COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

SUPERIOR COURT
C.A. NO. 14-751

MATTHEW BARRETT,
Plaintiff

v.

FONTBONNE ACADEMY,
Defendant

PLAINTIFF MATTHEW BARRETT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION[1]

Plaintiff Matthew Barrett, who has over twenty years of experience in the food services industry, was offered and accepted the position of Food Services Director at defendant Fontbonne Academy (Fontbonne), an independently operated Catholic school. When filling out new hire paperwork, Matt was asked for the name of an emergency contact and his relationship to that person. He listed "Ed Suplee" and the relationship as "husband." Two days later the Head of School told Matt that Fontbonne would no longer employ him because he is married to a person of the same sex.

This is straightforward discrimination on the basis of sexual orientation and sex. *See* Argument, § II, *infra*. Fontbonne claims that its religious character somehow permits it to engage in overt discrimination. That is not correct. Fontbonne claims as a defense a statutory exemption in G.L. c. 151B for certain specifically defined religiously-affiliated entities. That defense fails because the exemption applicable to employers is restricted to those who "limit[] membership, enrollment, admission, or participation to members of that religion," G.L. c. 151B, §1(5), criteria which Fontbonne concedes it does not meet. *See* Argument, § III, *infra*. Fontbonne's constitutional free exercise claim must similarly be rejected as it is well established and uncontroversial in American law that the State has a compelling interest in eradicating employment discrimination that outweighs claims for religious exemptions. *See* Argument, § IV, *infra*. This Court should enter summary judgment for plaintiff Matthew Barrett on Count I (sexual orientation discrimination) and Count II (sex discrimination) of the Complaint.

[1] By Order dated June 15, 2015, the Court (Cannone, J.) allowed the Joint Motion to Amend Scheduling Order to Set Schedule for Summary Judgment Briefing in which the plaintiff requested leave to file a brief of 60 pages to address the statutory and constitutional issues in this case.

STATEMENT OF FACTS

Fontbonne Academy, a sponsored ministry of the Congregation of the Sisters of Saint Joseph of Boston, is an independent Catholic girls' school in Milton, Massachusetts that enrolls students in grades 9-12. Facts ¶¶ 1-2, 7.[2] Fontbonne has no legal relationship to the Archdiocese of Boston and is operated and governed by its Administration and Board of Trustees. Facts ¶¶ 4-6.

Diversity is a core principle of Fontbonne. Facts ¶ 15. Fontbonne does not limit enrollment or admission of students, or employment of staff, to members of the Catholic religion. Facts ¶¶ 8, 11-12. In recent years Fontbonne's student body has included Muslims, Jews, Baptists, Buddhists, Hindus and Episcopalians. Facts ¶ 10.

Diversity of sexual orientation is also important to Fontbonne. Facts ¶ 16. It emphasizes that it does not discriminate on the basis of sexual orientation. Facts ¶ 18. Fontbonne fosters an environment of academic rigor, intellectual openness, and critical thinking. Facts ¶¶ 19, 21, 23. Students are praised for thinking critically about Catholic doctrine, which the Head of School agrees would not threaten the school's mission. Facts ¶¶ 22-25. Because Fontbonne is a "learning community," Fontbonne permits exploration in the classroom of topics related to "homosexuality, sexual orientation, marriage for same-sex couples, or 'gay rights.'" Facts ¶ 26. In fact, helping students understand the significant changes in American society regarding the acceptance of marriage for same-sex couples is part of Fontbonne's educational mission and is addressed in classes. Facts ¶¶ 27-28. A student would be permitted to write a paper supporting

[2] References to "Facts" in this memorandum are to the numbered paragraphs in Plaintiff Matthew Barrett's Statement of Undisputed Material Facts separately filed with the Court.

marriage for same-sex couples that disagreed with Church teaching on the subject. Facts ¶ 29. That student would be "applauded for thinking critically." Facts ¶ 25.

The plaintiff, Matt Barrett, married Edward Suplee in Massachusetts on September 12, 2012. Facts ¶ 30. Matt has over twenty years of experience in the food services industry, including running the food services operations at corporate headquarters and government buildings in Massachusetts. Facts ¶¶ 33-35. In June 2013, he applied for a job as Fontbonne's Food Services Director, a position that was ideal for him since he was looking for a full-time position of significant responsibility close to the home he shares with his spouse in Dorchester. Facts ¶ 36. Religious training or membership in the Catholic faith is not necessary for that job. Facts ¶¶ 13-14. That is true of most jobs at Fontbonne because, as the Head of School explained, a history teacher or the Food Services Director, for example, are "not formally presenting the gospel values" and "the teachings of the Catholic Church." Facts ¶ 13.

Before interviewing for the position, Matt spoke with a friend of his mother, Sister Katherine Short, whom he knew as a nun affiliated with the Sisters of Saint Joseph who provided massage for the nuns at Fontbonne. Facts ¶ 38. Sister Short told Matt that "in this day and age," his marriage to Ed would not be an issue for employment at Fontbonne; she assured him that "[t]hey will love you." Facts ¶ 39. And they did. After two successful interviews, Matt had a third interview with the Head of School, Mary Ellen Barnes, who viewed him as a "very worthy candidate," a "very positive person," and a "good fit" at Fontbonne. Facts ¶¶ 40-44. Ms. Barnes offered the job to Matt on July 9, 2013 and he accepted on that date. Facts ¶ 48. On July 9, 2013 Matt filled out an employee new hire form that listed the name of an emergency contact. He filled in "Ed Suplee" and in the space asking for "relationship," wrote "husband." Facts ¶¶ 49-50.

During Matt's interview with Ms. Barnes, she told him that every employee of Fontbonne is regarded as a "minister of the mission" and expected to model the teachings of the Catholic faith. Facts ¶ 45. She gave the example of abortion rights. *Id.* 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. Facts ¶ 47.

After Ms. Barnes noticed that Matt had listed his husband as his emergency contact, she was "completely unsure" and lacked "certainty" about whether it was or was not "ok to hire" someone with a same-sex spouse, especially because she understood that such marriages were now legal. Facts ¶¶ 54-55. Ms. Barnes called Suzanne Kearney, the Executive Director of an entity that provides resources to the sponsored ministries of the Sisters of Saint Joseph, and "asked for guidance in making [her] decision." Facts ¶¶ 56-57. After speaking with Ms. Kearney, Ms. Barnes understood that Ms. Kearney was also unsure what the appropriate decision should be. Facts ¶ 59. Ms. Kearney spoke with one of the leaders of the Sisters of Saint Joseph who did not give her a yes or no conclusion, and called the situation a "dilemma." Facts ¶¶ 60-61. Ms. Kearney then called the Superintendent of Schools for the Archdiocese of Boston who told her that "[w]e do not hire people in a same-sex marriage." Facts ¶¶ 62-63. Matt was then called to a meeting on July 12, 2013 at which Ms. Barnes rescinded Fontbonne's offer of employment to him because he is married to a man. Facts ¶¶ 68-69.

Ms. Barnes testified that her decision to rescind the job offer to Matt was specifically because he was not living consistently with the specifications of the Sacrament of Marriage in the Canon Law and the Catechism of the Catholic Church. Facts ¶ 74. She stated that all employees must live consistently with all Church teachings. Facts ¶¶ 77-79. Ms. Barnes

acknowledged that the marriage provisions of the Canon Law and Catechism, which she relied upon to fire Matt, also require that the parties to a marriage be baptized, but would nonetheless hire a heterosexual Jewish person married to another Jewish person who are both obviously non-baptized. Facts ¶¶ 80-82. Ms. Barnes explained that the non-baptized Jewish couple who does not meet the specifications of the Sacrament of Marriage simply does not have a Catholic marriage. Facts ¶ 84. That person could be employed because jobs at Fontbonne do not require a person to be in a Catholic marriage. Facts ¶ 84. Ms. Barnes also acknowledged that the Food Services Director position does not have to be filled by a person in a Catholic marriage. Facts ¶ 85.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD.

This Court must grant summary judgment for Matthew Barrett if (1) there is no genuine issue as to any material fact, and (2) he is entitled to judgment as a matter of law. Mass. R. Civ. P. 56; *see also Monell v. Boston Pads, LLC*, 471 Mass. 566, 569 (2015). The court must also examine the facts "in the light most favorable to the nonmoving party." *Walter E. Fernald Corp. v. Governor*, 471 Mass. 520, 523 (2015).

II. THE UNDISPUTED FACTS DEMONSTRATE THAT FONTBONNE DISCRIMINATED AGAINST MATT BARRETT ON THE BASIS OF HIS SEXUAL ORIENTATION AND SEX.

The undisputed facts show that Fontbonne violated the Massachusetts statute prohibiting employment discrimination "because of" a person's "sexual orientation" and "sex." G.L. c. 151B, § 4 (1) provides in relevant part:

It shall be an unlawful practice:

> 1. For an employer, by himself or his agent, because of the . . . sex . . .[or] sexual orientation[3] . . . of any individual to refuse to hire or employ or to bar or to discharge from employment such individual.

G.L. c. 151B, § 4(1). There is no dispute in this case that Matt Barrett was highly qualified for the position of Food Services Director. He was offered and accepted the position. After inadvertently learning that Matt is married to a man, Fontbonne's Head of School, Mary Ellen Barnes, told Matt that the school would not hire him solely because he is married to a person of the same sex. Facts ¶¶ 31-35, 44, 48-69. This is direct evidence of sexual orientation and sex discrimination. *See* §§ I, A and B, *infra. See also Chief Justice for Admin. & Mgmt. of the Trial Court v. Mass. Comm'n. Against Discrimination*, 439 Mass. 729, 732 n.11 (2003) ("[D]irect evidence consists of statements of discriminatory intent attributable to an employer").[4]

A. Fontbonne Engaged in Sexual Orientation Discrimination.

Fontbonne's refusal to hire Matt Barrett simply because is married to a person of the same sex is patently discrimination "because of" his sexual orientation. The individuals in the excluded class – those who are married to a person of the same sex – are gay and lesbian people.

Any doubt that discrimination because one is in a same-sex relationship is sexual orientation discrimination has been cleared up by decisions of the United States Supreme Court. *See Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) ("Our decisions have declined

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[3] G.L. c. 151B, § 3(6) states that "[t]he term 'sexual orientation' shall mean having an orientation for heterosexuality, bisexuality, or homosexuality."

[4] Evidence of direct discrimination renders unnecessary alternative methods of proving discrimination such as the *McDonnell Douglas* burden-shifting approach. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 121-122 (1985) (policy discriminatory on its face is direct evidence and renders alternative evidentiary approaches unnecessary); *Brooks v. Mass. Gen. Hosp.*, 2006 Mass. Super. LEXIS 557, *7 (Mass. Super. 2006) ("As Brooks does not offer any direct evidence of racial discrimination, his claim must be analyzed under the *McDonnell Douglas* framework.").

to distinguish between status and conduct in [the sexual orientation discrimination] context."); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("While it is true that the [sodomy] law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."). In *Elane Photography, LLC v. Willock*, 309 P.3d 53, 61 (N.M. 2013), for example, the court rejected the assertion of a photographer that she had not engaged in sexual orientation discrimination when she refused to photograph the commitment ceremony of a same-sex couple. There is no basis to distinguish "between discrimination based on sexual orientation and discrimination based on someone's conduct of publicly committing to a person of the same sex." *Id.* at 61-62 (noting that the Supreme Court has declined to distinguish between "a protected status and conduct closely correlated with that status"). Similarly, Fontbonne engaged in clear sexual orientation discrimination when it refused to hire Matt Barrett and barred him from employment because it objected to his marriage to another man. This Court should enter summary judgment for plaintiff Matthew Barrett on Count I of the Complaint.

B. Fontbonne Engaged in Sex Discrimination.

Fontbonne violated the sex discrimination provisions of G.L. c. 151B by treating Matt Barrett adversely solely because of his sex, and the sex of his spouse. As the United States Equal Employment Opportunity Commission (EEOC) has concluded, sexual orientation discrimination is inherently and necessarily discrimination because of a person's sex. *See Baldwin v. Foxx*, EEOC Appeal No. 0120133080 (EEOC July 15, 2015), *available at* www.eeoc.gov/decisions/0120133080.pdf (last viewed July 27, 2015).

In *Baldwin*, the EEOC began by noting that "Title VII's prohibition of sex discrimination means that employers may not 'rel[y] upon sex-based considerations' or take gender into account when making employment decisions." *Baldwin* at 5, citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 241-42 (1989); *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (EEOC Apr. 20, 2012).[5] The EEOC then concluded that "sexual orientation is inherently a 'sex-based consideration'" because "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms." *Baldwin* at 6. The EEOC explained that:

> "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. Someone is referred to as "heterosexual" or "straight" if he or she is physically and/or emotionally attracted to someone of the opposite-sex. See, e.g., American Psychological Ass'n, "Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation" (Feb. 2011), available at http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf ("*Sexual orientation* refers to the *sex* of those to whom one is sexually and romantically attracted") (second emphasis added). It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations.

Baldwin at 6.

The Supreme Judicial Court reached this same conclusion in 1979 when it recognized that sexual orientation is a "sex-linked" characteristic. *Macauley v. Mass. Comm'n Against Discrimination*, 379 Mass. 279, 281 (1979) (discrimination claim by gay man under sex discrimination law prior to the inclusion of sexual orientation as a protected class). The Court,

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[5] "Title VII focuses on discrimination in employment and 'share[s] substantial common ground' with c. 151B." *See Flagg v. Alimed, Inc.*, 466 Mass. 23, 33 (2013), quoting *Mass. Bay Transp. Auth. v. Mass. Comm'n Against Discrimination*, 450 Mass. 327, 337-338 (2008).

however, did not feel free to conclude that sexual orientation discrimination is sex discrimination based on two rationales that have been rendered inapplicable by subsequent developments in sex discrimination law. As such, *Macauley* now supports the conclusion, also reached by the EEOC, that sexual orientation discrimination is sex discrimination under Massachusetts law.

Macauley's first rationale was that the Legislature could not have had sexual orientation discrimination in mind when it added sex discrimination to the law. *Id.* at 281 (referencing pending legislation to add sexual orientation to c. 151B and stating it could not impose its own policy). The Supreme Court has made clear, however, that the scope of Title VII's sex discrimination provision must be determined by its text and not by what Congress had in mind when it passed the law. *See Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75, 79, 78-80 (1998) (holding that same-sex sexual harassment is sex discrimination and reasoning that "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").[6] As the EEOC noted in *Baldwin,* "Title VII prohibits discrimination on the basis of 'sex' without further definition or restriction … Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay, or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included." *See Baldwin* at 13 and n.13. This reasoning applies with the same force to the interpretation of the term "sex" in G.L. c. 151B.

[6] *See Muzzy v. Cahillane Motors*, 434 Mass. 409, 412 (2001) (looking to *Oncale* to interpret G.L. c. 151B).

Macauley also felt constrained by the state of sex discrimination law in 1979 which it characterized as applying only to differences between men and women. *Macauley*, 379 Mass. at 281. That limited view of sex discrimination has been eviscerated by *Price Waterhouse*. In holding that the term "sex" in Title VII included gender stereotyping, the Court ruled that "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute;" "gender must be irrelevant to employment decisions." *Price Waterhouse*, 490 U.S. at 239-240. *See also id.* at 251. ("Congress intended to strike at the entire spectrum of disparate treatment of men and women"). Since *Price Waterhouse*, courts have discarded the notion that sex discrimination only applies to the biological differences between men and women. *See Baldwin* at 9-12 (discussing cases). In fact, a transgender discrimination case cited by *Macauley* to make that point has been overruled. *See Macauley,* 379 Mass. at 282, citing *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661-663 (9th Cir. 1977); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-1202 (9th Cir. 2000) (The term "sex" in Title VII "encompasses both sex—that is, the biological differences between men and women—and gender;" "The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse.*").

The "inescapable link" between sexual orientation discrimination and sex discrimination is explicitly demonstrated in this case because Fontbonne "[t]reat[ed] an employee less favorably because of the employee's sex." *Baldwin* at 6-7. As a male job applicant who is married to a man, Matt Barrett was treated differently than a female job applicant who is married to a man. This is straightforward sex discrimination. Justice Greaney made this point in the context of the marriage statute in his concurrence in *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 345-346 (2003). He noted that the sex-based classification in a law that limits marriage to a man and

woman is "self-evident" because the "prohibition is based solely on the applicants' gender." *Id.* at 346. He explained that "Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman;" as such, "[o]nly [her] gender prevents [her] … from marrying [her] chosen partner[]." *Id.* at 346. Numerous state and federal courts have reached this same conclusion in the context of both discrimination cases and challenges to bans on the marriages of same-sex couples. *See, e.g., Hall v. BNSF Ry. Co.*, 2014 U.S. Dist. LEXIS 132878, *6-12 (W.D. Wash. 2014) (surveying cases) (denial of benefits to employee's same-sex spouse states a claim for sex discrimination because he "alleges disparate treatment … that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males"); *Videckis v. Pepperdine University*, 2015 WL 1735191 (C.D. Cal. 2015) ("a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender"); *Foray v. Bell Atl.*, 56 F. Supp. 2d 327, 329-330 (S.D.N.Y. 1999) (unmarried, partnered heterosexual man stated a Title VII violation based on his exclusion from a same-sex domestic partnership benefit program; court acknowledged sex discrimination theory but found parties not similarly situated).[7]

In addition, Fontbonne discriminated against Matt Barrett because of the sex of his spouse. This is impermissible associational discrimination on the basis of sex. *See Baldwin* at 8-9 ("Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex.").

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[7] *See also Latta v. Otter,* 771 F.3d 456, 480 (9th Cir. 2014) (Reinhardt, J., concurring) (prohibitions on marriage of same-sex couples facially discriminate based on sex and are also based on gender stereotypes); *Baker v. State*, 170 Vt. 194, 253 (1999) (Johnson, J. concurring) ("A woman is denied the right to marry another woman because her would-be partner is a woman"); *Baldwin* at 6-7 and n.5 (discussing cases).

The Supreme Judicial Court has recognized claims of associational discrimination based on handicap under G.L. c. 151B, despite the lack of explicit statutory language. *See Flagg v. AliMed, Inc.*, 466 Mass. 23 (2013). The Court's reliance in that decision on the broad language and remedial purposes of c. 151B applies just as forcefully to claims of associational sex discrimination. In *Flagg* the Court first emphasized the "overarching purpose" and language of G.L. c. 151B. *Id.* at 28. In that regard, the Court observed that the "Legislature recognized that employment discrimination is often subtle and indirect, and that it may manifest itself 'by so many devious and various means that no single corrective rule can be applied to prevent the injustices committed.'" *Id.* at 28.[8] The Court also pointed to the constitutional prohibition on handicap discrimination, the command of c. 151B, § 9 to interpret the statute liberally, and the general purpose of c. 151B to "'...remov[e] ... artificial, arbitrary, and unnecessary barriers to full participation in the workplace'" as grounds for the existence of an associational discrimination claim under c. 151B. *Id.* at 29-30, quoting *College-Town, Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination*, 400 Mass. 156, 162 (1987).[9] Finally, the Court relied upon the consistent and long-standing interpretation of the Massachusetts Commission Against Discrimination that G.L. c. 151B, § 4 includes associational discrimination, as well as federal precedent that construed Title VII as including associational discrimination because of race. *Id.* at 32-34. This broad reasoning easily includes associational sex discrimination claims. Because the undisputed evidence is that Matt Barrett was denied a job because of the sex of the person he associates with—his spouse—Fontbonne has engaged in illegal sex discrimination.

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[8] Quoting Report of the Special Commission Relative to the Matter of Discrimination Against Persons in Employment Because of Their Race, Religion or Nationality, 1945 House Doc. No. 337, at 2.

[9] Massachusetts added a prohibition on "sex" discrimination to the constitution in 1976. *See* art. 106 of the Amendments to the Massachusetts Constitution.

Macauley was prescient in its understanding that sexual orientation discrimination is inherently sex-based. This case presents explicit and undisputed facts which demonstrate that underlying construct. Matt Barrett was barred from employment because he is a man married to a man; if either his sex or the sex of his spouse were different, he would have been hired. Accordingly, this Court should enter summary judgment for Matt Barrett on Count II of the Complaint.

III. FONTBONNE CANNOT MEET THE REQUIREMENTS OF THE RELIGIOUS EXEMPTION FOR EMPLOYERS UNDER G.L. C. 151B BECAUSE IT DOES NOT LIMIT ADMISSION OR ENROLLMENT TO CATHOLIC STUDENTS.

Fontbonne has claimed as a defense a statutory exemption in G.L. c. 151B for certain specifically-defined religiously-affiliated entities. That defense fails because the clear and unambiguous language in G.L. c. 151B, § 1(5) squarely delineates the religious exemption available vis-à-vis employment discrimination claims under the statute and restricts it to employers that "limit[] membership, enrollment, admission, or participation to members of that religion." G.L. c. 151B, §1(5). Fontbonne's own admissions prove that it does not meet the criteria of the applicable exemption. Facts ¶¶ 8-11.

A. The Unambiguous Language of G.L. c. 151B, §§ 1(5) and 4(18) Restricts the Religious Exemption to Employers Who "Limit[] Membership, Enrollment, Admission, or Participation to Members of That Religion."

G.L. c. 151B contains two provisions addressing the scope of the exemption afforded to certain religiously-affiliated entities. They must be read together to create a harmonious whole. *See Reynolds v. City Express, Inc.,* 2014 Mass. Super. LEXIS 44, *21 (Mass. Super. Ct. 2014) ("courts construe the various provisions of a particular statute in harmony with one another, recognizing that the Legislature did not intend internal contradiction").

First, in the definition of "employer" set out in G.L. c. 151B, § 1(5), the Legislature unambiguously specified the type of employer to which it intended to grant a religious-based exemption from the statute's nondiscrimination requirements. Section 1(5) of G.L. c. 151B reads in relevant part:

> Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, *and which limits 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 with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

G.L. c. 151B, § 1(5) (emphasis supplied). The plain and unambiguous language of §1(5) must be given effect. *See City of Worcester v. College Hill Props., LLC*, 465 Mass. 134, 138 (2013) ("'Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent …' and 'the courts enforce the statute according to its plain wording'"), quoting *Martha's Vineyard Land Bank Comm'n v. Assessors of W. Tisbury*, 62 Mass. App. Ct. 25, 27-28 (2004).

Second, § 4 of G.L. c. 151B contains the law's substantive nondiscrimination prohibitions. Beyond employment, these provisions also address such areas as discrimination in certain housing accommodations (§ 4 ¶¶ 6, 7, 11, 13, and 18); in various real estate-related contexts, including making and purchasing mortgage loans (§ 4 ¶ 3B) and selling, brokering, or appraising residential real estate (§ 4 ¶3B); and in the provision of credit or services (§ 4 ¶¶ 10 and 14). Section 4 contains a similar, but less restrictive, religious exemption than that set forth in the definition of "employer." It reads in relevant part:

> Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

G.L. c. 151B, § 4(18). This generally applicable provision—covering multiple types of discrimination—expressly does not include the restriction to entities that limit "membership, enrollment, admission or participation" to members of the same religion that the Legislature included in § 1(5) governing employers.

Although this case is obviously a claim for discrimination by an "employer," Fontbonne seeks to ignore the clear language in § 1(5) and its limitation and instead maintain that it is entitled to an exemption from G.L. c. 151B looking solely at § 4(18). Fontbonne's attempt to avoid the clear and unambiguous definition of "employer" in § 1(5) cannot withstand the most basic principles of statutory interpretation. Fontbonne's assertion that § 4(18) applies to *any* religious employer, untethered from the predicate criteria in § 1(5), renders the limiting language in § 1(5)'s definition of employer superfluous. *See Abraham-Copley Square Ltd. P'ship v. Badaoui*, 72 Mass. App. Ct. 339, 342 (2008) (court must avoid interpretation that "would make the wording of [a statutory section] surplusage"); *Selectmen of Topsfield v. State Racing Comm'n*, 324 Mass. 309, 314 (1949) ("[b]arrenness of accomplishment is not lightly to be imputed to the legislative branch of government").

Rather than disregard the language of § 1(5), various provisions of a statute must be read together harmoniously to give effect to all of its provisions. As the Supreme Judicial Court has stated, "'all parts [of a statute] shall be construed as consistent with each other so as to form a

harmonious enactment effectual to accomplish its manifest purpose.'" *City of Worcester*, 465 Mass. at 139, quoting *Selectmen of Topsfield*, 324 Mass. at 312-313 (1949). *See also Ret. Bd. of Somerville v. Buonomo*, 467 Mass. 662, 668 (2014) ("Courts must ascertain the intent of a statute *from all its parts*") (emphasis supplied).

In the context of G.L. c. 151B, the Supreme Judicial Court has done just that. It has read both provisions related to religious exemptions in G.L. c. 151B together and determined that:

> Under the [1989 Amendments to G.L. c. 151B], an organization operated for charitable or educational purposes will be entitled to an exemption from c. 151B for employment-related actions calculated to promote the religious principles for which it is established or maintained only if it is "operated, supervised or controlled by or in connection with a religious organization" and it "limits membership, enrollment, admission or participation to members of that religion." Under the c. 516 amendments, such an organization's employment-related actions will not be entitled to exemption if the organization is not "operated, supervised or controlled by or in connection with a religious organization" or if it does not "limit[] membership, enrollment, admission or participation to members of that religion."

Collins v. Sec'y of Commonwealth, 407 Mass. 837, 843 (1990).[10] In short, an employer is not exempt under G.L. c. 151B if it does not limit membership, enrollment, admission or participation to members of that religion. This harmonization makes sense as the purpose of a defined term in a statute, *e.g.*, "employer," is to delineate the scope of subsequent provisions in that same statute.

[10] In *Collins* the Court was addressing whether art. 48 of the Massachusetts Constitution, which precludes a referendum on any "law that relates to religion, religious practices or religious institutions" applied to Chapter 516 of the Acts of 1989, which added sexual orientation as a protected class under G.L. c. 151B. *Collins*, 407 Mass. at 838. Because Chapter 516 broadened the scope of G.L. c. 151B's religious exemption for all protected classes, the Court concluded that a referendum was prohibited. *Id.* at 852. *See* Argument, § III, B, *infra* for discussion of the legislative history of the various amendments to the religious exemption in G.L. c. 151B.

Subsequent to *Collins*, the Superior Court (Izzo, J.) rejected the identical plea to ignore § 1(5) made by Fontbonne here. In that case, an employee brought a discrimination claim under G.L. c. 151B against the Jewish Community Center which did not limit enrollment, admission, membership, or participation to members of the Jewish community. *See Piatti v. Jewish Cmty. Ctrs. of Greater Boston*, Middlesex Superior Court, No. 91-5198 (March 4, 1992) (Memorandum of Decision on Cross Motions for Summary Judgment) (attached as Exhibit A). Nevertheless, the defendant asserted that "meeting the broader requirements of § 4(18), (which does *not* limit its application to organizations with restrictive membership practices) should suffice." *Id.* at 5 (emphasis in original). The Superior Court rejected this argument on the basis that "[s]uch an argument ignores the SJC's reconciliation of these two provisions in *Collins*." *Piatti*, Exhibit A, slip op. at 5, citing the block quote from *Collins*, *supra*). Accordingly, the Court ruled that the Jewish Community Center was not entitled to an exemption because "[c]learly the *Collins* Court construes the two provisions (§ 1 and § 4(18)) together, with the result being that Chapter 151B's religious exemption is only open to organizations which limit membership." *Piatti*, Exhibit A, slip op. at 6.

This harmonization of §§ 1(5) and 4(18) cohesively synchronizes the two provisions. Under the employment nondiscrimination provisions of § 4, the employer-specific definition in § 1(5) is incorporated into the scope of § 4's religious exemption. For § 4's non-employment provisions, such as housing, § 4(18) governs on its own terms because it is not limited or modified by any other provision in G.L. c. 151B. In this way, all of the language in G.L. c. 151B's religious exemptions is given effect. Any other reading would render § 1(5) a nullity. *See Manning v. Boston Redevelopment Auth.*, 400 Mass. 444, 453 (1987) (an enactment should not

be "construed in such a way as to make a nullity of pertinent provisions"); *Meunier's Case*, 319 Mass. 421, 423 (1946) ("None of [a statute's] words is to be rejected as surplusage").

Similarly, disregarding the definition of "employer" in § 1(5) would violate the "established canon of statutory construction that 'general statutory language must yield to that which is more specific.'" *See Silva v. Rent-A-Center, Inc.*, 454 Mass. 667, 671 (2009), quoting *TBI, Inc. v. Bd. of Health of N. Andover*, 431 Mass. 9, 18 (2000). *See also Morey v. Martha's Vineyard Comm'n*, 409 Mass. 813, 819 (1991) ("general language [] must yield to the more precise language"). A construction that disregards § 1(5) cannot stand.

B. The Legislative History Confirms That the Legislature Intended to Maintain a Separate, More Restrictive Religious Exemption for Employers.

This Court need not look to legislative history since the language of §§ 1(5) and 4(18) is clear. Nevertheless, an examination of the changes that the Legislature has made to the religious exemption language in G.L. c. 151B since its inception in 1946 supports the statute's plain meaning with respect to a separate, narrower exemption for employers.

When G.L. c. 151B first became law in 1946, it solely covered employment discrimination. *See* St. 1946, c. 368 ("An Act Providing for a Fair Employment Practice Law…"), attached as Exhibit B. The term "employer" in G.L. c. 151B, § 1(5) exempted "a club exclusively social, or a fraternal, charitable, educational or religious association or corporation" if not organized "for private profit." St. 1946, c. 368, § 4(1)(5). Section 4 contained the substantive prohibitions on discrimination in employment and included no exemption language. *See* St. 1946, c. 368, § 4(4).

In 1957, the Legislature amended G.L. c. 151B to move beyond employment discrimination to prohibit discrimination in certain housing accommodations. *See* St. 1957,

c. 426 ("An Act Relative to Discrimination Because of Race, Religion, National Origin or Ancestry in Publicly Assisted Housing Accommodations"), attached as Exhibit C. The prohibitions on housing discrimination were added to G.L. c. 151B, § 4. *See* St. 1957, c. 426, § 2. In addition, the Legislature included in G.L. c. 151B, § 4 the following exemption language:

> Nothing herein contained shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

St. 1957, c. 426, § 3. Notably, however, when it passed this amendment, the Legislature did not alter or eliminate the religious exemption language contained in the definition of employer in § 1. The Legislature thus clearly indicated an intention to maintain two separate exemptions: (1) for an employer and employment-related claims; and (2) for the newly added entities that were subject to the new, non-employment discrimination provisions of G.L. c. 151B.

If there could be any conceivable doubt at this point that the Legislature intended to differentiate in the religious exemptions as between employers and other entities under G.L. c. 151B, that doubt is certainly removed by the amendment of the definition of "employer" in 1969. The Legislature then passed a stand-alone bill that changed the religious exemption available to employers. *See* St. 1969, c. 216 ("An Act Relative to the Hiring and Employment Practices of Certain Religious or Denominational Organizations"), attached as Exhibit D. The Legislature removed the words "religious association or corporation" and added the language which remains in current law restricting the exemption to an employer "which limits membership, enrollment, admission, or participation to members of that religion." St. 1969,

c. 216, § 1. The exemption language in the definition of employer in G.L. c. 151B, § 1(5) thus read after the 1969 amendment:

> The term "employer" does not include a club exclusively social, or a fraternal association or corporation, if such club, association or corporation is not organized for private profit, nor does it include any employer with fewer than six persons in his employ, but shall include the commonwealth and all political subdivisions, boards, departments and commissions thereof. Nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, *and which limits membership, enrollment, admission, or participation to members of that religion*, from giving preference in hiring or employment to members of that same religion.

St. 1969, c. 216, § 1 (emphasis supplied). When the Legislature added this language to G.L. c. 151B, § 1(5), it did not alter the exemption language in G.L. c. 151B, § 4 that it passed in 1957.

By its 1969 amendment the Legislature was again clearly maintaining two exemptions—one for employment claims and one for non-employment claims. The Legislature attempted to align some of the language of the two exemptions by bringing language from § 4 ("operated, supervised or controlled by or in connection with a religious organization") into § 1(5). But, at the same time, the Legislature added a limitation to § 1(5) ("and which limits membership, enrollment, admission, or participation to members of that religion") not found in § 4(18). The language of the 1969 amendment demonstrates that the Legislature was aware of both provisions and intended a separate, narrower religious exemption for employers.

Finally, the Legislature added sexual orientation to G.L. c. 151B in 1989. *See* St. 1989, c. 516 ("An Act Making it Unlawful to Discriminate on the Basis of Sexual Orientation"), attached as Exhibit E. The Legislature altered the language of the religious exemption in both

§§ 1(5) and 4(18) thus demonstrating its awareness of these two provisions. See St. 1989, c. 516, §§ 1 and 14.[11]

After the 1989 Amendment, the employer exemption in G.L. c. 151B, § 1(5) read:

> Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, and which limits 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 with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

The 1989 amendments expanded the exemption available to religious employers in § 1(5). Prior to 1989, an employer was only entitled to give preference in hiring to members of the same religion. Such an employer could not, for example, refuse to hire a person in an interracial marriage on the basis that such a marriage violated its religious principles. Nor could it discriminate on the basis of religion, or any other grounds, *after* hiring, in matters such as compensation or other terms of employment. After the 1989 Amendments, however, the same qualifying employer could take "any action . . . calculated ... to promote [its] religious principles," § 1(5), and would be privileged to engage in all of those otherwise discriminatory actions. The Legislature clearly made a determination to expand the ways that qualifying employers could be exempt from the nondiscrimination law. Importantly, however, the

[11] The Legislature changed the final clauses of both provisions to read "from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained." St. 1989, c. 516, §§ 1 and 14.

Legislature maintained the language in G.L. c. 151B, § 1(5) restricting the criteria for a qualifying employer to entities that "limit[] membership, enrollment, admission or participation" to members of the same religion. *See* St. 1989, c. 516, § 1. By the 1989 amendments, the Legislature demonstrated once again that it was aware of and intended a more limited scope of religious exemption for employers.

The Legislature has sometimes narrowed the employer exemption, as it did in 1969, or expanded it, as it did in 1989, but it has always maintained separate and different provisions for employers and non-employers. If the Legislature had intended to make § 1(5) and § 4(18) coterminous, it surely would have eliminated § 1(5). Because Fontbonne does not restrict admission, enrollment—or even employment—to members of the Catholic religion (Facts ¶¶ 8-11), it cannot avail itself of the exemption for religious employers in § 1(5).[12]

IV. THE FREE EXERCISE CLAUSE OF THE MASSACHUSETTS CONSTITUTION DOES NOT EXCUSE FONTBONNE'S DISCRIMINATION AGAINST MATT BARRETT BECAUSE HE IS MARRIED TO A PERSON OF THE SAME SEX.

Our constitutional system cherishes religious freedom, but also recognizes that in a civil society conduct motivated by religious belief must often yield to the rule of law. It is therefore a fundamental premise of free exercise jurisprudence that state regulation will unavoidably burden religion. "It has been well understood since the founding of our nation that legislative restrictions may trump religious exercise." *Gilardi v. U.S. Dep't of Health and Human Servs.*, 733 F.3d 1208, 1226 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part), citing *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). In freedom of religion, the "freedom to believe

[12] Plaintiff makes no argument on summary judgment with respect to any of the other criteria in § 1(5), such as that the employer be "operated, supervised, or controlled" by a religious organization.

'is absolute,' [but] the freedom to act 'cannot be. Conduct remains subject to regulation for the protection of society.'" *Alberts v. Devine*, 395 Mass. 59, 73 (1985), quoting *Attorney Gen. v. Bailey*, 386 Mass. 367, 375 (1982), quoting *Cantwell v. Conn.*, 310 U.S. 296, 303-304 (1940).

The principle that the State has a compelling interest in eradicating employment discrimination that outweighs claims for religious exemptions is well-established and uncontroversial in American law. *See, e.g., EEOC v. Pac. Press Pub. Ass'n.*, 676 F.2d 1272, 1280 (9th Cir. 1982) ("elimination of all forms of discrimination [is the] 'highest priority;'" "Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."); *EEOC v. Mississippi Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("The government has a compelling interest in eradicating discrimination in all forms"); and cases cited in § C, *infra*.

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), Justice Alito offered assurance of the continued vitality of this principle. *See id.* at 2783. ("The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.") (internal citation omitted).[13] Justice Kennedy, the critical fifth vote, also recognized that the balance of interests in a pluralistic society does not permit respect

[13] Justice Alito was emphasizing that the Court's decision could not be construed to undermine the principle of nondiscrimination in employment. The underlying claim in that case was decided on grounds inapplicable here. The Court ruled that enforcing the contraceptive mandate of the Affordable Care Act against a corporation with religious objections was not the least restrictive means to achieve the State's compelling interest in women's health because the government had affirmatively set up another program as an alternative to fulfill the same goal. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782.

for religious freedom to impinge upon the important rights of others. *See id.* at 2786-2787 (Kennedy, J., concurring) ("[N]o person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.").

A. The Framework and Historical Context of the Balancing Test Under the Massachusetts Constitution.

The Supreme Judicial Court explained the framework for striking the proper balance between c. 151B and free exercise claims under the Massachusetts Constitution in *Attorney Gen. v. Desilets*, 418 Mass. 316, 321-323 (1994).[14] Under that test, the Court's task is "to determine whether the defendants have shown that the prohibition against [in this case, employment discrimination based on sexual orientation and sex] substantially burdens their free exercise of religion, and, if it does, whether the Commonwealth has shown that it has an interest sufficiently compelling to justify that burden." *Id.* at 322. The party claiming the exemption "'must show (1) a sincerely held religious belief, which (2) conflicts with, and thus is burdened by, the state requirement. Once the claimant has made that showing, the burden shifts to the State. The State can prevail only by demonstrating both that (3) the requirement pursues an unusually important governmental goal, and that (4) an exemption would substantially hinder the fulfillment of the goal.'" *Id.* at 322-323, quoting L. Tribe, American Constitutional Law, § 14-12, at 1242 (2d. ed. 1988). *See also Soc'y of Jesus of New England v. Commonwealth*, 441 Mass. 662, 669-670 (2004) (stating *Desilets* standard).[15]

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[14] Art. 46, § 1 of the Amendments to the Massachusetts Constitution provides: "No law shall be passed prohibiting the free exercise of religion." This provision parallels the First Amendment to the Constitution of the United States ("Congress shall make no law … prohibiting the free exercise of religion").

[15] There is no reported case in Massachusetts involving a claim for an exemption from the employment nondiscrimination law based on free exercise.

In *Desilets*, the Court declined to adopt under the Massachusetts Constitution a change in the federal free exercise standard in *Employment Div. v. Smith*, 494 U.S. 872, 878- 879 (1990). Prior to *Smith*, "the Supreme Court had also used a balancing test to determine free exercise claims under the First Amendment, requiring the State to identify a compelling State interest that would outweigh the burden on the free exercise of religion." *Soc'y of Jesus,* 441 Mass. at 669 n.10. *Smith* rejected that approach and ruled that if the burden on free exercise was "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Smith*, 494 U.S. at 878. The *Desilets* Court stated that it "prefer[red] to adhere to the standards of earlier [pre-*Smith*] jurisprudence ...[in which it] used the balancing test that the Supreme Court had established under the free exercise of religion clause in *Wisconsin v. Yoder*, 406 U.S. 205, 215-229 (1972) [and] *Sherbert v. Verner*, 371 U.S. 938, 406-409 (1963)." *Desilets*, 418 Mass. at 321-322.[16]

The Supreme Judicial Court's affirmation in 1994 of the pre-*Smith* federal jurisprudence cannot be viewed today as an inclination towards laxity in granting religious exemptions from state regulation. The historical context indicates just the opposite. The two major Supreme Court cases the Court pointed to, *Yoder* and *Sherbert*, involved laws that had the effect of severely penalizing religious observance by minority religions. *See Yoder*, 406 U.S. at 217-218 (compulsory education is "in sharp conflict with the fundamental mode of life mandated by the Amish religion" and "substantially interfere[s] with the religious development of the Amish child and his integration into the way of life of the Amish faith community;" the impact of the law on

[16] Because nondiscrimination laws are clearly neutral laws of general applicability, Fontbonne has no argument under the federal constitution. *See also Soc'y of Jesus*, 441 Mass. at 662 n.7 (no need for federal constitutional analysis because the Massachusetts Constitution extends protections that are at least as great as the federal constitution.).

the "practice of the Amish religion is not only severe, but inescapable" as it "compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs" and "carries with it a very real threat of undermining the Amish community and religious practice"); *Sherbert*, 374 U.S. at 404 (where a Seventh-Day Adventist was denied state unemployment benefits because she was not available to work on her Sabbath, the "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship").[17]

In addition, the exemptions granted in *Sherbert* and *Yoder* had no harmful impact on third parties, in contrast to an exemption from a nondiscrimination law. In fact, there does not appear to be "any decision in which … the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties." *Catholic Charities of Sacramento, Inc., v. Super. Ct.*, 85 P.3d 67, 565 (Cal. 2004). *See also Winters v. Miller*, 446 F.2d 65, 70 (2d Cir. 1971) (state's interest outweighs religious objections where there is a "clear interest, either on the part of society as a whole or at least in relation to a third party, which would be substantially affected by permitting the individual to assert what he claimed to be his 'free exercise' rights").

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[17] The two state cases cited as exemplars of the pre-*Smith* balancing test both rejected religiously-based exemptions. *See Desilets*, 418 Mass. at 322-323, citing *Alberts v. Devine,* 359 Mass. at 60, 72-73 (1985) (where clerical superiors defended actions inducing a psychiatrist to disclose confidential information about a minister as justified by the Book of Discipline of the United Methodist Church, state's interest in preventing interference with physician-patient relationships outweighed claims of impairment of free exercise of religion); and *Attorney General v. Bailey*, 386 Mass. 367, 376-377 (1982) (rejecting religiously-affiliated school's sincerely held belief that complying with state educational reporting requirements violates its religious principles).

Courts and commentators have noted the exceptional nature of *Yoder* and *Sherbert. See, e.g.*, *Gilardi*, 733 F.3d at 1235 (Edwards, J., concurring in part and dissenting in part) ("In sum, a careful reading of the Supreme Court's Free Exercise decisions during the twenty-seven years post-*Sherbert* shows that Free Exercise challenges to generally applicable, neutral government policies were rarely successful."), citing Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1417 (1990) ("Since 1972, the Court has rejected every claim for a free exercise exemption to come before it, outside the narrow context of unemployment benefits governed strictly by *Sherbert.*").

B. The Presence in the Workplace of a Person Who Outside of Work Has Entered into a Lawful Status Conferred by the State Does Not "Substantially Burden" Fontbonne's Exercise of Religion.

Fontbonne has the initial burden to show that Matt Barrett's presence in the workplace would substantially burden its free exercise of religion. *Desilets*, 418 Mass. at 322. The "substantial burden" requirement is no more than a threshold inquiry. If the Court determines that G.L. c. 151B does not impose a substantial burden, that is the end of the inquiry. If, on the other hand, the Court finds that Fontbonne's claim has passed the "substantial burden" threshold, it then goes on to balance the nature, weight, and extent of the burden against the State's interest in enforcement of the antidiscrimination laws. *See Curtis v. School Comm.*, 420 Mass. 749, 760-761 (1995) ("The degree of interference with free exercise necessary to trigger further analysis of the State's justification for the action in question, must at least rise to the level of a 'substantial burden;'" "[o]nly if a burden is established must the analysis move to the next step: a consideration of the nature of the burden, the significance of the governmental interest at stake, and the degree to which that interest would be impaired by an accommodation of the religious

practice."); *Desilets*, 418 Mass. at 324 ("[t]he extent of any burden will become important if and when it comes time to balance any such burden against the interests of the Commonwealth").

Fontbonne cannot make a threshold showing of substantial burden. The mere presence on staff of a person who outside of work has entered into a lawful civil status wholly irrelevant to his job does not meet the requirement that application of the nondiscrimination law put "substantial pressure on [Fontbonne] to modify [its] behavior and to violate [its] beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (standard for substantial burden). As the Fifth Circuit recently explained, this is a question of law for the court. *See E. Tex. Baptist Univ. v. Burwell*, 2015 U.S. App. LEXIS 10513, *14-18 (5th Cir. 2015) (discussing standard under federal Religious Freedom Restoration Act which is similar to pre-*Smith* balancing test).[18] *See also Little Sisters of the Poor Home for the Aged v. Burwell*, 2015 U.S. App. LEXIS 12145, *57 (10th Cir. 2015) (noting that courts determine substantial burden and reasoning that "[i]f plaintiffs could assert and establish that a burden is 'substantial' without any possibility of judicial scrutiny, the word 'substantial' would become wholly devoid of independent meaning. Furthermore, accepting any burden alleged by Plaintiffs as 'substantial' would improperly conflate the determination that religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise.") (internal citation omitted).

[18] The Court explained that the substantial burden "inquiry has three components: (1) What is the adherent's religious exercise? (2) Does the challenged law pressure him to modify that exercise? (3) Is the penalty for noncompliance substantial?" *E. Tex. Baptist Univ.*, 2015 U.S. App. LEXIS 10513 at *15. The court "accepts the objector's answer to the first question upon a finding that his beliefs are sincerely held and religious," and evaluates the second and third questions as issues of law. *Id.* For purposes of this summary judgment motion, plaintiff assumes that the sincerely held religious belief Fontbonne asserts here is that the marriage of same-sex couples is contrary to Church teaching.

Courts have found a substantial burden—even where it may ultimately be outweighed by the State's interest—when the religious objector is "pressured" by the law to undertake an act that violates its religious beliefs. *See, e.g., E. Tex. Baptist Univ.*, 2015 U.S. App. LEXIS 10513 at *21 (no substantial burden where religious organization had sincerely held religious opposition to contraception because "the acts *they* are required to perform do not include providing or facilitating access to contraceptives") (emphasis in original). In *Desilets*, for example, the landlord objected to entering into a contract that would facilitate the assertedly sinful conduct—fornication, a crime under G.L. c. 272, § 18—by providing the very place for its occurrence. Fontbonne cannot raise any concern here that it is enabling the creation of a marriage to which it objects. Matt was, and remains, a married man with or without a job at Fontbonne. Likewise, in *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. App. 1987) (en banc), the Court "accept[ed]" as a substantial burden that the university would be required to grant a gay student organization equal access to its facilities, including a grant of funds, subsidized office space, and use of the university name. *Id.* at 31-32 (ultimately finding burden outweighed by state's interest in nondiscrimination). In *New Life Baptist Church Acad. v. E. Longmeadow*, 885 F.2d 940 (1st Cir. Mass. 1989), a religious school believed that "it is a sin to 'submit' their educational enterprise to a secular authority for approval." *Id.* at 941. The Court ruled that the school was substantially burdened by being forced to comply with a state law that mandated private schools submit curriculum information to a local school committee for review. *Id.* at 944. The school in *New Life Baptist Church* was being forced to undertake the very conduct—active cooperation with a secular authority—that it believed was sinful.

In contrast, while respect must be accorded to Fontbonne's belief that the marriage of two men is contrary to its religious beliefs, Fontbonne simply has nothing to do with Matt's marriage.

Matt did nothing more than fill out an emergency contact form with the information requested by the school for a job that is unrelated to his marital choice. The application of the sexual orientation nondiscrimination law would not pressure Fontbonne to take, or refrain from taking, any actions with respect to the creation of Matt's marriage. Fontbonne is not forced to undertake any action, let alone steps that are remotely similar to the act of facilitating objectionable conduct on its property, the act of furnishing facilities and funds, the act of reporting to the State, or the act of providing contraceptives.

Because Fontbonne cannot show that Matt's presence in the workplace substantially burdens its religious exercise, this Court need go no further in considering its free exercise defense. Even if the Court were to find a substantial burden, however, any burden on the school is too slight and oblique to outweigh the State's compelling interest in eradicating discrimination on the basis of sexual orientation and sex in employment. *See* §§ C, D (discussing state's compelling interests) and E (discussing balancing of the nature of the burden and the state's interests), *infra*.

C. Massachusetts Has a Compelling Interest in Eradicating Employment Discrimination on the Basis of Sexual Orientation and Sex.

It is beyond serious question that the eradication of employment discrimination against groups that have been subjected to systemic discrimination is "an unusually important governmental goal." *See Desilets*, 418 Mass. at 323. General Law c. 151B was enacted in 1946 because the Legislature viewed employment discrimination as a "'hideous evil' that needs to be 'extirpated.'" *Flagg*, 466 Mass. at 28.[19] The State's interest in eradicating discrimination serves

[19] Quoting Report of the Governor's Committee to Recommend Fair Employment Practice Legislation, 1946 House Doc. No. 400, at 7.

not only to prevent injury to individuals, but also to advance vital societal interests. *See id.* at 28-29 ("workplace discrimination harm[s] not only the targeted individuals but the entire social fabric" and is "harmful to 'our democratic institutions.'").[20] *See also Roberts v. United States Jaycees*, 468 U.S. 609, 625-626 (1984) (antidiscrimination statute "protects the State's citizenry from a number of serious social and personal harms," including the removal of barriers to "social integration that have historically plagued certain disadvantaged groups").

The State's compelling interest in eliminating historic inequality is well established in our jurisprudence. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (compelling interest in eradication of race discrimination where university had religiously-based ban on interracial dating); *Roberts*, 468 U.S at 626 (compelling interest in eradication of gender discrimination in context of exclusion of women from all-male civic organization); *Nathanson v. Commonwealth*, 2003 Mass. Super. LEXIS 293, *20, *22 (Mass. Super. Ct. 2003) ("Statutes enacted for purposes of abating discrimination, such as the Massachusetts Public Accommodation statute, serve compelling state interests" and noting "[t]he Commonwealth's compelling interest in abating gender discrimination").[21]

A person's sexual orientation is a core aspect of identity; it has also been the basis of historic condemnation and exclusion. *See* §§ 1 and 2, *infra*. For these reasons, courts to address the issue have found that sexual orientation discrimination fits squarely within the compelling governmental interest framework. *See N. Coast Women's Care Med. Group, Inc. v. Super. Ct.*, 44 Cal. 4th 1145, 1158 (2008) (in case where physician refused assisted reproductive medical

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[20] Quoting Report of the Special Commission Relative to the Matter of Discrimination Against Persons in Employment Because of Their Race, Color, Religion or Nationality, 1945 House Doc. No. 337, at 2.

[21] In light of U.S. Supreme Court precedent establishing the State's compelling interest vis-à-vis sex discrimination, plaintiff will not address that point further.

treatment to lesbian based on religious views, the nondiscrimination law "furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation"); *Gay Rights Coal.*, 536 A.2d at 33-35 (ban on sexual orientation discrimination represents a compelling state interest because sexual orientation is a "basic component of a person's identity" (citation omitted) and "[d]espite its irrelevance to individual merit, a homosexual or bisexual orientation invites ongoing prejudice in all walks of life"); *Irish-American Gay v. City of Boston*, 1993 Super. LEXIS 320, *42-43 (Mass. Super. Ct. 1993) (finding a state's interest in eradicating sexual orientation discrimination compelling and citing *Roberts v. United States Jaycees*, *supra*). This compelling interest is, in fact, reflected in the actions taken by every branch of our government to eliminate the stain of condemnation and inequality experienced by gay and lesbian people in Massachusetts. *See* § 3, *infra* and *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 341 (2003) (noting the "persistent prejudices against persons who are (or who are believed to be) homosexual," and observing the "strong affirmative policy of preventing discrimination on the basis of sexual orientation"). The existence of a compelling state interest is a question of law. *See McRae v. Johnson*, 261 Fed. Appx. 554, 557 (4th Cir. 2008) (per curiam); *Gay Rights Coal.*, 536 A.2d at 33.

1. Gay and Lesbian People Have Been Subjected to a History of Harsh Oppression and Systemic Discrimination.

The State has a compelling interest in eradicating both the history—and the ongoing legacy—of the condemnation of gay and lesbian people. "'[G]ay persons share a history of persecution comparable to that of blacks and women.'" *See Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 177 (2008), quoting *Snetsinger v. Montana Univ. Sys.*, 325 Mont. 148, 163-164 (2004). *See also In re Marriage Cases*, 43 Cal. 4th 757, 841 (2008) ("[o]utside of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained

hostility … as homosexuals") (citation and internal quotations omitted). It is a shameful history that has been recognized by the Supreme Court and leading scholars. *See, e.g., Obergefell v. Hodges*, 2015 U.S. LEXIS 4250, *18-20 (U.S. 2015) (summarizing history of discrimination); *Lawrence*, 539 U.S. at 571 (2003) ("for centuries there have been powerful voices to condemn homosexual conduct as immoral"); R. Posner, *Sex and Reason* (Harvard University Press 1992) c. 11, p. 291 ("[f]or centuries, the prevailing attitude towards gay and lesbian people has been one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment.").[22]

Gay and lesbian people have been criminalized, pathologized, and subjected to harassment and the denial of legal protection in virtually every sphere of life. The criminalization of love and affection was possible because sodomy laws, in effect in all fifty states until 1961, made sexual acts with loved ones illegal. *See* G.L. c. 272, § 34 (prohibiting the "abominable and detestable crime against nature") and G.L. c. 272, § 35 (prohibiting "any unnatural and lascivious

[22] The legal precedent recognizing the history of discrimination against gay and lesbian people is too numerous to cite exhaustively. It includes: *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) ("homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than … rationality.'" (citation omitted); *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014) ("homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world"); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("[W]e do agree that homosexuals have suffered a history of discrimination"); *Whitehead v. Wolf*, 992 F. Supp. 2d 410, 427 (M.D. Pa. 2014) ("Within our lifetime, gay people have been the targets of pervasive police harassment, including raids on bars, clubs, and private homes; portrayed by the press as perverts and child molesters; and victimized in horrific hate crimes. . . prevented from adopting and serving as foster parents . . . [and subjected to] the widespread and enduring criminalization of homosexual conduct.") (citation omitted); *Varnum v. Brien*, 763 N.W.2d 862, 889 (Iowa 2009) ("The long and painful history of discrimination against gay and lesbian persons is epitomized by the criminalization of homosexual conduct in many parts of this country until very recently" and noting the exclusion from the military, and victimization through school bullying and hate crimes).

act with another person").[23] In addition, gay and lesbian people were "prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate." *Obergefell*, 2015 U.S. LEXIS 4250 at *19.[24] Homosexuality was classified as a mental disorder until 1973, *id.* at 7, and gay people were sometimes subjected to gruesome "therapies" to change their orientation, such as aversion therapy, castration, hysterectomy, lobotomies, electroshock treatment, and the administration of untested drugs. *See* John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970*, 14, 17-18 (1983). In the face of stigma and discrimination, violence against gay and lesbian people has been commonplace.[25]

Gay and lesbian people were also harmed by the lack of any legal relationship to each other. The lack of legal recognition of loving and committed relationships had devastating consequences, leaving couples with the inability even to control the disposition of the remains of a loved one.[26] And, as our Supreme Judicial Court recognized in its historic decision, the

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[23] The Supreme Judicial Court did not rule until 1974 that such laws could not be enforced against private, consensual conduct of adults. *See Commonwealth v. Balthazar*, 366 Mass. 298, 302 (1974).

[24] *See, e.g., Boutilier v. INS*, 387 U.S. 118, 120 (1967) (legislative history of Immigration and Nationality Act of 1952 "indicate[d] beyond a shadow of a doubt that Congress intended the phrase 'psychopathic personality' to include homosexuals" and labeled homosexuals ill); *Gay Rights Coal.*, 536 A.2d at 34-36 (discussing exclusion in the 1950s of gay and lesbian people from federal employment because they were regarded as "moral perverts" and "sex perverts," a ban not lifted until 1975).

[25] The United States Surgeon General estimates that 45% of gay people have been threatened with violence as a result of their sexual orientation, and 17% have been physically attacked. U.S. Surgeon General, *The Public Health Problem,* The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior, at 4 (July 9, 2001), *available at* http://www.ncbi.nlm.nih.gov/books/NBK44225/ (last viewed July 23, 2015). Likewise, the Surgeon General estimates that 80% of gay people have been verbally or physically harassed. *Id.*

[26] In one such case, Jon Reilly and Kevin Clarke were in a committed, long-term relationship when, in 1987, Reilly suddenly became ill and died of AIDS. Although Reilly had been clear about his desire to be cremated—a desire that was transcribed by a doctor into Reilly's medical

exclusion from marriage denied gay and lesbian people the substantial, tangible protections of that status and excluded them "from the full range of human experience and . . . [the] full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.'" *Goodridge*, 440 Mass. at 326 (citing *Baker v. State*, 170 Vt. 194, 229 (1999)).

Base stereotypes and unfounded fears pervaded Massachusetts politics in the 1970s and 80s. In 1985, the Governor removed two foster children from the home of a gay couple who had provided them a loving and stable home, a policy that was only overturned after litigation resulted in a settlement. *See* Dudley Clendinen, *Curbs Imposed On Homosexuals As Foster Parents*, N.Y. Times, May 25, 1985; *The Best Interest of Children: Babets v. Johnston*, GLAD History Timeline, *available at* http://www.glad.org/about/history/babets-v-johnston (last viewed July 28, 2015).

Legislators openly denigrated gay and lesbian people and invoked rank prejudice during the 17-year legislative process to pass a sexual orientation nondiscrimination law.[27] Opponents voiced the belief homosexuality was a "mental illness,"[28] that gay and lesbian people "recruit" and are "predatory,"[29] and openly referred to gay and lesbian people during floor debates as "fags and lesbos."[30]

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record—the hospital barred Clarke from executing Reilly's wishes and gave custody of the body to Reilly's estranged mother. *See* Gary Buseck, *Keynote Address: Civil Marriage for Same-Sex Couples*, 38 New Eng. L. Rev. 495, 497 (2004).

[27] *See generally* Peter M. Cicchino et al., *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 Harv. C.R.-C.L. L. Rev. 549, 563 (1991).

[28] *See* remarks of Representative Charles Long, State House News Service, House, Oct. 11, 1977, at 3, cited at *Sex, Lies and Civil Rights*, *supra* note 27 at 573 n. 126.

[29] *See* remarks of Representative William Connell, State House News Service, House, Nov. 17, 1987, at 3-5, cited at *Sex, Lies and Civil Rights*, *supra* note 27 at 574 n. 128.

[30] *See* remarks of Senate opponent Joseph Walsh (D-Boston), U.P.I. Oct. 10, 1983, cited at *Sex, Lies and Civil Rights*, *supra* note 27 at 572 n. 122.

The State's goal to wipe out the ongoing legacy of past exclusion, inequality, and social condemnation is indisputably a compelling governmental interest.

2. Sexual Orientation is an Immutable Characteristic and a Core and Fundamental Aspect of Identity.

Once reviled as criminals, perverts, and mentally disordered, gay and lesbian people are now acknowledged to be a "very real segment of the community," *Goodridge*, 440 Mass. at 341, who are "our neighbors, our coworkers, [and] our friends" with whom we share "a common humanity." *Id.* at 349 (Greaney, J., concurring). Sexual orientation, like race and sex, is an immutable characteristic. *See Obergefell*, 2015 U.S. LEXIS 4250 at *618, *622 ("sexual orientation is both a normal expression of sexuality and immutable," and the Constitution accords gay and lesbian people the right to "define and express their identity"); *Gay Rights Coal.*, 536 A.2d at 34 ("There is no reliable evidence that adult homosexual sexual orientation—the attempt is never made in the opposite direction—can be cured.") (quotation omitted). Sexual orientation is universally understood by courts to be "fundamental and central to one's identity," *see Pedersen v. OPM*, 881 F. Supp. 2d 294, 235 (D. Conn. 2012), and essential to a person's "right to self-determination." *Kerrigan*, 289 Conn. at 186 (2008).[31]

In *Lawrence*, the Supreme Court recognized that sexual orientation is an aspect of identity that the Constitution protects. *Lawrence* describes the intimate conduct of gay and

[31] *See also Baskin v. Bogan*, 766 F.3d 648, 657 (7th Cir. 2014) ("[T]here is little doubt that sexual orientation . . . is an immutable (and probable innate, in the sense of in-born) characteristic, rather than a choice"); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (sexual orientation is "so fundamental to [one's] identit[y]"); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 991 (S.D. Ohio 2013) ("There is now broad medical and scientific consensus that sexual orientation is immutable."); *Golinski v. United States Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012) ("[C]onsensus in the scientific community is that sexual orientation is an immutable characteristic."); *In re Marriage Cases*, 43 Cal.4th 757, 842 (2008) ("sexual orientation is so integral an aspect of one's identity").

lesbian people as "one element in a personal bond that is more enduring," and emphasizes that "[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice." *Lawrence*, 539 U.S. at 567. It is particularly noteworthy that *Lawrence* includes gay and lesbian people within "our laws and traditions" that afford "constitutional protection to personal decisions relating to marriage . . . [and] family relationships." *Id.* at 574, citing *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion). *See also Obergefell* (Fourteenth Amendment requires states to license marriages of same-sex couples, emphasizing *Lawrence*'s fundamental view that the personal bonds formed by gay and lesbian people are entitled to constitutional protection); *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (invoking *Lawrence* to rule that the Federal Defense of Marriage Act "demeans the couple, whose moral and sexual choices the Constitution protects").

In *Goodridge,* the Supreme Judicial Court invoked under the Massachusetts Constitution the "core concept of [the] common human dignity" of gay and lesbian people articulated in *Lawrence*. *Goodridge*, 440 Mass. at 313. It affirmed that gay and lesbian people are entitled to the "dignity and equality of all individuals" and may not be denied access to the "community's... rewarding and cherished institutions." *Goodridge*, 440 Mass. at 312-313.

3. The State Has Taken Significant Steps to Remedy Past Inequality and Has a Compelling Interest in Eradicating the Ongoing Discrimination and Stigma Faced By Gay and Lesbian People.

The State has demonstrated its compelling interest in eradicating sexual orientation discrimination through the significant—though unfinished—steps it has taken to remedy the inequality and exclusion of the past. Since the 1970s, our state has been on a journey to eliminate the myriad barriers to the full inclusion and participation of gay and lesbian people, a journey in which every branch of government has participated. In 1989, Massachusetts became the second

state to add protections to our nondiscrimination law on the basis of sexual orientation.[32] The Commonwealth, however, has done far more than add sexual orientation to the standard categories of our nondiscrimination statute. The Legislature, for example, added sexual orientation to the hate crimes statute.[33] It also added sexual orientation to the educational nondiscrimination laws and a law aimed at preventing school-based bullying.[34] It repealed the law prohibiting same-sex couples who live outside of Massachusetts from marrying here, and ensured equal health care coverage to married same-sex spouses at a time when they were otherwise excluded from federal benefits under the Federal Defense of Marriage Act.[35] The Executive Branch also had occasion to remove barriers to equality.[36] In addition our courts, for example, have rejected the criminalization of same-sex intimacy, *see Commonwealth v. Balthazar*, n. 23, *supra*; recognized the right of adoption by the non-biological parent in a same-sex relationship, *see Adoption of Tammy,* 416 Mass. 205, 214-215 (1993); and, in the historic

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[32] *See* St. 1989, c. 516, An Act Making it Unlawful to Discriminate on the Basis of Sexual Orientation (adding "sexual orientation" to nondiscrimination provisions of G.L. c. 151B, § 4 in employment, housing, credit and services and c. 272, §92A and 98 for public accommodations).

[33] *See* St. 1996, c. 163, § 2, codified at G.L. c. 265, § 39 (punishments for bias-motivated crimes committed on the basis of sexual orientation).

[34] *See* St. 1993, c. 282, codified at G.L. c. 76, § 5 (prohibiting discrimination "in obtaining the advantages, privileges and courses of study of [a public school] on account of … sexual orientation"); G.L. c. 71, § 37O (including sexual orientation in requirement that school anti-bullying plans identify groups of "students [who] may be more vulnerable to becoming a target of bullying or harassment").

[35] St. 2008 c. 216 (repealing G.L. c. 207, §§ 11-12); St. 2008 c. 217, the Massachusetts Health Equality Act, codified at G.L. c. 118E, § 61.

[36] Executive Order No. 340 Providing for Non-Discriminatory Benefit Policies for Employees of the Commonwealth (Sept. 23, 1992) (ordering elimination of sexual orientation discrimination in state employee benefits); Executive Order No. 341 Providing for Non-Discriminatory Visitation Privileges of Inmates, Patients and Residents of State Facilities (Sept. 23, 1992) (requiring that in "all state and county prisons, jails, hospitals, or other residential facilities, the visitation privileges for persons having a relationship of mutual support with inmates, patients, or residents are the same as" for spouses).

Goodridge decision, ruled that exclusion of same-sex couples from marriage is unconstitutional and "works a deep and scarring hardship on a very real segment of the community." *Goodridge*, 440 Mass. at 341.

In spite of those significant steps, the profound harm from decades of social condemnation is hardly a relic of the past. In 2014, the Massachusetts Commission Against Discrimination received 114 complaints of sexual orientation discrimination.[37] As with the history of discrimination against racial minorities, women, or people with disabilities, for example, laws and judicial decisions do not wipe out deeply entrenched biases and social hostility.[38] *See, e.g.*, *Commonwealth v. Delp*, 41 Mass. App. Ct. 435, 436-437 (1996) (post-conviction evidence from juror that he considered defendant not guilty until defendant took the stand and juror perceived defendant to be homosexual based on his "dialect," after which he "accepted [the] Commonwealth's testimony as Gospel," and found defendant "guilty solely on his apparent homosexuality"). In fact, the ongoing stigma of same-sex intimacy and the defamation of gay and lesbian people is explicit in our laws. The "abominable and detestable crime against nature," G.L. c. 272, § 34, remains on the books of the Commonwealth today, in spite of bills introduced to repeal it.[39] Our nondiscrimination law is sullied by the repeated

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[37] *See* Massachusetts Commission Against Discrimination, *2014 Annual Report*, at 9, (2014), *available at* http://www.mass.gov/mcad/documents/2014-MCAD-Annual-Report.pdf (last viewed July 23, 2015).

[38] *See* Joanna Almeida et al., *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38 J Youth Adolescence 1001, 1002 (2009) (although "attitudes towards same-sex relationships have generally become more favorable," "social stigma associated with homosexuality, as well as toward deviation from socially-prescribed gender roles, remains pervasive, particularly for young people").

[39] *See, e.g.*, An Act Abolishing Certain Laws of the Commonwealth, H. 3357 (2003), (refiled 2005); An Act Relative to the Reform of Archaic Laws Implicating Certain Private Consensual Intimate Conduct Between Adults, H. 492 (2011); An Act Relative to the Reform of Archaic

inclusion after the term "sexual orientation" of the modifier "which shall not include persons whose sexual orientation involves minor children as the sex object." *See, e.g.*, G.L. c. 151B, § 4(1).

Societal stigma has far-reaching impact. Research on sexual orientation discrimination has found that "stigma, prejudice and discrimination create a stressful social environment that can lead to mental health problems" and "leads [lesbian, gay, and bisexual] persons to experience alienation, lack of integration with the community, and problems with self-acceptance."[40] One literature review concluded that "[f]or decades, social scientists have documented serious negative health consequences of the stigma of homosexuality."[41] A 2003 study noted that gay and lesbian people face "stressors that are unique to their sexual orientation" and found that "gay-related stress contribute[s] independently to depressive symptoms."[42] This minority stress occurs both as a result of specific negative and discriminatory events and also "from the totality of the minority person's experience in dominant society." Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. Health & Social Behavior 38, 39 (1995).

The health impact of discrimination has been sufficiently severe to warrant the attention of the Surgeon General. Reviewing the relevant literature addressing sexual orientation

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Laws Implicating Certain Private Consensual Intimate Conduct Between Adults, H. 1592 (2013-2014); An Act To Repeal Certain Statutes That Are Unconstitutional, H. 1673 (2013-2014).

[40] Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psychol. Bull. 674, 679 (2003). These negative health outcomes have been identified as byproducts of "minority stress," "the excess stress to which individuals from stigmatized social categories are exposed as a result of their social… position." *Id.* at 677.

[41] Eric R. Wright & Brea L. Perry, *Sexual Identity Distress, Social Support, and the Health of Gay, Lesbian, and Bisexual Youth*, 51(1) J. Homosexuality 81, 83 (2006).

[42] Robin J. Lewis et al., *Stressors for Gay Men and Lesbians: Life Stress, Gay-Related Stress, Stigma Consciousness, and Depressive Symptoms*, 22 J. Soc. & Clinical Psychol. 716, 725 (2003).

discrimination, the Surgeon General has concluded that the stigmatization of "homosexual behavior, identity and relationships … [is] associated with psychological distress for homosexual persons and may have a negative impact on mental health, including a greater incidence of depression and suicide, lower self-acceptance and a greater likelihood of hiding sexual orientation."[43]

The legacy of ongoing discrimination and stigma has a particularly injurious impact on gay and lesbian youth. One study noted gay and lesbian youth "are more likely than heterosexual adolescents to exhibit symptoms of emotional distress, including depressive symptoms, suicidal ideation, and suicide attempts,"[44] which may be linked to "stressors related to having a stigmatized identity."[45] In fact, recent Massachusetts data indicates that almost a quarter of lesbian, gay, and bisexual youth in Massachusetts attempted suicide one or more times in the previous year, compared to 4.2% of heterosexual youth.[46] More than 10% of lesbian, gay, and bisexual high school students in Massachusetts are homeless, compared to 3% of heterosexual students.[47] And lesbian, gay, and bisexual youth in Massachusetts are more than five times as

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[43] U.S. Department of Health & Human Services, *Mental Health: Culture, Race, and Ethnicity, A Supplement to Mental Health: A Report of the Surgeon General*, at 38 (2001), *available at* http://www.ncbi.nlm.nih.gov/books/NBK44243/.

[44] Almeida, *supra* note 38 at 1001.

[45] Almeida, *supra* note 38 at 1002.

[46] *2013 Youth Risk Behavior Survey Results, Massachusetts High School Survey, Risk Behaviors and Sexual Identity Report*, at 3 (2013), *available at* http://www.mass.gov/cgly/2013MAH%20Sexual%20Identity.pdf (last viewed June 11, 2015).

[47] *2013 Youth Risk Behavior Survey Results*, *supra* note 46 at 3.

likely to have skipped school in the past month because of feeling unsafe compared to their heterosexual peers.[48]

The impact of ongoing stigma and disapproval is also reflected in the continued disproportionate number of hate crimes experienced by gay and lesbian people. In 2012, 27.3% of hate crimes in Massachusetts were motivated by sexual orientation bias.[49] In fact, in 2013, the Violence Recovery Program at Fenway Health in Boston documented 44 incidents of anti-lesbian, gay, bisexual, and transgender bias and hate violence, which was an increase of more than 50% over the number of reported incidents in 2012.[50]

The State has a compelling interest not only in fulfilling the aspiration of dignity and equality for all of its citizens, but also in ensuring that stigma and discrimination do not impair the health, safety, and welfare of gay and lesbian people.

4. The State Has a Uniquely Strong Interest in Eliminating Employment Discrimination.

While the State has a compelling interest in eradicating discrimination in all of the areas covered by Massachusetts law, the State has a unique and amplified interest in ensuring that people are not denied jobs for which they are qualified due to discrimination. Income inequality is a societal concern of the highest order. Without an income the ability to live independently and

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[48] *Massachusetts High School Students and Sexual Orientation, Results of the 2013 Youth Risk Behavior Survey*, (2013), *available at* http://www.mass.gov/cgly/YRBS13_FactsheetUpdated.pdf (last viewed June 11, 2015).

[49] Massachusetts State Police Commonwealth Fusion Center Crime Reporting Unit, *Hate Crime in Massachusetts 2013*, at 5 (2014), *available at* http://www.mass.gov/eopss/docs/eops/hate-crime-2013-final.pdf (last viewed May 29, 2015).

[50] Osman Ahmed & Chai Jindasurat, *A Report from the National Coalition of Anti-Violence Programs: Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2013: 2014 Release Edition*, at 114 (2013), *available at* http://avp.org/storage/documents/2013_ncavp_hvreport_final.pdf (last viewed July 23, 2015).

free of government assistance becomes for all but a few impossible. In addition, without an income, access to other areas protected under our nondiscrimination law, such as housing, credit, and public accommodations, becomes secondary and onerous. The State's interest in employment nondiscrimination goes further. The State utilizes private employment as a key component of the social safety net. The state and federal governments create tax and other incentives for the provision of important health and welfare benefits—including health insurance and retirement funds—through employer-based welfare benefit plans.[51] The State has a compelling and unique interest in ensuring access to an income unfettered by biases and intolerance.

D. The State Has a Compelling Interest in Protecting the Status of Marriage and Preventing the Denigration of One Class of Marriages.

1. Discrimination Against Same-Sex Married Couples Undermines the State-Created Social Safety Net.

This case involves discrimination against a gay man solely because he entered into a status that the State itself has created in order to fulfill vital societal objectives. The "government creates civil marriages" in order to "bring stability to our society" and "enhance[] the welfare of the community." *See Goodridge*, 440 Mass. at 312, 321, 322. Marriage is a "keystone of our social order" and a "building block of our national community." *See Obergefell*, 2015 U.S.

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[51] *See EBRI Databook on Employee Benefits*, Employee Benefit Research Institute, at 1 (Mar. 2011), *available at* http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2001.pdf (last viewed July 27, 2015) (discussing employee welfare benefits such as health insurance, 401(k) plans, and flexible spending health insurance accounts) ("The U.S. employee benefit system is a partnership among businesses, individuals, and the government. Most employment-based benefits, such as pensions and health insurance, are provided voluntarily by businesses. The government supports these voluntary employment-based benefits by granting them favorable tax treatment. Certain other benefits, including Social Security, unemployment insurance, workers' compensation, and family and medical leave, are mandatory.").

LEXIS 4250 at *31-32. It involves both responsibilities to each other and protection and support from society and the government. *See Obergefell*, 2015 U.S. LEXIS 4250 at *32-33 ("just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union"). In furtherance of that state goal, civil marriage provides an "abundance of legal, financial, and social benefits" and also "imposes weighty legal, financial, and social obligations" to ensure that "children and adults are cared for and supported whenever possible from private rather than public funds." *Goodridge*, 440 Mass. at 322. *See also Obergefell*, 2015 U.S. LEXIS 4250 at *33 (noting that throughout history, marriage has been the "basis for an expanding list of governmental rights, benefits, and responsibilities"). Given the weighty reliance of the state on access to marriage to ensure that individuals are not dependent on public funds for their welfare, the State has a particularly compelling interest in ensuring that individuals are not deterred from marrying—indeed, penalized for their marriage—by invidious discrimination.

2. The State Has a Compelling Interest in Preventing the Stigmatization and Second-Class Treatment of the Marriages of Same-Sex Couples.

The State's interest in marriage is far more than the granting of a license. Marriage is a "vital social institution" and "one of our community's most rewarding and cherished institutions." *Goodridge*, 440 Mass. at 312-313. It is a constitutionally protected status that is of "transcendent importance" and "essential to our most profound hopes and aspirations." *Obergefell*, 2015 U.S. LEXIS 4250 at *12. The decision to give same-sex couples the right to marry "conferred upon them a dignity and status of immense import" and "a relationship deemed by the State worthy of dignity in the community equal with all other marriages." *See Windsor* 133 S. Ct. at 2692. *See also Obergefell*, 2015 U.S. LEXIS 4250 at *27 ("There is dignity in the

bond between two men or two women who seek to marry and in their autonomy to make such profound choices."). As the Supreme Judicial Court has observed, "[i]t is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a 'civil right.'" *Goodridge* 440 Mass. at 325, quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

Decisions of the Supreme Court and Supreme Judicial Court establish that the State has an interest of the highest order in preventing the stigmatization and denigration of marriages. *See Goodridge*, 440 Mass. at 312 ("The Massachusetts constitution affirms the dignity and equality of all individuals. It forbids the creation of second class citizens."). Just months after the *Goodridge* decision, the Court ruled that the Legislature could not grant same-sex couples "civil unions," with all the tangible benefits of marriage, rather than marriage. *See Opinion of the Justices*, 440 Mass. 1201 (2004). The Court ruled that the Legislature could not constitutionally "relegate same-sex couples to a different status" or assign same-sex couples "to a second-class status," because doing so "would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits." *Id.* at 1206-1208. Granting permission for certain religious schools to engage in overt discrimination against one class of marriages – those of same-sex couples – creates the same constitutionally impermissible stigmatization. The State has a compelling interest in avoiding such harm.

Similarly, as the Supreme Court noted in *Obergefell*, the Court previously struck down the Defense of Marriage Act because it "impermissibly disparaged those same-sex couples 'who wanted to affirm their commitment to one another before their children, their family, their friends and their community.'" *Obergefell*, 2015 U.S. LEXIS 4250 at *22, quoting *Windsor*, 133 S. Ct. at 2689. *See also Windsor*, 133 S. Ct. at 2694 (Defense of Marriage Act "places same-sex

couples in an unstable position of being in a second-tier marriage" which "demeans the couples... whose relationship the state has sought to dignify"). Like *Obergefell*, the decisions in *Romer*, *Lawrence*, and *Windsor* before it all rejected laws that "demean" gay people's "existence or control their destiny," *Lawrence*, 539 U.S. at 578, that "impose inequality" through "disadvantage, a separate status, and so a stigma" on same-sex relationships. *Windsor*, 133 S. Ct. at 2693-2694.

The State's interest in preventing the stigmatization of the marriages of same-sex couples goes beyond the interests of the couple. The Supreme Court recognized in *Obergefell* that "[b]y giving recognition and legal structure to their parents' relationship, marriage allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'" *Obergefell*, 2015 U.S. LEXIS 4250 at *30, quoting *Windsor,* 133 S. Ct. at 2694. "Without the recognition, stability, and predictability marriage offers, [same-sex couples'] children suffer the stigma of knowing their families are somehow lesser." *Obergefell*, 2015 U.S. LEXIS 4250 at *30-31.

There is no greater stigmatization and denigration than being subjected to overt discrimination in the eyes of one's community, family, and children. There can be no greater statement that one's marriage—indeed one's choice about how to "shape ...[one's] individual[] destiny," *Obergefell*, 2015 U.S. LEXIS 4250 at *27,—is inferior and second class than being told that your marriage, and only your type of marriage, is not welcome here. The State has conferred upon same-sex couples a status of enormous dignity—indeed, a civil right and constitutionally protected fundamental right. The State has a compelling interest in ensuring that the individuals in those marriages are not demeaned, separated, and rendered second-class citizens by overt discrimination.

E. Any Burden on Fontbonne's Religious Exercise in This Case is Too Limited to Outweigh the Compelling State Interests at Stake.

The Court's next "task is to balance the State's interests against the nature of the burden" on Fontbonne. *See Desilets*, 418 Mass. at 331; *see also* discussion of *Desilets* and *Curtis* in Section B, *supra.* A constitutional balancing of interests is a question of law. *See Lewis v. City of Boston*, 321 F.3d 207, 218 (1st Cir. 2003) (in free speech context).

Any burden on Fontbonne is slight and tangential at best and cannot overcome the State's multiple weighty interests at stake here. Matt Barrett's job duties have nothing to do with any religious facet of Fontbonne's education program. He is not even in a classroom. The presence in the workplace of a person whose job is unrelated to religion, but who outside of his job has done nothing more than enter into a lawful status conferred by the State, falls at the weakest end of the spectrum of matters that may implicate free exercise concerns.

In analyzing the nature and severity of any burden here, it is therefore helpful to consider what this case does not involve. First, this case does not involve the State's interference with faith, doctrine, or ecclesiastical matters of church governance. It is beyond cavil that a Court could not direct a church or clergyperson to perform any marriage or otherwise interfere with "church disputes touching on matters of doctrine, canon law, polity, discipline, and ministerial relationships." *Soc'y of Jesus*, 441 Mass. at 667, quoting *Williams v. Episcopal Diocese of Mass.*, 436 Mass. 574, 579 (2002); *Alberts v. Devine*, 395 Mass. at 72 ("First Amendment prohibits civil courts from intervening in disputes concerning religious doctrine, discipline, faith, or internal organization").

Second, this case does not involve an employee of a church or of an exclusive religious community. *See Bob Jones*, 461 U.S. at 604 n.29 ("We deal here only with religious *schools*—not with churches or other purely religious institutions") (emphasis supplied). Rather, Fontbonne

is an independently operated college preparatory secondary school; in fact, a majority of its trustees are not affiliated with the Sisters of Saint Joseph. Facts ¶¶ 1-6. It hires and admits students of any faith and does not require that students adhere to any religious beliefs. Facts ¶¶ 8-11, 22. *Cf. Bob Jones*, 461 U.S. at 580 (state's interest outweighed asserted burden on religion even where school was "dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs" and "teachers are required to be devout Christians" and "[e]ntering students are screened as to their religious beliefs").

Third, this case does not involve any interference with religious observance or practice. *See Desilets*, 418 Mass. at 331 (assessing landlord's objection to fornication by his tenants and stating that the case does not concern "participation in a formal religious activity"). Nor can Fontbonne raise any concern that it is facilitating or complicit in conduct it objects to on religious grounds. *See* § IV, B, *supra.*

Fourth, Matt Barrett's job as Food Services Director is not remotely within the contours of doctrines that immunize religious entities from discrimination suits by employees primarily involved in religious functions. The ministerial exception, for example, is a judicial doctrine developed to avoid infringements of free exercise rights. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 706, 710 (2012). In *Hosanna-Tabor*, the Supreme Court agreed with all of the Courts of Appeal that had decided the issue that a ministerial exception exists to protect "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor,* 132 S. Ct. at 710. *See also Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 463 Mass. 472, 482 (2012) (following reasoning of and quoting extensively from *Hosanna-Tabor*). While the Supreme Court declined to adopt a "'rigid formula for deciding when an employee qualifies

as a minister,'" it focused on job duties and training, including one's title, degree of religious training, role in teaching religion as part of one's job duties, and the performance of religious functions for a church. *See Temple Emanuel*, 463 Mass. at 485-486, quoting *Hosanna-Tabor*, 132 S. Ct. at 707-708; *see also Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring) (employees whose "functions are essential to the independence of practically all religious groups" include "those who are entrusted with teaching and conveying the tenets of the faith to the next generation"). Courts have used other doctrinal tools as well to protect the right to determine who conveys religious values and traditions. For example, in *Piatti v. Jewish Cmty. Ctrs.*, 1993 Mass. Super. LEXIS 328 *3, *19 (Mass. Super. Ct. 1993), the Court found that being Jewish was a bona fide occupational qualification for a job that required providing Jewish students with an understanding of "self-definition as Jews" and "positive associations with Jewish experiences."

In this case, the position of Food Services Director does not come close to satisfying the criteria of that doctrine. No religious training is required for the position and, as Fontbonne's Head of School explained, positions such as a history teacher or Food Services Director do not need to be held by practicing Catholics because those staff "are not formally presenting the gospel values or the … teachings of the Catholic Church." Facts ¶¶ 12-14. In light of Matt Barrett's job duties, Fonbonne is not likely invoking that ministerial exception doctrine when it characterizes all of its employees—from groundskeeper to Head of School—as "ministers of the mission." In any event, Fontbonne can no more decide for itself that a job falls within the scope of a judicially crafted exception than it can decide that an employee is instead an independent contractor.

Turning to what this case does involve, this court must examine "[t]he precise nature of th[e] claimed burden." *Hernandez v. Comm'r*, 490 U.S. 680, 698 (1989). In addition, the relevant inquiry is not the impact of the statute upon the institution, but the actual impact of the statute on the schools' exercise of its sincerely held religious beliefs. *See Mississippi College*, 626 F.2d at 488.

In that regard, Fontbonne's claim appears to boil down to the assertion that Matt's presence would contrast with what the school is teaching in the classroom and be confusing to the students. Facts ¶ 72. This claim falls of its own weight. Fontbonne is not at all constrained in the conveying of its religious beliefs.

In the balance, Fontbonne's assertion cannot weigh heavily as it lives in a pluralistic world; invites a pluralistic student body; teaches diversity as a value; prepares its students for the world as it is; and, perhaps most importantly, pledges not to discriminate on the basis of sexual orientation, accepts lesbians among its student body, and welcomes respectful debate among its students about the Church's beliefs, including marriage equality. Facts ¶¶ 9-29. Any burden is slight in comparison to the harm to the State's interests in enforcing its antidiscrimination laws if an exemption were granted.

An examination of the specific facets of Fontbonne's educational environment and program underscores these points. Fontbonne's claim that it is burdened by the mere presence of a married gay man might merit greater weight were it an exclusive religious community that prohibited the expression of contrary views in all respects. But Fontbonne is a school that prepares students for college and life in a global community, and emphasizes intellectual openness and critical thinking. Facts ¶¶ 20-29. It is unsurprising therefore that Fontbonne explicitly states that it eschews discrimination on the basis of sexual orientation and values

diversity of sexual orientation. Facts ¶¶ 16, 18. Rather than avoid subjects about social change in American society, Fontbonne teaches about marriage equality in the classroom. Facts ¶¶ 28-29. It would permit a student to write a paper supporting marriage equality. Facts ¶ 29. In fact, Fontbonne acknowledges that with respect to "homosexuality, sexual orientation, marriage for same-sex couples, or 'gay rights' … no particular questions or issues are deemed categorically impermissible" for exploration because "Fontbonne is a learning community." Facts ¶ 26. Beyond that, Fontbonne permits students to disagree respectfully with Catholic teaching. Facts ¶ 22. It "applauds" them for doing so and acknowledges that such disagreement does not threaten its mission. Facts ¶¶ 24-25. The nature of Fontbonne's asserted burden is therefore significantly diluted and undercut not only by Matt Barrett's job duties, but also by these characteristics and features of its educational environment which permit and laud the airing of diverse views on the subject upon which it bases its claim for exemption.

In further weighing of the interests of Fontbonne, it is noteworthy that the Head of School was uncertain about whether employing a married gay man would be problematic (even though she knew that the Church was opposed to marriage equality). Facts ¶¶ 54-55. The religious belief asserted – and any asserted burden – must be that of Fontbonne Academy. Yet, Fontbonne's Head of School, Mary Ellen Barnes, was "completely unsure" and had a "lack of certainty" about whether Matt Barrett's marriage precluded employment at the school. Facts ¶ 54. Matt's marriage was not immediately understood to be impermissible; if it were, Ms. Barnes would not have had to seek guidance from others outside of Fontbonne. Ms. Barnes requested guidance in making her decision from Suzanne Kearney, the Executive Director of the Corporation for Sponsored Ministries of Sisters of Saint Joseph of Boston. Facts ¶ 56. Ms. Barnes testified that it was her understanding from the conversation that Ms. Kearney also was not sure what the

appropriate decision should be. Facts ¶ 59. Ms. Kearney then spoke with one of the leaders of the Sisters of Saint Joseph in Boston who also did not provide a "yes or no" conclusion and "called [the situation] a dilemma." Facts ¶¶ 60-61.[52] Surely such uncertainty and hesitation must be weighed in the balance since it clearly suggests that Matt Barrett's presence could be envisioned by Fontbonne leadership as unproblematic.[53]

Finally, the weight of Fontbonne's burden is weakened even further when one looks at the "very specific doctrinal teachings" of the Church on Sacramental Marriage, specifically the Catechism of the Catholic Church and Canon Law, which Ms. Barnes testified she relied upon in making her decision. Facts ¶¶ 73-74.[54] She maintained that all Fontbonne employees must

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[52] It was only after speaking to the Superintendent of Schools for the Archdiocese of Boston that Ms. Kearney was told that Catholic schools cannot hire a spouse married to a person of the same sex and reported that to Ms. Barnes. Facts ¶¶ 62-63, 66.

[53] As Fontbonne's uncertainty reveals, the presence in the workplace of a gay man married to a person of the same sex is not necessarily regarded as an impediment to clarity about Church teachings. Fordham University recently congratulated the Chairman of its Theology Department on his marriage to a man, stating that "[w]hile Catholic teachings do not support same-sex marriage, we wish Professor Hornbeck and his spouse a rich life filled with many blessings on the occasion of their wedding in the Episcopal Church. Professor Hornbeck is a member of the Fordham community, and like all University employees, students and alumni, is entitled to human dignity without regard to race, creed, gender, and sexual orientation." A Fordham representative also emphasized that same-sex unions are "now the law of the land, and Professor Hornbeck has the same constitutional right to marriage as all Americans." John Burger, *Fordham University Theology Department Chairman Marries Another Man*, Aleteia, (July 4, 2015), *available at* http://www.aleteia.org/en/society/article/fordham-university-theology-department-chairman-marries-another-man-5835364719656960 (last viewed July 24, 2015).

[54] While a Court may not question the verity of religious doctrines or beliefs, *see United States v. Ballard*, 322 U.S. 78, 86 (1944), courts regularly examine the religious sources pointed to by those claiming a religious exemption or accommodation based on a sincerely held religious belief. *See, e.g., Sherbert*, 374 U.S. 398, 402 n.1 ("Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible"); *Yoder*, 406 U.S. at 218 (examining beliefs of Old Order Amish communities and concluding that secondary schooling "contravenes the basic religious tenets and practice of the Amish faith"); *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360-361 (3rd Cir. 1999) (police officers who assert religious mandate to wear

conform to these precepts. Facts ¶¶ 77-79. However, as Ms. Barnes acknowledged, a Catholic sacramental marriage requires a marriage between two baptized people. Facts ¶ 81. Non-Catholics who are legally married do not have a Catholic sacramental marriage, and yet could nonetheless work for the school, according to Ms. Barnes, as long as they were in heterosexual marriages. Facts ¶¶ 80-82. Ms. Barnes went further by agreeing that a marriage that does not meet the specifications of the Sacrament of Marriage is simply not a Catholic marriage and acknowledged that the Food Services Director does not need to be in a Catholic marriage. Facts ¶¶ 83-85. Like these non-Catholic marriages, Matt Barrett is also legally and civilly married, but not in a Catholic sacramental marriage. Fontbonne has not explained why Matt Barrett is any less eligible for employment at the school, or where the Catholic Catechism and Canon Law say anything in addition that speaks directly to his marriage.

An exemption from a state mandate for equal employment opportunity is an extraordinary step. Plaintiff is not aware of any 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. It would take an unusually harsh and severe burdening of religion to overcome any one, let alone the synergy, of state interests at stake here. This case does not present such a situation. It involves none of the types of issues that have approached the level of substantial free exercise questions. The burden on the school, if any, is clearly outweighed by the compelling interests at stake here.

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beards citing provisions of the Quran and Sunnah, the detailed explanation of the injunctions contained in the Quran).

F. An Exemption That Permits Overt Discrimination Would "Substantially Hinder" the State's Goal of Nondiscrimination.

The final component of the *Desilets* analysis is a determination whether the granting of an exemption would "substantially hinder fulfillment of [the state's] goal." *Desilets*, 418 Mass. at 323.[55] It is plain that according Fontbonne the legal right to engage in otherwise unlawful discrimination substantially hinders the very goal of nondiscrimination.

The "least restrictive means" test does not require the government to compromise on the fulfillment of its objective. It does not mean that an exemption can be granted if the government can partially – or even mostly – fulfill its goal. Rather, the "least restrictive means" test inquires whether there is an alternative mechanism altogether that can achieve the same state end without burdening religion. In *Braunfeld v. Brown*, 366 U.S. 599 (1961), for example, the Court found that the Sunday closing laws were the least restrictive means to accomplishing the State's goal of a "weekly respite from all labor" because the religious objector's proposed "alternatives would not accomplish bringing about a general day of rest." *Braunfeld*, 366 U.S. at 607-608. S*ee also Hobby Lobby, supra* at n.1; *Sherbert*, 374 U.S. at 408 (discussing *Braunfeld* and stating that the "secular objective could be achieved, the Court found, only by declaring Sunday to be a day of rest"); *Boston Phoenix v. New England Tel. & Te. Co.*, 1996 Mass. Super. LEXIS 157, *40 (Mass. Super. Ct. 1996) (holding that there are less restrictive means of protecting minors from adult programming than presumptive blocking and reasoning that the inquiry is "whether there exists some alternative to presumptive [] blocking which alternative would effectively protect minors").

[55] While *Desilets* does not use the phraseology "least restrictive means," plaintiff assumes that cases interpreting that phrase are relevant to the "substantially hinder" concept in *Desilets*.

The State's interest in eradicating discrimination serves not only to prevent harm to individuals, but also to prevent a "hideous evil" from harming the "entire social fabric" and undermining our "democratic institutions." *Flagg*, 466 Mass. at 28-29. In this case, the State's specific interests relate to nondiscrimination, reducing the ongoing stigma of a same-sex sexual orientation, ensuring the vitality of marriage as a state-created social safety net, and preventing the denigration of marriages of same-sex couples. It is plain that the State's goals of nondiscrimination and avoidance of dignitary harms cannot be achieved by an alternative mechanism to the application of the nondiscrimination law. *See, e.g., Redhead v. Conference of Seventh-Day Adventists*, 440 F.Supp.2d 211, 221-222 (E.D. N.Y. 2006) (holding that Title VII is the least restrictive means of furthering the government's compelling interest in preventing discrimination).

CONCLUSION

For the foregoing reasons, Plaintiff Matthew Barrett respectfully requests that the Court enter summary judgment for him on Counts I and II of the Complaint.

Respectfully submitted,

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By his attorneys,

July 29, 2015
Dated

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CERTIFICATE OF SERVICE

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

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