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Law and Legislation Committee
City Council
Sacramento, California 95814

Honorable Members in Session:

SUBJECT: Exemption for Religious Organizations From Coverage of Proposed Ordinance Prohibiting Discrimination Based on Sexual Orientation

QUESTIONS PRESENTED

1. Is an exemption mandated by the Free Exercise clause of the First Amendment of the U.S. Constitution?

Answer: Yes, but only to protect sincerely-held religious belief, and jobs dealing with belief.

2. Can the exemption cover all activities of a religious institution?

Answer: No. Sectarian and secular activities should be distinguished. An exemption broad enough to cover a religion's secular activities runs the risk of invalidation under the Establishment clause of the First Amendment.

ANALYSIS

The City's proposed ordinance requires an an exemption for bona fide religious belief under the Free Exercise clause of the U.S. Constitution. The First Amendment to the U.S. Constitution provides in part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;..."

Title VII of the Civil Rights Act of 1964 (pertaining to discrimination in employment) contains an exemption for religious employers:

> "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. §2000e-1.

A recent case stated in dictum that Congressional provision of this exemption for religious activities is compelled by the Free Exercise clause. Amos v. Corporation of Presiding Bishop (D. Utah 1984) 594 F. Supp. 791 at 818. The court in Amos held that application of the §2000e-1 exemption to employees performing secular, non-religious jobs violated the establishment clause of the First Amendment, U.S. Constitution. The Amos plaintiff was an engineer at a Mormon Church-owned gym who was fired on religious grounds.

In holding §2000e-1 unconstitutional on Establishment Clause grounds, the District Court followed dictum in an earlier case, Kings Garden, Inc. v. FCC (D.C. Cir. 1974) 498 F. 2d 51, 55, cert. den. 42 L. Ed. 2d 269. See 22 ALR Federal at 600 for a discussion of this case. The District Court used the following principles to reach its conclusion:

The Free Exercise clause represents an absolute prohibition on the regulation of religious belief. Bob Jones University v. U.S. (1983) 76 L. Ed. 2d 157, 180. The Free Exercise clause is only a partial restriction on the regulation of lawful conduct grounded in religious belief, unless justified by a compelling government interest implemented in the least restrictive manner. Bob Jones, supra, at 181; Wisconsin v. Yoder, 406 U.S. at 215. A substantial impact on the operation of a private nonprofit religious school (or other institution) is permissible if it does not hinder observance of religious belief. Bob Jones, supra, at 181. The relevant inquiry is not the impact of the statute on the institution, but upon the institution's exercise of sincerely-held religious beliefs. Amos, supra, at 818.

Applying these Free Exercise principles to the proposed ordinance, an exemption must be provided for employment positions which occupy a "critically sensitive position within the church", e.g., ministers and teachers of religious doctrine. EEOC v. Pacific Press Publishing Association (CA Cal. 1982) 676 F. 2d 1272, 1277. It is important to distinguish between a religion's sectarian and secular enterprises like publishing houses, thrift stores, etc. Unless a tenet of the particular church mandates discrimination on the basis

of sexual orientation, application of the proposed ordinance to secular employment does not violate the Free Exercise clause. For example, college faculty at a sectarian university who taught secular subjects were held entitled to Title VII protection in EEOC v. Mississippi College (CA 5 1980) 626 F. 2d 477, 485, cert. den. 69 L. Ed 2d 994.

Extension of an exemption to secular activities by a religious institution presents the Establishment Clause problem recognized by the court in Amos. Using the traditional purpose-effect-entanglement test, the court found §2000e-1 as applied to have the impermissible primary effect of advancing religion. The court in Amos found a "special preference" toward religion in §2000-1 as applied in the facts of the case.

CONCLUSION

The ordinance should include an exemption for religious organizations in the conduct of their religious activities. This satisfies our obligations under the Free Exercise clause of the First Amendment. Any greater exemption would quite possibly violate the Establishment clause. Accordingly, a draft exemption is attached.

Respectfully submitted,

Theodore H. Kobey Jr.

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THK/jmv
Attachment

14.106-1 Exemption. The provisions of this chapter shall not apply to religious organizations or corporations not organized for private profit in the conduct of their religious activities.