IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

FIRE CHIEF DOUGLAS POOL, CITY OF BRYAN FIRE DEPARTMENT, Plaintiff-Appellee, v. DAD'S PLACE AND REIHLE RENTALS, LLC, Defendants-Appellants.	:	Court of Appeals No. 24 WM 000020 Trial Court Case No. 24CI100

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF DEFENDANTS-APPELLANTS

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INTRODUCTION

This case is about religious liberty. Dad's Place, a Church engaged in charitable work in the City of Bryan, serves the homeless and poor by opening its doors to worship twenty-four hours a day, seven days a week, and has done so for years. That service is paradigmatically religious. It fits favorably into the history of charitable works that have grown out of a millennia-long religious commitment to serve those in the community who find themselves in need of spiritual, social, or physical warmth. The City sought to burden the Church's ministry, so the Church asserted its religious-liberty rights under both the Ohio and federal constitutions.

The Ohio Supreme Court has said loud and clear that Ohio's Constitution requires "strict scrutiny" for such claims, but the trial court here inexplicably ignored binding Ohio law and looked to a lesser standard from federal law instead. The trial court's legal error cannot be denied: it said that the "governing standard" is the federal "neutral law" test of *Employment Division v. Smith,* 494 U.S. 872 (1990). *See* Decision and Order: Preliminary Injunction, Doc. 12/5/24 ("PI Order"), at 10–11 (Dec. 5, 2024). But the Ohio Supreme Court held 25 years ago that "the Ohio Constitution's free exercise protection is broader" than the federal Constitution's, so courts must "apply a different standard to a different constitutional protection." *Humphrey v. Lane*, 89 Ohio St. 3d 62, 68 (2000). The challenged state action "must serve a compelling state interest and must be the least

restrictive means of furthering that interest." *Id.* Thus, whatever the right answer here, the trial court indisputably erred by asking the wrong question.

Applying Ohio's proper test—strict scrutiny—the Church should prevail, and the preliminary injunction against the Church should be reversed. That is because the City has not shown a likelihood of success that its claimed interests are compelling, nor has it shown that it has chosen the least restrictive means of pursuing its interests. As shown below, the City cannot meet the higher burden that Ohio's Constitution requires. Indeed, the City has not even tried, and the trial court failed to ask them to. This Court should reverse, and follow the Ohio Constitution's *legal* mandate to protect the religious liberty of Dad's Place, and allow Dad's Place to follow its *religious* mandate to help the poor and vulnerable among us.

STATEMENT OF *AMICUS* INTEREST

The Ohio Attorney General is Ohio's chief law officer, R.C. 109.02, and has the privilege and obligation of protecting the citizens of Ohio. The Attorney General stands ready to defend the religious-liberty rights of Ohioans as enshrined in Article I, Section 7 of the Ohio Constitution.

STATEMENT OF THE CASE AND FACTS

The City of Bryan brought criminal proceedings against Pastor Chris Avell in January 2024, alleging zoning violations and aggressively seeking to stop his practice of inviting all comers to worship in his church at all hours. JD Pooley, *Bryan Pastor pleads not guilty to zoning violations for keeping church doors open to homeless* (Jan.

11, 2024), available at *https://www.13abc.com/2024/01/11/bryan-pastor-pleads-not-guilty-zoning-code-violations*. In July, the City filed a complaint in a civil case against the Church. *See* Complaint, Doc. 7/26/24.

After months of litigation, the Court of Common Pleas granted the City's motion for a preliminary injunction. It found that the Church was permitting people to sleep on the first floor of its building rather than the second floor (which the Church does not lease), and it concluded that this violated the fire code and zoning ordinances. *See* PI Order at 4–5, 12. It held that the Church's actions put citizens "at risk of injury and/or death" by allowing them to occupy the first floor rather than the second floor when they were sleeping. *Id.* at 9. It also discounted the Church's religious-liberty claims by applying the U.S. Supreme Court's First Amendment precedents but not even citing—let alone analyzing—the more-protective Ohio Constitution. *Id.* at 9–12, *contra Humphrey*, 89 Ohio St. 3d at 67. It did so despite extensive briefing of the Ohio standard by Dad's Place. *See* Defendant's Proposed Findings of Fact and Conclusions of Law, Doc. 10/11/24, ¶¶26–43. In the end, the Court of Common Pleas enjoined the church from using "the first floor" of the church for the activities the City found objectionable. PI Order at 12.

The Church sought an emergency stay of the injunction hours later, noting that the preliminary injunction disrupted the status quo and imposed grave harm for those worshipping at the church on winter nights. Mot. to Stay, Doc. 12/6/24, at 4–5, 12. The court responded by scheduling a hearing on the emergency stay ten days

later. The Church then sought a stay in this Court, which the Court granted. *See* Decision and Judgment Granting Stay, Doc. 12/30/24, at 2 (Dec. 30, 3034).

ARGUMENT

No court in this case has so far evaluated any of the Church's claims under the Ohio Constitution. "The Ohio Constitution is a document of independent force," however. *Arnold v. Cleveland*, 67 Ohio St. 3d 35, syl.1 (1993). Even when it shares core concepts with the federal Constitution, the Ohio Constitution maintains its own boundaries to protect the rights of Ohioans. The Ohio Supreme Court repeatedly has explained that the state constitution's protections for individual rights require independent analysis and may exceed those guaranteed by its federal counterpart. *See, e.g.*, *Arnold*, 67 Ohio St. 3d at 42. That is true for religious freedom: "the Ohio Constitution's free exercise protection is broader," so courts "vary from the federal test" and "apply a different standard." *Humphrey*, 89 Ohio St. 3d at 68. When applied correctly, the Ohio Constitution protects the Church's ministry from the City's borderline-arbitrary zoning-enforcement action.

I. The Ohio Constitution protects the right to engage in religious charity.

The lower court's treatment of the Church's religious claim should raise eyebrows. It characterized the City's selective code enforcement as a "perceived detriment" to the Church and Pastor Avell "in the exercise of their 'religious freedom.'" PI Order at 9–10. And it accused the Church of "attempting to make the facts of this case about 'religious freedom' when the case is wholly about 'public safety.'" PI Order at 1.

In context, the repeated use of quotes around the term "religious freedom" reveals the heart of the lower court's analysis: it never took the claims seriously. The

preliminary-injunction order impliedly judged the Church's ministry as outside the Church's legitimate exercise of religion and the Pastor's outreach as outside the dictates of conscience. That assumption violates a core boundary between religious practice and government interference. And what is more, it has no backing in history.

A. Government is prohibited from defining religious practice.

To the extent the court's preliminary injunction analysis concluded that the Church's charitable outreach to homeless people is nonreligious and about public safety alone, that analysis gravely erred. Government has no role in deciding what constitutes a religious practice or how central it is to "religious freedom." Ohio law has long held that courts have no right to pass judgment on the accuracy of a religious belief. *In re Milton*, 29 Ohio St. 3d 20, 26 (1987). Likewise, the U.S. Supreme Court has also recognized that the definition of religious practice "is not to turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

These limits on government power are sensible: the power to define what practices are sufficiently "religious" poses a threat to the existence of religion. As the U.S. Supreme Court explained over 80 years ago, government authority "to determine whether [a] cause is a religious one" is tantamount to a "censorship of religion" that threatens "its right to survive" and is a "denial of liberty protected by the First Amendment." *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940). That is equally true when a state court passes judgment on whether a church ministry falls sufficiently within its "religious freedom" to warrant application of Ohio's protection of that core liberty.

B. Charity and hospitality to the poor is a historically religious practice.

Even if the court had the right to define religious practice (it does not), it is wrong to assume that works of charity like those of the Church are not a core religious practice. "Throughout history, virtually all societies have relied to some extent on the generosity of religious and faith-based organizations." Brian C. Ryckman, *Indoctrinating the Gulf Coast: The Federal Response to Hurricanes Katrina and Rita and the Establishment Clause of the First Amendment*, 9 U. Pa. J. Const. L. 929, 929 (2007). Indeed, religious groups are the progenitors of charity and hospitality as we know it.

Begin with the earliest examples of outreach to the poor. Judaism holds claim to the earliest example of social welfare, which was a fundamental component of Jewish teachings and practices dating to at least 1,200 BC. *Tzedkah*, or "a combination of charity and justice," is at "the heart of Jewish social welfare," informed by the belief that the poor have a right to community support. *Religious Organizations in Community Service: A Social Work Perspective* 4 (Terry Tirrito & Toni Cascio, eds.) (2003). The Torah is filled with exhortations to care for both foreigners and the poor within Jewish society. During Roman rule, Jews developed a system of community tithing (*kuppah*), with funds dispersed based on need. *Religious Organizations in Community Service* at 8. Those Jewish communities also implemented the *tamhui*, ancestor of the modern soup kitchen, to provide the transient poor with two meals daily. *Id.*

The early Christian church similarly embodied an ethos of care for others premised on love for all mankind. Fittingly, early Christians referred to this as *caritas*—Latin for "charity." David P. King, *Religion, Charity, and Philanthropy in America*, Oxford Research Encyclopedias: Religion at 5 (Feb. 26, 2018). The New Testament teachings of Christ model charity, treating the poor with the dignity of Christ himself: "Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me." Matthew 25:34-40 (KJV). Christian practice of those tenets developed over the first three centuries AD, with charitable obligations taught "in the earliest writings of the Church Fathers." James William Brodman, *Charity & Religion in Medieval Europe* 11–12 (2009) (collecting sources from the first century onward); *Religious Organizations in Community Service* at 9–11. Early Christians contributed regularly to a community fund (*arca*) used to aid widows, orphans, sick and disabled, and imprisoned Christians. *Religious Organizations in Community Service* at 10. During Roman rule, Christian bishops implemented Christ's teachings on hospitality by designating guest rooms in their homes as *hospitalium*—rooms for use of the poor and sick, whom they tended. *See, e.g.*, Michele Augusto Riva and Ciancarlo Cesana, *The charity and the care: the origin and the evolution of hospitals*, 24 Europ. J. Internal Med. 1, 2 (2013) (quoting 1 Timothy 3:2). And by the fourth century, St. Basil founded the earliest model of the hospital and clinic—a public institution dedicated to healing that included convalescent homes and hospices for travelers and the poor. *Id.*

Islam has also long taught charity as a core precept. The Qur'an instructs Muslims to "practice regular charity." Qur'an 2:43; *see also id.* at 3:92; 9:60; 51:15–19. The Five Pillars of Islam guide daily life for Muslims, and the fifth pillar (*zakat*, or "purification") is the worship of Allah through obligatory giving to the needy. *Religious Organizations in Community Service* at 15. The *waqf*, an ancient Muslim social welfare institution, dispersed contributions from voluntary almsgiving (*sadaqah*). *Id.* at 17; Minlib Dallh, *Accumulate but Distribute: Islamic Emphasis on the Establishment of Waqf (Pious Endowment)*, 2 Relig. & Development 21, 24 (2023). "By the middle ages, *waqf* funds were used for a variety of establishments … including public soup kitchens, schools, hospices, orphanages, and hospitals." *Religious Organizations in Community Service* at 17.

The Middle Ages saw the progenitor of the modern hospital, the local charity house, spread "like a popular phenomenon" throughout European towns "in the Christian world." Riva and Cesana at 2; *see* Brodman at 5. The early hospital had a largely ecclesiastical foundation; many began from the "initiative of bishops themselves; others were founded by cathedral chapters and individual clergymen as well as wealthy laypeople." Brodman at 5. Indeed, for centuries the medieval monastery "was almost the only institution in Europe whose chief task was to care for the sick." Riva and Cesana at 2 (quotation omitted). These early hospitals doubled as almshouses for the poor and hostels providing lodging for pilgrims and travelers. *Id.* By the thirteenth century, charitable religious orders had arisen

dedicated to caring for "victims of particular diseases, pregnant women," and war prisoners. Brodman at 6.

The religious history of charity spanned the Atlantic and continued in the New World with the Puritans, Quakers, and other settlers. Aboard the *Arabella*, John Winthrop delivered a speech entitled *A Model of Christian Charity* to early colonists. Matthew S. Holland, *Bonds of Affection: Civic Charity and the Making of America—Winthrop, Jefferson, and Lincoln* 2, 21 (2007); Perry Miller, *The Shaping of American Character*, 28 New Engl. Q. 435, 443 (1955). Winthrop exhorted the colonists to follow the scriptural "command[] to love his neighbor as himself" because the colony "shall be as a city upon a hill. The eyes of all people are upon us," such that "[we must not] shame the faces" of God's servants. John Winthrop, *A Model of Christian Charity* (1630), in *Collections of the Massachusetts Historical Society* 34, 47 (1838), https://history.hanover.edu/texts/winthmod.html (spelling modernized). Likewise, Puritan minister Cotton Mather wrote in 1710 that only the "glorious work of grace on the soul" makes a sinner "zealous" to do good, including by caring for "orphans and widows" and those enduring "painful poverty." Cotton Mather, *Essays to Do Good* 17–18, 48–51 (publ. American Tract Society, 1840), https://ia804507.us.archive.org/13/items/essaystodogood00math/essaystodogood00math_bw.pdf. William Penn, a preeminent Quaker statesman and founder of Pennsylvania, likewise believed that "religious faith was one of the few forces" that could "truly move a people from selfishness to altruism." Arlin M. Adams & Charles J. Emmerich, *William Penn and the American Heritage of Religious Liberty*, 8 J. L. & Relig. 57, 70 (1990). He found

it a "severe Rebuke upon us, that God makes us so many Allowances, and we make so few to our Neighbor: *As if Charity had nothing to do with Religion*." William Penn, *Some Fruits of Solitude*, 172–73 (1693) (publ. H. M. Caldwell Co., 1903), https://www.loc.gov/item/03020370 (emphasis in original).

The Founders also understood charity as integral to religion. Benjamin Franklin, well-known for his public-welfare advances, wrote, "[I]f I have been, as you seem to think, a useful Citizen, the Publick owes the Advantage of it to that Book," referring to Cotton Mather's *Essays to Do Good*. *Letter from Benjamin Franklin to Samuel Mather* (May 12, 1784), https://founders. archives.gov/documents/Franklin/01-42-02-0150. Dr. Benjamin Rush, another notable Founder, established the country's first free medical clinic, the Philadelphia Dispensary; and he advocated for the abolition of slavery, improved education for women, and humane treatment for the mentally ill. Alyn Brodsky, *Benjamin Rush: Patriot and Physician* 5 (2007); Robert H. Bremner, *American Philanthropy* 32–33, 50–51 (2d ed., 1988); Nathan G. Goodman, *Benjamin Rush: Physician and Citizen 1746-1813*, 158–59 (1934). He did his charitable works out of "faithful imitation of the example of our Saviour and a general obedience to the plain and humble precepts of the Gospel." *Letters of Benjamin Rush* 441 (ed. L.H. Butterfield) (University of Virginia Press, Rotunda 2022) (letter to John Coakley Lettsom, Sept. 28, 1787).

The connection between charity and religion continued in the years immediately following the Founding and ratification. "Religion and social welfare in nineteenth-century America were inextricably linked," and "[a]lmost all forms of relief emanated

from church groups." Howard Jacob Karger & David Stoesz, *American Social Welfare Policy: A Pluralist Approach* 44 (2006). In short, charity, hospitality, and religion have long been intertwined. When the Ohio Constitution steps up to protect religious conduct, acts of charity are easily in the core of that protection as originally understood.

At any rate, there can be no doubt that the Church's decision to open its doors to the homeless is a fundamentally religious practice. Through its ministry, the Church is fulfilling one of the great commandments of the Christian faith: "love thy neighbor as thyself." Matthew 22:39 (KJV). Scripture overflows with instructions to care for those in need, with specific directions for believers to extend hospitality and offer spiritual and physical shelter. *See, e.g.*, Leviticus 25:35-36; Isaiah 58:7; Matthew 25:34-40; Romans 12:13; 1 John 3:17-18; 1 Peter 4:9; Hebrews 13:2; Titus 1:8. If the Church's embodiment of Christian teachings towards the needy is not a religious exercise, it is hard to imagine what would be.

* * *

At the very least, the Church has made a prima facia case that its activities are a form of religious practice entitled to protection by the Ohio Constitution against governmental burdens. The lower court should have taken that claim seriously and applied strict scrutiny under the Ohio Constitution.

II. Applying the City's ordinances to burden the Church's ministry fails strict scrutiny.

Under the Ohio Constitution, even neutral and generally applicable laws are subject to strict scrutiny when they burden religious liberty. Here, applying the City's

zoning regulations to the Church and Pastor Avell burdens their religious liberty and does not pass strict scrutiny.

A. Ohio applies strict scrutiny to burdens on religious liberty.

The Ohio Constitution protects religious liberty more robustly than the federal Constitution does—at least under current federal court precedent. Here is the Ohio Constitution's full text:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

Ohio Const. art. I, §7.

This language addresses religious liberty topics not explicitly addressed by the federal Constitution. For example, it specifically protects Ohioans from compelled contributions to places of worship. It prevents religious tests for witnesses in court. And most relevant to this case, it prevents "any interference with the rights of conscience." *Id.* This conscience-rights provision, more than any other, pointed the way to Ohio's robust protection of religious exercise. Because it focuses on individuals' rights rather than the government's actions, Ohio's conscience provision can only be understood to regulate even incidental burdens on religion. That is, "even

those tangential effects" on religious practice are "potentially unconstitutional." *Humphrey*, 89 Ohio St. 3d at 67.

Under that provision, Ohio courts apply strict scrutiny to laws that burden religious exercise. A litigant states a "prima facie free exercise claim" when he shows "that his religious beliefs are truly held and that the governmental enactment has a coercive affect against him in the practice of his religion." *Id.* at 68. Then "the burden shifts to the state to prove that the regulation furthers a compelling state interest." *Id.* at 69. Finally, "the state must prove that its regulation is the least restrictive means available of furthering that state interest." *Id.*

B. Applying the zoning regulations to the church burdened its religious liberty and does not pass strict scrutiny.

First, the Church has established a prima facie case that the City's application of its zoning laws burdened the Church's religious liberty. The City's pursuit of the Church under the fire code has reached the point of requiring the Church to either undertake a cost greater than anything feasible, Avell Aff., Def. Ex. 1, Doc. 9/19/24, ¶¶100–07, or cease its ministry. Either one is an obvious burden on religious practice.

Second, the City has not met its burden to show a compelling state interest in its selective application of its ordinances to the Church. In fact, its actions demonstrate that it has no compelling interest—or at least it feels its interests are compelling only when this particular Church violates its fire code. Other buildings in the City, including those used for sleeping, do not meet the same requirements that the City seeks to impose on the Church. Preliminary Injunction Hearing Transcript, Doc.

9/20/24, at 91. That arbitrary inconsistency undermines appeals to public safety or otherwise overriding interests.

Third, even if its claimed interest is compelling, the City has not shown that its enforcement is the least restrictive means of advancing its interest. The Church even posited a few ideas for achieving the City's interest without shutting down the Church's ministry to the homeless. Defendant's Proposed Findings of Fact and Conclusions of Law, Doc. 10/11/24, ¶69; Pool Dep., Def. Ex. 4, Doc. 9/19/24, at 115:10–116:13; Pool Dep., Def. Ex. 14, Doc. 10/11/24, at 71:4–72:21. But the City was not interested in these less restrictive alternatives. This, too, should damage any likelihood of success on the merits.

* * *

In times past, the Church used its resources to support the City's needs and care for its poor. Now it must use resources to litigate. But the Church and the City need not be at war. The first step back to peace—and back to the fundamental liberties at stake here—is for this Court to explain that the City's actions violate the Ohio Constitution.

CONCLUSION

This Court should vacate the preliminary injunction and remand for further proceedings.

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I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellants was served this 27th day of January 2025, by e-mail on the following:

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