COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

THE TRIAL COURT
SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. NOCV 2014-00751

MATTHEW BARRETT,
Plaintiff

v.

FONTBONNE ACADEMY,
Defendant

MEMORANDUM OF LAW IN SUPPORT OF FONTBONNE ACADEMY'S MOTION FOR SUMMARY JUDGMENT

Defendant Fontbonne Academy ("Fontbonne") seeks summary judgment on all counts of the plaintiff's Complaint. For the reasons discussed below, Fontbonne's motion should be allowed because the undisputed material facts of this case demonstrate that Fontbonne is entitled to judgment as a matter of law on either of two grounds. First, Fontbonne is entitled to judgment because it falls within the broad statutory exemption provided for religiously-affiliated groups in M.G.L. Chapter 151B. Second, Fontbonne is entitled to judgment because the application of Chapter 151B under the circumstances of this case would impermissibly infringe on Fontbonne's rights of expressive association under the First Amendment to the United States Constitution.[1]

[1] It is also Fontbonne's position that application of Chapter 151B would violate the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution, but Fontbonne does not press this argument at the summary judgment stage.

I. MATERIAL FACTS NOT IN DISPUTE

Fontbonne respectfully refers the Court to the Statement of Undisputed Material Facts in Connection with Fontbonne Academy's Motion for Summary Judgment filed separately with these motion papers.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is required where "the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56(c). Here, Fontbonne seeks summary judgment against the party that would bear the burden of proof at trial. It is therefore entitled to judgment in its favor upon showing "by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that [Mr. Barrett has] no reasonable expectation of proving an essential element of [his] case," *Kourouvacilis v. Gen'l Motors Corp.*, 410 Mass. 706, 716 (1991), or by showing that it has an absolute defense to the plaintiff's claims. *Mulgrew v. City of Taunton*, 410 Mass. 631, 634 (1991). It is not required to negate any of the elements of the plaintiff's claims, *id.*, but rather to demonstrate that, because the plaintiff "'cannot muster sufficient evidence to make out [her] claim[s], a trial would be useless and [Dr. Rice] is entitled to judgment as a matter of law.'" *Kourouvacilis,* 410 Mass. at 715, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (1986)(White, J., concurring).

In all cases, "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Id.* at 713, quoting *Celotex Corp.*, 477 U.S. at 323 (majority opinion). Discussing the cognate federal rule, the United States District

Court for the District of Massachusetts has noted that, where a defendant has moved for summary judgment, "[a] plaintiff may not obtain a trial merely on the allegations in [his] complaint, or by showing that there is 'some metaphysical doubt as to the material facts.'" *Burke v. Town of Walpole*, 2003 U.S. Dist. LEXIS 24895 at *18 (D. Mass. Oct. 8, 2003) citing *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-290 (1968) and quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Evidence that is "merely colorable or is not significantly probative" is unavailing for the non-movant who seeks to avoid summary disposition; *Burke v. Town of Walpole*, 405 F.3d 66, 76 (1st Cir. 2005) quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); and courts should "ignore any conclusory allegations, improbable inferences, and unsupported speculation." *Id.*

III. ARGUMENT

A. The plaintiff cannot recover in this case because Fontbonne's employment action was expressly permitted by the exemption for religiously-affiliated organizations contained within Massachusetts General Laws, Chapter 151B, § 4.

1. The undisputed facts of this case demonstrate that Fontbonne falls squarely within the exemption for religiously-affiliated organizations.

As it applies to this case, the Massachusetts anti-discrimination statute, Chapter 151B, declares that it is an unlawful practice for an employer "by himself or his agent, because of the ... sex ... [or] sexual orientation ... of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment, unless based upon a bona fide occupational qualification." M.G.L. ch. 151B, § 4(1). Recognizing that the state's interest in eliminating discrimination must yield under certain circumstances to the constitutional protections

afforded to religious employers, the Legislature has included specific religious exemptions in Chapter 151B. Those exemptions are applicable in this case; and they require judgment in favor of Fontbonne.

Section 4 of Chapter 151B sets out the Legislature's substantive prohibitions on discrimination in employment, housing, lending, and other areas. After describing in detail, in paragraphs 1 through 18, the types of conduct declared to be unlawful, the second un-numbered paragraph following paragraph 18 states that

> 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.**

As is plain from its language, Section 4 grants a broad exemption to qualifying entities from Chapter 151B's substantive prohibitions. For the exemption to apply, the entity at issue must be either a "religious or denominational institution or organization" or an "organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization." There is no legitimate dispute in this case that Fontbonne Academy is a Catholic college preparatory school within the Roman Catholic Archdiocese of Boston, and that it is operated as a Sponsored Ministry of the Congregation of the Sisters of St. Joseph of Boston. (Statement of Undisputed Material Facts ("SF"), ¶ 1). There is likewise no dispute that Fontbonne is organized under Chapter 180 of the General Laws to, among other things, "provide an educational experience integrated with Christian principles which will

prepare students to meet their civic, social, and moral responsibilities" and to "further the charitable, educational and social works of the Congregation of the Sisters of St. Joseph of Boston." (SF ¶ 2).

In light of the foregoing, it is plain that Fontbonne is operated for both charitable and educational purposes; and that it does so in connection with an order of Roman Catholic sisters, and within the Roman Catholic faith. It is therefore a qualifying entity for purposes of Chapter 151B, § 4's statutory exemption.

Qualifying entities, such as Fontbonne, are permitted to take "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." As a Catholic school, part of Fontbonne's mission is to advance and impart the teachings and values of the Roman Catholic faith. (SF ¶ 3). And, as a matter of faith, the state of marriage, according to Catholic doctrine, is reserved to a male spouse and a female spouse. (SF ¶ 8). Marriage, celebrated in the Sacrament of Matrimony is a "covenant, by which a man and a woman establish between themselves a partnership of the whole life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, [and which] has been raised by Christ the Lord to the dignity of a sacrament between the baptized." Code of Canon Law, Can. 1055, § 1 (1983); see also, Catechism of the Catholic Church, Art. 7, ¶ 1625 ("The parties to a matrimonial covenant are a baptized man and woman, free to contract marriage, who freely express their consent"). As is well known, the Catholic Church has taken a strong and consistent stance against political, societal, and judicial efforts to alter the traditional understanding of marriage as a state exclusive to one female spouse and one male spouse. (SF ¶ 8).

Fontbonne's decision not to employ Mr. Barrett, as he was told at the time, and as Fontbonne has maintained ever since, turned on the fact that he is a spouse in a same-sex marriage, and that such unions are against Catholic faith and teaching. (SF ¶ 16). Fontbonne's decision was made by its Head of School in light of the school's Catholic identity and the position of the Catholic Church, and out of concern that hiring Mr. Barrett would dilute the theological teaching, advanced by the school, that the state of marriage is one properly reserved to one man and one woman. (SF ¶ 15). There is no evidence in this case to suggest otherwise. In addition, Fontbonne holds all adult members of the learning community, regardless of job title, responsible for serving as models of Catholic teaching and ministers of the school's mission. (SF ¶ 13). In Ms. Barnes' estimation, hiring Mr. Barrett would potentially undermine the school's Catholic identity because Mr. Barrett be unable to fulfill his exemplary role, and would in fact be modeling a view of marriage contrary to the one taught in the school's theology classes. (SF ¶ 15).

The facts of this case make clear beyond any legitimate dispute that Fontbonne is a Catholic school that made an employment decision based on considerations of clear and well-known Catholic teaching. It was privileged to do so under Chapter 151B's exemption for religiously-affiliated organizations; and it therefore cannot be held liable for violating any substantive prohibition of Chapter 151B that may otherwise be applicable. The terms of the statute require summary judgment Fontbonne's favor and the dismissal of the plaintiff's Complaint.

2. Despite the plaintiff's contentions, the express terms of Chapter 151B and the history of the 1989 amendments show that Fontbonne is entitled to the exemption for religiously-affiliated entities, regardless of whether it exclusively hires Catholic employees or exclusively admits Catholic students.

In 1989, the Legislature enacted a collection of amendments to Chapter 151B that extended its protected classifications to include sexual orientation. At the same time, however,

these amendments dramatically broadened the exemptions afforded to religious groups from the statute's substantive prohibitions. See generally, *Opinion of the Attorney General*, Dec. 7, 1989; *Collins v. Secretary of the Commonwealth*, 407 Mass. 837, 841 (1990) ("These amendments represent a broadening of the statutory exemption previously accorded religious institutions and organizations, and certain affiliated charitable or educational organizations, from the anti-discrimination provisions of c. 151B.").

Section 1 of Chapter 516 of the Acts of 1989 amended the definitions section 1 of Chapter 151B by striking out the last sentence in the definition of "employer" and inserting the following in its place:

> 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.

In similar terms, Section 14 of Chapter 516 amended section 4, the substantive section, of Chapter 151B by striking out the then-existing third paragraph of section 4, and inserting in its place the following:

> 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.

As discussed above, the same language now appears in Chapter 151B, section 4, which contains the statute's substantive prohibitions, in the second un-numbered paragraph following paragraph 18.

A statute must be read in its entirety and in context to discern its meaning and give effect to each of its provisions. See *Rodman v. Rodman*, 470 Mass. 539, 541 (2015) ("A statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved use of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated."); *Wolfe v. Gormally*, 440 Mass. 699, 704 (2004). However, the plaintiff invites the Court to adopt an interpretation of Chapter 151B that gives effect only to the language found in the definitions section, and renders meaningless the broad exemption for religiously-affiliated organizations found in section 4.

As noted above, the Legislature undertook with the 1989 amendments to expand Chapter 151B's religious exemption from what was then in existence. Giving effect to both the substantive section, and the definitions section, Chapter 151B sets out a statutory plan that broadly exempts religiously-affiliated organizations from its prohibitions on discrimination in employment, housing, lending, and so on. The general exemption is found in section 4. By its terms, "[n]othing herein"—that is, no part of the statute's substantive prohibitions—is to be construed to bar certain religiously-affiliated groups from making, among other things, employment decisions that the group believes are in service of its religious beliefs.

The exemption's limits are contained in its express language. To come within the exemption, the entity at issue must be either (a) a religious or denominational institution or

organization, or (b) an organization that has a charitable or educational purpose and is affiliated with a religious organization; and its decision must be "calculated by such organization to promote the religious principles for which it is established or maintained." There is no other limitation expressed in section 4, and no reference is made to any further limitation to be found in the definitions section or any other section of the Chapter. As discussed above, the undisputed facts of this case demonstrate that Fontbonne is a qualifying organization that acted with the appropriate motivation under the statute.

A qualifying organization possessed of the proper motives is privileged to take certain actions that would otherwise be prohibited. Among these are "taking any action with respect to matters of employment" and, notably, "limiting admission to or giving preference to persons of the same religion or denomination." As is plain from the statutory language, a qualifying organization is permitted to limit admission or give preference; it is not required to do so as a condition precedent to the applicability of the exemption. Among the range of organizations who qualify for the exemption, the statute contemplates that some of them will limit admission or participation to members of the same religion, but it does not require them to do so.

The definition language in Section 1, rather than setting a limit on the broad applicability of section 4, simply makes clear that religiously-affiliated organizations who do in fact limit participation to members of that religion, may give preferential treatment in hiring to members of that religion. Such organizations had enjoyed that exemption prior the 1989 amendments. See *Collins*, 407 Mass. at 840, n.5 (setting out statutory text prior to amendment). The amendments broadened the scope of the exemption, consistently with the expansion of the substantive exemption set out in section 4, by making clear that the types of organizations described in section 1's definitional language are permitted, as are religiously-affiliated charitable or educational

organizations generally, to take "any action with respect to matters of employment ... which are calculated by such organization to promote the religious principles for which it is established or maintained."

There is nothing expressly stated in, or inferable from, the statute to support the contention that the exempting language in section 1 is intended to narrow the scope of the exempting language in section 4 to entities that are exclusive in hiring or enrollment. On the contrary, whatever the prior history of the statute, the fact that the Legislature inserted the same expansive language into both sections indicates that its intent was to bring two previously discrete and limited exemptions into sync with each other and to give the two sections a new and coincident breadth. Reading the exempting provisions to require exclusivity in hiring or enrollment as a condition precedent to the applicability of the exemption would restrict what, by its terms and by its apparent intent, was to be an expansion of the exemption afforded to religiously-affiliated entities. It should be rejected.

3. Analysis of the judicial and administrative decisions bearing on this issue shows that Fontbonne is entitled to Chapter 151B's exemption for religiously affiliated entities.

While there is no controlling authority on the question of whether Chapter 151B requires exclusivity before a religiously affiliated organization is entitled to exemption, one appellate decision, one trial court decision, and one MCAD decision relate to the issue. In *Collins v. Secretary of the Commonwealth*, the Supreme Judicial Court considered whether Chapter 516 of the Acts of 1989 "may be the subject of a referendum under art. 48 of the Amendments to the Massachusetts Constitution, which excludes from the referendum process any 'law that relates to religion, religious practices or religious institutions....'" *Collins*, 407 Mass. at 408. Based on the fact that, as discussed above, Chapter 516 contained new and more expansive exemptions from

the state Anti-Discrimination Statute for religious and religiously-affiliated organizations, the Court held that article 48 barred the proposed referendum. *Id.* The Court was not asked to construe or interpret the relationship, if any, between section 1 and section 14 of Chapter 516, nor was any such analysis necessary to the Court's holding. See e.g., *Allen v. Commissioner of Corporations and Taxation*, 272 Mass. 502, 508 (1930) (statement drawn from prior decision that was not necessary to the decision and involved a different question not binding in later case).

However, the Court, in what it refers to as a "somewhat extended (but by no means complete) description" of those two sections of the statute, used them to illustrate why Chapter 516, which otherwise did not relate to religion or religious practices or religious groups, was nevertheless precluded from the referendum process by article 48 of the Amendments to the Massachusetts Constitution. Throughout this brief explication, the Court refers to "the c. 516 amendments" collectively. *Collins*, 407 Mass. at 843. Neither one is considered individually; and the differences in language between section 1 and section 14 are never even referred to, let alone analyzed. Far from coming to a synthesis of the two provisions, or reaching any conclusion about their relationship to each other, the *Collins* decision does not even take up the issue; rather it provides a general gloss on the religion-related sections of Chapter 516 in order to provide a basis for its later discussion of why, as it ultimately held, Chapter 516 is not subject to referendum.

A Superior Court summary judgment decision in *Piatti v. Jewish Community Centers of Greater Boston*, relates to the issue of exclusivity, but does not add any greater level of insight on this question. There the court simply refers to the SJC's language from *Collins* without any further analysis. Moreover, *Piatti's* distinct factual context makes its outcome understandable, but much less relevant to this case. In *Piatti*, the alleged discrimination was on the basis of religion. The plaintiff asserted that he was passed over for re-hire because he was not Jewish. The defendant

community center, although religiously affiliated, was not exclusive in its membership or hiring. The defendant maintained, among other things, that it was entitled to use religion as a bona fide occupational qualification. The *Piatti* court determined that the community center could not do so, which was the only logical conclusion under the circumstances—a group that does not limit hiring to members of the same religion cannot then turn around and claim membership in its religion as a bona fide occupational qualification. However, *Piatti* supplies no guidance for a case, such as this one, where the challenged employment action was based on doctrinal considerations, rather than religious membership.

More instructive for present purposes is the Massachusetts Commission Against Discrimination's decision in *Larsen v. Sacred Hearts Parish School*, 2000 WL 33665362 (MCAD 2000). There a divorced teacher at a parochial school married her fiance, who was also divorced, without first seeking annulments of either previous marriage. The school declined to re-hire the teacher for the following school year "because her decision to remarry as a Catholic, without the obtaining of annulments by both her and her fiance, violated the teachings of the Roman Catholic Church with respect to the inviolability of Christian marriage." *Id.* at *2.

The plaintiff contended that the exemption language of Chapter 151B, section 4, should not apply because the school was not a "purely religious" school, and, significantly, because it did not limit enrollment or employment to members of the Catholic faith. *Id.* The Commission disagreed, finding that the exemption contained in Chapter 151B, section 4 deprived it of jurisdiction. In reaching that decision, the Commission ruled that

> the statute requires that in order to qualify for the exemption, the educational facility need only be 'operated, supervised or controlled by or in connection with a religious organization.' According to this language, respondent's admission of non-Catholic students and hiring of non-Catholic employees does not operate, in and of itself,

> to convert the respondent into a non-religious organization, unworthy of the exemption.

Id.

Neither Fontbonne nor Sacred Hearts School limited enrollment or employment exclusively to Catholics; and both made an employment decision on the basis of the Catholic Church's teaching concerning the Sacrament of Matrimony. The MCAD's reasoning and decision in *Larsen* is the only analysis on point with this case. For that reason, and in light of the Commission's statutory role in enforcing the Commonwealth's anti-discrimination law, it should be given substantial weight. See *Dahms v. Cognex Corp.*, 455 Mass. 190, 201 n.22 ("The MCAD is charged with enforcing G.L. c. 151B and its 'interpretation of its governing statute is entitled to substantial deference.'") quoting *Bynes v. School Comm. Of Boston*, 411 Mass. 264, 269 (1991).

4. The policies underlying Chapter 151B's religious exemption are not served by an interpretation that requires exclusivity.

The *Larsen* decision further serves to illustrate the practical impact of an "exclusivity" interpretation of Chapter 151B's religious exemption. Parochial schools, like the one in *Larsen*, often accept students and employees from different faiths. It is illogical to conclude that the Legislature, while on the one hand dramatically expanding the scope of the religious exemption—which expressly includes educational institutions—intended at the same time to exclude such a broad and obvious category of religiously-affiliated schools from that same exemption.

Moreover, such an interpretation would only serve to incentivize exclusivity. Chapter 151B reflects the Legislature's determination that religiously-affiliated organizations should have broad freedom from our anti-discrimination law in conducting their internal affairs. To require such organizations to be exclusive in their employment or enrollment in order to enjoy that

freedom would only serve to make otherwise available jobs unattainable for non-members, to make the organization's own position tenuous in that it would not be able to draw on the entire pool of potential employees or volunteers to carry out its work, and to enforce the societal divisions that our anti-discrimination statutes are, at least in part, intended to break down. Such an interpretation cannot be the intent of these amendments.

The undisputed facts of this case, the express language of Chapter 151B, the history and clear intent of the 1989 amendments, analysis of the relevant cases, and the values underlying Chapter 151B, all lead to the conclusion that Fontbonne is entitled to the statutory exemption for religiously-affiliated educational organizations regardless of whether it admits and employs only Catholics, or rather welcomes students and employees of all faiths. Accordingly, Fontbonne is entitled to summary judgment.

B. Application of Chapter 151B would unconstitutionally infringe on Fontbonne's right of expressive association under the First Amendment to the Constitution of the United States.

The undisputed facts of this case, taken with the U.S. Supreme Court's precedent regarding the expressive rights of private organizations, demonstrate that the plaintiff has failed to state a claim on which relief can be granted, and that Fontbonne therefore is entitled to judgment as a matter of law.

The First Amendment, made applicable to the States by the Fourteenth Amendment, secures our rights to speak, to worship, to enjoy a free press, to assemble, and to petition the government for redress of grievances. U.S. Const., Amend. 1. As the Supreme Court has observed, those rights "could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. United*

States Jaycees, 468 U.S. 609, 622 (1984). Accordingly, there is "implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* Groups who associate to pursue such goals would have little success in doing so were they compelled to accept members whose presence would undermine the group's associational purposes. See *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107, 122 (1981). The freedom of association protected by the First Amendment therefore "plainly presupposes the freedom not to associate." *Roberts*, 468 U.S. at 622.

An organization's freedom of expressive association is infringed when the organization is forced to include a person or group whose "presence ... affects in a significant way the [organization]'s ability to advocate public or private viewpoints." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). While the freedom of expressive association is not absolute, government interference with that freedom is subject to strict judicial scrutiny. Thus, only "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms" will be constitutionally tenable. *Id.* quoting *Roberts*, 468 U.S. at 623. While a particular group must engage in "some form of expression, whether it be public or private," in order to come within the protection of the First Amendment's right to expressive association, the right is "not reserved for advocacy groups." *Dale*, at 648. A religiously-affiliated organization like Fontbonne falls comfortably within the First Amendment's protection. Indeed, "[r]eligious groups are the archetype of associations formed for expressive purposes." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 713 (2012) (Alito and Kagan, JJ., concurring).

That Fontbonne is engaged in expressive activity is apparent. As a school, it is engaged in the college preparatory education of young women. (SF ¶¶ 1-3). As a school whose Catholic identity is central to its mission, Fontbonne carries out its business within the framework of the Roman Catholic faith, and seeks to instill those teachings in the students charged to its care. (SF ¶¶ 1-3). One of the components of that faith is the belief that marriage is a state ordained by God to be reserved solely to the union of one woman and one man. (SF ¶ 8).

The Supreme Court has upheld the right of expressive groups to exclude those espousing a contrary message. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the Court held that the organizers of the annual St. Patrick's Day/Evacuation Day parade in South Boston could not be forced to "admit a parade contingent expressing a message not of the private organizers' own choosing." *Id.* at 566. There, the respondent group of gay, lesbian, and bisexual individuals of Irish heritage had formed an organization (referred to as "GLIB" in the Court's decision and so here) "to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade." *Id.* at 561. GLIB's application was denied by the parade organizers, a private group known as the South Boston Allied War Veterans Council. GLIB sued, claiming, among other things, that the Council's refusal to allow the group to march violated the Massachusetts public accommodations statute.

The U.S. Supreme Court granted the Council's petition for certiorari, and took up the case to address the question of "whether the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment." *Id.* at 566. In holding, unanimously, that it does, the Court found that the parade itself was an expressive

activity for First Amendment purposes, regardless of whether there were multiple, even contradictory points of view expressed by the marchers, or whether there was any particular message espoused by the organizers. It was enough, the Court held, that the organizers of the parade had made what amounted to editorial selections in determining which contingents would be included in the parade and, importantly, which would not. *Id.* at 569-70.

Significantly, there was no dispute in *Hurley* about whether the parade organizers were refusing to admit openly gay, lesbian, or bisexual individuals as such. The Council stated no intent to do so, and GLIB claimed no instance of such refusal. Rather, the dispute between the parties was solely with respect to "the admission of GLIB as its own parade unit carrying its own banner." *Id.* at 572. That is, the dispute was over the message, rather than the characteristics of the messenger. As stated by the Court, "[s]ince every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring the petitioners to alter the expressive content of their parade." *Id.* at 573. The Court went on to conclude that "this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* No less than the organizers of the South Boston parade, Fontbonne is entitled to determine for itself the message it wishes to convey, both to its students and to the larger community.

Like the petitioner in *Hurley*, Fontbonne did not exclude gay, lesbian, or bisexual individuals, as such, from its faculty, staff, or student body. Its decision with respect to Mr. Barrett's employment was unrelated to his sexual orientation. Rather, Fontbonne declined to employ someone whose acknowledged relationship is in direct contradiction of Catholic doctrine regarding the nature and significance of marriage. In a school where all faculty and staff,

regardless of job title, are regarded as teachers and ministers, the forced inclusion of an employee whose avowed beliefs run counter to those espoused by the school would amount to nothing less than what concerned the *Hurley* Court—a court-ordered revision of the school's expressive message.

Just as such state interference was constitutionally impermissible when directed at the organizers of a parade, it is impermissible here. Indeed, such judicial editing of the school's message would be even more troubling in this case as Fontbonne is a Catholic school and the message at issue here is an expression of its identity as such. The principles enshrined in the freedoms of expression and religion secured by the First Amendment prohibit the application of state law to alter the expressive content of a private organization expressing a religious belief. See generally, *Hosanna-Tabor*, 132 S. Ct. at 706 (2012) (rejecting the suggestion that because of the expressive association rights implicit in the First Amendment, there was no need for a "ministerial exception" grounded in the religion clauses, and stating that such a result "is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."). As the Court has recognized, "[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views that it intends to express." *Dale*, 530 U.S. at 648. And as at least two members of the Court have additionally noted, the previous statement "applies with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals." *Hosanna-Tabor*, 132 S. Ct. at 712 (2012) (Alito and Kagan, JJ., concurring).

The principles expressed in *Hurley* were reiterated by the Court in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). There the Court held that the Boy Scouts of America ("BSA") could not be held liable under New Jersey's public accommodations statute for revoking the membership

of James Dale, an openly gay adult member of the Scouts' Monmouth Council. Reiterating that the First Amendment contains a right of expressive association, and that this right includes "the freedom not to associate," the Court concluded that BSA could not be forced to readmit Mr. Dale because the state interest in preventing discrimination, embodied in its public accommodations law, "d[id] not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Id.* at 659.

Examining the nature of the organization, the Court found that BSA is a private organization with a particular set of values that it seeks to impart to its youth members both expressly and through the example of its adult members. *Id.* at 649-50. In doing so, the Court found, it was "indisputable" that the group "engages in expressive activity." *Id.* at 650.

The Court's analysis then turned to whether application of the statute would "significantly affect [the BSA's] ability to advocate public and private viewpoints." *Id.* In concluding that it would, the Court found that the BSA advocated a position that was opposed to the "promotion of homosexual conduct as a legitimate form of behavior," *Id.* at 653, and that the forced inclusion of Mr. Dale, who was openly homosexual "would, at the very least, force the organization to send a message, both to the youth members and to the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* Such an intrusion into the internal structure and message of the organization, the Court held, was unjustified, regardless of the otherwise salutary purposes of the New Jersey statute.

The expressive message at issue in the present case is different; but the Court's opinion in *Dale* requires the same result. Fontbonne, like BSA, is a private organization that seeks to instill a particular set of values in its students. (SF ¶¶ 1-3). It too, therefore engages in what is indisputably expressive activity. Just as it is indisputable that Fontbonne engages in expressive

activity, it is likewise indisputable that one of the components of Fontbonne's expressive message is a belief, consistent with the school's Catholic identity, in the married state as something ordained by God to exist exclusively between a man and a woman. (SF ¶ 8). Stated differently, a component of the Catholic position expressed by Fontbonne is opposition to the promotion of same-sex unions as the equivalent of marriage as traditionally understood in the Catholic faith. Just as the inclusion of Mr. Dale would have required the BSA to adopt a position it opposed with respect to its views regarding homosexuality; the inclusion of Mr. Barrett would necessarily suggest, to Fontbonne's students and the outside world, that Fontbonne approves or condones same-sex marriage. See *Dale*, 530 U.S. at 653.

Like Mr. Dale, Mr. Barrett has expressed positions and a world view at odds with Fontbonne's Catholic teaching regarding marriage. Mr. Barrett, after all, confronted Fontbonne with the fact of his marriage, knowing that Fontbonne is a Catholic school, and knowing that, because it is affiliated with the Catholic Church, Fontbonne may well have a problem with his marital status. (SF ¶¶ 17-18). Moreover, few issues over the last decade have been the subject of public debate on the level occupied by the discourse regarding the status of same-sex marriages. Under any circumstances, the decision to marry (or not), carries with it certain statements about the couple's outlook. In light of the contentiousness that surrounds the issue of same-sex marriage, the very fact of having entered into that relationship carries an inherent weight of expressive content.

Mr. Barrett, as a partner in a same-sex marriage, regardless of whether he would otherwise be seen as an activist, is necessarily asserting, at the least, that he is entitled to have his relationship with Mr. Suplee defined as a "marriage" no less than the relationship between the partners in a heterosexual marriage; and is rejecting the idea of marriage as a relationship exclusive to male and

female spouses. Without question, Mr. Barrett is entitled to hold and express these views. But Fontbonne, just as undoubtedly, has the right to determine its own message, and the right to propound a message that is consistent with its Catholic identity. Application of Chapter 151B in this context would require Fontbonne to include among its staff an individual whose expressed views are not only contrary to those of the faith for whose advancement Fontbonne was organized, but go to the heart of an issue on which that faith takes a strong and clear position. Application of the statute would therefore impermissibly impair Fontbonne's First Amendment right to express its own views.

Like the BSA, Fontbonne is entitled to the court's deference in its assessment of conduct that would hamper its ability to express its views. *Dale*, 530 U.S. at 653. And it is not for this court to inquire whether Fontbonne's expressed values are agreeable or internally consistent. *Id.* at 651. The *Dale* Court rejected as irrelevant the assertion that the BSA did not revoke the memberships of scout leaders who openly disagreed with the group's position on sexual orientation. *Id.* Any assertion that Fontbonne has hired or retained employees who disagree with the Catholic Church on this or other social issues is likewise irrelevant. Uniformity of thought is not required for First Amendment protection; nor is an expressive group required to suppress disagreement—certainly such a requirement would be anathema in the context of an educational institution—in order to secure constitutional protection for its expressive activity. *Id.* at 656. ("[An organization] has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.").

In some cases, a group's expressive interests will not be significantly impaired if the group is compelled to admit previously excluded individuals. See e.g., *Roberts v. U.S. Jaycees*, 468 U.S.

609 (1984)(expressive interests of U.S. Jaycees would not be curtailed by application of Minnesota Human Rights Act prohibiting discrimination on the basis of sex); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987)(Rotary group's expressive interests would not be infringed by California statute prohibiting discrimination on the basis of sex). But this is not one of those cases. In such cases, the expressive purposes of the group were unrelated to any possible message that might be sent by the admission of the previously excluded individuals.

Rotary International, for example, involved a group whose purposes were to "provide humanitarian service, to encourage high ethical standards in all vocations, and to help build goodwill and peace in the world." 481 U.S. at 539. The group did not "take positions on 'public questions,' including political or international issues"; and would not, by application of the California statute, be required to abandon any of its constitutionally protected service activities. *Id.* at 548. Under such circumstances, the Court found, the admission of women as required by the statute would not unconstitutionally impair the group's right of expressive association.

Likewise, in *Roberts*, the Court's determination that the Jaycees' expressive association rights would not be impaired if the group was required to admit women depended on the finding that doing so would not "impede the organization's ability to engage in protected activities, or disseminate its preferred views." *Roberts*, 468 U.S. at 627. Importantly, the application of the state statute in that case, "require[d] no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Id.*

Neither circumstance is present in this case. To the contrary, as discussed above, the application of Chapter 151B to require Fontbonne to employ an individual who is a party to a same-sex marriage would undercut the beliefs regarding marriage that Fontbonne holds and

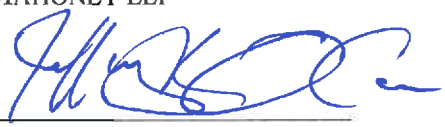
disseminates as part of its Catholic identity. The First Amendment, and the Supreme Court's expressive association cases prohibit such a result.

Conclusion

Based on the discussion above and the undisputed facts of this case, both because Fontbonne is entitled to Chapter 151B's religious exemption, and because application of Chapter 151B would unconstitutionally impair Fontbonne's rights of expressive association, the plaintiff cannot recover in this action. Fontbonne is entitled to judgment as a matter of law and requests that the plaintiff's Complaint be dismissed with prejudice.

The Defendant,
Fontbonne Academy

By its attorneys,
MORRISON MAHONEY LLP



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CERTIFICATE OF SERVICE

I, Jeffrey K. O'Connor, of MORRISON MAHONEY LLP, 1500 Main Street, Suite 2400, P.O. Box 15387, Springfield, Massachusetts 01115-5387, hereby certify that on the 31st day of July, 2015, I caused the foregoing document to be served upon the other party or parties in this action by FedEx delivery to:

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