

No. 20-1088

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**In the Supreme Court of the United States**

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DAVID CARSON, AS PARENT AND NEXT FRIEND OF O.C.,  
ET AL., PETITIONERS,

*v.*

A. PENDER MAKIN, IN HER OFFICIAL CAPACITY AS  
COMMISSIONER OF THE MAINE DEPARTMENT OF  
EDUCATION, RESPONDENT.

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

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**BRIEF OF *AMICI CURIAE* MEMBERS OF THE  
UNITED STATES SENATE SUPPORTING  
PETITIONERS**

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### **QUESTION PRESENTED**

Does a state violate the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or “sectarian,” instruction?

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT.....	4
I. For centuries, Congress has consistently supported educational efforts without concern for whether its funds were put to religious “uses.” .....	4
II. The Congress of the Confederation emphasized, and the First Congress reaffirmed, the value of religious education in the Northwest Ordinance.....	5
III. Congress supported Native American religious education in the 1800s.....	10
A. Early 19th century Congressional action provided financial support for religious education.....	10
B. The Civilization Fund Act of 1819 provided federal funding for religious education.....	12
IV. Congress financially supported the religious education of freed black Americans by the American Missionary Association through the Freedmen’s Bureau. ....	16
V. Congress has historically provided support to denominational schools in the District of Columbia, a practice it has continued in recent years.....	21

VI. Congress's longstanding attitude and practice do not reflect a "status v. use" distinction.....	24
CONCLUSION .....	26

## TABLE OF AUTHORITIES

### CASES

<i>Espinoza v. Montana Dep't of Revenue</i> , 140 S. Ct. 2246 (2020) .....	21
<i>Everson v. Board of Education of Ewing Township</i> , 330 U.S. 1 (1947) .....	24
<i>Locke v. Davey</i> , 540 U.S. 712 (2004) .....	1
<i>Rosenberger v. Rector &amp; Visitors of Univ. of Virginia</i> , 515 U.S. 819 (1995) .....	5
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985) .....	8

### STATUTES

D.C. Code § 38-1853.14 .....	23
Act of Mar. 3, 1803, ch. 31, § 1, 2 Stat. 225 .....	9
Act of Mar. 26, 1804, ch. 35, § 5, 2 Stat. 277 .....	9
Act. of Apr. 18, 1818, ch. 67, § 6, 3 Stat. 428.....	9
Act. of Mar. 3, 1819, ch. 85, § 1, 3 Stat. 516.....	12, 16
Act of Mar. 3, 1865, ch. 90, 13 Stat. 507.....	16, 17
Act of July 16, 1866, ch. 200, 14 Stat. 173.....	18, 19
Act of July 6, 1868, ch. 83, 15 Stat. 83.....	20
Act of July 25, 1868, ch. 245, 15 Stat. 193 (1868) ....	20
Act of June 10, 1872, ch. 415, 17 Stat. 366.....	20
Act of Feb. 14, 1873, ch. 138, 17 Stat. 437.....	16
Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50 (1789) .....	7, 8

Ordinance of 1784, April 23, 1784 .....	6
Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory, May 18, 1785 .....	6
Ordinance of 1787, July 13, 1787.....	6
<b>TREATIES</b>	
Ratified Indian Treaty 38: Kaskaskia - Vincennes, August 13, 1803, <a href="https://catalog.archives.gov/id/172679828">https://catalog.archives.gov/id/172679828</a> .....	11, 12
Treaty with the Kaskaskia, Aug. 13, 1803, 7 Stat. 78.	11
<b>OTHER AUTHORITIES</b>	
<i>About Serving Our Children, SERVING OUR CHILDREN</i> , <a href="https://servingourchildrenc.org/about-us/">https://servingourchildrenc.org/ about-us/</a> .....	22, 23, 24
3 AMERICAN CONGREGATIONAL YEAR BOOK FOR THE YEAR 1856 (1856).....	9
2 AMERICAN STATE PAPERS: INDIAN AFFAIRS (Walter Lowrie & Walter Franklin eds., 1834) .....	12, 13, 14, 15
3 AMERICAN STATE PAPERS: PUBLIC LANDS (Walter Lowrie, ed., 1834).....	10
George Anastaplo, The Northwest Ordinance of 1787: Illinois' First Constitution, 75 ILL. B.J. 122 (1986) .....	7
ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 1849-1850 (Gideon & Co., 1850).....	16
C. Antieau, A. Downey, & E. Roberts, FREEDOM FROM FEDERAL ESTABLISHMENT, FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 163 (1964).....	9

Ian Bartrum, <i>Religion and Race: The Ministerial Exception Reexamined</i> , 106 NW. L. REV. COLLOQUY 191 (2011–2012) .....	5, 6
George R. Bentley, A HISTORY OF THE FREEDMEN’S BUREAU (1955) .....	17, 18, 20, 21
John G. Browning, <i>Undaunted: Houston’s Earliest African-American Lawyers</i> , HOUS. LAW. (Jan./Feb. 2019).....	20, 21
Nathan S. Chapman, <i>Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause</i> , 96 NOTRE DAME L. REV. 677 (2020) .....	12, 14, 15
Communication to the House of Representatives (Mar. 23, 1824) .....	15
Communication to the Senate (Jan. 26, 1824) .....	14
Marcellus Cowdery, ELEMENTARY MORAL LESSONS, FOR SCHOOLS AND FAMILIES (1856) ...	9, 10
3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: HOUSE OF REPRESENTATIVES JOURNAL (Linda Grant De Pauw ed., 1977).....	7, 8
4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: LEGISLATIVE HISTORIES, AMENDMENTS TO THE CONSTITUTION THROUGH FOREIGN OFFICERS BILL 3 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).....	8

6	Documentary HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: LEGISLATIVE HISTORIES, MIGRATIONS OF FINES BILL THROUGH RESOLUTION OF UNCLAIMED WESTERN LANDS 1560–1561 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) .....	8
11	DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: DEBATES IN THE HOUSE OF REPRESENTATIVES (Charlene Bangs Bickford et al. eds., 1992).....	8
	<i>Faith, Knowledge, &amp; Service</i> , ANNUNCIATION CATHOLIC SCHOOL, <a href="https://annunciationschool.net/about-us/faith-knowledge-service/">https://annunciationschool.net/about-us/faith-knowledge-service/</a> .....	23
	John M. Gregory, SCHOOL FUNDS AND SCHOOL LAWS OF MICHIGAN: WITH NOTES AND FORMS (1859) .....	9
	J. G. de Roulhac Hamilton, RECONSTRUCTION IN NORTH CAROLINA (1914).....	17
	Peter H. Hanna, <i>School Vouchers, State Constitutions, and Free Speech</i> , 25 CARDOZO L. REV. 2371 (2004) .....	6, 9
	Michael A. Lawrence, <i>The Thirteenth Amendment As Basis for Racial Truth &amp; Reconciliation</i> , 62 ARIZ. L. REV. 637 (2020) .....	20
	Letter from the Superintendent of Freedmen’s Bureau and Abandoned Lands, Feb. 15, 1870, Ex. Doc. No. 142 .....	17, 18, 19, 20, 21
	Letter from William J. Williams, and others, to Congress (Nov. 1821) .....	15

Michael W. McConnell, Thomas C. Berg, & Christopher C. Lund, <i>RELIGION AND THE CONSTITUTION</i> (4th ed. 2016) .....	20, 22
OSP-Program Fact Sheet (SY-2020-21), <a href="https://servingourchildrenc.org/wp-content/uploads/2021/01/DC-OSP-Program-Fact-Sheet-SY-2020-21.pdf">https://servingourchildrenc.org/wp- content/uploads/2021/01/DC-OSP-Program-Fact- Sheet-SY-2020-21.pdf</a> .....	22
Report from James Monroe to the US House of Representatives (Jan. 20, 1822) .....	13
T. Raber Taylor, <i>Equal Protection of Religion: Today's Public School Problem</i> , 38 A.B.A. J. 335 (1952) .....	7
U.S. Senate, Freedmen's Bureau Acts of 1965 and 1966, <a href="https://www.cop.senate.gov/artandhistory/history/common/generic/FreedmensBureau.htm">https://www.cop.senate.gov/artandhistory/ history/common/generic/FreedmensBureau. htm</a> .....	18
<i>Why Milton?</i> MILTON GOTTESMAN JEWISH DAY SCHOOL OF THE NATION'S CAPITAL, <a href="https://www.miltongottesman.org/about-us/why-milton/">https://www.miltongottesman.org/about-us/why- milton/</a> .....	23
Marcus Willson, <i>HISTORY OF THE UNITED STATES, FOR THE USE OF SCHOOLS</i> (1845) .....	9

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

*Amici* are members of the United States Senate with a common interest in robust protections for the free exercise of religion. The members of Congress have long had a profound concern for protecting the religious liberties of United States citizens, and when they have seen those liberties threatened, they have taken decisive action to bolster or restore those freedoms. The Religious Freedom Restoration Act of 1993, for example, was passed by a unanimous House and an almost-unanimous Senate, and the Religious Land Use and Institutionalized Persons Act passed in both the House and the Senate by unanimous consent. As members of Congress, *amici* possess a unique perspective on the complex task of making laws that ensure neutral and even-handed treatment to persons of all faiths, and that comport with the solemn guarantees of the Free Exercise Clause of the First Amendment. *Amici* believe that adopting the First Circuit’s novel “use/status distinction” rule, which would prevent students from receiving tuition assistance if they choose to attend schools that Maine considers “sectarian,” violates the Religion Clause of

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<sup>1</sup> Under Rule 37.6, *Amici* affirm that no counsel for a party authored this brief, in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to this brief’s preparation or submission. The parties in this case have filed blanket consent for amicus briefs. Rule 37.3(a). Counsel of record was respondent in *Locke v. Davey*, 540 U.S. 712 (2004).

the United States Constitution and is at odds with centuries of federal legislative practice.

*Amici* are United States Senators:

Mike Lee

Mitch McConnell

John Cornyn

Ron Johnson

Ted Cruz

Tom Cotton

Steve Daines

Thom Tillis

Ben Sasse

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### SUMMARY OF ARGUMENT

From the earliest days of the United States, Congress has worked diligently to ensure that American schoolchildren receive the learning opportunities and tools which are so vital to their development. To achieve this end, Congress frequently partnered with religious organizations, which provided the personnel to operate schools in previously unreached communities while Congress provided the resources.

This support for religious educational opportunities dates back to the Northwest Ordinance of 1787, which was later reaffirmed by the same First Congress which drafted, debated, and adopted the Religion Clause. The Northwest Ordinance extolled the importance of both religion and education and provided land for local schools, many of which were sectarian. Congress continued its support in the 1800s, financially supporting religious education first for Native Americans and later for freed slaves. And today Congress provides scholarships to religious schools so that low income children may attend the private school of their choice, even if that school incorporates religious instruction into its curriculum.

Congress's longstanding attitude and practice cannot be squared with the "status v. use" distinction adopted by the First Circuit below. While making its funding available to both secular and sectarian organizations alike, Congress recognized the societal benefits that religious education often brought. Rather than restricting the educational opportunities

available to students by refusing funds to religious groups who wished to include religious teachings in their curricula, Congress acted to expand educational opportunities for all.

Viewed in light of this nearly 250-year history, the First Circuit's rule injects a "status v. use" distinction that Congress has never recognized in practice and jeopardizes Congress's ability to help the most vulnerable. Therefore, the judgment of the First Circuit should be reversed.

## ARGUMENT

### **I. For centuries, Congress has consistently supported educational efforts without concern for whether its funds were put to religious "uses."**

*"[T]he advancement and diffusion of knowledge . . . is the only guardian of true liberty." — James Madison*

Since its infancy under the Articles of Confederation, the United States of America has valued education and seen it as an integral part of a free society. To that end, Congress—entrusted with the will of the People—has worked for over two hundred years to increase educational opportunities for Americans. These efforts have ranged from funding schools in the Northwest Territory in the 1780s to providing scholarships to D.C. schoolchildren today. Often to achieve its educational goals, Congress has partnered with religious institutions, providing them with land, books, or funds.

Today, this robust tradition, woven into the very fabric of our nation, is at risk. The First Circuit's ruling is inconsistent with centuries of Congressional action from the time of the Framers until today. History shows that Congress repeatedly allocated funds to advance education without fear of triggering Establishment Clause concerns. The First Circuit's ruling is thus not only inconsistent with centuries of Congressional action, but also, if it were adopted at the federal level, would hinder Congress's ability to help those who need it most today—American schoolchildren.

**II. The Congress of the Confederation emphasized, and the First Congress reaffirmed, the value of religious education in the Northwest Ordinance.**

“Our Nation's tradition of allowing religious adherents to participate in evenhanded government programs . . . can be traced at least as far back as . . . the Northwest Ordinance of 1787.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 862 (1995) (Thomas, J., concurring).

In 1787, the Confederation Congress took up the topic of the Northwest Territory's long-term governance, drawing up an instrument which would “serve[ ] as something of a constitution in itself for those who settled the northwestern lands.” Ian Bartrum, *Religion and Race: The Ministerial Exception Reexamined*, 106 NW. L. REV. COLLOQUY

191, 197 (2011–2012).<sup>2</sup> The Ordinance adopted on July 13, 1787 included six Articles, two of which focused on religious liberty. The first Article provided that no person “shall ever be molested on account of his mode of worship, or religious sentiments.” Ordinance of 1787, July 13, 1787, art. I. The third Article went beyond the mere protection of free exercise, emphasizing the importance of morality and religious education to a stable government: “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” *Id.*, art. III.

This third Article contained two key propositions. First, the Confederation Congress placed religion and morality “alongside education in terms of magnitude and importance,” describing it as “necessary to good government.” *Id.*; Peter H. Hanna, *School Vouchers, State Constitutions, and Free Speech*, 25 CARDOZO L. REV. 2371, 2382 n.48 (2004). Second, the Confederation Congress provided that because of the importance of religious and moral training to healthy civic participation, “the means of education shall forever be encouraged.” Ordinance of 1787, art. III. For early Americans, “[r]eligion was the heart of education,” and the Confederation Congress

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<sup>2</sup> The Northwest Ordinance of 1787 expanded on the bare-bones Northwest Ordinances of 1784 and 1785, which established orderly procedures for the initial settlement and governance of the Northwest Territories but did little else. Ordinance of 1784, April 23, 1784; Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory, May 18, 1785.

recognized that the effort to have a well-educated citizenry might require some “cooperation by the state with religion and education.” T. Raber Taylor, *Equal Protection of Religion: Today’s Public School Problem (cont.)*, 38 A.B.A. J. 335, 335 (1952); see also George Anastaplo, *The Northwest Ordinance of 1787: Illinois’ First Constitution*, 75 ILL. B.J. 122, 128 (1986) (“Education, it would seem from the language of the Ordinance of 1787, is the primary means the community has for supporting religion and morality.”).

Two years later, the First Congress of the United States again endorsed this view of religious education when it reenacted the Northwest Ordinance in 1789. Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50 (1789). While the First Congress made minor changes to some provisions to adapt the Ordinance to the new Constitution, it left Articles I and III untouched, endorsing the positive view of religious education espoused by the Confederation Congress. *Id.* at 51–52 n.(a).

Notably, the First Congress’s consideration of the Northwest Ordinance overlapped with its deliberations on the Religion Clause of the Bill of Rights. James Madison introduced his proposed constitutional amendments, including the first versions of what would become the Free Exercise and Establishment Clauses, on June 8, 1789. 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: HOUSE OF REPRESENTATIVES JOURNAL 84 (Linda Grant De Pauw ed., 1977). Just a

few weeks later, Congress took up the Northwest Ordinance's reenactment, on July 14, 1789, and reenacted it on August 7. *Id.* at 110; 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: LEGISLATIVE HISTORIES, MIGRATIONS OF FINES BILL THROUGH RESOLUTION OF UNCLAIMED WESTERN LANDS 1560–1561 (Charlene Bangs Bickford & Helen E. Veit eds., 1986). Congress then returned to the proposed constitutional amendments, debating the framing of what would become the First Amendment on August 15, 1789, and passing the Bill of Rights the following month. 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: DEBATES IN THE HOUSE OF REPRESENTATIVES 1260–63 (Charlene Bangs Bickford et al. eds., 1992); 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: LEGISLATIVE HISTORIES, AMENDMENTS TO THE CONSTITUTION THROUGH FOREIGN OFFICERS BILL 3, 9 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

This overlap indicates that the First Congress did not consider the Northwest Ordinance's encouragement of religious education to be at odds with the First Amendment's prohibition of federally established religion. As Justice Rehnquist pointed out in dissent in *Wallace v. Jaffree*, 472 U.S. 38 (1985), “[I]t seems highly unlikely that the House of Representatives would simultaneously consider proposed amendments to the Constitution and enact an important piece of territorial legislation which conflicted with the intent of those proposals.” *Id.* at 100.

Furthermore, Congress did not leave Article III of the Northwest Ordinance as an idealistic, hortatory provision, never to be concretely acted upon. Rather, it expressly allocated lands in the Northwest Territory for use as schools. *See, e.g.*, Act of Mar. 3, 1803, ch. 31, § 1, 2 Stat. 225, 225–26; Act of Mar. 26, 1804, ch. 35, § 5, 2 Stat. 277, 279; Act. of Apr. 18, 1818, ch. 67, § 6, 3 Stat. 428, 430. And, given the widespread religious sentiment of the time, many of those schools were run by religious entities and included sectarian content. C. Antieau, A. Downey, & E. Roberts, FREEDOM FROM FEDERAL ESTABLISHMENT, FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 163, 174 (1964); Peter H. Hanna, *School Vouchers, State Constitutions, and Free Speech*, 25 CARDOZO L. REV. 2371, 2378 n.33 (2004). For example, early Michigan schools used Willson’s *History of the United States*, and Michigan, Ohio, Indiana, Illinois, and Iowa schools used Cowdery’s *Moral Lessons* as texts. John M. Gregory, SCHOOL FUNDS AND SCHOOL LAWS OF MICHIGAN: WITH NOTES AND FORMS 417–19, 422–423 (1859) (listing recommended books for public schools, drawing heavily on those “most widely in use”); 3 AMERICAN CONGREGATIONAL YEAR BOOK FOR THE YEAR 1856 at 169 (1856). Both texts were written from an expressly religious perspective. Marcius Willson, HISTORY OF THE UNITED STATES, FOR THE USE OF SCHOOLS 80, 113, 119, 376 (1845); Marcellus Cowdery, ELEMENTARY MORAL LESSONS, FOR SCHOOLS AND FAMILIES 39, 56, 138, 189, 206–07 (1856). Consistent with their religious teachings, these texts also fostered the growth of anti-slavery sentiment in the Northwest Territory. *See, e.g.*, Willson, *supra*, at 135, 168

(describing slavery as “immoral” and denouncing New York’s unjust treatment of slaves); Cowdery, *supra*, at 114, 181 (describing a slave as a “man” and “person[ ]” and describing his “noble” actions and generally elevating liberty above involuntary slavery).

In short, the history and text of the Northwest Ordinance demonstrate that from America’s founding, Congress emphasized the importance of a morally literate citizenry, supporting educational efforts through land grants even when those land grants were used by sectarian schools.

### **III. Congress supported Native American religious education in the 1800s.**

Congress’s recognition of the importance of education—regardless of its sectarian or non-sectarian nature—continued into the 1800s. As the United States expanded west around the turn of the 19th century, Congress funded educational opportunities for Native Americans, often working closely with religious missionaries.

#### **A. Early 19th century Congressional action provided financial support for religious education.**

Congress’s endorsement of religious education took varying forms around the turn of the 19th century. For example, in June of 1797, Congress granted tracts in trust to the “Society of the United Brethren (Moravian) for propagating the Gospel among the Heathen.” 3 AMERICAN STATE PAPERS: PUBLIC LANDS 467–68 (Walter Lowrie, ed., 1834).

In another notable action a few years later, the Senate consented to a treaty with explicit provisions allowing for financial support of religious education. On August 13, 1803, future president William Henry Harrison—the then governor of the Indian Territory—executed the Kaskaskia Treaty on behalf of the United States Government. *See* Treaty with the Kaskaskia, Aug. 13, 1803, 7 Stat. 78. Under its terms, the United States government acquired “all the lands in Illinois country” in the possession of the tribes of the Illinois Indians with the exception of a three-hundred-and-fifty-acre tract reserved for the tribe. In return, the United States took the Kaskaskia tribe under its “immediate care and patronage.” As part of the treaty’s conditions, the United States paid the tribe a yearly annuity with specific funds earmarked for the religious education. Specifically, under Article III of the Treaty, Congress agreed to pay \$100 a year for seven years “towards the support of a priest of that 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” as well as \$300 for the construction of a church. *Id.* at art. III.

On November 16, 1803, the Senate “[r]esolved, unanimously, that the Senate do advise and consent to the ratification of the treaty.” *See* Ratified Indian Treaty 38: Kaskaskia - Vincennes, August 13, 1803, <https://catalog.archives.gov/id/172679828>. Following the senate’s action, President Thomas Jefferson and Secretary of State James Madison—the author of the Religion Clause—signed the treaty on November 24,

1803. *Id.* It is not plausible that two such advocates of religious liberty would have approved of this treaty if they viewed it as conflicting with that portion of the First Amendment.

**B. The Civilization Fund Act of 1819 provided federal funding for religious education.**

On March 3, 1819, Congress passed “[a]n Act making provisions for the civilization of the Indian tribes adjoining the frontier settlements.” Act. of Mar. 3, 1819, ch. 85, § 1, 3 Stat. 516. The Act, later referred to as the Civilization Fund Act of 1819, authorized the president “to employ capable persons of good moral character, to instruct [Native Americans] in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic . . . .” *Id.* The Civilization Fund Act allocated 10,000 dollars “for the purpose of carrying into effect the provisions of this act.” *Id.*; see generally Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 NOTRE DAME L. REV. 677, 701–13 (2020) (providing an in-depth history of the Civilization Fund Act of 1819).

Although the Act did not explicitly provide for religious education, a partnership formed immediately between the government and Christian mission associations. *Id.*; see also 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 271–73 (Walter Lowrie & Walter Franklin eds., 1834). Shortly after passage of the Act in 1820, President Monroe authorized

Massachusetts minister Reverend Jedidiah Morse to visit Indian tribes to “acquire a more accurate knowledge of their actual condition, and to devise the most suitable plan to advance their civilization and happiness.” *Id.* at 273–74. According to a letter from Secretary of War John Calhoun in February 1820, Calhoun directed Morse on behalf of the United States government to “ascertain the actual condition of the various tribes which you may visit, in a religious, moral, and political point of view.” *Id.* Calhoun noted the importance of the “moral” condition of the Indians and instructed Morse to report back to the government “such facts as may come within your knowledge as will go to show the state of the trade with them, and the character of the traders, as, in your opinion will render it better calculated to secure peace between them and us, and will contribute more effectually to advance their moral conditions.” *Id.*

In addition to \$500 paid in 1820 to Reverend Morse for his “expenses of a visit of observation and inspection to the various Indian tribes in our immediate neighborhood,” the earliest expenditure reports from Congress are replete with entries showing payments to Christian organizations. *See* Report from James Monroe to the US House of Representatives (Jan. 20, 1822), in 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 271–73. For example, the first four authorized expenditures after Morse’s visit include:

- February 23, 1820 - \$250 for “tuition of Indian children at the school established by the Baptist

Board for Foreign Missions, at Great Crossings Kentucky.” *Id.* at 272.

- April 5, 1820 - \$500 for “buildings for the school at the Valley Towns in the Cherokee nation, established by the Baptist Board for Foreign Missions.” *Id.*
- April 11, 1820 - \$62.50 for “tuition to the school at Spring Place, in the Cherokee nation established by the Society of United Brethren for the southern States, commonly called the Moravian.” *Id.*
- May 8, 1820 - \$700 for “a school among the Osage on the Arkansas, established by the United Foreign Missionary Society of New York.” *Id.*

In total for the years 1820-21, the government paid \$16,605.80 under the Civilization Fund Act with the vast majority going to religious associated organizations. *Id.* at 272–73; Chapman, *supra*, at 706; *see also* Communication to the Senate (Jan. 26, 1824), in 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 443 (detailing additional expenditures in 1823 under the Civilization Fund Act, including to religious organizations).

Based on the reporting provided to Congress, there is no evidence that any sort of “use” distinction was used by the government when authorizing these funds. Instead, letters and reports to Congress show that the religious nature of the education offered by the missionaries was celebrated as an integral part of the program rather than a potential constitutional defect.

In a letter to Congress in 1821, William J. Williams described the missionary partnership as organized “[u]nder the auspices of Heaven, and patronized by Government” and operating to “send the Gospel, together with the arts of civilized life, to impoverished children of the forest...The efforts of these missionaries and their friends, connected with other wise arrangements of the Government, are now in the full tide of successful experiment.” Letter from William J. Williams, and others, to Congress (Nov. 1821) in 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 274–75. Williams ended his letter by imploring Congress to “continue to pursue and to cherish its present course” in order to add to the “moral and physical strength of the country.” *Id.*

Williams’ sentiments are not unique. In 1824, records indicate that Congress briefly considered repealing the Act for reasons unrelated to the Establishment Clause. Chapman, 96 NOTRE DAME L. REV. 677, 715. When defending the success of the program, the Committee on Indian Affairs specifically pointed to the successful interplay of pairing religious teaching with the “institutes of education and instruction in agriculture” as a reason to continue funding the Act. Communication to the House of Representatives (Mar. 23, 1824) in 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 457-59.

And, almost thirty years into the running of the program, the Commissioner of Indian Affairs continued to report on and approve of the interplay between religion and education, noting in particular the efforts of “missionary societies of various religious

denominations . . . selected with the concurrence of the Department” by whose efforts “the Indian youth are . . . carefully instructed in the best of all knowledge, religious truth, their duty towards God and their fellow beings.” ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 1849-1850 at 21 (Gideon & Co., 1850). In the end, Congress ultimately funded religious education efforts under the Civilization Fund Act of 1819 for over 50 years until the Act was repealed in 1873. Act of Feb. 14, 1873, ch. 138, 17 Stat. 437, 461.

**IV. Congress financially supported the religious education of freed black Americans by the American Missionary Association through the Freedmen’s Bureau.**

Congress continued its support of expressly religious educational efforts into the late 1800s through the Bureau of Refugees, Freedmen, and Abandoned Lands, more commonly known as the Freedmen’s Bureau. The Freedmen’s Bureau collaborated with the American Missionary Association and other religiously affiliated entities to send teachers to the south and educate former slaves – and they did so from a heavily religious perspective. The Freedmen’s Bureau supported these efforts with money and school buildings.

Congress launched the Freedmen’s Bureau late in the Civil War. Act of Mar. 3, 1865, ch. 90, 13 Stat. 507. Initially, the Bureau’s authority was limited to providing emergency relief and allocating abandoned land and vacated military barracks, and it had little

funding. *Id.* §§ 2, 4; J. G. de Roulhac Hamilton, RECONSTRUCTION IN NORTH CAROLINA 314 (1914). Once the war ended and reconstruction began, the federal government became increasingly aware that equipping newly freed slaves for economic independence would require more lasting measures. In particular, the Bureau's commissioners turned their efforts to increasing the educational opportunities available to black Americans. *Id.* at 299, 315.

Even before the Freedmen's Bureau's creation, private religious organizations had been hard at work in the South, setting up schools wherever possible. The Commissioner of the Freedmen's Bureau, General Oliver O. Howard, noted in his 1869 report to the War Department that "[a]s early as September 17, 1861, the American Missionary Association [AMA] commenced a school" for escaped black Americans, and "many schools" of a similar nature "had been established and maintained to a great extent by benevolent associations of the North." Letter from the Superintendent of Freedmen's Bureau and Abandoned Lands (hereinafter "Superintendent Letter"), Feb. 15, 1870, Ex. Doc. No. 142 at 11; *see also* George R. Bentley, A HISTORY OF THE FREEDMEN'S BUREAU 169 (1955) (discussing how the AMA "had engaged in spreading the Gospel and in teaching on an elementary level"). By early 1865, "about 750 people were teaching some 75,000 [ ] children in the areas of the South then occupied by Union armies." Bentley, *supra*, at 170. But the organizations had limited funds to hire teachers and were sorely in need of proper

school buildings, with some classes meeting outside, and other students sitting on the floor so they could use their benches as desks. *Id.* at 170, 172–73.

Since the Freedmen’s Bureau had land, but not money, in its first year, it partnered with the AMA and other charitable organizations creatively. For example, although it could not give the old military barracks away outright, it “fitted up for school-houses such government building as were no longer needed for military purposes,” and then allowed the charitable and religious organizations to use them for schools rent-free. Superintendent Letter at 11; Bentley, *supra*, at 171. The Bureau also provided “transportation for teachers, books, and school furniture,” and helped the societies get government rations for their teachers at cost.” Superintendent Letter at 11; Bentley, *supra*, at 171.

To further fill the resource gap, Congress expanded the Freedmen’s Bureau’s power and resources in 1866, enabling it to continue to act as a benefactor and resource coordinator for the boots-on-the-ground charitable organizations. Act of July 16, 1866, ch. 200, 14 Stat. 173. Notably, Congress passed this act with a bipartisan two-thirds majority in both houses, overriding President Andrew Johnson’s veto. U.S. Senate, *Freedmen’s Bureau Acts of 1965 and 1966*, <https://www.cop.senate.gov/artandhistory/history/common/generic/FreedmensBureau.htm> (last visited Sept. 8, 2021).

The 1866 Act contained several key provisions to aid charitable and religious education efforts. The act

directed that parcels of land be sold and their proceeds “appropriated, under the direction of the commissioner, to the support of schools, without distinction of color or race.” *Id.* § 8. Another allowed Commissioner Howard “to seize, hold, use, lease, or sell all buildings and tenements, and any lands appertaining to the same . . . formerly held . . . by the late so-called confederate states,” on the condition that the proceeds be used “to the education of the freed people.” *Id.* § 12.

Finally, and of chief importance for the instant matter, Congress expressly *mandated* “[t]hat the commissioner . . . at all times co-operate with private benevolent associations of citizens in aid of freedmen, . . . and shall hire or provide by lease buildings for purposes of education whenever such associations shall, without cost to the government, provide suitable teachers and means of instruction . . .” *Id.* § 13. In the words of Commissioner Howard, “[t]he law of July 16, 1866 sanctioned all that had been previously done” in partnership with the AMA and similar charitable organizations—and not only approved, but “enlarged [his] powers.” Superintendent Letter at 11.

In obedience to the statute, Commissioner Howard “co-operated” with the AMA and other aid societies to the fullest extent possible, giving them “every possible facility for continuing and enlarging their work,” without “supersed[ing] these benevolent agencies already engaged in the work of education.” Superintendent Letter at 11. The Bureau “create[d] an educational fund” from the lease or sale of various

Confederate properties, and sponsored the “rental, construction, and repairs of school buildings” with a \$500,000 direct appropriation from Congress for that purpose. *Id.*; Bentley, *supra*, at 172. The Bureau gave many of the school buildings it constructed to the religious organizations that owned the land where the schoolhouse was located, and then “rented” the schoolhouses from the organizations, to provide additional funds for teacher salaries. Bentley, *supra*, at 173. Congress extended the Bureau’s educational operations twice more, and it operated until 1872. Act of July 6, 1868, ch. 83, 15 Stat. 83; Act of July 25, 1868, ch. 245, 15 Stat. 193 (1868); Act of June 10, 1872, ch. 415, 17 Stat. 366.

The partnership provided much-needed support to religious organizations, allowing them to deploy more teachers to more schools and coordinating their efforts so as to maximize their impact. Bentley, *supra*, at 171; Michael W. McConnell, Thomas C. Berg, & Christopher C. Lund, RELIGION AND THE CONSTITUTION 323 (4th ed. 2016). The AMA alone ultimately founded “more than 500 schools and eleven colleges across the South during Reconstruction,” and several other colleges had religious roots. John G. Browning, *Undaunted: Houston’s Earliest African-American Lawyers*, HOUS. LAW. 30, 32 n.15 (Jan./Feb. 2019); *see also* Michael A. Lawrence, *The Thirteenth Amendment As Basis for Racial Truth & Reconciliation*, 62 ARIZ. L. REV. 637, 682 n.101 (2020) (pointing to Howard University, founded by the First Congregational Society, and Fisk University, founded by the AMA, both in partnership with the Freedmen’s

Bureau). One of the students supported by the AMA was Winston M.C. Dickson, one of Houston's first African-American lawyers. Browning, *supra*, at 32. The Freedmen's Bureau also provided \$10,000 to the Baptist National Theological Institute as part of its efforts to promote higher educational opportunities for freedmen. Bentley, *supra*, at 175.

Commissioner Howard was not ignorant of the religious character and efforts of many of the organizations with which he partnered. Neither was Congress. In describing the Freedmen Bureau's work in 1870, Commissioner Howard told Congress, "Too much praise cannot be bestowed upon the noble band of Christian teachers who have carried on successfully this work of education." Superintendent Letter at 12. For Congress, what mattered most was the expansion of quality educational opportunities—and Congress accomplished its goal by financially supporting the religious and secular "private benevolent organizations" who shared that purpose.

**V. Congress has historically provided support to denominational schools in the District of Columbia, a practice it has continued in recent years.**

The federal government also has a long history of aiding education in the District of Columbia without regard to whether such aid may be put to a religious "use." As this Court recognized in *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2258 (2020), Congress provided support to denominational schools in the District of Columbia until 1848. Most of

this support came in the form of land grants, which went to both public and private schools, including religious schools. McConnell, *supra*, at 319.

More recently, Congress renewed its efforts to ensure that students in the District of Columbia receive quality education at institutions best suited to meet their needs. Originally created as a part of the D.C. School Choice Incentive Act of 2003, the D.C. Opportunity Scholarship Program (“OSP”) currently provides scholarships to low income children to attend a participating D.C. private school of their choice. Since its inception in 2004 through the 2020-21 school year, OSP has provided scholarships to over 10,600 students. OSP-Program Fact Sheet (SY-2020-21), <https://servingourchildrendc.org/wp-content/uploads/2021/01/DC-OSP-Program-Fact-Sheet-SY-2020-21.pdf>.

Serving Our Children, the non-profit organization administering the scholarships, describes the program as “a lifeline for thousands of low-income families in the District who believe that a private school is or was the best option for their children.” *See About Serving Our Children, SERVING OUR CHILDREN*, <https://servingourchildrendc.org/about-us/> (last visited Sept. 8, 2021). As of last year, 82% of participating children are African-American and 10% Hispanic. Almost 40% of students receive SNAP and/or TANF benefits with the average income for participating families at less than \$24,000 per year. OSP-Program Fact Sheet (SY-2020-21).

Currently, approximately 40 schools participate in the program. These include Annunciation Catholic School, Archbishop Carroll High School, Blessed Sacrament School, Holy Trinity School, and Milton Gottesman Jewish Day School of the Nation’s Capital (“Milton”). These school are not only run by religious affiliated institutions, but openly consider their religious character as integral to educating students. For example, on its website Milton explains that it strives both for “academic excellence” and to “promote Jewish values.” At Milton, students, “dive into Jewish life – from a spirited early-morning tefilah experience to the foundational texts of the Jewish people.” *See Why Milton? MILTON GOTTESMAN JEWISH DAY SCHOOL OF THE NATION’S CAPITAL*, <https://www.miltongottesman.org/about-us/why-milton/> (last visited Sept. 8, 2021). Similarly, Annunciation Catholic School describes “Faith, Knowledge and Service [as] the three pillars of our school community.” Annunciation Catholic School strives to “form[ ] scholars in faith, supports their pursuit of knowledge, and teaches them to truly love God and serve Him through their commitment to love and serve their neighbors.” *See Faith, Knowledge, & Service, ANNUNCIATION CATHOLIC SCHOOL*, <https://annunciationschool.net/about-us/faith-knowledge-service/> (last visited Sept. 8, 2021).

Congress reauthorized OSP in 2011 under the Scholarships for Opportunity and Results (“SOAR”) Act and then again in 2017 and 2019. D.C. Code § 38-1853.14. OSP is currently the only federally funded program of its kind in the country. *See About Serving*

*Our Children*, SERVING OUR CHILDREN, <https://servingourchildrenc.org/about-us/> (last visited Sept. 8, 2021).

**VI. Congress’s longstanding attitude and practice do not reflect a “status v. use” distinction.**

Congress’s long history of support for religious education cannot be squared with the “status v. use” distinction embraced by the First Circuit. In providing financial support to religious institutions in the Northwest Territory, on Native American territories, in the Reconstruction South, and in Washington, D.C., Congress funded efforts to expand educational opportunities, despite the religious “uses” to which those funds were put. It gave funding, land, buildings, and books to religious institutions, regardless of whether those institutions were merely run by a religious group or used the funds to provide students with a sectarian education.

Furthermore, Congress’s practice, from the Founding until today, adheres to the understanding of the First Amendment set out in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947). In *Everson*, this Court explained that “[s]tate power is no[t] to be used so as to handicap religions.” *Id.* at 18. Rather, the First “Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers,” regardless of whether those groups of religious believers intend to use any federal benefits to advance their religion. *Id.* Still,

Congress recognized that religious education often brought with it societal benefits. Part I, *supra*.

Thus, the same Congress that wrote and approved the Religion Clause made land in the Northwest Territory equally available for secular and sectarian schools. Part I.A, *supra*. In the next century, it used public funds to provide aid to religious groups that were working to provide educational opportunities to Native Americans and freedman. Parts I.B and I.C, *supra*. And in the 20th and 21st centuries, it has made scholarships equally available to students who choose to use the funds for a religious education at a sectarian school. Part I.D, *supra*.

The fact that the funds in these cases might be used in part to teach religious principles to students along with reading, writing, and arithmetic did not—and does not—matter. Refusing funds to religious organizations who included various religious principles in their curricula would have hindered Congress's efforts to provide as many children as possible with a quality education, as religious groups historically were one of the primary drivers of educational expansion. Part I, *supra*. But more importantly, adopting the First Circuit's logic would impair Congress's ability to help children today and in the future.

Viewed in light of this nearly 250-year history, the First Circuit's rule injects a "status v. use" distinction that Congress has never recognized in practice. The judgment of the First Circuit should be reversed.

**CONCLUSION**

This Court should reverse the judgment below and remand the case for further proceedings.

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