UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

Horizon Christian Fellowship, *et al*,	
Plaintiffs,	Case No. _____
v.	**Plaintiffs' Motion for Preliminary Injunction**
Jamie R. Williamson, *et al*;	
Defendants.	**Oral Argument Requested**

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Abundant Life Church, House of Destiny Ministries, Community Christian Fellowship Haverhill, and Horizon Christian Fellowship (collectively, "Churches"); and Plaintiffs David Aucoin, Esteban Carrasco, Marlene Yeo, and Gary Small (collectively, "Pastors"), by and through their counsel, bring this Motion for a Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, based on Plaintiffs Memorandum in Support of Their Motion for a Preliminary Injunction, and exhibits thereto, and the Verified Complaint previously filed with the Court.

Plaintiffs seeks a preliminary injunction prohibiting the Defendants from enforcing or applying Massachusetts General Laws chapter 272 sections 92A and 98 against the Plaintiffs.

Respectfully submitted this 10th day of October, 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: October 10, 2016

/s/ Steven O'Ban
Steven O'Ban

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

Horizon Christian Fellowship, *et al*, Plaintiffs, v. Jamie R. Williamson, *et al*; Defendants.	Case No. _____ **PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION** **Oral Argument Requested**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

This case is about who controls Massachusetts churches. Are pastors and churches still free to teach their religious beliefs and use their houses of worship to reflect and reinforce those beliefs? Or can state officials impose on churches a Hobson's choice between violating their faith and risking imprisonment? This shouldn't be a question. The First Amendment forbids government intrusion into ecclesiastical matters like church teaching and administration. Yet Massachusetts officials have ignored these boundaries and injected themselves into what churches teach, believe, and promote. Fearing devastating financial penalties and imprisonment, Massachusetts churches and their pastors are now forced to seek judicial protection of their most basic First Amendment rights.

Plaintiffs Horizon Christian Fellowship ("Horizon"), Abundant Life Assemblies of God ("Abundant Life"), House of Destiny Ministries ("Destiny"), and Faith Christian Fellowship of Haverhill ("Faith Christian"), (referred to collectively as "Churches") are four churches in the Christian faith tradition. They all hold weekly worship services, Bible studies, youth events, and other ministry activities in furtherance of their overarching religious mission: communicating the transformational love of Jesus Christ. Motivated by their desire to build relationships and share their beliefs with their communities, the Churches welcome the public to attend their religious services and seek out ways to minister to their communities—everything from sharing meals with the poor and homeless, to welcoming the youth for neighborhood basketball outreaches, to allowing certain outside groups to use their church buildings.

The Churches believe the historic Christian teachings about human sexuality. For millennia, a central tenet of the Christian faith has been that God created two distinct, immutable, and complementary sexes—male and female—to reflect God's image. From their founding, the

Churches have not only taught this doctrine, but also structured their building policies to reflect and reinforce that doctrine. For example, the Churches have always maintained separate changing rooms and restrooms for men and women based on the unique biological differences between the sexes. The Churches could freely do so, until the Massachusetts Commission Against Discrimination ("MCAD") and the Attorney General recently threatened those freedoms through the state's public accommodations laws.

Massachusetts's public accommodations laws (codified at Massachusetts General Laws chapter 272 sections 95A, 98 (collectively called the "Act")), forbid discrimination in three ways:

1) making "any distinction, discrimination or restriction" based on a protected class, relative to a person's admission or treatment in any place of public accommodation, Mass. Gen. Laws ch. 272 § 98 ("facility use mandate");

2) "directly or indirectly … publish, issue, circulate, distribute or display…in any way, any advertisement … 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 a protected class relative to a person's admission or treatment in any place of public accommodation, Mass. Gen. Laws ch. 272 § 92A ("publication ban"); and

3) "aid[ing] or incit[ing]" the violation of the facility use mandate or publication ban in whole or in part, Mass. Gen. Laws ch. 272 §§ 92A, 98 (collectively, "conspiracy ban").

Violations of the Act are punished by up to $50,000 in penalties and 365 days in jail. *See id.*; *see also id.* at ch. 151B § 5. The Act defines a public accommodation as "any place … which is open to and accepts or solicits the patronage of the general public…" *Id.* ch. 272 §92A. It does not expressly exempt churches—or any other religious institution. *See id.* (listing examples of public accommodations, including an auditorium, theatre, music hall, meeting place or hall).

In July 2016, the Massachusetts legislature enacted S.B. 2407, which added "gender identity" as a protected class under the Act. *See* 2016 Mass. Legis. Serv. Ch. 134 (S.B. 2407). The legislature directed MCAD to issue regulations or guidance to effectuate the new law, which took full effect October 1, 2016. *See id.*, Sec. 4-5. On September 1, 2016, MCAD issued its "Gender Identity Guidance" which states, in part:

> Even a church could be seen as a place of public accommodation if it holds a secular event, such as a spaghetti supper, that is open to the general public.

"Gender Identity Guidance" p. 4. In a footnote, MCAD commented: "All charges, including those involving religious institutions or religious exemptions, are reviewed on a case-by-case basis." *Id*. p. 4, n.13. MCAD does not identify objective standards for applying its new "spaghetti supper" test. But MCAD intends to apply the Act to churches. And its interpretation is especially troubling because MCAD also wields enforcement power and enjoys substantial deference from Massachusetts courts. *See* Mass. Gen. Laws ch. 151B § 3; *see also Dahill v. Police Dept. of Boston*, 748 N.E.2d 956, 961 (Mass. 2001) ("The guidelines represent the MCAD's interpretation of G.L. c. 151B, and are entitled to substantial deference…."); *see also Currier v. Nat'l Bd. of Med. Exam'rs*, 965 N.E.2d 829, 842 (Mass. 2012) ("[T]he Legislature essentially delegated to the commission the authority in the first instance to interpret the statute and determine its scope. We thus are guided in our interpretation of the statute by the construction afforded by the commission.").

But not only does MCAD apply the Act to churches, the highest law enforcement officer in Massachusetts, the Attorney General, does as well. The Attorney General provides consumers with numerous resources on her website, including a list of "public accommodations." Nestled

within that list of public accommodations—without qualification, nuance, or even a "spaghetti supper" test—are "houses of worship."[1]

Classifying churches as public accommodations under the Act has far-reaching ramifications. The Churches have no choice but to conclude that their First Amendment freedoms are now in jeopardy and that simply communicating their beliefs about human sexuality and using their houses of worship consistently with their beliefs about biological sex could land them in enforcement proceedings and even jail.

Destiny and Abundant Life have passed written restroom policies to establish in writing how their facilities are to be used consistently with their faith, but these two churches fear publicly publishing those policies. All of the Churches still enforce their unwritten policies governing use of sex-specific changing areas and restrooms, but know that their conduct could—at any moment—land them in the legal crosshairs of their own government.

Even the Churches' pastors, Plaintiffs Gary Small of Horizon, David Aucoin of Abundant Life, Esteban Carrasco of Destiny, and Marlene Yeo of Faith Christian (collectively, "Pastors"), have curbed their public teaching about biological sex because the Act is written broadly enough to proscribe religious statements about God's design for two distinct and mutually complimentary male and female genders both inside and outside of the church.

The government's overreach violates the First Amendment and the foundational freedoms it embodies: the freedom of church autonomy, freedom to exercise religion, freedom of speech, freedom of expressive association, and freedom to peaceably assemble without government interference. The Act's coercive demands harm the Churches' and Pastors' ability to teach religious doctrine, to govern themselves, and to follow their faith.

[1] Available at http://www.mass.gov/ago/consumer-resources/your-rights/civil-rights/public-accomodation.html, *last visited* October 8, 2016.

A Hobson's choice is no choice at all. And rattling keys to the jail house inside the church doors is no way to maintain the fundamental freedoms upon which our country was founded. Because the state of Massachusetts has overstepped its lawful bounds, the Churches and Pastors need a preliminary injunction to stop this ongoing irreparable harm to their First Amendment rights and to bar the government from encroaching on areas where it does not belong—the Churches' changing rooms and restrooms, their sanctuaries, their pulpits, and their voices in public.[2]

ARGUMENT

The Churches need a preliminary injunction to avoid the imminent loss of constitutional rights. To obtain one, the Churches must establish (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) a balance of equities in their favor; and (4) service of the public interest. *See Arborjet, Inc. v. Rainbow Treecare Scientific Advancements, Inc.*, 794 F.3d 168, 171 (1st Cir. 2015). The Churches satisfy all four prongs here.

I. The Churches and their Pastors Will Likely Succeed in Showing that the Act Violates the First and Fourteenth Amendments.

The First and Fourteenth Amendments protect the Churches' right to communicate their doctrine and govern their internal affairs. But Massachusetts's public accommodations law (General Laws chapter 272 §§ 98 and 92A)—including the new gender identity amendments that took effect October 1, 2016—forces the Churches to use their facilities contrary to their faith and chills both the Churches' and their Pastors' speech without a compelling government interest, violating both the Religion Clauses and the Free Speech Clause. Additionally, both the

[2] For the sake of brevity, Plaintiffs have omitted a comprehensive statement of the facts and instead incorporate by reference Plaintiffs' Verified Complaint.

publication ban (§ 92A) and conspiracy ban (§ 98) are unconstitutionally overbroad and unconstitutionally vague, infringing the Churches' Due Process and Free Speech rights.[3]

A. The facility-use mandate violates the Churches' right to determine their religious beliefs, communicate those beliefs to their members and the public, and operate their facilities consistently with those beliefs without government interference.

1. The facility-use mandate intrudes into internal church affairs in violation of the church autonomy doctrine.

The First Amendment shields the autonomy of churches to control their internal affairs without government interference. Specifically, the Churches' religious beliefs about human sexuality and the way in which they communicate those beliefs through teaching and facility policies are constitutionally protected.

The Free Exercise and Establishment Clauses guarantee houses of worship the right to determine—without government interference—their own doctrine, polity, religious services, teaching, relationships with ministers and members, church administration, and other matters of internal governance. *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Churches in N. Am.*, 344 U.S. 94, 116 (1952) (striking down a state law determining the use of a cathedral); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct 694, 711-12 (2012) ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on their way."); *Serbian Eastern Orthodox Diocese for U.S. of America & Canada v. Milivojevich*, 426 U.S. 696, 710 (1976) (church autonomy principle "applies with equal force to church disputes over church polity and church administration"); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985)

[3] The Churches raise additional claims in their complaint and reserve the right to pursue them in later filings.

(dismissing suit based on claims of sexual and racial discrimination). "The principles articulated in the church autonomy line of cases also apply to civil rights cases." *Bryce v. Episcopal Churches in the Diocese of Colo.,* 289 F.3d 648, 656 (10th Cir. 2002).

The First Amendment has long recognized "a private sphere within which religious bodies are free to govern themselves in accordance with their own [religious] beliefs." *Hosanna-Tabor,* 132 S. Ct at 712. Indeed, the First Amendment—and especially the Religion Clauses—"radiat[e] ... a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of Church government as well as those of faith and doctrine." *Kedroff,* 344 U.S. at 116.

Under the church autonomy doctrine, the threshold inquiry is whether the actions complained of are "rooted in religious belief." *Bryce,* 289 F.3d 657. Protecting a church's right to express or communicate its faith necessarily includes preventing the government from interfering "in the way that the Church wishes its doctrine to be expressed," otherwise the government may engage in improper "back-door doctrinal determination[s]." *Menorah Chapels at Millburn v. Needle,* 899 A.2d 316, 321 (N.J. 2006).

The church autonomy doctrine applies to court decisions and legislative enactments alike. At issue in *Kedroff* was the validity of a state law determining the control of a cathedral. *Kedroff,* 344 U.S. at 115. A New York state law required every Russian Orthodox Church within the state to recognize as authoritative the decisions of the governing body of North American Churches, instead of the supreme authority of the Russian Orthodox Church in Moscow. The Supreme Court invalidated the law because the right to use the church building was strictly a matter of ecclesiastical government over which the state had no authority and was an intrusion

into the "forbidden area of religious freedom contrary to the principles of the First Amendment." *Id*. at 119.

The U.S. Supreme Court's most recent pronouncement of the church autonomy doctrine related to religious organizations' right to select their leaders, even when the government enforces nondiscrimination laws. *See Hosanna-Tabor*, 132 S.Ct. at 711-12. ("The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the … critical process of communicating the faith.") (Alito, J. and Kagan, J., concurring). The Court concluded that the Religion Clauses of the First Amendment protect a private sphere within which religious bodies are free to govern themselves without government interference, even when the government is enforcing nondiscrimination laws. "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 their own faith and mission." *Id.* at 706.

A house of worship embodies and furthers the religious expression of its congregants. Religion includes important communal elements for most believers, and they exercise their religion through religious organizations, churches being paramount:

> Determining that certain activities are in furtherance of an organization's religious mission …is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

Corp. of Presiding Bishop of Churches of Jesus Christ of Latter–Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

Ignoring this "solicitude," the Act intrudes into the "forbidden area" of church autonomy. It infringes on the Churches' freedom to determine how they communicate their faith both verbally, in writing, and through the use of their facilities. Specifically, the facility use mandate:

1. contradicts the Churches' doctrine that every service and event that takes places in the church facility—like worship services, youth activities, and community events—it is in furtherance of the Churches' religious purposes and therefore a religious activity;
2. is based on the inherently religious judgment that the Churches' control of their facilities is not reflective of the Churches' ability to communicate their beliefs, govern themselves, or determine their religious identity;
3. interferes with the Churches' right to communicate their beliefs;
4. encroaches upon the authority of the Churches' ecclesiastical government of their own affairs; and
5. coerces the Churches to abandon their religious beliefs regarding human sexuality.

The Defendants' failure to recognize that the facility-use mandate directly interferes with the Churches' ecclesiastical authority to inculcate their faith illustrates the importance of the First Amendment's protection against "secular control or manipulation." *Kedroff*, 344 U.S at 116.

Massachusetts's enforcement of the facility-use mandate against the Churches implicates religious liberty interests similar to those threatened when the government interferes with the right of religious organizations to choose their own leaders. *See Hosanna-Tabor*, 132 S.Ct. at 706. As when the government attempts to enforce employment nondiscrimination laws in the selection of spiritual leaders, the facility-use mandate encroaches upon the Churches' internal governance of their facilities, how the Churches' religious beliefs about sexuality will be embodied in the use of their own buildings, and the Churches' right to shape their own faith and mission. *Id.* The Churches determined that their changing room and restroom policies should reinforce their beliefs about the immutability and complementariness of the male and female sexes. This is a self-defining decision of these religious communities.

2. The facility-use mandate allows government bureaucrats to make subjective, case-by-case determinations in violation of the Free Exercise and Establishment Clauses.

The facility-use mandate also violates both the Free Exercise Clause and the Establishment Clause because it allows government bureaucrats to subjectively determine on a case-by-case basis whether the Churches' activities are sufficiently religious or not. This system of individualized government assessments renders the Act not generally applicable, and therefore subject to strict scrutiny under the Free Exercise Clause. *See Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 883-885 (1990) (noting that laws allowing for individualized government assessments give rise to strict scrutiny). The Defendants have no compelling interest in coercing churches to violate their deeply-held convictions in administering their own houses of worship, and any purported interest is not advanced in the least restrictive means possible. *See id.* Simply put, the risk of a government official determining "whether an activity is religious or secular requires a searching case-by-case analysis" that results in "considerable ongoing government entanglement in religious affairs," which plainly violates the Establishment Clause. *Amos,* 483 U.S. at 343. The facility use mandate also empowers MCAD to interfere with faith-based determinations about church facility use. The Establishment Clause prohibits government involvement in such ecclesiastical decisions. *See Hosanna-Tabor,* 132 S. Ct. at 706.

MCAD's and the Attorney General's declarations that the facility-use mandate will be enforced against the Churches, and other Massachusetts houses of worship, is a disturbing interference "with the internal governance of the Church[es]," how the Churches' beliefs will be personified, and the Churches' "right to shape their own faith and mission." *Hosanna-Tabor*, 132 S.Ct, at 706. The facility-use mandate is therefore unconstitutional and the Churches can, accordingly, demonstrate that they are likely to succeed on the merits of their Free Exercise and Establishment claims.

B. The publication ban and conspiracy ban violate the Churches' and Pastors' right to communicate their doctrine and control their facility use.

The Churches and their Pastors want to communicate the Bible's teaching about biological sex in sermons, speeches, and other public statements. Destiny and Abundant Life also want to publish their changing room and restroom policies to their members and the public on their Facebook pages and as an insert in its their weekly Sunday morning bulletins to ensure that their policies are consistently observed. And the Pastors want to publicly speak their beliefs about human sexuality without being accused of aiding or inciting discrimination. But the publication ban and conspiracy provision prohibit this constitutionally-protected speech in violation of the First Amendment.

3. The publication ban and conspiracy ban regulate constitutionally-protected religious speech.

The publication ban states that public accommodations may not

> directly or indirectly … publish, issue, circulate, distribute or display … in any way, any advertisement … 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 … gender identity.

Mass. Gen. Laws ch. 272 § 92A. And the conspiracy ban prohibits anyone from aiding or inciting the violation of the facility use mandate or conspiracy ban. *See* id. §§ 98, 92A. The publication ban and conspiracy ban are so broadly written as to prohibit these Churches and their Pastors from delivering sermons or public statements concerning their religious beliefs about biological sex, discussing those beliefs in connection with their facility policies, or distributing Destiny's and Abundant Life's' written changing room and restroom policy.

These provisions chill and prohibit religious speech. The Churches want to communicate their doctrine and their biblically-informed application of that doctrine. Private religious speech,

"far from being a First Amendment orphan," enjoys full and robust protection under the Free Speech Clause. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

4. The publication ban is content and viewpoint based.

"It is axiomatic that the government may not regulate speech based on its substantive content…." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). A law regulates content if it "draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2227 (2015). Yet the publication ban and conspiracy ban do precisely this. They prohibit speech about certain topics (gender identity) and permit speech about other topics (helping the poor), tethering legality to the message expressed. MCAD cannot evaluate the Churches' and Pastors' compliance with the Act without considering the ideas or messages they communicate—making the publication ban a textbook example of content-based restriction.

But not only is the publication ban a content-based restriction, it perpetrates a particularly "egregious form of content discrimination" called viewpoint discrimination. *Rosenberger*, 515 U.S. at 829. Viewpoint discrimination targets not only speech content, but the "particular views taken by speakers on a subject." *Id*. The Act allows for this noxious discrimination: it permits speech that favors access to changing rooms and restrooms based on gender identity, but proscribes speech that favors access to these sensitive spaces based on biological sex. *See* § 92A. This is classic viewpoint discrimination.

5. The publication ban and conspiracy ban fail strict scrutiny.

Content and viewpoint-based speech restrictions are presumptively unconstitutional. *See Reed*, 135 S.Ct. at 2226 ("Content-based laws—those that target speech based on their communicative content—are presumptively unconstitutional…."); *Naser Jewelers, Inc. v. City*

Of Concord, N.H., 513 F.3d 27, 33 (1st Cir. 2008) ("Content-based regulations are presumed to be unconstitutional and the government bears a heavy burden of justification."). The Defendants cannot overcome this presumption by portraying the Churches' speech as promoting an illegal activity banned under the facility-use mandate. As discussed above, the Churches have a constitutional right to direct and control their facility in harmony with their religious beliefs. This includes establishing standards for the use of sex-specific facilities. Communicating these standards, as the Churches want to do, is therefore lawful activity.

Thus, the Defendants must justify their publication ban and conspiracy ban by proving that they are narrowly tailored to serve compelling state interests. *See Reed*, 135 S.Ct. at 2226. They cannot meet this standard. The government has no compelling interest in censoring religious messages or ideas—especially those doctrinal beliefs expressed within a house of worship. The Churches' religious beliefs are fundamental to their understanding of the Bible's teaching regarding the immutability and complementariness of sex. Their beliefs are hardly new. The founder of their faith, Jesus Christ, taught in Matthew 19:4: "at the beginning the Creator 'made them male and female.'"

Nor can MCAD and the Attorney General justify these unconstitutional provisions by trying to shelter people from ideas they may find distasteful. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Furthermore, the publication ban and conspiracy ban lack narrow tailoring. They do not merely ban words declining to admit persons to accommodations or facilities, but also ban oral and written communications that could be interpreted as aiding or inciting—in any way—that

denial. Any criticism of a group or ideas associated with a group could imply that group is not permitted to use the sex-specific facilities of their choice. This sweeps in a substantial amount of constitutionally-protected expression, as discussed in greater detail below regarding overbreadth. Thus, the Defendants cannot satisfy strict scrutiny. Their content and viewpoint-based speech restrictions are unconstitutional and the Churches can therefore demonstrate that they are likely to succeed on the merits of their Free Speech claim.

C. The Act is unconstitutionally vague in violation of the Fourteenth Amendment.

While MCAD has clearly interpreted the Act to apply to Churches, the Act's imprecise language opens the door to this and various other interpretations, rendering it unconstitutionally vague. Vague, imprecise laws violate the Fourteenth Amendment's Due Process Clause by "fail[ing] to provide a person of ordinary intelligence fair notice of what is prohibited." *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016); *see also City of Chicago v. Morales*, 527 U.S. 41, 90 (U.S.1999) (stating same).

"[W]hen First Amendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required." *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). In fact, "[a] more stringent vagueness test is used when the rights of free speech or association are involved." *Butler v. O'Brien*, 663 F.3d 514, 520 (1st Cir. 2011). And for good reason. In the face of vague laws, citizens voluntarily curtail their First Amendment activities because they fear that those activities could be characterized as illegal. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). The Churches, for example, have self-censored not only their speech about how their facilities are to be used and refused to publish their written facility policies, but have also censored what their church leaders preach from the pulpit about human sexuality. The Pastors themselves have censored their public statements about biological sex and gender identity.

1. The Act is vague in three respects. First, the Act does not clearly indicate whether churches are, or are not, subject to the Act. The Act imprecisely defines "public accommodation" as "any place … which is open to and accepts or solicits the patronage of the general public…." Mass. Gen. Laws ch. 272 § 92A. It goes on to state that "without limiting the generality of the definition," the following are examples of public accommodations: "an auditorium, theatre, music hall, meeting place or hall." The Massachusetts legislature failed to provide a clear exemption for religious institutions. The legislature charged MCAD with adopting regulations or guidelines to interpret the Act, but MCAD promulgated an impossibly vague "spaghetti supper" test, and adopted a subjective case-by-case approach to determine when it thinks churches are public accommodations. To make matters worse, the chief law enforcement officer of Massachusetts simply categorized all houses of worship as public accommodations. Persons of ordinary intelligence, like the Churches and their Pastors, are left to speculate about whether, or when, MCAD might decide that a particular church is a public accommodation.[4]

Second, the publication ban is also vague as-applied to the Churches. Section 92A makes it a discriminatory practice to "directly or indirectly" publish information that is "intended to discriminate." It is unclear what qualifies as "indirectly" publishing, and whether sincere religious beliefs in the context of a church could be classified as "intended to discriminate."

Third, the conspiracy ban is vague. The Churches and Pastors are left to guess what speech and conduct might constitute aiding or inciting a violation of the facility use mandate or publication ban. *See* Mass. Gen. Laws ch. 272 §§ 98, 92A. The surrounding statute offers no narrowing context. "[W]ithout statutory definitions, narrowing context, or settled legal meanings," persons of ordinary intelligence—including the Churches and their Pastors—are left

[4] A constitutionally-required reading would exempt churches.

to speculate about what qualifies as aiding or inciting a violation of the Act. *U.S. v. Williams*, 553 U.S. 285, 306 (2008).

As a result, the Sections 98 and 92A of the Act are impermissibly vague and thereby unconstitutional on due process grounds. A preliminary injunction is necessary to stop the chilling effect both on the Churches, their Pastors, and on other non-parties not before this Court. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (noting that facial vagueness challenges are designed to prevent any chilling effect that imprecise laws may have on the protected speech of non-parties).

D. The publication ban is unconstitutionally overbroad in violation of the First Amendment.

"The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coal*., 535 U.S. 234, 244 (2002). The publication ban is unconstitutionally overbroad on its face because it sweeps within its ambit a substantial amount of constitutionally-protected expression. *See URI Student Senate v. Town Of Narragansett*, 631 F.3d 1, 12 (1st Cir. 2011) ("[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'").

According to the Act and MCAD's interpretation, both the facility-use mandate and the publication ban apply to the Churches when they host "secular" events. But all activities of the Churches are in furtherance of their religious mission and purpose. Thus, this interpretation of the Act sweeps within its ambit private religious speech that occurs before, during, and after worship services and all other religious programming. This language not only prohibits the

Churches from teaching about God's design for human sexuality, and publishing their changing room and restroom policy, but it also appears to prohibit church leaders from even responding with a negative answer to questions about changing room and restroom access.

As discussed above, the Churches have the First Amendment right to control their doctrine, beliefs, worship services, operations, polity, and facility in harmony with their religious beliefs. This includes establishing standards for the use of sex-specific facilities. Communicating these standards, as the Churches want to do, is therefore lawful activity.

II. The Churches are Suffering Irreparable Harm.

Because the Churches "have made a strong showing of likelihood of success on the merits of their First Amendment claim, it follows that the irreparable injury component of the preliminary injunction analysis is satisfied as well." *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 15 (1st Cir. 2012). The Act, and its interpretation, represses the Churches' freedom to communicate their beliefs and tramples on their freedom to use their facilities consistent with their faith. That harm is ongoing and irreparable. Fearing reprisal, the Churches chill and self-censor their speech. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id*. (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)). Only injunctive relief can stop further harm to the Churches' First and Fourteenth Amendment rights.

III. A Balance of Equities Favors the Churches.

Without an injunction, the Churches will continue to be deprived of their free speech, free exercise, and due process rights. With an injunction, MCAD and the Attorney General lose nothing because "the Government does not have an interest in the enforcement of an unconstitutional law." *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003).

Moreover, the preliminary injunction is limited in scope and only bars the Defendants from enforcing the law against the Churches—it would not otherwise impair enforcement of the law. Thus, the balance of hardships favors the Churches.

IV. A Preliminary Injunction Serves the Public Interest.

Finally, it is axiomatic that protection of First Amendment rights serves the public interest. *See Minn. Citizens Concerned for Life v. Swanson*, 692 F.3d at 870 (8th Cir. 2012). The public benefits when Churches—like Horizon, Abundant Life, Destiny, and Faith Christian—can continue communicating their message of hope and redemption in Jesus Christ, and welcoming all to enter and observe those beliefs as reflected consistently in everything from the pulpit, to the pew, to the use of their facilities.

CONCLUSION

If Jefferson's "wall of separation" has any true meaning and effect, it is to stop the government from controlling churches. To accomplish their religious missions, the Churches and their Pastors must have the autonomy to choose their beliefs, teach those beliefs, and operate by those beliefs. MCAD and the Attorney General have now bulldozed that autonomy. They threaten the Churches' very existence with devastating financial penalties and even imprisonment. Even now, the Churches and their Pastors are forced to chill their speech and curb their protected First Amendment activity. Plaintiffs Horizon, Abundant Life, Destiny, Faith Christian, and their Pastors, therefore request a preliminary injunction to stop this ongoing constitutional harm and to restore their control over their own changing rooms and restrooms, sanctuaries, and pulpits.

Dated: October 10, 2016

Respectfully submitted,

/s

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**Pro hac vice application pending*

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: October 10, 2016

/s/ Steven O'Ban
Steven O'Ban