No. _____

# In the Supreme Court of the United States

CROSSPOINT CHURCH,

*Petitioner*,

*v.*

A. PENDER MAKIN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE DEPARTMENT OF EDUCATION, ET AL.,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Petitioner Crosspoint Church operates Bangor Christian School (BCS), one of the two Christian schools at issue in *Carson v. Makin*, 596 U.S. 767 (2022). There, this Court told Maine not to exclude religious schools from its tuition program. Despite the Carson family's hard-won victory, Maine still excludes BCS from its tuition program. Maine has replaced the sectarian-school ban with a condition that tuition-accepting schools cannot discriminate based on religion, religious expression, sexual orientation, and gender identity. Maine knew that such a condition would be unacceptable to BCS and other religious schools. To obtain tuition funds, Crosspoint must cease operating BCS consistent with its Christian mission to preach the Gospel and biblically rooted beliefs about sex and gender identity. The questions presented are:

1. Whether public-benefits conditions requiring religious schools to abandon their religious exercise to obtain the benefits are subject to strict scrutiny.
2. Whether a law lacks general applicability when it categorically exempts secular conduct that undermines the government's asserted interest in a similar way as religious conduct, regardless of whether exemptions were based on "innocuous" distinctions between the secular and religious conduct at issue.
3. Whether a State acts non-neutrally toward religious exercise when it circumvents this Court's decision and enacts a law, the design, effect, and net result of which are to exclude religious schools with particular beliefs from participating in the public-benefits program.

## PARTIES TO THE PROCEEDING

Petitioner is Crosspoint Church. Crosspoint was the plaintiff in the U.S. District Court for the District of Maine and the appellant in the U.S. Court of Appeals for the First Circuit.

Respondents are A. Pender Makin, in her official capacity as Commissioner of the Maine Department of Education; Megan Sanders, Edward David, Julie Anne O'Brien, Mark Walker, and Thomas L. Douglas, in their official capacity as Commissioners of the Maine Human Rights Commission. Respondents were the appellees in the First Circuit and the defendants in the district court. Sanders was substituted to replace Jefferson Ashby, in his official capacity as a Commissioner of the Maine Human Rights Commission. Ashby was a defendant until the substitution.

## CORPORATE DISCLOSURE STATEMENT

Per Rule 29.6, Crosspoint Church states that it has no parent corporations and that no publicly held corporation owns 10% or more of its stock.

## RELATED PROCEEDINGS

1) *Crosspoint Church v. Makin*, No. 1:23-cv-00146-JAW (D. Me.) – final judgment entered on June 5, 2024; amended judgment entered on July 29, 2026.
2) *Crosspoint Church v. Makin*, No. 24-1590 (1st Cir.) – judgment affirming in part and reversing in part entered on July 2, 2026.
3) *St. Dominic Academy v. Makin*, No. 2:23-cv-00246-JAW (D. Me.) – order denying a preliminary injunction entered on August 8, 2024; order partially issuing a preliminary injunction entered on July 27, 2026.
4) *St. Dominic Academy v. Makin*, No. 24-1739 (1st Cir.) – judgment affirming in part and reversing in part entered on July 2, 2026.

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## INTRODUCTION

In *Carson v. Makin*, this Court told Maine not to exclude so-called "sectarian" religious schools from its tuition program. 596 U.S. 767, 789 (2022). Bangor Christian School (BCS), run by petitioner Crosspoint Church, was one of the Christian schools at issue. *Id.* at 775. More than four years after *Carson*, however, Maine still excludes BCS from the tuition program.

"There's a way to outmaneuver the Supreme Court, and Maine has found it," one observer noted.[1] What is this maneuver? Passing a new law that subjects religious schools that educate children consistent with their religious beliefs—if they were to accept the tuition—to investigations, enforcement actions, and civil penalties. Maine fully knew that abandoning their religious mission and practices would be an unacceptable condition for many of the same religious schools previously subject to the sectarian-school ban. So it eliminated the preexisting exemption for religious schools for sexual-orientation- and gender-identity-discrimination claims, thus imposing liability for any participating schools that wanted to adhere to their religious beliefs. It also enacted new provisions imposing liability for religion-based discrimination—meaning that religious schools could not require adherence to their belief systems among their students.

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[1] Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, N.Y. Times (June 23, 2022), bit.ly/4eNznd2.

When Crosspoint sued, the First Circuit largely rubberstamped Maine's post-*Carson* maneuver, applying rational-basis review. This error warrants the Court's review. ***First***, strict scrutiny applies because Maine conditions BCS's access to tuition funds on "abandoning" its religious practices. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). As this Court's decisions from *Sherbert* to *Carson* make clear, "it is too late in the day to doubt" that free-exercise rights "may be infringed by the … placing of conditions upon a benefit." *Carson*, 596 U.S. at 778. The court below ignored these decisions, asserting that *Employment Division v. Smith*, 494 U.S. 872 (1990), displaced them.

***Second***, even if *Smith* applies, Maine law is not generally applicable. Though Maine asserts an interest of not wishing to fund private schools that violate the Human Rights Act, Maine does not enforce the Act against *all* tuition-receiving private schools. Private schools outside Maine and private post-secondary schools inside Maine are categorically exempted from the Act, yet they still can receive Maine's money. The court below, however, contradicted this Court's decisions in *Tandon v. Newsom*, 593 U.S. 61 (2021), and *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), which require strict scrutiny for laws that permit such differential treatment.

***Third***, Maine law badly fails neutrality. Maine's object of circumventing *Carson* and excluding religious schools is plainly obvious from the law's "design," "effect," and "net result." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535-36

(1993). Maine's high-ranking officials have also denigrated BCS's religious beliefs as discriminatory, bigoted, and inimical to public education and even boasted that the new law was in anticipation of a "ludicrous" decision in *Carson* by a "far-right SCOTUS." This Court's decisions require strict scrutiny under these circumstances.

This Court already found the public-benefits and general-applicability issues cert-worthy in *St. Mary Catholic Parish v. Roy*, No. 25-581. *St. Mary* will resolve, or at least properly inform the resolution of, this case. Indeed, Maine and the court below invoked the Tenth Circuit's *St. Mary* decision. At minimum, the Court should hold this petition pending *St. Mary*.

Alternatively, the Court should grant the petition on the neutrality issue for either plenary review or summary reversal. Maine's maneuvers cannot be described as anything but defiance of *Carson*. During the *St. Mary* oral argument, members of this Court raised concerns about Maine circumventing *Carson*. *St.Mary*.Tr.34:9-35:19 (Gorsuch, J.); *id.* at 93:12-94:9 (Barrett, J.). "If the legislatures of the several states may, at will, annul" this Court's "judgments" and "destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *United States v. Peters*, 9 U.S. 115, 136 (1809). Free-exercise rights cannot be nullified with a clever legislative trick. If *Smith* is to remain on the books for now, then its neutrality prong must have teeth. Only a direct repudiation of Maine's maneuvers by this Court will safeguard free-exercise rights. The Court should grant this petition.

## OPINIONS BELOW

The First Circuit's opinion is reported at 180 F.4th 354 and is reproduced in the Appendix at 1a-21a. The District of Maine's orders are reported at 719 F.Supp.3d 99 and 2024 WL 2830931 and reproduced at App.24a-77a, 96a-104a.

## JURISDICTION

The First Circuit entered judgment on July 2, 2026. App.22a. Justice Jackson granted Crosspoint's application to extend the time to file a petition for writ of certiorari to November 30, 2026. *See* 26A365. This Court has jurisdiction under 28 U.S.C. §1254(1).

## PROVISIONS INVOLVED

The First and Fourteenth Amendments to the U.S. Constitution and relevant provisions of the Maine Revised Statutes, Title 5, §§4553, 4602 are reproduced at App.107a-29a.

## STATEMENT OF THE CASE

### I. Maine's exclusion of Bangor Christian School and the *Carson* litigation

**A.** Crosspoint Church is a Christian church in Bangor, Maine. App.82a. As part of its mission to preach the Gospel of Jesus Christ to adults and children, in 1970, Crosspoint founded BCS, a K-12 school, as an integrated auxiliary of the church. *Id.*

Crosspoint operates BCS consistent with a statement of faith set forth in BCS's student handbook. App.83a. The student handbook expounds on issues that "may or may not be explicitly taught in the classroom environment" but are nevertheless "relevant to the Christian worldview that [it] promote[s]" at BCS. D.Ct.Doc.44-3, at 11. For example, Crosspoint believes that "we should demonstrate love for others"—Christians and non-Christians alike. *Id.* Crosspoint also believes that marriage is "sanctioned by God" and "joins one man and one woman." *Id.* And it believes that God created two biological sexes. *Id.* at 11-12.

Consistent with its beliefs, BCS asks the parents and guardians who choose to enroll their children at BCS to agree to support "BCS's philosophy of Christian education." App.86a. Any children—regardless of their families' religious background—will be considered for admissions so long as the families agree to do so. *Id.* A student's "spiritual fit" is an essential criterion of admissions. App.5a.

BCS students also are required to attend the weekly chapel service. App.84a. The handbook requires students to wear clothing consistent with their biological sex and prohibits students from identifying as a gender other than their biological sex. App.85a. The code of conduct also prohibits students from engaging in sexual activity outside of marriage, as defined in the statement of faith. *Id.* A student who persistently advocates beliefs contrary to BCS's statement of faith is subject to removal from the school for failing to agree and cooperate with BCS's mission. App.84a.

**B.** Maine long considered BCS to be a "sectarian" school—thus, ineligible to participate in an otherwise-available tuition program.

Under the Maine Constitution, the legislature must require each town to maintain public schools. *See* Me. Const. art. VIII, pt. 1, §1. Many rural towns have found it difficult to operate a public secondary school of their own. *Carson*, 596 U.S. at 773. Maine addresses this problem by creating a tuition program with which families from the rural areas could send their children to approved private schools of the parents' choice. *Id.*

Before 1981, parents in Maine could use the tuition assistance to send their children to private religious schools. *Carson*, 596 U.S. at 774. But that changed when Maine's Attorney General issued an opinion, incorrectly asserting the Establishment Clause forbade giving public funds to parents who send their children to religious schools. *Id.* at 774-75;

*but see Zelman v. Simmons-Harris*, 536 U.S. 639, 652-53 (2002) (such arrangements do not offend the Establishment Clause). The legislature then amended the law to say that the tuitions could only be used at "a nonsectarian school." *Carson*, 596 U.S. at 774.

According to Maine, "a sectarian school" was a religious school "associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." *Id.* at 775. Maine's then-acting education commissioner stated religious schools like BCS were "exclusionary" and "engage[d] in discriminatory practices." D.Ct.Doc.44-9, at 4-5.

Maine deemed BCS to be a sectarian school. *Carson*, 596 U.S. at 775. So the Carson family—who wanted to send their daughter to BCS—could not obtain the tuition from the State and had to pay the tuition themselves. *Id.*

On June 21, 2022, this Court held that the sectarian-school ban ran afoul of the Free Exercise Clause. *Id.* at 788. The Court explained that Maine disqualified BCS from a "generally available benefit 'solely because of [its] religious character,'" thereby "'effectively penaliz[ing] the free exercise' of religion." *Id.* at 780. Regardless of how "the benefit and restriction [were] described," Maine's scheme "operate[d] to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 780-81, 789.

## II. Maine's amendments to the Human Rights Act in anticipation of *Carson*

While the petition for writ of certiorari was still pending in *Carson*, the Maine Human Rights Commission submitted to the legislature LD 1688, "An Act to Improve Consistency Within the Maine Human Rights Act." App.81a. On June 17, 2021, the legislature enacted the amendments to the Human Rights Act. *Id.*

**A.** The 2021 law includes three features that exclude religious schools like BCS from Maine's tuition program. These changes directly implicate religious schools because participation in the tuition program subjects those schools to the Human Rights Act. *See* Me. Rev. Stat., Tit. 5, §4553(2-A) ("Educational institution" includes "any private school … approved for tuition purposes and the governing body of each such school or program.").

First, the 2021 law drastically narrowed the preexisting exemption that used to shield religious schools from sexual-orientation- and gender-identity-discrimination claims. Before 2021, Maine law shielded religious schools from liability: "The provisions of this subsection relating to sexual orientation do not apply to any education facility owned, controlled or operated

by a bona fide religious corporation, association or society." §4602(4) (1993).[2] Now, Maine law shields religious schools only if they "do[] not receive public funding." §4602(5)(C).

Second, the 2021 law created liability for religious schools based on religious discrimination. Before 2021, Maine law prohibited educational discrimination on the basis of sex, disability, national origin, race, and sexual orientation, which Maine law had defined to include gender identity. The 2021 law consolidated these protected classes into §4602(1) and added "religion" as a new protected group. *See* §4602(1); *see St. Dominic Acad. v. Makin*, 181 F.4th 11, 25 (1st Cir. 2026).

Third, the 2021 law created liability for religious schools based on religious-expression discrimination. Before 2021, there was nothing equivalent to such claims. But the 2021 law states that "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." §4602(5)(D).

Despite these changes, Maine continued to exempt numerous activities from the Human Rights Act. Maine categorically exempted single-sex schools despite the Act's sex discrimination ban. *See* §4553(2-A) (1971) ("'Educational institution' means … any private school … approved for tuition purposes *if both*

[2] Gender identity was originally included as part of the statutory definition of sexual orientation. *St. Dominic*, 181 F.4th at 22 n.5.

*male and female students are admitted*." (emphasis added)). Next, Maine does not enforce the Act against private schools outside Maine even if they accept Maine's tuition funds. Maine tuition funds have paid for Maine students to attend private schools in Vermont, New Hampshire, Massachusetts, Connecticut, New York, Pennsylvania, Virginia, Michigan, Colorado, Utah, California, and Quebec, Canada. *St. Dominic Acad. v. Makin*, 744 F.Supp.3d 43, 51 (D. Me. 2024). Finally, the Act exempts private post-secondary schools even if they accept Maine's funds. *See* §4553(2-A) (defining "educational institution" to include "*public* postsecondary institution" (emphasis added)).

**B.** Maine's high-ranking officials have publicly confirmed that excluding BCS and other religious schools from the tuition program was the intended design and effect of the 2021 law.

Shortly after the 2021 law went into effect, Maine's education commissioner A. Pender Makin (the respondent in *Carson* and a respondent here), through her counsel, Maine Attorney General Aaron Frey, explained the significance of the 2021 law to this Court. Makin stated that the Carson family lacked standing because "[t]heir ability to obtain relief" from Maine's sectarian-school ban "depend[ed] on the willingness of the religious schools to accept public funds," which she viewed as "highly unlikely." *Carson*.Resp.Br.54, 2021 WL 4993533. Makin pointed to BCS's testimony in that case stating that BCS "would consider accepting public funds only if it did not have

to make 'any changes in how it operates.'" *Id.* But because of the 2021 law, "[a]ccepting public funds would result in a significant change in how BCS … operate[s]." *Id.* Namely, under the 2021 law, "BCS … would not be able to discriminate against students who are homosexual or transgender" if it were to accept the tuition funds. *Id.*

On the day of the *Carson* oral argument, Frey—who represented Makin—issued a press release stating religious schools are "not equivalent to a public education" because they "require students to undergo religious instruction." App.93a-94a. These schools, Frey continued, are "subject to the Maine Human Rights Act." App.94a. Frey said, because schools like BCS "want to continue to discriminate against individuals based on their status," Maine shouldn't be "forced to fund schools which exclude and discriminate against other Mainers." *Id.*

After this Court decided *Carson*, Frey issued another press release. "The education provided by the schools at issue here"—i.e., BCS—"is inimical to a public education." App.91a. BCS, according to Frey, "promote[s] a single religion to the exclusion of all others, refuse[s] to admit gay and transgender children, and openly discriminate[s] in hiring teachers and staff." App.91a-92a. Frey stated he would explore legislative solutions to ensure "public money is not used to promote discrimination, intolerance, and bigotry." App.92a. Regarding the Human Rights Act, Frey thought it was "not clear whether any religious schools will" apply to receive tuition funds because the Human Rights Act "would require" schools like BCS

to "eliminate" what he viewed to be "discriminatory practices." *Id.*

Maine's Speaker of the House Ryan Fecteau chimed in, too, shortly after the *Carson* decision. Responding specifically to a tweet discussing this Court's *Carson* decision and how Maine "changed" the law to "exclude schools that discriminate against LGBTQ+ students," Fecteau disparaged this Court as a "far-right" court and touted the 2021 law as having "[a]nticipated" the Court's "ludicrous decision."




App.95a.

## III. Maine's continued exclusion of BCS from the tuition program and this lawsuit

**A.** The 2021 law had the predictable effect of barring BCS's participation in Maine's tuition program

*despite* the Carson family's hard-won vindication before this Court. App.83a.

On March 27, 2023, Crosspoint filed this lawsuit in the District of Maine. App.25a. Crosspoint alleged that the 2021 law violates the Free Exercise Clause, including because it "condition[ed] BCS's participation in a generally available tuition program on [Crosspoint] forfeiting its right to operate BCS consistent with its religious beliefs," and did so through a law that was non-neutral and born out of "religious hostility" and not generally applicable because the law exempted single-sex schools. D.Ct.Doc.1, at 19-20. Crosspoint simultaneously moved for a preliminary injunction. App.25a-26a.

While Crosspoint's suit was pending, Maine changed the law yet again. Before this suit, Maine law categorically exempted single-sex schools from nearly all education-nondiscrimination provisions. After Crosspoint's preliminary-injunction motion was fully briefed, the Maine legislature eliminated that exemption. App.32a. Maine asserted that the change was not a response to the *Crosspoint* litigation but to correct a "mistake" in the law. *St. Dominic*, 744 F.Supp.3d at 76-77. Yet emails with the subject line "the single-sex school exemption/Crosspoint"—that were released through a public-records request—suggest that the law was recommended "in the hopes that [it] might help" the Attorney General's litigation in *Crosspoint*. *St.Dominic*.CA1.Reply.Br., Ex.B.

The district court denied Crosspoint's motion for a preliminary injunction, holding that Crosspoint was

"unlikely to succeed on the merits." App.24a. The court acknowledged that the 2021 law "burden[ed] Crosspoint's religious exercise." App.61a. Because Crosspoint requires its students to comply with its Statement of Faith, "the [Act] effectively prohibits Crosspoint from enforcing some tenets of those policies." App.60a.

Even so, the court declined to apply strict scrutiny, concluding that the 2021 law is "neutral, generally applicable, and rationally related to a legitimate government interest." App.24a-25a. It held the 2023 fix rendered the 2021 law generally applicable. App.61a-62a. It also held the 2021 law is "neutral." App.63a. The court stated that it did not find "significant evidence" that the legislature's "objective was 'to impede or constrain religion' as opposed to ensuring uniformity in a legislative scheme that already prohibited these types of discrimination by organizations receiving public funds in the housing and employment contexts." App.64a.

The court "acknowledge[d]" that Attorney General Frey's "immediate negative response to *Carson* and Speaker Fecteau's opinion about the purpose of the legislation len[t] credence to Crosspoint's argument." App.66a. But it ultimately discounted those statements, applied rational basis, and upheld the law. App.66a-69a.

After the court denied Crosspoint's motion, the parties submitted a joint stipulation of facts and moved to convert the order on the preliminary injunction into an order on a permanent injunction and final

judgment. App.78a-104a. The district court entered final judgment against Crosspoint on June 5, 2024. App.105a. Crosspoint timely appealed.

**B.** Crosspoint's appeal of final judgment was consolidated for oral argument with the appeal of the denial of a preliminary injunction in *St. Dominic Academy v. Makin*, No. 24-1739 (1st Cir.).

After Crosspoint filed this suit, St. Dominic Academy—a Catholic school operated by the Diocese of Portland—filed a separate suit challenging the 2021 law and moved for a preliminary injunction. In *St. Dominic*, the same district judge found the 2021 law neutral for the same reasons in *Crosspoint* but, this time, not generally applicable because Maine law exempted out-of-state private schools and post-secondary schools from the Human Rights Act. 744 F.Supp.3d at 73-77. Though the court applied strict scrutiny, it concluded that the 2021 law was narrowly tailored to further Maine's compelling interest "in ensuring that public money is not used to fund discrimination." *Id.* at 78.

The First Circuit heard arguments in January 2025, and, on July 2, 2026, issued its decisions in both *St. Dominic* and this case, mostly affirming the district court decisions and reversing in part. App.22a-23a. In the opinion for this case, the court "adopt[ed] the reasoning" in *St. Dominic*. App.10a.

The First Circuit agreed with Crosspoint that the religious-expression-discrimination provision violated the Free Exercise Clause. App.9a (citing *St. Dominic*,

181 F.4th at 30-36). This provision was "facially nonneutral [toward religion] because it singles out 'religious expression'" and could not satisfy strict scrutiny based on a generalized "interest in combatting discrimination in public funded Maine schools." *St. Dominic*, 181 F.4th at 35 (quoting §4602(5)(D)). The court remanded for an entry of a permanent injunction barring the enforcement of this provision. App.9a.

The Court of Appeals affirmed the district court otherwise, holding that the religious-, sexual-orientation-, and gender-identity-discrimination provisions do not violate the Free Exercise Clause. App.9a-10a.

The First Circuit "adopted the reasoning" in *St. Dominic* that *Carson* and this Court's other public-benefits decisions did not require strict scrutiny. App.9a (citing *St. Dominic*, 181 F.4th at 39-56). The court held that the neutrality-and-general-applicability framework under *Smith* was the governing framework. *St. Dominic*, 181 F.4th at 42. It concluded that the public-benefits decisions like *Carson* had no role unless the State excluded religious schools explicitly and "solely because of its religious character." *Id.*

Regarding general applicability, the First Circuit also adopted the *St. Dominic* opinion finding no defect with the 2021 law. *See* App.9a-10a. The court acknowledged that Maine funds private schools outside Maine and post-secondary schools in Maine without imposing the Human Rights Act on those schools. *St. Dominic*, 181 F.4th at 47. Nevertheless, the court thought these lines were drawn "along two innocuous

lines"—"location and grade level"—and concluded that the 2021 law was generally applicable. *Id.* at 50.

On neutrality, except for the religious-expression-discrimination provision that facially targeted religion, the court adopted the reasoning in *St. Dominic* and found the 2021 law neutral after discounting evidence of non-neutrality for one reason or another. App.9a-16a. The court first downplayed the effect of the 2021 law in excluding religious schools like BCS from the tuition program. That a law "may end up having greater consequence for religious [schools] inasmuch as they are more likely than their secular counterparts" to be adversely affected "alone[] does not prove a [religious] gerrymander." *St. Dominic*, 181 F.4th at 44 (quoting *CLS v. Martinez*, 561 U.S. 661, 700 (2010) (Stevens, J., concurring)).

The court agreed that the timing of the 2021 law show that Maine "likely adopted the 2021 Amendments at least partially in response to the *Carson* litigation." App.15a. Nonetheless, it discounted the law's timing as evidence of religious non-neutrality because the law, according to the court, was simply aligning the education provisions with housing and employment provisions. App.15a. The court also disregarded Maine's continued gerrymandering of the law in 2023 in response to Crosspoint's complaint as mere "preference for consistency in [the law]." *St. Dominic*, 181 F.4th at 46-47.

Regarding Attorney General Frey's negative and hostile comments toward BCS, the court observed that Frey had no role in the legislature. App.14a. It

also discounted Speaker Fecteau's tweet stating that the 2021 law was enacted in anticipation of this Court's *Carson* decision as a "one-off statement[]" and not attributable to other legislators. *Id.*

Having found the 2021 law generally applicable and neutral (except for the religious-expression-discrimination provision), the court applied rational basis and upheld the 2021 law's religious-, sexual-orientation-, and gender-identity-discrimination provisions excluding BCS's participation in the tuition program. App.21a.[3]

[3] On remand, the district court entered a permanent injunction barring respondents from enforcing the religious-expression-discrimination provision. D.Ct.Doc.62.

## REASONS FOR GRANTING THE PETITION

This petition raises three questions presented, each worthy of this Court's review. The first concerns the lower court's rational-basis review that contradicts this Court's decisions spanning from *Sherbert* to *Carson* applying strict scrutiny when a State conditions public benefits on abandoning religious exercise. *See* S.Ct. R. 10(c). The second concerns the lower court's general-applicability analysis that contradicts *Tandon* and *Fulton*. *Id.* This Court already found these issues cert-worthy in *St. Mary Catholic Parish v. Roy*, No. 25-581. *St. Mary* will resolve, or at least properly inform the resolution of, this case. At minimum, then, this petition should be held pending *St. Mary*. *See, e.g.*, *Roman Cath. Diocese of Albany v. Emami*, 142 S.Ct. 421 (2021) (GVR'd after *Fulton*).

Alternatively, this petition is worthy of review on the third question, which concerns the lower court's egregious misapplication of *Lukumi* and *Masterpiece*. *See* S.Ct. R. 10(c). Beyond jettisoning these bedrock neutrality decisions, the decision below entrenches the circuits in a 4-1 split over how to apply *Lukumi*'s teaching that "the effect of a law in its real operation" constitutes "strong evidence of its object." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535 (1993); *see* S.Ct. R. 10(a). In addition, the decision below improperly rubberstamps Maine's post-*Carson* maneuvers and is ripe for either plenary review or summary reversal.

## I. The decision below contradicts this Court's free-exercise decisions in the public-benefits context.

The "gravamen of Crosspoint's suit" has always been that Maine is "forcing Crosspoint to compromise its religious beliefs to participate in the tuitioning program." App.55a. The court below, however, applied rational basis and contradicted this Court's decisions applying strict scrutiny when a State withholds public benefits from a religious adherent "for refusing to abandon the dictates of his faith." *Carson v. Makin*, 596 U.S. 767, 778 (2022); *see Sherbert v. Verner*, 374 U.S. 398, 404 (1963). This irreconcilable conflict with the Court's bedrock free-exercise decisions warrants review. *See* S.Ct. R. 10(c).

**A.** This Court's decisions require strict scrutiny when a State conditions access to public benefits on forfeiting religious conduct. *See, e.g.*, *Sherbert*, 374 U.S. at 404; *Carson*, 596 U.S. at 778. The Free Exercise Clause protects religious exercise from not just "outright prohibitions" but also "indirect coercion or penalties on the free exercise of religion." *Lyng v. Nw. Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 450 (1988). When a State deems a religious adherent "ineligibl[e]" for public benefits because of "the practice of her religion," "the pressure upon her to forego[] that practice is unmistakable." *Sherbert*, 374 U.S. at 404.

An unbroken line of decisions spanning from *Sherbert* to *Carson* confirms that strict scrutiny applies in this context. In *Sherbert*, a Seventh-day Adventist who was fired from her job for declining to

work on Saturday (the Sabbath day of her faith) was subsequently denied South Carolina's unemployment benefits for not being "available for work" without "good cause." 374 U.S. at 399-400. This scheme put Sherbert to a choice: Either "follow[] the precepts of her religion and forfeit[] benefits," or "abandon[] one of the precepts of her religion in order to accept work" and unemployment benefits. *Id.* at 404. As this Court explained, "condition[ing] the availability of benefits upon [Sherbert's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 405. This Court then applied strict scrutiny. *Id.* at 406.

The Court applied the same principle in *Thomas v. Rev. Bd.*, 450 U.S. 707, 717 (1981). A Jehovah's Witness factory worker whose religious beliefs forbade his participation in the production of armaments was denied unemployment benefits when he quit his job after being transferred to the factory's military-tank production line. *Id.* at 709. This Court recognized that "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief," it "put[s] substantial pressure on an adherent to modify his behavior and to violate his belief." *Id.* at 717-18. Strict scrutiny applied. *Id.* at 718.

Contrary to the lower court's suggestion below that *Smith* replaced *Sherbert*'s analysis, *see St. Dominic Acad. v. Makin*, 181 F.4th 11, 42 (1st Cir. 2026), these public-benefits decisions exist alongside—and

were not curtailed by—this Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 878-79 (1990) (applying rational basis if the law is neutral and generally applicable). Strict scrutiny applies—regardless of whether the challenged law is facially "neutral"—if it "denies … a benefit because of conduct mandated by religious belief." *Thomas*, 450 U.S. at 717-18. And the issue in *Smith* was whether the Free Exercise Clause exempted religious conduct from "general criminal prohibition[s]," not whether *Sherbert* should be overruled. *Smith*, 494 U.S. at 874; *see id.* at 891 (O'Connor, J., concurring in the judgment) (agreeing with that framing). Indeed, *Smith* never even purported to overrule *Sherbert*. *See id.* at 883 (majority). Nor did it discuss any of the stare decisis considerations. *See Lukumi*, 508 U.S. at 567-70 (Souter, J., concurring in part and concurring in the judgment) (agreeing that *Smith* distinguished *Sherbert* and *Thomas* as public-benefits decisions and having "trouble concluding" that *Smith* discarded prior decisions).

The *Carson* trilogy only confirms the continuing vitality of the public-benefits cases. Missouri's exclusion of a church from a publicly available program providing recycled rubber tires for playgrounds received strict scrutiny. *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. 449, 453-54, 464 (2017). Missouri put a church to a choice: "[D]isavow its religious character" to participate in a government-benefit program that was available to other members of the community. *Id.* at 463. (citing and relying on *Sherbert*, 374 U.S. at 404). The Court reaffirmed *Sherbert*'s holding that it was "too late in the day to doubt that

the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit" and applied strict scrutiny. *Id.*

Strict scrutiny likewise applied to Montana's termination of a scholarship program under the State's no-aid constitutional provision, which prevented certain parents from accessing the scholarship funds to fund their children's religious education. *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 468, 484 (2020). Again, echoing *Sherbert*, this Court reiterated that requiring a school to "divorce itself from any religious control or affiliation" as "a condition on benefits or privileges" "'inevitably deters or discourages the exercise of First Amendment rights.'" *Id.* at 478 (quoting *Trinity Lutheran*, 582 U.S. at 463). Strict scrutiny applied, and the Court did not cite *Smith* once. *Id.* at 479.

This Court repeated these "unremarkable" principles in *Carson*, again without citing *Smith*. 596 U.S. at 780. "[A] State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Id.* at 778; *see id.* at 778-79 (citing *Sherbert*, 374 U.S. at 404; *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947); *Thomas*, 450 U.S. at 709, 720). By banning religious schools that it deemed "sectarian" from the tuition program, Maine "condition[ed]" the tuition funds on abandoning religious conduct, thereby "penaliz[ing] the free exercise of religion." *Id.* (cleaned up). And Maine failed strict scrutiny. *Id.* at 780-81.

**B.** The First Circuit's refusal to apply strict scrutiny cannot be reconciled with this Court's decisions.

As *Carson* already held, BCS's faith-based education indisputably constitutes "religious exercise." 596 U.S. at 785; *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 754 (2020). More specifically, BCS's school policies requiring support for its intentionally Christian education approach, considering a student's "spiritual fit," prohibiting "counter-witnessing" BCS's statement of faith, and requiring students to dress consistent with their biological sex and avoid sexual activity outside of marriage (as defined by the statement of faith) are all rooted in Crosspoint's faith. App.10a, 85a; *supra* 5-6; *see Mahmoud v. Taylor*, 606 U.S. 522, 550-54 (2025) ("instill[ing]" in children "religious beliefs" about marriage and sex constitutes "religious exercise").

Maine, however, "require[s]" BCS and other "religious institutions with faith-motivated policies" to "comply with [the Human Rights Act's] antidiscrimination provisions as a condition of participating in the tuitioning program." App.51a. To comply with the Act, Crosspoint would have to cease operating BCS consistent with its Christian beliefs. *See* App.60a. If it doesn't, Maine threatens BCS and Crosspoint with investigation, enforcement action, and potentially crushing civil penalties. App.31a. All this has been sufficient to deter and chill BCS's—and other religious schools'—participation in Maine's tuition program. App.60a-61a, 83a.

Maine's conditions are subject to strict scrutiny. Their purpose and effect are to "impede the observance of" Crosspoint's religious beliefs. *Sherbert*, 374 U.S. at 404. Those conditions "put substantial pressure" on Crosspoint to "modify [its] behavior and to violate [its] belief" to accept the tuition funds. *Thomas*, 450 U.S. at 717-18. The First Circuit's resort to rational basis cannot be reconciled with these decisions. That irreconcilable conflict is ripe for this Court's review.

## II. The decision below contradicts this Court's general-applicability decisions.

The decision below also contradicts this Court's general-applicability decisions. *See* S.Ct. R. 10(c).

Even assuming that *Smith* is the proper framework in public-benefits cases like this one, a law must be both neutral *and* generally applicable to evade strict scrutiny. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 526 (2022). General applicability and neutrality, though interrelated, are independent and separate requirements. *Id.* A law is not generally applicable "whenever" the government "treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021); *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021) (not generally applicable if the law "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way"). Whether religious conduct and secular conduct are "comparable" is "judged against the

asserted government interest that justifies the regulation at issue." *Tandon*, 593 U.S. at 62. And if the law is not generally applicable, strict scrutiny applies.

The decision below contradicts this Court's decisions by refusing to apply strict scrutiny even though Maine law flunks general applicability. Maine's asserted interest is "preventing public funds from being used to fund" what Maine views as "discrimination." Appellees.CA1.Br.45, 2024 WL 4604471. Despite this interest, Maine does not require compliance with the Human Rights Act from *all* private schools that accept Maine's tuition funds.

For one, private schools *outside* Maine that accept Maine's funds are not required to comply with the Act as a condition of accepting the tuition funds. *See* App.9a-10a; *St. Dominic*, 181 F.4th at 47. Maine parents have used the tuition program to send their children to private schools located in Vermont, New Hampshire, Massachusetts, Connecticut, New York, Pennsylvania, Virginia, Michigan, Colorado, Utah, California, and even Quebec. *St. Dominic Acad. v. Makin*, 744 F.Supp.3d 42, 51 (D. Me. 2024). None of these private schools are subject to the Act. Private post-secondary schools that accept Maine's funds are also not subject to the Act. *See* Me. Rev. Stat., Tit. 5, §4553(2-A) (covering only "public postsecondary institution[s]"). Maine's wholesale exemption of private schools outside Maine and private post-secondary schools from the Act renders the law applied to BCS and other religious schools in Maine not generally applicable. *See Tandon*, 593 U.S. at 62; *Fulton*, 593 U.S. at 534.

Although the district court in *St. Dominic* agreed Maine law was not generally applicable for this reason, 744 F.Supp.3d at 73, the First Circuit thought differently. According to that court, "location and grade level" were "innocuous contours" and thus make out-of-state and post-secondary schools not appropriate comparators to religious schools in Maine. 181 F.4th at 50; *see* App.9a-10a. But the First Circuit's freshly minted "innocuous contours" doctrine departs from the general-applicability analysis under *Tandon*. Merely restating how a State draws the line does not decide the comparability analysis. Instead, comparability is "judged against the asserted government interest that justifies the regulation at issue." *Tandon*, 593 U.S. at 62. Here, Maine asserted that its interest is "preventing public funds from being used to fund discrimination." Appellees.CA1.Br.45. That interest is present whether Maine's funds are going to a religious school in Bangor, a private school in Vermont, or a private post-secondary school. Same interest, but different treatment for religious schools here. Maine's law is thus not generally applicable, and the First Circuit's analysis cannot be reconciled with *Tandon* and *Fulton* and warrants review.

## III. The decision below misapplies this Court's neutrality decisions and deepens a circuit split.

Despite finding one provision of the 2021 law non-neutral, the court below upheld other challenged provisions as neutral. In doing so, the decision below jettisoned this Court's neutrality decisions in *Lukumi* and *Masterpiece* and deepened a 4-1 circuit split on

how to apply *Lukumi*'s analysis. The decision below is ripe for plenary review or summary reversal.

### A. The decision below contradicts *Lukumi* and *Masterpiece*.

The decision below finding the 2021 law neutral cannot be reconciled with *Lukumi* and *Masterpiece*.

**1.** *Smith*'s neutrality prong reflects the Constitution's commitment to "religious tolerance." *Lukumi*, 508 U.S. at 547. If the object of a law is—even "in part"—to restrict religious practices, the law is not neutral. *Kennedy*, 597 U.S. at 526. The neutrality analysis forbids not only laws outright "targeting religious beliefs," but even "subtle departures from neutrality," "covert suppression of particular religious beliefs," and "religious gerrymanders." *Lukumi*, 508 U.S. at 534 (cleaned up). As members of this Court have observed, "government actions burdening religious practice should be 'set aside' if there is even 'slight suspicion' that those actions 'stem from animosity to religion or distrust of its practices.'" *Dr. A v. Hochul*, 142 S.Ct. 552, 555 (2021) (Gorsuch, J., joined by Alito, J., dissenting from the denial of injunctive relief) (quoting *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617, 638-39 (2018)); *see also Stormans v. Wiesman*, 136 S.Ct. 2433, 2440 (2016) (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting from denial of certiorari).

The Court recognized there are "many ways" of showing that the "object" or "purpose" of a law is the "suppression of religion or religious conduct." *Lukumi*,

508 U.S. at 533. Laws that facially target religious practices, of course, fail neutrality. *Id.*

But "[f]acial neutrality is not determinative." *Id.* at 534. Because the whole point of this analysis is to ferret out "subtle departures from neutrality" and "covert suppression" of religious practices, even a facially neutral law can violate the neutrality requirement. *Id. Lukumi* thus instructs courts to assess multiple considerations. Importantly, *Lukumi* instructs courts to assess the law's "design" and "effect" in its "real operation." *Id.* The law's effect constitutes "*strong evidence* of its object." *Id.* (emphasis added). Putting a special emphasis on "the effects of the law" makes sense, *id.* at 558 (Scalia, J., concurring in part and concurring in the judgment), because the Free Exercise Clause prohibits laws "hindering unrestrained religious practices or worship," *Fulton*, 593 U.S. at 567 (Alito, J., concurring in the judgment).

And courts are to "meticulously" "survey" the "circumstances" of governmental action to "eliminate … religious gerrymanders." *Lukumi*, 508 U.S. at 534. In *Masterpiece*, this Court confirmed that factors relevant to assessing neutrality include "the historical background of the decision, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." 584 U.S. at 639 (quoting *Lukumi*, 508 U.S. at 540 (Op. of Kennedy, J.)). "'[O]fficial expressions of hostility' to religion [that] accompany laws or policies" require "'set[ting]

aside' such policies without further inquiry." *Kennedy*, 597 U.S. at 525 n.1.

**2.** The First Circuit's neutrality analysis contradicts *Lukumi* and *Masterpiece* at every step.

***First*,** the court failed to consider the 2021 law's "design" as a whole, which is chock full of provisions working together to exclude religious schools from the tuition program despite *Carson*. *Lukumi*, 508 U.S. at 535, 540. Before the 2021 amendment, Maine excluded "sectarian" religious schools from the tuition program. *Carson*, 596 U.S. at 775. The sectarian schools, according to Maine's officials, were "exclusionary," D.Ct.Doc.44-9, at 4-5, "promote[d] a single religion to the exclusion of all others," and "refuse[d] to admit gay and transgender children," App.91a-92a. With the 2021 amendment, Maine subjected funds-receiving schools to religious-, religious-expression-, sexual-orientation-, and gender-identity-discrimination provisions. App.3a-4a.

The "design" of the 2021 law is obvious: To replace the sectarian-school ban with new "condition[s]" that Maine knew from the *Carson* litigation BCS and other religious schools "will be unable to agree to," *St.Mary*.Tr.92:25-93:3 (Barrett, J.); *see supra* 5-6, 10-11, because of their religious mission to preach the Gospel and sincere beliefs about marriage and sex. *See supra* 5-6; App.84a-85a. This design circumvents *Carson* by indirectly reinstituting a barrier to keep the same religious schools (e.g., BCS) that Maine previously kept out of the tuition program with the sectarian-school ban. But "[w]hat cannot be done directly

cannot be done indirectly" as the Constitution "deals with substance, not shadows." *SFFA v. Harvard*, 600 U.S. 181, 230 (2023).

The First Circuit's failure to grasp the 2021 law's design also led to an inconsistent result. It declared one challenged provision (religious-expression provision) non-neutral but found others neutral. *See* App.9a-10a. That's an untenable outcome under *Lukumi*. There, this Court treated "four substantive"—and separately enacted—"ordinances" as "a group for neutrality purposes." 508 U.S. at 540. And it "invalidated" even the one ordinance that "appear[ed] to apply to substantial nonreligious conduct and not to be overbroad" because it "function[ed], with the rest of the enactments in question, to suppress Santeria religious worship." *Id.* Here, the court below conceded the religious-expression provision is "non-neutral" because it "singles out 'religious expression.'" *St. Dominic*, 181 F.4th at 35; *see* App.9a. Yet the lower court salvaged other challenged provisions as neutral. App.9a-10a. This error stems from the lower court's failure to grasp the law's design as a whole, under which the religious-expression provision "functions, with the rest of the [provisions] in question" to suppress the religious schools whom Maine previously labeled sectarian. *Lukumi*, 508 U.S. at 540.

***Second***, the First Circuit failed to treat the 2021 law's "effect … in its real operation" as "strong evidence of its object" to suppress BCS's and other religious schools' religious exercise. *Lukumi*, 508 U.S. at 535.

The court acknowledged that the 2021 law may result in "greater consequence for religious [schools]" than for "their secular counterparts." *St. Dominic*, 181 F.4th at 44; *see* App.9a-10a. That is obvious. The 2021 law imposes a "greater consequence" for religious schools like BCS that wish to operate consistent with their faith, including by requiring their students and parents to support (and not contradict) an intentionally Christian education, dress consistent with their biological sex, and refrain from sexual activities outside marriage. App.84a-85a; *see also Mahmoud*, 606 U.S. at 550-54. Secular private schools can adapt to Maine's demands without abandoning their religious practices. BCS cannot. *See* McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1134 (1990) (a law is "anything *but* neutral" if it burdens "a practice that, among others, defines what it means to be a faithful [religious adherent]").

The First Circuit, however, contradicted *Lukumi* by concluding this "greater consequence … alone does not prove a gerrymander." *St. Dominic*, 181 F.4th at 44 (quoting *CLS v. Martinez*, 561 U.S. 661, 700 (2010) (Stevens, J., concurring)). Nor did it consider the law's effect in tandem with other evidence of non-neutrality offered by Crosspoint. That analysis cannot be reconciled with *Lukumi*'s instruction that a law's "effect" in its "real operation" is "strong evidence of its object." 508 U.S. at 535.

***Third***, the court below also failed to "meticulously" "survey" the "circumstances," *Lukumi*, 508

U.S. at 534, and "the historical background" of the 2021 law, *Masterpiece*, 584 U.S. at 639.

To start, the timing of the 2021 law unmistakably shows that the law's object was to exclude BCS and other religious schools from the tuition program despite the sectarian-school ban's demise. The First Circuit acknowledged that Maine "likely adopted the 2021 Amendments at least partially in response to the *Carson* litigation." App.15a; *see also St. Dominic*, 181 F.4th at 44 (the "timing" of the 2021 law's enactment "does suggest that the *Carson* litigation spurred the amendment"). The court nonetheless disregarded the law's timing as evidence of non-neutrality because, in its view, Maine was simply aligning the education provisions with the employment and housing provisions that had similar nondiscrimination requirements. *Id.*; App.15a. But under the First Circuit's logic, a State can pass a law with one provision that suppresses religion so long as the legislature makes it look like other, existing provisions on unrelated matters. This shell game entirely jettisons *Lukumi*, which seeks to root out "subtle departures from neutrality" and "masked" hostility toward religion. 508 U.S. at 534.

Moreover, the court below ignored numerous high-ranking Maine officials' repeated—and proud—declarations about the 2021 law's object. *Masterpiece* required the court below to consider the officials' statements. 584 U.S. at 639 (quoting *Lukumi*, 508 U.S. at 540 (Op. of Kennedy, J.)); *see also Kennedy*, 597 U.S. at 525 n.1. For instance, the court below ignored Makin's statement to this Court in *Carson* that the 2021 law would make it "highly unlikely" for BCS

to "accept public funds" because it would "result in a significant change in how BCS … operate[s]." *Carson*.Resp.Br.54. As the education commissioner, Makin plays a role in enforcing the Human Rights Act by enjoying "joint rule-making authority" with the Human Rights Commission to "effectuate" the Act, Me. Rev. Stat., Tit. 5, §4603, and fully participating in the Commission's "conciliation efforts," §4604. Disregarding this statement contradicts the inquiry required by *Masterpiece*.

The court below also disregarded the "negative" statements by Attorney General Frey who described BCS as "inimical to a public education" and "fundamentally at odds with the values [Maine] hold[s] dear." App.66a, 91a-92a. Frey even suggested that funding BCS would amount to funding "discrimination, intolerance, and bigotry." App.92a. The lower court found this statement irrelevant, asserting that his statements do not count because he had "no role[]" in the legislature that passed the 2021 law. App.14a. But Maine's attorney general works at the behest of the legislature as he is chosen by the legislature. Me. Const. art. IX, §11. And in *Lukumi*, Justice Kennedy (joined by Justice Stevens) considered hostile statements by non-council-member individuals (police chaplain and city attorneys). 508 U.S. at 540-42. Besides, Frey represents Maine and all its agencies and officials, including respondents here, in all proceedings. Me. Rev. Stat., Tit. 5, §191(3). "[O]fficial expressions of hostility," *Masterpiece*, 584 U.S. at 639, toward BCS by an officer vested with vast executive authority does not become any less hostile just because he's not in the legislature. *Contra* App.14a; *see*

*Lukumi*, 508 U.S. at 619 (State cannot "pass[] judgment upon" or "presuppose[] the illegitimacy of religious beliefs").

The decision below also discounted the public statement by Speaker Fecteau who agreed that "Maine just changed the [Human Rights Act's] guidelines to exclude schools that discriminate against LGBTQ+ students" and stated that he "anticipated the ludicrous decision from the far-right SCOTUS" in *Carson*. App.95a. The lower court opined that one legislator's statement cannot be imputed to other legislators. App.14a. True enough, but this Court doesn't need to embrace "a naivete from which ordinary citizens are free," *Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019), or turn a blind eye to public statements, especially when the Speaker's statement only confirms the law's object already evident from its "design," "effect," and "net result," *Lukumi*, 508 U.S. at 535-36, the timing of the enactment, and statements of other Maine officials.

Because the decision below egregiously misapplies and contradicts *Lukumi* and *Masterpiece* at every step, this Court's review is warranted.

### B. The decision below deepens an entrenched circuit split.

In addition to contradicting *Lukumi* and *Masterpiece*, the decision below is ripe for this Court's review because it deepens to 4-1 an already entrenched circuit split over whether non-neutrality under *Lukumi* can be proven or bolstered with the law's effect in operation without a showing of overt religious hostility.

This Court's review is warranted to correct lower courts' confusion.

The Ninth Circuit does not require a showing of religious animus to prove non-neutrality. In *Bates v. Pakseresht*, that court recognized this Court "never" required "overt hostility." 146 F.4th 772, 795 (9th Cir. 2025). While "hostility toward religion is *sufficient* to show that a law is not neutral in operation," it's not required in every case because the Free Exercise Clause bars "even subtle departures from neutrality." *Id.* (emphasis added). Thus, religious animus is "not essential to [its] analysis." *Id.* There, Oregon denied a Christian woman's application to be an adoptive parent because she, based on her religious beliefs, objected to using adopted children's preferred pronouns or aiding in their gender transitions. *Id.* at 776. Consistent with *Lukumi*'s teaching that "'the effect of the law in its real operation' … is 'strong evidence of its object,'" the Ninth Circuit found Oregon's adoption policies non-neutral primarily based on the policies' "unequal effect" that "disproportionately exclude[d] persons who observe certain religious faiths" that taught "traditional religious" beliefs on "sexuality and gender identity." *Id.* at 792 (quoting *Lukumi*, 508 U.S. at 535). The court accepted *arguendo* that Oregon was acting "not out of hostility or animus toward religion," but "that [did] not make Oregon's policy neutral toward religion." *Id.* at 795.

The First, Second, Fourth, and Tenth Circuits have embraced an opposite view.

The Tenth Circuit was "not persuaded" by the argument that a law that "fall[s] almost exclusively on religious [adherents]" was non-neutral. *Chiles v. Salazar*, 116 F.4th 1178, 1223 (10th Cir. 2024), *rev'd on other grounds*, 607 U.S. 627, 655 (2026) (reversing on free-speech grounds).[4] There, the licensed therapist who objected to a so-called "conversion therapy" ban raised free-exercise claims in addition to free-speech claims. The court cabined the neutrality argument to religious "target[ing]" without analyzing whether the Colorado law created a religious gerrymander or was otherwise non-neutral. *Id.* at 1224. So it did not matter whether "people with certain religious beliefs are more likely to practice and seek conversion therapy" and that Colorado's prohibitions "f[e]ll almost exclusively on religious counselors." *Id.* at 1223-24.

The Fourth Circuit also rejected the argument that a law is non-neutral when "persons who hold religious views are those most impacted by [it]." *Polk v. Montgomery Cnty. Pub. Schs.*, 166 F.4th 400, 414 (4th Cir. 2026), *cert. pending* No. 26-8 (U.S.). For a law to be non-neutral, according to the Fourth Circuit, the law "must be motivated by religious hostility." *Id.* Without evidence of overt hostility, a non-neutrality argument relying on the law's effect "fails as a matter of law." *Id.* at 415. The court used this rule to bar a substitute

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[4] The Tenth Circuit routinely treats its prior decisions as controlling on issues that were not rejected by this Court if the judgment was reversed by this Court on other grounds. *See, e.g.*, *Colo. Union of Taxpayers v. Griswold*, 2023 WL 5425681, at *2 (10th Cir. Aug. 23) (repeatedly applying a prior panel's analysis from *303 Creative* on standing).

teacher's free-exercise challenge to a school district's policy requiring the use of the students' preferred pronouns. *Id.*

The Second Circuit has issued conflicting decisions over the years, but its more recent decisions require evidence of hostility to religion. Previously, the Second Circuit thought the effect of a law that "fell almost exclusively on adoption services holding particular beliefs" gave rise to "some reason to suspect that the object of the law was to target those beliefs and to exclude them from the adoption process." *New Hope Fam. Servs. v. Poole*, 966 F.3d 145, 169 (2d Cir. 2020); *see also A.H. v. French*, 985 F.3d 165, 180 (2d Cir. 2021) (focusing on "the effect of [the] law in its real operation" to find the government action non-neutral). But that court's more recent decisions have said the opposite. "It is not enough for a law to simply *affect* religious practice." *Miller v. McDonald*, 180 F.4th 420, 428 (2d Cir. 2026) (quoting *We The Patriots USA v. Conn. Off. of Early Childhood Dev.*, 76 F.4th 130, 145 (2d Cir. 2023)), *cert. pending* No. 26-438 (U.S.). Instead, "the law or the process of its enactment must demonstrate 'hostility' to religion." *Id.* While recognizing that *Lukumi* bars even "subtle departures from neutrality," the court limited the inquiry to "the background of the challenged decision," *Patriots*, 76 F.4th at 145, without heeding *Lukumi*'s clear instruction that the law's effect is "strong evidence" of its object," *Lukumi*, 508 U.S. at 535.

Here, the First Circuit held that Maine's new law inflicting a "greater consequence for religious [schools]" was not enough to show non-neutrality. *St.*

*Dominic*, 181 F.4th at 44; *see* App.9a-10a. Having disregarded a law's "effect" in its "real operation" as "strong evidence" of non-neutrality, *Lukumi*, 508 U.S. at 535, the decision below effectively heightened the bar for showing non-neutrality, *see St. Dominic*, 181 F.4th at 44.

The circuits are entrenched in an irreconcilable conflict over what a religious believer must show to prove non-neutrality. And this split is outcome determinative. Had Crosspoint been in the Ninth Circuit, it would have been able to show non-neutrality based on Maine law's "disproportionate[]" effect on religious schools that "observe certain religious faiths." *Bates*, 146 F.4th at 792. By echoing the Second, Fourth, and Tenth Circuits, the First Circuit below ignored *Lukumi*'s teaching that the law's effect is strong evidence of its object, held that "greater consequence" for religious schools was not enough, *St. Dominic*, 181 F.4th at 44, and heightened the bar for non-neutrality. Only this Court can resolve this conflict.

## IV. This case presents an ideal vehicle to reach the questions presented.

This case presents an ideal vehicle to reach the important questions presented. This case comes to this Court from final judgment and not in an interlocutory posture. App.104a-05a. And all relevant and material facts have been jointly stipulated. App.78a-88a.

No further percolation is needed on any of the three questions presented. This Court already found

the public-benefits and general-applicability questions cert-worthy in *St. Mary*. Here, Maine invoked the Tenth Circuit's *St. Mary* decision to defend its law. Maine 28(j) Ltr., *Crosspoint Church v. Makin*, No. 24-1590 (1st Cir. Oct. 2, 2025). And the court below repeatedly relied on the Tenth Circuit. *See St. Dominic*, 181 F.4th at 42, 47, 51, 59. This Court's *St. Mary* decision will thus resolve or further inform how to resolve this case. For that reason, at minimum, this petition should be held pending *St. Mary*.

Alternatively, the neutrality issue is independently worthy of this Court's review. The circuit split and confusion over how to operationalize *Lukumi* has been highlighted elsewhere. *See* Pet. for Writ of Certiorari, at 18-20, *Polk v. Montgomery Cnty. Pub. Schs.*, No. 26-8 (U.S. June 26, 2026) (highlighting the conflict between the Ninth and Fourth Circuits). Under ordinary circumstances, this entrenched conflict alone would have warranted plenary review.

But here, the decision below is ripe for summary reversal on the neutrality ground alone. The court below egregiously misapplied *Lukumi* and *Masterpiece* at every turn. *Supra* 28-35. A lower court cannot so badly misapply this Court's decisions without requiring a swift correction. *See Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022) (summarily reversing when the lower court "committed legal error in its application of decisions of this Court"); *V.L. v. E.L.*, 577 U.S. 404, 408 (2016) (similar).

Critically, this case concerns Maine's circumvention of *Carson*. Several members of this Court have

already raised concerns about Maine's circumvention of *Carson* during oral argument in *St. Mary*. *Supra* 3. It's been more than four years since *Carson* was decided. Yet BCS and Maine parents who wish to send their children there are still excluded from the tuition program all because of Maine's post-*Carson* maneuvers. Rather than rewarding Maine's circumvention with further delay and litigation after *St. Mary*, the Court could summarily reverse on the neutrality ground and rule in Crosspoint's favor. Only such a direct intervention from this Court will fully ensure that Maine respects this Court's decisions and the Free Exercise Clause.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

November 20, 2026 Respectfully submitted.

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# APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED JULY 2, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 24-1590

CROSSPOINT CHURCH,

*Plaintiff-Appellant,*

v.

A. PENDER MAKIN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE DEPARTMENT OF EDUCATION; MEGAN SANDERS,* IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION; EDWARD DAVID, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION; JULIE ANN O'BRIEN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION; MARK WALKER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION; THOMAS L. DOUGLAS, IN HIS OFFICIAL

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* Plaintiff originally named as a defendant Jefferson Ashby in his official capacity as a Commissioner of the Maine Human Rights Commission. Sometime around February 2024, Megan Sanders replaced Jefferson Ashby on the Maine Human Rights Commission. Commissioners, Me. Hum. Rts. Comm'n, https://www.maine.gov/mhrc/about/commissioners [https://perma.cc/AQ4H-47JF] (last visited Apr. 28, 2026). Pursuant to Federal Rule of Appellate Procedure 43(c)(2), we substitute Sanders for Ashby as a defendant-appellee.

*Appendix A*

CAPACITY AS COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION,

*Defendants-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. John A. Woodcock, Jr., *U.S. District Judge*]

Before

Montecalvo and Kayatta,** *Circuit Judges*.

July 2, 2026

**KAYATTA, *Circuit Judge***. Crosspoint Church ("Crosspoint") challenges certain provisions of the Maine Human Rights Act ("MHRA") on First Amendment grounds. This opinion, which resolves Crosspoint's appeal of the district court's denial of a permanent injunction, follows on the heels of our opinion in *St. Dominic Academy v. Makin*, No. 24-1739, 2026 U.S. App. LEXIS 19503 (1st Cir. July 2, 2026), deciding an appeal almost -- but not quite -- identical to the appeal in this case. In this opinion, we consider whether any differences between the two cases call for a different outcome on the merits in this case. As we will explain, we find no such outcome-determinative difference. We therefore *affirm* in part and *reverse* in part the district court's order denying Crosspoint's motion for a permanent injunction.

** Judge Selya heard oral argument in this case and participated in the initial semble thereafter. His subsequent death ended his involvement in this case. The remaining two panelists issued this opinion pursuant to 28 U.S.C. § 46(d).

*Appendix A*

## I.

We begin by briefly reviewing the statutory framework that Crosspoint challenges, the same framework at issue in *St. Dominic*. We then detail the facts presented by this particular case.

### A.

As we explained in our *St. Dominic* opinion, these cases concern the constitutionality of the intersection of two of Maine's statutory regimes. *See* 2026 U.S. App. LEXIS 19503, slip op. at 5-19. First, the State's tuition-assistance program, codified in Title 20-A of the Maine Statutes, allows for children to attend private elementary and secondary schools at public expense when the school administrative unit in which they reside neither maintains its own public school nor contracts to send children to a neighboring unit's public school or a private school. Me. Stat. tit. 20-A, §§ 5203(4), 5204(4). Second, the MHRA, contained in Title 5 of the Maine Statutes, provides Maine children protection against educational discrimination on certain prohibited grounds and applies to all in-state elementary and secondary schools that receive public funding. Me. Stat. tit. 5, §§ 4553(2-A), 4602. Thus, a private school that participates in the tuition-assistance program and then violates the MHRA exposes itself to civil suits from both the Maine Human Rights Commission (MHRC) and private alleged victims, with remedies including injunctive relief and monetary damages. *Id.* §§ 4612(4), 4613(2), 4621.

At issue here are four rules imposed by the MHRA. First, the "Employment Rule" bars employment

discrimination based on "race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry, national origin or familial status," *id.* § 4572(1), with several exceptions that ensure that a religious organization can discriminate in employment in favor of co-religionists, *id.* § 4553(4), and can "require that all applicants and employees conform to [its] religious tenets," *id.* § 4573-A(2). Second, the "Religious Expression Rule" provides that "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." *Id.* § 4602(5)(D). Third, the "Religious Nondiscrimination Rule" bars covered schools from discriminating in admissions, financial aid, academics, and the like on the basis of religion. *Id.* § 4602(1).[1] And fourth, the "Sexual Orientation and Gender Identity Nondiscrimination Rule" bars discrimination in all the same activities on the basis of sexual orientation or gender identity but exempts religious schools that do not receive public funding.[2] *Id.* § 4602(1), (5)(C).[3]

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1. In full, section 4602(1) applies to "academic, extracurricular, research, occupational training or other program[s] or activit[ies]," "athletic programs," "admission[s]," "recruitment," and "financial assistance." Me. Stat. tit. 5, § 4602(1).

2. This exemption is a hat on a hat: As explained above, the MHRA's education provisions as a whole only apply to those schools that accept public funding. Me. Stat. tit. 5, § 4553(2-A).

3. The Religious Nondiscrimination Rule and the Sexual Orientation and Gender Identity Nondiscrimination Rule are actually part of the same provision, section 4602(1). In full, that provision makes it "unlawful educational discrimination" to act "on the basis of sex, sexual orientation or gender identity, physical or mental

*Appendix A*

**B.**

Crosspoint is an independent Christian church not subject to the authority of any other ecclesiastical authority. Crosspoint runs Bangor Christian School (BCS), a private K-12 school, as an auxiliary of the church.

BCS operates according to Crosspoint's Statement of Faith, which is reproduced in the school's Student/Parent Handbook. The Statement of Faith avows belief in "the one, true God," avers that "Jesus Christ is the Son of God," and asserts that only "those who receive Jesus Christ will go to Heaven." Per Crosspoint, BCS "considers prospective students' spiritual fit in determining admissions." Still, the school will welcome a student of any religious background or belief, provided that the student's family "is willing to support our philosophy of Christian education" and "allow their children to be educated and influenced in an intentionally Christian environment." Applicants must also show that they are "in agreement with school policies." BCS's Student Handbook also states that "[f]inancial aid is awarded to families based on need, without regard to race, sex, color, religion or national origin," though BCS does provide "[c]hurch member discounts" for first-time enrollees.

BCS students must also adhere to the school's code of conduct and dress code, which the parties agree "derive from [BCS's] religious beliefs." The code of

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disability, ancestry, national origin, race, color or religion." Me. Stat. tit. 5, § 4602(1).

conduct prohibits sexual activity outside of marriage, defined as "join[ing] one man and one woman in a single, covenantal union." The code of conduct also bars students from "identifying as a gender other than their biological sex." The dress code similarly requires each student to "wear clothing traditionally associated with his or her sex assigned at birth." Based on these provisions, BCS leaders state that the school would likely refuse to admit an applicant who was "openly gay" or "[p]resenting oneself as a gender other than the one included on his or her birth certificate" and would likely expel a current student who came out as either. Additionally, a student may face discipline, including expulsion, if the student "persistently and unrepentantly engages in 'counter-witnessing,' that is, advocating beliefs contrary to BCS's statement of faith."

As to its employment practices, BCS requires that all staff members be co-religionists. Further, all BCS employees "must adhere to biblical standards of conduct, including those relating to sexual behavior."

Crosspoint alleges that each of the above policies violates one or more of the Employment Rule, the Religious Expression Rule, the Religious Nondiscrimination Rule, and/or the Sexual Orientation and Gender Identity Nondiscrimination Rule. BCS, Crosspoint says, meets or is willing to comply with the requirements for the tuition-assistance program and would apply to become approved for tuitioning purposes if not for the challenged rules.

## II.

At the outset, we consider whether the distinct procedural posture of Crosspoint's appeal gives us any reason to treat this case differently than *St. Dominic*.

In *St. Dominic*, Catholic school St. Dominic Academy and related parties moved for preliminary injunctive relief against the Commissioner of the Maine Department of Education and the five Commissioners of the MHRC (collectively, the "Commissioners"), the district court denied the motion, and the plaintiffs appealed that denial. *St. Dominic Acad. v. Makin*, 744 F. Supp. 3d 43, 84 (D. Me. 2024). In this case, Crosspoint sought similar preliminary injunctive relief against the same defendants, and the district court similarly denied the motion. *Crosspoint Church v. Makin*, 719 F. Supp. 3d 99, 126 (D. Me. 2024). Rather than appeal that denial -- as the *St. Dominic* plaintiffs did in their case -- Crosspoint stipulated to the conversion of the district court's preliminary-injunction denial into a permanent-injunction denial and to the entry of final judgment in favor of the Commissioners -- from which it then appealed. *Crosspoint Church v. Makin*, No. 23-cv-00146, 2024 U.S. Dist. LEXIS 98630, 2024 WL 2830931, at *4 (D. Me. June 4, 2024). The net result is that, in *St. Dominic*, we considered an appeal from the denial of a preliminary injunction, while here we work in the realm of permanent injunctive relief.

Although the standard for permanent injunctive relief differs from the standard for preliminary injunctive relief,

we do not believe this, alone, requires us to treat the two appeals differently, at least as far as their overlapping issues go. *See Caroline T. v. Hudson Sch. Dist.*, 915 F.2d 752, 755 (1st Cir. 1990) ("Where a plaintiff seeks permanent injunctive relief, the test is the same [as for preliminary injunctive relief], except that the movant must show actual success on the merits of the claim, rather than a mere likelihood of such success." (citation modified)). In stipulating to the entry of final judgment, Crosspoint reserved its right to appeal all aspects of the district court's preliminary-injunction order. At the same time, it agreed that it had no new facts to offer and eschewed any interest in any further hearing.[4] In particular, it reserved no right to argue that it might be entitled to a permanent injunction even if it was not entitled to a preliminary injunction. As a result, the different procedural posture of this case does not, by itself, give any reason to depart from our resolution of similar issues in *St. Dominic*. We therefore direct the remainder of this opinion to considering putatively material differences in the facts or substantive arguments presented in this case.

## III.

We move on, then, to Crosspoint's arguments for enjoining the Employment Rule, the Religious Expression

4. The parties did include, as part of their stipulated record before the district court, three documents that had not been part of the record on Crosspoint's motion for a preliminary injunction; however, the district court determined that these documents did not alter its analysis. *Crosspoint*, 2024 U.S. Dist. LEXIS 98630, 2024 WL 2830931, at *2-3. We consider these documents as part of the record on appeal.

Rule, the Religious Nondiscrimination Rule, and the Sexual Orientation and Gender Identity Nondiscrimination Rule.

Our analysis in *St. Dominic* resolves Crosspoint's challenge to the Employment Rule. *See* 2026 U.S. App. LEXIS 19503, slip op. at 24-30. As in that opinion, we hold that no case or controversy exists with respect to the Employment Rule because the rule's carveouts already provide the relief that Crosspoint claims to seek.

Our *St. Dominic* opinion also takes care of Crosspoint's claims against the Religious Expression Rule. Following that opinion's lead, we hold that the Religious Expression Rule unconstitutionally violates Crosspoint's free-exercise rights, and so we remand for the district court to enjoin that rule as applied to Crosspoint. *Id.* at 30-43, 2026 U.S. App. LEXIS 19503.

We turn, then, to the Religious Nondiscrimination Rule. In *St. Dominic*, we concluded that the Religious Nondiscrimination Rule does not proscribe St. Dominic's mission-oriented admissions practices. *Id.* at 45-50, 2026 U.S. App. LEXIS 19503. That conclusion applies equally to BCS's policies requiring students' families to "support [BCS's] philosophy of Christian education" and "allow their children to be educated and influenced in an intentionally Christian environment." Moreover, if Crosspoint fears the MHRA may require it to allow students to "advocat[e] beliefs contrary to BCS's statement of faith," the MHRC may not enforce the Religious Nondiscrimination Rule in a way that, in practice, recreates the Religious Expression Rule. We also found in *St. Dominic* that the Religious Nondiscrimination Rule's bar on St. Dominic's preference

for Catholic students in admissions and financial aid does not violate St. Dominic's constitutional rights. *Id.* at 51-90, 2026 U.S. App. LEXIS 19503. To the extent that certain of BCS's policies -- such as its "[c]hurch member discounts" and consideration of "prospective students' spiritual fit" -- similarly entail some discrimination based on students' religious beliefs, we adopt the reasoning of our *St. Dominic* opinion in finding no constitutional violation in the Religious Nondiscrimination Rule's application to those policies. *Id.*

Similarly, we conclude the Sexual Orientation and Gender Identity Nondiscrimination Rule works no constitutional violation for substantially the reasons given in our *St. Dominic* opinion. *See id.* at 90-107, 2026 U.S. App. LEXIS 19503.

In light of the foregoing, we address here only two arguments raised by Crosspoint but not by St. Dominic. The first, a free-exercise argument, takes aim at the Religious Nondiscrimination Rule and the Sexual Orientation and Gender Identity Nondiscrimination Rule together. The other, under a free-speech framing, targets the Sexual Orientation and Gender Identity Nondiscrimination Rule specifically. Neither changes the ultimate outcome.

**A.**

Crosspoint's first unique argument maintains that a set of recent amendments to the MHRA specifically targets BCS, in violation of the Free Exercise Clause.

In this dispute's precursor litigation -- which culminated in the Supreme Court's decision in *Carson v. Makin*, 596 U.S. 767, 142 S. Ct. 1987, 213 L. Ed. 2d 286 (2022) -- two of the plaintiffs (David and Amy Carson) sought funding to send their daughter to BCS. *Id.* at 775-76. In June 2021, before the Supreme Court acted on the *Carson* certiorari petition, the State amended various provisions of the MHRA. An Act to Improve Consistency in Terminology and within the Maine Human Rights Act, Me. Pub. L. 2021, ch. 366, 2021 Me. Laws 761 (codified as amended in scattered sections of Me. Stat. tit. 5) [hereinafter the "2021 Amendments"].

The 2021 Amendments touched many parts of the MHRA, but Crosspoint points to two allegedly targeted changes. First, the amendments added "religion" -- along with color and ancestry -- as prohibited grounds for discrimination in education, effectively creating the Religious Nondiscrimination Rule. 2021 Amendments sec. 19 (codified at Me. Stat. tit. 5, § 4602(1)). This aligned the MHRA's education protections with its employment and housing provisions, which already forbade discrimination on the basis of religion. Me. Stat. tit. 5, §§ 4571, 4581 (2018). Second, the amendments narrowed a carveout to the Sexual Orientation and Gender Identity Nondiscrimination Rule: Previously, the MHRA exempted all religious schools from the Sexual Orientation and Gender Identity Nondiscrimination Rule, Me. Stat. tit. 5, § 4602(4) (2018), but the amendments revised that exemption to apply only to those religious schools that do not receive public funding, 2021 Amendments sec. 19 (codified at Me. Stat. tit. 5, § 4602(5)(C)). This also matched

the MHRA's employment and housing provisions, which similarly exempted from their bars on sexual-orientation and gender-identity discrimination only those religious organizations that did not receive public funding. Me. Stat. tit. 5, § 4553(10)(G) (2018).[5]

In *St. Dominic*, we rejected the contention that the 2021 Amendments were intended to exclude religious schools generally from the tuition-assistance program. *See* 2026 U.S. App. LEXIS 19503, slip op. at 61-68, 99-101. Here, Crosspoint makes a more pointed argument that the narrowing of the rule's exemption for religious schools was motivated in particular by hostility toward BCS as the school at the center of *Carson*. This argument proceeds under the framework established in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990): "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). Specifically, Crosspoint's targeting claim sounds in the *Smith* neutrality inquiry. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 533, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021) ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."); *Masterpiece Cakeshop v. Colo. C.R.*

5. The 2021 Amendments also added the Religious Expression Rule, which Crosspoint likewise includes in its targeting argument. 2021 Amendments sec. 19 (codified at Me. Stat. tit. 5, § 4602(5)(D)). We already enjoin the Religious Expression Rule, but, in any event, its inclusion in the above list of changes would not alter our analysis.

*Comm'n*, 584 U.S. 617, 638, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018) ("[T]he government . . . cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.").

In support of this argument, Crosspoint alleges that three extrinsic sources postdating passage of the 2021 Amendments evince anti-BCS animus: (1) Attorney General Aaron Frey's press release the day the Supreme Court decided *Carson*, in which he described "[t]he education provided by the schools at issue here" as "inimical to a public education" and stated his intention to "explore" "statutory amendments to address the Court's decision and ensure that public money is not used to promote discrimination, intolerance, and bigotry"; (2) Maine House Speaker Ryan Fecteau's post-*Carson* tweet approving of the statement that "Maine just changed the [MHRA's] guidelines to exclude schools that discriminate against LGBTQ+ students" and calling *Carson* a "ludicrous decision from the far-right [Supreme Court]"; and (3) Professor Aaron Tang's June 2022 opinion piece in *The New York Times*, entitled "There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It," which extols the 2021 Amendments.

Even if we assume that these statements concerned BCS specifically, we reject Crosspoint's reliance on them for much the same reasons that we rejected the *St. Dominic* plaintiffs' reliance on them. *See* 2026 U.S. App. LEXIS 19503, slip op. at 64-68. Maine law assigned

Attorney General Frey and Professor Tang no roles in the adoption of the 2021 Amendments.[6] Speaker Fecteau did play a legislative role in their adoption, but "[w]hat motivates one legislator to [tweet] about a statute is not necessarily what motivates scores of others," so courts must "eschew guesswork" about legislative motive based on the one-off statements of individual legislators. *United States v. O'Brien*, 391 U.S. 367, 384, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). And even if the tweet did evidence legislative intent, we do not see any anti-BCS animus in a tweet criticizing a Supreme Court decision and describing the 2021 Amendments as "exclud[ing] [from the tuition-assistance program] schools that discriminate against LGBTQ+ students." That a legislator criticizes a practice and a religious group engages in that practice does not mean that legislator was motivated by religious animus. *Cf. Lukumi*, 508 U.S. at 540 (finding ordinances nonneutral on ground that they "were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice" (citation modified)).

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6. Crosspoint insists that, even if Frey had no formal role in the enactment, his statement goes to "the context in which [the state] legislated." However, Frey issued the press release in question roughly one year after passage of the 2021 Amendments. We fail to see how Frey's forward-looking intent to explore statutory amendments in June 2022 could be part of the legislative context when the amendments were passed in June 2021. *Cf. Alexander v. Sandoval*, 532 U.S. 275, 313-14, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (Stevens, J., dissenting) (referring to "the contemporary context" of legislative enactments); *Thompson v. Thompson*, 484 U.S. 174, 180, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988) (looking to "the context" "[a]t the time Congress passed" the legislation in question).

Crosspoint also contends that while the 2021 Amendments "ha[ve] ramifications for many religious schools, [their] timing and structure show that [their] purpose was to preemptively exclude BCS and other schools with similar beliefs from [the tuition-assistance program] to moot *Carson*." The State likely adopted the 2021 Amendments at least partially in response to the *Carson* litigation. But we will not infer something as sinister as an "express[] design[]" to discriminate against a specific religious entity where Maine offers a quite logical and compelling rationale for the amendments' structure and timing:

> If [the State's] Legislature anticipated that the [*Carson*] litigation might result in [the State] being prohibited from excluding religious schools from [public funding], it would have been entirely appropriate to then make the same distinction in education as the Legislature did [years earlier] for employment and housing and require religious organizations that accept public funds to comply with [all antidiscrimination rules].

Thus, just as we concluded in *St. Dominic* that the plaintiffs there had not shown that general antireligious animus likely motivated the 2021 Amendments, slip op. at 61-68, 99-101, 2026 U.S. App. LEXIS 19503, so too do we hold here that Crosspoint has not shown that specific anti-BCS animus motivated the same amendments. And for that reason and the other reasons expressed in *St. Dominic*, we conclude Crosspoint has not succeeded

on its free-exercise claims against the Religious Nondiscrimination Rule or the Sexual Orientation and Gender Identity Nondiscrimination Rule.

**B.**

Crosspoint also insists that the Sexual Orientation and Gender Identity Nondiscrimination Rule acts as a content- and viewpoint-based regulation of speech in violation of the Free Speech Clause.[7] Under the Free Speech Clause, "'[c]ontent-based laws -- those that target speech based on its communicative content -- are presumptively unconstitutional and may be justified only if' they satisfy strict scrutiny." *Free Speech Coal., Inc. v. Paxton*, 606

7. Much of Crosspoint's free-speech claim homes in on the Religious Expression Rule, which we need not consider here given that we already enjoin that rule under Crosspoint's free-exercise claim. Separately, we do not understand Crosspoint to assert any free-speech argument against the Religious Nondiscrimination Rule. As to section 4602(1), the provision containing both the Religious Nondiscrimination Rule and the Sexual Orientation and Gender Identity Nondiscrimination Rule, Crosspoint's free-speech arguments focus exclusively on students' sexual orientation and gender identity. To the extent this claim does apply to the Religious Nondiscrimination Rule, we reject that challenge for substantially the same reasons given with respect to the Sexual Orientation and Gender Identity Nondiscrimination Rule below. Specifically, on its face, the rule's prohibition on discrimination against students on the basis of religion regulates conduct, not speech. On this record, we do not read the Religious Nondiscrimination Rule as prohibiting religious instruction. The rule would not prevent BCS from teaching, for example, that there is only "one, true God" and that "Jesus Christ is the Son of God." And because we have enjoined the Religious Expression Rule, BCS would also be able to curtail religious expression that contradicts that teaching.

U.S. 461, 471, 145 S. Ct. 2291, 222 L. Ed. 2d 643 (2025) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015)). Viewpoint-based laws represent a subset of content-based laws where "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," and, as a result, "the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

The Sexual Orientation and Gender Identity Nondiscrimination Rule, Crosspoint contends, regulates speech because it would "require BCS to affirm a student's gender identity and sexual orientation," even though it would "violate[] BCS's statement of faith to admit a student or allow a student to remain enrolled who violates BCS's statement of faith by presenting as a gender not consistent with his or her biological sex."[8]

8. Unlike the plaintiffs in *St. Dominic*, Crosspoint makes no expressive-association claim under the First Amendment. *See Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 678-83, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010) (recognizing distinction between free-speech and expressive-association claims). Although Crosspoint's opening brief does reference "the school's 'expressive association'" in its free-speech discussion, Crosspoint made no expressive-association argument below, and in its reply brief to this court, stated, "Crosspoint is not . . . attempting to make a right to association argument." In light of this express waiver, we limit ourselves here to free-speech doctrine and decline to consider any impact the MHRA might separately have on Crosspoint's associational rights. *See United States v. Concepcion-Guliam*, 62 F.4th 26, 31 (1st Cir. 2023) ("A party who identifies an issue, and then explicitly withdraws it, has waived that issue." (citation modified)).

But the text of the rule contains no such requirement.[9] Rather, as the district court observed, "the plain text of the challenged provisions of the MHRA regulate

9. We add an important caveat here: In *St. Dominic*, the plaintiffs challenged on several grounds the potential application to St. Dominic of a 2016 memorandum from the MHRC that interpreted the Sexual Orientation and Gender Identity Nondiscrimination Rule to require a school to "use [a] student's preferred name and pronouns consistent with their gender identity" and instruct its employees and students "to address the student by the student's chosen name and use pronouns consistent with the student's gender identity." Memorandum from Barbara Archer Hirsch, Comm'n Couns., Me. Hum. Rts. Comm'n, to Amy Sneirson, Exec. Dir., Me. Hum. Rts. Comm'n, 3-4 (Jan. 13, 2016), https://www.maine.gov/mhrc/sites/maine.gov.mhrc/files/inline-files/20160113_g.pdf [https://perma.cc/594V-BCS7] [hereinafter "2016 MHRC Memorandum"]; *see also St. Dominic*, 2026 U.S. App. LEXIS 19503, slip op. at 91-92. Crosspoint, unlike the *St. Dominic* plaintiffs, makes no mention of the 2016 MHRC Memorandum in its briefs. Instead, Crosspoint focuses its analysis on a single concern: whether the Sexual Orientation and Gender Identity Nondiscrimination Rule prevents them from refusing to admit or expelling a student based on that student's sexual orientation or gender identity. While other applications of the Sexual Orientation and Gender Nondiscrimination Rule are possible, as suggested by the 2016 MHRC Memorandum, Crosspoint has not raised -- much less developed -- any argument about these other applications, which likely require a different, more precise legal analysis. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 561, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (distinguishing between complete exclusion of a protected group and other alleged violations of a state civil rights law). As such, we limit our decision here to the plain text of the Sexual Orientation and Gender Identity Nondiscrimination Rule. Nothing in this opinion precludes Crosspoint from later bringing a challenge to the 2016 MHRC Memorandum if the MHRC or a private litigant seeks to enforce the memorandum's policies against BCS.

conduct, not speech." *Crosspoint*, 719 F. Supp. 3d at 124. Facially, the Sexual Orientation and Gender Identity Nondiscrimination Rule simply prohibits educational discrimination on the basis of sexual orientation or gender identity. As the Commissioners concede, BCS "is free to impart whatever religious education it likes." This includes the message that marriage should be between "one man and one woman in a single, covenantal union" or that one's gender cannot be distinguished from one's biological sex.

The Supreme Court has repeatedly cited similar antidiscrimination laws as examples of regulations targeted at conduct that permissibly curb speech. In *R.A.V. v. City of St. Paul*, for instance, the Court described Title VII, the federal prohibition on sex discrimination in employment, as a "law[] directed not against speech but against conduct." 505 U.S. 377, 389, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). Similarly, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Court noted that the state antidiscrimination law at issue did "not, on its face, target speech or discriminate on the basis of its content" since "the focal point of its prohibition" was "on the act of discriminating against individuals." 515 U.S. 557, 572, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). So too, here, the text of the Sexual Orientation and Gender Identity Nondiscrimination Rule proscribes discriminatory conduct, not speech.

Of course, the Supreme Court has, on occasion, found an antidiscrimination law to infringe a party's free-speech rights. In *Hurley*, the Court ultimately found the state antidiscrimination law at issue unconstitutional as

applied to the extent it forced private parade organizers "to include among the marchers a group imparting a message the organizers d[id] not wish to convey," to wit, the excluded group's "pride in their Irish heritage as openly gay, lesbian, and bisexual individuals." *Id.* at 557, 559, 561. And in *303 Creative LLC v. Elenis*, the Court struck down the application of a state antidiscrimination law that would compel a web designer to create wedding websites for same-sex couples. 600 U.S. 570, 602-03, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 (2023); *see id.* at 592 (recognizing that "public accommodations statutes can sweep too broadly when deployed to compel speech"). However, both cases concerned not discrimination based on status but discrimination based on message. In *Hurley*, the parade organizers allowed openly gay, lesbian, and bisexual individuals to march; the organizers just objected to a particular group marching "as its own parade unit carrying its own banner." 515 U.S. at 572. Likewise, *303 Creative* concerned only the plaintiff's refusal to create a specific message, and the Court expressly disclaimed any "right to refuse to serve members of a protected class." 600 U.S. at 597-98 (citation modified); *see also Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 103 F.4th 765, 778-79 (11th Cir. 2024) (discussing *R.A.V.*, *Hurley*, and *303 Creative* as cases where the Supreme Court "recognize[d] and enforce[d] the critical distinction between *advocating* . . . discrimination and *practicing* it"). In contrast, here, Crosspoint seeks to refuse admission to (and expel) any student who is gay or transgender, irrespective of that student's speech. Although such refusal may express Crosspoint's views regarding sexual orientation and gender identity, and the Sexual Orientation and Gender

Identity Nondiscrimination Rule would interfere with that expression, that does not transform the rule into a speech regulation.

Crosspoint has failed to convince us that the Sexual Orientation and Gender Identity Nondiscrimination Rule should receive strict scrutiny as a content- or viewpoint-based regulation of speech. That being so, the rule is subject to only rational basis review, which it survives, as explained in our *St. Dominic* opinion. *See* 2026 U.S. App. LEXIS 19503, slip op. at 106-07.

**IV.**

For the foregoing reasons -- along with those we provided in *St. Dominic* -- we *affirm* in part and *reverse* in part the district court's order denying Crosspoint's motion for a permanent injunction. Specifically, we *affirm* the order insofar as it determined that no case or controversy exists with respect to the Employment Rule and rejected Crosspoint's arguments against the Religious Nondiscrimination Rule and the Sexual Orientation and Gender Identity Nondiscrimination Rule. And we *reverse* the order insofar as it rejected Crosspoint's arguments against the Religious Expression Rule. We thus *remand* the case for further proceedings consistent with this opinion, including the timely entry of a permanent injunction against the Religious Expression Rule as applied to Crosspoint. No costs are allocated.

**APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED JULY 2, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 24-1590

CROSSPOINT CHURCH,

*Plaintiff-Appellant,*

v.

A. PENDER MAKIN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE DEPARTMENT OF EDUCATION; MEGAN SANDERS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION; EDWARD DAVID, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION; JULIE ANN O'BRIEN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION; MARK WALKER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION; THOMAS L. DOUGLAS, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE HUMAN RIGHTS COMMISSION,

*Defendants-Appellees.*

**JUDGMENT**

Entered: July 2, 2026

*Appendix B*

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 district court's order denying the motion for a permanent injunction is affirmed in part and reversed in part, and the matter is remanded for further proceedings consistent with the opinion issued this day. No costs are allocated.

By the Court:

Anastasia Dubrovsky, Clerk

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE, FILED FEBRUARY 27, 2024

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

No. 1:23-cv-00146-JAW

CROSSPOINT CHURCH,

*Plaintiff,*

v.

A. PENDER MAKIN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE DEPARTMENT OF EDUCATION, *et al.*,

*Defendants.*

### ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

A church that operates a religious school sues Maine's Education Commissioner and Human Rights Commissioners to preclude enforcement of the state's educational and employment antidiscrimination laws, arguing that they violate the Free Exercise, Establishment, and Free Speech Clauses of the U.S. Constitution. The Court denies the injunction, primarily because it concludes that the plaintiff is unlikely to succeed on the merits. The Court determines that the educational antidiscrimination provisions do not violate the Free Exercise Clause because they are neutral, generally applicable, and rationally

related to a legitimate government interest. The Court concludes further that the educational provisions do not violate the Free Speech Clause because they regulate conduct, not speech. Finally, the Court concludes that the employment provisions do not proscribe any constitutionally protected conduct.

Recognizing that this case presents novel constitutional questions in the wake of the Supreme Court's decision in *Carson v. Makin*, the Court has framed its opinion as a prelude to a challenge to the Court of Appeals for the First Circuit for a more authoritative ruling.

## I. PROCEDURAL HISTORY

On March 27, 2023, Crosspoint Church filed a three-count complaint against A. Pender Makin, in her official capacity as Commissioner of the Maine Department of Education, and Jefferson Ashby, Edward David, Julie Ann O'Brien, Mark Walker, and Thomas Douglas, in their official capacities as Commissioners of the Maine Human Rights Commission (MHRC Commissioners), alleging that certain provisions of the Maine Human Rights Act (MHRA) effectively excluded it from approval for Maine's school tuitioning program in violation the Free Exercise, Establishment, and Free Speech Clauses of the U.S. Constitution.[1] *Compl.* (ECF No. 1). That same day,

1. Specifically, Crosspoint alleged that "[o]n its face and as applied to Plaintiff[], 5 M.R.S. §§ 4602(1), (5)(C), [and] (5)(D) violate[] the Free Exercise Clause of the First Amendment to the U.S. Constitution," *Compl.* ¶ 113, that "[a]s applied to Plaintiff, 5 M.R.S. § 4572(1)(A) violates the Free Exercise Clause and the Establishment

Crosspoint filed a motion for preliminary injunction to enjoin the Defendants from enforcing the provisions in Maine law that allegedly exclude it from the tuitioning program. *Pl.'s Mot. for Prelim. Inj.* (ECF No. 5) (*Pl.'s Mot.*).

On April 28, 2023, the Defendants opposed Crosspoint's motion. *Defs.' Opp'n to Pl.'s Mot. for Prelim. Inj.* (ECF No. 14) (*Defs.' Opp'n*), and on May 2, 2023, the American Civil Liberties Union of Maine (in conjunction with its national organization) filed an amici curiae brief in support of the Defendants' opposition. *Br. of Amici Curiae the American Civil Liberties Union and American Civil Liberties Union of Maine in Supp. of Defs.* (ECF No. 20). On May 12, 2023, Crosspoint filed a reply in support of its motion. *Pl.'s Reply in Supp. of Mot. for Prelim. Inj.* (ECF No. 21) (*Pl.'s Reply*). Also on May 12, 2023, the Defendants answered the complaint. *Defs.' Answer to Pl.'s Compl.* (ECF No. 23) (*Answer*).

On June 20, 2023, after this motion was taken under advisement, the Defendants filed correspondence with the Court regarding a bill recently passed by the Maine Legislature that amended the MHRA's definition of educational institution. *Notice/Correspondence Re: Enactment of Maine Pub. L. 2023, ch. 188* (ECF No. 28) (*Defs.' June 20 Correspondence*). On June 27, 2023, Crosspoint filed its own correspondence regarding the bill. *Notice/Correspondence Re: Enactment of Maine Pub. L. 2023, ch. 188* (ECF No. 29) (*Pl.'s June 27 Correspondence*).

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Clause of the U.S. Constitution," *id.* ¶ 131, and that "[a]s applied to Plaintiff, 5 M.R.S. § 4602 violates the Free Speech Clause of the U.S. Constitution." *Id.* ¶ 144.

## II. FACTUAL BACKGROUND

### A. The Parties

Crosspoint is a Christian church incorporated as a nonprofit corporation under Maine law and located in Bangor, Maine. *Compl.* ¶ 7. Bangor Christian Schools (BCS), a private, Christian school educating students from K4 to 12th grade, is an integrated auxiliary of Crosspoint. *Id.* ¶ 8. A. Pender Makin is the Commissioner of the Maine Department of Education, an agency of the state of Maine created and empowered under 20-A M.R.S. § 201, to "[s]upervise, guide and plan for a coordinated system of public education for all citizens of the State." *Id.* ¶ 9 (quoting 20-A M.R.S. § 201(1)).

Mr. Ashby, Mr. David, Ms. O'Brien, Mr. Walker, and Mr. Douglas are Commissioners of the Maine Human Rights Commission, an agency of the state of Maine, created and empowered under 5 M.R.S. § 4566 to "investigat[e] all forms of invidious discrimination, whether carried out legally or illegally, and whether by public agencies or private persons." *Id.* ¶ 12; 5 M.R.S. § 4566. Commissioner Makin and the MHRC Commissioners have joint rule-making authority to effectuate the subchapter of the MHRA prohibiting discrimination with respect to educational opportunity. *Compl.* ¶ 13; *Answer* ¶ 13.

### B. Maine's School Tuitioning Program

#### 1. The Pre-*Carson* Regime

Maine law provides that "[i]t is the intent of the Legislature that every person within the age

limitations prescribed by state statutes shall be provided an opportunity to receive the benefits of a free public education." 20-A M.R.S. § 2(1). The "control and management of the public schools" is "vested in the legislative and governing bodies of local school administrative units [SAUs], as long as those units are in compliance with appropriate state statutes," *id.* § 2(2), and "[a] school administrative unit that neither maintains a secondary school nor contracts for secondary school privileges . . . shall pay the tuition . . . at the public school or the approved private school of the parent's choice at which the student is accepted." *Id.* § 5204(4). A similar provision exists for elementary schools. *Id.* § 5203(4). The upshot is that Maine's tuitioning program permits SAUs—some of which are sparsely populated—to pay the tuition for students to attend other approved public or private schools, in lieu of maintaining their own.

When a SAU opts to pay students' tuition rather than maintain its own school(s), parents are solely responsible for selecting the school their children attend. *Compl.* ¶ 47. To receive the tuitioning benefit, however, the parents must select an "approved" school satisfying certain statutory criteria. *Id.* ¶ 46. Section 2951 of title 20-A of the Maine statutes, entitled "Approval for tuition purposes," provides in pertinent part:

> A private school may be approved for the receipt of public funds for tuition purposes only if it:
>
> **2. Nonsectarian**. Is a nonsectarian school in accordance with the First Amendment of the United States Constitution.

20-A M.R.S. § 2951(2).

### 2. The *Carson* Litigation

In 2018, three families, including two families whose children attended BCS, sued Maine's Education Commissioner to challenge 20-A M.R.S. § 2951(2), the "sectarian exclusion," claiming that it violated the First Amendment's Free Exercise Clause. *See Carson v. Makin*, 979 F.3d 21, 26-27 (1st Cir. 2020); *Carson v. Makin*, 596 U.S. 767, 142 S. Ct. 1987, 1994-95, 213 L. Ed. 2d 286 (2022). On June 21, 2022, the United States Supreme Court held that Maine's sectarian exclusion violates the Free Exercise Clause because it "operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 2002. Specifically, the Supreme Court held that "BCS . . . [is] disqualified from this generally available benefit 'solely because of [its] religious character.'" *Id.* at 1997 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 137 S. Ct. 2012, 2021, 198 L. Ed. 2d 551 (2017)). The Court continued, "[b]y 'condition[ing] the availability of benefits' in that manner, Maine's tuition assistance program . . . 'effectively penalizes the free exercise' of religion." *Id.* at 1997 (first alteration in original) (quoting *Trinity Lutheran*, 137 S. Ct. at 2022). As a result of the Supreme Court's decision in *Carson*, the sectarian exclusion is unenforceable.[2] *Compl.* ¶ 71.

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2. Paragraph 71 of Crosspoint's Complaint states: "As a result of the Supreme Court's decision in *Carson*, the sectarian exclusion is unenforceable." In their Answer, the Defendants admit only that "as a result of the Supreme Court's decision in *Carson*, sectarian schools are eligible to participate in the tuitioning program and otherwise deny the allegations made in this paragraph." *Answer* ¶ 71.

The Court is unclear how the Defendants could deny in good faith the proposition that the "sectarian exclusion is unenforceable."

### C. The Maine Human Rights Act's Antidiscrimination Provisions

While *Carson* was pending, the Maine Legislature enacted several amendments to the MHRA. *See* P.L. 2021, ch. 366, § 19 ("An Act to Improve Consistency in Terminology and within the Maine Human Rights Act"), 2021 Me. Laws 766-67 (Chapter 366).

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Upon remand, this Court asked the parties, including Commissioner Makin, to submit proposed final judgments. *See Carson v. Makin*, No. 1:18-cv-00327-JAW, 668 F. Supp. 3d 26, 2023 U.S. Dist. LEXIS 60496, at *29-30 (D. Me. Apr. 6, 2023). Although the Plaintiffs' and Commissioner Makin's proposed judgments differed in some respects, the Plaintiffs and Commissioner Makin each proposed an order permanently enjoining the state from enforcing 20-A M.R.S. § 2951(2). *See Carson v. Makin*, No. 1:18-cv-00327-JAW, *Letter from Michael Bindas, Senior Att'y, Inst. for Just., to Judge Woodcock* (Apr. 13, 2023), Attachs. 1 & 2 (ECF No. 95). *Compare id.*, Attach. 1, *[Proposed] Order Granting Pls. Declaratory and Permanent Inj. Relief* at 2 ("Defendant is hereby permanently **ENJOINED** as follows: 1. Defendant shall not enforce 20-A M.R.S. § 2951(2)"), *with id.*, Attach. 2, *[Proposed] Order Granting Pls. Declaratory and Permanent Inj. Relief* at at 1 ("Defendant is hereby permanently **ENJOINED** from enforcing 20-A M.R.S. sec. 2951(2)"). On April 18, 2023, this Court adopted Commissioner Makin's proposed enjoining language. *J.* at 2 (ECF No. 96) ("Defendant is hereby permanently **ENJOINED** from enforcing 20-A M.R.S. section 2951(2)"). As this Court permanently enjoined enforcement of 20-A M.R.S. § 2951(2) based on language supplied by the Commissioner, the Court is perplexed as to how the Defendants in this case, including Commissioner Makin, could deny that the sectarian exclusion is unenforceable, since the Court has permanently enjoined its enforcement, and its judgment on this issue is final. The Court declines to accept the Defendants' denial of paragraph 71 to the extent they deny the terms of this Court's June 29, 2023 permanent injunction in *Carson v. Makin*.

*Appendix C*

Prior to the 2021 amendments, the MHRA's educational discrimination provisions did not include gender identity, religion, ancestry, or color as protected classes and stated that "[t]he provisions in this subsection [prohibiting discrimination on the basis of] sexual orientation do not apply to any education facility owned, controlled or operated by a bona fide religious corporation, association or society." *Compl.* ¶¶ 75-76; P.L. 2005, ch. 10, § 21 ("An Act to Extend Civil Rights Protections to All People Regardless of Sexual Orientation").

Chapter 366, which took effect on October 18, 2021, added gender identity, religion, ancestry, and color as protected classes under the statute and narrowed the religious exception to state that "[n]othing in this section . . . requires a religious corporation, association or society *that does not receive public funding* to comply with this section as it relates to sexual orientation or gender identity." *Compl.* ¶¶ 77, 81; P.L. 2021, ch. 366, § 19, 2021 Me. Laws 767; 5 M.R.S. § 4602(5)(C) (emphasis in *Compl.*). Chapter 366 provides no exemptions from the prohibition against discrimination on the basis of religion in education and further requires that "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." P.L. 2021, ch. 366, § 19, 2021 Me. Laws 767; 5 M.R.S. § 4602(5)(D). MHRA violations, including violations of 5 M.R.S. § 4602, carry civil monetary penalties of up to $20,000 for a first violation, up to $50,000 for a second violation, and up to $100,000 for subsequent violations, as well as attorney's fees in certain circumstances. 5 M.R.S. §§ 4613(2)(B)(7), 4614. The Maine Superior Court is also empowered to issue a cease-and-desist order, *id.* § 4613(2)(B)(1), to

order reinstatement of a victim of unlawful employment discrimination with or without back pay, *id.* § 4613(2)(B)(2), and to award both compensatory and punitive damages, *Id.* § 4613(2)(B)(8).

When Crosspoint filed its complaint, the MHRA exempted single-sex schools, even those participating in the tuitioning program, from its prohibition on discriminating on the basis of race, color, ancestry, national origin, sex, religion, sexual orientation, and gender identity. *Compl.* ¶ 79; *Defs.' Opp'n* at 14 (acknowledging the exception but asserting it was unintentional). On June 15, 2023, the Governor of Maine signed Maine Public Law 2023, Chapter 188 (Chapter 188), which amended the MHRA to remove the exclusion of single-sex schools from the Act's definition of "educational institution." P.L. 2023, ch. 188, § 1 ("An Act to Amend the Definition of 'Educational Institution' Under the Maine Human Rights Act to Include Single-Sex Education Institutions"), 2023 Me. Laws 370; *Defs.' June 20 Correspondence* at 1.

Crosspoint believes that Chapter 366 is a "poison pill . . . designed to operate as an end-run around *Carson* to exclude Plaintiff from the tuitioning program." *Compl.* ¶ 87. As evidence of this connection, Crosspoint points to a press release from Maine's Attorney General issued on the day the Supreme Court decided *Carson*, in which the Attorney General stated:

> The education provided by the schools at issue here is inimical to a public education. They promote a single religion to the exclusion of all

> others, refuse to admit gay and transgender children, and openly discriminate in hiring teachers and staff. One school teaches children that the husband is to be the leader of the household. While parents have the right to send their children to such schools, it is disturbing that the Supreme Court found that parents also have the right to force the public to pay for an education that is fundamentally at odds with values we hold dear. I intend to explore with Governor Mills' administration and members of the Legislature statutory amendments to address the Court's decision and ensure that public money is not used to promote discrimination, intolerance, and bigotry.
>
> While the Court's decision paves the way for religious schools to apply to receive public funds, it is not clear whether any religious schools will do so. Educational facilities that accept public funds must comply with anti-discrimination provisions of the Maine Human Rights Act, and this would require some religious schools to eliminate their current discriminatory practices.

*Id.* ¶ 84. Crosspoint also cites a June 26, 2022 tweet by then-Speaker of the Maine House of Representatives Ryan Fecteau. *Id.* ¶ 87. An individual tweeted, "You know how SCOTUS said Maine couldn't exclude religious schools from their voucher program? Maine just changed the guidelines to exclude schools that discriminate against

LGBTQ+ students." *Id.* Speaker Fecteau responded, "Sure did. Anticipated the ludicrous decision from the far-right SCOTUS." *Id.*

### D. Bangor Christian Schools' Tuitioning Eligibility and Policies

#### 1. Tuitioning Eligibility

BCS is accredited by the New England Association of Schools and Colleges, annually maintains basic school approval under 20-A M.R.S. § 2901(2)(A), meets the requirements for reporting and release of student records, and is willing to comply with the remaining applicable requirements for tuitioning schools—aside from the disputed MHRA provisions. *Compl.* ¶¶ 49-51.

BCS's total high-school enrollment for the 2022-23 school year is 92 students, 28 of whom live in tuitioning SAUs: Bradford, Glenburn, Levant, Orrington, and Veazie. *Id.* ¶¶ 52-53. Crosspoint Church pays 95% of tuition for the children of Crosspoint Church employees, including BCS staff, to attend BCS. *Id.* ¶ 54. For the 2023-24 school year, eight BCS high-school students are children of Crosspoint Church employees and live in Glenburn, Maine—a tuitioning SAU. *Id.* ¶ 55. If the state approved BCS for tuition purposes, BCS would charge the tuition for these eight students to Glenburn, resulting in an annual savings of approximately $47,120. *Id.* ¶ 56. If the state approved BCS for tuition purposes, the BCS high-school students residing in tuitioning SAUs would be eligible to participate in the tuitioning program instead

of paying BCS tuition out of pocket. *Id.* ¶ 57. BCS has not applied for the tuitioning program but avers that it would apply if exempted from Chapter 366's penalties for discriminating on the basis of religion, sexual orientation, and gender identity. *Id.* ¶¶ 96, 100.

**2. School Policies**

Crosspoint's objective is "full obedience to the will of the Lord Jesus Christ who is the Founder and Head of the Church." *Id.* ¶ 19. BCS's vision "is to help students discover God's plan for their lives and to equip them to be successful on whatever path He is leading them," and its mission "is to assist families in educating the whole child by encouraging spiritual maturity and academic excellence in a supportive environment. Our final authority in all matters is the Word of God." *Id.* ¶¶ 25-26.

BCS operates in accordance with its Statement of Faith, which provides, in relevant part that: (1) the term marriage has only one legitimate meaning—a covenantal union between one man and one woman; and (2) all "sexual activity, identity or expression" that lies outside this definition of marriage "are sinful perversions of and contradictory to God's natural design and . . . will not be accepted." *Id.* ¶ 28. Its admissions policy provides:

> Bangor Christian Schools adheres to and supports the historical truth claims and moral foundations of Christianity. This includes, but is not limited to, the biblical definition of marriage, sexuality and moral conduct, and

> the clear biblical teaching that gender is both sacred and established by God's design. Parents or the legal guardians, who choose to enroll their children at our school, are agreeing to support these and other basic biblical values derived from historical Christianity and the relevant Christian positions embraced by Crosspoint Church. Parents understand and agree that Bangor Christian Schools will teach these principles and biblical values.
>
> Bangor Christian Schools does not discriminate in its practices against any person because of race, color, national or ethnic origin, gender, age, or disability.

*Id.* ¶ 29. Two criteria BCS uses for admissions are whether the student "is in agreement with school policies" and whether the parents "are willing to have their children trained in accordance with this philosophy." *Id.* ¶ 30. Finally, the admissions policy provides that BCS "will consider admission for students from any family who, despite their religious background or beliefs, is willing to support our philosophy of Christian education, student conduct requirements, and the above-stated positions and . . . [c]ontinued enrollment at Bangor Christian Schools is contingent upon this same understanding and support." *Id.* ¶ 31.

Any student who "persistently and unrepentantly engages in . . . advocating beliefs contrary to BCS's statement of faith" would be "subject to removal from the

school." *Id.* ¶ 35. BCS's code of conduct "prohibits students from . . . engaging in immoral conduct, including sexual activity outside of marriage as defined in the Statement of Faith, or identifying as a gender other than their biological sex." *Id.* ¶ 37.

Crosspoint Church employees, including BCS staff, "must be co-religionists—that is, they must be in agreement with Crosspoint's Statement of Faith and engage in religious practice consistent with Crosspoint Church's spiritual standards." *Id.* ¶ 39. BCS teachers "must agree to both BCS's Statement of Faith and the Educational Philosophy and Objectives and be committed to upholding them," including by adhering to the policies "relating to sexual behavior." *Id.* ¶¶ 40-41.

## III. THE PARTIES' POSITIONS

### A. Crosspoint Church's Motion for Preliminary Injunction

Crosspoint argues that it is entitled to a preliminary injunction because: (1) Chapter 366, as applied to religious institutions, violates the First Amendment's Free Exercise Clause; (2) applying the MHRA to prohibit Crosspoint from employing only co-religionists violates the First Amendment's Free Exercise and Establishment Clauses; (3) Chapter 366 violates the First Amendment's Free Speech Clause; (4) Crosspoint will suffer irreparable harm in the absence of an injunction; and (5) the balance of equities and public interest favor an injunction. *Pl.'s Mot.* at 1-20.

*Appendix C*

Beginning with the Free Exercise Clause, Crosspoint submits that "[t]he Free Exercise Clause prohibits government from burdening a plaintiff's 'sincere religious practice pursuant to a policy that is not neutral or generally applicable . . . unless the government can satisfy strict scrutiny by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.'" *Id.* at 7 (alteration in original) (quoting *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 142 S. Ct. 2407, 2421-22, 213 L. Ed. 2d 755 (2022)). It asserts that Chapter 366 "substantially burdens Plaintiff's sincere religious exercise." *Id.* Furthermore, Crosspoint contends that Chapter 366 is not neutral because "[a]lthough the poison pill[3] has ramifications for many religious schools, its timing and structure show that its purpose was to preemptively exclude Plaintiff from the tuitioning program in order to moot *Carson* . . . [t]his result is intentional and specifically targets Plaintiff's religious beliefs." *Id.* at 9. Assuming that Chapter 366 is not neutral, Crosspoint asserts that the Court should apply strict scrutiny. *Id.* at 11. Alternatively, Crosspoint offers that the Court should apply strict scrutiny on the theory that Chapter 366 is not generally applicable—specifically, because it exempts single-sex schools from the antidiscrimination provisions. *Id.* Crosspoint asserts that Chapter 366 cannot survive strict scrutiny because it is not narrowly tailored to achieve a compelling government interest. *Id.* at 12-14.

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3. Crosspoint refers to the disputed MHRA educational antidiscrimination provisions as a "poison pill" while Defendants refer to them as "Chapter 366." The Court adopts the neutral framing of Chapter 366.

Next, Crosspoint argues that applying the MHRA "to prohibit Plaintiff from hiring only co-religionists violates the Establishment and Free Exercise Clauses." *Id.* at 14. It points to the MHRA's provision prohibiting employers from discriminating against applicants because of, inter alia, religion and submits that "Plaintiff faces a credible threat of Defendants enforcing § 4572(1)(A) to prohibit BCS's practice of hiring only co-religionists if BCS participates in the tuitioning program." *Id.* at 14-15. Yet such enforcement would be unconstitutional, Crosspoint contends, because the "MHRA's plain language protects Plaintiff's right to hire only co-religionists" and "Plaintiff's hiring practices for its ministries, including BCS, are protected by the ministerial exception." *Id.* at 15-16. Crosspoint maintains that "[t]hreatening to enforce 5 M.R.S. § 4572(1)(A) against Plaintiff if it participates in the tuitioning program unconstitutionally conditions participation on Plaintiff relinquishing its First Amendment right to select its ministers." *Id.* at 17.

Crosspoint then contends that Chapter 366 "violates the U.S. Constitution's Free Speech Clause." *Id.* at 18. In its view, Chapter 366 "restricts Plaintiff's speech based on content and viewpoint, because it is designed to force Plaintiff to stop educating its students from its religious perspective as a condition of participating in the tuition program." *Id.* Crosspoint submits that "[i]mposing financial burdens because Plaintiff's teaching reflects its religious perspective is unconstitutional under the Free Speech Clause." *Id.* at 19.

Finally, Crosspoint asserts that it will suffer irreparable harm in the absence of an injunction and that

the balance of equities and public interest also favor an injunction. *Id.* at 19-20. It concludes that the Court should grant a preliminary injunction enjoining the Defendants from enforcing the religion, sexual orientation, and gender identity provisions of 5 M.R.S. § 4602 against Crosspoint and from enforcing 5 M.R.S. § 4572(1)(A) to prohibit Crosspoint from hiring co-religionists. *Id.* at 20.

**B. The Defendants' Opposition**

The Defendants argue first that Crosspoint's claim is not ripe because it is predicated on a "list of hypothetical events"—including Crosspoint applying for funding, being accepted, denying admission to a person in a protected class, and then facing a MHRC discrimination charge—and thus "there is no imminent threat of enforcement and Plaintiff's lawsuit . . . should be dismissed." *Defs.' Opp'n* at 1-2.

The Defendants go on to assert that, if ripe, "Plaintiff is not entitled to a preliminary injunction based on well-established precedent because it is not likely to prevail on the merits and none of the other relevant factors supports an injunction." *Id.* at 2. They submit that "[a]dmitting students belonging to these protected classes will in no way burden Plaintiff's religious practices," as "BCS would still be free to teach and say whatever it wishes — it simply would not be allowed to prevent willing students from receiving whatever education BCS chooses to deliver." *Id.*

The Defendants add that "even if the prohibitions against discrimination did interfere with Plaintiff's religious practices, they are permissible because they

are neutral and generally applicable." *Id.* Moreover, they offer that, in any event, "the prohibitions against unlawful discrimination satisfy strict scrutiny because, as the Supreme Court has recognized, states have a compelling interest in ending discrimination, and this outweighs any interest schools may have in discriminatory policies, even when such policies are based on sincerely held religious beliefs." *Id.*

Turning to the employment issue, the Defendants observe that "the MHRA expressly permits Plaintiff to hire only members of its religion and to require all employees to conform to Plaintiff's religious tenets" and "[t]he so-called 'ministerial exception' recognized by the Supreme Court may provide Plaintiff with further protection by barring application of the MHRA to some employment positions." *Id.* In their view, however, "[t]he extent to which the exception applies cannot be decided in the abstract in this facial challenge and must instead await an actual controversy." *Id.* at 2-3.

Finally, regarding Crosspoint's free speech claim, the Defendants submit that "the prohibitions against discrimination do not violate Plaintiff's First Amendment right to free speech because they regulate conduct, not speech" and "Plaintiff is free to say whatever it wishes; it just cannot exclude willing listeners for discriminatory reasons." *Id.* at 3.

**C. Crosspoint's Reply**

In reply, Crosspoint first submits that "Defendants' Response at least concedes (at 18) that the ministerial

exception restricts the application of 5 M.R.S. § 4572 (1)(A) to BCS's employment practices with respect to a significant portion of its employees" and "[a]t a minimum, then, a preliminary injunction to that effect is appropriate." *Pl.'s Reply* at 1.

Crosspoint also reiterates that "the Defendants' ongoing First Amendment violations justify the full injunction Plaintiff seeks." *Id.* Addressing the Defendants' ripeness argument, Crosspoint submits that "BCS need not risk the MHRA's substantial legal penalties to seek relief." *Id.* Crosspoint contends that its claim is ripe for pre-enforcement review because it is eligible for and would participate in the tuitioning program, but for the challenged provisions. *Id.* at 2. It says that it reasonably fears enforcement and thus "the poison pill forces BCS to either relinquish its religious identity or forego participation in the tuitioning program for which it is otherwise eligible." *Id.* at 2-3.

Next, Crosspoint contends that "Section 4602 burdens Plaintiff's religious exercise" because "BCS's religious exercise encompasses all aspects of operating BCS according to its religious beliefs" and "BCS's requiring students to behave consistently with BCS's statement of faith is an exercise of BCS's religious beliefs and is necessary to its religious educational mission." *Id.* at 3-4. Thus, in its view, "Section 4602 burdens BCS's religious exercise not just in its admissions, as Defendants claim, but also in BCS's daily internal operations" by requiring BCS to "permit student religious expression contrary to its statement of faith" and "also requir[ing] BCS to

affirm a student's gender identity and sexual orientation, contrary to its statement of faith." *Id.* at 4.

Crosspoint also reiterates that Chapter 366 violates the Free Exercise Clause because it "is not neutral and generally applicable," triggering strict scrutiny, and it cannot survive strict scrutiny because "Defendants assert . . . only a general interest in nondiscrimination" that is insufficiently compelling. *Id.* at 5-8.

### D. The Parties' Correspondence Regarding Recent Legislation

While this motion was under advisement, each party filed correspondence with the Court regarding the passage of Chapter 188, which amended the MHRA to remove the exclusion of single-sex schools from the Act's definition of "educational institution." *See Defs.' June 20 Correspondence; Pl.'s June 27 Correspondence.* After the Defendants notified the Court that the bill had been enacted, Crosspoint responded that "[a]lthough this amendment removed one of the constitutional flaws with the existing statutory scheme, it does not resolve Plaintiff's other challenges" and "[t]his challenge remains ripe for review" because "Plaintiff will suffer irreparable harm absent an injunction." *Pl.'s June 27 Correspondence* (citations omitted).

## IV. LEGAL STANDARD

"A preliminary injunction is an extraordinary and drastic remedy that is never awarded as of right." *Peoples*

*Fed. Sav. Bank v. People's United Bank*, 672 F.3d 1, 8-9 (1st Cir. 2012) (quoting *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d 26, 32 (1st Cir. 2011)). A judge should use the authority to grant such injunctive relief "sparingly." *Mass. Coal. of Citizens with Disabilities v. Civil Def. Agency & Off. of Emergency Preparedness*, 649 F.2d 71, 76 n.7 (1st Cir. 1981).

To determine whether to issue a preliminary injunction a court must analyze four factors:

> (1) the likelihood of success on the merits; (2) the potential for irreparable harm [to the movant] if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest.

*Esso Standard Oil Co. v. Monroig-Zayas*, 445 F.3d 13, 17-18 (1st Cir. 2006) (alteration in original) (quoting *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 11 (1st Cir. 2004)).

"The party seeking the preliminary injunction bears the burden of establishing that these four factors weigh in its favor." *Id.* at 18. Ultimately, "trial courts have wide discretion in making judgments regarding the appropriateness of such relief." *Francisco Sánchez v. Esso Standard Oil Co.*, 572 F.3d 1, 14 (1st Cir. 2009).

## V. DISCUSSION

### A. Likelihood of Success on the Merits

"The sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002); *see also Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 7 (1st Cir. 2012) (confirming that this factor is "the most important part of the preliminary injunction assessment" (quoting *Jean v. Mass. State Police*, 492 F.3d 24, 27 (1st Cir. 2007))). The Court analyzes the merits of Crosspoint's challenges to the MHRA and concludes that the religion, sexual orientation, and gender identity provisions of 5 M.R.S. § 4602 do not violate the Free Exercise, Establishment, or Free Speech Clauses of the U.S. Constitution. The Court also concludes that Crosspoint is not entitled to a preliminary injunction on its challenge to 5 M.R.S. § 4572(1)(A) because the parties agree that Crosspoint is exempt from this provision.

#### 1. Ripeness

As a threshold matter, the Court considers the Defendants' claim that Crosspoint's suit is not yet ripe for review. The Court concludes that it is ripe.

"If standing is a question of who, then ripeness—which shares standing's constitutional and prudential pedigree—is a question of when." *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999) (citation omitted). The United States Supreme Court explained that the basic function of ripeness is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). "While the doctrine has a prudential flavor, a test for ripeness is also mandated by the constitutional requirement that federal jurisdiction extends only to actual cases or controversies." *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 535 (1st Cir. 1995) (citing U.S. CONST. art. III, § 2; *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 242-45, 73 S. Ct. 236, 97 L. Ed. 291 (1952)).

"To determine whether a case is ripe for review, a federal court must evaluate the fitness of the issue presented and the hardship that withholding immediate judicial consideration will work." *Whitehouse*, 199 F.3d at 33. "To establish ripeness in a pre-enforcement context, a party must have concrete plans to engage immediately (or nearly so) in an arguably proscribed activity," and "[a] showing that the challenged statute, fairly read, thwarts implementation of the plan adds the element of hardship." *Id.* Crosspoint submits that both requirements are met because: (1) "BCS is eligible for the tuitioning program and would participate if the challenged MHRA provisions did not impose liability because of BCS's religious exercise"; and (2) the "Defendants also agree that BCS

'would be required to comply' with the challenged MHRA provisions if BCS participates in the tuitioning program." *Pl.'s' Reply* at 2.

The Court finds *Whitehouse* instructive and agrees with Crosspoint. In *Whitehouse*, the First Circuit considered a First Amendment challenge to a law prohibiting the use of certain public records for commercial solicitation. 199 F.3d at 28-29. The plaintiff association obtained protected records to use for commercial solicitations but feared prosecution under the law, despite no person having been criminally charged in its 20-year existence. *Id.* at 28. "Reluctant either to execute or to abandon its [plan], and seeing no other way of resolving the issue, the Association sued" to have the law enjoined as unconstitutional. *Id.* at 29. The state's Attorney General contended that the complaint "showed neither a sufficiently definite plan to engage in conduct that would transgress [the challenged law] nor a sufficiently imminent threat of prosecution." *Id.*

The *Whitehouse* Court sided with the plaintiff. Regarding fitness, the First Circuit observed that:

> This is not a case of statutory ambiguity but, rather, one that presents a single, purely legal question: Does Rhode Island's prohibition on using public records for commercial solicitation unconstitutionally restrain free expression? The Association has described a concrete plan to recruit new members—an activity plainly proscribed by the text of section 38-2-6—and no one has suggested any valid reason why

> resolution of the apparent conflict should await further factual development. Since the controversy was well-defined and amenable to complete and final resolution, it was fit for judicial review.

*Id.* at 34.

Crosspoint's case is fit for similar reasons. As in *Whitehouse*, this is not "a case of statutory ambiguity" but rather "a single, purely legal question." *Id.* Here, there is no ambiguity as to whether the MHRA, as amended by Chapter 366, proscribes Crosspoint's desired conduct. Crosspoint desires to apply for Maine's tuitioning program, a benefit the Supreme Court recently ruled the state could not deny to sectarian institutions, such as Crosspoint. While the Supreme Court was considering *Carson*, Maine's Legislature amended the MHRA to prohibit educational institutions that accept state funding—including religious institutions—from discriminating on the basis of "sexual orientation or gender identity." 5 M.R.S. § 4602(1). On the day the Supreme Court decided *Carson*, Maine's Attorney General stated that "[t]he education provided by the schools at issue here," including BCS, "is inimical to a public education. They promote a single religion to the exclusion of all others, refuse to admit gay and transgender children, and openly discriminate in hiring teachers and staff." *Compl.* ¶ 84. He added further that "[e]ducational facilities that accept public funds must comply with anti-discrimination provisions of the Maine Human Rights Act, and this would require some religious schools to eliminate their current discriminatory practices." *Id.*

In the Court's view, there is no statutory ambiguity here. There is no serious dispute that, if BCS received state funding, its stated policies would conflict directly with the MHRA's prohibition against discrimination on the basis of sexual orientation or gender identity. *See, e.g., id.* ¶¶ 37-38 (BCS's code of conduct prohibits students from "identifying as a gender other than their biological sex" and BCS's dress code requires students to "wear clothing consistent with their biological sex"); *Defs.' Opp'n* at 9 ("BCS apparently does not discriminate based on any class *other than* sexual orientation or gender identity" (emphasis added)).

The Defendants posit that Crosspoint's claim is unripe because it is based on a pyramid of hypotheticals, with its fear of sanction under the MHRA first dependent on applying for tuitioning, being approved, denying admission to a protected person, and then being charged and punished by the MHRC. *Defs.' Opp'n* at 9-10. In essence, the Defendants attempt to avoid *Whitehouse* by characterizing Crosspoint's claim as "rest[ing] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* at 8 (quoting *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998)). Under this logic, *Whitehouse* is distinguishable because there, the plaintiff association could have faced legal liability as soon as it started soliciting new members, whereas Crosspoint must wait for a member of a protected class to apply, and presumably be rejected. But the only way for Crosspoint to avoid liability is by refraining from acting. Once Crosspoint is approved for tuitioning, a member of a protected class could apply at any time, forcing Crosspoint to either violate the statute

or compromise its religious beliefs. Therefore, Crosspoint is in the same position as the *Whitehouse* plaintiff: do nothing or give up control over concerns for legal liability. To accept the Defendants' chain of hypotheticals would be to confine *Whitehouse* to the type of statute at issue in that case. The Defendants have provided no support for such a limited reading of *Whitehouse*, and the Court sees none.

The Defendants do not suggest that Crosspoint is insincere in its stated desire to apply for tuitioning or that its policies are not motivated by religious conviction. The Defendants do not offer any reason why, but for its religious convictions, Crosspoint/BCS would not be approved for tuitioning if it applied,[4] and it is equally clear that Crosspoint's policies violate the MHRA's antidiscrimination provisions. Based on the statements of the Maine Attorney General, it is a short step from Crosspoint/BCS's acceptance of tuition from the state to the Attorney General's enforcement of the unlawful educational discrimination provisions of Maine law with its potential of civil and other penalties. *See* 5 M.R.S. § 4613.[5]

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4. The Defendants' chain of hypotheticals assumes Crosspoint would be approved for tuitioning, and the Defendants themselves admit as much. *See Defs.' Opp'n* at 14 n.5 ("Discriminatory schools are free to participate in the tuitioning program regardless of whether they comply with the MHRA").

5. If Crosspoint violates the MHRA, it could be subject to civil penalties not in excess of $20,000 in the case of the first order under the Act, and escalating civil penalties thereafter, not in excess of $100,000 for a third or subsequent order. 5 M.R.S. § 4613(2)(B)(7). The MHRA also provides for an order to cease and desist. *Id.* § 4613(B)(1).

In short, the record does not reveal why "resolution of the apparent conflict should await further factual development." *Whitehouse*, 199 F.3d at 34. In terms of fitness for review, Crosspoint's claim primarily offers a "purely legal question," *id.*, of whether, after *Carson*, the state may require religious institutions with faith-motivated policies that discriminate on the basis of sexual orientation or gender identity to comply with the MHRA's antidiscrimination provisions as a condition of participating in the tuitioning program. Because this "controversy [is] well-defined and amenable to complete and final resolution," it is fit for judicial review. *Id.* at 34; *see also Sullivan v. City of Augusta*, 511 F.3d 16, 31-32 (1st Cir. 2007) (constitutional challenge to parade permit ordinance containing thirty-day advance notice requirement was ripe even though plaintiff had not applied for a permit less than thirty days before a planned march); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 830 (1st Cir. 2020) ("So long as th[e] uncertainty [inherent to pre-enforcement suits] does not undermine the credible threat of prosecution or the ability of the court to evaluate the merits of the plaintiff's claim in a preenforcement posture, there is no reason to doubt standing" (alteration in original) (quoting *Am. C.L. Union of Ill. v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012))).

Turning to the hardship prong of ripeness, *Whitehouse* is again instructive. In *Whitehouse*, the plaintiff "refrained from carrying forward its plan because it reasonably feared prosecution" under the challenged statute (even though the state had never pursued criminal charges under that statute). 199 F.3d at 32, 34. The First Circuit observed

that the plaintiff "thus faced the direct and immediate dilemma of choosing between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [it] believe[d] to be constitutionally protected activity" and that "[b]ecause lost opportunities for expression cannot be retrieved, delaying or denying resolution of the issue would have worked a substantial hardship." *Id.* at 34 (internal citations and quotations omitted).

The Court reaches the same conclusion here. In *Carson*, the Supreme Court struck down the sectarian exclusion, holding that "BCS . . . [is] disqualified from this generally available benefit 'solely because of [its] religious character,'" 142 S. Ct. at 1997 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021), and "[b]y 'condition[ing] the availability of benefits' in that manner, Maine's tuition assistance program . . . 'effectively penalizes the free exercise' of religion.'" *Id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2022). Crosspoint now seeks to avail itself of that program and avers that "[b]ut for the poison pill's penalization of Plaintiff's religious exercise" and the "credible threat of enforcement" it "would apply to become approved for tuition purposes." *Compl.* ¶¶ 100-01.

Setting aside—for the moment—the constitutionality of the challenged provisions, Crosspoint's fear of MHRA enforcement is eminently reasonable, especially given the timing of the amendments and the then-Speaker of the House's frank statement of his understanding of legislative intent. Moreover, the Maine Attorney General is the "chief law officer of the State," *Withee v. Lane & Libby Fisheries Co.*, 120 Me. 121, 123, 113 A. 22 (1921), and his statement on the day of the *Carson* decision would cause Crosspoint

reasonably to conclude that he would pursue Crosspoint for asserted violations of the MHRA's antidiscrimination provisions.

In sum, Crosspoint may apply for tuitioning, but its policies plainly run afoul of the MHRA's antidiscrimination provisions. Crosspoint is thus fairly stuck between "the Scylla of intentionally flouting state law and the Charybdis of forgoing what [it] believe[s] to be constitutionally protected activity." *Whitehouse*, 199 F.3d at 34 (quoting *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)); *see also Trinity Lutheran*, 582 U.S. at 462 ("To condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties" (alterations in original) (quoting *McDaniel v. Paty*, 435 U.S. 618, 626, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978))). Crosspoint has satisfied both the fitness and hardship prongs, and its claims are ripe for judicial review.

**2. Crosspoint's Free Exercise Claims**

Crosspoint brings two Free Exercise claims, alleging that the MHRA's educational discrimination provisions—codified at 5 M.R.S. § 4602—and employment discrimination provisions—§ 4752(1)(A)—each violate its First Amendment rights. *Pl.'s Mot.* at 7-17. The Court concludes that neither claim is likely to succeed on the merits. The educational discrimination claim is unavailing because the challenged provisions are neutral, generally applicable, and rationally related to a legitimate government interest. The employment discrimination

claim fails because Crosspoint has not identified any constitutionally protected conduct infringed by the statute.

The Free Exercise Clause prohibits the government from burdening a plaintiff's "sincere religious practice pursuant to a policy that is not neutral or generally applicable . . . unless the government can satisfy strict scrutiny by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Id.* at 2421-22 (citations and internal quotations omitted). The Supreme Court clarified that "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Trinity Lutheran*, 137 S. Ct. at 2022 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988)). "[I]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* (quoting *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)). "To condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender[] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties." *Id.* at 2022 (alterations in original) (quoting *McDaniel*, 435 U.S. at 626). In *Carson*, the Supreme Court held explicitly that Maine's "nonsectarian" requirement violated the Free Exercise Clause because "the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." 142 S. Ct. at 2002.

The Supreme Court has also provided that "a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law." *Kennedy*, 142 S. Ct. at 2421.

**a. The Educational Discrimination Claim**

The gravamen of Crosspoint's suit is that Chapter 366 impermissibly burdens religious exercise by forcing Crosspoint to compromise its religious beliefs to participate in the tuitioning program. *See, e.g., Compl.* ¶ 80 (alleging that § 4602 "operates to deter religious schools from participating in the tuitioning program if they hold disfavored religious beliefs, including . . . operating in accordance with traditional beliefs about the nature of marriage and sexuality"). Crosspoint asserts that *Carson* prohibited the state from excluding sectarian institutions from the tuitioning program, but Chapter 366 would now improperly force them to compromise their religious beliefs to access that benefit. *Pl.'s Mot.* at 7. The Defendants counter that "[a]dmitting students belonging to these protected classes will in no way burden Plaintiff's religious practices" and "BCS would still be free to teach and say whatever it wishes — it simply would not be allowed to prevent willing students from receiving whatever education BCS chooses to deliver." *Defs' Opp'n* at 2.

*Appendix C*

Whether the MHRA burdens Crosspoint's religious exercise presents a close call, at least in this pre-enforcement context. The MHRA provides:

> It is unlawful educational discrimination in violation of this Act, on the basis of sex, sexual orientation or gender identity, physical or mental disability, ancestry, national origin, race, color or religion, to:
>
> A. Exclude a person from participation in, deny a person the benefits of, or subject a person to, discrimination in any academic, extracurricular, research, occupational training or other program or activity;
>
> B. Deny a person equal opportunity in athletic programs;
>
> C. Apply any rule concerning the actual or potential familial status or marital status of a person or to exclude any person from any program or activity because of pregnancy or related conditions or because of sex or sexual orientation or gender identity;
>
> D. Deny a person admission to the institution or program or to fail to provide equal access to and information about an institution or program through recruitment; or
>
> E. Deny a person financial assistance availability and opportunity.

5 M.R.S. § 4602(1). These provisions are subject to the qualification that "[n]othing in this section . . . [r]equires a religious corporation, association or society that does not receive public funding to comply with this section as it relates to sexual orientation or gender identity." *Id.* § 4602(5). The MHRA further provides that "'Discriminate' includes, without limitation, segregate, separate or subject to harassment." *Id.* § 4553(2).

The statute plainly would prohibit Crosspoint—if it joins the tuitioning program—from denying admission to or otherwise excluding applicants based on their sexual orientation, gender identity, or religion. It does not, on its face, appear to directly limit the content of Crosspoint's religious expression or teaching—e.g., Crosspoint could not reject applicants for being homosexual, but it could still teach that homosexuality is a sin. *See Compl.* ¶ 28 (characterizing sexual conduct outside the Bible's definition of marriage as "sinful perversions of and contradictory to God's natural design and purpose for sexual activity").

Crosspoint responds, however, that "BCS's requiring students to behave consistently with BCS's statement of faith is an exercise of BCS's religious beliefs and is necessary to its religious educational mission" and "[a]ccordingly, applicants for admission at BCS must agree to cooperate with BCS's statement of faith and code of conduct, and a student who persistently advocates beliefs contrary to BCS's statement of faith is subject to expulsion for failure to cooperate with BCS's religious purpose and code of conduct." *Pl.'s Reply* at 4. It adds further that "[t]o

say that § 4602 does not burden BCS's religious practice because BCS may still express—but not enforce—its religious beliefs is absurd." *Id.* at 5.

Essentially, as noted earlier, Crosspoint is saying that the state's law requires it to admit students only to expel them. If Crosspoint admitted students with sexual orientations, gender identities, or religious views inconsistent with its central religious tenets, the students would be required under Crosspoint policy to adhere to religious beliefs inimical to their own sexual orientations, gender identities, and religious beliefs on pain of "removal from the school." *Compl.* ¶ 35.

Crosspoint's reasoning fits within recent Supreme Court precedent. In *Fulton v. City of Philadelphia*, 593 U.S. 522, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021), the Supreme Court considered the case of Catholic Social Services (CSS), a private agency that had contracted with the city to provide foster care services but refused to certify same-sex couples because it considered "the certification of prospective foster families to be an endorsement of their relationships." *Id.* at 1875. The city stated that it would not enter a future foster care contract with CSS "unless the agency agreed to certify same-sex couples," and CSS sued to enjoin the city from enforcing that directive. *Id.* at 1875-76. The Supreme Court sided with CSS, stating:

> As an initial matter, it is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its

> mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement. And "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.

*Id.* The Court went on to find that the city's policies triggered strict scrutiny because they were not generally applicable and concluded that:

> CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment.

*Id.* at 1881-82.

*Fulton* is helpful on the issue of burden. In *Fulton*, the government burdened an organization's religious exercise "by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs" through requiring it to—in the organization's view—"endorse" homosexual relationships to which it objected. *Id.* at 1875-76. Here, Crosspoint avers that requiring students to behave consistently with its statement of faith is an exercise of its religious beliefs and noncompliant students are subject to expulsion. Its policies prohibit "students from, among other things, engaging in immoral conduct, including sexual activity outside of marriage as defined in the Statement of Faith, or identifying as a gender other than their biological sex" and the school's "dress code requires students to wear clothing consistent with their biological sex." *Compl.* ¶¶ 37-38. To the extent that Crosspoint requires all students to comply with its statement of faith, the MHRA effectively prohibits Crosspoint from enforcing some tenets of those policies (for example, it likely could not permissibly discipline a student for identifying as transgender[6] or entering a non-heterosexual relationship). As such, the challenged

6. *See, e.g., Doe v. Reg'l Sch. Unit 26*, 2014 ME 11, ¶ 24, 86 A.3d 600, 607 (holding that "denying access to the appropriate bathroom [consistent with a student's gender identity] constitutes sexual orientation discrimination in violation of the MHRA"); *see also Pl.'s Reply* at 4 n.7 (reiterating its representatives' prior testimony that "it violates BCS's statement of faith to admit a student or allow a student to remain enrolled who violates BCS's statement of faith by presenting as a gender not consistent with his or her biological sex or by professing the entrenched belief that a homosexual sexual orientation is who [the student is] and [the student] think[s] that is right and good" (citation and internal quotation marks omitted)).

provisions of the MHRA burden Crosspoint's religious exercise.

As the Supreme Court observed in *Fulton*, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." 141 S. Ct. at 1876 (quoting *Thomas*, 450 U.S. at 714). Taking Crosspoint at its word, the challenged provisions of the MHRA "put[] it to the choice of curtailing its mission or approving [conduct] inconsistent with its beliefs." *Id.* at 1876. Against the backdrop of *Fulton*, the Court concludes that the MHRA's antidiscrimination provisions—which would effectively prohibit Crosspoint from enforcing several of its religiously motivated policies relating to sexual orientation and gender identity—burden Crosspoint's religious exercise.

Burdensome, however, does not mean impermissible, as "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Parker v. Hurley*, 514 F.3d 87, 95 (1st Cir. 2008) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)). Crosspoint contends that § 4602 triggers strict scrutiny because it is neither neutral nor generally applicable.

Crosspoint's argument on general applicability appears to have been mooted. It initially asserted that "5 M.R.S. § 4602 is not generally applicable, because it

categorically exempts single-sex schools from nearly all educational nondiscrimination provisions, including those relating to religion, sexual orientation, and gender identity." *Pl.'s Mot.* at 11. When this suit was filed, single-sex schools were indeed exempt. However, as each party acknowledges, on June 15, 2023, the Governor of Maine signed Maine Public Law 2023, Chapter 188, which eliminated the exemption for single-sex educational institutions. *See* P.L. 2023, ch. 188, § 1, 2023 Me. Laws 370; *Defs.' June 20 Correspondence; Pl.'s June 27 Correspondence*. Crosspoint, presumably referring to its general applicability claim, stated that "[a]lthough this amendment removed one of the constitutional flaws with the existing statutory scheme, it does not resolve Plaintiff's other challenges." *Pl.'s June 27 Correspondence* at 1. Because Crosspoint has not raised any other reason to suggest that the challenged provisions are not generally applicable, the Court concludes that the law is generally applicable and moves on to neutrality.

To qualify as neutral, a policy must not target religious beliefs or practices "because of their religious nature" and the "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. "If the policy's objective is to impede or constrain religion, the policy is not neutral." *Swartz v. Sylvester*, 53 F.4th 693, 700 (1st Cir. 2022) (citing *Lukumi*, 508 U.S. at 533). The First Circuit has noted that "[w]e are mindful that the Free Exercise Clause forbids subtle departures from neutrality and covert suppression of particular religious beliefs" and "[w]hen assessing

neutrality, a court must survey meticulously the totality of the evidence, both direct and circumstantial . . .. This includes the series of events leading to the conduct, as well as the historical background." *Id.* at 701 (citations and internal quotation marks omitted).

Crosspoint asserts that Chapter 366 is not neutral because "its timing and structure show that its purpose was to preemptively exclude Plaintiff from the tuitioning program in order to moot *Carson*," meaning that "[e]xcluding Plaintiff from the tuitioning program is a feature, not a bug." *Pl.'s Mot.* at 9-11. It cites Attorney General Frey's press release on the day *Carson* was decided and Speaker Fecteau's tweet about the legislative response to *Carson* as evidence that there is "no doubt that the Legislature specifically crafted the poison pill to target Plaintiff's religious beliefs." *Id.* at 10. The Defendants respond that Attorney General Frey issued the contested press release a year after the challenged law was passed and that the Court cannot divine the legislature's intent from a single tweet by then-Speaker Fecteau. *Defs.' Opp'n* at 13, 14 n.15. Furthermore, they offer that:

> even if [Chapter 366] was introduced and enacted in anticipation of an adverse Supreme Court ruling, it was not a "poison pill." Until then, religious schools were not eligible to receive public funds because they were excluded from the tuitioning program. There was thus no need to differentiate between religious schools receiving public funds and those that were not. If the Legislature anticipated that

> Maine might soon be prohibited from excluding religious schools from the tuitioning program, it would have been entirely appropriate for them to then draw the same distinction that already existed when it came to employment and housing discrimination — religious educational institutions not receiving public funds could discriminate based on sexual orientation or gender identity, while those receiving public funds were prohibited from doing so.

*Id.* at 13-14.

After weighing the parties' claims in light of the totality of the evidence and historical background, the Court concludes that Chapter 366 is neutral. Even accepting Crosspoint's assumption that the Maine Legislature passed Chapter 366 in anticipation of the Supreme Court striking down the sectarian exclusion, the Court does not find significant evidence that this legislation's objective was "to impede or constrain religion" as opposed to ensuring uniformity in a legislative scheme that already prohibited these types of discrimination by organizations receiving public funds in the housing and employment contexts. *Swartz*, 53 F.4th at 700 (citing *Lukumi*, 508 U.S. at 533).

The MHRA's history provides useful context for the recent amendments to its educational discrimination provisions. When the MHRA was enacted in 1971, it prohibited unlawful discrimination in employment, housing, and public accommodations—but not education.

P.L. 1971, ch. 501. It also did not initially prohibit discrimination based on sex, sexual orientation, or gender identity. *Id.* Later, the Legislature expanded the MHRA to prohibit discrimination in education (initially only prohibiting sex discrimination). P.L. 1987 ch. 578, § 3. Between 1987 and 1991, the Legislature continued to expand the educational discrimination provisions to prohibit discrimination on the basis of disability, race, and national origin. *See* P.L. 1987, ch. 478; P.L. 1989, ch. 725; P.L. 1991, ch. 100.

Then, in 2005, the Legislature again expanded the MHRA to prohibit discrimination on the basis of sexual orientation in all areas covered by the Act (employment, housing, public accommodations, and education). P.L. 2005, ch. 10 ("An Act to Extend Civil Rights Protections to All People Regardless of Sexual Orientation"). At the time, sexual orientation was defined to also include gender identity. *Id.* ("'Sexual orientation' means a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression"). Religious organizations that did not receive public funds were exempted from the provision on sexual orientation discrimination in employment, housing, and education. *Id.* (prohibiting "[d]iscrimination in employment, housing, public accommodation, credit and educational opportunity on the basis of sexual orientation, except that a religious corporation, association or organization that does not receive public funds is exempt from this provision"). Education facilities "owned, controlled or operated by a bona fide religious corporation, association, or society" were fully exempted. *Id.*

In other words, since 2005 the MHRA has prohibited sexual orientation/gender identity discrimination in employment, housing, and education but has also generally exempted religious organizations that do not receive public funds. From 2005 to 2021, its educational discrimination subsection—5 M.R.S. § 4602—exempted religious organizations, without distinguishing whether they received public funds, and, in 2021, Chapter 366 narrowed this exclusion to exempt only religious institutions that do not receive public funds. *Compare* P.L. 2005, ch. 10, *with* P.L. 2021, ch. 366, § 19; *see also* 5 M.R.S. § 4602(5).

Crosspoint submits that this change was made to target its purportedly disfavored religious exercise and subvert the Supreme Court's *Carson* decision. The Court acknowledges that Attorney General Frey's immediate negative response to *Carson* and then-Speaker Fecteau's opinion about the purpose of the legislation lend credence to Crosspoint's argument. But Attorney General Frey was not a member of the Maine Legislature when it enacted Chapter 366, and there is no evidence that he had a hand in proposing the legislation to a legislator. Regarding Speaker Fecteau, the United States Supreme Court has repeatedly cautioned against relying on the statements of one legislator to ascribe motivations to the entire legislative body. *See United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter" and courts should not rely on statements made by individual legislators since "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact

it"); *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring) (subjective motivation of lawmakers is irrelevant when conducting analysis under the First Amendment, and "it is virtually impossible to determine the singular 'motive' of a collective legislative body").

The historical background provides significantly more support for the Defendants' explanation that the Maine Legislature fashioned Chapter 366 to keep the MHRA's provisions on education discrimination in line with its broader scheme for exempting only religious organizations that do not receive public funding from certain antidiscrimination provisions. The tuitioning program's sectarian exclusion prohibited sectarian educational institutions from receiving public funding from 1981 up until its invalidation by *Carson* in 2022. 142 S. Ct. at 1994, 2002. The MHRA has, since 2005, generally exempted only religious organizations that do not receive public funds from its sexual orientation/gender identity provisions. *See* P.L. 2005, ch. 10. While religious organizations were exempted from those provisions from 2005 until 2022—regardless of whether they received public funding—there would have been no reason to include such a distinction. Because the sectarian exclusion blocked tuitioning funding for sectarian educational institutions, distinguishing between sectarian institutions that did or did not receive public funding would have been unnecessary and redundant.

Once the sectarian exclusion was struck down, however, the public funds distinction was no longer be mere surplusage. After the constitutionality of the

sectarian exclusion was challenged during the *Carson* litigation, the Legislature in 2021 passed Chapter 366, which—among other things—added the public funding distinction to the religious exception for educational discrimination. The current exemption, enacted in 2021, is consistent with the text and purpose of the Legislature's 2005 Act, which broadly proscribed sexual orientation and gender identity discrimination "in employment, housing, public accommodation, credit and educational opportunity . . . except that a religious corporation, association or organization *that does not receive public funds* is exempt from this provision." P.L. 2005, ch. 10 (emphasis added).

The First Circuit has directed that "[w]hen assessing neutrality, a court must survey meticulously the totality of the evidence, both direct and circumstantial . . .. This includes the series of events leading to the conduct, as well as the historical background." *Swartz*, 53 F.4th at 701 (citations and internal quotation marks omitted). Against this neutral explanation, Crosspoint insists that Chapter 366 instead targets its religious beliefs and was designed to prevent it from participating in the tuitioning program, relying on the Act's temporal relationship to the *Carson* litigation, then-Speaker Fecteau's tweet, and Attorney General Frey's press release—issued nearly a full year after Chapter 366 was enacted. Even if some members of the Maine Legislature enacted Chapter 366 with the *Carson* litigation in mind and even if Chapter 366 causes some religious institutions not to apply for tuition funding, the law itself may still be neutral. Given the historical and circumstantial backdrop, the Court does not find sufficient evidence to suggest that Chapter

366 "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."[7] *Fulton*, 141 S. Ct. at 1877.

The Court concludes that Chapter 366 is neutral and generally applicable. "When a religiously neutral and generally applicable law incidentally burdens free exercise rights, we will sustain the law against constitutional challenge if it is rationally related to a legitimate governmental interest." *Doe 1-6 v. Mills*, 16 F.4th 20, 29 (1st Cir. 2021) (citing *Fulton*, 141 S. Ct. at 1876). Maine has a legitimate interest in preventing discrimination in education, and the Court finds that the MHRA's challenged antidiscrimination provisions are rationally related to that interest. Crosspoint has failed to demonstrate a likelihood

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7. Though the parties focus primarily on the MHRA's sexual orientation and gender identity provisions, Crosspoint also contends that the statute violates its free exercise rights by "requir[ing] BCS to permit student religious expression contrary to its statement of faith." *Pl.'s Reply* at 4; 5 M.R.S. § 4602(5)(D) (providing that "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing").

These issues are not fleshed out in the parties' briefings nearly as thoroughly as the sexual orientation/gender identity issues. *See Defs.' Opp'n* at 2, 10; *Pl.'s Reply* at 4. Section 4602(5)(D) appears to primarily protect students' rights to religious expression. Even assuming that it would burden Crosspoint's religious exercise to prevent it from prohibiting disfavored religious expression, it is unclear to the Court in which context(s) this would arise and to what extent § 4602(5)(D) would infringe Crosspoint's desired behavior.

For the purposes of this motion, the Court concludes that Crosspoint has not carried its "burden of proving a free exercise violation." *See Kennedy*, 142 S. Ct. at 2421-22.

of success on the merits on its free exercise claim as it pertains to educational discrimination.

### b. The Employment Discrimination Claim

Crosspoint's employment discrimination claim is similarly unavailing. Crosspoint asserts that "applying MHRA's employment discrimination provision, 5 M.R.S. § 4572(1)(A), to prohibit Plaintiff from hiring only co-religionists violates the Establishment and Free Exercise Clauses." *Pl.'s Mot.* at 14. In Crosspoint's view, "Plaintiff faces a credible threat of Defendants enforcing § 4572 (1)(A) to prohibit BCS's practice of hiring only co-religionists if BCS participates in the tuitioning program . . .. Such enforcement violates both MHRA's plain text and the First Amendment." *Id.* at 15.

Section 4572 prohibits employers from discriminating on the basis of religion. As Crosspoint notes, however, 5 M.R.S. § 4573-A states plainly that:

> This subchapter does not prohibit a religious corporation, association, educational institution or society from giving preference in employment to individuals of its same religion to perform work connected with the carrying on by the corporation, association, educational institution or society of its activities. Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of that organization.

*Id.; Pl.'s Mot.* at 15 ("The plain text of the MHRA protects Plaintiff's employment autonomy even when Plaintiff accepts public funds"). The Defendants agree, offering that "[a]ll religious organizations (regardless of whether they receive public funds) are allowed to give employment preference to individuals of the same religion and may require all applicants and employees to conform to the organization's religious tenets" and "Plaintiff is thus free to limit employment to persons who share Plaintiff's religion and who conform to its religious tenets." *Defs.' Opp'n* at 18 (emphasis omitted) (citing 5 M.R.S. § 4573-A(2)). In reply, Crosspoint submits only that "Defendants' Response at least concedes (at 18) that the ministerial exception restricts the application of 5 M.R.S. § 4572(1)(A) to BCS's employment practices with respect to a significant portion of its employees" and "[a]t a minimum, then, a preliminary injunction to that effect is appropriate." *Pl.'s Reply* at 1.

The Court respectfully disagrees. Both Crosspoint and the state interpret § 4573-A(2) to exempt Crosspoint, as a religious institution, from § 4572(1)(A)'s prohibition on employment discrimination based on religion. The Court's own reading of the statute's operation confirms this interpretation.[8] Crosspoint offers no legitimate

8. Although not mentioned by the parties, Maine's Constitution contains a direct reference to the right of religious societies to employ "public teachers" of their choosing. Article I, § 3 is entitled, "Religious Freedom; Sects Equal; Religious Tests Prohibited; Religious Teachers," and provides in part:

> [A]ll religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive

justification for the Court to enjoin the hypothetical future enforcement of a statute (disclaimed by the state) in a manner that would appear to plainly violate the statute's own text. In essence, on this narrow issue, the Court declines to issue an injunction because there is no case or controversy between the parties. U.S. CONST. art. I, § 2.

### 3. Crosspoint's Free Speech Claim

Crosspoint argues that Chapter 366 also violates the Constitution's Free Speech Clause, asserting that it "restricts Plaintiff's speech based on content and viewpoint, because it is designed to force Plaintiff to stop educating its students from its religious perspective as a condition of participating in the tuition program." *Pl.'s Mot.* at 17. Under its interpretation of the law, "[i]f Plaintiff teaches from its religious perspective, it must either forgo accepting publicly funded tuition payments or face thousands of dollars in liability . . . [a]nd suppressing Plaintiff's religious perspective is the poison pill's avowed purpose." *Id.* at 18-19.

The Court is not convinced. At least in this pre-enforcement context, the plain text of the challenged provisions of the MHRA regulate conduct, not speech.

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right of electing their public teachers, and contracting with them for their support and maintenance.

ME. CONST. art. 1, § 3. The parties' unified position that the Maine statutes exempt Crosspoint as a religious institution from the provisions of Maine law that prohibit discrimination based on religion seems consistent with this specific provision of the Maine Constitution.

The Court found that the MHRA's antidiscrimination provisions could burden Crosspoint's religious exercise by impeding its ability to enforce certain religiously motivated policies. But on its face, the MHRA does not limit Crosspoint's ability to "teach[] from its religious perspective." *Id.* Prohibiting participating religious schools from discriminating on the basis of sexual orientation or gender identity may ultimately affect their conduct, but the Court has yet to see a persuasive argument that it infringes on their expression. *See Shurtleff v. City of Boston*, 596 U.S. 243, 142 S. Ct. 1583, 1598, 212 L. Ed. 2d 621 (2022) (Alito, J., concurring) ("'Speech,' as that term is used in our First Amendment jurisprudence, refers to expressive activity that is 'intended to be communicative' and, 'in context, would reasonably be understood . . . to be communicative'" (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)).

In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006), the Supreme Court held that a law denying certain federal funds to law schools that prohibited military recruiters did not violate the First Amendment because it "neither limits what law schools may say nor requires them to say anything" and the "schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds." *Id.* at 51, 60, 70. The Supreme Court emphasized that "[a]s a general matter, the [challenged law] regulates conduct, not speech. It affects what law schools must *do*—afford

equal access to military recruiters—not what they may or may not *say*." *Id.* at 60 (emphasis in original).

The Court concludes the same here: the challenged MHRA provisions limit conduct, not speech, and therefore do not infringe on Crosspoint's right to free expression. Crosspoint has not shown a likelihood of success on any of its claims.

### B. Irreparable Harm to Crosspoint

Having concluded that Crosspoint is not likely to succeed on the merits, the Court next considers the second prong of the preliminary injunction analysis. Irreparable harm is "an injury that cannot adequately be compensated for either by a later-issued . . . injunction, after a full adjudication on the merits, or by a later-issued damages remedy." *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005). To show irreparable harm, a plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction," not merely that it is a possibility. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) (emphasis in original); *see also Canadian Nat'l Ry. Co. v. Montreal, Me. & Atl. Ry., Inc.*, 786 F. Supp. 2d 398, 432 (D. Me. 2011) ("[P]roof of a mere possibility of injury is insufficient to justify an injunction").

Courts "measure irreparable harm on 'a sliding scale, working in conjunction with a moving party's likelihood of success on the merits.'" *Braintree Lab'ys, Inc. v. Citigroup Glob. Mkts. Inc.*, 622 F.3d 36, 42-43 (1st Cir. 2010) (quoting *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464,

485 (1st Cir. 2009)). Thus, "[t]he strength of the showing necessary on irreparable harm depends in part on the degree of likelihood of success shown," however, "at least some positive showing of irreparable harm must still be made." *Id.* at 43 (internal quotations omitted) (alteration in original); *see also Gately v. Commonwealth of Massachusetts*, 2 F.3d 1221, 1232 (1st Cir. 1993) ("[A] federal court cannot dispense with the irreparable harm requirement in affording injunctive relief").

In other words, as the First Circuit has recently put it, "[i]f the movant fails to demonstrate a likelihood of success on the merits, the remaining elements are of little consequence." *Akebia Therapeutics, Inc. v. Azar*, 976 F.3d 86, 92 (1st Cir. 2020). The Court does not doubt that, if Crosspoint's constitutional claims were meritorious, it would suffer irreparable injury by refraining from applying for the tuitioning program. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion)). Crosspoint, however, has not shown a likelihood of success on the merits, and Chapter 366 is thus unlikely to cause a deprivation of its constitutional rights.

### C. Balance of the Equities and the Public Interest

The Court must also weigh the balance of the hardships on the parties and the public interest. The Court does not discount Crosspoint's hardship related to not participating

in the tuitioning program for fear of MHRA enforcement, but it also does not find that hardship to outweigh the potential hardship the state would face from being unable to fully enforce its educational antidiscrimination laws. The public also has a strong interest in the state being able to effectively combat discrimination. Buttressed by the Court's conclusion about Crosspoint's likelihood of success on the merits, the balance of these factors favors the Defendants.

### D. Summary

The Court concludes that Crosspoint is not entitled to a preliminary injunction. With this said, the Court acknowledges that Crosspoint is raising important legal questions. Despite the plaintiffs' hard-fought and significant victory at the United States Supreme Court in *Carson*, the Maine Legislature and the Maine Attorney General have largely deprived Crosspoint and similar religious schools of the fruit of their victory. Crosspoint essentially argues that the Maine Legislature's enactment of statutes that prohibit discrimination on the basis of sexual orientation and gender identity is a form of state-enforced, secular religion. Yet, the Maine Legislature has the authority to define protected classes under its antidiscrimination laws. The rub comes when the Maine Legislature's view of the categories of people meriting protected status conflicts with sincerely held beliefs of members of religious communities. This is a tension as old as the nation itself. Although it has done its best to set out, analyze, and decide these difficult constitutional issues, the Court also recognizes that this case poses novel

constitutional questions and has attempted to frame its opinion as a prelude to a challenge to the Court of Appeals for the First Circuit for a more authoritative ruling. *See Carson v. Makin*, 401 F. Supp. 3d 207, 212 (D. Me. 2019) ("It has always been apparent that, whatever my decision, this case is destined to go to the First Circuit on appeal, maybe even to the Supreme Court").

**VI. CONCLUSION**

The Court DENIES Crosspoint Church's Motion for Preliminary Injunction (ECF No. 5).

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 27th day of February, 2024

## APPENDIX D — JOINT STIPULATED FACTS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE, FILED MARCH 28, 2024

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

No. 1:23-cv-00146-JAW

CROSSPOINT CHURCH,

*Plaintiff,*

v.

A. PENDER MAKIN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE DEPARTMENT OF EDUCATION, *et al.*,

*Defendants.*

### JOINT STIPULATED FACTS

Solely for purposes of resolution of the parties' joint motion to convert the Order on Plaintiff's Motion for Preliminary Injunction into an Order on Permanent Injunction and enter final judgment, Plaintiff and Defendants stipulate to each of the following facts:[1]

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.

*Appendix D*

***Facts About Publicly Funded Education in Maine***

1. The Maine Legislature guarantees every school-aged child residing within the state "an opportunity to receive the benefits of a free public education." 20-A M.R.S.A. § 2(1).

2. The Legislature vests the authority to fulfill the guarantee of § 2(1) in local school administrative units (SAUs). 20-A M.R.S.A. § 2(2).

3. 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." Such SAUs are referred to here as "tuitioning SAUs."

4. 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).

5. 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.

6. 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."

7. The Supreme Court declared the "nonsectarian" requirement unconstitutional in *Carson v. Makin*, 142 S. Ct. 1987 (2022).

8. The Defendant Commissioner of Education is responsible for enforcing the requirements of 20-A M.R.S.A. § 2951.

9. From the date that the Supreme Court issued its decision in *Carson*, the Department of Education (the "Department") has understood that it may not prevent private schools from receiving approval for the receipt of public funds for tuition purposes solely because they are sectarian.

10. On July 28, 2022, Cheverus High School, a sectarian high school in Portland, Maine, applied for approval for the receipt of public funds for tuition purposes.

11. The Department processed Cheverus' application in the same manner that it processed applications for any private school seeking approval for tuition purposes for the first time.

12. Cheverus' application was approved on September 16, 2022.

13. No other sectarian school has applied for approval for the receipt of public funds for tuition purposes.

*Appendix D*

***Amendments to the Maine Human Rights Act***

14. Defendants Sanders, David, O'Brien, Walker, and Douglas are Commissioners of the Maine Human Rights Commission ("MHRC"), an agency of the state of Maine, created and empowered under 5 M.R.S. § 4566 to "investigat[e] all forms of invidious discrimination, whether carried out legally or illegally, and whether by public agencies or private persons."

15. On May 6, 2021, the MHRC submitted LD 1688, "An Act to Improve Consistency Within the Maine Human Rights Act."

16. Exhibit 1 to the Stipulated Facts is a true and accurate copy of testimony of the MHRC's then-Executive Director in support of LD 1688.

17. On June 17, 2021, the Maine Legislature enacted LD 1688—"An Act to Improve Consistency in Terminology and within the Maine Human Rights Act," P.L. 2021, Ch. 366, § 19, and it was signed into law by the Governor on June 24, 2021.

18. That legislation amended 5 M.R.S.A. § 4602, the provision of the Maine Human Rights Act prohibiting educational discrimination, by adding ancestry, color, and religion as protected classes. The legislation struck the provision exempting all religious organizations from the prohibition against sexual orientation discrimination and replaced it with a provision stating: "Nothing in this section

. . . [r]equires a religious corporation, association or society that does not receive public funding to comply with this section as it relates to sexual orientation or gender identity."

***Facts About the Plaintiff***

19. Plaintiff Crosspoint Church is a Christian church incorporated as a nonprofit corporation under Maine law and is located at 1476 Broadway, Bangor, Maine 04401.

20. Plaintiff incorporated in 1967 under its original name Bangor Baptist Church "[f]or the purpose of maintaining a church for the worship of Almighty God, preaching the Gospel of Jesus Christ, and conducting the education of adults and children."

21. Crosspoint Church's objective is "full obedience to the will of the Lord Jesus Christ who is the Founder and Head of the Church."

22. Crosspoint Church is an independent church not subject to the governance or authority of any higher ecclesiastical body.

23. Crosspoint Church operates Bangor Christian School (BCS), a K4–12 school created in 1970 as an integrated auxiliary of the church.

24. Crosspoint Church's Senior Pastor and Deacon Board govern BCS.

25. Crosspoint Church operates BCS in accordance with its Statement of Faith, which summarizes its religious beliefs.

26. BCS's principal reports to Crosspoint Church's Senior Pastor.

27. BCS is accredited by the New England Association of Schools and Colleges.

28. BCS annually maintains basic school approval under 20-A M.R.S.A. § 2901(2)(A).

29. BCS meets the requirements for reporting and release of student records, *see* 20-A M.R.S.A. §§ 2951(5), (7), 2952 and is willing to comply with the remaining applicable requirements for tuitioning schools, *see id.* §§ 2951(5), 2953–2954.

30. BCS has not applied for approval for the receipt of public funds for tuition purposes, nor has BCS contacted Department personnel regarding the process for applying for approval.

31. But for the amendments to 5 M.R.S.A. § 4602, BCS would apply to become approved for tuition purposes.

32. During the 2022-23 school year, twenty-eight BCS high-school students lived in tuitioning SAUs: Bradford, Glenburn, Levant, Orrington, and Veazie, Maine.

33. BCS's total high-school enrollment for the 2022–23 school year is 92 students.

34. Crosspoint Church pays 95% of tuition for the children of Crosspoint Church employees, including BCS staff, to attend BCS.

35. For the 2023–24 school year, eight BCS high-school students are children of Crosspoint Church employees and live in Glenburn, Maine—a tuitioning SAU.

36. If the state approved BCS for tuition purposes, BCS would charge the tuition for these eight students to Glenburn, resulting in an annual savings of approximately $47,120.

37. If the state approved BCS for tuition purposes, the BCS high school students residing in tuitioning SAUs would be eligible to participate in the tuitioning program instead of paying BCS tuition out of pocket.

38. Students are required to attend BCS's weekly chapel service.

39. If a student persistently and unrepentantly engages in "counter-witnessing," that is, advocating beliefs contrary to BCS's statement of faith, that student would be deemed not in agreement and compliance with BCS's purpose, handbook, and code of conduct and, thus, be subject to removal from the school.

40. Students must adhere to BCS's code of conduct and dress code, which derive from Plaintiff's religious beliefs.

41. BCS's code of conduct prohibits students from, among other things, engaging in immoral conduct, including sexual activity outside of marriage as defined in the Statement of Faith, or identifying as a gender other than their biological sex.

42. BCS's dress code requires students to wear clothing consistent with their biological sex.

43. Crosspoint Church employees, including BCS staff, must be co-religionists—that is, they must be in agreement with Crosspoint's Statement of Faith and engage in religious practice consistent with Crosspoint Church's spiritual standards.

44. BCS teachers, as those primarily responsible for fulfilling BCS's religious mission, must agree to both BCS's Statement of Faith and the Educational Philosophy and Objectives and be committed to upholding them.

45. BCS teachers serve as Christian role models to the students; and, accordingly, must adhere to biblical standards of conduct, including those relating to sexual behavior; the use of alcohol, drugs, and tobacco; lewd public dancing; gambling; and any other activity that would hinder a teacher's religious testimony.

46. BCS teachers and staff uphold the Statement of Faith and Educational Philosophy and Objectives of the school.

47. BCS teachers and staff carry out Plaintiff's mission by educating students in their faith and fostering their spiritual development. Their duties are vital to accomplishing Plaintiff's purpose in preaching and educating students in the Gospel of Jesus Christ.

48. BCS teachers and staff educate students in Plaintiff's faith, inculcate its teaching, and train them to live their faith. They serve as Christian role models to the students, both in and out of school. They must not only agree that they share Plaintiff's Statement of Faith to be hired, but they must also feel that teaching at BCS is God's direction for them.

49. BCS does not require students to profess to be born-again Christians as a condition of admission.

50. 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.

51. BCS teaches children that the husband is the leader of the household.

52. Only men are eligible to serve on the Deacon Board.

53. Exhibit 2 to the Stipulated Facts is a true and accurate copy of BCS' Application for Admission.

54. Exhibit 3 to the Stipulated Facts is a true and accurate copy of BCS' Student Handbook.

55. Exhibit 4 to the Stipulated Facts is a true and accurate copy of BCS' Faculty Contract.

56. Exhibit 5 to the Stipulated Facts is a true and accurate copy of BCS' Teacher Contract.

57. Exhibit 6 to the Stipulated Facts is a true and accurate copy of the Deposition of Jeffrey Benjamin, part of the stipulated record in *Carson v. Makin*, No. 1: 1 8-cv-00327, Doc. 24- 8.

58. Exhibit 7 to the Stipulated Facts is a true and accurate copy of the Deposition of Martha Boone, part of the stipulated record in *Carson v. Makin*, No. 1: 1 8-cv-00327, Doc. 24-16.

***Facts Regarding the Sectarian Exclusion***

59. In 2003, the Maine Legislature considered repealing its sectarian exclusion. *See* L.D. 182, "An Act to Eliminate Discrimination Against Parents Who Want to Send Their Children to Religious Private Schools."

60. Exhibit 8 to the Stipulated Facts is true and accurate copy of the legislative history of L.D. 182.

61. Exhibit 9 to the Stipulated Facts is true and accurate copy of interrogatory responses from Education Commissioner Robert Hasson, Jr.

62. Exhibit 10 to the Stipulated Facts is true and accurate copy of correspondence regarding the Cardigan Mountain School.

***Facts Regarding Statements on Carson v. Makin and Amendments to Maine's Law***

63. Exhibit 11 to the Stipulated Facts is a true and accurate copy of the Statement of Maine Attorney General Aaron Frey on the Supreme Court Decision in *Carson v. Makin* (June 21, 2022).

64. Exhibit 12 to the Stipulated Facts is a true and accurate copy of the Statement of Attorney General Aaron Frey on the *Carson v. Makin* oral argument (Dec. 8, 2021).

65. Exhibit 13 to the Stipulated Facts is a true and accurate copy of the Tweet of Speaker of the House Ryan Fecteau on the Amendments to 5 M.R.S.A. § 4602 (June 26, 2022).

Date: March 28, 2024

/s/ *Christopher Taub*
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## APPENDIX E — EXHIBIT 11 — STATEMENT OF AARON FREY, DATED JUNE 21, 2022

### Exhibit 11

**Statement of Maine Attorney General Aaron Frey on Supreme Court Decision in Carson v. Makin**

June 21, 2022

**FOR IMMEDIATE RELEASE**

Contact: Danna Hayes
Danna.hayes@maine.gov

Statement of Maine Attorney General Aaron Frey on Supreme Court Decision in *Carson v. Makin*

AUGUSTA – Maine Attorney General Aaron Frey expressed his disappointment today with a United States Supreme Court decision, issued this morning, striking down a Maine law prohibiting religious schools from receiving public funds. Approximately 5,000 Maine children live in districts that neither have a public school nor contract with a school in a nearby district. To ensure that these children have access to a free public education, they are permitted to attend at public expense a public or private school of their choice. Public funds cannot be used to attend a private school that promotes religion because such schools, by definition, do not provide the equivalent of a public education.

*Appendix E*

Several families who wanted to send their children to religious schools at taxpayer expense challenged the law, arguing that it violated their constitutional rights, including their First Amendment right to the free exercise of religion. Both the federal court in Maine and a unanimous panel of the First Circuit Court of Appeals rejected the challenge and upheld the law. In today's decision, a divided Supreme Court struck down the law, rejecting Maine's argument that the purpose of the tuition program was to provide a public education for students who would otherwise be without, and concluding that Maine had created a school choice program that allowed a group of parents to select the secondary school of their choice. As a result, the Court held that their recent precedent dictates that excluding religious schools violates the Free Exercise Clause. Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan dissented, noting that the Court had effectively eliminated the notion of their being any play in the joints between the Establishment Clause and the Free Exercise Clause and expressing concern that this decision would open the door to claims that states must fund the religious equivalent of other public programs.

"I am terribly disappointed and disheartened by today's decision," said AG Frey. "Public education should expose children to a variety of viewpoints, promote tolerance and understanding, and prepare children for life in a diverse society. The education provided by the schools at issue here is inimical to a public education. They promote a single religion to the exclusion of all others, refuse to admit gay and transgender children, and openly discriminate

in hiring teachers and staff. One school teaches children that the husband is to be the leader of the household. While parents have the right to send their children to such schools, it is disturbing that the Supreme Court found that parents also have the right to force the public to pay for an education that is fundamentally at odds with values we hold dear. I intend to explore with Governor Mills' administration and members of the Legislature statutory amendments to address the Court's decision and ensure that public money is not used to promote discrimination, intolerance, and bigotry."

While the Court's decision paves the way for religious schools to apply to receive public funds, it is not clear whether any religious schools will do so. Educational facilities that accept public funds must comply with anti-discrimination provisions of the Maine Human Rights Act, and this would require some religious schools to eliminate their current discriminatory practices.

## APPENDIX F — EXHIBIT 12 — STATEMENT OF AARON FREY, DATED DECEMBER 8, 2021

### Exhibit 12

**Statement from Attorney General Frey on Carson v. Makin oral argument**

December 8, 2021

AUGUSTA – Today, the United States Supreme Court held oral arguments in *Carson v. Makin*, a case which considers whether it is constitutional for Maine to refuse to allow religious schools to receive taxpayer funds for the education of Maine's children. Chief Deputy Attorney General Christopher Taub and Assistant Attorney General Sarah Forster argued the case in defense of Maines public education system.

Following today's oral arguments, Maine Attorney General Aaron M. Frey issued the following statement:

"All Maine children, regardless of where they live, are entitled to a free public education. Maine law requires that children are provided a free public education, and that public education by its very nature must be inclusive of all students, regardless of the differences in their diverse backgrounds. A small number of children live in districts that do not operate a secondary school or contract with a school to provide an appropriate education. Those districts can satisfy their obligation to provide a public education by paying for the childrens tuition at a public or approved private school. Schools that require students to undergo

religious instruction are excluded because the education they provide is not equivalent to a public education. Maines program has survived legal challenge on prior occasions by the Maine Law Court, the Federal District Court of Maine, and the Federal First Circuit Court of Appeals."

"Schools receiving taxpayer funds are appropriately subject to the Maine Human Rights Act (MHRA), which prohibits discrimination against individuals on the basis of several protected classes. The two religious schools that the parents in this case want to send their children to have made it clear that they are not interested in complying with the MHRA and, therefore, these schools have not even applied to the Maine Department of Education to be eligible to participate in Maines tuition program. Put differently, these schools want to continue to discriminate against individuals based on their status in a protected class and that is inconsistent with the protections afforded to all Mainers under the MHRA."

"Attorneys from my office argued strongly today that *Carson v. Makin* is different from other cases the Supreme Court has considered recently; and made a compelling case for the constitutionality of Maines system of public education, and for how it benefits all Mainers. It would be inappropriate if Maine taxpayers were forced to fund schools which exclude and discriminate against other Mainers, as that would erode the foundational principles of a public education that is diverse and accessible to all."

## APPENDIX G — EXHIBIT 13



**Santiago Mayer** @santiagomayer_ · Jun 25

You know how SCOTUS said Maine couldn't exclude religious schools from their voucher program?

Maine just changed the guidelines to exclude schools that discriminate against LGBTQ+ students.

1,411 18K 124.9K

**Ryan Fecteau**
@SpeakerFecteau

Replying to @santiagomayer_

Sure did. Anticipated the ludicrous decision from the far-right SCOTUS.

7:51 AM · Jun 26, 2022 from Biddeford, ME · Twitter for iPhone

## APPENDIX H — ORDER ON JOINT MOTION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE, FILED JUNE 4, 2024

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

No. 1:23-cv-00146-JAW

CROSSPOINT CHURCH,

*Plaintiff,*

v.

A. PENDER MAKIN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE DEPARTMENT OF EDUCATION, *et al.*,

*Defendants.*

Signed June 4, 2024

### ORDER ON JOINT MOTION TO CONVERT ORDER ON PRELIMINARY INJUNCTION INTO ORDER ON PERMANENT INJUNCTION AND ENTER FINAL JUDGMENT

Determining that the small amount of additional evidence submitted by the parties does not alter the reasoning behind the Court's denial of the plaintiff's motion for preliminary injunction, the Court grants the parties' joint motion to convert the order on preliminary

injunction into an order on permanent injunction and enters final judgment in favor of the defendants.

## I. PROCEDURAL BACKGROUND

On March 27, 2023, Crosspoint Church filed a three-count complaint against A. Pender Makin, in her official capacity as Commissioner of the Maine Department of Education, and Jefferson Ashby, Edward David, Julie Ann O'Brien, Mark Walker, and Thomas Douglas, in their official capacities as Commissioners of the Maine Human Rights Commission, alleging that certain provisions of the Maine Human Rights Act (MHRA) effectively exclude it from approval for Maine's school tuitioning program in violation of the Free Exercise, Establishment, and Free Speech Clauses of the U.S. Constitution. *Compl.* (ECF No. 1). That same day, Crosspoint filed a motion for preliminary injunction to enjoin the Defendants from enforcing the provisions of Maine law that allegedly exclude it from the tuitioning program. *Pl.'s Mot. for Prelim. Inj.* (ECF No. 5).

On February 27, 2024, the Court denied Crosspoint's motion for preliminary injunction in a forty-seven-page order. *Order on Pl.'s Mot. for Prelim. Inj.* (ECF No. 41) (*Order on Prelim. Inj.*). Despite denying Crosspoint's motion, the Court acknowledged that Crosspoint "is raising important legal questions." *Id.* at 46. In recognition of these "novel constitutional questions," the Court "attempted to frame its opinion as a prelude to a challenge to the Court of Appeals for the First Circuit for a more authoritative ruling." *Id.*

*Appendix H*

On March 28, 2024, the parties filed a joint motion asking the Court to "convert its Order on Plaintiff's Motion for Preliminary Injunction into an Order on Permanent Injunction and enter final judgment to facilitate prompt and efficient appellate review." *Jt. Mot. to Convert Order on Prelim. Inj. Into Order on Permanent Inj. and Enter Final J.* (ECF No. 43) (*Jt. Mot. for Order on Permanent Inj.*). That same day, the parties submitted a joint stipulation of facts, with thirteen attachments, to be included as part of the record for appellate review. *Jt. Stipulated Facts* (ECF No. 44).

On April 1, 2024, the Court issued an order on the parties' joint motion, in which the Court expressed concern that new materials not previously before the Court were included in the parties' joint stipulation of facts. *Order on Jt. Mot. to Convert Order on Prelim. Inj. Into Order on Permanent Inj. and Enter Final J.* at 2 (ECF No. 45) (*Order on Jt. Mot.*). The Court further explained that it did not believe it could convert its order on preliminary injunction into an order on permanent injunction without referring to the new record and considering the new evidence offered by the parties. *Id.* at 2-3. To resolve this issue, the Court sought counsels' advice on how to proceed. *Id.* at 3.

To this end, on April 22, 2024, the Court held a telephonic conference of counsel. *Min. Entry* (ECF No. 47). During this conference, the Court instructed the parties to file a motion explaining why they added new materials to the joint stipulation of facts and whether they believed this additional evidence would impact the reasoning in the Court's order on preliminary injunction.

On April 24, 2024, the parties submitted a motion responding to the Court's queries. *Jt. Mot. in Resp. to Ct.'s Order on Jt. Mot. to Convert Order on Prelim. Inj. Into Order on Permanent Inj. and Enter Final J.* (ECF No. 48) (*Jt. Mot. in Resp. to Ct.'s Order*). In this motion, the parties acknowledged that some evidence in the joint stipulation of facts was not before the Court when it issued its order on Crosspoint's motion for preliminary injunction, but they represented this evidence was part of the record in *Carson v. Makin*. *Id.* at 1. The parties described the new evidence as "background information that will not materially impact the Court's thorough legal analysis or its ruling on the preliminary injunction motion." *Id.* The parties further clarified they were seeking "to ensure that all potentially relevant evidence is included in the record" "to ensure full appellate review and avoid possible remand." *Id.* at 2.

## II. DISCUSSION

### A. The Newly Stipulated Evidence

In its previous order, the Court referenced three attachments to the parties' joint stipulation of facts that were not before the Court when it was considering Crosspoint's motion for preliminary injunction: 1) Bangor Christian Schools' (BCS) application for admission, *Jt. Stipulated Facts*, Attach. 2; 2) the interrogatory answers of Robert G. Hasson, Jr., former Commissioner of the Maine Department of Education, *id.*, Attach. 9; and 3) correspondence between the Maine Department of Education and Cardigan Mountain School. *Id.*, Attach. 10.

Having analyzed each newly filed attachment, the Court determines they do not alter the reasoning in its order on Crosspoint's motion for preliminary injunction.

### 1. Bangor Christian Schools' Application for Admission

BCS's application for admission does not affect the Court's reasoning because the Court's order on Crosspoint's motion for preliminary injunction accounted for BCS's admissions policy and criteria. *See Order on Prelim. Inj.* at 10-11. The application primarily seeks demographic information about the prospective enrollee and their family, including religious affiliation. *Jt. Stipulated Facts*, Attach. 2, *BCS Admission Application*. Additionally, both the prospective student and a parent or guardian must affirm they "have read and understand the entire contents of the Student/Parent Handbook, and [] are willing to abide by all of the principles stated therein . . . [and] understand that the school may request withdrawal at any time, if in the opinion of the school, [the] child does not fit into the spirit of the institution." *Id.*

In its order on Crosspoint's motion for preliminary injunction, the Court, in concluding the challenged provisions of the MHRA burdened Crosspoint's religious exercise, discussed BCS's requirement that students comply with its statement of faith. *Order on Prelim. Inj.* at 29-32. As the relevant portions of BCS's application for admission merely provide cumulative evidence on this point, the Court concludes the application does not alter its previous order.

### 2. The Hasson Interrogatory Answers

The Hasson interrogatory answers likewise do not affect the reasoning behind the Court's denial of preliminary injunction because they primarily relate to 20-A M.R.S. § 2951(2), the "sectarian exclusion" invalidated by the United States Supreme Court in *Carson v. Makin*, 596 U.S. 767, 142 S. Ct. 1987, 213 L.Ed.2d 286 (2022). Specifically, the interrogatory answers discuss how the Maine Department of Education applied 20-A M.R.S. § 2951(2) and the interests purportedly advanced by it. *Jt. Stipulated Facts*, Attach. 9, *Def. Robert G. Hasson, Jr.'s Resps. to Pls.' First Set of Interrogs.* As 20-A M.R.S. § 2951(2) is not at issue in this case, the Court agrees with the parties that the Hasson interrogatory answers constitute "background information" that does not alter the reasoning in the Court's order on preliminary injunction. *See Jt. Mot. in Resp. to Ct.'s Order* at 1-2.

### 3. The Cardigan Mountain School Correspondence

As the Cardigan Mountain School correspondence also concerns tuitioning approval under 20-A M.R.S. § 2951(2), it similarly does not change the analysis in the Court's prior order. This correspondence, from the summer and fall of 2015, is comprised of several emails between officials at Cardigan Mountain School and the Maine Department of Education. *Jt. Stipulated Facts*, Attach. 10, *Cardigan Mountain School Correspondence*. In conjunction with Cardigan Mountain School's application to participate in Maine's tuitioning program, the officials

discuss the school's mandatory chapel services. *Id.* The correspondence ends with Maine Department of Education officials recommending the approval of Cardigan Mountain School for tuitioning purposes. *Id.*

In the Court's view, this correspondence, now nearly nine years old, primarily relates to 20-A M.R.S. § 2951(2). Whether students are required to attend chapel services appears to concern Cardigan Mountain School's potential status as a "sectarian" institution as opposed to its compliance with the challenged antidiscrimination provisions of the MHRA. Accordingly, the Court determines that the Cardigan Mountain School correspondence does not affect the reasoning in the Court's order on preliminary injunction.

### B. The Parties' Motion to Convert the Court's Order on Preliminary Injunction Into an Order on Permanent Injunction

Having determined that the newly submitted evidence does not alter the reasoning in the order on preliminary injunction, the Court turns to the parties' request to convert that order into an order on permanent injunction and enter final judgment. "A district court can convert a preliminary injunction order into a permanent injunction order and may do so without an evidentiary hearing where, as here, the parties agree that no hearing is necessary and where a hearing would serve little purpose." *Me. Republican Party v. Dunlap*, No. 1:18-cv-00179-JDL, 2018 WL 11183911, 2018 U.S. Dist. LEXIS 130446 at *2 (D. Me. Aug. 3, 2018) (citing *Shell Co. (P.R.) Ltd. v. Los Frailes*

*Serv. Station, Inc.*, 605 F.3d 10, 19 n.4 (1st Cir. 2010)). "Where a plaintiff seeks permanent injunctive relief, the test is the same [as the preliminary injunction standard], except that the movant must show actual success on the merits of the claim, rather than a mere likelihood of success." *Id.* (alteration in original) (quoting *Caroline T. v. Hudson Sch. Dist.*, 915 F.2d 752, 755 (1st Cir. 1990)).

In its order on Crosspoint's motion for preliminary injunction, the Court concluded that Crosspoint "is unlikely to succeed on the merits." *Order on Prelim. Inj.* at 1. Specifically, the Court determined that "the religion, sexual orientation, and gender identity provisions of 5 M.R.S. § 4602 do not violate the Free Exercise, Establishment, or Free Speech Clauses of the U.S. Constitution" and that "Crosspoint is not entitled to a preliminary injunction on its challenge to 5 M.R.S. § 4572(1)(A) because the parties agree that Crosspoint is exempt from this provision." *Id.* at 19. Because the small amount of additional evidence submitted by the parties does not change the Court's reasoning, Crosspoint cannot now show actual success on the merits where it previously failed to show a likelihood of success.

Accordingly, since the Court agrees with the parties that there are no material factual disputes and that an evidentiary hearing is unnecessary, *see Jt. Mot. for Order on Permanent Inj.* at 2, the Court adopts and restates all of the legal conclusions contained in its February 27, 2024 Order on Plaintiff's Motion for Preliminary Injunction. The Court further converts its denial of preliminary injunction into a denial of permanent injunction and enters final judgment for the Defendants.

## III. CONCLUSION

The Court GRANTS the Joint Motion in Response to Court's Order on Joint Motion to Convert Order on Preliminary Injunction Into Order on Permanent Injunction and Enter Final Judgment (ECF No. 48), considers the additional evidence submitted in the joint motion to convert order, and determines that the additional exhibits do not affect the merits of the Court's February 27, 2024 Order on Plaintiff's Motion for Preliminary Injunction (ECF No. 41) or the propriety of converting the order on preliminary injunction into an order on permanent injunction and appealable judgment. The Court further GRANTS the Joint Motion to Convert Order on Preliminary Injunction Into Order on Permanent Injunction and Enter Final Judgment (ECF No. 43). The Court further CONVERTS its February 27, 2024 Order on Plaintiff's Motion for Preliminary Injunction (ECF No. 41) into an Order on Permanent Injunction and ORDERS the Clerk to enter final judgment for the Defendants.

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 4th day of June, 2024

## APPENDIX I — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE, FILED JUNE 5, 2024

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CIVIL NO. 1:23-cv-00146-JAW

CROSSPOINT CHURCH,

*Plaintiff,*

v.

A. PENDER MAKIN, *et al.*,

*Defendants.*

### JUDGMENT

In accordance with the Order on Joint Motion to Convert Order on Preliminary Injunction into Order on Permanent Injunction and Enter Final Judgment entered by U.S. District Judge John A. Woodcock, Jr. on June 4, 2024,

JUDGMENT is hereby entered for all Defendants and against Plaintiff, Crosspoint Church.

*Appendix I*

CHRISTA K. BERRY
CLERK

By: /s/ Joanne McCue
Deputy Clerk

Dated: June 5, 2024

## APPENDIX J — CONSTITUTIONAL PROVISIONS INVOLVED

### U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

### U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## APPENDIX K — MAINE REVISED STATUTES TITLE 5, §4553 AND §4602

### §4553. Definitions

As used in this Act, unless the context or subchapter otherwise indicates, the following words have the following meanings. [PL 1995, c. 393, §1 (AMD).]

**1. Commission.** "Commission" means the Maine Human Rights Commission established by this Act. [PL 1971, c. 501, §1 (NEW).]

**1-A. Commercial facilities.** "Commercial facilities" means facilities that are intended for nonresidential use. [PL 1995, c. 393, §2 (NEW).]

**1-B. Covered entity.** For purposes of subchapter 3, "covered entity" means an employer, employment agency, labor organization or joint labor-management committee. For purposes of subchapter 5, "covered entity" means any applicable private entity or public entity. [PL 2019, c. 464, §1 (AMD).]

**1-C. Direct threat.** For purposes of subchapter 3, "direct threat" means a significant risk to the health or safety of others that can not be eliminated by reasonable accommodation. [PL 2019, c. 464, §1 (AMD).]

**1-D. Aggrieved person.** "Aggrieved person" includes any person who claims to have been subject to unlawful discrimination on the basis of protected class status, including discrimination based on the person's known

relationship or association with a member of a protected class and discrimination on the basis of perceived protected class status. "Aggrieved person" also includes any person who claims to have been injured by unlawful housing discrimination. [PL 2019, c. 464, §1 (AMD).]

**1-E. Complainant.** "Complainant" means a person who files a complaint under section 4611.
[PL 2019, c. 464, §1 (AMD).]

**1-F. Conciliation.** "Conciliation" means the attempted resolution after a finding by the commission that unlawful discrimination has occurred of issues raised by a complaint filed under section 4611 or by an investigation of such a complaint through informal negotiations involving the complainant, the respondent and the commission.
[PL 2019, c. 464, §1 (AMD).]

**1-G. Conciliation agreement.** "Conciliation agreement" means a written agreement setting forth the resolution of the issues in conciliation.
[PL 2011, c. 613, §4 (NEW); PL 2011, c. 613, §29 (AFF).]

**1-H. Assistance animal.** "Assistance animal" means, for the purposes of subchapter 4:

A. An animal that has been determined necessary for an individual with a physical or mental disability to mitigate the effects of a physical or mental disability by a physician, psychologist, physician associate, nurse practitioner, licensed social worker, licensed professional counselor or other licensed health

professional with knowledge of the disability-related need for an assistance animal; or [PL 2019, c. 464, §1 (AMD); PL 2025, c. 316, §3 (REV).]

B. An animal individually trained to do work or perform tasks for the benefit of an individual with a physical or mental disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals who are deaf or hard of hearing to intruders or sounds, providing reasonable protection or rescue work, pulling a wheelchair or retrieving dropped items. [PL 2015, c. 457, §1 (NEW).]

[PL 2019, c. 464, §1 (AMD); PL 2025, c. 316, §3 (REV).]

**2. Discriminate.** "Discriminate" includes, without limitation, segregate, separate or subject to harassment.

For purposes of subchapter 3, "discriminate" also includes:

A. Limiting, segregating or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee because of the protected class of the applicant or employee; [PL 2019, c. 464, §1 (AMD).]

B. Participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee to the discrimination prohibited by this Act. A relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee

of the covered entity or an organization providing training and apprenticeship programs;
[PL 2019, c. 464, §1 (AMD).]

C. Utilizing standards, criteria or methods of administration:

(1) That have the effect of discrimination on the basis of protected class status; or

(2) That perpetuate discrimination on the basis of protected class status by others who are subject to common administrative control;
[PL 2019, c. 464, §1 (AMD).]

D. Excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known protected class status of an individual with whom the qualified individual is known to have a relationship or association; [PL 2019, c. 464, §1 (AMD).]

E. Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity; [PL 1995, c. 393, §3 (NEW).]

F. Denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if the denial is based on

the need of the covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant; [PL 1995, c. 393, §3 (NEW).]

G. Using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual or a class of individuals based on their protected class status unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and [PL 2019, c. 464, §1 (AMD).]

H. Failing to select and administer tests concerning employment in the most effective manner to ensure that, when the test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude or any other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual or speaking skills of the employee or applicant, except when the skills are the factors that the test purports to measure. [PL 1995, c. 393, §3 (NEW).]

[PL 2019, c. 464, §1 (AMD).]

**2-A. Educational institution.** "Educational institution" means any public school or educational program, any public postsecondary institution, any private school or educational program approved for tuition

purposes and the governing body of each such school or program. [PL 2023, c. 188, §1 (AMD).]

**3. Employee.** "Employee" means an individual employed by an employer. "Employee" does not include any individual employed by that individual's parents, spouse or child, except for purposes of disability-related discrimination, in which case the individual is considered to be an employee. [PL 1995, c. 393, §5 (AMD).]

**4. Employer.** "Employer" includes any person in this State employing any number of employees, whatever the place of employment of the employees, and any person outside this State employing any number of employees whose usual place of employment is in this State; any person acting in the interest of any employer, directly or indirectly, such that the person's actions are considered the actions of the employer for purposes of liability; and labor organizations, whether or not organized on a religious, fraternal or sectarian basis, with respect to their employment of employees. "Employer" does not include a religious or fraternal corporation or association, not organized for private profit and in fact not conducted for private profit, with respect to employment of its members of the same religion, sect or fraternity, except for purposes of disability-related discrimination, in which case the corporation or association is considered to be an employer. [PL 2019, c. 464, §1 (AMD).]

**5. Employment agency.** "Employment agency" includes any person undertaking with or without compensation to procure opportunities to work, or to

procure, recruit, refer or place employees; it includes, without limitation, placement services, training schools and centers, and labor organizations, to the extent that they act as employee referral sources; and it includes any agent of such person acting in the interest of the person such that the agent's actions are considered the actions of the employment agency for purposes of liability.
[PL 2019, c. 464, §1 (AMD).]

**5-A. Familial status.** "Familial status" means a family unit that contains:

A. One or more individuals who have not attained 18 years of age and are living with a parent or another person having legal custody of the individual or individuals or the designee of the parent or other person having custody with the written permission of the parent or other person; or [PL 2021, c. 366, §2 (AMD).]

B. [PL 2021, c. 366, §2 (RP).]

B-1. One or more individuals 18 years of age or older who lack the ability to meet essential requirements for physical health, safety or self-care because the individual or individuals are unable to receive and evaluate information or make or communicate decisions. [PL 2021, c. 366, §2 (NEW).]

The protections afforded against discrimination on the basis of familial status apply to any person who is pregnant or who is in the process of securing legal custody of any

individual who has not attained 18 years of age. [PL 2021, c. 366, §2 (AMD).]

**5-B. Family.** "Family" includes, but is not limited to, a single individual. [PL 2011, c. 613, §5 (NEW); PL 2011, c. 613, §29 (AFF).]

**5-C. Gender identity.** "Gender identity" means the gender-related identity, appearance, mannerisms or other gender-related characteristics of an individual, regardless of the individual's assigned sex at birth. [PL 2019, c. 464, §1 (NEW).]

**6. Housing accommodation.** "Housing accommodation" includes any building or structure or portion thereof, or any parcel of land, developed or undeveloped, that is occupied, or is intended to be occupied or to be developed for occupancy, for residential purposes.

A. [PL 2011, c. 613, §6 (RP); PL 2011, c. 613, §29 (AFF).]

B. [PL 2011, c. 613, §6 (RP); PL 2011, c. 613, §29 (AFF).]

C. [PL 2011, c. 613, §6 (RP); PL 2011, c. 613, §29 (AFF).]

[PL 2011, c. 613, §6 (AMD); PL 2011, c. 613, §29 (AFF).]

**6-A. Normal retirement age.** "Normal retirement age" means the specified age, the years of service requirement or any age and years of service combination

at which a member may become eligible for retirement benefits. This subsection may not be construed to require the mandatory retirement of a member or to deny employment to any person based solely on that person's normal retirement age. [PL 2005, c. 10, §2 (AMD).]

**7. Person.** "Person" includes one or more individuals, partnerships, associations, organizations, corporations, municipal corporations, legal representatives, trustees, trustees in bankruptcy, receivers and other legal representatives, labor organizations, mutual companies, joint-stock companies and unincorporated organizations and includes the State and all agencies thereof. [PL 2011, c. 613, §7 (AMD); PL 2011, c. 613, §29 (AFF).]

**7-A. Physical or mental disability.** "Physical or mental disability" has the meaning set forth in section 4553-A. [PL 2007, c. 385, §1 (RPR).]

**7-B. Person with physical or mental disability.** [PL 2007, c. 385, §2 (RP).]

8**. Place of public accommodation.** "Place of public accommodation" means a facility, operated by a public entity or private entity, whose operations fall within at least one of the following categories:

A. An inn, hotel, motel or other place of lodging, whether conducted for the entertainment or accommodation of transient guests or those seeking health, recreation or rest; [PL 1995, c. 393, §7 (NEW).]

B. A restaurant, eating house, bar, tavern, buffet, saloon, soda fountain, ice cream parlor or other establishment serving or selling food or drink; [PL 1995, c. 393, §7 (NEW).]

C. A motion picture house, theater, concert hall, stadium, roof garden, airdrome or other place of exhibition or entertainment; [PL 1995, c. 393, §7 (NEW).]

D. An auditorium, convention center, lecture hall or other place of public gathering; [PL 1995, c. 393, §7 (NEW).]

E. A bakery, grocery store, clothing store, hardware store, shopping center, garage, gasoline station or other sales or rental establishment; [PL 1995, c. 393, §7 (NEW).]

F. A laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, dispensary, clinic, bathhouse or other service establishment; [PL 1995, c. 393, §7 (NEW).]

G. All public conveyances operated on land or water or in the air as well as a terminal, depot or other station used for specified public transportation; [PL 1995, c. 393, §7 (NEW).]

H. A museum, library, gallery or other place of public display or collection; [PL 1995, c. 393, §7 (NEW).]

I. A park, zoo, amusement park, race course, skating rink, fair, bowling alley, golf course, golf club, country club, gymnasium, health spa, shooting gallery, billiard or pool parlor, swimming pool, seashore accommodation or boardwalk or other place of recreation, exercise or health; [PL 1995, c. 393, §7 (NEW).]

J. A nursery, elementary, secondary, undergraduate or postgraduate school or other place of education; [PL 1995, c. 393, §7 (NEW).]

K. A day care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service center establishment; [PL 2019, c. 464, §1 (AMD).]

L. Public elevators of buildings occupied by 2 or more tenants or by the owner and one or more tenants; [PL 1995, c. 393, §7 (NEW).]

M. A municipal building, courthouse, town hall or other establishment of the State or a local government; and [PL 1995, c. 393, §7 (NEW).]

N. Any establishment that in fact caters to, or offers its goods, facilities or services to, or solicits or accepts patronage from, the general public. [PL 1995, c. 393, §7 (NEW).]

When a place of public accommodation is located in a private residence, the portion of the residence used exclusively as a residence is not covered by this subchapter, but that portion used exclusively in the operation of the place of public accommodation or that portion used both for the place of public accommodation and for the residential purposes is covered by this subchapter. The covered portion of the residence extends to those elements used to enter the place of public accommodation, and those exterior and interior portions of the residence available to or used by customers or clients, including rest rooms. [PL 2019, c. 464, §1 (AMD).]

**8-A. Private entity.** "Private entity" means any entity other than a public entity. [PL 1995, c. 393, §8 (NEW).]

**8-B. Public accommodation.** "Public accommodation" means a public entity or private entity that owns, leases, leases to or operates a place of public accommodation. [PL 2019, c. 464, §1 (AMD).]

**8-C. Public entity.** "Public entity" means:

A. The State or any local government; [PL 1995, c. 393, §8 (NEW).]

B. Any department, agency, special purpose district or other instrumentality of the State, 2 or more states or a local government; and [PL 1995, c. 393, §8 (NEW).]

C. A state, local or private commuter authority as defined in the federal Rail Passenger Service Act. [PL 2019, c. 464, §1 (AMD).]

[PL 2019, c. 464, §1 (AMD).]

**8-D. Qualified individual with a disability.** "Qualified individual with a disability" applies to only:

A. Subchapter 3 (employment). [PL 2023, c. 489, §1 (AMD).]

B. [PL 2023, c. 489, §2 (RP).]

For purposes of subchapter 3, "qualified individual with a disability" means an individual with a physical or mental disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires. [PL 2023, c. 489, §§1-3 (AMD).]

**8-E. Pregnancy-related condition.** "Pregnancy-related condition" means a known limitation of an employee's ability to perform the functions of a job due to pregnancy, childbirth or related medical conditions, including but not limited to lactation. [PL 2019, c. 490, §1 (NEW).]

***REVISOR'S NOTE:*** (Subsection 8-E as enacted by PL 2019, c. 464, §1 is REALLOCATED TO TITLE 5, SECTION 4553, SUBSECTION 8-F)

**8-F. (REALLOCATED FROM T. 5, §4553, sub-§8-E) Protected class.** "Protected class" means a class of individuals protected from unlawful discrimination under this Act. [PL 2019, c. 464, §1 (NEW); RR 2019, c. 1, Pt. A, §5 (RAL).]

**8-G. Protective hairstyle.** "Protective hairstyle" includes braids, twists and locks. [PL 2021, c. 643, §1 (NEW).]

**8-H. Race, for purposes of subchapters 3 and 5-B.** "Race," for the purposes of subchapters 3 and 5-B, includes traits associated with race, including hair texture, Afro hairstyles and protective hairstyles. [PL 2021, c. 643, §2 (NEW).]

**9. Real estate broker and sales agent.** "Real estate broker" and "real estate sales agent" have the same meanings as in Title 32, sections 13198 and 13200 respectively; but include all persons meeting those definitions, whether they are licensed or required to be licensed. [PL 2019, c. 464, §1 (AMD).]

**9-A. Reasonable accommodation.** For purposes of subchapter 3, "reasonable accommodation" may include, but is not limited to:

A. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and [PL 1995, c. 393, §8 (NEW).]

B. Job restructuring, part-time or modified work schedules, reassignment to a vacant position, leaves

of absence, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters and other similar accommodations for individuals with disabilities. [PL 2019, c. 464, §1 (AMD).]

[PL 2019, c. 464, §1 (AMD).]

**9-B. Undue hardship; undue burden.** "Undue hardship" or "undue burden" means an action requiring undue financial or administrative hardship. In determining whether an action would result in an undue hardship, factors to be considered include:

A. The nature and cost of the accommodation needed under this Act; [PL 1995, c. 393, §8 (NEW).]

B. The overall financial resources of the facility or facilities involved in the action, the number of persons employed at the facility, the effect on expenses and resources or the impact otherwise of the action upon the operation of the facility; [PL 1995, c. 393, §8 (NEW).]

C. The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees and the number, type and location of its facilities; [PL 1995, c. 393, §8 (NEW).]

D. The type of operation or operations of the covered entity, including the composition, structure and functions of the work force of the entity, the

geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity; [PL 1995, c. 393, §8 (NEW).]

E. All the resources available to meet the costs of the accommodation, including any government funding or other grants available for making public accommodations and places of employment accessible; [PL 1995, c. 393, §8 (NEW).]

F. The extent to which current costs of accommodations have been minimized by past efforts to provide equal access to persons with disabilities; [PL 1995, c. 393, §8 (NEW).]

G. The extent to which resources spent on improving inaccessible equipment or service could have been spent on making an accommodation so that service or equipment is accessible to individuals with disabilities, as well as to individuals without disabilities; [PL 1995, c. 393, §8 (NEW).]

H. Documented good faith efforts to explore less restrictive or less expensive alternatives; [PL 1995, c. 393, §8 (NEW).]

I. The availability of equipment and technology for the accommodation; [PL 1995, c. 393, §8 (NEW).]

J. Whether an accommodation would result in a fundamental change in the nature of the public accommodation; [PL 1995, c. 393, §8 (NEW).]

K. Efforts to minimize costs by spreading costs over time; and [PL 1995, c. 393, §8 (NEW).]

L. The extent to which resources saved by failing to make an accommodation for persons who have disabilities could have been saved by cutting costs in equipment or services for the general public. [PL 1995, c. 393, §8 (NEW).]

"Undue hardship" or "undue burden" is a higher standard than "readily achievable" and requires a greater level of effort on the part of the public accommodation. [PL 2019, c. 464, §1 (AMD).]

**9-C. Sexual orientation.** "Sexual orientation" means a person's actual or perceived heterosexuality, bisexuality or homosexuality. [PL 2023, c. 41, §1 (AMD).]

**9-D. Service animal.** [PL 2011, c. 369, §1 (RP).]

**9-E. Service animal.** "Service animal" means:

A. [PL 2015, c. 457, §2 (RP).]

B. For the purposes of subchapter 5, a dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability.

Examples of such work or tasks include, but are not limited to, assisting an individual who is totally or partially blind with navigation and other tasks, alerting an individual who is deaf or hard of hearing to the presence of people or sounds, providing nonviolent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting an individual to the presence of allergens, retrieving items such as medicine or a telephone, providing physical support and assistance with balance and stability to an individual with a mobility disability and helping a person with a psychiatric or neurological disability by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort or companionship do not constitute work or tasks for the purposes of this definition. [PL 2011, c. 369, §2 (NEW).]

[PL 2015, c. 457, §2 (AMD).]

**9-F. Rent.** "Rent" includes to lease, to sublease, to let or otherwise to grant for a consideration the right to occupy premises not owned by the occupant. [PL 2011, c. 613, §8 (NEW); PL 2011, c. 613, §29 (AFF).]

**9-G. Respondent.** "Respondent" means a person accused of unlawful discrimination in a complaint filed under section 4611. [PL 2019, c. 464, §1 (AMD).]

**10. Unlawful discrimination.** "Unlawful discrimination" includes:

*Appendix K*

A. Unlawful employment discrimination as defined and limited by subchapter 3; [PL 2019, c. 464, §1 (AMD).]

B. Unlawful housing discrimination as defined and limited by subchapter 4; [PL 2019, c. 464, §1 (AMD).]

C. Unlawful public accommodations discrimination as defined by subchapter 5; [PL 2019, c. 464, §1 (AMD).]

D. Aiding, abetting, inciting, compelling or coercing another to do any of such types of unlawful discrimination; obstructing or preventing any person from complying with this Act or any order issued in this subsection; attempting to do any act of unlawful discrimination; and punishing or penalizing, or attempting to punish or penalize, any person for seeking to exercise any of the civil rights declared by this Act or for complaining of a violation of this Act or for testifying in any proceeding brought in this subsection; [PL 1983, c. 578, §2 (AMD).]

E. In determining whether a person is acting as an agent or employee of another person so as to make such other person responsible for that person's acts, the question of whether the specific acts performed were actually authorized or subsequently ratified is not controlling; [PL 2005, c. 10, §4 (AMD).]

F. Unlawful educational discrimination as defined and limited by subchapter 5-B; [PL 2023, c. 489, §4 (AMD).]

G. Discrimination in employment, housing, public accommodation, credit and educational opportunity on the basis of sexual orientation or gender identity, except that a religious corporation, association or organization that does not receive public funds is exempt from this provision with respect to:

(1) Employment, as is more fully set forth in section 4553, subsection 4 and section 4573-A;

(2) Housing; and

(3) Educational opportunity.

Any for-profit organization owned, controlled or operated by a religious association or corporation and subject to the provisions of the United States Internal Revenue Code of 1986, 26 United States Code, Section 511(a) is not covered by the exemptions set forth in this paragraph; and [PL 2023, c. 489, §5 (AMD).]

H. Unlawful discrimination by public entities as described in section 4630. [PL 2023, c. 489, §6 (NEW).]

[PL 2023, c. 489, §§4-6 (AMD).]

* * *

*Appendix K*

**§4602. Unlawful educational discrimination**

**1. Unlawful educational discrimination.** It is unlawful educational discrimination in violation of this Act, on the basis of sex, sexual orientation or gender identity, physical or mental disability, ancestry, national origin, race, color or religion, to:

A. Exclude a person from participation in, deny a person the benefits of, or subject a person to, discrimination in any academic, extracurricular, research, occupational training or other program or activity; [PL 1985, c. 797, §1 (AMD).]

B. Deny a person equal opportunity in athletic programs; [PL 1983, c. 578, §3 (NEW).]

C. Apply any rule concerning the actual or potential familial status or marital status of a person or to exclude any person from any program or activity because of pregnancy or related conditions or because of sex or sexual orientation or gender identity; [PL 2021, c. 366, §19 (AMD).]

D. Deny a person admission to the institution or program or to fail to provide equal access to and information about an institution or program through recruitment; or [PL 2021, c. 366, §19 (AMD).]

E. Deny a person financial assistance availability and opportunity. [PL 2021, c. 366, §19 (AMD).]

[PL 2021, c. 366, §19 (AMD).]

**2. Unlawful educational discrimination on the basis of physical or mental disability.** [PL 2021, c. 366, §19 (RP).]

**3. Unlawful educational discrimination on the basis of national origin or race.** [PL 2021, c. 366, §19 (RP).]

**4. Unlawful education discrimination on the basis of sexual orientation.** [PL 2021, c. 366, §19 (RP).]

**5. Application.** Nothing in this section:

A. Requires an educational institution to provide separate athletic or other extracurricular programs to serve a person with a physical or mental disability; [PL 2021, c. 366, §19 (NEW).]

B. May be construed to affect the rights of a person with a physical or mental disability to special education programs under state or federal law; [PL 2021, c. 366, §19 (NEW).]

C. Requires a religious corporation, association or society that does not receive public funding to comply with this section as it relates to sexual orientation or gender identity; or [PL 2021, c. 366, §19 (NEW).]

D. Requires an educational institution to participate in or endorse any religious beliefs or practices; to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing. [PL 2021, c. 366, §19 (NEW).]

[PL 2021, c. 366, §19 (NEW).]