

Marriage Law and the Protection of Religious Liberty: Implications for Congregational Policies and Practices

Further Guidance to Pastors and Congregations from the NALC

In light of the recent decision by the US Supreme Court in *Obergefell v. Hodges*, as well as other federal/state/provincial/local legal developments and societal trends across North America, NALC pastors and congregations may be concerned about potential implications for their ministries. In this document, we aim to provide advice and suggestions to NALC congregations and pastors related to a range of congregational policy and practice topics, including the following:

- employment practices
- facilities use policies
- policies related to parish schools

This document supplements the guidance related to marriage law and religious liberty which was released by the NALC in June 2015.

The foundation for any congregational policy-making in this changing legal environment is a strong congregational doctrinal statement on marriage and human sexuality, drawn directly from Holy Scripture, the Lutheran Confessions, and the NALC Constitution. The following is a template policy which NALC congregations might consider using for this purpose.

Doctrine on Marriage and Sexuality

[Name of congregation] believes and confesses the “canonical Scriptures of the Old and New Testaments as the inspired Word of God and the authoritative source and norm of its proclamation, faith and life.” (NALC Constitution, Article 2.03)

The Triune God reveals a clear, consistent word regarding marriage and sexuality in Holy Scripture. He establishes marriage as the intimate relationship of a man and a woman to be ended only in death:

So God created man in his own image, in the image of God he created him; male and female he created them. (Genesis 1:27)

Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh. (Genesis 2:24)

Our Lord Jesus Christ quotes these two verses when asked about divorce:

He answered, "Have you not read that he who created them from the beginning made them male and female, and said, "Therefore a man shall leave his father and his mother and hold fast to his wife, and the two shall become one flesh"? So they are no longer two but one flesh. What therefore God has joined together, let not man separate." (Matthew 19:4-6)

Furthermore, God commands that sexual relationships are for marriage alone. All forms of sexual behavior and relationships outside the marriage of one man and one woman are prohibited. The commandment, "You shall not commit adultery," (Exodus 20:14) is primary, and Leviticus 18 records detailed, explicit prohibitions. Two of the many other Scriptural prohibitions are:

"You have heard that it was said, 'You shall not commit adultery.' But I say to you that everyone who looks at a woman with lustful intent has already committed adultery with her in his heart." (Matthew 5:27-28)

Or do you not know that the unrighteous will not inherit the kingdom of God? Do not be deceived: neither the sexually immoral, nor idolaters, nor adulterers, nor men who practice homosexuality, nor thieves, nor the greedy, nor drunkards, nor revilers, nor swindlers will inherit the kingdom of God. (1 Corinthians 6:9-10)

Article 6 of The Common Confession, the Appendix to the NALC Constitution, summarizes the Scriptural witness to God's will for marriage and family:

We believe and confess that the marriage of male and female is an institution created and blessed by God. From marriage, God forms families to serve as the building blocks of all human civilization and community. We teach and practice that sexual activity belongs exclusively within the Biblical boundaries of a faithful marriage between one man and one woman.

Therefore in obedience to our Lord and in submission to the authority of Scripture over all matters of faith and life, [Name of congregation] strives to ensure that all of its preaching, teaching and practices are in accord with God's will for marriage and sexuality.

Some General Principles

When joining the NALC, each congregation subscribed to the NALC's confession of faith, which includes clear teachings on marriage and sexual activity. In the aftermath of the US Supreme Court's *Obergefell* decision, many have asked whether the government will force congregations to act contrary to these teachings. For the most part, the answer is *no*. However, to limit the risk, each congregation should review its own situation and discern whether it ought to take some additional steps. In particular, each congregation should:

- 1. Include a Clear Statement of Belief in Governing Documents** – While every NALC congregation in some fashion has subscribed to the NALC confession of faith and to the 2005 Common Confession's section on marriage and sexual activity, a congregation should consider whether it has stated its religious beliefs as clearly and prominently as it might. A congregation that has not done so should consider adding to its constitution a clear subscription to the NALC's confession of faith and an express affirmation of the Common Confession's paragraph on marriage and sexual activity. Each congregation also should consider endorsing the foregoing Doctrine on Marriage and Sexuality as a statement of the congregation's beliefs.
- 2. Establish Policies Consistent with the Congregation's Statement of Belief** – All congregational policies should be consistent with the congregation's statement of belief and with the congregation's teachings on marriage and sexual activity. The following sections address issues relating to specific policies concerning employment, volunteers, facilities use and parochial schools.
- 3. Enforce These Policies Rigorously and Consistently** – A congregation must enforce its policies consistently and persistently. If a congregation makes exceptions, even in the interest of grace or charity, the congregation risks waiving its right otherwise to enforce its policies.
- 4. Make Sure that the Congregation's Policies and Practices Are Consistent with One Another** – A congregation should ensure that all of its policies and practices are consistent with one another. For example, a congregation would have a difficult time requiring an employee to abide by the NALC's teaching on marriage if at the same time the congregation opened its facilities to same-sex weddings or permitted its pastors to preside at such weddings.

Policies Governing Employees, Elected Leaders, and Other Congregational Leaders

As a preliminary matter, even without taking the steps discussed here, congregations and ministries have nearly complete discretion regarding the calling, disciplining, supervising, and dismissing of “ministers.” In 2012, the US Supreme Court in *Hosanna-Tabor Lutheran Church v. EEOC* unanimously ruled that “the authority to select and control who will minister to the faithful, a matter ‘strictly ecclesiastical,’ is the church’s alone.” The government simply won’t get involved.

A congregation’s pastors obviously are “ministers” covered by this ruling. Others employed by a congregation may be as well. (In *Hosanna-Tabor*, the minister was a called teacher at an LCMS congregation’s school.) In each case, the keys will include whether the person is working under a religious call or commission from the church and whether the person’s duties involve religious practices or instruction.

Hosanna-Tabor aside, a congregation should consider taking additional steps to ensure that it is legally able to align its mission with its policies governing employees, elected leaders, and other leaders who serve in prominent roles.

1. Establish Employment Policies that Facilitate the Congregation’s Mission – In some respects, all congregational employees and leaders reflect upon the congregation. Thus, in the interest of giving clear witness to the congregation’s beliefs, a congregation may require that all its employees and leaders share the congregation’s faith. A congregation also could require that employees and leaders agree to live in accord with the congregation’s moral theology, including specifically the congregation’s teachings on marriage and sexual activity. A congregation should spell out its expectations in any employee handbook and job or position descriptions. Specificity (in describing the religious/moral requirement for a particular position) and consistency (treating similar positions similarly) are important. So is an expressly stated link between the requirement and the congregation’s mission. This is particularly true for a congregation that operates a school, soup kitchen, or other ancillary ministry, which the secular world might otherwise be inclined to view as non-religious. A congregation should set out in writing (probably in a mission statement) the religious element of each ancillary ministry and any faith-related responsibilities of each employee who works with that ministry (leads prayer, Bible study, etc.). A congregation could choose to exempt some employees or leaders (e.g., janitors, employees who perform solely secular duties for an ancillary ministry, etc.) from these requirements. However, if it does so, it should include in the position description the reason for the exemption.

2. Require All Employees and Leaders to Sign an Acknowledgement of the Congregation’s Expectations – Employees and leaders should be required to sign a written acknowledgment of the expectations to which they have agreed as a condition of holding their positions. The acknowledgement should include an express statement that the employee or leader (i) has read and understood the congregation’s approved statement on marriage and sexual activity and (ii) will live in accord with it. (An example of an acknowledgement is attached.)

3. Enforce the Policy Rigorously and Consistently – If an employee or leader violates the promise to live in accord with the congregation’s confession of faith, the congregation must in all cases take appropriate action. Such action in the first instance might involve asking the employee or leader to repent. However, if the employee or leader does not, the congregation must take further steps, which generally will mean removing the person from his or her position. This can be difficult, but it is necessary. Otherwise, future employees and leaders might well be able to argue the congregation has waived its policies, rendering them unenforceable.

Sample Employee/Volunteer Leader Mission Acknowledgement

_____ Lutheran Church is a congregation of the North American Lutheran Church (the "NALC"). This congregation upholds the confession of faith described in the NALC constitution and in the 2005 Common Confession. A significant aspect of the congregation's mission is its outreach to the community and the witness that we bear in living out our lives as a Christian community. This outreach requires us to seek to model our faith in our daily lives.

This congregation specifically embraces the NALC's teachings regarding marriage and sexual activity as set out in the document titled Doctrine on Marriage and Sexuality. In the words of the Common Confession:

We believe and confess that the marriage of male and female is an institution created and blessed by God. From marriage, God forms families to serve as the building blocks of all human civilization and community. We teach and practice that sexual activity belongs exclusively within the Biblical boundaries of a faithful marriage between one man and one woman.

As an employee/elected leader/leader of this congregation, I acknowledge that the congregation has a genuine interest in maintaining a consistent witness to our members and to the community, and therefore expects its employees/elected leaders/leaders to act accordingly. Conduct deemed detrimental to, or inconsistent with the religious beliefs of this congregation, including without limitation its beliefs regarding marriage and sexual activity, constitutes grounds for employment discipline, up to and including dismissal. The pastor, in consultation with the church council, is the final arbiter on questions of conduct consistent with the congregation's beliefs.

I understand and acknowledge the importance of this to my position, and understand that my agreement with this principle is a necessary condition of my employment/continued service.

Employee/Leader Signature

Date

Facilities Use Policies

Many congregations permit individuals or outside groups to rent or otherwise use the facilities of the congregation for events not sponsored by the congregation. Types of events range broadly, including scouting, athletic, community, service and cultural activities. In considering whether to approve proposed outside uses of the congregation's facilities, congregations should consider both the specific proposed use of the facility and the nature of the outside organization, if any, which is organizing or sponsoring the use of the facility. Congregations should also consider whether the proposed use would reasonably imply to the congregation's members and to the public at large that the congregation endorses the proposed use and/or the mission and beliefs of the sponsoring organization.

Congregations should consider taking additional steps to align all such uses of their facilities with the congregation's faith, teaching and practice.

1. Establish a Facilities Use Policy that Facilitates the Congregation's Mission – A congregation should consider setting out in writing a clear policy that requires all uses of a congregation's property, as well as the mission and beliefs of any outside organization sponsoring such use, to be consistent with, or not inconsistent with, the faith, teaching and practice of the congregation. A sample policy follows this discussion.

2. Enforce the Policy Rigorously and Consistently – Doing so can lead to difficult situations, such as when the individual requesting to use the facilities is a congregation member or relative or close friend of a member, or when a non-Christian religious group proposes to rent the facility for religious activities. In these and other cases, a well-meaning desire to exhibit Christian hospitality may collide with the need for the congregation to protect its legal rights and prerogatives. Nonetheless, consistency and rigor in enforcement of the facilities use policy is necessary. Otherwise, other organizations and individuals who wish to use the congregation's facilities in ways inconsistent with the congregation's faith, teaching and practice might well be able to argue the congregation has waived its policies, rendering them unenforceable.

3. Charge Less than Market-Rate for Using the Congregation's Property – Whether a congregation is subject to non-discrimination laws when it rents out its facilities may depend in part on whether the congregation charges a market-rate rental fee. If a congregation charges a fee that resembles what a business would charge to rent a similar space, the law is more likely to view the rented space as a public accommodation and treat it as such under the law. To protect the congregation's right to place religious conditions on facilities use, congregations should aim to ensure that any fees charged are less than market rate. Best practices would be to keep facilities usage fees minimal and to explain to users that these fees are designed merely to cover the Church's associated costs (for example, maintenance, insurance, utilities), not to create a revenue stream for the congregation's other activities.

Sample Facilities Use Policy

All of the premises and facilities of _____ Lutheran Church are gifts from God, created through the sacrificial giving of past and current members and therefore entrusted to this congregation for use in its ministry. Although our premises and facilities are not generally open to the public, we do from time to time permit use of our premises and facilities by non-members, and by individual members for events not sponsored by the congregation, when that use is consistent with our mission and beliefs and for the purpose of demonstrating the love of Jesus Christ in practice (1 John 3:16-18, Mark 12:31, John 13:35).

For that reason, any and all uses of this congregation's premises and facilities must be consistent with, or not inconsistent with, the confession of faith, teachings and practices of this congregation and of the North American Lutheran Church, as found in Holy Scripture, the Lutheran Confessions, and the constitutions, bylaws, teaching statements, continuing resolutions and other policy and practice statements of this congregation and of the North American Lutheran Church. Any such proposed use shall be evaluated both on the basis of the proposed use and on the basis of the nature, mission and beliefs of the organization, if any, which proposes to sponsor or be responsible for such use.

The pastor, in consultation with the congregation council, is the final arbiter on questions of whether a particular proposed use of this congregation's premises and facilities is consistent with the congregation's confession of faith, teachings and practices.

Parochial School Policies

Some congregations operate schools as part of their ministry. These schools do not merely include religious instruction as part of their curriculum. Rather, they are Christian communities within which students, administrators, and teachers pray, study, and worship together. Students learn through communal experience how faith transforms their entire lives. All teachers, administrators and other staff, regardless of the subject they teach or role they perform, play a part in the religious education of the student by modeling the beliefs, norms and expectations of the church community in their individual lives.

Parochial schools have a legal right to exercise religious freedom. To safeguard this right, each school should (i) craft a mission statement describing the role of religious faith in all that the school does; (ii) adopt policies that implement that mission; and (iii) follow those policies consistently and persistently.

1. Write/Review School Mission Statement – Each school should draft a mission statement that places religious faith at the center of the school’s activities. This statement should include a clear commitment to the church’s statement of faith, teaching and practice, including church teaching on family, marriage, and sexuality.

2. Adopt Plans and Policies Outlining Expected Participation in School’s Religious Life – The school should adopt policies regarding its practices and regarding its people. Policies regarding practices will describe the ways in which the school’s faith commitment is manifest in all that the school does. These policies should describe the school’s prayer life, worship schedule, and religious-instruction program. Policies regarding people should state clearly the school’s expectations of students, parents, teachers, and other employees.

In particular, the policies should clearly describe the expected participation of students, teachers, and other employees in the school’s religious life and should expressly state that all members of the community are expected to abide by the teaching and practice of the congregation and the NALC regarding personal conduct and behavioral matters, while they are members of the community. The policy should make clear that such behavioral and conduct expectations include moral teachings regarding marriage, sexual activity, and living consistent with one’s biological sex, among other matters. The policy should state that acceptance of admission and enrollment constitutes acceptance by the parents and students of the behavioral expectations for so long as they remain members of the parish school community.

3. Including Non-Christians in the Community – Schools often admit non-Christian students (students from non-Christian families). Doing so should not pose a problem so long as parents (and students who are old enough) sign an acknowledgement of the school’s religious mission. Such students might be excused from some religious observances. However, such parents (and students who are old enough) must acknowledge that the students will abide by the church’s moral teachings and behavioral expectations so long as they are members of the parish school community.

Schools might also hire some non-Christian teachers or other employees. This is not necessarily a problem. However, the school should set out in writing its policies for deciding which teachers or employees need not be Lutherans or other Christians. And these policies should make clear that to avoid confusion in the school's educational mission, employees must agree to live in accord with the church's behavioral expectations and moral teachings, including teachings on family, marriage, sexuality, and living consistent with one's biological sex.

4. Require Teachers, Other Employees, and Volunteers to Sign a Mission

Acknowledgement – Teachers and other employees should be required to sign a mission acknowledgement like that expected from congregational employees and leaders. (An example is attached.)

5. Enforce All Policies Consistently and Persistently – Schools should cherish their

Christian character and live it consistently. This means keeping a commitment to prayer, worship, and study. It also means holding all members of the community to their commitment to live in accord with the church's behavioral expectations and moral teachings. The school should take a pastoral approach in dealing with violations. However, if a member of the community persistently refuses to conform his or her life to the church's behavioral expectations and moral teachings, appropriate action must be taken on a consistent basis. This might mean removing the person from the community.

Sample Teacher/Employee/Volunteer Leader Mission Acknowledgement

_____ School is a ministry of _____ Lutheran Church, a congregation of the North American Lutheran Church (the "NALC"). The congregation and school uphold the confession of faith described in the NALC constitution and in the 2005 Common Confession. A significant aspect of the school's mission is to teach students to live in accord with our faith. This requires that teachers and other school employees model the church's teachings in their daily lives.

This school specifically embraces the NALC's teachings regarding marriage and sexual activity as set out in the document titled Doctrine on Marriage and Sexuality. In the words of the Common Confession:

We believe and confess that the marriage of male and female is an institution created and blessed by God. From marriage, God forms families to serve as the building blocks of all human civilization and community. We teach and practice that sexual activity belongs exclusively within the Biblical boundaries of a faithful marriage between one man and one woman.

As a teacher/employee/volunteer leader of this school, I acknowledge that the school has a genuine interest in maintaining a consistent witness to our students and to the community, that I play a role in the religious education of the student by modeling the beliefs, norms and expectations of this religious community in my individual life, and that the school reasonably expects me to act in accordance with its behavioral norms and expectations in my individual life. Conduct deemed detrimental to, or inconsistent with the religious beliefs, teaching and practice of the school, including without limitation its beliefs, teaching and practice regarding marriage and sexual activity, constitutes grounds for employment discipline, up to and including dismissal. The congregation's pastor and the school principal are the final arbiters on questions of conduct consistent with the school's beliefs.

I understand and acknowledge the importance of this to my position, and understand that my agreement with this principle is a necessary condition of my employment/continued service.

Employee/Leader Signature

Date