ORIGINAL

IN THE
SUPREME COURT OF NORTH DAKOTA

Supreme Court No. 990228
Cass County Civil No. 96-88

990228

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

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 APPELLANTS HELP AND CARING MINISTRIES, INC., BENJAMIN LARSON, JOSEPH LARSON, AND DIAMOND CARD INTERNATIONAL, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other

Help and Caring Ministries ("HCM"), the parent ministry under which Family Life services ("FLS") developed, answers the State's religious arguments as follows:

I. Establishment Clause

The State's Establishment Clause argument, St.Brief at 25-36, assumes that a civil court legitimately has power to make decisions on a religious basis as long as its orders are denominationally neutral. This theme is stated repeatedly.

> The Judgment does not seek to prefer any religious denomination over another.
> . . .
> [T]hose associated with FLS . . . come from a wide variety of denominations. FLS . . . has only a generalized written expression of beliefs.
>
> By accommodating this generalized expression of Christian belief when it requested assistance in selecting new board members, the trial court did not coerce anyone to support or participate in any particular denomination, and does not establish, or tend to establish, a state religion.
> . .
> . . . the trial court sought . . . assistance of a broadly-based, non-denominational organization of evangelical Christian ministers . . . .
> . . .
> First, the F-M Evangelical Ministerium, branch managers, and employees, selected by the trial court to help appoint a new FLS board, do not embody any specific religion, faith, or congregation. They are collections of a broad range of faiths and congregations.
> . . .
> . . . no congregation, faith or religion exists which might be favored.
> . . .
> . . . a broad-based non-denominational organization . . . .

Id. at 29-30, 34-36.

Contrary to the State's position, the Constitution does not countenance non-denominational establishments of religion. It bans them all. Government may not "aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education*, 330 U.S. 1, 15 (1947). "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." *Id.* at 16. "Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them equally." *Abington v. Schempp*, 374 U.S. 203, 219 (1963). Government may favor "neither one religion over others nor religious adherents collectively over non-adherents." *Board. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 696 (1994) (internal citations omitted). "The Establishment Clause was intended to erect a wall of separation between church and State." *State v. Burckhard*, 1998 ND 21, ¶ 10, 579 N.W.2d 194. The wall of separation does not contain a "non-denominational" door by which all religions may pass through collectively, but not any one individually.

Additionally, the assertion that the Fargo-Moorhead Evangelical Ministerium ("Ministerium") is "non-denominational" stretches credulity. An association of evangelical churches would most likely not encompass Lutherans, Catholics, or Jews, and certainly not non-Christian faiths.[1]

[1] Because the trial court conducted its board creation process in secret, DN 1861, there is no evidence in the record as to the membership of the Ministerium.

The court's decision to seat Ministerium designees on the FLS board, but not those of any other churches, is thus a forbidden denominational preference. "The strictest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

II. Free Exercise Clause

The State seeks to distinguish the *Kedroff/Serbian* line of cases which forbid state intrusion into the internal administration of religious organizations. St.Brief at 42-44. None of the cases cited in the State's brief, however, involve state reorganization of the governing structure of a religious ministry. Justice Rehnquist's in-chamber remarks, *id.* at 43, refer merely to an attempt by a private party to sue a religious organization. The California state courts, subsequent to Justice Rehnquist lifting the stay, made it vividly clear that the capacity to sue a religious organization on a tort or contract theory was light years away from any assumed authority to reorganize the governing structure of such a body.

> To hold UMC suable is not equivalent to a review of its polity thus interfering with its internal affairs in violation of the free exercise clause of the First Amendment. There is no evidence to show that rendering UMC amenable to suit would affect the distribution of power or property within the denomination, would modify or interfere with the modes of worship affected by Methodists or would have any effect other than to oblige UMC to defend itself when sued upon civil obligations it is alleged to have incurred.

Barr v. United Methodist Church, 153 Cal. Rptr. 322, 332 (Cal.App.Dist.4

1979). In *Queen of Angels Hospital v. Younger*, 136 Cal.Rptr 36 (Cal.App.Dist.2 1977), the court expressly eschewed authority to control "the internal operations of a religious group[.]" *Id.* at 42. The issue in *Ambassador College v. Geotzke*, 675 F.2d 662 (5th Cir. 1982) was merely whether a private party suing a seminary was entitled to discovery. Such a controversy did not raise a church autonomy question.

> In all cases heretofore discussed, the government has been a party. This is not the case in the present action. We are faced with a scenario of a church and an individual contesting the validity of a gift by deed. There is no danger of government seeking to monitor or regulate a religious group.

Id. at 664. In denying First Amendment relief, the court reiterated that there was "no attempt to regulate or in any way become involved in the religious activities or control the financial matters of the church." *Id.* at 665.

The State's distinction between regulating commercial activities of a religious organization and regulating ecclesiastical functions, St.Brief at 31-34, is quite besides the point, when the State does not seek merely to regulate FLS, *e.g.*, by applying NDCC ch. 13-07, but to replace the ministry's board of directors and thus determine its religious character. In *Jimmy Swaggart Ministries v. Bd. of Equal.*, 493 U.S. 378, 392 (1990), the court noted that state action which "effectively choke[s] off an adherent's religious practices" would violate the Establishment Clause. Likewise, in *Tony & Susan Alamo Foundation v. Sec'y of Labor*, 471 US 290 (1985), the court upheld labor regulations because they would have

"no impact on petitioner's own evangelical activities[.]" *Id.* at 305-306. HCM has no objection to "commercial" regulation of FLS. The State's actions in this case, however, travel far beyond that sphere.

Related non-profit entities of a religious organization are, in fact, entitled to First Amendment protection, even if their activities are not purely ecclesiastical in nature. The Court respected the Mormon Church's representation that its gymnasium as well as its food-canning plant were "expressive of the Church's religious values." *Corporation of Presiding Bishop v. Amos,* 483 US 327, 330 n.14 (1987). A religiously-affiliated nonprofit corporation is entitled to a presumption that it "is not operated simply in order to generate revenue for the church, but that the activities themselves are infused with a religious purpose." *Id.* at 344 (Brennan, J., concurring). Thus, FLS as an integral part of HCM, and partaking of its evangelical character, is fully entitled on its own to free exercise protection, even though its activities are also engaged in by purely secular entities. "It is not the position of the courts to second guess what activities are sufficiently religious to qualify for free exercise protection." *Jesus Center v. Farmington Hills Zoning,* 544 NW2d 698, 703 (Mich.App. 1996).

The State also attempts to apply *Employment Division v. Smith,* 494 U.S. 872 (1990) to this case, arguing that incidental effects upon religious organizations arising from neutral laws of general applicability do not implicate the First Amendment. The issue in this case, however, is

not whether a neutral state law clashes with a religious practice of FLS or HCM, but whether the State incidental to its enforcement of secular law may appoint the leadership of a Christian ministry and reorganize its governing structure.

The autonomy of a religious ministry in the selection of personnel that set policy and doctrine has been strongly asserted by federal circuit courts in applying the lessons of *Kedroff* and *Serbian*.

> The right to choose ministers without government restriction underlies the well-being of religious community, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.
>
> Any attempt by government to restrict a church's free choice of its leaders thus constitutes a burden on the church's free exercise rights.

Rayburn v. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1167-68 (4th Cir. 1985). The State simply cannot tell religious organizations how to organize themselves or who shall minister the faith for them. Yet this is exactly what the court's judgment does in minute detail, not only removing the board of directors in its entirety but establishing a scheme for selecting board members and removing FLS from any connection with the larger ministry of which it was a part and from which it developed. If the State is allowed to control such decisions, as has occurred in this case, "the danger is that choices of clergy which conform to the preferences of public agencies may be favored over those which are neutral or opposed." *Rayburn* at 1170. Where the goals of the State and a

religious organization differ, as on the abortion question, "the temptation for state intrusion becomes apparent." When such values clash, the ministry "is entitled to pursue its own path without concession[.]" *Id.* at 1171. *Accord E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 462 (D.C.Cir. 1996).

Smith prevents an individual from becoming a law unto himself based on his religious beliefs. It does not give the State a license to reorder religious institutions.

> The ministerial exception is not invoked to protect the freedom of an individual to observe a particular command or practice of his church. Rather it is designed to protect the freedom of the church to select those who will carry out its religious mission. Moreover, the ministerial exception does not present the dangers warned of in *Smith*. Protecting the authority of a church to select its own members free of government interference does not empower a member of that church, by virtue of his beliefs, to become a law unto himself.
>
> ---
>
> [W]e cannot believe that the Supreme Court in *Smith* intended to qualify this century-old affirmation of a church's sovereignty over its own affairs.

Catholic University at 462-63 (internal quotation marks and citations omitted). The Fifth Circuit has recently "agree[d] with the reasoning and conclusion of the D.C. Circuit" in distinguishing between the two strands of free exercise precedent.

> We concur wholeheartedly with the D.C. Circuit's conclusion that *Smith*, which concerned individual free exercise, did not purport to overturn a century of precedent protecting the church against governmental interference in selecting its ministers.
>
> ---

> The fundamental right of churches to be free from government interference in their internal management and administration has not been affected by the Supreme Court's decision in *Smith* and the demise of *Sherbert*.

Combs v. Central Texas Conf. United Methodist Church, 173 F.3d 343, 349-50 (5th Cir. 1999). *Accord Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000).

Although the State is incorrect that *Smith* is the governing precedent for the free exercise issue in this case, it is correct that this case differs from *Kedroff* and *Serbian* — but only in the sense that the State's activity in this case is far more egregious. In *Kedroff* and *Serbian*, private parties resorted to the courts to settle a dispute over church governance. In this case, the civil magistrate *on its own initiative* is removing and appointing the governing authorities of a Christian ministry, and thus presuming to "seat[] a board loyal to its . . . religious purpose." St.Brief at 27. No civil court can undertake this function. "Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution." *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (Blackmun, J., concurring).

> [T]hat the Civil Magistrate is a competent Judge of Religious Truth . . . is an arrogant pretension.
> . . .
> [T]hat he may employ religion as an engine of civil policy . . . [is] an unhallowed perversion of the means of salvation.

James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 5 (1785).

The State concludes with the following most astonishing statement.

> To the extent FLS wishes to practice its religion, it remains as free to do so under its new directors as it did under the former ones. *Nothing has changed other than the identity of the directors.*

St.Brief at 37 (emphasis added). If the Free Exercise Clause means anything, it is that religious organizations are free to choose those that minister the faith for them free of government interference. And if the Establishment Clause means anything, it is that government may not appoint the leadership of religious organizations. For the State to say that "nothing has changed" when both these principles are simultaneously breached, is to engage in Orwellian reasoning of a high order. If the State can legitimately act to maintain the religious doctrine of an organization, it can also act to change it. Where religious doctrine or polity are implicated, the State can play no role at all, positive or negative. The State can be neither be friend nor a foe to religion. The entire subject matter of doctrinal correctness or incorrectness is beyond civil purview. It is of no import whether the court has dealt correctly or incorrectly with this issue, because it has no subject matter jurisdiction to address it at all.

> Some religious interests under the Free Exercise Clause are so strong that no compelling state interest justifies government intrusion into the ecclesiastical sphere. A secular court may not, for example, adjudicate matters that necessarily require it to decide among competing interpretations of church doctrine, or other matters of an essentially ecclesiastical nature, even if they also touch upon secular rights.

Bollard v. California Province of the Society of Jesus, 196 F.3d 940, 946 (9th Cir. 1999).

The State's "maintain the doctrine" theory is indistinguishable from the forbidden "departure from doctrine" theory it cites. St.Brief at 42. Both methodologies require a civil court to decide "by legal fiat" matters of religious doctrine. "Should the state assert power to change the statute requiring conformity to ancient faith and doctrine to one establishing a different doctrine, the invalidity would be unmistakable." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 108 (1952).

III. Conclusion

Help and Caring Ministries requests that the judgment be reversed as a forbidden establishment of religion and a violation of the free exercise autonomy rights of itself and its related agency, Family Life Services.

Respectfully submitted this 15th day of May, 2000.

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