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 FOR *AMICI CURIAE* THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE – MEMPHIS CHAPTER, REV. VERNON HORNER, DEBORAH L. WOMACK, DEACON GEORGE WOMACK, AND REV. STEVEN JOINER IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF *AMICI CURIAE*[1]

The Southern Christian Leadership Conference ("SCLC")-Memphis Chapter, is a 501(c)(3) nonprofit, non-denominational, inter-faith advocacy organization that is committed to nonviolent action to achieve social, economic, and political justice. It is the Memphis branch of the SCLC, an African-American civil rights organization founded in 1957 by Dr. Martin Luther King, Jr., Bayard Rustin, Ralph Abernathy, Fred Shuttlesworth, and others. The SCLC-Memphis Chapter works to improve educational access and outcomes, increase voter registration, and stand for those on the margins of society.

Individual *amici* are African-American community leaders in Memphis, TN. Rev. Vernon Horner is the President of the Memphis Baptist Ministerial Association, Deborah L. Womack is a 40-year veteran of the U.S. Army and President of the Ministers' Wives Guild, Rev. George Womack is the Deacon of the Faithful Baptist Church, and Rev. Steven J. Joiner is a Pastor in Memphis, TN.

Amici have seen firsthand—as parents themselves and/or through their many interactions with other parents and youth in the local community—the benefits that religious schools can offer to this nation's children, including in particular to children in low-income minority communities. *Amici* believe that

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[1] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or any counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus curiae* briefs in accord with Supreme Court Rule 37.3.

school-choice programs that provide access to religious schools significantly enhance educational outcomes for low-income students and help to reduce crime in low-income neighborhoods. Through the efforts of *amici* and others, Tennessee enacted the Education Savings Account Pilot Program, a state-funded school voucher program available to economically disadvantaged households in Memphis and Nashville. However, school choice opponents obtained an injunction in Tennessee state court blocking the Pilot Program from going into effect, and the dispute is now pending before the Tennessee Supreme Court.

The First Circuit's decision in this case permits states to bar parents from using tuition assistance to send their children to religious schools. Affirming this decision would significantly set back the school choice movement in this country, do severe damage to the nation's children, particularly its most vulnerable, and run counter to this Nation's founding ideals of religious equality and liberty. *Amici* urge this Court to reverse the decision below.

SUMMARY OF ARGUMENT[2]

The Fourteenth Amendment's Equal Protection Clause guarantees that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." That language enshrines the fundamental right of all persons to be free from discrimination

[2] *Amici* agree with Petitioners that Maine's discriminatory program is also unconstitutional under the First Amendment's Free Exercise Clause and Establishment Clause as applied to the states pursuant to the Fourteenth Amendment, as well as the Fourteenth Amendment's Equal Protection Clause. This brief focuses on the unconstitutionality of Maine's program under the Equal Protection Clause.

based on any unjustifiable standard—which, as this Court has recognized, plainly includes religion. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Indeed, the history of the Fourteenth Amendment and of state equal protection clauses in the late eighteenth and early nineteenth centuries shows that the Equal Protection Clause is rooted in notions of religious as well as racial equality.

Applying the Equal Protection Clause's bedrock principle of nondiscrimination against religion to this case yields a straightforward result: Maine's discriminatory tuition assistance program cannot stand. That program requires those school districts that do not provide public schooling to resident children to instead pay for schooling at any public or approved private school of the parent's choice to which the child is accepted, *except* if the school teaches or promotes religion. If that is not discrimination based on religion, nothing is. Maine's program discriminates against *schools* that commit the sin of exercising their religious beliefs, and it discriminates against religious *parents and children* who seek to exercise their own religious beliefs by sending their children to religious schools.

The First Circuit all but ignored the Equal Protection Clause's protections against religious discrimination and sanctioned Maine's program because it supposedly discriminated based on religious schools' and families' religious practices rather than their religious status. Under the First Circuit's reasoning, so long as a school's faculty stay silent in the classroom and other-school related activities about their religious beliefs, parents will receive tuition payments to send their children to that school. But if a school's faculty dare to expound on their religious beliefs to their students,

the State will shut the school out of the tuition assistance program and force parents to send their children to a different school that espouses only secular views. Such a rule cannot be justified based on any putative interest in preventing the state from endorsing religion, as Maine's school choice program does not involve any direct provision of aid to religious schools and merely permits *parents* to spend their tuition assistance at the school of their choice. Moreover, no one is asking Maine to give preference to any religion; all that is asked is that religious schools not be disadvantaged by Maine's tuition assistance program. To prohibit parents from choosing schools that offer religious instruction as part of such a program is impossible to square with the Constitution's guarantee that the State treat religious persons equally.

ARGUMENT

I. Discrimination Against Persons Because They Practice Religion Is Subject to Strict Scrutiny Under the Equal Protection Clause

The text and history of the Equal Protection Clause and this Court's precedents interpreting that clause all support subjecting discrimination based on religion—including, in particular, discrimination based on the practice of religion—to strict scrutiny. By failing to apply strict scrutiny—or to conduct any independent analysis at all of the Equal Protection Clause's protections against religious discrimination—the First Circuit gravely erred and its decision should be reversed.

A. This Court's Precedents Recognize that Religious Discrimination Is Subject to Strict Scrutiny Under the Equal Protection Clause

This Court has held that discrimination based on any "classification[] affecting fundamental rights" is subject to "the most exacting scrutiny" under "the Equal Protection Clause of the Fourteenth Amendment." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Discrimination against persons based on their religion plainly qualifies. *See, e.g.*, *Armstrong*, 517 U.S. at 464 (explaining that selective prosecution of an individual on account of an "unjustifiable standard" such as "religion" violates the equal protection component of the Fifth Amendment's Due Process Clause (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962))); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (stating that distinctions based on religion are "inherently suspect" under an equal protection analysis); *Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951) (holding that state and local government officials' refusal to grant permits to religious organizations to use public parks violated the Equal Protection Clause). Thus, just as strict scrutiny applies under the Equal Protection Clause "when the government distributes burdens or benefits on the basis of individual racial classifications," *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007), so too when it distributes burdens or benefits on the basis of individual religious classifications.

Indeed, although this Court has typically decided religious discrimination cases in the context of the Free Exercise Clause, it has expressly applied "an equal protection mode of analysis." *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 540 (1993)

(quoting *Walz v. Tax Comm'n of N.Y. City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). Applying equal protection principles, this Court has concluded that the Constitution "protect[s] religious observers against unequal treatment," *id.* at 542 (alteration in original) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in the judgment)), including "if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," *id.* at 531.[3] Accordingly, this Court's precedents make plain that the "bedrock principle of religious equality" now "firmly rooted in this Court's jurisprudence" and applied in "numerous cases" is grounded in both "the Free Exercise Clause and the Equal Protection Clause." *Morris Cnty. Bd. of Chosen Freeholders v. Freedom from Religion Found.*, 139 S. Ct. 909, 909-10 (2019) (Kavanaugh, J., respecting the denial of certiorari).

B. The History of the Equal Protection Clause Shows That a Core Focus of the Clause Was to Protect Against Discrimination Based on Religion, Including Religious Conduct

The guarantee of equal protection to religious persons has deep roots in this Nation's history. In fact, "[i]t was in discussions of religious liberty rather than race that the language of equal protection first wended

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[3] *See, e.g., Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *McDaniel v. Paty*, 435 U.S. 618 (1978).

its way into use in the several states." Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. Rev. 275, 277 (2006). Indeed, nearly all state constitutions around the time of the ratification of the U.S. Constitution "referred to the equal protection of individuals within different religious denominations and to the equal privileges and immunities or equal civil rights that they should enjoy." *Id.* By one scholar's count, as of 1800, the constitutions of 13 of the 16 states then admitted to the Union contained provisions guaranteeing the equal protection of the laws to religious persons (or at least to persons of certain religions or denominations), separate and apart from the free exercise provisions that were included in all states' constitutions at the time. *See* John K. Wilson, *Religion Under the State Constitutions, 1776-1800*, 32 J. Church & St. 753, 768 (1990).

For example, Article III of the Massachusetts Constitution of 1780 provided that "every denomination of Christians, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be *equally under the protection of the law*: and no subordination of any sect or denomination to another shall ever be established by law." (Emphasis added). In a similar vein, Article XXXVIII of the South Carolina Constitution of 1778 provided that "all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy *equal religious and civil privileges*." (Emphasis added.) And Article XXXIII of the Maryland Constitution of 1776 provided that, "as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are *equally entitled to protection* in their religious liberty." (Emphasis added); *see also, e.g.*, N.J.

Const. of 1776, art. XIX ("[N]o Protestant Inhabitant of this Colony shall be denied the Enjoyment of any civil Right, merely on Account of his religious Principles; but . . . all Persons, professing a Belief in the Faith of any Protestant Sect, . . . *shall fully and freely enjoy every Privilege and Immunity enjoyed by others their Fellow-Subjects*." (emphasis added)).

In addition, even where state constitutions did not invoke "equal protection" or equal civil rights or privileges language per se, they invoked similar religious nondiscrimination principles. *See, e.g.*, N.Y. Const. of 1777, Art. XXXVIII ("[T]he free exercise and enjoyment of religious profession or worship, *without discrimination or preference*, shall forever hereafter be allowed, within this State, to all mankind" (emphasis added)); Va. Const. of 1776, Decl. of Rights, § 16 ("[A]ll men *are equally entitled* to the free exercise of religion, according to the dictates of conscience . . . .") (emphasis added).

Such constitutional provisions prohibiting discrimination based upon religion continued to be enacted well into the nineteenth century. *See, e.g.*, Ala. Const. of 1819, Decl. of Rights, §§ 6-7 ("The civil rights, privileges, or capacities of any citizen, shall in no way be diminished, or enlarged, on account of his religious principles. . . . [N]o preference shall ever be given by law to any religious sect, society, denomination, or mode of worship . . . ."); Cal. Const. of 1849, art. I, § 4 ("The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State . . . .").

Moreover, these guarantees of equal protection and/or equal civil rights or privileges to religious persons did not merely grant equal rights to persons with different religious *status* but also prohibited discrimi-

nation based on religious *conduct*. For example, many state constitutional equal rights provisions included express protection of religious "exercise" or "worship."[4] More generally, contemporaries understood that the very concepts of equal protection and equal rights extended to and protected religious conduct. Thus, in a 1799 opinion, then-Judge (later Supreme Court Justice) Samuel Chase issued a writ of mandamus ordering the reinstatement of a minister who had been dispossessed of his congregation because it violated his right to equal protection. *Runkel v. Winemiller*, 4 H. & McH. 429, 450 (Md. Gen. Ct. 1799). Judge Chase reasoned as follows:

> [T]he pastors, teachers and ministers, of every denomination of christians, are equally entitled to the protection of the law, and to the enjoyment of their religious and temporal rights. And the court are of opinion, that every endowed minister, of any sect or denomination of christians, who has been wrongfully dispossessed of his pulpit, is entitled to the writ of *mandamus* to be

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[4] *See, e.g.*, Ala. Const. of 1819, Decl. of Rights, §§ 6-7 (prohibiting any preference based on "mode of worship"); Md. Const. of 1776, art. XXXIII (invoking "the duty of every man *to worship God in such manner* as he thinks most acceptable to him" as the basis for its guarantee of equal protection for religious liberty (emphasis added)); N.Y. Const. of 1777, Art. XXXVIII (guaranteeing "the free *exercise and enjoyment of religious profession or worship*, without discrimination or preference" (emphasis added)); Pa. Const. of 1776, Decl. of Rights, art. II ("Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments *or peculiar mode of religious worship*." (emphasis added)).

> restored to his function, and the temporal rights with which it is endowed.

Id. In other words, every pastor, minister, and—of most relevance here—religious teacher, was entitled to the same "protection of the law" and the same "temporal" rights in teaching or ministering to their students or congregation; thus, interfering with any particular pastor, minister, or teacher's conduct of such activities constituted a violation of their equal rights. Those principles remain as true today as they did in 1799.

In the early nineteenth century, this vocabulary of equal rights and equal protection was adopted by abolitionists in the struggle against slavery,[5] and ultimately, after the Civil War, enshrined in the Fourteenth Amendment. The concept of equal protection was thus *broadened* to protect persons from discrimination based on race or ethnicity, but nothing in the language or history of the Equal Protection Clause suggests that religious discrimination was somehow outside of its scope. The Equal Protection Clause prohibits states from denying "the equal protection of the laws" to "*any* person." (Emphasis added.) Its language thus only further expands to all persons the equal protection rights generally available to only "Christians" or "Protestants" under earlier state constitutional amendments. Moreover, there is no indication that the concept of equal protection was generally understood more narrowly by the 1850s and 1860s

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[5] *See, e.g.*, Jacobus Ten Broek, *Equal Under Law* 42 (1951) ("[S]lavery and the concomitant discrimination against free Negroes and abolitionists were to be described by abolitionists, as early as 1835, as denials of rights to the equal protection of the laws . . . ."); David M'Conaughty, *The Nature and Origin of Civil Liberty* 5-6 (1823).

than it had been when it was enshrined in earlier state constitutions or when Judge Chase expounded upon it in 1799 in *Runkel*.

Indeed, there is every reason to believe that religious discrimination was one of the evils that the Fourteenth Amendment was meant to eradicate. When the framers of the Fourteenth Amendment "condemned the systematic mistreatment of African Americans during Reconstruction," those framers cited the Indian caste system, which divided persons into classes based on religious distinctions, and the persecution of Jews in Europe, as comparably reprehensible forms of discrimination. Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 Fla. L. Rev. 909, 917, 961 (2013). For example, following ratification, Senator Charles Sumner, one of the leading anti-slavery voices of the time, remarked that:

> Religion and reason condemn Caste as impious and unchristian, making republican institutions and equal laws impossible; but here is Caste not unlike that which separates the Sudra from the Brahmin. Pray, sir, who constitutes the white man a Brahmin? Whence his lordly title? Down to a recent period in Europe the Jews were driven to herd by themselves separate from Christians; but this discarded barbarism is revived among us in the ban of color. There are millions of fellow citizens guilty of no offense except the dusky livery of the sun appointed by the heavenly Father, whom you treat as others have treated the Jews, as the Brahmin treats the Sudra. But pray, sir, do not pretend that

> this is the great Equality promised by our fathers.

Cong. Globe, 42d Cong., 2d Sess. 382-83 (1872).

Similarly, Rep. William Purman recognized that the Fourteenth Amendment banned religious discrimination, asking rhetorically: "Shall hostile legislation in States be permitted to oppress any class of citizens on account of religion, nativity, politics, or complexion, or deny to any such class their inalienable rights, among which are life, liberty, and the pursuit of happiness, and thus defeat the very spirit and provision of the Constitution itself?" 2 Cong. Rec. 423 (1874).

Judicial opinions of the era were in accord. For example, riding circuit in 1879, Justice Field struck down a law permitting prison guards to shave prisoners' hair because the law was directed at Chinese religious practices to wear a queue, or braid, and therefore violated equal protection. *See Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255-56 (C.C.D. Cal. 1879).[6] And in *American Sugar-Refining Co. v. Louisiana*, only about thirty years after the passage of the

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[6] *See also Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 596 (1895) (Field, J., concurring) ("Whenever a distinction is made in the burdens a law imposes or in the benefits it confers on any citizens by reason of their birth, or wealth, *or religion*, it is class legislation, and leads inevitably to oppression and abuses, and to general unrest and disturbance in society. It was hoped and believed that the great amendments to the Constitution which followed the late civil war had rendered such legislation impossible for all future time. But the objectionable legislation reappears in the act under consideration. *It is the same in essential character as that of the English income statute of 1691, which taxed Protestants at a certain rate, Catholics, as a class, at double the rate of Protestants, and Jews at another and separate rate.*" (emphasis added)).

Fourteenth Amendment, this Court stated that discrimination "made to depend upon differences of . . . religious opinions," like that based on race or national origin, constitutes "a denial of the equal protection of the laws to the less favored classes." 179 U.S. 89, 92 (1900).

Moreover, history does not support the notion that the Fourteenth Amendment's general guarantee of religious nondiscrimination contained a hidden exception for government benefit programs involving educational instruction. Far from believing that government should support only secular schools, the federal government actively and directly funded religious schools alongside secular schools at the time the Fourteenth Amendment was passed and later ratified. In 1866, the same Congress that passed the Fourteenth Amendment also instructed the newly created Freedmen's Bureau to provide suitable education to newly freed slaves through the funding of private benevolent associations.[7] Most of the benevolent associations funded by the Freedmen's Bureau "were missionary societies from the North, some interdenominational and some affiliated with particular religious denominations," including Presbyterian, Methodist, Baptist, and Congregationalist societies, among others.[8] For

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[7] Act of July 16, 1866, § 13; *see also* Michael W. McConnell et al., Religion and the Constitution 450-51 (2002); Richard B. Drake, *Freedmen's Aid Societies and Sectional Compromise*, 29 J. of S. His. 175, 178-79 (1963); Marjorie H. Parker, *Educational Activities of the Freedmen's Bureau*, 23 J. of Negro Educ. 9, 9-12 (1954).

[8] McConnell, *supra* note 7, at 451; *see also* Ronald E. Butchart, Northern Schools, Southern Blacks, and Reconstruction: Freedmen's Education, 1862-1875, at 4-9, 33-52 (1980); Ward M. McAfee, Religion, Race, and Reconstruction: The Public Schools in the Politics of the 1870s (1998).

example, between 1867 and 1870, the Freedmen's Bureau allotted $243,753.22 to the American Missionary Association ("AMA"), much of which "was spent to establish a group of institutions intended for secondary and professional education—particularly teacher training."[9] The AMA "though nondenominational, received an increasingly large portion of its support from the Congregationalists, and by 1867 it had instituted a policy of founding Congregational churches near its schools."[10] In Virginia alone, the Freedmen's Bureau "collaborated with more than twenty different churches and organizations."[11] Although the Freedmen's Bureau ceased its work in 1870, the debates over whether it should continue its mission were "never framed in terms of church-state separation."[12]

As this Court recognized in *Espinoza*, in the mid-to-late nineteenth century and continuing into the twentieth century, more than thirty states enacted so-called "no-aid" constitutional amendments prohibiting in some form the provision of state funds to religious or "sectarian" institutions. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020). These state constitutional amendments do not, however, provide any basis to conclude that an exception to the Equal Protection Clause's general bar on religious discrimination was recognized in the context of state benefits programs. As an initial matter, these amendments

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[9] Parker, *supra* note 7, at 12.

[10] Drake, *supra* note 7, at 176.

[11] Kimberly Taylor Lee, Organizing Freedom: Collaboration Between the Freedmen's Bureau and Church-Supported Charitable Organizations in the Early Years of Reconstruction, at 3 (May 15, 2019) (Ph.D. dissertation, Va. Poly. Univ.), *available at* https://vtechworks.lib.vt.edu/handle/10919/101812.

[12] McConnell, *supra* note 7, at 451.

shed no light on the meaning of the prior state constitutional amendments guaranteeing equal rights to religious persons that inform the meaning of the federal Equal Protection Clause's language. If anything, the fact that states felt it necessary to enact constitutional amendments to prohibit the funding of religious institutions suggests that state constitutional provisions guaranteeing equal rights to religious persons were not understood to contain exceptions for government benefit programs. In any event, as this Court has recognized, the nineteenth century state "no-aid" provisions "belong to a more checkered tradition" of anti-Catholic bigotry "shared with the [federal] Blaine Amendment of the 1870s." *Id.* Accordingly, given this "shameful pedigree," *id.* (quoting *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion)), they should no more "evince a tradition that should inform our understanding" of the Equal Protection Clause than the racial segregation that persisted in this country after the passage of the Fourteenth Amendment. *See id.*

In short, there is a wealth of evidence from the Founding through the ratification of the Fourteenth Amendment indicating that the doctrine of equal protection extended to (and indeed originally focused on) ensuring equal rights to religious believers, including with respect to religious conduct. That well-established tradition provides strong evidence that all laws that discriminate against religious persons should be understood to be presumptively unconstitutional under the Equal Protection Clause.

II. Maine's Tuition Assistance Program Violates the Equal Protection Clause

Without any analysis of the text or history of the Fourteenth Amendment, the First Circuit summarily

rejected petitioners' Equal Protection Clause argument on the view that the Equal Protection Clause provides no independent protection of religious rights beyond mere rational basis review. This was error. Whatever the scope of the Free Exercise and Establishment Clauses—and amici agree with petitioners' arguments that Maine's law is unconstitutional under those clauses as well—the above history and precedents make clear that the Equal Protection Clause independently protects persons from state discrimination based on religion. And just as the Equal Protection Clause subjects any discrimination in government benefit programs based on race to strict scrutiny, *Parents Involved*, 551 U.S. at 720, the same should be true for discrimination in government benefits based on whether a recipient practices religion, as is the case with Maine's program at issue here, *see Clark*, 486 U.S. at 461.

Applying the exacting scrutiny that the Equal Protection Clause requires yields a straightforward result: Maine's tuition assistance program is unconstitutional. That program expressly discriminates between otherwise eligible recipients of its public benefits program on account of their religion. And it is not narrowly tailored to serve any compelling state interest. Accordingly, Maine's discriminatory exclusion of "sectarian" schooling from its tuition assistance program should be struck down.

A. Because It Facially Discriminates Against Religion, Maine's Tuition Assistance Program Is Subject to Strict Scrutiny

By prohibiting parents from spending their tuition assistance dollars at schools that provide religious instruction, Maine's law runs afoul of the fundamental principle, enshrined in the Equal Protection Clause

(as well as the Free Exercise Clause), that the government may not engage in discrimination against religious conduct unless such discrimination is narrowly tailored to a compelling state interest. *See, e.g.*, *Church of Lukumi,* 508 U.S. at 532, 533; *Clark*, 486 U.S. at 461.

Maine's tuition assistance program provides funds to state residents who live in a district with no local public school to attend any approved school of their choice, with one key exception: Maine disqualifies any "sectarian" (i.e., religious) school from qualifying as "approved." *Carson ex rel. OC v. Makin*, 979 F.3d 21, 25 (1st Cir. 2020). Thus, Maine's program on its face discriminates against schools on the basis of religion by prohibiting schools from participating in the program because of the religious character of their instruction. It also similarly discriminates against parents and children based on a religious classification by preventing them from receiving public benefits solely because they choose to attend a religious school. The message to Maine's residents is clear: religious schools are disfavored.

The First Circuit upheld Maine's program because it discriminates based on whether schools *teach* religion as opposed to their religious *status*. *See id.* at 38. But that is a distinction without a difference. Religious acts and religious beliefs are inextricably linked, because religious practice, including worship, instruction, and proselytization, is an inherent part of many if not all religions. For many religions, preaching or spreading the "good word" may be a religious command. For the faithful, religious acts are aspects of one's religious identity just as much as one's inward religious beliefs. State discrimination against religious practices is thus just as much discrimination

against a person's religious faith as discrimination based on that person's inward religious beliefs. To condone the former while prohibiting the latter would render the Constitution's protections against religious discrimination a hollow promise.

Indeed, this Court has recognized as much. For example, in *Church of Lukumi*, this Court, in striking down a law targeting religious practices that involved alleged animal cruelty, explained that "target[ing] religious conduct for distinctive treatment or advanc[ing] legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." 508 U.S. at 546. And in *McDaniel*, this Court struck down a statute barring ministers from serving in public office, explaining that the statute, although "defined in terms of conduct and activity rather than in terms of belief," could be "overbalance[d]" only by "interests of the highest order and . . . not otherwise served." 435 U.S.at 627-29 (plurality opinion); *see also* 435 U.S. at 635 (Brennan, J., concurring in the judgment) (stating that the discrimination in question should be "categorically prohibit[ed]"). These cases make clear that religious actions versus religious status are not the dividing line between permissible and impermissible religious discrimination.

Although the First Circuit devoted much of its opinion to the purported distinction between religious use and religious status, the First Circuit ultimately did not rest its decision on that basis (perhaps unsurprisingly in light of the many problems that such a constitutional line would create). Instead, it quietly pivoted to an entirely different (but equally elusive) distinction: that Maine's program merely "refuses to subsidize" rather than "penalizes" religious exercise

because it seeks to give all Maine residents the equivalent of a secular, public education. *See Carson*, 979 F.3d at 42. But whether one characterizes Maine's program as a refusal to subsidize or as a penalty, it impermissibly discriminates against religion all the same. As this Court recently explained in *Espinoza*: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." 140 S. Ct. at 2261.

The First Circuit's error appears to have been grounded in its mistaken belief that a secular *public* education constitutes the "baseline" from which discrimination in subsidizing *private* schools should be measured. *Carson*, 979 F.3d at 42. A state's policies with respect to religious instruction at public schools is not the proper "baseline" for its policies with respect to private schooling, however, because discriminating among private schools based on religion is very different in its effects on religious schools than merely offering secular public schooling. Under Maine's discriminatory tuition assistance program, private schools are given a clear choice: either stop your religious instruction or forgo the receipt of tuition assistance funds. Thus, for many schools, Maine's program operates at least as a deterrent against exercising their religious beliefs, as they must weigh the value of their monetary benefits against the value of their religious principles. Indeed, for schools at risk of closing entirely, the choice between participating in the tuition assistance program and compromising their religious mission may be so coercive as to amount to no choice at all. By contrast, a state that, unlike Maine, provides only public schooling and offers no subsidy for private education would not put any religious school to this difficult (and unconstitutional)

choice. Since no private school would be eligible to receive any state funds regardless of whether its curriculum includes religious content, there would be no state disincentive toward religious exercise. Thus, as *Espinoza* makes clear, the relevant "baseline" for determining whether discrimination among private schools based on religion has occurred is the population of *private schools*, not the population of *public schools*, as the First Circuit wrongly concluded. *Compare Espinoza*, 140 S. Ct. at 2261, *with Carson*, 979 F.3d at 42.

In short, neither of the First Circuit's attempted justifications for subjecting Maine's facially discriminatory program to a lesser form of scrutiny hold water, and strict scrutiny should apply.

B. Maine's Discriminatory Program Cannot Survive Strict Scrutiny

There is no doubt that Maine's discriminatory program fails strict scrutiny. The First Circuit did not even attempt to identify a compelling state interest that supported Maine's discriminatory policy, nor could it. As even Respondents have conceded, "the Establishment Clause does not require Maine to impose the 'nonsectarian' requirement on its tuition assistance program." *Carson*, 979 F.3d at 36. The state seeks to justify its exclusion of religious schools from its tuition assistance program on the ground that it wishes to keep state-supported education entirely secular. *See id.* at 42-43. But, at bottom, that is the same justification that this Court rejected in *Espinoza*, where Montana sought to justify its discriminatory program based on its interest in "separating church and State 'more fiercely' than the Federal Constitution." *Espinoza*, 140 S. Ct. at 2260 (citation omitted). That interest "cannot qualify as compelling." *Id.* And that

is particularly so where, as here, Maine is not involved at all in the decision whether to subsidize any particular religious school, since the decision whether to use tuition assistance funds at any particular school rests with parents, not the State.

Nor is Maine's program narrowly tailored to advance its interest in secular public education. Maine's tuition assistance program extends beyond the provision of public education to subsidize only those private schools that offer secular instruction. Maine's program is thus fatally overinclusive in its effects. Maine could fully serve its interest in secular public education by creating additional public schools, or by allowing students with no public school in their district to attend public schools in other school districts, instead of subsidizing private schools. But having chosen the latter path, Maine "cannot disqualify some private schools solely because they are religious." *Espinoza*, 140 S. Ct. at 2261.

C. The First Circuit Failed Meaningfully to Analyze Whether Maine's Program Violates the Equal Protection Clause

Not only did the First Circuit fail to apply strict scrutiny to Maine's tuition assistance program under the Equal Protection Clause, it made no effort even to examine the scope of the Equal Protection Clause's protection of religious equality. Instead, it simply extrapolated—without support in either the text or the legislative history of the Equal Protection Clause—the limitations it purported to find in the Free Exercise Clause to the Fourteenth Amendment's separate Equal Protection Clause. That is no way to interpret any text, let alone the Constitution, particularly in light of the facts set forth in Section I.B above showing

that equal protection clauses had their own distinct history in protecting religious equality.

In support of its interpretation of the Equal Protection Clause, the First Circuit relied upon cursory footnotes in this Court's opinions in *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004), and *Johnson v. Robison*, 415 U.S. 361, 375, n. 14 (1974), in which this Court, without meaningful analysis, concluded that the programs at issue in those cases, having been found to be consistent with the Free Exercise Clause, also passed muster as a matter of rational basis review under the Equal Protection Clause. Neither decision controls here.

Locke is inapplicable here for the same reasons this Court found it inapplicable in *Espinoza*. First, *Locke* involved a program that, although it prohibited funding of devotional theology degrees, nevertheless "allowed scholarships to be used at 'pervasively religious schools' that incorporated religious instruction throughout their classes." *Espinoza*, 140 S. Ct. at 2257 (quoting *Locke*¸ 540 U.S. at 724). Second, this Court in *Locke* sustained the funding exclusion for devotional theology degrees only because it was supported by "historic and substantial" state interests. *Id.* (quoting *Locke*, 540 U.S. at 725). Neither is the case here.

Maine's program plainly prohibits parents from using state tuition assistance to send their children to "pervasively religious" schools—indeed, it prohibits tuition assistance at *any* religious school that offers instruction "through the lens of" a particular faith "associated" with the school. *Carson*, 979 F.3d at 38 (explaining that Maine's program bars funding of any school "associated with a particular faith or belief system" and that "promotes the faith or belief system with which it is associated and/or presents the

material taught through the lens of this faith" (quoting Statement of Me. Educ. Comm'r Robert G. Hasson, Jr.)). Thus, unlike the Washington program at issue in *Locke*, Maine's program "require[s] students to choose between their religious beliefs and receiving a government benefit." *Locke*, 540 U.S. at 720-21. Students who wish to attend a school associated with their faith need not apply.

Moreover, the First Circuit did not identify any "historic and substantial" tradition prohibiting parents from using tuition assistance to send their children to religious schools. Nor could it, as this Court already held in *Espinoza* that no such tradition exists in this country. *Espinoza*, 140 S. Ct. at 2258. Accordingly, whatever the merits of the majority opinion in *Locke*, it is plainly distinguishable and does not control the equal protection analysis in this case, let alone on the basis of a cursory footnote.

Johnson is even further afield. There, this Court upheld against equal protection and free exercise challenges a federal statute that granted educational benefits to military veterans but did not grant such benefits to conscientious objectors. *Johnson*, 415 U.S. at 363-66. *Johnson* is plainly distinguishable, because the failure to grant conscientious objectors the same benefits as military veterans did not discriminate against conscientious objectors on account of their religion. Instead, it merely treated them differently based upon the fact that they did not perform military service. *See id.* at 382 (explaining that the two groups "are, in fact, not similarly circumstanced"). Indeed, the Court noted that the overall statutory scheme arguably treated conscientious objectors *more favorably*, or at least no worse, than military veterans, because "by enacting legislation exempting conscientious objec-

tors from the well-recognized and peculiar rigors of military service, Congress has bestowed relative benefits upon conscientious objectors." *Id.* at 385 n.19. By contrast, there is no question that Maine's program here discriminates based on religion because it allocates government benefits expressly based on whether schools provide religious instruction.

III. Denying Parents Their Right to Use School Choice Funds at Religious Schools Does Great Harm to Children

Allowing states to prohibit parents from using school choice funds at religious schools is not only discriminatory and contrary to this country's most foundational principles, it would do great harm to the nation's children. There is abundant evidence that religious schools—which enroll about 76% of all private school students in the country[13]—on average perform better, and at a lower cost, than their nonreligious counterparts. According to a comprehensive analysis of the 1992 National Education Longitudinal Survey data set, students who attended religious schools obtained better academic results than students who attended either public or nonreligious

[13] *See* U.S. Dep't of Educ. Nat'l Center for Educ. Statistics, School Choice in the United States: 2019, https://nces.ed.gov/programs/schoolchoice/ind_03.asp (last visited Sept. 8, 2021) ("Of the 5.8 million students enrolled in private elementary and secondary schools, 36 percent were enrolled in Catholic schools, 13 percent were enrolled in conservative Christian schools, 10 percent were enrolled in affiliated religious schools, 16 percent were enrolled in unaffiliated religious schools, and 24 percent were enrolled in nonsectarian schools.").

private schools, after controlling for race and gender.[14] Indeed, the gap in performance between students who attended religious vs. nonreligious schools *increased* if one limited the data to Black and Hispanic students, after controlling for socioeconomic status and gender.[15] The same results also held if one analyzed only students of low socioeconomic status, controlling for race and gender.[16] Thus, not only do religious schools offer educational benefits to all students, but the greatest benefits flow to the most marginalized student populations.

Similar results continued to hold in a follow-up 2012 study comparing traditional public schools, charter schools, and religious schools, which found that "attending private religious schools is associated with the highest level of academic achievement among the three school types, even when sophisticated controls are used to adjust for socioeconomic status."[17] And in the same vein, a 2018 study found that, even after controlling for a "host of factors," students who "attended religious high schools, both Catholic and

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[14] William H. Jeynes, *Educational Policy and the Effects of Attending a Religious School on the Academic Achievement of Children*, 16 Educ. Policy 406, 412 (2002).

[15] *Id.* at 412; *see also* William H. Jeynes, *A Meta-Analysis of the Effects of Attending Religious Schools and Religiosity on Black and Hispanic Academic Achievement*, 35 Educ. & Urban Soc'y 27, 27 (2002) (finding that "religious schooling and religious commitment each have a positive effect on academic achievement and school-related behavior" among African-American and Hispanic students).

[16] Jeynes, *supra* note 14, at 413.

[17] William H. Jeynes, *A Meta-Analysis on the Effects and Contributions of Public, Public Charter, and Religious Schools on Student Outcomes*, 87 Peabody J. Educ. 305, 305 (2012).

non-Catholic, had a higher [college] GPA than those who attended public high schools," while "[s]tudents who attended private nonsectarian high schools had the lowest average college GPA."[18]

New York City provides a well-studied example. In 1990, the RAND Corporation compared the performance of children at public and Catholic high schools in New York City.[19] Only "25 percent of the public school students graduated *at all*, and only 16 percent took the [SAT]."[20] By contrast, "*over 95* percent of the Catholic school students graduated, and 75 percent took the SAT."[21] The Catholic school students also scored 173 points higher on the SAT on average than the small subset of public school students who graduated and took the test.[22] Catholic school students scored on average 100 points higher even than the most promising public school students who had been selected to attend magnet schools.[23]

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[18] David J. Fleming et al., *High School Options and Post-Secondary Student Success: The Catholic School Advantage*, 21 J. Catholic Educ. 1, 12 (2018).

[19] Sol Stern, *The Invisible Miracle of Catholic Schools*, City Journal, Summer 1996, *available at* https://www.city-journal.org/html/invisible-miracle-catholic-schools-12133.html.

[20] *Id.* (emphasis added).

[21] *Id.* (emphasis added).

[22] *Id.*

[23] *Id.* Similarly, a 1993 New York State Department of Education report found that "Catholic schools with 81 to 100 percent minority composition outscored New York City public schools with the same percentage of minority enrollment." *Id.* The Catholic schools outperformed public schools in "Grade 3 reading (+17 percent), Grade 3 mathematics (+10 percent), Grade 5 writing (+6 percent), Grade 6 reading (+10 percent), and Grade 6 mathematics (+11 percent)." *Id.*

Moreover, the Catholic schools outperformed even though they had "similar percentages of students from troubled families with low incomes" as public schools.[24]

Religious schools have achieved these superior results while spending less money per student on average than nonreligious private schools.[25] For example, the nationwide average cost of Catholic K-12 school tuition is about $6,080 per year, the average cost of tuition at other religious schools is about $10,200 per year, and the average cost of tuition at nonsectarian private schools is about $25,100 per year.[26] In short, religious schools provide better results at a fraction of the cost of nonreligious schools.

In part, the superior performance of religious schools appears to be the result of higher standards. For example, religious schools were more likely to require students to take a larger array of advanced courses and less likely to engage in "social promotion" of students to higher grade levels than nonreligious schools.[27] But there is substantial evidence that improved student performance at religious schools is also at least partly explained by the fact that they inculcate religious beliefs that are themselves associated with better academic achievement. This matters because it is an aspect of religious schooling that secular schools by definition are unable to replicate (and which lower income students would therefore likely never be able to experience absent school choice

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[24] *Id.*

[25] Jeynes, *supra* note 14, at 415-16.

[26] Melanie Hanson, Average Cost of Private School, https://educationdata.org/average-cost-of-private-school (last visited Sept. 8, 2021).

[27] Jeynes, *supra* note 14, at 415.

programs that give religious schools a level playing field).

For example, according to one study, students who attended religious activities weekly or more frequently had a high school GPA 14.4 percent higher on average than students who never attended religious activities.[28] According to another study, students who frequently attended religious services scored 2.32 points higher on tests in math and reading than those who attended only rarely or not at all.[29] And according to the National Survey of Children's Health, parents whose children attended religious services at least weekly were less likely to be contacted by their children's school about behavior problems than parents whose children attended religious services less frequently.[30]

For youth in impoverished neighborhoods, the impact of religion on academic performance is even starker. According to a Baylor University study, weekly religious worship delivers educational benefits to low-income children equal to or greater than moving them into middle class neighborhoods.[31]

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[28] J. L Glanville, D. Sikkink, & E. I. Hernández, *Religious Involvement and Educational Outcomes: The Role of Social Capital and Extracurricular Participation*, 49 Socio. Q. 105, 126 (2008).

[29] Mark D. Regnerus, *Shaping Schooling Success: Religious Socialization and Educational Outcomes in Metropolitan Public Schools*, 39 J. Sci. Study Religion 363, 369 (2000).

[30] Patrick F. Fagan & Nicholas Zill, Marriage & Religion Research Institute, *Parents Contacted by School About Their Children's Behavior Problems and Religious Attendance*, *available at* http://marri.us/wp-content/uploads/MA-52-54-166.pdf.

[31] Mark D. Regnerus, Baylor Univ. Inst. for Studies of Religion, Making the Grade: The Influence of Religion Upon the Academic Performance of Youth in Disadvantaged Communities 8-9 (2008),

In sum, when states prohibit parents from spending school choice funds at religious schools, they are harming students, and particularly the most disadvantaged students, and likely for no other reason than an ideological bias toward secular instruction.

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The impact of states' preference for secular instruction on religious schools has been dire. Faced with rising costs of schooling and free or subsidized competition, many religious schools in urban areas have been forced to close over the past decade, to the detriment of children.[32] The recent pandemic has only exacerbated these trends. According to a tally by the Cato Institute, 145 private schools have permanently closed at least in part due to COVID-related lockdowns, approximately 90% of which are religious schools.[33] For example, more than two dozen Catholic schools in the New York City area were forced to close permanently following the start of the pandemic.[34]

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available at https://www.baylorisr.org/wp-content/uploads/2019/09/ISR-Making-Grade_071.pdf; *see also* Richard B. Freeman, W*ho Escapes? The Relation of Churchgoing and Other Background Factors to the Socioeconomic Performance of Black Male Youths from Inner-City Tracts* (Nat'l Bureau of Econ. Rsch., Working Paper No. 1656, 1985) (finding that inner-city youth who attended religious activities had significantly higher school attendance and improved work activity and time allocation than those who did not).

[32] Anthony Miserandino, *The Funding and Future of Catholic Education in the United States*, 41 Brit. J. Religious Educ. 105 (2017).

[33] *See* Cato Institute, Covid-19 Permanent Private School Closures, https://www.cato.org/covid-19-permanent-private-closures (last visited Sept. 8, 2021).

[34] Tommy Beer, *Pandemic Leading to Increase in Permanent Closures of Catholic Schools*, Forbes, Mar. 23, 2021, *available at*

And this is despite the fact that a recent nationwide survey found that 80% of parents whose children attended a Christian school were satisfied with their child's education during COVID, compared to only 55% of parents whose children attended a public school.[35] Absent a decision by this Court prohibiting states' continued discrimination against religious schools, these unfortunate trends are likely only to continue. The principal victims will be this Nation's children.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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https://www.forbes.com/sites/tommybeer/2021/03/23/pandemic-leading-to-increase-in-permanent-closures-of-catholic-schools/?sh=229be9921d85.

[35] Chris Wilson and Trevor Smith, WPAi Intelligence, *Christian School Parents Are More Satisfied with Education than Public School Parents*, Aug. 4, 2021, *available at* https://herzogfoundation.com/wp-content/uploads/2021/08/HF_Data_Memo_210804.pdf.