Nos. 26-1730 & 26-1801

In the United States Court of Appeals for the Sixth Circuit

CHRISTIAN HEALTHCARE CENTERS, INC.,

Plaintiff-Appellant Cross-Appellee (26-1730/1801),

v.

DANA NESSEL, et al,

Defendant-Appellant.

Appeal from the United States District Court

for the Western District of Michigan at Grand Rapids

Case No. 1:22-cv-00787

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

MICHAEL P. FARRIS
NATIONAL RELIGIOUS BROADCASTERS
800 Maryland Avenue NE
Washington D.C. 20002
(202) 341-4783
mfarris@nrb.org
Attorney for *Amicus Curiae*

Disclosure Statement

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

Consent to File This Brief

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

Statement of Authorship

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

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Interest of Amicus

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

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

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

Introduction

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

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

As detailed herein, LGBT advocacy organizations in Michigan and elsewhere include in their job postings a clear expectation that *every* employee demonstrate agreement with the organization's mission. This includes medical assistants and billing clerks at LGBT medical clinics.

The question before this Court is whether religious organizations in Michigan will be guaranteed the same freedom as LGBT organizations to define their own missions, expound their own beliefs, and to hire only those candidates

who share their own missions and beliefs. This brief deals exclusively with the issue of expressive association.

Argument

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

In the district court, the State argued that the freedom of expressive association applies only to membership; not to employment decisions. *Christian Healthcare Ctrs., Inc. v. Nessel*, No. 1:22-cv-787, 2026 U.S. Dist. LEXIS 196876 at *30 (W.D. Mich. Aug. 5, 2026). The district court agreed, rejecting CHC's expressive association claim out of hand on this basis. *Id.* at 30-34. Distinguishing *Boy Scouts America v. Dale*, 530 U.S. 640 (2000), the seminal authority holding that an organization may not be forced to include a member who does not align with its values, the court claimed that "CHC has not supplied any authority applying the freedom to associate within the context of an employment relationship." *Id.* at *33.

This is simply not true. CHC's reply brief clearly supplied several cases that applying expressive association protections in the employment context. See Christian Healthcare Centers Brief at 28, *Christian Healthcare Ctrs., Inc. v. Nessel*, No. 1:22-cv-787, (W.D. Mich. Aug. 5, 2026), ECF No. 171, PageID 3525.

The district court recognized that the Supreme Court has extended freedom of association protections beyond membership decisions. The court cited cases applying this freedom in the context of compelled disclosure of membership lists,

solicitation of clients for group advocacy, denial of benefits based on a group's message, and punishment for political affiliation. *Christian Healthcare Ctrs.*, 2026 U.S. Dist. LEXIS 196876 at 32

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

The lower court's sole claim of authority comes not from any court, but rather from a statement by The Boy Scouts in *Dale*. In the context of litigation, The Boy Scouts stated that they believed they would have to comply with employment law. *Id.* at 33 (citing *Dale*, 530 U.S. at 672 (Stevens, J., dissenting)). The views of the Boy Scouts or their lawyer binds no one—not even The Boy Scouts, who are free to get a better lawyer.

The district court also cited one Supreme Court case dealing with expressive association in a private employment context. *Id.* (*citing Hishon v. King & Spalding*, 467 U.S. 69 (1984)). In that case, a law firm sought to demonstrate that it was the

kind of group that could claim the right of expressive association because "lawyers may make a distinctive contribution to the ideas and beliefs of our society." But the Court speedily rejected this claim by pointing out that the firm failed to show "how its ability to fulfill such a function would be inhibited by a requirement that it consider petitioner for partnership." *Hishon*, 467 U.S. at 78 (cleaned up). The firm effectively claimed the right for a commercial enterprise's leadership to hang out with the people they liked. The law firm did not make, and almost certainly could not make, any showing that it sought to advance particular views that would be undermined if the petitioner became a partner in the firm.

While the Court in *Hishon* did also state, in dicta, that "invidious private discrimination" has not been afforded affirmative protections, that fact is irrelevant here, where CHC is not engaged in "invidious discrimination," but merely seeks to employ those whose beliefs align with its core mission. *Id.*

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

It is significant, for purposes of this litigation, to emphasize that *Hishon* did *not* deny the right of employers to make expressive association claims vis-à-vis their employees. In fact, the Court's treatment of the substantive issue implies the exact opposite conclusion. The Court considered the claim and rejected it, not because the firm was an employer, but because it failed to demonstrate that making the petitioner a partner in the firm would interfere with any message that it wished to convey.

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

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

appropriate to ground the ministerial exception in the firmer ground of the Religion Clauses.

> According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association—a right "implicit" in the First Amendment. . . The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under [this] view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.
>
> *Hosanna-Tabor*, 565 U.S. at 189 (citations omitted). .

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

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

employees' freedom of expressive association claims are analyzed under the same standard as state employees' freedom of speech claims." *Id.* at 1036.[1]

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

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

Moreover, the Second Circuit has upheld a claim remarkably similar to the one in this case, in *Slattery v. Hochul*, 61 F.4th 278, 289–90 (2d Cir. 2023). There the Second Circuit held that the lower court erred in dismissing a pro-life

[1] The plaintiff in that case did not prevail but on a ground unique to the role of a public employee. This Court held that the association in question involved speech that was not a matter of public concern. *Id.* at 1038.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. CHC Unquestionably engages in Expressive Association.

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

The district court below recognized the communicative nature of CHC's practice. The court properly cited the organization's stated purpose to be a "Christian medical-service ministry that serves the community by providing direct medical services to its patients consistent with the tenets of its faith and to *communicate those beliefs to its patients and the public*." *Christian Healthcare Ctrs*, 2026 U.S. Dist. LEXIS 196876 at *6.

B. CHC's Ability to Transmit Its Message Would be Burdened by the Forced Inclusion of Employees (Regardless of Function) Who Do Not Share its Religious Beliefs.

The second phase of analysis requires a court to determine "whether the forced inclusion of" nonbelievers "would significantly affect" CHC's "ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 650. *See also Knox*, 567

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

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

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

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

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

The district court concluded that CHC had no legal basis for its claim of the right to integrated mission staffing (hiring only employees who share its beliefs) with respect to non-ministerial positions like medical assistants and receptionists. *Christian Healthcare Ctrs*, 2026 U.S. Dist. LEXIS 196876 at *29. LGBT groups clearly believe otherwise for similar positions in their organizations.

For instance, the Whitman-Walker Clinic in Washington, D.C. seeks a "Lead Medical Office Assistant." The expectations for this position include: "Performs and behaves in accordance with Whitman-Walker's mission, cultural norms and core values of dignity, respect, affirmation, and humility."[15] All Whitman-Walker applicants are informed:

> We are so glad that you stopped by because we know success in our mission starts with an amazing team. Whitman-Walker employees demonstrate our

[14] *Event Coordinator*, Affirmations, https://goaffirmations.org/news/jobs-internships/events-coordinator/ (last visited Oct. 27, 2026).
[15] *Lead Medical Office Assistant*, ADP Workforce Now, https://workforcenow.adp.com/mascsr/default/mdf/recruitment/recruitment.html?cid=6c21e150-66fc-4492-a689-beacefbdce66&ccId=19000101_000001&lang=en_US&selectedMenuKey=CareerCenter&jobId=519725 (last visited Oct. 27, 2026).

values every day, through hundreds of interactions with our communities.[16]

The Los Angeles LGBT Center operates a medical clinic which seeks a "Patient Account Biller"—a position with less public interaction than a receptionist. Nonetheless, the LGBT Center expects applicants for this position to possess the following "Job Qualifications and Experience" (among others):

- Knowledge of or experience working with the LGBTQ community and familiarity with issues of particular relevance to LGBTQ people.

- A passion for the Center's work and its mission to make the world a better place for LGBTQ people.[17]

Clearly, LGBT advocacy groups operating medical clinics take the exact same position as CHC—all of their employees, including medical assistants and those in clerical or administrative positions, must align with their mission. It defies common sense to think that any organization would approach the matter differently.

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[16] Careers at Whitman-Walker, Whitman-Walker, https://www.whitman-walker.org/about/careers/ (last visited Oct. 27, 2026).
[17] *Patient Account Biller*, Jobright, https://jobright.ai/jobs/info/6ab71e50d7fde2c08ec8ad93?visit=patient-accounts-clerk-jobs-in-united-states (last visited Oct. 27, 2026).

Yet, rather than following the Supreme Court's admonition in *Hosanna-Tabor* that religious organizations are entitled to even higher levels of associational freedom than secular ones, 565 U.S. at 189, the district court wrongly concluded that CHC had no basis for its claim that the First Amendment right to expressive association protected it in making the very type of hiring decisions that these secular organizations regularly make.

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

Non-ministerial employees can have enormous impact on an organization's ability to transmit its message with integrity. This certainly includes receptionists and medical assistants, who typically have numerous substantive interactions with patients in any healthcare facility. And as noted in the district court's opinion, CHC

staff regularly pray together and engage in corporate worship and Bible study together. *Christian Healthcare Ctrs*, 2026 U.S. Dist. LEXIS 196876 at *6. There can be no doubt that CHC's ability to transmit its Christian values among the staff and to the patients they serve would be burdened by the forced inclusion of employees who do not share these values. CHC wants every employee to reinforce the agreed message rather than undermine the Parish's values by either word or deed.

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

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

The message that is compromised does not have to be the central mission of the organization. It is enough that the disputed area comprises a component of the desire message. In *Dale,* the New Jersey court had rejected The Boy Scouts' claim because the organization did not associate for the "purpose of disseminating the belief that homosexuality is immoral." 630 U.S. at 644. The Supreme Court found that fact insignificant, saying: "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at 655. It defies common sense to suggest that the outcome of *Dale* would have changed if the Assistant Scoutmaster had been paid rather than a volunteer position. The presence of a paycheck does not remove the protection of the First Amendment.

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

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

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

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

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

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

> discouraging a disfavored one, however enlightened either purpose may strike the government. (Internal citations omitted).

Similarly, in *Dale*, the Court looked upon the forced inclusion of the gay scout leader as an interference with the message of The Boy Scouts. The Court did not reach the compelling interest question, but simply concluded that the law "may not interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may seem." *Dale*, 530 U.S. at 642.

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

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

Moreover, even if this Court were to consider the compelling interest analysis, Michigan would be hard-pressed to satisfy it in light of the fact that the federal government and every other State with a sexual orientation or gender

identity provision in its employment non-discrimination law exempts religious employers from its operation to some degree.

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

Conclusion

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

Respectfully submitted,

MICHAEL P. FARRIS
NATIONAL RELIGIOUS BROADCASTERS
800 Maryland Avenue NE
Washington D.C. 20002
(202) 341-4783
mfarris@nrb.org
Attorney for *Amicus Curiae*

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