**No. 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 FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL


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## INTEREST OF THE UNITED STATES

The United States has a substantial interest in preserving the free exercise of religion and, pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a)(2), regularly files statements of interest and amicus briefs in cases that implicate religious liberties. The United States filed a statement of interest in the proceedings below, and recently filed a merits-stage amicus brief in *Espinoza v. Montana Department of Revenue*, No. 18–1195 (U.S. petition for cert. granted June 28, 2019), which presents a question similar to the one here.

## STATEMENT OF THE ISSUE

Under specified conditions, Maine school districts pay the private-school tuition for certain high-school students. Maine law, however, categorically bars "sectarian" schools from participating in this tuition program. Does this categorical bar on "sectarian" schools violate the First Amendment's Free Exercise Clause?[1]

## STATEMENT OF THE CASE

### A. Maine's Secondary School System

Maine vests the control and management of public schools in local school administrative units. *See* 20–A Me. Rev. Stat. §§ 1(26), 2(2). There are 260 school administrative units in Maine. (Joint Appendix ("App.") at 60–61 ¶¶ 3–4.) Each school administrative unit "shall either operate programs in kindergarten and grades one to 12

[1] The United States addresses only Plaintiffs-Appellants' claim under the Free Exercise Clause. It takes no position on any other issue in this appeal.

or otherwise provide for students to participate in those grades as authorized elsewhere [by statute]." 20–A Me. Rev. Stat. § 1001(8).

School administrative units are not required to maintain a secondary school. *See* 20–A Me. Rev. Stat. §§ 1001(8), 5204(4). Of Maine's 260 school administrative units, 143 do not maintain a secondary school. (App. at 61 ¶ 6.) These 143 school administrative units have two options. They may either: (i) contract with another public school or an approved private school for schooling privileges for some or all of their resident students, *see* 20–A Me. Rev. Stat. §§ 2701–2702, 5204(3); or (ii) "pay the tuition," as determined by statutory formula, "at the public school or the approved private school of the parent's choice at which the student is accepted," *id.* § 5204(4). This appeal concerns only those school administrative units that do not maintain a secondary school and choose to comply with Maine law by instead paying tuition "at the public school or the approved private school of the parent's choice." *Id.*

As the statutory text indicates, private schools must be "approved" to be eligible to receive such tuition payments. 20–A Me. Rev. Stat. § 5204(4). "A private school may be approved for the receipt of public funds for tuition purposes only if" the school meets several requirements. *Id.* § 2951. These requirements include meeting various incorporation, reporting, auditing, administrative, student-assessment, and records-management standards. *Id.* § 2951(3), (5)–(7). A private school must also "[m]eet[] the requirements for basic school approval" *id.* § 2951(1), which requires schools to meet various hygiene, health, and safety standards, *id.* § 2901(1); and either to maintain

accreditation by a New England association of schools and colleges, *id.* § 2901(2)(A), or to meet various other prerequisites, including curriculum and teacher-certification requirements, *id.* §§ 2901(2)(B), 2902. This appeal does not concern any of these requirements.

This appeal concerns one more approval requirement imposed by Maine law—the nonsectarian-school provision. Maine law provides that "[a] private school may be approved for the receipt of public funds for tuition purposes only if it . . . [i]s a nonsectarian school." 20–A Me. Rev. Stat. § 2951, 2951(2).

**B. Plaintiffs and Their Children**

Plaintiffs-Appellants are three married couples—the Carsons, the Gillises, and the Nelsons—who proceed on their own behalves and as next friends of their respective minor children. (App. at 23; *Id.* at 64–67 ¶¶ 26, 42, 58.) Plaintiffs and their children all reside in towns whose school administrative units neither maintain a secondary school nor contract for secondary-school privileges with any particular public or private secondary school. (*Id.* at 61 ¶¶ 6, 9.) In other words, Plaintiffs' respective school administrative units comply with Maine law by paying secondary-school tuition "at the public school or the approved private school of the parent's choice," 20–A Me. Rev. Stat. § 5204(4), but they cannot pay tuition to "sectarian" schools, *id.* §§ 2951, 2951(2).

The Carsons and the Gilleses send their respective daughters, O.C. and I.G., to Bangor Christian Schools at their own expense, in part "because the school's Christian

worldview aligns with their sincerely held religious beliefs." (App. at 64–66 ¶¶ 27, 29, 30, 43–45.) The Nelsons send their son, R.N., to Temple Academy at their own expense "because they believe it offers him a great education that aligns with their sincerely held religious beliefs." (*Id.* at 67–68 ¶¶ 62, 63.) The Nelsons currently send their daughter, A.N., to a secular private high school. (*Id.* at 67 ¶ 60.) They would like to send A.N. to Temple Academy as well, but they "cannot afford the cost of tuition for both of their children." (*Id.* at 68 ¶ 65.)

Both Bangor Christian Schools and Temple Academy are considered "sectarian" schools, and thus cannot be approved for tuition purposes. (App. at 68, 77 ¶¶ 68, 130.) Plaintiffs argued below, and Defendant did not dispute, that Bangor Christian Schools and Temple Academy have either satisfied or could easily satisfy all of the other tuition-approval requirements set forth in Section 2951. (*See* Pl. Mot., R. Doc. 31, at 5 & n.5; App. at 69, 77 ¶¶ 72, 73, 131, 132.)

### C. District Court Proceedings

On August 21, 2018, Plaintiffs filed suit against Robert G. Hasson, Jr., then the Commissioner of Maine's Department of Education. (App. at 25 ¶ 10.) Plaintiffs asserted five claims—one each under the Free Exercise Clause, the Establishment Clause, the Free Speech Clause, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment. (App. at 32–38.) Mr. Hasson, who was sued in his official capacity, answered the complaint (R. Doc.

8), and was later substituted pursuant to Federal Rule of Civil Procedure 25(d) by the current Commissioner, Defendant-Appellee A. Pender Makin. (R. Docs. 20 & 22.)

The parties cross-moved for summary judgment in April 2019. Plaintiffs moved for summary judgment on their claims brought under the Free Exercise Clause, the Establishment Clause, the Free Speech Clause, and the Equal Protection Clause. (R. Doc. 31.) Defendant moved for summary judgment on all five claims, and also argued that the Plaintiffs lacked standing. (R. Doc. 29.) Both parties' motions drew from a series of jointly stipulated facts. (App. at 60–92.) The United States filed a statement of interest supporting Plaintiffs' claim under the Free Exercise Clause. (R. Doc. 54.) At oral argument, the parties "agreed to submit the case as cross-motions for judgment on a stipulated record." (App. at 93–94.)[2]

### D. The District Court's Opinion

On June 26, 2019, the district court granted judgment on the stipulated record to Defendant, and denied judgment to Plaintiffs. (App. at 93.)

The district court first rejected Defendant's challenge to Plaintiffs' standing based on this Court's precedent in *Eulitt ex rel. Eulitt v. State of Maine, Department of Education*, 386 F.3d 344 (1st Cir. 2004). (App. at 98–99.) As to the parties' substantive dispute, the district court acknowledged that several First Circuit and Maine Supreme

[2] "[T]o stipulate a record for decision allows the judge to decide any significant issues of material fact that he discovers; to file cross-motions for summary judgment does not allow him to do so." *Bos. Five Cents Sav. Bank v. Sec'y of the Dep't of Hous. & Urban Dev.*, 768 F.2d 5, 11–12 (1st Cir. 1985) (emphasis omitted).

Judicial Court decisions "have upheld the Maine approach to school choice" in the face of First Amendment and Equal Protection challenges. (*Id.* at 95–96.) As the district court put it, the question presented was whether the Supreme Court's 2017 decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), "has effectively overruled the latest First Circuit decision to uphold Maine's educational funding approach, namely *Eulitt*." (App. at 99.)

The district court concluded that it remained bound by *Eulitt*. (App. at 99–101.) The district court noted that four Justices in the *Trinity Lutheran* majority stated in a footnote that they were "not address[ing] religious uses of funding," *Trinity Lutheran*, 137 S. Ct. at 2024 n.3, and that Justice Breyer similarly cabined his separate opinion, *id.* at 2027 (Breyer, J., concurring in the judgment). Thus, the district court concluded, "[t]hat totals a majority of justices (five) who have said that *Trinity Lutheran* was not deciding such other issues." (App. at 100.)

"*Trinity Lutheran*," the district court explained, "may well have given good grounds to the plaintiffs to argue to the First Circuit that *that* court should reconsider its *Eulitt* holding." (App. at 99 (emphasis in original).) And "[i]t is certainly open to the First Circuit to conclude that, after *Trinity Lutheran*, it should alter its *Eulitt* holding that sustained Maine's educational funding law." (*Id.* at 100.) "[B]ut," the district court concluded, *Trinity Lutheran* "has not unmistakably cast the [*Eulitt*] decision into disrepute such that I as a trial judge can ignore *Eulitt*." (*Id.* at 99; *see also id.* at 100.) The

district court then "appl[ied] *Eulitt* to this controversy" and expressly "d[id] not decide the post-*Trinity Lutheran* merits." (*Id.* at 101.)

Based solely on *Eulitt*, the district court concluded "that Maine's educational funding program is constitutional," granted judgment to Defendant, and denied judgment to Plaintiffs. (App. at 101–02.) Plaintiffs appealed. (R. Doc. 61.)

## SUMMARY OF THE ARGUMENT

The Free Exercise Clause, as incorporated by the Fourteenth Amendment, generally prohibits discrimination on the basis of religious status in the distribution of public benefits. The Framers of the Bill of Rights were well aware that Parliament and colonial legislatures had denied civil and political privileges on account of religious status, and they adopted the Free Exercise Clause in part in order to prevent those abuses. Against the backdrop of that history, the Supreme Court has long held that the Clause bars laws that target religion for special disabilities.

Maine's nonsectarian-school provision contradicts those principles because it discriminates on the basis of religious status by disqualifying "sectarian" private schools, but not secular private schools, from receiving public funding. As recently clarified by *Trinity Lutheran*, a proper application of Supreme Court precedent compels the conclusion that Maine's imposition of special disabilities on religious schools, because they are religious, violates the Free Exercise Clause.

## STANDARD OF REVIEW

In considering judgments on a stipulated record, this Court "review[s] the district court's legal conclusions *de novo*," and "will set aside the district court's factual inferences 'only if they are clearly erroneous.'" *Tsoulas v. Liberty Life Assur. Co.*, 454 F.3d 69, 76 (1st Cir. 2006). The district court made no such factual inferences (App. at 94 n.1), so this appeal is reviewed *de novo*.

## ARGUMENT

The Constitution forbids imposing special disabilities on religious adherents on the basis of their religious status. Maine's nonsectarian-school provision violates that elementary rule. It prohibits otherwise-qualified religious secondary schools from receiving funds available to other secondary schools that meet Maine's basic school approval requirements—simply because of their religious character. That discriminatory restriction is "odious to our Constitution," and it "cannot stand." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017).

### I. *Trinity Lutheran* Compels a Fresh Analysis of the Free Exercise Question

This appeal does not come to the Court on a blank slate. This Court has twice upheld the constitutionality of Maine's nonsectarian-school provision. *Eulitt ex rel. Eulitt v. State of Maine, Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999).

The Supreme Court's 2017 decision in *Trinity Lutheran*, however, directly undermines the legal analysis in this Court's earlier cases. *Trinity Lutheran* thus compels this Court, as it did in *Eulitt*, to again "reject a rote application of stare decisis" and instead "to undertake a fresh analysis." *Eulitt*, 386 F.3d at 350.

**A.** "[T]he principle of *stare decisis* forms an integral part of our system of justice." *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 141 (1st Cir. 2000). For this reason, "newly constituted panels in a multi-panel circuit are"—as "a general rule"—"bound by prior panel decisions closely on point." *United States v. Rodríguez*, 527 F.3d 221, 224 (1st Cir. 2008).

But this general rule, known as the law-of-the-circuit doctrine, has exceptions. "[*S*]*tare decisis* is neither a straightjacket nor an immutable rule; it leaves room for courts to balance their respect for precedent against insights gleaned from new developments, and to make informed judgments as to whether earlier decisions retain preclusive force." *Carpenters Local*, 215 F.3d at 142. This Court "ha[s] considerably greater freedom than the district courts to evaluate the impact of recent Supreme Court precedent on [its] previous decisions." *Id.* at 138.

"The most obvious exception" to the law-of-the-circuit doctrine "applies when the holding of a previous panel is contradicted by controlling authority, subsequently announced." *Rodríguez*, 527 F.3d at 225. "A second, less obvious exception, comes into play in 'those relatively rare instances in which authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for

believing that the former panel, in light of fresh developments, would change its collective mind.'" *Id.*

In all events, "[w]hen emergent Supreme Court case law calls into question a prior opinion of another court, that court should pause to consider its likely significance before giving effect to an earlier decision." *Carpenters Local*, 215 F.3d at 141. This Court's 2004 decision in *Eulitt* did just that. *Eulitt* was the second time this Court considered the constitutionality of Maine's nonsectarian-school provision. Since the Court had first addressed the question in its 1999 *Strout* opinion, the Supreme Court issued two significant decisions implicating the First Amendment's Religion Clauses: *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Locke v. Davey*, 540 U.S. 712 (2004). These decisions, this Court noted, "cast[] doubt on [*Strout*'s] reasoning" and "raise[d] the distinct possibility" that its conclusion was incorrect. *Eulitt*, 386 F.3d at 348–49. Because *Zelman* and *Davey* "constitute[d] significant developments in the pertinent jurisprudence and shed new light on the case law upon which the *Strout* decision hinged," this Court—though ultimately reaffirming *Strout*'s holding—nevertheless "f[ou]nd it incumbent . . . to reject a rote application of stare decisis" and decided instead "to undertake a fresh analysis." *Eulitt*, 386 F.3d at 350.

**B.** Like *Davey* before it, *Trinity Lutheran* constitutes a "significant development[]" in the Supreme Court's Free Exercise Clause jurisprudence, and counsels this Court to again "undertake a fresh analysis" of the free-exercise challenge presented here. *Eulitt*, 386 F.3d at 350.

**1.** *Eulitt* does not control this appeal because *Eulitt* "is contradicted by controlling authority, subsequently announced"—*i.e.*, *Trinity Lutheran*. *Rodríguez*, 527 F.3d at 225.

"In *Strout*," *Eulitt* stated, "the panel held that [the nonsectarian-school provision] imposes no substantial burden on religious beliefs or practices—and therefore does not implicate the Free Exercise Clause—because it does not prohibit attendance at a religious school or otherwise prevent parents from choosing religious education for their children." *Eulitt*, 386 F.3d at 354 (citing *Strout*, 178 F.3d at 65). "Far from undermining that analysis," this Court continued, "*Davey* reinforces it." *Eulitt*, 386 F.3d at 354.

*Trinity Lutheran* directly undermines the *Strout-Eulitt* analysis. In *Trinity Lutheran*, Missouri argued that "merely declining to extend funds to Trinity Lutheran does not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights," and thus "does not meaningfully burden the Church's free exercise rights." 137 S. Ct. at 2022 (emphasis in original). Under the *Strout-Eulitt* analysis, Missouri's argument would have carried the day. But it did not. Instead, the Supreme Court *rejected* Missouri's argument, explaining that "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Trinity Lutheran*, 137 S. Ct. at 2022.

**2.** *Trinity Lutheran* also "casts doubt," *Eulitt*, 386 F.3d at 349, on other aspects of this Court's previous analysis. For example, *Eulitt* rejected the plaintiffs' attempt "to

cabin *Davey* and restrict its teachings" to funding the training of ministers, and chose instead to "read *Davey* more broadly" to mean that states "may act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so." *Id.* at 355. But *Trinity Lutheran* narrowly construed *Davey* along the very lines this Court rejected in *Eulitt*. *Compare Trinity Lutheran*, 137 S. Ct. at 2022–24 *with Eulitt*, 386 F.3d at 355. In fact, this narrow construction triggered the dissent to argue, as did this Court in *Eulitt*, that "[a] faithful reading of [*Davey*] gives it a broader reach." *Trinity Lutheran*, 137 S. Ct. at 2039 (Sotomayor, J., dissenting); *cf. Eulitt*, 386 F.3d at 355. *Trinity Lutheran* also expressly held that a state's "policy preference for skating as far as possible from religious establishment concerns" cannot, on its own, constitute a "compelling" state interest. 137 S. Ct. at 2024.

*Trinity Lutheran* also "casts doubt," *Eulitt*, 386 F.3d at 349, on *Eulitt* in yet another respect. Like *Strout* before it, *Eulitt* considered as relevant to its analysis whether anti-religious animus motivated Maine's nonsectarian-school provision. *Id.* at 355. But *Trinity Lutheran* did not even discuss whether the no-aid provision in that case was motivated by anti-religious animus, thus indicating that animus is not a necessary prerequisite to a free-exercise violation.

* * *

*Trinity Lutheran* counsels this Court to again "reject a rote application of stare decisis here and to undertake a fresh analysis" of the constitutionality of Maine's

nonsectarian-school provision. *Eulitt*, 386 F.3d at 350. As explained below, a fresh analysis compels the conclusion that Maine's nonsectarian-school provision violates the Free Exercise Clause.

## II. Maine's Nonsectarian-School Provision Violates the Free Exercise Clause of the U.S. Constitution

### A. The Free Exercise Clause Generally Prohibits the Denial of Benefits on the Basis of Religious Status

The Free Exercise Clause protects against religious discrimination by the Federal Government, and the Fourteenth Amendment makes that guarantee applicable to the States. As a general rule, the Clause prohibits laws that disqualify religious entities, because of their religious character, from benefits that are available to the rest of the public.

**1.** To the Framers of the Bill of Rights, the denial of civil and political privileges on the basis of religion was a familiar tool of religious persecution. In the early 17th century, for example, Parliament required people to worship in the Church of England before obtaining naturalization or certain forms of clemency, justifying that condition on the ground that naturalization and clemency were "Matters of meere Grace and Favour," "not fitt to be bestowed upon any others then such as are of the Religion nowe established." Naturalization and Restoration of Blood Act, 1609, 7 Jac. 1, c. 2 (Eng.), *reprinted in* 4 Statutes of the Realm 1157 (1963). Later statutes disqualified religious dissenters from serving as legal guardians to orphans; holding civil, military, and municipal office; sitting in Parliament; teaching at Oxford and Cambridge; and

receiving teachers' licenses.[3] Colonial legislatures, too, enacted a "host of laws" that imposed "burdens and disabilities of various kinds" on the basis of religion. *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961).

Many colonists—"too many to mention"—"spoke out" against "the philosophy of intolerance" underlying those laws. *Torcaso*, 367 U.S. at 490. The most notable denunciation came in the Virginia Act for Establishing Religious Freedom, an act of the Virginia legislature that was written by Thomas Jefferson and sponsored by James Madison. The statute's preamble condemned the imposition not only of "punishments," but even of "civil incapacitations," on the basis of religion. Virginia Act for Establishing Religious Freedom (Oct. 31, 1785), *reprinted in* 5 *The Founders' Constitution* 84–85 (Philip B. Kurland & Ralph Lerner eds., 1987). Proclaiming that "our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry," the preamble explained that "laying upon [a person] an incapacity to being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right." *Id.*

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[3] See Tenures Abolition Act 1660, 12 Car. 2, c. 24, § 8 (Eng.), *reprinted in* 5 Statutes of the Realm 260 (1963); Corporation Act, 1661, 13 Car. 2, Stat. 2, c. 1, § 1 (Eng.), *reprinted in* 5 Statutes of the Realm 321–23 (1963); Act of Uniformity, 1662, 14 Car. 2, c. 4, § 6 (Eng.), *reprinted in* 5 Statutes of the Realm 366 (1963); First Test Act, 1673, 25 Car. 2, c. 2, § 1 (Eng.), *reprinted in* 5 Statutes of the Realm 782–83 (1963); Second Test Act, 1678, 30 Car. 2, Stat. 2, c. 1, § 1 (Eng.), *reprinted in* 5 Statutes of the Realm 894–95 (1963); Schism Act, 1714, 13 Ann., c. 7, § 2 (London, 1714).

And the statute itself provided that religious beliefs "shall in no wise diminish, enlarge, or affect [one's] civil capacities." *Id.*

The Religion Clauses of the First Amendment "had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947). Through the Free Exercise Clause, the Framers of the First Amendment prevented the abuses that they had witnessed in England and the colonies, and denied the government the power to withhold public benefits on the basis of the recipient's religious character.

**2.** The Supreme Court's precedents confirm this understanding of the Free Exercise Clause. The Court has explained that a State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Everson*, 330 U.S. at 16 (emphasis in original). It has noted that a State may not "condition the availability of benefits" upon a person's surrender of his "religious faith," *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion), or require a person to "purchase his right" to exercise his religion "by sacrificing" a state-granted privilege, *id.* at 634 (Brennan, J., concurring in the judgment). It has said that the government may not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). It has observed that the government may not "impose special disabilities on the basis of

religious views or religious status." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). It has recognized that the Constitution "protects religious observers against unequal treatment." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (brackets omitted). And it has remarked that its decisions "have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion).

The Supreme Court applied those principles most recently in *Trinity Lutheran*. In that case, the State of Missouri offered grants to help schools improve their playgrounds, but prohibited schools controlled by churches from participating in the program. 137 S. Ct. at 2017. The Court explained that the Free Exercise Clause "'protects religious observers against unequal treatment'" and, as a general matter, prohibits "laws that target the religious for 'special disabilities' based on their 'religious status.'" *Id.* at 2019 (brackets omitted). The Court determined that Missouri's policy violated that "basic principle" because it "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 2019, 2021. That "express discrimination against religious exercise" imposed a forbidden "penalty on the free exercise of religion." *Id.* at 2021–22. That penalty was "nothing so dramatic" as "chains," "torture," or "the denial of political office," but it was "odious to our Constitution all the same, and [could not] stand." *Id.* at 2024–25.

In *Trinity Lutheran*, the Supreme Court distinguished its previous decision in *Locke v. Davey*, 540 U.S. 712 (2004), which upheld Washington State's refusal to fund degrees in theology as part of a state scholarship program. *Davey* emphasized that the State had gone "a long way toward including religion in its benefits," and had "merely chosen not to fund a distinct category of instruction." *Id.* at 721, 724. The Court explained that the State's decision reflected the "historic and substantial state interest" in declining to subsidize the "essentially religious endeavor" of "[t]raining someone to lead a congregation." *Id.* at 721, 725. *Trinity Lutheran* therefore interpreted *Davey* to mean that, where a State denies funds because of what the recipient "propose[s] to do" with those funds, rather than because of the recipient's identity, the State's "historic" interests may justify a refusal to fund certain "'essentially religious endeavor[s].'" *Trinity Lutheran*, 137 S. Ct. at 2023 (emphasis omitted).

In *Trinity Lutheran*, the Court suggested only one narrow exception to the general prohibition on discrimination against religious adherents on the basis of religious status: satisfaction of strict scrutiny. Although "'a law targeting religious beliefs as such is never permissible,'" the Court left open the possibility that a law that discriminates on the basis of religious status may be constitutional if it satisfies "the 'most rigorous' scrutiny." 137 S. Ct. at 2024 & n.4. "Under that stringent standard, only a state interest 'of the highest order' can justify [a] discriminatory policy." *Id.*

**3.** The prohibition on discrimination on the basis of religious status serves vital purposes. First and foremost, the ban protects religious liberty—the right to

practice one's religion without coercion or pressure from the government to change one's beliefs. Whenever a State "conditions receipt" of a "benefit" upon the surrender of one's faith, it puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 717–18 (1981). As the English and colonial experience of test oaths and civil incapacities proves, such a condition "inevitably deters or discourages the exercise" of religion. *Trinity Lutheran*, 137 S. Ct. at 2022 (brackets omitted).

The ban on discrimination on the basis of religious status also protects religious equality. Under our Constitution, any citizen who "seeks the benefits of citizenship" does so "not as an adherent," but "as an American." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1841 (2014) (Kagan, J., dissenting). That principle means that, in "seeking civic benefits, each person of this nation must experience a government that belongs to one and all, irrespective of belief." *Id.* at 1849. A State contravenes that principle when it "treat[s] religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment).

Finally, the ban on discrimination on the basis of religious status helps avoid religious strife. When a State denies "religious groups" benefits that are "open to others," it demonstrates "hostility toward religion." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (plurality opinion). That "aggressively hostile" attitude toward religion tends

to "'create the very kind of religiously based divisiveness'" that the Free Exercise Clause was meant to prevent. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2085 (2019).

### B. Maine's Nonsectarian-School Provision Impermissibly Denies Benefits on the Basis of Religious Status

Maine's nonsectarian-school provision violates the Free Exercise Clause. The provision's text demonstrates its unconstitutionality, and history, precedent, and the purposes of the Free Exercise Clause confirm that conclusion.

The nonsectarian-school provision facially discriminates on the basis of religious status. The provision states that "[a] private school may be approved for the receipt of public funds for tuition purposes only if it," *inter alia*, "[i]s a nonsectarian school." 20–A Me. Rev. Stat. § 2951, 2951(2). The provision thus incapacitates a school from receiving public funds simply because of what it is—a religious school. By adopting that incapacitation, Maine has "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character," in violation of the Free Exercise Clause. *Trinity Lutheran*, 137 S. Ct. at 2021.

The disability imposed by the nonsectarian-school provision resembles the religious disabilities that the Founders rejected when they adopted the First Amendment. For instance, Maine's denial of public funds on account of religious status parallels the English Parliament's denial of "any Pay, Salary, Fee or Wages" from the Crown on account of religious status. First Test Act, 1673, 25 Car. 2, c. 2, § 1 (Eng.), *reprinted in* 5 Statutes of the Realm 782–83 (1963). In

Jefferson's words, by disqualifying religious schools, and religious schools alone, from receiving public funds from the State, the nonsectarian-school provision deprives such schools of the "privileges and advantages" that they have a "natural right" to enjoy "in common" with the rest of the community. Virginia Act for Establishing Religious Freedom. The Framers of the Bill of Rights denied the government the power to impose such "civil incapacitations." *Id.*

Further, the disability in this case frustrates the purposes of the Free Exercise Clause. It undermines religious liberty by pressuring religious parents and religious schools to forgo religious education in order to obtain a public benefit. *See Trinity Lutheran*, 137 S. Ct. at 2022. It undermines religious equality by treating religious schools, "simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment). And it foments religious division by demonstrating an "aggressively hostile" attitude toward religion. *Am. Legion*, 139 S. Ct. at 2085.

The constitutional violation in this case is especially egregious because it involves the education of children. The right of a parent to determine the role of religion in his child's education is one of the most important elements of religious liberty. *See Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–36 (1925). Some parents believe that schools should "inculcate all needed temporal knowledge" but should "maintain a strict and lofty neutrality as to religion"—so that the child can receive his religious instruction at home or in church, or so that "after the

individual has been instructed in worldly wisdom he will be better fitted to choose his religion" on his own. *Everson*, 330 U.S. at 24 (Jackson, J., dissenting). Other parents prefer "not [to] leave the individual to pick up religion by chance," but insist on "early and indelible" religious instruction in their children's schools. *Id.* at 23.

The nonsectarian-school provision allows Maine to fund the former type of school (secular private schools) but not the latter type (religious private schools). It thus penalizes parents who choose a religious rather than a secular school for their children to receive their compulsory general education.

### C. Maine's Contrary Arguments Lack Merit

In its briefing below, Maine has advanced three contrary arguments. None has any merit.

**1.** Maine has argued that the Constitution distinguishes between a funding recipient's religious status and a funding recipient's use of the funds for religious purposes. In Maine's view, a State may not deny a person funds because of his religious status, but it may deny him funds because he plans to put those funds to a religious use.

Whether the distinction between religious use and religious status should be constitutionally significant is not free from doubt, and the line between the two may sometimes be difficult to draw. *See Trinity Lutheran*, 137 S. Ct. at 2025 (Gorsuch, J., concurring in part). And even if a restriction could fairly be said to rest on religious use, rather than religious status, a court must guard against reading the restriction too broadly. "If a facially use-based religious-funding restriction is given too broad a sweep,

it might well amount to status-based religious discrimination." O.L.C., *Religious Restrictions on Capital Financing for Historically Black Colleges and Universities*, 2019 WL 4565486, at *15 (Aug. 15, 2019). For example, "[t]o consider all activities of a religious school to be 'related to' sectarian instruction, and prohibit funding for the school on that basis, would risk collapsing the distinction between religious status and religious use." *Id.*

This Court need not, however, confront those issues in this case. Regardless of whether or where one draws the line between status and use, the nonsectarian-school provision plainly discriminates on the basis of religious status. It disqualifies religious schools that would otherwise meet Maine's educational requirements from receiving public funds simply because of their religious identity—not because of any religious content of the instruction they provide. The operative text disqualifies a school from receiving public funds if the school is "sectarian." 20–A Me. Rev. Stat. §§ 2951, 2951(2). The text makes plain that it is the "sectarian" character of the school, rather than the manner in which the school proposes to use the funds, that triggers the disqualification. That is discrimination based on status, not use.

**2.** Maine has also argued that constitutional no-aid principles justify denying aid to religious schools. That argument is unsound, and thus does not satisfy "the 'most rigorous' scrutiny" required to justify Maine's discrimination. *Trinity Lutheran*, 137 S. Ct. at 2024.

*i.* Maine properly has conceded below that compliance with the Establishment Clause does not require the exclusion of religious schools from funding

programs that are open to others. Time and again, the Supreme Court has rejected contentions that a State has violated the Establishment Clause by allowing religious groups to benefit from neutral governmental programs that are generally open to broad classes of participants. "If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be." *Mitchell*, 530 U.S. at 827 (plurality opinion); *see also, e.g.*, *Zelman*, 536 U.S. at 649–53; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001); *Agostini v. Felton*, 521 U.S. 203, 230–31 (1997); *Rosenberger v. Rector*, 515 U.S. 819, 842–43 (1995).

Unable to argue that the nonsectarian-school provision is necessary to comply with the Establishment Clause, Maine has asserted an interest in pursuing an even greater degree of separation between religion and government than the Establishment Clause requires. The Supreme Court has repeatedly determined, however, that such an interest, standing alone, is insufficient to justify discrimination against religion. For instance, in *McDaniel*, the Court held that the "interest in preventing the establishment of a state religion" could not justify disqualifying ministers from running for political office. 435 U.S. at 628 (plurality opinion); *see id.* at 636–42 (Brennan, J., concurring in the judgment). In *Widmar v. Vincent*, the Court held that the interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause" could not "justify content-based discrimination against . . . religious speech." 454 U.S. 263, 276 (1981). And in *Trinity Lutheran*, the Court held that, "[i]n the face of

[a] clear infringement on free exercise," a "preference for skating as far as possible from religious establishment concerns" could not "qualify as compelling." 137 S. Ct. at 2024.

*ii.* *Davey* is not to the contrary. In that case, as noted earlier, the Supreme Court upheld a State's refusal to fund degrees in devotional theology as part of a state scholarship program. The Court explained that the Establishment Clause did not require the State to take that step, but that the State's "antiestablishment interests" nonetheless supported its policy. 540 U.S. at 722. For three reasons, *Davey* does not support Maine here.

*First*, the Supreme Court has explained that *Davey* involved the denial of funds for religious uses, not the denial of funds on the basis of religious status. And the Court "took account of [the State's] antiestablishment interest only after determining" that the theology student "was denied a scholarship because of what he proposed *to do*" rather than "because of who he *was*." *Trinity Lutheran*, 137 S. Ct. at 2023 (emphases in original). In this case, the nonsectarian-school provision denies funds to "sectarian" schools, even if the schools seek to use those funds for secular instruction. Nothing in *Davey* suggests that a State's interests in avoiding an establishment of religion could justify that kind of discrimination.

*Second*, *Davey* involved payment for the "essentially religious endeavor" of "[t]raining someone to lead a congregation." 540 U.S. at 721. This case, by contrast, involves general secondary education at religious schools that either satisfy, or could easily satisfy, all other tuition-approval requirements—including accreditation and

curriculum requirements—imposed by Maine law. The Supreme Court has recognized that "religious schools pursue two goals, religious instruction and secular education," and that the "secular teaching" provided at a religious school can still promote "the State's interest in education." *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 245 (1968). Because education at a religious school can still serve secular purposes, such an education does not amount to an "essentially religious endeavor" in the sense that "[t]raining someone to lead a congregation" does. *Davey*, 540 U.S. at 721.

*Third*, the Court in *Davey* emphasized that the State's restriction rested on a strong "historic[al]" foundation. 540 U.S. at 725. It noted that the use of public funds to support the clergy "was one of the hallmarks of an 'established' religion" at the time of the Founding, that the Founders experienced "popular uprisings against procuring taxpayer funds to support church leaders," and that many States "around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Id.* at 722–23. There is no comparable historical justification for allowing States to disable religiously affiliated schools from receiving public funds and the absence of such history only proves that there is no compelling interest justifying the discrimination embodied in Maine's nonsectarian-school provision.

**3.** Finally, Maine has argued that including religious private schools in its tuition program would jeopardize its secular public education system. This argument defies logic. If the nonsectarian-school provision were stricken, tuition could be paid to religious schools only where the local school administrative unit "neither maintains

a secondary school nor contracts for secondary school privileges" 20–A Me. Rev. Stat. § 5204(4)—that is, in those school administrative units where there is *no* public secondary school. Tuition payments to religious schools cannot be said to jeopardize a secular public education system that does not, in fact, exist.

## CONCLUSION

For these reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 6500 words.

This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Microsoft Word 2019 in Garamond 14-point font, a proportionally spaced typeface.

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## CERTIFICATE OF SERVICE

I hereby certify that on October 7, 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. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system on the following persons:

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