

The following is a copy of an amicus brief filed on December 9, 1994 by the Stated Clerk, James E. Andrews in the Texas Court of Appeals on behalf of the position of Rev. Ned Benson. Also joining the brief were the Clerks of the Synod of the Sun, Mission, New Covenant, and Tres Rios.

No. 03-94-00061-CV

IN THE COURT OF APPEALS  
FOR THE THIRD SUPREME JUDICIAL DISTRICT  
AT AUSTIN, TEXAS

TEXAS DEPARTMENT OF HUMAN SERVICES  
TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES  
BURTON RAILFORD AND JANICE CALDWELL,

Appellants

Vs.

NED BENSON,

Appellee

ON APPEAL FROM THE 353RD JUDICIAL DISTRICT COURT  
OF TRAVIS COUNTY, TEXAS

BRIEF OF AMICUS CURIAE

James E. Andrews as Stated Clerk of the General Assembly of the  
Presbyterian Church (U.S.A.)

W. Clark Chamberlain as Stated Clerk of the Synod of the Sun, a Synod  
of the Presbyterian Church (U.S.A.)

Leslie E. Ellison, as Stated Clerk of Mission Presbytery of the  
Presbyterian Church (U.S.A.) and by Sylvia Washer as Executive  
Presbyter of Mission Presbytery of the Presbyterian Church (U.S.A.)

Charles J. Hollingsworth, as Stated Clerk of the Presbytery of Tres Rios,  
a Presbytery of the Presbyterian Church (U.S.A.)

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## STATEMENTS OF INTEREST

### **Statement of Interest of James E. Andrews as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.)**

James E. Andrews, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2,750,000 members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods. The Presbyterian Church (U.S.A.) has a significant presence in Texas, with 149,602 members, 567 churches, 5 presbyteries, and 1 synod.

Perhaps no matter is more central to the life and vitality of the church than the determination of who ministers to the people of a given congregation. The centrality of this principle to the free exercise of religion require that the state have no role whatsoever in determining or influencing who fills the pulpit. "Churches have a right of autonomy protected by the Free Exercise clause of the First Amendment. Each worshipping community has the right to govern itself and order its life and activity free of government intervention."<sup>1</sup> God Alone is Lord of the Conscience, A Policy Statement Adopted by the 200th General Assembly of the Presbyterian Church (U.S.A.) p. 16 (1988). In the case at bar, the state intervened in the life of the First Presbyterian Church of Austin; its minister, the Reverend Mr. Ned Benson; and Mission Presbytery, of which the Reverend Mr. Benson was a member. The results were the removal of the Reverend Mr. Benson from the pulpit and severe damage to the health and reputation of the congregation. The state must not violate the constitutional barrier against such intervention in the life of a religious body. It is the vital interest of the Stated Clerk to see that such occurrences do not happen again.

The General Assembly does not claim to speak for all Presbyterians, nor are its policy statements

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<sup>1</sup>God Alone is Lord of the Conscience, A Policy Statement Adopted by the General Assembly, Minutes of the 200<sup>th</sup> General Assembly, Presbyterian Church (U.S.A.), (1988), Part I, p. 566.

binding on the membership of the Presbyterian Church (U.S.A.). The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration by all the denomination's members.

**W. Clark Chamberlain, as Stated Clerk of the Synod of the Sun, a Synod of the Presbyterian Church (U.S.A.)**

W. Clark Chamberlain, as Stated Clerk of the Synod of the Sun, is the senior elected official of the Synod. The Synod is made up of eleven Presbyteries, five of which are located within the geographical confines of the state of Texas, with 567 congregations made up of 149,602 members in the state of Texas.

The Synod of the Sun's consideration of the matter led it to urge its member presbyteries and the General Assembly to file a brief in this matter.

**Leslie E. Ellison, as Stated Clerk of Mission Presbytery, a Presbytery of the Presbyterian Church (U.S.A.)**

Leslie E. Ellison, as Stated Clerk of Mission Presbytery, is the senior elected official of the Presbytery. The Presbytery is made up 31,000 members in 159 congregations in south Texas, including First Presbyterian Church of Austin.

Mission Presbytery joins this brief and urges this court to affirm the declaratory judgement issued by the trial court in this matter.

The Presbytery does not claim to speak for all Presbyterians in Mission Presbytery; nor are its statements binding on the membership of the churches in the Presbytery. However its statements are considered worthy of respect and prayerful consideration of all the members of congregations located in the Presbytery.

The Presbytery stands firmly in support of the General Assembly's positions on preserving the confidential relationship between ministers and their parishioners.

**Charles J. Hollingsworth, as Stated Clerk of the Presbytery of Tres Rios, a Presbytery of the Presbyterian Church (U.S.A.)**

The Presbytery is made up of over 15,000 members in 37 congregations.

The Presbytery does not claim to speak for all Presbyterians in Mission Presbytery; nor are its statements binding on the membership of the churches in the Presbytery. However its statements are considered worthy of respect and prayerful consideration of all the members of the congregations located in the Presbytery.

The Presbytery stands firmly in support of the General Assembly's positions on preserving the confidential relationship between ministers and their parishioners, having taken action to join the General Assembly in this brief.

#### **STATEMENT OF FACTS**

The Amici Curiae adopt and incorporate the Statement of Facts set forth in the Brief of the Appellee

#### **STATEMENT OF JURISDICTION**

The Amici Curiae adopt and incorporate the Statement of Jurisdiction set forth in the Brief of the Appellee.

#### **ARGUMENT**

##### **I. Preliminary Statement.**

The parties have presented this case entirely on the basis of common law and state statutory law; no state or federal constitutional questions are formally presented, and no question is presented under the Religious Freedom Restoration Act. But the facts of this case have profound implications for religious liberty, and the issues presented should be resolved in light of those implications. The Amici in this case will focus their attention on the duty of the state to protect the confidential relationship between a minister and his or her parishioners, when the minister has voluntarily complied with the state's mandatory reporting statutes. Since The Rev. Benson did not

challenge the right of the state to compel his cooperation, the Amici will not address the religious freedom issues surrounding the states' ability to compel a minister to breach a confidence. However the Amici wish to reserve those issues for another day.<sup>2</sup>

These Amici believe that the District Court's Declaratory Judgement ought to be affirmed and that it should be enforced by effective remedies.<sup>3</sup> They suggest two rationale for that position.

**II. The State of Texas has removed the opportunity of ministers effectively to intervene in child abuse cases and exposed ministers to great damage in the relationships with their parishioners.**

A. The Amici applaud the State of Texas' attempt to protect children. However the state has no "...monopoly on protecting children, nor does the state hold the only means for achieving that purpose."<sup>4</sup> The Amici believe the state has in fact frustrated its stated purpose by the way it has chosen to implement its statutory requirements. Its policies have hampered the Church's ability effectively to intervene into abusive situations.

The General Assembly of the Presbyterian Church has long advocated child protection. Most recently the General Assembly adopted a resolution in 1990 to call "... upon all the congregations and middle governing bodies of the Presbyterian Church (USA) who are engaged in working to better the condition of children, and encourage them

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<sup>2</sup>. These Amici do note that requiring clergy to report the confidences of their parishioners raises serious issues of religious liberty. Spiritual counseling, confessional, and similar religious acts and practices, whereby parishioners seek forgiveness, grace, redemption, or spiritual guidance, are central acts of religious faith. They cannot be burdened without compelling reason. See Religious Freedom Restoration Act, 42 U.S.C. section 2000-1(b) (West Supp. 1994); Tex. Const. art. 1, section 6. The clergy-penitent privilege has been "a long recognized principle of American law." In re Grand Jury Investigation, 918 F. 2d 381 (3rd Cir. 1990). It is extremely unlikely that the state has a compelling interest in requiring clergy to report in all or even most abuse situations, without regard to the confidentiality of the pastor's relationship with the informant, the seriousness and imminence of any danger, or the pastor's own judgment of the situation. Even assuming, arguendo, that the state has such a compelling interest in some cases, it still must pursue that interest by the least restrictive means, which is to say that it must handle the information in the way that does the least damage to the religious community.

<sup>3</sup> This brief does not address issues of damages, attorney's fee, or sovereign immunity.

<sup>4</sup> Micheal T. Flannery and Raymond C. O'Brien, The Pending Gauntlet to Free Exercise: Mandating that Clergy Report Child Abuse, Loyola of Los Angeles Law Review vol. 25:1, p.56 (1991)

and all Presbyterians to read the convention [United Nations, Convention of the Rights of the Child]<sup>5</sup> and find ways to utilize its principles in their work"<sup>6</sup> The members of the denomination have been actively involved in protecting children.

B. It is clear that the state of Texas has a general public policy that preserves and values confidentiality in the relationship of professionals with their clients, parishioners, and patients.<sup>7</sup>

The underlying justification for such privileges is the proposition that the state is better served by clients, parishioners, and patients feeling safe in disclosing potentially incriminating information. The legislature likewise included a specific section<sup>8</sup> within Texas Family Code to insure confidentiality of reports made. Yet the Texas Department of Human Services (via the Texas Department of Protective and Regulatory Services) has taken the position that confidentiality should not be granted to "professionals" who report child abuse.<sup>9</sup> The Department relies on a Texas Attorney General's opinion<sup>10</sup> as the basis for their assertion of the abrogation of the clergy privilege in abuse situations. From this they have developed their policy.

The policy is inconsistent with both the legislature's clear intent to preserve the privilege in Texas Rule of Evidence 505 as well as state's goal of encouraging the reporting of child abuse by clergy. The Amici believe that failing to maintain a confidence of information provided by clergy reports will result in fewer such reports. In his Dissertation submitted to Baylor University, Jeffrey W. Scott did a survey of some 127 ministers across the theological

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<sup>5</sup> The Convention says that Parties [to the Convention] shall undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents." The Convention of the Rights of the Child, section 3.2 Adopted by the General Assembly of the United Nations, November 20, 1989.

<sup>6</sup> Minutes of the 202nd General Assembly, Presbyterian Church,(U.S.A.),(1990) Part I, p. 844.

<sup>7</sup> Attorney-Client Privilege is found in the Government Code in the Code of Criminal Procedure in Art. 38.10.  
Physician-Patient Privilege is found in the Medical Practices Act (art. 4495b) in section 5.08b.  
Minister-Parishioner Privilege is found in the Texas Rules of Evidence at rule 505.

<sup>8</sup> Section 34.08

<sup>9</sup> See record at 210, 224, 323.

<sup>10</sup> Tex Att'y Gen JM-342.

spectrum inquiring into their perspectives and practice in dealing with abuse situations. He found that the single largest determinant as to a particular minister deciding to report a suspicion of abuse is whether that information came to him or her by way of a confidential communication. That factor was a stronger predictor of reporting than whether such reporting was mandatory or permissive. Hence, it seems virtually certain that the threat of sharing such report with the alleged perpetrators, as in the case at bar, would directly chill the future reporting by clergy. Such an effect runs directly counter to the state's stated purpose for requiring reports.<sup>11</sup>

C. By maintaining confidences, clergy often are able to intervene in family life. That opportunity for early intervention outweighs any benefit the state may gain by failing to protect the confidences shared with them in abuse reports. Parents sometimes seek spiritual guidance in order to discontinue abuse. The very fact that they confide in a minister is indicative of a desire to change their behavior. The minister may provide counseling or assistance in aiding the parent to overcome the abusive behavior, or the minister may be in a position to refer the parent to other helping professionals who can subsequently help the parent to cease the abuse.

If the parent later discovers that the minister has revealed that confidence to the state authorities, such communication and even contact likely will cease. The minister's ability to influence the situation will thus be greatly diminished and the child will surely be at much greater future risk.

The opportunity for clergy to direct the abuser to help provides the state with a unique opportunity for timely intervention in a troubled family. The state's ultimate purpose of protecting children is thus effectively carried out.

D. Ministers are unique, among professionals, in the way in which they interact with and assist parishioners. "Unlike other helping professionals, clergy perform their caring, confessing, and counseling ministries in

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<sup>11</sup>. Jeffrey W. Scott, "State Mandatory Reporting of Child and Elder Abuse: A Challenge to the Privacy of Penitential Communications." (Ph.d. Dissertation, Baylor University, 1991) pp. 243-257, 266-272, 324-353(summary of actual survey responses)

the context of a worshipping community."<sup>12</sup> Parishioners communicate information to a minister with the expectation that the minister will be "mutually involved in the counseling or confessing process."<sup>13</sup> Ministers are agents of the healing ministry of the Church; they do not try to maintain "professional distance and give dispassionate clinical advice."<sup>14</sup> Such personal and spiritual involvement is very different from that which we expect of other helping professionals. Such a theological context for ministering has significant implications for clergy confidentiality.

"[T]he penitential rite is a means to reestablish an integrated family atmosphere in which the child can develop. In such an instance, the end furthered by a religious practice conforms with the state purpose underlying reporting statutes."<sup>15</sup> "In the course of providing counsel and declaring God's forgiveness, the clergy are privy to the deepest secrets and darkest anxieties of those who come to be relieved of their burden in order to live more abundant, God-directed lives. The church has long recognized that troubled persons will seek spiritual counsel only if assured that their revelations will remain secret. Assurance that such conversations will be kept confidential is essential to their therapeutic value for the person and thus of benefit to society."<sup>16</sup>

The special relationship between confidentiality and a healing ministry has been recognized by the courts since the First Amendment was first interpreted by the courts.

### **III. The Department's Regulations Violate the Free Exercise of Religion by Encouraging Maximum**

#### **Intrusion into and Damage to the Life of the Church.**

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<sup>12</sup> Advisory Council on Church and Society, Minutes of the 199th General Assembly, Presbyterian Church,(U.S.A.), (1987) Part I, p. 341

<sup>13</sup> Advisory Council on Church and Society, Minutes of the 199th General Assembly, Presbyterian Church (U.S.A.), (1987) Part I, p. 342.

<sup>14</sup> Advisory Council on Church and Society, Minutes of the 199th General Assembly, Presbyterian Church (U.S.A.), (1987) Part I, p. 342.

<sup>15</sup> Micheal T. Flannery and Raymond C. O'Brien, The Pending Gauntlet to Free Exercise: Mandating That Clergy Report Child Abuse, Loyola of Los Angeles Law Review, vol 25:1, p. 22.

<sup>16</sup> Advisory Council on Church and Society, Minutes of the 199th General Assembly, Presbyterian Church (U.S.A.), (1987) Part I, p. 399.

A. Both the statutory scheme and the assurances made to the Reverend Mr. Benson should have preserved the confidentiality of his child abuse report. Instead, the Department released this information after promising not to do so, in contravention of its own statutes, and with no prior warning to Benson, First Presbyterian Church of Austin, or officials at Mission Presbytery. The resulting harm to the life of the church was substantial.<sup>17</sup> First Presbyterian Church, Benson, and Mission Presbytery first learned of the disclosure when a million dollar defamation action was filed against both First Presbyterian and Benson.

In addition to this civil action, ecclesiastical charges were filed against Benson at Mission Presbytery, of which he was a member. Both Benson and First Presbyterian spent substantial sums to defend the civil defamation suit. Moreover, just weeks after the disclosure Benson was removed from the pulpit of First Presbyterian Church. In total, the Department's actions disrupted individual congregants, their pastor, the local church, the presbytery, and its officials. It would be difficult to construct a scenario more damaging to the life of the church, especially with regard to who fills the pulpit of a church -- a core religious liberty and practice.

The Department's actions here contributed directly to the dismissal of one pastor and, thus, the appointment of another. If there is any decision in which the state should have no voice whatsoever, it is the selection of clergy. See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929). "Freedom to select the clergy ... must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).<sup>18</sup> With maximum intrusion into the overall life of the church and particularly the selection of clergy, the Department ran afoul of the First Amendment.

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<sup>17</sup> Reverend Benson's relationship with the congregation was dissolved following the disclosure. The membership of the First Presbyterian Church of Austin dropped from 627 in 1990 to 600 in 1991. During the same period the church offerings (general contributions and capital fund contributions) dropped from \$423,070. to \$369,510. Minutes of the 202nd General Assembly, Presbyterian Church (U.S.A.), (1990), Part II, p.249 and Minutes of the 203rd General Assembly, Presbyterian Church (U.S.A.), (1991), Part II, p.219. Both First Presbyterian Church of Austin and the Reverend Ned Benson also incurred significant expenses in defending the subsequent civil and ecclesiastical suits.

<sup>18</sup> See also Douglas Laycock and Susan E. Waelbroeck, *Academic Freeman and the Free Exercise of Religion*, 66 Tex. L. Rev. 145, 1460-63 (1988) (collecting cases from many contexts).

B. The Department's interpretation of its statutes and regulations will inevitably lead to further unnecessary violations of religious liberty. The Department vigorously denies that it has any duty to ministers who report child abuse. It denies that these reports are confidential. Not only are these denials an implausible interpretation of the Texas statutes, they are wholly at odds with the first amendment, the Religious Freedom Restoration Act, and the Texas Constitution's guarantee of religious liberty.

Protection of religious liberty requires that government may burden a person's exercise of religion only when the burden on that person is the least restrictive means to serve a compelling governmental interest. This the express standard of the Religious Freedom Restoration Act 42 U.S.C. section 2000bb-1(b) (West Supp. 1994). The Act restores to federal statutory law the former federal constitutional standard announced in Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963). The compelling interest test of Sherbert and Yoder was federal constitutional law until 1990, when the Supreme Court held that as a federal constitutional matter, the compelling interest test should apply only to cases in which government discriminated against religion. Employment Division v. Smith, 494 U.S. 872 (1990).<sup>19</sup>

In 1986, the Sixth Court of Appeals stated that, "The Texas Constitution grants greater religious freedom than is granted by the United States Constitution." Howell v. State, 723 F.2d 755, 758 (Tex App. 1986)). In 1986, the federal constitutional standard was Sherbert and Yoder, not Employment Division v. Smith. If the Texas Constitution granted greater protection than Sherbert and Yoder in 1986, it grants the same greater protection in 1994. The People of Texas have not authorized five justices of the United States Supreme Court to amend their Constitution; the Constitution of Texas means today what it meant before Employment Division v. Smith. What the Sixth Circuit thought it meant in 1986, and what it should mean as a matter of first principle, is the greatest possible protection for religious liberty - protection in all cases except those in which the state has a genuinely compelling interest that cannot be

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<sup>19</sup> On the differences between substantive protections of religious liberty and mere nondiscrimination provisions, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 10-21.

achieved by any other means.<sup>20</sup>

As noted above, this case does not present the question of whether Texas has a compelling interest in forcing clergy to reveal confidences. One the conditions for invoking a privilege have been met there is substantial authority that the confidence vested by a congregant in his or her pastor is inviolate -- even as against the state.<sup>21</sup> Assuming, arguendo, that the state does possess such a compelling interest in regards to child abuse reporting, it must use the least restrictive means to attain that interest. The Texas Department of Human Services has found possibly the most restrictive means. It not only requires pastors to report, it promises the shield of confidentiality and, then, violates that promise. The extreme burden this places on religion is evidenced by the case at bar.

Left to its own designs, the Department would continue these procedures with the likelihood that this case will be repeated in Texas again and again. The pastoral relationship between clergy and member is central to almost every faith. The centrality of this relationship runs among Baptists, Catholics, Episcopalians, Jews, Lutherans, Methodists, Mormons, Muslims, and Presbyterians. The Department must be compelled to alter its procedures, as required by the Declaratory Judgement, before more clergy and more congregations suffer the same disruption.

C. The Department's interpretation and application of Texas Law also violates the federal constitutional standard, because it discriminates against religion. The Department claims its confidentiality rules do not protect professionals who obtained their information in the course of a professional relationship. The Department includes clergy in its understanding of professionals. So if the Reverend Mr. Benson had been a plumber, an observant neighbor, or a gas station attendant, his confidential report would be protected. But because he was a minister functioning as a pastor, the Department denies him that protection.

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<sup>20</sup> Texas courts are committed to the independent interpretation of the Texas Constitution. See, e.g., LeCroy v. Hanlon, 713 S.W. 2d 335, 339 (Tex. 1986); Edgewood Indep. School Dist. v. Kirby, 777 W.W. 2d 391 (Tex. 1989); see generally Symposium on the Texas Constitution, 68 Tex. L. Rev. 1337 (1990).

<sup>21</sup> See Trammel v. United States, 445 U.S. 40, 51 (1980), In re Grand Jury Investigation, 918 F. 2d 374, 381-383 (3rd Cir. 1990), In Re Verplank, 329 F. Supp. 433, 435 (C.D. Cal. 1971), Mullen v United States, 263 F. 2d 275, 280 (D.C. Cir. 1958) (Fahy, J., concurring).

This interpretation also runs counter to the statutory scheme of encouraging the reporting of child abuse. More importantly, it places a particular and focused burden upon clergy. Clergy are professionals as defined by the Department. Clergy counsel with and learn extremely intimate knowledge from their congregation members. Under the Department's operations, there is no way a pastor can avoid reporting under the law and no way to avoid having his report disclosed and suffering the inevitable fallout. Such discrimination affirmatively burdens religion under the traditional standards set out by RFRA as well as the more stringent constitutional standards of both Employment Division v. Smith, 494 U.S. 872 (1990) and Church of the Lukumi v. Hialeah, 113 S. Ct 2217 (1993).

### **CONCLUSION**

For the foregoing reasons, the Declaratory Judgment of the district court should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Douglas Laycock, as a member of the Texas Bar, hereby certify that on December 9, 1994, I caused two copies of this brief amicus curiae to be served by placing same in the United States mail, first class, postage paid, to the following:

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