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, COMMISSIONER OF THE MAINE DEPARTMENT OF EDUCATION

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether petitioners' challenge to Me. Rev. Stat. Ann. tit. 20-A, § 2951(2), which provides that a "private school may be approved for the receipt of public funds for tuition purposes only if it" is "a nonsectarian school," presents an Article III case or controversy.

2. Whether Section 2951(2) violates the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause.

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INTEREST OF THE UNITED STATES

Congress has enacted a number of statutory provisions that bar the use of federal funds for religious activities. See pp. 19-20, *infra*. The United States therefore has a substantial interest in the constitutional principles governing this case.

STATEMENT

A. Maine's Tuition-Assistance Program

Maine requires local "school administrative units" (SAUs) to provide every school-age child "an opportunity to receive the benefits of a free public education." Me. Rev. Stat. Ann. tit. 20-A, § 2(1). For high-school students, see *id.* § 1(32)-(33), SAUs may fulfill that responsibility in one of three ways. First, an SAU may

maintain its own secondary school for students who reside within the SAU. *Id.* § 1001(8). Second, an SAU may contract for secondary-school privileges at a nearby public or approved private school. *Id.* §§ 2701-2702, 5204(3). Third, an SAU that does not provide secondary education through either of those means "shall pay the tuition * * * at the public school or the approved private school of the parent's choice at which the student is accepted." *Id.* § 5204(4). That third alternative is known as Maine's tuition-assistance program.

Under Maine law, a "private school may be approved" for the SAU-contract option and the tuition-assistance program "only if it" meets "the requirements for basic school approval." Me. Rev. Stat. Ann. tit. 20-A, § 2951(1); see *id.* § 2702 (incorporating the same eligibility requirements for the SAU-contract option). Those requirements include certain "standards for hygiene, health and safety." *Id.* § 2901(1). The school also must either be "[c]urrently accredited by a New England association of schools and colleges" or satisfy enumerated requirements. *Id.* § 2901(2). Those requirements include, *inter alia*, that the school generally "[u]se English as the language of instruction," *id.* § 2902(2); teach "Maine history, including the Constitution of Maine, Maine geography and environment and the natural, industrial and economic resources of Maine and Maine's cultural and ethnic heritage," *id.* § 4706(2); see *id.* § 2902(3); and maintain "a student-teacher ratio of not more than 30 to one," *id.* § 2902(6)(C). The law also specifies that, to be "approved" for tuition and SAU-contract purposes, a private school must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." *Id.* § 2951(2).

B. Facts And Procedural History

1. Temple Academy is a private school in Waterville, Maine, that is accredited by the New England Association of Schools and Colleges (NEASC). J.A. 20, 90. Temple Academy expects its teachers "to integrate Biblical principles with their teaching in every subject." J.A. 96-97 (citation omitted). The school teaches its students to obey the Bible "in every aspect of life," "to accept Christ as their personal savior," and "to spread the word of Christianity." J.A. 97.

Bangor Christian Schools (BCS) is an NEASC-accredited private school in Bangor, Maine. J.A. 80; D. Ct. Doc. 24-13, at 2 (Mar. 12, 2019). BCS's educational objectives include leading each student "to trust Christ as his/her personal savior" and "develop[ing] within each student a Christian world view and Christian philosophy of life." J.A. 84 (citation omitted). "[R]eligious instruction is completely intertwined" with "academic instruction at BCS." J.A. 85.

2. Petitioners are two sets of parents, the Carsons and the Nelsons, who reside in Maine SAUs that neither maintain their own secondary schools nor contract with nearby schools. J.A. 18, 70-71. In 2018, petitioners brought suit against respondent, the state official responsible for enforcing the requirement that a private school must be "nonsectarian" in order to receive funds under the tuition-assistance program. Me. Rev. Stat. Ann. tit. 20-A, § 2951(2); see J.A. 11-12, 72.

At the time, the Carsons' daughter was a sophomore at BCS, while the Nelsons had a son who was a seventh grader at Temple Academy and a daughter who was a sophomore at Erskine Academy, a nonsectarian private school. J.A. 13-14. The Carsons alleged that, but for Section 2951(2), they would have asked their SAU to

pay their daughter's tuition at BCS. J.A. 22-23. The Nelsons alleged that, but for Section 2951(2), they would have enrolled both of their children at Temple Academy and asked their SAU to pay their children's tuition at that school. *Ibid.*

Petitioners alleged that Section 2951(2) violated the Free Exercise and Establishment Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. J.A. 31; see J.A. 23-27, 29-30. Petitioners sought declaratory and injunctive relief against enforcement of Section 2951(2). J.A. 31-32.

3. The parties stipulated, *inter alia*, that Temple Academy and BCS are "sectarian" schools within the meaning of Section 2951(2), J.A. 80, 90; that "Temple Academy does not know whether it would accept public funding for tuition purposes" if Section 2951(2) were held invalid, J.A. 98; and that "[t]here is no way to predict" whether BCS would accept such funds if Section 2951(2) were held invalid, J.A. 90. The district court granted judgment for respondent on the stipulated record. Pet. App. 63-75. Relying on *Eulitt ex rel. Eulitt* v. *Maine*, 386 F.3d 344 (1st Cir. 2004), the court held that petitioners had Article III standing, Pet. App. 67-70, but rejected petitioners' constitutional challenges on the merits, *id.* at 70-73.

4. The court of appeals affirmed. Pet. App. 1-60.

a. The court of appeals held that petitioners had Article III standing. Pet. App. 15-21. The court acknowledged that "future developments might moot [petitioners'] claims by making clear that neither BCS nor [Temple Academy] will participate in the tuition assistance program." *Id.* at 21. But it concluded that, because those schools had not yet "extinguished" the possibility that they might participate, petitioners had standing. *Id.* at 19.

b. The court of appeals held that Section 2951(2) does not violate the Free Exercise Clause. Pet. App. 21-52. The court explained that, unlike the law this Court had invalidated in *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020), Section 2951(2) "does not bar schools from receiving funding simply based on their religious identity." Pet. App. 39. Rather, the court understood Section 2951(2) "to bar BCS and [Temple Academy] from receiving the funding based on the religious use that they would make of it in instructing children." *Ibid.* Emphasizing that "Maine may require its *public* schools to provide a secular educational curriculum rather than a sectarian one," *id.* at 44, and that "Maine provides tuition assistance only to those who cannot get the benefits of a free public school education directly from their SAU," *id.* at 43, the court concluded that Section 2951(2) "merely reflects Maine's refusal to subsidize religious exercise," *id.* at 42.

c. The court of appeals likewise rejected petitioners' Equal Protection Clause challenge, holding that Section 2951(2) satisfies rational-basis review. Pet. App. 52-56.

d. The court of appeals also rejected petitioners' contention that "the Establishment Clause requires Maine to include sectarian schools in the tuition benefit program." Pet. App. 56. The court emphasized that "schools seeking to be 'approved' generally self-identify as 'sectarian' or 'nonsectarian,'" and that petitioners had identified no "entanglement concern as applied to them specifically." *Id.* at 57-58.

SUMMARY OF ARGUMENT

I. Petitioners' challenge to Section 2951(2) does not present an Article III case or controversy. The parties have stipulated that it is unclear whether Temple Academy or BCS would participate in the tuition-assistance

program if Section 2951(2) were held invalid. That uncertainty prevents petitioners from establishing either injury fairly traceable to Section 2951(2) or redressability. And because the Carsons' daughter recently graduated from high school, their claims are now moot.

II. Section 2951(2) does not violate the Free Exercise Clause, which forbids laws "prohibiting the free exercise" of religion. U.S. Const. Amend. I. In interpreting the adjacent and similarly worded Free Speech Clause, this Court has long distinguished between laws that impermissibly "abridg[e] the freedom of speech" and laws that merely decline to subsidize it. *Ibid.*; see, *e.g.*, *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983).

Similar principles should govern under the Free Exercise Clause. The government cannot "discriminate[] against" or "impose[] a penalty on" religious exercise by denying generally available benefits based on the recipient's "religious character." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 (2017). But the Court has distinguished such penalties and discrimination—which effectively penalize constitutionally protected activity that is *not* government-funded—from mere refusals to subsidize particular religious activities. *Id.* at 2023-2024; see, *e.g.*, *Locke* v. *Davey*, 540 U.S. 712, 720-721 (2004). In a 2019 opinion, the Justice Department's Office of Legal Counsel has relied on the same distinction to conclude that federal statutes providing money to schools but prohibiting the funds' use for religious activities are constitutional.

As construed by the court of appeals, Section 2951(2) does not restrict funding based on a school's religious identity, but simply declines to subsidize a form of reli-

gious exercise—the inculcation of specific religious tenets in secondary-school students. As in *Locke*, the State's decision not to subsidize that category of religious instruction and inculcation reflects a legitimate interest in remaining neutral toward such an "essentially religious endeavor," not any "hostility toward religion." 540 U.S. at 721. Maine undisputedly has a valid—indeed, compelling—interest in providing nonsectarian education when SAUs maintain their own secondary schools (where the Constitution forbids sectarian instruction) or contract for secondary-school privileges nearby. Section 2951(2) simply ensures that the basic contours of a "free public education" remain the same under the tuition-assistance program. Me. Rev. Stat. Ann. tit. 20-A, § 2(1).

III. Section 2951(2) does not violate the Establishment Clause. By declining to fund religious instruction, Maine has not "disapprov[ed] of a particular religion or of religion in general." *Locke*, 540 U.S. at 725 n.10 (citation omitted). Nor does the inquiry into whether a school is covered by Section 2951(2) foster excessive government entanglement with religion. Schools generally self-identify as "sectarian" or "nonsectarian" within the meaning of the statute, and any further inquiry is based on objective factors about the school's mission and curriculum. In any event, this case presents no entanglement concerns, because the parties have stipulated that Temple Academy and BCS are covered by Section 2951(2).

IV. Section 2951(2) does not violate the Equal Protection Clause. Section 2951(2) furthers legitimate anti-establishment interests, and it does not infringe the right of parents to direct the education of their children. As this Court has repeatedly held, "a legislature's decision not to subsidize the exercise of a fundamental right

does not infringe the right, and thus is not subject to strict scrutiny." *Regan*, 461 U.S. at 549.

ARGUMENT

I. PETITIONERS' CHALLENGE TO MAINE'S STATUTE DOES NOT PRESENT AN ARTICLE III CASE OR CONTROVERSY

A. The Nelsons lack Article III standing to seek the declaratory and injunctive relief that their complaint requested. Their daughter has graduated from high school, and their son is now a sophomore at Erskine Academy. Pet. Br. 6. The Nelsons' only asserted current injury is the loss of the opportunity to send their son to Temple Academy using public funds. See Cert. Reply Br. 9.

The parties have stipulated, however, that "Temple Academy does not know whether it would accept public funding for tuition purposes" if Section 2951(2) were held invalid, and that it would not accept public funding if there were "strings attached." J.A. 98; see J.A. 98-99. On this record, Temple Academy itself therefore would lack standing to challenge Section 2951(2). To satisfy Article III, Temple Academy would be required to show that it is "'able and ready'" to apply to become an approved private school "in the reasonably foreseeable future" if Section 2951(2) is held to be unenforceable. *Carney* v. *Adams*, 141 S. Ct. 493, 500 (2020) (citation omitted). If Temple Academy "does not know" whether it would apply, J.A. 98, the school could not demonstrate the necessary "injury fairly traceable" to Section 2951(2). *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006) (citation omitted). And because the Nelsons could not send their son to Temple Academy using public funds unless Temple Academy applies to become an approved private school, see D. Ct. Doc. 24-2, at PageID #164-167

(Mar. 12, 2019), the same uncertainty prevents them from establishing standing as well. See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414 (2013) (reaffirming the Court's "usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors").

Analyzing the issue through the lens of redressability yields the same outcome. Even if Section 2951(2) were held invalid, public funds would be available to pay the Nelsons' son's tuition at Temple Academy only if Temple Academy applied to become an approved private school. The court of appeals held that the Nelsons had standing because Temple Academy had not "extinguished" the possibility that it *might* participate in the tuition-assistance program. Pet. App. 19. Under this Court's precedents, however, the Nelsons must show that their requested relief is "likely" to "redress[]" their asserted injury. *DaimlerChrysler*, 547 U.S. at 342 (citation omitted). The Nelsons cannot make that showing.

B. The Carsons likewise lack Article III standing. Given the parties' stipulation that "[t]here is no way to predict" whether BCS would accept public funds for tuition purposes if Section 2951(2) were held invalid, J.A. 90, the Carsons cannot establish injury fairly traceable to Section 2951(2) or redressability. And because the Carsons' daughter "recently graduated" from high school, Pet. Br. 7 n.4, their claims are now moot. See *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 90-91 (2013).

II. MAINE'S STATUTE DOES NOT VIOLATE THE FREE EXERCISE CLAUSE

The Free Exercise Clause of the First Amendment, which applies to the States under the Fourteenth Amendment, provides that "Congress shall make no law * * * prohibiting the free exercise" of religion. As some

Members of this Court have recently emphasized, the Clause protects "the free *exercise* of religion, not just the right to inward belief." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring in part). Thus, "'free exercise'" encompasses both "*be*[*ing*] a religious person, holding beliefs inwardly and secretly," and "*act*[*ing*] on those beliefs outwardly and publicly." *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2276 (2020) (Gorsuch, J., concurring) (citation omitted).

This case, however, does not turn on the meaning of "free exercise." Rather, for present purposes, "[t]he crucial word in the constitutional text is 'prohibit.'" *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988). In forbidding laws "prohibiting" the free exercise of religion, the Clause reaches "not just outright prohibitions," but also "indirect coercion or penalties on the free exercise of religion." *Ibid.* The government thus may not deny generally available benefits based on a person or entity's "religious character." *Trinity Lutheran*, 137 S. Ct. at 2021. But just as the government may decline to subsidize particular speech without violating the Free Speech Clause, its refusal to subsidize religious exercise does not, without more, violate the Free Exercise Clause.

In the court of appeals, the United States filed an amicus brief supporting petitioners and arguing that Section 2591(2) violates the Free Exercise Clause because it disqualifies schools "simply because of their religious identity—not because of any religious content of the instruction they provide." U.S. C.A. Br. 22. But the court of appeals interpreted Section 2591(2) differently, and the question on which this Court granted certiorari

presupposes that the statute operates only to distinguish between religious and non-religious uses of state funds. Petitioners have principally urged the Court to hold that such use-based distinctions are impermissible. Such a holding could call into question many federal statutes that prohibit various forms of government aid from being used for religious activities.

After the change in Administration and those intervening developments, the United States reexamined this case. As the case comes to this Court, it presents the question whether Maine may exclude Temple Academy and BCS from its tuition-assistance program not because of the schools' religious identity, but based on the religious nature of the instruction that the state funds would be used to provide. In the United States' view, such a use-based condition is consistent with the Free Exercise Clause because it reflects a decision not to subsidize religious instruction and inculcation.

A. The Free Exercise Clause Allows The Government To Decline To Subsidize Religious Exercise

In interpreting the adjacent and textually similar Free Speech Clause of the First Amendment, this Court has long distinguished between laws that penalize speech and laws that merely decline to subsidize it. Similar principles should govern under the Free Exercise Clause.

1. In construing the Free Speech Clause, this Court has long distinguished laws that abridge the freedom of speech from laws that merely decline to subsidize it

The Free Speech Clause states that "Congress shall make no law * * * *abridging* the freedom of speech." U.S. Const. Amend. I (emphasis added). Accordingly, the Court has drawn a line between laws that "abridg[e]"

the freedom of speech and laws that do not. *Ysursa* v. *Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009). Laws that merely decline to subsidize speech generally fall on the constitutional side of that line.

a. The paradigmatic example of a law that "abridg[es] the freedom of speech" is one that directly contracts or diminishes that freedom, either by restricting what a person may say or by compelling a person to say something. U.S. Const. Amend. I; see, *e.g.*, *Reed* v. *Town of Gilbert*, 576 U.S. 155, 159 (2015) (invalidating a content-based restriction on speech); *Wooley* v. *Maynard*, 430 U.S. 705, 713-715 (1977) (invalidating a law that compelled individuals to convey a particular message).

A law can also abridge the freedom of speech without "directly" interfering with it, as by imposing an "unconstitutional condition" on a government benefit. *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006). The Court has held, for example, that the government may not "deny a benefit to a person because of his constitutionally protected speech or associations." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). Such a denial would "penalize[] and inhibit[]" the exercise of free-speech rights in a manner that the government "'could not command directly.'" *Ibid.* (citation omitted). Thus, in *Perry*, the Court held that the government could not decline to renew a public school teacher's contract in retaliation for the teacher's public criticism of the school's policies. *Id.* at 598. And in *Speiser* v. *Randall*, 357 U.S. 513 (1958), the Court held that the government could not deny a tax exemption because the taxpayer had advocated the government's overthrow. *Id.* at 516-518.

The government likewise may not "condition" a benefit on "the affirmation of a belief that by its nature cannot be confined within the scope of the [g]overnment program." *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 221 (2013) (*AOSI*). Under that principle, "compelling" a person "to adopt a particular belief as a condition" of receiving a benefit would "go[] beyond defining the limits of the [government] *program* to defining the *recipient*." *Id.* at 218 (emphases added). Because the government could not achieve that result through "direct regulation," *id.* at 213, such a condition is "unconstitutional," *id.* at 214. Thus, in *AOSI*, the Court held that the government could not condition funds on a recipient's explicit "agree[ment] with the Government's policy to oppose prostitution and sex trafficking." *Id.* at 213; see *id.* at 221.

b. The Court has distinguished, however, between laws that "'abridg[e] the freedom of speech'" and laws that merely "decline[] to promote" it. *Ysursa*, 555 U.S. at 355. In *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983), the Court upheld a law that denied a particular tax-exempt status to organizations that engaged in substantial efforts to influence legislation. *Id.* at 542 & n.1, 551. The Court acknowledged that, under *Speiser* and *Perry*, "the government may not deny a benefit to a person because he exercises a constitutional right." *Id.* at 545. But the Court held that the law before it did not "fit[] the *Speiser-Perry* model," *ibid.*, because the law merely "ensur[ed] that no tax-deductible contributions [we]re used to pay for substantial lobbying," *id.* at 544 n.6. Congress therefore had not "den[ied] [organizations] any independent benefit on account of [their] intention to lobby"; rather,

"Congress ha[d] merely refused to pay for the[ir] lobbying out of public moneys." *Id.* at 545. This Court "reject[ed] the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State,'" *id.* at 546 (citation omitted), and held that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right," *id.* at 549.

The Court reaffirmed that holding in *Rust* v. *Sullivan*, 500 U.S. 173 (1991). *Rust* involved a law that "provide[d] federal funding for family-planning services" on the condition that program funds not be used to engage in abortion advocacy and counseling. *Id.* at 178; see *id.* at 196. The Court rejected the contention that the law "condition[ed] the receipt of a benefit * * * on the relinquishment of a constitutional right." *Id.* at 196. The Court explained that "the Government [wa]s not denying a benefit to anyone, but [wa]s instead simply insisting that public funds be spent for the purposes for which they were authorized." *Ibid.* The Court emphasized that, because the law left recipients free to engage in abortion-related speech on their own dime, it did not run afoul of the Court's "'unconstitutional conditions'" decisions "involv[ing] situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service." *Id.* at 197.

Regan, *Rust*, and other decisions of this Court establish a general principle that "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Rust*, 500 U.S. at 193 (quoting *Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980)). The Court has held that the Free Speech

Clause prohibits the government from excluding particular viewpoints when a subsidy program in effect creates a forum that the government has generally made available for a diversity of private expression. See *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-837 (1995); cf. *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 543-544 (2001). But outside that narrow context, the Court has consistently upheld laws that merely decline to fund an exercise of free speech. See, *e.g.*, *United States* v. *American Library Ass'n*, 539 U.S. 194, 210-214 (2003) (plurality opinion); *Rust*, 500 U.S. at 192-200; *Regan*, 461 U.S. at 542-551; *Cammarano* v. *United States*, 358 U.S. 498, 512-513 (1959).

2. With respect to freedom of religion, this Court should draw a similar distinction between laws that ban or penalize religious exercise and laws that merely decline to subsidize it

This Court's Free Exercise Clause precedents have applied the same basic framework that the Court has adopted under the Free Speech Clause. Pet. App. 26 n.1.

a. Just as the Free Speech Clause bars laws "*abridging* the freedom of speech," the Free Exercise Clause bars laws "*prohibiting* the free exercise" of religion. U.S. Const. Amend. I (emphases added). The laws that this Court has condemned as "prohibiting" the free exercise of religion generally mirror those that it has viewed as unconstitutionally "abridging" the freedom of speech. Those prohibitions include laws that directly regulate—and thus directly interfere with—religious exercise. In *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), for example, the Court held unconstitutional various laws that imposed criminal sanctions on a religious practice. *Id.* at 527-528, 546.

As in the free-speech context, the Court has also recognized that certain laws that do not interfere directly with religious exercise may nevertheless be invalid under the unconstitutional-conditions doctrine. The Court has held, for instance, that a government may not "condition[] receipt of an important benefit upon conduct proscribed by a religious faith," or "den[y] such a benefit because of conduct mandated by religious belief." *Thomas* v. *Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-718 (1981); see *Everson* v. *Board of Educ.*, 330 U.S. 1, 16 (1947) (recognizing that a government "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation"). In several decisions—including *Sherbert* v. *Verner*, 374 U.S. 398, 403-410 (1963), and *Thomas*, 450 U.S. at 716-719—the Court has thus "invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion." *Employment Div.* v. *Smith*, 494 U.S. 872, 883 (1990). The reasoning of *Sherbert* and *Thomas* tracks the reasoning of this Court's free-speech decisions in *Speiser* and *Perry*, discussed above. See *Perry*, 408 U.S. at 597 (observing that *Speiser* and *Sherbert* involve application of the same "general principle").

As in the free-speech context, moreover, the Court has invoked the Free Exercise Clause to strike down conditions on government funding that went "beyond defining the limits of the [government] program to defining the recipient." *AOSI*, 570 U.S. at 218. In *Trinity*

Lutheran, for example, the Court held that a government may not "deny[] a qualified religious entity a public benefit"—there, playground-resurfacing grants—"solely because of [the entity's] religious character." 137 S. Ct. at 2024. And in *Espinoza*, the Court held that a government may not "bar[] religious schools from public benefits solely because of the religious character of the schools"—that is, whether they were "affiliated" with or "controlled in whole or in part by" a church. 140 S. Ct. at 2255. The reasoning of those decisions mirrors the reasoning of this Court's free-speech decision in *AOSI*. To "condition[] the availability of benefits upon a recipient's willingness to surrender its religiously impelled status," *id.* at 2256 (brackets and citation omitted), would "go[] beyond defining the limits of the [government] program to defining the recipient," *AOSI*, 570 U.S. at 218.

b. At the same time, the Court has distinguished impermissible penalties on religious exercise from circumstances where the government has "merely chosen not to fund" religious activities. *Locke* v. *Davey*, 540 U.S. 712, 721 (2004); see *id.* at 720-721. Although the Court has described that distinction as one between government-funding decisions "based on status" and those "based on use," *Espinoza*, 140 S. Ct. at 2256, the distinction does not reflect any differentiation between religious *belief* and *practice*. When the government provides money to support secular projects, it may not "discriminate[] against otherwise eligible recipients by" excluding them from participation because of their religious beliefs *or* conduct, since the effect of such discrimination is to "impose[] a penalty on the free exercise of religion." *Trinity Lutheran*, 137 S. Ct. at 2021. The distinction between status and use instead reflects the distinction

drawn in *AOSI* between impermissible funding conditions "defining the recipient" and permissible conditions "defining the limits of the [government] program"—*i.e.*, conditions based on the use to which the funds would be put. 570 U.S. at 218.

The *Locke* Court upheld such a condition on the use of government funds. The state law at issue provided grants to students for postsecondary-education expenses but barred recipients from using the funds to pursue a "degree in theology"—*i.e.*, a degree that is "devotional in nature or designed to induce religious faith." 540 U.S. at 716 (citation omitted); see *id.* at 715. As in *Regan* and *Rust*, the Court in *Locke* concluded that the refusal to fund protected activity cannot, without more, be viewed as penalizing that activity. See *id.* at 720-721.

The *Locke* Court emphasized that the challenged law did not require recipients "to choose between their religious beliefs and receiving a government benefit," as the laws in *Thomas* and *Sherbert* had. 540 U.S. at 720-721. Rather, the State "ha[d] merely chosen not to fund a distinct category of instruction." *Id.* at 721; see *id.* at 720 n.3 (finding Free Speech Clause public-forum precedents inapposite because the scholarship program was not a forum created to "encourage a diversity of views from private speakers") (citation omitted). The Court noted that recipients could "still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology," *id.* at 721 n.4, and were barred only from using their scholarships for a specific course of instruction that the State had "chosen not to fund," *id.* at 721.

The *Locke* Court found no evidence that the State's choice not to fund religious instruction was based on

"hostility toward religion." 540 U.S. at 722. Rather, the Court held that, although the Establishment Clause did not preclude the State from allowing public funds to be used to pursue degrees in devotional theology, *id.* at 719, the State had legitimate "antiestablishment interests" in "deal[ing] differently with religious education for the ministry than with education for other callings," especially given that "[t]raining someone to lead a congregation is an essentially religious endeavor," *id.* at 721-722.

3. In analyzing the constitutionality of federal statutes, the federal government has distinguished between penalties on religious exercise and mere refusals to fund religious activities

The "federal government has in many instances excluded explicitly religious activities, including religious instruction, from more general funding programs, and thus has long asserted an interest in avoiding the funding of religious instruction akin to that recognized by the Court in *Locke*." Office of Legal Counsel (OLC), *Religious Restrictions on Capital Financing for Historically Black Colleges and Universities* (Aug. 15, 2019), slip op. 21 (OLC Op.), https://www.justice.gov/olc/file/1350166/download. Congress has enacted many provisions that bar the use of public funds for religious activities. See 20 U.S.C. 122 (providing that "[n]o part" of appropriations for Howard University "shall be used, directly or indirectly, * * * for the support of any sectarian, denominational, or religious instruction therein"); 20 U.S.C. 1011k(c) (providing that "no project assisted with funds under subchapter VII * * * shall ever be used for religious worship or a sectarian activity"); see also, *e.g.*, 20 U.S.C. 1062(c)(1), 1137(c), 7885; 25 U.S.C. 1803(b), 1813(e), 2502(b)(2), 3306(a); 34 U.S.C. 12161(d)(2)(D);

42 U.S.C. 290kk-2, 5001(a)(2), 9858k(a). The United States understands those laws to be generally consistent with the Free Exercise Clause because they do not discriminate based on religious status or deny benefits based upon religious exercise outside the program itself, but merely decline to subsidize religious activities. See OLC Op. 20-21 & n.5.

In 2019, OLC addressed the constitutionality of 20 U.S.C. 1066c(c) and 1068e(1), which govern the provision of funds appropriated for certain programs, including a capital-financing program for historically black colleges and universities (HBCUs). OLC determined that *Trinity Lutheran* had not cast doubt on the distinction—reflected in decisions like *Locke*, *Regan*, *Rust*, and *AOSI*—"between Congress's permissible discretion to allocate federal funds," on one hand, and "unconstitutional conditions" on the availability of those funds, on the other. OLC Op. 6. OLC explained that "Congress may permissibly decline to subsidize religious activity, just as Congress may decline to fund other constitutionally protected activities, such as lobbying." *Id.* at 19 (citing *Regan*, 461 U.S. at 548-549). OLC further observed, however, that Congress cannot deny funds for secular projects like "repair[ing] an HBCU's roads or sewers" simply because a particular HBCU "is religious in character." *Ibid.*

Applying that framework, OLC concluded that the final portion of Section 1066c(c), which bars the provision of program funds "to an institution in which a substantial portion of its functions is subsumed in a religious mission," 20 U.S.C. 1066c(c), "unconstitutionally discriminates on the basis of an institution's religious character," OLC Op. 16. OLC explained that this provision "does not merely define a secular government

program to exclude religious activities, but instead defines and excludes the recipient based upon its religious identity." *Ibid.* OLC reached a different conclusion, however, with respect to Section 1068e(1), which states that program funds "may not be used" for "any religious worship or sectarian activity." 20 U.S.C. 1068e(1). Based in part on principles of constitutional avoidance, OLC concluded that Section 1068e(1) is "best construed" as merely declining to subsidize particular "projects directly tied to devotional activities." OLC Op. 18; see *id.* at 19-20. OLC determined that, so construed, Section 1068e(1) is "a lawful exercise of Congress's discretion to define a federal aid program, rather than a penalty on the free exercise of religion." *Id.* at 19.

B. Maine's Statute Does Not Violate The Free Exercise Clause

Rather than penalizing religious exercise, Section 2951(2) merely declines to subsidize it. And petitioners have identified no basis for concluding that the Maine legislature's enactment or subsequent retention of the provision reflects hostility to religion. Section 2951(2) therefore does not violate the Free Exercise Clause.

1. Maine's statute merely declines to subsidize religious activities

a. Under Section 2951(2), a "private school may be approved for the receipt of public funds for tuition purposes only if it" meets specified criteria, including that it is "a nonsectarian school in accordance with the First Amendment of the United States Constitution." Me. Rev. Stat. Ann. tit. 20-A, § 2951(2). Petitioners, supported by the United States as amicus curiae, argued below that the text of Section 2951(2) excludes particular schools

from Maine's tuition-assistance program "solely because they are religious." Pet. C.A. 28(j) Letter 2 (June 30, 2020) (citation omitted); see Pet. App. 37-39 & n.5. The court of appeals rejected that argument. Pet. App. 34-39. The court held that Section 2951(2) "does not bar schools from receiving funding simply based on their religious identity," but rather bars schools "from receiving the funding based on the religious use that they would make of it in instructing children." *Id.* at 39.

This Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988). Because this Court has held that a State may not deny tuition funding based on a school's "religious status," *Espinoza*, 140 S. Ct. at 2256, the First Circuit's reading of Section 2951(2) is consistent with the principle that statutes should be construed if fairly possible in a way that avoids constitutional infirmities. Cf. OLC Op. 18 (noting that federal statutory restrictions on the provision of funds to religious HBCUs "can and must be construed to avoid unconstitutionality"). Petitioners no longer dispute that the application of Section 2951(2) "depends on the sectarian nature of the educational instruction that the school will use the tuition assistance payments to provide." Br. 5 (quoting Pet. App. 35). Indeed, the question on which petitioners sought (and this Court granted) review *presupposes* that Maine would exclude Temple Academy and BCS from the State's funding program only because those schools would use the funds to "provide religious, or 'sectarian,' instruction." Pet. I.

Because neither Temple Academy nor BCS has applied for approved-private-school status, and petitioners have not asked their respective SAUs to pay tuition

to those schools, Maine administrative officials have had no occasion to explain precisely why any such requests would be denied. But the parties have stipulated that both Temple Academy and BCS seek to provide religious inculcation in all aspects of the schools' instructional programs. J.A. 84-86, 96-97. Given the First Circuit's reading of Maine law, principles of constitutional avoidance, and the question on which this Court granted review, the Court should treat the issue before it as whether Maine's decision not to subsidize religious instruction and inculcation provides a constitutionally sufficient reason for denying Temple Academy and BCS approved-private-school status. Under the principles reflected in this Court's precedents and OLC's approach to analogous federal statues, it does.

b. Under this Court's precedents, "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Rust*, 500 U.S. at 193 (quoting *Harris*, 448 U.S. at 317 n.19). Petitioners nevertheless offer several reasons (Br. 17-36) that Section 2951(2) should be subject to strict scrutiny. Those arguments lack merit.

Petitioners argue (Br. 17-21) that Section 2951(2) is not a law of general applicability under *Lukumi*. But the requirement of general applicability found in the "*Lukumi* line of cases" does not apply where, as here, the government merely declines to subsidize religious exercise. *Locke*, 540 U.S. at 720. The *Locke* Court explained that, whereas the municipal laws at issue in *Lukumi* had "sought to suppress ritualistic animal sacrifices of the Santeria religion" by "ma[king] it a crime to engage in certain kinds of animal slaughter," the State in *Locke* had not imposed "criminal [or] civil sanctions on any type of religious service or rite" and had

"not require[d] students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720-721. Rather, "[t]he State ha[d] merely chosen not to fund a distinct category of instruction." *Id.* at 721. Similarly here, Maine has simply refused to subsidize religious instruction and inculcation.

Petitioners contend that Section 2951(2) "requires students to choose between free exercise rights and receipt of a public benefit." Pet. Br. 30 (emphasis omitted). But when a government "has merely refused to pay for [a protected activity] out of public moneys," it has not forced anyone to choose between "exercis[ing] a constitutional right" and "receiv[ing]" the benefit, *Regan*, 461 U.S. at 545, since anyone may still receive the benefit and engage in the protected activity "on [his] own time and dime," *AOSI*, 570 U.S. at 218. Thus, in *Rust*, an organization could still receive funds for "a Title X project" and engage in "abortion advocacy" through "programs that are separate and independent from th[at] project." 500 U.S. at 196. And in *Locke*, students could "still use their scholarship to pursue a secular degree" and "study[] devotional theology" at a different institution. 540 U.S. at 721 n.4.

The same is true here. Students in SAUs that do not operate or contract with secondary schools may receive tuition-assistance payments for a public or approved private school and separately obtain religious instruction. Thus, Section 2951(2) does not force students or parents "to choose between their religious beliefs and receiving a government benefit." *Locke*, 540 U.S. at 720-721. Rather, Maine "has merely chosen not to fund a distinct category of instruction." *Id.* at 721. Petitioners therefore "continue as before to be dependent on private sources" for the funds to send their children to

Temple Academy and BCS. *Maher* v. *Roe*, 432 U.S. 464, 474 (1977). In this respect, they are no different from parents who reside in SAUs that maintain their own secondary schools or contract for secondary-school privileges nearby. In both cases, the State subsidizes a nonsectarian education, but not religious instruction and inculcation.

Petitioners assert (Br. 30-31) that there are not enough hours in the day for students *both* to attend a public or approved private school through the tuition-assistance program *and* to obtain adequate religious instruction. But students who participate in the tuition-assistance program—like students who reside in SAUs that maintain their own secondary schools or contract with others—can still obtain meaningful religious instruction through afterschool, Saturday, and Sunday programs. Cf. *Locke*, 540 U.S. at 721 n.4 (noting that students could "pursue a secular degree" at one institution while "studying devotional theology" at another). And parents who believe that their children would be better served by attending a school that provides full-time religious instruction can "simply decline the subsidy." *Rust*, 500 U.S. at 199 n.5.

Petitioners explain (Br. 32) that they feel a religious obligation to provide their children with a religious education. But the Constitution does not require Maine to provide petitioners with "such funds as may be necessary" to fulfill that obligation, any more than it requires Maine to provide such funds to parents with similar convictions who live in SAUs that maintain their own secondary schools or contract for secondary-school privileges—or any more than it requires Maine to provide tuition assistance to schools that predominantly teach in a foreign language or that wish not to teach about Maine's

cultural heritage. *Regan*, 461 U.S. at 550 (citation omitted); see p. 2, *supra*. Maine has simply chosen not to subsidize some forms of education that differ materially from the education that Maine offers in its public schools, and this Court has repeatedly "reject[ed] the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Regan*, 461 U.S. at 546 (citation omitted).

c. Petitioners contend (Br. 28) that, to the extent *Locke* forecloses the application of strict scrutiny to decisions not to subsidize religious exercise, *Locke* "is an anomaly" and "should be overruled." But this Court has "held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan*, 461 U.S. at 549. The real anomaly would be to treat the right to free exercise differently from all other fundamental rights—including the right to free speech protected by the very next clause of the First Amendment.

2. Maine's statute does not reflect hostility to religion

After concluding that the State had "merely chosen not to fund a distinct category of instruction," this Court in *Locke* found no evidence that the funding restriction at issue reflected "hostility toward religion." 540 U.S. at 721. There is likewise no evidence of such hostility here.

a. Section 2951(2) was not enacted as part of the late 19th-century movement to adopt state-level "no-aid provisions" that (in some cases) mirrored the failed "Blaine Amendment"—a proposed federal constitutional amendment "'born of bigotry'" and "'hostility'" to Catholics. *Espinoza*, 140 S. Ct. at 2258-2259 (citation omitted); see *Bagley* v. *Raymond Sch. Dep't*, 728 A.2d 127, 132 n.8 (Me.) (noting that "Maine did not join" that

movement), cert. denied, 528 U.S. 947 (1999). Rather, Section 2951(2) was enacted in 1981 "in response to" an opinion that the Maine Attorney General had issued the previous year. *Bagley*, 728 A.2d at 130; see J.A. 35. After reviewing this Court's then-prevailing precedents—which "could be read to forbid a government, even in a religion-neutral funding program, from supporting religious educational institutions," OLC Op. 21-22—the Maine Attorney General concluded that "using public funds" to "pay for the tuition of students at sectarian elementary and secondary schools" violated the Establishment Clause. J.A. 65; see J.A. 42-58. Thus, in enacting Section 2951(2), Maine was motivated not by religious animus, but by a desire to ensure "compliance with the Establishment Clause." *Bagley*, 728 A.2d at 131.

As construed in this Court's more recent decisions, the Establishment Clause does not bar Maine from providing public funds for religious instruction through a program "of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 649 (2002); see *Locke*, 540 U.S. at 719. A State's refusal to fund particular religious activities can serve legitimate "anti-establishment interests," however, even if state law "draws a more stringent line than that drawn by the United States Constitution." *Locke*, 540 U.S. at 722. The Court upheld the challenged funding restriction in *Locke* even though it had "no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology." *Id.* at 719. The Court explained that the States' discretion to impose funding restrictions that the Establishment Clause does not require is central to the "play in

the joints" between the two Religion Clauses. *Id.* at 718 (citation omitted).

Here, as in *Locke*, even if Maine's tuition-assistance program qualifies as a program of true private choice under *Zelman*, cf. Pet. App. 30 n.2 (noting without resolving this question), the funding restriction still serves legitimate antiestablishment interests in ensuring that the State remains neutral toward an "essentially religious endeavor." 540 U.S. at 721. In *Locke*, that endeavor was "religious education for the ministry," *ibid.*; here, it is the inculcation of specific religious tenets in secondary-school students. Just as in *Locke*, that education is "devotional in nature or designed to induce religious faith." *Id.* at 716 (citation omitted). Both Temple Academy and BCS seek to lead their students "to a personal, saving knowledge of Christ." J.A. 93 (citation omitted); see J.A. 84. Maine has a legitimate antiestablishment interest in declining to fund such religious instruction and inculcation—particularly in a program that is designed not to facilitate alternative educational choices, but instead to guarantee to all students the "benefits of a free public education."

This Court has construed the "ministerial exception" to federal antidiscrimination laws as encompassing teachers at private religious schools. See *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 188 (2012). That approach reflects "a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Our Lady*, 140 S. Ct. at 2064; see *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) (concluding

that the ministerial exception should encompass "any 'employee' who * * * serves as a messenger or teacher of its faith"). The analogy between religious-school teachers and more traditional "ministers" is particularly close at schools like Temple Academy and BCS, in which the inculcation of religious values permeates all aspects of the instructional programs. Those educational missions are undoubtedly constitutionally protected exercises of religion. Yet just as a State has a legitimate antiestablishment interest in declining to pay the salaries of ministers, see *Locke*, 540 U.S. at 723, it has a similar interest in declining to fund that form of secondary-school religious instruction.

The Court in *Espinoza* distinguished *Locke* on the ground that, "[i]n the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones." 140 S. Ct. at 2258. The reference to "denominational" schools would encompass schools that are religiously affiliated but provide essentially secular instruction—a principal focus of the *Espinoza* decision. And even if some early American governments provided aid for religious instruction, that would suggest only that the Establishment Clause *allows* such assistance—not that Maine *must* fund instruction by teachers who perform roles analogous to those of traditional ministers.

Maine's unwillingness to take that step makes particular sense given the role of the tuition-assistance program in the State's public-education system. The tuition-assistance program is available only when an SAU does not maintain its own secondary school or contract for secondary-school privileges nearby. When a particular SAU does not take either of those steps, the tuition-assistance program functions as a substitute for the

"free public education" that the SAU would otherwise provide. Me. Rev. Stat. Ann. tit. 20-A, § 2(1); see *id.* § 5204(4). Indeed, the criteria for eligibility for the program are the same criteria that a private school must satisfy in order to accept students under the contract option. *Id.* § 2702. Petitioners acknowledge (Br. 40 n.9, 42-43) that Maine has a valid—indeed, compelling—interest in ensuring that the two other mechanisms for providing a "free public education" do not involve religious instruction or inculcation. Section 2951(2) and other statutory requirements (see p. 2, *supra*) simply ensure that the basic contours of a "free public education" remain the same when an SAU provides that benefit through the tuition-assistance program.

b. Petitioners' counterarguments lack merit. Petitioners contend (Br. 36-38) that, in defending Section 2951(2), Maine should be allowed to rely only on the rationale articulated in the Maine Attorney General's 1980 opinion. But there is nothing in that opinion that suggests animus toward religion. And because Section 2961(2) continues to serve legitimate antiestablishment interests today, there is likewise nothing in the current "operation" of the law that suggests such animus. *Locke*, 540 U.S. at 725. Rather, legitimate antiestablishment interests motivated the Legislature's decision to retain the law after *Zelman* made clear that some forms of indirect aid to religious schools are permissible. Pet. App. 55.

Finally, petitioners contend (Br. 42-44) that Section 2951(2) is insufficiently tailored to Maine's asserted interest in ensuring that the basic contours of a "free public education," Me. Rev. Stat. Ann. tit. 20-A, § 2(1), remain the same when an approved private school receives tuition-assistance payments. But "[w]ithin far broader limits than petitioners are willing to concede,

when the Government appropriates public funds to establish a program[,] it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. Here, Maine has reasonably identified nonsectarian instruction—a universal and constitutionally required feature of public schools across the country—as a core attribute of a "free public education." And contrary to petitioners' contention (Br. 43), that is not the only attribute Maine cares about. As described above, private schools must meet a series of statutory requirements to be approved for Maine's tuition-assistance program. See p. 2, *supra*. Petitioners are thus wrong to assert (Br. 43) that "Maine allows participating private schools to remain private in every respect save religion."

III. MAINE'S STATUTE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

In *Locke*, this Court held that the State's decision not to fund particular religious instruction did not violate the Establishment Clause. 540 U.S. at 725 n.10. The same outcome is warranted here.

A. Section 2951(2) has a "secular legislative purpose." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971). It serves legitimate antiestablishment interests and betrays no hostility toward religion. See pp. 26-31, *supra*. And while the Establishment Clause requires "denominational neutrality," see *Larson* v. *Valente*, 456 U.S. 228, 246 (1982), petitioners do not contend that Maine has provided tuition-assistance funds to schools that seek to inculcate the tenets of faiths other than those of Temple Academy and BCS, or that promote anti-religious perspectives.

B. Section 2951(2) does not have the "principal or primary effect" of "inhibit[ing] religion." *Lemon*, 403 U.S. at 612. As in *Locke*, "the State has not impermissibly"

"'disapprov[ed] of a particular religion or of religion in general.'" 540 U.S. at 725 n.10 (citation omitted). Rather, Maine has simply declined to subsidize religious instruction and inculcation. See pp. 21-26, *supra*.

C. The inquiry into whether a school is "nonsectarian" within the meaning of Section 2951(2) does "not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 613 (citation omitted). Schools "seeking to be 'approved' generally self-identify as 'sectarian' or 'nonsectarian,'" and to the extent any further inquiry is necessary, it is conducted based on "'objective factors such as mandatory attendance at religious services and course curricula.'" Pet. App. 57-58. The inquiry thus mirrors—and is no more entangling than—the inquiry under the "ministerial exception," which requires an assessment of what a particular employee does. *Our Lady*, 140 S. Ct. at 2062-2069.

In any event, this case presents no entanglement concerns. Such concerns could arise only if Maine officials attempted to second-guess a school's self-description of its mission or the content of the instruction it provided. But the parties have stipulated that Temple Academy and BCS are "sectarian" within the meaning of Section 2951(2), and that both schools include religious inculcation in all aspects of their instructional programs. J.A. 80, 84-86, 90, 96-97.

D. Petitioners also contend (Br. 50) that Maine's application of Section 2951(2) impermissibly depends on whether a particular school is "nominally" or "pervasively" religious. Under the Free Exercise Clause, the government may decline to subsidize particular religious activities whether or not the entity that seeks funds is "pervasively" religious. See OLC Op. 19. Conversely, funds that are otherwise available for secular

projects like "roads or sewers" cannot be withheld from a particular applicant based on its pervasively religious character. *Ibid.*; see *Trinity Lutheran*, 137 S. Ct. at 2021-2024.

Under that framework, Maine may permissibly decline to provide tuition-assistance funds for schools like Temple Academy and BCS, based on the religious character of the instruction for which those funds would be used. To be sure, because the state grants at issue here support the recipient schools' general operations, including teacher salaries, the overall character of the Temple Academy and BCS programs (and, in particular, those schools' stated policies of including the inculcation of religious values in all aspects of their curricula) bears heavily on the determination whether those schools' inclusion in the tuition-assistance program would result in state funding of religious instruction. In that respect Maine's tuition-assistance program differs from the playground-resurfacing subsidies that were at issue in *Trinity Lutheran*, or the funds for repair of "roads or sewers" to which the OLC opinion referred, OLC Op. 19, which would be used for purely secular purposes even in the hands of pervasively religious institutions. But the ultimate justification for withholding tuition-assistance payments here is the religious use to which those funds would be put, not the religious character or affiliation of the recipient.

IV. MAINE'S STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Because Section 2951(2) is "not a violation of the Free Exercise Clause," petitioners' equal-protection claims alleging "discrimination on the basis of religion" are subject only to "rational-basis scrutiny." *Locke*, 540 U.S.

at 720 n.3. Section 2951(2) survives such review for reasons explained above. See pp. 26-31, *supra*.

Petitioners contend that strict scrutiny should apply on the theory that Section 2951(2) infringes "the right of parents . . . to direct the education of their children." Br. 52 (citation omitted). But "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan*, 461 U.S. at 549. "It is one thing to say that a State may not prohibit" the "right of parents to send their children to private schools," and "quite another to say that such [parents] must, as a matter of equal protection, receive state aid." *Norwood* v. *Harrison*, 413 U.S. 455, 461-462 (1973). Petitioners' equal-protection claims thus fail.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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