

The amicus brief, Terence Silo v. CHW Medical Foundation, was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed in the Supreme Court in the State of California on September 4, 2001.

Case No. S095918

IN THE
SUPREME COURT OF CALIFORNIA

TERENCE SILO

Plaintiff-Respondent

Vs.

CHW MEDICAL FOUNDATION

Defendant-Petitioner

AFTER A DECISION BY THE COURT OF APPEAL,
THIRD APPELLATE DISTRICT
Consolidated Case Nos. C022895 and C024033

**AMICUS CURIAE BRIEF OF RELIGIOUS INSTITUTIONS IN SUPPORT OF
APPELLANT CATHOLIC HEALTHCARE WEST FOUNDATION**

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The *amici* represented in this brief are a broad coalition of religious organizations and denominations. Accordingly, they share a common interest in ensuring that the constitutionally protected rights to the free exercise of religion, freedom of association, and freedom from entangling governmental inquiries into religious matters continue to be respected in this State.

The rule of law announced by the Court of Appeal **B** that an employee of a religious institution can maintain a non-statutory, *public policy* tort action for religious discrimination against his employer **B** is not only contrary to settled principles of California tort law, but also infringes each of these fundamental freedoms. *Amici* therefore ask this Court to reverse the decision below.

INTRODUCTION AND SUMMARY

The Court of Appeals decision represents a fundamental assault on the right of a religious community to define and control its own destiny. As this Court is well aware from its decision vacating the earlier Court of Appeal decision in this case, the plaintiff, Mr. Silo, once worked for CHW Medical Foundation (Catholic Healthcare), a Catholic institution that is part of Catholic Healthcare West, and is charged with furthering the ministry of the Roman Catholic Church. He was terminated for, among other reasons, refusing to follow his supervisors' directions to cease his on-the-job, anti-Catholic proselytization of co-workers and patients. Yet the Court of Appeal determined, in essence, that Silo had a right, grounded ultimately in Article I, Section 8 of the State Constitution, to engage in actions that impede Catholic Healthcare's religious mission, and that the institution had no right to take religious matters into account in making its employment decisions.

The Court of Appeals decision -- the first and only appellate ruling in this State to permit a religious employer to be sued for religious discrimination **B** runs counter to a long

¹Amici include: General Conference of Seventh-day Adventists; The Church of Jesus Christ of Latter-Day Saints; American Baptist Churches in the USA; Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.); the Worldwide Church of God; The First Church of Christ, Scientist; California Catholic Conference; Loma Linda University & Medical Center; Adventist Health; Association of Christian Schools International and the Christian Legal Society. Each of these religious organizations and denominations is described in the concurrently filed application.

tradition of judicial and legislative respect for the autonomy of religious organizations. Throughout our Nation's history, those who have sought to protect religious freedom have recognized that it requires a healthy respect, not just for the autonomy of individual citizens in matters pertaining to religion, but for the autonomy of religious institutions as well. The reason was aptly summarized by the U.S. Supreme Court in *Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987):

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.

In recognition of this fundamental truth, the framers of the federal First Amendment and many state constitutions enacted protections for free exercise of religion, free speech and freedom of association that were broad enough to protect religious institutions as well as individuals. And the framers often included anti-establishment clauses including the federal Establishment Clause -- that not only protected individuals from having to support religious institutions against their will, but also protected those same institutions from burdensome and intrusive governmental inquiries. See, e.g., *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952) (First Amendment gives religious institutions the power to decide for themselves, free from state interference, matters of church government, as well as those of faith and doctrine); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871) (courts lack jurisdiction to decide ecclesiastical disputes over property).

An important aspect of this institutional autonomy is a religious community's right of self-definition, that is, its ability to determine for itself the nature and scope of its religious missions, and how best to carry them out. As the U.S. Supreme Court stated in *Amos*, Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself. *Amos*, 483 U.S. at 342. The Court, moreover, noted that solicitude for this right of self-definition is constitutionally justified

because, by A further[ing] of the autonomy of religious organizations, @ such a policy A often furthers *individual* religious freedom as well. @ *Id.* (emphasis added).

Accordingly, legislatures have routinely exempted religious institutions from laws that, while appropriate for secular institutions, would risk infringing a religious community's ability to define itself. That was the impetus behind the religious exemption in Title VII of the Civil Rights Act, which the U.S. Supreme Court upheld in *Amos*. It also was the impetus behind the religious exemption in California's Fair Employment and Housing Act (FEHA), which this Court upheld and applied in *McKeon v. Mercy Healthcare Sacramento*, 19 Cal. 4th 321 (1998) and *Kelly v. Methodist Hospital of So. California*, 22 Cal. 4th 1108 (2000). And it has been the impetus for decisions such as *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979), which have held on constitutional grounds that religious institutions are entitled to an implied exemption from regulatory schemes that could interfere with their autonomy.

The decision below is a stark departure from this venerable tradition of respect for institutional religious freedom. The Court of Appeal has now effectively ruled that Catholic Healthcare B and by implication other religious institutions throughout the State B cannot take religious factors into account in making personnel decisions, at least as to non-clergy employees. This rule would destroy the religious character of most religious institutions. It could, for example, require a Jewish day school to hire a non-Jewish teacher to teach the Torah to Jewish students.

To make matters worse, the Court of Appeal has ruled that religious factors cannot be considered even where, as here, the institution believes that employment of a particular individual will actually undermine the institution's religious mission. As noted earlier, the U.S. Supreme Court has recognized that a key aspect of the constitutionally protected right of self-definition is the ability to A[d]etermin[e] that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them. @ 483 U.S. at 342. Here, Mr. Silo concededly was obviously A committed @ to his employer's religious mission, and his employer determined that his continued employment would detract from, rather than A further, @ that mission.

Accordingly, the Court of Appeals decision is wrong as a matter of law and must be reversed for two specific reasons. First, as shown in Section I, it is contrary to the federal and state constitutions. It violates both the federal Establishment Clause and the state No Preference Clause, each of which protects the right of a religious institution to choose its members and employees consistently with what the institution defines as its own religious mission. *E.g.*, *Kedroff, supra*; *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). Moreover, because the Court of Appeals prohibition on religious discrimination by religious institutions is, by definition, non-neutral with respect to religion, and because that prohibition cannot satisfy the demands of strict scrutiny, it violates the Free Exercise clause as well. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533, 534 (1993); *cf. Employment Division v. Smith*, 494 U.S. 872 (1990) (neutral, generally applicable laws not subject to strict scrutiny by virtue of any burden on religion). It also violates the First Amendment's guarantees of free speech and free association.

In all events, as shown in Section II, the decision below also violates this Court's settled teachings regarding the circumstances in which such a public policy tort can be inferred from the state Constitution or other state law. This Court has repeatedly held that, when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law . . . cause of action. *Moorpark v. Superior Court*, 18 Cal. 4th 1143, 1159 (1998). That is true here, given that the Legislature has already enacted a ban on religious discrimination in the FEHA while expressly exempting religious employers from its coverage. Moreover, Silo has not satisfied and cannot satisfy the separate requirement that a new claim be based on a public policy that is clear and well established. *Id.* When all the applicable sources of public policy are considered - including the constitutional provisions protecting the religious freedom of religious employers - it is clear that there is no well-established California public policy barring religious employers from religious discrimination.

ARGUMENT

I. **FORCING RELIGIOUS INSTITUTIONS TO EMPLOY WORKERS REGARDLESS OF THE WORKERS' RELIGIOUS AFFILIATIONS, CONVICTIONS, AND BEHAVIOR VIOLATES THE RIGHTS OF RELIGIOUS LIBERTY AND FREEDOM OF SPEECH AND ASSOCIATION FOUND IN THE U.S. AND CALIFORNIA CONSTITUTIONS.**

The Court of Appeal correctly found that Catholic Healthcare is a religious institution created and operated to further the mission of the Catholic Church. *Silo v. CHW Medical Foundation*, 86 Cal. App.4th 947, 103 Cal. Rptr.2d 825 (Cal. Ct. App. 2001). Indeed, it was because of the institution's religious nature that the Court of Appeal held it qualified for the religious exemption under the FEHA. Still, the Court of Appeal held, in one, legally erroneous remark accompanied by one inapposite citation, that "[t]his is not a case implicating First Amendment concerns that arise when a court is asked to review quintessentially religious matters, such as the employment of a minister." *Id.*, citing *Schmoll v. Chapman University* (1999) 70 Cal. App.4th 1434, 83 Cal.Rptr.2d 426 (First Amendment bars judicial review of lawsuit alleging church-affiliated university modified terms of employment of campus chaplain).

In relying upon *Schmoll*, however, the Court of Appeals touched on only one area of religious-freedom protection for religious institutions, the so-called ministerial exemption. *See, e.g., E.E.O.C. v. Catholic University*, 83 F.3d 455, 466-467 (D.C. Cir. 1996) (government agency lacked authority to second-guess religious university's decision to fire a nun employed as a teacher); *Little v. Wuerl*, 929 F.2d 944 (3rd Cir. 1991) (upholding Catholic school's dismissal of Protestant teacher on grounds that secular court should not second-guess the school's determination that the teacher was unfit to advance its mission). This constitutionally-based rule exempts employment relationships between clergy and their employer churches from state regulation and oversight. Thus, as a general matter, clergy cannot sue their church-related employers for any sort of discrimination, whether it be racial, religious, or, as in the case of *Schmoll*, sex-based. *See, e.g., Catholic University*, 83 F.3d at 466-67; *Little*, 929 F.2d at 951.

The present case, by contrast, does not directly implicate the ministerial exemption, but that does not mean it is devoid of First Amendment concerns as the Court of Appeal claimed. While non-clergy employees of religious institutions often are protected from discrimination based on race, gender or ethnicity, they generally are not protected under state and federal statutes from the application of religious criteria in employment decisions. This is because, contrary to the conclusion of the Court of Appeals, suits by any type of employee against a *religious* institution over *religious* discrimination raise significant First Amendment issues.

Indeed, such claims directly threaten at least three crucial components of religious autonomy. The first is the right of self-determination or self-guided action (*i.e.*, the right to have one's corporate actions carried out by and through members or by persons supportive of the organization's religious mission). This right is protected by the federal Establishment and Free Exercise Clauses, as well as similar (and even broader) provisions of the California Constitution. The second is the right of self-definition (*i.e.*, the right of a religious entity to decide, by its own standards, the nature and content of its religious mission), which is also protected by the Free Exercise Clause. The third is the right of self-expression, which is protected by the Free Speech Clause, and which guarantees religious institutions the right to associate with those that share and express their religious values and goals.

To be sure, there is some overlap in the coverage and rationale of these three provisions, but they are supported by sufficiently disparate lines of cases to justify separate discussions. And all three work towards the common goal of preventing "as far as possible, the intrusion of either [church or state] into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). This goal, which has served as a touchstone and foundation for our Constitutional order, would be profoundly frustrated if this Court were to force Catholic Healthcare to choose between either employing a worker hostile to its Catholic identity or facing significant legal damages.

A. Forcing A Religious Institution To Employ A Worker Who Is Openly Hostile To The Institution's Religious Identity And Mission Would Inevitably Entangle The Courts In Matters Of Church Theology, Policy, And Administration, All In Violation Of The Federal Establishment Clause And The State Constitution's No Preference Clause.

Typically, one thinks of the Establishment Clause of the First Amendment when government funding, support, or endorsement of religion or a religious practice is at issue. Yet the Establishment Clause also provides much of the basis for the settled principle that the state should not have "excessive entanglement" with the church and its affairs. *Lemon*, 403 U.S. at 614. See, Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347 (1984) (discussing the right to church autonomy under the Establishment Clause). Moreover, the concern about "excessive entanglement" between church and state is an outgrowth of the belief that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCullum v. Board of Education*, 333 U.S. 203, 212 (1948); see *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982) ("religion and government each insulated from each other could then co-exist"); *Everson v. Board of Education*, 330 U.S. 1, 31-32 (1947) (The First Amendment creates "a complete and permanent separation of the spheres of religious activity and civil authority.")

Out of this concern about intrusion by the state into the realm of the church, the Court has recognized that courts may not interfere with issues of "church polity[,] church administration," or "church operation." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); see, *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 107 (1952). As the Court noted in *Kedroff*, the federal Constitution grants "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for

themselves, free from state interference, matters of church government as well as those of faith and doctrine.@ *Id.* at 116.

The California Constitution contains similar, if not more robust, guarantees of institutional separation, including both a no-establishment and a no-preference clause. Cal. Const., art. I, ' 4. California courts have interpreted the [no-preference] clause as being more protective of the principle of separation than the federal guarantee. *Sands v. Morongo Unified School District*, 53 Cal.3d 863, 883 (1991); *Fox v. Los Angeles*, 22 Cal.3d 792, 796 (1978). Thus, concerns about entanglement and intrusion are heightened under the California Constitution. As shown below, the new public policy tort recognized by the court below would seriously interfere with the right of self-determination that is protected under both the Federal and State constitutions.

1. The ability to choose its own members and agents lies at the heart of institutional autonomy for any organization. There can be no clearer example of an intrusion [by government] into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.@ *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

For religious organizations, the stakes are even higher. Many secular organizations are held together largely by the shared economic or financial interest of their members or workers. But religious organizations exist primarily on the basis of the shared faith and values of their members and workers. While church institutions sometimes do pay their

² The right to institutional autonomy rests on both the Establishment Clause and Free Exercise Clause. To the extent that it rests on the Establishment Clause it is unaffected by the United States Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which narrowed the range of protection available under the Free Exercise Clause to certain kinds of claims. Moreover, *Smith* itself endorsed the line of cases protecting institutional rights of the type at issue here under the Free Exercise Clause. See *id.* at 877; *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999); *E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 462 (D.C. Cir. 1996).

³ This Court, in *Golden Gateway Center v. Golden Gateway Tenants Association*, S081900 (Ca. August 30, 2001), recently recognized that the California Constitution may provide greater protection than the federal Constitution in other areas as well. The Court noted that California's free speech clause is more definitive and inclusive than the First Amendment Y.@ *Id.* at 6.

employees, these workers generally are not mere hirelings. Rather, they are partners in a shared vision of mission and service to advance the cause of the church. The Supreme Court has long recognized the dimension of spiritual authority that a church has in relation to its members, who unite to it with an implied consent to this government, and are bound to submit to it. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872).

While non-church-member employees of religious institutions may not consent to all requirements expected of members, a church has a right to choose as its agents (and indeed as its members) those who agree to abide by and support the religious mission of the church as it is expressed within the institution. *See, e.g., Gosche v. Calvert High School* 997 F. Supp. 867 (N.D. Ohio 1998), *aff'd*, 1999 WL 238649, No. 98-3201, (6th Cir April 13, 1999) (holding that an individual guilty of adultery committed contrary to her obligation to behave in conformity with "values of the Catholic Church," could not make out even a *prima facie* case of discrimination under Title VII, 42 U.S.C. ' 2000e, *et seq.*, or of the Americans With Disabilities Act, 42 U.S.C. ' 12101, *et seq.*). To force a church institution to hire those who will not abide by and support the mission of the church would change the nature of the community within a religious institution from a system of voluntary, shared submission based on shared principles to one of coerced economic command and control. This is especially true if a church institution were forced to hire individuals who, like Silo, are actually hostile to the church's religious identity and mission.

Courts and legislatures have long recognized the basic unfairness, incoherence and constitutional unacceptability of requiring religious organizations to hire workers who are not church members or who are not supportive of the institution's religious mission. The leading decision is the Supreme Court's decision in *Presiding Bishop v. Amos*, 483 U.S. 327 (1987), which upheld as constitutional the religious exemption to Title VII of the federal Civil Rights Act. The exemption, found in Section 702 of Title VII, relieves religious institutions from complying with the religious discrimination requirements of Title VII as to any of its employees.

(citations omitted).

The *Amos* case involved the firing of a janitor at a church-owned, but publicly accessible gymnasium. As in the present case, the plaintiff in *Amos* argued that his position as janitor was not part of the religious function of the Church of Jesus Christ of Latter-day Saints. Indeed, running a gymnasium would seem to have a more tenuous connection to a church's mission than the operation of a health clinic, as caring for the sick and suffering has a long religious heritage as a religious expression of charity and good works. But the Court found that, at least as to non-profit enterprises, any activities carried out by bona fide religious organizations ostensibly for religious purposes should be accepted as such by the courts.

Another federal court ruled that an activity as seemingly secular as operating a daily, national newspaper may be sufficiently tied to a religious organization's religious mission to allow the newspaper to prefer reporters who are church members under the ' 702 exemption. *Feldstein v. The Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983). As the *Feldstein* court noted, "A religious activity of a religious organization does not lose that special status merely because it holds some interest for persons not members of the faith, or occupies a position of respect in the secular world." *Id.* at 978. Here again is an example of a federal court's recognizing as religious an activity -- running a daily newspaper -- that is a good deal further from the core of historically religious activities than is tending to the sick and infirm as carried out by Catholic Healthcare.

Yet another court held that an English teacher at a business college run by the Church of Jesus Christ of Latter-day Saints could also be terminated for religious reasons under the ' 702 exemption, despite her claims that her teaching was not a "religious activity." *Larsen v. Kirkham*, 499 F. Supp. 960, 963 (D. Ut. 1980), *aff'd without opinion*, 1982 WL 20024, No. 80-2152 (10th Cir. Dec. 20, 1982). While the plaintiff in *Larsen* was herself a Church member, her level of church involvement was unsatisfactory to the college. The court ruled that the state could not invade the "province of a religion to decide whom it will regard as its members, or who will best propagate its doctrine. That is an internal matter exempt from sovereign interference." *Id.* at 966.

As this Court previously recognized in *Kelly v. Methodist Hospital of So. California*, 22 Cal. 4th 1108 (2000) and *McKeon v. Mercy Healthcare Sacramento*, 19 Cal. 4th 321 (1998), Catholic Healthcare's activities of community benevolence in tending to the sick and infirm are well within the class of activities that are viewed as serving religious purposes when carried out by churches or church-related entities. Indeed, if running a daily newspaper, teaching English at a business college, or cleaning a gymnasium are activities serving a religious purpose, it seems virtually axiomatic that tending to the sick and dying at a health clinic is a religious activity from any perspective.

2. The above decisions upholding and applying the ' 702 exemption do not explicitly hold that the exemption for religious institutions from claims of religious discrimination is required by the constitution. Such a ruling was not necessary to the results of the cases, and courts avoid constitutional rulings if a statutory ruling will suffice. Yet the reasoning and language of those decisions leave little doubt that the courts viewed the exemption as being based on and required by constitutional principles. Indeed, both the *Feldstein* and the *Larsen* courts speak in constitutional terms when applying the ' 702 exemption.

The *Feldstein* judge opined that not every activity carried out by a religious body may come within the protection of the First Amendment, and that the wall of separation between church and state is not absolute. I am nevertheless, he ruled, in this case unwilling to involve the federal court in what is ultimately an internal administrative matter [hiring a news reporter] of a religious activity [running a national, daily newspaper]. *Feldstein*, 555 F. Supp at 978. The *Larsen* court used similarly constitutionally charged language when it said that nothing in the language or history of the ' 702 exemption supports such an invasion of the province of a religion to decide . . . who will best propagate its doctrine. That is an internal matter exempt from sovereign interference. *Larsen*, 499 F. Supp. at 966. Such language leaves little doubt that these judges interpreted the ' 702 exemption to be consistent with their view of the protections offered by the First Amendment.

Similarly, the Supreme Court in *Amos* found that Congress had passed the ' 702 exemption with the purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions. @ *Amos*, 483 U.S. at 339. The Court noted that the statute furthered basic Establishment Clause principles. Rather than violating that Clause by entangling church and state, the Court ruled that the statute effectuates a more complete separation of the two . . . @ *Id.* The Court also noted the chilling effect that would be created by forcing a religious institution to predict which of its activities a secular court will consider religious. @ *Id.* at 336

In their separate concurrence, Justices Brennan and Marshall dwelt at length on the right of self-determination and definition protected by the exemption: Determining that certain activities are in furtherance of an organization's religious mission and *that only those committed to that mission should conduct them*, is thus a means by which a religious community defines itself. . . . if certain activities constitute part of a religious community's practice, then a religious organization should be able to require *that only members of its community* perform those activities. @ *Id.* at 342-343. (emphasis added). Later in the opinion they wrote that concern for the autonomy of religious organizations demands that we avoid the entanglement . . . that a case-by-case determination [of claims of religious discrimination by non-clergy workers] would produce. @ *Id.* at 344, 346 (emphasis added).

There are many practical reasons why religious organizations need legal protection, whether constitutional or statutory, to hire non-clergy employees who are supportive of their basic religious identity and mission. Often it is the non-clergy employees, whether they be receptionists, groundspeople, or records office personnel, that are the first or most frequent point of interaction between the religious institution and the general public. If such employees are committed to or supportive of the institution's religious mission, they will more fully communicate the ethos and mores of the church to the outside world. Even those employees that do not have much interaction with the public often have a greater role than clergy or administration in shaping the workplace environment and atmosphere, determining whether it will be supportive of or hostile towards the church's values and ideals.

On the other hand, employees like Silo who criticize and oppose their employer's religious mission are more likely to disrupt the institution's efforts to convey a positive impression regarding its religious mission. Such employees are also more likely to undermine and work to defeat the institution's objectives. For a religious organization to employ such a worker would be a self-destructive act that this Court should not require. The federal Establishment Clause and California's own No-Preference Clause foreclose that result.

B. By Labeling Certain Aspects Of Catholic Healthcare's Operations Or Activities As A Secular[®] And Not A Religious,[®] The Court Of Appeal Has Prevented The Religious Institution From Defining Its Own Religious Missions In Violation Of The Federal Free Exercise Clause.

Under the decision below, moreover, it would be left to the courts to decide who will best further the religious mission of Catholic Healthcare or, indeed, any other institution that finds itself on the receiving end of the Court of Appeals' legal theory. As discussed above, this result is deeply and constitutionally troubling. Silo argues, and the Court of Appeal apparently assumed, that the constitutional objections above are resolved by the fact that Silo's job, in the court's view, "in no way involved spreading the faith or teaching the convictions of the employer." (Plaintiff and Respondent's Answering Brief on the Merits, p. 27); *see Silo v. CHW Medical Foundation*, 86 Cal. App.4th 947, 103 Cal. Rptr.2d 825 (Cal. Ct. App. 2001). But rather than relieving Silo's case of constitutional difficulties, this very argument creates constitutional problems of its own. It leads the court to interfere with the second crucial aspect of church autonomy protected by the First Amendment—the right to religious self-definition, including the right to decide which aspects, if any, of an institution's mission are religious rather than secular. *Amos*, 483 U.S. at 344-345.

1. Although the right to self-definition has roots in the Establishment Clause, it is based primarily on Free Exercise principles. Under the Free Exercise clause of the First Amendment, a law that compels *religious* institutions to employ workers without reference to their religious affiliation, beliefs, or behavior is not neutral in regards to religion. Laws

that target religious behavior or status, or that are not otherwise neutral towards religion, must be justified by a compelling state interest that the law is narrowly tailored to meet. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533, 534 (1993).

Here, the Court of Appeal made no attempt to justify its public policy cause of action in the terms required by either the federal Free Exercise clause or, indeed, the State Free Exercise Clause, which unambiguously requires that such a law be subjected to strict scrutiny. See *People v. Woody*, 61 Cal. 2d 716 (1964).

By contrast, the U.S. Supreme Court has come to view actions by government officials in trying to distinguish secular from sacred functions of religious institutions as almost *per se* violations of the First Amendment right to self-definition. That is because A[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment@ *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977).

The majority opinion in *Amos*, for example, reflected an acute awareness of the constitutional problems inherent in the task of trying to distinguish religious from secular activity in adjudicating claims of religious discrimination against religious institutions. AThe line is hardly a bright one,@the Court observed, Aand an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.@ *Id.* at 336. The same view was reflected in the concurring opinion, which noted that this type of:

Agovernment intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result,

⁴ The compelling state interest test also applies because this is a hybrid rights case, in which Catholic Healthcare's right to free exercise rights are infringed in combination with its rights of speech and association, as discussed in Section I.C. below. *Smith*, 494 U.S. at 882 (freedom of speech and association mentioned as combining with free exercise claims to provide a hybrid rights challenge).

the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity. . . . Concern for the autonomy of religious organizations demands that we avoid . . . the chill on religious expression that a case-by-case determination would produce.@

Amos, 483 at 344, 345, 346 (emphasis added).

This concern about the government deciding between secular and religious components of a religious institution's activities did not originate with *Amos*. As early as *Lemon*, the Court recognized the difficulties and constitutional dangers inherent in determining which activities of a religious organization are religious and which are secular.@ *Lemon*, 403 U.S. at 621-22. And a few years later, in *Catholic Bishop*, the Court noted that under the First Amendment, a religious institution (in that case a religious school) has a right to determine for itself what is and is not an integral part of [its] religious mission,@ and that courts and agencies@ should not second-guess those judgments. *Catholic Bishop*, 440 U.S. at 496, quoting 559 F.2d 1112, 1118 (7th Cir. 1977).

Soon thereafter, in *Espinosa v. Rusk*, 456 U.S. 951 (1982), the Court affirmed a decision striking down a municipal regulation that exempted the solicitation of religious groups for religious activities, but not those groups' solicitation for secular activities. The Court of Appeals' decision in *Espinosa* stated that "the setting up of a city agency to make distinctions as to that which is religious and that which is secular so as to subject the latter to regulation is necessarily a suspect effort." *Espinosa*, 634 F.2d 477, 481, (10th Cir. 1980), *aff'd without opinion*, 456 U.S. 951 (1982). The court noted that the conception of "religion" entertained by the city was "purely spiritual or evangelical." *Id.* And the court concluded:

"Thus, the charitable activity of the church having to do with the feeding of the hungry or the offer of clothing and shelter to the poor was deemed to be subject to regulation. This broad definition of secular is part of the problem. . . . [A]lthough the ordinance does not express any anti-religious effort or object, it is objectionable because it involves municipal officials in the definition of what is religious." *Id.*

Accordingly, the offending ordinance was struck down to prevent intrusion into the area of religious self-definition.

2. In ruling on Silo's claims as it has done, the Court of Appeal trespassed into this protected area of religious self-definition. The ruling below that Silo does not play a religious role at Catholic Healthcare fulfills the prophecy in *Amos* that, if a case-by-case determination of what jobs within a religious organization are religious is allowed, "the [religious] community's process of self-definition would be shaped in part by the prospects of litigation". *Amos*, 483 at 344-346.

The decision below also runs directly into the religious misconceptions discussed in *Espinosa*. The Court of Appeal assumed that only discrimination claims by ministers and clergy would raise First Amendment concerns, thus using the very same stereotype criticized by the *Espinosa* court that defines religious activity as purely "spiritual or evangelical." But this reasoning overlooks the great legacy of "charitable activity of the church" in the field of care for the sick and infirm.

Indeed, the history of health care in the United States is largely a religious one. Even today, many of the major healthcare institutions across our country continue to have a religious affiliation or identity. Church healthcare work is historically much more of a traditional religious mission than printing a daily newspaper, running a gymnasium, or operating a business college. Yet all these latter activities have been found by federal courts, and by this Court, to constitute part of the religious mission of their sponsoring churches. *See supra* 12-13 (discussing *McKeon* and *Kelley*). To deny that status to healthcare work would be historically and constitutionally erroneous, and would disregard how religious institutions have defined their religious and spiritual missions through community healthcare services

⁵ In his brief, Silo asserts that the "First Amendment is not implicated" when a religious institution makes employment decisions about a non-ministerial employee. Plaintiff's Ans. Brief at 27. This is simply incorrect, as shown by the decisions in *Feldstein*, *Larsen*, and *Amos* discussed above. The two cases cited by Silo to support his claim actually stand for the proposition that non-ministerial employees may bring claims of discrimination based on gender, race or ethnicity. *See E.E.O.C. v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (gender discrimination claim); *E.E.O.C. v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980) (gender and race discrimination claims).

C. Forcing Catholic Healthcare To Employ A Worker Whose Speech Is Contrary To Or Critical Of The Institution's Religious Mission Or Identity Violates The Institution's Rights Of Freedom Of Speech And Association Under The Federal First Amendment.

Silo's claim against Catholic Healthcare, if sustained, would also violate the Free Speech Clause of the First Amendment. This guarantee has been found to protect not only speech, but also the right not to be forced to speak or to be associated with a particular message. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (state requirement to display "Live Free or Die" on license plates violates First Amendment); *see also Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107 (1981) (political parties have the right to prevent their ranks from being intruded upon by those with differing political principles); *accord Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973). The Clause not only protects the expressive rights of organizations, but also their right to associate with those that are supportive of their missions and ideals. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). It also contains a right not to speak and not to be associated with speech that is contrary to the views of the organization. *Hurley v. Irish-American Gay, Lesbian and Bi-sexual Group of Boston*, 515 U.S. 557 (1995) (parade organizers could not be forced to include a gay rights message with which they disagreed.)

The U.S. Supreme Court recently clarified the contours of this right in a ruling that upheld the rights of the Boy Scouts of America to disassociate itself from persons expressing views in support of homosexuality. *Boy Scouts of America v. Dale*, 530 U.S.

Neither of these cases supports Silo's notion that *religious* discrimination claims can be made by workers at religious institutions.

Indeed, the court in *Mississippi College* made one of the strongest statements ever about the government needing to defer to religious institutions' judgments about what is religious. The decision stated, "[w]e conclude that if a religious institution of the kind described in ' 702 presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, ' 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination. This interpretation of ' 702 is required to avoid the conflicts that would result between the rights guaranteed by the religion clauses of the first amendment and the EEOC's exercise of jurisdiction over religious educational institutions." *Mississippi College*, 626 F.2d at 485 (emphasis added).

640 (2000). Whatever one may think of the policy upheld in *Dale*, there can be no doubt that the Court's decision applies in such circumstances as these. There, the Court applied a two-part test to decide whether the Boy Scouts' rights to freedom of speech and association were impaired by a requirement that the organization hire a scoutmaster who was a gay activist. First, said the Court, it must be decided "whether the group engages in 'expressive association,'" whether public or private. *Id.* at 648. Second, it must be determined whether the forced inclusion of the scoutmaster "would significantly affect the Boy Scout's ability to advocate public or private viewpoints." *Id.* at 650.

When these two principles are applied here, it becomes apparent that the forced inclusion of Silo will disrupt Catholic Healthcare's mission and violate its rights of speech and association to a far greater extent than the violation found in *Dale*.

1. There can be little doubt that Catholic Healthcare engages in an expressive association, just as a group like the Sierra Club engages in expressive association for the purpose of protecting the environment. As *Dale* itself makes clear, institutions do not have to be advocacy organizations or "associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Dale*, 530 U.S. at 655.

That expression, moreover, does not have to be an overt, explicit verbal message. "[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569. Indeed, a broad range of activity is considered to be protected expressive activity, including, quiet persuasion, inculcation of traditional values, instruction of the young, and community service. *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring in judgment).

For example, in *MaGuire v. Marquette University*, 814 F.2d 1213 (7th Cir. 1987), a teacher with a doctoral degree in Religious Studies applied repeatedly for an

Associate Professor's position in the Theology Department at Marquette University, a Catholic university operated under the auspices of the Society of Jesus and in accordance with Jesuit Catholic principles. She was not selected for the position because of her publicly voiced opposition to Catholic Church policy on abortion, described by the university as a perceived hostility to the institutional church and its teachings, and to the goals and missions of Marquette. *Id.* at 1215. The teacher's own pleadings affirmed the dramatic distinctions between the pro-abortion positions she advocated and the policies of the university, affirming that the reason she desired to teach at Marquette was to highlight these differences. Indeed, she saw this as part of her personal effort to move Catholic moral teaching in a direction she desired. *Id.* at 1215-1217.

The Seventh Circuit properly affirmed the dismissal of the plaintiff's claims since she could not possibly have proven that discriminatory intent was the but for cause of the refusal to hire her. *Id.* at 1216. Rather, because plaintiff clearly opposed Catholic teaching as it was provided by Marquette, the institution could not be forced to allow plaintiff to teach there. *Id.*

Catholic Healthcare is likewise engaged in the expressive activity of ministering to the physical needs of the sick and dying in a manner consistent with and supportive of the humanitarian and moral teachings of the Roman Catholic Church. As the Court of Appeal noted, Catholic Healthcare must conduct its activities subject to the moral and ethical principles of the Roman Catholic Church and in conformity with the Ethical and Religious Directives for Catholic Health Facilities. *Silo v. CHW Medical Foundation*, 103 Cal. Rptr. 2d 825, 830 (Cal. Ct. App. 2001). As Catholic Healthcare notes in its own brief, [I]t is undisputed that [Catholic Healthcare] was and is an integral part of the Roman Catholic Church, and exists in order to carry out a mission that is inherently religious for Catholics—the delivery of health care. *Pet. Br.* At 17. Elsewhere the institution notes, without contradiction, that [Catholic Healthcare] would not exist but for the fact that the Sponsoring Congregations' primary religious mission is to heal the sick and comfort the

dying, acts that are part of the fundamental ecclesiastical mission of the Roman Catholic Church.⁶ Pet. Supp. Br. below at 9 (citing C.T. 906-907).

In short, Catholic Healthcare, and other religious healthcare institutions, are transmitting values along with their health services. The fact that some of their activities may overlap with those performed by secular health care providers does not detract from their religious nature. *See Feldstein*, 555 F. Supp. at 978; *Kelly*, *supra*, 22 Cal. App.4th at 1108. Thus, as with the Boys Scouts, A[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.⁷*Dale*, 530 U.S. at 651.

2. Forcing Catholic Healthcare to employ Silo would also significantly burden the message of its Catholic identity and mission, especially in light of Silo's penchant for criticizing the Catholic faith as *UnChristian*.⁸ The Catholic Church has a long heritage of proclaiming the Gospel of Jesus Christ through scripture, sacraments, and works of charity and mercy. Indeed, the Church views its healthcare work as a tangible expression of the care, concern and compassion that Jesus Christ taught his followers to have for others.

⁶ In the Roman Catholic world-view (and indeed for most Christian religions), the provision of health care is an essential ecclesiastical activity that proclaims, through tangible works of mercy, the dignity of men and women that is central to the Gospel of Jesus Christ. It is an expression of the divine interconnectedness among human beings—a connection so profound that Jesus taught that those performing such charitable acts were actually (or at least figuratively) doing them to Him. *See* Matthew 25:35-40. Moreover, the Gospel call to works of charity and mercy is central to the Catholic faith. A religious medical charity uniquely demonstrates concern for the inherent dignity of people when they are at their most vulnerable -- physically, emotionally and spiritually.

⁷ While Catholic Healthcare opted to hire non-members to further its expressive activity, it did so "only so long as such individuals comported themselves consistently with the mission and philosophy of defendant's religious Sponsoring Congregations." Pet. Br. at 17 (citing C.T. at 882). Silo has not done this.

⁸ The Catholic Church also teaches that the Church was instituted by Jesus himself to preach the Good News and the coming of the Reign of God. *Catechism of the Catholic Church*, ¶¶ 763-766 (1994). And the Church teaches that its own roots can be traced back to Christ's appointment of Peter as the first leader of the Christian church. *Id.* at ¶ 857, 862.

Thus, church leaders, teachers, priests and members would be deeply offended at the suggestion or claim that Catholics are not Christians and do not have Christ in their hearts.

But this is what Silo did, repeatedly. Shortly after coming to work at Catholic Healthcare, Silo became affiliated with a religious group that apparently viewed Catholics as not being "born again" and not having "Jesus in their heart[s]." R.T.2 181, 230. Silo became quite vocal in the workplace about his convictions and shared them with both co-workers and patients at Catholic Healthcare. Some of these were Catholic individuals whom Silo believed had not been "born again" as he had, and thus were not really Christians. It was undisputed at trial that Catholic Healthcare received several complaints from employees and at least one patient about Silo's sharing his views while on Catholic Healthcare's premises. Silo's lawyers, in attempting to soften his testimony regarding Catholics, essentially confirm his anti-Catholic views by "explaining" that Silo believed that Catholic's could leave their "non-Christ-like past[s], [and] *could* be a Christian." (Plaintiff & Respondents Answering Brief on the Merits, at 4.) (emphasis added)

The Free Speech concerns in this case are thus even more serious than in *Dale*, as there was no evidence that the would-be scoutmaster in *Dale* was advocating his views while on Boy Scout property or assignments. The issue there was the scoutmaster's public advocacy as a private individual in forums outside the Boy Scouts. In this case, however, Silo's anti-Catholic behavior took place on Catholic Healthcare property, during Silo's workday, with employees and patients of the clinic.

Under the authorities discussed above, Catholic Healthcare has a clear right *not* to have an anti-Catholic message sent by an employee, either publicly (to patients) or privately (to co-workers). "[I]t boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 576.

In sum, Catholic Healthcare, like all other expressive organizations, has the right to choose the message that its expressive activities will send. Like the Sierra Club, Catholic Healthcare has the right not to have its employees send messages with which it disagrees.

And like the Sierra Club, Catholic Healthcare has the right to associate with those who agree with its ideals and teachings, and to disassociate from those who vocally do not.

Silo, moreover, is plainly not supportive of the Catholic identity and religious mission. He has sent, and apparently would continue to send, messages that are critical of that identity and mission. Catholic Healthcare thus has a First Amendment right to disassociate itself from Silo's message and from Silo himself. The decision below deprives the institution of that fundamental right.

II. PERMITTING A COMMON-LAW WRONGFUL DISCHARGE CLAIM AGAINST RELIGIOUS EMPLOYERS FOR RELIGIOUS DISCRIMINATION IS IMPERMISSIBLE UNDER CONVENTIONAL CALIFORNIA TORT LAW

Even if the decision below did not violate the federal First Amendment and analogous provisions of the California Constitution, that decision is wrong as a matter of conventional California tort law. As noted above, the decision below is the first and only appellate ruling in this State to permit a religious employer to be sued in tort for wrongfully discharging an employee in violation of a public policy against religious discrimination. Relying solely on Article I, ' 8 of the California Constitution, the Court of Appeal held that, even as to a religious employer, A[t]he public policy of the State of California is [that] an employer may not discriminate against an employee on the basis of his or her religious beliefs or practices.@ *Silo*, at 833. It reached this result without even considering the policy embodied in Article I, ' 4 of the California Constitution, which Aguarantee[s]@religious employers the Afree exercise and enjoyment of religion,@or the fact that both the FEHA and Title VII specifically exempt religious employers from their respective bans against religious discrimination.

⁹ This omission apparently occurred because the Article I, ' 8 theory on which the Court of Appeal affirmed was never explicitly presented to the jury or briefed by the parties on appeal. The jury here was instructed: AThe public policy of the State of California is: an employer may not discriminate against an employee, on the basis of his or her religious beliefs or practices.@ *Silo*, *supra* at 833. And it was instructed that if it found a violation of the FEHA, it had to find a public policy violation. Because Silo never requested instructions under Article I, ' 8, Catholic Healthcare had no opportunity to ask for instructions reflecting the limitations that necessarily Acircumscribe@ a public policy claim grounded on Article I, ' 8.

The decision below is incorrect as a matter of California tort law because it ignores two key limitations on the creation of a public policy torts. One is the settled principle that, when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action. *Moorpark v. Superior Court*, 18 Cal. 4th 1143, 1159 (1998). The second is the requirement that a common law wrongful discharge claim, especially one against a religious employer, may be based only on a public policy that is clear and well established. *Id.*

A. The Theory Recognized By The Court Of Appeal Violates The Settled Requirements That Public-Policy Torts Must Respect The Substantive Limitations Imposed By State Law And May Be Based Only On Clear And Well-established Expressions Of Policy.

The Court of Appeals opinion correctly states the standard which this Court has articulated for determining whether a public policy can support a common law wrongful discharge action. The policy must be: (1) delineated in either constitutional or statutory provisions; (2) public; . . .; (3) well established at the time of the discharge; and (4) substantial and fundamental. *Silo, supra*, at 834; citing *Stevenson v Superior Court*, 16 Cal. 4th 880, 894 (1997). However, as the concurring opinion acknowledged, this Court has also placed substantial limitations on the public policy tort based on its recognition that a public policy as a concept is notoriously resistant to precise definition, and courts should venture into this area, if at all, with great care. *Silo, supra at 1243*; citing *Moorpark v. Superior Court*, 18 Cal. 4th 1143, 1159 (1998).

Thus, this Court has unequivocally and repeatedly held that, when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action." *Id.* Incorporation of such statutory and constitutional substantive limitations into the definition of a public policy is necessary to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge. *Stevenson, supra*, 16 Cal. 4th at 888.

This Court has twice applied these principles to conclude that there may be no common law wrongful discharge action as to matters specifically exempted from the FEHA. *Jennings v. Marralle*, 8 Cal. 4th 121 (1994); *Reno v. Baird*, 18 Cal. 4th 640 (1998). In *Jennings*, this Court held that the FEHA's prohibition against age discrimination in employment did not establish a fundamental public policy that would permit a wrongful discharge action to be asserted against an employer who was statutorily exempt from that prohibition. The employee in that case had no statutory claim because her employer did not regularly employ five or more workers. *Marralle*, 8 Cal. 4th at 121; Gov. Code ' 12926(d) (defining "employer" as a person "regularly employing five or more persons.>"). The *Jennings* Court explained why the existence of the FEHA small employer exemption foreclosed the implication of a common law wrongful discharge action there:

It would be unreasonable to expect employers who are expressly exempted from the FEHA ban on age discrimination to nonetheless realize that they must comply with the law from which they are exempted under pain of possible tort liability. We do not ascribe such a purpose to the Legislature.

Id. at 135-6.

Likewise, in *Reno*, this Court held that "[b]ecause [a] plaintiff may not sue an individual supervisor under the FEHA, she may not sue her individually for wrongful discharge in violation of public policy." *Reno v. Baird* 18 Cal. 4th 640, 664 (1998). As the Court explained, "[i]t would be absurd to forbid a plaintiff to sue a supervisor under the FEHA, then allow essentially the same action under a different rubric." *Id.*

The theory of liability recognized by the Court of Appeal is flatly foreclosed by these governing principles. At the time of Silo's discharge, Gov't Code ' 12940(j)(4)(B) provided that an employer covered by FEHA does not include a "religious association or corporation not organized for private profit." The Court of Appeal here originally held that the FEHA applies to religious employers like Catholic Healthcare. But on remand following this Court's decisions in *McKeon v. Mercy Healthcare Sacramento*, 19 Cal. 4th 321 (1998) and *Kelly v. Methodist Hospital of*

So. California, 22 Cal. 4th 1108 (2000), the Court of Appeal correctly held that a religious employer like Catholic Healthcare is exempt by statute from the anti-discrimination provisions of the FEHA. *Silo, supra*, at 833-834; citing Govt. Code § 12940(a). Because this statutory exemption circumscribe[s] the common law wrongful discharge cause of action, it follows that the FEHA cannot provide the public policy foundation for a wrongful termination suit against an exempt employer.

More broadly, the existence of the FEHA exemption by itself forecloses the recognition of a common law wrongful discharge action against religious employers for discriminatory employment decisions. That is the precise result this Court reached as to employers who come within the exemption for small employers, *Jennings, supra*, and as to individual actions against supervisors who are exempt from the act. *Baird, supra*. To paraphrase *Baird*, it would be absurd to forbid a plaintiff to sue [a religious employer for religious discrimination] under FEHA, then allow essentially the same action under a different rubric. 18 Cal. 4th at 664.

Federal law, which this Court has determined should be included as a source of fundamental public policy that limits an employer's right to discharge an at-will employee, *Green v. Ralee Engineering Co.*, 19 Cal.4th 66, 71 (1998), confirms this result. As noted above, Title VII of the federal Civil Rights Act permits religious employers to further their own religious precepts in making employment decisions. 42 U.S.C. § 2000e-1(a) (This subchapter shall not apply . . . to a religious corporation); see also 42 U.S.C. § 2003-2(e)(2). Because Title VII informs religious employers that they may be guided by their own religious practices in making employment decisions, it too circumscribes the public policy applicable to religious employers in California, foreclosing the implication of a common law action against such employers for religious

discrimination. *Stevenson, supra*, 16 Cal. 4th at 888. *See also* CHW Rep. Br. at 2-4.

B. The Theory Recognized By The Court Of Appeal Also Violates The Settled Requirement That The Pertinent Public Policy Be Clear And Well Established.

This conclusion that the FEHA and Title VII statutory exemptions foreclose the implication of a common law action that would essentially undo the exemptions provides a theoretically sufficient basis for resolving this entire case. But resting the decision here on the narrowest possible ground will by no means be satisfactory. Rather, to prevent unnecessary litigation and legislative activity that such a narrow decision would spawn, this Court should make clear that numerous other sources of public policy foreclose the common law theory which the Court of Appeal recognized here, regardless of the scope of the FEHA exemption in effect at any particular time.

Here, the Court of Appeal concluded that Article I, ' 8 of the Constitution by itself supported the implication of a wrongful discharge action against religious employers for religious discrimination. It did so without balancing the policy in that constitutional provision against the policies reflected in other relevant laws. This was error: when *all* the relevant sources are considered, it is clear that California public policy does not permit the implication of a common law wrongful discharge action against religious employers for religious discrimination.

At the outset, we acknowledge that Article I, ' 8 has, under certain circumstances, been found to state a public policy that may be the foundation of a common law wrongful discharge claim. For example, in *Rojo v. Kliger*, 52 Cal.3d 65, 90-91 (1990), this Court held that Article I, ' 8 declares a fundamental public policy against sex discrimination in employment that may form the basis of a common law wrongful discharge claim.

But as explained above, this Court has consistently made clear that a reviewing court must determine whether there are other applicable substantive limitations that effectively circumscribe the common law wrongful discharge cause

of action.@ *Stevenson, supra; Moorpark, supra; Jennings, supra; and Gantt v. Sentry Insurance*, 1 Cal. 4th 1083 (1992). Here, there are several such limitations applicable to Article I, ' 8, each of which is inconsistent with the common law theory that the Court of Appeal recognized here.

First, other provisions of the California Constitution circumscribe the principle reflected in Article I, ' 8. The most notable example is the right to free exercise of religion embodied in Article I, ' 4 of the Constitution, although, as explained in Part I above, the Establishment Clause and the right to free speech provide religious employers with similar protections.

Article I, ' 4 in part provides A[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed.@ The Free Exercise Clause permits the State to abridge religious practices only upon Aa demonstration that some compelling state interest outweighs the defendants= interests in religious freedom.@ *People v. Woody*, 61 Cal. 2d 716, 718 (1964). The Free Exercise Clause of the California Constitution thus creates a zone of religious freedom within which the State may not interfere. This Court most recently recognized the zone of non-interference when it upheld the constitutionality of the historic landmark exemption for noncommercial property owned by religious organizations. *East Bay Asian Local Development Corp. v. California*, 24 Cal 4th 693, 705 *et seq.* (2000) (citing many federal and state statutes containing exemptions for religious organizations). And, as explained above, the Free Exercise Clause in the First Amendment to the United States Constitution likewise creates such a zone of non-interference.

The existence of these constitutional protections for religious freedom forecloses the implication of a common law action against religious employers based on Article I, ' 8. This is true in part because the policies reflected in the former necessarily Acircumscribe@ any public policy claim based on the latter. *Moorpark, supra*, 18 Cal. 4th at 1159; *Stevenson, supra*, 16 Cal. 4th at 894.

In addition, because these competing provisions must be balanced before the composite policy can be distilled, religious employers do not, as they must, have adequate notice of the conduct that will subject them to tort liability to the employees they discharge. *Stevenson, supra*, 16 Cal. 4th at 888. Thus, there is no clear and well established policy of nondiscrimination applicable to religious employers. And without such a policy, there can be, under this Court's settled cases, no implied common law wrongful discharge action. *Id.*

Second, nor does Article I, § 8 itself even when viewed independently of Article I, § 4 impose an unqualified ban against religious discrimination. To the contrary, this Court has made clear that Article I, § 8 requires a balancing of the employer's and employee's respective rights. *Rankins v. Comm'n on Professional Competence* 24 Cal. 3d 167, 174 (1979). The need for such balancing again forecloses the conclusion that there is a clear and well established policy that could properly form the foundation for the common law action recognized by the Court of Appeal here.

Third, as discussed above, both FEHA and Title VII specifically exempt religious employers like Catholic Healthcare from adherence to their respective non-discrimination mandates. In addition, numerous other California statutes exempt religious institutions from various requirements, showing the legislature's intent to protect religious autonomy in many areas. Because the Legislature has

¹⁰ Bus. & Prof. Code § 2063 (Medical Practice Act (Bus. & Prof. Code § 2000 *et seq.*) requiring certification or licensure for the practice of medicine is not to be construed to interfere in any way with the practice of religion); Bus. & Prof. Code § 2789 (religious school exemption from Nursing Practice Act); Bus. & Prof. Code § 2731 (exemption from Nursing Practice Act for nursing in connection with practice of religious tenets); Bus. & Prof. Code § 2800 (partial exemption of religious organizations and individuals from penal provision of Nursing Practice Act); Bus. & Prof. Code § 2884 (exemption of religious training from Vocational Nursing Practice Act); Bus. & Prof. Code § 21662 (article governing swap meets not generally applicable to religious organizations); Code of Civ. Proc. § 425.14 (special showing required to bring claims for punitive or exemplary damages against religious organizations); Const., Art. 13, § 3 *et seq.* (tax exemptions for property used for religious purposes); Corp. Code § 9111 (special rules regarding incorporation of religious corporations); Educ. Code § 8263(d) (religious belief exemption from physical examination or immunization requirement for admission to a child care and development program); Educ. Code §

decided to exempt religious organizations from those numerous statutory measures, that composite legislative determination too became part of the public policy of the State that necessarily Acircumscribes the common law wrongful discharge cause of action.@ *Stevenson, supra*.

These constitutional and statutory limitations all Acircumscribe@the public policy that governs employment determinations by a religious employer. These policies, like the FEHA statutory exemption for religious employers, foreclose the

49406(g) and 87408.6(g) (religious belief exemption from tuberculosis examination); Educ. Code ' 76355(c) (religious exemption from health fee requirement); Govt Code ' ' 3502.5(c) and 3546.3 (conscientious objector exemption from requirement that employee join or financially support public employee organization as a condition of employment); Govt Code ' 12926 (exemption of religious organizations from employment discrimination provisions Fair Employment & Housing Act); Govt Code ' 12940(j)(4)(B) (exemption of religious organizations from anti-harassment provisions of Fair Employment & Housing Act); Govt Code ' 12955.4 (exemption of religious organizations from housing discrimination provisions of Fair Employment & Housing Act); Govt Code ' 19261(a) (religious belief exemption from standards of health and safety); Govt Code ' 65995(d) (developers fee exemption for facilities used exclusively for religious purposes); Health & Safety Code ' 100930 (religious exemption from requirement of disease information reporting and medical treatment); Health & Safety Code ' 1569.31 (partial exemption for religious organizations from regulations prescribing standard of care); Health & Safety Code ' 109335 (exemption of faith healing from regulations regarding treatment of cancer); Health & Safety Code ' 120605 (partial religious exemption from article regarding venereal diseases); Health & Safety Code ' 121370 (religious exemption from provisions regarding tuberculosis); Health & Safety Code ' 120365 (religious belief exemption from immunization requirement for admission to school); Health & Safety Code ' 17005 (exemption of person employed incidental to training for religious vocation from definition of Aemployee@under the Employee Housing Act); Health & Safety Code ' 123420(d) (exempts religious organizations from need to provide abortion services); Ins. Code ' 10494.2 (religious organization exemption from regulations governing life insurers); Pub. Util. Code ' 98168 (conscientious objector exemption from requirement of joining or financially supporting a labor organization); Pub. Util. Code ' 130051.17(d)(1)(B) (exemption from general prohibition against acceptance of gifts of travel by members of the L.A. County Metropolitan Transportation Authority for travel provided by nonprofit religious organization); Rev. & Tax. Code ' ' 206 and 214 *et seq.* (tax exemptions for religious organizations and societies); Unemp. Ins. Code ' 634.5(a) (exclusion of service performed in the employ of a church or religious organization from definition of Aemployment@for purposes of unemployment insurance); Unemp. Ins. Code ' 1241(b) (provision for suit by church or religious organization to challenge denial of unemployment insurance exemption); Unemp. Ins. Code ' 2902 (religious exemption from requirement of contributions for disability compensation); Welf. & Inst. Code ' 7104 (exemption from medical or psychiatric treatment of persons depending on faith healing); Welf. & Inst. Code ' 14004 (exemption of individuals with religious objections to health care).

implication of a common law wrongful discharge action against religious employers for religious discrimination. Consequently, the jury verdict should be vacated and reversed in its entirety.

CONCLUSION

This Court should reverse the lower court's decision, reject plaintiff's claims, and hold that Catholic Healthcare, and all other religious institutions, may use religious criteria in their employment decisions.

Dated: September 4, 2001

Respectfully submitted,

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Case No.: California Supreme Court Case No. S095918

PROOF OF SERVICE

STATE OF CALIFORNIA)
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COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action.

My business address is Sidley Austin Brown & Wood, 555 West Fifth Street, Suite 4000, Los Angeles, California 90013-1010.

On September 4, 2001, I served the foregoing document described as AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER CHW MEDICAL FOUNDATION on all interested parties in this action as stated on the attached service list.

I served the foregoing document by U.S. Mail, as follows:
I placed true copies of the document in a sealed envelope addressed to each interested party as shown above. I placed each such envelope with postage thereon fully prepaid, for collection and mailing at Sidley Austin Brown & Wood, Los Angeles, California. I am readily familiar with Sidley Austin Brown & Wood-s practice for collection and processing of correspondence for mailing with the United States Postal Service.
Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

**I declare under penalty of perjury under the laws of the
State of California that the above is true and correct, and that this
declaration is executed on September 4, 2001, at Los Angeles,
California.** _____

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