court the power to issue writs of mandamus); Act of July 23, 1866, ch. 217, 14 Stat. 216, https://bit.ly/3BhxQGg (Congressional action, taken only a month after Congress approved the Fourteenth Amendment, affirming continued racial segregation in District of Columbia public schools).

[11] Examples of founding-era state support for religious education also do not refute the steady movement toward public, nonreligious education between the founding and the adoption of the Fourteenth Amendment (see generally *supra* at Part II(B)) and thus do not serve as strong evidence of what the Free Exercise Clause meant when it began to apply to Maine in 1868 (cf. *McDonald*, 561 U.S. at 778).

fund similar programs. See, *e.g.*, *Zelman*, 536 U.S. 639; *Mueller* v. *Allen*, 463 U.S. 388 (1983). That is because a state's choice to accommodate religious practice beyond what the Constitution requires is, in certain circumstances, permissible state action. It would take a radical rewriting of history and doctrine to maintain that such support is now required of every state. Such a conclusion would eviscerate the "play in the joints" that allows states to promote either free-exercise or antiestablishment interests beyond what is strictly and absolutely required, and hence would draw a line nearly impossible for states to navigate when attempting to legislate in areas that might happen to touch on religion.

In short, neither this Court's precedent nor historical practices support a conclusion that Maine is required to use tax payments to fund distinctly religious instruction. Doing so would have squarely violated antiestablishment principles in many states in the founding and post-founding eras. But even where the applicable federal or state constitutional provision might have *permitted* funding religious instruction, there is simply no evidence that the Free Exercise Clause was intended or understood to *require* it. Maine's program thus falls well within the permissible range of choices that the Constitution leaves to the states. It should be upheld.

CONCLUSION

The judgment of the First Circuit should be affirmed.

Respectfully submitted.

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