No. 20-1088

# In The Supreme Court of the United States

DAVID and AMY CARSON,
as parents and next friends of O.C.,
and TROY and ANGELA NELSON,
as parents and next friends of A.N. and R.N.,
*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 *AMICUS CURIAE***
**THE STANLEY M. HERZOG CHARITABLE FOUNDATION IN SUPPORT OF PETITIONERS**

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## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Stanley M. Herzog Charitable Foundation is a non-profit, non-partisan organization headquartered in Smithville, Missouri that is dedicated to supporting the advancement and acceleration of nondenominational Christian education. Specifically, the Foundation aims to promote Christ-centered education that teaches and instills foundational Biblical values of commitment to God, family, and community in students so that families and culture flourish. It works to increase the availability of quality Christian education with a focus on K-12 schools, while also assisting with continuing education in colleges and trade schools. The Herzog Foundation partners with government decisionmakers and leaders in Christian education to identify areas of growth and gaps in the Christian education space to catalyze effective and scalable programs across the nation, and to assist with communicating and furthering the interests of Christian educators, parents, and students.

As the issue of states' denial of funding to private religious schools and students who desire to attend them again returns to this Court, the Herzog Foundation has an interest in helping to protect the

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amicus curiae and its counsel made any monetary contribution toward the preparation and submission of this brief. On July 9, 2021, Petitioners filed a blanket consent to the filing of amicus briefs. On July 14, 2021, Respondent filed a blanket consent to the filing of amicus briefs.

constitutional liberties of parents and students to attend the schools of their choice without government coercion, and the rights of religious schools to teach religious curriculum without discrimination. The Foundation thus offers this brief to explain why the First Circuit erred in its interpretation and understanding of the Free Exercise Clause, and to briefly outline America's time-honored history of public support for private religious education. Finally, the Foundation also offers research for the Court's consideration which demonstrates the superior performance and other outcomes for students attending private religious schools in comparison with their secular counterparts, further demonstrating why this Court should affirm parents' fundamental right "to direct the education . . . of [their] children," *Troxel v. Granville*, 530 U.S. 57, 66 (2000), by sending them to religious schools.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

James Madison, perhaps the most significant figure in enacting the First Amendment's religion clauses, once wrote the following in his *Memorial and Remonstrance*:

> [t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man *to exercise it as these may dictate*. . . . It is the duty of every man to render to the Creator such homage,

> and such only, as he believes to be acceptable to him.

2 Writings of James Madison 183–84 (G. Hunt ed. 1901). This sentiment encapsulates the popular sentiment of the Founding era regarding religious liberty, and the original understanding of the protections of the Free Exercise Clause: That beyond its basic protection of religious conscience, identity, and status, it also protected the right for the religiously observant to exercise and practice one's faith in accordance with the dictates of his or her religious beliefs. The Free Exercise Clause thus does not distinguish between government discrimination based on religious status or based on religious actions, including in the context of student-aid programs. Under either circumstance, the First Amendment has been offended, and the free exercise of religion impeded.

The contrary position taken by Maine regarding its tuition assistance program for high school students directly conflicts with the text, tradition, and history of the Free Exercise Clause. Maine's statutory exclusion of "sectarian" schools must not be upheld, particularly considering America's abundant history of public financing of private religious education, and parents' substantial interest in directing the education of their children by sending them to schools that yield demonstrably superior educational outcomes.

Accordingly, the First Circuit's decision should be reversed.

## ARGUMENT

### I. The Text and History of the First Amendment Demonstrate that the Free Exercise Clause Prevents Discrimination Based on an Organization's Religious Activities, Not Just Its Religious Status.

Maine's position that the Constitution permits states to discriminate based upon the religious *use* of funds, as opposed to a school's religious *status*, is a distinction without any basis in the Constitution. As Justice Gorsuch explained in his concurrence in *Espinoza v. Montana Department of Revenue*, "[c]alling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same." 140 S. Ct. 2246, 2278 (2020) (Gorsuch, J., concurring).

In *Espinoza*, petitioners challenged a Montana state program granting tax credits to individuals who donated to organizations awarding scholarships for private school tuition but prohibiting families from using these scholarships at religious schools pursuant to a "no-aid" provision of the Montana Constitution, which barred government aid to any school "controlled in whole or in part by any church, sect, or denomination." *Id.* at 2251-52 (quoting Mont. Const., Art. X, § 6(1)). This Court held that this exclusion violated the First Amendment's Free Exercise Clause by discriminating on the basis of a school's religious status. *Id.* at 2261. While the majority confined its holding to discrimination based on schools' religious character or status, it

acknowledged the argument made by other justices that there may not be "a meaningful distinction between discrimination based on use or conduct and that based on status" but determined that it did not need to reach that question. *Id.* at 2257.

However, as Justice Gorsuch aptly points out in his *Espinoza* concurrence, it was equally if not "more[] natural" in that case "to say that [Montana's] discrimination focused on what religious parents and schools *do*—teach religion." *Id.* at 2275 (Gorsuch, J., concurring). In other words, the teaching of religion is so fundamental to the identity of many religious schools that the two cannot effectively be disentangled for purposes of distinguishing between religious status and use. To discriminate against parents or schools based on one is to discriminate based on the other. *See id.*

The same rationale applies to Maine's sectarian exclusion of tuition assistance, which provides in relevant part that "[a] private school may be approved for the receipt of public funds for tuition purposes only if it . . . . [i]s a *nonsectarian* school[.]" Me. Stat. tit. 20-A, § 2951(2) (emphasis added). Although Maine allegedly focuses on the religious subject matter of a school's curriculum in determining whether it is "nonsectarian," rather than on the school's religious status per se, the truth is that Maine discriminates against schools (and against parents desiring to send their students to such schools) on both grounds because the religious nature of a school's curriculum is often so inextricably intertwined with the school's religious

character that the two bases are effectively indistinguishable. Accordingly, the First Circuit's determination that Maine's exclusion can be distinguished from Montana's no-aid provision in *Espinoza* based on the "use-status distinction" is founded on a flawed assumption that is erroneous in reality.

More fundamentally, however, the lower courts have based their holdings on a distinction without a difference for purposes of the Free Exercise Clause. As Justice Gorsuch put it, "it is not as if the First Amendment cares" whether discrimination is based on status or use. *Espinoza*, 140 S. Ct. at 2275-76 (Gorsuch, J., concurring). The Constitution's restriction of laws prohibiting the free exercise of religion "protects not just the right to *be* a religious person, holding beliefs inwardly and secretly; it also protects the right to *act* on those beliefs outwardly and publicly." *Id.* at 2276. Thus, whether Maine excludes schools based on their religious identity or because of their religious activities is ultimately irrelevant to this Court's determination because it is "a violation of the right to free exercise either way, unless the State can show its law serves some compelling and narrowly tailored governmental interest," *id.*

This interpretation of the Free Exercise Clause is bolstered by the First Amendment's plain language as understood at the time of the Founding. The text of the First Amendment provides, in relevant part, that "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U. S. Const., Amdt. 1.

Dictionary definitions of "exercise" from around the time of the Founding and the Bill of Rights' adoption confirm that the Free Exercise Clause would have been ordinarily understood to protect the freedom to openly practice and act on one's religion, i.e., to publicly do religious things, rather than just to identify oneself as religious or to passively hold religious views.

For instance, Buchanan's 1757 dictionary defined "exercise" to mean "[t]o use or practice." J. Buchanan, Linguae Britannicae Vera Pronunciatio (R. Alston ed. 1967) (London 1757). Samuel Johnson's 1805 English dictionary defined "exercise" with the following phrases: "Labour of the body," "*Use*; actual application of any thing," "Task; that which one is appointed to perform," and "*Act of divine worship,* whether *public* or private." S. Johnson, A Dictionary of the English Language (Philadelphia 1805) (emphasis added). And Noah Webster's dictionary defined "exercise" to mean "practice [or] employment." N. Webster, A Compendious Dictionary of The English Language (New Haven 1806).[2] These definitions demonstrate that, far from only protecting religious status or identity, the First Amendment's use of the words "free exercise" necessarily encompassed religious actions such as "use," "practice," "application," "task[s]," "perform[ance]," and even public "act[s] of divine worship." See *supra*.

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[2] Dictionary references are quoted from McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1114 n.23 (1990).

The First Amendment's textual history from the time of the Bill of Rights' adoption similarly undermines Maine's position on the use-status distinction. The first proposed Bill of Rights came from Representative James Madison in 1789, whose proposed amendments included provisions that "the full and equal rights of *conscience*" cannot be "infringed," and further that "[n]o State shall violate the equal rights of *conscience*[.]" 1 Annals of Congress 434 (J. Gales ed. 1834) (emphasis added). In subsequent iterations of what would become the First Amendment, the draft language changed back and forth between "rights of conscience" and "free exercise of religion" in both the House and Senate debates. *See* M. McConnell, et al., Religion and the Constitution 59 (4th ed. 2016) (hereinafter "Religion and the Constitution"). At one point, the House adopted a motion to alter the wording to include both "the free exercise [of religion]" and "the rights of conscience." 1 Annals of Congress 796. Ultimately, "free exercise of religion" was retained in the First Amendment, while the phrase "rights of conscience" was omitted. This choice provides compelling evidence that the drafters of the Bill of Rights extended protection beyond mere religious belief or status to religiously motivated conduct.

The distinction between how the words "free exercise of religion" and "rights of conscience" were understood by the founding generation is also instructive. For instance, in contrast with the definitions of "exercise" outlined above, "conscience" as defined in Samuel Johnson's 1805 dictionary

meant "knowledge," "[r]eal sentiment; veracity; private thoughts," "[s]cruple; difficulty;" and "reason; reasonableness." *See* S. Johnson, *supra*. Buchanan's dictionary described conscience as the "testimony of one's own mind." J. Buchanan, *supra*. And Webster's dictionary defined conscience to mean "natural knowledge, or the faculty that decides on the right or wrong of actions." N. Webster, *supra*.[3] Thus, far from being duplicative of each other, the term "conscience" was more naturally and typically understood to be confined to a person's inner beliefs or convictions, whereas "religious exercise" was encompassed actions done in accordance with those beliefs.

How this distinction between "exercise" and "conscience" was then understood is also reflected by the manner that the phrases were employed by laws of the time. As Professor Michael McConnell has explained, "[t]he Georgia Charter of 1732 is the only legal document of the period to make a distinction between the two phrases." McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1489 (1990) (hereinafter "Origins of Free Exercise"). The charter provided that "there shall be a liberty of *conscience* allowed in the worship of God, to all persons inhabiting, or which shall inhabit or be resident within our said province, and that all such persons, *except papists*, shall have a free *exercise* of religion." *Id.* (quoting Ga. Charter of 1732, *reprinted in* 1

[3] Dictionary references are quoted from McConnell, *The Origins And Historical Understanding Of Free Exercise Of Religion*, 103 Harv. L. Rev. 1409, 1489 (1990).

Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 369, 375 (B. Poore 2d ed. 1878)). Accordingly, as McConnell describes,

> Since Roman Catholics were guaranteed liberty of conscience but not the free exercise of religion [under the charter], this suggests that the former was understood to be narrower than the latter. The most plausible reading of the provision is that it permitted Catholics to believe what they wished (and possibly to worship as they liked, though that is more doubtful), but did not permit them to put their faith into action.

*Id.*at 1489-90. This charter's use of these two words reflects a key difference in the way their respective meanings were understood in 18th century America.

Additionally, the use and scope of the religious liberty provisions contained in twelve of the thirteen original states' constitutions is "the most direct evidence of the original understanding" of the meaning of the Free Exercise Clause because "it is reasonable to infer that those who drafted and adopted the first amendment assumed the term . . . meant what it had meant in their states." *Id.* at 1456. During the American Revolution, eleven of the thirteen states (plus Vermont) adopted new state constitutions; by 1789, every state except Connecticut had a constitutional provision protecting religious freedom. *Id.* at 1455. Religious "exercise"

was expressly included in six of these constitutions, and in two additional cases the protection went just as far or further: Maryland protected religious "practice" and Rhode Island provided "full libert[y] in religious concernments." *See id.* at 1426, 1459.

Importantly, none of the provisions in these state constitutions confined their religious freedom protections to beliefs and opinions, or to the mere expression of religious beliefs and opinions; instead, the language was expressly drafted to make clear that opinion, expression of opinion, and practice were all protected. *Id.* at 1458-59. Four states protected essentially *all* actions done in accordance with religious belief. For instance, Maryland prohibited punishing any person "on account of his religious persuasion *or* profession, *or* for his religious practice." *Id.* at 1459 (quoting Md. Declaration of Rights of 1776, art. XXXIII). The Virginia Bill of Rights, i.e., the model for three of the state proposals for the First Amendment, provides that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience," while defining "religion" as "the duty which we owe to our Creator, *and the manner of discharging it*." *Id.* at 1459-60 (quoting Va. Bill of Rights of 1776, § 16) (emphasis added). Additionally, eight of the states included protection for acts of "worship." *Id.* at 1460.

Furthermore, the limitations on religious liberty rights included in these state constitutions also reveal that religious freedom extended beyond religious status or identity. Nine of the thirteen states expressly limited the right of free exercise to

acts that would not disturb the "peace" or "safety" of the state, while four clarified that the right did not extend to immoral or licentious acts. *Id.* at 1461 (citation omitted). Similarly, New Hampshire and Massachusetts prohibited acts interfering with the religious practices of others, while Rhode Island forbade the use of religious liberty in a manner resulting in "civil injury or outward disturbance of others." *Id.* at 1461–62. These prohibitions further reinforce the fact that the right of free exercise was understood in the states to extend beyond beliefs or status alone; otherwise, these carveouts would be pointless. *Id.*

In short, "[t]he right to *be* religious without the right to *do* religious things would hardly amount to a right at all." *Espinoza*, 140 S. Ct. at 2277 (Gorsuch, J., concurring). It was no mistake that the drafters of the Bill of Rights used the words "free exercise" of religion in place of "rights of conscience" as originally proposed. They intended to extend the "broader freedom of action to all believers" which was "almost universally understood . . . to include conduct as well as belief," Origins of Free Exercise at 1490, in the same way it was in twelve of the thirteen original states' constitutions. Based on the popular and ordinary understanding of the Free Exercise Clause at the time of the Founding, there is simply no meaningful distinction between religious use and status.

Because Maine's condition on its public benefit discriminates against schools that it deems too "sectarian" in action, and also against the students

wishing to attend those schools, Maine's law violates the First Amendment just as if it had discriminated against students based on their religious identity or schools based on their religious status, which discrimination this Court has already determined is subject to the "strictest scrutiny," *Espinoza*, 140 S. Ct. at 2257. Accordingly, by relying on the use-status distinction to uphold Maine's law, the First Circuit erred.

## II. America's Substantial Historical Tradition of Public Funding of Private Religious Education Counsels in Favor of Petitioners' Interpretation of the Free Exercise Clause.

This Court has recognized that there exists a "historic and substantial" state interest in not funding the training of clergy relied on to uphold a state's prohibition on using scholarships to pursue devotional theology degrees, *Locke v. Davey*, 540 U.S. 712, 725 (2004). By contrast, however, "no comparable 'historic and substantial' tradition supports [a state's] decision to disqualify religious schools from government aid." *Espinoza*, 140 S. Ct. at 2258. Instead, America has a long and substantial historic tradition of governments providing financial support to denominational schools. *See id.* Indeed, "[f]ar from prohibiting such support, the early state constitutions and statutes actively encouraged this policy." L. Jorgenson, *The State and the Non-Public School, 1825-1925* 4 (1987). This historical analysis is relevant because "When the Framers did not discuss the precise question at issue, we have turned

to what history reveals was the contemporaneous understanding of [the Free Exercise Clause's] guarantees." *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring).

### A. Charity Schools in Seventeenth Century England and Colonial America.

To understand this history, it is instructive to first examine the private schools that existed prior to the founding of the United States, referred to as "charity schools," and which were initiated for the purpose of developing stronger character among America's youth. *See* W. Jeynes, American Educational History 37 (2007) (hereinafter "American Educational History"). The beginnings of these schools can be traced back to the Puritans in Europe during the early 1600s, who believed it was essential to make schooling universally accessible, regardless of socioeconomic status, based on a belief in the Christian concept of the equality of all people before God. *See id.* at 37, 39. They also sought to address the social and moral ills associated with poverty, spread the gospel, and prepare children to be successful and contributing members of society. *Id.* at 38. While not the first to advocate for free schooling for the poor, the Puritans were the first group to successfully inaugurate a system that would make charity schools widely available. *Id.*

Early European migrants to America brought the charity school system with them to the New World, which featured prominently in the early American

colonies. *See id.* These church-founded schools were generally community-based and were primarily church-sponsored in their colonial beginnings. *Id.* at 40; *see also* W. Jeynes, School Choice: A Balanced Approach 3 (2014) (hereinafter "School Choice"). Soon after the establishment of Harvard College and Boston Latin School, New England educators (beginning with the Puritans in Massachusetts) prioritized the establishment of charity schools. American Educational History at 38. The Puritans made charity schools available to pupils on the basis of what a family could afford, which in most cases meant that the parents paid either nothing at all or very little. School Choice at 4. There was a shared understanding in American society that the small number of wealthy people had a responsibility to support other members of society; a wealthy settler was often expected to pay for the education of up to 100 students. American Educational History at 39. These schools soon spread through the remainder of the Northeast, then to the Mid-Atlantic, and became a model for pre-Revolutionary War America that was emulated during the years following the war. *Id.* at 42-43.

### B. During the Founding Era, Governments Provided Funding to Religious Schools.

At the time of the drafting of the First Amendment, and throughout the late 1700s and early 1800s, public education was virtually nonexistent in American society; instead, most schools remained both private and religious in identity and emphasis. *See* Religion and the

Constitution at 318; American Educational History at 42. After the Revolutionary War, one of the great educational events in American educational history was the large-scale embrace across the Country of the charity school concept—i.e., finding ways to educate the masses at no or little cost to the student. American Educational History at 37. Charity schools grew exponentially, and quickly became the dominant method used throughout America for educating its people. *See* School Choice at 4. As Alexis De Tocqueville observed in the early 19th century, members of the clergy did not hold public office "[u]nless one gives this name to the offices that many of them occupy in the schools. The greater part of education [in America] is entrusted to the clergy." Alexis de Tocqueville, Democracy in America 283 n.4 (Harvey C. Mansfield & Delba Winthrop ed. 2002).

Though charity schools were private, they served as the forerunner for the public schools that would follow years later. American Educational History at 41.

Many of the Founders were ardent supporters of charity schools, both financially and otherwise, which certainly would have informed their view of the meaning of the Free Exercise Clause in relation to those schools. For instance, John Jay, the first chief justice of the U.S. Supreme Court and one of the authors of the Federalist Papers, and Alexander Hamilton gave "countless millions of dollars specifically to support charity schools for African Americans," which is particularly impressive considering the inflation-adjusted value of that sum.

School Choice at 4-5. Charity schools were the most common way that African American children in the North were educated—at the time, a large portion of African Americans were formerly enslaved persons who were unable to afford an education, making these charity schools a significant benefit to them. American Educational History at 44. Historians estimate that over 70 percent of African Americans in the North attended some type of charity school throughout the late 18th and 19th centuries. *Id.* at 88.

Throughout the 1800s, both public and private schools had a heavy religious emphasis. *See id.* at 42. Although the religious emphasis of American schools of that period is somewhat foreign from a modern perspective, as American educational historian William H. Jeynes has emphasized, "to individuals living in the 18th and 19th centuries, education without religion was inconceivable. . . . most educators of this era viewed moral education as the most important aspect of education. . . . [meaning] that religious instruction was required in the schools" because religion was viewed as foundational to morality. *Id.* at 42.

"In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones [i.e., charity schools]." *Espinoza*, 140 S. Ct. at 2258. Indeed, the opportunity to attend religious charity schools was widely available to students of all socioeconomic backgrounds because the cost of tuition was paid for by a combination of private philanthropy and public

grants to private schools. Religion and the Constitution at 318.

The State of New York provides a prominent illustration of how the public sector often partnered with religious schools near the time of the First Amendment's adoption to help further these important charitable objectives. As early as 1795, New York began to assist with financing church charity schools. American Educational History at 51. Between 1800 and 1830, New York continued this financial support by providing substantial public funding to Presbyterian, Episcopalian, Methodist, Quaker, Baptist, Lutheran, and Jewish schools among other sectarian schools. *See* Religion and the Constitution at 319.[4] Much of this support resulted from the efforts of the New York Free School Society ("NYFSS"), which persuaded New York government leaders that it was in the best interests of the city and the state to ensure that religious charity schools prospered to support New York City's rapidly growing population, which included many impoverished citizens. American Educational History at 48-49. DeWitt Clinton, mayor of New York and the founding president of the NYFSS, was instrumental in convincing both New York's city and state governments to provide financial support to these schools. *Id.* In 1822, Clinton was able to secure state support at a level of $150 per student for city charity

[4] Despite the widespread nature of this public funding of sectarian education in early 19th century America, these arrangements were never challenged as unconstitutional establishments of religion. *See id.*

schools, a significant amount at that time. *Id.* at 52. His efforts played a major role in expanding the reach of charity schools and were emulated by numerous other states; these schools in turn helped lay the foundation for the modern educational system. *Id.* Religious inspiration featured prominently in NYFSS's moral education program; Clinton even declared that teaching of the Bible in the classroom should serve as the foundation for a school's moral education program. *Id.* at 50.

### C. Prior to the Civil War, Charity Schools Requested and Obtained Taxpayer Funding to Meet Growing Demand.

Charity schools continued to thrive well into the mid-1800s, when pressure began to build from a large influx of poor immigrants to the United States, causing charity schools to seek additional public funding to make sure that they could continue to charge little or no tuition for those of limited means. School Choice at 5, 32-33. Accordingly, from 1837 until the 1860s, many charity schools requested and obtained tax money from governments to supplement charitable contributions. *Id.* at 33. Regarding the close ties that existed between government and religious resources in furthering shared educational goals, Professor Jeynes further writes:

> The interconnected nature of the private and public sector might be difficult for contemporary Americans to comprehend. However, in the early 1800s, there was not such a rigid distinction between the two

> sectors []. Rather, people thought of the overall good of the country. For example, churches often intervened to support struggling state universities, and state and city funds were frequently used to help private schools. Americans believed that the presence of education was so important that it was imperative that the private and public sectors support one another for the greater good of the country [].

*Id.* at 49 (internal citations omitted).

Public funding of America's private religious schools also played a prominent role in other contexts. Until 1848, education in Washington, D.C. (where the Establishment Clause was then applicable) was provided in part via public funding of private denominational schools. Religion and the Constitution at 319. The same was true for federal aid in the early 19th century, typically in the form of land grants, which was directed toward funding private religious schools. *Id.*

### D. During Reconstruction, the Freedmen's Bureau Hired Ministers to Educate Formerly Enslaved Persons.

This pattern continued through the second half of the 19th century as the country entered the Reconstruction period following the Civil War. In fact, at the time of the Civil War, "most Americans believed that education was a responsibility of the church and not the government." School Choice at

33. This belief was evidenced by the way that the federal government sought to educate formerly enslaved persons—adults and children alike—in the South during Reconstruction.

In 1865, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands—commonly referred to as the Freedmen's Bureau. *See* https://www.archives.gov/research/african-americans/freedmens-bureau. In 1866, the same year that it passed the Fourteenth Amendment, Congress also passed a law that instructed the Freedmen's Bureau to work through "private benevolent associations" to help educate formerly enslaved persons whenever such associations could provide suitable teachers. Religion and the Constitution at 323 (citing Act of July 16, 1866, §13). Most of these "private benevolent associations" were missionary societies from the North that were affiliated with specific religious denominations. *Id.* As such, public funds regularly went to Presbyterian, Methodist, Baptist, Congregationalist, and other religious educational societies to help establish and staff schools throughout the South. *Id.* While some educators were critical of the "missionary focus" of these schools, "the issue was never framed in terms of church-state separation, and the experience had little effect on the debate over aid to nonpublic [] schools in the rest of the country." *Id.* Another important example of the interconnectivity of religion and publicly funded education is the fact that Congress paid various religious denominations to run schools for Native Americans through the end

of the 19th Century. *See Espinoza*, 140 S. Ct. at 2258 (citing *Quick Bear v. Leupp*, 210 U. S. 50, 78 (1908)).

The number of public schools began to increase exponentially throughout America, however, in the wake of the Michigan Supreme Court's landmark 1872 decision, *Stuart v. School District No. 1*, 30 Mich. 69 (1874), which upheld public taxation for public high schools in a Kalamazoo, Michigan school district. School Choice at 33. Over time, as the total percentage of government funding of charity schools increased higher and higher, the church-based schools gradually transformed into public schools, which would eventually become the dominant educational paradigm in the U.S. *Id.* at 5. To illustrate, by 1892, about 70 percent of American high school students attended public schools. *Id.* at 33.

### E. The Formation of the Modern Public School System in the Early Twentieth Century.

With this transformation schools "became less and less community based and more monolithic in their structure," which meant that the belief system advanced by public schools "became more and more detached from that of the parents." *Id.* at 5. However, public schools did largely continue teaching the Bible and allowing prayer, much as the Christian schools did. *Id.* at 33.[5] During the 1920s

[5] As the Kalamazoo, Michigan case was a crucial turning point for the dramatic rise of public schools in America, *id.* at 33, this Court's 1962 and 1963 decisions to remove voluntary prayer

and 1930s, public schools became significantly more attached to state, local, and national government officials rather than local communities, particularly due to the influence of education theorist George Counts and educational reformer and scholar John Dewey. *Id.* at 5. By the mid-1960s, the American system of elementary and secondary education was more monolithic than ever before. *Id.* at 32.

Despite this dramatic shift in America's education system from predominantly private to public schools, particularly over the last century, the strong and unmistakable influence of America's early religious charity schools on the formation of our present public school system, including the free, universally accessible education it provides, persists to the present day.

**F. Conclusion.**

America has a deep historical tradition of allocating public resources to support private denominational schools throughout its history. When there was a need, such as with the immigration boom of the 1800s, in the post-Civil War South, or for Native Americans, governments relied on the existing religious infrastructure and personnel to effectively educate the masses—something that could never have been accomplished without utilizing America's religious underpinnings.

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and Bible reading from public schools was also a major historical inflection point where the teaching of religion and principles closely associated with Judeo-Christian values in public schools declined substantially, *id.* at 33-34.

At a minimum, there is certainly "no . . . 'historic and substantial' tradition support[ing] [a state's] decision to *disqualify* religious schools from government aid." *Espinoza*, 140 S. Ct. at 2258 (emphasis added). On the contrary, America's time-honored tradition of financially supporting private religious education, particularly at the time of the Founding, provides an important data point about how the drafters of the Bill of Rights, and the public at that time, would have understood the meaning of the Free Exercise Clause in the context of school choice. Maine's position regarding the use-status distinction is not only contrary to that original understanding, but also ahistorical when juxtaposed against the broader context of American history.

## III. This Court Should Affirm Parents' Fundamental Right to Direct the Education of Their Children by Sending Them to Private Religious Schools that Consistently Outperform Secular Competitors.

According to the Respondent, Maine has done no more than "declin[e] to fund explicitly religious activity that is inconsistent with a free public education." Resp't.'s Br. at i. In the State's view, its program exists "to engage private schools willing to deliver a specific service: an education that is substantively akin to that which a student would receive if their community operated a public school." *Id.* at 16. Indeed, the State bluntly asserts that its "tuition program is the result of a specific legislative determination that a sectarian education is not equivalent to a public education." *Id.* at 19.

Implicit in these assertions is the position that "sectarian" education is somehow inferior to nonreligious schooling. Modern social science, however, suggests that Maine has it backwards. Indeed, across nearly every metric, religious schools of all creeds and denominations produce students who excel when compared to their non-religious-school peers, even when controlling for variables such as race, gender, and socioeconomic status. And, crucially, it appears that religious schools are far better than their nonreligious counterparts in helping close performance gaps that have befuddled educators for generations.

For decades, social scientists have queried whether "students who attend religious schools actually perform better academically than do students who attend nonreligious schools." Jeynes, Educational Policy and the Effects of Attending a Religious School on the Academic Achievement of Children, 16 Educational Policy, No. 3, 406–07 (July 2002) (hereinafter Educational Policy). Using the 1992 National Education Longitudinal Survey data set,[6] Professor William H. Jeynes, during his tenure

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[6] Sponsored by the U.S. Department of Education's National Center for Statistics and designed by the National Opinion Research Center, the National Education Longitudinal Survey used a series of achievement tests to assess a nationally representative sample of schools and students. Educational Policy at 409-10. The study assessed 24,599 students from 1,052 schools starting when they were in the eighth grade; the students were assessed again in the tenth grade, and a final time in the twelfth grade. *Id*. Sixty-nine percent of the students in the sample size were White, 13% percent were Hispanic, 11

at the University of Chicago, sought to answer this quandary, which he broke into four separate questions:

- First, how do 12th-grade students in religious schools (most of which are Catholic or Protestant) perform academically versus their counterparts in nonreligious schools (public schools, preparatory schools, and other nonreligious private schools)?
- Second, what are the effects that emerge when one controls for [socioeconomic status]?
- Third, how do Black and Hispanic 12th-grade students in religious schools perform academically versus their counterparts in nonreligious schools?
- Fourth, how do low-[socioeconomic status] (the bottom half) 12th-grade students in religious schools perform academically versus low-[socioeconomic status] (the bottom half) 12th-grade students in nonreligious schools?

*Id.* at 409. According to Professor Jeynes, the bottom-line "[r]esults indicate that children attending religious schools achieve at higher levels academically than do their counterparts who are not

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percent were African American, 6 percent were Asian, and 1 percent were Native American. *Id.*

attending religious schools, even after controlling for race and gender." *Id*. at 412.

Professor Jeynes drew these conclusions after conducting several linear regression analyses, which, in layman's terms, means that he examined, as a statistical matter, what relationship one variable (*i.e.*, religious education) has on others (*i.e.*, academic performance). *Lesson 1: Simple Linear Regression,* Penn State Eberly College Of Science, https://online.stat.psu.edu/stat501/lesson/1 (last visited Sept. 8, 2021). According to Professor Jeynes, the strength of that relationship (*i.e.*, the effect that one variable has on another) is measured by a figure known as the standard deviation unit. Jeynes, Education Policy, at 412. The larger the standard deviation unit, the further the results were from the "mean" or "average" student appearing in the National Education Longitudinal Survey data set. *Id*.; Standard Deviation, Nat'l Library Of Medicine, *see also* https://www.nlm.nih.gov/nichsr/stats_tutorial/section2/mod8_sd.html (last visited Sept. 8, 2021).

According to Professor Jeynes's research, "12th-grade students attending religious schools outperform their counterparts attending nonreligious schools." Educational Policy at 414. The following table indicates this result; the positive standard deviation unit for the "religious school" category demonstrates the extent to which religious-school students outperform their peers in a variety of subjects:

*Effects (in standard deviation units) on the Academic Achievement of 12th-Grade Children Attending a Religious School (in 1992) Versus Children Who Did Not Attend a Religious School Using the No-SES Model (*n = *20,706)*

| *Academic Measure* | *Reading* | *Math* | *Social Studies* | *Science* |
|---|---|---|---|---|
| Intercept | 4.89**** | 5.33**** | 5.45**** | 5.66**** |
| Religious school | .39**** | .40**** | .41**** | .29**** |
| Asian | .13*** | .34**** | .21**** | .09* |
| Hispanic | –.51**** | –.58**** | –.49**** | –.64**** |
| Black | –.70**** | –.80**** | –.65**** | –.91**** |
| Native American | –.61**** | –.65**** | –.67**** | –.66**** |
| Race missing | –.56**** | –.56**** | –.52**** | –.57**** |
| Gender | .29**** | –.09**** | –.29**** | –.29**** |

| *Academic Measure* | *Composite* | *Left Back*[a] | *Basics*[a] |
|---|---|---|---|
| Intercept | 5.11**** | 3.22**** | .39**** |
| Religious school | .43**** | –.21**** | .42**** |
| Asian | .25**** | –.11*** | .28**** |
| Hispanic | –.58**** | .19**** | –.12**** |
| Black | –.80**** | .25**** | –.11**** |
| Native American | –.67**** | .29**** | –.32**** |
| Race missing | –.61**** | .19**** | –.11 |
| Gender | .06*** | –.17**** | .07**** |

*Note*. SES = socioeconomic status.
a. Logistic regression analysis was used.
*$p < .05$. ***$p < .001$. ****$p < .0001$.

*Id.* at 413.

"These results hold," moreover, "even when controlling for" socioeconomic status, which suggests that performance of religious school attendees does not depend on any purported tendency (suggested by some researchers) of religious schools to select for admission high-performing students from higher socioeconomic brackets. Indeed, the largest standard deviation units appear with regard to students from the lowest socioeconomic brackets, which suggests that those students benefit the most from attending religious schools:

*Effects (in standard deviation units) on the Academic Achievement of 12th-Grade Children Attending a Religious School (in 1992) Versus Children Who Did Not Attend a Religious School Using the SES Model (*n = *20,706)*

| *Academic Measure* | *Reading* | *Math* | *Social Studies* | *Science* |
|---|---|---|---|---|
| Intercept | 4.35**** | 4.71**** | 4.87**** | 5.12**** |
| Religious school | .18**** | .16**** | .18**** | .07** |
| SES Quartile 2 | .28**** | .33**** | .32**** | .29**** |
| SES Quartile 3 | .50**** | .58**** | .53**** | .51**** |
| SES Quartile 4 | .92**** | 1.08**** | .99**** | .93**** |
| Asian | .11** | .32**** | .19**** | .06* |
| Hispanic | –.25**** | –.27**** | –.21**** | –.37**** |
| Black | –.47**** | –.53**** | –.41**** | –.68**** |
| Native American | –.37**** | –.37**** | –.42**** | –.42**** |
| Race missing | –.39**** | –.36**** | –.33**** | –.40**** |
| Gender | .22**** | –.07**** | –.14**** | –.27**** |

| *Academic Measure* | *Composite* | *Left Back*[a] | *Basics*[a] |
|---|---|---|---|
| Intercept | 4.49**** | 3.56**** | .12**** |
| Religious school | .43**** | –.11**** | .42**** |
| SES Quartile 2 | .32**** | –.28**** | .17**** |
| SES Quartile 3 | .59**** | –.40**** | .29**** |
| SES Quartile 4 | 1.07**** | –.48**** | .45**** |
| Asian | .23**** | –.11*** | .27**** |
| Hispanic | –.28**** | .19**** | .01 |
| Black | –.54**** | .25**** | .00 |
| Native American | –.40**** | .29**** | –.21**** |
| Race missing | –.40**** | .19**** | –.02 |
| Gender | .08**** | –.17**** | .07**** |

*Note*. SES = socioeconomic status.

a. Logistic regression analysis was used.

*$p < .05$; **$p < .01$. ***$p < .001$. ****$p < .0001$.

*Id.* at 414.

In addition, "[t]he results . . . indicate that Black and Hispanic 12th graders attending religious schools generally do better than do their less religious counterparts":

*Effects (in standard deviation units) on the Academic Achievement of 12th-Grade Black and Hispanic Children Attending a Religious School (in 1992) Versus Children Who Did Not Attend a Religious School, Controlling for Gender and SES (*n = *20,706)*

| *Academic Measure* | *Reading* | *Math* | *Social Studies* | *Science* |
|---|---|---|---|---|
| Intercept | 4.15**** | 4.41**** | 4.64**** | 4.67**** |
| Religious school | .23** | .21** | .26*** | .10 |
| SES Quartile 2 | .23**** | .23**** | .24**** | .22**** |
| SES Quartile 3 | .46**** | .50**** | .46**** | .46**** |
| SES Quartile 4 | .78**** | .91**** | .81**** | .89**** |
| Gender | .15**** | –.07**** | –.15**** | –.29**** |

| *Academic Measure* | *Composite* | *Left Back*[a] | *Basics*[a] |
|---|---|---|---|
| Intercept | 4.22**** | 3.59**** | .10**** |
| Religious school | .24**** | –.15 | .17* |
| SES Quartile 2 | .24**** | –.27**** | .11** |
| SES Quartile 3 | .51**** | –.39**** | .31**** |
| SES Quartile 4 | .90**** | –.44**** | .42**** |
| Gender | .03 | –.22**** | .11** |

*Note*. SES = socioeconomic status.
a. Logistic regression analysis was used.
*$p < .05$. **$p < .01$. ***$p < .001$. ****$p < .0001$.

*Id.* at 415.

And, as noted above, "children from low-SES backgrounds attending religious schools also perform better academically than do their counterparts attending nonreligious schools":

*Effects (in standard deviation units) on the Academic Achievement of 12th-Grade low-SES Children Attending a Religious School (in 1992) Versus Children Who Did Not Attend a Religious School, Controlling for Race and Gender (*n = *20,706)*

| *Academic Measure* | *Reading* | *Math* | *Social Studies* | *Science* |
|---|---|---|---|---|
| Intercept | 4.56**** | 4.93**** | 5.04**** | 5.34**** |
| Religious school | .36**** | .33**** | .31**** | .23**** |
| Asian | .06 | .37**** | .26**** | .02 |
| Hispanic | –.29**** | –.32**** | –.25**** | –.43**** |
| Black | –.53**** | –.59**** | –.46**** | –.75**** |
| Native American | –.40*** | –.35*** | –.40*** | –.49**** |
| Race missing | –.38*** | –.38*** | –.34** | –.44**** |
| Gender | .19**** | –.09**** | –.14**** | –.30**** |

| *Academic Measure* | *Composite* | *Left Back*[a] | *Basics*[a] |
|---|---|---|---|

| | | | |
|---|---|---|---|
| Intercept | 4.72**** | 3.49**** | .19**** |
| Religious school | .37**** | –.27**** | .37**** |
| Asian | .23**** | –.11*** | .49**** |
| Hispanic | –.33**** | .10** | –.02 |
| Black | –.60**** | .21**** | –.02 |
| Native American | –.40**** | .24* | –.17**** |
| Race missing | –.40**** | .10 | –.04 |
| Gender | .05* | –.24**** | .08*** |

*Note*. SES = socioeconomic status.
a. Logistic regression analysis was used.
*$p < .05$. **$p < .01$. ***$p < .001$. ****$p < .0001$.

*Id.* at 416.

Taken as a whole, "[t]he results show that 12th-grade students attending religious schools outperform their counterparts attending nonreligious schools," *id.* at 414, and they "support the notion that religious schools benefit children to an extent that significantly surpasses any explanation that can be attributed to racial and socioeconomic factors alone," *id.* at 414-15.

These standard deviation changes translate neatly into increased test scores. In 2007, Professor Jeynes published additional findings in an article titled "Religion, Intact Families, and the Achievement Gap," which appeared in the Interdisciplinary Journal of Research on Religion. There, Professor Jeynes reported that children in the lowest socioeconomic quartile who attend religious schools score 7.6 percent higher on reading achievement tests; 7.0 percent higher on math achievement tests; 6.8 percent higher on social studies achievement tests; and 5.4 percent higher on science achievement tests than their counterparts at nonreligious schools. Jeynes, Religion, Intact Families, and the Achievement Gap, 3

Interdisciplinary Journal of Research on Religion at 5 (2007).

In that same paper, Professor Jeynes also examined the way in which attendance at religious schools affects the test scores of African American and Latino students. Without controlling for socioeconomic status and gender, Professor Jeynes reported that African American and Latino students scored more than 8 percent higher on reading, math, and social-studies achievement tests, while scoring 6 percent higher on science achievement tests. *Id.* at 6. When controlling for socioeconomic status and gender, these same students scored 4.6 percent higher on reading achievement tests, 4.2 percent higher on math achievement tests, 5.2 percent higher on social studies achievement tests, and 2.0 percent higher on science achievement tests. *Id.* at 6.

Respondent contends that Maine's "tuition program is the result of a specific legislative determination that a sectarian education is not equivalent to a public education." Resp't.'s Br. at 19. But social science suggests that, if anything, the benefits of religious education far exceed the benefits that flow from non-religious schools. This is evident when comparing the average sectarian-school student with the average non-sectarian school student. And the benefits become more pronounced for students from families in lower socioeconomic brackets and for students of color. In other words, Maine's decision to foreclose the ability of families to direct the education of their children by selecting religious schools when availing themselves of the

State's student-aid program not only violates the U.S. Constitution (for the reasons discussed above); it also deprives the State of a way to close educational performance gaps that have remained stubbornly persistent for decades.

## CONCLUSION

The decision below should be reversed, and this Court should declare that the use-status distinction is contrary to the text and original public understanding of the Free Exercise Clause and inconsistent with the history and time-honored tradition of American education. It should also affirm parents' important interests in sending their children to private religious schools that consistently outperform their secular counterparts.

*Respectfully submitted,*

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