

No. 19-1746

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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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.*

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On Appeal from the United States District Court for the  
District of Maine, No. 1:18-cv-00327-DBH

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**BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION,  
AMERICAN CIVIL LIBERTIES UNION OF MAINE FOUNDATION,  
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,  
ADL (ANTI-DEFAMATION LEAGUE), CENTRAL CONFERENCE OF  
AMERICAN RABBIS, HINDU AMERICAN FOUNDATION, INTERFAITH  
ALLIANCE FOUNDATION, MEN OF REFORM JUDAISM, NATIONAL  
COUNCIL OF JEWISH WOMEN, PEOPLE FOR THE AMERICAN WAY  
FOUNDATION, THE RECONSTRUCTIONIST RABBINICAL  
ASSOCIATION, UNION FOR REFORM JUDAISM, WOMEN OF  
REFORM JUDAISM, AMERICAN ATHEISTS, INC., SUSAN MARCUS,  
JAMES TORBERT, AND THETA TORBERT IN SUPPORT OF  
DEFENDANT-APPELLEE AND AFFIRMANCE OF THE JUDGMENT  
BELOW**

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## **CORPORATE DISCLOSURE STATEMENT**

All of the Amici Curiae are individuals or nonprofit corporations that have no parent corporations and do not issue stock.

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## **IDENTITIES AND INTERESTS OF AMICI CURIAE<sup>1</sup>**

Amici are religious organizations, civil-rights organizations, and individual taxpayers who share a commitment to religious freedom and the separation of religion and government.<sup>2</sup> Amici believe that religious freedom flourishes best when communities of faith steer clear of governmental aid and that state funding of religious activities does a disservice both to government and to religion. Amici thus oppose Appellants' efforts to force Maine to fund religious education in violation of a state statute that is, in part, designed to protect the independence of religious groups.

The amici are:

- American Civil Liberties Union.
- American Civil Liberties Union of Maine Foundation.
- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Central Conference of American Rabbis.
- Hindu American Foundation.

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<sup>1</sup> All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

<sup>2</sup> No party or parties authored this brief in whole or in part. No party or parties' counsel contributed money that was intended to fund the preparation or submission of this brief. No person--other than amici curiae, their members, and their counsel—contributed money that was intended to fund preparing or submitting this brief.

- Interfaith Alliance Foundation.
- Men of Reform Judaism.
- National Council of Jewish Women.
- People for the American Way Foundation.
- The Reconstructionist Rabbinical Association.
- Union for Reform Judaism.
- Women of Reform Judaism.
- American Atheists, Inc.
- Maine taxpayers Susan Marcus, James Torbert, and Theta Torbert.

Individual descriptions of the amici appear in the attached Appendix.



## SUMMARY OF ARGUMENT

Consistent with this Court’s decision in *Eulitt ex rel. Eulitt v. Maine, Department of Education*, 386 F.3d 344 (1st Cir. 2004), the district court correctly upheld the constitutionality of Maine’s school tuition payment law. *Carson v. Makin*, \_\_ F. Supp. 3d \_\_, 2019 WL 2619521, at \*4 (D. Me. June 26, 2019). The district court’s decision protected the religious freedom of both taxpayers and religious institutions, by ensuring that taxpayers’ freedom of conscience would not be compromised by coercive extraction of their tax payments to support religious education, and that religious institutions’ freedoms would not be harmed by the governmental interference and conditions that invariably accompany governmental support. This Court should affirm the judgment for four reasons.

First, after *Eulitt* was decided, the controlling law that governs public funding of religious education—and religious uses of public funds more generally—has not changed. The panel’s ruling in *Eulitt* thus endures. This Court can and should reject this appeal outright on grounds of *stare decisis*.

Second, to the extent the Court does not reject Appellants’ argument outright based on *stare decisis*, it should nevertheless dismiss the case as nonjusticiable: Appellants lack standing to bring this challenge because a decision in their favor would not redress their alleged injuries. Specifically, the particular religious

schools to which Appellants wish to send their children are unlikely to apply for participation in Maine’s tuition-payment program, *even if* this Court rules for them.

Third, if the Court decides to again analyze the constitutional merits of the tuition-payment program, *Eulitt* remains correct because Maine’s school-tuition-payment law operates within the permissible “play in the joints” between the Establishment Clause and the Free Exercise Clause, as recognized by the Supreme Court in *Locke v. Davey*, 540 U.S. 712 (2004). Again, the relevant law has not changed since *Eulitt*.

And finally, compelling state interests—avoiding government support for religious education and training, as well as employment and educational discrimination—animate Maine’s tuition payment law, and there is no other way to ensure that these interests are fulfilled.

## **ARGUMENT**

### **I. THIS COURT SHOULD RESOLVE THIS APPEAL ON GROUNDS OF *STARE DECISIS*.**

The principle of *stare decisis* “renders the ruling of *law* in a case binding in future cases before the same court or other courts owing obedience to the decision.” *Gately v. Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993) (emphasis in original). This Court’s consideration of Appellants’ arguments here ought to begin and end with that principle. In *Eulitt*, the Court reviewed the constitutionality of Maine’s private-school-tuition program, holding that the program did not violate

the Free Exercise, Free Speech, or Equal Protection Clauses of the First Amendment to the U.S. Constitution. 386 F.3d at 356-57. That program has remained, in all material respects, unchanged since then. It is, therefore, unnecessary for this Court to engage in any extensive deliberation in order to reach the identical result.

*Eulitt* itself demonstrates why the Court should summarily dispose of this case. In *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), this Court upheld Maine’s tuition-payment program. Five years later, the Court was presented with identical questions in *Eulitt*. Between *Strout* and *Eulitt*, however, the U.S. Supreme Court issued two decisions pertaining to the funding of religious education: *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which held that public funds could be used for religious education in connection with indirect aid programs; and *Locke v. Davey*, 540 U.S. 712 (2004), which held that states are nevertheless *not required* to allow public funds to be used for these purposes. The two cases shifted the law on indirect aid for religious education in a meaningful way. As a result, the *Eulitt* Court declined to issue a summary disposition based on *Strout* and, appropriately, undertook a “fresh analysis,” *Eulitt*, 386 F.3d at 350, though the ultimate result—upholding the program—was the same.

By contrast, a fresh analysis is not necessary here and would contradict the principles of *stare decisis*. There has been no post-*Eulitt* change in controlling law

that would justify reconsideration of this Court’s prior decision. Appellees have attempted to characterize *Trinity Lutheran Church of Columbia, Inc. v. Comer*, as working such a change, but footnote 3 of that decision belies their argument: “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.” 137 S. Ct. 2012, 2024 n.3 (2017) (emphasis added).<sup>3</sup> Because this case involves *religious uses* of public funds, the usual rule—that “newly constituted panels in a multi-panel circuit should consider themselves bound by prior panel decisions”—applies. *See Eulitt*, 386 F.3d at 349 (citing *United States v. Rodriguez*, 311 F.3d 435, 438-39(1st Cir. 2002)). The Court should, accordingly, resolve this appeal on grounds of *stare decisis*.

## II. APPELLANTS LACK STANDING TO BRING THIS LITIGATION.

If the Court does not apply *stare decisis*, however, it should still avoid reaching the merits, as Appellants do not have standing. Appellants have argued, both in the district court and here, that they have been “excluded” from the Maine

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<sup>3</sup> This footnote, though joined by only four Justices, is controlling because it set forth narrower grounds for the judgment than did the two Justices who joined the body of the majority opinion but not the footnote. *See Trinity Lutheran*, 137 S. Ct. at 2025-26 (concurring opinions of Thomas, J., and Gorsuch, J.); *Marks v. United States*, 430 U.S. 188, 193 (1977) (stating that, in fragmented decisions, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds”). In addition, a fifth Justice, Justice Breyer, concurred in the judgment, expressing views similar to those in the footnote. *See Trinity Lutheran*, 137 S. Ct. at 2026-27 (Breyer, J., concurring).

tuition program. Appellants’ Br. 10. But that is not accurate: Appellants are permitted to participate in the program on the same terms as any other similarly situated parent. Participation in the program allows parents to send their children to an approved private school. Appellants, instead, want to send their children to schools that are *not* approved and that have balked at the idea of seeking approval or participating in the program. Thus, Appellants cannot show that a decision in their favor will redress the injury they claim to have suffered: Even if the Court rules in Appellants’ favor, the schools to which they want to send their children have given no indication they will seek approval to participate in the program, and Appellants’ children will not, therefore, be able to attend those schools on the State’s dime.

Although redressability is a core element of standing, the bar is not high: A party need only “show a ‘substantial likelihood’ that the relief sought would redress the injury.” *See, e.g., M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018). But where, as here, “a favorable judicial decision would not require the defendant to redress the plaintiff’s claimed injury, the plaintiff cannot demonstrate redressability . . . unless she adduces facts to show that the defendant or a third party are nonetheless likely to provide redress as a result of the decision[.]” *Id.* (internal citations omitted). Appellants simply have not met their burden here.

In *Eulitt*, it was not clear from the record—one way or the other—whether the religious school attended by the plaintiffs’ children would apply to take part in the tuition-payment program if the plaintiffs were to prevail. Against this backdrop, the Court reasoned that the parent-plaintiffs there had standing to challenge the constitutionality of the religious-education restrictions because “the parents . . . ultimately will benefit” if “their children’s tuition at [the school were] paid by public funding.” *Eulitt*, 386 F.3d at 353.

In contrast to *Eulitt*, the record here makes clear that it is unlikely that Bangor Christian Schools and Temple Academy—the schools to which the plaintiffs want to send their children—will apply for state approval to receive public funds under the tuition-payment program even if Appellants prevail in this case. When asked to confirm that they would apply for state approval if permitted, both schools demurred, stating that they would not seek approval if accepting public funds meant that they would have to alter certain discriminatory employment and admissions policies. *See* Joint Stipulated Facts, ECF No. 25 (Mar. 15, 2019), ¶¶ 89-93, 125-27, 157-59, 177-78, 182-84 (detailing policies at both schools that prohibit attendance by gay, lesbian, and transgender students and employment of gay and lesbian people as teachers). In fact, as these schools are likely aware, there *are* strings attached to tuition funds. Schools that receive public funds as part of the tuition-payment program must follow the Maine Human Rights

Act, and would, therefore, be prohibited from considering sexual orientation and gender identity in their admissions and employment decisions, *see* 5 M.R.S. §§ 4552, 4553(2-A), 4553(9-C), 4553(10)(G), 4572(1)(A), 4601, 4602(4), discriminatory practices that both schools are unwilling to change, Stipulated Facts ¶¶ 127, 182, 184. Accordingly, Appellants can fill out all the applications they like for these schools, but they will still never obtain the remedy they seek because of the schools' demonstrated resistance to seeking state approval and accepting funds.

The district court nevertheless concluded that Plaintiffs had standing on the grounds that there may be other religious schools that exist, or might come into existence, to which Appellants might be willing to send their children, and which would be willing to apply to take part in the program. *Carson*, 2019 WL 2619521, at \*3 & n.11. But, to the knowledge of amici, the record shows that Appellants want a state subsidy for their children's tuition at Bangor Christian and Temple Academy in particular; there is no record evidence that they are interested in sending their children to any other religious school; and they have not identified any other religious school that might be suitable for their children *and* that would be willing to apply for program participation. *See* Stipulated Facts ¶¶ 27-41, 44-55, 60-66. The district court's speculation about other possible schools is, thus, inadequate to support standing.

### III. THE SUPREME COURT HAS ALREADY REJECTED THE ARGUMENTS APPELLANTS MAKE HERE.

Even if this Court concludes that a fresh look at the merits is justified and that Appellants have standing, the Court should reach the same conclusion at it did in *Eulitt*. That decision was squarely based on the Supreme Court’s decision in *Locke*, which held that a Washington statute prohibiting the use of state scholarship funds to pursue devotional-theology degrees did not violate the Free Exercise Clause or other provisions of the U.S. Constitution, even though allowing the funds to be used that way was permissible under the Establishment Clause. 540 U.S. at 715, 719, 720 n.3, 725 n.10. Whatever tension may exist between the Free Exercise Clause and the Establishment Clause, the Supreme Court explained, there has long been “room for play in the joints between them.” *Locke*, 540 U.S. at 718. As then-Chief Justice William Rehnquist stated in setting the framework for the Court’s analysis in *Locke*, this means that “some state actions [are] permitted by the Establishment Clause but not required by the Free Exercise Clause.” *Id.* at 719.

In reviewing the program challenged in *Locke*, the Supreme Court explained that Washington could have chosen, consistent with the Establishment Clause, to allow recipients of state-funded scholarships to pursue religious education and training to become clergy members, *id.* at 719, but it was not *required* to do so. The Court held that Washington’s “cho[ice] not to fund” was entirely permissible. *Id.* at 721. In reaching this conclusion, the Court flatly rejected the plaintiff’s



argument, based on *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), that the program was “presumptively unconstitutional because it is not facially neutral with respect to religion.” *Locke*, 540 U.S. at 720. This argument, the Court concluded, “would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning.” *Id.* at 720.

In *Lukumi*, the city of Hialeah enacted a law that “sought to suppress”—through criminalization—the religious practices of adherents of one particular faith (Santeria). *Id.* (citing *Lukumi*, 508 U.S. at 535). In *Locke*, by contrast, “the State’s disfavor of religion (if it can be called that) [was] of a far milder kind.” *Id.* Washington had done nothing like (1) “impos[ing]. . . criminal [or] civil sanctions on any type of religious service or rite,” as in *Lukumi*; (2) “deny[ing] . . . ministers the right to participate in the political affairs of the community,” as in *McDaniel v. Paty*, 435 U.S. 618 (1978); or (3) “requir[ing] [religious adherents] to choose between their religious beliefs and receiving a government benefit,” as in *Sherbert v. Verner*, 374 U.S. 398 (1963). *Locke*, 540 U.S. at 720-21.

Instead, as a sovereign entity in our federalist system of government, Washington “*ha[d] merely chosen not to fund a distinct category of instruction*”—religious instruction. 540 U.S. at 721 (emphasis added). And, unlike the strong state actions disfavoring religion that were condemned in *Lukumi*, *McDaniel*, and *Sherbert*, the Court determined that the choice not to fund religious education and

training placed a relatively minor burden on religious adherents and is *not* presumptively unconstitutional. *See Locke*, 540 U.S. at 725.

As the Supreme Court has recognized, “religious instruction is of a different ilk” than other forms of educational or professional instruction and training, *id.* at 723-25, and a State’s determination not to fund “religious instruction alone” is constitutional under the Free Exercise Clause. *Id.* at 725.

#### **A. Locke, Not Trinity Lutheran, Controls Here.**

Two years ago, the Supreme Court held in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), that the Missouri Department of Natural Resources had impermissibly discriminated against a church by denying it the opportunity to compete for a state grant designed to enable nonprofit entities to purchase rubber playground surfaces made from recycled tires. Appellants and their attorneys have placed a great deal of hope on the back of that decision. But *Trinity Lutheran* did not do what Appellants contend.

*Trinity Lutheran* did not overrule *Locke*. The U.S. Supreme Court does not overturn its own precedent by implication; if the Court had meant to overrule *Locke*, it would have said so. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). Instead, it said the opposite. The majority cited *Locke* approvingly (while distinguishing it from the case under consideration). *See Trinity Lutheran*, 137 S. Ct. at 2019, 2023 (citing *Locke*, 520 U.S. at 716, 720-22). Indeed,

two concurring Justices specifically took issue with the Court’s *refusal* to overrule *Locke*. See *Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., concurring in part, but remaining troubled by the Court’s continued endorsement of *Locke*), 2026 (Gorsuch, J., concurring in part, but skeptical of whether there ought to be a constitutional distinction between refusing to fund religious entities and refusing to fund religious education). When it comes to state funding of religious education and training, then, *Locke* remains controlling.

The state program at issue in *Trinity Lutheran* did not fund religious education; it offered competitive grants to nonprofit organizations that wished to provide a safer and more comfortable playground for young people in their care. 137 S. Ct. at 2017-18. But Missouri refused to award funding to any applicant “owned or controlled by a church, sect, or other religious entity.” *Id.* Though the plaintiff in *Trinity Lutheran* was a religious entity, the Court determined that the funds would not be put to religious uses. See *id.* at 2024 n.3 (noting that this case does “not address religious uses of funding”). Rather, the Center’s proposed use of the funds was aimed at, among other ends, increasing access to the playground for all children, including children with disabilities and neighborhood children who “often use[d] the playground during non-school hours”; providing a surface compliant with the Americans with Disabilities Act of 1990; providing a safe, long-lasting, and resilient surface under the play areas; and improving Missouri’s

environment by putting recycled tires to positive use. *Id.* at 2018. Although the Missouri State Department of Resources scored the Center’s application fifth out of forty-four, it denied the grant award, deeming the Center “categorically ineligible” based on a “strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity.” *Id.* at 2017. Trinity Lutheran sued the Department, alleging that its free-exercise rights had been violated. *Id.* at 2018.

In holding for the church, the Supreme Court explained that the Free Exercise Clause “‘protect[s] religious observers against unequal treatment’” and “‘subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’” *See id.* at 2019 (quoting *Lukumi*, 508 U.S. at 533, 542). Affirming that laws should neither exclude people “because of their faith, or lack of it, from receiving the benefits of public welfare legislation,” *see id.* at 2019-20 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)) (emphasis omitted), nor “regulate or outlaw conduct because it is religiously motivated,” *id.* at 2021 (citing *Lukumi*, 508 U.S. at 532), the Court analogized the case to *McDaniel*, 435 U.S. at 628, in which a Tennessee statute disqualifying ministers from serving as delegates to the state’s constitutional convention was overturned. *See id.* at 2022. In *McDaniel*, according to the Court, the challenged statute discriminated “by denying [the minister] a benefit solely because of his

‘*status as a minister*’” and thereby “‘effectively penalize[d]’” the free exercise of his religion. *Trinity Lutheran*, 137 S. Ct. at 2020 (emphasis in original) (quoting *McDaniel*, 435 U.S. at 626-27).

The Court distinguished those cases from *Locke*, emphasizing that the plaintiff in that case “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.” *Id.* at 2023 (noting that, by contrast, “Trinity Lutheran was denied a grant simply because of what it is—a church”). The Court also pointed out that the Washington statute at issue in *Locke* was “in keeping with the State’s antiestablishment interest in not using taxpayer funds to pay for the training of clergy.” *Id.* (citing *Locke*, 540 U.S. at 722). While the plaintiff in *Locke* had been seeking to use government funds for this “essentially religious endeavor”—opposition to which “lay at the historic core of the Religion Clauses”—“nothing of the sort [could] be said about a program to use recycled tires to resurface playgrounds.” *Trinity Lutheran*, 137 S. Ct. at 2023 (citing *Locke*, 540 U.S. at 721-22).

*Trinity Lutheran* reaffirmed *Locke*’s ruling that “there is ‘play in the joints’ between what the Establishment Clause permits and the Free Exercise Clause compels.” *Id.* at 2019 (quoting *Locke*, 540 U.S. at 718). The Court thus left undisturbed *Locke*’s holding that states can constitutionally restrict government

funding of religious activity to a greater extent than the federal Establishment Clause does. *See Locke*, 540 U.S. at 719, 725. Indeed, recognizing the differences between the case before it and *Locke*, the *Trinity Lutheran* Court strictly limited the scope of its holding: “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.” *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.

*Trinity Lutheran* and *Locke*, then, concern different scenarios that are subject to correspondingly different levels of judicial scrutiny. On one hand are programs, such as the one at issue in *Trinity Lutheran*, that categorically exclude churches *qua* churches, promote public safety, do not support “essentially religious endeavors” like the religious education of students, and, therefore, do not implicate state antiestablishment interests. As *Trinity Lutheran* explains, such programs—like other laws that expressly discriminate among people on the basis of religious status, and laws that target particular religious beliefs—are subject to the “strictest scrutiny.” *Id.* at 2019; *see also, e.g., Lukumi*, 508 U.S. at 533; *McDaniel*, 435 U.S. at 626, 628. On the other hand are programs like the one in *Locke*, in which eligibility for funding depends not on status or identity but on the use to which the money is put, and the proposed use—religious education and training—is an “essentially religious endeavor” that government may choose to avoid supporting

in order to vindicate traditional state antiestablishment interests. *Locke*, 540 U.S. at 721. Indeed, the rule that a state’s decision to fund secular education does not require the state to fund religious education was adopted by the Supreme Court long before *Locke*. See *Norwood v. Harrison*, 413 U.S. 455, 462, 469 (1973) (rejecting “any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise,” and refuting the proposition “that a State is constitutionally obligated to provide even ‘neutral’ services to sectarian schools”); *Sloan v. Lemon*, 413 U.S. 825, 834-35 (1973) (holding that “valid aid to nonpublic, nonsectarian schools [provides] no lever for aid to their sectarian counterparts”); accord *Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972), *aff’g mem.*, 332 F. Supp. 275 (E.D. Mo. 1971).

Multiple post-*Trinity Lutheran* decisions recognize that governmental bodies still retain the right to deny funding to religious institutions when the funds would go to religious uses. See *Caplan v. Town of Acton*, 479 Mass. 69, 85, 95, 92 N.E.3d 691, 704, 711 (2018) (plurality opinion) (holding that application of state constitution to enjoin state from funding restoration of church’s stained-glass windows did not violate federal Free Exercise Clause); accord *id.*, 479 Mass. at 103-04, 92 N.E.3d at 717-18 (Kafker, J., concurring); *Espinoza v. Mont. Dep’t of Revenue*, 393 Mont. 446 ¶ 40, 435 P.3d 603 (2018) (holding that application of state constitution to strike down tax-credit program that principally funded

religious education did not violate federal Free Exercise Clause), *cert. granted*, No. 18-1195 (June 28, 2019)<sup>4</sup>; *Freedom From Religion Found. v. Morris Cty. Bd. of Chosen Freeholders*, 232 N.J. 543, 575, 181 A.3d 992, 1010 (2018) (holding that application of state constitution to bar county from funding repairs to churches that would support religious functions or imagery did not violate federal Free Exercise Clause), *cert. denied*, 139 S. Ct. 909 (2019); *see also Harvest Family Church v. Fed. Emerg. Mgmt. Agency*, No. CV H-17-2662, 2017 WL 6060107, at \*4 (S.D. Tex. Dec. 7, 2017) (holding that federal policy prohibiting disaster-relief funding from being paid to repair facilities used for religious activities did not violate Free Exercise Clause), *vacated as moot*, No. 17-20768, 2018 WL 386192 (5th Cir. Jan. 10, 2018).

**B. This Court’s Ruling in *Eulitt* Faithfully and Correctly Applied *Locke* to Uphold Maine’s Tuition-Payment Statute and Remains Good Law.**

As noted above, this Court has previously applied the Supreme Court’s reasoning in *Locke* to Maine’s tuition-payment statute, holding it constitutional. *See Eulitt*, 386 F.3d at 357. Because *Locke*, and not *Trinity Lutheran*, controls this case, *Eulitt* remains good law, and there is no reason for this Court to depart from it.

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<sup>4</sup> Because the program at issue in *Espinoza* is funded by tax credits, unlike the program here, it is unclear whether the Supreme Court’s resolution of *Espinoza* will affect this case.



Like in *Locke*, this Court is not presented with the question whether Maine may fund religious education through its tuition-payment statute without violating the Establishment Clause. Rather, the question before this court is whether Maine is *constitutionally required* to provide such funding. And, just as in *Locke*, the answer is no.

In *Eulitt*, this Court described as “futile” the plaintiffs’ “effort to characterize Maine’s decision not to deploy limited tuition dollars toward the funding of religious education as an impermissible burden on their prerogative to send their children to Catholic school[.]” *Id.* As the Court noted, its ruling in *Strout* already determined that Maine’s tuition-payment statute “imposes no substantial burden on religious beliefs or practices—and therefore does not implicate the Free Exercise Clause[.]” *Id.* (citing *Strout*, 178 F.3d at 65). This conclusion was consistent with the Supreme Court’s determination in *Locke* that any burden on the scholarship applicant there was “mild” at most and not analogous to the types of burdens that traditionally trigger free-exercise concerns. *See id.; supra* pp. 10-11. Thus, this Court held, “[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.” *Eulitt*, 386 F.3d at 354 (citation omitted).

Likewise, this Court properly rejected the *Eulitt* plaintiffs’ argument that “exclud[ing] sectarian institutions as potential recipients of education funds

necessarily indicates an animus against religion.” *Id.* at 355. Despite a previous finding in *Strout* that there was “no indication that substantial animus against religion had motivated the passage of [the] law,” *id.* (citing *Strout*, 178 F.3d at 65), the Court nevertheless reviewed each of “the principal factors [identified in *Locke*] to be considered in determining whether a particular law is motivated by religious animus.” *Id.* First, the Court explained, “Maine’s decision not to extend tuition funding to religious schools does not threaten any civil or criminal penalty.” *Id.* Second, the law “does not in any way inhibit political participation.” *Id.* Finally, the Court observed, the law “does not require residents to forgo religious convictions in order to receive the benefit offered by the state—a secular education.” *Id.* That secular education is offered to all who are interested, whether or not they are members of any religious community, practice any particular religion, or follow any particularly religious teachings. *See id.* (“To the extent that these factors articulate a test for smoking out an anti-religious animus, the statute here passes that test with flying colors.”).

In sum, this Court in *Eulitt* faithfully applied the Supreme Court’s reasoning in *Locke*. Maine, like Washington, “has merely chosen not to fund” religious instruction. *See Locke*, 504 U.S. at 721. That choice is entirely permissible. *See supra* pp. 9-11. Accordingly, this Court should uphold Maine’s tuition-payment program, just as it did in *Eulitt*.

#### IV. MAINE HAS STRONG STATE INTERESTS IN DECLINING TO FUND RELIGIOUS EDUCATION AND RELIGION-BASED DISCRIMINATION

Maine’s decision not to fund religious education and training, like Washington’s, is supported by substantial “antiestablishment interests” in ensuring that religious training is funded solely with private money. *See Locke*, 540 U.S. at 722. As *Locke* explained, from the founding of our republic, states have recognized that “religious instruction is of a different ilk” than other endeavors. *Id.* at 722-23. To explain the scope of states’ traditional antiestablishment interests, *Locke* looked to the “public backlash,” *id.* at 722 n.6, that resulted from Patrick Henry’s proposal in 1784 that Virginia fund religious education—“learned teachers” of “Christian knowledge” “to correct the morals of men, restrain their vices, and preserve the peace of society”—through property taxes. *See* Patrick Henry, *A Bill Establishing A Provision for Teachers of the Christian Religion* (1784).

In response to Henry’s proposal, Virginia enacted the Bill for Religious Liberty, which prohibited compelled support for “*any* religious worship, place, or ministry *whatsoever*.” *Id.* at 722 (emphasis added). The Virginia bill was grounded in the philosophical view of its author, Thomas Jefferson, that respect for “the rights of conscience” in religious matters demanded a total ban on all government exactions for the benefit of religion, *see Reynolds v. United States*, 98 U.S. 145, 164 (1878), so that “[w]ith respect to money, religion would be wholly voluntary,”

*see* Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 923 (1986). James Madison’s Memorial and Remonstrance Against Religious Assessments—which was instrumental in the defeat of Henry’s bill, *see* *Everson v. Bd. of Educ.*, 330 U.S. 1, 12 (1947)—expressed the same broad opposition as Jefferson to public funding of religion, condemning any effort to force a citizen to contribute even “three pence only of his property” in support of religious activity. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 3 (1785). Madison and Jefferson also explained that public funding for religious institutions would weaken them by causing them to become dependent on governmental largesse; would undermine their independence by leading to governmental interference in their internal affairs; and would create religious strife by triggering competition between religious denominations for state aid. *See id.* ¶¶ 1–3, 6, 11; Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1785).

The broad concerns that the Founders had about any form of public funding of religious instruction or activity demonstrate that traditional state antiestablishment interests cannot be properly limited to public funding of the training of clergy, as Appellants contend, *see* Appellants’ Br. 29–31, but at the very least encompass tax funding of any form of religious education. Indeed, governmental support for religious training and education of impressionable young

people in elementary and secondary schools—no less than governmental support for postsecondary religious education and training of clergy—is official support for perhaps the most critical of all forms of religious training: An “affirmative if not dominant policy of church schools” is “to assure future adherents to a particular faith by having control of their total education at an early age.” *Walz v. Tax Comm’n*, 397 U.S. 664, 671 (1970).

Take, for example, the specific religious educations that Appellants want Maine to subsidize—those provided by Bangor Christian Schools and Temple Academy. Bangor Christian is a ministry of Crosspoint Church, and Temple Academy is an “integral ministry” and “extension” of Centerpoint Community Church. Stipulated Facts ¶¶ 69, 134, ECF No. 25 (Mar. 15, 2019). Bangor Christian’s objectives are to teach students to be good Christians, to promote Christian values, and to develop Christian leadership, including by “lead[ing] each unsaved student to trust Christ as his/her personal savior and then to follow Christ as Lord of his/her life” and by teaching students to spread Christianity to others. *Id.* ¶¶ 95, 96, 104. Similarly, Temple Academy teaches students to accept Christ as their personal savior, to accept that the Bible is the infallible word of God that must be obeyed in every aspect of life, and to attempt to spread Christianity. *Id.* ¶¶ 145, 169-71, 174. Both schools integrate religious instruction into all of their academic instruction. *Id.* ¶¶ 101, 164-65, 168.

In addition, Maine’s decision not to fund religious education and training is supported by the state’s compelling governmental interest in ensuring that students have access to publicly funded schools free from discrimination, consistent with the state’s long-standing interest in preventing public funding of discriminatory practices. *See* Stipulated Facts ¶¶ 193, 194, 196, 201.

Eliminating discrimination—in employment, education, and other contexts—has long been recognized to be a “compelling state interest[] of the highest order.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). That includes discrimination that is based on or motivated by religion. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *Jews for Jesus v. Jewish Cmty. Relations Council of N.Y.*, 968 F.2d 286, 295 (2d Cir. 1992). This compelling interest is particularly powerful when the government is asked to subsidize discriminatory practices, for “the Constitution does not permit the State to aid discrimination” by private entities. *Norwood*, 413 U.S. at 465-66; *see also id.* at 413 U.S. at 464 n.7 (citing with approval conclusion in *Lemon v. Kurtzman*, 403 U.S. 602, 671 n.2 (1971) (opinion of White, J., concurring in the judgments in part and dissenting in part), that “legislation providing assistance to any sectarian school which restricted entry on racial or religious grounds would, to that extent, be unconstitutional”)); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 425 (8th Cir. 2007) (holding that state

funding of privately operated prison rehabilitation program was unconstitutional partly because program’s operators required prospective participants to meet a religious test to enroll).

Here, Maine’s interests in preventing discrimination and not funding it are expressed in multiple statutes. “[T]he policy of this State” is “to prevent discrimination in employment, housing, or access to public accommodations on account of race, color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin[.]” 5 M.R.S. § 4552. And Maine law specifically prohibits private schools—including religious schools—that are approved to receive state-funded tuition payments from discriminating in admissions or employment on the basis of sexual orientation or gender identity, among other characteristics. *See* 5 M.R.S. §§ 4553(2-A), 4553(9-C), 4553(10)(G), 4572(1)(A), 4601, 4602(4); *see also Doe v. Regional Sch. Unit 26*, 2014 ME 11, ¶ 22, 86 A.3d 600, 606 (holding that a school’s decision to ban a transgender student from the girls’ bathroom qualified as forbidden discrimination on the basis of gender).

But both Bangor Christian Schools and Temple Academy—the schools for which Plaintiffs want the state to pay tuition—maintain discriminatory admissions and hiring practices. Both schools restrict admission based on religion, sex, and sexual orientation, for example. Neither school will admit students identifying as a

gender different from the one indicated on their birth certificate. Stipulated Facts ¶¶ 89-91, 158. And at Bangor Christian, if existing students present as a gender different from the one on their birth certificate, expulsion will result, though the students may first be given an opportunity to renounce their affirmed gender after counseling. *Id.* ¶¶ 90-91.

Similarly, both Bangor Christian and Temple Academy will not allow students who identify as lesbian, gay, or bisexual. *Id.* ¶¶ 92, 93, 157, 159. Bangor Christian would expel openly gay, lesbian, and bisexual students unless they were to disavow their sexual orientation after counseling. *See id.* ¶¶ 92, 93. Temple Academy not only bars students identifying as gay, lesbian, or bisexual, *id.* ¶ 157, but also prohibits the admission of students who have same-sex parents, *id.* ¶ 159.

Lastly, Bangor Christian and Temple Academy do not serve students of all religions. Though Bangor Christian asserts that it “is willing to consider admitting students from any religious background or faith,” the students “must be willing to support BCS’ philosophy of Christian education and conduct,” and they are subjected to intensive Christian proselytization. *Id.* ¶¶ 88, 95-96, 98, 101-04. And the standard social-studies curriculum at Bangor Christian includes an objective “to ‘[r]efute the teachings of the Islamic religion with the truth of God’s Word.’” *Id.* ¶ 116. Temple Academy “has a ‘pretty hard lined’ [sic] written policy . . . that only Christians will be admitted as students.” *Id.* ¶ 153. “Students from homes with



serious differences with the school’s biblical basis and/or its doctrines”—including Muslim students—“will not be accepted.” *Id.* ¶¶ 155-56.

Both schools also discriminate on similar grounds in hiring. Bangor Christian would not hire as teachers individuals who are gay or lesbian or “identify as a gender other than [the one] on their original birth certificate.” *Id.* ¶¶ 125-26. All the school’s teachers must also be “‘Born Again Christian[s] who know[] the Lord Jesus Christ as Savior” and “active, tithing member[s] of a Bible believing church.” *Id.* ¶¶ 123-24.

Similarly, Temple Academy would not hire as a teacher an individual who is gay or lesbian. *See id.* ¶ 177. Indeed, “Temple Academy’s Teacher Employment Agreement states that the Bible says that ‘God recognize[s] homosexuals and other deviants as perverted’ and that ‘[s]uch deviation from Scriptural standards is grounds for termination.’” *Id.* ¶ 178. Temple Academy also requires all its teachers to be “born-again Christian[s] who know[] the Lord Jesus Christ as Savior,” and all other employees must be “born-again Christian[s]” as well. *Id.* ¶¶ 176, 179.

Maine’s compelling state interests in preventing discrimination and state support thereof provide additional, strong justification for the lines drawn in the State’s tuition-payment program. By contrast, no state interest in preventing aid to discrimination was at issue in *Trinity Lutheran* because the preschool there did not discriminate based on religion in admissions and even allowed children not

enrolled in the school to use its playground. *See* 137 S. Ct. at 2017-18. Similarly, the school-voucher program that survived an Establishment Clause challenge in *Zelman v. Simmons-Harris* prohibited participating schools from discriminating based on religion. *See* 536 U.S. 639, 645 (2002).

### CONCLUSION

This Court has twice held that Maine's tuition-payment program does not violate the Constitution. Nothing about the program, or constitutional precedent, has changed, and so this Court should once again affirm the decision of the District Court and uphold the constitutionality of the program.

Respectfully Submitted,

Date: November 6, 2019

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the word limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 6,315 words.

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word in 14-point Times New Roman font.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 6, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that all parties to this case will be served by the appellate CM/ECF system.

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## **APPENDIX: STATEMENTS OF INTEREST OF AMICI CURIAE**

The **American Civil Liberties Union** and the **American Civil Liberties Union of Maine Foundation** have long worked on their members' behalf in Maine's legislature and courts to oppose public funding of religious education, including in the four previous lawsuits challenging the statute at issue in this case. The primary interest of the ACLU and the ACLU of Maine is to preserve, protect, and vigorously enforce the fundamental principles in the Bill of Rights.

**Americans United for Separation of Church and State** is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and separation of religion and government. Americans United represents more than 125,000 members and supporters across the country. Since its founding in 1947, Americans United has frequently participated as a party, as counsel, or as an *amicus curiae* in church-state cases before the U.S. Supreme Court, the federal appeals courts, and state courts. Americans United has long opposed the coercive extraction of taxpayer dollars for the support of religious education.

Founded in 1913 in response to an escalating climate of anti-Semitism and bigotry, **ADL (Anti-Defamation League)** is a leading anti-hate organization with the timeless mission to protect the Jewish people and to secure justice and fair treatment for all. Among ADL's core beliefs is strict adherence to the separation of

church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents.

The **Hindu American Foundation** (HAF) is a non-profit advocacy organization for the Hindu American community. Founded in 2003, HAF's work impacts a range of issues—from the portrayal of Hinduism in K–12 textbooks to civil and human rights to addressing contemporary problems, such as environmental protection and inter-religious conflict, by applying Hindu philosophy. Since its inception, HAF has made legal advocacy one of its main areas of focus. From issues of religious accommodation and religious discrimination to defending the fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about the impact of such issues on Hindu Americans as well as various aspects of Hindu belief and practice in the context of religious liberty and basic civil rights.

**Interfaith Alliance Foundation** is a national non-profit organization committed to promoting true religious freedom and strengthening the separation between religion and government. With members from over 75 faith traditions and of no faith, Interfaith Alliance promotes policies that protect freedom of belief,

prevent the misuse of religion to discriminate, and ensure that all Americans are treated equally under law.

The **National Council of Jewish Women** (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles state that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain democratic society." Consistent with our Principles and Resolutions, NCJW joins this brief.

**People For the American Way Foundation** (PFAWF) is a nonpartisan civic organization established to promote and protect civil and constitutional rights and values, including religious liberty and freedom from discrimination. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle that states like Maine should be able to enact and enforce provisions that protect religious liberty for all, and that the right to be free from taxpayer financial support for religious education is a fundamental part of religious liberty that states like Maine should not be compelled



to abandon, particularly where doing so would require taxpayer support for schools with discriminatory policies and practices.

**The Reconstructionist Rabbinical Association** is the professional organization and collective voice for Reconstructionist rabbis across the United States and throughout the world. As Jews, our commitment to justice stems from our belief that all people are created in God's image. We understand that all of us thrive better in a multi-ethnic, multi-religious nation where the separation of church and state is legally and culturally embedded into our social fabric.

The **Union for Reform Judaism**, whose 900 congregations across North America include 1.5 million Reform Jews, the **Central Conference of American Rabbis**, whose membership includes more than 2,000 Reform rabbis, the **Women of Reform Judaism** which represents more than 65,000 women in nearly 500 women's groups, and the **Men of Reform Judaism** come to this issue out of our longstanding commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the cornerstone of religious freedom. We are also deeply devoted to public schools, which are uniquely open to every student, regardless of their religion, race, socioeconomic status, sex, sexual orientation, gender identity, or disability. And by promoting diversity and the free exchange of ideas, we believe that public schools form the heart of the American democratic system. Government funding of religious

education threatens the First Amendment’s guarantee of religious liberty and undermines our public school system.

**American Atheists, Inc.** is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the “wall of separation” between government and religion created by the First Amendment. We strive to foster an environment where atheism and atheists are accepted as members of our nation’s communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, advocacy, and community-building and work to end the stigma associated with being an atheist in America. American Atheists, Inc. is a 501(c)(3) nonprofit corporation with members nationwide.

**Susan Marcus, James Torbert, and Theta Torbert** are taxpayers residing in communities served by Regional School Unit 12. They oppose the use of their tax dollars for quintessential religious activity, such as teaching religious doctrine and training children in religious observance. James and Theta Torbert are retired public schoolteachers who remain committed to the success of Maine’s public schools, which serve all children, regardless of race, sex, sexual orientation, physical or mental disability, or national origin. Susan Marcus is an active advocate in her

community for civil liberties, including taxpayers' right to be free from coerced financial support for religion.