No. 26-1736

In the United States Court of Appeals for the Sixth Circuit

SACRED HEART OF JESUS PARISH, et al,

Plaintiff-Appellee,

v.

DANA NESSEL, et al,

Defendant-Appellant.

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Appeal from the United States District Court

for the Western District of Michigan Southern District

Case No. 1:22-cv-1214

AMICUS BRIEF OF NATIONAL RELIGIOUS BROADCASTERS IN SUPPORT OF PLAINTIFF-APPELLEE

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Disclosure Statement

National Religious Broadcasters is a nonprofit corporation. It has no parent corporation, nor does it have any stockholders whatsoever.

Consent to File This Brief

All parties have consented to the filing of this amicus brief by National Religious Broadcasters.

Statement of Authorship

Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for Amicus affirms that no counsel for any party authored this brief in whole or in part, no party and no party's counsel contributed any money for the preparation or submission of this brief, and no person or entity other than National Religious Broadcasters and its counsel contributed any money for the preparation or submission of this brief.

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Interest of Amicus

National Religious Broadcasters (NRB) is a non-partisan association of Christian broadcasters united by their shared purpose of proclaiming Christian teaching and promoting biblical truths. NRB's 1,487 members reach a weekly audience of approximately 141 million American listeners, viewers, and readers through radio, television, the Internet, and other media.

Since its founding in 1944, NRB has worked to foster excellence, integrity, and accountability in its membership. NRB also works to promote its members' use of all forms of communication to ensure that they may broadcast their messages of hope in accordance with the First Amendment's guarantees. NRB believes that religious liberty and freedom of speech form the cornerstone of a free society.

NRB contends that all organizations engaged in expressive association should have the freedom of integrated mission staffing—the prerogative to hire all employees based on fidelity to the vision and values of the organization. Religious organizations, in particular, rely on the freedom to employ only persons who share the common faith and who are willing to live in accordance with the tenets of that faith on a daily basis.

Introduction

All nonprofit organizations that have an established set of values and a clear mission seek to hire only those individuals that are fully aligned with the beliefs, vision, and values of the organization.

The district court rejected Sacred Heart's argument that Michigan's non-discrimination law ("ELCRA") violates its First Amendment rights under the doctrines of religious autonomy and expressive association. In particular, the court rejected out of hand the claim that either of those doctrines would allow it to employ only "co-religionists"—staff who share and live consistently with Sacred Heart's beliefs, including those regarding marriage and sexuality. The court considered this an unjustified expansion of both the "ministerial exception" to laws governing employment practices of religious organizations and to the doctrine of expressive association.

As detailed herein, LGBT advocacy organizations in Michigan and elsewhere include in their job postings a clear expectation that *every* employee demonstrate agreement with the organization's mission. This includes janitors and those working with youth athletics, whose positions would not be considered the equivalent of "ministerial" in a religious organization.

The question before this Court is whether religious organizations in Michigan will be guaranteed the same freedom as LGBT organizations to define

their own missions, expound their own beliefs, and to hire only those candidates who share those missions and beliefs. This brief deals exclusively with the issue of expressive association.

Argument

I. The Right of Expressive Association Applies in the Employment Context.

In the district court, the State argued that the freedom of expressive association applies only to membership; not to employment decisions. *Sacred Heart of Jesus Parrish v. Nessel*, No. 1:22-cv-1214, 2026 U.S. Dist. LEXIS 196878, at *36 (W.D. Mich. Aug. 5, 2026). The district court agreed, rejecting Sacred Heart's expressive association claim out of hand on this basis. *Id.* at *36-39. Distinguishing *Boy Scouts America v. Dale*, 530 U.S. 640 (2000), the seminal authority holding that an organization may not be forced to include a member who does not align with its values, the court claimed that "Sacred Heart has not supplied any authority applying the freedom to associate within the context of an employment relationship." *Id.* at *39.

This is simply not true. Sacred Heart's reply brief clearly cited several cases applying expressive association protections in the employment context. *See* Sacred Heart Brief at 21-22, *Sacred Heart of Jesus Parrish v. Nessel*, No. 1:22-cv-1214, (W.D. Mich. Aug. 5, 2026), ECF No. 105, PageID 2809-2810.

The district court recognized that the Supreme Court has extended freedom of association protections beyond membership decisions. The court cited cases applying this freedom in the context of compelled disclosure of membership lists, solicitation of clients for group advocacy, denial of benefits based on a group's

message, and punishment for political affiliation. *Sacred Heart*, 2026 U.S. Dist. LEXIS 196878, at *38.

But finding no binding precedent explicitly in the employment context, the district court concluded that the freedom of expressive association is simply inapplicable in employment cases. The court did not cite a single precedent directly supporting its novel rule that employment decisions are entitled to less First Amendment protection than membership decisions. Nor did it grapple with the illogic of a legal doctrine that allows a group to exclude members who reject its core values but compels it to employ staff members who are not aligned.

The lower court's claim of authority comes not from any court, but rather from a statement by The Boy Scouts in *Dale*. In the context of litigation, The Boy Scouts stated that they believed they would have to comply with employment law. *Id.* at *39 (citing *Dale*, 530 U.S. at 672 (Stevens, J., dissenting)). The views of The Boy Scouts or their lawyer binds no one—not even The Boy Scouts, who are free to get a better lawyer.

The district court also cited one Supreme Court case dealing with expressive association in a private employment context. *Id.* (citing *Hishon v. King & Spalding*, 467 U.S. 69 (1984)). In that case, a law firm sought to demonstrate that it was the kind of group that could claim the right of expressive association because "lawyers may make a distinctive contribution to the ideas and beliefs of our society." But the

Court speedily rejected this claim by pointing out that the firm failed to show "how its ability to fulfill such a function would be inhibited by a requirement that it consider petitioner for partnership." *Hishon*, 467 U.S. at 78 (cleaned up). The firm effectively claimed the right for commercial enterprise leadership to hang out with the people it likes. The law firm did not make, and almost certainly could not make, any showing that it sought to advance particular views that would be undermined if the petitioner became a partner in the firm. While the Court in *Hishon* did also state, in dicta, that "invidious private discrimination" has not been afforded affirmative protections, that fact is irrelevant here, where Sacred Heart is not engaged in "invidious discrimination," but merely seeks to employ those whose beliefs align with its core mission. *Id.*

By no means did the Court in *Hishon* announce a categorical rule that expressive association claims are never valid in employment cases. The entire discussion of the expressive association issue in *Hishon* is one paragraph long. *Id.* at 78. It recites the normal rules for all expressive association cases: the organization seeking to enforce its right to exclude others must demonstrate that it has a message, and that message would be impaired if the group were forced to include the unwanted individual.

It is significant, for purposes of this litigation, that *Hishon* did *not* deny the right of employers to make expressive association claims vis-à-vis their employees.

In fact, the Court's treatment of the substantive issue implies the exact opposite conclusion. The Court considered the claim and rejected it, not because the firm was an employer, but because it failed to demonstrate that making the petitioner a partner in the firm would interfere with any message that it wished to convey.

The Supreme Court again discussed the right to expressive association in the employment context in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012). There the Court was called upon to consider the argument that a religious organization's freedom of association under the First Amendment provided a sufficient basis for the ministerial exception to non-discrimination laws.

While the Court ultimately held that the Religion Clauses were the proper basis for the ministerial exception available to religious organizations, it did not deny the availability of an expressive association claim in the employment context. Rather, it found that because the First Amendment's Religion Clauses provide a higher level of protection for religious organizations than that which would be available to secular organizations under an expressive association theory, it was appropriate to ground the ministerial exception in the firmer ground of the Religion Clauses.

> According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association—a right "implicit" in the First Amendment. . . . The right to

> freedom of association is a right enjoyed by religious and secular groups alike. It follows under [this] view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.

Hosanna-Tabor, 565 U.S. at 189 (citations omitted).

The implication of the *Hosanna-Tabor* decision for this case is that while the First Amendments' Religion Clauses provide greater protection for the employment decisions of religious organizations than that enjoyed by secular organizations, both religious and secular organizations alike enjoy the right to freedom of association under the First Amendment. The fairest inference from the Court's positive, substantive discussion of this right in the context of employment decisions challenged under non-discrimination laws is that the right *is* applicable in this context.

Contrary to the pronouncement of the district court, this Court has also recognized that freedom of expressive association does exist within the employment context in *Akers v. McGinnis*, 352 F.3d 1030 (6th Cir. 2003). "State

employees' freedom of expressive association claims are analyzed under the same standard as state employees' freedom of speech claims." 352 F.3d at 1036.[1]

While there are pragmatic distinctions between the expressive association claim of an employee compared to those of an employer, the nature of the First Amendment does not permit this rule to be available to only one side of employment relationships. This is especially true since the organization itself clearly has such rights vis-à-vis its members. There is no logic that justifies the conclusion that only employees have the right of expressive association.

As this Court recognized in *Akers*, expressive association claims are akin to free speech claims, and this is significant. If the State of Michigan sought to ban Sacred Heart Parish from teaching and expressing its views concerning marriage and sexuality, such a ban would clearly be subject to strict scrutiny under the First Amendment. The ELCRA's rejection of an employer's right to only hire those willing to advance this message must be given similar First Amendment scrutiny.

Moreover, the Second Circuit has upheld a claim remarkably similar to the one in this case, *Slattery v. Hochul*, 61 F.4th 278 (2d Cir. 2023). There the Second Circuit held that the lower court erred in dismissing a pro-life organization's expressive association claim. The prolife group had plausibly alleged that by

[1] The plaintiff in that case did not prevail, due to the unique analysis for public employees. This Court held that the association in question involved speech that was not a matter of public concern. *Id.* at 1038.

forcing it to hire employees whose actions were in conflict with the message it was trying convey, the State's non-discrimination law severely burdened its right to freedom of expressive association. *Id.* at 288. The Second Circuit held that the district court must apply strict scrutiny to the law, because the First Amendment right of expressive association protects the right of a prolife organization to hire and retain only employees who share the organization's views on the right to life. *Id.* at 289. "[I]f the state could require an association that expressly opposes abortion to accept members who engage in the conduct the organization opposes, it would severely burden the organization's right of expressive association." *Id.* at 290.

The Supreme Court has acknowledged the First Amendment right of organizations to expressive association, and that said right encompasses the right *not* to associate with those who oppose the organizations' views. *Dale*, 530 U.S. 640. It has discussed this right in the employment context. *Hishon*, 467 U.S. 69; *Hosanna-Tabor*, 565 U.S. 171. The Second Circuit has explicitly held that strict scrutiny must be applied when a State's non-discrimination law compels an organization to hire or retain employees who do not share the views that the organization seeks to advance. *Slattery*, 61 F.4th 278. Against this background, it was inappropriate for the district court to grant summary judgment to Defendants.

Finally, there is a very good reason that there are relatively few cases concerning expressive association in the employment context as it pertains to the kind of clash in this case—the LGBT movement vs. religious employers. Section 702(a) or Title VII of the Civil Rights Act of 1964 contains an exception that allows religious employers to favor their co-religionists. There are similar or broader religious exemptions to the non-discrimination laws in virtually every state.

In addition to Michigan, according to the Movement Advancement Project,[2] there are twenty-three states that have laws explicitly prohibiting discrimination in employment on the basis of sexual orientation and gender identity.[3] In ten additional states, the statute banning sex-based discrimination has been interpreted, most often by administrative agencies, to include discrimination on the basis of sexual orientation or gender identity.[4] In one state, Wisconsin, the law only addresses sexual orientation and not gender identity.[5] In sixteen states, there are no explicit prohibitions concerning discrimination on the basis of sexual orientation or gender identity.[6]

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[2] State Nondiscrimination Laws: Employment, Movement Advancement Project (last visited Oct. 27, 2026), https://www.lgbtmap.org/img/maps/citations-nondisc-employment.pdf.
[3] *Id.* at 3.
[4] *Id.* at 4.
[5] *Id.*
[6] *Id.*

In all thirty-four of the above-listed states with LGBT protections, there is an exemption for religious employers. In sixteen of these states, the religious exemption is categorical—religious organizations are not covered employers.[7] In twelve of these states, religious organizations are permitted to limit their hiring to only those who share their faith.[8] In four states, employers are allowed to limit their hiring to those who share their faith so long as it is a bona fide occupational qualification.[9] Connecticut's religious exemption is idiosyncratic but very broad.[10]

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[7] Alaska (Alaska Stat. § 18.80.300(5)), Arizona (Ariz. Rev. Stat. § 41-1462), California (Cal. Gov. Code § 12926(d)), Colorado (Colo. Rev. Stat. § 24-34-402(6)), Delaware (Del. Code Ann. Tit. 19, § 710(7)), Illinois (775 Ill. Comp. Stat. 5/2 101(B)(2)), Iowa (Iowa Code § 216.6(6)(d)), Kansas (Kan. Stat. § 44 1002(b) & (i)), Maine (5 Me. Stat. § 4553(4)), Massachusetts (Mass. Gen. Laws ch. 151B, §4(18)), Nevada (Nev. Rev. Stat. § 613.320(1)(b)), New Mexico (N.M. Stat. Ann. § 28-1 9(B)), Rhode Island (R.I. Gen.Laws § 28-5-6(8)(ii)), Texas (Tex. Labor Code § 21.109), Utah (Utah Code § 34A-5-102(1)(ii)), Virginia (Va. Code Ann. § 2.2-3905(E)).

[8] Florida (Fla. Stat. § 760.10(9)), Hawaii (Haw. Rev. Stat. § 378-3(5)), Kentucky (Ky. Rev. Stat. § 344.090(1) & (2)), Nebraska (Neb. Rev. St. § 48-1103(1)), New Hampshire (N. H. Rev. Stat. § 354 A:18), New Jersey (N.J. Rev. Stat. § 10:5-12(a)), New York (N.Y. Exec. Law § 296(11)), Ohio (Ohio Rev. Code Ann. § 4112.02(O)), Oregon (Or. Rev. Stat. § 659A.006(5)(c)), Pennsylvania (43 Pa. Cons. Stat. § 955(10)), Vermont (Vt. Stat. Ann. 21, § 495(e)), Wisconsin (Wis. Stat. § 111.337(2)(am)).

[9] Maryland (Md. Code, State Gov. § 20-605(a)(1)), Michigan (Mich. Comp. Laws § 37.2208), Minnesota (Minn. Stat. § 363A.20), North Dakota (N.D. Cent. Code § 14-02.4 08).

[10] Connecticut (Conn. Gen. Stat. § 46a-81p).

Washington uniquely limits its religious exemptions to those who qualify as "ministers."[11]

This overwhelming body of law should have led the district court to press the State of Michigan to justify its deviation from a well-established, virtually universal practice of religious exemptions vis-à-vis non-discrimination laws. The record is far from bare. And the dominant view in state and federal law is that religious employers are not subject to laws prohibiting discrimination on the basis of sexual orientation or gender identity.

Because of its unjustified, categorical rejection of the availability of expressive association claims in the employment context, the district court failed to undertake the required three-step analysis for such claims. It is to this analysis that we now turn.

II. The Right of Expressive Association Entitles Sacred Heart to Hire Only Employees Whose Beliefs Align With Those It Seeks to Advance.

The freedom of association is not enumerated as such in the text of the First Amendment, but it is derived from "the close nexus between the freedoms of

[11] This was the result of a decision of the Washington Supreme Court which dramatically limited the protections contained in the religious exemption statute. *Woods v. Seattle's Union Gospel Mission,* 481 P.3d 1060 (Wash. 2021). However, the impact of this decision was significantly altered by the Ninth Circuit in *Union Gospel Mission of Yakima, Washington,* 162 F.4th 1190 (9th Cir. 2026). That panel decision was vacated as the result of granting review *en banc.* The case was argued on September 29, 2026.

speech and assembly.*" Nat'l Ass'n for Advancement of Colored People v. State of Alabama. ex rel. Patterson*, 357 U.S. 449, 460 (1958). It is well settled that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.* The Supreme Court has made it clear that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 460-61.

This right that has become known as "expressive association" extends only to "a group engage[d] in expressive activity that could be impaired." *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010) (internal citations omitted). It is well-established that the freedom of expressive association also "presupposes a freedom *not* to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, (1984) (emphasis added); *see also Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 892* (2018) ("The right to eschew association for expressive purposes is likewise protected."). Government may not violate this protection unless it demonstrates that its policy serves a "compelling state interest that cannot be achieved through means significantly less restrictive of associational

freedoms." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 310 (2012) (cleaned up).

Boy Scouts of America. v. Dale, 530 U.S. 640 (2000), is the seminal and controlling case upholding the freedom to not associate. *Dale* considered the freedom of expressive association in the context of an anti-discrimination claim brought by an LGBT individual who was excluded from the organization.

Evaluation of a claim of expressive association requires a three-step analysis. First, it must be demonstrated that the group is engaged in expressive association—advocacy of points of view, the advancement of beliefs and ideas, or transmission of a system of values. *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010). Second, the forced inclusion of those who do not agree with the organization's message must be shown to burden the ability of the organization to transmit its desired message. *Id.* The third step is to evaluate the claim of government that the intrusion on the freedom of association is justified. "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

A. Sacred Heart Parish Unquestionably engages in Expressive Association.

The proper first step for every expressive association case is to determine "whether the group engages in 'expressive association.'" *Dale*, 530 U.S. at 648. To qualify, "a group must engage in some form of expression, whether it be public or private." *Id.* And as Justice Alito emphasized in his concurrence in *Hosanna-Tabor*, "Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith." *Hosanna-Tabor*, 565 U.S. at 200-01.

It is undisputed that Sacred Heart Parish is the kind of organization engaged in expressive association. The Parish schools provide a comprehensive education that is infused with Catholic doctrine and worldview. The district court summarized the purpose of the Sacred Heart curriculum as "the pursuit of 'truth,' including 'the Catholic understanding of man and woman and the purpose of each' and 'a proper understanding of human anthropology.'" *Sacred Heart*, 2026 U.S. Dist. LEXIS 196878, at *10-11.

B. Sacred Heart's Ability to Transmit Its Message Would be Burdened by the Forced Inclusion of Employees (Regardless of Function) who do not Share Its Views.

The second phase of analysis requires a court to determine "whether the forced inclusion of" nonbelievers "would significantly affect" the Parish's "ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 650. *See also Knox*,

567 U.S. at 309 ("[T]he ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed.").

Every organization that exists to perpetuate its beliefs fully expects every employee to share its mission. This is a commonsense approach that is followed by LGBT organizations (among virtually all others). This is easy to demonstrate by examining the job postings of LGBT advocacy groups both in Michigan and nationally. In this case, Sacred Heart Parish merely seeks to protect the same right that LGBT organizations expect for themselves.

- Equality Michigan requires applicants for Manager of Individual & Corporate Giving to demonstrate a "[c]ommitment to racial, economic, and gender justice and to advancing equity for LGBTQ+ communities."[12]
- MiGen (Michigan LGBTQ+ Elders Network) requires those seeking the position of Development Director to demonstrate that they are "[p]assionate about community impact and aligned with MiGen's mission and shared values."[13]

[12]Manager of Individual & Corporate Giving, Equality Michigan, LinkedIn (last visited Oct. 27, 2026), https://www.linkedin.com/jobs/view/manager-of-individual-corporate-giving-at-equality-michigan-4273728461/.
[13] Development Director, Michigan LGBTQ+ Elders Network, Indeed (last visited Oct. 27, 2026), indigo.com.

- Events Coordinator applicants for Affirmations LGBTQ+ Community Center are advised: "If our mission aligns with yours, we encourage you to consider joining us as an Events Coordinator!"[14]

The district court concluded that the Parish had no legal basis for its claim of the right to integrated mission staffing (hiring only employees who share its beliefs) with respect to non-ministerial positions like custodians and coaches. *Sacred Heart*, 2026 U.S. Dist. LEXIS 196878, at *36, 39. LGBT groups clearly believe otherwise for similar positions in their organizations.

For instance, the San Francisco LGBT Center calls their janitors "Facilities Ambassadors." A Facility Ambassador's duties include "[i]ndependently perform[ing] routine janitorial duties to maintain cleanliness and hygiene across all facility areas."[15] The first three "essential qualifications" for its janitors are:

- Commitment to the mission and vision of the SF LGBT Center.
- Knowledge/familiarity with LGBTQ+ community and/or ability to work with a broad range of community members representing the full diversity of the LGBTQ+ and allied communities.

[14] *Event Coordinator*, Affirmations, https://goaffirmations.org/news/jobs-internships/events-coordinator/ (last visited Oct. 27, 2026).
[15] Facilities Ambassador, Roccam Recruiting, Vaia (last visited Oct. 27, 2026), vaia.com.

- Strong commitment to racial, social, and economic justice.[16]

Proud Academy is an LGBT "proposed tuition-free public charter school" in Connecticut.[17] Its website invites educators and others to file an "intent to Apply for Employment Form." The list includes physical education teachers among other positions. The introduction to the "Careers" page includes the following instruction for all positions, including "food services" and "custodial services:

> We are actively seeking dedicated and enthusiastic volunteers for our community in the Naugatuck Valley who are eager to support LGBTQ+ youth and their allies at the Valley PROUD Center. We are also accepting resumes for Founding Teachers and school staff. If you're an educator, an administrative professional, or a school support team member who believes that PROUD Academy and Valley PROUD Center aligns with your values and goals, please fill out the careers form below.

As revealed by the postings of the San Franscisco LGBT Center and the Proud Academy, these advocacy groups want all of their employees—including their janitorial staff and physical education teachers— to share the mission of their organizations. It defies common sense to think that any organization would approach the matter differently.

Yet, rather than following the Supreme Court's admonition in *Hosanna-Tabor* that religious organizations are entitled to even higher levels of associational

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[16] *Id.*

[17] Careers, PROUD Academy (last visited Oct. 27, 2026), https://www.proudacademyct.org/apps/pages/index.jsp?uREC_ID=628946&type=d. All statements in this paragraph are found on this webpage.

freedom than secular ones, 565 U.S. at 189, the district court wrongly concluded that the Parish had no basis for its claim that the First Amendment right to expressive association protected it in making the very type of hiring decisions that these secular organizations regularly make.

The district court's conclusion that religious organizations can *only* claim the protection of the ministerial exception doctrine does not square with the direct statement by the Supreme Court that the "right to freedom of association is a right enjoyed by religious and secular groups alike." *Id.* Secular organizations, including LGBT organizations, clearly believe that they have the right to limit their hiring to those who support their mission. And this sentence from *Hosanna-Tabor*, written in the context of an employment case, unequivocally recognizes this right. When the compelled hiring of an employee who does not share the organization's views would burden the organization's ability to transmit those views, the First Amendment does not permit it.

Non-ministerial employees can have enormous impact on an organization's ability to transmit its message with integrity. Coaches teach far more than athletic technique; they teach character to youth. "Youth sports are as much about instilling life lessons as they are winning and losing." *McElhaney v. Williams*, 81 F.4th 550, 553 (6th Cir. 2023). *See also Reid v. Huron Bd. of Educ., Huron Sch. Dist. No. 2-2*, 449 N.W.2d 240, 243 (S.D. 1989) ("The Huron High School Coaches Handbook

recognizes as much in its Statement of Philosophy: 'Among the most valuable contributions of athletics are the *development of good sportsmanship, learning to win with dignity,* as well as the *education one can gain from a loss,* and the *development of pride in the school and community.*' (Emphasis in original) These are the ultimate life skills we want our young people taught, whether in a classroom or on the playing field or on a basketball court.")

Sacred Heart would reasonably place great emphasis on alignment with its values in the selection of its coaching staff. It is entitled to know that the lessons being taught by coaches fully align with the mission of its school.

The same thing is true with regard to the role of janitors in a school setting. Although cases reviewing the role of school janitors often arise in the troubling setting of liability for sexual assault, courts have recognized that janitors are positioned to influence the lives of school children. *See*, *e.g.*, *Doe v. ABC Sch.*, 316 So.3d 1086, 1095 (La. App. 1st Cir. 2020) ("A janitor's prominent presence on a school's campus and the fact that he is an adult make it natural that an elementary-school-aged child would view him as an authority figure."). Sacred Heart Parish wants to ensure that its sextons serve as positive influences with children. Like all personnel in the facility, the Parish wants every employee to reinforce the agreed message rather than undermine the Parish's values by either word or deed.

Once again, the job postings from LGBT organizations, including Proud Academy, demonstrate that they expect all employees, regardless of position, to fully adhere to the mission of the organization. Catholic schools are just as entitled as LGBT groups to exercise integrated mission staffing, insisting that every role is filled with an employee who supports the mission. All advocacy groups seek to ensure that the message they send is unequivocal and consistent. The very presence of a contrary-minded employee muddies the message.

In *Dale,* the Supreme Court analyzed expressive association with a focus on *message.* "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648.

The message that is compromised does not have to be the central mission of the organization. It is enough that the disputed area comprises a component of the desired message. In *Dale,* the New Jersey court had rejected The Boy Scouts' claim because the organization did not associate for the "purpose of disseminating the belief that homosexuality is immoral." 630 U.S. at 644. The Supreme Court disagreed, finding: "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that

could be impaired in order to be entitled to protection." *Id.* at 655. It defies common sense to suggest that the outcome of *Dale* would have changed if the Assistant Scoutmaster had been paid rather than a volunteer position. The presence of a paycheck does not remove the protection of the First Amendment.

Another aspect of the holding in *Dale* merits special emphasis. The Supreme Court followed the principle that organizations, not courts, determine their beliefs, messages, and missions. "The Boy Scouts …assert that it 'does not want to promote homosexual conduct as a legitimate form of behavior…We accept the Boy Scouts' assertion." *Dale, supra* at 651. "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression." *Id* at 653.

The district court's rejection of Sacred Heart Parish's claim that the First Amendment right of expressive association protects its practice of hiring only employees who align with the beliefs it seeks to transmit cannot be squared with the law nor with the common understanding of all advocacy employers, including LGBT organizations. The First Amendment entitles all advocacy organizations to employ only those who believe in their mission so that their message is not compromised.

C. Compelled Association Renders the Statute Unconstitutional Without the Necessity of Considering the Compelling Interest Test.

Normally, the third step of expressive association analysis requires the government to demonstrate that its policy is the least restrictive means of achieving a compelling governmental interest unrelated to the suppression of speech. *Roberts v. Jaycees,* 468 U.S. at 623. However, the three most relevant Supreme Court cases demonstrate that where there is a finding of compelled speech or compelled association, a categorical rule comes into play rendering consideration of the compelling interest standard unnecessary.

In *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995), the Court held:

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. …While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government. (Internal citations omitted.)

Similarly, in *Dale*, the Court looked upon the forced inclusion of the gay scout leader as an interference with the message of the Boy Scouts. The Court did not reach the compelling interest question, but simply concluded that the law "may not interfere with speech for no better reason than promoting an approved message

or discouraging a disfavored one, however enlightened either purpose may seem." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 642 (2000).

Finally, in *303 Creative LLC v. Elenis*, the Court held that even the State's generally compelling governmental interest in preventing discrimination cannot justify compelled speech. 600 U.S. 570, 592 (2023) "This Court has also recognized that no public accommodations law is immune from the demands of the Constitution. In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech." *Id.*

Dale demonstrates that compelled inclusion is analyzed as compelled speech. *303 Creative* announces a categorical rule against compelled speech in this very context. Michigan's rule must fall.

Moreover, even if this Court were to consider the compelling interest analysis, Michigan would be hard-pressed to satisfy it in light of the fact that the federal government and every other State with a sexual orientation or gender identity provision in its employment non-discrimination law exempts religious employers from its operation to some degree.

No organization engaged in expressive association should ever be compelled by any government to hire employees who clearly reject the organization's message.

Conclusion

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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