IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC. Plaintiff, v. SARA PARKER PAULEY, in her official Capacity as Director of the Missouri Department of Natural Resources Solid Waste Management Program, Defendant.	)	Case No. 2:13-cv-04022-NKL

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION REQUESTING LEAVE TO AMEND COMPLAINT

The Court should reconsider its Order dismissing the Complaint as it incorrectly treated Defendant's Motion to Dismiss as a motion on the merits by improperly evaluating the evidence. In ruling on a motion to dismiss, a court must accept the allegations in the complaint as true. Here, Plaintiff alleged that the State does not have a compelling governmental interest to prohibit Plaintiff from participating in the scrap tire program. But rather than accept that allegation as true, the court evaluated the evidence to see if indeed Missouri has a compelling government interest to prohibit Plaintiff from participating in the scrap tire program. This was error, and the Court should reconsider its Order.

The Defendant's respond by claiming that the Court did not commit any error as the State has a compelling governmental interest to insist on a high degree of separation between church and state and has an interest in following its own laws. *See* Defendant's Suggestions in Opposition to Plaintiff's Motion for Reconsideration ("Defendant's Opposition") at 1, 3. But

whether the state has acted in such a way as to negate its alleged compelling interest is not an appropriate determination on a motion to dismiss. The Court must accept the pleaded allegations as true and allow the parties to present their evidence.

Whether the state has a compelling interest hinges on the evidence in the case. Although this case was not to the point where evidence was to be submitted, Plaintiff has significant evidence showing the state does not have a compelling governmental interest here, including evidence that the state has repeatedly given grants to church daycares and preschools. A state actor does not have a compelling interest when it acts contrary to that interest. *See Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993) (finding that the city did not have a compelling interest to prevent the ritual slaughter of animals when it allowed the killing of animals for various other reasons, including meat butchering) and *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (1999) (holding that city did not have a compelling interest to prohibit policeman to have beards when it allowed policeman to have beards for other reasons, including medical reasons).

In addition, the Court should grant Plaintiff leave to amend its complaint to include the newly discovered evidence that the State has issued several grants to church-run daycares.

I. The Court inappropriately evaluated the evidence on a motion to dismiss.

Trinity pled ample facts for the Court to infer that the State violated Trinity's constitutional rights by denying it participation in the scrap tire program. But rather than simply evaluating whether Trinity pled a plausible claim for relief, the Court reached the legal merits of the case and dismissed Trinity's complaint. Defendant argues that dismissal was appropriate because "Missouri's insistence on a high degree of separation of church and state is a compelling

state interest." *See* Defendant's Suggestions in Opposition to Plaintiff's Motion for Reconsideration, 1-2.

But whether the state has a compelling interest in this case is a factual matter, and not a legal matter that is conclusively established before the presentation of evidence. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993) and *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (1999) are directly on point.

In *Hialeah*, a church sued the city over an ordinance than prohibited the ritual slaughter of animals. The city defended its ordinance, citing several compelling interests, such as preventing cruelty to animals and public health. *See id*. at 543-544. The Court rejected the argument that such interests were compelling because the City had acted contrary to such interests in numerous ways. For example, although the City claimed to have a compelling interest to prevent cruelty to animals, it allowed fishing and the extermination of mice and rats within homes. *See id*. at 543 ("Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing—which occurs in Hialeah … is legal. Extermination of mice and rats within a home is also permitted.")

The Court held that the City's actions in permitting various killings of animals undercut its claim to a compelling governmental interest. "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest 'of the highest order' … when it leaves appreciable

damage to that supposedly vital interest unprohibited.'" *Id*. at 546-47 (quoting *Florida Star v. B.J.F*. 491 U.S. 524, 541 (1989) (Scalia, J., concurring in part and concurring in judgment).

The same analysis was used in *Fraternal Order of Police*. There the court held that a city police department did not have a compelling governmental interest prohibiting facial hair on its officers when it permitted various exceptions. *See Fraternal Order of Police Newark Lodge No. 12*, 170 F.3d at 366 ("The Department's decision to allow officers to wear beards for medical reasons undoubtedly undermines the Department's interest in fostering a uniform appeaerance through its 'no-beard' policy.")

Whether the state has a compelling interest is not a forgone legal conclusion. It depends on the facts of the case. But if the state has indeed funded other similar organizations, like the fifteen other examples of daycares and schools that are controlled by a church and that received a scrap tire grant, then the state's alleged compelling interest falls. Consequently, the Court's analysis exceeds the scope of Rule 12(b)(6) motion, and is manifest error. As discussed above, Trinity pled sufficient facts in its complaint to state a plausible claim for relief, and should be permitted to proceed to discovery. Thus, Trinity requests that this Court amend its judgment to reinstate the case.

II. Trinity Requests Leave to Amend Its Complaint With New Evidence That The State Granted Tire Scrap Materials to Numerous Religious Entities.

Trinity seeks leave to amend its complaint, for the first time, to include newly discovered evidence that the state has issued grants on at least fifteen occasions to religious daycares. Rule 15(a)(2) provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." "All circuits acknowledge that post-judgment leave to amend may be granted if timely requested." *U.S. ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 823 (8th Cir. 2009).

This amendment is necessary to serve justice. The State claims that it has a compelling interest in excluding Trinity from its scrap tire program *solely* because Trinity is a church and its participation would violate Missouri's Blaine Amendment. The Court accepted this argument, and dismissed Trinity's lawsuit on the assumption that the Church could not produce evidence that the State lacks a compelling interest in its heightened separation between church and state. But the State itself disclosed in discovery that other religious schools and churches have received scrap tire grants from the State of Missouri. This fact drastically undercuts any purported interest the State may claim in refusing scrap tires to Trinity solely because it is a church. It would be a grave miscarriage of justice to disallow an amendment that directly undercuts the State's position and the Court's rationale for dismissal.

Defendant argues that this amendment should not be allowed as it would be futile. *See* Defendant's Opposition, at 3 ("Plaintiff proposed amended complaint is no different from the dismissed complaint, in that Plaintiff still seeks a ruling that Missouri Art. I, Section 7 should not be applied to Plaintiff, even though it is a church.") But this argument misses the point that if indeed the State does not have a compelling interest here (as could be proven by the State's actions in funding church-run daycares), then its actions in prohibiting Plaintiff from participating in the scrap tire program are unconstitutional. Plaintiff should be allowed to amend its complaint.

Conclusion

The Court manifestly erred in overlooking the sufficiency of Trinity's complaint, reaching the legal merits of the case, and analyzing the sufficiency of Trinity's evidence at the motion to dismiss stage. Therefore, Trinity respectfully requests that this Court reconsider its

Order, reinstate Trinity's case, and permit Trinity to amend its complaint with newly discovered evidence that the State of Missouri grants scrap tires to other religious organizations.

Respectfully submitted, this 2nd day of December, 2013.

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**Admitted Pro Hac Vice*

CERTIFICATE OF SERVCE

I hereby certify that on this 2nd day of December, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to:

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s/ Joel L. Oster
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