

No. 10-35519

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**INTERMOUNTAIN FAIR HOUSING COUNCIL, JANE COWLES, and
RICHARD CHINN,**

Plaintiffs-Appellants,

v.

**BOISE RESCUE MISSION MINISTRIES and
BOISE RESCUE MISSION, INC.,**

Defendants-Appellees.

**On Appeal from the United States District Court
for the District of Idaho**

**BRIEF *AMICUS CURIAE* OF
THE NATIONAL LEGAL FOUNDATION,**
in support of Defendants-Appellees
Urging Affirmance

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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties. NLF has been litigating First Amendment cases in both state and federal courts since 1985, and as such, is able to lend expertise in the resolution of the instant appeal.

This Brief is filed pursuant to consent of all parties.

SUMMARY OF THE ARGUMENT

Your *Amicus* expands upon four arguments made by the Appellants (the “Rescue Mission”). First, your *Amicus* argues why 24 C.F.R. § 100.201 (LEXIS, current through Nov. 12, 2010) should not be considered in the analysis of whether a homeless shelter is a dwelling for the purposes of the Fair Housing Act (“FHA”). This Brief shows that the Intermountain Fair Housing Council and the other Appellants (collectively referred to as “IFHC”) have inappropriately used the definition of “dwelling unit” from 24 C.F.R. § 100.201, a definition that applies only to Department of Housing and Urban Development (“HUD”) regulations governing discrimination based on handicap under the FHA. Second, this Brief shows that IFHC incorrectly caricatures the Rescue Mission’s length of stay policy, straining a natural understanding of the language of the policy. Third, this Brief demonstrates that IFHC mistakenly argues that facts are disputed, when in

actuality the court below carefully analyzed the putatively disputed facts in light of the appropriate legal standard and simply came to a different legal conclusion.

Finally, this Brief explains why *Employment Division Department of Human Resources v. Smith*, 494 U.S. 872 (1990), is inapplicable to the instant case because the FHA is not a neutral law of general applicability.

ARGUMENT

I. THE DEFINITION OF “DWELLING UNIT” CONTAINED IN 24 C.F.R. § 100.201 IS INAPPLICABLE TO THE INSTANT CASE BECAUSE IT APPLIES ONLY TO DISCRIMINATION BASED UPON HANDICAP.

IFHC incorrectly invoked the definition of “dwelling unit” contained in 24 C.F.R. § 100.201 to argue that the FHA applies to shelters like those run by the Boise Rescue Mission. In reality, 24 C.F.R. § 100.201 only applies in the context of discrimination based upon handicap and therefore has no bearing on the instant case.

HUD promulgated both 24 C.F.R. § 100.20 (LEXIS, current through Nov. 12, 2010) and § 100.201 in 1989, and made careful distinctions between the definitions of “dwelling unit” and “dwelling.” 54 F.R. § 3232 (1989). First, HUD specifically pointed out that the definition for “dwelling unit” was only applicable in subpart D dealing with handicap discrimination. Conversely, the “definitions in Subpart A [which include the definition for “dwelling”] *also apply* to Subpart D,”

that is, they are incorporated by reference. *Id.* (emphasis added). Thus, in addition to the fact that “dwelling unit” has applicability only in the handicap discrimination context, that definition is completely unhelpful in determining the meaning of “dwelling,” since its definition in Subpart D is identical to its definition in Subpart A. “Dwelling” is the controlling definition and that is the definition used by the court below.

That HUD intended to exclude “homeless shelters” from the definition of “dwelling” is further supported by a canon of construction applied to statutes and regulations. Where Congress has “include[d] particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *United States ex rel. Eisenstein*, 129 S. Ct. 2230, 2235 (2009) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)). *See also*, *United States v. Alghazouli*, 517 F.3d 1179, 1187 (9th Cir. 2008). “The canons of construction of course apply equally to any legal text and not merely to statutes.” *Smith v. Brown*, 35 F.3d 1516, 1523 (Fed. Cir. 1994) (further noting that this Court applied the canons of construction to regulations in *Campesinos Unidos, Inc. v. United States Dep’t of Labor*, 803 F.2d 1063, 1069-70 (9th Cir. 1986)). When this canon of construction is applied to the competing definitions of “dwelling” (which

excludes “homeless shelter”) and “dwelling unit” (which includes “homeless shelter”), HUD’s specific inclusion of “homeless shelter” within the definition of “dwelling unit” leads to the conclusion that it intended to *exclude* “homeless shelter” from the definition of “dwelling.”

Furthermore, in this particular case, one need not rely upon the canon of construction alone. HUD has explicitly stated that the difference in the two definitions was deliberate: When the regulations were first drafted, the definitions of “dwelling unit” and “dwelling” were nearly identical. 54 F.R. § 3232. However, HUD significantly modified the definition of “dwelling unit” after receiving comments from legislators. *Id.* In particular, some “commenters were concerned that the definition of ‘dwelling unit’ [was] too similar to the definition of ‘dwelling’ in § 100.20” and that the similarity was “confusing.” *Id.* Thus, HUD “accommodate[d] these concerns,” and “revised” the definition in the final version. *Id.*

Perhaps most significant to our present inquiry, however, is the clear implication that rooms within homeless shelters could never be classified as “dwelling units” (for purposes of handicap discrimination claims) unless the building of which they are a part is first determined to be a dwelling as defined in 24 C.F.R. § 100.20. 54 F.R. § 3232. As the Federal Register reports, “[i]n other

types of dwellings (*as defined in § 100.20*) in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling, rooms in which people sleep are ‘dwelling units’.” *Id.* (emphasis added). Therefore, the court below properly excluded any consideration of a “dwelling unit” once it determined that the Rescue Mission’s shelters were not dwellings in the first place. *Intermountain Fair Housing Council v. Boise Rescue Mission Ministries*, 2010 U.S. Dist. LEXIS 48065, at *48 (D. Idaho May 12, 2010). The court’s analysis was spot on, distinguishing between homeless shelters that are residences and those that are not. *Id.*

Nevertheless, IFHC’s use of the definition of “dwelling unit” is superficially appealing because this Court addressed the term in a footnote when discussing a homeless shelter in *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1123, n.2 (9th Cir. 2007). But in that footnote this Court was only using the definition for a limited analogical purpose.

The evolution of the above-mentioned footnote in *Community House* is instructive. Citing *Turning Point v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996), this Court had initially noted that “[w]e have previously applied the Fair Housing Act to homeless shelters.” *Community House, Inc. v. City of Boise*, 468 F.3d 1118, 1123, n.2 (9th Cir. 2006). But, this Court later *deleted* the original footnote 2 and

corrected it with a much more detailed explanation. This Court acknowledged that it has “never squarely addressed the issue of whether all temporary shelters fit within the Act’s definition of ‘dwelling’” and explicitly refused to do so in *Community House*. 490 F.3d at 1123, n.2. However, because the shelter in that case “generate[d] up to \$125,000 in rent per year from forty-nine transitional housing units in which the tenants reside for up to a year and a half,” this Court was persuaded that “*at least part of the facility* ‘[was] occupied as, or designed or intended for occupancy as, a residence by one or more families,’ and thus qualifie[d] as a ‘dwelling’ under [42 U.S.C. §] 3602(b).” *Id.* (emphasis added).

This Court went on to mention “dwelling unit” for the limited purpose of illustrating by analogy that homeless shelters are not *per se* shielded from coverage under the FHA.

Moreover, *at least in the handicap discrimination context*, the regulations interpreting the coverage of the FHA specifically contemplate that “residences” within homeless shelters qualify as “dwellings.” The regulations provide that a “dwelling unit” may include “other types of dwellings in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling, rooms in which people sleep.” Examples of these other types of dwelling units “include dormitory rooms and sleeping accommodations in shelters intended for occupancy as *a residence for homeless persons.*”

Community House, 490 F.3d at 1123, n.2 (internal citations omitted) (first emphasis added; second emphasis in original).

In other words, this Court was simply noting that the FHA could apply to certain types of hybrid properties which contained homeless shelters as part of them. *Id.* This Court noted that the lower court in that case properly applied the FHA to a situation where a shelter was generating rental income from long-term transitional housing units. *Id.* As the Rescue Mission has capably and thoroughly argued in its brief, whether a property is a “dwelling” is a fact-specific inquiry conducted on a case-by-case basis. (Appellees’ Br. at 13-35.) Further, a point also argued by the Rescue Mission, the FHA does not apply to the homeless shelters in this case because of the short duration of stay and the significant control the Rescue Mission exercises over the affairs of the guests. (Appellees’ Br. at 13-35.)

II. IFHC WRONGLY CHARACTERIZES THE RESCUE MISSION’S LENGTH OF STAY POLICY BECAUSE GUESTS ARE DISCOURAGED FROM STAYING AT THE SHELTERS FOR LONG PERIODS OF TIME.

IFHC strains to give the Rescue Mission’s length of stay policy a most unnatural meaning, suggesting that guests “reside there for very lengthy periods of time” and that Plaintiff Chinn would have been “permitted to remain [at the Shelter] at least through the winter months.” (Appellants’ Br. at 19.) Yet this understanding is quite removed from what is actually state in the policy.

As the Rescue Mission has more thoroughly explained in its Brief, “[u]nless winter weather endangers their safety, guests are limited to seventeen consecutive nights at the Shelter.” (Appellees’ Br. at 5. *See also*, Br. at 21.) Therefore, the most natural understanding of the policy is that most stays at the Shelter will be seventeen days or less. Additionally, when the weather would “endanger” the safety of a guest (and that guest has used up his seventeen consecutive nights), he is not automatically turned out of the Shelter with nowhere to go. In other words, the most natural reading of the policy is that the Shelter allows itself some discretion to permit, as an act of benevolence, a guest to stay *an extra few days* until the guest can find another place to stay during periods of dangerous weather.

The Rescue Mission’s preference for short stays is reinforced by the fact that the Rescue Mission requires each guest to acknowledge that he is a “transient guest in an *emergency* homeless shelter,” a place that is not a “temporary home or residence.” (Appellees’ Br. at 6 (emphasis added).) Further, as the Rescue Mission has pointed out, there is no evidence in the Record that any guest has availed himself of the full consecutive seventeen night stay, (Appellees’ Br. at 22), much less the 150 day stay suggested by *Amicus*, AIDS Legal Referral Panel, *et al.*, (Br. *Amici Curiae* AIDS Legal Referral Panel, *et al.* at 20). Perhaps somewhat ironically, Plaintiff Chinn apparently never took advantage of the Rescue

Mission's benevolence over the winter months. (Appellees' Br. at 8 (noting that Plaintiff Chinn only stayed at the Shelter for a total of twenty-two nights over four separate occasions, none of which was during the months of November, December, January, February, or March.))

III. IFHC INCORRECTLY SUGGESTS THE COURT BELOW OVERLOOKED DISPUTED FACTS WHEN THE PUTATIVE "FACTS" IN QUESTION WERE ASSUMED TO BE TRUE BY THE COURT.

IFHC argues repeatedly that there are material facts in dispute. (Appellants' Br. at 18, 31.) However, when one looks at those arguments in detail, there are really only three sets of putative facts in dispute. First, IFHC argues that the length of time Plaintiff Chinn stayed at the Rescue Mission is in dispute. Second, IFHC argues that court below overlooked facts supporting the Plaintiffs' claims of interference, coercion, and intimidation. (Appellants' Br. at 31.) Third, IFHC argues that the court ignored facts tying her failure to convert to Christianity and her request for transfer to a retaliation claim. (Appellants' Br. at 32.) As will be explained below, the court properly granted summary judgment in spite of these putatively disputed facts because they were either not in dispute or were legally insufficient to prevent summary judgment.

As to the "disputed" length of Plaintiff Chinn's stays, and as the Rescue Mission has thoroughly argued in its Brief, IFHC simply ignored an uncontradicted

affidavit from the Rescue Mission giving specific dates for Mr. Chinn's stays. (Appellees' Br. at 21, n.12.) Thus, Mr. Chinn's general statements about his stays at the Rescue Mission in 2005 and 2006 coincide nicely with the Rescue Mission's specific data concerning Mr. Chinn's stays. (Appellees' Br. at 21, n.12.).

A consideration of the application of Rule 56 (c) is helpful for consideration of the other putative disputed facts. As Federal Rule of Civil Procedure 56 (c) sets forth, summary judgment is appropriate when the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Additionally, "for a party to avoid summary judgment, a non-movant must show a genuine issue of material fact by presenting *affirmative evidence* from which a jury could find in his favor," and "bald assertions" are "insufficient to withstand summary judgment." *Federal Trade Commission v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) (emphasis in original).

The court below carefully set forth the summary judgment standard, including highlighting when a fact is genuine and material. *Intermountain Fair Housing Council*, 2010 U.S. Dist. LEXIS 48065, at *16-17. The district court also specifically accepted as true the facts alleged by IFHC and recited and interacted

with those facts in significant detail. *Id.* at *3-15. Yet in the end, the court was simply unpersuaded by those facts:

[T]he shelter is not a “dwelling” and is therefore not subject to the FHA. Moreover, as also discussed above, the Rescue Mission’s alleged activities in relation to both the shelter and the Discipleship Program are protected by the First Amendment. Accordingly, those activities *cannot be deemed as “interfering” with the exercise by Chen [sic] or Cowles of “rights” protected by the FHA. See 42 U.S.C. § 3617.*

Id. at *46 (emphasis added).

What IFHC has done is to conflate “disputed facts” with its disputing the court’s legal conclusions. This error is not unlike the one made by a criminal defendant in *Jeffers v. Ricketts*, 627 F. Supp. 1334, 1348 (D. Ariz. 1986). There, the defendant claimed he was “forced to go before the jury in identifiable jail clothing,” and that “facts [were] in dispute since the Respondents deny that the clothing [was] ‘identifiable’ and further deny that [the defendant] wore them ‘involuntarily.’” *Id.* The court rejected the defendant’s formulation because the “record adequately describe[d] the clothing and the circumstances for [the Plaintiff’s] appearance before the jury in the clothing,” and the court simply determined that the defendant’s clothing was not rise to the level of “interfere[ing] with [his] presumption of innocence.” *Id.* at 1349.

Just as in *Jeffers* where the fact that the defendant appeared before the jury in jail clothing was not in dispute, so here the facts as alleged by the Plaintiffs were either actually, or deemed to be, true. *See id.* at 1348. Just as in *Jeffers* where the court found the existence of those facts was not sufficient for the defendant to successfully defend his matter, so here the court carefully analyzed the Plaintiffs’ allegations and found them legally wanting. *See id.* This is not the stuff of disputed facts, IFHC’s disagreement with the court’s legal *conclusions* notwithstanding.

IV. THE COURT BELOW PROPERLY IGNORED *EMPLOYMENT DIVISION V. SMITH* WHEN IT ADDRESSED THE RESCUE MISSION’S RELIGIOUS EXEMPTION AND FIRST AMENDMENT FREE EXERCISE DEFENSES.

IFHC mistakenly argues that the court below erred by not enforcing the FHA against the Rescue Mission under the analysis set forth in *Employment Division Department of Human Resources v. Smith*, 494 U.S. 872 (1990). For its part, the Rescue Mission has correctly presented several arguments why *Smith* does not foreclose the Rescue Mission from prevailing on a Free Exercise defense. (Appellees’ Br. at 45-48.) Your *Amicus* presents one more.

In *Smith*, after articulating the legal standard for analyzing a neutral law of general applicability and applying that standard to the claim at hand, the Supreme Court ultimately held that “the right of free exercise does not relieve an individual

of the obligation to comply with a ‘valid and neutral law of general applicability.’” 494 U.S. at 879. Yet the Court seemed compelled to illustrate that neutral and generally applicable laws were not the end of the discussion. Rather, the Court explained that positive free exercise protections could be properly legislated, even if they were not constitutionally required. *Id.* at 890 (“[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.”). Such a circumstance would create a law that is not “neutral” or of “general applicability,” and challenges to that law would not fall under *Smith* at all.

In the instant case, the FHA is not a “neutral law of general applicability.” Its regulations contain exemptions for many different groups and circumstances. *See, e.g.*, 24 C.F.R. § 100.10 (LEXIS, current through Nov. 12, 2010). Thus, the court below properly ignored the *Smith* analysis, and, first, evaluated the Rescue Mission’s defenses under the FHA’s religious exemption and, second, under the First Amendment Free Exercise Clause. *Intermountain Fair Housing Council*, 2010 U.S. Dist. LEXIS 48065, at *27-45.

CONCLUSION

For the foregoing reasons, and for additional reasons stated in the Appellees' Brief, the judgment of the District Court should be affirmed.

Respectfully submitted,
this 19th day of November, 2010

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,965 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in fourteen-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2010, I have electronically filed the foregoing Brief *Amicus Curiae* of The National Legal Foundation in the case of *Intermountain Fair Housing Council, et al. v. Boise Rescue Mission Ministries, et al.*, No 10-35519, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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