No. 24-1590

UNITED STATES COURT OF APPEALS
For The First Circuit

CROSSPOINT CHURCH,

Plaintiff-Appellant,

v.

A. PENDER MAKIN, in her official capacity as Commissioner of the Maine Department of Education; JEFFERSON ASHBY, in his official capacity as Commissioner of the Maine Human Rights Commission; EDWARD DAVID, in his official capacity as Commissioner of the Maine Human Rights Commission; JULIE ANN O'BRIEN, in her official capacity as Commissioner of the Maine Human Rights Commission; MARK WALKER, in his official capacity as Commissioner of the Maine Human Rights Commission; THOMAS L. DOUGLAS, in his official capacity as Commissioner of the Maine Human Rights Commission

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE (CASE NO. 1:23-CV-00146-JAW)

BRIEF OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Rules

INTRODUCTION

Maine law permits certain towns to comply with their constitutional duty to provide a public education to their resident students by paying the tuition at a public or approved private school of the parents' choice. Two years ago, in *Carson v. Makin*, 596 U.S. 767 (2022), the United States Supreme Court held that the Free Exercise Clause of the First Amendment prevents Maine from excluding religious secondary schools from this school tuitioning program. Since *Carson*, the Maine Department of Education ("Maine DOE") has allowed religious schools to participate in the tuition program exactly like nonsectarian private schools, and one such school has participated in the program for the last two years.

Schools that accept public funds by participating in the program must comply with provisions of the Maine Human Rights Act ("MHRA") prohibiting discrimination in employment and education. Appellant Crosspoint Church operates Bangor Christian Schools ("BCS"). It asks this Court to declare that under the First Amendment, it must be allowed to participate in the program while still engaging in otherwise unlawful discrimination by denying educational opportunities to children based on their sexual orientation, gender identity, and religion. Compliance with the MHRA, says Crosspoint, would violate its sincerely held religious beliefs. In just two short years, the argument has evolved from a

desire to not be discriminated against due to a so-called "sectarian exclusion" in *Carson*, to seeking special treatment to continue otherwise illegal discrimination.

Crosspoint's pre-enforcement challenge to the MHRA is not ripe. If Crosspoint were to participate in the tuition program, it is entirely speculative as to whether it would ever face an enforcement action. This is primarily because an enforcement action is contingent on a child in a protected class being denied educational opportunities at BCS. Crosspoint offers no evidence suggesting that a child who is gay, transgender, or does not share Crosspoint's religious beliefs has ever applied for, and been denied, admission to BCS, or that such a scenario is reasonably likely in the future. If this does occur, and an enforcement action results, Crosspoint can raise its First Amendment defenses then, and a court can address them in the context of specific facts.

In any event, the First Amendment does not excuse Crosspoint from complying with the MHRA. The applicable provisions of the MHRA impose no burden on Crosspoint's religious exercise, but even if they did, the MHRA is a neutral and generally applicable anti-discrimination law. Nor do the provisions limit Crosspoint's expression or restrict BCS from teaching from a religious perspective and instilling religious beliefs in its students. Rather, the MHRA provisions govern only Crosspoint's conduct – it may not deny educational opportunities on the basis of sexual orientation, gender identity, or religion. In

other words, it is free to impart whatever religious education it likes to BCS students, but it cannot exclude children who want to receive that education based on their membership in a protected class. The challenged provisions easily pass rational basis review, and, based on Supreme Court precedent, would pass strict scrutiny.

Crosspoint also challenges the MHRA provisions prohibiting discrimination in employment, arguing that the First Amendment allows them to limit employment to persons who share its religious beliefs. As Appellees told the district court, though, the MHRA expressly allows Crosspoint to hire only those sharing its religious beliefs, so there is no First Amendment violation, or even any case and controversy.

Crosspoint has a choice. It can continue to be exempt from the applicable provisions of the MHRA, or it can accept public funds. It cannot do both, though, and use public funds to engage in discriminatory conduct. If the Court reaches the merits, it should affirm the district court's order rejecting Crosspoint's First Amendment claims.

STATEMENT OF THE ISSUES

I. Whether the district court erred in concluding that this matter is ripe.

II. Whether the district court correctly held that Section 4602 of the MHRA does not violate the Free Exercise Clause.

III. Whether the district court correctly held that there is no dispute that the employment provisions of MHRA allow Crosspoint to employ only those sharing its religious beliefs and do not violate the Establishment or Free Exercise Clauses.

IV. Whether the district court correctly held that Section 4602 of the MHRA does not violate the Free Speech Clause.

STATEMENT OF THE CASE

Participation of Private Schools in Maine's Public Education System

Maine's Constitution requires local governments to provide a free public education. Me. Const. art. VIII, pt. 1, § 1. By statute, local school administrative units ("SAUs") must "either operate programs in kindergarten and grades one to 12 or otherwise provide for students to participate in those grades as authorized elsewhere [by statute]." 20-A M.R.S. § 1001(8). Maine's Legislature has provided two alternatives for an SAU to provide a public education to its resident students when it does not operate a public school for one or more grades. First, an SAU may contract with another public or approved private school for schooling privileges for some or all of its resident students in those grades. 20-A M.R.S. §§ 2701, 2702. Second, an SAU "that neither maintains a secondary school nor contracts for secondary school privileges . . . shall pay the tuition . . . at the public

school or the approved private school of the parent's choice at which the student is accepted." 20-A M.R.S. § 5204(4); *see also* 20-A M.R.S. § 5203(4) (tuition provision for elementary school education).

Prior to 1981, religious schools could participate in the tuition program. *Carson v. Makin*, 596 U.S. 767, 774 (2022). In 1981, in response to an opinion from Maine's Attorney General that funding religious schools violated the Establishment Clause, the Legislature enacted a provision limiting the receipt of tuition payments to nonsectarian schools. *Id*., at 774-75 (citing 20-A M.R.S. § 2951(2)). This Court, Maine's Law Court, and the United States Supreme Court (by denying certiorari petitions three times) rejected multiple First Amendment challenges to the exclusion of religious schools from the tuition program. *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004); *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999); *Anderson v. Town of Durham*, 895 A.2d 944 (Me.), *cert. denied*, 549 U.S. 1051 (2006); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999).[1]

[1] Crosspoint claims that "the sectarian exclusion allowed religious schools to participate in the tuitioning program if, and only if, the state was persuaded that the school's religious beliefs were satisfactorily 'universal' and not 'discriminatory.'" App. Br., 6. This is not true. Prior to *Carson*, no religious schools were permitted to participate in the tuition program. That a school was operated by a religious organization did not necessarily mean that it was a religious school. Rather, a critical factor was whether the school promoted a particular faith or belief system and taught through the lens of that faith. JA260. The fact that a school might promote "universal moral and spiritual values," (e.g., compassion, honesty, and

Two years ago, however, the United States Supreme Court held that the Free Exercise Clause of the First Amendment prevents Maine from excluding religious secondary schools from its school tuitioning program. *Carson*, 596 U.S. at 789. Since that decision, the Maine DOE has understood that it may not prevent private schools from receiving approval for the receipt of public funds for tuition purposes solely because they are sectarian. Stip. Facts, ¶ 9 (JA56). Put simply, the Maine DOE reads *Carson* to require that they treat sectarian schools the same way they treat non-sectarian schools with respect to the tuition program.

On July 28, 2022, Cheverus High School, a sectarian high school in Portland, Maine, applied for approval for the receipt of public funds for tuition purposes. Stip. Facts, ¶ 10 (JA56). The Maine DOE processed Cheverus' application in the same manner that it processed applications for any private school seeking approval for tuition purposes for the first time. Stip. Facts, ¶ 11 (JA56). The Maine DOE approved Cheverus' application on September 16, 2022. Stip. Facts, ¶ 12 (JA56). No other sectarian school has applied for approval for the receipt of public funds for tuition purposes. Stip. Facts, ¶ 13 (JA56-57).

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respect) did not necessarily mean that the school was religious. Whether a school was discriminatory had nothing to do with the analysis, and the portions of the record Crosspoint cites to (App. Br., 6) are not to the contrary.

Maine's Anti-Discrimination Laws

Employment, Housing, and Public Accommodation Discrimination

The Maine Human Rights Act ("MHRA") broadly prohibits discrimination against various protected classes in the areas of employment, housing, public accommodations, lending, and, as relevant here, education. 5 M.R.S. §§ 4551-4634. The Maine Human Rights Commission ("MHRC") is charged with administering the MHRA, and actions to enforce the MHRA may be brought by either MHRC staff or an aggrieved person. 5 M.R.S. §§ 4611-4623. Nothing in the MHRA assigns enforcement authority to the Maine Attorney General or the Maine DOE.[2]

The MHRA was first enacted in 1971. Me. Pub. L. 1971, ch. 501. As originally enacted, it prohibited only employment, housing, and public accommodations discrimination based on race, color, religion, ancestry, and national origin, and, with respect to employment, age. *Id*. In 1973, sex and physical disability were added to the protected classes. Me. Pub. L. 1973, ch. 347;

[2] Pursuant to 20-A M.R.S. § 258-A, a private school in the tuition program could be randomly selected for review by the DOE Commissioner for, *inter alia*, compliance with the MHRA. However, the only action the Commissioner can take is to refer the findings to the MHRC.

Me. Pub. L. 1973, ch. 705. In 1975, mental disability was added to the protected classes. Me. Pub. L. 1975, ch. 358.[3]

In 2005, protection was extended to sexual orientation. Me. Pub. L. 2005, ch. 10.[4] "Sexual orientation" was defined as "a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression." *Id.*, § 3. The prohibition against sexual orientation discrimination thus encompassed gender identity discrimination. But in recognition of the difference between sexual orientation and gender identity, the MHRA now has a separate definition for gender identity: "the gender-related identity, appearance, mannerisms or other gender-related characteristics of an individual, regardless of the individual's assigned sex at birth." 5 M.R.S. § 4553(5-C). And "sexual orientation" is now defined as "a person's actual or perceived heterosexuality, bisexuality or homosexuality." 5 M.R.S. § 4553(9-C).

As enacted, the MHRA expressly permitted (and continues to permit) non-profit religious organizations to limit employment to members of their own religion. Me. Pub. L. 1971, c. 501*; see also* 5 M.R.S. § 4553(4) (exempting from the definition of "employer" any "religious or fraternal corporation or association,

[3] The 1973 and 1975 amendments referred to a physical or mental "handicap," but this was changed to "disability" in 1991. Me. Pub. L. 1991, ch. 99.

[4] As will be discussed, this added sexual orientation as a protected class not only in employment, housing, and public accommodations, but also in education.

not organized for private profit and in fact not conducted for private profit, with respect to employment of its members of the same religion, sect or fraternity. . . .").

In 1995, the Legislature added a provision expressly stating that the provisions governing unlawful employment discrimination

> do[] not prohibit a religious corporation, association, educational institution or society from giving preference in employment to individuals of its same religion to perform work connected with the carrying on by the corporation, association, educational institution or society of its activities. Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of that organization.

Me. Pub. L. 1995 c. 393, § 21, *codified at* 5 M.R.S. § 4573-A(2).[5]

Education Discrimination

In 1983, the Legislature added Subchapter V-B to the MHRA to prohibit discrimination in education. Me. Pub. L. 1983, ch. 578, § 3. Initially, it prohibited only discrimination based on sex. *Id*. "Educational institution" was defined as "any public school or educational program, any public post-secondary institution, any private school or educational program approved for tuition purposes if both male and female students are admitted and the governing body of each such school or program." *Id*., § 2, *codified at* 5 M.R.S. § 4553(2-A). Excluding single-sex

[5] In some ways, this provides more protection to religious organizations than the "ministerial exception," which exempts religious organizations from employment discrimination laws only with respect to employees "holding certain important positions." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020).

schools from this definition made sense inasmuch as such schools might otherwise have been unable to comply with the new anti-discrimination provisions (which, again, prohibited only discrimination based on sex).

Subsequently, the Legislature prohibited other forms of educational discrimination. In 1987, discrimination based on physical or mental disability was prohibited. Me. Pub. L. 1987, ch. 478. In 1989, the Legislature prohibited educational institutions from discriminating based on national origin. Me. Pub. L. 1989, ch. 725. Discrimination based on race was added in 1991. Me. Pub. L. 1991, ch. 100. In 2005, the Legislature enacted "An Act to Extend Civil Rights Protections to All People Regardless of Sexual Orientation." Me. Pub. L. 2005, ch. 10. Along with adding sexual orientation (which included gender identity) as a protected class in employment, public accommodations, and housing (as discussed above), it also extended the protection to education. *Id*., §§ 20-21. However, "education facility[ies] owned, controlled or operated by a bona fide religious corporation, association or society" were exempted from the provisions prohibiting education discrimination based on sexual orientation. *Id*., § 21. With respect to employment and housing discrimination, on the other hand, only religious organizations that did not receive public funds were exempted from the prohibition against sexual orientation discrimination. *Id*., § 6 (codified at 5 M.R.S. §

4553(10)(G)).[6] There was thus an inconsistency with respect to the treatment of religious organizations when it came to sexual orientation – such organizations were always exempt with respect to education discrimination, but only those that did not accept public funds were exempt with respect to employment and housing discrimination. This inconsistency is likely because prior to the Supreme Court's decision in *Carson*, religious schools were not eligible to receive public funds. As such, there was no need to distinguish between religious schools receiving public funds and those that were not.

As additional categories of unlawful discrimination were added to the section prohibiting educational discrimination, the Legislature, for the most part, did not go back and address the definition of "educational institution."[7] As discussed above, this definition excluded single-sex schools, thus effectively exempting them not just from prohibitions against sex discrimination, but from

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[6] This law also exempted non-profit religious organizations that do not receive public funds from the prohibition against sexual orientation discrimination in education, *id*., § 6, but, as noted above, a separate provision exempted all religious organizations from that prohibition.

[7] The one exception was that in 1995, the Legislature added the following to the definition: "For purposes related to disability-related discrimination, 'educational institution' also means any private school or educational program approved for tuition purposes." Me. Pub. L. 1995 c. 393, § 4. This meant that single-sex schools were not exempt from the provisions prohibiting unlawful disability discrimination. Chapter 393 also amended the definition of "employer" to state that even if a religious entity is not an "employer" for purposes of hiring members of its religion, it is an "employer" with respect to disability-related discrimination. *Id*., § 5.

prohibitions against most other forms of discrimination. While it was understandable to exempt single-sex schools from prohibitions against sex discrimination, it made no sense to exclude them from prohibitions against other forms of discrimination. Thus, it is likely that the failure of the Legislature to update the definition of educational institution was inadvertent. In any event, the oddity has now been fixed. On June 15, 2023, the Governor signed into law Maine Pub. L. 2023, ch. 188, which removes the exclusion of single-sex schools from the MHRA's definition of "educational institution." *See* 5 M.R.S. § 4553(2-A).

2021 Amendments to the MHRA

On May 6, 2021, the MHRC submitted L.D. 1688, "An Act to Improve Consistency Within the Maine Human Rights Act." Stip. Facts, ¶ 15 (JA57). The MHRC's Executive Director testified that the MHRA's provisions were "amended in a piecemeal fashion," resulting in "internal inconsistencies," often with no "logical rationale." JA65. The eleven-page bill addressed numerous parts of the MHRA, including the statement of policy, the definitions, and the provisions governing employment, housing, public accommodation, credit extension, and education discrimination. JA43-54.

Among the purposes of L.D. 1688 was to "clarify[] the scope of the Maine Human Rights Act application in education." JA54. Sections 18 and 19 addressed education discrimination, with Section 18 amending the MHRA's broad statement

of the right to be free from discrimination in education and Section 19 amending the substantive provisions prohibiting such discrimination set forth in 5 M.R.S. § 4602. JA52. With respect to Section 19, the MHRC's Executive Director testified that "[t]he MHRA's current education coverage is woefully out of date, and inconsistent with the rest of the Act." JA69. In addition to reformatting Section 4602, the bill added as protected categories ancestry, color, and religion, categories which were, since the MHRA's inception in 1971, protected in the areas of employment, housing, and public accommodations. JA52.[8] The bill struck the provision exempting all religious organizations from the prohibition against sexual orientation discrimination and replaced it with a provision stating: "Nothing in this section . . . [r]equires a religious corporation, association or society that does not receive public funding to comply with this section as it relates to sexual orientation or gender identity." JA53, *codified at* 5 M.R.S. § 4602(5)(C). While Crosspoint refers to this as a "poison pill," it simply made the education discrimination provision pertaining to sexual orientation and gender identity discrimination consistent with the provisions governing employment and housing discrimination, which exempted only religious organizations that do not receive public funds.

[8] Gender identity was also separately named, but was not added as a protected class, since, as discussed above, sexual orientation was already defined as including "gender identity or expression." L.D. 1688 changed references to "sexual orientation" to "sexual orientation or gender identity" throughout the MHRA to make clear that gender identity is protected. JA66 n.3

5 M.R.S. § 4553(10)(G). The bill also clarified that educational institutions are not required "to participate in or endorse any religious beliefs or practices," but that "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." JA53, *codified at* 5 M.R.S. § 4602(5)(D).

With some amendments not relevant here, LD 1688 was passed in both chambers of the Legislature on June 17, 2021 and signed into law by the Governor on June 24, 2021 as Maine Public Laws 2021, ch. 366 ("Chapter 366").[9] Under current law, then, only those religious schools that do not receive public funds may discriminate based on sexual orientation, gender identity, religion, and the other protected categories. 5 M.R.S. § 4553(10)(G)(3); 5 M.R.S. § 4602(5)(C). With respect to employment, all religious organizations may give employment preference to individuals of the same religion and may require all applicants and employees to conform to the organization's religious tenets. 5 M.R.S. § 4573-A(2).[10] Only those religious organizations that do not receive public funds may

[9] https://legislature.maine.gov/LawMakerWeb/summary.asp?paper=SP0544&SessionID=14.

[10] Crosspoint claims that "[t]o undermine the *Carson* plaintiffs' standing, [the DOE Commissioner] contended that if the state approved BCS for the tuition program, provisions of the [MHRA] would require BCS to hire employees that do not share its religious beliefs." App. Br. 7. This is not what the Commissioner said. What she did say is that if BCS were to accept public funds, it would no longer be able to discriminate in its hiring based on sexual orientation. *See, e.g.,* Def.'s Mot. For

discriminate in employment based on sexual orientation and gender identity. 5 M.R.S. § 4553(10)(G)(1). No religious organizations are permitted to discriminate in employment based on any of the other protected classes (except to the extent, as discussed below, that the "ministerial exception" permits the discrimination).

Crosspoint Church

Crosspoint is a Christian church incorporated as a nonprofit corporation. Complaint, ¶ 7 (JA16). Crosspoint operates BCS, a private, Christian school educating students from kindergarten to twelfth grade, as an "integrated auxiliary of [Crosspoint]." Complaint, ¶¶ 8, 21 (JA16, 18). BCS is willing to consider admitting students from any religious background or faith so long as they are willing to support BCS' philosophy of Christian education and conduct. Stip. Facts, ¶ 50 (JA60). Crosspoint employees, including BCS staff, must be co-religionists—that is, they must agree with Crosspoint's Statement of Faith and engage in religious practice consistent with Crosspoint's spiritual standards. Stip. Facts, ¶ 43 (JA59).

Procedural History

On March 27, 2023, Crosspoint filed a complaint against the DOE Commissioner and the Commissioners of the MHRC, all in their official capacities

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Summ. J., 13-14 in *Carson v. Makin*, No. 1:18-cv-327-DBH, ECF No. 29; Brief for Appellee, 22–23 in *Carson v. Makin*, Appeal No. 19-1746.

only. JA15-42. Crosspoint alleged that if BCS were to participate in the tuition program and accept public funds, enforcing the MHRA's provisions prohibiting educational discrimination on the basis of religion, sexual orientation, and gender identity would violate Crosspoint's rights under the Free Exercise, Establishment, and Free Speech Clauses in the First Amendment of the United States Constitution. In addition, Crosspoint claimed that the provisions prohibiting employment discrimination would "prohibit its practice of hiring only co-religionists if it participates in the tuitioning program," in violation of the Establishment and Free Exercise Clauses. Complaint, ¶¶ 114-131 (JA35-38) (citing 5 M.R.S. § 4572(1)(A)). That same day, Crosspoint filed a preliminary injunction motion seeking to enjoin defendants "from enforcing the religion, sexual orientation, and gender identity provisions of 5 M.R.S.A. § 4602 against [Crosspoint] and from enforcing 5 M.R.S.A. § 4572(1)(A) to prohibit [Crosspoint] from hiring co-religionists." ECF No. 5, at 20.

On February 27, 2024, the district court entered an order denying Crosspoint's preliminary injunction motion, "primarily because [the court] conclude[d] that [Crosspoint] is unlikely to succeed on the merits." ADD2.[11] The court found that Crosspoint's Free Exercise challenge to the MHRA's educational

[11] The court rejected defendants' argument that because there was no imminent threat of enforcement, the case was not yet ripe for review. ADD20-27. As will be discussed below, this was error.

provisions was "unavailing because the challenged provisions are neutral, generally applicable, and rationally related to a legitimate government interest." ADD27. The court noted that whether the challenged provisions would burden Crosspoint's religious exercise "present[ed] a close call, at least in this pre-enforcement context." ADD29. Nevertheless, the court held that the challenged provisions impose a burden because they "would effectively prohibit Crosspoint from enforcing several of its religiously motivated policies relating to sexual orientation and gender identity." ADD33.

The court recognized that even though the challenged provisions impose a burden, they are not subject to strict scrutiny so long as they are "neutral and of general applicability." ADD33. The court noted that Crosspoint's only basis for alleging that the provisions are not generally applicable was that single-sex schools were exempt. ADD34. But because the Legislature eliminated this exemption, the court concluded that the challenged provisions are generally applicable. *Id*.

The court also held that the challenged provisions are neutral. ADD36. The court found that even if Chapter 366 was enacted "in anticipation of the Supreme Court striking down the sectarian exclusion," there was not "significant evidence that this legislation's objective was 'to impede or constrain religion' as opposed to ensuring uniformity in a legislative scheme that already prohibited these types of discrimination by organizations receiving public funds in the housing and

employment contexts." ADD36. This finding was the result of the court's careful review of the MHRA's legislative history. ADD36-37. The court noted that since 2005, the MHRA "generally exempted only religious organizations that do not receive public funds from its sexual orientation/gender identity provisions." ADD39. While religious educational institutions were exempted regardless of whether they received public funding, this was "[b]ecause the sectarian exclusion blocked tuition funding for sectarian educational institutions" and "distinguishing between sectarian institutions that did or did not receive public funding would have been unnecessary and redundant." *Id*. When the Supreme Court struck down sectarian exclusion, however, "the public funds distinction was no longer be [sic] mere surplusage." *Id*. Finding that the challenged provisions are both neutral and generally applicable, the court concluded that they survived Crosspoint's free exercise challenge because they were rationally related to Maine's "legitimate interest in preventing discrimination in education." ADD41.

With respect to Crosspoint's argument that the MHRA's employment provisions prevent Crosspoint from hiring only co-religionists in violation of the Establishment and Free Exercise Clauses, the court found that there was no case or controversy between the parties. ADD43. The court noted that the MHRA plainly allows religious organizations to give employment preference to members of the same religion and to require all employees to conform to the organizations'

religious tenets. ADD41-42 (citing 5 M.R.S. § 4573-A(2)). And it credited Appellees' assertion that Crosspoint "'is thus free to limit employment to persons who share [Crosspoint's] religion and who conform to its religious tenets.'" ADD42-41 (quoting Defs. Opp'n to PI Mot., at 18, ECF No. 14). The court concluded that because there was no case or controversy between the parties, there was no basis for issuing an injunction. ADD43; *see also* ADD27 ("The employment discrimination claim fails because Crosspoint has not identified any constitutionally protected conduct infringed by the statute.").

The court also rejected Crosspoint's free speech claim, finding that the challenged provisions "regulate conduct, not speech." ADD43. The court correctly found that the provisions do not limit how BCS teaches students, and BCS is still free to teach from a religious perspective. ADD44; *see also* ADD30 ("Crosspoint could not reject applicants for being homosexual, but it could still teach that homosexuality is a sin."). The court stated that while "[p]rohibiting participating religious schools from discriminating on the basis of sexual orientation or gender identity may ultimately affect their conduct," the court had "yet to see a persuasive argument that it infringes on their expression." ADD44. The court concluded that the challenged provisions "limit conduct, not speech, and therefore do not infringe on Crosspoint's right to free expression." ADD45.

Turning to the remaining preliminary injunction factors, the court held that because Crosspoint was not likely to succeed on the merits, the challenged MHRA provisions were "unlikely to cause a deprivation of its constitutional rights." ADD46. The court found that any hardship Crosspoint might face did not "outweigh the potential hardship the state would face from being unable to fully enforce its educational antidiscrimination laws," and that "[t]he public also has a strong interest in the state being able to effectively combat discrimination." *Id*. The court thus denied Crosspoint's preliminary injunction motion. ADD47.

On March 28, 2024, the parties filed a joint motion asking the court to convert its preliminary injunction order into a permanent injunction order and enter final judgment. ECF No. 43. The parties also submitted a joint stipulation of facts, with exhibits, to be included in the record for appellate review. ECF No. 44. On April 24, 2024, at the court's request, the parties filed a motion explaining that the newly submitted evidence would not materially impact the court's preliminary injunction motion but should be included in the record to ensure full appellate review. ECF No. 48. The court concluded that the new evidence did not alter its reasoning in ruling on the preliminary injunction. ADD54. The court converted its preliminary injunction order into an order on permanent injunction, ADD49-56, and entered final judgment for defendants on June 5, 2024. ADD57.

This appeal followed.

SUMMARY OF THE ARGUMENT

Crosspoint's pre-enforcement challenge is not ripe. A case lacks ripeness if it rests upon contingent events that may never occur. Often, a plaintiff can establish ripeness by demonstrating that it intends to engage in proscribed conduct, and it need not show that enforcement is reasonably likely. But there is a wrinkle here. If Crosspoint were to participate in the tuition program, it is entirely speculative whether it would ever engage in conduct proscribed by the MHRA. This is because no child who is gay, transgender, or does not share Crosspoint's religious beliefs may ever seek, and be denied, admission to BCS. BCS offers no evidence suggesting that such children have applied in the past or have indicated an intent to do so in the future. If someday BCS were to deny admission to a member of a protected class, and that person were to file a complaint, Crosspoint can then raise its First Amendment defenses and a court can decide them in the context of specific facts. Crosspoint claims it will suffer a hardship if the Court does not now resolve the First Amendment issues because it otherwise will not know whether it might face an MHRA enforcement action if it participates in the tuition program. But a decision in this case will not eliminate that alleged hardship. Even if the Court were to resolve all of the issues in Crosspoint's favor and enjoin the Appellees from enforcing the MHRA against Crosspoint, Crosspoint

could still face private MHRA actions if it takes public money and fails to comply with the MHRA.

If the Court does reach the merits, it should affirm the district court's decision rejecting all of Crosspoint's First Amendment arguments. The educational provisions of the MHRA do not burden Crosspoint's religious practices in violation of the Free Exercise Clause. Crosspoint would still be free to teach however it likes, including instilling its religious beliefs in its students. Crosspoint's argument seems to be that the mere presence of a child who is gay, transgender, or does not share Crosspoint's religious beliefs would burden its religious exercise. Crosspoint does not demonstrate how this would be a burden, though. With narrow exceptions, the Free Exercise Clause does not allow religious entities to exclude people simply because they are not like them. But even if there is a burden, the MHRA's educational provisions are neutral and generally applicable, and satisfy rational basis.

Crosspoint claims that the 2021 amendment to the educational provisions (which allowed religious schools to discriminate on the basis of sexual orientation and gender identity only if they do not accept public funds) was a "poison pill" intended to prevent religious schools from participating in the tuition program should the Supreme Court eventually strike down the religious school exclusion. If the Legislature was aware that the Supreme Court might issue an adverse ruling, it

is more likely that the intent was to make the education provisions consistent with the employment and housing provisions and exempt only those religious organizations that do not accept public funds from the prohibitions against discrimination based on sexual orientation and gender identity. This distinction had never been necessary in the education provisions because religious schools were not eligible to receive public funds.

Crosspoint argues that the education provisions are not generally applicable because out-of-state schools and private in-state postsecondary schools are not required to comply with them. Crosspoint never argued that below,[12] and barely argues it now. Even if not waived, the argument fails. Maine has no jurisdiction to regulate conduct outside of its borders, and colleges are not similarly situated to primary and secondary schools. More importantly, religious schools are treated exactly the same as nonsectarian schools when it comes to these "exceptions." Out-of-state religious schools and out-of-state nonsectarian schools are equally exempt from the MHRA; the same is true for in-state private religious post-secondary schools and in-state private non-sectarian secondary schools. This is not a situation, then, where religious conduct is being treated less favorably than similar secular conduct. As a neutral and generally appliable law, the education

[12] They appear to have been inspired by the partially successful arguments made by another religious school in *St. Dominic Academy v. Makin*, No. 2:23-CV-00246-JAW, 2024 WL 3718386, at *23 (D. Me. Aug. 8, 2024).

provisions need only pass the rational base test. And because they are rationally related to Maine's legitimate interest in ending discrimination, they pass. But even if the provisions were not neutral and generally applicable, they would pass strict scrutiny.

Crosspoint argues that the MHRA's employment provisions violate the Establishment and Free Exercise Clauses because they prohibit Crosspoint from hiring only persons who share its religious beliefs. But the MHRA plainly allows Crosspoint to hire only co-religionists, and the Appellees so advised the district court. It is not clear why Crosspoint continues to press the argument, but, in any event, there is no constitutional violation or even a case and controversy with respect to the employment provisions.

Crosspoint's Free Speech challenge to the education provisions fails because the provisions regulate conduct, not speech. Crosspoint is free to convey whatever messages it wants to its students. The education provisions do not limit Crosspoint's expression. What they do limit is Crosspoint's ability to restrict the audience for its expression by denying admission based on membership in a protected class. In other words, Crosspoint would be free to teach, for example, that marriage can only mean one sanctioned by God joining one man and one woman, Complaint, ¶ 28(d) (JA20), but it could not refuse admission to a gay child. Excluding children from educational opportunities on the basis of sexual

orientation, gender identity, or religion is not a form of speech protected by the First Amendment.

STANDARD OF REVIEW

In an appeal from a decision on a stipulated record, this Court reviews the district court's legal conclusions de novo and its factual findings for clear error. *Thompson v. Cloud*, 764 F.3d 82, 90 (1st Cir. 2014); *Tsoulas v. Liberty Life Assur. Co. of Boston*, 454 F.3d 69, 76 (1st Cir. 2006); *Boston Five Cents Sav. Bank v. Sec'y of Dept. of Hous. & Urban Dev.*, 768 F.2d 5, 12 (1st Cir. 1985).

ARGUMENT

I. The District Court Erred in Concluding That This Matter is Ripe.

Crosspoint brings a pre-enforcement challenge to provisions in the MHRA prohibiting it from denying educational opportunities because of a child's sexual orientation, gender identity, or religion. But whether Crosspoint would ever be subject to an action seeking to enforce those provisions is entirely speculative. This is primarily because it is uncertain whether a child who is gay, transgender, or does not share Crosspoint's religious beliefs would ever apply for, and be denied, admission, and then seek to enforce the MHRA.[13] And even if Appellees were to be enjoined from enforcing the challenged provisions against Crosspoint, that

[13] While MHRC staff members can file complaints, 5 M.R.S. § 4611, they would need to be aware of a potential violation, which would likely only be possible if a child's family were to bring the matter to the attention of MHRC staff.

would not prevent private individuals from doing so. A court ruling would essentially be advisory, and Crosspoint's claims are not ripe.

"[T]he doctrine of ripeness has roots in both the Article III case or controversy requirement and in prudential considerations." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 59 (1st Cir. 2003). "The basic rationale of the ripeness inquiry is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements in violation of Article III's case or controversy requirement." *Lab. Rels. Div. of Constr. Indus. of Massachusetts, Inc. v. Healey*, 844 F.3d 318, 326 (1st Cir. 2016) (cleaned up). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (cleaned up). The plaintiff "bear[s] the burden of alleging facts sufficient to demonstrate ripeness," and "[e]ven a facial challenge to a statute is constitutionally unripe until a plaintiff can show that federal court adjudication would redress some sort of imminent injury that he or she faces." *Reddy v. Foster*, 845 F.3d 493, 501 (1st Cir. 2017).

"There are two factors to consider in determining ripeness: 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Roman Cath. Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 89 (1st Cir. 2013) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 148

(1967)). This Court "generally require[s] both prongs to be satisfied in order for a claim to be considered ripe." *Id*.

"The inquiry as to the fitness of the issues for judicial resolution itself involves both constitutional and prudential components." *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 8 (1st Cir. 2012). "The constitutional inquiry, grounded in the prohibition against advisory opinions, is one of timing." *Mangual*, 317 F.3d at 59. "The prudential concern is whether resolution of the dispute should be postponed in the name of 'judicial restraint from unnecessary decision of constitutional issues.'" *Id*. (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974)). "The fact that an event has not occurred can be counterbalanced in this analysis by the fact that a case turns on legal issues 'not likely to be significantly affected by further factual development.'" *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 70 (1st Cir. 2003) (quoting *Ernst & Young v. Depositors Econ. Prot. Corp*., 45 F.3d 530, 536 (1st Cir.1995)). But "[t]he notion that disputes which turn on purely legal questions are always ripe for judicial review is a myth." *Ernst & Young*, 45 F.3d at 537.

> Put bluntly, the question of fitness does not pivot solely on whether a court is capable of resolving a claim intelligently, but also involves an assessment of whether it is appropriate for the court to undertake the task. Federal courts cannot—and should not—spend their scarce resources in what amounts to shadow boxing. Thus, if a plaintiff's claim, though predominantly legal in character, depends upon future

> events that may never come to pass, or that may not occur in the form forecasted, then the claim is unripe.

Id.; *see also Mcinnis-Misenor*, 319 F.3d at 72 ("Here, that the future event may never come to pass augurs against a finding of fitness.").

"The inquiry into the hardship to the parties of withholding court consideration is 'wholly prudential.'" *Sindicato Puertorriqueno de Trabajadores*, 699 F.3d at 9 (quoting *Mangual*, 317 F.3d at 59). "Under 'hardship,' the court should consider whether the challenged action creates a direct and immediate dilemma for the parties." *Verizon New England, Inc. v. Int'l Bhd. of Elec. Workers, Loc. No. 2322*, 651 F.3d 176, 188 (1st Cir. 2011) (cleaned up).

"[W]hen free speech is at issue, concerns over chilling effect call for a relaxation of ripeness requirements." *Sullivan v. City of Augusta*, 511 F.3d 16, 31 (1st Cir. 2007). *But see Roman Cath. Bishop of Springfield*, 724 F.3d at 90 n.10 (stating that "we do not resolve today the question of whether relaxed First Amendment ripeness standards apply generally to claims predicated on alleged Free Exercise violations"). "Thus, when First Amendment claims are presented, reasonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim." *Sullivan,* 511 F.3d at 31 (cleaned up). "Still, '[t]o establish ripeness in a pre-enforcement context, a party must have concrete plans to engage immediately (or nearly so) in an arguably proscribed activity." *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 826 (1st Cir. 2020)

(quoting *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999)).

Here, Crosspoint cannot demonstrate that it has concrete plans to engage in arguably proscribed activity. To be sure, Crosspoint plans to participate in the tuition program. But that, by itself, would not be unlawful. Nor would it be unprecedented. There is already a sectarian school in the program. It could be unlawful if Crosspoint denied admission to a child based on sexual orientation, gender identity, or religion. At this point, though, it is entirely speculative whether this would ever occur. Crosspoint offers no evidence that gay or transgender children have applied in the past for admission. Nor does it offer any evidence that such children have expressed interest in applying. And given Crosspoint's tenets and teachings, it is questionable whether gay or transgender children would apply. *See, e.g.,* Complaint, ¶ 28(d) (JA20) ("We believe that the term 'marriage' has only one, legitimate meaning, and that is marriage sanctioned by God, which joins one man and one woman in a single, covenantal union, as delineated by Scripture."); ¶ 28(d) (JA21) ("Any deviation from the sexual identity that God created will not be accepted."); ¶ 29 (referring to the "clear biblical teaching that gender is both sacred and established by God's design") (JA21). With respect to religion, BCS does not require children to be born-again Christians and "BCS is willing to consider admitting students from any religious background or faith so long as they are

willing to support BCS' philosophy of Christian education and conduct." Stip. Facts, ¶¶ 49-50 (JA60). Even if this allows for the possibility that Crosspoint might deny admission based on a child 's religious beliefs, it is speculative whether such a child would apply.[14]

Cases addressing standing when the actions of third parties are involved further demonstrate that Crosspoint's claims are not ripe. A question of standing "bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention." *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975); *see also McInnis-Misenor*, 319 F.3d at 69 (stating that "[i]n general, standing and ripeness inquiries overlap," and "[t]he overlap is most apparent in cases that deny standing because an anticipated injury is too remote, for example."); *Whitehouse*, 199 F.3d at 33 (stating that ripeness "shares standing's constitutional and prudential pedigree" and that the overlap between the two "is nowhere more apparent than in pre-enforcement challenges.").

In the standing context, the Supreme Court has recognized that when causation depends on the actions of third parties not before the court, "the plaintiff must show that the third parties will likely react in predictable ways that in turn

[14] As the district court recognized, there is no case or controversy between the parties when it comes to hiring, inasmuch as the MHRA allows Crosspoint to hire only persons who share its religious views and conform to its religious tenets. ADD43.

will likely injure the plaintiffs." *Food & Drug Admin. v. Alliance for Hippocratic Med.*, 602 U.S. 367, 383 (2024) (cleaned up); *see also Murthy v. Missouri*, 144 S. Ct. 1972, 1986 (2024) ("[W]e have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment.") (cleaned up); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (when an essential element of standing depends on choices made by parties not before the court, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury"). Here, then, Crosspoint must show that if it participates in the tuition program, children who are gay, transgender, or do not share Crosspoint's religious beliefs are likely to apply to BCS. Crosspoint has failed to do so.[15]

Crosspoint will not suffer any hardship if the Court were to decline to address its constitutional challenges. Crosspoint is free to raise its First Amendment claims as defenses to an action under the MHRA (should one ever present itself), and a court could then evaluate the claims in the context of specific

[15] Because here the risk of enforcement turns on the actions of third parties, this matter is distinguishable from *Whitehouse*, 199 F.3d 26, upon which the district court primarily relied in finding Crosspoint's claims are ripe. In *Whitehouse*, the plaintiff intended to use public records for commercial solicitation, in direct contravention of state law. *Id.*, at 28. It thus faced immediate enforcement action. Here, on the other hand, whether Crosspoint might face enforcement action is dependent on intervening choices by third parties not before the Court.

facts. Crosspoint may argue that it faces a hardship because if it participates in the tuition program, a gay or transgender student may apply, and it would then face the dilemma of admitting the student in alleged contravention of its religious beliefs or denying admission and face a MHRA enforcement action. Again, as discussed above, such a scenario is entirely speculative. That aside, a decision from this Court would not resolve Crosspoint's dilemma. This is because even if Crosspoint were to obtain a favorable ruling in this case, such a ruling would not prevent a private party from bringing an action in state court alleging that Crosspoint violated their rights under the MHRA. At most, a ruling in Crosspoint's favor would remove the requirement that they exhaust their claim of discrimination before the MHRC; no favorable ruling from this Court would bind a state court in a private cause of action. In other words, no ruling in this case would ensure Crosspoint that it will not face consequences if it violates the MHRA.

II. The District Court Correctly Held That Section 4602 of the MHRA Does Not Violate the Free Exercise Clause.

Crosspoint argues that 5 M.R.S. § 4602 – the MHRA provision prohibiting discrimination in education – violates the First Amendment's Free Exercise Clause. This Clause states: "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I.[16] A plaintiff can prove a free exercise

[16] The Free Exercise Clause is applicable to the states via the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

violation by "showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022). Crosspoint fails to demonstrate that Section 4602 burdens its religious practices, but even if it did, Section 4602 is neutral and generally applicable.

A. Section 4602 Does Not Burden Crosspoint's Religious Practices.

Crosspoint offers no support for its claim that Section 4602 would prohibit it "from teaching from its religious perspective" if it were to accept public funds. App. Br.. at 8; *see also id*., at 2 (claiming that "religious schools are subject to administrative investigations, complaints, and financial penalties of thousands of dollars if they offer instruction . . . consistent with their sincerely held religious beliefs"). Crosspoint would still be able to teach however it likes, including, for example, teaching that "marriage is defined by God to join one man and one woman in a covenantal Union," that "a person's 'gender is both sacred and established by God's design,'" and that "the only method of salvation is by grace, through repentance and faith in Jesus Christ." App. Br., at 4. As the district court correctly found, nothing in the MHRA "limit[s] Crosspoint's ability to 'teach[] from its religious perspective." ADD44.

Crosspoint appears to argue that the mere existence in its midst of a gay or transgender child would burden its religious exercise. App. Br., 15-16. But

inasmuch as Crosspoint would be free to convey whatever messages it likes to such a child, it is impossible to see how this is so. *See Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (while private school was free to teach that racial segregation is desirable, there was no showing that ordering school to not exclude racial minority students "'would inhibit in any way the teaching in these schools of any ideas or dogma.'"); *see also Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) ("There is no constitutional right . . . to discriminate in the selection of who may attend a private school. . . ."); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964) ("[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty."). Moreover, the broader implications of Crosspoint's argument are troubling. If Crosspoint can exclude children from its school on religious grounds simply because of who they are or what they believe, it is hard to see how this would not extend to other contexts. For example, if a devoutly religious person operated a restaurant, could they bar gay and transgender people on religious grounds? It cannot, and should not, be the case that mere presence of certain people – especially children – constitutes a burden on religious exercise.[17]

[17] Crosspoint argues that Section 4602 burdens its religious exercise because it "put[s] Crosspoint to the choice of participating in a generally available benefit program or surrendering its constitutionally protected religious exercise." App. Br. 16. That was the issue, though, that the Supreme Court addressed, and resolved, in *Carson*, and religious schools may now participate in the tuition program. The

B. Section 4602 Is Neutral and Generally Applicable.

Even if there were some burden on Crosspoint's religious exercise, Supreme Court cases "establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Division v. Smith*, 494 U.S. 872 (1990)); *see also Brox v. Woods Hole*, 83 F.4th 87, 93 (1st Cir. 2023) ("We review a law that burdens religious exercise but that is neutral with respect to religion and generally applicable only to ensure that it has a rational basis."). If a law is not neutral and generally applicable, it is subject to strict scrutiny and must be narrowly tailored to serve a compelling state interest. *Kennedy*, 597 U.S. at 532; *Lukumi*, 508 U.S. at 546. Section 4602 is neutral and generally applicable, but, even if it were not, it would survive strict scrutiny.

1. Section 4602 is Neutral.

A law is not neutral when its object "is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533; *see also Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 533 (2021) ("Government fails

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issue here is whether religious schools participating in the program must, just like every other participating school, comply with a neutral and generally applicable anti-discrimination law.

to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."). "Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.'" *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 584 U.S. 617, 639 (2018) (quoting *Lukumi*, 508 U.S. at 540).

Crosspoint argues that Section 4602 is not neutral because the 2021 amendments made by Chapter 366 were intended to "target Crosspoint's religious exercise." App. Br., at 19. But Crosspoint offers no competent evidence in support of this claim. It primarily relies upon statements made by Maine's Attorney General in his June 21, 2022 press release. App. Br., at 19-22 (citing JA274-75). The Attorney General expressed no hostility toward BCS or its religious beliefs, nor did he indicate an intent to preclude BCS from participating in the tuition program. What he did say is that schools accepting public funds should not be allowed to discriminate. JA275. Further, the Attorney General is not part of the Legislature, and his statements were made a year after the 2021 amendments at issue. It is impossible to see, then, how the Attorney General's statements shed light on the intent behind the amendments. *See* District Court Decision, at ADD38

("But Attorney General Frey was not a member of the Maine Legislature when it enacted Chapter 366, and there is no evidence that he had a hand in proposing the legislation to a legislator.").

Crosspoint claims that the Attorney General "specifically identified BCS as an enforcement target," App. Br., 16-17, and "indicat[ed] 'he would pursue Crosspoint for asserted violations of the MHRA's antidiscrimination provisions' if it participated in the tuitioning program." App. Br., at 22 (quoting district court decision).[18] This is simply not true. In fact, by statute, it is the MHRC that is charged with investigating potential discrimination and bringing complaints. 5 M.R.S. §§ 4566, 4611-4614. What the Attorney General did say is that he "intend[ed] to explore with Governor Mills' administration and members of the Legislature statutory amendments to address the Court's decision and ensure that public money is not used to promote discrimination, intolerance, and bigotry." JA 274-275.[19]

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[18] Crosspoint's selective quotation of the district court opinion seems designed to give the impression that the district court found that the Attorney General expressly stated that he would pursue Crosspoint under the MHRA. What the district court actually said is that the Attorney General's statements would cause Crosspoint to "reasonably conclude" that he would pursue Crosspoint. ADD 26-27. Given the content of the Attorney General's statement, as will be discussed, it is impossible to see how Crosspoint could reasonably have reached this conclusion.

[19] It is also not true, as Crosspoint claims, that in her *Carson* briefing, the DOE Commissioner, "threaten[] to enforce 5 M.R.S.A. §4602 against BCS if it participated in the tuitioning program." App. Br., at 16. Rather, in support of her

In an effort to demonstrate legislative intent, Crosspoint cites to a single ten-word "tweet" from a state legislator. App. Br., at 2; JA279-80. The Court should give this no consideration. *See United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body, . . . and this Court has a long tradition of refraining from such inquiries."). [20]

Perhaps stronger, but still wrong, is Crosspoint's argument that the timing of the 2021 amendments to Section 4602 demonstrates that they were designed to prevent religious schools from participating in the tuition program. According to Crosspoint, Maine's Legislature enacted Chapter 366 in anticipation of a Supreme Court ruling in *Carson* that Maine cannot exclude religious schools from the

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standing argument, the DOE Commissioner noted that BCS had testified that it would consider accepting public funds only if did not have to make any changes in how it operates, and that accepting public funds would prohibit BCS from refusing to hire people because of their sexual orientation and refusing to admit students because of their sexual orientation or gender identity. Respondent's Brief in *Carson v. Makin* (No. 20-1088), at 53-54. The Commissioner made no threat to enforce the MHRA against BCS, nor could she since she has no such authority. And, like the Attorney General, she is not a member of the Legislature.

[20] Crosspoint also points to a *New York Times* guest essay by a law school professor. App. Br., at 21. Appellees are aware of no support for the notion that op-eds are a legitimate source for discerning legislative intent.

tuition program. App. Br., at 1, 19. One flaw in this argument is that Chapter 366 was enacted on June 24, 2021. At the time, both the district court and this Court had rejected the *Carson* plaintiffs' challenge to the religious exclusion, and the Supreme Court had not yet granted certiorari. Further, in three earlier failed challenges to the religious exclusion, the Supreme Court denied certiorari. *Anderson*, 549 U.S. 1051 (2006) (Mem.); *Bagley,* 528 U.S. 947 (1999) (Mem.); *Strout*, 528 U.S. 931 (1999) (Mem.). So, at the time Chapter 366 was enacted, it was uncertain whether the Supreme Court would even grant certiorari, much less reverse the lower court decisions.

But even if Chapter 366 was enacted in anticipation of an adverse Supreme Court ruling, the record evidence does not demonstrate that it was a "poison pill" designed to exclude religious schools from the tuition program. More likely is that it was intended to ensure that if religious schools were eventually allowed to participate in the program, they would comply with the MHRA's education provisions that are applicable to other schools accepting public funds.

As discussed above, for employment and housing, only those religious organizations that did not receive public funds were exempt from the provisions prohibiting discrimination based on sexual orientation and gender identity. Education was an outlier, where all religious schools were exempt from those provisions. This was likely because there was no need to make a distinction

between religious schools accepting public funds and those that did not, inasmuch as no religious schools were eligible to receive public funds. If Maine's Legislature anticipated that the ongoing litigation might result in Maine being prohibited from excluding religious schools from the tuitioning program, it would have been entirely appropriate to then make the same distinction in education as the Legislature did for employment and housing and require religious organizations that accept public funds to comply with the prohibition against sexual orientation and gender identity discrimination. *See* District Court decision, at ADD38-39 ("The historical background provides significantly more support for the Defendants' explanation that the Maine Legislature fashioned Chapter 366 to keep the MHRA's provisions on education discrimination in line with its broader scheme for exempting only religious organizations that do not receive public funding from certain antidiscrimination provisions.").

2. Section 4602 is Generally Applicable.

A law is not generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534.[21] Below, Crosspoint argued only that

[21] A law may also be not generally applicable if it "permit[s] the government to grant exemptions based on the circumstances underlying each application." *Id*.; *see also Kennedy*, 597 U.S. at 526. But Crosspoint does not argue that Section 4602 allows for the granting of exemptions.

Section 4602 is not generally applicable because single-sex schools were exempt. ADD34. Because this exemption was subsequently eliminated, the district court concluded that Crosspoint's general applicability argument "appears to have been mooted," and it concluded that Section 4602 is generally applicable. *Id*. On appeal, Crosspoint argues that the law is not generally applicable because it does not apply to private postsecondary institutions or out-of-state schools. App. Br., at 18. Crosspoint did not make this argument below and it makes no effort to develop the argument now, instead simply citing to the district court's decision in another case in which the court concluded that the combination of these two exceptions means that Section 4602 is not generally applicable. *St. Dominic Acad. v. Makin*, No. 2:23-CV-00246-JAW, 2024 WL 3718386, at *23 (D. Me. Aug. 8, 2024).[22] Crosspoint's argument has been waived. *McCoy v. Massachusetts Inst. of Tech*., 950 F.2d 13, 22 (1st Cir. 1991) ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal."); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (referring to the "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived").

[22] The district court went on to find, though, that Section 4602 passes strict scrutiny. *Id*., at *28.

But even if not waived, the argument fails. Neither of the "exceptions" means that Section 4602 is not generally applicable. The Legislature has not exempted out-of-state schools from the requirement that they comply with the education provisions of the MHRA. Rather, the MHRA simply does not, and cannot, apply to conduct outside of Maine's borders. Crosspoint offers no support for the proposition that a state law is not generally applicable unless it applies across the United States. Indeed, if that were the case, it would seem that no state law, which necessarily only applies within a state's borders, could ever be generally applicable. Moreover, even if the fact that out-of-state schools are not subject to the MHRA is an "exception," it is not one that treats secular conduct more favorably than religious conduct. Religious out-of-state schools are exempt from the MHRA's requirements to the exact same extent as are out-of-state nonsectarian schools. This is nothing like, for example, *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam), where, during the COVID pandemic, a state restricted religious gatherings while allowing secular gatherings, such as sporting events and concerts.

Private postsecondary institutions are not subject to the MHRA's education provisions. 5 M.R.S. § 4553(2-A)(defining "educational institution'). This does not mean that Section 4602 is not generally applicable, though. Postsecondary institutions are not comparable to primary and secondary schools. In Maine,

primary and secondary education is compulsory for everyone within a prescribed age range, while post-secondary education is entirely voluntary. Public education through public or private elementary and secondary schools is provided at public expense, while post-secondary education relies primarily on the student and their family for funding. How and where a student accesses public elementary and secondary education is dictated by where their parents reside, while students and their families are free to shop both within and outside of Maine for the post-secondary school that best fits their goals. Finally, post-secondary students are older and, for the most part, adults, making them more able than their younger counterparts to determine what instruction is appropriate for them or consistent with their knowledge and beliefs. *See Tandon*, 593 U.S. at 62 ("[W]hether 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."). Moreover, as with out-of-state schools, Maine is not treating secular conduct more favorably than religious conduct. A private religious postsecondary school is exempt from the MHRA's education provisions to the same extent as is a private nonsectarian postsecondary school.

In sum, Section 4602 is neutral and generally applicable and is rationally related to Maine's legitimate interest in ending discrimination. *See* District Court

decision, ADD41.[23] It does not violate the Free Exercise Clause. In some ways, the law is similar to a policy instituted by a public university conditioning student groups' eligibility for school funds and facilities on groups' agreements to open membership and leadership positions to all students (referred to as the "all-comers policy"). *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law*, 561 U.S. 661 (2010). A religious organization argued that this violated their rights to free speech, expressive association, and the free exercise of religion by requiring them, as a condition of financial support, to accept members who do not share their beliefs about religion and sexual orientation. *Id*., at 667. After rejecting the free speech and expressive association claims, the Supreme Court summarily disposed of the free exercise claim, noting that "the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct." *Id*., at 697 n.27. The Court concluded that the organization could not "moor its request for accommodation to the Free Exercise Clause" because in seeking an exemption from the all-comers policy it was seeking "preferential, not equal, treatment." *Id*. The same is true here. Crosspoint is seeking preferential, not equal, treatment – it wants the ability to deny educational opportunities to certain people while still receiving public funds. It can't have it both ways.

[23] Crosspoint does not argue that Section 4602 fails rational basis review.

C. Section 4602 Would Pass Strict Scrutiny.

Even if Section 4602 were not neutral and generally applicable, it would survive strict scrutiny because it is narrowly tailored to serve a compelling state interest. *See Kennedy*, 597 U.S. at 532; *Lukumi*, 508 U.S. at 546. It is the stated policy of Maine to prevent discrimination in many aspects of society, including employment, housing, public accommodations, and, as relevant here, education. 5 M.R.S. § 4552. It is further Maine's policy to provide opportunities for individuals "to participate in all educational, counseling and vocational guidance programs, all apprenticeship and on-the-job training programs and all extracurricular activities without discrimination because of sex, sexual orientation or gender identity, a physical or mental disability, ancestry, national origin, race, color or religion." 5 M.R.S. § 4601. There can be no dispute that states have a compelling interest in eliminating discrimination. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982) (recognizing that a state has a substantial interest in protecting its citizens from "the political, social, and moral damage of discrimination"); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (eliminating discrimination "plainly services compelling state interests of the highest order").

Maine also has a compelling interest in preventing public funds from being used to fund discrimination, and Section 4602 is narrowly tailored to serve that

interest. Maine likely could have made all schools, regardless of whether they accept public funds, subject to the MHRA. Maine did not go that far, though, and instead only requires those schools accepting public funds to comply with Section 4602. A religious school thus has options – it can decline public funds and continue to discriminate, or take public funds and comply with the same anti-discrimination law that other schools must comply with.

As the Supreme Court's decision in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) makes clear, Maine's compelling interest in eliminating discrimination outweighs whatever interest Crosspoint might have in refusing to admit certain students. At issue in *Bob Jones* was an IRS ruling making private schools with racially discriminatory admissions policies ineligible for tax-exempt status. Two religious colleges challenged the ruling, arguing that their racially discriminatory policies were based on sincerely held religious beliefs and that applying the ruling to them would violate their rights under the Free Exercise Clause. *Id*., at 579-585, 602-03. The Supreme Court rejected the challenge, finding that the government had a "compelling," "fundamental," and "overriding" interest in eliminating racial discrimination in education. *Id*., at 604. The Court further concluded that this interest "substantially outweighs whatever burden denial of tax benefits places on [the colleges'] exercise of their religious beliefs" and that no less restrictive means were available to achieve the government's

interest. *Id*. Similarly, in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), the Supreme Court held that a state's "compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."

The district court, in a different case, concluded that Section 4602 satisfies strict scrutiny. It found that "[a]s a general matter, Maine's asserted interest in eliminating discrimination within publicly funded institutions is compelling." *St. Dominic Acad. v. Makin*, No. 2:23-CV-00246-JAW, 2024 WL 3718386, at *27 (D. Me. Aug. 8, 2024) (citing *Fulton*, 593 U.S. at 542).[24] The district court recognized that Maine had not created a system of exceptions from Chapter 366 and that the law was narrowly tailored "because it is written to encompass discriminatory conduct, and nothing more." *Id*., at 28. The district court was right – even if Section 4602 is not neutral and generally applicable, it passes strict scrutiny.

[24] The district court was right to rely on *Fulton* inasmuch as the Supreme Court recognized there a city's "weighty" interest in ensuring equal treatment of gay persons. *Fulton*, 593 U.S. at 542. The only case Crosspoint cites in support of its claim that eliminating discrimination is not a compelling interest is a decision from the District of Colorado denying a motion to dismiss and granting a preliminary injunction. App. Br., 24 (citing *Darren Patterson Christian Acad. v. Roy*, 699 F. Supp. 3d 1163, 1186 (D. Colo. 2023)). Oddly, the court there cited *Fulton* in support of its apparent conclusion that eliminating discrimination is not a compelling interest. That court's reliance on *Fulton* was misplaced and its conclusion was wrong.

III. The District Court Correctly Held That There is No Dispute That the Employment Provisions of the MHRA Allow Crosspoint to Employ Only Co-Religionists and Do Not Violate the Establishment or Free Exercise Clauses.

While acknowledging that the "MHRA's plain language protects BCS's right to hire only co-religionists," Crosspoint nevertheless contends that it "fears Defendants will enforce the MHRA against it in violation of the MHRA's text and the First Amendment." App. Br., at 26-27. In their briefing below, Appellees made plain that "'[a]ll religious organizations (regardless of whether they receive public funds) are allowed to give employment preference to individuals of the same religion and may require all applicants and employees to conform to the organization's religious tenets'" and "'[Crosspoint] is thus free to limit employment to persons who share [Crosspoint's] religion and who conform to its religious tenets.'" ADD42 (quoting Appellees' opposition brief). Quite simply, and as the district court recognized, "there is no case or controversy between the parties" as to this issue. ADD43.

In an effort to create a controversy, Crosspoint repeatedly claims that in her briefing in *Carson*, the DOE Commissioner stated that if BCS participated in the tuition program, the MHRA would require it to hire employees who do not share BCS's religious beliefs. Opp. Br., 7, 14, 26, 27. This is false. What the Commissioner actually said is that if BCS accepted public funds, it "likely would no longer be free to refuse to hire homosexuals." Def.'s Mot. For Summ. J., at 13

in *Carson v. Makin*, No. 1:18-cv-327-DBH, ECF No. 29; Brief for Appellee, at 23 in *Carson v. Makin*, Appeal No. 19-1746. She also noted in her district court briefing that "[r]egardless of whether a religious organization accepts public funds, it may require that all employees conform to its religious tenets." Def. Mot. For Summ. J., at 13 n.3. To be absolutely clear (again), Appellees agree that if Crosspoint accepts public funds, it may still limit its hiring to co-religionists who conform to its religious tenets. Crosspoint's misrepresentations of Appellees' prior statements do not create a controversy.[25]

IV. The District Court Correctly Held That Section 4602 of the MHRA Does Not Violate the Free Speech Clause.

Crosspoint argues that "Section 4602 restricts Crosspoint's speech based on content and viewpoint, because it is designed to force BCS to stop educating its students from its religious perspective as a condition of participating in the tuition program." App. Br., at 31. The statute does nothing of the sort. As the district court correctly recognized, Section 4602 "limit[s] conduct, not speech, and

[25] Crosspoint discusses the "ministerial exception" which exempts religious organizations from employment discrimination laws with respect to employees "holding certain important positions." *Our Lady of Guadalupe Sch.*, 591 U.S. at 746; *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012). Appellees agree that under binding Supreme Court precedent, the MHRA's employment provisions cannot be applied against Crosspoint with respect to employment actions relating to employees whose positions fall within the ministerial exception. Which of Crosspoint's employment positions are covered by the ministerial exception is fact-specific and cannot be resolved here.

therefore do[es] not infringe on Crosspoint's right to free expression." ADD45. Crosspoint is free to teach students as it currently does, regardless of whether it accepts public funds. It may continue to teach from a biblical perspective and instill its religious values. The only thing that would change if Crosspoint accepted public funds is that it could not deny children educational opportunities based on sexual orientation, gender identity, or religion. In other words, the MHRA would restrain Crosspoint from restricting the audience, but would not restrain the message.

The Supreme Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), is instructive. At issue there was the Solomon Amendment, which denied federal funding to colleges that prohibited military recruiters from coming on campus. 10 U.S.C. § 983. The law was passed in response to law schools denying access to military recruiters because they disagreed with the federal government's policy on homosexuals in the military. *Rumsfeld*, 547 U.S. at 51-52. The schools argued that the law violated their First Amendment freedoms of speech and association. *Id*., at 51. The Court rejected this argument, finding that the law "regulates conduct, not speech. It affects what law schools must do—afford equal access to military recruiters—not what they may or may not say. *Id*., at 60 (emphasis in original). The law "neither limits what law schools may say nor requires them to say anything." *Id*. The same is true here

– Section 4602 dictates what private schools accepting public funds must do – provide equal educational opportunities to all children, regardless of their sexual orientation, gender identity, or any other protected category. It does not restrict what schools must say.[26]

It is not true, as Crosspoint claims, that if it accepted public funds, BCS would be required "to affirm a student's gender identity and sexual orientation, contrary to its statement of faith." App. Br., at 33-34. BCS would not need to affirm, endorse, or otherwise express agreement with a student's gender identity or sexual orientation – it simply could not use such status as a basis for denying a student educational opportunities.

Crosspoint attempts to analogize this case to ones where the Supreme Court has prevented the government from forcing one speaker to accommodate the message of someone else. App. Br., at 34 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 566 (1995); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality opinion);

[26] Crosspoint attempts to distinguish *Rumsfeld* by arguing that BCS students "undoubtedly become part of the school's 'expressive association,'" while in *Rumsfeld* the recruiters were "outsiders" who did not become part of the law schools' expressive association. App. Br., at 33. Crosspoint does not explain how students become part of its expressive association, but in any event, Crosspoint did not allege, and did not argue below, that Section 4602 violates its First Amendment right to association. Rather, it has only claimed that the statute violates it First Amendment rights to free speech and free exercise of religion. Complaint, ¶¶ 88-113, 132-144 (JA32-35, 39-40).

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974)). But the Court in *Rumsfeld* distinguished these cases, *Rumsfeld*, 547 U.S. at 63, and they are similarly distinguishable here. In *Hurley*, the Supreme Court said that a city could not force parade organizers to include marchers with whom they disagreed. But this was because "parades are . . . a form of expression, not just motion," and "every participating unit affects the message conveyed by the private organizers." *Hurley*, 515 U.S. at 568, 572-73; *see also id*., at 577 ("[E]ach unit's expression is perceived by spectators as part of the whole."). Here, on the other hand, Crosspoint offers no support for the notion that schools are inherently expressive in the same way that parades are, nor has it shown how admitting gay or transgender students would interfere with its own expression. And, unlike in *Hurley*, there is no risk that a student's expression will be confused with that of Crosspoint. *See Rumsfeld*, 547 U.S. at 65 (2006) ("[H]igh school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.").

Tornillo and *Pacific Gas* are even less relevant. At issue in *Tornillo* was whether a state could require a newspaper to print, free of charge, a political candidate's response to editorials critical of him. 418 U.S. at 243-44. In *Pacific Gas*, a state regulatory agency required a privately owned utility company to include with its bills the speech of a third party with which it disagreed. 475 U.S.

at 4-5. In both these cases, as the *Rumsfeld* Court recognized, there were First Amendment violations because compelling the newspaper and utility to disseminate the messages of others interfered with their ability to disseminate their own messages. 547 U.S. at 64. Here, on the other hand, requiring Crosspoint to provide equal access to educational opportunities does not interfere with Crosspoint's ability to express whatever views, and make whatever speech, it chooses.

Crosspoint claims that 5 M.R.S. § 4602(5)(D), "would also require BCS to permit student religious expression contrary to its statement of faith. Allowing such expression would interfere with BCS's speech about the nature of salvation." App. Br., at 34. But this provision simply states that nothing in Section 4602 "[r]equires an educational institution to participate in or endorse any religious beliefs or practices; to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing." 5 M.R.S. § 4602(5)(D). This provision has not yet been interpreted by a state court. It is unclear then, what it might require of Crosspoint. That said, given that the provision expressly states that a religious organization need not participate in or endorse any religious beliefs or practices, it is doubtful that, as Crosspoint claims, Crosspoint would have to allow students to broadcast Muslim prayers or allow an imam on campus to conduct religious services. It could be interpreted far more

narrowly, as, for example, requiring schools to permit students to wear symbols of any religion or privately discuss their religious beliefs with other students. Crosspoint offers no explanation as to how allowing religious expression by students would interfere with BCS's own speech.[27]

CONCLUSION

For the reasons discussed above, Appellees respectfully request that the Court affirm the district court's entry of final judgment in their favor.

Dated: October 21, 2024
Augusta, Maine

Respectfully submitted,

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[27] In the event that the Court concludes that requiring Crosspoint to allow students to express different religious views violates Crosspoint's free speech rights, it should only enjoin application of the second phrase in 5 M.R.S. § 4602(5)(D) and not the other MHRA provisions being challenged here. *See* 1 M.R.S. § 71(8).

CERTIFICATE OF COMPLIANCE

The within Appellees' Brief is submitted under Federal Rule of Appellate Procedure 32(a)(7)(B). I hereby certify that the brief complies with the type-volume limitation prescribed by Rule 32(a)(7)(B)(i). For this Certification, I relied on the word count function of the word-processing software used to prepare this brief (Microsoft Word), which has counted 12,972 words in this brief. I further certify that all text in this brief is in proportionally spaced Times New Roman Font and is 14 points in size.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I, Christopher C. Taub, Chief Deputy Attorney General for the State of Maine, hereby certify that on this, the 21st day of October, 2024, I filed the above brief electronically via the ECF system. I further certify that on this, the 21st day of October, 2024, I served the above brief electronically on the following party, who is an ECF Filer, via the Notice of Docket Activity:

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