9-14-1993

Brief of Defendant-Appellees Catholic Diocese of Cleveland and Bishop Anthony M. Pilla , Hawley v. City of Cleveland, 24 F3d 814 (6th Cir. 1994)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JANE HAWLEY, et al.,	)	
	)	
Plaintiffs - Appellants,	)	
	)	Case No. 91-3740
v.	)	
	)	
CITY OF CLEVELAND, et al.,	)	
	)	
Defendants - Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF OF DEFENDANTS-APPELLEES CATHOLIC DIOCESE OF CLEVELAND AND BISHOP ANTHONY M. PILLA

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 25, Defendants-Appellees Catholic Diocese of Cleveland and Bishop Anthony M. Pilla, make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation? No

If the answer is Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: N/A

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? No

If the answer is Yes, list the identity of such corporation and the nature of the financial interest: N/A

Douglas J. Paul, Esq.
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Catholic Diocese of Cleveland and
Bishop Anthony M. Pilla

9/14/93
Date

TABLE OF CONTENTS

TABLE OF CASES AND STATUTORY PROVISIONS

Cases

Statutory Provisions and Rules

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Statement of Subject Matter and Appellate Jurisdiction contained in the Brief of Plaintiffs-Appellants adequately sets forth the jurisdiction of the Federal District and Appellate Courts and, pursuant to Rule 28(b) of the Federal Rules of Appellate Procedure, these Defendants-Appellees are omitting any further statement of jurisdiction.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

As indicated in the Brief submitted by the Plaintiffs-Appellants, this case impacts substantial Constitutional rights. Specifically, this case is about the interplay between the Establishment and Free Exercise Clauses of the First Amendment. An opportunity to present the position of the Diocese of Cleveland and Bishop Anthony M. Pilla on these issues, in an oral argument before the Court of Appeals, will assist the Court in the resolution of this case.

STATEMENT OF ISSUES

Despite the listing of issues contained in the Brief of Plaintiffs-Appellants, Defendants-Appellees Catholic Diocese of Cleveland and Bishop Anthony M. Pilla believe that the following issues define the parameters of this case:

A. Whether, in the absence of a record, the finding of the District Court, holding that the Chapel at Cleveland Hopkins Airport does not violate the Establishment Clause of the First Amendment, is clearly erroneous.

B. Whether a municipal airport may designate its tenants and set the rental rates for such tenants on a reasonable basis standard.

C. Whether a municipal airport may provide space to community organizations, including religious organizations.

D. Whether renting airport space to a religious group for the aid and comfort of the travelling public is an impermissible establishment of religion.

E. Whether the mere taking of offense at the content of speech is sufficient grounds under the Constitution to suppress that speech.

STATEMENT OF THE CASE

Nature of the Case

This action was instituted by three named individuals: Jane Hawley, Lucille Branch and David Finley, all of whom are alleged to be citizens of the United States and resident taxpayers of the City of Cleveland. Named as an additional Plaintiff was Americans United for Separation of Church and State, a non-profit organization incorporated in the District of Columbia, purporting to represent twenty-five of its members who were also alleged to be taxpayers of the City of Cleveland. The Defendants included the City of Cleveland, its Director of Port Control, the Catholic Diocese of Cleveland and Bishop Anthony M. Pilla. Subsequent to the original Complaint the Plaintiffs, on two occasions, modified and supplemented the Complaint adding two additional Plaintiffs, Eileen Roberts and William James, and deleting Americans United for Separation of Church and State.

The essence of the Complaint of the Plaintiffs-Appellants is that, pursuant to Ordinance Nos. 843-82, 2124-82, and 1607-83, duly passed by Cleveland City Council, the Director of Port Control, on behalf of the City of Cleveland, entered into an agreement, effective August 1, 1983, with Anthony M. Pilla, Bishop of the Catholic Diocese of Cleveland for the use of approximately 2,733 square feet of space located in the terminal building of Cleveland Hopkins International Airport (the "Airport") for the operation of a Chapel. The Plaintiffs-Appellants claim that the authorizing ordinance violates the Establishment Clause of the First Amendment to the United States Constitution as applied to the States, and hence the City of Cleveland, by the Fourteenth Amendment thereto.

The Proceedings Below

This action was filed in the United States District Court for the Northern District of Ohio on August 16, 1983. The matter was tried to the District Court on February 5, 1991 through February 11, 1991. After the submission of proposed findings from all parties to the action, the Trial Court, on July 19, 1991, ruled in favor of the Defendants-Appellees and dismissed the Complaint filed by the Plaintiffs-Appellants. Two (2) of the Trial Court's final Conclusions of Law were as follows:

> 11. The Plaintiffs cannot demonstrate that the lease agreement between the City of Cleveland and Bishop Pilla violates the Establishment Clause of the First Amendment. It does not constitute a state indorsement of religion or involve excessive entanglement. At most, the lease conveys only an incidental benefit to religion. Based upon its policy toward other non-profit service organizations, the City cannot deny equal access to the Diocese. The fact that some or all of the Plaintiffs may take offense at the exercise by the Diocese of its rights under the lease does not provide a justification for suppressing that exercise. The Plaintiffs' case being completely without merit, it must be dismissed.
>
> 12. Providing space for the erection of a religious chapel is merely an accommodation to serve the convenience of those who use the Airport. The Airport does not sponsor, subsidize or interfere with the Diocese which operates the Chapel. The Airport does not establish religion by its actions in connection with leasing of space to the Diocese or the erection of the Chapel. Such actions did not show "governmentally established religion or governmental interference with religion". *Brashich v. Port Authority of New York and New Jersey*, 484 F.Supp. 697 (S.D. NY 1979), *aff'd*, 791 F.2d 224 (2nd Cir. 1980).
>
> Conclusions of Law, at ¶¶ 11, 12.

The Plaintiffs-Appellants filed a notice of appeal from the decision of the District Court on August 14, 1991. On November 19, 1991, this Court set a modified briefing schedule which would have required that the Plaintiffs-Appellants file their Brief by January 2, 1992. On November 23, 1991, the Court Reporter who recorded the testimony at trial died without transcribing his notes, with the exception of only a small portion of the proceedings which was transcribed during the course of the trial at the request of the City of Cleveland. On December 19, 1991, the Plaintiffs-Appellants sought an extension of time to file a brief, in

part because of a delay in the securing of the transcript. That request was granted by this Court on December 20, 1991 and the time for the filing of the Appellants' Brief was extended to January 16, 1992. This Court indicated that this was a "final extension".

On January 7, 1992, the Plaintiffs-Appellants filed a Motion to Hold Case in Abeyance Pending Completion of Transcript, citing the death of the Court Reporter as requiring additional time to perfect the appeal. The Motion to Hold in Abeyance was granted by this Court on January 9, 1992. On February 25, 1992, the Transcript Coordinator wrote to counsel for Plaintiffs-Appellants inquiring whether a full transcript was necessary for the appeal. By a letter dated March 13, 1992, Plaintiffs-Appellants indicated that the appeal required a complete transcript. That letter displayed a familiarity with alternative procedures for completing the record.

Nevertheless nothing further happened on the appeal and no attempts were made by the Plaintiffs-Appellants to use any of the alternative procedures contained in Rule 10 of the Federal Rules of Appellate Procedure for over a year. On May 24, 1993, the Chief Deputy Clerk of this Court wrote to suggest that the Appellants follow the Rule 10(c) procedure. However, the Plaintiffs-Appellants still never took steps to even attempt the Rule 10(c) procedure and filed their Brief with this Court on August 13, 1993, one day short of two (2) years after the filing of the Notice of Appeal. Thus, the record on appeal includes none of the trial testimony with the exception of that small portion of the evidence previously transcribed.[1]

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[1] In their Brief, the Plaintiffs-Appellants indicated "We will not invoke Rule 10(c); the inevitable disputes with opposing counsel over what was said at trial would only prolong this appeal even further". Of course, Appellants have had more than two (2) years to prepare the statement and presumably felt no need to prosecute the appeal until prodded by the Court.

Facts

The lack of transcript is evident in the recitation of the facts contained in the Brief of the Plaintiffs-Appellants. Certainly anyone who attended the trial of this matter would be surprised at the Appellants' Brief as it bears little relationship to the evidence offered and admitted at the trial.[2] The facts of this case most clearly and succinctly appear in the Findings of Fact and Conclusions of Law issued by the District Court. Those findings of fact, as determined from all of the evidence admitted at trial, are set forth verbatim as follows:

1. The plaintiffs are citizens of the United States and resident taxpayers of the City of Cleveland.

2. The defendants include the City of Cleveland, its Director of Port Control, the Catholic Diocese of Cleveland and Bishop Anthony M. Pilla.

3. Cleveland Hopkins International Airport (the "Airport"), is a major, modern airport facility currently served by 16 airlines, providing non-stop service to over 60 major U.S. cities, and connecting service to points all over the world.[3] The Airport occupies an 18,000 acre site. The passenger terminal measures 690,000 square feet. At Hopkins can be found nearly 5,000 parking spaces; 12 passenger elevators, 8 speedwalks and 13 escalators. There are also 5,000 airline and other tenant employees based at Hopkins.

4. To serve the employees, patrons and passengers at this major transportation facility and solely to accommodate persons using the Airport, there are various commercial establishments including newsstands, book stores, flower stores, country stores, candy shops,

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[2] Indeed, the Plaintiffs-Appellants have changed counsel yet again. In the ten years this matter has been pending the Plaintiffs-Appellants were first represented by outside counsel who was assisted by counsel for the ACLU. Thereafter, outside counsel withdrew from the case and the discovery phase of the litigation was prosecuted by ACLU representatives. The Appellants' immediate pretrial representation consisted of ACLU counsel supported by a Law School professor. The matter was actually tried by the professor, assisted by another outside counsel without the participation of the ACLU. The present appeal brief bears the name of the professor and new ACLU counsel who was not present at the trial.

[3] In 1983, for example, the Airport served 5.1 million passengers and recorded over 200,000 landings and take-offs. In 1989 the Airport served 8.2 million passengers and recorded over 250,000 landings and take-offs.

restaurants, cafeterias, bars, and baking and hotel facilities. In addition, Hopkins has five rental car companies and eleven freight companies. There are also non-profit service establishments such as the U.S.O. and a Travelers' Aid center, as well as the Chapel, which is the subject of this litigation.

5. Pursuant to Ordinance Nos. 843-82, 2124-82, and 1607-83, duly passed by Cleveland City Council the Director of Port Control, on behalf of the City of Cleveland, entered into an agreement, effective August 1, 1983, with Anthony M. Pilla, Bishop of the Catholic Diocese of Cleveland for the use of approximately 2,733 square feet of space located in the terminal building of the Airport for the operation of a Chapel. The Airport Chapel was intended by the City to provide services to the traveling public and employees at the airport.

6. City of Cleveland Ordinance No. 843-82, introduced by Councilmen Ciolek and Forbes, by Department Request, "Authorizing the Director of Port Control to enter into an Agreement with Anthony M. Pilla, Bishop of Cleveland, for use of certain space at Cleveland Hopkins International Airport", was read for the first time in the Cleveland City Council on April 19, 1982. The legislation was referred to the Director of Port Control, who approved it on April 21, 1982, the Director of Finance, who noted his approval on April 30, 1983, and the Law Director of the City of Cleveland, who found "no legal objection to the passage of the within ordinance", on May 2, 1982. The legislation was also referred to the Committee on Aviation, Lakefront Development and Transportation, which recommended passage on May 3, 1982, and the Committee on Finance, which recommended passage on May 13,1982. The ordinance had a second and third reading on May 17, 1982, and May 24, 1982, respectively. Ordinance 843-82 was signed by the Mayor on May 28, 1982.

7. City of Cleveland Ordinance No. 2142-82, introduced by Councilmen Ciolek and Forbes, by Departmental Request, "To amend Section 1 of Ordinance No. 843 82, passed May 24, 1982, relating to the use of certain space at Cleveland Hopkins International Airport", was read for the first time in the Cleveland City Council on September 27, 1982. The legislation was referred to the Director of Port Control, who approved it on September 29, 1982, the Director of Finance, who noted his approval, and the Law Director of the City of Cleveland, who found "no legal objection to the passage of the within ordinance", on October 4, 1982.

The legislation was also referred to the Committee on Aviation, Lakefront Development and Transportation, which recommended passage on October 25, 1982. The ordinance had a second and third reading on December 6, 1982. Ordinance 2124-82 was signed by the Mayor on December 8, 1982.

8. City of Cleveland Ordinance No. 1607-83, introduced by Councilmen Ciolek, Johnson, Woods and Forbes, by Departmental Request, "To amend Section 1 of Ordinance No. 843-82, passed May 24, 1982, as amended by Ordinance No. 2142 82, passed December 6, 1982, authorizing the Director of Port Control to enter into an Agreement with Anthony M. Pilla, Bishop of Cleveland, for use of certain space at Cleveland Hopkins International Airport", was read for the first time in the Cleveland City Council on May 23, 1983. The legislation was referred to the Director of Port Control, who approved it on May 24, 1983, the Director of Finance, who noted his approval on May 27, 1983, the Law Director of the City of Cleveland, who found "no legal object to the passage of the within ordinance", on June 20, 1983. It was approved by the City Planning Commission on June 17, 1983. The legislation was also referred to the Committees on Aviation, Lakefront Development and Transportation, the Committee on Real Property, the Committee on City Planning, and the Committee on Finance, all of which recommended passage on June 20, 1983. The ordinance had a second and third reading on June 20, 1983. Ordinance 1607-83 was signed by the Mayor on June 23, 1983.

9. The legislation authorizing the lease between the City of Cleveland and the Diocese of Cleveland for the Airport Chapel took over 14 months to be approved by the Cleveland City Council.

10. Cleveland Hopkins International Airport is an entirely self sustaining unit in the economic sense and receives not a cent from the tax-supported general fund of the City of Cleveland. Airport operations, development and expansion is paid exclusively by bond proceeds, airline rentals, airport user fees, landing fees, concession fees and other operating revenue. The bonds which finance airport activities are secured by the airlines. If, at year's end, airport expenses exceed revenue, this loss is adjusted by charging the airlines under the formula set forth in the Agreement and Lease between the airlines and the City. Likewise,

year end revenue is credited to the airlines. The Airport is, therefore, not supported by or dependent upon any municipal or state tax dollars.

11. As an incentive to the City to provide good management for the Airport System, an incentive compensation payment is provided which is paid from Airport Revenues to the General Fund of the City. Such amounts, if any, are determined for each year by a formula located in Section 8.06(b) of the Agreement and Lease between the Airlines and the City. There were no incentive compensation payments made in the years 1984, 1986 and 1988, but such payments were made in 1985 and 1987. Even if the Chapel's rent were $60,000 per year, this amount would have no impact whatsoever on the incentive payment calculations. It would neither produce an incentive payment when there otherwise was none, nor would it increase what otherwise was paid in 1985 and 1987. In fact, calculations performed by the City and accepted into evidence, demonstrate that the incentive payments for those years would have actually been reduced had the Diocese been paying more rent for the Airport Chapel space.

12. The Administration of the Airport makes its decision as to the appropriateness of particular uses of space at the Airport based upon passenger usage, the public nature of the service provided, the needs of the airlines and their employees and the prevailing practice at other airports in the nation. The Airport has conducted studies about the need for particular uses at the Airport.

13. There are airport chapels existing in at least 16 other airports in the Continental United States. There had long been a small space designated as a chapel in the plans of the Airport. However, that space did not effectively function as a chapel prior to the building of the existing Chapel by the Diocese and the appointment of Monsignor Blair as Chaplain.

14. Rental fees at Hopkins are based upon the nature of the entity seeking space and the desirability of the space itself. Commercial entities are typically charged a base rental rate plus a percentage of the gross receipts of the operation of such entity at the airport. Non-profit entities, including Travelers Aid and U.S.O. are charged $1.00 per year for the space they occupy, and some political and religious groups are given temporary space, free of charge, to solicit for their causes.

15. There is no obligation upon the Airport to charge a market rate for any of the space at the Airport and it is common for airports to charge non-profit tenants less than full market rent.

16. Pursuant to the Agreement between the Bishop and the City, the Chapel is located at the base of Concourse B in the Airport's passenger terminal building. The Chapel site is not prime, or even desirable commercial airport space. The area is in the passageway leading to the least traveled concourse at the Airport, accounting for only 20% of the total passengers using the Airport.

17. The space leased to the Diocese in 1983 was at the time the Lease was entered into, in a state of disrepair and in need of permanent improvements to render it functional. It had never before been rented. Not a single commercial enterprise had ever expressed any interest in leasing this space for commercial purposes. Indeed, the only use of this space was as an emergency medical center for international airport purposes. The premises leased by the Diocese had been used for storage by custodial workers and lockers since 1979 and remained unused entirely during the 1970's.

18. The bank location next door to the location of the Chapel at the Airport has been vacated and has not yet been re-rented. Since prior to the execution of the lease for the Chapel, there has continuously been vacant space at the Airport. Some of the space at the Airport which was vacant at the time that the Chapel lease was entered into is still vacant.

19. The Catholic Diocese of Cleveland constructed an addition to the Airport, at the sole cost and expense of the Catholic Diocese of Cleveland, wherein Twenty Seven Hundred Thirty-Three (2,733) square feet of space at the base of Concourse B in the airport passenger terminal building is used by the Diocese of Cleveland as and for a Chapel providing aid and comfort, as well as rendering service to the air traveling public, and to airport patrons and employees of the Airport and tenants at the Airport. The construction of the Airport Chapel was done in complete conformity with the architectural design of the Airport, and is not visually seen to be a Chapel from either the outside of the Airport nor by walking down Concourse B.

20. In the construction of the Chapel facility at Cleveland Hopkins International Airport, the Diocese of Cleveland, through voluntary contributions, spent Two Hundred Eighty-Seven Thousand Three Hundred Nine Dollars ($287,309.00), including monies to actually expand the rentable space at the Airport, plus Seventeen Thousand Eight Hundred Ninety-Nine Dollars ($17,899.00) in architectural and engineering service fees, and Thirty-Three Thousand One Hundred Twenty-Eight Dollars ($33,128.00) in interior furnishings, for a total expenditure of Three Hundred Thirty-Eight Thousand Three Hundred Thirty-Six Dollars ($338,336.00). The Airport Chapel at Cleveland Hopkins International Airport opened in February, 1986.

21. The exterior of the Airport Chapel, outside of a sign indicating that it is a chapel, displays no religious symbols or other indications of religious purpose to those passing nearby on the Concourse.

22. Although the interior of the Airport Chapel contains statuary and other symbols of the Catholic faith, the only thing which is not easily removable is the tabernacle and that can be, and has been, screened off from view to accommodate other religious organizations and individuals desiring to use the Airport Chapel.

23. Prayer cards of several religious faiths, including Baha'i, Jewish (in Hebrew and English), Protestant, and Catholic, are available to the public at the Airport Chapel and are provided at the sole cost and expense of the Diocese.

24. The Airport Chapel is a non-profit service enterprise, whose purposes are exclusively for aid, comfort and service to the air traveling public, as well as airport patrons and employees, in furtherance of the public purpose of the Airport. City Council determined that the Diocese should be treated similar to the other non-profit organizations with space at the Airport. The Diocese of Cleveland pays One Hundred Dollars ($100.00) per month, or Twelve Hundred Dollars ($1,200.00) per year, rental, in addition to the payment of all utilities. However, if the cost of the construction of the Chapel is included, the effective rental rate being paid by the Diocese for the premises is $14.91 per square foot. Article IV. of

the Lease Agreement between the City of Cleveland and the Diocese of Cleveland requires that the Airport Chapel be made available to other religious groups and individuals "regardless of the religious content of their worship activities."

25. The City of Cleveland regularly allows religious groups to use space at the Airport, to confront people directly, and to distribute literature if such other religious groups wish to do so. This may be done in public areas with direct access to the public, as opposed to being within a confined area. The Airport Chapel is available for use by persons of all religious persuasions, for meditation, reflection, prayer, and quiet time throughout the day and early evening, and for more formal worship services.

26. The Diocese of Cleveland, through Monsignor Robert C. Blair, Chaplain of the Airport Chapel, has taken numerous steps to publicize the availability of the Airport Chapel for use by persons of all faiths and denominations, including letters directed to 22 leaders of major denominations in the Cleveland area, sent within the first month after the opening of the Chapel.

27. The Airport Chapel has been used by several other religious groups and organizations of widely different faiths, both Christian and non-Christian. No one has ever been denied the opportunity to use the Airport Chapel.

28. The Airport Chapel is open to the public each day until 8:30 P.M. Monsignor Robert C. Blair is available at the Airport on a full-time basis, and is on-call virtually around-the-clock to assist and serve the needs of the Airport's patrons and employees, and also the air traveling public. He is part of, and has participated in drills in connection with, the Airport's emergency disaster relief network. On innumerable occasions, Monsignor Robert C. Blair, Chaplain at the Airport Chapel, has rendered, and continues to render, invaluable secular service to Cleveland Hopkins International Airport, its officers and representatives, the employees located at the airport and the air traveling public.

29. Over the years, many thousands of people have visited the Airport Chapel and made, in many instances, favorable comments concerning its availability, and assistance to

them. The Visitors' Books show that the Airport Chapel has been visited by air travelers from most of the countries in Europe, South America and Asia, as well as people of the United States of America. Over Fifteen Thousand (15,000) people have signed the Visitor's Books.

30. Travellers and airport and airline employees, both Catholic and non Catholic, regularly use the Chapel as a source of solitude where they can collect their thoughts, meditate, or work through problems which are troubling them. Employees of the airlines and other tenants of the Airport have used the Chapel to fulfill their own personal religious obligations when the circumstances of their employment would have made it difficult to do so otherwise.

31. On the weekend immediately preceding trial of this matter, approximately 128 people fulfilled their Sunday Mass obligation by attending the regularly scheduled services at the Airport Chapel.

32. Several airline representatives have written letters thankful for, and in support of, the services and facilities provided at the Airport Chapel.

SUMMARY OF ARGUMENT

In the absence of a compelete record, the finding of the District Court, holding that the Chapel at Cleveland Hopkins Airport does not violate the Establishment Clause of the First Amendment, cannot be deemed to be clearly erroneous.

Airports are non-public forums and may designate who may be a lessee and the rate of rent to be charged on a reasonable basis standard. A municipal airport, like Cleveland Hopkins Airport, may provide space to community organizations, including religious organizations such as the Airport Chapel.

Renting airport space to a religious group for the aid and comfort of the travelling public is not an establishment of religion. A chapel at an airport serving the needs of the travelling public does not constitute an endorsement of religion. An airport chapel is not a source of coercion over non-believers in violation of the Establishment Clause. State action that confers an incidental benefit to a religion or results in incidental costs to the State does not constitute a violation of the Establishment Clause.

The mere taking of offense at the content of speech is insufficient grounds under the constitution to suppress that speech.

ARGUMENT

A. IN THE ABSENCE OF A RECORD, THE FINDING OF THE DISTRICT COURT, HOLDING THAT THE CHAPEL AT CLEVELAND HOPKINS AIRPORT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT, CANNOT BE DEEMED TO BE CLEARLY ERRONEOUS

The Trial Court issued its Findings of Fact and Conclusions of Law pursuant to the provisions of Rule 52(a) of the Federal Rules of Civil Procedure. That Rule provides, in pertinent part, as follows:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact*, whether based on oral or documentary evidence, *shall not be set aside unless clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .
>
> Fed.R.Civ.P 52(a),
> (Emphasis added).

One of the best explications of the "clearly erroneous" standard for appellate review can be found in the case of *Anderson v. Bessemer City*, 470 U.S. 564 (1985), a Title VII case in which the trial court had found discrimination, but the Fourth Circuit reversed on the ground that there was "clear error" in the trial court's finding. The Supreme Court reversed because the Circuit Court "misapprehended and misapplied the clearly erroneous standard".

> This standard plainly does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.
>
> 470 U.S. at 573.

The Supreme Court went on to explain that the "clearly erroneous" standard of review allowed the rejection of a finding of the District Court only if there was no support for that finding anywhere in the record.

> If the district court's account of the evidence is plausible *in light of the record viewed in its entirety*, the court of appeals may not reverse it even though

> convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.*
>
> 470 U.S. at 573-4,
> (Emphasis added).

This Court has also consistently followed the clearly erroneous test for the appellate evaluation of the findings of the District Court. In the case of *Smith v. Heath*, 691 F.2d 220 (6th Cir. 1983), this Court affirmed a judgment entered by the District Court in a 1983 action against various police officers.

> In bench trials, the scope of appellate review is limited to determining whether the findings made by the trial court are clearly erroneous. The function of this court is not to decide the case *de novo*. We cannot substitute our judgment for that of the district judge merely because we might give the facts another construction, resolve the ambiguities differently or generally view the facts differently.
>
> 691 F.2d at 223,
> (Citations omitted).

Similar language from this Court is found in the case of *Ghandi v. Police Dept. of City of Detroit*, 747 F.2d 338 (6th Cir. 1984), an action by a political organization against the Detroit Police and the FBI complaining about an investigation into the group's activities. Some of the plaintiffs' claims were dismissed for insufficient evidence pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

> The usual standard applicable to review of a judgment on the merits in a bench trial are controlling. Thus, the scope of appellate review is limited to determining whether the findings made by the trial court are clearly erroneous.
>
> 747 F.2d at 353.

See, also *Dunn Appraisal Company v. Honeywell Information Systems, Inc.*, 687 F.2d 877 (6th Cir. 1982).

While this Circuit has given closer scrutiny to so-called "mixed" questions of law and fact, *Clevenger v. Oak Ridge School Bd.*, 744 F.2d 514 (6th Cir. 1984), there is no need, in the case at bar, for the application of other than the "usual" clearly erroneous standard. The findings put at issue in the Brief of the Appellants make it clear that their arguments require a

wholesale attack on purely factual findings.[4] In order to find in favor of the Plaintiffs-Appellants this Court would need evidence that the following "factual" findings of the trial court were "clearly erroneous" -- that the Airport Chapel was intended by the City to provide services to the traveling public and employees of the Airport (¶5); that the passage of the legislation authorizing the Chapel took some 14 months and was reviewed and approved at several separate committees and the law department (¶9); that the Airport is not supported by or dependent upon any municipal or state tax dollars (¶10); that even if the Chapel's rent were $60,000.00 per year, it would have no impact upon the incentive payment received by the City. In fact, such a payment by the Diocese would actually have reduced the amount received in those years by the City (¶11); that the old area designated by the City for a chapel, long before the involvement of the Diocese did not effectively perform that function (¶13); that it was common for the Airport to charge non-profit tenants less than market rates for their space (¶15); that the Airport Chapel site is not prime or even desirable commercial space (¶16); that not a single commercial enterprise had ever expressed interest in the space leased by the Diocese (¶17); that the space in the Airport is used by the Diocese as and for a chapel providing aid and comfort, as well as rendering service to the air traveling public, and to airport patrons and employees of the Airport and tenants at the Airport (¶19); that all of the religious symbolism on the interior of the Chapel is either easily removable or screenable, and had, in fact, been removed in the past to accommodate other religious groups (¶22); that the Chapel has been used by other religious groups and no one has ever been denied the right to use the space (¶27); that Monsignor Robert C. Blair, Chaplain at the Airport Chapel, has rendered, and continues to render, invaluable *secular*[5] service to Cleveland Hopkins International Airport, its officers and representatives, the employees located at the airport and

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[4] Although it is not necessary, given the purely factual findings at issue in the case at bar, to decide what exactly a "mixed" question of fact and law is, it is interesting to note that this Court, and others, have found that things like discriminatory intent in civil rights cases are "factual" matters subject to the clearly erroneous standard. *Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352 (6th Cir. 1984). See, also, *Bostick v. Boorstin*, 617 F.2d 871 (DC Cir. 1980).

[5] It is apparently the position of the Plaintiffs-Appellants that Monsignor Blair cannot possibly perform secular service while wearing his collar.

the air traveling public (¶28); and that the Chapel is regularly used by employees of the airport and allows them to exercise their rights of free exercise and fulfill their own religious obligations made difficult due to the demands of their employment at the airport (¶30). There can hardly be an argument that any of the foregoing are "mixed questions".

The Plaintiffs-Appellants also contend that the nature of this case somehow requires a *de novo* review. However, the types of cases in which the clearly erroneous standard has been utilized covers a broad spectrum. In the case of *Parrilla-Lopez v. U.S.*, 841 F.2d 16 (1st Cir. 1988), the First Circuit upheld the district court's award of damages in an action under the Federal Tort Claims Act, 28 U.S.C. §§2671 *et seq.* applying the clearly erroneous standard of review. The Fifth Circuit used the standard in a First Amendment case, finding that the District Court's conclusion that a lease did not violate a tenant's First Amendment associational rights by permitting the landlord to evict her for her guest's violent behavior was not clearly erroneous. *Chavez v. Housing Authority of El Paso*, 973 F.2d 1245 (5th Cir. 1992). This Court has applied the standard in an employment discrimination case, applying it to the District Court's holding, that a 55-year age limitation was a bona fide occupational limitation. *EEOC v. Kentucky State Police Dept.*, 860 F.2d 665 (6th Cir. 1988), *cert. den.*, 109 S.Ct. 2066. Even the United States Supreme Court felt the standard applicable in a Title VII case in which the trial court had found discrimination, but the Fourth Circuit had reversed on the ground that there was "clear error" in the trial court's finding. The Supreme Court reversed because the Circuit Court "misapprehended and misapplied the clearly erroneous standard". *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

Of more direct significance to the case at bar is the fact that Courts, including the Supreme Court, have utilized the clearly erroneous standard of review in connection with Establishment Clause cases under the First Amendment. For example, in *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976), Justice Blackmun explained the appropriate standard of appellate review for such cases:

> We cannot say that the foregoing findings as to the role of religion in particular aspects of the colleges are clearly erroneous. Appellants ask us to set those findings aside in certain respects. Not surprisingly they have gleaned from this record of thousands of pages, compiled during several weeks of trial, occasional evidence of a more sectarian character than the District Court ascribes to the

colleges. *It is not our place*, however, *to reappraise the evidence*, unless it plainly fails to support the findings of the trier of facts.

426 U.S. 758,
(Emphasis added).

Just as the Supreme Court did not revisit the finding of the lower Court in *Roemer* with regard to the sectarian nature of the colleges in issue in that case, it is not appropriate for this Court to second guess the District Court's findings regarding the Catholic nature of the Chapel at the Airport.[6] See also the case of *Southside Fair Housing Committee v. New York*, 928 F.2d 1336 (2nd Cir. 1991), where the Second Circuit held that the trial court's findings that the city's sale of land to an Hasidic congregation did not violate the Establishment Clause were not clearly erroneous. The fact that the Hasidim were incidental beneficiaries did not make the system by which land sales were consummated constitutionally infirm.

Given the fact that the Plaintiffs-Appellants have not provided this Court with a complete record, this would be a peculiar case for the Court of Appeals to engage in a *de novo* review. The lack of a transcript of the trial makes it impossible for any reviewing court to even know the evidence presented to the trial court. The burden of providing the

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[6] For example, the Appellants take issue with the finding that the specifically Catholic items on the interior of the Chapel are removable. To challenge that finding, they cite to depositions of Monsignor Robert Blair, taken respectively eight (8) and four (4) *years* before trial, that he thought they would be "burdensome" to remove. The finding of the Trial Court was after Monsignor Blair testified on the witness stand on two (2) separate occasions and the Appellants had the opportunity to attempt to impeach his testimony with the transcript of his prior depositions. The Appellants have no basis to set aside that finding of the Trial Court as "clearly erroneous" on the basis of deposition testimony never even offered into evidence at trial.

necessary record falls squarely on the Appellants. Rule 10(b) of the Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

> . . .
>
> (2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the *appellant shall include* in the record a transcript of *all evidence relevant to such finding or conclusion.*[7]
>
> . . .
>
> Fed.R.App.P. 10(b),
> (Emphasis added).

The courts have been consistent regarding the effect of the failure of an appellant to provide a complete record to the appellate court. No claim that a finding is not supported by the evidence can be sustained where evidence is omitted from the record on appeal. In such a case, the trial court's findings are presumed to be supported by evidence. *Griffith's Dairy, Inc. v. Squire*, 138 F.2d 758 (9th Cir. 1943). It is not incumbent upon the appellee to persuade the appellate court that the district court's findings of fact are correct. *Pacific Queen Fisheries v. Symes*, 307 F.2d 700 (9th Cir. 1962), *cert. den.* 372 U.S. 907. The Ninth Circuit has held that it could not even consider an appellant's contention that a finding of fact by the district court was in error where the transcript of the testimony was not before the appellate court and the record on appeal did not include all the evidence on which the district court might have based its findings. *Jensen v. United States*, 326 F.2d 891 (9th Cir. 1964).

In the case of *Parrilla-Lopez v. U.S.*, 841 F.2d 16 (1st Cir. 1988), the First Circuit upheld the district court's award of damages in an action under the Federal Tort Claims Act, 28 U.S.C. §§2671 *et seq*. After citing the burden of the appellant to show that the findings

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[7] The clear intent of the Rules is that all of the evidence relative to the issues on appeal be available to the Court of Appeals. In the event that an appellant limits the issues and seeks to prosecute the appeal on less than a complete transcript of the trial, Rule 10(b)(3) makes it incumbent on the appellant to designate the issues and allow the appellee to require the appellant to include additional information in the record. The Plaintiffs-Appellants have also not sought to utilize this procedure to bring this appeal based upon less than a complete transcript of the trial evidence.

he was challenging were clearly erroneous, with the concomitant requirement to compare a "consideration of all the evidence" to the trial court's finding, the court made it clear that in the absence of a complete record the district court's decision would not be disturbed.

> Under Fed.R.App.P. 10(b), the appellant was required to order a transcript of the trial and include relevant parts of the transcript in the record. The appellant failed to do so. As such we are forced to rely on the district court's own findings and statements.
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> 841 F.2d at 18, n.3.

This Court has taken the same position, citing "numerous cases of this and other federal Courts" that the provision in Rule 52(a) that findings of fact by a trial judge shall not be set aside unless clearly erroneous means that such findings of fact are "presumptively correct". The burden is on those who question a finding of the District Court to show that it is clearly erroneous. *J.A. Jones Construction Co. v. Englert Engineering Co.*, 438 F.2d 3 (6th Cir. 1971).

The Plaintiffs-Appellants might argue that the effect of the above cited law is to deprive them of their right of appellate review because of the unhappy circumstance of the untimely death of the court reporter. Indeed, the Rules of Appellate Procedure specifically provide a way to ameliorate the harshness of the requirements of a proper record on appeal in such circumstances. Rule 10(c) of the Federal Rules of Appellate Procedure provides as follows:

> (c) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.
>
> Fed.R.App.P. 10(c).

The Plaintiffs-Appellants have declined to utilize this procedure, even though specifically prompted to do so by this Court. The Ninth Circuit is one of the many courts to penalize an appellant where he elects not to include sufficient evidence in the record through

the procedure set forth in Rule 10(c). In the case of *United States* v. *Mills*, 597 F.2d 693 (9th Cir. 1979), the defendants appealed convictions for bank robbery and other crimes. One of the grounds for the appeal was the allegation that the sentence was enhanced because the defendant elected to stand trial. The appellant sought to have an affidavit of counsel submitted as part of the record on appeal. The Circuit Court found such affidavit not to be a proper part of the record and cited to Rule 10(c) as the appropriate procedure to have the court of appeals consider the issues raised by matters not contained in the transcript.

> Appellant made *no attempt to follow the procedures prescribed by Rule 10(c).* Nor did he attempt, during or immediately after the in-chambers conference, to preserve in the transcript the substance of the court's alleged remarks. It was his responsibility to do so in order to make a proper record for appeal. *Since no record is provided upon which his claim can be evaluated, it must be denied.*
>
> 597 F.2d at 698,
> (Emphasis added).

On several occasions this Circuit has taken an appellant to task for failure to utilize the Rule 10(c) procedure. The case of *United States* v. *Ellzey*, 874 F.2d 324 (6th Cir. 1989), involved an appeal from a criminal conviction for mail and wire fraud. This Court refused to reverse the conviction because of a failure to record side-bar conferences even though 28 U.S.C. §753 requires all trial proceedings to be on the record. This Court, citing Rule 10(c) of the Federal Rules of Appellate Procedure pointed out that the appellant "has not shown that he made any reasonable or unsuccessful effort to determine the substance of the unrecorded remarks". He could have used Rule 10(c) to cure the record. *Illinois Central Railroad Company* v. *Riley*, 392 F.2d 787 (6th Cir. 1968), was another case involving missing, unrecorded jury instructions. This Court made it clear that:

> *[Appellants] could have proceeded under Rule 75(c), F.R.C.P. [now Fed.R.App.P. 10(c)]* to prepare a statement of their own from the best available means which could have been served on defendant. *They did not take this course* but elected instead to rely on the agreed order by which the court did this for them. *They have no cause for complaint on this score.*
>
> 392 F.2d at 790,
> (Emphasis added).

The appellate courts have refused to consider appeals where appellants have been unable to have the matters which were heard by the Court included in the record. They have

been reluctant to even consider issues where that appellant has not even attempted to utilize the Rule 10(c) procedure. The court below found that the totality of the evidence at trial supported the conclusion that the lease for the Chapel at Cleveland Hopkins International Airport was not prohibited by the Establishment Clause of the First Amendment to the United States Constitution. Plaintiffs-Appellants, in error, assert that the standard to be applied is a *de novo* review, citing a case standing for exactly the opposite proposition. Appellants' Brief, at 12. They even mistakenly refer to this Court's affirmation of the clearly erroneous standard in the case of *Dayton Christian Schools* v. *Ohio Civil Rights Comm.*, 766 F.2d 932 (6th Cir. 1985), as "dicta." Appellants' Brief, at 12 n.8.

Plaintiffs-Appellants provide no substantive argument why this Court should deviate from the clearly erroneous standard of review, and approach the court in a curious posture. Having voluntarily eschewed the opportunity to reconstruct the record below through Federal Rule of Appellate Procedure 10(c), they ask this Court to review the evidence *de novo*, proffering only a portion of the testimony and documents that the court below found unpersuasive after a lengthy trial and asking consideration of matters which were not even introduced into evidence at trial. Having failed to provide this Court with a record on appeal which includes "all of the evidence" relevant to the issues which they raise on appeal, they cannot be provided relief from this Court.

B. AIRPORTS ARE NON-PUBLIC FORUMS AND MAY DESIGNATE WHO MAY BE A LESSEE AND THE RATE OF RENT ON A REASONABLE BASIS STANDARD

After a lengthy period of uncertainty, the United States Supreme Court has recently and definitively determined that airports are non-public forums. *International Society for Krishna Consciousness, Inc. (ISKCON)* v. *Lee*, 112 S. Ct. 2701, 2706 (1992). Accordingly, their actions are scrutinized by a reasonableness standard. Where a publicly owned airport is operating "as a proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license, its actions will not be subjected to the heightened review which its actions as lawmaker may be subject." *Id.*, at 2705. Regulations, the Court stated, "need only satisfy the requirement of reasonableness," and the particular action taken

by the airport "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Id.* at 2708 (emphasis in original) (citations omitted). In managing the space under its control, therefore, an airport has the discretion reasonably to decide what entities it may rent to and what the appropriate rental should be for a particular space. As stated by the Supreme Court, the purpose of air terminals is "the facilitation of air travel." *ISKCON*, 112 S. Ct., 2707.

It is within the experience of all travellers that, although air travel may be one of the safest forms of public transport, travelers and their friends and relatives frequently experience anxiety concerning the possibility of accidents. A chapel is a place where one can find rest and comfort in confronting the uncertainties of travel in a modern jet in an era punctuated by political violence and sensational news events. Anything that those who manage airports can do to help allay or deal with the apprehensions of the public has a beneficial objective. Providing a chapel meets a basic need and assists and supports the air passenger and his or her close relatives. In common with the treatment accorded to other non-profit groups such as Traveller's Aid and the U.S.O., a lease for a chapel provides a legitimate service to air travelers. That is why at least 16 major airports around the country have decided to provide chapels for the use of the travelling public. Findings of Fact, at ¶13.[8] As the District Court for the District of New Jersey declared, "[I]t is permissible to construct houses of worship on public land at an airport to enable travelers and airport employees to practice their religion." *American Civil Liberties Union of New Jersey v. City of Long Branch*, 670 F. Supp. 1293, 1296 (D. NJ 1987) (upholding city creation along public streets of an eruv, an area within which Orthodox Jews may carry or push objects during the Sabbath), citing *Brashich v. Port Authority of New York and New Jersey*, 484 F. Supp. 697, *aff'd*, 791 F.2d 224 (2nd Cir. 1980) (government may accommodate religion by allowing construction on airport property of denominational chapels).

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[8] According to the best knowledge and belief of appellees, based upon a telephone survey of September 3, 1993, there are now at least 18 other airports with chapels in the United States: Albuquerque, Atlanta, Charlotte, Chicago-Midway, Chicago-O'Hare, Cincinnati, Dallas-Fort Worth (3 separate chapels), Denver-Stapleton, Houston, Nashville, New York-Kennedy (3 separate chapels), Newark, Oklahoma City, Orlando, Pittsburgh, San Antonio, Seattle, St. Louis. San Francisco has a Christian Science Reading Room.

In 1983, the City of Cleveland, following studies conducted by the Airport "about the need for particular uses at the Airport," Findings of Fact, at ¶12, determined that the Airport Chapel, "whose purposes are exclusively for aid, comfort and service to the air travelling public, as well as airport patrons and employees," would serve "the public purpose of the Airport." Findings of Fact, at ¶24. After 14 months of negotiation, the City and the Diocese of Cleveland reached agreement as to the terms of the lease for a space that was "not prime, or even desirable commercial airport space." Findings of Fact, at ¶16. The area was "in a state of disrepair and in need of permanent improvements to render it functional." Findings of Fact, at ¶17. The rent was set at $1200 per year, with the Diocese obligated to undertake the expense of major improvements. That expense eventually totalled nearly $340,000. After a lengthy trial, the district judge found as a matter of law that the purposes of the lease, to provide "aid, comfort and service to the air travelling public," as well as its terms met the reasonable basis test required by the Supreme Court for the use of a non-public forum. Conclusions of Law, at ¶8; *Cornelius v. NAACP Legal Defense Fund, Inc.*, 473 U.S. 788, 808, 105 S.Ct. 3439, 87 L. Ed.2d 576 (1985).

Similarly, the rent charged to various tenants by the Airport is also subject to a reasonable basis standard, not heightened scrutiny. The Airport may decide, for example, that gift shops may engender higher revenue and can be charged a higher rental rate for such lessees. Conversely, management may decide that the provision of food or sundries may be important for the air travelling public and accept lower rentals for restaurants or news stands. In the same vein, airport management may conclude that certain kinds of community organizations offer a useful service to the travelling public and, as an incentive, offer space below the rate charged for commercial establishments. All that is required is that the distinctions among the rentals charged to various tenants be based upon a reasonableness standard. *ISKCON*, 112 S. Ct., 2705. *Williamson v. Lee Optical*, 348 U.S. 483 (1955). As the court below found, "There is no obligation upon the Airport to charge a market rate for any of the space at the Airport and it is common for airports to charge non-profit tenants less than full market rent." Findings of Fact, at ¶15.

Thus, the Airport may charge a lower or higher rent, depending upon the need for a particular kind of tenant, or because of the status of a tenant as a not-for-profit organization, or because of supply and demand. The fact that the Airport charges Travellers' Aid and the U.S.O. $1 per year is no more discriminatory against the Diocese of Cleveland which pays $1200 per year plus hundreds of thousands of dollars of improvements than is the fact that commercial entities may pay more per square foot than does the Diocese. In sum, the Airport has established two classes of rental spaces, one to provide income to the Airport and commercial service to the travelling public, and one to provide other important, but intangible benefits to travellers. The distinction meets the required reasonable basis test under the Constitution. *Cornelius*, 473 U.S., at 806; cf. *Perry Educational Assn. v. Perry Local Educators' Assn*, 460 U.S. 49 (1983).

C. A MUNICIPAL AIRPORT MAY PROVIDE SPACE TO COMMUNITY ORGANIZATIONS, INCLUDING RELIGIOUS ORGANIZATIONS

It is now settled law that a state run institution may allow access to and may control the use of its nonpublic forums by outside organizations, including religious organizations, provided the state does not discriminate among groups on the basis of content, or within groups on the basis of viewpoint. *Cornelius v. NAACP Legal Defense Fund, Inc.*, 473 U.S. 788, 800 (1985). In particular, access may not be denied simply because the group seeking access is religious. Such a denial would be unconstitutional. *Widmar v. Vincent*, 454 U.S. 263 (1981); *Christian Science v. City and County of San Francisco*, 784 F.2d 1010 (9th Cir. 1986), *cert. den.*, 479 U.S. 1066, 107 S.Ct. 953. Congress may even enjoin such a denial by statute. *See Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) (upholding the constitutionality of the Equal Access Act as applied to religious groups). Nor can the state deny access simply because the group may engage in prayer or religious exercises, *Widmar*, 454 U.S., 271 n.9, 272 n.11, or deal with the airport's needs "from a religious standpoint." *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141, 2147, 124 L.Ed.2d 352, 61 U.S.L.W. 4549 (1993) (voiding a school's prohibition against a community group's participation in an after hours school program because its message would be religious).

The Supreme Court has specifically ruled that the mere desire to maintain separation of church and state is a constitutionally inadequate justification for discrimination against a religious group that would otherwise be entitled to access. *Lamb's Chapel*, 113 S.Ct., 2148; Widmar, 454 U.S., 270-71. In such situations, the only appropriate grounds for denial must be content neutral, e.g., the time requested or the space desired is not available, or the purposes for leasing the space could be better served by another tenant. *Widmar*, 454 U.S., 276-77. That principle was applied to protect a religious organization that had rented space at the San Francisco International Airport when the Airport sought to evict the tenant merely because it was religious. *Christian Science v. City and County of San Francisco*, 784 F.2d, 1013-1015.

Cleveland Hopkins Airport decided that a place for meditation, comfort, and quiet would serve the travelling public. It could have denied, under a reasonable basis standard, the request of the Diocese of Cleveland to rent the space because some other group would provide a better atmosphere for reflection. But it could not have refused the Diocese the space simply because the group had a religious content, or because it possessed a Catholic viewpoint, or because prayer services would occur within the space. As the Supreme Court announced in *ISKCON*, "The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." 112 S. Ct., 1705-06.

Although the Airport could not prohibit the Chapel from providing aid and comfort from a religious standpoint to those who desired it, nor forbid those who wished voluntarily to pray in the space, it also could not deny the use of the space to other persons needing rest and emotional comfort merely because of *their* religious viewpoint. Accordingly, the lease requires the availability of the space for all groups. The record and the findings confirm the many instances when the Chapel and the chaplain have provided such services of aid and comfort to persons of all faiths and to persons of no religious faith. Some 15,000 persons had signed the Chapel visitor's book at the time of the trial. Findings of Fact, at ¶29. In order to accommodate all groups, religious symbols in the Chapel can easily be removed or screened at the request of groups seeking to use the Chapel. *Id.*, at ¶22. Furthermore, no religious

group has been excluded from renting space at the airport in preference to the Catholic Chapel. The space was rented in pursuance of the Airport's objective of providing a place of aid and support for the travelling public, and the Diocese was the only organization that offered and was willing to undertake the expense of renting and furnishing a space to fulfill that objective. A denominational preference occurs only when one religious sect is given privileges while others are affirmatively denied those same privileges. *Larson v. Valente*, 456 U.S. 228 (1982), *Texas Monthly, Inc. v. Bullock*, 488 U.S. 1 (1989). The record demonstrates no such preference in this case. The Diocese has fulfilled its promise to make the Chapel available to other groups. The lease for the Chapel, therefore, meets the reasonable basis test established by the Supreme Court for the use of a nonpublic forum and avoids viewpoint discrimination. *Cornelius* 473 U.S., 808.

D. RENTING AIRPORT SPACE TO A RELIGIOUS GROUP FOR THE AID AND COMFORT OF THE TRAVELLING PUBLIC IS NOT AN ESTABLISHMENT OF RELIGION

1. A Chapel at an Airport Serving the Needs of the Travelling Public does Not Constitute an Endorsement of Religion

In recent years, the United States Supreme Court has refined its application of the traditional test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[9] The Supreme Court has concluded that reasonable accommodation of religious activities does not violate the Establishment Clause of the United States Constitution so long as there is no endorsement of religion in purpose or effect. *Allegheny County v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S.Ct. 3086, 106 L. Ed. 2d 472, 494 (1989), accepting Justice O'Connor's approach in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J. concurring). This Circuit has adopted and applied the endorsement approach. *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986), *cert. den.*, 479 U.S. 939; *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990).

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[9] The older, now outdated, test was "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S., 612-13 (citations omitted).

According to Justice O'Connor, a governmental practice does not violate the Establishment Clause "merely because it in fact causes, even as a primary effect, advancement or inhibition of religion." *Lynch v. Donnelly*, 465 U.S. 668, 691-92 (O'Connor, J., concurring). Rather, the question is whether the government is seen to have endorsed and placed its authority behind a religion or a religious doctrine. Justice O'Connor found that having the evident symbol of Christian belief in a creche did *not*, in the context of a holiday display, "communicate a message that the government intends to endorse the Christian beliefs represented by the creche." *Id.*, at 692. Similarly, having a chapel in an unassuming space, available to all faiths, with removable religious symbols, and as part of a series of public service entities for the benefit of the travelling public communicates no governmental endorsement of what people may do, or say, or think about while visiting the Chapel.

The facts and the law demonstrate that renting a space in an airport to a religious organization for a secular purpose does not constitute an endorsement of religion in purpose or effect. In *Christian Science v. City and County of San Francisco, supra*, for example, the Ninth Circuit specifically found that rental of airport space to a religious organization does not constitute a violation of the First Amendment. 784 F.2d, 1015. In that case the San Francisco International Airport sought to evict the Christian Science Reading Room, a long term tenant, because the Airport believed that the Establishment Clauses of the United States and California Constitutions required such an eviction. At the time it made its decision, the Ninth Circuit used the stricter version of the test in *Lemon v. Kurtzman* before it had been modified by the Supreme Court in *Allegheny County* to permit more accommodation to religion. Nonetheless, the Ninth Circuit held that rental of space to a religious organization does not constitute an advancement of religion when the purpose is secular. 784 F.2d, 1014. In the case of San Francisco International Airport, the purpose of the rental was to obtain revenue. *Id.* In the case of Cleveland Hopkins International Airport, the purpose was primarily to provide for the aid and comfort of the travelling public.

The Supreme Court has held that, so long as the goal is secular, the government may utilize the services of religious organizations. *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding the federal Adolescent Family Act which allows funds to be given to religious and

charitable organizations for the purpose of dealing with the problem of teenage pregnancy). Providing aid and comfort to the travelling public is an appropriate secular purpose. Utilizing a chapel for that purpose is a legitimate option, and does not mean that the airport is endorsing religion. The Ninth Circuit's holding that having a religious organization at the airport does not have the effect of advancing religion is noteworthy in this context as well, inasmuch as the purpose of Christian Science reading rooms is to invite passersby to enter and use their religiously based services.

Under the endorsement test as applied by this Court, the question depends on a sensitivity to the unique circumstances and context of a particular challenged practice. As this Court stated in *Clawson*, "the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice." 915 F.2d, 247 (quoting Justice O'Connor in *Allegheny County*, 492 U.S., 625 (O'Connor, J.,. concurring)). In this case, the Chapel is in an airport, not in a governmental institution that represents the sovereign teaching authority of the state, such as a school, courthouse, or city hall. In contrast to primary and secondary schools and other governmental institutions whose emblematic function is to espouse values, the Ninth Circuit noted the entirely different atmosphere of an airport.

> An airport does not symbolize or represent governmental authority in the minds of most citizens in the way that a city hall does or a courthouse or the Treasury Department Defense, or Agriculture Departments.
>
> 784 F.2d, 1014.

If religious groups can operate in universities or high schools without engaging the state's imprimatur, *Widmar*, 454 U.S., 274, *Mergens*, 496 U.S., 248, then an airport, not founded for the purposes of inculcating values, cannot be a place where the state can reasonably be perceived as endorsing religion.[10]

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[10] The fact that there are chapels and religious entities long established in airports across the country has some bearing. Although the practice may not be as entrenched as that approved in *Marsh v. Chambers*, 463 U.S. 783 (1983)(upholding the practice of prayer before meetings of the state legislature), *See, Carter v. Broadlawns Medical Center*, 857 F.2d 448 (8th cir. 1988), *cert. denied*, 109 S.Ct. 1569 (state supported chaplaincy in hospitals not justified by historic practice at the time of the First Amendment), it is nonetheless one factor in determining the context of state endorsement. "[T]he 'history and ubiquity' of a practice is relevant because it provides part of the context in which a

In *Clawson*, *supra*, this Court looked at a number of factors in determining that the placement of a creche did not imply an endorsement of religion. 915 F.2d, 248-49. A similar analysis in regard to the Chapel at the Airport yields the same conclusion. The Chapel is one of a number of public service organizations at the Airport. Its location is unobtrusive, less noticeable than any commercial rental space. It is on a concourse with other facilities, and has no signs of recognition beyond a few directional signs in the same format as other directional signs in the Airport, a sign at the door, and occasional posted schedules of services. Its patrons are virtually all adults who voluntarily seek out its services, not impressionable children who are compelled to be there. Unlike even legitimate creches in public forums where non-believers find it difficult to avoid seeing Mary and the Christ Child in the midst of a holiday display, the Chapel is in a non-public forum, in one of the less travelled concourses, and where religious symbolism cannot be seen unless one stops and looks through the door or affirmatively enters. Applying this Court's context standard to these facts, there can be no doubt that the physical placement of the Chapel communicates no endorsement of religion. The conclusion that the Supreme Court found in *Lamb's Chapel* applies with particular cogency to airports:

> Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the [government] was endorsing religion or any particular creed, and any benefit to the Church would have been no more than incidental.
>
> 113 S.Ct., at 2148.

Finally, there is no entanglement. By the terms of the lease between the City and the Diocese, the City has maintained a hands-off attitude in running the Chapel, not deciding which groups should use it, but nonetheless guaranteeing, through contract terms, that the space will be available to other groups so that the purpose of aid and comfort to the travelling public is maintained.

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reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Allegheny County*, 106 L. Ed. 2d, 519 (O'Connor, J., concurring). The longstanding practice of having chapels in airports attests to the general secular purpose of providing aid and comfort to the travelling public. *See, e.g., Brashich v. Port Authority of New York and New Jersey*, 484 F. Supp. 697 (S.D. NY 1979), *aff'd*, 791 F.2d 224 (2nd Cir. 1980).

Applying, therefore, the endorsement test established by the Supreme Court and long utilized by this Court, we can easily see that there is no effective endorsement of a religious doctrine merely by having space rented to a religious organization in an airport for the purpose of providing aid and comfort to the travelling public.

2. An Airport Chapel is not a Source of Coercion over non-Believers in Violation of the Establishment Clause

In several recent cases dealing with the Establishment Clause, a number of Justices of the Supreme Court, sometimes a majority, have indicated a preference for a new test to replace the endorsement standard. As indicated by Justice Kennedy, the new test focuses on whether the challenged practice coerces "anyone to support or participate in any religion or its exercise," or whether the governmental practice gives "direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" *Allegheny County*, 492 U.S., 659 (Kennedy, J., concurring in part and dissenting in part).[11] The evident purpose of the coercion test is to clarify and expand the range of governmental accommodation of religious practices that are so much a part of American society.

Should the coercion test displace the endorsement standard, the place of the Chapel at Cleveland Hopkins International Airport would remain well within the contours of the Constitution. No person is compelled to enter, participate, or be confronted by any religious services in the Chapel. And the benefits flowing to the Catholic Church from the City of Cleveland are so indirect and indeterminable that there is nothing approaching the kind of establishment of religion through expenditures of the public fisc that the framers of the First Amendment had in mind.

3. State Action That Confers an Incidental Benefit To a Religion or Results in Incidental Costs to the State Does Not Constitute a Violation of the Establishment Clause

The record shows that any financial cost to the City is highly speculative and conjectural. "Cleveland Hopkins International Airport is an entirely self-sustaining unit in the

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[11] Justice Kennedy continued to utilize the coercion test in striking down school sponsored prayers at graduation ceremonies in *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

economic sense and receives not a cent from the tax supported general fund of the City of Cleveland." Findings of Fact, at ¶10. Plaintiffs-Appellants' claims of City support are reduced to an assertion that some undetermined amount of incentive payment to the City may have been lost because of the lower rent provided for the Chapel. Appellants' Brief at 8. That assertion is contradicted by the fact finder after a full trial on the merits, Findings of Fact, at ¶11, and Appellants again seek to retry the case without providing the Court with a record on which to judge the evidence. Paragraph 11 of the Trial Court's Findings of Fact provides as follows:

> As an incentive to the City to provide good management for the Airport System, an incentive compensation payment is provided which is paid from Airport Revenues to the General Fund of the City. Such amounts, if any, are determined for each year by a formula located in Section 8.06(b) of the Agreement and Lease between the Airlines and the City. There were no incentive compensation payments made in the years 1984, 1986 and 1988, but such payments were made in 1985 and 1987. *Even if the Chapel's rent were $60,000 per year, this amount would have no impact whatsoever on the incentive payment calculations.* It would neither produce an incentive payment when there otherwise was none, nor would it increase what otherwise was paid in 1985 and 1987. In fact, *calculations performed by the City and accepted into evidence, demonstrate that the incentive payments for those years would have actually been reduced had the Diocese been paying more rent for the Airport Chapel space.*
>
> Findings of Fact, at ¶11, (Emphasis added).

Appellants' argument, moreover, is beside the point. As noted above, an airport may charge whatever it wishes, no matter what its expected gain or loss in revenue, so long as the basis of its decision is reasonable. If the Airport loses money because the U.S.O. or an attractive restaurant pays less than the market rate, that is within the Airport's discretion. So long as the Chapel provides a benefit to the travelling public, the relative gain or loss of the level of rent it pays is within the reasonable discretion of airport management. After all, in some situations, the Supreme Court has held that even direct payments to religious organizations to further secular purposes are fully within the discretion of the state. *Bowen v. Kendrick*, 487 U.S., 608. In the case before this Court, however, the financial cost to the City

is, at most, highly indirect and attenuated. Incentive payments depend upon a complicated formula between the Airlines and the City and are based upon a number of variable factors. In many years, no incentive payments were made at all.

Furthermore, even if there is some incidental financial cost to the City in the diminution of incentive payments by the airlines, or even if this results in some ancillary benefits to the Chapel, they of themselves do not constitute a violation of the Establishment Clause. Incidental benefits do not constitute an endorsement of religion. *Committee of Public Education v. Nyquist*, 413 U.S. 756, 771 (1973), *Widmar*, 454 U.S., 273-74. Every time a city provides fire and police protection to a church, there is an incidental benefit. *Roemer v. Maryland Public Works Bd.*, 416 U.S. 736, at 747 (1976). Every time a church takes advantage of its tax exempt status, there is an incidental cost to the state. *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970). Sunday closing laws, although recreational in purpose, nonetheless give people an opportunity to attend church. *McGowan v. Maryland*, 366 U.S. 420 (1961). In some situations, even direct grants to a religious organization to further a social policy do not violate the First Amendment. *Bowen v. Kendrick*, *supra*. See also *Tilton v. Richardson*, 403 U.S. 672 (1971) (federal construction grants to church related colleges do not offend the Establishment Clause); *Hunt v. McNair*, 413 U.S. 734 (1973) (approving favorable loan rates to sectarian colleges); and *Roemer v. Maryland Public Works Bd.*, *supra* (noncategorical grants to church related colleges are constitutional).

The Supreme Court has repeatedly found that indirect or attenuated benefits to a religion are not prohibited by the Establishment Clause. *Zobrest v. Catalina Foothills Schools District*, 61 U.S.L.W. 4641, 4643 (1993) (sectarian institutions may receive attenuated benefit as a result of a government policy providing benefits to a broad class of citizens); *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481, 488 (1986) (benefit flowing to religious institution from recipient of rehabilitation funds is not a subsidy of religion); *Mueller v. Allen*, 463 U.S. 388, 400 (1983) (tax benefit available to all parents that primarily flows to parochial schools not violative of Establishment Clause); *Widmar*, 454 U.S., 271-275 (incidental benefits accruing to religious groups who use university facilities do not amount to an establishment of religion); *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970)

(tax exemption for religious organizations, including houses of worship, does not offend Establishment Clause).

Under the Supreme Court's definition, indirect benefits do not amount to a subsidy. As Justice Brennan explained in *Walz*, a subsidy harms the fisc by directing public funds to religious uses. But when the state eschews the collection of taxes which would otherwise have been available, it merely refrains from diverting to its own uses income independently generated by churches through voluntary contributions. 397 U.S., 690-91 (Brennan, J., concurring). By deciding to allocate space for the legitimate objective of providing a service to its public at a rate of rent lower than that charged to commercial tenants, the Airport was in the same way only refraining from diverting to its own uses income that the Diocese would have had to generate independently through voluntary contributions. Whatever incidental benefit accrued to the Diocese from this lease was fully within the limits established by the Supreme Court.

E. THE MERE TAKING OF OFFENSE AT THE CONTENT OF SPEECH IS INSUFFICIENT GROUNDS UNDER THE CONSTITUTION TO SUPPRESS THAT SPEECH

When all is said and done, the gravamen of Appellants' complaint is that they are offended at seeing a chapel when they visit the Airport. Standing may be present where one alters one's behavior to avoid unwelcome religious observances, *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985), but relief is constitutionally impermissible if the religious organization has a right to be where it is. Where the speech in question is otherwise lawfully present, then offense taken by individuals at the content of the expression is not a sufficient ground for suppressing it. *Cohen v. California*, 403 U.S. 15 (1971); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Many people avoid preachers on street corners. However, if the preacher has a right to be on that corner to exercise his right in a public forum, one cannot suppress his behavior merely because one would rather not have to listen to him. *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Edwards v. South Carolina*, 372 U.S. 229 (1963). Compare, *Feiner v. New York*, 340 U.S. 315 (1951).

But in this case, Appellants take offense not at any one importuning them for contributions, *ISKCON*, 112 S.Ct., 2708, nor because there is a Christian symbol that cannot be avoided.[12] See, *ACLU v. Rabun County*, 698 F.2d 1098 (llth Cir. 1983), *modifying*, 678 F.2d 1379 (llth Cir. 1982) (cross prominently constructed in a state park violates Establishment Clause). Neither do Appellants complain about proselytizing by the Airport Chaplain. See *Carter v. Broadlawns Medical Center*, 857 F.2d 448 (8th Cir. 1988), *cert. den.* 109 S.Ct. 1569, in which the Eighth Circuit held that a county hospital could constitutionally hire a chaplain for counseling and spiritual support, but not for proselytizing. Rather, Appellants are offended simply because, behind a closed door, a chapel exists.

In *Widmar*, *supra*, and *Mergens*, *supra*, the Supreme Court held that certain religious groups had the constitutional right to use public facilities. The fact that some people may have been offended as they went about their other legitimate school activities, that they may not be able to avoid the signs of these groups, is no justification for these religious groups to be evicted. See *Christian Science v. City and County of San Francisco*, *supra*. Although avoidance of unwelcome religious exercises may confer standing when the avoidance results in lack of use of the facility, it cannot suppress such observances if they are otherwise lawful. If offense were the basis for suppressing content, then some of the greatest cases in our constitutional history would be overturned in an instant.[13]

In sum, where the Chapel at Cleveland Hopkins Airport has a legitimate reason for existence, as in this case, furthering the aid and comfort of the travelling public along with

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[12] In fact, there are specific Findings of Fact which indicate that "[t]he construction of the Airport *Chapel* was done in complete conformity with the architectural design of the Airport, and *is not visually seen to be a Chapel from either the outside of the Airport nor by walking down Concourse B*" (Findings of Fact, at ¶19); and "[t]he exterior of the Airport *Chapel*, outside of a sign indicating that it is a chapel, *displays no religious symbols or other indications of religious purpose to those passing nearby on the Concourse*" (Findings of Fact, at ¶21).

[13] The Court is of course aware of a myriad of cases, often prosecuted by the ACLU, which make clear the principle that unpopular speech or causes are protected by the Constitution. Nazis who march in Skokie, Illinois, purveyors of less than delicate speech by way of sexually explicit materials, and even, burners of the American Flag, would be surprised to hear the ACLU espouse the proposition that the Diocese of Cleveland should be denied the right to utilize space in the Airport as a Chapel because someone might be offended to have to walk past its non-descript doors.

other public service organizations, then mere offense cannot be the basis of suppression of that legitimate existence.

CONCLUSION

Airport chapels are nothing new to air travel in the United States. Neither is their constitutionality. In 1979, the District Court in New York upheld airport chapels at New York's Kennedy Airport in the case of *Brashich v. Port Authority of New York and New Jersey*, 484 F. Supp. 697 (S.D. NY 1979), *aff'd*, 791 F.2d 224 (2nd Cir. 1980):

> . . . [T]he Port Authority has not established religion, but has *only made accommodations for religious practices.* As earlier stated, JFK Airport is a massive facility covering over 4,500 acres, with an enormous number of people using the facility. The Port Authority has made provisions to accommodate the Airport's large population of travellers, visitors and employees. Within the Airport complex, provision has been made for medical, dental and pharmacy services; also there are hotel, parking, shopping and banking services. *Providing land for the erection of religious chapels is merely a further accommodation* by the Port Authority *to serve the convenience of those who use the Airport.* Contrary to plaintiff's contention, the Port Authority does not sponsor, subsidize or interfere with the religious groups which operate the chapels at the Airport. Nor does it advise them on the conduct of their institutions.
>
> Plaintiff has not shown that the Port Authority established religion by its actions in connection with leasing of land to the three religious groups herein, or their erection of the three chapels. *Plaintiff has not shown "governmentally established religion or governmental interference with religion", the two standards of neutrality for First Amendment purposes* as expressed in *Walz, supra*, 397 U.S. at 669, 90 S.Ct. at 1412.
>
> 484 F. Supp., at 703-704.
> (Emphasis added).

In a commendable action to assist the air traveller, Cleveland Hopkins International Airport has provided a number of public services. The Chapel is one of them. The Airport has accommodated the needs of those who use its facility. It has exercised reasonable discretion in the regulation of its nonpublic forum. Its actions do not endorse religion, but rather, endorse the notion that the air traveller should be made comfortable and secure in using the facility. The well-supported Findings of Fact and Conclusions of Law of the District Court should be affirmed.

ADDENDUM

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JANE HAWLEY, et al.,	)	
	)	
Plaintiffs - Appellants,	)	
	)	Case No. 91-3740
v.	)	
	)	
CITY OF CLEVELAND, et al.,	)	
	)	
Defendants - Appellees.	)	

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CROSS-DESIGNATION BY DEFENDANTS-APPELLEES CATHOLIC DIOCESE OF CLEVELAND AND BISHOP ANTHONY M. PILLA OF ADDITIONAL APPENDIX CONTENTS

Pursuant to the provisions of Rule 11(b) of the Local Rules of the Sixth Circuit Court of Appeals, Defendants-Appellees Catholic Diocese of Cleveland and Bishop Anthony M. Pilla designate the following parts of the record to be included in the Joint Appendix.

32.[14] City Record containing City of Cleveland Ordinance No. 843-82 (Defendant Diocese Exhibit 5001).

33. List of the costs and expenses of demolition, construction and furnishing of the Chapel, with Architect's Certificate dated January 31, 1986 (Defendant Diocese Exhibit 5004).

34. Photographs of the Chapel (Defendant Diocese Exhibits 5005a, 5005b, 5005c, 5005d, 5005e, 5005f, 5005g, 5005j, 5005k, 5005m, 5005n, 5005o, and 5005p).

35. Article published in "The Airport Flyer", March, 1986 edition (Defendant Diocese Exhibit 5006).

36. Letter from Monsignor Robert C. Blair dated March 23, 1986 sent to twenty-two (22) religious leaders (Defendant Diocese Exhibit 5011).

37. Letter from Monsignot Robert C. Blair dated August 25, 1986 to Rabbi Armond E. Cohen of the Park Synagogue (Defendant Diocese Exhibit 5012).

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[14] The Brief of the Plaintiffs-Appellants designated items 1 through 31, and the additional items designated by these Defendants-Appellees accordingly begin with number 32.

38. September 13, 1986 Survey circulated by Monsignor Robert C. Blair to "Employers, Employees and Tenants, Cleveland Hopkins International Airport" (Defendant Diocese Exhibit 5013).

39. Letter from Terry Klema, Airport Terminal Manager at Cleveland Hopkins International Airport, dated December 27, 1985 (Defendant Diocese Exhibit 5014).

40. Letter from Ronald L. Wallenfang to Bishop Anthony M. Pilla dated August 1, 1988 (Defendant Diocese Exhibit 5015).

41. Letter from Mrs. S.M. Coates of Lakewood, Ohio to Monsignor Robert C. Blair dated October 22, 1989 (Defendant Diocese Exhibit 5016).

42. Baha'u'llah Prayer Card distributed at the Airport Chapel (Defendant Diocese Exhibit 5018).

43. Jewish Prayer Card distributed at the Airport Chapel (Defendant Diocese Exhibit 5019).

44. Protestant Prayer Card distributed at the Airport Chapel (Defendant Diocese Exhibit 5020).

45. Catholic Prayer Card distributed at the Airport Chapel (Defendant Diocese Exhibit 5021).

46. Letter from Howard G. Showalter of Franchise Operations, Inc., dated October 8, 1990 (Defendant Diocese Exhibit 5022).

47. Letter from J.B. Stack, Station Manager for Transworld Airlines, Inc. (TWA), dated October 29, 1990 (Defendant Diocese Exhibit 5023).

48. Letter from Joseph M. Dattilio, General Manager of Host International, Inc., dated November 2, 1990 (Defendant Diocese Exhibit 5024).

49. Letter from Paul Kaparoff, Manager-Airport Services, Eastern Airlines, Inc., dated November 12, 1990 (Defendant Diocese Exhibit 5025).

50. Letter dated November 19, 1990, from Kathryn J. Foster, founder of Kathryn Joy Foster Music Ministries (Defendant Diocese Exhibit 5026).

51. Letter dated November 25, 1990, from Margaret and Darryl Greene of the Baha'i Faith (Defendant Diocese Exhibit 5028).

52. Balance of the Transcripts of the Depositions of Monsignor Robert Blair taken November 1, 1983, and March 2, 1987.

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