UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HORIZON CHRISTIAN FELLOWSHIP, *et al.*, Plaintiffs v. JAMIE R. WILLIAMSON, *et al.*, Defendants.	)	CIVIL ACTION NO. 1:16-cv-12034

MOTION OF GLBTQ LEGAL ADVOCATES & DEFENDERS, THE MASSACHUSETTS TRANSGENDER POLITICAL COALITION, THE BOSTON ALLIANCE OF GAY, LESBIAN, BISEXUAL & TRANSGENDER YOUTH, AND MASSEQUALITY TO FILE AN *AMENDED* MEMORANDUM AS AMICI CURIAE SUPPORTING DEFENDANTS

Movants respectfully seek leave to file the attached *amended* memorandum of law as *Amici Curiae*. In support of this motion, amici state as follows:

1. On December 6, Amici filed a motion for leave to file a memorandum of law in support of Defendants' opposition to Plaintiffs' motion for preliminary injunctive relief.

2. That memorandum inaccurately cited cases in support of the following sentence which appears at the bottom of page 10 and continues to the top of page 11: "When a Plaintiff alleges that a church has violated the law, there is a legal determination made whether conduct falls within the scope of the Law – an inquiry that the Supreme Court and the SJC has held is proper for a commission such as the MCAD to determine and which does not violate the First Amendment."

3. The correct citations to support that sentence are: *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.* 477 U.S. 619, 628 (1986); *Temple Emanuel*, 436 Mass. at 481-482.

4. This Court granted *amici's* motion on December 8, 2016

5. The attached memorandum correctly cites the aforementioned cases in support of the text that appears at pp. 10-11.

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CONCLUSION

Wherefore, the *Amici*, respectfully request that the Court grant them leave to file the attached *amended* memorandum.

Respectfully submitted,

GLBTQ Legal Advocates & Defenders
The Massachusetts Transgender Political Coalition
The Boston Alliance of Gay, Lesbian, Bisexual & Transgender Youth
MassEquality

By Their Attorneys,

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Dated: December 9, 2016

CERTIFICATE OF SERVICE

I, Jennifer Levi, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on December 9, 2016.

/s/ Jennifer Levi
Jennifer Levi

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HORIZON CHRISTIAN FELLOWSHIP, *et al.*, Plaintiffs v. JAMIE R. WILLIAMSON, *et at.*, Defendants.	CIVIL ACTION NO. 1:16-cv-12034

AMENDED MEMORANDUM OF LAW OF GLBTQ LEGAL ADVOCATES & DEFENDERS, THE MASSACHUSETTS TRANSGENDER POLITICAL COALITION, THE BOSTON ALLIANCE OF GAY, LESBIAN, BISEXUAL & TRANSGENDER YOUTH, AND MASSEQUALITY AS _AMICI CURIAE_ IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

It is important to note at the outset the breathtaking claim that the Plaintiffs are making in this litigation. They assert—without any basis in law—that churches are wholly outside the reach of the Massachusetts Public Accommodations Law, M.G.L. c. 272, §§ 1 ff. ("the Law"), in any and all of its aspects, *see* Compl., Prayer for Relief ¶ 2 (seeking a judgment "declaring that [M.G.L. c.] 272 [§§] 92A and 98, as applied to Churches and Pastors [the plaintiffs], violates the First and Fourteenth Amendments of the U.S. Constitution as-applied.").

Although Plaintiffs rely throughout their papers on the example of recent amendments to the Law that add gender identity to its protected categories, their challenge is broadly directed toward "the Act," words which the Plaintiffs use to refer collectively to M.G.L. c. 272, §§ 92A and 98. Pls.' Mem. in Supp. of Mot. for a Prelim. Inj. ("Pls.' Mem.") at 7-8. So, for example, following Plaintiffs' logic, a church that rents space as part of a for-profit venture to private groups

could refuse to rent its space to African-Americans (based on race) and hold itself wholly immune from the Law. That is not, and cannot be, the law.

In support of their stunning position, the Plaintiffs make a series of arguments—none of which withstand even minimal scrutiny.

BACKGROUND

The Law prohibits discrimination in any "place of public accommodation," defined as "any place . . . which is open to and accepts or solicits the patronage of the general public." M.G.L. c. 272, § 92A. Plaintiffs, a group of churches represented by the Alliance Defending Freedom ("ADF"), challenge three provisions of the Law. Pls.' Mem. 2. Section 98 prohibits places of public accommodation from "mak[ing] any distinction, discrimination or restriction on account of religious sect, creed, class, race, color, denomination, sex, gender identity, sexual orientation, . . . nationality, or because of deafness or blindness, or any physical or mental disability relative to the admission of any person to, or his treatment in any *place of public accommodation*." M.G.L. c. 272, § 98 (emphasis added). Section 92A commands that places of public accommodation shall not:

> directly or indirectly . . . publish, issue, circulate, distribute or display, or cause to be published, issued, circulated, distributed or displayed, in any way, any advertisement, circular, folder, book, pamphlet, written or painted or printed notice or sign . . . intended to discriminate against or actually discriminating against persons of any religious sect, creed, class, race, color, denomination, sex, gender identity, sexual orientation, . . . nationality, or because of deafness or blindness, or any physical or mental disability, in the full enjoyment of the accommodations, advantages, facilities or privileges offered to the general public by such *places of public accommodation*, resort or amusement."

Id. § 92A (emphasis added). Both sections also prohibit aiding and inciting a violation. *Id.* §§ 92A, 98.

Plaintiffs challenge the Commonwealth's ability to enforce the Law against them regardless of the factual circumstances of any activity or function in which they are engaged. They do so based

on a number of conflated constitutional grounds. Because Plaintiffs ignore well-established Massachusetts precedent and stretch their constitutional claims beyond recognized legal limits, their motion fails.

I. PLAINTIFFS ALLEGE NO FACTS TO ESTABLISH THAT ANY ACTIVITY THEY ENGAGE IN WOULD TRIGGER APPLICATION OF THE PUBLIC ACCOMMODATIONS LAW.

The Plaintiffs have not alleged that they are engaged or even wish to engage in any activity that would subject them to liability under any provision of the Law. They do not allege that any claims have been filed, or that any are threatened to be filed against them. This is fatal to their motion.

All of the relevant provisions of the Law cited by Plaintiffs, by their terms, apply only to "places of public accommodation" as that term is defined in § 92A. A place of public accommodation is defined in the Law as a place which is "open to and accepts or solicits the patronage of the general public." M.G.L. c. 272, § 92A. The statute provides an admittedly non-exhaustive list of examples, none of which include a church. So, while in theory, *Amici* agree that churches are not exempt, well-established Massachusetts law excludes them from being subject to the Law when an activity being held therein by them or anyone else serves as a *religious* and a not "public, *secular* function." *Donaldson v. Farrakhan*, 463 Mass. 94, 99-100 (2002) (emphasis added).

In *Donaldson v. Farrakhan*, the Supreme Judicial Court ("SJC") held that a men-only meeting hosted by a mosque and held at an otherwise-public theater was not subject to the Law because plaintiffs failed to prove that it was a "public, *secular* function." *Donaldson*, 436 Mass. 94, 99-100 (2002) (emphasis added). For this reason, plaintiffs failed to establish that the theater "retained its character as a place of public accommodation" under Massachusetts law at the time of the event even though the theater, when not used by the mosque for a *religious* meeting, would

have constituted a "public accommodation" subject to the dictates of the statute. *Id.* at 102. The SJC also held that the mosque's meeting at the theater did not constitute a "place of public accommodation" subject to the statute because "individuals who engage in *religious activities* do so, in part, to foster and communicate a common system of beliefs and values" and "this is constitutionally protected expressive activity." *Id.* at 100-01 (emphasis added). *Donaldson* thus established the governing Massachusetts law that churches or other religious institutions do not constitute places of "public accommodation" under the statute when engaged in *religious, as opposed to secular, activities*. Under this well-settled law, Plaintiffs have failed to state a viable claim that they are even potentially subject to enforcement since the activities alleged in their complaint cause them to fall outside the scope of the Law.

This court should deny a preliminary injunction in this case for the same reason one was denied by the district court in *Fort Des Moines Church of Christ v. Jackson*, No. 4:16-cv-00403, 2016 WL 6089842 (S.D. Iowa Oct. 14, 2016) (denying motion for preliminary injunction and rejecting facial and as-applied challenges by plaintiff church to state law and city ordinance prohibiting places of public accommodation from discrimination and publication of discriminatory statements). Plaintiffs cannot demonstrate a likelihood of success on the merits because, as in *Fort Des Moines Church*, there is "a significant amount of uncertainty surrounding whether the antidiscrimination laws would ever be applied to [their] conduct." 2016 WL 6089842 at, *18. Indeed, in this case there is no question that the Law does not reach the conduct described in Plaintiff's complaint.

In *Fort Des Moines Church*, the court determined that the Iowa law was consistent with the general rule established by a range of "state and federal courts" that have concluded that "churches and programs they host are *not* places of public accommodation." *Id.* at *19 (emphasis

in original) (citing *Traggis v. St. Barbara's Greek Orthodox Church*, 851 F.2d 584, 586, 590 (2d Cir. 1988) (affirming on other grounds grant of summary judgment where district court found that church had not violated state civil rights act because church was not public accommodation); *Vargas–Santana v. Boy Scouts of Am.*, Civ. No. 05-2080 (ADC), 2007 WL 995002, at *6 (D.P.R. Mar. 30, 2007) ("[A]s a matter of law, a church is not a place of public accommodation."); *Wazeerud-Din v. Goodwill Home & Missions, Inc.*, 737 A.2d 683, 687-88 (N.J. Super. 1999) (holding that church's addiction program was not public accommodation because group was essentially religious in nature and "a religious institution's solicitation of participation in its religious activities is generally limited to persons who are adherents of the faith or at least receptive to its beliefs"); *Roman Catholic Archdiocese of Philadelphia v. Commonwealth of Pennsylvania*, 548 A.2d 328, 331 (Pa. Cmwlth. 1988) (holding that parochial schools run by the Catholic church are not places of public accommodation under Pennsylvania law)).

It is important to note that, although the Iowa law contains a religious exemption and the Law in Massachusetts does not, this distinction is of no consequence because the court in *Fort Des Moines Church* did not rely on Iowa's religious exemption to reach its conclusion denying the injunction. As the court pointed out, it is settled law, even apart from any express statutory exemption, that public accommodations statutes do not apply to churches' use of their facilities for religious purposes. *See Fort Des Moines Church*, 2016 WL 6089842, at *18. That determination is consistent with the outcome and rule in *Donaldson*. The court in *Fort Des Moines Church* explained that the religious exemption contained in the challenged Iowa law was meant not so much to codify this rule as to clarify "the legislature's intent to limit the religious institution exemption to those organizations who are *genuine* in their religious beliefs or those who request the protection of the religious institution exemption *in good faith*." *Id.* at *16 (emphasis added).

The outcome in *Fort Des Moines Church* would have been no different even if the Iowa statute had not contained a religious exemption. Similarly, with or without an express religious carve-out, the Massachusetts Law does not apply to churches engaged in wholly religious activities. There is no need to expressly exempt such activities from the scope of the Law because, under well-settled law, such activities are not subject to public accommodations laws in the first instance.

II. THE PLAINTIFFS' SPECIFIC ARGUMENTS FAIL.

Plaintiffs are not content to live with the line drawn by the SJC between religious functions and activities, to which public accommodations laws do not apply, and wholly secular, non-religious ones, to which they might apply even if hosted in a church facility. So, Plaintiffs make several legal claims that overstate the scope of exempted conduct to argue that they are exempt from the Law at all times, no matter what they do, a claim unsupported by the doctrine and cases upon which they rely.

A. The Church Autonomy Doctrine Has a Well-Defined and Limited Scope That Does Not Provide Plaintiffs Immunity From the Massachusetts Public Accommodations Law.

As their broadest substantive argument, the Plaintiffs look to the so-called "church autonomy doctrine" under the First Amendment's Religion Clauses. Pls.' Mem. at 6-9. The church autonomy doctrine is a settled part of First Amendment jurisprudence, and *Amici* have no quarrel with the Plaintiffs' initial, general exposition of the doctrine on pages 6-8 of their Memorandum. Plaintiffs seek, however, to apply the doctrine to encompass the totality of the "use of their facilities" and "the control of their facilities." *See* Pls.' Mem. at 8-9. The church autonomy doctrine does not stretch this far.

The church autonomy doctrine applies to certain internal ecclesiastical leadership and governance matters and prohibits legislative or judicial interference in resolving specific internal church disputes. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565

U.S. 171, 188 (2012) (referring to "interfere[nce] with the internal governance of the church"); *Employment Div., Dep't of Human Servs. of Oregon v. Smith*, 494 U.S. 872, 877 (1990), *overruled by legislative action* (Nov. 16, 1993) (characterizing church autonomy cases as prohibiting government from "lend[ing] its power to one or the other side in controversies over religious authority or dogma"); *Temple Emanuel of Newton v. MCAD*, 463 Mass. 472, 476-477 (2012) (holding that First Amendment removes jurisdiction of civil courts over "church disputes *touching on matters of doctrine, canon law, polity, discipline and ministerial relationships*") (emphasis added) (quotations omitted); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 655 (10th Cir. 2002) (stating that "churches have autonomy in making decisions *regarding their own internal affairs*" and courts cannot review "internal church disputes involving matters of faith, doctrine, church governance and polity") (emphasis added).

"The church autonomy doctrine is not without limits, however, and does not apply to purely secular decisions, even when made by churches." *Bryce*, 289 F.3d at 657; *see also McKelvey v. Pierce*, 800 A.2d 840, 844 (N.J. 2002) ("The First Amendment does not immunize every legal claim against a religious institution and its members."); *Van Osdol v. Vogt*, 908 P.2d 1122, 1134 (Colo. 1996) ("We do not by this opinion hold that churches are insulated from the law"); *cf. Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 42 (1st Cir. 2012) (holding that church autonomy doctrine does not bar a court from resolving disputes over church property where court applies neutral principals of law).

As then-Associate Justice Rehnquist stated in *General Council on Fin. & Admin. V. Cal. Superior Court*,

> There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. See *Serbian Eastern Orthodox Diocese v. Milivojevich* [426 U.S. 696, 709-710 (1976)]. But this Court never has suggested that those

> constraints similarly apply outside the context of such intraorganization disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs.

439 U.S. 1369, 1373-1373 (1978) (Rehnquist, J., in chambers). Here, the Plaintiffs seek to stretch the church autonomy doctrine far beyond its proper limits by contending that *any* application of the Law "implicates religious liberty interests similar to those threatened when the government interferes with the right of religious organizations to choose their own leaders." Pls.' Mem. at 9 (citing *Hosanna-Tabor,* 565 U.S. at 188). This analogy is misplaced.

As discussed in Section I, above, the Law applies to a religious institution only when it is involved in a secular event open to the general public. The Law therefore does not reach a church's religious activities, leadership or governance decisions, and it certainly does not inject itself into any internal church disputes. Indeed, it does not, in any way, regulate what any religious institution can preach as its view on the use of bathrooms (or anything else, for that matter) or how a church operates or otherwise uses its facilities for any religious event. Rather, it simply obligates a church to obey the Law when it engages in certain outward-focused, secular activities of a public nature or rents or otherwise allows its facilities to be similarly used.

This is precisely the point made by Chief Justice Roberts when, in *Hosanna-Tabor*, he explained the distinction between church autonomy (as embodied in the ministerial exception) and the purview of neutral laws of general applicability as articulated by the Court in *Employment Division, Department of Human Services of Oregon v. Smith:*

> It is true that the ADA's prohibition on retaliation [that was invoked by the plaintiff in *Hosanna-Tabor*], like Oregon's prohibition on peyote use [at issue in *Smith*], is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *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, 565 U.S. at 190 (citing *Smith*, 494 U.S. at 877 (distinguishing the government's regulation of "physical acts" from its "lend[ing] its power to one or the other side in controversies over religious authority or dogma")).

While questioning the right of a church to dismiss one of its leaders quite plainly involves an internal church decision, a church's obligation to follow a neutral law of general applicability, such as the Law here, when it engages in an outward act of holding a public, secular function (or allowing any other entity to use its facilities to do so) is an entirely different matter.[1] Therefore, the Plaintiffs' church autonomy argument fails.

B. The Law Is Not Subject to Strict Scrutiny Under the Free Exercise Clause.

Making an alternative Religion Clause argument, the Plaintiffs pivot awkwardly from a focus on an *entity's* right under the church autonomy doctrine to an *individual's* right when facing an alleged substantial burden on their free exercise right. Pls.' Mem. at 10. There are multiple problems with the Plaintiffs' claim.

First, the Plaintiffs have nowhere in their Memorandum articulated either whose free exercise rights are being burdened or how such rights are being burdened. No individual is

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[1] Commentators agree on these limits to the church autonomy doctrine. *See, e.g.,* Mark W. Cordes, *The First Amendment and Religion After Hosanna-Tabor,* 41 Hastings Const. L. Q. 299, 329 (2014) ("[T]he autonomy right implicit in *Hosanna-Tabor* concerns the selection of leaders relevant to the internal workings of a religious institution, specifically as it relates to doctrine, governance and mission. For that reason it would not apply to generally applicable laws relating to health, safety, or land use. Although such laws might at times burden the effectiveness of ministry and mission, they do not affect a religious organization's right to define what that mission will be. A religious organization's right to define for itself its beliefs, doctrine, identity and mission, all of which turn on the ability to control leadership decisions, is the essence of the autonomy right recognized in *Hosanna-Tabor*. For that reason most generally applicable laws not touching upon those core concerns would still be subject to the *Smith* neutrality standard.") (footnotes omitted).

required by the Law to alter or compromise their religious beliefs in any way. Nor is any individual in any circumstance going to be required to act contrary to their religious beliefs (even assuming the Free Exercise Clause reaches any actions that might be in issue).

Second, the Plaintiffs attack the law because it allegedly allows "government bureaucrats to subjectively determine on a case-by-case basis whether the Church's activities are sufficiently religious or not." Pls.' Mem. at 10. This wholly mischaracterizes the operation of the Law. If a public accommodations complaint is lodged against a religious institution, it is filed at the MCAD and is subject to a well-established procedure that, among other things, determines whether the complaint falls within the scope of the Law as involving a "public, secular function" in accordance with the legal standard established by the SJC in *Donaldson*. *See* 436 Mass. at 99-100. All such legal determinations are subject to judicial review in the Massachusetts trial and appellate courts. No "bureaucrat" makes a "subjective" determination of whether anything is "sufficiently" religious.

Third, it is worth noting that neither the Law nor its application violate the Religion Clauses simply because MCAD or the courts have to determine whether an event is secular or religious. It is the natural consequence of the Religion Clauses that courts have to engage in some level of consideration of religion in order to apply them. When a Plaintiff alleges that a church has violated the law, there is a legal determination made whether conduct falls within the scope of the Law—an inquiry that the Supreme Court and the SJC have held is proper for a commission like the MCAD to determine and which does not violate the First Amendment. When a Plaintiff alleges that a church has violated the law, there is a legal determination made whether conduct falls within the scope of the Law – an inquiry that the Supreme Court and the SJC has held is proper for a commission such as the MCAD to determine and which does not violate the First

Amendment. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.* 477 U.S. 619, 628 (1986); *Temple Emanuel*, 436 Mass. at 481-482.

Apropos of the issues raised by the Plaintiffs, the exception applied to church decisions regarding the selection of their ministers cannot be applied without a court's assessing whether the person seeking relief has no remedy because they are, in fact, a "minister," a determination which requires an assessment of the religious nature of a complainant's duties. *See, e.g., Herx v. Diocese of Ft. Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168, 1177 (N.D. Ind. 2014) (engaging in factual analysis to determine that plaintiff teacher was not a religious minister) (subsequent history omitted); *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 WL 1068165, at *3 (S.D. Ohio Mar. 29, 2012) ("[T]he analysis of whether a teacher is a minister involves more than the teacher's affiliation with a religious school."). In fact, the court in *Fort Des Moines Church* rejected the plaintiffs' vagueness argument on the grounds that courts and agencies routinely and ably judge whether activity is *bona fide* religious activity. *See* 2016 WL 6089842, at *16 (pointing out that "when making enforcement judgments, state or municipal authorities may only inquire [but they *do* inquire] as to whether such beliefs are sincerely held.").

Finally, the Plaintiffs seek the application of strict scrutiny, asserting that their claim is not subject to *Smith*, because the Law allows "individualized government assessments" that "render[] the Act not generally applicable." Pls.' Mem. at 10 (citing *Smith*, 949 U.S. at 883-85). Once again, the Plaintiffs seek support where there is none. The Plaintiffs point to a passage in *Smith* in which Justice Scalia explained the unemployment cases, which were the only cases where the Court has applied strict scrutiny to invalidate a government action on the grounds that a law called for individualized exceptions. *Smith*, 494 U.S. at 883. He noted that the test "was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant

conduct" where a "'good cause' standard created a mechanism for individualized exemptions." *Id.* at 884 (citation omitted). In such a system of individualized exemptions, a refusal to extend the system to cases of "religious hardship" is not acceptable "without compelling reason." *Id.* Lastly, Justice Scalia noted that, regardless of the scope of the test, it has "nothing to do with an across-the-board criminal prohibition on a particular form of conduct." *Id.*

The Law here does not operate with a system of individualized exemptions but rather is a statute of general applicability prohibiting a particular form of conduct *across the board*. The fact that one has the ability to show that an entity does not fall within the scope of the statute by showing that it is not a public accommodation does not in any way make the Law akin to the operation of the unemployment compensation system described in *Smith*. Therefore, Plaintiffs' argument for strict scrutiny fails.[2]

C. The Plaintiff's Free Speech Claims Are Without Merit.

The Plaintiffs argue that the Law prohibits them, in violation of the First Amendment, from: (1) speaking about their religious teachings on biological sex in "sermons, speeches and other public statements"; (2) publishing their "changing room and restroom policies" to their

[2] Plaintiffs make a glancing one-sentence argument suggesting that a governmental determination of whether an activity is religious or secular amounts to an entanglement that violates the Establishment Clause, citing a concurring opinion in *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring). Pls.' Mem. at 10. However, *Amos* involved a wholly different question – whether the statutory religious *exemption* in Title VII, as extended to non-profit activities of religious organizations, violated the Establishment Clause. The Court held it did not. Justice Brennan, in a concurring opinion, simply explained why he believed that that statutory extension of the exemption to non-profit activities was wise in the specific context. Here, the question raised is whether an agency can make a religious-versus-secular determination without violating the Establishment Clause. The Supreme Court answered that question the year before *Amos* in *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, at 628 (1986), and at least implicitly reaffirmed that position in *Hosanna-Tabor*, 132 S. Ct. at 706, which anticipates the same determination being made by agencies and courts in assessing whether a party is a "minister" or rather a person engaged in secular activities.

members and the public on their Facebook pages; (3) publishing these policies as an insert to "their weekly Sunday morning bulletins"; and, (4) publicly sharing their beliefs about human sexuality "without being accused of aiding or inciting discrimination." Pls.' Mem. at 11. With a proper understanding of the Law in relation to the Plaintiff's allegations, these religious free speech claims melt away.

First, as set forth above, under settled Massachusetts law, a religious institution would only be subject to the Law if it hosted a "public, secular function." *Donaldson*, 463 Mass. at 99-100. Conversely, if it were engaged in religious activity, the Law simply would not apply. *See id.*; *Fort Des Moines Church*, 2016 WL 6089842 at *19 (citing cases). Therefore, it is beyond cavil that *religious* sermons simply are not covered by the Law. *See id.* at *20-21.

Second, in order to dispel any of the other concerns raised by the Plaintiffs, it is only necessary to look carefully at the Law, which is not "so broadly written" as the Plaintiffs allege. Pls.' Mem. at 11. While the Plaintiffs cite only a circumscribed version of what they call the "publication ban," *id.*, the full text demonstrates the error in their argument:

> *No owner, lessee, proprietor, manager, superintendent, agent or employee* of any place of public accommodation, resort or amusement shall, directly or indirectly, by himself or another, publish, issue, circulate, distribute or display, or cause to be published, issued, circulated, distributed or displayed, in any way, any advertisement, circular, folder, book, pamphlet, written or painted or printed notice or sign, of any kind or description, *intended to discriminate against or actually discriminating against persons* of any religious sect, creed, class, race, color, denomination, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, nationality, or because of deafness or blindness, or any physical or mental disability, *in the full enjoyment of* the accommodations, advantages, facilities or privileges offered to the general public by such places of public accommodation, resort or amusement.

M.G.L. c. 272, §92A, First Paragraph (emphasis added). In order to be liable, a person or entity must: (1) have an ownership, lessee, management, agency, or employee position with respect to a

public accommodation; (2) in that capacity, publish, circulate or display something like an advertisement or a sign; and (3) intend to or actually discriminate against people protected under the Law in the full enjoyment of that person or entity's place of public accommodation. [3]

The general activities Plaintiffs describe—including sermons, public statements of religious views, or the circulation of church bulletins—do not fall within the purview of the Law. Plaintiffs' speeches and other statements about biological sex, published changing room and restroom policies for the ordinary operation of the church's regular religious activities, and communications of their views and policies about human sexuality simply cannot in the ordinary course trigger the Law because they are not connected to advertising about a public accommodation and thus, critically, do not hinder the "full enjoyment" of any place of public accommodation.

Put another way, for any of the concerns raised by the Plaintiffs to trigger the Law, they must arise in the specific context of either the denial of full enjoyment of a public accommodation controlled by the Plaintiffs or the denial of such full enjoyment by another that is aided or incited by the Plaintiffs. As to the former, the Plaintiffs do not allege the operation or control of any

[3] Section 92A creates liability if the owner or operator publishes the requisite advertising, *etc.*, "directly or indirectly, by himself or another." The Plaintiffs challenge the use of "indirectly" as unconstitutionally vague by assertion and without argument. Pls.' Mem. at 15. In context, "indirectly" seems to have quite a basic, common sense meaning of "through an intervening person or thing." The New Shorter Oxford English Dictionary 1351 (Vol. 1 1993). Section 92A also requires, as an element, that one "intended to discriminate." The Plaintiffs simply raise the question—without argument or citation—whether that language is vague in the context of sincere religious beliefs. Pls.' Mem. at 15. Again, this is wholly inadequate legal argument; and, in any event, the pertinent element is intent in the context of a public, secular function where all citizens are judged by the same legal standard of intent.

public accommodation as understood under Massachusetts law.[4] As to the latter, it is important to understand exactly what the Law proscribes.[5]

The concepts of aiding and inciting are well-defined and understood in the law. Under Massachusetts law, aiding "captures conduct that constitutes actual assistance in the commission of the felony and requires some degree of knowing participation." *Marshall v. Commonwealth*, 463 Mass. 529, 533 n.8 (2012). "Aiding" is "knowing participation in the criminal offense." *Id.* at 536. One who "aids" in the commission of a crime is "as guilty of that crime as the principal" based on proof of knowing participation and shared criminal intent. *Commonwealth v. Zanetti*, 454 Mass. 449, 461, 467 (2009);[6] *see also Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 320 (D. Mass. 2013) (aiding and abetting under the Alien Tort Statute requires proof that "a defendant provided 'practical assistance to the principal that has a substantial effect on the perpetration of the crime'") (quoting *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39 (D.C. Cir. 2011)).

Likewise, the meaning of incitement is clear. The government can "suppress speech for advocating the use of force or a violation of the law only if 'such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (quoting *Brandenburg v. Ohio*, 395 U.S. 444,

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4 If the Plaintiffs operate a public accommodation within the meaning of the Law, their conduct in such operation "remains subject to regulation for the protection of society." *Cantwell v. Conn.*, 310 U.S. 296, 303-304 (1940) ("The [freedom to believe] is absolute but, in the nature of things, the [freedom to act] cannot be.").

5 In addressing aiding or inciting in the context of the Plaintiffs' free speech argument, the *Amici* have also addressed the Plaintiffs' vagueness argument concerning these terms. *See* Pls.' Mem. at 14-16.

6 "'Participation'" includes "'aiding or assisting' in acts that constitute crime or 'agreeing to stand by at, or near, the scene of the crime . . . to provide aid or assistance in committing the crime or in escaping, if such help becomes necessary'; agreement need not be formal or explicit as 'it is enough consciously to act together before or during the crime with the intent of making the crime succeed.'" *Commonwealth v. Hornsby*, 89 Mass. App. Ct. 1132, 2016 Mass. App. Unpub. LEXIS 709, at *5 (Jul. 15, 2016) (quoting *Zanetti,* 454 Mass. at 470).

447 (1969) (*per curiam*)); *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (*per curiam*) ("[A]dvocacy of illegal action at some indefinite future time" is not "sufficient to permit the State to punish . . . speech."); *Blum v. Holder*, 744 F.3d 790, 801-02 (1st Cir. 2014) (holding that a peaceful public demonstration would not constitute incitement).

As properly defined and applied, aiding and inciting are simply not protected by the First Amendment. *United States v. Stevens*, 559 U.S. 460, 468-469 (2010) (incitement and "speech integral to criminal conduct" are unprotected and their preventing and punishment raise no constitutional problems); *see also Commonwealth v. Lucas*, 472 Mass. 387, 393 n.6 (2015) ("within these classes of unprotected speech . . . include[s] . . . speech integral to criminal conduct"); *Sexual Minorities Uganda*, 960 F. Supp. 2d at 329 (incitement and aiding and abetting, both criminally and civilly, are not protected speech). As a result, the Plaintiffs' claims under the First Amendment relating to the "aids or incites" component of the Law are also without merit.[7]

[7] As demonstrated in the text, the Plaintiffs have failed to allege any viable free speech concerns in their Complaint or their preliminary injunction papers. Therefore, there is no basis to consider the Plaintiffs' arguments about content-based and viewpoint-based restrictions or about strict scrutiny. Pls.' Mem. at 12-14. Also, for these same reasons, the Plaintiff's overbreadth argument fails where it is clear that the Law does not sweep in constitutionally-protected expression as the Plaintiffs indiscriminately surmise with little analysis and no legal argument. *Id.* at 16-17.

CONCLUSION

For all of the foregoing reasons, *Amici* respectfully submit that the Plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

GLBTQ Legal Advocates & Defenders
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The Boston Alliance of Gay, Lesbian, Bisexual & Transgender Youth
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CERTIFICATE OF SERVICE

I, Jennifer Levi, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on December 9, 2016.

/s/ Jennifer Levi
Jennifer Levi