No. 20-1088

In The
Supreme Court of the United States

DAVID CARSON, as Parent
and Next Friend of O.C., et al.,

Petitioners,

v.

A. PENDER MAKIN, in her official capacity as
Commissioner of the Maine Department of Education,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit**

BRIEF FOR THE STATE OF VERMONT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The State of Vermont submits this brief, as amicus curiae, to highlight the unique challenges of providing a public education system for children in Northern New England and States' need for flexibility in meeting these challenges.

Like Maine, Vermont is both committed and obligated by its state constitution to provide the benefits of a free public education to all children in the State. Geography and lack of population density make it practically and financially impossible for many Vermont school districts to meet this obligation by operating their own public high school. These districts instead pay tuition for their children to attend other high schools—either a public school in a different district or an approved private school.

In operating this public education program, Vermont must also heed another state constitutional command—dating to 1777—which prohibits the State from compelling its residents, through taxation, to "support any place of worship, or maintain any minister." Because many religious schools maintain a place of worship on school grounds and employ ministers, providing unrestricted public funds to these schools would violate the state constitution.

Vermont cannot comply with both its state constitution and the absolutist position advanced by petitioners here—namely, that once a State incorporates private schools into its public education system, the

Free Exercise Clause requires unrestricted funding of all those schools' religious activities.

SUMMARY OF ARGUMENT

Education in the United States has evolved dramatically since the colonial period. What once was a patchwork of mostly private schools and tutors teaching primarily from the Bible is now a comprehensive nationwide system of compulsory education, overwhelmingly carried out in free public schools constitutionally committed to teaching a secular curriculum. Providing this system of free public education "is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

This Court has consistently recognized that States need flexibility to perform this function in a way that responds to varied local conditions. This is especially true with respect to funding religious education. In this sensitive area, the Court has cautioned against interpreting the federal constitution to impose rigid litmus tests or one-size-fits-all solutions.

Vermont's experience reflects the wisdom of this approach. Vermont has met the challenge of providing free high-quality education to children spread across a rural and mountainous State in part by incorporating private schools into the public education system. In operating this system, Vermont has a historic and substantial interest in ensuring that public funds are

not used to support religious worship. This interest dates to the founding—early Vermonters included a prohibition against compelled support of worship in their first constitution just days before they fought and died for American independence in critical battles against the British in the summer of 1777.

Petitioners' position, taken to its logical extreme, would compel Vermont residents to fund religious worship in private schools, in violation of the Vermont Constitution. Because neither the First Amendment nor this Court's precedent compels that result, petitioners' position should be rejected.

ARGUMENT

I. States need flexibility to provide a comprehensive system of free public education that responds to local conditions.

In the past 250 years, American education has changed dramatically to meet the needs of an increasingly large and diverse population. This change has been driven primarily by state governments, which are obligated by their own laws and constitutions to offer the opportunity for free public education to all state residents. The Court has consistently recognized the States' primary role in educating the nation's children and emphasized the importance of allowing States flexibility to perform this vital function.

1. Public schools were "virtually unknown" in the founding era. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2053 n.14 (2021) (Alito, J., concurring). Most education in the colonies was provided by private schools and tutors. *Morse v. Frederick*, 551 U.S. 393, 411 (2007) (Thomas, J., concurring). This "haphazard system" excluded many children "on the basis of income, race or ethnicity, gender, geographic location, or other reasons." Ctr. for Educ. Pol'y, George Wash. Univ., History and Evolution of Public Education in the US 1 (2020).

State-supported public education emerged gradually. "At the time of the American Revolution, some cities and towns in the Northeast had free local schools paid for by all town residents, but this was not the norm." *Id*. Benjamin Franklin and Thomas Jefferson proposed ambitious public education programs for Pennsylvania and Virginia, respectively, but those proposals were not adopted. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 239 (1963) (Brennan, J., concurring). "It was not until the 1820's and 1830's, under the impetus of Jacksonian democracy, that a system of public education really took root in the United States." *Id.*; *see also Morse*, 551 U.S. at 411 ("Public schooling arose, in part, as a way to educate those too poor to afford private schools.") (Thomas, J., concurring).

Throughout the 19th century, "[p]ublic schools were more common in cities than in rural areas, and in the Northeast than in other parts of the country." Ctr. for Educ. Pol'y at 4; *see also Brown*, 347 U.S. at 489-90

(noting that by the time the Fourteenth Amendment was ratified, free public education in the South still "had not yet taken hold," and for Black children it was "almost nonexistent"). Gradually, however, "more states accepted responsibility for providing universal public education and embedded this principle in their state constitutions." Ctr. for Educ. Pol'y at 4. By 1918, compulsory school attendance laws were in place nationwide, *Ingraham v. Wright*, 430 U.S. 651, 660 & n.14 (1977), and every state constitution now guarantees residents access to free public education, Jeffrey Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 30 (2018).

Today, "nearly 90% of the students in this country attend public schools." *Mahanoy*, 141 S. Ct. at 2052 (Alito, J., concurring). And providing public education is recognized as "perhaps the most important function of state and local governments," *Brown*, 347 U.S. at 493, and the "primary vehicle" for "inculcating fundamental values necessary to the maintenance of a democratic political system." *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quotation omitted).[1]

2. The relationship between public education and religion has also evolved significantly since the colonial period. Much of early American education was religious. As it had been in England, "the basis of education was largely the Bible, and its chief purpose

[1] Major federal education legislation has been designed to support rather than "displace the primacy of States in the field." *See*, *e.g.*, *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 208 (1982).

inculcation of piety." *Ill. ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 213 (1948) (Frankfurter, J., concurring). "To the extent that the State intervened, it used its authority to further aims of the Church." *Id.*

As the nation's demographics rapidly changed following independence, however, so too did the States' relationship to religious education. These changes are reflected, in part, in this Court's jurisprudence applying the First Amendment's religion clauses to the States. *See*, *e.g.*, *id.* at 212 (invalidating Illinois program that permitted 30 minutes of weekly religious instruction in public school); *Schempp*, 374 U.S. at 241 (Brennan, J., concurring) (Because public schools rely on "public funds—funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all"—these schools aim to provide "an atmosphere in which children may assimilate a heritage common to all American groups and religions."). Today it is settled that "[p]ublic schools must not engage in religious instruction." Pet. Br. 42.

"The evolution of colonial education, largely in the service of religion, into the public school system of today is the story of changing conceptions regarding the American democratic society, of the functions of State-maintained education in such a society, and of the role therein of the free exercise of religion by the people." *McCollum*, 333 U.S. at 215 (Frankfurter, J., concurring). Competing versions of this story fill the U.S. reports. *See*, *e.g.*, *id.* at 213-20; *Espinoza v. Montana*

Dep't of Revenue, 140 S. Ct. 2246, 2268-74 (Alito, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 718-26 (2002) (Breyer, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 92-106 (1985) (Rehnquist, J., dissenting); *Lemon v. Kurtzman*, 403 U.S. 602, 645-49 (1971) (Brennan, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 425-35 (1962).

Although this history is "complex," *Espinoza*, 140 S. Ct. at 2259, there can be little dispute that the country's educational expectations have evolved dramatically since the colonial period, and that the burden of meeting those expectations now falls squarely on the States, *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973) ("[F]undamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States."). Indeed, as noted above, "nearly all state constitutions impose an obligation to create a system of free public education" that is available to all state residents. *See* Sutton at 35.

3. This Court has recognized that States need flexibility to fulfill this weighty obligation. The Court has cautioned against "imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *Rodriguez*, 411 U.S. at 43.

This is particularly true with respect to public aid to religious schools, a sensitive topic which has long

divided both members of the Court and the people of this country. *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980) (noting such "cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country"). On this issue, the Court has declined to "furnish a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools" in favor of permitting States "flexibility" to provide education for their youth. *Id.*; *see also Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 697 n.1, 699-700 (1970) (Harlan, J., concurring) (rejecting "inflexible" approach to religious funding cases and suggesting constitutionality may sometimes depend "on what activities the church in fact sponsored"). "The wisdom of allowing States greater latitude in dealing with matters of religion and education can be easily appreciated in this context," for "without education one can hardly exercise the civic, political, and personal freedoms" conferred by the Constitution. *Zelman*, 536 U.S. at 680 (Thomas, J., concurring). Our federal system thus rightly confers upon States the "constitutional right to experiment with a variety of different programs to promote educational opportunity." *Id.*

II. To provide necessary educational opportunities, Vermont school districts without public high schools pay tuition for their children to attend public schools in other districts or private schools.

1. Vermont has long been committed to providing a robust system of free public education that is available to all state residents.

Vermont began establishing a public education system long before most other States. "Deeply interested in the education of their children, the first inhabitants, as soon as they were organized into communities, seem generally to have instituted such means of literary training as was practicable." George Gary Bush, U.S. Bureau of Educ., History of Education in Vermont 11 (1900). "Instead of waiting, as in many of the States, for teachers to establish schools and invite the children to them, the people of Vermont set up the schools and then invited teachers." *Id.* at 11-12. Before the end of the 18th century, "many of the towns had established schools and were generously raising funds by taxation, in whole or in part, for the building of schoolhouses and for paying the salaries of teachers." *Id.* at 12.

Vermont's commitment to public education is reflected in its constitution, which, as originally enacted, instructed the legislature to provide for a "school or schools . . . in each town," "[o]ne grammar school in each county, and one university." Vt. Const., ch. II, § 40 (1777). As amended, this provision currently requires

the maintenance of "a competent number of schools . . . in each town unless the general assembly permits other provisions for the convenient instruction of youth." Vt. Const., ch. II, § 68. Public education is the only "governmental service [that] . . . has ever been accorded constitutional status in Vermont." *Brigham v. State*, 692 A.2d 384, 392 (Vt. 1997). This constitutional commitment requires the State "to make educational opportunity available on substantially equal terms" to all children in Vermont. *Id.* at 398.

2. Vermont has had to experiment with different approaches to fulfill its obligation to provide equal educational opportunities to a population spread across rural and mountainous terrain.

Vermont's first schoolhouses "were primitive structures constructed of logs at the edges of clearings or beside trails," with "split-log seats and desks but few supplies." Mary Josephine Willis Kenny, Univ. of Vt., The Vermont Schoolmarm and the Contemporary One-Room Schoolhouse 3 (1990). They were often "cold, dirty, and poorly ventilated," and lacked adequate drinking water or outhouses. *Id.* Efforts to improve the funding and adequacy of these schools in the State's first decades made only limited progress, with some communities reportedly flouting an 1810 law that required local taxes to support teachers and many localities resisting any attempts by the State to establish supervisory authority over schools. David M. Ludlum, Social Ferment in Vermont 1791-1850 224, 226 (1966). The condition of these primary or "common" schools improved in the 1840s and 1850s,

however, driven by a movement of reformers who worked to make a vision of tax-supported, state-controlled secular public schools a reality. *Id*. at 228-29, 236. Teachers' wages were raised, instruction became more professional, attendance increased, and the State worked to ensure that the costs of operation were paid entirely by public funds, the distribution of which was tied to average daily attendance rates. *Id.* at 236; Bush at 26-29.

Public secondary education in Vermont developed more slowly. Despite the original constitutional design to operate a public "grammar school in each county," *see* Vt. Const. ch. II, § 40 (1777), there were "almost none" in the State for decades, owing to "local conditions resulting from environment, and the mistake of delegating public secondary education to the county, a unit lacking political vitality," Bush at 29, 57.

The secondary education that did exist in early Vermont was provided by private "academies," the first of which was established in 1780. *Id.* at 51. In the absence of state support, these schools were often founded by "leading public men and philanthropists in the different communities," who, "impressed with a sense of responsibility for the education of the children in their neighborhood," would solicit pledges of money, materials, and labor to build an academy in their town. Bush at 57-58. Other academies "were denominational institutions, established, controlled, and, in part at least, supported by the churches." Works Progress Admin. (WPA), Vermont: A Guide to the Green Mountain State 54 (1937). "With few exceptions the

academies of Vermont [were] dependent upon tuition fees for support." Bush at 68.

Though the academies provided an important path to the university for the "best sons of Vermont," *id.* at 70, they "did not appeal to parents who could not afford to pay tuition and wanted free public secondary schools that would equip their children for the practical trades of farming or shopkeeping," Kirsten Goldberg, *Vermont's 'Tuitioning' Is Nation's Oldest Brand of Choice*, Educ. Week (May 18, 1988). The academies were also "hampered by the want of means for their adequate support." Bush at 57. "The population, in view of its distribution and the lack of easy transportation, was at no time sufficient to warrant [the] numerous academies" that had been created, or at least "to maintain them at a high standard of interest and efficiency, taken as a whole." *Id.* at 53. The shortcomings of the academy system led the State in the 1840s to pass legislation for a comprehensive system of graded public education, including public high schools. *Id.* at 59.

Despite this new legislative mandate, many rural school districts—due to population, geography, or resources—simply lacked the capacity to build and maintain adequate public high schools. *See* Annie Waldman, *Voucher Program Helps Well-Off Vermonters Pay for Prep School at Public Expense*, ProPublica (June 2, 2017). Faced with this reality, the State in 1869 passed a law enabling districts to tuition students when doing so would be more efficient than operating a school. The 1869 law authorized:

> any school district in this State, in which any academy is located, or any district adjoining said first . . . district . . . to make any arrangement or agreement with officers of said academy, to instruct in said academy all or part of the scholars belonging to such district, in all studies which are required by law to be taught in common schools, and such other instruction as is provided by law in cases of graded schools.

1869 Vt. Acts & Resolves No. 9, § 1. In the years that followed, some academies remained as private institutions (but now able to receive public funds), others were absorbed into the public school system, and many others disappeared. *See* Bush at 59-60; WPA at 54.

Although the tuitioning program has evolved since 1869, its key feature remains in place. School districts that do not maintain a public school must pay tuition for their resident students to attend an approved private school or a public school in another district. *See* Vt. Stat. Ann., tit. 16, § 822. As of last year, 40 of Vermont's 115 school districts—representing about 17% of Vermont's school-age population—did not operate their own public high school and instead paid tuition for their students to attend a private or public school outside the district. Decl. of Brad James, *A.H. v. French*, No. 5:20-cv-135, ECF No. 29-2, ¶ 4, (D. Vt. 2020); *see also* App. 1 (map of Vermont school districts with public high schools).

* * *

The history described above shows that Vermont required decades of experimentation to overcome its geography and population distribution and provide a system of public secondary education that fulfilled the promise set forth in the state constitution. As in Maine, Vermont's system permitting districts to educate students either by operating schools or paying tuition has for more than a century been an integral part of the way the State provides public education.

III. Vermont has a historic and substantial interest in preventing public education funds from being used to support religious worship.

1. In addition to the interests highlighted by Maine, *see* Resp. Br. 1, 9, 22-45, Vermont has a historic and substantial interest in ensuring that public tuition funds are not used to support religious worship.

This interest dates to the founding and is reflected in Vermont's original 1777 constitution, which was drafted just days before early Vermonters fought and died for American independence at Hubbardton and Bennington in the campaign that led to the decisive victory over General Burgoyne at Saratoga. *See generally* Matt Bushnell Jones, Vermont in the Making: 1750-1777 386-93 (1939).[2]

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[2] Vermont's first constitution was introduced to a convention of delegates at Windsor, Vermont, on July 2, 1777, as British troops 100 miles away laid siege to Fort Ticonderoga, which had been captured for the American side two years earlier by Ethan

Vermont's constitution reflects a fervent dedication to religion and religious liberty. It also reflects a recognition that freedom of conscience—the freedom to engage in and support religious worship as dictated by one's own mind, not by the government—is a necessary aspect of religious freedom. In the same breath, the Vermont Constitution provides "[t]hat all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, . . . and that no person . . . can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister." Vt. Const., ch. I, art. 3. The injunction against compelled support is connected to the declaration of the right to worship not with "but," but with "and." Freedom from compelled support for the religion of others is an inextricable aspect of Vermonters' religious freedom.

This "Compelled Support Clause" of Vermont's constitution closely resembles the 1786 Virginia Statute for Religious Liberty first drafted by Thomas

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Allen and the Green Mountain Boys. Jones at 336, 354, 386. The Battle of Hubbardton was fought while the constitutional convention was still in session. *See id.* at 388. The Battle of Bennington was fought on August 16. *See generally* G.G. Benedict, *The Part Taken by the Vermonters in the Battle of Bennington*, 5 Proceedings of the N.Y.S. Hist. Ass'n 113-27 (1905). Jonas Fay, secretary of the convention and a future Vermont Supreme Court justice, served at Bennington alongside his brother John, who was killed in the battle. The Vermont Encyclopedia 121-22 (J. Duffy, S. Hand & R. Orth eds. 2003); Jacob G. Ullery, Men of Vermont: An Illustrated Biographical History of Vermonters and Sons of Vermont 50 (1894).

Jefferson and spearheaded by James Madison. That Statute provides that "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." Va. Code Ann. § 57-1 (1786); *see also Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 11-13 (1947) (describing history of statute).

Like the Virginia Statute for Religious Liberty, Vermont's Compelled Support Clause was born out of a reverence for religious conviction and freedom of conscience. The preamble to the Virginia Bill, which was enacted in response to a bill that would have required Virginians to pay taxes to support religious teachers, famously proclaimed that "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness." *Everson*, 330 U.S. at 12-13 (quoting 12 Hening, Statutes of Virginia 84 (1823); Commager, Documents of American History 125 (1944)). It went on: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern." *Id*.

Similarly, after the Vermont Legislature passed a 1783 act permitting towns to levy a tax to hire and support a minister, the Council of Censors—which at the time reviewed the State's laws for

constitutionality—declared the act "repugnant to the Constitution" of the State. Records of the Council of Censors, An Address of the Council of Censors to the People of Vermont, 158 (1800); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 553-54 (Vt. 1999) (describing Council of Censors and repeal of 1783 Ministerial Act); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2034 (2017) (Sotomayor, J., dissenting). Echoing Jefferson and Madison, the Council declared that "religion is a concern personally and exclusively operative between the individual and his God; and that whoever attempts to control this sacred right, in any possible way, does it by usurpation and not by right." Records at 157-58. The Council urged the act's repeal to "restore community to their inestimable constitutional privileges, and prevent the establishment of precedents dangerous to, and subversive of, the dearest rights of freemen." *Id*. at 158.

To those who drafted the Vermont Constitution and first construed it, freedom from compelled support for the religion of others was not in opposition to the free exercise of religion. It *was* freedom of religion.

This principle, of course, was hardly limited to Vermont.[3] As members of this Court have observed, to Jefferson and Madison, who framed not just the Virginia Statute for Religious Liberty but also the First

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[3] Vermont's first constitution, including the Compelled Support Clause, was modeled on Pennsylvania's 1776 constitution. Jones at 385-92; *see* Penn. Const., ch. 1, art. 2 (1776).

Amendment to the U.S. Constitution, "'[e]stablishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom" of religion. *Everson*, 330 U.S. at 40 (Rutledge, J., dissenting).

Consistent with its purpose of promoting freedom of conscience, Vermont's Compelled Support Clause is a narrow prohibition on compelled support for worship.[4] Under the Compelled Support Clause, public funds may flow to religious institutions. They simply may not fund worship. *Taylor v. Town of Cabot*, 178 A.3d 313, 320 (Vt. 2017) ("[T]he fact that the recipient of government support is a religious organization is not itself determinative under the Compelled Support Clause; whether the funds are used to support religious worship is the critical question.").

The Vermont Supreme Court has therefore upheld, under the Compelled Support Clause and the First Amendment, a leasing agreement between a state agency and religious college to support the construction of a classroom and science building for the college. *Mann*, 247 A.2d at 74. It has likewise found taxpayers challenging the publicly funded restoration of a historic church very unlikely to succeed in

[4] In the 1960s, the Vermont Supreme Court repeatedly observed that the federal Establishment Clause, as interpreted by this Court at that time, was more restrictive than Vermont's Compelled Support Clause. *See Vt. Educ. Buildings Fin. Agency v. Mann*, 247 A.2d 68, 73 (Vt. 1968); *Swart v. S. Burlington Town Sch. Dist.*, 167 A.2d 514, 518 (Vt. 1961).

arguing that such funding violates the Compelled Support Clause. *Taylor*, 178 A.3d at 320.

In the context of paying tuition to religious schools, the Vermont Supreme Court has not disapproved "the myriad ways that a public school district can subsidize education in a religious school by paying for expenses that [would] occur whether or not the school was sectarian," such as "payments for school transportation to sectarian schools, . . . text books used in sectarian schools, . . . or teachers of secular subjects to sectarian school children." *Chittenden*, 738 A.2d at 562.

Instead, the Vermont Supreme Court has interpreted the Compelled Support Clause as simply requiring school districts to ensure that public funds are not used for religious worship. As the record here shows, mandatory worship is an integral part of the educational experience at many religious schools. *See* Resp. Br. 13 (students at Bangor Christian School required to attend chapel (citing JA 86)), 15 (students at Temple Academy required to attend weekly religious service (citing JA 96)). The Vermont Supreme Court held in *Chittenden* that the school district paying tuition to a religious school would have to require adequate safeguards to ensure that public dollars flowing to religious schools did not support worship.[5]

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[5] On the record before it in *Chittenden*, the Vermont Supreme Court determined that religious worship included religious instruction. *Taylor*, 178 A.3d at 320 (citing *Chittenden*, 738 A.2d

Concededly, as the Second Circuit recently observed, this ruling "created uncertainty in" school districts that tuition their students as to what safeguards would be adequate to satisfy the Compelled Support Clause, with some school districts paying tuition to religious schools and some categorically declining to do so. *A.H. by & through Hester v. French*, 985 F.3d 165, 172 (2d Cir. 2021).

And uncertainty as to the proper role of religion in Vermont schools is hardly new. The historical record concerning Vermont's earliest schools is not perfectly clear, given the lack of state control over the schools and the haphazard way in which many schools were administered. Ludlum at 224. But early public schools in Vermont, as in other States, no doubt embraced some religious elements. *See* Rev. Richard Gabel, Public Funds for Church and Private Schools 331 (1937); Bush at 25-26 (noting "exceedingly heated" debates "over the role of religious instruction in the schools"). It was not until the 1840s and 50s that reformers began to reshape public education in Vermont to be more centralized and standardized, better funded and administered, and secular—in short, to bring public education in Vermont closer to conforming with both the Education Clause and Compelled Support

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at 562). This conclusion is consistent with this Court's recent holdings that teachers at religious schools were "ministers" for the purpose of applying the "ministerial exception" to employment discrimination claims. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012).

Clause of the State's constitution. *See* Ludlum at 228-36.

But, of course, the validity of a constitutional provision does not depend on its being straightforward to interpret or simple to implement. *Cf. Mitchell v. Helms*, 530 U.S. 793, 804 (2000) ("The case's tortuous history over . . . 15 years indicates well the degree to which our Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle."); *Walz*, 397 U.S. at 700 (Harlan, J., concurring) ("The prospect of difficult questions of judgment in constitutional law should not be the basis for prohibiting legislative action that is constitutionally permissible.").

Vermont's narrow constitutional proscription against forced contribution to religious worship may be difficult to interpret and implement in some contexts. But like the Establishment Clause that followed it and shares some of its historical and intellectual lineage, it is a critical aspect of the protection for Vermonters' religious freedom. Vermont's Compelled Support Clause and the federal Establishment Clause are textually distinct and resist conflation. *See Chittenden*, 738 A.2d at 562 (holding Compelled Support Clause not "intended to cover only state religious establishments").[6] But despite their different means and

[6] Thus, the intervention of "parental choice between the public funding source and the educational provider" may alleviate an "establishment" concern but not necessarily a "compelled

ends, both provisions protect individual freedom of conscience against compulsion. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."). Vermont's interest in protecting individuals' rights to engage in and support religious worship as they see fit—and *only* as they see fit—is as old as the Republic, and as important as any other right enshrined in the States' constitutions.

2. The interest in freedom from forced support for worship is analogous to the state interest upheld in *Locke v. Davey*, 540 U.S. 712 (2004).

Locke involved a Washington constitutional provision, which stated that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment," Wash. Const., art. I, § 11, which had "been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry," 540 U.S. at 719. This Court held that Washington's interest in refraining from funding the schooling of clergy "is scarcely novel" and that there were "few areas in which a State's antiestablishment interests come more into play." *Id*. at 722. It noted that "[s]ince the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders,

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support" concern. *Chittenden*, 738 A.2d at 563; *compare Mitchell*, 530 U.S. at 829-36.

which was one of the hallmarks of an 'established' religion." *Id*. Therefore, this Court held—citing state constitutional provisions including Vermont's Compelled Support Clause—that "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Id*. at 723. This interest in refraining from funding an "essentially religious endeavor," the Court held, was "historic and substantial" and did not offend the Free Exercise Clause. *Id*. at 721, 725.

Washington's interest in refraining from supporting the ministry is paralleled in Vermont's Compelled Support Clause. Like Vermont, Washington's constitution foreclosed the State from funding "a distinct category of instruction"—religious training—but allowed public funding to flow to religious institutions and went "a long way toward including religion in its benefits." *Id*. at 721, 724. Washington's constitution, like Vermont's, simply drew a line at forcing its citizens to support religious ministry and to pay for the propagation of others' religious beliefs. *Id*.; *see also Taylor*, 178 A.3d at 323.

3. The interest against compelled support of worship is distinct from the state interest asserted in *Espinoza*.

Vermont's founding-era interest in protecting freedom of conscience is not comparable to the interest Montana asserted in *Espinoza* in its mid-19th century mini-Blaine Amendment prohibiting aid to religious

schools. *See* 140 S. Ct. at 2268 (Alito, J., concurring) (noting that Montana's no-aid "provision was modeled on the failed Blaine Amendment to the Constitution of the United States" which "was prompted by virulent prejudice against immigrants, particularly Catholic immigrants"). *Espinoza* held that "there is no 'historic and substantial' tradition against aiding [religious] schools." *Id*. at 2259. The Court noted that "[i]n the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones." *Id*. at 2258. Montana argued that "a tradition against state support for religious schools arose in the second half of the 19th century, as more than 30 States—including Montana—adopted no-aid provisions."[7] *Id*. This Court held that these "no-aid provisions of the 19th century" that were born out of anti-Catholic, anti-immigrant bias "hardly evince a tradition that should inform our understanding of the Free Exercise Clause." *Id*. at 2259.

Those words from *Espinoza* echo the Vermont Supreme Court's 1999 holding in *Chittenden* that "the specific prohibitions on public financial support for religious schools and other religious institutions" so prevalent in other States' constitutions "were adopted between 1830 and 1928 in response to attempts to obtain funds for Roman Catholic

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[7] Those States did not include Vermont or Maine. *See* Blaine Info Central, Becket Fund for Religious Liberty, https://www.becketlaw.org/research-central/blaine-amendments-info-central/ (last visited Oct. 25, 2021).

institutions, particularly schools," and that such constitutional amendments (which Vermont did not adopt) "shed no light" on the Compelled Support Clause, "which was first adopted in 1777." 738 A.2d at 558.

Montana's ban on public funding of religious schools shares none of the history or intellectual roots of founding-era protections for religious conscience like Vermont's Compelled Support Clause or the federal Establishment Clause. *See id*. Not only does the Compelled Support Clause predate Montana's no-aid provision by about a century, it is a much narrower restriction that permits public money to flow to religious schools so long as it does not fund worship. *Taylor*, 178 A.3d at 323. Moreover, the Compelled Support Clause is not specific to schools; it simply prohibits compelled funding of religious worship wherever it may take place. Finally, the Compelled Support Clause grew not out of religious animus, like mini-Blaine Amendments, but out of profound reverence for freedom of religious conscience—a reverence that Jefferson and Madison shared and which informed the First Amendment. *See Chittenden*, 738 A.2d at 556; *cf.* Amicus Br. of Prof. McConnell at 7 (noting that aside from the constitutional text, "the next best evidence of the original meaning of the Free Exercise Clause comes from similar clauses in state constitutions adopted during and after the Revolutionary War").

4. Vermont's history demonstrates why the Court should proceed cautiously in deciding this case.

As this Court acknowledged in *Espinoza*, the historical record concerning payment of public money to religious schools is "complex." 140 S. Ct. at 2259. This complexity warrants caution, as the Court has also recognized. These issues "stir deep feelings" that have divided the country and the Court for decades, and the Court has wisely declined to "furnish a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools" in favor of permitting States "flexibility" in providing education for their youth. *See Regan*, 444 U.S. at 662.

The States are obligated by their own laws and constitutions to provide all children living within their borders the opportunity for a free public education. *See* Sutton at 30, 35. Like Maine, Vermont—in light of its unique circumstances and after nearly a century of experimenting with other approaches—satisfies this obligation in part by paying tuition to private schools. But these tuition payments are part of Vermont's public education system—they are not "merely some governmental 'benefit' indistinguishable from other forms or social welfare." *See Plyler*, 457 U.S. at 221.

Petitioners and their amici seek from this Court a categorical rule that whenever a State provides funds to a private school as part of a public education program, the State must allow those funds to be used for any purpose—including to support the school's religious worship—unless the State can overcome a strict scrutiny analysis. Such a holding would severely undermine the flexibility this Court has held States need when operating their public education systems.

It would also ignore the historic and substantial interest that States like Vermont have in preventing the compelled support of worship—an interest that the founders of our States and country recognized as central to liberty.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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