No. 20-1088

In The Supreme Court of the United States

DAVID and AMY CARSON, as parents and next friends of O.C., and TROY and ANGELA NELSON, as parents and next friends of A.N. and R.N.,

Petitioners,

v.

A. PENDER MAKIN, in her official capacity as Commissioner of the Maine Department of Education,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

JOINT APPENDIX

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Case No. 19-1746
United States Court of Appeals for the First Circuit

Date Filed	Document Description
10/01/2019	APPENDIX filed by Appellants Amy Carson, David Carson, Alan Gillis, Judith Gillis, Angela Nelson and Troy Nelson. Number of volumes: 1. Number of copies: 5. Certificate of service dated 09/30/2019. [19-1746] (GRC) [Entered: 10/01/2019 04:54 PM]
10/02/2019	APPELLANTS' BRIEF filed by Appellants Amy Carson, David Carson, Alan Gillis, Judith Gillis, Angela Nelson and Troy Nelson. Certificate of service dated 09/30/2019. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 10/09/2019. Brief due 10/30/2019 for APPELLEE Pender Makin. [19-1746] (AMM) [Entered: 10/02/2019 04:38 PM]
10/31/2019	APPELLEE'S BRIEF filed by Appellee Pender Makin. Certificate of service dated 10/30/2019. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 11/07/2019. Reply brief due 11/20/2019 for APPELLANT Amy Carson, David Carson, Alan Gillis, Judith Gillis, Angela Nelson and Troy

	Nelson. [19-1746] (AMM) [Entered: 10/31/2019 12:40 PM]
11/20/2019	REPLY BRIEF filed by Appellants Amy Carson, David Carson, Alan Gillis, Judith Gillis, Angela Nelson and Troy Nelson. Certificate of service dated 11/20/2019. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 11/25/2019. [19-1746] (AMM) [Entered: 11/20/2019 04:57 PM]
01/08/2020	CASE argued. Panel: David J. Barron, Appellate Judge; David H. Souter, Associate Supreme Court Justice and Bruce M. Selya, Appellate Judge. Arguing attorneys: Vivek Suri for US, Timothy Keller for Angela Nelson, David Carson, Amy Carson, Alan Gillis, Judith Gillis and Troy Nelson and Sarah A. Forster for Pender Makin. [19-1746] (DJT) [Entered: 01/08/2020 12:57 PM]
06/30/2020	CITATION of supplemental authorities pursuant to Fed. R. App. P. 28(j) filed by Appellants Amy Carson, David Carson, Alan Gillis, Judith Gillis, Angela Nelson and Troy Nelson. Certificate of service dated 06/30/2020. [19-1746] (TK) [Entered: 06/30/2020 06:06 PM]
07/03/2020	RESPONSE to citation of supplemental authorities pursuant to Fed. R. App. P. 28(j) [6349574-2] filed by Appellee Pender Makin. Certificate of service

	dated 07/03/2020. [19-1746] (CCT) [Entered: 07/03/2020 09:12 AM]
10/29/2020	OPINION issued by David J. Barron, Appellate Judge; David H. Souter,* Associate Supreme Court Justice and Bruce M. Selya, Appellate Judge. Published. *Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation. [19-1746] (GRC) [Entered: 10/29/2020 03:04 PM]
10/29/2020	JUDGMENT entered: This cause came on to be heard on appeal from the United States District Court for the District of Maine and was argued by counsel. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. [19-1746] (GRC) [Entered: 10/29/2020 03:07 PM]
11/19/2020	MANDATE issued. [19-1746] (GRC) [Entered: 11/19/2020 04:05 PM]

DOCKET ENTRIES

Carson, et al. v. Makin
Case No. 1:18-cv-00327-DBH
United States District Court for the District of Maine

Date Filed	Docket No.	Document Text
08/21/2018	1	COMPLAINT against ROBERT G HASSON, JR **PAYMENT OF FILING FEE DUE WITHIN 48 HOURS. IF FILING FEE IS BEING PAID WITH A CREDIT CARD COUNSEL ARE INSTRUCTED TO LOGIN TO CMECF AND DOCKET *Case Opening Filing Fee Paid* FOUND IN THE *Complaints and Other Initiating Documents* CATEGORY. CHECK PAYMENTS DUE WITHIN 48 HOURS.**, filed by ANGELA NELSON, DAVID CARSON, AMY CARSON, JUDITH GILLIS, TROY NELSON, ALAN GILLIS. (Service of Process Deadline 11/19/2018) Fee due by 8/23/2018.(bfa) (Entered: 08/21/2018)
09/12/2018	8	ANSWER to 1 Complaint,, by ROBERT G HASSON, JR.(FORSTER, SARAH) (Entered: 09/12/2018)

03/12/2019	24	LOCAL RULE 56(h) STIPULATED RECORD by AMY CARSON, DAVID CARSON, ALAN GILLIS, JUDITH GILLIS, ANGELA NELSON, TROY NELSON. (Attachments: # 1 Exhibit 1 - Opinion of Attorney General Richard S. Cohen, # 2 Exhibit 2 - Def.'s Responses to Pls.' Requests for Production, # 3 Exhibit 3 - Def.'s Responses to Pls.' Interrogatories, # 4 Exhibit 4 - Def.'s Responses to Pls.' Requests for Admissions, # 5 Exhibit 5 - Def.'s Deposition of David Carson, # 6 Exhibit 6 - Def.'s Deposition of Judith E. Gillis, # 7 Exhibit 7 - Def.'s Deposition of Troy Nelson, # 8 Exhibit 8 - Def.'s Deposition of Jeffrey Benjamin 30(b)(6), # 9 Exhibit 9 - Exh. 12 to Benjamin Dep. - Notice of Dep. of BCS 30(b)(6), # 10 Exhibit 10 - Exh. 13 to Benjamin Dep. - BCS Teacher Contract, # 11 Exhibit 11 - Exh. 14 to Benjamin Dep. - BCS Faculty Manual, # 12 Exhibit 12 - Exh. 15 to Benjamin Dep. - BCS Student Handbook, # 13 Exhibit 13 - Exh. 16 to Benjamin Dep. - BCS Financial Aid Application, # 14 Exhibit 14 - Exh. 17 to

Benjamin Dep. - Email Correspondence, # 15 Exhibit 15 - Exh. 18 to Benjamin Dep. - BCS Application for Admission, # 16 Exhibit 16 - Def.'s Deposition of Martha Boone 30(b)(6), # 17 Exhibit 17 - BCS Bible Curriculum Grades 1-8, # 18 Exhibit 18 - BCS Bible Curriculum for High School, # 19 Exhibit 19 - BCS Earth Sciences Curriculum, # 20 Exhibit 20 - BCS 4th Grade Social Studies Curriculum, # 21 Exhibit 21 - BCS 5th Grade Social Studies Curriculum, # 22 Exhibit 22 - BCS 9th Grade Social Studies Curriculum, # 23 Exhibit 23 - BCS 10th Grade Government Curriculum, # 24 Exhibit 24 - Def.'s Deposition of Denise LaFountain 30(b)(6), # 25 Exhibit 25 - Exh. 5 to LaFountain Dep. - Notice of Dep. of TA 30(b)(6), # 26 Exhibit 26 - Exh. 6 to LaFountain Dep. - TA Admissions Policy, # 27 Exhibit 27 - Exh. 7 to LaFountain Dep. - TA Teacher Employment Agreement, # 28 Exhibit 28 - Exh. 8 to LaFountain Dep. - TA Student/Parent Handbook, # 29 Exhibit 29 - Exh. 9 to LaFountain Dep. - TA Faculty Handbook, # 30 Exhibit 30 -

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03/15/2019	25	JOINT STIPULATED FACTS by AMY CARSON, DAVID CARSON, ALAN GILLIS, JUDITH GILLIS, ANGELA NELSON, TROY NELSON. (KELLER, TIMOTHY) Modified on 3/15/2019 to clean up text (mnw). (Entered: 03/15/2019)
04/05/2019	29	MOTION for Summary Judgment by A PENDER MAKIN Responses due by 4/26/2019. (FORSTER, SARAH) (Entered: 04/05/2019)
04/05/2019	31	MOTION for Summary Judgment *and Memorandum in Support Thereof* by AMY CARSON, DAVID CARSON, ALAN GILLIS, JUDITH GILLIS, ANGELA NELSON, TROY NELSON Responses due by 4/26/2019. (KELLER, TIMOTHY) (Entered: 04/05/2019)

05/01/2019	45	RESPONSE in Opposition re 31 MOTION for Summary Judgment filed by A PENDER MAKIN. Reply due by 5/15/2019. (TAUB, CHRISTOPHER) (Entered: 05/01/2019)
05/01/2019	46	RESPONSE in Opposition re 29 MOTION for Summary Judgment filed by AMY CARSON, DAVID CARSON, ALAN GILLIS, JUDITH GILLIS, ANGELA NELSON, TROY NELSON. Reply due by 5/15/2019. (KELLER, TIMOTHY) (Entered: 05/01/2019)
05/10/2019	48	REPLY to Response to Motion re 31 MOTION for Summary Judgment filed by AMY CARSON, DAVID CARSON, ALAN GILLIS, JUDITH GILLIS, ANGELA NELSON, TROY NELSON. (KELLER, TIMOTHY) (Entered: 05/10/2019)
05/10/2019	49	REPLY to Response to Motion re 29 MOTION for Summary Judgment filed by A PENDER MAKIN. (FORSTER, SARAH) (Entered: 05/10/2019)
06/24/2019	57	Minute Entry for proceedings held before JUDGE D. BROCK HORNBY: Oral Argument held

		re 29 MOTION for Summary Judgment filed by A PENDER MAKIN, 31 MOTION for Summary Judgment filed by JUDITH GILLIS, DAVID CARSON, TROY NELSON, ALAN GILLIS, AMY CARSON, ANGELA NELSON. (Court Reporter: Lori Dunbar) (clp) (Entered: 06/24/2019)
06/26/2019	58	DECISION AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON A STIPULATED RECORD re: 29 Motion for Summary Judgment; 31 Motion for Summary Judgment By JUDGE D. BROCK HORNBY. (mjlt) (Entered: 06/26/2019)
06/26/2019	59	JUDGMENT **It is hereby ORDERED that any motion for attorney's fees shall be filed within the time specified in Local Rule 54.2 of this Court.** By DEPUTY CLERK:Michelle Thibodeau. (mjlt) (Entered: 06/26/2019)
07/23/2019	61	NOTICE OF APPEAL as to 59 Judgment, 58 Order on Motion for Summary Judgment, by AMY CARSON, DAVID CARSON, ALAN GILLIS,

JUDITH GILLIS, ANGELA NELSON, TROY NELSON . (Filing fee $ 505 receipt number 0100-2052838.)

NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from our web site at http://www.med.uscourts.gov/forms/ MUST be completed and submitted to the Court of Appeals. Counsel should also register for a First Circuit CM/ECF Appellate Filer Account at https://pacer.psc.uscourts.gov/pscof/regWizard.jsf and review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/cmecf (KELLER, TIMOTHY) (Entered: 07/23/2019)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

DAVID and AMY CARSON, on their own behalf and as next friends of their child, O.C.; ALAN and JUDITH GILLIS, on their own behalf and as next friends of their child, I.G.; and TROY and ANGELA NELSON, on their own behalf and as next friends of their children, A.N. and R.N., Plaintiffs, v. ROBERT G. HASSON, JR., in his official capacity as Commissioner of the Maine Department of Education, Defendant.	Civil Action No. _____

PLAINTIFFS' COMPLAINT

(Filed Aug. 21, 2018)

INTRODUCTION

1. This is a federal civil rights action to vindicate the rights guaranteed to three Maine families by the First Amendment's Free Exercise, Establishment, and Free Speech Clauses, and the Fourteenth Amendment's Equal Protection and Due Process Clauses.

2. In Maine, local "school administrative units" (SAUs) that do not operate their own secondary schools may pay tuition for resident students to attend either a private secondary school or another SAU's secondary school. However, by statute, SAUs may not pay tuition to otherwise qualified private schools if those schools are sectarian. Me. Stat. tit. 20-A, § 2951(2).

3. Defendant Robert G. Hasson, Jr. is responsible for enforcing—and does enforce—Maine's statute prohibiting SAUs from making tuition payments on behalf of children whose parents choose to enroll them in otherwise qualified sectarian schools.

4. Plaintiffs reside within the boundaries of three different SAUs that pay tuition for students to attend secular private schools. Plaintiffs, however, send their children to otherwise qualified sectarian schools and thus do not receive tuition payments from those SAUs.

5. Defendant Hasson's enforcement of Maine's denial of a generally available public benefit—tuition payments for secondary education—to Plaintiffs because their children attend a sectarian school violates the principle that the government must not discriminate against, or impose legal difficulties on, religious individuals or institutions simply because they are religious.

6. Defendant Hasson's enforcement of the statutory prohibition against making tuition payments on behalf of families choosing an otherwise qualified sectarian school violates the Free Exercise,

Establishment, and Free Speech Clauses of the First Amendment to the U.S. Constitution as well as the Fourteenth Amendment's Equal Protection and Due Process Clauses.

PARTIES, JURISDICTION, AND VENUE

7. Plaintiffs David and Amy Carson are a married couple who have resided in Glenburn, Maine for 22 years. Their daughter O.C.[1] will be a sophomore at Bangor Christian Schools, a private, nonprofit sectarian school, in the 2018-19 school year. Bangor Christian Schools is the only school O.C. has ever attended and is the same school from which both David and Amy graduated high school. David and Amy send O.C. to Bangor Christian Schools because the school's worldview aligns with their sincerely held religious beliefs and because of the school's high academic standards.

8. Plaintiffs Alan and Judith Gillis are a married couple who have resided in Orrington, Maine for 25 years. Their youngest daughter I.G. will be a junior at Bangor Christian Schools, a private, nonprofit sectarian school, in the 2018-19 school year. Alan and Judith send I.G. to Bangor Christian Schools because the school's worldview aligns with their sincerely held religious beliefs and because of the school's high academic standards.

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[1] Pursuant to Local Rule 5.2(a)(3), Plaintiffs' minor children are identified only by their initials.

9. Plaintiffs Troy and Angela Nelson are a married couple who have resided in or near Palermo, Maine for their entire lives. Their daughter, A.N., will be a sophomore at Erskine Academy, a secular private academy in the 2018-19 school year. Their son, R.N., will be in seventh grade at Temple Academy, a private, nonprofit sectarian school in the 2018-19 school year. Troy and Angela send R.N., and would prefer to send A.N., to Temple Academy because the school offers a high-quality educational program that aligns with their sincerely held religious beliefs, but they cannot afford to send more than one child to private school at their own expense.

10. Defendant Robert G. Hasson, Jr., is the Commissioner of the Maine Department of Education (hereinafter "Department"), an agency of the State of Maine, created and empowered under Me. Stat. tit. 20-A, § 201(1) to "[s]upervise, guide and plan for a coordinated system of public education for all citizens of the State," that is headquartered in Augusta, Maine.

11. Defendant Hasson has the primary responsibility and practical ability to enforce the legal and regulatory requirements for SAUs, as well as the primary responsibility and practical ability to ensure that the Department's regulations, policies, and powers are implemented in accordance with the U.S. Constitution.

12. Defendant Hasson is sued only in his official capacity as Commissioner of the Maine Department of Education.

13. Plaintiffs' action, filed pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201(a) and 2202, seeks a declaration that Me. Stat. tit. 20-A, § 2951(2) is unconstitutional on its face and as applied to Plaintiffs, as well as an injunction enjoining Defendant Hasson from enforcing Me. Stat. tit. 20-A, § 2951(2) and enjoining Defendant from otherwise denying tuition payments to tuition-eligible students and their parents on the sole basis that an otherwise eligible private school is sectarian.

14. This Court possesses jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343(a)(3).

15. Pursuant to 28 U.S.C. § 1391(b)(1) and (2), venue is proper in this judicial district because Defendant resides within it and the events giving rise to Plaintiffs' claims occurred within it.

STATEMENT OF FACTS

16. The Maine State Legislature (hereinafter "Legislature") guarantees every school-aged child residing within the State "an opportunity to receive the benefits of a free public education." Me. Stat. tit. 20-A, § 2(1).

17. The Legislature has vested "in the legislative and governing bodies of local school administrative units" the authority to fulfill the guarantee described in paragraph 16. Me. Stat. tit. 20-A, § 2(2).

18. Accordingly, the SAUs with jurisdiction in the towns in which Plaintiffs reside—the Glenburn

and Orrington School Departments and Regional School Unit ("RSU") #12, of which Palermo is a member—are required to provide for the education of children residing within the towns of Glenburn, Orrington and Palermo through twelfth grade. *See* Me. Stat. tit. 20-A, § 1001(8).

19. Neither the Glenburn School Department, the Orrington School Department, nor RSU #12 maintains a secondary school.

20. If a SAU does not maintain a secondary school, then, pursuant to Me. Stat. tit. 20-A, § 5204(4), it must either: (a) contract with a public or private school for the education of its resident secondary students; or, (b) pay tuition for each resident secondary student at the public secondary school or private secondary school of his or her parents' choice that is "approved for the receipt of public funds for tuition purposes," Me. Stat. tit. 20-A, § 2951, and at which the student is accepted.

21. To be "approved" pursuant to Me. Stat. tit. 20-A, § 2951, a private school must:

a. meet the requirements for "basic school approval" under Me. Stat. tit. 20-A, § 2901, Me. Stat. tit. 20-A, § 2951(1);

b. be nonsectarian, Me. Stat. tit. 20-A, § 2951(2);

c. be incorporated under the laws of the State of Maine or of the United States, Me. Stat. tit. 20-A, § 3951(3);

d. comply with the state's reporting, auditing, and student assessment requirements, Me. Stat. tit. 20-A, § 2951(4)-(6); and

e. release student records to the SAU, if a student transfers from the private school, Me. Stat. tit. 20-A, § 2951(7).

22. A private school meets the requirements for basic school approval under Me. tit. 20-A, § 2901 if it meets the State's hygiene and health and safety laws, Me. tit. 20-A, § 2901(1), and is either:

a. accredited by the New England Association of Schools and Colleges, Me. tit. 20-A, § 2901(2)(A); or

b. approved "for attendance purposes," Me. Stat. tit. 20-A, § 2901(2)(B). To be approved "for attendance purposes" a private school must meet a list of requirements, such as hiring only certified teachers, providing instruction in English, and satisfying certain course and curriculum requirements. Me. tit. 20-A, § 2902.

23. A SAU that chooses to pay tuition on behalf of students, instead of contracting with a single public or private school to educate its resident secondary students, does not determine which schools receive the tuition payments. Rather, each resident secondary student's parents are solely responsible for selecting the school their child will attend.

24. Under Me. Stat. tit. 20-A, § 2951(2), a private school may not be approved for tuition purposes unless

it is "a nonsectarian school in accordance with the First Amendment of the United States Constitution." Accordingly, the Department does not permit SAUs to pay tuition on behalf of parents of otherwise tuition-eligible students if those parents choose sectarian schools for their children.

25. Neither the Glenburn School Department, the Orrington School Department, nor RSU #12 has contracted with a single public or private school for the education of their resident secondary students.

26. Because the SAUs in which Plaintiffs reside maintain neither their own secondary school nor contract with a public or private school for the education of their resident secondary students, the Glenburn School Department, the Orrington School Department, and RSU #12 must, for each of their resident secondary students, pay the tuition at the public school or private school that is approved for tuition purposes and that is selected by the resident secondary student's parents. *See* Me. Stat. tit. 20-A, § 5204(4).

27. The Glenburn School Department, the Orrington School Department, and RSU #12 are obligated to pay up to the legal tuition rate, established pursuant to Me. Stat. tit. 20-A, §§ 5805-06, to the public or private school approved for tuition purposes selected by the resident secondary student's parents.

28. As residents of the Town of Glenburn, Plaintiffs David and Amy Carson are entitled to have the Glenburn School Department pay up to the legal

tuition rate to the public or approved private secondary school that they select for their daughter O.C. to attend.

29. As residents of the Town of Orrington, Plaintiffs Alan and Judith Gillis are entitled to have the Orrington School Department pay up to the legal tuition rate to the public or approved private secondary school that they select for their daughter I.G. to attend.

30. David and Amy Carson, as well as Alan and Judith Gillis, have chosen to send their respective daughters, I.G. and O.C., to Bangor Christian Schools.

31. Bangor Christian Schools is a private, non-profit, sectarian school located in Bangor, Maine and is incorporated under the laws of Maine that educates children at the prekindergarten through 12th-grade levels.

32. Bangor Christian Schools is fully accredited by the New England Association of Schools and Colleges and thus operates as and is classified by the Maine Department of Education as meeting the requirements for "basic school approval" pursuant to Me. Stat. tit. 20-A, § 2901(1), (2)(A).

33. However, even though Bangor Christian Schools meets the basic school approval requirements for a private school under Me. Stat. tit. 20-A, § 2901(1), (2)(A) and, upon information and belief, is willing to comply with the requirements to be approved for tuition purposes under Me. Stat. tit. 20-A, § 2951, it is

ineligible to be approved for tuitioning purposes for the sole reason that the school is sectarian. *See* Me. Stat. tit. 20-A, § 2951(2).

34. Upon information and belief, but for the sectarian exclusion, Bangor Christian Schools would apply for status as a school approved for tuition and accept tuition payments from the Glenburn and Orrington School Departments.

35. As residents of the Town of Palermo, which is a member of RSU #12, Plaintiffs Troy and Angela Nelson are entitled to have RSU #12 pay up to the legal tuition rate to the public or approved private secondary school that they select for their children, A.N. and R.N., to attend.

36. Troy and Angela Nelson send their daughter A.N. to the Erskine Academy, a secular private academy in South China, Maine. RSU #12 does pay tuition for A.N. to attend Erskine Academy, a secular private academy, but Troy and Angela would prefer to send A.N. to Temple Academy, a private, nonprofit sectarian school located in Waterville, Maine that educates children at the pre-kindergarten through 12th-grade levels. However, RSU #12 would not pay tuition for A.N. to attend Temple Academy because it is a sectarian school.

37. Troy and Angela Nelson send their son, R.N., to Temple Academy and they want R.N. to continue attending Temple Academy once he matriculates to secondary school. However, RSU #12 will not pay tuition for R.N. to attend Temple Academy when he

matriculates to secondary school because Temple Academy is a sectarian school.

38. Troy and Angela cannot afford to send both of their children to Temple Academy at their own expense.

39. Temple Academy, like most sectarian schools in Maine, currently operates as an unapproved private school that annually affirms to the Maine Department of Education its intent to comply with the state's guidelines for equivalent instruction pursuant to Me. Stat. tit. 20-A, § 5001(3)(A)(1)(b).

40. Temple Academy, however, as a school that is fully accredited by the New England Association of Schools and Colleges, could satisfy the requirements for "basic school approval" pursuant to Me. Stat. tit. 20-A, § 2901(1), (2)(A) if it sought such approval. Upon information and belief, the only reason Temple Academy would consider seeking basic approval would be to become approved for tuition purposes under Me. Stat. tit. 20-A, § 2951, which is currently futile because it is not eligible to be approved for tuition purposes for the sole reason that it is a sectarian school. *See* Me. Stat. tit. 20-A, § 2951(2).

41. Upon information and belief, but for the sectarian exclusion, and upon approval of its School Board, Temple Academy would seek recognition as a basic approved school and apply for status as a school approved for tuition and accept tuition payments from the RSU #12.

42. Prior to 1980, sectarian schools could be approved for tuition purposes. However, in 1982, in response to a 1980 opinion of the Maine Attorney General concluding that paying tuition for students who attend sectarian schools violated the Establishment Clause of the U.S. Constitution, *see* Op. Me. Att'y Gen. 80-2, the Maine Legislature enacted the sectarian exclusion currently codified at Me. Stat. tit. 20-A, § 2951(2).

43. The Establishment Clause of the U.S. Constitution does not prohibit the inclusion of sectarian schools for tuitioning purposes. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

44. Because of the sectarian exclusion codified at Me. Stat. tit. 20-A, § 2951(2), neither David and Amy Carson nor Alan and Judith Gillis can have tuition paid to Bangor Christian Schools by their respective SAUs, the Glenburn and Orrington School Departments, on behalf of their respective daughters, I.G. and O.C.

45. Because of the sectarian exclusion codified at Me. Stat. tit. 20-A, § 2951(2), Troy and Angela Nelson cannot have tuition paid to Temple Academy by RSU #12, on behalf of their children A.N. and R.N.

46. But for the sectarian exclusion codified at Me. Stat. tit. 20-A, § 2951(2), Plaintiffs would have asked their respective SAUs to pay the tuition at their respective sectarian schools.

47. But for the sectarian exclusion codified at Me. Stat. tit. 20-A, § 2951(2), Plaintiffs' respective SAUs would have been required to pay tuition at their respective sectarian schools.

48. None of the Plaintiffs have requested that their respective SAUs pay tuition to their respective sectarian schools because such a request would be futile.

49. Consequently, David and Amy Carson and Alan and Judith Gillis have paid, and must continue to pay, tuition for their respective children, I.G. and O.C., to attend Bangor Christian Schools.

50. Consequently, Troy and Angela Nelson cannot enroll A.N. at Temple Academy because they cannot afford tuition payments for both of their children. Moreover, they have paid, and will be required to continue to pay, tuition for R.N. to attend Temple Academy upon his matriculation to high school.

51. If Plaintiffs prevail in this case, they will request tuition to attend their respective sectarian schools from their respective SAUs, and their respective SAUs will be required to pay such tuition to otherwise qualified sectarian schools.

COUNT I: FREE EXERCISE OF RELIGION

52. By this reference, Plaintiffs incorporate each and every allegation set forth in paragraphs 1 through 51 of this Complaint as though fully set forth herein.

53. The Free Exercise Clause of the First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law . . . prohibiting the free exercise" of religion.

54. The Free Exercise Clause applies to states and their subdivisions and municipalities through the Fourteenth Amendment to the U.S. Constitution.

55. The Free Exercise Clause protects against governmental hostility toward religion and requires neutrality toward religion.

56. Me. Stat. tit. 20-A, § 2951(2) is not neutral with respect to religion and is not a law of general applicability. Rather, it discriminates against religion on its face, in that it allows parents whose SAU does not operate its own secondary school, and instead pays tuition for students residing in the SAU to attend the public or private secondary school of the parents' choice, to direct their children's tuitioning payments to private secular schools, but not to private sectarian schools.

57. On its face and as applied to Plaintiffs, Me. Stat. tit. 20-A, § 2951(2) conditions the receipt of a public benefit on the forgoing of religious convictions and free exercise rights.

58. By denying tuition payments for children whose parents choose to send them to sectarian schools, Me. Stat. tit. 20-A, § 2951(2) forces parents either to forgo the receipt of an otherwise generally

available benefit or to forgo their right and conviction to educate their children in a sectarian school.

59. On its face and as applied to Plaintiffs, Me. Stat. tit. 20-A, § 2951(2) discriminates and imposes special disabilities based on the religious status of: (a) the schools it bars from receiving tuitioning payments; and (b) the parents whose sincerely held religious beliefs motivate them to choose sectarian schools for their otherwise tuition-eligible children.

60. On its face and as applied to Plaintiffs, Me. Stat. tit. 20-A, § 2951(2) substantially burdens the free exercise rights of parents whose conviction is to educate their child in a sectarian school.

61. Defendant has no compelling, substantial, or even legitimate interest in denying tuition-eligible families private sectarian options while allowing them private secular options.

62. Me. Stat. tit. 20-A, § 2951(2) is not narrowly tailored to achieve, nor is it rationally related to, any governmental interest Defendant purports to have.

63. The Establishment Clause of the U.S. Constitution does not prohibit SAUs from making tuition payments to private sectarian schools chosen by Plaintiffs for their children or by the parents of other tuition-eligible students for their own children.

64. A desire to achieve greater separation of church and state than is already ensured under the Establishment Clause of the U.S. Constitution cannot justify the exclusion of sectarian options in SAUs that

pay tuition for students who attend secular private schools.

65. On its face and as applied to Plaintiffs, Me. Stat. tit. 20-A, § 2951(2) violates the Free Exercise Clause of the First Amendment to the U.S. Constitution insofar as it denies sectarian options to tuition-eligible students and their parents.

COUNT II: ESTABLISHMENT OF RELIGION

66. By this reference, Plaintiffs incorporate each and every allegation set forth in paragraphs 1 through 65 of this Complaint as though fully set forth herein.

67. The Establishment Clause of the First Amendment to the U.S. Constitution provides, "Congress shall make no law respecting an establishment of religion."

68. The Establishment Clause applies to states and their subdivisions and municipalities through the Fourteenth Amendment to the U.S. Constitution.

69. The Establishment Clause requires neutrality toward religion.

70. Accordingly, government may neither favor, nor disfavor, religion over non-religion or one religion over another.

71. By denying tuition-eligible students and their parents sectarian options while allowing private secular options, Me. Stat. tit. 20-A, § 2951(2) is, on its face and as applied to Plaintiffs, hostile toward and disapproving of religion.

72. Defendant does not have a valid secular governmental purpose for denying tuition-eligible families sectarian options.

73. On its face and as applied to Plaintiffs, Me. Stat. tit. 20-A, § 2951(2) has the principal and primary effect of inhibiting religion, in that it denies tuition to children whose parents wish to send them to a sectarian school. In this regard, it conditions receipt of an otherwise available public benefit on their willingness to forgo their religious convictions and their right to educate their children in a sectarian school. It thereby creates a substantial disincentive for parents to enroll their children in sectarian schools.

74. On its face and as applied to Plaintiffs, Me. Stat. tit. 20-A, § 2951(2) violates the Establishment Clause of the First Amendment to the U.S. Constitution insofar as it denies sectarian options to tuition-eligible students and their parents.

COUNT III: FREEDOM OF SPEECH

75. By this reference, Plaintiffs incorporate each and every allegation set forth in paragraphs 1 through 74 of this Complaint as though fully set forth herein.

76. The Free Speech Clause of the First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech."

77. The Free Speech Clause applies to states and their subdivisions and municipalities through the Fourteenth Amendment to the U.S. Constitution.

78. The Free Speech Clause prohibits restrictions of speech that are based on content or viewpoint.

79. Plaintiffs' decisions concerning, and making provision for, the education of their children are a form of expression and speech protected by the Free Speech Clause.

80. On its face and as applied to Plaintiffs, Me. Stat. tit. 20-A, § 2951(2) restricts expression and speech based on content and viewpoint because it denies tuition payments only for those children whose parents wish to send them to a sectarian school.

81. Defendant has no compelling, substantial, or even legitimate interest in denying tuition-eligible families sectarian options while allowing private secular options.

82. Me. Stat. tit. 20-A, § 2951(2) is not narrowly tailored to achieve, nor is it rationally related to, any governmental interest Defendant purports to have.

83. On its face and as applied to Plaintiffs, Me. Stat. tit. 20-A, § 2951(2) violates the Free Speech Clause of the First Amendment to the U.S. Constitution insofar as it denies sectarian options to tuition-eligible students and their parents.

COUNT IV: EQUAL PROTECTION OF THE LAWS

84. By this reference, Plaintiffs incorporate each and every allegation set forth in paragraphs 1 through 83 of this Complaint as though fully set forth herein.

85. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

86. The Equal Protection Clause applies to states and their subdivisions and municipalities.

87. The Equal Protection Clause prohibits the government from discriminating on the basis of religion, which is a suspect classification for equal protection purposes.

88. By denying tuition-eligible students and their parents sectarian options while allowing private secular options, Me. Stat. tit. 20-A, § 2951(2) discriminates, facially and as applied to Plaintiffs, on the basis of religion.

89. Defendant has no compelling, substantial, or even legitimate interest in denying tuition-eligible students and their parents sectarian options while allowing private secular options.

90. Me. Stat. tit. 20-A, § 2951(2) is not narrowly tailored to achieve, nor is it rationally related to, any governmental interest Defendant purports to have.

91. By excluding sectarian options, Me. Stat. tit. 20-A, § 2951(2) makes it more difficult for one group of citizens than for all others to seek aid from the government.

92. On its face and as applied to Plaintiffs, Me. Stat. tit. 20-A, § 2951(2) discriminates on the basis of religion and therefore violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution insofar as it denies sectarian options to tuition-eligible students and their parents.

COUNT V: DUE PROCESS

93. By this reference, Plaintiffs incorporate each and every allegation set forth in paragraphs 1 through 92 of this Complaint as though fully set forth herein.

94. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

95. The Due Process Clause applies to states and their subdivisions and municipalities.

96. Among the liberties protected by the Due Process Clause is the liberty of parents to control and direct the education and upbringing of the children under their control. This liberty is fundamental.

97. On its face and as applied to Plaintiffs, Me. Stat. tit. 20-A, § 2951(2) conditions receipt of a public

benefit on the forbearance of the Plaintiffs' liberty to control and direct the education and upbringing of their children. By prohibiting tuition payments for children whose parents choose to send them to sectarian schools, it forces parents to either forgo the benefit of tuition funds for their child or forgo their right to send their child to the school of their choice.

98. Defendant has no compelling, substantial, or even legitimate interest in denying tuition-eligible students and their parents sectarian options while allowing private secular options.

99. Me. Stat. tit. 20-A, § 2951(2) is not narrowly tailored to achieve, nor is it rationally related to, any governmental interest Defendant purports to have.

100. On its face and as applied to Plaintiffs, Me. Stat. tit. 20-A, § 2951(2) violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution insofar as it denies sectarian options to tuition-eligible students and their parents.

PRAYER FOR RELIEF

Plaintiffs respectfully request the following relief:

A. A declaratory judgment by the Court that Me. Stat. tit. 20-A, § 2951(2), on its face and as applied to Plaintiffs, violates the Free Exercise, Establishment, Free Speech, Equal Protection, and Due Process Clauses of First and Fourteenth Amendments to the U.S. Constitution insofar as its excludes sectarian options from Maine's system of paying tuition for

students to attend private and public schools in towns whose SAUs do not operate a secondary school of their own;

B. A preliminary and permanent injunction prohibiting Defendant from enforcing Me. Stat. tit. 20-A, § 2951(2) or otherwise denying sectarian options to tuition-eligible students and their parents;

C. An award of attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988; and

D. Any other legal and equitable relief the Court may deem appropriate and just.

DATED: August 21, 2018

Respectfully submitted,

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*Certificates for admission *pro hac vice* have been filed contemporaneously with the filing of this complaint pursuant to

Local Rule 83.1(c). Upon his admission, Mr. Keller will serve as counsel of record.

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[SEAL]

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STATE OF MAINE

DEPARTMENT OF THE ATTORNEY GENERAL

AUGUSTA, MAINE 04333

January 7, 1980

Honorable Howard M. Trotzky
Maine State Senate
State House
Augusta, Maine 04333

Dear Senator Trotzky:

This will respond to your request for an opinion on the following question:

> "Does L.D. 691, Chapter 431, Public Law 1979, violate the First Amendment of the U.S. Constitution inasmuch as it allows individuals in school administrative districts to attend privately operated religious schools at public expense?"

Your question raises a broader issue, namely, whether public funds may be used to pay the tuition of children attending religiously operated elementary and secondary schools. In order to properly respond to your

question, it is necessary to set out the pertinent statutory provisions in some detail.

The Statutory Framework

At the present time there are several statutes which authorize school officials, in appropriate circumstances, to pay the tuition of students who attend privately operated elementary and secondary schools. Section 1 of Chapter 431 of the Public Laws of 1979 enacted a new section 213-A to Title 20 of the Maine Revised Statutes which mandates that each school administrative district maintain both an elementary and a secondary school for its pupils. 20 M.R.S.A. §213-A (2)(D) (1965-1979 Supp.) provides, however, that

> " . . . a district may meet the requirement of providing a secondary school facility by contracting . . . with a private academy for all or part of its pupils for a term of from 2 years to 10 years."

20 M.R.S.A. §912 (1965-1979 Supp.) authorizes each school administrative unit to contract with another administrative unit for elementary school privileges. In the event that an administrative unit does not maintain an elementary school and does not contract for elementary school privileges, it "may pay tuition for any student who resides with a parent or legal guardian in that administrative unit and who attends an approved elementary school." 20 M.R.S.A. §912 (1965-1979 Supp.).

Section 1289 of Title 20, as amended by P.L. 1979, c. 431, §4, permits any administrative unit which does not maintain a secondary school to authorize its local school committee to enter into contracts with the trustees of an approved private academy for secular educational services. Any contract entered into pursuant to 20 M.R.S.A. §1289 may run from one to five years. Section 1289 further provides that in those instances where an administrative unit has entered into a contract with a private academy, a joint committee may be established consisting of "a mutually agreed upon number of members of the school committee or board of directors of each contracting administrative unit chosen from their own membership and an equal number of trustees of the academy." The responsibilities and powers of the joint committee are set out in 20 M.R.S.A. §1289 (1965-1979 Supp.) and include the authority to select and employ the teachers at the academy, to fix their salaries, to arrange the course of study and "to supervise the instruction and to formulate and enforce proper regulations pertaining to other educational activities of the school." Finally; with respect to the financial arrangements pertaining to a contract made pursuant to 20 M.R.S.A. §1289, the tuition liability of the contracting administrative unit is the same as if the unit maintained an approved secondary school.

In the event that an administrative unit does not maintain an approved secondary school and does not contract for secondary school privileges, a student who resides within the unit "may attend any approved

secondary school to which he may gain admission." 20 M.R.S.A. §1291 (1965-1979 Supp.) as amended by P.L. 1979, c.431, §5. Additionally, 20 M.R.S.A. §1291 permits a student to attend "some other approved secondary school to which he may gain admission for the purpose of studying an occupational course, a mathematics or science course or a foreign language course where the secondary school within his administrative unit does not offer a sufficient number of those courses.[1]

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[1] 20 M.R.S.A. §1291 (1965-1979 Supp). provides in pertinent part:

> "Any youth whose parent or legal guardian maintains a home for his family in an administrative unit that maintains, or contracts for school privileges in, an approved secondary school which offers less than 2 approved occupational courses of study, and who has met the qualifications for admission to the high school in his town, may elect to attend some other approved secondary school to which he may gain admission for the purpose of studying an occupational course not offered or contracted for by the administrative unit of his legal residence. Any youth whose parent or legal guardian maintains a home for his family in an adminstrative unit that maintains, or contracts for school privileges in, an approved secondary school, and who has met the qualifications for admission to the high school in his unit, may elect to attend some other approved secondary school in the State to which he may gain admission for the purpose of studying or of completing at least a 2-year course in mathematics or science when such courses are not offered or contracted for by the administrative unit of his legal residence or a foreign language when the unit where he resides offers less than 2 approved foreign language courses, . . . "

Finally, 20 M.R.S.A. §1454 provides that "[a]ny youth whose parent or legal guardian maintains a home for his family in the unorganized territory of this State and who may be judged by the commissioner qualified to enter an approved secondary school may attend any such school in the State to which he may gain entrance . . . ."

To summarize the statutory provisions in question, 20 M.R.S.A. §213-A (1965-1979 Supp.) permits a school administrative district, which does not maintain a secondary school facility, to contract with a private academy to provide secondary school privileges for its pupils. 20 M.R.S.A. §912 (1965-1979 Supp.) authorizes a school administrative unit, which does not maintain an approved elementary school and does not contract with another unit for such services, to pay a student's tuition for attendance at "an approved elementary school." 20 M.R.S.A. §1289 (1965-1979 Supp.) authorizes a school administrative unit, which does not maintain an approved secondary school, to contract with a private academy to provide for the schooling of all or some of its pupils. 20 M.R.S.A. §1291 (1965-1979 Supp.) permits a student to attend any approved secondary school to which he may gain admission in the event that his school administrative unit does not support, maintain or contract for secondary schooling for its pupils. Additionally, 20 M.R.S.A. §1291 permits a student, in appropriate circumstances, to attend an approved secondary school to which he may gain admission for the purpose of studying an occupational course, a mathematics or science course or a foreign

language course. Finally, 20 M.R.S.A. §1454 (1965-1979 Supp.) permits, in certain circumstances, a student from the unorganized territory to attend an approved secondary school, to which he may gain admission, at State expense.

Before addressing your specific question regarding the constitutional issue, it is necessary to determine whether the statutory provisions referred to above apply to religiously operated elementary and secondary schools or whether the statutory authority of school administrative districts and units to enter into contracts with and pay the tuition of students at non-public schools is limited to private non-religious elementary and secondary schools.

It is a well-established principle that the courts will avoid addressing questions raising constitutional issues unless it is impossible to do so. See, e.g., Johnson v. Maine Wetlands Control Board, Me., 250 A.2d 825, 827 (1969); State v. Good, Me., 308 A.2d 576, 579 (1973); Morris v. Goss, 147 Me. 87, 93, 83 A.2d 556 (1951). While the judiciary has both the duty and the power to invalidate unconstitutional legislation, State v. Butler, 105 Me. 91; 73 A. 560 (1909), it has an equally important responsibility to exercise that power with caution and "only when there are no rational doubts which may be resolved in favor of the constitutionality of the statute. . . ." Crommett v. City of Portland, 150 Me. 217, 231, 107 A.2d 841 (1954) quoting State v. Vahlsing, 147 Me. 417, 430, 88 A.2d 144 (1952). As stated by former Chief Justice Dufresne, "[t]he cardinal principle

of statutory construction is to save, not to destroy." State v. Davenport, Me., 326 A.2d 1, 6 (1974).

With respect to any legislative enactment, there is a strong presumption of constitutionality. State v. S.S. Kresge, Inc., Me., 364 A.2d 868, 872 (1976). In construing legislation, the duty of the court is to determine whether the provisions of the statute "are susceptible of a reasonable interpretation which would satisfy constitutional requirements." Portland Pipe Line Corp. v. Environmental Improvement Commission, Me., 307 A.2d 1, 15 (1973), app. dismissed, 414 U.S. 1035 (1973). If at all possible, a statute should be construed, in a reasonable manner, so as to avoid rendering it unconstitutional. State v. Fitanides, Me., 373 A.2d 915, 920-21 (1977). Where a statute is reasonably susceptible of two interpretations, the court is bound to adopt that interpretation which sustains the statute's constitutionality. See Portland Pipe Line Corp. v. Environment Improvement Commission, supra; In re Stubbs, 141 Me. 143, 147, 39 A.2d 853 (1944).

With respect to sections 213-A, 912, 1289, 1291 and 1454 of Title 20, the statutes are all silent as to whether school administrative units and districts are authorized to pay the tuition of students attending religiously operated elementary and secondary schools. Each statute in question authorizes, in appropriate cases, either a school administrative unit or district to enter into contracts with and pay the tuition for students at privately operated elementary and secondary schools. One interpretation of these statutes is that administrative units and districts may contract with any

private elementary or secondary school, including religiously operated ones. On the other hand, an equally reasonable interpretation of these statutory provisions is that the authority of administrative units and districts to enter into such contracts is limited to private, non-sectarian elementary and secondary schools.

In view of the doctrine that statutes should be construed, if reasonably possible, so as to avoid rendering them unconstitutional, it is now necessary to consider whether the practice of using public funds to pay tuition for students attending religiously operated elementary and secondary schools is constitutionally permissible.[2]

The Establishment Clause

The First Amendment to the United States Constitution[3] provides in relevant part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

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[2] It is our understanding that as of October 1, 1979, 46 pupils were attending religiously operated elementary schools and 239 pupils were attending religiously operated secondary schools at public expense pursuant to 20 M.R.S.A. §§213-A, 912, 1289, 1291 or 1454 (1965-1979 Supp.).

[3] The provisions of the First Amendment have been made binding on the states through the Fourteenth Amendment. See Murdock v. Pennsylvania, 319 U.S. 106 (1943).

Article I, §3 of the Maine Constitution contains a similar prohibition.[4]

Any analysis of the First Amendment's "Establishment Clause" and its interrelationship with state attempts to provide public aid, either directly or indirectly, to religiously operated schools, must necessarily begin with the United States Supreme Court decision in Everson v. Board of Education, 330 U.S. 1 (1947). In Everson, the Court upheld a New Jersey statute authorizing reimbursement to parents for the costs of

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[4] Article I, §3, Me. Const., provides:

> "All men have a natural and unalienable right to worship Almighty God according to the dictates of their consciences, and no one shall be hurt, molested or restrained in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship; --and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance."

The Maine Law Court has held that the prohibitions in Article I, §3 are "no more stringent" than those embodied in the First. and Fourteenth Amendments to the United States Constitution. Squires v. City of Augusta, 155 Me. 141, 164, 153 A.2d 80, 88 (1959).

transporting their children to school. The statute also permitted reimbursement for transportation expenses to parents whose children attended parochial schools. In arriving at its decision, the Court recognized the inherent tension between the "Establishment Clause" and the "Free Exercise Clause" of the First Amendment. As stated by the Court:

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion."

Id. at 16.

Acknowledging that the "establishment clause" was intended to erect "'a wall of separation between church and State,'" the Court concluded that providing bus transportation to all children, including those attending religious schools, did not offend any constitutional principle embodied in the First Amendment. Id. at 16 quoting Reynolds v. United States, 98 U.S. 145, 164. In essence, the Court concluded that providing transportation to all school children did not have either the purpose or effect of promoting or establishing religion.[5]

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[5] The constitutionality of using public money to provide transportation to children attending religious schools was recently

In Abington School District v. Schempp, 374 U.S. 203, 222 (1963) the Supreme Court attempted to formulate a general rule regarding establishment clause cases.[6] The Court stated:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Applying the test announced in Schempp, the Court in Board of Education v. Allen, 392 U.S. 238 (1967) upheld a New York statute authorizing the loan of approved secular textbooks to all school children, including those attending parochial schools. While the Court recognized that textbooks are significantly different from school buses, the Court also noted that "each book loaned must be approved by the public school authorities; only secular books may receive approval." 392 U.S. at 244-45.

In its landmark decision in Lemon v. Kurtzman, 403 U.S. 602 (1971) (hereinafter referred to as Lemon

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reaffirmed in Cromwell Property Owners Association v. Toffolon, ___ F.Supp. ___ (D.Conn., Docket No. Civil H-78-475, Filed August 31, 1979).

[6] Abington School District v. Schempp, supra involved Bible reading in public schools. See also Engel v. Vitale, 370 U.S.

I), the United States Supreme Court added a third and possibly a fourth criterion to the "purpose and effect" test it had adopted and followed in Schempp and Allen. In Lemon I, the Court held that in order for a statute to survive a challenge that it is unconstitutional because it authorizes state aid to religiously affiliated schools, not only must it have a secular legislative purpose and a primary or principal effect which neither advances nor inhibits religion, it must also not foster an excessive governmental entanglement with religion. Additionally, the Court suggested that issues involving the use of public money to aid religious schools carry the potential for political divisiveness in local communities. This danger of political divisiveness, the Court added, is at odds with the fundamental principle that church and State remain separate.

The analysis formulated in Lemon I has been utilized by the Court in all of the subsequent cases raising establishment clause challenges. In evaluating a challenged statute, it should be emphasized that the First and Fourteenth Amendments prohibit laws "'respecting an establishment of religion' even though its consequence is not to promote a 'state religion.'" Committee For Public Education. v. Nyquist, 413 U.S. 756, 771 (1972). On the other hand, "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone constitutionally invalid." Id.

An examination of each of the tests articulated in Lemon I follows.

The "Purpose" Test

The "purpose" test enunciated by the United States Supreme, Court is perhaps the easiest to apply. Pursuant to this standard, the Court attempts to ascertain the purpose which the legislative enactment was designed to achieve. In most cases involving state aid to religious schools, it is clear one way or the other, what purpose the statute was intended to serve. In the most recent cases, the Court has had no need to use the "purpose" test since it has been clear that a particular statute had a secular purpose, i.e., providing for the education of all school children. However, in some relatively early decisions the Court did strike down state statutes because their purposes were to promote religious activity. See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1969) (statute prohibiting the teaching in public schools of the theory of evolution); Engle v. Vitale, 370 U.S. 421 (1962) (statute requiring prayer reading in public schools); Abington School District v. Schempp, 374 U.S. 203 (1963) (statute requiring Bible reading in public schools); McCollum v. Board of Education, 333 U.S. 203 (1948) (statute authorizing "release time" from public education for religious instruction in public school buildings). Compare Zorach v. Clauson, 343 U.S. 305 (1952) in which the Court upheld the constitutionality of a statute authorizing "release time" from public education for religious instruction off public school premises.

It is fair to say that with respect to cases involving public aid, in varying forms, to religious educational

institutions, the Court has rarely used the "purpose" test to invalidate a state statute.

The "Primary or Principal Effect" Test

The "primary effect" test formulated by the United States Supreme Court to evaluate statutes claimed to be violative or the Establishment Clause is, perhaps, the most difficult test to understand and apply. In many cases, its contours overlap with those of the "entanglement" test. Nevertheless, it is fair to say that those cases which have discussed and applied the "primary effect" test have emphasized a common element. That element is that the educational institutions receiving public aid were pervasively religious, such that it would be impossible to identify public aid as being used for purely secular purposes. The pervasively religious atmosphere at such institutions has led the Court to conclude that public aid for purely secular functions cannot be distinguished from the sectarian function performed by the religious institution and therefore has a primary effect of aiding and/or promoting that religious atmosphere. A few examples may clarify the "primary effect" rationale.

In Hunt v. McNair, 413 U.S. 734 (1973) the Court considered a South Carolina statute which was designed to assist higher education institutions in constructing, financing and re-financing building projects through revenue bonds. The law was designed to benefit all institutions of higher education, including those operated by religious groups. The advantage of the

statute was that the college or university would borrow money at low interest and would not have to pay income tax on that interest. The law was challenged on First Amendment' grounds when a Baptist College attempted to apply for benefits under it. In speaking of the "primary effect" test, the Court observed:

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."

Id. at 743.

In Hunt, the Court found no evidence that the college was pervasively religious and therefore held that the law, as applied in this case, did not have a primary effect of advancing religion.

Similar results were reached in Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976) and Tilton v. Richardson, 403 U.S. 672 (1970). In Roemer, a state statute authorized the payment of public funds to "any private institution of higher learning within the State of Maryland." The act specifically provided that the funds could not be used for sectarian purposes and an auditing procedure was established to ensure that this provision of the act was not violated. Moreover, funds were not available to institutions which awarded only "seminarian or theological" degrees. In

rejecting a claim that the primary effect of the law advanced religion, the Court noted that while the religiously operated colleges had some aspects of sectarian influence, they were not pervasively sectarian. The Court was not persuaded that the institutions in question were so permeated with religion that their sectarian aspects could not be separated from their secular functions.

Similarly, in Tilton the Court upheld the constitutionality of Title I of the Higher Education Facilities Act of 1963 (20 U.S.C. §§711-721). This Act provided federal grants for the construction of buildings and facilities used exclusively for secular educational purposes. The Act was challenged when several catholic colleges applied for construction grants. The Court rejected the "primary effect" argument "that religion so permeates the secular education Provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." 403 U.S. at 680.

On the other hand, there are several cases in which the Supreme Court has employed the "primary effect" rationale to strike down statutes providing aid to sectarian educational institutions. For example, in Meek v. Pittenger, 421 U.S. 349 (1975) the Court struck down a portion of a Pennsylvania statute which authorized private elementary and secondary schools, including religious ones, to receive instructional material and equipment. Although the instructional material and equipment was secular in nature, the Court invalidated the statute because its primary effect

advanced religion in view of "the predominantly religious character of the schools benefitting from the Act." Id. at 364. The Court stated:

> " . . . faced with the substantial amounts of direct support authorized by [the] Act . . . , it would simply ignore reality to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and then characterize [the] Act . . . as channelling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion." Id. at 365-66 quoting Hunt v. McNair, 413 U.S. at 743.

Once again, a similar result was reached in Wolman v. Walter, 433 U.S. 229 (1977) in which the Court struck down a portion of a state statute which authorized Payment to private religious elementary and secondary schools for field trip supervision. Using the "primary effect" rationale as well as the "entanglement" test, the Court concluded that it was simply impossible to separate the secular functions performed by the schools from their sectarian ones.[7]

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[7] It should also be noted that the Wolman Court invalidated a portion of the statute which authorized pupils, or their parents, in religious schools to receive secular instructional material and equipment. In Meek, the material and equipment was given

In Committee For Public Education v. Nyquist, 413 U.S. 756 (1972) and Levitt v. Committee For Public Education, 413 U.S. 472 (1972) the Court invalidated two New York statutes on the ground that their primary effect advanced religion. In Nyquist, the statute authorized direct payments to private elementary and secondary schools, including religious ones, for "maintenance and repair" of school buildings. The statute also authorized tuition reimbursements and a tax break directly to parents who sent their children to non-public schools.[8] The Court concluded that the secular and sectarian purposes of the religious schools were *so* intertwined that there was no practical way to keep them separate. With respect to the "maintenance and repair" provisions of the statute, the Court stated:

> "No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions . . . Absent appropriate restrictions on expenditures . . . , it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of

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directly to the schools. The Court did not consider this distinction to be relevant for First Amendment purposes.

[8] In striking down the "tax benefits" portion of the New York statute, the Court distinguished its ruling in Walz v. Tax Commission, 397 U.S. 664 (1969) which upheld the constitutionality of property tax exemption to religious organizations for properties used solely for religious worship.

> sectarian elementary and secondary schools." 413 U.S. at 774.

With respect to the tuition reimbursement section of the act, the Court concluded that it, too, had a primary effect that advanced religion. The Court first observed that a direct payment of money to the school would be invalid under the establishment clause. The Court was unimpressed with the argument that the statute was saved because the reimbursements were made to the parents not to the schools. "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools . . . [T]he effect of the aid is unmistakably to provide desired financial support for non-public, sectarian institutions."[9] Id. at 783. The decision in Nyquist was followed in Sloan v Lemon, 413 U.S. 825 (1973) in which the Court struck down a Pennsylvania statute authorizing tuition reimbursements to parents who sent their children to non-public sectarian schools.

Finally, in Levitt v. Committee For Public Education, supra, the Court struck down a New York statute which authorized direct money grants to non-public elementary and secondary schools to perform "testing and recordkeeping" which was required by state law. Using the "primary effect" test, the Court ruled that the statute "constitutes an impermissible aid to

[9] The Court rejected the contention that tuition reimbursements were, for First Amendment purposes, different from direct tuition payments.

religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities." 413 U.S. at 480.

As is apparent from the foregoing, the focus of the "primary effect" test is upon the character of the religious institutions involved. Where the institution is dedicated to the inculcation of religious beliefs, state aid to that institution presents a serious risk of having a primary effect of advancing religion simply by virtue of the fact that it is practically impossible to Isolate secular functions or purposes from the overriding role of the sectarian school to promote the tenets of such religious beliefs. This explains why state aid to sectarian colleges and universities has generally. been upheld while state aid to sectarian elementary and secondary schools is more likely to be viewed as violating the primary effect test. The United States Supreme Court has acknowledged that there are "significant differences between the religious. aspects of church-related institutions of higher learning and parochial elementary and secondary schools." Tilton v. Richardson, 403 U.S.at 685; Committee For Public Education v. Nyquist, 413 U.S. at 777 n.32; Hunt v. McNair, 413 U.S. at 734. There tends to be a considerable amount of academic freedom at church-related colleges and universities and the Court has taken notice of the fact that, generally, such institutions of higher learning do not have a pervasive religious atmosphere. Moreover, church-related colleges and universities usually do not have as their principal function the indoctrination of religious beliefs. Finally, the age of college

students is a factor supporting the Supreme Court's view that public funds will not be used to influence one's religious beliefs. Accordingly, it is much easier in the college setting to separate the school's secular functions from its religious mission.

The same cannot be said for church-related elementary and secondary schools. Such schools exist for the very purpose of teaching and promoting the tenets of a particular religious faith. The process of education at religiously operated elementary and secondary schools is inextricably bound to the task of indoctrinating pupils in the principles of their faith. That task or mission permeates the entire educational curriculum and is directed at an age group which is particularly susceptible to religious indoctrination. It is this pervasiveness' of religious purpose which is at the heart of the "primary effect" test.

The "Entanglement" Test

The "entanglement" test appears to have first surfaced in the Supreme Court's decision in Lemon v. Kurtzman, 403 U.S. 602 (1971). In applying the "entanglement" test, the Court listed the following factors to be considered: (a) the character and purposes of the institution receiving state aid, i.e., college or elementary or secondary school; (b) the nature of the aid provided (e.g., one lump sum payment or annual grants); (c) the resulting relationship between the sectarian institution and the government. The statutes at issue in Lemon I involved a Rhode Island law which provided

for a direct 15% reimbursement to teachers in non-public elementary and secondary schools, and a Pennsylvania law giving a limited reimbursement to non-public elementary and secondary schools for teachers salaries, text-books and instructional materials. Obviously, the salary reimbursements went only to teachers in purely secular subjects.

The Court took notice of the distinct possibility that a teacher in a non-public school will have difficulty in preventing his religious beliefs from "seeping" into his course of instruction.

> "We . . . recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine."

Id. at 618-619.

In order to assure that non-public school teachers, who have received salary reimbursements, are abiding by the First Amendment and are not preaching religious doctrines in the classroom, the state would have to engage in "[a] comprehensive, discriminating and continuing . . . surveillance." "Unlike a book, a teacher cannot be inspected once so as to determine the extent . . . of his or her personal beliefs and subjective acceptance of the limitations imposed by the First

Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church." Id. at 619. The Court in Lemon I emphasized that the state must be "certain" that "subsidized teachers do not inculcate religion." Id. See also Meek v. Pittenger, 421 U.S. 349, 370-71. To be "certain" that non-public school teachers are not using the classroom to instill religious beliefs, there would have to be almost constant monitoring of church-related schools. It is this monitoring or surveillance by the government which entangles it, to an excessive degree, with the church.

The "entanglement" test is usually applied in situations where the so-called "human factor" is involved; e.g., classroom teachers and other professionals providing diagnostic tests and therapeutic services. See Meek v. Pittenger, supra; Wolman v. Walter, 433 U.S. 229 (1977). It is these types of activities which require the most surveillance. Moreover, these activities tend to be funded on a continuous basis, rather than on a lump sum basis, thereby adding to the government's entanglement with church-sponsored schools.

The "Political Divisiveness" Test

In Lemon I the Court also referred to the "potential for political divisiveness" which statutory programs providing for aid to church-related schools are likely to generate. It is unclear whether the "political divisiveness" language in the Court's opinion was intended to be an independent test under the

Establishment Clause or whether it is part of the "entanglement" test. In any event, it has been referred to by the Court in Lemon I, Roemer and Nyquist. The underlying premise of the "political divisiveness" factor is that state aid to church-related schools is likely to engender very strong political views about the propriety of using public money to aid church-related schools. This is particularly true with respect to elementary and secondary school education since it is an important issue of local concern. The Court emphasized that political divisiveness and debate along religious lines was one of the principal evils which the First Amendment was intended to eliminate. Finally, the Court noted that the potential for political differences along religious lines is more likely to occur where the state aid is of a continuing nature.

Analysis

Having set forth the criteria by which a statutory enactment will be measured in order to determine whether it offends the First Amendment's Establishment Clause, it is now possible to examine the practice of contracting with sectarian elementary and secondary schools in light of these criteria.[10]

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[10] Implicit in this statement is- the question of what is meant by the term "sectarian". As used in this opinion, the term "sectarian" refers to those institutions which are characterized by a pervasively religious atmosphere and whose dominant purpose is the promotion of religious beliefs. This issue is discussed in greater detail in a later section of this opinion.

1. The "Purpose" Test

Initially, there would appear to be no difficulty in concluding that the practice of contracting with sectarian schools for educational services has a secular purpose. The underlying purpose of such a practice would appear to be the general education of all elementary and high school students. This purpose is certainly secular in nature and would not violate the "purpose" test under the First Amendment. See, e.g., Sloan v. Lemon, 413 U.S. 825, 829-30 (1973); Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. at 773; Lemon v. Kurtzman, 403 U.S. 602 (1971).

2. The "Primary Effect" Test

The application of the "primary effect" test to the practice of contracting for educational services with religiously operated elementary and secondary schools, presents a much thornier question. In applying the "primary effect" test to the various forms of statutory aid which have been reviewed by the United States Supreme Court, the critical factor which has emerged is the character of the institutions which receive public funds. See, e.g., Wolman v. Walter, 433 U:S. 229 (1977); Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1974). Where an institution is characterized by a pervasively religious atmosphere, the receipt of public funds by that institution, either directly or indirectly, presents a significant risk that the primary effect of such state aid

will be to advance religion in contravention of the Establishment Clause of the First Amendment.

Assuming that a contract is made with a sectarian school for educational services, the effect of such a contract will be to expend public funds to send students to a religiously operated elementary or secondary school. While it is contemplated that such a contract would involve only secular educational services, it would seem highly unlikely that the school's secular 'functions could be separated from its predominantly religious purpose. It is difficult to imagine how the practice of contracting for educational services with religious schools differs from the tuition reimbursement program invalidated by the United States Supreme Court in Committee for Public Education v. Nyquist, supra. Indeed, the effect of such a contract is to make a direct payment of public money to a sectarian school for the purpose of providing educational services to elementary and high school students. In striking down a New York statute which attempted to provide tuition reimbursement to parents who sent their children to nonpublic sectarian schools, the United States Supreme Court stated:

> "There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools. . . ."

Committee for Public Education v. Nyquist, 413 U.S. at 780.

In view of the foregoing, it is our conclusion that the practice of contracting with and paying the tuition of students at sectarian elementary and secondary schools has a primary effect which advances religion and, therefore, violates the Establishment Clause of the First Amendment.

3. The "Entanglement" Test

The practice fares no better under the "entanglement" test adopted by the United States Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971). In those instances where elementary and secondary students attend sectarian schools at public expense, the state would have to engage in a program of constant surveillance in order to be "certain" that non-public school teachers were not allowing religious instruction to "seep" into the secular educational curriculum. It is such excessive surveillance which entangles the state in the affairs of church-related schools such that the First Amendment is violated. Once again, the fact is that public funds would be expended to send children to a sectarian school and there would be no effective means of assuring that the wall of separation between church and state had not been breached. Accordingly it is our conclusion that the practice of contracting with sectarian schools for the purchase of educational services results in excessive entanglement between the state and such sectarian schools and therefore violates the First Amendment's Establishment Clause.

4. The "Political Divisiveness" Test

Finally, the practice in question, when applied to sectarian elementary and secondary schools, could very well engender the type of political divisiveness along religious lines which the Supreme Court has indicated the First Amendment seeks to avoid. Members of a local community tend to divide sharply on religious issues and it is easy to envision a situation in which members of a local community differ widely on whether public money should be expended to send students to religiously operated elementary and secondary schools. Such political divisiveness could be exacerbated by the fact that the duration of some contracts with sectarian schools could extend over a period of years.

Based upon the decisions of the United States Supreme Court, as examined above, it is our conclusion that the practice of paying the tuition of students attending sectarian elementary and secondary schools violates the Establishment Clause of the First Amendment to the United States Constitution.

State Court Decisions

As additional support for our conclusion it should be observed that the Justices of the Maine Supreme Court have issued an opinion on proposed legislation which would have authorized the making of contracts with sectarian schools for secular educational services. In 1970 the 104th Legislature considered enacting L.D. 1751 (H.P. 1394) being "An Act Creating the Nonpublic

Elementary Education Assistance Act". This proposed Act would have permitted administrative units "to contract and pay for secular education service." The use of this contractual authority was limited to situations where the local school committee had determined that the closing of a non-public school would have an adverse impact on the local tax rate or on classroom space in the public school system. In view of the possibility that the proposed Act implicated First Amendment concerns, the Legislature requested an advisory opinion from the Justices of the Supreme Judicial Court. In Opinion of the Justices, Me., 261 A.2d 58 (1970), the Justices responded with four of them concluding that the proposed legislation violated the Establishment Clause and two of them reaching the opposite result.[11]

Mr. Chief Justice Williamson and Justices Marden and Weatherbee were of the opinion that the proposed Act ran afoul of both the "purpose" and the "primary effect" tests.

> "Budgets for the secular instruction may be technically separable from the budget of the entire operation of the [sectarian] schools, but the institution is an inseparable whole, which is strengthened in its institutional

[11] It should be noted that the Opinion was issued while Lemon v. Kurtzman was pending before the United States Supreme Court. Consequently, the Justices did not have the benefit of a clear application of the "entanglement" test. All of the Justices appeared to have recognized the importance of the Lemon case. In fact, Mr. Chief Justice Williamson was of the opinion that Lemon would be totally dispositive of the issue.

> purpose when it is strengthened in any of its departments by outside financial assistance."

261 A.2d at 67.

Mr. Justice Webber reached a similar conclusion in, a separate answer in which he stated that "my concern is that what in the legislative proposal is termed a contract for secular educational service will be viewed as in reality a method for providing public aid to a sectarian school in support of all of its purposes." 251 A.2d at 69.

Former Chief Justice Dufresne and Mr. Justice Pomeroy were of the view that the proposed Act did not offend the First Amendment. Both Justices relied heavily on the lower court's decision in Lemon v. Kurtzman which was later reversed by the United States Supreme Court. In view of the decision in Lemon I, and later Supreme Court cases, it is probable that the opinions of Justices Dufresne and Pomeroy would be different today.

While there are many differences between the proposed Act examined by the Supreme Judicial Court in Opinion of the Justices, supra, and the practice now under consideration, they both involved contracts with sectarian schools for secular educational services. Based upon the Justices Opinion and the Supreme Court's decisions in Lemon v. Kurtzman and Committee for Public Education v. Nyquist, there would appear to be a strong likelihood that the Law Court, if given the opportunity, would invalidate the practice

of contracting for educational services with sectarian elementary and secondary schools.

Finally, courts in other jurisdictions have uniformly held that statutes authorizing contracts with sectarian schools for secular educational services offend the Establishment Clause of the First Amendment. See, e.g., John v. Sanders, 319 F.Supp. 421, 430 (D.Conn.), aff'd, 403 U.S. 955 (1970); Opinion of the Justices, 357 Mass. 836, 258 N.E.2d 779 (1970); In Re Proposal C, 384 Mich. 390, 185 N.W.2d 9 (1971); Swart v. South Burlington Town School District, Vt., 167 A.2d 514 (1961).

Conclusion

The following will summarize our conclusions regarding the constitutionality of the practice of using public funds to contract with and pay for the tuition of students at sectarian elementary and secondary schools. We conclude: that the practice has a secular purpose and does not offend the First Amendment on that ground; that the practice has a primary effect which advances religion and violates the Establishment Clause of the First Amendment on that ground; that the practice produces excessive entanglement between the State and sectarian schools, and, consequently, violates the First Amendment on that ground. Finally, we note that the practice carries the potential for generating political divisiveness along religious lines and may violate the First Amendment on that basis also.

As discussed previously,[12] it is a fundamental canon of statutory construction that legislation is to be interpreted, if possible, so as to avoid rendering it unconstitutional. Where a statute is susceptible of two interpretations, the courts are bound to adopt that interpretation which sustains the statute's constitutionality. In view of our conclusion that the practice of contracting with sectarian elementary and secondary schools for educational services offends the First Amendment, it is now necessary to determine whether sections 213-A, 912, 1289, 1291 or 1454 of Title 20 authorize school administrative units or districts to engage in such a practice. Each statute authorizes administrative units or districts or the Commissioner of Education, in limited situations, to pay the tuition for students at a private academy or at some other approved elementary or secondary school. None of the statutes explicitly include or exclude sectarian schools from operation. To interpret the statutes as permitting school administrative units and districts to contract with sectarian schools for educational services would render them at least partially unconstitutional. On the other hand, an interpretation does not authorize such a practice is a reasonable construction of the statutes and is consistent with the favored rule that statutory enactments should be construed, whenever possible, so as to uphold their constitutional validity.

In light of our conclusion that the practice of contracting with and paying the tuition for students at

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[12] See pages 3-5 supra.

sectarian elementary and secondary schools is unconstitutional, we interpret 20 M.R.S.A. §§213-A, 912, 1289, 1291 and 1454 (1965-1979 Supp.) as not authorizing such a practice.[13] As so interpreted, it is our conclusion that sections 213-A, 912, 1289, 1291 and 1454 of Title 20 do not violate the First Amendment.

Application of Opinion

During the course of this opinion, we have repeatedly referred to "sectarian" elementary and secondary schools and have concluded that the practice of using public funds to send students to such schools is unconstitutional. As used in this opinion and in the decisions of the United States Supreme Court, the term "sectarian" refers to those institutions which are characterized by a pervasively religious atmosphere and whose dominant purpose is the promotion of religious beliefs. The question of whether a particular school is pervasively religious in nature is a factual one and

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[13] Even assuming that the statutes are interpreted as permitting school administrative units and districts to contract with sectarian schools, our conclusion that the practice is unconstitutional would remain unchanged. Moreover, any provision of the statutes deemed violative of the First Amendment would be severable from other statutory provisions. See 1 M.R.S.A. §71(8) (1979) which provides:

> "The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application-of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application."

must be determined on an individual basis. See, e.g., Weiss v. Bruno, 82 Wash.2d 199, 409 P.2d 973, 979-89 (1973). It is, of course, conceivable that. there may exist elementary and secondary schools which are religiously affiliated to a nominal degree only and are not necessarily characterized by a pervasively religious atmosphere. Within the context of this opinion, however, it is simply not possible to examine each religiously affiliated school to determine whether it is pervasively sectarian for First Amendment purposes.[14]

I hope this information is helpful to you. Please feel free to call upon me if I can be of further assistance.

Sincerely,

/s/ Richard S. Cohen
RICHARD S. COHEN
Attorney General

[14] The United States Supreme Court has had no difficulty in concluding that those institutions which might be described as typical "parochial" or "religious" schools are pervasively sectarian. As noted above, however, there may be situations where a school is only nominally affiliated with a religious organization, and such nominal affiliation mov he insufficient to characterize the school as a pervasively sectarian institution.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

DAVID and AMY CARSON, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 18-cv-00327 DBH
A. PENDER MAKIN, in her official capacity as Commissioner of the Maine Department of Education,	)	
Defendant.	)	

JOINT STIPULATED FACTS

(Filed Mar. 15, 2019)

Solely for purposes of resolution of the parties' cross-motions for summary judgment, the plaintiffs and defendant stipulate to each of the following facts:[1]

Facts About Publicly Funded Education in Maine

1. Pursuant to 20-A M.R.S.A. § 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

[1] By stipulating to these facts, the parties do not concede that the facts are relevant or material, and the parties reserve the right to dispute the relevance and/or materiality of any stipulated fact. The parties also reserve the right to supplement the record when they file their motions and opposition briefs.

benefits of a free public education." Doc. No. 8, PageID# 38 (Ans. ¶ 16).

2. Pursuant to 20-A M.R.S.A. § 2(2), "[i]t is the intent of the Legislature that the control and management of the public schools shall be vested in the legislative and governing bodies of local school administrative units, as long as those units are in compliance with appropriate state statutes." Doc. No. 8, PageID# 38 – 39 (Ans. ¶ 17).

3. Pursuant to 20-A M.R.S.A. § 1(26), school administrative unit ("SAU") means a state-approved unit of school administration.

4. There are 260 SAUs in Maine.

5. Pursuant to 20-A M.R.S.A. § 1001(8), SAUs "shall either operate programs in kindergarten and grades one to 12 or otherwise provide for students to participate in those grades as authorized elsewhere in this Title." Doc. No. 8, PageID# 39 (Ans. ¶ 18).

6. Of the 260 SAUs, 143 do not operate a secondary school, including the SAUs that serve the towns in which Plaintiffs reside: Glenburn, Orrington, and Palermo. Doc. No. 8, PageID# 39 (Ans. ¶ 19).

7. Pursuant to 20-A M.R.S.A. § 5204(4), 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." Doc. No. 8, PageID# 39 (Ans. ¶ 20).

8. Pursuant to the plain language of 20-A M.R.S.A. § 5204(4), SAUs may not pay tuition to a private school unless the school is selected by the resident student's parents. Doc. No. 8, PageID# 39 (Ans. ¶ 20).

9. The SAUs that serve the towns in which Plaintiffs reside do not contract for secondary school privileges with any particular public or private secondary school for the education of their resident secondary students. Doc. No. 8, PageID# 41 (Ans. ¶ 25).

10. The SAUs that serve the towns in which Plaintiffs reside are obligated to pay up to the legal tuition rate, established pursuant to 20-A M.R.S.A. § 5805 and 20-A M.R.S.A. § 5806, to the public or private school approved for tuition purposes selected by the resident secondary student's parents. Doc. No. 8, PageID# 41 (Ans. ¶ 27).

11. 20-A M.R.S.A. § 5001-A(3)(A)(1)(b) permits the Department of Education to recognize private schools as providing equivalent instruction for purposes of meeting the requirements of compulsory school attendance under 20-A M.R.S.A. § 5001-A. Doc. No. 8, PageID# 43 (Ans. ¶ 39).

12. 20-A M.R.S.A. § 2901 lays out the requirements for a private school to operate as an approved private school for meeting the requirement of compulsory school attendance under 20-A M.R.S.A. § 5001-A(3)(A)(1)(a). Doc. No. 8, PageID# 40 – 41 (Ans. ¶ 22).

13. 20-A M.R.S.A. § 2951 contains the requirements for a private school to be approved to receive

public funds for tuition purposes when resident secondary student's parents select an approved school. Doc. No. 8, PageID# 39 – 40 (Ans. ¶ 21).

14. 20-A M.R.S.A. § 2951(2) states, in pertinent part, that "[a] private school may be approved for the receipt of funds for tuition purposes only if it: . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution." Doc. No. 8, PageID# 41 (Ans. ¶ 24).

15. Exhibit 2 to the Stipulated Record (Doc. No. 24-2, PageID# 164 – 167) contains a true and accurate copy of the Department's 2018-2019 Annual School Approval Report for private schools.

16. SAUs are not allowed to pay tuition to a private school that is not approved for the receipt of public funds for tuition purposes pursuant to 20-A M.R.S.A. § 2951. Doc. No. 8, PageID# 41 (Ans. ¶ 24).

17. The Defendant Commissioner of Education is responsible for enforcing the requirements of 20-A M.R.S.A. § 2951. Doc. No. 8, PageID# 37 (Ans. ¶ 3).

18. Prior to 1980, some sectarian schools received public funds for tuition purposes when resident secondary students' parents selected those sectarian schools. Doc. No. 8, PageID# 44 (Ans. ¶ 42)

19. In 1979-1980, 211 students received funding from the State of Maine for tuition to sectarian secondary schools that were selected by the students' parents. Stipulated Record ("SR"), Ex. 4 (Doc. 24-4, PageID# 227 (RFA 1)).

20. In 2017-18, nearly 180,000 students in grades K-12 were educated at public expense.

21. Of these, 4,546 secondary students (grades 9-12) attended a private school approved for tuition purposes. SR, Ex. 2 (Doc. No. 24-2, PageID# 206 (D000043)).

22. Over 95% of those 4,546 secondary students attended a handful of private schools colloquially referred to as the "town academies" or the "Big 11."

23. Over the past five school years, families in Glenburn chose to send their secondary school students to twelve nearby public and private high schools, with the majority going to Bangor High School (public), John Bapst Memorial High School (which, despite its name, is non-sectarian and private), and Orono High School (public). SR, Ex. 2 (Doc. No. 24-2, PageID# 212 (D000049)).

24. Over the past five school years, families in Orrington chose to send their secondary school students to nine nearby public and private high schools, with the majority going to Brewer High School (public) and John Bapst Memorial High School (private). SR, Ex. 2, (Doc. No. 24-2, PageID# 212 (D000049)).

25. Over the past five school years, families in RSU 12/Palermo[2] chose to send their secondary school students to eleven nearby public and private high schools, with the majority going to Erskine

[2] A regional school unit ("RSU") is a type of SAU in which two or more municipalities combine to pool their educational resources to educate students.

Academy (private). SR, Ex. 2 (Doc. No. 24-2, PageID# 212 (D000049)).

Facts About the Plaintiffs

26. David and Amy Carson are a married couple who reside in Glenburn, Maine. SR, Ex. 5 (Doc. No. 24-5, PageID# 237 (Carson 7:8 – 12)).

27. The Carsons' daughter, O.C.,[3] is a high-school sophomore at Bangor Christian Schools ("BCS"). SR, Ex. 5, Doc. No. 24-5, PageID# 243 (Carson 13:12 – 17)).

28. BCS is the only school O.C. has ever attended. SR, Ex. 5 (Doc. No. 24-5, PageID# 243 – 244 (Carson 13:10 – 14:8)).

29. The Carsons send O.C. to BCS because the school's Christian worldview aligns with their sincerely held religious beliefs and because of the school's high academic standards. Doc. No. 1, PageID# 2 (Compl. ¶ 7).

30. The Carsons pay the tuition for O.C. to BCS. Doc. No. 1, PageID# 10 (Compl. ¶ 49).

31. David Carson is a member of Crosspoint Church in Bangor, Maine. SR, Ex. 5 (Doc. No. 24-5, PageID# 240 (Carson 10:19 – 22)).

32. David Carson attends church services at Crosspoint Church twice a year, and his wife, Amy, never attends church services at Crosspoint

[3] Plaintiffs' minor children are identified by their initials pursuant to Local Rule 5.2(a)(3).

Church. SR, Ex. 5 (Doc. No. 24-5, PageID# 241 – 242 (Carson 11:21 – 12:6)).

33. The reason David Carson does not attend church very frequently is the passing of a daughter when he and Amy were younger. SR, Ex. 5 (Doc. No. 24-5, PageID# 243 (Carson 13:3 – 9)).

34. O.C. attends weekly youth group services at Crosspoint Church. SR, Ex. 5 (Doc. No. 245, PageID# 242 – 243 (Carson 12:7 – 12; 13:2)).

35. The Carsons and O.C. consider themselves born-again Christians. SR, Ex. 5 (Doc. No. 24-5, PageID# 244 (Carson 14:15 – 20)).

36. The Carsons' religion does not require them to send their daughter, O.C., to a Christian school and does not prevent them from sending her to a public school. SR, Ex. 5 (Doc. No. 24-5, PageID# 244 – 255 (Carson 14:24 – 15:5)).

37. The Carsons both attended and graduated from BCS. SR, Ex. 5 (Doc. No. 24-5, PageID# 238 – 239 (Carson 8:3 – 6; 9:22 – 25)).

38. The Carsons believe that BCS teaches students what it means to be a Christian, that the Bible represents the Word of God, that students should conform their behavior to what is said in the Bible, and that in order to be Christian students must accept Jesus Christ as their savior. SR, Ex. 5 (Doc. No. 24-5, PageID# 245 (Carson 15:9 – 25)).

39. The Carsons see as a benefit the fact that BCS teaches Christian values. SR, Ex. 5 (Doc. No. 24-5, PageID# 246 (Carson 16:1 – 5)).

40. The Carsons believe that BCS is helping their daughter, O.C., become a better Christian. SR, Ex. 5 (Doc. No. 24-5, PageID# 246 (Carson 16:8 – 10)).

41. The closest public school to the Carsons is Bangor High and the Carsons believe that Bangor High provides a good education. SR, Ex. 5 (Doc. No. 24-5, PageID# 247 – 248 (Carson 17:23 – 18:6)).

42. Alan and Judith Gillis are a married couple who reside in Orrington, Maine. SR, Ex. 6 (Doc. No. 24-6, PageID# 267; 270 (Gillis 5:9 – 11; 8:4 – 7)).

43. The Gillises' youngest daughter, I.G., is a high-school junior at BCS. SR, Ex. 6 (Doc. No. 24-6, PageID# 276 (Gillis 14:7 – 12)).

44. The Gillises send I.G. to BCS because the school's Christian worldview aligns with their sincerely held religious beliefs and because of the school's high academic standards. Doc. No. 1, PageID# 2 – 3 (Compl. ¶ 8).

45. The Gilleses pay the tuition for I.G. to attend BCS. SR, Ex. 6 (Doc. No. 24-6, PageID# 284 (Gillis 22:2 – 5)).

46. I.G. does not receive any fmancial aid or scholarships to help offset the cost of tuition. SR, Ex. 6 (Doc. No. 24-6, PageID# 284 – 285 (Gillis 22:16 – 23:2)).

47. The Gillesses and I.G. attend Crosspoint Church in Bangor, Maine. SR, Ex. 6 (Doc. No. 24-6, PageID# 275 (Gillis 13:5 – 10)).

48. The Gillises' daughter, I.G., did not begin attending BCS until the 4th quarter of her freshman

year. SR, Ex. 6 (Doc. No. 24-6, PageID# 276 (Gillis 14:7 – 12)).

49. Before starting at BCS, the Gillises' daughter, I.G., attended public schools. SR, Ex. 6 (Doc. No. 24-6, PageID# 276 – 277 (Gillis 14:17 – 15:12)).

50. One motivating factor in the Gillises' decision to transfer I.G. from her public school to BCS was that I.G. was being bullied in her public school because of her Christian beliefs. SR, Ex. 6 (Doc. No. 24-6, PageID# 277 – 278 (Gillis 15:13 – 16:1)).

51. The Gillises' three other children all attended public high schools. SR, Ex. 6 (Doc. No. 24-6, PageID# 279 – 280 (Gillis 17:19 – 18:3)).

52. Nothing in the Gillises' religion requires them to send their children to a religious school. SR, Ex. 6 (Doc. No. 24-6, PageID# 282 (Gillis 20:15 – 21)).

53. The Gillises believe that BCS provides instruction on how to live one's life as a Christian, and in their opinion that is an underlying part of the school. SR, Ex. 6 (Doc. No. 24-6, PageID# 288 (Gillis 26:19 – 25)).

54. The Gillises believe that BCS teaches children that to become Christians they must accept Jesus Christ as their savior. SR, Ex. 6 (Doc. No. 24-6, PageID# 289 (Gillis 27:1 – 7)).

55. The Gillises believe that BCS teaches children that the Bible is the Word of God, that Christians need to follow what is written in the Bible, and that children who attend BCS should model their lives in accordance with what is written in the

Bible. SR, Ex. 6 (Doc. No. 24-6, PageID# 289 (Gillis 27:8 – 18)).

56. The Gillises believe that non-Christian students attend BCS. SR, Ex. 6 (Doc. No. 24-6, PageID# 286 (Gillis 24:8 – 11)).

57. The Gillises' belief that non-Christian students attend BCS is based on their impression that one of I.G.'s friends at BCS does not attend church and that the friend and his family are not Christian. SR, Ex. 6 (Doc. No. 24-6, PageID# 286 (Gillis 24:12 – 17)).

58. Troy and Angela Nelson are a married couple who reside in Palermo, Maine. SR, Ex. 7 (Doc. No. 24-7, PageID# 310; 312 (Nelson 4:13; 6:17 – 19)).

59. The Nelsons attend Central Church in China, Maine. SR, Ex. 7 (Doc. No. 24-7, Page ID# 314 (Nelson 8:13 – 20)).

60. The Nelsons' daughter, A.N., is currently a high-school sophomore who attends Erskine Academy, a secular private school. Doc. No. 1, PageID# 3 (Compl. ¶ 9).

61. The Nelsons do not dispute the quality of secular education their daughter receives at Erskine – believing it provides a good quality education. SR, Ex. 7 (Doc. No. 24-7, PageID# 325 (Nelson 19:10 – 18)).

62. The Nelsons send their seventh-grade son, R.N., to Temple Academy because they believe it offers him a great education that aligns with their sincerely held religious beliefs. Doc. No. 1,

PageID# 3 (Compl. ¶ 9); SR, Ex. 7 (Doc. No. 24-7, PageID# 308; 314 – 315 (Nelson 2:14 – 16; 8:13 – 9:17)).

63. The Nelsons pay the tuition for R.N. to attend Temple Academy and also perform 50 hours of volunteer work each year for Temple Academy. SR, Ex. 7 (Doc. No. 24-7, PageID# 321 (Nelson 15:16 – 22)).

64. The Nelsons and R.N. do not receive any financial aid to offset the cost of tuition. SR, Ex. 7 (Doc. No. 24-7, PageID# 322 (Nelson 16:9 – 16)).

65. The Nelsons would like to send their daughter, A.N., to Temple Academy, because of the quality of education and the discipline, but cannot afford the cost of tuition for both of their children. SR, Ex. 7 (Doc. No. 24-7, PageID# 326 (Nelson 20:10 – 15)); Doc. No. 1, PageID# 3 (Compl. ¶ 9).

66. But for the sectarian exclusion codified at 20-A M.R. S.A. § 2951(2), Plaintiffs would have asked their respective SAUs to pay the tuition to their respective sectarian schools. Doc. No. 1, PageID# 10 (Compl. ¶ 46).

67. It would be futile for Plaintiffs to request that their SAUs pay tuition to BCS or Temple Academy because both schools qualify as sectarian pursuant to 20-A M.R.S.A. § 2951(2). SR, Ex. 4 (Doc. No. 24-4, PageID# 228 (RFA 4 & 5)).

Facts Relating to Bangor Christian Schools

68. BCS is a sectarian school for purposes of 20-A M.R.S.A. § 2951(2) and thus cannot be approved for tuition purposes. SR, Ex. 4 (Doc. No. 24-4, PageID# 228 (RFA 4)).

69. BCS was founded in 1970 as a ministry of the Bangor Baptist Church (now Crosspoint Church). SR, Ex. 11 (Doc. No. 24-11, PageID# 420 (BDS000068); SR, Ex. 12 (Doc. No. 24-12, PageID# 465 (BDS000013)).

70. BCS "is now into its fifth decade of training young men and women to serve the Lord." SR, Ex. 12 (Doc. No. 24-12, PageID# 465 (BDS000013)).

71. Members of Crosspoint Church do not receive a discount on tuition to BCS. SR, Ex. 8 (Doc. No. 24-8, PageID# 374 (Benjamin 33:4 – 6)).

72. BCS is accredited by the New England Association of Schools and Colleges ("NEASC"). SR, Ex. 8 (Doc. No. 24-8, PageID# 377 (Benjamin 36:11 – 21)).

73. The Department of Education considers BCS a "private school approved for attendance purposes" pursuant to 20A M.R.S.A. §§ 5001-A(3)(A)(1)(a) and 2901 based, in part, on BCS being accredited by NEASC. Doc. No. 8, PageID# 42 (Ans. ¶ 32).

74. Exhibit 15 to the Stipulated Record (Doc. No. 24-15) is a true and accurate copy of BCS' Application for Admission.

75. Exhibit 12 to the Stipulated Record (Doc. No. 24-12) is a true and accurate copy of BCS' Student Handbook.

76. The Head of School of BCS reports to Crosspoint Church's Senior Pastor and Deacon Board. SR, Ex. 8 (Doc. No. 24-8, PageID# 349 – 350 (Benjamin 8:24 – 9:1)).

77. The Deacon Board approves BCS' tuition and the budget. SR, Ex. 8 (Doc. No. 24-8, PageID# 374 (Benjamin 33:1 – 3)).

78. Only men are eligible to serve on the Deacon Board. SR, Ex. 8 (Doc. No. 24-8, PageID# 385 – 386 (Benjamin 44:17 – 45:3)).

79. BCS believes that God has ordained distinct and separate spiritual functions for men and women, and the husband is to be the leader of the home and men are to be the leaders of the church. SR, Ex. 12 (Doc. No. 24-12, PageID# 469 (BDS000017)).

80. BCS' Head of School's employment agreement is with Crosspoint Church. SR, Ex. 8 (Doc. No. 24-8, PageID# 350 (Benjamin 9:7 – 8)).

81. BSC' Head of School is also the Connections Pastor for Crosspoint Church. SR, Ex. 8 (Doc. No. 24-8, PageID# 351 (Benjamin 10:4 – 8)).

82. BCS has an Advisory Board with no policymaking authority – its role is to advise BCS' administration. SR, Ex. 8 (Doc. 24-8, PageID# 352 (Benjamin 11:1 – 12).

83. Exhibit 11 to the Stipulated Record (Doc. No. 24-11) is a true and accurate copy of BCS' Faculty Manual.

84. BCS' admissions policy states that it admits students of any race, color, or national or ethnic origin, but it is silent with respect to whether it discriminates on the basis of gender, gender-identity, sexual orientation, or religion. SR, Ex. 11 (Doc. No. 24-11, PageID# 432 (BDS000080)).

85. BCS' mission "is to assist families in educating the whole child by encouraging spiritual maturity and academic excellence in a supportive environment" and the Bible is BCS' "final authority in all matters." SR, Ex. 8 (Doc. No. 24-8, PageID# 365 (Benjamin 24:3 – 6)).

86. Prior to admitting any student, BCS officials meet with the student and his or her family to explain BCS' mission and goal of instilling a Biblical worldview in BCS' students in order to try and determine if the school is a good fit for the student. SR, Ex. 8 (Doc. No. 24-8, PageID# 365 – 366 (Benjamin 24:3 – 18; 25:13 – 17)).

87. BCS does not require students to profess to be born-again Christians as a condition of admission. SR, Ex. 8, (Doc. No. 24-8, PageID# 365 – 366 (Benjamin 24:25 – 25:1)).

88. BCS is willing to consider admitting students from any religious background or faith so long as they are willing to support BCS' philosophy of Christian education and conduct. SR, Ex. 8 (Doc. No. 24-8, PageID# 370 (Benjamin 29:6 – 16)).

89. BCS believes that a student who is homosexual or identifies as a gender other than on his or her original birth certificate would not be able to sign the agreement governing codes of conduct that BCS requires as a condition of admission. SR, Ex. 8 (Doc. No. 24-8, PageID# 370 – 371 (Benjamin 29:25 – 30:15)).

90. At BCS, presenting oneself as a gender other than the one listed on his or her original birth certificate, whether done on the school grounds or off school grounds, "may lead to immediate suspension and probable expulsion." SR, Ex. 12 (Doc. No. 24-12, PageID# 485 (BDS000033)).

91. If a student presented himself or herself as a gender other than that on his or her original birth certificate, and refused to stop presenting himself or herself as a gender other than that on said birth certificate after conversations and counseling with school staff, the student would not be allowed to continue attending BCS – just as a student who insisted on drinking every weekend would not be allowed to continue attending the school. SR, Ex. 16 (Doc. No. 24-16, PageID# 542 (Boone 23:1 – 21)).

92. If a student was openly gay and regularly communicated that fact in the school environment to his or her classmates, "that would fall under an immoral activity" under BCS' Statement of Faith and if "there was no change in the student's position" after counseling the student would not be allowed to continue attending BCS. SR, Ex. 16 (Doc. No. 24-16, PageID# 542 – 543 (Boone 23:22 – 24:14)).

93. An openly gay student who regularly communicated that fact in the school environment to his or her classmates would receive counseling, but if the student was "entrenched in this is who I am, I think that it is right and good" the student would not be allowed to continue attending BCS because "it clearly goes against [BCS'] Biblical beliefs" – even if the student was celibate and did not engage in homosexual acts. SR, Ex. 16 (Doc. No. 24-16, PageID# 543 – 544 (Boone 24:20 – 25:11)).

94. BCS may require the withdrawal at any time of a student "who, in the opinion of the school, does not fit into the spirit of the institution, regardless of whether or not he/she conforms to the specific rules and regulations of Bangor Christian Schools." SR, Ex. 12 (Doc. No. 24-12, PageID# 504 – 505 (BDS000052 – 53)).

95. Among the objectives of BCS are to teach students to be good Christians, to promote Christian values, and to develop Christian leadership. SR, Ex. 16 (Doc. No. 24-16, PageID# 528 (Boone 9:7 – 14)).

96. Among BCS' other educational objectives are to 1) "lead each unsaved student to trust Christ as his/her personal savior and then to follow Christ as Lord of his/her life"; 2) "develop within each student a Christian world view and Christian philosophy of life"; 3) "prepare each student for the important position in life of spiritual leadership in school, home, church, community, state, nation, and the world"; 4) "provide each student opportunities for developing skills necessary for

their future careers"; 5) "teach each student the thinking skills that will enable him/her to meet intellectual challenges"; and 6) "provide each student opportunities to develop an understanding of and appreciation for the arts as well as contributing to them." SR, Ex. 12 (Doc. No. 24-12, PageID# 470 (BDS000018)).

97. Students at BCS "will be placed on academic probation for the next grading period when at the end of a nine week grading period they have earned: A. An overall grade average below 75%. B. An F in any course. C. A grade below 75% in Bible." SR, Ex. 12 (Doc. No. 24-12, PageID# 478 (BDS000026)).

98. Bible is singled out because from BCS' perspective, "that is the primary thing in our school." SR, Ex. 16 (Doc. No. 24-16, PageID# 528 (Boone 9:24)).

99. BCS believes there are a lot of reasons for families to want to send their children to BCS, but from BCS' perspective, the main reason parents send their children to BCS is to develop a biblical worldview. SR, Ex. 8 (Doc. No. 24-8, PageID# 367 (Benjamin 26:7 – 13)).

100. BCS believes that another reason for families to want to send their children to BCS is the school's strong academics. SR, Ex. 8 (Doc. No. 24-8, PageID# 367 (Benjamin 26:9 – 15)).

101. BCS does not believe there is any way to separate the religious instruction from the academic instruction at BCS. From BCS' perspective, religious instruction is completely intertwined and

there is no way for a student to succeed if he or she is resistant to the sectarian instruction. SR, Ex. 16 (Doc. No. 24-16, PageID# 539 (Boone 20:13 – 21)).

102. BCS teaches children that the husband is the leader of the household. SR, Ex. 16 (Doc. No. 24-16, PageID# 526 – 528 (Boone 7:19 – 9:1)).

103. At BCS, attending chapel is mandatory. SR, Ex. 16 (Doc. No. 24-16, PageID# 544 (Boone 25:15 – 16)).

104. BCS teaches students they should spread Christianity in the world. SR, Ex. 16 (Doc. No. 24-16, PageID# 544 (Boone 25:17 – 23)).

105. Exhibit 17 to the Stipulated Record (Doc. No. 24-17) is a true and accurate copy of BCS' Bible Class Curriculum for Grades 1-8.

106. Exhibit 18 to the Stipulated Record (Doc. No. 24-18) is a true and accurate copy of BCS' Bible Class Curriculum for High School.

107. Exhibit 19 to the Stipulated Record (Doc. No. 24-19) is a true and accurate copy of BCS' Earth Sciences Curriculum.

108. Exhibit 20 to the Stipulated Record (Doc. No. 24-20) is a true and accurate copy of BCS' Fourth Grade Social Studies Curriculum.

109. Exhibit 21 to the Stipulated Record (Doc. No. 24-21) is a true and accurate copy of BCS' Fifth Grade Social Studies Curriculum.

110. Exhibit 22 to the Stipulated Record (Doc. No. 24-22) is a true and accurate copy of BCS' Ninth Grade Social Studies Curriculum.

111. Exhibit 23 to the Stipulated Record (Doc. No. 24-23) is a true and accurate copy of BCS' Tenth Grade Government Curriculum.

112. One of the objectives for students in the fourth-grade social studies class at BCS is to "[r]ecognize that God has ordained evangelism." SR, Ex. 20 (Doc. No. 24-20, PageID# 645 (BDS000742)).

113. Other objectives for students in the fourth-grade social studies class at BCS include, *inter alia,* being able to "[i]dentify and label the continents and oceans on a map"; "[i]dentify American Indians as the only true Native Americans"; "[r]ecognize that the heritage of the United States has been shaped by people who have emigrated from many parts of the world"; and to "[e]xamine [the] process of entering the United States through Ellis Island." SR, Ex. 20 (Doc. No. 24-20, PageID# 643 – 644 (BDS000740 – 41)).

114. One of the objectives for students in the fifth-grade social studies class at BCS is to "[r]ecognize God as Creator of the world." SR, Ex. 21 (Doc. No. 24-21, PageID# 655 (BDS000751)).

115. Other objectives for students in the fifth-grade social studies class at BCS include, *inter alia,* being able to "[r]ecognize and tell time in different time zones"; "[m]easure distances using map scales"; [s]ummarize [the] events that led up to [the] United States to enter [World] [W]ar [I]"; and to [e]xamine the dictatorships of Stalin,

Mussolini, Hitler and Hirohito." SR, Ex. 21 (Doc. No. 24-21, PageID# 655 – 662 (BDS000751 – 58)).

116. One of the objectives for students in the ninth-grade social studies class at BCS is to "[r]efute the teachings of the Islamic religion with the truth of God's Word." SR, Ex. 22 (Doc. No. 24-22, PageID# 669 (BDS000788)).

117. Other objectives for students in the ninth-grade social studies class at BCS include, *inter alia,* being able to "[o]utline the major periods in Greek history"; [c]ontrast Roman civilization with Greek civilization"; "[l]ist important events in the life of Muhammad and the early history of Islam"; and "[i]dentify the cultural contributions of the Byzantine and Islamic civilizations." SR, Ex. 22 (Doc. No. 24-22, PageID# 668 – 669 (BDS000787 – 88)).

118. One of the objectives for students in the tenth-grade government class at BCS is to "[d]etermine a Christian framework for determining and executing foreign policy." SR, Ex. 23 (Doc. No. 24-23, PageID# 683 (BDS 000812)).

119. Other objectives for students in the tenth-grade government class at BCS include, *inter alia,* being able to "[e]xplain why government is necessary"; "[e]xplain a citizen's obligations to the government"; "[e]xplain the original purpose of education in American colonies"; and "[d]istinguish between a republic and democracy." SR, Ex. 23 (Doc. No. 24-23, PageID# 675 (BDS000804)).

120. One of the objectives for students in the earth science class at BCS is to "[e]xplain how special

layers in the atmosphere are evidence of God's good design." SR, Ex. 19 (Doc. No. 24-19, PageID# 631 (BDS001142)).

121. Other objectives for students in the earth science class at BCS include, *inter alia,* being able to "[d]escribe how people can affect the atmosphere"; "[s]ubdivide the atmosphere and describe the structure and function of each layer"; [e]xplain how each layer of the atmosphere benefits humans and other living creatures" and "Mabel and distinguish between evaporation, vaporization, sublimation, condensation, freezing and melting." SR, Ex. 19 (Doc. No. 24-19, PageID# 630 – 631 (BDS001142)).

122. Exhibit 10 to the Stipulated Record (Doc. No. 24-10) is a true and accurate copy of BCS' Teacher Contract.

123. To be a teacher at BCS, one must affirm that "he/she is a 'Born Again' Christian who knows the Lord Jesus Christ as Savior." SR, Ex. 10 (Doc. No. 24-10, PageID# 410 – 411 (BDS000059 – 61)).

124. Every employee of BCS "[m]ust be born again" and "[m]ust be an active, tithing member of a Bible believing church." SR, Ex. 11 (Doc. No. 24-11, PageID# 424 (BDS000072)).

125. BCS will not hire teachers who identify as a gender other than on their original birth certificate or admit such students. SR, Ex. 8 (Doc. No. 24-8, PageID# 358 (Benjamin 17:2 – 21)).

126. BCS will not hire homosexual teachers. SR, Ex. 8 (Doc. No. 24-8, PageID# 357; 386 (Benjamin 16:11 – 19; 45:4 – 17)).

127. If BCS did not have to make any changes in how it operates, it would consider accepting public funds for tuition purposes. SR, Ex. 8 (Doc. No. 24-8, PageID# 359; 380; 386 – 387 (Benjamin 18:18 – 25.; 39:10 – 17; 45:22 – 46:3)).

128. There is no way to predict whether Crosspoint Church's Deacon Board would approve or disapprove accepting public funds for tuition purposes, although, all things being equal, accepting public funds for tuition purposes is something BCS would consider. SR, Ex. 8 (Doc. No. 24-8, PageID# 387 – 388 (Benjamin 46:1 – 47:1)).

129. It would be futile for BCS to seek from the State approval to accept public funds for tuition purposes because BSC is a sectarian school for purposes of 20-A M.R.S.A. 2951(2). SR, Ex. 4 (Doc. No. 24-4, PageID# 228 (RFA 4)).

Facts Relating to Temple Academy

130. Temple Academy is a sectarian school for purposes of 20-A M.R.S.A. § 2951(2) and thus cannot be approved for tuition purposes. SR, Ex. 4 (Doc. No. 24-4, PageID# 228 (RFA 5)).

131. Temple Academy is accredited by the NEASC. SR, Ex. 24 (Doc. No. 24-24, PageID# 746 – 747 (LaFountain 60:19 – 61:10)).

132. The Department of Education considers Temple Academy to be a "private school recognized by the department as providing equivalent instruction" pursuant to 20-A M.R.S.A. § 5001-A(3)(A)(1)(b). Doc. No. 8, PageID# 43 (Ans. ¶ 39).

133. Temple Academy is affiliated with Centerpoint Community Church. SR, Ex. 24 (Doc. No. 24-24, PageID# 699 (LaFountain 13:17 – 20)).

134. Temple Academy is an "integral ministry" and essentially an "extension" of Centerpoint Community Church. SR, Ex. 24 (Doc. No. 24-24, PageID# 735 – 736 (LaFountain 49:24 – 50:13)); SR, Ex. 28 (Doc. No. 24-28, PageID# 792 (TA000016)).

135. The governing body for Temple Academy is Centerpoint Community Church's Board of Deacons. SR, Ex. 24 (Doc. No. 24-24, PageID# 700 – 701; 702 (LaFountain 14:22 – 15:1; 16:17 – 21)).

136. All members of Centerpoint Community Church's Board of Deacons are members of Centerpoint Community Church. SR, Ex. 24 (Doc. No. 24-24, PageID# 706 (LaFountain 20:22 – 25)).

137. While Temple Academy has a school board, it is only advisory – it has no authority over the curriculum. SR, Ex. 24 (Doc. No. 24-24, PageID# 701 (LaFountain 15:2 – 12)).

138. Temple Academy's school board operates entirely under the authority of Centerpoint Community Church's Board of Deacons. SR, Ex. 28 (Doc. No. 24-28, PageID# 794 (TA000018)).

139. The superintendent of Temple Academy is the lead pastor of Centerpoint Community Church. SR, Ex. 24 (Doc. No. 24-24, PageID# 702 – 703; 704 (LaFountain 16:22 – 17:6; 18:1 – 4)).

140. Centerpoint Community Church's Board of Deacons has the authority to dictate the curriculum

for the school. SR, Ex. 24 (Doc. No. 24-24, PageID# 704 (LaFountain 18:16 – 25)).

141. Temple Academy agrees that there is a "big difference" between private schools and private Christian schools. SR, Ex. 24 (Doc. No. 24-24, PageID# 715 (LaFountain 29:4 – 10)).

142. Exhibit 28 to the Stipulated Record (Doc. No. 24-28) is a true and accurate copy of Temple Academy's Student/Parent Handbook.

143. Temple Academy's mission is "to know the Lord Jesus Christ and to make Him known through accredited academic excellence and programs presented through [Temple Academy's] thoroughly Christian Biblical world view." SR, Ex. 28 (Doc. No. 24-28, PageID# 791 (TA000015)).

144. Temple Academy's educational philosophy "is based on a thoroughly Christian and Biblical world view," and a "world view" "is a set of assumptions that one holds about the basic makeup of his world and forms the basis for all that one does and thinks." SR, Ex. 28 (Doc. No. 24-28, PageID# 791 (TA000015)).

145. Among Temple Academy's objectives are to 1) "foster within each student an attitude of love and reverence of the Bible as the infallible, inerrant, and authoritative Word of God;" 2) "teach the fundamental doctrines of the historic Christian faith;" 3) "develop within each student a biblically-based morality;" and 4) "aid families in making their homes Christ-centered." SR, Ex. 28 (Doc. No. 24-28, PageID# 792 – 793 (TA000016 – 17)).

146. Temple Academy's "academic growth" objectives are to 1) "provide a sound academic education in which the subjects areas are taught from a Christian point of view"; 2) "help every student develop a truly Christian world view by integrating studies with the truths of Scripture"; and 3) "promote excellence and competence in communication and computational skills." SR, Ex. 28 (Doc. No. 24-28, PageID# 792 – 793 (TA000016 – 17)).

147. Temple Academy seeks "to lead every student to a personal, saving knowledge of Christ." SR, Ex. 28 (Doc. No. 24-28, PageID# 796 (TA000020)).

148. Exhibit 26 to the Stipulated Record (Doc. No. 24-26) is a true and accurate copy of Temple Academy's Admissions Policy.

149. Exhibit 32 to the Stipulated Record (Doc. No. 24-32) is a true and accurate copy of a brochure Temple Academy provides to prospective students and their parents.

150. Exhibit 33 to the Stipulated Record (Doc. No. 24-33) is a true and accurate copy of a letter Temple Academy sends to parents enclosing an application packet.

151. Temple Academy's admission policy states that it does not discriminate on the basis of race, color, or national or ethnic origin, but it is silent with respect to whether it discriminates on the basis of gender, gender-identity, sexual orientation, or religion. SR, Ex. 26 (Doc. No. 24-26, PageID# 776 (TA00003)); SR, Ex. 28 (Doc. No. 24-28, PageID# 796 (TA000020)); SR, Ex. 32 (Doc. No. 24-32, PageID# 898 (TA000061)).

152. Under Temple Academy's admission policy, a student would most likely not be accepted if he or she comes from a family that does not believe that the Bible is the word of God. SR, Ex. 24 (Doc. No. 24-24, PageID# 721 – 722 (LaFountain 35:20 – 36:8)).

153. Temple Academy has a "pretty hard lined" written policy that states that only Christians will be admitted as students, though exceptions have been made, and might be made in the future, to admit students of different faiths. SR, Ex. 24 (Doc. No. 24-24, PageID# 749; 748 (LaFountain 63:9 – 23; 62:14 – 17)).

154. There are currently, and have been in the past, students who attend Temple Academy who are not necessarily Christians but who have said they support the school's Statement of Faith. SR, Ex. 24 (Doc. No. 24-24, PageID# 715; 717; 719 (LaFountain 29:18 – 21; 31:11 – 16; 33:11 – 22)).

155. Under Temple Academy's written admission policy, "students from homes with serious differences with the school's biblical basis and/or its doctrines will not be accepted." SR, Ex. 24 (Doc. No. 24-24, PageID# 723 (LaFountain 37:9 – 14)); SR, Ex. 26 (Doc. No. 2426, PageID# 776 (TA000003)).

156. Temple Academy believes that a Muslim family would have serious differences with Temple Academy's biblical basis and its doctrines. SR, Ex. 24 (Doc. No. 24-24, PageID# 723 (LaFountain 37:20 – 24)).

157. Temple Academy will not admit a student who is homosexual, though there are students presently enrolled who "struggle" with homosexuality. SR, Ex. 24 (Doc. No. 24-24, PageID# 725 (LaFountain 39:6 – 14)).

158. A child who identifies with a gender that is different than what is listed on the child's original birth certificate would not be eligible for admission to Temple Academy. SR, Ex. 24 (Doc. No. 24-24, PageID# 726 (LaFountain 40:4 – 8)).

159. Temple Academy will not admit a child who lives in a two-father or a two-mother family. SR, Ex. 24 (Doc. No. 24-24, PageID# 727 (LaFountain 41:16 – 20)).

160. Exhibit 30 to the Stipulated Record (Doc. No. 24-30) is a true and accurate copy of Temple Academy's Family Covenant.

161. As a condition of enrollment to Temple Academy, the student's parents must sign a Family Covenant in which they affirm that they are in agreement with Temple Academy's views on abortion, the sanctity of marriage, and homosexuality and in which they acknowledge that Temple Academy may request that the student withdraw if "the student does not fit into the spirit of the institution regardless of whether or not he/she conforms to the specific rules and regulations." SR, Ex. 24 (Doc. No. 24-24, PageID# 743 (LaFountain 57:19 – 22)); SR, Ex. 30 (Doc. No. 24-30, PageID# 872 (TA000068)).

162. As a condition of enrollment to Temple Academy, students in grades 7 to 12 must sign a covenant

in which the student affirms that he or she "will seek at all times, with the help of the Holy Spirit, to live a godly life in and out of school in order that Jesus Christ will be glorified." SR, Ex. 24 (Doc. No. 24-24, PageID# 745 – 746 (LaFountain 59:21 – 60:16)); SR, Ex. 30 (Doc. No. 24-30, PageID# 872 (TA000068)).

163. Students at Temple Academy are required to attend a religious service once a week. SR, Ex. 24 (Doc. No. 24-24, PageID# 727 – 728 (LaFountain 41:25 – 42:4)).

164. Temple Academy provides a "biblically-integrated education," which means that the Bible is used in every subject that is taught. SR, Ex. 24 (Doc. No. 24-24, PageID# 728 (LaFountain 42:14 – 20)).

165. The Bible is integrated into subjects like math because Temple Academy believes a creator designed the universe such that "one plus one is always going to be two." SR, Ex. 24 (Doc. No. 24-24, PageID# 728 – 729 (LaFountain 42:19 – 25; 43:6 – 8)).

166. Bible verses are not integrated into subjects like math. Rather, "it's algebra, it's pre-cal, calculus, just like you'd see in any high school across America." SR, Ex. 24 (Doc. No. 24-24, PageID# 729 (LaFountain 43:1 – 11)).

167. Exhibit 29 to the Stipulated Record (Doc. No. 24-29) is a true and accurate copy of Temple Academy's Faculty Handbook.

168. Temple Academy teachers "are expected to integrate Biblical principles with their teaching in

every subject taught at Temple Academy." SR, Ex. 29 (Doc. No. 24-29, PageID# 862 (TA000130)).

169. Temple Academy 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. SR, Ex. 24 (Doc. No. 24-24, PageID# 721 (LaFountain 35:1 – 9)).

170. Temple Academy teaches students that they should obey the Bible in their daily lives. SR, Ex. 24 (Doc. No. 24-24, PageID# 729 (LaFountain 43:23 – 25)).

171. Temple Academy teaches students that they should attempt to spread the word of Christianity. SR, Ex. 24 (Doc. No. 24-24, PagerD# 730 (LaFountain 44:1 – 3)).

172. Temple Academy teaches students that a "proper marriage" is between a man and a woman. SR, Ex. 24 (Doc. No. 24-24, PageID# 735 (LaFountain 49:10 – 18)).

173. Temple Academy strives to "mold" students to be "Christlike." SR, Ex. 24 (Doc. No. 2424, PageID# 736 – 737 (LaFountain 50:18 – 51:2)).

174. Temple Academy promotes to students that they should obey the Bible, accept that the Bible is the Word of God, and to accept Christ as their personal savior. SR, Ex. 24 (Doc. No. 24-24, PageID# 737 (LaFountain 51:3 – 23)).

175. Exhibit 27 to the Stipulated Record (Doc. No. 24-27) is a true and accurate copy of Temple Academy's Teacher Employment Agreement.

176. Affirming that "he/she is a born-again Christian who knows the Lord Jesus Christ as Savior" is a necessary qualification to be a teacher at Temple Academy. SR, Ex. 24 (Doc. No. 24-24, PageID# 731 (LaFountain 45:3 – 11)); SR, Ex. 27 (Doc. No. 24-27, PageID# 782 (TA000092)).

177. Homosexuals are not eligible for employment as teachers at Temple Academy. SR, Ex. 24 (Doc. No. 24-24, PagerD# 732 (LaFountain 46:7 – 9)); SR, Ex. 27 (Doc. No. 24-27, PageID# 783 (TA000093)).

178. Temple Academy's Teacher Employment Agreement states that the Bible says that "God recognize[s] homosexuals and other deviants as perverted" and that "[s]uch deviation from Scriptural standards is grounds for termination." SR, Ex. 27 (Doc. No. 24-27, PageID# 783 (TA000093)).

179. A person must be a born-again Christian to be eligible for all staff positions at Temple Academy, including custodial positions. SR, Ex. 24 (Doc. No. 24-24, PageID# 748 – 749 (LaFountain 62:21 – 63:1)).

180. Temple Academy does not know whether it would accept public funding for tuition purposes – it would have to see whether there were strings attached and it does not know enough now to say yes. SR, Ex. 24 (Doc. No. 24-24, PageID# 710 (LaFountain 24:4 – 22)).

181. If Temple Academy could become eligible to accept public funding for tuition purposes with no strings attached, Temple School would have to see it in writing. SR, Ex. 24 (Doc. No. 24-24, PageID# 711 (LaFountain 25:7 – 12)).

182. Before accepting public funds for tuition purposes, Temple Academy would want to have in writing that the school would not have to alter its admissions standards, hiring standards, or curriculum, and if it had that in writing, Temple Academy would consider accepting public funds for tuition purposes. SR, Ex. 24 (Doc. No. 24-24, PageID# 751 (LaFountain 65:4 – 25)).

183. If in order to receive public funds for tuition purposes Temple Academy could no longer require that teachers be born-again Christians, Temple Academy would refuse to accept public money. SR, Ex. 24 (Doc. No. 24-24, PageID# 732 (LaFountain 46:1 – 6)).

184. Temple Academy would not take public money for tuition purposes if it was conditioned on Temple Academy no longer being able to exclude homosexuals from employment as teachers. SR, Ex. 24 (Doc. No. 24-24, PagerD# 732 (LaFountain 46:7 – 14)).

185. It would be futile for Temple Academy to seek from the State approval for tuition purposes because Temple Academy is a sectarian school for purposes of 20-A M.R.S.A. 2951(2). SR, Ex. 4 (Doc. No. 24-4, PageID# 228 (RFA 5)).

Facts Regarding Attorney General Opinion 80-2

186. Maine's Attorney General authored opinion 80-2.

187. Exhibit 1 to the Stipulated Record (Doc. No. 24-1) is a true and accurate copy of the Maine Attorney General's opinion 80-2.

188. After the date of the Attorney General's opinion, legislation was passed that ultimately became the provision currently codified at 20-A M.R.S.A. § 2951(2).

Facts Regarding Bill to Allow Sectarian Schools to be Approved for the Receipt of Public Funds

189. In 2003, a bill – LD 182 ("An Act to Eliminate Discrimination Against Parents Who Want to Send Their Children to Religious Private Schools," 121st Legis. (2003)) – was introduced to repeal 20-A M.R.S. § 2951(2), the provision that allows only nonsectarian schools to be approved for the receipt of public funds for tuition purposes.

190. Exhibit 2 to the Stipulated Record (Doc. No. 24-2) contains a true and accurate copy of LD 182 at PageID# 183 – 184.

191. On May 13, 2003, the Maine House of Representatives debated LD 182. Legis. Rec., May 13, 2003, at H-582 to H-589. SR, Ex. 2 (Doc. No. 24-2, PageID# 185 – 201).

192. Exhibit 2 to the Stipulated Record (Doc. No. 24-2) contains a true and accurate copy of the Legislative Record of the House debate that occurred on May 13, 2003 at PageID# 185 – 201.

193. The Legislative Record from the May 13, 2003 debate on LD 182 attributes the following statement to Representative Fischer in opposition to the bill:

> Mr. Speaker, I submit to you and to this body that there 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.
>
> * * *
>
> Mr. Speaker, I submit it is fundamentally wrong for us to fund discrimination, but that is exactly what this bill calls for. Private religious schools freely admit that they do not hire individuals whose beliefs are not consistent with the school's religious teachings.
>
> * * *
>
> Ladies and gentlemen of the House, I ask you to consider this question, can private religious schools discriminate against citizens of the State of Maine, including even members of this body, because of their religious beliefs? Yes, they can. Is it right for them to do this with our tax money? No, it is not.
>
> Ladies and gentlemen of the House, do you want to take our preciously limited resources and promote discrimination?

H-582-83. SR, Ex. 2 (Doc. No. 24-2, PageID# 186 – 187 (D000023 – D000024)).

194. The Legislative Record from the May 13, 2003 debate on LD 182 also attributes the following statement to Representative Fischer in opposition to the bill:

Entanglement would mean that if we were to give money to private religious schools, we would have a responsibility to them, to make them accountable in some way. How are we going to make private religious schools who teach religion in the classroom accountable to standards in the State of Maine that do not include any sort of religion in them? How do we reconcile that? There is no answer for that. You can't reconcile. Our public schools are not allowed to teach religion.

Private religious schools can. You can't get from one to the other. That is the first thing, entanglement.

The second one is something that I am sure there are members of this body who would be very concerned about. It is about hiring policies. My father, for instance, is a professor. He has his doctorate. He has taught for 40 years now. He cannot get a job at St. Doms Academy. You know why? He is not a Christian. That is fine, but I am telling you if you can discriminate against people on that basis, what does that say. If you receive public money, you are going to be accountable to public laws. I am a Christian. I could get a job at St. Doms. Go figure. The point is you are going to have a firewall there, as the good Representative from Portland said. You are suddenly going to have to open yourself up to the laws of the State of Maine if you receive public money. I don't think from the testimony that we received from directors of Christian schools across the State of Maine

> that that is something that they are willing to accept. They said that they hire based on whether a person's beliefs are the same as ours. That is a direct quote. You ask any member of the Education Committee, even folks on the Minority Report. They will tell you that that is the truth.
>
> How do you explain to my father that he is a professor and he is the most qualified person for a job that you are not going to hire him because he is not a Christian? That is not what we believe in in this state. We had a big discussion yesterday, if you remember, about our terms of employment. Our terms of employment in this state are at will. We are a state that believes and we say every single day when you get a job that we don't discriminate on the basis of, and you put the list right through. That is our state. It is in our Human Rights Act. It is in the US Civil Rights Act. If someone can explain to me how we aren't going to make private religious schools accountable for their hiring practices, then I will vote against this bill too.

H-586-87. SR, Ex. 2 (Doc. No. 24-2, PageID# 195 – 196 (D000032 – D000033)).

195. The Legislative Record from the May 13, 2003 debate on LD 182 attributes the following statement to Representative Cummings in opposition to the bill:

> If we were to move in the direction of religious vouchers at this time in our history, we would effectively be giving up the rights for

> the education of our children to entities whose overwhelming mission is religious. You do not have to be opposed to religious entities having that kind of control. In our decision today, we have to believe that children are better supported by the public schools with public money. If you choose to do otherwise, then let it be with private money.

H-584. SR, Ex. 2 (Doc. No. 24-2, PageID# 190 (D000027)).

196. The Legislative Record from the May 13, 2003 debate on LD 182 attributes the following statement from Representative Cummings in opposition to the bill:

> From a public policy position, we must believe that a religiously neutral classroom is the best if funded by public dollars. It is the foundation of our religious agreements to expect diversity in a situation.
>
> * * *
>
> Our purpose here today is as policy makers we provide an opportunity for the people of Maine to continue their religious avocations and their religious pursuits, but not with public money for the many reasons you have heard today. Yes, in fact, there is, of course, discrimination in religious institutions. I defend their right to do so, but not with my dollar.

H-587. SR, Ex. 2 (Doc. No. 24-2, PageID# 197 – 198 (D000034 – D000035)).

197. The Legislative Record from the May 13, 2003 debate on LD 182 attributes the following statement from Representative Glynn in support of the bill: "This bill is a step toward ending discrimination against parents who wish to send their children to religious or private schools." SR, Ex. 2 (Doc. No. 24-2, PageID# 185 (D000022)).

198. The Legislative Record from the May 13, 2003 debate on LD 182 attributes the following statement from Representative Snowe-Mello: "Many of our religious schools do an excellent job a[t] teaching our young people." SR, Ex. 2 (Doc. No. 24-2, PageID# 194 (D000031)).

199. On May 14, 2003, the Maine Senate debated LD 182. Legis. Rec., May 14, 2003, at S629, 640-41.

200. Exhibit 2 to the Stipulated Record (Doc. No. 24-2) contains a true and accurate copy of the Legislative Record of the Senate debate that occurred on May 14, 2003 at PageID# 202 – 205.

201. The Legislative Record from the May 14, 2003 debate on LD 182 attributes the following statement to Senator Martin in opposition to the bill:

> 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. I submit that our publicly funded education system works best when the education is one of diversity and assimilation. An educational system that promotes tolerance and assimilation by educating all of our children together, without regard to religious affiliation

and without promoting religious view points, is preferred. 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. Religious neutrality in the classroom is best.

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.

The alternative offered by this bill, I submit, is contrary to that preferred approach. The bill could create and promote 'separate and sectarian' educational systems.

Fifty years ago, the Supreme Court rejected as unconstitutional publicly funded 'separate but equal schools,' where the education system funded separate schools based on race. The bill would have us fund 'separate and sectarian' schools where the educational system funds separate schools based on religion.

While citizens most certainly have the right to attend those schools, I do not believe that we should spend our tax dollars to fund the schools. Rather, we should use our limited dollars for schools, whether the public or private under our tuition programs, that are non-religious and that are neutral on religion.

Not only is this bill bad public policy, it is bad governmental policy. Government and religion should be separate. Separation of

church and state is firmly established in this state and country. It is appropriate and necessary for the Department of Education and local education officials to ensure that what is being taught at publicly funded elementary and secondary schools is in keeping with the appropriate cultural morals and values of America. That can be done at public schools and private non-religious schools that receive public funding.

The proponents of the bill would demand public funds for private religious schools because, under the tuition program, public funds can be used for private nonreligious schools. But the non-religious schools are just like public schools in that they are religiously neutral and can be held accountable. Government officials can review what is being taught in private non-religious schools to make sure what is taught is appropriate and not anti-American. Government officials cannot, and should not, review the religious teachings of religious schools, but that is exactly what we will be funding, religious teachings. The public funds could be used to teach intolerant religious views, but we could not review those without approving or disapproving of a religion. The government does not approve or disapprove of religious teachings, and everyone must agree that we should not fund anti-American teaching in the classroom. Since we cannot hold religious schools accountable for what they teach, we should not fund them.

S-640. SR, Ex. 2 (Doc No. 24-2, PageID# 204 – 205 (D000041 – D000042)).

202. The Legislative Record records that majorities in both the House of Representatives and the Senate voted against LD 182, and the bill was thus not enacted into law.

Date: March 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of March, 2019, a true and correct copy of **JOINT STIPULATED FACTS** was filed and served on the following counsel of record using the Court's CM/ECF system:

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