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 FOR HILLSDALE COLLEGE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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## INTEREST OF AMICUS CURIAE[1]

Hillsdale College is a small Christian liberal arts college located in southern Michigan. From its foundation in 1844, the College has existed to diffuse the "sound learning ... essential" to "the prevalence of civil and religious liberty and intelligent piety in the land."[2]

Since its beginning, Hillsdale College has been convinced that freedom from certain sorts of government control is necessary for the propagation of this sound learning. That is why, when the College learned in 1984 that its students' receipt of federal student aid opened it to government direction to adopt policies antithetical to its long-cherished beliefs, Hillsdale became one of a very few American colleges to reject federal funding, replacing its students' erstwhile federal aid with private scholarships and other forms of private aid.

In this case another government attempts to exercise another mechanism of control over education. Hillsdale College, having thought much on these issues, submits this brief to clarify the interests at stake in this case.

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[1] Pursuant to Rule 37.3, all parties consent to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no person other than amicus curiae has made a monetary contribution to fund its preparation or submission.

[2] Hillsdale College, Articles of Ass'n, https://www.hillsdale.edu/about/history/founding-documents/.

## SUMMARY OF ARGUMENT

Many cases present this Court with a conflict between strong protected rights and interests. But this case does not. Here, the plaintiffs seek to vindicate a right and responsibility that this Court has recognized as at the absolute core of the American tradition of ordered liberty: the interest in the religious education of one's own children. And the state has no interest at all to put down on the opposite side of the ledger.

The plaintiffs' interest is easy to see, for, as this Court has long and often recognized, the right to direct the education of one's children, and especially their religious education, is at the heart of our "enduring American tradition." *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020). So is the protection afforded to that right. Just last year, this Court applied "strictest scrutiny," *id.* at 2257, to a law that allowed parents to spend state tuition aid at a school of their choosing so long as that school was not religious. The same standard should apply to a law that allows parents to spend aid at a school of their choosing so long as that school's *instruction* is not religious.

The state's interest is harder to find. It cannot be in preventing an establishment of religion, since under this Court's case law a parent's selection of a school, in the context of a program of private choice, places no state *imprimatur* on the school's religious character or activities. And the state has no other valid interests in play. Maine claims a compelling interest in uniformity

between the education a child receives in public school and in a private school funded by its program, but the reason Maine's public schools must not teach religion—that those schools speak for the state—does not apply to education in private school.

The principal purpose of this brief is to explain that this Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), which has sometimes been a source of confusion, does not establish a freestanding state interest in singling out the study of religion for disfavor in a program of private choice. To the contrary, it shows that no such interest exists. At issue in *Locke* was not which subjects the plaintiff could use state funds to study, but which career he could use those funds to pursue. The state interest upheld there was in declining to lend material support to becoming a pastor, something the Court grouped alongside state support for building churches or compelling attendance at church. That case had nothing to do with which subjects the plaintiff could study on state funds; indeed, the law at issue in *Locke* actually *permitted* state support for just the sort of education that the plaintiffs here desire for their children, and the Court heavily relied on this fact in holding that the law did not violate the Free Exercise Clause.

## ARGUMENT

### I. PARENTS' FUNDAMENTAL INTEREST IN DIRECTING THEIR CHILDREN'S RELIGIOUS EDUCATION REQUIRES STRICT SCRUTINY OF STATE MEASURES THAT DISFAVOR IT.

The "primary role of the parents in the upbringing of their children is" both "an enduring American tradition" and a core strand of the "culture of Western civilization." *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972). That is why this Court has long recognized "the right, coupled with the high duty," of parents to direct the education of their children. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). Pursuant to that right and duty, parents have a particularly "fundamental interest" in "guid[ing] the religious future and education of their children." *Yoder*, 406 U.S. at 232. That interest is all the more powerful when, as so often and as in this case, the parents' own religious commitments prompt them to seek to educate their children in a particular faith.

The parents' interest stands in marked contrast to that of the state, which under the United States Constitution has no power to "standardize its children" through education. *Id.* at 233. In particular, the state has no legitimate interest in "influenc[ing] … the religious future of the child." *Id.* at 232. That responsibility rests with the parents and those to whom they may choose to entrust it.

As the Court has recently noted, "[m]any parents exercise" their right to direct their children's religious

education and to exercise their own religion "by sending their children to religious schools." *Espinoza*, 140 S. Ct. at 2261. The Constitution protects that choice. When a state singles out and disfavors parents' choice of a school on account of the school's religious character, strict scrutiny is appropriate. That includes when a state offers tuition benefits for a secular school of a parent's choosing but not for a religious one. Such a policy "penalizes [the parental] decision by cutting families off from otherwise available benefits" and may be sustained only by the most compelling of state interests. *Id.*

Many parents also discharge their educational responsibilities by selecting a school that teaches religion. For these parents, the point of their choice is not (or not only) the school's religious identity, but the religious content of the instruction it gives. This choice is rooted in the same "fundamental interest," *Yoder*, 406 U.S. at 232, as that which prompts parents to seek out schools with a religious identity.

It is easy to see why some parents make that choice, for the content of an elementary or secondary school education can exercise profound influence on a child's character; her notions of right and wrong; and her view of the goal of life. For instance, schools that Maine *actually approved* for participation in the tuition assistance program at issue in this case aim to teach their students about living virtuously;[3] to

[3] *See* Maine Dep't of Educ., Private Schools Approved for the Receipt of Public Funds from Maine School Units Pursuant to 20-

identify and promote particular values;[4] and to offer their students a vision of the good life.[5] These are all questions about which many religions have much to say, and it is only natural that some parents would choose to have these questions taught from the perspective or against the background of their religious beliefs.

Yet Maine seeks to keep plaintiffs from that choice by forbidding use of its tuition assistance program at schools that teach religion. Religion is the *only* subject thus singled out for disfavor. Maine law sets forth a few affirmative curricular requirements for schools that wish to participate in its tuition assistance

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A MRSA Chapter 117, Sub-chapter 2 ("Approved Private Schools"), https://www.maine.gov/doe/sites/maine.gov.doe/files/inline-files/FY21_PrivateSchoolsApprovedTuition_27May2021.pdf (last accessed Sept. 6, 2021) (listing, Berwick Academy as an approved school); Berwick Academy, Homepage, https://www.berwickacademy.org/#/ (last accessed Sept. 6, 2021) (explaining that Berwick Academy "is dedicated to promoting virtue … among the rising generations").

[4] *See* Approved Private Schools (listing Thornton Academy as an approved school); Thornton Academy, About Us, https://www.thorntonacademy.org/about-us (last accessed Sept. 6, 2021) (explaining that the school promotes values such as the "Core Pillars — Respect, Responsibility, Compassion, and Investment").

[5] *See* Approved Private Schools (listing Lincoln Academy as an approved school); Lincoln Academy, Mission, https://www.lincolnacademy.org/about-la/mission/ (last accessed Sept. 6, 2021) (explaining that the school seeks to help students "develop traits that will strengthen future relationships and [their] ability to lead fulfilling lives").

program; they must, for instance, teach American and Maine history and offer physical education. *See* Me. Stat. 20-A §§ 2702, 4706, 4723. But it does not ban the subjects that it does not require. This means that parents are free to seek out schools that offer instruction in the subject matters of interest to them and their children. They can enroll their children in schools that offer classes in languages of their choice; that specialize in science, technology, or the arts; or that focus on one or more cultures. They can select schools that teach from any number of ideological perspectives. And, as noted above, they can choose schools that teach specific values, norms of personal conduct, or visions of a good human life.[6] The one subject off the table is religion.

The plaintiffs in this case seek to vindicate the same interest as at issue in *Espinoza*: the "fundamental interest" in directing the religious education of their children. They seek to do so in a similar kind of program as at issue in *Espinoza*: a tuition assistance program of private choice. And just as in *Espinoza*, the state has attached conditions to participation in the program that disfavor religion and only religion. Under this Court's case law, strict scrutiny is required when a law "treat[s] *any*

[6] Maine interprets its law to prohibit use of tuition assistance at schools that teach a "belief system." Pet. App. 35. It is impossible to say what, if any, subject matters in addition to religion might fall within the ban on teaching "belief systems," but it is clear from actual practice that Maine permits use of tuition assistance at schools that teach personal values, etc.

comparable secular activity more favorably than religious exercise," *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam), but Maine's law treats *every* other sort of teaching more favorably than teaching about religion.[7] Strict scrutiny is more than warranted.

## II. THE STATE HAS NO LEGITIMATE INTEREST IN DISFAVORING RELIGIOUS INSTRUCTION.

The "strictest scrutiny" applicable here may be satisfied only if the Maine law "advance[s] interests of the highest order and … [is] narrowly tailored in pursuit of those interests." *Espinoza*, 140 S. Ct. at 2260 (internal quotation marks omitted). This Court has explained that laws singling out religious conduct for adverse treatment "will survive strict scrutiny only in rare cases." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). The Maine law cannot survive because Maine has *no* legitimate interest—let alone a "compelling" one as this Court requires, *id.*—in singling out religious instruction for disfavor.

Maine asserts a "compelling interest in ensuring that the instruction students receive at … private schools is the substantive equivalent of what students would have received if they attended a public school." Br. in Opp. i. But that is a policy decision, not an interest; it does not explain *why* such equivalence is

[7] It also therefore treats every other parental choice of a school more favorably than a parental choice of a school that teaches religion.

something Maine may legitimately seek. To evaluate Maine's assertion, we must ask two questions: what are the reasons public schools may not offer religious instruction, and do those reasons apply in the context of students whose parents choose to enroll them at private schools in programs of private choice?

The answer to the first question is that public schools may not teach religion because they are public. They are instrumentalities of the state and, as such, are subject to the Establishment Clause. That is why this Court has long forbidden public schools to "advance[ ] … religious doctrine." *Edwards* v. *Aguillard*, 482 U.S. 578, 596 (1997). The root of the state's interest in declining to teach religion in public schools is that the schools speak for the state.

But that is not true of schools that students attend under Maine's tuition assistance program. No one disputes that these schools, being private, are not state actors. Nor does Maine endorse the content of the instruction these schools offer, for the schools are selected by Mainer families, not by Maine. Few aspects of this Court's First Amendment case law are more settled than that the interposition of such private choice removes, in both reality and appearance, "the *imprimatur* of government endorsement" of a school's religion. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 649 (2002).[8] Because

[8] *See also Zelman*, 536 U.S. at 655 ("no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous

any religious instruction offered by the private schools participating in the tuition assistance program is not and under this Court's case law cannot reasonably be construed as the state's, the state lacks a legitimate interest in pursuing there the anti-establishment measures that may be necessary in the public-school context.

For the same reasons, Maine cannot claim any interest in declining to subsidize instrumentalities of the propagation of religion, as if it were being asked to erect churches. For "neutral government program[s]" like Maine's "dispens[e] aid not to schools but to individual … children," *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993), whose families then decide where to spend it. That is why this case does not present the specter of state subsidies for "the religious functions of [a religious] institution." *Witters* v. *Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 489 (1986). If anyone is subsidizing instrumentalities of religion here, it is the plaintiffs, *see id.*, and Maine lacks any legitimate interest in deterring them from doing so.

Maine certainly lacks a freestanding interest in discouraging religious instruction that does not constitute or indicate state support for religion. After all, the First Amendment's "guarantee … is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including

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independent decisions of private individuals, carries with it the *imprimatur* of government endorsement").

religious ones, are broad and diverse." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995). More fundamentally, as we noted above, the state has no legitimate interest in "influenc[ing] … the religious future" of its children. *Yoder*, 406 U.S. at 232. Aside from its interest in avoiding establishing a religion, Maine simply has no permissible reason to seek to stop a child from receiving religious instruction, including in schools that it partially funds. Indeed, it is hard to imagine how a state could ever have a valid interest in objecting to receipt of religious instruction, and its interest in not being the religious instructor is not in play here.

The answer to the second question, then, must be: the reasons that public schools may not teach religion do not apply in the context of private schools accepting funds under Maine's tuition assistance program. Because those reasons do not apply, Maine has failed to offer any legitimate interest in preventing religious instruction in the private schools that families choose for their children. At the very least, Maine's interests, whatever they may be, "cannot qualify as compelling in the face of the infringement of free exercise here." *Espinoza*, 140 S. Ct. at 2260 (internal quotation marks omitted).

## III. THIS COURT'S DECISION IN *LOCKE* V. *DAVEY* DOES NOT GIVE MAINE AN ANTI-ESTABLISHMENT INTEREST TO INVOKE.

This Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), is sometimes read to stand for the notion that states have an anti-establishment interest in

disfavoring (some or all) religious instruction even in programs of private choice. But a proper understanding of that case shows that it supports the argument we have advanced here. *Locke* upheld a state's decision not to lend material support to religious ministers to equip them for the ministry. Far from indicating a compelling state interest in forbidding participants in state programs of private choice from studying religious subject matter, *Locke* heavily relied on the fact that state funds *could be used* for such instruction en route to its holding that the law complied with the Free Exercise Clause.

At issue in *Locke* was a Washington state program that offered scholarships for post-secondary educational expenses, including tuition, on a combined basis of merit and financial need. 540 U.S. at 716. Plaintiff Joshua Davey qualified for the scholarship and opted to use it to pay for education at a Christian college that required all its students to take classes in religion. *See id.* at 724–25. But when he sought to pursue a degree in pastoral ministries so that he could serve as a church pastor, he discovered that Washington law forbade the use of scholarship funds in pursuing degrees in "devotional theology." *Id.* at 716–17. Davey then challenged the restriction under the Free Exercise Clause.

This Court upheld the Washington law. The Court acknowledged that laws that are not "facially neutral with respect to religion" are typically "presumptively unconstitutional." *Id.* at 720. But it declined to apply that presumption in Davey's case because Washington

had "merely chosen not to fund a distinct category of instruction"—that is, "training for religious professions." *Id.* at 721. This decision was permissible, the Court explained, because in the United States there was a long tradition of refusing to support individuals in becoming or remaining religious ministers. *Id.* at 722. Indeed, taxpayer financial support of ministers "was one of the hallmarks" of the maintenance of official state churches in the Old World and the colonies, against which many early American states enacted constitutional prohibitions. *Id.* Washington's interest in withholding state support for Davey's efforts to become a minister was therefore "substantial." *Id.* at 725.

Moreover, the Washington law narrowly targeted this interest in withholding state support for becoming a minister. The Court explained that the Washington scholarship could be used to attend "pervasively" religious colleges and, under Washington's interpretation of its law, could even be used for classes in devotional theology so long as the student did not pursue a devotional theology degree. *See id.* at 724–25. The availability of the scholarship for these uses convinced the Court that the Washington law did not "evinc[e] … hostility toward religion." *Id.* at 724. In light of that absence of hostility and the state's substantial interest in withholding its support from ministers, the Court found the Washington law permissible under the Free Exercise Clause. *See id.* at 725.

Justices of this Court have maintained, both at the time of decision and more recently, that *Locke* was wrongly decided. They have criticized its understanding both of the Free Exercise Clause[9] and of the asserted anti-establishment interests underlying its analysis.[10] Furthermore, *Locke* has occasioned considerable confusion by, for instance, leaving unclear whether it applied a degree of scrutiny less than strict or found that Washington's law satisfied strict scrutiny.

But one thing at least is clear: *Locke* does not stand for the proposition that a state has any interest, much less a compelling one, in singling out religious instruction for disfavor in programs of private choice. In fact, *Locke* simply did not involve any distinction between instruction in religious and non-religious subject matter. Unlike the Maine law here, the Washington law *permitted* use of state funding for religious instruction. The Washington scholarship could be used for attendance at "pervasively religious schools," where "*all* … students, through instruction, through modeling, [and] through … classes" received religious instruction. *Id.* at 724 (emphasis and second alteration in original; internal quotation marks omitted). Even more significantly, the scholarship could be used to take courses *in devotional theology*. *Id.* at 725. Had Davey not pursued a devotional theological major, the scholarship funds he would have received would have covered his attendance at classes

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[9] *See Locke*, 540 U.S. at 726–27 (Scalia, J., dissenting).

[10] *See Espinoza*, 140 S. Ct. at 2265 (Thomas, J., concurring).

in devotional theology. *See id.* Excluding instruction in religious subject matter from a program of private choice, then, was just not in the cards in *Locke*. Indeed, this Court heavily relied on that fact, explaining that the Washington law did not "evinc[e] … hostility toward religion" precisely because it allowed use of its scholarship to study religious subject matter at schools that taught religion. *Id.* at 724–25.

At issue in *Locke* was not which subjects the plaintiff could study using state funds, but which career he could pursue. That is because pursuing a devotional theological *degree* (rather than just receiving instruction in it as a subject) is preparation for the ministry. *Id.* at 719. Davey wanted to be a pastor, and Washington declined to help him become one. *Id.* at 717, 719. That is how this Court has read *Locke*: "Davey 'was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry.'" *Espinoza*, 140 S. Ct. at 2257 (quoting *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2023–24 (2017)) (emphasis in original). The issue in *Locke* was state support for becoming a minister, not for studying religion.

As the *Locke* Court understood it, the Washington law had more in common with early American bans on paying the salaries of ministers, using tax funds to build churches, or compelling people to attend church against their will, *see* 540 U.S. at 723 (citing bans on

these policies), than with the Maine law here.[11] Indeed, *Locke* is not an education case at all except accidentally; it could just as easily have been about, for instance, anti-glebe laws.[12] The state's interest in avoiding the sort of material support to ministry against which early Americans protested is simply irrelevant to whether a state has an interest in singling out the study of religious subject matter for disfavor under a program of private choice. To answer that question, we must turn to this Court's line of cases applying the Religion Clauses in the school context, and as we have suggested above, the answer under those cases is clear.

There is no hint that the *Locke* Court would have treated Maine's law like a law withholding state support for becoming a minister. Indeed, all indications are to the contrary, especially the Court's express reliance on the Washington law's coverage of instruction in religious subject matter. *See id*. at 724–25. Recipients of the scholarship in *Locke* were eligible to attend just the sorts of schools and take just the sorts of religious courses that the plaintiffs in this case wish their children to attend and take. And there is, of course, no suggestion that the plaintiffs' children in

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[11] Of course, that is not to say that the *Locke* Court was right to assess that Washington's law was drawn to addressing bona fide anti-establishment interests. *See, e.g.*, *Espinoza*, 140 S. Ct. at 2265 (Thomas, J., concurring).

[12] *See, e.g.*, Va. Code § 57-3 (1919) (appropriating glebe lands).

this case will become ministers by virtue of attending secondary schools that teach religion.

For these reasons, *Locke* does not support the notion that a state has a valid interest in trying to steer state funding recipients away from the study of religious subject matter. If anything, it stands for the contrary proposition: laws that discriminate against the study of religious subject matter evince the hostility toward religion that this Court has often made clear is prohibited by the Free Exercise Clause.

In any event, this Court in *Trinity Lutheran* was perfectly clear that the state interest at play in *Locke* may justify only state measures that do not require a choice "between … religious beliefs and receiving a government benefit." *Trinity Lutheran*, 137 S. Ct. at 2023. Thus, even if the interest in *Locke* were, contrary to fact, an interest in preventing the use of state funds from a program of private choice for religious study, that interest is not enough to "qualify as compelling in the face of the infringement of free exercise here." *Espinoza*, 140 S. Ct. at 2260 (internal quotation marks omitted).

## CONCLUSION

This Court should reverse the decision below.

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Respectfully submitted,

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