



E-Notice

2017-L-050886

CALENDAR: 3

To: Paul Zachary Winters
paul@wagenmakerlaw.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
BY HAND CLUB FOR KIDS NFP v. ILLINOIS DEPARTMENT EMPLO

The transmission was received on 04/04/2018 at 12:46 PM and was ACCEPTED with
the Clerk of the Circuit Court of Cook County on 04/04/2018 at 1:21 PM.

MEMORANDUM OF LAW

NOTICE OF FILING FILED

Filer's Email: paul@wagenmakerlaw.com
Filer's Fax: (312) 626-1610
Notice Date: 4/4/2018 1:21:34 PM
Total Pages: 24

DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
COOK COUNTY
RICHARD J. DALEY CENTER, ROOM 1001
CHICAGO, IL 60602

(312) 603-5031
courtclerk@cookcountycourt.com

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

COOK COUNTY, ILLINOIS
LAW DIVISION
CLERK DOROTHY BROWN

By The Hand Club For Kids, NFP, Inc.,

An Illinois not-for-profit corporation

Plaintiff,

v.

Illinois Department of Employment Security;
Director of Department of Employment Security;
Board of Review of Illinois Department of
Employment Security; and Kim E. Wimberly,

Defendants.

Case No. 17 L 50886

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

FACTUAL BACKGROUND..... 1

 A. The Moody Church’s control and supervision of By The Hand 1

 B. The purpose, mission, and activities of By The Hand..... 2

PROCEDURAL HISTORY 5

STANDARD OF REVIEW 6

ARGUMENT 6

I. The record plainly shows that By The Hand is operated primarily for religious purposes and thus qualifies for the Act’s religious exemption..... 6

II. Subjecting By The Hand to the Act’s requirements would be unconstitutional..... 9

 A. The Department’s narrow interpretation and application of § 211.3(A)(2) violates constitutional principles of religious deference and neutrality 10

 B. Subjecting By The Hand to the Act’s requirements violates the Religion Clauses of the U.S. and Illinois Constitutions 12

III. Subjecting By The Hand to the Act’s requirements would violate the Illinois Religious Freedom Restoration Act..... 15

CONCLUSION..... 15

ELECTRONICALLY FILED
4/4/2018 12:46 PM
2017-L-050886
PAGE 2 of 21

TABLE OF AUTHORITIES

Cases

Calvary Baptist Church of Tilton v. Department of Revenue,
349 Ill. App. 3d 325, 812 N.E.2d 1 (2004).....8

Christian School Association of Greater Harrisburg v. Pennsylvania,
423 A.2d 1340 (Pa. Commw. Ct. 1980)9, 10

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993).....14

Colorado Christian University v. Weaver,
534 F.3d 1245 (10th Cir. 2008)13

Community Renewal Society v. Department of Labor,
108 Ill. App. 3d 773, 439 N.E.2d 975 (1982).....9, 10

*Corporation of Presiding Bishop of the Church of Jesus Christ of
Latter-day Saints v. Amos*,
483 U.S. 327 (1987).....10, 11

Diocese of Quincy v. Episcopal Church,
2014 IL App (4th) 130901, 14 N.E.3d 1245.....12

Employment Division, Department of Human Resources of Oregon v. Smith,
494 U.S. 872 (1990).....14

Fairview Haven v. Department of Revenue,
153 Ill. App. 3d 763, 506 N.E.2d 341 (1987).....13

Grussgott v. Milwaukee Jewish Day School, Inc.,
882 F.3d 655 (7th Cir. 2018)11, 12

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,
132 S. Ct. 694 (2012).....13, 14

Kendall v. Director of Division of Employment Security,
473 N.E.2d 196 (Mass. 1985).....10

Lyng v. Northwest Indian Cemetery Protective Ass’n,
485 U.S. 439 (1988).....15

New York v. Cathedral Academy,
434 U.S. 125 (1977).....10

ELECTRONICALLY FILED
4/4/2018 12:46 PM
2017-L-050886
PAGE 3 of 21

NLRB v. Catholic Bishop of Chicago,
440 U.S. 490 (1979).....12

People v. Cornelius,
213 Ill. 2d 178, 821 N.E.2d 288 (2004).....9

Provena Covenant Medical Center,
236 Ill. 2d 368, 925 N.E.2d 1131 (2010).....7

Spencer v. World Vision, Inc.,
633 F.3d 723 (9th Cir. 2011)12, 13

St. Martin Evangelical Lutheran Church v. South Dakota,
451 U.S. 772 (1981).....9

Terwilliger v. St. Vincent Infirmiry Medical Center,
804 S.W.2d 696 (Ark. 1991)9

Thomas v. Review Board of Indiana Employment Security Division,
450 U.S. 707 (1981).....11, 15

Unity Christian School v. Rowell,
2014 IL App. (3d), 6 N.E.3d 845.....6, 9

Constitutional Provisions

Ill. Const., art. I, § 312

U.S. Const. amend. I.....12

Statutes

775 Ill. Comp. Stat. Ann. 35/15.....15

820 Ill. Comp. Stat. Ann. 405/211.3(A)(2).....*passim*

820 Ill. Comp. Stat. Ann. 405/602.....13

820 Ill. Comp. Stat. Ann. 405/1506.1.....14

ELECTRONICALLY FILED
4/4/2018 12:46 PM
2017-L-050886
PAGE 4 of 21

INTRODUCTION

Plaintiff By The Hand Club For Kids, NFP, Inc. (“By The Hand”) is no ordinary after-school program. By The Hand is distinctly Christian in character and purpose: it is a ministry of The Moody Church, hires only Christians who agree with its religious beliefs, holds regular Bible studies and chapel services for students, and measures success in large part on whether students enter into a personal and saving relationship with Jesus Christ and become involved in a local church. Since its ministry creation in 2001, By The Hand has not been liable for unemployment tax because it qualifies as an exempt religious employer under § 211.3 of the Illinois Unemployment Insurance Act (the “Act”). But the Illinois Department of Employment Security now wants By The Hand to pay into the system because it offers students free meals, free medical care, and free academic support. The organization’s religious beliefs, however, compel it to care for the whole child, and the Department is wrong to think such Christian charity and generosity converts the program into a primarily secular one. The Court should thus overturn the Department’s erroneous conclusion that By The Hand is not “operated primarily for religious purposes,” and wisely avoid the serious constitutional problems that would otherwise result.

FACTUAL BACKGROUND

By The Hand is a “Christ-centered, after school program” that ministers to children from some of Chicago’s most under-resourced neighborhoods. The program nurtures the whole child—mind, body, and soul—with the goal of leading children “by the hand” to the “abundant and eternal life” that comes through a personal relationship with Jesus Christ. (1 R. at 155, 164; 2 R. at 320.)

A. The Moody Church’s control and supervision of By The Hand.

By The Hand is, and always has been, a ministry of The Moody Church, a nondenominational Christian church located in Chicago. (2 R. at 358, 370.) The Elders of The

Moody Church, as the Church’s governing body, are responsible for the spiritual oversight of By The Hand (4 R. at 358, 719). The Church exercises its control and supervision in a variety of ways. For example, the executive director of By The Hand is a Church staff member, attends Church staff meetings, and “serve[s] at the pleasure of the Elders of The Moody Church.” (1 R. at 172–73; 2 R. at 388–89.)¹ Moreover, no person may be elected or reelected to By The Hand’s board of directors, nor any changes or amendments made to the Articles of Incorporation or Bylaws, without first being approved by The Moody Church. (1 R. at 167, 178; *see also* 4 R. at 719.) In addition, By The Hand may not consider, approve, or make any substantial revisions to its annual budget unless first reviewed and approved by the Elders of The Moody Church. (1 R. at 168.) Any “sales, leases, exchanges or other disposition” of By The Hand’s property or assets must likewise be approved by the Elders of The Moody Church. (1 R. at 174.) So too must any “loans or encumbrances upon the assets” of the ministry. (1 R. at 174.) As a result, By The Hand works closely with the Church’s finance committee “to prepare necessary financial reports and budgeting information.” (1 R. at 172, 173.)

B. The purpose, mission, and activities of By The Hand.

By The Hand is a 501(c)(3) nonprofit “organized and operated exclusively for religious and charitable purposes” that began out of a spiritual vision experienced by Founder and now Executive Director Donnita Travis. (1 R. at 153, 158, 161.) In 1997, Ms. Travis believed God had placed a scripture verse—John 10:10²—on her heart and was calling her to help children have the “abundant life” that comes through a relationship with Jesus Christ. (3 R. at 585 [Travis Aff. ¶ 4].) Ms. Travis began developing a plan for a holistic after-school program specifically geared towards

¹ Because the Executive Director, Donnita Travis, has decided to serve as a full-time volunteer, The Moody Church contributes approximately \$100,000 to By The Hand in lieu of her salary. (2 R. at 390.)

² John 10:10 states: “The thief comes only to steal and kill and destroy. I came that they may have life and have it abundantly.”

kids from Chicago’s most under-resourced neighborhoods. (3 R. at 585 [Travis Aff. ¶ 5].) She shared the vision with her church, The Moody Church, and began working with the Church’s director of children’s ministry to offer church-based classes every night. (3 R. at 585–86 [Travis Aff. ¶ 5]; *see also* 2 R. at 395.)

From the very beginning, By The Hand’s goal has been to show the love of Jesus, “sharing the gospel, praying, and teaching the Bible” and “getting kids and families into church.” (3 R. at 586 [Travis Aff. ¶ 5].) Its Christian identity and purpose are unmistakable. The organization’s governing documents include a detailed statement of doctrine and belief, making clear that, among other things, By The Hand believes “[a]ll Scripture is given by inspiration of God,” “[t]he Godhead eternally exists in three distinct persons, the Father, the Son and the Holy Spirit,” salvation comes only through “the name of Jesus Christ,” and individuals are “created in Christ Jesus to do good works.” (1 R. at 165–66.) By The Hand also has developed a “very specific set of beliefs or values” governing every aspect of its program. (3 R. at 561.) First and foremost is the expectation that By The Hand is to be “Christ-like,” “permeated by God’s Word and lead[ing] from Christ-surrendered, and Spirit-filled hearts.” (3 R. at 561.)

To that end, By The Hand employees must be Christians and affirm their salvation in Jesus Christ as a condition of employment. (*See* 3 R. at 586 [Travis Aff. ¶¶ 8, 12].) They must sign and agree with By The Hand’s statement of faith, certify that they regularly attend a “Bible believing local Church,” and agree to adhere to biblical standards of living. (3 R. at 586 [Travis Aff. ¶ 14]; 4 R. at 627.) Each staff member and volunteer must also be willing and able to lead Bible study and chapel, pray with and disciple students, and to be Christian role models. (2 R. at 325.) In short, employment at By The Hand “presupposes that each employee has committed his or her life to Jesus Christ for salvation and for Christian service” and that “[a] lifestyle in accordance with

biblical principles is essential to demonstrate that commitment to fellow employees, to the By The Hand Club students, and to the world.” (4 R. at 627.)

By The Hand’s daily activities are no less Christian. Two sites are located in church buildings (2 R. at 304), and the organization’s John 10:10 theme verse is posted throughout each site’s lobby and classrooms. (3 R. at 587 [Travis Aff. ¶ 19].) By The Hand gives each student a Bible and presents the message of the Gospel on the first day of programming. Students also attend Bible studies and chapel services, which consist of worship, preaching, prayer, and scripture memorization. (2 R. at 320–21.) Specifically, By The Hand uses Evangelism Explosion, an evangelistic curriculum that teaches students about the Christian faith. (2 R. at 321.) By The Hand permits only Christian music to be played during programming (3 R. at 565.) By The Hand has developed a behavior management process that is grounded in biblical principles and uses the phrase “AOK for Jesus” as guiding disciplinary terminology. (3 R. at 587 [Travis Aff. ¶ 18].) Furthermore, staff and volunteers regularly pray with the students, and each staff meeting begins with prayer. (2 R. at 331, 335; 3 R. at 587 [Travis Aff. ¶ 21].) By The Hand also holds a monthly all-staff prayer meeting, hosts two annual prayer summits for donors, volunteers, and staff, and conducts home visits to pray in-person with the students’ families. (See 2 R. at 331, 335; 3 R. at 587 [Travis Aff. ¶¶ 17, 21].) The ministry focuses on children living in high-risk, inner-city neighborhoods, and therefore offers hot meals, medical care, and academic rotations designed to help students with reading and homework. Notably, everything By The Hand does is offered free of charge. (2 R. at 321.)

Consistent with By The Hand’s thoroughly Christian nature, each program site has a spiritual development specialist, who is tasked with ensuring consistency in chapel services and Bible studies, coaching the rest of the staff on how to lead effective chapel and Bible study, and

discipling students in the Christian faith. (2 R. at 324, 330; *see also* 3 R. at 586 [Travis Aff. ¶ 13].) The specialists meet individually with students to read scripture and pray together and to teach them how to face life’s challenges from a Christian faith perspective. (2 R. at 330–31.) Because “students are mentored spiritually with a goal of each child developing a personal and saving relationship with Jesus Christ” (4 R. at 719), the position description for team leaders targets 100% of students “hav[ing] a personal and saving relationship with Jesus Christ” and 100% of students “attend[ing]” or being “involved in a local church.” (4 R. at 646.) Given the importance of those metrics, By The Hand “provides updates” about them in its “ezines, on its website and in its Annual Reports.” (3 R. at 587 [Travis Aff. ¶ 20].) By The Hand also keeps spiritual records documenting whether students “have accepted Christ, go to church, have received a welcome bag with a Bible, and [have] taken any small group classes like discipleship and mentoring.” (3 R. at 564; *see also* 3 R. at 587 [Travis Aff. ¶ 20].)

PROCEDURAL HISTORY

On November 20, 2016, By The Hand’s former human resource manager, Kim Wimberly, filed a claim seeking unemployment benefits under the Act. (1 R. at 6.) By The Hand timely protested the claim, noting that the Department had previously determined in February 2008 and December 2009 that By The Hand was an exempted religious employer under § 211.3 of the Act. (1 R. at 25–26, 187–88.) On December 30, 2016, despite there being no changes to Illinois law or By The Hand’s operations since those earlier determinations, the Department concluded that Ms. Wimberly was eligible to receive unemployment benefits. (1 R. at 44.) By The Hand timely appealed that determination on January 13, 2017. (1 R. at 47.) After conducting a telephonic hearing, the Department’s Hearing Referee issued a ruling on March 20, 2017, holding that By The Hand is not “operated primarily for religious purposes” and therefore not exempt under §

211.3(A)(2). (3 R. at 433–41.) By The Hand subsequently appealed that decision to the Department’s Board of Review. (3 R. at 444–56.)

On September 1, 2017, the Board of Review affirmed in the employee’s favor, concluding that By The Hand is not “operated primarily for religious purposes.” (4 R. at 819.) Although the Board of Review agreed that By The Hand is “operated, supervised, controlled or principally supported” by The Moody Church, it held that By The Hand’s principal activities are “nonreligious in nature.” (4 R. at 816, 819.) In the Board of Review’s opinion, “operation of an after school program is not necessary for evangelism” and the organization’s “main activities” are “to teach children, to feed them, to help them with homework, to help them read, [and] to care for their medical needs.” (4 R. at 819.) According to the Board of Review, the “First Amendment to the U.S. Constitution and the Illinois Constitution” had no application because its “decision does not limit [By The Hand’s] evangelistic activity.” (4 R. at 819.) The Board of Review further stated that, had By The Hand wished to avoid application of the unemployment tax, it could have chosen to operate with volunteers instead of “hir[ing] paid staff.” (4 R. at 819.)

STANDARD OF REVIEW

Whether an employer “falls within an exemption to coverage under the state unemployment system is a mixed question of law and fact.” *Unity Christian School v. Rowell*, 2014 IL App (3d) 120799, ¶ 18, 6 N.E. 3d 845, 849. “Such mixed questions are reviewed for clear error.” *Id.* ¶ 19.

ARGUMENT

I. The record plainly shows that By The Hand is operated primarily for religious purposes and thus qualifies for the Act’s religious exemption.

Section 211.3(A)(2) of the Act exempts organizations that are not “institution[s] of higher education” if “operated primarily for religious purposes” and “operated, supervised, controlled or

principally supported by a church or convention or association of churches.” 820 Ill. Comp. Stat. Ann. 405/211.3(A)(2). By The Hand is not an institution of higher education, and no one disputes that it is operated, supervised, and controlled by The Moody Church. The only question, then, is whether By The Hand is “operated primarily for religious purposes.” Because the record plainly shows that it is, the Department erred in concluding otherwise.

There being “no all-inclusive definition of religious purpose,” courts generally evaluate an organization’s purpose based on “its charter, bylaws, and actual method and facts relating to its operation.” *Provena Covenant Med. Ctr.*, 236 Ill. 2d 368, 408, 925 N.E.2d 1131, 1155 (2010). When those sources are considered here, the primarily religious purpose of By The Hand is obvious. Indeed, By The Hand exists today because of a religious calling to help children experience “abundant life” through relationship with Jesus Christ. Evidence of this religious purpose permeates By The Hand’s articles of incorporation, bylaws, operations manual, and general policies and procedures. As noted above, By The Hand:

- Includes a lengthy statement of doctrine in its bylaws (1 R. at 165–66);
- Has developed a set of guiding beliefs and principles requiring it to be, first and foremost, “Christ-like” (3 R. at 561);
- Requires its employees to be Christians, sign and agree with its statement of faith, certify that they regularly attend a “Bible believing local Church,” and agree to adhere to a Christian code of conduct (3 R. at 586 [Travis Aff. ¶ 14]; 4 R. at 627);
- Requires its employees and volunteers to lead Bible study and chapel, pray with and disciple students, and to be Christian role models (2 R. at 325);
- Employs a spiritual development specialist at each site to ensure consistency in chapel services and Bible studies, coach the rest of the staff on how to lead effective chapel services and Bible studies, and disciple students in the Christian faith (2 R. at 324, 330; *see also* 3 R. at 586 [Travis Aff. ¶ 13]);
- Has set a goal of 100% of students “hav[ing] a personal and saving relationship with Jesus Christ” and 100% of students “attend[ing]” or being “involved in a local church” (4 R. at 646); and

- Keeps spiritual records for the students, documenting whether they “have accepted Christ, go to church, have received a welcome bag with a Bible, and [have] taken any small group classes like discipleship and mentoring.” (3 R. at 564; *see also* 3 R. at 587 [Travis Aff. ¶ 20].)

The religious purpose is also evident in daily practice. As noted, two program sites are located in church buildings, the organization’s theme verse (John 10:10) is posted in the lobby and classrooms of each program site, students are given Bibles and attend chapel and Bible studies, an evangelism curriculum is used to teach students about Christianity, Christian music plays during programming, and intentional times for prayer and discipleship are set aside each day.

So why did the Department conclude that By The Hand primarily is a secular undertaking?

Because By The Hand apparently offers too much free food, free reading and homework support, and free medical care. Indeed, at bottom, the Department ruled that By The Hand’s generosity and effectiveness in these areas trumps its unquestionably religious activities and purpose. But feeding the hungry, caring for the sick and needy, and helping students is how By The Hand exercises its religious beliefs, and those activities are no less spiritual to By The Hand than the more traditional and fully integrated activities of prayer, chapel, and Bible study. As noted by the organization’s Director of Human Resources and Volunteer Development at the hearing, every part of the program is done as “a way of loving kids as Jesus would” because “[w]hen Jesus walked on the Earth, he met physical needs, and spiritual needs.” (2 R. at 337.) The Department’s conclusion to the contrary—that caring for another’s physical needs is not religious activity—turns the analysis on its head and impermissibly imposes the government’s preferred view of religion. As explained in more detail below, constitutional concerns require the government “to accept the entity’s characterization of its activities and beliefs as religion as long as the characterization is in good faith.” *Calvary Baptist Church of Tilton v. Dep’t of Revenue*, 349 Ill. App. 3d 325, 331, 812 N.E.2d 1, 5 (2004).

Regardless of whether caring for physical needs and offering academic support may properly be deemed “secular” here, such activity does not relegate By The Hand’s undeniably religious activities and purpose to second place. The court’s decision in *Unity Christian School v. Rowell*, 2014 IL App (3d) 120799, 6 N.E. 3d 845, is instructive on this point. In that case, the court held that a parochial school was operated primarily for religious purposes within the meaning of § 211.3(A)(2), even though the school’s curriculum was “primarily secular in nature.” *Id.* ¶ 33. The court rejected the argument that the school must demonstrate the “majority of class time was spent on religious instruction as opposed to secular topics such as mathematics, grammar, or science” to qualify for the exemption where “the primary purpose of the school is to teach those secular subjects in a faith-based environment.” *Id.* ¶¶ 31, 33.

Like in *Unity Christian School*, the critical factor here is not that By The Hand feeds children or helps them with their homework, but rather that it does so in a distinctly Christian way. The purpose is to create Christian students, to integrate the Christian faith into all aspects of their lives, and to equip them to positively influence their communities by living out the Christian faith. As noted by its Founder and Executive Director, By The Hand simply “would not exist or continue this ministry if it were not for religious purposes.” (3 R. at 586 [Travis Aff. ¶ 9].) Where, like here, “religion pervades the operation of the institution, exemption of the operation as one operated primarily for a religious purpose may be had.” *Terwilliger v. St. Vincent Infirmary Med. Ctr.*, 804 S.W.2d 696, 699 (Ark. 1991).

II. Subjecting By The Hand to the Act’s requirements would be unconstitutional.

It is well established that a statute is to be interpreted and applied in such a way “to avoid raising doubts of its constitutionality.” *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981); *see also People v. Cornelius*, 213 Ill. 2d 178, 189, 821 N.E.2d 288, 296 (2004). Illinois courts thus have been “quite cautious in attempting to define, for tax and

unemployment insurance purposes, what is or is not a religious activity or organization—for obvious policy and constitutional reasons.” *Community Renewal Soc’y v. Dep’t of Labor*, 108 Ill. App. 3d 773, 779, 439 N.E.2d 975, 978 (1982) (internal quotations and brackets omitted).³ Here, the Department did not exercise appropriate care and instead relied on a subjective, overly restrictive, and ultimately unconstitutional understanding of what constitutes religious activity.

A. The Department’s narrow interpretation and application of § 211.3(A)(2) violates constitutional principles of religious deference and neutrality.

The U.S. Supreme Court has cautioned that government officials may not determine, based on their own standards, the religious significance of particular activities. For example, in *New York v. Cathedral Academy*, 434 U.S. 125 (1977), the Court considered a statute that reimbursed private religious schools for certain activities but only if devoid of religious content. Holding the statute unconstitutional, the Court noted that the “sort of detailed inquiry” required by the statute “would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments.” *Id.* at 132. As the Court explained, the statute would place schools “in the position of trying to disprove any religious content in various classroom materials,” while simultaneously requiring the state “to undertake a search for religious meaning in every classroom examination offered in support of a claim.” *Id.* at 132–33. The Court concluded that “[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.” *Id.* at 133.

In *Incorporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), the Court again found this sort of inquiry problematic in the context

³ Courts nationwide take a similar approach. *See, e.g., Kendall v. Director of Div. of Employment Sec.*, 473 N.E.2d 196, 199 (Mass. 1985) (“Although tax exemptions are normally ... given a strict construction with all doubts construed against the taxpayer ... the rule of strict construction is superseded in instances where there is a strong possibility that the statute in question infringes upon a party’s right to the free exercise of religion.”); *Christian Sch. Ass’n of Greater Harrisburg v. Pennsylvania*, 423 A.2d 1340, 1343 (Pa. Commw. Ct. 1980) (same).

of evaluating whether an employee’s duties were religious or secular. There, the lower court had held that a “building engineer” at a church gymnasium performed a secular activity. *Id.* at 332. The Supreme Court reversed, explaining that forcing a religious organization “to predict which of its activities a secular court will consider religious” would impose a “significant burden” and “might affect the way an organization carried out what it understood to be its religious mission.” *Id.* at 336. Recognizing that the line between religious and secular “is hardly a bright one,” the Court concluded that an organization “might understandably be concerned” courts “would not understand its religious tenets and sense of mission.” *Id.*

These cases stand for the proposition that, because determining “what is a ‘religious’ belief or practice is more often than not a difficult and delicate task,” the “resolution of that question” may not “turn upon a judicial perception of the particular belief or practice in question.” *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). Yet that is exactly what happened here. The Department proclaimed—based on nothing more than its subjective view of religion—that By The Hand’s “main activities” are teaching students, feeding them, and caring for their medical needs, and that those activities are purely secular ones “not necessary for evangelism.” (4 R. at 819.) But the government may not decide what is “necessary for evangelism” (it should not have an opinion on the matter), nor may it unilaterally and categorically classify activities as secular (especially when they are consistent with historical religious practices).

Indeed, constitutional principles of deference and neutrality counsel in favor of a broad definition of religion that encompasses all activities of an organization that are based on or further the organization’s sincerely held religious beliefs. This does not mean that courts “can never question a religious organization’s designation of what constitutes religious activity,” but rather that they must “defer to the organization in situations like this one, where there is no sign of

ELECTRONICALLY FILED
4/4/2018 12:46 PM
2017-L-050886
PAGE 15 of 21

subterfuge.” *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018). This deferential neutrality is the only way to protect religious institutions from governmental monitoring and second-guessing of their religious beliefs and practices, and the only way to avoid serious constitutional problems. *See Spencer v. World Vision, Inc.*, 633 F.3d 723, 730 (9th Cir. 2011) (noting that the Supreme Court “has repeatedly cautioned courts against venturing into th[e] constitutional minefield” of classifying particular activities as “religious” or “secular”).

B. Subjecting By The Hand to the Act’s requirements violates the Religion Clauses of the U.S. and Illinois Constitutions.

Subjecting religious organizations like By The Hand to the Act’s requirements runs afoul the Religion Clauses in several ways.⁴ First, a narrow interpretation and application of § 211.3(A)(2) entangles the government with religion by forcing it to closely review and evaluate the activities of religious institutions. In the absence of religious deference, how could the government determine whether an organization like By The Hand is sufficiently religious without trolling through its organizational documents, employee contracts, curriculum (including books and teacher aides), classroom décor, teaching methods, financial records, and interactions between staff and students—evaluating them for “religious” content, tallying them up, and then comparing them to what the government deems religious or secular? Not only would the government’s conclusions “impinge on rights guaranteed by the Religion Clauses,” but so would “the very process of inquiry leading to findings and conclusions.” *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). The type of line drawing called for under the Department’s restrictive interpretation of § 211.3(A)(2) is “incredibly difficult” and “impermissibly entangles the

⁴ Under the First Amendment to the United States Constitution, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” U.S. Const. amend. I. “The Illinois Constitution contains a similar protection.” *Diocese of Quincy v. Episcopal Church*, 2014 IL App (4th) 130901, ¶ 41, 14 N.E.3d 1245, 1255 (2014); *see* Ill. Const., art. I, § 3.

government with religion.” *Grussgott*, 882 F.3d at 660.

Second, the Department’s interpretation and application of the exemption raises establishment problems because government officials will inevitably make distinctions that favor expressly religious or traditional methods of pursuing a religious mission over more unconventional methods. For instance, too much discretion (and not enough deference) will lead to impermissible governmental proclamations about how certain activities, such as feeding or educating needy children, are not religious or “necessary for evangelism.” The discretion alone “raise[s] the specter of constitutionally impermissible discrimination between institutions on the basis of the ‘pervasiveness or intensity’ of their religious beliefs.” *World Vision, Inc.*, 633 F.3d at 729 (quoting *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008)).

Third, subjecting organizations like By The Hand to the requirements of the Act will entangle the government in religious and theological disputes whenever an employee is terminated based on a failure to adhere to the organization’s statement of faith, teach in accordance with the organization’s religious beliefs, or abide by the organization’s religiously informed code of conduct. This is because employees may not receive unemployment benefits if discharged for “misconduct,” which the Act defines, in relevant part, as a “deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual’s behavior in the performance of his [or her] work.” 820 Ill. Comp. Stat. Ann. 405/602. Evaluating claims of “misconduct” in such situations is constitutionally forbidden. *See Fairview Haven*, 153 Ill. App. 3d at 772–73 (“[G]overnmental bodies are precluded from resolving disputes on the basis of religious doctrine and must respect the internal autonomy of religious organizations.”).

Fourth, subjecting religious organizations like By The Hand to the requirements of the Act will interfere with their ability to select its “ministers,” depriving them of “control over the

selection of those who will personify its beliefs.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012). Indeed, under the Act, an employer’s unemployment contribution (tax) rate depends in part on whether the employer caused unemployment in preceding years. *See* 820 Ill. Comp. Stat. Ann. 405/1506.1. Because the rate increases if the employer fires employees, subjecting By The Hand to the Act’s requirements would pressure it “to accept or retain an unwanted minister” or “punish” it “for failing to do so”—a result the Religion Clauses expressly forbid. *Hosanna-Tabor*, 132 S. Ct. at 706.⁵

Finally, subjecting By The Hand to the Act’s requirements violates the Free Exercise Clause because the government “may not refuse to extend” a religious exemption “without compelling reason” where the law at issue “create[s] a mechanism for individualized exemptions” that depends on the discretion of government officials. *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 884 (1990). Here, there is no question the Department’s interpretation and application of § 211.3(A)(2) has given it broad discretion to characterize activities as “religious” or “secular” and to decide whether certain “religious” activities are weighty enough to make the organization “primarily religious.” The analysis is entirely subjective and involves precisely the type of “individualized governmental assessment[s]” found problematic by the U.S. Supreme Court. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993). Denying a religious exemption under § 211.3(A)(2) thus triggers strict scrutiny—a heightened standard of review that the government cannot meet given the Act’s existing

⁵ In this case, Ms. Wimberly’s position was a ministerial one because the position is responsible for recruiting, training, equipping, and developing staff to carry out every aspect of the program (2 R. at 338), and is expected to ensure that job applicants are “interviewed and assessed in accordance with By The Hand Club culture and values.” (4 R. at 647.) In short, the HR manager is entrusted with the critical responsibility of identifying, selecting, and training the very individuals who shape and preserve the organization’s religious mission on a daily basis. *See Hosanna-Tabor*, 132 S. Ct. at 707–08 (holding that “the ministerial exception is not limited to the head of a religious congregation” and that an employee’s religious functions need not be to the exclusion of all secular duties).

exemptions. *See id.* at 546–47 (holding that “underinclusiveness” shows asserted state interest is not compelling and government action not narrowly tailored).

III. Subjecting By The Hand to the Act’s requirements would violate the Illinois Religious Freedom Restoration Act.

Under Illinois’ Religious Freedom Restoration Act, the “[g]overnment may not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.” 775 Ill. Comp. Stat. Ann. 35/15. Application of the Act to By The Hand here substantially burdens the organization’s religion because it has the “tendency to coerce [the organization] into acting contrary to its religious beliefs.” *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450–51 (1988). Indeed, the Department has deprived By The Hand of a religious exemption—and thus subjected it to financial penalty—simply because it has pursued activities compelled by its religious beliefs—that is, loving and nurturing the whole child by providing free food, free medical care, and free academic tutoring. Where, like here, the state denies “a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify [its] behavior and to violate [its] beliefs, a burden upon religion exists.” *Thomas*, 450 U.S. at 717–18. As indicated above, the Department cannot establish that the burden is necessary to further a compelling governmental interest or that it has used the least restrictive means in pursuing its purported interest.

CONCLUSION

Based on the foregoing reasons, By The Hand respectfully requests that the Court overturn the Department’s erroneous ruling, hold that By The Hand qualifies for the religious exemption under § 211.3(A)(2) of the Act, and avoid serious constitutional issues.

Dated: April 4, 2018

Respectfully submitted,



Erik Stanley, Cook County Atty No. 62420*
Jeremiah Galus, Cook County Atty No. 62467*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
estanley@ADFlegal.org
jgalus@ADFlegal.org

Sally Wagenmaker, Bar No. 33749
Paul Winters, Bar No. 55933
Jonathan S. Hwang, Bar No. 61469
WAGENMAKER & OBERLY, LLC
53 W. Jackson Blvd., Ste. 1734
Chicago, IL 60604
(312) 626-1600
sally@wagenmakerlaw.com
paul@wagenmakerlaw.com
jonathan@wagenmakerlaw.com

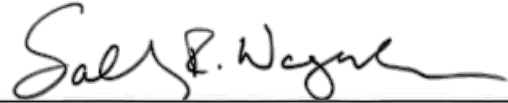
ATTORNEYS FOR PLAINTIFF

**Admitted under Supreme Court Rule 707*

ELECTRONICALLY FILED
4/4/2018 12:46 PM
2017-L-050886
PAGE 20 of 21

CERTIFICATE OF SERVICE

I hereby certify that I served Illinois Department of Employment Security; Director of Illinois Department of Employment Security; Board of Review of Illinois Department of Employment Security; and Kim E. Wimberly with the foregoing Plaintiff's Memorandum of Law in Support of Complaint, via U.S. mail, with sufficient postage before 5 p.m. on April 4, 2018.



Sally Wagenmaker, Bar No. 33749
WAGENMAKER & OBERLY, LLC
53 W. Jackson Blvd., Ste. 1734
Chicago, IL 60604
(312) 626-1600
Attorney for Plaintiff

ELECTRONICALLY FILED
4/4/2018 12:46 PM
2017-L-050886
PAGE 21 of 21

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

By The Hand Club for Kids, NFP, Inc.,

An Illinois not-for-profit corporation

Plaintiff,

v.

Illinois Department of Employment Security;
Director of Department of Employment Security;
Board of Review of Illinois Department of
Employment Security; and Kim E. Wimberly,

Defendants.

Case No. 17 L 50886

NOTICE OF FILING

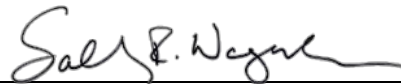
TO: Illinois Department of Employment Security
c/o Mr. Jackub Piechnik
Assistant Attorney General
Illinois Attorney General's Office
33 S. State St., Suite 992
Chicago, IL 60603

Director of Illinois Department of Employment Security
c/o Mr. Jackub Piechnik
Assistant Attorney General
Illinois Attorney General's Office
33 S. State St., Suite 992
Chicago, IL 60603

Board of Review of Illinois Department of Employment Security
c/o Mr. Jackub Piechnik
Assistant Attorney General
Illinois Attorney General's Office
33 S. State St., Suite 992
Chicago, IL 60603

Ms. Kim E. Wimberly
834 Washington Blvd., Apt. 3C
Oak Park, IL 60302

PLEASE TAKE NOTICE that on Wednesday, April 4, 2018, the undersigned caused to be filed with the Clerk of the Circuit Court, Cook County, Plaintiff's Memorandum of Law in Support of Complaint, a copy of which is attached hereto, in the above referenced matter.

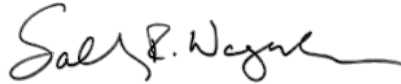


Sally Wagenmaker, Bar No. 33749
WAGENMAKER & OBERLY, LLC
53 W. Jackson Blvd., Ste. 1734
Chicago, IL 60604
(312) 626-1600
Attorney for Plaintiff

ELECTRONICALLY FILED
4/4/2018 12:46 PM
2017-L-050886
PAGE 2 of 3

CERTIFICATE OF SERVICE

I hereby certify that I served Illinois Department of Employment Security; Director of Illinois Department of Employment Security; Board of Review of Illinois Department of Employment Security; and Kim E. Wimberly with the foregoing Notice of Filing, via U.S. mail, with sufficient postage before 5 p.m. on April 4, 2018.



Sally Wagenmaker, Bar No. 33749
WAGENMAKER & OBERLY, LLC
53 W. Jackson Blvd., Ste. 1734
Chicago, IL 60604
(312) 626-1600
Attorney for Plaintiff

ELECTRONICALLY FILED
4/4/2018 12:46 PM
2017-L-050886
PAGE 3 of 3

Law DIVISION

Litigant List

Printed on 04/04/2018

Case Number: 2017-L-050886

Page 1 of 1

Plaintiffs

Plaintiffs Name	Plaintiffs Address	State	Zip	Unit #
BY HAND CLUB FOR KIDS NFP			0000	

Total Plaintiffs: 1

Defendants

Defendant Name	Defendant Address	State	Unit #	Service By
BOARD REVIEW IL DEPT EM			0000	
DIRECTOR IL DEPT EMP SE			0000	
WIMBERLY KIM E			0000	
ILLINOIS DEPARTMENT EMPLO			0000	

Total Defendants: 4