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* FREEDOM X IN SUPPORT OF PETITIONERS

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September 10, 2021

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STATEMENT OF INTEREST[1]

Freedom X is a public interest law firm devoted to protecting and expanding religious liberty and free expression. It represents students who challenge constraints on their political and religious activity. Freedom X and its supporters are vitally interested in this case, as Maine coerces students by forcing them to choose between the substantial economic benefit they deserve to receive and the religious activity they wish to pursue. A successful outcome in this case will ensure not only funding for Maine students who live in districts without a public school, but also protections for students nationwide whose expression is stifled by religious and political intolerance.

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[1] *Amicus* files this brief with all parties' consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

SUMMARY OF ARGUMENT

This case offers the Court the opportunity to decide whether to extend the rule barring discrimination based on religious status to discrimination based on religious use. *Espinoza v. Montana Dept. of Rev.*, 140 S.Ct. 2226, 2257 (2020). This Court might also decide whether to extend—or overrule—*Locke v. Davey*, 540 U.S. 712 (2004). But this Court need neither extend nor overrule precedent to resolve this case. This Court can invalidate the exclusion of religious schools from Maine's tuition assistance program by applying extant caselaw.

Though the government does not infringe a constitutional right just because it declines to subsidize its exercise (*Rust v. Sullivan,* 500 U.S. 173, 193 (1991); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983)), the government may not penalize the exercise of the right. *Agency for Intl. Dev.v. Alliance for Open Soc'y Intl.*, 570 U.S. 205, 214 (2013) (*AID*); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The First Circuit found there was no constitutional violation because Maine simply *refused to subsidize* religious activity and did not *penalize* it. *Carson as next friend of O.C. v. Makin*, 979 F.3d 21, 41-42 (1st. Cir. 2020), citing *Regan* at 549. This was incorrect. Because students at religious schools receive all the secular instruction prescribed by the state's curriculum, and are denied funding only because, in addition to the prescribed secular instruction, they *also* engage in religious activity, the funding denial acts as a penalty, and therefore imposes an unconstitutional condition.

The State may constitutionally pursue its goals by subsidizing certain activities without subsidizing alternatives. E.g. *U.S. v. American Library Assn*. 539 U.S. 194, 211-12 (2003); *Rust*, 500 U.S. 173, 192; *Maher v. Roe*, 432 U.S. 464, 474 (1977). So a State may decide to subsidize clothing for needy families but refuse to subsidize religious garments like hijabs or *tallitot*. Cf. *Locke*, 540 U.S. at 721: "The State has merely chosen not to fund a distinct category of instruction." But the State may not deprive an individual of a benefit he would otherwise receive just because he *also* exercises a constitutional right. *AID*, 570 U.S. 205; *Perry*, 408 U.S. 593 (1972). It would thus be an unconstitutional *penalty* if families who purchased a religious garment not only lacked a subsidy for it but also lost the subsidy for the shirts, pants, and shoes they would otherwise receive.

That is what happens in Maine. Reading, writing, and arithmetic are the shirts, pants, and shoes, and families forfeit subsidies for such instruction because schools *also* engage in protected First Amendment activity. That is unconstitutional. *AID*, 570 U.S. 205; *Perry*, 408 U.S. 593. A similar defect invalidated a comparable program in Vermont. *A.H. by and through Hester v. French*, 985 F.3d 165 (2d. Cir. 2021).

This is not a case where the protected activity of religion would "undermine" the encouraged activity of secular instruction. *AID*, 570 U.S. 205, 220. This Court has upheld conditions disfavoring activities where they were mutually exclusive to the subsidized activity. *American Library Assn*., 539 U.S. 194; *Rust*, 500 U.S. 173; *Regan*, 461 U.S. 540; *Maher*, 432 U.S. 464. But it has struck down conditions where the protected

activity did not undermine the encouraged activity. *AID*, 570 U.S. 205, 220; *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 388-99 (1984); *Perry*, 408 U.S. 593. Because religious schools provide the same quality of secular instruction as other schools, and do not seek extra funding, the schools' *additional* activity of religion does not undermine the program. "[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose . . . any aid going to a religious recipient *only has the effect of furthering that secular purpose*." *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (emphasis added).

Opponents of a more inclusive program contend that including religious schools will undermine neutrality (*Carson*, 979 F.3d at 42) and create divisiveness (*Espinoza*, 120 S.Ct. at 2282 (Breyer, J., dissenting)). To the contrary, a broader program will ensure "religious preference is not a factor" in students' access to education. Many schools fail to accommodate the sabbaths and religious holidays of minority religions, so their observers confront a substantial disadvantage, and may need to renounce their religious observance to "participate in an otherwise generally available" school activity. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2024 (2017). Including schools that accommodate the schedules of Saturday sabbath-observers will enable such students to make decisions free from external pressure, and receive the full range of educational opportunities available to everyone else, without regard to their religious preference.

Nor will their inclusion foster religious divisiveness. See e.g. *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 8-13 (1947). It violates the Establishment Clause to allocate resources by a majority vote, whereby the adherents of the majority faith can "effectively silence[]" others. *Santa Fe Ind. Schl. Dist. v. Doe*, 530 U.S. 290, 304 (2000). But where resources are distributed equally to "religious, irreligious, and areligious" alike, through "numerous independent and private choices," the government cannot easily grant special favors that might lead to a religious establishment. *Mitchell*, 530 U.S. 793, 809-10.

Maine's program legitimately promotes secular education but illegitimately suppresses religious activity. Excluding accredited schools that provide full secular instruction from the program because they *also* engage in religious activity creates an unconstitutional penalty on religious exercise. Students attending religious schools ask not for a carrot of subsidy with which to practice their religion, but to avoid the stick of penalty for doing so.

ARGUMENT

Maine imposes an unconstitutional condition because it does not merely refuse to subsidize religious activity but affirmatively penalizes it.

The exclusion of religious schools from Maine's program violates the unconstitutional conditions doctrine. Though the State may subsidize some activities without subsidizing others (*Rust,* 500 U.S. 173, 193; *Regan*, 461 U.S. 540, 549), it may not deny a benefit on a basis that infringes a constitutional right. *AID.*, 570 U.S. 205, 214; *Perry v. Sindermann*, 408 U.S. 593, 597. The First Circuit found there was no constitutional violation because Maine simply *refused to subsidize* religious activity and did not *penalize* it. *Carson*, 979 F.3d 21, 41-42, citing *Regan* at 549. This was incorrect. Because students at religious schools receive all the secular instruction prescribed by the state's curriculum, and are denied funding only because, in addition to the prescribed secular instruction, they *also* engage in religious activity, the funding denial acts as a penalty, and therefore imposes an unconstitutional condition.

The State may selectively fund certain programs to address an issue of public concern without funding alternative ways of addressing that concern. *AID*, 570 U.S. at 217. The State may fund childbirth and not abortion (*Maher*, 432 U.S. 464, 474), *advice* about childbirth over abortion advice (*Rust*, 500 U.S. 173, 192), non-lobbying activity over lobbying (*Regan*, 461 U.S. 540, 549), and non-pornographic speech over pornographic speech (*American Library Assn*. 539 U.S. 194, 211-12). But the State may not deprive an

individual of a benefit he would otherwise receive just because he *also* exercises a constitutional right. *AID*, 570 U.S. 205; *Perry*, 408 U.S. 593. The government in *AID* could not withhold from an organization funds it would otherwise receive just because it *also* exercised its right not to speak. And the college in *Perry* could not deny a teacher employment just because he *also* exercised his right to speak.

Perry signals the limits of *Locke v. Davey,* 540 U.S. 712. If Washington could decide to fund degrees in medicine or computer science but not theology, the college in *Perry* could presumably decide to replace faculty teaching Social Science or Government with other faculty teaching Physical Science or Engineering. But it could not deny a teacher his position, when he was properly fulfilling all his duties, just because he *also* engaged in First Amendment activity, whether political speech, prayer, or religious study. Petitioners do not seek what was rejected in *Locke*, funding for religious instruction *instead of* secular instruction; they seek only the same subsidy for secular instruction provided to every other student in the program. That religious schools also engage in prayer or Bible study does not disqualify them from participation.

The same would be true outside education. A State could decide to subsidize clothing for needy families but refuse to subsidize religious garments like a hijab or tallit. Cf. *Locke*, 540 at 721: "The State has merely chosen not to fund a distinct category of instruction." But it would be an unconstitutional *penalty* if families that purchased one not only lacked a subsidy for the

religious garment but also lost the subsidy for the shirts, pants, and shoes they would otherwise receive.

Reading, writing, and arithmetic are the shirts, pants, and shoes, and families forfeit subsidies for such instruction because schools *also* engage in protected First Amendment activity. That is unconstitutional. *AID*, 570 U.S. 205; *Perry*, 408 U.S. 593.

Though the First Circuit justified excluding religious schools from the program by citing Maine's "interest in concentrating limited state funds on its goal of providing secular education" (*Carson*, 979 F.3d at 47, internal citation omitted), their inclusion would not impinge on that interest. Nothing in the record suggests accredited religious schools provide substandard secular instruction, so their inclusion would fully serve Maine's interest in providing secular education. See *Bd. of Ed. of Cent. Schl. Dist No. 1. v. Allen*, 392 U.S. 236, 248 (1968): religious schools "are performing, in addition to their sectarian function, the task of secular education." And Maine would spend no more per capita to send students to religious schools than secular ones, so it would not provide a "financial incentive for students to undertake sectarian education" through "broader benefits" than those available to students attending secular schools. See *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 488 (1986). No constitutional ground justifies the religious schools' exclusion.

A. Aid recipients do not forfeit funding for encouraged activity by engaging in protected activity.

The Court's most recent guidance on distinguishing constitutional from unconstitutional conditions focused on the distinction between conditions that "specify the activities [the State] wants to subsidize" and conditions that "seek to leverage funding to regulate speech outside the contours of the program itself." *AID*, 570 U.S. at 214-15. The Court recognized States can manipulate the "definition of a particular program" to subsume any condition, so it refused to rubber-stamp any definition offered by the Government to defend its condition, lest semantics eliminate First Amendment protections. *Id*. at 215. The activity Congress wished to subsidize in *AID* was "combat[ting] HIV/AIDS around the world," and the disputed condition demanded recipients affirmatively endorse the Government's prostitution policy. *Id*. at 209-10. This went beyond furthering the particular program of combatting HIV/AIDS and instead imposed an "ongoing condition on recipients' speech and activities" that could not be "confined within the scope of the Government program." *Id*. at 218, 221. The condition therefore violated the First Amendment. *Id.*

The instant activity Maine wishes to subsidize is *instruction in secular subjects*. So long as a religious school properly fulfills that task, Maine has no more legitimate role in regulating schools' religious exercise than Congress had in regulating the recipients' speech in *AID*. The same was true in *Perry*; so long as the teacher properly instructed students on Government

and Social Science, his additional First Amendment activity could not justify his termination. *Perry*, 408 U.S. at 598. *Perry* was an easier case than *AID*, where the condition might have been "relevant to the objectives of the program," but such relevance does not guarantee the condition's constitutionality. *AID,* 570 U.S. at 214. The instant condition, that religious schools suppress all religious activity (even if privately funded) to receive the subsidy for secular instruction, exceeds any condition upheld by this Court.

There is a basic difference between *encouraging* an activity deemed to be in the public interest and *directly interfering* with a protected alternative, so the State may subsidize childbirth without equally subsidizing abortion. *Maher*, 432 U.S. 464, 475 (1977). The State may likewise subsidize *advice* about childbirth without subsidizing advice about abortion. *Rust,* 500 U.S. at 192-94 (rejecting the view that "if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights.") And a decision to subsidize access to library "material of requisite and appropriate quality for education purposes" does not entail a State duty to fund access to pornography. *American Library Assn.*, 539 U.S. 194, 211-12. These cases might support the result in *Locke*, 540 U.S. 712, allowing states to fund secular but not religious education.

But they do not authorize *penalties* for engaging in constitutionally protected activity. Though the State could confine its library subsidies to educational materials (and not pornography), it would be different if a library denied a visitor equal access to educational

materials at the library because he viewed pornography on his home computer. Similarly, *Maher* would have been a different case if it had considered the current technology that enables pregnant women to abort one twin and deliver the other. Though the State could decline to subsidize the abortion, it would be different if a woman who had undergone an (unsubsidized) abortion then was denied funding for childbirth because she had aborted her other child. And although Congress declined to subsidize indecent art in *NEA v. Finley*, 524 U.S. 569 (1998), artists could produce such work (without subsidy) and still receive subsidies for projects that qualified as decent. Moreover, religion warrants neutrality in a way abortion does not. *Colorado Christian Univ. v. Weaver*, 544 F.3d 1245, 1260 (10th Cir. 2008).

The Court has thus ensured parties do not lose access to subsidies for encouraged activity due to their (unsubsidized) protected activity. In *Regan*, 461 U.S. 540, 544, Congress could constitutionally confine subsidies (tax deductions) for charitable organizations to their non-lobbying activities because the organizations could create a legal structure permitting them to engage in (unsubsidized) lobbying. Recipients of funds in *Rust* could continue to advise about (or perform) abortions through other (unsubsidized) programs. *Rust*, 500 U.S. at 196. Because these organizations could receive the subsidy for the encouraged activity without having to abandon the protected activity, the State was not "leverag[ing] funding to regulate speech outside the contours of the program itself." *AID*, 570 U.S. at 214-15.

Such leveraging occurred in *AID*. The organizations provided full value to the Government in using the funds they received to further the goal of combatting HIV/AIDS. Their silence regarding prostitution did not cost the Government one dime, so there was no plausible concern that federal funds were being misdirected to support the protected but not encouraged activity of nonendorsement.

The *AID* court expressly addressed—and rejected—the concern that recipients would use federal funds to promote prostitution despite the Government's opposition. *AID*, 570 U.S. at 220. The Government's argument rested on the premise that its funding would "simply supplant private funding," rather than pay for new programs or expand existing ones. *Id*. But no evidence supported such speculation, and the Court found no reason to believe it was true. *Id*. Here, affirmative evidence shows religious schools will use public funds to pay for new programs or expand existing ones — i.e. by instructing *new students* attending through the program, who would not otherwise attend. State funding will not simply supplant private funding; not all students who currently attend (or wish to) will be able to participate in the program and receive funding, as many districts have a public school. Currently attending students, therefore, will not necessarily be able to draw on State funds to replace their current tuition payments.

The instant program suffers from the defect that was fatal in *League of Women Voters*, 468 U.S. 364. Broadcast stations that received any federal grant (regardless of its size) were "barred absolutely from all

editorializing." *Id*. at 400. The condition did not merely "specify the activities Congress wants to subsidize"; by conditioning the grant on the complete absence of editorials, it "leverage[d] funding to regulate speech." *AID*, 570 U.S. at 214-215. More importantly, unlike the organizations in *Regan*, 461 U.S. 540, and *Rust*, 500 U.S. 173, recipients were "barred from using even wholly private funds to finance its [protected] activity." *League of Women Voters* at 400.

Maine imposes a comparable restriction. If religious schools accept *any* funds from the State, they may not use even private funds to engage in religious activity. The State is seeking not only to promote secular education but also to *suppress religious activity*. Maine is thus leveraging its funding to regulate schools' speech. That resembles the unconstitutional conditions in *AID* and *League of Women Voters*, not the constitutional ones in *Rust* and *Regan*.

The Second Circuit recently addressed a program similar to Maine's. *A.H.*, 985 F.3d 165. Like Maine, Vermont subsidizes private education for students whose district does not maintain a public high school, and the State further subsidizes college-level study for qualified students. *Id*. at 170-71. However, Vermont's college subsidies benefit only students whose secondary education is state-funded. *Id*. In other words, like the family denied funding for both a religious garment and the other clothing provided to everyone else, students attending religious high schools are denied funding both for their secondary education and their (secular) college-level study. The Second Circuit found that in forcing parents to choose between religious exercise

and receiving otherwise available benefits, Vermont imposed a "penalty on the free exercise of religion." *Id.* at 180, citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 (2017).

Vermont did more than refuse to subsidize religious education; it affirmatively penalized it. Maine presents the same choice between religious exercise and an otherwise available benefit, and likewise imposes an unconstitutional penalty.

B. Schools' religious activity does not undermine their secular instruction

When the State disburses public funds to private entities, it may take steps to ensure its message is not garbled. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), citing *Rust*, 500 U.S. 173, 196-200. A possible justification for the *AID* condition was that recipients' silence regarding prostitution could "undermine" their task in combatting HIV/AIDS. *AID*, 570 U.S. 205, 220. The Court concluded it would not. *Id.*

Where funding conditions were necessary to ensure protected activity did not undermine encouraged activity, this Court has upheld the conditions. Because (at least with a single pregnancy) childbirth and abortion are mutually exclusive options, every abortion would have the effect of reducing the number of childbirths, and thereby undermine that encouraged activity. *Rust*, 500 U.S. 173; *Maher*, 432 U.S. 464. Every minute that a library patron spent accessing pornography was a minute he was not accessing educational materials. *American Library Assn.*, 539

U.S. 194. And Congress could reasonably conclude that if it extended tax deductions to both lobbying and nonlobbying activity by charitable organizations, more people would contribute to the former, and fewer funds would support the latter. *Regan*, 461 U.S. 540. These funding conditions were therefore upheld as constitutional.

By contrast, the protected activity did not undermine the program in *League of Women Voters*, where the Court extensively considered whether editorial speech would undermine the encouraged activity, and concluded it would not. *Id*. 468 U.S. at 388-99. The *Perry* teacher's speech outside of class likewise did not undermine his classroom instruction in Government and Social Science. *Perry*, 408 U.S. 593. And religious activity like prayer or Bible study does not undermine the encouraged activity of secular instruction.

In contrast to the mutually exclusive options of childbirth and abortion, educational materials and pornography, or nonlobbying and lobbying, instruction in secular subjects is entirely consistent with religious exercise. No evidence suggests the accredited religious schools provide substandard instruction in secular subjects, or that secular schools provide it more efficiently.

The First Circuit indulged the premise that schools engaging in religious activity must necessarily shortchange secular instruction, because funding is a zero-sum game. *Carson*, 979 F.3d 21, 41-42, citing "Maine's interest in concentrating limited state funds on its goal of providing secular education." It is not, in

part because many religious school teachers see their work as a calling, and are willing to work longer hours (or accept less compensation) than teachers in secular schools. See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 177 (2012).

Furthermore, schools can express religious values while simultaneously teaching secular concepts. For example, a secular school might teach mathematics through the following word problem:

> Madison celebrated Halloween by trick-or-treating. She went to ten homes and collected two pieces of candy from each. How many total pieces of candy did she receive?

A religious school might instead use the following problem:

> Miriam celebrated Purim by observing the commandment to give charity to the poor. She visited ten families and gave two boxes of food to each. How many total boxes of food did she give?

The mathematical lesson is the same: ten times two equals twenty. That the religious school *also* emphasizes the importance of charity in no way undermines the secular instruction.

Because religious schools provide secular instruction as effectively as nonreligious ones, their inclusion in the program would not undermine Maine's goal of providing students with secular instruction.

C. A fully inclusive choice program would best promote a "neutral" system of education where "religious preference is not a factor."

The First Circuit authorized the exclusion of religious schools so Maine could maintain a "religiously neutral public education system in which religious preference is not a factor." *Carson*, 979 F.3d at 42. But the current system is not neutral with regard to religion, and including more schools among the choices could optimize neutrality.

The calendar at nearly every "secular" school gives students at least two weeks' vacation at the end of December, yet provides little if any vacation time for Jewish holidays. Jewish students who observe their holidays are thus at a significant disadvantage compared to their classmates, who need never choose between observing a religious holiday and attending class. Including schools with other calendars would thus reduce the risk that a student's "religious preference is . . . a factor" in her education.

The problem is even worse for extracurricular activities like athletics. For example, the California Interscholastic Federation (like others nationwide) forbids athletic games or practices on Sundays, except for schools that observe the Sabbath on Friday and Saturday.[2] Therefore, a student can fully participate in team practices (which might be necessary to remain on the team) only by attending a school that also observes that day of rest. The restriction is even more acute

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[2] CIF Rule 504(M). https://d2o2figo6ddd0g.cloudfront.net/3/9/xhymrrv26bn214/500_Series.pdf

regarding games; a student at a "secular" school will have to renounce her religious observance to "participate in an otherwise generally available" school activity. *Trinity Lutheran*, 137 S.Ct. 2012, 2024. This is a coercive pressure that a student who observes a Sunday sabbath (or none at all) will not have to face. But schools observing a Saturday sabbath can receive accommodations from other schools and provide them to their own students. Therefore, only when a student attends a school observing a Saturday sabbath will there be scheduling accommodations that enable her both to observe her faith and participate in the otherwise available activity.

A more inclusive program will better promote neutrality with regard to religious preference.

D. Expanding choice will prevent divisiveness because families, not the majority, will make funding decisions.

Objection to religious schools' inclusion is rooted in fears that it will fuel division and discord. *Espinoza*, 140 S.Ct. 2246, 2282 (Breyer, J., dissenting), citing *Committee for Publ. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794-796 (1973) [citing *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 8-9]. Though the eighteenth century practices described in *Everson* did foster division, inclusive school choice programs have the opposite effect.

Everson recalled the practices that led the Founding Generation to bar the federal establishment of religion. *Everson,* 330 U.S. at 8-13. Majorities used the state system of compulsory taxation to force dissenters to

subsidize the religious institutions favored by the majority. *Id.* at 10. Adherents of the established denomination thus used state power to gain financial advantage over dissenters holding competing viewpoints. *Everson* extended the Establishment Clause's principle of subsidiarity so that individual states also were barred from favoring any religion, leaving decisions about religious funding with each individual household. *Id.* at 15.

Majority control and exploitation of a state program can still violate Establishment Clause principles. This occurred in *Santa Fe Ind. Schl. Dist. v. Doe*, 530 U.S. 290, where students voted whether to allow a prayer at high school football games, and who would lead it. *Id.* at 297. The system unconstitutionally created a "majoritarian election on the issue of prayer." *Id.* at 316. "[T]he majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced." *Id.* at 304. The election entrusted the distribution of resources (i.e. access to the public address system) to a majority vote, and thus created "divisiveness along religious lines." *Id.* at 317.

But a case decided one week later showed how the Government could distribute resources in a way that respected the concerns cited in *Everson*. *Mitchell v. Helms*, 530 U.S. 793. The federal government distributed educational materials to schools on a per capita basis. *Id.* at 802. The program differed from the one in *Santa Fe* in two significant ways. First, access to the state resources was not limited to those holding the majority's viewpoint, but were available, in equal

amounts, to all, "religious, irreligious, and areligious" alike. *Id*. at 809. Second, there was not a single vote that effected the allocation of property, but numerous independent and private choices, made by each family. *Id*. at 810. These two factors combined to preclude the divisive competition for governmental favor in distributing resources that generated the Establishment Clause. "For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Id*.

The instant program resembles the program in *Mitchell*, not *Santa Fe*. The distribution of funds depends on numerous private choices, not a single election, and every student receives an equal amount of aid, so there is no special favor available to religious school students. Indeed, the analysis in *Mitchell* applies completely here:

> [I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose . . . then it is fair to say that any aid going to a religious recipient *only has the effect of furthering that secular purpose*. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has *provided no more than that same level to religious recipients*.

Mitchell at 810 (emphasis added).

Expanding Maine's program to include religious schools will enable families to apply their benefits to the school of their choice, so they can "shape and plan their own destiny in a world where governments are always eager to do so for them." *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2071 (2021) (internal citation omitted).

CONCLUSION

Maine provides the benefit of subsidized secular instruction to students who choose to attend nonreligious institutions but withholds that benefit from students who choose to attend schools that engage in religious exercise. This resembles the unconstitutional penalty struck down in *AID*, 570 U.S. 205, *League of Women Voters*, 468 U.S. 364, and *Perry*, 408 U.S. 593, not the constitutional refusal to subsidize upheld in *American Library Assn.,* 539 U.S. 194*, Rust*, 500 U.S. 173, *Regan*, 461 U.S. 540, and *Maher*, 432 U.S. 464. Maine does not merely specify the activity it wishes to subsidize—secular instruction—it also leverages its funding to suppress protected First Amendment activity. *AID*, at 214-15. Suppression is not necessary to fulfill the program's goal because including religious schools in the program would not undermine secular instruction. Inclusion would foster neutrality and not division. This Court must reverse the First Circuit's decision.

Respectfully submitted,

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