IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DAVID CARSON, as parent and next friend of O.C.;
AMY CARSON, as parent and next friend of O.C.;
ALAN GILLIS, as parent and next friend of I.G.;
JUDITH GILLIS, as parent and next friend of I.G.;
TROY NELSON, as parent and next friend of A.N. and R.N.;
ANGELA NELSON, as parent and next friend of A.N. and R.N.,
Plaintiffs-Appellants,

v.

A PENDER MAKIN, in her official capacity as COMMISSIONER OF THE MAINE DEPARTMENT OF EDUCATION,
Defendant-Appellee.

On Appeal from the
United States District Court for the District of Maine, Bangor

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF APPELLANTS AND URGING REVERSAL

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[redacted]

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CORPORATE DISCLOSURE STATEMENT

The ACLJ is a non-profit legal corporation dedicated to the defense of constitutional liberties secured by law. The ACLJ has no parent corporation and issues no stock.

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INTEREST OF AMICUS[1]

Amicus, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys regularly appear before the U.S. Supreme Court, federal courts of appeals, and other courts as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), addressing a variety of constitutional law issues, including the Free Speech and Religion Clauses of the First Amendment. The defense of religious freedom is a top priority for the ACLJ. The present case involves the crucial ability of churches and religious schools to make their own decisions free of government interference. The ACLJ submits this brief in support of the appellants.

ARGUMENT

Appellants persuasively contended below, and the district court held, that the question whether the Maine Human Rights Act ("MHRA") would bar private religious schools from participating in the Maine town tuitioning system is not an

[1]All parties consented to the filing of this amicus brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

obstacle to appellants' standing in the present case. Amicus wishes to highlight the additional point that application of MHRA to religious schools would raise serious federal constitutional questions. Consequently, to the extent this Court concludes that the applicability of MHRA to religious schools would affect the disposition of the present appeal (either regarding standing or the merits), this Court should certify the case to the Supreme Judicial Court of Maine, thereby allowing that court the opportunity to authoritatively construe the MHRA and its applicability, or not, to private religious schools. In so certifying the case, this Court would point the state supreme court to the doctrine of constitutional avoidance, discussed *infra*.

I. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE MILITATES IN FAVOR OF REJECTING THE APPLICABILTY OF MHRA TO PRIVATE RELIGIOUS SCHOOLS.

This Court should consider certifying to the Supreme Judicial Court of Maine the question whether MHRA even applies to religious schools. Taking this route follows the well-trodden path of construing statutes to avoid serious constitutional questions.

> It has long been an axiom of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." . . . This approach, we said recently, "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound

by and swears an oath to uphold the Constitution."

Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 466 (1989) *(*quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

Maine's state supreme court follows this same approach. "When constitutional rights are implicated in the application of a statute, another rule of statutory construction holds that we must construe a statute to preserve its constitutionality, or to avoid an unconstitutional application of the statute, if at all possible." *Nader v. Me. Democratic Party*, 41 A.3d 551, 558 (Me. 2012) (internal citations omitted). *See also Hannum v. Bd. of Envtl. Prot.*, 832 A.2d 765, 770 (Me. 2003) ("The law is well established that when reviewing a constitutional challenge to a statute or a regulation, we will avoid addressing constitutional issues if the case can be resolved by addressing nonconstitutional issues.") (internal citations omitted); *Maine v. Crocker*, 435 A.2d 58, 63 (Me. 1981) ("We start from the fundamental precepts that courts will, if possible, 'construe legislative enactments so as to avoid a danger of unconstitutionality' and that the central purpose of statutory construction is 'to save, not to destroy.'") (internal citation omitted).

Illustrative of the constitutional avoidance doctrine is the United States Supreme Court's decision in *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979).

That case, like this one, involved the applicability of government regulations to religious schools. *NLRB*, 440 U.S. at 491. There, as here, the schools provided both religious and secular instruction. *Id*. at 492 (noting that the schools provide "special religious instruction" plus "essentially the same . . . curriculum as public secondary schools"); *id*. at 493 (explaining that the high schools sought to provide "traditional secular education" with religious orientation, plus "religious training"). There, as here, First Amendment protections were at risk from government intrusion into the affairs of religious schools. *Id*. at 494, 500.

Invoking the constitutional avoidance doctrine, the United States Supreme Court declared that "it is incumbent on us to determine whether the [government's] exercise of its jurisdiction here would give rise to serious constitutional questions." *Id*. at 500–01. If so, the Court would require a clear statement -- "the affirmative intention of Congress clearly expressed" -- before construing the statute to apply to such circumstances. *Id*. at 501. Finding "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act," *id*. at 504, the Court "decline[d] to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of

the guarantees of the First Amendment Religion Clauses." *Id*. at 507.[2]

The "clear statement rule" which the Supreme Court applied to the NLRA in *Catholic Bishop* serves a valuable purpose: "'[C]lear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation.'" *Sossamon v. Texas*, 536 U.S. 277, 291 (2011) (quoting *Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119, 139 (2005)) (plurality opinion).

Here, there can be no dispute that applying MHRA would, at a minimum, raise serious constitutional questions. Any requirements that condemned as "discrimination" a religious school's adherence to its mission integrity, and in particular to religious doctrines on sexuality and human nature, would essentially put the religious school to the choice of changing its doctrines or disqualifying itself from otherwise available public benefits. To condition participation in public programs on such sacrifice of religious identity very likely violates the First

[2] The U.S. Supreme Court did not find a sufficiently clear statement in the 1) "[a]dmittedly . . . broad terms" of the NLRA, 440 U.S. at 504; 2) legislative adoption of a different express exemption to address certain religious concerns, *id*. at 506; 3) statutory enumeration of other exceptions not including church-operated schools, id. at 511 (Brennan, J., dissenting); and 4) prior rejection of legislation that would have provided the exception for religious educational organizations, id. at 512–13 (Brennan, J., dissenting). In light of these details, it is plain that MHRA likewise contains no "clear statement" that would pass muster under *Catholic Bishop*.

Amendment protections for speech and religion. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 570 U.S. 205, 221 (2013) (noting if "[t]he Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. . . . it violates the First Amendment"); *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2025 (2017). In addition, were the text of the MHRA to apply to employees with religious ministerial duties, it would invite a nightmare of entanglement with religious questions. *Cf. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (holding that the ministerial exception constitutionally protects religious employers in mission-related staffing decisions).

> Implied limitation rules avoid applications of otherwise unambiguous statutes that would intrude on sensitive domains in a way that Congress is unlikely to have intended had it considered the matter. In these instances, the absence of a clear congressional statement is, in effect, equivalent to a statutory qualification saying, for example, "Notwithstanding any general language of this statute, this statute shall not apply extraterritorially"; or ". . . this statute shall not abrogate the sovereign immunity of nonconsenting States"; or ". . . this statute does not regulate the internal affairs of foreign-flag vessels."

Spector, 545 U.S. at 139. Here, the "internal affairs" are of a church school, not a ship, but the concern is no less valid.

In *Catholic Bishop*, the Supreme Court steered clear of the looming

constitutional shoals by construing the NLRA not to apply, "in the absence of a clear expression of Congress' intent," to teachers in church-run schools. 440 U.S. at 507. Charting the same course here would resolve the issue of MHRA's significance, without the need to definitively resolve the constitutional dimensions of the ministerial exception. The Supreme Judicial Court of Maine is best positioned to authoritatively construe its own state statutes, such as MHRA. Hence, to the extent that the applicability of MHRA affects the disposition of this appeal, this Court should certify the question of whether MHRA poses an obstacle to private religious school participation in the Maine town tuitioning system to the Supreme Judicial Court of Maine. *See* Me. R. App. P. 25 (Apr. 25, 2019) (noting that a "federal court may, upon its own motion or upon request of any interested party, certify such questions of law of this State to the Supreme Judicial Court sitting as the Law Court, for instructions concerning such questions of state law"), https://courts.maine.gov/rules_adminorders/rules/text/mr_app_p_plus_2019-04-25.pdf. *E.g.*, *Fortin v. Titcomb*, 671 F.3d 63, 66, 76 (1st Cir. 2012) (certifying questions on the Maine Tort Claims Act).

CONCLUSION

Amicus respectfully asks this Court to reverse the decision below or, in the alternative, certify this case to the Supreme Judicial Court of Maine.

Respectfully submitted,

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