

**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 THE ROMAN
CATHOLIC BISHOPS OF THE (ARCH)DIOCESES
OF LOUISIANA IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICI CURIAE*¹

Amici curiae, **The Roman Catholic Bishops of the (Arch)dioceses of Louisiana**, individually, include the Archbishop of the Archdiocese of New Orleans and the Bishops of each of the Dioceses in Louisiana (“*Amici* Bishops”) who file this brief in support of the Diocese of Baton Rouge (whose Bishop is The Most Rev. Robert W. Muench) and the Rev. M. Jeffrey Bayhi, Petitioners herein. **The Most Rev. Gregory M. Aymond** is the Archbishop of New Orleans; **The Most Rev. Michael Jarrell** is the Bishop of Lafayette; **The Most Rev. Ronald P. Herzog** is the Bishop of Alexandria; **The Most Rev. Glen John Provost** is the Bishop of Lake Charles; **The Most Rev. Michael G. Duca** is the Bishop of Shreveport; **The Most Rev. Shelton J. Fabre** is the Bishop of Houma-Thibodaux.

Amici Bishops’ interest in this case arises from their responsibilities as stewards to safeguard the integrity of the seal at the heart of the Sacrament of Reconciliation. Within the Sacrament is the protection and safeguarding of conscience. This superior form of confidentiality provides the one singular place of refuge where a person can relieve his or her

¹ Counsel for all parties were given 10 day notice and have consented to the filing of this brief. Their consent letters are on file with the Clerk. Sup. Ct. R. 37.2(a). No counsel for any party authored any part of this brief, nor contributed monetarily to the brief’s preparation or submission. Sup. Ct. R. 37(6). *Amici* have no parent corporations and no stock. Sup. Ct. R. 29.6.

conscience and participate in the graces of reconciling with God and the Church, knowing that the sacred trust of absolute confidentiality will not be violated by the priest nor invaded by the power of the State. *Amici* Bishops have a core interest in the outcome of this case because any governmental breach of the seal of confession – whether by subjecting the priest to subpoena power or by imposing mandatory reporter duties within the confessional – would represent an assault upon the Sacrament of Christ’s mercy and forgiveness.²



SUMMARY OF THE ARGUMENT

Religious liberty is at the core of our civil life together and at the core of our legal code; but First Amendment “freedoms are delicate and vulnerable,” and the “threat of sanctions may deter their exercise

² *Amici* Bishops abhor the grave sin of child abuse and wholeheartedly share the interest of the State in protecting children. This interest can be served without violating the seal of confession. For example, since 2002, the *Amici* Bishops have each implemented Safe Environment Training for all priests and diocesan employees in accord with the United States Conference of Catholic Bishop’s *Charter for the Protection of Children and Young People*. Moreover, state invasion of the confessional seal would not be an effective means to combat child abuse (or any other crime). Perpetrators could use anonymous confession behind the screen (or may not confess their crimes). Victims could always report offenders outside the context of the Sacrament. And priests in any event simply could not and would not violate their sacred obligation to safeguard the confessional seal.

almost as potently as the actual application of sanctions.” *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citations omitted).

Section I of this brief urges this Court to grant the Petition to address serious constitutional violations of the Free Exercise, Establishment and Free Speech Clauses of the First Amendment. Section II alternatively urges this Court to grant the Petition to remand for clarification or certification of questions to the Louisiana Supreme Court so that Petitioners and others are not left walking on eggshells in regard to their religious vocations and their rights of religious liberty.

According to the Louisiana Supreme Court’s per curiam decision, the Church and its clergy face civil and criminal punishment for the observance of fundamental religious precepts – here, the seal of confession. Further, the court below contemplates civil adjudication of which communications count as “confessions *per se*” and which do not, an exercise that entangles State with Church and impermissibly assigns religious questions to civil authorities.

This brief begins by setting forth key passages in the proceedings below to highlight how the state supreme court concluded that priest-confessors are mandatory reporters “notwithstanding any claim of privileged communication.” It then analyzes the federal constitutional questions raised, including how this case is distinguishable from *Employment Division v. Smith*. The brief ends by demonstrating that

this case is ripe for review, and alternatively setting forth two questions that could be clarified on remand or certification to the Louisiana Supreme Court.



REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO ADDRESS SERIOUS VIOLATIONS OF RELIGIOUS LIBERTY.

A. The Louisiana Supreme Court Per Curiam Opinion Eviscerates the Sacrament of Reconciliation.

[A] priest who hears confessions . . . can make no use of knowledge that confession gives him about penitents' lives. This secret, which admits of no exceptions, is called the "sacramental seal," because what the penitent has made known to the priest remains "sealed" by the sacrament.

Catechism of the Catholic Church § 1467.

A confessor who directly violates the sacramental seal incurs a latae sententiae excommunication reserved to the Apostolic See.

1983 Code of Canon Law c.1388 § 1.

Amici Bishops urge this Court to grant the Petition because any State encroachment on the sacramental seal – whether by subjecting the priest to subpoena power and contempt charges in a trial, or by imposing mandatory reporter duties and penalties

within the confessional – is an encroachment on the very Sacrament of Christ’s mercy and forgiveness.

At the heart of the Sacrament of Reconciliation is the penitent’s knowledge that the sacred trust of confidentiality will not be violated by the priest, nor invaded by the power of the State. Yet, the Louisiana Supreme Court’s opinion does just that, subjecting Father Jeffrey Bayhi and the Diocese of Baton Rouge, and by extension all Louisiana priests and dioceses, to the coercive force of state power for honoring their religious vocations.

As a result, this case implicates both the Free Exercise and Establishment Clauses of the First Amendment, as discussed in Petitioners’ brief, as well as free speech issues. U.S. Const. amend. I. This *amicus* brief is offered to bring this Court’s attention to important aspects of the decisions below that highlight the real and immediate threat to both the Sacrament of Reconciliation and to the delicate balance of Church-State relations.

1. The Louisiana Supreme Court effectively forces all priests to break the confessional seal in certain circumstances, or else face civil and criminal penalties for staying true to their religious vocations.

A reading of the Louisiana Supreme Court’s per curiam opinion, issued without the benefit of full briefing and oral argument, leads one to ask whether

the decision really means what it says. By its own terms, the opinion below found that priests are subject to mandatory reporter penalties and liability “notwithstanding any claim of privileged communication,” La. Child. Code art. 609; after allowing the contents of confession into evidence based on the waiver of the penitent, the state supreme court then went on to empower civil fact finders to determine “whether the communications between the child and the priest were confessions *per se*. . . .” App. 9a.

But one need not guess whether the court understood that it was dealing with communications made in the Sacrament of Reconciliation. The court’s decision itself recognized that the child “decided to seek spiritual guidance **through confession** with the defendant priest.” App. 2a (emphasis added).

Yet, the Louisiana Supreme Court bluntly concluded: “**A member of the clergy** as a mandatory reporter under this provision then **has a mandatory duty to report abuse**” under La. Child. Code art. 609:

Notwithstanding any claim of privileged communication, any mandatory reporter who has cause to believe that a child’s physical or mental health or welfare is endangered as a result of abuse or neglect or that abuse or neglect was a contributing factor in a child’s death **shall report** in accordance with Article 610.

La. Child. Code art. 609(A)(1) (App. 79a) (emphasis added).

Therefore, in addition to the Petitioners' exposure to judicially imposed civil liability (App. 9a), the priest also faces a risk of criminal fines and imprisonment imposed by the sanctions placed on mandatory reporters who fail to report certain information. *See* La. Child. Code art. 609(A)(2) ("Violation of the duties imposed upon a mandatory reporter subjects the offender to criminal prosecution authorized by La. R.S. 14:403(A)").³

In so ruling, the opinion strikes at the heart of the Free Exercise Clause and violates the Establishment Clause by inserting a fact finder into the confessional booth to rifle through various statements to determine if certain communications were "confessions *per se*." *See* App. 9a, opinion of the court; *see also* App. 13a and 21a, reciting plaintiffs' claims.

³ As pointed out by the court of appeal (but not even mentioned by the Louisiana Supreme Court), La. R.S. 14:403(B) appears to provide a privilege to the priest under these circumstances:

In any proceeding concerning the abuse or neglect or sexual abuse of a child or the cause of such condition, *evidence may not be excluded on any ground of privilege, **except in the case of communications between*** an attorney and his client or between **a priest**, rabbi, duly ordained minister or Christian Science practitioner **and his communicant**.

App. 20-21a (emphasis in original).

The extreme nature of the decision and its “confession *per se*” standard is brought to light by a review of the appellate court opinion that it reversed. The court of appeal had found that under La. Child. Code art. 603(15)(c), a priest is not a mandatory reporter required to report a “confidential communication” made in relation to sacramental confession. App. 32a. In so ruling, the court of appeal pointed to the plaintiffs’ petition and other allegations establishing that the minor chose to make the communications “during the Sacrament of Reconciliation.” *Ibid.*

Importantly, the court of appeal expressly rejected the plaintiffs’ “attempt to imply that the minor child’s conversation with the priest was not **‘truly’ a confession** because she was not confessing her own sin.” *Ibid.* (emphasis added). It was in this context that the Louisiana Supreme Court reinstated the trial court’s denial of the motion in limine with the instruction that a fact finder determine whether the communications between the priest and the penitent were “**confessions *per se***.” App. 9a (emphasis added).

The state supreme court reversed the finding of the court of appeal that a priest is **not** a mandatory reporter for purposes of Article 609. (App. 8a). It becomes clear, then, that as a mandatory reporter, the priest is duty bound under Article 609 to report

certain communications “notwithstanding” any claim of privilege.⁴

Finally, it is notable that the Louisiana Supreme Court reversed and vacated the appellate court’s judgment “in its entirety,” and reinstated the judgment of the trial court. App. 9a. The trial court believed Article 609 applies to Father Bayhi: “When pressed by the defendants’ counsel as to whether that meant that the trial court was holding that the priest also had a duty to report, the trial court stated, ‘**Yes, at this point, there may be some duty based on [Art.] 609.**’” App. 28a (emphasis added).

The ruling below judicially removes all legislatively granted protection under the exception of La. Child. Code art. 603(15)(c) for members of the clergy in the Sacrament of Reconciliation. What is constitutionally worse is that without considering the dangerous implications to the First Amendment’s religion clauses, the Louisiana Supreme Court gives Father Bayhi and all Louisiana priests a Hobson’s choice: mandatorily report confidential communications made in confession in order to save himself and his church from civil and criminal penalties, or refuse to report confidential communications in order to safeguard his

⁴ The legislature employed the phrase “privileged communication” in Article 609 instead of “confidential communication” as appears in Article 603(15), which contains the exception to the mandatory reporting requirements for members of the clergy.

soul and the souls of penitents who rely on the mercy conveyed under the sacramental seal.

2. Exposing the priest to civil and criminal liability under these circumstances implicates First Amendment violations concerning religion and speech.

The Louisiana Supreme Court's per curiam opinion presents federal constitutional questions by implicating both of the religion clauses, as well as the Free Speech Clause of the First Amendment.

First, it violates the Establishment Clause by excessively entangling the State in the affairs of the Church. As Petitioners have argued, claims for clergy malpractice and negligence have generally been dismissed on grounds that they excessively entangle the courts in an examination of religious doctrine and practice. App. 27. For similar reasons, the question whether a priest-confessor violated a duty to report suspected abuse or neglect also inescapably entangles the courts in matters of religious doctrine and practice.

Such a detailed investigation would not only break the seal of confession but would intrude upon highly sensitive issues of religious doctrine and practice concerning the teachings of the Church and the nature of the priest's counseling. *See Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336, 107

S. Ct. 2862, 97 L.Ed.2d 273 (1987) (“[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.” (Footnote omitted)).

Further, the per curiam opinion also implicates the Free Exercise Clause by unduly burdening the priest and the Diocese in their sacred duty to maintain the seal of confession, as well as the Free Speech Clause by compelling the priest’s speech against both his will and his religious convictions.

Amici acknowledge this Court’s holding in *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and that the Louisiana statutory scheme may arguably constitute neutral laws of general applicability.⁵ But *Smith* is distinguishable. *Smith* involved laws (1) *prohibiting*

⁵ *Amici* note that the mandatory reporting laws only apply to a subsection of the population; therefore, La. Child. Code art. 609 does not seem to be a law of general applicability, thus raising a valid question of whether *Smith* applies at all. *Cf. Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (Jackson, J., concurring) (“There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally”).

crimes which (2) were “otherwise prohibitable conduct,” 494 U.S. at 882, namely drug use.⁶ A law imposing *affirmative* obligations (mandatory reporting) and the *novel* application of such a law (such as the Louisiana Supreme Court requiring a priest to report information learned during *confession*), even though it may be “neutral and generally applicable,” raises far graver Free Exercise concerns than the law at issue in *Smith*. Moreover, Petitioners here, unlike those in *Smith*, are not affirmatively seeking benefits from the state, but are instead seeking only to be left alone to practice a sacrament that conveys the mercy and forgiveness at the heart of Christianity.

The instant case is therefore much closer factually to *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, ___ U.S. ___, 132 S. Ct. 694 (2012), than it is to *Smith*, to the extent that *Smith* involved “outward physical acts” whereas *Hosanna-Tabor* involved an “internal church decision.” *Hosanna-Tabor*, 132 S. Ct. at 707.

Insofar as this case also implicates the free speech rights of the priest, it falls within the category of cases the *Smith* majority recognized as presenting a “hybrid situation” in which the First Amendment

⁶ *Smith* expressly referred to “conduct the State is free to regulate,” 494 U.S. at 879; but the State is not free to regulate the Sacrament of Reconciliation. Likewise, *Smith* noted that it involved an “across-the-board criminal prohibition” on “socially harmful conduct,” *id.* at 884-85.

bars application even of a neutral and generally applicable law to religiously motivated action. *Smith*, 494 U.S. at 881-82 (citing, *inter alia*, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)). Petitioners here, like the school children in *Barnette*, object on religious grounds to the speech the government compels them to make. *Amici* suggest that this case presents a vehicle by which the Court may further explicate the hybrid exception noted in *Smith*.

Notwithstanding these distinguishing factors, if the ruling below is deemed permissible under *Smith*, given the draconian effects of the mandatory reporter laws to Petitioners and others, *Amici* suggest that this Court should reconsider *Smith* as applied under these circumstances.

The decision below has also exposed ecclesiastical matters to State court review and second-guessing, bringing the full force of the law to bear against a priest and a church in a manner that substantially burdens Free Exercise rights.

If the priest is bound by Article 609, placing him under legal obligation to report suspected child abuse learned during confession, then either the seal is shattered by the priest's compliance with the mandate to report (with a corresponding sentence of excommunication from the Roman Catholic Church), or he is at risk of criminal penalty every time a minor seeks the sacrament of confession and says anything arguably suggestive of abuse or neglect. Thus, even a

minor's complaint during confession that her father raised his voice to her to the point of extreme anguish to the child, or spanked her, could trigger a duty to report under Article 609, which requires, on pain of imprisonment, the reporting of any communication that gives one "cause to believe that a child's physical or mental health or welfare is endangered as a result of abuse or neglect." La. Child. Code art. 609(A)(1) (App. 79a). This vague and imprecise language, purposefully made as broad as possible, invites after-the-fact second-guessing by clever plaintiffs seeking to hold priests and the Church liable for harm that may have befallen a penitent after confession.

Further, the ruling casts a decided "chill" over the entire church body, because penitents will be less likely to seek the grace of reconciling with God, knowing that the confidentiality of their communications may be compromised. It also chills priests performing sacramental duties as well as priestly vocations due to the fear of priests and seminarians finding themselves between the Scylla of criminal penalties for failing to report suspected abuse and the Charybdis of violating Church law and teaching to maintain the sanctity of the seal of confession.

The chilling impact on free exercise resulting from government invasion of the Sacrament of Reconciliation was addressed by the Ninth Circuit Court of Appeals, where the court held that a tape recording of an inmate's confession to a Catholic priest obtained pursuant to a warrant was inadmissible against the inmate. *Mockaitis v. Harclerod*, 104 F.3d 1522 (9th

Cir. 1997), overruled on other grounds, *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Although *Mockaitis* was decided under the Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb(a), and thus later implicitly overruled by *Boerne*, it is still instructive in its reasoning. The court stated, “No question exists that [the prosecutor] has substantially burdened Father Mockaitis’s exercise of religion as understood in the First Amendment.” 104 F.3d at 1530. The court’s reasoning relied in part on this Court’s decisions in *Trammel v. United States*, 445 U.S. 40, 51 (1980) (the priest-penitent privilege is “rooted in the imperative need for confidence and trust”) and *Totten v. United States*, 92 U.S. 105, 107 (1875) (“suits cannot be maintained which would require a disclosure of the confidences of the confessional”). See also *People v. Phillips*, N.Y. Ct. Gen. Sess. (1813) (“It is essential to the free exercise of a religion, that its ordinances should be administered – that its ceremonies as well as its essentials should be protected. The sacraments of a religion are its most important elements.”) (quoted at App. 54a, Kuhn, J., concurring in court of appeal decision).

For priests and penitents, just as for the inmate in *Mockaitis*, “the knowledge, belief, or suspicion that freely-confessed sins would become public would operate as a serious deterrent to participation in the sacrament and an odious detriment accompanying participation.” 104 F.3d at 1530. To require a priest to reveal the contents of the sacrament “not only intrudes upon the confession . . . but . . . invades their

free exercise of religion and doing so makes it impossible for Father Mockaitis to minister the sacrament. . . .” *Ibid.*

B. This Case Is Ripe for Review.

This case has now been remanded for proceedings consistent with the defective per curiam opinion. Unless this Court grants the Petition, the harm to Petitioners is neither speculative nor remote. Indeed, it is real and immediate.

The case is therefore ripe for judicial review. The hardship to Petitioners is immediate, and the issues are fit for decision. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (stating ripeness requirements); *Ohio Civil Rights Comm’n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 625 n.1 (1986) (citing *Steffel v. Thompson*, 415 U.S. 452, 458-60 (1974), and holding that the mere filing of an administrative action threatening sanctions satisfies ripeness requirements). Cf. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991) (concluding that constitutional separation-of-powers challenge to “veto power” of administrative board was ripe “even if the veto power has not been exercised to respondents’ detriment,” because “[t]he threat of the veto hangs over the [decision makers subject to the veto power] like the sword over Damocles, creating a ‘here-and-now subservience’ . . . sufficient to raise constitutional questions”).

This Court should therefore grant certiorari to address this decision establishing a pernicious new precedent that violates the First Amendment religion and free speech clauses.

II. IN THE ALTERNATIVE, THIS COURT SHOULD REMAND FOR CLARIFICATION OR CERTIFY QUESTIONS TO THE LOUISIANA SUPREME COURT.

The Louisiana Supreme Court opinion forces clergy to reveal the contents of sacramental confession. In essence, the Church and its ministers face civil and criminal punishment for the observance of fundamental religious precepts – here, the seal of confession. Further, the court below contemplates civil adjudication of what counts as “confessions *per se*” and what does not, an exercise that entangles State with Church and impermissibly assigns religious questions to civil authorities.

Respondents may deny the extremity of the decision below. Seizing upon the “confessions *per se*” language, they may argue that the court did not *really* hold that a priest can be forced to report to the State matters learned in confession. Such attempts to recast the decision should be rejected out of hand as inconsistent with the issues and arguments that Respondents expressly articulated in their application for writ of certiorari to the Louisiana Supreme Court, namely that this case presents the question whether “the entire fundamental purpose of Louisiana’s mandatory reporting laws, override a clergyman’s

First Amendment right of the free exercise of religion.” Original Writ Application Filed on Behalf of Plaintiffs to the Louisiana Sup. Ct., at iii (Dec. 11, 2013). For Respondents to attempt to recast the decision below would also be inconsistent with the nature of the judgment (which reinstated an order *denying* protection to the contents of the confession).

However, if this Court has any doubts about whether the court below truly meant to embrace a position so antithetical to religious liberty, the proper approach would be to provide the state supreme court the opportunity to clarify, or retreat from, such an extreme position.

This Court could do so in either of two ways. First, it could grant review and then remand for clarification, as it did at first in *Employment Division v. Smith*, 485 U.S. 660 (1988), before subsequently again granting review and reaching the merits. Second, it could grant review and then certify questions to the state supreme court, as it did more recently in *Cline v. Oklahoma Coalition for Reproductive Justice*, 133 S. Ct. 2887 (2013). (Louisiana allows for the certification of questions to the state supreme court. Rule XII, Rules of Supreme Court of Louisiana.) In either event, the state supreme court could be asked directly: “Does the mandatory child abuse reporting law require clergy to report suspected child abuse where the suspected abuse is learned of through sacramental confession?” If the answer is “no,” then the decision below is plainly wrong on its own terms, as all the parties agree that the alleged revelations

pertinent to the motion in limine, and thus to this appeal, took place in the context of sacramental confession. But if the answer is “yes,” then the Free Exercise/Establishment Clause question whether a state can force a priest to divulge the contents of confessions is squarely presented.

There is a second question the Court could ask: “What is the significance of the state supreme court’s reference to ‘confessions *per se*’?” If the court below meant that the church’s ecclesiastical judgment about what does and does not qualify as sacramental confession can be second-guessed, then this Court’s “no religious decisions” doctrine is squarely implicated, as explained by the Petition for Certiorari. Likewise, if the court below meant that the inviolability of the confessional depends on a statement-by-statement analysis – *i.e.*, whether the penitent was confessing the penitent’s own sins, or revealing those of another person – again the integrity of the sacramental confession is being overridden, subjecting the communications to disclosure and judicial parsing.⁷ But if the court below meant only that communications *outside the confessional* are not privileged, then the *opinion* below is unremarkable, but the *judgment* below, authorizing compulsion of testimony about the

⁷ The notion that a bright line can be drawn between confession of one’s own sins and those of others is illusory. The acts of others may bear upon the culpability of the penitent, and thus be a proper part of the sacramental confession: was the act in question, for example, committed on the penitent’s own initiative, or was it the result of coercion by another?

contents of confession, is not sustainable or consistent with that opinion.



CONCLUSION

For all of the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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