IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

OUR LADY'S INN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 4:17-cv-01543-AGF
	)	
CITY OF ST. LOUIS,	)	
	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Federal Rules

State Statutes

Municipal Ordinances

Other Sources

INTRODUCTION

Until now, the City of St. Louis has forbidden discrimination based on the familiar categories of "race, color, age, religion, sex, familial status, disability, sexual orientation, national origin or ancestry." To this list, a new ordinance adds a new protected class based not on an immutable characteristic or classification of persons historically subject to social opprobrium, but rather on conduct: those who have made or expect to make "reproductive health decision[s]."

Ordinance 70459, which took effect on February 13, 2017, purports to address discrimination in employment, housing and realty against individuals who have had, or are planning to have, abortions—among other "reproductive health decision[s]." Proponents and sponsors of the Ordinance, however, were unable to point to the actual occurrence of any such discrimination in the City of St. Louis. Ordinance 70459 is accordingly a remedy in search of a problem.

Rather than solving problems, the Ordinance creates them. The vague and sweeping scope of the Ordinance conflicts with the First and Fourteenth Amendments of the United States Constitution and several provisions of Missouri law.

Ordinance 70459 defines "reproductive health decision" in language that is both far-reaching and confusing. A "reproductive health decision" is "any decision related to the use or intended use of a particular drug, device, or medical service related to reproductive health, including the use or intended use of contraception or fertility control or the planned or intended initiation or termination of a pregnancy." This definition goes well beyond an individual woman's decision to initiate a pregnancy[1] or have an abortion. It includes "any decision" by

[1] Discrimination on the basis of pregnancy has long been outlawed under Missouri and federal law. *See Sheridan v. Div. of Employment Sec.*, 425 S.W.3d 193, 202 n.4 (Mo. App. W.D. 2014) ("[N]umerous state and federal laws protect against adverse employment decisions based on pregnancy."); *Self v. Midwest Orthopedics Foot & Ankle, P.C.*, 272 S.W.3d 364, 366 (Mo. App. W.D. 2008) (holding that pregnancy discrimination is actionable under the

anyone that is "related to" pregnancy or abortion. Under the Ordinance's terms, the pregnancy being initiated or terminated may be one's own or someone else's.

The new protected class created by Ordinance 70459 thus includes—among others—abortion activists, advocates, and providers, all of whom have made "decision[s] related to" abortion. It follows that Ordinance 70459 forbids Plaintiffs, including their elementary schools and maternity home, from making adverse employment, housing or realty decisions based on an individual or entity being an abortion activist, advocate, or provider. Plaintiffs oppose abortion and consider it immoral, according to the teachings of their religion. Thus, Ordinance 70459 forbids Plaintiffs from speaking and acting in accordance with their sincerely held religious beliefs, thereby violating their religious freedom, as well as freedom of expression and association.

The Ordinance also contravenes Missouri law. In 2007, Missouri established an Alternatives to Abortion Program (Mo. Rev. Stat. 188.325), authorizing and funding alternatives-to-abortion providers like Plaintiff Our Lady's Inn to provide housing and other services to women only if they have chosen not to have an abortion. The state-mandated activities of Our Lady's Inn would be illegal under Ordinance 70459. In 1986, Missouri provided that "[i]t is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes." Mo. Rev. Stat. 188.010. And just this year, the Missouri Legislature passed Mo. Rev. Stat. 188.125, which

---

Missouri Human Rights Act); 42 U.S.C. § 2000e(k) ("Pregnancy Discrimination Act of 1978"); 42 U.S.C. § 3602 ("Fair Housing Act") ("The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant . . .").

preempts any local laws that infringe on the operations and rights of alternatives to abortion agencies such as Our Lady's Inn..

The City of St. Louis intentionally included in its new protected class not only individuals but also organizations that provide or promote abortion. In forbidding employment discrimination, the Ordinance refers only to protected "individuals" or "employees." In forbidding discrimination in housing or sale or lease of realty, however, the Ordinance protects not only "individuals" but also "persons," which it defines to include corporations and all other kinds of business organizations. Therefore, an owner of real estate would violate the Ordinance by refusing to rent office space to an abortion provider or advocacy organization.

Ordinance 70459 expressly forbids constitutionally protected speech, barring employers, as well as persons selling or leasing real property or offering housing, from printing or publishing any statement which expresses "any preference, limitation, specification or discrimination because of reproductive health decisions . . . ." Sections Two (B)(5) and Two (C)(1)(f). These are "speech codes" that violate the First Amendment's guarantee of freedom of speech and freedom of association.

The City of St. Louis included a limited religious exemption that applies to a narrow and ill-defined category of religious objectors. The exemption applies to "religious institution[s], corporation[s], association[s], societ[ies], health care facilit[ies] [and] educational institution[s] with historic religious affiliation" (religious organizations), without further defining what those terms mean. The exemption is only partial, in that it allows only that these religious organizations are not required to allow abortions on their property, to provide or pay for abortions, or to provide health insurance coverage for abortions. Sections Two (B)(6) and Two (C)(1)(j). But in all other respects, religious organizations are subject to the new Ordinance, and

individuals with sincere religious, moral or ethical objections to abortion are not exempt in any way.

Even if the Ordinance remedied some actual problem the City has not yet identified, applying it to Plaintiffs is nonsensical. Our Lady's Inn, for instance, has the sole mission of serving as an alternative to abortion for women struggling with crisis pregnancies. Ordinance 70459 affects Our Lady's Inn as both an employer and as an entity that houses employees, pregnant women and new mothers. The Ordinance prohibits Our Lady's Inn from employing only individuals who oppose abortion. The Ordinance requires Our Lady's Inn to house women who intend to have or *do* have abortions, even though Our Lady's Inn receives money from the State of Missouri precisely to help women avoid abortion.

Archdiocesan Elementary Schools require that teachers and other employees sign a "Witness Statement" attesting that they will not publicly support abortion and will otherwise live in harmony with the teachings of the Catholic faith both in their professional and personal lives. Ordinance 70459 forbids requiring such a statement and promises a criminal penalty—a fine for organizations, and a fine and/or jail time for individuals—for anyone who effectuates the Witness Statement policies of Archdiocesan Elementary Schools. The Ordinance also clearly ignores Archdiocesan Elementary Schools' First Amendment immunities under *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012).

The Ordinance even reaches Plaintiffs' employee health insurance plans. It specifically exempts some religious organizations from having to provide health insurance for abortion, but it forces non-exempt parties, including for-profit company O'Brien Industrial Holdings, LLC and its owner Frank Robert O'Brien Jr., to cover abortions in their employee health care plans. It is not clear whether this limited exemption for religious organizations applies to Our Lady's Inn.

This abortion insurance mandate directly violates rights secured by Missouri law. *See* Mo. Rev. Stat. 191.724, 376.805.1, 188.125.6.

For its enforcement, Ordinance 70459 incorporates by reference Ordinance 67119. However, the enforcement provisions in Ordinance 67119 plainly say that they apply to that ordinance alone. Further, for protected classes not named in the Missouri Human Rights Act, Chapter 213, the only means of enforcing Ordinance 67119 is by prosecution for a criminal misdemeanor. Thus, Ordinance 70459 either fails because it has no means of enforcement or it is void for vagueness because it is a law that seeks to impose criminal liability without adequate notice of what it prohibits and any sanction therefore.

The City of St. Louis enacted Ordinance 70459 with knowledge that it would coerce religious employers, as well as other pro-life individuals and organizations, to violate their sincerely held religious beliefs, their pro-life missions, or both, which not only align with state law but are in some cases specifically authorized and funded by the State of Missouri. Ordinance 70459 prevents Plaintiffs—indeed, it prevents *all* religious institutions, faith-based employers, and pro-life organizations—from making employment and housing and real estate decisions consistent with their institutional missions and sincere moral and religious beliefs. Ordinance 70459 denies religious and pro-life organizations the right to practice their faith, to freely associate around a cause, to speak freely, and to be true to their missions.

The Ordinance makes organizations with offices or staff within the City vulnerable to numerous and costly legal actions when an employee or applicant for employment claims that he or she was passed over for promotion, reprimanded, or not hired because of a "reproductive health decision" such as publicly advocating, promoting, participating in, or providing abortions. Those looking to sell or lease real estate are similarly at risk from discrimination lawsuits.

Plaintiffs therefore seek relief in this Court to protect the most fundamental of American rights. They move for summary judgment on their prayer for declaratory and injunctive relief to remedy Ordinance 70459's numerous violations of Plaintiffs' freedom of speech, freedom of association, and other rights secured by the U.S. Constitution and Missouri law.

FACTUAL BACKGROUND

I. The Plaintiffs

A. Our Lady's Inn

In 1982, Missouri nonprofit corporation Our Lady's Inn opened its doors in a former convent in South St. Louis City in order to provide a safe and loving home for pregnant women who sought an alternative to abortion. Statement of Material Facts, ¶1. The current home can accommodate 18 families. *Id*. It is usually filled to capacity with a waiting list. *Id*.

Our Lady's Inn also operates a four-family flat that provides transitional housing for women who have completed their stay in the residential shelter and are either working, attending school or enrolled in a job-training program. *Id*. at ¶2. Additionally, Our Lady's Inn operates Twice Blessed Resale Shop, which provides job experience and training for the women living at Our Lady's Inn. *Id*.

Our Lady's Inn also leases living space to women who are employees and serve as supervisors of residents. *Id*. at ¶3. Resident supervisors are required to agree with and espouse the pro-life position taken by Our Lady's Inn. *Id*.

In addition to housing and employment opportunities, Our Lady's Inn provides counseling, nursing care and various other services to women in pregnancy crises. *Id*. at ¶4. When a family leaves, Our Lady's Inn offers them two years of "aftercare" case management. *Id*.

As a pro-life agency, Our Lady's Inn openly opposes the procurement or facilitation of abortion by its clients or its employees. *Id*. at ¶5. Our Lady's Inn, as a matter of sincerely held religious belief, believes that abortion interferes with God's design for humanity and thus it is morally objectionable. *Id*.

Women who plan to have abortions, or who have recently procured abortions, are not eligible for admittance to Our Lady's Inn. *Id*. at ¶6.

In accordance with these positions, Our Lady's Inn is part of, and its mission is consistent with the Missouri Alternatives to Abortion Program, established in 2007 through Mo. Rev. Stat. 188.325. *Id*. at ¶7. The program assists low-income pregnant women in carrying their unborn children to term instead of having abortions, and in caring for their children or placing their children for adoption. *Id*. The program provides services and counseling during pregnancy and following birth for up to one year. *Id*. The Missouri Legislature has budgeted $6,458,561 for the Alternatives to Abortion Program for fiscal year 2018. *Id*.

Since 1982, Our Lady's Inn has served as a life-affirming alternative to abortion for more than 6,400 women who have chosen life for their unborn babies. *Id*. at ¶8. For 35 years these women and families have been sheltered and supported in their efforts to live healthy and productive lives, attain educational goals, gain employment and secure stable housing. *Id*.

Our Lady's Inn's private funding would be threatened if it facilitated abortion by housing women who were making plans to procure an abortion, as would its public funding as a maternity home and as an alternatives to abortion agency. *Id*. at ¶9.

Our Lady's Inn is continuously reviewing applicants to hire, and reviewing and promoting existing employees. *Id*. at ¶10. One criterion for employment at Our Lady's Inn is that the applicant support the maternity home's pro-life mission; if an applicant does not support the pro-life mission, Our Lady's Inn does not consider him or her to be a good candidate for employment. *Id*.

Since the enactment of Ordinance 70459, Our Lady's Inn has received phone calls and applications from individuals it believes are trying to test Our Lady's Inn's pro-life policies. *Id*.

at ¶11. Our Lady's Inn has spent substantial time and effort addressing these types of situations with its staff and analyzing possible liability under Ordinance 70459. *Id*.

Our Lady's Inn has 50 employees and provides 28 of them with health insurance. *Id*. at ¶12. Our Lady's Inn believes that providing health insurance for full-time employees is a requirement of justice and morality. *Id*. at ¶13. Health insurance is as critical a benefit to Our Lady's Inn employees as their wages. *Id*. Providing health insurance assists Our Lady's Inn to attract and retain employees and helps with maintaining a healthy staff. *Id*. Our Lady's Inn opposes providing its employees with abortion coverage as a matter of sincerely held beliefs, and Our Lady's Inn has employees whose sincerely held religious beliefs prohibit them from having insurance coverage for abortion. *Id*. at ¶14.

B. Archdiocesan Elementary Schools of the Archdiocese of St. Louis

Plaintiff Archdiocesan Elementary Schools of the Archdiocese of St. Louis (Archdiocesan Elementary Schools) is a Missouri nonprofit corporation with its principal place of business in St. Louis, Missouri. *Id*. at ¶15. Archdiocesan Elementary Schools is a group of Archdiocesan elementary schools administered by the Catholic Education Center and governed by the Archdiocesan Board of Catholic Education. *Id*. The school principals report directly to the Associate Superintendent for Elementary School Administration, who reports to the Superintendent for Elementary School Administration, who reports to the Most Reverend Robert J. Carlson, Archbishop of St. Louis. *Id*.

Archdiocesan Elementary Schools currently operates three elementary schools within the City of St. Louis: St. Louis Catholic Academy, Most Holy Trinity Academy, and St. Cecilia School and Academy. *Id*. at ¶16. The Archdiocesan Elementary Schools typically serve

economically disadvantaged families of parishes that are unable to provide a sufficient parish subsidy to sustain a school independently. *Id*.

The Archdiocese of St. Louis conducts its educational mission through its schools. *Id*. at ¶17. The first Catholic school opened in St. Louis in 1818. *Id*. Archdiocesan schools welcome students in all financial conditions, from all backgrounds, and of any or no faith. *Id*.

Archdiocesan Elementary Schools is particularly dedicated to teaching the underserved. *Id*. at ¶18. In 1947, as one of Archbishop Joseph E. Ritter's first acts upon arrival in St. Louis, he instructed all pastors in the Archdiocese to end racial segregation in the parochial schools. *Id*. It would be almost another seven years before the United States Supreme Court would follow suit for the nation's public schools. *Id*. Today, Archdiocesan Elementary Schools continues to exemplify the Catholic Church's dedication to teaching urban, minority, and non-Catholic youth. *Id*.

Archdiocesan Elementary Schools is a religious institution. *Id*. at ¶19. It is organized as a Missouri nonprofit corporation and exists exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. *Id*. All of Archdiocesan Elementary Schools' activities must be in accord with the Canons of the Catholic Church. *Id*.; *see, e.g.*, Canon 1398 ("A person who procures a completed abortion incurs a latae sententiae excommunication.").

Archdiocesan Elementary Schools employs approximately 25 religious educators who are either certified or in the process of obtaining certification as religion teachers by the Religious Education Department of the Catholic Education Office of the Archdiocese of St. Louis. Statement of Material Facts, at ¶20. All educators seeking this certification must hold a bachelor's degree with at least twelve credit hours in specified theology and religious education

courses from a Catholic college, university, or institute. *Id*. Teachers of Archdiocesan Elementary Schools spend part of every workday performing duties related to inculcating the Catholic faith in their schoolchildren. *Id*. Archdiocesan Elementary Schools' religion teachers are a principal source of religious instruction to students. The classes and teachers play a critical role in transmitting the Catholic faith. *Id*.

Archdiocesan Elementary Schools requires that its employees, upon application for employment, sign a Witness Statement attesting that they respect ecclesial authority, will not take a public position contrary to the Catholic Church, and will conduct their lives in a manner consistent with the teachings of the Catholic Church. *Id*. at ¶21. This requirement is imposed by the Archdiocese of St. Louis of all Catholic school employees throughout the Archdiocese. Among other doctrines, the Witness Statement requires signers to abide by the Catholic Church's longstanding and widely known opposition to abortion. *Id*. Catholic moral teaching condemns intentional human interference with or taking of life through abortion. *Id*. at ¶23; *see generally* Catechism of the Catholic Church ¶¶ 2270-75, *available at* http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm; *see id.* ¶ 2271 ("Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable. Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law . . .").

Accordingly, the Witness Statement signed by every teacher in a Catholic school in the Archdiocese of St. Louis states that "[o]btaining or assisting another to obtain an abortion" is contrary to the Church's teachings and "must be avoided during one's term of employment teaching/working in Catholic education." Statement of Material Facts, at ¶23.

The Catholic Education Office is always in the process of hiring, reviewing, promoting, and renewing the contracts of presently-employed teachers and other educators. *Id*. at ¶22. In Spring 2017, the office completed the bulk of new hires and contract renewals for teachers who will work for St. Louis's Catholic schools during the 2017-18 school year. *Id*. During the months of April through June, the Archdiocese hired or renewed the contracts of approximately 3,500 Catholic school employees. *Id*. Twenty-five of those were teachers and principals at Archdiocesan Elementary Schools. *Id*. Every one of those new and renewed employees was required to sign the Witness Statement as a condition of employment. *Id*.

Archdiocesan Elementary Schools has more than six employees in the City of St. Louis and thus is subject to the employment nondiscrimination section of the Ordinance. *Id*. at ¶24.

C. O'Brien Industrial Holdings, LLC and Frank Robert O'Brien Jr.

O'Brien Industrial Holdings, LLC (O'Brien Industrial Holdings) is a Missouri limited liability company with its principal place of business in St. Louis, Missouri. *Id*. at ¶25. O'Brien Industrial Holdings is the holding company for and owner of the Christy family of companies: Christy Catalytics, LLC; Christy Industrial Services Co., LLC; Christy Minerals Company, LLC; The Christy Refractories Company, LLC; and O'Brien Asset Management, LLC. *Id*. at ¶26.

Frank Robert O'Brien Jr. (Frank O'Brien), an individual and citizen of the State of Missouri, is the Chairman and Managing Member of O'Brien Industrial Holdings. *Id*. at ¶27. O'Brien Industrial Holding is a closely held company, and Frank O'Brien is the principal owner and holds the sole voting interest in the company. *Id*. He is responsible for setting all policies governing the conduct of all phases of the business of O'Brien Industrial Holdings and the Christy family of companies. *Id*.

O'Brien Industrial Holdings, through its subsidiaries, is engaged in the exploration,

mining and processing of refractory and ceramic raw materials (Christy Minerals); the manufacturing and distribution of refractory and insulation products (Christy Refractories); the installation of refractory products for all types of industries (Christy Industrial); and the supplying of ceramic and alumina balls to over 40 countries, as well as mass transfer media for the hydrocarbon and chemical processing industries (Christy Catalytics). *Id*. at ¶28.

O'Brien Industrial Holdings has its main offices at 4641 McRee Avenue in the City of St. Louis. *Id*. at ¶29. Prominently displayed in the company's lobby is a statue of the Sacred Heart of Jesus. *Id*. O'Brien Industrial Holdings and its subsidiaries share a common Mission and Values, which are published on O'Brien Industrial Holdings' website, provided to all prospective employees, and discussed with prospective business partners. *Id*. at ¶30. As there stated, the Mission of O'Brien Industrial Holdings "is to make our labor a pleasing offering to the Lord while enriching our families and society." *Id*. O'Brien Industrial Holdings' statement of the company's Values begins with the following: "Integrity. Our conduct is guided by the Golden Rule and the Ten Commandments." *Id*. at ¶31.

O'Brien Industrial Holdings' "Explanation of Mission and Values" posted on its website begins with a quotation from Ephesians 6:1-9, and proceeds to list the following company goals:

a. For all of O'Brien Industrial Holdings' employees to have the ability to own their own homes, accomplished through each employee's pay and an annual profit-sharing bonus;

b. For all of O'Brien Industrial Holdings' employees to have the ability to send their children to college, accomplished through a generous company scholarship program; and

c. For all of O'Brien Industrial Holdings' employees to have the opportunity to retire with dignity through participation in a 401(k) profit sharing plan.

Id. at ¶32.

O'Brien Industrial Holdings explains its Mission of "enriching society" by stating that the ownership of O'Brien Industrial Holdings and its subsidiaries "pledge to tithe on the earnings of the Companies." *Id*. at ¶33. Part of the tithing is through the "St. Nicholas Fund," an I.R.C. 501(c)(3) organization named for the fourth century bishop of Myra. *Id*. O'Brien Industrial Holdings asks its employees to "keep their eyes open" for situations where "a little monetary help may make a big difference to someone" and to notify the Company's St. Nicholas Committee if they see such a need. *Id*. The committee investigates such charitable referrals and responds to them anonymously. *Id*.

O'Brien Industrial Holdings and its subsidiaries currently have approximately 105 employees. *Id*. at ¶34. Approximately 40 of these employees work in the City of St. Louis, and thus the Company is subject to the employment nondiscrimination section of the Ordinance. *Id*.

O'Brien Industrial Holdings' employees are covered by a group health insurance plan, O'Brien Industrial Holdings, LLC Employee Benefit Plan ("O'Brien Plan"), which is administered by a third-party administrator that adjudicates claims and pays benefits as provided for in the O'Brien Plan. *Id*. at ¶35. O'Brien Industrial Holdings and Frank O'Brien consider the provision of employee health insurance—like the Company's profit sharing, retirement plan, scholarship program, and tithing efforts—an integral component of furthering the Company's Mission and Values. *Id*.

Frank O'Brien holds to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. *Id*. at ¶36. He believes that intentional action to

destroy the life of an unborn child is gravely sinful. *Id*. O'Brien adheres to Catholic Church teaching regarding the immorality of sterilization and artificial means of contraception. *Id*. He believes he has a religious duty to strive to conduct himself and his business in a manner consistent with the principles of his Catholic faith. *Id.* Therefore, neither Frank O'Brien as an individual nor O'Brien Industrial Holdings can provide coverage for abortion, contraceptives or sterilization without violating O'Brien's sincere religious beliefs. *Id*.

Frank O'Brien and O'Brien Industrial Holdings are always reviewing applicants to hire, and reviewing and promoting existing employees. *Id*. at ¶38. O'Brien Industrial Holdings is also always in the process of negotiating new business relationships. *Id*. Since the publication of this Ordinance, Frank O'Brien has refrained from disclosing information to prospective business partners that, prior to Ordinance 70459, he would have disclosed about O'Brien Industrial Holdings' Mission and Values, due to concerns that such disclosure would expose him to criminal liability under Ordinance 70459. *Id*. He has also been uncertain of whether and how the company may communicate information about its Mission and Values and the scope of the company's health plan to prospective employees without incurring legal penalties. *Id*.

II. St. Louis City Ordinance 70459

Until now, the City of St. Louis has forbidden discrimination based on the familiar categories of "race, color, age, religion, sex, familial status, disability, sexual orientation, national origin or ancestry." To this list, Ordinance 70459 adds a new protected class: those who make "reproductive health decision[s]." By the Ordinance's terms, that class includes not just women who makes decisions about their own pregnancies, but also other individuals and corporate entities, including abortion activists, promoters or providers. Any individual, male or

female, or corporate entity that makes any decision regarding abortion or other reproductive decision is now in a protected class.

Ordinance 70459 became effective on or about February 13, 2017.[2] Ordinance 70459 was drafted by St. Louis aldermen in collaboration with the National Abortion Rights Action League (NARAL),[3] an organization that stridently opposes the Catholic Church's position on abortion and that seeks the closure of alternatives-to-abortion providers.[4]

In hearings on Board Bill 203, which became Ordinance 70459, the Bill's sponsors presented "expert testimony" vilifying the Catholic Church and its opposition to abortion; misrepresenting the Catholic Church as favoring pregnancy discrimination; criticizing the Church's opposition to contraception as "woefully out of touch"; calling the Church's concern for the unborn "disingenuous"; and labeling the Church an "oppressive religious institution" that shames women for their reproductive decisions.[5]

The Ordinance's prohibitions can be divided into two sections: those related to employment and those related to housing and realty.

---

[2] *See* https://www.stlouis-mo.gov/government/city-laws/ordinances/ordinance.cfm?ord=70459 (last visited Sept. 24, 2017); copies of Ordinances 70459 and 67119 are also attached for the Court's convenience as Exhibits 1 and 2.

[3] *See* Rachel Lippmann, *Aldermen look to make St. Louis a sanctuary for reproductive health,* St. Louis Public Radio (Dec. 27, 2016), http://news.stlpublicradio.org/post/aldermen-look-make-st-louis-sanctuary-reproductive-health#stream/0 (last visited Sept. 6, 2017).

[4] *See, e.g.*, Jennifer Ludden, *States Fund Pregnancy Centers That Discourage Abortion*, National Public Radio (Mar. 9, 2015) http://www.npr.org/sections/health-shots/2015/03/09/391877614/states-fund-pregnancy-centers-that-discourage-abortion (last visited Sept. 6, 2017); *see generally* Twitter #exposethrive #thrivelies (referring to Alternative to Abortion agency "ThriVe", the hashtag is often used by NARAL Missouri's Twitter account); Dr. Bernard Nathanson*, Confessions of an Ex-Abortionist*, Catholic News Agency (discussing tactics as founder of NARAL: "We systematically vilified the Catholic Church and its 'socially backward ideas' and picked on the Catholic hierarchy as the villain in opposing abortion."), http://www.catholicnewsagency.com/resources/abortion/articles-and-addresses/an-ex-abortionist-speaks/ (last visited Sept. 6, 2017); Facebook, "*Protest ThriVe St. Louis*, *Hosted by NARAL Pro Choice Missouri*," Feb. 11, 2017, https://www.facebook.com/events/820724634732706/ ("Crisis Pregnancy Centers (CPCs) are fake 'providers' that lure women into their facilities under the false idea that they will provide the accurate and medically relevant information . . .") (last visited Sept. 6, 2017).

[5] *See Meeting: St. Louis City Housing, Urban Development, and Zoning Committee,* Jan. 18, 2017 https://www.youtube.com/watch?v=EldB8mtP-nw&list=PL03m33dygN_tGslJ8Q8jhnwMKs6ZKFosF&index=30 (00:31:00 to 00:35:30) (last visited Sept. 24, 2017).

The relevant employment-related restrictions, found in Section Two (B), outlaw the following:

> (1) For an employer to fail or refuse to hire, to discharge or otherwise to discriminate against any individuals with respect to compensation or the terms, conditions or privileges of employment, because of their reproductive health decisions or pregnancy status (including childbirth or a related medical condition). However, nothing in this ordinance shall require a religious institution, corporation, association, or society to provide reproductive health benefits of any kind;
>
> (2) For an employer to take any adverse employment action against an employee based on a reproductive health decision by an employee or employee's dependent. However, nothing in this ordinance shall require a religious institution, corporation, association, or society to provide reproductive health benefits of any kind;
>
> * * *
>
> (5) For an employer, labor organization or employment agency to print or circulate or cause to be printed or circulated, any statement, advertisement or publication, or to make any inquiry in connection with prospective employment, which expresses directly or indirectly any preference, limitation, specification or discrimination because of reproductive health decisions or pregnancy status (including childbirth or a related medical condition), unless based upon a bona fide occupational qualification.

The relevant housing and realty restrictions, found in Section Two (C)(1), outlaw the following:

> (a) For any person, including, without limitation any real estate broker, salesman or agent, or any employee thereof, to discriminate against any individuals because of their reproductive health decisions or pregnancy status (including childbirth or a related medical condition), with respect to the use, enjoyment or transfer, or prospective use, enjoyment or transfer, of any interest whatsoever in realty, or with respect to the terms, conditions, privileges or services granted or rendered in connection therewith, or with respect to the making or purchasing of loans for the purchase or maintenance of residential real estate or loans in the secondary market, or the provision of other financial assistance, or with respect to the terms, conditions, privileges or services granted or rendered in connection with any interest whatsoever in realty, or with respect to the making of loans secured by residential real estate;
>
> * * *
>
> (c) For any real estate broker, salesman or agent, or any employee thereof, or any other person seeking financial gain thereby, directly or indirectly to induce or solicit,

> or attempt to induce or solicit, the transfer of any interest whatsoever in realty, by making or distributing, or causing to be made or distributed, any statement or representation concerning the entry or prospective entry into the neighborhood of a person or persons of person based on said person's reproductive health decision or pregnancy status (including childbirth or a related medical condition);
>
> (d) For any person to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate the sale or rental of, or otherwise make unavailable or deny a dwelling to any persons because of their reproductive health decisions or pregnancy status (including childbirth or a related medical condition);
>
> (e) For any person to discriminate against any other person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of that person's reproductive health decisions or pregnancy status (including childbirth or a related medical condition);
>
> (f) For any person to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on reproductive health decisions or pregnancy status (including childbirth or a related medical condition) or an intention to make any such preference, limitation, or discrimination;
>
> (g) For any person to represent to another person because of reproductive health decisions or pregnancy status (including childbirth or a related medical condition), that any dwelling is not available for inspection, sale, or rental when such dwelling is, in fact, so available;
>
> * * *

A. Ordinance 70459 extends protected class status not just to a woman making a reproductive decision regarding her own pregnancy, but also to other individuals and corporate entities, including abortion activists, promoters and providers.

Ordinance 70459 "prohibit[s] discrimination based on a person's reproductive health decisions or pregnancy," where "'[r]eproductive health decision' means *any decision* related to the use or intended use of a particular drug, device, or medical service related to reproductive health, including the use or intended use of contraception or fertility control or the planned or intended initiation or termination of a pregnancy." Section One (14) (emphasis added). That definition goes far beyond a particular woman's *own* past or future decision to use contraception,

initiate a pregnancy, or have an abortion. It encompasses "*any* decision"—by *anyone*, male or female— that is in any way "*related to*" the use of contraception, pregnancy, or abortion. *Id.* (emphasis added). The contraceptive use, pregnancy, or abortion in question need not be one's own; it could be someone else's.

Other aspects of the Ordinance confirm its breadth. The definition of "[a]ggrieved person" includes "*any person* who claims to have been injured by a discriminatory act or practice described" therein. Section One (3) (emphasis added). In its employment section, the Ordinance refers only to "individuals" or "employees," Section Two (B), but in the section on housing and realty the Ordinance refers not only to "individuals" but also to "persons," Section Three (c)-(h), which the Ordinance defines to include corporations and other business organizations, Section One (11). Thus, the Ordinance protects not only women who use contraception, initiate pregnancies, or have abortions, but also their husbands, boyfriends, sexual partners, and friends, plus groups whose activities relate to reproduction, such as abortion advocacy groups and providers.

B. Ordinance 70459 restricts and otherwise chills what Plaintiffs can say and publish regarding abortion and other reproductive decisions.

Ordinance 70459 contains two speech codes, one for employment discrimination and one for housing discrimination: Sections Two (B)(5) and Two (C)(1)(f). Those subsections forbid employers and landowners/landlords from "print[ing], "circulat[ing]" or "publish[ing]" any notice, statement, advertisement or publication, which expresses directly or indirectly any preference based on reproductive health decisions.

These speech codes prevent Plaintiffs from making employment, housing and realty determinations—or even making inquiries—consistent with their institutional missions and sincere moral and religious beliefs about human life.

C. Ordinance 70459 requires employers that are not considered religious organizations, including individual religious employers, to provide health care coverage for abortion, contraception and sterilization.

Ordinance 70459 implicitly requires all employers of six or more employees (except for an uncertain category of religious organizations) to provide health insurance coverage for abortion, contraception, and sterilization. Sections Two (B)(1) and (2) of the Ordinance make it a "prohibited discriminatory employment practice":

> (1) For an employer to fail or refuse to hire, to discharge or otherwise to discriminate against any individuals with respect to compensation or the terms, conditions or privileges of employment, because of their reproductive health decisions or pregnancy status (including childbirth or a related medical condition) . . . [or]
>
> (2) For an employer to take any adverse employment action against an employee based on a reproductive health decision by an employee or employee's dependent. . . ."

Although the terms of these provisions are vague and susceptible to multiple interpretations, one eminently plausible interpretation is that an employee has grounds for complaint under Ordinance 70459 if her employer denies a request for health insurance coverage for contraception, abortion, or sterilization. Such a denial could be characterized as "discriminat[ion] . . . with respect to compensation or privileges of employment[] because of . . . reproductive health decisions," Section Two (B)(1), or as an "adverse employment action . . . based on a reproductive health decision."[6]

If there were any doubt of that possibility, it is resolved by the ensuing text of the Ordinance, which makes clear that, whatever else they require, these provisions *at least* require non-religious employers to provide health care coverage for abortion, contraception and sterilization. Both subsections quoted above conclude as follows: "However, nothing in this

[6] As defined by Ordinance 70459, "'Adverse employment action' includes, but *is not limited to*, termination, demotion or refusal to promote or advance, loss of career specialty, reassignment to a different shift, reduction of wages or benefits, refusal to provide training opportunities or transfer to a different department, adverse administrative action, or *any other penalty, disciplinary or retaliatory action*." Section One (2) (emphasis added).

ordinance shall require a *religious* institution, corporation, association, or society to provide reproductive health benefits of any kind . . . ." Sections Two (B)(1) & (2) (emphasis added). That narrowly-tailored exemption implies that the provisions *do* require an employer that is *not* "a religious institution, corporation, association, or society" to provide such benefits.

Further supporting that interpretation, in Sections Two (B)(6) and Two (C)(1)(j), the Ordinance states that:

> Nothing in this Ordinance shall prohibit a religious institution, corporation, association, society, health care facility or educational institution with historic religious affiliation from . . . [r]efusing to provide health insurance coverage to any employee for any reproductive health service.

Id. In four separate subsections, then, the Ordinance disclaims an intent to require *religious organizations* from having to provide health insurance for abortion and other reproductive choices, but *it makes no such disclaimer as to other employers*. If the City had *not* intended to require all but a select few employers to provide health care coverage for abortion, contraception and sterilization, it would have drafted the express exemptions to include *any individual or organization*. *See, e.g.,* D.C. Code 2-1401.05 (stating that "This section shall not be construed to require an employer to provide insurance coverage related to a reproductive health decision," with no qualification that the employer be "religious."). The City did not draft it that way, despite apparent knowledge of the D.C. law. Thus, Ordinance 70459 provides a legal basis for employees to challenge an employer's decision not to provide health insurance coverage for abortion, contraception and sterilization.

D. Ordinance 70459 contains narrow exemptions.

Individual employers with six or more employees are not exempt from any of Ordinance 70459's requirements, no matter how religious or avowedly pro-life they may be. Any corporate employer that does not qualify as a "religious institution, corporation, association, society, health

care facility or educational institution with historic religious affiliation," Sections Two (B)(6) and Two (C)(1)(j), is likewise not exempt from any provision of Ordinance 70459, no matter how sincere its opposition to abortion, contraception or sterilization.

Frank O'Brien is an employer with sincere religious convictions that infuse the way he operates his business, but as an individual he is not exempt from any of Ordinance 70459's requirements. O'Brien Industrial Holdings and Our Lady's Inn both consider themselves "religious," but it is not clear whether the exemption for religious organizations applies to either or both.

Apart from the express exemptions for religious organizations, described above, the Ordinance contains only one other exemption. Subsection (5) of Section Two (B), quoted above, exempts from the Ordinance's ban on employment-related speech expressing a preference based on reproductive health decisions, speech that is "based upon a bona fide occupational qualification" (BFOQ). "Bona fide occupational qualification" is not defined, and it appears nowhere else in the Ordinance. By its terms, the BFOQ exception applies only to the employment speech code found in Section Two (B)(5), and it is not limited to BFOQs based on religion. Nothing in the Ordinance explains or provides context for interpreting the scope of the BFOQ exception.

E. Ordinance 70459 lacks an enforcement mechanism.

Ordinance 70459 dictates that its enforcement will be "pursuant to the procedures set forth in Ordinance 67119." Ordinance 70459 Section Three. But Ordinance 67119 limits its enforcement mechanisms (administrative, civil claim, and criminal prosecution) to discrimination against classes protected by Ordinance 67119 and Mo. Rev. Stat. Chapter 213; it

does not provide any procedures for offenses against classes created elsewhere. Therefore, Ordinance 70459 lacks an enforcement mechanism.

Ordinance 67119 establishes the St. Louis Civil Rights Enforcement Agency and the St. Louis Civil Rights Enforcement Commission and endows them with authority to enforce the provisions of Ordinance 67119 itself and Chapter 213 of the Revised Missouri Statutes, which both specify classes that may not be discriminated against in employment, housing and public accommodations. *See* Mo. Rev. Stat. 213.040, 213.055, 213.065; Ordinance 67119 Sections Three (3), Five (2), Seven (1), Eight, Nine. Neither Ordinance 67119 nor Chapter 213 names "reproductive health decision[s]" as a protected class. Therefore Ordinance 67119 does not give the St. Louis Civil Rights Enforcement Agency and the St. Louis Civil Rights Enforcement Commission authority to enforce a prohibition on discrimination on this basis.

Section Ten (A) of Ordinance 67119 describes how these entities will process discrimination complaints. When there is a meritorious complaint alleging discriminatory conduct that would violate Ordinance 67119 ("this Ordinance") but not Mo. Rev. Stat. Chapter 213, Section Ten (a)(3) dictates that it be referred to the City Counselor for criminal prosecution. Ordinance 67119 Section Ten (A)(3) (emphasis added). There is no further, or alternative, process. Other sections of Ordinance 67119 confirm that only criminal enforcement is available for offenses not covered by state discrimination law. *See id.* Section Ten (D) (a civil action in circuit court applicable only to classes protected by Rev. Mo. Stat. Chapter 213); *Id.* Section Ten (E)(3) (after a determination of probable cause of unlawful discrimination concerning a protected class *not* named in Chapter 213, the only recourse is to refer the matter for criminal prosecution by the City Counselor).

Ordinance 67119 provides only one criminal penalty for a violation of its provisions:

> Any person convicted of violation of ***this Ordinance*** shall be punished by a fine of not less than Two Hundred Fifty Dollars ($250.00) nor more than Five Hundred dollars ($500.00), or by imprisonment for not more than ninety (90) days or by both such fine and imprisonment.

Ordinance 67119, Section Seventeen (emphasis added). Ordinance 67119 does not specify a penalty for violation of any other ordinance.

Ordinance 70459's terms set no geographic limits on its applicability.

III. Plaintiffs' Need for Relief

Ordinance 70459's chilling effect on Plaintiffs' exercise of their rights under both federal and state law has already caused Plaintiffs substantial harm. Plaintiffs cannot proceed with hiring, reviewing or firing employees, or with selling or renting housing, without fear of prosecution under this Ordinance. When Plaintiff Archdiocesan Elementary Schools asked approximately 3500 current and prospective employees to sign the Witness Statement agreeing to live their lives in accordance with the Church's teachings on abortion and contraception, it became vulnerable to prosecution under Ordinance 70459. By providing housing exclusively to women who choose not to have abortions, Plaintiff Our Lady's Inn has exposed itself to prosecution under Ordinance 70459. If Plaintiff Frank O'Brien were to disclose his Company's Mission and Values to prospective employees and business partners, as he has done in the past, he would open himself and his company up to liability under Ordinance 70459, as would be the case if he refuses any employee's request to include coverage for a "reproductive health decisions" in his company health care plan.

Several additional factors make Plaintiffs' concerns about prosecution especially credible. For example:

(1) Proponents of the bill—even an "expert" testifying in support of the Ordinance at the request of the Bill's sponsors—have ridiculed and condemned Catholic beliefs about abortion and contraception;[7]

(2) The Ordinance was passed despite there being *no evidence whatsoever* that it was needed to address existing discrimination, suggesting that the initiative has an ulterior purpose;[8]

(3) Enforcement of the Ordinance (if it can be effected at all) is meant to be initiated by aggrieved parties, not by government authorities; and

(4) The Ordinance's vague terms permit many interpretations of its requirements, allowing wide latitude for capricious and/or ideologically-motivated enforcement.

Given all of the above factors, Plaintiffs' fear of prosecution is more than credible. By chilling the exercise of their rights and exposing them immediately to the prospect of costly and damaging enforcement actions backed by criminal penalties, Ordinance 70459 is causing Plaintiffs serious and ongoing hardship. They need relief now.

Plaintiffs have no adequate or speedy remedy at law to correct or redress the deprivation of their rights caused by Ordinance 70459. Unless Ordinance 70459 is declared unlawful and enforcement of it enjoined, Plaintiffs will continue to suffer irreparable injury.

[7] *See, e.g.*, *Meeting: St. Louis City Housing, Urban Development, and Zoning Committee, supra* note 5.

[8] Katie Kull, Associated Press, *St. Louis ordinance seeks to pre-empt Missouri abortion laws* (Feb. 23, 2017) https://apnews.com/0f4d18472fce4550b75008a9003300ae (last visited Sept. 6, 2017) (Alderperson Green admitting that the "ordinance wasn't sparked by any specific case or current law").

ARGUMENT

Summary Judgment Standard, Injunctive Relief Standard, and Burden of Proof

Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment if the information before the court shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Rule 56(c) of the Federal Rules of Civil Procedure). An issue of material fact is genuine if it has a real basis in the record, and a genuine issue of fact is material if it "might affect the outcome of the suit under the governing law." *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The initial burden is on the moving party to establish the non-existence of any genuine issue of fact that is material to a judgment in its favor. *Van Horn v. Best Buy Stores*, 526 F.3d 1144, 1146 (8th Cir. 2008) ("the defendants met their initial burden of notifying the . . . court of the basis for their summary judgment motion and identifying the documents that they believed demonstrated the absence of a material fact"). After the moving party discharges this burden, the non-moving party must do more than show that there is some doubt as to the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). Instead, the non-moving party bears the burden of setting forth specific facts by affidavit or otherwise showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at 249; *Palesch v. Missouri Comm'n on Human Rights*, 233 F.3d 560, 565-66 (8th Cir. 2000). "[I]n order to defeat a motion for summary judgment, the non-movant cannot simply create a factual dispute; rather, there must be a genuine dispute over those facts that could actually affect the outcome of the lawsuit." *Webb v. Lawrence County*, 144 F.3d 1131, 1135 (8th Cir. 1998); *see also Stanback v. Best*

Diversified Prods., Inc., 180 F.3d 903, 909 (8th Cir. 1999) (finding that general statements in affidavits and depositions are insufficient to defeat a properly supported summary judgment motion).

To obtain a permanent injunction, a plaintiff is required to show: (1) success on the merits; (2) that it faces irreparable harm; (3) that the harm to it outweighs any possible harm to others; and (4) that an injunction serves the public interest. *Cmty. of Christ Copyright Corp. v. Devon Park Restoration Branch of Jesus Christ's Church*, 634 F.3d 1005, 1012 (8th Cir. 2011).

With regard to showing irreparable injury, Supreme Court precedent is clear: "Loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). When a constitutional right is impaired, a finding of irreparable injury is mandatory. *See id*.

As to Plaintiffs' First Amendment claims, where the government is regulating expressive activity, the government bears the burden of proving that its actions pass constitutional muster. *See, e.g.*, *Perry Ed. Assn. v. Perry Local Ed. Assn.*, 460 U.S. 37, 45-46 (1983). "[W]hen a regulation allegedly infringes on the exercise of first amendment rights, the statute's proponent bears the burden of establishing the statute's constitutionality." *Ass'n of Cmty. Organizations for Reform Now v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983); *see also Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (proponent "carries a heavy burden of showing justification" for speech restriction); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 658 (1981) (Brennan, J., concurring).

When a law restricts speech, the government's burden to produce evidence is not satisfied by mere speculation or conjecture; it must offer real evidence establishing that the problem it

identifies is real and that the speech restriction will materially alleviate it. *See Edenfield v. Fane,* 507 U.S. 761, 770-71 (1993); *see also U.S. v. Playboy Entm't Grp.*, 529 U.S. 803 (2000). For example, in a case where limitations on campaign contributions restricted speech, the Supreme Court held that "Congress must show *concrete evidence* that a particular type of financial transaction is corrupting or gives rise to the appearance of corruption[.]" *McConnell v. FEC,* 540 U.S. 93, 185-86 n.72 (2003) (emphasis added) (overruled on other grounds in *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010)).

I. Plaintiffs Are Entitled to Summary Judgment on Their Free Speech Claim (Count I).

A. Ordinance 70459 impermissibly abridges speech based on content and viewpoint.

1. Ordinance 70459 regulates speech based on content.

The "First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed." *R.A.V. v. City of St. Paul, Minn.,* 505 U.S. 377, 382 (1992). Accordingly, content-based regulations of speech are "presumptively invalid." *Id.*; *see also Playboy Entm't Grp., Inc.*, 529 U.S. at 818 ("It is rare that a regulation restricting speech because of its content will ever be permissible."). For a municipality to enforce a content-based regulation, it must show that its regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Frisby v. Schultz,* 487 U.S. 474, 481 (1988) (internal citation and quotation marks omitted).

"The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1981). "Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Id.* (emphasis in original) (internal citation and quotations omitted).

Under these standards, Ordinance 70459's restrictions on speech are unconstitutional. In the employment context, Ordinance 70459 directly and immediately interferes with Plaintiffs' speech by barring them from:

> print[ing] or circulat[ing] or caus[ing] to be printed or circulated, any statement, advertisement or publication, or [making] any inquiry in connection with prospective employment, which expresses directly or indirectly any preference, limitation, specification or discrimination because of reproductive health decisions or pregnancy status (including childbirth or a related medical condition), unless based upon a bona fide occupational qualification.

Section Two (B)(5). Other prohibitions contained in Section Two (B), including but not limited to (B)(1) and (2), also abridge Plaintiffs' free speech rights.

In the context of housing and realty, Ordinance 70459 directly and immediately interferes with Plaintiffs' constitutionally protected speech by making it unlawful:

> to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on reproductive health decisions or pregnancy status (including childbirth or a related medical condition) or an intention to make any such preference, limitation, or discrimination . . . .

Section Two (C)(1)(f). The remaining prohibitions contained in Section Two (C), including but not limited to (C)(1)(d), (e), and (g), also abridge Plaintiffs' speech.

Ordinance 70459's speech codes are not content-neutral. They facially ban speech on certain subjects (e.g., abortion) but allow speech on other subjects (e.g., anything other than "reproductive health decisions," as that term is broadly defined). For example, Our Lady's Inn may post an advertisement expressing a preference to house pregnant women who have certain physical or socioeconomic attributes, but the maternity home may not express a preference for women who intend or hope to avoid abortion. Courts have found laws like these to be content-based. *See, e.g.*, *Campbell v. Robb*, 162 F. App'x 460, 468 (6th Cir. 2006) (finding publication

ban in Fair Housing Act to be "clearly a content-based speech regulation in that it allows landlords to express certain preferences while outlawing others").

As content-based regulations of speech, Ordinance 70459's speech codes are "presumptively invalid," *R.A.V.*, 505 U.S. at 382, and must survive strict scrutiny.[9] *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) (a "law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech") (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)); *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 686 (8th Cir. 2012) ("Content based regulations, such as those which impose special prohibitions on those speakers who express views on disfavored subjects are presumptively invalid, are subject to the most exacting scrutiny, and must be narrowly tailored to serve a compelling government interest." (internal quotation marks and citations omitted)). As described in Section I.D[10], below, Ordinance 70459 cannot survive strict scrutiny.

2. Ordinance 70459 regulates speech based on viewpoint.

Ordinance 70459's speech codes go beyond content discrimination to "viewpoint discrimination"—an "egregious form of content discrimination" where the government targets "particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). "When the government targets not subject matter, but

[9] Certain types of "commercial speech" are subject to intermediate scrutiny. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011). Lesser scrutiny in this context applies to speech that is used to solicit business or market goods and services; generally, this refers to advertising. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–63 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising."). Plaintiffs' speech claims are not based on an abridgment of their advertising; at the very least any of Plaintiffs' speech that might be construed to be advertising is "inextricably intertwined" with pure speech, so that "the entirety must . . . be classified as noncommercial." *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 474 (1989). In any case, the Ordinance could not survive even intermediate scrutiny.

[10] All internal cross-references are to the Argument section of the brief, unless otherwise noted.

particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.*

Ordinance 70459 does target "particular views taken by speakers" on the subject of reproductive health decisions, in that it permits employers and landlords to say that they welcome advocates (or, theoretically, opponents) of abortion on their staffs or in their housing, or that they support someone's reproductive health decision, but it prohibits them from saying that they do *not* welcome a pro-life or pro-choice activist, or that they do not support someone's reproductive health decision. Permitting one viewpoint on a topic but banning the opposite viewpoint on the same topic is viewpoint discrimination, even when the topic is not whether to be for or against something but rather whether to be tolerant of various views on an issue or to express one's own view. *See R.A.V.*, 505 U.S. at 391-92 (finding restriction on fighting words based just on race, color, creed, religion, and gender to be viewpoint-based because it permitted messages in favor of tolerance but not opposed to it); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 571-72 (7th Cir. 2001) (finding viewpoint discrimination when city required "that a party's civic speech be diluted by forcing the inclusion of all views on that topic"). "Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas." *R.A.V.*, 505 U.S. at 394.

Of course, Ordinance 70459 purports to be viewpoint-neutral by prohibiting decisions based on *any* reproductive health decision, whether that decision is to engage in or to refrain from engaging in, contraception or abortion. *See* Ordinance 70459. But the veneer of neutrality disappears upon closer inspection. "There are various situations which will lead a court to conclude that, despite the seemingly neutral justifications offered by the government, nonetheless the decision to exclude speech is a form of impermissible discrimination." *Ridley v.*

Massachusetts Bay Transp. Auth., 390 F.3d 65, 87 (1st Cir. 2004). More than one of those situations is present here: an improper legislative motive and no legitimate legislative aim. *See id.* Alderwoman Megan Green, the Ordinance's sponsor, was cited by the Associated Press as saying that "her ordinance wasn't sparked by any specific case or current law. Rather, she viewed it as a way for the city to stake out its opposition to future laws enacted in Missouri, where Republicans now control all corners of government."[11] The fact that advocates on one side of a polarizing political debate admit to having drafted the Ordinance to advance their own political agenda at the expense of their political adversaries amply demonstrates that the justification for the Ordinance is anything but viewpoint-neutral. *See Ridley*, 390 F.3d at 87 ("[S]tatements by government officials on the reasons for an action can indicate an improper motive.").

The lack of any evidence of invidious discrimination on the basis of reproductive health decisions is further evidence that the Ordinance's appearance of neutrality is a pretext. "[S]uspicion [of impermissible discrimination] arises where the viewpoint-neutral ground is not actually served very well by the specific governmental action at issue; where, in other words, the fit between means and ends is loose or nonexistent." *Id.* Here, the record supports far more than a "suspicion" of non-neutrality based on a "loose . . . fit between means and ends." *Id.* In the debates of Board Bill 203, which became Ordinance 70459, the bill's sponsors were unable to point to any evidence of the kind of discrimination that they claimed to be trying to address with Ordinance 70459.[12] Meanwhile, as noted above, the Ordinance's own sponsor admitted that it had *no* "end" other than to advance one political viewpoint against its opposition. *See supra* note

[11] Katie Kull, Associated Press, *St. Louis ordinance seeks to pre-empt Missouri abortion laws* (Feb. 23, 2017), https://apnews.com/0f4d18472fce4550b75008a9003300ae (last visited Sept. 6, 2017); *see also* notes 3 and 4 regarding the involvement of the National Abortion Rights Action League in drafting the Ordinance.

[12] *See, e.g.*, *Meeting: St. Louis City Housing, Urban Development, and Zoning Committee, supra* note 5.

11 and accompanying text. The lack of a fit between the Ordinance and any legitimate legislative end strongly suggests that ordinance is plainly not "viewpoint-neutral."

The Ordinance's bias is even more apparent in its practical application. In what conceivable set of circumstances would an employer or landlord discriminate against a prospective employee or tenant for making a decision to *not* get pregnant, *not* use contraception, or *not* get an abortion? How would such a "reproductive health decision" be discernible, and who would object to it? The Ordinance is plainly aimed at making one attitude toward "reproductive health decisions" the only acceptable one. After all, although abortion is still hotly contested, it is legal. Therefore, the pro-choice aldermen and lobbyists who drafted Ordinance 70459 are in a politically advantageous position *vis-à-vis* those who oppose abortion, and they stand to gain even greater advantage by using their legislative powers to shut down public discussion of the issue.

In light of all of the above, Ordinance 70459's prohibition on expressing a view about abortion in several common and meaningful fora is not viewpoint-neutral. The pro-choice majority of the St. Louis City Board of Aldermen is trying to use their lawmaking power to silence citizens who disagree with them. But "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." *R.A.V.*, 505 U.S. at 392; *see also Child Evangelism Fellowship of Minnesota v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1000 (8th Cir. 2012) ("The government may not regulate speech when the specific ideology, opinion or perspective of the speaker is the rationale for the restriction.").

Even if the Ordinance constrained speakers on both sides of the abortion debate equally, however, that still would not make it viewpoint-neutral. In *Rosenberger*, for example, the

Supreme Court held that a public university's prohibition on funding for a religious student newspaper was unconstitutional viewpoint discrimination, even though the funding ban reached all activities that promoted *any* "belief in or about a deity or an ultimate reality," even atheist or other anti-religious beliefs. *Rosenberger*, 515 U.S. at 825. The Court rejected the dissent's argument that the regulation did not discriminate based on viewpoint because it excluded both theistic and atheistic views:

> The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. ***It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint***. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

Id. at 831-32 (emphasis added); *see also Arizona Life Coal. Inc. v. Stanton*, 515 F.3d 956, 971-72 (9th Cir. 2008) (finding viewpoint discrimination where a state commission denied an application for a "Choose Life" specialty license plate because it related to abortion, rejecting the defense that no opposing group had been granted a license plate either). Like the regulations in *Rosenberger* and *Arizona Life Coalition*, Ordinance 70459's speech codes discriminate on the basis of a speaker's viewpoint, even though they technically proscribe the expression of both favorable and unfavorable views about someone's reproductive health decision.

Like laws that regulate speech on the basis of content, laws that discriminate on the basis of viewpoint are at least subject to strict scrutiny, *see Bible Believers v. Wayne Cnty.,* 805 F.3d 228, 248 (6th Cir. 2015) (en banc) ("Both content- and viewpoint-based discrimination are subject to strict scrutiny."), a standard that Ordinance 70459 cannot meet. *See* Section I.D, *infra*.

At times the Supreme Court has taken an even more rigorous approach to viewpoint-discriminatory laws, treating them as *per se* unconstitutional:

> [T]here are some purported interests—such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are ***so plainly illegitimate that they would immediately invalidate the rule***. The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (emphasis added); *see also Rosenberger*, 515 U.S. at 836-37 (invalidating a viewpoint-discriminatory law without consideration of the government's interest or the law's tailoring); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (same). Like all laws that discriminate on the basis of a speaker's viewpoint, Ordinance 70459 is an unconstitutional infringement of Plaintiffs' freedom of speech.

B. Public accommodations law does not insulate Ordinance 70459 from the First Amendment.

Public accommodations laws are not exempt from the First Amendment. *See, e.g.*, *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 680 (2010) ("In the context of public accommodations, we have subjected restrictions on that [First Amendment] freedom to close scrutiny"); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that applying state public accommodations law to require the Boy Scouts to readmit a homosexual male as an assistant scoutmaster violated the Boy Scouts' First Amendment rights); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that Massachusetts violated First Amendment by requiring organizers of an annual St. Patrick's Day parade to allow an organization in favor of gay rights to march in the parade); *Apilado v. N. Am. Gay Amateur Athletic All.*, No. C10-0682-JCC, 2011 WL 5563206, at *1 (W.D. Wash. Nov. 10,

2011) (enjoining Washington public accommodation law from violating First Amendment by compelling gay softball team to admit heterosexual players); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 59 (N.D. Ohio 1995) (declaring that city would violate free speech rights by using public accommodation law to exclude all-male event from city convention center).

The legislative trend is toward broader and broader public accommodations laws, enlarging the definition of "public accommodation" and adding more protected classifications. *See Dale*, 530 U.S. at 656-57 and n.2 (discussing this expansion). An effect of this expansion is that "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased." *Id.* at 657. Ordinance 70459 exemplifies this trend. The ordinance departs radically from Missouri law and has no analog anywhere else in the United States. Laws addressing supposed discrimination on the basis of "reproductive health decisions" have not existed *anywhere* until very recently, and they exist only in a few jurisdictions now.[13] No other law purports to prohibit nearly as much conduct as Ordinance 70459.[14] Moreover, as described above, the law has nothing to do with addressing any actual discrimination; rather, it is a tactic in an effort by abortion advocacy organizations to pursue ideological "victories" at the local level in response to political losses at the state and federal levels. *See supra* note 11 and accompanying text.

[13] According to the St. Louis Post-Dispatch, citing a statement by Alderwoman Megan Green, "St. Louis [joined] only the District of Columbia, Boston and Delaware in passing similar legislation." Koran Addo, St. Louis Post-Dispatch, *Bill protecting women against discrimination for having an abortion passes in St. Louis City Hall* (Feb. 11, 2017) http://www.stltoday.com/news/local/govt-and-politics/bill-protecting-women-against-discrimination-for-having-an-abortion-passes/article_ebbfb676-ef5c-560a-ba0c-3b9a3a9672a1.html (last visited Sept. 6, 2017). Plaintiffs have located the D.C. and Delaware legislation. *See* 80 Del. Laws, c. 291, http://delcode.delaware.gov/sessionlaws/ga148/chp291.pdf, and D.C. Code 2-1401.05, https://beta.code.dccouncil.us/dc/council/code/sections/2-1401.05.html. Plaintiffs have not located the alleged Boston law.

[14] The D.C. and Delaware laws are dwarfed by Ordinance 70459. *See* 80 Del. Laws, c. 291; D.C. Code 2-1401.05. For example, neither has speech codes or any provisions relating to housing.

Of course, state and local governments may take different approaches to employment and housing discrimination, differing on which classifications deserve protected status. But no jurisdiction may enact a law that infringes its citizens' constitutionally protected freedoms. It would obviously be impermissible, for example, for a government to make adherents of one party's political platform a protected class, so that they would receive preferential treatment as opposed to those who espouse the other party's agenda. It is no more permissible for the City to extend special protections to individuals who hold certain views on abortion or religion, which as "public issues," occupy "the highest rung on the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (holding that "religious speech . . . is as fully protected under the Free Speech Clause as secular private expression."). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion . . . ." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642 (1943) (ruling in favor of Jehovah's Witnesses who objected to compelled pledge of allegiance to flag).

Ordinance 70459 violates Plaintiffs' rights under the First Amendment. Under the Free Speech clause, speakers have the right to choose the content of their speech consistent with their consciences. *See Speiser v. Randall*, 357 U.S. 513, 536-37 (1958). The City cannot compel Plaintiffs to speak against their consciences, nor can it prohibit their communications because of their content or viewpoint unless its prohibition can survive strict scrutiny. *See McCullen v. Coakley*, --- U.S. ---, 134 S.Ct. 2518, 2530 (2014). The government does not have

the power to compel speakers to utter messages they oppose or to withhold viewpoints they want to promote.[15]

Notwithstanding any principle of public accommodation law, by barring Plaintiffs' speech and expressive conduct because of its content and viewpoint, Ordinance 70459 violates Plaintiffs' First Amendment rights. The Ordinance must therefore survive strict scrutiny, which it cannot. *See* Section I.D, *infra*.

C. Ordinance 70459 punishes a substantial amount of protected free speech for no legitimate purpose.

In the First Amendment context, a law "that is substantially overbroad may be invalidated on its face." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 458 (1987) (citing *New York v. Ferber,* 458 U.S. 747, 769 (1982), and *Broadrick v. Oklahoma,* 413 U.S. 601 (1973)).

"In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 (1982); *see also Kolender v. Lawson,* 461 U.S. 352, 358 n.8 (1983). "Criminal statutes must be scrutinized with particular care, *e.g.*, *Winters v. New York,* 333 U.S. 507, 515 (1948); those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston, Tex*, 482 U.S. at 459 (citing *Kolender,* 461 U.S. at 358 n.8).

Statutes that burden or suppress free speech, especially by means of criminal sanctions, must be narrowly drawn in order to avoid the chilling effect on expression. *See Virginia v. Hicks*,

[15] The Missouri General Assembly has recognized Our Lady's Inn's rights to free speech and assembly in the face of Ordinance 70459's attempt to infringe them. The newly enacted Section 188.125, which protects conscience rights of alternatives to abortion agencies, states that "It is the intent of the general assembly to acknowledge the right of an alternatives to abortion agency to operate freely and engage in speech without governmental interference as protected by the constitution of the United States and the constitution and laws of Missouri . . ." Mo. Rev. Stat. 188.125.1. Any municipal law that runs contrary to a state statute is beyond the power of the municipality and therefore of no effect. *McCollum v. Dir. of Revenue*, 906 S.W.2d 368, 369 (Mo. banc 1995).

539 U.S. 113, 119 (2003). "[T]he First Amendment needs breathing space and . . . statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn[.]" *Broadrick,* 413 U.S. at 611. When people refrain from protected speech because of the risk of running afoul of an overbroad law, it harms "not only [speakers] but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. at 119; *see also Taxpayers for Vincent*, 466 U.S. at 798 ("[B]roadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected."). Therefore, the Supreme Court has provided that:

> The showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate *all* enforcement of that law, until and unless a limited construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.

Virginia v. Hicks, 539 U.S. at 118-19 (internal quotation marks and citations omitted). This "overbreadth doctrine" has its origin in the First Amendment speech precedents of the United States Supreme Court. *See Broadrick*, 413 U.S. at 612-13; *see also Virginia v. American Booksellers Ass'n,* 484 U.S. 383 (1988); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985); *Taxpayers for Vincent*, 466 U.S. at 796; *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947 (1984).

Ordinance 70459 "punishes a substantial amount of protected free speech," especially "judged in relation to the [Ordinance's] plainly legitimate sweep," which is nonexistent. *Virginia v. Hicks*, 539 U.S. at 118-19. As noted above, the Ordinance redresses *no* misconduct. *See* Section I.A.2, *supra*. Its proponents have produced no evidence that anyone has suffered any invidious discrimination in employment or housing as a result of having had an abortion or used

contraception.[16] Therefore, the Ordinance has no "legitimate sweep." *Id.* On the other side of the scale, the Ordinance plainly does "punish[] a substantial amount of protected free speech." *Id.* It prevents Archdiocesan Elementary Schools from advertising or publicly posting adherence to Catholic religious doctrine as a condition of employment for educators of Catholic schoolchildren. It prevents Our Lady's Inn from disseminating information about its mission of housing homeless women who want to avoid abortion. It chills all Catholic or pro-life employers' expression related to contraception, abortion, and reproductive technologies. Because the Ordinance is thus substantially overbroad, it should be held facially invalid even if it also has some legitimate applications. *City of Houston, Tex*, 482 U.S. at 459 (citing *Kolender,* 461 U.S. at 359, n.8).

The City has not demonstrated that proponents of abortion constitute a class that needs protecting. Pro-life entities, including entities whose sole mission is to prevent abortion, should not have their speech suppressed for no reason.

D. Ordinance 70459 fails strict scrutiny.

As noted above, the Supreme Court has treated laws that regulate speech on the basis of viewpoint as per se unconstitutional. *See* Section I.A.2, *supra*. Elsewhere, the Supreme Court has held that all content-discriminatory laws, including those that discriminate on the basis of viewpoint, are presumptively unconstitutional and must satisfy the Supreme Court's strict scrutiny standard. *See* Section I.A, *supra*. Even under this lesser standard, Ordinance 70459 fails.

Strict scrutiny review under the First Amendment requires that the Act "be narrowly tailored to promote a compelling government interest." *Playboy Entm't Grp., Inc*., 529 U.S. at 813. The Government's burden to "demonstrate a compelling interest and show that it has

[16] The Ordinance's proponents also have produced no evidence of discrimination on the basis of pregnancy, but to the extent any has occurred, it is already prohibited under Missouri and federal law, as described above. *See supra* note 1.

adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Strict scrutiny is an exacting inquiry, such that "it is the rare case in which . . . a law survives strict scrutiny." *Burson v. Freeman,* 504 U.S. 191, 211 (1992).

1. Ordinance 70459 does not serve a compelling interest.

The compelling interest test can only be satisfied when the law at issue serves interests "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). The determination of whether an asserted interest meets this test "is not to be made in the abstract" but rather "in the circumstances of this case" by looking at the particular "aspect" of the interest "addressed by the law at issue." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); *see also Lukumi*, 508 U.S. at 546 (rejecting assertion that protecting public health was compelling interest "in the context of these ordinances"). "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of the fundamental right to free speech. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The Government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest.").

As discussed above, the Ordinance serves no legitimate government interest, never mind a compelling one. *See* Section I.A.2, *supra*, especially note 11 and accompanying text (noting the lack of evidence of invidious discrimination based on reproductive health decisions and the bill's sponsor's admission that it is intended more as a partisan political tactic than to redress any

harm). Although any Ordinance that purports to bar some form of discrimination might seem to serve an abstract government interest in preventing discrimination, abstract interests do not make the cut as compelling. In concluding that strict scrutiny demands an inquiry "in light of the particular burden the government has placed on the particular claimant," Judge Gorsuch, writing for a unanimous panel, noted:

> The more abstract the level of inquiry, often the better the governmental interest will look. At some great height, after all, almost any state action might be said to touch on "one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue," and measuring a highly particularized and individual interest "directly against one of these rarified values inevitably makes the individual interest appear the less significant."

Yellowbear v. Lampert, 741 F.3d 48, 57 (10th Cir. 2014) (citations omitted); *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996) ("an effort to alleviate the effects of societal discrimination is not a compelling interest"). To meet the standard, the Ordinance must serve a specific, concrete interest (*e.g.,* a problem or issue requiring a solution) that is important enough to qualify as "compelling," and restricting Plaintiffs' speech must materially further that interest. *See Brown v. Entm't Ass'n*, 564 U.S. 786, 799 (2011) (requiring "an 'actual problem' in need of solving . . . and the curtailment of free speech must be actually necessary to the solution . . ."); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (explaining that previous Supreme Court opinions "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants."); *Interactive Digital Software Ass'n v. St. Louis Cty., Mo.*, 329 F.3d 954, 958 (8th Cir. 2003) (finding a regulation on violent video games unconstitutional where there was insufficient evidence of their alleged harmful effects).

"When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease

sought to be cured." *Turner Broadcasting System, Inc.*, 512 U.S. at 664. Rather, Defendants "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.*; *Shaw*, 517 U.S. at 909 (while governments "may take remedial action when they possess evidence of past or present discrimination, they must identify that discrimination, public or private, with some specificity . . . A generalized assertion of past discrimination in a particular industry or region is not adequate because it provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.") (quotations omitted).

Ordinance 70459 dismally fails the compelling interest test. There is no specific evidence, much less compelling proof, that any Plaintiff or anyone else has injured anyone in any manner that could be addressed by the Ordinance. The government has presented no evidence of individuals in the City of St. Louis being discriminated against because of their "reproductive health decisions." Rather, Alderwoman Megan Green has acknowledged that the Ordinance "wasn't sparked by any specific case or current law," but is rather "a way for the city to stake out its opposition to future laws enacted in Missouri, where Republicans now control all corners of government."[17] There is simply no evidence of harm, much less harm "of the highest order." *Church of the Lukumi Babalu Aye*, 508 U.S. at 546; *see also Interactive Digital Software Ass'n*, 329 F.3d at 958 (finding insufficient evidence of harm with more evidence than the City has adduced here). Therefore, there is no compelling interest for Ordinance 70459 to serve.

[17] Katie Kull, Associated Press, *St. Louis ordinance seeks to pre-empt Missouri abortion laws* (Feb. 23, 2017) https://apnews.com/0f4d18472fce4550b75008a9003300ae (last visited Sept. 6, 2017).

2. Ordinance 70459 is not narrowly tailored to the City's alleged interests.

The Ordinance also fails the "narrow tailoring" prong of the strict scrutiny standard. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (internal citations omitted).

Ordinance 70459 does not "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Id.* Rather, in the absence of any evidence that there is any evil to remedy, the Ordinance prophylactically restricts the speech of *all* employers with six employees or more and *all* landlords, without exception. The City has not even pointed to other legislative bodies that have determined that such speech restrictions are necessary to address any social harm. *See supra* note 14 (noting that neither of the allegedly "similar" laws in D.C. and Delaware includes speech codes); *McCullen*, 134 S. Ct. at 2537 (citing the absence of similar laws in any other jurisdiction as "rais[ing] concern that the [government] has too readily foregone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage").

Further, the Ordinance does not exempt even organizations such as Our Lady's Inn, whose state-supported mission is housing pregnant women who want to avoid abortion, from its speech codes. It does not permit even Archdiocesan Elementary Schools, a subsidiary of the Catholic Church itself, to express a preference for teachers and staff who adhere to the Catholic Church's teachings about abortion. A narrowly tailored ordinance would at least exempt such absurd applications of the law. *See Riley v. Nat'l Fed'n of Blind of N.C., Inc.,* 487 U.S. 781, 801 (1988) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (internal quotations and citations omitted).

The Government bears the burden of demonstrating that there are no less restrictive alternatives that would further its alleged interests. *See Playboy Entm't Grp., Inc*., 529 U.S. at 813. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.* Applying that principle here, the City would have to demonstrate: (1) that the already-existing legal prohibitions on pregnancy discrimination are not adequately addressing discrimination on the basis of pregnancy status; (2) that there have been instances of invidious discrimination based on other "reproductive health decisions" that are not adequately addressed by existing laws, and (3) that such instances cannot be addressed without restricting Plaintiffs' speech. Without demonstrating that Ordinance 70459 serves *any* legitimate interest, the City cannot possibly demonstrate that it is the "least restrictive alternative" to further any such interest.

"If the First Amendment means anything, it means that regulation of speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). The City's use of restricting speech as "the first strategy" it thought to try, and its failure to pursue (or apparently even consider) any other available options for furthering whatever legitimate end it may eventually claim for the Ordinance, ends the analysis.

Ordinance 70459's content-based speech restrictions do not serve any compelling governmental interest, and they certainly are not narrowly tailored to do so. Therefore, Plaintiffs are entitled to summary judgment on their free speech claims.

II. Plaintiffs Are Entitled to Summary Judgment on Their Expressive Association Claim (Count II).

The fundamental right to expressive association was first articulated in *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958), where Justice Harlan wrote for the Court that "[e]ffective

advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking on the close nexus between the freedoms of speech and assembly." *Id*. at 460; *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."). "The reason we have extended First Amendment protection in this way is clear: The right to speak is often exercised most effectively by combining one's voice with the voices of others." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 68 (2006) (*FAIR*).

Inherent in the right to associate is a correlative right of non-association. *See Roberts*, 468 U.S. at 623 ("Freedom of association . . . plainly presupposes a freedom not to associate."); *see also id*. at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.").

The strict scrutiny standard applies whenever government action "directly and immediately affects associational rights." *Dale*, 530 U.S. at 656.

"[A]ssociations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at 655. Ordinance 70459 purposefully, directly, immediately and substantially threatens the rights of Plaintiffs and their constituents *(i.e.,* members, clients, donors, students and parents) to associate "to speak, to worship, and to petition the government for the redress of grievances" and

for "social, . . . educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622. The Supreme Court therefore requires that the Ordinance be subjected to the "strict scrutiny" standard. *See Dale*, 530 U.S. at 656.

Plaintiffs believe in the inherent value and sanctity of all human life, even *in utero*, and they associate for the purpose of communicating that viewpoint to congregants, students, clients, customers, and recipients of services. As the Supreme Court held of the Boy Scouts in *Dale*, "[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Id.* at 650. Plaintiffs' insistence on like-mindedness as to this issue among their employees, and in the case of Our Lady's Inn, among employees, tenants and clients, is constitutionally protected as a prerequisite for their expressive association. *See Knox v. Serv. Emps. Int'l Union, Local 1000,* 132 S. Ct. 2277, 2288 (2012). Their associations will be impaired, if not destroyed, if they are compelled to employ or house individuals who advocate for or perform abortions.

Roberts, as articulated by the *Dale* Court, sets out a three-step inquiry into whether an anti-discrimination law abrogates a plaintiff's right of free association: (1) whether the organization engages in expressive activity; (2) whether the inclusion of the civil-rights claimant interferes with the organization's expression; and (3) whether the state has a compelling interest which justifies any interference with the organization's expression, and if so whether it has advanced its interest through the least restrictive means of achieving its end. *See Dale*, 530 U.S. at 648, 650, 657-58.

Regarding the first element, "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private." *Roberts*, 468 U.S. at 648.

There is no question that Plaintiffs engage in expressive activity. Regarding the Archdiocesan Elementary Schools, the Supreme Court has long held that private schooling and education of children, *i.e.*, the "instruction of the young," are expressive activities. *See Runyon v. McCary,* 427 U.S. 160 (1976); *Roberts*, 468 U.S. at 638 (O'Connor, J., concurring). Archdiocesan Elementary Schools' religion teachers are a principal source of religious instruction to students. Statement of Material Facts, ¶20. The classes and teachers play a critical role in transmitting the Catholic faith. *Id*. Given its educational mission, there is no doubt that Plaintiff Archdiocesan Elementary Schools qualifies as an expressive association. *See Dale*, 530 U.S. at 650 ("It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.").

Our Lady's Inn's mission is to encourage and assist homeless women to avoid abortion. Our Lady's Inn proudly calls itself a "life-affirming alternative to abortion."[18] Communicating the viability of that alternative to pregnant women themselves is the maternity home's principal expressive activity, but Our Lady's Inn also engages in a variety of other expressive activities aimed at raising awareness of the dignity of life and the needs of pregnant women in challenging circumstances, generating community support for its mission, and fundraising. *See, e.g.*, Council of Young Friends of Our Lady's Inn, https://ourladysinn.org/young-friends/ ("The mission of our Council of Young Friends will be to spread awareness and cultivate the support of the next generation of the Our Lady's Inn family . . ."). Statement of Material Facts, ¶8. Thus, Our Lady's Inn falls squarely within the courts' understanding of an "expressive association." *See Roberts*, 468 U.S. at 626-67 (identifying the Jaycees as an expressive association on account of "a variety of civic, charitable, lobbying, fundraising, and other activities").

[18]Statement of Material Facts, ¶20; Our Lady's Inn, *Who We Are*, https://ourladysinn.org/who-we-are/ (last visited Sept. 6, 2017).

Frank O'Brien and O'Brien Industrial Holdings openly and outwardly conduct business in accordance with Mr. O'Brien's sincerely held Catholic beliefs. Statement of Material Facts, ¶¶29-33, 36. The company's mission "is to make our labor a pleasing offering to the Lord while enriching our families and society." *Id*. at ¶30. That mission is communicated to new hires, prospective business partners, and the community at large through the company's Mission and Values statement, which includes Biblical quotations and Values statements, as well as through its employment policies and community outreach activities. *Id*. at ¶¶29-33, 36. Inasmuch as Frank O'Brien has deliberately constructed O'Brien Industrial Holdings as not only a business enterprise but also a forum in which individuals "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends," the company qualifies as an expressive association. *Dale*, 530 U.S. at 647 (quoting *Roberts*, 468 U.S. at 622).

The second element of the *Roberts*/*Dale* analysis—whether the inclusion of the parties protected by the Ordinance interferes with the organization's expression—does require that the Court explore, to a limited extent, the nature of Plaintiffs' position on reproductive health decisions, most notably abortion. *See Dale*, 530 U.S. at 650. Plaintiffs' clear and unquestioned opposition to abortion is outlined above and in the attached declarations, and "because the record before [the Court] contains written evidence of the [Plaintiffs'] viewpoint, [] it is instructive, if only on the question of the sincerity of the professed beliefs." *Id*. at 651. The Court must then determine whether the inclusion as employees and/or tenants of individuals who dissent from Plaintiffs' beliefs about abortion would significantly burden Plaintiffs' expressive efforts to oppose and discourage abortion. *Id*. at 651. It certainly would.

If the Ordinance were enforced against Our Lady's Inn, for example, the maternity home could not fire, or decline to hire, a nurse who recommends abortion to residents. Similarly,

Archdiocesan Elementary Schools could not avoid hiring an abortion advocate to teach religion classes in its Catholic schools. Frank O'Brien and O'Brien Industrial Holdings would be subject to the hiring and housing constraints, and they would also be forced to provide and pay for health insurance coverage for abortion for employees, despite their avowed commitment to adhere to the Catholic faith as an individual and as an organization.

Courts must "give deference to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653 (citing *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 123-24 (1981) (considering whether a Wisconsin law burdened the National Party's associational rights and stating that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party")). Further, courts must not be "guided by [their] views of whether the [the organization's views] are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message." *Dale*, 530 U.S. at 661. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id*. (citing *Hurley,* 515 U.S. at 579).

This deference is not unlimited, of course. In *FAIR*, an association of law schools and law faculties sought to exclude military recruiters from their campus job fairs "because they object to the policy Congress has adopted with respect to homosexuals in the military." *FAIR,* 547 U.S. at 52. The Solomon Amendment, however, required the Department of Defense to deny federal funding to institutions of higher education that declined to grant military representatives access to and assistance for recruiting purposes. *Id.* at 51. The Supreme Court held that this law did not

violate the law schools' First Amendment rights because the law schools were free to disassociate themselves from the military's views, and students could appreciate the difference between school-sponsored and non-sponsored speech. *Id.* at 65, 69-70 (emphasizing that "recruiters are not part of the law school" but are "by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. . . . [N]othing about the statute affects the composition of the group . . .)."

Ordinance 70459 is not like the Solomon Amendment. It does not mandate that outsiders be allowed to come into Plaintiffs' organizations for a limited purpose, as in *FAIR*; it mandates that outsiders become insiders, and "become members of the . . . expressive association" by working or residing within it. *Id*. Compelling Plaintiffs to include dissenters from their pro-life messages as employees and/or tenants of their organizations would significantly burden Plaintiffs' expressive missions to oppose and discourage abortion.

Ordinance 70459 violates Plaintiffs' right to freedom of association by denying them the right to organize their staffs and circulate expressive materials in accordance with their views on controversial reproductive health decisions, for example, that abortion is a grave moral wrong. The Ordinance restricts the freedom of organizations and individuals such as Plaintiffs to form expressive associations of those who share their commitment to respecting the sanctity of life and the dignity of the unborn child.

Moreover, because Ordinance 70459 is substantially overbroad as discussed above, the Ordinance also chills and deters Plaintiffs as well as third parties not before the Court from engaging in expressive association guaranteed by the First Amendment. *See* Section I.C, *supra*. Therefore, Plaintiffs are entitled to summary judgment on their expressive association claim.

III. Plaintiff Archdiocesan Elementary Schools Is Entitled to Summary Judgment on Its *Hosanna-Tabor* Claim (Count III).

In *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, the Supreme Court recognized that the First Amendment Religion Clauses grant religious organizations broad authority to hire and fire "ministers" without government interference by way of employment discrimination laws. *See* 565 U.S. 171, 181-90 (2012). "Requiring a church to . . . retain an unwanted minister . . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id*. at 188. By imposing constraints on the employment decisions of religious employers, such as Plaintiff Archdiocesan Elementary Schools, Ordinance 70459 seeks to subject them to precisely the sort of government interference that *Hosanna-Tabor* forbids.

The *Hosanna-Tabor* Court declined to adopt a rigid formula for determining whether an employee qualifies as a "minister," but it did establish that it is a broad category, "not limited to the head of a religious congregation," *id.* at 190. That category would undoubtedly encompass teachers in Catholic elementary schools, and especially teachers of religion. Indeed, the dismissed employee in *Hosanna-Tabor* was herself a fourth grade teacher, who taught both religious and secular subjects. *Id.* at 178, 196. Although she apparently only spent 45 minutes a day on her religious duties, the Supreme Court held that the ministerial exception barred her from pursuing a disability employment discrimination claim. *See id.* at 193. The Supreme Court criticized the lower court for "plac[ing] too much emphasis" on the proportion of time she spent on secular duties, observing that the question of whether an employee's religious duties warrant application of the ministerial exception "is not one that can be resolved by a stopwatch." *Id.* at 193-94. Instead, the Court considered a number of other factual circumstances, including the fact that the claimant had undertaken "a significant degree of religious training" in order to qualify

for her position, and that her "job duties reflected a role in conveying the Church's message and carrying out its mission." *Id*. at 191-92.[19]

Hosanna-Tabor's conclusion is consistent with decades of case law recognizing that parochial schools play a critical role in the transmission of religious faith and that the government should accordingly hesitate to interfere with their employment decisions. *See, e.g.*, *Little v. Wuerl*, 929 F.2d 944, 948 (3d Cir. 1991) ("The religious significance of parochial schools—and their teachers in particular—is proclaimed by the Catholic Church [and] has been recognized by the courts . . . ."); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) ("[W]e have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school. . . . Religious authority necessarily pervades the school system.") (internal citations and quotations marks omitted); *Id. at* 504 ("The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.").

Moreover, although *Hosanna-Tabor* is the most recent Supreme Court precedent applicable to Plaintiff Archdiocesan Elementary Schools' Religion Clauses claim, earlier employment discrimination case law also supports the rights of religious organizations to require their employees to model adherence to their religious tenets. For example, in *Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc*., the Third Circuit upheld the termination of a Catholic school teacher who had signed a pro-choice proclamation later made public. 450 F.3d

[19] Although Plaintiffs submit that this case's facts are sufficiently similar to those of *Hosanna-Tabor* to be squarely controlled by that case, it is also true that *Hosanna-Tabor*'s progeny have applied the ministerial exception even more broadly. *See, e.g.*, *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012) (church music director considered to be minister); *Ginalski v. Diocese of Gary*, 2016 WL 7100558, *8 (Dec. 5, 2016) (school principal a minister despite "lack of evidence of involvement in religious activity").

130 (3d Cir. 2006). The *Curay-Cramer* decision foreshadowed *Hosanna-Tabor* by observing that a religious organization has an intrinsic right to "define the parameters of what constitutes orthodoxy," and that Title VII cannot be applied "in situations where it is impossible to avoid inquiry into a religious employer's religious mission or the plausibility of its religious justification for an employment decision." *Id*. at 141. *See also Little*, 929 F.2d at 948 ("We conclude that the permission [granted by Title VII to religious institutions] to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."); *cf. Chambers v. Omaha Girls Club*, *Inc*., 834 F.2d 697, 705 (8th Cir. 1987) (holding that Title VII did not bar the dismissal of an unmarried pregnant employee for violating a "role model" policy, because the policy was both a business necessity and a *bona fide* occupational qualification for an organization that sought to encourage young women to avoid teen pregnancy).

Many, if not all, of Archdiocesan Elementary Schools' employees qualify as "ministers" under *Hosanna-Tabor*. All parochial elementary school employees have "job duties [that] reflect[] a role in conveying the Church's message and carrying out its mission." *Hosanna-Tabor*, 565 U.S. at 192. Like the teacher in *Hosanna-Tabor*, the teachers of Archdiocesan Elementary Schools spend part of every workday performing duties related to inculcating the faith in Catholic schoolchildren. Statement of Material Facts, at ¶20. In addition, like the teacher in *Hosanna-Tabor*, approximately 25 of Archdiocesan Elementary Schools' employees have undertaken specialized religious education in preparation for their roles. *Id*. These 25 religious educators are either certified or are in the process of obtaining certification as religion teachers by the Religious Education Department of the Catholic Education Office of the Archdiocese of St. Louis. *Id*. Moreover, in order to pursue that certification, those employees must already hold

a bachelor's degree with at least twelve credit hours in specified theology and religious education courses from a Catholic college, university, or institute. *Id.* If there is any doubt about the "ministerial" status of other parochial school employees, there is absolutely no question that Archdiocesan Elementary Schools' religion teachers, who are the primary source of religious instruction to students and thus play a critical role in transmitting the Catholic faith, qualify as "ministers" under *Hosanna-Tabor*. *Id*.

It should be noted, though, that Archdiocesan Elementary Schools has consistently treated *all* of its employees as ministers of the Catholic faith—not only in the context of this litigation, but by recognizing that every such employee contributes to educating parochial schoolchildren in the faith by modeling a faithful Catholic life, and therefore requiring a commitment to living in conformity with Catholic doctrine as a condition of employment. *Id.* at ¶21; *see also* 2017 Archdiocesan Witness Statement, Exhibit A to DePriest Declaration ("All who serve in Catholic education in the parish and school programs, and Catholic Education Office of the Archdiocese of St. Louis will witness by their public behavior, actions, and words a life consistent with the teachings of the Catholic Church."). The conception of all Catholic schoolteachers as exemplars of the faith is found in Canon Law, which dictates that "[t]he instruction and education in a Catholic school must be grounded in the principles of Catholic doctrine; teachers are to be outstanding in correct doctrine and integrity of life." Canon 803(2) of the Catholic Church. Thus, *all* Catholic schoolteachers play "a role in conveying the Church's message and carrying out its mission." *Hosanna-Tabor*, 565 U.S. at 191-92.

Given (a) the courts' longstanding recognition of the critical role of parochial school employees in transmitting religious faith, (b) the courts' deference to religious organizations on matters of institutional self-governance, and (c) *Hosanna-Tabor*'s finding, on similar facts, that

the First Amendment protects religious institutions from government interference in their employment decisions, Ordinance 70459's regulation of Archdiocesan Elementary Schools' employment decisions is plainly unconstitutional.

The Religion Clauses of the First Amendment vest in churches and religious schools the autonomy to order their own affairs, including to decide for themselves, free from governmental interference, matters of church government and doctrine, the communication of that doctrine, and internal administration of their own institutions. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 COLUM. L. REV. 1373, 1388-89 (1981). Under the Religion Clauses, decisions that Ordinance 70459 purports to control—such as whether to hire, retain, promote or fire parochial school employees based on their reproductive health decisions—are Archdiocesan Elementary Schools' alone to make.Therefore, Plaintiff Archdiocesan Elementary Schools is entitled to summary judgment on its *Hosanna-Tabor* claim.

IV. Plaintiff Archdiocesan Elementary Schools Is Entitled to Summary Judgment on Its *Pierce v. Society of Sisters* Claim (Count IV).

Ordinance 70459 violates parents' rights under *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), to "direct the upbringing and education of children under their control" by selecting schools that exemplify the values and principles they want their children to learn. *Id.* at 534-35. "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* By interfering with the employment decisions of parochial schools, compelling them to employ teachers who espouse values that contradict those of the Catholic Church, Ordinance 70459 usurps the "right [and] high duty" of parents to select an educational program that prepares their children to live up to the obligations of the Catholic faith.

In *Pierce*, a parochial school was granted standing to challenge an Oregon statute that required all children to attend public school. *Id*. at 530. The religious school successfully argued that the statutory requirement violated the rights of parents to direct the upbringing of their children, even though no parent was a plaintiff in the suit. *Id*. at 531-35. Because of the close relationship between the school and the parents, and because the school had an interest in the parents' (the third parties') constitutionally protected activity, the school had third-party as well as primary standing. *Id*. at 535-36.

Pierce involved both injury to the parochial school itself (*i.e.*, being "threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools," *id*. at 535) and violation of the fundamental rights of parents and children (*i.e.*, "the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school . . .," *id*. at 532).

Similarly, this case involves both injury to Catholic schools themselves and a violation of the fundamental rights of parents and their children. Specifically, by forcing Archdiocesan Elementary Schools to hire, retain and promote employees who openly violate or vocally disagree with Catholic moral teaching, Ordinance 70459 jeopardizes Catholic schools' mission to teach their students the doctrines of the Catholic faith by word and example. It also violates the fundamental rights of the parents to "direct the upbringing and education" of their children by choosing a school environment in which the faculty and staff uniformly model Catholic values, as well as the rights of children to attend a school with the desired educational environment. *See id.* at 532, 534-35. Accordingly, under *Pierce*, as applied to Archdiocesan Elementary Schools, Ordinance 70459 is repugnant to the Due Process Clause of the Fourteenth

Amendment of the U.S. Constitution. Plaintiff Archdiocesan Elementary Schools is entitled to summary judgment on its due process claim under *Pierce v. Society of Sisters*.

V. Plaintiffs Are Entitled to Summary Judgment on Their Void for Vagueness Claims (Count V).

Ordinance 70459 is void for vagueness. The Supreme Court has recognized that a law can be impermissibly vague for either of two independent reasons: (1) if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) if it authorizes or encourages arbitrary and discriminatory enforcement. *See Chicago v. Morales,* 527 U.S. 41, 56 (1999). Ordinance 70459 suffers from both defects.

When First Amendment freedoms are at stake, courts apply the vagueness analysis more strictly, requiring laws to provide a greater degree of specificity and clarity than would be necessary under ordinary due process principles. *See Hoffman Estates*, 455 U.S. at 499. "First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal citations omitted). Moreover, those standards for specificity and clarity are even higher when a law threatens to impose criminal penalties:

> The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime must be defined with appropriate definiteness. . . . There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment.

Winters v. NY, 333 U.S. 507, 515 (1948) (internal quotation marks and citations omitted)); *see also Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 872 (1997) ("*Reno v. ACLU*") (noting that "vagueness . . . is a matter of special concern" for a "content-based regulation of speech" backed

by criminal penalties, because "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images").

Ordinance 70459's vague terms, backed by criminal sanctions, threaten to chill even more constitutionally protected speech, association, and religious practice than its drafters intended. Therefore, the Ordinance is void for vagueness.

A. The Ordinance uses vague, undefined terms.

Ordinance 70459 is unconstitutionally vague because persons of ordinary intelligence cannot determine which expressive activities are prohibited by the statute. A statute is void for vagueness where "'it forbids . . . the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application . . . .'" *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1308 (8th Cir. 1997) (*quoting Smith v. Goguen*, 415 U.S. 566, 572 (1974)). Because the Ordinance fails to define several key provisions, and defines others using exceptionally broad or amorphous terms, citizens of ordinary intelligence are left to guess at the contours of the law's criminal prohibition and cannot anticipate what conduct will result in arrest and prosecution. *See Grayned*, 408 U.S. at 108. Such vagueness also "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-09.

Ordinance 70459's definition of "reproductive health decision," for instance, is both vague and sweeping in its scope: "any decision related to the use or intended use of a particular drug, device, or medical service related to reproductive health, including the use or intended use of contraception or fertility control or the planned or intended initiation or termination of a pregnancy." Ordinance 70459 Section One (14) (emphasis added). The term, "reproductive

health decision," which is used throughout the Ordinance, is broad enough to encompass not just medical decisions but also political speech or activism regarding abortion or abortifacients, and even the performance of abortions. Moreover, the abortion that is the subject of a "reproductive health decision" does not have to be the employee's own, or even a husband's or sexual partner's; it could be anyone's. Also, the contraceptive use or abortion in relation to which any person's decision of any kind is protected can be entirely speculative (or "intended," according to the Ordinance). An employer or landlord might violate the Ordinance even if no reproductive conduct ever actually happens.

The excessive and ill-defined scope of the definition of "reproductive health decision" makes it difficult for Plaintiffs and other employers and landlords to tailor their conduct to avoid violation of the Ordinance. *See Grayned*, 408 U.S. at 108. It also leaves room for agenda-driven parties or prosecutors to pursue criminal penalties against employers or landlords for conduct that is arguably within the sweep of the Ordinance. That kind of uncertainty will stifle speech and "lead citizens to 'steer far wider of the unlawful zone.'" *Id.* at 109; *see* Section I.C, *supra*.

Ordinance 70459 is also vague as to its effect on Plaintiffs' health insurance plans and whether employers in the City are required to provide coverage for abortion, abortifacients, sterilizations, and contraceptives. Sections (B)(1) and (2) of the Ordinance state that "nothing in this ordinance shall require a religious institution, corporation, association, or society to provide reproductive health benefits of any kind . . . ." In addition, Sections Two (B)(6) and Two (C)(1)(j) contain the following narrow exemption:

> Nothing in this Ordinance shall prohibit a religious institution, corporation, association, society, health care facility or educational institution with historic religious affiliation from:
>
> i. Prohibiting the provision of any reproductive health service on property owned or leased by it;

ii. Refusing to provide or pay for any reproductive health service to any patient, student or employee; or

iii. *Refusing to provide health insurance coverage to any employee for any reproductive health service.*

Id. (emphasis added). Accordingly, in four places, the Ordinance exempts religious organizations from having to provide health insurance for abortion and other reproductive choices. The Ordinance contains no such exemption for employing entities that are not religious organizations, and no exemption for individuals who are employers, religious or not. The implication is that the Ordinance intends to require non-exempt employers (as long as they have six or more employees) to provide health care coverage for abortion, contraception and sterilization.

If the City did not want the Ordinance to be interpreted as requiring employers to provide such coverage, it could have drafted an exemption that stated that "nothing in this ordinance shall require *any individual or organization* to provide reproductive health benefits . . . ." Lawmakers in the District of Columbia did precisely that, stating that "This section shall not be construed to require *an employer* to provide insurance coverage related to a reproductive health decision," with no qualification that the employer be "religious." D.C. Code 2-1401.05 (emphasis added); *see also supra* notes 13-14. The Delaware law, though not a model of clarity, did not include any mention of insurance benefits. *See* 80 Del. Laws, c. 291, § 1; *see also supra* notes 13-14.

Furthermore, the exemption for religious organizations is vague, applying to any "religious institution, corporation, association, society, health care facility or educational institution with historic religious affiliation." Ordinance 70459, Section Two (B)(6). It is impossible to know from the text of the Ordinance whether entities such as O'Brien Industrial Holdings or Our Lady's Inn qualify as "religious . . . corporation[s]" for the purposes of this

exemption. The Ordinance contains no definitions of the terms used in the exemption, nor is there any guidance as to their interpretation in the context of the overall Ordinance.

The Ordinance's speech codes create further uncertainty about the scope of the Ordinance. Section Two (B)(5) provides an exemption from one of the Ordinance's speech codes for a "bona fide occupational qualification" (BFOQ). But BFOQ is undefined, and the context in which it appears offers no guidance as to its meaning. It is also unclear how the exemption could be applied, since it might permit an employer to make certain "discriminatory" statements in hiring, but other provisions of the Ordinance which are not subject to the BFOQ exemption would not permit the same employer to hire consistent with those outlawed statements. Because there is no general BFOQ exception to the employer restrictions, it is impossible to discern how the drafters intend for the narrow BFOQ exception to the employment-related speech code to work.

In sum, many of Ordinance 70459's substantive provisions are perniciously vague and therefore void.

B. The Ordinance's enforcement language is vague.

Ordinance 70459's enforcement mechanism is impermissibly vague. The Ordinance provides for an "aggrieved person" to "file a complaint with the Director of the Civil Rights Enforcement Agency pursuant to the procedures set forth in Ordinance 67119," and that "[s]uch complaints shall be taken, investigated, processed and enforced according to the terms and provisions of Ordinance 67119. However, Ordinance 67119 provides for enforcement only as to classes protected under Ordinance 67119 itself:

> Whenever a complaint alleges a prohibited discriminatory practice that, if proven true, **would violate *this Ordinance***, but does not violate any of the provisions of Section 213 R.S. Mo., the Director shall cause such complaint to be investigated, and if the Director determines that

> there is probable cause to believe that a prohibited discriminatory practice has occurred, the Director shall refer the matter to the City Counselor for prosecution.
>
> ***
>
> Any person convicted of **violation of *this Ordinance*** shall be punished by a fine of not less than Two Hundred Fifty Dollars ($250.00) nor more than Five Hundred dollars ($500.00), or by imprisonment for not more than ninety (90) days or by both such fine and imprisonment . . .

Ordinance 67119, Sections Ten (A)(3), Seventeen (emphases added).

Ordinance 70459 is void for vagueness because it fails to provide adequate notice to Plaintiffs of how it is enforceable and by what means, which will lead to arbitrary enforcement. Moreover, as noted above, such vagueness is especially problematic when enforcement is by criminal sanction. *See Winters*, 333 U.S. at 515; *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

C. The Ordinance's geographical scope is unclear.

Finally, Ordinance 70459 is void for vagueness because it contains no geographical limitations as to its application or enforcement. Plaintiffs have employees and property both inside and outside the City of St. Louis, and are without any guidance as to the geographical limitations of the Ordinance's application. Enforcement outside the City limits would be in violation of Mo. Rev. Stat. 213.135.1, which limits the jurisdiction of local human rights commissions—such as those created by Ordinance 67119 that are purportedly responsible for processing complaints under Ordinance 70459, *see* Section IX, *infra*—to "complaints of violations . . . that are alleged to have been committed within the city, town, village or county which created the commission." But Ordinance 70459's drafters failed to limit the scope of the Ordinance as required by Mo.Rev. Stat. 213.135.1 or any other state law.

Ordinance 70459 is void for vagueness, both on its face and as applied to Plaintiffs. Thus, Plaintiffs are entitled to summary judgment on their claim that Ordinance 70459 violates the Due Process Clause of the Fourteenth Amendment.

VI. Plaintiffs O'Brien Industrial Holdings and Frank O'Brien Are Entitled to Summary Judgment on Their Equal Protection Claim (Count VI).

Ordinance 70459 violates the Fourteenth Amendment guarantee of Equal Protection because it treats O'Brien Industrial Holdings and Frank O'Brien differently than religious organizations having the same objection to the Ordinance, in a way that cannot rationally be described as advancing the City's interests.

The Equal Protection Clause prohibits lawmakers from "treating differently [entities that] are in all relevant respects alike." *See Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992) (citation omitted). Under equal protection doctrine, the City cannot make a distinction that "bears no rational relationship to a legitimate governmental interest." *See Frontiero v. Richardson*, 411 U.S. 677, 683 (1973). In order to avoid violating the guarantee of equal protection, the City must demonstrate that "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). Equal protection requires that "that government not treat similarly situated individuals differently without a rational basis." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

Under this rational-basis review, "it is incumbent on the Court to find 'the relation between the classification adopted and the object to be attained.'" *March for Life v. Burwell*, 128 F. Supp. 116, 126 (D.D.C. 2015) (citing *Romer v. Evans,* 517 U.S. 620, 632 (1996)). "Were the Court to abdicate this search, it would disregard basic principles of equal protection, which secure not only the rights of domestic persons, but also the limits of regulatory authority." *Id*.

In Ordinance 70459's exemptions for religious organizations, the City has excused certain "religious" organizations from portions of the Ordinance, apparently attempting to respect their opposition to abortion (albeit in an unacceptably narrow manner, as described in Section V.A, above). But the exemption is limited to any "religious institution, corporation, association, society, health care facility or educational institution with historic religious affiliation." Ordinance 70459, Sections Two (B)(6) and Two (C)(1)(j). The Ordinance does not exempt entities that do not fall into that category, such as, presumably,[20] O'Brien Industrial Holdings or Frank O'Brien. By extending exemptions to religious organizations but failing to extend them to other employers with deep commitments to the same religious beliefs, the City has treated these Plaintiffs differently from similarly situated entities. O'Brien Industrial Holdings and Frank O'Brien have the same sincerely held religious beliefs about abortion as exempt entities, and there is no principled reason to afford them less protection than those entities. Non-exempt Plaintiffs and the exempt entities "are in all relevant respects alike." *Nordlinger,* 505 U.S. at 10.

The City cannot treat O'Brien Industrial Holdings and Frank O'Brien less favorably than church-affiliated organizations simply because the City does not regard them as "religious" employers. *See Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 872-73 (7th Cir. 2014). In *Center for Inquiry*, the Seventh Circuit held the Equal Protection Clause was violated where a state offered the benefit of marriage solemnization to religious persons but not to atheist humanists, even though their interests in having their marriages solemnized were indistinguishable. *Id.* at 874-75. The court held that the Government cannot "favor religions over

[20] As noted in Section V(A), above, the Ordinance does not define any of the terms used in the exemption, so it is impossible to tell whether any particular employer qualifies for the exemption, but Plaintiffs here suppose that the most likely reading of the exemption does not encompass either O'Brien Industrial Holdings or Frank O'Brien. It may also not include Plaintiff Our Lady's Inn, in which case this Equal Protection claim would apply with equal force to Our Lady's Inn and all similarly-situated entities.

non-theistic groups that have moral stances that are equivalent to theistic ones except for non-belief in God or unwillingness to call themselves religions." *Id.* at 873; *cf. Welsh v. United States*, 398 U.S. 333, 340 (1970) (holding that an individual who "deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience" was equally entitled to a religious conscientious objector exemption under selective service act). Just as "[i]t is irrational to allow humanists to solemnize marriages if, and only if, they falsely declare that they are a 'religion,'" *Ctr. for Inquiry*, 758 F.3d at 875, it is irrational to allow O'Brien Industrial Holdings and Frank O'Brien an exemption from this Ordinance if and only if they are religious organizations as defined by the Ordinance. Whether they fall into that legislatively-created category has no effect on the legitimacy or sincerity of their objections to abortion or other controversial reproductive technologies. Therefore, if the City explicitly exempts religious organizations from, *inter alia*, the provision of health care coverage for reproductive health services, it must also exempt other entities and individuals, such as O'Brien Industrial Holdings and Frank O'Brien, that share the same position on abortion.

Plaintiffs O'Brien Industrial Holdings and Frank O'Brien are thus entitled to summary judgment on their claim that Ordinance 70459's limited exemptions violate the rights secured to them by the Equal Protection Clause of the Fourteenth Amendment.[21]

VII. Plaintiffs Our Lady's Inn, O'Brien Industrial Holdings and Frank O'Brien Are Entitled to Summary Judgment on Their Claims That Violations of Mo. Rev. Stat. 191.724, 376.805 and 191.032 Cause the Ordinance To Be Null and Void (Count VII).

Mo. Rev. Stat. 71.010 states that every Missouri municipality must "confine and restrict . . . the passage of its ordinances to and in conformity with the state law upon the same

[21] The Supreme Court, honoring a closely-held corporation's objection to providing contraceptive drugs to its employees, avoided the error of distinguishing between traditionally religious entities and for-profit entities run in accordance with their owners' religious beliefs. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014).

subject." A municipal ordinance is void if it conflicts with the general laws of the state. *See McCollum v. Dir. of Revenue,* 906 S.W.2d 368, 369 (Mo. banc 1995).

As explained in Section V.A, above, the most plausible reading of Ordinance 70459 is that it requires entities that are not exempt as religious organizations to provide health care coverage for abortion, contraception and sterilization. *See* Ordinance 70459, Sections Two (B)(1) and Two (B)(2); Section Two (B)(6) and Two (C)(1)(j). Individuals like Frank O'Brien, religious or not, enjoy no exemptions from the Ordinance's requirements. And, although its terms are vague and undefined, the Ordinance's exemption also does not appear to apply to Our Lady's Inn or O'Brien Industrial Holdings.[22]

Any municipal requirement that employers provide insurance coverage for abortion directly conflicts with at least two provisions of state law and is therefore null and void:

a. Mo. Rev. Stat. 191.724 prohibits any governmental entity, public official, or entity acting in a governmental capacity from mandating that an employer or an employee include coverage for abortion, contraception or sterilization in a health plan; and

b. Mo. Rev. Stat. 376.805.1 states that "No health insurance contracts, plans, or policies delivered or issued for delivery in the state shall provide coverage for elective abortions except by an optional rider for which there must be paid an additional premium."[23]

Because it requires something that state law forbids, Ordinance 70459 is in irreconcilable conflict with the general laws of the state. *See McCollum*, 906 S.W.2d at 369.

[22] As also noted above, the St. Louis aldermen could easily have followed D.C.'s example in exempting *all* employers from the requirement to provide health care coverage for controversial reproductive health services, but they chose not to. *See* Section V.A, *supra*.

[23] As discussed in Section XI, below, newly-enacted Mo. Rev. Stat. 188.125.6 provides yet another layer of state law protection against a requirement that employers provide insurance coverage for abortion.

Moreover, Sections 191.724 and 376.805.1 are consistent with the General Assembly's stated position on abortion: "It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes." Mo. Rev. Stat. 188.010. Ordinance 70459 therefore makes a protected class out of individuals solely based on their opposition, through action or belief, to Missouri law.

To the extent that Ordinance 70459 contradicts state law prohibiting municipalities from requiring employers to provide insurance coverage, Plaintiffs are entitled to summary judgment that it is null and void.

VIII. Plaintiff Our Lady's Inn Is Entitled to Summary Judgment on Its Claim that Violation of Mo. Rev. Stat. 188.325 and 135.600 Causes the Ordinance to be Null and Void (Count VIII).

As stated in the prior section, Mo. Rev. Stat. 71.010 states that local ordinances must conform to state law. A municipal ordinance is void if it conflicts with the general laws of the state. *McCollum,* 906 S.W.2d at 369.

Our Lady's Inn is part of, and its mission is consistent with, Missouri's Alternatives to Abortion Program, established in 2007 by Mo. Rev. Stat. 188.325. The program assists low-income pregnant women in carrying their unborn children to term instead of having abortions, and further assists them in caring for their newborns or placing their infants for adoption.[24] The program provides services and counseling during pregnancy and following birth.[25]

A separate statute provides that a "maternity home" is "a residential facility located in this state established for the purpose of ***providing housing*** and assistance ***to pregnant women who are carrying their pregnancies to term***, and which is exempt from income taxation under

[24] Missouri Alternatives to Abortion Program website, http://a2a.mo.gov (last visited Sept. 20, 2017).

[25] *Id*.

the United States Internal Revenue Code." Mo. Rev. Stat. 135.600.1(2) (emphasis added). Our Lady's Inn is a maternity home. Thus, it "provid[es] housing . . . to pregnant women who are carrying their pregnancies to term," as mandated by state law. It also leases apartment space to resident supervisors who are required to agree with and support the maternity home's pro-life mission. Statement of Material Facts, ¶3.

Section 135.600 and Section 188.325 are consistent with the General Assembly's stated position on abortion: "It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes." Mo. Rev. Stat. 188.010. Ordinance 70459 therefore makes a protected class out of individuals solely on account of their opposition, through action or belief, to Missouri law.

Ordinance 70459 forbids Our Lady's Inn to discriminate in the provision of housing on the basis of anyone's reproductive health decisions. By Ordinance 70459's terms, then, if Our Lady's Inn is going to provide housing services to pregnant women, it also has to house women who are not pregnant. Likewise, if it houses pregnant women who are not planning to abort, it also has to house women who are planning to abort, and women who have already aborted. If Our Lady's Inn were to comply with those requirements, it would no longer be considered a "maternity home" for purposes of the Maternity Home Tax Credit. Our Lady's Inn would also lose private funding if it housed women who had abortions while residing at the home. Statement of Material Facts ¶9. The home's charitable mission and whole purpose for associating would be directly countermanded and in time destroyed.

In addition, if Our Lady's Inn were to comply with Ordinance 70459, it would no longer be in compliance with the Alternatives to Abortion Act, which provides that "[t]he alternatives to

abortion services program and the moneys expended under this section shall not be used to perform or induce, assist in the performing or inducing of or refer for abortions. Moneys expended under this section shall not be granted to organizations or affiliates of organizations that perform or induce, assist in the performing or inducing of or refer for abortions." Mo. Rev. Stat. 188.325.5.

The Alternatives to Abortion Act also provides that the "[s]ervices provided under the alternatives to abortion program shall include . . . housing and utilities." Mo. Rev. Stat. 188.325. Ordinance 70459 prohibits Our Lady's Inn from providing housing to women on the basis of their having chosen not to have abortions. The Ordinance thus prohibits what state law specifically mandates. *See* Mo. Rev. Stat. 71.010; *State ex rel. Sunshine Enters. of Mo., Inc. v. Bd. of Adjustment of the City of St. Ann*, 64 S.W.3d 310, 314 (Mo. 2002) ("An ordinance conflicts with state law if it permits something state law prohibits, or prohibits something state law permits."). Our Lady's Inn's participation in, and the receipt of funding from, the Alternatives to Abortion Program would also be in jeopardy if the organization were compelled to providing housing to women after they have abortions.

Because the Ordinance conflicts with Mo. Rev. Stat. 188.325 and 135.600, and with Missouri's abortion-related statutes in general, Plaintiff Our Lady's Inn is entitled to summary judgment that the Ordinance is null and void.

IX. Plaintiffs Are Entitled to Summary Judgment on Their Claim That Ordinance 70459 Is Null and Void Because Its Enforcement Provision Is Defective (Count IX).

Ordinance 70459's enforcement provision refers to Ordinance 67119:

> An aggrieved person may . . . file a complaint with the Director of the Civil Rights Enforcement agency pursuant to the procedures set forth in Ordinance 67119. Such complaints shall be taken, investigated, processed and enforced according to the terms and provision of Ordinance 67119.

Ordinance 70459, Section Three. However, Ordinance 67119 explicitly limits its enforcement mechanisms (administrative, civil claim, and criminal prosecution) to the classes protected under Ordinance 67119 and Mo. Rev. Stat. Chapter 213; it does not allow for complaints based on other ordinances. Therefore, Ordinance 70459 has no enforcement mechanism.

Ordinance 67119 establishes the St. Louis Civil Rights Enforcement Agency and the St. Louis Civil Rights Enforcement Commission and endows them with authority to enforce the provisions of Ordinance 67119 itself and Chapter 213 of the Revised Missouri Statutes, which both specify classes that may not be discriminated against in employment, housing and public accommodations. *See* Mo. Rev. Stat. 213.040, 213.055, 213.065; Ordinance 67119 Sections Three (3), Five (2), Seven (1), Eight, Nine. Neither Ordinance 67119 nor Mo. Rev. Stat. Chapter 213 names "reproductive health decision[s]" as a protected class. Therefore Ordinance 67119 does not give the St. Louis Civil Rights Enforcement Agency and the St. Louis Civil Rights Enforcement Commission authority to enforce a prohibition on discrimination on that basis.

Section Ten (A) of Ordinance 67119 describes how these entities will process discrimination complaints. When there is a meritorious complaint alleging discriminatory conduct that would violate Ordinance 67119 ("this Ordinance") but not Mo. Rev. Stat. Chapter 213, Section Ten (a)(3) dictates that it be referred to the City Counselor for criminal prosecution. Ordinance 67119 Section Ten (A)(3) (emphasis added). There is no further, or alternative, process. Other sections of Ordinance 67119 confirm that only criminal enforcement is available for offenses not covered by state discrimination law. *See id.* Section Ten (D) (a civil action in circuit court applicable only to classes protected by Rev. Mo. Stat. Chapter 213); *Id.* Section Ten (E)(3) (after a determination of probable cause of unlawful discrimination concerning a protected

class *not* named in Chapter 213, the only recourse is to refer the matter for criminal prosecution by the City Counselor).

Ordinance 67119 provides only one criminal penalty for a violation of its provisions:

> Any person convicted of violation of ***this Ordinance*** shall be punished by a fine of not less than Two Hundred Fifty Dollars ($250.00) nor more than Five Hundred dollars ($500.00), or by imprisonment for not more than ninety (90) days or by both such fine and imprisonment.

Ordinance 67119, Section Seventeen (emphasis added). Ordinance 67119 does not specify a penalty for violation of any other ordinance, such as Ordinance 70459.

Because Ordinance 67119 does not provide for enforcement of other ordinances, Ordinance 70459's cross-reference to Ordinance 67119 is defective. Accordingly, Plaintiffs are entitled to summary judgment on their claim that Ordinance 70459 has no means of enforcement and is therefore null and void.

X. Plaintiffs Are Entitled to Summary Judgment on Their Claim That Ordinance 70459 Violates The Missouri Religious Freedom Restoration Act (Count X).[26]

The Missouri Religious Freedom Restoration Act (RFRA), Mo. Rev. Stat. 1.302, 1.307, broadly protects the exercise of religion and sets a high threshold for government limitation of any religiously motivated belief or action. Missouri's RFRA applies to all state and local laws, resolutions, and ordinances and the implementation of such laws, resolutions, and ordinances, whether statutory or otherwise, *see* Mo. Rev. Stat. 1.307.1, and it protects all "persons," a term that Mo. Rev. Stat. 1.020 defines to include corporations.

In 1998, the United States Supreme Court held that the Federal Religious Freedom Restoration Act could not be applied to state laws. *See In re Young*, 141 F.3d 854, 856 (8th Cir. 1998) (citing *City of Boerne v. Flores,* 521 U.S. 507 (1997)). In response, Missouri and many other states enacted state statutes to protect religious freedom. *See* James A. Hanson, *Missouri's*

[26] Plaintiffs state this Count X as a primary claim, and do not raise it as a defense.

Religious Freedom Restoration Act: A New Approach to the Cause of Conscience, 69 MO. L. REV. 853, 869 (2004). In some respects, Missouri's statute is more robust than any other state's. *Id.* at 875. It provides:

> A governmental authority may not restrict a person's free exercise of religion, unless: (1) The restriction is in the form of a rule of general applicability, and does not discriminate against religion, or among religions; **and** (2) **The governmental authority demonstrates that application of the restriction to the person is *essential to further a compelling governmental interest*, and is *not unduly restrictive* considering the relevant circumstances**.

Mo. Rev. Stat. 1.302.1 (emphasis added). For purposes of Missouri's RFRA, "exercise of religion" includes "an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief." Mo. Rev. Stat. 1.302.2. Unlike the federal RFRA and any other state's RFRA, Missouri's RFRA does not include a requirement that the exercise of religion be "substantially" burdened. Any restriction of a religiously motivated action is prohibited unless the government meets its burden of proving the restriction is essential to further a compelling government interest.

Plaintiffs' beliefs that abortion and some forms of contraception are grave moral wrongs are religious beliefs. Thus, to the extent that Plaintiffs make employment or housing decisions motivated by those beliefs, those decisions are protected by Missouri's RFRA as "exercises of religion." Mo. Rev. Stat. 1.302.2. Similarly, when Plaintiffs decline to personally cooperate in what they consider to be the grave moral wrongs of abortion and contraception by providing their employees with health care coverage for those services, that decision is a RFRA-protected "exercise of religion," since it is a "refusal to act that is substantially motivated by religious belief." *Id.*[27]

[27] It is likely that Archdiocesan Elementary Schools qualify for the Ordinance's exemption from the requirement to provide such health insurance coverage to employees, but the same exemption does not appear to apply to the other Plaintiffs. *See* Sections V.A, VI, *supra*.

Ordinance 70459 requires Plaintiffs to act contrary to their religious beliefs when making employment, employee benefits, and other human resources decisions. It also requires them to act contrary to their religious beliefs in the context of the sale and rental of realty and, for Our Lady's Inn, in housing decisions. Therefore, under Missouri's RFRA, the City bears the heavy burden of demonstrating that the application of Ordinance 70459 to Plaintiffs "is essential to further a compelling governmental interest, and is not unduly restrictive considering the relevant circumstances." Mo. Rev. Stat. 1.302.1(1). The law is very clear: The government must "meet[] the burden of going forward with the evidence and of persuasion." Mo. Rev. Stat. 1.302.3.

As discussed in Section I.D.1, above, Plaintiffs are not aware of any evidence that the Ordinance will serve *any* governmental interest, much less a "compelling" one. As noted above, pregnancy discrimination is already prohibited by Missouri and federal law. *See Self v. Midwest Orthopedics Foot & Ankle, P.C.*, 272 S.W.3d 364, 366 (Mo. App. W.D. 2008) (decided under the Missouri Human Right Act); 42 U.S.C. 2000e(k) (the "Pregnancy Discrimination Act of 1978"); *see also supra* note 1. The proponents of Ordinance 70459 have produced no evidence that invidious discrimination based on "reproductive health decisions" ever happens, much less that it happens on such a scale as to justify the Ordinance's infringement of Plaintiffs' constitutional and statutory rights. The Ordinance's supporters have also not shown that instances of such discrimination—if there are any—cannot be redressed by existing laws. Because there is no evidence that there is any problem to redress, it would be impossible for the City to demonstrate that the Ordinance "is not unduly restrictive considering the relevant circumstances." *Id.* What relevant circumstances can the Court even consider? All available evidence suggests that Ordinance 70459 was passed to advance an ideological or pro-choice agenda, not to fix any actual problem. *See supra* note 11 and accompanying text. Providing a

political "win" to the reproductive rights lobby is not a "compelling state interest," and *any* restrictions placed on Plaintiffs' religious exercise for such a specious purpose are "unduly restrictive."

Ordinance 70459 has the immediate and continuing effect of restricting Plaintiffs' free exercise of religion. It pressures Plaintiffs to violate their sincerely held religious beliefs and practices by threatening them with fines and incarceration. And there is no evidence that it serves any legitimate purpose. Because the restriction on Plaintiffs is not in furtherance of a compelling governmental interest and is unduly restrictive considering the relevant circumstances, the Ordinance is unenforceable against Plaintiffs under Missouri's RFRA. *See* Mo. Rev. Stat. 1.302, 1.307. Therefore, Plaintiffs are entitled to summary judgment that Ordinance 70459 violates the Missouri Religious Freedom Restoration Act.

XI. Plaintiffs are Entitled to Summary Judgment Because Missouri Senate Bill 5 Preempts Ordinance 70459[28]

On July 26, 2017, the Governor of Missouri signed legislation related to Missouri's abortion laws, collectively known as Senate Bill 5. There are several new statutes within Senate Bill 5; however, it appears that only Mo. Rev. Stat. 188.125 could have a direct bearing on the case at bar. Mo. Rev. Stat. 188.125 was scheduled to take effect on or about September 24, 2017.

Among other provisions, Section 188.125 preempts local ordinances that:

(1) "prohibits, restricts, limits, controls, directs, interferes with, or otherwise adversely affects" the "operations or speech" of alternatives to abortion agencies such as Our Lady's Inn, Mo. Rev. Stat. 188.125.2;

(2) require any person to "directly or indirectly participate in abortion if such

[28] Senate Bill 5 was not passed until after Plaintiffs initiated this lawsuit, but the parties agreed, with the Court's approval, to address the effects of the new law in their summary judgment briefs.

participation is contrary to the religious beliefs or moral convictions of such person," *id.* 188.125.4;

(3) require that any health plan include benefits not required by state law, *id.* 188.125.6.

The statute defines "[p]articipate in abortion" as "[t]o undergo an abortion" or "[t]o perform or induce, assist in, refer or counsel for, advocate for, promote, procure, reimburse for, or ***provide health plan coverage*** for an abortion not necessary to save the life of the mother." Mo. Rev. Stat. 188.125.10(2)(b) (emphasis added).

As described above, Ordinance 70459 radically interferes with Our Lady's Inn's operations. *See, e.g.*, Sections II and VIII, *supra*. As a "maternity home" and agency of the Alternatives to Abortion Program, Our Lady's Inn's mission requires it to make employment and housing decisions based on "reproductive health decisions," which Ordinance 70459 forbids. For example, Ordinance 70459 would prohibit the maternity home from asking prospective employees if they share its commitment to the sanctity of human life. The housing provisions would prevent Our Lady's Inn from considering its pro-life mission when renting or selling property. Most troubling of all, the Ordinance would prohibit the maternity home from providing its housing services to women who choose not to have abortions, which would imperil its sources of public and private funding, likely putting an end to its operations altogether.

Ordinance 70459 also interferes with Our Lady's Inn's speech, as described in Section I, above. In the employment context, Ordinance 70459 directly and currently interferes with Our Lady's Inn's speech by barring it from

> print[ing] or circulat[ing] or caus[ing] to be printed or circulated, any statement, advertisement or publication, or [making] any inquiry in connection with prospective employment, which expresses directly or indirectly any preference, limitation, specification or discrimination because of reproductive health decisions or pregnancy

> status (including childbirth or a related medical condition), unless based upon a bona fide occupational qualification.

Ordinance 70459, Section Two (B)(5); *see also* Section I, *supra*. The other prohibitions contained in Section Two, including but not limited to (B)(1) and (2), also interfere with Our Lady's Inn's speech.

As to housing and realty, Ordinance 70459 directly and currently interferes with Our Lady's Inn's constitutionally protected speech by making it unlawful to:

> make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on reproductive health decisions or pregnancy status (including childbirth or a related medical condition) or an intention to make any such preference, limitation, or discrimination . . .

Ordinance 70459, Section Two (C)(1)(f). The remaining prohibitions contained in Section Two, including but not limited to (C)(1)(d), (e), and (g), also interfere with Plaintiffs' speech.

Senate Bill 5 preempts all of these provisions that purport to constrain Our Lady's Inn operations and speech.

Senate Bill 5 also preempts the provisions of Ordinance 70459 that apparently require Plaintiffs Our Lady's Inn, O'Brien Industrial Holdings and Frank O'Brien to provide health insurance coverage for abortion, sterilizations, and contraceptives. *See* Section VII, *supra*. Under Mo. Rev. Stat. 188.125.10(2)(b), providing health insurance coverage for abortion is "participat[ing] in abortion," and no municipality may "requir[e] a person to directly or indirectly participate in abortion." Mo. Rev. Stat. 188.125.4. And municipalities are also barred from requiring Plaintiffs to provide employer health insurance coverage for anything that is "not otherwise required by state law," which includes abortion, sterilizations and contraceptives. Mo. Rev. Stat. 188.125.6.

Accordingly, Plaintiffs Our Lady's Inn, Frank O'Brien, and O'Brien Industrial Holdings

are entitled to summary judgment that Ordinance 70459 is preempted by Mo. Rev. Stat. 188.125.[29]

XII. Plaintiffs Satisfy the Remaining Factors for a Permanent Injunction.

As noted above, to obtain a permanent injunction, a plaintiff is required to show: (1) success on the merits; (2) that it faces irreparable harm; (3) that the harm to it outweighs any possible harm to others; and (4) that an injunction serves the public interest. *Cmty. Of Christ Copyright Corp. v. Devon Park Restoration Branch of Jesus Christ's Church*, 634 F.3d 1005, 1012 (8th Cir. 2011). Plaintiffs have more than satisfied this standard.

Ordinance 70459 is legally defective for all of the reasons enumerated in this memorandum; thus, Plaintiffs are entitled to prevail on the merits.

Ordinance 70459 has chilled Plaintiffs' First Amendment expression. *See* Sections I and II, *supra*; *see also* Section I.C (discussing the particular harm of overbroad constraints on speech), *supra*. "Loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). When a constitutional right is impaired, a finding of irreparable injury is mandatory. *See id*.

There is no evidence whatsoever that anyone would be harmed by the invalidation of Ordinance 70459. The City has never produced any evidence of invidious discrimination in St. Louis against employees or tenants on the basis of reproductive health decisions. Therefore, the existing harms to Plaintiffs vastly outweigh any possible harms to others.

Finally, there is no question where the public interest lies. The Ordinance does not remedy any actual problem, but it does violate the federal constitutional and state statutory

[29] Mo. Rev. Stat. 188.125 specifically provides for a private cause of action and various legal remedies, including injunctive relief and attorney fees, costs and expenses. *See* Mo. Rev. Stat. 188.125.7. In addition to the causes of action described in Plaintiffs' Complaint, Plaintiffs request relief based on Mo. Rev. Stat. 188.125's preemption of Ordinance 70459.

rights of all St. Louis citizens. There can be no public interest in a continued violation of those rights and, as such, an injunction against enforcement of Ordinance 70459 will not negatively impact the interests of the public. "[N]either the government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003).

CONCLUSION

WHEREFORE, for the reasons stated herein and in all the pleadings, motions, briefs, declarations and exhibits filed herewith, Plaintiffs respectfully request that the Court enter summary judgment in their favor and against the City of St. Louis:

(a) Declaring the following provisions of St. Louis Ordinance 70459 to be unconstitutional, unlawful, invalid, unenforceable, null and void and otherwise of no force and effect, as applied to Plaintiffs respectively:

1. Our Lady's Inn: Section Two (A); (B)(1) (first sentence), (2) (first sentence), (5); and (C)(1)(a), (b), (c), (d), (e), (f), (g), (h);
2. Archdiocesan Elementary Schools: Section Two (A); (B)(1) (first sentence), (2) (first sentence), (5); and
3. Frank O'Brien & O'Brien Industrial Holdings: Section Two (A); (B)(1) (first sentence), (2) (first sentence), (5);

(b) Declaring the following provisions of St. Louis Ordinance 70459 to be facially unconstitutional, unlawful, invalid, unenforceable, null and void and otherwise of no force and effect:

1. Section Two (A);

2. Section Two (B)(1) (first sentence), (2) (first sentence), (3), (4), (5); (C)(1)(a), (b), (c) (d), (e), (f), (g), (h); and

3. Section Three;

(c) Enjoining the City of St. Louis, including its officers, agents, servants, and employees, from enforcing the provisions enumerated in (a) above against those Plaintiffs to which their application is unlawful, and the provisions enumerated in (b) above against Plaintiffs and all other persons;

(d) Declaring the remaining provisions of St. Louis Ordinance 70459 to be invalid because they are "so essentially and inseparably connected with, and so dependent upon, the void provision[s] that it cannot be presumed that the Board of Aldermen would have enacted the valid provisions without the void ones," and because "the valid provisions, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent," Ordinance 70459, Section Five;

(e) Awarding Plaintiffs the costs of this action, reasonable attorney fees, expert fees and expenses pursuant to 42 U.S.C. 1988, and as otherwise provided by law; and

(f) Granting such other and further relief as the Court shall deem necessary and just.

Respectfully submitted this 25th day of September, 2017.

THOMAS MORE SOCIETY

By: /s/ Sarah E. Pitlyk

Sarah E. Pitlyk #60670MO
Thomas Brejcha
Peter Breen
19 S. La Salle Street, Suite 603
Chicago, IL 60603
Phone: (312) 782-1680
Facsimile: (312) 782-1887

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that on September 25, 2017, the foregoing was filed electronically with the Clerk of the Court for the United States District Court for the Eastern District of Missouri to be served by operation of the Court's electronic filing system upon the following registered CM/ECF participants:

Robert M. Hibbs
Nolan Sharkey
Associate City Counselor
City of St. Louis Law Department
1915 Olive Street, Room 773
St. Louis, MO 63103-1625

/s/ Sarah E. Pitlyk