No. 10-35519

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERMOUNTAIN FAIR HOUSING COUNCIL; JANENE COWLES; RICHARD CHINN,

Plaintiffs–Appellants,

v.

BOISE RESCUE MISSION MINISTRIES; BOISE RESCUE MISSION, INC.,

Defendants–Appellees.

On Appeal from the United States District Court
for the District of Idaho, Boise Division
No. 1:08-CV-00205-EJL-CWD – Hon. Edward J. Lodge

APPELLEES' RESPONSE BRIEF

Luke W. Goodrich
Eric C. Rassbach
Asma T. Uddin
Diana M. Verm
THE BECKET FUND FOR
RELIGIOUS LIBERTY
3000 K St., NW, Suite 220
Washington, DC 20007
T (202) 955-0095
F (202) 955-0090

Counsel for Boise Rescue
Mission Ministries

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Boise Rescue Mission, Inc., which does business as Boise Rescue Mission Ministries, states that it does not have a parent corporation or issue any stock.

s/ Luke W. Goodrich

Luke W. Goodrich
Counsel for Boise Rescue Mission Ministries

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Regulations

Other Authorities

GLOSSARY

AU Br.	Brief of *Amici Curiae* Americans United for Separation of Church and State and the Anti-Defamation League in Support of Plaintiffs-Appellants.
Br.	Appellants' Opening Brief
E-	Appellees' Supplemental Excerpts of Record
FHA	Fair Housing Act
Housing Br.	Brief of *Amici Curiae* AIDS Legal Referral Panel, *et al.*
HUD	United States Department of Housing and Urban Development
Op.	Amended Memorandum Order of May 12, 2010

STATEMENT OF THE ISSUES

1. Whether a homeless shelter qualifies as a "dwelling" under the FHA when guests at the shelter can stay only a short time and are not permitted to treat the shelter as their home.
2. Whether the FHA applies to a dwelling that has not been offered for "sale or rental" and has not been made "unavailable" or "denied."
3. Whether the FHA's religious exemption, which allows religious organizations to give preference to "persons of the same religion," covers a claim that a homeless shelter gives preference to persons who attend the shelter's religious services.
4. Whether the FHA's religious exemption protects the choice of a religious discipleship program to limit membership to those who agree with the program's religious beliefs and practices.
5. Whether the First Amendment protects the choice of a religious discipleship program to limit membership to those who agree with the program's religious beliefs and practices.
6. Whether a claim of sex discrimination can survive summary judgment when plaintiffs offer no specific instance of differential treatment on the basis of sex.

INTRODUCTION

This lawsuit seeks to punish the Boise Rescue Mission for two good deeds. The Mission's first good deed was to give free shelter and meals to Plaintiff Chinn. In return he has sued the Mission under the FHA because he dislikes the Mission's religious atmosphere. He doesn't allege that he or anyone else was ever denied shelter. He claims only that he found some comments at the chapel services to be offensive, and that other guests who did not attend chapel services had to wait longer to receive their food.

Whatever the truth of these claims, the Mission's gift of free shelter and meals does not violate the FHA for three reasons: (1) The homeless shelter does not fit within the FHA's definition of a "dwelling"; (2) There has been no "sale or rental" of a dwelling, and no dwelling has been made "unavailable" or "denied"; and (3) Plaintiff's allegations of religious discrimination fall within the FHA's religious exemption. Perhaps most importantly, there is no reason to stretch the FHA to cover the homeless shelter because other federal laws—including Title II of the Civil Rights Act of 1964—plainly prohibit discrimination in places of public accommodation, including homeless shelters.

The Mission's second good deed was to approve Plaintiff Cowles' application for membership in its Christian discipleship program after she said she was "desp[e]rately looking to fill [the] void in my life with spirituality and not drugs."

E-110. Cowles ultimately asked to leave the program when she grew dissatisfied with its rigorous Christian requirements, and she was later placed in an alternative, non-religious recovery program. Nevertheless, she sued the Mission, alleging that the discipleship program's religious requirements violate the FHA.

This claim fails because the program's religious requirements are protected under the FHA's religious exemption and the First Amendment. As a private religious community that accepts no government funds, the discipleship program is entitled to limit its membership to those who share the group's religious beliefs. Cowles cannot force it to accept members who disagree with its religious beliefs any more than she could force a church to accept members who disagree with its beliefs.

STATEMENT OF FACTS

A. The Mission

The Boise Rescue Mission, Inc., is an Idaho nonprofit corporation that serves the poor, needy, and homeless in Boise, Idaho. Op. 2. As its Articles of Incorporation state, it is a religious organization that was created "for the worship of God, the teaching and preaching of the Word of God, [and] the winning of people to a personal faith in the Lord Jesus Christ, and in the spiritual improvement of mankind." E-79, E-92. The Mission receives no government funding. Op. 2.

Two of the Mission's programs are at issue in this case: the Emergency Services Program located at the River of Life Rescue Mission (the "Shelter"), and the New Life Discipleship/Recovery Program located at the City Light Home for Women and Children (the "Discipleship Program"). Op. 2; E-79.

B. The Shelter

The Shelter provides food, shelter, clothing, and other necessities to those in need. Op. 2. It also offers practical programs focused on education, job-search, and work training. *Id.* All services are offered free of charge. Op. 3; E-84.

The Shelter also offers a variety of religious activities, including chapel services, pre-meal prayers, and morning devotions. Op. 2. Although guests are encouraged to participate, all religious activities are voluntary. Op. 3 n.1; E-84, E-102.

Guests of the Shelter must abide by comprehensive restrictions on their visit. First, Guests must follow a set schedule:

- Guests must check in between 4 and 5:30 p.m. or they may be denied shelter.
- Guests must wait in a designated area until 6 p.m., when voluntary chapel, job training, and counseling programs begin.
- Dinner is at 7 p.m. The building is locked down at 8 p.m. Lights are turned out at 10 p.m.
- Guests must wake up at 6:15 a.m. and vacate the premises by 8:00 a.m.

E-81-82, E-102-104; Op. 3-5.

Second, there are strict limitations on their ability to access the Shelter:

- Unless winter weather endangers their safety, guests are limited to seventeen consecutive nights at the Shelter.
- If a guest misses a night at the Shelter, he will not be allowed to stay there for thirty days. This rule prevents the Shelter from becoming an "occasional" shelter enabling a chronically homeless lifestyle.
- Once guests check in for the night, they are not allowed to leave.
- Guests must leave the Shelter at 8 a.m. and may not return to the Shelter during the day except from 12 to 1 p.m. for lunch.
- Guests may not loiter near the Shelter during the day.

E-82-83; E-102-104; Op. 3-5.

Finally, Guests face strict limitations on their privacy and freedom:

- Guests are assigned a bed in a communal dormitory. In periods of high demand, they may be assigned to sleep on a mattress on the floor or space on the floor in the day room, dining area, or hallways. No guest has a private room.
- Guests have no right to any particular bed. They may not personalize the area around their beds or leave personal items near the bed during the day. Shelter staff may reassign beds at any time for any reason.
- Guests must take a shower every night. They may not sleep in their own clothes, but must use the pajamas provided.
- Guests may not store personal belongings at the shelter except in a separate storage area with restricted access.
- Guests generally may not receive phone calls, mail, or visitors while at the Shelter.
- Guests and their belongings are subject to search at any time without notice.

E-80-83, E-102-104; Op. 3-5.

Upon entering the Shelter, all guests sign a form agreeing to abide by Shelter rules and stating: "I understand and acknowledge that my stay at the Boise Rescue Mission is as a transient guest in an emergency homeless shelter, and that the emergency homeless shelter is not my temporary home or residence." E-80, E-102.

C. Chinn's stay at the Shelter

Plaintiff Richard Chinn was a guest at the Shelter on four occasions: October 2-7, 2005 (five nights), October 9-10, 2005 (two nights), April 11-20, 2006 (nine nights), and May 11-17, 2006 (six nights). Op. 5-6. He received a bed and meals during each visit. *Id.* Although Chinn claims he was told chapel services were mandatory, Op. 6, Shelter rules provide that services are voluntary. E-84, E-102. Chinn also observed fifteen to twenty out of about sixty guests who did not attend chapel services; none was ever denied shelter. Op. 7; E-63-64. In his interview with HUD, "Mr. Chinn said that staff encouraged guests to go [to chapel] but never said that they had to attend." E-124.

Chinn also alleges that guests who did not attend chapel services were treated differently from those who did—specifically, they had to wait longer in line for food and received "substitute food of inferior quality when the prepared food ran out." E-63; Op. 6. In his HUD interview, however, Chinn said that "there was always enough food," and after interviewing Chinn, HUD found that "there did not appear to be any repercussions for not attending [chapel]." E-124.

Chinn alleges that he found several comments during chapel services to be offensive to his Mormon faith, so after his fourth visit, he decided not to return. Op. 7; E-64. Shortly thereafter, he moved into his own housing. E-124.

D. The Discipleship Program

The Discipleship Program, which is separate from the Shelter, is a faith-based residential program for women dealing with alcohol or drug addictions. The stated goal of the program is to "help its members grow into a new life, in Christ, that is free from the addictions and destructive habits of their old life." E-105. As a faith-based program, it is open only to those who are of the same faith or desire to be of the same faith as the Mission. E-85, E-105.

Members of the Discipleship Program live in a structured community with rigorous religious requirements, including regular "worship services, Bible study, prayer, religious singing, public Bible reading and public prayer." E-85; E-105-109. They also engage in Christian service activities, have limited contact with visitors, and participate in support groups with fellow members. E-105-107.

All aspects of the Discipleship Program are offered free of charge. For those members who work, the program collects $100 per month, which it returns to residents upon graduation from the program. E-109. This savings requirement is designed to teach members about money management during their time in the program. E-109.

E. Cowles' membership in the Discipleship Program

Plaintiff Janene Cowles applied to the program in October 2005, expressing a strong personal desire for the "inner peace" that comes from having "God in her life." E-110. Program staff interviewed Cowles and explained the rigorous religious requirements of the program. E-87. She was later accepted as a member. E-87. Because she was in jail for a felony drug conviction, her participation in the program was made part of the conditions of her probation. Op. 8; E-87. She entered the Discipleship Program in March 2006. Op. 8-9.

After several months in the program, Cowles grew dissatisfied with its rigorous religious requirements. E-3. In May or June of 2006, she asked program staff for a transfer to a non-religious program. E-3. Shortly thereafter, staff wrote a letter to her attorney, formally requesting that Cowles "be quickly placed in a recovery program that would best suit her beliefs and needs." E-59. In August 2006, Cowles was discharged from the program because, in view of the Discipleship Program staff, she was not committed to recovery through the program's rigorous religious requirements. E-88.

At Cowles' request (E-131), staff wrote a letter to her judge suggesting that she "be given an opportunity to complete a program that is not faith-based." E-60. She was later released from jail, and the judge modified the terms of her probation so that she could participate in a non-religious recovery program. E-134.

F. Plaintiffs' Complaints

Acting through the Intermountain Fair Housing Council, Chinn and Cowles filed FHA complaints with HUD. E-5-6, E-64. Chinn alleged religious discrimination in his treatment at the Shelter (E-123); Cowles alleged religious and gender discrimination in her treatment at the Discipleship Program (E-129).

HUD dismissed Chinn's Shelter complaint on the ground that there was no evidence of religious discrimination. E-124. Specifically, although the Intermountain Fair Housing Council submitted a declaration on behalf of Chinn, claiming that those who skipped chapel had to wait outside in the cold and sometimes received no food at all, Chinn admitted in interviews with HUD that "the declaration was not accurate." E-124. Instead, he testified that "no one was required to attend chapel" and "there was always enough food" for those who did not attend. E-124. HUD thus found no evidence of discrimination. E-124, E-121.

HUD dismissed Cowles' complaint on the ground that the Discipleship Program was covered by the FHA's religious exemption. E-130. Specifically, it held that the program's practice of removing "persons who do not accept the religious requirements [of the program]" fell within the terms of the exemption. E-130.

While her HUD complaint was pending, Cowles also filed a complaint with the Idaho Human Rights Commission, alleging discrimination in violation of Idaho's public accommodations law. E-133. Although the Commission found that the pro-

gram was covered under state law as a public accommodation, it held that requiring the program to accept non-Christians would violate the First Amendment. E-140-142.

G. The District Court's Opinion

Plaintiffs filed suit in federal district court. E-169. In a thirty-four page summary judgment opinion, and later a thirty-six page amended opinion, the district court dismissed all claims. It rejected Chinn's Shelter claim because the Shelter did not fit within the FHA's definition of a "dwelling." Op. 19-20. And it rejected Cowles' Discipleship Program claim because forcing the program to admit members who disagreed with the program's religious beliefs would violate the First Amendment. Op. 34. This appeal followed.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, applying the same standard as the district court. *Community House, Inc.* v. *City of Boise*, --- F.3d ----, 2010 WL 3895700, at *9 (9th Cir. Oct. 6, 2010). It views the facts and reasonable inferences to be drawn from them in the light most favorable to the nonmoving party. *Id.*

As Plaintiffs have pointed out, "Courts generously construe the Fair Housing Act." *City of Edmonds* v. *Washington State Bldg. Code Council*, 18 F.3d 802, 804 (9th Cir. 1994). "As a broad remedial statute, its exemptions must be read nar-

rowly." *Id.* Nevertheless, to determine Congress' intent in passing the FHA, this Court "look[s] to the text of the statute." *Id.* In most cases, "[t]he plain language will control." *Id.*; *see also United States* v. *Gilbert*, 813 F.2d 1523, 1526-27 (9th Cir. 1987) ("Although the language of the [Fair Housing] Act is broad, it is also specific."); *Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U.S. 361, 374 (1986) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself . . . prevents the effectuation of congressional intent.").

SUMMARY OF ARGUMENT

I. Plaintiff Chinn's Shelter claim fails for three independent reasons. First, the Shelter does not fall within the FHA's definition of a "dwelling." Guests at the Shelter are limited to a shorter maximum stay than in any other case in which a federal court has deemed a building to be a dwelling. More importantly, Shelter guests are subject to comprehensive restrictions on their visit that forbid them from treating the Shelter as their home.

Second, the FHA does not apply because there has been no "sale or rental" of a dwelling. The text of the relevant FHA provisions is expressly tied to the "sale or rental" of a dwelling. It does not apply to shelter given away for free. And even assuming the FHA applied to free housing that was made "unavailable" or "denied," the Shelter was never made "unavailable" or "denied" here.

Third, the religious discrimination alleged by Plaintiffs falls within the FHA's religious exemption. That provision allows religious organizations to "giv[e] preference" to persons of the same faith, which is precisely what Plaintiffs complain about here.

II. Plaintiff Cowles' claim against the Discipleship Program also fails for three reasons. First, the Discipleship Program's choice of members is covered by the FHA's religious exemption, which expressly allows the program to "limit[] . . . occupancy . . . to persons of the same religion" and to "giv[e] preference" to the such persons.

Second, the program's choice of members is protected by the First Amendment. The Supreme Court has long recognized the right of religious organizations to control their internal affairs, including the right to choose their members. And that right is reinforced by cases protecting the First Amendment right of expressive association.

Third, the program's choice of members is protected by the Religious Freedom Restoration Act. *Amici*'s Establishment Clause concerns are both meritless and waived.

III. Finally, Plaintiffs' sex discrimination claim fails because she has offered no evidence that similarly situated males were given better treatment.

ARGUMENT

I. The Shelter does not violate the FHA.

Chinn's Shelter claim fails for three independent reasons: (A) The Shelter is not a "dwelling"; (B) Even assuming the Shelter is a dwelling, there has been no "sale or rental" of a dwelling and no dwelling has been made "unavailable" or "denied"; and (C) The Shelter falls within the FHA's religious exemption.

A. The FHA does not apply because the Shelter is not a "dwelling."

The FHA makes it unlawful to discriminate on the basis of religion "in the terms, conditions, or privileges of sale or rental of a dwelling . . . ." 42 U.S.C. § 3604(b). "Dwelling" is defined as "any building, structure, or portion thereof which is *occupied as, or designed or intended for occupancy as, a residence* by one or more families . . . ." *Id.* § 3602(b) (emphasis added).

Contrary to Plaintiffs' assertion (Br. 16), this Court has "never squarely addressed the issue of whether all temporary shelters fit within the Act's definition of 'dwelling.'" *Community House, Inc.* v. *City of Boise*, 490 F.3d 1041, 1048 n.2 (9th Cir. 2007). In one case, the Court assumed that the FHA applied to a shelter because the parties did not dispute it. *Id.* (discussing *Turning Point, Inc.* v. *City of Caldwell*, 74 F.3d 941, 942 (9th Cir. 1996)). In another case, the Court declined to resolve the issue because the facility included not only a homeless shelter but also transitional housing units that were occupied for up to a year and a half and clearly

qualified as dwellings. *Id.* Thus, whether homeless shelters qualify as "dwellings" remains an open question. *See also Community House*, 2010 WL 3895700, at *19-*20 ("We ha[ve] not determined whether homeless shelters in general me[e]t the definition of a 'dwelling' . . .").

The district court correctly held that the Shelter was not a dwelling based on two factors: (1) the short "period of time" of a typical stay; and (2) the tightly regulated "conditions under which a guest may stay at the shelter." Op. 18-19. First, guests are limited to seventeen consecutive nights unless winter weather endangers their safety. Op. 18. Second, guests are subject to comprehensive restrictions on their visit: no private room, no guaranteed bed, no entry during the day, no leaving at night, no check-in after hours, no personalizing the bed area, no leaving belongings in the bed area, no phone calls, no mail, and no visitors. *Id.* Based on these facts, the court concluded that the shelter is not a residence but a "place of temporary sojourn or transient visit." Op. 19.

Plaintiffs and the Housing *amici* criticize the district court's approach as too narrow. They claim that the shelter is a residence because Chinn "considered the River of Life shelter to be his residence" and "ha[d] nowhere else to go." Housing Br. at 22; Br. 19-20 (Mission "was his only shelter"). In other words, they urge this Court to consider an occupant's alleged *subjective intent* to treat the building as a home, rather than the occupant's *objective ability* to do so. Housing Br. at 22; Br.

18-19. As explained below, however, persuasive precedent, the FHA's text, and common sense all counsel in favor of considering the occupant's objective ability to treat the building like a home.

1. A building is a dwelling when the occupants both (a) treat the building as a home and (b) stay for a significant length of time.

Two other circuits have considered how to determine whether a building is a dwelling; both have looked to objective factors demonstrating whether the occupants are able to treat the building like a home. In *Schwarz* v. *City of Treasure Island* (which neither Plaintiffs nor *amici* discuss), the Eleventh Circuit considered whether the term "dwelling" included halfway houses for recovering substance abusers. 544 F.3d 1201 (11th Cir. 2008). The court adopted two principles for determining whether a building is a dwelling:

> (1) the more occupants treat a building like their home—*e.g.*, cook their own meals, clean their own rooms and maintain the premises, do their own laundry, and spend free time together in common areas—the more likely it is a "dwelling"; and
>
> (2) the longer the typical occupant lives in a building, the more likely it is that the building is a "dwelling."

Id. at 1214-15. The first factor focused not on the occupants' subjective view of the building, but on their objective ability to "treat [the] building like their home." *Id.* Specifically, "they sign[ed] month-long leases for $1,000 to $2,000 per bedroom; they cook[ed] their own food; they [ate] together; they clean[ed] and maintain[ed] the premises; and they spen[t] their free time together." *Id.* at 1215-16. They also

had access to "common living areas, such as kitchens and living rooms, where residents c[ould] socialize like a family." *Id.* And they were allowed to do their own laundry, have visitors, and take "primary responsibility for enforcing the rules" of the home. *Id.* at 1207. In short, the buildings "function[ed] more like residential homes than hotels." *Id.* at 1216.

The Third Circuit adopted a similar standard in *Lakeside Resort Enterprises, LP* v. *Board of Supervisors*, 455 F.3d 154 (3d Cir. 2006). There, the court considered whether the term "dwelling" included a residential drug- and alcohol-treatment facility. It relied on two factors: (1) whether the facility is designed to house persons "for a significant period of time"; and (2) whether those persons "would have viewed [the facility] as their home during that time." *Id.* at 160. Again, the latter factor focused *not* on the subjective intent of the occupants, but on their objective ability to treat the facility as their home:

> [The] residents would eat meals together (separated by gender), return to their rooms in the evening, receive mail at the facility, and make it their "residence" while they were there. . . . [R]esidents hung pictures on their walls and had visitors in their rooms. Although residents in treatment were apparently not allowed off the grounds of the facility unsupervised, testimony showed that they treated it like a home for the duration of their stays. This satisfies (though barely) the second factor . . . .

Id. at 159-60. Other courts have likewise focused on the occupants' ability to treat the building as their home.[1]

Focusing on an individual's ability to treat the building as a home also follows from the statutory language. Because the phrase "occupied as, or designed or intended for occupancy as, a residence" is not defined in the FHA, this Court gives the words their ordinary meaning. *Greenwood* v. *CompuCredit Corp.*, 615 F.3d 1204, 1208 (9th Cir. 2010). The word "occupancy" (which plaintiffs and their *amici* ignore) means "the *taking and holding possession* of real property under a

[1] *See, e.g.*:

- *Cohen* v. *Township of Cheltenham*, 174 F. Supp. 2d 307, 322-23 (E.D. Pa. 2001) (group home was residence where "children would treat the home as any other resident would treat his or her own home. The residents would eat their meals together, have housekeeping responsibilities, and sleep in the home.")
- *Louisiana Acorn Fair Housing* v. *Quarter House*, 952 F. Supp. 352, 359 (E. D. La. 1997) ("[T]he most important fact in this analysis is that [the time-share] owners possess the right to return to their unit.");
- *Villegas* v. *Sandy Farms, Inc.*, 929 F. Supp. 1324, 1328 (D. Or. 1996) ("[T]he cabins [for migrant farm workers] are their homes. The nature of the workers' occupancy resembles that of a resident far more than that of a hotel guest.");
- *Lauer Farms, Inc.* v. *Waushara County Bd. of Adjustment*, 986 F. Supp. 544, 559 (E.D. Wis. 1997) (same);
- *Conn. Hospital* v. *City of New London*, 129 F. Supp. 2d 123, 125-26 (D. Conn. 2001) (Group homes for recovering substance abusers were dwellings where "[t]he homes are generally self-governing, with house members setting their own rules and working out most problems themselves"; residents "shop for food" and "often eat together"; and residents "divide up chores" and have "free time [to engage] in a variety of activities" at the house).

lease or tenancy at will." Webster's Third New International Dictionary 1560 (1981) (emphasis added). Similarly, "occupied" means "held by occupation," and "occupation" means "the *actual possession and use* of real estate." *Id.* at 1560-61 (emphasis added). "Residence" means "a building used as a home." *Id.* at 1931. Thus, the phrase "occupied as, or designed or intended for occupancy as, a residence" means not just sleeping in a place at night, but "possess[ing]" and "us[ing]" a place as a "home."

This conclusion fits with common experience. When someone rents or buys a residence, they get the house key and the bundle of rights that goes along with it. As possessors of the property, they have a right to occupy it. Subject to contractual rules, they can come and go as they please, invite or exclude others, and otherwise make use of the property. Guests in a public accommodation (like a hotel) do not have the same rights.

Considering an occupant's objective ability to use a building as a home also makes sense of existing case law. Included in the term "dwelling" have been a children's home,[2] a nursing home,[3] a residential drug-treatment facility,[4] a hospice for AIDS patients,[5] cabins for migrant farm workers,[6] and a timeshare unit.[7] Ex-

[2] *United States* v. *Hughes Mem'l Home*, 396 F. Supp. 544, 549 (W.D. Va. 1975).

[3] *Hovsons, Inc.* v. *Township of Brick*, 89 F.3d 1096, 1102 (3d Cir. 1996).

[4] *Lakeside*, 455 F.3d at 160.

[5] *Baxter* v. *City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989).

cluded from the term "dwelling" have been a hotel or motel,[8] bed and breakfast,[9] hospital,[10] and jail.[11] What principle draws a sensible line between these cases?

According to plaintiffs and their *amici*, the controlling principle is the plaintiff's subjective intent. A hotel is not a dwelling, they say, because "hotel guests do not normally consider a hotel to be their residence." Housing Br. at 21. But this principle fails to make sense of existing case law. If someone rents a hotel room for a month while searching for a new house, they may "ha[ve] no other home" and may intend "to use the [hotel] as [their] residence[]" for the month, *id.* at 22; but that does not convert the hotel into a "dwelling." Similarly, if a homeless person is hospitalized for several months and considers the hospital a residence, that does not convert the hospital into a dwelling. A prisoner may stay in prison for several years without another home, but that does not mean prisons are dwellings.

The principle that makes sense of the case law is the individual's objective right to use a building as a home. If someone stays in a hotel room for a month, they generally cannot move in their own furniture, hang new pictures on the wall, exclude the housekeepers, and invite the in-laws to join them. The hotel limits their

---

[6] *Villegas*, 929 F. Supp. at 1328.

[7] *Louisiana Acorn*, 952 F. Supp. at 359-60.

[8] *Patel* v. *Holley House Motels*, 483 F. Supp. 374, 381 (S.D. Ala. 1979)

[9] *Schneider* v. *County of Will*, 190 F. Supp. 2d 1082, 1087 (N.D. Ill. 2002)

[10] *See United States* v. *City of Boca Raton*, 2008 WL 686689, *6 (S.D. Fla. 2008).

[11] *Garcia* v. *Condarco*, 114 F. Supp. 2d 1158, 1163 (D.N.M. 2000).

control over the room, retains the right to perform housekeeping, and retains the right to move the occupant to a different room as needed. If someone stays in a hospital for six months, they typically cannot invite visitors whenever they want, get rid of the furniture and equipment they dislike, and exclude the doctors and nurses. Prisoners face even more restrictions.

By contrast, residents of a nursing home typically have their own room and receive visitors (*Hovsons*); migrant farm workers might use their cabin for only five months, but they use it and control it like a rental home (*Villegas*); timeshare owners may stay for a short time, but they control the unit while they are there and have a right to return (*Louisiana Acorn*). The dividing line is the objective right to use the building as a home.

To support their subjective intent rule, Plaintiffs rely primarily on a lone district court case, *Woods* v. *Foster*, 884 F. Supp. 1169, 1174 (N.D. Ill. 1995). But *Woods* is not inconsistent with an objective approach. Op. 19. There, the women and children "inhabit[ed] the shelter," and "live[d] there" until they could find "more permanent housing"; there was no suggestion that the residents faced any restrictions on personalizing or occupying the space, much less the comprehensive restrictions at issue here. *Id.*; Op. 19. Indeed, Plaintiffs and their *amici* have cited *no case* finding a building to be a dwelling where guests were subject to comprehensive restrictions like those at issue here.

Nor does 24 C.F.R. § 100.201 support Plaintiff's argument. Br. 20. This regulation defines "dwelling unit" under the Fair Housing Amendments Act, not "dwelling" under the FHA provisions at issue here. More importantly, it includes homeless shelters only if they are "intended for occupancy as a residence." *Id.* Thus, it begs the question to claim that this regulation means that the Shelter is a residence.

2. Guests at the Shelter do not stay for a significant length of time.

Under the objective standard of the Eleventh and Third Circuits, the Shelter is not a dwelling. First, guests do not stay at the Shelter for a significant length of time. The record contains the following evidence on the length of stay:

- Chinn stayed at the shelter four times, averaging 5.25 nights per stay. Op. 5-6; E-86-87.[12]
- Guests are generally allowed to stay for a maximum of seventeen consecutive nights. Op. 4; E-82.
- Guests may stay more than seventeen consecutive nights only during winter, when cold weather presents an exceptional danger to the homeless. Op. 4; E-82.

[12] The length of Chinn's stays is not "in dispute." Br. 18. The only evidence of how long Chinn stayed comes from Roscoe's affidavit and the Shelter's written records, which give the precise length of each of Chinn's stays. E-86-87. Chinn's affidavit is not to the contrary; it says only that he "alternately lived at the [Defendant's shelters] . . . throughout the years 2005 and 2006." E-62.

There is no evidence of the average length of stay, no evidence that any guest has stayed for "150 days" (Housing Br. 20), and no evidence of any particular stay exceeding seventeen nights.

The stays at issue here are much shorter than in any case relied upon by Plaintiffs. Plaintiffs rely primarily on the homeless shelter in *Woods*, 884 F. Supp. 1169. But as the District Court pointed out, "the guests in *Woods* were allowed to stay for a much longer period of time (up to one-hundred-twenty days)." Op. 19. In fact, *Woods* noted that there was no evidence supporting an actual 120-day limit, and the shelter admitted that any limit was "subject to exceptions." 884 F. Supp. at 1174.

Next, Plaintiffs rely on *Lakeside*, where the average stay at a substance abuse home was 14.8 days. Br. 20; Housing Br. 18-19. But Plaintiffs neglect to mention the court's full analysis. There, the court explained that "the 14.8-day average stay at the proposed facility is more nuanced than perceived at first blush." 455 F.3d at 159. Specifically, the 14.8-day average "result[ed] chiefly from caps on health-insurance funding," not from a cap on the length of stay. *Id.* at 158. Thus, those on "scholarship" or with the ability to pay could stay much longer. *Id.* at 159. The facility "accommodate[d] 30-day stays as a matter of course and even longer stays on occasion," *id.*, and "[s]ome rooms in the facility . . . would house residents staying for extended periods, thereby satisfying with ease the significant-stay factor."

Id. Thus, *Lakeside* is distinguishable because, despite the 14.8-day average, residents could stay indefinitely, and in fact stayed for extended periods as a matter of course.

In short, Plaintiffs cannot point to a single case involving stays as short as those at issue here—5.25-day-average actual stays, and a maximum of seventeen days.

3. Guests at the Shelter do not (and cannot) treat the facility like a home.

Most importantly, guests at the Shelter cannot "treat [the] building like their home." *Schwarz*, 544 F.3d at 1215 (11th Cir. 2008); *see also Lakeside*, 455 F.3d at 160 (occupants "treated it like a home for the duration of their stays"). Instead, they are subject to comprehensive restrictions not present in any home:

- Guests are assigned a "bed, a mattress on the floor, or space on the floor" in "a dormitory-style room, a hallway, or the day room," and may be required to relocate "at anytime without notice."
- Guests "are not guaranteed the same bed each night they return" and receive "no advantage or right . . . over new guests";
- Guests "may not come and go as they please," and "are not allowed to leave the shelter once they arrive in the evening";
- Guests "may not sleep in their own clothes," but "must use the provided pajamas";
- Guests must abide by "lights-out quiet time at 10:00 pm," and must "w[ake] up at 6:15 am";
- Guests "are not allowed to stay at the shelter during the day," except a brief return for lunch;
- Guests "may not loiter at or near the facility";

- Guests "are not allowed to personalize the bed area assigned to them or leave belongings in their bed area";
- Guests cannot store personal belongings at the shelter except "in a separate storage area with restricted access";
- Guests are generally "not allowed to receive phone calls, mail, or have visitors at the shelter."
- Guests and their belongings are subject to search at any time without notice.

Op. 3-5, 18; E-83, E-102.

In *Lakeside*, the residents "return[ed] to their rooms in the evening, receiv[ed] mail at the facility, . . . hung pictures on their walls and had visitors in their rooms." 455 F.3d at 159-60. Yet the Third Circuit held that the substance abuse facility "barely" satisfied the requirement of treating the facility like a home. *Id.* at 160. Similarly, in *Schwarz*, the court asked whether the facilities "function more like residential homes than hotels." *Schwarz*, 544 F.3d at 1216.

Here, guests have *far less* liberty than they would have at a hotel. The restrictions fall *not* somewhere in between those of a hotel and a home, but between those of a hotel and a prison. Accordingly, the Shelter is even less of a dwelling than is a hotel.

4. Homeless shelters are typically regulated under federal law as "public accommodations."

Plaintiffs' best argument is a visceral one: Homeless shelters should not be allowed to discriminate. But just because a homeless shelter is not a "dwelling" under the FHA does not mean it has a license to discriminate. Rather, homeless

shelters are typically regulated under state and federal law as places of "public accommodation." For example, the Americans with Disabilities Act defines "public accommodation" to include "a day care center, senior citizen center, *homeless shelter*, . . . or other social service center establishment." 42 U.S.C. § 12181(7)(K) (emphasis added); 28 C.F.R. § 36.104(11). Similarly, Title II of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, national origin, or religion in places of public accommodation, defines "public accommodation" to include "any inn, hotel, motel, *or other establishment which provides lodging to transient guests* . . ." 42 U.S.C. § 2000a(b)(1) (emphasis added). Providing "lodging to transient guests" is precisely what homeless shelters are designed to do. Thus, they fall squarely under Title II, and there is no reason to stretch the text of the FHA to cover homeless shelters.

No reason, that is, unless you are an attorney looking for a larger payout. FHA suits tend to be much more lucrative than Title II suits. While FHA plaintiffs can be awarded compensatory and punitive damages, Title II plaintiffs are limited to injunctive relief. *Compare* 42 U.S.C. § 3613(c) *with* 42 U.S.C. §§ 2000a-3(a), 2000a-5(a), 2000a-6(b). Similarly, Title II plaintiffs cannot always file suit immediately. If a state or local law authorizes state or local authorities to seek relief, a plaintiff must provide thirty days' notice before filing suit, and a federal court "may stay proceedings . . . pending the termination of State or local enforcement

proceedings." *Id.* § 2000a-3(c). Thus, if state or local authorities resolve the problem, the plaintiff might never receive attorney's fees. Indeed, in this case, Cowles did initially file a complaint with a state agency under Idaho's public accommodations law, and the agency held that the Shelter was a place of public accommodation. E-140. Plaintiffs could have filed suit under Title II, but chose not to.

Fair housing groups also receive large HUD grants—approximately $14-$20 million each year—to enforce the FHA and state and local equivalents. (For example, in 2008-09, while this suit was pending, Plaintiff Intermountain Fair Housing Council received enforcement grants totaling $550,000. *See* HUD, *FY 2008 Annual Report on Fair Housing* 56 (2008), available at http://www.hud.gov/content/releases/fy2008annual-rpt.pdf; HUD, *FY 2009 Annual Report on Fair Housing* 70 (2009), available at http://www.hud.gov/content/releases/fy2009annual-rpt.pdf.). But under HUD regulations, these grants are to be used "to investigate violations and obtain enforcement of the rights granted under the Fair Housing Act" or "substantially equivalent" state laws—not Title II. 24 C.F.R. § 125.401(a). Thus, fair housing advocacy groups have a strong pecuniary incentive to push for homeless shelters to be covered under the FHA instead of Title II.

B. The FHA does not apply because there has been no "sale or rental" of a dwelling.

Even assuming the Shelter is a "dwelling," the FHA is inapplicable because there has been no "sale or rental" of a dwelling. No court has thoroughly consid-

ered the question of whether the FHA applies to free housing. *Compare Johnson* v. *Dixon*, 786 F.Supp. 1, 4 (D.D.C. 1991) *with Woods*, 884 F. Supp. at 1175. As explained below, the FHA provisions at issue here are expressly tied to the "sale or rental" of a dwelling and thus do not apply to housing that is given away for free.[13]

1. There has been no "sale or rental" under section 3604(b).

Section 3604(b) of the FHA provides:

> [I]t shall be unlawful . . . [t]o discriminate against any person in the terms, conditions, or privileges of *sale or rental of a dwelling*, or in the provision of services or facilities *in connection therewith*, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(b) (emphasis added). This provision covers two types of discrimination, both tied to the sale or rental of a dwelling: (1) discrimination in "the terms conditions, or privileges of *sale or rental of a dwelling*," and (2) discrimination "in the provision of services or facilities *in connection therewith*." *Id.* (emphasis added).

Although the term "therewith" is arguably ambiguous—referring either to "sale or rental of a dwelling" or to just "a dwelling"—both HUD and federal courts have interpreted it to refer to the "*sale or rental* of a dwelling." *See* 24 C.F.R.

[13] Although the Mission did not raise this argument below, this Court may affirm "on any ground supported by the record, provided the parties have had the opportunity to discuss it in their briefs." *Scholar* v. *Pacific Bell*, 963 F.2d 264, 266 (9th Cir. 1992). Moreover, there is no waiver here because "the issue is purely one of law," and "will not prejudice the [Plaintiffs] . . . because [they can] brief[] the merits of this argument on appeal." *Weissburg* v. *Lancaster Sch. Dist.*, 591 F.3d 1255, 1260 (9th Cir. 2010).

§ 100.65(a) (interpreting "in connection therewith" to mean "in connection with the sale or rental of a dwelling). As the Fifth Circuit has said, "[t]his reading is grammatically superior and supported by the decisions of many courts." *Cox* v. *City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005).

Here, it is undisputed that there has been no "sale or rental" of a dwelling. "To rent" is defined as "to lease, to sublease, to let and otherwise to grant *for a consideration* the right to occupy premises not owned by the occupant." 42 U.S.C. § 3602(e) (emphasis added). "Sale" is typically understood to mean "[t]he transfer of property or title *for a price*." Black's Law Dictionary 1364 (8th ed. 2004) (emphasis added). Since the Shelter welcomes guests for free, there is neither "consideration" nor "price," and § 3604(b) does not apply.

2. There has been no "sale or rental" under section 3604(a).

Nor is plaintiffs' claim cognizable under § 3604(a). That section provides:

> [I]t shall be unlawful . . . [t]o refuse to *sell or rent* after the making of a bona fide offer, or to refuse to negotiate for the *sale or rental* of, or *otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a) (emphasis added). The terms "refuse to sell or rent" and "refuse to negotiate" are obviously inapplicable in the absence of a sale or rental dwelling. Thus, the only question is whether the phrase "otherwise make unavailable or deny" also contemplates the sale or rental of a dwelling. *Id.*

The FHA's text, structure, implementing regulations, and purpose all confirm that it does. The phrase "otherwise make unavailable or deny" is part of a list of three forms of discrimination: (1) "refus[ing] to sell or rent," (2) "refus[ing] to negotiate for sale or rental," and (3) "otherwise mak[ing] unavailable or deny[ing]" a dwelling. *Id.* The word "otherwise" indicates that "mak[ing] unavailable or deny[ing]" is a broad category of conduct, of which refusing to sell and refusing to negotiate are two examples.

Under the canon of *ejusdem generis*, "when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed." Black's Law Dictionary 556 (8th ed. 2004). Any other reading makes the list of specifics mere surplusage. *See United States* v. *Alderman*, 601 F.3d 949, 952-53 (9th Cir. 2010) (general "otherwise" clause called for "straightforward *ejusdem generis* analysis"); *Columbia Pictures Industries, Inc.* v. *Professional Real Estate Investors, Inc.*, 866 F.2d 278, 282 (9th Cir. 1989) (same).

Applying *ejusdem generis* here, the phrase "otherwise make unavailable or deny" must be construed to embrace conduct "of the same type" as the two examples that precede it—namely, "refus[ing] to sell or rent" and "refus[ing] to negotiate for the sale or rental." Because both examples involve conduct that prevents the "sale or rental" of a dwelling, the phrase "otherwise make unavailable or deny" must

include conduct that prevents the "sale or rental" of a dwelling, too—such as racial steering, mortgage and insurance redlining, and discriminatory zoning. *Cox*, 430 F.3d at 741-42. (The canon of *noscitur a sociis*—which holds that the meaning of doubtful words may be determined by reference to associated words and phrases—compels the same result. *See Carvalho* v. *Equifax Information Services, LLC*, 615 F.3d 1217, 1225 (9th Cir. 2010).)

This interpretation is further confirmed by reading § 3604 as a whole. Section 3604 includes five other subsections, each of which is expressly limited to conduct related to the sale or rental of a dwelling. *See* 42 U.S.C. § 3604(b)-(f). HUD regulations, too, confirm that § 3604(a) is limited to sale and rental conduct. The title of the relevant regulation is "Other prohibited *sale and rental conduct*." 24 C.F.R. § 100.70 (emphasis added). And every subsection deals with some aspect of the sale or rental of housing. *See id.*, §§ 100.70(d)(1)-(4).

Finally, the history and purpose of the FHA confirm that it covers sale or rental housing, not free shelter. As several courts have observed, it is "clear from a survey of the debates on the Act that Congress had *commercial housing* as its focus in passing the Act." *Player* v. *State of Ala. Dept. of Pensions and Sec.*, 400 F. Supp. 249, 266 (D. Ala. 1975) (emphasis added) (citing 114 Cong. Rec. 4296 (1968)); *United States* v. *Koch*, 352 F. Supp. 2d 970, 976-78 (D. Neb. 2004) (citing 114 Cong. Rec. 2274-84, 2703-09, 3421-22). The target was not free housing but well-

known commercial practices such as racial steering, mortgage and insurance red-lining, and exclusionary zoning. Perhaps most tellingly, other civil rights laws of the time (such as Title II) swept so broadly that Congress was compelled to include language limiting them to conduct affecting interstate commerce. *See* 42 U.S.C. § 2000a(b), (c); 42 U.S.C. § 12181(1), (7). But the FHA has no interstate commerce provision. The reason is obvious: The Act regulates the sale or rental of housing, which already affects interstate commerce.

3. The Shelter has not been made "unavailable" or "denied."

But even assuming the phrase "make unavailable or deny" applies to free housing, the Shelter has not been made "unavailable" or "den[ied]" here. There is a difference between offering a dwelling with undesirable "terms" or "conditions" (§ 3604(b)), and making a dwelling "unavailable" altogether (§ 3604(a)). The latter means not just that a dwelling has been made less desirable, but that the dwelling has not been obtained at all.

That is how this Court interpreted the phrase in *Ojo* v. *Farmers Group, Inc.*, 600 F.3d 1205 (9th Cir. 2010). There, the question was whether the denial of homeowner's insurance on the basis of race could have the effect of "mak[ing] unavailable or deny[ing]" a dwelling. This Court said that it could, because "[m]ortgage lenders require prospective borrowers to obtain homeowner's insurance, so without insurance, there may be no loan, and without a loan, there may be

no home available to a person who wants to buy the home." *Id.* at 1208 (emphasis added). In other words, the denial of homeowner's insurance made housing unavailable because it could prevent a person from buying the home altogether. HUD regulations confirm that § 3604(a) applies only to conduct that "makes unavailable or denies" a dwelling. *See* 24 C.F.R. § 100.70(b), (d)(1)-(4). And other circuits have adopted the same rule.[14]

Here, Chinn complains not about "availability" of shelter but about the conditions affecting its desirability. It is undisputed that Chinn was never turned away when he requested shelter. Op. 5-6; E-62, E-86-87. Nor does he complain that any other guest was ever turned away. E-63-64. Instead, he alleges that guests who did not attend chapel services received "inferior treatment"—namely "substitute food of inferior quality"—and that he heard comments during the chapel service that

[14] *See, e.g.*:

- *Tenafly Eruv Association* v. *Borough of Tenafly*, 309 F.3d 144, 157 n.13 (3d Cir. 2002) (taking down Jewish *eruv* made housing "much less desirable," not unavailable);
- *Cox*, 430 F.3d at 740 (conduct "may have harmed the housing market, decreased home values, or adversely impacted homeowners' 'intangible interests,' but such results do not make dwellings 'unavailable' within the meaning of the Act");
- *Bloch* v. *Frischholz*, 587 F.3d 771, 777 (7th Cir. 2009) (en banc) ("Availability, not simply habitability, is the right that § 3604(a) protects.");
- *Clifton Terrace Associates, Ltd.* v. *United Technologies Corp*, 929 F.2d 714, 719 (D.C. Cir. 1991) ("A lack of elevator service is a matter of habitability, not availability, and does not fall within the terms of [§ 3604(a)].").

were offensive to his Mormon faith. E-63-64. This does not even come close to making the Shelter "unavailable." *See Tenafly*, 309 F.3d at 157 n.13; *Bloch*, 587 F.3d at 778-79; *Cox*, 430 F.3d at 740.

C. Plaintiffs' claim of religious discrimination falls within the FHA's religious exemption.

Finally, Chinn's Shelter claim fails because his allegations of religious discrimination fall within the FHA's religious exemption. That exemption provides:

> Nothing in this subchapter shall prohibit a religious organization . . . from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons . . . .

42 U.S.C. § 3607(a).

To come within the exemption, the Mission must first prove that it is a "religious organization." *Id.* Then it must prove that the application of the FHA would prohibit it from (a) "limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion," or (b) "giving preference to [persons of the same religion]." *Id.*

1. The Mission is a religious organization.

There is no dispute that the Mission is a religious organization, with the purpose of "providing for the worship of God, the teaching and preaching of the Word of God, [and] the winning of people to a personal faith in the Lord Jesus Christ." Op. 21; E-68. It offers guests "spiritual guidance, Christian counseling, and Christian

religious services." Op. 21; E-68. And it conducts "numerous religious activities every day, including worship services, bible studies and prayer." *Id.*

2. Plaintiffs allege that the Shelter gives preference to persons of the same religion.

This lawsuit would also prohibit the Mission from "giving preference to [persons of the same religion]." 42 U.S.C. § 3607(a). The district court concluded that this requirement was not satisfied because giving preference to "individuals who attend or participate in religious services" is not the same as giving preference to "persons of the same religion." Op. 24. But this misunderstands Plaintiffs' claim. The point of Plaintiffs' claim is that giving preference to persons who attend chapel has a *disparate impact on the basis of religion*. Those who reject the Shelter's religion are less likely to attend; those who are "of the same religion" are more likely to attend. Thus, a "chapel preference" is effectively a preference for those who are "of the same religion" as the Shelter, and Plaintiffs' claim falls within the religious exemption.

Plaintiffs' claim also falls squarely within the religious exemption's purpose. Other federal antidiscrimination laws, like Title VII, routinely exempt religious organizations from prohibitions on religious discrimination. *See* 42 U.S.C. § 2000e-1. As the Supreme Court has explained, the purpose of these exemptions is to protect "the ability of religious organizations to define and carry out their religious missions." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 335-

36 (1987). Religious organizations often have legitimate reasons for giving preferences to co-religionists. If they could not do so, they would often be unable to "carr[y] out what [they] understood to be [their] religious mission." *Id.* The same is true of the FHA's religious exemption. By permitting religious organizations to give preference to co-religionists, the FHA ensures that those organizations are free to carry out their religious missions.

Here, Chinn is essentially seeking to hold the Shelter liable because of its pervasively religious atmosphere. He found the chapel services to be "offensive to [his] religious faith," and he felt like the services created "a hostile environment" due to "comments in derogation of the Mormon faith." E-64. The message of the lawsuit is simple: If you maintain a comprehensively religious environment, and one of your guests dislikes your message, you can be sued for religious discrimination. The result will be pressure on the Mission to curtail its religious activity. That sort of pressure is why the district court held that applying the FHA to the Shelter would violate the First Amendment (Op. 30); and that sort of pressure is precisely what the religious exemption is designed to prevent.

II. The Discipleship Program does not violate the FHA.

Cowles' claim against the Discipleship Program also fails for three reasons. First, the Discipleship Program is protected under the FHA's religious exemption. Second, the Discipleship Program's decision to exclude Cowles is protected under

the First Amendment. Third, the Discipleship Program is protected under RFRA. Finally, *amici*'s new arguments under the Establishment Clause are both meritless and waived.

A. The Discipleship Program is covered by the FHA's religious exemption.

The FHA's religious exemption is even more plainly applicable to the Discipleship Program than it is to the Shelter. As noted above, the Mission easily qualifies as a "religious organization." Religion pervades the Discipleship Program: "Spiritual growth in Jesus Christ is the core of the [Discipleship Program]," and "the program would be nothing if stripped of its religious elements." E-105; E-85.

Thus the only question is whether the Mission (a) "limit[s] the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion," or (b) "giv[es] preference to [persons of the same religion]." 42 U.S.C. § 3607(a). The Mission does both.

1. The Discipleship Program is non-commercial and limits occupancy "to persons of the same religion."

The district court rightly concluded that the Mission operates the Discipleship Program "for other than a commercial purpose." Op. 22-23. The Discipleship Program receives no government funds and forbids members from receiving government financial aid. E-10. It generates no revenue at all, let alone profit. Op. 22-23.

But the district court rejected the application of the religious exemption on two grounds. First, it pointed out that the Mission admitted Cowles, who "explicitly

disclaims that she is of the same religion as the Rescue Mission." Op. 24. Second, it suggested that there is a distinction between "requir[ing] that the residents who are not Christian convert to Christianity to graduate from the Program," and "limiting occupancy to, or giving preference to, 'persons of the same religion.'" *Id.*

Both assertions are faulty. First, it is of no moment that Cowles "disclaims that she is of the same religion as the Rescue Mission." *Id.* It is undisputed that the Discipleship Program is open only "to those who are *or desire to be* of the same faith as the Rescue Mission," E-85 (emphasis added). Cowles was admitted only because she expressed a desire to adopt the faith of the Discipleship Program. During the interview process, she was told about the "intense, faith-based curriculum," including requirements to attend church services, engage in daily Bible reading, and be "guid[ed] . . . into a personal relationship with God." E-75; E-106. She not only accepted those requirements, but expressed a strong desire for them. E-110-11. She was then discharged when it became apparent that she "was not committed to recovery through the Discipleship Program's rigorous religious requirements." E-88. Far from showing that the Discipleship Program is open to non-Christians, Op. 24, Cowles' admission and dismissal show that the Discipleship Program does, in fact, limit occupancy to "persons of the same religion."

Nor is there any merit to the district court's distinction between "a requirement that the residents who are not Christian convert to Christianity to graduate from the

Program" and "limiting occupancy to . . . 'persons of the same religion.'" *Id.* A requirement that members adopt the same religion as the Discipleship Program operates as a *de facto* limitation on occupancy. Although Cowles was allowed to enter the Discipleship Program when she was not yet a Christian, she was not allowed to remain there as a non-Christian. The term "limiting occupancy" embraces not only a complete bar on entry, but also a limitation on continued occupancy.

2. The Discipleship Program "giv[es] preference" to persons of the same religion.

The requirement that members be Christians or convert to Christianity also operates as a "preference" for "persons of the same religion." 42 U.S.C. § 3607(a). Only Christians are allowed to stay in the program to completion. Those who refuse Christianity are, like Cowles, eventually asked to leave. It is difficult to see how this can be construed as anything other than "giving preference" to "persons of the same religion." *Id.*

3. The Discipleship Program falls squarely within the purposes of the FHA's religious exemption.

The Mission's conduct also falls squarely within the religious exemption's purpose. As explained above, the exemption is designed to protect "the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335. Here, the mission is to free members from addiction through "personal faith in Christ." E-73. Cowles' claim strikes at the heart of that mission.

Her suit seeks to punish the Mission, via damages, attorneys' fees, and an injunction, for requiring all Discipleship Program members to make a "deep commitment . . . toward developing their personal faith in Jesus Christ." E-105. If her suit is allowed to proceed, the Discipleship Program will be unable to require members to abide by its religious requirements. It will be forced, as the district court said, "to remove religion from its religious programs." Op. 30.

Furthermore, as explained below, forcing the Discipleship Program to accept members who disagree with its religious beliefs raises serious First Amendment problems. The canon of constitutional avoidance thus offers an additional reason for rejecting a narrow interpretation of the religious exemption. *See Spencer* v. *World Vision, Inc.*, 619 F.3d 1109, 1114 (9th Cir. 2010) ("[T]he canon of constitutional avoidance counsels against [a] stringent interpretation of [Title VII's religious exemption].").

B. Forcing the Discipleship Program to accept members who reject its religious practices would violate the First Amendment.

Even assuming the Discipleship Program is not protected under the FHA's religious exemption, it is protected under the First Amendment. The Free Exercise Clause protects the right of religious organizations to control their internal affairs, including the right to decide who can be a member. And the Free Speech Clause (together with the Free Exercise Clause) protects the Discipleship Program's

membership decisions as an expressive association. Thus, Cowles cannot use the FHA to force the Discipleship Program to accept her as a member.

1. Free Exercise of Religion

The Supreme Court has long recognized the right of religious organizations to control their internal affairs. *Watson* v. *Jones*, 80 U.S. 679, 728-29 (1871). This right includes the freedom of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). Most importantly, it includes the right of a religious organization to decide who can be a member: "[Civil courts] have no power to revise or question ordinary acts of church discipline, or of excision from membership. . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off." *Bouldin* v. *Alexander*, 82 U.S. 131, 139-40 (1872).

Not surprisingly, lawsuits directly challenging church membership decisions are rare; "[t]he easiest cases don't even arise." *United States* v. *Lanier*, 520 U.S. 259, 271 (1997). But several courts have considered claims that the exercise of church discipline constituted a tort, such as defamation, invasion of privacy, or intentional infliction of emotional distress. When such claims interfere with a church's right to control its membership and internal affairs, they have been overwhelmingly rejected. *See, e.g.*, *Westbrook* v. *Penley*, 231 S.W.3d 389 (Tex. 2007) (rejecting tort

claims where a pastor, pursuant to church's disciplinary process, disclosed details of plaintiff's private life to church congregation); *O'Connor* v. *Diocese of Honolulu*, 885 P.2d 361 (Haw. 1994) (refusing to interfere with an excommunication); *Fowler* v. *Bailey* 844 P.2d 141, 144 (Okla. 1992) (concluding that "church disciplinary decisions cannot be reviewed for the purpose of reinstating expelled church members").

This Court's decision in *Paul* v. *Watchtower Bible & Tract Society*, 819 F.2d 875 (9th Cir. 1987) (Reinhardt, J.), is instructive. There, a former member of the Jehovah's Witnesses challenged its practice of "shunning" persons who had been excluded from the church. *Id.* at 876-77. The plaintiff challenged the shunning as tortious, alleging common law claims of defamation, invasion of privacy, and outrageous conduct. *Id.* at 877.

This Court held that shunning was protected by the Free Exercise Clause. "Imposing tort liability for shunning . . . would in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings." *Id.* at 881. Moreover, constitutional protection was "particularly appropriate here" because of the "nearly absolute[]" protection afforded to church membership decisions:

> Courts generally do not scrutinize closely the relationship among members (or former members) of a church. Churches are afforded great latitude when they impose discipline on members or former members. We agree with Justice Jackson's view that "[r]eligious activities which concern only members

> of the faith are and ought to be free—as nearly absolutely free as anything can be."

Id. at 883 (quoting *Prince* v. *Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring)). Thus, if church members "no longer want to associate with [someone][,] . . . they are free to make that choice" and are "protected under the first amendment." *Id.*

The same reasoning applies here. Although the Discipleship Program is not registered as a church, it is a close-knit religious organization with rigorous requirements for membership. It dismissed Cowles because she disagreed with the program's religious beliefs and refused to comply with its religious requirements. Her lawsuit directly challenges this membership decision, seeking to compel the program to retain unwanted members on pain of "substantial damages." *Id.* at 881. As in *Paul*, the program's membership decision is protected by the First Amendment.

It is no response to say that the Discipleship Program is not a "church." First, the Discipleship Program is far more religiously rigorous and intimate than a typical church. At a minimum, members engage in all of the traditional activities associated with a church, including "worship services, Bible study, prayer, religious singing, public Bible reading and public prayer." E-85. But they also engage in a wide range of daily communal religious activities such as "morning devotions, scripture memorization, . . . evening chapel services, Christian service activities,

[and] evangelistic training." E-105. They live together, eat meals together, and do household chores together. E-24, E-29-30. They participate in peer support groups, discussing the most personal details of their lives. E-9. And they agree to abide by quasi-monastic rules regulating nearly every aspect of their communal and personal life:

- Members may have no visitors (even family) for the first thirty days and strictly limited visits thereafter.
- Members may receive no phone calls or mail for the first thirty days.
- Members wear clothing provided by the Mission.
- Members agree not to smoke, consume alcohol, or use drugs.
- Members agree not to work outside the Mission for the first nine months of membership.
- Members cede most control over their finances while in the program.
- Unmarried members agree not to be involved in any romantic relationships while in the program. Married members are allowed spousal visits only with counselor approval.

E-42-45.

In these respects, membership in the Discipleship Program more closely resembles membership in a monastery or convent than a church. Of course, individuals recovering from substance abuse are not monks. But the Discipleship Program's communal worship, work, and rules mirror those of a religious order. Just as many religious orders require temporary or permanent vows of poverty, chastity, or obedience, members of the Discipleship Program cede control over their finances,

foreswear all romantic relationships, and obey comprehensive restrictions on their personal and communal life. And just as many religious orders limit contact with the outside world, members of the Discipleship Program do the same. If anything, then, the Discipleship Program is entitled to just as much First Amendment protection for its membership decisions as is a church.

Second, even assuming the Discipleship Program is something less than a church, this Court has repeatedly recognized that "the Free Exercise Clause clearly protects organizations less pervasively religious than churches." *Spencer*, 619 F.3d at 1114 (internal quotations omitted). Indeed, this Court has suggested that offering churches greater protection than other religious organizations would "raise the specter of constitutionally impermissible discrimination between institutions on the basis of the 'pervasiveness or intensity' of their religious beliefs." *Id.*; *see also NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501-04 (1979) (recognizing rights of religious schools).

Similarly, in the employment context, federal courts have uniformly recognized the "ministerial exception," a First Amendment doctrine that bars certain lawsuits brought against religious groups by employees who perform religious functions. *See, e.g.*, *Elvig* v. *Calvin Presbyterian Church*, 375 F.3d 951, 955 (9th Cir. 2004). The ministerial exception has routinely been applied to organizations that are not

churches. Examples include a teacher at a religious elementary school,[15] a chaplain at a religious hospital,[16] a kosher food supervisor at a Jewish nursing home,[17] and an administrator at a Salvation Army rehabilitation center.[18] These cases confirm that the right of religious groups to control their internal affairs extends not only to churches but to organizations like the Discipleship Program.

2. *Employment Division* v. *Smith*

Plaintiffs and their *amici* argue that a free exercise claim is foreclosed by *Employment Division* v. *Smith*, which held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" 494 U.S. 872, 879 (1990); Br. 28-29; AU Br. 5-9. According to Plaintiffs, the FHA is neutral and generally applicable; therefore, the Free Exercise Clause does not protect the Discipleship Program from its operation. Br. 28-29.

This argument grossly overstates the scope of *Smith*. Far from authorizing the government "to interfere with a church's governance of its own affairs," *Bollard* v. *Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 945 (9th Cir. 1999), *Smith* in-

[15] *Coulee Catholic Sch.* v. *Labor & Indus. Review Comm'n*, 768 N.W.2d 868 (Wis. 2009).

[16] *Scharon* v. *St. Luke's Episcopal Presb. Hosps.*, 929 F.2d 360 (8th Cir. 1991).

[17] *Shaliehsabou* v. *Hebrew Home*, 363 F.3d 299 (4th Cir. 2004).

[18] *Schleicher* v. *Salvation Army*, 518 F.3d 472 (7th Cir. 2008).

stead reaffirmed the right of religious organizations to control their internal affairs. Citing a long line of cases involving church property disputes, the Court reaffirmed that the government cannot "lend its power to one or the other side in controversies over religious authority or dogma." 494 U.S. at 877. Similarly, the Court noted that "it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns," in which case a neutral and generally applicable law would have to give way. *Id.* at 882. In other words, when a case involves a religious organization's internal affairs—including its "freedom of association" and matters of "religious authority"—the fact that the law may be neutral and generally applicable is not dispositive. *Id.* at 882, 877.

Numerous cases since *Smith* have recognized this point. Indeed, *amici* concede that, "[d]espite the holding of *Smith*, courts have recognized that religious organizations have a constitutional right (of somewhat unclear parameters) to define themselves and their operations." AU Br. 9. Most notable are cases involving the ministerial exception, which protects religious organizations from a wide variety of neutral and generally applicable laws—including Title VII,[19] the Age Discrimination in Employment Act,[20] the Americans with Disabilities Act,[21] the Fair Labor

[19] *Bollard*, 196 F.3d at 944.

[20] *Tomic* v. *Catholic Diocese*, 442 F.3d 1036, 1042 (7th Cir. 2006).

Standards Act,[22] and state tort[23] law. Indeed, all eleven circuits to address the question have applied the ministerial exception to neutral and generally applicable laws since *Smith*.[24]

This is because the right of a religious organization to control its internal affairs "is of a fundamentally different character from [the right] at issue in *Smith*." *EEOC* v. *Catholic Univ.*, 83 F.3d 455, 462 (D.C. Cir. 1996). The plaintiff in *Smith* sought an individualized exemption "to observe a particular command or practice of his church." *Id.* Such individualized exemptions could potentially reach into any field of human activity and could apply to virtually any government regulation, thus "empower[ing] a member of [a] church, 'by virtue of his beliefs, "to become a law unto himself."'" *Id.* (quoting *Smith*, 494 U.S. at 885). By contrast, the right of a religious organization to control its internal affairs is far narrower; it is confined to

---

[21] *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 227 (6th Cir. 2007).

[22] *Schleicher*, 518 F.3d at 478.

[23] *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 309 (3d Cir. 2006).

[24] *See, e.g.*, *Rweyemamu* v. *Cote*, 520 F.3d 198, 204-10 (2d Cir. 2008); *Petruska*, 462 F.3d at 303-09 (3d Cir. 2006); *EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795, 800-05 (4th Cir. 2000); *Combs* v. *Cent. Tex. Annual Conference*, 173 F.3d 343, 348-50 (5th Cir. 1999); *Hollins*, 474 F.3d at 225-27 (6th Cir. 2007); *Alicea-Hernandez* v. *Catholic Bishop*, 320 F.3d 698, 702-04 (7th Cir. 2003); *Scharon*, 929 F.2d at 362-63 (8th Cir. 1991); *Elvig*, 375 F.3d at 955 (9th Cir. 2004); *Bryce* v. *Episcopal Church*, 289 F.3d 648, 656-58 (10th Cir. 2002); *Gellington* v. *Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302-04 (11th Cir. 2000).

activities affecting the organization's members, and "does not present the dangers warned of in *Smith*." *Id.*

In short, this is not a case about whether the Free Exercise Clause "relieve[s] an individual of the obligation to comply with a 'valid and neutral law of general applicability'"; it is a case about a religious organization's internal affairs, including its "freedom of association" and "religious authority." *Smith*, 494 U.S. at 882, 877, 879. Thus, an argument that the FHA is neutral is beside the point.

3. Freedom of Association

The Mission is also protected under the First Amendment right of expressive association. As the Supreme Court has explained, "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984). Thus, the rights of free exercise and free speech include a corresponding right of expressive association: the right "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.*

The right of expressive association protects a wide variety of groups. It protects the right of political parties to select their own leaders, *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 229 (1989), to select who can vote

in party primaries, *California Democratic Party* v. *Jones*, 530 U.S. 567, 574-75 (2000), and to select who can be a member, *New York State Board of Elections* v. *Lopez Torres*, 552 U.S. 196, 202 (2008). It protects the right of parade organizers to exclude a group with an unwanted message. *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 581 (1995). It protects the Boy Scouts' right to exclude a leader who undermines the Scouts' message on an important issue. *Boy Scouts* v. *Dale*, 530 U.S. 640, 659 (2000). And it protects the right of "a private club [to] exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Hurley*, 515 U.S. at 581.

To determine whether an organization is protected by the right of expressive association, the Court must answer two questions. First, does the organization "engage in some form of expression, whether it be public or private"? *Dale*, 530 U.S. at 648. Second, would the law at issue "significantly affect the [organization's] ability to advocate public or private viewpoints"? *Id.* at 641, 650. Both questions require an affirmative answer here.

First, there is no question that the Discipleship Program engages in "some form of expression." *Id.* at 648. To lead members into a "personal faith in Christ," the program engages in a wide variety of expressive activities, including "worship services, Bible study, prayer, religious singing, public Bible reading and public prayer." E-85. It also provides members with counseling, educational training, job

training, and peer support groups. E-10. It is undisputed that these are expressive activities.

Second, forcing the Discipleship Program to admit individuals (like Cowles) who disagree with its Christian beliefs and refuse to engage in its Christian practices would "significantly affect the [Discipleship Program's] ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 641, 650. The central message of the Discipleship Program is that it is impossible to gain freedom from addiction apart from "personal faith in Christ." E-85, E-105. That is why religious activities are mandatory; and that is why the program cannot be completed without adopting that faith. E-3. Forcing the Discipleship Program to admit individuals who reject the faith would directly contradict this message. It would tell members that "personal faith in Christ" is unnecessary.

In short, just as political parties, parades, and private clubs can exclude those who interfere with their message (*Lopez Torres*, *Hurley*, *Dale*), the Discipleship Program can exclude members who reject its religious beliefs.[25]

[25] *Christian Legal Society* v. *Martinez*, 130 S. Ct. 2971 (2010), is not relevant here. There, the government merely attached conditions to a subsidy; it did not "*compel*[] a group to include unwanted members." *Id.* at 2986. Here, there is no subsidy, and the Mission would be compelled to include unwanted members.

4. The District Court's Analysis

The District Court correctly concluded that the First Amendment protects the Discipleship Program, relying on three factors:

> (1) [T]he magnitude of the statute's impact upon the exercise of the religious belief, (2) the existence of a compelling [government] interest justifying the burden imposed upon the exercise of the religious belief, and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the [government].

Op. 29 (quoting *Bollard*, 196 F.3d at 946 (9th Cir. 1999)). These factors provide additional grounds for protection under the First Amendment.

As the district court noted regarding the first factor, requiring the Discipleship Program to admit unwanted members "would have a tremendous negative impact upon the exercise of the Rescue Mission's religious beliefs." Op. 30. Admitting members who reject its beliefs and practices would strike at the heart of the program, which "would be nothing if stripped of its religious elements." E-85.

Second, while the provision of fair housing is certainly an important government interest, that interest is at its weakest when it comes to prohibiting religious distinctions made by religious organizations. As this Court noted in *Paul*, when a religious organization makes religious distinctions among its members, the organization does not present "a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention." 819 F.2d at 883. Moreover, "[s]ome religious interests under the Free Exercise Clause are so strong that no compelling

[governmental] interest justifies government intrusion into the ecclesiastical sphere." Op. 31 (quoting *Bollard*, 196 F.3d at 946). One such interest is a religious organization's "nearly absolute[]" right to select its own members. *Paul*, 819 F.2d at 883.

Third, far from "imped[ing] the objectives sought to be advanced by the state," *Bollard*, 196 F.3d at 946, protecting the Discipleship Program promotes them. As the district court pointed out, the purpose of the FHA is "to provide, within constitutional limitations, for fair housing throughout the United States." Op. 32 (quoting 42 U.S.C. § 3601). This purpose does not embrace forcing religious communities to admit members who disagree with their religious beliefs. Indeed, the FHA specifically recognizes that religious organizations may give preference to co-religionists. 42 U.S.C. § 3607(a).

Plaintiffs argue that the existence of a religious exemption in the FHA counsels against recognizing any additional constitutional protection. Br. 27. But that is just what courts have routinely done in ministerial exception cases under Title VII. *Bollard*, 196 F.3d at 945. Statutory protections do not displace the Constitution.

C. Forcing the Discipleship Program to accept members who reject its religious practices would violate RFRA.

The Discipleship Program's choice of members is also protected under RFRA. RFRA requires strict scrutiny whenever the government "substantially burden[s] a person's exercise of religion even if the burden results from a rule of general appli-

cability." 42 U.S.C. § 2000bb-1(a), (b). As explained in Part II.B above, forcing the Discipleship Program to admit unwanted members is a "substantial burden" on its religious exercise and is not "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

Amici argue that RFRA does not apply to suits between private parties. AU Br. at 4 n.2. But as the district court pointed out, this Court "has not directly addressed the use of the RFRA as a defense . . . in a lawsuit between private parties," Op. 25 (discussing cases), and the Second, Eighth, and D.C. Circuits have all rightly applied RFRA to such suits.[26] RFRA's language is broad, applying to "all Federal law . . . whether statutory or otherwise." 42 U.S.C. § 2000bb-3. It defines "government" to include a "branch" of the United States (thus obviously including the judiciary) and to include a "person acting under color of law" (thus including officials that would ultimately enforce a judgment between private parties). *Id.* § 2000bb-2(1). As this Court stated in another suit between private parties: "Clearly, the application of [a] law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power." *Paul*, 819 F.2d at 880.

[26] *Hankins* v. *Lyght*, 441 F.3d 96, 103 (2d Cir. 2006); *Christians* v. *Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1416-17 (8th Cir. 1996); *Catholic Univ.*, 83 F.3d at 467-470 (EEOC was also a party); *but see Tomic*, 442 F.3d at 1042; *General Conference Corp. of Seventh-Day Adventists* v. *McGill*, 617 F.3d 402, 411-12 (6th Cir. 2010).

In any event, as the district court suggested (Op. 28), this Court need not decide whether RFRA applies to suits between private parties, because Plaintiff Intermountain Fair Housing Council is a state actor. The Council has received over half a million dollars in federal funds "to investigate violations and obtain enforcement of the [FHA]." 24 C.F.R. § 125.401(a); *see supra* at 26. It thus stands in the government's shoes, and RFRA unquestionably applies.

D. The Discipleship Program does not violate the Establishment Clause.

For the first time on appeal, *amici* assert that exempting the Discipleship Program from the FHA would violate the Establishment Clause. This argument is both waived and meritless.

1. The Establishment Clause argument is waived.

"Generally, we do not consider on appeal an issue raised only by an amicus." *United States* v. *Gementera*, 379 F.3d 596, 607 (9th Cir. 2004). The only exceptions are for "purely legal questions when the parties express an intent to adopt the arguments as their own," or for questions of jurisdiction, federalism, or comity that "may be considered sua sponte." *Id.* Neither exception applies here.

Nor can Plaintiffs raise the claim for the first time on appeal themselves. In *MacDonald* v. *Grace Church Seattle*, this Court refused to consider a new Establishment Clause argument because it was not a "pure question of law" and required "a determination of factual matters." 457 F.3d 1079, 1086 (9th Cir. 2006). Here,

too, *amici*'s Establishment Clause argument turns on multiple factual issues, such whether Cowles had a secular alternative, whether her participation was voluntary, and whether the Mission is a state actor.

2. The Establishment Clause argument is meritless.

The argument is also meritless, and the factual assertions *amici* make to support it are particularly baseless. Cowles was not "coerced to attend BRM's Discipleship Program" or denied "secular rehabilitation options." AU Br. 12, 3. She was offered a religious program because she told the judge and the Mission that she wanted a religious program. E-110-11.

When she grew disenchanted with the religious program, she asked for a transfer to a non-religious program. E-3. At Cowles' request, E-131, the program wrote a letter to her judge suggesting that she be offered a secular alternative. E-60. The judge then, in fact, modified the terms of her probation and released her from jail so that she could complete a secular recovery program. E-134.[27]

Amici's Establishment Clause argument also barks up the wrong tree. Even if Cowles had faced a choice between staying in jail and entering the Discipleship Program, that choice would have been imposed by the State, not the Mission. The

[27] The federal government lists thirty-five drug rehabilitation programs within fifty miles of Boise, many of which offer secular programming. *See* SAMHSA Substance Abuse Treatment Facility Locator, http://ow.ly/2XgOD. Had Plaintiffs raised an Establishment Clause claim below, discovery would have revealed even more secular alternatives.

appropriate remedy would be to order *the State* to provide a secular alternative (which it did)—not to punish the Mission.

Nor is the Discipleship Program a state actor. AU Br. 13-15. The program receives no government funds and has no direct interaction with the state. Merely accepting individuals who are referred by the state does not transform the Mission into a state actor. *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 832, 843 (1982) (private school was not a state actor even though the state paid the school to accept state referrals).

Hanas v. *Inner City Christian Outreach, Inc.*, 542 F. Supp. 2d 683 (E.D. Mich. 2008) is easily distinguishable. There, the court ordered the plaintiff to join the religious rehabilitation program against his will; here, Cowles volunteered. *Id.* at 690; E-75. There, the court conflated the rules of the program with the rules of the court; here, not so. 542 F. Supp. 2d at 690. There, the court denied a request for a secular alternative; here, a secular alternative was granted. *Id.* at 692; E-134. If a prison chaplain is not a state actor, *Montano* v. *Hedgepeth*, 120 F.3d 844, 850 (8th Cir. 1997), the Discipleship Program certainly isn't either.

III. Plaintiffs' retaliation and sex discrimination claims are meritless.

The District Court also correctly dismissed Plaintiffs' retaliation claims on the ground that the Shelter is not a dwelling and the Discipleship Program is protected by the First Amendment. Op. 33-34. In any event, Plaintiffs have not even at-

tempted to explain (1) what specific "protected activity" they engaged in, (2) what "adverse action" was taken, or (3) how there was a "causal link"—all of which are required under § 3617. *Walker* v. *City of Lakewood*, 272 F.3d 1114, 1128 (9th Cir. 2001).

Cowles' sex discrimination claim fails for similar reasons. Her affidavit offers no personal knowledge that any similarly-situated male members of the Disciple-ship Program were given privileges denied to her. Op. 34-35. Nor does she offer evidence that similarly situated males were allowed to work or receive visitors of the opposite sex. *Id.* Thus, the district court rightly rejected the claim.

CONCLUSION

The decision of the district court should be affirmed.

Respectfully submitted.

s/ Luke W. Goodrich

Luke W. Goodrich
Eric C. Rassbach
Asma T. Uddin
Diana M. Verm
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K St., NW, Suite 220
Washington, DC 20007
T (202) 955-0095
F (202) 955-0090

Counsel for Boise Rescue Mission Ministries

STATEMENT OF RELATED CASES

Counsel for Appellees is unaware of any related cases pending in this Court that (a) arise out of the same or consolidated cases in the district court or agency; (b) are cases previously heard in this Court which concern the case being briefed; (c) raise the same or closely related issues; or (d) involve the same transaction or event.

November 12, 2010

s/ Luke W. Goodrich

Luke W. Goodrich
Counsel for Boise Rescue Mission Ministries

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 12, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

November 12, 2010

s/ Luke W. Goodrich

Luke W. Goodrich
Counsel for Boise Rescue Mission Ministries

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing brief is proportionally spaced, has a typeface of 14 points or more, and contains 13,810 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

November 12, 2010

s/ Luke W. Goodrich

Luke W. Goodrich
Counsel for Boise Rescue Mission Ministries