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

LAINTIFFS-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

Francisco M. Negrón, Jr.*
Chief Legal Officer
National School Boards Association
1680 Duke Street, FL2
Alexandria, VA 22314
(703) 838-6722
Circuit Bar No. 120630
*Counsel of Record
Counsel for *Amici Curiae*

John Foskett
Valerio, Dominello & Hillman LLC
One University Avenue
Suite 300B
Westwood, MA 02090
(617) 862-2005
Circuit Bar No. 14227

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.

By: /s/Francisco M. Negrón, Jr.
Francisco M. Negrón, Jr.
Attorney for Amici Curiae
National School Boards Association
Maine School Boards Association
Massachusetts Association of School Committees
New Hampshire School Boards Association
Rhode Island Association of School Committees

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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

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.

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

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.

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, [illegible]

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 (o a)3.6 (l)8.4 (i)8.5rineic ru 6 reuceeeooisde7

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.

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 schendi a miz

activity simply because they choose to fund the secular equivalents of such activity." *Id*. at 354, citing

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*

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.

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].

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*

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.

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

uses of [public] funding," such as drove the decision in *Locke* and such as was deferred to another day by the plurality opinion in

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

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Francisco M. Negrón, Jr.*
Chief Legal Officer

John Foskett

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Dated: November 6, 2019

/s/ Francisco M. Negrón, Jr.
FRANCISCO M. NEGRÓN, JR.
Attorney for Amici Curiae

I hereby certify that on November 6, 2019, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Timothy Keller
Institute for Justice
398 South Mill Ave.
Suite 301
Tempe, AZ 85281
(480) 557-8300

Arif Panju
Institute for Justice
816 Congress Ave
Suite 960
Austin, TX 78701
(512) 480-5936

Lea Patterson
First Liberty Institute
2001 West Plano Pkwy.
Suite 1600
Plano, TX 75075
(972) 941-4444

Counsel for Appellants

Jeffrey T. Edwards
Preti Flaherty Beliveau & Pachios LLP
1 City Center
P.O. Box 9546
Portland, ME 04112
(207) 791-3000

Michael K. Whitehead
Jonathan R. Whitehead
Whitehead Law Firm LLC
229 SE Douglas St.
Suite 210
Lees Summit, MO 64063
(816) 398-8967

Counsel for Appellants

Sarah A. Forster
Christopher C. Taub
MAINE ATTORNEY GENERAL'S OFFICE
Six State House Station
Augusta, ME 04333
(207) 626-8800

Counsel for Appellee

/S/ Francisco M. Negrón, Jr.
FRANCISCO M. NEGRÓN, JR.
Attorney for Amici Curiae