

No. 20-1088

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**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

RESPONDENT.

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

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**AMICUS BRIEF FOR PROFESSOR CHARLES L. GLENN  
IN SUPPORT OF PETITIONERS**

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

*Amicus* Charles L. Glenn is a professor emeritus of educational leadership and policy at Boston University. He is the author of over 300 articles and book chapters and over a dozen books, including *The Myth of the Common School* and *The American Model of State and School*. Members of this Court have cited his work in prior opinions. *E.g.*, *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2269 (2020) (Alito, J., concurring); *Roper v. Simmons*, 543 U.S. 551, 625 (2005) (Scalia, J., dissenting). He regularly appears as an expert witness in school-funding cases. Prior to his career in academia, Professor Glenn spent twenty years as the director of urban education and equity efforts for the Massachusetts Department of Education, where he spearheaded the desegregation of Boston Public Schools.

As an academic whose work has focused extensively on the history of education, *amicus* is well acquainted with this country's long history of funding schools that provide education with a religious character, whether or not those schools have a religious affiliation. He has an interest in the sound development of this body of law consistent with historical practice.

## SUMMARY OF ARGUMENT

Since its founding in 1778, Phillips Academy in Andover, Massachusetts has been one of the Nation's most prominent high schools. Notable alumni include two U.S.

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<sup>1</sup> Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or his counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3, *amicus* affirms that all parties have filed blanket letters of consent to the filing of *amicus* briefs with the Clerk's Office.

Presidents, one Supreme Court Justice, Olympians, and the beatboxer from the multi-Grammy-winning a cappella group Pentatonix. Today, the school is nondenominational. But from the school's founding until deep into the 20th century, the school embraced a religious outlook. The school's 1778 constitution defined the schoolmaster's "duty" as "to instruct and establish [students] in the truth of Christianity," and rated instruction in English, Latin, Greek, and a host of other secular subjects as more peripheral to the school's mission. *The Constitution of Phillips Academy, in Andover* 11-12 (1828). And the school's Board of Trustees and every faculty member had to practice the Protestant faith. *Id.* at 12.

Then as now, governments created generally applicable grant programs to support schools. In 1793, the Massachusetts legislature offered land grants "for the encouragement of Lit[er]ature." Resolve of Feb. 28, 1793, ch. 62, *reprinted in [1792-93] Acts and Laws of the Commonwealth of Massachusetts* 256 (1895). The grant criteria were neutral: Massachusetts resolved to aid geographically dispersed academies with adequate student bases and proven fundraising ability. Resolve of Feb. 27, 1797, ch. 44, *reprinted in [1796-97] Acts and Laws of the Commonwealth of Massachusetts* 307 (1896). All told, Massachusetts made 43 such grants through 1818. Jean F. Hankins, *Settling Oxford County: Maine's Revolutionary War Bounty Myth*, 42 *Me. Hist.* 135, 143 (2005).

Phillips Academy was one such recipient, receiving eighteen square miles in 1797. Resolve of Feb. 27, 1797, ch. 45, *reprinted in [1796-97] Acts and Laws of the Commonwealth of Massachusetts* 310 (1896). Phillips Academy's commitment to instructing students in the Protestant faith was hardly disqualifying. Indeed, Massachusetts continued legislating for the benefit of the school's "pious founders and benefactors" for years

thereafter. Act of June 20, 1807, ch. 22, 1807 Mass. Acts 192, 193; Act of Feb. 16, 1814, ch. 125, 1814 Mass. Acts 373, 374.

This episode was no outlier. From the Founding through the ratification of the Fourteenth Amendment, States, localities, and the federal government repeatedly funded schools through generally applicable programs, like land grants. As a rule, those governmental programs funded schools engaged in religious instruction, whether by formally teaching religion or by infusing all educational endeavors with a religious worldview. Some of those schools were affiliated with specific religious groups; others were the progenitors of modern-day public schools and professed no single creed. But in the early Republic, “there was no such thing as a secular school; all schools used curriculum that was imbued with religion.” Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2171 (2003).

Nor did governments see any distinction between schools based on “religious status” or “religious use.” And the idea that the government could *exclude* schools from governmental grants out of a desire to avoid supporting religious education would have been heresy to early generations of Americans. In an era when many believed that the point of school was to teach the Christian faith, governments often cited schools’ religious character as a primary reason justifying funding.

This history illustrates why singling out schools that provide religious instruction for disfavored treatment violates the Free Exercise Clause. The government may not deny “a generally available benefit solely on account of religious identity” absent “a state interest of the highest order.” *Trinity Lutheran Church of Columbia, Inc. v.*

*Comer*, 137 S. Ct. 2012, 2019 (2017) (internal quotation marks omitted). That is true whether “religious identity” refers to the status of being religious (no discriminating against Catholics) or doing religious things (no discriminating against people who attend mass and take the Eucharist). The “freedom to act” and the “freedom to believe” are two sides of the same coin. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring). The Free Exercise Clause thus plainly prohibits the government from putting schools to the choice of suppressing their distinctively religious character or bearing the financial burdens of exclusion from government programs. See Pet. Br. 51.

This history also refutes any purported state interest in avoiding funding of religious education. At the Founding, some States expressed an antiestablishment interest in not “using tax funds to support the ministry.” *Locke v. Davey*, 540 U.S. 712, 723 (2004). But *no* State understood this clergy-specific interest to extend to not funding religious practices in schools. The idea that funding religious instruction raises Establishment Clause concerns would have been utterly foreign at the Founding, at the ratification of the Fourteenth Amendment, and for every generation in between. Today, there is no possible basis for seizing upon such a concern to justify discrimination against the very types of schools that dominated American education for the first half of our Nation’s history.

## ARGUMENT

### I. States Uniformly Provided Funds to Schools to Support Religious Instruction

From the Founding, the States took varied approaches towards both education and religion. New England States were heavily involved in funding schools; in the South, governmental funding of any education was the

exception rather than the rule; the mid-Atlantic States fell in between. When it came to funding the clergy, the Revolution ended public funding for the Anglican ministers of the South, who predominantly backed the British. McConnell, *supra*, at 2155. But in New England, compulsory financial support for the proudly patriot Congregational clergy thrived after the Revolution. *Id.* at 2157.

Formal disestablishment also varied. The First Amendment did not trigger disestablishment. Rather, States made a series of political decisions to terminate colonial arrangements by which public funding was provided to churches: North Carolina in 1776, New York in 1777, Virginia between 1776 and 1779, Maryland in 1785, South Carolina in 1790, Georgia in 1798, Vermont in 1807, Connecticut in 1818, New Hampshire in 1819, Maine in 1820, and Massachusetts in 1832-33. Charles L. Glenn, *The American Model of State and School: An Historical Inquiry* 57 (2012).

Despite these differences, States agreed on one thing: public support for religious education was unobjectionable. Well into the 19th century, “most Americans thought that school prayers, Christian morals, and the Bible were essential to education.” Robert H. Keller, Jr., *American Protestantism and United States Indian Policy, 1869–82*, at 2 (1983). Accordingly, from the Founding through the ratification of the Fourteenth Amendment, States funded religious instruction as part and parcel of funding schools.

#### A. New England States Funded Religious Instruction

1. Early New England was the birthplace of American public education. Across New England, towns shouldered the costs of colonial schools, but often gave local clergy responsibility for school curriculum and even instruction. McConnell, *supra*, at 2172. Unsurprisingly, a religious outlook pervaded every subject that New England

schools taught. Students learned reading from *The New-England Primer*, which taught the alphabet with catchy rhymes from A (“In Adam’s Fall, We sinned all”) to Z (“Zacheus he did climb the Tree, Our Lord to see”). James W. Fraser, *Between Church and State: Religion and Public Education in a Multicultural America* 10 (1999). Older students tackled the Lord’s Prayer and the Westminster Catechism. *Id.* The New England colonists placed a high value on raising children who would achieve knowledge of God’s plan of salvation through independent study of the Bible. Providing for schools went hand in hand with providing for religious instruction.

After independence, New England States continued providing for local schools with taxpayer funds, and education remained intensely local. In 1851, Maine had some 4,500 school districts, responding to local demands and subject to no common direction. See *Historical Sketch of School Legislation in the State of Maine*, 6 Conn. Common Sch. J. 355, 362-63 (1852). In 1870, the geographically much smaller New Hampshire boasted 2,118 school districts, each responsible for establishing, funding, and supervising schools for a state population of 318,300. Eugene Alfred Bishop, *The Development of a State School System: New Hampshire* 11-12 (1930).

As a result, the thousands of local schools that sprang up across New England, though not by *status* denominational, inevitably took on the religious character of local communities. The worldview these local schools presented to their students was thus distinctively religious: “[M]ost schools made religious instructions and devotions a normal part of their program.” Charles L. Glenn, *The Myth of the Common School* 86 (2002). Town schools of the era were “virtually Congregational parochial schools.” Richard J. Gabel, *Public Funds for Church and Private Schools* 183 (1937). Connecticut even required schools to

teach the catechism until 1818. *Id.* at 201. Quite naturally, “the same local evangelical group that originally organized a Sunday school was often in due course the prime mover in the establishment of a common school, in the process overseeing the selection of teachers, the organization of curricula, and the choice of textbooks.” Lawrence A. Cremin, *American Education: The National Experience, 1783-1876*, at 66 (1988).

In modern terms: these States created generally applicable programs of taxpayer support for local schools. Those programs overwhelmingly funded schools offering religious education, because at the time, schools focused on imparting the tools students would need to read and understand the Bible. Denying funds to schools because they would *use* those funds to advance a religious mission would have been nonsensical.

2. By the 1830s, social reformers warned that these local schools were not consistently promoting moral habits. These reformers called for an expanded state role in overseeing local efforts and training teachers in order “to shape future citizens to a common pattern,” prompting the rise of “common schools.” Glenn, *Common School, supra*, at 76. New England States and local governments continued supporting these common schools through general taxation, primarily at the local level. *See* Lloyd P. Jorgenson, *The State and the Non-Public School, 1825-1925*, at 7 (1987). Again, by offering funding to government-run schools in general, New England States and localities funded religious instruction in particular.

The centerpiece of common-school instruction was “least-common-denominator Protestantism.” *Espinoza*, 140 S. Ct. at 2271 (Alito, J., concurring) (citation omitted). Horace Mann, who became Secretary of the

Massachusetts Board of Education in 1837, was the common-school movement's leading light. *See id.*

To Mann, education served to “elevate mankind into the upper and purer regions of civilization, Christianity, and the worship of the true God.” Glenn, *Common School, supra*, at 171-72. Mann called on teachers to “train [children] up to the love of God and the love of man; to make the perfect example of Jesus Christ lovely in their eyes; and to give to all so much of religious instruction as is compatible with the rights of others and with the genius of our government.” *Id.* at 164. As Mann told the Board and the wider public, “I could not avoid regarding the man who should oppose the religious education of the young, as an insane man.” *Id.* at 168. Similarly, in 1837, Massachusetts Governor Edward Everett orated about “the one living fountain, which must water every part of the social garden, or its beauty withers and fades away. Of course I mean, sir, moral and religious, as well as mental education.” Glenn, *American Model, supra*, at 60.

Bible reading was ubiquitous. By 1848, Mann ventured that there was not “a single town in the Commonwealth in whose schools [the Bible] is not read.” Glenn, *Common School, supra*, at 166. Mann averred that all members of the State Board of Education recommended “the daily reading of the Bible, devotional exercises, and the constant inculcation of the precepts of Christian morality in all the Public schools.” *Id.* In practice then, “[e]arly common schools featured Bible reading, prayer, hymns, and holiday observances.” John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297 (2001).

Common schools also used distinctly Christian textbooks, including the popular *McGuffey's Readers*. Children learned Psalms and read sermons on temperance.

Fraser, *supra*, at 42. One minister extolled *McGuffey's*, in a statement seemingly written for a book jacket: “They are excellent for educational purposes—their religion is unsectarian, true religion—their morality, the morality of the Gospel.” *Id.*

So pervasive was religious instruction in common schools that Mann was dumbfounded by Protestant critics who charged that Mann’s common schools were inculcating the watered-down Unitarianism of Boston’s liberal elite. Glenn, *Common School, supra*, at 186. Mann responded: “if th[e] Bible is in the schools, how can it be said that Christianity is excluded from the schools; or how can it be said that the school system, which adopts and uses the bible, is an anti-Christian, or an un-Christian system?” Fraser, *supra*, at 27. Catholic critics of common schools agreed, considering common schools to be overwhelmingly Protestant—and thus “an affront” to tenets of the Catholic faith. *Espinoza*, 140 S. Ct. at 2271 (Alito, J., concurring).

The New England common or grammar school of the early Republic, then, was not religious in official denominational *status*, but it was definitely religious in its *use*. In rural areas, where often each school served only a dozen or so families, with a single teacher chosen locally, it was not difficult to reflect the religious convictions of this limited clientele. People who shared common views often chose to live near each other, or propinquity led to common views. In such cases, common public schools could be distinctive in terms of religious content in the curriculum as well as in using Bible readings and Christian hymns as opening ceremonies each day.

In population-dense urban areas, a wider variety of schools flourished, and governments supported schools with varying degrees of religious status as well as use.

For instance, in Lowell, where Catholic immigrants were replacing the factory workers drawn from the New England countryside, the Public School Committee agreed in 1836 to take over support and management of two parochial schools. The Committee examined and employed the teachers, and prescribed the same books as for its other schools, but the teachers were Catholic and the books were examined to screen out content disparaging Catholicism. This arrangement—which Horace Mann and others praised—continued until 1852. Glenn, *Common School*, *supra*, at 216-17.

In sum, common schools through the ratification of the Fourteenth Amendment lacked religious status in the modern sense and held themselves out as nondenominational. But these schools were deeply religious—faith “permeate[d] everything they” did. See *Espinoza*, 140 S. Ct. at 2256 (majority opinion) (cleaned up). New England States funded common schools precisely *because* those schools put religion at the heart of education. After the Civil War, those common schools would evolve into the public schools of today, continuing religious practices like prayer and Bible reading well into the 20th century.

3. New England States and local governments similarly opened their coffers to support private schools. Gabel, *supra*, at 186. Towns gave some academies cash funding. *Id.* State legislatures gifted land grants to others. *Id.* at 186, 190, 194. Until 1820, Massachusetts made land grants in the interior parts of Maine to support academies; in 1796, for instance, four academies were “incorporated by the legislature and endowed with handsome grants of the public lands.” Elmer E. Brown, *Secondary Education in the United States: The Academy Period*, 6 Sch. Rev. 225, 234 (1898) (citation omitted). While town-level gifts were ad hoc, Massachusetts distributed public lands to academies pursuant to neutral, generally

applicable criteria. Resolve of Feb. 27, 1797, ch. 44, *supra*. And Maine continued this policy after breaking off from Massachusetts in 1820, giving 332,800 acres of land and \$20,000 to private academies from statehood to 1851. Gabel, *supra*, at 190.

Yet again, however, governments did not exclude private academies offering religious instruction from this public munificence. Quite the opposite, these private academies touted the depth of their religious character. Churches directly controlled some of these schools, like Cheshire Academy in Connecticut. *Id.* at 201. Other academies were not formally affiliated with a particular denomination or faith. Across the board though, private schools made faith the centerpiece of their teachings even more than common schools did. Some, like Phillips Academy, taught denominational doctrines like Trinitarianism. *Constitution of Phillips Academy, supra*, at 11. Besides the usual Bible reading and prayers, private academies also featured chapel services and compulsory Sabbath worship that common schools would have left to church-affiliated Sunday schools. Gabel, *supra*, at 186.

As with the local grammar schools, the academies were left free to determine the extent to which the instruction provided had a distinctively religious character, or not. As a 19th century historian put it, “[w]ith characteristic devotion to local self government, Massachusetts proposed no further state control of those schools which she thus liberally endowed.” Elmer E. Brown, *Secondary Education in the United States: The Academic Period*, 6 Sch. Rev. 357, 360 (1898). Trying to limit the teaching of religion would have been unfathomable in an era when schools universally blended education and faith.

### B. Mid-Atlantic States Funded Religious Teaching

In the mid-Atlantic States, denominational schools flourished during the first decades of the American Republic. Dutch Reformed, Presbyterians, Quakers, Anglicans, Lutherans, and other groups started and supported their own schools, filling a gap left by the general lack of public provision of education. For example, the colony of New Jersey was under “concessions and agreements” that guaranteed liberty of conscience. *The Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Province of West New Jersey in America*, ch. 16 (1677); *The Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey* (1664). As a result, New Jersey—like New York and Pennsylvania—became a haven for settlers from various religious groups that were experiencing difficulties or persecution in Europe.

“To most of these groups of religious devotees, the school was as essential to the maintenance of their denominational entity as was the church.” Paul Monroe, *Founding of the American Public School System* 91 (1971). These groups supported colonial governments’ practice of leaving local churches in charge of sponsoring and controlling schools, and this practice continued in the new States.

Thus, for the first few decades after the Founding, these States primarily relied on private denominational schools to educate children. These schools were largely funded through tuition, but States extended public funding to educate the poor, sometimes by paying students’ tuition at denominational schools. *E.g.*, James Pyle Wickersham, *A History of Education in Pennsylvania* 273 (1870); Glenn, *American Model*, *supra*, at 138. So the

common thread continued: funding schools meant funding religious instruction.

By the 1840s, the common-school movement, with its generically Protestant vision of public education, had attained dominance in the mid-Atlantic, and mid-Atlantic States turned to general taxation to support these schools. Gabel, *supra*, at 348-49, 374, 380. Whether these States were funding private denominational schools or generically Protestant public schools, however, the bottom line was the same. Religion informed all aspects of education, and mid-Atlantic States opened their purses with that understanding.

New York's experience is illustrative. In 1795, the State appropriated \$50,000 annually to towns to support public education. Diane Ravitch, *The Great School Wars: A History of the New York City Public Schools* 7 (2000). Upstate towns established local schools much like New England's, *id.*; religious instruction was commonplace. As of 1829, 216 New York towns used the New Testament as a reader. Gabel, *supra*, at 350. But in New York City, religious heterogeneity prompted a different approach. Many churches offered schools for the children of their members. Ravitch, *supra*, at 6. Thus, the City redirected its share of New York's 1795 appropriation to the City's eleven existing schools—ten affiliated with churches and one unaffiliated school for free Blacks. *Id.* at 7. In other words: New York offered a generally applicable grant, available to a mix of schools. New York did not limit funding recipients to secular schools; such an exclusion would have been self-defeating given the ubiquity of religious education.

In 1805, the forerunner of New York's public-school system emerged. Philanthropists privately founded the Free School Society (later renamed the Public School

Society) to educate poor boys who did not attend church schools. *Id.* at 8. Like New England's common schools, Society schools offered "nonsectarian[]" education, "which was in reality nondenominational Protestantism." *Id.* at 9. The Society aimed "to inculcate the sublime truths of religion and morality contained in the Holy Scriptures." Philip Hamburger, *Separation of Church and State* 220 (2002). Pupils thus followed a strict curriculum, learning reading in eight stages culminating in the Bible. Ravitch, *supra*, at 13. On Tuesday afternoons, "distinguished ladies" instructed the children in the catechisms of their respective denominations. Jorgenson, *supra*, at 15. Society schools also required daily Bible readings and religious exercises. Ravitch, *supra*, at 18. A typical recitation ran:

TEACHER: Children, who is good?

ANSWER: The Lord is good.

T. To whom should we be thankful?

A. Be thankful unto Him.

T. Whose name should we bless?

A. Bless his name.

*Id.*

All the while, New York State and City funded these Society schools. In 1807, the state legislature appropriated \$4,000 for a building and \$1,000 annually for teachers' salaries. Jorgenson, *supra*, at 14. New York City donated the land for the Society's first schoolhouse. Ravitch, *supra*, at 11. In 1811, the State gave \$4,000 for a second building, and in 1813 the State set up a new school fund from which the Society received an annual allotment. Jorgenson, *supra*, at 15. By 1825, the Society had wielded its political clout to edge other schools out and become the

sole beneficiary of public funding in New York City. Fraser, *supra*, at 52-53.

No one had any doubt that by funding public schools, New York was funding religious instruction. Communities fought bitterly, with Catholics objecting that these schools insisted on the Protestant King James Bible, Protestant hymns and prayers, and “textbooks in which Catholics were condemned as deceitful, bigoted, and intolerant.” Hamburger, *supra*, at 220; Jay Alan Sekulow & Jeremy Tedesco, *The Story Behind Vidal v. Girard’s Executors: Joseph Story, the Philadelphia Bible Riots, and Religious Liberty*, 32 Pepp. L. Rev. 605, 627 (2005). In 1840, Catholic schools petitioned the City for a share of public support. Fraser, *supra*, at 54. In response, the Society offered to black out the worst anti-Catholic references in its textbooks, but deemed the King James Bible non-negotiable. Hamburger, *supra*, at 223.

The solution was not for the government to stop funding religious instruction in schools. Instead, in 1842, New York City adopted State Secretary of State John Spencer’s proposal devolving control to local districts so “that every denomination may freely enjoy its ‘religious profession’ in the education of its youth.” *Id.* at 226-228; Fraser, *supra*, at 56. That proved a Pyrrhic victory for Catholics, because New York State then barred the teaching of “any religious sectarian doctrine or tenet,” i.e., no to Catholicism, but yes to nondenominational Protestantism. Jeffries & Ryan, *supra*, at 301. The victory was also marred by violence. The day of the crucial election, tensions boiled over into violence with dueling Catholic and anti-Catholic mobs fighting in the streets of New York. Ravitch, *supra*, at 75. A mob destroyed the Bishop of New York’s residence, and the militia was called out to protect St. Patrick’s Cathedral. *Espinoza*, 140 S. Ct. at 2272 (Alito, J., concurring).

The upshot: Protestant-style Bible reading continued. Fraser, *supra*, at 56-57. When a few schools interpreted the state law to bar “all religion including the Bible and prayers,” the legislature set them straight, “enjoin[ing] the Board of Education from forbidding the Scriptures without note or comment in any schools.” Gabel, *supra*, at 360-61. Accordingly, throughout the 19th century, New York continued funding public schools, and those public schools continued offering instruction in generic Protestantism. Fraser, *supra*, at 57. In the decades after ratification of the Fourteenth Amendment, the debate shifted to whether the State could exclude certain denominational (Catholic) schools from public funds, while funding non-denominational (Protestant) schools. But it would have been inconceivable for governments, when funding schools writ large, to exclude all instruction with a religious character.

### C. Southern States Funded Religious Instruction

The antebellum South invested little in education. The combination of a predominantly rural population and strict racial divisions stood in the way. Fraser, *supra*, at 24; see Glenn, *American Model*, *supra*, at 24-25, 89. But the few episodes that exist comport with trends elsewhere: southern States aided religious schools, sometimes as part of generally available subsidies, without regard for the religious nature of instruction. And southern States did so despite other qualms about state-supported religion. Many States, for instance, prohibited governmental funding of the clergy specifically. See *Locke*, 540 U.S. at 722-23 & n.6. But opposition to funding the clergy did not translate into opposition to funding religiously affiliated schools, *Espinoza*, 140 S. Ct. at 2258, or schools that offered a religious perspective.

For instance, in 1783, the Georgia legislature authorized the governor to grant 1,000 acres of land to any

person authorized by a county for the erection of a school. Those allocations went directly to churches. Anglicans, Methodists, and Catholics all received distributions. The church erected the school, then the preacher served double duty as schoolmaster. Gabel, *supra*, at 242. Unsurprisingly, “[d]aily prayers, religious exercises and instruction were part of the school curriculum; . . . and ‘Sabbath breaking’ was listed among the immoralities in school regulations.” *Id.* at 243.

Meanwhile, Virginia, starting in 1810, and Delaware, starting in 1818, both funded Sunday schools as part of larger programs to educate the poor. Jorgenson, *supra*, at 13-14; *see* Gabel, *supra*, at 220. Sunday schools received their pro rata share of a larger appropriation based on the number of children enrolled. Gabel, *supra*, at 394. Sunday schools back then covered literacy and more secular basics than Sunday schools today, but “religious and moral instruction” remained the “ultimate purpose.” Jorgenson, *supra*, at 13.

Immediately after the Civil War, public funding of education grew. But a proposal that governments deny funds to certain schools because of the specific religious instruction they provided did not go over well. In 1871, Texas made one effort to bar public funding for private schools that taught “sectarian doctrines.” Gabel, *supra*, at 650. Baylor University’s President attacked those efforts as “the most absurd, monstrous and blundering systems of Free Schools ever adopted on this continent.” Carl H. Moneyhon, *Public Education and Texas Reconstruction Politics, 1871–1874*, 92 Sw. Hist. Q. 393, 400 (1989). “Actual revolt” ensued, with the “destruction of schoolhouses and riots.” Gabel, *supra*, at 651. The legislature relented, repealing the provision in 1873. *Id.*

Thus, in the South, where antebellum governments generally steered clear of education, the trend still held. When the government *did* get involved in funding education, public dollars that went to schools by definition went to religious education. And there was no distinction between religious status and religious use.

## **II. The Limited Federal Education Programs in the Early Republic Reached Religious Use**

As the one entity subject to the First Amendment before incorporation, federal practice sheds considerable light on the historical understanding of the Religion Clauses. *E.g.*, *Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983). And, whether the federal government provided general grants for education or earmarked particular funds for particular projects, the government routinely funded religious instruction. That was often the point.

### **A. The Federal Government Funded Missionaries to Teach Christianity to Native Americans**

From the Founding, the federal government was heavily involved in efforts to educate Native Americans. The United States worked so closely together with missionaries to advance an explicitly evangelizing mission that “Indians viewed Church and State as one.” Keller, *supra*, at 8.

While “[t]he establishment of schools among the Indians began with Protestant missionary groups, . . . there was little growth until government aid was provided.” Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834*, at 220 (1970). In 1776, the First Continental Congress adopted a resolution declaring that “a friendly commerce between the people of the United Colonies and the Indians, and the propagation of the gospel, and the cultivation of the civil arts among the latter, may

produce many and inestimable advantages to both.” Charles L. Glenn, *American Indian/First Nations Schooling: From the Colonial Period to the Present* 31 (2011). A Committee on Indian Affairs was authorized to employ “a minister of the gospel, to reside among the Delaware Indians, and instruct them in the Christian religion.” *Id.*

After ratification of the Constitution, this partnership continued. The first Secretary of War, Henry Knox, urged that missionaries should be appointed to live among Native Americans to achieve “the salutary effect of attaching them to the interest of the United States.” R. Pierce Beaver, *Church, State, and the American Indians* 64 (1966). Knox and President Washington then issued joint instructions to dispatch said missionaries to Tribes to “teach[] them the great duties of religion and morality, and to inculcate a friendship and attachment to the United States.” George Washington & Henry Knox, *Instructions to the Commissioners for Treating with the Southern Indians* (Aug. 29, 1789), in 1 *American State Papers: Indian Affairs* 66 (1832).

The Jefferson administration, too, employed missionaries to teach Native Americans. President Jefferson “despite his famous metaphor of the ‘wall of separation’ between church and state, did not . . . hesitate to sign a treaty in 1803 with the Kaskas[k]ia Indians of Illinois.” Glenn, *American Indian, supra*, at 51. That treaty obligated the United States to pay \$100 per year “towards the support of a priest of [the Catholic] religion, who will engage to perform for the said tribe the duties of his office and also to instruct as many of their children as possible in the rudiments of literature.” A Treaty Between the United States of America and the Kaskaskia Tribe of Indians, 7 Stat. 78, 79 (1803). Jefferson also approved “modest funding” for a Presbyterian mission school where

Cherokee “children were taught to read from the Bible and catechism, to say Christian prayers daily, and to sing Christian hymns.” Glenn, *American Indian, supra*, at 52 (citation omitted).

The Monroe Administration expanded these efforts through an 1819 congressional appropriation of \$10,000 for a general “civilization fund.” *Id.* at 53. Those federal funds went almost exclusively to denominational missions, with the “actual operation of schools” left up to religious organizations. *Id.* at 53-54. As a House committee report explained, the aim was to “moralize” Native Americans in the hopes that “the Bible will be their book, and they will grow up in habits of morality and industry.” Beaver, *supra*, at 67-68.

By 1840, missionary Isaac McCoy observed: “[The Baptist schools] have been sustained almost wholly by means obtained from the Government of the United States.” Keller, *supra*, at 5. McCoy exaggerated only a touch. From 1826 to 1842, \$53,529 of the \$73,197 the Baptists spent on missionary schools came from the federal government. Beaver, *supra*, at 102. And by 1842, federal funds helped to support 37 schools established by missionary groups, with 85 teachers and 1,283 pupils. K. Tsianina Lomawaima, *They Called It Prairie Light: The Story of Chillicothe Indian School 2* (1994).

Federal funding for missionary schools continued into the late 19th century. *Espinoza*, 140 S. Ct. at 2258. Until then, “virtually no one seemed to be troubled by the constitutional implications of the federal government’s long-standing policy of trying to convert the Indians to Christianity.” Donald L. Drakeman, *Church, State, and Original Intent* 307 (2010). Opposition emerged only later, as the federal government increasingly gave Catholic missions most of the funding, prompting anti-Catholic

Protestant organizations to cool on the endeavor. *Id.* at 313-14. From the Founding through the adoption of the Fourteenth Amendment, though, the federal government actively funded schools for Native Americans. “[S]pecific conversion to Protestant Christianity [w]as one of the key ingredients” in that policy. Fraser, *supra*, at 90. Not only did the federal government channel funds to religious schools; the federal government did so to ensure religious instruction.

#### **B. The Freedman’s Bureau Partnered with Religious Groups to Provide Religious Instruction**

During Reconstruction after the Civil War, the Freedmen’s Bureau engaged in “the federal government’s pioneer, if fleeting, venture into education at the state and local levels.” Jacqueline Jones, *Soldiers of Light and Love: Northern Teachers and Georgia Blacks, 1865-1873*, at 108 (1980); see *Espinoza*, 140 S. Ct. at 2258. In addition to many educational efforts initiated by Blacks themselves, numerous Protestant organizations in the North worked to provide instruction for formerly enslaved adults and children. White teachers from the North saw themselves as engaged in a missionary enterprise and were often supported as such by Northern churches. Congress directed the Bureau to educate the freedmen in cooperation with these “private benevolent associations,” and authorized the Bureau to expend funds to facilitate that mission. Act of July 16, 1866, § 13, 14 Stat. 173, 176. That generally applicable grant included religious groups, as well as a few secular partners.

The Freedman’s Bureau’s principal partner was the American Missionary Association, which received over \$1 million in federal funding—20% of the Bureau’s total appropriation. Jones, *supra*, at 92. The American Missionary Association was “explicitly evangelical” and imbued

its schools with a “religious character.” Charles L. Glenn, *African-American/Afro-Canadian Schooling: From the Colonial Period to the Present* 56 (2011).

No surprise, then, that these schools were also comprehensively religious. At one Mississippi school, students began the day with an hour spent reading Scripture, praying, and singing hymns. Joe M. Richardson, *Christian Reconstruction: The American Missionary Association and Southern Blacks, 1861–1890*, at 44 (2009). At a Texas school, the day began and ended with Bible reading and prayer. *Id.* Teachers had to “furnish credentials of Christian standing.” *Id.* at 166. Evangelical Christians were preferred, other Protestants tolerated; Catholics and Unitarians need not apply. *Id.* These teachers, vetted for their piety, came armed with “missionary zeal” and believed that “teaching the Negro to read and understand the Bible was absolutely essential to his religious and moral development.” Glenn, *African-American*, *supra*, at 57 (citation omitted). The goal was that the “Christ-like mission of the teachers” would break down prejudice until “there shall be no Blacks and no Whites, no North and no South, but when all shall be one in Christ Jesus.” *Id.*

Federal efforts to educate southern Blacks were short-lived. *Id.* at 62. But this drawdown did not reflect discomfort with funding religious education. Federally funded schools petered out because Reconstruction collapsed. Southern opponents did not simply object to teaching Blacks to read the Bible or to engage with Christianity. Southern opponents condemned the “Yankee schooma’am” for doing “incalculable mischief” by daring to educate Blacks at all. *Id.* at 58.

### C. Congress Funded Religious Education in Federal Jurisdictions

From the start, when Congress funded schools in federal territories and enclaves, Congress funded religious education. The Land Ordinance of 1785, which laid out the Northwest Territory, set aside one section of each township to support public schools. Act of May 20, 1785 para. 11. That generally applicable rule by definition included schools with religious perspectives, not least because the expectation was that all schools in the region would provide such instruction: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” Northwest Ordinance art. 3 (July 13, 1787). “[T]his aspiration was probably largely fulfilled” given “the religious character of the curriculum and the common practice of employing the minister as the schoolmaster.” McConnell, *supra*, at 2151.

In the District of Columbia, Congress supported denominational schools, including explicitly Presbyterian schools, until at least 1848. *Espinoza*, 140 S. Ct. at 2258; Gabel, *supra*, at 179. As in the States, even public schools in D.C. taught religion. An 1813 schoolmaster’s report, the first surviving record of a D.C. public school, describes how of the 91 pupils, “55 have learned to read in the Old and New Testaments, . . . 26 are now learning to read Dr Watts’ Hymns and . . . 20 can now read the Bible.” J. Ormond Wilson, *Eighty Years of the Public Schools of Washington—1805 to 1885*, 1 Recs. Colum. Hist. Soc’y 119, 127 (1896). Whether the other 36 students learned anything is lost to history. More generally, the Bible served as the “standard reader and speller” “for a long time” in D.C. schools. Gabel, *supra*, at 179 n.75.

Once again, the federal government valued the religious mission or *use* of schooling. The federal government saw no legal impediment to financially supporting either schools with a religious *status* or schools that would put those funds to religious *use* by providing education infused with a religious perspective. That distinction simply would not have occurred to earlier generations.

### III. Restricting Generally Available Aid Based on a School’s “Religious Use” Violates the Free Exercise Clause

1. The cardinal rule of the Free Exercise Clause is that when the government enacts a generally applicable law or creates a generally applicable program, the government cannot facially discriminate against religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *Locke*, 540 U.S. at 726 (Scalia, J., dissenting); accord *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting).

The Free Exercise Clause thus condemns generally applicable laws that discriminate against schools because of their religious affiliation. *Espinoza*, 140 S. Ct. at 2261. And the Free Exercise Clause equally condemns generally applicable laws that discriminate against schools because they provide an education from a religious perspective. Religious people do religious things. See *Trinity Lutheran*, 137 S. Ct. at 2025-26 (Gorsuch, J., concurring in part). The Constitution protects “not just the right to be a religious person” but “the right to *act* on those beliefs outwardly and publicly.” *Espinoza*, 140 S. Ct. at 2276 (Gorsuch, J., concurring). After all, practicing one’s religion stands “at the very heart of the First Amendment’s guarantee of religious liberty.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). It would be meaningless for the Free Exercise Clause to prohibit the

government from discriminating against self-identified Catholics or Pentecostals, but tolerate excluding those who attend Mass or speak in tongues.

Those principles apply equally to funding programs. The “government may not force people to choose between participation in a public program and their right to free exercise of religion.” *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part). Religious discrimination is religious discrimination, whether it comes as a penalty or a denial of benefits. *See S. Bay*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting). And “exclusion of religious speech and motivations, of religious organization and programs from equal participation in the ‘public square’ and in public funding is not neutral in its effects.” Charles L. Glenn, *The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies* 76 (2000). Such exclusions force a reversion to secular conformity, as schools feel pressured to abandon the very expressions of faith that made their school environments distinctive. *Id.*

The history of governmental funding for education shows just how incomprehensible permitting discrimination on the basis of religious use would be. Since the Founding, the federal government and States funded education to varying degrees. They often did so indiscriminately, either by offering aid to all public schools or by showering private schools as a class with support. The idea that governments could have excluded schools from such funding because of their religious perspective would have beggared belief. Indeed, the idea that general grants to schools would *not* have funded instruction based on religious perspectives would have been unthinkable. Well through the 19th century, virtually all schools—whether public or private, formally affiliated with a religion or not—aimed to foster faith. Local, state, and federal governments in the early national period took for

granted the religious *use* of schooling, i.e., that the mission of school was to instill a Biblical worldview.

Today, Maine excludes private schools from public funding when they engage in the “religious purposes of inculcation and proselytization.” Pet.App.36a. But in Horace Mann’s time, inculcating Christian values was not a reason to disfavor a school; it was a prime reason for governments to support schooling. Maine’s program of subsidizing all schools, unless they happen to offer a religious worldview, would have been anathema to early Americans. And allowing such discrimination would hollow out the Free Exercise Clause by allowing governments to disfavor schools that espouse their faiths too openly.

2. Certainly, the historical record decisively refutes any argument that public funding for religious use raises special antiestablishment concerns. *See* Pet. Br. 40-41. *Locke* identified a state interest in not “using tax funds to support the ministry.” 540 U.S. at 723. But States’ scattered opposition to funding clergy reflected concerns specific to funding clergy. *See Espinoza*, 140 S. Ct. at 2257-58 (majority opinion). And the historical record suggests that the Establishment Clause at most protects against the “coercion of religious orthodoxy and of financial support by force of law and threat of penalty,” e.g., compelling mandatory attendance at an established church or taxes to specifically fund churches. *Espinoza*, 140 S. Ct. at 2264 (Thomas, J., concurring) (citation omitted); *accord Town of Greece v. Galloway*, 572 U.S. 565, 608 (2014) (Thomas, J., concurring in part and in the judgment).

Regardless, whatever concerns existed about governmental funding of clergy did not extend to funding education with a religious character. *See Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., concurring in part); *accord id.*

at 2026 (Gorsuch, J., concurring in part). To early generations of Americans, “genuinely secular public education was simply inconceivable.” Jeffries & Ryan, *supra*, at 298 (internal quotation marks omitted). Early generations saw that as a feature, not a bug, in a world where secular education was virtually nonexistent. That history belies the existence of any “historic and substantial tradition,” much less one amounting to a state interest “of the highest order,” that might justify denying government benefits that the Free Exercise Clause would otherwise require. *Espinoza*, 140 S. Ct. at 2258, 2261 (majority opinion) (internal quotation marks omitted). Invoking such an interest today would turn the history of the early Republic on its head.

\* \* \*

Maine’s school-funding program puts schools, parents, and students to a choice: forgo putting your faith into practice, or forgo benefits available to every other Mainer. That same choice would have ruled out public support for virtually all early American schools. The Free Exercise Clause forbids such discrimination.

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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