



August 3, 2022

San Diego Symphony
1245 Seventh Avenue
San Diego, CA 92101
Fax: (619) 235-0005
[REDACTED]

*Sent via Facsimile, Email, and
Certified Mail RRR
Tracking No. [REDACTED]*

San Diego Symphony Orchestra Association
1245 Seventh Avenue
San Diego, CA 92101

Re: Unlawful Religious Discrimination in a Place of Public Accommodation

Dear Sir or Madam:

First Liberty is the nation’s largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. We represent Awaken Church (the “Church”) in this matter. Please direct to me all further communications.

We write to request that the San Diego Symphony and the San Diego Symphony Orchestra Association (collectively, “the Symphony”) approve the Church’s request to rent the Rady Shell on December 2 or 3, 2022. Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, and the California Unruh Civil Rights Act, both of which govern public accommodations like Rady Shell, forbid discrimination based on religion. The Symphony’s last communication with our client indicated it would not rent to religious organizations, which is unlawful religious discrimination. We respectfully request that the Symphony cease its unlawful actions and rent the Rady Shell to the Church as it originally agreed. Failure to do so will continue to violate federal and state law and will result in legal action against the Symphony and all other responsible parties.¹

¹ To the extent that further investigation might reveal that the Symphony’s unlawful policy of religious discrimination and its unlawful religious discrimination against the Church are attributable to the San Diego Unified Port District, which leases the park property to the Symphony and apparently approved the Symphony’s operations plan for special event permits, the Church reserves the right to pursue appropriate legal action against it as well. Such action may include not only claims under Title II of the Civil Rights Act of 1964 and claims under California’s Unruh Civil Rights Act, *see infra* Part II, but also claims under the federal and state constitutions for violations of the Church’s rights to free exercise of religion, freedom of speech, freedom of expressive association, freedom of assembly, and equal protection of the laws. *See, e.g., Carson v. Makin*, 142 S. Ct. 1987, 1996 (2022) (observing that government discrimination based on religious status is “‘odious to our Constitution’ and [can] not stand” (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017))). Furthermore, Title II specifies that discrimination is supported by State action if “carried on under color of any custom or usage

I.

Awaken Theater, a ministry of Awaken Church, will produce and perform *Night of Christmas* in December 2022 as a holiday event for the people of San Diego. *Night of Christmas* is a theatrical performance that walks through the Christmas story using traditional Christmas music, storytelling, acting, vocalists, and an orchestra.

In May 2022, the Church contacted the Rady Shell about renting space as the venue for *Night of Christmas*. The Rady Shell is managed by the San Diego Symphony. Through e-mails and a phone call with Victoria Andújar, the Symphony's director of venue rentals for the Rady Shell, the Church chose the first weekend in December to rent the Rady Shell for its Christmas performance. Ms. Andújar explained the Church could have either December 2 or 3, depending on the date chosen by another renter who had expressed interest in the same weekend. Ms. Andújar further explained she would give the other renter three days to choose a date.

Nearly two weeks passed without a confirmed date from Ms. Andújar. As the matter was time sensitive and Ms. Andújar was not responding to the Church's e-mails, the Church contacted Kristie Ewing, the senior director for special events at the Rady Shell. On June 14, the Church had a phone call with Ms. Ewing, who said she would confirm the Church's rental date and send the Church the rental contract once she had done so.

Merely minutes later, the Church received an e-mail from Ms. Andújar. This was the first communication from Ms. Andújar in over a week, despite the time sensitivity of the matter and the Church's repeated attempts to reach her. Ms. Andújar explained that the Symphony refused to rent Rady Shell space to the Church. She said the Symphony's artistic department was the other renter she had mentioned almost two weeks earlier and that it was not ready to choose a December date for its purposes. She then went on and explained that in any event, the Symphony would not rent the Rady Shell to the Church because the Church is a religious organization. Per Ms. Andújar's e-mail, the Symphony does not "have a policy on renting this venue to religious organizations. Until we have time to consider this internally, we have decided we must pass on this rental and any other potential rentals to religious organizations." See Attachment A (June 14, 2022 e-mail from Victoria Andújar). Ms. Andújar made clear that she knew Awaken Theater was a ministry of

required or enforced by officials of the State or political subdivision thereof." 42 U.S.C. § 2000a(d); see also *Fleming v. Cigna Health Corp.*, No. 15-CV-04646-EMC, 2016 WL 3439800, at *4 (N.D. Cal. June 23, 2016) ("private entities have the ability to 'become' state actors through their activities"); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) ("the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity").

In sum, to the extent that the San Diego Unified Port District has the authority to oversee or enforces policy decisions of the Symphony, the Church can bring claims against it under 42 U.S.C. § 1983, alleging that the Symphony's discriminatory actions violate the First Amendment to the U.S. Constitution and Title II, as well as state-law claims for violations of Article 1, Section 4 of the California Constitution and the Unruh Act.

Awaken Church, that Awaken Church was a religious organization, and that its religious status was the reason for her denial.

II.

By the plain terms of Ms. Andújar’s e-mail, at least until it revisits the matter, the Symphony *does* have a policy — a policy of *not* renting space to religious organizations. This policy, and the Symphony’s refusal to rent to the Church expressly based on its status as a religious organization, constitute flagrant violations of federal and state laws that prohibit religious discrimination.

Under Title II of the Civil Rights Act of 1964, the Rady Shell is a place of public accommodation. *See* 42 U.S.C. § 2000a(b)(3) (“Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter . . . : any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment”). The Rady Shell is clearly a “place of entertainment” within the meaning of Title II. *Daniel v. Paul*, 395 U.S. 298, 305-06 (1969) (describing legislative history); *see also United States v. DeRosier*, 473 F.2d 749, 752 (5th Cir. 1973) (“Once it was shown, as here, that the establishment is a ‘place of entertainment’, and thus a place of public accommodation, the Act proscribes any and all efforts to deny one ‘the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodation’ of that place because of discrimination based on . . . religion.”). Title II mandates that “[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of *any place of public accommodation*, as defined in this section, without discrimination or segregation on the ground of race, color, *religion*, or national origin.” 42 U.S.C. § 2000a(a) (emphases added). It is a blatant violation of federal law to “withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive any person of any right or privilege secured by [Title II].” 42 U.S.C. § 2000a-2. Indeed, “Title II precludes private and public actors from segregating or depriving individuals of services on account of their religion.” *Akiyama v. U.S. Judo Inc.*, 181 F. Supp. 2d 1179, 1185 (W.D. Wash. 2002).

The Symphony’s rejection of the Church constitutes direct evidence of discrimination on the basis of religion, because the Symphony expressly admitted in writing that it refused to contract with the Church because it is a religious organization. *Fahim v. Marriott Hotel Services, Inc.*, 551 F.3d 344, 349 (5th Cir. 2008) (“direct evidence of discrimination” under Title II is where “incident could be directly linked to [plaintiff’s] race or religion”); *Boyle v. Jerome Country Club*, 883 F. Supp. 1422, 1431 (D. Idaho 1995) (“evidence of actual religious discrimination” would include being turned away because of religion). The Church can also prove a prima facie case of discrimination under Title II, because (1) it is clearly religious, a protected class; (2) the Church “attempted to contract for services and afford [itself] of the full benefits and enjoyment of a public accommodation”; (3) the Church was “denied the full benefits or enjoyment of a public accommodation”; and (4) “such services were available to similarly situated persons outside the protected class who received full benefits or were treated better.” *Crumb v. Orthopedic Surgery Med. Grp.*, No. 07-CV-6114-GHK-PLAx, 2010 WL 11509292, at *3 (C.D. Cal. Aug. 18, 2010), *aff’d*, 479 F. App’x 767 (9th Cir. 2012); *see also Boyle*, 883 F. Supp. 1422, 1429–30 (D. Idaho 1995) (plaintiff established prima facie case of religious discrimination under Title II by

showing his religious beliefs prevented him from playing on Sunday and golf club denied his schedule change request). The Symphony has not provided a legitimate, non-discriminatory reason for rejecting the Church's request, only that it is a religious organization — which is to say that the only reason it provided was that it wished to discriminate on the basis of religion. Thus, the Symphony has violated Title II by discriminating against the Church because of its religion, and the Church is entitled to relief.

Similarly, California's Unruh Civil Rights Act prohibits religious discrimination. Cal. Civ. Code §§ 51, 51.5. Indeed, the Act applies not only to places of public accommodation, but also to all "business establishment[s] of any kind whatsoever." Cal. Civ. Code § 51.5. And it prohibits not just discrimination generally, but also specifically forbids refusals to "contract with . . . any person in this state on account of" religion. *Id.* Here, the Symphony has expressly admitted — in writing — that it refused to contract with the Church on account of its religious status.

As the U.S. Court of Appeals for the Ninth Circuit has explained, "the [U.S.] Supreme Court determined that the 'overriding purpose of Title II was to [re]move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public.'" *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994) (quoting *Daniel v. Paul*, 395 U.S. 298, 307–08 (1969) (cleaned up). This includes "remov[ing] 'the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of' a protected characteristic." *Akiyama*, 181 F. Supp. 2d at 1185 (W.D. Wash. 2002) (quoting S. Rep. No. 88–872 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2370). This means that "Title II precludes private and public actors from segregating or depriving individuals of services on account of their religion." *Akiyama*, 181 F. Supp. 2d at 1185.

The Symphony has refused to rent the Rady Shell — a place of public accommodation — to Awaken Church specifically and expressly because the Church is a "religious organization[]." In doing so, the Symphony has violated and continues to violate Title II and California's Unruh Civil Rights Act. This renders the Symphony liable to the full range of legal actions and penalties available under Title II and the Unruh Civil Rights Act, including but not limited to injunctive relief requiring approval of the Church's request, damages, a further amount determined by a jury, payment of the Church's attorney's fees, and intervention by the California Office of the Attorney General. 42 U.S.C. § 2000a-3(a); 42 U.S.C. § 2000a-3(b); Cal. Civ. Code §§ 51, 51.1, 51.5, 52.

III.

One way or another, the Symphony's unlawful religious discrimination in a place of public accommodation must end. The Church is confident this matter can be resolved without resort to legal action. The Church asks only that the Symphony comply with the law — and, frankly, common decency — and rent Rady Shell space to the Church in December 2022 as it previously agreed to do.

This is a time-sensitive matter. Not later than August 10, 2022, please provide to me your written assurance that the Symphony will rent the Rady Shell to the Church in December 2022,

along with the rental agreement and any other documents the Church may need to rent the Rady Shell. If I do not hear from you and receive the rental agreement by that time, I will proceed as the Church directs, which likely will include seeking redress in federal court against the Symphony and any other responsible parties. This would include recovery of the Church's attorney's fees and costs, among other relief.

I can be reached at the phone number and e-mail address indicated below.

Sincerely,



Jordan E. Pratt, Senior Counsel
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227 Pennsylvania Ave. SE
Washington, DC 20003
Tel. (972) 941-4444
[REDACTED]

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*Sent via Facsimile, Email, and
Certified Mail RRR
Tracking No. 70180680000185443058*

Attachment A

Begin forwarded message:

From: Victoria Andújar <[REDACTED]>
Date: June 14, 2022 at 2:23:47 PM PDT
To: Awaken Theatre Co <[REDACTED]>, Kaeli Cota <[REDACTED]>
Cc: Anika Aguirre <[REDACTED]>, Summer Peterson <[REDACTED]>, Josiah DeLeon <[REDACTED]>, Travis Winger <[REDACTED]>
Subject: Re: Renting The Rady Shell at Jacobs Park

Dear Kaeli,

Thank you for your patience, and once again for your interest in renting The Rady Shell at Jacobs Park. Unfortunately, we will not be able to fulfill your request. The first hold I previously mentioned is our artistic department who is still eyeing these dates for an event and they are not ready to release at this time.

However, in addition, your request has made us realize we don't currently have a policy on renting this venue to religious organizations. Until we have time to consider this internally, we have decided we must pass on this rental and any other potential rentals to religious organizations. As you know, The Shell is in high demand, and we are still determining how we prioritize our limited rental availability so that supporting our artistic mission is the primary consideration.

I sincerely thank you and wish you all the best with your event.

Sincerely,
Victoria

Victoria Andújar
Director of Venue Rentals, San Diego Symphony

c. [REDACTED]
[REDACTED]

From: Awaken Theatre Co <[REDACTED]>
Date: Tuesday, June 14, 2022 at 11:03 AM
To: Kaeli Cota <[REDACTED]>
Cc: Victoria Andújar <[REDACTED]>, Anika Aguirre <[REDACTED]>, Summer Peterson <[REDACTED]>, Josiah DeLeon <[REDACTED]>
Subject: Re: Renting The Rady Shell at Jacobs Park

Good Morning Victoria,

How are you? I'm looking to connect with you or someone from your team to confirm our event being hosted at Rady Shell for the first weekend of December. I've left you a voicemail also. Do you have a preferred time of day today that I can reach you?

Blessings,

Kaeli Cota

On Jun 9, 2022, at 8:17 AM, Kaeli Cota <[REDACTED]> wrote:

Good Morning Victoria,

I wanted to send a follow up email to connect with you on our event date inquiry for the first weekend of December. Awaken Theater would love to confirm a contract with you asap.

I look forward to talking with you; do you have availability today?

Thank you!

Kaeli Cota
Awaken Theater Coordinator

On Jun 7, 2022, at 1:45 PM, Kaeli Cota <[REDACTED]> wrote:

Hello Victoria!

I was curious if the 3 day reserve hold given to the other client has been lifted since we last spoke on Thursday of last week?

Would you also be available to confirm if there is any Thursday available in December (preferably later in the month) as another date option for our Night of Christmas event?

I look forward to chatting on the phone; when is the best time for a phone chat?

Thank you,
Kaeli Cota

On Mon, Jun 6, 2022 at 4:17 PM Victoria Andújar <[REDACTED]> wrote:
Hello Kaeli,

I'm still working on the date challenge for you. My preference is to hold off on a meeting until we know we have a date that works.

That said, as The Rady Shell at Jacobs Park is open to the public most days, you and your team are welcome to come visit and walk the space whenever we're not closed for events. Tuesday, Thursday

afternoon, or Friday this week would be good days to do that. Next week, you could come Monday, Tuesday, or Thursday after 2pm.

All best,
Victoria

Victoria Andújar
Director of Venue Rentals, San Diego Symphony

[REDACTED]
[REDACTED]

From: Kaeli Cota <[REDACTED]>
Date: Monday, June 6, 2022 at 1:52 PM
To: Victoria Andújar <[REDACTED]>, Anika Aguirre <[REDACTED]>, Summer Peterson <[REDACTED]>, [REDACTED] <[REDACTED]>, Josiah DeLeon <[REDACTED]>, Awaken Theatre Co <[REDACTED]>
[REDACTED] <[REDACTED]>

Subject: Re: Renting The Rady Shell at Jacobs Park

Hello Victoria,

It was lovely speaking with you on the phone last week! I'm looking forward to reconnecting with you today or early this week to proceed in confirming the first weekend of December, 2022 to host our Night of Christmas event at Rady Shell. Would you also be available for a walk through this week of the venue?

Thanks so much for your time,

Kaeli Cota
Awaken Theater Coordinator

On Wed, Jun 1, 2022 at 3:29 PM Kaeli Cota <[REDACTED]> wrote:
Hello Victoria,

I wanted to follow up to specify that we want to book the first weekend of December. load in Dec 2 and the event date will be Dec 3, 2022. Are you available to chat on the phone? Thank you!

On Wed, Jun 1, 2022 at 11:12 AM Kaeli Cota <[REDACTED]> wrote:
Hello!

We'd like to proceed with booking Rady Shell in December, are you available to chat on the phone today to finalize the details?

Thank you!

Kaeli Cota

On May 26, 2022, at 8:49 PM, Victoria Andújar <[REDACTED]> wrote:

Hello Kaeli,

Please see the attached rate card for use of the stage for a public event.
Private events are handled by the Events team at Petco Park and are priced differently.

Regarding date availability, right now I only have the 1st weekend of December possibly available, and maybe Mon Dec 12.

Let me know what other questions you have at this phase.

All best,
Victoria

Victoria Andújar
Director of Rentals, San Diego Symphony

[REDACTED]
[REDACTED]

From: Kaeli Cota <[REDACTED]>
Date: Thursday, May 26, 2022 at 1:12 PM
To: Victoria Andújar <[REDACTED]>
Subject: Re: Renting The Rady Shell at Jacobs Park

Hello Victoria!

What dates are available in December, lets begin there. :) I did not see any events on the Rady Shell calendar for December, is it not released yet?
What is the cost to host an event at Rady Shell? Thank you so very much for your time! I'm also available by phone [REDACTED].

Kaeli Cota

On Thu, May 26, 2022 at 12:22 PM Victoria Andújar <[REDACTED]> wrote:
Hello Kaeli,

Thank you for your inquiry and for your interest in hosting an event at The Rady Shell at Jacobs Park.

Date availability in December 2022 is very limited due to our own holiday programming. May I ask which dates you're interested in?

Next, please share more details about your event. Are you planning to use the stage? About how many people would attend? Would this be private, for invited guests only? Or is this on-sale or free to the public?

Answers to these questions will help us further address your inquiry.

Warmly,
Victoria

Victoria Andújar *(she/her/hers)*
Director of Rentals
**The Rady Shell @ Jacobs Park | Copley Symphony Hall @ Jacobs
Music Center**

[REDACTED]
[REDACTED]

San Diego Symphony
1245 Seventh Avenue | San Diego, CA 92101
www.sandiegosymphony.org

Visit our
Rentals
Website: privaterental.sandiegoshell.com

name: Kaeli Cota

email: [REDACTED]

Message: Hello, I'd like to inquire about hosting a Christmas Event at Rady Shell in December 2022. May I connect with the event director to book this event today? My cell phone is [REDACTED] Thank you!