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<p><b>SUPREME COURT, STATE OF COLORADO</b> Court Address: 2 E. 14th Avenue Denver, Colorado 80203</p>	<p><b>COURT USE ONLY</b></p>
<p>On Petition for Writ of Certiorari from the Colorado Court of Appeals Case No. 05CA2432</p> <p>Appeal from a Final Judgment of the District Court, Arapahoe County, Colorado Case No. 04CV1774, The Honorable Marilyn Leonard</p>	
<p><b>PETITIONER(S):</b> CATHOLIC HEALTH INITIATIVES COLORADO d/b/a Villa Pueblo Towers</p> <p><b>RESPONDENT(S):</b> CITY OF PUEBLO, COLORADO, DEPARTMENT OF FINANCE, and LARA BARETT AS DIRECTOR</p>	<p>Case No.: 07SC905</p>
<p>Attorney for Petitioner: Mark L. Sabey, #16309 Kutak Rock LLP 1801 California, Suite 3100 Denver, Colorado 80202 Telephone: (303) 297-2400 Facsimile: (303) 292-7799</p>	<p><b>OPENING BRIEF</b></p>

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## ISSUES FOR REVIEW

1. Whether the Court of Appeals applied the proper test for religious activity.
2. Whether the test for religious activity applied by the Court of Appeals, with which Catholic Health must comply continually to retain its tax exemption, and which the City of Pueblo must apply in subsequent audits, is unconstitutional and creates an ongoing chilling and entangling effect.

## NATURE OF THE CASE

Following a March 12, 2004 Final Determination of the Executive Director of the Colorado Department of Revenue, Catholic Health appealed to the District Court pursuant to C.R.S. § 29-2-106.1(7) which required that the case be addressed in the manner provided by C.R.S. § 39-21-105, i.e., a de novo proceeding. I:2-11 (this is the abbreviated form of record citation to Volume I, pp. 2-11). The parties waived trial and submitted the case to the District Court based on stipulated facts. II:398-427. The District Court entered an order (App. B to Petition) which was reversed by the Court of Appeals on September 6, 2007. Catholic Health Initiatives Colorado v. City of Pueblo, 183 P.3d 612 (Colo. App. 2008).

## **STATEMENT OF THE FACTS**

The facts in this case are stipulated and are fully set forth in the record. II:398-427. As there are no factual or evidentiary disputes, this fact statement will summarize only a few of the most pertinent stipulated facts. Citations to the Record will be provided only at the end of each paragraph unless more frequent references are needed.

### **A Faith-based Environment for Their Last Days:**

Just as faith-based parochial schools meet students' educational needs in an environment that is supportive and encouraging to religious faith, Villa Pueblo is a faith-based retirement community that meets the health care, social and other needs of the elderly in an environment that supports and encourages religious faith. It gives the elderly the option to live in a faith-based community during their last days. The district court recognized that Villa Pueblo is "a community of like minded citizens who have chosen to conclude their lives in a community of similarly situated souls." II:716.

### **Caring for the Elderly:**

Catholic Health provides care to the elderly at Villa Pueblo. II:416-419. Catholic Health's decision to provide care to the elderly is based on the religious beliefs and teachings of the Catholic Church and is intended to advance its



religious mission and ministry to share the compassion of Christ by continuing His ministry of healing and helping. II:400-409. The beliefs and teachings that motivate Catholic Health to operate Villa Pueblo are found in the Bible, in ethical and religious directives of the Catholic Church, and in letters of Catholic Church leaders, including the Pope. *Id.* The district court said that the operation of Villa Pueblo “is a charitable deed on the part of the Catholic Church as all religions are admonished to do by statements in the new testament.” II:716.

### **The Bible’s Teachings About Religious Worship and Service:**

Through a parable recorded in the Bible, Jesus Christ taught that service to those who are typically marginalized by society is service to God:

Then the king will say to those on his right, ‘Come, you who are blessed by my Father. Inherit the kingdom prepared for you from the foundation of the world. For I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me, naked and you clothed me, ill and you cared for me, in prison and you visited me.’ Then the righteous will answer him and say, ‘Lord, when did we see you hungry and feed you, or thirsty and give you drink? When did we see you a stranger and welcome you, or naked and clothe you? When did we see you ill or in prison, and visit you?’ And the king will say to them in reply, ‘Amen, I say to you, whatever you did for one of these least brothers of mine, you did for me.’”

New American Bible (“Bible”), Matthew 25:34-40. The Bible also states: “Religion that is pure and undefiled before God and the Father is this: to care for orphans and widows in their affliction. . . .” Bible, James 1:27. In the Catholic

faith, serving those at the margins of society, including the elderly, is one of the purest forms of religious worship. Villa Pueblo can be seen as a response to the plea of the Psalmist: "Cast me not off in my old age; as my strength fails, forsake me not." Bible, Psalms 71:9. For those of the Catholic faith, religious worship is not limited to the narrow confines of traditional church services. II:400-401.

**501(c)(3) Tax Exemption:**

Catholic Health is recognized by the IRS as a not-for-profit tax exempt organization under Section 501(c)(3) of the Internal Revenue Code. II:399-400.

**Catholic Church Control and Directives:**

The religious beliefs that motivate Catholic Health to operate Villa Pueblo permeate every aspect of Villa Pueblo's operations. Villa Pueblo is under the control of the Church, must operate in accordance with extensive religious directives, and cannot sell its assets without approval from Rome. II:401-402; II:435-502.

**Religious Nature of Employment at Villa Pueblo:**

Every employee must support the religious mission and ministry of the organization and must be willing to adhere to the Ethical and Religious Directives. II:403 (at subparagraph 9); II:407. Catholic Health instructs new employees in orientation about the meaning of its religious mission. All employees are required

to support that religious mission and follow the religious directives of the Catholic Church related to their job. II:411.

Centura has an Office of Mission and Ministry, which is charged to ensure that the organization stays true to its religious mission and ministry. The office of Mission and Ministry implements many programs to enhance spirituality in the workplace and to ensure that the services provided by facilities such as Villa Pueblo are very different from the services provided by for-profit, non-religious facilities. Many facilities, including Villa Pueblo, have a Pastoral and Spiritual Care office which provides and encourages pastoral and spiritual care within each facility. II:411-416. Villa Pueblo provides an extensive pastoral and spiritual care program for its residents. II:422-424. The physical facility at Villa Pueblo includes a chapel for use by residents and staff for worship and meditation. II:423.

**Mission and Values:**

Catholic Health's facilities are affiliated with and operated by Centura Health Corporation ("Centura"), a Colorado not for profit organization. Centura is required to implement the religious mission and ministry of Catholic Health at Villa Pueblo and other Catholic Health facilities, and to comply with all religious directives of the Catholic Church. Centura has adopted a Mission and Values Statement which is posted on Centura's website which is available to the general

public. This religious mission statement is posted in all public areas at Villa Pueblo, including a prominent posting in the entrance to the facility. It is included on advertising brochures for Villa Pueblo and on business cards of those who work with potential residents. The religious functions and nature of Villa Pueblo are discussed with potential residents and are very attractive to many potential residents. II:409-411. Villa Pueblo holds itself out to the general public as a religious organization. II:424-425.

**Values Impact Analysis:**

Centura Health's Values Impact Analysis process (VIA) provides an important framework for Centura employees and leaders to make key decisions in the light of its Mission and Values. II:415-416. Despite the fact that Villa Pueblo and the other Senior Care facilities of Catholic Health lose money each year, Catholic Health continues to operate these facilities as part of its religious mission. In the aggregate, the operation of the senior care facilities, including Villa Pueblo, resulted in a significant average overall loss of approximately \$5 million per year. II:422.

**Spirituality and Healing:**

Catholic Health believes that personal spirituality strengthens mental, physical and emotional health. Catholic Health believes that those who have faith

and/or a belief that their life has a purpose and meaning heal faster and remain healthier. Catholic Health is aware of the numerous scientific studies that document the positive impacts of spirituality and spiritual practices (such as prayer and chaplain visits) on the healing process. Catholic Health promotes understanding of the potential health benefits of spirituality through information and education. II:411.

**Tax Treatment of Catholic Health:**

Catholic Health applied for property tax exemption for Villa Pueblo claiming that Villa Pueblo is owned and used solely and exclusively for religious purposes. The Colorado Department of Revenue, Division of Property Taxation, determined that it was appropriate to grant property tax exemption, finding that the property of Villa Pueblo is used solely and exclusively for religious purposes. II:425; II:529.

The State of Colorado exempts from taxation all entities organized and operated exclusively for religious or charitable purposes for sales made to such organizations in the conduct of their activities within the scope of those purposes. C.R.S. §§ 39-26-114(1)(a)(II) and 39-26-102(2.5). Catholic Health applied for and the Colorado Department of Revenue has issued a Certificate of Exemption for Colorado State Sales and Use Tax. II:425.

The City of Pueblo has concluded that Catholic Health is a “charitable organization” and has granted an Exempt License to Catholic Health for its operation of St. Mary Corwin Hospital in Pueblo. II:425-426.

Catholic Health’s operation of The Villas at Sunny Acres located in the City of Thornton, a faith-based retirement community identical to Villa Pueblo, was found by the Adams County District Court to be a tax-exempt religious activity after a full trial. App: 62-68. Despite application of various incorrect legal tests and standards (which further demonstrate the need for a clear pronouncement by this Court), the district court reached the correct conclusion that the operation of Sunny Acres is a religious activity.

### **SUMMARY OF THE ARGUMENT**

This case deals with the definition of religious activity and how government officials (whether city or court officials) should go about deciding whether an activity is religious. This is a crucial issue that directly relates to individual rights. The free exercise clause protects not just belief, but also, the exercise of religion, i.e., activities based on religious belief. An activity that is not religious is not entitled to such constitutional protection. If government officers were free to impose their subjective perspectives about what is and is not a religious activity, the protections of the free exercise clause would be meaningless. Although less

crucial, tax exemptions for religious activities also would be subject to the whims of administrative officials seeking to collect more funds. A clear legal standard is necessary.

The Code of the City of Pueblo, Colorado (“Code”) exempts from sales and use taxes religious organizations in the conduct of their regular religious activities and functions. It was undisputed that Catholic Health is a religious organization. The only issue for the district court to decide was whether the operation of Villa Pueblo is a religious activity or function.

The stipulated facts demonstrate convincingly that the operation of Villa Pueblo is a religious activity. The Court of Appeals concluded that “the entire operation of Villa Pueblo is a religious activity” that is exempt from taxation. 183 P.3d at 615-616. Although the ruling was favorable to Catholic Health, the test adopted by the Court of Appeals was erroneous in several respects that negatively impact Villa Pueblo’s ongoing operations. Under the Code, the City can conduct an investigation at any time to determine whether Villa Pueblo continues to meet the test for exemption. Code § 14-4-7. A grant of exemption is not a permanent and irrevocable grant. As soon as an entity fails to meet the requirements for exemption, the right to exemption is lost. Villa Pueblo is under pressure, therefore, to continually comply with the religious activity tests articulated by the Court of

Appeals in order to retain its tax exempt status. Unfortunately, those tests are unconstitutional.

Despite this Court's repeated recognition that activities motivated by sincere religious beliefs are religious activities, the Court of Appeals rejected that definition. The Court of Appeals asserted that motivation does not control, "although it should be considered, along with some analysis of the organization's activities." 183 P.3d at 617. Likewise, the Court of Appeals stated "the government may consider motivation but must examine other factors." *Id.* at 618. (emphasis added). Unfortunately, the nature of that analysis was never clearly described, defined or limited. The Court of Appeals left the legal standard vague with statements like "We conclude that a certain amount of inquiry into a religious organization's activities is appropriate" and "We do not purport to define conclusively the term 'religious activity.'" *Id.* at 617 and 619. The Court of Appeals opinion failed to adopt a bright-line test as required for avoiding unconstitutional inquiries.

By requiring government officials to consider factors other than the actor's motivation in determining whether an activity is religious, the Court of Appeals opinion forces government officials to address and determine religious questions. In addition, the Court of Appeals opinion improperly permits government officials



to engage in unconstitutional business and financial inquiries beyond whether the entity is non-profit. The impact of all this is an immediate and continuing chilling effect on Catholic Health and an ongoing entanglement between the City and Villa Pueblo.

## **ARGUMENT**

### **I. IN DECIDING WHETHER AN ACTIVITY IS RELIGIOUS, ONLY A BRIGHT-LINE TEST IS ACCEPTABLE.**

In University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002), the court held that it was unconstitutional for the NLRB to apply a “substantial religious character” test in deciding whether to exercise jurisdiction over a religiously affiliated university. The court held that “[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” 278 F.3d at 1341, quoting NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979). The court pointed out that it is well established in numerous contexts that “courts should refrain from trolling through a person’s or institution’s religious beliefs.” 278 F.3d at 1341-42, quoting Mitchell v. Helms, 530 U.S. 793, 828 (2000). The court also noted “the difficulty of judicially deciding which activities of a religious organization were religious and which were secular.” 278 F.3d at 1342, citing Presiding Bishop v. Amos, 483 U.S. 327 (1987).

The court found that the inquiry that led to the NLRB's conclusion that the University's primary purpose and function was secular education, was unconstitutional. The NLRB's unconstitutional position was that it could "consider, on a case-by-case basis, all aspects of a religious school's organization and function that [it deemed] relevant." 278 F.3d at 1339. The court found that this wide-open inquiry was unconstitutional and that a "bright-line test" was needed for deciding issues of religious exemption. *Id.* at 1345.

**A. To Apply Its Exemption For Religious Activities, The City Must Distinguish Between Religious And Non-Religious Activities.**

The Pueblo Code grants a sales and use tax exemption to non-profit religious organizations in the conduct of their regular religious functions and activities. Pueblo Code § 14-4-76(8) and § 14-4-77(5). In order to apply this exemption, the City must determine which functions and activities of religious organizations are religious and which are not.

**B. Such A Determination Is Extremely Sensitive.**

Evidence of the sensitivity of governmental efforts to distinguish between religious and secular activities can be found in the history of Title VII of the Civil Rights Act of 1964 which prohibits religious discrimination in employment. Recognizing that religious organizations need to use religious criteria in selecting employees for religious positions or activities, Congress originally included an

exemption allowing religious organizations to discriminate on the basis of religion in carrying out their religious activities. After eight years of experience with the “religious activities” exemption, Congress adopted an amendment exempting religious organizations in all of their activities, not just their religious activities. 42 U.S.C. § 2000e 1(a). The exemption was broadened to eliminate the constitutional difficulties that arise when the government makes decisions about which activities of religious organizations are religious.

In Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987), a unanimous United States Supreme Court found that the new exemption was proper because it eliminated government entanglement and interference with religious organizations:

[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. at 336. A concurring opinion stated:

A case by case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.

Id. at 343-344 (citations omitted).

Likewise, in a tax case, the United States Supreme Court stated that “requiring the Government to distinguish between ‘secular’ and ‘religious’ benefits or services . . . may be ‘fraught with the sort of entanglement that the Constitution forbids.’” Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 697 (1989).

These cases demonstrate that government officials must exercise extreme caution in any effort to distinguish between religious and secular activities or functions. The proper manner and test for making such determinations without violating constitutional restrictions is a matter of utmost importance.

### **C. A Bright Line Test Is Needed.**

In order to avoid unconstitutional entanglement and chilling effects in this sensitive area, only a bright line test, a clear legal standard, will do. For example, in University of Great Falls, *supra*, the court observed that, because 501(c)(3) exemption is based on a relatively clear legal standard and does not involve resolution of religious questions, it is a factor that can be appropriately required for religious exemption:

As the Amos Court noted, it is hard to draw a line between the secular and religious activities of a religious organization. See Amos, 483 U.S. at 336, 107 S.Ct. at 2868-69. However, it is relatively straightforward to distinguish between a non-profit and a for-profit entity.

*Id.* at 1344. There was no constitutional problem with an assessment by government officials of the “relatively straight-forward” issue of the non-profit status of a religious organization. In this case, therefore, it was perfectly appropriate for the City to determine whether Catholic Health was a 501(c)(3) exempt organization as required by Pueblo Code § 14-4-21(5).

But the City’s verification that Catholic Health was non-profit, did not resolve the issue of whether the operation of Villa Pueblo was a religious activity. Is there a bright-line test for religious activity? Yes. The immediately following sections outline the parameters and basis for that bright-line test.

1. Government Officials Cannot Decide Which Activities Properly Manifest Devotion To God.

A dictionary definition of “religious” is: “relating to or manifesting faithful devotion to an acknowledged ultimate reality or deity.” *Websters New Collegiate Dictionary* 969 (1981). Religious activities and functions, therefore, are those activities and functions that relate to or manifest faithful devotion to God. The problem is that the correct way to manifest devotion to God is not a matter government officials can decide. “Man’s relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.” *United States v. Ballard*, 322 U.S. 78, 86-87 (1944); see, also, *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508

U.S. 520, 531 (1993) (court cannot decide that animal sacrifice is not religion); Espinosa v. Rusk, 634 F.2d 477 (10th Cir. 1980) *aff'd* 456 U.S. 951 (1982) (a city cannot narrowly define religious activities). In New York v. Cathedral Academy, 434 U.S. 125, 133 (1977), the Court stated:

The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once.

Id. at 133. Similarly, in Thomas v. Review Bd. Ind. Empl. Sec. Div., 450 U.S. 707, 101 S.Ct. 1425 (1981), the court stated:

Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion.

Id. at 716.

These cases establish that government officials cannot decide religious questions; they can only determine whether the action was motivated by sincere religious belief. If an action is motivated by sincere religious belief, it is a religious activity, regardless of what anyone else may believe. Government officials cannot discount religious views that are different from their own and

cannot address religious questions.

2. Religious Activities Are Activities Motivated By Sincere Religious Beliefs and Purposes.

Because government officials can neither decide religious matters nor define the scope of proper religious practice, the only way they can properly decide whether an activity is religious is by reference to the actor's motivations and purposes. The United States Supreme Court has stated that, "while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case." *United States v. Seeger*, 380 U.S. 163, 184 (1965). Likewise, "[a]lthough a court may not determine whether a given belief is or is not a religion, the trier of fact may determine whether the belief is sincerely held as a religious belief without violating the First Amendment." *In re the Marriage of Hoyt*, 742 P.2d 963, 964 (Colo. App. 1987).

Often, the true nature of an activity cannot be determined without knowing the motivation of the one conducting the activity. For example, whether a man who shot his hunting partner committed a crime depends on the man's motivation and intent. If there was criminal motive and intent (as opposed to a mere accident) the shooting was a criminal act. Likewise, whether an act is religious depends on the actor's motive and intent.

In the context of the free exercise clause, courts have repeatedly recognized that activities that are religiously motivated are religious activities. In Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988), this Court addressed the question of what constitutes religious conduct (religious activity):

[T]he threshold question is whether the conduct of the defendant is religious. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (“to have the protection of the [r]eligious [c]lauses the claims must be rooted in religious belief”) . . . .

Id. at 283-284. The test applied by this Court to determine whether the activities of the defendant were religious was whether “the alleged conduct . . . was dictated by his sincerely held religious beliefs or was consistent with the practice of . . . religion.” Id. Also, Bear Valley Church, Christ v. DeBose, 928 P.2d 1315, 1321 (Colo. 1996) (an activity is religious if the alleged conduct was dictated by sincerely held religious beliefs or was consistent with the practice of religion); Moses v. The Diocese of Colorado, 863 P.2d 310, 320 (Colo. 1993) (recognizing the distinction between “secular conduct” and “religiously motivated conduct”). This Court has repeatedly recognized that activities motivated by sincerely held religious beliefs are religious activities. Likewise, the United States Supreme Court has stated:

Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected



by the Free Exercise Clause.

Employment Div., Ore. Dept. of Human Res. v. Smith, 494 U.S. 872, 893 (1990) (O'Connor concurring).

The plain meaning of the term “religious activities” is much broader than formal acts of worship or church services. It encompasses all activities motivated by religious belief, such as pilgrimages, missionary work, and community service, to name a few. By analogy, the IRS publication entitled, “Applying for 501(c)(3) Tax Exempt Status” (II:599-614) explains at page 4 that religious purposes go well beyond the functions of a church: “Other religious organizations that do not carry out functions of a church, such as mission organizations, speakers’ organizations, nondenominational ministries, ecumenical organizations, or faith-based social agencies, may qualify for exemption.”

In Matter of Community Synagogue v. Bates, 1 N.Y.2d 445, 154 N.Y.S.2d 15, 136 N.E.2d 488 (1956), the zoning board had concluded that a synagogue building was not for “strictly religious uses” because, in addition to worship services, the building was also used for community services “such as Red Cross work, Boy Scout work and work of other such organizations.” *Id.* at 453. Reversing this decision, the court stated:

Strictly religious uses and activities are more than prayer and sacrifice and all churches recognize that the area of their responsibility is

broader than leading the congregation in prayer.

*Id.* The court concluded that such community services were strictly religious uses, because they were motivated by religious belief.

In *Espinosa v. Rusk*, 634 F.2d 477 (10th Cir. 1980), *aff'd* 456 U.S. 951 (1982), the City of Albuquerque required a license for solicitations, but exempted solicitations by religious groups for “evangelical, missionary or religious but not secular purposes.” *Id.* at 479. The ordinance exempted religious activities but not secular activities. *Id.* The Seventh Day Adventist Church conducted an annual solicitation drive for money to support various activities of the church, including medical, community, evangelical and educational services. The church maintained that all of these activities were part of its religious mission and were therefore exempt from the ordinance. The city decided that a license was necessary because the solicitation was for secular rather than purely religious purposes. The Tenth Circuit found the city’s actions unconstitutional and stated:

[T]his is a very sensitive area. The setting up of a city agency to make distinctions as to that which is religious and that which is secular so as to subject the latter to regulation is necessarily a suspect effort. . . . The conception of religion entertained by the City in this very case was that it had to be purely spiritual or evangelical. Thus, the charitable activity of the church having to do with the feeding of the hungry or the offer of clothing and shelter to the poor was deemed to be subject to regulation. This broad definition of secular is part of the problem. Whether a less vigorous construction would result in a different conclusion is not, of course, before us and is not a proper

subject for us to consider. Inasmuch, however, that the challenge is to the ordinance as applied we must conclude that the present effort is an invalid interference.

*Id.* at 481. This case makes it clear that it is unconstitutional for a city to impose its views on the scope and limits of religious practice. Religious activities are not limited to worship services or other activities that are purely spiritual or evangelical. Religious activities include churches' religiously motivated efforts to make the world a better place.

A wide variety of religiously motivated activities have been found to constitute the "exercise of religion" which is protected by the federal and state constitutions. *E.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (refusal to comply with compulsory education laws); *Ballinger v. Commissioner of Internal Revenue*, 728 F.2d 1287, 1291 (10th Cir. 1984) (opposition to social insurance); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (animal sacrifices). Even an activity which may be objectionable to others, such as animal sacrifices, is a religious activity if it is motivated by religious beliefs. But the same activity is not religious if there is no religious motivation.

The same is true in the taxation context. In numerous cases, this Court has recognized an entitlement to religious tax exemption for activities that are motivated by sincere religious beliefs and purposes. *E.g.*, *McGlone v. First Baptist*

Church of Denver, 97 Colo. 427 (1935); Maurer v. Young Life, 779 P.2d 1317 (Colo. 1989); see, also, C.R.S. § 39-3-106(2) and 39-2-117(1)(b)(II) (religiously motivated activities constitute worship). Thus, the bright-line test for religious activity is whether the activity is motivated by sincere religious beliefs or purposes. Obviously, the application of the bright-line test may involve some difficult determinations. Sincerity can be difficult to assess. Nevertheless, to avoid unconstitutional inquiries, the test itself must be clear.

3. Government Officials May Question, Explore And Examine Sincerity And Other Non-Religious Questions.

Under the Colorado Constitution (Section 5 of Article X), property used for religious worship is exempt from property taxation. After many years of experience with this exemption, the Colorado Legislature declared that any activity of a religious organization that is in furtherance of religious purposes is a religious activity and constitutes religious worship. C.R.S. § 39-3-106(2). This statute was needed to prevent public officials from violating the constitution by discounting the views of religious organizations and imposing their own perspective on what constitutes a religious activity or religious worship. To further ensure compliance with constitutional requirements, the Colorado legislature adopted C.R.S. § 39-2-117(1)(b)(II), which provides that, after an applicant for property tax exemption declares the religious mission and religious purposes of the owner of

the property and the uses of the property that are in furtherance of such mission and purposes, “[s]uch declaration shall be presumptive as to the religious purposes for which the property is used.” *Id.* The property owner’s declaration can only be challenged on three grounds: (1) that the religious mission and purposes are not religious beliefs sincerely held, (2) that the property is not actually used for the purposes described in the application, or (3) that the property is used for private gain or corporate profit. *Id.* These statutes outline the proper approach for government officials deciding whether an activity is religious.

While government officials cannot delimit the scope of religious practice, they can address the honesty and sincerity of asserted religious beliefs and motivations. *See, e.g., E.E.O.C. v. Union Independiente de la Autoridad*, 279 F.3d 49, 56 (1st Cir. 2002). The government can attack fraudulent assertions. The government is not at the mercy of a sham religion or a fake belief. *See, e.g., Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir. 1974). In fact, any person who makes fraudulent claims of religious motivation while seeking tax exemption would be guilty of tax fraud and would be subject to criminal prosecution.

In addition to addressing sincerity, government officials can determine whether a religious organization meets other requirements for a religious exemption without violating the Establishment Clause. In this case, the exemption

for religious activities is only available to religious organizations. The City obtained extensive information from Catholic Health about its religious mission, religious directives, general nature of operations, corporate documents, and connection with the Catholic Church. The City determined and stipulated that Catholic Health is a religious organization. II:399. Catholic Health does not object to this inquiry or determination by the City.

Under the Pueblo Code, the religious exemption is only available to religious organizations certified by the IRS to be 501(c)(3) exempt non-profit organizations. The City obtained from Catholic Health proof of its non-profit IRS certification, and stipulated that Catholic Health met this requirement. II:400. Catholic Health also does not object to this inquiry or determination. Even if the Code had required an independent determination of non-profit status by the City (rather than the Code's approach of deferring to the IRS), Catholic Health would not have objected to that inquiry.

Finally, the Code grants religious exemption only for religious activities. Catholic Health obtained extensive information demonstrating the connection between the religious mission and beliefs of Catholic Health and the specific activity of providing a faith-based environment and holistic (spiritual, physical and emotional) care to the elderly. The City stipulated that the operation of Villa

Pueblo was motivated by a religious mission and by sincere religious belief, including the following stipulations:

- “As part of its religious ministry to the elderly who are in need of support services, Catholic Health operates Villa Pueblo, a continuing care retirement community. Catholic Health’s mission is to share the compassion of Christ by continuing His ministry of healing and helping.”
- “In the Catholic faith, serving those at the margins of society, including the elderly, is one of the purest forms of religious worship.”
- “Catholic health believes that personal spirituality strengthens mental, physical and emotional health. . . . Catholic Health combines medical skills, compassionate touch, and spiritual treatment to care for the whole person . . . . In this manner, Catholic Health strives to create healing sanctuaries that carry on the ministry of Christ.”
- “Villa Pueblo held itself out to the general public as a religious organization.”<sup>1</sup>

II:400-401, 411, 424. Based on the stipulated facts and on repeated admissions of counsel, the Court of Appeals concluded:

[T]he City does not attack the sincerity of the religious beliefs of the Catholic Church and of Catholic Health that motivate the operation of Villa Pueblo. To the contrary, Catholic Health’s religious motives are stipulated.

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<sup>1</sup> In *University of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002), the court stated: “[S]uch public representations serve as a market check. While public religious identification will no doubt attract some . . . to the institution, it will dissuade others. In other words, it comes at a cost. . . . Thus, the requirement of public identification helps to ensure that only *bona fide* religious institutions are exempted.” The court felt that an organization’s public representations were a key indicator of sincerity.

183 P.3d at 617. Catholic Health does not object to this inquiry or determination regarding the sincerity of its religious motives.

From the above, it is clear that Catholic Health is not seeking to prevent a reasonable inquiry related to whether it meets the Code requirements for exemption. Because Catholic Health's 501(c)(3) exemption, its status as a religious organization, and its sincere religious motivations were all stipulated, however, there was no basis for further inquiry. Where, as here, the government does not raise any question of sincerity, the courts must accept a taxpayer's assertion that an activity is religious. In Ballinger v. Commissioner of Internal Revenue, 728 F.2d 1287 (10th Cir. 1984), the court stated:

The IRS does not challenge and the record does not reflect any question as to the sincerity of appellant's religious beliefs. We do not feel compelled to inquire further since '[c]ourts are not arbiters of scriptural interpretation.' Therefore, we accept as fact that his objection to social insurance is religious in nature.

Id. at 1291. In Church Of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993), the United States Supreme Court found that, where the "sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons" had not been questioned, the practice must be deemed religious and subject to the protections of the First Amendment. Id. at 531. In this case, since sincerity was



stipulated, that should have been the end of the Court of Appeals' religious activity inquiry.

## **II. THE TEST APPLIED BY THE COURT OF APPEALS WAS NOT A BRIGHT LINE TEST AND WAS UNCONSTITUTIONAL.**

### **A. The Court Of Appeals' Test Forces Government Officials To Decide Religious Questions.**

The Court of Appeals held that it was the nature of the activity, not the character of the organization that determines exemption. 183 P.3d at 617-618. Catholic Health agrees. Being a 501(c)(3) exempt religious organization alone did not qualify Catholic Health for exemption. The pertinent exemption was only for religious activities, not all activities of religious organizations. The Court of Appeals erred, however, in its legal analysis describing how government officials should decide whether an activity is religious.

Despite this Court's repeated recognition that activities motivated by sincere religious beliefs are religious activities, the Court of Appeals rejected that definition. The Court of Appeals asserted that motivation does not control, "although it should be considered, along with some analysis of the organization's activities." *Id.* at 618. Unfortunately, the nature of that "analysis" was never clearly described, defined or limited. The Court of Appeals stated that "the government may consider motivation but must examine other factors." *Id.* But, it

failed to clearly describe these mandatory “other factors.” The Court of Appeals left the legal standard vague with statements like “We conclude that a certain amount of inquiry into a religious organization’s activities is appropriate” and “We do not purport to define conclusively the term ‘religious activity.’” *Id.* at 617 and 619. The Court of Appeals opinion failed to adopt a bright-line test as required for avoiding unconstitutional inquiries.

By requiring government officials to consider factors other than the actor’s sincere motivation in determining whether an activity is religious, the Court of Appeals opinion forces government officials to address and determine religious questions. A city official charged with the task of applying the religious activities exemption is left with the following perspective after reading the opinion:

- The term “religious activity” is not conclusively defined, but I must apply a definition to carry out my responsibility. I am obligated, therefore, to use my judgment about what constitutes a religious activity.
- Even if I feel that the activity is motivated by sincere religious belief or religious purposes, I must conduct an additional evaluation of the activities themselves to determine whether they are religious.
- Although I may consider the actor’s motivations, I may not rely on that factor alone. I must consider other factors. Since those factors are not clearly defined, I am free to decide what factors I should consider based on my judgment.

The Court of Appeals never explained how government officials could possibly determine whether an activity is religious without reference to motivations. The Court of Appeals decision leaves it to government officials to examine the activities of an organization and to determine whether the activities appear to the government officials to be religious in nature, with no specific limits, standards or guidelines for that determination. The test adopted by the Court of Appeals forces government officials to make impermissible decisions as to what is “religious” by applying their own understanding or definition of the nature of religious activities, rather than relying on the motivations of the actor.

In Lemon v. Kurtzman, 403 U.S. 602 (1971), the United States Supreme Court held unconstitutional a statute that would require the government to examine the expenditures of religious schools and determine which were secular and which were religious. The court stated:

[T]he program requires the government to examine the school’s records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches.

Id. at 620.

**B. The Court of Appeals' Interpretation Of And Reliance On The Samaritan Institute Case Was Unwarranted.**

The issue in *Samaritan Institute v. Tina L. Prince-Walker*, 883 P.2d 3 (Colo. 1994), was whether Samaritan Institute was an organization “operated primarily for religious purposes,” i.e., whether Samaritan institute was a religious organization. By deferring to the factual findings of the referee who awarded unemployment benefits to Ms. Prince-Walker, this Court affirmed the referee’s award and his conclusion that Samaritan Institute was not a religious organization. In contrast, it has been stipulated that Catholic Health is a religious organization: “Catholic Health is a religious organization affiliated with the Roman Catholic Church . . . .” II:399. The key issue in *Samaritan* is not an issue in this case. Catholic Health is a religious organization.

The Court of Appeals quoted the following phrase from *Samaritan*: “The activities of an organization, and not the motivation behind those activities, determine whether an exemption is warranted.” *Samaritan*, 883 P.2d at p. 7. In other words, if an organization’s activities are religious, it is exempt because it meets the statutory requirement of being “operated primarily for religious purposes.” If it is simply a religious organization with general religious motivations, but its activities are not religious, it is not being “operated primarily for religious purposes.” The Court felt that an organization’s claims of general

religious motivations should not be given much weight if the organization is not carrying out specific religious activities. The Court stated:

Motivation alone has little probative value. For example, in this case, the petitioner points to its by-laws, which state that ‘the Institute is an expression of the love of God,’ as proof that the Institute is operated for a religious purpose.

*Id.* at 8, n. 4.

The Court of Appeals noted this Court’s emphasis in *Samaritan* on specific religious activity rather than general religious motivation and then stated: “This analysis accords with the court’s statement in *Maurer v. Young Life, supra*, that the tax board must examine the use to which property is put, not the character of the owner.” *Catholic Health*, 183 P. 3d at 618. As stated above, Catholic Health agrees that its general motivations as a religious organization are insufficient to establish that a specific activity is religious. As the Court of Appeals recognized, not all activities of a religious organization are necessarily religious. *Id.* at 617. This analysis does not, however, explain how to determine whether an activity is or is not religious. For an activity to be religious, there must be a specific religious purpose or motivation for the activity itself. The Court of Appeals recognized, therefore, that an activity that is a “mere fund raiser” may not qualify as a religious activity if the activity itself has no religious significance. *Id.* at 618. Nevertheless, in addressing the crucial issue of motivation, the Court of Appeals seems to have

confused two distinct concepts: (1) general corporate motivation and character, and (2) motivation for a specific activity. As a result, the Court of Appeals applied Samaritan too broadly. Samaritan should be read to support the proposition that general motivation is not determinative, while specific motivation is. Samaritan should not be read to undermine the concept that religious motivation for a specific activity determines whether the activity is religious, a concept that has been consistently applied by this Court and the United States Supreme Court. The Court of Appeals erred in concluding that an activity that is specifically motivated by religious beliefs and religious purposes does not necessarily qualify as a religious activity.

In Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988) and in Bear Valley Church, Christ v. DeBose, 928 P.2d 1315, 1321 (Colo. 1996), this Court ruled before and after Samaritan that activities motivated by religious beliefs or purposes are religious activities. In those cases, the Court had to determine whether certain improper actions of clergy were religious. The general religious focus and activity of clergy members was insufficient to make all of their actions religious. The issue was whether sexually abusive conduct was a religious activity subject to free exercise protections. In Bear Valley this Court addressed “the threshold question

[of] whether the conduct of the defendant is religious” and reviewed its ruling in

Destefano as follows:

Noting that the defendants did not claim that the priest was motivated by a sincerely held religious belief to engage in [sexual misconduct], we concluded that . . . “he cannot avail himself of the protections afforded by the first amendment.” We foresaw, however, that “[i]f the alleged conduct . . . was dictated by his sincerely held religious beliefs or was consistent with the practice of his religion, we would have to resolve a difficult first amendment issue.”

[W]e reversed summary judgment . . . after determining that [the conduct at issue] was [not] motivated by a sincerely held religious belief.

Bear Valley, 928 P.2d at 1320-1321 (emphasis added, citations omitted). This Court cited United States Supreme Court cases to support its approach to the issue of whether the conduct at issue was religious conduct. Thus, to determine whether an activity is religious, government officials and courts must assess whether it is specifically motivated by sincere religious belief. If so, it is a religious activity.

Bear Valley addressed whether specific conduct that occurred during religious counseling constituted a religious activity. Samaritan addressed whether an administrative office for religious counseling centers located in other states was operated primarily for religious purposes. Since both cases addressed activities related to religious counseling, one might expect similar analysis. However, the wording of the exemption and the legislative history discussed in Samaritan may

account for the different approaches. The sole issue in this case is whether particular conduct—the operation of Villa Pueblo—is a religious activity. That is precisely the same issue that was addressed in Bear Valley, which correctly defines the test for religious activity. The Court of Appeals should have emphasized Bear Valley, not Samaritan.

Counsel for the City has asserted that in Samaritan “the Colorado Supreme Court stated that a church related charitable organization such as a home for the aged would not be considered to be operated primarily for religious purposes.”<sup>2</sup> The Samaritan case involved an administrative office, not a home for the aged. The quote in Samaritan that mentions a home for the aged was not a statement by the Colorado Supreme Court or the United States Supreme Court, but rather was a quote of the comments of one legislator from the 1969 legislative history of Section 3309 of the Federal Unemployment Tax Act (“FUTA”). H. R. Rep. No. 91-612, p. 44 (1969).

The City has presented no similar legislative history in this case. The wording of the exemption in this case is different than the wording of the FUTA exemption. Since 1969, the constitutional parameters for deciding whether an activity is religious have been extensively addressed by the United States Supreme

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<sup>2</sup> The City’s Answer Brief filed below in the Colorado Court of Appeals on August 21, 2006, p. 20.



Court and other courts as outlined above. For example, the constitutional concerns expressed by the United States Supreme Court in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987) apply to any determination by government officials of whether an activity is religious. These constitutional issues were not addressed in Samaritan, however, because—as demonstrated by certified copies of the briefs filed with this Court in that case<sup>3</sup>—the constitutional issues were not even raised by the parties. See, Hanes v. People, 198 Colo. 31, 33, 598 P.2d 131 (1979) (“We do not address the constitutional issue because it was not raised on appeal.”). The Court of Appeals should not have relied on Samaritan as authority regarding the constitutional considerations raised in this case.

Had the constitutional considerations been properly addressed, the outcome of Samaritan may have been very different. For example, in Kendall v. Director of Division of Employment Security, 393 Mass. 731 (1985), the court stated:

The claimant asks us to set aside the board's findings and adopt a narrower definition of “religious purposes” than that applied by the board. Essentially, she contends that only if a school is devoted to religious instruction can it be said to operate “primarily for religious purposes.” We decline to impose such rigid criteria in defining religious pursuits. We are mindful of the fact that courts have

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<sup>3</sup> See, Appendix to Catholic Health’s Reply Brief filed below with the Colorado Court of Appeals, on June 12, 2006.

generally “been quite cautious in attempting to define, for tax [and unemployment insurance] purposes, what is or is not a ‘religious’ activity or organization — for obvious policy and constitutional reasons.” Community Renewal Soc. v. Department of Labor, 108 Ill. App.3d 773, 779 (1982), quoting B. Hopkins, The Law of Tax-Exempt Organizations § 8, at 132 (3d ed. 1979). . . .

\* \* \*

At oral argument the claimant conceded that the Center’s operations are religiously motivated but argued that this motivation is distinct from the Center’s secular purpose, the education of the mentally retarded. We do not see a clear distinction between such motive and purpose. The fact that the religious motives of the Sisters of St. Francis of Assisi also serve the public good by providing for the education and training of the mentally retarded is hardly reason to deny the Center a religious exemption.

Id. at 734-735.

In prior briefing, the City has argued that Samaritan is similar to this case. Although there are some superficial similarities (both involve religious exemptions), a detailed analysis of the facts of the two cases reveals that there are far more differences than similarities.

Samaritan Institute stated that its ministry was to provide pastoral counseling, but no counseling services were actually provided in Colorado. Samaritan, supra, 883 P.2d at 8. Samaritan Institute’s activities in Colorado were limited to administrative services. Id. In contrast, Catholic Health’s ministry to care for the elderly is carried out in Colorado by providing local services to the elderly.

Samaritan Institute had no religious requirements for hiring or staffing, and new employees were not instructed as to the religious purposes of the organization. *Id.* In the case of Villa Pueblo, there are very definite religious requirements and employees are instructed and trained extensively on an ongoing basis regarding the religious mission and ministry they are expected to fulfill. Spirituality in the workplace is encouraged at Villa Pueblo.

Samaritan Institute did not evangelize or proselytize, as demonstrated by the fact that it did not sponsor any worship services or prayer. *Id.* Villa Pueblo sponsors worship services, religious counseling and many other evangelization activities. Villa Pueblo provides pastoral care and encourages employees to pray with residents. Villa Pueblo makes every effort to address the spiritual needs of residents and employees.

In *Samaritan*, the court indicated that where religion pervades the operation of an institution, it will be viewed as an organization that is operated primarily for religious purposes. *Id.* at 7. But the court concluded that the services offered by Samaritan Institute were essentially secular, not different than those offered by secular organizations. *Id.* at 8. The stipulated facts in this case demonstrate that religion pervades the operation of Villa Pueblo and that the services provided by Villa Pueblo are very different from those offered by secular organizations. Even

if the “substantial religious character” test were the proper constitutional test for whether an organization is religious (and it is not!)<sup>4</sup>, Villa Pueblo would be exempt, as the Court of Appeals correctly concluded. Thus, the only serious problem caused in this case by the Court of Appeals’ overbroad reading of Samaritan is that the Court of Appeals announced a religious activity test that does not rely on the actor’s motivations for the specific activity and, consequently, requires government officials to consider other factors and make religious determinations.

**C. The Court Of Appeals Opinion Improperly Permits A Subjective, Undefined Business And Financial Inquiry Beyond Whether Catholic Health Was 501(c)(3) Certified.**

The Court of Appeals cited four decisions from other jurisdictions holding that the operation by a religious organization of an elderly care facility was not a religious activity, then distinguished those cases as follows: “However, in each case the evidence reflected the facilities were business operations, and unlike here, none of them were operating at a loss. For these reasons, these cases do not change our result.” 183 P.3d at 619 (emphasis added). This indicates that Villa

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<sup>4</sup> The determination of whether religion pervades an organization is essentially the same as the “substantial religious character” test found unconstitutional in University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002).

Pueblo must be operated at a loss to maintain religious status. It also creates a misleading dichotomy between business operations and religious activity.

There is a business element to most organized religious activities. No one could dispute that operating a church and conducting worship services is a religious activity, yet a church must purchase bricks and mortar for a building, refrigerators and stoves for the church kitchen, soap and toilet paper for the bathrooms, and pews and altars and robes for worship services. Churches must pay secretaries and clergy, purchase insurance and pay utility bills. Looking only at a church's financial documents, such as its general ledger of income and expenses and its annual financial statements, would tend to lead one to conclude that a church looks a lot like any other business. This is because religious activities have to be carried out in the real world, and therefore, religious organizations are subject to many of the same financial considerations as other organizations. Yet despite all the financial aspects of running a church, nobody would seriously contend that operating a church and conducting worship services are not a religious activity.

The underlying premise of the religious exemption is that religious organizations are involved in business transactions such as purchases; otherwise, the sales and use tax provisions would not even come into play. The religious

exemption was intended to exempt business transactions related to religious activities. Therefore, the vague distinction between business operations and religious activities makes no sense.

The only financial or business inquiry of religious organizations permitted by the Code is whether the organization has been “certified as a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code.” Code § 14-4-21(5). It was stipulated that Catholic Health met this test, and that should have been the end of the Court of Appeals’ business/financial inquiry. Subjective investigations beyond that bright-line test are entangling and unconstitutional. University of Great Falls v. NLRB, 278 F.3d 1335, 1344 (D.C. Cir. 2002). The Court of Appeals erred in adopting a test that permits a vague, subjective, wide-open inquiry that is not found in the Code, rather than the bright-line 501(c)(3) standard set forth in the Code.

In addition, while addressing the issue of fees charged to residents, the Court of Appeals cited charitable exemption cases, creating further confusion of the issues. The test for charitable exemption cannot be constitutionally applied in addressing issues of religious exemption. See, General Conference of Church of God—7<sup>th</sup> Day v. Carper, 192 Colo. 178, 180-81, 557 P.2d 832, 834 (1976); Board

*of Assessment Appeals v. AM/FM International*, 940 P.2d 338, 344 and n. 11 (Colo. 1997).

### **III. THE COURT OF APPEALS' OPINION CREATES AN ONGOING ENTANGLING AND CHILLING EFFECT.**

The Court of Appeals ruled that Villa Pueblo is entitled to exemption. However, an exempt license creates an ongoing relationship in which the organization must always comply with the standards for exemption in order to retain the exemption. Villa Pueblo has the ongoing duty to comply with those standards, and the City can audit Villa Pueblo at any time to determine whether it is in compliance. If the Court of Appeals had adopted the proper bright-line test, this would not be a problem. The Court of Appeals, however adopted a test not based on Catholic Health's sincere religious motivations. Since City officials will be guided by the Court of Appeals' ruling, it is clear that Villa Pueblo will, on an ongoing basis, be subjected to unconstitutional legal tests and to the subjective perceptions and religious views of government officials.

The Court of Appeals' erroneous rulings and the City's ongoing scrutiny impose daily pressure on Villa Pueblo to ensure that it continues to lose money, to avoid the appearance of being a "business operation" (whatever that might mean to the City), and to ensure that its activities will clearly and convincingly appear religious to City officials and to courts. Thus, there is ongoing pressure for a

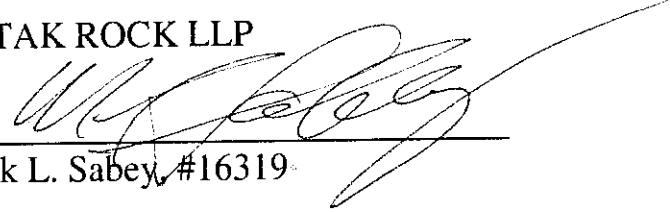
religious organization to be guided by the actual or potential perceptions of public officials rather than by its own religious mission. The dangers warned about in *Amos, supra*, are now a reality, because fear of potential tax liability will now affect the way Villa Pueblo carries out its religious mission and “the community’s process of self-definition will be shaped in part by the prospects of litigation.” 483 U.S. at 336, 343-344.

### CONCLUSION

WHEREFORE, Catholic Health respectfully requests this Court to eliminate the ongoing chilling and entangling effect of the Court of Appeals’ opinion by ruling that (1) whether an activity is religious must be determined by government officials based exclusively on an assessment of whether the actor’s motivations for the specific activity are sincerely religious, not the views of government officials regarding the practice of religion, (2) the meaning of the term “religious activities” is activities that are specifically motivated by the actor’s religious beliefs and purposes, and (3) non-profit religious activities need not be operated at a loss or in a non-business-like manner to be considered religious.

Respectfully submitted this 21<sup>st</sup> day of August, 2008.

KUTAK ROCK LLP

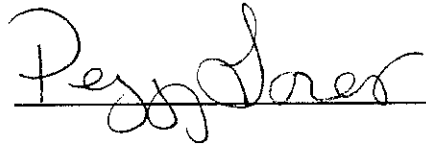
  
Mark L. Sabey, #16319



## CERTIFICATE OF SERVICE

The undersigned certifies that on the 21<sup>st</sup> day of August, 2008, a true and correct copy of the **OPENING BRIEF** was served via U.S. Mail, first-class postage prepaid, addressed as follows:

Robert P. Jagger, Esq.  
503 North Main Street, Suite 127  
Pueblo, Colorado 81003



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