

The following brief was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). It was filed in the United States Court of Appeals for the Ninth Circuit on September 23, 1996.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

THE REVEREND TIMOTHY MOCKAITIS	)	
and THE MOST REVEREND FRANCIS E.	)	USCA No. 96-35901
GEORGE, O.M.I.,	)	
	)	USDC No. 96-913-PA
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	
F. DOUGLAS HARCLEROAD, THE	)	
HONORABLE JACK A. BILLINGS, THE	)	
HONORABLE KIP W. LEONARD, CONAN	)	
WAYNE HALE, JONATHAN WAYNE	)	
SUSBAUER, and JOHN DOES Nos. 1-5,	)	
	)	
Defendants-Appellees.	)	

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BRIEF AMICUS CURIAE OF THE UNITED STATES CATHOLIC CONFERENCE;  
NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A.;  
CHRISTIAN LEGAL SOCIETY; THE CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS; CLIFTON KIRKPATRICK, AS STATED CLERK  
OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A);  
THE AMERICAN JEWISH CONGRESS; THE COMMISSION ON SOCIAL  
ACTION OF REFORM JUDAISM; THE BAPTIST JOINT COMMITTEE  
ON PUBLIC AFFAIRS; AND THE EVANGELICAL LUTHERAN CHURCH  
IN AMERICA, IN SUPPORT OF PLAINTIFFS-APPELLANTS

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

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THE HONORABLE OWEN PANNER, UNITED STATES DISTRICT JUDGE

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CORPORATE DISCLOSURE STATEMENT

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Pursuant to F.R.A.P. 26.1, those of the amici which are corporate entities state that they do not issue shares to the public.

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### INTEREST OF AMICI

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Roman Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, criminal justice, and the economy. When permitted by court rules and practice, the Conference files briefs *amicus curiae* in litigation of importance to the Catholic Church and its people throughout the United States. The protection of the rights of the priests and people of the Roman Catholic church to freely exercise their religious beliefs is of great and fundamental importance to the Conference, and is at issue in this case.

The National Council of Churches of Christ in the United States of America ("NCC") is the nation's largest ecumenical body representing 33 Protestant, Anglican and Orthodox communions with an aggregate membership of 53 million. The NCC does not purport to speak for all of its members, but rather for its 270-member General Assembly.

The Christian Legal Society ("CLS") is a nationwide

network of 4,500 Christian lawyers, law students and law professors committed to loving and serving Jesus Christ and promoting justice, reconciliation and religious liberty. Through its legal advocacy and information arm, the Center for Law and Religious Freedom, CLS has defended the autonomy of religious institutions from excessive government interference in state and federal courts for over two decades. CLS has a particular concern over the State's action in the underlying prosecution, an unprecedented breach of an inviolable religious communication and exercise.

The Church of Jesus Christ of Latter-day Saints is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 9.5 million with more than 20,000 congregations located throughout the world. Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshiping almighty God according to the dictates of our own conscience and allow all men the same privilege to let them worship how, where, or what they may." Article of Faith, No. 11.

Clifton Kirkpatrick, 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 the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 171 presbyteries under the jurisdiction of 16 synods. The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretative body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members. The General Assemblies have continually reaffirmed the historic position that it "is the spiritual and professional duty of clergy to hold in confidence materials revealed to them . . ." and that "being called to testify in a court of law does not negate this sacred obligation." The Theology underlying that position and the polity incorporating it are quite different from that of the Roman Catholic Church, but an intrusion by the state such as has been manifested in this case represents a danger to all religious bodies and threatens religious liberty in the United

States.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews and all Americans. It has filed numerous briefs in support of the right of religious institutions to freely worship God as their beliefs dictate. Rarely in recent years has there been as blatant an interference with that right as occurred here.

The Commission on Social Action of Reform Judaism is a joint instrumentality of the Union of American Hebrew Congregations and the Central Conference of American Rabbis, representing 800 synagogues, 1,700 Rabbis and 1.5 million congregants nationwide. The Commission joins this brief because the holding below threatens the sacredness of communication between a rabbi and his or her congregants, endangering a fundamental precept of Judaism. The Commission is concerned, moreover, that in reaching that result, the ruling diminishes the traditional and vitally important, weight given to implementing the First Amendment's free exercise guarantees when resolving a conflict between those guarantees and other governmental policies.

The Baptist Joint Committee on Public Affairs is composed

of representatives from various cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to ensure the religious liberty of all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptists Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptist through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The Evangelical Lutheran Church in America (ELCA) is the largest Lutheran denomination in North America and is the fifth-largest Protestant body in the United States. It has approximately 11,000 member congregations, which in turn have

approximately 5.2 million individual members nationwide. Of these, 123 congregations with almost 49,000 members are in the State of Oregon.

**STATEMENT OF JURISDICTION**

Amici adopt the Statement of Jurisdiction submitted by Plaintiffs-Appellants.

**STATEMENT OF ISSUES PRESENT FOR REVIEW**

Amici adopt the Statement of Issues Presented for Review submitted by Plaintiffs-Appellants.

**STATEMENT OF THE CASE**

Amici adopt the Statement of the Case submitted by Plaintiffs-Appellants, but offer the following additional points. This case arises from the decision on the part of state officials to tape and transcribe the private administration of a sacrament of the Roman Catholic church, a sacrament which is absolutely and unequivocally to be kept secret on pain of excommunication. Stipulated Facts, Numbers 19-21, Attachment A to Opinion of the District Court dated August 15, 1996 (hereinafter, "Stipulated Facts, Number \_\_\_\_"). This violation of the secrecy of the confessional was not accidental or inadvertent. Stipulated Facts, Numbers 25, 27-30. Indeed, it was planned and accomplished precisely because

law enforcement officials were aware that if they had an opportunity to listen to the Sacrament of Penance being administered by Father Mockaitis to Hale, they might be able to record secretly a penitential act or "confession," as it is known by Catholics, which requires of its participants the most complete honesty and willingness to fully confess one's sins to God. Stipulated Facts, Number 42. This sacrament is of the utmost importance to the religious exercise of all Roman Catholics. Stipulated Facts, Number 21. The essential elements of this personal act are shared by many religious traditions.

It was for precisely that reason that law enforcement officials believed that taping the confession, like taping a meeting between a suspect and his lawyer, held particular promise of revealing information that would help secure a conviction. *Id.* They knew that Father Mockaitis would not suspect that any such surreptitious listening or recording was being conducted. Stipulated Facts, Numbers 32, 35-39. Yet in the face of their awareness of the sanctity of the confessional, indeed because of it, Stipulated Facts, Numbers 42, 43, the state proceeded to violate rights guaranteed expressly in the Bill of Rights - the free exercise of

religion.

Appellee Harclerod knows and has admitted that this taping of the sacrament of penance was "wrong," "societally unacceptable" and "shakes [the] confidence" of all citizens in the Oregon criminal justice system. Statement of Doug Harclerod, May 22, 1996, Exhibit 1 to State Defendants' Trial Brief dated August 9, 1996. We would add that such conduct shakes the confidence of all citizens about when and how their government may intrude on their private religious exercises. In spite of these admissions, however, Appellees take the position that the Appellants have no real remedy for these violations, and that continued violations of the seal of confession must be permitted.

Let us be clear: these actions of the state are not simply "wrong" but we will argue clearly violate the First and Fourth Amendments to the Constitution. Furthermore, by conducting this surreptitious taping, the District Attorney potentially violated the Fifth Amendment by creating a situation in which a suspect, Hale, may virtually have been forced to incriminate himself in order to participate in one of the Church's sacraments. The preservation of this ill-gotten gain compounds the wrong and perpetuates the violation.

The only appropriate remedy is to restore the *status quo ante* -- to destroy the tape and transcript so that no further violations can occur.

In spite of the fact that Appellants are defending principles of religious liberty that are fundamental to our legal system, their arguments and interests in this matter have been regularly met with absolute indifference, if not overt derision. First and most significantly, on June 12, 1996, the Appellants sought relief from the state trial judge to whom the cases against Hale and Susbauer were assigned, Circuit Judge Jack Billings. Judge Billings returned the motion and supporting papers to Appellants' counsel, simply declaring them "not suitable for filing." Letter of Honorable Jack Billings, dated June 13, 1996, Exhibit HH to Appellant's Emergency Motion for Injunction Pending Appeal dated August 23, 1996. Judge Billings informed counsel, in sweeping language, that any attempts to intervene in the criminal proceedings were "not permitted by law," and then added that, if Appellants intended to commence their own action to represent their interests, they "do not state a justiciable controversy." *Id.* Having foreclosed all possibility of proceeding in that court, Judge Billings continued that absent

"direction of some higher court, this Court will not consider, under any circumstances, the action which your clients desire." *Id.* (emphasis supplied).

The court's complete indifference to Appellants' religious interests continued when, on the following day, the court heard Hale's and Susbauer's motion to preserve the tape, in which the District Attorney concurred. Stipulated Facts, Number 60. Though preservation of the tape violated precisely the religious interests Appellants sought to protect, they were not given notice of this hearing or any opportunity to be heard. As a result, the tape was ordered preserved. And despite the District Attorney's supposed respect for Catholic religious practice, and previous admission that the taping was "simply not right," Statement of Doug Harclerod, May 22, 1996, he compounded the violation of Appellants' rights by concurring in the position that the tape should be maintained.

Even more egregiously, on July 31, 1996, the state court heard argument upon, and subsequently granted, Hale's and Sausbauer's motions for permission to listen to the tape of the sacramental confession. Stipulated Facts, Number 83. This was an additional, independent violation of the seal of the confessional, and at no time were Appellants advised of

this hearing or given an opportunity to appear.

Significantly, the State again did not oppose this violation of Appellants' religious rights.

Indeed, if this Court fails to act now, the stage is set for virtually unlimited public dissemination of the contents of the confession. Hale's counsel has stated bluntly that she "can no longer be bound by" the trial court's order sealing the tape and transcript of the confession. See, Circuit Rule 27-3 Certificate, attached to Emergency Motion for Injunction Pending Appeal dated August 23, 1996, at 3. Thus, at each and every step of this process, beginning with the intentional intrusion into a secret confession, Appellants have been denied the right to be heard to protest the continued violation of their free exercise rights and those violations continue unchecked. This Court is the forum in which these rights will be considered, if they are to receive consideration at all. The religious community represented here submits that it is only by destroying the tape and transcript, now, that this wrong can be corrected.

#### **SUMMARY OF ARGUMENT**

This case concerns the State of Oregon's decision to intrude secretly upon the Sacrament of Penance which Fr.

Timothy Mockaitis administered on April 22, 1996 to a suspect who was being held in Lane County Jail in Eugene, Oregon. The Sacrament of Penance has as one of its components the confession of sins by the person seeking the sacrament, and it is a matter of Catholic religious doctrine that all communications which take place as part of that process must be kept absolutely secret and confidential. Indeed, the priest administering the sacrament is said to be present and to function "in the person of Christ," rather than in his individual or personal capacity. Stipulated Facts, Number 18.

This invasion, which encompassed the secret audio taping of the confession without Father Mockaitis' knowledge or consent, and subsequent review of that tape by investigators of the Lane Court District Attorney's Office, by Assistant District Attorneys and by counsel for the suspects has, rightly, led to an enormous public outcry, what District Judge Owen Panner correctly described as "a fury of criticism." Opinion at 4.

The amici file this brief supporting Father Mockaitis and Archbishop George because they all recognize the confidentiality of clergy-penitent communications as being especially worthy of respect, and as having been properly

accorded the highest degree of protection by our legal system. These values are very much at issue in this case, which has its origins in the deliberate decision of a police investigator to obtain and review the tape of this exchange expressly because it was part of the Sacrament of Penance, and because that investigator saw a chance to obtain evidence by knowingly violating the secrecy of the confessional.

Affidavit of Jeffrey James Carley, Exhibit BB to Stipulated Facts, attached to Opinion of District Court dated August 15, 1996, at 2. It is difficult to imagine any more blatant and bald-faced an affront to the basic tenets of a religion, short of intentionally committing acts of sacrilege as a matter of state policy.

In our legal system, the confidentiality of exchanges between priest and penitent is properly entitled to extraordinary weight, and is privileged for reasons arising out of both the Constitution itself and our common-law heritage. Amici act here to protect all people of faith and their clergy in the exercise of their religious beliefs. We suggest that it is only by overturning the District Court's blatantly erroneous interpretation of abstention doctrine, and remanding for the District Court to consider the vital

principles at stake here and direct the destruction of the tape and transcript, that those interests can be protected.

### ARGUMENT

#### **I. The Need for Repentance and Reconciliation, of Which Absolute Confidentiality is an Integral Part, is Central to the Exercise of Many Religious Traditions.**

Personal accountability for one's actions, followed when appropriate by repentance and reconciliation, is a religious experience that transcends denominational lines. Every person experiences this moment differently and our nation's diverse religious traditions approach this experience in different ways. Yet each would agree that the moment of spiritual accountability, repentance and reconciliation is private - between that individual and his or her God. For this reason, each would agree that protection for the secrecy of this private encounter is of the highest importance to the religious community as a whole. In every state a statute guarantees its confidentiality. Even without statutory confidentiality, however, if "free exercise of religion" has any genuine meaning, it places such religious exercises beyond

the power of the government to infringe.

This concern goes to the very heart of the case. A conversation between one seeking repentance and the Church's minister of repentance was invaded - knowingly and blatantly - precisely because the expediency of investigative gain was thought to be of greater value than a constitutional right. Further use or review of the taped penitential communications in the instant case multiplies and repeats the error, and genuinely threatens the free exercise rights of Fr. Mockaitis and Archbishop George. Where a faith tradition directs its adherents to seek God's saving grace through one of its ministers, the confidentiality of such communications is imperative, and deserving of constitutional protection.<sup>1</sup>

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<sup>1</sup> While analysis of the District Court's reading of *Younger v. Harris*, 401 U.S. 37 (1971) and *Perez v. Ledesma*, 401 U.S. 82 (1971) is not the principal focus of the amici in this brief, amici respectfully submit that the District Court's ruling on abstention is clearly wrong. The key to the *Younger* decision is indisputably the fact that the parties seeking federal court intervention there were already parties to a pending state court proceeding which could have resolved their claims. See *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079 (9th Cir. 1987). Here the state court judge, Judge Billings, simply rejected the plaintiffs-appellants' arguments out of hand because they were not parties, and wrote that that court "will not consider, under any circumstances, that

In the Roman Catholic tradition, penance is one of the seven Sacraments, the principal means by which faith is strengthened and God is worshiped. Stipulated Facts, Number 14. It is the view of the Roman Catholic Church that the contents of all communications between a priest and a penitent during confession are absolutely secret and confidential, and the priest involved has an unconditional obligation to keep the contents of all such communications secret. Stipulated Facts, Nos. 19-21. So important is this "Seal of Confession" that even the penitent may not release the priest from his obligation to disclose nothing of what occurred during the confession, and pursuant to Church law a priest who "publishes" or makes known anything said in a sacramental confession is automatically excommunicated. Stipulated Facts,

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action which your clients desire." Stipulated Facts, Number 56. Because of this decision there was "no ongoing state proceeding" in which appellants could have vindicated their rights, simply because Judge Billings flatly refused to allow appellants to commence or participate in any such proceeding. Thus, *Younger* and *Perez* are entirely inapposite. *FOCUS v. Allegheny Court of Common Pleas*, 75 F.3d 834, 844 (3rd Cir. 1996) (*Younger* is inapplicable where a putative litigant is not allowed to intervene in existing litigation and so cannot secure an adjudication of a claim, due to judge's refusal to accept for filing, or rule upon, motion).

Nos. 22, 23. Thus, in the Roman Catholic tradition absolute confidentiality is an integral part of the process of confession and reconciliation with God, and so is a necessary component of both a priest's and a penitent's free exercise of religion.

The requirement of absolute secrecy for such communications is integral to the religious beliefs of many, otherwise very different, faiths. The American Baptist Churches, U.S.A., in 1978 issued a policy statement reading, in part:

The effective pastoral counseling of the ministry depends upon the assurance of those who seek it that the information they reveal in confidence to their pastoral counselor may be given with full freedom. The American Baptist Church in the U.S.A. expresses its conviction that such confidential, spiritual communications to its ministers should have the status of privileged communications . . .

The American Baptist Church in the U.S.A. further declares that, whether or not appropriate statutes are enacted, it is a principle with us that any of our number who receive confidential information in the course of responding to a request for spiritual counseling is not morally obligated to disclose it without consent of the other party.

"American Baptist Policy Statement on Privileged

Communications," Minutes of the Executive Committee of the General Board, American Baptist Churches, U.S.A., June 19, 1978. This recognition that the important religious goals of repentance and reconciliation will only be met if confidentiality is required and honored, and the penitent reveals information with "full freedom," was echoed shortly thereafter by the Supreme Court in *Trammel v. United States*, 445 U.S. 40, 51 (1980) (the clergy-penitent 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 . . .") Of course, it was that same "full freedom" of which the District Attorney intentionally took advantage, when the decision was made to search the tape of the confession. Stipulated Facts, Number 42.

The Episcopal Church takes an even firmer position. The Executive Office of the General Convention of the Episcopal Church has issued the following guidance:

Notwithstanding any restraints, demands, or privileges imposed or conferred by civil law, the clergy of The Episcopal Church are bound to the secrecy of the confessional and the inviolate priest-penitent relationship. The obligation rises above the demands of the civil legal system.

"Memorandum on Privileged Communications in The Episcopal Church," The General Convention of the Episcopal Church, N.Y. (n.d.), p. 4, reprinted in Tiemann & Bush, *The Right to Silence, infra*, at 56 (emphasis supplied).

The Constitution of the Evangelical Lutheran Church in America contains the following language:

In keeping with the historic discipline and practice of the Lutheran church and to be true to a sacred trust inherent in the nature of the pastoral office, no ordained minister of this Church shall divulge any confidential disclosure received in the course of the care of souls or otherwise in a professional capacity, nor testify concerning conduct observed by the ordained minister while working in a pastoral capacity, except with the express permission of the person who has given confidential information to the ordained minister or who was observed by the ordained minister, or if the person intends great harm to self or others.

Constitutions, Bylaws and Continuing Resolutions, Evangelical Lutheran Church in America (Minneapolis: Augsburg Fortress, November 1995), Article 7.45.

Other faith traditions take similar positions regarding clergy-communicant confidentiality. Indeed, in *Krugilov v. Krugilov*, 29 Misc.2d 17, 217 N.Y.S.2d 845 (1961), appeal

dismissed 226 N.Y.S.2d 931 (1962), the New York Supreme Court, Queens County, held that private discussions of a husband and wife with a Rabbi, even outside the context of a formal "confession," were entitled to be maintained as confidential by the Rabbi even though one of the participants in that conversation consented to disclosure, because such confidentiality was an integral component of the religious practice of that particular faith community. The court noted the position taken by the New York Board of Rabbis which read, in part, as follows:

The New York Board of Rabbis deem it essential for the proper work of the Rabbi in the community, that any confidence reposed in him by . . . anyone . . . who has come to him for counseling not be divulged . . . Otherwise the confidential role of the Rabbi in counseling would be completely vitiated, to the detriment of those who seek his guidance.

*Id.* Clearly this policy statement would also be broad enough to cover intentional acts of confession, analogous to confessions made as part of the Sacrament of Penance in the Roman Catholic tradition.

These examples suffice to demonstrate the common understanding between religious groups that in order to freely exercise their religious beliefs, penitential communications

with clergy must be privileged, and that the demands of the civil legal system, if they are in conflict with that obligation, must yield. While amici practice different faiths in different ways, they all maintain that the underlying need for reconciliation and spiritual healing requires that the confidentiality of priest-penitent communications be respected here.

**II. Courts Have Recognized That the Confidentiality of Clergy-Penitent Communications is Exceptionally Worthy of Protection, and is Constitutionally Required.**

The First Amendment to the Constitution prohibits government from infringing the "free exercise" of religion. Matters of religious doctrine and practice are beyond the power of the civil courts to adjudicate. *E.g., Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). Religious practices and traditions are entitled to respect by government and the government may not impinge upon such practices and traditions absent grave reasons. *E.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972). Liturgical and sacramental forms are not merely incidental expressions, but go to the heart of the constitutionally protected religious exercise. *Church of Lukumi Babalu Aye v. City of Hialeah*, \_\_\_\_

U.S. \_\_\_\_\_, 113 S.Ct. 2217(1993). The Roman Catholic sacramental practice of penance or "confession" is entitled to the same constitutional respect<sup>2</sup> In matters decided as long ago as the early 1800's, courts recognized that our Constitution affirmatively protects, even exempts, religious practices when they conflict with general legal obligations. Confidential communications with clergy are one such example. See generally, *Trammell v. United States*, 445 U.S. 40 (1980); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise*, 103 Harv. L. Rev. 1409 (1990); Michael Plantamura, "Clergyman-Penitent Privilege," in Scott Stone and Ronald Liebman eds., *Testimonial Privileges* 359-76 (1983); James A. Serritella, "Confidentiality, the Church, and the Clergy," *Proceedings of the Forty-Eighth Annual Convention of*

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<sup>2</sup> In fact, churches themselves, as organizations, suffer a cognizable injury under the First Amendment when assertedly illegal state conduct deters adherents from freely participating in religious activities protected by the First Amendment. *Presbyterian Church, U.S.A. v. United States*, 870 F.2d 518 (9th Cir. 1989). It is clear that just such an impact has occurred in the instant case, in relation to both Fr. Mockaitis' and Archbishop George's religious responsibilities, as well as those of other priests of this diocese. Stipulated Facts, Numbers 5-7, 38, 70, 71, 73.

*the Canon Law Society of America* 83-93 (1986); William Harold Tiemann and John C. Bush, *The Right to Silence: Privileged Clergy Communication and the Law* (3d ed. 1989).<sup>3</sup>

In *People v. Phillips* (reported in W. Sampson, *The Catholic Question in America* (1813, and photo. reprint 1974)), the Court of General Sessions in the City of New York was called upon to decide whether a Catholic priest to whom an oral confession had been made could be ordered by a civil court to reveal what the penitent said in confession. The issue arose because the defendant, David Phillips, had allegedly confessed during the sacrament of penance to having received stolen goods, and then had caused them to be returned to their rightful owner with the help of the priest who heard his confession, Fr. Kohlmann.

When Fr. Kohlmann was called to testify to identify the defendant as the criminal, he refused to provide any testimony about the confession on the basis that he was absolutely

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<sup>3</sup> Amici also contend that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* provides a complete basis for all of the relief sought here. As demonstrated herein, the state's actions have substantially burdened Fr. Mockaitis' and Archbishop George's free exercise of their religious beliefs, and have done so in a way that furthers no compelling governmental interest.

prohibited by his religion from disclosing anything. The state argued that the Constitution guaranteed only that all denominations would be enabled to profess their religious beliefs and worship "without discrimination or preference," but that it did not "grant[ ] [the priest] exemption from previous legal duties," which in this case encompassed the duty to testify fully and truthfully when called to do so by the State. *People v. Phillips, supra*, at 51.

The court held that Fr. Kohlmann's interest in the free exercise of his religion was particularly worthy of constitutional protection:

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 . . . .

Secrecy is the essence of penance. The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed. To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman Catholic religion would thus be annihilated.

*State v. Phillips, supra*, at 111 (emphasis supplied). Thus, the Court ruled that an exception to the obligation to testify

was constitutionally required. *Id.* at 114; *McConnell, supra*, at 1411. See also *Commonwealth v. Cronin*, 2 VA.CIR.CT. 488, 503 (Rich. 1855) (protecting confession against compelled disclosure on grounds that disclosure would deter individuals from seeking spiritual aid).

The great weight which is properly given to implementing First Amendment free exercise guarantees is evident in the Supreme Court's jurisprudence. Exactly one hundred fifty years later, in *Sherbert v. Verner*, 374 U.S. 398 (1963) the Court reaffirmed the same basic rule spelled out in *Phillips*. In the context of an unemployment compensation dispute, the Court held that while the state had a legitimate need to ensure that workers are present for work, and could legitimately limit unemployment compensation payments to those who make themselves available to work, it could not enforce that interest in the face of a Seventh-Day Adventist's refusal to work on Saturday, his Sabbath. That rule - that the state's interest must yield to the religious adherent's interest -- remain unchanged in this area of the law. See *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989).

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court approved a constitutional argument exempting Old Order Amish children from compulsory education past the age of 16. The Court clearly recognized the important state interest in ensuring and improving the education of children, *Id.* at 213, a function which, the Court noted, "ranks at the very apex" of the interests of the state. Nevertheless, the Court viewed the Free Exercise guarantees of the First Amendment as even more important, writing that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

On balance, then, the Free Exercise clause was held to supersede other important state interests. The Court wrote: "The values underlying [the Free Exercise and Establishment clauses] have been zealously protected, even at the expense of other interests of admittedly high social value." *Id.* at 214. "[T]here are areas of conduct protected by the Free Exercise clause of the First Amendment and thus beyond the power of the state to control, even under regulations of general applicability." *Id.* at 220.

For present purposes, the conflict in the case at bar mirrors the conflict presented in the 1940s and resolved in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). There, the Court affirmed a lower court decision enjoining enforcement of a state regulation requiring all children to recite the Pledge of Allegiance. Plaintiffs were Jehovah's Witnesses who had sued on the basis that their religious beliefs prohibited them from saluting an "image," the flag. The Court held that while important and constitutionally-protected state interests of national unity and patriotism might be furthered by the regulation, the students' and parents' Free Exercise rights must prevail.

It is significant that, in so ruling, the Court overturned its own three-year-old decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). In *Gobitis*, the Supreme Court had rejected the theory that the free exercise of religious beliefs protected by the First Amendment could "*compel exemption* from doing what society thinks necessary for the promotion of some great common end . . . ." *Gobitis, supra* at 593. In *Barnette* the Supreme Court chose a different course, finding the First Amendment did compel just

such an "exemption" from governmental rules. The same rule should govern here.<sup>4</sup>

**III. The Free Exercise Interests Must Prevail, and No Disclosure of This Confession May Be Made.**

This case draws together two interests, the importance to a broad spectrum of religious traditions of the process of repentance and reconciliation, however implemented, and the

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<sup>4</sup> *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990) is an attempt to revisit the *Barnette - Gobitis* tension. However, *Smith* did not change the law in any material way in respect to the questions at issue in this case. *Smith* dealt with the question whether the illegal use of hallucinogens, broadly proscribed as a felony under applicable state law, was constitutionally required to be permitted of employees of a drug rehabilitation program. First, (and unlike, for example, *Phillips, supra*) the *Smith* decision did not address, or change in any way, the degree of deference which is constitutionally due to internal religious beliefs and practices, here, the confidentiality of the sacrament of penance. Second, the state in the instant case did not merely broadly enforce a neutral law of general applicability, as it did in *Smith*. Presumably, all sacramental confessions are not taped and reviewed by law enforcement authorities in Oregon. Rather, here the state targeted the sacramental confession of one specific individual, Hale; obtained a search warrant to review the audiotape of his confession; and only Hale's confession was "searched." In *Smith*, by contrast, the state of Oregon clearly made all uses of "Schedule I controlled substances" a felony. *Id.* at 874.

recognition that the free exercise of religion is entitled to a high level of constitutional protection. Appellants' First Amendment rights should prevail here. Other federal courts have recognized the need to balance these interests in the same way, and make it all the more important that the Ninth Circuit act similarly in this matter.

In *United States v. Dubé*, 820 F.2d 886 (7th Cir. 1987), the Seventh Circuit wrote that the clergy-penitent 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." *Id.* at 889, quoting *Trammel v. United States*, *supra*, 51. That court found the clergy-penitent privilege inapplicable in that particular case, it having been amply demonstrated that the discussions in question involved only joint efforts to further a tax evasion scheme. But the Seventh Circuit recognized and reaffirmed the existence of, and constitutional underpinnings of, the clergy-penitent privilege,<sup>5</sup> even in the face of "the

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<sup>5</sup> The court added that the "privilege, of course, would apply in other cases to ordained ministers, rabbis, Christian Science practitioners, as well as priests." *Id.* at 889, fn. 9. See also *Scott v.*

fundamental principle that the public has a right to every person's evidence . . ." *Id.* It is that same balancing of interests which amici ask this Court to make in the instant case. In *Eckmann v. Board of Education of Hawthorn School District No. 17*, 106 F.R.D. 70 (E.D. Mo. 1985) the court held that, under federal common law and the law of Missouri, the clergy-penitent privilege belonged to the clergy person involved, and could not be waived by the penitent. Thus, balancing the broader questions of free exercise protection against the need of litigants to discover all relevant evidence, the court found that a nun, functioning as Spiritual Director to a student seeking admission to a religious congregation, was entitled to exercise the clergy-penitent privilege to protect all communications made to her by that student in her capacity as Spiritual Director. Here, no matter what the penitent's intentions may have been, the taped confession cannot be maintained, used or further disclosed

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*Hammock*, 133 F.R.D. 610 (D.Utah 1990) (recognizing Utah's clergy-penitent privilege encompassed spiritual discipline given in LDS (Mormon) Church, which has no ordained clergy and no sacraments); *Oregon v. Cox*, 87 Or.App. 443, 497-98, 742 P.2d 694, 696 (1987) (extension of statutory privilege to LDS Church; compelled testimony over objection should be stricken).

without doing irreparable damage to Fr. Mockaitis' free exercise rights as a priest of the Roman Catholic church.

Clearly the clergy-penitent privilege has been recognized by other federal trial and appellate courts as well. See *In re: Grand Jury Investigation*, 918 F.2d 374, 376 (3rd Cir. 1990) (holding that a "clergy-communicant" privilege exists where communication has been made to a clergyman, in his spiritual capacity, by persons seeking spiritual counseling, and in the reasonable expectation of confidentiality); *United States v. Wells*, 446 F.2d 2, 4 (2d Cir. 1971) (clergy-penitent privilege applies to "confidential confessions or other confidential communications of a penitent seeking spiritual rehabilitation"); *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1958) (Fahy and Edgerton, J.J., concurring, writing that statements to Lutheran minister, made to obtain spiritual aid, are protected by clergy-penitent privilege). That privilege has constitutional underpinnings. *McConnell*, *supra*, at 1415,16.

Even if this case did not involve a clear constitutional violation that demands a firm remedy, broader interests are presented than in the usual criminal case. If the Court were

inclined to balance the free exercise rights of the plaintiffs-appellants against other interests, concededly important, offered by the state, amici suggest that, just as the Supreme Court did in *Yoder*, *Sherbert* and *Barnette*, this Court must strike that balance in favor of finding a "constitutionally required exception" to the rules that might generally weigh in favor of disclosure of the taped communications at issue here.

The religious communities represented here are extremely concerned about the implications of the case at bar. On at least three different occasions during this course of events, important religious interests were met with arrogance, derision, or indifference. A decision was made to intercept a penitential confession; a judge decided that religious claims had no place, ever, in his court; and the state defendants, while admitting the wrongfulness of their actions, nonetheless seek the benefit of their error by refusing to seek destruction of the tape. Indeed, the District Attorney has concurred at every step with motions to preserve, listen to and make further use of the tape. In our civil tradition, religion is entitled to benevolent treatment respectful of the special place religion has in the lives of our citizens and in

our constitutional hierarchy. There may be no way to undo completely the offense to plaintiffs. But in its

current posture, this case may provide the only relief.<sup>6</sup> The conduct complained of violated the Constitution and this Court should so state. The threat to maintain and use the tape - the ill-gotten gain of this deliberate breach of respect for a constitutional guarantee - must be plainly rejected. The tape must be destroyed.

#### CONCLUSION

For all of the reasons set forth above and in the submissions of Plaintiffs-Appellants, amici respectfully

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<sup>6</sup> The proper remedy for a violation of confidentiality is normally suppression of the tainted evidence, not dismissal of the indictment or the case. See, e.g., *People v. Burnidge*, 664 N.E.2d 656, 659 (Ill.App. 1996), *Oregon v. Cox*, 742 P.2d 694, 696 (Or.App. 1987)(privilege not waived, reversed and remanded for new trial). In both cases the state parties arguably instigated the violation of confidentiality. In both cases the courts ruled the testimony inadmissible by statute.

submit that the decision of the District Court should be reversed and the matter remanded to that court for further proceedings, with instructions to order the destruction of the tape and all transcripts thereof, and order that no further use or disclosure of its contents be made.

Respectfully submitted,

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**STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28-2.6, amici are unaware of any related cases pending in this court.

**CERTIFICATE OF COMPLIANCE**

Ninth Circuit Rule 32(e)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that appellants' brief (excluding the permitted exclusions)<sup>7</sup> is:

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DATED: September 23, 1996.

\_\_\_\_\_  
Jeffrey Hunter Moon

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<sup>7</sup> Excluded are the table of contents, table of authorities, certificate of service, certificate of compliance, state of related cases, and any addendum.

CERTIFICATE OF SERVICE BY FIRST CLASS MAIL

I HEREBY CERTIFY that on the \_\_\_\_\_ day of September, 1996, I personally served the foregoing Brief Amicus Curiae on the following persons, at the following addresses:

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I HEREBY CERTIFY that on the \_\_\_\_\_ day of September, 1996, I filed the foregoing Brief Amicus Curiae in Support of Plaintiffs-Appellants by mailing the original and the appropriate number of copies by first class mail to the following address:

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