No. _____

In the Supreme Court of the United States

ST. DOMINIC ACADEMY, ET AL.,
Petitioners,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Carson* v. *Makin*, this Court held that Maine cannot "continue excluding religious schools from its tuition assistance program" "on the basis of their religious exercise."

Yet Maine's religious exclusion persists. In a move lauded as a "model" for "[o]utmaneuver[ing] the Supreme Court," Maine amended its human rights law to attach new restrictions to its tuition assistance program. The amendments prohibit religious schools from preferring students of their own faith in admissions and financial aid. Maine also repealed a longstanding religious exemption on matters of sexual orientation and gender identity. As Maine told this Court in its *Carson* merits brief, these new restrictions make it doubtful that "any religious school would accept public funds."

The First Circuit upheld Maine's renewed exclusion. It deemed *Carson* "derivative" of *Employment Division* v. *Smith*'s "facial neutrality framework"—and thus inapplicable here, because the amendments do not explicitly "exclude schools solely because they are religious schools." And applying *Smith*, the Court held that Maine's secular exemptions did not undermine general applicability. In so doing, the court sided with the minority position in an entrenched and acknowledged 7-5 split over what kinds of exemptions undermine general applicability.

The questions presented are:

1. Whether *Carson* v. *Makin* applies only when the government explicitly excludes religious people and institutions.

2. Whether proving a lack of general applicability under *Employment Division* v. *Smith* requires showing categorical exemptions for identical secular conduct.

3. Whether *Employment Division* v. *Smith* should be overruled.

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellants below) are St. Dominic Academy, a d/b/a of the Roman Catholic Bishop of Portland; the Roman Catholic Bishop of Portland, a corporation sole; Keith Radonis, on his own behalf and as next friend of children K.Q.R., L.R.R., and L.T.R.; Valori Radonis, on her own behalf and as next friend of children K.Q.R., L.R.R., and L.T.R.[1]

Respondents (defendants-appellees below) are A. Pender Makin in her personal capacity and official capacity as Commissioner of the Maine Department of Education; Jefferson Ashby, in his personal capacity as Commissioner of the Maine Human Rights Commission; Megan Sanders, in her official capacity as Commissioner of the Maine Human Rights Commission;[2] Edward David, in his personal capacity and official capacity as Commissioner of the Maine Human Rights Commission; Julie Ann O'Brien, in her personal capacity and official capacity as Commissioner of the Maine Human Rights Commission; Mark Walker, in his personal capacity and official capacity

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[1] Plaintiffs Keith and Valori Radonis and their minor children initially filed a claim for injunctive relief and damages. However, during the pendency of the appeal, their claims for injunctive relief became moot, and the First Circuit remanded those claims for dismissal without prejudice. App.386a. The Radonises retain a claim for damages.

[2] Petitioners originally named Jefferson Ashby as a defendant in both his personal capacity and his official capacity as a Commissioner. App.1a n.*. After this lawsuit was filed, Megan Sanders replaced him as Commissioner. *Ibid.* The First Circuit substituted Sanders with respect to the claims against Ashby in his official capacity only, because the claims against him in his personal capacity remained. *Ibid.* (citing Fed. R. App. P. 43(c)(2)).

as Commissioner of the Maine Human Rights Commission; and Thomas L. Douglas, in his personal capacity and official capacity as Commissioner of the Maine Human Rights Commission.

RULE 29.6 DISCLOSURE STATEMENT

No Petitioner has a parent corporation. No publicly held corporation owns any portion of any of the Petitioners, and none of the Petitioners is a subsidiary or an affiliate of any publicly owned corporation.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *St. Dominic Acad.* v. *Makin*, No. 2:23-cv-246 (D. Me. Aug. 8, 2024) (order denying motion for preliminary injunction);
- *St. Dominic Acad.* v. *Makin*, No. 24-1739 (1st Cir. July 2, 2026) (opinion and judgment); and
- *St. Dominic Acad.* v. *Makin*, No. 2:23-cv-246 (D. Me. July 27, 2026) (order on remand entering partial permanent injunction and staying further proceedings).

The following proceedings challenge application of the same laws and were consolidated for argument before the First Circuit:

- *Crosspoint Church* v. *Makin*, No. 1:23-cv-146 (D. Me. Feb. 27, 2024) (order denying motion for preliminary injunction);
- *Crosspoint Church* v. *Makin*, No. 1:23-cv-146 (D. Me. June 4, 2024) (order converting order on preliminary injunction into order on permanent injunction and entering final judgment);
- *Crosspoint Church* v. *Makin*, No. 24-1590 (1st Cir. July 2, 2026) (opinion and judgment); and
- *Crosspoint Church* v. *Makin*, No. 1:23-cv-146 (D. Me. July 27, 2026) (order on remand entering partial permanent injunction and staying further proceedings).

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INTRODUCTION

Since 1981, Maine has excluded religious schools from its public tuition assistance program based on their religious status, character, and exercise. At first, Maine did so explicitly: only "nonsectarian" schools could participate. But in *Carson* v. *Makin*, this Court held that exclusion unlawful. So, Maine officials looked for a different approach.

Even as this Court considered *Carson*, Maine implemented new antidiscrimination requirements for schools that wanted to receive public funds. First, Maine added its first-ever ban on participating schools considering a student's religion in admissions and financial aid—a common practice for religious schools seeking to form a community centered around shared religious beliefs. Second, Maine eliminated the preexisting religious exemption from its prohibition on sexual orientation and gender identity discrimination—thus requiring schools to affirm students' gender identity choices, even over the objection of their parents. And third, it imposed a new "religious expression" rule stating that "to the extent" a school allows religious expression, it cannot "discriminate between religions in so doing." Thus, as the court below recognized, "if a preacher at a school-mandated Mass permits students to say 'Amen,'" the school must "allow expressions of disagreement." App.35a.

Maine officials knew these new rules would act as poison pills making it virtually impossible for many religious schools to receive public funds. Indeed, they freely admitted that the religious gerrymander was the point. In *Carson*, Maine's Attorney General predicted to this Court that many religious schools would

not even apply for the program under the new law because they couldn't give up what he considered discriminatory practices. And less than a week after *Carson* was decided, the then-Speaker of Maine's House of Representatives confirmed that Maine had changed its laws specifically because it had "[a]nticipated" this Court's "ludicrous decision." App.296a.

Maine's supporters understood the strategy. Two days after *Carson* was decided, the *New York Times* ran an op-ed entitled "There's A Way to Outmaneuver the Supreme Court, and Maine Has Found It." App.289a. In that article, law professor Aaron Tang touted the changes that Maine officials had made to its tuition assistance program, and lauded those tactics as a "model for lawmakers elsewhere who are alarmed by the court's aggressive swing to the right." App.290a.

Whatever Maine's purposes, the ultimate problem is that it is excluding otherwise-eligible schools from a public benefits program based on their religious exercise. And other states—notably including Colorado—are following suit. *St. Mary Catholic Parish* v. *Roy*, No. 25-581 (argued Nov. 3, 2026).

The First Circuit blessed Maine's efforts to outmaneuver this Court's decision in *Carson*. And its decision implicates the same significant First Amendment questions that this Court rightly considered worthy of certiorari in *St. Mary*.

First, the opinion below narrowly construed *Carson* as nothing more than a principle "derivative" of *Employment Division* v. *Smith*'s "facial neutrality framework." App.47a n.27. Like the Tenth Circuit's reasoning in *St. Mary*, this would render *Carson* a rule about

superficial neutrality rather than a substantive requirement ensuring that religious organizations can participate in public benefits programs without forfeiting their religious exercise. As this case demonstrates, that misreading would allow states to exclude religious communities from public benefits by relabeling protected religious exercise as forbidden "discrimination."

Second, the decision below exacerbates a 7-5 split over how to apply the general applicability rule in *Smith*. 494 U.S. 872, 885 (1990). On one side, four circuits and three state high courts assess *all* categories of exemptions from a law to determine whether any undermine the government's asserted interests "in a similar way" to the religious exercise at issue. *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 534 (2021). On the other side, now three circuits and two state high courts consider only categorical exemptions for *identical* secular conduct.

Accordingly, the first two questions presented in this petition track closely the two questions granted in *St. Mary*. If this Court rules for the petitioners in *St. Mary*, the Court should at a minimum grant, vacate, and remand in this case for further consideration in light of *St. Mary*.

But this case also merits independent plenary review because Maine's circumvention of *Carson*—and the First Circuit's contortion of this Court's Free Exercise Clause precedent—illustrate the deep problems with *Smith* itself. *Smith* created an unworkable standard that incentivizes states to constantly rejigger their laws to suppress disfavored religious activity, as Maine has done here. The First Circuit knew all this,

but still held that Maine's law was neutral and generally applicable under *Smith*. App.53a, 88a-89a. The net result is that even after the *Carson* win, religious parents have been rewarded not with acceptance, but continued exclusion because of their religious exercise.

So far, *Smith* has allowed Maine to do indirectly what it could not do directly. Maine's chutzpah is inspiring other states across the country to continue discriminating against religious institutions in their public programs. And lower courts are dismissing this Court's precedent as narrow and weightless. But "[t]he Constitution deals with substance, not shadows." *Students for Fair Admissions* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023). It is well past time for this Court to retire *Smith*, and this case presents an ideal vehicle to do so. Only this Court can correct the problems created by *Smith* and ensure that the Free Exercise Clause is not reduced to a drafting rule. Therefore, the Court should also consider granting solely on the third question, to cleanly and finally dispose of *Smith*.

OPINIONS BELOW

The First Circuit's opinion is reported at 181 F.4th 11 and reproduced at App.1a. The district court's opinion is reported at 744 F. Supp. 3d 43 and reproduced at App.98a.

JURISDICTION

The First Circuit issued its opinion and judgment on July 2, 2026. App.1a. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech[.]"

Me. Rev. Stat. tit. 5, § 4553 is reproduced in relevant part at App.201a-216a.

Me. Rev. Stat. tit. 5, § 4602 is reproduced in relevant part at App.217a-218a.

STATEMENT OF THE CASE

A. Maine's tuition assistance program

Maine's Constitution requires local towns "to make suitable provision, at their own expense, for the support and maintenance of public schools." Me. Const., art. VIII, pt.1, § 1. But because Maine is the most rural state in the country, many local school administrative units (SAUs) do not have large enough populations to support a public school. *Carson* v. *Makin*, 596 U.S. 767, 773 (2022).

To provide education in these rural areas, Maine created its earliest tuition assistance program in 1873. App.232a. Under the program today, if an SAU neither operates its own public school nor contracts with a nearby school to educate its children, that SAU must "pay the tuition * * * at the public school or the approved private school of the parent's choice at which the student is accepted." Me. Rev. Stat. tit. 20-A, § 5204(4).

For a private school to be "approved," it must meet certain basic requirements under Maine's compulsory

education law. Me. Rev. Stat. tit., 20-A, § 2951(1). For example, the school must be accredited, meet specified curricular requirements, and maintain a student-to-teacher ratio of not more than 30 to 1. *Id.* §§ 2902(2), 2902(3), 2902(6)(C), 4706(2). Maine's tuition assistance program "imposes no geographical limitation: Parents may direct tuition payments to schools inside or outside the State, or even in foreign countries." *Carson*, 596 U.S. at 774 (citing Me. Rev. Stat. tit. 20-A, §§ 2951(3), 5808). Over the years, Maine has paid tuition to schools in Québec and as far away as Utah and California. App.233a.

Once a private school is "approved for tuition purposes," it becomes an "[e]ducational institution" covered by the provision of the Maine Human Rights Act (the Act) that forbids "unlawful educational discrimination." See Me. Rev. Stat. tit. 5, § 4553(2-A), (F) ("Educational institution" includes "public school[s]," "public postsecondary institution[s]," and private schools "approved for tuition purposes"); Me. Rev. Stat. tit. 5, § 4602 ("Unlawful educational discrimination"). Penalties for repeatedly engaging in prohibited discrimination can reach $100,000. Me. Rev. Stat. tit. 5, § 4613.

However, the Act as a whole does not apply to conduct outside of Maine, and Maine has imposed no separate requirement that out-of-state schools "approved for tuition purposes" under Maine's education law must comply with the Act. App.10a-12a & n.7, 64a. Thus, some of these approved out-of-state schools—such as Dana Hall School, an all-girls boarding school in Massachusetts—have policies that would concededly violate the Act. *Ibid.*

B. The *Carson* litigation

When Maine first created the modern version of its tuition assistance program, it allowed religious schools to participate. App.234a. But in 1981, Maine imposed a requirement that all participating schools must be "nonsectarian," claiming the change was required by the Establishment Clause. *Carson*, 596 U.S. at 774 (quoting Me. Rev. Stat. tit. 20-A, § 2951(2)). But even after this Court clarified that the Establishment Clause does not require states to exclude religious schools from public programs, see *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 652-653 (2002), Maine "continue[d] excluding religious schools from its tuition assistance program," *Carson*, 596 U.S. at 768. And when this Court held that restrictions based on "religious status" violate the Free Exercise Clause in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 461 (2017), Maine persisted in its refusal to allow religious schools to participate in the program. *Carson*, 596 U.S. at 774-775.

In 2018, two families challenged Maine's "nonsectarian" requirement under the Free Exercise Clause. Because this Court had recently held restrictions based on "religious status" to be unconstitutional, Maine instead argued that its restriction was based on a school's "religious use" of state funds. A school was sectarian, Maine said, "only if it promotes a particular faith and presents academic material through the lens of that faith." *Carson*, 596 U.S. at 786-787. Maine insisted that its goal was to ensure that it funded only "religiously neutral" and "not discriminatory" education. Tr. of Oral Arg. at 48, 52, 54-55, 69, 75, 82, 87, *Carson*, 596 U.S. 767 (No. 20-1088).

This Court rejected Maine's arguments, holding that denying funds based on religious "activity" or "use" is equally as "offensive to the Free Exercise Clause" as denying funds based on religious "status." *Carson*, 596 U.S. at 787. And permitting states to draw a distinction between religious status and use would "raise serious concerns about state entanglement" and "denominational favoritism," because policing religious uses would require "scrutinizing whether and how a religious school pursues its educational mission." *Ibid.* This Court stated in no uncertain terms that, "[r]egardless of how the benefit and restriction are described," Maine could not "exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 789.

C. Maine's amendments to its Human Rights Act

But even as *Carson* was still pending before this Court, Maine officials took action to ensure that the program would continue to exclude schools whose beliefs did not align with the State's preferred views. In June 2021, as this Court considered the *Carson* petition for certiorari, the Maine Human Rights Commission proposed extensive revisions to the Act, which the Maine Legislature enacted in Legislative Document 1688. These revisions imposed new barriers for religious schools by making three substantial changes to the Act's section on "educational discrimination."

First, LD 1688 broadened the ban on "educational discrimination" to include discrimination based on "religion," which had never been included before. Me. Rev. Stat. tit. 5, § 4602(1). This new religious nondiscrimination rule prevented approved schools from limiting "admission" or "financial assistance" based on

"religion." *Id.* § 4602(1)(A), (D), (E). Thus, a participating religious school cannot prefer students of its own faith in admissions or financial aid. Nor can it require admitted students to agree to support or adhere to the school's religious tenets, as this would constitute religious "discrimination."

Second, LD 1688 added a new "religious expression" rule providing that, "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." Me. Rev. Stat. tit. 5, § 4602(5)(D). As explained by the First Circuit, at a minimum, this rule means that "if a preacher at a school-mandated Mass permits students to say 'Amen,'" St. Dominic must "allow expressions of disagreement," and if St. Dominic requires students to recite the Lord's Prayer, it must allow the reciting of "the Hare Krishna Mahā mantra" as well.[3] App.35a.

Third, LD 1688 repealed a longstanding religious exemption that protected religious schools' beliefs on matters of sexual orientation and gender identity. Previously, the Act's provisions "relating to sexual orientation [did] not apply to any education facility owned, controlled or operated by a bona fide religious corporation, association or society." Me. Rev. Stat. tit. 5, § 4602(4) (repealed 2021). LD 1688 "struck" this exemption and added an additional prohibition against "gender identity" discrimination that applies to "religious" schools that "receive public funding." Me. Rev.

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[3] The First Circuit correctly observed that examples like these are not "fanciful" "once one considers the tendency of some students to look for opportunities * * * to test and provoke their schools." App.35a & n.22.

Stat. tit. 5, § 4602(1), 5(C). These changes require religious schools to address sensitive issues relating to sexual orientation and gender identity in a manner reflective of the State's preferences, rather than the school's own faith commitments. App.251a-253a. In fact, the Maine Human Rights Commission has explained that approved religious schools must now (1) facilitate a student's gender transition, including over the objection of their parents, and (2) discipline other students and staff who object to using a student's preferred pronouns—even if this contradicts the school's religious mission. App.302a-303a.

Maine's officials made no secret about the reasons for these changes. In an unsuccessful attempt to moot the case, see *Carson*, 596 U.S. at 781 n.*, Commissioner Makin's merits brief in *Carson* closed by insisting that that LD 1688—which had become effective just days prior—made it doubtful that "any religious school would accept public funds," Resp. Br. at 53-54, *Carson*, 596 U.S. 767 (No. 20-1088), 2021 WL 4993533. Makin argued that the changes to the Act would undermine "the willingness of * * * religious schools to accept public funds," because doing so "would result in a significant change in how [they] operate." *Ibid.* After oral argument, Maine's Attorney General issued a press statement announcing that religious schools would remain excluded because they "want to * * * discriminate." App.295a.

The same day *Carson* was decided, the Attorney General issued a press release criticizing the religious schools in that case as "inimical" to Maine's "values" because "they promote a single religion," "refuse to admit gay and transgender children," and "discriminate in hiring teachers and staff." App.287-288a. He vowed

to use Maine's "statutory amendments" to prevent such schools from receiving "public money," and again warned that any school seeking tuition funds must now "comply with anti-discrimination provisions of the [Act]," which would "require some religious schools to eliminate their current practices." *Ibid.* Days later, Maine's then-Speaker of the House boasted that Maine had "changed the guidelines" for the tuition assistance program because it "[a]nticipated the ludicrous [*Carson*] decision from the far-right SCOTUS." App.296a.

In 2023, one of the religious schools that the Attorney General had singled out during *Carson* challenged Maine's new regime in court. After the school argued that the Act was not generally applicable because it exempted single-sex schools, Maine lawmakers hastily amended the Act *again*, this time to remove the exemption for single-sex schools. See *Carson*, 596 U.S. at 774 (citing Me. Rev. Stat. tit. 5, § 4553(2-A)) (noting the single-sex school exemption); Me. Pub. L. 2023, ch. 188 § 1.[4]

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[4] While these changes applied to participating schools located in Maine, they had no impact on participating schools located outside of Maine because Maine amended only the Act, and not the education law establishing the tuition assistance program itself. Maine conceded below that the Act applies only to approved schools within Maine. Resp. C.A. Br. 36. Thus, despite removing the exemption for single-sex schools from the Act, Maine continued to approve single-sex schools outside of Maine to receive tuition funding. See Maine Dep't of Educ., Private Schools Approved for the Receipt of Public Funds from Maine School Units 2023-

Even within the State, Maine continues to provide public funds to schools that are not subject to the Act, operating several grant programs that provide funding for students to use at the public and private postsecondary schools of their choice. App.247a. While public postsecondary schools are "[e]ducational institution[s]" subject to the Act, private postsecondary schools are not. See Me. Rev. Stat. tit. 5, § 4553(2-A), 10(F).

D. St. Dominic Academy

Petitioner Roman Catholic Bishop of Portland operates multiple Catholic Schools in Maine, including Petitioner St. Dominic Academy. App.226a. St. Dominic Academy traces its roots back to schools established in the 1870s by the Sisters of Charity of St. Hyacinthe to educate French-speaking families from Québec who had come to work in local mills. App.228a-229a. Over the years, St. Dominic grew to include two campuses, offering education from pre-kindergarten through 12th grade and receiving accreditation from the New England Association of Schools & Colleges. *Ibid.*[5]

St. Dominic participated successfully in Maine's tuition program until it was excluded as sectarian in

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2024, at 4 (Feb. 8, 2024), https://perma.cc/S6KL-Y6J9 (listing Dana Hall School, an all-girls boarding school in Massachusetts, as approved); Maine Dep't of Educ., Private Schools Approved for the Receipt of Public Funds from Maine School Units 2024-25 (Sept 23, 2024), https://perma.cc/94RG-7M8Z (same).

[5] See New England Association of Schools and Colleges, St. Dominic Academy—Auburn Campus, https://perma.cc/74NM-5BLH.

1981. App.234a. Between 1994 and 2022, Maine families filed six separate lawsuits seeking to restore their ability to use state tuition funds at St. Dominic and other religious schools.[6] In 2025, after 34 years of exclusion, St. Dominic's high school campus closed due to low enrollment and financial constraints. App.389a. Today, St. Dominic continues to offer Catholic education to elementary and middle school students, including those who live in SAUs lacking their own public schools. *Ibid.*

St. Dominic meets all the requirements to participate in Maine's program—except that it cannot comply with the new provisions of the Act without abandoning its religious exercise. App.224a. Catholic teachings instruct Catholic schools to serve as "the principal assistance to parents" in forming children in the Catholic faith. App.226a. Accordingly, although St. Dominic admits "[s]tudents of other religious beliefs" as "part of the Catholic Church's evangelizing mission," the school gives preference to Catholics in admissions and financial aid. App.227a.

Additionally, the mission of Diocesan schools is "to strengthen the Catholic Church" and to help students "become faith-filled Christians." App.226a. Thus, regardless of their religious background, all students attend Catholic religion classes and Mass. App.250a. And every student must "understand, accept, and [be]

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[6] *Strout* v. *Albanese*, 178 F.3d 57 (1st Cir. 1999) (district court case filed in 1994; included parents who wished to send their children to St. Dominic); *Bagley* v. *Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999); *Anderson* v. *Town of Durham*, 895 A.2d 944, 958 (Me. 2006) (St. Dominic); *Joyce* v. *State*, 951 A.2d 69, 70 (Me. 2008); *Eulitt* v. *Maine Dep't of Educ.*, 386 F.3d 344, 352 (1st Cir. 2004) (St. Dominic); *Carson*, 596 U.S. 767.

willing to support the mission and goals of the school" and agree to uphold "Catholic Christian morals." App.227a.

Among the Catholic Church's teachings St. Dominic requires its students to understand, accept, and support are those regarding human sexuality and gender. App.251a-253a. In keeping with Church teaching, St. Dominic aims to be "understanding of human weakness and the complexities of life," while upholding, as the Church has explained, that "biological sex and the socio-cultural role of sex (gender) can be distinguished but not separated" and that "protecting our humanity" means "accepting it and respecting it as it was created." App.253a. Accordingly, St. Dominic will not facilitate a student's gender transition; nor will it use, or require its students and staff to use, pronouns that do not align with a student's biological sex. St. Dominic also believes that its role is to assist parents in their "inalienable" "right and * * * duty" to educate their own children. App.252a. Thus, it could not support a student's attempt to hide a change in gender presentation from the student's parents. App.251a-253a.

E. Procedural background

Petitioners filed suit on June 13, 2023, and moved for a preliminary injunction enabling them to participate in the tuition assistance program for the 2023-24 school year. The district court denied the preliminary injunction. First, it held that the Act is not generally applicable because it "does not apply to private post-secondary institutions or to schools located outside of Maine," even though such schools "are eligible to receive public funds from Maine," which similarly un-

dermined Maine's interest in "eliminating discrimination." App.152a-153a. But the district court then held that the Act nevertheless satisfied strict scrutiny because "all the challenged provisions are written to prohibit only discriminatory conduct." App.166a.

The First Circuit affirmed in part and reversed in part. It first held that the religious expression rule is not neutral under the Free Exercise Clause "because it singles out 'religious expression'" on its face. App.36a. And the religious expression rule failed strict scrutiny because the State failed to identify a compelling interest. App.37a-39a.

The First Circuit then concluded that the religious nondiscrimination rule did not prohibit St. Dominic from requiring all students to support its religious mission through their words and conduct because "requiring all students to support the school's mission does not necessarily treat students differently on the basis of their religious beliefs." App.41a.

Nevertheless, the Court held that the religious nondiscrimination rule prohibited St. Dominic's practice of giving preference to Catholic families in admissions and financial aid, and that the sexual orientation and gender identity nondiscrimination rule prohibited St. Dominic's policy requiring students to dress and be addressed by pronouns that correspond with their biological sex. App.40a-42a, 83a-85a.

The First Circuit next held that these two rules—the religious nondiscrimination rule and the sexual orientation and gender identity nondiscrimination rule—were not subject to strict scrutiny. The court read *Carson* as "derivative of *Smith*'s facial neutrality framework" and declined the apply it to Petitioners'

free exercise claims. App.47a n.27. It then held that Maine's program was neutral and generally applicable. Relying on *Christian Legal Society* v. *Martinez*, 561 U.S. 661 (2010), the Court reasoned that although the Act "may end up having greater consequences for religious schools," it was still neutral toward religion. App.56a. And the court concluded that Maine's exemptions for out-of-state schools from its nondiscrimination requirements did not undermine Maine's "limited interest in combatting discrimination within Maine specifically" that it had purportedly asserted "from the start." App.66a. Applying *Smith*, the First Circuit held that rational basis review was satisfied. App.79a-80a.

The same day, the First Circuit issued a decision in a parallel case, *Crosspoint Church* v. *Makin*. Plaintiff Crosspoint Church operates Bangor Christian School, where the Carson family sought to use their state tuition funds. *Carson*, 596 U.S. at 775-776. The First Circuit held that its "conclusion[s]" in this case "applie[d] equally" to all of Crosspoint Church's parallel claims. *Crosspoint Church* v. *Makin*, 180 F.4th 354, 360 (1st Cir. 2026). The First Circuit then rejected Crosspoint Church's "unique argument[s]" that Maine officials specifically targeted Bangor Christian School both before and after *Carson*. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. Lower courts are defying *Carson*'s prohibition on denying religious people benefits "because of their religious exercise."

Maine's new requirements for its tuition assistance program are a clear attempt to evade this Court's decision in *Carson*—and the decision below blessed those tactics. The First Circuit has now joined the Fourth,

Ninth, and Tenth Circuits in their circumvention of this Court's repeated holding that states may not "exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." *Carson*, 596 U.S. at 781. This Court should intervene now to stop this defiance before it spreads further.

1. *Carson* held that when "otherwise eligible schools" are "exclude[d]" from a benefits program "on the basis of their religious exercise," the exclusion triggers strict scrutiny. 596 U.S. at 789; accord *id.* at 785. *Carson* rooted this rule in pre-*Smith* cases like *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981). It called this rule "unremarkable." *Carson*, 596 U.S. at 780 (citing *Trinity Lutheran*, 582 U.S. 449 and *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464 (2020)). And this Court has since reiterated that access to public benefits cannot be conditioned "on parents' willingness to accept a burden on their religious exercise." *Mahmoud* v. *Taylor*, 606 U.S. 522, 561 (2025).

Both some of the oldest cases in this line (*Sherbert, Thomas*) and the most recent (*Mahmoud*) involved benefits programs that did not call out "religion" by name, but burdened religious practices nevertheless. And the free exercise rule that these cases confirm "applies fully whether the prohibited [religious] discrimination is in an express provision" of the law or in a government's "reconceptualization of the public benefit." *Carson*, 596 U.S. at 785. Indeed, to hold otherwise would be to "render[]" this line of cases "essentially meaningless." *Id.* at 784. Thus, governments do not escape *Carson*'s rule by banning religious conduct without using the word "religion." After all, the burden on

the religious believer is the same, whether the ban uses the word "religion" or not.

2. The First Circuit nevertheless allowed Maine to prohibit basic features of many religious schools' common life—including religious admissions preferences and conduct policies—by "reconceptualizing" its ban on these practices as nothing more than a rule against wrongful "discrimination."

To reach this result, the court below first had to minimize *Carson*. It did so by reframing *Carson* as merely "derivative of *Smith*'s facial neutrality framework" and denying that it had any independent application in this case. App.47a. The First Circuit relied on recent decisions from the Fourth, Ninth, and Tenth Circuits, each of which have made similar moves. App.50a-53a (citing *Youth 71Five Ministries* v. *Williams*, 160 F.4th 964, 979 (9th Cir. 2025); *Kim* v. *Board of Educ.*, 93 F.4th 733, 747-749 (4th Cir. 2024); and *St. Mary Catholic Parish* v. *Roy,* 154 F.4th 752, 765 (10th Cir. 2025), cert. granted 146 S. Ct. 2573 (2026)). The First Circuit thus concluded that the rule in *Carson* does not apply unless a law excludes religious participants "solely because of [their] religious character." App.47a n.27.

Drawing on the decisions of these other circuits, the First Circuit concluded that the Act did not do so here. First, it held that the Act's nondiscrimination rules did not single out religion because secular organizations are equally capable of discriminating on the basis of religion, sexual orientation, or gender identity. App.50a-52a, 87a-88a; accord *Youth 71Five*, 160 F.4th at 979 (adopting a similar argument); *St. Mary*, 154 F.4th at 764 (same). And second, it noted that the religious exclusion was not complete—since at least one

religious school in the state had decided that it could comply with Maine's new requirements. App.50a-51a; accord *St. Mary*, 154 F.4th at 764 (noting that Colorado "welcomed" certain religious preschools). So, according to the First Circuit, there was no religious discrimination here, and *Carson* is irrelevant. App.49a-50a.

This two-step misses the point of the Free Exercise Clause, which requires courts to focus on "the substance of free exercise protections, not on the presence or absence of magic words." *Carson*, 596 U.S. at 785; accord *NRA* v. *Vullo*, 602 U.S. 175, 190 (2024) (government "cannot do indirectly what [it] is barred from doing directly"). Here, there can be no doubt: the Act burdens core religious exercise.

That burden falls on St. Dominic's practice of requiring the families it serves to agree to uphold its religious mission in word and deed, and the school policies that flow naturally from this agreement. "[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 753-754 (2020). Like many other religious schools, St. Dominic uses religious admission and conduct policies to carry out that mission. The same is true for St. Dominic's reli-

gious commitment to (among other things) not transition children to a different gender over the objection of their parents.[7]

Maine claimed below that St. Dominic could adopt such policies—but simultaneously asserted that their basic features (preferences for co-religionists, requirements to adhere to religious views on sex and gender) were unlawful discrimination. Thus, Maine used the newly amended Act to accomplish what its previous religious exclusion, struck down in *Carson*, could no longer do: exclude religious schools from the tuition assistance program on the basis of their religious exercise.

The decision below suggested St. Dominic's religious exercise could be grounds for exclusion because "religious discrimination" is not "solely a practice of religious schools." App.50a. But this is like saying that Adell Sherbert was not excluded for her religious exercise because some nonreligious people would rather not work on Saturdays. And it pretends that hypothetical wrongful discrimination by secular schools is analytically indistinguishable from St. Dominic's religious

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[7] The First Circuit acknowledged that Maine's gender-transition requirement likely conflicts with *Mirabelli* v. *Bonta*, 607 U.S. 492 (2026), which Petitioners had raised in a Rule 28(j) letter after oral argument. 3/4/2026 Pet'rs' C.A. Notice of Suppl. Auth. But the court declined to reach this claim because *Mirabelli* "did not indicate that a party other than a parent could generally assert such a claim." App.94a.

exercise of assisting Catholic parents in transmitting their faith to the next generation.[8]

Nor is Maine's policy saved because other religious entities comply. When the government imposes nondiscrimination policies that exclude religious communities because they organize themselves around a shared set of beliefs about God that implicate sex and marriage, it is excluding those communities on the basis of their religious exercise, just as *Carson* forbids. And this is true even if other religious entities—including co-religionists—decide that they can participate in the program. *Catholic Charities Bureau, Inc.* v. *Wisconsin Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 250 (2025) (government-imposed eligibility requirements cannot "differentiat[e] between religions based on theological choices"). The First Circuit nevertheless thought that excluding only some religious schools for their religious exercise—namely those with beliefs and practices Maine dislikes—rendered the exclusion more permissible.

Such exclusion for religious exercise would trigger strict scrutiny under *Carson* even if it were not deliberate or selective. But here the selective religious exclusion is a feature, not a bug. After all, Maine made it crystal clear that it intended to use its newly

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[8] There is, of course, a critical distinction between "discrimination"—that is, making a distinction between two things on the basis of "particular criteria"—and "wrongful discrimination." See generally Richard Garnett, *Wrongful Discrimination? Religious Freedom, Pluralism, and Equality, in Religious Freedom and Gay Rights: Emerging Conflicts in North America and Europe* 72-73 (Timothy Shah, Thomas Farr & Jack Friedman eds., 2016). The First Circuit's analysis ignores this distinction entirely.

amended nondiscrimination law to exclude certain religious schools because of their religious exercises regardless of what this Court said in *Carson*. The Maine legislature's maneuvers were such a transparent gerrymander that they were confirmed on Twitter and written up in the New York Times. App.289a; App.296a. Maine even raised its new law in its *Carson* briefing, hoping that its dissuasive effect could sink that case by scaring religious schools away. See Resp. Br. at 54, *Carson*, 596 U.S. 767 (No. 20-1088), 2021 WL 4993533; *Carson*, 596 U.S. at 781 n.*. And the day *Carson* was decided, the Maine Attorney General publicly vowed that he would use these same rules to resurrect the specific religious exclusion this Court had just struck down. App.286a-288a.

Maine officials were right about one thing: the new restrictions are indeed untenable for many religious schools. A Catholic school participating in Maine's program cannot prefer Catholic families in admission—even if transmitting the Catholic faith to the next generation is the very purpose for which the school exists. The same school cannot honor Catholic beliefs and parents' wishes by not transitioning children at school—even if the school's faith so requires. And while the First Circuit claimed that St. Dominic was somehow still free to adopt "mission-oriented admissions practices," even this freedom is lost the moment that a Maine Human Rights Commissioner suspects the school's religious admissions practices are a "pretext for prohibited discrimination." App.45a; accord *Crosspoint*, 180 F.4th at 360 (concluding that consideration of "prospective students' spiritual fit" could be unlawful religious discrimination). Since the penalties for engaging in "prohibited discrimination" can reach $100,000—and since the Act includes a private right

of action as well—a religious school like St. Dominic participates in Maine's program only at tremendous risk. Me. Rev. Stat. tit. 5, §§ 4613 (monetary penalties), 4621 (private party lawsuits).

This Court's intervention is urgently needed to prevent the intransigence evidenced by the First, Fourth, Ninth, and Tenth Circuits from becoming the rule. This Court is already considering a nearly identical question presented in *St. Mary*, and this petition should be held pending the outcome in that case. If the Court resolves *St. Mary* in Petitioners' favor on the *Carson* question, that decision should control the outcome here, and the Court can GVR this case. If not, this Court should grant plenary review to reiterate that the government cannot force religious groups to give up their protected religious exercise to receive public benefits. Using a nondiscrimination rule to ban religious groups from a public benefit because they organize themselves around shared beliefs and conduct violates the Free Exercise Clause in the same way as excluding them solely because they are self-admittedly religious under *Carson*.

II. The decision below exacerbates the 7-5 split over whether a law is generally applicable under the Free Exercise Clause.

In addition to ignoring this Court's public-benefits precedent, the decision below deepened the split over how to determine whether a law is generally applicable—a split that has only worsened since this Court granted certiorari on the same question in *St. Mary*. It is also wrong under *Fulton*. But beyond that, the First Circuit's decision illustrates the true unworkability of *Smith*'s framework, the chaos it has sown in the lower courts, and the ease with which governments hostile

to religion may evade the First Amendment under its standard.

As *Fulton* explained, under *Smith* a regulatory scheme "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions." 593 U.S. at 534; see also *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021). Lower courts are split on whether a government action "that does not exempt religious conduct can ever be neutral and generally applicable if it exempts secular conduct that similarly frustrates the specific interest that the mandate serves." *Dr. A.* v. *Hochul*, 142 S. Ct. 2569, 2570 (2022) (Thomas, J., dissenting from denial of cert., joined by Alito and Gorsuch, J.J.). This split "is widespread, entrenched, and worth addressing," *ibid.*, and is currently before this Court in *St. Mary, supra*, (No. 25-581). The upshot of the status quo is that drastically different free-exercise standards apply across the country based solely on a religious claimant's geography.

A. There is a 7-5 split on the test for determining whether a law is generally applicable under *Smith*.

The majority rule—adopted by seven courts—evaluates any form of discretion and all categorical exemptions permitted by a regulatory scheme, to determine if they pose a similar threat to the government's asserted interest as the prohibited religious conduct. See *Fellowship of Christian Athletes* v. *San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 689 (9th Cir. 2023) (en banc); *Blackhawk* v. *Pennsylvania*, 381 F.3d

202, 209-211 (3d Cir. 2004) (Alito, J.); *Monclova Christian Acad.* v. *Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 482 (6th Cir. 2020); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1234-1235 (11th Cir. 2004); *Louisiana* v. *Spell*, 339 So. 3d 1125, 1135-1137 (La. 2022); *Mitchell County* v. *Zimmerman*, 810 N.W.2d 1, 15-16 (Iowa 2012); *Hawaii* v. *Armitage*, 319 P.3d 1044, 1067 (Haw. 2014); see also Pet. at 14-19, *St. Mary, supra*, (No. 25-581).

Meanwhile, the First Circuit's decision here joins four other courts in cabining the general applicability analysis such that only categorical exemptions for *identical* secular conduct or *unfettered* discretion undermine general applicability. See *Emilee Carpenter, LLC* v. *James*, 107 F.4th 92, 110-111 (2d Cir. 2024); *St. Mary*, 154 F.4th at 763; *Kim*, 93 F.4th at 748; *Spillane* v. *Lamont*, 323 A.3d 1007, 1024-1025 (Conn. 2024); *North Coast Women's Care Med. Grp.* v. *San Diego Cnty. Superior Ct.*, 189 P.3d 959, 965 (Cal. 2008); see also Pet. at 19-21, *St. Mary*, *supra* (No. 25-581).

Since the grant in *St. Mary*, the split has only deepened—with the Second and Fourth Circuits doubling down on their application of *Smith*, and the First Circuit here joining those courts' incorrect reasoning. See *Miller* v. *McDonald*, 180 F.4th 420, 429-430 (2d Cir. 2026) (per curiam), petition for cert. pending, No. 26-438 (filed Sep. 28, 2026) (religious and medical exemptions to vaccine requirement could not be plausibly comparable unless medically unvaccinated students were in "a clustered population of almost 100% unvaccinated students"); *Perry* v. *Marteney*, 172 F.4th 315, 324 (4th Cir. 2026), petition for cert. pending, No. 26-319 (filed Sep. 4, 2026) (religious exemption from vaccine mandate not comparable to medical exemptions

despite that unvaccinated students "pose a similar hazard to public health" regardless of reasons for being unvaccinated); see also *Renteria* v. *New Mexico Off. of Superintendent of Ins.*, No. 23-2123, 2025 WL 635754, at *9 (10th Cir. Feb. 27, 2025), petition for cert. pending, No. 25-113 (filed July 28, 2025) (fraternal benefit and labor organizations may provide medical benefits while healthcare sharing ministries may not because the "medical payments provided by the [secular] organizations is incidental or ancillary to their other, primary purposes for being").

In the decision below, the First Circuit joined the minority side of this split. The court held that, to be comparable, the burdened religious conduct must be identical to the exempted secular conduct if it is to undermine the government's asserted interest. See App.63a-71a. And the court allowed Maine to rewrite its interest on appeal just enough to avoid this conclusion. See *infra* Section II.B.

B. The decision below is wrong.

The First Circuit's decision is also badly wrong, as it twists this Court's free-exercise decisions beyond reason to avoid applying strict scrutiny to Petitioners' claims. This kind of free-exercise distortion is now rampant among the lower courts—reflecting an even further splintering in the protections afforded to religious claimants. This case is an especially clear example.

First, after the district court ruled that the Act's exemptions undermined Maine's interests in "eliminating discrimination," App.153a, the First Circuit allowed Maine to rewrite its interests on appeal to pre-

cisely track the contours of the Act. The court characterized Maine's interest as "combatting discrimination generally and state-funded discrimination specifically in education" of "children" and solely "within Maine." App.66a-67a. This is a far cry from the broad interest in "ensuring that public money is not used to fund discrimination" that Maine initially asserted in the district court. Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. 13, D. Ct. Doc. 25 (July 11, 2023); see also *id.* 18, 21-22. And it is well-established that a government may not frame its interest so as to authorize a "bespoke requirement specifically addressed to [the plaintiff's] religious exercise" and nothing else. *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022); see also *Masterpiece Cakeshop* v. *Colorado C.R. Comm'n*, 584 U.S. 617, 652 (2018) (Gorsuch, J., concurring) (rejecting the notion that *Smith* permits the government to "adjust[] the dials *just right*" and "fine-tun[e] the level of generality up or down" in order to "engineer" neutrality and general applicability).

Second, the First Circuit impermissibly focused on Maine's *reasons* for exempting comparable secular conduct. Because it found Maine's reasons for exempting out-of-state girls' boarding schools and private postsecondary schools were "innocuous," it gave Maine a pass. App.69a. But that doesn't address whether the secular and religious conduct pose a comparable "risk[]" to the government's interest. *Tandon*, 593 U.S. at 62. Choosing to exempt out-of-state and post-secondary schools may "make[] sense" and seem "important" and "justified"—but that doesn't mean such exemptions don't undermine Maine's broad asserted interest in preventing discrimination in publicly funded institutions. See *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 544 (1993).

Third, the First Circuit gave Maine a pass because some religious schools (those out-of-state) are exempt from the Act. App.64a-65a. By that rationale, as long as *some* religious schools are not treated worse than secular schools, a law is generally applicable. But that approach is foreclosed by this Court's decision in *Lukumi*, which held that a law targeting Santería animal practices while exempting "kosher slaughter," another religious practice, was not generally applicable. 508 U.S. at 536.

As this discussion illustrates, assessing "[t]he nature and scope of exemptions" and "[i]dentifying appropriate comparators" "continue[s] to plague courts" when they are "called upon to apply *Smith*." *Fulton*, 593 U.S. at 603, 609-610 (Alito, J., concurring) (emphasis omitted). If the Court resolves *St. Mary* in Petitioners' favor on general applicability grounds that apply equally here, this Court could GVR. If not, then this Court should grant plenary review. In the meantime, the Court should hold this petition pending its decision in *St. Mary*.

III. *Employment Division* v. *Smith* should be overruled.

Ultimately, *Smith* is at the root of both errors identified above: *Smith* has proved stubbornly unworkable and susceptible to manipulation. It is well past time for this Court to retire *Smith*. This case presents an ideal vehicle to do so—as *Smith* led directly to the lower court's errors, and those errors exemplify how *Smith* continues to undermine this Court's efforts to reform the doctrine.

1. *Smith* rewards governments that pass overbroad laws. Under any other strand of this Court's

First Amendment doctrine, a restrictive law would be made more, not less, egregious if the government broadened its reach. See, *e.g.*, *United States* v. *Williams*, 553 U.S. 285, 292 (2008) ("a statute is *facially* invalid if it prohibits a substantial amount of protected speech" (emphasis added)); *Chiles* v. *Salazar*, 607 U.S. 627, 639-640, 646-647 (2026) (where "application of the law strikes at the heart of the First Amendment's protections for free speech" by "broadly" defining prohibited speech, "it warrants considerably more searching scrutiny than * * * rational-basis review," and the fact that the regulation "targets only" a subset of speakers "changes nothing"). Yet under *Smith*, overbreadth is the very quality that can most readily save a law from strict scrutiny.

This aspect of *Smith* predictably leads to "leveling down"—altering laws to restrict more and more behavior in an effort to resist accommodating religious exercise. Consider three recent examples.

First, in *Crosspoint Church*, when a religious school pointed out that the Act was not generally applicable because it expressly exempted single-sex schools from its "unlawful educational discrimination" provisions, Maine officials scrambled to address "the single-sex school exception/Crosspoint," App.384a, and the Maine legislature promptly amended the law to remove that exemption, App.61a-62a. Incredibly, the First Circuit found that Maine's move "evince[d] not hostility but rather a preference for consistency" "and a willingness to listen to litigants' complaints." App. 62a.

Second, in *St. Mary*, Colorado repeatedly modified its universal preschool regulations in response to St.

Mary's lawsuit, including by dropping its previous accommodation allowing faith-based preschools to preference members of their own congregations after the district court ruled it rendered one of Colorado's nondiscrimination requirements not generally applicable. See Pet. Br. at 17, *St. Mary, supra* (No. 25-581). And the Tenth Circuit approved that maneuver, determining that it "need not consider" a general applicability argument regarding the congregation preference "because the congregation preference no longer exists, and thus cannot undermine the law's general applicability." *St. Mary*, 154 F.4th at 772 n.16.

And third, in *Doe* v. *San Diego Unified School District*, the Ninth Circuit initially enjoined a high school COVID-19 vaccine mandate "only while a 'per se' deferral of vaccination [was] available to pregnant students." 19 F.4th 1173, 1175 (9th Cir. 2021). The school district stripped its pregnant students of their exemption the next day. *Ibid.* And, without that exemption, the Ninth Circuit went on to hold that the school district's newly amended policy was generally applicable after all. *Id.* at 1180.

"There is no question that *Smith*'s interpretation can have startling consequences." *Fulton*, 593 U.S. at 545 (Alito, J., concurring). But those consequences are also entirely predictable under the rule of *Smith*.

2. *Smith* incentivizes gamesmanship by governments and courts alike. As the First Circuit's general applicability analysis illustrates, *Smith*'s standard is incredibly manipulable: one can simply widen or narrow the comparability aperture. But this flexibility is no virtue. Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1185 (1989) ("uncomfortably like legislation"). Instead, it reflects

the general unworkability embedded in the *Smith* standard—one that is inherently "vulnerable to manipulation and arbitrariness." *M.A. ex rel. H.R.* v. *Rockland Cnty. Dep't of Health*, 53 F.4th 29, 42 (2d Cir. 2022) (Park, J., concurring); see also *Fulton*, 593 U.S. at 626 (Gorsuch, J., concurring) ("[J]udges across the country continue to struggle to understand and apply *Smith*'s test even thirty years after it was announced.").

3. In practice, *Smith* swallows other strands of free exercise jurisprudence. Among lower courts, *Smith*'s reach is rarely confined to cases presenting the types of "across-the-board criminal prohibition[s] on a particular form of conduct" that confronted the Court in *Smith*. 494 U.S. at 884. To the contrary, *Smith* continues to exert a gravitational pull on separate forms of free exercise analysis. Below, by limiting *Carson* to explicit religious exclusions, App.47a-48a & n.27, the First Circuit refashioned an independent line of precedent—*Sherbert*, *Thomas*, *Carson*—into merely another iteration of the stingiest applications of *Smith*'s prohibition on religious targeting. App.53a, 88a-89a. Other non-*Smith* free exercise precedents met a similar fate. See App.92a, 95a ("set[ting] *Mahmoud* and *Mirabelli* aside" because "neither case concerned schools' rights"). Such *Smith*-maxxing in the lower courts has meant that "this Court has had to intervene" repeatedly "to clarify how *Smith* works" and explain where its flawed framework doesn't control. *Fulton*, 593 U.S. at 626 (Gorsuch, J., concurring).

4. If *Smith* were rooted in text, history, and tradition, continuing to straighten out these repeated tangles might be a worthy task for this Court. But *Smith* is rootless. See*, e.g.*, *Lewis-Williams* v. *San Francisco*

Bay Area Rapid Transit Dist., 191 F.4th 981, 994 (9th Cir. 2026) (Nelson, J., concurring) ("The real problem is that *Smith* is demonstrably erroneous."). And its flaws, both theoretical and practical, render *Smith* the antithesis of a precedent deserving the benefit of the doubt. Stare decisis—which "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights," *Janus* v. *AFSCME*, 585 U.S. 878, 917 (2018)—counsels abandoning *Smith* rather than spot-checking the lower courts and muddling through.

Already, members of this Court have recognized the "serious arguments that *Smith* ought to be overruled." *Fulton*, 593 U.S. at 543 (Barrett, J, concurring); see also *Id.* at 618 (Gorsuch, J., concurring) (*Smith* was "mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice"). And having settled nothing, it is not entitled to the "policy judgment" that "it is more important that the applicable rule of law be settled than that it be settled right." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). To the contrary, this Court's stare decisis factors for revisiting its construction of the Constitution "weigh strongly against *Smith*: its reasoning; its consistency with other decisions; the workability of the rule that it established; and developments since the decision was handed down." *Fulton*, 593 U.S. at 595 (Alito, J., concurring). *Smith* aspired, in theory, to more stability. Thirty-six years of *Smith*'s reality proves it has led to the opposite.

It need not be so—and often already isn't. Under federal and state RFRA laws and parallel state court decisions, the federal government and forty states already operate under the pre-*Smith* regime, with no hint of the "anarchy" that originally motivated *Smith's*

rule.[9] *Smith*, 494 U.S. at 888. This Court, since *Smith*, has repeatedly declined to expand its rule broadly to various categories of free-exercise cases—including otherwise available public benefits. *Carson*, 596 U.S. at 780. Now is the opportunity to fully correct course.

IV. This case is an excellent vehicle to address these issues of nationwide importance.

This case is an excellent vehicle to address the pressing questions presented. Maine's actions and the First Circuit's rubber stamp pointedly demonstrate how *Carson* will lose its meaning to the drumbeat of *Smith* if this Court does not intervene.

The questions presented arrive on a clean preliminary injunction record, with no disputed material facts, after each claim was properly raised and preserved below. St. Dominic carefully explained how

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[9] Twenty-seven states rejected *Smith* by legislation, twelve by judicial decision, and one (Alabama) by constitutional amendment. See Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 844 n.22, 845 n.26 (cataloguing cases and statutes as of 2014). See also, *e.g.*, Ark. Code §§ 16-123-401 *et seq.* (2015); Ga. Code §§ 50-15A-1 *et seq.* (2025); Ind. Code §§ 34-13-9-0.7 *et seq.* (2015); Mont. Code §§ 27-33-101 *et seq.* (2021); Neb. Rev. Stat. §§ 20-701 *et seq.* (2024); N.D. Cent. Code § 14-02.4-08.1 (2023); S.D. Codified Laws § 1-1A-4 (2021); W. Va. Code § 35-1A-1 (2023); Iowa Code §§ 675.1 *et seq.* (2024); Utah Code §§ 63G-33-101 *et seq.* (2025); Wyo. Stat. §§ 9-29-101 *et seq.* (2025); *Vlaming* v. *West Point Sch. Bd.*, 302 Va. 504, 556 (2023) (interpreting Article I, § 16 of Virginia's Constitution to provide a more robust protection of religious exercise than *Smith*'s ahistorical "reformulat[ion of] the federal free-exercise doctrine"); *State* v. *Mack*, 173 N.H. 793, 814 (2020) ("in construing our State Constitution, we decline to adopt the reasoning of *Smith*"); *Neely* v. *Wyoming Comm'n on Jud. Conduct & Ethics*, 390 P.3d 728, 736 (Wyo. 2017) ("unlike the *Smith* Court, we will apply strict scrutiny to our analysis").

each amendment to the Act perpetuates the religious exclusion held unlawful in *Carson*. App.239a-246a. It further explained how each challenged provision of the amended Act burdens its religious exercise—including its policies preferring Catholic families in admissions and financial aid, and its practices requiring students to dress and be addressed in a way that corresponds with their biological sex and refusing to facilitate child gender transitions, especially against parental wishes. App.250a-253a.

This Court need not speculate about the practical effects of Maine's ongoing exclusion of religious families and schools from its tuition program. It is already familiar. Nearly five years ago, this Court addressed the same harm when it issued its opinion in *Carson*. But because Maine "anticipated" and sought to "outmaneuver" *Carson*, and because the First Circuit refuses to fulsomely apply it, religious families and schools in Maine have endured the same exclusion since before the ink was even dry. Maine's course of open defiance, with *Smith* as its compass, makes this case a particularly vivid example of the mischief invited by *Smith*. Only this Court's intervention can put an end to it.

CONCLUSION

The Court should hold this petition pending the resolution of *St. Mary*, and depending on the disposition of that case, grant this petition, vacate, and remand, or grant plenary review.

Respectfully submitted.

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NOVEMBER 2026

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 24-1739

ST. DOMINIC ACADEMY, d/b/a Roman Catholic Bishop of Portland, a corporation sole; ROMAN CATHOLIC BISHOP OF PORTLAND, a corporation sole; KEITH RADONIS, on their own behalf and as next friend of children K.Q.R., L.R.R., and L.T.R.; VALORI RADONIS, on their own behalf and as next friend of children K.Q.R., L.R.R., and L.T.R.,

Plaintiffs, Appellants,

v.

A. PENDER MAKIN, in the personal capacity and official capacity as Commissioner of the Maine Department of Education; JEFFERSON ASHBY, in the personal capacity; MEGAN SANDERS,* in the official capacity as Commissioner of the Maine Human Rights Commission; EDWARD DAVID, in the personal capacity and official capacity as Commissioner of the Maine Human Rights Commission; JULIE ANN O'BRIEN, in the personal

* Plaintiffs originally named Jefferson Ashby as a defendant in both his personal capacity and 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). As to the claims against Ashby in his official capacity, we substitute Sanders pursuant to Federal Rule of Appellate Procedure 43(c)(2). The claims against Ashby in his personal capacity remain.

capacity and official capacity as Commissioner of the Maine Human Rights Commission; MARK WALKER, in the personal capacity and official capacity as Commissioner of the Maine Human Rights Commission; THOMAS L. DOUGLAS, in the personal capacity and official 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.

Adèle Auxier Keim, with whom Mark L. Rienzi, Benjamin A. Fleshman, Michael J. O'Brien, Amy Ren, The Becket Fund for Religious Liberty, James B. Haddow, and Petruccelli, Martin & Haddow LLP were on brief, for appellants.

Michael C. Gilleran and FisherBroyles LLP on brief for Seymour Institute for Black Church and Policy Studies and Religious Freedom Institute as amici curiae supporting appellants.

Edward M. Wenger, Jonathan P. Lienhard, and Holtzman Vogel Baran Torchinsky & Josefiak PLLC on brief for Herzog Foundation as amicus curiae supporting appellants.

** 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).

Thomas M. Fisher, Bryan Cleveland, and EdChoice Legal Advocates on brief for EdChoice, Inc. as amicus curiae supporting appellants.

Mark A. Lippelmann, Jeremiah Galus, Ryan Tucker, David A. Cortman, and Alliance Defending Freedom on brief for Christian Schools International, American Association of Christian Schools, Association for Biblical Higher Education, International Alliance for Christian Education, and Cardinal Newman Society as amici curiae supporting appellants.

Joshua Blackman, Josh Blackman, LLC, John S. Whitman, and Richardson, Whitman, Large & Badger on brief for Jewish Coalition for Religious Liberty as amicus curiae supporting appellants.

John A. Meiser, Meredith Holland Kessler, Lindsay and Matt Moroun Religious Liberty Clinic, Nicole Stelle Garnett, and Notre Dame Education Law Project on brief for National Council of Young Israel and Notre Dame Education Law Project as amici curiae supporting appellants.

Christopher C. Taub, Chief Deputy Attorney General of Maine, with whom Aaron M. Frey, Attorney General of Maine, and Sarah A. Forster, Assistant Attorney General of Maine, were on brief, for appellees.

Karen L. Loewy, Kenneth D. Upton, Jr., Lambda Legal Defense and Education Fund, Inc., Gary D. Buseck, Mary L. Bonauto, and GLBTQ Legal Advocates & Defenders on brief for GLBTQ Legal Advocates & Defenders and Lambda Legal Defense and Education Fund, Inc. as amici curiae supporting appellees.

Michelle Fraling, Aditi Fruitwala, Daniel Mach, Heather Weaver, American Civil Liberties Union Foundation, Carol Garvan, Zachary L. Heiden, Anahita Sotoohi, American Civil Liberties Union of Maine Foundation, Alex J. Luchenitser, Alexandra Zaretsky, and Americans United for Separation of Church and State on brief for American Civil Liberties Union, American Civil Liberties Union of Maine, and Americans United for Separation of Church and State as amici curiae supporting appellees.

Adam J. Hunt, Tamara Wiesebron, Jenny Xin, Justin Kareem Rezkalla, Morrison & Foerster LLP, Robert Kim, Jessica Levin, Wendy Lecker, Education Law Center, Kristen L. Hollar, and National Education Association on brief for Public Funds Public Schools, National Education Association, National School Boards Association, American Federation of Teachers, In the Public Interest, Freedom from Religion Foundation, American Atheists, Inc., Council of Parent Attorneys and Advocates, Inc., Network for Public Education, Pastors for Children, Disability Rights Maine, and Maine Education Association as amici curiae supporting appellees.

July 2, 2026

KAYATTA, **Circuit Judge**. The State of Maine ("Maine" or the "State") subjects in-state K–12 schools to a set of antidiscrimination rules codified in the Maine Human Rights Act (MHRA), which is enforced by the Maine Human Rights Commission (MHRC) and by private litigants. Primarily, these rules apply only to those schools that receive public

funding. Two lawsuits challenge these rules as applied to religious schools, taking issue with the MHRA's impact on school policies that draw lines based on religious identity or expression or that discriminate based on sexual orientation or gender identity.

In one suit -- the one on appeal here -- St. Dominic Academy (a Catholic school), the Roman Catholic Diocese of Portland (which runs St. Dominic Academy), and Keith and Valori Radonis (on behalf of their children, who intended to attend St. Dominic Academy) sought, as relevant here, declaratory and injunctive relief against the Commissioner of the Maine Department of Education and the five Commissioners of the MHRC (collectively, the "Commissioners"). In the other suit, Crosspoint Church ("Crosspoint"), which runs a Christian K–12 school, sought similar relief against the same defendants. The district court denied injunctive relief in both suits, prompting two separate appeals. We heard oral argument in both cases on the same day.

The two appeals turn on similar facts and, for the most part, warrant similar resolutions. Because the briefing in case at bar raises more preserved arguments than does Crosspoint's briefing, we use this case to analyze the legal issues shared by the two cases. In our opinion in Crosspoint's appeal -- which we issue simultaneously with this opinion -- we resolve two final arguments unique to Crosspoint. Our resolution of Crosspoint's appeal otherwise largely relies upon the reasoning of this opinion.

As the remainder of this opinion explains, we affirm in part and reverse in part the district

court's order denying plaintiffs' motion for a preliminary injunction.

I. Statutory Background

Plaintiffs' constitutional challenge aims at the intersection of two of Maine's statutory frameworks. The first of these statutes is the State's tuition-assistance program, codified in Title 20-A of the Maine Revised Statutes, which allows children to attend private elementary and secondary schools at public expense under certain circumstances. See Me. Stat. tit. 20-A, §§ 5203(4), 5204(4). The second of these statutes is the MHRA, contained in Title 5 of the Maine Revised Statutes, which prohibits discrimination on certain grounds in employment, housing, education, and other areas. See Me. Stat. tit. 5, §§ 4551–4634. Because the MHRA's education provisions only apply to a school if it receives public funding, see id. § 4553(2-A), a private school in the State that forgoes tuition assistance may operate – for the most part[1] -- free of the MHRA's strictures. By contrast, a privfdasdfsate school that accepts tuition assistance will be subject to the MHRA's antidiscrimination provisions. We begin by describing each of these two statutory frameworks.

A. Maine's Tuition-Assistance Program

Under State law, a school administrative unit "that neither maintains a [public] school nor contracts for [public] school privileges . . . shall pay the tuition . . . at the public school or the approved

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[1] For example, certain employment provisions of the MHRA apply regardless of public funding. See infra Section I.B.1.

private school of the parent's choice at which the student is accepted." Me. Stat. tit. 20-A, § 5204(4) (addressing secondary schools); see also id. § 5203(4) (same for elementary schools). As of the 2024–25 school year, the program allowed a maximum tuition of $12,066.94 for in-state elementary schools and $14,080.88 for in-state and out-of-state secondary schools.[2] See id. §§ 5804–5806, 5808 (setting tuition rates at roughly the average cost of educating a student in the State).

To participate in the program, a private school need not be located in Maine, id. § 5808,[3] but it must comply with basic requirements concerning, among other things, academic achievement, health and safety, and records maintenance. See id. § 2951. In 1981, the State legislature made it a requirement that participating schools be "nonsectarian." An Act to Revise the Education Laws, Me. Pub. L. 1981, ch. 693, sec. 5, 1981 Me. Laws 2063, 2177 (codified at Me. Stat. tit. 20-A, § 2951(2) (2018)).

In 2018, three couples, the parents of school-aged children in Maine, challenged this nonsectarian

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[2] Tuition Rates, Me. Dep't of Educ., https://www.maine.gov/doe/funding/reports/tuition [https://perma.cc/2XMY-9LRB] (last visited July 24, 2025). The Maine Department of Education website does not indicate whether any out-of-state elementary schools received tuition-assistance payments in the 2024–2025 school year and, if so, at what tuition rate.

[3] As of the 2024–25 school year, Maine was paying tuition to four out-of-state schools, as compared to twenty-five in-state private secondary schools, along with at least another eight in-state private elementary schools (not counting those seemingly affiliated with secondary schools already included in the count). Tuition Rates, supra.

requirement in federal court. Complaint, Carson v. Makin, 401 F. Supp. 3d 207 (D. Me. 2019). Both the district court and this court rejected their challenge. Carson, 401 F. Supp. 3d at 212, aff'd, 979 F.3d 21 (1st Cir. 2020). In February 2021, they sought review in the Supreme Court. Petition for Writ of Certiorari, Carson v. Makin, 596 U.S. 767 (2022). The Court granted certiorari in July 2021, Carson v. Makin, 141 S. Ct. 2883 (2021) (mem.), and held in June 2022 that the nonsectarian requirement violated the First Amendment's Free Exercise Clause, thus reversing this court's decision, Carson, 596 U.S. at 789. Consequently, the State could no longer enforce the nonsectarian requirement, and, in May 2025, the State legislature repealed that requirement. An Act to Update the Laws Regarding Education, Me. Pub. L. 2025, ch. 112, sec. 5, 2025 Me. Laws 305, 306 (codified at Me. Stat. tit. 20-A, § 2951(2)). Other than this alteration, the relevant portions of the tuition-assistance program have remained substantively unchanged since 2018.

B. The Maine Human Rights Act

The MHRA comprises the State's statutory nondiscrimination regime. Broadly speaking, it prohibits discrimination on certain grounds in employment, housing, education, public accommodations, and the extension of credit. We first outline the MHRA's coverage and enforcement, then address a recent set of amendments to the MHRA, and finally describe the specific provisions at issue here.

1. Coverage and Enforcement

As originally enacted in 1971, the MHRA barred

"discrimination in employment, housing or access to public accommodations on account of race, color, religion, ancestry or national origin." Maine Human Rights Act, Me. Pub. L. 1971, ch. 501, § 1, 1971 Me. Laws 1001, 1001 (codified at Me. Stat. tit. 5, § 4552 (1972)). Over the years, the State expanded the MHRA to cover discrimination in education. An Act to Insure State Enforcement of Equal Opportunity in State-supported Educational Programs, Me. Pub. L. 1983, ch. 578, sec. 2, 1983 Me. Laws 2259, 2260 (codified at Me. Stat. tit. 5, § 4553(10)(F)).[4] It also added sex, disability, sexual orientation, and gender identity[5] as prohibited grounds of discrimination. An Act to Prevent Sex Discrimination under Human Rights Act, Me. Pub. L. 1973, ch. 347, sec. 1, 1973 Me. Laws 631, 631 (codified as amended at Me. Stat. tit. 5, § 4552); An Act to Prevent Physical Handicap Discrimination

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[4] At some point, the legislature added the "extension of credit" as another realm protected by the MHRA. Me. Stat. tit. 5,§ 4552. The parties essentially ignore the MHRA provisions regarding public accommodations and credit, so we do the same.

[5] Gender identity was originally included as part of the statutory definition of sexual orientation. See An Act to Extend Civil Rights Protections to All People Regardless of Sexual Orientation, Me. Pub. L. 2005, ch. 10, sec. 3, 2005 Me. Laws 70, 71 (codified at Me. Stat. tit. 5, § 4553(9-C)) (2005)). In 2021, sexual orientation and gender identity were separated into distinct classifications. See 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). Although Maine law now recognizes them as distinct bases, for ease of reference, we use the term "sexual orientation and gender identity discrimination" when talking about these statutory protections.

under Human Rights Act, Me. Pub. L. 1973, ch. 705, sec. 1, 1973 Me. Laws. 76, 76 (codified as amended at Me. Stat. tit. 5, § 4552); An Act to Extend Civil Rights Protections to All People Regardless of Sexual Orientation, Me. Pub. L. 2005, ch. 10, secs. 1, 3, 2005 Me. Laws 70, 70–71 (codified as amended at Me. Stat. tit. 5, §§ 4552, 4553(9-C)).

A covered entity that violates the MHRA exposes itself to civil liability. "Any aggrieved person" or "any employee of the [MHRC]" may file a complaint of discrimination with the MHRC. Me. Stat. tit. 5, § 4611. The MHRA requires the MHRC to investigate such complaints, id. § 4612(1)(B), and empowers it to file suit if it "finds reasonable grounds to believe that unlawful discrimination has occurred," id. § 4612(4)(A). Alternatively, aggrieved persons may file suit on their own behalf. Id. § 4621. For violations of the education provisions, available remedies include injunctive relief and civil monetary damages up to $100,000 for repeat violators. Id. § 4613(2)(B)(1), (7). Similar remedies exist for employment-discrimination actions against employers with more than fourteen employees. Id. § 4613(2)(B)(1), (8).

The MHRA does not apply to all schools. In particular, the MHRA's education provisions apply only to "any public school or educational program," "any public postsecondary institution," and "any private school or educational program approved for tuition purposes." Id. § 4553(2-A). In other words, the MHRA's nondiscrimination-in-education regime covers only schools that receive public funding. In contrast, the MHRA's employment provisions generally apply to all employers regardless of public funding, though with carveouts for religious

employers, discussed below. See id. § 4553(4) (defining "employer" without regard to public funding).

Two further caveats are relevant to our description of Maine's reticulated statutory scheme. First, the MHRA's educational provisions do not apply to private postsecondary institutions (i.e., colleges, universities, and technical schools), including those that receive public funds. Id. § 4553(2-A). So while the State offers Maine undergraduate students attending Maine postsecondary institutions need-based grants of up to $2,500 per year paid directly to the students' institutions through the Maine State Grant Program, Me. Stat. tit. 20-A, §§ 11611–11620,[6] such institutions are not bound by the MHRA's provisions regarding educational discrimination.

Second, the parties agree that the MHRA does not have extraterritorial reach. See Judkins v. Saint Joseph's Coll. of Me., 483 F. Supp. 2d 60, 65–66 (D. Me. 2007) (noting the MHRA's lack of extraterritorial reach). Thus, the MHRA does not empower suits against out-of-state schools that participate in the tuition-assistance program. In fact, one such school (Massachusetts's Dana Hall School) bars boys from attending, a practice that would violate the MHRA if Dana Hall were located in Maine and continued to accept tuition-assistance

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[6] Maine State Grant Program, Fin.Auth. Of Me., https://www.famemaine.com/affording-education/pay-for-school/maine-grant-tuition-programs/maine-state-grant-program/ [https://perma.cc/8BRK-WEVE] (last visited July 24, 2025).

funds.[7]

2. The 2021 Amendments

In May 2021, before the Supreme Court acted on the Carson certiorari petition, the MHRC submitted to the Maine legislature a bill to amend the MHRA, entitled "An Act to Improve Consistency within the Maine Human Rights Act" (the "2021 Amendments"). S.P. 544, 130th Leg., 1st Spec. Sess., 2021 Me. Laws. 761 (enacted).[8] The proposed bill touched many parts of the MHRA, including its policy statement, definition of familial status, and provisions governing discrimination in employment, housing, public accommodations, credit, and education. See generally id. The summary included in the bill stated that the amendments would "address[] inconsistencies" in the MHRA, including by "[c]larifying the scope of the Maine Human Rights Act['s] application in education." Id.

In support of the bill, the MHRC submitted testimony to the legislature stating that, because "its provisions have been amended in a piecemeal fashion," "the scope of the MHRA's protection varies based on which area of its jurisdiction is invoked." Hearing on Leg. Doc. 1688 Before the J. Standing Comm. on the Judiciary, 130th Leg., 1st Spec. Sess. 1 (Me. 2021) (statement of Amy M.

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[7] Tuition Rates, supra; About Dana Hall, Dana Hall Sch., https://www.danahall.org/about [https://perma.cc/AY4Y-HRCV] (last visited Apr. 22, 2026).

[8] A largely identical set of amendments had been proposed in 2019 but were not enacted into law. H.P. 1218, 129th Leg., 1st Reg. Sess. (Me. 2019).

Sneirson, Exec. Dir., Me. Hum. Rts. Comm'n, & Barbara Archer Hirsch, Comm'n Couns., Me. Hum. Rts. Comm'n). As relevant here, the MHRC opined that "[t]he MHRA's current education coverage is woefully out of date, and inconsistent with the rest of the Act." Id. at 5.

The legislature enacted the 2021 Amendments into law in June 2021, shortly before the Supreme Court granted certiorari in Carson. 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).

3. The Challenged Rules

At issue in this case are four rules imposed by the MHRA. Below, we describe these rules in turn, as well as the effect of the 2021 Amendments on each.

a. The Employment Rule

We begin with the first challenged rule, which we refer to as the "Employment Rule." Subject to three important carveouts explained below, it 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." Me. Stat. tit. 5, § 4572(1). This rule predates the 2021 Amendments and the Carson litigation, as do its three carveouts.[9]

[9] The 2021 Amendments did explicitly add familial status, and, as relevant here, gender identity to the list of enumerated protected characteristics. 2021 Amendments sec. 5 (codified at Me. Stat. tit. 5, § 4572). However, prior to the 2021 Amendments, gender identity was a protected characteristic via the statutory definition of sexual orientation. See supra note 5.

Compare Me. Stat. tit. 5, §§ 4553(4), 4553(10), 4572(1), 4573-A(2) (2026), with Me. Stat. tit. 5, §§ 4553(4), 4553(10), 4572(1), 4573-A(2) (2018).

First, section 4553(4) excludes from the definition of "employer" any nonprofit "religious or fraternal corporation or association . . . with respect to employment of its members of the same religion, sect or fraternity, except for purposes of disability-related discrimination." This carveout insulates religious entities whether or not they receive public funds.

Second, section 4573-A(2) allows any religious organization to "giv[e] preference in employment to individuals of its same religion to perform work connected with the carrying on . . . of its activities" and to "require that all applicants and employees conform to [its] religious tenets." This carveout likewise covers religious entities regardless of whether they receive public funds.

Third, section 4553(10)(G) expressly exempts from the Employment Rule's sexual orientation and gender identity provisions religious entities that do not receive public funds.

b. The Religious Expression Rule

We next turn to the second challenged rule, which we refer to as the "Religious Expression Rule." Entirely new when adopted as part of the 2021 Amendments, this rule provides that the MHRA does not "[r]equire[] an educational institution to participate in or endorse any religious beliefs or practices" but that, "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." 2021 Amendments sec. 19 (codified at Me. Stat. tit. 5,

§ 4602(5)(D)). Like the rest of the MHRA's education provisions, this rule only applies to a private elementary or secondary school in Maine if it receives public funding. Me. Stat. tit. 5, § 4553(2-A).

c. The Religious Nondiscrimination Rule

We refer to the third of the challenged rules as the "Religious Nondiscrimination Rule." As relevant here, and as the parties agree, this rule bars schools from discriminating on the basis of religion in "academic, extracurricular, research, occupational training or other program[s] or activit[ies]," "athletic programs," "admission[s]," "recruitment," or "financial assistance." Me. Stat. tit. 5, § 4602(1).

This bar on religious discrimination was added by the 2021 Amendments. 2021 Amendments sec. 19 (codified at Me. Stat. tit. 5, § 4602(1)). Prior to 2021, including in 2018 when the Carson litigation began, the MHRA barred discrimination in education on the basis of race, sex, sexual orientation (or gender identity),[10] physical or mental disability, or national origin. Me. Stat. tit. 5, § 4602 (2018). The 2021 Amendments added to this prohibition actions taken on the basis of color, ancestry, and -- most relevant here -- religion. 2021 Amendments sec. 19 (codified at Me. Stat. tit. 5, § 4602(1)). This extension aligned the MHRA's education provisions with its

[10] Contrary to language in plaintiffs' opening brief, the prohibition on gender-identity discrimination in education predated the 2021 Amendments, which merely separated sexual orientation and gender identity into distinct classifications. See supra note 5.

employment and housing provisions, which already covered discrimination on those grounds. Me. Stat. tit. 5, §§ 4571, 4581 (2018). This rule also only applies if a school receives public funding. Me. Stat. tit. 5, § 4553(2-A).

d. The Sexual Orientation and Gender Identity Nondiscrimination Rule

Finally, we refer to the fourth challenged rule as the "Sexual Orientation and Gender Identity Nondiscrimination Rule." This rule mirrors the Religious Nondiscrimination Rule's scope but bars instead actions taken on the basis of sexual orientation or gender identity. Me. Stat. tit. 5, § 4602(1).[11]

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[11] 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 reads:

> 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 participationin, 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

Prior to the 2021 Amendments, the MHRA exempted from this prohibition on sexual-orientation and gender-identity discrimination "any education facility owned, controlled or operated by a bona fide religious corporation, association or society." Me. Stat. tit. 5, § 4602(4) (2018). This exemption applied regardless of whether a religious school received public funding. The 2021 Amendments revised this exemption to read, "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." 2021 Amendments sec. 19 (codified at Me. Stat. tit. 5, § 4602(5)(C)); see also id. sec. 3 (codified at Me. Stat. tit. 5, § 4553(10)(G)). In other words, the MHRA now exempts from the Sexual Orientation and Gender Identity Nondiscrimination Rule only those religious schools that do not receive public funding. In this regard, the amendments again aligned the MHRA's education provisions with its employment and housing provisions, which already exempted from similar rules against discrimination

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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.

Me. Stat. tit. 5, § 4602(1). We follow St. Dominic's lead and treat section 4602(1)'s bars on religious discrimination and sexual orientation and gender identity discrimination separately. See Me. Stat. tit. 1, § 71(8) (providing for severability of statutory provisions and applications).

on the basis of sexual orientation and gender identity only those religious entities that did not receive public funds. Me. Stat. tit. 5, § 4553(10)(G) (2018). In any case, as part of the MHRA's education provisions, the Sexual Orientation and Gender Identity Nondiscrimination Rule only applies to schools that receive public funding. See Me. Stat. tit. 5, § 4553(2-A).

C. Summary

To summarize: Maine previously barred parents from using publicly funded tuition-assistance payments at sectarian religious schools. A pair of families challenged that nonsectarian requirement in federal court. As that case was being litigated, the State amended the nondiscrimination laws applicable to all Maine elementary and secondary schools receiving public funding. The Supreme Court then struck down the nonsectarian requirement, allowing parents to direct public funds to religious schools via the tuition-assistance program. Now, a religious school in Maine may receive publicly funded tuition assistance, but if it does so, it must comply with most of the State's nondiscrimination laws or else face investigation by the MHRC and potential civil liability.

II. Case Background

A. Facts[12]

St. Dominic Academy is a private Catholic school

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[12] In reciting the following facts, "[w]e look at the allegations in the plaintiffs' complaint[] and the evidence from the preliminary injunction proceedings." Doe v. Trump, 157 F.4th 36, 47 (1st Cir. 2025)

operated by the Roman Catholic Diocese of Portland. The school offers education from pre-kindergarten through eighth grade.[13] It does not currently receive tuition assistance, but the school states -- and the Commissioners do not dispute -- that it "meets or is capable of meeting the requirements to become approved for tuition purposes." Keith and Valori Radonis are parents of school-aged children who, at the time of filing this lawsuit, wished to send their children to St. Dominic using the tuition-assistance program.

As a Catholic school, St. Dominic is "part of the Catholic Church's evangelizing mission." Its "primary purpose" is "to assist Catholic parents in providing their children with a Catholic education," and as such, the school "gives preference in both admission and financial aid to Catholic students." Although Diocesan policy provides that "[s]tudents of other religious beliefs should be admitted whenever possible," St. Dominic admits only students who "understand, accept, and [are] willing to support the mission and goals of the school" and "agree to attend religion classes, Mass, and other religious activities." Every student at St. Dominic "must agree to uphold 'Catholic Christian morals.'" Similarly, St. Dominic requires all employees to "[l]ive personal lives in such a way that fundamental teachings of the Catholic Church are upheld."

St. Dominic does not "inquire about a student's

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[13] When it filed this lawsuit, St. Dominic offered grades nine through twelve, as well. After oral argument on this appeal, though, the Diocese decided to close St. Dominic's high school operations.

sexual orientation or gender identity at the time of admission." The school's leaders do, however, believe that "[t]he right and duty of parents to educate their children are primordial and inalienable." Accordingly, the school objects to being required by the State to facilitate "a student's efforts to change his or her gender identity" without parental consent. The school also suggests it would not "discipline staff and students who have a religious or conscientious objection to using a student's preferred pronouns if they do not correspond to the student's biological sex."

According to St. Dominic, its foregoing policies violate, to one extent or another, the Employment Rule, the Religious Expression Rule, the Religious Nondiscrimination Rule, and/or the Sexual Orientation and Gender Identity Nondiscrimination Rule. Were it not for these rules, the school says, it would seek and receive approval for the tuition-assistance program.

B. Procedure

In March 2023, Crosspoint Church -- which operates a private, religious K–12 school unaffiliated with the plaintiffs in this case -- sued the Commissioners in the District of Maine, seeking relief on First Amendment grounds from the Employment Rule, the Religious Expression Rule, the Religious Nondiscrimination Rule, and the Sexual Orientation and Gender Identity Nondiscrimination Rule. Crosspoint Church v. Makin, 719 F. Supp. 3d 99, 103–04, 104 n.1 (D. Me. 2024). In June 2023, St. Dominic Academy, the Roman Catholic Diocese of Portland, and Keith and Valori Radonis (on behalf of their school-aged children) filed this similar suit

against the same defendants in the same court. The plaintiffs in both suits moved for preliminary injunctive relief.

In February 2024, the district court denied Crosspoint's motion for a preliminary injunction. Id. at 126. In June 2024, the court, upon joint motion of the parties to that suit, converted that order into an order denying a permanent injunction and entered final judgment for the Commissioners. Crosspoint Church v. Makin, No. 23-cv-00146, 2024 WL 2830931, at *4 (D. Me. June 4, 2024). In August 2024, in this suit, the district court denied plaintiffs' motion for a preliminary injunction. St. Dominic Acad. v. Makin, 744 F. Supp. 3d 43, 84 (D. Me. 2024). The plaintiffs in both suits timely appealed, and we consider the latter case here.

During the pendency of this appeal, plaintiffs informed us that the Radonises' claim for injunctive relief was moot. This development moots the parental-rights claim for injunctive relief, which was asserted only on behalf of the Radonises. We therefore remand that claim and order its dismissal without prejudice. See White v. Gittens, 121 F.3d 803, 807 (1st Cir. 1997).[14] The upshot is that we consider, here, only the appeal of St. Dominic Academy and the Roman Catholic Diocese of Portland (collectively, "St. Dominic").

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[14] In supplemental notices of authority submitted after the Radonises' parental-rights claim became moot, St. Dominic nevertheless argues that the Supreme Court's parental-rights caselaw supports its own entitlement to relief. We address that argument below. See infra Section III.A.4.b.iii.

III. Analysis

When ruling on a motion for a preliminary injunction, a district court must consider four factors: (1) "the movant's likelihood of success on the merits"; (2) "whether and to what extent the movant will suffer irreparable harm in the absence of injunctive relief"; (3) "the balance of relative hardships"; and (4) "the effect, if any, that an injunction or the lack of one may have on the public interest." Russomano v. Novo Nordisk Inc., 960 F.3d 48, 52 (1st Cir. 2020) (citation modified). "The party seeking the preliminary injunction bears the burden of establishing that these four factors weigh in its favor." Esso Standard Oil Co. (P.R.) v. Monroig-Zayas, 445 F.3d 13, 18 (1st Cir. 2006). That said, "the four factors are not entitled to equal weight in the decisional calculus; rather, likelihood of success is the main bearing wall of the four-factor framework." Corp. Techs., Inc. v. Harnett, 731 F.3d 6, 9–10 (1st Cir. 2013) (citation modified).

"We review the district court's ruling on a motion for a preliminary injunction for abuse of discretion. Within that caselaw supports its own entitlement to relief. We address that argument below. See infra Section III.A.4.b.iii. framework, we examine legal questions de novo, findings of fact for clear error, and the balancing of the four factors for abuse of discretion." Russomano, 960 F.3d at 53 (citation modified).

A. Likelihood of Success on the Merits

We consider first St. Dominic's likelihood of success on the merits in its challenges to the Employment Rule, the Religious Expression Rule, the Religious

Nondiscrimination Rule, and the Sexual Orientation and Gender Identity Nondiscrimination Rule, in that order. As we will explain, we conclude that St. Dominic has not shown that the Employment Rule would prohibit any of its preferred policies. In contrast, we find that St. Dominic has shown a likelihood of success as to the Religious Expression Rule. However, St. Dominic has not established a likelihood of success as to any contested application of the Religious Nondiscrimination Rule. Finally, St. Dominic is not likely to succeed in its challenge to the Sexual Orientation and Gender Identity Nondiscrimination Rule.

1. The Employment Rule

St. Dominic argues that the Employment Rule "threatens to intrude on" its "hiring rights," which "are rooted in longstanding protections that stem from both Religion Clauses" of the First Amendment. We read the MHRA differently and thus see no live controversy concerning St. Dominic's employment practices.

"Article III [of the Constitution] confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021); see also U.S. Const. art. III., § 2, cl. 1. In other words, "federal courts do not adjudicate hypothetical or abstract disputes" or "issue advisory opinions." TransUnion, 594 U.S. at 423–24. This means that, to invoke our power, a plaintiff must first and foremost establish standing. Id. at 423. Standing, in turn, requires a plaintiff to show "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant;

and (iii) that the injury would likely be redressed by judicial relief." Id. Here, we focus on the first requirement, injury in fact. When a plaintiff brings a pre-enforcement challenge to a statute on First Amendment grounds, this requirement is satisfied if "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the statute, and there exists a credible threat of prosecution." N.H. Right to Life Pol. Action Comm. v. Gardner, 99 F.3d 8, 14 (1st Cir. 1996) (citation modified).[15] As the party invoking the federal judicial power, St. Dominic bears the burden of "demonstrat[ing] standing for each claim that [it] press[es] and for each form of relief that [it] seek[s]." TransUnion, 594 U.S. at 431.[16]

St. Dominic has failed to carry this burden as regards the Employment Rule because that rule does not proscribe the school's hiring practices. While the rule generally bars schools from employment

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[15] While New Hampshire Right to Life confined this standard to situations in which the plaintiff challenged a statute carrying criminal penalties, 99 F.3d at 14, we have more recently cited this standard in a case involving a school board policy with no apparent criminal penalties, McBreairty v. Miller, 93 F.4th 513, 518 (1st Cir. 2024). In this case, where the MHRA grants a government body civil enforcement powers and imposes substantial financial liability for violations, we assume a similar standard governs.

[16] "We assume, favorably to [St. Dominic], that a plaintiff's standing to seek a preliminary injunction should be judged on the sufficiency of the allegations of the complaint, with any preliminary hearing evidence favorable to the plaintiffs on standing treated as additional allegations of the complaint." McBreairty, 93 F.4th at 518 n.2 (citation modified).

discrimination based on religion, sexual orientation, or gender identity, the MHRA contains two specific carveouts for religious schools that apply regardless of whether a school participates in the tuition-assistance program. First, section 4553(4) expressly protects a religious school's ability to discriminate "with respect to employment of its members of the same religion, sect or fraternity." Me. Stat. tit. 5, § 4553(4). Second, section 4573-A(2) allows a religious school to "require that all applicants and employees conform to [its] religious tenets." Id. § 4573-A(2).

The district court held that these provisions fully protect St. Dominic's religious hiring autonomy. See St. Dominic, 744 F. Supp. 3d at 68. Specifically, the court explained that the provisions "clearly protect[]" St. Dominic's ability "to limit employment to individuals who conform with the Catholic faith." Id. On appeal, the Commissioners concede -- as they did below, id. at 67 -- that these provisions allow St. Dominic to "limit employment to members of its religion and require all applicants [for employment] and employees to conform to its religious tenets."

These concessions notwithstanding, St. Dominic insists that the Employment Rule still threatens its hiring practices. It argues that the rule exposes it to liability if it refuses to employ persons who do not comply with the school's religious tenets concerning sexual orientation and gender identity.

But the rule's above-quoted carveouts -- which apply regardless of whether St. Dominic accepts tuition assistance -- clearly allow St. Dominic to hire only co-religionists and to ensure that all employees, even non-Catholic ones, conform to the school's understanding of Catholic teachings --

including those concerning sexual orientation and gender identity. These exceptions may well provide the school with greater leeway than the Constitution requires. See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188 (2012) (recognizing "ministerial exception," which "precludes application of [employment] legislation to claims concerning the employment relationship between a religious institution and its ministers"); see also Union Gospel Mission of Yakima Wash. v. Brown, 162 F.4th 1190, 1197 (9th Cir. 2026) (extending church-autonomy doctrine to protect "the decision to hire co-religionists for non-ministerial roles if that decision is based on the organization's sincerely held religious beliefs"). It therefore matters not that the third carveout from the Employment Rule -- section 4553(10)(G) -- offers no redundant protection for schools that take tuition-assistance payments. See Me. Stat. tit. 5, § 4553(10)(G).

St. Dominic cites several extrinsic sources to support its view that the MHRC might nevertheless try to use the Employment Rule to interfere with St. Dominic's hiring practices. Most notably, St. Dominic points out that, during the Carson litigation, the State (on behalf of Commissioner Makin) contended that if religious schools "receive public funds, the [MHRA] will prohibit them from considering sexual orientation in their employment decisions." Carson, 401 F. Supp. 3d at 209. But with the statutory text, the district court's decision, and the Commissioners' appellate briefing in this case all pointing plainly in the opposite direction, those abandoned contra-textual assertions made in litigation nearly a half-decade ago or more carry no weight. Through its legislation and the

Commissioners' concessions in this litigation, the State has twice made clear that St. Dominic already has what it claims to seek. And our ruling so stating should add belt to suspenders.

St. Dominic also highlights the Commissioners' suggestion that, under certain circumstances, the Employment Rule might prevent a religious school from firing someone in a same-sex union. But the Commissioners do not argue that St. Dominic cannot fire a teacher who enters a same-sex union for failing to "conform to [St. Dominic's] religious tenets." Rather, the Commissioners suggest that there may be circumstances in which a religious school might refuse to employ a person in a same-sex union for reasons other than noncompliance with that school's religious tenets. And if the position is non-ministerial, the Commissioners speculate, such a situation might trigger the Employment Rule.[17] However, we need not delve into this hypothetical. So long as St. Dominic views same-sex unions as "[in]compatible with [Catholic] teaching," as St. Dominic assures us it does, the Commissioners' hypothetical will never apply to the school.

In sum, it is clear that the Employment Rule does not credibly threaten to injure St. Dominic, so the question whether the rule would be unconstitutional if it did pose such a threat is a purely hypothetical

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[17] In such a case, the Commissioners say, "a court would need to decide whether the action was based on the employee's conformance with [the school's] religious tenets." We note that, in such an inquiry, it would not be "within the judicial function and judicial competence to inquire" whether the school "correctly perceived the commands" of its faith. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981).

question not presented by any controversy between the parties. See Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) ("The basic inquiry is whether the conflicting contentions of the parties present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." (citation modified)), overruled on other grounds by 442 U.S. 936 (1979); Whitmore v. Arkansas, 495 U.S. 149, 157 (1990) ("[The] alleged injury is too speculative to invoke the jurisdiction of an Art. III court."). As such, the district court was without power under the Constitution to issue St. Dominic's requested injunction against the Employment Rule.

2. The Religious Expression Rule

We turn next to St. Dominic's challenge to the Religious Expression Rule, which provides that "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." Me. Stat. tit. 5, § 4602(5)(D). St. Dominic primarily contends that this rule violates the school's free-exercise rights because it would require the school to "allow students to express dissenting religious views, even when doing so is contrary to the school's religious mission." As we explain, we conclude that St. Dominic has shown a likelihood of success on the merits of this challenge.[18]

a. Justiciability

[18] Accordingly, we need not reach St. Dominic's other arguments against the rule and do not address them in the analysis that follows.

The Commissioners argue, first, that we should not reach the merits of St. Dominic's challenge to the Religious Expression Rule. In so arguing, they point to the doctrines of ripeness, see Abbott Lab'ys v. Gardner, 387 U.S. 136, 148–49 (1967) (subsequent history omitted), and Pullman abstention, see R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941). For the following reasons, we conclude that neither doctrine bars St. Dominic's challenge to the Religious Expression Rule.

i. Ripeness

The Commissioners insist that St. Dominic's claims are not ripe for judicial review. The district court found St. Dominic's challenge to the Religious Expression Rule ripe, St. Dominic, 744 F. Supp. 3d at 61–65, a determination we review de novo, Lab. Rels. Div. of Constr. Indus. of Mass., Inc. v. Healey, 844 F.3d 318, 327 (1st Cir. 2016).

Ripeness doctrine derives from the same Article III case-or-controversy requirement as standing doctrine. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 n.5 (2014); see also supra Section III.A.1. Whereas standing trains on who may sue, ripeness asks when they may sue. R.I. Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 33 (1st Cir. 1999). The latter inquiry aims "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Abbott Lab'ys, 387 U.S. at 148. To determine the ripeness of a dispute, we must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. at 149. In this pre-enforcement context, fitness demands

that St. Dominic "have concrete plans to engage immediately (or nearly so) in an arguably proscribed activity," while hardship demands "[a] showing that the challenged statute, fairly read, thwarts implementation of the plan." Whitehouse, 199 F.3d at 33.

St. Dominic satisfies both the fitness and the hardship prongs. First, St. Dominic has clearly "articulated a concrete plan to violate the" Religious Expression Rule, Thomas v. Anchorage Equal Rts. Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000) (citation modified), including by continuing to allow and encourage students to engage in Catholic expression while limiting any attempts to engage in analogous non-Catholic religious expression. Second, the rule would thwart those plans by requiring St. Dominic to either limit Catholic expression by students or allow non-Catholic expression on an equal footing. In essence, absent "prompt judicial review," St. Dominic might be "forc[ed] . . . to choose between refraining from core [First Amendment activities] on the one hand, or engaging in [those activities] and risking costly" punishment on the other. Susan B. Anthony List, 573 U.S. at 167–68; see also Whitehouse, 199 F.3d at 34 (describing "the direct and immediate dilemma of choosing between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [plaintiff] believe[s] to be constitutionally protected activity" (citation modified)).

The Commissioners primarily rejoin that St. Dominic's claim is not ripe absent "a credible threat of prosecution" directed at the school. Whitehouse,

199 F.3d at 33.[19] True enough. But, in the First Amendment context, so long as the challenged statute "facially restrict[s] expressive activity by the class to which the plaintiff belongs," we "assume a credible threat of prosecution in the absence of compelling contrary evidence." N.H. Right to Life, 99 F.3d at 15. Here, St. Dominic plans to continue engaging in conduct that would flatly violate the rule's text were it to accept tuition assistance. As such, we see no reason to think it "imaginary or wholly speculative," Babbitt, 442 U.S. at 302–03, that either the MHRC or a private plaintiff would bring an MHRA action if application of the Religious Expression Rule to St. Dominic is not precluded.

The Commissioners also argue that St. Dominic's claims are not ripe because enforcement turns on the actions of third parties -- i.e., St. Dominic will only face an enforcement action if a discriminated-against student complains. But parties can sometimes satisfy ripeness even where their claims are contingent on uncertain future events, including those involving third parties. See, e.g., Stern v. U.S. Dist. Ct. for Dist. of Mass., 214 F.3d 4, 12 (1st Cir. 2000) (allowing a suit predicated on the nonparty Department of Justice approving an application for a subpoena). Moreover, because the MHRA empowers MHRC employees to file complaints themselves, Me. Stat. tit. 5, § 4611, St. Dominic could face an enforcement action even if no student complains. And the probability of such an action, should St. Dominic violate the Religious Expression Rule, is sufficiently

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[19] Ripeness shares this requirement with standing doctrine in this pre-enforcement posture. Whitehouse, 199 F.3d at 33.

great that we will not force St. Dominic to risk a suit for damages in order to clarify its rights.

We therefore conclude that St. Dominic's challenge to the Religious Expression Rule is ripe.

ii. Pullman Abstention

The Commissioners separately argue that we should rely on Pullman to abstain from adjudicating St. Dominic's claims because of uncertainty surrounding the Religious Expression Rule's meaning. The district court rejected this argument, St. Dominic, 744 F. Supp. 3d at 60–61. We review the district court's rejection de novo. See Brooks v. N.H. Sup. Ct., 80 F.3d 633, 637 (1st Cir. 1996).[20]

Under Pullman, "declining to exercise jurisdiction is warranted where (1) substantial uncertainty exists over the meaning of the state law in question, and (2) settling the question of state law will or may well obviate the need to resolve a significant federal constitutional question." Batterman v. Leahy, 544 F.3d 370, 373 (1st Cir. 2008). We apply

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[20] In Brooks, we reviewed a district court's decision to abstain under Younger v. Harris, 401 U.S. 37 (1971), rather than Pullman. Brooks, 80 F.3d at 637. But other circuits similarly apply a de novo standard to the question of "whether the requirements for Pullman abstention are satisfied." Am. Encore v. Fontes, 152 F.4th 1097, 1109 (9th Cir. 2025) (citation modified); see also id. ("If [those requirements] are not [satisfied], the district court has little or no discretion to abstain; if they are, we review the decision to abstain for an abuse of discretion." (citation modified)). Because, here, we concern ourselves only with the preliminary requirements for Pullman abstention, we proceed with de novo review.

Pullman abstention only where a "statute is of an uncertain nature[] and is obviously susceptible of a limiting construction."Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 237 (1984) (quoting Zwickler v. Koota, 389 U.S. 241, 251 n.14 (1967)).

The Commissioners contend that a state court might read the Religious Expression Rule to not reach any of St. Dominic's religiously motivated practices. But should St. Dominic accept tuition-assistance funds, the Religious Expression Rule would clearly force St. Dominic to allow non-Catholic religious proselytizing unless it barred all forms of religious expression -- including, as pertinent here, the Catholic expression that is central to the school's self-described role as "part of the Catholic Church's evangelizing mission."[21] In short, the Religious Expression Rule is not so uncertain that state-court intervention would "obviate the need to resolve a significant federal constitutional question." Batterman, 544 F.3d at 373.

b. Level of Scrutiny

We turn now to the level of scrutiny we should apply to St. Dominic's free-exercise challenge to the Religious Expression Rule. The Free Exercise Clause, as incorporated against the states, bars any law "prohibiting the free exercise" of religion. U.S.

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[21] The Commissioners also briefly argue that St. Dominic cannot press its claims because the 2021 Amendments "would not require St. Dominic to change its educational practices." Whether we construe this as an Article III injury-in-fact argument or a First Amendment argument, we reject the Commissioners' contention as to the Religious Expression Rule for the reasons given in this section and the following section, infra.

Const. amend. I. Pursuant to the traditional framework applied to free-exercise claims, propounded in Employment Division v. Smith, 494 U.S. 872 (1990), "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021). Because we conclude the Religious Expression Rule burdens St. Dominic's religious exercise and is not neutral, we subject the rule to strict scrutiny without reaching the issue of its general applicability. Our reasoning follows.

At the outset, the Commissioners seem to argue Smith's framework does not apply here at all because the Religious Expression Rule does not burden St. Dominic's religious exercise. To support this argument, the Commissioners urge a narrow interpretation of the Religious Expression Rule. According to the Commissioners, the language, "to the extent an educational institution permits religious expression," refers solely to permitting religious expression by students. Under this proposed interpretation, that St. Dominic requires students to attend Mass but does not provide imam-led prayer services is irrelevant. What matters, say the Commissioners, is to what extent students may engage in Catholic religious expression and whether the school allows students to engage in non-Catholic religious expression to the same extent. In this way, the Commissioners contend, "requiring schools to allow religious expression by students does not regulate the religious practices of the schools themselves."

Assuming the Commissioners' interpretation is correct, the rule would still implicate St. Dominic's religious exercise. St. Dominic, as part of its religious mission, requires students to attend religion classes, Mass, and other religious activities. These activities necessarily entail some degree of student participation. Even under the Commissioner's reading of the Religious Expression Rule, then, if a preacher at a school-mandated Mass permits students to say "Amen" in order to signify agreement, St. Dominic would then be required to allow expressions of disagreement. And in the classroom, inculcation often solicits -- indeed encourages -- affirmation, for example in the form of an iterative exchange of expression. Few would teach the Lord's Prayer without having the students recite it; and under the Religious Expression Rule that recitation would, in turn, appear to require the school to allow the reciting of, for example, the Hare Krishna Mahā mantra. And while such an example may seem fanciful,[22] the point is that the Religious Expression Rule would inevitably interfere with a religious school's ability to foster an expressive environment consistent with its religious mission.

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[22] Or perhaps not, once one considers the tendency of some students to look for opportunities (much less state-provided soapboxes) to test and provoke their schools. See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677–78 (1986) (discussing high school student's nomination speech as "part of a school-sponsored educational program in self-government," in which student "referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor"); Morse v. Frederick, 551 U.S. 393, 397–98 (2007) (explaining how student, at an off-campus event, held up fourteen-foot banner displaying phrase "BONG HiTS 4 JESUS").

Having determined that the Religious Expression Rule would burden St. Dominic's religious exercise, we move on to the question of neutrality. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." Fulton, 593 U.S. at 533. A law can lack neutrality under Smith in one of two ways: facially or nonfacially. See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533–34 (1993). We can start -- and end -- our analysis of the Religious Expression Rule with facial neutrality.

"A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." Id. at 533. For example, a tuition-assistance program that permits recipients to pursue a degree in every area of study except devotional theology is not facially neutral. Locke v. Davey, 540 U.S. 712, 715 (2004); see also id. at 731 (Scalia, J., dissenting) (describing such a program as engaging in "facial discrimination against religion"). By contrast, ordinances barring the "ritual sacrifice[]" of animals are facially neutral, even though "[t]he words 'sacrifice' and 'ritual' have a religious origin," because "current use [of those words] admits also of secular meanings." Lukumi, 508 U.S. at 527, 533–34; see also Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 461 (2017) (describing Lukumi as concerning "facially neutral" ordinances).

Here, the Religious Expression Rule is facially nonneutral because it singles out "religious expression." Me. Stat. tit. 5, § 4602(5)(D). Unlike ritual sacrifice, it is difficult to see how religious

expression can have anything but a religious meaning. And the Religious Expression Rule draws a line that separates religious expression from other forms of expression -- including other forms of identity-based expression, such as ethnicity-based expression (e.g., hosting events for Italian-American students) and sexual-orientation-based expression (e.g., participating in a Pride parade).

The Religious Expression Rule thus burdens St. Dominic's religious practice. And, in singling out religious expression as opposed to other forms of expression, the rule lacks facial neutrality.

c. Strict Scrutiny

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." Lukumi, 508 U.S. at 546. To survive that scrutiny, the law must "advance[] interests of the highest order" and be "narrowly tailored to achieve those interests." Fulton, 593 U.S. at 541 (citation modified). Here, the Commissioners point to Maine's interest in combatting discrimination in publicly funded Maine schools but offer no argument why this general interest justifies the Religious Expression Rule specifically. The district court fairly inferred a particular interest in "protecting students' rights to free expression." St. Dominic, 744 F. Supp. 3d at 77. But, in light of Carson, 596 U.S. 767, an interest in potentially protecting students' free-speech and free-exercise rights cannot justify presently infringing schools' free-exercise rights.

In Carson, the Supreme Court found that the tuition-assistance program's prior nonsectarian

requirement failed strict scrutiny. Id. at 781. Although Maine asserted an interest in the separation of church and state, the Court explained that allowing religious schools to participate in the program would not violate the Establishment Clause of the First Amendment. Id. In other words, the Constitution did not require Maine to pursue its antiestablishment interest via the nonsectarian requirement. As such, Maine's "interest in separating church and state more fiercely than the Federal Constitution" could not be compelling "in the face of the infringement of free exercise." Id. (quotation marks omitted) (quoting Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 484–85 (2020)).

The Court's Espinoza decision points in the same direction. There, Montana argued that a similar bar on tuition assistance to religious schools "protect[ed] the religious liberty of taxpayers by ensuring that their taxes [were] not directed to religious organizations, and . . . safeguard[ed] the freedom of religious organizations by keeping the government out of their operations." Espinoza, 591 U.S. at 485. The Court found those interests insufficient because it had previously upheld "government programs that spend taxpayer funds on equal aid to religious observers and organizations." Id. And, the Court explained, "[a]n infringement of First Amendment rights . . . cannot be justified by a State's alternative view that the infringement advances religious liberty." Id.

Similarly, here, Maine seeks to protect the free-speech and free-exercise rights of students, but it has not argued that such protection is required by the

Constitution. As a result, that goal cannot justify infringing the free-exercise rights of religious schools by conditioning equal access to tuition assistance on such schools acting not like religious schools, but instead like theological debate fora in which all religious views warrant equal treatment.

Absent any cogent argument that the State has a compelling interest behind the Religious Expression Rule's facial nonneutrality, the rule cannot survive strict scrutiny. We therefore conclude that St. Dominic is likely to prevail on its Free Exercise Clause challenge to the Religious Expression Rule.[23]

3. The Religious Nondiscrimination Rule

We focus next on the Religious Nondiscrimination Rule, which bars subject schools from discriminating on the basis of religion in admissions, financial aid, academics, extracurriculars, athletics, and the like. Me. Stat. tit. 5, § 4602(1). We begin by addressing threshold questions of justiciability, finding St. Dominic's claims justiciable in part. We then consider the level of scrutiny to apply to the rule under St. Dominic's various claims. Determining that St. Dominic has not established that any form of heightened scrutiny should apply, we subject the rule to rational basis review, which it survives. We therefore conclude that St. Dominic has not shown a

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[23] The Commissioners argue that if we "conclude[] that [the Religious Expression Rule] violates any of St. Dominic's rights, [we] should only enjoin [the Religious Expression Rule] and not any other MHRA provisions." St. Dominic does not challenge this severability argument, which we adopt. See Leavitt v. Jane L., 518 U.S. 137, 139 (1996) ("Severability is of course a matter of state law."); Me. Stat. tit. 1, § 71(8) ("The provisions of the statutes are severable.").

likelihood of success on the merits of its challenge to the Religious Nondiscrimination Rule.

a. Justiciability

As with the Religious Expression Rule, the Commissioners contend that St. Dominic's challenge to the Religious of course a matter of state law."); Me. Stat. tit. 1, § 71(8) ("The provisions of the statutes are severable."). Nondiscrimination Rule is nonjusticiable under the doctrines of ripeness and Pullman abstention.

St. Dominic identifies only two types of practices in which it currently engages that it contends the Religious Nondiscrimination Rule would forbid were it to accept tuition assistance. First, although the school welcomes students of any or no faith, it gives preference to Catholic students in admissions and financial aid, a practice we call its "Catholic preference." Second, in general, the school only admits those students who "agree to attend religion classes, Mass, and other religious activities," and to support the school's mission and goals, which include "evangelizing," "uphold[ing] 'Catholic Christian morals,'" and "assist[ing] Catholic parents in providing their children with a Catholic education." We refer to these practices collectively as St. Dominic's "mission-oriented admissions practices." We focus our justiciability analysis on these two sets of practices.

i. Ripeness

To the extent the Religious Nondiscrimination Rule would bar St. Dominic's Catholic preference were the school to accept tuition assistance, we find St. Dominic's claims ripe for much the same reasons its claims as to the Religious Expression Rule are ripe.

See supra Section III.A.2.a.i. Specifically, the school's Catholic preference is an "arguably proscribed activity," such that the rule would "thwart[] implementation of [St. Dominic's] plan" to participate in the tuition-assistance program. Whitehouse, 199 F.3d at 33. Given that clear conflict, we find it likely that St. Dominic faces "a credible threat of prosecution" if it does accept program funding. Babbitt, 442 U.S. at 298.

In contrast, we find no case or controversy -- let alone a ripe one -- concerning St. Dominic's mission-oriented admissions practices.[24] The rule does not arguably proscribe those policies and, consequently, St. Dominic does not face a credible threat of enforcement. The rule prohibits discrimination on the basis of religion, but requiring all students to support the school's mission does not necessarily treat students differently on the basis of their religious beliefs.

Nevertheless, St. Dominic asserts that the rule

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[24] The Commissioners couch their argument against reaching the merits of the Religious Nondiscrimination Rule in terms of ripeness. Nevertheless, our conclusion with respect to St. Dominic's mission-oriented admissions practices sounds in both standing and ripeness. See In re Fin. Oversight & Mgmt. Bd. for P.R., 110 F.4th 295, 314 (1st Cir. 2024) (noting federal courts' "independent obligation" to consider standing). We have recognized before that "standing and ripeness issues in a case can boil down to the same question." Jensen v. R.I. Cannabis Control Comm'n, 160 F.4th 18, 24 (1st Cir. 2025) (citation modified). In this pre-enforcement context, both doctrines require St. Dominic to show that its planned course of conduct is "arguably proscribed" by the statute and that it faces a "credible threat of prosecution." Whitehouse, 199 F.3d at 33 (ripeness); N.H. Right to Life, 99 F.3d at 14 (standing).

"makes it unlawful for St. Dominic to require its admitted students to agree to support the school's Catholic mission." St. Dominic provides no support for this interpretation in the statute's text, the canons of statutory construction, or MHRA caselaw. Unlike in its challenge to the Sexual Orientation and Gender Identity Nondiscrimination Rule, St. Dominic points to no agency guidance establishing such an application. See infra Section III.A.4.a. Without any enforcement history, judicial construction, or agency guidance, moreover, we lack clarity as to how the Religious Nondiscrimination Rule would be applied to St. Dominic's mission-oriented admissions practices. It would be difficult to determine whether, for example, the hypothetical ban on these practices that St. Dominic reads into the rule would be a neutral application of the rule or a targeting of the school's religious exercise. If the MHRC issued guidance stating, "No school may require students to support its mission in a way that infringes students' sincerely held religious beliefs," such guidance might equally apply to a secular school that required a student to support its mission of fostering inclusion of transgender perspectives even if that student objected on religious grounds. But if the guidance held, "No school may require students to support a religious mission," that might more readily be understood as targeting only those schools that have religious missions, i.e., religious schools. But St. Dominic gives us no reason to think that the Religious Nondiscrimination Rule would be applied in that way.

The Commissioners -- comprising the body tasked with enforcing the rule -- disavow such an interpretation. They maintain that "the only conduct

that is arguably proscribed by [the Religious Nondiscrimination Rule] is St. Dominic's practice of giving preference to Catholics in admissions and financial aid," and that "there is no evidence in the record that [the rule] would force St. Dominic to admit students it does not want."[25] The Commissioners are not simply saying they do not intend to enforce the rule against St. Dominic's mission-oriented admissions practices in their sole discretion; rather, they are saying no person could so enforce the rule because it does not prohibit those practices. Blum v. Holder, 744 F.3d 790, 798 (1st Cir. 2014) ("Particular weight must be given [in the standing inquiry] to the Government['s] disavowal of any intention to prosecute on the basis of the Government's own interpretation of the statute and its rejection of plaintiffs' interpretation as unreasonable.").

Still, St. Dominic insists, the Commissioners "admit[] that the MHRA may require St. Dominic to . . . [u]ndergo [MHRC] investigation if it declines to admit a student who will not promise to support its

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[25] The district court stated that the Commissioners "do not contest that these policies and practices may violate the MHRA." St. Dominic, 744 F. Supp. 3d at 63 (citing Defs.' Opp. to Pls.' Mot. Prelim. Inj. 8–9, Dkt. No. 25). We see no such concession in the Commissioners' opposition below. Rather, in arguing that St. Dominic's claims were not ripe, the Commissioners noted that "St. Dominic apparently does not discriminate in admissions" because "it admits students of any faith or no faith at all" and "does not claim to discriminate based on any other protected class." Defs.' Opp. to Pls.' Mot. Prelim. Inj. 8–9 (citation modified). As the issues of standing and ripeness we consider here are pure matters of law subject to de novo review, we owe no deference to the district court's construction of the Commissioners' arguments below.

religious mission, uphold Catholic moral teaching in his personal life, and fully participate in the religious life of the school." But that is not quite right. All the Commissioners say is that "[i]t is possible that the MHRC might have to investigate whether, for example, a student was denied admission based on being a member of a protected class." That is, the MHRC would only investigate if St. Dominic were using its mission-oriented admissions practices as a pretext for denying students admission on a basis prohibited by the MHRA.[26] Nothing in the record before us indicates that St. Dominic does so, and, even if it fears an unfounded investigation chilling its religious freedom, "[a]llegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." Blum, 744 F.3d at 796 (citation modified).

In sum, St. Dominic has failed to show that the Religious Nondiscrimination Rule would arguably proscribe its mission-oriented admissions practices were it to accept tuition assistance. And while we "assume a credible threat of prosecution in the absence of compelling contrary evidence" in First Amendment cases, that assumption only applies where the challenged statute "facially restrict[s]" a plaintiff's conduct. N.H. Right to Life, 99 F.3d at 15. Here, the Religious Nondiscrimination Rule does not so restrict St. Dominic's mission-oriented admissions practices,

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[26] Notably, this point is not limited to a claim of religious discrimination. The same would hold true if St. Dominic used its mission-oriented admissions practices as a pretext for discrimination on the basis of race, sex, disability, or any other prohibited ground, yet St. Dominic makes no argument that an investigation on those bases would violate its rights.

and the Commissioners have "affirmatively represented that [the MHRC] does not intend to prosecute such conduct because [they] do[] not think it is prohibited by the [rule]." Blum, 744 3d at 798. St. Dominic thus faces no credible threat of enforcement.

Absent conduct arguably proscribed by the rule and a credible threat of enforcement, we find no present case or controversy to confront regarding St. Dominic's mission-oriented admissions practices. This should hardly be bad news for St. Dominic. As matters now stand, the school would be free to continue requiring students to attend religion classes and Mass, support the school's mission and goals, and "uphold 'Catholic Christian morals,'" even if it joins the tuition-assistance program. And if the MHRC later reverses course and attempts to construe the Religious Nondiscrimination Rule as barring those mission-oriented admissions practices as such (rather than as pretext for prohibited discrimination), the school may well have a viable judicial-estoppel argument. See Perry v. Blum, 629 F.3d 1, 8 (1st Cir. 2010) (noting that judicial estoppel "operates to prevent a litigant from taking a litigation position that is inconsistent with a litigation position successfully asserted by him in an earlier phase of the same case or in an earlier court proceeding"). And while that estoppel may not apply to a private litigant who is not a party to this suit, the hypothetical harm of a private litigant suing St. Dominic for discrimination on a ground the MHRC itself says is not covered by the MHRA does not rise to the level of injury required to establish standing. See Lujan, 504 U.S. at 560 (explaining that standing requires plaintiff's injury to be "actual or

imminent, not conjectural or hypothetical" (citation modified)).

ii. Pullman Abstention

The Commissioners alternatively argue that we should abstain under Pullman because it is not clear whether a state court would find that any of St. Dominic's policies violate the Religious Nondiscrimination Rule. But, at the very least, St. Dominic's complaint plainly states that the school "give[s] preference to Catholic students in admissions." As suggested by our ripeness analysis, there is no "substantial uncertainty" that preferring one applicant over another because of the applicants' differing religious beliefs would conflict with the Religious Nondiscrimination Rule. Batterman, 544 F.3d at 373; see Finnemore v. Bangor Hydro-Elec. Co., 645 A.2d 15, 17 (Me. 1994) (defining operative question under MHRA's employment religious-nondiscrimination provision as "whether [action] occurred because of an individual's religious beliefs or would not have occurred but for the individual's religion"). Because St. Dominic's Catholic preference likely falls within the rule's prohibition, we find Pullman abstention unavailable here.

We proceed, therefore, with St. Dominic's challenge to the Religious Nondiscrimination Rule whittled down to the rule's application to its preference for Catholic students in admissions and financial aid.

b. Level of Scrutiny

Having found St. Dominic's challenge to the Religious Nondiscrimination Rule justiciable only as to the rule's application to the school's Catholic

preference, we next consider what level of scrutiny to apply to that challenge. We evaluate, in turn, St. Dominic's arguments for heightened scrutiny under

(1) Carson's interpretation of the Free Exercise Clause,

(2) Smith's interpretation of the Free Exercise Clause,

(3) the church-autonomy and religious-entanglement doctrines,

(4) the expressive-association doctrine, and

(5) the unconstitutional-conditions doctrine.

i. Free Exercise: Carson Analysis

We begin with St. Dominic's argument that the Religious Nondiscrimination Rule should receive strict scrutiny under the Free Exercise Clause. To make this free-exercise claim, St. Dominic first leans on the Supreme Court's line of cases dealing with the exclusion of religious actors from generally available benefits, which culminated most recently in the Court's Carson decision. See 596 U.S. 767; Espinoza, 591 U.S. 464; Trinity Lutheran, 582 U.S. 449. These cases make clear that strict scrutiny applies if Maine tries to "disqualify some private schools" from the tuition-assistance program "solely because they are religious." Carson, 596 U.S. at 780 (quoting Espinoza, 591 U.S. at 487).[27] This rule holds

[27] We read this principle as a derivative of Smith's facial neutrality framework: Where a school is "disqualified from [a] generally available benefit 'solely because of [its] religious character,'" Carson, 596 U.S. at 780 (quoting Trinity Lutheran, 582 U.S. at 462), the government has definitionally failed to act neutrally under Smith. See id. at 781 ("[T]here is nothing neutral

regardless of whether the exclusion hinges on a school's "religious status" or on the "religious use" to which a school proposes to put state-provided funds. Id. at 786 (quoting Espinoza, 591 U.S. at 477). Along those lines, St. Dominic insists that its preference for Catholic students in admissions and financial aid is one of several "examples of protected 'religious uses' that together make up [its] 'religious character,'" such that prohibiting this preference in the tuition-assistance program effectively excludes St. Dominic solely based on its religious character.[28]

As we suggested in finding St. Dominic's challenge to the Religious Nondiscrimination Rule ripe, the rule does indeed burden St. Dominic's religious exercise by prohibiting the school, if it accepts tuition

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about Maine's program. The State pays tuition for certain students at private schools -- so long as the schools are not religious."); Fulton, 593 U.S. at 533 ("Government fails to act neutrally when it . . . restricts practices because of their religious nature."). Nevertheless, because St. Dominic addresses its Carson-based argument separately from its Smith analysis, we do the same.

[28] As far as we can tell, the Religious Nondiscrimination Rule does not directly exclude any school from the tuition-assistance program. In its complaint, St. Dominic suggests -- without pointing to any statutory or regulatory support -- that compliance with the MHRA is "a prerequisite to being 'approved for tuition purposes.'" We need not determine whether that is so, though, because in keeping with the Supreme Court's free-exercise doctrine, we analyze the Religious Nondiscrimination Rule as if the rule does directly exclude schools that engage in religious discrimination. See Carson, 596 U.S. at 778 ("The Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988))).

assistance, from continuing its Catholic preference. That burden, in turn, requires that we scrutinize the Religious Nondiscrimination Rule under the traditional free-exercise framework of Smith, as we do in the next section of this opinion. Contrary to what St. Dominic argues, though, the mere fact that the rule imposes a burden on St. Dominic's free exercise does not by itself require that we subject the rule to strict scrutiny under Carson. Unlike the nonsectarian requirement at issue in Carson, the Religious Nondiscrimination Rule does not exclude schools solely because they are religious schools.

In Carson, the Court invalidated Maine's prior nonsectarian requirement, which excluded from the tuition-assistance program a school if it "promote[d] the faith or belief system with which it [was] associated and/or present[ed] the material taught through the lens of this faith." 596 U.S. at 775 (quoting Carson, 979 F.3d at 38). Because such faith-based instruction was a "religious use" of funds uniquely tied to "the mission of a private religious school," the Court explained, the nonsectarian requirement effectively targeted religious schools as such. Id. at 787 (quoting Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 754 (2020)).

In contrast, religious discrimination is not a uniquely religious practice. Whereas religious instruction is necessarily religiously motivated, a school may engage in religious discrimination against a student for religious or secular reasons. For example, the school may so discriminate motivated not by its own religious tenets but by negative stereotypes about followers of the student's religion. Such

discrimination, though based on the student's religious beliefs, would not be based on the school's religious beliefs. It would be, from the school's perspective, entirely secular. In this way, religious discrimination is not inherently a religious use of tuition-assistance funds.

Similarly, St. Dominic has not shown that religious discrimination is solely a practice of religious schools. Secular schools -- like all institutions -- are equally capable of discriminating against students on the basis of students' religious beliefs and equally subject to the Religious Nondiscrimination Rule. See Youth 71Five Ministries v. Williams, 160 F.4th 964, 979 (9th Cir. 2025) ("Government agencies, secular corporations, and religious ministries alike might engage in religion-based employment discrimination."), pet. for cert. filed, No. 25-776 (Dec. 23, 2025). As such, the rule's prohibition on that discrimination does not inevitably target only religious schools.

Nor is this a case where the State is saying, in practical effect, that religious schools must surrender their status as religious schools in order to obtain public tuition assistance. Cf. Trinity Lutheran, 582 U.S. at 462 ("[T]he Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution."). St. Dominic, specifically, does not even attempt to show that the school would be unable to retain its religious character if it made admissions and financial aid decisions without regard to individual students' religious affiliations. Rather, the school touts that it welcomes students of all religions and does not allege that non-Catholic

students would make up a significantly greater share of its student body without the preference. Neither does it provide any evidence that, without the Catholic preference, any enrolled Catholic student or any prospective Catholic applicant would be deprived of financial aid they would otherwise receive. Likewise, St. Dominic has not developed a record suggesting that, generally, Maine religious schools restrict admissions by religion. Cheverus High School, a non-Diocesan Catholic school unaffiliated with St. Dominic, for one, participates in the tuition-assistance program and does not evidently discriminate against students on the basis of religion. And Crosspoint, in this case's companion, alleges no policy as explicit as St. Dominic's Catholic preference. Cf. Complaint 31, Crosspoint, 719 F. Supp. 3d 99 (No. 23-cv-00146) (describing admissions policy of Bangor Christian School).[29]

The foregoing shows that the Religious Nondiscrimination Rule does not exclude any school solely because of its religious character. Rather, the rule excludes a school because it discriminates against students on the basis of the students' religion, a practice that is neither uniquely religious nor uniquely tied to religious schools. See Kim v. Bd. of Educ., 93 F.4th 733, 749 (4th Cir. 2024) (finding no

[29] Our discussion of these other schools should not be understood to express a preference for one religious denomination's practices over another. See Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n, 605 U.S. 238, 247–48 (2025) (explaining First Amendment "principle of denominational neutrality"). We note Cheverus and Crosspoint only to point out that, just as secular schools are not inherently immune to the Religious Nondiscrimination Rule, religious schools are not invariably censured by the rule, either.

Carson violation where county "d[id] not let any private schools, religious or nonreligious, participate in selecting the board of education student member," reasoning that "[t]he process d[id] not exclude students because of their religious exercise," "it exclude[d] students who cho[]se not to attend public school for whatever reason"). In short, the State is simply saying that a school in Maine, whether religious or not, cannot accept public funds while simultaneously putting up, for example, a "No Protestant Children Need Apply" sign.

We therefore do not find that Carson renders the Religious Nondiscrimination Rule per se not neutral. To find otherwise would, in essence, be to hold that any state practice imposing any burden on a religious school's religious practices necessarily imposes a burden solely because the school is religious -- and therefore triggers strict scrutiny. Such a ruling would, in all but theory, eliminate the allowance for neutral, generally applicable laws that incidentally burden religious practice recognized by Smith, 494 U.S. at 878–82, and applied in the cases that underpin Carson itself. See Trinity Lutheran, 582 U.S. at 460; Lukumi, 508 U.S. at 546. As discussed below, we are not free to discard Smith based on an overly expansive interpretation of Carson, especially without any clarity as to what, exactly, would replace Smith.[30]

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[30] In fact, during the pendency of this appeal, the Supreme Court expressly declined to consider the question of "[w]hether Employment Division v. Smith should be overruled," in granting certiorari in a case concerning a Colorado sexual-orientation and gender-identity nondiscrimination rule as applied to religious preschools receiving public funds. St. Mary Cath. Par. v. Roy,

ii. Free Exercise: Smith Analysis

We turn to applying Smith. As explained above, the traditional Smith framework for free-exercise challenges provides that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." Fulton, 593 U.S. at 533. We conclude that the Religious Nondiscrimination Rule is likely both neutral and generally applicable and, therefore, not subject to strict scrutiny under Smith.

(1) Neutrality

As to facial neutrality, the Religious Nondiscrimination Rule proscribes not a religious practice but rather "educational discrimination" "on the basis of . . . religion" in academics, extracurriculars, research activities, occupational training, athletic programs, admissions, financial aid, and the like. Me. Stat. tit. 5, § 4602(1). Unlike the Religious Expression Rule, then, the Religious Nondiscrimination Rule does not facially target "a religious practice without a secular meaning." Lukumi, 508 U.S. at 533; see St. Mary Cath. Par. in Littleton v. Roy, 154 F.4th 752, 766 (10th Cir. 2025) (finding facially neutral nondiscrimination rule that "does not mention religion except to prohibit discrimination based on religious affiliation"), cert. granted sub nom. St. Mary Cath. Par. v. Roy, No. 25-581, 2026 WL 1052111 (U.S. Apr. 20, 2026) (mem.). As discussed above, discrimination on the basis of religion can be motivated by either religious or secular

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No. 25-581, 2026 WL 1052111 (U.S. Apr. 20, 2026) (mem.); Petition for Writ of Certiorari, St. Mary, 2026 WL 1052111.

considerations. Consequently, a law prohibiting such discrimination across the board does not improperly "infringe upon or restrict practices because of their religious motivation." Lukumi, 508 U.S. at 533.

Nevertheless, St. Dominic argues that the Religious Nondiscrimination Rule lacks facial neutrality because it "subject[s] religious schools to a ban on 'religious discrimination'" in admissions and financial aid. But the rule subjects secular schools to the same ban: It protects students of any or no religious faith from discrimination by any publicly funded Maine school, religious or secular. Under the rule, a secular school may not deny admission to a student merely because that student's religious beliefs conflict with the school's secular philosophy, just as a religious school may not deny admission to a student merely because that student's religious beliefs conflict with the school's religious doctrine.[31] Cf. Loe v. Jett, 796 F. Supp. 3d 541, 569 (D. Minn. 2025) (finding ban on schools requiring students to sign faith statements not facially neutral because it "'restricts' [schools'] admissions practices only 'because of their religious motivation'" (quoting Lukumi, 508 U.S. at 533)).[32]

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[31] Similarly unavailing is St. Dominic's argument that the rule lacks facial neutrality because "[s]ecular [private] schools may impose many different kinds of admission criteria: financial, academic, athletic, family legacy, and ability to advance the school's mission." Religious schools may impose each of these criteria to the same extent as secular schools.

[32] The plaintiffs in Loe also challenged a similar nondiscrimination rule, but the court expressly declined to reach that rule's own constitutionality, instead finding the rule inseverable from the constitutionally infirm faith-statement ban and invalidating it on that ground alone. Loe, 796 F. Supp. 3d at

Moreover, prohibiting religious discrimination is an entirely proper -- and secular -- subject of legislation. Boyajian v. Gatzunis, 212 F.3d 1, 5 (1st Cir. 2000) ("Prohibition of religious discrimination is unquestionably an appropriate, secular legislative purpose."); see also Williams v. California, 764 F.3d 1002, 1012 (9th Cir. 2014) (similar). Numerous antidiscrimination laws bar religious discrimination. E.g., 42 U.S.C. § 2000a(a) (banning "discrimination or segregation on the ground of . . . religion" in public accommodations).[33] Under St. Dominic's argument, all such laws would trigger strict scrutiny simply by including the words "religion" or "religious." Cf. United States v. Skrmetti, 605 U.S. 495, 512 (2025) ("This Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny."); Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 64 (2001) ("Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction.").

The Religious Nondiscrimination Rule's application to St. Dominic's Catholic preference is also nonfacially neutral. In determining whether a

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578 n.57.

[33] Even before the 2021 Amendments, the MHRA barred religious discrimination in other realms, including public accommodations. Me. Stat. tit. 5, § 4591 (2018). Indeed, it is possible this bar on religious discrimination in public accommodations did then (and does now) apply to schools regardless of participation in the tuition-assistance program. See id. § 4553(8)(J) (defining "place of public accommodation" to include a "nursery, elementary, secondary, undergraduate or postgraduate school or other place of education").

facially neutral law is nevertheless nonneutral, courts must "survey meticulously the circumstances of" government action to ferret out "governmental hostility [that] is masked." Lukumi, 508 U.S. at 534 (citation omitted). St. Dominic advances four arguments on this front, none of which is likely to succeed.

First, St. Dominic argues that the Religious Nondiscrimination Rule constitutes a religious gerrymander. A religious gerrymander arises where a law "target[s] [a plaintiff] and their religious practices," such that "the burden of [the law], in practical terms, falls on [religious] adherents but almost no others." Lukumi, 508 U.S. at 535–36. In St. Dominic's view, the Religious Nondiscrimination Rule is a religious gerrymander because it "punish[es] religious schools when they pursue their religious missions but leave[s] secular private schools free to pursue their missions without fear." However, as discussed above, the rule does not proscribe St. Dominic's mission-oriented admissions practices as such. See supra Section III.A.3.a.i. We deal here only with the rule's application to the distinct practice of preferring (as among applicants who agree to support the school's mission) one applicant over another in admissions and financial aid based on that applicant's religion. And as to that practice, the rule erects the same barriers for religious and secular schools alike, with no indication that its burden "in practical terms, falls on" religious schools "but almost no others." Lukumi, 508 U.S. at 536. Although this application of the rule "may end up having greater consequence for religious [schools] . . . inasmuch as they are more likely than their secular counterparts to wish to exclude students of particular faiths,"

Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 700 (2010) (Stevens, J., concurring), that, alone, does not prove a gerrymander, see Lukumi, 508 U.S. at 535 ("[A]dverse impact will not always lead to a finding of impermissible targeting.").

Second, St. Dominic points to the timing of the 2021 Amendments -- enacted while the Supreme Court was considering whether to grant certiorari in Carson -- to argue that the State designed the 2021 Amendments as what it calls an "end-run" around Carson by creating a "poison pill" that will deter religious schools from accepting state tuition funds. The timing does suggest that the Carson litigation spurred the amendments.[34] That does not mean, however, that the amendments were motivated by religious animus or intended as an impermissible workaround to an anticipated Supreme Court decision. We, like the district court, St. Dominic, 744 F. Supp. 3d at 74–75, are convinced that the Maine legislature added religion as a prohibited ground for discrimination in education in order to align the MHRA's education provisions with its employment and housing provisions, which already protected individuals in Maine from religious discrimination. Me. Stat. tit. 5, §§ 4571, 4581 (2018). The original bill and MHRC testimony in support thereof buttress this conclusion. See supra Section I.B.2. Contrary to St. Dominic's assertion, then, this is not a case where

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[34] Though only in part; the amendments reached far beyond the scope of matters relevant to Carson. See, e.g., 2021 Amendments secs. 4, 5 (codified at Me. Stat. tit. 5, §§ 4571, 4572(1)) (adding "familial status" as a prohibited classification in employment).

a government actor's "repeated changes in position" as to the application of a policy to a particular individual indicate that the actor is targeting that individual's beliefs. Meriwether v. Hartop, 992 F.3d 492, 515 (6th Cir. 2021). It is, instead, a case of the State seeking, through the full legislative process, to align its protections for students' religious freedom with previously enacted protections for workers and tenants. Cf. id. (finding changes in university's basis for disciplining individual, "along with the alleged religious hostility [in decisionmakers' statements]," allowed for "plausible inference" of religious targeting at motion-to-dismiss stage).

Third, and relatedly, St. Dominic contends that the 2021 Amendments were likely motivated by hostility toward religion -- i.e., "a negative normative evaluation" of the specific religious practices at issue here. Masterpiece Cakeshop v. Colo. C.R. Comm'n, 584 U.S. 617, 639 (2018) (citation modified). In support of this narrative, St. Dominic points to three statements made in the year-plus following the 2021 Amendments' June 2021 passage:

2021 Frey Statement: On December 8, 2021 -- the day the Supreme Court heard oral argument in Carson -- Maine Attorney General Aaron Frey stated that "[s]chools that require students to undergo religious instruction are excluded [from the tuition-assistance program] because the education they provide is not equivalent to a public education." He also described the schools involved in Carson as "want[ing] to continue to discriminate against individuals based on their status in a protected class."

2022 Frey Statement: On June 21, 2022 -- the

day the Court released its Carson decision -- Frey issued a statement expressing his disappointment with the decision. He said:

> 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.

He continued by explaining that the 2021 Amendments "would require some religious schools to eliminate their current discriminatory practices" and expressed interest in further "statutory amendments to address the Court's decision and ensure that public money is not used to promote discrimination, intolerance, and bigotry."

2022 Fecteau Statement: On June 25, 2022, in response to a tweet reading, "Maine just changed the guidelines to exclude schools that discriminate against LGBTQ+ students," Maine House Speaker Ryan Fecteau tweeted, "Sure did. Anticipated the ludicrous decision from the far-right [Supreme Court]."[35]

St. Dominic argues that the above statements

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[35] The acronym LGBTQ+ stands for "'lesbian, gay, bisexual, transgender and queer' with a '+' sign to recognize the limitless sexual orientations and gender identities used by members of the LGBTQ+ community." MacRae v. Mattos, 106 F.4th 122, 128 n.5 (1st Cir. 2024) (citation modified), cert. denied, 145 S. Ct. 2617 (2025) (mem.).

evince hostility toward religious practices or religious schools per se. In so arguing, St. Dominic appears to conflate animus toward a practice -- discrimination -- with animus toward a religious group that engages in that practice. We do not believe government actors must avoid criticizing any practice in which any religious group engages or else be accused of harboring impermissible religious animus. See Polk v. Montgomery Cnty. Pub. Schs., 166 F.4th 400, 414 (4th Cir. 2026) (framing neutrality inquiry as whether law "was enacted 'because of' and not 'in spite of' its effect on religion." (citation modified)). And the record does not suggest that Fecteau or Frey find the discrimination in question any less distasteful when motivated by secular rather than religious reasons or when practiced by secular rather than religious schools. We need not determine if that is so, though, because St. Dominic's hostility argument fails for the more straightforward reason that whatever subjective states of mind one might infer in Frey and Fecteau as individuals, their three post-enactment statements provide little probative value in determining why the State government as a whole adopted the 2021 Amendments. In enacting laws, Maine speaks and acts through its entire elected legislature and its elected governor. Me. Const. art. IV, §§ 1, 2. Attorney General Frey, who is neither a legislator nor the governor, had no vote at all in enacting the 2021 Amendments.[36] And while Fecteau did have a role as a legislative leader,

[36] Although the 2022 Frey Statement referred to "statutory amendments to address the Court's decision," this statement came roughly a year after passage of the 2021 Amendments. It nowhere implies Frey had any role in that earlier enactment.

"[w]hat motivates one legislator to [tweet] about a statute is not necessarily what motivates scores of others," so courts must "eschew guesswork" based on one-off statements by individual legislators. United States v. O'Brien, 391 U.S. 367, 384 (1968).

Attempting to buttress its hostility argument, St. Dominic points to Mid Vermont Christian School v. Saunders, 151 F.4th 86 (2d Cir. 2025), but that case is inapposite. Mid Vermont focused on an enforcement action taken against a religious school shortly after the official overseeing the enforcement action expressed hostility toward that specific school's religious views. Id. at 89–90, 93–94. So, of course, the official's statements provided direct insight into why that same official subsequently took action against the school. Id. at 94. Here, we have no such alignment of expression and actor -- nor any enforcement action at all. Cf. Masterpiece Cakeshop, 584 U.S. at 634–36 (finding civil rights enforcement order against bakery violated Free Exercise Clause where members of enforcement body expressed hostility toward bakery owner's religious beliefs during hearings leading up to action).

Finally, St. Dominic makes one last argument regarding nonneutrality, pointing to a 2023 amendment of the MHRA's definition of "educational institution." Prior to 2023, single-sex schools had been excluded from that definition and thereby exempted from the MHRA's education provisions. Me. Stat. tit. 5, § 4553(2-A) (2022). In its initial complaint in this case's companion, Crosspoint alleged this preferential treatment of single-sex schools showed that Maine was not treating religious schools fairly. Complaint ¶¶ 79, 105, 112,

Crosspoint, 719 F. Supp. 3d 99 (No. 23-cv-00146). The Maine legislature then acted to eliminate the single-sex exemption, making the MHRA apply to single-sex schools on the same terms as all other schools. An Act to Amend the Definition of "Educational Institution" Under the Maine Human Rights Act to Include Single-sex Educational Institutions, Me. Pub. L. 2023, ch. 188, 2023 Me. Laws 370 (codified at Me. Stat. tit. 5, § 4553(2-A)).

This change, St. Dominic implies, evidences "Maine's determination to exclude disfavored religious schools." We cannot see how. While "repeated changes in position" and "an evolving policy" in a single case may give rise to a "plausible inference" of pretext, Meriwether, 992 F.3d at 515, they do not inexorably do so. Here, St. Dominic does not allege the amendment altered the MHRA's treatment of religious schools in any way. And even assuming the 2023 amendment was in direct response to Crosspoint's complaint, no adverse inference arises. A litigant pointed out a potential gap in the MHRA, and the State responded by eliminating that gap so that the MHRA now applies to every primary or secondary school in Maine that receives public funds. That evinces not hostility but rather a preference for consistency in the MHRA's application within Maine's borders and a willingness to listen to litigants' complaints. See St. Mary, 154 F.4th at 767 (finding no evidence of hostility in removal of exception to nondiscrimination rule where change came in response to religious schools' complaints).

We thus find the MHRA's bar on religious discrimination to be neutral both facially and nonfacially, at least to the extent it prohibits a school

from giving outright preference to one student over another in admissions and financial aid based on the students' religious beliefs.

(2) General Applicability

We find the Religious Nondiscrimination Rule generally applicable, as well. A law is not generally applicable when it "in a selective manner impose[s] burdens only on conduct motivated by religious belief." Lukumi, 508 U.S. at 543. As relevant here, one way a law may lack general applicability is if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." Fulton, 593 U.S. at 534.[37] Invoking this principle, St. Dominic argues that the Religious Nondiscrimination Rule lacks general applicability because, if St. Dominic were to accept tuition assistance, the rule would apply to St. Dominic, a private, in-state, religious K–8 school, but not to two sets of supposed comparators: (1) private, out-of-state, secular K–12 schools participating in the tuition-assistance program; and (2) private, secular postsecondary institutions receiving public funding through student grants. We consider each in turn.

St. Dominic first stresses that the Religious Nondiscrimination Rule does not apply to out-of-state, private, secular K–12 schools that accept

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[37] A law may also evince a lack of general applicability where it provides "a mechanism for individualized exemptions." Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 526 (2022) (quoting Fulton, 593 U.S. at 533). St. Dominic does not contend the Religious Nondiscrimination Rule provides for any such exemptions.

Maine students underwritten by the State's tuition-assistance program. True. But neither does it apply to an out-of-state, religious school participating in the program.[38] That geographical limitation on the rule's coverage has nothing at all to do with the secular or religious nature of the schools. Rather, the MHRA as a whole does not apply to conduct outside of Maine. Judkins, 483 F. Supp. 2d at 65-66. In this respect, Maine treats secular schools and religious schools that accept tuition assistance exactly alike: If they are in Maine, the MHRA applies; if they are outside Maine, it does not apply.

St. Dominic responds by encouraging us to analyze general applicability through the blueprint drawn by Tandon v. Newsom, 593 U.S. 61 (2021) (per curiam). There, in a per curiam opinion, the Supreme Court granted plaintiffs seeking to hold at-home religious gatherings an emergency injunction pending appeal against a California COVID-19 regulation that limited the size of private gatherings in homes -- including for religious purposes -- to three households. Tandon, 593 U.S. at 62–63. The Court found the regulation likely not generally applicable because it allowed larger, secular gatherings at "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants." Id. at

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[38] At least one school that St. Dominic identifies as a religious school -- Cardigan Mountain School -- is an out-of-state school that has received tuition assistance. 2015–16 Tuition Rates for Private Schools, Me. Dep't of Educ., https://www.maine.gov/doe/sites/maine.gov.doe/files/inline-files/FY16_PrivateSchoolsApprovedTuition_14Jan2019.pdf [https://perma.cc/2GRS-NZW8] (last visited Mar. 13, 2023).

63. In doing so, the Court explained that the government may not "treat any comparable secular activity more favorably than religious exercise." Id. at 62. Whether secular conduct is comparable to the religious exercise at issue, the Court stated, must be judged according to "the asserted government interest that justifies the regulation at issue." Id. If two activities -- one secular and one religious -- effectuate or undermine the asserted government interest(s) in the same manner, then those two activities are comparators. See id.

In Tandon, the "religious exercise at issue" was the in-home religious gathering of more than three households. Id. The California regulation prohibited all such exercise; no similar religious exercise fell on the unregulated side of the line. Here, the religious exercise at issue is private, religious education. But unlike in Tandon, the State does not put all private religious schools -- or any particular form of private religious schooling -- on the regulated side of its lines. Rather, the exact same religious exercise -- private religious schooling -- may be regulated or unregulated, depending on a school's location.

In any event, even by Tandon's measure, St. Dominic's general-applicability argument fails in light of the interests served by the MHRA. It is not the Commissioners' burden to prove that the State's interests make out-of-state schools and postsecondary institutions inappropriate comparators for St. Dominic's religious exercise. Rather, because St. Dominic retains the burden to show that the challenged rules are not neutral and generally applicable, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 525 (2022), we must determine whether St.

Dominic has demonstrated that religious discrimination at out-of-state schools undermines the State's interests to the same degree as religious discrimination at in-state schools.[39]

Under that framework, St. Dominic has failed to establish comparability. As we have noted, the 2021 Amendments sought to align the MHRA's education provisions with its other provisions. See supra Section I.B.2. Implicit throughout the MHRA is a limited interest in combatting discrimination within Maine specifically. Judkins, 483 F. Supp. 2d at 65–66. For example, the MHRA's employment provisions apply to out-of-state employers only if they "employ[] any number of employees whose usual place of employment is in this State." Me. Stat. tit. 5, § 4553(4). Likewise, the MHRA limits the MHRC's jurisdiction to in-state conduct. See id. § 4566 (granting MHRC jurisdiction to "investigat[e] all conditions and practices within the State which allegedly detract from the enjoyment, by each inhabitant of the State, of full human rights and personal dignity"). There is no evidence that, in enacting the 2021 Amendments, the legislature had or pursued any interest in extending the jurisdiction of the MHRC to include activity in other states. Rather, its interests in combatting discrimination generally and state-funded discrimination specifically in education were, from the start,

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[39] We recognize that, after Tandon, there has been some uncertainty in the lower courts about who bears the burden of showing comparability. See William T. Sharon, Religious and Secular Comparators, 30 Geo. Mason L. Rev. 763, 767, 803–19 (2023). However, we read the Kennedy opinion as squarely placing that burden on the plaintiff. See 597 U.S. at 525.

qualified by the general and pre-existing jurisdictional limitation that qualifies all interests that the MHRC is charged with pursuing. The MHRA's focus on conduct within Maine's borders is hardly unusual and implies no improper purpose or effect relevant to our inquiry. See Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989) (parsing Commerce Clause claim and cautioning against "the application of a state statute to commerce that takes place wholly outside of the State's borders" (citation modified)). In the words of the Commissioners' brief on appeal, "Maine's interest in stopping entities outside of Maine from discriminating is simply not the same as its interest in stopping entities inside Maine from doing so."

St. Dominic separately points to private, secular postsecondary institutions receiving public funding as supposed comparators that are not subject to the MHRA's education provisions. Me. Stat. tit. 5, § 4553(2-A). Again, though, St. Dominic misperceives the line that Maine has drawn between those schools subject to the rule and those not subject. The MHRA's education provisions do not apply to any private postsecondary institution, whether secular or religious. Indeed, private, postsecondary institutions are not a part of the tuition-assistance program; if they receive public funding at all, they do so through a separate system of student grants. Contrast Me. Stat. tit. 20-A, §§ 5203, 5204 (establishing tuition-assistance programs for elementary and secondary students), with id. § 11612 (establishing the Maine State Grant Program for post-secondary students). The line here is drawn based on grade level, not religion.

Looking to the interests at play, that line makes sense. As the Commissioners document, unlike K–12 schooling, postsecondary school "is entirely voluntary," "relies primarily on the student and their family for funding," and educates older students who are "more able than their younger counterparts to determine what instruction is appropriate for them or consistent with their knowledge and beliefs." Tandon explained that "[c]omparability is concerned with the risks various activities pose." 593 U.S. at 62. Self-evidently, schools that primarily educate adults do not pose the same risk of undermining the State's interest in "preventing educational discrimination against children," as schools that primarily educate children. See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746–47 (2007) (stressing costs of race-based discrimination in primary and secondary schools in particular). Additionally, Maine's interest in "preventing public funds from being used to fund discrimination" carries significantly more salience in the context of K–12 schools (which can receive between approximately $12,000 and $14,000 per student per year) than private postsecondary schools (which can receive only $2,500 per student per year).[40] Finally, because postsecondary institutions generally enjoy a more robust right to academic freedom under the First Amendment than primary or secondary schools, Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla, 490 F.3d 1, 11 n.6 (1st Cir. 2007), Maine's power to regulate is more circumscribed --

[40] Compare Tuition Rates, supra (elementary and secondary schools), with Maine State Grant Program, supra (postsecondary schools).

and its antidiscrimination interests consequently less robust -- at the postsecondary level.

In sum, the MHRA's coverage separates schools along two innocuous lines: (1) a line between in-state and out-of-state schools and (2) a line between K–12 schools and postsecondary schools. In both cases, concerns unrelated to religion -- location and grade level -- separate the regulated from the unregulated. And in both cases, there are both religious and secular schools on each side of the line. We are at a loss to see how these lines, entirely unrelated to religious exercise, somehow "in a selective manner impose burdens only on conduct motivated by religious belief." Lukumi, 508 U.S. at 543.

These lines also comport with how the Supreme Court has approached the general-applicability inquiry. In Roman Catholic Diocese of Brooklyn v. Cuomo, for instance, the Supreme Court preliminarily enjoined a COVID-19-related executive order in New York that "impose[d] very severe restrictions on attendance at religious services in areas classified as 'red' or 'orange' zones." 592 U.S. 14, 15–16 (2020) (per curiam). The order lacked general applicability,[41] the Court found, because it treated religious conduct worse than secular conduct within the same zone. See id. at 17 ("In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as 'essential' may

[41] Although the Court in Roman Catholic Diocese -- and in Tandon, for that matter -- did not clearly delineate between neutrality and general applicability in its analysis, we have treated both cases as concerning primarily general applicability. See, e.g., Brox v. Woods Hole, 164 F.4th 37, 44–45, 47 (1st Cir. 2026).

admit as many people as they wish."); id. ("The disparate treatment is even more striking in an orange zone."). These within-zone comparisons suggest that we should similarly compare the treatment of in-state, religious K–12 schools in the tuition-assistance program to their geographical and program peers: in-state, secular K–12 schools in the tuition-assistance program.

Where, as here, the government draws a line (or lines) along innocuous contours, in a manner consistent with the underlying government interests at play, we will not subject that innocuous line to heightened scrutiny simply because some religious actors -- along with some secular ones -- fall on one side of that line, while some secular actors -- along with some religious ones -- fall on the other. Cf. Skrmetti, 605 U.S. at 517–19 (upholding an allegedly discriminatory line on the basis that it was drawn based on medical use, rather than between genders or sexes, even though individuals with certain gender identities fell disproportionately on the disfavored side of the line). A contrary holding would largely eviscerate Smith's accommodation of neutral, generally applicable laws. For example, under St. Dominic's approach, a party could challenge Title VII's employment discrimination protections on the grounds that they offend Tandon by exempting "all small employers -- religious and secular alike," while covering some large, religious employers. McMahon v. World Vision, Inc., 704 F. Supp. 3d 1121, 1142–43 (W.D. Wash. 2023) (emphasis omitted), rev'd on other grounds, 147 F.4th 959 (9th Cir. 2025). Indeed, at least one plaintiff has already filed such a challenge, which a court in the Western District of Washington rejected, explaining that the proper comparison is

between "small religious employers" and "small secular employers." Id. at 1142.

In its opening brief, St. Dominic "preserve[s] the argument that Smith was wrongly decided for Supreme Court review." St. Dominic remains free to seek such review through a writ of certiorari. But St. Dominic rightly recognizes that it cannot press such an argument here. And, just as the Constitution forbids us from expressly overruling Supreme Court precedent, the Constitution also forbids us from attempting such an overruling sub silentio. See U.S. Const. art. III, § 1 (placing the Supreme Court above lower courts); Arias v. Herzon, 150 F.4th 27, 42 (1st Cir. 2025) ("[A]s a lower court, we are required to follow the Court's precedents, not treat them as but shells of their former selves."). As with St. Dominic's Carson argument, we therefore will not -- indeed, cannot -- adopt St. Dominic's preferred interpretation of Tandon in a manner that would extinguish a Supreme Court precedent that the Court has regularly applied for thirty-five years. See, e.g., Mahmoud v. Taylor, 606 U.S. 522, 564–65 (2025); Kennedy, 597 U.S. at 525–26; Fulton, 593 U.S. at 533; Trinity Lutheran Church, 582 U.S. at 460; Christian Legal Soc'y, 561 U.S. at 694 n.24, 697 n.27;[42] Lukumi, 508 U.S. at 531; Smith, 494 U.S. at 881; see also St. Mary, 2026 WL 1052111, at *1 (granting certiorari but declining to consider whether Smith should be overruled).

We thus hold that the application of the Religious

[42] In Christian Legal Society, the Court rejected a free-exercise challenge to an "all-comers" nondiscrimination policy based on Smith. 561 U.S. at 697 n.27.

Nondiscrimination Rule to prevent St. Dominic, if it accepts tuition assistance, from giving preference to Catholic students in admissions and financial aid does not warrant heightened scrutiny under Smith.

iii. Church Autonomy and Religious Entanglement

St. Dominic alternatively asserts that the Religious Nondiscrimination Rule likely warrants strict scrutiny because it violates the school's church-autonomy rights under the First Amendment by impermissibly entangling the State in the school's internal religious affairs.

The "church autonomy doctrine," on which St. Dominic relies, "protect[s] the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." Our Lady of Guadalupe Sch., 591 U.S. at 746 (citation modified). This "limit[s] the role of civil courts in the resolution of religious controversies that incidentally affect civil rights." Serbian E. Orthodox Diocese for U.S. & Can.v. Milivojevich, 426 U.S. 696, 710 (1976). For example, "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." Jones v. Wolf, 443 U.S. 595, 602 (1979).

Here, assuming religious schools possess church-autonomy rights, the Religious Nondiscrimination Rule's bar on a school giving preference to one student over another in admissions and financial aid based on the two students' religious affiliations does not infringe those rights. The rule would not require any material or entangling judicial inquiry into matters of faith or doctrine. As we have explained,

the prohibition on discrimination on the basis of a student's religion does not hinge on the school's doctrinal reasons for doing so. Rather, the question is solely "whether [the discrimination] occurred because of an individual's religious beliefs or would not have occurred but for the individual's religion." Finnemore, 645 A.2d at 17. The inquiry required by the rule is a question of civil rights that incidentally affects religious exercise, not vice versa. Cf. Milivojevich, 426 U.S. at 720 (applying doctrine to state-court order "to reinstate as Bishop one who espoused views regarded by the church hierarchy to be schismatic"); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 115 (1952) ("This controversy concerning the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government . . . .").

While St. Dominic asserts that "a religious school's religious admissions criteria, just like a church's membership criteria, are entirely protected from government intrusion," it struggles to marshal any support for such a sweeping statement of law. Instead, it cites only to (1) a Supreme Court case concerning the defrocking of a Serbian orthodox bishop stemming from a church schism, Milivojevich, 426 U.S. at 698–99, 706, 709, 713–14; (2) our own decision affirming dismissal of a priest's tort suit against the church for which he had been working at the time of his alleged injuries, Dowd v. Soc'y of St. Columbans, 861 F.2d 761, 763–64 (1st Cir. 1988); and (3) a decision from a Texas state court collecting cases from other Texas state courts, a Michigan state court, a Pennsylvania state court, and the Eastern District of Pennsylvania, In re St. Thomas High

Sch., 495 S.W.3d 500, 512 & n.1 (Tex. App. 2016). While the Supreme Court has separately, under the "ministerial exception" doctrine, provided protection for "the employment relationship between a religious institution and its ministers," Hosanna-Tabor, 565 U.S. at 188, the Court has not, to date, extended this doctrine to religious school students, and St. Dominic has not clearly presented any argument, let alone a developed one, as to why we should independently do so now.[43] Accordingly, we treat the issue as waived for purposes of this particular appeal. See Igartúa v. United States, 626 F.3d 592, 603 (1st Cir. 2010) ("An argument raised in a perfunctory or not serious manner is waived.").[44]

St. Dominic's claim also relies heavily on a single sentence from Carson, which warned that "scrutinizing whether and how a religious school pursues its educational mission would . . . raise serious concerns about state entanglement with religion and denominational favoritism." 596 U.S. at 787. But -- as with the rest of Carson -- we do not read this language as creating a new test for whether government action violates the religion clauses.

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[43] Moreover, it is not clear the ministerial exception as it currently stands can even be used as the basis of a claim, rather than as a defense. See Hosanna-Tabor, 565 U.S. at 195 n.4 (describing the ministerial exception as "an affirmative defense to an otherwise cognizable claim"); Youth 71Five, 160 F.4th at 983–84 (concluding that the ministerial exception cannot form the basis for a standalone claim under 42 U.S.C. § 1983).

[44] One amicus to this case insists that the "ministerial exception" should extend to church congregants, but "[a]mici cannot interject into a case issues which the litigants have chosen to ignore." Airport Impact Relief, Inc. v. Wykle, 192 F.3d 197, 205 n.3 (1st Cir. 1999).

Instead, the Court was simply explaining why "use-based discrimination is [no] less offensive to the Free Exercise Clause" than "status-based discrimination." Id. at 787–88. That is, the government cannot escape strict scrutiny simply by reformulating a status-based exclusion (e.g., schools that are Catholic) as a use-based exclusion (e.g., schools that promote Catholicism). See id.

St. Dominic instead reads Carson as "forbid[ding]" states from "examin[ing religious schools'] admission policies, codes of conduct, and practices" and using such examination to enforce laws against religious schools. But that reasoning would apply equally to the MHRA's prohibition on race, sex, or disability discrimination, provisions that even St. Dominic does not contend violate its rights. See Christian Legal Soc'y, 561 U.S. at 702–03 (Stevens, J., concurring) (noting similar lack of limiting principle). What is more, that interpretation of Carson ignores Smith's accommodation of neutral, generally applicable laws. That is perhaps why, in addition to excerpting a single sentence from Carson and a single sentence from an employment case, see Our Lady of Guadalupe Sch., 591 U.S. at 746, St. Dominic relies for its argument primarily on a quartet of pre-Smith cases. See Kedroff, 344 U.S. at 115; Milivojevich, 426 U.S. at 713–14; NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 502 (1979); Dowd, 861 F.2d at 764.

In short, we find no interference with St. Dominic's church-autonomy rights in the Religious Nondiscrimination Rule's application to the school's Catholic preference and decline St. Dominic's invitation to expand significantly the

Supreme Court's religious-entanglement caselaw to forbid a state from enacting a neutral, generally applicable law that comports with Smith and other key precedents.

iv. Expressive Association

We turn next to St. Dominic's argument that the Religious Nondiscrimination Rule likely interferes with its First Amendment right to expressive association and, as such, deserves strict scrutiny.[45] The Supreme Court has characterized this right as follows: "[A] regulation that forces [a] group to accept members it does not desire . . . may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate." Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984). A law that infringes that freedom will be unconstitutional unless it withstands strict scrutiny. Id. To determine whether a law infringes the freedom of association, we must ascertain whether "the presence of [the unwanted persons] affects in a significant way the group's ability to advocate public or private viewpoints." Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000); see also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548–49 (1987) (upholding the application of a state nondiscrimination law that barred private Rotary Clubs from excluding women from full membership because the challenged law did not

[45] St. Dominic also raises a First Amendment challenge to the MHRA on compelled-speech grounds; that challenge, however, is directed solely at the Religious Expression Rule, so we need not consider it further.

"affect in any significant way the existing members' ability to carry out their various purposes").

St. Dominic devotes three pages of its opening brief and another three of its reply to arguing that "forcing [it] to allow unwanted members or expression violates [its] expressive-association rights if it 'affects in a significant way the [school's] ability to advocate public or private viewpoints.'" But St. Dominic offers nary a word to support any suggestion that precluding it from preferencing Catholic students in admissions or financial aid will somehow burden its expressive-association rights. To the contrary, St. Dominic admits that it "welcomes non-Catholics 'willing to learn in a thoroughly Catholic educational environment.'" See Jaycees, 468 U.S. at 627 (finding no expressive-association violation where group already allowed unwanted members -- women -- to participate in much of its activities); Rotary Int'l, 481 U.S. at 549 n.8 (same).

To support the claimed burden on its expressive-association rights, St. Dominic points instead to its complaint that the MHRA would force it to accept students who do not support its mission and to allow competing religious expression. But we have already found that the Religious Nondiscrimination Rule does not prohibit St. Dominic's mission-oriented admissions practices and that the Religious Expression Rule may not force St. Dominic to permit competing religious expression. All we consider here is the Religious Nondiscrimination Rule's application to St. Dominic's preference for Catholic students in admissions and financial aid. And St. Dominic has made no showing that requiring the school to evaluate non-Catholic

applicants on an equal footing with Catholic applicants would itself significantly hinder "the group's ability to advocate public or private viewpoints." Dale, 530 U.S. at 648; see also Runyon v. McCrary, 427 U.S. 160, 176 (1976) (rejecting schools' expressive-association claim where "there is no showing that discontinuance of the discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma" (citation modified)). In short, on this record, we find no burden on St. Dominic's associational rights. See Dale, 530 U.S. at 653 ("[A]n expressive association can[not] erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.").

v. Unconstitutional Conditions

St. Dominic lastly contends that strict scrutiny applies because the Religious Nondiscrimination Rule runs afoul of the unconstitutional-conditions doctrine. The unconstitutional-conditions doctrine prohibits the government, in certain situations, from conditioning the grant of a benefit on the surrender of a constitutional right. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214 (2013). In other words, it limits the government's ability to argue that, although it could not constitutionally impose a restriction on an entity directly, it can nevertheless impose the same restriction as a condition of that entity's voluntary acceptance of public funds. Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (FAIR), 547 U.S. 47, 59 (2006). Here, though, the Commissioners make no such argument. Rather, in defending the Religious Nondiscrimination

Rule, the Commissioners have treated the rule as an attempted direct restriction on the school's conduct -- and we have done the same. We have found that the Religious Nondiscrimination Rule does not require the school to surrender its free-exercise rights to receive tuition assistance. And we have found that St. Dominic has failed to articulate any burden on its right to expressive association from the rule. We have, in short, analyzed the rule as a direct restriction and found no constitutional infirmity to be immunized by the acceptance of state funds. Because "a funding condition cannot be unconstitutional if it could be constitutionally imposed directly," id. at 59–60, St. Dominic's unconstitutional conditions theory does not change our conclusion.

c. Rational Basis Review

Concluding that St. Dominic has not demonstrated heightened scrutiny should apply, we employ rational basis review, under which a law survives if "rationally related" to a "legitimate end." Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987). Under this forgiving standard, the Religious Nondiscrimination Rule passes muster.

Maine's aim to expand the definition of unlawful educational discrimination covered by the MHRA certainly qualifies as a legitimate end. St. Dominic claims that a government can have no legitimate interest in barring religious discrimination by religious schools. But, as we have noted, "[p]rohibition of religious discrimination is unquestionably an appropriate, secular legislative purpose." Boyajian, 212 F.3d at 5. And the Supreme Court has found not only a legitimate, but a

"compelling," "fundamental, overriding interest" in "eradicating racial discrimination in education," even where the discriminatory practices in question derived from the subject school's sincerely held religious beliefs. Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983); see also Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 609 (1982) ("This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils."). Though not dispositive, we also note that, here, Maine pursues not only a general antidiscrimination interest but also an interest in preventing publicly funded discrimination specifically. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) (plurality opinion) ("[A]ny public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."); Norwood v. Harrison, 413 U.S. 455, 463 (1973) ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.").

The Religious Nondiscrimination Rule thus plainly serves legitimate government ends. And St. Dominic does not contest that the Religious Nondiscrimination Rule -- which withholds public funding from, or subjects to liability, those who discriminate based on religion -- rationally relates to those ends.

4. The Sexual Orientation and Gender Identity Nondiscrimination Rule

We come now to the Sexual Orientation and Gender Identity Nondiscrimination Rule, which prohibits any in-state primary or secondary school receiving public funding from discriminating against students and applicants on the basis of sexual orientation or gender identity. Me. Stat. tit. 5, § 4602(1).[46] We start by addressing the Commissioners' threshold ripeness and Pullman arguments as applied to the Sexual Orientation and Gender Identity Nondiscrimination Rule. We then turn to the merits, concluding first that the Sexual Orientation and Gender Identity Nondiscrimination Rule does not trigger heightened scrutiny and second that the rule survives rational basis review. Thus, St. Dominic's challenge to the Sexual Orientation and Gender Identity Nondiscrimination Rule fails.

a. Justiciability

Before reaching the merits, we address justiciability. As with the Religious Expression Rule and the Religious Nondiscrimination Rule, the Commissioners urge us to avoid the merits of this dispute on ripeness and Pullman grounds.

St. Dominic, relying on a 2016 memorandum authored by Commission Counsel for the MHRC, points to two potential applications of this rule that allegedly violate the school's constitutional

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[46] The rule provides a specific carveout for religious schools that do not receive public funding, Me. Stat. tit. 5, § 4602(5)(C), but, given that the MHRA's education provisions do not apply to schools that do not receive public funding anyway, id. § 4553(2-A), this carveout is largely superfluous.

rights. See 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"]. First, St. Dominic says, the rule would require the school to "facilitate a student's gender transition over the objection of their parents," by using the student's preferred pronouns and name and allowing the student to dress in clothing consistent with their gender identity.[47] Second, according to St. Dominic, the rule would mandate that the school "discipline other students and staff who object to using a student's preferred pronouns." We refer to these two applications, collectively, as the Sexual Orientation and Gender Identity Nondiscrimination Rule's "Gender Presentation Policy." St. Dominic does not inquire about a student's sexual orientation or gender identity in admissions or allege any other practice in which it intends to engage that might be construed as discrimination on those grounds, so we focus only on the Gender Presentation Policy in our analysis.[48]

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[47] Although St. Dominic uses the expansive term "facilitate" in describing this requirement, the relevant portion of the 2016 MHRC Memorandum addresses only a student's chosen name, preferred pronouns, and dress. 2016 MHRC Memorandum, supra, at 3–4.

[48] In its reply brief, St. Dominic refers in passing to a supposed admission by the Commissioners that the Sexual Orientation and Gender Identity Nondiscrimination Rule would require publicly funded schools to "[a]ccept an enrolled student's assertion of their gender identity, including when the student sincerely

i. Ripeness

We find St. Dominic's claims against the Sexual Orientation and Gender Identity Nondiscrimination Rule ripe but only to the extent those claims challenge the Gender Presentation Policy. As we have stated, ripeness in this pre-enforcement context requires St. Dominic to show that it has "concrete plans to engage immediately (or nearly so) in an

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holds a 'fluid' gender identity that shifts with changing athletic seasons," and "[a]llow students to use 'toilet, locker room, and shower facilities' that correspond to their asserted gender identity, regardless of whether other students or staff object because of their own religious beliefs (for example about modesty)." St. Dominic does not clarify whether any school policies would violate these alleged requirements. In any event, St. Dominic did not mention these requirements below or raise them in its opening brief. We therefore deem any arguments relating to these requirements waived. See Álamo-Hornedo v. Puig, 745 F.3d 578, 582 (1st Cir. 2014) ("[I]n the absence of exceptional circumstances, arguments presented for the first time in an appellant's reply brief are deemed waived."); see also United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

St. Dominic's reply brief also attempts to introduce as evidence a 2022 draft rulemaking that interprets the Sexual Orientation and Gender Identity Nondiscrimination Rule as requiring schools to treat all sexual orientations and gender identities "as equally valid" in any "[h]uman sexuality courses." But even if we assume that St. Dominic properly introduces this evidence and that it bears relevance to St. Dominic's claims, this draft rulemaking is just that: a draft. St. Dominic adduces no evidence indicating that the State intends to finalize the proposal, the Commissioners' briefing indicates that the MHRC does not plan to enforce the Sexual Orientation and Gender Identity Nondiscrimination Rule in such a way, and the rule's plain text does not suggest that it contains such a requirement.

arguably proscribed activity," and that "the challenged statute, fairly read, thwarts implementation of the plan." Whitehouse, 199 F.3d at 33.

Here, St. Dominic alleges that it would refuse to comply with "a student's efforts to change his or her gender identity" without the consent of that student's parents and would not discipline other students or faculty who refused to use pronouns consistent with that student's gender identity. Although the Commissioners contend it is not clear that this would violate the Sexual Orientation and Gender Identity Nondiscrimination Rule, it is at least "arguably proscribed" by the rule. After all, the 2016 MHRC Memorandum establishing the Gender Presentation Policy shows that the MHRC believes the rule would prohibit St. Dominic's conduct. And, during the pendency of this appeal, the MHRC filed a complaint against five public school districts for violations of the Sexual Orientation and Gender Identity Nondiscrimination Rule in athletics and private spaces, in which it cited the same 2016 MHRC Memorandum, albeit a different section. Complaint 16, Me. Hum. Rts. Comm'n v. Me. Sch. Admin. Dist. 70, No. 25-188 (Me. Super. Ct. Kennebec Cnty. Nov. 17, 2025).[49] This recent enforcement activity

[49] The alleged violations in that complaint concern the restriction of athletic opportunities and private spaces by biological sex. See generally Complaint, Me. Sch. Admin. Dist. 70, No. 25-188. We are not here called to address the constitutional implications of the rule's possible application to such practices, other than to acknowledge that the complaint lends credence to St. Dominic's contention that the MHRC continues to read the rule in accord with the 2016 MHRC Memorandum.

supports the idea that St. Dominic faces a credible threat of prosecution for that arguably proscribed activity. We therefore conclude that St. Dominic's challenge to the Sexual Orientation and Gender Identity Nondiscrimination Rule is ripe to the extent that it targets the Gender Presentation Policy.

Before proceeding, though, we note the limited scope of this conclusion. We address here only those applications of the Sexual Orientation and Gender Identity Nondiscrimination Rule actually challenged by St. Dominic: the Gender Presentation Policy's requirement that a school receiving public funding use a transgender student's preferred name and pronouns, encourage staff and students to do the same, and allow the student to dress in accord with their gender identity. It strikes us that other applications of the rule are hopelessly uncertain at this time. We are aware of only one case construing the MHRA's bar on gender-identity discrimination in education, and in that case, the Maine Supreme Judicial Court stressed the fact-sensitive nature of "[d]ecisions about how to address students' legitimate gender identity issues" under the MHRA. Doe v. Reg'l Sch. Unit 26, 86 A.3d 600, 606–07 (Me. 2014) (finding MHRA violation where school barred transgender student who identified as girl from using girls' bathroom, contrary to plan "carefully developed over several years" and "designed to sensitively address [her] gender identity issues" in light of fact that "[t]he school, her parents, her counselors, and her friends all accepted that [she] is a girl"). We therefore express no opinion regarding the constitutionality of applications of the Sexual Orientation and Gender Identity Nondiscrimination Rule not before us.

ii. Pullman Abstention

As to St. Dominic's challenge to the MHRC's Gender Presentation Policy, Pullman abstention is not appropriate because no "substantial uncertainty exists over the meaning of" that policy specifically. Batterman, 544 F.3d at 373. Although other applications of the Sexual Orientation and Gender Identity Nondiscrimination Rule are uncertain at this time, we have in the Gender Presentation Policy a specific interpretation promulgated by the body tasked with administering the MHRA and issuing regulations thereunder. Me. Stat. tit. 5, § 4566(7). That interpretation would require St. Dominic, if it accepted tuition assistance, to use a transgender student's chosen name and pronouns and mandate that employees and other students do the same. In response to St. Dominic's concerns about those requirements, the Commissioners argue that "a state court might not agree with" the 2016 MHRC Memorandum that lays out the Gender Presentation Policy. But the fact that a state court "might" not read the Sexual Orientation and Gender Identity Nondiscrimination Rule as expansively as does the MHRC does not create the "substantial uncertainty" required for Pullman abstention. See Midkiff, 467 U.S. at 237 ("[T]he relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts might render adjudication of the federal question unnecessary."). Without any material ambiguity regarding the Gender Presentation Policy, we do not believe abstention is appropriate in this case, where First Amendment rights are at stake. See Mangual v. Rotger-Sabat, 317 F.3d 45, 64 (1st Cir. 2003) ("[T]he delay involved in abstention is especially problematic where First Amendment

rights are involved.").

b. Level of Scrutiny

Moving to the merits, St. Dominic makes only three arguments with respect to the Sexual Orientation and Gender Identity Nondiscrimination Rule specifically: (1) that the rule triggers strict scrutiny under Smith, (2) that the rule violates St. Dominic's church-autonomy rights, and (3) that the rule implicates parental rights under the Free Exercise Clause. St. Dominic did not argue in the district court that the Sexual Orientation and Gender Identity Nondiscrimination Rule interferes with the school's free-speech or expressive-association rights in any way, nor has it attempted to do so on appeal. Any such argument is therefore waived. United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990). As we will explain, none of the arguments St. Dominic does present persuade us that heightened scrutiny should govern application of the Sexual Orientation and Gender Identity Nondiscrimination Rule's Gender Presentation Policy to St. Dominic should it decide to participate in the tuition-assistance program.

i. Free Exercise

St. Dominic primarily contends that the Sexual Orientation and Gender Identity Nondiscrimination Rule should receive heightened scrutiny under the Free Exercise Clause.

We do not understand St. Dominic to contend that the rule triggers strict scrutiny under Carson's interpretation of the Free Exercise Clause on the ground that it "disqualif[ies] some private schools" from the tuition-assistance program "solely because

they are religious." Carson, 596 U.S. at 780 (quoting Espinoza, 591 U.S. at 487). Even if St. Dominic did mean to raise that argument, we are unpersuaded. As mentioned, the MHRC is currently pursuing an action against several secular schools for conduct that the MHRC asserts violates the rule. Complaint, Me. Sch. Admin. Dist. 70, No. 25-188. And the record does not suggest that religious schools, by their nature, engage in sexual-orientation or gender-identity discrimination. See Polk, 166 F.4th at 415 ("[B]ecause Polk herself is a Christian who believes that there are only two sexes does not mean that all Christians believe the same thing, and that non-Christians inherently believe otherwise."). Simply put, barring sexual orientation and gender identity discrimination does not exclude religious schools from the tuition-assistance program solely based on their religious character. See St. Mary, 154 F.4th at 763–65 (finding similar nondiscrimination rule as applied to Catholic preschools did not trigger strict scrutiny under Carson). St. Dominic does separately argue that the Sexual Orientation and Gender Identity Nondiscrimination Rule raises entanglement concerns under Carson, which we address below. See infra Section III.A.4.b.ii.

Proceeding thus under Smith's "neutral and generally applicable" framework, we begin with general applicability. In so doing, we see no reason to depart from our conclusion, with respect to the Religious Nondiscrimination Rule, that the MHRA's education provisions are generally applicable. See supra Section III.A.3.b.ii(2). Nor does St. Dominic present any unique case for why the Sexual Orientation and Gender Identity Nondiscrimination Rule specifically falters on this prong of the Smith

test.

That leaves only neutrality. St. Dominic makes no argument that either the Sexual Orientation and Gender Identity Nondiscrimination Rule as whole or the Gender Presentation Policy in particular is facially nonneutral. Rather, as to this rule, St. Dominic's neutrality challenge rests entirely on nonfacial nonneutrality. Nonfacial nonneutrality, as we have noted, refers to "governmental hostility [that] is masked." Lukumi, 508 U.S. at 534. But St. Dominic cannot argue that the Maine legislature enacted the Sexual Orientation and Gender Identity Nondiscrimination Rule itself -- or that the MHRC instituted the Gender Presentation Policy -- out of hostility to religious schools. After all, the bar on sexual-orientation and gender-identity discrimination was added to the MHRA in 2005, when the nonsecular requirement generally excluded religious schools from the MHRA's coverage. The same holds true for the Gender Presentation policy, which was established in 2016, two years before the Carson litigation began. Instead, St. Dominic's arguments center on recent amendments to the Sexual Orientation and Gender Identity Nondiscrimination Rule. The bulk of these arguments -- regarding the Frey and Fecteau Statements and the single-sex exemption -- fail here for the same reasons they failed with regard to the Religious Nondiscrimination Rule. See supra Section III.A.3.b.ii(1).

St. Dominic's one remaining argument narrows in on the 2021 Amendments' impact on the Sexual Orientation and Gender Identity Nondiscrimination Rule's carveout for religious schools. Previously, the

rule exempted all religious schools, but with the amendments, the rule now exempts only those religious schools that do not receive public funding. 2021 Amendments sec. 19 (codified at Me. Stat. tit. 5, § 4602(5)(C)). St. Dominic argues that this change was born of hostility to religious schools.

For two reasons, we find no such hostility here. First, this amendment simply aligned the MHRA's education provisions with its employment and housing provisions, which already limited their religious exemptions from similar prohibitions on sexual-orientation and gender-identity discrimination to entities that did not receive public funding. Me. Stat. tit. 5, § 4553(10)(G) (2018). Second, the pre-amendment exemption was essentially meaningless since the MHRA only applies to a religious school if it receives public funding and, prior to Carson, no religious school could receive public funds for tuition. Me. Stat. tit. 20-A, § 2951(2) (2018).[50] Thus, before the 2021 Amendments, the Sexual Orientation and

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[50] St. Dominic argues that this is not precisely accurate. The nonsectarian requirement challenged in Carson did not bar all religious schools from the tuition-assistance program, only those that were "associated with a particular faith or belief system" and "promote[d] [that] faith or belief system . . . and/or present[ed] the material taught through the lens of this faith." Carson, 596 U.S. at 775 (citation modified). However, the pre-amendment religious exemption also did not exempt all religious schools, only those that were "owned, controlled or operated by a bona fide religious corporation, association or society," Me. Stat. tit. 5, § 4602(4) (2018). While St. Dominic identifies at least one nonsectarian religious school that participated in the program prior to Carson, it has not shown that that school qualified for the pre-amendment exemption. On this record, then, we see no room between the nonsectarian requirement and the pre-amendment exemption.

Gender Identity Nondiscrimination Rule applied to all Maine K–12 schools that received public funding. The legislature's decision to ensure that, post-Carson, the Sexual Orientation and Gender Identity Nondiscrimination Rule continued to apply to all Maine K–12 schools that receive public funding evinces no hostility toward religious schools as such.

Because the Sexual Orientation and Gender Identity Nondiscrimination Rule is both neutral and generally applicable, the rule's application to St. Dominic, should it accept tuition assistance, does not warrant heightened scrutiny under the Free Exercise Clause.

ii. Church Autonomy and Religious Entanglement

St. Dominic applies its church-autonomy and religious-entanglement argument to the Sexual Orientation and Gender Identity Nondiscrimination Rule's Gender Presentation Policy, too. See supra Section III.A.3.b.iii. In its view, the policy would allow the MHRC to "dictate what students may wear and be called at school, whether parents' wishes will be honored, and when and whether students and staff must be disciplined for failing to follow the Commission's guidance about these matters."[51] Of course, the text of the Sexual Orientation and Gender Identity Nondiscrimination Rule itself contains no such language. Rather, the rule simply prohibits a school from discriminating on the basis of a student's sexual orientation or gender identity if the school

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[51] St. Dominic does not contend that such discipline for staff might include termination or otherwise implicate the ministerial exception under Hosanna-Tabor, 565 U.S. at 188.

accepts public funding. Even the Gender Presentation Policy does not give the MHRC power to dictate students' names and dress; rather, it gives students that power, instructing schools to honor the requests of individual students regarding their own names, pronouns, and dress. And, as with the Religious Nondiscrimination Rule, enforcement of this policy would not require the MHRC or courts to inquire into the religious motivations for allegedly discriminatory practices or decide matters of church doctrine. Thus, for substantially the same reasons that this argument falters as to the Religious Nondiscrimination Rule, we do not see either the church-autonomy doctrine or St. Dominic's conception of a religious-entanglement doctrine as providing an independent basis to apply strict scrutiny.

iii. Parental Rights

Finally, in two notices of supplemental authority, St. Dominic asks us to reverse based on the Supreme Court's recent decisions in Mahmoud v. Taylor, 606 U.S. 522 (2025), and Mirabelli v. Bonta, 607 U.S. 492 (2026). Both decisions reaffirmed "the rights of parents to direct the religious upbringing of their children." Mahmoud, 606 U.S. at 547 (citation modified); see also Mirabelli, 607 U.S. at 496–97. But neither case concerned schools' rights. As such, these cases do not provide reason for us to find a violation of St. Dominic's rights.[52]

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[52] St. Dominic does not clearly confine its parental-rights argument to its challenge to the Sexual Orientation and Gender Identity Nondiscrimination Rule. Because Mahmoud and Mirabelli both address sexual-orientation and gender-identity policies, we tackle the issue here. Nevertheless, our conclusion applies equally to St. Dominic's challenges to the MHRA's other

We focus our attention on Mirabelli, the more recent and apposite of the two cases. There, several teachers and parents challenged, on grounds including a free-exercise claim, California policies that barred schools "from telling [parents] about their children's efforts to engage in gender transitioning at school unless the children consent[ed] to parental notification" and required schools to "use children's preferred names and pronouns regardless of their parents' wishes." Mirabelli, 607 U.S. at 493. After the Ninth Circuit stayed the district court's permanent injunction against the policies, the Supreme Court vacated the stay with respect to the parent-plaintiffs. Id. at 498. As relevant here, the Court explained that the parents held "sincere religious beliefs about sex and gender," and "California's policies violate[d] those beliefs," imposing an impermissible "burden on religious exercise." Id. at 496 (quoting Mahmoud, 606 U.S. at 550). On this ground, the Court found it likely that the policies "substantially interfere[d] with the 'right of parents to guide the religious development of their children.'" Id. (quoting Mahmoud, 606 U.S. at 559); see also Mahmoud, 606 U.S. at 545–46 (finding likely violation of parental rights in school board policy requiring use of LGBTQ+-inclusive storybooks in elementary school classrooms with no notice or opt-out for parents who objected on religious grounds).

St. Dominic correctly points out that this case parallels Mirabelli to an extent. As with the policies in Mirabelli, the Sexual Orientation and Gender Identity Nondiscrimination Rule's Gender

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education provisions.

Presentation Policy would require subject schools to use a transgender student's preferred name and pronouns over a parent's objection -- though nothing before us suggests the rule would bar a school from informing parents of their child's gender transitioning. However, no party remaining in this suit is a parent asserting a parental-rights claim, and the Mirabelli Court did not indicate that a party other than a parent could generally assert such a claim. In fact, the Court declined to vacate the stay as to the teacher-plaintiffs, suggesting that, even if the policies violated the parents' rights, they might not violate the teachers' rights. Mirabelli, 607 U.S. 498; see also Mahmoud, 606 U.S. at 540–42 (addressing claims of parents and an unincorporated association of parents and teachers); cf. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–36 (1925) (finding private religious school deprived of property without due process by compulsory public-education law because law unconstitutionally interfered with parental right to direct the education of children); Runyon, 427 U.S. at 175 n.13, 176–77 (allowing private school to argue civil rights statute violated "a parent's right to direct the education of his children," grounded in substantive due process, but finding no such violation).

It is "a fundamental restriction on our authority that in the ordinary course, a litigant must assert his or her own legal rights and interest, and cannot rest a claim to relief on the legal rights or interests of third parties." Hollingsworth v. Perry, 570 U.S. 693, 708 (2013) (citation modified). This general principle does admit of a "limited" exception, but that exception requires the party asserting rights on behalf of another to justify its third-party standing. Kowalski v.

Tesmer, 543 U.S. 125, 130 (2004). Here, St. Dominic has put forth no reason why it should be allowed to litigate on behalf of the Radonises or any other parents not party to this suit. Because, "[i]n our adversarial system of adjudication, . . . [t]he parties frame the issues for decision, while the court serves as neutral arbiter of matters the parties present," Clark v. Sweeney, 607 U.S. 7, 9 (2025) (citation modified), we need proceed no further down the path of parental rights. We thus set Mahmoud and Mirabelli aside for the limited purpose of determining St. Dominic's own entitlement to relief.

c. Rational Basis Review

As St. Dominic has not demonstrated that strict scrutiny should apply,[53] we employ rational basis review of the Sexual Orientation and Gender Identity Nondiscrimination Rule and its Gender Presentation Policy. Just as combatting religious discrimination qualifies as a legitimate governmental pursuit, so too combatting sexual-orientation and gender-identity discrimination rises to the level. Telescope Media Grp. v. Lucero, 936 F.3d 740, 777 (8th Cir. 2019) (Kelly, J., concurring in part and dissenting in part) ("If eradicating discrimination based on race or sex is a

[53] To the extent St. Dominic also argues for strict scrutiny of the Sexual Orientation and Gender Identity Nondiscrimination Rule under the unconstitutional-conditions doctrine, that argument fails for the same reason it failed with respect to the Religious Nondiscrimination Rule: St. Dominic has not shown that the Sexual Orientation and Gender Identity Nondiscrimination Rule would unconstitutionally infringe its free-exercise rights if the rule were a direct restriction, so the rule is not unconstitutional as a funding condition. FAIR, 547 U.S. at 59–60.

compelling state interest, then so is [a state's] interest in eradicating discrimination based on sexual orientation."). And the imposition of liability for sexual-orientation or gender-identity discrimination on those schools that accept public funding rationally relates to those antidiscrimination goals, as does the requirement that such schools respect students' expression of their gender identity. We thus find that St. Dominic has not demonstrated a likelihood of success on the merits of its limited challenge to the Sexual Orientation and Gender Identity Nondiscrimination Rule.

B. Remaining Factors

With our likelihood-of-success-on-the-merits discussion complete, we turn to the other three preliminary injunction factors. Beginning with St. Dominic's challenges to the Employment Rule, the Religious Nondiscrimination Rule, and the Sexual Orientation and Gender Identity Nondiscrimination Rule, we note that St. Dominic "does not argue on appeal that the other three factors mandate an injunction even if its claims are not likely to succeed on the merits," so we "rest [our] affirmance[s] solely on [our] unlikelihood-of-success holding[s]." Becky's Broncos, LLC v. Town of Nantucket, 138 F.4th 73, 78 (1st Cir. 2025) (citation modified).

As to the Religious Expression Rule, St. Dominic has satisfied the other three factors. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Roman Cath. Diocese, 592 U.S. at 19 (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion)). And the balance of equities and public interest also favor St. Dominic -- after all, the

Commissioners can hardly justify a religiously discriminatory provision on the ground that the provision is necessary to combat religious discrimination.

IV. Conclusion

For the foregoing reasons, we affirm in part and reverse in part the district court's order denying St. Dominic's motion for a preliminary injunction. Specifically, we affirm the order insofar as it determined that no case or controversy exists with respect to the Employment Rule and that St. Dominic has not shown a likelihood of succeeding on the merits of its claims against the Religious Nondiscrimination Rule and the Sexual Orientation and Gender Identity Nondiscrimination Rule. And we reverse the order insofar as it determined that St. Dominic has not demonstrated its entitlement to a preliminary injunction against the Religious Expression Rule. We thus remand the case for further proceedings consistent with this opinion, including the timely entry of a preliminary injunction against the Religious Expression Rule as applied to St. Dominic. No costs are allocated.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

No. 2:23-cv-00246-JAW

ST. DOMINIC ACADEMY, a d/b/a of the ROMAN CATHOLIC BISHOP OF PORTLAND, et al.,

Plaintiffs,

v.

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

Defendants.

ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

A Catholic Diocese, a Catholic school, and a Catholic family seek to preliminarily enjoin certain educational and employment antidiscrimination laws, arguing that they violate the Free Exercise Clause, the Free Speech Clause, the Establishment Clause, and the unconstitutional conditions doctrine. Although the Court agrees that the plaintiffs have raised significant constitutional issues, the Court denies the motion, primarily because it concludes that the plaintiffs are unlikely to succeed on the merits. After rejecting the defendants' arguments against reaching the merits on *Pullman* abstention and ripeness grounds, the Court concludes that an injunction against the employment antidiscrimination provisions is unnecessary because the plaintiffs' proposed injunction would only reach conduct that is already protected by the plain text of the law. The Court further determines that the

educational antidiscrimination provisions do not violate the Free Exercise Clause because, despite not being generally applicable, they are neutral and survive strict scrutiny. In a similar vein, the Court rejects the plaintiffs' Free Speech Clause argument because the educational antidiscrimination provisions do not compel speech. Finally, the Court concludes that the plaintiffs have presented insufficient evidence that the educational antidiscrimination provisions invite excessive entanglement or impose unconstitutional conditions.[1]

I. PROCEDURAL HISTORY

On June 13, 2023, the Roman Catholic Bishop of Portland, St. Dominic Academy (St. Dominic), and Keith and Valori Radonis—on their own behalf and as next friends of their children K.Q.R., L.R.R., and L.T.R—filed a civil action against Maine Department of Education Commissioner A. Pender Makin and Maine Human Rights Commission (MHRC) Commissioners Jefferson Ashby, Edward David, Julie Ann O'Brien, Mark Walker, and Thomas Douglas. *Verified Compl.* (ECF No. 1) (*Compl.*). The complaint broadly alleged that certain provisions of the Maine Human Rights Act (MHRA) effectively

[1] Although the parties requested oral argument, the Court has decided to issue this order without it. Although it is generally this Court's practice to hold oral argument when requested, the Court is conscious of the delay in issuing this opinion, and the parties' presumed determination to obtain a more authoritative decision from the Court of Appeals for the First Circuit. Moreover, the briefing for both sides of this lawsuit is thorough and excellent, and the Court is not convinced that oral argument would materially alter its conclusions.

exclude St. Dominic from participating in Maine's school tuitioning program in violation of the Plaintiffs' rights under the Free Exercise, Free Speech, and Equal Protection clauses of the U.S. Constitution. *Id.* The Plaintiffs asked the Court to declare the challenged provisions of the MHRA unconstitutional and sought injunctive relief and damages. *Id.* at 40. All Defendants were sued in their official and personal capacities. *Id.* ¶¶ 20-25.

On June 14, 2023, the Plaintiffs moved for a preliminary injunction, asking the Court to enjoin the allegedly unconstitutional provisions of the MHRA. *Pls.' Mot. for Prelim. Inj.* (ECF No. 5) (*Pls.' Mot.*). On July 3, 2023, the Plaintiffs filed correspondence to supplement the record with two cases recently decided by the United States Supreme Court. *Notice of Suppl. Authority in Supp. of Pls.' Mot. for Prelim. Inj.* (ECF No. 20); *Notice of Suppl. Authority in Supp. of Pls.' Mot. for Prelim. Inj.* (ECF No. 21). On July 11, 2023, the Defendants opposed the Plaintiffs' motion for preliminary injunction. *Defs.' Opp'n to Pls.' Mot. for Prelim. Inj.* (ECF No. 25) (*Defs.' Opp'n*). On July 19, 2023, the Plaintiffs replied. *Pls.' Reply in Supp. of Mot. for Prelim. Inj.* (ECF No. 29) (*Pls.' Reply*).

On August 11, 2023, the Defendants answered the complaint. *Defs.' Answer to Pls.' Compl.* (ECF No. 30). That same day, the Defendants filed a motion to dismiss all claims against them in their personal capacities. *Defs.' Mot. to Dismiss Personal Capacity Claims* (ECF No. 31). On September 1, 2023, the Plaintiffs opposed dismissal of the personal capacity claims. *Pls.' Resp. in Opp'n to Mot. to Dismiss Personal Capacity Claims* (ECF No. 33). On

September 13, 2023, the Defendants replied. *Defs.' Reply in Supp. of Their Mot. to Dismiss Personal Capacity Claims* (ECF No. 34).

On October 16, 2023, the Plaintiffs filed correspondence to supplement the preliminary injunction record with a case recently decided by the Court of Appeals for the First Circuit. *Notice of Suppl. Authority in Supp. of Pls.' Mot. for Prelim. Inj.* (ECF No. 35). Similarly, on June 20, 2024, and again on June 28, 2024, the Plaintiffs filed correspondence to supplement the motion to dismiss record with recently decided cases from the United States Supreme Court and the District of Massachusetts. *Notice of Suppl. Authority in Supp. of Pls.' Resp. in Opp'n to Defs.' Partial Mot. to Dismiss* (ECF No. 47); *Notice of Suppl. Authority in Supp. of Pls.' Resp. in Opp'n to Defs.' Partial Mot. to Dismiss* (ECF No. 48).

II. FACTUAL BACKGROUND

A. The Parties

1. The Plaintiffs

The Roman Catholic Bishop of Portland is a Maine corporation that is the legal entity representing the Roman Catholic Diocese of Portland (Diocese). *Compl.* ¶ 17. The Diocese is part of the Roman Catholic Church, and it operates schools throughout Maine. *Id.*

St. Dominic Academy (St. Dominic) is a Roman Catholic school with campuses in Lewiston, Maine and Auburn, Maine that offers education from pre-kindergarten through twelfth grade. *Id.* ¶¶ 18, 40. It is an educational ministry of the Diocese, and the

only Catholic high school operated by the Diocese in Maine. *Id.* ¶¶ 18, 46.

Keith and Valori Radonis are residents of Whitefield, Maine. *Id.* ¶ 19. They have three children: K.Q.R., age 16; L.R.R., age 15; and L.T.R., age 10. *Id.* K.Q.R. and L.R.R. are currently eligible to receive town tuitioning, as Whitefield has no public high school. *Id.* ¶¶ 19, 51. L.T.R. will become eligible to receive town tuitioning upon entering the ninth grade in the 2027-2028 school year. *Id.* ¶ 19.

Both Mr. Radonis and Ms. Radonis were raised in Catholic homes, and they strive to be faithful Catholics and to raise their children according to their Catholic faith. *Id.* ¶ 52. They believe that they have made a covenant with God to have and raise children according to the Catholic faith, that it is their religious responsibility as parents to plant, nurture, and cultivate their children's faith, and that a Catholic education is the best way to create a foundation of faith for their children. *Id.*¶¶ 58-59.

Before the Radonis family moved to Maine, Ms. Radonis homeschooled K.Q.R. and L.R.R. using a Catholic curriculum. *Id.* ¶ 60. Upon moving to Maine, Mr. Radonis and Ms. Radonis enrolled their children at St. Michael School (St. Michael), a Catholic school located approximately 30 minutes from the Radonis home. *Id.* ¶¶ 61-62.

L.T.R. currently attends St. Michael. *Id.* ¶ 62. K.Q.R. and L.R.R. currently attend high school at Erskine Academy in China, Maine, approximately 25 minutes from the Radonis home. *Id.* ¶ 63. K.Q.R. and L.R.R.'s tuition at Erskine Academy is paid for by the tuitioning program. *Id.* ¶ 64. However, if St.

Dominic were part of the tuitioning program, Mr. Radonis and Ms. Radonis would have used their town tuitioning dollars to send K.Q.R. and L.R.R. to St. Dominic for high school. *Id.* Mr. and Ms. Radonis would like to send L.R.R. to St. Dominic, where she has been accepted, and to send L.T.R. to St. Dominic once he completes eighth grade at St. Michael. *Id.* ¶¶ 65, 67.

2. The Defendants

A. Pender Makin is the Commissioner of the Maine Department of Education. *Id.* ¶ 20. Jefferson Ashby, Edward David, Julie Ann O'Brien, Mark Walker, and Thomas Douglas are members 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." *Id.* ¶¶ 21-25; 5 M.R.S. § 4566. All six Defendants are sued in their personal and official capacities. *Compl.* ¶¶ 20-25.

Commissioner Makin and the MHRC Commissioners both have authority to issue rules implementing the education provisions of the Maine Human Rights Act (MHRA). *Id.* ¶ 160. Under the MHRA, the MHRC is further empowered to investigate "alleged infringements upon human rights and personal dignity." *Id.* ¶ 161; 5 M.R.S. § 4566. A private party may file a complaint with the MHRC, which the MHRC will then investigate and, potentially, file suit in Maine Superior Court. *Compl.* ¶ 161; 5 M.R.S. §§ 4611-4612. Alternatively, private parties may independently file suit under the MHRA in Maine Superior Court. *Compl.* ¶ 161; 5 M.R.S.

§ 4621.

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.

To participate in the tuitioning program, a school need not be located in Maine. *Compl.* ¶ 74. Maine has paid tuition to schools in Vermont, New Hampshire, Massachusetts, Connecticut, New York, Pennsylvania, Virginia, Michigan, Colorado, Utah, California, and Quebec, Canada. *Id.* ¶ 75.

In addition to the tuitioning program for elementary and secondary schools, Maine operates grant programs for students attending postsecondary

institutions. *Id.* ¶ 77. Such grants can be used at any public or private postsecondary institution in Maine, including those that are religious. *Id.*

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. *Id.* ¶ 72. To receive the tuitioning benefit, however, the parents must select an "approved" school satisfying certain statutory criteria. *Id.* 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 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*, 142 S. Ct. 1987, 1994-95 (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." *Carson*, 142 S. Ct. at 2002. Specifically, the Supreme Court held that the schools

favored by the families in *Carson* "are disqualified from this generally available benefit 'solely because of their religious character.'" *Id.* at 1997 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (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). Since *Carson* was decided, the Maine Department of Education has understood that private schools cannot be barred from receiving public funds solely because they are sectarian. *Aff. of Megan Welter* ¶ 4 (ECF No. 26) (*Welter Aff.*).

3. The Tuitioning Program After *Carson*

During the 2022-2023 school year, Cheverus High School (Cheverus) was the only sectarian school to participate in the tuitioning program. *Welter Aff.* ¶¶ 5, 7, 9. Cheverus is a Catholic school that is owned and operated by the Jesuits. *Pls.' Reply*, Attach. 1, *Decl. of Marianne Pelletier* ¶ 4 (*Pelletier Decl.*). It is operationally independent from the Diocese and establishes its own policies regarding admissions, hiring, curriculum, and student conduct. *Id.* ¶¶ 5-6.

The Maine Department of Education processed Cheverus' application in the same manner that it processes applications from any private school seeking tuitioning approval for the first time. *Welter Aff.* ¶ 6. During the 2022-2023 school year, five students attended Cheverus at public expense through the tuitioning program. *Id.* ¶ 8.

C. The Maine Human Rights Act's Antidiscrimination Provisions

1. The Maine Human Rights Act's Unlawful Educational Discrimination Provisions

The MHRA contains certain antidiscrimination provisions that apply to "educational institutions," defined as "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." *See* 5 M.R.S. § 4553(2-A) (defining "educational institution"); *id.* § 4602 (discussing "unlawful educational discrimination"). 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. *Id.* §§ 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).

The MHRA's definition of "educational institution" does not include private postsecondary institutions, *id.* § 4553(2-A), and although schools outside Maine can participate in the tuitioining program, the MHRA does not apply extraterritorially. *Compl.* ¶ 128; *Judkins v. Saint Joseph's Coll. of Me.*, 483 F. Supp. 2d 60, 65-66 (D. Me. 2007). When the Plaintiffs filed their complaint,

the MHRA also exempted single-sex schools, even those participating in the tuitioning program, from its prohibitions on discrimination based on race, color, ancestry, national origin, sex, religion, sexual orientation, and gender identity. *Compl.* ¶ 129; *see Defs.' Opp'n* at 5 (acknowledging the omission but suggesting it was likely "inadvertent"). On June 15, 2023, however, 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 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.

2. The 2021 Amendments to the Maine Human Rights Act

While *Carson* was pending, the Maine Legislature enacted several amendments to the MHRA. *See Compl.* ¶ 106; 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). Prior to the enactment of Chapter 366, the MHRA's educational antidiscrimination provisions did not include gender identity, religion, ancestry, or color as protected classes but did include a provision stating 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." *See Compl.* ¶ 131; 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." *See Compl.* ¶¶ 107-09, 132; P.L. 2021, ch. 366, § 19, 2021 Me. Laws 767; 5 M.R.S. § 4602(5)(C). Chapter 366 provides no exemptions from the prohibition against religious discrimination and further requires that "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." *See Compl.* ¶¶ 107, 109, 132; P.L. 2021, ch. 366, § 19, 2021 Me. Laws 767; 5 M.R.S. § 4602(5)(D).

The Plaintiffs view Chapter 366 as an "attempt to keep religious schools out of the [tuitioning] program" in the absence of the sectarian exclusion invalidated in *Carson*. *Compl.* ¶ 106. As evidence, they point to Maine's statements during the *Carson* litigation, which "repeatedly described the purpose of the sectarian exclusion using language strikingly similar to the new prohibitions in [Chapter 366]." *Id.* ¶ 111.

The Plaintiffs further support their characterization of Chapter 366 by citing two press releases issued by Maine's Attorney General. The first, issued on the day the Supreme Court heard oral argument in *Carson*, reads in part:

> Schools that require students to undergo religious instruction are excluded [from the tuitioning program] because the education they provide is not equivalent to a public education.
>
> . . .
>
> 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 Maine[']s 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.
>
> . . .
>
> 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.

Id. ¶¶ 114-16. The second press release, issued the day the Supreme Court issued its decision in *Carson*, further states, in relevant part:

> "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.

Id. ¶ 119.

The Plaintiffs also point to a June 26, 2022 tweet by then-Speaker of the Maine House of Representatives Ryan Fecteau. *Id.* ¶ 122. 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.*

Finally, the Plaintiffs cite an essay by U.C. Davis School of Law Professor Aaron Tang titled, "There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It," which appeared in the *New York Times* on June 23, 2022, two days after the Supreme Court decided *Carson*. *Id.* ¶ 120. In the essay, Professor Tang states:

> Let's start with the Carson case. Anticipating this week's decision, Maine lawmakers enacted a crucial amendment to the state's anti-discrimination law last year in order to counteract the expected ruling.
>
> . . .
>
> The legislative fix made by Maine lawmakers offers a model for lawmakers elsewhere who are alarmed by the court's aggressive swing to the right. Maine's example shows that those on the losing end of a case can often outmaneuver the court and avoid the consequences of a ruling.

Id. ¶ 121.

D. The Maine Human Rights Act's Unlawful Employment Discrimination Provisions

The MHRA's employment discrimination provision, which the Plaintiffs also challenge, states that it is a violation of the Act "[f]or any employer to fail or refuse to hire or otherwise discriminate

against any applicant for employment because of race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry, national origin or familial status." *Id.* ¶ 152; 5 M.R.S. § 4572(1)(A). However, the Act also clarifies that the employment discrimination provisions do not:

> [P]rohibit 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.

5 M.R.S. § 4573-A(2).

E. St. Dominic Academy's Tuitioning Eligibility and Policies

1. Diocesan Schools in Maine

Education is central to the Catholic faith, and diocesan bishops are responsible for ensuring that Catholic schools are established in a particular area. *Compl.* ¶¶ 30-31. The bishop is also responsible for overseeing the operations of local Catholic schools. *Id.* ¶ 31. The Diocese began founding Catholic schools in Maine over 100 years ago. *Id.* ¶ 32. Today, it operates eight schools, including St. Dominic, which collectively educate more than 2,100 students. *Id.*

F. St. Dominic Academy's Tuitioning Eligibility

Except for the provisions of the MHRA challenged here, St. Dominic meets or is capable of meeting the requirements to become approved for tuitioning purposes. *Id.* ¶ 18. St. Dominic has received Basic School Approval from the state of Maine. *Id.* ¶ 45. But for the challenged provisions, St. Dominic would apply to participate in the tuitioning program, and the school believes it would be approved. *Id.* ¶ 124.

Because St. Dominic is the only Catholic high school operated by the Diocese in Maine, it not unusual for students to commute from 30 to 60 minutes away to attend St. Dominic. *Id.* ¶ 46. Several towns that participate in the tuitioning program are within an hour's drive of St. Dominic, including Whitefield, Raymond, Fayette, Chelsea, Alna, Westport, Windsor, Vassalboro, Dresden, West Bath, and Hanover. *Id.* ¶ 47. Some of these towns are near Augusta, where St. Dominic has operated a bus for students in the past and plans to do so again when enrollment warrants it. *Id.* ¶ 48.

Students eligible for town tuitioning have attended St. Dominic in recent years, and St. Dominic expects more to enroll in the future. *Id.* ¶ 49. According to St. Dominic, additional families would use tuitioning funds to send their children to St. Dominic if the school were approved. *Id.*

G. St. Dominic Academy's School Policies

The Diocese's mission in operating Catholic schools is "to strengthen the Catholic Church and to create an environment in which the faith is preserved, nourished, shaped and communicated" so

that "students will become faith-filled Christians" who contribute to the "Church and communities." *Id.* ¶ 33.

Because Catholic schools are part of the Catholic Church's evangelizing mission, Diocese policy provides that "[s]tudents of other religious beliefs should be admitted whenever possible." *Id.* ¶ 34. However, to ensure that Catholic schools continue to help Catholic parents give their children a Catholic education, the Diocese gives preference to Catholic students in both admissions and financial aid. *Id.* Further preference is given to members of the parish to which the school belongs. *Id.*

For all schools, the Diocese only admits students, whether Catholic or non-Catholic, who "understand, accept, and [are] willing to support the mission and goals of the school," and who agree to attend religion classes, Mass, and other religious activities." *Id.* ¶ 35. Students at St. Dominic must also agree to uphold "Catholic Christian morals." *Id.* ¶ 36.

The Diocese has adopted the following nondiscrimination policy for all its schools:

> Maine Catholic Elementary and Secondary Schools within the Roman Catholic Diocese of Portland admit students of any race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the school. They do not discriminate on the basis of race, color, national and ethnic origin in administration of their educational policies, admissions policies, scholarship and loan programs, and athletic and other school

administered programs.

Id. ¶ 37.

A primary characteristic of Catholic schools is a "concern for teaching the integration of faith, culture, and life." *Id.* ¶ 38. Because the "personnel of a Catholic school are critical to achieving this ministry," each school employee shares the responsibility to form students in the faith by the knowledge they share and by the faith they model in action. *Id.* Teachers and other employees are evaluated based on how they maintain and promote the Catholic identity and mission of the school. *Id.* ¶ 39. In addition, as a condition of employment, all employees must "[l]ive personal lives in such a way that fundamental teachings of the Catholic Church are upheld." *Id.*

III. THE PARTIES' POSITIONS

A. The Plaintiffs' Motion for Preliminary Injunction

In their motion, the Plaintiffs assert that "[a]fter *Carson*, it is clearly established that excluding religious schools from Maine's tuition assistance program is unconstitutional," and "[w]hether Maine accomplishes this through the flat ban struck down in *Carson* or through the web of entangling laws enacted in *Carson*'s shadow, Maine's rules are unconstitutional." *Pls.' Mot.* at 1. According to the Plaintiffs, "Maine's ongoing efforts to exclude religious schools from the program violate Plaintiffs' First Amendment rights in nine different ways." *Id.* at 5.

The Plaintiffs initially argue the challenged provisions of the MHRA violate the Free Exercise Clause in four different ways. First, in their view, "Maine's rules violate the Free Exercise Clause by targeting religion," *id.*, because "each piece of Maine's new regulatory scheme is intended to prevent religious schools like St. Dominic from participating in Maine's program, and actually does so." *Id.* at 9. Second, the Plaintiffs submit that "Maine's rules violate the Free Exercise Clause by re-imposing the same exclusion from a public benefits program invalidated in *Carson*." *Id.* at 10. Third, the Plaintiffs contend that "Maine's rules violate the Free Exercise Clause because they are not generally applicable." *Id.* at 12. Finally, the Plaintiffs maintain that "Maine's rules violate the Free Exercise Clause by infringing on the rights of parents to direct the religious education of their children." *Id.* at 12.

Next, the Plaintiffs submit that the provision of the MHRA requiring "equal religious expression" runs afoul of the Free Speech Clause because "it compels speech by religious schools," *id.* at 13, and "violates the Free Speech Clause right of expressive association." *Id.* at 14.

Shifting away from the Free Speech and Free Exercise clauses, the Plaintiffs further contend that the challenged MHRA provisions violate three other First Amendment doctrines. According to the Plaintiffs, "Maine's rules violate the Establishment Clause because they invite excessive entanglement under *Carson*," thereby allowing "Maine officials to condone the actions of religious schools who have beliefs the government agrees with

and sanction those who do not." *Id.* at 15. In addition, the Plaintiffs suggest that "Maine's rules violate the First Amendment right of religious autonomy." *Id.* at 17. Finally, the Plaintiffs submit that "Maine's rules impose unconstitutional conditions on the [tuitioning] program." *Id.* at 18.

In light of these alleged constitutional infirmities, the Plaintiffs declare that "Maine's rules cannot satisfy strict scrutiny" because "they are not narrowly tailored to serve a compelling government interest." *Id.* at 19. In particular, the Plaintiffs dispute Maine's asserted interest "in preventing discrimination in education" as being underinclusive. *Id.* Accordingly, the Plaintiffs submit that "Maine's interests [do not] justify its rules." *Id.*

The Plaintiffs conclude with a discussion of the other preliminary injunction factors, which they believe weigh in their favor. *Id.* at 19-20. The Plaintiffs assert that they are "suffering and will continue to suffer irreparable harm due to the ongoing violation of their First Amendment rights." *Id.* at 20. In addition, they submit that the Radonis family is irreparably harmed "by the loss of educational opportunities for L.R.R.," who they wish to enroll at St. Dominic. *Id.* Finally, the Plaintiffs maintain that the balance of equities favors injunctive relief and that the public interest is best served by protecting First Amendment rights. *Id.*

B. The Defendants' Opposition

In their opposition, the Defendants initially submit that the Court should not reach the merits of the Plaintiffs' claims. *Defs.' Opp'n* at 7-9. The Defendants assert that under the doctrine of

Pullman abstention, the "Court should [] abstain from deciding this case, at least until Maine courts have had the opportunity to interpret the new amendments to the MHRA." *Id.* at 7. Further, the Defendants suggest this case is not ripe because "the extent to which the MHRA applies to St. Dominic should it accept public funds is a purely hypothetical issue," and the harms alleged by the Plaintiffs are based on contingent future events. *Id.* at 8-9.

The Defendants next argue that if the Court does reach the merits, it should conclude that the challenged provisions of the MHRA do not violate the Plaintiffs' rights under the Free Exercise Clause. *Id.* at 9-15. In the Defendants' view, the Plaintiffs "fail to demonstrate that application of the MHRA to St. Dominic would have any meaningful impact on it, much less burden or interfere with its religious practices." *Id.* at 9. "Even if there were some burden on Plaintiffs' religious practices," the Defendants contend the challenged provisions are both neutral and generally applicable. *Id.* at 11. Regarding neutrality, the Defendants maintain that the "2021 amendments to the MHRA were neither designed to impinge on religious practices nor motivated by any animus toward religion" and instead "made the educational provisions of the MHRA consistent with those addressing employment and housing." *Id.* at 13. With respect to general applicability, the Defendants dispute the Plaintiffs' arguments that the challenged provisions are not generally applicable because the MHRA does not apply extraterritorially or to private postsecondary institutions. *Id.* at 14. Finally, the Defendants submit that "[r]equiring private religious schools that accept public funds to comply with the MHRA

does not infringe on the rights of parents to raise their children and direct their religious upbringing." *Id.* at 16.

Turning to the Plaintiffs' claims under the Free Speech Clause, the Defendants aver that the challenged provisions do not compel speech. *Id.* at 17-18. Nor, in the Defendants' view, do the challenged provisions violate the Plaintiffs' right of expressive association. *Id.* at 18. "[E]ven if there is some interference with Plaintiffs' associational rights," the Defendants argue, "it is outweighed by the State's interest in ensuring that schools educating students at public expense do not discriminate." *Id.*

Regarding the Plaintiffs' remaining First Amendment claims, the Defendants initially deny that the challenged provisions result in excessive entanglement. *Id.* at 19. They also suggest the Plaintiffs' religious autonomy argument is unavailing because it only references the MHRA's unlawful employment discrimination provisions, yet "St. Dominic is free to employ only Catholics who subscribe to the Bishop's religious tenets." *Id.* Finally, with respect to the Plaintiffs' unconstitutional conditions argument, the Defendants submit that "[b]ecause the MHRA is a neutral and generally applicable law, it does not need to have any exceptions for religious schools (apart from exceptions to protect some employment practices)." *Id.* at 20. In the Defendants' view, "allow[ing] religious schools to exempt themselves from the MHRA's educational provisions by not accepting public funds . . . is not an unconstitutional condition. It is a benefit that give[s] religious

schools an option if their religious beliefs prevent them from complying with the MHRA." *Id.* at 20-21.

Concluding their discussion of the merits, the Defendants argue that the challenged provisions survive strict scrutiny. *Id.* at 21-23. The Defendants aver that "[t]here can be no dispute that states have a compelling interest in eliminating discrimination," and "[s]tates have an even greater interest in ensuring that publicly-funded institutions do not discriminate." *Id.* at 21. In the Defendants' view, this compelling interest "outweighs whatever interest St. Dominic might have in engaging in discrimination." *Id.* at 22.

Finally, the Defendants submit that the remaining preliminary injunction factors weigh in their favor. *Id.* at 23-24. The Defendants characterize the Plaintiffs' alleged irreparable harm as "speculative," and suggest that "even if the Court were to enjoin Defendants, that would not prevent the harm Plaintiffs are claiming." *Id.* The Defendants conclude by submitting that the balance of equities favors them, and that "the public interest would suffer if [their] efforts to eliminate discrimination were impeded." *Id.* at 24.

C. The Plaintiffs' Reply

Beginning with the Defendants' abstention arguments, the Plaintiffs contend that "*Pullman* abstention does not apply" because "Plaintiffs' claims do not depend on any ambiguous provisions of state law." *Pls.' Reply* at 2. The Plaintiffs go on to assert that the case "is ripe." *Id.* at 3. This is so, they continue, because "St. Dominic [] has concrete plans to engage in proscribed activity that it believes to be

constitutionally protected." *Id.* (internal quotations omitted).

Turning to their free exercise arguments, the Plaintiffs contend that Chapter 366 targets religion because "Maine never disputes—and thereby concedes—that [Chapter 366 was] keyed to practices of religious schools." *Id.* at 4. They further suggest the Defendants' opposition does not "address Plaintiffs' argument that the Act reimposes the non-sectarian exclusion that *Carson* struck down, thus conceding the merits on this claim." *Id.* Regarding general applicability, the Plaintiffs submit that the fact that the MHRA does not apply to out-of-state or private postsecondary institutions "undermines Maine's asserted interests in the same way that an exemption for Plaintiffs would." *Id.* at 5. Finally, the Plaintiffs say that the provisions at issue infringe on the right of parents to direct the religious education of their children because "[c]omplying with the Act interferes with St. Dominic's ability to provide the Radonis' children with a Catholic education." *Id.* at 6.

With respect to their free speech claims, the Plaintiffs reiterate that the provision of the MHRA requiring "equal religious expression" compels speech by religious schools and forces them "to modify their religious message by allowing all other religious expression on campus." *Id.* The Plaintiffs further submit that this provision also "burdens Plaintiffs' association by precluding the Radonises from using town-tuitioning funds at St. Dominic unless St. Dominic is willing to modify its Catholic message by allowing an equal amount of non-Catholic religious expression at its school." *Id.* at 7.

The Plaintiffs then shift to their other First Amendment arguments. *Id.* at 7-9. In their view, it "is difficult to imagine a more entangling inquiry than one which asks how much non-Catholic expression a Catholic school must permit." *Id.* at 8. Despite the Defendants' concessions regarding the MHRA's unlawful employment discrimination provisions, the Plaintiffs maintain they are entitled to a preliminary injunction in this respect based on Maine's prior statements. *Id.* Moreover, regarding unconstitutional conditions, the Plaintiffs argue that "*Carson* cannot be sidestepped by labeling participation [in the tuitioning program] by religious schools an 'option' and a 'benefit' such that Maine can dictate the details of who may carry out a school's religious mission and how they may do so." *Id.* at 9.

In the Plaintiffs' view, their identified constitutional violations "mean[] that Maine must pass strict scrutiny, which it cannot do." *Id.* According to the Plaintiffs, the Supreme Court "has repeatedly held that when an antidiscrimination law is applied in a way that violates First Amendment rights, the Constitution must prevail." *Id.* at 10. The Plaintiffs again dispute the Defendants' identified interests and suggest that "Maine often chooses not to pursue [these interests] at all, as when giving money to out of state schools and in-state private colleges not covered by the Act." *Id.*

Finally, the Plaintiffs reiterate that the remaining preliminary injunction factors favor them, and that "preventing Defendants from enforcing the challenged provisions would provide significant relief to Plaintiffs." *Id.*

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 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. "[T]rial 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))).

1. The Defendants' Arguments Against Reaching the Merits

Though the Plaintiffs bear the burden of demonstrating likelihood of success, the Defendants argue the Court should not even reach the merits of the preliminary injunction for two reasons. First, the Defendants submit that the Court should abstain from deciding the merits under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), on the ground that the merits involve uncertain issues of state law. Further, the Defendants contend that this dispute is not ripe. The Court addresses both bases for bypassing the merits.

a. *Pullman* Abstention

Under the abstention doctrine announced by the United States Supreme Court in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), "declining to exercise jurisdiction is warranted where (1) substantial uncertainty exists

over the meaning of the state law in question, and (2) settling the question of state law will or may well obviate the need to resolve a significant federal constitutional question." *Batterman v. Leahy*, 544 F.3d 370, 373 (1st Cir. 2008); *see also* 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE § 4242 (3d ed. 2007) (noting that under *Pullman* abstention, "a federal court may, and ordinarily should, refrain from deciding a case in which state action is challenged in federal court as contrary to the federal constitution if there are unsettled questions of state law that may be dispositive of the case and avoid the need for deciding the constitutional question" (footnote omitted)). In *Pullman* itself, for example, the Supreme Court held that abstention was appropriate because a "substantial" constitutional issue—a potential Fourteenth Amendment violation—could be avoided if a Texas state court concluded that the state's railroad commission lacked the authority under state law to promulgate the order at issue. 312 U.S. at 498-99, 501.

In the Defendants' view, *Pullman* abstention is appropriate here because "no state court has yet interpreted [Chapter 366], much less how [it] would be applied to a religious school." *Defs.' Opp'n* at 7. Accordingly, the Defendants say it is unclear whether Chapter 366 would actually lead to some of the consequences envisioned by the Plaintiffs. *Id.* The Defendants submit that state court interpretations of Chapter 366 would "better focus the constitutional inquiry" and could render it "unnecessary to decide the constitutional issues raised by Plaintiffs." *Id.*

The Plaintiffs disagree, contending that the Defendants' "novel" abstention argument "fails because Plaintiffs' claims do not depend on any ambiguous provisions of state law." *Pls.' Reply* at 2. The Plaintiffs further argue that any state court interpretation of Chapter 366 would not resolve all the constitutional issues presented, and they suggest that the "only ambiguity Maine points to is whether the Act will be interpreted to burden Plaintiffs' religious exercise in each and every way that Plaintiffs identify." *Id.* (footnote omitted). In the Plaintiffs' view, "Maine concedes that the Act will burden Plaintiffs in at least some ways, and that is enough." *Id.* (citation omitted). The Court concludes the Plaintiffs have the better argument.

In cases subsequent to *Pullman*, the Supreme Court has emphasized that abstention is appropriate only if a state court interpretation could resolve the constitutional issues presented and the state law at issue is ambiguous. *Wisconsin v. Constantineau*, 400 U.S. 433, 437-39 (1971); *see also* WRIGHT, MILLER, COOPER & AMAR, *supra*, § 4242 ("Thus abstention is not indicated if the state law is clear on its face, or if its meaning has already been authoritatively decided by the state courts, or if the constitutional issue would not be avoided or changed no matter how the statute is construed" (footnotes omitted)). Indeed, "[w]here there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." *Constantineau*, 400 U.S. at 439.

Here, the Defendants do not point to any ambiguity in the challenged provisions of the MHRA, nor do they demonstrate how the interpretation of

these statutes by a Maine state court would obviate the need to reach the constitutional issues raised by the Plaintiffs. Instead, the Defendants merely suggest that a state court interpretation would further illuminate the scope of the challenged provisions, thereby "better focus[ing] the constitutional inquiry." *Defs.' Opp'n* at 7. As the Plaintiffs point out, however, the only ambiguity implicated by this argument "is whether the Act will be interpreted to burden Plaintiffs' religious exercise in each and every way that Plaintiffs identify." *Pls.' Reply* at 2. This is not sufficient ambiguity under *Pullman*, as the Supreme Court has explained that the abstention doctrine should not be applied so expansively as to obscure federal courts' jurisdiction to decide federal constitutional questions, even when those questions are "enmeshed with state law." *Constantineau*, 400 U.S. at 437-39. As the Defendants have not adequately shown how the interpretation of the challenged provisions by Maine state courts would resolve the constitutional issues presented, the Court rejects their *Pullman* abstention argument.

b. Ripeness

The United States Supreme Court has 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 (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; and *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 242-45 (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." *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999). "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.*

The Defendants contend that this case is not ripe because "the extent to which the MHRA applies to St. Dominic should it accept public funds is a purely hypothetical issue." *Defs.' Opp'n* at 8. The Defendants point out that St. Dominic "has not yet applied to participate in the tuitioning program," and they further suggest that "even if it were to participate and be accepted, a claim would arise only if it then allegedly violated the MHRA and the aggrieved person or a staff member of the MHRC were to make a charge of discrimination." *Id.* According to the Defendants, that "this case is not ripe is further evidenced by the fact that" Cheverus, another Catholic high school, "participated in the tuitioning program for a full school year, and Plaintiffs do not claim that any charge of discrimination was made (or even threatened) against that school or that the school had to curtail any of its religious practices." *Id.* at 9.

The Plaintiffs, on the other hand, maintain that the "lawsuit is ripe." *Pls.' Reply* at 3. They argue that "the possibility of enforcement through individual complaints ma[kes] the likelihood of prosecution greater, not less" and that "the existence of a valid legal defense does not defeat ripeness." *Id.* (emphasis omitted). The Plaintiffs further represent that St. Dominic is preparing to apply for the tuitioning program but intends to continue engaging in activities that are arguably prohibited by the MHRA. *Id.* In other words, the Plaintiffs argue that St. Dominic "has concrete plans to engage in proscribed activity that it believes to be constitutionally protected." *Id.* (internal quotations omitted).

The Court finds *Whitehouse* instructive and agrees with the Plaintiffs. 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.

Like the plaintiff in *Whitehouse*, the Plaintiffs here have demonstrated their "concrete plans to engage immediately (or nearly so) in an arguably proscribed activity." *Id.* at 33. St. Dominic 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 St. Dominic. *Compl.* ¶¶ 5, 15. However, the school believes that some of its policies and practices conflict with the MHRA, putting it at risk of enforcement actions should it participate in the tuitioning program.

For example, according to the Plaintiffs, because the Catholic faith views parents as the primary educators of their children, St. Dominic could not refer to a student using their preferred name and pronouns over the objections of the

student's parents. *Id.* ¶¶ 140, 143. Likewise, St. Dominic would not discipline students and staff members who, after reflecting on the teachings of the Pope, decide they cannot use a student's preferred pronouns that conflict with the student's biological sex. *Id.* ¶¶ 145-46. Both these policies potentially violate the MHRA's prohibitions sexual orientation and gender identity discrimination. *See* Me. Hum. Rts. Comm'n, Interpretation of the Education Provisions of the MHRA 3-4 (2016), https://perma.cc/D5Z3-PMP8 (noting that if a student and their parent or guardian "do not agree with regard to the student's sexual orientation, gender identity, or gender expression, the educational institution should, whenever possible, abide by the wishes of the student," and "a pattern of refusal to acknowledge a student's gender identity by using their chosen name and pronouns may be considered to constitute such a violation").[2] While the Defendants do not outright concede that St. Dominic's policies violate the MHRA, they do acknowledge the possible conflict. *See Defs.' Opp'n* at 11 ("It is not clear how this guidance would apply to St. Dominic, or whether a state court would even agree with the guidance").

In a similar vein, St. Dominic, like all Diocesan schools, places some limits on students' religious expression. *Compl.* ¶ 135. Specifically, St. Dominic does not allow students to publicly condemn, mock, or denigrate Catholic beliefs or publicly seek to dissuade other students from believing in them. *Id.* Further, Diocesan schools only admit students who

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[2] This document was cited in the Plaintiffs' motion for preliminary injunction. *See Pls.' Mot.* at 16 n.13.

"understand, accept, and are willing to support the mission and goals of the school." *Id.* ¶ 35. Accordingly, St. Dominic does not believe it can comply with the MHRA's prohibition on religious discrimination or the statute's requirement that "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." *Id.* ¶ 136; 5 M.R.S. § 4602(1), (5)(D). Again, the Defendants do not contest that these policies and practices may violate the MHRA. *See Defs.' Opp'n* at 8-9.

Instead, the Defendants posit that the Plaintiffs' claims are unripe because they are based on a pyramid of hypotheticals, with fear of sanction under the MHRA being dependent on applying for tuitioning, being approved, engaging in activity arguably proscribed under the MHRA, and then being charged, found liable, and punished by the MHRC. *Id.* at 8. In essence, the Defendants attempt to avoid *Whitehouse* by claiming that "[i]t is not clear that these [potential violations] would ever happen or, if they did, whether they would constitute violations of the MHRA." *Id.* at 9. 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 St. Dominic must first engage in arguably proscribed activity and then face a MHRC complaint.

But the only way for St. Dominic to truly avoid liability is by refraining from acting. Once St. Dominic is approved for tuitioning, it could face any number of situations that would force it to either compromise its religious beliefs or violate the statute and potentially face civil monetary penalties as well

as a cease-and-desist order.[3] Therefore, St. Dominic is in the same position as the *Whitehouse* plaintiff: do nothing or give up control over 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.

By demonstrating an intent to apply to participate in the tuitioning program while maintaining policies that arguably violate the MHRA, the Plaintiffs have shown that they have "concrete plans to engage immediately (or nearly so) in an arguably proscribed activity." *See Whitehouse*, 199 F.3d at 33. The record does not reveal why "resolution of the apparent conflict should await further factual development." *Id.* at 34. Instead, the dispute presented offers a legal question of whether, after *Carson*, the state may require religious institutions with faith-motivated policies that arguably violate certain provisions of the MHRA to comply with those 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.*; *see also Project Veritas Action Fund v.*

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[3] Specifically, if the Diocese or St. Dominic violate the MHRA, they 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(2)(B)(1). If the asserted violation involves employment, the Superior Court is further authorized to order reinstatement of the victim with or without back pay. *Id.* § 4613(2)(B)(2).

Rollins, 982 F.3d 813, 830 (1st Cir. 2020) ("So long as th[e] uncertainty 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 584, 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 (first and second alterations in original) (internal citations and quotations omitted).

The Court reaches the same conclusion here. In *Carson*, the Supreme Court struck down the sectarian exclusion, holding that religious schools "are disqualified from this generally available benefit 'solely because of their religious character,'" 142 S. Ct. at 1997 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021), and that "[b]y 'condition[ing] the availability of benefits' in that manner, Maine's tuition assistance program . . . 'effectively penalizes the free

exercise' of religion." *Id.* (first alteration in original) (quoting *Trinity Lutheran*, 137 S. Ct. at 2022). St. Dominic now seeks to avail itself of the program and avers that "[w]ere it not for [Chapter 366's] amendments to the Act's education provisions and Defendants' reinterpretations of the Act's employment provisions, St. Dominic and other Diocesan schools would apply to be approved for tuition purposes and, on information and belief, would be approved." *Compl.* ¶ 124.

Setting aside—for the moment—the constitutionality of the challenged provisions, St. Dominic's fear of MHRA enforcement is eminently reasonable. On the day the Supreme Court heard oral argument in *Carson*, the Maine Attorney General issued a press release asserting that "[s]chools 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." *Id.* ¶ 115. Likewise, on the day *Carson* was decided, the Attorney General issued another statement cautioning 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.* ¶ 119. Although the Attorney General's press releases focused on the schools in *Carson*, his statements concerning compliance with the MHRA applied to all religious schools. As the Maine Attorney General is the "chief law officer of the State," *Withee v. Lane & Libby Fisheries Co.*, 113 A. 22, 23 (Me. 1921), his statements could reasonably cause the Plaintiffs to conclude that he would pursue all religious schools

for asserted violation of the MHRA's antidiscrimination provisions in light of the sectarian exclusion's invalidation.

In sum, St. Dominic may now apply for tuitioning, but its policies plainly run afoul of the MHRA's antidiscrimination provisions. St. Dominic 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 (first alteration in original) (internal quotation omitted); *see also Trinity Lutheran*, 137 S. Ct. at 2022 ("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 (1978) (plurality opinion))). The Plaintiffs have satisfied both the fitness and hardship prongs, and their claims are ripe for judicial review.[4]

[4] The Defendants' insistence that this case is unripe because Cheverus has participated in the tuitioning program for a full school year without facing any MHRC complaints or, presumably, compromising its religious beliefs is misplaced. Cheverus is a Jesuit, not a Diocesan, high school, and it establishes its own policies regarding admission, hiring, curriculum, and student conduct. *Pelletier Decl.* ¶¶ 4-5. Accordingly, the fact that Cheverus' policies have not yet resulted in a MHRC complaint sheds no light on whether St. Dominic's policies arguably violate the MHRA.

2. The Employment Discrimination Provisions of the Maine Human Rights Act

Having concluded that it is proper to reach the merits, the Court initially discusses the Plaintiffs' challenge to certain employment discrimination provisions in the MHRA. Pursuant to 5 M.R.S. § 4572(1)(A), it is unlawful employment discrimination "[f]or any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment" because of, among other things, "sexual orientation or gender identity." The Plaintiffs contend that applying this provision to St. Dominic would "strip" the school of its religious hiring rights. *Pls.' Mot.* at 18; *see also Compl.* ¶ 236 (arguing that application of the MHRA's employment discrimination provisions to St. Dominic would infringe the school's right to "make employment decisions based on [its] religious beliefs free from government interference").

As the Court understands it, the argument that the MHRA's employment discrimination provision would be applied to St. Dominic is premised entirely on statements by Maine officials during and immediately following the *Carson* litigation. *See Compl.* ¶¶ 155-58; *Pls.' Mot.* at 17-18. In *Carson*, the Maine Department of Education and Attorney General "took the position that a school that participates in the program forfeits its religious exemption to the sexual orientation and gender identity employment discrimination provisions." *Compl.* ¶ 155; *see also Carson v. Makin*, 401 F. Supp. 3d 207, 209 (D. Me. 2019) (summarizing Maine's argument that if religious schools "receive public

funds, the Maine Human Rights Act will prohibit them from considering sexual orientation in their employment decisions"). Similarly, in 2021, the MHRC submitted a letter to the Maine Legislature taking the position that "once the public funds to which all taxpayers contribute are utilized to subsidize the religious organization, the organization must not discriminate against a group of those taxpayers in its public accommodations, housing or employment." *Letter from Me. Hum. Rts. Comm'n, to Hon. Anne Carney et al.* at 3 (Apr. 20, 2021), https://perma.cc/7B9E-2J2X.[5] Notwithstanding these prior statements, the Court concludes that the MHRA's employment discrimination provisions cannot be applied to strip St. Dominic of its religious hiring rights.[6] Another provision of the MHRA, 5 M.R.S. § 4573-A(2) provides:

This subchapter does not prohibit a religious corporation, association, educational institution or

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[5] This letter was cited by the Plaintiffs in footnote 18 of their motion. *Pls.' Mot.* at 18 n.18.

[6] 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 own 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 right of electing their public teachers, and contracting with them for their support and maintenance.

ME. CONST. art. I, § 3. This state constitutional provision buttresses the Court's view that the state of Maine would face legal challenges if it interfered with St. Dominic's hiring practices.

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.

In their opposition, the Defendants concede that were St. Dominic to participate in the tuitioning program, "it would still be entitled to limit employment of all staff, including teachers, to Catholics conforming to the Bishop's religious tenets." *Defs.' Opp'n* at 9; *see also id.* at 23 (taking the position that all religious schools "are exempt from aspects of the MHRA's employment provisions").

The only relief sought by the Plaintiffs with respect to their employment discrimination challenge is the ability to make employment decisions in a manner already protected by the MHRA. The Plaintiffs represent that "as a condition of employment, all employees must live personal lives in such a way that fundamental teachings of the Catholic Church are upheld." *Compl.* ¶ 39 (internal quotation omitted). Further, the employment handbook for Diocesan schools provides that "[a]ll employees must comply with the teachings of the Roman Catholic Church and . . . [e]mployee conduct and behavior should be consistent with the principles of the Catholic Church." *Id.* ¶ 148. In essence, these policies "require that all applicants and employees conform to the religious tenets" of the Catholic Church, and therefore, they are protected under the

MHRA. *See* 5 M.R.S. § 4573-A(2).

Despite the Defendants' concession and the plain text of the MHRA, the Plaintiffs in their reply ask the Court to enjoin the challenged employment discrimination provisions for two reasons. First, they take issue with the Defendants' statement that St. Dominic can limit employment to "*Catholics* conforming to the Bishop's religious tenets," *see Defs.' Opp'n* at 10 (emphasis supplied), characterizing the reference to Catholics as a "'co-religionist' gloss" that is at odds with the plain text of the MHRA and Supreme Court precedent. *Pls.' Reply* at 8. The Plaintiffs are correct that the plain text of the MHRA allows a religious organization to require *all* applicants and employees to conform to the organization's religious tenets. *See* 5. M.R.S. § 4573-A(2). However, the Plaintiffs appear to read too much into the Defendants' choice of words, as the Defendants elsewhere state that religious organizations are "exempt" from certain of the MHRA's employment discrimination provisions. *See Defs.' Opp'n* at 23. The Court therefore does not read the Defendants' concession as limiting the exemption in 5 M.R.S. § 4573-A(2) to "co-religionists."

The Plaintiffs also suggest that a preliminary injunction is warranted because "Maine asserts that its concession regarding religious tenets only applies so long as the Commission or a future state court *agrees* with those religious tenets." *Pls.' Reply* at 8 (emphasis in original). Here, Plaintiffs are referencing a footnote in the Defendants' opposition, which reads:

Plaintiffs do not claim that homosexuals and

> transgender individuals are unable to conform to the Bishop's religious tenets, and, if they did make such a claim, [it] is not clear whether a state court would conclude that the Bishop's employment actions based on sexual orientation and gender identity are actionable under the MHRA.

Defs.' Opp'n at 20 n.16. This footnote appears to be discussing a hypothetical scenario in which the Diocese takes a negative employment action based on sexual orientation or gender identity against an individual who conformed with the Diocese's religious tenets. However, the Plaintiffs have not asked for an injunction allowing them to take such action; they have only asked for assurances that they may continue to hire individuals who conform to the Diocese's religious tenets. Because the Court is reticent to wade into speculative and potentially complicated constitutional questions, the Court views the parties' dispute over this hypothetical as outside the scope of the present action and declines to address it.

In short, the Plaintiffs have asked that St. Dominic continue to be allowed to limit employment to individuals who conform with the Catholic faith. This practice seems clearly protected by the plain text of the MHRA, and the Plaintiffs offer no legitimate 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.[7] U.S. CONST. art. III, § 2.

3. The Educational Discrimination Provisions of the Maine Human Rights Act

In addition to these employment discrimination provisions, the Plaintiffs challenge two of the MHRA's educational discrimination provisions, both of which were enacted in Chapter 366.[8] First, the Plaintiffs contend that 5 M.R.S. § 4602(1) is unconstitutional as applied to them insofar as it prohibits educational discrimination on the basis of religion, sexual orientation, and gender identity. *Pls.' Mot.* at 6-7; *see also Compl.* ¶ 136 ("Diocesan schools also cannot comply with 5 M.R.S. § 4602(1), which prohibits discrimination on the basis of religion"); *id.* ¶ 137 ("Diocesan schools also cannot comply with 5 M.R.S. § 4602(1), which says that educational institutions may not discriminate on the basis of sexual orientation or gender identity"). Further, the Plaintiffs suggest that 5 M.R.S. § 4602(5)(D) is similarly unconstitutional. *Pls.' Mot.* at 6, 10-11; *see also Compl.* ¶¶ 132-33 ("St. Dominic cannot comply with § 4602(5)(D)'s requirement that

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[7] In light of this conclusion, the Court does not reach the Plaintiffs' argument that the MHRA's employment discrimination provisions violate their First Amendment right of religious autonomy, *see Pls.' Mot.* at 17-18, as doing so would amount to issuing an advisory opinion.

[8] To standardize terminology, the Court uses "Chapter 366" when referring to the challenged educational discrimination provisions as a unit. When referring to only one of the challenged provisions, the Court uses the statutory section for that provision in the Maine code.

'to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing'" (quoting 5 M.R.S. § 4602(5)(D))).

To begin, the Court briefly reviews the statutory scheme. 5 M.R.S. § 4602(1) provides:

> **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;
>
> 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) (emphasis supplied). 5 M.R.S.

§ 4602(5)(D) further provides that nothing in 5 M.R.S. § 4062 "[r]equires 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."

The Plaintiffs launch a variety of constitutional challenges to Chapter 366. *See Pls.' Mot.* at 5 (outlining these theories of relief). The Court begins with their initial theory, which focuses on the Free Exercise Clause.

a. The Free Exercise Clause

"The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, 'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status.'" *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). The Supreme Court has 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 (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 (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.* (alterations in original) (quoting *McDaniel*, 435 U.S.

at 626 (plurality opinion)).

Pursuant to the Free Exercise Clause, the government cannot burden 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." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-22 (2022). On the other hand, "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citing *Emp. Div. v. Smith*, 494 U.S. 872, 878-82 (1990)).

The "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* at 1877. "A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions,'" *id.* (quoting *Smith*, 494 U.S. at 884), or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* Based on the record before it, the Court concludes that the challenged provisions of the MHRA are neutral, but not generally applicable, making them subject to strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) ("A law failing to satisfy [neutrality or general applicability] must be justified by a compelling governmental interest and must be

narrowly tailored to advance that interest").

i. The Burden Imposed by the Challenged Provisions

As a preliminary matter, the Defendants suggest that the Court need not engage in a free exercise analysis because the Plaintiffs "fail to demonstrate that application of the MHRA to St. Dominic would have any meaningful impact on it, much less burden or interfere with its religious practices." *Defs.' Opp'n* at 9. The Defendants submit that the MHRA does not burden the Plaintiffs' religious exercise with respect to admissions because "Plaintiffs provide no evidence that St. Dominic would, in fact, end up denying admissions or scholarships to non-Catholics." *Id.* Further, while the Defendants concede St. Dominic "would need to permit other religious expression" pursuant to the MHRA, they counter that St. Dominic need not endorse these alternative beliefs, and "it is not clear whether St. Dominic currently allows students to express religious views that differ from those of the Bishop or how allowing them to do so would burden Plaintiffs' religious practices." *Id.* at 10. Finally, the Defendants contend that complying with the MHRA's prohibitions on educational discrimination based on sexual orientation and gender identity would not burden the Plaintiffs because "it is difficult to see how allowing students to wear the clothes of their gender identity and addressing them by their preferred names and pronouns interferes with 'parents' primordial and inalienable right and duty to educate their children.'" *Id.* at 11 (quoting *Pls.' Mot.* at 16).

The Plaintiffs respond that the MHRA does

burden them with respect to admissions because St. Dominic gives "preference to Catholic families for admission and scholarships," a practice "which is rooted in the school's religious beliefs." *Pls.' Mot.* at 10. The Plaintiffs also contend that the challenged provisions burden them by "requir[ing] St. Dominic to permit students to express 'dissenting religious views,' no matter how disrespectful towards the Catholic faith," *Pls.' Reply* at 5 (quoting *Defs.' Opp'n* at 10), and giving the MHRC "authority to determine what students 'are called or what they wear' while at the Bishop's schools." *Id.* (quoting *Defs.' Opp'n* at 11).

As it did in a parallel case, *see Crosspoint Church v. Makin*, No. 1:23-cv-00146-JAW, 2024 U.S. Dist. LEXIS 32975, at *39-42 (D. Me. Feb. 27, 2024), the Court finds *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), helpful on the issue of burden. In *Fulton*, 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 (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.

Here, the Plaintiffs represent that St. Dominic cannot comply with the MHRA's prohibition on religious discrimination because the school's preference for Catholic families in admissions and financial aid is rooted in the Catholic faith. *Pls.' Mot.* at 10; *see also Compl.* ¶ 136 ("[B]ecause the

primary purpose of [Catholic] schools is to assist Catholic parents in providing their children with a Catholic education, the Diocese gives preference in both admission and financial aid to Catholic students"). Similarly, the Plaintiffs contend that the MHRA's prohibitions on sexual orientation and gender identity discrimination conflict with Catholic teaching on the role of parents in education and the relationship between gender and sex. *See Pls.' Reply* at 5; *Compl.* ¶¶ 137-46 ("The [MHRC's] rules compelling schools to enforce students' preferred pronouns—regardless of their parents' wishes, and without reference to the student's biological sex—would require Diocesan schools to discipline staff and students who, after reflecting on Pope Francis' words, conclude that they cannot do so"). Finally, the Plaintiffs say that St. Dominic cannot follow 5 M.R.S. § 4602(5)(D)'s prohibition on discriminating among religions in allowing religious expression because of St. Dominic's mission as a Catholic school. *See Pls.' Reply* at 5; *Compl.* ¶¶ 35-36, 133-35 ("In line with this Diocesan policy, St. Dominic students must agree to uphold Catholic Christian morals" (internal quotation omitted)).

Like *Fulton*, this is therefore a case where the government is burdening an organization's religious exercise "by putting it to the choice of curtailing its mission" or adopting policies and practices inconsistent with its religious beliefs. *See* 141 S. Ct. at 1875-76. To the extent the Defendants question the logic or sincerity of the Plaintiffs' asserted burden, this argument is foreclosed by the Supreme Court's observation in *Fulton* that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First

Amendment protection." *Id.* at 1876 (quoting *Thomas*, 450 U.S. at 714). Accordingly, against the background of *Fulton*, the Court concludes that the challenged provisions of the MHRA—which would effectively prohibit St. Dominic from enforcing several of its religiously motivated policies—burden the Plaintiffs' religious exercise.[9]

ii. General Applicability

As noted above, a law is not generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877; *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) (explaining that laws are not generally applicable "whenever they treat *any* comparable secular activity more favorably than religious exercise" (emphasis in original)). "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged

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[9] The Defendants' final argument that the challenged provisions of the MHRA do not burden the Plaintiffs' religious exercise is that Cheverus, a different Catholic school, has been participating in the tuitioning program and presumably "would not have done so if it meant abandoning its religious identity." *Defs.' Opp'n* at 11. As the Court explained above, Cheverus is not a Diocesan school but "[a]n inclusive Jesuit Catholic school." *Pls.' Reply* at 1 (quoting *Our Mission*, Cheverus High Sch., www.cheverus.org). Further, Cheverus' interpretation of the Catholic faith does not control that of the Plaintiffs here. *See Thomas*, 450 U.S. at 715-16 ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith").

against the asserted government interest that justifies the regulation at issue." *Tandon*, 141 S. Ct. at 1296 (per curiam).

Here, the Plaintiffs assert that Chapter 366 is not generally applicable for two reasons.[10] First, the Plaintiffs point out that private postsecondary institutions are not included in the MHRA's definition of "educational institution." *Pls.' Mot.* at 7; *Pls.' Reply* at 5. Further, the Plaintiffs argue that the inclusion of schools located outside of Maine in the tuitioning program renders Chapter 366 not generally applicable. *Pls.' Mot.* at 7-8; *Pls.' Reply* at 5. According to the Defendants, the government interest that justifies applying Chapter 366 to St. Dominic is the interest in eliminating discrimination, particularly among publicly funded institutions. *Defs.' Opp'n* at 21-22.

There is no dispute that Chapter 366 does not apply to private postsecondary institutions or to schools located outside of Maine. *See Pls.' Mot.* at 7-8, 12; *Pls.' Reply* at 4-5; *Defs.' Opp'n* at 14 ("Schools outside of Maine are not subject to the MHRA

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[10] The Plaintiffs initially made a third argument against general applicability, premised on the exclusion of private, single-sex schools from the MHRA's definition of "educational institution." *Compl.* ¶¶ 202-03; *Pls.' Mot.* at 9. However, 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. In their reply, the Plaintiffs acknowledged the removal of this exclusion, *Pls.' Reply* at 4, and as the Court explained in *Crosspoint Church*, the enactment of Chapter 188 moots any argument that the MHRA is not generally applicable because of the exclusion of single-sex schools. 2024 U.S. Dist. LEXIS 32975, at *43-44.

because Maine has no jurisdiction over them . . . [and] post-secondary private schools are exempted from the educational provisions of the MHRA"). Both private postsecondary schools and out-of-state schools are eligible to receive public funds from Maine. *See Compl.* ¶ 77 (explaining that Maine operates a program awarding grants that "may be used at any public or private post-secondary institution in Maine, including those that are religious"); *id.* ¶ 75 ("Maine or Maine towns have paid for Maine students to attend private schools in Vermont, New Hampshire, Massachusetts, Connecticut, New York, Pennsylvania, Virginia, Michigan, Colorado, Utah, California, and in Quebec, Canada").

In the Court's view, the combination of these two factors renders Chapter 366 not generally applicable. The Defendants do not claim that there is any mechanism for ensuring that schools not subject to the MHRA conform with the government's interest in eliminating discrimination. It appears that these schools could adopt any of St. Dominic's policies or practices that allegedly violate the MHRA without fear of enforcement actions or risk of losing access to public funds from Maine. In other words, Chapter 366 is "underinclusive," and therefore not generally applicable, because it "fail[s] to prohibit nonreligious conduct that endangers [Maine's] interests in a similar or greater degree than" St. Dominic's conduct. *See Lukumi*, 508 U.S. at 543.

The Defendants respond that Chapter 366 is generally applicable because all private postsecondary institutions and all out-of-state schools, even those that are religious, are exempt

from the MHRA's educational discrimination provisions. *Defs.' Opp'n* at 14. This argument misconstrues how the Court is to assess general applicability. For a law to be generally applicable, it must not "prohibit[] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. Here, secular out-of-state schools and secular private postsecondary institutions are allowed to take public funds, including from the tuitioning program, without giving any assurances that they are not engaged in discrimination. The Defendants cannot avoid the conclusion that the laws are not generally applicable by drawing narrower categories, as they appear to have done by emphasizing that all private postsecondary institutions and all out-of-state schools are exempt.[11]

iii. Neutrality

Although strict scrutiny is triggered by the Court's conclusion that Chapter 366 is not generally applicable, the Court addresses the

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[11] The Defendants also contend that *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*, 561 U.S. 661 (2010), supports their position that the challenged provisions of the MHRA are generally applicable. *See Defs.' Opp'n* at 14-16. While the *Martinez* Court did conclude that the policy at-issue was generally applicable, 561 U.S. at 697 n.27, that case is not factually analogous to this one. There, the challenged policy was applicable to all student organizations. *Id.* at 671-72. Here, by contrast, some educational institutions can take public funds from the state of Maine without subjecting themselves to the challenged provisions of the MHRA.

Plaintiffs' neutrality[12] arguments for the sake of completeness.

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 "the Free Exercise Clause forbids subtle departures from neutrality and covert suppression of particular religious beliefs" and

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[12] The Plaintiffs interchangeably argue that the challenged provisions are both not neutral and target religion. *Compare Pls.' Mot.* at 9-10 ("This religious gerrymander—adopted by government officials who boasted about their success in continuing to exclude Maine's religious schools—renders Maine's law not neutral" (internal quotation omitted)), *with id.* at 8 ("The historical background of Maine's discrimination against religious schools, the sequencing of its move to continue excluding religious schools from its public program by attaching religiously unacceptable conditions on their participation, and contemporaneous statements from Maine officials all demonstrate religious targeting").

Although religious targeting and neutrality are related, they are distinguishable. To prove religious targeting, a plaintiff must show that "'official expressions of hostility' to religion accompany laws or policies burdening religious exercise." *Kennedy*, 142 S. Ct. at 2422 n.1 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018)). "[A] law targeting religious beliefs as such is never permissible," *Lukumi*, 508 U.S. at 533, whereas a law that is not neutral because its object is "to infringe upon or restrict practices because of their religious motivation" is sometimes permissible, if it can pass strict scrutiny. *Id.* Because the Court concludes that the challenged educational discrimination provisions of the MHRA are neutral, however, this distinction is immaterial.

"[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 (internal citations and quotations omitted).

As evidence of Chapter 366's lack of neutrality, the Plaintiffs cite the "historical background of Maine's discrimination against religious schools, the sequencing of its move to continue excluding religious schools from its public program by attaching religiously unacceptable conditions on their participation, and contemporaneous statements from Maine officials." *Pls.' Mot.* at 8. Specifically, the Plaintiffs contend that "Maine knew exactly which rules would create the most significant conflicts for religious schools, because during discovery in *Carson* two such schools described in detail the religious practices they wished to protect." *Id.* at 6 (footnote omitted). The Plaintiffs point to statements by the Maine Attorney General, a tweet by the former speaker of the Maine House of Representatives, an essay published in the *New York Times*, and the timing of the enactment of Chapter 188 as further evidence that Chapter 366 is not neutral. *Id.* at 8-9.

The Defendants respond that Chapter 366 was "neither designed to impinge on religious practices nor motivated by any animus toward religion." *Defs.' Opp'n* at 13. Instead, the Defendants aver that Chapter 366 "made the educational provisions of the MHRA consistent with those addressing employment and housing." *Id.* In the Defendants' view, because Maine "has a compelling interest in ensuring that public money is not used to fund discrimination . . . it

was entirely appropriate for it to ensure that religious schools . . . would comply with the MHRA's educational provisions if they chose to participate in the tuitioning program as a result of new legal precedent." *Id.* The Defendants further dispute the specific pieces of evidence cited by the Plaintiffs. *Id.* at 13-14.

In assessing neutrality, the Court finds it useful to separate 5 M.R.S. § 4602(1) from 5 M.R.S. § 4602(5)(D). With respect to 5 M.R.S. § 4602(1), 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. The initial version of the MHRA only prohibited discrimination based on race, color, religion, ancestry, national origin, and, with respect to employment only, age. *Id.* When enacted, the MHRA did not 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 based on 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 based on 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 that time, the definition of sexual orientation included 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 provisions 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"). Further, education facilities "owned, controlled or operated by a bona fide religious corporation, association, or society" were fully exempted. *Id.*

In short, the MHRA has prohibited religious discrimination in employment, housing, and public accommodations since 1971. Since 2005, the Act has prohibited sexual orientation and gender identity discrimination in employment, housing, public accommodations, and education but has also generally exempted religious organizations that do not receive public funds. From 2005 to 2021, the MHRA's educational discrimination subsection—5 M.R.S. § 4602—exempted religious organizations from the Act's prohibition on discrimination on the basis of sexual orientation, without distinguishing whether they received public funds.

In 2021, the Legislature enacted Chapter 366, "An Act to Improve Consistency within the Maine

Human Rights Act." Among other things, Chapter 366 newly prohibited educational discrimination based on religion and replaced the exemption for sexual orientation discrimination for religiously affiliated educational institutions with a provision stating that nothing in 5 M.R.S. § 4602 "[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." *See* 5 M.R.S. § 4062(5)(C)

As noted above, the Defendants contend that these amendments primarily served to make the MHRA's educational discrimination provisions consistent with the rest of the Act. *See Defs.' Opp'n* at 5-6. Based on the record before it, the Court finds this argument persuasive. Regarding the addition of religion as a protected class, the MHRC submitted testimony to the Legislature stating that the "MHRA's current education coverage is woefully out of date, and inconsistent with the rest of the Act." *Defs.' Opp'n*, Attach. 3, *Letter from Me. Hum. Rts. Comm'n, to Hon. Anne Carney et al.* at 5 (May 14, 2021). According to the MHRC, the MHRA was "amended in a piecemeal fashion," often without any "logical rationale." *Id.* at 1.

Similarly, the record supports the Defendants' explanation that the Maine Legislature fashioned Chapter 366 to keep the MHRA's provisions on educational 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, exempted only religious organizations that do not receive public funds from its sexual orientation and gender identity provisions in other areas. *See* P.L. 2005, ch. 10. However, from 2005 until 2022, there would have been no reason to include a distinction based on public funding in the educational discrimination context. Because the sectarian exclusion blocked tuitioning funding for all sectarian educational institutions, distinguishing between those that did and 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 mere surplusage. The current exemption, enacted in 2021, makes the educational discrimination provisions 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 supplied).

Notwithstanding this background, the Plaintiffs submit that "each piece of Maine's new regulatory scheme is intended to prevent religious schools like St. Dominic from participating in Maine's program, and actually does so." *Pls.' Mot.* at 9. The Plaintiffs initially point to testimony from the *Carson* litigation, suggesting that "Maine knew exactly which rules would create the most significant

conflicts for religious schools." *Id.* at 6. But there is no evidence that the Legislature was aware of this testimony, let alone considered it in enacting Chapter 366. Similarly, although the Plaintiffs' argument finds some support in Attorney General Frey's immediate negative response to *Carson*, Attorney General Frey was not a member of the Legislature when it enacted Chapter 366, and there is no evidence that he had a hand in proposing the legislation to a legislator.

Turning to then-Speaker Fecteau's statements, 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 (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) (explaining that the 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 body"). Although the Plaintiffs attempt to buttress then-Speaker Fecteau's statement with Professor Tang's essay in the *New York Times*, there is no evidence that Professor Tang has been affiliated with the state of Maine at any point or had any inside knowledge about the passage of Chapter 366.

Finally, although the Plaintiffs characterize the timing of the passage of Chapter 188 as a "litigation-

driven decision," *Pls.' Mot.* at 12 n.12, which further evidences a lack of neutrality with respect to Chapter 366, *id.* at 10, the Court does not find the timing of one law to be probative of the intention behind a different law passed almost two years earlier. This is especially so here, because the Plaintiffs present no evidence to counteract the Defendants' explanation that the enactment of Chapter 188 served to correct a "mistake" in the statutory scheme. *See Defs.' Opp'n* at 14.

Accordingly, the Court concludes that the Plaintiffs have failed to present sufficient evidence that the addition of religion as a protected class and the limitation of the exemption from the MHRA's sexual orientation and gender identity provisions were passed with an objective to "impede or constrain religion." *See Swartz*, 53 F.4th at 700 (citing *Lukumi*, 508 U.S. at 533). Instead, based the record before it, the Court determines that it is more likely these changes were made to ensure uniformity in a legislative scheme that already prohibited these types of discrimination by organizations receiving public funds in the housing and employment contexts.

The neutrality of 5 M.R.S. § 4602(5)(D), which prohibits educational institutions that allow religious expression from discriminating among religions, is a closer question. The Defendants do not provide any evidence concerning the background and purpose of this provision. Similarly, the Plaintiffs only discuss 5 M.R.S. § 4602(5)(D) in combination with the other challenged provisions and likewise do not provide any evidence specifically related to it. *See Pls.' Mot.* at 8-10.

Based on the paucity of evidence in the record, the Court cannot conclude that 5 M.R.S. § 4602(5)(D) was enacted "in a manner intolerant of religious beliefs or [to] restrict[] practices because of their religious nature." *See Fulton*, 141 S. Ct. at 1877. On its face, the statute applies not just to religious schools, but to all "educational institution[s]" that "permit[] religious expression." *See* 5 M.R.S. § 4602(5)(D). Furthermore, the inclusion of the provision in a bill titled, "An Act to Improve Consistency in Terminology and within the Maine Human Rights Act," suggests it was intended to remedy religious discrimination, not to "impede or constrain" religion as such. *See Swartz*, 53 F.4th at 700 (citing *Lukumi*, 508 U.S. at 533). The provision could also be interpreted as protecting students' rights to free expression, another non-neutral purpose. *See Crosspoint Church*, 2024 U.S. Dist. LEXIS 32975, at *52 n.7. In light of such countervailing evidence, the Plaintiffs' evidence is not sufficient to support a determination that 5 M.R.S. § 4602(5)(D) is not neutral at this preliminary stage.

The First Circuit has directed that "[w]hen assessing neutrality, a court must survey meticulously the totality of the evidence, both direct and circumstantial." *Swartz*, 53 F.4th at 701 (internal citations and quotations omitted). Nevertheless, 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, this does not prevent the law itself from being 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." *Fulton*, 141 S. Ct. at 1877. The Court concludes that Chapter 366 is neutral.

iv. Strict Scrutiny

Having concluded that Chapter 366 is not generally applicable, the Court turns to whether it can nevertheless satisfy strict scrutiny. *See Kennedy*, 142 S. Ct. at 2422 ("Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny"). To satisfy strict scrutiny, the government must show "that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end." *Id.* at 2426. "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881.

The Defendants argue that Chapter 366 satisfies strict scrutiny because Maine has a compelling interest in eliminating discrimination, especially with respect to publicly funded institutions. *Defs.' Opp'n* at 21-22. The Plaintiffs, relying on *Fulton*, respond that the "question is not whether Maine 'has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception' to schools like St. Dominic." *Pls.' Mot.* at 19 (quoting *Fulton*, 141 S. Ct. at 1881).

As a general matter, Maine's asserted interest in eliminating discrimination within publicly funded institutions is compelling. *See Fulton*, 141 S. Ct. at 1882 ("We do not doubt that this interest is a weighty

one, for '[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth'" (alteration in original) (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018)). The Supreme Court explained in *Fulton*, however, that in the First Amendment context, a high-level compelling interest does not suffice and "courts must 'scrutinize[] the asserted harm of granting specific exemptions to particular religious claimaints.'" *Id.* at 1881 (quoting *Gonzales v. O Centro Espírita Beneficente União de Vegetal*, 546 U.S. 418, 431 (2006)). In *Fulton*, for example, the Supreme Court held that "the interest of the City in the equal treatment of prospective foster parents and foster children" was not sufficiently compelling because the "creation of a system of exceptions" in the challenged policy "undermines the City's contention that its non-discrimination policies can brook no departures." *Id.* at 1882.

The Plaintiffs assert that the *Fulton* Court's reasoning applies with equal force here. *See Pls.' Mot.* at 19 ("Maine does not pursue its 'broadly formulated interest' when it pays grants to private post-secondary schools or pays tuition for out-of-state and out-of-country schools."). But the facts in *Fulton* differ from the facts of this case. The contract at issue in *Fulton* explicitly provided for "a system of individual exemptions, made available . . . at the 'sole discretion' of the Commissioner." 141 S. Ct. at 1878. Here, by contrast, the text of the MHRA does not provide for any exceptions. In the Court's view, Maine has a compelling interest in not creating a system of exemptions, as existed in *Fulton*, that would free in-state schools from complying with state

antidiscrimination law.

Therefore, whether considered at face value or according to the rubric set forth in *Fulton*, the Defendants have advanced a compelling interest in enforcing Chapter 366. It is likewise clear that Chapter 366 is narrowly tailored. To this end, 5 M.R.S. § 4602(5)(C) exempts religious organizations that do not receive public funds from the MHRA's ban on sexual orientation and gender identity discrimination in education. Similarly, private schools that do not participate in the tuitioning program are excluded from the MHRA's definition of "educational institution," and therefore exempt from the educational discrimination provisions of the MHRA. *See* 5 M.R.S. § 4553(2-A).

Furthermore, all the challenged provisions are written to prohibit only discriminatory conduct. Under the provisions, "St. Dominic would still be free to conduct morning prayers however it wants, teach from a Catholic perspective, and promote Catholicism to the exclusion of all other religions." *Defs.' Opp'n* at 10. While the Plaintiffs put forth a number of policies and practices that arguably violate the challenged provisions, at this early stage—no state court has interpreted Chapter 366—it is not sufficiently clear the Act would reach any conduct that the state does not consider discriminatory. In the absence of any evidence to the contrary, the Court concludes that Chapter 366 is narrowly tailored because it is written to encompass discriminatory conduct, and nothing more.

Accordingly, the Court concludes that Chapter 366 survives strict scrutiny. In reaching this result,

the Court is mindful of the Supreme Court's admonition that a "law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546. However, "rare" does not mean "never." Based on the record before it at this preliminary stage, the Court determines that the weighty interest advanced by the Defendants and the tailoring of Chapter 366 to fit that interest support a determination that Chapter 366 is likely to survive strict scrutiny.[13]

b. Compelled Speech

In addition to the Free Exercise Clause, the Plaintiffs attack the constitutionality of Chapter 366 under the Free Speech Clause. Specifically, the Plaintiffs contend that 5 M.R.S. § 4602(5)(D) is unlawful because it "compels speech by religious schools." *Pls.' Mot.* at 13-14.

The First Amendment "protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply misguided and likely to cause anguish or incalculable grief." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023) (internal

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[13] Having concluded that the challenged educational discrimination provisions survive strict scrutiny, the Court does not reach the Plaintiffs' other constitutional challenges that, if meritorious, would simply trigger the application of strict scrutiny. *See Pls.' Mot.* at 12-13 (infringement of parents' right to direct the religious education of their children); *id.* at 14-15 (infringement of the First Amendment right of expressive association)

citations and quotations omitted). Therefore, "the government may not compel a person to speak its own preferred messages." *Id.* This is true "whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include." *Id.*

According to the Plaintiffs, "by forcing [religious schools] to allow speech that they disagree with on their school campuses," 5 M.R.S. § 4602(5)(D) "forces schools to express religious viewpoints with which they do not agree." *Pls.' Mot.* at 13. In other words, the Plaintiffs say that "forcing the Diocesan schools to allow religious expression—including religious expression that is *contrary* to the Catholic faith the school exists to impart—would alter the message the schools seek to convey to their students." *Id.* at 14 (emphasis in original).

The Defendants disagree. In their view, the speech implicated by 5 M.R.S. § 4602(5)(D) is "that of students, not the Plaintiffs." *Defs.' Opp'n* at 17. The Defendants further submit that it "is doubtful that the public would view a student's support of a religion other than Catholicism as representing the Bishop's views." *Id.* (footnote omitted). The Defendants have the better argument.

5 M.R.S. § 4602(5)(D) states that "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." The statute does not reach the speech of educational institutions, nor does it compel individual students to "express religious viewpoints with which they do not agree." *See Pls.' Mot.* at 13. The statute only requires schools to refrain from

suppressing any student's religious viewpoint. The Defendants even concede that "St. Dominic would still be free to conduct morning prayers however it wants, teach from a Catholic perspective, and promote Catholicism to the exclusion of all other religions." *Defs.' Opp'n* at 10.

Still, the Plaintiffs protest that merely allowing other religious perspectives "would alter the message [Diocesan] schools seek to convey to their students." The Plaintiffs draw support for this argument from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). *Hurley* involved a dispute over the refusal by a group of parade organizers to admit a group of "gay, lesbian, and bisexual" individuals, who wished to march in the parade "to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals," among other things. *Id.* at 561. After classifying parades as "a form of expression," *id.* at 568, the Court held that "[s]ince every participating unit affects the message conveyed by the private organizers," inclusion of the additional group would force the organizers "to alter the expressive content of their parade." *Id.* at 572-73.

The Court is unconvinced that *Hurley* applies with equal force here. In reaching its holding, the *Hurley* Court was careful to focus on the inherent nature of parades. *See id.* at 577 ("[I]n the context of an expressive parade . . the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole"). However, the potential for attribution recognized by the *Hurley* Court has not carried over into other contexts. *See,*

e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-87 (1980) (rejecting a shopping center's compelled speech claim because the "views expressed by members of the public in passing out pamphlets or seeking signatures for a petition [] will not likely be identified with those of the owner," and the owner "can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand"). Indeed, in a case subsequent to *Hurley*, the Supreme Court reaffirmed its prior holding that "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 65 (2006).

Accordingly, the Court concludes that *Hurley* does not help the Plaintiffs because it is unlikely that alternative religious expression, especially "religious expression that is *contrary* to the Catholic faith," would be attributed to St. Dominic or the Diocese. *See Pls.' Mot.* at 14 (emphasis in original). Further, to the extent St. Dominic is concerned about potential misattribution, 5 M.R.S. § 4602(5)(D) does not prohibit the school from disavowing religious expression that is contrary to Catholic teaching. Because 5 M.R.S. § 4602(5)(D) only implicates student expression, concerns speech that is unlikely to be attributed to St. Dominic, and allows St. Dominic to disavow speech with which it disagrees, the Plaintiffs are unlikely to succeed on their compelled speech challenge.

c. Excessive Entanglement

Next, the Plaintiffs argue they are likely to

succeed on the merits because Chapter 366 violates the Establishment Clause by "creat[ing] excessive entanglement between the state of Maine and religious schools." *Pls.' Mot.* at 16. According to the Plaintiffs, Chapter 366 gives the MHRC authority to:

> [I]nvestigate and determine questions like where, when, and how often to allow prayer in school; whether a Catholic school must allow Protestant worship; what the school may teach about its own Catholic beliefs and the beliefs of other religions; whether families and students may be asked to support the religious mission of the school; and who is qualified to teach students in a Catholic school about Catholicism.

Id. at 15. In addition, the Plaintiffs suggest that Chapter 366 "requires a school to facilitate a student's efforts to change his or her gender identity even if the school knows that the student's parents object," which conflicts with Catholic doctrine. *Id.* at 16. All told, the Plaintiffs suggest that Chapter 366 gives rise to "an entanglement that inevitably invites Maine officials to condone the actions of religious schools who have beliefs the government agrees with and sanction those who do not." *Id.*

In response, the Defendants contend that the Plaintiffs' argument lacks "any factual or legal support," and "[i]t is difficult to see why the MHRC would ever have to look into such matters to determine whether the MHRA was violated." *Defs.' Opp'n* at 19. The Defendants further submit that "when it comes to litigation, religious organizations do not have some sort of blanket immunity from relevant factual inquires." *Id.*

The Plaintiffs' argument relies upon the Supreme Court's statement in *Carson* that "scrutinizing whether and how a religious school pursues its educational mission would [] raise serious concerns about state entanglement with religion and denominational favoritism." 142 S. Ct. at 2001; *see also Pls.' Mot.* at 15 (quoting this passage); *Pls.' Reply* at 7 (same). The *Carson* Court made this statement in response to an argument that the sectarian exclusion was permissible for merely "impos[ing] a use-based restriction," not "status-based religious discrimination." *Id.* at 2000 (quoting *Carson v. Makin*, 979 F.3d 21, 35, 37-38 (1st Cir. 2020)). In so doing, the Court highlighted the constitutional infirmities that would accompany a legal paradigm where discrimination based on religious status was forbidden, but discrimination based on the religious use of funding was allowed.

The Court is unconvinced by the Plaintiffs' attempt to transpose this argument to Chapter 366. To start, although the Plaintiffs claim that Chapter 366 gives the MHRC "authority to say how [religious] schools should be run," *Pls.' Mot.* at 15, they provide no evidence in support of this assertion. As far as the Court is aware, Chapter 366 has not yet been enforced, and the Defendants, who play key roles in enforcing the MHRA, have represented that it "is difficult to see why the MHRC would ever have to look into such matters to determine whether the MHRA was violated." *Defs.' Opp'n* at 19. While giving the MHRC "authority to investigate and determine questions like where, when, and how often to allow prayer in school," would undoubtedly raise entanglement concerns, the Court has no reason

to conclude that Chapter 366 actually grants such authority.

Further, unlike the distinction in *Carson*—which concerned the state potentially condoning some religious uses and condemning others—Chapter 366 applies to religious and nonreligious schools alike. *See* 5 M.R.S. § 4553(2-A) (defining "educational institution" to include "any public school or educational program" and "any private school or educational program approved for tuition purposes"). Accordingly, unlike *Carson*, Chapter 366 does not facially contemplate religious entanglement. Because the Plaintiffs provide no evidence that such entanglement would accompany the enforcement of Chapter 366, the Court concludes there is insufficient evidence that the Plaintiffs are likely to succeed on the merits.[14]

d. Unconstitutional Conditions

Finally, the Plaintiffs submit that Chapter 366 is unlawful because it "impose[s] unconstitutional conditions" on schools participating in the tuitioning program. *Pls.' Mot.* at 18-19; *Pls.' Reply* at 9. Under the doctrine of unconstitutional conditions, "the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . .

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[14] As noted above, the Plaintiffs also suggest that excessive entanglement would result from St. Dominic being required to "facilitate a student's efforts to change his or her gender identity even if the school knows that the student's parents object" or "discipline a Catholic teacher for following the teachings of Pope Francis on sex and gender." *Pls.' Mot.* at 16 (footnotes omitted). As the Defendants point out, these arguments concern "whether the MHRA burdens Plaintffs' religious practices." *Defs.' Opp'n* at 19.

freedom of speech even if he has no entitlement to that benefit.'" *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (alteration in original) (quoting *F. for Acad. & Institutional Rts.*, 547 U.S. at 59). Cases in which unconstitutional conditions have been found "involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis in original).

Because the Plaintiffs have not shown that Chapter 366 actually restricts their speech or religious exercise, the Court concludes that the doctrine of unconstitutional conditions is inapplicable. The Plaintiffs surmise that Chapter 366 "force[s] religious schools to stop being religious," and they accuse the Defendants of attempting "to control the internal operations of religious schools." *Pls.' Mot.* at 18. But the Court has already rejected the Plaintiffs' sweeping interpretation of Chapter 366's consequences, and in concluding that Chapter 366 is neutral, the Court found that the law was not motivated by a desire to control religious schools. As the Court has determined that the Plaintiffs are unlikely to succeed on their other constitutional challenges, the Court likewise concludes that the Plaintiffs have not carried their burden of showing a likelihood of success on their unconstitutional conditions claim.

B. Irreparable Harm

Having concluded that the Plaintiffs are 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 permanent 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 (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 *Vaquería 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 the Plaintiffs' constitutional claims were meritorious, they would suffer irreparable injury from their inability to participate in the tuitioning program. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) ("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 (1976) (plurality opinion)). The Plaintiffs have not shown a likelihood of success on the merits, however, and the challenged provisions of the MHRA are therefore unlikely to cause them irreparable injury.

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 the Plaintiffs' 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 Plaintiffs may well view the breadth of the state's antidiscrimination laws as the triumph of the tenets of a state secular religion, enacting into law ever expanding categories of protected persons, over their exercise of the principles of ancient religious beliefs protected by the First Amendment. However, as the Court noted in *Crosspoint Church*, the Maine Legislature has the authority to define protected

classes under its antidiscrimination laws, and the public also has a strong interest in the state being able to effectively combat discrimination. 2024 U.S. Dist. LEXIS 32975, at *59-60. Moreover, the Plaintiffs are free to practice their religion, including the teaching of their religion as they see fit, but cannot require the state to subsidize their religious teachings if they conflict with state antidiscrimination law. Buttressed by the Court's conclusion about the Plaintiffs' likelihood of success on the merits, the balance of these factors favors the Defendants.

D. Summary

The Court concludes that the Plaintiffs are not entitled to a preliminary injunction. However, as the Court observed in *Crosspoint Church*, the Plaintiffs are raising important legal questions. *Id.* Some resemble those in *Crosspoint Church*, while others differ. Both cases implicate the fundamental tension that arises when the Maine Legislature's view of the categories of people meriting protected status conflicts with the sincerely held beliefs of religious communities. Although the Diocese, St. Dominic, and Mr. and Ms. Radonis seek the protection the Supreme Court's decision in *Carson*, this tension has kept them from realizing the practical benefits of a landmark decision.

In reaching its conclusions, the Court has discussed and decided the difficult constitutional questions presented. At the same time, the Court recognizes that this case poses novel constitutional issues and, as it did in *Crosspoint Church*, the Court 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*, 401 F. Supp. 3d at 212 ("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 the Plaintiffs' Motion for Preliminary Injunction (ECF No. 5).

SO ORDERED.

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

Dated this 8th day of August, 2024

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.

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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.

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.

Tiffany H. Bates, with whom Patrick Strawbridge, Consovoy McCarthy PLLC, Kelly J. Shackelford, David J. Hacker, Jeremiah G. Dys, Camille P. Varone, and First Liberty Institute were on brief, for appellant.

R. Shawn Gunnarson, Christopher A. Bates, Jarom M. Harrison, and Kirton McConkie on brief for Church of Jesus Christ of Latter-Day Saints, National Association of Evangelicals, Ethics and Religious Liberty Commission of the Southern Baptist Convention, and Lutheran Church-Missouri Synod as amici curiae supporting appellant.

Christopher C. Taub, Chief Deputy Attorney General of Maine, with whom Aaron M. Frey, Attorney General of Maine, and Sarah A. Forster, Assistant Attorney General of Maine, were on brief, for appellees.

Aditi Fruitwala, Michelle Fraling, Daniel Mach, Heather Weaver, Louise Melling, American Civil Liberties Union Foundation, Carol Garvan, Zachary L. Heiden, Anahita Sotoohi, American Civil Liberties Union of Maine Foundation, Alexandra Zaretsky, and Americans United for Separation of Church and State on brief for American Civil Liberties Union,

** 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).

American Civil Liberties Union of Maine, and Americans United for Separation of Church and State as amici curiae supporting appellees.

Adam J. Hunt, Tamara Wiesebron, Jenny Xin, Justin Kareem Rezkalla, Morrison & Foerster LLP, Jessica Levin, Wendy Lecker, and Education Law Center on brief for Public Funds Public Schools, National Education Association, National School Boards Association, American Federation of Teachers, In the Public Interest, Freedom from Religion Foundation, American Atheists, Inc., Council of Parent Attorneys and Advocates, Inc., Network for Public Education, Pastors for Children, and Disability Rights Maine as amici curiae supporting appellees.

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 (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.

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 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

[1] In full, section 4602(1) applies to "academic, extracurricular, research, occupational training or other program[s] or

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]

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

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

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 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 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

[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 WL 2830931, at *2–3. We consider these documents as part of the record on appeal.

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 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 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.

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. 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. 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.

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 (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 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 (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 (1993). Specifically, Crosspoint's targeting claim sounds in the Smith neutrality inquiry. See Fulton v. City of Philadelphia, 593 U.S. 522, 533 (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. Comm'n, 584 U.S. 617, 638 (2018) ("[T]he

[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.

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 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 (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)).

Crosspoint also contends that while the 2021

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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 (2001) (Stevens, J., dissenting) (referring to "the contemporary context" of legislative enactments); Thompson v. Thompson, 484 U.S. 174, 180 (1988) (looking to "the context" "[a]t the time Congress passed" the legislation in question).

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, 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 U.S. 461, 471 (2025) (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)). Viewpoint-based laws represent a subset of content-based laws where "the specific motivating ideology or

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[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.

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 (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]

But the text of the rule contains no such requirement.[9] Rather, as the district court

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[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 (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)).

[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

observed, "the plain text of the challenged provisions of the MHRA regulate 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

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, 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/inlinefiles/20160113_g.pdf [https://perma.cc/594V-BCS7] [hereinafter "2016 MHRC Memorandum"]; see also St. Dominic, 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. 559, 561 (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.

"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 (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 (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 (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 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.

Maine Revised Statutes Title 5, §4553. Definitions

As used in this Act, unless the context or subchapter otherwise indicates, the following words have the following meanings.

1. Commission. "Commission" means the Maine Human Rights Commission established by this Act.

1-A. Commercial facilities. "Commercial facilities" means facilities that are intended for nonresidential use.

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.

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.

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.

1-E. Complainant. "Complainant" means a person who files a complaint under section 4611.

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.

1-G. Conciliation agreement. "Conciliation agreement" means a written agreement setting forth the resolution of the issues in conciliation.

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

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.

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;

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;

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;

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;

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;

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;

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

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.

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.

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.

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.

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.

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

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.

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.

5-B. Family. "Family" includes, but is not limited to, a single individual.

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.

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).]

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.

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.

7-A. Physical or mental disability. "Physical or mental disability" has the meaning set forth in section 4553-A.

7-B. Person with physical or mental disability.

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;

B. A restaurant, eating house, bar, tavern, buffet, saloon, soda fountain, ice cream parlor or other establishment serving or selling food or drink;

C. A motion picture house, theater, concert hall, stadium, roof garden, airdrome or other place of exhibition or entertainment;

D. An auditorium, convention center, lecture hall or other place of public gathering;

E. A bakery, grocery store, clothing store, hardware store, shopping center, garage, gasoline station or other sales or rental establishment;

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;

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;

H. A museum, library, gallery or other place of public display or collection;

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;

J. A nursery, elementary, secondary, undergraduate or postgraduate school or other place of education;

K. A day care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service center establishment;

L. Public elevators of buildings occupied by 2 or more tenants or by the owner and one or more tenants;

M. A municipal building, courthouse, town hall or other establishment of the State or a local government; and

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.

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.

8-A. Private entity. "Private entity" means any entity other than a public entity.

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.

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

A. The State or any local government;

B. Any department, agency, special purpose district or other instrumentality of the State, 2 or more states or a local government; and

C. A state, local or private commuter authority as defined in the federal Rail Passenger Service Act.

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.

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.

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.

8-G. Protective hairstyle. "Protective hairstyle" includes braids, twists and locks.

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.

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.

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

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.

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;

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;

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;

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;

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;

F. The extent to which current costs of accommodations have been minimized by past

efforts to provide equal access to persons with disabilities;

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;

H. Documented good faith efforts to explore less restrictive or less expensive alternatives;

I. The availability of equipment and technology for the accommodation;

J. Whether an accommodation would result in a fundamental change in the nature of the public accommodation;

K. Efforts to minimize costs by spreading costs over time; and

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.

"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.

9-C. Sexual orientation. "Sexual orientation" means a person's actual or perceived heterosexuality, bisexuality or homosexuality.

9-D. Service animal.

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.

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.

9-G. Respondent. "Respondent" means a person accused of unlawful discrimination in a

complaint filed under section 4611.

10. Unlawful discrimination. "Unlawful discrimination" includes:

A. Unlawful employment discrimination as defined and limited by subchapter 3;

B. Unlawful housing discrimination as defined and limited by subchapter 4;

C. Unlawful public accommodations discrimination as defined by subchapter 5;

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;

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;

F. Unlawful educational discrimination as defined and limited by subchapter 5-B;

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

H. Unlawful discrimination by public entities as described in section 4630.

Maine Revised Statutes Title 5, §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;

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.

2 to 4. Deleted. Laws 2021, c. 366, § 19, eff. Oct. 18, 2021.

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;

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;

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

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.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

ST. DOMINIC ACADEMY, a d/b/a of the ROMAN CATHOLIC BISHOP OF PORTLAND, a corporation sole; ROMAN CATHOLIC BISHOP OF PORTLAND, a corporation sole; and KEITH and VALORI RADONIS on their own behalf and as next friends of their children K.Q.R., L.R.R., and L.T.R.,

Plaintiffs,

v.

A. PENDER MAKIN, in her personal capacity and 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 personal capacities and in their official capacities as Commissioners of the Maine Human Rights Commission,

Defendants.

Civil No.

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VERIFIED COMPLAINT

INJUNCTIVE RELIEF SOUGHT

INTRODUCTION

1. For years, Catholic schools in Maine served rural families that participated in Maine's town tuitioning program. Under this program, Maine pays private school tuition for families who live in rural areas where there is no public school. But in 1980, Maine announced that it was excluding all "sectarian" religious schools—including Catholic schools—from its program. John Bapst, a Diocesan high school in Bangor, closed immediately. Between 1998 and 2019, Maine families filed five separate lawsuits challenging Maine's discriminatory rule. In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the U.S. Supreme Court held that Maine's rule violated the Free Exercise Clause of the First Amendment.

2. Nevertheless, Maine persists in its religious discrimination. In 2021, just after the parents in *Carson v. Makin* filed a petition for a writ of certiorari to the Supreme Court, Maine amended the section of the Maine Human Rights Act (the "Act") that applies to co-educational public and private K-12 schools that receive public funds. Maine implemented these changes to continue the exclusionary practices that the Supreme Court declared unconstitutional in *Carson*.

3. Keith and Valori Radonis live in Whitefield, Maine. Their two oldest children use town tuitioning money to attend Erskine Academy—a nonreligious private school—and their youngest child attends St. Michael School, a parish school in St. Michael Catholic Parish in Augusta, Maine.

4. Keith and Valori are faithful Catholics, and they would like to send their children to St. Dominic

Academy, the only Diocesan high school in Maine.

5. Likewise, St. Dominic Academy—and indeed all of the schools operated by the Roman Catholic Diocese of Portland—would like to resume serving the rural Maine families that participate in the town tuitioning program (the "program").

6. However, they cannot do so, because in 2021, just after the parents in *Carson* asked the Supreme Court to review their case, Maine amended its human rights law to add more rules intended to keep religious schools out. Among other things, Maine:

- Imposed a **new** religious neutrality requirement on schools, stating that "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing";
- Imposed a **new** religious nondiscrimination requirement on schools; and
- **Removed** the religious exemption that had previously allowed religious (but "nonsectarian") schools to handle sensitive issues relating to sexual orientation and gender identity in a way that reflected their faith commitments. 5 M.R.S. § 4602(5).

7. Neither the provisions restricting schools' religious expression nor the provisions relating to sexual orientation and gender identity currently apply to the non-religious, single-sex private schools that also participate in the program. *Id.* § 4553(2-A).

8. Private post-secondary schools, which are also eligible to receive student-directed Maine funding, are likewise not covered by these provisions of the Act. *Id.*

9. And none of the provisions of the Act are enforceable against public and private schools outside of Maine, even though the same law that authorizes state funding for private schools in Maine also allows Maine to pay tuition at private schools in other states and public schools in Canada. 20-A M.R.S. § 3252.

10. Maine's efforts to exclude religious schools were not confined to its Legislature. During the same spring 2021 timeframe when the *Carson* cert petition was pending, the Maine Human Rights Commission, the quasi-independent state agency charged with enforcing the Act, stated its view that, under the Act, religious schools that accept public funds lose their religious hiring rights.[1] The Commission adopted this interpretation knowing that it would discourage religious schools from accepting town tuitioning funds. The Commissioner of Education took a similar position in *Carson*, arguing that no school would accept town tuitioning funds because it would mean losing their religious hiring rights.

11. After the Supreme Court ruled in *Carson* that Maine could not exclude religious schools from the program, Maine's Attorney General Aaron Frey issued a statement. He denounced religious schools that "promote a single religion to the exclusion of all others" as discriminatory, vowed to work with the governor and legislature to prevent public money from going to these schools, and asserted that under the Act, religious schools could not receive public money unless

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[1] Letter from Amy M. Sneirson, Exec. Dir. of the Me. Hum. Rts. Comm'n to Hon. Anne Carney, Me. Senate Chair & Hon. Thom Harnett, Me. House Chair 3 (April 20, 2021), https://perma.cc/7B9E-2J2X.

they gave up their religious hiring practices—*Carson* notwithstanding.[2]

12. Maine's attempts were open and blatant: craft a new policy to get out from under the clear pronouncement of *Carson*. In a June 2022 opinion piece in the New York Times, law professor Aaron Tang praised Maine for "outmaneuver[ing]" the Supreme Court by passing a "legislative fix" to "avoid the consequences of a ruling," and pointed out that, as a result of the revisions to the Maine Human Rights Act that were passed in 2021, two religious schools that were hoping to take part in Maine's town tuitioning after *Carson* had already backed out.[3]

13. Maine continues its efforts today. After a religious school pointed out in litigation that Maine's present exemption for single-sex schools renders its rules not generally applicable, Maine rushed through an amendment to the Act to eliminate it. L.D. 1833, 131st Leg. (Me. 2023).

14. Plaintiffs—a Catholic school, a Catholic diocese, and a Catholic family—seek declaratory and injunctive relief against Maine's ongoing efforts to "outmaneuver" the Supreme Court and continue to exclude religious schools from the program.

15. The deadline for applying to take part in the program for the 2023-24 school year is **August 31**. St. Dominic is prepared to meet that deadline, and the

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[2] Statement of Maine Attorney General Aaron Frey on Supreme Court Decision in *Carson v. Makin*, Office of the Maine Attorney General (June 21, 2022), https://perma.cc/544J-DAFN.

[3] Aaron Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It,* N.Y. Times (June 23, 2022), https://perma.cc/YUR2-YYZX.

Radonises' daughter L.R.R. is prepared to attend St. Dominic using town tuitioning funds.

16. Plaintiffs request that this Court enforce the constitutional rule clearly established in *Carson*, enjoin the unconstitutional conditions that Maine officials continue to impose on the program, and allow the Diocese, St. Dominic, and the Radonis family to move forward without delay.

IDENTIFICATION OF PARTIES

17. The Roman Catholic Bishop of Portland is a Maine corporation sole and the legal entity representing the ecclesiastical entity of the Roman Catholic Diocese of Portland (the "Diocese"). The Diocese is a canonical part of the Roman Catholic Church and operates Diocesan schools throughout the State of Maine.

18. St. Dominic Academy is a Roman Catholic school located in Lewiston and Auburn, Maine. It is an educational ministry of the Diocese. With the exception of the provisions challenged in this lawsuit, St. Dominic meets or is capable of meeting the requirements to become approved for tuition purposes.

19. Keith and Valori Radonis are residents of Whitefield, Maine. Their child K.Q.R. is 16 years old and is currently eligible to receive town tuitioning. Their child L.R.R. is 15 years old and is currently eligible to receive town tuitioning. Their child L.T.R. is 10 years old and will become eligible to receive town tuitioning when he enters ninth grade in the 2027-28 school year.

20. Defendant A. Pender Makin is the Commissioner of the Maine Department of Education

(the "Department"). She is sued in her personal and official capacities.

21. Defendant Jefferson Ashby is a member of the Maine Human Rights Commission (the "Commission"), the quasi-independent state agency charged with enforcing the Act. He is sued in his personal and official capacities.

22. Defendant Edward David is a member of the Commission. He is sued in his personal and official capacities.

23. Defendant Julie Ann O'Brien is a member of the Commission. She is sued in her personal and official capacities.

24. Defendant Mark Walker is a member of the Commission. He is sued in his personal and official capacities.

25. Defendant Thomas Douglas is a member of the Commission. He is sued in his personal and official capacities.

JURISDICTION AND VENUE

26. This action arises under the Constitution and laws of the United States. The Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

27. The Court has authority to issue the declaratory and injunctive relief sought under 28 U.S.C. §§ 2201 and 2202.

28. Venue lies in this district under 28 U.S.C. § 1391(b)(1) because all Defendants reside in the District of Maine.

29. Venue also lies in this district under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or

omissions giving rise to the claims in this lawsuit occurred in the District of Maine.

FACTUAL ALLEGATIONS

Diocesan Schools in Maine

30. Education is central to the Catholic faith. The Code of Canon Law—a code of ecclesias-tical laws governing the Catholic Church—instructs that Catholic schools serve as "the principal assistance to parents" in forming children in the Catholic faith. 1983 Code c.795-96.

31. Thus, canon law calls upon Catholics "to foster Catholic schools, assisting in their establishment and maintenance." *Id.* c.800 § 2. If Catholic schools are not available in a particular area, "it is for the diocesan bishop to take care that they are established." *Id.* c.801 § 1. The bishop also has the responsibility to "regulate and watch over" their operations. *Id.* c.802 § 1, c.804 § 1.

32. Consistent with this religious obligation, the Diocese began founding schools in Maine more than 100 years ago. As the Catholic community in Maine grew, particularly through the arrival of significant numbers of French-Canadian immigrants in the 1870s, Diocesan schools grew with it. Today the Diocese operates eight schools, educating more than 2,100 students statewide.

33. The Diocese's mission in operating these schools is "to strengthen the Catholic Church and to create an environment in which the faith is preserved, nourished, shaped and communicated" so that its "students will become faith-filled Christians" who

contribute to the "Church and communities."[4]

34. Catholic schools are part of the Catholic Church's evangelizing mission. Thus, the Diocese's policy is that "[s]tudents of other religious beliefs should be admitted whenever possible." Diocese of Portland, Student Handbook at 3 (June 30, 2017). But because the primary purpose of these schools is to assist Catholic parents in providing their children with a Catholic education, the Diocese gives preference in both admission and financial aid to Catholic students, and further preference to children who are members of the parish to which the school belongs.

35. In all its schools and for all its students, whether Catholic or non-Catholic, the Diocese admits only students who "understand, accept, and [are] willing to support the mission and goals of the school," and who are willing to agree to attend religion classes, Mass, and other religious activities. *Id.* at 1-3.

36. In line with this Diocesan policy, St. Dominic students must agree to uphold "Catholic Christian morals." St. Dominic Academy Addendum to the Maine Catholic School Student Hand-book at 3 (July 2018).

37. Consistent with federal law, the Diocese has adopted the following nondiscrimination policy for its schools:

> Maine Catholic Elementary and Secondary Schools within the Roman Catholic Diocese of Portland admit

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[4] Roman Catholic Diocese of Portland, *Mission of Maine's Catholic Schools* (June 12, 2023), https://perma.cc/5L8E-JPGF.

> students of any race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the school. They do not discriminate on the basis of race, color, national and ethnic origin in administration of their educational policies, admissions policies, scholarship and loan programs, and athletic and other school administered programs.

Diocese of Portland, Student Handbook at 3.

38. A primary characteristic of Catholic schools is "concern for teaching the integration of faith, culture, and life." Diocese of Portland, School Personnel Policies and Procedures Manual at 2 (Oct. 1, 2022). And the "personnel of a Catholic school are critical to achieving this ministry." *Id.* Each school employee shares the responsibility to form students in the faith by the knowledge they share and by the faith they model in action.

39. Teachers and other employees are evaluated on how they maintain and promote the Catholic identity and mission of the school. And as a condition of employment, all employees must "[l]ive personal lives in such a way that fundamental teachings of the Catholic Church are upheld." *Id.* at 5.

St. Dominic Academy

40. St. Dominic Academy is a Roman Catholic school with campuses in Lewiston and Auburn, Maine.

41. St. Dominic offers education from pre-kindergarten through twelfth grade. Pre-kindergarten

through fifth grade are offered at St. Dominic's Lewiston campus, and grades six through twelve are offered nearby at its Auburn campus.

42. The first of several elementary schools that would eventually be consolidated into St. Dominic Academy were founded in the 1870s by the "Grey Nuns"—the Sisters of Charity of St. Hyacinthe—to educate children from French-speaking families who had come to work in local mills. French language secondary schools for men and women soon followed. By the 1880s, the schools began to offer evening classes to mill workers, who enrolled by the hundreds.

43. St. Dominic's high school was founded in 1941 by Father Francois Drouin, OP as a hockey academy for boys. St. Dominic's hockey program has been highly successful, winning 26 state championships.

44. Because of this long history, there are families in the Lewiston-Auburn area that have sent three generations of children to the Catholic schools now represented by St. Dominic Academy.

45. St. Dominic has received Basic School Approval from the State of Maine.

46. St. Dominic is the only Catholic high school operated by the Diocese in Maine. As a result, it is not unusual for students to commute from 30 to 60 minutes away to attend St. Dominic.

47. Several towns that participate in town tuitioning are within an hour drive from St. Dominic, including Whitefield, Raymond, Fayette, Chelsea, Alna, Westport, Windsor, Vassalboro, Dresden, West Bath, and Hanover.

48. Some of these towns are near Augusta, where

St. Dominic has operated a bus for students in the past and plans to do so again when enrollment warrants it.

49. Students eligible for town tuitioning have attended St. Dominic in recent years, and St. Dominic expects more such students to enroll in the future. On information and belief, there are additional families who would be eligible for town tuitioning and who would send their children to St. Dominic if it were approved for tuition purposes.

The Radonis Family

50. Keith and Valori Radonis live in Whitefield, Maine with their three children, K.Q.R. (age 16), L.R.R. (age 15), and L.T.R. (age 10).

51. Whitefield has no public high school, and the Radonis children are thus eligible to receive town tuitioning for grades 9-12.

52. Both Keith and Valori were raised in Catholic homes, and they strive to be faithful Catholics today. They also strive to raise their children according to their Catholic faith.

53. Valori was raised in Auburn, where her family was active in the local Catholic parish.

54. Keith attended a Catholic high school, an experience that he regards as foundational for his faith and character as an adult.

55. Keith is a retired Navy pilot. As a result of Keith's work in the Navy, the Radonis family has lived in Virginia, Rhode Island, and elsewhere in the U.S. and overseas. In each location, the Radonis family has found meaning and connection in the local Catholic community.

56. After Keith retired from the Navy, the Radonis family moved to Maine to be close to Valori's parents.

57. The Radonis family owns and operates a small organic farm, where they raise organic poultry and bison to sell locally.

58. For Keith and Valori, providing a Catholic education is an expression of their faith. They believe that they have made a covenant with God to have and raise children according to the Catholic faith. It is their religious responsibility as parents to plant, nurture, and cultivate the seed of faith in their children.

59. They also believe that a Catholic education is the best way to create a foundation of faith for their children that will last a lifetime.

60. Prior to moving to Maine, Valori homeschooled her two oldest children using a Catholic curriculum.

61. When the family moved to Maine, they enrolled their children at St. Michael School, a school affiliated with St. Michael Catholic Parish, so that they could continue their Catholic education.

62. Their youngest child, L.T.R., is 10 years old and in the 2023-24 school year will be in fifth grade. He currently attends St. Michael, approximately 30 minutes from the Radonises' home.

63. Their two older children, K.Q.R. (who is 16 and will be in eleventh grade during the 2023-24 school year) and L.R.R. (who is 15 and will be in tenth grade during the 2023-24 school year), currently attend high school at Erskine Academy in China, Maine. Erskine is approximately 25 minutes from the Radonises' home.

64. Whitefield currently pays tuition for K.Q.R. and L.R.R. to attend Erskine Academy. But for Maine's illegal exclusion of religious schools from the program, the Radonises would have used their town tuitioning dollars to send K.Q.R. and L.R.R. to St. Dominic for high school instead.

65. The Radonis family would like L.R.R. to attend St. Dominic, and she has been accepted for the 2023-24 school year.

66. St. Dominic is about 55 minutes from the Radonises' home and is located in Auburn, where Valori's parents live.

67. The Radonis family would like L.T.R. to continue at St. Michael through eighth grade, and then transfer to St. Dominic for high school.

Maine's Town Tuitioning Program

68. The Maine Constitution requires each town in the state to provide its school-aged children with a free education. *See* Me. Const. Art. VIII.

69. But Maine is the most rural state in the nation, and it isn't feasible for every small rural town to maintain its own schools from kindergarten through twelfth grade.

70. Thus, since at least 1873, Maine has allowed towns without a public school serving particular grades—most often high school—to fulfill their constitutional obligation by paying tuition for students to attend a private school.

71. Under current law, each Maine town or small group of towns is organized into a "school administrative unit" (or "SAU") that bears the legal responsibility to provide for the education of each child

living in that area from kindergarten through twelfth grade. 20-A M.R.S. § 2(2).

72. If the SAU does not maintain a school for a particular grade, it must either (1) contract with a particular public or private school to educate each student of that grade, or (2) pay tuition for each student of that grade at the public or private school of the parent's choice that is "approved for tuition purposes" and "at which the student is accepted." 20-A M.R.. §§ 5203, 5204, 2951.

73. In the parts of the state that have no municipal government, the Department is similarly responsible either to maintain local public schools or pay tuition for school-aged children to attend another public or private school that is "approved for tuition purposes." 20-A M.R.S. §§ 3252(1); 3253-A(1).

74. Under this program, Maine has approved and paid tuition to schools across the country and even internationally.

75. For example, Maine or Maine towns have paid for Maine students to attend private schools in Vermont, New Hampshire, Massachusetts, Connecticut, New York, Pennsylvania, Virginia, Michigan, Colorado, Utah, California, and in Quebec, Canada.[5]

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[5] *See, e.g.*, List of Schools Approved for Tuition Purposes, 2014-15: https://perma.cc/5RXJ-TLTF; 2015-16: https://perma.cc/2GRS-NZW8; 2016-17: https://perma.cc/728J-CJUF; 2017-18: https://perma.cc/TB26-5MAP; 2018-19: https://perma.cc/J9QC-A5R9; 2019-20: https://perma.cc/8JT9-4SXQ; 2020-21: https://perma.cc/C6DV-WK62; 2021-22: https://perma.cc/3UDF-WPDJ; 2022-23: https://perma.cc/3RYC-EYE4; *see also* 20 M.R.S.

76. Schools that wish to serve students who are eligible for town tuitioning during the 2023-2024 school year must apply for approval "for tuition purposes" from the Department by August 31, 2023.[6]

77. Maine also operates state grant programs for students in post-secondary institutions. These grants may be used at any public or private post-secondary institution in Maine, including those that are religious.[7] And private post-secondary institutions are not subject to the educational discrimination provisions of the Maine Human Rights Act. 5 M.R.S. § 4553(2-A).

Maine's Ongoing Efforts to Exclude Religious Schools

78. For over a century, the program served Maine and its students well. Private religious and nonreligious schools alike—including Diocesan schools like St. Dominic and its predecessors—participated in the program and assisted Maine's towns to fulfill their responsibility to provide an education for young Mainers.

79. Then in the 1980s, Maine began to exclude certain religious schools from the program.

80. In 1980, Maine's Attorney General issued an opinion concluding that the First Amendment's Establishment Clause prohibited the state from

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§ 3252(7) (authorizing the Commissioner of Education to pay tuition to public schools in Quebec).

[6] *See Private School Approval*, Maine Department of Education, https://perma.cc/RDZ3-6GNE.

[7] *See Maine State Grant Program*, The Finance Authority of Maine, https://perma.cc/CU5U-NEFW.

paying the tuition of students who attend "sectarian" schools. Me. Op. Att'y Gen., No. 80-2, 1980 WL 119258 (Jan. 7, 1980) ("1980 Opinion"). The 1980 Opinion relied heavily on the now-overruled decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

81. The 1980 Opinion drew a line between "sectarian" schools (which the Opinion interpreted to include religious schools like those operated by the Diocese) and schools that were "religiously affiliated" but "not necessarily characterized by a pervasively religious atmosphere." 1980 Opinion, 1980 WL 119258, at *14. The 1980 Opinion concluded that aid to "sectarian" schools was unconstitutional, but left open the possibility of funding "religiously affiliated" schools that were not "pervasively sectarian." *Id.*

82. Similarly, when defending the funding ban before the U.S. Supreme Court in *Carson*, Maine argued that "[a]ffiliation or association with a church or religious institution" was a "potential indicator" that a school might be sectarian, but it was not "dispositive." *Carson v. Makin*, 142 S. Ct. at 1994.

83. This move—distinguishing between (acceptable) religious schools and those that are "sectarian"—is not new. Bans on state aid to "sectarian" schools have a "shameful pedigree." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020).

84. At a time in the late-19th Century when readings from the King James Version of the Bible were mandatory in many public schools, House Speaker and later Senator James Blaine of Maine championed a constitutional amendment (called the "Blaine Amendment") that would have banned state

aid to "sectarian" schools in order to prevent states from partnering with Catholic schools to carry out their educational mission. "[I]t was an open secret that 'sectarian' was code for 'Catholic.'" *Id.* at 2270.

85. When Senator Blaine's federal constitutional amendment failed, he used his position in Congress to force territories seeking statehood to include so-called "Baby Blaines" in their proposed constitutions. These Blaine Amendments were "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general." *Id.* at 2259.

86. It is ironic that, while Maine's senator was working to prevent other state governments from choosing to work with Catholic schools, Maine Catholics were educating thousands of Maine children—especially the children of recently-arrived immigrants—and in many cases partnering with the state to do so.

87. It is against this historical background that the Maine Legislature added a new requirement to the program in 1982 that any school receiving tuition funds be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." 20-A M.R.S. § 2951(2).

88. Maine refused to give up the sectarian exclusion even after the U.S. Supreme Court made clear that the Establishment Clause does not bar the use of state tuition vouchers at religious schools. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

89. With the Establishment Clause justification for the sectarian exclusion eliminated, the Maine Legislature considered a bill in 2003 to repeal it. *See* L.D. 182, 121st Legislature, "An Act to Eliminate

Discrimination Against Parents Who Want to Send Their Children to Religious Private Schools," https://perma.cc/VFK9-WUPR.

90. But opponents of the bill fashioned a new justification for the sectarian exclusion, arguing that religious schools should not receive tuition funds because they are "discriminatory." Legislative Record, Me. House of Representatives, 121st Legislature, at H-582-89 (May 13, 2003), https://perma.cc/YLG7-3Z5S.

91. Since then, Maine, and Defendants specifically, have repeatedly explained that the purpose of the sectarian exclusion is to bar schools "that promote a particular faith" from the program because Maine viewed them as "discriminatory" rather than "religiously neutral." *Carson* OA Tr. at 48, 54, 69, 82;[8] *see also Anderson v. Town of Durham,* 2006 ME 39, ¶ 57, 895 A.2d 944, 960 (2006) (noting that Maine refused to extend tuitioning to religious schools to "avoid[] involvement in discrimination in admissions and hiring."); *Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344, 356 (1st Cir. 2004) (noting concerns about religious schools' "admission," "religious tolerance" and "participation in religious activities").

92. This sectarian exclusion meant that Diocesan schools—including St. Dominic—were barred from the program. To remain in the program, a Diocesan school would be forced to give up much of its religious teaching and identity.

93. The sectarian exclusion also made it impossible for many religious parents in Maine to provide the

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[8] *See* https://perma.cc/Y2AF-3C8K.

religious education they desired for their children. These parents paid taxes that supported the SAUs in their towns. But they were barred from accessing the benefits to send their children to the schools of their choice simply because the schools were religious in a way that Maine disapproved of.

94. Some such parents were able to make the financial sacrifice to pay their children's tuition themselves, while others simply could not afford it and were forced to send their children to schools that did not provide the type of education that the parents wanted for their children.

95. For years, these Maine parents attempted to regain equal access to the program.

96. Between 1994 and 2017, Maine parents seeking to use town tuitioning or similar program funds at private religious schools challenged Maine's program five times.[9] Three out of these five lawsuits involved parents who wished to send their children to St. Dominic Academy or its predecessor schools.

97. Then in 2017, the U.S. Supreme Court decided in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), that excluding a religious organization "from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution." *Id.* at 467.

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[9] *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999) (district court case filed in 1994; included parents who wished to send their children to St. Dominic); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999); *Anderson v. Town of Durham*, 2006 ME 39, 47, 895 A.2d 944, 958 (St. Dominic); *Joyce v. State*, 2008 ME 108, 4, 951 A.2d 69, 70; *Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344, 352 (1st Cir. 2004) (St. Dominic).

98. With *Trinity Lutheran* showing that Maine's discrimination against religious education was unconstitutional, another group of religious Maine parents challenged the sectarian exclusion in *Carson*, 142 S. Ct. 1987.

99. But Maine did not relent. Instead, it doubled down. Knowing that the sectarian exclusion in its education law was vulnerable to a Free Exercise challenge in light of *Trinity Lutheran*, Defendants began looking for ways to shore up their arguments and other ways to keep religious schools out of the program should the sectarian exclusion ultimately be held unconstitutional.

100. After the complaint in *Carson* challenged the sectarian exclusion in Maine's education law under *Trinity Lutheran*, the Defendants turned to a different law—the Maine Human Rights Act (the "Act")—to attempt to keep religious schools out of the program.

101. During *Carson*, Maine threatened to strip the Act's religious exemptions from any religious schools that sought to participate in the program. *See* Defendant's Motion for Summary Judgment at 13-14, *Carson v. Makin*, 401 F. Supp. 3d 207 (D. Me. 2019) (No. 18-327). Maine used this threat to assert that the parents in *Carson* lacked standing, because the religious schools that the *Carson* plaintiffs wanted to attend would never choose to participate in the program if it meant giving up their right to hire employees that shared their faith. *Id.* The *Carson* plaintiffs argued that religious schools' employment decisions should remain protected under the Act. *See* Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment at 8-10, *Carson*, 401 F. Supp. 3d 207 (No. 18-327).

102. But the district court was "doubtful" of the plaintiffs' interpretation of the Act and concluded that "[a]t the very least, the statute is ambiguous and might well deter the schools from proceeding to take public funds so as to avoid the risk." *Carson v. Makin*, 401 F. Supp. 3d at 209 & n.9.

103. At the First Circuit, the Department and the Attorney General repeated their argument about the Act. They insisted that religious schools accepting funds would be forced to make "a significant change to how [they] operate" because they would lose their statutory religious exemption from the employment provisions in the Act. Br. of Appellee at 23, *Carson v. Makin*, 979 F.3d 21 (1st Cir. 2020).

104. The First Circuit questioned whether Defendants could use the Act to keep religious schools out of the program, noting the "free exercise concerns that might then arise." *Carson*, 979 F.3d at 31 (citing *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) ("other employers in other cases may raise free exercise arguments that merit careful consideration")).

105. Once *Carson* reached the Supreme Court, Defendants took even more aggressive actions to keep religious schools out of the program.

106. While the Supreme Court considered *Carson*, the Commission proposed—and Maine enacted—sweeping changes to the Act's provisions on educational discrimination. This law, L.D. 1688, took a three-pronged approach to attempt to keep religious schools out of the program.

107. First, L.D. 1688 prohibits "educational institution[s]"—which include co-ed private schools

that participate in the program—from discriminating in education on the basis of "religion." 5 M.R.S. § 4602(1), (5). Among other things, this appears to mean that a religious school cannot participate in the program if it gives preference in admissions to students who share the school's religious beliefs.

108. Second, L.D. 1688 repeals the religious exemption that religious schools participating in the program would have had from the Act's prohibition on sexual orientation and gender identity discrimination in education.

109. Third, L.D. 1688 adds a new religious neutrality rule barring religious schools from "discrimat[ing] between religions" in "permit[ting] religious expression." 5 M.R.S. § 4602(5)(D).

110. Maine's arguments before the Supreme Court in the *Carson* case made it increasingly clear that L.D. 1688 was intended to keep religious schools out of the program should the sectarian exclusion be struck down.

111. Defendants repeatedly described the purpose of the sectarian exclusion using language strikingly similar to the new prohibitions in L.D. 1688.

112. Defendants argued again and again that the "defining feature" of the schools allowed to participate in the program is "religious neutrality." *See* OA Tr. at 48, 52, 54, 69, 73, 82, 86.

113. They also argued that the sectarian exclusion was meant to keep out schools that "actively discriminate[] against certain protected classes," because Maine only wants schools that are "inclusive," and "not discriminatory." *Id.* at 69, 85.

114. Following the oral argument, the Attorney General issued a press statement that explicitly connected the purposes of the sectarian exclusion with L.D. 1688's amendments to the Act. He explained his view that "[s]chools that require students to undergo religious instruction are excluded [from the program] because the education they provide is not equivalent to a public education." Statement from Attorney General Frey on *Carson v. Makin* oral argument (Dec. 8, 2021), https://perma.cc/BGL4-YHLY.

115. The Attorney General further stated:

> 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.

Id.

116. He concluded: "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." *Id.*

117. On June 21, 2022, the Supreme Court issued its decision in *Carson*, holding that Maine's sectarian exclusion violates the Free Exercise Clause. The Court explained that the First Amendment does not permit "enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." 142 S. Ct. at 1998. The Court held that Maine's sectarian exclusion entailed further First Amendment problems because "scrutinizing whether and how a religious school pursues its educational mission would … raise serious concerns about state entanglement with religion and denominational favoritism." 142 S. Ct. at 2001.

118. That same day, the Attorney General issued another statement to the press, again explaining that L.D. 1688's amendments to the Act would continue to keep religious schools out of the program in the absence of the sectarian exclusion.

119. The statement read:

> "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.

Statement of Attorney General Aaron Frey, https://perma.cc/544J-DAFN.

120. The connection between the now-defunct sectarian exclusion and L.D. 1688 did not go unnoticed in the public. Just two days after the *Carson* decision, the New York Times published an essay by U.C. Davis

Law Professor Aaron Tang entitled "There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It."[10]

121. Writing about L.D. 1688, Professor Tang explained:

> Let's start with the Carson case. Anticipating this week's decision, Maine lawmakers enacted a crucial amendment to the state's anti-discrimination law last year in order to counteract the expected ruling. … The legislative fix made by Maine lawmakers offers a model for lawmakers elsewhere who are alarmed by the court's aggressive swing to the right. Maine's example shows that those on the losing end of a case can often outmaneuver the court and avoid the consequences of a ruling.

Id.

122. Maine's then-Speaker of the House also bragged publicly that Maine "changed the guidelines" with L.D. 1688 because it "[a]nticipated the ludicrous [*Carson*] decision from the far-right SCOTUS."[11]

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[10] Tang, *There's a Way to Outmaneuver the Supreme Court*, https://perma.cc/YUR2-YYZX.

[11] Ryan Fecteau (@SpeakerFecteau), Twitter (June 26, 2022, 8:51 AM), https://twitter.com/SpeakerFecteau/status/1541041572636237826 (replying to Santiago Mayer (@santiagomayer)), Twitter (June 25, 2022, 10:24 AM), https://twitter.com/santiagomayer_/status/1540702357532442624).



123. Defendants' efforts to outmaneuver the Supreme Court and undermine its holding in *Carson* have so far been largely successful. Since the Court struck down the sectarian exclusion, only one religious school has applied to the Department to be approved for tuition purposes.

124. Were it not for L.D. 1688's amendments to the Act's education provisions and Defendants' reinterpretations of the Act's employment provisions, St. Dominic and other Diocesan schools would apply to be approved for tuition purposes and, on information and belief, would be approved. On information and belief, many other religious schools would also apply and be approved.

Defendants' Current Exclusion of Religious Schools

125. Without judicial relief, St. Dominic and other Diocesan schools will continue to be excluded from the program by these unconstitutional education and employment provisions.

Education Provisions

126. The Act places certain conditions on "educational institution[s]." The Act defines "educational institution[s]" to include public elementary, secondary, and post-secondary schools as well as "any private school or educational program approved for tuition purposes if both male and female students are admitted." 5 M.R.S. § 4553(2-A).

127. All private post-secondary schools are excluded, even though they may receive state funds through the Maine State Grant Program.

128. In addition, schools outside Maine that participate in the program—including schools in neighboring states, like Massachusetts, and those in other countries, like Canada—are exempt because the Act does not apply extraterritorially.

129. Single-sex private schools approved for tuition purposes are likewise exempt because they fall outside the statutory definition of "educational institution." 5 M.R.S. § 4553 (2-A). Thus, during the current 2022-23 school year, Maine paid tuition to two all-girls boarding schools in Massachusetts. *Supra* note 5.

130. However, a month after the religious school in *Crosspoint Church*, a parallel case, cited this exemption, Maine lawmakers introduced a bill to remove it. The Commission testified in support of this bill. The revision passed on June 12, 2023, and is awaiting the governor's signature. Complaint, *Crosspoint Church v. Makin*, No. 1:23-cv-00146 (D. Me. Apr. 27, 2023); L.D. 1833, 131st Leg. (Me. 2023). On information and belief, the Commission supported and the Maine Legislature enacted this change for the purpose of trying to strengthen their arguments in

Crosspoint Church.

131. Until the Act was amended by L.D. 1688 in 2021, religiously affiliated schools that qualified as "nonsectarian" were likewise exempt from the rules regarding sexual orientation and gender identity discrimination.[12] Me. Pub. L. 2005, ch. 10, sec. 21, § 4602(4) ("[t]he provisions in 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."); *see also* Me. Pub. L. 2005, ch. 10, sec. 3, § 4553(9-C) (defining "sexual orientation" to include "gender identity.").

132. As amended by L.D. 1688, the relevant portions of the Act's educational discrimination provision, 5 M.R.S. § 4602, now read:

> 1. Unlawful educational discrimination. It is unlawful educational discrimination in violation of this Act, on the basis of … sexual orientation or gender identity, … or religion, to:
>
> A. Exclude a person from participation in, deny a person the benefits of, or subject a person

[12] Nonsectarian, religiously affiliated schools are not a null set. As Maine emphasized to the Supreme Court in *Carson*, religiously affiliated schools that Maine did not regard as "sectarian" could still participate in the program. Thus, schools like the Maine Coast Waldorf School, which belongs to an educational movement that "has its foundations in Anthroposophy" and which offers a "non-sectarian and non-denominational" education "based on a belief that there is a spiritual dimension to the human being and to all of life," could and did participate over many years. Waldorf Education, FAQs About Waldorf, https://perma.cc/L3BB-95FG; *see also supra* note 5 (listing Maine Coast Waldorf School receiving tuition every year from 2015 to 2022).

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. Application. Nothing in this section …

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

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.

133. St. Dominic cannot comply with § 4602(5)(D)'s requirement that "to the extent that an educational institution permits religious expression, it cannot

discriminate between religions in so doing."

134. Diocesan schools like St. Dominic teach about religion from a Catholic perspective. While Diocesan schools welcome children from all faiths and none, families that choose these schools for their children understand and agree that they will learn about religion from a Catholic perspective. So, for example, St. Dominic provides regular Mass that students are required to attend. To continue doing so, Maine's law would require St. Dominic to also allow schoolwide chapel services led by a rabbi, imam, or Protestant preacher. This is inconsistent with St. Dominic's commitment as a Catholic school.

135. Similarly, while Diocesan schools welcome students from all faiths or no faith who are willing to learn in a thoroughly Catholic educational environment, Diocesan schools do place some limits on students' religious expression at school. For example, St. Dominic would not allow students to publicly condemn, mock, or denigrate Catholic beliefs or publicly seek to dissuade other students from believing in them. Nor would St. Dominic permit students to organize clubs or distribute literature for these purposes. St. Dominic's religious beliefs also require teachers and staff to uphold core Catholic teachings in word and deed, regardless of their individual beliefs. This requirement is rooted in Catholic theology, which asks teachers to "reveal the Christian message not only by word but also by every gesture of their behavior."[13]

136. Diocesan schools also cannot comply with 5

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[13] Sacred Congregation for Catholic Education, *The Catholic School* at ¶ 43 (1977).

M.R.S. § 4602(1), which prohibits discrimination on the basis of religion. While Diocesan schools welcome students of all faiths and none, as a Catholic school they invite families to join them in their Catholic educational mission and participate in the religious life of the school through practices like attending Mass, praying before meals, and participating in Church-led service projects. Diocesan schools also give preference to Catholic students in admissions and financial aid.

137. Diocesan schools also cannot comply with 5 M.R.S. § 4602(1), which says that educational institutions may not discriminate on the basis of sexual orientation or gender identity.

138. Diocesan schools firmly believe that everyone is created "in the image of God" and "possess an inalienable dignity which comes to them immediately from God their creator."[14] Accordingly, they believe that each person should be treated with dignity, compassion, and respect. And they do not inquire about a student's sexual orientation or gender identity at the time of admission.

139. However, Diocesan schools cannot delegate their responsibility to make religiously grounded decisions regarding appropriate student conduct to the Maine Human Rights Commission.

140. For example, the Catholic faith views parents as the primary educators of their children. "'The role of parents in education is of such importance that it is almost impossible to provide an adequate substitute.' The right and duty of parents to educate their children

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[14] Catechism of the Catholic Church § 369.

are primordial and inalienable."[15]

141. But the Commission, the state agency responsible for enforcing the Act, has interpreted the gender-identity nondiscrimination provision to require a school to facilitate a student's efforts to change his or her gender identity even if the school knows that the student's parents object.[16]

142. The Commission has also interpreted the gender identity provision to require the school to use a student's preferred name and pronouns, and if the student so requests, to "require[]" all employees and "instruct" other students to do so as well. *Id.* at 3. The Commission warns that a "pattern" of refusing to use the student's preferred pronouns may be considered a violation of the Act. *Id.* at 3-4.

143. This approach, which requires Maine schools to do what students ask without consulting their parents, is inconsistent with the Diocese's commitment to respect parents' "primordial and inalienable" "right and … duty" to educate their children.[17]

144. The Commission's approach would also require Diocesan schools to discipline staff and students who have a religious or conscientious objection to using a student's preferred pronouns if they do not correspond to the student's biological sex.

145. Pope Francis, the head of the Roman Catholic

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[15] Catechism of the Catholic Church § 2221.

[16] S*ee* Me. Hum. Rights Comm'n, "Interpretation of the Education Provisions of the MHRA," at 4 (Jan. 13, 2016), https://perma.cc/D5Z3-PMP8.

[17] Catechism of the Catholic Church § 2221.

Church worldwide, has counseled that Catholics must be "understanding of human weakness and the complexities of life," while emphasizing that "biological sex and the socio-cultural role of sex (gender) can be distinguished but not separated" and that "protecting our humanity" means first of all "accepting it and respecting it as it was created."[18]

146. The Commission's rules compelling schools to enforce students' preferred pronouns—regardless of their parents' wishes, and without reference to the student's biological sex—would require Diocesan schools to discipline staff and students who, after reflecting on Pope Francis' words, conclude that they cannot do so. This is untenable.

Employment Provisions

147. Catholic educators must "bear witness to Christ" "by their life as much as by their instruction." *Gravissimum Educationis* § 8 (1965). And canon law requires them to be "outstanding in correct doctrine and integrity of life." 1983 Code c. 803, § 2.

148. Accordingly, the employment handbook for Diocesan schools provides: "All employees must comply with the teachings of the Roman Catholic Church and must perform all agreed upon articles under the terms of employment. Since Maine Catholic schools are Catholic institutions, they should reflect the values and beliefs of the Catholic faith. Employee conduct and behavior should be consistent with the principles of the Catholic Church. The employee's personal and professional life shall reflect the

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[18] Pope Francis, *Amoris Laetitia*, no. 56 (2016) (quoting the *Relatio Finalis*, no. 58 (2015)).

philosophy of Catholic education and be in accordance with the policy of the diocese and onsite procedures." Diocese of Portland, School Personnel Policies and Procedures Manual at 27 (Oct. 1, 2022). Each school employee agrees to follow this handbook as a condition of employment.

149. The Diocese also asks all teachers in its schools to enter into a "ministerial agreement," promising among other things that they "will exhibit the highest Christian ethical standards and personal integrity and demonstrate and exemplify Catholic teachings based on Christian principles, supporting the teachings, disciplines, and traditions of the Catholic Church while at work and in [their] personal life."

150. The Supreme Court has recognized that "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school[]." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020). For that reason, the Court has held that the First Amendment forbids courts from interfering in any way with a religious community's selection of its religious teachers, including through the application of employment nondiscrimination laws. *Id.* at 2064.

151. The Act, like the federal employment nondiscrimination laws in *Our Lady*, is subject to this rule, which is known as the "ministerial exception."

152. The Act makes it unlawful for "any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of … sexual orientation or gender identity." 5 M.R.S. § 4572(1)(A).

153. But the Act also includes a religious exemption,

which provides: "This subchapter [on employment discrimination] 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." 5 M.R.S. § 4573-A(2).

154. Nothing in this text makes the religious exemption contingent on whether or not a religious employer receives public funds.

155. But in *Carson*, the Department and Attorney General nonetheless took the position that a school that participates in the program forfeits its religious exemption to the sexual orientation and gender identity employment discrimination provisions, because of a separate, narrower version of the religious exemption in another part of the Act. *Carson*, 401 F. Supp. 3d at 207. The district court concluded that their reading was a "plausible" interpretation of Maine law. *Id.* at 209.

156. The Commission has likewise interpreted the religious exemption to be limited to religious employers that receive no public funds. While the *Carson* cert petition was pending, the Commission submitted testimony to the Maine Legislature opposing a bill that would have clarified the rights of religious schools that receive town tuitioning funds and stating its view that, under the Act, "a religiously affiliated school … may continue to operate within its beliefs, at its own expense, but once public funds … are

utilized … the organization must not discriminate" in "employment."[19]

157. Notwithstanding Defendants' views to the contrary, Diocesan schools cannot constitutionally be required to give up their religious hiring rights as a condition of participating in the program. *See, e.g.*, *Carson v. Makin*, 979 F.3d at 31, *rev'd and remanded*, 142 S. Ct. 1987 (2022) (acknowledging that applying the Act in a way that abrogates religious schools' hiring rights would raise concerns under the Free Exercise Clause).

158. However, the Commission and the Attorney General have repeatedly asserted that the Act does just that.

Enforcement of the Education and Employment Provisions

159. The Act is enforced in a variety of ways.

160. The Commissioner of Education and the Maine Human Rights Commission both have authority to issue rules implementing the education provisions of the Act.

161. On information and belief, schools applying to the Department to participate in the program must certify their compliance with the education and employment provisions in the Act as a prerequisite to being "approved for tuition purposes."

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[19] Letter from Me. Hum. Rts. Comm'n to Hon. Anne Carney, et al. at 3 (Apr. 20, 2021), https://perma.cc/8RXA-YTH6. The Commission appears to believe that even receiving pandemic recovery funds or money from federal school lunch programs is enough to strip religious organizations of their hiring rights under Maine law. *See id.*

162. On information and belief, the Department would not approve Diocesan schools for tuition purposes knowing that Diocesan schools will not violate their faith in order to comply with the education and employment provisions in the Act.

163. Because Diocesan schools do not and cannot comply with the education and employment provisions as the Defendants interpret them, applying to be approved for tuition purposes would be futile.

164. In the alternative, if the Department approved Diocesan schools for tuition purposes, they would immediately become subject to the Act's education and employment provisions as interpreted by the Defendants and would face a credible threat of enforcement.

165. The Act empowers the Commission to investigate "alleged infringements upon human rights and personal dignity" using its independent subpoena power. 5 M.R.S. § 4566. A private party may file a complaint with the Commission, which may then conduct its own investigation and file suit in Maine Superior Court. 5 M.R.S. § 4612. And private parties may also file suit directly in Superior Court themselves. 5 M.R.S. § 4621. If the court finds that unlawful discrimination has occurred, it may impose penalties up to $100,000 for repeat offenders. 5 M.R.S. § 4613.

166. In short, applying to be approved for tuition purposes would either be futile—because the Department would deny the application for failure to comply with the Act—or exceptionally risky—because upon approval each Diocesan school would immediately face a credible threat that the

Commission or a private plaintiff would enforce the Act against it. Either way, Diocesan schools need judicial relief to protect their First Amendment rights before they can apply.

167. By excluding the Diocese and its schools from participating in the program, Defendants have imposed harm by denying them funding and restricting their ability to serve Maine families.

168. By depriving the Radonises of the right to use town tuitioning funds to send their children to Catholic schools, Defendants have harmed them and their children. In particular, the Radonises have had to send their children to non-Catholic schools and will have to spend their own resources to send their children to St. Dominic because Maine refuses to allow them to spend their town tuitioning funds at the school of their choice.

CLAIMS

Count I
42 U.S.C. § 1983
Violation of U.S. Const. Amend. I: Religious Targeting

169. All preceding paragraphs are realleged and incorporated herein by reference.

170. The Free Exercise Clause of the First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

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

172. "[A] law targeting religious beliefs as such is

never permissible." *Trinity Lutheran*, 582 U.S. at 466 n.4 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)).

173. Because "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion," the 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," *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

174. Maine has targeted the religious beliefs of both schools and Maine families by:

- Removing the single-sex school exemption and religious exemption from its educational nondiscrimination law;
- Adding new religious nondiscrimination and equal religious expression requirements; and
- Interpreting its employment discrimination law to hold that religious schools that receive government funds lose their religious exemption to the state employment discrimination law.

175. Maine's Human Rights Commission has publicly stated that religious schools that participate in Maine's program will lose their religious exemptions.

176. During the *Carson* litigation, Maine's Attorney General also took the position that religious schools that participate in Maine's program will lose their religious exemptions, and argued that, for that reason,

parents seeking to send their children to religious schools that wished to retain their religious hiring rights lacked standing to sue. *Carson*, 401 F. Supp. 3d at 209; *Carson*, 979 F.3d at 30.

177. Maine's Attorney General made specific remarks disparaging the beliefs and practices of religious schools that seek to participate in Maine's program, including:

- "The education provided by the [religious schools in *Carson I*] is inimical to a public education."
- These religious schools provide "an education that is fundamentally at odds with values we hold dear" because "[t]hey 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."

Statement of Attorney General Aaron Frey, https://perma.cc/544J-DAFN.

178. The Attorney General vowed "to explore with Governor Mills' administration and members of the Legislature statutory amendments to address the Court's decision [in *Carson I*] and ensure that public money is not used to promote discrimination, intolerance, and bigotry." *Id*.

179. Maine and its officials do not have a compelling reason for their actions, and they have not selected the means least restrictive of religious exercise in order to further their interests.

180. Defendants are persons within the meaning of 42 U.S.C. § 1983.

181. Plaintiffs have suffered and will suffer harm

absent relief.

Count II
42 U.S.C. § 1983
Violation of U.S. Const. Amend. I:
Free Exercise of Religion—Categorical Exclusion from Otherwise Available Government Benefits

182. All preceding paragraphs are realleged and incorporated herein by reference.

183. Under the Free Exercise Clause, imposing "special disabilities on the basis of religious views or religious status" triggers strict scrutiny. *Trinity Lutheran*, 582 U.S. at 460-61.

184. Thus, a system that precludes religious entities and families from obtaining generally available state benefits solely because of their religious character or beliefs is unconstitutional unless the government can satisfy strict scrutiny. *Espinoza*, 140 S. Ct. at 2261.

185. St. Dominic's Catholic religious beliefs and identity permeate its entire school and mission. Its religious exercise is offering education from a distinctively Catholic perspective.

186. The Radonises lives in an area that does not provide a public high school, and they are eligible to receive tuition assistance payments to cover the cost of educating their children.

187. Their sincerely held religious beliefs require them to provide their children with a Catholic education to the best of their abilities.

188. "Maine offers its citizens a benefit: tuition assistance payments for any family whose school district does not provide a public secondary school."

Carson, 142 S. Ct. at 1997.

189. Maine amended the Act while *Carson* was pending to add the new requirements that schools that take part in the program must not "discriminate" on the basis of religion and "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." 5 M.R.S. § 4602. Collectively, these are referred to as "religious nondiscrimination requirements."

190. The religious nondiscrimination requirements closely track Maine's arguments at the Supreme Court, where Maine asserted that under its prior program "a school is excluded only if it promotes a particular faith and presents academic material through the lens of that faith." *Carson*, 142 S. Ct. at 2001.

191. Thus, the religious nondiscrimination requirements amount to a "religious gerrymander[]" and have the effect of excluding religious schools like St. Dominic from the program. *Id.* at 2000.

192. This also has the effect of precluding families like the Radonis family from using town tuitioning funds to obtain a religious education for their children.

193. The religious nondiscrimination requirements require Plaintiffs to choose between exercising their religious beliefs and receiving an otherwise available benefit. Plaintiffs are thus "disqualified from this generally available benefit 'solely because of their religious character'" and beliefs. *Id.* at 1997.

194. "By condition[ing] the availability of benefits in that manner, Maine's tuition assistance program . . . effectively penalizes the free exercise of religion."

Id. (internal quotations omitted).

195. Categorically excluding schools because of their religious exercise of "[e]ducating young people in their faith, inculcating its teachings, and training them to live their faith," *id.* at 2001, furthers no governmental interest.

196. Discrimination against religious schools and families is not the least restrictive means of furthering a compelling governmental interest.

197. Defendants are persons within the meaning of 42 U.S.C. § 1983.

198. Plaintiffs have suffered and will suffer harm absent relief.

Count III
42 U.S.C § 1983
Violation of U.S. Const. Amend. I:
Free Exercise Clause—Not Generally Applicable

199. All preceding paragraphs are realleged and incorporated herein by reference.

200. State action "burdening religious practice must be of general applicability." *Lukumi*, 508 U.S. at 542.

201. A law is not generally applicable if it treats "*any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); *Lukumi*, 508 U.S. at 542-46.

202. Under this rule, the Act's educational nondiscrimination rules are not generally applicable. 5 M.R.S. § 4602.

203. As of today, the Act's rules regarding educational nondiscrimination do not apply to private single-sex schools, even if those schools receive state funds, because they are not covered by the Act's current definition of "educational institution" that will remain Maine law until and unless the governor signs L.D. 1833 and it goes into effect.

204. The Act's rules regarding educational nondiscrimination also do not apply to private post-secondary schools, even if those schools receive state funds, because they are not covered by the Act's definition of educational institutions.

205. The Act's rules are also unenforceable with respect to schools outside of Maine (whether in neighboring U.S. states or in Canada), because the Act does not apply extraterritorially.

206. Thus, Maine law treats "comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296.

207. The Act is therefore subject to strict scrutiny, requiring the State to have a compelling interest in discriminating against religious schools, and this rule must be the least-restrictive means of achieving that end. *Lukumi*, 508 U.S. at 531-32.

208. Conditioning access to government funding on a school's willingness to give up its religious identity and exercise furthers no governmental interest.

209. Moreover, by creating categorical exemptions for out-of-state schools and all private post-secondary schools, Maine has not treated its own interests as compelling.

210. Discrimination against K-12 religious schools

located in Maine is not the least restrictive means of furthering a compelling governmental interest.

211. Defendants are persons within the meaning of 42 U.S.C. § 1983.

212. Plaintiffs have suffered and will suffer harm absent relief.

Count IV
42 U.S.C. § 1983
Violation of U.S. Const. Amend. I:
Free Exercise Clause—Parental Right to Direct Children's Education and Upbringing

213. All preceding paragraphs are realleged and incorporated herein by reference.

214. "[T]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925)).

215. Parent's' right to direct the education and upbringing of their children is not only deeply embedded in "[t]he history and culture of western civilization," *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); it also has "a constitutional dimension," *Troxel*, 530 U.S. at 65.

216. "[T]his traditional interest of parents with respect to the religious upbringing of their children" is a "fundamental right[] and interest[]" and is "specifically protected by the Free Exercise Clause of the First Amendment." *Yoder*, 406 U.S. at 214; *see also Emp. Div. v. Smith*, 494 U.S. 872, 881 (1990) (citing *Yoder*, 406 U.S. 205). It is also "perhaps the

oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel*, 530 U.S. at 65; *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

217. Keith and Valori Radonis's sincere religious beliefs compel them to provide a Catholic education for their children to the best of their abilities.

218. By prohibiting the Radonis family from using otherwise available town-tuitioning funds to send their children to a Catholic school unless that school abandons its religious identity, Maine has interfered with the Radonises' right to direct the religious upbringing of their children.

219. Defendants do not have a compelling interest in interfering with religious families' ability to direct the upbringing of their children.

220. Defendants' discriminatory policies are not the least restrictive means to further any governmental interest.

221. Defendants are persons within the meaning of 42 U.S.C. § 1983.

222. The Radonis family has suffered and will suffer harm absent relief.

Count V
42 U.S.C. § 1983
Violation of U.S. Const. Amend. I:
Ministerial Exception

223. All preceding paragraphs are realleged and incorporated herein by reference.

224. "The First Amendment protects the right of religious institutions 'to decide for themselves, free

from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady*, 140 S. Ct. at 2055 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

225. An institution's right to religious autonomy "ensures that the authority to select and control who will minister to the faithful . . . is the church's alone." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194-95 (2012).

226. "Applying this principle," the Supreme Court has repeatedly held that "the First Amendment bar[s] a court from entertaining an employment discrimination claim" regarding a teacher or other ministerial employee responsible for transmitting the faith to the next generation. *Our Lady*, 140 S. Ct. at 2055 (citing *Hosanna-Tabor*, 565 U.S. at 171).

227. Nevertheless, during the *Carson* litigation, Maine threatened to use the Act's employment nondiscrimination policies to force any religious schools that participated in the program to abandon their religious hiring policies. *Carson*, 979 F.3d at 30, *rev'd and remanded*, 142 S. Ct. 1987.

228. Likewise, while the cert petition for the *Carson* litigation was pending before the Supreme Court, the Maine Human Rights Commission submitted written testimony to the Maine Legislature in which the Commission asserted that private religious schools that receive any government funds (including but not limited to town tuitioning funds) become subject to the Maine Human Rights Act's employment

nondiscrimination requirements.[20]

229. Similarly, the Attorney General of Maine, in his official statement issued the day that *Carson* was decided, accused some religious schools that sought to participate in Maine's program of "openly discriminating in hiring teachers and staff" and asserted 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."[21]

230. Applying the Act's employment nondiscrimination provisions to school employees who have the "responsibility of educating and forming students in the faith . . . threatens the school's independence in a way that the First Amendment does not allow." *Our Lady*, 140 S. Ct. at 2069.

231. Defendants are persons within the meaning of 42 U.S.C. § 1983.

232. The Diocese and its schools have suffered and will suffer harm absent relief.

Count VI
42 U.S.C. § 1983
Violation of U.S. Const. Amend. I:
Religious Autonomy

233. All preceding paragraphs are realleged and

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[20] Letter from Amy M. Sneirson, Exec. Dir. of the Me. Hum. Rts. Comm'n to Hon. Anne Carney, Me. Senate Chair, et al. 3 (April 20, 2021), https://perma.cc/7B9E-2J2X.

[21] Statement by Attorney General Aaron Frey (June 21, 2022), https://perma.cc/544J-DAFN.

incorporated herein by reference.

234. The First Amendment protects the right of a religious institution to make "personnel decision[s] based on religious doctrine" even when that decision does not involve a ministerial employee. *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 660 (10th Cir. 2002).

235. Maine and its officers intend to enforce the Act's employment nondiscrimination provisions against religious schools that accept town tuitioning funds.

236. St. Dominic maintains religious conduct standards for all employees, both ministers and non-ministers. Enforcing the Act to bar these religious standards infringes on the school's right to govern its own internal affairs, frame its own policies and doctrine, create and maintain a school environment that is faithful to its religious beliefs, and make employment decisions based on those religious beliefs free from government interference. This violates the First Amendment. *See Our Lady*, 140 S. Ct. at 2060.

237. Defendants are persons within the meaning of 42 U.S.C. § 1983.

238. The Diocese and its schools have suffered and will suffer harm absent relief.

Count VII
42 U.S.C. § 1983
Violation of U.S. Const. Amend. I:
Excessive Entanglement with Religion

239. All preceding paragraphs are realleged and incorporated herein by reference.

240. *Carson* explained that "scrutinizing whether and how a religious school pursues its educational

mission" would "raise serious concerns about state entanglement with religion and denominational favoritism," both of which violate the Establishment Clause. 142 S. Ct. at 2001 (citing *Our Lady*, 140 S. Ct. at 2064; *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

241. If the Diocesan schools are approved for tuitioning purposes, they will become subject to the challenged portions of the Act.

242. Enforcing the challenged portions of the Act against the Diocese will require the Commission and Maine Courts to sit in judgment on the internal religious policies of the Diocesan schools.

243. This will result in excessive entanglement between Maine and the Diocesan schools.

244. It will also open the door to allowing Maine to show denominational favoritism by approving religious schools whose religious beliefs align with Maine's beliefs about religious non-discrimination, gender identity, and sexual orientation.

245. Defendants are persons within the meaning of 42 U.S.C. § 1983.

246. The Diocese and its schools have suffered and will suffer harm absent relief.

Count VIII
42 U.S.C. § 1983
Violation of U.S. Const. Amend. I:
Free Speech—Compelled Speech and Expressive Association

247. All preceding paragraphs are realleged and incorporated herein by reference.

248. Using government power to force a group that

is formed for expressive purposes to include a message not its own "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

249. The Free Speech Clause prohibits the government from compelling people to speak messages against their will.

250. The Free Speech Clause also prohibits the government from forcing a group formed for expressive purposes to accept members who oppose those purposes. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 650, 659 (2000).

251. St. Dominic was formed for the expressive purpose of proclaiming the Catholic faith to the next generation. It is an expressive association within the meaning of *Hurley* and *Dale*.

252. Maine amended the Act in a way that would require religious schools that participate in the program to admit students and hire faculty and staff who are opposed to St. Dominic's religious views.

253. Maine also amended the Act to prohibit "religious discrimination" and require equal religious expression.

254. These rules would alter the content of St. Dominic's Catholic message, against its will.

255. These rules would also force St. Dominic to change its own message by giving students and families that do not share St. Dominic's Catholic faith equal time with students and families that do.

256. These rules would also force St. Dominic to

surrender control over the religious speech on its campuses to the State of Maine.

257. These rules would therefore "significantly affect [the school's] ability to advocate" for its religious "viewpoints." *Dale*, 530 U.S. at 648.

258. These rules would also infringe on the ability of St. Dominic and the Radonis family to join together to accomplish the expressive purpose of educating the Radonises' children in the Catholic faith.

259. Coercing religious schools into altering their religious speech and expression serves no compelling government interest.

260. Maine has not selected the means least restrictive of religious speech to further its interests.

261. Defendants are persons within the meaning of 42 U.S.C. § 1983.

262. Plaintiffs have suffered and will suffer harm absent relief.

Count IX
42 U.S.C. § 1983
Violation of U.S. Const. Amend. I:
Unconstitutional Conditions

263. All preceding paragraphs are realleged and incorporated herein by reference.

264. The "unconstitutional conditions doctrine . . . vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

265. "The 'unconstitutional conditions' doctrine limits the government's ability to exact waivers of

rights as a condition of benefits, even when those benefits are fully discretionary." *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006) (citations omitted); *see also Koontz*, 570 U.S. at 608 ("[W]e have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights." (citations omitted)).

266. In order to participate in Maine's program, private religious schools must give up their religious identity by, among other things:

- Abandoning religious hiring rights that are protected by the First Amendment;
- Allowing all religious expression equally, even when it is inconsistent with the school's own religious beliefs;
- Abandoning religious requirements related to student and faculty behavior.

267. In order to receive Maine's town tuitioning funds, the Radonis family and other families like them must abandon their religious beliefs by sending their children to a secular school.

268. Such requirements violate the unconstitutional conditions doctrine.

269. Defendants are persons within the meaning of 42 U.S.C. § 1983.

270. Plaintiffs have suffered and will suffer harm absent relief.

Count X
42 U.S.C. § 1983
Violation of U.S. Const. Amend. XIV:
Equal Protection—Discrimination Based on Religion

271. All preceding paragraphs are realleged and incorporated herein by reference.

272. The Equal Protection Clause prohibits discrimination on the basis of religion.

273. Maine's application of the Act to exclude religious schools like St. Dominic from the program penalizes St. Dominic because of its religious beliefs.

274. It also penalizes the Radonis family for their religious beliefs.

275. Private co-educational schools that do not share St. Dominic's religious beliefs are allowed to participate in Maine's program.

276. Families who do not share the Radonis family's religious beliefs and who wish to send their children to private co-educational schools are allowed to participate in Maine's town-tuitioning program.

277. Defendants do not have a compelling interest in discriminating on the basis of religion and denying religious schools equal protection.

278. Defendants' religious discrimination is not the least restrictive means to further any governmental interest.

279. Defendants are persons within the meaning of 42 U.S.C. § 1983.

280. Plaintiffs have suffered and will suffer harm

absent relief.

PRAYER FOR RELIEF

Wherefore, Plaintiffs request that the Court:

a. Declare that the religious expression, religious discrimination, sexual orientation, and gender identity provisions of 5 M.R.S. § 4602 violate the First Amendment to the United States Constitution as applied to Plaintiffs;

b. Declare that the religious expression, religious discrimination, sexual orientation, and gender identity provisions of 5 M.R.S. § 4602 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as applied to Plaintiffs;

c. Declare that applying 5 M.R.S. § 4553(10)(G) to strip the Diocese and its schools of their religious hiring rights if they accept public funds violates the First Amendment to the United States Constitution as applied to Plaintiffs;

d. Declare that applying 5 M.R.S. § 4553(10)(G) to strip the Diocese and its schools of their religious hiring rights if they accept public funds violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as applied to Plaintiffs;

e. Issue preliminary and permanent injunctive relief prohibiting Defendants from applying the religious expression, religious discrimination, sexual orientation, and gender identity provisions of 5 M.R.S. § 4602 to the Diocese and its schools if they accept public funds;

f. Issue preliminary and permanent injunctive relief prohibiting Defendants from applying 5 M.R.S. § 4553(10)(G) to strip the Diocese and its schools of their religious hiring rights if they accept public funds;

g. Award actual damages in an amount to be determined;

h. Award nominal damages;

i. Award Plaintiffs reasonable attorney's fees and costs; and

j. Award all such other relief as the Court may deem proper.

JURY DEMAND

Plaintiffs request a trial by jury on all issues so triable.

Dated: June 13, 2023

Respectfully submitted,

/s/ *Adèle Auxier Keim*
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Counsel for Plaintiffs

VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I, Keith Radonis, declare under penalty of perjury that the foregoing allegations that pertain to me and my family are true and correct to the best of my knowledge.

Dated: 6/13/2023

/s/ Keith Radonis
Keith Radonis

VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I, Valori Radonis, declare under penalty of perjury that the foregoing allegations that pertain to me and my family are true and correct to the best of my knowledge.

Dated: 6/13/2023

/s/ Valori Radonis
Valori Radonis

VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I, Marianne Pelletier, declare under penalty of perjury that the foregoing allegations that pertain to St. Dominic Academy and the Roman Catholic Diocese of Portland are true and correct to the best of my knowledge.

Dated: 6/13/2023

/s/ Marianne Pelletier
Marianne Pelletier
Superintendent of Schools
Roman Catholic Diocese of Portland

MAIN HUMAN RIGHTS COMMISSION
Amy M. Sneirson, Executive Director
Barbara Archer Hirsch, Commission Counsel

* * *

April 20, 2021

The Honorable Anne Carney, Senate Chair
The Honorable Thom Harnett, House Chair
Joint Standing Committee on Judiciary
100 State House Station
Augusta, ME 04333

Re: An Act Clarifying the Acceptance of Public Funding by Community Benefit Organizations – LD 879

Dear Senator Carney, Representative Harnett, and Members of the Joint Standing Committee on Judiciary:

The Maine Human Rights Commission ("Commission") is Maine's quasi-independent, neutral, apolitical State agency[1] charged with enforcing our state anti-discrimination law, the Maine Human Rights Act, 5 M.R.S. §§ 4551, *et seq*. ("MHRA" or the "Act"). The Commission is statutorily charged with the duties of: investigating, conciliating, and at times litigating discrimination cases under the MHRA; promulgating rules and regulations to effectuate the MHRA; and making recommendations for further legislation or executive action concerning infringements on human rights in Maine. 5 M.R.S. § 4566(7), (11). With those duties in mind, the Commission provides this testimony against LD 879, *An Act Clarifying the Acceptance of Public Funding by Community Benefit Organizations*.

The MHRA's Purpose, and Backdrop to LD 879.

The policy of the Commission and the MHRA itself is to "keep continually in review all practices infringing on the basic human right to a life with dignity, and the causes of these practices, so that corrective measures may, where possible, be promptly recommended and implemented, and to prevent discrimination in employment, housing or access to public accommodations on account of race, color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin". 5 M.R.S. § 4552. That breadth of purpose carries into the specified powers and duties of the Commission. The MHRA provides that "[t]he commission has the duty of investigating all conditions and practices within the State which allegedly detract from the enjoyment, by each inhabitant of the State, of full human rights and personal dignity. Without limiting the generality of the foregoing, it has the duty of investigating all forms of invidious discrimination, whether carried out legally or illegally, and whether by public agencies or private persons. Based on its investigations, it has the further duty to recommend measures calculated to promote the full enjoyment of human rights and personal dignity by all the inhabitants of this State." 5 M.R.S. § 4566.[1]

From the MHRA's inception, discrimination was prohibited based on race, color, sex, religion, ancestry

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[1] The Commission itself is made up of five Commissioners, appointed by the Governor for staggered five-year terms. By statute, there can be no more than three Commissioners from any political party. 5 M.R.S. § 4561.

or national origin, with the only substantive change to protected classes being the addition of physical and mental disability in 1974/5. The MHRA was amended in 2005 to include a new protected class based on sexual orientation (defined to include actual or perceived homosexuality, bisexuality, or heterosexuality, gender identity, and gender expression) (here "LGBTQ"). This amendment became effective after decades of rancorous public engagement and wrangling on the issue,[2] and this Legislature had many years' worth of discussion about how to accommodate religiously-affiliated employers, housing providers, places of public accommodation, and schools that might have faith-

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[2] In 1981, the Legislature debated adding LGBTQ protection to the MHRA. In 1983, the Maine Senate added LGBTQ protection to the MHRA but the House defeated it; in 1989, the Maine House added LGBTQ protection to the MHRA but the Senate defeated it. In early 1990's, Portland and Lewiston proposed banning LGBTQ discrimination. In 1993, the Legislature added LGBTQ protection to MHRA but the then-governor vetoed it. In November 1995, a citizens'-initiated ballot initiative sought to ban Maine state and local governments from passing anti-discrimination ordinances; this was defeated with 53% of the vote. In 1997, the Maine Legislature passed LGBTQ protection to the MHRA, and the then-governor signed it into law, but it never went into effect, as a February 1998 special election voter-initiated ballot initiative repealed it (52% vote to repeal). In 1999, the Legislature again passed LGBTQ protection to the MHRA, and it was again signed into law, but this, too, did not take effect; in November 2000 voters narrowly (51.3%) utilized a "people's veto" to reject it. In 2005, the Legislature yet again passed LGBTQ protection to the MHRA, and the then-governor signed it into law in March 2005; this amendment took effect in December 2005 after a ballot initiative seeking its repeal in November 2005 was rejected (45% repeal it to 55% keep it).

based objections to including LGBTQ people.

The Legislature carefully and deliberately carved out an exemption to the MHRA non-discrimination mandate for religious organization employers, housing providers, and educational programs as follows:

> . . . 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, as is more fully set forth in section 4602, subsection 4.
>
> Any for-profit organization owned, controlled or operated by a religious association or corporation and subject to the provisions of the Internal Revenue Code, 26 United States Code, Section 511(a) is not covered by the exemptions set forth in this paragraph.

5 M.R.S. § 4553(10)(G). This exemption is the subject of LD 879, which would broaden the category of religious groups that can discriminate based on LGBTQ status in employment, housing, and education.

The MHRA's Balance of Rights: Publicly-Funded Groups Should Not Be Given Permission to Discriminate.

This bill arises at the intersection where two rights protected in the MHRA—the right of people to

access jobs, housing, education and public accommodations without discrimination based on innate characteristics and the right of persons to exercise their faith—appear to conflict. The MHRA has long protected both of these key rights in its non-discrimination principles, and has provisions to balance these rights and accommodate tension between them that LD 879 would upset.

LD 879 proposes allowing a "religious corporation, association or organization" that is not for-profit under tax codes to discriminate against LGBTQ people even it operates using state or federal funds. This would allow an employer that aligns itself with a religious affiliation or belief (to the extent that a business entity can have a religious belief) to fire or refuse to hire someone LGBTQ even if the employer applied for and receives a federal or state pandemic economic recovery grant, and would allow a community shelter operated by a religious entity to refuse entry to someone based on their LGBTQ status even though the entity applied for and operates using community grant funds from Maine or the federal government, and would allow a school affiliated with a religious organization to fire a teacher or expel a student who is LGBTQ even though the school applied for and receives federal or state funds for instructional support or school lunch.

This proposal would upend the delicately-balanced standard in the MHRA, intended to allow for religious expression but also to require nondiscrimination in public. The MHRA provides that religiously-affiliated organizations that are not for-profit can pick and choose who to employ to carry out their ministries, and who to allow into

housing they provide, and which children to educate. This is consistent with the free exercise of a genuinely-held religious belief. Within the MHRA, the organization's right to freely exercise religious beliefs only becomes circumscribed once the organization opens itself to the public or seeks out taxpayer funds. A religiously-affiliated school or shelter or employer may continue to operate within its beliefs, at its own expense, but once the public funds to which all taxpayers contribute are utilized to subsidize the religious organization, the organization must not discriminate against a group of those taxpayers in its public accommodations, housing or employment.

Issues surrounding religiously-affiliated organizations, government funding, and discrimination are being contested from local communities to the United State Supreme Court. All arise out of the same bedrock question, the extent to which church and state must remain separate in this country. We need not answer that larger question today, but we can determine whether the State of Maine should make a policy <u>within its non-discrimination law</u> that organizations that affirmatively seek out or accept state or federal monies paid by all Mainers should be expected to serve all Mainers regardless of protected-class status. Because LD 879 would allow religious organizations to seek out and use taxpayer dollars from LGBTQ taxpayers, while excluding those same taxpayers from their employment, housing, services and places, and education, this proposal would countenance invidious discrimination and should be rejected.

Conclusion

Thank you for this opportunity to provide testimony against LD 879. The Commission would be pleased to discuss these issues with you at your convenience, including at the work session on this matter.

Sincerely,
/s/ *Amy M. Sneirson*
Amy M. Sneirson, Executive Director

/s/ *Barbara Archer Hirsch*
Barbara Archer Hirsch, Commission Counsel

maine.gov/ag/news/article.shtml

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.

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.

There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It

nytimes.com/2022/06/23/opinion/supreme-court-guns-religion.html

Aaron Tang

June 23, 2022



What a week so far for conservatives. On Tuesday, the Supreme Court struck down a Maine law that prohibited religious private schools from receiving taxpayer dollars. On Thursday, it invalidated a New York State gun safety law limiting the public carry of firearms. And on Friday, it overturned Roe v. Wade. The outcome in these cases was not surprising. The court has ruled in favor of religious litigants in an overwhelming number of cases; the gun case's outcome was clear from the oral argument before the justices in November; and the court's draft abortion decision was leaked in May.

What is surprising is how little the 6-to-3 decision in the Maine case, Carson v. Makin, will matter practically. And the reason offers a glimpse of hope

for those who worry about a future dominated by the court's conservative supermajority — including the many Americans troubled by the court's decision in the gun case, New York State Rifle & Pistol Association v. Bruen.

Let's start with the Carson case. Anticipating this week's decision, Maine lawmakers enacted a crucial amendment to the state's anti-discrimination law last year in order to counteract the expected ruling. The revised law forbids discrimination based on gender identity and sexual orientation, and it applies to every private school that chooses to accept public funds, without regard to religious affiliation.

The impact was significant: The two religious schools at issue in the Carson case, Bangor Christian Schools and Temple Academy, said that they would decline state funds if, as Maine's new law requires, accepting such funds would require them to change how they operate or alter their "admissions standards" to admit L.G.B.T.Q. students.

The legislative fix made by Maine lawmakers offers a model for lawmakers elsewhere who are alarmed by the court's aggressive swing to the right. Maine's example shows that those on the losing end of a case can often outmaneuver the court and avoid the consequences of a ruling.

By enacting its law, Maine was able to assure its taxpayers that they will not be complicit in discriminating against L.G.B.T.Q. students, because private schools that discriminate will be ineligible for public funds. The law will limit church-state entanglement, assuming other religious schools decline funding for the same reasons as the schools in

Carson. And although nondiscriminatory private schools can still receive public funds, Maine can eliminate that program at any point — a fact the court conceded. (Whether it *should* is a closer question that ought to turn on the program's impact on educational equity.)

Other states should follow Maine's lead. A handful of blue states — including Illinois, Maryland, Nevada and Vermont — provide vouchers or similar tax-credit scholarships to low-income students to enroll in private schools. None of them, however, enacted a statute prohibiting funds-receiving private schools from discriminating against L.G.B.T.Q. students. Legislation that would do so is pending in Maryland's legislature, the General Assembly. Lawmakers there should quickly enact it. Other states should also prohibit such discrimination.

And lawmakers troubled by the court's gun safety decision and worried about the looming ruling on abortion should also take a page from Maine's playbook.

Now that the court has struck down New York's limits on who may carry guns in public, state lawmakers there and in other states should pass new laws to deter gun violence. Justice Clarence Thomas's majority opinion made clear that the constitutionality of restrictions is historically "settled" in "sensitive places" such as legislatures, courtrooms and polling locations, and that "modern regulations" may "prohibit" the carry of firearms in "new" places. Given that, states should enact an expansive list of so-called sensitive places where guns may not be carried. Though Justice Thomas did not specify which those might be, during oral arguments in November,

several justices pondered that they might include public transportation, crowded venues, university campuses and places where alcohol is served.

Justice Brett Kavanaugh noted in a concurrence joined by Chief Justice John Roberts, moreover, that while states may not impose restrictions that prevent "ordinary, law abiding citizens" from carrying a gun to defend themselves, states can still enact rigorous requirements for a public carry permit, such as stringent background and mental health records checks and completion of regular training courses.

Another promising reform for states to consider would be to require gun owners to possess firearm liability insurance. Not only would such a requirement ensure that victims of gun violence can recover for their losses and "provide financial incentives for responsible arms carrying," but it also draws strong historical support from a host of 19th century "surety laws" recognized in the court's opinion.

And on Friday, the court eliminated the right to abortion. Because of the sweeping nature of the court's decision, there are some limits on what pro-choice states can do alone. But at a minimum, lawmakers should act vigorously to ensure that abortion providers are able to serve out-of-state patients unable to obtain care in their home states. Connecticut and New York have already passed such laws; others should follow suit.

As Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan noted in their dissent, "it is women who cannot afford" to travel to other states "who will suffer the most."

To protect these patients, lawmakers must act at the national level. So the Biden administration should argue that Food and Drug Administration rules permitting the use of mifepristone to terminate a pregnancy override contrary state laws. Promisingly, Attorney General Merrick Garland issued a statement on Friday advancing precisely this approach. Congress should also continue working to enact the Women's Health Protection Act to enshrine a right to abortion as a matter of federal law, even though the filibuster remains an obstacle.

Last fall, Justice Sotomayor, for whom I clerked in 2013-14, predicted that there would be "a lot of disappointment in the law" in the current court term. Now we see why. For understandable reasons, some critics of the current court have girded for a battle to expand the number of justices. Maine has shown another promising path. Sometimes, the best way to protect against overreaching by the conservative court is through good old-fashioned lawmaking.

Aaron Tang (@AaronTangLaw) is a law professor at the University of California, Davis, and a former law clerk to Justice Sonia Sotomayor.

maine.gov/ag/news/article.shtml

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."


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

MEMO

Date: January 13, 2016
To: Amy Sneirson, Executive Director
From: Barbara Archer Hirsch, Commission Counsel
Re: Interpretation of the Education Provisions of the MHRA

The Commission's Education Rule, which is a joint rule enacted with the Department of Education, has not been updated in any significant way in the past 15 years. Even the most recent amendment, enacted in 2000, did not amend the rule to include all of the then-protected classes which had been added to the MHRA: while race, national origin, and disability had been added to the education provisions in the late 1980s, those classes are not mentioned in our current rule.

Ten years ago, the education provisions of the MHRA were amended to make discrimination on the basis of sexual orientation (which includes gender identity and gender expression) unlawful. Soon thereafter, the Commission applied the sexual orientation protections in a claim by a transgender student's right to use the bathroom corresponding with her gender identity. The case became the subject of long-running litigation around the application of the MHRA's sexual orientation provisions in education. Because of the litigation, the Commission held off on rulemaking. The litigation was finally concluded about two years ago. *See Doe v. RSU 26*, 2014 ME 11. In the wake of *Doe,* we received a number of inquiries about the rights of students under the MHRA, specifically with regard to sexual orientation issues.

While we would like to propose changes to the current Education Rule, that avenue is unavailable at

the moment. The public is in need of guidance as to the application of the education provisions of the MHRA generally, and how the Commission interprets the Act with regard to sexual orientation discrimination in particular. Those issues are addressed below.

Introduction:

As an initial matter, while the text of the Education Rule addresses sex discrimination only, its provisions are also applicable to unlawful education discrimination on the basis of race, national origin, physical or mental disability, and sexual orientation. The rules, like the MHRA itself, are meant to be interpreted broadly. In particular, with regard to discrimination on the basis of sex and sexual orientation, including gender identity and gender expression, the Commission's rules are intended to be liberally construed to facilitate inclusion and educational opportunity for transgender individuals. **Whenever educational or extra-curricular opportunities offered by a covered educational institution are offered separately to students based on sex and/or gender, students shall be allowed to participate in accordance with their gender identity.**

Definitions:

"Sexual orientation" is defined in the MHRA to mean a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression. The terms heterosexuality, bisexuality, and homosexuality should not be considered exclusive, however, and the statute should be interpreted to cover all orientations (including, for example, those who identify as asexual).

"Gender identity" means an individual's sincerely held core belief regarding their gender, whether that individual identifies as male, female, a blend of both, neither, or in some other way (such as, for example, students who identify as "queer", "genderqueer", "bi-gender", "intersex" or "gender fluid").

"Gender expression" means an individual's external expression of their gender identity, through such means as clothing, hair styling, jewelry, voice, and behavior.

"Transgender" is used as an umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex/gender they were assigned at birth. Being transgender does not imply any specific sexual orientation.

Determination of a Student's Gender Identity:

In general, an educational institution should accept a student's assertion of their gender identity when there is consistent and uniform assertion of the gender identity, or any other evidence that the student's gender identity is sincerely held as part of their core identity. If the educational institution has a credible, objective reason to believe that a student's gender identity is being asserted for an improper purpose, it may request additional evidence supporting the student's stated gender identity.

(a) Satisfactory additional evidence may include, but shall not be limited to, the following:

i. A written statement from a physician, physician's assistant, nurse practitioner, or nurse who has been involved with the

student's health care;

ii. A written statement from a psychologist, psychiatrist, or social worker who has met with the student;

iii. Passports or other formal documents showing the student's gender identity;

iv. Familial documents, such as family photographs or statements from the student's parent(s), guardian(s), or other adult relative(s);

v. A statement from an adult who is close to the student and can speak to the student's core gender identity.

(b) An educational institution may not require medical records as proof of a student's gender identity.

Athletics:

Students should be allowed to compete on single-sex/gender teams based upon their gender identity.

In general, if a student's gender identity changes in concert with athletic seasons, the educational institution may request additional information supporting the student's stated gender identity, unless the school is already aware that the asserted gender identity, which may be fluid, is the student's sincerely held core belief as to their gender.

If the participation of a transgender student on the single-sex/gender team that most closely matches the student's gender identity poses a significant risk of substantial physical harm to the student or to other participants, the educational institution and the

student shall enter into interactive discussions to minimize or eliminate the threat of substantial harm, while also providing mutually-acceptable athletic opportunity for the student. The assessment that there is a significant risk of substantial physical harm cannot be based on generalizations or on assumptions about transgender athletes, or about sex/gender differences generally. Rather, the educational institution should engage in an individualized assessment of the individual student's participation on the particular team at issue.

Comparable Facilities:

Students must be permitted to use the toilet, locker room, and shower facilities corresponding to their gender identity. Facilities such as a curtained changing area or unisex facilities may be provided and made available to all students, but should not be used to isolate or segregate students based on their sexual orientation, gender expression, or gender identity. Students shall not be required to use facilities corresponding to their assigned birth sex/gender, where their assigned birth sex/gender and their gender identity are different.

If the educational institution offers housing in which students are separated or assigned by gender, students should be permitted to reside in the housing facilities corresponding to their gender identity.

Harassment/Hostile Educational Environment:

Educational institutions are subject to potential claims under the MHRA for harassment/hostile educational environment based on a student's sexual orientation. In the school context, the Commission has interpreted a hostile educational environment as

involving harassment that a reasonable student of the same age and maturity as the student being harassed would consider severe or pervasive enough to create an intimidating, hostile, or offensive school environment. An educational institution may be held liable for the alleged hostile environment if it knew or should have known of the harassment and failed to take prompt, appropriate action.

Student Names/Appearance:

A student's official record shall bear their legal name, which may be changed only upon proof that the student's legal name has been changed pursuant to a court order. At the written request of a student, however, and consistent with the student's gender identity, the educational institution shall use the student's preferred name and pronouns consistent with their gender identity on all other documents.

If a student so chooses, the educational institution's employees should be required to address the student by the student's chosen name and use pronouns consistent with the student's gender identity. The educational institution should also, at the request of any student, instruct its students to address the student by the student's chosen name and use pronouns consistent with the student's gender identity. Inadvertent slips and honest mistakes will not be considered a violation of the Act, but a pattern of refusal to acknowledge a student's gender identity by using their chosen name and pronouns may be considered to constitute such a violation.

Students should be permitted to dress in a manner consistent with the student's gender identity, subject to any dress code adopted by the educational institution.

The dress code should be applied to the student consistent with their gender identity.

In the event that the student and their parent/legal guardian do not agree with regard to the student's sexual orientation, gender identity, or gender expression, the educational institution should, whenever possible, abide by the wishes of the student with regard their gender identity and expression while at school.

Exhibit 1

APPROVED
June 15, 2023
BY GOVERNOR
CHAPTER 188
PUBLIC LAW

STATE OF MAINE

**IN THE YEAR OF OUR LORD
TWO THOUSAND TWENTY-THREE**

H.P. 1165 - L.D. 1833

An Act to Amend the Definition of "Educational Institution" Under the Maine Human Rights Act to Include Single-sex Educational Institutions

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 5 MRSA §4553, sub-§2-A, as amended by PL 1995, c. 393, §4, is further amended to read:

2-A. Educational institution. "Educational institution" means any public school or educational program, any public ~~post-secondary~~ postsecondary institution, any private school or educational program approved for tuition purposes ~~if both male and female students are admitted~~ and the governing body of each such school or program. ~~For purposes related to disability-related discrimination, "educational institution" also means any private school or educational program approved for tuition purposes.~~

Exhibit 2

130th MAINE LEGISLATURE

FIRST SPECIAL SESSION-2021

Legislative Document **No. 1688**

S.P. 544 In Senate, May 6, 2021

An Act To Improve Consistency within the Maine Human Rights Act

Submitted by the Maine Human Rights Commission pursuant to Joint Rule 204.

Received by the Secretary of the Senate on May 4, 2021. Referred to the Committee on Judiciary pursuant to Joint Rule 308.2 and ordered printed.

/s/ Darek M. Grant
DAREK M. GRANT
Secretary of the Senate

Presented by Senator HICKMAN of Kennebec.

Cosponsored by Representative TALBOT ROSS of Portland and

Senators: CARNEY of Cumberland, SANBORN of Cumberland, VITELLI of Sagadahoc,

Representatives: DUNPHY of Old Town, HARNETT of Gardiner.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 5 MRSA §4552, as amended by PL 2005, c. 10, §1, is further amended to read:

§4552. Policy

To protect the public health, safety and welfare, it is declared to be the policy of this State to keep continually in review all practices infringing on the basic human right to a life with dignity, and the causes of these practices, so that corrective measures may, where possible, be promptly recommended and implemented, and to prevent discrimination in employment, housing, education, extension of credit or access to public accommodations on account of an individual's actual or perceived race, color, sex, sexual orientation or gender identity, physical or mental disability, religion, ancestry or national origin and in employment, extension of credit and access to public accommodations on the basis of age; and in employment and housing on the basis of familial status; and in employment~~, discrimination on account of age or~~ because of the previous assertion of a claim or right against a prior employer under former Title 39 or Title 39-A ~~and in housing because of familial status; and to prevent discrimination in the extension of credit on account of age, race, color, sex, sexual orientation, marital status, religion, ancestry or national origin; and to prevent discrimination in education on account of sex, sexual orientation or physical or mental disability~~ and because of protected activity under Title 26, chapter 7, subchapter 5-B; and to prevent discrimination or retaliation on the basis of an assertion of rights under this Act or interference with an individual's

right to be free from discrimination prohibited under this Act.

Sec. 2. 5 MRSA §4553, sub-§5-A, as amended by PL 2019, c. 464, §1, is further amended to read:

5-A. Familial status. "Familial status" means ~~that~~ a family unit ~~may contain one or more individuals who have not attained 18 years of age and are living with~~ that contains:

A. ~~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

~~B. The designee of the parent or other person having custody, with the written permission of the parent or other person.~~

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.

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.

Sec. 3. 5 MRSA §4553, sub-§10, ¶G, as amended by PL 2019, c. 464, §1, is further amended by amending subparagraph (3) to read:

(3) Educational opportunity~~, as is more fully set~~

~~forth in section 4602, subsection 4.~~

Sec. 4. 5 MRSA §4571, as amended by PL 2005, c. 10, §10, is further amended to read:

§4571. Right to freedom from discrimination in employment

The opportunity for an individual to secure employment without discrimination because of race, color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry ~~or~~, national origin or familial status is recognized as and declared to be a civil right.

Sec. 5. 5 MRSA §4572, sub-§1, as amended by PL 2005, c. 10, §§11 and 12, is further amended to read:

1. Unlawful employment. It is unlawful employment discrimination, in violation of this Act, except when based on a bona fide occupational qualification:

A. For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry ~~or~~, national origin or familial status, because of the applicant's previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions taken by the applicant that are protected under Title 26, chapter 7, subchapter 5-B; or, because of those rēasons, to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms,

conditions or privileges of employment or any other matter directly or indirectly related to employment; or, in recruiting of individuals for employment or in hiring them, to utilize any employment agency that the employer knows or has reasonable cause to know discriminates against individuals because of their race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry ~~or~~, national origin or familial status, because of their previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions that are protected under Title 26, chapter 7, subchapter 5-B;

(1) This paragraph does not apply to discrimination governed by Title 39-A, section 353;

B. For any employment agency to fail or refuse to classify properly, refer for employment or otherwise discriminate against any individual because of race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry ~~or~~, national origin or familial status, because of the individual's previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions taken by the individual that are protected under Title 26, chapter 7, subchapter 5-B; or to comply with an employer's request for the referral of job applicants if a request indicates either directly or indirectly that the employer will not afford full and equal employment opportunities to

individuals regardless of their race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry ~~or~~, national origin or familial status, because of previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions that are protected under Title 26, chapter 7, subchapter 5-B;

C. For any labor organization to exclude from apprenticeship or membership or to deny full and equal membership rights to any applicant for membership because of race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry ~~or~~, national origin or familial status, because of the applicant's previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions taken by the applicant that are protected under Title 26, chapter 7, subchapter 5-B; or, because of those reasons, to deny a member full and equal membership rights, expel from membership, penalize or otherwise discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment, representation, grievances or any other matter directly or indirectly related to membership or employment, whether or not authorized or required by the constitution or bylaws of that labor organization or by a collective labor agreement or other contract; to fail or refuse to classify properly or refer for employment or otherwise discriminate against any member because of race or color, sex,

sexual orientation or gender identity, physical or mental disability, religion, age, ancestry ~~or,~~ national origin or familial status, because of the member's previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions taken by the member that are protected under Title 26, chapter 7, subchapter 5-B; or to cause or attempt to cause an employer to discriminate against an individual in violation of this section, except that it is lawful for labor organizations and employers to adopt a maximum age limitation in apprenticeship programs, if the employer or labor organization obtains prior approval from the Maine Human Rights Commission of any maximum age limitation employed in an apprenticeship program. The commission shall approve the age limitation if a reasonable relationship exists between the maximum age limitation employed and a legitimate expectation of the employer in receiving a reasonable return upon the employer's investment in an apprenticeship program. The employer or labor organization bears the burden of demonstrating that such a relationship exists;

D. For any employer, employment agency or labor organization, prior to employment or admission to membership of any individual, to:

(1) Elicit or attempt to elicit information directly or indirectly pertaining to race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry ~~or~~, national origin or

familial status, any previous assertion of a claim or right under former Title 39 or Title 39-A or any previous actions that are protected under Title 26, chapter 7, subchapter 5-B;

(2) Make or keep a record of race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry ~~or~~, national origin or familial status, any previous assertion of a claim or right under former Title 39 or Title 39-A or any previous actions that are protected under Title 26, chapter 7, subchapter 5-B, except under physical or mental disability when an employer requires a physical or mental examination prior to employment, a privileged record of that examination is permissible if made and kept in compliance with this Act;

(3) Use any form of application for employment, or personnel or membership blank containing questions or entries directly or indirectly pertaining to race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry ~~or~~, national origin or familial status, any previous assertion of a claim or right under former Title 39 or Title 39-A or any previous actions that are protected under Title 26, chapter 7, subchapter 5-B. This section does not prohibit any officially recognized government agency from keeping records permitted to be kept under this Act in order

to provide free services to individuals requesting rehabilitation or employment assistance;

(4) Print, publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification or discrimination based upon race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry or, national origin or familial status, any previous assertion of a claim or right under former Title 39 or Title 39-A or any previous actions that are protected under Title 26, chapter 7, subchapter 5-B; or

(5) Establish, announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry or, national origin or familial status, the previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions that are protected under Title 26, chapter 7, subchapter 5-B, of that group; or

E. For an employer, employment agency or labor organization to discriminate in any manner against individuals because they have opposed a practice that would be a violation of this Act or because they have made a charge, testified

or assisted in any investigation, proceeding or hearing under this Act. This paragraph does not limit the liability of persons pursuant to section 4633.

Sec. 6. 5 MRSA §4573-A, sub-§3 is enacted to read:

3. Physical or mental disability. This subchapter does not prohibit an employer from discharging or refusing to hire an individual with a physical or mental disability or subject an employer to any legal liability resulting from the refusal to employ or the discharge of the individual with a physical or mental disability if the employer establishes that the individual, because of the physical or mental disability, is unable to perform job duties or to perform job duties in a manner that would not endanger the health or safety of the individual or others.

Sec. 7. 5 MRSA §4581, first ¶, as amended by PL 2011, c. 613, §10 and affected by §29, is further amended to read:

The opportunity for an individual to secure housing in accordance with the individual's ability to pay, and without discrimination because of race, color, sex, sexual orientation or gender identity, physical or mental disability, religion, ancestry, national origin or familial status is hereby recognized as and declared to be a civil right.

Sec. 8. 5 MRSA §4581-A, sub-§1, as enacted by PL 2011, c. 613, §11 and affected by §29, is amended to read:

1. Sale or rental of housing and other

prohibited practices. For any owner, lessee, sublessee, managing agent or other person having the right to sell or rent or manage a housing accommodation, or any agent of these, to:

A. Make or cause to be made any written or oral inquiry concerning the race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, ancestry, national origin or familial status of any prospective purchaser, occupant or tenant of the housing accommodation;

B. Refuse to show or refuse to sell, rent, lease, let or otherwise deny to or withhold from any person the housing accommodation because of race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, ancestry, national origin or familial status;

C. Make, print or publish or cause to be made, printed or published any notice, statement or advertisement relating to the sale, rental or lease of the housing accommodation that indicates any preference, limitation or discrimination based upon race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, ancestry, national origin or familial status or an intention to make any such preference, limitation or discrimination;

D. Discriminate against any person because of race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, ancestry, national origin or familial status in the price, terms, conditions or privileges of the sale, rental or lease of any housing accommodations or in the

furnishing of facilities or services in connection with any housing accommodations; or

E. Evict or attempt to evict any tenant of any housing accommodation because of the race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, ancestry, national origin or familial status of the tenant;

Sec. 9. 5 MRSA §4581-A, sub-§2, as enacted by PL 2011, c. 613, §11 and affected by §29, is amended to read:

2. Selling, brokering or appraising of housing. For any real estate broker or real estate salesperson, or any agent of these, to:

A. Fail or refuse to show any person a housing accommodation listed for sale, lease or rent because of race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, ancestry, national origin or familial status;

B. Misrepresent, for the purpose of discriminating because of race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, ancestry, national origin or familial status, the availability or asking price of a housing accommodation listed for sale, lease or rent or for such reason to fail to communicate to the person having the right to sell, rent or lease the housing accommodation any offer for the same made by any applicant;

C. In any other manner to discriminate against any applicant for a housing accommodation because of race or color, sex, sexual orientation or gender

identity, physical or mental disability, religion, ancestry, national origin or familial status;

D. Make or cause to be made any written or oral inquiry or record concerning the race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, ancestry, national origin or familial status of any applicant for or intended occupant of a housing accommodation; or

E. Accept for listing any housing accommodation when the person having the right to sell, rent or lease the housing accommodation has directly or indirectly indicated an intention of discriminating among prospective tenants or purchasers on the ground of race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, ancestry, national origin or familial status, or when the broker or salesperson knows or has reason to know that the person having the right to sell, rent or lease the housing accommodation has made a practice of discrimination since July 1, 1972;

Sec. 10. 5 MRSA §4581-A, sub-§3, as enacted by PL 2011, c. 613, §11 and affected by §29, is amended to read:

3. Making of loans; other financial assistance. For any person to whom application is made for a loan or other form of financial assistance for the acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, whether secured or unsecured, or agent of the person, to:

A. Make or cause to be made any oral or written inquiry concerning the race or color, sex, sexual

orientation or gender identity, physical or mental disability, religion, ancestry, national origin or familial status of any applicant for financial assistance or of existing or prospective occupants or tenants of housing accommodations; or

B. Discriminate in the granting of financial assistance, or in the terms, conditions or privileges relating to obtaining or the use of any financial assistance, against any applicant because of race or color, sex, sexual orientation or gender identity, physical or mental disability, religion, ancestry, national origin or familial status; or

Sec. 11. 5 MRSA §4583, as amended by PL 2007, c. 243, §4, is further amended to read:

§4583. Application

Nothing in this Act may be construed to prohibit or limit the exercise of the privilege of every person and the agent of any person having the right to sell, rent, lease or manage a housing accommodation to set up and enforce specifications in the selling, renting, leasing or letting or in the furnishings of facilities or services in connection with the facilities that are consistent with business necessity and are not based on the race, color, sex, sexual orientation or gender identity, physical or mental disability, religion, country of ancestral origin or familial status of or the receipt of public assistance payments by any prospective or actual purchaser, lessee, tenant or occupant. Nothing in this Act may be construed to prohibit or limit the exercise of the privilege of every person and the agent of any person making loans for or offering financial assistance in the acquisition,

construction, rehabilitation, repair or maintenance of housing accommodations to set standards and preferences, terms, conditions, limitations or specifications for the granting of loans or financial assistance that are consistent with business necessity and are not based on the race, color, sex, sexual orientation or gender identity, physical or mental disability, religion, country of ancestral origin or familial status of or the receipt of public assistance payments by the applicant for a loan or financial assistance or of any existing or prospective owner, lessee, tenant or occupant of a housing accommodation.

Sec. 12. 5 MRSA §4591, as amended by PL 2005, c. 10, §16, is further amended to read:

§4591. Equal access to public accommodations

The opportunity for every individual to have equal access to places of public accommodation without discrimination because of race, color, sex, sexual orientation or gender identity, age, physical or mental disability, religion, ancestry or national origin is recognized as and declared to be a civil right.

Sec. 13. 5 MRSA §4592, sub-§1, as amended by PL 2005, c. 10, §17, is further amended to read:

1. Denial of public accommodations. For any public accommodation or any person who is the owner, lessor, lessee, proprietor, operator, manager, superintendent, agent or employee of any place of public accommodation to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of race or color, sex, sexual orientation or gender identity, age, physical or mental disability,

religion, ancestry or national origin, any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to ~~accommodation~~ accommodations, advantages, facilities, goods, services and privileges may depend.

For purposes of this subsection, unlawful discrimination also includes, but is not limited to:

A. The imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages or accommodations, unless the criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages or accommodations being offered;

B. A failure to make reasonable modifications in policies, practices or procedures, when modifications are necessary to afford the goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities, unless, in the case of a private entity, the private entity can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations;

C. A failure to take steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services,

unless, in the case of a private entity, the private entity can demonstrate that taking those steps would fundamentally alter the nature of the good, service, facility, privilege, advantage or accommodation being offered or would result in an undue burden;

D. A private entity's failure to remove architectural barriers and communication barriers that are structural in nature in existing facilities and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals, not including barriers that can be removed only through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift, where the removal is readily achievable;.

When the entity can demonstrate that the removal of a barrier under this paragraph is not readily achievable, a failure to make the goods, services, facilities, privileges, advantages or accommodations available through alternative methods if alternative methods are readily achievable; and

E. A qualified individual with a disability, by reason of that disability, being excluded from participation in or being denied the benefits of the services, programs or activities of a public entity, or being subjected to discrimination by any such entity;

Sec. 14. 5 MRSA §4592, sub-§2, as amended by PL 2005, c. 10, §17, is further amended to read:

2. Communication, notice or advertisement. For any person to directly or indirectly publish,

display or communicate any notice or advertisement to the effect that any of the accommodations, advantages, facilities and privileges of any place of public accommodation are refused, withheld from or denied to any person on account of race or color, sex, sexual orientation or gender identity, age, physical or mental disability, religion, ancestry or national origin, or that the patronage or custom of any person belonging to or purporting to be of any particular race or color, sex, sexual orientation or gender identity, age, physical or mental disability, religion, ancestry or national origin is unwelcome, objectionable or not acceptable, desired or solicited, or that the clientele is restricted to any particular race or color, sex, sexual orientation or gender identity, age, physical or mental disability, religion, ancestry or national origin. The production of any communication, notice or advertisement purporting to relate to any place of accommodation is presumptive evidence in any action that the action was authorized by its owner, manager or proprietor;

Sec. 15. 5 MRSA §4592, sub-§6, as amended by PL 2007, c. 664, §5, is further amended to read:

6. Association. For a covered entity to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations or other opportunities to an individual or entity because of the known ~~disability~~ protected class status of an individual with whom the individual or entity is known to have a relationship or association;

Sec. 16. 5 MRSA §4595, as amended by PL 2005, c. 10, §18, is further amended to read:

§4595. Right to freedom from discrimination solely on basis of age, race, color, sex, sexual orientation or gender identity, marital status, ancestry, religion or national origin in any credit transaction

The opportunity for every individual to be extended credit without discrimination solely because of any one or more of the following factors: age; race; color; sex; sexual orientation or gender identity; marital status; ancestry; religion or national origin is recognized as and declared to be a civil right.

Sec. 17. 5 MRSA §4596, as amended by PL 2005, c. 10, §19, is further amended to read:

§4596. Unlawful credit extension discrimination

It is unlawful credit discrimination for any creditor to refuse the extension of credit to any person solely on the basis of any one or more of the following factors: age; race; color; sex; sexual orientation or gender identity; marital status; ancestry; religion or national origin in any credit transaction. It is not unlawful credit discrimination to comply with the terms and conditions of any bona fide group credit life, accident and health insurance plan, for a financial institution extending credit to a married person to require both the husband and the wife to sign a note and a mortgage and to deny credit to persons under ~~the age of~~ 18 years of age or to consider a person's age in determining the terms upon which credit will be extended.

Sec. 18. 5 MRSA §4601, as amended by PL 2005, c. 10, §20, is further amended to read:

§4601. Right to freedom from discrimination in education

The opportunity for an individual at an educational institution to participate in all educational, counseling and vocational guidance programs ~~and~~, all apprenticeship and on-the-job training programs and all extracurricular activities without discrimination because of sex, sexual orientation or gender identity, a physical or mental disability, ancestry, national origin ~~or~~, race, color or religion is recognized and declared to be a civil right.

Sec. 19. 5 MRSA §4602, as amended by PL 2005, c. 662, Pt. A, §1, is further amended to read:

§4602. Unlawful educational discrimination

1. Unlawful educational discrimination ~~on the basis of sex~~. 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 ~~family~~ 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.

~~**2. Unlawful educational discrimination on the basis of physical or mental disability.** It is unlawful educational discrimination in violation of this Act solely on the basis of physical or mental disability to:~~

~~A. Exclude from participation in, deny the benefits of or subject to discrimination under any educational program or activity any otherwise qualified individual with physical or mental disability;~~

~~B. Deny any person equal opportunity in athletic programs, provided that no educational institution may be required under this subsection to provide separate athletic programs to serve persons with physical or mental disability;~~

~~C. Deny admission to any institution or program or fail to provide equal access to and information about an institution or program through recruitment; or~~

~~D. Deny financial assistance availability and opportunity.~~

~~Nothing in this subsection may be construed to cover the rights of children with disabilities to special education programs under state or federal law.~~

~~**3. Unlawful educational discrimination on**~~

~~**the basis of national origin or race.** It is unlawful educational discrimination in violation of this Act, on the basis of national origin or race, 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 admission to the institution or program or to fail to provide equal access to and information about an institution or program through recruitment; or~~

~~C. Deny financial assistance availability and opportunity.~~

~~**4. Unlawful education discrimination on the basis of sexual orientation.** It is unlawful education discrimination in violation of this Act, on the basis of sexual orientation, 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 family or marital status of a person or to exclude any person from any program or activity because of their sexual orientation;~~

~~D. Deny admission to the institution or program or to fail to provide equal access to any information about an institution or program through~~

~~recruitment; or~~

~~E. Deny financial assistance availability and opportunity.~~

~~The provisions in 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.~~

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;

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;

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

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.

Sec. 20. 5 MRSA §4612, sub-§2-A, as enacted by PL 2019, c. 465, §6, is amended by amending the first blocked paragraph to read:

An administrative dismissal operates as an order of dismissal and has the same effect as a finding by the commission that no reasonable grounds exist to believe that unlawful discrimination has occurred,

except that an administrative dismissal pursuant to paragraph C does not entitle the complainant to an award of attorney's fees, civil penal damages or compensatory and punitive damages.

Sec. 21. 5 MRSA §4622, sub-§1, ¶A, as amended by PL 2019, c. 465, §8, is further amended to read:

A. Dismissed the case under section 4612, subsection 2 or subsection 2-A, paragraphs A and B and D to F;

Sec. 22. 5 MRSA §4634, as enacted by PL 2001, c. 206, §1, is amended to read:

§4634. Right to breast-feed

Notwithstanding any ~~other~~ provision of law to the contrary, a ~~mother~~ person may breast-feed ~~her~~ that person's baby in any location, public or private, where the ~~mother~~ person is otherwise authorized to be.

SUMMARY

This bill addresses inconsistencies in the protections provided in different areas of jurisdiction under the Maine Human Rights Act. The bill provides more inclusive protection by:

1. Including adult family members dependent for care in the definition of "familial status";
2. Including familial status as a protected class in employment;
3. Including age as a protected class in public accommodations; and
4. Clarifying the scope of the Maine Human Rights Act application in education.

The bill also clarifies that the sexual orientation provisions in the Maine Human Rights Act extend to gender identity.

Exhibit 3

MAINE HUMAN RIGHTS COMMISSION
Amy M. Sneirson, Executive Director
Barbara Archer Hirsch, Commission Counsel

* * *

May 14, 2021

The Honorable Anne Carney, Senate Chair
The Honorable Thom Harnett, House Chair
Joint Standing Committee on Judiciary
100 State House Station
Augusta, ME 04333

Re: An Act to Improve Consistency within the Maine Human Rights Act – LD 1688

Dear Senator Carney, Representative Harnett, and Members of the Joint Standing Committee on Judiciary:

The Maine Human Rights Commission ("Commission")—the quasi-independent, neutral, apolitical State agency[11] charged with enforcing the Maine Human Rights Act, 5 M.R.S. §§ 4551, *et seq*. ("MHRA" or the "Act")—has the duty of: investigating, conciliating, and at times litigating discrimination cases under the MHRA; promulgating rules and regulations to effectuate the MHRA; and making recommendations for further legislation or executive action concerning infringements on human rights in Maine. 5 M.R.S. § 4566(7), (11).

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[1] The Commission itself is made up of five Commissioners, appointed by the Governor for staggered five-year terms. By statute, there can be no more than three Commissioners from any political party. 5 M.R.S. § 4561.

The MHRA has a long and distinguished history, influenced by time and public acceptance of certain protected groups, but its provisions have been amended in a piecemeal fashion. As a result, the scope of the MHRA's protection varies based on which area of its jurisdiction is invoked:

Area of Jurisd.	**Protected Classes**
Employment	sex, sexual orientation, race, color, national origin, ancestry, physical or mental disability, age, and religion, as well as retaliation for engaging in activity protected by the Maine Whistleblowers' Protection Act ("WPA") and for having made a workers' compensation claim against a previous employer.
Housing	sex, sexual orientation, race, color, national origin, ancestry, physical or mental disability, religion, familial status, and receipt of public assistance.
Public accommodation	sex, sexual orientation, race, color, national origin, ancestry, physical or mental disability, and religion.
Education	sex, sexual orientation, race, national origin, and physical or mental disability.

Extension of Credit	sex, sexual orientation, race, color, national origin, ancestry, physical or mental disability, religion, age, and marital status.

While there are some entirely appropriate reasons for these internal inconsistencies,[2] often there is not a logical rationale for them. LD 1703 attempts to update the balance of the MHRA's protections across areas of application so the Act is internally consistent, and more understandable and user-friendly for the public. To that end, the Commission is pleased to provide this testimony in support of LD 1703.

Section 1

This section, the overall statement of the MHRA's "Policy", would be amended to reflect changes to coverage that are discussed below. Those changes include adding "familial status" protection in employment, updating education protections to include routine protected classes, and adding age to the protected classes covered in public accommodations.[3] We will discuss each in detail

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[2] For example, the WPA applies only in employment. Even so, tenants often file Commission complaints alleging whistleblower retaliation for reporting unsafe or unlawful housing conditions, which is not covered in housing.

[3] The Policy section also reflects amendments made to the MHRA in 2019 to add a distinct MHRA definition for "gender identity" separate from the definition of "sexual orientation". Gender identity already is protected under the MHRA, but is included in the definition of sexual orientation; this is confusing for two distinct reasons. First, gender identity is not a type of sexual orientation, and should not be defined as such. Second,

below.

Another amendment within this Policy statement makes clear that the Act prohibits discrimination on the basis of both protected class status and perceived protected class status, meaning a person can file a complaint if they are subjected to discrimination because they are in the protected class or because they were perceived to be in the protected class.

- Currently, the MHRA explicitly protects against discrimination based on perceived disability: the definition of "physical or mental disability" includes "being regarded as having or likely to develop" a disability. 5 M.R.S. § 4553-A(1)(D). "Perceived disability" claims are common at the Commission, especially in the employment context: for example, employees who are injured at work are often regarded as disabled even if their injury resolves within six months and they have no remaining restrictions.
- While these are the most common perception claims, they are not the only such claims filed with the Commission, and the Commission has interpreted the MHRA to include other perception-based claim. For example, the

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because the text of the nondiscrimination provisions of the Act (as opposed to the definition section) refers only to sexual orientation, members of the public frequently do not comprehend that gender identity is protected under the MHRA. This word change will make it easier for people to understand what the Act covers and prohibit. The Policy proposal here simply carries that definition forward by changing references to sexual orientation to "sexual orientation or gender identity". This update is applied in many sections of the Bill, including 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, and 16–19.

Commission has seen a number of claims from individuals alleging they were discriminated against based on their perceived sexual orientation. In these cases, individuals who do not conform to gender stereotypes allege that they are perceived as gay and are harassed or otherwise discriminated against as a result. In one such case, a student was bullied and harassed because his classmates perceived him to be gay; the harassment began as mocking his "man-boobs", making sexual comments, and repeatedly conducting a "gay test" by seeing how long it took him to react to being touched, and eventually escalated to alleged sexual assault.[4]

- The Commission believes it is important to make clear in the statute itself that discrimination on the basis of perceived protected class status is unlawful: otherwise, an individual engaged in blatant discriminatory conduct would be excused if they happened to target someone in error.

Sections 2, 4 and 5

The MHRA already bars discrimination in housing based on "familial status", which currently is defined as a familial unit containing one or more individuals under the age of 18 and which prohibits housing providers from denying housing to families with minor children. LD 1688 would make two

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[4] The student's mother (for herself and the student) and the Commission filed suit against the school unit, alleging a hostile educational environment based on sex and perceived sexual orientation. The case eventually resolved. *See Doe et al. v. Brunswick School Department*, Docket No. 15-CV-00257-DBH, U.S. District Court for the District of Maine.

changes to familial-status coverage: (a) expand the definition of familial status to include caring for a dependent adult; and (b) make familial status discrimination unlawful in the employment context as well as housing.

- *Section 2 would amend the definition of "familial status" to include care for a dependent adult*:
  - The proposed change would include in the definition of familial status a familial unit containing "[o]ne or more individuals 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".
  - This definition was drawn from the definitions section of the Adult Protective Services Act, and uses language which became effective 7/1/19. *See* 22 M.R.S. § 3472(10) ("Incapacitated adult").
  - This change is intended to reflect the reality of today's families, which often include not only minor children, but elderly or incapacitated adults who require assistance from family members. This is particularly true in Maine, with the oldest population in the country.
  - A person's need to care for dependent family members should not be used as a reason to deny them access to housing or employment, whether that care is required for a child or incapacitated adult.
- *Sections 4 and 5 would add "familial status" to*

the protected classes in employment:

- This change would prohibit employers from discriminating based on an employee's need to care for dependent family members, whether those are children or adults. This is not intended to create a new type of leave for workers[5], but rather is intended to stop employers from making stereotypical assumptions about employees with family care obligations.
- An employer would not be required to excuse an employee from their work responsibilities; if an employee is unable to perform their work because of family responsibilities, they would still be subject to the employer's usual disciplinary process. The employer would not, however, be able to (for example) refuse to hire an applicant who lives with their disabled sibling based on the assumption that the applicant would need time off from work to care for their family member.
- Again, this change is intended to reflect the reality of today's families, where employees are often responsible for minor children and incapacitated or elderly adults.

➢ The Commission notes that these changes are not

[5] With the federal Family and Medical Leave Act and its Maine counterpart already protecting employees who need time away from work to care for a newborn child or a sick family member, and this Legislature's action in 2019 requiring employers to provide earned paid leave, it would be understandable (but incorrect) for employers to warily view the proposal in LD 1688 as another attempt to build employee leave requirements.

a substantial change to the scope of the MHRA, but rather a change in terminology and an effort to make the Act clearer.

- Whether in employment or housing, the sort of discrimination covered under "familial status" might also be alleged as discrimination based on association with an individual with a disability. The Commission purposely chose the definition of "incapacitated adult" rather than "dependent adult" in an effort to balance the rights of caretakers and families against the rights of employers and housing providers. *Compare* 22 M.R.S. § 3472(10) *with* § 3472(6).
- As for employment discrimination on the basis of having minor children, many potential claims could already be covered based on sex (disparate impact claims: claims that neutral policies have the effect of discriminating on the basis of protected class) or age (association with minor child).

Section 6

In 2019, the MHRA was updated in several places, both via agency bills that the Commission introduced and via other proposals. One of the changes made in a Commission agency bill was the removal of 5 M.R.S. § 4573-A(1-B), which had provided that employers did not have to employ individuals with disabilities who could not travel to and from and/or remain at the workplace.[6] The

[6] Under the framework of disability employment laws, a person with a disability is allowed to request that their employer change how a policy is applied if necessary because of the employee's disability, which leads to an interactive dialogue

Commission initiated this amendment related to clarify a ruling by the Maine Supreme Judicial Court, sitting as the Law Court, that the statutory section in question meant that a leave of absence was not a potential reasonable accommodation for individuals with disabilities. *See Carnicella v. Mercy Hospital,* 2017 ME 161. The *Carnicella* decision, which arose in a case where an employee sought indefinite leave from employment, was inconsistent with the MHRA's protections, the Commission's longstanding interpretation of the MHRA that temporary or finite leave *could* be a reasonable accommodation, and the ADA. At the Commission's behest, the Legislature removed 5 M.R.S. § 4573-A(1-B) from the MHRA.

Unfortunately, the removal of § 4573-A(1-B) in its entirety had the unintended consequence of casting doubt on the continued existence of the employer's so-called "safety defense" that arose from the removed section. The removed language had been interpreted to permit employers not to hire/retain disabled

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between employer and employee about the request, its reasonableness, and its relationship to the employee's disability. The Commission always has interpreted the MHRA to acknowledged that a *temporary* leave of absence can be a reasonable accommodation that allows an employee with a disability to address a disability issue and then to return to work. This is consistent not only with the purpose of the MHRA, but with other state law (such as the Maine Family Medical Leave Act) and federal employment laws like the federal Family and Medical Leave Act and the Americans with Disabilities Act ("ADA"). Whether *open-ended* leave can be a reasonable accommodation is another question altogether, and the Commission, again consistent with state and federal law. has repeatedly held that indefinite leave is not a reasonable accommodation.

individuals if the employer proved that the individual caused a risk to the health and safety of themselves or others. Because of this uncertainty, the Commission has proposed reinserting language spelling out the contours of the safety defense in the statute. This will promote clarity and consistency of interpretation of the MHRA.

Sections 12-14

Places of public accommodation are privately- or publicly-owned places, privileges or services that are offered or open to the public. The MHRA currently does not prohibit discrimination on the basis of age in places of public accommodation, and there is no logical rationale for excluding people based on age from Maine's publicly-offered spaces, privileges, and services. The Commission believes that it is important to add this coverage, both to make the MHRA more consistently applicable throughout the State and to address an issue that is important to Maine's aging population. In 2019, 21.9% of Mainers were age 65 or older, and Maine had the largest share of population in that age group in the country. *See* https://www.census.gov/newsroom/press-releases/2020/65-older-population-grows.html. Maine continues to have the highest median age (44.7 years old) in the country. *See* https://worldpopulationreview.com/en/state-rankings/median-age-by-state.

Section 15

Another 2019 update to the MHRA confirmed the Commission's longstanding interpretation that the MHRA bars discrimination because of a person's association with another person who is in a protected

class by amending the 5 M.R.S. § 4553(1-D) definition of an "aggrieved person" who could bring a MHRA claim, and the proposal in Section 15 would update references in the Act's public accommodation section to reflect that.

This aligns with the Commission's longstanding interpretation of the MHRA coverage as including associational claims, an interpretation upheld by courts reviewing MHRA actions.[7] There are circumstances when a person who is not themselves in a protected class is targeted for discrimination in a place of public accommodation because they are associated with someone who is in a protected class. Some examples could include a person who is denied service at a restaurant because someone else in their party has a service animal, or a family which was turned away from staying at a hotel because the mother wore a hijab. The discrimination still occurs **because of** the protected class, so the 2019 amendment to the "aggrieved person" definition and the proposed amendment to the MHRA in Section 15 allow the associated person who also was impacted by the discrimination to bring a claim related to it.

The proposal in this section would simply make clear to all reading the Act that the Commission's

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[7] For example, in May 2017, the Commission prevailed in litigation establishing that both a Caucasian woman and an African American man were discriminated against based on race when they were denied the opportunity to rent housing once the housing provider learned of the man's race by observing and speaking with their biracial children. *Maine Human Rights Commission et al. v. Megunticook Management and Realty Corp.*, KEN-CV-15-135 (Me. Super. Ct. Ken. Cty., May 15, 2017) (*Murphy, J*).

interpretation applies in places of public accommodation.

Section 19

The MHRA's current education coverage is woefully out of date, and inconsistent with the rest of the Act. The Act's education provisions currently prohibit discrimination on the basis of race (but not color), national origin (but not ancestry), sex and sexual orientation, and physical or mental disability. This is confusing for at least two reasons.

First, there is no reason to cover race and national origin, but not color and ancestry. These most likely were simply drafting oversights due to the piecemeal amendment process mentioned above.

Second, most Maine educational institutions are also covered as places of public accommodation[8], as the MHRA specifically includes a "nursery, elementary, secondary, undergraduate or postgraduate school or other place of education" and an "establishment of the State" in its "public accommodation" definition. As public accommodations schools also are prohibited from discriminating on the basis of color, ancestry and religion.[9] Because those prohibitions are not

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[8] Schools are also covered as employers, but this aspect appears to the Commission to be fully understood both by schools and by their employees.

[9] The MHRA specifically excludes from its definition of "educational institution" single-sex schools. See 5 M.R.S. § 4553(2-A). It also provides that the sexual orientation protections in education do not apply to education facilities owned, controlled or operated by a bona fide religious corporation, association or society. Id. at § 4602(4).

currently made explicit in the education provisions of the Act, however, students, parents, and schools may not know of this coverage.

This proposed change would make the Act clearer and more consistent.

Sections 20-21

In 2019, the Legislature added a new subsection to 5 M.R.S. § 4612 which spelled out the Executive Director's previously implicit (although found in the Commission's rules) authority to administratively dismiss certain claims without the need for investigations, such as cases falling outside the Commission's limited jurisdiction, or cases in which the complaining party refuses to cooperate with the Commission's process. One such reason for administrative dismissal is failure to file a claim within the Commission's 300-day statute of limitations. *See* 5 M.R.S. § 4612(2-A)(C). We have since learned that this change created some confusion with regard to the award of attorneys' fees and costs in subsequent court cases. The Act provides that attorneys' fees are available only if the plaintiff establishes that they had previously filed a complaint with the Commission, which had taken on of several specific enumerated actions on their complaint; the changes to the Act in 2019 added administrative dismissal to that list of actions. *See id.* at § 4622(1)(A). The Commission did not intend to amend the act to allow the award of attorneys' fees to individuals who had failed to timely file their Commission complaint. This result would leave complaining parties with no incentive to file a timely complaint with the Commission, since the failure to do so would have no consequence in court. It would

also undermine the Commission's function of screening and evaluating cases before litigation is initiated, which is intended to easy the burden on Maine's courts. This revision addresses any misunderstanding about the impact of an administrative dismissal for failure to timely file with the Commission.

Section 22

A 2019 amendment of the MHRA revised wording about pregnancy to be gender-neutral, so that the reference is to a pregnant person rather than to a pregnant woman. This change was made in recognition of the fact that individuals whose gender is male or nonbinary can be pregnant. The proposal in Section 22 related to the right of a person to breast-feed wherever they may lawfully be reflects that wording update.

Conclusion

Thank you for this opportunity to provide testimony in support of LD 1688. The Commission takes seriously its duty to protect the people of Maine from discrimination, and its duty to safeguard the MHRA itself, and approaches these substantive amendments after much consideration. We greatly appreciate the Committee's attention at this late date in the session, and would be pleased to discuss these issues with you at your convenience, including at the work session on this matter.

Sincerely,
/s/ *Amy M. Sneirson*
Amy M. Sneirson, Executive Director

/s/ *Barbara Archer Hirsch*
Barbara Archer Hirsch, Commission Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ST. DOMINIC ACADEMY, et al., *Plaintiffs*, v. A. PENDER MAKIN, in her official capacity as Commissioner of the Maine Department of Education, et al., *Defendants.*	Civil Action No. 23-cv-00246-JAW

AFFIDAVIT OF MEGAN WELTER

I, Megan Welter, being duly sworn, do depose and state as follows:

1. I am the Associate Commissioner of Public Education for the Maine Department of Education. I have held this position since July 1, 2022. Prior to becoming an Associate Commissioner, I was the Department's Director of Policy and Governmental Affairs.
2. I make this affidavit based on my personal knowledge and my review of information in the possession of the Department of Education.
3. One of my official duties is to oversee the approval of private schools for the receipt of public funds for tuition purposes.
4. From the date that the Supreme Court issued its decision in *Carson v. Makin*, 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.

5. 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.

6. 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.

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

8. During the 2022-23 school year, five students attended Cheverus at public expense with their tuition paid by a school administrative unit or Education in the Unorganized Territory.

9. In the 2022-2023 school year, no other sectarian school applied for approval for the receipt of public funds for tuition purposes.

10. On September 23, 2022 Marianne Pelletier, the Superintendent of Maine Catholic Schools, contacted the Department to inquire about St. Dominic Academy applying for approval for the receipt of public funds for tuition purposes. A representative of the Department informed Superintendent Pelletier that the deadline for approval for the 2022-23 school year had passed, but that the school was welcome to apply for approval for tuition purposes for the 2023-24 school year.

11. The Department treated Superintendent Pelletier's inquiry in the same manner that it treated any private school that sought approval after the August 31, 2022 deadline. While the Department continued to work with private schools that had applied prior to the deadline to assist them in securing approval, no new applications were accepted after August 31, 2022.

12. St. Dominic Academy has not applied for approval for the receipt of public funds for tuition purposes for the 2023-24 school year.

I declare under penalty of perjury that the foregoing statements are true and correct.

Executed on June 28, 2023

/s/ Megan Welter
Megan Welter

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ST. DOMINIC ACADEMY, a d/b/a of the ROMAN CATHOLIC BISHOP OF PORTLAND, a corporation sole; ROMAN CATHOLIC BISHOP OF PORTLAND, a corporation sole; and KEITH and VALORI RADONIS on their own behalf and as next friends of their children K.Q.R., L.R.R., and L.T.R.,

Plaintiffs,

v.

A. PENDER MAKIN, in her personal capacity and 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 personal capacities and in their official capacities as Commissioners of the Maine Human Rights Commission,

Defendants.

No. 2:23-cv-00246-JAW

DECLARATION OF MARIANNE PELLETIER

I, Marianne Pelletier, am a U.S. citizen over eighteen years of age and I make the following declaration under 28 U.S.C. § 1742(2):

1. I am the Superintendent of Schools for the Roman Catholic Diocese of Portland in the state of Maine. I have held this position since June 10, 2019.

2. I am responsible for overseeing all of the schools operated by the Diocese. I oversee Diocesan schools' policies regarding admission, hiring, curriculum, and student conduct.

3. St. Dominic Academy is the only high school operated by the Diocese in the state of Maine.

4. Cheverus High School has been owned and operated by the Society of Jesus (Jesuits) since the 1940s.

5. As a Jesuit school, Cheverus establishes its own policies regarding admission, hiring, curriculum, and student conduct.

6. Although Cheverus is operationally independent of the Diocese, for informational purposes and as a resource for parents, the Diocese lists Cheverus on its online "Find a School" directory.

7. As part of my official duties, I sign the State of Maine Department of Education annual private school approval form for each of the schools operated by the Diocese.

8. On information and belief, Cheverus files an annual private school approval form with the State of Maine as well.

9. I have never filed a Department of Education annual private school approval form on behalf of

Cheverus.

10. In September 2022, I learned that Cheverus had been approved for tuition purposes.

11. On September 23, 2022, I called the Maine Department of Education to request information about the requirements for participating in the town tuitioning program.

12. I was told by a Maine Department of Education employee that the deadline for applying to participate for the 2022-23 school year had passed.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on July 18, 2023.

/s/ Marianne Pelletier

Exhibit A

From: Welter, Megan
To: Forster, Sarah
Subject: FW: draft rule: nondiscrimination in education
Date: Wednesday, June 22, 2022 1:43:59 PM
Attachments: draft education rule.2022.doc

Hello!

I wanted to put this back on your radar, given Pender's questions in an earlier email today.

From: Welter, Megan
Sent: Tuesday, May 17, 2022 10:08 AM
To: Forster, Sarah <Sarah.Forster@maine.gov>
Cc: Holmes, Jaci <Jaci.Holmes@maine.gov>
Subject: FW: draft rule: nondiscrimination in education

Hi Sarah,

Jaci and I met with Barbara this morning. Will you please review the draft rule and then let's set a time to talk about it. Barbara acknowledged that because she knows this is a join rule, that we may need to provide feedback first.

Will you look it over and let us know when we can meet to talk about it? Thanks,

Megan

From: Barbara Archer Hirsch <barbara.archerhirsch@mhrc.maine.gov>

Sent: Tuesday, March 22, 2022 11:06 AM
To: Welter, Megan <Megan.Welter@maine.gov>
Subject: draft rule: nondiscrimination in education

EXTERNAL: This email originated from outside of the State of Maine Mail System. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi, Megan:

I'm the attorney for the Maine Human Rights Commission. Sarah Forster suggested that you were the best person to contact to discuss rulemaking.

Our education provisions were amended in the last legislative section, and I've been working on draft rules, since the existing rule addresses only discrimination on the basis of sex. I've finally completed my draft, and am sending it over for review/suggestions/revisions/discussion . . . whatever needs to happen, basically. I'm not really familiar with your rulemaking process -- as an independent agency, we basically do our own thing, but I know you need to get various approvals before the rule can move forward.

Maybe we could talk briefly about the process and the substance of the rule sometime in the next week or two? We're overhauling most of our rules due to statutory changes, so I have a whole package to submit, and this can either be part of the package or move separately, depending on your needs.

Also, if you want to foist me off on someone else, just let me know who to bother next!

Thanks!

Barbara

--

Barbara Archer Hirsch (she/her/hers)
Commission Counsel

Maine Human Rights Commission
51 State House Station
Augusta, ME 04333-0051
Telephone (and via Relay): (207) 624-6290
Fax: (207) 624-8729
www.maine.gov/mhrc

[ATTACHMENT: DRAFT EDUCATION RULE]

94-348
05-071

MAINE HUMAN RIGHTS COMMISSION
A Joint Rule with the
DEPARTMENT OF EDUCATION

Chapter 4:
EQUAL EDUCATIONAL OPPORTUNITY

4.01 GENERALLY

A. Purpose

Pursuant to ~~Title 5, M.R.S.A., §§ 4551 *et seq.*, as amended by P.L. 1983 c. 578,~~ 5 M.R.S. § 4603, the Maine Human Rights Commission and the Commissioner of Education adopt this rule designed to assure nondiscrimination on the basis of ~~sex~~ protected class status in the

educational institutions of the State of Maine.

B. Effect

This rule shall be accorded the full force and effect of interpretative administrative regulations.

C. Construction

(1) Consistent with the public policy underlying the Maine Human Rights Act, this rule shall be liberally construed to accomplish the purposes of the governing legislation.

(2) Should any provision or the application of any provision of this rule to any educational institution, be held invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or its application.

4.02 DEFINITIONS

All terms used in this rule, unless the context otherwise indicates, shall have the same meaning as in the Maine Human Rights Act, Title 5, M.R.S. §§ 4551, *et seq*., and applicable provisions of Title 20-A.

A. Commission: "Commission" ~~shall~~ means the Maine Human Rights Commission.

B. Educational institution: "Educational institution" ~~shall~~ means any public school or educational program, any public post-secondary institution, and any private school or educational program approved for tuition purposes if the school or program is not

specifically designated for members of only one sex ~~both male and female students are admitted~~, and the governing body of each such school or program. The governing body shall include, as appropriate, school committees, boards of directors of school administrative units, cooperative boards of vocational regions, the boards of trustees of the University of Maine and Maine Maritime Academy, the State Board of Education for the vocational-technical institutes, the Commissioner of Education for schools in the unorganized territory and the Governor Baxter School for the Deaf, and boards of trustees or directors of private schools.

(1) For the purposes of disability-based discrimination, "educational institution" includes any private school or educational program approved for tuition purposes, without regard to the makeup of its student body.

C. Protected class status: "Protected class status" means those classes listed in 5 M.R.S. § 4601. *Protected class* also includes being perceived as a member of a protected class, as well as having a known relationship or association with a member of a protected class. *Protected class* also includes traits associated with protected class status, such as natural hair textures, Afro styles and protective hair styles (such as braids, twists, and locks) or protected-class related body modifications.

D~~C~~. Unlawful educational discrimination: "Unlawful educational discrimination" ~~shall~~ means action on the basis of ~~sex~~ protected class status to:

(1) 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;

(2) Deny a person equal opportunity in athletic programs;

(3) Apply any rule concerning the actual or potential family or marital status of a person or to exclude any person from any program or activity because of pregnancy or related conditions;

(4) Deny admission to the institution or program or to fail to provide equal access to and information about an institution or program through recruitment; ~~or~~

(5) Deny financial assistance availability and opportunity; or

(6) Harass or otherwise create or permit a hostile educational environment.

E. To "harass" includes verbal or physical conduct related to a protected class or directed at a person or persons because of protected class status when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's access to, educational opportunity,

(2) Submission to or rejection of such conduct by an individual is used as the basis for an individual's access to educational opportunity;

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's access to educational opportunity or creating an intimidating, hostile, or offensive environment in educational settings; or

(4) Such conduct constitutes an assault, as defined by Title 17-A, section 207.

F~~D~~. Approved for tuition purposes: An institution "approved for tuition purposes" ~~shall~~ means any school or educational program approved by the Commissioner of Education for the receipt of public funds pursuant to Title 20-A, Maine Revised Statutes, §§ 2951, 5104, 7252.

G. *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.

H. *Religion* includes all aspects of religious observance and practice, as well as belief.

I. *Sexual orientation* means a person's pattern of sexual, emotional, or romantic attraction to others, which may include, but is not limited to, actual or perceived heterosexuality, bisexuality, and homosexuality. Sexual orientation as a protected class also includes a person's gender identity and gender expression.

J. *Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered

entity, including the following factors:

A. The nature and cost of the accommodation needed under the Act, taking into consideration the availability of tax credits and deductions, and/or outside funding;

B. The overall financial resources of educational institution and the effect on expenses and resources;

C. The impact of the accommodation upon the operation of the educational institution, including the impact on the ability of other students to access the programs and services it offers.

D. The extent to which current costs of accommodations have been minimized by past efforts to provide equal access to persons with disabilities;

E. 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;

F. Documented good faith efforts to explore less restrictive or less expensive alternatives.

K. *Reasonable accommodation* –

A. *Reasonable Accommodation* means, with regard to individuals with disabilities:

(1) Modifications or adjustments to an

application process that enable a qualified applicant with a disability to be considered for admission; or

(2) Modifications or adjustments to the educational environment, or to the manner or circumstances under which the programs or services provided are customarily provided, that enable a qualified individual with a disability to access the educational facility's programs or services; or

(3) Modifications or adjustments that enable a student with a physical or mental disability to enjoy equal benefits and privileges of the educational facility as are enjoyed by its other similarly situated students without disabilities.

B. *Reasonable accommodation* is also applicable to other protected class statuses when individuals, because of protected class status, require modifications or adjustments in order to access the educational facility's privileges, programs or services. Examples of such situations include, but are not limited to:

(1) Schedule modifications to accommodate an individual's religious practices;

(2) Modifications to dress/appearance rules to accommodate natural hair styles, protected-class related body modifications, or gender identity or expression; and

(3) Modifications to eliminate language barriers, such as providing screening examinations in languages other than English.

C. *Reasonable accommodation* may include but is not limited to:

(1) Making existing facilities readily accessible to and usable by individuals with disabilities; and

(2) Modified schedules; exceptions to attendance policies; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, materials, or policies; the provision of qualified interpreters; and other similar accommodations.

D. To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual in need of the accommodation. This process should identify the protected class status related limitations of the individual and potential reasonable accommodations that could overcome those limitations.

E. A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of physical or mental disability under the "actual disability" prong (5 M.R.S. §4553-A(1)(A, B)), or "record of" prong (5 M.R.S. §4553-A(1)(C)), but is not required to

provide a reasonable accommodation to an individual who meets the definition of physical or mental disability solely under the "regarded as" prong (5 M.R.S. §4553-A(1)(D)).

L. *Gender expression* means the manner in which an individual's gender identity is expressed, including, but not limited to, through dress, appearance, manner, speech, or lifestyle, whether or not that expression is different from that traditionally associated with that individual's assigned sex at birth.

4.03 GENERAL REQUIREMENT OF NONDISCRIMINATION

A. Nondiscrimination

The right to freedom from discrimination on the basis of ~~sex~~ protected class status in public and publicly-supported educational institutions is recognized and declared to be a civil right. This right includes the opportunity for an individual at an educational institution to participate in all academic and extra-curricular programs and related activities without discrimination on the basis of ~~sex~~ protected class status.

B. Affirmative Action

Remedial action which results in preferential treatment of one ~~sex~~ protected class status, undertaken pursuant to court order or a formal consent decree or settlement as the result of action by an authorized federal or state agency, shall not be unlawful educational

discrimination for purposes of the Act.

Affirmative action resulting in preferential treatment of one ~~sex~~ protected class status, if undertaken pursuant to an affirmative action plan adopted by the governing body of the institution, shall be deemed not to be unlawful educational discrimination under the Act. Such affirmative action plans may be adopted in the absence of a finding of unlawful educational discrimination to overcome the effects of conditions of the past which have resulted in limited participation by persons of one ~~sex~~ protected class and may involve special recruitment, counseling and other efforts to encourage the participation of members of that ~~sex~~ protected class in programs or activities not traditionally entered by ~~the opposite sex~~ members of that protected class. ~~Neither sex~~ No protected class can be entirely excluded from any activity by such affirmative action efforts. Nothing in this section, however, shall limit the ability of an educational institution to sponsor a single sex team in interscholastic or intercollegiate athletic competitions in compliance with § 4.11(C), provided that individuals are permitted to participate on the team or teams that correspond to their gender identity.

C. Exemption

The provisions relating to sexual orientation or gender identity discriminaton do not apply to any education facility owned, controlled, or operated by a bona fide religious corporation, association, or society which does not receive

public funds.

The provisions of this rule relating to single-sex organizations does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists of students at institutions of higher education.

D. Construction

Nothing herein may be construed to cover the rights of individuals with physical or mental disability to special education programs under state or federal law.

E. Gender identity

With regard to the provisions of this rule addressing sexual orientation or gender identity, these rules are intended to be liberally construed to facilitate inclusion and educational opportunity for students without regard to their sexual orientation or gender identity. Whenever educational or extra-curricular opportunities offered by a covered educational institution are offered separately to students based on sex and/or gender, students shall be allowed to participate in accordance with their gender identity

In general, an educational institution should accept a student's assertion of their gender identity unless the educational institution has a credible good faith belief that a student's gender identity is being asserted for an

improper purpose. The burden of establishing that the student has misrepresented their gender identity is on the educational institution. If the educational institution has such a credible good faith belief, it may ask for additional information supporting the student's asserted gender identity. An educational institution may not require medical records or medical information as proof of a student's gender identity.

The fact that a student's gender identity may be fluid or gender-diverse is not sufficient reason to doubt the student's asserted identity.

4.04 ADMISSIONS AND RECRUITMENT

A. General

No person shall, on the basis of ~~sex~~ protected class status, be denied admission, or be subjected to discrimination in admission by any educational institution to which the Act applies.

An educational institution shall not discriminate on the basis of ~~sex~~ protected class status in the recruitment of students. Written materials or recruitment activities used by an educational institution to recruit students shall not contain references suggesting the predominance of members of one protected class ~~one sex~~ or preference for members of one protected class ~~one sex~~.

B. Specific Prohibitions

(1) In determining whether a person satisfies any policy or criterion for admission, or in

making any offer or referral of admission, a educational institution shall not:

a. Give preference to one person over another on the basis of ~~sex~~ protected class status, by ranking applicants separately on such basis, or otherwise;

b. Apply numerical limitations upon the number or proportion of ~~persons of either sex~~ members of any protected class who may be admitted; or

c. Otherwise treat one individual differently from another on the basis of ~~sex~~ protected class status.

(2) Any standards used as part of the admissions process, including but not limited to testing, the use of recommendations and interviewing, to any ~~public school~~ educational institution shall not discriminate on the basis of ~~sex~~ protected class status.

4.06 ACADEMIC PROGRAMS

A. Availability of Programs and Courses

~~Each and e~~Every academic program and course offered by an educational institution shall be open and available to students regardless of ~~sex~~ protected class status. Nothing herein shall be construed to prohibit the use of prerequisites that have been demonstrated to be essential to success in a given program or course. However, if participation in a program or course is dependent upon completion of a prerequisite

which previously excluded members of a protected class ~~was previously limited to students of one sex~~, then all members of the previously excluded group shall be given the opportunity to acquire the prerequisites or be allowed to enter the program or course without such prerequisites. If it cannot be shown that a prerequisite is essential to success in a given program or course, the prerequisite shall be abolished.

When placement in a given course or program depends on prior academic achievement (such as honors-level or advanced placement courses), educational institutions shall consider the potential impacts of previous systemic discrimination and obstacles to achievement based on protected class status. In determining eligibility for such courses and programs, the educational institution shall make adjustments to achievement-based standards to accommodate students who have been impacted by systemic discrimination and protected-class based obstacles to achievement.

B. Required Courses

The determination of what courses are required of any student shall be made without regard to ~~sex~~ protected class status.

~~C. Scheduling of Classes~~

~~The scheduling of students into classes shall not be done on the basis of sex~~ ~~protected class status~~, ~~except as authorized in sections 4.09 and 4.18.~~

C~~D~~. Special Education

Nothing contained herein may be construed to cover the rights of children with disabilities to special education programs under state or federal law.

4.07 VOCATIONAL PROGRAMS

The assignment of students into vocational programs or courses, including cooperative education, apprenticeships or on-the-job training sites, shall not be done on the basis of ~~sex~~ protected class status. Each educational institution shall require cooperating employers, vocational trainers, and special contractors to pledge that opportunities will not be restricted on the basis of ~~sex~~ protected class status. Where there is reasonable evidence of discrimination on the basis of ~~sex~~ protected class status, responsible officials of the educational institution shall take appropriate corrective action, including, but not limited to, terminating the relationship with the ~~outside person~~ cooperating employer, vocational trainer, or special contractor.

4.08 PHYSICAL EDUCATION

A. ~~Assignments~~

The assignment of students to physical education courses shall not be done on the basis of ~~sex~~ protected class status. This section does not prohibit the grouping of students in physical education classes by ability as assessed by objective standards of individual performance developed and applied without regard to ~~sex~~ protected class status.

~~B. Effective Date~~

~~With respect to physical education courses at the secondary and postsecondary levels, the educational institution shall comply fully with this section as expeditiously as possible but in no event later than January 1, 1985.~~

4.09 HUMAN SEXUALITY

~~Portions of courses in elementary and secondary schools which exclusively treat the topic of human sexuality may be conducted in separate sessions for boys and girls.~~

Human sexuality courses shall include information about sexual orientation and gender identity that treats all sexual orientations and gender identities as equally valid. It is a violation of the MHRA to present information about sexual orientation or gender identity in a manner that suggests that one such orientation or identity is superior to another, or that one such orientation or identity is less valid or subject to question.

4.10 EXTRACURRICULAR ACTIVITIES OTHER THAN ATHLETICS

All extracurricular activities shall be open to students without regard to protected class status.

Educational institutions may establish objective standards for participation, such as vocal range for choruses, as long as those criteria are not based on protected class status. Where those objective standards result in the exclusion of members of a protected class, the educational institution shall ensure that comparable alternatives are made available to members of that protected class.

4.11 ATHLETICS

A. General

No person shall, on the basis of protected class status, ~~sex~~, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by an educational institution.

In addition to the specific obligations described below, this general obligation of nondiscrimination shall include the duty to make reasonable accommodations based on protected class status to allow all students to access the educational institution's athletic programs. Reasonable accommodations may include, but are not limited to, modifications to uniforms (such as allowing students to wear hijabs), scheduling accommodations, and the provision of auxiliary aids as needed.

B. Equal Opportunity on the Basis of Sex

An educational institution which sponsors or participates in interscholastic, intercollegiate, club or intramural athletics shall provide an overall equal athletic opportunity for all students ~~both sexes~~.

To provide equal opportunity in these programs, an institution must select sports and levels of competition which effectively accommodate the interests and abilities of ~~both~~ all sexes and provide equal opportunities on a seasonal basis.

This section does not require all teams to be

integrated or the provision of identical sports for ~~both~~ all sexes.

In determining whether equal opportunities are available in athletics programs, the Commission shall consider whether the following are substantially equal:

* The provision of equipment and supplies;
* Scheduling of games and practice time;
* Travel and per diem allowance;
* Opportunity to receive coaching and academic tutoring;
* Assignment of coaches, tutors and officials;
* Provision of locker rooms, practice and competitive facilities;
* Provision of medical and training machine facilities and services;
* Provision of housing and dining facilities and services;
* Provision of supportive services and benefits, including publicity, band and cheerleading support sponsored by the educational institution.

Unequal aggregate expenditures for members of each sex or unequal expenditures for ~~male and female~~ sex-segregated or sex-specific teams if an educational institution operates or sponsors separate teams will not constitute per se noncompliance with this section, but the Commission may consider the failure to provide necessary funds for teams of one sex in

assessing general equality of opportunity.

C. Single-Sex Teams

An educational institution may sponsor single-sex team in interscholastic or inter-collegiate athletics competitions in the following instances:

(1) The institution sponsors a team for each sex in the same sport.

(2) The sport is boxing.

(3) The educational institution establishes one team in a sport and, as a result of athletic competition for places on the team, or the lack of interest of students, only the members of one sex become members of the team.

In such a case, the educational institution must provide equal opportunity in athletics by sponsoring a team in another sport which effectively accommodates the interests and abilities of other sexes. ~~the opposite sex~~.

(4) The educational institution establishes a single sex team in one or more sports in order to accommodate effectively the interests and abilities of one sex and to increase the general opportunities for participation by that sex.

This may be done where competition open to ~~both~~ all sexes has or will likely result in an overall lessening of equal opportunities in athletics for one sex.

D. Gender Identity and Athletics:

Students must be permitted to participate in athletic programs consistent with their gender identity. Historically, athletic teams have been categorized as for "boys" or "girls", consistent with the then-prevailing understanding that "gender" and "sex" were synonyms. Our understanding of gender as a concept which is not necessarily aligned with sex assigned at birth has changed, however, and schools must accommodate student athletes whose gender identity is different than their sex assigned at birth. This requires an approach to eligibility that reduces barriers to participation faced by gender-diverse and transgender students.

1) When a student registers to participate in athletics, the student shall indicate their gender identity. If the student's identity is neither "boy" nor "girl", and the student wishes to participate in a sport that is gender-segregated (such as basketball) or gender-specific (such as softball), the student shall, in addition to identifying their gender identity, identify the existing classification which most closely aligns with their identity.

2) Once a student has identified their gender identity (or that category of athletic teams which most closely aligns with their identity), the student shall consistently be treated as eligible for participation in athletic activities available to individuals with that gender identity for the remainder of the athletic season. A student may not

participate during that same season on a team designated for another gender.

3) If a student is gender-fluid, transitioning, or their gender identity otherwise shifts during an athletic season, the student must nonetheless participate in gender-segregated and/or gender-specific athletics consistent with the gender with which they identified at the start of the season. The student may participate on another team consistent with their then-current identity during subsequent athletic seasons.

4) Students must be provided with reasonable accommodations to allow them to access athletics consistent with their gender identity. This may include, but is not limited to, the following:

   a. Access to locker rooms, toilets, and other facilities consistent with their gender identity. If there is no facility consistent with their gender identity (i.e., nonbinary), students shall use the facility where they feel safest due to their gender identity.

   b. Modifications to uniforms or equipment to accommodate gender identity or expression, consistent with student safety and the rules of the applicable sport.

5) Educational institutions are encouraged, but not required, to make available athletic opportunities that are not gender-segregated or gender-specific.

4.12 COUNSELING

A. Counseling

An educational institution shall not discriminate against any person on the basis of ~~sex~~ protected class status in the counseling or guidance of students or applicants.

B. Use of Appraisal and Counseling Materials

An educational institution which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of ~~their sex~~ protected class status or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials would encourage ~~members of one sex~~ students to enter programs or activities in which members of that protected class have been traditionally excluded. ~~which are traditionally entered by the opposite sex~~.

4.13 COMPARABLE FACILITIES

An educational institution may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of ~~the~~ another sex. Students shall be permitted to use the facilities which correspond, or most closely correspond, to their gender identity, or where they feel safest due to their gender identity.

Any restroom for use by one person (or for family or assisted use) that has an outer door that can be

locked by the occupant shall be available to any student and cannot be identified as available only for members of one sex.

4.14 HOUSING

A. Generally

An educational institution shall not, on the basis of protected class status ~~sex~~, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

B. Separate Housing Facilities

An educational institution may provide separate housing on the basis of sex. However, housing provided by an educational institution to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(1) Proportionate in quantity to the number of students of that sex applying for such housing, and

(2) Comparable in quality and cost to the student.

Students shall be placed in the housing facility which corresponds, or most closely corresponds, to their gender identity, or where they feel safest due to their gender identity.

These rules shall also apply to temporary lodging during activities offered by educational institutions, such as lodging at athletic camps

or on field trips.

4.15 FINANCIAL ASSISTANCE

A. General

Except as provided in subsections B and C of this section, an educational institution, in providing financial assistance to any of its students shall not:

(1) On the basis of protected class status ~~sex~~, provide different amount of types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Apply any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of ~~the~~ another sex with regard to marital or parental status.

B. Financial Aid Established by Certain Legal Instruments

An educational institution may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular ~~sex~~ protected class specified therein; provided that the aggregate of all the awards of such ~~sex—~~restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on

the basis of protected class ~~sex~~.

C. Athletic Scholarships

(1) To the extent that an educational institution awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this section.

(3) Students shall be eligible for such scholarships and awards consistent with their gender identity.

4.16 EMPLOYMENT ASSISTANCE TO STUDENTS

A. Assistance by Educational Institution in Making Available Outside Employment

An educational institution which assists any agency, organization, business or person in making employment available to any of its students shall meet the following:

(1) It shall take reasonable steps to assure that such employment is made available without discrimination on the basis of protected class status ~~sex~~; and

(2) It shall not render such services to any agency, organization, business or person

which discriminates on the basis of protected class status ~~sex~~ in its employment practices; and shall ~~issue~~ ensure that any employment recruitment activities are offered to all ~~both male and female~~ students in a non-discriminatory manner.

4.17 HEALTH AND INSURANCE BENEFITS AND SERVICES

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, an educational institution shall not discriminate on the basis of protected class status ~~sex~~, or provide such benefit, service, policy, or plan in a manner which would constitute discrimination on the basis of protected class staus ~~sex~~.

4.18 MARITAL OR PARENTAL STATUS

An educational institution shall not establish or implement any policy concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex, sexual orientation, or gender identity.

B. Pregnancy and Related Conditions

(1) An educational institution shall not unlawfully discriminate against any student, or exclude any student from any program or course activity on the basis of such student's pregnancy, pregnancy-related condition, childbirth, false pregnancy, termination of pregnancy or recovery therefrom.

(2) An educational institution may require such a student to obtain the certification of

a physician that the student is able to continue participation in the regularly scheduled program, course or activity so long as such a certification is required of all students for other conditions which may require the attention of a physician.

~~(3) An educational institution which operates a portion of its programs or activities separately for pregnant students, admission to which is voluntary on the part of the student as provided in paragraph (b) (1) of this section, shall ensure that the separate instruction is comparable to that offered to other students.~~

(4) An educational institution shall treat pregnancy, pregnancy-related conditions, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit service, plan, or policy which such educational institution administers, operates, offers, or participates in with respect to students admitted to the institution's educational programs.

(5) In the case of an educational institution which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, an educational institution shall treat pregnancy, pregnancy-related conditions, childbirth, false pregnancy, termination of pregnancy and recovery

therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which ~~she~~ they held when the leave began.

Public schools, however, shall excuse students who are disabled by pregnancy-related conditions, as an excusable absence pursuant to Title 20-A, section 5001-A (4).

(6) Nothing in this rule shall prevent a school from providing educational programs/courses and related activities separately to pregnant students, who~~, with the consent of their parents,~~ request to be excused from regular programs and activities.

4.19 ~~SEXUAL~~ HARASSMENT

Harassment on the basis of ~~sex~~ protected class status shall be unlawful educational discrimination within the meaning of Title 5, §4602. ~~This shall include unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature in the following situations:~~

~~(1) Submission to such conduct is made either explicitly or implicitly a term or condition of a student's educational benefits;~~

~~(2) Submission to or rejection of such conduct by a student is used as the basis for decisions on educational benefits;~~

~~(3) Such conduct has the purpose or effect of~~

~~substantially interfering with an individual's academic performance or creating an intimidating, hostile or offensive educational environment.~~

~~**4.20 EXCLUSIONS**~~

~~A. Social Fraternities and Sororities~~

~~This rule does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists of students at institutions of higher education.~~

~~B. Special Occasions or Events~~

~~This rule does not prohibit the occasional holding of special events organized for members of one sex, such as father-son, mother-daughter dinners.~~ Students must ~~be allowed to participate in any event corresponding, or most closely~~ corresponding, to their gender identity, regardless of their biological sex assigned ~~at birth.~~

~~C. Single Sex Organizations~~

~~This rule does not prohibit the single sex membership practices of The Girl Scouts, Boy Scouts, Young Men's Christian Association, Young Women's Christian Association, Boys State, Girls State, or other such groups which may use the facilities of the educational institution.~~

4.20 STUDENT NAMES

When a student changes their name because of their

protected class status, such as to reflect a change in their gender identity, the educational institution shall use the name the student provides regardless of their legal name, except that:

A. Where otherwise legally required, the educational institution shall use the student's legal name on school records; and

B. Where an educational institution has a credible good faith belief that a student's name change is being asserted for an improper purpose (i.e., to dissociate from prior disciplinary action taken under their prior name), it may ask for additional information supporting the use of the student's name.

EFFECTIVE DATE:
August 25, 1984 - filing 84-291, Chapters 4 and 4-a

EFFECTIVE DATE (ELECTRONIC CONVERSION):
May 12, 1996

AMENDED:
July 30, 1996 - Section 11 (C) (2) – Chapter 4 only, filing 96-316, jointly with Department of Education

NON-SUBSTANTIVE CORRECTIONS:
October 2 and 29, 1996 - minor spelling.

REPEALED AND REPLACED:

September 19, 2000 – Chapters 4 and 4-A, filing 2000-395, jointly with Department of Education

AMENDED:

February 8, 2010 – Chapter 4-A only, filing 2010-21, jointly with Department of Education

AMENDED:

_____. 2022 – Chapter 4 only, filing _____, jointly with Department of Education

Exhibit B

From: Barbara Archer Hirsch
To: Taub, Christopher C; Forster, Sarah
Cc: Amy Sneirson; Kit Thomson Crossman
Subject: the single-sex school exception/ Crosspoint
Date: Wednesday, April 12, 2023 4:01:46 PM
Attachments: draft amedment.definitions, educational institution.0423.docx

EXTERNAL: This email originated from outside of the State of Maine Mail System. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Attached is a draft of a bill that would eliminate the exception from the definition of "educational institution" that currently exists for single-sex schools. I added a summary stating that this should have been done in 2021, in the hopes that might help.

I'm gone until Wednesday of next week (when I'll be driving, but available). I'll probably check email occasionally, but am going to try very hard not to do it very often. If you need anything, the best bet is to send an email cc'ed to Kit and Amy, who will either be able to answer without me or know how to find me.

Thanks --

Barbara

--

Barbara Archer Hirsch (she/her/hers)
Commission Counsel

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[ATTACHMENT]

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 5 MRSA § 4553, sub-§2-A, is amended to read:

2-A. Educational institution. "Educational institution" means any public school or educational program, any public post-secondary institution, any private school or educational program approved for tuition purposes ~~if both male and female students are admitted~~, and the governing body of each such school or program. ~~For purposes related to disability discrimination, "educational institution" also means any private school or educational program approved for tuition purposes.~~

SUMMARY

This bill amends the definition of "educational institution" to remove the exception for single-sex private schools approved for tuition purposes, correcting the inadvertent failure to amend the definition as part of the amendments made to the Maine Human Rights Act's education provisions in PL 2021, c. 366, § 19.

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January 17, 2025

VIA CM/ECF

Anastasia Dubrovsky
Clerk of Court
United States Court of Appeals for the First Circuit
John Joseph Moakley U.S. Courthouse
1 Courthouse Way
Suite 2500
Boston, MA 02210

Re: *St. Dominic Academy v. Makin,* No. 24-1739

Dear Ms. Dubrovsky:

I write to update the Court that, following argument on January 7, the Radonis family informed me that they recently sold their farm in Whitefield, Maine—the tuitioning jurisdiction where they have lived for the past seven years. While the Radonises continue to maintain a house in Whitefield, and their daughter continues to attend St. Dominic Academy, they have moved their principal residence to a rental property in a nearby non-tuitioning town.

For this reason, it is unlikely that the Radonises could benefit from a preliminary injunction at this time. Their daughter should have been entitled to tuition funding for the first several months of this

school year (and all of last). And towns sometimes agree to continue providing such funding through the end of the school year after a family relocates—treatment the Radonises would seek if a preliminary injunction issues. Nevertheless, these harms appear more likely to be redressed through the Radonises' damages claims, which are not yet before the Court.

The Bishop and St. Dominic's need for a preliminary injunction are unaffected by the Radonis family's move. Diocesan schools, including St. Dominic, have historically served, continue to serve, and wish to serve families from tuitioning jurisdictions. St. Dominic has continued to receive inquiries from tuition-eligible families hoping to attend. And, of course, St. Dominic itself continues to suffer Maine's unlawful exclusion, too.

Word Count: 225

Respectfully submitted,

/s/ Adèle Keim

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April 1, 2025

VIA CM/ECF

Anastasia Dubrovsky, Clerk of Court

United States Court of Appeals for the First Circuit
1 Courthouse Way, Suite 2500
Boston, MA 02210

Re: *St. Dominic Academy et al. v. Makin et al.*, No. 24-1739

Dear Ms. Dubrovsky:

Because of low enrollment and financial constraints, the Bishop of Portland has reached the difficult decision to close St. Dominic Academy's high school campus. St. Dominic plans to cease offering grades 9-12 at the end of this academic year. St. Dominic will continue to operate its elementary and middle school programs, offering education to students in pre-kindergarten through eighth grade.

St. Dominic and the Bishop of Portland continue to require injunctive relief from this Court, for four reasons.

First, St. Dominic needs injunctive relief to benefit its high school program in its last year of operation. St. Dominic currently educates 9th-12th grade students who are eligible to receive town tuitioning funds, but

are not able to do so.

Second, St. Dominic needs injunctive relief to benefit its elementary and middle school programs, which will continue. It is not uncommon for students to commute 30 to 60 minutes to attend St. Dominic, including from tuitioning jurisdictions. JA21. Several towns that participate in town tuitioning at the elementary or middle school level are within an hour's drive from St. Dominic.[1]

Third, the Bishop needs injunctive relief to benefit other Diocesan schools. JA17. Like St. Dominic, these schools wish to participate in the town tuitioning program, but cannot do so because of Maine's exclusionary policies. JA14.

Fourth, the Bishop needs injunctive relief to benefit new Diocesan high schools that he intends to open in the future.[2]

Maine has excluded St. Dominic from its tuition program for more than 40 years. St. Dominic's high school has now been forced to close its doors. Maine's discriminatory exclusion continues to harm all the Bishop's schools. Prompt relief is needed.

Word Count: 331

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[1] JA21 (identifying Whitefield, Fayette, Chelsea, Westport, Windsor, and West Bath); *see also* Nick Murray, *School Choice Map of Maine* at 5, Maine Policy Institute (Oct. 2021), http://perma.cc/3L6N-BWHC (identifying these towns as offering tuitioning for grades K-12 or 6-12).

[2] *See* Roman Catholic Diocese of Portland, *Maine Catholic Education Inquiry & Information Night* (Mar. 6, 2025), https://perma.cc/PH2Q-7LPD.

Respectfully submitted,

/s/ Adèle Keim

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cc: All counsel of record (by ECF notification)