COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

SUPERIOR COURT
C.A. NO. 14-751

MATTHEW BARRETT,	)
Plaintiff	)
	)
v.	)
	)
FONTBONNE ACADEMY,	)
Defendant	)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO FONTBONNE ACADEMY'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Fontbonne Academy's motion for summary judgment is notable at the outset for what it chooses *not* to argue in support of its claim for an exemption from state employment discrimination law based on its religious character. Although Fontbonne asserted as an affirmative defense and articulated in discovery that Matt Barrett's employment would substantially burden its exercise of religion,[1] it disavows that doctrine on summary judgment, perhaps cognizant that: (1) the Supreme Court has reaffirmed the state's compelling interest in eradicating employment discrimination over any asserted burdens on religious exercise, *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (discussed in Plt's Summary Judgment Memo at 23); and (2) its invocation of free exercise would require that it distinguish itself from cases that highlight our nation's disturbing history of religiously-based exclusions. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (state's compelling interest in eradicating race discrimination outweighs free exercise defense of ban on interracial dating and marriage); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n. 5 (1968)

[1] *See* Answer dated June 23, 2014, Fourth Affirmative Defense, and Deposition of Mary Ellen Barnes., Ex. 2 to Joint Appendix, pp. 137-138.

(characterizing as "patently frivolous" free exercise defense to justify racial discrimination in access to public accommodations). Nor does Fontbonne attempt to shoe-horn Matt Barrett's job preparing meals in the cafeteria into the "ministerial exception," a judicial doctrine that bars employment discrimination claims against religious entities by those whose job duties implicate constitutional concerns. *See* Plt's Summary Judgment Memo at 48-49. Fontbonne understands perfectly well, as its Head of School testified, that Matt Barrett is not an employee who is "formally presenting the gospel values or the … teachings of the Catholic Church." Plt's Facts at ¶¶ 12-13.

Fontbonne's claim of an infringement of its right to expressive association avails it nothing more. It relies chiefly on two cases, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), which, in fact, demonstrate that this case does not rise to the level of the exceptional facts required for an exemption from state law. The contexts of those cases, which involve a gay rights organization marching in a parade, and a Boy Scout leader who was a high profile gay rights activist and was responsible for instilling the organization's values in its members, are far afield from the facts here. There is no basis in the doctrine of expressive association to grant Fontbonne the right to exclude an employee who is not in a leadership position, does not "present[] the gospel values or the teachings of the Catholic Church," has done nothing political, never volunteered information about his marriage, and simply filled out a form at the school's request to ensure notification of his loved one in the event of a medical emergency on the job. Moreover, as with the legal framework of free exercise, any burden on Fontbonne's ability to communicate its religious beliefs is slight and is outweighed by the powerful state interests at stake here. This Court should deny Fontbonne's motion for summary judgment and enter judgment for Matt

Barrett.[2]

ARGUMENT

I. THE TERMS OF THE RELIGIOUS EXEMPTION FOR EMPLOYERS IS SET FORTH IN G.L. C. 151B, § 1(5).

Fontbonne tries mightily to downplay the clear and unambiguous language in G.L. c. 151B, § 1(5) which squarely delineates the religion exemption available vis a vis employment discrimination claims under the statute. The language of § 1(5) is plain and unambiguous. G.L. c. 151B's nondiscrimination provisions do not bar certain religiously-affiliated employers which "limit[] membership, enrollment, admission, or participation to members of that religion, from giving preference in hiring or employment to members of the same religion or from taking any action . . . calculated by such organization to promote the religious principles for which it is established or maintained." G.L. c. 151B, § 1(5). In the face of this clear language, and the legislature's historical separate treatment of religious employers, this Court should not rule that the "taking any action" provision applies to *any* religious employer, untethered from the qualifying criteria in § 1(5), without a more clear and specific indication in the statutory language.

Fontbonne's argument renders the entirety of § 1(5) superfluous and should be rejected for the following reasons. First, Fontbonne's entire argument that §§ 1(5) and 4(18) are coterminous rests on the incorrect assumption that the elimination of the employer/non-employer distinction is the only way to give effect to the legislature's intent to expand the religious exemptions in 1989 in the wake of the gay rights law. *See* Deft's Summary Judgment Memo at

---

[2] Plaintiff set forth in his opening brief his argument that Fontbonne cannot meet the requirements of the statutory exemption for certain religiously-affiliated employers in G.L. c. 151B, § 1(5). Section I of the Argument here briefly replies to Deft's Summary Judgment Memo on that issue. Section II responds to the expressive association issue.

9-10. That is plainly wrong as the 1989 amendments did, in fact, significantly expand the exemption available to religious employers in § 1(5), while clearly maintaining § 1(5)'s language requiring exclusivity by a qualifying religious employer. *See* Plt's Summary Judgment Memo at 21-22. If, as Fontbonne claims, the "taking any action" provision in § 4(18) applies to all religiously-affiliated employers, then the legislature's addition of that language to § 1(5) in 1989 would have been superfluous. Beyond that, if § 4(18) applies to all religious employers, there would be no need for § 1(5) at all because § 4(18) also permits entities to "giv[e] preference to persons of the same religion or denomination." G.L. c. 151B, § 4(18).

Second, giving effect to the language of § 1(5) does not render § 4(18) "meaningless" (Deft's Summary Judgment Memo at 8) as that section obviously applies to all of G.L. c. 151B's non-employment provisions. Third, Fontbonne asks this Court to ignore a Supreme Judicial Court decision, that extensively analyzed both religious exemptions in G.L. c. 151B, in favor of the decision of an MCAD hearing officer in *Larsen v. Sacred Hearts Parish School*, 2000 WL 33665362 (MCAD 2000) that offers no insight because it did not discuss § 1(5) at all, thus failing to recognize that there were *two* relevant statutory provisions. *Larsen* was not a decision of the Full Commission and thus should be accorded no deference (*see Johansson v. Mass. Comm'n Against Discrimination*, No. 05–P–1367, 2007 WL 2142069, at *3 (July 26, 2007)); in any event, it is simply wrong because it is contrary to the statutory language. Fourth, defendant's policy argument (Deft's Summary Judgment Memo at 13-14) is irrelevant. The statutory language of § 1(5) is clear and unambiguous; any change is for the legislature, not this Court. Regardless, contrary to Fontbonne's speculation, it is more probable that the narrower employment exemption reflects the unique harm that flows from employment discrimination. *See* Plt's Summary Judgment Memo at 42-43.

II. THE PRESENCE OF MATT BARRETT AS FOOD SERVICES DIRECTOR AT FONTNONNE DOES NOT VIOLATE ANY RIGHT OF EXPRESSIVE ASSOCIATION.

Dale remains the only expressive association case at any level setting aside a nondiscrimination law. Similarly, in the context of a religious employer there is no reported case in which an exemption from a nondiscrimination law has been granted under free exercise principles when the employee's job duties have nothing to do with religion. This paucity of case law over time is for good reason. An exemption from a state mandate to ensure equal opportunity for groups subject to historic and systemic discrimination is an extraordinary step and requires exceptional facts.

Fontbonne's argument is that it can discriminate against any employee with a same-sex spouse, regardless of the individual's rank in the organization or any other factors, because that employee does not model Catholic teaching in some respect.[3] It is true that Matt Barrett does not model Catholic teaching on marriage. But that fact is not, and cannot be, enough to warrant an exemption from state law under expressive association doctrine. Expressive association doctrine does not permit Fontbonne to bar any employee in its midst whom it claims embodies a message contrary to its beliefs.

Assuming for the sake of argument that expressive association doctrine should even be applied in the employment discrimination context, the Supreme Court has set out a three-part analysis for claims of expressive association. First, the Court must determine "whether the group engages in 'expressive association.'" *See Dale*, 530 U.S. at 648. This is not a high bar as

---

[3] Fontbonne asserts that it: (1) "carries out its business within the framework of the Roman Catholic faith, and seeks to instill those teachings in the students charged to its care;" and (2) "In a school where all faculty and staff, regardless of job title, are regarded as teachers and ministers, the forced inclusion of an employee whose avowed beliefs run counter to those espoused by the school would amount to nothing less than what concerned the *Hurley* Court – a court-ordered revision of the school's expressive message." Deft's Summary Judgment Memo at 16, 17-18.

hundreds of nonprofit organizations in Massachusetts satisfy this threshold step because they "engage in some form of expression, whether it be public or private." *Id.* Fontbonne meets this criterion.

Second, the Supreme Court has required that the existence of any asserted contrary message have not just *an* impact on a group's ability to convey its values, but rather that it significantly and seriously burden that pursuit. *See Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984) (assessing whether there are "serious burdens" on freedom of expressive association); *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988); *Dale*, 530 U.S. at 648 ("[t]he 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") (emphasis supplied); *id.* at 653 (standard is whether Dale's presence would "significantly burden" the Scouts' expression). Put another way, "[t]hat is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Dale*, 530 U.S. at 653.

Third, even if the inclusion of an unwanted member rises to the high level of a serious burden, "the freedom of expressive association, like many freedoms, is not absolute. [The Supreme Court has] held that the freedom could be overridden '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.'" *Dale*, 530 U.S. at 648, quoting *Roberts*, 468 U.S. at 623. As the analysis in *Dale* makes clear, whether the facts of a case rise to the level of significantly affecting associational rights, and whether any burden is outweighed by compelling state interests, are questions of law for the Court. *See Dale,* 530 U.S. at 648-649

(applying factual findings to the elements of expressive association).

A. The Presence of a Food Services Employee Who is Not in a Leadership Role, is Not One of the Employees Presenting The Gospel Values or Church Teachings, And Has Done Nothing Political, Does Not Significantly Burden Fontbonne's Ability to "Advocate" Its Viewpoints.

1. Matt Barrett is Not in a Leadership Position Nor Does He Teach Religious Principles.

Under the analysis in *Dale*, Fontbonne has produced no evidence that Matt Barrett's presence substantially burdens its ability to "provide an education to young women rooted in gospel values and the teachings of the Catholic Church." Deft's Facts at ¶ 3. And indeed it could not because Matt is "not formally presenting the gospel values or the … teachings of the Catholic Church." Plt's Facts at ¶ 13. No religious training is required for Matt's job and it is undisputed that he does not undertake any religious duties or teaching. This distinction is essential to differentiating the "mere acceptance of a member from a particular group" from the "severe intrusion" necessary to override the state's interest in nondiscrimination. *Dale*, 530 U.S. at 653, 659.

The Court in *Dale* could have simply said, as Fontbonne does here, that the presence of a gay person in the Scouts undermines the Boy Scouts' ability to advance its antigay message. The Court did not do that. Rather, the Court first considered the mission of the Boy Scouts, which is to "'instill values in young people.'" *Id.* at 649 (citing Boy Scouts mission statement). Next, the Court identified who in the organization performs the duties and tasks of conveying its message. The Court pointed out that "[t]he Boy Scouts seeks to instill these values by having its *adult leaders* spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values – both expressly and by

example." *Dale*, 530 U.S. at 649-650 (emphasis supplied). The pivotal criterion of a leadership role is clear throughout the Court's opinion. *See Dale*, 530 U.S. at 655 (discussing whether the "Boy Scouts discourages Scout leaders from disseminating views on sexual issues"); *id.* at 652 ("the official position of the Boy Scouts was that avowed homosexuals were not to be Scout leaders"); *id.* at 653 ("whether Dale's presence as an assistant scoutmaster would significantly burden" the Boy Scouts); *id.* at 650 ("whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints").

It is, of course, common sense that those whose job it is to convey the teachings of an association are the personnel with the potential to have a significant impact on the organization's message, and that conversely, those without such responsibility have little or no such impact. That principle from *Dale* has been followed in its implementation in subsequent litigation involving Boy Scout chapters. *See, e.g., Chicago Area Council of BSA v. City of Chicago Comm'n on Human Rels.*, 322 Ill. App. 3d 17, 28 (2001) (quoting *Dale*'s caution that associations cannot "erect a shield against nondiscrimination laws by asserting that mere acceptance of a member from a particular group would impair its message," and stating that "nonexpressive positions [] do not abridge *Dale*"). *See also Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 857-858 (2d Cir. 1996) (Christian student organization could not reject non-Christians from *all* officer positions).

The lack of any leadership role or responsibility for presenting the gospel values and teachings of the Catholic Church at Fontbonne ends any claim that Matt Barrett's presence would "significantly affect" Fontbonne's ability to advocate its own "viewpoints" on Catholic teaching. This conclusion is reinforced by the scope of the ministerial exception doctrine which

helps elucidate the parameters of expressive association in the religious institution context.

The ministerial exception flows from the Religious Clauses of the Constitution and was developed to address exactly the type of issue presented by this case: a claim by a religiously-affiliated employer of an unconstitutional infringement on its autonomy to teach the tenets of the faith. *See* Plt's Summary Judgment Memo at 48-49. As the Supreme Court has explained, expressive association and the ministerial exception should be viewed as in alignment in order to avoid differing results under related theories. *See Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez*, 561 U.S. 661, 680-681 (2010) ("It therefore makes little sense to treat CLS's speech and association claims as discrete. . . . When these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association.").

Both expressive association and the ministerial exception address the same principles. Just as expressive association analyzes the impact on a group by the forced inclusion of those who convey its message, the ministerial exception avoids free exercise infringements against religious employers by "focus[ing] on the function performed by persons who work for religious bodies" and precluding discrimination suits by "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694, 711-712 (Alito, J., concurring).[4]

---

[4] The Court's discussion of expressive association in *Hosanna-Tabor* indicates that it did not view it as broader or more protective of religious employers than the ministerial exception. The Court rejected the position of the Equal Employment Opportunity Commission and the plaintiff that the Court need not find a ministerial exception flowing from the Religion Clauses because religious organizations could invoke a constitutional right to freedom of association. *See*

It is, of course, beyond question here that Matt Barrett's job duties do not come within the ministerial exception and that Fontbonne is not entitled to an exemption from the antidiscrimination law on that basis. At Fontbonne, the undisputed facts show that, at most, the exception extends to the Administration and theology faculty. *See* Plt's Facts at ¶¶ 12-13 (noting that only Administration and theology faculty are required to be Catholic; no other position need be filled by a member of the Catholic religion because they are not staff who are "formally presenting the gospel values or the … teachings of the Catholic Church.").

2. *Dale* Reached its Result Because of James Dale's High Profile Gay Activism, a Critical Fact Which Fontbonne Acknowledges is Totally Absent Here.

In addition to focusing on the nature of James Dale's responsibilities, the *Dale* Court emphasized his highly visible role as a gay activist speaking publicly in favor of principles that were (arguably) inimical to the Boy Scouts' message. *Dale*, 530 U.S. at 644-645, 653. As the Court explained:

> [In college Dale] quickly became involved with, and eventually became the copresident of, the Rutgers University Lesbian/Gay Alliance. In 1990, Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers. A newspaper covering the event interviewed Dale about his advocacy of homosexual teenagers' need for gay role models. In early July 1990, the newspaper published the interview and Dale's photograph over a caption identifying him as the copresident of the Lesbian/Gay Alliance.

Id. at 645. The Court concluded that on those particular facts, Dale's presence as a leader who had been a public activist and had been outspoken about the legitimate needs of gay teens, would constitute a "severe intrusion" on the Boy Scouts' right to convey that homosexuality is immoral. *See Dale*, 530 U.S. at 659; *id.*at 653 ("Dale was the copresident of a gay and lesbian organization

---

Hosanna-Tabor, 132 S.Ct. at 706. The Court found that view "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Id.* It is hard to imagine the Court would have taken that position if it viewed expressive association as conferring broader rights than the ministerial exception doctrine it recognized.

at college and remains a gay rights activist. Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.").

The *Dale* Court's citation of "*Hurley* [as] illustrative on this point," *Dale*, 530 U.S. at 653, only serves to underscore the inapplicability of *Dale* here. *Dale* equated the presence of a high profile gay rights activist as a leader inculcating values to carrying a banner affirming gay identity in a parade.[5] *See Dale*, 530 U.S. at 654. Neither of those circumstances is remotely comparable to Fontbonne's employment of Matt Barrett. Matt is not one of the Fontbonne employees who teaches the tenets of Catholicism, and he has done nothing political or public.

There is, of course, no evidence in this case that Matt Barrett has engaged in any type of activism, let alone the highly visible media activism undertaken by James Dale. If, as Fontbonne baldly asserts, "Mr. Barrett has expressed positions and a world view at odds with Fontbonne's Catholic teaching regarding marriage," Deft's Summary Judgment Memo at 20, it points to absolutely no record evidence of the sort examined by the Court in *Dale*.

Facing this obvious deficiency, Fontbonne mischaracterizes the undisputed facts and strains to have this Court perceive Matt as some kind of intentional hostile invader. *See* Deft's Summary Judgment Memo at 20 ("Mr. Barrett, after all, *confronted* Fontbonne with the fact of his marriage, knowing that Fontbonne is a Catholic school, and knowing that, because it is affiliated with the Catholic Church, Fontbonne may well have a problem with his marital status.") (emphasis supplied). To the contrary, the undisputed facts demonstrate that before applying for the job Matt inquired of a nun affiliated with the Sisters of Saint Joseph whether his

---

[5] Counsel for the Boy Scouts pressed that analogy at oral argument and the Court surely agreed. *See Dale*, 530 U.S. at 696 (Stevens, J., dissenting) (quoting from oral argument transcript) (counsel for Boy Scouts argued that "Dale 'put a banner around his neck when he … got himself into the newspaper…. He created a reputation …. He can't take that banner off.'").

marriage would be a problem for his employment. She told Matt that "in this day and age," his marriage to Mr. Suplee would not be an issue for his employment at Fontbonne. *See* Plt's Facts at ¶¶ 38-39. He was told: "They will love you." *Id.* Thus, Matt's subjective understanding, to the extent it is even relevant, was that his marriage would not present a conflict.[6] Moreover, Fontbonne's suggestion that Matt must have known that he presented a "problem" is even more disingenuous because Fontbonne's Head of School admitted that she herself was unsure whether it was permissible for Fontbonne to hire a person with a spouse of the same sex, including because the law had changed in Massachusetts. *See* Plt's Facts at ¶¶ 54-56 and deposition of Mary Ellen Barnes, Ex. 2 to Joint Appendix, pp. 90-92. In fact, Matt Barrett had made no attempt to publicize his marriage, or even mention his marriage in three interviews. Nor was he asked about nor did he ever express a view on the religious significance of his marriage. Fontbonne, in essence, elicited the basic fact of Matt's same-sex spouse when he was requested to fill out a form that presumably would sit in a file. In short, because the undisputed facts show that Matt Barrett has not engaged in any activism of the sort that clearly animated the Court's decision in *Dale*, Fontbonne cannot meet the "significant burden" element of the expressive association test.

What is left is just Fontbonne's claim that it is entitled to the Court's deference in its assessment that Matt's presence would hamper its ability to express its views. Fontbonne's school policy that characterizes every staff member as a "minister" and "teacher," regardless of their job duties, cannot be sufficient to justify an exemption from state law. Fontbonne cannot by fiat transform Matt Barrett's job into something that it is not and thereby literally grant itself an

---

[6] *See also* Plt's Facts at ¶ 47 ("Based on his prior discussion with Sister Short and his understanding that marriage was legal for same-sex couples in Massachusetts, it did not occur to Matt that the example of abortion advocacy might also include his lawful marriage to Ed.").

exemption. In order to determine whether the mere presence of an employee substantially burdens an association's ability to convey its viewpoints, *Dale* directs this Court to examine on a case-by-case basis the employee's role and responsibilities. An employer cannot simply deem its employees to be within the scope of a legal exemption.

In its expressive association cases, the Supreme Court has not, in fact, deferred to a group's assertion about the impact of inclusion on its core message. *See Christian Legal Soc'y*, 561 U.S. at 668 (upholding law school's requirement that student groups have open membership policy and rejecting assertion of Christian group that its associational rights would be impaired by the forced inclusion of "members who do not share the organization's core beliefs about religion and sexual orientation"); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60, 69 (2006) (declining to defer to law schools' view of how their speech would be affected by allowing on campus military recruiters who denied employment to lesbian and gay students, and citing *Dale*'s caution that a speaker cannot assert that the mere presence of unwanted individuals is sufficient).

Fontbonne's reliance on *Dale* for its claim of deference cannot hold up. *See* Deft's Summary Judgment Memo at 21, citing *Dale*, 530 U.S. at 653. Read in context of the surrounding sentences, *Dale* makes clear that it reached its assessment of the significance of the burden by applying the facts it found to the elements of expressive association:

> We must then determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.' 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. *That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have 'become leaders in their community and are open and honest about their sexual orientation.'*

> *Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist.*

Dale, 530 U.S. at 653 (emphasis supplied, internal citations omitted). *See also Bd. of Appeals v. Hous. Appeals Comm.*, 451 Mass. 581, 590 (2008) ("deference [is] not abdication").

3. *Hurley* is Inapposite Because It is Premised on the Unique Attributes of a Parade.

Hurley, discussed at pages 16-18 of Deft's Summary Judgment Memo, is inapposite because it was applying free speech principles to the special context of a parade. It was not applying the elements of expressive association. *Hurley* involved the claim of a gay organization to march in the St. Patrick's Day Parade in South Boston "in order to celebrate its members' identit[ies]." *Hurley*, 515 U.S. at 570 (noting also that the "organization distributed a fact sheet describing the members' intentions"). The Court's ruling excluding the gay organization hinged on the unique attributes of a public parade which the Court explained is "a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches." *Hurley*, 515 U.S. at 568; *id.* at 569 (noting again "[t]he protected expression that inheres in a parade"); *Rumsfeld*, 547 U.S. at 63 ("[t]he expressive nature of a parade was central to our holding in *Hurley*.").

Fontbonne's citation of *Hurley* for the broad proposition that it can exclude any message it wants ignores the specific application of *Hurley* to a parade.[7] Fontbonne correctly states that in *Hurley* the "dispute was over the message, rather than the characteristics of the messenger." Deft's Summary Judgment Memo at 17. In that context, a parade by definition *is* the message. It therefore follows that the inclusion of *any* unwanted message necessarily alters the organizer's message. In *Hurley*, the Court ruled that inclusion of an unwanted group per se changed the

[7] *See, e.g.,* Deft's Summary Judgment Memo at 16 ("The Supreme Court has upheld the right of expressive groups to exclude those espousing a contrary message." (citing *Hurley*)).

parade's message because of the unique attributes of a parade. The Court concluded that because "every participating unit affects the message conveyed by the [parade's] private organizers," the application of state law dictating that a particular group be included "alter[s] the expressive content of th[e] parade." *Hurley*, 515 U.S. at 572-573. But the same is not true for an expressive association claim which focuses on whether the "forced inclusion of an *unwanted person* in a group infringes the group's freedom of expressive association." *See Dale*, 530 U.S. at 648 (emphasis supplied). Under expressive association doctrine, there are standards to determine whether the inclusion of the "unwanted person" rises to the level of substantially burdening the association's ability to convey its message. If simple presence could trump an antidiscrimination statute under expressive association, there would have been no need for *Dale* to undertake its assessment of James Dale's position and attributes, nor for the Court in *Roberts* and related cases to assess the effects of admitting women to all-male clubs. For these reasons *Hurley* is not translatable to the associational context and there is no basis in the associational context for Fontbonne's conclusion that "[n]o less than the organizers of the South Boston parade, Fontbonne is entitled to determine for itself the message it wishes to convey…." Deft's Summary Judgment Memo at 17.

4. There is No Basis to Conclude That Students Will Perceive the Hiring of an Employee as Approval of Marriage for Same-Sex Couples by the Catholic Church, Rather Than Required Compliance With Massachusetts Law.

The rationale and result of *Dale* do not support Fontbonne's assertion that "[j]ust as the inclusion of Mr. Dale would have required the BSA to adopt a position it opposed with respect to its views regarding homosexuality; the inclusion of Mr. Barrett would necessarily suggest, to Fontbonne's students and the outside world, that Fontbonne approves or condones same-sex marriage." Deft's Summary Judgment Memo at 20. Aside from the obvious, controlling

distinction that James Dale was a high profile activist in a leadership position, three additional factors distinguish *Dale* on this point and lead to the conclusion that the likelihood of such confusion is unfounded and speculative at best.

First, unlike the Boy Scouts, Fontbonne is an academic institution. It is a college preparatory school that encourages critical thinking as a core value and prepares students for life in a secular society.[8] In furtherance of that educational mission, Fontbonne admits that critical thinking by students about Catholic doctrine—including marriage—would not threaten its mission. Plt's Facts at ¶ 24-25. Fontbonne prides itself on an "academically rigorous" curriculum that "provides students with information and with the … thinking skills … to leave Fontbonne and be successful matriculating [in] college and also outside of [the] college." Plt's Facts at ¶ 19. It "fosters intellectual openness," which its Head of School described as "healthy" and a "value for any worthwhile educational institution." Plt's Facts at ¶¶ 21, 23. Therefore, in furtherance of that mission, Fontbonne does not avoid controversial topics. It teaches about marriage equality in the classroom, Plt's Facts at ¶¶ 27-28, and would permit a student to write a paper supporting marriage equality. Plt's Facts at ¶ 29. In fact, Fontbonne acknowledges that with respect to "homosexuality, sexual orientation, marriage for same-sex couples, or 'gay rights' … [n]o particular questions or issues are deemed categorically impermissible" for exploration. Plt's Facts at ¶ 26. A student who disagreed with Catholic teaching about marriage for same-sex couples in a paper or classroom discussion would be "applauded for thinking critically." Plt's Facts at ¶¶ 25, 29.

---

[8] Both *Dale* and *Roberts* emphasize the need to identify the organization's mission and purpose in order to assess the extent of the impact of the unwanted member's presence on the institution. *See Dale*, 530 U.S. at 649 (The "general mission of the Boy Scouts is clear: 'To instill values in young people.'"); *Roberts*, 468 U.S. at 612 (identifying "[t]he objective of the Jaycees" from its bylaws).

Fontbonne's mission to provide a secular education in which students think openly, explore freely, and disagree with doctrine without school-imposed constraints, vitiates any claim that students cannot understand the difference between Church teaching and the application of the secular law. In this environment in which there are openly lesbian students and subjects of sexual orientation and marriage for same-sex couples are explored in classes, Fontbonne has not presented any reason why its students would not understand the difference between the school's adherence to Church teaching and the application of the civil law in a state in which marriage equality has been the law for almost 12 years. In fact, Fontbonne's hybrid mission as both a Catholic school and a college preparatory school virtually ensures that its students have developed the ability to distinguish the civil and religious worlds. In this environment of intellectual openness and diversity of ideas, the requirement to include an employee in a nonleadership position as a requirement of the civil law cannot come close to being a "severe intrusion" on Fontbonne's associational rights.

Second, the Catholic Church's position on marriage is clear. *See* Deft's Facts at ¶ 8; Exhibit E to O'Connor Aff. ("*Marriage: Love and Life in the Divine Plan, A Pastoral Letter of the United States Conference of Catholic Bishops*"). The clarity of the Catholic view of marriage undercuts further any notion that the hiring of a nonministerial employee would be understood as anything other than compelled compliance with the civil law. For example, in *Catholic Charities of Diocese of Albany v. Serio*, 28 A.D. 3d 115, 128 (N.Y. App. Div. 3d Dep't 2006), the Court rejected the defense of expressive association and required Catholic Charities to comply with the contraceptive coverage mandate in state health insurance law. The Court reasoned that it did "not agree with plaintiffs' assertion that they will be perceived as endorsing contraceptives, especially in light of the context in which plaintiffs are obligated to provide contraceptive coverage." *Id.* at

129. The Court concluded that "[g]iven plaintiffs' well-known religious beliefs regarding contraception, we cannot conclude that there is a 'great likelihood' that plaintiffs' provision of contraceptive coverage to its employees would be perceived as anything more than compliance under protest with a statutory mandate." *Id.* at 130.

Third, the reasoning of *Catholic Charities* has even more force in the context of this case in light of the significant changes in the cultural and legal landscape in Massachusetts with respect to the equality of gay and lesbian people and the existence of marriage for same-sex couples. At the time that *Dale* was decided in 2000, gay and lesbian people could not marry in any state and it was permissible under the federal constitution to criminalize same-sex intimacy. Today in Massachusetts it is well known that employers are forbidden from discriminating on the basis of sexual orientation. Marriage equality for same-sex couples has been the law of this state for almost 12 years. It is likely that the vast majority of Fontbonne students know gay and lesbian married couples. In today's world it is simply improbable that anybody would understand that hiring a gay person who happens to be married would suggest anything about an employer's position other than that employers must follow the law and not discriminate.

B. The Multiple State Interests at Stake Here, Which Include Discrimination in Employment Rather Than Public Accommodations, Are of a Substantially Higher Order Than Those Assessed by the Court in *Dale* And Outweigh Any Infringement on Fontbonne's Right of Expressive Association.

Any slight infringement of Fontbonne's right of expressive association on the facts of this case is clearly "overridden" by the multiple and compelling state interests in enforcing the sexual orientation and sex nondiscrimination laws here. *Dale*, 530 U.S. at 648.[9] In his opening brief, plaintiff presented in detail the grounds for the state's compelling interests in: 1) eradicating

[9] The Massachusetts antidiscrimination statute, G.L. c. 151B, § 4, is plainly "unrelated to the suppression of ideas." *Dale*, 530 U.S. at 648.

employment discrimination on the basis of sexual orientation and sex (Plt's Summary Judgment Memo at 30-43); 2) ensuring that discrimination does not deter people from, or penalize people for, entering into a state-licensed status through which the state creates a safety net of rights and protections that fosters private, rather than public welfare (Plt's Summary Judgment Memo at 43-44); and 3) preventing the stigmatization and second-class treatment of the marriages of same-sex couples (Plt's Summary Judgment Memo at 44-46). Plaintiff does not repeat those arguments in this opposition brief and refers the Court to those sections, which also explain why the state interests in nondiscrimination cannot be achieved through means less restrictive of associational freedoms (Plt's Summary Judgment Memo at 54-55).

The Court in *Dale* was balancing a "severe intrusion" on the Boy Scouts' expressive association rights against the state's interest in preventing discrimination in public accommodations. *See Dale*, 530 U.S. at 659. In that balancing, the Court took a skeptical view of the expansion of public accommodations statutes over time from "traditional places of public accommodation – like inns and trains" to the Boy Scouts case in which "the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term 'place' to a physical location." *Dale*, 530 U.S. at 657. In contrast, statutory coverage in the employment context is clear and stable.

More importantly, this case involves state interests of a substantially higher order than those in play in *Dale*. Employment discrimination is unique among the areas covered by the antidiscrimination law. Without the ability to earn an income, the ability to live independently and free of government assistance becomes impossible for all but a few. Moreover, the state utilizes private employment as a key component of the social safety net in the areas of health insurance, retirement savings, and other employer-based welfare benefit plans (Plt's Summary

Judgment Memo at 43 & n. 51). In fact, the Supreme Court in *Roberts* viewed the admission of women to the Jaycees as particularly important because of the way in which such clubs facilitate economic advancement through employment opportunities. *See Roberts*, 468 U.S. at 626.

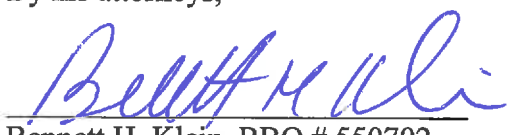
The state's interest in eradicating the "hideous evil" of employment discrimination is specific and essential to our "social fabric." *See Flagg v. AliMed, Inc.*, 466 Mass. 23, 28-29 (2013), discussed at Plt's Summary Judgment Memo at 30-31. Exclusion from participation in a parade or voluntary membership association is entirely different than being barred from work, which is the cornerstone of self-reliance and private welfare. In a society in which religiously-affiliated entities necessarily participate in the employment market, the state's interest in eradicating unlawful discrimination overrides any small and tangential burdens on Fontbonne with respect to the hiring of an employee who has no leadership role, does not teach religion, and has done nothing public or political.

CONCLUSION

For the foregoing reasons, Plaintiff Matthew Barrett requests that this Court deny Defendant Fontbonne Academy's Motion for Summary Judgment and grant his Motion for Summary Judgment.

Respectfully submitted,

MATTHEW BARRETT,
By his attorneys,



September 17, 2015
Dated

Bennett H. Klein, BBO # 550702
bklein@glad.org
Gary Buseck, BBO # 067540
gbuseck@glad.org
Gay & Lesbian Advocates & Defenders
30 Winter Street
Suite 800
Boston, MA 02108
617-426-1350

On the Brief:

John P. Ward
johnpward@gmail.com
Law Offices of John P. Ward
584 Castro St., No. 802
San Francisco, CA 94114

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Plaintiff's Memorandum of Law in Opposition to Fontbonne Academy's Motion for Summary Judgment was served upon counsel of record for each party by overnight mail, postage-prepaid on:

John G. Bagley
Jeffrey K. O'Connor
Morrison Mahoney LLP
1500 Main Street, Suite 2400
P.O. Box 15387
Springfield, MA 01115-5387
(413) 737-4373

DATED: September 17, 2015

Bennett H. Klein