No. 18-1195

In The
Supreme Court of the United States

ESPINOZA, ET AL.,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Montana

BRIEF OF THE STATE OF MAINE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE STATE OF MAINE AS AMICUS CURIAE

Like the State of Montana, the State of Maine has a paramount interest in the provision of a free public education to all of its children. The Constitution of Maine has a provision requiring "the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools." Me. Const. art. VIII, pt. 1, § 1. It has never had a so-called "Blaine Amendment" or a "no-aid" clause.

Because it is a lightly populated, predominantly rural state, many school administrative units ("SAUs") in Maine do not operate public secondary schools. In those cases, Maine law provides two options: an SAU may contract with another public or approved private school for schooling privileges for some or all of its resident students in those grades, 20-A Me. Rev. Stat. Ann. §§ 2701, 2702, or an SAU "that neither maintains a secondary school nor contracts for secondary school privileges . . . shall pay the tuition, . . . , at the public school or the approved private school of the parent's choice at which the student is accepted." 20-A Me. Rev. Stat. Ann. § 5204(4). In order to be an approved private school, a school must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." 20-A Me. Rev. Stat. Ann. § 2951(2) ("Section 2951(2)"). It is this decision to exclude sectarian schools from receiving public funds that links the States of Maine and Montana.

Maine's interest in this case is far from theoretical: the outcome of this case has the potential to impact pending litigation challenging the constitutionality of Section 2951(2) in the First Circuit Court of Appeals, *Carson v. Makin*, No. 19-1746 (appeal filed August 2, 2019). This litigation represents the third time in the last 20 years that a group of Maine parents has sued to invalidate Section 2951(2) and fundamentally change Maine's public education system. Maine submits this brief to ensure that, in analyzing the issue presented in *Espinoza*, the Court is aware of the different approaches that the States take with respect to the use of private schools in ensuring the provision of a free public education. Maine believes that Montana should prevail in *Espinoza*, but in the event that it does not, Maine urges the Court to limit its ruling in a manner that allows for states like Maine to continue to use secular, but not sectarian, schools as part of the provision of a free public education to its children.

SUMMARY OF ARGUMENT

I. Maine has taken a unique approach to the use of private schools as part of its system of public education. Unlike Montana's tax credit program, or the typical "voucher" or "school choice" program, *see Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), Maine's tuition program serves not as an opportunity for families to choose an alternative to their local public school, but as a method of delivering a free public education to students who "live within school administrative units that

simply do not have the resources to operate a public school system, and whose children would otherwise not be given an opportunity to receive a free public education." *Hallissey v. Sch. Admin. Dist. No. 77*, 755 A.2d 1068, 1073 (Me. 2000). Because Maine's tuition program uses private schools as *de facto* public schools, and not as alternatives to public schools, Maine has a compelling interest in ensuring that the education provided to the students in the tuition program is comparable to the non-sectarian education which they would receive if they attended a public school.

II. Unlike a sweeping "Blaine Amendment" or "no-aid" clause, the tuition program is the result of specific legislative consideration of whether sectarian education belongs as part of Maine's public education system. In undertaking that consideration, there is no evidence of animus or hostility toward religion; instead, the Maine Legislature sought to reject intolerance and discrimination in schools serving as *de facto* public schools. It is clear from the undisputed facts in *Carson v. Makin* that the education provided by the sectarian schools, as well as the schools' policies and practices, are inconsistent with a public education.

III. Section 2951(2) has been challenged twice before and in each case, both Maine's Supreme Judicial Court and the Court of Appeals for the First Circuit found the statute to be constitutional. Nothing in this Court's limited holding in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) casts doubt on this Court's prior decision in *Locke v. Davey*, 540 U.S. 712 (2004) which held that with respect to

funding religious education and training, the "play in the joints" between the Religion Clauses allows States to decline funding for sectarian education while they provide funding for secular education.

ARGUMENT

I. Unlike a typical "voucher" or "school choice" program, the benefit made available by Maine's tuition program is a free public education for students who reside in a school administrative unit that neither operates a public school nor contracts for schooling privileges.

In his *Trinity Lutheran* concurrence, Justice Breyer observed that "[p]ublic benefits come in many shapes and sizes." 137 S. Ct. 2012 at 2027. In order to properly analyze the constitutionality of Maine's tuition program, it is essential to start by identifying the public benefit bestowed by the program: a free public education. It is equally important to state what Maine's tuition program is not: a "voucher" or "school choice" program where parents are given the opportunity to select a school other than the local public school that their child would otherwise attend. It is this distinction between Maine's use of secular private schools as *de facto* public schools and the opportunity to use public funds to choose an alternative to an otherwise available public school that distinguishes Maine's tuition program from the voucher program in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) and the

scholarship program in *Espinoza* and justifies Maine's decision to exclude sectarian schools.

> The Constitution of Maine states:
>
> > A general diffusion of the advantages of education being essential to the rights and liberties of the people; to promote this important object, the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools; . . . .

Me. Const. art. VIII, pt. 1, § 1. Pursuant to 20-A Me. Rev. Stat. Ann. § 2(1), "[i]t is the intent of the Legislature that every person within the age limitations prescribed by state statues shall be provided an opportunity to receive the benefits of a free public education."

In Maine, there are currently 260 local SAUs, defined by statute as the state-approved unit of school administration, serving nearly 180,000 students in grades K-12 at public expense. JSF, ¶¶ 3, 4, 20.[1] Each SAU "shall either operate programs in kindergarten and grades one to 12 or otherwise provide for students to participate in those grades as authorized elsewhere [by statute]." 20-A Me. Rev. Stat. Ann. § 1001(8). Of the 260 SAUs, 143 do not operate a secondary school. JSF,

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[1] The Joint Stipulated Facts ("JSF, ¶ __") cited herein was filed in *Carson v. Makin*, 1:18-cv-327-DBH and is available through the District of Maine's PACER service (https://ecf.med.uscourts.gov) at Document No. 25.

¶ 6. Maine law provides two alternatives for an SAU to provide a public education to its resident students when it does not operate a public school for one or more grades. First, an SAU may contract with another public or approved private school for schooling privileges for some or all of its resident students in those grades. 20-A Me. Rev. Stat. Ann. §§ 2701, 2702. Second, an SAU "that neither maintains a secondary school nor contracts for secondary school privileges pursuant to chapter 115 shall pay the tuition, in accordance with chapter 219, at the public school or the approved private school of the parent's choice at which the student is accepted." 20-A Me. Rev. Stat. Ann. § 5204(4).

Section 2951 contains the requirements for a private school to be approved to receive public funds for tuition purposes. JSF, ¶ 13. Those schools must, *inter alia*, meet the requirements for basic school approval contained in the statute and agree to comply with reporting and auditing requirements. 20-A Me. Rev. Stat. Ann. § 2951(1), (5). In addition, and at the heart of the *Carson v. Makin* litigation, they must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." 20-A Me. Rev. Stat. Ann. § 2951(2).

There is no dispute that students who receive a public education from a public secondary school receive a non-sectarian education. So, if students reside in an SAU that operates a public high school or that has a contract for secondary school privileges, the students are not entitled to a sectarian education at public expense. With respect to students who live in an

SAU that neither operates a public high school nor contracts for schooling privileges, Maine's Supreme Judicial Court has explained:

> The Legislature endeavors to ensure that each child will be entitled to an *opportunity* to receive a free public education, not to guarantee children a free education at any public or private school of their choice. Within the statutory scheme, section 5204(4)'s function is limited to authorizing the provision of tuition subsidies to the parents of children who live within school administrative units that simply do not have the resources to operate a public school system, and whose children would otherwise not be given an opportunity to receive a free public education.

Hallissey, 755 A.2d 1068 at 1073 (emphasis in original). Thus, the tuition program is simply a vehicle for students in this third category to receive a free public education that is consistent with, and no broader than, the benefit provided by the first two options. As there is no dispute that students in the first two categories cannot receive sectarian instruction at public expense, Section 2951(2) applies that same rule to the third.

No case has ever held, or even suggested, that a State's decision to define a public education to mean a secular education raises any constitutional concerns. This is unsurprising given the considerable state interest in public education as well as the primary role of the state in this area. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (describing public education as

"perhaps the most important function of state and local governments"); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("providing public schools ranks at the very apex of the function of a State"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 39 (1973) (with respect to public education, a state's efforts "shall be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution").

A free public education has long been equated with a secular instruction. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("Free public education, if faithful to the ideal of secular instruction . . . will not be partisan or enemy of any . . . creed. . . ."); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (striking down religiously motivated instruction in public secondary schools and stating that "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools. . . ." (citation omitted)); *see also Bethel Sch. Dist. No. 403 v. Frazier*, 478 U.S. 675, 681 (1986) (noting that the objectives of public education are to "inculcate the habits and manners of civility" which "must, of course, include tolerance of divergent . . . religious views. . . .").

In contrast, "voucher" programs such as the one reviewed by this Court in *Zelman* and the scholarship program before it now in *Espinoza* involve a different type of program: a program that provides not the basic access to a free public education, but the option to use

public funds to reject or avoid the free public education offered by a local public school. There is no question that the purpose of the Montana scholarship program "is to provide parental and student choice in education." Mont. Code Ann. § 15-30-3101. With respect to the Pilot Project Scholarship Program that the Court reviewed in *Zelman*, Chief Justice Rehnquist began his opinion by describing in the starkest terms the demonstrable failure of Cleveland's public school system – a school district described by the state auditor as being in a "crisis that is perhaps unprecedented in the history of American education" – as well as the inability of the predominantly low-income and minority families to send their children to any school other than Cleveland's public schools. *Zelman*, 536 U.S. at 644. Against that backdrop, the tuition aid program was "part of a broader undertaking by the State to enhance the education options of Cleveland's schoolchildren in response to the [state] takeover." *Id.* at 647.

In sum, unlike Montana or Ohio, Maine's tuition program uses private schools as *de facto* public schools and not as alternatives to public schools. As such, as described below, Maine has a compelling interest in ensuring that the education provided to the students in the tuition program is comparable to that which they would receive if they attended a public school.

II. Unlike a sweeping "Blaine Amendment" or "no-aid" clause, Maine's tuition program is the result of carefully considered legislative judgment as to what constitutes a public education.

Maine's unique approach for providing a free public education reflects the carefully considered judgment of the Legislature as to what constitutes a public education. Unlike an all-inclusive "Blaine Amendment" or "no-aid" clause, the tuition program is the result of specific legislative consideration of whether sectarian education belongs as part of Maine's public education system, as opposed to as an alternative available to parents at their own expense.

Prior to 1980, some sectarian schools received public funds for tuition purposes. JSF, ¶ 18. In January of 1980, in response to a request from a legislator, the Maine Attorney General issued an opinion that thoroughly reviewed the existing First Amendment jurisprudence and concluded that the public funding of religious schools would violate the Establishment Clause. JSF, ¶ 187. Subsequently, the Legislature enacted the provision currently codified at Section 2951(2). JSF, ¶ 188. More than 15 years later, two separate groups of parents filed lawsuits challenging the constitutionality of Section 2951(2). Both the Maine Suupreme Judicial Court and the Court of Appeals for the First Circuit agreed with the reasoning of the Attorney General and held that the Establishment Clause prevented Maine from allowing payments to sectarian schools. *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127

(Me. 1999); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999).

That was not the end of the Legislature's consideration of the use of public tuition dollars for sectarian education. In 2002, this Court decided *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). *Zelman* held, for the first time, that it was possible for a state to develop a "voucher" program that would allow parents to use public money to pay for sectarian schools without violating the Establishment Clause. *Id.* at 662-63. Presented with the opportunity to consider public tuition payments for sectarian education anew, a bill was introduced in 2003 to repeal Section 2951(2). JSF, ¶ 189. The bill did not become law. JSF, ¶ 202. Copies of the official legislative record provide insight into the specific rationales of the Legislature in deciding to retain Section 2951(2), each of which explain the policy basis for the decision:

- It is the sovereign prerogative of the people of the State of Maine to determine how public funds can and should be used in supporting public education for the children of this state. JSF, ¶ 193.
- Maine has a high performing system of public education, and there is no need to add to or change it. JSF, ¶ 192; Document No. 24-2, PageID 192.
- Bringing all of our children together, no matter what their religious affiliation or background, promotes democracy, tolerance, and what is best in all of us. JSF, ¶ 201.

- A publicly funded education system works best when the education is one of diversity and assimilation, religiously neutral, and not a "separate and sectarian" one. JSF, ¶¶ 196, 201.
- The government has an important oversight role with respect to what is taught in schools but cannot, and should not, oversee the religious components of any school. Because of that, public funds should not pay for an education over which the state cannot have oversight. JSF, ¶¶ 194, 201.
- Religious schools can, and reserve the right to, discriminate in favor of those of their own religion and the state should not fund discrimination. JSF, ¶¶ 193-94.

Consistent with counsel for Petitioner's brief in the instant case, counsel for the parents' First Circuit brief in *Carson v. Makin* is permeated with assertions that Maine's tuition program is hostile to religion and the product of religious animus. The portions of the legislative record they cite to, though, belie these assertions. For example, not wanting to "fund discrimination" or the teaching of "intolerant" views does not demonstrate a hostility to religion. Rather, it demonstrates a hostility to discrimination and intolerance. As discussed above, the purpose of the tuition program is to provide a free public education, *i.e.*, a secular education. It is not evidence of animus, then, to not want to

include in the program schools whose overwhelming mission is religious.

As the stipulated facts in *Carson v. Makin* make clear, the education at the sectarian schools for which the parents seek public funds is nothing like the education at public schools or private secular schools. As a representative of Temple Academy ("TA") candidly testified, there is a "big difference" between private schools and private Christian schools. JSF, ¶ 182. And as previously described by this Court, "'[t]he affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.'" *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971) (quoting *Walz v. Tax Comm'r of City of New York*, 397 U.S. 664, 671 (1970)).

Bangor Christian Schools ("BCS") is a ministry of Crosspoint Church with the objective of "training young men and women to serve the Lord." JSF, ¶ 70. The School will only admit students who are willing to support BCS' philosophy of Christian education and conduct. JSF, ¶ 88. BCS believes that a student who is homosexual or identifies as a gender other than that on his or her birth certificate could not sign the agreement governing codes of conduct that BCS requires as a condition of admission. JSF, ¶ 89. A student who has been admitted, but subsequently presents him or herself as homosexual, or as a gender other than that on his or her birth certificate, would not be allowed to continue attending BCS. JSF, ¶¶ 90-92.

BCS does not believe that there is any way to separate the religious instruction from the academic instruction. JSF, ¶ 101. Religious instruction is "completely intertwined." *Id.* Among the objectives of BCS are teaching students to be good Christians, promoting Christian values, and developing Christian leadership. JSF, ¶ 95. BCS teaches students they should spread Christianity in the world. JSF, ¶ 104. This includes teaching children that the Bible is the word of God, that it is infallible, and that it should be obeyed in every aspect of life. JSF, ¶ 169.

TA is an "integral ministry" and essentially an "extension" of Centerpoint Community Church. JSF, ¶ 134. The Academy will not admit homosexual students or students who identify with a gender that is different than what is listed on his or her birth certificate. JSF, ¶¶ 157-58. It will not admit a child who lives in a two-father or two-mother family. JSF, ¶ 159.

TA provides a "biblically-integrated education" where teachers "are expected to integrate Biblical principles with their teaching in every subject taught." JSF, ¶¶ 164, 168. TA teaches children that the Bible is the Word of God, that it is infallible, and that it should be obeyed in every aspect of life. JSF, ¶ 170. TA seeks to "mold" students to be "Christlike." JSF, ¶ 173. TA teaches students that they should attempt to spread the word of Christianity. JSF, ¶ 171.

In sum, the stipulated facts in *Carson* show that the sectarian schools to which the parents seek to send their children at public expense explicitly discriminate

against homosexuals, individuals who are transgender, and non-Christians with respect to both who they admit and retain as students, and who they hire as teachers and staff. They provide instruction aimed at inculcating their students in the Christian faith, and engage in and encourage students to engage in proselytizing. To the extent that they provide education in many of the same subjects that are included in the curricula of non-sectarian schools and public schools, the schools themselves candidly acknowledge that there is no way to separate the religious instruction from the "biblically-integrated" academic instruction.

III. The Court of Appeals for the First Circuit has previously rejected claims that Maine's tuition program violates the Free Exercise Clause and nothing in this Court's *Trinity Lutheran* decision casts doubt on the First Circuit's decision.

Maine's tuition program has been repeatedly challenged in both federal and state court over the past 20 years, with both Maine's Supreme Judicial Court and the Court of Appeals for the First Circuit squarely rejecting claims from parents that the tuition program violates the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause. *Eulitt v. Maine Dep't of Educ*., 386 F.3d 344 (1st Cir. 2004); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999); *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999). The First Circuit's 2004 *Eulitt* decision carefully considered the

impact of both *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) and *Locke v. Davey*, 540 U.S. 712 (2004) and concluded that Maine's decision not to fund religious education fell within the "play in the joints" affirmed by *Locke*. Nothing in this Court's recent decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) suggests that either *Locke* or the central principle behind the "play in the joints" – that there is room between what the Establishment Clause allows and what the Free Exercise Clause requires – is no longer the law. In contrast, Petitioners' argument would snap the "joints" of the Religion Clauses shut; a position sharply in contrast with the entirety of this Court's Religion Clauses jurisprudence.

Read together, *Zelman* and *Locke*, both written by Chief Justice Rehnquist, emphasize the deference due to State decision making regarding education, and particularly the funding of religious education. *Zelman* explains what States are permitted to do with respect to funding religious education; *Locke* explains what States cannot be forced to do. While Ohio was able to create a "voucher" program that allowed parents to access public funding for sectarian education without running afoul of the Establishment Clause, Washington was able to exclude state funding for religious vocational education without running afoul of the Free Exercise Clause. Maine has chosen a similar route to that taken by Washington, and Maine's tuition program survives constitutional scrutiny for the reasons outlined in *Locke*. Nothing in the *Trinity Lutheran* decision disturbs *Locke*, and nothing in *Trinity Lutheran*

casts the constitutionality of Maine's tuition program into doubt.

Unlike *Trinity Lutheran*, which is explicitly limited to a single set of facts and specifically excludes "religious uses of funding," there is no basis for concluding that *Locke* is applicable to only one specific educational funding decision. *Locke* affirms the legitimacy of establishment concerns when it comes to the funding of religious education and training. 540 U.S. at 721-23. Maine's use of private schools as *de facto* public schools is a prime example of a situation where religious and secular private schools are not "fungible."

Unlike *Trinity Lutheran*, Maine's tuition program does not exclude "fully qualified recipients" from an "otherwise available benefit program." While the parents are eligible to participate in the tuition program because they live in towns that neither operate a secondary school nor contract for school privileges, they are seeking a different public benefit than the one Maine is offering: a publicly funded sectarian education. Unlike Trinity Lutheran Church, which wanted to obtain public funds for the same type of safety upgrade for its playground surface as the non-church applicants, these parents are looking for public funds for a completely different purpose: a sectarian education as opposed to a public education.

Unlike *Trinity Lutheran*, the Maine parents are not being asked to choose between their religious beliefs and receiving a government benefit. Whether the parents are religious or whether their desire to choose

a sectarian school for their children is motivated by their sincere religious beliefs is wholly immaterial with respect to the tuition program. No matter what the reason, public funding through the tuition program for sectarian schools is not available. While the parents testified that they would like to choose a sectarian school because it provides a high quality education and is consistent with their religious beliefs, a non-religious parent who wishes to send her son to a nearby Catholic high school because she believes it has strong disciplinary policies and her son wants to play on the hockey team would also be prevented from doing so. Unlike Trinity Lutheran Church, which was disqualified from the Scrap Tire Program simply because it was a church, Maine's tuition program hinges not on who a parent is, but on what he or she wishes to purchase with public funds.

In sum, *Trinity Lutheran* and *Locke* address different scenarios with correspondingly different levels of judicial scrutiny. On one hand is a situation where the religious are singled out because of their religious status and denied access to a generally available public benefit program that does not implicate anti-establishment interests (*e.g.*, the categorical exclusion of churches because they are churches from a program that provides scrap tire for playground resurfacing as in *Trinity Lutheran*). On the other is a limit on all persons, religious or not, from using public money to fund an "essentially religious endeavor" that triggers traditional state antiestablishment interests (*e.g.*, a program that prohibits everyone, religious or not, from

using public funds to pay for a degree in devotional theology as in *Locke*). In at least two ways, Maine's tuition program is a better example of this principle than *Locke* itself: parents in Maine seeking to obtain a sectarian education for their children are less likely to be religiously motivated than individuals pursuing degrees in devotional theology, and, as discussed above, Maine's antiestablishment interest in its publicly funded K-12 education system is far greater than a State's interest in funding of post-secondary education.

CONCLUSION

For the reasons stated, Amicus Curiae State of Maine respectfully urges the Court to affirm the judgment of the Montana Supreme Court.

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