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' REPLY IN SUPPORT OF SUMMARY JUDGMENT** Hon. Lance E. Walker

I. INTRODUCTION

Defendant's Opposition to Summary Judgment does not refute that the Hermon School Department's ("HSD") conduct violated federal and state law. *See* Defendant's Opposition to Plaintiffs' Motion for Summary Judgment ("Def.'s Oppo."), ECF 032. Rather, in its opposition, Defendant largely ignores many of Plaintiffs' arguments in favor of summary judgment and misconstrues the record and applicable legal standards. This Court should thus grant Plaintiffs' Motion for Summary Judgment ("Motion") because the record is clear that HSD violated TPC's constitutional rights and state law through its discriminatory and unlawful denial of a rental use agreement to the Church based on its religious beliefs. *See* ECF 029.

II. ARGUMENT

A. TPC Is Entitled To Summary Judgment On Its First Amendment Claims

Defendant cannot show a genuine issue of material fact regarding Plaintiffs' First Amendment claims. *See* Def's Motion, at **8-10. In its opposition, Defendant overlooks many of Plaintiffs' arguments and muddies the applicable constitutional standards. *Id.* at **6-10. To be clear, the First Amendment protects against outright prohibitions on First Amendment rights, as well as "indirect coercion or penalties." *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988); Def's Oppo. at *7 (suggesting that HSD did not violate the religion clauses because it did not enact a "law"). HSD's denial of a long-term rental use agreement to the Church and explicit hostility towards its beliefs is an unequivocal violation of the Free Exercise, Establishment, and Free Speech Clauses.

1. HSD's conduct violated the Free Exercise Clause

Defendant's opposition overlooks many of Plaintiffs' Free Exercise arguments and confuses the applicable legal standard for Free Exercise Claims. Def's Oppo. at **7-11. There are many different theories of liability under the Free Exercise Clause. Defendant's theory of coercion is only one such theory. *Id*. at **7-8. However, Plaintiffs' Free Exercise claim does not rest upon a coercion theory[1], but

[1] Even if Plaintiffs were arguing pursuant to a coercion theory, they would still meet their burden. The record reflects that TPC was coerced to violate their religious beliefs and surrender to Defendants' views on same-sex marriage, abortion, gender-affirming medical care, conversion therapy for LGBTQ individuals, and sex education for youth in order to obtain a long-term use arrangement. *See* JR, Exh. 8, pp. 281; Exh. 10, 449-50.

rather upon the recent "seismic shift in Free Exercise law." *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1288, 1233 (9th Cir. 2021). Under the Supreme Court's recent expansion of Free Exercise rights, Plaintiffs may prove a Free Exercise violation by showing that HSD burdened TPC's sincere religious practice pursuant to a practice or policy that is not "neutral" or "generally applicable." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022). Plaintiffs' Motion alleges multiple ways in which HSD's conduct fails both the neutrality and general applicability tests pursuant to *Brooklyn Diocese, Tandon, Lukumi,* and *Fulton*. *See* Motion at ** 8-10 (citations omitted).

Defendant misunderstands Plaintiffs' general applicability and neutrality arguments. Plaintiffs' argument is not that HSD has a policy or practice that "takes religion into account." Def.'s Oppo. at **8-9. Rather Plaintiffs' argument is that HSD's facility use form and Policy KG *does not* take religion into account, yet the Committee took religion into account when considering a use arrangement with TPC. JR, Exh. 8, pp. 281; Exh. 10, 449-50; JR, Exh. 4, pp. 43-45; Exh. 5, pp. 47-48; Exh. 9, pp. 337-38, 373; Exh. 10, pp. 407-437; Exh. 11, pp. 489-90; Supplemental Declaration of Micah Grant ("Supp. Grant Decl."), Exh. A, pp. 4-9.

Defendants also incorrectly assert that Plaintiffs argue only an intolerance theory (pursuant to *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993) ("Lukumi")) and entirely ignore Plaintiffs' arguments under *Tandon* and *Fulton*. Def.'s Oppo. at *9-10. Plaintiffs' Motion makes clear that HSD's conduct was not neutral and generally applicable in at least three ways: (1) HSD treated other entities more favorably than TPC, (2) HSD acted in an intolerant manner to TPC's beliefs, and (3) HSD engaged in an "individualized government assessment." Motion at **8-9.

Defendant also argues that HSD's "facility use process" does not apply to TPC because this process applies only to short term requests for use. Def.'s Oppo. at *10. However, HSD's facility use process is relevant here because it shows that TPC was treated differently than every other entity that pursued use arrangements with HSD. Neither the Committee nor Superintendent Grant even 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. Further, in his email to Plaintiffs requesting their

views of various political and religious issues, Mr. McLaughlin did not indicate that the Church should go through the facilities use request process. JR, Exh. 8, 281. At all times, TPC remained open to any facility use arrangement consisting of six months or longer. Gioia Decl., ¶ 29.

Defendant further contends that Plaintiff has not proved a "substantial burden" because a long-term lease is not a public benefit, and no other entity has ever asked for a long-term lease. Def.'s Oppo. at **10-11. Defendant is wrong. First, case law is clear that the free exercise of religion is infringed "by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462-64 (2017). Any privilege or benefit HSD extends to others, including facility use, is a "public benefit" or privilege for free exercise purposes. *Id.*

Second, HSD chooses not to call its rental use agreements/arrangements "leases" in its moving and responsive papers. Regardless of what HSD chooses to call its short-term or long-term rental use agreements/arrangements, HSD has permitted various outside entities to use its facilities for varying lengths of times, ranging from three months to one year. JR, Exh. 10, pp. 412-437; Exh. 5, p. 47; ECF No. 31-2, Supp. Grant Decl., Exh. A, p. 3 ("[I]t's not uncommon to have a request for a basketball, an organization will ask us to rent a gym for a block of time (x) amount of Sundays for 4 months, 3 months. That's a very common thing for the school – or for the superintendent – to sign off on, are smaller rental blocks of time.").

Finally, TPC is not the only entity that has asked for a long-term lease. Defendants admitted that Mr. Richards Production was permitted to make use of HSD facilities for a period of one year. JR, Exh. 5, p. 47; Exh. 10, p. 436. Additionally, Mr. Richards Production was permitted to utilize the facility's use process. JR, Exh. 10, pp. 432-437; Exh. 5, p. 47. However, when TPC requested the same use term, 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. Instead, the Committee required Pastor Matt 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.

Because Plaintiffs' Motion shows that HSD's conduct was not neutral or generally applicable, the burden shifts to Defendant to prove that it can satisfy "strict scrutiny" by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Lukumi*, 508 U.S. at 546. Plaintiffs' Motion outlines why Defendants conduct cannot survive any level of scrutiny. Motion at **11-12. Yet, Defendants opposition does not even attempt to refute Plaintiffs' arguments or show how HSD has satisfied strict scrutiny. Accordingly, TPC is entitled to summary judgment on its free exercise claim.

2. HSD's conduct violated the Establishment Clause

Defendant confuses the basis of Plaintiffs' Establishment Clause claim. Plaintiff is not arguing that HSD established a religion. *See* Def's Oppo. at *12. Rather, Plaintiff brings a reverse establishment clause claim. The Supreme Court has unqualifiedly declared that government officials cannot be "overtly hostile to religion", *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989), or act with an "official purpose" to disapprove of any religion or religious belief. *See Lukumi*, 508 U.S. at 532. HSD's overt hostility to TPC's religious beliefs is the basis of TPC's establishment claim.

Recently, in *Kennedy v. Bremerton*, the Supreme Court outlined a new test to analyze Establishment Clause claims. Plaintiffs' reliance on *Kennedy* and *Shurtleff* is not merely quoting "general" language, but rather the new legal standard for establishment claims. Def.'s Oppo. at **11-12. Defendant does not and cannot refute Plaintiffs' establishment clause analysis.

Additionally, Defendant misconstrues the factual record in an attempt to show that HSD was not hostile to religion. *Id.* at *12. Plaintiff will address each record cite in turn:

- The record is clear that TPC is not the first entity to request a use term of one year. Defendants admitted that Mr. Richards Production was permitted to make use of HSD facilities for a period of one year. JR, Exh. 5, p. 47; Exh. 10, p. 436. Additionally, HSD has permitted various outside entities to use its facilities for varying lengths of times, ranging from three months to one year. JR, Exh. 10, pp. 412-437; Exh. 5, p. 47; ECF No. 31-2, Supp. Grant Decl., Exh. A, p. 3. At all times, TPC remained open to any

facility use arrangement consisting of six months or longer, yet neither the Committee nor Superintendent Grant offered TPC the facility use form. Gioia Decl., ¶ 29; JR, Exh. 6, pp. 52; Gioia Decl., ¶ 32.

- 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. Further, the Committee's various comments made during the December 12, 2022, committee meeting revealed they were aware of the Church's beliefs. *See* Supp. Grant Decl., Exh. A, pp. 4, 6-9 (see comments made by Principal Walsh, Committee Member McLaughlin, Committee Member Benjamin, Superintendent Grant, and Committee Member Keezer).
- TPC was denied use of facilities. The Committee was, at a minimum, on constructive notice that a month-to-month arrangement was not feasible for TPC, so the Committee's offer of a month-to-month lease was a constructive denial of access. Gioia Decl., ¶¶ 33, 35-36; JR, Exh. 1, pp. 12. Additionally, TPC was never offered any other use arrangement, even though Superintendent Grant had the authority to do so. JR, Exh. 10, p. 408.
- Even if HSD has rented its facilities to clubs like the Good News Club, the record does not reflect that HSD has ever rented its facilities to a Church. To succeed on its establishment claim, Plaintiffs are only required to show that HSD was hostile to its religious beliefs. The record is rife with such evidence. JR, Exh. 8, pp. 281; Exh. 10, 449-50; JR, Exh. 4, pp. 43-45; Exh. 5, pp. 47-48; Exh. 9, pp. 337-38, 373; Exh. 10, pp. 407-437; Exh. 11, pp. 489-90; Supp. Grant Decl., Exh. A, pp. 4-9.

Accordingly, Defendant fails to raise a genuine issue of material fact as to Plaintiff's Establishment Clause claim.

3. HSD's conduct violated the Free Speech Clause

Defendants again confuse the applicable legal standard and misrepresent Plaintiffs' free speech arguments. Def.'s Oppo. at *13-15. In their Motion, Plaintiffs first engage in forum analysis, as required under First Amendment case law, to show that HSD is a limited public forum. Motion at **12-13. Plaintiffs then show how HSD's conduct constituted impermissible content and viewpoint discrimination. Id. at **13-15.

Defendants maintain that they could not have violated the Free Speech Clause because Plaintiffs were not denied access to HSD facilities and only sought a long-term (rather than a short-term) use arrangement. See Def.'s Oppo. at ** 14-15. These arguments are red herrings. First, denial of access is not required to prove a Free Speech claim. Id. Free speech case law is clear that "the government may not regulate speech based on its substantive content or the message it conveys," Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96, (1972) (emphasis added), and "may not favor one speaker over another." Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). HSD has regulated speech by permitting TPC to only "speak" on a month-to-month basis while allowing other entities to speak for contracted periods of three months to one year. Essentially, HSD has favored these speakers over TPC because of the message TPC conveys.

Even if denial of access was required to prove a free speech claim, the Committee was, at a minimum, on constructive notice that a month-to-month arrangement was not feasible for TPC, so the Committee's offer of a month-to-month lease was a constructive denial of access. Gioia Decl., ¶¶ 33, 35-36; JR, Exh. 1, pp. 12. Additionally, TPC was never offered any other use arrangement, even though Superintendent Grant had the authority to do so, or the facility use form. JR, Exh. 10, p. 408.

Additionally, Defendants granted a one-year facility use arrangement to Mr. Richard's Productions and did not require them to present to the Committee, but rather referred them to the facilities use process. JR, Exh. 5, p. 47; Exh. 10, p. 436. To argue that no other entity has ever requested a long-term lease is disingenuous and contrary to evidence. The record is clear that HSD has permitted various outside entities to use its facilities for periods of three months to one year. JR, Exh. 10, pp. 412-437; Exh. 5, p. 47; ECF No. 31-2, Supp. Grant Decl., Exh. A, p. 3. Plaintiffs were never offered any other use term, nor were they referred to the facility use form. Accordingly, there is no genuine issue of material fact that

HSD's conduct violated the Free Speech Clause.

B. TPC Is Entitled To Summary Judgment On Its Public Accommodations Law Claim

Defendant does not even attempt to dispute the legal analysis in Plaintiff's Motion regarding this claim. Plaintiffs' Motion clearly shows that HSD, a place of public accommodation, discriminated against TPC. Motion at **16-17. Accordingly, there is no genuine issue of material fact regarding HSD's violation of Maine's Public Accommodations law.

C. TPC Is Entitled To Relief

Defendant**s**' response to Plaintiffs' damages, injunctive, and declaratory relief claims is to call them "mystifying" rather than try to dispute any of Plaintiffs' legal or factual analysis. *Id.* at *16. Courts may rule on nominal damages, injunctive, and declaratory relief at the summary judgment stage. *See Boston's Children First v. City of Boston,* 395 F.3d 10, 13 (1st Cir. 2005); *Aurelio v. Rhode Island Dept. of Admin., Div. of Motor Vehicles*, 985 F. Supp. 48, 53 (D.R.I. 1997). Additionally, at this stage, Plaintiffs**'** burden is merely to prove that it suffered damages and would be able to offer admissible evidence as to the amount of damages at trial. *Frankenmuth Mut. Ins. Co. v. Five Points W. Shopping City, LLC*, No. 2:20-CV-1288-KOB, 2022 WL 949888, at *15 (N.D. Ala. Mar. 29, 2022). Accordingly, Plaintiffs are entitled to summary judgment on their damages claims.

III. CONCLUSION

Defendant's opposition does not raise a genuine issue of material fact as to HSD's discriminatory and unlawful conduct. Accordingly, this Court should grant Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

Dated: February 26, 2024

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