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 **PLAINTIFF THE PINES CHURCH'S AND MATT GIOIA'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREIN** Hon. Lance E. Walker

TO THE COURT, ALL PARTIES, AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on _____, 2024, at 9:00 a.m. or as soon thereafter as counsel may be heard in the United States District Court for the District of Maine, Plaintiffs The Pines Church ("TPC" or "the Church") and Matt Gioia ("Pastor Matt") will, and hereby do, move this Court under Federal Rule of Civil Procedure 56 for summary judgment.

The Church and Pastor Matt respectfully request that the Court enter judgment in their favor because the undisputed evidence establishes that Defendant Hermon School Department ("HSD") violated the First Amendment and Maine's Public Accommodation Law. Plaintiffs are therefore entitled to damages, injunctive relief, and a declaratory judgment that HSD's selective and discriminatory leasing practices are unconstitutional.

This motion will be based on this notice of motion and motion for summary judgment, memorandum of points and authorities, the accompanying declarations, request for judicial notice, [proposed] order in support thereof, and other evidence or arguments as may be presented.

Respectfully submitted,
The Pines Church, a Maine non-profit corporation,
and Matt Gioia, an individual

DATED: January 22, 2024

/s/ Bethany Onishenko

Bethany Onishenko, Esq., Bar No. 2022079
Advocates for Faith and Freedom
bonishenko@faith-freedom.com
25026 Las Brisas Road
Murrieta, California 92562
Tel: (951) 600-2733

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

This action seeks to hold the Hermon School Department ("HSD"), including the Hermon School Committee ("the Committee"), responsible for its 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. In 2020, Pastor Matt uprooted his family from Colorado to establish The Pines Church in central Maine. Following its founding in 2021, TPC experienced rapid growth. In just shy of a year, the congregation outgrew its current meeting space at a local movie theater and began searching for a more accommodating facility.

Hermon High School has a history of opening its spaces for rental use to outside entities. In November 2022, Pastor Matt was negotiating a deal with HSD to rent space at Hermon High School for its Sunday services when members of the Committee presented the Church with questions regarding TPC's religious beliefs, such as its stance on gay marriage, abortion, conversion therapy, gender reassignment treatment, and sexual education for youth. The Committee's questions were inappropriate and not germane to whether TPC qualifies for a rental agreement. Indeed, the Committee has not asked these questions of similarly situated secular entities and activities who have leased its facilities. Thus, TPC asks this Court to intervene and grant its Motion for Summary Judgment for the following reasons.

First, HSD's challenged conduct undisputedly violated TPC's constitutional rights, including the Church's right to religious exercise and free speech. HSD's hostility toward the Church also violated the Establishment Clause. The Supreme Court has made clear that the government may not treat secular entities more favorably than religious entities. 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.

Second, HSD's denial of a rental agreement to the Church violated Maine's Public Accommodation laws. HSD engaged in unlawful discrimination in a place of public accommodation when it denied TPC the full and equal enjoyment of school facilities.

Third, TPC is entitled to nominal damages because HSD violated its constitutional rights. TPC is also entitled to a declaratory judgment that HSD's discriminatory denial of a long-term rental use agreement to the Church while offering similar uses to secular organizations was unconstitutional. TPC is also entitled to a permanent injunction because HSD's discriminatory rental use consideration practices because the balance of hardships tips sharply in the Church's favor, HSD's conduct is not in the public interest, and the denial of a long-term rental use agreement to TPC has and will continue to substantially burden the Church if this Court does not enjoin HSD from its discriminatory and order HSD to offer TPC a long-term use arrangement. Accordingly, TPC asks this Court to grant it nominal damages, compensatory damages, declaratory relief, and a permanent injunction.

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 Committee 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 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. Declaration of Matt Gioia in Support of Summary Judgment ("Gioia Decl."), ¶ 9. TPC believes that God defines human sexuality, and that men and women are created in the image of God. *Id.*, ¶ 10. The Church first began holding services at Spotlight Cinema in Orono, Maine in 2021. *Id.*, ¶ 12. However, the Church quickly outgrew this space. *Id.*, ¶ 13; JR, Exh. 1, pp. 11-12; JR, Exh. 7, pp. 106, 141-42; Exh. 8, pp. 278-79. The venue TPC currently uses only has 170 usable seats. Gioia Decl., ¶ 14; JR, Exh. 1, pp. 11-12. 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, particularly in Hermon, Maine, as many families in the congregation, including Pastor Matt and his family, reside in Hermon. JR, Exh. 7, pp. 148-49; Gioia Decl., ¶ 17. As Pastor Matt began looking for rental opportunities in Hermon, he quickly realized that Hermon had no available rental 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 lease 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 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 or lessee 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 to TPC, 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 on same-sex marriage, abortion, gender reassignment care, conversion therapy for LGBTQ individuals, and sex education for youth. 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 6-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.

C. The Pines Church's Need For Long-Term Accommodations

A month-to-month lease is not feasible for the Church because it makes it impossible to plan and budget and allows HSD to terminate the lease on short notice, leaving the Church with nowhere to go. Gioia Decl., ¶¶ 33, 35-36; JR, Exh. 1, pp. 12 ("Plaintiffs sought a long-term facility use arrangement of one year so that they could advertise and promote different events such as Easter services, Christmas services, Mother's Day service, and others. Plaintiffs work with designers and printers to create event mailers."). The Church has been unable to find a location that can accommodate its growing congregation. Gioia Decl., ¶ 34; JR, Exh. 7, pp. 147. The Church is still renting a theater that cannot accommodate its needs. Gioia Decl., ¶ 34; JR, Exh. 1, pp. 11-12; Exh. 7, pp. 106, 141-42; Exh. 8, pp.

278-79. As a result of Defendant's refusal to provide Plaintiffs with their proposed facility use arrangement, Plaintiffs' congregational growth, and consequently, its tithes and offerings, have been stifled. Gioia Decl., ¶¶ 6, 16, 37.

During Pastor Matt's extensive 15-year plus experience in church development and growth with Messenger International, he worked with over 20,000 churches. *Id.*, ¶¶ 2-5; JR, Exh. 1, pp. 7-8. His work and studies of church growth reflected a direct correlation between the growth of a church, the usable physical space of a church's venue, and the congregant's tithes and offerings giving. Gioia Decl., ¶ 6. Articles on church growth also suggest that when a congregation is at 70% of its current seating capacity, a larger venue is necessary to avoid stifling the growth of the church. JR, Exh. 1, pp. 11-12. At this time, Plaintiffs' congregation has far surpassed 70% of its seating capacity at its current venue making for tight and uncomfortable seating. Gioia Decl., ¶ 14-16; Exh. 7, pp. 106, 141-42; Exh. 8, pp. 278-79. Due to a lack of space, the congregation has been unable to organically grow, leading to economic loss and loss in future growth/opportunity. Gioia Decl., ¶¶ 6, 16, 33. Given the time constraints of Plaintiffs' current venue, Plaintiffs are unable to offer a second church service to account for its congregational growth. *Id.*, ¶ 14. The only viable option is a long-term facility use arrangement. *Id.*, ¶¶ 35-36. Further, as a result of Defendants' disparaging treatment of Plaintiffs and the resulting lawsuit, members have left Plaintiffs' congregation and Plaintiffs have continued to suffer reputational harm and loss of goodwill. *Id.*, ¶ 37; JR, Exh, 1, p. 8.

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). Declaratory relief is appropriate to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

IV. ARGUMENT

A. HSD's Denial Of A Rental Use Arrangement To TPC Violated Its Constitutional Rights

The statement of material facts demonstrates several constitutional violations. *First*, HSD's conduct violated the Free Exercise Clause because HSD denied TPC long-term facility use, while offering

similar uses to secular entities and activities. *Second*, HSD violated TPC's free speech rights because it discriminated against the Church based on the content and viewpoint of its message. Finally, HSD violated the Establishment Clause by acting in hostility towards the Church and its beliefs.

1. HSD's conduct violated the Free Exercise Clause

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. *Lukumi,* 508 U.S. at 553.

The Committee burdened the Church's religious tenets when it refused to extend a long-term use arrangement or even a six-month arrangement to the Church, despite the Church meeting all the use criteria and offering to pay substantially more than the monetary rental amount. Gioia Decl., ¶ 29; JR, Exh. 7, p. 159. The denial of both a long-term and short-term use arrangement has also burdened TPC because the Committee's decision harmed the Church's goodwill and stifled its growth. Gioia Decl., ¶¶ 6, 16, 36. 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

A regulation is not generally applicable where it "treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (emphasis in original) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020)). 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 *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67-68 (2020) (per curiam)). Moreover, a law is not neutral when it is intolerant of religious beliefs or restricts practices because of their religious nature. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) ("Lukumi"). HSD's leasing process

"operate[s] in practice" in a way that "target[s] religious practice…." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) (quoting *Lukumi*, 508 U.S. at 535-37).

Additionally, a strict scrutiny standard of review is appropriate in situations that involve "individualized governmental assessment." *Swartz v. Sylvester*, 53 F.4th 693, 700 (1st Cir. 2022). Here, the Committee has sole discretion to approve or deny organizations when offering use terms greater than a month-to-month term. The Committee follows no particularized, objective criteria. Instead, they rely on their own subjective beliefs and opinions, as evidenced during the December 12, 2022, committee meeting. JR, Exh. 10, pp. 453-54.

The Committee acted in an intolerant manner when it sought to deny TPC both a long-term and short-term use arrangement. HSD requested information about the Church's beliefs on various religious/political issues and denied the Church several different use proposals based upon the Church's beliefs. 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 use 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. HSD's conduct was not neutral towards the Church and its religious beliefs.

HSD's challenged conduct also fails the general applicability test. 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 Production, among others, for periods of three months to one year. JR, Exh. 10, pp. 412-431. Additionally, HSD has not 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 the other organizations and entities who currently use HSD facilities. Therefore, HSD's lease consideration practices were not 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 fn. 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 Pines Church, by disqualifying it from a public benefit, i.e. long-term facility use, solely 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. To date, the Church continues to meet in a facility that cannot accommodate the Church's congregation and is stunting its overall growth. 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 First Amendment

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

"[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*, 125 S. Ct. 2854, 2856 (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 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.

B. HSD's Denial Of A Rental Use Agreement To TPC violated Public Accommodations Laws

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

[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).

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.

C. TPC Is Entitled To Relief

1. TPC is entitled to nominal damages

TPC is entitled to nominal damages against HSD because it acted in a discriminatory and unconstitutional manner towards the Church. *See Cortes-Reyes v. Salas-Quintana*, 608 F.3d 41, 53 fn.

15 (1st Cir. 2010) ("nominal damages are similarly appropriate in the context of a First Amendment violation."). Nominal damages are especially important in civil rights cases. "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). HSD's conduct violated the Free Exercise Clause, Free Speech Clause, and Establishment Clause. Thus, TPC is entitled to nominal damages against the Defendant.

2. TPC is entitled to compensatory damages

TPC is also entitled to compensatory damages against HSD because HSD violated TPC's constitutional rights and Maine's Public Accommodations law. School Departments may be held liable for damages in Maine. *See Jackson v. State*, 544 A.2d 291, 294 (Me. 1988) (ordering a school Department to pay damages); *Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, No. 21-40333, 2023 WL 2401349 (5th Cir. Mar. 8, 2023) (holding that public school Department was not arm of the state, and thus was not entitled to Eleventh Amendment immunity). TPC is statutorily entitled to up to $20,000 in compensatory damages for unlawful discrimination under Maine's Public Accommodations law. 5 MRSA 4613.

Additionally, courts have permitted recovery of compensatory damages against school districts for violations of constitutional rights. *See Knapp v. Whitaker*, 577 F. Supp. 1265, 1266 (C.D. Ill. 1983) (affirming over $500,000 in compensatory damages to a high school teacher for a school board's First Amendment violation); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (outlining the types of compensatory damages available in 1983 actions). TPC may recover damages for its out-of-pocket losses and other injuries, including impairment to its reputation and humiliation. *See id.* ("compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation ..., personal humiliation, and mental anguish and suffering.") (internal quotations and citations omitted).

Here, HSD's discriminatory conduct towards the Church has resulted in impairment of TPC's reputation. HSD's discriminatory comments and conduct towards the Church have harmed the Church's reputation in the community and amongst its congregants. Following the Committee's denial of TPC's

rental use proposal and this resultant lawsuit, several congregants left the Church. Gioia Decl., ¶ 37. Additionally, research shows that once a church reaches 70% capacity, the congregation's growth is stunted. TPC's congregation exceeds 70% of its current meeting facility's capacity. Exh. 7, pp. 106, 141-42**.** Through his years of experience in church development, Pastor Matt knows that without additional space, the Church can no longer physically grow. Gioia Decl., ¶ 15-16. This stifled physical growth directly impacts the tithes and offerings coming into the Church. *Id.* Accordingly, the Committee's denial of a long-term rental agreement or a six-month agreement to the Church has inhibited the congregation's organic growth and receipt of tithes and offerings.

3. TPC is entitled to declaratory relief

Declaratory relief requires that a plaintiff "show that there is a substantial controversy over present rights of 'sufficient immediacy and reality' requiring adjudication." *Bos. Tchrs. Union, Loc. 66, AFT, AFL-CIO v. EdgJR,* 787 F.2d 12, 15–16 (1st Cir. 1986) (citing *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975)). TPC is entitled to declaratory relief because Defendants denied, and continue to deny, a long-term rental agreement to TPC, while offering similar arrangements to secular entities. A judgment declaring these practices unconstitutional is therefore necessary to afford TPC complete relief.

4. TPC is entitled to injunctive relief

TPC satisfies the requirements for injunctive relief: (1) irreparable harm; (2) balance of hardships; and (3) public interest. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

TPC can demonstrate irreparable harm because the loss of a constitutional right, "for even [a] minimal period [] of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Committee's denial of a long-term lease to TPC, while offering similar leases to secular organizations, violated TPC's right to free exercise of religion and free speech. HSD's conduct also violated the Establishment Clause. Because HSD still refuses to grant the Church an extended lease, a permanent injunction enjoining HSD's discriminatory conduct is necessary to prevent irreparable harm.

The last two factors merge when the government is the opposing party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). The balance of the hardships weighs in the Church's favor. It would not be difficult for HSD to offer a long-term lease to the Church, as it routinely offers similar leases to other clubs and

organizations. Notably, HSD has offered lease arrangements to a variety of entities for periods of time ranging from three months to a year. JR, Exh. 10, pp. 412-37. Meanwhile, the Church is having great difficulty finding any other facility in or around Hermon, Maine sufficient to meet its capacity needs.

HSD's denial of a long-term lease or even a six-month lease is certainly not in the public's interest. The Committee's conduct violated the Church's constitutional rights, and "it is always in the public interest to prevent the violation of a party's constitutional rights." *Elrod*, 427 U.S. at 373. The denial of a long-term lease to the TPC has and will continue to substantially burden the Church if this Court does not enjoin HSD from its discriminatory practices. Thus, the balance of hardships tips in TPC's favor.

V. CONCLUSION

HSD's refusal to offer the Church a use arrangement other than a month-to-month is unconstitutional. Therefore, TPC and Pastor Matt are entitled to (1) a declaratory judgment declaring HSD's discriminatory leasing practices unconstitutional; (2) a permanent injunction of HSD's discriminatory rental use consideration practices by ordering Defendants to offer TPC either a six-month or one-year rental use agreement; (3) nominal damages resulting from the HSD's unconstitutional actions; and (4) compensatory damages resulting from HSD's unconstitutional actions and violations of Maine Public Accommodation laws.

Respectfully submitted,

Dated: January 22, 2024

/s/ Bethany Onishenko, Esq.
Bethany Onishenko

Attorney for Plaintiffs