UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Horizon Christian Fellowship et al., **Plaintiffs,** **v.** **Jamie R. Williamson, Sunila T. George, and Charlotte G. Richie, in their official capacities as Commissioners of the Massachusetts Commission Against Discrimination; and Maura Healey, in her official capacity as the Attorney General of Massachusetts,** **Defendants.**	**CIVIL ACTION NO. 16-12034-PBS**

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Defendants Commissioners of the Massachusetts Commission Against Discrimination ("MCAD") and Massachusetts Attorney General Maura Healey respectfully submit this memorandum in opposition to plaintiffs' motion for preliminary injunction.

INTRODUCTION

The plaintiffs, four Churches and their Pastors, bring this action seeking to enjoin enforcement of the Massachusetts public accommodations law, Mass. Gen. Laws c. 272, §§ 92A and 98, which prohibits discrimination in public accommodations and was recently amended to add "gender identity" as a protected class. Plaintiffs, who believe that "one's biological sex was determined by God," *Compl.* ¶ 85, allege that the law, as amended, infringes on their right to express their religious beliefs and to use their building facilities in a manner consistent with those beliefs, in violation of the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, and the Due Process Clause of the Fourteenth Amendment.

More broadly, plaintiffs challenge what they perceive to be government overreach, alleging that "[t]his case is about who controls Massachusetts churches." *See Plaintiffs' Mem.* at 1. But Massachusetts has a long and proud history of recognizing the rights of religious organizations to practice and express their faith, and the public accommodations law does not deprive plaintiffs of those rights. Indeed, the laws of the Commonwealth, enforced by both the MCAD and the Attorney General, specifically protect the rights of religious groups.

Moreover, the Massachusetts Supreme Judicial Court has construed the public accommodations law in a manner that protects religious freedoms and reconciles potential tensions between those freedoms and the Commonwealth's compelling interest in eradicating discrimination. Specifically, in *Donaldson v. Farrakhan*, 436 Mass. 94 (2002), the Court made clear that the public accommodations law does not extend to speech or religiously-expressive conduct that is protected by the First Amendment, while explaining that the law may properly be

applied if a religious organization hosts or engages in a "public, secular function."

Disregarding the narrowing construction of the law set forth in *Donaldson*, plaintiffs request a sweeping injunction restraining defendants from "enforcing or applying" the law against them. *See Compl.*, Prayer for Relief. But plaintiffs do not establish that they engage in specific conduct or activity to which the law, as construed in *Donaldson*, applies, nor have the defendants initiated enforcement of the law against the plaintiffs. To the contrary, plaintiffs allege that *all* of the activities described in the Complaint are an expression of their religious beliefs. For that reason, there is no objectively reasonable basis for plaintiffs' asserted fear that they will be subject to liability under the law for religiously-expressive speech or activities. The plaintiffs therefore lack standing to sue and are not likely to succeed on the merits of any of their claims. The Court accordingly should deny plaintiffs' motion for a preliminary injunction.

STATUTORY FRAMEWORK

The Massachusetts public accommodations law, Mass. Gen. Laws c. 272, §§ 92A and 98, prohibits discrimination based on race, color, religious creed, national origin, sex, gender identity, or sexual orientation, in the admission of any person to, or treatment in, a "public accommodation." Mass. Gen. Laws. c. 272, § 98 (as amended effective October 1, 2016). The law also contains two ancillary provisions targeting conduct that effectuates acts of discrimination: a provision that prohibits "aid[ing]" or "incit[ing]" discrimination, *see id.*, and a provision that prohibits a public accommodation from publishing, circulating, distributing, or displaying, an advertisement, notice, or other similar printed material "intended to discriminate against or actually discriminating against" a person in a protected class "in the full enjoyment of" such public accommodation. *Id.* § 92A, first para. (as amended effective July 8, 2016).

The law defines "public accommodation" as "any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public," including "an inn,

tavern, [or] hotel"; "a carrier . . . for the transportation of persons"; "a retail store"; "a restaurant, bar or eating place"; "an auditorium, theater, music hall, meeting place or hall"; "a place of public amusement, recreation, sport, exercise or entertainment"; and "a public library [or] museum." *Id.* § 92A, second para. (as amended effective October 1, 2016). Of significance here, the law provides that a public accommodation that lawfully separates access to its premises or portion thereof based on a person's sex "shall grant all persons admission to, and the full enjoyment of, such place of public accommodation or portion thereof consistent with the person's gender identity." *Id.*[1]

The MCAD is authorized to receive and investigate complaints by any person claiming to be aggrieved by a violation of the public accommodations law; and the Attorney General likewise is authorized to file a complaint with the MCAD alleging a violation of the law. *See* Mass. Gen. Laws c. 151B, § 5; *see generally Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination*, 463 Mass. 472, 478-79 (2012).[2] During the MCAD's initial review of a complaint, it may determine not to commence an investigation if it finds that the commission lacks jurisdiction or that the information on the face of the complaint fails to support an inference of discrimination. 804 Code Mass. Regs. § 1.13(a). If the MCAD determines that it has jurisdiction, an investigating commissioner gathers information, including by obtaining a position statement from the person or organization (the "respondent") alleged in the complaint to

[1] The law imposes a fine of up to $2,500 and/or imprisonment for up to one year, on any person who discriminates in violation of the law or who "aid[s] or incite[s]" such discrimination; in addition, it renders such person liable for damages to any person aggrieved by an act of discrimination. *Id.* § 98. The statute also provides for a fine of up to $100, and imprisonment up to 30 days, for persons who violate the "publication" provision. *Id.* § 92A, third para.

[2] As an alternative, any person claiming to be aggrieved by discrimination in a public accommodation, including the Attorney General, may (after 90 days following the filing of a complaint with the commission) file an action in superior court. Mass. Gen. Laws c. 151B, § 9.
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have committed a discriminatory act. *Id.* §§ 1.10(8), 1.13. After completing the investigation, the investigating commissioner determines whether there is probable cause to believe that the respondent violated the law, *id.* § 1.15(7), and, if probable cause is found, the matter may proceed to a public hearing conducted by a hearing commissioner (different from the investigating commissioner). *Id.* §§ 1.20-1.21. Following the hearing, the hearing commissioner issues a written decision with findings of fact and conclusions of law. *Id.* § 1.21(18). Any party aggrieved by that decision may seek review by the full commission, *id.* § 1.23(1)(h), and a party aggrieved by the full commission's decision may seek judicial review. *Id.* § 1.24. At any stage of the proceedings, the MCAD may dismiss the complaint for lack of jurisdiction, *e.g.*, where it determines that the respondent is not a "public accommodation." *Id.* §§ 1.13(1)(a), 1.15(4).

In amending the public accommodations law to add "gender identity" as a protected class, the Legislature directed the MCAD and Attorney General to promulgate regulations, policies, or guidance to effectuate the purposes of the amendment. Massachusetts Senate Bill No. 2407, sec. 4 (July 6, 2016). On September 1, 2016, the MCAD issued "Gender Identity Guidance." *See* Affidavit of Yaw Gyebi, Jr., ¶ 3, Ex. A. The Guidance identified, as examples of entities that fall within the statutory definition of "public accommodation," retail stores, restaurants, malls, hotels, motels, businesses such as loan companies, taxi cab services, insurance companies, and public agencies, parks, beaches, and public roads. Gyebi Aff't Ex. A at 4. The Guidance added one sentence stating: "[e]ven a church could be seen as a place of public accommodation if it holds a secular event, such as a spaghetti supper, that is open to the general public." *Id.* However, a footnote explained that all charges of discrimination received by the MCAD, "including those involving religious institutions," are reviewed on a "case-by-case basis." *Id.*

On December 5, 2016, the MCAD revised its "Gender Identity Guidance," to remove the sentence referring to a "spaghetti supper" as an example of a "public, secular function," replacing that sentence with the following two sentences:

> The law does not apply to a religious organization if subjecting the organization to the law would violate the organization's First Amendment rights. *See Donaldson v. Farrakhan*, 436 Mass. 94 (2002). However, a religious organization may be subject to the Commonwealth's public accommodations law if it engages in or its facilities are used for a "public, secular function." *Id.*

Gyebi Aff't ¶ 4, Ex. B.[3]

The Attorney General also issued "Gender Identity Guidance for Public Accommodations," on September 1, 2016. *See* Affidavit of Genevieve Nadeau, ¶ 2 and Ex. A. The Attorney General's Guidance lists, as examples of "public accommodations," "hotels, stores, restaurants, theaters, sports stadiums, health and sports clubs, hospitals, transportation services, museums, libraries, and parks." Nadeau Aff't Ex. A. It makes no mention of religious organizations. *Id.* At the time of the filing of the complaint, the Attorney General's website also listed additional examples of public accommodations, including laundromats, dry-cleaners, gas stations, barber shops, concert halls, bowling alleys, auditoriums, convention centers, and "houses of worship." *See* Nadeau Aff't ¶ 3.

Soon after plaintiffs filed their complaint, the Chief of the Attorney General's Civil Rights Division sent a letter to plaintiffs' counsel, on November 7, 2016, explaining that the Attorney General's website had been revised "to remove the categorical reference to 'houses of worship' as an example of a 'place of public accommodation' within the meaning of Mass. Gen.

[3] The revised MCAD Guidance changed the sentence explaining that MCAD reviews all charges "including those involving religious institutions, . . . on a case-by-case basis," moving it from a footnote to the text, and eliminating the reference to "religious institutions," so that the sentence in the revised Guidance states: "As required by statute, MCAD reviews each complaint of discrimination based on the particular factual circumstances presented." Gyebi Aff't Ex. B.

Laws. c. 272, §§ 92A & 98." *See* Nadeau Aff't ¶ 4 and Ex. B. The letter explained that, while religious facilities "may qualify as places of public accommodation if they host a public, secular function, an unqualified reference to 'houses of worship' was inconsistent with *Donaldson v. Farrakhan*, 436 Mass. 94 (2002), and we have removed that reference." Nadeau Aff't Ex. B. The letter noted that *Donaldson* "continues to provide important guidance on the application of" the public accommodations law. *Id.*

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs Horizon Christian Fellowship, Swansea Abundant Life Assembly of God, House of Destiny Ministries, and Faith Christian Fellowship of Haverhill, and their respective pastors filed a complaint in this action on October 11, 2016. On the same date, plaintiffs filed a motion for preliminary injunction, seeking an order prohibiting defendants "from enforcing or applying [the public accommodations law] against plaintiffs." *See Plaintiffs' Mot.* at 1. Plaintiffs assert that the law violates their First Amendment rights of free exercise of religion, free speech, free association, and freedom of assembly, and the Due Process Clause. *Compl.*, First-Fifth Causes of Action. They request a preliminary and permanent injunction, as well as a declaration that the law is unconstitutional as applied to them. *Id.* Prayer for Relief ¶¶ 1-2. They also challenge the "publication" and "aiding or inciting" provisions on overbreadth grounds, claiming that those provisions are unconstitutional on their face. *Compl.* ¶ 209.

Plaintiffs believe that "God . . . made each person as either male or female"; that "maleness or femaleness is designed by God and is tied to biology, chromosomes, physiology, and anatomy"; and that "sex is an immutable trait." *See Compl.* ¶¶ 16-18. They allege that they "wish to communicate their religious beliefs regarding human sexuality and use their buildings in a manner consistent with" those beliefs. *Id.* ¶ 1. All of the plaintiff Churches have restrooms that are designated for persons based on biological gender. *Id.* ¶¶ 57, 64, 74, 82.

As alleged in the complaint, plaintiffs "engage in religious expression and practice in every activity they open to the public," including communal worship and other formal religious services, Sunday school classes, Bible studies, youth-oriented activities, and various community outreach events. *Id.* ¶ 10.[4] Plaintiffs "welcome the public to all of their activities" because they believe that doing so is part of their religious mission. *Id.* ¶ 11. Plaintiffs explain that "[e]ven activities [that] the Churches undertake that do not contain overt religious inculcation are religious in nature because they are motivated by the Churches' religious mission and engender other important elements of religious meaning, expression, and purpose." *Id.* ¶ 12.

Plaintiffs assert that the amendment of the law to include "gender identity" prohibits them from communicating their religious views concerning human sexuality and from using their building facilities in a manner consistent with those views. *See Plaintiffs' Mem.* at 4 ("simply communicating their beliefs about human sexuality and using their houses of worship consistently with their beliefs about biological sex" could result in enforcement proceedings). Plaintiffs allege that the Pastors wish "to preach . . . sermons addressing God's design for human sexuality and the Churches' beliefs about 'gender identity,'" and also communicate their message by posting sermons on their websites, writing articles, speaking on the radio, and speaking in their churches and public venues but "fear that if they were to do so they would violate the Act's prohibitions." *Compl.* ¶¶ 22, 24-25.

Plaintiffs also construe the statute as "[r]equiring the Churches to allow individuals to use

[4] In addition to providing regular worship and prayer services, the plaintiff Churches allegedly engage in numerous community outreach events that – by plaintiffs' characterization – are religiously-expressive, including, *e.g.*, meals for the homeless; food pantries; an "alcohol and chemical addiction recovery ministry for the community" that one plaintiff operates from its building and promotes on the radio; concerts; festivals; and a "basketball outreach" program for students. *See Compl.* ¶¶ 10-13, 52-99, 101-02.

the facilities reserved for the opposite biological sex," which they allege would "force[] plaintiffs "to speak a message that they do not want to speak." *Id.* ¶¶ 32-33. They also allege that the law prohibits them "from making statements that might cause individuals to believe that they will not be permitted access to sex-specific changing rooms, showers, and restrooms," including such statements made in sermons and other written or spoken statements. *Id.* ¶¶ 20-21, 23. All of the plaintiff Churches have unwritten policies and practices, which "flow . . . from their religious beliefs," and which limit changing rooms and restrooms to "members of the designated biological sex." *Id.* ¶¶ 91-92. Two of the Churches (Swansea Abundant Life Assembly of God and House of Destiny Ministries) have adopted written policies limiting access to restrooms, changing rooms, and showers based on biological sex but have refrained from publicizing the policies because they believe that the law prohibits them from doing so. *Id.* ¶¶ 31, 96-98.

Plaintiffs have received no communication from either the MCAD or Attorney General concerning the public accommodations law, nor has either agency received any complaints alleging discrimination by any of the plaintiffs under the public accommodations law. Nadeau Aff't ¶ 5; Gyebi Aff't ¶¶ 2, 5. Nonetheless, plaintiffs broadly assert that the MCAD "intends to apply the Act to churches," pointing to one sentence in the MCAD's (now superseded) "Gender Identity Guidance" and a former version of the Attorney General's website. *Plaintiffs' Mem.* at 3-4.

ARGUMENT

The plaintiffs have not shown that they engage in any specific speech or conduct that falls within the public accommodations law as construed by the Supreme Judicial Court in *Donaldson*. Plaintiffs accordingly lack standing and fail to demonstrate a likelihood of success on the merits, "the critical factor in the analysis." *Barr v. Galvin*, 584 F. Supp. 2d 316, 319 (D. Mass. 2008) (citing *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993)). For that reason

alone, the Court should deny plaintiffs' request for a preliminary injunction. The other relevant factors also weigh against issuance of an injunction. The public accommodations law unquestionably serves a compelling public interest in eliminating discrimination, *see Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and plaintiffs have not shown an objectively reasonable fear of prosecution. Plaintiffs accordingly do not establish that they will suffer irreparable harm in the absence of an injunction or that the balance of hardships warrants injunctive relief.

I. PLAINTIFFS DO NOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THEY HAVE NOT SHOWN THAT THEY ENGAGE IN CONDUCT OR SPEECH WITHIN THE SCOPE OF THE PUBLIC ACCOMMODATIONS LAW.

Plaintiffs assert that they are faced with "a Hobson's choice between violating their faith and risking imprisonment." *Plaintiffs' Mem.* at 1. But plaintiffs' fear is not objectively reasonable, as it is premised on a reading of the public accommodations law that is at odds with *Donaldson*, where the Supreme Judicial Court held that the law does not apply to a religiously-affiliated event reflecting the "expression of religious viewpoints." 436 Mass. at 102.

In *Donaldson*, the question was whether a theater hosting a speaking event sponsored by the Nation of Islam was a place of "public accommodation." The event was promoted, organized, and funded by a mosque, and presented by minister Louis Farrakhan at a city-owned theater, to address drugs, crime, and violence in the community, and the role that men play in the community. *Id.* at 97-101. Based on the specific facts presented, the Court found that the event was not a "public, secular function" of the mosque and that the theater therefore was not a "public accommodation" at the time of the event. *Id.* at 99-100. Addressing plaintiffs' constitutional claim, the Court further found that application of the law to require the admission of women to the event "would be in direct contravention of the religious practice of the mosque"

because it would impair the "expression of religious viewpoints" of the mosque with respect to the "separation of the sexes" (part of the Nation of Islam's "belief system") and the role of men in the community. *Id.* at 101-02. The Court thus held that the "forced inclusion of women in the mosque's religious men's meeting by application of the public accommodation statute" would "significantly burden" the mosque's rights of expression and association and thus violate defendants' First Amendment rights. *Id.* at 95, 101-02.

Plaintiffs have not shown that they engage in any specific conduct or speech that falls within the law as construed by *Donaldson*. By plaintiffs' characterization, all of their conduct and speech is religiously-expressive: *see Compl.* at ¶ 13 ("in all the Churches' activities, they are communicating their understanding of God's truth, and refraining from communicating message that violate the Churches' understanding of God's truth."); *id.* ¶¶ 101-02 ("Every event that occurs in the Churches' facilities is part of the exercise of their religious beliefs"); *id.* ¶ 134 ("The Churches want to communicate in writing and orally to their members and the public their religious beliefs regarding human sexuality and their facility use policies regarding access to their sex-specific showers and restrooms."). Those activities that the plaintiffs describe specifically, such as sermons, communual worship services, other religious services, Sunday school classes, and Bible studies, *see Compl.* ¶ 10, are plainly protected by the First Amendment.[5] *See Fort Des Moines Church of Christ v. Jackson*, 2016 WL 6089842, at *19-21

[5] The complaint more vaguely describes other activities, under the general rubric of community "outreach", which plaintiffs characterize as an expression of their religious beliefs, *see supra* page 7 & n.4. The complaint does not describe those community outreach activities with sufficient specificity to enable the Court to determine conclusively that such activities are *necessarily* entitled to First Amendment protection. But, it does appear from the allegations in the complaint that plaintiffs' outreach activities would likely be outside the scope of the public accommodations law (as not constituting a "public, secular" function under *Donaldson*). Of course, a determination (by the MCAD or a court) as to whether the public accommodations law applies to a *specific* church activity would require more particularized facts. For present

(S.D. Iowa, October 14, 2016) (holding that church was not likely to succeed on merits of its First Amendment claims challenging provisions prohibiting discrimination in public accommodations based on gender identity, where it failed to show, on the facts presented, that the challenged provisions "would ever apply to its conduct").[6]

For this reason, plaintiffs lack standing to bring their claims. A party asserting First Amendment rights may assert a pre-enforcement challenge to a law only where the party alleges either an intention to engage in conduct proscribed by the law or that he is chilled from exercising the right to free expression; in particular, the party must establish the existence of a "credible threat of enforcement" under the challenged law in order to establish standing. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (internal citation and quotation marks omitted). "Put another way, the fear of prosecution must be 'objectively reasonable.'" *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003). Because plaintiffs do not allege that they engage in any specific speech or conduct that falls within the public accommodations law as construed in *Donaldson*, they lack standing to bring their claims.

A. The Plaintiffs Have Not Shown that Enforcement of the Law Will Violate Their Rights Under the Free Exercise or Establishment Clause.

Under the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I. The Free Exercise

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purposes, it is clear that plaintiffs' conclusory assertions, based on the hypothetical possibility that the law might, at some future point, apply to their conduct, does not establish an "objectively reasonable" threat of prosecution warranting injunctive relief. *See Matos v. Clinton School District*, 367 F.3d 68, 73 (1st Cir. 2004) ("A preliminary injunction should not issue except to prevent a real threat of harm . . . . Preliminary injunctions are strong medicine, and they should not issue merely to calm the imaginings of the movant.").

[6] While the Iowa law contained an exemption for religious organizations acting to further a "bona fide religious purpose," *see* 2016 WL 6089842 *2, 4, the absence of an express "religious" exemption here does not meaningfully distinguish the Massachusetts law. *Donaldson* constitutes binding authority concerning the proper application of Mass. Gen. Laws. c. 272, §§ 92A and 98.

Clause protects "the right to believe and profess whatever religious doctrine one desires." *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). Under the Establishment Clause, "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so." *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (internal citation and quotation marks omitted). The Massachusetts prohibition on discriminatory treatment in public accommodations does not violate either aspect of the First Amendment.

Plaintiffs argue that prohibiting discrimination against protected classes in the admission to, or treatment in, public accommodations "infringes on the Churches' freedom to determine how they communicate their faith" through their speech and in the use of their buildings, allegedly in violation of the Free Exercise Clause. *See Plaintiffs' Mem.* at 8.[7] But, as explained above, church activities involving worship and expressions of religious belief – that is, activities protected by the Free Exercise Clause – are not within the application of the public accommodations law as construed in *Donaldson*. 436 Mass. at 100-102. As such, plaintiffs cannot show that their Free Exercise rights are threatened.

And even considering the narrow – and at this point hypothetical – enforcement of the law to a "public, secular" function of a church, the law would not violate the Free Exercise Clause. It is well-established that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of*

[7] Plaintiffs refer to this provision of the statute as the "facility-use mandate," *see Plaintiffs' Mem.* at 2, but the term is not apt, because the statute does *not* apply to the Churches – and thus would not "mandate" the manner in which they use their facilities – where application of the law would "impair[]" plaintiffs' "expression of religious viewpoints." *See Donaldson*, 436 Mass. at 102.

Hialeah, 508 U.S. 520, 531 (1993). The provision prohibiting discriminatory treatment is neutral on its face, as it does not "target[] religious beliefs" or "infringe upon or restrict practices because of their religious motivation." *Id.* at 533. Rather, the provision is aimed at eliminating discrimination against protected classes of persons in *all* public accommodations. For that reason, it also is a law of "general applicability." *Id.* at 543 ("general applicability" requirement prohibits government from enacting laws that selectively "impose burdens only on conduct motivated by religious belief"). Like the public accommodations law upheld in *Roberts v. United States Jaycees*, the Massachusetts prohibition on discriminatory treatment similarly "reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services," a "goal[] which is unrelated to the suppression of expression" and "plainly serves compelling state interests of the highest order." 468 U.S. at 624.

Other courts that have considered challenges to public accommodations laws have rejected similar Free Exercise claims. In *Fort Des Moines Church of Christ*, an Iowa federal court held that a church, which challenged provisions prohibiting discrimination in public accommodations based on gender identity, was not likely to succeed on the merits of its Free Exercise claim, because the Iowa provisions were "neutral on their face," "generally applicable," and did not selectively impose burdens on religiously-motivated conduct. 2016 WL 6089842, at *20.[8] In sum, plaintiffs are unlikely to succeed on the merits of their Free Exercise claim.

Plaintiffs also cannot succeed on the merits of their Establishment Clause claim. The

[8] *See also Elane Photography, LLC v. Willock*, 309 P.3d 53, 58-59, 72-75 (N.M. 2013) (New Mexico public accommodations law, which prohibited discrimination based on sexual orientation, was a neutral law of general applicability and did not violate Free Exercise Clause), *cert. denied*, 134 S. Ct. 1787 (2014).

claim is not fleshed out in their memorandum and so should not be treated by the Court as a basis for injunctive relief. At most, plaintiffs seem to suggest that the mere exercise of authority by the MCAD to investigate a complaint that any of the plaintiffs have violated the Massachusetts law would constitute "government entanglement in religious affairs." *See Plaintiffs' Mem.* at 10. But there is no complaint of discrimination by any of the plaintiffs now, and so the claim is hypothetical. And if the assertion of "entanglement" were based on the fact that MCAD's Gender Identity Guidance (as revised) states that a religious organization "may be subject to" the public accommodations law "if it engages in or its facilities are used for a 'public, secular function,'" and that the MCAD reviews all charges of discrimination based on the particular facts presented, *see* Gyebi Aff't Ex. B at 4-5, such an assertion would not state a claim under the Establishment Clause.

The "mere exercise of jurisdiction" by an administrative agency like the MCAD, which is charged with investigating and adjudicating complaints of discrimination, does not violate the Free Exercise or Establishment Clause rights of a religious entity charged with discrimination. *See Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986), where the Supreme Court held that an Ohio commission, which was charged with investigating claims of discrimination, "violates no constitutional rights by merely investigating the circumstances of [a teacher's] discharge" by a religious school. *Accord Temple Emanuel*, 463 Mass. at 440 (the MCAD "does not violate the First Amendment merely by investigating the circumstances of a minister's denial of reemployment in response to a complaint of discrimination") (citing *Dayton*). Plaintiffs' claim that the prohibition on discriminatory treatment violates the Establishment Clause accordingly is not likely to succeed.

B. The Plaintiffs Have Not Shown that the Law Will Infringe Their Freedom of Speech.

1. The Law Does Not Reach Religious Speech.

Plaintiffs assert that two ancillary provisions of the law – prohibiting a person from "aid[ing]" or "incit[ing]" discrimination and prohibiting "publication" of statements that effectuate discrimination – prevent plaintiffs from "communicat[ing] the Bible's teaching about biological sex in sermons, speeches and other public statements" and (in the case of two plaintiffs) from publishing their restroom policies, allegedly in violation of plaintiffs' free speech rights. *Plaintiffs' Mem.* at 11. Plaintiffs allege that all of the speech in which they engage or wish to engage is an expression of their religious beliefs. *See Compl.* ¶ 134. But under *Donaldson*, the public accommodations law does not apply to the "expression of religious viewpoints" – the speech in which plaintiffs wish to engage – because such expression is speech protected by the First Amendment. *See Donaldson*, 436 Mass. at 97-101; *id.* at 102 (public accommodations law could not properly be applied to a religiously-affiliated speaking event reflecting the "expression of religious viewpoints"). Accordingly, plaintiffs are not likely to succeed on the merits of their claim that these two provisions "chill and prohibit" their religious speech. *See, e.g., Fort Des Moines Church of Christ*, 2016 WL 6089842, at *18-19 (plaintiff church did not demonstrate likelihood of success on its as-applied free speech challenge to Iowa public accommodations law because it had "not shown that the challenged provisions would ever apply to its conduct").

2. The Provisions Prohibiting "Aiding" or "Inciting" Discrimination, and Prohibiting Publication of Discriminatory Statements, Do Not Infringe Free Speech.

Relatedly, plaintiffs characterize the "aid[ing] or incit[ing]" and "publication" provisions as "content" and "viewpoint"-based restrictions that are "presumptively unconstitutional" and

that must be reviewed under a strict scrutiny standard. *Plaintiffs' Mem.* at 12-14. But, again, plaintiffs cannot demonstrate that the law, including these provisions, applies to their religious speech or activities under *Donaldson*. And to the extent that plaintiffs arguably intend to assert a facial challenge to these provisions, such a claim fails, because even where the provisions do apply, they are best understood as regulating conduct or speech that effectuates discrimination and thus do not infringe on free speech rights. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572 (1995) (Massachusetts public accommodations law "does not, on its face, target speech or discrimination on the basis of its content, the focal point of the prohibition being rather on the *act* of discriminating against individuals in the provision of publicly available goods, privileges and services on the proscribed grounds.") (emphasis added).

"States can constitutionally regulate conduct even if such regulation entails an incidental limitation on speech," where such regulation is within the Government's constitutional power; furthers an important governmental interest unrelated to the suppression of free expression; and any incidental restriction on alleged First Amendment freedoms is no greater than is essential to furthering that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The Massachusetts law unquestionably satisfies these criteria. *See Roberts v. United States Jaycees*, 468 U.S. at 624; *see also Jews for Jesus v. Jewish Community Relations Council*, 968 F.2d 286, 295-96 (2d Cir. 1992) (New York public accommodations law "making 'direct' discrimination unlawful" "easily" satisfies *O'Brien*).

To begin with, the "aid[]ing or incit[ing]" provision does not target speech; although aiding or inciting may be accomplished through speech, they need not be. *Jews for Jesus*, 968 F.2d at 296. Moreover, even assuming that this provision indirectly regulates speech, it extends only to "speech designed to secure a violation of the anti-discrimination statutes." *Id.* at 296.

The First Amendment, however, "provides no defense to persons who have used otherwise protected speech or expressive conduct to force or aid others to act in violation of a valid conduct-regulating statute," such as the Massachusetts law at issue. *Id.* (New York provisions prohibiting persons from "aid[ing] or incit[ing" discrimination were "unquestionably constitutional").[9]

The "publication" provision similarly extends only to speech that effectuates discriminatory conduct or is itself discriminatory. Under the provision, an "owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation" may not "directly or indirectly . . . publish, issue, circulate, distribute or display," an "advertisement, circular, folder, book, pamphlet, written or painted or printed notice or sign . . . intended to discriminate against or actually discriminating against persons [of protected classes]" in the admission to or treatment in public accommodations. Mass. Gen. Laws c. 272, § 92A, 1st para. Fairly read, the provision prohibits, for example, a public accommodation from posting a notice that its facilities are open only to a single race. *Cf. Fort Des Moines Church of Christ*, 2016 WL 6089842, at *14-15 (Iowa provision banning "discriminatory publications" was aimed at preventing places offering goods and services to the public from communicating, through advertisements or similar postings, that their goods and services were not intended to be available to protected classes). Such a prohibition falls well within the limits imposed by the First Amendment. *See Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006) ("Congress, for example, can prohibit employers from discriminating in hiring on the

[9] *See also Presbytery of New Jersey v. Florio*, 902 F. Supp. 492, 499, 519-22 (D.N.J. 1995) (New Jersey provisions making it unlawful to "aid" or "incite" any prohibited discrimination in business transactions did not violate church's free speech rights because the law "does not target expression" but instead is aimed at "conduct or secondary effects"), *aff'd on other grounds*, 99 F.3d 101 (3rd Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."). Indeed, "[i]t has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).[10]

In sum, plaintiffs have not shown that the "aid[ing]" or "incit[ing]" or "publication" provisions apply, nor can they succeed on the merits of their Free Speech claim.[11]

3. The Law Is Not Overbroad.

Plaintiffs also assert a facial challenge to the law on overbreadth grounds, arguing that the law "sweeps within its ambit private religious speech that occurs before, during, and after worship services and all other religious programming." *Plaintiffs' Mem.* at 16. This claim is fundamentally flawed because plaintiffs fail to show the existence of a "substantial number of instances" in which the law cannot constitutionally be applied. Moreover, given the Supreme Judicial Court's narrowing construction of the law in *Donaldson*, there is no "realistic danger" that the law will "significantly compromise" the constitutional rights that plaintiffs have identified. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (facial overbreadth challenge will not succeed unless "there [is] a realistic danger that the statute

[10] *Cf. Ragin v. New York Times Co.*, 923 F.2d 995, 1003 (2d Cir. 1991) (rejecting First Amendment challenge to provision of federal Fair Housing Act that prohibited advertisements indicating racial preference upon finding that such advertisements were not protected commercial speech); *Fort Des Moines Church of Christ*, 2016 WL 6089842 at *15 (noting that "discriminatory messages in advertising" are not protected by First Amendment).

[11] Although the MCAD and Attorney General strongly contest plaintiffs' assertion that the "aiding and inciting" and "publication" provisions are subject to strict scrutiny, *see Plaintiffs' Mem.* at 12-14, the provisions would pass muster under even that heightened standard, for the reasons set forth above.

itself will significantly compromise recognized First Amendment protections of parties not before the Court"); *Jaycees*, 468 U.S. at 630-31 (holding that Minnesota public accommodations law was not overbroad, given state court's "willingness to adopt limiting constructions that would exclude private groups from the statute's reach, together with the commonly used and sufficiently precise standards it employed to determine that the Jaycees is not such a group"). Because plaintiffs have not demonstrated that "a substantial number of instances exist in which the [l]law cannot be applied constitutionality," *New York State Club Ass'n Inc. v. City of New York*, 487 U.S. 1, 14 (1988), they are not likely to succeed on the merits of their overbreadth claim. *See Fort Des Moines Church of Christ*, 2016 WL 6089842 *15 (holding that church was unlikely to succeed on overbreadth challenge to Iowa public accommodations law, where it "fail[ed] to identify unconstitutionally broad applications of the instant provisions, let alone demonstrate that a substantial number of such applications exist").

C. The Law Is Not Unconstitutionally Vague.

Plaintiffs also assert that the law is unconstitutionally vague, alleging that they have "self-censored" their speech concerning the use of their facilities and "what their church leaders preach from the pulpit about human sexuality," allegedly as a result of the law's "imprecise language." *See Plaintiffs' Mem.* at 14. Plaintiffs are unlikely to succeed on this claim.

1. The Definition of "Public Accommodation" Is Not Vague.

Plaintiffs contend that the definition of a "public accommodation" is impermissibly vague insofar as "the legislature failed to provide a clear exemption for religious institutions." *See Plaintiffs' Mem.* at 15. This argument is without merit. A law is unconstitutionally vague, and thus in violation of the Due Process Clause, only if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304 (2008). "'Fair notice' is understood as notice short of semantic certainty," and, "[b]ecause

'words are rough-hewn tools, not surgically precise instruments[,] . . . some degree of inexactitude is acceptable in statutory language.'" *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (internal citation omitted). The definition of "public accommodations" readily passes muster under those standards.

Contrary to plaintiffs' assertion, *see Plaintiffs' Mem.* at 15 n.4, the fact that the definition of "public accommodation" does not provide an exemption for churches does not render it unconstitutionally vague. *Donaldson*'s narrowing construction of the law – to apply to religious organizations or facilities only with respect to a "public, secular function" – provides a meaningful, comprehendible standard. *Cf. Roberts v. United States Jaycees*, 468 U.S. at 629-30 (rejecting vagueness and overbreadth challenges where the Minnesota Supreme Court relied on "specific and objective criteria" to distinguish between "public" and "private" entities).[12]

Plaintiffs further assert that the MCAD's Guidance is "impossibly vague" because it states that the MCAD follows "a case-by-case approach" to determine whether any entity – including a church – is a "public accommodation." *Plaintiffs' Mem.* at 15. But the law is not rendered vague merely because, if the MCAD were to receive a complaint alleging discrimination by a plaintiff Church, it would be called upon to investigate the facts bearing on whether the law applied in the particular circumstances presented. That an enforcement agency must from time-to-time consider, after obtaining the facts, whether a church-related event constitutes a "secular" function does not violate the Due Process Clause. *Cf. Dayton, supra; see also, e.g., Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Comm'n*, 132 S. Ct. 694, 707-09 (2012) (addressing whether particular employee

[12] *See also Fort Des Moines Church of Christ*, 2016 WL 6089842 * 16 (rejecting vagueness challenge to "bona fide religious institution" and "bona fide religious purpose" in Iowa public accommodations law).

fell within "ministerial exception" to employment discrimination claims, and inquiring as to extent of the employee's "secular" duties and whether the employment served a "religious mission"); *Butler v. O'Brien*, 663 F.3d 514, 520 (1st Cir. 2011) ("The mere fact that close cases can be envisioned does not make a statute vague."), *cert. denied*, 132 S. Ct. 2748 (2012).

2. The "Publication" and "Aiding or Inciting" Provisions Are Not Vague.

Plaintiffs also argue that two other aspects of the law are impermissibly vague: the language in the "publication" provision prohibiting public accommodations from "indirectly" publishing material "intended to discriminate," *see* § 92A, 1st para., and the prohibition on actions that "aid[] or incite[]" discrimination, *see* § 92A, 2nd para. *See Plaintiffs' Mem.* at 15. For much the same reasons that these provisions are not overbroad, they also are not vague.

A common-sense understanding of "indirectly" is that it merely prohibits persons from arranging for the publication or distribution of materials that discriminate in public accommodations, as would be the case if, for example, a restaurant owner directed a subordinate to post a sign stating "No Trans-Gender Persons admitted." Similarly, the "intended to discriminate" language, read in context, applies to materials reasonably understood as conveying a message that persons in a protected class are not welcome in a place of public accommodation. *See Hermida v. Archstone*, 826 F. Supp. 2d 380, 384 (D. Mass. 2011) (court must interpret law so as to render it "consonant with sound reason and common sense") (internal citation and quotation marks omitted). In short, the terms "indirectly" and "intended to discriminate" are well within the comprehension of persons of ordinary intelligence, and plaintiffs thus are unlikely to succeed in their claim that the publication provision is vague. *See Fort Des Moines Church of Christ*, 2016 WL 6089842, at *2, 16-17 (finding plaintiff unlikely to succeed on merits of vagueness challenge to the phrase "in any other manner indicate" in provision making

it a discriminatory practice "[t]o directly or indirectly advertise or in any other manner indicate or publicize" that persons in protected classes were unwelcome in a public accommodation).

Plaintiffs also are unlikely to succeed on the merits of their vagueness challenge to the language prohibiting a person from "aid[ing] in or incit[ing]" discrimination. *See* Mass. Gen. Laws c. 272, § 98A, 2nd & 3rd paras. This language appears within § 98A, 3rd para., which also prohibits persons from "caus[ing] or "bring[ing] about" a violation of the discriminatory treatment provision. In this context, the terms "aid" and "incite" – like "cause" or "bring about" – refer to actions that effectuate discrimination and are not so lacking in standards to render them unconstitutionally vague. *Cf. Presbytery of New Jersey of the Orthodox Presbyterian Church v. Whitman*, 99 F.3d 101, 105 (3d Cir. 1996) (affirming dismissal of overbreadth challenge to New Jersey law prohibiting discrimination based on sexual orientation, and noting, as example, that under provision prohibiting persons from "aiding," "abetting," and "inciting" discrimination, the State could prohibit a person from offering a reward to an employer for refusing to hire someone based on sexual orientation), *cert. denied*, 520 U.S. 1155 (1997).

II. THE REMAINING FACTORS DISFAVOR INJUNCTIVE RELIEF.

The plaintiffs fail to establish that they will suffer harm absent issuance of an injunction, because they have not set forth facts establishing an *objectively reasonable* fear of prosecution under the statute. *See Mangual*, *supra*. Plaintiffs' conclusory assertions that the statute "chills" their speech and results in "self-censorship" do not provide a basis for injunctive relief, as plaintiffs have not shown that they engage in any speech or conduct to which the Massachusetts public accommodations law, as construed by *Donaldson*, applies. *See also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Thus, the fact that the deprivation of First Amendment rights will usually constitute irreparable harm is beside the point. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

And because plaintiffs do not demonstrate any objectively reasonable fear of prosecution, the balance of hardships also weighs *against* injunctive relief. Massachusetts' prohibition on discrimination in public accommodations serves "compelling state interests of the highest order," *see Roberts v. United States Jaycees*, 468 U.S. at 624, and thus the public interest would be impeded by enjoining enforcement of the statute.[13]

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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[13] In their motion for preliminary injunction, plaintiffs do not press two claims set forth in the complaint, namely, their claims based on freedom of association and freedom of assembly. *See Compl.*, Third and Fifth Causes of Action. Defendants thus do not address those claims here, other than to state that the claims lack merit for the same reasons that plaintiffs fail to establish a likelihood of success on the merits of their other claims. Defendants will address the claims based on freedom of association and freedom of assembly in a motion to dismiss the complaint.

CERTIFICATE OF SERVICE

I hereby certify that the above Memorandum of Law, which I filed electronically through the Court's electronic case filing system on December 7, 2016, will be sent electronically to all parties registered on the Court's electronic filing system, and paper copies of the motion will be sent by first class mail, postage pre-paid, to non-registered parties.

/s/ Amy Spector
Amy Spector