IN THE
SUPREME COURT OF NORTH DAKOTA

Supreme Court No. 990212
Cass County Civil No. 96-88

State of North Dakota, ex rel.
Heidi Heitkamp, Attorney General, **Plaintiff-Appellee,**

-vs-

Family Life Services, Inc., d/b/a
Family Life Credit Services, et al. **Defendants-Appellants.**

ON APPEAL FROM THE JUDGMENT
OF THE CASS COUNTY DISTRICT COURT
HONORABLE DONOVAN FOUGHTY, PRESIDING

BRIEF FOR APPELLANT FAMILY LIFE SERVICES, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

ISSUES PRESENTED FOR REVIEW

1. Did the court below lack subject matter jurisdiction?

2. Did the court below lack authority under state law to dismantle and reconstitute the Board of Directors of Family Life Services, Inc.?

3. By dismantling and reconstituting the FLS Board, did the court below violate the Establishment and Free Exercise Clauses of the First Amendment and the Fourteenth Amendment of the United States Constitution?

4. By dismantling and reconstituting the FLS Board, did the court below violate Article I, Section 3 of the North Dakota Constitution?

STATEMENT OF THE CASE

Nature of the Case

This is an extraordinary case, involving a judicially-ordered takeover of a Christian nonprofit organization, Family Life Services, Inc. ("FLS"). FLS is a Christian nonprofit credit counseling corporation, having its home office in Fargo, North Dakota, and determined by the Internal Revenue Service to be tax-exempt under the Internal Revenue Code. FLS is an integral part of a larger Christian ministry, which is among the leading pro–life organizations in North Dakota. At issue in this appeal are the legality and constitutionality of the trial court's takeover of FLS, including its order dismantling and reconstituting the entire FLS Board of Directors ("FLS Board").

On January 9, 1996, the North Dakota Attorney General, Heidi Heitkamp, brought an action against FLS and others, alleging violations of North Dakota

Nonprofit Corporation law (N.D.C.C. ch.10-24 and ch. 10-26) and Consumer Credit Counseling Services law (N.D.C.C. ch. 13-07). The Attorney General sought the appointment of a receiver and a decree dissolving FLS, pursuant to N.D.C.C. Section 10-26-07, or in the alternative, "reorganiz[ing] … FLS … under an independent board of directors…." DN 1*.[1] Without notice to any defendant, the Attorney General obtained *ex parte* from the district court an injunction, installing Fargo accountant Wayne Drewes as trustee over FLS' trust accounts. DN 10*.

On January 25, 1996, after a brief hearing and over objection (DN 19-20), Mr. Drewes was appointed receiver (DN 21*) and, ever since, has managed and controlled FLS. Although the receiver was appointed on the Attorney General's representation that FLS should be dissolved and liquidated, this has never happened. Nor was this the Attorney General's objective in this case. From the beginning, the Attorney General sought the takeover of FLS and, in an attempt to provide a semblance of legal support for such a takeover, filed an Amended Complaint in August 1996, claiming such authority under *quo warranto* (N.D.C.C. ch. 32-13). DN 208*.

FLS' Answer (DN 203*) and many motions filed below denied the jurisdiction of the court, contested the legitimacy of the proceeding against it, including the *ex parte* injunction and appointment of the receiver, formally pled the religious nature of its mission, and claimed that the proceeding violated its rights under the Constitutions of

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[1] "DN" refers to the Docket Number of the document that is cited. The Docket entries that are being included in the deferred Joint Appendix are followed by an asterisk (*).

the United States and North Dakota. After more than three years of motions practice, interim orders, and a 32-day trial from April 27, 1998 to October 1, 1998, the trial court entered final Judgment on May 7, 1999, granting the Attorney General the relief she sought: removal of all six FLS directors from office and installation of a new, seven-member FLS Board. Judgment, DN 1774*.[2] The Court's Order relied solely upon the Nonprofit Corporation law and the Consumer Credit Counseling Services law, but not on *quo warranto*. None of the statutes relied upon by the Attorney General or the court below authorized the removal of existing board members, much less the appointment of all new directors by the State.

The court ordered the removal of all six FLS Board members, all of whom had been elected according to the FLS Charter and By-Laws, and ordered the reconstitution of that Board with seven new members, to be selected in a manner determined by the court. It made no finding of impropriety whatsoever against three of the six FLS directors, nor any findings or even any explanation as to why the available statutory remedies for the violations found, including injunctive relief and civil penalties, were ignored. *See* N.D.C.C. Sec. 13-07-07.

Notice of entry of judgment was May 11, 1999. Filing a timely notice of appeal on July 9, 1999 (DN 1804)*, FLS now seeks relief from this Court, and submits that the trial court had no jurisdiction or authority under state law to order the dismantling

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[2] On May 7, 1999, several months subsequent to entry of its Findings of Fact ("FF"), Conclusions of Law ("CL"), and Order for Judgment (DN 1680*) on January 21, 1999, the lower court entered its final Judgment. DN 1774*.

and reconstituting of the FLS Board; but even if it did, then that order violated the religious freedom guarantees in the Constitutions of the United States and North Dakota.

Statement of Material Facts

A. FLS: Part of an Integrated, Christian, Pro-Life Ministry.

Although FLS was incorporated in 1989, its roots go back to September 1981 when the Fargo Women's Health Organization, an abortion provider, opened for business in Fargo, North Dakota. The following spring, Darold[3] and Patricia Larson founded a crisis pregnancy center in their home to minister to women who might otherwise choose abortion. This effort, begun as an avowedly Christian response to the threat of abortion, blossomed into a significant pro-life ministry — the only ministry in North Dakota which combined under one roof an adoption agency, a maternity home, and a crisis pregnancy center. Trial Transcript Vol. 6, pp. 1260-1301 ("T6:1260-1301"). Under the umbrella of Help and Caring Ministries, Inc. ("HCM"), the Larsons also founded a Christian counseling center, and FLS. As it developed, the FLS credit counseling organization actually generated net funds which were used to sustain the pro-life ministry to unborn children and their mothers. T9:1804. Thereafter, FLS was separately incorporated to "provide a broad range of counseling

[3] Darold Larson has been a politically active, pro-life figure in North Dakota, and ran as a pro-life independent candidate for the U.S. Senate in the Special Election to replace Senator Quentin Burdick in 1992. *See* Ex. 305A-B, DN 1115-16*.

and support services to the community from a Biblical perspective through credit counseling, budgeting and debt liquidation programs." (FF 20-25.)

As one of the ministries operating under the HCM umbrella (Exhibit 153, Art. I(9), para. 2), FLS's Christian mission reflected the HCM Constitution, which stated the guiding purpose of the overall ministry: to promulgate the gospel of Jesus Christ, to establish a Biblical form of ministry government, to hold Christian meetings, and to minister to people in need, including those entangled in addictions, facing a crisis pregnancy, and experiencing financial problems. Exhibit 153, Article I (DN 1103)*. As was true of every ministry in the HCM family, the "Christian, spiritual religious affairs" of FLS "always supersede[d] and … [took] precedence over the business affairs of this Corporation." *Id.*, Article III, ¶ 1.

Thus, the trial court found: FLS "adheres to the historic fundamentals of the faith based on the inspirations of the Bible," as detailed in a seven-paragraph Statement of Faith (FF 26-27, 184); FLS is a nondenominational Christian ministry providing "credit counseling and debt management service … from a Christian and biblical perspective"; "FLS counselors help … clients in dealing with their immediate financial crisis and assist … clients in getting their lives under fiscal control … hop[ing] to earn to right to share the gospel and good news of Jesus Christ" (FF 184); and FLS "is a unique prolife Christian ministry wherein" the Board and the FLS "branch office managers are prolife Christians," and as such "Christians they are obligated to protect the unborn … through legal protest, civil disobedience and providing alternatives for women to abortion." (FF 185.)

As part of their faith-based Biblical form of management, HCM and the allied organizations were subject to the direction and control of a Minister, who "shall have the spiritual responsibility to fulfill the purpose of the Ministry as described in Article I of the HCM Constitution," including "the power to appoint committees, to select ministry leaders and other helpers to fulfill the ministry mission…." Exhibit 153, Article IV, DN 1103*. Darold Larson fulfilled this role for HCM and its allied organizations. The allied ministries were subject to management agreements with HCM to ensure each operated Biblically, and, in the case of FLS, the agreement placed power of approval and removal of directors through the Christian Caring Ministries Trust ("CCMT"), of which Darold Larson was a trustee. FF 8, 30-31, 113*.

B. Finding of Breach of Fiduciary Duties by the Three-Member FLS Board.

The trial court determined that Mr. Larson's veto power resulted in his misusing his "control … [of] the corporate and financial affairs of FLS" (FF 28); that, as a consequence, prior to January 1996, the three FLS Board members, unknowingly[4] permitted Larson "to improperly use and commingle client trust funds" (CL 28) and also failed to timely disburse client funds, in violation of N.D.C.C. Sections 10-26-07 (2) and 13-07-04; and that, in addition, the three FLS Board members did not prevent

[4] The trial court made no express finding regarding the FLS Board's lack of knowledge, but found that Mr. Larson "hid the trust account withdrawal from FLS directors and auditors" (FF 92), and that it was only in November 1995, two months before the Attorney General filed this suit, that Mr. Larson's commingling activities really came to light. FF 129-131.

Mr. Larson from using FLS to serve his own personal interests and to make improper loans.

The trial court held that the three FLS Board members had breached their fiduciary duties in allowing these various improprieties to occur. CL 34-40, 42-44. Thus, the breaches of fiduciary duty by the FLS Board arose essentially from failure "to establish internal controls to prevent Larson from exercising unilateral control over the financial affairs" of FLS during the period up to January 1996. CL 51.

C. Court Removal of the Entire FLS Board of Directors.

After the three FLS Board members learned of extensive commingling by Mr. Larson in late 1995, significant changes began to occur in the ministry governing structure. At the FLS Board meeting of December 19, 1995, a motion was "made and carried that Help and Caring continue in a consulting capacity rather than an administrative role as in previous years." Exh. 274, DN 1578*. In February 1996, CCMT "gave written consent for the FLS board to make whatever changes to the bylaws it desired." FF 31. In July 1996, the FLS By-Laws were amended, removing CCMT from having any oversight over the approval and removal of FLS directors. *Id.*

Subsequently, three new Board members were elected under the new By-Laws, expanding the three-member FLS Board to six. FF 29-31. The trial court virtually ignored the election of these three new members, and despite the fact that none of them even could be accused of any fiduciary breach, removed them from office, lumping

them with the three directors who had been found to have breached their fiduciary duties. Judgment, ¶ 2, DN 1774*.[5]

D. Court Appointment of an Entirely New FLS Board.

To replace the entire FLS Board, the court ordered the creation of a so-called "independent board of directors," to "consist of 7 members," three to be selected by "branch office managers … active for the past 12 months with FLS," one to be elected by an "absolute majority" of FLS employees, and three to be appointed by the "F-M [Fargo-Moorhead] Evangelical Ministerial Association Board of Directors." Judgment, ¶ 3, DN 1774. Although the court formally specified only "financial" criteria of eligibility for election to the FLS Board, at the heart of its scheme were **religious** criteria determined by the court and administered through its receiver.

FLS twice moved that the selection process for Board members be conducted on the record. DN 1648, 1758. The trial court refused.

> I can see no benefit whatsoever, and I think it would be **actually destructive to what the Court is trying to do** to participate for the receiver to be forced to disclose information that they've received from parties that might be interested in participating on the new board. [Hearing of April 30, 1999, Tr. 39-40 (emphasis added).]

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[5] One of the new Board members removed by the lower court, Ronald Shaw, was never a party to the case, and another, Patricia Larson, had been dismissed from the case. DN 1347*. The third, Martin Wishnatsky, intervened in the case despite the trial court's efforts to keep him from becoming a party. Charlene Uchtman, one of the Board members found to have been in breach, also was not a party, for she had been earlier dismissed from the case. DN 579*.

Although the court did not explain "what it is trying to do," the record reveals that, both before and after entry of judgment, the court actively implemented a plan to insure that **religious** criteria would govern the Board selection process.

1. Religious Qualifications for Board Members.

The road to the trial court's final order reconstituting the FLS Board began with an initial effort to reconstitute the Board from within FLS. In an oral ruling from the bench on October 1, 1998, the court ordered that (i) four seats on a new seven-member Board would be filled by FLS branch office managers and employees, and that (ii) the other three seats would be filled by existing Board members, **provided** that a "reconciliation" could be reached between the branch office managers and employees on the one hand and the existing Board members on the other. T33:7133-7135, 7139-7140*. When asked why the branch office managers and employees would be granted authority to determine the composition of a majority of the FLS Board — with the resulting authority to "set its religious doctrine" — the trial court replied "that Darold Larson and FLS" had, by their decision to employ them, already determined that they have "sufficient Christian credentials to sit on the board…." T33:7141-7142*.

On October 15, 1998, less than two weeks after the above-mentioned order was issued, the 12 employees of FLS wrote to the court stating that its proposed "reconciliation" was impossible. Citing Scripture (*Proverbs* 28:13; *II Samuel* 12:14 and *Acts* 9:1-9), the employee group proclaimed that "input or participation" of the existing Board members would not be "prudent or amicable." DN 1627*. On November 2, 1998, the FLS ministry's branch office association agreed, advising the

court by letter that, as to the existing FLS Board members, "*personally* we can be reconciled as God leads," but not as members of the FLS Board. DN 1630*.

2. Evangelical Ministers as Arm of the Court.

After the branch office managers and employees exercised the veto given to them by the trial court, the court next reviewed a report from the receiver of interviews with those same managers and employees as to how they wanted their employer's Board of Directors selected. All said they wanted FLS to remain "Christian," and many recommended that it also remain "pro-life." DN 1653*.

The receiver thereafter informed the court that the Valley Christian Counseling Center ("VCCC") had invited him to a meeting on January 8, 1999. VCCC is a subsidiary of the F-M Evangelical Ministerial Association ("Ministerium"), an association of certain Protestant churches. DN 1653.[6] Prompted by this report, on January 7, 1999, the court sent a letter to the receiver's attorney, requesting a recommendation on restructuring the FLS Board and information on the Ministerium, and advising him that "[a]t this time I am inclined to request their [the Ministerium's] assistance in selecting the FLS board." DN 1651*.

This was not the first time that the court had entertained such a plan. At the October 1, 1998 hearing, when attempting to restructure the FLS Board from within, the court announced that it was "looking for other alternatives," specifically mentioning the Ministerium as a possibility. T33:7134*. Indeed, the idea of utilizing an

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[6] This report to the court was not shared with the defendants until flushed out by FLS's Motion for Disclosure of Ex Parte Communications. DN 1651-1655, 1661.

association of Protestant ministers to select FLS Board members was first proposed by Assistant Attorney General Huey. In May 1996, in a hearing on FLS' motion to discharge the receiver, Mr. Huey articulated the State's religious views, attesting that the Ministerium was "a recognized and credible organization of Evangelical ministers, all of whom hold religious and theological beliefs consistent with the defendants" and recommending "that we ask … [these] ministers from Evangelical congregations in this community … to step forward and three of their members to serve on the board of directors." Hearing of May 1, 1996, Tr. 27-35*. At the conclusion of trial, two and one-half years later, the court returned to the State's earlier recommendation, opining that the "Minister[ium] … would be a very much pro life Christian group that may have an interest in going on the board." T33:7134*.

After a meeting on January 8, 1999, between the receiver, his attorney and the VCCC Board, events moved swiftly towards employing the Ministerium in the Board selection process. The Order for Judgment of January 21, 1999 delegated to the Ministerium the authority to appoint three FLS directors. ¶ 3(c), DN 1680*. Extensive meetings and discussions subsequently took place between the receiver, the receiver's attorney and the Ministerium leading up to the July 1999 announcement of the three Ministerium appointees. *See* "Synopsis of the Record on Court Appointment of Evangelical Ministers and other 'Sufficiently Religious' Persons to the Board of Family Life Services" (DN 1861); "Notice of Identity of New Board of Directors" (DN 1831).

E. Expressions of Prejudice.

Not only did the trial court apply religious criteria in its reconstruction of the FLS Board, but it employed its own religious standards to pass rather gratuitous judgment on the Christian views and practices of key persons affiliated with FLS.

The record is replete with debates between the Attorney General's office and the defendants about the role of religion in the proceeding below. *See, e.g.,* DN 153 and 160; 277 and 289; 428-429 and 488-489; T19:4146. At one point, for example, Mr. Larson's role as pastor of the Community Praise Center was criticized because he was neither elected by a church council nor appointed by a bishop of a denomination, the Assistant Attorney General claiming: "No church in the country functions the way he's just described. Churches have councils that elect people." T26:5693. Unwilling to stay out of this religious dispute, the court found that Mr. Larson had obtained a Certificate of Ordination from the Pentecostal Assembly of America, for which he had only to "fill out an application and pay an annual fee," and that Mr. Larson "operated" an unincorporated church without members. The court also belittled Mr. Larson's role as a minister, stating that "he did not provide spiritual leadership to either the directors or employees." FF 179, 180, 182; October 25, 1999 Memorandum and Order at 4 (DN 1889).

While the court merely demeaned Mr. Larson's Christian credentials, it launched an outright attack against Martin Wishnatsky, an intervening defendant who was not even charged with any wrongdoing by the Attorney General. *See State ex rel.*

Heitkamp v. Family Life Services, Inc., 1997 N.D. 37, 560 N.W.2d 526. Eleven separate paragraphs in the trial court's findings criticize Mr. Wishnatsky. For example, he is described as a "militant antiabortion activist" and a "militant defender of Darold Larson" who "intimidated pro-life FLS employees." The court condemned him for filing "frivolous lawsuits"— all because of his militant antiabortion stand — and described him as "a victimized protagonist in a drama he has created." FF 166-70. Finally, the court trivialized Mr. Wishnatsky's own religious freedom claims, asserting that he "rarely attended FLS Bible studies … [except] on his birthday," and that the ministry provided him through FLS could just as easily be met elsewhere. FF 172.

None of these Findings were referenced in any of the court's Conclusions of Law. Nor are they cited as the basis of any ruling by the court on the constitutional claims raised by defendants. Indeed, the court below paid scant formal attention to the religious freedom and establishment issues, making only cursory findings, such as that FLS is not a "church," and "First Amendment privileges cannot shield an entity when it violates state law." FF 184-185. The failure to address these issues in a traditional judicial manner is one more indication that the lower court, prodded by the Attorney General, used its view regarding the kind of Christian ministry FLS should be in fashioning the new FLS Board.

ARGUMENT

I. THE TRIAL COURT HAD NO AUTHORITY UNDER NORTH DAKOTA LAW TO DISMANTLE AND RECONSTITUTE THE FLS BOARD.

The trial court ruled that N.D.C.C. ch. 10-24 through ch. 10-28 and N.D.C.C. ch. 13-07 govern this case. CL 4-8. None of the statutes cited by the court support its order to dismantle and to reconstitute the FLS Board, nor does any other provision of North Dakota law.

A. The Court Lacked Jurisdiction Under N.D.C.C. ch. 10-24 through ch. 10-28.

According to N.D.C.C. Section 10-28-07, the Secretary of State, not the Attorney General, was empowered to "administer chapters 10-24 through 10-28 … and to perform the duties therein imposed," including the power to initiate investigations into potential violations of the nonprofit corporation code and to "certify to the attorney general for … action … all interrogatories and answers" obtained in such investigations. N.D.C.C. Sec. 10-28-05. Only after the Secretary of State had concluded his investigation, **notified** the nonprofit corporation that he had found cause for dissolution of that corporation, and **certified** that such corporation has "given … cause for dissolution" could the Attorney General "file an action in the name of the state against" that corporation. N.D.C.C. Sec. 10-26-08.

The Attorney General instituted this action under Section 10-26-07 seeking dissolution of FLS without FLS having received the required notice from the Secretary of State and without the Attorney General having previously received the required

certification from the Secretary of State. Clearly, the action below was instituted by the Attorney General without lawful authority. Therefore, N.D.C.C. ch. 10-24 through 10-28 conferred no subject matter jurisdiction upon the court below.

Nothing in Section 10-26-07 is to the contrary. That statute does not confer authority upon the Attorney General; rather, it only confers authority upon the district court before which an involuntary dissolution action has been lawfully brought by the Attorney General, which, in turn, is determined by Section 10-26-08.

This reading of Section 10-26-07 is reinforced by examining other statutes which do confer authority upon the Attorney General to institute a civil action. For example, Section 13-07-07 of the Consumer Credit Counseling Services Act, invoked by the Attorney General below, provides that "[t]he attorney general may institute a civil action in the name of the state in the district court…." There is no comparable language in Section 10-26-07.

Likewise, Section 10-19.1-118, the Business Corporation Act counterpart to Section 10-26-07, contains a subsection (2), not found in Section 10-26-07, which specifically authorizes the institution of an involuntary dissolution action by the Attorney General. That subsection is the Business Corporation Act version of Section 10-26-08. As Section 10-26-08 requires notice to a nonprofit corporation from the Secretary of State, Section 10-19.118(2) requires notice to a business corporation from the Attorney General, prior to the filing of an involuntary dissolution action. Surely, the state legislature did not intend Section 10-26-07 to authorize the Attorney General

to institute an involuntary dissolution action against a nonprofit corporation, and thereby to bypass the notice requirement of Section 10-26-08. To rule otherwise would confer a benefit upon a business corporation that is not extended to a nonprofit corporation, a result clearly not contemplated by the relevant statutes. Thus, the court's judgment below must be reversed for lack of subject matter jurisdiction.

B. The Court's Order Was Not Authorized by N.D.C.C. ch. 10-24 through ch. 10-28.

Nothing in N.D.C.C. ch. 10-24 through 10-28 authorizes a court to dismantle and to reconstitute a nonprofit corporate board. Unlike N.D.C.C. Section 10-19.1-115, the provision governing involuntary dissolutions of business corporations, N.D.C.C. Section 10-26-07 does not authorize a court to "grant any equitable relief it deems just and reasonable in the circumstances" **or** to "dissolve a corporation and liquidate its assets and business." Section 10-26-07 provides only for "involuntary dissolution."

This reading of Section 10-26-07 is confirmed by Section 10-26-11, which authorizes a court to appoint a receiver in a nonprofit corporation involuntary dissolution proceeding, pursuant only to "proceedings to liquidate the assets and affairs of a corporation," and only after "it is established that liquidation of its affairs should precede the entry of a decree of dissolution" (Section 10-26-10.4), to the end that the receiver "preserve the corporate assets … until a full hearing can be had."

The court below departed completely from these statutory rules, appointing a receiver, not to liquidate FLS, but rather to maintain FLS as an ongoing enterprise. Indeed, at the outset of this case, the court appointed the receiver solely because of the

Attorney General's representation that FLS has "engaged in a continuing pattern of abuse of authority granted them by law." DN 21*. The court, at the end of the case, compounded its error, authorizing the receiver to oversee the reconstitution of the FLS Board, by "provid[ing] any assistance necessary to the entities involved in selecting the 7 member board of directors of FLS." DN 1774*.

The court simply assumed that it had general equity powers to fashion a remedy such as board removal to enforce the Nonprofit Corporation law in effect at that time. But it did not. Such powers were not conferred upon North Dakota district courts until 1997, when the State legislature substituted N.D.C.C. ch. 10-33 for N.D.C.C. ch. 10-24 through 10-28. In the new law, Section 10-33-107(1) specifically authorizes the court, in an involuntary dissolution proceeding against a nonprofit corporation, to "grant equitable relief it considers just and reasonable in the circumstances," bringing the nonprofit corporation law into conformity with Section 10-19.1-115(1) governing involuntary dissolution proceedings against business corporations. If the court already had such general equity powers under N.D.C.C. ch. 10-24 through 10-28, then there would have been no need for Section 10-33-107(1). But the court did not have such general equity power. This new provision was not available in this case, not only because N.D.C.C. ch. 10-33 was not in effect at the time this action was initiated, but because the Attorney General did not comply with the notice requirement of Section 10-33-107(1)(e), a condition precedent to the court's jurisdiction.

Not only did N.D.C.C. ch. 10-24 through 10-28 not confer upon a court general equity powers, it conferred no authority to remove a corporate board member. That did not, however, deter the court below from removing all the members of the FLS Board. Such power was not granted to the court until 1997 with the enactment of the new Nonprofit Corporation Act, which contains Section 10-33-37 expressly granting such authority. By the trial court's own ruling, however, the 1997 Act did not apply to this case. CL 4 and 6.

C. The Court's Order Was Not Authorized by N.D.C.C. ch. 13-07.

The court below found that FLS, as a consumer credit counseling service, "is subject to the provisions of North Dakota law, including N.D.C.C. ch. 13-07." Additionally, the court found that FLS violated both Sections 13-07-04 and 13-07-06. Yet it did not either (i) issue a permanent injunction or (ii) impose a civil penalty, as authorized by N.D.C.C. Section 13-07-07. Instead, the court chose to fashion a remedy of its own making not prescribed by any provision in N.D.C.C. ch. 13-07.

Offering no explanation, the court ignored the injunctive and penalty remedies authorized by Section 13-07-07, but seized upon that same section to justify awarding the Attorney General $104,616.11 in costs and attorneys' fees. Judgment, ¶ 11, DN 1774*. But for the express terms of that section, the court did not have such power. The court simply cherry picked its way through Section 13-07-07, tossing its two remedies aside without explanation, yet awarding the Attorney General all of her requested attorneys' fees.

D. The Court's Order Was Not Authorized by N.D.C.C. ch. 32-13.

Confronted by the defendants' objections to her proposed takeover of FLS, the Attorney General urged the court to look to N.D.C.C. Section 32-13-01 for authority to dismantle and reconstitute the FLS Board. Thus, she amended her complaint, asking the court "pursuant to N.D.C.C. ch. 32-13" to "order that all individual defendants be removed from whatever office they might hold in any defendant nonprofit corporation…." DN 208*. The court declined the invitation, making no mention of N.D.C.C. ch. 32-13 in its recitation of law governing this case. DN 1680*.

N.D.C.C. Section 32-13-01, upon which the Attorney General mistakenly relied, authorizes "[t]he remedies formerly attainable by … the writ of *quo warranto,* and proceedings by information in the nature of *quo warranto*…." Section 32-13-03 provides that "[a]n action may be commenced by the state … against the parties offending … [w]hen any person shall usurp, intrude into, or unlawfully hold or exercise … any office in a corporation … created by the authority of this state."

In *State v. Clevenger,* 364 P.2d 128 (N.M. 1961), the New Mexico attorney general, invoking a statute identical to North Dakota's, commenced a *quo warranto* action "to remove the individual defendants as directors of … a non-profit corporation" because "the directors had breached their duties in administering a charitable trust and [thus] were unfit and incompetent to hold … office…." *Id.,* 364 P.2d at 129. Finding that "certain directors were paid unauthorized compensation; that title to a Cadillac automobile was taken by one director without authorization," the trial judge removed

the offending directors for failure to exercise proper oversight and to maintain proper accounting and records. *Id.,* 364 P.2d at 129-30.

The New Mexico Supreme Court reversed, ruling the state's *quo warranto* statute did **not** apply to lawfully-appointed directors who had simply breached their fiduciary duties. *Id.,* 364 P.2d at 130-31. As was true in *Clevenger,* so is the case here. The Attorney General claimed, and the court below found, only a breach of fiduciary duties, not an unlawful usurpation of office. CL 27-31, 34-41, 42-44, 51. Therefore, N.D.C.C. ch. 32-13-03 simply does not apply.

E. The Court's Order Was Not Authorized by Common Law or Equity.

In her complaint, the Attorney General claimed authority to institute this law suit "in the public interest pursuant [to] the common law" and invoked "the general powers of a court of equity … to enter appropriate orders … including "reorganiz[ing] … FLS under an independent board of directors and officers duly elected by such independent board." DN 1*. Such lofty appeals to the "public interest," "common law" and "equity" have no place in this case, where available statutory remedies were rejected in favor of an unauthorized takeover of a Christian ministry.

According to N.D.C.C. Section 1-01-06, "there is no common law in any case where the law is declared by the code." As this Court has observed, the North Dakota legislature has, by N.D.C.C. Section 1-01-03, "codified a list of priorities of authoritative law," ranking the "statutes of the state" above the "decisions of the tribunals enforcing those rules which, though not enacted, form what is known as

customary or common law," the latter "fall[ing] at the very bottom." *Burr v. Trinity Medical Center,* 492 N.W.2d 904, 907 (N.D. 1992). Further, as this Court has also made clear, "[t]he principles of equity are deemed part of the common law … [and] [a]s common law encompasses equity, and as there is no common law in any case where the law is declared by the code … equity does not apply where the law is declared by statute." *State by Workmen's Comp. Bureau v. Clary,* 389 N.W.2d 347, 351 (N.D. 1986).

Thus, this Court has instructed the courts of the State that N.D.C.C. Sections 1-01-03 and 1-01-06, taken together:

> bespeak the legislature's persistence that codified law commands more attention and compliance than common law. Therefore, it would be inappropriate for district courts to haphazardly fashion equitable remedies with no deference to codified law. Instead, district courts should tread carefully when entering the realm of equitable remedies, fashioning them **only when directed to do so by statutes and court rules**, when there is no adequate remedy, or when the equitable remedy is better adjusted to render complete justice. [*Burr v. Trinity Medical Center, supra,* 492 N.W.2d at 908 (emphasis added).]

There is no doubt that the lower court ignored this lesson. First, it made no attempt to fashion an equitable remedy "directed" by statute or by "court rule." Instead, it studiously ignored the well-crafted comprehensive statutory scheme of equitable remedies contained in N.D.C.C. ch. 10-24 through 10-28 and ch. 13-07 in a tendentious effort to take over FLS and to restructure it according to criteria found in no statute or court rule. N.D.C.C. Section 10-26-07 provided for the remedy of involuntary dissolution only, not — as is now the case under the 1997 Nonprofit

Corporation Act — the additional power to fashion another equitable remedy that might be "just and reasonable." *See* N.D.C.C. Sec. 10-33-107. N.D.C.C. ch. 10-24 through 10-28 did not authorize the removal of directors by judicial proceeding, although the new law does. *Contrast* N.D.C.C. Sec. 10.19.1-41.1 and Sec. 10-33-37. N.D.C.C. Section 13-07-07 provided the very specific remedies of injunctive relief and civil penalties, not removal of directors. And N.D.C.C. ch. 32-13 codified ancient common law remedies which do not apply to fiduciary misconduct.

This is **not** a case where the legislature has **not** spoken. Rather, the legislature has provided carefully crafted rules binding on the courts even when fashioning equitable remedies. *State by Workmen's Comp. Bureau v. Clary, supra,* 389 N.W.2d at 351 ("Equity follows the letter and spirit of the law and courts of equity are bound by and must follow and apply the principles of substantive law."); *Matter of Estate of Voeller,* 534 N.W.2d 24, 26 (N.D. 1995) ("[A]n equitable remedy cannot avoid the meaning of an unambiguous statute….").

Second, the court below made no effort whatsoever to find that the statutory remedies provided in N.D.C.C. Sections 10-26-07 and 13-07-07 were inadequate. Yet the inadequacy of legal remedies has always been a prerequisite to general equitable relief. The court may not substitute presumptuously an equitable remedy for a remedy provided by statute. *D.C. Trautman Co. v. Fargo Excavating Co.,* 380 N.W. 2d 644, 645 (N.D. 1985) ("[a] party is not entitled to equitable relief if there is a remedy provided by law which is equally adjusted to rendering complete justice"); *A & A Metal*

Bldgs. v. I-S, Inc., 274 N.W.2d 183, 188 (N.D. 1978) ("[a] court has equitable jurisdiction to provide a remedy where none exists at law").

Finally, the court unlawfully delegated its judicial power to nongovernmental agencies, abandoning its responsibilities to monitor the receiver of FLS and virtually turning FLS over to the receiver's attorney and other private nongovernmental persons and entities. Such delegation of the court's equitable powers is clearly impermissible under North Dakota law. *See, e.g.*, *State v. Nelson,* 417 N.W.2d 814, 817-18 (N.D. 1987) (judge may not delegate sentencing authority to addiction evaluator); *State v. Saavedra,* 406 N.W.2d 667, 669-73 (N.D. 1987).

II. THE ORDER DISMANTLING AND RECONSTITUTING THE FLS BOARD VIOLATES THE RELIGION CLAUSES OF THE FIRST AMENDMENT.

A. Empowering Religious Entities to Select the New FLS Board Violates the Establishment Clause.

In its Order for Judgment, the trial court conferred upon FLS branch office managers and employees and the F-M Evangelical Ministerial Association's Board of Directors almost unlimited power to select the members of the new FLS Board. Although the receiver was commissioned to oversee the selection process, the court left it up to the managers, the employees and the Ministerium to select the new members by whatever criteria they choose, limited only by the financial and employment standards identified by the order. The court even refused to supervise the selection of new FLS Board members, relinquishing all control to the receiver and nongovernment persons and entities. *See* pp. 8-11, *supra*. By thus delegating unbridled equity power, the

court violated the well-established rule that government power may not be exercised constitutionally by a religious entity.

Without doubt, the Ministerium is a religious association of certain evangelical Protestant pastors from the Fargo/Moorhead area. Indeed, the court apparently chose to delegate power to the Ministerium precisely because it thought their members' religious views were compatible with those of FLS. *See* pp. 10-11, *supra*. The court below found that FLS is a religious entity, concluding that FLS was a distinctively interdenominational Christian pro-life ministry, providing credit counseling and debt management service from a Biblical perspective with the hope that FLS counselors share with clients the "gospel and good news of Jesus Christ." *See* p. 4, *supra*. The court recruited the FLS branch office managers and employees precisely because they appeared to share the FLS religious mission, thus meeting "the religious qualifications" which were chosen by the "Defendants themselves or by persons acting under their direction." *See* DN 429 (AG Brief), pp. 8-9. In fact, the court stated on the record that anyone employed by, or working in the branch offices of, FLS "has sufficient Christian credentials to sit on the board." T:33:7142. Additionally, the court assumed that the FLS employees and branch office managers would apply Biblical principles in their decision-making process, and that Christian character and faith would be the foremost criteria to be applied to those selected to the new Board. *See* pp. 8-10, *supra*.

By deliberately choosing these two religious entities to exercise its equitable powers, the court violated the rule of *Larkin v. Grendel's Den,* 459 U.S. 116 (1982). In *Grendel's Den,* the U.S. Supreme Court struck down a Massachusetts law because it vested in certain churches an absolute veto over the granting of liquor licenses to certain business establishments located within a certain distance from a church building. By vesting such "discretionary governmental powers in religious bodies," the Massachusetts legislature breached the jurisdictional wall set up by the Establishment Clause which prevents a "'fusion of governmental and religious functions." *Id.,* 459 U.S. at 123, 126. As Chief Justice Warren Burger observed in that case:

> The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith … [because the statute] does not by its terms require that churches' power be used in a religiously neutral way." [*Id.*, 459 U.S. at 125.]

Likewise, in this case, the court below vested its "discretionary equitable powers" in two religious entities. In doing so, the court unconstitutionally gave to those religious bodies "standardless power, calling for no reasons, findings or reasoned conclusions" to implement the court's equity decree, thereby enabling those bodies to further their "explicitly religious goals." *Id*. 459 U.S. at 125, 127-28. As was true of the power conferred upon churches under the Massachusetts law, the power conferred by the trial judge here upon the Ministerium, a consortium of church pastors, enabled those pastors to appoint persons to the FLS Board solely because they were members of

a particular congregation or adherents of a particular religious faith. Under the rule of *Grendel's Den,* such a delegation of government power is clearly an unconstitutional establishment of religion. *Id.; Barghout v. Bur. of Kosher Meat and Food Control*, 66 F.3d 1337 (4th Cir. 1995).

As explained and applied in a later case, *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 698 (1994), *Grendel's Den* means that "a State may not delegate its civic authority to a group chosen according to religious criterion." Yet, that is exactly what the court below did, determining that, because the employees and office branch managers of FLS and the members of the Ministerium met the FLS religious criteria, they were qualified to exercise the court's equitable power to reconstitute the FLS Board. As the Supreme Court pointed out in *Kiryas Joel*, it does not matter that "the recipients of state power … are a group of individuals united by common doctrine, not the group's leaders or officers," as was the case with the FLS employees and branch office managers. The rule of *Grendel's Den* applies, for "a State may [not] deliberately delegate discretionary power to an individual, institution, or community on the ground of religious identity." *Id.,* 512 U.S. at 698-99.

The religious identity of the employees and branch office managers of FLS and the Ministerium was not an "incidental" matter. The court made their "Christian credentials" the centerpiece of its effort to enlist them to carry out the court's decision to dismantle and reconstitute the FLS Board. By doing so, it not only violated the Establishment Clause, but violated the Free Exercise Clause as well.

B. Dismantling and Reconstituting the FLS Board Violates the Free Exercise Clause.

FLS is a Christian nonprofit credit counseling agency wholly integrated into a larger Christian counseling and pro-life ministry. Its Articles of Incorporation and By-Laws, including those providing for FLS governance, reflect its Christian mission in two distinct ways. First, its religious mission of counseling and proselytizing always has priority over its business affairs. Second, its governing structure and operations must always conform to Biblical principles. *See* pp. 4-6, *supra.*

Originally, the FLS By-Laws gave Christian Caring Ministries Trust the right to approve and to remove FLS Board members. FF 30. After the institution of this lawsuit, however, CCMT relinquished control of the FLS Board, leading to a change of the form of religious governance, but not a change in religious mission. Instead of operating under a hierarchical authority, common in many religious denominations, the FLS Board began to function more like an independent board of elders, independently electing three new members to the Board. FF 29, 31.

This change in government, however, was trumped by the trial court's appointment of a receiver who has operated FLS since January 1996. Ostensibly, the court justified this change in operations because of evidence of financial abuse and breach of fiduciary duty, but it did so without regard to the FLS's Christian mission and mode of governance, treating FLS as if it were merely an ordinary business operation.

But FLS is not an ordinary business. Rather, it is a religious organization, as the court below determined, and as it recognized in its plan to reconstitute the board. *See* pp.

8-11, *supra.* As a religious organization, the court was prohibited by the Free Exercise Clause of the First Amendment from dismantling and reconstituting the FLS Board as a remedy for whatever financial and fiduciary abuses it may have found.

In a line of cases dating back to 1872, the U.S. Supreme Court has laid down stringent rules limiting the exercise of civil power to resolve disputes affecting "religious organizations." Although courts have jurisdiction to resolve **civil** disputes, the Court has insisted that civil authorities cannot employ a remedial solution that changes the governing structure of "religious bodies." To do so undermines the right of the people to decide how they are going to govern themselves as "voluntary religious associations." Thus, the High Court has ruled that it "'cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church.'" *Watson v. Jones,* 80 U.S. 679, 730 (1872). Likewise, the Court has ruled that neither a legislature nor a court can decide between two competing religious authorities which "would most faithfully carry out the purposes of the religious trust." *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 107, 109 (1952); *Kreshik v. St. Nicholas Cathedral,* 363 U.S. 190 (1960).

On one occasion, the U.S. Supreme Court permitted civil intervention into the internal governance of a religious organization based upon a showing of "fraud, collusion or arbitrariness," *Gonzales v. Roman Catholic Archbishop,* 280 U.S. 1, 16 (1929), but this exception allows for only "marginal judicial involvement." Thus,

even when a state court maintained that it was simply enforcing state law governing "implied trusts," the High Court ruled that "[t]he First Amendment **prohibits** a State from **employing religious organizations as an arm of the civil judiciary** to perform the function of interpreting and applying state standards." *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem. Presbyterian Church,* 393 U.S. 440, 450-51 (1969) (emphasis added).

If a state judge may not employ a "religious organization as an arm of the civil judiciary" to enforce its law of implied trusts, then neither may a state judge "employ a religious organization as" its arm to enforce the law governing nonprofit corporations. Yet that is precisely what was done by the trial court in this case. It employed the F-M Evangelical Ministerial Association Board of Directors and the employees and branch managers of FLS to establish an FLS Board of Directors independent from the FLS Board that had previously run the FLS ministry. *See* FF 187-188.

Such action not only runs contrary to the U.S. Supreme Court's holding in *Presbyterian Church,* but it runs afoul of that Court's rulings in *Kedroff, supra*, and *Kreshik, supra,* where the New York state legislature and courts transferred control over the Russian Orthodox church from the church authorities in Moscow to those in America in an effort to ensure that the Church would "carry out more effectively and faithfully the purposes of this religious trust." *Kedroff, supra,* 344 U.S. at 117-18. Rejecting the claim that the state authorities were simply enforcing its "cy-pres doctrine," the Court ruled that the statute had by "displac[ing] one church administrator

with another … intrude[d] for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom…." *Id.,* 344 U.S. at 119.

The court below summarily dismissed the institutional free exercise holding contained in *Kedroff* as "a red herring," stating that "FLS is a corporation…, an artificial being existing only in contemplation of law … [having] no existence outside the boundaries set by the state." Having found that the FLS Board in "breach … [of] their fiduciary duty as corporate directors of a non-profit corporation," the trial court ruled that the "First Amendment will not shield them in their capacity as corporation officers." DN 1822, at 2.

Such reasoning is virtually identical to that articulated by Justice Robert Jackson in his lone dissenting opinion in *Kedroff* :

> Nothing in New York law required this denomination to incorporate its Cathedral…. But this denomination wanted the advantages of a corporate charter for its Cathedral, to obtain immunity from personal liability and other benefits…. When it sought the privileges of incorporation under the New York law applicable to its denomination, it seems to me that this Cathedral and all connected with its temporal affairs were submitted to New York law. [*Kedroff, supra*, 344 U.S. at 128.]

Just as such thinking was rejected in *Kedroff*, so should this Court reject it here.

The trial court also insisted that the rule in this long line of cases applied only to **churches**, and that FLS did not meet either the court's or the IRS definition of a church. FF 46; DN 1899. Just because FLS does not meet the IRS' or the court's definition of a "church" does not disqualify it from enjoying the full protection of the Free Exercise Clause. Courts have applied both the Free Exercise and Establishment

Clauses to cases in which neither party is a church. *See, e.g.*, *Everson v. Board of Education,* 330 U.S. 1 (1946); *Wisconsin v. Yoder,* 406 U.S. 205 (1972). After all, the constitutional text bans laws respecting an establishment of **religion**, and laws prohibiting the free exercise of **religion**, **not** just the establishment of a **church** or the free exercise of religious activities by a **church**.

What is relevant is whether FLS is a religious organization. The trial court so concluded, finding that FLS was engaged in a uniquely Protestant/Catholic interdenominational Christian pro-life ministry. FF 184. The Free Exercise Clause demands that the court not appoint the leadership of religious organizations. Nonetheless, the trial court delegated power to the Ministerium, an evangelical Protestant association with no Catholic representation, despite the unique Protestant/Catholic nature of the FLS ministry. By that delegation and the delegation to the FLS employees, the court also ruled that it was irrelevant whether the pro-life ministry of FLS rested upon Christianity or some other religious faith or, for that matter, upon no religious faith at all, but upon "ethical, practical, sociological or medical considerations." Having separated Christianity from the FLS pro-life ministry, the court then found that "First Amendment privileges cannot shield that entity when it violates state law...." FF 185.

Not only is this finding disingenuous, it is simply wrong. If a charitable organization has integrated its distinctive Christian pro-life message into its governing structure, then a court cannot use a civil legal scalpel to excise that message, hoping

thereby to avoid the strictures of the First Amendment. Having failed to limit itself to a remedy carefully crafted only to halt financial breaches of duty, the court entered into a religious thicket outside its jurisdiction, intruding into the governance of a religious organization and making religiously discriminatory decisions, thus committing *per se* violations of the Free Exercise Clause.

C. The Order Dismantling and Reconstituting the Board Is Infected with Religious Prejudice in Violation of the Free Exercise Clause.

In its Conclusions, the trial court found only that the FLS Board, as constituted prior to the institution of this law suit, breached its fiduciary duties. It made no finding of breach of duty by any of the three FLS Board members elected subsequent to January 1996. Nevertheless, the trial court singled out one of the latter three for a special set of findings, none of which related to any legal issue before the court. As set forth in more detail in the Statement of the Case, *supra*, the court found Martin Wishnatsky to be a "militant antiabortion activist" responsible for numerous "frivolous law suits" with no substantial interest in the religious ministry of FLS. Pages 12-13, *supra*. The trial court's hostility to Mr. Wishnatsky's religious beliefs and practices no doubt influenced the court's decision to dismantle and reconstitute the FLS Board so that Mr. Wishnatsky would not serve on it.

Rule 52 of the North Dakota Rules of Civil Procedure states: "[i]n all actions tried upon the facts without a jury … the court **shall** find the facts specially and state separately its conclusions of law **thereon**, and direct the entry of the appropriate judgment…." (Emphasis added.) Thus, the trial court's prejudicial findings against

the religious views and actions of Mr. Wishnatsky necessarily undergird the court's Conclusions and Judgment. That being the case, the court's Conclusions and Judgment are infected with religious prejudice and discrimination and must be reversed for violation of the Free Exercise Clause.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 523 (1993), the U.S. Supreme Court unanimously ruled that a series of city ordinances outlawing cruelty to animals violated the "nonpersecution principle" of the First Amendment. Although the ordinances did not expressly discriminate, the High Court found that they were enacted to eliminate the religious sacrifice of animals, observing that the Free Exercise Clause "'forbids subtle departures from [religious] neutrality'" and "'covert suppression of particular religious beliefs,'" as well as obvious and overt ones. *Id.,* 508 U.S., at 534.

In *Hialeah,* the Court undertook a "meticulous survey" of the legislative record, uncovering official action laced with religious prejudice. A similar survey of the trial court record reveals official action permeated with religious discrimination. First, as noted above, the trial judge condemned the religious credentials, beliefs and actions of Messrs. Larson and Wishnatsky, and chastised the latter for being overly militant in his "antiabortion positions" and, hence, intimidating FLS employees. *See* pp. 12-13, *supra*. Second, the trial judge trivialized FLS's distinctively Christian pro-life position, concluding that an "ethical, practical, sociological or medical" foundation could serve just as well. FF 185. Third, the trial judge denigrated the importance of continuing the

particular denominational leadership in place at FLS, presuming that Christians from all churches will just continue to work together at FLS "in meeting their fellow man's temporal and spiritual needs." FF 184.

These three Findings are crucial to the court's Order to reconstitute the Board by using FLS employees, branch office managers, and also the Ministerium. The animosity expressed by the trial court toward Messrs. Larson's and Wishnatsky's religious opposition to abortion is like the opposition expressed by the Hialeah City Council against the religious sacrifice of animals, found unconstitutional in *Hialeah, supra,* 508 U.S. at 540-42. The trial court's attempt to neutralize what it perceived to be a "militant" Christian element in the FLS pro-life ministry is like the unconstitutional effort by Tennessee to cleanse its political process of religious influence. *See McDaniel v. Paty,* 435 U.S. 618, 622 (1978). And the trial court's preference for the leadership of the Ministerium over that of the existing FLS Board smacks of the kind of unconstitutional discrimination struck down in *Fowler v. Rhode Island,* 345 U.S. 67, 69-70 (1953).

In a previous ruling that Mr. Wishnatsky had a right to intervene as a defendant in this case to defend his First Amendment religious freedoms, this Court admonished the trial court that "[w]e must never forget the role pursuit of religious freedom has played in the history of our nation." (*State v. Family Life Services, Inc., supra*, 1997 N.D. 37, ¶15, 560 N.W.2d at 528.) Had the court below heeded this history lesson, it would not have treated Messrs. Larson's and Wishnatsky's religious views and

practices with such disdain. But the trial court did not heed the warning, and as a consequence, the Judgment dismantling the FLS Board and reconstituting it according to the court's views of religious credibility violates the "nonpersecution principle of the First Amendment" in the *Hialeah, McDaniel* and *Fowler* cases.

III. THE COURT ORDER DISMANTLING AND RECONSTITUTING THE FLS BOARD VIOLATES THE NORTH DAKOTA CONSTITUTION.

Even if the court order was "religiously neutral" in every way, it is still unconstitutional under Article I, Section 3 of the North Dakota Constitution. The State Constitution religious freedom argument was raised in the Answer (DN 203, ¶14) and thoroughly briefed in the trial court. *See* DN 485 (Memorandum of Law on Free Exercise of Religion and the North Dakota Constitution), 488, 513, 539, 689, 1793, and 1860. Under that guarantee, this Court should examine the trial court's order dismantling and reconstituting the FLS Board to determine if it was supported by a compelling state interest and, if so, whether the order was the least restrictive means available to protect that interest (hereinafter "compelling state interest test").

Prior to *Employment Division v. Smith,* 494 U.S. 872, 878 (1990), state courts generally applied the compelling state interest test without determining whether the test was required by the federal or by the state constitution. *E.g.*, *State v. Hershberger,* 444 N.W. 2d 282 (Minn. 1989). This Court was no exception. *State v. Shaver*, 294 N.W.2d 883, 888, 901 (N.D. 1980); *State v. Rivinius*, 328 N.W.2d 220, 228-29 (N.D. 1982). After *Smith*, some state courts have continued to apply the compelling interest

test to claims resting upon state constitutional guarantees even though that test is no longer used to enforce the federal free exercise guarantee.

The Minnesota Supreme Court led the way in *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990), following the vacation of its earlier judgment for reconsideration in light of *Smith*. *Minnesota v. Hershberger,* 495 U.S. 901 (1990). Article I, Section 16 of the Minnesota Constitution reads, as follows:

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed … nor shall any control of or interference with the rights of conscience be permitted …; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state….

The Minnesota justices found "[t]his language … [to be] of a **distinctively stronger character** than the federal counterpart … [noting that] [w]hereas the first amendment establishes a limit on government action at the point of *prohibiting* free exercise, section 16 precludes even an *infringement* on or an *interference* with religious freedom." *State v. Hershberger, supra,* 462 N.W.2d at 397 (italics original; bold added).

Based on these differences, the Minnesota Court ruled that the state constitution affirmatively commanded state civil authorities to accommodate religious convictions and activities, where the federal constitution did not. Additionally, the Minnesota court concluded that the state constitutional text "invite[d] the court to balance competing values in a manner that the compelling state interest test" requires:

> Thus, while the terms "compelling state interest" and "least restrictive alternative" are creatures of federal doctrine, concepts embodied therein can provide guidance as we seek to strike a balance under the Minnesota Constitution between freedom of conscience and the state's public safety interest. [*Id.*, 462 N.W.2d at 398.]

The text of Article I, Section 3 of the North Dakota Constitution reads almost identically to Article I, Section 16 of the Minnesota Constitution:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state … but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

This Court has not yet determined whether North Dakota's constitutional guarantee requires application of the compelling state interest test. It should do so now, as the language of the North Dakota Constitution "invites" the court to examine in each case whether individual conscience has been invaded without sufficient state justification.

The Washington State Supreme Court has done just that with religious freedom claims arising under that state's constitution. *First Covenant Church v. Seattle,* 840 P.2d 174 (Wash. 1992). This decision is especially relevant to North Dakota, because Washington and North Dakota were admitted to the Union under the same Enabling Act. *See* Enabling Act, 25 Stats. 676, Section 4, N.D.C.C., Vol. 13A, at 64. As this Court has previously ruled a "comparison of the key constitutional provisions and existing case law of states which entered the Union at the same time and under similar conditions as North Dakota will be very helpful and valuable in determining the intent

of the people of North Dakota in adopting … the North Dakota Constitution." *Cardiff v. Bismarck Public School Dist.,* 263 N.W.2d 105, 112 (N.D. 1978).

Article I, Section 3 of the North Dakota Constitution guarantees "[t]he free exercise and enjoyment of religious profession," not just religious worship. Therefore, it extends protection beyond activities taking place in church. This Court has recognized that the religion clause of the State Constitution requires that "the interest of the state and the interests of individuals regarding their religious beliefs and convictions must be harmonized and balanced with the interests of the state so as to preserve the separate interests as much as possible without infringing upon the respective rights more than is necessary." *State v. Rivinius, supra,* 328 N.W.2d, at 228.

FLS does not challenge the legitimacy of the state's interest to enforce laws insuring that boards of nonprofit corporations, religious or otherwise, perform their financial fiduciary duties. What FLS does claim, however, is that the state has no compelling interest to reject the prescribed statutory remedies enacted by the state legislature to enforce those duties in favor of a corporate takeover, and that, by doing so, the court below did not use the least restrictive means to ensure financial integrity to FLS.

There can be no doubt that the judicial order dismantling and reconstituting the FLS Board has substantially burdened the "free exercise and enjoyment of religious profession." Such actions have not only fractured the religious fellowship within the Board, but have broken the religious leadership of the Board, dismantling the internal

governing structure of FLS, and rebuilding it according to the court's preferences. Moreover, the order to dismantle and reconstitute is based upon both religious "discrimination" and "preference," directly contrary to the express guarantee of religious freedom found in Article I, Section 3.

Having demonstrated both a substantial and a discriminatory burden upon FLS, there is no question that the compelling state interest test requires reversal of the trial court's judgment. At no time did the court below ever find a compelling state interest justifying the appointment of a receiver to take complete control of FLS, as was done in this case.

Furthermore, there is no state statute authorizing the dismantling and reconstitution of the board of a nonprofit corporation. *See* Pages 16-20, *supra*. Had the court below chosen to abide by these statutory remedies, it would have chosen remedies that are far less intrusive upon the religious exercise of the FLS Board. There is nothing in the record to demonstrate that such remedies would not have effectively stopped the financial abuses found by this court. To the contrary, the court below never even seriously considered those remedies, having appointed a receiver to take complete control of FLS less than three weeks after the complaint in this case was filed.

Instead of placing a receiver in complete control, the court could have appointed a special master to monitor the activities of the FLS Board and to report to the court. That alternative would have been far less intrusive upon FLS' free exercise of religion than the drastic remedy it chose. Rather than choosing the least restrictive means, the

court chose the most restrictive, thereby affronting the religion clauses of the North Dakota Constitution.

The court's insistence on a receiver taking complete control of FLS and the further order of dismantling and reconstituting the FLS Board neither were justified by a compelling state interest nor constituted the least restrictive means for furthering that interest. Because those orders are not necessary to the "peace or safety" of the State of North Dakota, but rather evince religious "discrimination and preference," they violate Article I, Section 3 of the North Dakota Constitution.

CONCLUSION

For the foregoing reasons, Appellant FLS submits that the Judgment of the trial court removing and replacing the FLS directors and granting attorney's fees to the Attorney General should be reversed.

Respectfully submitted,

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