

**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 AMERICAN  
SOCIETY FOR THE DEFENSE OF TRADITION,  
FAMILY, AND PROPERTY; TRADITION, FAMILY,  
PROPERTY-LOUISIANA; TRADITION, FAMILY,  
PROPERTY, INC.; AND PRO-LIFE ACTION LEAGUE  
IN SUPPORT OF PETITIONERS**

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September 25, 2014

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**STATEMENT OF IDENTITY AND  
INTEREST OF *AMICI CURIAE*<sup>1</sup>**

The Foundation for a Christian Civilization, Inc., known as **The American Society for the Defense of Tradition, Family, and Property**, is a nonprofit organization of lay Catholic Americans concerned about the moral crisis of Christian civilization. It is a civic, cultural, and nonpartisan organization, dating back to 1971, inspired by the traditional teachings of the Supreme Magisterium of the Roman Catholic Church. It works in a peaceful manner in the realm of ideas to defend and promote the principles of private ownership, family, and perennial Christian values. The organization has consistently defended the freedom of the Catholic Church to fulfill its mission of salvation unhindered by improper state control and coercion. It has been involved in the defense of the Seal of Confession since at least 2003, when the Sacrament of Penance and the freedom of the Catholic Church were threatened by proposed legislation in New Hampshire.

**Tradition, Family, Property-Louisiana**, incorporated in 2006, fosters and defends the values of

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<sup>1</sup> Pursuant to Rule 37.6, counsel for *Amici* certifies that no party or counsel for a party authored or paid for this brief in whole or in part, and that no person other than *Amici*, their members or donors, or their counsel have made a monetary contribution to fund the brief's preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *Amici* to file this brief. All parties have consented to the filing of this brief. Only Petitioners have filed a blanket consent.



Christian civilization, especially its three fundamental and mutually supporting principles – tradition, family, and private property – in several Southern and Southwestern states. Individuals associated with the organization helped muster opposition to an attempted legislative threat to the Seal of Confession in the Louisiana legislature.

**Tradition, Family, Property, Inc.**, incorporated in 1993, is a §501(c)(4) organization that defends and promotes the principles of tradition, family, and private property. Over the years, it has joined with other organizations in coalition efforts to safeguard fundamental constitutional rights, and among these, the freedom of the Catholic Church to carry out its spiritual work of salvation in the United States, unhindered by unjustifiable government interference.

**Pro-Life Action League**, founded in 1980, aims at saving the nation’s unborn children through non-violent direct action, and has become one of the nation’s premier pro-life organizations. It has helped organize hundreds of “Stand up for Freedom” rallies nationwide to draw the country’s attention to the government’s overreach and disrespect for the consciences of millions of Americans.

*Amici* uphold the Catholic Church’s fundamental right to free exercise of religion guaranteed by the First Amendment. *Amici* have defended this constitutional right from unlawful government overreach and laws that seek to compel people of faith and religious associations to violate the tenets of their faith.

*Amici* are deeply concerned about the lower court's ordering of a priest to break the inviolable seal of confession, after which he will face automatic excommunication, without any showing of a compelling government interest or narrow tailoring. The disregard for fundamental constitutional rights has serious implications for the religious liberty rights of the Petitioners, as well as all Americans, who may desire the healing and restoration that come from confidential communications with their clergy.

*Amici* support Petitioners, the Roman Catholic Church of the Diocese of Baton Rouge and the Reverend M. Jeffrey Bayhi, and urge the Court to grant the petition for a writ of certiorari.



### SUMMARY OF ARGUMENT

Religious liberty has always had an important place in our nation's democracy. "[T]he long and intensive struggle for religious freedom in America [is] particularly relevant in the search for the First Amendment's meaning." *McGowan v. State of Maryland*, 366 U.S. 420, 437 (1961). "[R]eligious freedom was the crux of the struggle for freedom in general" and finds "irrefutable confirmation" in "the [First] Amendment's sweeping content." *Everson v. Bd. of Educ.*, 330 U.S. 1, 34 (1947) (Rutledge, J., dissenting). Significant burdens on religious liberty cannot be disregarded merely because they result from a neutral, generally applicable law. Rather, religious liberty,

secured by the First Amendment, deserves “a sanctity and a sanction not permitting dubious intrusions.” *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

This brief will demonstrate that the Court’s decision in *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) permits dubious government intrusions and leads to impermissible government entanglement in religious affairs contrary to the preferred position of religious liberty guaranteed under the First Amendment. As a result, *Amici* urge this Court to revisit *Smith* and ensure that religious liberty is protected from gratuitous and discretionary abridgments by the government.

*Amici* also urge this Court to review *Smith* to clarify its reach to hybrid situations. This case presents the epitome of the hybrid situation resulting from burdens on free exercise of religion, compelled speech, and restriction of the freedom to associate.

Finally, *Amici* show that the irreparable harm to the penitent-priest relationship from the lower court’s order that the confessional seal be broken is especially worthy of this Court’s attention.



## ARGUMENT

The Louisiana mandatory reporter law is a generally applicable and neutral criminal law that incidentally burdens religious rights. La. Child. Code

Ann. art. 609 (Supp. 2013), *recodified at* La. Child Code Ann. art. 609 (2014). While it contains an exception from reporting by clergy for “confidential” communications as defined in Louisiana’s Code of Evidence, La. Child. Code Ann. art. 603(17)(c), App. 78a, the lower court has ordered a breaking of the seal of confession to determine whether there has been a “confidential” communication or “confession per se.” App. 8a-9a. In so ordering, the court found that no privilege attaches to the priest and that he cannot claim the privilege in his own right. App. 6a-7a.

Petitioners have argued that making this determination violates the First Amendment. Brief at 13. Concurring with the decision not to rehear the case, Justice Guidry stated that this First Amendment claim was not relevant when considering the meaning and intent of the mandatory reporting statute. App. 72a-73a. *Amici* agree with Petitioners that the First Amendment’s Religious Question Doctrine claim is meritorious, but argue that other First Amendment issues are present which require that this Court provide the framework to properly decide these issues.

Additionally, the Court should grant the Petition to prevent irreparable injury to the priest. If the seal is broken, no court can reseal the confession. *See Maness v. Meyers*, 419 U.S. 449, 460 (1975) (noting that compliance with a court order to reveal information could cause irreparable injury and no court can “unring the bell”).

**I. The Court Needs to Revisit *Smith* to Ensure Religious Liberties Are Protected From the Whims and Overreach of State Legislatures.**

Religious liberty has often been called our “first freedom.” See *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1560 (9th Cir. 1997) (Religious liberty is “the first liberty assured by the First Amendment. . .”). It occupies a “preferred position.” *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). As noted in *Smith*, religious liberty cannot always prevail, 494 U.S. at 879 (allowing religious beliefs to be superior to the law of the land permits citizens “to become a law unto himself”), but that should not eliminate the great care necessary to safeguard the preferred place of religious liberty. The “preferred position” of religious liberty demands judicial vigilance against state legislatures’ overreach and gratuitous burdening of free exercise rights.

Rather than require judicial vigilance, *Smith* leaves religious liberties in the hands of state legislatures whenever a neutral law of general applicability is involved. *Smith*, 494 U.S. at 878-79. Giving states the discretion to burden religious liberty or ignore it when it is inconvenient, is contrary to the “preferred position” occupied by the free exercise of religion. And as discussed *infra*, unless there is a hybrid situation, no heightened scrutiny of the state’s interest is even required. *Id.* at 889. *Smith* removes religious liberty from its “preferred position in our basic scheme”, *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944),

unless it is accompanied by another fundamental interest.

**A. *Smith* Permits State Legislatures to Substantially Burden Religious Liberty Without Showing a Compelling Interest or Narrow Tailoring.**

Without the necessity of showing a compelling state interest or narrow tailoring, religious liberty rarely wins. As a result, the fate of religious liberty lies solely in the hands of state legislatures. The *Smith* Court noted that:

[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequences of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

*Smith*, 494 U.S. at 890.

Without judicial scrutiny of neutral generally applicable laws, religious liberty is left to the vagaries of the political process, thus denigrating the purpose of the Bill of Rights. See Kathleen Sullivan, *Religion and Liberal Democracy*, 69 U. Chi. L. Rev. 195, 216 (1992) (discussing inadequacy of the legislative process as a protector of the Bill of Rights and need

for interpretation of the First Amendment that recognizes free exercise exemptions for the protection of minority religious groups). “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *Smith*, 494 at 903 (O’Connor, J., concurring in the judgment) (quoting *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943)). Application of “[t]he compelling interest test effectuates the First Amendment’s command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling government interests ‘of the highest order.’” *Id.*, 494 U.S. at 895 (O’Connor, J., concurring in the judgment) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). This is consistent with the Court’s affirmation of the First Amendment’s protection of the rights of religious organizations. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012) (The “First Amendment . . . gives special solicitude to the rights of religious organizations.”).

## **1. The Penitent-Priest Relationship Should Not be Subject to the Dis- cretion and Vagaries of Govern- ment Officials.**

The nature of the penitent-priest relationship and the important purposes it serves, require protection from the vagaries of the political process. Confidentiality is necessary for full confession of sins; otherwise, penitents may fear disclosure and withhold sins or fail to come to confession altogether. See Karl Keating, *Catholicism and Fundamentalism: The Attack on "Romanism" by "Bible Christians"* (Ignatius Press 1988) at 43-44 (“‘And he that is ashamed to make known his weakness, encourage him so that he will not hide it from you. And when he has revealed it to you, do not make it public.’”) (quoting 4th Century Aphraates). The role of a priest in hearing confession is compared to that of a father and a physician:

It behooves us, therefore, to draw near to the priests in great confidence and to reveal to them our sins; and those priests, with all diligence, solicitude, and love, and in accord with the regulations mentioned above, will grant healing to sinners. [The priests] will not disclose the things that ought not be disclosed; rather, they will be silent about the things that have happened, as befits true and loving fathers [cf. 1 Thess. 2:11; 1 Cor. 4:15] who are bound to guard the shame of their children while striving to heal their bodies.



William A. Jurgens, *The Faith of the Early Fathers* at 83-84 (1979) (quoting Theodore of Mopsuestia).

The relationship between a penitent and clergy is unlike any other in the world. Penitents rely upon clergy to help them handle fears, anxieties, doubts, and despairs. A member of the clergy receives the penitent's sorrow, brings forgiveness, and offers counsel and encouragement.

Protecting the penitent-priest relationship from government interference recognizes "the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance so that harmony with one's self and others can be realized." *Keenan v. Gigante*, 390 N.E.2d 1151, 1154 (N.Y. 1979); *see also U.S. v. Isham*, 48 M.J. 603, 607 (N.M.C.C.A. 1998) ("to carry out their mission of providing spiritual and moral guidance and succor during times of personal crisis, military chaplains must develop and keep the trust of those they serve. . . . If those who are battling loneliness and resentment feel that their chaplains will have to testify against them about some or all of what they have revealed in confidence, they are likely to avoid going to them for solace.").

Compelling a priest to break the seal of confession destroys the trust between a penitent and priest which is necessary for complete spiritual guidance and healing. It also interferes with a church sacrament in violation of the Free Exercise Clause. *See Mockaitis*, 104 F.3d at 1530 (excluding tape of

jailhouse confession because taping the confession “invades their free exercise of religion and . . . makes it impossible for [the priest] to minister the sacrament.”). Therefore, government should be required to demonstrate a compelling interest and narrow tailoring to avoid impermissibly burdening the manner in which forgiveness and peace is received by millions of people.

## **2. Permitting Legislatures to Grant, or Not Grant, Exceptions at Their Discretion Often Leads to Impermissible Government Entanglement in Religious Affairs.**

As this case amply demonstrates, without heightened scrutiny, legislatures may require compliance with any generally applicable law without regard to the impact on religious belief. A religious adherent’s only option is to obtain an exception from the legislature. However, after *Smith*, legislatures are no longer constitutionally required to make exceptions, or, if they choose to create them, may do so without regard to First Amendment principles.

In this case, instead of protecting free exercise rights, Louisiana’s legislative exception compels speech and has resulted in government entanglement in religious questions in violation of the First Amendment. *See Thomas v. Review Bd.*, 450 U.S. 707, 717 (1981) (“Courts are not arbiters of scriptural interpretation.”); *see also Kedroff v. St. Nicholas*

*Cathedral*, 344 U.S. 94, 116 (1952) (First Amendment assures “a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”). The Louisiana Supreme Court ruled that in order to determine whether Louisiana’s statutory exception applies, it must have information about the very matter the exception supposedly protects. App. 8a-9a. The government has usurped the authority of the Church and taken upon itself to determine what is and is not a “confession per se.” Sadly, the political process here was not sufficient to ensure the protection of the penitent-priest relationship from government entanglement.

As a result, the priest must make a choice: violate Louisiana law and risk imprisonment, or be excommunicated for breaking the seal of confession. Neither choice is acceptable nor should such a choice even be required. This Hobbesian choice highlights the danger of placing religious liberty in the hands of legislatures.

This case illustrates four problems with *Smith*. First, *Smith* invites government entanglement, contrary to the overriding interest in keeping the government out of religious affairs, particularly those affecting the faith and mission of the church itself. See *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 702, 707 (2012) (“Both Religion Clauses bar the government from

interfering with the decision of a religious group” over decisions that affect “the faith and mission of the church itself.”); *see also U.S. v. Lee*, 455 U.S. 252, 263 n.2 (1981) (Stevens, J., concurring) (“[T]he principal reason for adopting a strong presumption against [claims for tax exemptions] is not a matter of administrative convenience [but] the overriding interest in keeping the government . . . out of the business of evaluating the relative merits of differing religious claims.”).

Second, the free exercise of religion becomes dependent upon the ability to obtain exceptions. Unpopular and small religious adherents may be unable to bargain for an exception. Other religious adherents may lack the resources or political acumen necessary to secure an exception.

Third, *Smith* does not prohibit state legislatures from modifying laws of general applicability at any time for any reason. A confession that is protected by state law from disclosure one day, may not be protected the next. This uncertainty undermines the trust needed in the penitent-priest relationship.

Fourth, without the necessity of demonstrating a compelling interest or narrowly tailored means, “exceptions” may be illogical, unreasonable, or inadequate. Here, the exception has been read to require disclosure of the very thing it was designed to protect: the inviolability of the confession.

The Court should take this occasion to revisit its decision in *Smith* so that penitents and priests are

not left at the mercy of state legislatures. Without strong protection of the free exercise of religion, a priest may be compelled to speak, and the penitent-priest relationship irreparably damaged.

**B. The First Amendment Issues Raised By a State Compelling a Priest to Break the Seal of Confession In Violation of His Religious Beliefs Require This Court to Elucidate *Smith's* Reach to Hybrid Situations.**

In dicta, the *Smith* Court said that the only decisions in which the First Amendment bars application of a generally applicable law to religiously motivated action have involved not only the Free Exercise clause alone, but the Free Exercise clause in conjunction with other constitutional protections such as freedom of speech. *Smith*, 494 U.S. at 881 (citations omitted). These “hybrid” situations involved compelled expression, freedom of association, and Free Exercise clause concerns. *Id.* at 882.

The *Smith* dicta cites two cases involving the freedom of religion and the Free Exercise Clause and compelled expression. *See id.* at 882 (citing *Wooley v. Maynard*, 430 U.S. 705 (1997) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors)). In both *Wooley* and *Barnette*,

there was a free exercise claim connected with compelled communicative activity.

*Smith* also notes hybrid situations involving a free exercise claim in conjunction with other constitutional protections. *See Smith*, 494 U.S. at 881 (citing *Yoder*, 406 U.S. 205) (invalidating compulsory school attendance laws as applied to Amish parents who refused on religious grounds to send their children to school); *Smith*, 494 U.S. at 882 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)) (hybrid situation involving freedom of association and Free Exercise Clause concerns).

This case presents the epitome of the hybrid situation mentioned in *Smith* because it raises other fundamental constitutional rights. The seriousness of the religious question is amplified by the compelled speech and right of association involved in this case. Therefore, should this Court not revisit *Smith*'s holding, *Amici* urge the Court to clarify the hybrid rights portion of *Smith* so that it protects priests from compelled speech that violates the obligations of their priestly office.

### **1. The Right to Refrain From Speaking Is a Fundamental Right.**

Here, as in *Wooley* and *Barnette*, there is a free exercise claim connected with compelled speech. The right to refrain from speaking is a fundamental right protected by the First Amendment. *Wooley*, 430 U.S. at 714 (“[T]he right of freedom of thought protected by the First Amendment against state action includes

both the right to speak freely and the right to refrain from speaking at all.”); *Barnette*, 319 U.S. at 645 (Murphy, J., concurring) (“The right to freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all.”). “Official compulsion to affirm what is contrary to one’s religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the ‘severest contests in which I have ever been engaged.’” *Barnette*, 319 U.S. at 646 (Murphy, J., concurring) (quoting from Thomas Jefferson’s autobiography).

The lower court has ordered a priest to break the confessional seal and testify about the subject matter of the confessions, thus not only violating his religious belief, but compelling him to speak. While the subject matter of the confessions may involve statements of fact, as opposed to statements of belief or opinion, it is nevertheless compelled speech. *See Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 797-98 (1988) (stating that *Barnette* and *Wooley* “cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of ‘fact’: either form of compulsion burdens protected speech.”).

In this case, a priest is being forced to engage in speech which his religious beliefs forbid. *See* 1983 Code of Canon Law c.983, §1 (“Can. 983 § 1. The sacramental seal is inviolable; therefore it is

absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason.”); 1983 Code of Canon Law c.984, §§1-2 (“Can. 984 § 1. A confessor is prohibited completely from using knowledge acquired from confession to the detriment of the penitent even when any danger of revelation is excluded. § 2. A person who has been placed in authority cannot use in any manner for external governance the knowledge about sins which he has received in confession at any time.”); *see also* The Canon Law, Letter & Spirit: A Practical Guide to the Code of Canon Law 536 (Rt. Rev. Msgr. Gerard Sheehy et al. eds. 1995) (“One certain principle which emerges from Can. 983-984 is that information gained in the confessional should be regarded as not having been gained at all and, in so far as is humanly possible, should not ever be acted on or spoken of in any way.”). Through confession, the priest is granting not his own forgiveness, but God’s forgiveness. Catechism of the Catholic Church §§1461-1467, [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p2s1c1a2.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p2s1c1a2.htm). The underpinning of the inviolable seal is the belief that the priest is receiving the confession in God’s stead, and just as God hears and keeps secret all confessions, so must the priest also keep everything secret. *See* Catechism §1467 (the priest himself does not receive the information, but receives it on behalf of God, and therefore, it is not his to divulge).<sup>2</sup>

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<sup>2</sup> The Lutheran Church – Missouri Synod has a nearly identical belief. “‘So long as God keeps silent,’ . . . ‘should the  
(Continued on following page)



Confidentiality is critical. The forgiveness of sin is free and total and the priest, after declaring absolution, is no longer to “remember” the matter. *See Isaiah* 43:25 (New American Bible rev. ed. 2011) (“It is I, I, who wipe out, for my own sake, your offenses; your sins I remember no more.”); *Jeremiah* 31:34 (New American Bible rev. ed. 2011) (“They will no longer teach their friends and relatives, ‘Know the Lord!’ Everyone, from least to greatest, shall know men – oracle of the Lord – for I will forgive their iniquity and no longer remember their sin.”). Should the priest disclose any information received during confession, he faces automatic excommunication. 1983 Code of Canon Law c.1388 §1 (“A confessor who directly violates the seal of confession incurs an automatic excommunication reserved to the Apostolic See; if he does so only indirectly, he is to be punished in accord with the seriousness of the offense.”).

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chaplain or whoever hears confession also keep silent. For he who confessed it to him, has not confessed it to a man, but to God, in whose place the preacher sits. Therefore, he shall keep it secret.” *The Pastor-Penitent Relationship, Privileged Communications, A Report of the Commission on Theology and Church Relations of The Lutheran Church – Missouri Synod* at 6 n. 8 (September 1999), <http://www.lcms.org/page.aspx?pid=683> (last visited Sept. 22, 2014) (“By virtue of his ordination and the office into which he is called, the pastor has had his lips sealed from speaking about the sins of the penitent to anyone, including a court of law.”).

## **2. The Right of Association Is a Fundamental Right.**

The right to associate is a fundamental right protected by the First Amendment. This Court has held that this freedom of association also includes a right to privacy in one's associations. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations."). The penitent-priest relationship involves both the right to associate and the right to privacy in this association.

The right of religious association protects the freedom of penitents to engage in confession – a sacrament in the Roman Catholic Church, and therefore, a key religious activity. *See Hosanna-Tabor*, 132 S. Ct. at 711-12 ("The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals. . . .") (Alito, J., concurring, joined by Kagan, J.). Afraid that their confessions will be disclosed, penitents may refuse to come to confession. Compelled disclosure of private confessions thus chill penitents' associations with their priests.

The right to privacy of the penitent-priest association itself is also implicated. Compelling disclosure of the subject of the confession necessitates disclosure of the fact that confession took place at all, something which the priest is prohibited from revealing. *See*

Commentary on Canon 1388 in *The Canon Law, Letter & Spirit: A Practical Guide to the Code of Canon Law* (Rt. Rev. Msgr. Gerard Sheehy et al. eds. 1995) (Direct violation “occurs when the confessor deliberately discloses the identity of the penitent and the contents of a confession, either explicitly or implicitly; indirect violation occurs when the confessor negligently says or does or fails to do something which leads others to conclude or suspect the identity of the penitent and the content of the confession.”). This right to associate anonymously and choose if and when to reveal it, belongs to both the penitent and the priest. *NAACP*, 357 U.S. at 459 (Court noting that, like members, association was constitutionally entitled to withhold disclosure of its association with its members.). Compelled disclosure in this case thus burdens the right of association and demands heightened scrutiny be applied.

## **II. Allowing the Lower Court’s Decision to Stand Will Cause Irreparable Damage to the Penitent-Priest Relationship and Makes This Petition Especially Worthy of This Court’s Attention.**

Whether the penitent-priest privilege is protected under any clause of the First Amendment is a case of first impression. Courts and society have long recognized the importance of the penitent-priest relationship, the benefits that abound to penitent, priest, and society as a whole, and the need to protect the

confidentiality of the relationship in order that its purposes may be furthered.

This Court has acknowledged the rationale for the clergy communications privilege:

The privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.

*Trammel v. U.S.*, 445 U.S. 40, 51 (1980). The Court has also recognized a general principle against disclosure of confidences of a confessional:

It may be stated as a general principle that public policy forbids the maintenance of any suit in a court of justice the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional. . . .

*Totten v. United States*, 92 U.S. 105, 107 (1875).

There is consensus that communications to clergy should be private and confidential and that this policy benefits the penitent, clergy, and society. *People v. Edwards*, 248 Cal. Rptr. 53, 55 (1st Dist. 1988) (“Justification for the privilege is grounded on societal interests in encouraging . . . the development of religious institutions by securing the privacy of the

... communication.”); *Simpson v. Tennant*, 871 S.W.2d 301, 308 (Tex. App. Houston 14th Dist. 1994) (“Confidentiality benefits the individual, the clergy, and society. The individual benefits from unfettered freedom of religion . . . ; his perceived ability to communicate with God through an emissary; the therapeutic value in obtaining psychological and physical relief from fear, tension, and anxiety; and in his exercise of a fundamental right to privacy. . . . The clergy benefits in being able to safely draw out innermost thoughts and feelings with the assurance that confidences are protected by public policy. . . . The church as an institution benefits in enjoying recognition of its prestigious place in society. . . . The judiciary benefits by avoiding direct confrontations with the clergy.”) (citations omitted).

The inviolability of the confessional seal is a fundamental part of the Sacrament of Confession, which has been in existence for nearly two millennia. Permitting states to compel the breaking of this seal at whim will undermine an essential part of both a penitent’s religious life and a Sacrament of the Catholic Church. Just as the Court was concerned about the impact of the law on the Amish’s three hundred year old religious practice, so too should this Court be mindful about the devastating impact on a nearly two-thousand year old religious practice. *See Yoder*, 406 U.S. at 218.

While this case involves the breaking of the seal of confession by a priest, the confidentiality of confession is demanded by other Christian denominations as well, and therefore, this case's impact will extend outside of the Roman Catholic Church. *See, e.g.,* The Pastor-Penitent Relationship, Privileged Communications, A Report of the Commission on Theology and Church Relations of The Lutheran Church – Missouri Synod at 10 (September 1999) (Ordination Rite asks “Will you forgive the sins of those who repent, *and will you promise never to divulge the sins confessed to you?*”) (emphasis in original), <http://www.lcms.org/page.aspx?pid=683>; *see also* Theodosius, *Guidelines for Clergy Compiled Under the Guidance of the Holy Synod of the Orthodox Church in America* at 14, available at <https://oca.org/PDF/official/clergyguidelines.pdf> (last visited Sept. 22, 2014) (“Theologically, the need to maintain the secrecy of confession comes from the fact that the priest is only a witness before God. One could not expect a sincere and complete confession if the penitent has doubts regarding the practice of confidentiality. Betrayal of the secrecy of confession will lead to canonical punishment of the priest.”).



**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 25, 2014