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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE OF VIRGINIA, CALIFORNIA, DELAWARE, MASSACHUSETTS, MINNESOTA, NEW MEXICO, NEW YORK, OREGON, WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF DEFENDANT-RESPONDENT

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INTEREST OF AMICI CURIAE

Amici curiae are the Commonwealths of Virginia and Massachusetts, the States of California, Delaware, Minnesota, New Mexico, New York, Oregon, and Washington, and the District of Columbia.

Like Maine, Amici States respect the right of our residents to freely exercise their faith. At the same time, Amici States have a strong government interest in providing education to their residents, financing that education, and maintaining flexibility in their approaches to when and how to subsidize religious schools that use such funds for sectarian purposes. Amici States highlight two unique State interests when it comes to funding religious schools. *Firs*t, public education is a historic and substantial State function. *Second*, Amici States have a strong interest in maintaining the "play in the joints" between the Establishment and Free Exercise Clauses that govern their respective funding choices for religious schools that use the funds for religious purposes. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970). Like Maine, Amici States have a strong interest in retaining control over the substance of state-funded education and especially retaining the authority to decide whether taxpayer dollars should support programs that advance religious beliefs, which may include beliefs inimical to the States' policies.

SUMMARY OF ARGUMENT

After witnessing religious persecution during the colonial era, Americans at the Founding reached the firm conviction that government should not be intertwined with religion. They understood that the entanglement of government in religion would undermine the free practice of religion. The Establishment and Free Exercise Clauses were born of this understanding.

Since the Founding, the States (as sovereigns) have retained authority to operate public schools and define an approach to education that best fits local conditions and traditions. A rigid one-size-fits-all approach that eliminates the distinction this Court has drawn between discrimination based on religious status, on the one hand, and declining to fund educational programs based on the programs' religious use of funding, on the other, would prevent State and local governments from implementing programs precisely tailored for their individual needs.

States must retain the flexibility to decide whether and how to fund religious schools within the "play in the joints" of the Religion Clauses. See *Locke* v. *Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970)). Recognizing that no one solution applies for all States, the Framers intentionally left "space" for the individual States to decide for themselves whether and how to provide aid to religious institutions. Any decision by this Court should retain this flexibility, which allows the States to tailor their different funding approaches for private schools, whether religious or secular, to their State-specific needs.

Adopting Petitioners' one-size-fits-all approach will not only hinder States' ability to respond to the unique concerns of their residents but will also impermissibly invade State sovereignty when it comes to education. Amici States urge this Court to preserve the States' freedom to decline funding to programs based on their use of this funding to advance religion.

ARGUMENT

The Establishment Clause prohibits laws "respecting an establishment of religion," and the Free Exercise Clause forbids laws "prohibiting the free exercise thereof." U.S. Const. amend. I. This Court has long

recognized that "[t]he course of constitutional neutrality" when navigating the Religion Clauses "cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970). Maine's policy fits comfortably within the "play in the joints" between the Free Exercise and Establishment Clauses of the First Amendment. *Id.*

I. States have a historic and substantial tradition of deciding for themselves whether or how to finance religious schools

Since ratification of the Bill of Rights, the First Amendment's Religion Clauses have worked together to ensure that government does not favor any one religion, and that Americans remain free to practice the religion of their choice or to refrain from practicing a religion at all.

A. Americans at the Founding sought to disentangle government from religion

The words in the Religion Clauses of the First Amendment "reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity." *Everson* v. *Board of Educ.*, 330 U.S. 1, 8 (1947).

1. In the common telling of American history, the colonies were established, at least in part, to allow the colonists to practice their religion without fear of persecution. At the same time, however, many early colonists chose to impose their own religion on others. *Everson*, 330 U.S. at 10 & n.8 (explaining that "[a]lmost every colony exacted some kind of tax for church support," which "dissenters were compelled to pay,"

regardless of their religious beliefs). Indeed, "some of the colonies and States [attempted] to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well," and "[p]unishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions." *Reynolds* v. *United States*, 98 U.S. 145, 162–63 (1878). As this Court has recognized, in the early days of our country, "Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated." *Everson*, 330 U.S. at 10.

For instance, the Virginia House of Burgesses in 1619 established the Church of England as Virginia's religion. H.R. McIlwaine, ed., Journals of the House of Burgesses of Virginia 1619–1658/59 at 13 (1915) ("All ministers shall duely [sic] read divine service, and exercise their ministerial function according to the Ecclesiastical[] Lawes [sic] and orders of the church of *Englande* [sic].").[1] In the ensuing years, Anglicans "welcomed the efforts of the civil authority to expel Puritan preachers in the name of religious uniformity." Hutson, *supra* note 1, at 18. Virginia even went so far as to enact a law in 1659 that provided for the death penalty for Quakers. *Religion and the Founding of the American Republic*, Library of Congress, https://www.loc.gov/exhibits/religion/rel01-2.html.

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[1] James H. Hutson, Religion and the Founding of the American Republic 18 (1998).

In New England, once the Puritans gained power, they "relentlessly suppressed dissent," including by expelling Quakers from Massachusetts, hanging Quakers who returned, and banishing Presbyterians and Baptists. Hutson, *supra* note 1, at 7–8; *Religion and the Founding of the American Republic*, Library of Congress, https://www.loc.gov/exhibits/religion/rel01-2.html. Meanwhile, Maryland Protestants in the 1640s, "assisted by coreligionists from Virginia, seized control and deported . . . Catholic leaders to England in chains." Hutson, *supra* note 1, at 15. When Maryland Catholics gained power in 1649, they passed a Toleration Act that still "established the death penalty for anti-Trinitarian Christians." *Id.*; An Act Concerning Religion (Md. Sept. 21, 1649), available at https://avalon.law.yale.edu/18th_century/maryland_toleration.asp. Once Protestants regained power in 1654, they repealed the Toleration Act and eventually "outlawed the Roman Catholic religion." Hutson, *supra* note 1, at 15. This period when "Catholics in Maryland were dissenters in their own country" lasted until the American Revolution. *Id.*

In sharp contrast to their neighbors, Rhode Island and Pennsylvania offered religious freedom to their residents. After being forced out of Massachusetts, Roger Williams founded Rhode Island. Edmund S. Morgan, Roger Williams: The Church and the State 3 (1967). His belief that government should not interfere with residents' religious beliefs was so strong that he "protected even those whom Williams regarded as dangerously misguided." Hutson, *supra* note 1, at 8. Pennsylvania's similar success with religious freedom made it "a point of reference a century later for Americans opposing plans for government-supported religion" with Virginians in the House of Delegates citing it as proof that States did not need established religions to still have governments

that "stand[] firm" and residents of "bright[] Morals and [] upright Characters." *Id.* at 11.

Rhode Island and Pennsylvania were exceptions to the "evils, fears, and political problems" that ultimately led to the Establishment and Free Exercise Clauses. See *Everson*, 330 U.S. at 8. "[O]ne of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Flast* v. *Cohen*, 392 U.S. 83, 103 (1968). James Madison and his supporters worried that "religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general." *Id.* at 103–04. When the "Virginia legislative body was about to renew Virginia's tax levy for the support of the established church," Thomas Jefferson and Madison "led the fight against this tax." *Everson*, 330 U.S. at 11–12. Their fight reflected how Virginians, like people "elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." *Id.* at 11.

2. This conviction led to Jefferson writing and Madison spearheading the Virginia Statute for Religious Freedom, which provided in part that "no man shall be compelled to frequent or support any religious worship . . . nor shall otherwise suffer on account of his religious opinions or belief." Va. Code Ann. § 57-1 (1786).[2] Jefferson explained in the statute's preamble

[2] See also *Thomas Jefferson and the Virginia Statute for Religious Freedom*, Va. Museum of Hist. & Culture, https://virginiahistory.org/learn/thomas-jefferson-and-virginia-statute-religious-freedom; *Virginia Statute for Religious Freedom*, The Jefferson Monticello,

that public funding of religious activities, including religious education, violates the freedom of conscience of taxpayers because "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Everson*, 330 U.S. at 13 (quoting Va. Code Ann. § 57-1). He further elaborated that "even [] forcing [someone] to support this or that teacher of his own religious persuasion[] is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern." *Id.* (quoting Va. Code Ann. § 57-1).

Madison shared Jefferson's beliefs and similarly explained that governmental support for religion was "[r]eligious bondage [that] shackles and debilitates the mind and unfits it for every noble enterprize [sic]." Letter from James Madison to William Bradford (Apr. 1, 1774), available at https://founders.archives.gov/documents/Madison/01-01-02-0031. He firmly believed that "Religion & Govt. will both exist in greater purity, the less they are mixed together." Letter from James Madison to Edward Livingston (July 10, 1822), available at https://founders.archives.gov/documents/Madison/04-02-02-0471.

Jefferson and Madison's work ultimately led to the Establishment and Free Exercise Clauses of the First Amendment, which "had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson*, 330 U.S. at 13. Indeed, Jefferson lauded the First Amendment as "building a wall of separation between Church & State," Letter from Thomas Jefferson to Danbury Baptists (Jan. 1, 1802), available at https://www.loc.gov/loc/lcib/9806/danpre.html, language

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https://www.monticello.org/site/research-and-collections/virginia-statute-religious-freedom.

that this Court "accepted almost as an authoritative declaration of the scope and effect of the amendment," *Reynolds*, 98 U.S. at 164.

In keeping with this wall of separation, numerous States enacted constitutional clauses that broadly barred the use of tax dollars to support religion. See *Locke* v. *Davey*, 540 U.S. 712, 719 (2004) (noting that Washington's State constitution prohibited "even indirectly funding religious instruction that will prepare students for the ministry"). State courts have long interpreted these types of constitutional clauses as barring public subsidies that fund religious education. *Knowlton* v. *Baumhover*, 166 N.W. 202, 207 (Iowa 1918) (holding that Iowa's constitutional provision that "forbids the establishment by law of any religion or interference with the free exercise thereof and all taxation for ecclesiastical support" barred the use of public funds to aid religious instruction); *Findley* v. *City of Conneaut*, 62 N.E.2d 318, 323 (Ohio 1945) (concluding that Ohio's constitutional provision that declared that "[n]o person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent" prohibited municipalities from "expend[ing] funds raised by taxation for the support or maintenance of a sectarian school" (internal emphasis omitted)); *Chittenden Town Sch. Dist.* v. *Department of Educ.*, 738 A.2d 539, 541–42, 563–64 (Vt. 1999) (concluding that Vermont's constitution prohibits "compelled taxpayer support of religious worship" and thus prevents public funding of religious schools absent "adequate safeguards against the use of such funds for religious worship"). The States that took the opposite approach and "persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups" ultimately built this wall of separation between religion and government once

this Court determined that the Fourteenth Amendment "ma[de] the prohibitions of the First applicable to state action abridging religious freedom." *Everson*, 330 U.S. at 14–15.

B. Since the Founding, State and local governments have had flexibility to decide how to fund schools, what to teach their children, and how to create a safe learning environment

1. This Court has "recognized the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests." *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982) (internal quotation marks and citations omitted); see also *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979) ("Public education, like the police function, fulfills a most fundamental obligation of government to its constituency. The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions[.]" (internal quotation marks and citation omitted)). Public education, in turn, is an area "where States historically have been sovereign." *United States* v. *Lopez*, 514 U.S. 549, 564 (1995); see also *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities.").

Education in the United States has been from the very beginning a "largely decentralized matter in which individual states and local governments have raised the taxes and provided the teachers and administrators who run schools." Kenneth L. Townsend, *Education and the Constitution: Three Threats to Public Schools and the Theories that Inspire Them*, 85 Miss. L.J. 327, 332 (2016); see also Gerald Leinwand, Public Education 20 (1992)

("The common school [public school] movement was not national."). Indeed, "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools," and "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process." *Milliken* v. *Bradley*, 418 U.S. 717, 741–42 (1974); see also Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 Harv. L. Rev. 1810, 1846 (2004) ("Local accommodations will better calibrate the balance between religious and secular interests."). Because of this deeply rooted tradition, "States and local school boards are generally afforded considerable discretion in operating public schools." *Edwards* v. *Aguillard*, 482 U.S. 578, 583 (1987); see also *Epperson*, 393 U.S. at 104 ("By and large, public education in our Nation is committed to the control of state and local authorities.").

School funding falls within State-spending and taxation restrictions—areas where each State faces unique, local obstacles and conditions. See *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 40, 42 (1973) (referring to taxation as "an area in which [this Court] has traditionally deferred to state legislatures" and noting that "experience counsels against premature interference with the informed judgments made at the state and local levels" with respect to "the most persistent and difficult questions of educational policy"). Maine faces the unique obstacle of not operating public secondary schools in more than half of its local school administrative units. Pet. App. 5. To remedy this local issue, Maine allows local school administrative units to contract with public or approved private schools for school privileges or to pay tuition costs at a public or approved private school. Pet. App. 5.

Other States and localities have similarly decided to enact programs to address their own specific challenges. For instance, Ohio recognized that its public schools in Cleveland "were in the midst of a crisis that is perhaps unprecedented in the history of American education" and responded by providing financial assistance to families in Cleveland. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 644–45 (2002) (quoting Cleveland City Sch. Dist. Performance Audit 2-1 (Mar. 1996)) (internal quotation marks omitted). When disadvantaged children in parochial schools in New York City needed remedial education, the City took a different route. *Agostini* v. *Felton*, 521 U.S. 203, 208 (1997). To remedy this problem while complying with the Establishment Clause, the City sent public employees to these schools to provide supplemental, remedial instruction on a neutral basis under a program that this Court upheld. *Id.* at 234–35.

These programs were precisely tailored to remedy State- and locality-specific issues. Such "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation, and a healthy competition for educational excellence." *Milliken*, 418 U.S. at 742 (quoting *Rodriguez*, 411 U.S. at 50) (internal quotation marks omitted). While some States may adhere to James Madison's view that not even "three pence" of public funding should support any religious establishment by funding solely publicly provided education programs, *Flast* v. *Cohen*, 392 U.S. 83, 103 (1968) (quoting James Madison, Memorial and Remonstrance (June 1785)), other States may choose to support education programs that occur at all private schools, both secular and religious. Cf. *Locke* v. *Davey*, 540 U.S. 712, 719 (2004) ("[T]here is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree

in devotional theology . . . ."). Allowing each State to decide for itself how to address funding for religious schools—operating within the constitutional space this Court has recognized—permits their respective policies to reflect their unique and even divergent perspectives. See Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 Harv. L. Rev. 1810, 1846 (2004) ("Local accommodations will better calibrate the balance between religious and secular interests.").

Maine's program reflects one approach tailored to its unique needs. Because Maine's 180,000 publicly educated K–12 students are spread out across the predominantly rural State, local public schools cannot meet the need for an accessible public education. Through the program at issue in this case, Maine relies on *private* schools to deliver a *public* education.

2. States' "control over the operation of schools" extends not just to funding but also to the substance of the education that these schools provide. See *Milliken*, 418 U.S. at 741–42. Each State individually sets the minimum requirements that public education must fulfill.[3]

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[3] See, *e.g.*, *Standards of Learning (SOL) & Testing*, Virginia Dep't of Educ., https://www.doe.virginia.gov/testing/index.shtml ("The Standards of Learning (SOL) for Virginia Public Schools establish minimum expectations for what students should know and be able to do at the end of each grade or course . . . ."); *Georgia Standards of Excellence (GSE)*, Georgia Dep't of Educ., https://www.georgiastandards.org/Georgia-Standards/Pages/default.aspx (setting standards by school subject); *Alabama Course of Study English Language Arts*, Alabama State Dep't of Educ. (2021), https://www.alabamaachieves.org/wp-content/uploads/2021/08/2021-Alabama-English-Language-Arts-Course-of-Study.pdf (setting minimum content standards). By setting these minimum requirements, States establish the baseline education that each child attending public school receives. See *50-State Comparison High School Graduation Requirements*, Educ. Comm'n of the States (Feb.

When States set these baseline education requirements, they establish standards for school curricula, which lay out which subjects and topics students should learn as part of a holistic education. See, *e.g.*, *Science Standards of Learning–Adopted 2018*, Virginia Dep't of Educ., https://www.doe.virginia.gov/testing/sol/standards_docs/science/2018/index.shtml (listing curriculum framework per grade).

This Court has "acknowledged the State[s'] power to prescribe the school curriculum," but it has also made clear that States must comply with the Constitution when doing so. See *Epperson*, 393 U.S. at 105. "While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition," this Court has made clear that "the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion." *Id.* at 106 (quoting *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 225 (1963)). For instance, a State may not proscribe the teaching of evolution because the "State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit . . . the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment." *Id.* at 107; *id.* at 106 ("[T]he First Amendment does not permit the State[s] to require that teaching and learning [] be tailored to the principles or prohibitions of any religious sect or dogma."). Likewise, a State cannot require schools that choose to teach evolution to also teach Creationism with the purpose of advancing a particular religious belief. *Edwards*, 482 U.S. at 593 (holding that Louisiana's Creationism Act violated the

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2019), https://reports.ecs.org/comparisons/high-school-graduation-requirements-01 (compiling States' graduation requirements).

First Amendment because its "primary purpose . . . is to advance a particular religious belief" and "to restructure the science curriculum to conform with a particular religious viewpoint").

3. In addition to their curricula-related interests, States have a strong interest in providing a safe and nurturing school environment in which students can learn and mature. See, *e.g.*, *Providing a Safe, Non-discriminatory School Environment for Transgender and Gender-Nonconforming Students*, California Sch. Bds. Ass'n (Feb. 2014), https://www.csba.org/~/media/E68E16A652D34EADA2BFDCD9668B1C8F.ashx ("A safe, nondiscriminatory school environment . . . is essential to student achievement."). Providing this type of safe school environment requires that States be able to promote inclusivity with respect to, *inter alia*, race, religion, sexual orientation, and gender identity. See *Effects of Bullying*, stopbullying.gov, https://www.stopbullying.gov/bullying/effects ("Bullying is linked to many negative outcomes including impacts on mental health, substance abuse, and suicide."); *Diversity, Race & Religion*, stopbullying.gov, https://www.stopbullying.gov/bullying/groups ("Schools and communities that respect diversity can help protect children against bullying behavior."); *LGBTQI+ Youth*, stopbullying.gov, https://www.stopbullying.gov/bullying/lgbtq ("Lesbian, gay, bisexual, transgender, queer, intersex, nonbinary or otherwise gender non-conforming (LGBTQI+) youth and those perceived as LGBTQI+ are at an increased risk of being bullied."). Recognizing the harms of bullying and the importance of inclusivity, many States have committed to providing safe and nondiscriminatory environments for their students.[4] These States should

[4] See, *e.g.*, *Gender Diversity*, Virginia Dep't of Educ., https://www.doe.virginia.gov/support/gender-diversity/index.shtml ("Every Virginia student, regardless of their gender identity, gender

not be compelled to distribute public funds to entities that, on the basis of sincerely held religious beliefs, cannot commit to providing such a nondiscriminatory environment.

II. Petitioners' rigid test undermines States' historic and substantial flexibility in deciding whether to fund religious education

To meet its mandate under its State constitution to offer a public education to children in a State that is too rural to offer traditional local public schools in all areas, Maine relies on *private* schools to deliver a *public* education.[5] The program at issue in this case, therefore, is not simply about a State's decision to subsidize private education. It is about how the State goes about offering a public education.

Petitioners contend that Maine did not approve the schools they wish to attend because of the schools' religious status. Petitioners also insist that Maine should be denied the option of declining approval based on the religious use to which the schools put State funds. Petitioners ask this Court to abandon the use/status

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expression, or sexual orientation, has a right to learn free from discrimination and harassment."); *Gender-Inclusive Schools*, Washington Off. of Superintendent of Pub. Instruction, https://www.k12.wa.us/policy-funding/equity-and-civil-rights/information-families-civil-rights-washington-schools/gender-inclusive-schools ("Washington public schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender and gender-expansive students.").

[5] In accordance with its State constitutional mandate, Maine's legislature passed a statute that obliges it to "enact the laws that are necessary to assure that all school administrative units make suitable provisions for the support and maintenance of the public schools" so that every school-age child in the State has "an opportunity to receive the benefits of a free public education." Me. Stat. tit. 20-A, § 2(1); see also Me. Const. art. VIII, Pt. 1, § 1.

distinction in favor of a rigid test that would apply strict scrutiny regardless of whether a State funding decision is premised on religious status or religious use. Pet'rs' Br. 23–30; *id.* at 28 (asking this Court to overturn *Locke* to the extent *Locke* did not apply strict scrutiny). Applying Petitioners' strict-scrutiny-no-matter-what approach, including to use-based funding decisions, would not only erode Maine's ability to regulate public education in the State but would also more generally undermine the "considerable discretion" traditionally afforded to States "in operating public schools." *Edwards* v. *Aguillard*, 482 U.S. 578, 583–84 (1987).

States offer a wide array of educational funding programs.[6] And, within the "play in the joints" of the

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[6] See, *e.g.*, Va. Code Ann. § 23.1-628 (2016) (tuition assistance grant program); *Education Improvement Scholarships Tax Credits Program*, Virginia Dep't of Educ., https://www.doe.virginia.gov/school_finance/scholarships_tax_credits/; *50-State Comparison*, *Scholarship Tax Credits*, Educ. Comm'n of the States (March 2021), https://reports.ecs.org/comparisons/scholarship-tax-credits-01 (listing whether States have programs that provide tax credits to businesses and individual taxpayers who donate funds to nonprofit scholarship-granting organizations that manage and distribute donated funds through private school tuition scholarships); *50-State Comparison*, *Vouchers*, Educ. Comm'n of the States (March 2021), https://reports.ecs.org/comparisons/vouchers-01 (listing whether States offer State-funded school voucher programs that allow students to use public monies to attend a private school); see also *Low Income Students Scholarship*, Kan. Dep't of Revenue, https://www.ksrevenue.org/prtaxcredits-LowIncomeStudents.html (providing educational scholarship to eligible students); *MASSGrant & MASSGrant Plus*, Office of Student Fin. Assistance, https://www.mass.edu/osfa/programs/massgrant.asp (outlining Massachusetts program that provides need-based financial assistance to undergraduate students); *MI Student Aid*, Off. of Postsecondary Fin. Plan., https://www.michigan.gov/mistudentaid/0,4636,7-372--481218--,00.html (offering Tuition Incentive Program to eligible Medicaid recipients); *The New York State Tuition Assistance Program (TAP)*, N.Y. Higher Educ. Servs. Corp.,

Religion Clauses, States make different choices on how these programs apply to religious education.[7] A State "legislature's decision not to subsidize the exercise of a fundamental right," such as a right arising from the Free Exercise Clause, "does not infringe the right, and thus" should not be "subject to strict scrutiny." *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983).

Numerous State constitutions also "embody distinct views" on funding for religious schools and "deal differently with religious education" than with education on other topics. *Locke* v. *Davey*, 540 U.S. 712, 721 (2004). A State's sovereign interests are at their zenith when the State protects and enshrines a principle in its constitution, and State courts are accordingly the

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https://www.hesc.ny.gov/pay-for-college/apply-for-financial-aid/nys-tap.html (explaining New York grant that helps eligible residents pay tuition at approved schools).

[7] See *Virginia Accredited School Locator*, Private Education, https://vcpe.org/SCHOOL-LOCATOR (listing accredited schools, including various religious schools); H.D. 588, 2021 Leg. at 104 (Md. 2021), https://mgaleg.maryland.gov/2021RS/bills/hb/hb0588f.pdf (describing and providing appropriations for the "Broadening Options and Opportunities for Students Today (BOOST) Program," which "provides scholarships for students who are eligible for the free or reduced price lunch program to attend eligible nonpublic schools"); *Resources*, Maryland BOOST Scholarship Coal., https://www.marylandboost.org/resources (providing a list of BOOST-eligible schools, including religious schools); N.C. Gen. Stat. Ann. §§ 115C-562.1–562.8 (2020), https://www.ncleg.gov/Laws/GeneralStatuteSections/Chapter115C (providing for the Opportunity Scholarship Program that helps families who make below a certain amount of income pay tuition at participating nonpublic schools); *K12 Programs: Participating Nonpublic Schools*, North Carolina State Educ. Assistance Auth., https://myportal.ncseaa.edu/NC/NonpublicSchools.aspx/ (providing a list of non-public schools participating in the Opportunity Scholarship Program, including some religious schools).

final arbiters of these provisions, subject to federal constitutional requirements. *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983) ("It is fundamental that state courts be left free and unfettered by [this Court] in interpreting their state constitutions." (quoting *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1940))). As they navigate the "space for legislative action [that is] neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause," *Cutter* v. *Wilkinson*, 544 U.S. 709, 719 (2005), States should remain free to "achiev[e] greater separation of church and State than is already ensured under the Establishment Clause," subject to the "limit[s] [of] the Free Exercise Clause," as contemplated by the Founders. *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) (quoting *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2024 (2017)).

Petitioners' approach would seriously undermine States' freedom to achieve "greater separation of church and State" in their school funding decisions. *Espinoza*, 140 S. Ct. at 2260 (quoting *Trinity Lutheran*, 137 S. Ct. at 2024). This Court in *Locke* made clear that States may, if they wish, decline to fund educational programs that use State funding for religious purposes, as opposed to programs that simply have a religious status. 540 U.S. at 725 ("The State's interest in not funding the pursuit of devotional degrees is substantial . . . ."). Since *Locke*, courts and legislatures have relied on this use/status framework. See, *e.g.*, *Illinois Bible Colls. Ass'n* v. *Anderson*, 870 F.3d 631, 639–40 (7th Cir. 2017) (concluding that Illinois's oversight of post-secondary education complied with *Locke* because "[i]t is only if the Bible Colleges seek to issue degrees that they must comply with the standards of the Illinois statute; only when the colleges venture into the secular sphere is regulatory oversight required"); *Parker* v. *Hurley*, 514 F.3d 87, 103 n.16 (1st Cir. 2008) (noting that, although "this case is not

a funding case," "[a]s here, the government in *Locke* made no attempt to regulate the plaintiffs' conduct"); *Freedom From Religion Found.* v. *Morris Cnty. Bd. of Chosen Freeholders*, 181 A.3d 992, 1010 (N.J. 2018) ("[T]he Churches are not being denied grant funds because they are religious institutions; they are being denied public funds because of what they plan to do[.]"). But because Petitioners overlook how each State approaches its education system differently, Petitioners would have this Court throw away this nuanced approach.

1. States take diverse approaches to overseeing education, including education provided by religious schools. Some States require that private schools provide certain courses or otherwise offer an education comparable to public school education.[8] Other States

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[8] See, *e.g.*, Alaska Stat. Ann. § 14.30.010(b)(1) (not requiring students to attend a public school if they are "provided an academic education comparable to that offered by the public schools in the area"); Ariz. Rev. Stat. Ann. § 15-802(A) ("Every child . . . shall attend a school and shall be provided instruction in at least the subjects of reading, grammar, mathematics, social studies, and science."); Cal. Educ. Code § 48222 (exempting students from compulsory education law if they attend a private school that teaches in English and "offer[s] instruction in the several branches of study required to be taught in the public schools of the state"); Ga. Code Ann. § 20-2-690(b)(1), (4) (requiring that private schools whose "primary purpose" "is religious in nature" "provide[] a basic academic educational program which includes, but is not limited to, reading, language arts, mathematics, social studies, and science"); Mass. Gen. Laws ch. 76, § 1 ("[S]chool committees shall approve a private school when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency . . . that in the public schools in the same town; but shall not withhold such approval on account of religious teaching . . . ."); N.Y. Educ. Law § 3204(2) (McKinney 2018) ("Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides."); 24 Pa. Cons. Stat. § 13-1327(b) (providing that children at religious schools can meet the compulsory school

impose lighter curricula requirements on private schools or place the burden of providing a baseline education on children's parents or guardians, instead of directly on the private schools. See, *e.g.*, Tex. Educ. Code Ann. § 25.086(a)(1) (exempting children from compulsory school attendance requirements if they "attend[ ] a private or parochial school that includes in its course a study of good citizenship"); Conn. Gen. Stat. § 10-184 (providing that parents and guardians must "cause [children] to be instructed in reading, writing, spelling, English grammar, geography, arithmetic and United States history and in citizenship" and that parents and guardians can meet this requirement by sending their children to public schools or by "show[ing] that the child is elsewhere receiving equivalent instruction in the studies taught in the public schools").

Meanwhile, other States determine which private schools to regulate based on the schools' accreditation or approval status or whether they receive State benefits, such as tax exemptions.[9] Although States indisputably

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attendance requirements if the schools teach certain courses but also providing that "[n]othing contained in this act shall empower the Commonwealth . . . to approve the course content, faculty, staff or disciplinary requirements of any religious school referred to in this section without the consent of said school").

[9] See, *e.g.*, Conn. Gen. Stat. § 10-18(a)(1) ("All high, preparatory, secondary and elementary schools, public or private, whose property is exempt from taxation, shall provide a program of United States history . . . ."); Ind. Code Ann. § 20-30-1-1 (providing that curriculum laws apply to public schools and "State accredited nonpublic schools"); La. Stat. Ann. § 17:11 ("The board shall adopt standards and guidelines which shall be applied in determining whether a nonpublic school applying for approval meets the requirements of a sustained curriculum or specialized course of study of quality at least equal to that prescribed for similar public schools."). Other States exempt private schools from licensure or regulation. Ala. Code § 16-1-11.2(b) ("Nonpublic schools, including private, church, parochial, and religious schools . . . are not subject to licensure or

have the authority to enforce their educational standards, Petitioners insist that Maine does not have a "compelling []or historic and substantial" "interest in ensuring that the public's funds go to support only the rough equivalent of a public education." Pet'rs' Br. 36. This argument ignores States' fundamental authority to enforce their educational standards and the integral role States play in setting and enforcing their own educational standards.[10] See Pet'rs' Br. 15.

2. Just as "training for religious professions and training for secular professions are not fungible," *Locke* v. *Davey*, 540 U.S. 712, 721 (2004), so too with secular and religious State-funded education. States have a

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regulation by the state or any political subdivision of the state . . . ."); Ala. Code § 16-22A-16 ("[N]othing in this chapter shall be construed to establish state control over curriculum or the selection of personnel in private or parochial/church schools, nor is this chapter intended to establish additional regulatory authority over private or parochial/church schools."); Fla. Stat. § 1002.42(2)(h) ("It is the intent of the Legislature not to regulate, control, approve, or accredit private educational institutions . . . .").

[10] Some private schools, including some religious schools, do not meet State educational standards or teach material that undermines basic science and history curricula. See Leslie Postal et al., Private schools' curriculum downplays slavery, says humans and dinosaurs lived together, Orlando Sentinel (June 1, 2018), https://www.orlandosentinel.com/news/education/os-voucher-school-curriculum-20180503-story.html (explaining that, in a study of textbooks from three publishers (Abeka, Bob Jones University Press, or Accelerated Christian Education), the social studies curricula "downplay[ed] the horrors of slavery and the mistreatment of Native Americans"—with one book teaching "that 'most black and white southerners had long lived together in harmony' and that 'power-hungry individuals stirred up the people'" as part of the civil rights movement—and the science curriculum "denounce[d] evolution as untrue," even "telling students the Biblical Noah likely brought baby dinosaurs onto his ark"); see also *America: Land I Love in Christian Perspective* 282–83 (Abeka, 3d ed. 2016) (teaching that "Satan hatched" the concepts of evolution and modern psychology).

substantial interest in deciding for themselves whether to fund education that "is an essentially religious endeavor," *id.*, or that advances religious beliefs. This interest is particularly substantial when those beliefs may include views that conflict with States' policies, including their commitment to antidiscrimination.[11] For instance, some schools, including one of the schools Petitioners seek to attend, teach that, in accordance with their religious beliefs, women should be subordinate to men. See J.A. 81, 86 (Bangor Christian School "believes that . . . the husband is to be the leader of the home and men are to be the leaders of the church" and thus the school "teaches children that the husband is the leader of the household"). Other schools enact disciplinary policies that condemn non-adherence to the school's stated religious tenets based on the students' sexual orientation or gender identity or expression.[12] Indeed,

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[11] Maine's antidiscrimination law, the Human Rights Act (HRA), for example, applies to "any private school or educational program approved for tuition purposes," Me. Stat. tit. 5, § 4553(2-A), and proscribes discrimination in educational programs "because of sex, sexual orientation or gender identity, a physical or mental disability, ancestry, national origin, race, color or religion," *id.* § 4601. Federal law also includes various provisions protecting against discrimination. See, *e.g.*, 42 U.S.C. 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property . . . ."); 42 U.S.C. 2000c-8 ("Nothing in this subchapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education."). Both the States and Congress have an interest in ensuring that public funds are not spent in a manner that contravenes antidiscrimination prohibitions. And, even under Petitioners' rigid approach, both State and federal anti-discrimination laws would remain valid and fully enforceable against any entity that violated them, including religious schools.

[12] See, *e.g.*, J.A. 84 ("An openly gay student who regularly communicated that fact in the school environment . . . would receive

some schools refuse to admit candidates who express their sexual orientation or gender identities, and other schools discipline or expel students who do so.[13]

States must not be stripped of the freedom to decline to provide taxpayer funding to entities that would use these public funds to spread views inimical to States' own policies. See *Norwood* v. *Harrison*, 413 U.S. 455, 468–69 (1973) ("Like a sectarian school, a private school—even one that discriminates—fulfills an important educational function; however . . . the legitimate educational function cannot be isolated from discriminatory practices—if such in fact exist" and "discriminatory treatment exerts a pervasive influence on the entire educational process"); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 592 (1983) ("[T]here can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.").[14]

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counseling, but if the student was 'entrenched in this is who I am, I think that it is right and good' the student would not be allowed to continue attending [Bangor Christian School] because 'it clearly goes against [Bangor Christian School's] Biblical beliefs' – even if the student was celibate and did not engage in homosexual acts").

[13] See, *e.g.*, J.A. 95 ("Temple Academy will not admit a student who is homosexual" or "admit a child who lives in a two-father or a two-mother family"); J.A. 95 ("A child who identifies with a gender that is different than what is listed on the child's original birth certificate would not be eligible for admission to Temple Academy."); J.A. 83 ("[P]resenting oneself as a gender other than the one listed on his or her original birth certificate, *whether done on the school grounds or off school grounds*, 'may lead to immediate suspension and probable expulsion,'" and if the student "refused to stop presenting himself or herself as a gender other than that on said birth certificate after conversations and counseling with school staff, the student would not be allowed to continue attending [Bangor Christian School] . . . ." (emphasis added)).

[14] If the "play in the joints" of the Religion Clauses had been eliminated decades earlier, States that opposed segregation before this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483

3. Maine, like any other State, has a fundamental interest in determining how to best provide a quality education to all school-age children in the State while ensuring that its public funds are not used in ways that are inimical to its own policies. Whether to allow public funds to further religious instruction is a complex decision that is intrinsically intertwined with State and local conditions. This decision is best left to the States.

* * *

This Court has long recognized that a State's choice of whether and how to finance religious education is a "historic and substantial state interest" that falls cleanly within the "play in the joints" of the Religion Clauses. See *Locke*, 540 U.S. at 718, 724 (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970)). Maine should retain the flexibility to define what constitutes a public education in Maine, and Amici States ask this Court to refrain from adopting a test that would diminish State flexibility in navigating taxpayer funding of religious schools that use such funding to advance sectarian purposes. "If any

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(1954), would have encountered additional barriers in enforcing their own constitutions or antidiscrimination laws, see, *e.g.*, *Clark* v. *Board of Sch. Dirs.*, 24 Iowa 266, 274–76 (1868) (holding that Iowa Constitution "fixe[d] the equality of right in all the youths" and that schools could not be segregated), to the extent that they would have been pressured to use public funds to send students to religious schools that discriminated on the basis of race. See, *e.g.*, Bekah McNeel, *Some Christian schools are finally grappling with their racist past and segregated present*, The Undefeated (Aug. 26, 2020), https://theundefeated.com/features/some-christian-schools-are-finally-grappling-with-their-racist-past-and-segregated-present/ (noting that "[m]any" religious "schools were created to preserve racial segregation"); Kristina D. McKenzie, *The desegregation of New Orleans public and Roman Catholic schools in New Orleans*, LSU Master's Theses 43–45 (2009) (explaining how parochial schools delayed desegregation).

room exists between the two Religion Clauses, it must be here." *Id.* at 725.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted.

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