UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE RIGHT REVEREND JOHN BRYSON CHANE, *et al.*,

Plaintiffs,

v.

THE DISTRICT OF COLUMBIA,

Defendant.

No. 08-cv-1604 (RJL)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Other Authorities **Page**

TABLE OF EXHIBITS & DECLARATIONS

Declarations

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THE RIGHT REVEREND JOHN BRYSON CHANE, *et al.*, Plaintiffs, v. THE DISTRICT OF COLUMBIA, Defendant.	No. 08-cv-1604 (RJL)

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Introduction

This lawsuit seeks to prevent the impending unconstitutional transfer of millions of dollars of District of Columbia government real estate and tax funds to the Central Union Mission to assist it in carrying out its stated purpose: "to glorify God through proclaiming and teaching the gospel, leading people to Christ, developing disciples, and serving the needs of hurting people throughout the Washington Metropolitan Area."

This transfer was specifically authorized by special legislation recently enacted by the District of Columbia Council. It is not part of any general, religiously neutral program. It will have the effect of coercing vulnerable, homeless people to participate in the Mission's religious activities on a daily basis. For these reasons and others, the planned transfer violates the Establishment Clause of the First Amendment, as well as D.C. Code § 44-715. Without interim injunctive relief, the transfer will take place before this Court can reach a decision on the merits of this lawsuit.

STATEMENT

A. Central Union Mission

As its website recounts, Central Union Mission (the "Mission") was established in 1884 to provide a Christian "outreach to wayward men . . . on the streets of Washington."[1] Its corporate charter provides that "[t]he business and objects of the Society are establishing, operating, and maintaining Gospel Missions of an undenominational or interdenominational character for the purpose of reaching the nonchurchgoing portion of the community in and near the District of Columbia, and auxiliary activities deemed necessary in furnishing emergency aid to persons and families."[2] Its formal Mission Statement declares: "Our mission is to glorify God through proclaiming and teaching the gospel, leading people to Christ, developing disciples, and serving the needs of hurting people throughout the Washington Metropolitan Area."[3] The Mission's informational tax return (Form 990) for the fiscal year ended June 30, 2007, reports that 78% of its program service expenses were devoted to "preaching the gospel and assisting the needy with food, clothes and shelter."[4]

As a means of capturing an audience for its religious message, the Mission provides food and shelter to homeless and needy people. The Mission offers overnight accommodation through two programs, the "Overnight Guest Ministry" and the "Men's Ministry–Spiritual Transformation Program."[5]

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[1] Exhibit 1 (http://www.missiondc.org/about/who_we_are.html) (this and all following citations to the Mission's website were accessed on September 22, 2008).

[2] Exhibit 2.

[3] Exhibit 1.

[4] Exhibit 3 at 3 (http://missiondc.org/pdf/990_2006.pdf).

[5] Exhibit 4 (http://missiondc.org/about/what_we_do.html).

1. The Overnight Guest Ministry

The Overnight Guest Ministry shelters approximately 80 transient homeless men each night.[6] The Mission describes this ministry as follows: "A hot supper, warm showers, fresh clean clothing, safe shelter at night, and a sizzling breakfast in the morning *all wrapped with the gospel message of hope*."[7]

A significant portion of the Mission's building is occupied by a chapel,[8] and homeless men are required to attend religious services there as a condition of receiving a bed for the night.[9] The following announcement is made every evening to men seeking shelter at the Mission: "Because we are a Christian ministry, and not just a homeless shelter, we conduct an evening chapel service and all overnight guests must attend in order to stay with us overnight."[10] No one is permitted to go upstairs to the sleeping quarters until after the chapel service is finished.[11] A guest who is assigned a bed and fails to attend chapel (or Bible study, when it is offered as an alternative) is barred from the Mission for a period of time.[12]

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[6] Exhibit 5 (Transcript of July 17, 2008 D.C. Council meeting) at 8 (testimony of Mission Executive Director David Treadwell) (see Declaration of Alex Garnick) (video available at http://oct.dc.gov/services/on_demand_video/on_demand_july_2008_week_3.shtm).

[7] Exhibit 6 (http://missiondc.org/about/shelter.html) (emphasis added).

[8] Declaration of John Gerdes, ¶ 3; Declaration of Roy Crabtree, ¶ 4.

[9] Declaration of Roy Crabtree, ¶ 5; Declaration of Timothy Blackwell, ¶¶ 13-17; Declaration of John R. McDermott, ¶ 2; Declaration of Eric Sheptock, ¶ 6.

[10] Declaration of John Gerdes, ¶ 4; *see also* Declaration of Timothy Blackwell, ¶ 14.

[11] Declaration of John Gerdes, ¶ 4. *See also* Declaration of John R. McDermott, ¶ 2; Declaration of Timothy Blackwell, ¶ 10. After the men are in bed, staff members walk around reading Bible verses to them. *Id*. ¶ 22.

[12] Declaration of Timothy Blackwell, ¶ 16. Shortly before the D.C. Council voted to approve the challenged legislation, the Executive Director of the Mission told the Council that participation in chapel services was not mandatory. However, the example he gave to substantiate that claim was as follows: "we on occasion have a Muslim young man come in in the evening. I will allow him to sit in a separate area. We'll talk to him, be sure that he is genuine in his beliefs and all; he's not required to attend anything. And that's an exception that

Chapel services at the Mission are explicitly Christian and typically last from 45 to 90 minutes.[13] Men seeking shelter receive a "nightly invitation to receive the Lord as Savior," so that their "spiritual transformation begins."[14] On one recent occasion, the preacher gave an aggressive sermon that denigrated religious beliefs different from his:

> You know Buddha cannot save you, Mohammed cannot save you, Confucius cannot save you and Mary cannot save you. . . . There's nobody that can save your soul from the Devil's burning Hell other than Jesus Christ. . . . I hope today that you're not one of his foes, you're either for him or against him.

The preacher then repeatedly urged the homeless men who had been required to listen to his sermon to come forward and commit themselves to Jesus.[15]

On Sundays, there is an additional religious program in the chapel before lunch; homeless men are allowed to stay in the shelter after breakfast, and get lunch, only if they attend this additional chapel service.[16]

2. The Men's Ministry–Spiritual Transformation Program

The Men's Ministry–Spiritual Transformation Program is a "12-18 month residential rehabilitation program for men who seek restoration through a relationship with Jesus Christ."[17] The program's "[g]oals are achieved by involving the men in systematic Bible Study, biblical

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we've made to accommodate." Exhibit 6 at 4 (Treadwell testimony). Such an "exception" only proves the rule. Timothy Blackwell stayed at the Mission for several months in 2007-08; he never saw anyone allowed to stay overnight who did not attend chapel or Bible study. Declaration of Timothy Blackwell, ¶ 17. Plaintiff Crabtree lost his bed at the shelter when he stopped attending chapel services because he needed to lie down and elevate his legs to treat his phlebitis. Declaration of Roy Crabtree, ¶ 8.

[13] Declaration of Roy Crabtree, ¶ 4; Declaration of John Gerdes, ¶ 2; Declaration of Timothy Blackwell, ¶ 18; Declaration of Eric Sheptock, ¶ 6.

[14] Exhibit 6.

[15] Declaration of John Gerdes, ¶ 5. This is typical. *See* Declaration of Timothy Blackwell, ¶ 19.

[16] Declaration of Roy Crabtree, ¶ 6; Declaration of Timothy Blackwell, ¶ 21.

[17] Exhibit 7 (http://missiondc.org/pdf/brochure.pdf).

counseling, regular drug testing, and work therapy in and around the Mission."[18] The Mission proclaims: "Changes happen when the men are encouraged and taught to cultivate an intimate and active relationship with Christ."[19] The Spiritual Transformation Program accommodates approximately 50 men, who live at the Mission; thus more than 1/3 of the Mission's beds are reserved for the men in this Program.[20]

Religion is a required component of the Spiritual Transformation Program, and the men in the program receive spiritual training every day.[21] In addition to attending evening chapel service, they take afternoon classes in such subjects as prayer, discipleship, and spiritual rebirth;[22] the program also provides "Christian counseling."[23]

The Mission applies constant pressure on overnight guests to join the Spiritual Transformation Program, and discriminates against those who decline to join. For example, men in the program receive reserved beds, while men who are not in the program do not, and must get in line on the street every afternoon to seek a bed.[24] Men in the Program get three meals a day at the Mission, while others must leave the shelter after breakfast six days a week and may not return until late afternoon.[25] Overnight guests at the Mission are regularly – sometimes several

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[18] Exhibit 8 (http://missiondc.org/about/mens.html).

[19] *Id*.

[20] *Id*.

[21] Exhibit 5 at 7 (Treadwell testimony).

[22] Exhibit 9 (Carlyle Murphy, *A Matter of Faith & Funds For Serving Area's Needy; Restrictions Divide Religion-Based Programs*, Washington Post, Mar. 18, 2001, at A1). (This and most other news articles cited in this memorandum are available through links on the Mission's "Media" web page, http://missiondc.org/about/media.html.)

[23] Exhibit 10 (*Spiritual Transformation Program Celebrates 25 years of Life Change!*, The Missionary, Oct. 2007) at 3, 5. (The Missionary is the Mission's newsletter.)

[24] Declaration of Roy Crabtree, ¶ 7.

[25] *Id*.

times per week – invited by Mission staff to join the Spiritual Transformation Program.[26]

3. Additional Ministries at the Mission

The Mission maintains a Food Service Ministry that serves thousands of hungry people every year, and "[a]t every meal," the hungry "hear about the love of Christ."[27] The Food Service Ministry also provides a "Food Depot" where needy people can "fill their shopping carts with wholesome items *after* they enjoy some good Gospel singing and an encouraging Word from the Bible."[28]

The Mission also maintains a Children's Ministry, which holds a "Back Pack Giveaway Party" in August and a "Christmas Bag Party" in December, at which children receive school supplies and Christmas presents, respectively. Children at these parties also "hear of God's love and salvation through faith in Jesus Christ."[29]

As part of its Community Outreach Ministry, the Mission hosts a monthly "Senior Luncheon" which includes "a hot meal and a joyful service replete with singing and praising."[30] The Mission also hosts an "Easter Senior Luncheon," where "[s]enior neighbors gather in the Mission Chapel to celebrate our risen Savior!"[31]

4. The Mandatory Nature and Discriminatory Impact of the Mission's Religious Activities

All the social services provided at the Mission require participation in religious activity. The Mission's Executive Director, David Treadwell, has explained why: "We really are in the

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[26] Declaration of Timothy Blackwell, ¶ 23.

[27] Exhibit 11 (http://missiondc.org/about/food.html).

[28] *Id*. (emphasis added).

[29] Exhibit 12 (http://missiondc.org/camp/index.html) at 2.

[30] Exhibit 13 (*Discovering Hope: Friends and Food in Times of Need*, The Missionary, Apr. 2007) at 1.

[31] Exhibit 14 (http://missiondc.org/events/happenings.html).

business of making disciples. We believe that the answer for these people is Christ. So we don't know any other way to meet their needs without sharing the Gospel with them."[32] He has also stated, "[W]e are in the business of converting people to Christ. That's what we do. We believe that's the ultimate answer to their needs."[33]

The Mission employs only Christians. Director Treadwell explained to the D.C. Council: "Because of the nature of the work that we're doing . . . we do want the whole team to be of the Christian faith."[34]

To be sure, the Mission offers its facilities and services to individuals regardless of their religious beliefs or non-beliefs, but this is because, from the Mission's perspective, a non-Christian is a lost soul that can be saved. Offering food and shelter to needy people garners the Mission an audience for its message that Jesus Christ is the answer to their problems. As Director Treadwell wrote in the Mission's newsletter: "It is well documented that people who are hungry, without homes, or battling addictions are not usually seeking Christ as the immediate solution to their problem. However, when followers of Christ step in to address immediate problems, they open the door for Christ and the solution to our greatest needs."[35]

Because of the Mission's mandatory religious activities, omnipresent Christian atmosphere, and frequent efforts to recruit overnight guests to the Spiritual Transformation Program, the Mission is not open *in a non-discriminatory manner* to persons of minority religious faiths, persons of no faith, or other persons who do not wish to participate in the Mission's brand of Christian religiosity. If such persons wish to obtain the shelter and food the

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[32] Exhibit 9.

[33] Exhibit 15 (Rob Boston, *Faith-based backlash*, Church & State, Apr. 2001), at 1.

[34] Exhibit 5 at 4 (Treadwell testimony).

[35] Exhibit 16 (David Treadwell, *Getting the Big Picture of Life Change*, The Missionary, Oct. 2007) at 2.

Mission provides, they must participate in religious activities that do not reflect, or are even contrary to, their beliefs – which for some individuals would mean compromising or violating their own religious beliefs.

In substance, Central Union Mission is a nondenominational Christian church that provides social services as part of its missionary goal of saving people's souls through Jesus Christ. Activities in furtherance of that goal are integral to, and inseparable from, the social services it provides; the Mission seeks to lead homeless men and other needy people to Christ by requiring their participation in religious activities, and by providing social services in a manner that prods recipients to commit themselves to Christ and discriminates against those who do not.

B. The Mission's Search for a New Home

Since 1983, the Mission has been located at 1350 R Street N.W., in the District's Shaw neighborhood.[36] In 2006, the Mission sold its R Street building for $7 million to a developer, who plans to build an office building on the site.[37] In 2006 and 2007, the Mission purchased several contiguous properties on Georgia Avenue in the Petworth neighborhood, north of Howard University; it planned to build a new, state-of-the-art facility there and move its operations to that location.[38] The Mission estimated that it would spend approximately $15 million, all in private funds, to create its new facility.[39] At the time the Mission purchased the

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[36] Exhibit 17 (Mission History, at http://missiondc.org/about/media.html).

[37] Exhibit 18 (David Treadwell, letter to the editor, *Central Union Mission Isn't 'Cashing In'*, Washington Post, Apr. 29, 2006, at A16); Exhibit 19 (Melissa Castro, *After Eight Years, Shelter is Set for Redevelopment*, Washington Business Journal, May 16, 2008).

[38] Exhibit 20 (Press Release, *Central Union Mission Announces Relocation to Petworth*, Apr. 20, 2006, at http://missiondc.org/about/release.html).

[39] Exhibit 18; Exhibit 20 ("Central Union Mission does not take government funding for its efforts.").

Georgia Avenue properties, it needed no zoning approval to build its new facility there.[40]

However, strong opposition to the Mission's plan developed in the community and was supported by the community's D.C. Council representative, Jim Graham. Concerns were expressed about diminished property values, about the activities of Mission guests outside the Mission, and about the negative impact that the Mission would have on efforts to develop and revitalize the neighborhood.[41] In December 2006, the D.C. Zoning Commission enacted a "zoning overlay" in the area that includes the Mission's Georgia Avenue properties.[42] The overlay requires developers constructing buildings larger than 12,000 square feet (the Mission's new facility would have occupied approximately 60,000 square feet) to get a special exception from the D.C. Board of Zoning Adjustment; exceptions are granted only after a public comment period that includes a public hearing.[43]

Because the Mission is obligated to vacate its current premises in October 2009, it needs to find new quarters in which to carry on its missionary activities.[44] It also needs to find a buyer

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[40] Exhibit 21 (Paul Schwartzman, *Planned Shelter May Face Hurdle*, Washington Post, Dec. 14, 2006, at DZ3).

[41] Exhibit 22 (David Treadwell, *Planning the Next Era of Ministry*, The Missionary, June 2006) at 2; Exhibit 23 (Paul Schwartzman, *Neighborhood Unites in Opposing Shelter*, Washington Post, May 29, 2006, at B1; Exhibit 24 (Editorial, *Being Charitable: A Brewing Battle Over a D.C. Homeless Shelter's Future*, Washington Post, Dec. 25, 2006, at A28).

[42] Exhibit 25 (Jim Graham, D.C. Council, Ward One, Press Release: *New Ga Ave Overlay Helps Residents on Central Union Mission*, Dec. 13, 2006).

[43] *Id.*; Exhibit 26 (Paul Schwartzman, *NW Facility to Be Scaled Down, but Neighbors Say Cut is Not Enough*, Washington Post, Dec. 18, 2006, at B2. In August 2007 the Mission filed an application with the Board of Zoning Adjustment for a special exception, but at the Mission's request, the hearing was postponed from February 2008 to Fall 2008, and has not yet been held. Exhibit 27 (Partial transcript of D.C. Council Roundtable, July 10, 2008) at 5 (testimony of Acting Deputy Director for Real Property Tax Administration) (see Declaration of Alexander G. Tievsky) (video available at http://oct.dc.gov/services/on_demand_video/on_demand_july_2008_week_3.shtm); Exhibit 28 (Paul Schwartzman, *Central Union Mission in Talks for New Site in Downtown D.C.*, Washington Post, Feb. 22, 2008, at B1).

[44] Exhibit 27 at 11 (Treadwell testimony).

for its Georgia Avenue properties, if it does not relocate there.

C. The District of Columbia Rescues the Mission

The District of Columbia owns a valuable property known as the Gales School, located at 65 Massachusetts Avenue, N.W., a short distance west of Union Station.[45] The Gales School was built in 1881 and was designed by Edward Clark, the architect of the Capitol. It was named after Joseph Gales, Jr., the eighth Mayor of Washington and publisher of the National Intelligencer newspaper. It was last used as a public school in 1944; since then, it has been used for a variety of purposes, including temporary housing for soldiers returning from World War II and office space for District of Columbia agencies.[46] From 2000 through 2004, it was used as a homeless shelter, but currently it is unoccupied and unusable.[47]

As part of the District of Columbia's Ten Year Plan for dealing with the problem of homelessness, the District planned to renovate the Gales School and operate it as a 150-bed shelter for homeless women.[48] Some renovation has already taken place.[49]

However, the District of Columbia has abandoned that plan in order to rescue the Central Union Mission from its real estate pinch, and in order to slough off the expense of running the shelter to a private entity – apparently not caring that the entity imposes its religion on those seeking shelter.

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[45] Exhibit 29 (District of Columbia Council, Resolution 17-758, "Gales School Disposition Emergency Approval Resolution of 2008").

[46] Exhibit 30 (Jesse Carlson, *Gales School*, DC Preservation Advocate, Spring 2004, at 1); *see also* Exhibit 31 (*Gales School*, at http://www.flickr.com/photos/ncindc/2745403129/).

[47] Exhibit 27 at 5 (City Administrator testimony); Exhibit 32 (District of Columbia Council, "Gales School Disposition Emergency Declaration Resolution of 2008") § 3(c).

[48] Exhibit 47 (District of Columbia, HOMELESS NO MORE: A STRATEGY FOR ENDING HOMELESSNESS IN WASHINGTON D.C. BY 2014, at 26 (*available at* www.ich.gov/slocal/plans/washingtondc.pdf)).

[49] Exhibit 33 (Mayor's Analysis of Economic Factors) at 1.

Aware of community opposition in Petworth, and because it preferred a downtown location, the Mission began negotiating with the District in the fall of 2007 to acquire the Gales School.[50] On April 1, 2008, the District and the Mission reached a nonbinding agreement, memorialized in a "term sheet," whereby the Mission would obtain ownership of the Gales School, as well as millions of dollars in District funds to renovate the School, in exchange for the Mission's Georgia Avenue properties, which are much less valuable than the School.[51] (We henceforth refer to this plan as "the Transaction.")

This agreement was reached through private and exclusive negotiations between the District and the Mission.[52] The District did not negotiate with, or attempt to negotiate with, any other organization that could have operated the Gales School as a homeless shelter; it did not issue a Request for Proposals or seek competitive bids for the renovation and operation of the Gales School as a homeless shelter; and it did not place the Gales School for sale on the open market before reaching agreement with the Mission.[53]

On June 30, 2008, the Transaction was first presented by the Mayor to the D.C. Council for approval, in the form of a proposed emergency resolution.[54] On July 10, two Council committees held a joint "Roundtable" on the proposed resolution.[55] On July 15, the Council

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[50] Exhibit 34 (David Treadwell, *The Exhilaration of Changing Times*, The Missionary, June 2008) at 2.

[51] *See* Exhibit 27 at 1 (Councilmember Brown statement).

[52] Exhibit 28; Exhibit 27 at 2 (Councilmember Graham statement); Exhibit 35 (Press Release, *Central Union Mission to Serve From Gales School* (Apr. 3, 2008), at http://missiondc.org/about/gales_school.html); Exhibit 34 at 2.

[53] *See* Exhibit 27 at 1-2 (Councilmember Graham statement), 8-9 (City Administrator testimony).

[54] Exhibit 27 at 1 (Councilmember Brown statement).

[55] *See* Exhibit 27.

considered, but did not act on, a proposed emergency resolution approving the Transaction.[56]

On July 16, 2008, D.C. Council Chairman Vincent Gray introduced at the request of the Mayor a new proposed emergency resolution entitled the "Gales School Disposition Emergency Approval Resolution of 2008."[57] The new resolution was circulated to the Council on July 17, 2008, was passed by voice vote on the same day, and took effect immediately.[58] As enacted, it was numbered Resolution 17-758 (the "Resolution").[59]

In the Resolution, the Council determined that the Gales School property is no longer required for public purposes. The Resolution also "approve[d], on an emergency basis, the negotiated sale of the [Gales School] Property to Central Union Mission . . . for the specific purpose of operating a homeless shelter and pursuant to such terms and conditions as the Mayor deems necessary and appropriate."[60]

In documents accompanying the proposed resolution, Mayor Fenty outlined the Transaction: The Mission will convey to the District of Columbia its Georgia Avenue properties, which are assessed at $3.79 million, and in exchange the District of Columbia will convey to the Mission the Gales School property, which is assessed at $8.93 million, plus up to $7 million in cash, for a total value of up to $15.93 million.[61] This would represent a net

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[56] *See* Exhibit 36 (partial transcript of July 15 Legislative Meeting) (see Declaration of Alexander G. Tievsky) (video available at http://oct.dc.gov/services/on_demand_video/on_demand_july_2008_week_3.shtm).

[57] Exhibit 37 (Council of the District of Columbia, Legislative Information Management System, PR17-0893, "Gales School Disposition Emergency Approval Resolution of 2008.").

[58] Exhibit 29 § 5; Exhibit 37.

[59] Exhibit 29.

[60] *Id.*

[61] Exhibit 33.

financial gain for the Mission of up to $12.14 million.[62] The Mission will also covenant to use the Gales School property "as a homeless shelter providing not less than 150 beds and providing rehabilitation and other services for a minimum period of forty (40) years."[63] The cash that is to be paid to the Mission as part of the Transaction will come from the District's Shelter and Transitional Housing Pool,[64] which is designated for use to renovate or construct District homeless shelters, and is financed by local District of Columbia tax revenues.[65] In addition, a resolution proposing to provide the Mission with more than $200,000 in real property tax

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[62] The Mission recognizes that it is receiving government funding through the Transaction. The following exchange took place at the July 17, 2008, meeting of the D.C. Council:

> Councilmember Gray: So in point of fact this is receiving government funding, because the value of the property of Georgia Avenue versus the value of the property on Massachusetts Avenue, that redounds to your benefit. Is that right?
>
> Mission Director Treadwell: That is correct.

Exhibit 5 at 8.

[63] Exhibit 33. The Mayor values these services at approximately $1.5 million per year, and on that basis calculates that the Transaction is a good deal for the city. *Id*. But that is a constitutionally impermissible calculation, as we show below. *See infra* at 33-34.

[64] Exhibit 38 (Fiscal Impact Statement for Gales School disposition, at 2).

[65] *See* Exhibits 39 & 40 (Government of the District of Columbia, *FY 2009 Proposed Budget and Financial Plan*, June 9, 2008, at AM0-6, A-1, C-1; Government of the District of Columbia, *FY 2008 Proposed Budget and Financial Plan*, June 7, 2007, at AM0-6, A-1, C-1). The Shelter and Transitional Housing Pool is financed by District General Obligation Bonds. *See* Exhibit 39 at AM0-6, C-1; Exhibit 40 at AM0-6, C-1. The District uses real property taxes to pay the debt service on General Obligation Bonds, *see* Exhibit 41 (District of Columbia, Office of the Chief Financial Officer, Debt Management, http://cfo.dc.gov/cfo/cwp/view,a,1323,q,590215,cfoNav,|33210|.asp (last visited Aug. 24, 2008)); *see also*, *e.g.*, Exhibit 42 (District of Columbia FY 2007 Proposed Budget and Financial Plan, *D.C. Comprehensive Financial Management Policy*) at I-2. General Obligation Bonds are payable from any available general revenues of the D.C. government, and are backed by the District's full faith and credit. *See* Exhibit 43 (Letter from Natwar M. Gandhi, Chief Financial Officer of the District of Columbia, to Mayor Adrian M. Fenty and Council Chairman Vincent C. Gray, June 20, 2007), Background and Analysis, at 1.

forgiveness on its Georgia Avenue properties was introduced in the D.C. Council on July 14, 2008; the Council will likely approve that tax relief in connection with the Transaction.[66]

The Transaction is not part of any neutral, generally available government program. It is a legislative measure exclusively designating specified property and funds to a specific gospel mission for use in carrying out its Christian ministries.

D. The Impact of the Transaction

The District of Columbia plans to carry out the Transaction along the lines outlined by the Mayor and authorized by the Resolution.[67]

Nothing in the Resolution, or in the terms of the Transaction, limits or restricts the Mission's ability to require individuals seeking shelter and social services at the Gales School to participate in religious activities, as they are compelled to do at the Mission's current location. The Director of the Mission understands that the terms of the Transaction will "not limit in any way [the Mission's] ability to do [its] Christian work."[68] Moreover, after the Transaction, the Mission will own the Gales School property in fee simple, and after 40 years will be free to use it for any lawful nonprofit purpose (including unalloyed religious purposes) or to sell it at market price and use the proceeds for any lawful nonprofit purpose (including unalloyed religious purposes), within or outside the District of Columbia.[69]

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[66] *See* Exhibit 27 at 8; Exhibit 44 (Fiscal Impact Statement: "Central Union Mission Equitable Tax Relief Emergency Act of 2008.").

[67] *See* Exhibit 45 (letter from the General Counsel to the Mayor to one of plaintiffs' counsel, Aug. 13, 2008).

[68] Exhibit 5 at 4 (Treadwell testimony). Mr. Treadwell made a similar statement in the Mission's June 2008 newsletter: "The new property [referring to the Gales School] will undergo significant renovation with no limitation or interruption in our ministry." Exhibit 34 at 2.

[69] *See* Exhibit 29; Exhibit 38 at 2. Thus, for example, after 40 years the Gales School could be converted into a church or a theological seminary, or it could be sold and the proceeds used to fund Christian missionary work in India or Iraq.

Because the Mission "believe[s] that the answer for these [homeless] people is Christ," and because it "do[es]n't know any other way to meet their needs without sharing the Gospel with them," it is "in the business of converting people to Christ."[70] Mandatory chapel services (including a "nightly invitation to receive the Lord as Savior"[71]) and the Spiritual Transformation Program are at the heart of the Mission's activities. Plaintiffs therefore believe that the Mission's renovation of the Gales School will include a chapel of significant size, and that a large proportion of the beds at the Gales School will be set aside for the Spiritual Transformation Program and thus will be unavailable for use as emergency shelter. For the same reasons, plaintiffs believe that homeless men seeking shelter at the Gales School will be required to participate in nightly chapel services, as they are at the Mission's current location.

The Transaction is not a good deal for the homeless. To the contrary, it would cause a major loss in shelter space for homeless D.C. residents.[72] There is already a chronic shortage of emergency shelter beds in the District of Columbia, especially in the downtown area, where many homeless people remain because of the availability of other services.[73] And the Mayor has just closed the Franklin School shelter, which had housed approximately 400 homeless men in the downtown area.[74]

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[70] Exhibit 9; Exhibit 15 at 1.

[71] Exhibit 6.

[72] The supply of emergency beds for homeless people in the District will be reduced by more than 200. The Mission had planned to house approximately 170 men as overnight guests at its Georgia Avenue location, and the District had planned to house 150 homeless women at the Gales School, for a total of approximately 320 emergency shelter beds at the two facilities. Exhibit 18; Exhibit 47 at 26; Exhibit 27 at 10. If the Transaction is consummated, there will be no beds at the Georgia Avenue location and only approximately 100 beds for "overnight guests" at the Gales School, assuming approximately 50 beds are reserved for the Spiritual Transformation Program. *See* Declaration of Ed Lazere, ¶ 6.

[73] Declaration of Mary Ann Luby, ¶¶ 7-17. Declaration of Eric Sheptock, ¶¶ 14-15.

[74] Exhibit 46 (David Nakamura, *Remaining Homeless Moved Out of Shelter*, Washington Post, Sept. 27, 2008, at B2).

Thus, if the Transaction is consummated, many homeless men will likely be faced with a choice between sleeping on the street and staying at the Mission. Some homeless men who are not Christian or otherwise do not wish to attend or participate in religious activities will, as a practical matter, be coerced to use the Mission as a shelter and to participate in its religious activities.[75]

Nor is the Transaction financially sensible for the District of Columbia. The District is giving away a very valuable downtown property in exchange for property worth less than half as much, and is permanently divesting itself of property that may be immensely valuable in forty years, when the Mission's obligations to the city come to an end. The Mayor's claim of financial savings to the District is misleading, because the alleged savings stem only from the net reduction of shelter space.[76]

The Mission is not a poor organization: It received $7.6 million in non-governmental "direct public support" during the year covered by its latest Form 990 financial report, and it had more than $11 million in assets as of the date of that report.[77] The Mission planned to spend $15 million of its own money to renovate its Georgia Avenue properties for use as a homeless shelter.[78] Director Treadwell testified to the D.C. Council, "We have never received government funding at all."[79]

The Mission could purchase the Gales School property, or some other suitable property, at fair market value, just as it purchased the Georgia Avenue properties that it now owns; or it

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[75] Declaration of Mary Ann Luby, ¶¶ 24-27; Declaration of Eric Sheptock, ¶¶ 17-20; *see also* Declaration of Timothy Blackwell, ¶¶ 24-29.

[76] *See* Declaration of Ed Lazere, ¶¶ 2-7.

[77] Exhibit 3, lines 1b and 59.

[78] Exhibit 18; Exhibit 20.

[79] Exhibit 5 at 8.

could lease the Gales School from the District at fair market value for the 40-year term of its pledge to operate a shelter there. It is not necessary for the District of Columbia to provide the Mission with a multi-million dollar gift to induce the Mission to continue to provide emergency shelter and other social services in the District of Columbia. The Mission would do that regardless. The net impact of the Transaction will be to replace two shelters with one, and to replace a secular shelter with a gospel "rescue mission" that immerses its needy clients in religion.

E. The Plaintiffs

Plaintiffs are six residents of the District of Columbia who pay D.C. income and property taxes, and two D.C. residents who are homeless; they challenge the Transaction because it will use District of Columbia tax funds in an unlawful manner and because it will effectively coerce homeless men into participating in religious exercises against their will.[80]

Taxpayer plaintiff The Right Reverend John Bryson Chane is the Bishop of the Episcopal Diocese of Washington. As Bishop of Washington, he serves 93 congregations and 45,000 members in the District of Columbia area. He also serves as the President and CEO of the Protestant Episcopal Cathedral Foundation, which governs Saint Alban's School for Boys, The National Cathedral School for Girls, Beauvoir Primary School, the Cathedral College, and the National Cathedral. He supports the separation of church and state and believes that our country's Founders intended, through the First Amendment of our Constitution, to prohibit the use of public funds to support the propagation of any religious faith. He believes that public funds should not be used to support social service programs that proselytize or evangelize to their clients, coerce their clients to attend or participate in religious activities, immerse their

[80] *See* declarations of all plaintiffs, filed herewith.

clients in a religious environment, or otherwise tie the provision of benefits to participation in or exposure to religious activity. He believes that the District's planned gift of valuable property and tax funds to the Central Union Mission will constitute unlawful use of public funds and property, without his consent, to support the propagation of a religion and the coercion of homeless persons to take part in religious activity.

Taxpayer plaintiff Rev. Dr. Joseph M. Palacios is a Roman Catholic priest who teaches and performs pastoral work at Georgetown University. He opposes the use of public funds to support the provision of social services that are infused with religion or are conditioned on participation in religious activity, because such funding leads to overt or subtle coercion of vulnerable populations to take part in religious activity. As a Roman Catholic, he does not subscribe to the aggressive proselytizing that takes place at the Central Union Mission and does not support such coercive efforts at conversion.

Roy Crabtree has been a homeless resident of the District since late 2006. He stayed at the Central Union Mission for a period of about three months in 2006-2007, where he was required to participate in religious services each evening as a condition of receiving shelter. When he stopped attending services because he had to lie down to treat his phlebitis, he was forced out of the Mission. Mr. Crabtree now stays at another shelter; he would go back to the Mission if he were not required to participate in religious services every day and were not pressured to join the Mission's Spiritual Transformation Program.

Eric Sheptock has been a homeless resident of the District of Columbia since 2005. Although he is a Christian and regularly attends church on Sunday, he does not wish to attend church services every night, as he would be required to do if he stayed at Central Union Mission. Because the Mayor intends to close the shelter where Mr. Sheptock currently resides, he faces

the prospect of being forced to use the new Central Union Mission shelter at the Gales School and to go to chapel services there every night. He also objects to the Transaction because it will be financed by public property and public money from a fund designated to benefit all homeless persons, including himself, yet the Transaction will unlawfully condition the benefits from that property and those funds on participation in religious activity. He further objects to the Transaction because it will substantially decrease the total number of beds available for the homeless in the District.

Taxpayer plaintiff Eliza Patterson is a financial supporter of the Central Union Mission and believes it does good work, but she objects to the District of Columbia using tax money to subsidize the Mission's activities.

Taxpayer plaintiff Franklin Chow served in the United States Air Force as a Chaplain's Assistant, and is now retired from employment with the federal Equal Employment Opportunity Commission and the United States Commission on Civil Rights. He is an active member of a Christian church in the District of Columbia, and he has attended chapel services at the Central Union Mission and has been impressed by the religious fervor that was evident there. But he objects to the use of D.C. tax money to subsidize the acquisition and rehabilitation of a building in which the Central Union Mission will carry out its religious activities.

Taxpayer plaintiff David Schwartzman has been on the faculty at Howard University since 1973 and is currently the D.C. Statehood Green Party's candidate for an At-Large seat on the D.C. Council, as well as the Party's Tax & Budget and Legislative Agenda Coordinator. He is also the Coordinator of Fair Taxes for DC, and an active member of the D.C. Fair Budget Coalition. He is dismayed at the Transaction as yet another example of tax dollars being doled out to private interests, especially as the deal will actually result in a cut in services to the

homeless. He is also offended that public funds will be used to construct an enterprise whose goal is to impose religious beliefs on vulnerable people who need food and shelter.

Taxpayer plaintiff Edward Levin worked in the federal government for approximately thirty years, retiring as Chief Counsel of the Economic Development Administration. He objects to the Transaction because he opposes the use of public funds to support religious activity or instruction, believing that such public funding corrupts government and degrades religion. He believes that the Transaction will constitute an unlawful use of public funds and property to support the religious activity of a faith to which he does not subscribe.

ARGUMENT

This case presents the question whether the government can lawfully provide a gospel mission with both millions of dollars in cash and the physical facility in which to carry out its work of religious conversion intertwined with the provision of food, shelter, and "Christian counseling."

The answer is no, as is made clear by controlling, unambiguous holdings of the Supreme Court. This Court should act now to prevent the Transaction from taking place.

Plaintiffs are entitled to preliminary injunctive relief if they show:

> "1) a substantial likelihood of success on the merits, 2) that [they] would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction." *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995); *see Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (explaining the four factors). No one factor is determinative and the Court should balance a movant's showings regarding the four factors on a sliding scale. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998); *CityFed Fin. Corp*., 58 F.3d at 747 ("If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.").

Affum v. United States, 550 F. Supp. 2d 63, 65 (D.D.C. 2008) (Lamberth, C.J.). Plaintiffs satisfy these standards here.

I. Plaintiffs Have Standing to Challenge Resolution 17-758.

The question whether plaintiffs have standing is often an issue in Establishment Clause cases. In this case, the question is not difficult.

A plaintiff has standing to pursue a cause of action if he or she shows "(1) injury in fact that is concrete and actual or imminent, not conjectural or hypothetical; (2) causation, a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant; and (3) redressability, a likelihood that the requested relief will redress the alleged injury." *Spirit of Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 40 (D.D.C. 2007) (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998)).

A. The Taxpayer Plaintiffs Have Standing.

The six taxpayer plaintiffs have shown (1) a likelihood of imminent injury to their interests as District of Columbia taxpayers, (2) directly caused by the transaction authorized by Resolution 17-758, that will be (3) fully redressed if this Court prohibits the defendant from carrying out that transaction. They therefore have standing.

1. Plaintiffs Will Suffer Injury-in-Fact.

The taxpayer plaintiffs, who pay property and income taxes to the District of Columbia, will suffer the injury of having their tax dollars used in an unconstitutional manner unless the Transaction is enjoined.

While the scope of taxpayer injury recognized under the doctrine of *federal* taxpayer standing is relatively narrow, *see, e.g.*, *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007),[81] the scope of taxpayer injury recognized under the doctrine of *municipal*

[81] Even if this were a federal taxpayer case, however, the taxpayer plaintiffs would have standing because the challenged expenditure was specifically authorized by a legislative act. *See Hein,* 127 S. Ct. at 2565-66.

taxpayer standing is broad, *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349 (2006) (noting the well-established "standing of municipal residents to enjoin the 'illegal use of the moneys of a municipal corporation'") (quoting *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923)). The federal and local courts in this jurisdiction are in agreement that when a District of Columbia "municipal taxpayer can establish that the challenged activity involves a measurable appropriation or loss of revenue, the injury requirement is satisfied." *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988); *accord D.C. Federation of Civic Associations v. Airis*, 275 F. Supp. 533, 536 (D.D.C. 1967) ("the Court recognizes it to be the law of the District of Columbia Circuit that a taxpayer of the District of Columbia may maintain suit in order to restrain the expenditure of municipal funds for an object claimed to be illegal or in a manner claimed to be unlawful"); *Calvin-Humphry v. District of Columbia*, 340 A.2d 795, 799 (D.C. 1975) ("taxpayers have always had the right, in the proper case, to initiate suit against the city government to prevent illegal use of municipal funds").

The injury in such cases is simply the "misuse of public funds." *Common Cause*, 858 F.2d at 5. As the D.C. Circuit recognized, such misuse includes transfers or leases of government property for less than fair market value. *Id.* at 5, 7 (citing with approval *Hawley v. City of Cleveland*, 773 F.2d 736, 741-42 (6th Cir. 1985); *Annunziato v. New Haven Bd. of Aldermen*, 555 F. Supp. 427, 431 (D. Conn. 1982); *Ridgefeld Women's Political Caucus, Inc. v. Fossi*, 458 F. Supp. 117, 120 n.3 (D. Conn. 1978)).

The plaintiffs' allegations easily satisfy the test for injury. The Transaction involves not just a "measurable," but an exceptionally large expenditure of municipal funds – millions of dollars – "for an object claimed to be illegal," indeed, unconstitutional.

2. Plaintiffs' Injury is Caused by the Challenged Expenditure, and the Requested Relief will Redress that Injury.

The D.C. Circuit explained in *Common Cause* that "[w]hen the relief requested does not go beyond an order that the allegedly illegal conduct cease, causation and redressability are essentially identical requirements," because "[b]y enjoining an illegal expenditure, the court can redress the taxpayer's injury caused by the misuse of public funds and ensure that the funds will be devoted to lawful purposes of possible benefit to the taxpayers." 858 F.2d at 5. Thus, if a D.C. "taxpayer has shown that the challenged program involves a measurable appropriation of public funds, the Court will recognize standing. The injury – misuse of public funds – is redressed by an order prohibiting the expenditure." *Id*.

This is precisely the situation here. The taxpayer-plaintiffs' injury – the misuse of their city's public funds to assist a religious mission in carrying out its religious purposes – will be directly caused by the property transfer and cash expenditure authorized by the challenged Resolution, and an injunction prohibiting the transfer and expenditure will redress that injury in a surgically pinpointed manner.

B. The Homeless Plaintiffs Have Standing.

The homeless plaintiffs have standing because if the Transaction is implemented they will suffer the injury of being unable to seek shelter at the Gales School without being compelled to participate in religious activities. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 584, 596 (1992) (plaintiff forced to submit to prayer or forgo high school graduation has standing). That injury will be caused by the challenged legislation, and would be redressed by the requested relief. The homeless plaintiffs also will suffer the injury caused by having funds that are earmarked to benefit homeless persons (such as themselves) spent unlawfully and in a discriminatory manner that benefits only those homeless persons who are willing to attend religious services every night

and otherwise partake of the Mission's omnipresent religiosity. *See Heckler v. Matthews*, 465 U.S. 728, 738-40 (1984) (standing to challenge discrimination in provision of public benefits); *Allen v. Hickel*, 424 F.2d 944, 947 (D.C. Cir. 1970) (plaintiffs for whose benefit public property is set aside "have standing to complain when the [property is] impermissibly devoted to uses that contravene the Establishment Clause"); *Jewish War Veterans v. United States*, 695 F. Supp. 3, 10 (D.D.C. 1988) (plaintiff's "curtailment of his use of a public resource" to avoid Establishment Clause violation confers standing).

II. Plaintiffs Have a Substantial Likelihood of Success on the Merits.

A. The Transaction Authorized by Resolution 17-758 Violates the Establishment Clause.

"The First Amendment provides that 'Congress shall make no law respecting an establishment of religion.' Laws intended to advance or inhibit religion, or having either effect, violate the Establishment Clause." *American Jewish Congress v. Corporation for National & Community Service*, 399 F.3d 351, 354 (D.C. Cir. 2005) (citing *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997)). Whatever its intent, Resolution 17-758 has the undeniable *effect* of advancing the Mission's particular religion. The District intends to provide and finance a building for the Mission that the Mission will then use for religious indoctrination. The massive financial aid that will flow to the Mission is not part of any broad, neutral government program that makes aid available equally to secular entities and entities of all religious faiths. Nor will financial aid flow to the Mission through the genuinely private choices of individuals. Rather, the D.C. Council has specifically earmarked $12 million for the Mission to assist the Mission in doing what it does – which is "proclaiming and teaching the gospel, leading people to Christ, developing disciples, and serving the needs of hurting people."[82]

[82] Exhibit 1 (Mission Statement).

1. The Transaction Violates the Establishment Clause by Supplying a Publicly Financed Building for Religious Use.

Nothing in the D.C. Council's Resolution, or in the terms of the Transaction, limits or restricts the Mission's ability to use the Gales School for religious purposes. The Transaction will "not limit in any way [the Mission's] ability to do [its] Christian work,"[83] and the Mission's Director has stated that "Christian work" is the ineradicable heart of the Mission's program: "we don't know any other way to meet their needs without sharing the Gospel with them."[84] It is, therefore, safe to say that religious activities will be a prominent part of what the Mission will do at the Gales School, and that individuals seeking shelter and social services at the Gales School will be required to participate in religious activities every day, as they are required to do at the Mission's current location.

a. Supreme Court precedent squarely prohibits the public financing of buildings that are put to religious uses.

The District's failure to prevent religious use of the government-financed Gales School building is a patent violation of the Establishment Clause. This is made clear by *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), which control this case.

In *Tilton*, the Supreme Court struck down a portion of a statute that provided grants to colleges and universities, including religiously affiliated institutions, for the construction of educational facilities. The statute prohibited the funding of "any facility used or to be used for sectarian instruction or as a place for religious worship," 403 U.S. at 675, but this restriction expired twenty years after a facility's construction. *Id*. at 683.

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[83] Exhibit 5 at 4 (Treadwell Testimony).

[84] Exhibit 9.

The Court unanimously held that the statute and the grants issued under it were unconstitutional to the extent that the restriction expired after twenty years. *Id.* at 683-84 (plurality opinion).[85] The Court reasoned that if, after twenty years, a building were used for religious purposes, "the original federal grant will in part have the effect of advancing religion." *Id*. at 683 (plurality opinion). The Court explained:

> Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. . . . The restrictive obligations of a recipient institution . . . cannot, compatibly with the Religion Clauses, expire while the building has substantial value.

Id.

Two years later, in *Nyquist*, the Supreme Court struck down a New York statute that provided private schools, including parochial schools, with grants for the maintenance and repair of their facilities. 413 U.S. at 774-80. The grants were not accompanied by any restriction limiting them "to the upkeep of facilities used exclusively for secular purposes." 413 U.S. at 774.

Citing its holding in *Tilton*, the Court reasoned, "[i]f tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, *a fortiori* they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of

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[85] The other five Justices agreed with the four-Justice plurality on this point. *See id.* at 692 (Douglas, Black and Marshall, JJ.) ("The reversion of the facility to the parochial school at the end of 20 years is an outright grant . . . . The Court properly bars it even though disguised in the form of a reversionary interest."); *id.* at 660 (Brennan, J.) ("I do not believe that construction grants to such a sectarian institution are permissible."); *id*. at 655 n.1 (White, J.) ("I accept the Court's invalidation of the provision in the federal legislation whereby the restriction on the use of buildings constructed with federal funds terminates after 20 years.").

facilities without any limitations on their use." *Id*. at 776-77. The Court further stated, "[i]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair." *Id*. at 777. "Absent appropriate restrictions on expenditures for [religious] purposes," the Court concluded, "it simply cannot be denied that this [statute] has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools." *Id.* at 675; *accord id.* at 680 ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.").

The unconstitutionality of the Transaction at issue here follows *a fortiori* from *Tilton* and *Nyquist*. Here, there is not just a possibility that *some* religious use *may* occur in a building after 20 years – there is a certainty that ubiquitous and coercive religious use *will* occur in the Gales School beginning on the day it opens as the Central Union Mission. As the Court said in *Nyquist*, summarizing the holding of *Tilton*, "the State may not erect buildings in which religious activities are to take place." *Id*.[86] Under *Tilton* and *Nyquist*, the Transaction is fatally flawed and its implementation should be enjoined.

b. *Tilton* and *Nyquist* apply Establishment Clause principles that have stood for more than sixty years.

Tilton and *Nyquist* applied no special rule, but a fundamental Establishment Clause principle: Government bodies cannot provide aid directly to religious institutions if the

[86] It follows that the government also may not "sell," "swap," or lease to a private entity, for less than fair market value, a building in which religious activities are to take place. *See, e.g.*, *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1057-59 (9th Cir. 2007) (city violated Establishment Clause by leasing city property for $1 per year to religious homeless shelter); *Annunziato v. New Haven Bd. of Aldermen*, 555 F. Supp. 427, 433 (D. Conn. 1982) (city violated Establishment Clause by selling city property for $1 to Jewish day school).

institutions will use that aid to support religious activity. This principle has been repeatedly applied by the Supreme Court for sixty years, and was reaffirmed by a majority of the Justices in 2000, in the Court's most recent decision addressing direct aid.

In *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), the Court stated: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." In subsequent years, the Court repeatedly reaffirmed that government aid cannot be used to fund religious activity. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988); *Roemer v. Board of Public Works*, 426 U.S. 736, 754-55 (1976); *Hunt v. McNair*, 413 U.S. 734, 743 (1973). In *Agostini v. Felton*, the Court again affirmed that the Establishment Clause prohibits "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." 521 U.S. 203, 219 (1997) (internal quotation marks omitted).

In *Mitchell v. Helms*, 530 U.S. 793 (2000), four Justices sought to overturn that long-standing body of law, contending that diversion of government aid for religious use should be constitutional so long as the aid is distributed based on neutral criteria that neither favor nor disfavor religion. *See id*. at 809-10, 813, 820 (2000) (opinion of Thomas, J.). But five Justices disagreed and reaffirmed that – even if aid is distributed neutrally – "actual diversion of government aid to religious indoctrination" is "constitutionally impermissible," as explained in a concurring opinion by Justice O'Connor. *Id.* at 840, 857 (O'Connor, J., concurring, joined by Breyer, J.); *accord id.* at 868, 884, 909 n.27 (Souter, J., dissenting, joined by two other Justices). The courts of appeals have agreed that Justice O'Connor's opinion is controlling on this point, as she joined in the judgment on the narrowest grounds (*see Marks v. United States*, 430 U.S. 188, 193 (1977)), and her position garnered a majority of the Court. *See Community House, Inc. v.*

City of Boise, 490 F.3d 1041, 1058 (9th Cir. 2007); *Columbia Union College v. Oliver*, 254 F.3d 496, 504 n.1 (4th Cir. 2001); *DeStefano v. Emergency Housing Group, Inc*., 247 F.3d 397, 418 (2d Cir. 2001); *Johnson v. Economic Development Corp*., 241 F.3d 501, 510 n.2 (6th Cir. 2001).

To be sure, Establishment Clause jurisprudence has evolved in recent decades. For example, in *Mitchell* and *Agostini*, the Court held that the government can provide aid in the form of services or equipment to schools that engage in substantial religious activities, so long as the services or equipment are restricted to secular uses and are not actually used to support the religious activities. *See Mitchell*, 530 U.S. at 867 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 226, 234-35. And, in another line of cases, the Supreme Court has held that it is constitutional for the government to provide aid such as vouchers or scholarships directly to a broad class of individuals – even if the individuals then use the aid to pay for religious activity at religious institutions – so long as the individuals are free to direct the aid to any one of a wide group of secular and religious providers, and use religious institutions solely as a result of their own genuine and independent private choices. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 652-53 (2002).[87] Here, however, the aid is neither restricted to secular uses nor delivered directly to individual beneficiaries. And the Supreme Court has never questioned the continuing validity of *Tilton* or *Nyquist*, or of the broad principle that direct governmental support of religious indoctrination is unconstitutional.

Applying these principles, *Community House, Inc. v. City of Boise*, 490 F.3d 1041 (9th Cir. 2007), recently found a constitutional violation in circumstances very similar to those here. The City of Boise had leased a city-owned building to a religious organization, Boise Rescue

[87] *See also Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481, 488 (1986); *Mueller v. Allen*, 463 U.S. 388, 397-99 (1983).

Mission Ministries, for $1 per year to operate a homeless shelter. *Id.* at 1057. Boise Rescue Mission offered a one-hour Christian chapel service to the homeless before dinner. *Id*. The court ordered the issuance of a preliminary injunction prohibiting the use of the building for religious activity. *Id.* at 1059-60. The court explained that "*Mitchell* stands for the proposition that actual diversion of secular government aid to religious indoctrination violates the Establishment Clause." *Id.* at 1059. The court added that, under the Establishment Clause, "a publicly financed building may not be diverted to religious use." *Id.* The court concluded that "the aid from the City (*i.e*., the subsidized [building]) is actually being diverted for Christian chapel services in addition to other services for the homeless." *Id.*

Here, likewise, the District plans to provide a rescue mission with a building at below-market value, as well as cash to renovate the building. The Mission will use this publicly subsidized building for chapel services and other religious activities, including Bible study, Christian counseling, and the Spiritual Transformation Program. The Mission has a constitutional right to preach the gospel and recruit disciples for Christ, as it has been doing for 124 years. But the District of Columbia is constitutionally barred from subsidizing those activities. The constitutional violation is plain.

c. The constitutional violation here is particularly egregious because government aid will be used to support religious coercion.

Indeed, the constitutional violation here is more egregious than the one in *Community House*. There, the court ruled that the public subsidy for the building in which a religious homeless shelter operated was unconstitutional even assuming that religious activities were

voluntary. *Id.* at 1057, 1060.[88] Religious coercion, however, greatly exacerbates the constitutional violation. "It is beyond dispute . . . that government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). And "activities that the federal government could not constitutionally participate in directly cannot be supported indirectly through the provision of support for other persons engaged in such activity." *National Black Police Ass'n v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983); *see also Rutan v. Republican Party of Illinois*, 467 U.S. 62, 77-78 (1990) ("What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.").

Thus, "when state funds are used to coerce worship or prayer, the Establishment Clause has been violated." *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 412 (2d Cir. 2001). In *Center Township v. Coe*, 572 N.E.2d 1350, 1359-60 (Ind. App. 1991), for instance, the court held that a township violated the Establishment Clause by paying religious missions to provide shelter for the homeless, because the missions required the homeless to attend religious services in order to receive shelter.

Here, too, District of Columbia property and funds will be used to support religious coercion by providing the facilities where the coercion will take place – including a chapel where homeless men seeking shelter will attend mandatory religious services, as well as space for a Spiritual Transformation Program that homeless men are pressured to enter through both oral

[88] As *Community House* reflects, an Establishment Clause violation does not require any showing of coercion. *See*, *e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 61 n.51 (1985) ("'The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion'" (quoting *Engel v. Vitale*, 370 U.S. 421, 430 (1962)); *School District of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) ("a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended").

exhortations and the carrot of better treatment. The constitutional violation here is particularly severe.

d. The District cannot legitimately deny that the Transaction will subsidize religious activity.

In light of the clear law prohibiting the provision of a public subsidy for religious indoctrination (let alone the egregious facts concerning the coercion of the homeless), the District cannot justify this unconstitutional Transaction. The District could not plausibly defend the Transaction by arguing, for example, that it is permissible to provide the Mission with a building and money to renovate it because the building itself will not be religious. This is no defense, for (even setting aside the fact that the building will contain a chapel) the building undoubtedly will be used for extensive religious activity. As is clear from *Tilton*, *Nyquist*, and *Community House*, the provision – or the financing of – a building that is secular in itself is unconstitutional when the building will be put to religious uses. *See also Mitchell*, 530 U.S. at 837-38, 857-58 (O'Connor, J., concurring) (Establishment Clause prohibits use of secular federally-funded materials and equipment, such as computers, to advance a parochial school's religious mission); *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 418-19, 424-25 (8th Cir. 2007) (state payments to religious prison program — which were in part used for telephone, mailing, computer, copying, and other office costs — were unconstitutional because they ultimately supported religious indoctrination); *Freedom from Religion Foundation v. Bugher*, 249 F.3d 606, 612-13 (7th Cir. 2001) (program of grants to public and private educational institutions for telecommunications purposes was unconstitutional insofar as it made grants to religious institutions that could be used to support the religious activities of such institutions).

It appears, instead, that the District may seek to defend the Transaction on the ground that it will purportedly save the District money in the long run because the District would otherwise itself use public funds to renovate the Gales School and to operate the property as a homeless shelter.[89] Factually, this defense fails, because any savings would arise only from a net reduction in shelter beds for the homeless, as the Transaction would eliminate a planned city-operated shelter at the Gales School, while providing a public subsidy for the formerly privately-financed Mission shelter.[90] This defense fails legally, as well, for the Supreme Court has repeatedly rejected efforts to justify public aid to religious institutions with arguments that the institutions provide financial or other benefits to the state.

In *Sloan v. Lemon*, 413 U.S. 825, 829-30 (1973), for example, the Supreme Court struck down a state program that paid for part of the tuition of children attending parochial schools, notwithstanding that the state would have had to incur "intolerable" costs of more than $1.4 billion if it were charged with providing education to those children itself. Likewise, in *Nyquist*, 413 U.S. at 773-74, the Court held that a state's "concern for an already overburdened public school system" and its "interest in preserving a healthy and safe educational environment for all of its schoolchildren" could not justify state programs that aided sectarian schools. *See also Lemon v. Kurtzman*, 403 U.S. 602, 613, 625 (1971) (benefits provided by sectarian schools held not relevant in decision striking down public aid for such schools); *Americans United*, 509 F.3d at 416-17, 424-25 (state funding of religious treatment program for prisoners was unconstitutional notwithstanding fact that it would have cost state far more to provide substitute secular programming of its own).

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[89] *See, e.g.*, Exhibit 33 at 1-3.

[90] *See* Declaration of Ed Lazere, ¶¶ 2-7.

Indeed, the unconstitutionality of the Transaction is only confirmed by the District's belief – expressed at D.C. Council meetings and in District documents describing the Transaction – that the consideration for the Transaction is that the Mission will operate a homeless shelter at the Gales School for forty years.[91] Surely the District would not contend that it could pay a rescue mission $12 million over forty years in equal annual installments to finance the operation of a religious homeless shelter. The fact that the $12 million is to be provided up front in the form of property and renovation funds cannot make any difference to the constitutional analysis. "Law reaches past formalism." *Lee*, 505 U.S. at 595.

2. Resolution 17-758 Contravenes the Fundamental Establishment Clause Principle of Neutrality.

A "central Establishment Clause value" is that the Clause "'mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)); *see also Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). As explained above, the plaintiffs need not show that the Transaction runs afoul of this neutrality principle, because governmental subsidies for religious indoctrination are unconstitutional regardless of whether the subsidies are doled out on a neutral basis. *See, e.g.*, *Mitchell*, 530 U.S. at 840, 857 (O'Connor, J., concurring).

The Transaction does violate the central requirement of neutrality, however, in two ways. First, the Transaction does not arise out of any governmental program that allocates public aid to both secular and religious institutions based on neutral criteria, but instead was enacted through a

[91] *See, e.g.*, Exhibit 5 at 8 (Councilmember Schwartz statement); Exhibit 33; Exhibit 27 at 4-5 (City Administrator testimony).

special legislative action that will provide unique benefits to a single, favored religious institution. Second, the Transaction does not benefit all homeless persons equally without regard to religion, but instead favors Christian believers (or those willing to convert), and gives homeless persons incentives to undertake religious indoctrination.

a. The Transaction Violates the Establishment Clause by Providing Public Aid to Central Union Mission in the Unfettered Political Discretion of the Mayor and Council.

In *Mitchell*, both Justice O'Connor's controlling concurrence and Justice Thomas's plurality opinion agreed that government aid must be "'allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion.'" *Mitchell*, 530 U.S. at 813 (plurality op.), 846 (O'Connor, J., concurring) (both quoting *Agostini*, 521 U.S. at 231). Government programs or actions that have provided special benefits to religious groups in general, or to specific religious entities in particular, have repeatedly been struck down.

For example, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Court held unconstitutional a statute that gave a tax exemption to religious periodicals but not to comparable secular periodicals. In *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 702, 705 (1994), the Court struck down the creation of a school district that matched the boundary of a religious enclave, partly because the district was drawn through "a special and unusual Act of the legislature" and "extend[ed] the benefit of a special franchise" to a religious group. In *Foremaster v. City of St. George*, 882 F.2d 1485, 1489 (10th Cir. 1989), the court invalidated an electricity subsidy to the Church of Latter Day Saints, in part because the city "gave no other church such a subsidy" and thus "conveyed a message of City support for the LDS faith." *See also ACLU of Louisiana Foundation v. Blanco*, No. 07-4090, 2007 WL 2915092, at *3 (E.D. La. 2007) (enjoining "non-neutral legislative appropriations" to two

churches because, *inter alia*, "the appropriations evidence a legislative preference for two specific houses of worship over others").

Here, the District's subsidy to the Mission is not part of any general program that aids both secular and religious institutions. The District did not create any opportunity for both secular and religious organizations to submit bids to operate a homeless shelter at the Gales School.[92] The District did not put the Gales School on the open market and attempt to sell it to the highest bidder.[93] Rather, the District enacted the Transaction through a special resolution passed through emergency procedures. The Resolution benefits a single religious organization, and violates the core Establishment Clause requirement that government aid be neutrally allocated. As the court said in *Blanco,* such "non-neutral, direct money grants of taxpayer funds to favored houses of worship are clearly unconstitutional under any Supreme Court test." 2007 WL 2915092, at *3.

b. The Transaction Advances Religion by Discriminating Among Homeless Persons Based on Religion and by Giving the Homeless Incentives to Undertake Religious Indoctrination.

The Establishment Clause prohibits the government from "discriminat[ing] among persons on the basis of their religious beliefs and practices." *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989). Accordingly, governmental aid must be "'made available to both religious and secular beneficiaries on a nondiscriminatory basis.'" *Mitchell*, 530 U.S. at 813 (plurality op.), 846 (O'Connor, J., concurring) (both quoting *Agostini*, 521 U.S. at 231). And governmental support of social services must not "give aid recipients any

[92] *See* Exhibit 27 at 1-2 (Councilmember Graham statement), 8-9 (City Administrator testimony).

[93] *Id.*

incentive to modify their religious beliefs or practices" or "to undertake religious indoctrination." *Agostini*, 521 U.S. at 231-32.

In *Americans United*, the Eighth Circuit found that a state's support of a religious prison program violated these principles. The program required inmates to take part in Christian religious activities, 509 F.3d at 415, and even though the program allowed inmates of any religion to enroll, *id*. at 414, the intensive Christian nature of the program effectively precluded inmates who held other beliefs from taking part. *Id.* at 425. The court therefore concluded that the "program was not allocated on neutral criteria and was not available on a nondiscriminatory basis." *Id*. at 425.

Here, too, the proposed Transaction will result in government-supported religious discrimination. Because the Mission ties its provision of shelter and other services to participation in Christian religious activity, homeless persons who are not willing to participate in Christian services will not be able to take shelter at the Mission. Thus, the Transaction will provide aid in a manner that discriminates in favor of religious Christians and against persons of other faiths or other beliefs about religion.

What is more, the Transaction will coerce homeless persons to submit to religious indoctrination. Because District homeless shelters are typically filled to capacity in the winter (and year-round in the downtown area where homeless persons can walk to needed services) many homeless men will be faced with a choice between staying at the Mission and sleeping on the street.[94] While some homeless men will choose the street to avoid being subjected to unwanted proselytization, the obvious detriments of doing so will force others to use the Mission

[94] Declaration of Mary Ann Luby, ¶¶ 24-27; Declaration of Eric Sheptock, ¶¶ 17-18; Declaration of Timothy Blackwell, ¶¶ 24-29. This situation will only be exacerbated by the Mayor's recent closing of the Franklin School, a major downtown shelter. *See supra* n.74.

– and thus to participate in the Mission's religious activities – even if they do not desire to attend worship services (indeed, even if it offends their own religious beliefs to do so).[95] The resulting "effect of advancing [the Mission's] religion" (*Agostini*, 521 U.S. at 231) could hardly be clearer.

B. The Transaction Violates D.C. Code § 44-715.

D.C. Code § 44-715 provides:

> It is hereby declared to be the policy of the government of the United States to make no appropriation of money or property for the purpose of founding, maintaining, or aiding by payment for services, expenses, or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control; and no money appropriated for charitable purposes in the District of Columbia shall be paid to any church or religious denomination, or to any institution or society which is under sectarian or ecclesiastical control.

29 Stat. 411, 683 (1896). Resolution 17-758 plainly violates this provision of the Code, and should therefore be enjoined.[96]

III. Plaintiffs Will Suffer Irreparable Injury if an Injunction is not Granted.

Because "[t]he harm inflicted by religious establishment is self-executing," the law of this Circuit is that "where a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006); *accord In re Navy Chaplaincy*, 534 F.3d 756, 759 (D.C. Cir. 2008).

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[95] Declaration of Mary Ann Luby, ¶ 26; Declaration of Eric Sheptock, ¶¶ 17, 20; Declaration of Timothy Blackwell, ¶¶ 24, 25, 29.

[96] Any issues that might arise from the application of this statute to prohibit disbursement of government funds to a religiously-affiliated institution that hires employees and provides social services in a strictly non-religious manner need not be considered here, as the Mission is not such an institution.

IV. A Preliminary Injunction Will Not Substantially Injure Other Parties.

It certainly will not harm the District of Columbia to remain in possession of valuable real estate and $7 million in cash while the Court decides this case.

Until it agreed to the Transaction, the District itself planned to renovate the Gales School for use as a shelter.[97] If the District does not wish to delay the beginning of renovations, it is free to start them; the initial steps will presumably be the same regardless of who will occupy the building, and a preliminary injunction prohibiting the transfer of the Gales School to Central Union Mission would not preclude the District from taking those steps.

Nor will a preliminary injunction harm the homeless residents of the District of Columbia. To the contrary, as we have explained, it is the Transaction that will be harmful to the homeless. *See supra* at 15-16. And even were the facts otherwise, temporary injunctive relief will not harm the homeless, as the Mission plans to remain in its current location for more than a year, the Gales School likewise could not open as a shelter before December 2009 under the most optimistic scenario, and it may well take until sometime in 2011 before the building will be ready.[98] Indeed, if the District allows the Mission to relocate to the Mission's Georgia Avenue property, the Mission may well be able to open a new facility there substantially earlier than it could at the Gales School.[99]

Finally, any harm to the Mission consists only in not receiving a taxpayer-funded gift to which it has no legal entitlement. Resolution 17-758 *authorizes* the transfer of the Gales School to the Mission on "such terms and conditions as the Mayor deems necessary and appropriate." The Mission has no enforceable right to compel a transfer. A preliminary injunction restraining

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[97] Exhibit 47 at 26.

[98] *See* Exhibit 27 at 11 (Treadwell testimony).

[99] *See* Exhibit 27 at 11-12 (Treadwell testimony).

the Mayor – which is what plaintiffs seek here – will not deprive the Mission of anything it now has, or has a right to receive.

V. The Public Interest Favors Preserving the Status Quo Until the Court can Reach a Fully-Informed Decision on the Merits.

The relief requested here serves the classic purpose of a preliminary injunction – to preserve the status quo until the Court can reach a more fully informed decision. Absent a preliminary injunction, the Mayor and the Mission may finalize their deal, and the Gales School and millions of dollars of District funds may be transferred to the Mission in a transaction that may become more and more difficult to undo as time passes.[100]

The plaintiffs have shown a high likelihood that the Transaction is unconstitutional, justifying postponement of its implementation until the Court can resolve the merits of this case on a more comprehensive factual and legal record.

Moreover, the public interest does not favor going forward with a deal that represents both a financial loss to the District of Columbia and a loss in shelter space for homeless residents.[101]

As Judge Richey cogently observed, "the public interest favors reasoned, thorough judicial consideration of laws that may intrude upon constitutional interests. It opposes the hasty enforcement of legislation which may suffer from constitutional infirmities." *Waters v. Barry*, 711 F. Supp. 1121, 1124 (D.D.C. 1989).

To be very clear, the preliminary injunction sought by plaintiffs would not prevent the Mission from relocating to the Gales School – so long as the Mission purchases it, or leases it, at

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[100] In *Community House*, the court of appeals directed the entry of a preliminary injunction "prohibiting chapel services and other religious activities" at the shelter. 490 F.3d at 1060. Plaintiffs would not want to have to seek such a remedy in this case.

[101] *See* Declaration of Ed Lazere, ¶¶ 2-7.

fair market value. Nor would the preliminary injunction sought by plaintiffs prevent the Mission from continuing to function as a religious institution, and continuing to operate mandatory chapel services and the Spiritual Transformation Program – so long as it continues to do so without government financial support. Plaintiffs seek only to preserve the status quo, to prevent implementation of the defendant's plan to support the Mission's religious missionary work with a multi-million dollar gift of public land and public funds, pending full review of that plan by this Court.

CONCLUSION

For the reasons stated above, plaintiffs' motion for a preliminary injunction should be granted. A proposed order is filed herewith.

Respectfully submitted,

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