UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE

THE PINES CHURCH, a Maine non-profit corporation; **Matt Gioia**, an individual; Plaintiffs, vs. **HERMON SCHOOL DEPARTMENT;** Defendant.	Civil Action No.: 1:23-cv-00214-LEW **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** Hon. Lance E. Walker

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I. INTRODUCTION

In its Motion for Summary Judgment, the Hermon School Department ("HSD"), including the Hermon School Committee ("the Committee"), attempts to complicate a clear case of religious discrimination by muddying the legal standards of Plaintiffs' claims and failing to apply the applicable legal standards to this record. *See* Defendant's Motion for Summary Judgment ("Def's Motion"), ECF 27. HSD's motion does not adequately refute the evidence that HSD acted with explicit hostility toward The Pines Church ("TPC" or "the Church") and Pastor Matt Gioia ("Pastor Matt") through its discriminatory and unlawful denial of a rental use agreement to the Church based on its religious beliefs.

The Court should deny Defendant's motion for two reasons. *First*, HSD's assertion that its challenged conduct did not violate federal, or state law is erroneous. With respect to the Free Exercise Clause, the Supreme Court has made clear that the government may not treat any secular entities more favorably than religious entities. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). Defendant has done so here by extending long-term rental agreements to other entities, but not TPC. Regarding free speech, HSD's exclusion of TPC from meeting after hours at school facilities based on the Church's religious nature is unconstitutional viewpoint discrimination, particularly where HSD opens its forum to activities that serve a variety of purposes. *See Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001).

HSD's hostility toward the Church also violated the Establishment Clause, as HSD treated secular entities more favorably than TPC when it extended long-term rental agreements to various secular organizations and activities while denying the same to the Church. Finally, HSD engaged in unlawful discrimination under Maine's Public Accommodations laws when it denied TPC the full and equal enjoyment of school facilities, which are a place of public accommodation.

Second, even though the factual record demonstrates several constitutional and statutory violations, to the extent Defendant contends it did not discriminate against Plaintiffs because of their religion, that is an issue generally not suitable for resolution on a motion for summary judgment. "Discrimination cases are often bound up in the sort of factual inquiries best left to a jury…[and are] least

suited for a determination on a motion for summary judgment" *Ruffino v. State St. Bank and Tr. Co.*, 908 F. Supp. 1019, 1028 (D. Mass. 1995) (citations omitted). Accordingly, this Court should deny Defendant's motion for summary judgment.

II. STATEMENT OF FACTS

A. HSD's Community Use Policies

HSD offers its school facilities for community use via long-term or short-term use arrangements. ECF No. 26, Stipulated Joint Record ("JR"), Exh. 10, pp. 408. There is no written HSD policy that defines a short-term use or a long-term use (JR, Exh. 9, pp. 319, 323-24), but Superintendent Micah Grant ("Superintendent Grant") asserted that a one-year use is considered a long-term use (*id.* at pp. 319, 324), whereas anything less than a year, including a six-month use, is a short-term use (*id.* at pp. 319). The Superintendent is responsible for bringing action items, including long-term use proposals, before the Committee for their consideration and approval. JR, Exh. 9, pp. 306-07. HSD has represented that in considering whether to approve a use application, the "primary consideration for the Board would be whether the lease would conflict with needs for the space by the school community." JR, Exh. 6, pp. 52. The Building/Facilities Request Form is the only form required to be completed by organizations and seeks basic information regarding the areas requested and date/times requested. *Id.* No inquiry is made into the beliefs of the requesting organization. *Id.* Superintendent Grant affirmed that there are no other criteria outside the "Community Use of Facilities" policy considered in determining whether a potential applicant interested in using HSD facilities may utilize HSD space. JR, Exh. 9, pp. 336-37.

HSD has approved various uses of HSD facilities ranging from three months to one year. For example, Mr. Richard Productions was permitted to make use of HSD facilities from July 1, 2018, through June 30, 2019. JR, Exh. 10, pp. 432-437; Exh. 5, p. 47. Additionally, HSD facilities are currently rented out by various organizations, including the Good News Club, Builder's Club, Cub Scouts, Girl Scouts, for periods of three to nine months. JR, Exh. 10, pp. 412-31. Many of these organizations meet weekly for the entirety of the school year. *Id.* For example, the Builder's Club has met weekly in various areas of Hermon Middle School for at least the past four school years. JR, Exh. 10, pp. 420, 422-29.

HSD did not require any of these organizations to provide their stances on political and/or religious issues such as sexual orientation, gender reassignment care, conversion therapy, or abortion. JR, Exh. 4, pp. 43-45; Exh. 5, pp. 47-48; Exh. 9, pp. 337-38, 373; Exh. 10, pp. 412-437. Additionally, Mr. Richards Productions, who utilized HSD spaces for a period of one year, was not required to give a presentation to the Committee nor seek their approval to use HSD facilities. JR, Exh. 10, pp. 432-437; Exh. 5, pp. 47-48.

B. The Pines Church's Pursuit Of A Rental Use Agreement With HSD

TPC first began holding services at Spotlight Cinema in Orono, Maine in 2021. Declaration of Matt Gioia in Support of Plaintiff's Summary Judgment ("Gioia Decl."), ECF 29.1, ¶ 12. TPC has an oral lease with Spotlight Cinema that permits them to make use of the Spotlight Cinema facilities indefinitely. JR, Exh. 8, pp. 113, 189-90. TPC has quickly outgrown the cinema space, as the venue only has 170 usable seats. *Id.*, ¶¶ 13-14; JR, Exh. 1, pp. 11-12; JR, Exh. 7, pp. 106, 141-42; Exh. 8, pp. 278-79. When a congregation is at 70% of its current seating capacity, a larger venue is necessary to avoid stifling the growth of the church. Gioia Decl., ¶¶ 15-16; JR, Exh. 1, pp. 11-12; Exh. 7, pp. 141-42. Attendance records show that TPC reached its 70% threshold throughout 2022 and 2023. Exh. 7, pp. 106, 141-42; JR, Exh. 8, pp. 278-79; Gioia Decl., ¶ 14.

In September 2022, the Church began seeking new rental options and locations, but Pastor Matt quickly realized that Hermon had no available spaces. JR, Exh. 7, p. 147. After coming up short, Pastor Matt considered Herman High School facilities, as the location would allow the Church to serve the Hermon community more directly, and the high school space would allow the Church to meet its growing needs. Gioia Decl., ¶ 17. The high school would seat approximately 100 more guests than the Church's current meeting facility. *Id.*; JR, Exh. 1, pp. 11-12. Pastor Matt contacted Superintendent Grant on or around September 23, 2022, to discuss potential rental opportunities. Gioia Decl., ¶ 17; JR, Exh. 7, pp. 153; 157; JR, Exh. 10, pp. 440-41. After reaching out via email, Pastor Matt met with Superintendent Grant several times to negotiate a potential rental agreement. Gioia Decl., ¶ 17; JR, Exh. 7, pp. 153, 155, 157. Superintendent Grant was receptive about the Church's proposal to lease school facilities and

frequently expressed his willingness to help accommodate the needs of the Church. JR, Exh. 7, pp. 155-56, 158-59; JR, Exh. 10, pp. 440-43.

On or around October 19, 2023, Superintendent Grant asked Pastor Matt to submit a written proposal to the Committee, followed by an oral presentation at the next school meeting to explain the Church's vision for renting HSD facilities. Gioia Decl., ¶¶ 18-19; JR, Exh. 7, pp. 158, 166; JR, Exh. 8, p. 271; JR, Exh. 10, p. 445. Pastor Matt submitted a written proposal to the Committee on October 26, 2022, requesting a one-year lease of Hermon High School facilities. Gioia Decl., ¶ 19; JR, Exh. 10, pp. 439. At all times, TPC remained open to any facility use arrangement consisting of six months or longer. Gioia Decl., ¶ 29.

On November 7, 2022, Pastor Matt presented to the Committee information regarding the Church and its vision for leasing space at Hermon High School. Gioia Decl., ¶ 20; JR, Exh. 10, pp. 445. At the committee meeting, Pastor Matt also extended an offer to rent the high school spaces for $1,000 a month – $400 above HSD's proposed rent amount – to display the Church's serious intent to invest in the Hermon community. JR, Exh. 7, p. 159; Gioia Decl., ¶ 21. The Hermon School Department has not asked other entities or individuals who use or lease its space for periods longer than a month-to-month, including the Girl Scouts of America, the Cub Scouts of America, and Mr. Richards Productions, to give presentations to the Committee following their facility use form submissions or facility use inquiries. JR, Exh. 4, pp. 43-45; Exh. 5, pp. 47-48; Exh. 9, pp. 337-38, 373; Exh. 10, pp. 412-437.

Following Pastor Matt's presentation, committee member Chris McLaughlin ("Mr. McLaughlin") sent a November 8, 2022, email to HSD Superintendent Grant in which he stated he wanted to get a better sense of how the Church approaches issues of "diversity, equity and inclusion." JR, Exh. 8, pp. 281; Exh. 10, 449-50. The email contained follow-up questions from the committee member inquiring about the Church's beliefs on same-sex marriage, abortion, gender-affirming medical care, conversion therapy for LGBTQ individuals, and sex education for youth. *Id.* This committee member has not asked these questions to any other individual or entity and factual discovery has shown that no other Hermon School Department Committee member or Hermon School Department Employee has asked other interested

facility users or lessees these questions or similar questions. JR, Exh. 4, pp. 43-45; Exh. 5, pp. 47-48; Exh. 9, pp. 337-38, 373; Exh. 10, pp. 412-437; Exh. 11, pp. 489-90. The Hermon School Department Facilities Use Form and Policy do not require that a long-term facility user ascribe to a certain set of religious or political beliefs. JR, Exh. 10, 407-11.

Superintendent Grant forwarded the questions to Pastor Matt seeking the Church's views and stances on these issues to forward to the Committee for review. Gioia Decl., ¶ 22; JR, Exh. 8, pp. 280-81. When asked why he forwarded inappropriate questions regarding the Church's stance on political and religious issues, Superintendent Grant responded, "I wasn't thinking. I made a poor decision . . . I did not think about the negative ramifications of the email." JR, Exh. 9, pp. 372-73. Pastor Matt did not respond to the Committee's inquiries as to the Church's beliefs. Gioia Decl., ¶ 23.

On December 12, 2022, after the Plaintiffs refused to answer the questions, the Committee voted on whether to extend a lease to the Church. *Id.*, ¶¶ 23-24; JR, Exh. 10, pp. 453-54. During discussions, the Committee voiced various concerns about the Church's lease proposal, none of which were related to whether the Church was a qualified lessee. Gioia Decl., ¶¶ 25-28. For instance, one committee member expressed that leasing to the Church did not fit the Committee's goals. *Id.*, ¶ 25. Other committee members and Principal Brian Walsh brazenly made discriminatory comments about the Church by suggesting HSD's association with the Church and its religious beliefs would create a negative public image. *Id.*, ¶ 26. Principal Brian Walsh even insinuated that HSD could not associate themselves with the Church because their religious and political beliefs do not align with HSD's mission. *Id.*, ¶ 27.

After discussion, one committee member motioned to move forward with a six-month facility use arrangement. JR, Exh. 10, pp. 453. There was no second. *Id.* Another committee member motioned to move forward with a month-to-month facility use arrangement. *Id.* This motion was seconded and voted for by four committee members. *Id.* Committee member Chris McLaughlin opposed the motion. *Id.* at 454. Two other committee members abstained from voting. *Id.* The Committee denied the Church's proposed facility use arrangements despite the Church meeting all of the use criteria and offering to pay substantially more than the monetary rental amount. *Id.* at 453-454; JR, Exh. 7, p. 159; Gioia Decl., ¶¶

21, 28. At no point in time did HSD identify any scheduling conflicts with the Church's lease proposals. JR, Exh. 6, pp. 52 ("[T]he primary consideration for the Board would be whether the lease would conflict with needs for the space by the school community."); Gioia Decl., ¶ 31.

Neither the Committee nor Superintendent Grant offered Plaintiff any other facility use arrangement even though he had the power to do so and even though he offered similar arrangements to secular organizations. JR, Exh. 9, pp. 366-68; Gioia Decl., ¶ 30. Neither the Committee nor Superintendent Grant offered TPC the facility use form despite that allegedly being HSD's preferred process for determining lease arrangements. JR, Exh. 6, pp. 52 ("[The Department] prefers to utilize the facilities use request process rather than a formal lease . . . ."); Gioia Decl., ¶ 32.

III. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The nonmoving party at the summary judgment stage is entitled to have the credibility of his evidence as forecast assumed, and all internal conflicts in the evidence resolved favorably to him." *Blanchard v. Peerless Ins. Co.*, 958 F.2d 483, 489 (1st Cir. 1992) (cleaned up).

IV. ARGUMENT

A. HSD's Denial Of A Rental Use Arrangement To TPC Violated Its Rights Under Federal And State Law

Defendant has not shown that it is entitled to summary judgment on Plaintiffs' claims. *See* Def's Motion, at **8-10. Defendant muddies the applicable legal standards and application of the record in this case to those legal standards. *Id.* at **6-10. Defendant applies the facts of this case to all of Plaintiffs' claims simultaneously and claims that Plaintiffs were not discriminated against based on their religion and thus cannot maintain any of their claims. *Id.* at **8-10. However, the statement of material facts demonstrates several violations of the Federal Constitution and state law.

First, HSD's conduct violated the Free Exercise Clause because HSD denied TPC long-term facility use, while offering similar uses to other entities. *Second*, HSD violated TPC's free speech rights

because it discriminated against the Church based on the content and viewpoint of its message. *Third*, HSD violated the Establishment Clause by acting in hostility towards the Church and its beliefs. *Finally,* HSD engaged in unlawful discrimination in a place of public accommodation under Maine's Public Accommodations laws when it denied TPC the full and equal enjoyment of school facilities.

1. HSD's conduct violated the Free Exercise Clause

Defendant's motion fails to address the full breadth of protections afforded under the Free Exercise Clause. Def's Motion at *6. To the extent Defendant suggests Plaintiffs must prove discriminatory intent to prevail, it overlooks the recent "seismic shift in Free Exercise law." *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1288, 1233 (9th Cir. 2021). There are different theories of liability under the Free Exercise Clause. For instance, recently, the Supreme Court has emphasized that a regulation is not neutral and generally applicable where it "treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62 (emphasis in original) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) ("Brooklyn Diocese")).

Moreover, under the Free Exercise Clause, neutral laws of general applicability are subject to "rational basis" scrutiny if they only incidentally burden religious activity. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878 (1990). But, when burdensome laws are discriminatory against religious practices, i.e., not generally applicable, or neutral, strict scrutiny applies, and the government's actions must be both justified by a compelling interest and narrowly tailored to advance that interest. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) ("*Lukumi*"). For the reasons discussed below, HSD's facility use consideration practices are neither neutral nor generally applicable and fail strict scrutiny.

a. HSD's facility use consideration practices are not neutral and generally applicable.

HSD's facility use consideration practices are not neutral and generally applicable for the following reasons. *First,* HSD's facility use consideration practices fail both the neutrality and general applicability tests under *Brooklyn Diocese* and *Tandon*. A regulation is not neutral and generally applicable where it "treat[s] any comparable secular activity more favorably than religious exercise."

Tandon, 593 U.S. at 62 (internal citation omitted). And "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon*, 593 U.S. at 62 (citing *Brooklyn Diocese*, 141 S. Ct. at 67). Moreover, a law lacks general applicability when "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.

Here, HSD did not request information regarding the religious beliefs or inquire into the beliefs of other organizations who rent its spaces, nor does its facility use criteria form seek this information. JR, Exh. 4, pp. 43-45; Exh. 5, pp. 47-48; Exh. 9, pp. 337-38, 373; Exh. 10, pp. 412-437. Hermon High School and other HSD facilities are currently used and have previously been used by various organizations, including the Builder's Club, the Good News Club, Boy Scouts, Girl Scouts, and Mr. Richard's Productions. JR, Exh. 10, pp. 412-431. And contrary to Defendant arguing otherwise, the record does reflect that it has leased its facilities to the Richard's Production for a year but denied that option to Plaintiffs. Def's Motion at *8. Additionally, HSD has never made similar inquiries regarding the impact other prospective lease applicants or current tenants may have on its public image. JR, Exh. 4, pp. 43-45; Exh. 5, pp. 47-48; Exh. 9, pp. 337-38, 373; Exh. 10, pp. 412-437. Defendants cannot show that the Church is not comparable to these other organizations.

Second, the record does reflect that HSD refused to offer a long-term lease to Plaintiffs or consider other options because of their religious beliefs. *See* Def's Motion at *9. A law is not neutral when it is intolerant of religious beliefs or restricts practices because of their religious nature. *Lukumi*, 508 U.S. at 532. "The Free Exercise Clause protects against governmental hostility, which is masked, as well as overt." *Id.* at 534. "Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements by members of the decision-making body." *Id.* at 540 (internal citations omitted).

Historically, HSD has consistently permitted use of its facilities for periods of three months to one year. JR, Exh. 10, pp. 412-431. HSD has never requested information regarding religious beliefs or

inquire into the beliefs of other organizations who rent its spaces, nor does its facility use criteria form seek this information. JR, Exh. 4, pp. 43-45; Exh. 5, pp. 47-48; Exh. 9, pp. 337-38, 373; Exh. 10, pp. 412-437. HSD has only ever denied use of facilities when the requested spaces are unavailable. Gioia Decl., ¶¶ 33, 35-36; JR, Exh. 1, pp. 12; Exh. 8, pp. 188-89. At no point in time did HSD identify any scheduling conflicts with the Church's rental use proposals. JR, Exh. 6, pp. 52; Gioia Decl., ¶ 31.

Additionally, prior to considering (and ultimately rejecting) TPC's facility use proposals, HSD requested information about the Church's beliefs on various religious/political issues. Committee member Chris McLaughlin sent a November 8, 2022, email to HSD Superintendent Grant in which he stated he wanted to get a better sense of how the Church approaches issues of "diversity, equity and inclusion." JR, Exh. 8, pp. 281; Exh. 10, 449-50. The email contained follow-up questions from the Committee inquiring about the Church's beliefs on same-sex marriage, abortion, gender-affirming medical care, conversion therapy for LGBTQ individuals, and sex education for youth. *Id.*

After TPC refused to answer these inappropriate questions, the Committee considered the Church's proposal. The Committee voiced various concerns about the Church's proposal, none of which were related to whether the Church qualified to use HSD facilities. The Committee's concerns largely focused on the impact the Church's use arrangement may have on HSD's public image if they chose to associate with the Church and its religious beliefs. Gioia Decl., ¶¶ 25-28. Further, Superintendent Grant had the authority and discretion to offer a short-term rental arrangement, including a six-month use, to TPC, like he did for other entities, but he refused to offer TPC such an arrangement. JR, Exh. 10, p. 408. Considering the events and circumstantial evidence surrounding HSD's denial of TPC's use proposal alleged in the record, Plaintiffs have demonstrated that HSD's practices are not neutral under *Lukumi*.

Third, HSD's facility use consideration practices are not generally applicable because it invites "the government to consider the particular reasons for a persons' conduct by providing a mechanism for individualized exemptions." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). Strict Scrutiny applies "regardless of whether any exceptions have been given, because it 'invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude…." *Id.* at 1879. HSD's

conduct is not generally applicable under *Fulton* because it permits use terms ranging from three months to one year by secular entities and organizations but prohibits similar use by TPC. JR, Exh. 10, pp. 412-431. Defendant did not adhere to any objective criteria when determining whether to grant or deny Plaintiffs a use arrangement. In other words, HSD has arbitrarily determined that the Church is not worthy of consideration for long-term use, but that other entities are. Therefore, HSD's lease consideration practices were not neutral and generally applicable.

b. In the alternative, HSD's facility use consideration practices substantially burdened TPC's religious exercise

A substantial burden on the free exercise of religion exists "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Perrier-Bilbo v. United States*, 954 F.3d 413, 431 (1st Cir. 2020) (citations omitted). Penalizing an individual for engaging in a religious practice clearly constitutes a substantial burden, and even "indirect 'discouragements'" can qualify. *Sherbert v. Verner*, 374 U.S. 398, 404 n.5 (1963). Any policy that expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462-64 (2017).

HSD's facility use practices discriminate against an otherwise eligible recipient, the Church, by disqualifying it from a public benefit, i.e. long-term facility use, because of the Church's religious character. Such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny. *Lukumi*, 508 U.S. at 546. TPC is free to continue operating as a church and adhering to its Biblical views on marriage and sexuality, but that freedom comes at the cost of exclusion from the benefit of a long-term use arrangement with HSD for which the Church is otherwise fully qualified. The Supreme Court has made clear that when the government conditions a benefit in this way, it has punished the free exercise of religion. *See McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion) ("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.").

Additionally, HSD's conduct imposes more than just a mere inconvenience to the Church. *See Perrier-Bilbo v. United States*, 954 F.3d 413, 432 (1st Cir. 2020) ("not every imposition or inconvenience rises to the level of a substantial burden.") (quotations omitted). Since HSD's denial of TPC's long-term use proposal and refusal to provide even a six-month use term, the Church has been unable to find any other facility that can accommodate its growing congregation and needs. Gioia Decl., ¶ 34; JR, Exh. 7, pp. 147. To date, the Church continues to meet in a facility that cannot accommodate the Church's congregation and is stunting its overall growth. Gioia Decl., ¶¶ 6, 16, 37. Accordingly, HSD has substantially burdened the Church's religious exercise.

c. HSD's facility use consideration practices cannot survive strict scrutiny

"Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022). A strict scrutiny analysis is also appropriate where "[g]overnment enforcement of laws or policies ... substantially burden the exercise of sincerely held religious beliefs." *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002) (citing *Lukumi*, 508 U.S. at 546 and *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963)).

Because HSD's facility use consideration practices were neither neutral nor generally applicable, substantially burdened the Church's religious exercise, and constituted an individualized governmental assessment, HSD must satisfy strict scrutiny, which means its practices must be "narrowly tailored" to serve a "compelling" interest. *Lukumi*, 508 U.S. at 546. "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." *Id.* At 545-46. The Committee's conduct cannot survive this scrutiny.

The Committee's decision to deny Plaintiffs a long-term use arrangement was not narrowly tailored to further any legitimate, much less compelling, government interest. There is no reason why other facility use applicants were awarded use arrangements spanning three months to one year, while

the Plaintiffs were only offered a month-to-month option. JR, Exh. 10, pp. 412-31. The only justification the Committee offered for its refusal to offer a long-term use is that a rental arrangement with the Church did not fit the Committee's goals or HSD's mission and would create a negative public image for HSD. Gioia Decl., ¶¶ 25-28.

This is not a legitimate government interest. As the Supreme Court has noted, "[T]here is little if any risk of official state endorsement or coercion where no formal classroom activities are involved, and no school officials actively participate… [T]he school itself has control over any impressions it gives its students. To the extent that a school makes clear that its [allowing use of its facilities] is not an endorsement of the views of the ... participants, students will reasonably understand that the school's [granting access] evinces neutrality toward, rather than endorsement of, religious speech." *Board of Education v. Mergens*, 496 U.S. 226, 251 (1990). **"**The Constitution neither mandates nor tolerates" the Committee's "ferret[ing] out and suppress[ion] [of] religious observances even as it allows comparable secular observances." *Kennedy*, 142 S. Ct. at 2433. Thus, the Committee has violated the Church's rights under the Free Exercise Clause.

2. Content and Viewpoint Discrimination in a Public Forum Undeniably Violates the Free Speech Clause

Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities." *Kennedy*, 142 S. Ct. at 2421. Chief amongst the evils the First Amendment prohibits are government "restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 340 (2010). Indeed, the Supreme Court has called viewpoint discrimination "an egregious form of content discrimination" and has held that "the Government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995).

a. HSD facilities constitute a designated public forum

Under the prevailing constitutional framework, the extent to which a "government can restrict speech turns on the category to which property is assigned." *Curnin v. Town of Egremont*, 510 F.3d 24, 28 (1st Cir. 2007). The Supreme Court has "identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985); *Curnin*, 510 F.3d at 28.

"Designated public forums" include areas that are not quintessentially public forums, but which the state has nevertheless "opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983). In a designated public forum, the Government "is bound by the same standards as apply in a traditional public forum." *Id*. at 46. This means that content-based restrictions on speech by the Government receive strict scrutiny review.

School facilities during school hours are typically nonpublic forums. *Nurre v. Whitehead*, 580 F.3d 1087, 1093 (9th Cir. 2009). School facilities can become designated public forums, however, "if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations." *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988)) (internal quotation marks omitted). According to HSD's Community Use of School Facilities policy, HSD facilities are "made available for appropriate community use." JR, Exh. 10, pp. 408-11. Pursuant to this policy, HSD has allowed various organizations and entities to make use of its facilities over the years – including the Girl Scouts, Cub Scouts, Builder's Club, and Mr. Richard's Productions. JR, Exh. 10, pp. 412-431. Accordingly, HSD has at a minimum, established a designated public forum.

b. The Committee denied the Church's use proposal because of the Church's communicative content and viewpoint

Regardless of what type of forum the government creates, it cannot discriminate against speech on the basis of viewpoint, *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995), and any restriction must be "reasonable in light of the purpose served by the forum."

Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985). There are various situations which will lead a court to conclude that, despite the seemingly neutral justifications offered by the government, nonetheless the decision to exclude speech is a form of impermissible discrimination. Statements by government officials on the reasons for an action can indicate an improper motive. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977).

Additionally, the Supreme Court has long indicated that the exclusion of worship services and other devotional activity from public forums is content-based or viewpoint-based discrimination. *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981); *Rosenberger*, 515 U.S. at 845; *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001). For example, in *Lamb's Chapel*, the Supreme Court held that a school district violated the Free Speech Clause by denying a church access to school premises to exhibit a film series on family and child-rearing issues, solely because the film dealt with the subject from a religious standpoint. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). Later, in *Good News Club*, the Supreme Court similarly held that a public school's exclusion of Christian ministries from meeting after hours at a school based on the ministry's religious nature is unconstitutional viewpoint discrimination, particularly where the school opens its limited public forum to activities that serve a variety of purposes. 533 U.S. at 112.

In the same vein as *Good New Club*, HSD's exclusion of TPC from meeting after hours at school facilities based on the Church's religious nature is unconstitutional viewpoint discrimination, particularly where HSD opens its forum to activities that serve a variety of purposes. *Id*. The Committee denied the Church's six-month and one-year use proposals because of the Church's views on same-sex marriage, abortion, gender-affirming medical care, conversion therapy for LGBTQ individuals, and sex education for youth. The Committee's questions reflect an improper motive on behalf of HSD to exclude traditional viewpoints on these issues from use of school facilities. *See Vill. of Arlington Heights*, 429 U.S. at 268.

The Committee also chose to deny the Church's use proposals because they are a religious entity and espouse Christian beliefs. This conduct constitutes content-based discrimination because the Committee "single[d] out [a] specific subject matter for differential treatment." *Reed v. Town of Gilbert*,

Ariz., 576 U.S. 155, 156 (2015).

The Committee's viewpoint and content-based exclusions cannot survive strict scrutiny because the Committee cannot demonstrate that extending a long-term use arrangement or even certain short-term use arrangements to other organizations while excluding TPC from such terms furthers any compelling governmental interest and is narrowly tailored to that end. *Id.* at 157. Even assuming the Committee has a compelling interest in preserving its public image (which it does not), the Committee's conduct is highly underinclusive because HSD allows other secular activities to use its facilities who espouse political beliefs regarding abortion, conversion therapy, same-sex marriage, etc. At no point in time did the Committee or the Superintendent offer TPC a facility use form. Instead of offering TPC a simple form to fill out, the Committee required them to submit a written proposal, give a presentation to the Committee, and answer questions related to their political and religious beliefs. JR, Exh. 9, pp. 366-68; JR, Exh. 10, pp. 439, 445. Accordingly, HSD's conduct violates TPC's free speech rights.

3. HSD's Conduct Violated the Establishment Clause

Defendant again fails to acknowledge the full breadth of protections afforded under the Establishment clause and cites to precedent that the Supreme Court has largely abandoned. Def's Motion at * 8 (citing *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 222 (1963); *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)). "[The] First Amendment mandates government neutrality between . . . religion and nonreligion." *Epperson v. Arkansas*, 393, U.S. 97, 104 (1968). HSD certainly "may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." *Sch. Distr. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963); *see also Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (state may "neither abdicate [its] responsibility to maintain a division between church and state nor evince a hostility to religion."). "The government neutrality required under the Establishment Clause is … violated as much by government disapproval of religion as it is by government approval of religion." *Lukumi*, 508 U.S. at 532.

The distinction between permissible and impermissible activities under the Establishment Clause must "accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers." *Kennedy*,

142 S. Ct. at 2411. Accordingly, "the Establishment Clause must be interpreted by "'reference to historical practices and understandings.'" *Id.* Among the "hallmarks" that courts may consider in determining the existence of an Establishment Clause violation are six founding-era religious establishments: (1) the government exerted control over the doctrine and personnel of the established church, (2) the government mandated attendance in the established church and punished people for failing to participate, (3) the government punished dissenting churches and individuals for their religious exercise, (4) the government restricted political participation by dissenters, (5) the government provided financial support for the established church, often in a way that preferred the established denomination over other churches, and (6) the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function. *Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 286 (2022)[1]; *see also Hilsenrath on behalf of C.H. v. Sch. Dist. of the Chathams*, No. CV1800966KMMAH, 2023 WL 6806177, at *6 (D.N.J. Oct. 16, 2023) (utilizing "hallmarks" of an Establishment Clause violation found in the *Kennedy* majority decision footnote 5 to analyze an Establishment Clause claim).

The Committee's discriminatory facility use consideration process presents at least two "hallmarks" associated with establishment of religion to which *Kennedy* alluded. Here, Defendant's denial of a long-term use term or even a six-month term to the Church evidences the Defendant's open and rampant display of impermissible government hostility toward religious speech and religious free exercise, as HSD rents to similarly situated secular entities and activities. This reflects the Committee's attempt to "punish[] dissenting churches and individuals for their religious exercise." *Id.* Defendant's denial of a long-term use arrangement and a six-month arrangement to the Church sends the message to houses of worship and other religious entities that organizations that maintain traditional historically

[1] In his concurring opinion in *Shurtleff*, Justice Gorsuch cited to and adopted the position of Professor Michael McConnell when he enumerated these six hallmarks of founding-era religious establishments. *See Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 285–86, 142 S.Ct. 1583, 212 L.Ed.2d 621 (2022) (citing Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 William & Mary L. Rev. 2105 (2003)). Underscoring the Court's adoption of these hallmarks as the guiding principles for Establishment Clause jurisprudence, footnote 5 of the majority opinion in *Kennedy* also cites directly to *Shurtleff* and Professor McConnell's scholarship. *See Kennedy*, 142 S. Ct. at 2429 n.5 (citing same).

orthodox biblical beliefs about human sexuality are second-class institutions, outsiders, and not full members of the Hermon community and evidence HSD's attempt to "exert[] control over the doctrine…of the established church." *Id.* If TPC had a different set of beliefs, then perhaps HSD might consider offering its facilities to TPC for its use and enjoyment. "Rather than respect the First Amendment's double protection for religious expression", HSD "preference[s] secular activity" over religious activity. *Id*. at 2431. Accordingly, HSD's conduct violates the Establishment Clause.

4. HSD's Denial of a Rental Use Agreement to TPC Violated Public Accommodations Laws

Defendants claim that Plaintiffs were not discriminated against based on their religion and thus they cannot maintain their claim under Maine's public accommodations laws. *See* Def's Motion, at **8-10. They are wrong. Pursuant to Maine law, every individual shall have "equal access to places of public accommodation without discrimination because of…religion." 5 M.R.S.A. § 4591. It is unlawful discrimination for "any 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 accommodations, advantages, facilities, goods, services and privileges may depend." 5 M.R.S.A. § 4592. School facilities are defined as a place of public accommodation. 5 M.R.S.A. § 4553 (8)(J). Maine courts have found that the unlawful discrimination in a place of public accommodation occurs when an individual is "treated differently from other[s]…solely because" of their protected status. *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 606 (2014).

Here, HSD is the owner of Hermon High School, which provides facilities for public use and rental. HSD denied the Church the full and equal enjoyment of Hermon High School facilities on account of religion. Specifically, HSD discriminated against the Church regarding the terms of the Church's access to Hermon High School facilities – offering the Church an impracticable month-to-month term while offering other organizations extended rental terms. JR, Exh. 10, pp. 412-31, 453. Additionally,

HSD discriminated against the Church by inquiring about the Church's beliefs regarding human sexuality, marriage, and abortion. HSD has never asked these questions of any other user, nor does its facilities use form request this information. Further, neither the Committee nor Superintendent Grant offered TPC the facility use form despite that allegedly being HSD's preferred process for determining lease arrangements. JR, Exh. 6, p. 52. Instead, HSD required TPC to submit a written proposal, give a presentation to the Committee, and answer a series of questions regarding their beliefs to even be considered for a potential lease. JR, Exh. 8, pp. 281; JR, Exh. 10, pp. 439, 445, 449-50. Accordingly, HSD violated § 4592 of Maine's Public Accommodations law.

B. Plaintiff Matt Gioia's Claims Are Identical to Plaintiff TPC's Claims

Plaintiff concedes that Pastor Matt's claims are redundant to those brought by TPC. *See* Def's Motion at *10. Pastor Matt does not seek any relief separate from that sought by TPC.

C. At The Very Least, There Are Genuine Issues Of Material Fact

Defendant's central argument in support of summary judgement is that TPC cannot maintain any of its claims because HSD did not discriminate against TPC because of its religious beliefs. *See* Def's Motion at *8-10. However, "[d]iscrimination cases are often bound up in the sort of factual inquiries best left to a jury… [and are] least suited for a determination on a motion for summary judgment*" Ruffino v. State St. Bank and Tr. Co.*, 908 F. Supp. 1019, 1028 (D. Mass. 1995) (citing *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 840 (1st Cir. 1993), cert. denied, 511 U.S. 1018 (1994); *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1116 (1st Cir. 1993).

Defendant dedicates a mere three substantive paragraphs in its motion to applying the record in this case to all applicable legal standards, thereby muddying the applicable law and how the record *specifically* applies to each of Plaintiffs' claims. *See* Def's Motion, at *9. In these paragraphs, Defendant contends that HSD could not have discriminated against TPC because (1) "it is the only applicant that HSD has had for a long-term lease"; (2) committee member Chris McLaughlin's questions were irrelevant; and (3) the Board voted to give TPC a month-to-month lease. *See* Def's Motion, at *9. The factual record disputes the validity of these statements and, at the very least, raises genuine issues of

material fact.

First, HSD has offered its facilities to other entities for extended use terms. Plaintiffs have produced evidence that HSD has approved various uses of HSD facilities ranging from three months to one year. For example, HSD permitted Mr. Richard Productions to make use of its facilities from July 1, 2018, through June 30, 2019. JR, Exh. 10, pp. 432-437; Exh. 5, p. 47. Additionally, various organizations currently rent out HSD facilities, including the Good News Club, Builder's Club, Cub Scouts, and Girl Scouts, for periods of three to nine months. JR, Exh. 10, pp. 412-31. Many of these organizations meet weekly for the entirety of the school year. *Id.* For example, the Builder's Club has met weekly in various areas of Hermon Middle School for at least the past four school years. JR, Exh. 10, pp. 420, 422-29.

Second, committee member Chris McLaughlin's questions regarding the Church's views on gay marriage, abortion, conversion therapy, gender reassignment treatment, and sexual education for youth were not "irrelevant." Def's Motion, at *9. Defendant argues that the questions were "irrelevant" because TPC never responded to these inquiries and the Board voted to extend a month to month lease to the Church, but these arguments are misplaced. *Id.* at *9. Mr. McLaughlin was a member of the HSD School Committee and, therefore, a representative of the Committee. JR, Exh. 8, pp. 281; Exh. 10, 449-50. The questions he presented to TPC, through Superintendent Grant, were asked in his capacity as a member of the Committee. Id. Whether the Committee knew about Mr. McLaughlin's questions to TPC is irrelevant to a finding of discrimination. Additionally, TPC's position on these issues is self-evident. JR, Exh. 8, pp. 220-58, 264-65. TPC is a non-denominational Christian church which maintains biblically orthodox religious beliefs and practices regarding human sexuality, marriage, and abortion, as most Christian churches have faithfully maintained for the past two thousand years. JR, Exh. 8, pp. 220-58, 264-65; Gioia Decl., ¶ 9. Accordingly, Mr. McLaughlin's inappropriate questions are relevant to determining the Committee's discriminatory treatment of TPC.

Third, the Board's month-to-month lease offer also does not negate a finding of discrimination. *See* Def's Motion, at *9. Plaintiffs' claims of discrimination are based upon HSD offering other entities use of its facilities in terms ranging from three months to one year. JR, Exh. 10, pp. 412-37. HSD has

only denied the request of an entity when the space requested was unavailable, yet it denied Plaintiffs' request to use HSD facilities for any period longer than month-to-month, even though the space was not occupied. Gioia Decl., ¶¶ 33, 35-36; JR, Exh. 1, pp. 12; Exh. 8, pp. 188-89. HSD has never identified any scheduling conflicts with the Church's rental use proposals. JR, Exh. 6, pp. 52; Gioia Decl., ¶ 31.

As discussed above, the evidence shows that HSD requested information about the Church's beliefs on various religious/political issues and denied the Church several different rental use proposals based upon the Church's beliefs. HSD did not request information regarding the religious beliefs or inquire into the beliefs of other organizations who rent its spaces, nor does its facility use criteria form seek this information. JR, Exh. 4, pp. 43-45; Exh. 5, pp. 47-48; Exh. 9, pp. 337-38, 373; Exh. 10, pp. 412-437. Notably, Hermon High School and other HSD facilities are currently used and have been used by various organizations, including the Builder's Club, the Good News Club, Boy Scouts, Girl Scouts, and Mr. Richard's Production, among others, for periods of three months to one year. JR, Exh. 10, pp. 412-431. Accordingly, Plaintiffs have produced sufficient evidence to show, at a minimum, a genuine issue of material fact regarding HSD's intent in denying Plaintiffs proposed rental use arrangement.

V. CONCLUSION

HSD's refusal to offer the Church a use arrangement other than a month-to-month is unconstitutional and violative of Maine's public accommodations laws. Accordingly, this Court should deny Defendant's motion for summary judgment regarding TPC's claims.

Respectfully submitted,

Dated: February 12, 2024

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