IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
PART II, TWENTIETH JUDICIAL DISTRICT
AT NASHVILLE

CHRIST CHURCH PENTECOSTAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 11-50-IV**
	)	
TENNESSEE STATE BOARD OF EQUALIZATION; TENNESSEE ASSESSMENT APPEALS COMMISSION; GEORGE L. ROOKER, JR., in his official capacity as the DAVIDSON COUNTY ASSESSOR OF PROPERTY; and **ROBERT E. COOPER, JR.,** in his official capacity as Attorney General and Reporter for the State of Tennessee,	)	
	)	
Defendants.	)	

PLAINTIFF'S INITIAL BRIEF

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Table of Contents

I.

INTRODUCTION

This is a case about tax exemption for a church building that is used purely and exclusively for carrying out the religious purposes of the church. The Assessment Appeals Commission denied tax exemption for portions of the Church's building even though the Church presented undisputed evidence as to how the uses in those portions of the building were integrally related to the purpose and mission of the Church.

The Commission's decision is contrary to the standards for tax exemption in the Tennessee statutes, and it violates the Church's constitutional rights under the United States Constitution. This Court should reverse the Commission's decision and hold that the entirety of the Church's property is exempt from taxation. In doing so, not only will this Court adhere to the statutory test for exemption of religious property, but it will also avoid violating the Constitutional freedoms of the Church.

II.

STATEMENT OF FACTS

Christ Church Pentecostal has been in existence since 1949. (T. 292).[1] It occupied various properties in the Nashville area for several years before moving to its current property on Old Hickory Boulevard in 1972. (T. 293). Initially, Christ Church purchased five acres of property on Old Hickory, but through the years the Church property has expanded to twenty-four acres with several buildings. (T. 293). From the beginning of the church, all of its buildings have always been considered exempt from taxation. (T. 293).

In 2004, construction was completed on an educational wing of the church. (T. 24; R.

[1] References to the Record in this Brief will be to the Record on Appeal by page number as follows, R. ___. References to the Transcripts of the Hearings before the Administrative Law Judge and before the Assessment Appeals Commission will be to the Transcript by page number as follows, T. ___.

318-340). The addition contains space for worship and fellowship activities, classrooms for religious education and children's activities, an indoor playground, a chapel, a café and bookstore area, and a fitness center with gymnasium. (R.320, 299-303, 292-294). The entire purpose of the new building is to preach the good news of Jesus Christ and to do everything the Church can do to attract people, both young and old, to minister to them. (T. 17, 25). The new building is a part of Christ Church's overall mission which is to be a "community of Worship and Word dedicated to Life Transformation through Service to the Glory of God." (R. 21). The Christ Church Statement of Purpose demonstrates how the buildings and the activities of the Church fulfill the Mission of the Church:

> The Christ Church Corporation exists in order to proclaim in word and deed the gospel of Jesus Christ as this church understands it. Theologically, this involves the teachings of both Old and New Testaments and the application of those teachings to the entirety of individual, family, and community life.
>
> . . .
>
> In order to facilitate these aims, this Corporation shall secure certain organizational and material tools. These shall include, but are not limited to a bookstore (where materials for study may be purchased at reasonable cost by those who attend our church), places for refreshment and fellowship (such as a coffee shop), a gymnasium for training our members and neighbors in physical fitness, and a cemetery where we can bury our dead and give visible witness to our belief in "the communion of saints." **All such ministries will grow from our purpose statement and shall be organized and operated in such a way that facilitates this purpose statement.**
>
> This church will specifically utilize these ministry entities to provide care and education to immigrant or indigent communities in order to integrate them into the social networks of the city and to facilitate their transition into citizenship and productive involvement with their fellow citizens. However, we will endeavor to operate in such a way that we remain fiscally solvent and compatible with our biblical beliefs. (R. 21) (emphasis added).

Believing that the new addition to its building was completely in alignment with its stated mission of proclaiming the Gospel and ministering to the community, Christ Church applied for

a tax exemption for the new building on November 17, 2004. (R. 318-340).

The Initial Determination by the State Board of Equalization

On January 23, 2007, a staff attorney for the State Board of Equalization conducted a site visit of the new facility and, on March 20, 2007, made an Initial Determination that most of the new building was tax-exempt. (R. 275-291; R. 55-142). The Initial Determination denied tax exemption for two different areas of the new building: (1) the bookstore/café area, and (2) the fitness center/gymnasium. (R. 290). A lengthy letter attached to the Initial Determination purported to explain the rationale for the denial of tax exemption for these areas. (R. 275-287). The letter states that the bookstore/café area of the building is "without a doubt a retail business," and that it "competes with similar tax-paying businesses." (R. 277). The letter characterized the fitness center/gymnasium as "without a doubt a business operation," as "commercially operated," and also concluded that the fitness center was not "directly incidental to the accomplishment of the religious outreach purposes of a church or its doctrinal desire to promote health." (R. 280).

In 2008, Christ Church was assessed taxes on the portion of the building denied tax exemption. (R. 311-315). The Church appealed the assessments and the Initial Determination to the State Board of Equalization. (R. 308, 316).

The Hearing Before the Administrative Law Judge

A hearing on the appeal was held before Administrative Law Judge Pete Loesch on August 19, 2009. (T. 265- 495). The testimony at the hearing was consistent and undisputed that Christ Church's property was used entirely for a purely and exclusively religious purpose. Pastor L.H. Hardwick testified that:

> The whole purpose was to provide places where people could come that were not necessarily religious people as such, but people that -- for instance, some of the

> people in the neighborhood would come in and be attracted to the gym or to the bookstore or to the coffee shop, and this would minister not only to them, but also, of course, to our own church members. And the idea was to use it as an outreach tool and as a place for fellowship. (T. 293-294).
>
> . . .
>
> our purpose is to bring these people step-by-step into an area where they're going to feel comfortable. And hopefully as they come to the gym, or as they come to the coffee shop, or the bookstore, and gradually kind of begin to feel comfortable there. Then hopefully, our whole purpose eventually is to bring them into a place of worship to where they can hear the word of God and sense the spirit of the Lord moving in the services. It's just a step leading into that. (T. 299).

Others from the church also testified that the entire purpose of the bookstore, gift shop, café, and fitness center are to expose unbelievers to the Church and to hopefully provide a space where unbelievers can feel comfortable coming in to a church setting. Pastor Dan Scott testified that the "main point here today is it's a part of our faith. It's not other than our faith." (T. 314). Scott Hord, who directs the fitness center, testified as to the purpose of the fitness center. He stated, "our whole thing was outreach. It was all about outreach. It was about connecting with the community, connecting with various races, religions." (T. 365). He also explained that,

> I like to say it's a bridge, and that's the clearest picture I think I can present. It's a bridge from the church to the community and it connects us with the community with people that would never probably ever connect with the church. And it brings them in. It meets their needs physically. It meets their needs from an athletic interest. And then it connects them to the body of the church eventually. (T. 359).

Mr. Hord testified that the entire fitness facility was to fulfill the purpose of the church which is to reach out to people with the Gospel and, "if we can get them to believe in Jesus Christ, then their lives will be transformed, their families will be transformed, and the community will be transformed." (T. 362).

Katy Mashburn, who manages the bookstore, gift shop, café facility, testified that the purpose of the facility was entirely religious. She stated

> And I know that everything we do; every book, every concert, every event we host for kids, every single thing is fulfilling our purpose, which is to teach people about Jesus Christ and his discipleship. And so I 100 percent believe that everything we do down to our core is fulfilling our purpose. (T. 438).

Juanita Dabbs, who works at the bookstore testified that the entire purpose of the bookstore, gift shop, café area was that, "It is definitely an extended ministry of Christ Church." (T. 451). Pastor Wayne Dismuke, who is the coffee shop pastor testified regarding the purpose of the areas for which CCP is claiming exemption when he stated, "that whole building that houses the gymnasium, the bookstore, the coffee shop, that's referred to as the Hardwick Center for Family Life, and that's the purpose behind that building, is to minister to every area of the man, the person." (T. 462).

No evidence was offered at the hearing to rebut or contradict any of the Church's direct and undisputed testimony on the purpose and workings of the bookstore/café and the fitness center.

On November 20, 2009, the Administrative Law Judge entered an Initial Decision and Order that held, "[I]n addition to those portions of the subject property approved for exemption by the State Board designee, the gymnasium component of the Hardwick Activity Center shall be tax-exempt to the extent of 50% of its value effective November 17, 2004. The remainder of the subject property shall be taxable." (R. 178).

The Hearing Before the Assessment Appeals Commission

On December 11, 2009, Christ Church appealed the decision of the Administrative Law Judge to the Assessment Appeals Commission. (R. 167-168). A hearing was held before the Commission on August 5, 2010. (T. 1-264). At the hearing, once again, the pastors and staff of Christ Church presented undisputed testimony that all of the activities in the bookstore/café and in the fitness center were integrally related to the purpose and mission of the Church. Pastor

Hardwick testified that the entire purpose of the building was "to preach the good news of Jesus Christ," and to "do everything we could do to attract the people, the young people, the older people, and minister to them." (T. 17, 25). Pastor Dan Scott once again referred to the purpose and mission of the church (R. 21), and set forth how the buildings have been used to further that mission and purpose, including examples of outreach activities conducted in both the bookstore/café and the fitness center. (T. 31-32, 35-36, 38, 43-45). Pastor Scott's testimony detailed how the uses of the bookstore/café and the fitness center were changing lives and were integral to the religious mission of the church to preach the gospel and minister to the community.

The Fitness Center

Scott Hord, previous director of the fitness center, described the purpose of the center as:

> [A] bridge to the community. There's a lot of people in the community that won't step foot in the church and come to a worship service but might come into the gym to play basketball or to work out, and so I always looked at myself really as an undercover pastor on staff to meet those people and get to know them but not only meet their needs for why they're coming in, but my intention was really to share Christ with them and to help them where they're at. (T. 67).

Although the church charged a fee for use of the fitness center, Mr. Hord testified that the fee was really more of a suggested donation and that no one was turned away for lack of ability to pay the suggested fee. (T. 68, 97). The Church only charged a fee in order to allow people to take ownership in the facility to preserve it from damage and abuse. (T. 69). In the few years of its operation, the fitness center income usually never exceeded the expenses of operation. (T. 69-70). But the Church never expected to make any money on the fitness center and only held it open for its ministry purposes of outreach and ministry to the community. (T. 88-89).

Mr. Hord prepared a comprehensive list of the many activities conducted in the fitness center and testified how each of the activities was directly related to the Church's mission and

purpose. (T. 70-91). For example, Mr. Hord stated that the fitness center is used every year for Vacation Bible School. (T. 71). He discussed the Upwards Sports program and how that program reaches out to the community at large and was one of the greatest outreaches that Christ Church had in the fitness center. (T. 74-75). Mr. Hord testified that over the years the fitness center had "become an opportunity to people to get to know each other in the form of that community that churches need to have." (T. 78). Without the fitness center, Mr. Hord stated that Christ Church "just won't be able to impact the community the way we have in the last five years." (T. 91).

At times, during the operation of the fitness center, a personal trainer would come in and offer training for a fee. (T. 88). Additionally, the Church offered dance, yoga, and pilates classes for a fee. (T. 93). The inclusion of the personal trainer was allowed because Mr. Hord knew the trainer and viewed him as "not just a personal trainer, but a guy that was involved in the men's ministry, which I'm involved with, and I knew that it would be great for people to get to know him not just for the benefit of what he's an expert at, but also from a Christian perspective."(T. 102). The Church never made a profit off of the trainer or the specific classes and the classes were only offered to "get to know these people and bridge them to church... and also eventually share Christ with them or try to get them to come to Church." (T. 88-89, 72).

Mr. Hord testified that the fitness center was transitioning to control by the YMCA. The YMCA was planning to move into the fitness center and Christ Church was no longer going to be operating its fitness center as a ministry of the Church. (T. 89-90). As of July 14, 2010, the YMCA took over the fitness center and is currently operating it as a YMCA facility under a Space Use Agreement with Christ Church. (T. 210-211, 214).

The Bookstore/Café

Katy Mashburn, the general manager of the bookstore/café area testified that the purpose of the bookstore/café was to "reach people… they wanted to be reached through the word, and so we wanted to… just build a bridge through…being able to get together over a cup of coffee or a book." (T. 104). Ms. Mashburn prepared a comprehensive list of uses of the bookstore/café area and testified how each of those uses was directly related to the purpose and mission of the Church. (T. 105-110). For example, the bookstore/café area contained televisions where the sermons were broadcasted live from the sanctuary. (T. 107). The bookstore/café, through the televisions became "a sanctuary for some people." (T. 107). Ms. Mashburn stated that everything the bookstore carried "has been very purposeful and its communicated biblical principles…." (T. 108).

The pricing of the items in the bookstore was based on making the item affordable to people. (T. 118). Sometimes the suggested retail price for the book or item was the price that was set, but the overriding concern was to make the item affordable, and if the item was something that someone needed, they were never turned down if they could not afford it. (T. 118). This was in keeping with the bookstore's overarching purpose to be a ministry source to the church and community. Ms. Mashburn testified that the bookstore was different than a retail bookstore because it was hidden within the church, it did not have regular retail hours, it only carried items that were in alignment with the Church's theology, and it was intended to reach out to the people in the Church and the community. (T. 114-115). She stated at the hearing before the Administrative Law Judge that the bookstore "was never conceived to be a retail environment. It was meant to be a ministry." (T. 444). She then explained, "everything we do; every book, every concert, every event we host for kids, every single thing is fulfilling our

purpose, which is to teach people about Jesus Christ and his discipleship. And so I 100 percent believe that everything we do down to our core is fulfilling our purpose." (T. 438). This was consistent with the testimony of Wayne Dismuke, the coffee shop pastor, who testified:

> I don't agree that it [the bookstore] was retail. We sold things, but we gave away as much as we sold, and there's not very many retail places that would continue to thrive for six years as we did by not making any money, but we thrived because of the ministry that was there. (T. 138).

In fact, Ms. Mashburn testified that the bookstore's income never exceeded the expenses and so the Church never made any money on the bookstore. (T. 126). She stated, "We lost money every year, but I don't think of it as losing money, I think of it as, you know, giving back to our community." (T. 126).

Ms. Mashburn testified that the bookstore/café at Christ Church was very similar to other college and university bookstores in the area. (T. 111). She stated that she had visited the college or university bookstores of Lipscomb University, Vanderbilt University, and Belmont University, and that the bookstores in those colleges and universities were very similar to Christ Church's bookstore except that they offered more items than Christ Church did. (T. 111). Pastor Scott testified that the bookstore was "more like a college bookstore where the professor can say you can get this over here at the college bookstore..." (T. 35).

Ms. Mashburn finally testified that the bookstore/café area was being discontinued by the Church in order to utilize the space for youth meetings. (T. 115-118). The bookstore will be moving back to its original location in the main church building and is being drastically downsized so the Church can use the bookstore/café space in the new building for youth activities. (T. 115-118, 33). The bookstores/café ceased operating in the new building on June 26, 2010, and the space was converted to meeting space and classrooms for Bible study. (R. 2).

The nature of the bookstore/café as a ministry of the Church and not as a retail

establishment was echoed by Mike Briggs, a member of Christ Church who is also a consultant in the Christian publishing and retail industry. (T. 151-152). Mr. Briggs has been consulting like this since 1990 all throughout the United States. (T. 152). He testified that the vision of the bookstore was not a retail space, but was ministry oriented. He stated:

> The vision for the whole thing was to be able to have resources that would help the people that attended the church minister not only to the members themselves but to help them minister to others in the neighborhood, shall I say, and have a positive impact on the culture for the cause of Christ. (T. 153).

He testified that it was not the vision of the Church to start a retail bookstore and that it was not feasible to do that at the Church because of lack of visibility and velocity of product. (T. 153-155). He stated that "If it wasn't the church supporting that space, it couldn't stand on its own." (T. 155). Mr. Briggs testified that the decision about pricing for the items in the bookstore was made at the point of need. (T. 165). He stated that the Church was different from other retail stores in that the Church bought the product outright as opposed to merely stocking it for the manufacturer as a retailer would. (T. 165). That figured in to the ministry focus of the Church. In discussing pricing, Mr. Briggs stated:

> In the case of Christ Church, because you identify the ministry value of that product, you say we've made an investment in this product because we know that at some point somebody may have a specific need that this product will meet and therefore we're buying it, we own it, we put it on the shelf. Whether we sell it to them at full retail, at a discounted price, or give them free is something that's determined at the point of need, I guess, from the person that comes in. (T. 165).

Mr. Briggs also stated that church bookstores are a growing ministry for churches across the country. At the time of the hearing before the Administrative Law Judge in 2009, there were 2,700 church bookstores across the country. (T. 158). A year later, at the time of the hearing before the Assessment Appeals Commission in 2010, there were 3,200 church bookstores across the country. (T. 158). He stated that church bookstores are becoming "an important means of

being able to minister to the people in the pews." (T. 158).

Expert Testimony

This opinion was buttressed by Dr. Gregg Allison, a professor of church history and theology from Southern Baptist Theological Seminary in Louisville. Dr. Allison provided expert testimony in the hearing before the Commission. He is a recognized expert in the field of church history, theology, and the history of theology. (T. 177-179; R. 36-53). Dr. Allison prepared an expert report for this case and testified at the hearing that, after studying Christ Church's mission, purpose, and its activities in the bookstore/café and the fitness center, it was his opinion:

> That the activities that Christ Church engages in in the café and bookstore and activity center are consistent with Christ Church's mission and purpose statement and consistent with Christian theology and the history of the church. ... the activities that it engages in in these three venues are integrally related to its mission and purpose. (T. 179, 193).

Dr. Allison's expert report in this case concluded:

> Each of the activities Christ Church conducts in the HAC are consistent with how churches have fulfilled their religious mission throughout the ages. Indeed, it has been common for churches in history, as well as in contemporary society, to provide space for evangelization and discipleship activities to occur. What Christ Church does in the HAC is in keeping theologically with the Church's mission on earth and is in keeping with the historical and contemporary practices of churches across the globe.
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> . . .
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> Each of the activities Christ Church conducts in the Bookstore/Café are consistent with how churches have fulfilled their religious mission throughout the ages. Indeed, it has been common for churches in history, as well as in contemporary society, to provide space for evangelization and discipleship activities to occur. What Christ Church does in the Bookstore/Café is in keeping theologically with the Church's mission on earth and is in keeping with the historical and contemporary practices of churches across the globe. (R. 27, 38).

Following the testimony, the Assessment Appeals Commission deliberated and voted to uphold the determination of the Administrative Law Judge to tax the bookstore/café area and to

tax 50% of the fitness center. (T. 250-263). On October 8, 2010, the Commission released its Final Decision and Order. (R. 15-19). In its opinion, the Commission stated with regard to the fitness center that Christ Church's furthers the purpose of the Church but that because Christ Church utilized "fee-based public membership and fee-based group and individual instruction similar to secular fitness facilities, and thus are not used *exclusively* for religious purposes." (R. 17). The Commission held that Christ Church had taken the bookstore/café "to a new level. With cash registers, inventory control, and pricing at or near retail." (R. 17). Thus, the Commission held that "no sufficient basis has been shown to overturn the initial decision and order of the administrative judge, which should be affirmed." (R. 18).

Christ Church timely filed a Petition for Review with this Court on January 13, 2011, and respectfully requests that this Court overturn the decision of the Assessment Appeals Commission and find that the bookstore/café and the fitness center are entirely exempt.

III.

ARGUMENT

The decision of the Commission to tax the bookstore/café area and the fitness center is contrary to the law and the facts in that Christ Church proved that all of the use of those spaces was purely and exclusively for the carrying out of the religious purposes of the Church. No contrary evidence was presented to rebut this. Thus, Christ Church's facilities are entirely exempt.

Denying tax exemption for the bookstore/café and the fitness center also violates the United States Constitution under the First Amendment and the Fourteenth Amendment. The decision to tax the property violates the Establishment Clause of the First Amendment because it interferes and excessively entangles the government with the religious doctrine of the church.

The decision to tax the property also violates the Equal Protection Clause of the Fourteenth Amendment because it treats Christ Church, a religious organization, differently than other similarly situated entities that are given a tax exemption for virtually identical facilities either statutorily or through established case law. There is no sufficient government interest in this kind of differential treatment.

A.

Christ Church is Entitled to a Tax Exemption Because it Established that the Bookstore/Café and the Fitness Center Are Used Purely and Exclusively for Carrying Out the Purposes of the Church.

Tennessee Code §67-5-212(a)(1) states that property owned by a religious institution and actually used "purely and exclusively for carrying out one (1) or more of the exempt purposes for which the institution was created or exists" shall be exempt from taxation. The Tennessee Supreme Court has held that "in this state, contrary to most other states, tax exemptions in favor of religious, scientific, literary and educational institutions are liberally construed, rather than strictly." *George Peabody College for Teachers v. State Board of Equalization*, 407 S.W. 2d 443, 445 (Tenn. 1966). The Tennessee Supreme Court has clarified the test for use under the exemption statute and has stated that the use requirement is met if the property's use is "directly incidental to or an integral part of one of the recognized purposes of an exempt institution." *Methodist Hospitals of Memphis v. Assessment Appeals Comm'n.*, 669 S.W.2d 305, 307 (Tenn. 1984). This determination is necessarily fact intensive. "[E]ach case must be decided on its facts and the application of the law to those specific facts." *Youth Programs, Inc. v. State Board of Equalization*, 170 S.W. 3d 92, 106 (Tenn. Ct. App. 2005). In this case, the record is undisputed that the bookstore/café area and the fitness center are put to uses that are directly incidental to or are an integral part of Christ Church's purpose and mission.

Every single person who testified both before the Administrative Law Judge and the Assessment Appeals Commission was unified in their testimony that every use of the areas under consideration were integral to the purpose and mission of Christ Church. Pastor Hardwick, the pastor emeritus of the Church testified that the entire purpose of building the addition that contains the bookstore/café and the fitness center was to reach out to the community and minister to their needs; something that is a direct purpose of the Church. Pastor Scott testified that the fitness center and the bookstore/café were used directly for ministry purposes. The record is replete with examples of how the activities by the Church in these areas have been used to minister and reach out to the community and the church members. (*See, e.g.,* T. 35-36, 44, 86-87, 111-113, 134-136, 201-207, 381-388, 389-392, 470-479). Indeed, there is no use of the café/bookstore or the fitness center that was not integral to this primary purpose of outreach, evangelism, and ministry.

The Exemption Designee, the Administrative Law Judge, and the Assessment Appeals Commission denied exemption for the bookstore/café and the fitness center because they believed that the uses were "retail" or "commercial" or were in competition with other secular retail or commercial uses. The Commission focused on the fee for the use of the fitness center and the classes, and the "cash registers, inventory control, and pricing at or near retail" of the items in the bookstore to deny tax exemption. (R. 17). The Staff Attorney's legal analysis stated that, "The church poses a significant and persistent competitive threat to taxpaying retail businesses such as local fitness centers, gift shops, coffee shops, chain book and gift shops and independent Christian bookstores." (R. 110). In contrast with this obvious hyperbole, the Tennessee courts have plainly stated that simply calling an activity "retail" or "commercial" or saying that it competes with secular uses does not justify denying tax exemption.

This is especially true when the State's property tax exemption scheme explicitly grants tax exemption to uses that do compete with commercial enterprises. The exemption statutes explicitly provide for a tax exemption for family wellness centers and for college or university bookstores. *See* Tenn. Code Ann. §§67-5-213(d)(1) and 67-5-525. Family wellness centers are in competition with private for-profit wellness and health centers to a greater extent than Christ Church's fitness center. Yet, family wellness centers are specifically exempt from property tax by statute despite this competition. Likewise, college or university bookstores are in competition with private for-profit businesses and bookstores. Yet college or university bookstores are exempt from property taxes. Similarly, the Legislature has granted a tax exemption for thrift stores owned by charitable or religious institutions despite the fact that those thrift stores compete with other clothing and furniture stores that are for-profit. *See* Tenn. Code Ann. §67-5-212(n). It is difficult to see how a concern about competition from Christ Church's uses of its property could be relevant or applicable when identical or more intensive competitive activities are specifically exempted by statute even though they compete with private for-profit businesses.

In addition, the requirement for obtaining exemption only requires that property be owned and actually used purely and exclusively for carrying out an exempt purpose. *See* Tenn. Code Ann. §67-5-212 (a)(1). There is no requirement that an exemption be denied if the use of the property in some way is designated as "retail" or "commercial" or if it competes in some way with other commercial enterprises. Focusing on whether an activity is characterized as "retail" or "commercial" detracts from the analysis mandated by statute - whether the use is purely and exclusively for carrying out an exempt purpose.

The retail competition concern was raised for the first time in a dissent in the 1892 case of *M.E. Church v. Hinton*, 21 S.W. 321 (Tenn. 1892). There, Justice Snodgrass dissented from

granting an exemption to property housing a publishing company and bookstore of a church. Justice Snodgrass advocated the rationale that, if extended too far, a church could run a business enterprise tax free and drive out taxable businesses. However, in later cases, the Tennessee Supreme Court has held that the competition concern is not a dispositive factor in the decision to grant or deny tax exemption. *See Book Agents of Methodist Episcopal Church v. The State Board of Equalization,* 513 S.W.2d 514, 523 (Tenn.1974). Indeed, in the *Book Agents* case, the Court discussed at length the competition concern, and cautioned against resting too heavily on such a concern. The Court stated

> It is true that the Methodist and Baptist institutions are in competition with other publishers, printers and consultants. Under the statute, however, the presence of competition makes property taxable only where an individual receives profits [Tenn. Code Ann. §67-502 (2)]. **The presence of competition is relevant but not determinative. Other companies could compete with an institution's efforts to accomplish an exempt institutional purpose**, but the circumstances may indicate that the purpose is not exempt.

Id. at 523 (emphasis added). The Court explained that, despite the presence of competition, "[T]he test of taxability is exclusive use for exempt institutional purposes and such use may be consistent with a privilege tax if the circumstances warrant." *Id.* Therefore, the last time the Supreme Court of Tennessee addressed the competition concern, it held that competition of non-profit entities with commercial enterprises should be sparingly applied. The Court explicitly held that the test for exemption is the use of the property for exempt purposes and not whether such use competes with commercial businesses. And the Court also pointed out that the competition concern could be taken too far considering that commercial enterprises can undertake a number of activities that compete with non-profit activities.

In the *Youth Programs* case, the court rejected a competition rationale and rejected focusing on whether the use of the property was "commercial" or "retail." *See Youth Programs*,

170 S.W. 2d at 92. In that case, the State argued that Youth Program's golf tournament was "fundamentally commercial in nature," and thus must be denied an exemption. *See id.* at 104. The court rejected that argument and stated:

> [W]e cannot imagine an activity in which Youth Programs might engage that would not be a considered a commercial endeavor were it not conducted by a charitable institution and the proceeds not given to a charity. The simplest bake sale involves the commercial activity of selling baked goods and, albeit to a negligible extent, competes with commercial, tax-paying entities conducting the same enterprise. The fact that a charitable institution's activities may be similar to or in competition with tax-paying businesses does not by itself render the property on which it conducts those activities taxable. *Book Agents, of the Methodist Episcopal Church v. State Bd. of Equalization*, 513 S.W.2d 514, 523 (Tenn.1974). For-profit entities may exist to provide the same services as non-profit, charitable entities. *Id.* We recognize, moreover, that the tournament in this case includes a substantial purse or profit to the tournament winner. However, the fact that a profit is generated by an organization's activities is not determinative. Section 67–5–212 disallows the exemption only where stockholders, officers, members, or other employees receive or are entitled to receive profits other than reasonable compensation for services.

Id. at 104-05.

In *Middle Tennessee Medical Center v. Assessment Appeals Commission*, 1994 WL 32584 (Tenn. Ct. App. 1994), the court granted tax exemption for a hospital book shop, but denied tax exemption for a wellness center operated by the hospital. The *Middle Tennessee* court was concerned that granting the tax exemption would give the hospital an unfavorable edge of competition over commercial health facilities in the area. But this decision was based on several facts not present in Christ Church's case. First, the membership costs were comparable to those charged by private for-profit health spas. *Id.* at *4. Second, the hospital advertised its programs to the general public. *Id.* at *5. Finally, the great majority of those using the facility were not under a doctor's care, but chose the facility over other competing business entities. *Id.* The Court of Appeals cautioned, though, that it was not attempting to "create some hard and fast rule to fix forever the tax status of wellness centers owned by charitable hospitals. *Each case must*

stand on its own facts." *Id.* Thus, the competition concern is fact-oriented and may not be applicable in every case.

None of the factors in *Middle Tennessee* are present in this case.[2] Christ Church only charges a small yearly fee for use of the facilities and gives away many memberships for free to those who cannot afford them. (T. 64, 97, 366, 371). Additionally, the bookstore gives away a lot of materials for free to those in need. (T. 118, 138, 317, 355-356, 437-438). The fee structure does not even mimic a commercial business at all. Christ Church also does not advertise its facilities to the general public. The use of the facility is limited to those who hear about it word-of-mouth. (T. 92, 95-96). Finally, there is no evidence in this case that people deliberately choose Christ Church's facility over commercial enterprises. In fact, the evidence in the case shows that the facilities are used by those who would not normally pay for use of commercial fitness facilities because they cannot afford such facilities. (T. 305). The Church's facilities are oriented toward members of the church and the surrounding neighborhood who need a safe place to go and who may not want to attend a church service.

Testimony from Michael Briggs, an industry consultant for inspirational Christian bookstores demonstrates conclusively that the bookstore, café, and gift shop are not even set up properly to compete with commercial businesses. (T. 153-155, 164-165, 169, 407-433). Mr. Briggs testified that, "it would not be possible to put a commercial venture in that church, especially where it is located." (T. 409). He also testified that, "There is not enough critical mass on the shelves of this little store to classify it as a viable commercial entity." (T. 413).

> From a business standpoint, there is a multitude of reasons why it can't be a viable retail organization. It doesn't pay rent, it doesn't produce enough profit

[2] It is also important to note that *Middle Tennessee* was decided prior to the addition to the exemption code of § 67-5-225 (family wellness centers). The addition of this statute, as described above, raises significant Equal Protection concerns that must be accommodated, and that make the rationale of *Middle Tennessee* less applicable in this case.

> margin to be able to pay any of its own overhead, no one in the industry, any kind of vendor, I should say, in the industry calls on it as a sales call to say we recognize you as a viable retail entity and we want to come make sales calls and get you to buy our product. (T. 154).
>
> There's a litany of things that I could list for you that doesn't make it viable. From the very fact of its location, not being a good commercial; for it not being able to sustain itself with paying any kind of rent or any kind of utilities; for the inability to be acknowledged as a retail entity by the very vendors that service that channel of retail. There are no sales reps that come to this church to call on them to say, buy our wares. They're not big enough to attract any kind of attention from the vendor community at all. The inventory that we do have is very aged and dated. We don't have the velocity of turnover. There's not people there every day of the week. There aren't established retail hours set up. They fluctuate with the seasons or the events that are going on at the church. (T. 415).

The facts of this case demonstrate that the competition concern that may be applicable in some cases is simply not applicable here.

Sparingly applied, as it should be, the competition concern is not present in this case and should not be used as a justification to deny exemption to Christ Church's property. Additionally, simply designating some of the activities as "retail" or "commercial" not only defies the undisputed testimony in this case, it is not an appropriate consideration in the exemption decision-making process. Given the fact that similar uses are exempt (family wellness centers, college or university bookstores, thrift shops) even though they engage in "retail" or "commercial" enterprises and could be considered in competition with for-profit businesses, the retail competition concern is plainly insufficient to negate the exclusive religious use of the properties in dispute.

The Church convincingly and overwhelmingly demonstrated that the entirety of the activities conducted in the bookstore/café and in the fitness center are directly incidental to or integrally related to the exempt purposes of the Church. Thus, they are exempt from taxation as these areas are purely and exclusively used for the exempt purposes of the Church.

B.

Denying Christ Church a Tax Exemption for the Bookstore/Café and the Fitness Center Violates the Establishment Clause of the First Amendment to the United States Constitution Because it Excessively Entangles the State in Church Doctrine.

The undisputed evidence in this case demonstrates that Christ Church's mission and purpose encompass all of the activities conducted in the bookstore/café and the fitness center. Indeed, the expert testimony in this case, which was also undisputed, demonstrated that all of the activities were integral to Christ Church's religious mission and also were in keeping with the religious mission of the worldwide church as a whole and were consistent with church theology and history. The Commission's decision to deny tax exemption for these areas was a governmental determination that the activities in the bookstore/café and the fitness center did not further the religious mission and purposes of the Church. This decision excessively entangles the government with church doctrine and theology and substitutes the wisdom of the state for the doctrine of the church in contravention of the Establishment Clause. Furthermore, the state's determination crossed the line from deciding the tax exemption on objective, neutral grounds to becoming engaged in deciding religious doctrinal issues in violation of the Establishment Clause.

The Establishment Clause obviously does not mean that churches get a free pass in the exemption context. Abiding by the neutral requirements of the law does not raise Establishment Clause concerns. But what the Establishment Clause does mandate is that the State must tread carefully when it purports to decide whether activities are integrally related to the religious mission and purpose of a church. The State did not tread carefully in this case and has crossed the line into violating the Establishment Clause.

1. The Establishment Clause Prohibits Governmental Interference with Church Doctrine.

The Establishment Clause of the United States Constitution states that, "Congress shall make no law respecting an establishment of religion...." U.S. CONST. AMEND. I. In deciding whether a particular governmental action violates the Establishment Clause, the Supreme Court has enunciated a three-part test. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Court has stated, "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13.

The excessive entanglement prong focuses on the fact that "neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947). Requiring courts to "inquire into the significance of words and practices to different religious faiths would tend inevitably to entangle the state with religion in a manner forbidden by our cases." *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981). "It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). "Properly understood, the [excessive entanglement] doctrine protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits (as in *Lemon*) or as a basis for regulation or exclusion from benefits (as here)." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (*citing* Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L.Rev. 347, 397 (1984)).

The United States Supreme Court has held that, "If there is any fixed star in our

constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in ... religion...." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The Supreme Court has consistently rejected, as violative of the Establishment Clause, any test that requires the government "to determine matters at the very core of a religion - the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role." *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l. Presbyterian Church*, 393 U.S. 440, 450 (1969). There is clearly an "overriding interest in keeping the government - whether it be the legislature or the courts - out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude." *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982). (Stevens, J., concurring). The Supreme Court has also recognized that there would be "serious constitutional questions that would arise concerning a statute that distinguishes between religions on the basis of commitment to belief in a divinity." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 n.3 (1982).

The Supreme Court has cautioned that attempting to define religious worship with any certainty is fraught with constitutional errors. In *Widmar*, the Supreme Court rejected a distinction between protecting religious speech and not protecting religious worship. The Court stated, "Merely to draw the distinction would require ... the courts ... to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the state with religion in a manner forbidden by our cases." *Id.* at 269 n.6. "The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in [the same] position."

United States v. Ballard, 322 U.S. 78, 87 (1944).

In *Colorado Christian*, the Tenth Circuit Court of Appeals held that exclusion of a Christian University from a state scholarship program violated the Establishment Clause because, at least in part, the criteria for exclusion required the State to improperly intrude into and decide religious doctrinal issues. The Court stated, "The Colorado provisions challenged here are fraught with entanglement problems. The most potentially intrusive element of the Colorado statute is the criterion requiring Commission staff to decide whether any theology courses required by the university 'tend to indoctrinate or proselytize.'" *Colorado Christian*, 534 F.2d at 1261. The Court found that, "The Commission concluded that the course failed the statutory criterion, although it did not explain why.... Such inquiries have long been condemned by the Supreme Court." *Id.* at 1262 (*citing New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.")).

Similarly, in this case, the State has made a determination that the bookstore/café and the fitness center do not further the Church's doctrine or mission. In essence, the State has taken upon itself the task of defining what the Church's religious mission and purpose is and has defined it in such a way as to exclude all the activities in the bookstore/café and most of the activities in the fitness center. And the State has done so without any evidence to rebut or contradict the Church's own testimony that every single one of the activities in the bookstore/café and the fitness center are integrally related to the Church's purposes and mission. Just as in *Colorado Christian*, the State here has denied tax exemption without stating why other than the State's own judgment that the property does not relate to Christ Church's mission and

doctrine and that the property is not traditionally what a church does. As *Colorado Christian* demonstrates, this determination is unconstitutional.

2. Other States Have Recognized that the Government Violates the Establishment Clause in the Exemption Context by Interfering with Church Doctrine.

The Supreme Court has plainly stated on numerous occasions that the Establishment Clause prohibits the state from engaging in a restrictive determination on matters of religion that would "prescribe what shall be orthodox in ... religion...." *Barnette*, 319 U.S. at 642. The Establishment Clause prohibits such determinations as completely outside the realm and authority of the government.

Other courts have similarly recognized this concept in the tax exemption realm. The Illinois courts have stated:

> [G]overnmental bodies are precluded from resolving disputes on the basis of religious doctrine and must respect the internal autonomy of religious organizations. **In the tax context, the first amendment requires the court to accept the entity's characterization of its activities and beliefs as religious as long as the characterization is in good faith.**

Fairview Haven v. Dep't. of Revenue, 506 N.E.2d 341, 348 (Ill. App. Ct. 1987)(emphasis added)(citations omitted). Likewise, in the tax exemption context, the New York courts have recognized that:

> When, as here, particular purposes and activities of a religious organization are claimed to be other than religious, the civil authorities may engage in but two inquiries: Does the religious organization assert that the challenged purposes and activities are religious, and is that assertion bona fide? **Neither the courts nor the administrative agencies of the State or its subdivisions may go behind the declared content of religious beliefs any more than they may examine into their validity.** This principle was firmly established in *Watson v. Jones*, when the Supreme Court declared that "the law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

Holy Spirit Assoc. for the Unification of World Christianity v. Tax Comm'n., 435 N.E.2d 662, 665 (N.Y. Ct. App. 1982)(emphasis added)(citations omitted). The Supreme Court of Colorado

explained the rationale behind granting such deference to religious organizations in the tax exemption field when it stated, "Avoiding a narrow construction of property tax exemptions based upon religious use also serves the important purpose of avoiding any detailed governmental inquiry into or resultant endorsement of religion that would be prohibited by the establishment clause of the first amendment to the United States Constitution." *Maurer v. Young Life*, 779 P.2d 1317, 1333 n.21 (Col. 1989). Similarly, the Tennessee courts recognize that, "[T]ax exemption statutes are construed liberally in favor of religious, charitable, scientific, and educational institutions." *Youth Programs, Inc. v. Tennessee State Bd. of Equalization*, 170 S.W.3d 92, 97 (Tenn.Ct.App.,2004). As the Colorado Supreme Court noted, this rule of liberal construction avoids improperly entangling the state in matters of religious doctrine.

In this case, the State undertook to decide what activities of the Church were within the traditional functions of the Church and what activities furthered the Church's mission. This type of inquiry is fraught with constitutional problems. Taking a position in contradiction to Christ Church's clearly-stated religious beliefs compounds the constitutional error in this case because the State has made a doctrinal decision on behalf of the Church. Essentially, the State has told Christ Church that, regardless of what the Church asserts about its mission and its doctrinal positions, the State will not accept it because it has made its own determination as to what the Church's mission and doctrinal positions are. This is true even though the State has no evidence to contradict Christ Church's testimony and no evidence that the Church is not sincere in its religious beliefs concerning how the uses of the bookstore/café and the fitness center further its mission and are congruent with its doctrinal position. The Establishment Clause prohibits just this sort of decision by the state.

The easiest way the State can avoid the Establishment Clause violation in this case is

simply to accept the undisputed evidence in this case that the uses in the bookstore/café and the fitness center are integrally related to the purposes of the Church. Granting a tax exemption to all of Christ Church's property would avoid the Establishment Clause violation that has already occurred in this case.

C.

Denying Christ Church a Tax Exemption But Statutorily Granting Similarly-Situated Entities a Tax Exemption Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution Because it Treats Similarly-Situated Entities Differently Without a Sufficient Basis for the Differential Treatment.

There are similarly situated uses of property to that of Christ Church that are granted a tax exemption either by statute or by court decision. These similarly-situated uses are treated more favorably than Christ Church. As applied in this instance, Tennessee Code §67-5-212(a), 67-5-213(d)(1), 67-5-223(a), and 67-5-225 violate the Equal Protection Clause of the United States Constitution because they treat similarly situated entities differently without any sufficient rationale for the differential treatment.

1. Unequal Treatment of Churches is Subject to the Highest Level of Constitutional Scrutiny

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985).

> It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the

> achievement of [any legitimate governmental] objective." *McGowan v. Maryland*, 366 U.S., at 425, 81 S.Ct., at 1105. This presumption of constitutional validity, however, disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, "suspect," the principal example of which is a classification based on race, *e. g., Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873.

Harris v. McRae, 448 U.S. 297, 322 (1980).

Religion is also considered a suspect class. The Supreme Court has stated that, "Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion." *Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990). Therefore, if the government classifies benefits such as tax exemptions and treats religious institutions less favorably than similarly-situated secular institutions, it must demonstrate a compelling interest for doing so and also demonstrate that the compelling interest it asserts is advanced in the least restrictive means available. The strict scrutiny test is the most exacting constitutional scrutiny available and the Supreme Court has recognized that, "if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test." *Id.* at 888.

In this case, the denial of tax exemption for the bookstore/café and fitness center portions of Christ Church's property treats it unequally from other similarly situated entities both in case law and in statutory classification.

2. The YMCA Tax Exemption.

Tennessee Code §67-5-225 exempts from property taxes "Real and personal property used as a nonprofit family wellness center...." Christ Church's fitness center activities are similarly situated to those of a family wellness center. In fact, Scott Hord testified that the YMCA's mission is very similar to Christ Church's and that he didn't expect to see much

difference between what the YMCA would do in the fitness center and what Christ Church did by itself in the fitness center. (T. 93-94). In comparing the statutory definition of a family wellness center in the Tennessee Code and Christ Church's activities in the fitness center, it is apparent that the only difference between the two is that Christ Church operates with a primary purpose of spiritual outreach. In contrast, a "family wellness center" in the Tennessee Code is defined, in part, as an entity that "Has as its historic sole purpose the provision of programs promoting physical, mental, and spiritual health, on a *holistic* basis without emphasizing one over another." Tenn. Code Ann. §67-5-225(a)(2) (emphasis added). Family wellness centers are granted a tax exemption, but Christ Church's virtually identical use was denied a tax exemption. The difference in purpose does not justify treating Christ Church's property differently than a family wellness center.

In *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), the U.S. Supreme Court struck down as unconstitutional a New Mexico statute that granted a property tax exemption to Vietnam War veterans who were residents of the state before May 8, 1976. The Court held that the statute violated the Equal Protection Clause because it treated veterans differently based upon the time of their residence in the state, and New Mexico did not provide a rational basis for such a distinction. The Court stated, "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 618. The Court examined the statute and its asserted justifications under the rational basis standard, which is the lowest level of constitutional scrutiny, and held that the State's asserted rationale for the distinction between Vietnam veterans living in the state before May 8, 1976, and those living in the state after that date were not rational. Thus, the statute was unconstitutional.

In the same way, providing a tax exemption for a "family wellness center" but not for

Christ Church's fitness center activities is irrational. There is no rational distinction to be made between what Christ Church does and what a family wellness center does other than perhaps the purpose behind the use of the property. Christ Church uses the property exclusively for spiritual outreach while a family wellness center uses the property primarily for holistic health. *See* Tenn. Code Ann. §67-5-225 (a)(1). In fact, as the following chart illustrates, there is absolutely no distinction between CCP's activities and a family wellness center's activities other than the purpose behind the activities:

Statutory Requirements for "family wellness center"	**CCP's activities in the Fitness Center**[3]
Provides team sports opportunities for youth and teens – Tenn. Code Ann. §67-5-225 (a)(2)(B)	Provides "Upward" sports programs and indoor soccer for youth and teens (T. 74-75, 76 333, 361-62)
Provides leadership development for youth, teens and adults – Tenn. Code Ann. §67-5-225 (a)(2)(C)	Provides leadership development for youth, teens and adults (T. 83-84, 385-385)
Provides services for at-risk youth and teens – Tenn. Code Ann. §67-5-225 (a)(2)(D)	Provides services for at-risk youth and teens (T. 83-84, 293-294, 295-297, 304, 335-336, 338, 380, 382-385, 389-392).
Provides summer programs for at-risk and non-at-risk youth and teens – Tenn. Code Ann. §67-5-225 (a)(2)(E).	Provides summer programs for youth and teens (T.71-72, 74-75, 354, 333-334, 340).
Provides outreach and exercise programs for seniors – Tenn. Code Ann. §67-5-225 (a)(2)(F)	Provides exercise programs for seniors and others (T. 83-84, 76-77, 370, 376-377, 363).
Provides services for disabled children and adults – Tenn. Code Ann. §67-5-225 (a)(2)(H)	Provides services for disabled children and adults (T. 473-484).

Overall, the activities in Christ Church's property are similarly situated to the activities required for a family wellness center to obtain exemption. There is no rational basis for treating Christ Church differently from an identical facility.

[3] In order be exempt as a family wellness center, an entity must only meet five of the eight listed criteria. CCP easily meets at least five of the listed criteria.

Additionally, denying Christ Church a tax exemption because it does not address health from a holistic perspective but from a spiritual perspective violates the Equal Protection Clause because it makes a class distinction based on religion. As the Supreme Court stressed in *Harris v. McRae*, 448 U.S. 297 (1980) and *Employment Division v. Smith*, 494 U.S. 872 (1990), when a state makes a statutory classification predicated on religion, it must demonstrate that there is a compelling reason for treating classes differently based on religion. Here, the State has no such compelling reason for granting a tax exemption to a family wellness center that approaches health from a holistic approach while denying Christ Church who approaches health from a primarily spiritual standpoint.

Treating Christ Church differently from a family wellness center violates the Equal Protection Clause because the State has no rational basis or compelling interest to justify granting a property tax exemption to a family wellness center while denying Christ Church's identical facility. Granting Christ Church a tax exemption removes any constitutional violation by treating the Church the same as a similarly situated family wellness center.

3. The College Bookstore Tax Exemption.

The Tennessee Legislature has exempted from taxation bookstores owned by colleges or universities that operate not-for-profit to supply students with textbooks even though the bookstore may also sell other items of a souvenir nature or toiletries. *See* Tenn. Code Ann. §67-5-213(d)(1). There is no qualitative difference in the activities of a college or university bookstore that is granted tax exemption under §67-5-213 and the activities of Christ Church in providing books and items for sale to its church members and others that visit the campus. Indeed, Katy Mashburn and Pastor Dan Scott both testified that the Christ Church bookstore was similar to a college or university bookstore. (T. 111, 34-35). There is no rational basis for

denying a tax exemption for the Church's bookstore/café while allowing a tax exemption for a virtually identical activity conducted by a similar entity. Denying Christ Church a tax exemption violates the Equal Protection Clause as described above. Granting the Church a tax exemption avoids an Equal Protection violation by treating it the same as other similarly situated entities and activities.

4. Hospital Gift Shops.

In *Tennessee Medical Center v. Assessment Appeals Commission*, 1994 WL 32584 (Tenn. Ct. App. 1994), the Tennessee Court of Appeals exempted a hospital gift shop under the same statute applicable in this case. The court held that the gift shop was directly incidental to one of the exempt purposes of the hospital and thus was entitled to a tax exemption. *Id.* at *3. The court found that the presence of the gift shop "makes the wait more bearable," and "promotes peace of mind." *Id.* Therefore it was directly incidental to the exempt purpose of the hospital to provide care for patients.

The only difference between a hospital bookstore/gift shop and Christ Church's bookstore/café is in the purpose of the bookstore. While the hospital has a purpose of caring for patients, Christ Church has a purpose of ministering to its congregation and the community. While the hospital's bookstore may make the wait more bearable and promote peace of mind while in the hospital, Christ Church's bookstore makes life more bearable and promotes spiritual health and peace of mind by ministering to the congregation and the community. The only discernible difference between a hospital bookstore and Christ Church's bookstore is in the purpose of the organization and that is an insufficient basis upon which to treat two similarly situated entities differently. It is hard to fathom how the Tennessee Court of Appeals has interpreted state law to require exemption of a hospital bookstore, but not a church bookstore.

Indeed, refusing to extend an exemption to Christ Church while granting an exemption to the hospital cannot survive strict scrutiny under the Equal Protection Clause. There is absolutely no compelling reason to grant a tax exemption for a hospital bookstore, but not for a church bookstore.

5. Community and Performing Arts Centers.

The State, by statute, applies a different exemption standard to entities such as museums, art galleries, and theaters. Property of churches is only exempt if it is used "*purely and exclusively* for carrying out one or more of the exempt purposes. . . ." Tenn. Code Ann. § 67-5-212(a)(1) (emphasis added). But the property of community and performing arts organizations (such as museums, art galleries, and theaters) is exempt for any "uses *necessary and incidental*." Tenn. Code Ann. § 67-5-223(a) (emphasis added). The exemption for community and performing arts organizations is much less rigorous than that for churches, since approved uses need only be "incidental" to the purpose of the organization rather than "purely and exclusively for carrying out" the purpose. It isn't hard to imagine that many (if not most) museums have a gift shop, and that many theaters most likely have a bar or coffee shop. Because those uses are exempted by the State and virtually identical uses by Christ Church are not exempted, the State must justify its differential treatment by demonstrating a compelling reason for doing so. This the State cannot do because there is no sufficiently compelling reason to treat the Church's bookstore/café differently from other identical exempt entities that do the same thing. The state has no valid justification from treating CCP differently from other similarly-situated entities.

D.

The Tax Exemption Statutes Violate the Free Exercise Clause of the First Amendment to the United States Constitution.

The tax exemption scheme in the Tennessee statutes violates the Free Exercise Clause

because it substantially burdens the free exercise of religion of Christ Church and does so without any compelling reason that is advanced in the least restrictive means available. The Free Exercise clause of the First Amendment bars any regulation of religious beliefs. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993), *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). However, laws which are facially neutral toward religion and generally applicable to all conduct, including religious conduct, can infringe on religious conduct without being subjected to strict scrutiny. *Smith*, 494 U.S. at 878. A law is neutral if, on its face, it does not target religious conduct, and it is generally applicable if it equally burdens religious and non-religious conduct without making exceptions for non-religious conduct which undermine its purpose. *Lukumi*, 508 U.S. at 533-540, 543-546. A law which burdens religious conduct and is either not neutral or not generally applicable is subject to strict scrutiny, *Smith*, 494 U.S. at 878, and therefore must serve a compelling government interest and be narrowly tailored to serve that interest. *Lukumi*, 508 U.S. at 546.[4]

In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the Supreme Court struck down a series of city ordinances which prohibited the practice of religious animal sacrifice while allowing almost all other animal killings, including those associated with hunting, fishing, meat production, and pest extermination. *Lukumi,* 508 U.S. at 536-537. The Court examined the city's two interests supporting the ordinances—preventing cruelty to animals and protecting public health. It found that the ordinances were "underinclusive for these ends" because they "fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree

[4] Any law which permits individualized, discretionary exemptions and burdens religious conduct must also undergo strict scrutiny, to avoid a situation where a law is facially neutral and generally applicable in theory, but in practice applied to discriminate against religiously-motivated conduct. *Smith*, 494 U.S. at 884.

than [religious animal sacrifice]." *Id.* at 543. Since the law was underinclusive and burdened Free Exercise, the Court applied strict scrutiny to the ordinances. It found that the city's interests "could be achieved by narrower ordinances that burdened religion to a far lesser degree" and found that, under its strict scrutiny analysis, "[t]he absence of narrow tailoring suffices to establish the invalidity of the ordinances." *Id.* at 546. "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 547 (internal quotations omitted).

Two Third Circuit cases, authored by then-Judge Alito, further illustrate the *Smith/Lukumi* general-applicability analysis. In *Fraternal Order of Police Newark Lodge v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), the court considered a police policy that prohibited officers from wearing beards but offered exemptions to two categories: 1) officers who had medical reasons for wearing a beard; and 2) officers that were undercover. *Id.* at 360. Two Muslim officers requested an exemption from the policy for religious reasons, but were denied. The City's reason for the policy was to promote uniform appearance among its officers. *Id.* at 366. The exception for undercover officers did not harm the purpose of the policy—as undercover officers are, by nature, out of uniform—and accordingly would not have resulted in imposition of heightened scrutiny. However, the exemption for medical reasons undermined that policy–it made the police officers' appearance non-uniform. *Id.* Thus, the policy as it was applied to the Muslim officers was subject to heightened scrutiny under the Free Exercise Clause and found to be unconstitutional. *Id.*

In *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3rd Cir. 2004), a Lakota Indian kept two bears on his property to conduct religious ceremonies in keeping with his tribe's traditions. *Id.* at

204. A state law prohibited privately keeping wildlife without paying a fee for a permit. The purported state interest in the law was to discourage "the keeping of wild animals in captivity" and to generate revenue. *Id.* at 211. Nonetheless, zoos and nationally recognized circuses were exempt from the fee requirement. *Id.* As a result, the court found the law not generally applicable under *Smith* and *Lukumi* because the zoo and circus exemptions "work against the Commonwealth's asserted goal of discouraging the keeping of wild animals in captivity," and its interest in generating revenue. *Id.* Thus, Pennsylvania's decision not to grant an exemption for religious reasons was subject to strict scrutiny and declared to be unconstitutional as a violation of Free Exercise.

1. The Tax Exemption Statutes are not Generally Applicable.

As stated above, the Tennessee tax exemption statutes are not generally applicable. They do not exempt all fitness centers, religious or otherwise. They do not exempt all bookstores, religious or otherwise. Instead, the Tennessee statutes create categorical exemptions for family wellness centers and for college and university bookstores but refuse to grant the same exemption to identical religious uses. Instead, Christ Church's fitness center and bookstore are taxable even though the only difference between Christ Church's facilities and the other identical facilities granted tax exemption under the Tennessee exemption statutes is that Christ Church's facilities are religious and serve a religious purpose.

2. Taxing Christ Church's Facilities Substantially Burdens the Church's Free Exercise of Religion.

It is undisputed that Christ Church's free exercise of religion is substantially burdened by the taxes levied on it in this case. Pastor Dan Scott testified that taxing the facilities would be devastating to the ministry of the church and would force it to close down certain ministries and thereby fail to reach certain populations with the gospel of Jesus Christ. Scott Hord testified that

closing the fitness center would be detrimental to the ministry and outreach opportunities of the Church. In sum, the testimony amply demonstrates that taxing the Church would prove to be a substantial burden on its ministry.

3. The Interest Supporting the Exemption Statutes is Undermined by the Exceptions to It.

The exemption statutes, as currently constituted cannot survive strict scrutiny because whatever interest the State has is undermined by the underinclusive nature of the exemption scheme. As the court stated in *United States v. Friday*, 525 F.3d 938 (10th Cir.2008):

> [W]hen strict scrutiny is applicable the government is generally not permitted to punish religious damage to its compelling interests while letting equally serious secular damage go unpunished. As the Supreme Court explained in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, "[i]t 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 958; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 579 (1993) (holding that an underinclusive statute fails to truly promote an interest of the highest order and stating, "If the State's goal is important enough to prohibit religiously motivated activity, it will not and must not stop at religiously motivated activity.") Whatever interest the State has in ensuring a uniform taxation of property is undermined completely by the exceptions to the statute contained in the college and university bookstore exemption and in the family wellness center exemption. The exemption statutes are underinclusive because they establish categorical exemptions for certain secular uses, like college and university bookstores and family wellness centers. Yet the State refuses to extend the same benefit to religious uses. The State cannot identify any compelling interest it has in preserving its exemption statutes as they currently exist because the current exemption scheme does appreciable damage to that interest to the same extent as exempting religious bookstores and fitness centers would. Put simply, the

State cannot identify a compelling reason for extending exemption only to secular fitness centers and bookstores but not religious ones.

Even if the State could identify a compelling interest, it is certainly not pursuing the interest in the least restrictive means available. A less restrictive means would be to require religious fitness centers to meet the same exemption requirements as family wellness centers and to allow religious bookstores a categorical exemption to the same extent as college and university bookstores. There are many ways to administer the exemption scheme in a way that is less restrictive to religious uses than currently exists.

In sum, the exemption statutes violate the Free Exercise Clause. Finding Christ Church's property to be exempt from taxation to the same extent as the secular uses granted exemption by the exemption statutes avoids this constitutional violation.

E.

The Exemption Statutes Violate Tennessee's Religious Freedom Restoration Act.

Tennessee Code § 4-1-407 is known as Tennessee's Religious Freedom Restoration Act ("RFRA"). It mirrors the Free Exercise Clause of the United States Constitution in many ways except for one important distinction. The Tennessee RFRA states in §4-4-407(b) that "no government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability." Therefore, unlike the federal Free Exercise Clause, even a law of general applicability cannot burden the free exercise of religion.

Tennessee Code §4-1-407 (c) states, "No government entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is: (1) Essential to further a compelling governmental interest; and (2) The least restrictive means of furthering that compelling governmental interest." As stated above, the

State cannot demonstrate a compelling government interest that is advanced in the least restrictive means. Thus, for the reasons already stated in the Free Exercise analysis, the exemption analysis also violates the Tennessee RFRA.

IV.

CONCLUSION

For the foregoing reasons, Christ Church respectfully requests that this Court reverse the decision of the Assessment Appeals Commission and grant tax exemption to the bookstore/café and the fitness center on Christ Church's property.

Dated this 28th day of April, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2011, a true and correct copy of the foregoing was served by placing same in the U.S. Mail, postage prepaid, addressed to:

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