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MEMORANDUM OF LAW

DATE: August 8, 2005

TO: Deputy Mayor and City Council

FROM: City Attorney

SUBJECT: Lease of the Concourse to the Neighborhood Involvement Association

INTRODUCTION

The City Manager has proposed a lease of most of the City's Concourse facility to the Neighborhood Involvement Association, Inc. [NIA]. The proposed lease is the result of a Request for Proposals [RFP] seeking proposals for the management, operation, and use of the Concourse. NIA's proposal was the only submission received by the City. NIA is a non-profit 501(c)(3) corporation organized for the benefit of the North Park Apostolic Church [NPAC or the Church]. Under the terms of the proposed lease, NIA would manage the Concourse, including the scheduling of events, and lease Golden Hall to the Church for its services. The nature of NIA and its close relationship with the North Park Apostolic Church raises concerns regarding the entanglement of government and religion under the First Amendment of the United States Constitution and Article I, Section 4 of the California Constitution.

As far as we can discern, the constitutional question raised here has not been directly addressed by the courts. That question is whether an arms-length commercial transaction between a third party and a government agency for management of a public facility for the benefit of the government agency can constitute a violation of the Establishment Clause because the third party is a religious organization. The facts here are different from cases addressed by the courts, such as government aid programs where the aid, though intended for secular purposes, poses the risk of being used to further religion when that aid is provided to a religious organization. Here, the contemplated contract is not looking to bestow government aid as part of a government program, but rather to meet the City's existing need for property management services and, in the process, earn income for the City. These facts are also unlike the monument cases that consider whether a passive display containing a religious message and situated in a public place amounts to government endorsement of that religious message. In those cases, the fundamental right to freely express a religious point of view is a strong consideration. The free speech element is missing here where the parties are seeking to consummate a purely commercial contract. Nor are these facts on point with other lease cases where a government entity enters into an arms-length transaction for the use of government property. In those lease

cases, as long as the property was made available to all and is leased at market rate, the fact that the lease is to a religious organization is without consequence. Here, however, the contract is more than a lease; it is also a contract for the management and operation of a public facility. As such, it places the leasing entity in the City's stead and necessitates a greater level of interaction between the City and the religious organization than an ordinary lease.

As discussed in the analysis section below, it is the combination of certain factors that cause the proposed lease to violate both the Establishment Clause of the United States Constitution and the No Preference Clause of the California Constitution: (1) supervision of the management and operation services to be rendered under the proposed lease; (2) the public nature of the facility and its centrality to City government; (3) the preference created by the lease for a religious organization; and (4) the perception of government preference for religion caused by enlisting a religious organization to act on behalf of the City. This opinion does not prevent the Church from leasing City facilities at the Concourse, as it has done in the past. Rather, it draws a distinction between a market-rate lease of City property and a contract to provide services on behalf of the City on the facts presented here.

QUESTIONS PRESENTED

1. Does the proposed lease between the City of San Diego and NIA for the use, management, and operation of a City-owned facility violate the Establishment Clause of the United States Constitution?

2. Does the proposed lease between the City of San Diego and NIA for the use, management, and operation of a City-owned facility violate the Establishment Clause of the California Constitution?

SHORT ANSWERS

1. Yes, by delegating operation and management of the Concourse to NIA, the proposed lease would excessively entangle the City in the affairs of a religious organization.

2. Yes, in addition to excessive entanglement, the proposed lease would create an impermissible preference for religion.

BACKGROUND

I. The San Diego Concourse.

The Concourse is a building located in the City's Civic Center along with City Hall, the Civic Theatre, and the Civic Center office building. The Civic Center is the seat of the City's government. The offices of the Mayor, City Council, City Attorney, City Manager, City Clerk, Auditor and Comptroller, Treasurer, most Department Directors, many City departments, and Council Chambers are located in the Civic Center. The Concourse adjoins City Hall and the Evans P. Jones Parkade. The Parkade is the primary parking facility for City employees working

at the Civic Center and for events at the Concourse and Civic Theatre. City Hall, the Concourse, and the Civic Center Building surround the open air Civic Center Plaza.

The Concourse is an approximately 114,000 square foot facility including a large auditorium with a stage, balcony and theatre seating (Golden Hall), Plaza Hall, Copper Room, Silver Room, various conference rooms, box office, administration offices, and support facilities. It also has a basement with additional space for storage or meetings, and a large kitchen.

The Concourse has been used since its construction in 1964 as a public event center and meeting hall. It typically hosts events such as: high school and community college graduations and other award ceremonies; gymnastics, dance, cheerleading, and martial arts competitions; career fairs; naturalization ceremonies; dinners for community organizations and charity fundraisers; annual Thanksgiving and Christmas dinners for the homeless; religious services; vendor events such as book fairs, scrapbooking expos, and craft fairs; occasional City Council meetings; election central; business conferences and conventions; and educational seminars.

From 1993 until July 1, 2005, the Concourse, Parkade, and Civic Theatre were managed by the Convention Center Corporation [CCC] as part of its management agreement with the City for the San Diego Convention Center. The City and CCC amended the management agreement to return the Concourse operations to the City as of July 1. Prior to the CCC's management, the Concourse was managed by the City.

II. The RFP Process.

On February 14, 2005, the City Council authorized the City Manager to proceed with an RFP for a majority of the Concourse including Golden Hall for an interim use pending redevelopment of the Concourse. The City issued the RFP on February 28, 2005. The City placed an ad in the San Diego Daily Transcript for thirty days, an ad in the real estate section of the Wall Street Journal, and an ad in the trade publication 'Real Estate Investor'. Copies of the RFP were also distributed to local brokers and potential interested parties.

The RFP described the Concourse as "a major center for cultural and professional events, including election central, professional examinations, and City functions. . . . The large open-air plaza, in which the Concourse resides, has been the setting for many public celebrations, festivals, and parades." The stated objectives of the RFP were to lease Golden Hall auditorium and related facilities for interim use as an event venue. "Proposed uses must compliment other existing uses in the Civic Center Complex and allow for occasional City-use of the auditorium for periodic civic events."

A pre-submittal conference for interested parties was held at the Concourse on March 21, 2005. Two outside parties and representatives of several City departments attended. Deadline for submission of proposals was 4 p.m. on April 11, 2005.

The City received one proposal from NIA and the Church [the Proposal]. The Publishing Services Section of the City's General Services Department submitted an internal memo proposing to use Plaza Hall for the City's printing operations.

III. The Neighborhood Involvement Association.

The Proposal submitted by NIA and the Church contemplates that NIA would be the leasing entity. The proposal describes NIA as follows:

> The Neighborhood Involvement Association (NIA) is a 501(c)(3) corporation and is the business arm of the North Park Apostolic Church. . . . It has as its primary mission, the support of the North Park Apostolic Church (NPAC) and its social ministry which includes the betterment of the Mid-city area.

NIA's By-Laws describe the social service mission of NIA:

> dedicated to providing positive impact in the Mid-city area of San Diego . . . NIA is involved in the endeavors of providing food, clothing, shelter, education, training, counseling and other community services to homeless and/or low income persons in the Mid-City area of San Diego. . . . Future goals are to implement programs geared towards: housing and assisting aged or infirm persons; rehabilitation of such persons afflicted of substance abuse or released from custody; safe home for persons abused and/or expectant mothers needing assistance. . . . The property of the corporation is irrevocably dedicated to charitable purposes . . .

In addition, NIA's Proposal states that NIA has acted as the primary entity for the operation of the Church's Community Center, and for the past seven years, has managed the operations of the community center, church, and retail complex on 54th and University Avenues.

The principal staff members of NIA are the Reverend Joel Trout, CEO, the Reverend A. Mark Garcia, Business Manager, and Kim Wilson, Vice President. Bishop Trout is Pastor of the Church; Reverend Garcia is Assistant Pastor, Youth Pastor and Business Manager for the Church. According to the Proposal, NIA currently shares offices with the Church.

There are seven members on NIA's Board of Directors. Bishop Trout sits as Chair. Reverend Garcia is also a Board member. Directors serve a two-year term and are elected by the other directors.

The Proposal makes clear that NIA is closely connected to the Church. The Proposal was submitted under the names of both NIA and the Church. The required deposit was paid by the Church. The cover letter is signed by Bishop Trout on behalf of both NIA and the Church. The "Experience and Ability" section jointly describes the experience of "NIA/NPAC". The financial statements submitted are those of the Church with the explanation: "NPAC is the sole financial

support of NIA and therefore these statements reflect the accurate financial condition of both organizations."

The Proposal offers to operate the Concourse "as an event venue in much the same manner as they have been operated by the City and by the Convention Center Corporation in the past," with one exception. The Church would become the primary tenant of Golden Hall, paying market rent to use the facility twice a week "dependant upon the needs of NPAC." NIA would "conduct an extensive marketing program" to market the facility both in and out of San Diego. That program would include marketing to other religious organizations. Whenever possible, NIA would continue to offer the venue to prior users.

The Proposal offers to forego a portion of parking revenues generated by Golden Hall events in exchange for free parking for Church events. NIA has indicated that NIA's administrative offices would move to the Concourse and the Church's administrative offices would be located elsewhere.

IV. The Proposed Lease.

The Real Estate Assets Department has negotiated a lease with NIA for use of part of the Concourse which is before the City Council for approval. The proposed lease contains the following basic terms:

Premises: Golden Hall, Silver Room, various conference rooms, box office, administration offices, support facilities, basement, and kitchen; and non-exclusive use of the Civic Center Plaza for events. The leased premises do not include the Copper Room or Plaza Hall.

Term: Five years and five one-year options to renew. The lease may be terminated by the City with 18 months prior written notice if the City intends to proceed with redevelopment of the Concourse.

Use: Management, marketing, and operation of the premises as a public assembly venue for entertainment, sporting events, educational, community, convention, performing arts, corporate, and civic activities. The City retains the right to use the Concourse for certain events without charge. NIA would reserve Golden Hall for the Church for services on Sunday mornings and Wednesday evenings. The Church would pay the same rates as other users. The Church would not pay for parking at the Parkade on Sunday mornings until noon and Wednesday evenings after 5:30.

Rent: $130,000 per year base rent, plus five percent of gross receipts. NIA has agreed to pay the rent for the first five years ($650,000) within thirty days of execution of the lease. The City intends to use those funds to make necessary improvements to Plaza Hall for relocation of the Publishing Services Section.

Operations: Rooms must be booked at rates set by the City Manager. NIA is required to not discriminate on any illegal basis, including religion, in its operations. NIA must operate the

property in a "fiscally responsible manner." NIA must provide the City a yearly accounting and the City has the right to inspect NIA's books and records. NIA must accommodate the City's use of the Concourse for City Council meetings, elections, and other limited City uses.

Utilities and Maintenance: A pro-rata share of the utilities, services, and exterior maintenance costs for the Concourse, plus a pro-rata share of capital improvement costs, plus all costs for operation and maintenance of the leased premises.

NIA proposes to pay the $650,000 in rent using Church funds generated by the sale of the Church's facility at 54th and University. The escrow for that sale is currently pending. (*See* Purchase Agreement and Joint Escrow Instructions, attached to the Supplemental to City Managers Report No. 05-153.)

NIA has agreed to the addition of two provisions to the proposed lease—a requirement that office space at the Concourse be used by NIA only for Concourse administration and a requirement that requests for use of the Concourse be handled on a first come, first served basis. (Supplemental to City Managers Report No. 05-153 at p. 2.) It does not appear that this second requirement would affect the Church's use of Golden Hall on Sundays and Wednesdays.

ANALYSIS

I. The Establishment Clause of the United States Constitution.

The First Amendment of the United States Constitution provides, in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .." These two guarantees are intended to both foreclose state interference with the practice of religion and foreclose the establishment of a state religion, thereby permitting both government and religion, "each insulated from the other," to coexist. *Larkin v. Grendel's Den*, 459 U.S. 116, 122 (1982).

Simple though it may sound, few issues have so divided the United States Supreme Court as the application of the Establishment Clause to the interaction between government and religion. The Court recently issued two decisions regarding the display of the Ten Commandments on public property. These cases demonstrate the division in the Court: *Van Orden v. Perry*, __ U.S. __, 125 S. Ct. 2854, decided on June 27, 2005; and *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, __ U.S. __, 125 S. Ct. 2722, also decided on June 27, 2005. In *Van Orden*, none of the six opinions mustered a majority endorsement of the approach taken to reach the resulting judgment upholding placement of a monument containing the Ten Commandments on the grounds of the Texas State Capitol. In *McCreary*, five Justices joined the majority opinion holding that a display of the Ten Commandments at county courthouses as part of a display of historical documents violated the Establishment Clause. The plurality from *Van Orden* formed the dissent in *McCreary*.

Despite, or perhaps because of, the many cases parsing the every day interactions between government and religion, "we can only dimly perceive the lines of demarcation in this

extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 668 (1970) (stating that the differences between the cases may be caused by the factual limitations of the cases). Indeed, the Supreme Court has repeatedly acknowledged the difficulty of applying the Religion Clauses of the First Amendment. *See Van Orden*, 125 S. Ct. at 2868 (Breyer, J., concurring)("there is 'no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible") *quoting School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) and *Lee v. Weisman*, 505 U.S. 577, 619 (1992) (noting "difficult questions" dividing the Court on Establishment Clause). In 2000, Justice Thomas aptly described the previous fifteen years of Establishment Clause jurisprudence as "tortuous history." *Mitchell v. Helms*, 530 U.S. 793, 804 (2000). As if to prove the point, that case also had no majority opinion but three plurality opinions each more than thirty pages in length.

This Establishment Clause landscape is made all the more difficult by the fact that we have not been able to locate any cases that apply the Establishment Clause to a situation similar to the one at hand: an arms-length transaction to a religious organization for the lease and operation of a public facility. Although there are cases that lay out the principles for lease of government-owned property by religious organizations (*see, e.g., Woodland Hills Homeowners Organization v. Los Angeles Community College Dist*., 218 Cal. App. 3d 79 (1990), *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp.2d 1259 (S.D. Cal. 2003)), those cases do not address a situation where the lessee is also operating a public venue on behalf of the government. To be clear, the simple lease at arms-length of City-owned property to a religious organization is not at issue here. *See Utah Gospel Mission v. Salt Lake City Corporation*, 316 F. Supp.2d 1201, 1241 (D. Utah 2004) (arms-length sale of easement by City to Mormon Church is not "sponsorship," "financial support," or "active involvement" in church affairs). Rather, it is the *operation* of a public facility by a religious organization that raises constitutional issues here. *First Unitarian Church of Salt Lake City v. Salt Lake City Corporation*, 308 F.3d 1114 (10th Cir. 2002), cert den. 123 S.Ct. 2606 (2003) (permitting religious organization to control use of public easement violates First Amendment).

The most recent Supreme Court cases, *McCreary* and *Van Orden*, concern the placement of a religious message on public property. In those cases, the primary inquiry focused on whether the installations serve a secular purpose and whether they have the primary effect of advancing religion. Neither case addressed excessive entanglement of government with religion because of the passive nature of the installations. As such, they are of limited use in this analysis.

Nonetheless, there are some principles that have been set down by the Supreme Court and not overruled that we can fairly rely on in analyzing the application of the Establishment Clause to the proposed lease. To echo Justice Breyer in *Van Orden*, first and foremost, we must keep in mind the basic purposes of the Religion Clauses:

> They seek to "assure the fullest possible scope of religious liberty and tolerance for all." They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike. They seek to maintain that

> "separation of church and state" that has long been critical to the "peaceful dominion that religion exercises in [this] country," where the "spirit of religion" and the "spirit of freedom" are productively "united," "reign[ing] together" but in separate spheres "on the same soil." They seek to further the basic principles set forth today by Justice O'CONNOR in her concurring opinion in *McCreary* . . ..

125 S.Ct. at 2868 (citations omitted). In *McCreary*, the basic principles set forth by Justice O'Connor are:

> Government may not coerce a person into worshipping against her will, nor prohibit her from worshipping according to it. It may not prefer one religion over another or promote religion over nonbelief. It may not entangle itself with religion. And government may not, by "endorsing religion or a religious practice," "mak[e] adherence to religion relevant to a person's standing in the political community."

125 S.Ct. at 2746 (citations omitted).

In *Lemon v. Kurtzman*, the United States Supreme Court articulated the currently accepted three-part test of whether a government action violates the Establishment Clause. To be valid, a government action must meet all three prongs of the *Lemon* Test: (1) the government action must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-613; *Kreisner v. City of San Diego*, 1 F.3d 775, 781 (9th Cir. 1993), citing *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989).

Although the test has been much criticized, it remains a standard by which to measure whether a challenged government action is in accord with the principles described above, and in compliance with the Establishment Clause. *Kreisner*, 1 F.3d at 780, *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); modified but not overruled in its application to school aid in *Agostini v. Felton*, 521 U.S. 203, 222-223 (1997) and *Mitchell v. Helms*, 530 U.S. at 807-808; not followed but not overruled in *Van Orden*, 125 S. Ct. at 2861; followed in *McCreary*, 125 S. Ct. at 2735-2736.[1]

A. Secular Purpose.

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[1]Another oft-cited standard is the "Endorsement Test" laid out by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687-694 (1984). The Endorsement Test focuses on the purpose and effect of the government action. Nonetheless, no majority of the Supreme Court Justices applied the Endorsement Test in either of the Court's most recent cases, and in *McCreary*, the majority opinion employed the *Lemon* Test. 125 S. Ct. at 2735-2736.

The first prong of the *Lemon* Test only requires that there be some secular purpose furthered by the government's action. *Bowen v. Kendrick*, 487 U.S. at 603. The government action fails this prong only if there is no secular purpose being advanced, and the government's action is motivated entirely by religious considerations. *Lynch v. Donnelly*, 465 U.S. at 680; *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

The proposed lease clearly has a secular purpose. The lease of the Concourse on an interim basis was authorized by the City Council for the purpose of keeping the facility open and available for events until the City makes other plans for use of the property. This purpose was established in the Council's authorization of the RFP process separate, apart, and before NIA's lease proposal. The City Council's decision was necessitated by the amendment of the Convention Center Corporation's agreement with the City, removing it as the operator of the Concourse. Accordingly, Council's interest in keeping the facility open for public events is a legitimate secular purpose for the proposed lease. *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist.*, 218 Cal. App. 3d 79, 94 (1990).

B. Primary Effect.

The second part of the test examines the primary effect of the government action in respect to religion. It looks at whether the action is neutral towards religion or either helps or hinders religion. If the government action has a primary or principal effect of advancing or endorsing religion, it violates the establishment clause. *Kreisner*, 1 F.3d at 782; *Larkin v. Grendel's Den*, 459 U.S. at 125-126.

In *Larkin v. Grendel's Den*, the Court examined a zoning statute that gave religious institutions the ability to veto liquor license applications made by nearby establishments. The Court stated that this delegation of decision-making authority by the State to a religious organization could be used by the religious organization to further its own goals. 459 U.S. at 125. Combined with "the appearance of a joint exercise of legislative authority by Church and State," the Court found that the statute could be seen as having a primary effect of advancing religion and therefore violated the Constitution. 459 U.S. at 126.

Standing in contrast to the *Grendel's Den* case is the Supreme Court's decision in *Bowen v. Kendrick*. In that case, on a 5 to 4 vote, the Court upheld the Adolescent Family Life Act [AFLA]. AFLA authorized federal grants to public or nonprofit private organizations for counseling services and research in the area of premarital adolescent sex and pregnancy. *Bowen*, 487 U.S. at 593. AFLA provided that the complexity of the area required the involvement of religious, charitable and other private organizations as well as government agencies and contemplated that grant funding for services would be provided to religious organizations. Id. at 595-596.

In upholding AFLA, the Court walked the thin line between entanglement with or endorsement of religion and government interaction with religion for the public good. On the second prong of the *Lemon* test, the Court determined that AFLA did not have the primary effect of advancing religion because the law did not require that grantees be affiliated with religious

organizations, and the services to be provided under the Act are not religious in nature. 487 U.S. at 605-615. The fact that AFLA's approach in addressing adolescent sexuality and pregnancy coincided with the approach taken by certain religions did not make advancement of religion the primary effect of AFLA. 487 U.S. at 612-613. Rather, Congress sought to include religious organizations in solving a problem that such organizations deal with regularly. 487 U.S. at 606-607.

From the City's perspective, the proposed lease addresses a purely secular need to keep the Concourse open as an available public venue for all comers. But whereas the first prong of the *Lemon* Test looks at the government's purpose, the second prong looks at the actual effect on religion. Here, the proposed lease will make a religious organization responsible for the operation and leasing of a public venue such that NIA will control leasing of the meeting spaces.

NIA's proposed control of leasing of the Concourse to the public is a significant step beyond the facts of the school-aid cases or the federal grants in *Bowen*. Unlike those cases, here, the City proposes putting the religious organization not on the receiving end of government aid available to all, but in the place of the government in determining who will receive the benefit of the government program; *i.e.*, determining, in place of the City, who will be able to use the City facility. Whether NIA uses religious principles to make those decisions, favors other religious entities aligned with its beliefs in leasing space, or prefers the Church over other potential users, are all part of the "risks inherent in programs that bring about administrative relationships" between public agencies and church-sponsored organizations. *Walz*, 397 U.S. at 672.

As such, these facts are more akin to *Grendel's Den* than *Bowen*. Like *Grendel's Den*, the City will be delegating its decision-making authority to a religious organization that could be used by the religious organization to further its own goals. 459 U.S. at 125. Also like *Grendel's Den*, this delegation gives the appearance of the exercise of authority by City and Church, together. 459 U.S. at 126. Further, in *Bowen*, the Court emphasized the social service nature of the programs to be provided by grant recipients, and the diverse field of organizations that would be receiving the grants. 487 U.S. at 609. Religious organizations were to play a role in addressing an area in which they were already involved, not to become the sole provider of services on behalf of the government. 487 U.S. at 607. By being part of a "fairly wide spectrum of organizations" eligible to receive grant funds, the funding had only an incidental effect in advancing religion. 487 U.S. at 608.

Thus, although the opportunity to lease and operate the Concourse was made available to all and the proposed lease was negotiated as an arms-length transaction, and although an arms-length lease to the Church for use of the City-owned property would not violate the Establishment Clause, it is the very nature of the responsibilities proposed to be delegated to a religious organization in this proposed lease that give it a primary effect of advancing religion.

This result is consistent with the Ninth Circuit Court of Appeals decision in *Kreisner v. City of San Diego*. In *Kreisner*, the court resolved the issue of whether the City could permit the annual religious Christmas display at the Organ Pavilion in Balboa Park. The Court paraphrased the second prong of the *Lemon* test as coextensive with O'Connor's Endorsement Test:

> The test under this prong is whether "the challenged government action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their religious choices." [Citation omitted.] The question, in other words, is whether the government's action "actually conveys a message of endorsement" of religion in general or of a particular religion. *Wallace*, 472 U.S. at 69, . . . (O'Connor, J., concurring in the judgment).

Kreisner, 1 F.3d at 782. The Court determined that the City did not sponsor the display and the City was not endorsing the religious message by allowing the display because a reasonable observer would not interpret the City's tolerance of the display in an area that is a public forum and hosts an eclectic range of uses as an endorsement of religion. 1 F.3d at 784. Further, the City issued the permit on a neutral basis following a policy of first-come, first-served for use of the public forum, "a valid means for regulating the use of a public forum." 1 F.3d at 787. "Such a policy does not vest impermissible discretion in any official." Id. Thus, as long as the City was fairly and objectively permitting access to the space, the content of the messages displayed in that space would not be imputed to the City. 1 F.3d at 785-786, 790.

The same cannot be said of the Concourse once control of the facility is turned over to a religious organization. Although the hypothetical "reasonable observer" would see that the City fairly solicited bids for the lease, operation, and management of the Concourse, the observer would also see that under the resulting contract, one church had obtained primary use of the facility and its affiliated business controlled use by others on behalf of the City. The fact that NIA intends to carry out its obligations under the lease in conjunction with the Church (*e.g.*, in the payment of rent), poses the very real problem that the lease may have, as a primary effect, the advancement of the religious beliefs of the Church.

C. Excessive Entanglement with Religion.

The third prong of the *Lemon* Test is whether the proposed lease will lead to "excessive government entanglement with religion." *Bowen v. Kendrick*, 487 U.S. at 615. Administrative relationships between religious and civil authorities are forbidden when they result in government support or direction of religious enterprises or when they are "pregnant with dangers of excessive government direction" of such enterprises. *Lemon*, 403 U.S. at 620; *Walz v. Tax Comm'n*, 397 U.S. 664, 674.

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

Lemon, 403 U.S. at 625; *Grendel's Den*, 459 U.S. at 126.

Relying on this language from *Lemon*, in *Grendel's Den*, the Court held that the delegation of authority by the legislature to churches in that case was excessive entanglement. 459 U.S. at 126. Whereas the Establishment Clause sought to prevent "a fusion of governmental and religious functions," the statute in *Grendel's Den* enmeshed churches in the processes of government by delegating government authority. 459 U.S. 126-127.

The primary difference between the delegation of authority contemplated by the proposed lease and that of the zoning law in *Grendel's Den* is the level of discretion being delegated. In *Grendel's Den*, churches were granted the power of the "reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications." 459 U.S. at 127. In the present case, NIA would have the authority of an administrator. Nonetheless, as discussed below, the administration of the Concourse by a religious organization presents many of the hallmarks of excessive entanglement: supervision by government of a religious organization's operations; support of a religious enterprise; and the potential for political divisiveness.

Most entanglement cases have involved government aid to parochial schools and have analyzed whether the aid recipients were "pervasively sectarian" in that they had as "'a substantial purpose the inculcation of religious values.'" *Bowen v. Kendrick*, 487 U.S. at 616 (citations omitted). In those cases, the danger is that proper supervision of the program would require a level of monitoring that "would threaten both the 'freedom of religious belief of those who [were] not adherents to the denomination' and the 'freedom of . . . the adherents of the denomination.'" 487 U.S. at 616 (citations omitted).

In *Bowen*, the intention of the statute was for the aid to go to organizations that could fill the need that the government had identified for community-based counseling and research services. The *Bowen* Court described the dilemma between providing adequate supervision to ensure that the funds were properly used and thereby entangling government with religion as a "Catch-22 argument." 487 U.S. at 615. The Court sidestepped the argument by distinguishing AFLA grant recipients from parochial schools as "religiously affiliated organizations that are not necessarily 'pervasively sectarian. '" 487 U.S. at 617. In the Court's view, the grant monitoring required to ensure that the grant funds are properly used (essentially, review of educational materials and site visits) did not amount to excessive entanglement. 487 U.S. at 617.

Like the grant recipients in *Bowen*, NIA is a religiously affiliated organization with the primary objective of providing social services, not proselytizing. It also is not "pervasively sectarian" in the same way as a private religious school that seeks, as part of its mission, to teach its religious beliefs. More problematic, however, is the nature of the "program" in which NIA would participate. Unlike the AFLA grants providing funding for social services to agencies that typically provide such services, the proposed lease contemplates that NIA perform a function on behalf of the City, *i.e.*, leasing out the City's property on a regular basis to the public.

Unlike *Bowen*, it is difficult to conceive of sufficient safeguards that would not result in excessive entanglement. To avoid violating the second prong of the *Lemon* Test, the benefits already negotiated for the Church (preferential use of Golden Hall, free parking) would have to be excised; the City would have to be sufficiently involved in NIA's operations to ensure that the Church is treated like other users on a first come, first served basis and that Sunday mornings and Wednesday evenings are not guaranteed to the Church to the exclusion of others; the City would need to implement checks to ensure that potential events are not screened for content that conflicts with NIA and the Church's missions; the City would have to oversee NIA's use of office space to protect against use of City equipment and facilities by NIA, "the business arm of the Church," for Church business; and the City would become the arbiter should any conflicts arise in implementing the first come, first served policy for use of the Concourse. This degree of involvement in NIA would likely be construed as excessive entanglement.

The proposed lease bears the very real potential of creating divisiveness between religious groups, nonreligious groups, and the City, "sapping the strength of government and religion alike." *Van Orden*, 125 S.Ct. at 2868. The potential for division is another indicator of excessive entanglement. Id.

In essence, this commercial transaction expects NIA and the Church to put the City's objectives for both revenue production and public use of the Concourse before the tenets of the Church. Under the Establishment Clause, that is an expectation that impinges on both the religious freedom of NIA and Church members and the City's obligation to operate government separate from religion.[2]

II. The No Preference Clause of the California Constitution.

The California Constitution prohibits the legislature from making any law respecting religion and guarantees the free exercise and enjoyment of religion without discrimination or preference. Cal. Const., art. I, § 4. Id. Because of its prohibition against any preference, and the use of the more encompassing word "respecting," the scope of the protection against government approval of religion under the state constitution is broader than the federal Establishment Clause. *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 794 (1978); *Feminist Women's Health Center, Inc. v. Philibosian*, 157 Cal. App. 3d 1076, 1092 (1984), cert. den., 470 U.S. 1052 (1985); *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist.*, 218 Cal. App. 3d 79 (1990). California's No Preference clause prohibits both material aid to religion and any official

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[2]In contrast, in *Kreisner*, the court characterized the City's involvement in issuing the permit for the Christmas display and providing a part of the cost for utilities as "indirect and de minimis." 1 F.3d at 789. Neither form of aid "demonstrates that the City has an active, deeply involved relationship with the Committee." Id. The City no longer, as it had in the past, erected and removed the display, or stored the display on City property. 1 F.3d at 778. Per the Court, those actions were "more troublesome under the entanglement prong." 1 F.3d at 789.

involvement that promotes religion. *See Barnes-Wallace*, 275 F. Supp. 2d 1259. "Even an appearance of preference is prohibited and whether the government's action has a secular purpose is irrelevant." 13 Cal. Jur. 3d, Constitutional Law § 233, citing *Barnes-Wallace*.

The courts in both *Fox* and *Feminist Women's Health Center*, disregarded the government's subjective purpose for its action in consideration of the religious preference that had objectively resulted. *Fox*, 22 Cal. 3d at 804; *Feminist Women's Health Center*, 157 Cal.App.3d at 1092. In *Fox*, the California Supreme Court held that the practice of illuminating a large Latin cross on city hall to honor Christmas and Easter violated the No Preference clause, regardless of the message the city intended to send in doing so. In *Feminist Women's Health Center*, the county district attorney intended to release aborted fetuses to antiabortion groups for a religious burial. Following *Fox*, the court held that such action would result in a preference for religion:

> Whatever the district attorney's motive, a preference will be objectively demonstrated if the fetuses are delivered to Valhalla in these circumstances. As the concurring opinion observed in *Fox*: "We must never forget that the religious freedom of every person is threatened whenever government associates its powers with one particular religious tradition. The threat today may seem small, but the breach in principle is large."

Feminist Women's Health Center, 157 Cal. App. 3d at 1092, quoting *Fox*, 22 Cal. 3d at 805.

The court in *Feminist Women's Health Center* also found that the proposed action violated article XIV, section 5 of the California Constitution which prohibits the government from granting "anything to or in aid of a religious sect, church, creed or sectarian purpose." 157 Cal. App. 3d at 1093. This provision bans both monetary aid to religion and any official involvement that promotes religion, but not indirect, remote, and incidental benefits which have a primary public purpose. *Lucas Valley Homeowners Assn. v. County of Marin*, 233 Cal. App. 3d 130, 146 (1991). The aid that is prohibited by this section "includes aid 'in the intangible form of prestige and power.'" *Feminist Women's Health Center*, 157 Cal.App.3d at 1093, quoting *Fox*, 22 Cal. 3d at 802. The proposed burial ceremony "would enlist the power and prestige of the state" and was therefore prohibited. 157 Cal. App. 3d at 1093.

The proposed lease violate the No Preference Clause in at least three possible respects: (1) by virtue of the Church's relationship with NIA, the Church is guaranteed meeting space at the Concourse on Sunday mornings and Wednesday evenings creating a preference for the Church; (2) by agreeing not to charge parking fees at the adjacent parking garage during Church services, the Church is treated differently than other users and obtains a preference; and (3) by locating regular Church services and NIA's operations in the Civic Center and by placing operation of the Concourse in the hands of NIA, the proposed lease creates an appearance of preference for the Church.

CONCLUSION

The proposed lease of the Concourse to NIA appears to violate the Establishment Clause of the United States Constitution and the No Preference Clause of the California Constitution. Adequate supervision of the proposed lease to ensure that religious organizations including the Church are not offered and do not obtain preferences not available to others and that opportunities for reserving event space are offered equally to all would require immersion by the City in NIA's and the Church's business, creating an entanglement that can not be sanctioned under the Establishment Clause. Also, placing a religious organization in charge of administering a public event space at the heart of the seat of City government and allowing the Church first priority on that event space and free parking creates at least an appearance if not an actual preference for the Church, in violation of the No Preference Clause of the California Constitution. For both of these reasons the proposed lease should not be authorized by the City Council.

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