

No. 19-1746

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,
No. 1:18-cv-00327-DBH

**BRIEF OF *AMICUS CURIAE* PUBLIC FUNDS PUBLIC SCHOOLS
SUPPORTING THE APPELLEE AND AFFIRMANCE**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

Public Funds Public Schools (“PFPS”) is a national campaign to ensure that public funds for education are used to maintain and support public schools. PFPS uses a range of strategies to protect and promote public education. This includes engaging in litigation challenging private school vouchers and other diversions of public funds to private schools, as well as supporting public interest, civil rights, and private bar attorneys in doing so.

PFPS is a collaboration of the Southern Poverty Law Center (“SPLC”), a nonprofit civil rights organization dedicated to seeking justice for the most vulnerable members of society, and Education Law Center (“ELC”), a nonprofit organization dedicated to effective advocacy for equal educational opportunity and public education rights in the United States. Based on extensive expertise and experience, SPLC and ELC have participated as *amici curiae* or as counsel in cases promoting public education rights—including cases to prevent the diversion of public funds from public schools—in states across the nation.

PFPS submits this brief in support of defendant-appellee Makin to explain the limited role the Maine Tuition Program plays in the State of Maine’s (“State”)

¹ Neither party’s counsel authored this brief in whole or in part nor contributed money intended for the preparation or submission of this brief. No party other than *amicus curiae*, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

constitutionally-mandated public education system, and why the State has a compelling interest of the highest order in limiting participation in the program to nonsectarian private schools.

SUMMARY OF THE ARGUMENT

PFPS submits this brief² to explain how the Maine Tuition Program (“MTP”)—including its limitation to secular schools as codified at 20-A M.R.S. § 2951(2)—is carefully calibrated so that the State can fulfill its affirmative obligation under the Maine Constitution to ensure “suitable provision . . . for the support and maintenance of public schools” across the state. Me. Const. art. VIII, Pt. 1, § 1. Despite repeated judicial rulings upholding the MTP’s limitation to nonreligious schools since its enactment decades ago,³ plaintiffs-appellants brought yet another challenge, asserting that the U.S. Supreme Court’s holding in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___, 137 S. Ct. 2012 (2017), now justifies upending this well-settled precedent. The court below was unconvinced that the circumscribed holding in *Trinity Lutheran* negated the prior decisions validating the legality of excluding religious schools under the MTP. *Carson v. Makin*, No. 1:18-CV-327-DBH, 2019 WL 2619521 (D. Me. June 26,

² Counsel for all parties have consented to the filing of this *amicus* brief in accordance with Fed. R. App. P. 29(a)(2).

³ *Strout v. Comm’r, Me. Dep’t of Educ.*, 13 F. Supp. 2d 112 (D. Me. 1998), *aff’d sub nom. Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999); *Bagley v. Me. Dep’t. of Educ.*, No. CV-97-484, 1998 WL 35550607, at *1 (Me. Super. Apr. 20, 1998), *aff’d sub nom. Bagley v. Raymond Sch. Dep’t.*, 728 A.2d 127 (Me. 1999); *Eulitt v. Me. Dep’t of Educ.*, 307 F. Supp. 2d 158 (D. Me. 2004), *aff’d on other grounds sub nom. Eulitt ex rel. Eulitt v. Me., Dep’t of Educ.*, 386 F.3d 344 (1st Cir. 2004); *Anderson v. Town of Durham*, No. CIV.A. CV-02-480, 2003 WL 21386768, at *1 (Me. Super. May 14, 2003), *aff’d Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006).

2019). PFPS agrees with the defendant-appellee that the *Trinity Lutheran* decision does not apply to this case because the MTP does not discriminate based on religious identity. PFPS files this brief to explain that even applying *Trinity Lutheran*'s elevated standard of review, this Court should uphold the MTP in its current form because it advances a compelling state interest "of the highest order," *Trinity Lutheran*, 137 S. Ct. at 2019 (internal quotations omitted)—namely, Maine's obligation under Article VIII of its constitution to provide a public education to every school-age child in the state.

The State purposefully designed the MTP to advance this compelling constitutional interest. Invalidating Section 2951(2) would undermine the State's careful construction of a limited program that fulfills its Education Article mandate in the rare circumstances where a traditional public school is unavailable. It would also divert the limited funding provided by the State to comply with its constitutional obligation to maintain and support its public schools. Finally, private religious schools often utilize admissions criteria and other policies that discriminate on the basis of characteristics protected by Maine's legal framework to prevent discrimination in public education, and are inherently dedicated to advancing sectarian views. Thus invalidating Section 2951(2) would force the State to either regulate schools participating in the MTP in a manner that entangles the State in matters of religion, knowingly fund discrimination in public education,

or abandon the longstanding MTP altogether. All three options are antithetical to the public education guarantee in the State's constitution. Limiting the MTP to nonreligious schools is the only way to ensure that this integral component of the State's comprehensive system for delivering free public education to Maine's school children aligns with its constitutional and statutory mandates.

ARGUMENT

I. Constitutional and Statutory Framework of the MTP

The State has an affirmative constitutional obligation to provide all Maine children with a publicly-funded education. Specifically, the Maine Constitution's Education Article imposes on the Legislature a "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 (emphasis added). In furtherance of this constitutional obligation, the Legislature has imposed upon itself the mandatory duty to "enact the laws that are necessary to assure that *all school administrative units make suitable provisions for the support and maintenance of the public schools*" such that every school-aged person residing in the state "shall be provided an opportunity to receive the benefits of a free public education." 20-A M.R.S. § 2(1) (emphasis added). And the Legislature has enacted a statutory framework governing numerous aspects of the provision of public education pursuant to that constitutional mandate. *See, e.g., id.* § 15670 *et*

seq. (setting forth the “Essential Programs and Services Funding” formula to ensure school funding that is “adequate to fully provide for all of the staffing and other material resource needs of the essential programs and services identified by the Legislature”); *id.* § 4701 *et seq.* (setting forth detailed requirements for instruction and for earning a high school diploma).

In most Maine towns, the State is able to fulfill its constitutional mandate to ensure “suitable provision” for the education of Maine children in traditional public schools operated by school administrative units (“SAU”). However, due to geography or historical circumstance, some SAUs do not maintain traditional public schools at every grade level. In those instances, Maine law permits SAUs to participate in the MTP, which allows them to provide publicly-funded education to local children enrolled in qualifying schools outside their home district using the per-pupil allotment under the State’s statutorily enacted school funding formula. 20-A M.R.S. § 15670 *et seq.*

Under the MTP’s statutory framework, an SAU that does not operate its own public schools can enter an exclusive contract with either an out-of-district public school or a private nonsectarian school. *Id.* § 5203(3) (elementary), § 5204(3) (secondary); *see also id.* § 2701 (authority to contract for school privileges). If the SAU decides not to enter such a contract, the law allows the SAU to fund attendance at public or nonsectarian private schools selected by parents, provided

any such private school is approved by the State. *Id.* §§ 5203(4) (elementary), 5204(4) (secondary). The requirements established by the State for private school participation in the MTP include the schools' adherence to rigorous standards to ensure education quality, transparency, and accountability, as well as nondiscrimination.

Private schools “may be approved for the receipt of public funds for tuition purposes only if” they meet certain accreditation and other requirements. *Id.* § 2951. The private schools must be nonsectarian. *Id.* § 2951(2). Additionally, they must “meet[] the requirements for basic school approval” under subchapter I of the statute (described below), *id.* § 2951(1); be incorporated under state and federal law, *id.* § 2591(3); comply with statutory reporting and auditing requirements, *id.* § 2951(5); and release copies of records for students transferring to the SAU, *id.* § 2951(7). Private schools that enroll 60% or more publicly-funded students must administer state assessments and meet applicable requirements of the state system of learning results. *Id.* § 2951(6).

The statutory requirements for “basic school approval” under subchapter I for private schools seeking to participate in the MTP are extensive and substantive. Regardless of accreditation method, all participating private schools must abide by “standards for hygiene, health and safety established by applicable law and rule.” *Id.* § 2901(1). The Maine Department of Education requires participating private

schools to certify compliance with health, safety and fire codes; immunization requirements in 20-A M.R.S. §§ 6352–6358; as well as other statutes.⁴

Additionally, participating private schools must satisfy one of two accreditation pathways to secure MTP funding: a school must either secure accreditation from the New England Association of Schools and Colleges, or from the Maine Department of Education after meeting the extensive requirements specified in 20-A M.R.S. § 2902. 20-A M.R.S. § 2901(2). Schools using the first pathway must “make available to the [Education] commissioner on a timely basis all accreditation reports on the school and shall notify the commissioner promptly upon a determination that the school is not accredited or is on probation.” *Id.* § 2906.⁵ For schools using the second pathway, Section 2902 imposes requirements for curriculum and instruction, accountability standards, teacher certification, length of school years and days, class size, and other standards governing the substance and quality of education for Maine students. *Id.* § 2902.

As is the case with traditional public schools, the Maine Commissioner of Education (“Commissioner”) closely monitors all approved private schools participating in the MTP through reporting and auditing requirements.

⁴ Me. Dep’t. of Educ., *Private School Approval, Annual School Approval Report at 2*, <https://bit.ly/2Cr13p4>.

⁵ The New England Association of Schools and Colleges’ detailed accreditation standards are available on its website: <https://www.neasc.org/> (“Independent Schools,” navigate to “Standards”).

Participating private schools must annually “report to the commissioner the information the commissioner may require.” *Id.* § 2952. Additionally, the Commissioner “may adopt rules regarding tuition charges, accounting, audits, contracts and other aspects of schooling privileges arranged between a private school and school administrative units.” *Id.* § 2954. The existence of a comprehensive statutory framework governing the MTP has enabled it to function as part of the State’s system for delivering public education for many decades.

II. The State has a Compelling Interest of the Highest Order in Preserving the MTP as a Limited and Carefully Designed Means to Fulfill its Constitutional Obligation Under Maine’s Education Article

A. The MTP—with its Carefully Constructed Limitations—is Designed to Fulfill the State’s Affirmative Constitutional Obligation to Provide an Adequate Public Education

Maine has a paramount duty to ensure the provision of public education under Article VIII of its constitution, and a fundamental interest in ensuring an educated populace. Me. Const. art. VIII, Pt. 1, § 1 (“A general diffusion of the advantages of education [is] essential to the preservation of the rights and liberties of the people”); *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments It is the very foundation of good citizenship.”).

Maine’s highest court has acknowledged its constitutional framers’ respect for the supreme importance of providing public education to all the State’s children:

At the Maine Constitutional Convention in October 1819, Judge Judah Dana said that “no subject has, or can come before this Convention of deeper interest to the State; whatever constitution we may form and send out to the people, however excellent it may be in other respects, unless it contains ample provision for the education of our youth, it will be materially deficient... [A] free government rest[s] on the virtue and intelligence of the people...” J. Perley, *Debates, Resolutions, and Other Proceedings of the Convention of Delegates* 280–81 (1820). Out of that Convention came Article VIII

Blount v. Dep’t of Educ. & Cultural Servs., 551 A.2d 1377, 1381 (Me. 1988); see also J. Perley, *Debates, Resolutions, and Other Proceedings of the Convention of Delegates* 211–12 (1820) (“The subject before us is solemn and important. To provide for the education of our youth . . . And I congratulate this Convention on the opportunity they have for prescribing a duty to their legislators, which if properly performed, will preserve our republican institutions.”). The Maine judiciary has long recognized that “the constitution of this State imposes on the Legislature the duty to make suitable provisions for the support and maintenance of the public schools” precisely because “[t]he education of the people is regarded as so much a matter of public concern, and of such paramount importance” *Donahoe v. Richards*, 38 Me. 379, 391 (1854).

Plaintiffs-appellants' challenge to Section 2951(2) must be scrutinized in light of the role the MTP plays in fulfilling the State's constitutional obligation to provide public education to all children in Maine. *See Beckett v. Roderick*, 251 A.2d 427, 432 (Me. 1969) ("We must interpret and construe our educational legislation in the light of the fundamental public policy established by the Constitution of the State of Maine, Article VIII . . ."). The MTP was established as a carefully designed part of the State's unique statutory framework for satisfying its fundamental duty under the Education Article. As explained in Part I of this brief, the MTP is a meticulously regulated program that allows SAUs to fund education in nonsectarian private schools in the limited circumstances where traditional public schools are not available. *Hallsisey v. Sch. Admin. Dist. No. 77*, 2000 ME 143, ¶ 16, 755 A.2d 1068, 1073 (explaining that use of the MTP is limited to SAUs "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" as required by the Maine Constitution). In those instances, the MTP is the sole pathway for Maine children to obtain the publicly-funded education that they are guaranteed under Article VIII. The only way to guarantee that children in MTP-funded private schools receive a constitutionally adequate education is for the State to retain firm control over participating private schools.

This allows the State to ensure that the education children receive conforms to the State's public education standards and requirements.

The Legislature's limitation of the MTP to nonsectarian schools was a deliberate choice, based on its role in effectuating the Maine Education Article's affirmative mandate. In 1980, Maine's Attorney General issued an opinion concluding that public funding of religious schools was unconstitutional. *Op. Me. Att'y Gen. 80-2* (1980). In response, the Legislature enacted what is now Section 2951(2), limiting tuition payments under the MTP to secular schools. In 2003, a bill repealing that provision was proposed and rejected. *L.D. 182* (121st Legis. 2003). During the debate on that bill, the Legislature reaffirmed the limitation of the MTP to secular schools as central to the State's core duty to provide a free public education to all children, and one that reflects the democratic values of the State. *See, e.g., 1 Legis. Rec. S-640* (1st Reg. Sess. 2003) (Senator Martin: "Because we retain a responsibility of a publicly funded education, we must look carefully at what we believe is an appropriate form of education for our children Non-religious publicly funded education has been the norm in Maine and elsewhere in our country, and the 'melting pot' effect of this, on our children is what makes this state and this country great."); *1 Legis. Rec. H-582-83* (1st Reg. Sess. 2003) (Representative Fischer: "[T]here are a number of reasons why this bill should be rejected. These reasons are compelling and have at their root the

sovereign prerogative of the people of the State of Maine regarding how public funds can and should be used in supporting public education for the children of this state Publicly funding education for our children is one of the most important and vital functions of our state and it is this body’s responsibility to carefully exercise discretion over our education system.”).⁶

The State’s compelling interest in fulfilling its Education Article mandate—and in maintaining the limited, carefully constructed form of the MTP that currently allows it to do so—is “of the highest order.” *Trinity Lutheran*, 137 S. Ct. at 2019 (internal quotations omitted).

B. The State has a Compelling Interest in Safeguarding Public Funds for Public Schools

As this Court observed in its 2004 ruling upholding the secular-school limitation on the MTP, “the legislative history [of Section 2951(2)] clearly indicates” that a key reason for excluding religious schools from the program was the State’s “interest[] in concentrating limited state funds on its goal of providing secular education.” *Eulitt ex rel. Eulitt v. Me., Dep’t of Educ.*, 386 F.3d 344, 356

⁶ Similar sentiments were expressed by many opponents of the bill. *See also, e.g.*, 1 Legis. Rec. H-584 (1st Reg. Sess. 2003) (Representative Sullivan: “Public schools are what have made the cornerstone of this country. Education, free to all children We need to honor that. We need to set policy and say that we support our public schools with taxpayer’s money. We don’t support private schools, parochial private schools. It is not right.”).

(1st Cir. 2004); *see also, e.g.*, 1 Legis. Rec. H-585 (1st Reg. Sess. 2003)

(Representative Mills: “[T]here are a finite number of resources available to us. . . . I don’t see how, as a policy matter, it is possible to give . . . religious based schools dollars without taking those same dollars away from secular schools and public schools.”); *id.* at H-584 (Representative Cummings: “The resources . . . to drain off from public schools to [repeal the MTP’s religious school exclusion] will be an endangerment to the quality of our public schools . . .”).

The State’s decision to restrict private school participation in the MTP to nonsectarian private schools furthers Maine’s compelling interest in fulfilling its constitutional obligation to adequately fund its public school system.⁷ Conversely, expanding the MTP to sectarian private schools, as plaintiffs-appellants seek, would undermine the State’s core obligation under Maine’s Education Article to “maintain” and “support” its public schools. In other words, the plaintiffs-appellants seek a remedy that would substantially impede the State’s ability to “make suitable provision” for the delivery of public education to all children, as required by the Maine Constitution.

⁷ A growing body of research evidence demonstrates the causal relationship between increases in public school funding and improved outcomes for students. *See, e.g.*, C. Kirabo Jackson, et al., Nat’l Bureau of Econ. Research, *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, NBER Working Paper No. 20847 (2015), <https://bit.ly/2TfiwUH> (finding that school funding increases led to more completed years of education, higher wages, and reduced poverty).

Expansion of the MTP would be particularly harmful given the compelling evidence that current funding of the State’s public schools is not adequate. Maine public school funding levels have not recovered from the 2008 recession. As of late 2017, Maine’s public school funding remained *nine percent below* pre-recession levels, even as the cost of providing an education has risen annually.⁸ In 2013, a State-commissioned study found that the Legislature needed to increase funding for public education by \$260 million per year, which it has not done.⁹ Further, the State’s funding mechanism provides fewer resources to public schools serving high concentrations of students in poverty, a condition known as “regressive” school funding. A recent report found that the State devotes only about \$0.83 in education funding to high-poverty districts for every dollar it spends on low-poverty districts,¹⁰ even though research overwhelmingly shows that

⁸ Michael Leachman, et al., Center on Budget and Policy Priorities, *A Punishing Decade for School Funding* (Nov. 2017), <https://bit.ly/2Jns0gS>.

⁹ Christopher Cousins, *Study of Maine School Funding Recommends Additional \$260 million*, Bangor Daily News (Oct. 29, 2013), <https://bit.ly/2CqPyLT>, citing Lawrence O. Picus and Associates, *An Independent Review of Maine’s Essential Programs and Services Funding Act* (April 1, 2013), <https://bit.ly/2WcYtIz>. See also Me. State Legislature Office of Policy and Legal Analysis, *Independent Review the Essential Programs and Services Funding Act*, <https://bit.ly/2Fm1f8J>.

¹⁰ Danielle Farrie, Robert Kim & David G. Sciarra, *Making the Grade 2019: How Fair is School Funding in Your State 7* (Education Law Center 2019), <https://edlawcenter.org/assets/Making-the-Grade/Making%20the%20Grade%202019.pdf>.

(continued . . .)

impoverished students need additional programs and services to have the same opportunity to succeed in school as their more affluent peers.¹¹

This backdrop of chronic and significant shortfalls in public school funding provides crucial context for evaluating the Legislature’s decision to restrict sectarian private school participation in the MTP. If the MTP was expanded to religious schools, more students would avail themselves of the program; for example, students from SAUs eligible to participate in the MTP who already attend religious schools would be able to use the MTP to cover their tuition. Reasonable estimates of such participation show that the likely fiscal impact would be significant. According to data from the 2017-18 school year,¹² 5,091 students attended nonsectarian private schools under the MTP.¹³ The total enrollment in nonsectarian private schools in the State, including both MTP-funded students and

¹¹ See, e.g., C. Kirabo Jackson, Nat’l Bureau of Econ. Research, *Does School Spending Matter? The New Literature on an Old Question*, NBER Working Paper No. 25368 (2018), <https://www.nber.org/papers/w25368> (collecting studies demonstrating the positive effects of education spending for low-income children).

¹² Because private schools are not required to report enrollment data to the State, the most comprehensive data available is spread across three sources. See Me. Dep’t of Educ., *Student Enrollment Data, Private School Data October 1 Counts 2017/18*, <https://bit.ly/2CsDxpl>; Me. Dep’t of Educ., Search for Maine Schools, <https://bit.ly/2Oc1PZm> (sort by Public/Private: Private); and Nat’l Ctr. for Educ. Statistics, Private School Universe Survey data for 2015-16, <https://bit.ly/2HENK5r> (search by State: Maine). Data drawn from these sources has been summarized and attached to this Brief as Appendix A.

¹³ Appendix A.

(continued . . .)

non-MTP-funded students, was 9,703 students.¹⁴ This means that the MTP funded approximately 52% of nonsectarian private school students at the State-set rate of \$9,272 for elementary school and \$11,759 for secondary school.¹⁵

According to 2017-18 data, there were roughly 4,532 private sectarian school students in Maine.¹⁶ Assuming that ending the restriction on sectarian schools would result in 52% of private sectarian school students (or roughly 2,357 students) obtaining MTP funding, the cost to Maine public schools would be between \$21,854,104 and \$27,715,963 per year.¹⁷

The funding impacts of expanding the MTP are neither abstract nor irrelevant: they strike at the core of the Legislature's constitutional duty to make suitable provision to maintain and support Maine's public schools. *See* 1 Legis. Rec. H-584–85 (1st Reg. Sess. 2003) (discussing need to safeguard finite public education funding and concern that expanding MTP would divert critical resources from public schools). The State has a compelling interest of the highest order in safeguarding taxpayer dollars for exclusive use in the delivery of public education. This interest strongly militates against forcing the State to divert its limited public

¹⁴ *Id.*

¹⁵ Me. Dep't. of Educ., *2018-2019 Tuition Rates for Private Schools*, <https://bit.ly/2W3kJEu>, citing 20-A M.R.S. § 5804(2).

¹⁶ Appendix A.

¹⁷ Of course, the financial impact could be even greater if more private sectarian schools opened in Maine, or if more students attended those schools, as a result of this Court finding that sectarian schools are eligible for MTP funds.

dollars from an already under-funded system of public schools to private schools whose core purpose is providing religious education.

C. The State Has a Compelling Constitutional Interest in Ensuring All Publicly-Funded Schools Are Free from Discrimination

Eliminating discrimination in education is a further compelling interest of the highest order. *See Trinity Lutheran*, 137 S. Ct. at 2019; *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (government’s compelling interest in eradicating race discrimination in education overrode burden on religious exercise). Maine’s fundamental interest in preventing discrimination is also embedded within its constitutional obligation to “make suitable provision” for public education, and is an integral component of the statutory framework for the MTP. Maine’s anti-discrimination law, the Human Rights Act (“HRA”), applies to “any private school or educational program approved for tuition purposes,” 5 M.R.S. § 4553(2-A), which means it applies to all private schools that receive MTP funds. The HRA proscribes, *inter alia*, discrimination in educational programs “because of sex, sexual orientation, a physical or mental disability, national origin or race.” *Id.* § 4601. The legislative history of the 2003 bill to repeal Section 2951(2) also demonstrates that the limitation of the MTP to secular schools is inextricably linked to Maine’s commitment to non-discrimination. *See* 1 Legis. Rec. H-587 (1st Reg. Sess. 2003) (Representative Fischer: “[I]t’s my duty to defend these laws, to oppose discrimination and to protect the civil rights of my

constituents. Mr. Speaker, these responsibilities are the same for every member of this chamber. Public money should never be used to subsidize discrimination against the citizens, against the taxpayers, of the State of Maine.”).

Private sectarian schools, such as the schools plaintiffs-appellants seek to attend through the MTP, often have explicit policies that discriminate based on legally protected characteristics such as religion and disability.¹⁸ The State cannot respond to these policies and practices simply by requiring the sectarian schools to comply with Maine’s anti-discrimination and other education-related laws. It is clear that inclusion of these schools in the MTP would impose upon the State the heavy, complex, and time-consuming burden of monitoring and supervising private religious schools to protect student health and safety; serve students with disabilities and other education needs; promote educational quality; and meet the State’s education standards and performance objectives for its public schools, including its legal obligation to provide an inclusive, non-discriminatory school system. Even more troubling, the State would be limited in how it could regulate these schools to ensure nondiscrimination because doing so would impermissibly

¹⁸ For example, Calvary Christian Academy has a strict policy requiring all students to attend services at the school’s affiliated church or at another church “of like faith and doctrine.” Calvary Christian Academy, *School Handbook 2018-2019* 2, 4, <https://bit.ly/2W9C5ji>. Temple Academy only permits enrollment by Christian families, and its handbook states that it will not accept any child with “substantial learning problems or disabilities.” Temple Academy, *Parent/Student Handbook 2018-2019* 9, <https://bit.ly/2H8JziO>.

entangle the State in the religion-based missions of the sectarian schools or force it to fund religious endeavors. *See, e.g., Trinity Lutheran*, 137 S. Ct at 2023; *Surinach v. Pesquera De Busquets*, 604 F.2d 73 (1st Cir. 1979). The State’s constitutional and statutory duty to provide nondiscriminatory public education to *all* Maine children—which can only be achieved by maintaining the current limited scope of the MTP—is an interest of the highest order.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to affirm the judgment of the district court in favor of the defendant-appellee.

Respectfully submitted,

Date: November 6, 2019

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Appendix A – Private School Enrollment in Maine for the 2017-18 School Year

Private School Enrollment in Maine		
Religious	4,532	
Nonreligious	9,174	
Special Purpose	529	
Total Private School Students	14,235	
	All Private Nonsectarian Students	9,703
	All Private Nonsectarian Publicly-Funded School Students	5,091
	Percent Publicly-Funded	52%

See Me. Dep't of Educ., *Student Enrollment Data, Private School Data October 1 Counts 2017/18*, <https://bit.ly/2CsDxpl>; Me. Dep't of Educ., Search for Maine Schools, <https://bit.ly/2Oc1PZm> (sort by Public/Private: Private); Nat'l Ctr. for Educ. Statistics, Private School Universe Survey data for 2015-16, <https://bit.ly/2HENK5r> (search by State: Maine).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 4644 words according to the word count feature of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2019, I served the foregoing document on the following counsel of record via U.S. Mail:

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I also certify that on November 6, 2019, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will electronically serve a copy on all other counsel of record.

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