

**In The
Supreme Court of the United States**

THE ROMAN CATHOLIC CHURCH OF
THE DIOCESE OF BATON ROUGE AND
THE REVEREND M. JEFFREY BAYHI,

Petitioners,

v.

ROBERT D. MAYEUX AND LISA M. MAYEUX,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Louisiana**

**AMICUS CURIAE BRIEF OF CATHOLIC ACTION
FOR FAITH AND FAMILY, CATHOLIC ANSWERS,
THE CATHOLIC LEAGUE FOR RELIGIOUS AND
CIVIL RIGHTS, CATHOLICS COME HOME, PRIESTS
FOR LIFE, GOSPEL OF LIFE MINISTRIES, THE
NATIONAL PRO-LIFE RELIGIOUS COUNCIL, THE
NATIONAL CLERGY COUNCIL, FAITH AND ACTION,
NATIONAL PRO-LIFE CENTER, CATHOLICS
CALLED TO WITNESS, CHARISMATIC EPISCOPAL
CHURCH FOR LIFE, ANGLICANS FOR LIFE, THE
CARDINAL KUNG FOUNDATION, JOHN PAUL THE
GREAT CATHOLIC UNIVERSITY, CATHOLICS AT
WORK ORANGE COUNTY, THE TERRI SCHIAVO
LIFE & HOPE NETWORK, AND CATHOLIC WAR
VETERANS OF THE UNITED STATES OF
AMERICA, IN SUPPORT OF PETITIONERS**

CHARLES S. LIMANDRI

Counsel of Record

PAUL M. JONNA

JEFFREY M. TRISSELL

FREEDOM OF CONSCIENCE DEFENSE FUND

P.O. Box 9520

Rancho Santa Fe, CA 92067

(858) 759-9948

cslimandri@limandri.com

Counsel for Amici Curiae, Catholic

Action for Faith and Family, et al.

September 24, 2014

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF IDENTITY AND INTEREST OF THE AMICI CURIAE	1
SUMMARY OF THE ARGUMENT.....	6
ARGUMENT	8
A. The Louisiana Supreme Court’s Directive to Find a Legal Definition of “Confession” Impermissibly Violates the Religious Ques- tion Doctrine in Contravention of Su- preme Court Precedent.....	8
1. Brief overview of the Religious Ques- tion Doctrine.....	8
2. The logical spectrum of the Religious Question Doctrine.....	9
3. The Religious Question Doctrine ap- plies here	12
B. The Louisiana Supreme Court’s Criminali- zation of Longstanding Duties Reserved to Ministers Is a Violation of the Ministerial Exception of the First Amendment	18
1. Brief overview of the Ministerial Ex- ception	18
2. The Ministerial Exception applies here	20
CONCLUSION.....	24

TABLE OF AUTHORITIES

Page

CASES

<i>Abdelhak v. Jewish Press Inc.</i> , 411 N.J. Super. 211, 985 A.2d 197 (Super. Ct. App. Div. 2009)	10
<i>Commack Self-Service Kosher Meats, Inc. v. Weiss</i> , 294 F.3d 415 (2d Cir. 2002)....	9, 10, 12, 17, 18
<i>Elmora Hebrew Center, Inc. v. Fishman</i> , 593 A.2d 725 (N.J. 1991)	10
<i>Employment Div., Dept. of Human Resources of Ore. v. Smith</i> , 494 U.S. 872 (1990).....	19, 20
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968).....	11
<i>Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC</i> , 132 S. Ct. 694 (2011)....	18, 19, 20, 21, 23
<i>Jones v. Wolf</i> , 443 U.S. 595 (1979)	9
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	11, 16, 17
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971).....	9
<i>McClure v. Salvation Army</i> , 460 F.2d 553 (5th Cir. 1972)	18
<i>Mockaitis v. Harclerod</i> , 104 F.3d 1522 (9th Cir. 1997)	16
<i>Molko v. Holy Spirit Ass’n</i> , 224 Cal. Rptr. 817 (Cal. Ct. App. 1986).....	10, 12
<i>NLRB v. Catholic Bishop of Chi.</i> , 440 U.S. 490 (1979).....	9
<i>Parents of Minor Child v. Charlet</i> , 135 So. 3d 1177 (La. 2014).....	<i>passim</i>

TABLE OF AUTHORITIES – Continued

Page

<i>Pearson v. Church of God</i> , 458 S.E. 2d 68 (S.C. Ct. App. 1995), <i>aff'd</i> , 478 S.E. 2d 849 (S.C. 1996)	11, 17
<i>People v. Phillips</i> , N.Y. Ct. of Gen. Sess. (1813)	15
<i>Planned Parenthood v. Casey</i> , 505 U.S. 833 (1992)	11
<i>Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church</i> , 393 U.S. 440 (1969)	9
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	11, 16, 17
<i>School Dist. of Abington Township v. Schempp</i> , 374 U.S. 203 (1963)	16
<i>Town of Greece v. Galloway</i> , 134 S. Ct. 1811 (2014)	16
<i>United States v. Ballard</i> , 322 U.S. 78 (1944)	8, 9
<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	11
<i>Van Orden v. Perry</i> , 545 U.S. 677 (2005)	16
<i>Watson v. Jones</i> , 80 U.S. (13 Wall.) 679 (1871)	8
<i>Zummo v. Zummo</i> , 574 A.2d 1130 (Pa. Super. Ct. 1990)	10

CONSTITUTION

U.S. Const. amend. I	8, 18
----------------------------	-------

TABLE OF AUTHORITIES – Continued

Page

STATUTES & RULES

42 U.S.C. § 2000bb et seq.....	16
La. Child Code art. 603(15)(c) (2014).....	13
La. Child Code art. 609 (2014).....	13
La. Code Evid. art. 511 (2006).....	13
N.Y. Rev. Stat. pt. 3, ch. 7, tit. 3, § 72 (1828).....	15
Sup. Ct. R. 37.2(a)	1
Sup. Ct. R. 37.6.....	1

CANON LAW PROVISIONS

1983 CODE c.1331, § 1.....	23
1983 CODE c.1388, § 1.....	15, 22

OTHER AUTHORITIES

Catechism of the Catholic Church §§ 1117-21, http://www.vatican.va/archive/ccc_css/archive/catechism/p2s1c1a2.htm#1117	14
Catechism of the Catholic Church § 1118, http://www.vatican.va/archive/ccc_css/archive/catechism/p2s1c1a2.htm#1118	14
Catechism of the Catholic Church §§ 1461-1467, http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c2a4.htm#1461	15
Catechism of the Catholic Church § 1467, http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c2a4.htm#1467	15

TABLE OF AUTHORITIES – Continued

Page

Catechism of the Catholic Church § 1548, http://www.vatican.va/archive/ccc_css/archive/ catechism/p2s2c3a6.htm#1548	15
Jacob M. Yellin, <i>The History and Current Status of the Clergy-Penitent Privilege</i> , 23 SANTA CLARA L. REV. 95 (1983)	14
John C. Bush & William H. Tiemann, <i>The Right to Silence: Privileged Clergy Commu- nication and the Law</i> 42 (3d ed. 1989)	14
Lori L. Brocker, Note, <i>Sacred Secrets: A Call for the Expansive Application and Interpreta- tion of the Clergy-Communicant Privilege</i> , 36 N.Y.L. SCH. L. REV. 455 (1991)	15
<i>Privileged Communications to Clergyman</i> , 1 CATH. LAW 199 (1955)	15

**STATEMENT OF IDENTITY AND
INTEREST OF THE AMICI CURIAE¹**

Catholic Action for Faith and Family is an association of Catholics that strives to uphold and defend Christian values inspired by the teachings of the Roman Catholic Church. The organization works in a legal and peaceful manner in the realm of ideas to promote these values. It aims to provide a network of resources and activities for clergy and laity to inspire them to reach out to others in an active way to defend these values.

Catholic Answers is America's largest lay-run organization dedicated to Catholic apologetics and evangelization. It began in 1979 and uses a wide variety of media to explain and defend the teachings of the Catholic Church. These media include print, audio, and video publications, as well as a daily, live, call-in radio program and extensive online resources. Catholic Answers is an apostolate dedicated to serving Christ by bringing the fullness of Catholic truth to the world. It helps good Catholics become better

¹ This brief is filed with the consent of all parties; copies of their consent letters have been submitted to this Court. Sup. Ct. R. 37.2(a). Pursuant to Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any other party and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. Both petitioners and respondents have waived ten-day notice in the matter.

Catholics, bring former Catholics “home,” and lead non-Catholics into the fullness of the faith.

The **Catholic League for Religious and Civil Rights** is the nation’s largest Catholic civil rights organization. Founded in 1973 by the late Father Virgil C. Blum, S.J., the Catholic League defends the right of Catholics – lay and clergy alike – to participate in American public life without defamation or discrimination. Motivated by the letter and the spirit of the First Amendment, the Catholic League works to safeguard both the religious freedom rights and the free speech rights of Catholics whenever and wherever they are threatened.

Catholics Come Home is an independent, non-profit Catholic apostolate that creates effective and compassionate media messages and broadcasts them nationally and internationally, in order to inspire, educate and evangelize inactive Catholics and others, and invite them to live a deeper faith in Jesus Christ, in accord with the Magisterium of the Roman Catholic Church.

Priests for Life is the largest ministry in the Catholic Church working to end abortion and euthanasia, and consisting of clergy who place a special emphasis on “life issues” in their personal lives and ministries; lay associates can also be members.

Gospel of Life Ministries is a national and worldwide interdenominational ministry that seeks to advance and apply Christian pro-life teachings in society, and to provide confidential counseling and healing to those who have been involved in abortion.

The **National Pro-Life Religious Council** (NPRC) is a coalition of Christian groups that focus on ending abortion and witnessing to the historical, Biblical Christian teaching on the sanctity of life.

The **National Clergy Council** (NCC) exists to encourage, equip, and mobilize clergy and other church leaders from all Christian traditions to use their ministries and positions to introduce biblical and classical Christian moral instruction into the conversation and debate surrounding public life and policy in the United States and abroad.

Faith and Action, based in Washington, DC, is a Christian outreach organization ministering to top-level government officials. It provides numerous personal ministries to elected officials and its staff, conducts worship services, sponsors religious oriented events, and provides media commentary on faith issues that are interwoven within governmental and legal matters.

National Pro-Life Center is an interdenominational ministry based in Washington DC which serves as a resource of pro-life information and action.

Catholics Called to Witness is a not-for-profit organization that advances biblical teaching on modern day moral issues through innovative media.

Charismatic Episcopal Church for Life is an organization of clergy and laity in the International Communion of the Charismatic Episcopal Church that educates and mobilizes the churches on pro-life issues and collaborates with other groups, across denominational lines, to advance the protection of life.

Anglicans for Life is an organization of Anglican clergy and laity that assists the Anglican communion to keep updated on pro-life issues, and that collaborates in various projects within the denomination and also ecumenically to advance the pro-life cause.

The **Cardinal Kung Foundation**, established in 1994, assists Catholics in China, and perpetuates the legacy and memory of the late Ignatius Cardinal Kung, bishop of Shanghai, China, who together with 200 other priests and church leaders was arrested by Communist authorities on September 8, 1955, and subjected to 30 years of imprisonment and torture for his staunch fidelity to the Catholic faith.

John Paul the Great Catholic University, located in Escondido, California, is a teaching institution focused on impacting culture for Christ by forming students as creators and innovators, leaders and entrepreneurs at the intersections of media, business and theology, guided by the teachings of Jesus Christ as preserved by His Catholic Church.

Catholics at Work Orange County is the Orange County-based chapter of the National Catholic Professionals and Business Clubs. It seeks to serve its members and guests by helping them more closely integrate their lives of faith and work. The comfortable intersection of faith and work has been a natural and complementary marketplace for the free exchange of ideas, goods, services, employment serving the Common Good in the country since the founding of the Republic. The Orange County Club and the 16

others with which it is associated strive to strengthen this marketplace through their efforts to better form members of the business community not only in business practice, but in religious practice as well.

The **Terri Schiavo Life & Hope Network** is a 501(c)(3) non-profit group dedicated to helping persons with disabilities and the incapacitated who are in or potentially facing life-threatening situations. Incorporated in 2001 to fight for the life of Terri Schindler Schiavo, the focus of the Terri Schiavo Life & Hope Network now and in the future is to help others avoid tragedies that reflect what Terri Schiavo endured. Through the organization's extensive network of medical and legal professionals, and an active public education program, the Life & Hope Network provides assistance to save the lives of the medically vulnerable, while working to change public opinion to be more responsive to their plight over the long-term.

Catholic War Veterans of the United States of America, founded in 1935, "by patriots, chartered by Congress, and blessed by Pius XI." Having proudly served America in uniform, CWV members know that "life, liberty, and the pursuit of happiness" are not freedoms that come to us without sacrifice. The founding fathers pledged to each other "their lives, their fortunes, and their sacred honor" to provide these freedoms to their posterity. Catholic War Veterans give continuity to this pledge today.

Catholic Action, et al., address in this brief the question of whether a court can impose liability for a priest's failure to report certain communications to

public authorities based on a determination made in court of whether those communications constitute “confession[] *per se*,” *Parents of Minor Child v. Charlet*, 135 So. 3d 1177, 1181 (La. 2014), or whether it must respect the church’s own view that such communications are confessional and absolutely protected from disclosure by the priest on penalty of automatic excommunication.

Catholic Action, et al., have an interest in preserving the right of religions to define in their own view which communications are confessional and absolutely protected from disclosure, and to protect the right of ministers to refuse to break the seal of the confessional if their religious beliefs require the maintenance of that seal.

Catholic Action, et al., appear as *amici curiae* in support of Petitioners the Roman Catholic Church of the Diocese of Baton Rouge and the Reverend M. Jeffrey Bayhi and urge this Court to grant the petition for a writ of certiorari.



SUMMARY OF THE ARGUMENT

The Louisiana mandatory reporter of child abuse statute includes ministers as mandatory reporters of child abuse. However, according to that statute, a minister is not required to report a confessional communication, as defined by the Louisiana priest-penitent evidentiary privilege.

This leads to the necessity of having some person determine whether a communication fits within those portions of the Louisiana code. The Louisiana Supreme Court held that the fact-finder, a jury, will determine whether such a communication was “confession[] *per se*.” This holding directly violates the Religion Clauses of the First Amendment of the United States Constitution.

This Court has not previously fully addressed how the rights of a priest and penitent in the confessional setting interact with the strong protections of the Religion Clauses of the First Amendment – in part, no doubt, due to the existence of nearly universal statutory schemes protecting the rights of priests and penitents. When the Supreme Court precedents regarding the Religious Question Doctrine and the Ministerial Exception Doctrine are analyzed with regard to the rights of priests and penitents, however, it becomes clear that those rights are protected not only by statutes, but also by the First Amendment of the United States Constitution. This is because, with regard to the Religious Question Doctrine, the definition of a “Confession” by the jury would impermissibly deprive religions of the right to define “Confession” by placing a government imprimatur on an official definition of “Confession.”

Also, the court is essentially criminalizing traditional ministerial duties which are required for many ministers to perform. Indeed, the failure to perform the duty of maintaining the seal of the confessional can disqualify certain ministers from serving with their religion. This criminalization not only affects

whether those ministers can act as ministers, but, by doing so, also substantially infringes on the inner workings of religions. Both the interference with ministers' duties, and the inner workings of religions, are prohibited by the Ministerial Exception.

This Court should take this opportunity to affirm that the longstanding and inherent rights of priests and penitents to confidentiality, codified in the priest-penitent privileges found in numerous evidentiary codes, are not only protected by statute, but also by the Religion Clauses of the First Amendment of the United States Constitution.



ARGUMENT

A. The Louisiana Supreme Court's Directive to Find a Legal Definition of "Confession" Impermissibly Violates the Religious Question Doctrine in Contravention of Supreme Court Precedent.

1. Brief overview of the Religious Question Doctrine.

The First Amendment of the United States Constitution prohibits Federal and State Judiciaries from making determinations concerning religious questions. See, e.g., U.S. Const. amend. I; *United States v. Ballard*, 322 U.S. 78 (1944); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). This prohibition, which is embodied in the Religious Question Doctrine, forbids courts both from determining the truth or falsity of a religious claim from an objective or scientific

viewpoint, *Ballard*, 322 U.S. at 86-87, as well as from even determining a specific religion's internal definition of a religious tenet. *Jones v. Wolf*, 443 U.S. 595, 603 (1979); *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 425-27 (2d Cir. 2002). This Doctrine is logically sound and serves important government interests. It prevents entanglement between the government and religion and religious ideas, and it permits religious beliefs and thoughts to evolve naturally without the push or pull of government sanctioned ideas. *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 442 & n.1 (1969). It further prevents excessive entanglement between the government and religious affairs which would arise through the attempt to determine the answer to religious questions. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (prohibiting excessive entanglement between government and religion); see also *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.").

2. The logical spectrum of the Religious Question Doctrine.

The contours of the Religious Question Doctrine have not been entirely determined, including what constitutes a religious claim or tenet. On one end of the spectrum, if the questions put before courts have been obviously religious ones, courts have refused to determine them. This includes questions about

whether certain religious-psychological techniques are efficacious or whether certain foods were prepared as required by the Orthodox Jewish kosher laws. See, e.g., *Elmora Hebrew Center, Inc. v. Fishman*, 593 A.2d 725 (N.J. 1991) (normal rabbinical duties of a rabbi of a traditional Jewish Congregation); *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990) (whether attending Catholic religious services was contrary to the Jewish faith); *Molko v. Holy Spirit Ass’n*, 224 Cal. Rptr. 817, 829 (Cal. Ct. App. 1986) (efficacy of religious-psychological techniques of the Unification Church); *Commack*, 294 F.3d at 425-27 (whether certain foods meet kosher requirements of Judaism); *Abdelhak v. Jewish Press Inc.*, 411 N.J. Super. 211, 985 A.2d 197 (Super. Ct. App. Div. 2009) (defaming effect in the Orthodox Jewish community that an Orthodox Jew had received a “seruv” by a rabbinical court).

Wordplay and legal arguments have, in the past, tried to convince courts that they could adopt, for practical purposes, a secular legal answer to a religious question. The arguments have urged the court to create a false divide, where religious questions can have two answers – a secular one and a religious one. These arguments, however, have not been adopted precisely because the courts have ruled that determining a secular answer to a religious question would override the religious answer. See *Commack*, 294 F.3d at 427-28 (rejecting argument that definition of “kosher” for statutory purposes is based on established trade standards and not the Shulhan Aruch,

Code of Jewish Law, from which it was obviously taken); see also *Pearson v. Church of God*, 458 S.E. 2d 68, 72 (S.C. Ct. App. 1995), *aff'd*, 478 S.E. 2d 849 (S.C. 1996) (“[W]e have no right or authority to make value judgments concerning the meaning and application of such words as ‘license’ and ‘ministry’ to the Church of God or its members. If we applied secular principles of contract construction to this ‘quintessentially ecclesiastical’ matter, we would wade into waters prohibited to us by the First Amendment * * * .”).

On the other end of the spectrum, the Court has shown that even if there is a religious definition or answer to a question, it can sometimes choose to not even invoke the Religious Question analysis. Without analyzing whether a case raises the Religious Question Doctrine, the Court has shown that if there is a secular definition or answer to the question, the Court can sometimes make a determination as to that secular definition. Every time the Court has done so, however, the question has had obvious substantive secular implications, and the decision has been bolstered by a specific substantive, secular interest, which arguably overrode any other general, philosophical or religious interest. See, e.g., *Roe v. Wade*, 410 U.S. 113, 159-62 (1973) (commencement of life); *United States v. Virginia*, 518 U.S. 515, 554-58 (1996) (morality of interracial marriage); *Lawrence v. Texas*, 539 U.S. 558, 575-78 (2003) (morality of homosexual conduct); *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (origins of humanity); *Planned Parenthood v.*

Casey, 505 U.S. 833, 851 (1992) (meaning of life). However, even when secular concerns, such as fraud, are at issue, if the result would be to override a religion's own view of what its beliefs and practices entail, courts have applied the Religious Question Doctrine strictly and consistently. See, e.g., *Molko*, 224 Cal. Rptr. at 829 (fraud case concerning the efficacy of the religious-psychological techniques of the Unification Church); *Commack*, 294 F.3d at 425-27 (fraud case concerning whether certain foods meet kosher requirements of Judaism).

3. The Religious Question Doctrine applies here.

The various cases discussing this subject have raised several important issues such as: (1) what is the definition of a religious question?; (2) why does the adoption of a secular definition for a ritualistic practice like "kosher" violate the Religious Question Doctrine when the adoption of a secular definition for the commencement of life does not?; and (3) would the adoption by the Court of a secular definition of a "Confession" be more akin to the "kosher" situation, or the "commencement of life" situation?

In *Parents of Minor Child v. Charlet*, the Louisiana Supreme Court did not address the precedent and Doctrine of the United States Supreme Court with regard to religious questions. 135 So. 3d 1177 (La. 2014). In *Charlet*, the Louisiana Supreme Court was tasked with applying Louisiana's mandatory

reporter of child abuse statute, La. Child Code art. 609 (2014), which exempts ministers from their mandatory reporter obligations if the means by which they learned of the child abuse was through a confidential communication as defined in Louisiana's priest-penitent privilege, La. Code Evid. art. 511 (2006), to the situation of an underage parishioner confessing to her priest the existence of an abusive sexual relationship with an older man. La. Child Code art. 603(15)(c) (2014); *Charlet*, 135 So. 3d at 1179-81.

The Louisiana Supreme Court applied the text of the relevant statutes, but failed to incorporate an analysis of the Religious Question Doctrine, an incorporation which would have altered the conclusion of the Court. See *id.* The Court did not address whether the definition of a "Confession" is a religious question, but directed a jury to determine whether there was a valid "confession[] *per se*," and implicitly adopt a definition of a valid "Confession" for purposes of the priest-penitent privilege in Louisiana. *Id.* at 1181.

The Louisiana Supreme Court should have realized that, although the priest-penitent privilege has a long common law history in American jurisprudence, the justification for bringing it into American law involves a mixture of both religious and practical considerations. Under the Religious Question analysis, no jury should be permitted to determine whether a self-described "Confession" constitutes a "confession[] *per se*."

The priest-penitent privilege has existed in the common law since before the Protestant Reformation in the Sixteenth Century. Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 96 (1983). Prior to the Protestant Reformation, a confession to a religious authority – by definition in all instances to a Catholic priest – had been held by society at large to be a confidential act since at least the fifth century. See John C. Bush & William H. Tiemann, *The Right to Silence: Privileged Clergy Communication and the Law* 42 (3d ed. 1989).

Currently, in the single largest religious body in America, the Roman Catholic Church, a verbal confession of sins to an ordained priest is one of the seven sacraments. See Catechism of the Catholic Church §§ 1117-21, http://www.vatican.va/archive/ccc_css/archive/catechism/p2s1c1a2.htm, hereinafter “Catechism.” The seven sacraments are fundamental pillars of the Roman Catholic faith, and their administration are among the core functions of her ministers. See Catechism § 1118 (“The sacraments are of the Church in the * * * sense that they are * * * for her. * * *. They are for the Church in the sense that the sacraments make the Church, since they manifest and communicate to men, * * * the mystery of communion with the God who is love, One in three persons.”) (internal citations omitted).

Further, as understood by the Catholic faith, within the pillar of the sacrament of Confession, the priest is not simply himself hearing the confession,

but is instead standing in the place of God, and granting not his own forgiveness, but God's forgiveness. See Catechism §§ 1461-1467, 1548. Consequently, the priest himself did not merely receive the information, but he received it on behalf of God, and it is not his to divulge in any circumstance whatsoever. See Catechism § 1467. The Roman Catholic Church reserves its most severe penalty for any priest who divulges any information he received during a Confession. See 1983 CODE c.1388, § 1 ("A confessor who directly violates the seal of the confession incurs an automatic *latae sententiae* excommunication reserved to the Apostolic See * * * .").

The priest-penitent privilege cannot be explained by purely secular reasons besides the commonsensical joinder of morality and religion. Instead, the priest-penitent privilege is perhaps best understood as a historical secular accommodation of an important religious belief. See *People v. Phillips*, N.Y. Ct. of Gen. Sess. (1813), reprinted in *Privileged Communications to Clergyman*, 1 CATH. LAW 199 (1955) (first holding that a priest cannot be compelled to disclose to a court that which has been confessed to him in the administration of the sacrament of penance); N.Y. Rev. Stat. pt. 3, ch. 7, tit. 3, § 72 (1828) (first statute protecting a priest from being compelled to disclose to a court that which has been confessed to him in the administration of the sacrament of penance); Lori L. Brocker, Note, *Sacred Secrets: A Call for the Expansive Application and Interpretation of the Clergy-Communicant Privilege*, 36 N.Y.L. SCH. L. REV. 455,

485 (1991) (“The clergy-communicant privilege has traditionally been asserted on public policy grounds.”). Indeed, courts have recognized the religious association of the privilege and have held that infringements on the ability of persons to practice Roman Catholic Confession are significant burdens requiring strict scrutiny under the Religious Freedom Restoration Act. See 42 U.S.C. § 2000bb et seq.; *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1531 (9th Cir. 1997).

The Court has actually held that historically precedential incursions of religious belief into the secular sphere are favored. See *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1819 (2014); see also *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) (“[T]he line we must draw between the permissible and the impermissible is one which accords with history * * *.”); *Van Orden v. Perry*, 545 U.S. 677, 703-04 (2005) (Breyer, J., concurring in judgment) (relying, for constitutional purposes, upon the consideration that the religious practice had been uncontested for a significant period of time).

Having a statutory priest-penitent privilege with a court sanctioned definition of “Confession” and who holds the privilege, is constitutionally problematic. The secular answer to the religious question of how to define a “Confession” would override the religious answer. Further, unlike in *Roe* and *Lawrence*, where the Court did not address the Religious Question Doctrine with regard to the more philosophical issues of how to define the beginning of life and the morality

of certain sexual practices, here there is a threat of overriding a religion's own view of what its beliefs and practices entail. See *Commack*, 294 F.3d at 425-27; *Pearson*, 458 S.E. 2d at 72; *Roe*, 410 U.S. at 159-62; *Lawrence*, 539 U.S. at 575-78. This is because the priest-penitent privilege stands solely on religious justifications. It is a practice unique to religion, and especially unique to the Catholic faith. Adopting any definition of a "Confession," beyond how a particular religion defines "Confession," will potentially override the religious definition of a "Confession" and is constitutionally impermissible. Further, a secular definition of "Confession" that determines whether the penitent may waive the priest's obligation to maintain the seal of the "Confession," is just as problematic as a secular definition that determines whether there is a seal. Any secular definition, in whatever form, removes the right of the religion to define "Confession" and should be found illicit under the Religious Question Doctrine.

Furthermore, the end result of permitting the Louisiana Supreme Court's judgment to stand would be that if a particular religion's definition and understanding of a "Confession" corresponds with Louisiana's legal definition of a "confession[]" *per se*," then the ministers of that particular religion will be insulated from potential legal liability. See *Charlet*, 135 So. 3d at 1181. If the definitions do not correlate, however, the minister who hears a "Confession" could face legal liability if the Doctrines of his faith do not

allow him to divulge the information but the requirements of the law require such divulgence.

This would impermissibly push the religious definitions of a “Confession” to match the legal definitions of “confession[] *per se*” in the same way that the court was concerned that a legal definition of “kosher” would push the religious definitions of “kosher” to match it. See *Commack*, 294 F.3d at 425-27. Consequently, the Court should not permit a jury to adopt a definition of “Confession” but leave the definition up to religious authorities.

B. The Louisiana Supreme Court’s Criminalization of Longstanding Duties Reserved to Ministers Is a Violation of the Ministerial Exception of the First Amendment.

1. Brief overview of the Ministerial Exception.

The Ministerial Exception of the First Amendment of the U.S. Constitution exempts religious organizations from being liable for the violation of any law in the decision of whether to retain or release a minister. See, e.g., U.S. Const. amend. I; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2011); *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972). The religious organization can be liable for its actions in how it directs that minister to act, but the decision of whether or not a particular person will be its minister is entirely left to it. *Hosanna-Tabor*, 132 S. Ct. at 694.

The depth, breadth and strength of the Ministerial Exception was recently unanimously reaffirmed by this Court in *Hosanna-Tabor*, holding that the Ministerial Exception is the natural and direct result of the Religion Clauses of the First Amendment. *Id.*, 132 S. Ct. at 703. The Court held that the Religion Clauses ensured that, unlike the British Crown, the new Federal government would have no role in filling ecclesiastical offices. *Id.* “The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.” *Id.*

The Court further noted that “[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision.” *Id.* at 706. Instead, the adherents of a religious faith put their faith lives in the hands of their ministers. *Id.* Consequently, interference with their choice of ministers “interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.” *Id.*

The Court also addressed the relationship of the traditional Free Exercise jurisprudence, extant since *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), with the Ministerial Exception jurisprudence it was outlining in that case. *Hosanna-Tabor*, 132 S. Ct. at 706-07. This Court held that, although in most circumstances, regardless of religious prescriptions or proscriptions, individuals

and organizations must comply with valid and neutral laws of general applicability, a religion's selection of its ministers is unique. *Id.* The Court noted that "*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* Lastly, the Court also noted that suffering the religion to undergo a penalty in exchange for its ability to choose a minister of its own liking is equally invalid under the Ministerial Exception. *Id.* at 709.

The Court specifically chose, however, to not address whether the Ministerial Exception would in any way bar criminal prosecutions for interfering with law enforcement investigations or other proceedings, but stated that "[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise." *Id.* at 710.

2. The Ministerial Exception applies here.

In the present case, the Ministerial Exception is implicated through the attempt of the Louisiana Supreme Court to criminalize a longstanding and quintessential duty of religious ministers. *Charlet*, 135 So. 3d at 1180-81. The holding by the Louisiana Supreme Court that a minister could be criminally liable for failing to violate the seal of the confessional – or for imposing a definition of a "Confession" which permits the priest to break the seal if

waived by the penitent – appears on its face to be a ruling of general applicability. *Id.* at 1179. The ruling, however, criminalizes conduct that is unique to ministers, and conduct that is unique to a certain class of ministers – those ministers who believe that the privilege of the seal of the confessional is held by both the priest and the penitent. *Id.*

Criminalizing conduct that is unique to ministers should not necessarily draw the ire of the Ministerial Exception – and arguably there is no conduct that is the practice of all ministers. When, as here, however, conduct that represents a significant divide within the practice of ministers is criminalized (i.e., how to hear a confession), the real and practical capability of religious organizations to select the ministers of their choice is greatly prejudiced. This is regardless of which understanding of “Confession” the minister holds.

The need to consider the Ministerial Exception is shown through the Court’s own determination that internal religious decisions, especially ones that affect “the faith and mission of the church itself” are particularly protected. *Hosanna-Tabor*, 132 S. Ct. at 709. In *Hosanna-Tabor*, the Court raised the Ministerial Exception particularly because the issue was internal to the church’s religious belief, and specifically not an outward act. *Id.* The present case may appear to concern the outward physical act of complying with a mandatory reporting of child abuse statute. More fundamentally, however, the present case constitutes government interference with the internal church

decision of whether to retain or loose ministers. This interference is the direct result of the criminalization of a historical and widespread ministerial practice, the hearing of a “Confession.” Furthermore, the ministers’ own understanding of their religious requirements, such as whether they must hear confessions and whether they are sealed, are judgments that affect the essential faith and mission of their respective religions. As such, those judgments must be kept protected from government overreach.

The fact that this is a particularly important issue is made evident when one looks at the real object of the conflict – the seal of the confessional. As noted previously, the act of confession to an ordained priest in the Roman Catholic Church is of paramount importance to the members of that faith. Confession is a pillar of the Catholic faith, a core and absolute duty of its ministers, a sacrament regularly received by millions of faithful adherents, and a practice for whose abuse the most severe punishments are reserved. See pp. 14-16, *supra*. As also noted previously, the violation of the seal of the confessional by a Roman Catholic priest results in a *latae sententiae* excommunication which can only be lifted by the direct intervention of the Apostolic See (i.e., the Pope) 1983 CODE c.1388, § 1. An excommunicated minister would be forbidden from having any ministerial participation in any worship services within the Catholic Church, from celebrating the sacraments, and from “exercis[ing] any ecclesiastical offices,

ministries, or functions whatsoever * * * ." See 1983 CODE c.1331, § 1.

This means that a priest who has incurred an automatic excommunication for breaking the seal is no longer allowed to act as a priest. He is disqualified from ministry as long as the excommunication is in effect. Thus, the action of the state of Louisiana would coerce priests into doing acts that will disqualify them from ministry in the Catholic Church and thus directly impact who the Church is able to appoint and retain as its ministers, in violation of *Hosanna-Tabor*. 132 S. Ct. at 706. *Hosanna-Tabor* holds that any government interference with the selection of ministers by their religions is suspect because it "depriv[es] the church of control over the selection of those who will personify its beliefs." *Id.* The coercion into excommunication at issue here is such a direct interference which should not only be found suspect, but unconstitutional.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES S. LIMANDRI

Counsel of Record

PAUL M. JONNA

JEFFREY M. TRISSELL

FREEDOM OF CONSCIENCE DEFENSE FUND

P.O. Box 9520

Rancho Santa Fe, CA 92067

(858) 759-9948

Attorneys for Amici Curiae, Catholic

Action for Faith and Family, et al.

September 24, 2014