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' COMBINED MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby submit their Combined Memorandum in Opposition to Defendant's Motion for Summary Judgment and Reply to Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment.

Plaintiffs note that each paragraph of their Statement of Material Facts (Doc. 16) was expressly admitted, except for paragraphs 8, 9, 11, 37 and 38. Even as to those five paragraphs, the City of St. Louis (City) raises no factual challenges and offers no opposing evidence.

For simplicity's sake, Plaintiffs address Defendant's legal arguments in the order they appear in Defendant's Memorandum in Support of its Motion for Summary Judgment (Doc. 20-2).[1]

[1] Because the City's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, Doc. 21-3, makes substantially the same arguments as its Memorandum in Support of its own Motion for Summary Judgment, Doc. 20-2, Plaintiffs include references to only the latter memorandum. Still, Plaintiffs mean for this single brief to serve as both a reply to the City's response to Plaintiffs' Motion for Summary Judgment and a response to Defendant's Motion for Summary Judgment.

I. Plaintiffs' Void for Vagueness Claim

A. "Reproductive Health Decision"

Plaintiffs argue that Ordinance 70459's definition of "reproductive health decision" is overbroad because, by its terms, it includes not only an employee's (or tenant's) decision to have an abortion, but also an employee's (or tenant's) decision to advocate for abortion or even perform abortions. *See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Doc. 15, at 70-71. For example, the definition does not require that an employee's protected "reproductive health decision" be related to his or her own reproduction, which brings decisions to advocate for abortion or provide abortions to others within the Ordinance's ambit. *Id.* at 71.

In response, the City states that:

> Any time Ordinance 70459 refers to "reproductive health decision" the drafters limit the scope of who these [*sic*] reproductive health decisions are protected by prefacing "reproductive health decisions" with the word "their," "persons," or immediately referencing the person making the decision soon thereafter.

Doc. 20-2 at 2. For instance, the City says, the "limiting" words include those where the Ordinance protects employees "because of *their reproductive health decisions*." *Id*. (emphasis in original). The City seems to be arguing that the "reproductive health decision" has to be made by an employee, and that the decisions of those "closely related to the person or individual making the reproductive health decision" are not protected. *Id*. Plaintiffs do not argue otherwise, but the City's argument is beside the point.

It is undisputed that the "reproductive health decisions" of *employees* (or *tenants*, as the case may be) are the only ones at issue. The problem is that the definition of "reproductive health decision" does not protect only their decisions to use contraceptives or have abortions, although the ordinance could have easily been drafted that way. The definition instead applies to "*any decision* [by such an employee] *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).

There are many decisions "related to" abortion other than the decision *to have* an abortion. Pro-choice advocates, abortion providers and many others make decisions *related to* abortion, and the plain terms of Ordinance 70459 protect all those decisions. The City may have believed, and may still believe, that Alderwoman Megan Green intended to protect only those employees who actually *have* abortions or *use* contraceptives. But the text reflects no such limitations. If the intent of the Board of Aldermen was to protect only those individuals who have abortions or use contraceptives, then the Ordinance's text—and specifically its definition of "reproductive health decisions"—should reflect that limited scope. Because it does not, and instead that definition is amorphous and overbroad, the Ordinance is void for vagueness.[2, 3]

B. Mandated Insurance Coverage for Abortion

The Ordinance exempts from any requirement to provide health insurance coverage for abortion "religious institution[s], corporation[s], association[s], societ[ies], health care facilit[ies] or educational institution[s] with historic religious affiliation." Ordinance 70459, Section Two (B)(6) and Section Two (C)(1)(j). Plaintiffs argue that it is doubtful—and, at best, unclear—that Ordinance 70459 exempts organizations like O'Brien Industrial Holdings and Our Lady's Inn

[2] Plaintiffs do not concede that an ordinance criminalizing discrimination on the basis of whether someone has had, or is planning to have, an abortion would be valid. Such an ordinance would still suffer from many of the defects enumerated in Plaintiffs' Motion for Summary Judgment and Memorandum in Support thereof. *See generally* Doc. 15 at 37-89. For example, it would still violate both the U.S. Constitution and state law by preventing Our Lady's Inn from carrying out its pro-life mission of providing housing to pregnant women who plan to give birth. *See id.* at 39-62, 79-80, 83-88.

[3] A recent California anti-discrimination law regarding reproductive health decisions, for instance, simply protects "decisions, including . . . the use of any drug, device, or medical service." AB-569, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB569 (last visited Nov. 2, 2017). That law, which takes up about one page, contains no speech or housing regulations, and specifically incorporates and references *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* 565 U.S. 171 (2012).

from the Ordinance's implicit but apparent insurance coverage requirement, since they may not be viewed as "*religious* institutions [or] corporations . . ." under the Ordinance. Doc. 15 at 72-73.

The City does not deny that the Ordinance creates insurance obligations for non-exempt entities, but instead argues that the adjective "religious" modifies only the term "institution" and does not so limit the terms "corporation, association, society, [or] health care facility" to religious organizations.[4] Thus, the City argues, "corporation[s], association[s], societ[ies] [and] health care facilit[ies]" are exempt whether they are religious or not. Doc. 20-2 at 4. This reading is strained and far from obvious. Moreover, it raises an obvious question: if that were the City's purpose, why does the Ordinance not just exempt "organizations" without qualification and avoid these interpretative issues?[5] But even if it had, the exemption would still be defective,

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[4] This language appears four times in Ordinance 70459. 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;**

Emphasis added. In Sections Two (B)(6) (regarding employment) and Two (C)(1)(j) (regarding housing and realty), identical provisions appear as follows:

> **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.

Emphasis added.

[5] The District of Columbia recently adopted just such a clear exemption to its ordinance that has similarities to (though avoids many of the defects of) Ordinance 70459. *See* D.C. Code 2-1401.05 ("This section shall not be construed to require an employer to provide insurance coverage related to a reproductive health decision."); *see also* Doc. 15 at 32. There is no question that the drafters of Ordinance 70459 were aware of the phrasing of District of Columbia's exemption. Koran Addo, *Bill protecting women against discrimination for having an abortion passes in St. Louis City Hall,* St. Louis Post-Dispatch, 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-

because there is no rational basis for exempting all "organizations" but not similarly-situated individuals operating as sole proprietorships. The City does not dispute that individuals are left out of the exemption altogether but offers no rationale for drawing that arbitrary line.

In sum, the City's arguments make an unconstitutionally vague ordinance even less clear. If the City had meant to provide the Ordinance's limited exemptions to all employers, it could have done so easily, using plain language. *See* Doc. 15 at 32; *see also supra* note 4.

C. "Bona Fide Occupational Qualification"

The City argues that "bona fide occupational qualification" (BFOQ) is a term of art, rendering allegations of vagueness invalid. Doc. 20-2 at 4. Again, the City misses the point.

The Ordinance's speech code for employers, Section Two (B)(5), provides an exemption for a BFOQ. So an employer may make certain "discriminatory" *statements* in hiring if based on a BFOQ; however, that same exemption does not appear in the Ordinance's provisions regarding whom Plaintiffs *may actually hire* (*i.e.*, the Ordinance does *not* say that Plaintiffs may discriminate in hiring based on a BFOQ). *See* Ordinance 70459, Sections Two (B)(1)-(4). Because there is no general BFOQ exception to the employer restrictions and there is no rationale for applying it to employment-related speech but not to employment itself, it is impossible to discern how the drafters intend for the BFOQ exception to the employment-related speech code to operate. *See also* Doc. 15 at 33. The Ordinance is impermissibly vague.

II. Plaintiffs' Freedom of Speech Claim

The City argues that Ordinance 70459 is content-neutral "because it refers to *any* reproductive health decisions . . . The Ordinance is not trying to support or denounce any political view . . ." Doc. 20-2 at 7. The City conflates content and viewpoint discrimination.

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ba0c-3b9a3a9672a1.html (last visited Nov. 14, 2017) ("In urging her colleagues to pass the bill, Green said St. Louis would join only the District of Columbia, Boston and Delaware in passing similar legislation.").

> Government discrimination among viewpoints—or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker"—is a "more blatant" and "egregious form of content discrimination." *Rosenberger v. Rector and Visitors of Univ. of Va*., 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995). But it is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y*., 447 U.S. 530, 537, 100 S. Ct. 2326, 65 L.Ed.2d 319 (1980).

Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2230 (2015).

The Ordinance's speech codes are indisputably content-based, as they "single[] out specific subject matter for differential treatment, even if [they do] not target viewpoints within that subject matter." *Id*. The specific subject matter is reproductive health, or, more specifically, preferences based on reproductive health. This is content-based regulation subject to strict scrutiny, *id.* at 2231, a test the City cannot pass.[6] *See also* Doc. 15 at 40-41.[7]

The City is also wrong, however, that the Ordinance does not target or support any political view or ideology. The ideological target is quite clear, as Alderwoman Green acknowledges in her declaration that she was motivated by the fact that "Missouri [is becoming] an increasingly conservative state politically." Doc. 20-1, ¶ 3. It was also apparent in the debates leading to the Ordinance's passage, in which the Ordinance's sponsors presented "expert testimony" vilifying the Catholic Church for its "woefully out of touch" and "disingenuous" opposition to abortion. *See* Doc. 15 at 27 n.5; *see also id.* at 43-44.

The speech codes in Ordinance 70459 masquerade as viewpoint-neutral regulations, as on their face they bar employers from indicating *any* preference based on reproductive health decisions. But Alderwoman Green's statements and the effect of the speech codes make clear

[6] Plaintiffs' initial brief contains a detailed strict scrutiny analysis, Doc. 15 at 51-56, although that was before the City described its purportedly "compelling interests." Those interests are discussed below in this section.

[7] Much of the City's free speech analysis is based on time, place and manner restrictions as addressed in *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989). Ordinance 70459 does not merely regulate the time, place and manner of Plaintiffs' speech, but on its face regulates the content of their speech. This disqualifies Ordinance 70459 as a time, place and manner restriction.

that the Ordinance's true target is opposition to abortion and/or contraceptive devices. *See* Doc. 15 at 41-45. Any putative protections on the other end of the spectrum—for those who decide to carry their babies to term or to refrain from using contraceptives—are illusory, either because they are obviously unnecessary or because they are already provided by state and federal laws. *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."). A bar on speech that affects only one side of the political spectrum constitutes viewpoint discrimination, "an egregious form of content discrimination" that is "presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995); *see also* Doc. 15 at 41-45.

Thus, the City, through Ordinance 70459, engages in both content and viewpoint discrimination, either of which dooms its speech restrictions. A content- or viewpoint-discriminatory speech restriction must serve a "compelling state interest" and be narrowly tailored to serve that interest. The City does not satisfy that standard.

The City alleges two purportedly compelling interests: (1) prohibiting "discrimination against historically disadvantaged groups, such as a person's reproductive health decisions" and (2) ensuring "that individuals have access to housing and employment despite their decision to have a family or terminate a pregnancy." Doc. 20-2 at 9-10.

The City cannot summarily state, without evidence, that people who make reproductive health decisions are "historically disadvantaged" and expect such a statement to withstand strict scrutiny, "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *see also Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738, 2741 (2011) (noting that a compelling interest must involve a "high degree of necessity" and the

government "must specifically identify an 'actual problem' in need of solving, and the curtailment of [a fundamental constitutional right] must be actually necessary to the solution.") (citations omitted). It is difficult to discern whom the City is even talking about as historically disadvantaged; Plaintiffs presume that the City is referring to those who choose to have abortions, but to acknowledge as much would undermine the City's argument that Ordinance 70459 is viewpoint-neutral. Regardless of what "class" it is actually describing, the City cannot simply posit "historical disadvantage" of the magnitude that would warrant the designation "compelling state interest" without presenting a shred of evidence thereof.

Ensuring "that individuals have access to housing and employment despite their decision to have a family or terminate a pregnancy," similarly fails the compelling state interest test. As support for this statement, the City merely points to poverty and unemployment rates in the City. The City presents no evidence of a connection between discrimination on the basis of reproductive health decisions and those poverty and unemployment rates, nor any evidence that curtailing Plaintiffs' rights would improve those issues. If there were any such evidence, Alderwoman Green's declaration presumably would point to instances in which people lost their jobs or homes because of their reproductive health decisions. Instead, relying on hearsay, she describes alleged "concerns" by unnamed City residents that their circumstances were "threatened"—without even alleging that a single "threat" ever came to fruition—as the impetus for the Ordinance. Doc. 20-1, ¶2. In short, the City provides nothing that could qualify as evidence that there is a relationship between discrimination based on reproductive health decisions and poverty or unemployment.

The City also argues that by bringing this lawsuit Plaintiffs have demonstrated that there *is* a problem that Ordinance 70459 solves. That argument has no merit. What Plaintiffs'

allegations and declarations show is that there are employers and housing providers who care enough about supporting the unborn that they choose to exercise their constitutional right to associate with others for the sake of furthering that value, and who will not stand idly by while the City infringes their constitutional rights for no legitimate reason. Plaintiffs have provided the same quantum of evidence as the City (*i.e.*, precisely none) that even one woman has been discriminated against in employment or housing because of her personal choice to get pregnant, have an abortion or use contraception, which are the alleged social ills that the Ordinance purports to address. And Plaintiffs' lawsuit does not, by any conceivable interpretation, demonstrate that there is an epidemic of such discrimination on an order that might qualify as a "compelling state interest" justifying the suppression of First Amendment rights. The City cannot simply point to the Archdiocesan Elementary Schools' Witness Statement and Our Lady's Inn's Alternatives-to-Abortion mission to compensate for the fatal deficiency in its own case—that it has not demonstrated that the Ordinance serves any interest at all, much less a compelling one.

III. Plaintiffs' Freedom of Association Claim

In analyzing Plaintiffs' freedom of association claim, the City undertakes a three-part analysis pursuant to *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000). *See* Doc. 20-2 at 11-14. First, the City concedes that Archdiocesan Elementary Schools and Our Lady's Inn engage in expressive association but argues that O'Brien Industrial Industries and Frank O'Brien do not because their "Mission Statement states nothing about being pro-life or assisting in alternative-to-abortion care" and "[t]heir activities include chemical processing, mining, etc., but have nothing to do with the pro-life agenda." Doc. 20-2 at 12.

The City does not cite any cases on the issue of what constitutes expressive activity, but *Dale* says that

> associations 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. For example, the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.

Dale, 530 U.S. at 655. Similarly, the primary purpose of O'Brien Industrial Holdings, LLC, is not to espouse views on reproductive rights, but the City is wrong that this disqualifies the company from engaging in expressive association.

The Mission of O'Brien Industrial Holdings is "to make our labor a pleasing offering to the Lord while enriching our families and society," and chairman and owner Frank O'Brien holds to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. Doc. 16, Statement of Facts, ¶¶ 30, 36 (admitted, Doc. 21-2, ¶¶ 30, 36). Mr. O'Brien 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. Doc. 16, Statement of Facts, ¶ 36 (admitted, Doc. 21-2, ¶ 36). Prominently displayed in the O'Brien Industrial Holdings lobby is a statue of the Sacred Heart of Jesus. Doc. 16, Statement of Facts, ¶ 29 (admitted, Doc. 21-2, ¶ 29).

O'Brien Industrial Holdings thus openly and proudly expresses its Catholic values, which are widely known to include respect for the sanctity of human life and profound opposition to abortion. This is expressive association, regardless of what industry the company operates in.

Next, the City looks at whether the initiation of a civil rights claim against the Plaintiffs would interfere with each organization's expression. Regarding Our Lady's Inn, the City argues that women housed by Our Lady's Inn would not become "members" of the organization as that word is used in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 55 (2006)

(*FAIR*). As a preliminary matter, Our Lady's Inn does not have members, as did the group in *FAIR*, so the analogy simply fails. Regardless of anyone's formal membership status, the point is that by requiring Our Lady's Inn to accept tenants who, for instance, openly advocate for or plan to have abortions, Ordinance 70459 would interfere with Our Lady's Inn's expressive association as a maternity home and Alternatives-to-Abortion agency. Finally, the City focuses exclusively on Our Lady's Inn's tenants ("Unlike in *Dale*, these women are not members of the organization or have [*sic*] a stature that would negate the expressive actions of Our Lady's Inn." Doc. 20-2 at 13), but the City fails to acknowledge that the Ordinance also requires Our Lady's Inn to hire employees whose views contradict the very mission of its expressive association.

As for Archdiocesan Elementary Schools, the City admits that the "Archdiocese hires teachers and staff, who do become members of the organization." Doc. 20-2 at 13. The City further states that "[i]f . . . these teachers were actively involved in pro-choice protests or telling students they were pro-choice then there would be a concern since the teachers would give off a different perception than the expressed views of the Archdiocese." Doc. 20-2 at 13. This is precisely the threat that Ordinance 70459 poses to Plaintiffs' association rights, and the City openly concedes it.

Finally, the City analyzes the third element of the *Dale* test—whether there is a governmental interest that justifies the interference with association rights—by reiterating its alleged interests of prohibiting "discrimination against historically disadvantaged groups" and "ensur[ing] its citizens have access to employment, housing, and privacy for family planning." Doc. 20-2 at 14. As discussed in Section II, above, there is no evidentiary connection between these interests and the Ordinance.

IV. The Archdiocesan Elementary Schools' *Hosanna-Tabor* Claim

The City attempts to distinguish the "called teachers," or "ministers," in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), by minimizing the religious training undertaken by the religion teachers of the Archdiocesan Elementary Schools and by overemphasizing factual aspects of *Hosanna-Tabor* that subsequent courts have not considered critical. *See* Doc. 20-2 at 14-15 ("The 'called' teachers in *Hosanna-Tabor* required candidates to take eight courses of theological study (typically 24 credit hours, double that of the Archdiocese), obtain the endorsement of their local Synod district, and pass an oral examination by a faculty committee."). In fact, *Hosanna-Tabor*, which involved a kindergarten and later fourth-grade teacher deemed a "minister" under longstanding "ministerial exception" precedent, does not even mention credit hours and makes clear that its facts are not dispositive of what it means to be a "ministerial" employee. In fact, the Court "was reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister" and instead looked at "all the circumstances of [the teacher's] employment." *Id*. at 190; *see also Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) ("Application of the exception . . . does not depend on a finding that [an employee] satisfies the same considerations that motivated the Court to find that [the teacher in *Hosanna-Tabor*] was a minister within the meaning of the exception.").

The City admits the following facts:

> Archdiocesan Elementary Schools employ approximately 25 religious educators who either are 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. 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. Teachers of Archdiocesan Elementary Schools spend part of every workday performing duties related to inculcating the Catholic faith in their schoolchildren. 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.
>
> Archdiocesan Elementary Schools' employees contribute to educating parochial schoolchildren in the Catholic faith by both word and deed—i.e., by incorporating tenets of the faith into the educational curriculum and also by modeling faithful Catholic lives.

Doc. 16, Statement of Facts, ¶¶ 20-21 (admitted, Doc. 21-2, ¶¶ 20-21). The City cannot reasonably admit such facts and deny that *Hosanna-Tabor*'s ministerial exception applies, especially given the exception's broad application in courts around the country. *See Hosanna-Tabor*, 565 U.S. at 191 (finding that the schoolteacher qualified for the ministerial exemption because she "performed an important role in transmitting the Lutheran faith"); *see also, 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, *6-*8 (N.D. Ind. Dec. 5, 2016) (school principal a minister despite lack of religious training and "lack of evidence of involvement in religious activity"); *Fratello v. Archdiocese of New York*, 863 F.3d 190, 207 (2d Cir. 2017) ("lay principal" at Catholic school deemed "minister"); *cf. Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc.*, 450 F.3d 130, 137-41 (3d Cir. 2006) (dismissing a gender discrimination claim brought by a Catholic schoolteacher who was fired for publicly supporting abortion for fear of "meddling in matters related to a religious organization's ability to define the parameters of what constitutes orthodoxy").[8]

[8] While only religion teachers of Archdiocesan Elementary Schools are required to be certified as religious educators, all of the organization's teachers qualify as ministers because all teachers "spend part of every workday performing duties related to inculcating the Catholic faith in their schoolchildren" and each of "Archdiocesan Elementary Schools' employees contribute to educating parochial schoolchildren in the Catholic faith by both word and deed—i.e., by incorporating tenets of the faith into the educational curriculum and also by modeling faithful Catholic lives." Doc. 16, Statement of Facts, ¶¶ 20-21 (admitted, Doc. 21-2, ¶¶ 20-21).

V. Archdiocesan Elementary Schools' *Pierce v. Society of Sisters* Claim

The City claims to be "unaware how [*Pierce v. Society of Sisters,* 268 U.S. 510 (1925)] extends to a teacher who is fired or not hired for using birth control or having an abortion" and says that application of *Pierce* to the case at bar "would allow for a slippery slope." Doc. 20-2 at 15.

The City's argument sidesteps the real issue—that its sweeping, overbroad Ordinance purports to force Catholic schools to hire and retain teachers whose views on abortion and the sanctity of human life are anathema to those of the Catholic Church. The Ordinance's requirements imperil the mission of the Archdiocesan Elementary Catholic Schools, which is to teach their students the doctrines of the Catholic faith by word and example. *See* Canon 803(2) of the Catholic Church ("The 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*." (emphasis added)). 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. *Pierce*, 268 U.S. at 532, 534-35. The longstanding holding in *Pierce* gives private religious schools standing to combat this type of interference with their own rights and the rights of students and parents, and the City cannot evade the issue it created by summarily stating that enforcement of *Pierce* will lead to "a slippery slope." *See also* Doc. 15 at 67-69.

VI. Frank O'Brien's and O'Brien Industrial Holdings' Equal Protection Claim

Plaintiffs argue that the Ordinance violates the Equal Protection Clause and multiple Missouri statutes by requiring employers that do not qualify for its narrow exemption for religious organizations to provide health insurance coverage for abortion, contraception, and

sterilization. *See* Doc. 15 at 75-77. The City rejects those claims on the grounds, discussed in Section I.B, above, that the adjective "religious" does not apply to "corporation[s], association[s], societ[ies], [or] health care facilit[ies]," making *all* such organizations exempt from providing such insurance, whether religious or not. *See* Doc. 20-2 at 4, 21.

Plaintiffs have already responded to this argument in Section I.B., but to reiterate: (a) it is a strained reading of the Ordinance's text, (b) the City could have used far simpler and less ambiguous terms if it had set out to exempt all organizations, and (c) even using the City's interpretation, the exception still draws an arbitrary line between "organizations" and individuals or sole proprietorships, which the City makes no attempt to justify. *See* Section I.B, *supra*.

VII. Our Lady's Inn's Claim That Ordinance 70459 Conflicts with State Tax Credit Programs

The City argues that no part of Missouri's tax credit programs for maternity homes and Alternatives-to-Abortion agencies states that their participants, such as Our Lady's Inn, would lose funding if they started providing care to women who have abortions. *See* Doc. 20-2 at 16. What the City fails to recognize is that such an organization would no longer qualify for the programs. 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 the United States Internal Revenue Code." Mo. Rev. Stat. 135.600.1(2) (emphasis added).

If Our Lady's Inn were to comply with Ordinance 70459 and house women who plan to have abortions, it would no longer be 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. *See* Doc. 16, Statement of Facts, ¶ 9 (denied, Doc. 21-2,

¶ 9, but no evidence or support given for said denial; *see* Fed. R. Civ. P. 56(c)(1) (detailing evidence necessary to support denial)).

VIII. Plaintiffs' Claim That Ordinance 70459 Has No Enforcement Mechanism

The City does not disagree with Plaintiffs' analysis of the interplay between Ordinance 70459 and Ordinance 67119. Doc. 20-1 at 17. Ordinance 70459 refers to Ordinance 67119 for enforcement, but Ordinance 67119's enforcement mechanism is expressly limited to its own protected classes and not those of outside ordinances.

The City argues that "it would be against the legislative intent for Ordinance 70459 . . . to have its enforcement clause deemed invalid." Doc. 20-2 at 17. Of course the legislative intent of any new law is to include a remedy, but the City cannot pull itself up by its bootstraps just by *intending* to have an effective law. The law has to *actually have* a remedy.

IX. Plaintiffs' Religious Freedom Restoration Act Claim

The City agrees that compliance with Ordinance 70459 would *prima facie* burden Plaintiffs' statutory rights under Mo. Rev. Stat. § 1.302 ("Religious Freedom Restoration Act"), but argues that Ordinance 70459 is supported by a compelling interest. *See* Doc. 20-2 at 18. As discussed in Section II, above, the City has provided no evidentiary connection between its alleged compelling interests and the Ordinance. Therefore, the Ordinance violates Mo. Rev. Stat. § 1.302.

X. Plaintiffs' Claim That Ordinance 70459 Conflicts with Senate Bill 5 (Section 188.125)

The City acknowledges that Mo. Rev. Stat. § 188.125 states that "no Ordinance can infringe on an alternative-to-abortion's operations or speech," but it dismisses the statute's obvious preemptive effects on Ordinance 70459 with the conclusory statement that Our Lady's Inn's "right to speech and association . . . is not without limitation." Doc. 20-2 at 19.

Plaintiffs do not allege that Our Lady's Inn's associational and speech rights are unlimited, but Plaintiffs do note that, under § 188.125, those rights may not be constrained by local ordinances such as Ordinance 70459. *See* Doc. 15 at 86-88. Nor may any local ordinance interfere with Our Lady's Inn's "operations"—an issue that the City neglects to address. *See* Doc. 20-2 at 19. The City also omits any mention of § 188.125's other relevant provisions, which preempt local ordinances that purport to require any "person"—not just any "organization"—to provide health insurance coverage for abortion, contraception, or sterilization. *See* Doc. 15 at 86-88.

To the extent that it interferes with Our Lady's Inn's operations or speech or requires any of the Plaintiffs to provide health insurance coverage for abortion, contraception, or sterilization, Ordinance 70459 is plainly preempted by Mo. Rev. Stat. 188.125.

CONCLUSION

Because the City has not provided the requisite justification for Ordinance 70459's numerous violations of Plaintiffs' constitutional and statutory rights, Plaintiffs respectfully request that the Court deny the City's motion for summary judgment and grant summary judgment in Plaintiffs' 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 20th day of November, 2017.

THOMAS MORE SOCIETY

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Certificate of Service

I hereby certify that on November 20, 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:

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