IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

REDEEMER FELLOWSHIP OF EDISTO ISLAND, Plaintiff, v. TOWN OF EDISTO BEACH, SOUTH CAROLINA Defendant.	)	Case No. 2:18-cv-02365-DCN Oral Argument Requested

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The Plaintiff, REDEEMER FELLOWSHIP OF EDISTO ISLAND, by and through its counsel, files this Motion pursuant to Rule 65 of the Federal Rules of Civil Procedure, and respectfully requests that this Court enter a preliminary injunction prohibiting Defendant TOWN OF EDISTO BEACH, SOUTH CAROLINA, from enforcing or applying its facility use policy banning "religious worship services" in the Edisto Beach Civic Center against Plaintiff, and states as follows:

1. The Plaintiff's counsel was not able to confer with opposing counsel pursuant to Local Rule 7.02 prior to filing this motion because opposing counsel has not yet entered a notice of appearance. Plaintiff's counsel will confer as soon as possible after opposing counsel appears.

2. The facts of this case are as stated in Plaintiff's Verified Complaint and the Declarations of Robin Heath and Cameron Andrews, which are incorporated herein by reference.

3. Rule 65 of the Federal Rules of Civil Procedure authorizes the District Court to grant preliminary injunctive relief.

4. The Plaintiff is likely to succeed on the merits. The Defendant's worship ban violates the Free Speech Clause because it is a content and viewpoint based restriction on protected speech which the Defendant cannot sufficiently justify.

5. The Defendant's worship ban violates the Free Exercise Clause because it is neither neutral nor generally applicable, is hostile towards religion, and fails strict scrutiny.

6. The Defendant's worship ban also violates the Establishment Clause because it discriminates among religions, evidences hostility towards religion, and promotes excessive government entanglement with religion.

7. The Plaintiff is suffering, and will continue to suffer, irreparable harm without an injunction. The Plaintiff is being denied its constitutional rights, which cannot be remedied with money damages.

8. The Defendant will not be harmed by the issuance of an injunction.

9. Issuance of an injunction is in the public interest as the protection of the Plaintiff's constitutional and statutory rights are of the highest public importance.

WHEREFORE, the Plaintiff respectfully requests that this Court issue a Preliminary Injunction enjoining the Defendant, and Defendant's officers, agents, employees, and all others persons acting in concert with them, from enforcing its policy banning "religious worship services" in the Edisto Beach Civic Center so that: the Defendant must not prohibit the Plaintiff from holding religious worship services in the Civic Center.

Dated: August 27, 2018

Respectfully submitted,

s/ Matthew G. Gerrald

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**Pro Hac Vice Motions forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2018, I electronically filed the foregoing Motion with the Clerk of this Court by using the court's CM/ECF system. Defendant will be served a copy of the Motion and its attachments by process server.

Respectfully submitted,

s/ Matthew G. Gerrald
Matthew G. Gerrald

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MEMORANDUM OF LAW IN SUPPORT OF
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SUMMARY OF THE NATURE OF THE CASE

The Town of Edisto Beach, South Carolina, will rent the Edisto Beach Civic Center to anyone, for any purpose—except "religious worship services." Worship, alone, is banned. The Town's targeted discrimination against religion not only violates the First Amendment, it also disproportionately harms small churches like Redeemer Fellowship of Edisto Island ("Redeemer Fellowship or the "Church") which seek rented space in which to meet.

Redeemer Fellowship has a heart to love and serve the Edisto Beach community, and introduce it to the Gospel. *See* Declaration of Robin Heath (Heath Decl.) ¶ 1. The Church's congregation of approximately 35-45 congregants outgrew its current meeting space in a church member's home. *See id.* at ¶¶ 2, 7-9. So, early in 2018, Redeemer Fellowship began diligently seeking new space on the island to rent. *See id.* at ¶ 13.

The Edisto Beach Civic Center was a natural option. The Town has made the Civic Center's auditorium, lobby area, two multi-purpose rooms, and grounds available for rent. *See* Declaration of Cameron Andrews (Andrews Decl.) ¶ 3. The Center's facility use guidelines state: "The Edisto Beach Civic Center welcomes civic, political, business, social groups and others to its facility." *See id*. ¶ 2; *see also* Original Civic Center Guidelines, Ver. Compl. Ex. A; Amended Civic Center Guidelines, Ver. Compl. Ex. E. When the Church first inquired about renting space in the Center, worship was permitted—it was treated just like any other form of expressive activity. So when Redeemer Fellowship first applied to rent the Civic Center for its April 1, 2018, Sunday worship service, Civic Center manager Kelly Moore approved the application without controversy. *See* Andrews Decl. ¶¶ 14-15. The Church paid the rental fee just like any other member of the community and held its Easter worship service in the Center. *See id*. at ¶¶ 15-16.

Finding that the Civic Center suited its needs for space and location, the Church on April 9, 2018, presented the Civic Center with a rental proposal that included use of the auditorium either one Sunday per month or every Sunday. *See id*. ¶ 19. But rather than allowing the Church to again rent the Civic Center for its services, the Town changed its facility use policy to ban "religious worship services." *See id*. ¶¶ 25-26.

At the May 10, 2018, Town Council meeting, the Town Attorney claimed that renting out the Civic Center for worship services was prohibited by the Establishment Clause. The Town Council immediately voted to amend its Civic Center facility use policy to ban "religious worship services." *See* May 10, 2018, Town Council Meeting Minutes, Ver. Compl. Ex. C. Immediately thereafter, the Town denied Redeemer Fellowship's request to rent the Civic Center based on the Town's new worship ban. *See* Andrews Decl. ¶25.

The Town of Edisto Beach is operating in a time warp. Its antiestablishment fears resurrect arguments that were raised, debunked, and dismissed decades ago. The Supreme Court has been manifestly clear: giving religious organizations equal access to government facilities does not violate the Establishment Clause. But affirmatively discriminating against religious worship most certainly violates the First Amendment. The Town's policy and conduct stands in direct violation of Supreme Court precedent like *Widmar v. Vincent*, 454 U.S. 263 (1981), and Fourth Circuit precedent like *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703 (1994).

Edisto Beach's targeted discrimination against religious worship, both facially and as-applied, violates the Religion and Free Speech Clauses of the First Amendment of the United States Constitution. Redeemer Fellowship therefore seeks a preliminary injunction to stop further irreparable injury to its constitutional rights.

STATEMENT OF FACTS

The Church incorporates by reference the facts set forth in the declarations of Pastor Robin Heath and Redeemer Fellowship representative Cameron Andrews, filed concurrently with this memorandum, and as set forth in Plaintiff's Verified Complaint (Dkt. #1) filed with this Court on August 27, 2018.

ARGUMENT

Redeemer Fellowship seeks a preliminary injunction on its Free Speech, Free Exercise, and Establishment Clause claims.[1] "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As discussed below, the Church meets all of these requirements. Therefore, a preliminary injunction should issue.

I. REDEEMER FELLOWSHIP IS LIKELY TO SUCCEED ON THE MERITS.

In response to the Church's request to rent the Civic Center, the Town changed its facility use guidelines to ban "religious worship services" at the Civic Center. As discussed below, the Town's worship ban and its actions in applying that worship ban to Redeemer Fellowship violate the Free Speech, the Free Exercise, and the Establishment Clauses of the United States Constitution.

[1] Due to briefing limits, Plaintiff is only briefing selected claims in this Motion for Preliminary Injunction. The Church does not waive other claims or arguments presented in the Verified Complaint that are not included in this Motion and will pursue them as the case progresses.

A. Redeemer Fellowship is likely to succeed on its Free Speech claim because the Town discriminated against worship—protected speech—in a public forum based on its content and viewpoint without a compelling justification.

1. Worship is protected First Amendment speech.

The first inquiry a court must undertake when analyzing a free speech claim is whether the plaintiff has engaged in protected speech. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). Redeemer Fellowship wants to use the Town Civic Center for private religious speech: worship. "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). The First Amendment indisputably protects "religious worship and discussion". *Widmar*, 454 U.S. at 269. Therefore, Redeemer Fellowship wants to engage in, and the Town banned, protected speech.

2. The Civic Center is a designated (or limited) public forum because the Town has made government property generally available to the public for expressive activity.

Because the Town's worship ban applies in a specific location—the Civic Center—it triggers a forum-based analysis for assessing whether the Town's worship ban is constitutional. *See Minnesota Voter's Alliance v. Mansky*, 138 S.Ct. 1876, 1885 (2018) (stating same). Courts recognize three categories of government property: (1) the traditional public forum, (2) the nonpublic forum, and (3) the designated public forum. *See id.*

The traditional public forum is a place that "by long tradition or by government fiat ha[s] been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). "[Q]uintessential public forums" include public parks, streets, and meeting halls. *Id.* at 45 (public parks and streets); *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (meeting halls). In this forum, the government may impose reasonable time, place, and

manner restrictions on private speech, but content-based restrictions must satisfy strict scrutiny, and viewpoint restrictions are prohibited. *See Minnesota Voter's Alliance*, 138 S.Ct. at 1885.

The nonpublic forum is government property that is not open by tradition or designation for public expression. *See Perry*, 460 U.S. 37 at 46. The government may "retain nonpublic forum status by allowing selective, permission-only access to the forum" contingent upon discretionary judgments. *Warren v. Fairfax Cty.*, 196 F.3d 186, 193 (4th Cir. 1999). Examples of nonpublic fora include open areas of a military base, a public school's internal mail system, and a polling place. *See, e.g.*, *Greer v. Spock*, 424 U.S. 828 (1976) (military base); *Perry*, 460 U.S. 37 (public school's internal mail system); *Minnesota Voters Alliance*, 138 S.Ct at 1886 (polling place). The government can restrict access to a nonpublic forum if its restrictions are reasonable and viewpoint neutral. *See Goulart v. Meadows*, 345 F.3d 239, 248 (4th Cir. 2003).

The designated (or limited) public forum is property that the government has opened to the public—or some segment of the public—for expressive activity.[2] *Ark. Educ. Television Com'n v. Forbes*, 523 U.S. 666, 677 (1998). A designated public forum can only be created by "purposeful government action" in which the government intends "to make the property 'generally available' to a class of speakers." *Id.* at 678 (internal citations omitted). The government creates a designated public forum when it grants general access to a class of speakers, not just selective access for individual speakers. *See id.* at 679. The Supreme Court has recognized university meeting facilities generally open to student groups, a school board meeting open to the public, and a municipal auditorium and theater as public fora. *See, e.g.*, *Widmar*, 454 U.S. 263 (university facilities);

[2] Although some Circuit Courts of Appeal distinguish between "limited public forum" and "designated public forum", the Fourth Circuit treats these labels as two terms for the same forum. *See Goulart*, 345 F.3d at 250 ("In *Warren* [*v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999)], we treated the terms "designated public forum" and "limited public forum" as two names for the same forum.").

Madison Joint Sch. Dist. v. Wisc. Emp't Relations Comm'n, 429 U.S. 167 (1976) (school board meeting); *Southeastern Promotions, Ltd v. Conrad*, 420 U.S. 546 (1975) (auditorium and theater).

In *Goulart v. Meadows*, 345 F.3d 239 (4th Cir. 2003), the Fourth Circuit found community centers to be designated public fora. *See id.* at 251. A Maryland county opened its community centers to the public for expressive activity, such as sewing and sign language courses, math tutoring, and marriage and parenting enrichment. *See id*. The recreation coordinators used established guidelines to determine who could rent the centers and for what purposes. *See id*. As a result, the community centers were designated public fora. *See id*. at 250-51.

Similarly, the Edisto Beach Civic Center is a designated public forum for three reasons. First, the Town opened the Civic Center to expressive activity by purposeful government action. The Town intentionally created and published facility use guidelines, thereby opening the Civic Center for community rentals.

Second, the Town opened the Civic Center to the general public, not the selective expression of a few. The Center's facility guidelines state that it welcomes "civic, political, business, social groups and others to its facility." This is a wide-open policy that, true to its "civic" purpose, welcomes everyone. The Center has been rented for exercise classes, art guild events, birthday parties, bridge games, job fairs, wedding rehearsals, Christmas parties, women's clubs, Bible studies, baptism celebrations, a church office, and business offices. *See* Andrews Decl. ¶ 9.

Third, permission to use the Civic Center is not selective, or based on discretionary judgments; it is granted as a matter of course to all individuals or groups who meet the facility use guidelines criteria. With the exception of the worship ban, the remaining guidelines are time, place, and manner restrictions directing *how* and *when* the facility may be used—they do not restrict *who*

may speak. *See* 2018 Amended Civic Center Guidelines, Ver. Compl. Ex. E. The Edisto Beach Civic Center is therefore a designated public forum.

3. Banning worship excludes religious speakers who fall within the class to which the Civic Center is made generally available.

After identifying the protected nature of the speech and the proper forum, the next step is determining the proper standard of review. In a designated public forum, the Fourth Circuit invokes two different levels of First Amendment analysis. *See Goulart*, 345 F.3d at 250.

The "internal standard" applies when the government excludes a speaker who falls *inside* the class to which a designated public forum is made generally available. *See Warren*, 196 F.3d at 193. In this context, the exclusion must be viewpoint neutral and content-based restrictions are subject to strict scrutiny. *See id.*; *see also Forbes*, 523 U.S. at 677 (If the government "excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny."). Under the internal standard, the designated public forum is treated just like a traditional public forum. *See Minnesota Voters Alliance*, 138 S.Ct. at 1885.

On the other hand, the "external standard" applies when the government excludes a speaker who falls *outside* the class to which a designated public forum is made generally available. *See Warren*, 196 F.3d at 194. The government's designation of the class must be viewpoint neutral and reasonable in light of the forum's objective purposes. *See id.* Entities of a "similar character" to those allowed access may not be excluded. *See id.* Under the external standard, the designated public forum is treated just like a nonpublic forum. *See id*.

Here, the Town has been remarkably clear in its designation of the class of speakers to whom the Civic Center is made generally available. According to its facility use guidelines, the forum is open to "civic, political, business, social groups and others." Amended Civic Center Guidelines, Ver. Compl. Ex. E. Redeemer Fellowship is a civic group, a social group, and most

certainly qualifies as "others." The Church is of a "similar character" to others permitted to speak in the Civic Center. *American Civil Liberties Union v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005).

More specifically, the Civic Center is open to religious speakers for religious expression. The Center has been rented for Bible studies and baptism celebrations. *See* Andrews Decl. ¶ 9. The Town currently has a long-term rental agreement with the Episcopal Church which uses the Center for Vestry meetings, church office space, theological training, and Bible studies. *See id*. at ¶¶ 5-7. There is no difference traceable to the purpose of the forum for allowing Bible studies, theological training, and baptism celebrations and *not* allowing "religious worship services." Both involve religious speakers. Both involve religious expression. Both involve a communal gathering of religious adherents. Indeed, both involve "worship." And the fact that the Town prior to May 10, 2018, allowed the Center to be rented for worship services just underscores that its new worship ban is not traceable to the forum's purpose.

The Town's attempt to distinguish between worship and every other type of religious speech has nothing to do with the purpose of the forum: it has everything to do with the Town's failure to understand the Establishment Clause. In sum, the Fourth Circuit's "internal standard" applies because Redeemer Fellowship falls within the class of speakers for whom the Civic Center was made generally available.

4. Banning worship in a designated public forum is a content-based speech restriction and the Town cannot meet its burden to justify content-based discrimination with a narrowly tailored, compelling government interest.

Under the Fourth Circuit's internal standard, content-based restrictions in a designated public forum are subject to strict scrutiny. *See Goulart*, 345 F.3d at 250. As the Supreme Court has unequivocally stated: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus

toward the ideas contained' in the regulated speech." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2228 (2015). This stringent standard for content-based discrimination "reflects the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018) (internal quotation marks omitted).

a. Banning worship is a content-based speech restriction.

"Government regulation of speech is content based if a law applies to a particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S.Ct. at 2227. While some content-based distinctions are obvious (such as those that define speech by subject matter), other content-based distinctions "are more subtle, defining regulated speech by its function or purpose." *Id.*

The Town banned "religious worship services" as if they are a discrete, definable, government-discernable activity. They are not. "Worship" is a theological term—not a legal term—and therefore legally meaningless apart from its component parts: singing religious songs, teaching religious subject matter, reading religious texts, and fellowshipping around shared religious values, as an act of devotion to God. In other words, worship cannot be defined apart from its *purpose* and *content*.

Attempts to categorize worship as an "activity" are fruitless. The labels used to describe speech are unimportant; what matters is the "substance" of the speech. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001). There is no legal distinction between religious expression and worship. *See id.* at 110-11. In fact, the Supreme Court over thirty years ago specifically rejected a distinction between religious worship and religious expression, stating "[w]e think that the distinction advanced by the dissent [between religious speech and religious worship] lacks

foundation in either the Constitution or in our cases, and that it is judicially unmanageable." *Widmar*, 454 U.S. at 271 n.9. To crystalize the Town's policy, it bans singing, teaching, reading, and fellowshipping that are done collectively *for religious purposes* while permitting those same activities when done for other purposes. This means the Town must evaluate the content of the speech to determine its permissibility.

b. Avoiding an Establishment Clause violation is not a compelling government interest here because equal access to the Civic Center poses no risk of an actual Establishment Clause violation.

Because the worship ban is a content-based speech restriction in a designated public forum, the Town must satisfy strict scrutiny. *See Goulart*, 345 F.3d at 250; *see also Reed*, 135 S.Ct. at 2227. But the Town cannot meet this stringent test, because its sole justification for imposing the worship ban is legally wrong.

The Town imposed the worship ban because it feared violating the Establishment Clause. According to the official minutes of the May 10, 2018, Town Council meeting, town attorney Bert Duffie recommended amending the Civic Center's rental rules to prohibit rentals for religious worship services because he believed the Establishment Clause prohibited that type of rental:

> In this particular situation, when you have worship services, which is sort of the core of a religious activity obviously, you have signs that are put out at the Civic Center with the religious organization's name on it and the Edisto Beach Civic Center's name on it, there's potential for flyers to be given out, and it gives the appearance that the Town is endorsing or supporting whichever particular religious organization that is. So that could violate the Establishment Clause and put the Town at risk for liability. The other aspect of it is, the rentals at the Civic Center, being governmental rentals are generally less costly than private party rentals, so if you have an organization that is trying to use the Civic Center as its quote 'Church' what the case laws demonstrate is that has been termed a subsidy, where the government is subsidizing through that type of rental, the establishment of that church, and that again, could violated [sic] the Establishment Clause.

May 10, 2018, Town Council Meeting Minutes, Ver. Compl. Ex. C.

In a nutshell, town attorney Duffie offered two reasons why he thought allowing worship in the Civic Center violated the Establishment Clause: (1) church signs or fliers naming the Civic Center give the appearance of endorsement, and (2) cheaper government rentals subsidize religion.

But the Supreme Court has repeatedly held that providing religious groups equal access to government programs, buildings, and even funding does not violate the Establishment Clause. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (funding); *Good News Club*, 533 U.S. at 112-17 (buildings); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995) (funding); *Widmar*, 454 U.S. at 274-75 (1981) (buildings); *see also Trinity Lutheran Church of Columbia v. Comer*, 137 S.Ct. 2012 (2017) (programs). It is well-established that a policy does not offend the Establishment Clause if it (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) does not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Neither of the Town's antiestablishment arguments have merit. First, neutral equal access policies that treat religious groups on the same terms as everyone else do not "endorse" religion. Over thirty years ago, the Supreme Court in *Widmar v. Vincent*, 454 U.S. 263 (1981), held that a public university's inclusive open forum policy that did not discriminate against religious speech had a secular purpose, a primarily secular effect, and avoided government entanglement with religion. *See id.* at 272-73. Allowing religious groups to enjoy a forum's benefits on the same terms as everyone does not communicate government approval of a religious group any more than it does every other group eligible to speak in the forum. *See id*. at 273. But singling out religious speech for disfavored treatment violated the Free Speech Clause. *See id*. at 277.

Similarly, in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Court rejected the argument that allowing a church to rent public school facilities in

order to broadcast an overtly Christian film series would communicate government endorsement of religion. The film was not sponsored by the school, and it would have been one of many other community uses. *See id*. at 395. "[T]here would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." *Id.* at 395. But the school's policy discriminating against religious speech violated the Free Speech Clause. *See id*. at 394-97.

The Fourth Circuit reiterated the same principle in *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703, 707-08 (4th Cir. 1994). In that case, the court rejected as "unfounded" the argument that allowing churches to rent public school facilities on equal terms with other groups communicated endorsement. "Mere speculation that a nonexclusive access to a public forum might ripen into a violation of the Establishment Clause, absent any facts suggesting that probability, is a not a justification sufficiently compelling to burden free access to the forum." *Id*. at 708. The school's policy discriminating against churches violated both the Free Speech and Free Exercise Clauses. *See id*. at 707.

Similarly, in *Gracepointe Church v. Jenkins*, C/A No. 2:06-cv-01463-DCN, 2006 WL 1663798 (D.S.C. June 8, 2006), the District of South Carolina granted a preliminary injunction after rejecting the same argument advanced in this case: namely, that allowing churches to distribute flyers publicizing worship services on government property communicates government endorsement of religion. *See id*. at *5.[3] *Gracepointe* involved a public high school that rented to "nonprofit community organizations," but refused to allow a church to rent the school for worship. *See id*. at *1. In response to the school's antiestablishment argument, the Court concluded that

[3] As required by local rule, this case is available for the Court's convenient reference as an attachment to this brief.

"[a]llowing all groups that are using school facilities to distribute flyers announcing their activities does not have a principal or primary effect of advancing religion, nor does it foster excessive government entanglement with religion." *Id*. at *5.

In this case, Edisto Beach does not endorse every women's club, Bible study, baptism celebration, or other community event that takes place at the Center. These are private party rentals, not Town-sponsored events. And there is a crucial difference between government speech endorsing religion (which the Establishment Clause forbids) and *private* speech endorsing religion (which the Free Speech and Free Exercise Clauses protect). *See Capitol Square*, 515 U.S. at 765. No reasonable person assumes that the Town endorses every event that occurs at the Center. The Town itself understands this distinction at some level, because it allowed the Episcopal Church to erect a sign inside the Civic Center with the words: "The Episcopal Church on Edisto." *See* Andrews Decl. ¶ 7.

Second, government rental fees that apply equally to secular and religious groups alike do not "subsidize" religion. The Town's fee schedule applies uniformly to all community groups, including churches. The Fourth Circuit has rejected the notion that this arrangement subsidizes religion. In *Fairfax Covenant Church*, the court noted that when even below-market rates apply uniformly to all nonprofit groups, there is no government subsidy of religion. *See* 17 F.3d. at 708.

The Supreme Court in *Widmar*, rejecting a similar argument, explained that "a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion." 454 U.S. at 273. In other words, even if the Town charges below market rates, the fact that religious groups may incidentally benefit *just like everyone else* does not create a constitutional violation. *See id.* at 272-73. The Church in this case does not have

special, lower rates under the Town's fee schedule. Redeemer Fellowship would pay the same fees as other community groups. Therefore, there is no Establishment Clause concern.

The Town's antiestablishment arguments are also internally incoherent. Under its theory, allowing Redeemer Fellowship to hold worship services communicates endorsement, but allowing the Episcopal Church to erect a church sign inside the Center and rent the Center for Bible studies and theology classes does not. A church handing out a flier publicizing that it meets at the Civic Center communicates endorsement, but passing out invitations to a baptism celebration does not. Similarly, the Town claims that allowing Redeemer Fellowship to rent the Center for worship "subsidizes" religion, but allowing other churches to rent the Center for Bible studies, theological training, baptism celebrations, and other overtly religious expressive activities do not. This is nonsensical.

As the Fourth Circuit aptly put it, the Town's "concern about the establishment of religion is not only unfounded but is also reflective of a one-sided view of the First Amendment." *Fairfax Covenant Church*, 17 F.3d at 708. "[M]ere speculation" about an establishment violation "is not a justification sufficiently compelling to burden free access to the forum." *Id*. The Town has no narrowly tailored, compelling justification for its content-based worship ban. Thus, it is unconstitutional and Redeemer Fellowship is likely to succeed on its Free Speech claim.

5. Even under an "external standard" for designated public or nonpublic fora, the worship ban is unreasonable in light of the forum's purpose because there is no cognizable Establishment Clause concern.

The Town's worship ban is most appropriately analyzed under the designated public forum "internal standard," but the Church is likely to succeed on the merits of its Free Speech Claim even under the Fourth Circuit's "external standard" for designated public fora or nonpublic fora. Once a government has opened a limited or nonpublic forum, it must respect the lawful boundaries it

has itself set, which include only making "reasonable" content-based distinctions. *Rosenberger*, 515 U.S. at 829-30. In other words, "content discrimination…may be permissible *if* it preserves the purposes of that limited forum." *Id*. (emphasis added).

Here, the worship ban is unreasonable in light of the Civic Center's purpose. As discussed above, courts have repeatedly found that there is no cognizable Establishment Clause concern with a neutral, equal access policy that treats religious groups on equal footing with secular groups. Since a purported Establishment Clause concern is the Town's sole justification for imposing the worship ban, it fails even the reasonableness test. Therefore, the Town's content-based restriction of protected First Amendment worship fails even under the more lenient nonpublic forum analysis.

6. Banning worship is also a viewpoint-based restriction which is unconstitutional in any forum.

The Town's worship ban also discriminates based on viewpoint. Under any test, and in any forum, viewpoint-based restrictions are unconstitutional. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829 (internal citations omitted). "Discrimination against speech because of its message is presumed to be unconstitutional." *Id*. at 828.

In *Lamb's Chapel*, the Supreme Court held that when a public school excluded a Christian film solely because it dealt with family values from a religious perspective, it committed viewpoint discrimination. *See* 508 U.S. at 394. Similarly, in *Rosenberger*, a public university's refusal to fund a student publication because the publication addressed issues from a religious perspective was viewpoint discrimination. *See* 515 U.S. at 845. And in *Good News Club*, excluding a faith-based after-school club from meeting at the public school was viewpoint discrimination. *See* 533 U.S. at 111-112.

In each of these cases, the government banned a religious entity from enjoying equal access to a public forum based solely on its religious viewpoint. Comparable secular viewpoints were permitted. Excluding "religious worship services" from the Edisto Beach Civic Center similarly discriminates against Redeemer Fellowship based on its viewpoint. Secular groups may rent the facility for book studies, musical concerts, mix and mingle events, and other community events. But when a religious group wants to gather together to do the same activities from a religious viewpoint, they are banned from renting the Civic Center. This viewpoint discrimination is presumptively unconstitutional, and therefore the Church is likely to succeed on the merits of its Free Speech claim.

B. Redeemer Fellowship is likely to succeed on its Free Exercise claim because the Town's worship ban is neither neutral nor generally applicable, is hostile towards religion, and fails strict scrutiny.

The exercise of religion unquestionably includes not only the freedom to believe, but also to practice one's faith through "assembling with others for a worship." *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). Redeemer Fellowship has a sincere religious belief that it is to regularly assemble for worship. But the Town's worship ban has burdened the Church's religious exercise by preventing the Church from using the Civic Center on the same terms as every other civic group solely because of its religious content.

"The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 (2017). Laws that are not neutral or generally applicable must be justified by a compelling government interest that is advanced in the least restrictive means available. *See Smith*, 494 U.S. at 878; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). And

expressions of hostility to religion blatantly violate the First Amendment. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1732 (2018).

1. The Town's worship ban is not neutral or generally applicable because it facially discriminates against a religious practice.

A law is not neutral if its object "is to infringe upon or restrict practices because of their religious motivation" or "if it refers to a religious practice without a secular meaning discernable from the language or context." *Lukumi*, 508 U.S. at 533. The Town's policy bans "religious worship services." This overt reference to religiously motivated conduct lacks a discernable secular meaning and categorically treats religious expression worse than all other expression.

The Town's policy also intentionally restricts practices because of their religious motivation. If a group wanted to rent the Civic Center for a meet and greet, a book lecture and discussion, and a musical performance, that use would be permitted. But when Redeemer Fellowship asked to rent the Civic Center for the exact same activities—but was motivated by its *religious* convictions to do them—the Church was rejected. Edisto Beach has singled out what it admits to be "core religious activity" for inferior treatment. *See* May 10, 2018, Town Council Meeting Minutes, Ver. Compl. Ex. C. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue…prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. Thus, the Town's facially discriminatory policy is neither neutral nor generally applicable.

2. The Town's worship ban evidences hostility towards religion because it singles out "religious worship services" for disfavored treatment.

In addition to targeting religion, the Town's worship ban evidences "impermissible hostility toward the sincere religious beliefs…." *Masterpiece Cakeshop,* 138 S.Ct. at 1729.

> Factors relevant to the assessment of government neutrality include the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.

Id. at 1731 (internal quotation marks omitted). Here, the specific sequence of events leading to the enactment of the Town's worship ban raises serious questions about the Town's hostility towards religion. Prior to May 10, 2018, the Town's policy did not mention, much less ban, religious worship. Redeemer Fellowship twice requested, and was twice granted, permission from Special Projects Coordinator Kelly Moore to rent the Center for its Sunday morning worship services. But when the Church asked to rent the Center for future services, the Town Council responded by amending its facility use policy to ban "religious worship services." In a highly suspicious sequence of events, the Town chose to intentionally single out religious worship—and, specifically, Redeemer Fellowship's religious worship—for disfavored treatment.

The Free Exercise Clause is designed to stop governments from acting with hostility towards religion. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the city of Hialeah gerrymandered its ordinances to target certain religious practices. The Supreme Court, in striking down Hialeah's discriminatory laws, noted that the government cannot selectively impose burdens only on conduct motivated by religious belief without running afoul of the First Amendment. *See id*. at 543. Because, after all, the "Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id*. at 534.

3. The Town has no narrowly tailored, compelling justification sufficient to justify burdening the Church's religious exercise.

The Town's discriminatory worship ban must therefore satisfy strict scrutiny. It cannot meet this standard. The Town has no compelling interest in banning worship at the Civic Center. Prior to the Town's May 10, 2018, council meeting, worship was not only permitted but actually

took place at the Center, undercutting any assertion the Town may make about its interests. Additionally, the worship ban is not narrowly tailored to further any purported interest because it permits Bible studies, theological training, and other religious expression, but bans worship. Therefore, Redeemer Fellowship has established a likelihood of success on its Free Exercise claim.

C. Redeemer Fellowship is likely to succeed on its Establishment Clause claim because the Town's worship ban discriminates among religious sects, evidences hostility towards religion, and promotes excessive entanglement with religion.

For decades, the Supreme Court has "adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which…prefer one religion' over another." *Larson v. Valente*, 456 U.S. 228, 246 (1982). A government policy also violates the Establishment Clause if it excessively entangles the government with religion. *See Lemon*, 403 U.S. at 612-13. The Town's worship ban violates both principles.

1. The Town's worship ban treats some religious groups worse than others, thereby discriminating among religious sects.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. In *Larson*, Minnesota required religious organizations that received less than 50% of their total contributions from members or affiliated organizations to comply with registration and reporting laws. 456 U.S. at 231-32. The Court held that the 50% rule "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." *Id*. at 246.

The Town's exclusion of "religious worship services" results in a denominational preference far worse than that in *Larson*. Religious groups that have a Judeo-Christian understanding of a worship service, including Redeemer Fellowship, are excluded from renting the Civic Center for their religious activities. But religious groups that do not hold what the Town

calls a "religious worship service" may rent the Center for all of their devotional exercises. In other words, nontheistic religious groups like Buddhists, Taoists, and classical Hindus may rent the Civic Center for their devotional activities, but theistic groups like Jews, Muslims, and Christians may not. Government discrimination among religious sects is the very evil the Religion Clauses were designed to prevent. *Id*. at 244-45. By distinguishing among religious groups, the Town has "embarked on a course of religious favoritism anathema to the First Amendment." *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1844 (2014).

2. The Town's worship ban evidences hostility towards religion.

As discussed above, the circumstances surrounding the Town's decision to enact the worship ban evidences impermissible hostility towards religion that is intolerable under the Establishment Clause. It is the most basic requirement of our constitutional system that the government "must be neutral in matters of religious theory, doctrine, and practice" and "may not be hostile to any religion." *Epperson v. Arkansas*, 393 U.S. 97, 103–104 (1968).

3. The Town's worship ban excessively entangles the Town with religion because it requires excessive and pervasive monitoring of religious speech to determine whether it violates the Town's worship ban.

A government policy violates the Establishment Clause if it excessively entangles the government with religion. *See Lemon*, 403 U.S.at 612-13. *Lemon* involved school aid programs that subsidized the salaries of educators who taught secular subjects in religious schools. *See id.* 606-07. The Supreme Court held that the "comprehensive, discriminating, and continuing state surveillance" necessary to ensure that the teachers did not inculcate religion resulted in excessive government entanglement. *Id.* at 619. In some situations, the government needed to analyze school records to determine what expenditures were attributable to secular education versus religious

activity. *See id*. at 620. "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." *Id*.

This case is fraught with similar dangers. To comply with the worship ban, Edisto Beach officials must hunt through facility use applications, church websites, church sermons, and perhaps even surreptitiously visit church events to determine whether a religious group is holding a "religious worship service." Government bureaucrats must then make a determination they are not qualified to make: what qualifies as *worship*. Monitoring religious expression and continuing government surveillance excessively entangles the Town with religion.

4. The Town's worship ban cannot be justified.

As discussed above under both Free Speech and Free Exercise, the Town cannot justify its worship ban. There is no compelling government justification for discriminating among religious groups or excessively entangling itself with religion. Therefore, the Church has shown a likelihood of success on the merits of its Establishment Clause claim.

II. PLAINTIFF WILL SUFFER IRREPARABLE INJURY ABSENT AN INJUNCTION.

The Church's remedy at law is inadequate if preliminary injunctive relief is not granted. With First Amendment claims, a plaintiff's irreparable harm is "inseparably linked to the likelihood of success on the merits". *WV Ass'n of Club Owners and Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (internal quotation marks omitted). This is because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011).

No amount of monetary damages can compensate Redeemer Fellowship for the loss of its First Amendment freedoms. *See id*. Redeemer Fellowship's damages go far beyond money; it is losing the freedom to speak religious messages, the freedom to exercise its faith on the same terms

as secular groups, the ability to minister to its community, and it is being discriminated against by its own Town government. Without an injunction, these irreparable injuries will continue to mount.

III. THE BALANCE OF EQUITIES FAVORS AN INJUNCTION.

In the context of First Amendment freedoms, the injury to the plaintiff easily outweighs whatever burden the injunction may impose, because the government is in no way harmed by the issuance of an injunction that prevents the government from enforcing unconstitutional restrictions. Furthermore, the Town's position in the balance is even more drastically reduced by the fact that it allowed the Church *twice* to rent the Civic Center for worship before instituting the worship ban. The Town is not harmed by an injunction—it benefits. An injunction will allow the Church to rent the Civic Center on the same terms as other groups, which serves only to financially benefit the Town.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.

Finally, as the Eleventh Circuit has stated: "the public has no interest in enforcing an unconstitutional [policy]." *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1271-72 (11th Cir. 2006). But "injunctions protecting First Amendment Freedoms are always in the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). Here, the public interest plainly weighs in favor of granting Redeemer Fellowship a preliminary injunction.

CONCLUSION

As the Fourth Circuit concluded in *Fairfax Covenant Church*:

> Rather than having the effect of remedying the concern about the Establishment Clause, the [Town's] policy of…discrimination against religious organizations moves the [Town] into a non-neutral, antireligion corner by burdening free speech and the free exercise of religion.

17 F.3d at 708. Infringing on Free Speech and Free Exercise does not "remedy" a phantom Establishment Clause concern. In this case, the Town of Edisto Beach veered from constitutional

neutrality into a conflict with the First Amendment by creating a worship ban. Redeemer Fellowship's loss of First Amendment rights is irreparable, and further loss must be prevented by a speedy preliminary injunction.

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Respectfully submitted,

s/ Matthew G. Gerrald

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**Pro Hac Vice Motions forthcoming*