IN THE IOWA SUPREME COURT

Supreme Court No. 16-1078
Marion County Case No. LACV09460

VALERIE BANDSTRA, ANNE BANDSTRA,
RYAN BANDSTRA, and JASON BANDSTRA,
PLAINTIFFS-APPELLANTS,
v.
COVENANT REFORMED CHURCH,
DEFENDANT-APPELLEE.

APPEAL FROM THE DISTRICT COURT
IN AND FOR MARION COUNTY
THE HONORABLE JOHN D. LLOYD

BRIEF *AMICUS CURIAE* OF INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. IN SUPPORT OF DEFENDANT-APPELLEE

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INTEREST OF *AMICUS CURIAE*

The International Society for Krishna Consciousness, Inc. (ISKCON) is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. ISKCON has suffered discrimination in the United States and has sought judicial relief based on the First Amendment. ISKCON has successfully pressed before the U.S. Supreme Court its constitutional rights to engage in religious speech. *See, e.g., Lee v. Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (*per curiam*).

SUMMARY OF ARGUMENT

When Covenant Reformed Church described the lead plaintiffs' conduct as adulterous, it was expressing a moral evaluation of uncontested facts—an opinion based on those facts. It is a fact that each of the plaintiffs had a sexual relationship with the pastor. Whether this sexual relationship should be labelled adultery, though, is an opinion, which turns on Covenant's moral and reli-

gious beliefs that the plaintiffs were morally culpable (though of course the pastor was even more morally culpable).

This expression of opinion is protected under the First Amendment:

1. It is protected free speech, even without regard to Covenant's being a religious institution. Covenant believes the women's conduct is adulterous even though the women were subject to psychological pressure. The women believe that the psychological pressure sufficiently nullified their consent that their actions thus were not adulterous. Both sides have a Free Speech Clause right to express their opinions.

2. Covenant's speech is also protected under the Religion Clauses because it is a religious evaluation of how conduct should be labeled. Secular courts may not decide whether religious opinions are true or not. Some churches, for instance, may define "marriage" to include same-sex marriages; some may define them to exclude such marriages, or even exclude remarriages after a divorce. If those churches want to label some secular marriages as not true marriages, they are free to do so. Likewise, if they want

to describe conduct as adultery, under their religious definitions, they are free to express that opinion (at least so long as the audience knows the underlying historical facts, as the audience here did).

3. The First Amendment also precludes negligence liability imposed on the theory that the expression of opinion negligently distresses the listeners. The First Amendment protects the expression of opinion against tort lawsuits, regardless of the tort around which the plaintiffs frame their arguments.

4. The First Amendment protects "counterculture" religions and ideologies as well as ones within the mainstream culture. Plaintiffs might view the church's statements as "counterculture practices" that "fail[] to meet the ordinary standard of care." Appellants' Proof Brief 24. But even if jurors agree with plaintiffs on this, a church's expression of moral and religious views cannot lead to financial liability, regardless of whether the views adhere to the majority culture or the "counterculture."

This Court should therefore affirm the trial court's grant of summary judgment for Covenant.

ARGUMENT

I. Covenant's speech is protected opinion under the Free Speech Clause.

The word "adultery" generally means voluntary sex between two people, at least one of whom is married (but not to the other participant). There is a factual core to the term: Calling someone an adulterer even though she never had sex with anyone who was not her husband would indeed be a false factual assertion. When it comes to this factual core, though, Covenant's speech was accurate. The women had indeed had a sexual relationship with the pastor.

But "adultery" also, in many instances, represents a personal opinion about what counts as sufficiently voluntary behavior to merit moral condemnation. If a married man has sex with his boss, fearing that she might fire him if he refuses, is that adultery? What if he has sex with a prospective business client, in order to close a deal that means the difference between success and ruin? What if he has sex with his psychotherapist, who seduces him when he is emotionally vulnerable? What if he has sex with the minister who is counseling him? What if he was seduced by a

close friend who targeted him when he was emotionally vulnerable, and used the friendship to figure out how to emotionally manipulate him?

Different people can answer these question differently. One way of seeing that is to consider how someone one knows might react if she learned that her husband was having sex with his pastor and spiritual counselor.

Would she view this as adultery? Would she be forgiving—or even feel that there is nothing to forgive—because the husband was under the pastor's psychological pressure? Or would she be angry at her husband (of course, as well as at the pastor), because she viewed the husband as sufficiently morally responsible for his actions?

Different wives would react differently, which reflects the difference in moral judgment and moral opinions. People's use of the word "adultery," which suggests a moral and religious transgression, reflects this difference in opinion. And it is precisely this difference in opinion that rests at the heart of plaintiffs' objections to Covenant's statement.

This Court's decision in *Yates v. Iowa West Racing*, 721 N.W.2d 762 (Iowa 2006), further illustrates these two aspects of the word "adultery." The first two inquiries under the *Yates* test are,

1. "whether the alleged defamatory statement 'has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous,'" *id.* at 770 (citation omitted); and
2. to what degree the statements are "'objectively capable of proof or disproof,'" *id.* (citation omitted).

When it comes to some aspects of "adultery" (was there sex? was one party married to someone else?), there is a "precise core of meaning" on which there is consensus, and that core is "objectively capable of proof or disproof." But when it comes to judgments about what sort of pressure—emotional, spiritual, or financial—is so grave as to stop the sex from being sufficiently voluntary and thus adulterous, there is no precise core, and there is no objective proof. They are judgments that different observers (different spouses, different pastors, different fellow congregants) make dif-

ferently, depending on their opinions about human emotions and about when people should be held responsible for their actions.

And this is made especially clear by the third and fourth *Yates* factors, which look to "'the context in which the alleged defamatory statement occurs,'" *id.* at 770 (citation omitted), and "'the broader social context into which [the alleged defamatory] statement fits,'" *id.* (citation omitted). Covenant, without disputing facts as to what physically occurred between the women and the pastor, was voicing its opinion on how to morally characterize the women's conduct: "God calls it sin." Appellants' Proof Brief 59. The context shows that this was a subjective evaluative religious opinion. And the social context, of a church trying to define for its members what constitutes moral failing and what pressure people are responsible for resisting (hard as that may be), further shows that Covenant was expressing an opinion.

II. Covenant's speech is protected under the Religion Clauses, because it is a religious evaluation about how conduct should be labeled.

Covenant's speech is thus protected under the Free Speech Clause, and would have been protected even had it been said in a

secular discussion. But this protection is especially clear within a religious discussion.

Church leaders and congregants must be free to discuss what they view as adultery in God's eyes, not just theoretically but with respect to events in their community. They have to be able to define terms in accordance with their religious doctrines, free from interference by the secular legal system.

Consider, for instance, the word "marriage." Some people define this to include same-sex marriage; others define it to cover only opposite-sex marriage. Some define it to include polygamous marriage; others define it as purely monogamous marriage. The secular legal system today defines it one way; until recently, it defined it another way; and different religious groups define it in still other ways.

The Religion Clauses, as well as the Free Speech Clause, protect churches' ability to use any of these definitions. Say, for instance, that a minister faults two people for having sex even though they are not married to each other, but listeners know that the people are a same-sex couple in a civilly recognized same-sex

marriage. The statement, in context, is a statement of religious opinion—in God's eyes, the minister is saying, this relationship is not a marriage, regardless of what it might mean to the secular legal system.

The change in meaning of "marriage" within the legal system leaves "[r]eligious doctrine and views contrary to this principle of law . . . unaffected"; "people can continue to associate with the religion that best reflects their views," and presumably to express those views. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009). This Court has thus recognized that two definitions—secular and religious—may simultaneously exist, one for use in secular institutions and another in churches. *Id.* Likewise, even if "adultery" had a clear secular definition applicable to this case (which it does not, for reasons given in Part I), churches would still have a right to use the definition that they see as God's will rather than Caesar's.

Likewise, say that a church calls someone a "murderer," in a context where it is clear that it is referring to that person having performed an abortion (which the person did indeed perform). In

context, this is a statement of opinion—that abortion is murder. Many people do not share this opinion. The secular legal system does not share this opinion. But the Religion Clauses protect the rights of churches to express this opinion (just as the Free Speech Clause protects the rights of others). The same is true for the opinion that sex with one's pastor is voluntary enough to constitute "adultery."

Nor does *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404 (Iowa 2003), call for a different result. *Kliebenstein* never considered whether the speech in that case was opinion; indeed, the only reference to the word "opinion" in that decision concerns the admissibility of an expert opinion. *Id.* at 407. The issue in *Kleibenstein* was whether the phrase "spirit of Satan" was a purely ecclesiastical term or a secular term, and this Court concluded that, in the right context, it could have a secular meaning. *Id.* at 406-08. "[C]ases cannot be read as foreclosing an argument that they never dealt with," *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality op.); *United States v. L.A. Tucker Truck*

Lines, Inc., 344 U.S. 33, 37-38 (1952), and *Kleibenstein* never dealt with the opinion question that this case poses.

III. The First Amendment protects Covenant's speech from a finding of negligence liability by a jury.

Just as Covenant cannot be held liable for defamation based on its religious speech, so it cannot be liable for negligence. Indeed, even when speech has led to physical injury, courts have found it to be immune from negligence claims. Thus, for instance, broadcasters and film distributors cannot be liable on the theory that their speech negligently provoked some viewers into copying the crimes that the speech depicts. *See, e.g.*, *Olivia N. v. NBC*, 178 Cal. Rptr. 888, 894 (Ct. App. 1981); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989). Magazine publishers cannot be liable on the theory that their speech negligently provoked some readers (even children) into doing dangerous, even deadly things. *See, e.g.*, *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987).

This protection exists because the government may not impose liability based on its judgments about what artistic, moral, and religious expression is "unreasonable." Speakers "[can]not properly

be found to have violated their duty of reasonable care by exercising protected rights of free speech," *Yakubowicz*, 536 N.E.2d at 630. And "[i]n any event, the [speakers] cannot be liable for exercising those [free speech] rights." *Id.* at 630 n.4.

The same is true of religious speech. Reasonable people disagree about whether various religious teachings can cause harm, including physical or emotional harm (and not just theological or spiritual harm). Is it harmful to teach that homosexuality is evil, given that gay children (or even adults) could find that distressing or even emotionally traumatizing?

Is it harmful to teach that premarital sex is evil, on the theory that such teachings can lead people to feel guilty about natural human desires? Is it harmful to teach that premarital sex is acceptable, on the theory that such teachings can lead people to engage in behavior that can cause disease or unwanted pregnancy? Is it harmful to deny the existence of Heaven and Hell, on the theory that lack of concern about divine justice will encourage people to commit crime?

Whatever disputes there may be about these questions, judges and juries should not resolve those disputes, or decide which position is unreasonable. Likewise, it is not for judges and juries to decide whether it is reasonable for a church to use the word "adultery" to refer to congregants' being seduced by their pastor, regardless of whether this distresses those people. "It is not the province of the courts to inquire as to the soundness or reasonableness of religious beliefs." *Wilmes v. Tiernay*, 174 N.W. 271, 272 (Iowa 1919) (quoting *Moran v. Moran*, 73 N.W. 617, 621 (Iowa 1897)). The "reasonableness of [religious] statements is protected from judicial scrutiny by the First Amendment," including in tort lawsuits alleging negligence. *Smith v. Tilton*, 3 S.W.3d 77, 85-86 (Tex. Ct. App. 1999) (rejecting negligent misrepresentation claim based on such religious statements); *see also, e.g.*, *Braverman v. Granger*, 844 N.W.2d 485 (Mich. Ct. App. 2014) (jury in negligence cases may not, in determining whether Jehovah's Witness defendant reasonably refused a blood transfusion, evaluate the "reasonableness of the tenets of the person's religion or the reasonableness of the person's decision to abide by his or her religious beliefs").

And liability for allegedly unreasonable religious statements is foreclosed even when the statements seriously distress people. Religions deal with matters that are deeply important to their members, both because they can touch on eternal life or eternal damnation, and because people's family and social lives are often centered on the church. Religious teachings, as well as related practices such as excommunication, shunning, prohibition of interfaith marriages, and more, can thus often deeply distress some members or ex-members of a religious group. Nonetheless, these religious teachings and practices are protected by the First Amendment. *See, e.g.*, *Sands v. Living Word Fellowship*, 34 P.3d 955, 959 (Alaska 2001) (religiously motivated shunning cannot form the basis of a negligence claim, even when it led plaintiff to a suicide attempt that left him permanently paralyzed).

IV. The First Amendment protects "counterculture practices" as much as it protects the mainstream culture.

Plaintiffs argue that "counterculture practices" such as Covenant's "will often be accompanied by negative legal consequences." Appellants' Proof Brief 24. But the First Amendment protects countercultural speech and religious belief as much as it protects

the mainstream culture. Indeed, countercultural speech and beliefs especially need constitutional protection. "The First Amendment protects the right of individuals to hold a point of view different from the majority . . . ." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

CONCLUSION

Covenant has a free speech right to voice its opinion about what constitutes adultery, even when such judgments are disputed. Covenant's speech is protected under the Religion Clauses because it is a religious judgment about moral responsibility. The First Amendment precludes negligence liability for such speech, even if it emotionally distresses plaintiffs. And there is no "countercultural practices" exception to the First Amendment. This Court therefore ought to affirm the District Court's decision to dismiss the plaintiffs' claims.

Respectfully submitted,

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s/ Jason D. Walke

June 5, 2017