Docket No. 08-0419

IN THE SUPREME COURT OF THE UNITED STATES

Spring Term 2009

BOBBIE LABORDE,

***Petitioner*,**

v.

NAYLOR APPOINTED APOSTOLIC CHURCH,

***Respondent*.**

ON WRIT OF CERTIORARI

SUPREME COURT OF THE STATE OF FREMONT

BRIEF FOR RESPONDENT

ATTORNEYS FOR RESPONDENT

P-2 (Issue 1: whether the First Amendment limits adjudication of civil actions with respect to the ministerial employment decisions of a religious organization)
P-1 (Issue 2: whether the First Amendment protects religious organizations against judicial enforcement of statutory and contractual obligations to avoid discrimination on the basis of sexual orientation)

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QUESTIONS PRESENTED

1. Does the First Amendment limit adjudication of civil actions with respect to the ministerial employment decisions of a religious organization?
2. Without regard to an employee's ministerial status, does the First Amendment protect religious organizations against judicial enforcement of statutory and contractual obligations to avoid discrimination on the basis of sexual orientation?

OPINIONS BELOW

The decision of the Supreme Court of the State of Fremont affirming the dismissal of Petitioner's claims by the Fourth District Court is available at *Laborde v. Naylor Anointed Apostolic Church*, No. S-12259, slip op. 2 (Fre. June 3, 2008). The decision of the Fourth District Court of the State of Fremont is unpublished.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of the State of Fremont was entered on June 3, 2008, and this Court granted certiorari on November 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1331 (2008).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech…" U.S. Const. amend. I.

The Fremont Non-Discrimination Act, codified as Fremont State Code Section 413.2, prohibits employment discrimination on the basis of an "individual's race, color, religion, sex, national origin, or actual or perceived sexual orientation." F.S.C. § 413.2 (2006). Section 413.3 of the Fremont State Code provides that the subchapter does not

apply to "employment of individuals of a particular religion" by a religious entity. F.S.C. § 413.3 (2006).

STATEMENT OF THE FACTS

The Naylor Anointed Apostolic Church (NAAC) is a small, quiet, rural church located in the town of Naylor, Fremont. *Laborde v. Naylor Anointed Apostolic Church*, No. S-12259, slip op. 2, 3 (Fre. June 3, 2008). The congregation has a small membership, with approximately fifty members attending weekly services. *Id.* Since 1980, NAAC has belonged to the Apostolic Christian Assemblies of America (ACAA). *Id.* ACAA is comprised of approximately 63 independent congregations across the United States. *Id.* As a member congregation, NAAC uses the ACAA Charter as its constitution. *Id.* This constitution provides that Declarations of the Council are binding on all congregations and failure to comply with the ACAA Charter or decisions of the council may result in the congregation being expelled from the ACAA. *Id.* NAAC also has its own constitution that retains the right to hire and fire its pastor and grants the pastor the authority to make all day-to-day decisions, including decisions regarding employment. *Id.*

NAAC hired Bobbie Laborde as Chapel Steward in 2005. *Id.* Mr. Laborde's duties as Chapel Steward included providing for the "security, safety, and cleanliness of the Naylor Chapel" as well as assisting in the spiritual mission of NAAC through preparing the weekly bulletin and greeting congregation members every Sunday. *Id.* NAAC gave Mr. Laborde great latitude in preparing the weekly bulletin, including selecting a scripture passage to be printed on the front page. *Id.* at 4. The pastor shared the topic of the upcoming sermon each week in order to assist with the selection of the

passage, but Mr. Laborde was given complete discretion to select the passage he found appropriate. *Id.* The employment contract between NAAC and Mr. Laborde was based on a form contract provided by the ACAA. The termination clause of the contract provides that just cause for termination includes "a failure to abide by the doctrine of Jesus Christ as laid out in scripture the charter of the ACAA, and/or the constitution of the [NAAC]." *Id.*

In 2005, Pastor Jones (the former pastor who hired Mr. Laborde) allied himself with a local organization that advocates for gay and lesbian rights and began mentioning same-sex issues in his weekly sermons. *Id.* at 5. The NAAC congregation was uneasy with Pastor Jones' viewpoints on sexual orientation and tensions quickly rose. *Id.* After members of the congregation registered protests with the Council, Pastor Jones transferred to a different congregation. *Id.* at 6. NAAC hired Clarence Strickland to replace Pastor Jones in September 2006. *Id.* Shortly after joining the congregation as pastor, Pastor Strickland's weekly sermons became more conservative, sometimes openly condemning homosexuality. *Id.* The congregation, in support of Pastor Strickland, approved a resolution rejecting the ACAA's policy prohibiting discrimination on the basis of sexual orientation. *Id.*

Mr. Laborde became uncomfortable with the messages expressed by the congregation regarding the morality of homosexuality. *Id.* Mr. Laborde criticized Pastor Strickland's sermons after services. *Id.* These tensions culminated one Sunday when Mr. Laborde confronted Pastor Strickland about the congregations' views on sexual orientation and revealed that he was a sexually active gay man. *Id.* The following Sunday, Pastor Strickland terminated Mr. Laborde's employment with two weeks notice.

Id. at 7. This termination was consistent with the terms of Mr. Laborde's employment contract, which includes that just cause for termination includes, "failure to abide by the doctrine of Jesus Christ." J.A. at 3. Mr. Laborde appealed his termination to the congregation, who endorsed Pastor Strickland's decision. *Laborde* at 7.

Mr. Laborde next filed a complaint with the Naylor County Employment Commission. *Id.* Fremont State Code Section 413.2 prohibits discrimination in the workplace on a variety of grounds. *Id.* at 5. In 2004, the Fremont legislature amended Section 413.2 through passage of the Non-Discrimination Act (NDA), which added sexual orientation as a protected category in employment discrimination. *Id.* at 5. The commission decided not to pursue the matter and issued Mr. Laborde a right to sue letter. *Id.* at 7. Mr. Laborde filed suit in the Fourth District Court of the State of Fremont, alleging the termination was a breach of contract and in violation of Fremont State Code Section 413.2(a)(1). *Id.* The district court granted NAAC's motion to dismiss for lack of subject matter jurisdiction, finding Mr. Laborde's position was ministerial in nature and the court was therefore precluded from asserting jurisdiction. *Id.* at 8. Mr. Laborde appealed the decision to the Supreme Court of the State of Freemont, which upheld the district court's decision that Mr. Laborde's position was ministerial in nature and the First Amendment barred recovery under either the contractual or statutory provisions. *Id.* at 18. This Court granted Mr. Laborde's Petition for Writ of Certiorari on November 14, 2008. *Id.* at 1.

SUMMARY OF THE ARGUMENT

I. Petitioner's claims of employment discrimination and breach of contract are barred by the ministerial exception, which limits court jurisdiction over the employment-

related civil claims of ministerial employees of religious organizations. The ministerial exception has been widely applied by the circuit courts since its inception over thirty-five years ago, and is supported by the First Amendment and serious policy concerns. Petitioner's job function is ministerial, and he therefore falls within this exception.

The ministerial exception prevents courts from inquiring into a religious organization's employment decisions regarding ministerial employees. Courts have applied this exception because to adjudicate such decisions would violate a religious organization's free exercise rights under the First Amendment, and would result in courts impermissibly entangling themselves in ecclesiastical matters in violation of the Establishment Clause of the First Amendment.

Ministerial employees act as intermediaries between religious organizations and their constituents, as well as the general public. They are representatives of the religious organization and are expected to spread religious doctrine, as well as to abide by it. By intervening in the organization's choice of ministerial employees, courts would impermissibly infringe on the organization's ability to shape and exercise its beliefs and ultimately to perpetuate its doctrine and its own existence.

Moreover, for a court to resolve employment disputes for ministerial employees, it would be forced to impermissibly entangle itself in the religious organization's interpretations of its own doctrine, in violation of the Establishment Clause. Indeed, the process of litigation itself would involve the courts in religious issues and the inner workings of an ecclesiastical body. Interpretation of religious doctrine must be left to ecclesiastical bodies, as required by the First Amendment.

Petitioner's employment places him squarely within the ministerial exception. He was an employee of a church, for which he performed important spiritual functions. He had discretion to make doctrinal decisions by choosing scriptures to be disseminated to the congregation in the weekly bulletin, he greeted congregants as they arrived for services, and he consulted with the pastor on the weekly sermon. His job duties were clearly important to the spiritual function of the church and to its ability to exercise its beliefs. Therefore his claims must be dismissed.

II. The First Amendment bars judicial enforcement of Petitioner's contract and statutory claims. Enforcement of either claim would violate the Free Exercise, Establishment, and Freedom of Speech Clauses of the First Amendment.

Petitioner's claim under the Fremont Non-Discrimination Act (NDA) should be dismissed because the NDA is unconstitutional as applied to Respondent's employment decision, as it would violate Respondent's right to freedom of association under the First Amendment. Respondent's employment decision with regard to Petitioner is protected because Respondent is an intimate association, which must be free to make decisions as to its membership absent a compelling state interest applied in the least restrictive manner. Respondent is also protected as an expressive association, whose message would be impermissibly burdened if it were forced to comply with the NDA in its hiring decisions. Respondent has clearly and repeatedly expressed its message that homosexuality is contrary to its religious beliefs, and cannot be forced to employ individuals whose presence would interfere with that message.

Furthermore, the NDA as applied in this situation would impermissibly burden Respondent's right to free exercise of its religious beliefs. The government would need

to present a compelling interest and use the least restrictive means necessary to impose the NDA to limit Respondent's employment decisions, but has not met this test.

Petitioner's claim for breach of contract should also be dismissed, because adjudication of such a claim would violate the Establishment Clause of the First Amendment, as it would require this Court to interpret Respondent's doctrinal beliefs in order to determine whether the contract was in fact breached. This Court would be in the untenable position of determining whether Petitioner's sexual orientation is contrary to church doctrine, a question upon which members of the Christian faith are not in agreement. It would constitute an impermissible entanglement with ecclesiastical concerns for civilian courts to attempt to address this issue.

Therefore, both the contract and statutory claims are unenforceable.

ARGUMENT

I. The First Amendment limits adjudication of civil actions with respect to the ministerial employment decisions of a religious organization.

A. The ministerial exception should be adopted by this Court to limit adjudication of a religious organization's ministerial employment decisions.

Though it is an issue of first impression in this Court, there are compelling reasons why this Court should adopt the ministerial exemption to severely limit secular court jurisdiction over employment disputes between religious organizations and their ministerial employees. The first court to formally announce this exception was the Fifth Circuit in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). Under the ministerial exception, neither Congress nor the courts may involve themselves in employment decisions or disputes between religious organizations and their ministerial employees. *Id.* at 560.

The ministerial exception has been applied by circuit courts across the country in the thirty-five years since *McClure* was decided.[1] *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008); *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Hollins v. Methodist Healthcare*, 474 F.3d 223 (6th Cir. 2007); *Bryce v. Episcopal Church in the Diocese*, 289 F.3d 648 (10th Cir. 2002). The ministerial exception has also been adopted by state courts. *See, e.g., McDonnell v. Episcopal Diocese of Georgia*, 381 S.E.2d 126 (Ga. Ct. App. 1989).[2]

Courts have been reluctant to intervene in a religious organization's ministerial employment decisions for many reasons, relating to violations of both the Free Exercise and Establishment Clauses of the First Amendment. As the court in *McClure* stated, "The relationship between an organized church and its ministers is its lifeblood." *Id.* at 558. If a court were to assert jurisdiction over such an employment dispute, it would "intrude upon matters of church administration and government which have … been proclaimed to be matters of a singular ecclesiastical concern." *Id.* at 560. Its effect

[1] The courts have found that the ministerial exception does survive *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *EEOC v. Catholic University of America* 461-462. First, the court in *Catholic University* reasoned that *Smith* limited an individual's ability to exempt itself from general laws, but not a religious institution's, because the risk of an individual becoming a "law unto himself" was not present with a religious institution. Second, the court reiterated a long line of decisions from this Court that support a religious organization's ability to make decisions about its internal affairs and doctrine without state interference. 462.

[2] The First Amendment was incorporated against the states through the Fourteenth Amendment in *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940).

would be "the very opposite of that separation of church and State contemplated by the First Amendment." *Id.* A church's determination of who will speak on its behalf is a *per se* religious matter that must be left to ecclesiastical institutions, not secular courts. *Minker* at 1356-1357. A church's fate is "inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents." *Natal* at 1578. In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 89 S.Ct. 601 (1969), the Court stressed the dangers of violating the First Amendment when church property litigation required civilian courts to resolve controversies over religious doctrine—such involvement by the courts risks "inhibiting the free development of religious doctrine and … implicating secular interests in matters of purely ecclesiastical concern." *Id.* at 606.

If a secular court inquired into the reasons behind a church's decision relating to its ministerial employees, it would impermissibly burden the free exercise of religion. The Free Exercise Clause applies to churches as well as to individuals. *Rayburn* at 1167. This right gives churches the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* (Citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). Moreover, the right to choose ministerial employees without government interference "underlies the well-being of religious communities" because a church's ability to perpetuate its own existence depends on those it chooses to preach its values and message, and to interpret its doctrines. Therefore, if the State attempts to restrict or dictate how a church may choose its leaders, this constitutes a burden on the church's right of free exercise. *Rayburn* at 1167-1168. The court in *Rayburn* further found that the State interest in

preventing employment discrimination was outweighed by the church's right to free exercise in hiring ministerial employees: "While an unfettered church choice may create minimal infidelity to the objectives of Title VII [of the Civil Rights Act of 1964], it provides maximum protection of the First Amendment right to the free exercise of religious beliefs." *Id.* at 1169.

In *Minker*, a Methodist minister filed both age discrimination and breach of contract claims against his church when he was denied a pastorship. The court found that a church's decision to appoint a minister is "uniquely within a church's ecclesiastical discretion" and that a secular court could not interpret a church's spiritual policies without impermissibly burdening its free exercise right. *Minker* at 1361. The court found it could not even interpret the written contract that Minker was attempting to enforce, as it would require an impermissible inquiry into church doctrine, and possibly the resolution of a religious controversy. *Id.* at 1359, 1360.

A court's inquiry into ministerial hiring decisions could also violate the Establishment Clause by entangling a court in a church's doctrinal decisions and interpretations. Under the "*Lemon* test," reiterated in *Rayburn* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)), a statute is valid under the Establishment Clause if it meets all of the three requirements: it has a secular legislative purpose, its principal or primary effect neither advances nor inhibits religion, and it does not foster excessive government entanglement with religion. *Rayburn* at 1170. The court in *Rayburn* found that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982) met the first two requirements, but not the last. The court found that the danger of entanglement was more

severe when the court was asked to apply Title VII to a church, versus a parochial school, because the purpose of a church is "fundamentally spiritual." *Rayburn* at 1170.

The court in *Rayburn* found that involving itself in such a dispute would result in an "intolerably close relationship between church and state" in both procedural and substantive terms. From a substantive standpoint, the court found that an examination of a church's ministerial employment decision would be impermissible because it would require the state to substitute its own judgment for the church's as to who should be "God's appointed." *Id.* at 1170. A church is entitled to pursue its own path and to make that determination itself. From a procedural standpoint, the court found that subjecting a church to a potentially lengthy lawsuit, in which discovery of church records and probing the mind of church officials were likely, would constitute excessive entanglement. *Id.* at 1171. Moreover, the potential far-reaching remedies the court could impose and potential post-lawsuit surveillance would also constitute excessive entanglement. *Id.* The long-term result of litigation of this sort could be that a church would make its hiring decisions not based on its own doctrine or faith, but rather on a desire to avoid future litigation—this constitutes not only entanglement, but a burden on free exercise, because it prevents the church from exercising its beliefs in making ministerial employment decisions. *Id.* As the court in *McDonnell* stated, "one of the promptings of the creation of this nation" was to prevent entanglement of the state with ecclesiastical affairs. *Id.* at 176.

Petitioner is asking the Court to insert itself into a ministerial employment dispute in a way that would violate both the Free Exercise and Establishment Clauses of the First Amendment. If this Court were to adjudicate Petitioner's claims, it would violate the Free Exercise Clause by preventing Respondent from making its ministerial employment

decisions for doctrinal reasons. Instead, Respondent would be forced to make future decisions based on a desire to avoid litigation. *Rayburn* at 1171. The decision to terminate Petitioner's employment is uniquely within Respondent's "ecclesiastical discretion." *Minker* at 1361. Moreover, to resolve the employment dispute would require this Court to entangle itself in doctrinal decisions over whether Petitioner's sexual orientation is at odds with church doctrine. *Laborde v. Naylor Anointed Apostolic Church*, No. S-12259, slip op. 2, 7 (Fre. June 3, 2008). It would also expose Respondent to a lengthy trial process and inquiry into its religious reasons for terminating Petitioner, impermissibly entangling itself with the church's doctrinal mission in violation of the Establishment Clause. *Rayburn* at 1171.[3]

B. Because Petitioner was a ministerial employee, his dismissal falls under the ministerial exception, and therefore this Court is precluded from considering his claims.

Although Petitioner is not an ordained minister of the NAAC or ACAA, he is a ministerial employee and the Supreme Court of the State of Fremont was correct to dismiss his claims for lack of subject matter jurisdiction. The ministerial exception's application does not depend on job title or whether the employee has been ordained, but rather on the functions performed by the employee. *Rayburn* at 1168. The Court must decide whether the position is "important to the spiritual and pastoral mission of the church." *Id.* at 1169. As long as the position is ministerial, the Court cannot inquire into the reasons for the decision, even if those reasons might be discriminatory. *Id.*

[3] The NAAC did not waive its right to claim the ministerial exception, as claimed by Petitioner. *LaBorde* at 7. The ministerial exception "is not subject to waiver" because a federal court will not insert itself into a religious controversy even at the request of the church. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006).

If the employee is an ordained minister, priest, or the equivalent, then the ministerial exception unquestionably applies to him or her. In *Rweyemamu*, the exception applied to an ordained Catholic priest who was denied several promotions within the church. *Id.* at 200. In *Young*, the exception applied to a probationary minister who was denied promotion to Clergy Member of the. *Id.* at 184. In *Minker*, the exception applied to a Methodist minister who was denied pastorship. *Id.* at 1355. In *Natal*, the exception applied to a clergyman-employee of the Christian and Missionary Alliance. *Id.* at 1576. And in *McDonnell* the exception applied to an Episcopalian minister. *Id.* at 126.

However, even if an employee is not called "minister" or "priest," or is not ordained, the employee could nevertheless fulfill a ministerial function and come within the ministerial exception. As the court in *Rweyemamu* noted, "ministerial exception" is merely judicial shorthand: It protects more than just ministers, and is not confined to the Christian faith. *Id.* at 206. The court noted that the exception is not a rigid one. Given that it is based on concerns over Free Exercise and Establishment Clause violations, whether an employee is ministerial depends on both the employee's job functions and the nature of the dispute. For example, if a lay employee has a pervasively religious relationship with his or her employer, inquiry into a discrimination suit would be unconstitutional; but an actual minister's claim for being injured by a falling gargoyle could be adjudicated without violation of the religion clauses. *Id.* at 208.

Some nonministers who have been found to have ministerial functions precluding judicial review of their employment-related claims include: a nun/faculty member at a Catholic university (*Catholic University of America*); an organist/music director at a

Catholic Church (*Tomic*); a press secretary for a Catholic church (*Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698 (7th Cir. 2003)); a director of music ministries (*EEOC v. Roman Catholic Diocese of Raleigh, North Carolina*, 213 F.3d 795 (4th Cir. 2000)); and a kosher compliance officer at a Jewish nursing home (*Shaliehsabou v. Hebrew Home of Greater Washington*, 363 F.3d 299 (4th Cir. 2004)).

In *Catholic University of America*, the court found the plaintiff Sister McDonough to be a ministerial employee because, although she could never be ordained as a priest, her responsibilities were "essentially religious." *Id.* at 463. She was a member of an ecclesiastical faculty whose mission was to foster and teach doctrine and related disciplines, and she instructed students in the fundamental ecclesiastical laws of the church. The court stressed the importance of faculty members at this university in the spiritual mission of the Catholic Church. *Id.* at 464.

In *Tomic*, the court found the plaintiff organist to have a ministerial position because he had discretion to choose music and the manner in which it would be played at each mass—through his choice of music, he could alter the religious experience of the parishioners. *Id.* at 1040. The court contrasted Tomic with an organ tuner, who would not have discretion to shape parishioners' religious experience. *Id.* at 1041. The court also contrasted Tomic with a math teacher in a parochial school (who, in *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993), was found not to be a ministerial employee). The court stated that Tomic was "more like a clergyman than a math teacher" because his duties had a significant religious dimension, unlike a math teacher whose only religious duties were to take students to mass and lead them in prayers. *Tomic* at 1041. Moreover, an inquiry into the reasons for Tomic's dismissal would require

examination of church doctrine and whether his choice of music at mass was appropriate, whereas DeMarco's claim required asking only whether he led students to mass or not.

In *Alicea-Hernandez* the court found the plaintiff, a press secretary for a Catholic church, was a ministerial employee because she served as a liaison between the Church and both its parishioners and the community. She was responsible for conveying the Church's message to the public as a whole, and a church's message is extremely important and *per se* religious in nature. *Id.* at 704. The court found that because she conveyed the Church's message, which is essential to a church's existence (*Rayburn* at 1168), she was a ministerial employee and her claim was dismissed.

In *Roman Catholic Diocese* a cathedral music director and part-time music teacher was barred from pursuing a sex-discrimination claim against the church because her position was ministerial. The court found that she performed ministerial and spiritual functions because she assisted in planning liturgies, was in charge of the parish choirs, chose music to enhance the theme of the Scriptures at each mass, and served as representative of the church to the congregation through her prominent role in worship services and being listed on the front of the Parish bulletin alongside the priests and Director of Religious Education. *Id.* at 803. The court was not persuaded by the EEOC's arguments that she was not a ministerial employee because she did not have the final say in her choice of music and because the position did not even require an employee to be Catholic. *Id.* The court stressed that employment decisions regarding her position related to how a church spreads its message. *Id.* at 804.

In *Shaliehsabou* the court found that an employee of a predominantly Jewish nursing home who acted as Mashgiach, or kosher compliance supervisor, was a

ministerial employee, and his claim seeking unpaid overtime was dismissed. *Id.* at 300. The court found that his primary duties, which consisted of inspecting food deliveries, ensuring kosher food preparation, lighting ovens, and cleansing utensils, were spiritual in nature because the kosher diet is an "integral part of Judaism," and amounted to "supervision of religious ritual and worship." *Id.* at 308. The plaintiff was "the primary human vessel through whom the Hebrew Home chose to assure that the Jewish dietary laws were followed." *Id.*

Petitioner's job functions are ministerial. Like the plaintiff in *Catholic University*, Laborde's bulletin-preparation responsibilities were important to the spiritual mission of the NAAC. *Laborde* at 4. Like the plaintiff in *Tomic*, Petitioner had discretion to make spiritual decisions that would affect the congregants' religious experience because he chose the scriptures that would appear in each week's bulletin, and the pastor did not interfere with Petitioner's choice. *Laborde* at 4. Like the plaintiff in *Roman Catholic Diocese*, Petitioner acted as a representative of the church through his discretion in choosing the bulletin readings and in greeting members as they arrived for services. *Laborde* at 4. Unlike the plaintiff in *DeMarco*, inquiry into the reasons for Petitioner's dismissal would require examination of church doctrine with respect to his sexual orientation. *Laborde* at 7. Like the plaintiff in *Aliciea-Hernandez*, Petitioner acted as a liaison between the church and its congregation, by choosing the scripture for the weekly bulletin and by greeting congregants and handing out the bulletin. *Laborde* at 3. Given the small and intimate size of this congregation, Petitioner's personal presence in greeting congregants is especially important and they were likely to view him as a representative of the church. *Laborde* at 3. Moreoever, the fact that Petitioner was

terminated because his lifestyle was not in harmony with Respondent's doctrine, but that he was told he could remain a member of the church, indicates that he was viewed as a representative of the church. *Laborde* at 7. Finally, like the plaintiff in *Shaliehsabou*, although Petitioner performed many functions that are secular, such as keeping the Naylor Chapel clean, he can still be considered a ministerial employee. *Laborde* at 7.

In some cases the courts have found the duties of lay employees of religious institutions to be insufficiently spiritual to be considered ministerial: a Temple administrator (*Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994)); secular faculty members at a religious educational institution (*EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980)); and administrative support staff at a seminary (*EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981)).

In *Weissman*, a Temple administrator's age discrimination claim was not barred because the court found he was not a ministerial employee. His responsibilities included supervising administrative, clerical, custodial, and maintenance staff; managing property and equipment; and maintaining financial records. Importantly, he played no role whatsoever in decisions that related to spiritual matters. *Id.* at 1040. The court noted that the "overwhelming majority" of his duties were secular. The court also found it important that the Temple's stated reasons for firing Weissman were not religious, but were instead based on dissatisfaction with his performance of his secular duties. The court noted that, "If any or all of the reasons asserted for dismissal are religious, the trial court can use the case-by-case approach to determine those rare cases where a lay employee's relationship with a religious institution is so pervasively religious that even

mere pretext inquiry poses a significant risk of First Amendment infringement." *Id.* at 1045. This is just such a case.

In *Mississippi College*, the court found that the ministerial exception did not apply to faculty and staff at a religious educational institution. *Id.* at 489. The court stressed that the College is not a church, and that the faculty and staff did not function as ministers. The employees were not "intermediaries between a church and its congregation" and they "neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine." It was insufficient that the employees were expected to act as "exemplars of practicing Christians." The plaintiff's claim of racial discrimination was allowed to proceed. *Id.* at 485.

In *Southwestern Baptist*, the court found that although seminary faculty members fell under the ministerial exception, the administrative and support staff employees did not. The court contrasted the positions—though the institution itself was wholly ecclesiastical, the job functions of each set of employees differed. The faculty acted as intermediaries by training future clergymen and were hired based on religious criteria. *Id.* at 283. By contrast, the support and administrative staff, at least those who performed only functions related to the seminary's financial, maintenance, and nonacademic issues, were not ministerial. The court stated that these employees were "not engaged in activities traditionally considered ecclesiastical or religious." *Id.* at 284.

Petitioner's job functions distinguish him from the employees the courts have determined to be nonministerial. The plaintiff in *Weissman* played no role in spiritual decisions, but Petitioner played a very important spiritual role, by choosing the scriptures in the weekly bulletin. *Laborde* at 3. Unlike the plaintiff in *Weissman*, Petitioner was

terminated for stated religious reasons. *Laborde* at 7. The plaintiffs in *Mississippi College* did not act as intermediaries between the church and its congregation, and were not working at a church. Petitioner both works at a church and acts as an intermediary by choosing scriptures and by greeting the small number of congregants as they arrive for services. *Laborde* at 3. Finally, unlike the administrative and support staff in *Southwestern Baptist*, Petitioner does perform activities "traditionally considered ecclesiastical or religious" by having discretion to choose the weekly bulletin scripture. *Southwestern Baptist* at 284; *Laborde* at 3.

II. The First Amendment protects Respondent from judicial enforcement of obligations related to decisions made on the basis of sexual orientation.

A. The Fremont Non-Discrimination Act (NDA) unconstitutionally burdens Respondent's freedom of association rights protected under the First Amendment.

1. Respondent's membership decisions are protected because of the intimate nature of the association.

One of the implicit protections guaranteed by the First Amendment is the right to associate with others, "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jay*cees, 468 U.S. 609, 622 (1984). The protection of the freedom of association is necessary in order to effectuate the rights secured under the First Amendment, including the right to exercise religion and the freedom of speech. There are, however, limits to the right to freedom of association. The Court in *Roberts* found that freedom of association did not permit the U.S. Jaycees to exclude women from membership. In evaluating the Jaycees' claim that admitting female members would burden the organization's right to intimate association, this Court considered the organization's nature, including its "size, purpose, policies, selectivity,

[and] congeniality." *Id*. at 620. The Court found that the Jaycees were not an intimate association because of the size and non-selective membership of the local chapter. *Id*. The Jaycees chapter had 433 members and averred that applicants were only denied membership based on age or sex. *Id*. at 621. The Court also suggested that intimate relationships were those more akin to familial relationships.

Generally, in order to be protected as an intimate association, an association must be highly personal. This protection is not typically extended to religious organizations, which are often larger and less intimate. *Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 198 (3d Cir. 1990). However, Respondent in this case is an intimate religious organization in a small rural community established to allow members to express their religious faith. Membership has never exceeded seventy-five, and approximately fifty members currently attend weekly services. *Laborde* at 3.

Congregants take steps to ensure their fellow members hold consistent beliefs. This was exemplified through the protests surrounding Pastor Jones' advocating for gay and lesbian rights which resulted in his transfer to another congregation. *Id*. at 5-6. Congregants also exemplified the selective nature of the church when they told Petitioner he could remain a member of the church and attend services. *Id*. at 7. This implies a corresponding right to disallow members with inconsistent beliefs from continued participation in the association.

The small size of the congregation and its exclusivity of membership afford Respondent protection as an intimate association. However, the protection of intimate associations is not absolute, as infringement may be justified by regulations that serve compelling state interests, that are unrelated to the suppression of ideas, and that cannot

be achieved through less restrictive means. *Roberts* at 623. The compelling state interest identified in *Roberts* was the elimination of discrimination against women, a class that receives heightened protection. *Id.* at 624. However, unlike gender, sexual orientation has not been deemed a suspect or quasi suspect class where laws that burden the class merit increased judicial scrutiny. *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126, 1133 (9th Cir. 1997). *See also Romer v. Evans*, 517 U.S. 620 (1996).

2. Respondent's expressive activities would be seriously burdened through compliance with the NDA.

The First Amendment right to freedom of association also extends to organizations engaged in expressive activity, regardless of whether the organization is intimate. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). The right to freedom of speech is toothless without a corresponding right to associate for the purpose of engaging in expressive activity. This is especially true when expression of unpopular viewpoints may be suppressed by the majority. *Id.* at 647-648. As the Supreme Court of the State of Fremont found, requiring Respondent to comply with the NDA would impermissibly burden Respondent's right to expressive association protected under the First Amendment. *Laborde* at 13.

In order to determine the extent of protection under the right to freedom of association, the Court must first determine if the association engages in "expressive association." *Dale* at 648. This Court confronted the issue of what constitutes expressive association in *Dale*. The Boy Scouts sought to remove an adult leader because of his sexual orientation. This Court found the Boy Scouts' mission of instilling moral values in young people sufficient to constitute an expressive activity. *Id.* at 650. Respondent's expressive activities are even more clear. The church's purpose is to express its religious

viewpoints. The pastor proselytizes Christian viewpoints in the weekly sermon and bulletin. Respondent's governing constitution expresses its viewpoints about the Holy Bible, God, and Jesus Christ, and the Respondent's role in spreading the "gospel of Jesus Christ." J.A. at 5.

In particular, the congregation has directly and clearly expressed its opposition to homosexuality, beginning with its protest against Pastor Jones' advocacy of gay and lesbian rights. *Laborde* at 6. These protests led to Pastor Jones' transfer to a different congregation, indicating that support of gay and lesbian rights is inconsistent with the congregation's viewpoints. *Id.* The congregation even more clearly disavowed support for homosexuality when it approved an official resolution rejecting ACAA's policy of nondiscrimination on the basis of sexual orientation. *Id.* at 6. Yet again, the congregation spoke when members endorsed Pastor Strickland's decision to terminate Petitioner's employment on the basis of his sexual orientation. *Id.* at 7.

Since Respondent is an organization engaged in expressive association, the inquiry becomes: whether Respondent's ability to express its viewpoints would be seriously burdened by requiring compliance with the NDA. *Dale* at 658. The First Amendment includes multiple protections for a religious organization's ability to express its viewpoint, including the Freedom of Speech, Establishment, and Free Exercise Clauses. Courts must defer to the association's assessment of whether its expressive abilities would be hindered through forced compliance with governmental regulations. *Dale* at 653. Furthermore, even greater judicial deference is due to an asserted *religious* belief, because of the dangers posed when courts determine what constitutes a religious belief or practice. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707,

714 (1981). Protected religious beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* The same religious belief need not even be held by all members of a religious sect in order to receive protection, as "Courts are not arbiters of scriptural interpretation." *Id.* at 716. If secular courts reviewed religious beliefs any more searchingly would violate both the Establishment and Free Exercise Clauses by interpreting scriptural doctrine.

Respondent has clearly asserted its ability to engage in free speech and freely exercise its religion would be impeded by requiring continued employment of a homosexual individual. The congregation passed a resolution rejecting the ACAA policy regarding discrimination on the basis of sexual orientation. *Laborde* at 6. This reflects a schism in viewpoints on interpretation of scripture relating to homosexuality, but does not lessen the protection for this viewpoint. Respondent includes "failure to abide by the doctrine of Jesus Christ" as grounds for termination, indicating its strong interest in ensuring a common viewpoint among the congregation. J.A. at 3. This condition of employment is central to Respondent's ability to spread its religious beliefs. Compliance with the NDA would require Respondent to hire employees of all sexual orientations, and because Respondent believes that a homosexual lifestyle is "out of harmony with the gospel of Christ," forced employment of homosexual individuals would directly contravene the message Respondent seeks to spread. *Laborde* at 7.

The right to freedom of association is not absolute and must be balanced against the State's interest. *Dale* at 658-659. The Court in *Dale* found the State's interest in eradicating discrimination on the basis of sexual orientation was insufficient to justify such a severe intrusion into the Boy Scouts' right to freedom of expressive association.

Id. at 659. Likewise, Respondent's freedom of expressive association would be greatly impeded by requiring Respondent to either hire or continue to employ homosexual individuals, as described above.

The dissent in *Dale* doubted the veracity of the Boy Scouts' assertion that inclusion of homosexual troop leaders would impede the Boy Scouts' right to expressive association, because many of the Boy Scouts' proclamations against homosexuality were asserted after the commencement of litigation. *Id.* at 686 (Stevens, J. dissenting). However, in the present case, Respondent publicly and clearly asserted that homosexuality did not comport with its religious faith, before terminating Petitioner. *Laborde* at 5-7. These expressions began with the removal of Pastor Jones and continued through the congregants' approval of Petitioner's termination. *Id.* The majority of the congregation spoke, and the church leadership was furthering the religious morals and shared goals of the congregation.

Justice Stevens noted in his dissent in *Dale*, "surely there are instances in which an organization that truly aims to foster a belief at odds with the purposes of the State's antidiscrimination laws will have a First Amendment right to association that precludes forced compliance with those laws." *Id.* at 686. Justice Stevens asserted a standard for when to apply this test: the organization must show it advocated a position inconsistent with "a position advocated or epitomized by the person whom the organization seeks to exclude." *Id.* at 687. Respondents have satisfied this additional burden proffered by the dissent, but not required by the majority, as they have unequivocally asserted practicing homosexuality is at odds with the values of the congregation. Rather than this position being asserted after, or in defense of, litigation, these public expressions were all asserted

before commencement of the current litigation. Therefore, in addition to satisfying the burden announced by the majority in *Dale*, the facts in the present case would also address the concerns raised by the dissenting Justices.

B. The NDA impermissibly burdens Respondent's right to free exercise of religion.

The First Amendment prohibits the government from interfering with the free exercise of religion. Petitioner argues that, under *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), Respondent is not exempt from a neutral, generally applicable law that might interfere with the free exercise of religion. In *Smith*, respondents were terminated and ineligible for unemployment benefits after using peyote, a controlled substance, in a religious ceremony. This Court found the use of peyote was not protected under the Free Exercise Clause and rejected the need for a compelling state interest to justify generally applicable, religion-neutral laws that may incidentally burden individuals' religious practice. *Id*. at 886. The Supreme Court of the State of Fremont limited *Smith* to the free exercise of individuals and found the *Smith* analysis inapplicable to Respondent, an organization. *Laborde* at 16.

It was unclear how the *Smith* decision would impact the right of a church, as compared to individuals, to exercise its religious beliefs. The court in *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996) found that, even after *Smith*, the Free Exercise Clause guarantees a church the freedom to "decide how it will govern itself, what it will teach, and to whom it will entrust ministerial responsibilities." *Id.* at 463. The rule in *Smith* is therefore limited to burdens on an individual's right to exercise religion and does not extend to churches. *Catholic University* at 462.

However, even if this Court determines *Smith* should extend to churches, Respondent's employment decision is protected because it falls under the "hybrid" rights doctrine enunciated in *Smith*, where a compelling state interest must support application of a neutral, generally applicable law to a religious action that involves rights secured under the Free Exercise Clause in conjunction with another constitutionally protected right. *Smith* at 881. Application of the NDA to Respondent violates Respondent's rights to both free exercise and freedom of association. Respondent has a right to freely exercise its religious views on sexual orientation, and additionally to exercise its freedom of association and expression based on these views.

Circuit courts have struggled with the scope and proper application of the hybrid rights doctrine announced in *Smith*. *Green v. City of Philadelphia*, 2004 U.S. Dist. LEXIS 9687, at 18 (E.D. Pa. May 26, 2004). Circuits that accept the hybrid rights doctrine have found that plaintiffs must, at a minimum, demonstrate a colorable claim that the "companion right has been infringed." *Id.* at 23. Respondent has met that burden with its claimed infringement of freedom of expressive association. In many respects, Respondent's expressive activities would be burdened even more than those of the plaintiffs in *Boy Scouts*. As the Court in *Smith* proffered, "it is easy to imagine" a case where a challenge to freedom of association would be implicated at the same time as a Free Exercise claim. *Id.* at 888. This is such a case.

C. Matters of internal church governance should be resolved by the organization's internal procedures and ecclesiastical courts.

In order to evaluate Petitioner's claim that his termination violated his employment contract, it would be necessary for this Court to interpret and adjudicate matters of internal church governance and spiritual doctrine. Respondent terminated

Petitioner's employment consistent with the terms of his contract, in which just cause for termination includes "failure to abide by the doctrine of Jesus Christ." J.A. at 3. The central issue for the contract dispute is whether practicing homosexuality violates Christian religious doctrine. As the Supreme Court of the State of Fremont noted, requiring a church to continue to employ a homosexual individual despite the church's belief that homosexuality is immoral would "place the courts directly in the middle of a church's internal affairs." *Laborde* at 17.

Judicial restraint cautions against resolution of internal matters of church governance by secular courts, as it would require courts to adjudicate issues reserved for ecclesiastical decisionmakers. This Court has a long history of deferring to internal procedures when determining issues related to church governance. In *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), the Court was asked to adjudicate a claim relating to the defrocking of a Bishop. The Illinois Supreme Court interpreted provisions of the church's governing documents in order to determine the validity of petitioner's claim. *Id.* at 708. This Court found the Illinois Supreme Court's inquiry was an impermissible intrusion into religious practices, in violation of the Free Exercise Clause. *Id.* at 709. Religious disputes are to be resolved by ecclesiastical tribunals under their particular procedures, not by a secular court. *Id.*

Judicial restraint in this area ensures the independent nature of religious bodies. Allowing those aggrieved by ecclesiastical courts to appeal to secular courts would lead to "the total subversion of such religious bodies." *Id.* (quoting *Watson v. Jones*, 13 Wall. 679 (1872)). Members of a religious organization impliedly consent to the internal governance procedures dictated by the church and are therefore bound to submit to

ecclesiastical jurisdiction. *Id.* To hold otherwise would, "deprive these bodies of the right of construing their own laws." *Id.*

Just as the Court in *Serbian E. Orthodox* rejected the invitation to decide whether a church abided by its own internal procedures, this Court should decline to adjudicate Petitioner's contract claim. Respondent's governing constitution states, "the pastor has authority to make all day-to-day decisions of the congregation, including decisions regarding the employment of staff members." J.A. at 5. Pastor Strickland exercised this discretion when choosing to terminate Petitioner's employment. Respondent chose to break with the ACAA's position on non-discrimination regarding sexual orientation with the resolution passed by the majority of the congregation. *Laborde* at 6. Both Petitioner's claim of firing and Respondent's decision to not comply with the ACAA's non-discrimination policy should be adjudicated by the ACAA. Leadership and governance of congregations that are members of the ACAA is vested in a Council of Elders. J.A. at 4. This tribunal is best suited to determine any repercussions from the congregation's actions and to interpret the terms of the employment contract between Petitioner and Respondent.

This Court should decline to resolve ecclesiastical matters with respect to whether Petitioner was terminated for just cause for not abiding by the "doctrine of Jesus Christ as laid out in scripture." *Id.* at 3. Christians as a whole disagree about the Bible's teachings regarding the morality of homosexuality, as evidenced in the recent events in Respondent's congregation, contrasted with the ACAA's position of non-discrimination based on sexual orientation. *Id.* Adjudicating this claim would directly interject this Court into the center of a debate on Biblical scripture. When there is not even

concurrence among Christians on this issue, a secular court is no better equipped to resolve it.

Respondent voluntarily complied with the NDA starting in 2004, when the ACAA amended its Charter to include a prohibition on discrimination based on sexual orientation. *Laborde* at 5. The ACAA Charter is binding on member congregations, including Respondent, but the remedy for noncompliance with the Charter is disciplinary action by the ACAA. J.A. at 4. Respondent's voluntary compliance with the non-discrimination policy is not sufficient to trigger jurisdiction by this court. Petitioner's claim is based, in part, on the fact that Respondent did not comply with the ACAA charter. However, the congregation's "own internal guidelines and procedures must be allowed to dictate what its obligations to its members are without being subject to court intervention." *Natal v. Christian and Missionary Alliance,* 878 F.2d 1575, 1577 (1st Cir. 1989) (quoting *Dowd v. Society of St. Columbans*, 861 F.2d 761 (1st Cir. 1988)). In *Natal*, the court refused to exercise jurisdiction over a pastor's claim that a church did not comply with its internal procedures, finding that doing so would constitute excessive entanglement in the church's affairs. *Id. See also, McDonnell v. Episcopal Diocese*, 381 S.E.2d 126 (Ga. Ct. App. 1989) (finding the First Amendment prohibits civil jurisdiction over a termination action because it would require interpreting a church's policy and procedure manual). Courts have found that voluntary compliance by religious organizations with anti-discrimination statutes is not a waiver of First Amendment rights. Rather, the matter is properly adjudicated through the organization's own procedures and laws. *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 227 (6th Cir. 2007).

Since Respondent was terminated for religious reasons, the exercise of jurisdiction by this Court would constitute excessive entanglement under the First Amendment. In an action alleging discrimination on the basis of gender, the court found that the religious organization only needed to provide "convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion." *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th. Cir. 1980). The court also found the EEOC could not investigate whether the religious reason for the termination was a pretext without running afoul of the First Amendment. *Id.* Likewise, any determination by this Court that goes beyond Respondent's proffered religious reasons for terminating Petitioner's employment would violate the First Amendment.

CONCLUSION

Dismissal of Petitioner's claims is supported by both precedent and serious constitutional concerns that formed the basis for this nation's founding and are expressed in the First Amendment. Respondent's termination of Petitioner's employment implicates important doctrinal issues that must be resolved by the Respondent's internal ecclesiastical procedures, not the courts. Respondent's rights of free exercise and freedom of intimate and expressive association would be seriously burdened by a court's involvement in determining whether its beliefs are correct, and who is best qualified to spread its message. The mere process of litigation would burden Respondent's right to exercise its beliefs through making employment decisions based on doctrine rather than fear of litigation. Respondent, like any other religious institution, must be allowed the freedom to resolve deep ecclesiastical questions on its own.