UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Fort Des Moines Church of Christ, Plaintiff, v. Angela Jackson, *et. al*, Defendants.	Case No. 4:16-cv-00403-SMR-CFB **PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION** **Oral Argument Requested**

INTRODUCTION

Plaintiff Fort Des Moines Church of Christ (Church) has satisfied the standard for a preliminary injunction. The State Defendants completely ignore the Church's arguments that the church autonomy doctrine bars the State of Iowa from dictating how the Church must use its facility and communicate its beliefs about human sexuality. They also ignore the fact that the State's speech ban is content and viewpoint based. Instead, the Defendants double-down on the Commission's position that the Church is a public accommodation and that the Act authorizes it to dictate how the Church uses its facility and what public statements it may make concerning human sexuality.

Defendants' overreach is entirely predictable in light of Iowa's constitutionally flawed definition of public accommodation, which clearly encompasses churches. The Commission has twice tried to inform "churches" and then "places of worship" what activities will bring them under the Act. But in doing so, the Commission only highlights how the Act interferes into the internal affairs of houses of worship, and why a preliminary injunction is absolutely necessary to protect the Church from further chill of its constitutional rights.

ARGUMENT

I. The Commission's Case-by-Case Application of the Exemption for Religious Institutions Subjects the Church to the Act and Unconstitutionally Encroaches on the Internal Affairs of the Church.

Curiously, Defendants argue that the Church is unlikely to prevail on the merits because it is not a "public accommodation," and yet the Commission has written[1] and rewritten[2] its brochure to explicitly address when "churches" and "places of worship" are public accommodations. *See* State Defendants' Resistance to Plaintiff's Motion for Preliminary Injunction, pgs. 5-6, 8. The Church, like all houses of worship, invites nonmembers to its services and activities, and thus fits within the definition of a public accommodation: "distinctly private place(s)" that offer services, facilities, or goods to "nonmembers ... gratuitously."[3] *See* Iowa Code § 216.2(13)(a) (emphasis supplied). Thus, the broad definition of a public accommodation includes the Church, unless it imposes "qualifications ... related to a bona fide religious purpose." *Id*. § 216.7(2)(a).

If the Act had simply exempted all "bona fide religious institutions"—such as the Church—and stopped at that, Defendants might have an argument. But it did not. The Act empowers the Commission, on a case-by-case basis, absent any objective standard, to determine when a church's services and activities have a "bona fide religious purpose." One need look no further than the two versions of the Commission's brochure to demonstrate that it treats the Church and other houses of worship as public accommodations. The Commission initially defined a nonreligious purpose to include "a child care facility operated at a church ***or a church service open to the public***." (emphasis supplied). Only after this suit was filed did the Commission revise its directive. But

[1] The Commission took down the original brochure, entitled "A Public Accommodations Provider's Guide to Iowa Law," after this suit was filed. It is attached to the Declaration of Steven T. O'Ban, as Ex. A, filed herewith.
[2] The Commission's revised brochure can be found at https://icrc.iowa.gov/sites/default/files/publications/2016/2016.sogi_.pa1_.pdf (last viewed Aug. 4, 2016).
[3] The Church rejects on First Amendment grounds that Iowa may regulate it as a public accommodation. It argues that for purposes of this lawsuit the definition of a public accommodation is so broad and vaguely written that it subjects the Church to the Act.

instead of enunciating an objective standard that clarified that churches are no longer subject to the Act, the Commission doubled-down on its intent to enforce the Act against churches. The revised brochure states in pertinent part: "Places of worship" are subject to the Act if they "***engage[] in non-religious activities which are open to the public***"[4] (emphasis supplied).

In both versions of the brochure, the act of a church opening its building to the public is a strong indication it is a public accommodation. All of the Church's activities are open to the public. *See* Ver. Compl. ¶49. Thus, the only remaining determination is whether an activity is "nonreligious." But without an objective test to guide (and restrain) the Commission in its determination, the following may be "nonreligious activities" of the Church: inviting the hungry from the community and providing food and other essentials (as many secular food banks do); holding a movie night to meet and build relationships with its neighbors; and providing childcare for the children of member and nonmember mothers when they gather for fellowship. *Id*. Given the vagueness of the religious institution exemption and the Commission's undiminished resolve to apply the Act to the Church, Defendants cannot defeat the Church's preliminary injunction on the ground that many (but not all) of the Church's activities may be exempt.

Not only does the vague religious purpose test force the Church to guess which of its activities may subject it to the Act, the uncertainty chills the Church's free exercise of its faith:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out … its religious mission.

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987). Relying on *Amos*, the Ninth Circuit in *Spencer v. World Vision*, 633 F.3d 723, 731-

[4] https://icrc.iowa.gov/sites/default/files/publications/2016/2016.sogi_.pa1_.pdf.

732 (2010) affirmed dismissal of plaintiffs' employment discrimination claims, declining to examine whether the Christian humanitarian organization's activities and purposes were religious or secular: "If we are ill-equipped to determine whether an activity or service is religious or secular in nature, how are we to know which side of the line an entity's "purpose" falls on?" *Id.* The Church needs a preliminary injunction to end the uncertainty created by an exemption that empowers an ill-equipped Commission to determine whether its activities are "nonreligious."

II. Defendants Rely Entirely on Legal Authorities Applying Nondiscrimination Laws to Commercial and Secular Entities, Ignore the Church's Key Free Speech Claims, and Contend Iowa Has the Authority to Interfere in Internal Church Affairs.

Defendants rely entirely on cases involving commercial or civic entities—a bakery, photographer, landlord, "business establishment" providing health services, and a secular civic organization—for the proposition that Iowa's nondiscrimination law applies to churches and does not violate the First Amendment. *See* Resistance, pgs. 7-11. Defendants also improperly rely on the standard in *Employment Division v. Smith,* 494 U.S. 872 (1990), which applies the deferential rational basis test when a law is neutral and generally applicable and incidentally burdens religion. *Id.* at pg. 9. But none of Defendants' cases, including *Smith*, involved ***a church***, and thus did not apply the church autonomy doctrine discussed at length in Plaintiff's Memo in Support of Motion for Preliminary Injunction, pgs.7-12, ("Memo in Support of MPI").

The U.S Supreme Court, and every U.S. circuit court to address the church autonomy doctrine after *Smith*, does not follow *Smith*. "*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC.*, 132 S.Ct. 694, 707 (2012); *see also Bryce v. Episcopal Church in the Diocese of Colorado,* 289 F.3d 648, 656-57 (10th Cir. 2002) (dismissal

of employment discrimination claim based on the church autonomy doctrine).[5] Importantly, *Hosanna-Tabor, Bryce*, and nearly every recent church autonomy case involved discrimination claims against a church and the courts ruled that the church autonomy doctrine barred those claims from going forward. *See id*. The unanimous Court in *Hosanna-Tabor* barred the employment discrimination claim of a private religious school teacher: "Such action interferes with the internal governance of the church," how the church's beliefs will be personified, and the church's "right to shape its own faith and mission." *Hosanna-Tabor,* 132 S.Ct. at 706.

Not only do Defendants ignore the applicable free exercise case law, they completely ignore the Church's arguments that the speech ban (Iowa Code § 216.7(1)(b)) is content and viewpoint-based discrimination and, therefore, presumptively unconstitutional. *See Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2227 (2015); *see* Memo in Support of MPI, pgs. 13-15. The speech ban declares certain speech unlawful, such as comments regarding gender identity (content based), and statements one may view as "unwelcome" (viewpoint based). The speech ban fails strict scrutiny—Defendants have no compelling interest in censoring the religious messages. A preliminary injunction is necessary to prevent the Church's free speech from further chill.

CONCLUSION

The Church is likely to succeed on the merits and suffer irreparable harm unless an injunction is issued. This Court should issue a preliminary injunction to protect the Church's rights secured under the First and Fourteenth Amendments of the U.S. Constitution.

[5] "The Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) does not undermine the principles of the church autonomy doctrine. … In addition, the ministerial exception cases rely on a long line of Supreme Court cases affirming the church autonomy doctrine, which protects the fundamental right of churches to decide for themselves matters of church government, faith, and doctrine. *Id.* These cases' rationale extends beyond the specific ministerial exception to the church autonomy doctrine generally, and we therefore find that the church autonomy doctrine remains viable after *Smith.*"

Respectfully submitted this 8th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on, I electronically filed the foregoing paper with the Clerk of Court by using the CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Date: August 8, 2016

/s/ Steven O'Ban
Steven O'Ban