

ORIGINAL

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IN THE
SUPREME COURT OF NORTH DAKOTA

Supreme Court No. 990212
Cass County Civil No. 96-88

FILED
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CLERK OF SUPREME COURT

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State of North Dakota ex rel.
Heidi Heitkamp, Attorney General,

STATE OF NORTH DAKOTA

Plaintiff-Appellee,

-vs-

Family Life Services, Inc., d/b/a
Family Life Credit Services, et al.

Defendants-Appellants.

ON APPEAL FROM THE JUDGMENT
OF THE CASS COUNTY DISTRICT COURT,
THE HONORABLE DONOVAN FOUGHTY, PRESIDING

REPLY BRIEF OF APPELLANT GARY CHAFFIN

& Addendum

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The State in its brief argues as follows: FLS is “almost exclusively secular . . . [with] certain limited religious aspects.” St.Brief at 18. FLS is “fundamentally secular,” *id.* at 19, “secular purposes predominate,” *id.* at 28, the “principal function of FLS is not to indoctrinate any specific religious belief,” *id.* at 34, and “FLS is largely an ordinary business operation [which] engages in primarily secular business activity”). *Id.* at 37. Because of this unexpected attack by the State upon the religious character of FLS, appellant Gary L. Chaffin is constrained to set the record straight. In his opening brief Mr. Chaffin defended the importance of the religious defense presented by his counsel and argued that the trial court erred in finding it irrelevant and as a consequence prematurely terminating the presentation of a case by both FLS and himself. Opening Brief of Gary Chaffin Brief at 3-23. The State’s claim that FLS is not a religious organization for First Amendment purposes — a startling attempt to undercut the religious defense by mischaracterizing the record — requires a forthright answer.

I. Standard of review: de novo examination of “constitutional facts”

In a First Amendment case, a reviewing court is not constrained by the “clearly erroneous” standard of review, but must make “an independent examination of the whole record” to ensure that “the judgment does not constitute a forbidden intrusion on the field of free expression.” *State v. Springer-Ertl*, 2000 SD 56, ¶ 25, ___ N.W.2d ___,

quoting *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 499 (1984). This scrutiny also applies to facts relevant to the First Amendment's religion clauses. *New Life Baptist Church Academy v. Town of East Longmeadow*, 885 F.2d 940, 942-943 (1st Cir. 1989) (constitutional fact doctrine applies to case involving alleged violations of the religion clauses of the First Amendment); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1231 n.7 (10th Cir. 1998) (en banc) (establishment clause).

The requirement of independent appellate review . . . generally requires us to review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. Even where a speech case has originally been tried in a federal court, subject to the provision of Federal Rule of Civil Procedure 52(a) that "findings of fact . . . shall not be set aside unless clearly erroneous," we are obliged to make a fresh examination of crucial facts.

Hurley v. Irish-American Group of Boston, 515 U.S. 557, 567 (1995). In *Hurley*, the state court's conclusion that petitioner's conduct was "non-expressive" was subject to de novo examination "to assure ourselves that this judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 567-568.

Since the State argues in its brief that FLS is a "fundamentally secular" organization with only incidental religious activity which does not implicate the First Amendment, this Court has a similar obligation to

examine the entire record independently of the trial court to assure that the judgment does not constitute “a forbidden intrusion” into state establishment or suppression of religion.

II. FLS is a religious organization whose major purpose is to minister the gospel of Jesus Christ.

A. State’s Concessions

The State concedes that the FLS articles of incorporation provide for services to be administered “from a Biblical perspective,” admits the practice of a weekly Bible Study and daily devotions, and, most significantly, that the purpose of the credit counseling service is “to earn the right to share the gospel and good news of Jesus Christ” with clients. The Statement of Faith, quoted in full by the trial court, is unabashedly Christian. St.Brief at 37-38. These admissions alone are sufficient to characterize FLS as a Christian ministry, which, like a church shelter, reaches the lost through meeting their temporal needs. *Jesus Center v. Farmington Hills Zoning*, 544 N.W.2d 698 (Mich.App. 1996).

B. Court’s further findings

The State omits the following Findings of Fact from its brief:

The evidence suggests that FLS and HCM are organizations where Christians from all churches can come together to assist in meeting their fellow man’s temporal and spiritual needs.

...

The evidence is clear that the Boards of HCM and FLS and the branch office managers are prolife Christians.

FF, ¶ 184-185, I J.A. 498. The court subsequently reiterated this finding:

HCM and FLS are non-profit nondenominational Christian organizations.

...

HCM and FLS outline in their corporate documents a statement of faith and belief. This statement of faith is consistent with several if not all Christian churches.

...

The history or genesis of FLS and HCM does not come from a common church, but from a common belief that abortion is a sin.

...

The evidence suggests that Darold Larson and others were involved with HCM and FLS because of their Christian beliefs.

Memorandum and Order of October 25, 1999 at 2-5. DN 1889. The court's choice of the Evangelical Ministerial Association to select three board members underscores the Christian pro-life character of FLS. "Based on the record the Court was able to identify nondenominational pro-life Christian groups. The Court through its equity powers requested that these groups select the FLS board of directors." *Id.* at 5.

C. Deeper into the record

Undertaking an independent *Bose* examination of the record, there is abundant evidence to confirm the court's findings.¹

1. 1996 Amendments to FLS bylaws

Because of the Attorney General's attack on FLS' Christian and pro-life character throughout this case, the FLS board of directors early in the litigation considered it prudent to articulate unmistakably in the by-

¹ Documents cited in this reply brief which are not in the Joint Appendix are included in the addendum to this brief.

laws its Christian pro-life mission. The amended bylaws dated July 17, 1996, expand the statement of purpose to include the following additional language: "including to minister to individuals and family human needs, whether spiritual, mental, or physical; to provide pro-life resources to women in an untimely or unplanned pregnancy who choose to carry their babies to term." Article I, Section 2. Immediately after this statement is printed in boldface the following quotation from the Gospel of Matthew:

FOR I WAS HUNGRY, AND YOU FED ME; I WAS THIRSTY,
AND YOU GAVE ME WATER; I WAS A STRANGER, AND YOU
INVITED ME INTO YOUR HOMES; NAKED AND YOU
CLOTHED ME; I WAS SICK AND IN PRISON AND YOU
VISITED ME.

MATTHEW 25:35,36

Further on is a statement of requirements for FLS board members, which includes "a loyal pro-life perspective on the sanctity of life," agreement with the Statement of Faith, and a commitment "to providing pro-life resources to women in an untimely or unplanned pregnancy who chose to carry their babies to term." Article III, section 2. I J.A. 384, 386. Similarly, the August 23, 1998 FLS minutes record the following Resolution: "Be it resolved that the board of Family Life Services, Inc. reiterates its historic mission to support, without exception, the sanctity of human life." I J.A. 450.

2. Branch office training manual

The FLS branch office training manual demonstrates the pervasively religious character of the agency. The Certificate of Completion provided

to new branch managers certifies a pledge "to adhere to our Statement of Faith". Addendum ("A") at 2. The welcoming letter sent to new branch managers states: "As an associate of Family Life Credit Services, you are part of a growing family of individuals committed to ministering to people's financial needs in the name of Jesus Christ." A:3. The "General Statement of Purpose" in the manual states:

During all phases of counsel, our ongoing objectives are to provide practical solutions to money management problems and Biblical principles of stewardship.

A second major objective is to earn the right to share the gospel of Jesus Christ with them. We believe that He is the answer to a person's inner turmoil, which may be reflected in the way they handle their money.

A:5. The "General Policies" section states: "Family Life Credit Services is a non-denominational Christian organization. All persons involved . . . are expected to conduct themselves in a traditional Judeo-Christian manner. This includes . . . maintaining a personal walk with Jesus Christ." A:6.

One branch manager included the following statement in his literature: "This is a totally Christian national non-profit organization, whose purpose is to reach out to individuals and families that are in serious financial difficulty, to free them from that bondage and to minister to them in the power of the Holy Spirit." A:11. Recommended publications for FLS clients include *What the Bible says about Money*, *God's Principles for Operating a Business*, and the *Biblical Economics Library*. A:9, 12.

3. Employment Advertisements

Even the receiver, *viz.* the court, has proclaimed the Christian character of FLS. His want ads are emblazoned with the boldface heading: **Christian Credit Counseling Agency**. “If you enjoy working with the public and desire working in a Christian organization . . .” A:13.

4. State’s witnesses

The State’s own witnesses testified clearly to the religious character of FLS. Sue Pinkney left her job at a bank to join FLS because it allowed her to share her faith as part of her employment duties. A:16-18. “Yes, if given the opportunity we would be able to directly, for example, pray with the clients” A:19.

Q. But you yourself were ministering the gospel [at FLS] and also doing the works of charity.

A. Yes.

A:22. Gloria Patocka, another witness for the State, described FLS as a “nonprofit Christian credit counseling organization.” A:23. Darold Larson, Jolene Eslinger, and Mrs. Patocka comprised a three-person committee that reviewed branch office applications. “Basically they had to be a Christian person.” A:24. The application asked for information about church membership and probed the quality of the applicant’s religious commitment.

What does it mean to be a Christian. When did you receive Jesus as your Lord and Savior. And there was also some questions about what do you think the Bible teaches on abortion and homosexuality.

A:25. The committee at times disagreed on “the standard for the Christianity of the applicants.” *Id.* “I really questioned their Christianity. and a real concern of mine definitely, number one, it was the Christianity.” A:26. Mrs. Patocka conducted the training sessions for new branches. “Throughout the whole course of the training, there was talk of spiritual matters . . . basically that we were a Christian organization and that we applied Biblical principles to the financial doings of our clients” A:27. The branches were given a tithing brochure for the clients containing scripture verses on tithing. A:28. “[T]ithing was even on the budget form that we went over with the client.” *Id.*

[T]hat was a perfect opportunity. . . . you could say, do you remember when we talked about tithing. You know, well, this is what God has to say about it. So it was a real door opener . . .

A:29. The training included an overview of Help and Caring Ministries and a tour of its related pro-life agencies. A:29-30.

5. Christian credit counselors association

The branches collectively belonged to an evangelical arm of FLS, the National Association of Christian Credit Counselors (“NACCC”). Founded also by Mr. Larson, the purpose of NACCC was to develop credit counseling “from a Christian perspective” and to “enhance the fulfillment of the great commission of sharing the Gospel of Jesus Christ and fostering Christian goals in the lives of fellow coworkers and members of the NACCC.” A:31. Regional branch office conventions partook of the character of a revival meeting, replete with testimonies, prayer, gospel

singing, and Bible preaching. DN 317; A:32.

6. Ministry Purpose

Mr. Larson clearly conveyed the religious vision of the ministry: “[O]ur objective . . . was to provide a service whereby we would have access to talk to the individual client about their . . . eternal life and about their relationship with the Lord[.]” A:14-15.

We’re not . . . just doing the business aspect of turning accounts into dollars, but we’re also ministering to people. That’s our objective.

And you don’t minister every time the phone rings. . . . our objective was . . . to earn the right to be able to share with them what we think is the most -- the most valuable, the most entrusted possession, and that is eternal life with them.

A:33. *See similarly* Opening Brief of Help and Caring Ministries at 6-7 (“Ministry of Family Life Services”).

The State’s brief describes FLS as a “fundamentally . . . secular credit counseling business.” St.Brief at 19. “[T]here is no evidence in the record to suggest that . . . the manner in which FLS conducted its credit counseling business [was] substantially different from . . . its purely secular counterparts.” *Id.* These statements are manifestly unfaithful to the record as is the assertion that there is “no identifiable, unique, or particular FLS religious doctrine or dogma.” *Id.*

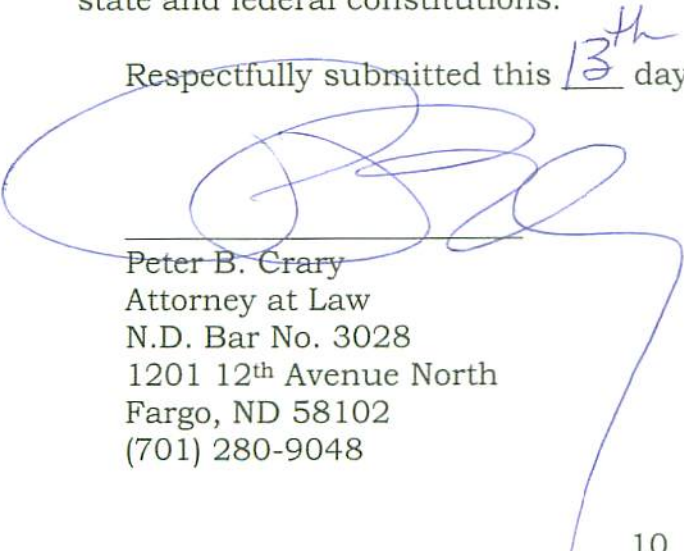
But we have a distinct religious view that’s apart from many other religions. First of all, we’re Christian. We believe that Jesus died for our sins, rose again, and that someday, that if we have put our faith and trust in him and received him as lord and savior, that we’re going to have -- spend eternal life with him, as well. Not every religion believes that.

A:33. The statement that “the staff never understood support for pro-life organizations to be part of the FLS mission,” St.Brief at 19, is flatly contradicted by the testimony of Sue Pinkney and Gloria Patocka set out in the opening brief of HCM at 7-10 (“FLS as Banker for Mercy Ministries”). Indeed, in its closing argument, the State said that “the Attorney General has no objection . . . to use whatever surplus may be generated by FLS’ operations in *other religiously motivated* social service agencies.” A:34 (emphasis added).

III. Conclusion

“An independent examination of the whole record,” *Bose* at 499, makes it abundantly clear that the State’s characterization of FLS as a secular organization in its brief is a gross misstatement of the record. This “constitutional fact” is of great significance. If FLS is in truth a Christian ministry, and not simply a secular business as the State so desperately seeks to portray it, then State removal and reappointment of its board of directors deeply implicates the religion clauses of both the state and federal constitutions.

Respectfully submitted this 13th day of May, 2000.



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