STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO.: CRT 6145-09

HARRIET BERNSTEIN and **LUISA PASTER**; and **J. FRANK VESPA-PAPALEO**, Director, N.J. Division on Civil Rights,

COMPLAINANTS,

-vs-

OCEAN GROVE CAMP MEETING ASSOCIATION,

RESPONDENT.

RESPONDENT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DECISION

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PRELIMINARY STATEMENT

Complainants Harriet Bernstein and Luisa Paster asked the Ocean Grove Camp Meeting Association of the United Methodist Church (the "Association") to host their same-sex civil-union ceremony in its Boardwalk Pavilion (the "Pavilion"). The Association politely declined Complainants' request because that use of its worship facility would violate its sincerely held religious beliefs. Complainants, in turn, filed a complaint with the New Jersey Division on Civil Rights ("DCR"), alleging that the Association's refusal to host their ceremony constituted unlawful civil-union-status discrimination in violation of the New Jersey Law Against Discrimination ("LAD").

The Association files this Motion for Summary Decision, asking this tribunal to deny all Complainants' claims. As will be explained herein, Complainants' claims lack merit because (1) the LAD does not apply to the Association's operation of its Wedding Ministry in its worship Pavilion; (2) the Association's conduct did not constitute impermissible civil-union-status discrimination; (3) applying the LAD to force the Association to host Complainants' civil-union ceremony would violate the Association's rights of expressive association; (4) applying the LAD in this situation would amount to a compelled-speech violation; and (5) applying the LAD under these circumstances would violate the Association's free-exercise rights.

STATEMENT OF FACTS

A. The Founding of the Association

"In 1869 a small band of Methodist clergymen . . . capped a long search for an agreeable place to establish camp meeting grounds" by purchasing 260 acres (or one square-mile) of oceanfront property in New Jersey. *Schaad v. Ocean Grove Camp Meeting Ass'n*, 72 *N.J.* 237, 254 (1977), *rev'd on other grounds*, *State v. Celmer*, 80 *N.J.* 405 (1979); Rasmussen Cert. at ¶ 1

(R. Ex. 1). Shortly after arriving, these clergymen created the Association, which, as expressed in its original Act of Incorporation, exists "for the purpose of providing and maintaining for the members and friends of the Methodist Episcopal Church a proper, convenient and desirable permanent camp meeting ground and [C]hristian seaside resort." Act of Incorporation at ¶ 1 (1870) (R. Ex. 3). Indeed, as the Association's first President Dr. Ellwood H. Stokes said, the object of the Association "is preeminently *Religious*." Morris S. Daniels, The Story of Ocean Grove at 35 (1919) (R. Ex. 5).

The Association's founding was part of the National Holiness Camp Meeting movement. Daniels, The Story of Ocean Grove at 24 (R. Ex. 5). Camp-meeting organizations, such as the Association, "exist for the purpose of providing religious bodies or societies with . . . places for religious services." *Schaad, supra*, 72 *N.J.* at 270 (Sullivan, J., concurring); Rasmussen Cert. at ¶ 4 (R. Ex. 1). The Association has thus convened a camp meeting every summer since 1870. *Id.* at ¶ 5; Daniels, The Story of Ocean Grove at 24 (R. Ex. 5). Camp meetings are focused, religious, revival gatherings, which involve, among other things, daily preaching, prayer, and worship. Richard E. Brewer, Perspectives on Ocean Grove at 4-5 (1969) (R. Ex. 6); Rasmussen Cert. at ¶ 6 (R. Ex. 1).

From its very beginning, as shown in its founding documents, the Association consecrated its land to "sacred uses" for "high and holy purposes," and its founders "enjoin[ed] [the] strict observance" of these principles "upon those who may succeed" them. *See* Preamble to the Act of Incorporation at 1 (1870) (R. Ex. 8). The Association likewise dedicated its facilities "to be used for [God's] glory" and declared that it would not use those facilities in a manner "inconsistent with the doctrines, discipline, or usages of the Methodist Episcopal Church." Daniels, The Story of Ocean Grove at 59 (R. Ex. 5); Rasmussen Cert. at ¶ 8 (R. Ex. 1).

B. The Association Remains a Religious Organization

Today, more than 140 years after its founding, the Association remains focused on its purpose of providing a place dedicated to the worship and study of Jesus Christ. Rasmussen Cert. at ¶ 9 (R. Ex. 1). Indeed, the Association's bylaws confirm that it retains the same purpose stated in the original Act of Incorporation. Bylaws at 1 (R. Ex. 13). And its mission, as consistently reiterated throughout its organizational documents, is "to provide opportunities for spiritual birth, growth, and renewal through worship, education, cultural and recreational programs for persons of all ages in a Christian seaside setting." Rasmussen Cert. at ¶ 11 (R. Ex. 1). In line with this mission and purpose, the Association continues to be classified as a nonprofit organization exempt from federal income tax. *Id.* at ¶ 12.

The Association also continues to own all the land in the Ocean Grove community. Rasmussen Cert. at ¶ 13 (R. Ex. 1). While the Association leases some portions of the land as residential property to home owners (for a nominal fee) and as commercial property to business owners, it maintains direct control over significant portions of its property and many of its facilities to further its Christian mission through its programs and activities. *Id.* at ¶ 14.

In 1979, the New Jersey Supreme Court declared that "the Ocean Grove Camp Meeting Association of the United Methodist Church is first and foremost a religious organization." *State v. Celmer*, 80 *N.J.* 405, 416 (1979). It correctly observed that "[s]uch a state of affairs is not only evident from its name, but also from the purposes underlying its formation, its internal governmental structure, and the various activities which it undertakes." *Ibid.*

The Association's organizational structure confirms that it is a religious organization, composed exclusively of religious leaders. The Association is governed by a Board of Trustees, which begins every meeting with religious "devotional exercises" and closes with prayer.

Bylaws at 1, 3 (R. Ex. 13). Every voting trustee must be a member of the United Methodist Church, and at least ten of those trustees must be clergy of that denomination. *Id.* at 1. Each (non-voting) associate trustee, while he or she need not be from the United Methodist Church, must "be a member of a Christian Church in good and regular standing." *Id.* at 2. The trustees annually elect from their own voting members the officers and committee chairpersons who run the Association. *Id.* at 5; *see also Schaad, supra*, 72 *N.J.* at 279 (Pashman, J., concurring and dissenting).

In addition to its religious leaders, the Association operates primarily through the employment of and volunteer assistance provided by professing Christians. Rasmussen Cert. at ¶ 21 (R. Ex. 1). The Association requires that certain ministry-related volunteers and employees provide a statement of their Christian faith. *Id.* at ¶ 22. The Association relies on its hundreds of volunteers and the thousands of hours they donate each year to operate its many programs and ministries. *Id.* at ¶ 23.

The Association's programs and activities, which mostly occur during the summer months, also leave no doubt regarding its religious purpose and mission. Its activities primarily consist of programs designed to help draw people closer to Jesus Christ. Rasmussen Cert. at ¶ 27 (R. Ex. 1). For instance, the Association conducts the following overtly religious activities: (1) Sunday worship services, *see* 2008 Calendar of Events at 3-5 (R. Ex. 7); (2) a "Bible hour" every weekday providing Biblical teaching for adults, *id.* at 6-7; (3) multiple programs every weekday providing Biblical teaching for children and youth of all ages, *id.* at 9; (4) almost daily gospel-music programs, *id.* at 11; (5) a camp-meeting week, which, as mentioned above, is a spiritual revival event, *id.* at 8; and (6) periodic educational seminars teaching Biblical principles about myriad topics, *see* Rasmussen Cert. at ¶ 28 (R. Ex. 1). The Association conducts these religious

programs in many of its facilities, including, but not limited to, the Great Auditorium, Bishop Janes Tabernacle, Thornley Chapel, the Youth Temple, and the Pavilion. *Id.* at ¶ 29.

In all that it does, the Association is acutely concerned with Christian evangelism, which fits squarely within its mission-statement charge to provide opportunities for "spiritual birth." Rasmussen Cert. at ¶ 30 (R. Ex. 1). Evangelism is a term encompassing conduct that encourages people to begin or revive personal relationships with and commitments to Jesus Christ. *Id.* at ¶ 31; *see also* Merriam-Webster Online Dictionary, *available at* http://www.merriam-webster.com/dictionary/evangelism (last visited July 22, 2010). The Association's programs and activities seek to further this goal of evangelism, either by reaching out directly to the public with the love and Gospel message of Jesus Christ or by inviting the public to other events that will expressly proclaim that message. Rasmussen Cert. at ¶ 32 (R. Ex. 1).

This evangelistic purpose motivates even the activities and programs that are not overtly religious, such as the Association's classical concerts and Saturday-night family entertainment. Rasmussen Cert. at ¶ 34 (R. Ex. 1). Through these events, the Association connects with people who might not attend its worship services and encourages them to attend those services in the future. *Id.* at ¶ 35. For example, the Association begins its Saturday-night family-entertainment events with a brief prayer and typically a quick promotion of its upcoming religious services and events. *Id.* at ¶ 36. These are just some of the diverse ways that the Association strives, in all its programs, to reach the entire community with the love and Gospel message of Jesus Christ. *Id.* at ¶ 37. These creative outreach activities are consistent with the Association's Wesleyan tradition of reaching out to the entire community, rather than waiting for people to attend church in a traditional setting. *Id.* at ¶ 38.

C. The Association's Use of the Pavilion

The Pavilion is a wood-framed, open-air structure overlooking the Atlantic Ocean. Rasmussen Cert. at ¶ 41 (R. Ex. 1). The Pavilion and its predecessor structures have regularly housed worship services for the Association since the 1880s. *Id.* at ¶ 42; *see also* Daniels, The Story of Ocean Grove at 82, 85 (R. Ex. 5). The currently standing Pavilion has existed since the 1940s, and it has regularly housed worship services since that time. Rasmussen Cert. at ¶ 43 (R. Ex. 1). Due to the Pavilion's open-air nature and thus its accessibility to anyone passing by, these worship services have been an important part of the Association's evangelistic outreach to the community. *Id.* at ¶ 44.

Still today, the Pavilion remains one of the Association's places of worship and a vibrant component of its religious mission. Rasmussen Cert. at ¶ 45 (R. Ex. 1). The Association holds the following overtly religious events in the Pavilion each summer: (1) Pavilion Praise, which is a Sunday morning contemporary worship service that hosts approximately 450 people each week (and leads some visitors to salvation in Jesus Christ nearly every week), *see id.* at ¶ 46; Pavilion Praise Pictures (R. Ex. 17); (2) the Breakfast Club, which is a daily program held Monday through Friday mornings that provides Biblical teaching for middle- and high-school students, *see* Rasmussen Cert. at ¶ 46 (R. Ex. 1); (3) Gospel Music Ministries, which are almost daily "evangelistic services" presenting "the Gospel message of salvation" in Christ through music and preaching, *see ibid.*; 2008 Calendar of Events at 11 (R. Ex. 7); and (4) numerous camp-meeting events each summer, *see* Rasmussen Cert. at ¶ 46 (R. Ex. 1). Between 2002 and 2006, these programs accounted for approximately 75% of the Pavilion's total usage. *Id.* at ¶ 47; Boardwalk Pavilion Usage Summary at 1 (R. Ex. 18). And since at least 2002, the Association has posted signs on the Pavilion advertising these (and other) religious services and programs to encourage

the public to attend those events. Rasmussen Cert. at ¶ 48 (R. Ex. 1); *see also* Pavilion Sign Pictures at 1-8, 10-13 (R. Ex. 19).

The Association also uses the Pavilion for its Summer Band Concert series, which, between 2002 and 2006, accounted for approximately 8% of the Pavilion's total usage. Rasmussen Cert. at ¶ 50 (R. Ex. 1). While these concerts are not necessarily religious in content, the Association holds these free-of-charge events to further its evangelistic mission by drawing people to its facilities, enabling its staff to build relationships with them, and hoping that the attendees might see the many posted signs advertising the Association's worship services and religious events and that they might be encouraged to attend those events. *Id.* at ¶ 51.

Additionally, before April 2007, even though the vast majority of events in the Pavilion were the Association's own worship services, events, and programs, the Association occasionally co-sponsored or supported events or meetings held by community, charitable, or religious organizations. Rasmussen Cert. at ¶ 52 (R. Ex. 1). Between 2002 and 2006, these events constituted a mere 3% of the Pavilion's total usage. *Id.* at ¶ 53. The Association preapproved all these events and did not charge the organizations a fee to use the Pavilion. *Id.* at ¶ 54. The Association wanted to support and promote all these events, and none conflicted with its religious faith, beliefs, or principles. *Id.* at ¶ 55. As with the Summer Band Concert series, these events were evangelistic efforts enabling the Association to build relationships with persons and organizations in the community, which, in turn, allowed the Association to share the love and message of Jesus Christ with them. *Id.* at ¶ 56.

When the Association is not using the Pavilion for events or programs, it permits the public to access the Pavilion to sit, rest, enjoy the scenery, or avoid the sun or rain. Rasmussen Cert. at ¶ 57 (R. Ex. 1). Again, the Association permits this public access as a means of

evangelism, hoping that its generosity with its idyllic, seaside real estate will display the love of Jesus Christ, and that the visitors to the Pavilion will see the posted signs and be encouraged to attend the Association's worship services or religious events. *Id.* at ¶ 58. The Association, however, has never permitted a use of the Pavilion that directly conflicts with its religious faith, beliefs, or principles, and the public at all times must abide by the Association's rules and restrictions. *Id.* at ¶ 59.

D. The Association's Wedding Ministry

The Association has operated a Wedding Ministry since about 1997. Rasmussen Cert. at ¶ 61 (R. Ex. 1). Through this ministry, the Association originally hosted wedding ceremonies in Thornely Chapel, Bishop Janes Tabernacle, the Youth Temple, and the Pavilion. *Id.* at ¶ 62. The Association has created a page on its website discussing its Wedding Ministry. *Id.* at ¶ 63; Wedding Website Page at 1-2 (R. Ex. 22). The day-to-day operation of this ministry is assigned to the Wedding Committee, which is staffed by unpaid volunteers. Rasmussen Cert. at ¶ 64 (R. Ex. 1). At least one volunteer wedding coordinator from that committee attends and maintains supervision over every wedding and wedding rehearsal hosted in the Association's facilities. *Id.* at ¶ 65. Between 2002 and 2006, weddings and wedding rehearsals under the Association's Wedding Ministry accounted for roughly 11% of the Pavilion's total usage. *Id.* at ¶ 66.

The Wedding Ministry has many purposes. First, it is another means of evangelism for the Association. Rasmussen Cert. at ¶ 67 (R. Ex. 1). The Wedding-Committee coordinator is able to interact with the couple and their families, which, in turn, creates an opportunity for the coordinator to share the love of Jesus Christ. *Id.* at ¶ 68. Additionally, some couples ask the Wedding Committee to provide or recommend a minister for their ceremony, and the Committee typically recommends a United Methodist minister affiliated with the Association or one of the

ministers on the Association's staff or Board. *Id.* at ¶ 69. This provides additional outreach opportunities by fostering direct interaction between the couple and a United Methodist minister. *Ibid.*

Second, through the Wedding Ministry, the Association seeks to promote and communicate the message inherent in every wedding ceremony. Rasmussen Cert. at ¶ 70 (R. Ex. 1). According to the Association's sincerely held religious beliefs, which are based on its interpretation of the Holy Bible and its reading of the Book of Discipline of the United Methodist Church, marriage is the uniting of one man and one woman. *Id.* at ¶ 72; *see also* Ephesians 5:22-33; Book of Discipline at ¶161(C) (2004).[1] Thus, every wedding ceremony between one man and one woman, regardless of whether it expressly proclaims a particular religious doctrine, communicates this Biblical understanding of marriage. Rasmussen Cert. at ¶ 73 (R. Ex. 1). That is a message the Association wants to support and communicate through its Wedding Ministry. *Id.* at ¶ 74. This purpose is particularly salient for weddings held in the open-air Pavilion, which can be seen by all who pass by the Pavilion. *Ibid.*

Third, by allowing its facilities to be used for wedding ceremonies, which fulfill the legal solemnization requirement for entering a marriage in New Jersey, the Association wants to support marriage as a vital and effective social institution, important for, among other things, promoting the best interests of children. Rasmussen Cert. at ¶ 75 (R. Ex. 1).

The Wedding Committee provides extensive wedding-related assistance to the marrying couples, including wedding-coordination assistance, on-site rehearsal and wedding-day assistance by a volunteer wedding coordinator, assistance in locating a minister, a photographer,

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[1] The relevant statements from each cited portion of the Book of Discipline are quoted in the attached Certification of Scott Rasmussen.

or a reception venue, and assistance in setting up the Pavilion. Rasmussen Cert. at ¶ 76. Offering such far-ranging assistance to the couples is part of the Association's efforts to fulfill the Biblical commandment of serving others. *Id.* at ¶ 77. Plus, this assistance fosters discussion and interaction between the Wedding Committee and the couple, thereby furthering the Association's evangelistic purposes. *Id.* at ¶ 78.

The Association does not refuse to host weddings for persons from non-Christian religions or denominations; nor does the Association give a preference to persons who share its religious beliefs. Rasmussen Cert. at ¶ 79 (R. Ex. 1). Doing so would undermine the Wedding Ministry's evangelical purpose because it would hinder the Association's efforts to reach out to persons of different religious faiths. *Id.* at ¶ 80.

Even though the Wedding Ministry is a nonprofit, outreach endeavor, the Association typically charges a small fee to host each wedding. Rasmussen Cert. at ¶ 81 (R. Ex. 1). The fee was initially implemented in 1997, and at that time, it was only $150; a year later, it was raised to $250 (which included a deposit of $75). *Id.* at ¶ 82. But the Association sometimes accepts a lesser amount; for instance, on some occasions it has accepted only $75, $150, $200, or even waived the fee entirely. *Id.* at ¶ 83; *see, e.g.*, Facilities-Use-Request Forms (R. Ex. 23).

The Association's fee is *far* below fair-market value for a wedding-ceremony venue. Rasmussen Cert. at ¶ 84 (R. Ex. 1). The average cost of renting a ceremony location in Monmouth County, New Jersey—where the Association is located—is $2,846 per wedding. Monmouth County Wedding Costs at 1-2 (R. Ex. 24). The Association's $250 fee is approximately 9% of that fair-market value. This percentage is even smaller when considering the additional wedding assistance that the Wedding Committee provides. For instance, the average cost for a day-of wedding coordinator, which is just one aspect of the assistance

provided by the Wedding Committee, is $1,428 in Monmouth County. *Ibid.* Thus, the fair market value of everything provided by the Association is at least $4,274, and its $250 fee is a mere 6% of that figure.

The purpose of the fee is to raise funds to pay for the upkeep and maintenance costs of the Association's facilities, including the Pavilion, and any excess funds help cover the costs of the Association's ministries, including the Wedding Ministry. Rasmussen Cert. at ¶ 85 (R. Ex. 1). The last eight full years that the Association hosted weddings in the Pavilion, between 1999 and 2006, it collected an average of $2,613 per year for hosting weddings in that facility. *Id.* at ¶ 86; Income Statement at 1-2 (R. Ex. 25). And during that same time, the yearly maintenance costs and expenses for the Pavilion alone averaged $1,350, which is more than half the money collected for hosting weddings there. Rasmussen Cert. at ¶ 87 (R. Ex. 1); Income Statement at 1-2 (R. Ex. 25). Additionally, operating the Wedding Ministry involves many miscellaneous costs, such as time spent by hourly workers on administrative tasks connected with that ministry, costs of supplies used by the Wedding Committee volunteers, and other difficult-to-quantify administrative costs. Rasmussen Cert. at ¶ 88 (R. Ex. 1). Taking into account the miscellaneous costs associated with the Wedding Ministry, it is clear that the funds collected through that ministry (especially considering that the Association has an annual operating budget of more than $3.7 million) do not accomplish much more than covering maintenance and upkeep costs on the facilities used for weddings. *Id.* at ¶¶ 89-90.

E. The Association's Green-Acres Tax Exemption

In July 1989, the Association applied to the New Jersey Department of Environmental Protection ("DEP") for a Green-Acres real-property tax exemption for its beachfront property, which included its beach, its boardwalk, and a beachfront grass area (where the Pavilion is

located). *See* Green-Acres Application (R. Ex. 26). The purpose of the Green-Acres program is to preserve "natural open space areas for public recreation and conservation purposes," *see N.J.S.A.* 54:4-3.63; thus, to be eligible for the exemption, property must be "open for public use on an equal basis" for recreational and conservation purposes, *see N.J.A.C.* 7:35-1.4(a)(2); *N.J.A.C.* 7:35-1.2.

The Association sought the exemption for the Pavilion because that facility is open to the public on an equal basis for the recreational purposes of sitting, resting, conversing, enjoying the scenery, or avoiding the sun or rain. Rasmussen Cert. at ¶ 93 (R. Ex. 1). But in its Green-Acres application, the Association made it clear that it "maintains and controls the use of the [P]avilion." Green-Acres Application at Attachment ¶ 6d (R. Ex. 26). The Association also described the then-occurring uses of the Pavilion, which included religious services, gospel concerts, band concerts, weddings, and baptisms. *Ibid.*

In August 1989, the Township of Neptune—the municipality where the Pavilion is located—objected to the Association's Green-Acres application. August 1989 Neptune Letter at 1-2 (R. Ex. 27). So in September 1989, the Green-Acres Office held a public hearing regarding the matter. Public-Hearing Minutes at 1 (R. Ex. 28). The minutes from the public hearing reflect that the Association's representative, Phillip Herr, stated that the "[P]avilion is open and access is gained through numerous entrances from the boardwalk." *Id.* at 2. That statement is consistent with the Association's willingness to allow the public to enter the Pavilion for the recreational purposes of sitting, resting, conversing, enjoying the scenery, or avoiding the sun or rain. Rasmussen Cert. at ¶ 98 (R. Ex. 1). And the minutes also reflect that Mr. Herr reiterated what was written in the application: that the Pavilion is used for "religious services," "musical

events," "weddings, memorial services, [and] baptisms[.]" Public-Hearing Minutes at 2 (R. Ex. 28).

According to the minutes, Mr. Herr also said that the Association allows other organizations to use the Pavilion, citing as examples religious groups such as the Greek Orthodox Church and local community groups such as a radio station. Public-Hearing Minutes at 2, 5 (R. Ex. at 28). The minutes also indicate Mr. Herr's acknowledgement that the Association does not restrict use of the Pavilion only to religious events or services. *Id.* at 5. Notably, none of the statements attributed to Mr. Herr contradicts or undermines the use of the Pavilion as outlined in this Statement of Facts. And according to the Green-Acres public record, nowhere did the Association represent that the Pavilion is open for any *uses* or *activities* in which the public might want to engage. Such a statement, of course, would have directly contradicted the Association's representation that it "maintains and controls the use of the [P]avilion." *See* Green-Acres Application at Attachment ¶ 6d (R. Ex. 26).

Later in September 1989, the DEP granted the Green-Acres exemption to the Association for nearly all property in its application including the Pavilion. Green-Acres Approval Letter at 1-2 (R. Ex. 29). The Association kept that exemption until September 2007, when the DEP, after learning of the incidents giving rise to this case, revoked the Green-Acres exemption for the portion of the property on which the Pavilion sits. Green-Acres Revocation Letter at 1-2 (R. Ex. 30). But the Monmouth County Board of Taxation refused to impose rollback taxes for that portion of the Association's property. Rasmussen Cert. at ¶ 101 (R. Ex. 1). And to this day, the Association continues to receive the Green-Acres exemption for all other property approved in its original application. *Id.* at ¶ 102.

Shortly after the DEP revoked the Green-Acres exemption for the Pavilion lot, the Association applied for and received a real-property tax exemption for that lot as "church and charitable property" because it is owned by a religious organization and, as a place of worship, is actually and exclusively used in its work. Rasmussen Cert. at ¶ 104 (R. Ex. 1); Pavilion Property Classification at 1 (R. Ex. 33).

F. The Association's Religious Views on Marriage, Same-Sex Unions, and Homosexual Behavior

The Association sincerely believes, based on its interpretation of the Holy Bible and its reading of the Book of Discipline, that marriage is the uniting of one man and one woman. Rasmussen Cert. at ¶ 72 (R. Ex. 1); *see also* Ephesians 5:22-33; Book of Discipline at ¶ 161(C). This marital union represents the loving and committed relationship between Jesus Christ and His Church. Rasmussen Cert. at ¶ 105 (R. Ex. 1); *see also* Ephesians 5:22-33. The Association also believes that marriage between one man and one woman is the only sacred romantic union approved by the Bible. Rasmussen Cert. at ¶ 106 (R. Ex. 1). The Association openly preaches these religious beliefs about marriage. *Id.* at ¶ 107.

The Association also believes that marriage between one man and one woman is a vital social institution, and that marriage's role in society serves, among other things, as public confirmation of the complementary roles of the sexes and the importance of providing both fathers and mothers for all children. Rasmussen Cert. at ¶ 108 (R. Ex. 1).

In contrast, the Association sincerely believes that the "practice of homosexuality" is incompatible with Christian teaching, and thus it does not condone that practice. Rasmussen Cert. at ¶ 109 (R. Ex. 1); *see also* Romans 1:26-27; Book of Discipline at ¶161(G). As a result of this, and because of its belief that marriage is the only sacred romantic union, the Association sincerely believes that, to adhere to its Biblical principles and its reading of the Book of

Discipline, it cannot allow same-sex civil-union ceremonies in the facilities that it uses for worship services. Rasmussen Cert. at ¶ 110 (R. Ex. 1); *see also* Book of Discipline at ¶341(6). Additionally, the Association does not want to promote homosexual conduct as appropriate behavior; nor does it want to support same-sex unions as morally legitimate unions. Rasmussen Cert. at ¶¶ 111-12 (R. Ex. 1).

Nevertheless, the Association fervently believes that persons who identify as homosexual are of sacred worth, deeply loved by Jesus Christ, and, like all other persons, in need of a relationship with God. Rasmussen Cert. at ¶ 113 (R. Ex. 1); *see also* Book of Discipline at ¶161(G). The Association thus welcomes and encourages all persons—including those who identify as homosexual—to attend its worship services and ministry-related events. Rasmussen Cert. at ¶ 114 (R. Ex. 1); *see also* Book of Discipline at ¶161(G).

G. Complainants' Request to Hold a Civil-Union Ceremony in the Pavilion

In early March 2007, Complainant Bernstein asked the Association if she could use the Pavilion for a civil-union ceremony with her partner, Complainant Paster. Rasmussen Cert. at ¶ 116 (R. Ex. 1). Ms. Bernstein submitted the $75 deposit that accompanies a request to reserve a facility under the Association's Wedding Ministry. *Id.* at ¶ 117. The Association denied that request and returned the deposit because that particular use of the facility would violate its sincerely held religious beliefs. *Id.* at ¶ 118. Then on March 5, 2007, Ms. Bernstein sent an email to the Association's President Scott Rasmussen, asking him to take her request to the Board of Trustees for consideration. March 2007 Emails at 1-2 (R. Ex. 35). In response, Mr. Rasmussen said that the Association was "unable to accommodate [that] request" because it does "not permit uses [of the Pavilion] that conflict with the clearly established policies of [its]

denomination." *Id.* at 1. But Mr. Rasmussen invited Complainants "to participate fully in the ministries and programs of [the Association]." *Ibid.*

Complainants nevertheless persisted in their efforts to use the Pavilion for their civil-union ceremony. On March 11, 2007, they and a few other Ocean-Grove residents sent a letter asking the Association to allow civil-union ceremonies in its facilities. March 2007 Letter at 1 (R. Ex. 36). And later, Complainants and some other Ocean-Grove residents formed a group called Ocean Grove United, which, among other things, insists that the Association must host civil-union ceremonies in the Pavilion. Rasmussen Cert. at ¶ 122 (R. Ex. 1); *see also* http://www.oceangroveunited.org/.[2]

Complainants' persistence about this civil-union issue prompted the Association to alter its ministries. Rasmussen Cert. at ¶ 125 (R. Ex. 1). On April 1, 2007, Mr. Rasmussen decided that the Association would no longer host weddings in the Pavilion. *Id.* at ¶ 126. Then on April 29, 2007, Mr. Rasmussen formally established a policy prohibiting any outside individuals or organizations from reserving the Pavilion for any purpose. *Id.* at ¶ 127. He implemented these policy changes because of the fear that, as a result of Complainants' request, the government would improperly apply the LAD to force the Association to host civil-union ceremonies in its

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[2] This insistence conflicts with Ms. Bernstein's previously acknowledged understanding of the Association's rules and purpose. Ten years earlier when Ms. Bernstein purchased a house on land owned by the Association, she acknowledged her understanding of the Association's rules and regulations, which stated that "[t]he Association reserves the right . . . to withdraw th[e] privilege" of using its publicly accessible premises for "conduct [that] is not generally considered compatible with the interest or purposes of the Association." Bernstein's Property Application at 2, 6 (R. Ex. 37). At that time, she also acknowledged that she was "in full sympathy with the purpose of the . . . Association, that being to provide and maintain for Methodists and their friends a proper, convenient and desirable permanent Camp Meeting Ground and Christian Seaside Resort." *Id.* at 2.

Pavilion in violation of its religious tenets and constitutional rights. *Id.* at ¶ 128. The Association's Board of Trustees later ratified these policy changes. *Id.* at ¶ 129.

Notwithstanding these fear-impelled policy changes, the Association wants to be free to use the Pavilion consistently with its religious mission. Rasmussen Cert. at ¶ 130 (R. Ex. 1). It thus would like to have the right to resume operating its Wedding Ministry in the Pavilion, and it also desires to begin once again co-sponsoring and supporting events by community, charitable, and religious organizations in that facility. *Id.* at ¶ 131. If, however, the DCR were to require the Association to host Complainants' ceremony, the Association would feel pressured to speak out against that ceremony and the messages conveyed therein. *Id.* at ¶ 132. But even though the Association does not support same-sex unions or homosexual conduct, it does not want to be forced to speak out specifically and actively against civil-union ceremonies. *Id.* at ¶ 133. The Association believes that if it is forced to speak against civil-union ceremonies, it might unnecessarily alienate some people in the community who it is trying to reach with the Gospel message. *Id.* at ¶ 134.

H. Complainants' Civil-Union Ceremony

On September 30, 2007, Complainants legally entered into a civil union under the laws of the State of New Jersey. Compl'ts Resp. to Resp't First Req. for Interrogs. at No. 1 (R. Ex. 41); Civil-Union Certificate (R. Ex. 42). That same day, they held their civil-union ceremony on a fishing pier in Ocean Grove. *See* Civil-Union Invitation (R. Ex. 43); Civil-Union Pictures (R. Ex. 44). Complainants invited their friends and family members to attend that ceremony because "they wanted to share their happiness" with those close to them. Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 2 (R. Ex. 45). Approximately 80 of their friends and family members

attended. *Id.* at No. 1. Complainants used a microphone during their ceremony. *See* Civil-Union Pictures at 5-6, 9 (R. Ex. 44).

Complainants held their ceremony under a canopy called a Chuppah, which is "a traditional element of Jewish marriage ceremonies [that] signifies the beginning of a new household for the couple." Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 11 (R. Ex. 45); *see also* Civil-Union Pictures at 1, 3-4, 11 (R. Ex. 44). Three officiants presided over Complainants' ceremony: Rabbi Al Landsberg; Town of Neptune Deputy Mayor Randy Bishop; and the couple's friend Tom Pivinski. Compl'ts Resp. to Resp't First Req. for Interrogs. at No. 5 (R. Ex. 41); Civil-Union Program at 2 (R. Ex. 46).

Mr. Pivinski began the ceremony by welcoming the guests and sharing a quick spiritual message, which, among other things, included the following:

> This is a holy moment. God's spirit infuses it with value and integrity and truth. God's spirit has shown Harriet and Luisa the way to each other and has set their hearts afire for one another.

Pivinski Email at 2 (R. Ex. 47). Then Rabbi Landsberg offered an introductory prayer of blessing. Civil-Union Program at 2 (R. Ex. 46); Ceremony Agenda at 1 (R. Ex. 48). He also explained the significance of the Chuppah to the guests and blessed a cup of grape juice with a traditional Jewish prayer (known as the Kiddish) before giving it to the couple to drink. *Id.* at 1; Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 10 (R. Ex. 45); Civil-Union Pictures at 2, 4 (R. Ex. 44).

The couple then engaged in a braiding ritual that they created for their ceremony, and while performing that ritual, they said:

> These three ribbons hanging here represent three aspects of our lives—the blue is the sea and sky, the lavender is the traditional lesbian color, and the white, of course[,] is for weddings and hope for the future. We are braiding them now to

> create a bond stronger and more beautiful than each part alone. May our lives be ever intertwined, our love keeping us together.

Ceremony Agenda at 1 (R. Ex. 48). Next, the couple exchanged vows that they had written for each other, and after that, they exchanged rings and jointly stated in part:

> We pledge to each other to be loving friends and partners in marriage. . . . *Hare at mekudeshet li betaba' at zo k'dat Moshe v' Yisrael.* Behold, thou art consecrated to me with this ring, according to the law of Moses and Israel.

Compl'ts Resp. to Resp't First Req. for Interrogs. at No. 8 (R. Ex. 41); Vows at 1-2 (R. Ex. 49). Mr. Bishop then gave the legal pronouncement. Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 5 (R. Ex. 45); Civil-Union Program at 2 (R. Ex. 46).

Next Rabbi Landsberg read the contents of the Ketubah, which is a Jewish wedding certificate. Ceremony Agenda at 2 (R. Ex. 48); Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 4 (R. Ex. 45); Ketubah Photos at 1-4 (R. Ex. 50). He stated in part:

> Harriet Bernstein and Luisa Paster did hereby declare themselves to be married each to the other . . . . Accordingly, let it be promulgated to all those that will hear, that Harriet and Luisa have pledged to each other an exclusivity called marriage, and have embraced as friends, as lovers, and as unwavering companions.

Id. at 1-3. Rabbi Landsberg then explained to the guests and led the couple in the traditional Jewish-wedding breaking-of-the-glass custom. Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 9 (R. Ex. 45); Ceremony Agenda at 2 (R. Ex. 48); Civil-Union Pictures at 12 (R. Ex. 44). And finally, the couple kissed and embraced at the conclusion of the ceremony. Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 6 (R. Ex. 45); Civil-Union Pictures at 13 (R. Ex. 44).

PROCEDURAL HISTORY

In June 2007, Complainants filed a discrimination complaint with the DCR, alleging that the Association's denial of their request to host their civil-union ceremony in the Pavilion

amounts to unlawful public-accommodation discrimination on the basis of civil-union status. The Association filed a motion to dismiss that complaint, contending that the LAD does not apply under these circumstances and that, in any event, this application of the LAD would violate its constitutional rights. In January 2008, however, the DCR denied that motion largely because, the DCR claimed, it needed more evidence to evaluate the Association's arguments. In December 2008, the DCR, relying on incomplete facts and flawed legal analysis, issued a Finding of Probable Cause that the Association engaged in unlawful discrimination. But in this brief, the Association will highlight the DCR's errors and show that Complainants' claims lack merit.

LEGAL ARGUMENT

I. Under the Circumstances of this Case, the Pavilion Is Not a Public Accommodation, But a Place of Religious Worship Used for Ministry by a Religious Organization.

Complainants allege that the Pavilion is a "public accommodation" under *N.J.S.A.* 10:5-5(l), and thus that the Association's refusal to host their civil-union ceremony violates the LAD. But the LAD does not apply because the Association is a religious organization with a mission of evangelism and community outreach; the Pavilion is one of its many places of worship; and the Wedding Ministry is one of the ministries through which it seeks to create evangelism opportunities and promote and support marriage. Complainants sought a novel expansion of the Association's Wedding Ministry, seeking to use the Pavilion—one of the Association's places of worship—for their civil-union ceremony. But under these circumstances, the Pavilion is not a public accommodation, and thus the LAD does not apply.

A. The Pavilion Is a Place of Worship Operated by a Religious Organization.

"[T]he Legislature clearly did not intend to subject" "a place of worship" or "religious programs" "to the LAD." *Wazeerud-Din v. Goodwill Home and Missions, Inc.*, 325 *N.J. Super.*

3, 10 (App. Div. 1999). Accordingly, the "longstanding construction of the LAD," reaffirmed by the DCR's current director in April 2010, is that places of religious worship "are not 'public accommodations' within the meaning of the LAD[.]" Stipulation of Settlement, *Ocean Grove Camp Meeting Association v. Le*, Case No. 3:07-cv-03802-JAP-TJB, at ¶ 1 (D. N.J. April 22, 2010) (R. Ex. 4) (quoting Aff. of C. Gregory Stewart, Director of New Jersey Division on Civil Rights, *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio*, at ¶ 10 (June 4, 1992) (R. Ex. 4-A)). A religious organization is thus "free to practice discrimination, . . . as dictated by [its] faith, [by] denying access to and use of any place of worship under [its] care." Supp. Aff. of C. Gregory Stewart, Director of New Jersey Division on Civil Rights, *Cummings v. Florio*, at ¶ 20 (March 24, 1995) (R. Ex. 4-A).

The Association is a religious organization with an evangelical mission to reach out to the community by "provid[ing] opportunities for spiritual birth, growth, and renewal through worship, education, cultural and recreational programs for persons of all ages in a Christian seaside setting." Rasmussen Cert. at ¶ 11 (R. Ex. 1). The Pavilion is one of its places of worship and religious outreach where *every day* during the summer (except some Saturdays)—either through Pavilion Praise, the Breakfast Club, Gospel Music Ministries, or camp-meeting events—the Association proclaims the Gospel message of Jesus Christ and provides opportunities to worship God. *Id.* at ¶ 46. These worship services and overtly religious activities account for an overwhelming majority of the events that occur in the Pavilion. *Id.* at ¶ 47. It is thus undeniable that the Pavilion is a place of worship and has functioned as such since its inception. *Id.* at ¶¶ 42-43, 45.

As further evidence, the Pavilion is legally classified as "church and charitable property," meaning that it is owned by a religious organization and is actually and exclusively used for the

organization's work. The Pavilion's official "property class" is "15D." Pavilion Property Classification at 1 (R. Ex. 33). Class 15D constitutes "church and charitable" property. *N.J.A.C.* 18:12-2.2(o). Property classified as such is "real property owned by religious and charitable organizations actually and exclusively used in the work of the organizations." *Ibid.* This property classification thus further establishes that the Pavilion is a place of worship used exclusively for the Association's religious work, and confirms that the LAD does not apply to the Pavilion.

B. The Public-Accommodation Analysis Focuses on the Requested Use of the Pavilion—the Wedding Ministry—Not the Other Uses of that Facility.

Public-accommodation analysis involving a religious organization or a place of worship focuses on the complainant's particular request to use the respondent's facility, rather than the other uses of the sought-after facility or the other irrelevant activities of the respondent organization. *See Wazeerud-Din, supra*, 325 *N.J. Super.* at 12 (focusing on the program that the complainant wanted to access and finding it "unnecessary to decide" "if some of the [organization's] other activities were considered public accommodations"); *cf. Donaldson v. Farrakhan*, 762 *N.E.*2d 835, 838 (Mass. 2002) (requiring the plaintiffs to show that the theatre where the defendant held a religious service "was a place of public accommodation *on the night in question*") (emphasis added). This focused analysis is necessary to avoid the "serious constitutional questions" that would arise if the government were to apply the LAD broadly and impermissibly "entangle" itself with religion. *Wazeerud-Din, supra*, 325 *N.J. Super.* at 10-11.

But in its Finding of Probable Cause, the DCR erred by focusing on the fact that, when the Association is not using the Pavilion for its own programs or ministries, it allows the public to enter for "conservation and recreational uses" such as sitting, congregating, or seeking shelter from the sun or weather. *See* Finding of Probable Cause at 8-9. That, however, is not the

Pavilion use at issue here. Complainants did not request to use (nor would the Association have denied a request to use) the Pavilion for those recreational purposes; instead, Complainants asked the Association to host their civil-union ceremony in the Pavilion under the auspices of its Wedding Ministry. The public-accommodation analysis thus should focus on the Wedding Ministry, rather than these informal recreational uses of the Pavilion.

Moreover, as a practical matter, it cannot be true that the Association's permitting the public to sit, rest, or seek shelter in the Pavilion—which, in combination with the many signs promoting the Association's events, is a means of evangelism for the Association, *see* Rasmussen Cert. at ¶ 58 (R. Ex. 1)—subjects *all the Association's activities in that place of worship, including its own ministries*, to the LAD. Many churches and religious organizations, particularly those with scenic beauty or historical significance, permit the public to enter for informal recreational purposes such as sitting, resting, or enjoying the scenery. *See id.* at ¶ 60. Examples of these, both in State and out of State, include St. Patrick's Cathedral in New York City and the Church of St. Gabriel in Marlboro, New Jersey, to name a few. *See* Publicly Accessible Churches (R. Ex. 20). But governing legal authority indicates that such religious hospitality does not subject such religious organizations or the Association to the LAD when operating their other ministries. *See Wazeerud-Din, supra*, 325 *N.J. Super.* at 12-13 ("By offering such beneficence [to the public], a church [or religious organization] does not become a public accommodation which must allow anyone to participate in its religious activities"). Therefore, following the DCR's reasoning in its Finding of Probable Cause would have a far-reaching effect on many religious organizations, subjecting all their ministries to the LAD and upsetting established law.

In its Finding of Probable Cause, the DCR also erred by focusing on the Association's receipt of the Green-Acres exemption. *See* Finding of Probable Cause at 8-9. But that fact does not transform the Association or the Pavilion into a public accommodation for purposes of this case. First, the Association's continued receipt of the Green-Acres exemption for portions of its beachfront property not at issue here does not convert the Association into a public accommodation for all purposes. Again, the analysis must focus on the particular facility and requested use at issue in the case. *See Wazeerud-Din, supra*, 325 *N.J. Super.* at 12. Reasoning otherwise would transform all the Association's places of worship and ministry programs—not to mention all the places of worship and ministry programs operated by other religious organizations that receive the Green-Acres exemption, *see* Rasmussen Cert. at ¶ 103 (R. Ex. 1)—into public accommodations subject to the LAD. No legal authority supports such a sweeping result. Second, neither does the Association's former receipt of the Green-Acres exemption for the parcel on which the Pavilion is located convert that facility into a public accommodation for purposes of this case. Notably, the DEP revoked the Green-Acres exemption for the parcel on which the Pavilion is located, *see id.* at ¶ 100, and in doing so, declared that the exemption does not apply to the Pavilion. Thus, in the eyes of the State, the Pavilion does not qualify for the Green-Acres exemption, and it would be error to rely on that now defunct fact in the public-accommodation analysis. Simply put, the Green-Acres issue is a red herring. The relevant analysis, as discussed herein, focuses on Complainants' requested use of the Pavilion and thus the Association's Wedding Ministry.[3]

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[3] The Association did not need the Green-Acres exemption to obtain a real-property tax exemption for the parcel on which the Pavilion is located. Soon after the DEP revoked the Green-Acres exemption, the Association obtained a religious exemption because the Pavilion is owned by a religious organization and is used as a place of worship in the Association's work.

In short, it is a separate question, not before this tribunal, whether the Association's allowing the public to sit and relax in the Pavilion (or the Association's applying for a Green-Acres exemption because it allows the public to sit and relax in the Pavilion) subjects it to the LAD if it were to deny an individual's access to the Pavilion for those purposes. The issue here is different, and it thus requires analysis focusing on Complainants' requested use.

C. The Association's Wedding Ministry Is Not Subject to the LAD.

Complainants sought to use the Pavilion as part of the Association's Wedding Ministry, and in doing so, asked the Association to extend that ministry in a way that conflicts with its sincerely held religious beliefs. But as will be demonstrated herein, the LAD does not apply under such circumstances.

The Wedding Ministry is, among other things, part of the Association's evangelism and outreach to the community. Rasmussen Cert. at ¶ 67 (R. Ex. 1). This ministry creates evangelism opportunities through interaction between the Wedding Committee and the community (i.e., the couple and their families) and, sometimes, between a Methodist minister and the couple. *Id.* at ¶¶ 68-69, 78. Through this ministry, the Association also seeks to communicate in its facilities the message inherent in every wedding ceremony—that marriage is the union of one man and one woman—which is consistent with its religious beliefs. *Id.* at ¶¶ 70-74. And the Association additionally seeks to serve the community—an affirmative religious commandment—by providing extensive wedding-related assistance to the couple for a small fee, which is roughly 6% of the fair-market value, is sometimes reduced or waived altogether, and

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See Rasmussen Cert. at ¶ 104 (R. Ex. 1); *N.J.A.C.* 18:12-2.2(o). So to the extent that the government originally exempted the Pavilion on an arguably inapplicable basis, it has since changed that, and in the process, affirmed the Pavilion as one of the Association's places of worship.

does little more than cover the upkeep costs and expenses of the facilities. *Id.* at ¶¶ 76-77, 81-84, 89; Monmouth County Wedding Costs at 1-2 (R. Ex. 24). In short, the Wedding Ministry is a religious ministry, permeated by distinctly religious purposes, and directly related to the Association's essential mission of Christian evangelism; it is thus not subject to the LAD. *See Wazeerud-Din, supra*, 325 *N.J. Super.* at 12 (finding that the LAD did not apply because the organization's "essential mission [was] religious indoctrination and worship" and the program that the complainant wanted to attend was "directly related to th[at] mission").

"[T]he consistent construction and interpretation of the LAD" by the courts, the Attorney General, and the DCR is "that, consonant with constitutional legal barriers respecting legitimate belief and free exercise protected by the First Amendment, the State [is] not authorized to regulate or control religious . . . governance, practice or liturgical norms, even where ostensibly or colorably at odds with any of the LAD prohibited categories of discrimination." Stipulation of Settlement, *Ocean Grove Camp Meeting Ass'n v. Le*, at ¶ 5 (R. Ex. 4) (quoting Stewart Aff. at ¶ 10); *see also Wazeerud-Din, supra*, 325 *N.J. Super.* at 10; *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio*, 40 *F.*3d 1454, 1461 (3d Cir. 1994); N.J. Att'y Gen. Formal Op. No. 1-2007, 187 N.J.L.J. 367 (2007) (R. Ex. 51) (discussing the solemnization of civil unions). In light of this, the DCR has stated that it "has no intention of construing or enforcing the LAD in any manner which . . . would even tend or threaten to violate the sincere 'tenets' of any religion." Stewart Aff. at ¶ 12 (R. Ex. 4-A). Recently, the Legislature has made clear that "every religious . . . organization in this State may join together in marriage or civil union such persons according to the rules and customs of the . . . organization." *N.J.S.A.* 37:1-13.

Here, however, Complainants seek to apply the LAD in a manner that will directly violate the Association's religious tenets and dictate the practice and operation of its ministry

involving marriage. It would do so by forcing the Association to open its Wedding Ministry to civil-union ceremonies and thus requiring it to change its ministry practice in a way that directly violates its sincerely held religious beliefs. The courts, the Attorney General, and the DCR have all made clear that the LAD does not apply to a place of worship under such circumstances, and thus Complainants' claims should be dismissed because the Pavilion is not a public accommodation for purposes of this case.

II. The Association Did Not Decline to Host Complainants' Civil-Union Ceremony on Account of their Civil-Union Status.

Complainants allege that the Association's denial of their request to host their civil-union ceremony amounts to unlawful discrimination on the basis of "civil-union status." But that assertion rests on a misapprehension of the meaning of civil-union-status discrimination. The Association's refusal to host Complainants' civil-union ceremony had absolutely nothing to do with the couple's civil-union status; it depended entirely on their intended use of the Pavilion, that is, for an inherently expressive civil-union ceremony. The Association did not want to host a civil-union ceremony on its premises because doing so would violate its sincerely held religious beliefs and force the Association to communicate, promote, and associate with a message contrary to its religious beliefs. Complainants' civil-union status was wholly irrelevant to the Association's decision.

New Jersey courts have yet to construe the Legislature's newly created prohibition on civil-union-status discrimination, so this tribunal's analysis should begin with general principles of statutory construction. "In considering questions of statutory interpretation, the first step is to look at the plain meaning of the provision at issue." *Middletown Twp. PBA Local 124 v. Twp. of Middletown*, 193 *N.J.* 1, 12 (2007). "[I]f the Legislature has not provided otherwise, words are to be given 'ordinary and well-understood meanings.'" *Alan J. Cornblatt, P.A. v. Barow*, 153

N.J. 218, 231 (1998). "[T]he court's sole function is to enforce the statute in accordance with [its] terms," it "has no power to substitute its own idea of what a statute should provide in the face of clear and unambiguous statutory requirements." *Middletown, supra*, 193 *N.J.* at 12.

The task is thus to determine the ordinary meaning of "civil-union status." The LAD itself indicates that "civil union" means "a legally recognized union of two eligible individuals established pursuant to [New Jersey law]." *N.J.S.A.* 10:5-5(ss). And the ordinary meaning of "status" is "[a] person's legal condition." Black's Law Dictionary 1447 (8th ed. 2004). Hence, "civil-union status" means a person's legal condition of having entered or not having entered a legally recognized civil union.

This interpretation of "civil-union status" is confirmed by the well-established meaning of "marital status," which is the statutory term found next to civil-union status in the LAD. *See N.J.S.A.* 10:5-12(f)(1). New Jersey courts have found that the prohibition on marital-status discrimination prevents an entity covered by the LAD from basing its "decision . . . on the fact that an individual is either married or single." *Thomson v. Sanborn's Motor Express, Inc.*, 154 *N.J. Super.* 555, 560 (App. Div. 1977). This understanding of marital-status discrimination has been embraced by courts across the country. *See, e.g., Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd.*, 415 *N.E.*2d 950, 953 (N.Y. 1980) ("[T]he plain and ordinary meaning of 'marital status' is the social condition enjoyed by an individual by reason of his or her having participated or failed to participate in a marriage"); *Donato v. Am. Tel. and Telegraph Co.*, 767 *So.* 2d 1146, 1155 (Fla. 2000) ("[T]he term 'marital status' . . . means the state of being married, single, divorced, widowed or separated"). "[W]hen the Legislature utilizes words that have previously been the subject of judicial construction, it is deemed to have used those words in the sense that has been ascribed to them." *Perez v. Rent-A-Center, Inc.*, 186 *N.J.* 188, 211 (2006);

see also Johnson v. Scaccetti, 192 *N.J.* 256, 277 (2007). Thus, this understanding of "marital status" applies equally to the similar concept of "civil-union status."

Applying this understanding of "civil-union status," it is indisputable that the Association did not decline to host Complainants' civil-union ceremony because of their civil-union status. The Association acted as it did because it was concerned that permitting the intended use of the Pavilion—for a civil-union ceremony—would violate its sincerely held religious beliefs and constitutional rights. *See* Rasmussen Cert. at ¶¶ 118, 120, 128 (R. Ex. 1). Complainants' civil-union status had nothing to do with that decision. The Association would have made the same decision regardless of Complainants' civil-union status. In other words, it did not matter whether Complainants had yet to enter a legally recognized civil union, as was the case here, or whether Complainants had already entered that legal union; the Association would have denied their request in either event because of the direct violation of its religious beliefs and constitutional rights.

Neither did it matter to the Association that Complainants' civil-union ceremony would result in a particular legal status. The mere act of hosting a civil-union ceremony would have violated the Association's religious beliefs; it did not matter whether that ceremony would create a legal status between the partners. Similarly, the Association's constitutional concerns of expressive association and compelled speech, as will be discussed below, derive from the inherent message communicated by the civil-union ceremony, and those concerns apply fully regardless of whether that ceremony would create a legal status between the partners.

Nor can it be said that the Association discriminated against Complainants because they had entered into the legal status of a civil union; after all, Complainants had yet to obtain that legal status. Civil-Union Certificate (R. Ex. 42). Thus, Complainants, perhaps sensing this

weakness in their claim, allege in their complainant that the Association refused to host their ceremony "because of their *impending* civil union status." Complaint at 1 (emphasis added). The Legislature, however, did not create a protected classification based on a person's *impending* status. Complainants' own allegations, then, by focusing on their impending status, show that they are attempting to stretch the concept of civil-union status beyond what the statutory language can bear. But neither Complainants nor this tribunal can "substitute [their] own idea of what a statute should provide in the face of clear and unambiguous statutory requirements." *See Middletown, supra*, 193 *N.J.* at 12. Complainants thus have not presented a valid claim of civil-union-status discrimination.[4]

III. Applying the LAD to Force the Association to Host Complainants' Inherently Expressive Civil-Union Ceremony in its Pavilion Would Violate the Association's Right of Expressive Association under the United States Constitution.

Applying the LAD as Complainants request would force the Association to host an inherently expressive civil-union ceremony in its Pavilion where worship services and religious activities are regularly held. This would significantly interfere with the Association's internal affairs, burden the Association's expression, and make involvement with the Association less desirable or attractive thereby threatening to affect the Association's composition. This application of the LAD would thus violate the Association's rights of expressive association.

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[4] Neither did the Association discriminate against Complainants on the basis of their sexual orientation. Individuals who identify as homosexual are free to use the Pavilion consistent with its permitted uses, and the Association welcomes and encourages all such individuals to attend its worship services and ministry-related events. Rasmussen Cert. at ¶¶ 114-15 (R. Ex. 1). The Association declined Complainants' request only because it involved an expressive ceremony communicating a message that contradicted the Association's religious beliefs about the fundamental structure of marriage. *See id.* at ¶¶ 118, 120, 128. This decision was motivated not by the status of the messenger but by the message itself, and therefore, does not constitute unlawful discrimination.

The United States Supreme Court "has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 *U.S.* 609, 618, 104 *S. Ct.* 3244, 3249, 82 *L. Ed.* 2d 462 (1984); *see also U.S. Const.* amend. I. That Court has thus "upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities." *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 *U.S.* 537, 544, 107 *S. Ct.* 1940, 1945, 95 *L. Ed.* 2d 474 (1987). "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, *supra*, 468 *U.S.* at 623, 104 *S. Ct.* at 3252.

"[T]he freedom of expressive association protects more than just a group's membership decisions." *Rumsfeld v. FAIR*, 547 *U.S.* 47, 69, 126 *S. Ct.* 1297, 1312, 164 *L. Ed.* 2d 156 (2006). "Government actions that . . . unconstitutionally burden this freedom may take many forms." *Boy Scouts of Am. v. Dale*, 530 *U.S.* 640, 648, 120 *S. Ct.* 2446, 2451, 147 *L. Ed.* 2d 554 (2000). Among other things, the government may violate an organization's right of expressive association by "interfer[ing] with the internal organization or affairs of the group." *Roberts*, *supra*, 468 *U.S.* at 622-23, 104 *S. Ct.* at 3252. Indeed, "[a]s the definition of 'public accommodation' has expanded [under state law] . . . , the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased." *Dale*, *supra*, 530 *U.S.* at 657, 120 *S. Ct.* at 2456. Here, through a broad application of the LAD, Complainants ask the State to interfere significantly with the internal affairs of a religious organization by requiring the Association to include Complainants' civil-union ceremony in its Wedding Ministry, even though hosting such unions would contravene the Association's religious beliefs, expression, and practices.

A. The Association Is Protected by the First Amendment Right of Expressive Association.

The Supreme Court laid out the legal analysis for an expressive-association claim in *Dale*. The first step is to "determine whether a group is protected by the First Amendment's expressive associational right[.]" *Dale*, *supra*, 530 *U.S.* at 648, 120 *S. Ct.* at 2451. To make that determination, a court "must determine whether the group engages in 'expressive association.'" *Ibid.* "The First Amendment's protection of expressive association is not reserved for advocacy groups," *ibid.*, or for organizations that "trumpet [their] views from the housetops," *id.* at 656, 120 *S. Ct.* at 2455. "[T]o come within its ambit, a group must [simply] engage in some form of expression, whether it be public or private." *Id.* at 648, 120 *S. Ct.* at 2451. Stated differently, an organization does "not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. [It] must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at 655, 120 *S. Ct.* at 2454.

The Association unquestionably engages in expression and expressive activity. In fulfilling its evangelical mission to provide opportunities for spiritual birth, the Association regularly communicates the Gospel message of salvation in Jesus Christ through various means of expression. Rasmussen Cert. at ¶ 33 (R. Ex. 1). And in fulfilling its mission to provide opportunities for spiritual growth through educational programs, it regularly preaches, teaches, and seeks to instill Biblical Christian values in all who attend its programs and worship services. *Id.* at ¶ 39. This Biblical teaching at times includes expressing and supporting Christian values about the basic structure, understanding, and function of marriage. *Id.* at ¶ 40. Of particular note, the Association uses the Pavilion almost daily during the summer—through Pavilion

Praise, the Breakfast Club, Gospel Music Ministries, and camp-meeting events—to communicate these evangelical messages and instill these Biblical Christian values. *Id.* at ¶ 49.

These activities plainly entitle the Association to protection under the First Amendment's right of expressive association. "It seems indisputable that an association that seeks to transmit . . . a system of values engages in expressive activity." *Dale*, *supra*, 530 *U.S.* at 650, 120 *S. Ct.* at 2452. This is particularly true for religious organizations, like the Association, that "engage in religious activities . . . to foster and communicate a common system of beliefs and values for . . . others to follow." *Donaldson*, *supra*, 762 *N.E.*2d at 840; *see also Murdock v. Pennsylvania*, 319 *U.S.* 105, 108-09, 63 *S. Ct.* 870, 872-73, 87 *L. Ed.* 1292 (1943) (acknowledging that religious evangelism "has the same claim as . . . others to the guarantees of freedom of speech"). It is thus undisputable that the Association is protected by the First Amendment right of expressive association.

B. Forcing the Association to Host Complainants' Inherently Expressive Civil-Union Ceremony in its Pavilion Would Significantly Affect its Ability to Express its Views.

The legal analysis next considers whether requiring the Association to host Complainants' civil-union ceremony in the Pavilion "would significantly affect [its] ability to [express its] public or private viewpoints." *Dale*, *supra*, 530 *U.S.* at 650, 120 *S. Ct.* at 2452. This inquiry first requires brief consideration of the Association's views on marriage, same-sex unions, and homosexual conduct.

Courts should deferentially assess an organization's professed views, readily adopting the organization's characterization of its beliefs. *See id.* at 651, 120 *S. Ct.* at 2452 ("We accept the [organization's] assertion [about its beliefs]. We need not inquire further . . ."). To the extent that a court reviews an organization's expressed views at all, it does so only to assess "the

sincerity of the professed beliefs." *Ibid.* It is most assuredly "not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." *Ibid.*

The Association believes that marriage is the union of one man and one woman, that this union represents the loving and committed relationship between Jesus Christ and His Church, and that this union is the only sacred romantic union approved by the Bible. Rasmussen Cert. at ¶¶ 72, 105-06 (R. Ex. 1). It communicates these religious principles about marriage through its services, programs, and events. *Id.* at ¶ 107. The Association also believes that marriage is a vital social institution worthy of support. *Id.* at ¶ 108. In contrast, the Association believes that the "practice of homosexuality" is incompatible with Christian teaching and that it cannot allow same-sex civil-union ceremonies in the facilities used for worship services. *Id.* at ¶¶ 109-10. Neither does the Association want to promote homosexual conduct as appropriate; nor does it want to support same-sex unions as morally legitimate. *Id.* at ¶¶ 111-12. The sincerity of these beliefs is unassailable and should be accepted by this tribunal.

Having established the Association's views, the analysis next considers the effect that hosting Complainants' civil-union ceremony would have on the Association's ability to communicate its views. Courts "must . . . give deference to an association's view of what would impair its expression." *Dale, supra,* 530 *U.S.* at 653, 120 *S. Ct.* at 2453. The Association fervently believes, and herein demonstrates, that hosting Complainants' civil-union ceremony in the Pavilion would significantly affect its ability to express its views. *See* Rasmussen Cert. at ¶ 135 (R. Ex. 1). This tribunal should defer to the Association's views on this matter.

It is important to note at the outset that Complainants sought to hold an inherently expressive ceremony on the Association's property. Civil-union ceremonies necessarily involve

expression, including vows and legal pronouncements, communicated among the couple and a legal officiant, *see N.J.S.A.* 37:1-13 to 37:1-19; and those ceremonies require that witnesses observe and attest to this mandated expression, *see N.J.S.A.* 37:1-17. Fitting squarely within this mold, Complainants' ceremony was particularly expressive: it included numerous communicative marriage rituals, *see* Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at Nos. 9-12 (R. Ex. 45); spiritual messages, *see* Pivinski Email at 2 (R. Ex. 47); a prayer of blessing, *see* Civil-Union Program at 2 (R. Ex. 46); the exchanging of vows, *see ibid.*; a legal pronouncement, *see ibid.*; and 80 guests who witnessed and shared in the ceremony, *see* Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at Nos. 1-2 (R. Ex. 45). Further evidencing their expressive purpose, Complainants used a microphone to communicate during the ceremony. *See* Civil-Union Pictures at 5-6, 9 (R. Ex. 44). In sum, Complainants' civil-union ceremony was undoubtedly an expressive event.

Not only was Complainants' ceremony expressive, it communicated messages that are antithetical to the Association's beliefs and expressions. In direct contrast to the Association's religious belief and expression that marriage is the uniting of one man and one woman, Complainants' ceremony communicated and endorsed the idea of a sacred marital union between two persons of the same sex. Most notably, Complainants and their officiants repeatedly proclaimed that the two women were entering a "marriage," *see* Compl'ts Resp. to Resp't First Req. for Interrogs. at No. 8 (R. Ex. 41); Ketubah Photos at 1-3 (R. Ex. 50)—a message reinforced by the many Jewish-marriage rituals incorporated into the ceremony, *see* Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at Nos. 9-12 (R. Ex. 45).

Additionally, Complainants' ceremony explicitly promoted homosexual conduct as appropriate, which is contrary to the Association's desire not to promote it. Among other things,

Complainants stated that they included a lavender ribbon in their braiding ritual because it "is the traditional lesbian color," *see* Ceremony Agenda at 1 (R. Ex. 48); Mr. Pivinski stated that "God's spirit has shown [Complainants] the way to each other and has set their hearts afire for one another," *see* Pivinski Email at 2 (R. Ex. 47); Rabbi Landsberg stated that Complainants "embraced as friends, as lovers, and as unwavering companions," *see* Ketubah Photos at 1-3 (R. Ex. 50); and the two women kissed and embraced at the conclusion of the ceremony, *see* Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 6 (R. Ex. 45); Civil-Union Pictures at 13 (R. Ex. 44). Similarly, by its very nature, Complainants' ceremony communicated approval for same-sex unions, despite the fact that the Association does not want to express support for such unions as morally legitimate.

Complainants' ceremony would significantly affect the Association not only because it communicates messages that are directly antithetical to the Association's beliefs, but also because it would occur in a facility where the Association almost daily conducts worship services or religious activities. *See* Rasmussen Cert. at ¶¶ 46, 49 (R. Ex. 1). So in the very same place of worship where the Association conducts religious services and programs proclaiming Biblical truths about marriage, it would be forced to host—under the auspices of its Wedding Ministry—a ceremony that sends directly contradictory messages and violates its religious faith.

If the Association were required to host Complainants' ceremony in its Pavilion, the message of Complainants' ceremony would be directly associated with the Association. *See* Rasmussen Cert. at ¶ 136 (R. Ex. 1). For starters, the Pavilion is covered with signs advertising the Association's worship services and ministry events. *Id.* at ¶ 48; Pavilion-Sign Pictures at 2-4, 6-8, 10-13 (R. Ex. 19). Additionally, every event in the Pavilion requires prior approval from the Association, *see* Rasmussen Cert. at ¶¶ 54, 62 (R. Ex. 1); and thus Complainants' ceremony

"would likely be perceived as having resulted from the [Association's] customary determination . . . that [an event] was worthy of presentation and quite possibly of support." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 *U.S.* 557, 575, 115 *S. Ct.* 2338, 2348, 132 *L. Ed.* 2d 487 (1995). The link between the Association and Complainants' ceremonial message would be particularly strong because Complainants' ceremony would take place under the Association's Wedding Ministry and be attended by at least one member of the Wedding Committee, whose presence would signify the Association's approval of and support for Complainants' ceremony. *See* Rasmussen Cert. at ¶ 65 (R. Ex. 1).

The impact on the Association's expression is particularly acute for events held in the open-air Pavilion because the messages communicated through all services and ceremonies therein are broadcast to all who pass by. *See* Rasmussen Cert. at ¶¶ 44, 74 (R. Ex. 1). Hosting Complainants' civil-union ceremony in the Pavilion as part of its Wedding Ministry "would, at the very least, force the organization to send a message . . . to . . . the world" that it affirms and supports sacred romantic unions between persons of the same sex. *See Dale*, *supra*, 530 *U.S.* at 653, 120 *S. Ct.* at 2454. This would certainly make it difficult for the Association to communicate its own views about marriage, same-sex unions, or homosexual conduct, all of which are directly contrary to the views communicated through Complainants' ceremony. In short, forcing the Association to host Complainants' civil-union ceremony in the Pavilion would significantly burden its ability to express its views.[5]

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[5] An additional consideration is that interfering with the internal affairs of a *religious organization* by requiring it to violate its religious beliefs and practices imposes a significant burden on that organization's associational rights. *See Donaldson*, *supra*, 762 *N.E.*2d at 841 ("Forcing the [religious organization] and its leaders to include women in the meeting . . . would . . . be in direct contravention of the religious practice of the [organization]. This would be a significant burden on the [organization]."); *Erichsen v. His Supper Table*, No. WSHRC: 25PX-

In addition to significantly burdening the Association's expression, applying the LAD under these circumstances would also make involvement with the Association less desirable or attractive and thus threaten to interfere with the Association's composition. *See* Rasmussen Cert. at ¶ 138 (R. Ex. 1). It would, for instance, make involvement as a voting Board member less desirable for many people eligible to participate in that role. *See ibid.* Every voting Board member must be a member or clergy of the United Methodist Church. *Id.* at ¶ 17. That Church and thus its members and clergy are governed by the Book of Discipline, which, like the Association, affirms that marriage is "between a man and a woman," *see* Book of Discipline at ¶ 161(C), "does not condone the practice of homosexuality," *see* Book of Discipline at ¶161(G), and refuses to host "[c]eremonies that celebrate homosexual unions," *see* Book of Discipline at ¶341(6). So forcing the Association to host civil-union ceremonies would require it to engage in conduct that violates the official beliefs of the United Methodist Church and its members. This undoubtedly would make membership as a voting member on the Association's Board less attractive to many members and clergy of the United Methodist Church, the only class of persons eligible to join the Association in that capacity.

Forcing the Association to host civil-union ceremonies would also make involvement as a volunteer or employee of the Association less desirable to many eligible people. *See* Rasmussen Cert. at ¶ 138 (R. Ex. 1). As a Christian organization, the Association operates primarily through the employment of and volunteer assistance provided by professing Christians, and it requires

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1021-07-8, Investigative Finding of the Washington State Human Rights Commission at 2-3 (June 16, 2008) (R. Ex. 52) ("Because Respondent is a religious organization, guaranteed expressive freedoms of religion and association . . . , [it] can choose to not associate with homosexuals if doing so violates its religious tenets"). Applying the LAD to the Association under these circumstances would impose this significant burden on the associational rights of a religious organization, and it thus would create additional constitutional concerns.

employees and volunteers in certain ministry-related positions to provide a statement of their Christian faith. *Id.* at ¶¶ 21-22. Most Christians, as demonstrated by the beliefs of the large, mainstream Christian Churches (including the United Methodist Church), affirm marriage between one man and one woman, disapprove of homosexual conduct, and reject unions of same-sex couples. *See* Roman Catholic Church's Statement at 1-7 (R. Ex. 38); Southern Baptist Convention's Statement at 1-2 (R. Ex. 39). Requiring the Association to act contrary to these widely held Christian beliefs would thus make involvement with the Association less desirable to the group of Christians eligible to participate in these particular roles. And the Association, it must be noted, relies heavily on its volunteers to operate its many programs and events, *see* Rasmussen Cert. at ¶ 23 (R. Ex. 1); thus, anything that risks decreasing its pool of willing volunteers threatens to burden its operations.[6]

Moreover, participation in the Wedding Ministry, which operates solely through volunteers, would also be less attractive to many Christians. Members of the Wedding Committee are actively involved in the wedding process—meeting the couple, attending the rehearsal and wedding, and offering hands-on wedding-coordination assistance. *See* Rasmussen Cert. at ¶¶ 65, 76 (R. Ex. 1). But many Christians would not want to provide similar support for a same-sex ceremony because doing so would directly conflict with their sincerely held religious beliefs. In sum, then, forcing the Association to host civil-union ceremonies would make

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[6] Likewise, forcing the Association to host civil-union ceremonies will likely have a negative impact on its fundraising. The Association is a nonprofit organization that depends on donations from its ministry supporters, most of whom are professing Christians. Rasmussen Cert. at ¶¶ 24-25 (R. Ex. 1). Thus, requiring the Association to act contrary to certain widely held Christian beliefs could cause some of its ministry supporters to discontinue or decrease their financial support. This negative financial impact threatens to further burden the Association's operations. *See id.* at ¶ 24.

involvement with the Association less desirable or attractive for some Board members, employees, and volunteers, thus threatening to interfere with the Association's composition.

C. The State's Interest in the LAD Does Not Justify this Significant Burden on The Association's Right of Expressive Association.

Having determined that forcing the Association to host Complainants' civil-union ceremony would significantly burden its expression, the last step of the expressive-association analysis requires a comparison between this substantial intrusion of the Association's rights and the government's interest in the LAD. *See Dale*, *supra*, 530 *U.S.* at 658-59, 120 *S. Ct.* at 2456. The United States Supreme Court has already conducted this analysis under similar circumstances and thus established binding precedent to follow. That Court in *Dale* said:

> We have already concluded that [this application of New Jersey's public-accommodation law] would significantly burden the organization's right to oppose or disfavor homosexual conduct. *The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the [organization's] rights to freedom of expressive association.* That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.

Id. at 659, 120 *S. Ct.* at 2457. *Dale* thus establishes that New Jersey's interests underlying the LAD do not justify this significant burden on the Association's right of expressive association, and as a result, this application of the LAD would violate the Association's constitutional rights.

IV. Applying the LAD to Force the Association to Host Complainants' Inherently Expressive Civil-Union Ceremony in its Pavilion Would Result in a Compelled-Speech Violation under the United States and New Jersey Constitutions.

Freedom of speech is protected under the United States and New Jersey Constitutions. *See U.S. Const.* amend. I; *N.J. Const.* art. I, § 6. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley*, *supra*, 515 *U.S.* at 573, 115 *S. Ct.* at 2347 (quotation marks omitted); *see also Wooley v. Maynard*, 430 *U.S.* 705, 714, 97 *S. Ct.* 1428, 1435, 51 *L. Ed.* 2d 752 (1977) ("[T]he First Amendment . . .

includes both the right to speak freely and the right to refrain from speaking"). The First Amendment thus prohibits "the government from compelling [private organizations] to express certain views." *See United States v. United Foods, Inc.*, 533 *U.S.* 405, 410, 121 *S. Ct.* 2334, 2338, 150 *L. Ed.* 2d 438 (2001).

"[C]ompelled-speech cases are not limited to the situation in which an individual must personally speak the government's message. [The courts] have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message." *Rumsfeld, supra*, 547 *U.S.* at 63, 126 *S. Ct.* at 1309. "The compelled-speech violation in [those] cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Ibid.* And as will be demonstrated below, that is precisely what would occur here if the Association were forced to host Complainants' civil-union ceremony.

Again, it is important to emphasize that Complainants sought to engage in expression in the Association's facility. As previously demonstrated, Complainants' civil-union ceremony was an expressive event that communicated messages to all who observed it, and Complainants ask the State to use the LAD to force the Association to host this communicative event in its open-air Pavilion. *See supra* at pp. 34-35.

Also as discussed above, Complainants' expression in the Pavilion would be linked to the Association because (1) the Association almost daily holds its own services and programs in the Pavilion to communicate its values and beliefs; (2) the Association approves and supports every event held in the Pavilion; (3) all wedding ceremonies held on the Association's premises are part of its Wedding Ministry and attended by a member of the Wedding Committee; and (4) the Pavilion is covered with signs advertising the Association's worship services and ministry

events. *See Hurley, supra*, 515 *U.S.* at 575, 115 *S. Ct.* at 2348 (noting that the speaker's message "would likely be perceived as having resulted from the [host's] customary [approval]"); *see also supra* at pp. 36-37.

The Association is not a silent host, however; it engages in its own expression through its use of the Pavilion—activities that include its worship services, its religious programs, and, most notably here, its operation of the Wedding Ministry. *See* Rasmussen Cert. at ¶ 71 (R. Ex. 1). One of the purposes of the Wedding Ministry is for the Association to promote and communicate the message inherent in every wedding ceremony held in its facilities—that marriage is the uniting of one man and one woman. *See id.* at ¶¶ 70, 73-74. Such ceremonies, by their very nature, proclaim this understanding of marriage through a solemn event laden with expression and attended by witnesses. *See id.* at ¶ 73. The Association thus communicates this message through its Wedding Ministry and, by extension, through every wedding ceremony held in its facilities. *See id.* at ¶¶ 73-74. And of particular note here, the wedding ceremonies in the open-air Pavilion communicate this message to a broader public audience. *Id.* at ¶ 74.

The Association's own message through its Wedding Ministry—proclaiming marriage as the uniting of one man and one woman—would be substantially affected by permitting Complainants' expressive ceremony. *See* Rasmussen Cert. at ¶ 139 (R. Ex. 1). As discussed above, Complainants' civil-union ceremony communicated messages that are antithetical to the Association's beliefs and expressions. *See supra* at pp. 35-36. And it is undeniable that forcing an organization to associate with directly contrary views burdens its own expression. *See Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 *U.S.* 1, 18, 106 *S. Ct.* 903, 913, 89 *L. Ed.* 2d 1 (1986) (plurality) ("Such forced association with . . . hostile views burdens the expression of views different from [those of the hosted speaker]").

More specifically, hosting Complainants' civil-union ceremony would affect the Association's own expression by forcing it "either to appear to agree with [Complainaints'] views or to respond." *Id.* at 15, 106 *S. Ct.* at 911. "This pressure to respond is particularly apparent" where, as here, "the owner has taken a position [contrary] to the view being expressed on [its] property." *Id.* at 15-16, 106 *S. Ct.* at 911 (quotation marks omitted); *see also id.* at 18, 106 *S. Ct.* at 913 ("Such forced association with . . . hostile views . . . risks forcing [the organization] to speak where it would prefer to remain silent"). So if the Association were required to host Complainants' ceremony, it would feel pressured to speak out against that ceremony and the messages conveyed therein. Rasmussen Cert. at ¶ 132 (R. Ex. 1). But while the Association does not support same-sex civil unions or homosexual conduct, it does not want to be forced specifically to speak out against civil-union ceremonies. *Id.* at ¶ 133. "That kind of forced response is antithetical to the . . . First Amendment[.]" *See Pac. Gas and Elec. Co.*, *supra*, 475 *U.S.* at 16, 106 *S. Ct.* at 911-12.

Also, applying the LAD as suggested by Complainants would affect the Association's expression by requiring it to allow Complainants' expressive use of the Pavilion instead of using it for another expressive event, like a wedding or a worship service, conveying a message it would rather support. *See Miami Herald Publ'g Co. v. Tornillo*, 418 *U.S.* 241, 256, 94 *S. Ct.* 2831, 2839, 41 *L. Ed.* 2d 730 (1974) (noting that one effect on the host's speech was "taking up space that could be devoted to other material [that it] may have preferred to print"). Forcing the Association to replace its desired message—communicating that marriage is the union of one man and one woman—with the contrary message of Complainants' ceremony—promoting, among other things, a marital union between two persons of the same sex—plainly affects the Association's own message.

The Association's expression has already been affected by its genuine concern that the DCR might erroneously force it to host civil-union ceremonies in the Pavilion. Following the events giving rise to this litigation, the Association stopped operating its Wedding Ministry in the Pavilion, *see* Rasmussen Cert. at ¶ 126 (R. Ex. 1)—the facility where, due to its open-air nature, the Association most widely communicates the message of that Ministry, *see id.* at ¶ 74. This tangibly demonstrates that Complainants' suggested application of the LAD will significantly affect (and has already affected) the Association's own expression.

In light of these compelled-speech concerns, the Association has shown that the Constitution forbids the DCR from forcing the Association to host Complainants' civil-union ceremony—that is, unless this application of the LAD satisfies strict-scrutiny analysis, which requires that it be a "narrowly tailored means of serving a compelling state interest." *See Pac. Gas and Elec. Co.*, *supra*, 475 *U.S.* at 19, 106 *S. Ct.* at 913. But for all the reasons that will be discussed in Section V.B. of this brief, strict scrutiny is not satisfied here.

V. Applying the LAD to Force the Association to Alter its Wedding Ministry and Contravene its Sincerely Held Religious Beliefs Would Violate the Association's Right to the Free Exercise of Religion under the United States and New Jersey Constitutions.

A. Strict Scrutiny Applies to the Association's Free-Exercise Claim.

Free exercise of religion is protected under the United States and New Jersey Constitutions. *See U.S. Const.* amend. I; *N.J. Const.* art. I, § 3. "Depending on the nature of the challenged law or government action, a free exercise claim can prompt either strict scrutiny or rational basis review." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 *F.*3d 144, 165 (3d Cir. 2002). There are two reasons why this threatened application of the LAD—which would force the Association to expand its Wedding Ministry by hosting Complainants' civil-union ceremony in violation of its sincerely held religious beliefs—requires strict scrutiny. First, the

relevant legal scheme, which includes the LAD and the DCR's longstanding policy of not applying the LAD to "places of worship," is not neutral or generally applicable. Second, the Association has raised a valid hybrid claim.

1. The Governing Legal Scheme Is Not Neutral or Generally Applicable.

The governing legal scheme fails the neutrality and general-applicability requirements in at least three ways. First, if the DCR were to apply the LAD against the Association here, it would be clear that the DCR does not neutrally apply its "place-of-worship" policy among different religious sects and practices. Second, if the DCR were to apply the LAD against the Association here, it would show that the DCR's place-of-worship policy constitutes a system of individualized exemptions. Third, the LAD's many statutory exemptions render the statutory scheme not generally applicable.

a. If the DCR Were to Apply the LAD Here, It Would Show That the DCR Does Not Neutrally Apply Its Place-of-Worship Policy.

"[T]he protections of the Free Exercise Clause pertain if the law [or policy] at issue discriminates against some or all religious beliefs[.]" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 *U.S.* 520, 532, 113 *S. Ct.* 2217, 2226, 124 *L. Ed.* 2d 472 (1993). "The Free Exercise Clause . . . extends beyond facial discrimination. The Clause forbids subtle departures from neutrality, and covert suppression of particular religious beliefs[.]" *Id.* at 534, 113 *S. Ct.* at 2227 (quotation marks and citations omitted). Thus, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Ibid.* Statutes or governmental policies that violate the neutrality requirement "must undergo the most rigorous of scrutiny." *Id.* at 546, 113 *S. Ct.* at 2233.

It is the DCR's longstanding policy, reaffirmed by its current director in April 2010, that places of religious worship "are not 'public accommodations' within the meaning of the LAD[.]" Stipulation of Settlement, *Ocean Grove Camp Meeting Ass'n v. Le*, at ¶ 5 (R. Ex. 4) (quoting Stewart Aff. at ¶ 10). The DCR thus admits that prior to this case it has *never before* "prosecuted as a public accommodation under the LAD a . . . place of religious worship." *Id.* at ¶ 4 (quoting Stewart Aff. at ¶ 9).

And in this case, the DCR is most assuredly dealing with a place of worship. The Pavilion is owned by a religious organization, and it is almost daily used for worship services and religious programs. *See* Rasmussen Cert. at ¶¶ 45-46, 49, 104 (R. Ex. 1). So if the DCR were to deviate from its place-of-worship policy and apply the LAD to the Pavilion, the DCR would plainly demonstrate that it does not neutrally apply its policy to all places of worship, but instead, discriminates among different religious sects and practices. *See Fowler v. Rhode Island*, 345 *U.S.* 67, 69-70, 73 *S. Ct.* 526, 527, 97 *L. Ed.* 828 (1953) (finding that the government's application of a local ordinance to prohibit a religious service of Jehovah's Witnesses, but not religious services of Catholic or Protestant sects, violates the Free Exercise Clause because "call[ing] the words which one [minister] speaks . . . a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one [religious organization] over another"). Such a non-neutral application of the DCR's place-of-worship policy would invoke strict scrutiny. *See Lukumi*, *supra*, 508 *U.S.* at 546, 113 *S. Ct.* at 2233; *see also Tenafly Eruv Ass'n*, *supra*, 309 *F.*3d at 167-68 (finding that the government's "selective, discretionary application [of its law]" violated the neutrality requirement because the government "tacitly or expressly granted exemptions from the [law] for various . . . religious . . . purposes," but not for the religiously burdened litigant's purposes).

b. If the DCR Were to Apply the LAD Here, It Would Show That the DCR's Place-of-Worship Policy Constitutes a System of Individualized Exemption.

"[A] law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk v. Pennsylvania*, 381 *F.*3d 202, 209 (3d Cir. 2004) (Alito, J.). And where "a state creates [such] a mechanism for exemptions, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 *F.*3d 359, 365 n.5 (3d Cir. 1999) (Alito, J.) (alterations omitted).

If the DCR were to apply the LAD here, it would show that the place-of-worship policy amounts to a discretionary exemption from the LAD. The DCR has nowhere defined what it means by the term "place of worship." Of course, it would be objectively reasonable to construe a place of worship to mean a facility owned by a religious organization that is regularly used for religious worship. But if the Pavilion—a structure that without question is owned by a religious organization and almost daily used for worship services—is not a "place of worship" exempt from the LAD's reach, then it is doubtful what arbitrary standard the DCR has created for this discretionary exemption.

In sum, if the DCR were to find that the Pavilion is not exempt from the LAD as a place of worship, the DCR would plainly demonstrate that its place-of-worship policy constitutes an individualized, discretionary exemption that can be applied to favor some and discriminate against other types of religious organizations or facilities. *See Blackhawk, supra*, 381 *F.*3d at 210 (finding that a "sufficiently open-ended" exemption brought the case "within the

individualized exemption rule"). And as discussed above, the DCR's refusal to apply its place-of-worship policy to the Pavilion—the place of worship at issue here—would be "sufficiently suggestive of discriminatory intent." *See Fraternal Order of Police*, *supra*, 170 *F.*3d at 365. This would require the application of strict scrutiny. *See Blackhawk*, *supra*, 381 *F.*3d at 209-10.

c. The LAD's Many Statutory Exemptions Render the Statutory Scheme Not Generally Applicable.

"A law burdening religious practice that is . . . not of general application must undergo the most rigorous of scrutiny." *Lukumi*, *supra*, 508 *U.S.* at 546, 113 *S. Ct.* at 2233. A law is not generally applicable when the government fails to prohibit conduct "that endangers [its] interests in a similar or greater degree" than the prohibited religious conduct. *Id.* at 543, 113 *S. Ct.* at 2232.

"[C]ategories of selection [and exemption] are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* at 542, 113 *S. Ct.* at 2232. The LAD is not generally applicable because it contains many categorical exemptions that undermine the statute's general purpose of preventing discrimination to at least the same degree as the Association's decision not to allow its place of worship to be used for a purpose that violates its religious beliefs. *See Blackhawk*, *supra*, 381 *F.*3d at 211 (finding that "[t]he categorical exemptions . . . trigger strict scrutiny because at least some of the exemptions . . . undermine the [governmental] interests . . . to at least the same degree as would an exemption for [the religiously motivated party]").

The LAD's public-accommodation provision, for example, does not apply to an "educational facility operated or maintained by a bona fide religious or sectarian institution." *N.J.S.A.* 10:5-5(l). But allowing an educational facility operated by a religious organization to refuse to admit any person or group because of their protected-class status undermines the

governmental interest in preventing discrimination to a greater degree than would permitting the Association to refuse to host an inherently expressive ceremony that violates its sincerely held religious beliefs. *Cf. Romeo v. Seton Hall Univ.*, 378 *N.J. Super.* 384, 391-92 (App. Div. 2005) (finding Seton Hall University to be an exempt educational facility and thus upholding its refusal to permit a student organization supporting persons who identify as homosexual).

Additionally, the LAD exempts from its real-property-rental provision a "religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization," specifically allowing those organizations to "limit[] admission to or giv[e] preference to persons of the same religion or denomination" or to "mak[e] such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." *N.J.S.A.* 10:5-5(n). But the decision of a religious organization—based on its determination of what will "promote the religious principles for which it is established or maintained"—that it will not rent its real property to a person or group because of their protected-class status undermines the governmental interest in preventing discrimination to at least the same degree as the Association's decision not to allow its property to be used for a purpose that directly conflicts with its religious beliefs. These categorical exemptions thus demonstrate that the LAD does not satisfy the general-applicability requirement. *See Blackhawk, supra*, 381 F.3d at 211.

A simple illustration sharply displays the LAD's lack of general applicability. If the Association were to lease real estate as part of its religious mission, it could refuse to lease those premises to a same-sex couple if it determined that their occupancy of the premises would not "promote the religious principles for which it is . . . maintained." *See N.J.S.A.* 10:5-5(n). But

according to Complainants' construction of the LAD, the Association could not refuse to allow a same-sex couple to conduct a civil-union ceremony in its Pavilion, even though the Association has determined that such an inherently expressive event would not promote—and, in fact, would directly contradict—the religious principles for which it is maintained. The government's interest in the LAD is affected almost identically by both decisions, but the law prohibits one and not the other. This unexplainable underinclusiveness shows that the LAD does not satisfy the general-applicability requirement, and thus strict scrutiny applies.

2. The Association Has Presented a Valid Hybrid Claim.

Even if the governing legal scheme is both neutral and generally applicable, strict scrutiny should apply because this application of the LAD "incidentally burdens rights protected by the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech[.]" *Tenafly Eruv Ass'n*, *supra*, 309 *F.*3d at 165 n.26; *see also South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 150 *N.J.* 575, 598-600 (1997) (recognizing that the "'compelling state interest' analysis [is] required for hybrid claims"); *Blackhawk*, *supra*, 381 *F.*3d at 207 (recognizing hybrid claims). Here, the Association has combined the burden on its free-exercise rights with the burden on its rights of expressive association and free speech. This constitutes a valid hybrid claim, and thus strict scrutiny applies.

B. Applying the LAD to Force the Association to Host a Civil-Union Ceremony Does Not Satisfy Strict Scrutiny.

Strict-scrutiny analysis is "the most rigorous of scrutiny"; it requires that the application of the LAD to the Association under these circumstances "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Lukumi*, *supra*, 508 *U.S.* at 546, 113 *S. Ct.* at 2233. The burden of satisfying this stringent test rests on Complainants. *See*

Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 *U.S.* 707, 718, 101 *S. Ct.* 1425, 1432, 67 *L. Ed.* 2d 624 (1981).

Strict-scrutiny analysis "look[s] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[s] the asserted harm of granting *specific exemptions to particular religious claimants.*" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 *U.S.* 418, 431, 126 *S. Ct.* 1211, 1220, 163 *L. Ed.* 2d 1017 (2006) (emphasis added); *see also Wisconsin v. Yoder*, 406 *U.S.* 205, 221, 92 *S. Ct.* 1526, 1536, 32 *L. Ed.* 2d 15 (1972) (recognizing that the Court "must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the . . . exemption" for the particular religiously burdened group). Here, the LAD seeks to further the generalized state interest in preventing civil-union-status discrimination, but Complainants cannot demonstrate, as they must under strict scrutiny, that this state interest is materially undermined by granting an exemption to the Association.

The existence of the DCR's place-of-worship policy—not to mention the LAD's many religiously based statutory exemptions—fatally destroys any suggestion that the State's interests would be materially burdened by exempting the Association's Wedding Ministry from the LAD's reach. If, as the DCR has long said in administering its place-of-worship policy, a religious organization is "free to practice discrimination, . . . as dictated by [its] faith, [by] denying access to and use of any place of worship under [its] care," *see* Supp. Aff. of Stewart at ¶ 20 (R. Ex. 4-A), then the State cannot justify punishing the Association for its religiously motivated decision to prohibit in one of its places of worship a ceremony that violates its sincerely held religious beliefs. *See Gonzales*, *supra*, 546 *U.S.* at 433, 126 *S. Ct.* at 1221-22 (finding strict-scrutiny not satisfied where the government already granted a broad religious

exemption). After all, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, *supra*, 508 *U.S.* at 547, 113 *S. Ct.* at 2234 (quotation marks and alterations omitted).

Stated differently, when focusing on the specific circumstances of this case, as is required under strict-scrutiny analysis, the particularized state interest in applying the LAD here is much "less substantial" than—and perhaps even inconsequential compared to—the generalized state interest in preventing discrimination. *See Yoder*, 406 *U.S.* at 228-29, 92 *S. Ct.* at 1540 ("[The governmental] interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attendance for children generally"). Again, as demonstrated by the DCR's place-of-worship policy and the LAD's many religiously based statutory exemptions, the state interest in applying the LAD to dictate the actions of religious organizations—particularly in their places of worship—are much less important than the state interest in controlling the actions of nonreligious organizations.

Additionally, preventing the novel type of discrimination that is allegedly at issue in this case, civil-union-status discrimination, does not amount to a compelling interest of the highest order because "civil-union status," unlike race or sex, is not protected under the New Jersey Constitution, federal law, or the United States Constitution. *See Attorney General v. Desilets*, 636 *N.E.*2d 233, 239 (Mass. 1994) ("Because there is no constitutionally based prohibition against discriminating on the basis of marital status, marital status discrimination is of a lower order than those discriminations to which [the state constitution] refers"). And finally, the Legislature has indicated that the State has *no* interest in preventing "religious organizations" from addressing issues involving the solemnization of marriages and civil unions, as the Association seeks to do here, "according to the[ir] rules and customs." *See N.J.S.A.* 37:1-13.

Complainants are thus unable to establish any governmental interest in forcing the Association to host civil-union ceremonies, let alone a compelling state interest of the highest order.

But even if the State were to have a compelling interest in preventing civil-union-status discrimination, the DCR's decision to punish the Association for upholding its religious principles in its places of worship, while allowing other religious organizations to "practice discrimination . . . [by] denying access to and use of [their] place[s] of worship," *see* Supp. Aff. of Stewart at ¶ 20 (R. Ex. 4-A), is "not narrowly tailored to promote that interest." *See Tenafly Eruv Ass'n*, *supra*, 309 *F.*3d at 172. Most obviously, the State could more narrowly tailor its governing legal scheme by exempting the Association from the LAD's reach when operating its ministries in its places of worship.

CONCLUSION

For the foregoing reasons, the Association respectfully requests that all Complainants' claims be dismissed.

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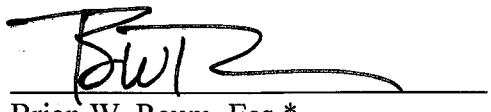
Respectfully submitted,



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