

SUPREME COURT OF NORTH CAROLINA

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REV. ROBERT RICHARDSON, III )  
et al., )

Plaintiffs-Appellees, )

v. )

STATE OF NORTH CAROLINA, )  
et al., )

From Wake County

Defendants, )

CYNTHIA PERRY, GENNELL )  
CURRY, THOM THILLIS, AND )  
PHIL BERGER, )

Intervenor-Defendants- )  
Appellants )

\*\*\*\*\*

BRIEF OF AMICI CURIAE AMERICANS UNITED FOR SEPARATION OF  
CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION, AMERICAN  
CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION,  
ANTI-DEFAMATION LEAGUE, BAPTIST JOINT COMMITTEE FOR  
RELIGIOUS LIBERTY, AND THE INTERFAITH ALLIANCE FOUNDATION

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INDEX

Table of Cases and Authorities ..... ii

Introduction .....1

Background .....3

Argument.....4

I. Taxpayer-Funded Private Schools Do Not Fulfill A Public Purpose.....4

    A. The voucher program uses taxpayer dollars to support private religious instruction .....4

    B. Taxpayer-funded private schools receive minimal public oversight .....9

    C. Taxpayer-funded private schools exclude students on the basis of religion, disability, and other characteristics.....11

II. The Constitution Does Not Require The Public To Fund Private Religious Instruction.....14

Conclusion .....17

Certificate Of Compliance

Certificate Of Service

TABLE OF CASES AND AUTHORITIES

CASES

*Anderson v. Town of Durham*,  
895 A.2d 944 (Me. 2006) .....16

*Brusca v. State Board of Education*,  
405 U.S. 1050 (1972), *aff'g mem.* 332 F. Supp. 275, 276  
(E.D. Mo. 1971).....15–16

*Colorado Christian University v. Weaver*,  
534 F.3d 1245 (10th Cir. 2008).....16, 17

*Eulitt v. Maine*,  
386 F.3d 344 (1st Cir. 2004) .....16

*Leandro v. State*,  
488 S.E. 2d 249, 346 N.C. 336 (N.C. 1997).....8

*Locke v. Davey*,  
540 U.S. 712 (2004) .....14, 15

*Luetkemeyer v. Kaufmann*,  
419 U.S. 888 (1974), *aff'g mem.* 364 F. Supp. 376, 387  
(W.D. Mo. 1973) .....15

*Norwood v. Harrison*,  
413 U.S. 455 (1973) .....15

*Sloan v. Lemon*,  
413 U.S. 825 (1973) .....16

*Teen Ranch, Inc. v. Udow*,  
479 F.3d 403 (6th Cir. 2007).....16

CONSTITUTIONAL PROVISIONS

N.C. Const. art. V, § 2.....2

OTHER SOURCES

A Beka Book, <http://www.abeka.com/> .....6

Accelerated Christian Education, <a href="http://www.aceministries.com/">http://www.aceministries.com/</a> .....	6
BJU Press, <a href="http://www.bjupress.com/page/Home">http://www.bjupress.com/page/Home</a> .....	6
Pressley Baird, <i>Group Says School with Anti-Gay Policy Shouldn't Get Tax Dollars</i> , Star News Online (Nov. 26, 2014), <a href="http://www.starnewsonline.com/article/20131126/articles/131129669">http://www.starnewsonline.com/article/20131126/articles/131129669</a> .....	13
N.C. State Board of Education, <i>North Carolina Essential Standards: Biology</i> , <a href="http://www.ncpublicschools.org/docs/acre/standards/new-standards/science/biology.pdf">http://www.ncpublicschools.org/docs/acre/standards/new-standards/science/biology.pdf</a> .....	9
N.C. State Board of Education, <i>North Carolina Essential Standards: Eighth Grade Social Studies</i> (Aug. 23, 2012), <a href="http://www.ncpublicschools.org/docs/acre/standards/new-standards/social-studies/8.pdf">http://www.ncpublicschools.org/docs/acre/standards/new-standards/social-studies/8.pdf</a> .....	9
Deanna Pan, <i>14 Wacky 'Facts' Kids Will Learn in Louisiana's Voucher Schools</i> , Mother Jones (Aug. 7, 2012), <a href="http://www.motherjones.com/blue-marble/2012/07/photos-evangelical-curricula-louisiana-tax-dollars">http://www.motherjones.com/blue-marble/2012/07/photos-evangelical-curricula-louisiana-tax-dollars</a> .....	6, 7, 8
State of N.C. Div. of Non-Pub. Educ., <i>2014 North Carolina Directory of Non-Public Schools</i> (June 2014), available at <a href="http://www.ncdnpe.org/documents/13-14-CS-Directory.pdf">http://www.ncdnpe.org/documents/13-14-CS-Directory.pdf</a> .....	10, 13
Valerie Strauss, <i>Loch Ness Monster Real in Biology Textbook</i> , Wash. Post (June 26, 2012), <a href="http://www.washingtonpost.com/blogs/answer-sheet/post/loch-ness-monster-real-in-biology-textbook/2012/06/26/gJQAPhwr4V_blog.html">http://www.washingtonpost.com/blogs/answer-sheet/post/loch-ness-monster-real-in-biology-textbook/2012/06/26/gJQAPhwr4V_blog.html</a> .....	7
Rachel Tabachnick, <i>Vouchers/Tax Credits Funding Creationism, Revisionist History, Hostility Toward Other Religions</i> , Talk to Action (May 25, 2011), <a href="http://www.talk2action.org/story/2011/5/25/84149/9275">http://www.talk2action.org/story/2011/5/25/84149/9275</a> .....	8
UNESCO Institute for Statistics, <i>Adult and Youth Literacy</i> (Sept. 2014), <a href="http://www.uis.unesco.org/literacy/Documents/fs-29-2014-literacy-en.pdf">http://www.uis.unesco.org/literacy/Documents/fs-29-2014-literacy-en.pdf</a> .....	8

Lindsay Wagner, *Taxpayer Funds may be Funneled to Home Schools Through School Vouchers*, NC Policy Watch (Dec. 12, 2013), <http://www.ncpolicywatch.com/2013/12/12/taxpayer-funds-may-be-funneled-to-home-schools-through-school-vouchers/> .....10

2 Writings of James Madison (Hunt ed. 1901).....17

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INTRODUCTION

The North Carolina school voucher program sends millions of taxpayer dollars to private schools, the vast majority of which are religious. Those private

schools' curricula can be infused with religion—not just in theology class, but also in biology class, history class, and even math class. In addition, the schools are not required to comply with most state academic standards, and most are not accountable to the public either. Unlike public schools, moreover, these taxpayer-funded private schools are not open to all; they can and do exclude students on the basis of religion, disability, and other grounds, and also discriminate in their hiring.

By spending taxpayer dollars to support private religious schools, the voucher program violates the North Carolina Constitution's requirement that "[t]he power of taxation shall be exercised in a just and equitable manner, *for public purposes only*, and shall never be surrendered, suspended, or contracted away." N.C. Const. art. V, § 2(1) (emphasis added). Taxpayer funding of religious education by religious schools does not advance a public purpose, and the Superior Court correctly concluded that the voucher program violated the North Carolina Constitution.

Although parents have the right to send their children to private, religious schools if they so choose, the State is not required to fund private religious education at taxpayer expense. The cases relied on by Defendants' *amici* do not suggest otherwise. Courts, including the U.S. Supreme Court, have repeatedly held that the government may exclude religious education from taxpayer programs. The

justification is even stronger where, as here, the state Constitution reserves taxpayer funds for public purposes.

### BACKGROUND

In 2013, the General Assembly enacted legislation establishing the Opportunity Scholarship Program. The legislation, as amended, provides more than ten million dollars of taxpayer funds, each school year, for vouchers up to \$4,200 for each participating student to attend a private school. (R p 1329 ¶ 2)

For the 2014–2015 academic year, voucher applicants identified 446 private schools that they planned to attend; 322 of those schools are religious. *Id.* ¶ 6. Schools receiving voucher funds need not be accredited by any state or national organization, are not subject to state curricular requirements, and may discriminate against applicants or students, as well as employees, on the basis of religion and other characteristics. *Id.* ¶ 4; *see also, e.g., id.* at 295, 317, 1093.

The Superior Court held that the voucher program violates the North Carolina Constitution because it fails to advance a public purpose and appropriates public-education funds to private schools that are not subject to the State’s educational standards. *Id.* at 1328–32.

ARGUMENT

**I. TAXPAYER-FUNDED PRIVATE SCHOOLS DO NOT FULFILL A PUBLIC PURPOSE.**

The diversion of taxpayer funds to private schools does not fulfill a public purpose. Instead, the government is providing massive taxpayer support for religious instruction at private religious schools.

Unlike public schools, taxpayer-funded private schools need not, and often do not, fulfill the state's educational standards. Many of the private schools receiving taxpayer funds teach curricula infused with religion. The transfer of taxpayer dollars to religious schools comes with little to no oversight. Unlike public schools, taxpayer-funded private schools are not open to the public; they can and do discriminate on the basis of religion and against students with disabilities. The result is massive taxpayer subsidies for private, religious schools to provide religious education to a limited number of students who profess the school's preferred religious beliefs.

*A. THE VOUCHER PROGRAM USES TAXPAYER DOLLARS TO SUPPORT PRIVATE RELIGIOUS INSTRUCTION.*

The voucher program transfers millions of taxpayer dollars to private schools that will use these resources to provide religious instruction. This school year alone, nearly 1,000 applicants to the voucher program planned to attend dozens of schools that identify themselves as ministries of affiliated churches. (R

pp 1002–06 (listing schools)) Many of these schools, such as Cary Christian School in Wake County, seek to “teach all subjects from a biblical worldview as parts of an integrated whole with the Scripture at the center.” *Id.* at 322.

Religion is a criterion for hiring of staff, including teachers, at many taxpayer-funded private schools. For example, at Fellowship Baptist Academy, in Durham, all teachers “are born-again Christians who have been called by God into the teaching ministry.” *Id.* at 347. Similarly, at Salem Baptist Christian School, “[a]ll of the teachers are required to be professing Christians,” *id.* at 1093, and at LifeSpring Academy, in Clayton, “administrators, teachers, and staff all state that [they] have asked Jesus Christ into [their] hearts and ... believe that Jesus is the son of God, that He died on the cross for our sins, and that He rose from the grave,” *id.* at 376. Bethesda Christian Academy proclaims that its teachers’ “most important qualifications are that they are born again (John 3:3–6 and 1 Peter 1:3) and that they are called to teach a Christ-centered curriculum in the context of a Christian school.” *Id.* at 317.

Unsurprisingly, many of these schools teach religious curricula. Carolina Christian School, a K–12 school in Locust, teaches its students “that God directly created this Earth and all life on it without using any secondary process such as evolution from one species to another.” *Id.* at 1027. Northview Baptist Academy, in Fayetteville, teaches “that God created the universe in six literal, 24-hour

periods” and “reject[s] evolution, the Day-Age Theory, and Theistic Evolution as unscriptural theories of origin.” *Id.* at 396 ¶ N.

Many taxpayer-funded private schools also use thoroughly Christian textbooks. David Mills, North Carolina’s Director of the Division of Non-Public Education, explains that taxpayer-funded private schools in the state use a variety of curricular materials, including Christian textbooks published by Bob Jones University Press, A Beka Book, and Accelerated Christian Education. *Id.* at 1245 ¶ 20; *see also id.* at 1010, 1093, 1123. Bob Jones University Press promotes its texts as “Christ-centered resources for education, edification and evangelism.” BJU Press, <http://www.bjupress.com/page/Home> (all websites last visited Jan. 29, 2015). A Beka Book’s motto is “excellence in education from a Christian perspective.” A Beka Book, <https://www.abeka.com/>. Accelerated Christian Education seeks to “reach[] the world for Christ ... one child at a time.” Accelerated Christian Education, <http://www.aceministries.com/>.

Textbooks by these publishers have infused religion into the teaching of science and even mathematics. Bob Jones University textbooks have taught that “[d]inosaurs and humans were definitely on the earth at the same time and may even have lived side by side within the past few thousand years.” Deanna Pan, *14 Wacky ‘Facts’ Kids Will Learn in Louisiana’s Voucher Schools*, Mother Jones (Aug. 7, 2012), <http://www.motherjones.com/blue-marble/2012/07/photos->

evangelical-curricula-louisiana-tax-dollars (quoting *Life Science* (Bob Jones Univ. Press ed., 3rd ed. 2007)). Accelerated Christian Education has taught that scientists “are becoming more convinced” that dinosaurs are “alive today.” Valerie Strauss, *Loch Ness Monster Real in Biology Textbook*, Wash. Post (June 26, 2012), [http://www.washingtonpost.com/blogs/answer-sheet/post/loch-ness-monster-real-in-biology-textbook/2012/06/26/gJQAPhwr4V\\_blog.html](http://www.washingtonpost.com/blogs/answer-sheet/post/loch-ness-monster-real-in-biology-textbook/2012/06/26/gJQAPhwr4V_blog.html) (quoting *Biology 1099* (Accelerated Christian Education Inc. ed. 1995)). A Beka Book has taught that “the laws of mathematics are a creation of God and thus absolute,” and claims to “provide[] attractive, legible, and workable traditional mathematics texts that are not burdened with modern theories such as set theory.” Pan, *supra* (quoting ABeka.com). These examples may be appropriate for Sunday school or religious schools that are privately financed, but not for schools taking taxpayer dollars reserved for public use.

These publishers have also adopted religious approaches to lessons in American history, geography, constitutional law, and comparative religion. A textbook published by Bob Jones University proclaims that gays and lesbians “have no more claims to special rights than child molesters or rapists.” Pan, *supra* (quoting *Teacher’s Resource Guide to Current Events for Christian Schools, 1998–1999* (Bob Jones Univ. Press ed. 1998)). An A Beka text states that “God

used the Trail of Tears to bring many Indians to Christ.” Pan, *supra* (quoting *America: Land That I Love* (A Beka Book ed., Teacher ed. 1994)).

Another teaches that African religions are “false religious beliefs” from Egyptian descendants of the Bible’s Ham. Rachel Tabachnick, *Vouchers/Tax Credits Funding Creationism, Revisionist History, Hostility Toward Other Religions*, Talk to Action (May 25, 2011), <http://www.talk2action.org/story/2011/5/25/84149/9275> (quoting *Old World History and Geography* 247 (A Beka Book ed., 1991)). Still another states that Africa “is still in need of the gospel ... Only about ten percent of Africans can read and write.” Pan, *supra* (quoting *Old World History and Geography in Christian Perspective* (A Beka Book ed., 3rd ed. 2004)). In fact, the rate of literacy in Sub-Saharan Africa is between 60 and 70 percent. See UNESCO Institute for Statistics, *Adult and Youth Literacy*, 3 (Sept. 2014), <http://www.uis.unesco.org/literacy/Documents/fs-29-2014-literacy-en.pdf>.

North Carolina residents have diverse beliefs about religion, and their right to hold, promote, and teach those diverse beliefs is protected by both the U.S. and North Carolina Constitutions. But the diversion of taxpayer funds to this type of educational environment cannot be squared with the public purpose of providing an education that “prepar[es] students to participate and compete in the society in which they live and work.” *Leandro v. State*, 488 S.E. 2d 249, 254, 346 N.C. 336, 345 (N.C. 1997). Indeed, the state’s standards for public education stress rigorous

understandings of science, history, and other subjects. *See, e.g.,* N.C. State Board of Education, *North Carolina Essential Standards: Biology 3*, <http://www.ncpublicschools.org/docs/acre/standards/new-standards/science/biology.pdf> (students should be taught to “[e]xplain how fossil, biochemical, and anatomical evidence support the theory of evolution”); N.C. State Board of Education, *North Carolina Essential Standards: Eighth Grade Social Studies 7* (Aug. 23, 2012) <http://www.ncpublicschools.org/docs/acre/standards/new-standards/social-studies/8.pdf> (students should learn about “the origin of beliefs, practices, and traditions that represent various groups within North Carolina and the United States” and “the contributions of particular groups,” including “women, religious groups, and ethnic sectors”). The use of public funds to advance private religious beliefs is at odds with the State’s goal of providing a modern public education that is neutral on questions of religion.

***B. TAXPAYER-FUNDED PRIVATE SCHOOLS RECEIVE MINIMAL PUBLIC OVERSIGHT.***

The private schools participating in the voucher program are not subject to the rigorous oversight provided to public schools. To the contrary, private schools—including those participating in the voucher program—receive minimal oversight, and thus are unaccountable to the government or the taxpayers who fund them.

First, taxpayer-funded private schools are not subject to any State requirements governing academic subjects, courses, or curricula. The State does not require these schools to employ principals or teachers who have any particular licenses, credentials, degrees, experience, or expertise. (R p 1329 ¶ 4) Taxpayer-funded private schools need not be accredited by the State Board of Education or any other state or national institution. *Id.* More than half of the schools selected by applicants for 2014–15 vouchers are not accredited by any governmental or private organization at all. *Id.* ¶ 6. For example, North Carolina’s official directory of private schools includes Paramount Christian Academy, which is operated by one person who uses Christian books to teach her granddaughter and two other children from her home. *See* State of N.C. Div. of Non-Pub. Educ., *2014 North Carolina Directory of Non-Public Schools 23* (June 2014), <http://www.ncdnpe.org/documents/13-14-CS-Directory.pdf>; Lindsay Wagner, *Taxpayer Funds may be Funneled to Home Schools Through School Vouchers*, NC Policy Watch (Dec. 12, 2013), <http://www.ncpolicywatch.com/2013/12/12/taxpayer-funds-may-be-funneled-to-home-schools-through-school-vouchers/>.

Second, taxpayer-funded private schools are allowed to handpick their standardized tests. Although the schools that participate in the voucher program must administer a standardized test every year, each school chooses which test to administer. (R p 501 ¶ 7) This prevents any meaningful comparison of the progress

of students across different taxpayer-funded private schools, and between those private schools and public schools.

Finally, most taxpayer-funded private schools are not required to publicly report the results of even their handpicked standardized tests. Instead, only those schools enrolling twenty-five or more voucher students must disclose data on their students' performance. *Id.* ¶ 11. This exception nearly swallows the rule: for the 2014–2015 school year, roughly 3,800 voucher applicants planned to attend 446 different private schools; as a result, the vast majority of schools receiving taxpayer funding enroll fewer than 25 voucher program participants. *Id.* at 1329 ¶ 6. For these schools, neither parents nor the public at large has any way to assess the effectiveness of the public funds supporting these schools. And this absence of public oversight reinforces that the voucher program is serving a nonpublic purpose.

*C. TAXPAYER-FUNDED PRIVATE SCHOOLS EXCLUDE STUDENTS ON THE BASIS OF RELIGION, DISABILITY, AND OTHER CHARACTERISTICS.*

Unlike public schools, taxpayer-funded private schools can and do exclude students on the basis of religion, disability, and other characteristics.

Many taxpayer-funded private schools prioritize admission of students from a certain religious background or exclude applicants of particular faiths. (R pp 280–83) Raleigh Christian Academy, for example, advises applicants that it is “not

a church school for those in cults, i.e., Mormons, Jehovah Witness, Christian Science, Unification Church, Zen Buddhism, Unitarianism, and United Pentecostal.” *Id.* at 407. Bethesda Christian Academy, in Durham, requires parents to support the school’s “Statement of Faith” and to “share the testimony of their salvation” during an admission interview. *Id.* at 318. The school’s “goal is for the student to think like Christ” and to “find a Biblical World View essential to their being able to articulate their faith in a compelling and effective way.” *Id.* at 311. By permitting taxpayer-funded schools to condition admission on acknowledgement of a particular religious faith, the voucher program coerces parents and children into professing religious beliefs they may not share in order to take advantage of a government benefit.

Other schools not only require a profession of faith, but also impose restrictions on the private lives of students and their families. Parents of applicants to Asheville Christian Academy must submit essays concerning “what [they] believe about Jesus Christ,” agree to attend weekly worship services, submit a reference from a pastor, and commit to “uphold[] a biblical view of marriage between one man and one woman,” *Id.* at 301–05. In addition, the school will enroll only students from families “whose lifestyle testifies to a serious commitment to the Christian faith.” *Id.* at 294–95. Likewise, Myrtle Grove Christian School, in Wilmington, requires the families of applicants to agree, in

writing, to refrain from “sexual immorality, including homosexuality and bisexuality.” Pressley Baird, *Group Says School with Anti-Gay Policy Shouldn’t Get Tax Dollars*, Star News Online (Nov. 26, 2014), <http://www.starnewsonline.com/article/20131126/articles/131129669>.

Students who want to use vouchers for a non-religious education often have few if any options. In thirty-two of North Carolina’s 100 counties, the only private schools are religious schools. (R p 1330 ¶ 7) In three more counties, the only independent, non-religious private school is a treatment facility. *See* State of N.C. Div. of Non-Pub. Educ., *2014 North Carolina Directory of Non-Public Schools*, *supra*, at 2, 44, 86. Eleven other counties have no private school at all. *See id.* And the forty-six counties without secular options are concentrated in the western and eastern portions of the state, where public schools are struggling with inadequate funds. *See id.*

Taxpayer-funded private schools also can, and do, discriminate against students with disabilities. Although public schools provide an education customized for students with special needs, taxpayer-funded private schools are largely off-limits to those students. Students at Coastal Christian High School in Wilmington must not only “exhibit a desire to grow in a relationship with Jesus Christ,” but also must have “an I.Q. score of at least 90.” (R p 330) The school excludes students who “need a level of help that CCHS would not be able to

provide.” *Id.* Similarly, Covenant Classical School, in Cabarrus County, informs would-be applicants, “We are not equipped with the resources required to serve children who are seeking to be admitted into special educational programs.” *Id.* at 333.

Public schools are open to all students, regardless of religion, sexual orientation, or disability. Schools, on the other hand, that pick and choose their students and exclude entire classes of people necessarily fail to fulfill the State’s goal of educating the *public*.

## **II. THE CONSTITUTION DOES NOT REQUIRE THE PUBLIC TO FUND PRIVATE RELIGIOUS INSTRUCTION.**

The North Carolina Constitution’s public-purpose requirement is fully consistent with the freedom of speech and religion; nothing in either the U.S. or North Carolina Constitutions requires taxpayers to finance private religious education at private religious schools. Although Defendants’ *amici* suggest that the Superior Court’s ruling improperly “discriminates against religious schools and parents,” Br. of Christian Legal Society at 8, the U.S. Supreme Court and other courts have repeatedly held that the government need not fund private religious instruction.

The U.S. Supreme Court has recognized that a state government may reserve taxpayer funds for secular instruction. In *Locke v. Davey*, 540 U.S. 712 (2004), the Supreme Court upheld a state law barring university students from using state

scholarship funds to pursue a degree in theology; the Court rejected challenges under the Free Exercise, Free Speech, Equal Protection, and Establishment Clauses. *Id.* at 715, 720 n.3, 725 n.10. The law did not burden religious students' religious-exercise or other constitutional rights because "[t]he State ha[d] merely chosen not to fund a distinct category of instruction" and the students were not prohibited from undertaking theological study. *Id.* at 721. The law, moreover, was motivated by a "historic and substantial state interest" in ensuring that private religious education was not supported by the public funds. *See id.* at 721–23, 725.

Contrary to the assertions of Defendants' *amici*, this rule applies fully to school voucher programs and is not limited to the narrow context of college programs in devotional theology. *See* Br. of Christian Legal Society at 30–31. Case after case has reaffirmed—in a range of contexts and circumstances—that the right to practice or preach one's religion need not force taxpayers to subsidize the exercise of those rights. Religious-funding exclusions have been upheld repeatedly by the U.S. Supreme Court.<sup>1</sup> These exclusions have been upheld repeatedly by

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<sup>1</sup> *See, e.g., Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974), *aff'g mem.* 364 F. Supp. 376, 387 (W.D. Mo. 1973) (upholding statute providing free bus transportation to public-school pupils but not to pupils enrolled in sectarian schools); *Norwood v. Harrison*, 413 U.S. 455, 462 (1973) ("the Court [has] affirmed the right of private schools to exist and to operate; it [has] said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise"); *Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972), *aff'g mem.* 332 F. Supp. 275, 276 (E.D. Mo. 1971) (upholding state constitutional provision prohibiting funding of any school "controlled by any

federal circuit courts.<sup>2</sup> And these exclusions have been upheld by state courts. *See, e.g., Anderson v. Town of Durham*, 895 A.2d 944, 959 (Me. 2006) (“[t]he statute merely prohibits the State from funding [religious parents’] school choice, and as such, it does not burden or inhibit religion in a constitutionally significant manner”). These cases reaffirm that states may “act upon their legitimate concerns about excessive entanglement with religion” and “are not required to go to the brink of what the Establishment Clause permits.” *Eulitt v. Maine*, 386 F.3d 344, 355 (1st Cir. 2004).

None of the cases cited by Defendants’ *amici* suggest that the government is obligated to fund private religious education. Even *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), acknowledged that “*Locke [v. Davey]* precludes any sweeping argument that the State may never take the religious character of an activity into consideration when deciding whether to extend public

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religious creed, church, or sectarian denomination whatsoever”); *Sloan v. Lemon*, 413 U.S. 825, 834 (1973) (“[V]alid aid to nonpublic, nonsectarian schools [provides] no lever for aid to their sectarian counterparts.”).

<sup>2</sup> *See, e.g., Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 410 (6th Cir. 2007) (state may prohibit use of government funds to place children in a youth residential organization that incorporated religious teaching into its programs, because “failure to fund [plaintiff’s] religious programming does not violate [plaintiff’s] free exercise rights”); *Eulitt v. Maine*, 386 F.3d 344, 346 (1st Cir. 2004) (federal Constitution does not require state “to extend tuition payments to private sectarian secondary schools on behalf of students who reside in a school district that makes such payments available on a limited basis to private nonsectarian secondary schools”).

funding.” *Id.* at 1256. The court invalidated Colorado’s program only because it “discriminate[d] *among* religions, allowing aid to ‘sectarian’ but not ‘pervasively sectarian’ institutions,” a distinction made “on the basis of criteria that entail intrusive governmental judgments regarding matters of religious belief and practice.” *Id.* (emphasis in original). Here, however, the Superior Court’s judgment requires no inquiry into the degree of sectarianism in particular schools.

Far from raising constitutional concerns, the Superior Court’s judgment upholds principles of religious liberty dating back to the nation’s founding, which stressed that the funding of religious education was a private responsibility, not a public obligation. *See, e.g.*, 2 Writings of James Madison 183, 184 (Hunt ed. 1901). The taxpayers of North Carolina are entitled to the same protection.

### CONCLUSION

The use of taxpayer funds to finance religious education at religious schools that discriminate on the basis of religion does not fulfill a public purpose, and is thus prohibited by the North Carolina Constitution. Enforcement of the public-purpose requirement—and the reservation of taxpayer funds for secular education—is consistent with both the federal and North Carolina Constitutions. The Superior Court’s decision should be affirmed.

Respectfully submitted,

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January 30, 2015

N.C. R. APP. P. 28(J) CERTIFICATE OF COMPLIANCE

In accordance with N.C. R. App. P. 28(j), I certify that this Brief of *Amici Curiae* contains no more than 3,750 words.

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I certify that a copy of this Brief of *Amici Curiae* was served upon counsel for all parties by email addressed to the following persons:

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January 30, 2015