UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL J. POSNER, a minor, by his parent, LOUIS J. POSNER,	:	
Plaintiff,	:	
-against-	:	
CENTRAL SYNAGOGUE, CENTRAL SYNAGOGUE NURSERY SCHOOL, and MARY SOLOW, as director of CENTRAL SYNAGOGUE NURSERY SCHOOL,	:	93 Civ. 2448 (LBS)
Defendants,	:	
-and-	:	
THE UNITED STATES OF AMERICA,	:	
Defendant-Intervenor.	:	

MEMORANDUM OF LAW OF THE UNITED STATES OF AMERICA IN OPPOSITION TO PLAINTIFF'S CONSTITUTIONAL CHALLENGE TO SECTION 307 OF THE AMERICANS WITH DISABILITIES ACT

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UNITED STATES DISTRICT COURT
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Preliminary Statement

Plaintiff Louis J. Posner commenced this action on behalf of his son, Daniel J. Posner, alleging, inter alia, violations of title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12181-89 (Supp. II 1990), by various defendants affiliated with defendant Central Synagogue Nursery School ("Nursery School") and controlled or employed by defendant Central Synagogue.[1] Title III of the ADA prohibits discrimination on the basis of disability in places of public

[1] Plaintiff did not assert an ADA claim in his original complaint but added such a claim in an amended complaint filed on or about June 2, 1993.

accommodation, including privately owned and operated nursery schools. 42 U.S.C. § 12181(7)(j).[2]

Defendants moved for summary judgment arguing, inter alia, that they are exempt from the requirements of title III pursuant to section 307 of the ADA, which provides that, "the provisions of [title III] shall not apply . . . to religious organizations or entities controlled by religious organizations, including places of worship." 42 U.S.C. § 12187. In response to the motion, plaintiff challenged the constitutionality of this exemption. See Plaintiff's Memorandum of Law in Support of Challenge of Constitutionality of the Americans with Disabilities Act, 42 U.S.C. § 12101 ("Pl. ADA Mem."). Because the constitutionality of a Federal statute was called into question, this Court duly notified the Attorney General and granted the

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[2] For existing public accommodations, title III imposes several prohibitions and requirements to ensure nondiscriminatory treatment for persons with disabilities, including the elimination of unnecessary eligibility criteria, 42 U.S.C. § 12182(b)(2)(A)(i), 28 C.F.R. § 36.301, the requirement of making reasonable modifications in policies, practices, or procedures, 42 U.S.C. § 12182(b)(2)(A)(ii), 28 C.F.R. § 36.302, the requirement of taking steps necessary to ensure that no person with disabilities is excluded, denied services, segregated, or otherwise treated differently, 42 U.S.C. § 12182(b)(2)(A)(iii), 28 C.F.R. § 36.202, the removal of existing barriers to access, where such removal is readily achievable, 42 U.S.C. § 12182(b)(2)(A)(iv), 28 C.F.R. § 36.304, and, if removal of barriers is not readily achievable, the requirement of adopting readily achievable alternate methods to ensure access to goods or services. 42 U.S.C. § 12182(b)(2)(A)(v), 28 C.F.R. § 36.305. For new construction and alterations, title III also imposes the additional requirements of ensuring that the newly constructed or altered portions of a facility be readily accessible and usable by persons with disabilities. 42 U.S.C. § 12183; 28 C.F.R. §§ 36.301-.406.

United States permission to intervene in this action pursuant to 28 U.S.C. § 2403 to defend the constitutionality of section 307 of the ADA.

Plaintiff's argument should be rejected because Congress acted constitutionally when it chose to exempt the activities of religious organizations from title III of the ADA. Plaintiff's argument is misfocused on whether Congress could have chosen to regulate the activities of nursery schools operated by religious organizations without running afoul of the Free Exercise or Establishment Clauses of the First Amendment. See generally Pl. ADA Mem. at 12-20. Because Congress in fact chose to exempt from title III all activities of religious organizations, the relevant issue is whether the exemption runs afoul of the Establishment Clause. The relevant Supreme Court precedents demonstrate that it does not.

Statement of Facts

It is uncontested that the defendant Nursery School is operated by, or is a program of, defendant Central Synagogue, a fundamentally religious entity. While Posner asserts that the Nursery School is a secular operation,[3] the defendants assert that it is only one of a number of religious programs closely related to the Synagogue. See Affidavit of Livia Thompson, sworn to Nov. 18, 1993 ("Thompson Aff."), ¶ 8. The Sabbath and all

[3] Posner bases his assertion that the Nursery School is a secular institution on the Nursery School's statement that it "values and welcomes children from diverse, ethnic, racial and religious backgrounds." See, e.g., Amended Complaint ¶¶ 29-30.

major Jewish holidays are integrated and observed in the Nursery School's program. See Affidavit of Linda Yassky, sworn to July 19, 1993 ("Yassky Aff."), ¶ 13; Affidavit of Louis J. Posner, sworn to Mar. 29, 1993 ("Posner Aff.")(Ex. F. to Yassky Aff.), ¶ 8. In addition, celebrations for Passover and Chanukah are observed (id.) and Shabbat parties are conducted every Friday morning at the Nursery School. Affidavit of Mary Solow, sworn to Nov. 18, 1993 ("Solow Aff."), Ex. D. The Nursery School is located in the same building as the Synagogue's administrative offices, has no separate legal existence, relies solely on Central Synagogue for all of its needs, and is completely overseen by the Synagogue's board of directors in conjunction with the Synagogue's Nursery School Committee. Solow Aff. ¶ 2; Thompson Aff. ¶ 8; Yassky Aff. ¶ 1, n.1. The Synagogue and the Nursery School also share one set of books and all costs incurred by the Nursery School, including staff salaries, are paid by the Synagogue. Solow Aff. ¶ 2; Thompson Aff. ¶ 1. Finally, the Synagogue also monitors all tuition payments generated by the Nursery School, which, together with Synagogue donations, membership dues, religious school tuition, and cemetery fees, are the sole financial support for the Synagogue. Thompson Aff. ¶ 8.

Argument

SECTION 307'S EXEMPTION FOR RELIGIOUS ORGANIZATIONS DOES NOT VIOLATE THE FIRST AMENDMENT[4]

A. The First Amendment Permits Legislation that Accommodates Religion

The First Amendment's Free Exercise Clause prohibits Congress from acting to interfere with religious practices. The Establishment Clause on the other hand prohibits Congress from acting to sponsor religion.[5] The Supreme Court has made clear that there is also a middle ground within which Congress can properly act to accommodate religion. See, e.g., Walz v. Tax Commission, 397 U.S. 667, 673 (1970). Such accommodation may go beyond what Congress is minimally required to do to avoid interference with religion so long as it falls short of what would constitute improper government sponsorship or entanglement

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[4] The government takes no position on the merits of plaintiff's ADA claim or defendants' defenses to it, other than section 307. However, because it is well established that federal courts "ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable," Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 136 (1946); e.g. New York Transit Auth. v. Beazer, 440 U.S. 568, 582 (1979); Merrill v. Town of Addison, 763 F.2d 80, 83 (2d Cir. 1985), this court should, if possible, decide the matter on nonconstitutional grounds.

[5] The Free Exercise Clause and the Establishment Clause are both set forth in the First Amendment to the Constitution, as "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

in religion.[6] As we will demonstrate, section 307 of the ADA is an accommodation of religion of the type that the Supreme Court has recognized as permissible.[7]

It is well settled that the Establishment Clause does not flatly forbid all government action relating to religion.

> Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith -- as an absolutist approach would dictate -- the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.

Lynch v. Donnelly, 465 U.S. 668, 678 (1984). The evil against which the Clause protects is the "'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) (citation omitted); see also School District v. Ball, 473 U.S. 373, 381 (1985). However, reasonable government accommodation of religion, as is the case here, is not proscribed.

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[6] As the Supreme Court has noted, "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage." Walz v. Tax Commission, 397 U.S. at 673; see also Marsh v. Chambers, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); Gillette v. United States, 401 U.S. 437, 453 (1971).

[7] Because there can be no serious argument that section 307 interferes with religious organizations' religious practices, but cf. Pl. ADA Mem. at 14-16 (analyzing the Free Exercise Clause), the only issue here is whether section 307 violates the Establishment Clause.

B. Section 307 Does Not Violate the Establishment Clause

As the Supreme Court noted in an Establishment Clause case very similar to this one, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987), a statute broadly exempting religious entities from regulation is subject to the three tests outlined in Lemon v. Kurtzman, 403 U.S. 602 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion'" Lemon, 403 U.S. at 612-613 (citations omitted).[8] Section 307 satisfies each of these tests.

[8] In Amos, a building engineer employed by the Church of Latter Day Saints was discharged because he failed to become a member of the church. 483 U.S. at 330. The engineer brought suit against the church under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, alleging discrimination on the basis of religion. Id. at 331. The church moved to dismiss, relying on section 702 of title VII, which exempts religious organizations from the prohibition against discrimination on the basis of religion, 42 U.S.C. § 2000e-1. In response, the plaintiff argued that section 702 would violate the Establishment Clause if it would allow religious employers to discriminate on the basis of religion in hiring for nonreligious positions, an argument accepted by the district court in striking down the statutory exemption. 483 U.S. at 331-34. The Supreme Court, however, disagreed and held that Section 702 constitutionally exempted the church from liability under title VII for discharging Amos. Id. at 334-40.

1. Section 307 Serves the Permissible Secular Purpose of Preventing Government Interference with Religion

As the Court noted in Amos, the first test under Lemon is whether the statute has a secular purpose. The Court noted that relieving government interference with religious activities, as well as the consequential burden on religious entities, is a valid secular purpose.

> Under the Lemon analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.... [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Amos, 483 U.S. at 335-36 (citations omitted).

Like the exemption considered in Amos, section 307 of the ADA properly alleviates government interference with religious organizations. Just as religious entities are permitted to hire only people of their faith under title VII, section 307 allows them also to design their facilities and perform their services in accordance with their religious tenets. Many of the services that a church or synagogue provides to its members or parishioners (e.g., spiritual counseling and the performance of rituals or ceremonies) are vitally important to that religion and may involve tenets central to its beliefs; any government interference with these services may intrude upon this

pervasively religious relationship. There is not always agreement, however, over where to draw the line separating intrinsically-religious activities from the more secular activities of a church. See Amos, 483 U.S. at 336. Congress's decision here to avoid government interference entirely is an approach that is entitled to deference. Id. at 338.[9]

Forcing religious entities to open even their more secular day-to-day activities to government scrutiny with the consequence of facing potential liability may constitute an impermissible governmental interference with religious practice. In Forest Hills Early Learning Center v. Grace Baptist Church, 846 F.2d 260 (4th Cir. 1988), cert. denied, 488 U.S. 1029 (1989), the Fourth Circuit articulated precisely this concern in rejecting an Establishment Clause challenge to an exemption from state licensing requirements afforded to child care centers operated by churches. Relying on Amos, the court noted that requiring a church to defend its child care program before the state agencies or judiciary would appear to be an inappropriate conflict between church and state that the legislature may properly decide to avoid.

> The government interference to be avoided includes both positive statutory mandates to which a religious group would have to conform its practices, and the "significant burden on a religious organization" caused by forcing it to defend its beliefs and practices in extended free exercise litigation before "a judge [who may] not understand its religious tenets and sense of mission."

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[9] See infra at 12-20.

> The potential for just the sorts of burdens the Court is concerned with is very clear in the present case. Absent the exemption, some church leaders would immediately be forced to violate their convictions against submitting aspects of their ministries to state licensing, or face legal action by the state. This would be an unseemly clash of church and state which the legislature might well wish to avoid.

Id., 846 F.2d at 263 (citing Amos, 483 U.S. at 335-36); see also Forte v. Coler, 725 F. Supp. 488, 490-91 (M.D. Fl. 1989)(also upholding exemption for religiously-controlled child care facilities to state licensing requirements). To avoid interfering with religion, Congress and state legislatures may, consistent with the Constitution, broadly exempt religiously-controlled entities from regulation. Even if some of a religious entity's activities are secular, exempting all of its activities from regulation does not violate the Establishment Clause. See Amos, 483 U.S. at 335-36.

Congress's decision to broadly exempt religious entities from the coverage of title III is appropriate because of the broad requirements of title III and the investigative and enforcement mechanisms provided in the statute. As noted above, title III imposes requirements on the way that public accommodations design their facilities[10] and conduct their day-to-day services and activities. In addition, title III may be enforced by private litigation by any person subject to

[10] Indeed, for new construction and alterations, the Department Justice regulations implementing title III requires strict compliance with the ADA Standards for Accessible Design set forth in Appendix A to the implementing regulation. 28 C.F.R. § 36.406(a).

discrimination, 42 U.S.C. § 12188(a), or by investigation and litigation by the Attorney General. 42 U.S.C. § 12188(b)(1)(B).[11] Given the broad scope of title III's coverage and means of enforcement, Congress's decision to exempt religion entities was appropriate.

2. Section 307 Does Not Have the Effect of Either Advancing or Inhibiting Religion

The second inquiry under Lemon is whether the "principal or primary effect" of the statute is to advance or inhibit religion. As demonstrated below (see infra at 16-20), section 307's principal effect is to eliminate government interference with religious organizations altogether. The Supreme Court has consistently held that this result satisfies the second Lemon test and is plainly permissible under the Establishment Clause. See, e.g., Walz v. Tax Commission, 397 U.S. at 674-77; Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

Again, the Supreme Court's decision in Amos provides the appropriate analytical framework. In Amos, the Court acknowledged that, while exemption statutes always have the facial appearance of advancing religion, Amos, 483 U.S. at 336-37, such statutes accommodating religion do not fail the second

[11] In addition to compensatory damages and injunctive relief, the Attorney General is authorized to seek civil penalties in an amount not exceeding $50,000 for a first violation and not exceeding $100,000 for any subsequent violation. 42 U.S.C. § 12188(b)(2)(C).

Lemon test, unless the government itself appears to give its imprimatur to the advancement of religion.

> A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence.

483 U.S. at 337 (emphasis in original); see also, County of Allegheny v. ACLU, 492 U.S. 573, 601 n.51 (1989)("[g]overnment efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion"). The legislative determination that religious institutions should be insulated from this regulatory requirement does not in any way resemble the government sponsorship of religion prohibited by the Establishment Clause. If there is any advantage obtained by religious groups, it is not a product of government compulsion; the government simply has left these groups free to follow the dictates of their faiths.

As the Court noted in Amos, a broad exemption statute, such as that contained in title III of the ADA and the statute at issue in Amos, is very different from a statute that provides the force of law to advance religion. The Amos Court distinguished exemption statutes from the state law held unconstitutional in Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), which required employers to honor their employee's choice of a day of Sabbath. The Amos Court observed that the Caldor statute was impermissible because it had the primary effect of advancing the particular religious practice of Sabbath observance and forced

private employers to accommodate this religious practice without regard to the burden imposed upon them. Amos, 483 U.S. at 337-38 n.15. Section 307 of the ADA, by contrast, does not endorse any specific practice and does not compel any private individual to take any action regarding religious observance. The provision thus fosters separation between government and religion rather than government intervention with respect to religious concerns.

Even if section 307 has the slight or incidental effect of advancing religion, it is permissible because it merely "accommodates" the free exercise of religion. Indeed, the Supreme Court has observed that, "evidence of accommodation of all faiths and all forms of religious expression" pervades our Nation's history, and that "[t]hrough this accommodation . . . governmental action has 'follow[ed] the best of our traditions' and 'respect[ed] the religious nature of our people.'" Lynch v. Donnelly, 465 U.S. at 677-678 (citation omitted); see also County of Allegheny v. ACLU, 492 U.S. at 593; McDaniel v. Paty, 435 U.S. 618, 638-639 (1978) (Brennan, J., concurring). Far from establishing religion, accommodation by the government of religious beliefs or institutions produces a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Walz v. Tax Commission, 397 U.S. at 669.

The most obvious means by which government may foster this "benevolent neutrality" is through the adoption of blanket exemptions from generally applicable statutes in order to

accommodate individual religious beliefs and protect the autonomy of religious organizations. The Supreme Court consistently has recognized that exemptions of this type do not offend the Establishment Clause. For example, in Zorach, 343 U.S. 306, the Court upheld a statute permitting the release of students from public school classes so that they could attend a center for religious instruction. The Court observed that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions," and held that the exemption on religious grounds from the compulsory attendance requirement did not effect an establishment of religion. Zorach, 343 U.S. at 313-314.

Similarly, in Walz v. Tax Commission, 397 U.S. 664 (1970), the Court rejected an Establishment Clause challenge to a statute creating a state property tax exemption for property owned by a religious organization and used for religious purposes. The Court could not "read [the] statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions." 397 U.S. at 673; see also United States v. Lee, 455 U.S. 252, 260 & n.11 (1982) (indicating approval of statute exempting religious objectors from the obligation to pay social security taxes); Gillette v. United States, 401 U.S. 437 (1971) (upholding exemption from the military draft for conscientious objectors); Braunfeld v. Brown, 366 U.S. 599, 608 (1961) (while

upholding state criminal statute requiring closure of retail businesses on Sundays, the Court acknowledged that, while not required to do so, a state could create an exception to the statute for individuals choosing a different Sabbath); Selective Draft Law Cases, 245 U.S. 366, 389-390 (1918) (upholding exemption from the draft for religious objectors).

Where a statutory exemption accommodates the free exercise of religion, it is permissible under the second Lemon test so long as it does not convey a message of "endorsing" religious activity to an objective observer. County of Allegheny v. ACLU, 492 U.S. at 592-96 (adopting analysis followed by Justice O'Connor's concurring opinion in Amos); Amos, 483 U.S. at 348-49 (O'Connor, J., concurring); see also Texas Monthly v. Bullock, 489 U.S. 1, 28 (1989)(Blackmun, J., concurring)(noting that, "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable"). As Justice O'Connor noted in her concurrence in the Amos decision, "[t]o ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute." 483 U.S. at 348 (O'Connor, J., concurring).

Section 307's exemption of religious entities cannot be objectively characterized as an endorsement of religious activity. The obligations imposed upon title III covered

entities are entirely independent and unique to each entity; unlike a tax exemption operating to subsidize a religious organization, they do not directly or indirectly subsidize exempt organizations. The exemption also does not in any way grant any form of federal financial aid to religious organizations or directly provide such organizations with a financial advantage over competitors in the secular economy. The exemption merely excludes religiously-controlled entities from the prohibitions against discrimination on the basis of disability.[12]

3. Section 307 Does Not Entangle the Government with a Religious Entity, but Instead Fosters a Complete Separation of Church and State

The third test under Lemon is determining whether a statute fosters an excessive government entanglement with religion. The Supreme Court repeatedly has approved exemptions from generally applicable statutes for religious individuals and institutions similar to the exemption at issue in this case. United States v. Lee, 455 U.S. 252, 260 & n.11 (1982); Gillette v. United States, 401 U.S. 437 (1971); Walz, 397 U.S. at 679-80; Braunfeld v.

[12] Moreover, even if a direct financial benefit did exist, that would not automatically render Section 307 violative of the Establishment Clause. The property tax exemption approved in Walz, 397 U.S. 664, conferred a far greater financial benefit than religious organizations could obtain from the exemption contained in section 307. Yet the Court in Walz upheld the exemption and did not find that it resembled impermissible financial aid to religion or could lead to domination of the economy by religious groups. 397 U.S. at 672-76. See also Forest Hills Early Learning Center, 846 F.2d at 263-64 (upholding an exemption relieving church-operated child care centers from state child care licensing requirements and that provided churches with slight advantages over secular competitors).

Brown, 366 U.S. at 608. These decisions make clear that Congress acted within constitutional bounds in enacting the accommodation for religious organizations contained in section 307. Indeed, Congress's decision to prevent any interference with activities likely to be religious in nature is the statutory approach least likely to create entanglement between religion and government. Amos, 483 U.S. at 339. Elimination of the section 307 exemption, on the other hand, would subject these activities to continuing supervision by the federal government.

Plaintiff argues that, in order to survive scrutiny under the Establishment Clause, an exemption for religious entities should be very narrowly drawn.[13] The Supreme Court's decision in Amos establishes exactly the opposite principle. Where a statute broadly exempts religious entities from government regulation, it fosters a separation of the two and cannot be said to entangle the government and religion. Amos, 483 U.S. at 339; Forest Hills Early Learning Center, 846 F.2d at 264. By contrast, where a statute more narrowly exempts certain religious activity from regulation, as plaintiff urges, it creates the risk of inconsistent treatment and the perception that a government is favoring one religious belief over another--- precisely, the type of entanglement between the sovereign and the church that the Establishment Clause was intended to preclude. Texas Monthly v. Bullock, 489 U.S. 1, 20 (1989).

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[13] Pl. ADA Mem. 18-20.

Section 307 excludes from coverage any activity conducted by a religiously-controlled entity, without requiring the intrusive and sensitive determination of whether an activity is religious or secular. Obviously, worship services are religious in nature and any government regulation of such services would be highly suspect. Other services, such as operating a homeless shelter or sponsoring a nutrition program, may not as deeply implicate the religious nature of an organization. But, as discussed above, establishing the point at which activities become inherently religious may be impossible. Amos, 483 U.S. at 336; Forest Hills Early Learning Center, 846 F.2d 260.[14]

Governmental evaluation of a church's beliefs and activities is avoided with the broad exemption contained in section 307. If a school operated by a religious organization were covered by title III, the Justice Department and the courts very possibly would be called upon to examine its religious beliefs and practices. For example, Section 308(b)(2)((A)(ii) of the ADA provides that discrimination under title III includes a failure to make reasonable modifications in policies, practices, or procedures that are necessary to ensure nondiscriminatory treatment to persons with disabilities. 42 U.S.C.

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[14] In this case, Posner notes that the Nursery School is a non-profit organization. Amended Complaint ¶ 3. As two concurring opinions in Amos observe, however, government entanglement with religious organizations is more likely in such cases, because non-profit organizations operated by religious entities are not likely to be secular in nature. Amos, 483 U.S. at 344-45 (Brennan, J., concurring); Amos, 483 U.S. at 348-49 (O'Connor, J., concurring).

§ 12182(b)(2)(A)(ii); see also 28 C.F.R. § 36.302(a). While a public accommodation does not have to make modifications that are not "reasonable" or that would "fundamentally alter" the nature of the goods or services provided, 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302(a), any investigation or evaluation of these defenses could require scrutiny of religious practices and beliefs and, as discussed below, would excessively entangle government with religion.

Title III affords covered entities certain defenses that are based on financial resources.[15] A review of the financial resources of a religious entity in a title III lawsuit or investigation by the Department of Justice may impermissibly entangle the government with religion. The Eleventh Circuit has held that this type of inquiry into the financial affairs of religious entities constitutes an impermissible and invasive government entanglement with religion. Church of Scientology Flag Service Organization v. Clearwater, 2 F.3d 1514, 1535-38 (11th Cir. 1993).

Plaintiff asserts that the defendant Nursery School is "already subject to a myriad of regulations in connection with

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[15] For example, Title III requires covered public accommodations to remove architectural barriers to access in existing facilities where it is "readily achievable" to do so. 42 U.S.C. § 12182(b)(2)(A)(iv). The second factor listed in the statute to be considered in determining whether a particular action is readily achievable is "the overall financial resources of the facility." 42 U.S.C. § 12181(9)(B). The same list of factors is to be applied in determining whether it is an "undue burden" for a public accommodation to provide a particular auxiliary aid or service necessary for communication with a person with a disability. 28 C.F.R. § 36.104.

the operation of day care services" and that "it is difficult to see how requiring compliance with ADA would increase the level of entanglement to the point that it becomes 'excessive' and therefore unconstitutional." Pl. ADA Mem. at 17. This is not the relevant inquiry, however. Even assuming for the sake of argument that Congress could have extended title III to regulate religiously-controlled schools without excessively entangling government with religion, the issue is whether Congress's failure to do so sponsors or creates entanglement with religion in violation of the Establishment Clause. As demonstrated above, it does not.

Conclusion

For the foregoing reasons, the Court should enter an order rejecting plaintiff's constitutional challenge to section 307 of the ADA and declaring that section 307 of the ADA is constitutional.

Dated: Washington, D.C.
December 30, 1993

Respectfully submitted,

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