UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

THE PINES CHURCH and MATT GIOIA Plaintiffs v. HERMON SCHOOL DEPARTMENT Defendant	)	**Civil Action No. 1:23-cv-00214-LEW**

HERMON SCHOOL DEPARTMENT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The motion for summary judgment filed by Plaintiffs The Pines Church and Matthew Gioia displays a fundamental misunderstanding of what summary judgment is.[1] As Rule 56 of the Federal Rules of Civil Procedure provides, and caselaw in this District and around the country supports, summary judgment is appropriate only "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." The Plaintiffs' theory here, based on an email sent by one of the Hermon School Department ("HSD") School Committee members to Matthew Gioia, is that HSD denied the Church's request for a long-term lease because of its religious views (views that, to this day, are unknown to HSD). The threshold problem with Plaintiffs' position is that this theory is not undisputed. It is HSD's position, supported by properly supported and admissible facts, that it was not the Church's ideology that caused it to deny the Church's request, but rather the fact that

[1] Plaintiffs' motion is not in compliance with D. Me. L.R. 83.1(c)(1) which requires that local counsel "shall sign all papers filed with the Court."

it had never granted a long-term lease and such an arrangement was not consistent with its stated goal of ensuring school facilities are at all times available for school use. Moreover, although Plaintiffs repeatedly assert that other secular entities were granted long term leases, *see, e.g.* ECF Doc. 29, PageID ##: 708, 715 (Plaintiffs' Br. 8,15), that contention is disputed – or more accurately, it is not supported by the record. What the record reflects is that The Pines Church is the only entity that has ever asked for a contractual right to use school facilities for a one-year period. And finally, Plaintiffs' references to alleged proposals by the Church for a six-month lease, *e.g.* ECF Doc. 29, PageID ##: 714, 719 (Pl. Br. 14, 19) are just plain false given the concession by Matthew Gioia that he never asked for anything other than a one-year lease. The facts of this case, taken in the light most favorable to HSD, are that The Pines Church is free to use HSD facilities on a month-to-month basis just like every other organization that wishes to use school property. The fact that that arrangement is not the one that The Pines Church wants is not a violation of its free exercise rights, it does not establish a religion or violate the Church's free speech rights, and it is not discriminatory. Plaintiffs' motion for summary judgment should be denied.

STATEMENT OF FACTS

The facts of this case, taken in the light most favorable to HSD as the non-moving party, are as follows.

A. HSD's Facilities Use Policy

HSD is a public school district in Hermon Maine that operates elementary, middle and high schools. ECF Doc. 31, PageID #: 745 (HSD Opposing Statement of Facts ("HSD OSMF") ¶ 58). Use by the public of school facilities is governed by School Board Policy KG. ECF Doc. 31, PageID ##:745-746 (HSD OSMF ¶59); ECF Doc. 28-2, PageID ##: 688-691(Grant Decl. Ex.

1). Policy KG begins with "Use Criteria" and provides for community use of facilities "when such facilities are not required for their primary purposes: the instruction of students and related school activities." ECF Doc. 28-2, PageID #: 688. Also, in the section setting forth criteria for use is the prohibition against making facilities available for "commercial, personal or personal social event purposes." *Id.* It does not provide that religious or political beliefs should in any way factor into the decision as to whether to allow use, and it has consistently been the practice of the School Department not to ask about the religious or political beliefs of those who request permission to use facilities. The Pines Church Statement of Material Facts ("TPC SMF") ¶ 32; ECF Doc. 31, PageID #: 741 (HSD OSMF ¶ 32).

Policy KG contains a single sentence relating to long term lease arrangements:

> The long-term rental or lease of unused school facilities shall be authorized by the Hermon School Committee upon recommendation of the Superintendent of Schools.

ECF Doc. 28-2, PageID #: 688.

Policy KG then goes on to set forth guidelines for the "occasional or short-term use of school facilities." *Id.* Among other things, "if applicable" users are required to submit a certificate of general liability insurance in the minimum amount of $1 million and a release of liability." *Id.* at PageID #: 689. Often users who expect to want space more than once will submit at certificate of insurance and executed waiver the first time they request space. By doing so, they are authorized to use the space at other times during that year. Submission of the insurance certificate and waiver, however, do not give them a right to use of the space for any specific period of time. ECF Doc. 31, PageID #: 746 (HSD OSMF ¶ 62-63).

At HSD, short-term use of school facilities is not accomplished through formal leases. Rather, the School Department has put into place a system, whereby those who want to use facilities submit a "Building/Facilities Use Request Form" and, if applicable, proof of insurance

and a waiver, and the requests are dealt with on a case-by-case basis depending upon availability of space. ECF Doc. 31, PageID #: 746 (HSD OSMF ¶ 61-63).

B. Community Use of HSD Facilities

Over the course of a year, dozens of individuals and organizations request permission to use HSD facilities and in most cases those requests are granted. Some request space for a single date others request space for a specific day in a week for the school year. The Building/Facilities Use Request Form does not ask for an entity's political or religious beliefs, ECF Doc. 30, PageID #: 728 ("TPC SMF" ¶ 7), and HSD does not require those requesting to use its space to provide information on political or religious beliefs. *Id* at PageID #: 731, ECF Doc. 30, PageID #: 728 (TPC SMF ¶ 29). The requests of both secular and religious groups are granted without reference to their beliefs on controversial issues.

C. The Pines Church's Request

On September 23, 2022, Plaintiff Matthew Gioia contacted HSD to inquire about leasing the theater, cafeteria and two classrooms at the Hermon High School to hold its Sunday Services. ECF Doc. 31, PageID #: 747 (HSD OSMF ¶ 69). Gioia's request was for a one-year period and he has never asked for any period less than that. ECF Doc. 31, PageID ##:747, 749 (HSD OSMF ¶¶ 70, 96). Gioia made a presentation to the HSD School Committee at its November 2022 meeting. ECF Doc. 31, PageID #: 747 (HSD OSMF ¶73). At that meeting, he described what he called the heart and soul of the Church and invited School Committee members to visit the Church to find out what it was about. ECF Doc. 31, PageID #: 747 (HSD OSMF ¶ 73). He asked specifically for a one-year lease. ECF Doc. 31, PageID #: 747 (HSD OSMF ¶ 74).

After the meeting where Committee Members were invited by Gioia to visit the Church and learn more about it, one of the HSD Committee members, Chris McLaughlin, asked Gioia

for some information on the Church's beliefs about a number of controversial issues. ECF Doc. 31, PageID #: 747 (HSD OSMF ¶¶ 75, 78). Gioia asked him to "funnel" requests through the Superintendent and when the Superintendent sent Gioia the same questions, he refused to answer them. ECF Doc. 31, PageID #: 747 (HSD OSMF ¶¶ 77, 80). Neither the Superintendent nor McLaughin followed up and there is no record evidence that McLaughlin or anyone else associated with HSD knows anything about The Church's views on the questions McLaughlin asked or, for that matter, on anything else.

On December 12, 2022, the HSD School Committee discussed The Pine Church's request. ECF Doc. 31, PageID #: 747 (HSD OSMF ¶ 81). As one might expect in a conversation relating to the use of school property by a Church raised Establishment Clause concerns in the minds of a couple of people in attendance. The High School Principal expressed some concerns about students becoming confused over the relationship between the Church and the school, and Committee Member McLaughlin questioned how leasing space "manages to bolster our community." ECF Doc. 31, PageID ##: 742, 748 (HSD OSMF¶ ¶37, 85). HSD Superintendent Grant, however, assured the group on the advice of counsel that it would be perfectly legal to rent the space to the Church. That explanation was accepted by the School Committee members who spoke. ECF Doc. 31, PageID #: 748 (HSD OSMF ¶87). Their concerns about giving the Church a long-term lease were different:

- From Committee Member Keith: "My biggest concern is locking up an area for a full year when you don't know exactly how it's going to impact. . . especially an auditorium with shows, show prep, concerts, concert prep, and they're actually using up some of the other classrooms. We don't know what we don't know." ECF Doc. 31, PageID #: 749 (HSD OSMF ¶ 90).

- From Committee Member Oiler: "It's not the church, it's any sort of organization that can come in here. Say, 15 of them all of a sudden catch the stomach bug. Who's cleaning all that up? If we already have a shortage of custodians, I just have concern that allowing that many people in and out of the building. Quite frankly, I'd suggest that we look at the other organizations that are renting the space and making sure that we are adequately getting paid also. It's not – to me – about what type of organization at all. It's the number of people." ECF Doc. 31, PageID #: 749 (HSD OSMF ¶ 89).

Ultimately Committee Member Oiler moved to extend the Church a month-to-month lease. That motion passed. ECF Doc. 31, PageID #: 749 (HSD OSMF ¶ 91). The Pines Church, however, refused the offer of a month-to-month lease and initiated this action. ECF Doc. 31, PageID #: 749 (HSD OSMF ¶ 93).

ARGUMENT

I. The Standard for Summary Judgment

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). "An issue is genuine if a reasonable jury could resolve the point in favor of the nonmoving party. A fact is material if its existence or nonexistence has the potential to change the outcome of the suit. *Tropigas de Puerto Rico, Inc. v. Certain Underwriters at Lloyd's of London*, 637 F.3d 53, 56 (1st Cir. 2011) (citations and quotation marks omitted). The Court views the record in the light most favorable to the nonmovant and draws all reasonable inferences in the nonmovant's favor. *Baum-Holland v. Hilton El Con Mgmt., LLC*, 964 F.3d 77, 87 (1st Cir. 2020). Indeed, the "summary judgment standard requires absolute deference to the nonmovant's factual assertions (as long as those assertions are put forward on personal knowledge or

otherwise documented by materials of evidentiary quality)." *Morelli v. Webster,* 552 F.3d 12, 18 -19 (1st Cir. 2009).

A nonmovant plaintiff "bears 'the burden of producing specific facts sufficient to deflect the swing of the summary judgment scythe.'" *Theidon v. Harvard Univ.*, 948 F.3d 477, 494 (1st Cir. 2020) (quoting *Mulvihill v. Top-Flite Golf Co.*, 335 F.3d 15, 19 (1st Cir. 2003)). The Court "afford[s] no evidentiary weight to conclusory allegations, empty rhetoric, unsupported speculation, or evidence which, in the aggregate, is less than significantly probative." *Tropigas de Puerto Rico, Inc.*, 637 F.3d at 56 (internal quotation marks omitted).

II. Plaintiffs are not entitled to Summary Judgment on their Free Exercise and Establishment Clause Claims

The First Amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I. In this case, Plaintiffs attempt to turn a local school board's decision on its first ever request for a long-term lease of school property into a "law" that violates one (or both) of these rights. At the very least, there are questions of fact precluding summary judgment in Plaintiffs' favor on these claims. In fact, as set forth in HSD's motion for summary judgment (ECF Doc. 27), it is the School Department that is entitled to judgment as a matter of law.

A. The Free Exercise Claim

Count I of Plaintiffs' Amended Complaint is a claim for violation of the Free Exercise Clause of the United States Constitution. One of the hallmarks of a free exercise claim is coercion by the governmental defendant. Thus, in *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 222–23, (1963) the United States Supreme Court explained:

> The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it

> is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.

The *Schempp* Court went on to explain that the distinction between the Free Exercise Clause and the Establishment Clause, is "apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Id.* at 223; *see also Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion").

Here there is no evidence – much less undisputed evidence – of any coercion of The Pines Church by HSD. Unlike in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017) where a church was faced with the choice of being entitled to a public benefit or remaining a religious organization, or *Fulton v. City of Philadelphia, PA*, 593 U.S. ___; 141 S. Ct. 1868 (2021), which involved a foster care agency forced to choose between curtailing its mission and approving relationships inconsistent with its beliefs, there is no evidence in this record – much less undisputed evidence – that there was any attempt by HSD to coerce The Pines Church. There is no evidence in this record that School Committee members knew what the Church's ideology was, and there is certainly no evidence that they conditioned a long-term lease of school facilities on the Church doing anything. Rather, the evidence is that the lease proposal was rejected in favor of a shorter term more flexible lease which is more in line with what other users of HSD facilities operate under.

In their brief, Plaintiffs make two arguments relative to their Free Exercise claim. First, they assert that "HSD's facility use consideration practice are not neutral and generally applicable," and they go on to argue that "HSD's leasing process" targets religious practice ECF Doc. 29, PageID #: 708; (Pl. Br. 8). To begin with, although Plaintiffs argue that HSD has such a "process" or a "practice," that takes religion into account, they fail to point to a single bit

of evidence in the record to support that contention. Indeed, their statement of material facts establishes the opposite. Thus, Plaintiffs rely on the Policy KG, which has no language in it targeting religion, and undisputed facts to the effect that HSD's policy is not to inquire about or consider religion in making facilities use decisions. *See* ECF Doc. 30, PageID ##: 728, 730 (TPC SMF ¶ 7, 24).

In *Fox v. Makin*, 2023 WL 5279518 (D. Me. August 16, 2023), this Court recently set out the relevant analysis with respect to neutrality:

> A law is not neutral if it "single[s] out religion or religious practices," *Does 1-6 v. Mills*, 16 F.4th 20, 29 (1st Cir. 2021), and is "not generally applicable if it 'treat[s] any comparable secular activity more favorably than religious exercise,' " *Lowe v. Mills*, 68 F.4th 706, 714 (1st Cir. 2023)(citation omitted). A law lacks general applicability if, for example, "it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions" or "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 (cleaned up).

Id. at *5, (cleaned up). Here, looking at HSD's policy and its practice, there is nothing that singles out religion or religious practices, nor does it treat religious and secular conduct differently.

Plaintiffs appear to either ignore or disavow completely the fact that the policy and practice in effect in the District is the polar opposite of what they claim.[2] They focus instead on McLaughlin's questions about the Church's approaches on diversity equity and inclusion and the musing by certain members of the School Committee about possible Establishment Clause implications were they to rent to a church as proof that the School Committee "acted in an intolerant manner." ECF Doc. 29 PageID #: 709 (Pl. Brief 9). In the end, this argument

[2] Several times in their brief, Plaintiffs discuss whether the law or policy at issue should be subject to strict scrutiny or rational basis but they fail to articulate what law or policy they are referring to.

provides no aid to their effort to obtain summary judgment. In the first place, that HSD was intolerant is very much in dispute, *see, e.g.* ECF Doc. 31 (HSD OSMF ¶ 36, 37, 38, 39, 82, 83, 84, 85, 86, 87, 88, 89, 90. 95, 97), which in and of itself precludes summary judgment in its favor. Moreover, it is not intolerance that is critical to free exercise analysis but rather whether the governmental regulation interferes with the plaintiff's free exercise of their religion. Here, there is no such evidence.

Plaintiffs also fault HSD Superintendent for not offering to consider the Church's request through the facilities use process and authorizing its use of school facilities for a period of up to six months and even go so far as accusing him of "refus[ing]" to offer such an arrangement. ECF Doc. 29, PageID #: 709. Plaintiffs fail, however, to point to any evidence in the record to support such a "refusal." To the contrary, the evidence on this record is undisputed that: (1) the facilities use process applies to short term requests for use, not long-term leases, ECF Doc. 31 PageID #: 747 (HSD OSMF ¶ 72), and Gioia never requested anything other than a one-year lease. ECF Doc. 31 PageID #: 749 (HSD OSMF ¶ 96). The facilities use process thus did not apply so any comparison between those entities that requested short term use, and The Pines Church, which was asking for a long-term formal lease, just does not make sense.

Second, Plaintiffs argue that HSD's "practices" substantially burdened the Church's religious exercise. This argument is based on two things the Church has failed to establish on the record: (1) that any denial was as a result of a law or practice of HSD; and (2) that a long-term lease is a "public benefit." In fact, as established by the Declaration of Superintendent Grant, the Grant deposition and the discussion at the December Committee meeting, long term leases are

not public benefits in Hermon since no entity has ever asked for or received a long-term lease before.[3]

In addition, Plaintiffs' argument concerning the alleged burden that the Committee's decision placed on them conflates the notion of a burden on religion (which is relevant to a free exercise analysis), with the burden generally on the plaintiff (which is not). There is no dispute here that The Pines Church was welcomed by the HSD School Committee to hold its services – in other words to engage in the free exercise of its religion -- at the Hermon High School on a month-to-month basis. Any burden that was placed on the Church, therefore, was not to its right to free exercise but rather its desire for convenience and that is not something protected by the Free Exercise Clause of the United States Constitution.

B. The Establishment Clause Claim.

Count IV of Plaintiffs' Amended Complaint is a claim for violation of the Establishment Clause. "T]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *Anderson v. Laird*, 466 F.2d 283, 293 (D.C. Cir. 1972).

The basis of Plaintiffs' Establishment Clause claim is not well developed in their memorandum. Aside from quoting from some general language in *Kennedy v. Bremerton*

[3] Plaintiffs' repeated refrain that other entities had leases for a year – a fact that is disputed – is due at least in part to their failure to differentiate between a formal lease (which is what Gioia requested) and a Facilities Use Request that has been granted. The former obligates the School Department to make space available for a specified amount of time while under the latter, permission can be revoked at any time if necessary for the use of the school. This distinction is one that was very much appreciated by HSD School Committee members as they wrestled with how to respond to the Church's request. ECF Doc. 31, PageID #: 744 (HSD OSMF ¶ 46).

School District, 597 U.S. 507 (2022), and characterizing comments made in a concurring opinion in *Shurtleff v. City of Bos. Massachusetts*, 596 U.S. 243 (2022), (a First Amendment case), as hallmarks of establishment of religion, Plaintiffs provide this Court with no authority for their argument that refusing to give the Pines Church a long-term lease could in any way be seen as establishing a religion. What they do instead is argue the facts. For example, they state: "Defendant's denial of a long-term use arrangement and a six-month arrangements to the Church sends the message to houses of worship and other religious entities that organizations that maintain traditional historically orthodox biblical beliefs about human sexuality are second-class institutions, outsiders and not full members of the Hermon community." ECF Doc. 29, PageID #: 716 (Pl. Br. 16). Any attempt by Plaintiffs to argue that this is undisputed would be nothing short of ridiculous given the facts in this record including:

- The only request that The Pines Church made was for a one-year lease, ECF Doc. 31, PageID #: 49 (HSD OSMF ¶ 96), the first such request that had ever been made. ECF Doc. 31, PageID #: 747 (HSD OSMF¶ 71).
- There is no evidence that anyone at HSD knows what The Pines Church's beliefs about human sexuality were given Gioia's refusal to answer McLaughlin's questions. ECF Doc. 31, PageID #: 747 (HSD OSMF ¶ 80).
- The Pines Church was not denied use of facilities. ECF Doc. 31, PageID #: 749 (HSD OSMF ¶ 91).
- HSD has made space available to religious organizations. ECF Doc. 28, PageID #: 681 (HSD SMF ¶ 9).

In short, there are simply no facts in the record – much less undisputed facts – that support any claim that denying request for a one-year lease constituted establishment of a religion.

III. Plaintiffs are Not Entitled to Summary Judgment on their Free Speech Claim

Count III of the Amended Complaint is a claim for violation of Plaintiffs' First Amendment right to free speech. Although not entirely clear from Plaintiffs' brief, it appears that Plaintiffs' theory is two-fold. First, Plaintiffs argue that HSD excluded the Church from its facilities based on its viewpoint; and second, they assert that HSD discriminated against the Church by requiring it to present to the School Committee rather than go through the facilities use process. The summary judgment record does not support Plaintiffs' claims.

"[P]rotected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985). Rather, the First Amendment prohibits the government "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 & Visitors of the Univ. of Virgina*, 515 U.S. 819, 829 (1995). "The essence of a viewpoint discrimination claim is that the government has preferred the message of one speaker over another." *McGuire v. Reilly*, 386 F.3d 45, 62 (1st Cir. 2004). In order to prevail on summary judgment on their First Amendment claim, therefore, Plaintiffs must point to undisputed facts in the record that establish both that HSD prevented their speech and that it did so because of their viewpoint. This they cannot do.

In the first place, on this record, Plaintiffs cannot show that they have been excluded from the forum given that they were offered a month-to-month lease. ECF Doc. 31, PageID #: 749 (HSD OSMF ¶ 93). In all the cases cited by Plaintiffs in support of their First Amendment

argument, the plaintiff was denied access to the forum altogether. Thus, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), the Supreme Court addressed the issue of a New York statute that expressly precluded the use of school facilities for religious purposes and denied a church access to use school facilities for the viewing of a religious film by the public. *Id.* at 387. The church's requests were expressly denied because the film appeared to be "church related." *Id.* at 389. Similarly, in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), the plaintiff club was denied the ability to use school facilities because of its religious views. And in *Rosenberger*, 515 U.S. 819, the university refused to provide any student activities funds to subsize a Christian publication.

Here by contrast, the summary judgment record establishes that The Pines Church was not denied access, it was just denied the access it wanted to have. Plaintiffs have pointed to no cases that support their position that they are guaranteed not only access but access to a level that meets their preference. Their motion for summary judgment on Count III should be denied for that reason alone.

Furthermore, notwithstanding Plaintiffs' strident assertions that the reason HSD denied their request for a one-year lease was because of their viewpoint, there is at least a question of fact on that issue. Plaintiffs argue that comments made during the December, 2022 meeting show possible religious animus on behalf of the speakers. The summary judgment record establishes the opposite. *See* HSD OSMF ¶ 87, 88, 89, 90, 92. 95, 97.

Nor is there any merit to Plaintiffs' apparent argument that the fact that they were required to submit their proposal to the School Committee whereas other entities were not, was a violation of their free speech rights. The fact – indeed the undisputed fact – of the matter is that Plaintiffs, unlike those entities that utilized the facilities use process, asked for a one-year lease.

ECF Doc. 31, PageID #: 749 (HSD OSMF ¶ 96). Because HSD's Policy KG[4] requires that long term leases be granted by the School Committee, Plaintiffs were asked to make their request to the School Committee. No other entity had ever requested a long-term lease and so no other entity was asked to present to the School Committee. ECF Doc. 31, PageID ##: 746, 747 (HSD OSMF ¶ 60, 71). Had The Pines Church indicated a willingness to back off its one-year lease request and accept the less formal facilities use process for a shorter period of time, there is nothing to suggest that its request would not have be granted when space was available. The problem with that for the Church is that it has claimed that it needs the certainty that a long term formal lease will provide so that it is able to plan and budget. ECF Doc. 30, PageID #: 734 (TPC SMF ¶ 47). However, the First Amendment does not require that HSD accommodate the Church's special circumstances.

IV. Plaintiffs are Not Entitled to Summary Judgment on Their Public Accommodations Discrimination Claim

Finally, Plaintiffs have asserted a claim under the Maine Human Rights Act for discrimination in public accommodations. That law makes it unlawful for any public accommodation to "discriminate against or in any manner withhold from or deny full and equal enjoyment of any person, on account of . . . religion. . ." 5 M. R.S. § 4592 (1). That section establishes three prerequisites in order to find unlawful discrimination: (1) the party charged is "the owner, lessee, proprietor, manager, superintendent, agent or employee" of a place of public

[4] To the extent that Plaintiffs are suggesting that the provision in the policy requiring School Committee approval of only long term leases is subject to strict scrutiny, *see* ECF Doc. 29, PageID#: 714 (Pl. Br. at 14) they are in error. Strict Scrutiny applies if the law or policy at issue is content based on its face. *See Reed v. Town of Gilbert, Ariz.,* 576 U.S. 155, 164 (2015); *Comcast of Maine/New Hampshire, Inc. v. Mills*, 435 F. Supp. 3d 228, 247 (D. Me. 2019), *aff'd*, 988 F.3d 607 (1st Cir. 2021).

accommodation who (2) refuses or withholds "to any person, on account of race or color, sex, physical or mental disability, religion, ancestry or national origin," (3) "any of the accommodations, advantages, facilities or privileges of public accommodation." *Maine Hum. Rts. Comm'n v. Le Club Calumet*, 609 A.2d 285, 286 (Me. 1992)

Although this Count of the Amended Complaint sets forth claim under a different theory, the factual disputes precluding summary judgment in Plaintiffs' favor on the other claims apply with equal force here. Plaintiffs claim that their lease request was denied because of their religion; HSD disputes that claim with competent evidence in the record. Plaintiffs' motion on the MHRA claim should therefore be denied.

V. Plaintiffs Are Not Entitled To Summary Judgment on Damages

The final portion of Plaintiffs' brief ECF Doc 29, PageID ## 718 – 720, is devoted to an argument that the Church should be entitled to relief in the form of damages, injunctive and declaratory relief. Why this argument is included in a motion for summary judgment is mystifying. Even Plaintiffs do not claim that the amount of their alleged damages is undisputed, so it is unclear what they are asking from the Court at this juncture. Putting aside that Plaintiffs are not entitled to judgment on liability, there is no record evidence upon which this Court could award them damages.

CONCLUSION

Plaintiffs' claims that their rights have been violated in this case all stem from the fact that they are comparing apples to oranges. Thus, Plaintiffs compare HSD's treatment of their request for a one-year lease with the treatment of other entities that requested permission to use school facilities from time to time. What The Pines Church says is that it needs to have a legally binding commitment (a lease), permitting it to space for a specific period of time. That well be

true, but the undisputed evidence here is that HSD has not provided that commitment to any entity – religious or secular -- and its refusal to do so for The Pines Church is simply not actionable. At the very least, Plaintiffs' allegations concerning the motivation of HSD are disputed. Their motion for summary judgment should be denied.

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