

Nos. 26-1736 & 26-1787

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

SACRED HEART OF JESUS PARISH, GRAND RAPIDS; JOSEPH BOUTELL;
RENEE BOUTELL; PETER UGOLINI; KATIE UGOLINI,

Plaintiffs-Appellants / Cross-Appellees,

v.

DANA NESSEL, in her official capacity as Attorney General of Michigan

Defendant-Appellee / Cross-Appellant,

JOHN E. JOHNSON, JR., in his official capacity as Executive Director of
the Michigan Department of Civil Rights; PORTIA L. ROBERSON, in her
official capacity as a member of the Michigan Civil Rights Commission;

ZENNA FARAJ ELHASON, in her official capacity as a member of the
Michigan Civil Rights Commission; GLORIA E. LARA, in her official
capacity as a member of the Michigan Civil Rights Commission; REGINA

MARIE GASCO-BENTLEY, in her official capacity as a member of the
Michigan Civil Rights Commission; ANUPAMA KOSARAJU, in her official
capacity as a member of the Michigan Civil Rights Commission;

RICHARD J. CORRIVEAU, in his official capacity as a member of the
Michigan Civil Rights Commission; DAVID WORTHAMS, in his official
capacity as a member of the Michigan Civil Rights Commission; LUKE
R. LONDO, in his official capacity as a member of the Michigan Civil

Rights Commission.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan / Case No. 1:22-cv-01214

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CORPORATE DISCLOSURE STATEMENT

Under Fed. R. App. P. 26.1 and Sixth Circuit R. 26.1(a), Appellant Sacred Heart of Jesus Parish, Grand Rapids, states that it has no parent corporation, does not issue stock, is not a subsidiary or an affiliate of a publicly owned corporation, and there is no publicly owned corporation or its affiliate, not a party to this appeal, with a financial interest in the outcome of this case.

As individual persons, Appellants Joseph Boutell, Renee Boutell, Peter Ugolini, and Katie Ugolini confirm the same.

TABLE OF CONTENTS

Corporate Disclosure Statement.....	i
Statement in Support of Oral Argument.....	1
Statement of Jurisdiction.....	2
Statement of Issues	3
Statement of the Case	4
I. Sacred Heart’s employees advance its distinctly Catholic approach to education.	4
II. Catholic parents choose Sacred Heart to help them raise their children in the faith.	8
III. Michigan’s ELCRA expansion threatens Sacred Heart’s religious character.....	11
IV. Michigan actively enforces ELCRA against religious employers, religious schools, and public accommodations while allowing case-by-case exemptions.....	13
V. Fearing enforcement, Sacred Heart sues, and Michigan’s litigation positions repeatedly shift, leaving Sacred Heart at enforcement officials’ mercy.....	15
A. Michigan shifts its views on employment policies.	16
B. Michigan changes its positions on Sacred Heart’s student policies.....	18
C. Michigan’s current positions do not bind anyone.....	22
VI. The district court enters summary judgment against Sacred Heart—despite concluding that the First Amendment protects some of its policies.....	22
VII. While this appeal proceeds, Michigan’s reading of ELCRA burdens Sacred Heart’s hiring and chills its speech.	27

Standard of Review	28
Summary of the Argument	29
Argument.....	30
I. The First Amendment protects Sacred Heart’s right to hire employees who share its beliefs and parents’ right to send their children to an authentically Catholic school.	30
A. The Religion Clauses’ church-autonomy doctrine protects Sacred Heart’s autonomy to set religious expectations for <i>all</i> its employees.....	30
B. The Employment Clause triggers strict scrutiny because the BFOQ process makes it not generally applicable.....	38
C. The Free Speech Clause protects the right of employers with a distinctly expressive mission to hire employees who will further that message.	45
D. Forcing Sacred Heart to hire non-Catholic employees violates parents’ rights by denying them the religious education they chose for their children.	49
II. The Unwelcome Clause is unconstitutionally vague and overbroad.....	53
III. Sacred Heart needs a permanent injunction to prevent enforcement based on its ministerial employment decisions and its pronoun and educational policies.	56
Conclusion	61
Certificate of Compliance.....	62
Certificate of Service	63
Addendum	64

TABLE OF AUTHORITIES

Cases

<i>303 Creative LLC v. Elenis</i> , 6 F.4th 1160 (10th Cir. 2021).....	55
<i>ACLU v. The Florida Bar</i> , 999 F.2d 1486 (11th Cir. 1993)	58
<i>Bernard v. Gulf Oil Company</i> , 619 F.2d 459 (5th Cir. 1980)	59
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000)	45, 46, 47
<i>Christian Healthcare Centers, Inc. v. Nessel</i> , 117 F.4th 826 (6th Cir. 2024).....	22, 59, 60
<i>Christian Legal Society v. Walker</i> , 453 F.3d 853 (7th Cir. 2006)	46
<i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993)	42
<i>City & County of San Francisco v. Trump</i> , 897 F.3d 1225 (9th Cir. 2018)	58, 59
<i>Dahl v. Board of Trustees of Western Michigan University</i> , 15 F.4th 728 (6th Cir. 2021).....	40, 41, 44
<i>Darren Patterson Christian Academy v. Roy</i> , 699 F. Supp. 3d 1163 (D. Colo. 2023).....	48
<i>Does v. Catholic Relief Services</i> , __ F.4th __, 2026 WL 3091963 (4th Cir. Oct. 16, 2026).....	43
<i>Esurance Property & Casualty Insurance Company v. Michigan Assigned Claims Plan</i> , 968 N.W.2d 482 (Mich. 2021).....	53

<i>Eubanks v. Wilkinson</i> , 937 F.2d 1118 (6th Cir. 1991)	53
<i>Everson v. Michigan Department of Corrections</i> , 391 F.3d 737 (6th Cir. 2004)	41
<i>Fellowship of Christian Athletes v. San Jose Unified School District</i> , 82 F.4th 664 (9th Cir. 2023)	39, 40, 43
<i>Fulton v. City of Philadelphia</i> , 593 U.S. 522 (2021)	passim
<i>Hall v. Baptist Memorial Health Care Corp.</i> , 215 F.3d 618 (6th Cir. 2000)	3, 37
<i>Hishon v. King & Spalding</i> , 467 U.S. 69 (1984)	48
<i>Holt v. Hobbs</i> , 574 U.S. 352 (2015)	45
<i>Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC</i> , 565 U.S. 171 (2012)	30, 32, 35, 45
<i>Hunt v. City of Los Angeles</i> , 601 F. Supp. 2d 1158 (C.D. Cal. 2009)	60
<i>Hunt v. City of Los Angeles</i> , 638 F.3d 703 (9th Cir. 2011)	60
<i>Hutchinson v. Thomas</i> , 789 F.2d 392 (6th Cir. 1986)	46
<i>Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America</i> , 344 U.S. 94 (1952)	30, 36
<i>Mahmoud v. Taylor</i> , 606 U.S. 522 (2025)	passim
<i>Malik v. Brown</i> , 16 F.3d 330 (9th Cir. 1994)	33

<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	52
<i>Middleton v. United Church of Christ Board</i> , No. 20-4141, 2021 WL 5447040 (6th Cir. Nov. 22, 2021)	32
<i>Monclova Christian Academy v. Toledo-Lucas County Health Department</i> , 984 F.3d 477 (6th Cir. 2020)	43
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	48
<i>Our Lady of Guadalupe School v. Morrissey-Berru</i> , 591 U.S. 732 (2020)	30, 31
<i>Our Lady's Inn v. City of St. Louis</i> , 349 F. Supp. 3d 805 (E.D. Mo. 2018)	48
<i>Petruska v. Gannon University</i> , 462 F.3d 294 (3d Cir. 2006)	31
<i>Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary</i> , 268 U.S. 510 (1925)	51, 52
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	45
<i>Seattle's Union Gospel Mission v. Woods</i> , 142 S. Ct. 1094 (2022)	31
<i>Serbian Eastern Orthodox Diocese for United States of America & Canada v. Milivojeovich</i> , 426 U.S. 696 (1976)	30, 31
<i>Simpson v. Alex Pickens, Jr., & Associates, MD, PC</i> , 874 N.W.2d 359 (Mich. App. 2015)	60
<i>Slattery v. Hochul</i> , 61 F.4th 278 (2d Cir. 2023)	47

<i>Tandon v. Newsom</i> , 593 U.S. 61 (2021)	42, 44
<i>Union Gospel Mission of Yakima Washington v. Brown</i> , 162 F.4th 1190 (9th Cir. 2026)	32, 33
<i>Union Gospel Mission of Yakima Washington v. Brown</i> , 181 F.4th 1331 (9th Cir. 2026)	32
<i>United Food & Commercial Workers Union v. Southwest Ohio Regional Transit Authority</i> , 163 F.3d 341 (6th Cir. 1998)	53, 54
<i>United States v. Oregon State Medical Society</i> , 343 U.S. 326 (1952)	57
<i>Warren v. City of Athens</i> , 411 F.3d 697 (6th Cir. 2005)	56
<i>Watson v. Jones</i> , 80 U.S. (13 Wall.) 679 (1872)	31, 36, 37
<i>Welty v. Dunaway</i> , __ F.4th __, 2026 WL 2874671 (6th Cir. Sep. 24, 2026)	28
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	49, 50, 51, 52
<i>Youth 71Five Ministries v. Williams</i> , 160 F.4th 964 (9th Cir. 2025)	47

Statutes

28 U.S.C. § 1291	2
28 U.S.C. § 1331	2
28 U.S.C. § 1343	2
28 U.S.C. § 2107	2
42 U.S.C. § 1983	2

42 U.S.C. § 2000e-1	44
775 Ill. Comp. Stat. 5/2-101	44
Ariz. Rev. Stat. Ann. § 41-1462.....	44
Colo. Rev. Stat. § 24-34-402	44
Ind. Code Ann. § 22-9-1-3.....	44
Ky. Rev. Stat. Ann. § 344.090	45
MCL 37.2208	39
MCL 37.2302	54
MCL 37.2401	11
MCL 37.2402	11, 59
MCL 37.2403	12, 59
Ohio Rev. Code Ann. § 4112.02.....	45
R.I. Gen. Laws § 28-5-6.....	45
S.C. Code Ann. § 1-13-80.....	45
Tenn. Code Ann. § 4-21-405	45

Other Authorities

Douglas Laycock, <i>A Syllabus of Errors</i> , 105 Mich. L. Rev. 1169 (2007)	31
Lael Daniel Weinberger, <i>Church Autonomy, Religious Leaders, and Non-Minister Employees</i> , U. Chi. L. Rev. Online (forthcoming), Geo. Mason L. & Econ. Rsrch. Paper 26-19 (Oct. 19, 2026)	36

Rules

Fed. R. Civ. P. 56.....	28
Federal Rule of Appellate Procedure 4	2

Regulations

Mich. Admin. Code R 37.25.....41, 42

STATEMENT IN SUPPORT OF ORAL ARGUMENT

The First Amendment authorizes a religious school to govern itself, including by requiring every employee, not just ministers, to share its faith. That is a religious judgment the government may not second-guess. Federal law and most states respect it. But Michigan does not.

And under *Fulton* and *Tandon*, a law that lets officials grant exemptions case by case or to favor secular over religious interests is not generally applicable, so the government may not refuse a religious exemption without a compelling reason. Otherwise, officials could treat secular reasons as worthy and religious ones as suspect. Michigan's employment law works exactly that way.

Independent of the above, parents have a constitutional right—reaffirmed in *Mahmoud*—to direct their children's religious upbringing, including by choosing a religious school. Michigan would force Sacred Heart to choose between hiring those who reject its faith and closing. Either way, parents lose the Catholic education they chose.

Finally, Michigan concedes that the First Amendment likely protects some of the school's speech and religious exercise. But it insists no injunction is needed because its law exempts conduct "permitted by law." If that were enough, any state could concede its law is unconstitutional as applied, cite a vague savings clause, and avoid relief.

Oral argument is warranted to aid the Court in resolving these important constitutional issues.

STATEMENT OF JURISDICTION

Joe and Renee Boutell, Peter and Katie Ugolini, and Sacred Heart sued Michigan officials John E. Johnson, Jr., in his official capacity as Executive Director of the Michigan Department of Civil Rights; Portia L. Roberson, Zenna Faraj Elhasan, Gloria E. Lara, Regina Marie Gasco-Bentley, Anupama Kosaraju, Richard J. Corriveau, David Worthams, and Luke R. Londo in their official capacities as members of the Michigan Civil Rights Commission; and Dana Nessel, in her official capacity as Michigan Attorney General, in the United States District Court for the Western District of Michigan under 42 U.S.C. § 1983, alleging violations of Sacred Heart's rights under the First and Fourteenth Amendments to the United States Constitution. The district court properly exercised federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1343.

On August 5, 2026, the district court denied Sacred Heart's motion for summary judgment and granted Michigan's cross-motion for summary judgment. Sacred Heart timely filed its notice of appeal on August 19, 2026, within the 30-day period established in 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A). The Attorney General timely cross-appealed on September 4, 2026. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Sacred Heart expects every employee to model the Catholic faith. Federal law and most states let religious employers hire only coreligionists. Michigan does not, except for “ministers.” But the First Amendment does not let courts “dictate to religious institutions how to carry out their religious missions.” *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 626 (6th Cir. 2000). This appeal asks whether the court erred in rejecting Sacred Heart’s right to hire fellow believers.

A law that lets officials weigh each applicant’s reasons for an exemption is not generally applicable. *Fulton v. City of Phila.*, 593 U.S. 522, 533–34 (2021). The district court held otherwise, rejected Sacred Heart’s expressive-association claim, and rewrote one of the law’s clauses to save it. This appeal asks whether each ruling was error.

Parents have a right “to direct the religious upbringing of their children.” *Mahmoud v. Taylor*, 606 U.S. 522, 547 (2025) (citation modified). Forcing Sacred Heart to hire non-Catholics would strip parents of the Catholic education they chose. This appeal first asks whether the district court erred in rejecting their claims.

Finally, Michigan concedes the First Amendment likely protects some of Sacred Heart’s practices. But it says ELCRA’s “permitted by law” exception makes an injunction unnecessary. Were that enough, any state could escape any injunction with a vague five-word savings clause. This appeal asks whether the court erred in agreeing.

STATEMENT OF THE CASE

I. Sacred Heart’s employees advance its distinctly Catholic approach to education.

Polish immigrants who worked in nearby gypsum mines founded Sacred Heart of Jesus Parish on Grand Rapids’ west side more than a century ago. Compl., R.1, PageID.5. Its school, Sacred Heart Academy, is a ministry of the parish that serves nearly 400 students from pre-kindergarten through twelfth grade. Stips., R.83, PageID.1440, 1442. Its mission is to “restore all things in Christ.” *Id.* at PageID.1441. It “exists to support parents in forming their children in the Catholic faith by providing a classical Catholic education.” *Id.* And it believes that parents are their children’s primary educators; the school exists “to supplement and support parents in their educational role.” *Id.* at PageID.1442. To protect its Catholic identity, Sacred Heart takes no state or federal funding. *Id.* at PageID.1443; Compl., R.1, PageID.9.

The Catholic faith permeates everything Sacred Heart does. Students in second grade and up begin every school day with Mass, and all faculty attend daily Mass. Stips., R.83, PageID.1442–43. The school calendar follows the Church’s liturgical calendar. Compl., R.1, PageID.7. The Church’s teachings on sexuality and marriage are “woven throughout the entire Sacred Heart curriculum.” Stips., R.83, PageID.1443. And Sacred Heart divides high-school students into single-sex “households”

to “build up community, train older students in leadership, and provide mentorship for younger students.” *Id.* at PageID.1447.

Sacred Heart “welcomes any family desiring the formation offered in its Catholic classical setting.” *Id.* at PageID.1442. It has had students who struggle with gender discordance. *Id.* at PageID.1447. Students agree to abide by the school’s faith-based policies, which require them to live in conformity with Catholic doctrine. *Id.* at PageID.1448. And Sacred Heart embraces the Church’s teaching that all people should be treated “with dignity, respect, and charity—even those who reject the Church’s teachings.” *Id.* at PageID.1445.

Sacred Heart upholds the Church’s teachings on marriage and human sexuality. *Id.* It believes “God created man in his own image ... male and female he created them,” and that marriage “can only exist between one man and one woman.” *Id.* It rejects “the notion that a man or woman can ‘transition’ to a gender inconsistent with his or her biological sex.” *Id.* So Sacred Heart refers to students and employees only by sex-reflective pronouns, and it assigns restrooms, sports teams, and households by sex. *Id.* at PageID.1447.

Sacred Heart relies on employees to inculcate the faith “by requiring all faculty and staff to support, live, and model the Catholic faith and its doctrine and morals.” *Id.* at PageID.1443. Following diocesan policy, it requires school employees to become certified catechists—that is, certified to teach the Catholic faith. *Id.*; *see also*

Floyd Dep., R.88-1, PageID.2204. Sacred Heart believes “it is the job of every employee to support, live out, model, and teach the Catholic faith and its doctrine.” Stips., R.83, PageID.1443. So all its employees must be Catholics who support the Church’s teachings, including on marriage and sexuality. *Id.* Every year, they sign a memorandum of understanding outlining their religious and moral duties, and they publicly swear an oath of fidelity to Church teaching at Mass. *Id.* They’re also required to demonstrate “what it means to be a Catholic man or woman.” *Id.* at PageID.1446.

That expectation reaches every position. Stips., R.83, PageID.1448. Sacred Heart’s job description for coaches explains that “[e]ach employee helps to extend the ministry of the local Pastor.” Job Postings, R.1-10, PageID.147. Coaches must model “virtuous sportsmanship,” form students “in virtue, especially humility and charity,” serve “as a role model and mentor,” and integrate “Jesus Christ, the life of the Church and the organic unity of the Catholic faith into the athletic environment.” *Id.* Sacred Heart’s custodians consider caring for church property “an act of stewardship,” and they enlist students to help set up liturgical decorations and the Christmas creche. Suppl. Floyd Decl., R.29-2, PageID.568. And Sacred Heart requires all employees to fulfill their duties “for the purpose of assisting in fulfilling the Academy’s mission of assisting families, forming Catholics, and cultivating culture.” Stips., R.83, PageID.1444.

Sacred Heart hires new teachers every year and advertises open positions on its website and other job sites. *Id.* at PageID.1446. It desires to emphasize in postings that employees must “believe, support, and model the Catholic faith” and be “practicing Catholics whose public lives are lived in conformity with the moral teachings of the Church.” *Id.* at PageID.1446–47. It employs 65 faculty and staff. Mot. to Expedite, Nolan Decl. ¶ 9, Case No. 26-1736.

Sacred Heart requires faithful employees because “the Catholic faith is better transmitted to and retained by young people when they are exposed to an authentic Catholic community living out Christian principles.” Stips., R.83, PageID.1444. So all its “employees must be consistent, in expression and example, with the teaching and practice of the Catholic faith”—in private life as well as in public. *Id.*; Mem. of Understanding, R.1-4, PageID.115 (listing cohabitation and sex outside marriage among conduct “inconsistent with Catholic doctrine or morals”).

Sacred Heart “will not operate in a manner inconsistent with Catholic teachings in provision of educational services, in employment, or in any services offered to the public.” Stips., R.83, PageID.1449. “Rather than defy Catholic doctrine” in its policies or hiring decisions, “Sacred Heart would shut down.” Compl., R.1, PageID.2.

II. Catholic parents choose Sacred Heart to help them raise their children in the faith.

Joe and Renee Boutell and Peter and Katie Ugolini are practicing Catholics. Compl., R.1, PageID.24. They believe the Church’s teachings that God creates each person “either male or female,” that “biological sex is immutable,” and that marriage “can only exist between one man and one woman.” Stips., R.83, PageID.1451–52. And they believe they have “a religious duty to raise their children in the Catholic faith.” *Id.* at PageID.1451.

That duty shapes where they send their children to school. The parents believe they “have the first responsibility for the education of their children” and “a religious duty to choose schools that will best help them in their task as Christian educators.” *Id.* They believe that formation in the faith “comes not just from formal catechesis but also from learning by the example of others authentically living the Catholic faith.” *Id.* So they believe it is “essential to their children’s spiritual well-being” that their children be “surrounded by a true, good, and beautiful Catholic culture at school where students, teachers, priests, and families all strive for holiness together.” *Id.*

Both families sacrificed to find that kind of school. The Boutells adopted five children, all with special needs. Compl., R.1, PageID.19. The children first attended a non-Catholic classical school. *Id.* But when Sacred Heart of Jesus Parish in Grand Rapids re-founded its school,

Sacred Heart Academy, as a classical Catholic school in 2013, the Boutells “did not hesitate” to enroll them there. *Id.* at PageID.6, 20. Public schools offered more targeted help for children with special needs, but the Boutells chose an authentic Catholic education instead. *Id.* at PageID.20. When their youngest needed weekly special instruction through the public schools, the instructor came to Sacred Heart so that he could remain in its Catholic community. *Id.* The family drove forty minutes each way to school and later bought a house closer to the school. *Id.* at PageID.19.

The Ugolinis, both physicians, sent their oldest son to public school for one year. *Id.* at PageID.21–22. Given the “lack of essential moral and spiritual formation” there, Katie stopped practicing medicine and homeschooled their four children. *Id.* at PageID.22. After the children began taking classes at Sacred Heart through its program for homeschoolers, the Ugolinis enrolled them full-time. *Id.* They chose Sacred Heart “because the Catholic faith is paramount and permeates every aspect of the academics, community, and culture.” Stips., R.83, PageID.1450. Every day they drive past one of the best public high schools in the state—right across the street from their home—to take their children to Sacred Heart. Compl., R.1, PageID.22. Katie now teaches science there. Stips., R.83, PageID.1450.

For both families, Sacred Heart's employees are central to their children's religious formation. The parents send their children to Sacred Heart "because of the clear Catholic teaching, through class instruction and example," including "on marriage and sexuality." *Id.* at PageID.1452. Students "learn about the vocation of marriage through observing their teachers and staff model true, chaste courtship that results in sacramental marriage in the Catholic Church." *Id.* at PageID.1451. They see their teachers "flourish in their own marriages" and even attend their teachers' nuptial Masses. Compl., R.1, PageID.27. In a public school, the parents believe their children would not "learn by the example of teachers and peers trying to genuinely live the faith." *Id.* at PageID.22; Boutell Decl., R.5-3, PageID.313.

The parents also chose Sacred Heart because their children "will not be exposed to anything that contradicts or confuses Catholic teaching." Stips., R.83, PageID.1452. If a Catholic school like Sacred Heart were "forced to affirm positions contrary to the Church's teachings on marriage and sexuality, it would greatly confuse their impressionable children and hinder their moral and spiritual development." *Id.* Both families believe Sacred Heart is the only place their children can receive "a holistic moral, spiritual, and academic formation in the Catholic faith." *Id.* at PageID.1450; Compl., R.1, PageID.24. If Sacred Heart were forced to teach, "in word or example," anything contrary to Church teaching, they would remove their children. Compl., R.1, PageID.28.

III. Michigan's ELCRA expansion threatens Sacred Heart's religious character.

In conflict with Sacred Heart's religious practices, Michigan's anti-discrimination law, the Elliott-Larsen Civil Rights Act, has been amended to include sexual orientation and gender identity as protected classes. *See* Stips., R.83, PageID.1452–56; *Christian Healthcare Centers, Inc. v. Nessel*, Nos. 26-1730 & 26-1801, Applt.Br. at pp. 10–18. Because ELCRA's provisions and enforcement mechanisms are set out fully in the *Christian Healthcare* opening brief, Sacred Heart will not repeat them here except to discuss the Education Clause, the Education Publication Clause, and the limited religious-school exemption.

The Education Clause prohibits public and private schools from discriminating against an individual “in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of religion, race, color, national origin, sex, sexual orientation, or gender identity or expression.” MCL 37.2402(a); *see* MCL 37.2401. It also prohibits schools from excluding, expelling, limiting, or otherwise discriminating against students and applicants on the same grounds. MCL 37.2402(b).

The Education Publication Clause prohibits schools from publishing “a catalog, notice, or advertisement indicating a preference, limitation, specification, or discrimination based on” those same traits “of an applicant for admission.” MCL 37.2402(d).

ELCRA also contains a limited exception for religious schools: “[t]he provisions of section 402 *related to religion* shall not apply to a religious educational institution or an educational institution operated, supervised, or controlled by a religious institution or organization which limits admission or gives preference to an applicant of the same religion.” MCL 37.2403 (emphasis added).

Michigan has stipulated that these clauses forbid much of what Sacred Heart does, especially in its hiring decisions. For non-ministerial positions, ELCRA prohibits Sacred Heart from recruiting and hiring only candidates “who support, live, and model Church teaching.” Stips., R.83, PageID.1454. It prohibits Sacred Heart from requiring those employees to sign the memorandum of understanding or swear the oath of fidelity. *Id.* at PageID.1453. It prohibits Sacred Heart from asking applicants for those positions whether they identify as Catholic, the name of their parish, or how often they attend Mass. *Id.* at PageID.1454. And it prohibits job postings for those positions that “indicate a desire to recruit and hire employees who share Sacred Heart’s Catholic faith.” *Id.* Michigan has also stipulated that it considers it a violation of ELCRA for Sacred Heart to refuse admission to a student because the student is in a homosexual relationship. *Id.* at PageID.1456.

IV. Michigan actively enforces ELCRA against religious employers, religious schools, and public accommodations while allowing case-by-case exemptions.

Michigan enforces ELCRA against employers, schools, and public accommodations, including over constitutional defenses. Employers can ask for individualized exemptions from the Employment Clause, which the Commission grants or denies based on each employer's particular circumstances and reasons. MCL 37.2208 (BFOQ exemptions). Because these are catalogued in the *Christian Healthcare* opening brief as they pertain to employers and public accommodations (pp. 13–18), this brief focuses only on enforcement against religious schools.

Religious Schools. The Department has investigated religious schools even after they raised the ministerial exception. Jt. Stmt. of Material Facts, R.87, PageID.1638–41. When a Catholic school's former principal filed a national-origin discrimination complaint in August 2019, the Department ordered the school to submit a detailed position statement within fourteen days and answer thirty interrogatories. *Id.* at PageID.1638. It then interviewed a priest of the diocese before concluding, six months after the complaint, that the ministerial exception applied. *Id.* at PageID.1639. When a Christian school's former director of marketing and admissions filed a complaint in November 2020, the Department did not interview the head of school until July 2023 and did not dismiss the complaint under the ministerial exception until August 2023—nearly three years later. *Id.* at PageID.1639–40. And when a

Catholic parish school discharged an employee who was pregnant outside marriage, she filed a complaint in October 2023 that the Department pursued until July 2024. *Id.* at PageID.1640–41.

Nor has the Department confined its investigations of religious ministries to schools. In May 2023, it served Catholic Charities of Shiawassee & Genesee Counties a certified housing-discrimination complaint alleging gender-identity discrimination under ELCRA, along with an order for documents. Catholic Charities Case File, R.88-4, PageID.2590, 2593, 2596. Yet in December 2023—seven months after the Department served that complaint, four months after it closed its investigation of the Christian school, and two months after the parish-school employee filed her complaint—Michigan told this Court there was “no history of enforcement or a threat of enforcement of [ELCRA] against Sacred Heart or any similar religious entity.” Appellees’ Br. 13, Case No. 23-1781.

The Department also pursues complaints against schools involving sexual orientation and gender identity. During this litigation, it served a certified complaint on Peace Lutheran Church and School after a parent alleged that, as “a lesbian woman,” she received unequal service when the school “did not allow [her] to sit on the bench during a game.” Peace Lutheran Compl., R.105-1, PageID.2829; Notice of Certified Compl., R.105-1, PageID.2826. The Department ordered the school to produce information within two weeks and warned that

“[f]ailure to comply with this order may subject you to enforcement proceedings in the Circuit Court.” Order, R.105-1, PageID.2831.

The Department is also investigating a transgender student’s complaint that a Michigan school district denied the student access to the restroom matching the student’s gender identity. Trevino Dep., R.88-1, PageID.1977. And the Commission has voted to seek staff legal opinions on whether ELCRA requires transgender students be given access to restrooms on that basis and be addressed “by their chosen pronouns and names.” Johnson Dep., R.88-1, PageID.1686, 1689–90. Asked whether the Department would investigate such complaints if they were not resolved voluntarily, the director answered “perhaps, yes” as to restrooms and “Yes” as to pronouns. *Id.* at PageID.1688–90.

V. Fearing enforcement, Sacred Heart sues, and Michigan’s litigation positions repeatedly shift, leaving Sacred Heart at enforcement officials’ mercy.

Fearing enforcement, Sacred Heart and the parents filed a pre-enforcement suit in December 2022, challenging ELCRA under the First and Fourteenth Amendments and seeking declaratory and injunctive relief. Compl., R.1, PageID.68–69; Op., R.116, PageID.2891. In the years that followed, Michigan’s view of how ELCRA applies to Sacred Heart shifted repeatedly. In Michigan’s words, its legal positions took shape “[a]s this litigation has developed and the factual record has matured.” Defs.’ Summ. J. Reply, R.106, PageID.2838.

At first, Michigan declined to take positions. It told the district court the Commission had “yet to determine, through the results of investigation or an interpretive statement, how Michigan’s civil rights laws interface with constitutional rights involving religion,” and there was “no formal policy issued by any of the Defendants” on religious exemptions. Defs.’ Mot. to Dismiss Br., R.23, PageID.409, 411–12. Disavowing enforcement was “impossible,” Michigan said, because “the religious freedom inquiry would be so fact dependent.” Defs.’ Mot. to Dismiss Reply, R.32, PageID.775. Michigan’s answer said Defendants had “not made any determination” about Sacred Heart’s conduct. *E.g.*, Answer, R.53, PageID.1144, 1167. And in its first discovery responses, Michigan objected to request after request. RFA Resps., R.88-2, PageID.2347–54; Interrog. Resps., R.88-2, PageID.2357–62.

A. Michigan shifts its views on employment policies.

In its prior appeal brief to this Court, Michigan represented that the conduct Sacred Heart sought to engage in, “such as advertising for or hiring only employees that share the same religious beliefs, is not proscribed by Michigan’s laws.” Appellees’ Br. 12–13, Case No. 23-1781. Just over two years after Sacred Heart sued, that position changed. The Commission and Department stipulated that coaches, custodians, and sextons are non-ministerial and admitted ELCRA would bar Sacred Heart from declining to hire an applicant for these positions who refused to abstain from same-sex sexual activity. Suppl. RFA Resps.,

R.88-2, PageID.2366; *see* Stips., R.83, PageID.1452–53. They further admitted that requiring employees to swear the oath of fidelity and sign the memorandum of understanding violates the Employment Clause, “unless the law requires otherwise.” Suppl. RFA Resps., R.88-2, PageID.2369. Michigan later stipulated that, for non-ministerial positions, ELCRA prohibits that very conduct: recruiting and hiring only candidates who commit to the Catholic faith and posting job openings seeking employees who share the faith. Stips., R.83, PageID.1454.

Michigan’s view of the BFOQ process changed, too. In 2023, Michigan told the district court that “redress is clearly available” under ELCRA for Sacred Heart’s hiring concerns through a BFOQ. Defs.’ Mot. to Dismiss Br., R.23, PageID.403. Then, at summary judgment, Michigan argued that ELCRA “incorporates the ministerial exception through its BFOQ provision.” Defs.’ Summ. J. Br., R.98, PageID.2727.

The Commission’s designee reached his views on Sacred Heart’s positions in the days before his deposition. Londo Dep., R.88-1, PageID.2065. He concluded the coach position is not ministerial “[y]esterday morning probably,” based on “a very preliminary analysis” that was “certainly not written in stone.” *Id.* at PageID.2063. His conclusions rested on his “individual review” and were “just sort of based on [his] own gut reaction.” *Id.* at PageID.2062. The Commission, he explained, has no “specific rule or procedure or decision matrix” for these questions. *Id.* Asked about the sexton, he first testified that the

position qualifies for the ministerial exception. *Id.* at PageID.2063. Minutes later, questioned by Michigan’s counsel, he reversed. *Id.* at PageID.2065. As he put it, if he hadn’t “been so hasty,” he “would not have answered that it qualifies.” *Id.* at PageID.2066.

The Department’s designee drew similar lines. She agreed that integrating “Jesus Christ and the Life of the Church” into athletics is a religious function, but she said the coach is not ministerial because that is only “one of 12 essential duties.” Trevino Dep., R.88-1, PageID.1988–89. Asked whether informing students in Catholic virtues is a religious function, she answered, “I would hope not,” because “we’re talking about sports.” *Id.* at PageID.1987–88. And she testified that someone need “[n]ot necessarily” be a practicing Catholic to live by the Church’s moral teachings, “because I don’t even think they’re all conformed.” *Id.* at PageID.1990.

B. Michigan changes its positions on Sacred Heart’s student policies.

In 2023, Michigan told this Court that Sacred Heart’s concerns about pronouns, restrooms, locker rooms, uniforms, and sports teams were “a parade of possibilities based on [its] ‘highly speculative fear.’” Appellees’ Br. 18, Case No. 23-1781. Michigan’s positions on those policies and admissions later shifted and changed, too.

Take admissions. In the district court, Michigan suggested Sacred Heart apply for “an exemption under Mich. Comp. Laws § 37.2403 as a religious educational institution.” Defs.’ Mot. to Dismiss Br., R.23, PageID.392. Its answer said whether ELCRA’s education provisions apply would be decided “case-by-case.” Answer, R.53, PageID.1134. The Commission’s designee testified that refusing to admit transgender students or students in homosexual relationships violates ELCRA. Londo Dep., R.88-1, PageID.2056. Later, though, he disavowed enforcement as to admissions because Sacred Heart is “very clearly a religious school.” *Id.* at PageID.2064. Asked how he knew, he pointed first to its name—“Parish and Academy kind of really drives that point home”—and then to its mission, handbook, and structure. *Id.* But weeks later, Michigan stipulated that refusing admission to a student in a homosexual relationship violates ELCRA. Stips., R.83, PageID.1456.

On pronouns, Michigan first said the Commission “has not put out an interpretive statement or otherwise opined on that issue.” Defs.’ PI Resp., R.26, PageID.455. In early 2025, Michigan objected that the individual defendants “are not authorized to speak on behalf of the MCRC in the absence of an official position taken by the MCRC.” Interrog. Resps., R.88-2, PageID.2357–58. Then, in May 2025, Michigan admitted that failing to use preferred pronouns is gender-identity discrimination, “unless the law provides otherwise.” Suppl. RFA Resps., R.88-2, PageID.2370. The same day, it stated, “[u]pon information and

belief, based on current authority,” that the First Amendment precludes using the Accommodation Clause to compel Sacred Heart’s use of preferred pronouns—while maintaining that Sacred Heart’s treatment of its students and employees falls under other parts of ELCRA. Suppl. Interrog. Resps., R.88-2, PageID.2373–74.

Michigan’s witnesses then testified that the State has a compelling interest in requiring Sacred Heart to use preferred pronouns. The Department’s director testified Michigan has “a compelling interest to prevent discrimination” and that if someone complained about Sacred Heart’s pronoun practices, they “would look into it.” Johnson Dep., R.88-1, PageID.1776. The Department’s designee testified Sacred Heart’s pronoun policy “may” violate ELCRA, and her analysis would be no different for Sacred Heart than for Christian Healthcare Centers, a religious medical ministry. Trevino Dep., R.88-1, PageID.1973–74.

Asked whether the Department believes it has “a compelling interest in compelling Sacred Heart to use a student’s preferred pronouns,” she answered, “Yes,” though she added that “it goes back to looking at the legal questions surrounding that.” *Id.* at PageID.1984. She agreed that the interest was general, with nothing specific to Sacred Heart. *Id.* And the director testified that failing to use a person’s preferred pronouns denies the “full or equal enjoyment” of a service and that the Department has a compelling interest in requiring that ministry to use them. Johnson Dep., R.88-1, PageID.1734–36.

The Commission's designee added that, setting exemptions aside, Sacred Heart's pronoun policy violates ELCRA. Londo Dep., R.88-1, PageID.2056. Later, he disavowed enforcement against Sacred Heart's student pronoun policy, describing that as "more a First Amendment speech function than necessarily an exemption." *Id.* at PageID.2064. But he later explained that he had testified about pronouns only in his "own individual personal capacity." Londo Second Dep., R.88-1, PageID.2094. And the Commission had "yet to take a position as a body on whether or not use of pronouns violates the accommodation clause," apart from "the First Amendment concerns." *Id.* at PageID.2098.

Michigan's witnesses testified similarly about Sacred Heart's sex-separated facilities and teams. The Department's director testified that separating students by sex for restrooms and sports could "[p]ossibly" violate ELCRA. Johnson Dep., R.88-1, PageID.1775. The Department's designee said such policies "may" violate ELCRA. Trevino Dep., R.88-1, PageID.1970–73. And the Commission's designee testified Sacred Heart's separate households and sports teams violate ELCRA, as does barring a transgender student from the restroom or locker room matching the student's gender identity. Londo Dep., R.88-1, PageID.2056. His later disavowals did not mention those policies. *See id.* at PageID.2064.

Michigan's view of Sacred Heart's speech changed, too. In May 2025, Michigan said that a statement by Sacred Heart's pastor on Catholic teaching, "on its face, without any additional information,"

does not implicate the Education Publication Clause. Suppl. Interrog. Resps., R.88-2, PageID.2377. Months later, each of Michigan’s witnesses testified that publishing the statement could—or does—violate ELCRA. Johnson Dep., R.88-1, PageID.1771–72; Trevino Dep., R.88-1, PageID.1980; Londo Dep., R.88-1, PageID.2057–59.

C. Michigan’s current positions do not bind anyone.

Michigan’s latest positions do not bind enforcement officials going forward. This point is catalogued in the *Christian Healthcare* brief (pp. 25–26) and needn’t be repeated here. Suffice to say, “the commission would always be free to essentially change its mind.” Londo Second Dep., R.88-1, PageID.2092. And the Department would follow the Commission’s lead. Trevino Second Dep., R.88-1, PageID.2081.

VI. The district court enters summary judgment against Sacred Heart—despite concluding that the First Amendment protects some of its policies.

Several years ago, this Court held Sacred Heart has standing to challenge ELCRA’s employment, education, and public-accommodation provisions and their publication clauses. *Christian Healthcare Ctrs., Inc. v. Nessel*, 117 F.4th 826, 857 (6th Cir. 2024). The Court explained that “the language of exemptions” within ELCRA “is not so clear that it renders the laws obviously inapplicable to Plaintiffs’ conduct.” *Id.* at 847.

On remand, Michigan stipulated to a preliminary injunction barring it from “initiating any charge, conducting any investigation, or taking any other enforcement action of any kind against” Sacred Heart for sexual-orientation or gender-identity discrimination “until final judgment.” Stip. Prelim. Inj., R.61, PageID.1248.

After discovery, the parties cross-moved for summary judgment. Sacred Heart argued that ELCRA, as applied, violates its religious autonomy, its free-exercise and expressive-association rights, and the parents’ rights, and that the Unwelcome Clause is facially vague and overbroad. Pls.’ Summ. J. Br., R.93, PageID.2660. It sought an injunction protecting its employment policies, its pronoun policy, its sex-separated facilities and activities, and its publications about them. Pls.’ Combined Reply, R.105, PageID.2789.

Michigan cross-moved. The Commission and the Department agreed that the art teacher position qualifies for the ministerial exception, but not the coach or sexton. Defs.’ Summ. J. Br., R.98, PageID.2729–30; Op., R.116, PageID.2900. They stressed that this agreement “should not be read as a template for future disputes” and is “not a categorical safe harbor.” Defs.’ Summ. J. Br., R.98, PageID.2732–33. They also said that, as to Sacred Heart’s “student policies regarding housing, pronouns, athletics, restrooms, and uniforms,” “ELCRA does not require Sacred Heart to change those policies.” *Id.* at PageID.2712. That concession did not mention employees. *See id.*

Michigan grounded its concession in both the First Amendment and section 403, which it had described to this Court in 2023 as “an exemption permitting admission of students based upon religion.” Appellees’ Br. 35, Case No. 23-1781. It now argued that Sacred Heart’s “policies related to restrooms, uniforms, sports teams, and pronouns are directly related to its religious beliefs” and therefore “fall within § 403’s exception from § 402’s discrimination provisions on the basis of religion.” Defs.’ Summ. J. Br., R.98, PageID.2752. It added in a footnote that Sacred Heart’s pronoun policy “would also likely be excluded from enforcement” under the First Amendment. *Id.* at PageID.2752 n.7. But Michigan warned that treating a gay student differently in “anything else that was not rooted in its religious beliefs” would “likely run afoul” of ELCRA. *Id.* at PageID.2751.

On admissions, Michigan now argued that Sacred Heart lacks standing because it “does not refuse to admit students based on their sexual orientation or gender identity or expression—only those students who refuse to comply with their religious policies.” *Id.* at PageID.2753. In reply, Michigan framed the issue as whether Sacred Heart’s policies “constitute discrimination based upon Sacred Heart’s religious beliefs or animus toward the LGBTQ community.” Defs.’ Summ. J. Reply, R.106, PageID.2849. And it took the position that Sacred Heart’s admission policies qualify as “religious discrimination within the plain meaning of” section 403—not animus. *Id.* at PageID.2849–50.

The district court denied Sacred Heart's summary-judgment motion and granted Michigan's. *Op.*, R.116, PageID.2928. It rejected Sacred Heart's right to employ co-religionists because that claim "expands the underlying religious autonomy doctrine and ministerial exception more broadly than the Supreme Court's body of caselaw currently permits." *Id.* at PageID.2905. It rejected the expressive-association claim on similar grounds. *Id.* at PageID.2908. And it held that the BFOQ process does not make the Employment Clause discretionary, concluding that the witnesses' "case by case" testimony "does not reveal a systemic problem." *Id.* at PageID.2915–16, 2918.

On Sacred Heart's student policies, the court followed Michigan's lead. It concluded: "As Defendants astutely point out ..., Sacred Heart's policies are grounded in, and turn on adherence to, its religious doctrine and therefore fall within the protection of § 403." *Id.* at PageID.2920. It then read the Accommodation Clause's "except where permitted by law" language as "carving out space for Sacred Heart's activities that may otherwise constitute prohibited discrimination when separately authorized by the First Amendment." *Id.* at PageID.2920–21. It highlighted that "Defendants do not dispute that Sacred Heart's religiously motivated policies are permitted by the First Amendment," but it cited the pages of Michigan's reply brief that made its section 403 argument. *Id.* at PageID.2922.

“In sum,” the court said, the prohibitions “yield to Sacred Heart’s rights under § 403, as well as its rights under the First Amendment.” *Id.* at PageID.2923. Because Sacred Heart’s policies are “permitted by” ELCRA, publishing them does not violate the publication clauses, and “Sacred Heart’s constitutional challenge fails.” *Id.* at PageID.2923–24. The court concluded that “ELCRA, via § 403 and the First Amendment, adequately protects Sacred Heart.” *Id.* at PageID.2928.

The court acknowledged Sacred Heart’s concern that Michigan’s positions “will not bind future enforcement officials in future administrations or future cases.” *Id.* at PageID.2923. And it noted that Michigan had been “fully transparent” that its agreement “should, in fact, *not* be read as a template for future disputes.” *Id.* But the court deemed the time Michigan took to reach its positions “commensurate with the importance of the constitutional issues at stake.” *Id.*

The court also rejected the parents’ claims by characterizing them as being “premised on the success of Sacred Heart’s challenges.” *Id.* at PageID.2924. Because “Sacred Heart’s as-applied challenges lack merit,” the court concluded, the “Parent-Plaintiffs’ claim concomitantly fails.” *Id.* at PageID.2925. It also rejected the vagueness and overbreadth challenges to the Unwelcome Clause. *Id.* at PageID.2927. And it concluded that the Attorney General is a proper defendant based on “her specific authority to enforce the ELCRA,” but it entered judgment for all defendants. *Id.* at PageID.2895–96 n.5; J., R.117, PageID.2930.

Sacred Heart and the parents appealed, and the Attorney General cross-appealed. Notice of Appeal, R.118, PageID.2931; Notice of Cross-Appeal, R.120, PageID.2937.

VII. While this appeal proceeds, Michigan’s reading of ELCRA burdens Sacred Heart’s hiring and chills its speech.

The stipulated injunction the parties previously agreed to expired with the final judgment. Stip. Prelim. Inj., R.61, PageID.1248; J., R.117, PageID.2930. That leaves Sacred Heart exposed any time it makes non-ministerial hiring decisions while its appeal proceeds. Mot. to Expedite, Nolan Decl. ¶ 21, Case No. 26-1736; Stips., R.83, PageID.1453–56.

Despite its current willingness to chill its speech, Sacred Heart will not abandon its faith to avoid that risk. Sacred Heart “would shut down its school rather than operate a school inconsistent with the Church’s faith and doctrine.” Mot. to Expedite, Nolan Decl. ¶ 26, Case No. 26-1736; *see* Compl., R.1, PageID.16.

STANDARD OF REVIEW

This Court reviews a “district court’s summary judgment decision ... de novo.” *Welty v. Dunaway*, __ F.4th __, 2026 WL 2874671, at *4 (6th Cir. Sept. 24, 2026). “Summary judgment is appropriate only when ‘the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Id.* (quoting Fed. R. Civ. P. 56(a)). And “courts must view the record evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of the nonmoving party.” *Id.* The Court “review[s] a district court’s decision to grant or deny permanent injunctive relief, as well as its fashioning of such relief when granted, for an abuse of discretion.” *Id.* at *5. A court abuses its discretion “when it improperly applies the law.” *Id.* (citation modified).

SUMMARY OF THE ARGUMENT

Michigan's Employment Clause violates the Constitution four ways. First, church autonomy protects a religious school's sincere requirement that every employee—not just ministers—share its faith. That is a religious judgment beyond the State's reach. Second, because the Commission weighs each employer's reasons for a BFOQ exemption—and grants exemptions for comparable secular conduct—the Employment Clause is not generally applicable and triggers strict scrutiny that Michigan cannot satisfy. Third, forcing Sacred Heart to employ those who reject its faith burdens its expressive association. Its employees convey its faith to its students, and those who reject that faith cannot do so authentically. Fourth—independent of the first three—the Clause infringes parents' right to direct their children's religious upbringing. Forcing Sacred Heart to hire those who reject its faith would shutter the Catholic school these parents chose.

The district court saved the Unwelcome Clause by rewriting it to mean something the Denial Clause already means. But federal courts may not rewrite state statutes to save them. As written, its subjective terms are unconstitutionally vague and overbroad.

Finally, Michigan's late, nonbinding concessions cannot defeat a permanent injunction. Nor can ELCRA's "permitted by law" exception, which leaves Sacred Heart guessing what it may say and do. The Constitution demands more. This Court should reverse.

ARGUMENT

I. The First Amendment protects Sacred Heart’s right to hire employees who share its beliefs and parents’ right to send their children to an authentically Catholic school.

A. The Religion Clauses’ church-autonomy doctrine protects Sacred Heart’s autonomy to set religious expectations for *all* its employees.

The First Amendment protects the right of religious organizations “to decide matters of faith and doctrine,” and it assures “independence” in “matters of church government.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020) (citation modified). This autonomy includes the freedom to require members to “conform[]” to the “standard of morals required of them.” *Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 714 (1976) (citation modified). And it shields religious organizations from “secular control or manipulation” and “state interference.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

The right to hire religious leaders is one “component” of this autonomy, known as the ministerial exception. *Our Lady*, 591 U.S. at 746. That exception is narrow in scope—it applies only to specific types of positions—but broad when it applies. A religious entity can hire, fire, or discipline its ministers *for any reason*; it need not be able to cite “a religious reason.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194 (2012).

That approach makes sense. As Professor Laycock put it, the ministerial exception’s “primary purpose is to prevent judges and juries from second-guessing the church’s ‘choice as to who will perform particular spiritual functions.’” Douglas Laycock, *A Syllabus of Errors*, 105 Mich. L. Rev. 1169, 1181 (2007) (quoting *Petruska v. Gannon Univ.*, 462 F.3d 294, 304 (3d Cir. 2006)). If a religious organization dismisses a minister for discriminatory reasons, “that is unfortunate.” *Id.* at 1181–82. But it would be “worse if a judge erroneously found discrimination where the [minister] had really been dismissed because his performance was unsatisfactory, or if the judge imposed an unwanted spiritual leader on a church—no matter why that leader had lost the confidence of his flock.” *Id.* at 1182. So the ministerial exception balances those “competing interests” decidedly in the religious organization’s favor. *Id.*

The First Amendment, though, is broader than the ministerial exception, as is the right of religious organizations to have autonomy over their internal affairs. Church autonomy is a “broad principle.” *Our Lady*, 591 U.S. at 747. And it “is not so narrowly confined” to the ministerial exception, *Seattle’s Union Gospel Mission v. Woods*, 142 S. Ct. 1094, 1096 (2022) (Alito, J., respecting the denial of certiorari). Church autonomy protects a religious organization’s broader ability to require that *all* its members and employees meet the “standard of morals required of them.” *Milivojevich*, 426 U.S. at 714 (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872)).

Stated differently, the ministerial exception provides complete protection against *any* “examination” of a religious organization’s “reasons for determining the fitness and qualifications of its ministers.” *Middleton v. United Church of Christ Bd.*, No. 20-4141, 2021 WL 5447040, at *3 (6th Cir. Nov. 22, 2021). And that’s because those “determination[s] [are] *necessarily* informed by religious belief.” *Id.* (emphasis added). But a religious organization’s insistence that all its employees share its religious beliefs is equally “informed by religious belief.” *Id.* So the First Amendment protects those decisions, too.

Sometimes called the “coreligionist doctrine,” this protection is broader in scope—it applies to *all* types of positions—but much narrower in application. Unlike the ministerial exception, the coreligionist doctrine only protects a religious organization’s hiring and firing decisions when the organization bases them on a sincere “religious reason.” *Hosanna-Tabor*, 565 U.S. at 194. “Because who a religious organization hires may go to the very character of its religious mission, the church autonomy doctrine protects the decision to hire co-religionists for non-ministerial roles if that decision is based on the organization’s sincerely held religious beliefs.” *Union Gospel Mission of Yakima Wash. v. Brown*, 162 F.4th 1190, 1197 (9th Cir.), *reh’g en banc granted, opinion vacated*, 181 F.4th 1331 (9th Cir. 2026).

If the reason given is not religious or if it's insincere, the doctrine does not apply. "Unlike with the broader protection of the ministerial exception, a religious organization cannot discriminate on other grounds, and the religious motivation cannot be a pretext for non-religious discrimination." *Yakima*, 162 F.4th at 1205 (citation modified).

That limitation makes sense. The "hiring of non-ministerial positions is not *necessarily* a religious matter." *Id.* So the "church autonomy doctrine only protects religious institutions' non-ministerial hiring policy on a showing that the employment decision [is] 'rooted in religious belief' that [is] 'sincerely held.'" *Id.* (quoting *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994)).

Sacred Heart has made that showing here. Michigan stipulated Sacred Heart hires only employees who "adhere to and agree to abide by all tenets of the Catholic faith," and it does so "[i]n accordance with its sincerely held religious beliefs." Stips., R.83, PageID.1448.

First, Sacred Heart's hiring requirement is rooted in its faith. Sacred Heart believes "it is the job of every employee to support, live out, model, and teach the Catholic faith and its doctrine." Stips., R.83, PageID.1443. And its standard of conduct requires employees to be "consistent, in expression and example, with the teaching and practice of the Catholic faith." *Id.* at PageID.1444. That duty reaches coaches, who integrate "Jesus Christ, the life of the Church and the organic unity of the Catholic faith into the athletic environment." Job Postings,

R.1-10, PageID.147; Trevino Dep., R.88-1, PageID.1988–89. And it reaches custodians, who enlist students to help set up liturgical decorations and the Christmas creche, so it is “crucial” that they be “fully committed to the Catholic faith.” Suppl. Floyd Decl., R.29-2, PageID.568. Sacred Heart requires all this because “the Catholic faith is better transmitted to and retained by young people when they are exposed to an authentic Catholic community living out Christian principles.” Stips., R.83, PageID.1444. An employee who rejects that faith cannot live it out.

Second, that belief is sincere, not pretextual. Sacred Heart “welcomes any family desiring the formation offered in its Catholic classical setting,” and it has had students who struggle with gender discordance. Stips., R.83, PageID.1442, 1447. And it holds every employee to the same standard: each one signs a memorandum of understanding every year and agrees, “as a condition of employment,” to “support and exemplify in conduct and expression both Catholic doctrine and morality.” *Id.* at PageID.1443–44; Mem. of Understanding, R.1-4, PageID.115. That standard reaches conduct anyone might engage in—cohabitation, sex outside marriage, abortion, IVF, and surrogacy among them. Mem. of Understanding, R.1-4, PageID.115. So the requirement turns not on who applicants are, but on whether they share Sacred Heart’s beliefs and whether their conduct is consistent with those beliefs.

The district court rejected Sacred Heart’s invocation of the coreligionist doctrine on the theory that the school had “not provided any binding authority to support its proposed application” of that doctrine. Op., R.116, PageID.2904. But the First Amendment is binding, even if a “since vacated” Ninth Circuit opinion is not. *Id.* at PageID.2904 n.8.

More importantly, a broad church-autonomy doctrine has deep roots in our nation’s history and tradition. For example, as President, Thomas Jefferson penned a letter to a group of “Ursuline Nuns who ran an *orphanage and Catholic school* in New Orleans.” Br. of Professors Stephanie Barclay and Richard W. Garnett as Amici Curiae in Supp. of Pet’r, *Youth 71Five Ministries v. Williams*, No. 25-776, 2026 WL 499909, at *11 (U.S. Feb. 17, 2026) (emphasis added). He assured them that the Louisiana Purchase would not undermine their “broad right of self-governance and religious liberty.” *Id.* (citation modified). And “the principles of the constitution” would allow their “institution ... to govern itself according to [its] own voluntary rules, without interference from the civil authority.” *Id.* (citation modified).

“Given this understanding of the Religion Clauses—and the absence of government employment regulation generally—it was some time before questions about government interference” with religious organizations’ employment decisions came before the Supreme Court. *Hosanna-Tabor*, 565 U.S. at 185. When they did, the Court upheld their

right to decide “questions of discipline, or of faith, or ecclesiastical rule, custom, or law” for themselves. *Watson*, 80 U.S. at 727. As the Supreme Court later put it, the doctrine recognized in *Watson* “radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff*, 344 U.S. at 116.

The coreligionist doctrine fits neatly within the “historical limits” of the broader church-autonomy doctrine. Lael Daniel Weinberger, *Church Autonomy, Religious Leaders, and Non-Minister Employees* 16, U. Chi. L. Rev. Online (forthcoming), Geo. Mason L. & Econ. Rsch. Paper 26-19 (Oct. 19, 2026), ssrn.com/abstract=7639018. Especially in cases like this one that have the “twin safeguards of ex ante disclosure and consent in place.” *Id.* Sacred Heart has long told prospective employees about its religious expectations before they agree to work there. Its job postings explained that employees must be “practicing Catholics whose public lives are lived in conformity with the moral teachings of the Church,” and its job description for coaches required a “willingness to sign the ‘Faculty Memorandum of Understanding’ and swear the ‘Oath of Fidelity.’” Stips., R.83, PageID.1447; Job Postings, R.1-10, PageID.148. And its job offers took the form of the memorandum itself, which makes living by Catholic doctrine and morality “a condition of employment.” Maltbie Dep., R.88-1,

PageID.2293–94; Mem. of Understanding, R.1-4, PageID.115. So anyone who accepts employment “unite[s] themselves” to Sacred Heart “with an implied consent to this government,” and they are thus “bound to submit to it.” *Watson*, 80 U.S. at 729.

What’s more, this Court has correctly observed that “the First Amendment does not permit federal courts to dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices.” *Hall*, 215 F.3d at 626.

The district court brushed *Hall* aside as a case that “addressed only whether a terminated employee stated a prima facie case of religious discrimination under Title VII.” Op., R.116, PageID.2905. But *Hall* did not cite the First Amendment in throwaway dicta. Instead, the Court rejected the terminated employee’s argument there that she was similarly situated to another employee whom the Baptist college defendant had failed to terminate despite that employee having violated “the Southern Baptist Convention’s prohibition against the ordination of women.” *Hall*, 215 F.3d at 626. In conducting its Title VII analysis, this Court refused to second-guess the college for making that employment decision—*not* because Title VII forbade it, but because “*the First Amendment* does not permit federal courts to dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices.” *Id.* (emphasis added).

That constitutional principle foreclosed the terminated employee’s Title VII argument. And applying the same constitutional principle here forecloses Michigan’s argument and the district court’s conclusion that the Employment Clause does not violate the First Amendment when it “interferes with Sacred Heart’s faith-based employment policies and corresponding decisions by restricting its ability to hire employees who share its religious beliefs.” Op., R.116, PageID.2905. It does. And Sacred Heart is entitled to a permanent injunction protecting its right to hire coreligionists.

B. The Employment Clause triggers strict scrutiny because the BFOQ process makes it not generally applicable.

The Employment Clause burdens religious exercise and is not generally applicable because it (1) authorizes individualized exemptions, and (2) treats comparable secular employers better than Sacred Heart. So the clause (3) triggers and fails strict scrutiny.

1. Individualized exemptions. Michigan employers who want to hire based on a protected trait can ask the Commission for an exemption, and the Commission decides each request on a case-by-case basis—one employer, one position, one application at a time. As the Department put it previously, a BFOQ exemption “let[s] an employer do what otherwise would be illegal discrimination.” Regulatory Impact Statement, R.29-4, PageID.616. Indeed, as ELCRA expressly states, the

Commission “may” exempt an employer “[u]pon sufficient showing” that a protected trait is “a bona fide occupational qualification reasonably necessary to the normal operation of the business.” MCL 37.2208. This includes BFOQs based on sexual orientation and gender identity. Londo Dep., R.88-1, PageID.2027–28. Because such a standard turns on “the circumstances underlying each application,” it creates “a mechanism for individualized exemptions” that undermines the law’s general applicability and triggers strict scrutiny. *Fulton*, 593 U.S. at 533–34 (citation modified).

The district court acknowledged that the Commission “retains discretion to decide whether an application ... contains sufficient (or insufficient) information to support the exemption under the statute.” Op., R.116, PageID.2915. Yet it held the Employment Clause generally applicable because the Commission cannot reject an application “for any reason.” *Id.* at PageID.2915–16. In the court’s view, the 13-question application form, judicial review, and the “context-specific” nature of the inquiry kept the Commission in check. *Id.* at PageID.2914–18. But *Fulton* does not require unbridled discretion; it requires only a mechanism that lets officials weigh the reasons behind each request, as here.

The en banc Ninth Circuit said so explicitly in *Fellowship of Christian Athletes v. San Jose Unified School District (FCA)*, 82 F.4th 664 (9th Cir. 2023) (en banc). There, the court rejected the argument that “*Fulton* was only concerned with ‘unfettered’ discretion” as “overly

narrow.” *Id.* at 687–88. Properly read, *Fulton* teaches that “the mere existence of a discretionary mechanism to grant exemptions can be sufficient to render a policy not generally applicable, regardless of the actual exercise.” *Id.*

This Court applied the same rule in *Dahl v. Board of Trustees of Western Michigan University*, 15 F.4th 728, 730 (6th Cir. 2021) (per curiam). There, a public university required student-athletes to get vaccinated against COVID-19 but announced that “[m]edical or religious exemptions and accommodations will be considered on an individual basis.” *Id.* The Court held the policy was not generally applicable and triggered strict scrutiny. *Id.* at 733–34. The university considered exemptions “on an individual basis” and “retain[ed] discretion to extend exemptions in whole or in part.” *Id.* at 733. That “‘invite[d]’ the government to decide which reasons for not complying with the policy are worthy of solicitude.” *Id.* at 733–34 (quoting *Fulton*). The Court did not ask whether that discretion was unbridled. It did not ask whether the university had a form, a review process, or reasons for its decisions. It looked at “the terms of the policy itself” and found a mechanism for individualized exemptions. *Id.* at 733.

Same here. The Commission, too, reviews exemption requests one at a time and decides whether each applicant deserves an exception. And like the university, it “retains discretion” over the outcome—as the district court recognized. Op., R.116, PageID.2915. The law does not

define “sufficient showing.” Nor does it explain what makes a protected trait “reasonably necessary” to an employer’s “normal operation.” The Commission fills in those gaps “[o]n a case by case basis.” Londo Dep., R.88-1, PageID.2029. Its formal rules govern the *process*—who reviews a request, what records must be produced, and when an exemption can be revoked—not how the Commission must weigh a request. *Id.* at PageID.2027–29; Mich. Admin. Code R 37.25. And in deciding whether an employer has reasonable alternatives, commissioners “consult their own perspectives.” Londo Dep., R.88-1, PageID.2030.

Asking whether a trait is “reasonably necessary” to an employer’s “normal operation” is an inherently discretionary call—one that “invites the government to consider the particular reasons for a person’s conduct” and “decide which reasons for not complying with [the law] are worthy of solicitude.” *Fulton*, 593 U.S. at 533, 537 (citation modified); *see also Everson v. Mich. Dep’t of Corr.*, 391 F.3d 737, 760–61 (6th Cir. 2004) (recognizing “the case-by-case nature of the BFOQ analysis”). A 13-question form does not change that. It tells employers what to submit, not how the Commission must weigh the submission.

It also doesn’t matter whether Sacred Heart has applied for a BFOQ or how long it has been since Michigan granted one. A “formal mechanism for granting exceptions” renders a law “not generally applicable, regardless whether any exceptions have been given.” *Fulton*, 593 U.S. at 537; *accord Dahl*, 15 F.4th at 733–34.

The mechanism also offers feeble protection. Sacred Heart hires according to its faith for *all* positions; Michigan interprets the BFOQ provision to cover *only* ministerial employees. *See* Defs.’ Summ. J. Br., R.98, PageID.2726–27; Spring Arbor Univ. BFOQ Op., R.88-4, PageID.2608 (excluding “support staff, clerical or maintenance personnel”); BFOQ Rulings, R.88-4, PageID.2609 (Islamic school’s exemption would not reach its “janitorial staff” or “office personnel”).

The Commission can also revoke a BFOQ later. Londo Dep., R.88-1, PageID.2029. And a BFOQ expires after five years. Mich. Admin. Code R 37.25(4). So a BFOQ does not offer the lasting protection Sacred Heart needs and the First Amendment demands. And the process penalizes religious employers simply for hiring coreligionists. Sacred Heart would need to hire a lawyer to prepare legal briefs seeking BFOQ protection for every new and existing employee. Suppl. Floyd Decl., R.29-2, PageID.564–67. The BFOQ mechanism destroys general applicability.

2. Comparability. The BFOQ process also leads Michigan to treat “comparable secular” employers “more favorably” than Sacred Heart. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). Comparability looks at the harm to the government’s asserted interests. *Id.* A law that treats religious activities less favorably than “nonreligious conduct that endangers [the government’s] interests in a similar” way is not generally applicable. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993).

Michigan claims an interest generally in protecting against “unlawful discrimination based on protected bases,” Trevino Dep., R.88-1, PageID.1911–12; Londo Dep., R.88-1, PageID.2032–33, and specifically “in the elimination of workplace discrimination,” Suppl. Interrog. Resps., R.88-2, PageID.2375. Yet it justified a female-sex BFOQ over concerns of “privacy” and “experience in breast feeding,” BFOQ Rulings, R.88-4, PageID.2612–14, and a sex-based BFOQ “for privacy reasons,” *id.* at PageID.2614–16. By doing so, the Commission authorized “what otherwise would be illegal discrimination.” Regulatory Impact Statement, R.29-4, PageID.616; Londo Dep., R.88-1, PageID.2032–33. So the exemptions undermine Michigan’s interests.

By exempting these discriminatory activities—but not Sacred Heart’s non-ministerial coreligionist hiring, Stips., R.83, PageID.1453–54; Suppl. Interrog. Resps., R.88-2, PageID.2374—Michigan treats the school’s policies “less favorably” than “comparable secular” policies. *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep’t*, 984 F.3d 477, 480 (6th Cir. 2020) (citation modified). Michigan cannot prioritize secular interests over Sacred Heart’s religious reasons. That “selective enforcement favoring comparable secular activities” means the Employment Clause lacks general application. *FCA*, 82 F.4th at 689; *accord Does v. Catholic Relief Servs.*, __ F.4th __, 2026 WL 3091963, at *66 (4th Cir. Oct. 16, 2026) (Quattlebaum, J., dissenting) (BFOQs “favor secular interests over religious ones,” triggering strict scrutiny).

And it does not matter that Michigan sometimes exempts other religious organizations. That “is no answer” because a law triggers strict scrutiny “whenever” it treats “*any* comparable secular activity more favorably than religious exercise.” *Tandon*, 593 U.S. at 62.

3. Strict Scrutiny. That leaves Michigan to overcome strict scrutiny, which it cannot. The question “is not whether [it] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception” to Sacred Heart. *Fulton*, 593 U.S. at 541. Michigan has never tried to make that showing. Nor can it. Michigan’s “system of exceptions ... undermines [its] contention that its non-discrimination policies can brook no departures.” *Id.* at 542. Having built that system of exemptions, Michigan “must explain why it chose not to grant” one to a Catholic school that asks only to staff its ministry with Catholics. *Dahl*, 15 F.4th at 736.

The Employment Clause also is not narrowly tailored to furthering Michigan’s interest in preventing discrimination. Title VII pursues the same interest yet exempts religious employers “with respect to the employment of individuals of a particular religion.” 42 U.S.C. § 2000e-1(a). And most states do the same.¹ When so many other jurisdictions

¹ *E.g.*, Ariz. Rev. Stat. Ann. § 41-1462; Colo. Rev. Stat. § 24-34-402(6); 775 Ill. Comp. Stat. 5/2-101(B)(2); Ind. Code Ann. § 22-9-1-3(h)(1)–(2); Ky. Rev. Stat. Ann. § 344.090(2); Ohio Rev. Code Ann. § 4112.02(O); R.I. Gen. Laws § 28-5-6(9)(ii); S.C. Code Ann. § 1-13-80(I)(5); Tenn. Code Ann. § 4-21-405.

manage to “achieve [their] interests in a manner that does not burden religion,” *Fulton*, 593 U.S. at 541, Michigan “must, at a minimum, offer persuasive reasons why it believes that it must take a different course,” *Holt v. Hobbs*, 574 U.S. 352, 369 (2015). It has not and cannot.

C. The Free Speech Clause protects the right of employers with a distinctly expressive mission to hire employees who will further that message.

The Employment Clause also violates Sacred Heart’s First Amendment “right to associate with others in pursuit of...religious...ends.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). By prohibiting coreligionist hiring, Michigan strikes at the heart of the school’s mission and message. Courts apply a three-part test to decide whether the expressive-association right applies. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 653, 656 (2000). Sacred Heart passes each.

First, Sacred Heart “engage[s]” in “expression.” *Id.* at 648. Not every employer is an expressive association. But “[r]eligious groups are the archetype of associations formed for expressive purposes.” *Hosanna-Tabor*, 565 U.S. at 200–01 (Alito, J., concurring). Sacred Heart teaches students the Catholic faith through catechesis, the curriculum, prayer, Mass, and its employees’ examples. Stips., R.83, PageID.1442–43. Through its religious mission, Sacred Heart is a “religious association[]” that “express[es] and disseminat[es]” “religious doctrine.” *Hutchinson v. Thomas*, 789 F.2d 392, 394 (6th Cir. 1986) (citation omitted).

Second, forcing Sacred Heart to accept employees who reject its beliefs about marriage and sexuality would “significantly burden” its ability to express its religious message. *Dale*, 530 U.S. at 653. Those employees could not authentically communicate the school’s Catholic beliefs. And their “presence” would “force” Sacred Heart “to send a message, both to [its students] and the world, that [its religion] accepts homosexual conduct” and identifying as the opposite sex as morally permissible. *Id.* Indeed, “[n]o clearer example” of “intrusion” into a religious group’s associational rights exists than pressuring it to accept insiders who do not share its faith, because they “would cause the group as it currently identifies itself to cease to exist.” *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 861, 863 (7th Cir. 2006) (citation modified).

Third, forcing Sacred Heart to associate with those who reject its faith cannot survive strict scrutiny. *Dale*, 530 U.S. at 656–57; *see supra* p. 44–45. So Michigan cannot enforce the Employment Clause against Sacred Heart’s faith-based employment policies.

Michigan does not dispute that Sacred Heart “engage[s] in some form of expression.” *Dale*, 530 U.S. at 648. It argues instead that hiring “a non-Christian” would not burden the school’s expression because Sacred Heart could still “provide a Catholic education consistent with its religious mission.” Defs.’ Summ. J. Br., R.98, PageID.2739. That argument fails to “give deference to” the school’s “view of what would impair its expression.” *Dale*, 530 U.S. at 653. From the start, Sacred

Heart has made clear that its religious mission depends on employees who share its religious beliefs. Compl., R.1, PageID.13.

The district court recognized that much. It did not deny that forcing Sacred Heart to staff its ministry with people who neither believe nor follow Catholic teachings would impair its expression. Instead, it rejected the claim because Sacred Heart supposedly “ha[d] not supplied any authority applying the freedom to associate within the context of an employment relationship.” Op., R.116, PageID.2907. But Sacred Heart did supply that authority: its summary-judgment briefing cited several federal cases holding that expressive association protects employers with a distinctly expressive mission. *See* Pls.’ Combined Reply, R.105, PageID.2810–11 (citing cases). Indeed, repeating the district court’s error would create a split with the Second and Ninth Circuits. *See Slattery v. Hochul*, 61 F.4th 278, 288 (2d Cir. 2023) (“The right to expressive association allows Evergreen to determine that its message will be effectively conveyed only by employees who sincerely share its views.”); *Youth 71Five Ministries v. Williams*, 160 F.4th 964, 985 (9th Cir. 2025) (applying expressive-association right to a nondiscrimination rule that would force a religious ministry to hire “individuals who reject its Statement of Faith”).²

² Multiple district courts have also applied the right in the employment context. *E.g.*, *Darren Patterson Christian Acad. v. Roy*, 699 F. Supp. 3d 1163, 1184–85 (D. Colo. 2023) (forcing Christian school to “hire those

Nor does Sacred Heart’s claim stretch beyond what caselaw “currently permits.” Op., R.116, PageID.2908. The claim rests on—and passes—*Dale*’s three-part test. And the Supreme Court has explained that “the activities of” an expressive association’s “staff” are “modes of expression and association” that the First Amendment protects. *NAACP v. Button*, 371 U.S. 415, 428–29 (1963).

Hishon v. King & Spalding, 467 U.S. 69 (1984), does not hold otherwise. The Court there did not hold that employers have no such right. *Contra* Op., R.116, PageID.2907 (citing *Hishon*). It held only that a for-profit law firm had not shown that making a woman partner would “inhibit[]” expression of its “beliefs.” *Hishon*, 467 U.S. at 78. In other words, the Court applied the same test later outlined in *Dale*—and the law firm flunked it. The Court would not have applied that test if expressive association did not reach the employment context at all.

Sacred Heart is no for-profit law firm. It’s a Catholic school whose employees carry its faith to students every day. Forcing it to employ people who reject the faith would alter the message it exists to share. The First Amendment forbids Michigan from imposing that burden.

who disagree with its religious expression and evangelistic mission” violates expressive association); *Our Lady’s Inn v. City of St. Louis*, 349 F. Supp. 3d 805, 821–22 (E.D. Mo. 2018) (“[T]he forced inclusion of teachers or other staff who do not adhere to [the schools’ religious values] would significantly affect the [schools’] ability to advocate their viewpoints, through its teachers and staff, to their students.”).

D. Forcing Sacred Heart to hire non-Catholic employees violates parents' rights by denying them the religious education they chose for their children.

The Supreme Court has “long recognized the rights of parents to direct the religious upbringing of their children.” *Mahmoud*, 606 U.S. at 547 (citation modified). “The practice of educating one’s children in one’s religious beliefs, like all religious acts and practices, receives a generous measure of protection from our Constitution.” *Id.* at 547. “[T]hose rights are violated by government policies that ‘substantially interfer[e] with the religious development’ of children.” *Id.* at 546 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)). And *direct* interference is not required. In *Yoder*, the Supreme Court “held that the Free Exercise Clause protects against policies that impose *more subtle* forms of interference with the religious upbringing of children.” *Id.* at 548 (emphasis added).

In that case, there was no “suggestion that Amish children would be compelled to commit some specific practice forbidden by their religion.” *Id.* at 549. “Rather, the threat to religious exercise was premised on the fact that high school education would ‘expos[e] Amish children to worldly influences in terms of attitudes, goals, and values contrary to [their] beliefs’ and would ‘substantially interfer[e] with the religious development of the Amish child.’” *Id.* (quoting *Yoder*, 406 U.S. at 218). And that interference “violated the parents’ free exercise rights.” *Id.*

So too here. By forcing Sacred Heart to hire non-ministerial employees whose beliefs and conduct directly contradict Sacred Heart’s Catholic beliefs, Michigan eviscerates the very reason the Boutells and Ugolinis chose the school to help them direct the religious upbringing of their children: its authentic Catholic community and culture. Stips., R.83, PageID.1450. Both sets of parents believe their children learn the faith not only from catechesis but also “by the example of others authentically living the Catholic faith.” *Id.* at PageID.1451. Their children learn about marriage “through observing their teachers *and staff.*” *Id.* (emphasis added). Yet Michigan has stipulated that ELCRA bars Sacred Heart from hiring only those “who support, live, and model Church teaching” for any non-ministerial position—including coaches and custodians. *Id.* at PageID.1454–55.

That makes the constitutional harm here analogous to the harm in both *Yoder* and *Mahmoud*. In *Mahmoud*, the Supreme Court rejected the lower courts’ view that *Yoder* was “*sui generis*” and limited to its facts. *Mahmoud*, 606 U.S. at 557–58. There, the Court applied *Yoder* to hold that a public-school board’s “introduction of ... ‘LGBTQ+-inclusive’ storybooks, combined with its no-opt-out policy, burden[ed] the parents’ right to the free exercise of religion,” *id.* at 563, even absent any “compulsion or coercion to renounce or abandon one’s religion,” *id.* at 558.

Here, the harm is worse. Michigan forbids Sacred Heart from refusing to hire or from firing a coach who identifies as transgender or a custodian in a same-sex relationship. Stips., R.83, PageID.1453–55. So Sacred Heart would be forced to retain a custodian who arrives at a school event with his husband, or a male athletic coach who identifies as a woman and starts coming to games dressed as one. The Boutells and Ugolinis chose Sacred Heart so their children would “not be exposed to anything that contradicts or confuses Catholic teaching.” *Id.* at PageID.1452. Michigan would make that contradiction part of the school, posing “a very real threat of undermining” those beliefs. *Mahmoud*, 606 U.S. at 565 (quoting *Yoder*, 406 U.S. at 218).

What’s more, the “inevitable practical result” of Michigan’s plans to enforce ELCRA against Sacred Heart threatens the “destruction” of Sacred Heart’s school. *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925). Sacred Heart “will not operate in a manner inconsistent with Catholic teachings ... in employment.” Stips., R.83, PageID.1449. And it has sworn that if it “must choose between operating consistent with Catholic teaching and closing the school, Sacred Heart will close the school.” Compl., R.1, PageID.32; *accord id.* at PageID.16; Floyd Decl., R.5-1, PageID.299. That would eliminate the religious educational option these parents chose for their children: “the only classical Catholic school of its kind in the surrounding area.” Stips., R.83, PageID.1441.

That makes this case closer to *Pierce* and *Meyer*, cases where the Supreme Court found constitutional violations even *without* implicating the Free Exercise Clause. The Constitution “protects ... a parent’s decision to send his or her child to a private religious school instead of a public school.” *Mahmoud*, 606 U.S. at 547 (citing *Pierce*, 268 U.S. at 532–35). Michigan threatens to take that choice off the table.

Finally, even if Sacred Heart managed to stay open, Michigan’s insistence on forcing it to hire employees who don’t share its beliefs would destroy the authentically Catholic community and culture that led the Boutells and Ugolinis to send their children there. Stips., R.83, PageID.1450. That, too, violates “the power of parents to control the education of their own.” *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). The Boutells and Ugolinis deserve a permanent injunction to preserve their right “to direct the religious upbringing of their children.” *Mahmoud*, 606 U.S. at 543 (quoting *Yoder*, 406 U.S. at 218).

That right is unique to the Boutells and Ugolinis—it doesn’t rise or fall based on Sacred Heart’s claims. *Contra* Op., R.116, PageID.2924–25. Because ELCRA substantially interferes with the parents’ religious upbringing of their children, it must satisfy strict scrutiny “regardless of whether the law is neutral or generally applicable.” *Mahmoud*, 606 U.S. at 565. And Michigan has no legitimate—let alone compelling—interest in denying parents their right to send their children to an authentically Catholic school. This Court should reverse.

II. The Unwelcome Clause is unconstitutionally vague and overbroad.

The district court also erred in concluding that the Unwelcome Clause is sufficiently clear and “readily susceptible” to a “narrowing construction” to survive Sacred Heart’s void-for-vagueness and overbreadth facial challenges. Op., R.116, PageID.2927–28. Courts may not “rewrite” challenged statutory provisions “to cure their substantial infirmities.” *United Food & Com. Workers Union v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 362 (6th Cir. 1998). And that command is stronger here, given the “federalism concerns that arise whenever [a federal court] deals with state statutes.” *Eubanks v. Wilkinson*, 937 F.2d 1118, 1125 (6th Cir. 1991).

Moreover, as Michigan’s courts have explained, “courts *must* interpret statutes in a way that gives effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.” *Esurance Prop. & Cas. Ins. Co. v. Mich. Assigned Claims Plan*, 968 N.W.2d 482, 488 (Mich. 2021) (citation modified) (emphasis added).

The district court broke both cardinal commands here. It rewrote the second half of Section 302(b), which prohibits publishing anything indicating “that an individual’s patronage of or presence ... is objectionable, unwelcome, unacceptable, or undesirable because of ... sexual orientation, gender identity or expression,” among other traits,

MCL 37.2302(b), to mean that a public accommodation “may not publish statements indicating that patrons will be denied service or treated unequally because of a protected characteristic,” Op., R.116, PageID.2927.

But that’s exactly what the first part of the same provision, the Denial Clause, already prohibits. That provision, which is separated from the Unwelcome Clause by an “or,” prohibits publishing anything indicating that the “full and equal enjoyment” of goods or “services” will be “denied” based on a protected characteristic. MCL 37.2302(b). So the district court’s rewriting of the Unwelcome Clause wrote it right out of the statute to reject Sacred Heart’s vagueness challenge. Op., R.116, PageID.2927. And the court relied on the same rewriting a page later to reject Sacred Heart’s overbreadth challenge. *Id.* at PageID.2928 (referencing “the reasons previously stated” to uphold the provision based on that “narrowing construction”).

Without that rewriting, the Unwelcome Clause is unconstitutional on both grounds.

Its “near-synonyms,” Op., R.116, PageID.2927, are “not susceptible to objective definition,” as “illustrated” by the Commission’s witness being “unable to define” them, *United Food*, 163 F.3d at 360. *See* Londo Dep., R.88-1, PageID.2034 (conceding he did not think the Commission has any policy or rules defining the terms and he could not define them).

And the same list of terms—with its focus on the subjective reaction of the person made to feel objectionable, unwelcome, unacceptable, or undesirable—“unyieldingly sweeps in substantial swaths of protected conduct and speech.” *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1213–14 (10th Cir. 2021) (Tymkovich, J., dissenting) (explaining why the same “subjective” terms in Colorado’s anti-discrimination law make the provision “both overbroad and vague”). For example, the Commission’s designee testified that Sacred Heart’s mere promise to “accompany any student experiencing same sex attraction ... to find his or [her] true identity as a son or daughter of God” implies that same-sex attraction is “inherently wrong *or unwelcomed*” and “would be a violation of ELCRA.” Londo Dep., R.88-1, PageID.2057 (emphasis added). “It takes little imagination to multiply [this] example[] by dozens.” *303 Creative*, 6 F.4th at 1214 (Tymkovich, J., dissenting).

As a result, the district court erred by refusing to enter a permanent injunction against the Unwelcome Clause. And this Court should reverse.

III. Sacred Heart needs a permanent injunction to prevent enforcement based on its ministerial employment decisions and its pronoun and educational policies.

“Where a plaintiff establishes a constitutional violation ..., the plaintiff will be entitled to permanent injunctive relief upon a showing of: (1) a continuing irreparable injury if the court fails to issue the injunction, and (2) the lack of an adequate remedy at law.” *Warren v. City of Athens*, 411 F.3d 697, 711 (6th Cir. 2005). Here, the Commission, Department, Sacred Heart, and district court all seem to agree that the First Amendment protects Sacred Heart’s ministerial hiring decisions and some of its educational policies. Despite that, the district court still granted Michigan’s motion for summary judgment. That was error.

Since this litigation began four years ago, Michigan has been all over the map.

On pronouns, it swung from saying the First Amendment protects the policy “based on current authority,” to saying the policy “may” violate ELCRA, to claiming a “compelling interest” in overriding it. Suppl. Interrog. Resps., R.88-2, PageID.2373; Trevino Dep., R.88-1, PageID.1973, 1984.

On admissions, the Commission’s designee said turning away students who identify as transgender violates ELCRA, then disavowed enforcement. Londo Dep., R.88-1, PageID.2056, 2064. Weeks later, Michigan stipulated that refusing to admit a student in a homosexual relationship violates ELCRA. Stips., R.83, PageID.1456.

On ministerial hiring, Michigan said “it appears the art teacher qualifies,” but warned that concession “should not be read as a template for future disputes.” Suppl. Interrog. Resps., R.88-2, PageID.2374; Defs.’ Summ. J. Br., R.98, PageID.2732. The Commission’s designee said the sexton qualifies, then reversed. Londo Dep., R.88-1, PageID.2063, 2065–66. And the Attorney General has “concerns” about her co-defendants’ concessions. Defs.’ Summ. J. Br., R.98, PageID.2720.

Michigan finally conceded “ELCRA does not require Sacred Heart to change” its student policies. *Id.* at PageID.2712. Even then, it said only that the First Amendment would “likely” shield the pronoun policy. *Id.* at PageID.2752 n.7. And it admits its positions took shape “[a]s this litigation has developed.” Defs.’ Summ. J. Reply, R.106, PageID.2838.

“The sole function of an action for injunction is to forestall future violations.” *United States v. Or. State Med. Soc’y*, 343 U.S. 326, 333 (1952). “All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur.” *Id.* And it is the “duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.” *Id.*

Sacred Heart has made its necessary showing. Pls.’ Summ. J. Br., R.93, PageID.2660, 2666; Pls.’ Combined Reply, R.105, PageID.2794–802. And Michigan has answered with irreconcilable mid-litigation

protestations while conceding that none of its positions bind future commissions, much less private plaintiffs who sue in state court. Londo Second Dep., R.88-1, PageID.2092; Londo Dep., R.88-1, PageID.2020.

For its part, the district court relied on Michigan’s concessions about what the First Amendment requires for “specific positions and policies,” Op., R.116, PageID.2904 n.7—combined with section 403’s narrow religious exemption and the Accommodation Clause’s “permitted by law” exception—to conclude that “ELCRA, via § 403 and the First Amendment, adequately protects Sacred Heart,” so “the relief Plaintiffs seek is not warranted.” *Id.* at PageID.2920–23, 2928.

But that can’t be right. Otherwise, states could add a “permitted by law” exception to every law and buy a get-out-of-injunction-free card. The “anomalous result” that would follow would allow them to do as Michigan has done here: argue that ELCRA is “constitutional and enforceable and yet,” when someone challenges it on constitutional grounds, “again come into court saying” that it “does not apply to that proposed speech” or conduct. *ACLU v. Fla. Bar*, 999 F.2d 1486, 1495 (11th Cir. 1993). “This process itself ... is enough to chill speech” and religious exercise. *Id.*

Indeed, Michigan’s “interpretation would simply lead [courts] into an intellectual cul-de-sac.” *City & Cnty. of S.F. v. Trump*, 897 F.3d 1225, 1240 (9th Cir. 2018). If a permitted-by-law exception precludes injunctive relief, “judicial review is a meaningless exercise, precluding

resolution of the critical legal issues.” *Id.* Meanwhile, the ordinary plaintiff will be left without any options other than to chill his constitutionally protected speech or conduct. After all, “knowledge of what may be constitutionally protected is not readily available to the usual [plaintiff].” *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 470–71 (5th Cir. 1980). “In a real sense, ... silence is the only alternative.” *Id.*

The result might be different if the district court had correctly read a substantive provision to “not reach [Sacred Heart’s] conduct.” *Christian Healthcare*, 117 F.4th at 860 (Murphy, J., concurring). And the court tried that with section 403, holding Sacred Heart’s policies fall within it because they are “grounded in” religious doctrine. Op., R.116, PageID.2920. But that’s not the best reading of the statute’s text.

Section 403 exempts religious schools only from “[t]he provisions of section 402 related to religion.” MCL 37.2403. And section 402 bars discrimination “because of religion, race, color, national origin, sex, sexual orientation, or gender identity or expression.” MCL 37.2402(a). Each subsection lists those traits. MCL 37.2402(b)–(e). Religion is one trait of seven. So section 403 leaves the Education Clause’s bans on sex, sexual-orientation, and gender-identity discrimination in place.

When interpreting the words of a statute, Michigan courts give them “their common and ordinary meaning,” “understood in [their] grammatical context,” and giving effect “to every phrase, clause, and word.” *Simpson v. Alex Pickens, Jr., & Assocs., MD, PC*, 874 N.W.2d

359, 363 (Mich. App. 2015). This Court has already suggested that section 403 “would arguably not apply” to policies based on “other protected characteristics, such as gender identity.” *Christian Healthcare*, 117 F.4th at 845. And unless Michigan courts say otherwise (and they have not), that plain reading of the text controls. *Contra Op.*, R.116, PageID.2920.

In a “context as fraught with litigation as the First Amendment,” a “standard... akin to providing that it exempts all constitutionally protected activities” cannot be enough. *Hunt v. City of L.A.*, 601 F. Supp. 2d 1158, 1171 (C.D. Cal. 2009), *aff’d on that ground*, 638 F.3d 703 (9th Cir. 2011). Where crippling fines “are threatened and expression is involved, the Constitution demands more.” *Id.* at 1171–72.

CONCLUSION

This Court should reverse the decision below granting Michigan's motion for summary judgment and denying Sacred Heart's motion for summary judgment and remand for the court to issue Sacred Heart's requested relief.

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Respectfully submitted,

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FRAP 32(g)

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,997 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Word 365 using a proportionally spaced typeface, 14-point Century Schoolbook.

Dated: October 23, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2026, I electronically filed the foregoing opening brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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ADDENDUM**DESIGNATION OF RELEVANT
DISTRICT COURT DOCUMENTS**

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g), Plaintiffs-Appellants designate the following district court documents as relevant:

Record Entry	Description	Page ID # Range
1	Verified Complaint	1-74
1-4	Exhibit 3 to Complaint – Faculty Memo and Oath	113-118
1-10	Exhibit 9 to Complaint – Current Job Postings	143-149
5-1	Declaration of Rev. Ronnie P. Floyd, STL in Support of Plaintiffs’ Motion for Preliminary Injunction	290-300
5-3	Declaration of Plaintiff Renee Boutell in Support of Plaintiffs’ Motion for Preliminary Injunction	310-318
23	Brief in Support of Defendants’ Motion to Dismiss	364-414
26	Defendants’ Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction	427-478
29-2	Rev. Ronnie P. Floyd’s Supplemental Declaration	562-570

29-4	Appendix in Support of Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss and Plaintiffs' Reply Brief in Support of Plaintiffs' Preliminary Injunction Motion	574-749
32	Reply Brief in Support of Defendants' Motion to Dismiss	756-779
44	Opinion and Order	930-961
53	Defendants' Corrected Answer to Plaintiffs' Complaint and Affirmative Defenses	1081-1224
61	Stipulated Preliminary Injunction	1248-1251
83	Corrected Joint Stipulations	1439-1458
87	Joint Statement of Material Facts	1637-1643
88-1	Exhibit A to Plaintiffs' Consent Motion for Leave to Exceed Page Limits for Supporting Documents on Motion for Summary Judgment	1649-2336
88-2	Exhibit B to Plaintiffs' Consent Motion for Leave to Exceed Page Limits for Supporting Documents on Motion for Summary Judgment	2337-2456
88-4	Appendix Part 3 in Support of Plaintiff's Summary Judgment Motion	2528-2618
93	Memorandum in Support of Plaintiffs' Motion for Summary Judgment	2643-2688

98	Defendants' Brief in Support of Their Cross-Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment	2701-2757
105	Plaintiffs' Combined Reply in Support of Their Motion for Summary Judgment and Response to Defendants' Cross-Motion for Summary Judgment	2781-2824
105-1	Exhibit A to Plaintiffs' Combined Reply	2825-2833
106	Defendants' Reply Brief in Support of Their Cross-Motion for Summary Judgment	2834-2852
116	Opinion and Order	2884-2929
117	Judgment	2930
118	Notice of Appeal	2931-2933
120	Notice of Cross-Appeal	2937-2938