19–1746

In the United States Court of Appeals For the First Circuit

DAVID CARSON, AS PARENT AND NEXT FRIEND OF O.C.;
AMY CARSON, AS PARENT AND NEXT FRIEND OF O.C.;
ALAN GILLIS, AS PARENT AND NEXT FRIEND OF I.G.;
JUDITH GILLIS, AS PARENT AND NEXT FRIEND OF I.G.;
TROY NELSON, AS PARENT AND NEXT FRIEND OF A.N. AND R.N.;
ANGELA NELSON, AS PARENT AND NEXT FRIEND OF A.N. AND R.N.,
PLAINTIFFS-APPELLANTS,

v.

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

On Appeal from the United States District Court
For the District of Maine

Brief of *Amici Curiae*
National School Boards Association, Maine School Boards Association, Massachusetts Association of School Committees, New Hampshire School Boards Association, and Rhode Island Association of School Committees
In Support of Defendant-Appellee

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the National School Boards Association, the Maine School Boards Association, the Massachusetts Association of School Committees, the New Hampshire School Boards Association, and the Rhode Island Association of School Committees make the following disclosures as *amici curiae*:

1. No amicus is a publicly held corporation or other publicly held entity.
2. No amicus has a parent corporation;
3. No amicus has 10% or more of its stock owned by a corporation.

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INTEREST OF *AMICI CURIAE*

Amicus curiae the National School Boards Association ("NSBA") was founded in 1940 and is a non-profit organization representing state associations of local school boards and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members governing approximately 13,800 local school districts serving nearly 50 million public school students. NSBA regularly represents its members' interests before Congress, federal courts, and state courts and has participated as amicus curiae in numerous cases involving issues under the First Amendment's Free Exercise Clause and its Establishment Clause.

Amicus curiae the Maine School Boards Association ("MSBA") is recognized as a non-profit educational advisory organization under 30-A MRSA 5724(9). The members of MSBA are 221 of the 229, or 97%, of local district school boards representing the municipal and regional school administrative units in the State of Maine. The mission of MSBA is to enhance the education of all students in Maine's public schools by identifying the needs of local school boards through board development, information and support services, and by advocating for all Maine public schools at the state and national levels. MSBA's interest in this case is upholding the principle, as established in 20-A MRSA § 2951, that sectarian schools shall not be eligible for receipt of public funds for tuition purposes. An additional

interest of MSBA is making the Court aware that a decision imposing such an obligation on local school boards would have substantial implications for MSBA members and public education in the state of Maine.

Amicus curiae the Massachusetts Association of School Committees, Inc., ("MASC") is a Massachusetts corporation incorporated under G. L. chapter 180. The members of MASC are the approximately 320 Massachusetts school committees from cities, towns, and regional school districts. MASC represents the interests of its members in supporting and enhancing public elementary and secondary education in the Commonwealth. MASC's general interest in this case is maintaining the principle that sectarian education shall not be a public expense, a matter with substantial implications for MASC's members.

Amicus curiae the New Hampshire School Boards Association ("NHSBA") is a voluntary, non-profit association whose membership is comprised of approximately 160 of the 176 locally elected New Hampshire school boards. NHSBA provides a variety of services designed to help its members to effectively perform their duties and obligations. As elected bodies entrusted by their respective towns and cities to oversee the public schools, these school boards, acting through NHSBA, are uniquely positioned to ensure that this court is aware of the significant impact its decision will have on New Hampshire's local school boards and on the many important decisions these boards are charged with making.

Amicus curiae the Rhode Island Association of School Committees ("RIASC") is a non-profit organization dedicated to developing the effectiveness of Rhode Island School Committee members in meeting their role and responsibilities in promoting student achievement in safe and challenging learning environments, while playing a leading role in shaping and advocating public education policy at the local, state, and national levels. RIASC, on behalf of its school committee members, is uniquely positioned to explain to this Court how its decision will affect public education in Rhode Island.

FRAP 29(a)(2) STATEMENT

All parties have consented to the filing of this amicus brief.

FRAP 29 (a)(4)(E) STATEMENT

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici Curiae* state that (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money to fund the preparation or submission of this brief; and (iii) no person other than *Amici Curiae* and their counsel contributed money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents a question that is of vital importance to NSBA and to its member state school board associations: whether the free public, secular education furnished to residents by their local school boards must include the option of a pervasively religious education or whether creative methods of providing a secular public education that are necessitated by local district circumstances may lawfully exclude the sectarian alternative.

States, not the federal government, are responsible for financing, managing, and supporting public education through locally chosen school boards that govern their community schools. From our nation's founding, public education was omitted from those functions delegated to the new central government as part of the effort to preserve a *federal* system of state sovereigns and to avoid a *national* government. *See* Kern Alexander & M. David Alexander, *American Public School Law* 119 (Wadsworth Cengage Learning, 8th ed. 2012). States fulfill their public education mission in a variety of ways. Like other states that restrict public funding for religious instruction in their effort to support public schools, Maine has Establishment Clause concerns associated with funding religious instruction that long have been recognized by the Supreme Court. Those concerns were not at issue in the *Trinity Lutheran* decision that is the asserted fulcrum of this appeal, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___ U.S. ___, 137 S.Ct. 2012 (2017).

Maine has a unique method for ensuring that its local school districts/school administrative units ("SAU's") are able to furnish a free public, secular education to all their residents. Because some SAU's for historical and/or geographic reasons do not operate schools at all grade levels, Maine provides for two alternatives. First, the SAU may contract with another SAU or with a non-sectarian private school to serve its residents. In lieu of such an arrangement, Maine authorizes the SAU to make tuition payments for its residents to attend their choice of private schools but, consistent with the fundamental attributes of a public education, excludes sectarian schools from this program. For the third time in two decades Maine's system has been challenged in this court on a claim that its denial of state-funded tuition for sectarian schools as part of this program violates the First Amendment's Free Exercise Clause.

Appellants ("plaintiffs") assert that this court must revisit and reverse its holding in *Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004) based on the intervening Supreme Court decision in *Trinity Lutheran, supra,* ___ U.S. ___, 137 S.Ct. 2012 (2017) [Appellants' Brief at 1, 11-12]. NSBA and the other *amici* urge this court to reject that argument because the Maine program easily withstands scrutiny under the legal framework that has been left unaltered by *Trinity Lutheran*. In fact, adoption of plaintiffs' argument in the context of the pervasively religious schools they seek to attend at public expense would raise clear

Establishment Clause concerns that were wholly absent in *Trinity Lutheran*. Those concerns directly implicate the ability of SAU's to deliver to all their residents what has always been defined by the courts as a public, secular education rather than one which is sectarian in all its aspects, ranging from curriculum to enrollment to student conduct requirements.

In short, Maine has not infringed the Free Exercise Clause by lawfully choosing to exclude a sectarian option from its program to support a public, secular education in its SAU's. *Amici* urge the court to uphold its decision in *Eulitt* as Circuit precedent that is both binding and correctly decided. To hold otherwise would be to require Maine and its local SAU's to fund pervasively religious instruction -- something that the Supreme Court has never held is required by the Free Exercise Clause. Such a holding would call into question similar provisions in other jurisdictions in this Circuit and would remove a means by which those jurisdictions support their public schools.

ARGUMENT

I. *Eulitt* Held That Maine's Program Offering a Secular Public Education Does Not Infringe the Free Exercise Clause Based on the "Play in the Joints" Between the Religion Clauses Recognized in *Locke v. Davey*. *Trinity Lutheran* Has Left That Framework in Place.

In *Eulitt*, this court was asked to revisit its holding in *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), which had sustained the Maine scheme against a Free

Exercise challenge. The putative grounds requiring another assessment of the Maine program were the intervening decisions in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) and in *Locke v. Davey*, 540 U.S. 712 (2004). *Eulitt, supra*, 386 F.3d at 348, 353.

Critical to understanding the holding in *Eulitt* and central to this appeal is *Eulitt*'s definition of the "benefit" provided by the Maine scheme. *Eulitt* stated succinctly that what the Maine program offers is a "secular education." *Eulitt, supra*, 386 F.3d at 355, 354 n.5. The SAU in *Eulitt* operated its own grade school but outsourced its secondary education to another SAU, contracting to educate at least 90% of its secondary students there and up to 10% of its students at eligible nonsectarian schools if their needs could not be met by the other SAU. The appellants sought a ruling that the Maine scheme's exclusion of sectarian schools violated their rights.

Applying *Locke*, the *Eulitt* court first decided that while the appellants' claim was phrased as one for religious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, that claim had to be measured by the Free Exercise Clause. *Eulitt, supra*, 386 F.3d. at 353-354, citing *Locke*, *supra*, 124 S.Ct. at 1312 n. 3. The court next observed that under *Locke* "the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious

activity simply because they choose to fund the secular equivalents of such activity." *Id*. at 354, citing *Locke*, *supra,* 124 S.Ct. at 1213. Put differently, *Eulitt* stated "[t]he fact that the state cannot interfere with a parent's fundamental right to choose religious education for his or her child does not mean that the state must fund that choice." *Id*. *Eulitt* then recognized *Locke*'s reaffirmation that there is "'room for play in the joints'" between the Free Exercise Clause and the Establishment Clause. *Id.* at 355, quoting *Locke*, *supra*, 124 S.Ct. at 1311. *Eulitt* rejected an argument that *Locke*'s analysis was myopically limited to the type of restriction in the state program that had been challenged in that case, *i.e.,* a narrow barrier to the use of public scholarship money for pursuit of training to enter religious ministries. *Id*. Instead, *Eulitt* applied *Locke* for the broader proposition that "state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so." *Id.*

Eulitt then assessed Maine's program under the three factors specified by *Locke* for testing improper religious animus. The court ruled that the Maine scheme "does not threaten any civil or criminal penalty"; that "it does not in any way inhibit political participation"; and, crucially, that it "does not require residents to forgo religious convictions in order to receive the benefit offered by the state – a secular education." *Eulitt, supra*, 386 F.3d at 355, citing *Locke, supra,* 124 S.Ct. at 1312-

1313. The court finished its analysis by pointing to *Locke*'s recognition that "states are not required to go to the brink of what the Establishment Clause permits" and concluded that Maine "may take into account plausible entanglement concerns in making decisions in areas that fall within the figurative space between the Religion Clauses." *Id.,* citing *Locke, supra*, 124 S.Ct. at 1311-1312.

This analysis decided the case. Finding no Free Exercise Clause problem in Maine's program, the court applied the easily satisfied rational basis test; noted that the appellants had not even attempted this "steep uphill climb"; and affirmed the district court's grant of summary judgment for the state. *Eulitt, supra,* 386 F.3d at 356.

Trinity Lutheran has done nothing to undermine *Eulitt* and this court must sustain the Maine statute yet again for two reasons. First, *Trinity Lutheran* left intact the analysis in *Locke* that was relied on in *Eulitt.* Second, a five Justice majority in *Trinity Lutheran* agreed that the type of benefit made available by Missouri in that case was dispositive. That benefit is fundamentally different from the benefit offered by Maine.

In *Trinity Lutheran*, Missouri offered state grants for non-profit entities to purchase rubber playground surfaces made from recycled tires as part of an environmental program. Although the plaintiff church met all the criteria for a grant,

its application was denied solely because it is a church. *Trinity Lutheran*, *supra*, 137 S.Ct. at 2017-2018. Its claim asserted violation of the Free Exercise Clause and a seven-Justice majority agreed.[1] At the outset, the four-Justice plurality opinion took into account Missouri's concession that the Establishment Clause would not have barred the church's participation. *Id*. at 2019. The opinion next reaffirmed *Locke*'s recognition that "'there is play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Id*., quoting *Locke*, *supra,* 540 U.S. at 718. The plurality pointed out, however, that "denying a generally available benefit solely on account of religious identity" requires that the state show an "interest 'of the highest order.'" *Id.* at 2019 [citation omitted]. The opinion characterized the church's claim as one involving a "refusal to allow [it] – solely because it is a Church – to compete with secular organizations for a grant." *Id.* at 2022.

The plurality opinion distinguished *Locke.* In that case Washington had set up a scholarship program to assist high-achieving students with postsecondary education costs and had chosen to authorize these funds at non-sectarian and

[1] Four Justices signed on to the plurality opinion. *Trinity Lutheran, supra*, 137 S.Ct. at 2017. Two Justices each authored an opinion which concurred "in part", each joining in the other's opinion. *Id*. at 2025 (Thomas, J., concurring in part; Gorsuch, J., concurring in part). A seventh Justice authored a concurring opinion. *Id.* at 2026 (Breyer, J., concurring). Two Justices joined in a dissenting opinion. *Id.* at 2027 (Sotomayor, J., dissenting).

sectarian schools alike, but had drawn the line on use of funds to pursue a devotional theology degree. The Supreme Court sustained this restriction against Free Exercise Clause challenge. The *Trinity Lutheran* plurality stated why the restriction imposed by Washington in *Locke* was different from that imposed by Missouri: the plaintiff in *Locke* "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do* – use the funds to prepare for the ministry." *Trinity Lutheran, supra*, 137 S.Ct. at 2023 [emphasis in original].

The *Trinity Lutheran* plurality continued by noting Washington's clear "antiestablishment interest in not using taxpayer funds to pay for the training of clergy"; stated that *Locke* had accounted for this interest; but pointed out that, unlike Davey, the church in *Trinity Lutheran* was "put to the choice between being a church and receiving a government benefit." *Trinity Lutheran, supra*, 137 S.Ct. at 2024. When pressed to justify its denial of the grant, Missouri could "offer[] nothing more than [its] policy preference for skating as far as possible from religious establishment concerns." *Id*. That was deemed well short of the minimum necessary to validate Missouri's action. *Id*. In a footnote, the *Trinity Lutheran* plurality stated simply and starkly the limits of its opinion: "This case involves express discrimination based on religious identity with respect to playground resurfacing. *We do not address religious uses of funding* or other forms of discrimination." *Id*. at 2024 [emphasis added].

One of the concurring opinions in *Trinity Lutheran* stated, "I agree with much of what the Court says" but devoted more space to the "particular nature of the public benefit here at issue." *Trinity Lutheran, supra*, 137 S.Ct. at 2026 [Breyer, J., concurring]. The concurrence analogized the Missouri resurfacing benefit to "such 'general government services as ordinary police and fire protection'"; found no plausible basis for a religious restriction; observed that "[p]ublic benefits come in many shapes and sizes"; and concluded "I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day." *Id*. at 2027.

Trinity Lutheran is therefore limited by its facts to the exclusion of a church from a particular grant program, which Missouri defended with vague Establishment Clause concerns, while conceding that to include the church would not have violated that clause. The facts and concerns here are quite different.

II. Maine's Method of Supporting a Public Secular Education by Restricting Funding for Religious Instruction is Based on Valid Entanglement Concerns and is Well Within the "Play in the Joints" Left Undisturbed by *Trinity Lutheran*.

Two points emerge from *Trinity Lutheran* that are crucial for this appeal. First, even if the Establishment Clause does not bar Maine from providing a specific benefit for religious purposes, the "play in the joints" between the two clauses still applies, and within that space there is ample room for Maine to *choose not* to provide the benefit. Second, for a five-Justice majority the character of the benefit offered

by Missouri was a central factor in that decision. That majority agreed that *Trinity Lutheran* says nothing about the entirely separate matter of "religious uses of [public] funding."[2] In fact, plaintiffs concede that "a majority of the Court" refused to address this question [Appellants' Brief at 22].

A. Maine's Choice Not to Fund Pervasively Religious Instruction Complies with Decades of Supreme Court Precedent and is Fully Consistent with *Trinity Lutheran*.

The Supreme Court long has recognized that the Establishment Clause bars a state from enacting curriculum and related requirements in the public schools where the purpose "either is the advancement or inhibition of religion." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963). Accordingly, the Court has invalidated required exercises at the opening of the school day that include reading of the Bible and recitation of the Lord's prayer, *id.* at 225; the required teaching of creationism, *Edwards v. Aguillard,* 482 U.S. 578, 593 (1987); and a legal bar on teaching evolution science because it conflicts with religious views, *Epperson v. Arkansas,* 393 U.S. 97, 107 (1968). "While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program or education need not conflict with the First Amendment's prohibition, the

[2] The District Judge correctly assessed this result. *Carson v. Makin*, ___ F.Supp.3d ___, 2019 WL 2619521, at *3 (D. Maine June 26, 2019). While he also noted that "[i]t is certainly open" to this court to conclude that *Trinity Lutheran* has changed the landscape regarding *Eulitt*'s continuing vitality, *id*., the court should refuse to do so for the reasons set forth herein.

State may not adopt programs or practices in its public schools … which 'aid or oppose' any religion" and "[t]his prohibition is absolute." *Id*. at 106 [citation omitted].

Consistent with these decisions the Court has invalidated the use of public funds for sectarian education in ways that are even less encompassing than that advocated by plaintiffs in this appeal. The Court considered two such state statutes in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Pennsylvania's statute reimbursed private schools for expenses including teacher salaries. The Rhode Island statute paid a salary supplement directly to private school teachers. Both states were found to be giving public aid to "church-related educational institutions." *Id*. at 607. The Court ruled that both statutes were unconstitutional in light of the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id*. at 612, citing *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). The Court then stated its well-known test, "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion…; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id*. [citations omitted].

Excessive entanglement was the Court's concern with these programs. Simply put, the *Lemon* Court concluded that an attempt to fund only the "secular"

component of the religious schools' operations nonetheless immersed the states unlawfully in those operations. Because sectarian schools receiving aid "have a significant religious mission and … a substantial portion of their activities is religiously oriented," the programs in *Lemon* involved "excessive entanglement between government and religion." *Lemon, supra,* 403 U.S. 602 at 613.

Since *Lemon*, the Court has rejected some attempts to invalidate state programs that limit funding to sectarian institutions when there is a plausible secular purpose, reflecting the Court's "reluctance to attribute unconstitutional motives to the states…" *Mueller v. Allen*, 463 U.S. 388, 394-395 (1983). Although the Court has, since *Mueller*, found certain types of neutral public support of religious institutions and schools permissible under the Establishment Clause,[3] it has never held such support to be required under the Free Exercise Clause.[4] The central tenet of *Lemon* – that state governments must avoid excessive entanglement with religion

[3] *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman*, *supra*, 536 U.S. 639; *Locke*, *supra*, 540 U.S. at 718; *Trinity Lutheran, supra,* 137 S.Ct. 2012.

[4] The Court appears to have drawn a line where the state "actually advance[es] religion" in the "content of the curriculum taught by state teachers *during the school day*". *Good News Club v. Milford Cent. School*, 533 U.S. 98, 116-117 (2001), citing and distinguishing *Edwards v. Aguillard, supra*, 482 U.S. at 584 [emphasis in original]. *Good News Club* distinguished *Sch. Dist. of Abington v. Schempp, supra*, 374 U.S. 203, on the same grounds. *Id*. at 117 n.7.

– abides. And the Court has *never* held that a state must ignore its significant historic concerns about entanglement and direct public money to fund religious instruction.

The Supreme Court's decades-long application of the Establishment Clause provides ample support for Maine's historic avoidance of directly funding religious education. There can be no question that the curriculum and, indeed, the entire education environment, enrollment standards, and student conduct rules at the schools that plaintiffs seek to attend are pervasively religious in the fullest sense. Appellee's Brief at 3 n.1, at 9-14, and record references therein. If public schools in Maine were to adopt the curriculum and environment of these religious schools in public school buildings, significant Establishment Clause concerns would arise. In this case, where Maine has chosen to provide public secular education through tuition vouchers to private schools, it has a significant – indeed, a compelling – interest in avoiding religious instruction.

Whether Maine *could* have chosen to include these sectarian schools and their programs in its delivery of a secular public education to residents is open to grave doubt. There can be no question, however, that no matter what test is applied Maine's choice *not* to do so is based on clear and valid entanglement concerns that cannot be voided by the Free Exercise Clause without eliminating the "play in the joints" the Court repeatedly has recognized, most recently in *Locke* and in *Trinity Lutheran*. In this sense the present appeal is not simply about a state's limitation on the "religious

uses of [public] funding," such as drove the decision in *Locke* and such as was deferred to another day by the plurality opinion in *Trinity Lutheran, supra,* 137 S.Ct. at 2024 n. 3. While Establishment Clause worries are significant in that broad context, they are even more substantial here.

B. The Publicly Available Benefit at Issue Here, a Secular Public Education, is Fundamentally Different from the Playground Resurfacing Materials Involved in *Trinity Lutheran*.

What was absent in *Trinity Lutheran* is amply present in this appeal. Missouri's offer of recycled playground surfacing materials raised no plausible entanglement misgivings that could justify its being withheld from an entity based on nothing more than that entity's religious/sectarian character; hence Missouri's inability to articulate an Establishment Clause concern beyond a vague reference to maintaining distance. Maine's benefit – a public, secular education – is the polar opposite of that involved in *Trinity Lutheran*. However measured, Maine's entanglement concerns are obvious, require little explication, and easily surmount plaintiffs' Free Exercise challenge.

The fundamental difference between this case and that in *Trinity Lutheran* is emphasized by another factor. The church in *Trinity Lutheran* did not insist that Missouri expand the available benefit to fit with the church's religious beliefs, such as requiring that Missouri provide reimbursement for materials used to resurface ecclesiastical space that complied with religious requirements. Instead, the church

merely sought (and qualified for) the benefit as offered but still was denied participation solely because it is a church. Here, on the other hand, plaintiffs insist on fundamentally altering the benefit provided by Maine – a free secular, public education. Plaintiffs admit that their schools of choice require that Maine abandon its secular standards for curriculum and admission before those schools will accept publicly funded tuition payments. Appellants Brief at 5-6. Accordingly, and unlike the church in *Trinity Lutheran*, plaintiffs are not being denied the benefit offered by Maine based on their religion in any sense. To the contrary, the option of obtaining a secular education by attending non-sectarian private schools at public expense is made available to plaintiffs on identical terms as it is made available to all other residents in their SAU's. Likewise, plaintiffs retain the unfettered freedom to choose, instead, an education which is sectarian in all respects. They simply are being told that the Maine program properly does not include that type of education.

The Supreme Court consistently has recognized the important role in public education that is occupied by the local school boards whose interests are represented by NSBA and its members. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both in the maintenance of community concern and support for schools and the quality of the educational process." *Milliken v. Bradley,* 418 U.S. 717, 741-742 (1974*). See also Board of Education v. Pico,* 457 U.S. 853, 863 (1982)

– "local school boards have a substantial legitimate role to play in the determination of school library content"; *Edwards, supra,* 482 U.S. at 583 – "States and local school boards are generally afforded considerable discretion in operating public schools."

Maine places local boards on the front line of implementing the delivery of a "free public education" to "every person" in their SAU's. 20-A M.R.S. §§ 2(1) and (2). To that end, and among numerous other important tasks, the local boards must "adopt policies that govern" the SAU's; must "adopt the courses of study in alignment with the system of learning results" established by the State; must "adopt a policy governing the selection of educational materials and may approve educational materials"; and must "adopt a district-wide student code of conduct consistent with the statewide standards." 20-A M.R.S. §§ 1001(1-A), (6), (10-A), and (15). Plaintiffs' theory, if accepted, would remove these boards from their important local oversight function of ensuring that the fundamental elements of a public, secular education are made available to all the residents of their SAU's free of the sectarian content and requirements against which the Establishment Clause counsels.

Nothing that is material has changed since *Eulitt* was decided in 2004. That decision remains good precedent and for a third time this court should rule that Maine's program is fully consistent with the religion clauses.

III. If the Court Requires Maine to Fund the Pervasively Religious Education Sought by Plaintiffs Under Maine's Unique Program for Supporting Public Education, It Will Undermine Support of Public Education Throughout This Circuit.

This court's ruling will have impacts beyond Maine. Other jurisdictions in this Circuit have strong protections for freedom of religion in their constitutions but also uphold equally strong commitments to public secular education in those same instruments. To that end Massachusetts, New Hampshire, Puerto Rico, and Rhode Island all significantly restrict or prohibit the public funding of sectarian schools.

In Massachusetts, Amended Art. 18, Sec. 1, provides that "[n]o law shall be passed prohibiting the free exercise of religion," but the "anti-aid amendment," Amended Art. 18, Sec 2, bars, *inter alia*, the "use of public money or property" to "aid[] any church." New Hampshire's Constitution also guarantees freedom of religion, N.H. Const., Part I, Art. 5, but, as part of its requirement that the state support public education, expressly provides that "no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of one religious sect or denomination," N.H. Const., Part II, Art. 83. Puerto Rico's Bill of Rights in its Constitution specifies that "[n]o law shall be made … prohibiting the free exercise [of religion]," P.R. Const., Art. II, Sec. 3, but also proscribes any law "respecting an establishment of religion," states "[t]here shall be complete separation of church and state," and expressly requires "a system of free and wholly non-sectarian education," P.R. Const., Art. II, Secs. 3 and 5. Finally, Rhode Island protects the free exercise of

religion, R.I. Const., Art. I, § 3, but bars money that is appropriated for "support of public schools" from being diverted or used "for any other purpose, under any pretense whatsoever," R.I. Const., Art. XII, §§ 2, 4.[5]

These jurisdictions' constitutionally mandated support of their public school systems and the inherently secular purpose at the heart of these policies should not be thwarted by a decision that would force them to fund religious instruction.

CONCLUSION

For the reasons set forth herein this court should affirm the judgment entered by the District Court.

[5] In addition, twenty other states have placed some kind of limit on public funding for private and religious schools. *See* Ala. Const. Art. XIV, § 263; Ark. Const. Art. 14, § 2; Cal. Const. Art. 9, § 8; Colo. Const. Art. IX, § 7; Del. Const. Art. X, § 3; Ga. Const. Art. X, § II, Par. III; Haw. Const. Art. X, § 1; Ky. Const. § 189; Mich. Const. Art. I, § 4; Minn. Const. Art. XIII, § 2; Miss. Const. Art. 8, § 208; Mo. Const. Art. IX, V 8; Mt. Const. Art. V, §11(5) & Art. X, §6; Neb. Const. Art. VII, § 11; N.M. Const. Art. XII, § 3; N.C. Const. Art II, § § 6,7; S.C. Const. Const. Art. XI, § 4; Tex. Const. Art. VII, § 5; Va. Const. Art. VIII, §10; Wyo. Const. Art. II, § 4. Of these, eighteen prohibit state funding to religious schools specifically.

Respectfully submitted,

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Case Number 19-1746

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Dated: November 6, 2019

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