The amicus brief, Evangelical Lutheran Church in America v. Atlantic Mutual Insurance Company, was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed in the United States Court of Appeals for the Fifth Circuit on July 24, 1998.

No. 98-50311

In The United States Court of Appeals
For the Fifth Circuit

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EVANGELICAL LUTHERAN CHURCH
IN AMERICA, *et al.*,

Plaintiffs-Appellees,

vs.

ATLANTIC MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

____

Appeal From the United States District Court
For the Western District of Texas

____

BRIEF OF AMICI CURIAE GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, EVANGELICAL COVENANT CHURCH, FIRST CHURCH OF CHRIST, SCIENTIST, GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, REORGANIZED CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, UNITED STATES CATHOLIC CONFERENCE, WISCONSIN EVANGELICAL LUTHERAN SYNOD and WORLDWIDE CHURCH OF GOD IN SUPPORT OF PLAINTIFFS-APPELLEES

____

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CERTIFICATE OF INTEREST OF AMICI CURIAE

The undersigned, counsel of record for amici curiae,[1] The General Council on Finance and Administration of the United Methodist Church, The Evangelical Covenant Church, The First Church of Christ, Scientist, The General Assembly of the Presbyterian Church (U.S.A.), The General Conference of Seventh-day Adventists, The Reorganized Church of Jesus Christ of Latter Day Saints, The United States Catholic Conference, The Wisconsin Evangelical Lutheran Synod and The Worldwide Church of God, furnishes the following statement in compliance with Circuit Rule 28.2.1:

The General Council on Finance and Administration ("GCFA") is the finance and administrative arm of The United Methodist Church. The United Methodist Church is a worldwide religious denomination with approximately nine million members in the United States, and approximately 36,000 local churches in the United States. There are approximately 790,000 United Methodist members and 2,160 United Methodist churches in the state of Texas. The denomination is embedded not

[1] Appellant's Certificate of Interested Persons incorrectly identifies Amici's law firm and James C. Geoly, one of Amici's attorneys, as attorneys for Appellees. As Appellees' certificate correctly states, Amici's attorneys formerly were attorneys for Appellees as plaintiffs in the district court. Amici's attorneys are no longer counsel for Appellees in this case and have never appeared for any party hereto in this Court.

only in the tradition and teachings of religious tolerance but also seeks to provide for the maintenance of worship, the edification of behaviors, and the redemption of the world.

The United Methodist Church is known as a connectional denomination and, under this structure, the "annual conference" is the fundamental body of the denomination, which "connects" the local churches of a geographic region together for a common purpose. There are 68 annual conferences in the United States, six of which are in Texas. The bishops in The United Methodist Church serve as the denomination's spiritual leaders. Each bishop is assigned to an episcopal area, which consists of one or more annual conferences over which the bishop serves as the general superintendent for spiritual purposes. The bishop of an area also serves as the presiding officer over the annual conference(s) in the bishop's area when the annual conference(s) holds it annual business meeting. In addition to local churches, each annual conference has a relationship with a number of ministry-related organizations: hospitals, children's homes, retirement communities, shelters, educational institutions and social services.

GCFA has an interest in this litigation because it is officially assigned under *The Book of Discipline* to safeguard and protect the legal rights and interests of the denomination. GCFA also has an interest because it is responsible under *The Book*

of Discipline for instituting, managing and maintaining an insurance program to protect the denomination. GCFA secures insurance coverage for several of the United Methodist Church entities in the pending action, *Centennial Ins. Co., Atlantic Mutual Ins. Co.* and *Atlantic Lloyd's Ins. Co. of Tex. v. Bailey, et al.*, No. 5-98-00007-CV (Tex. App. Dallas), in which Atlantic Mutual Insurance Company has made substantially the same argument to overturn a trial court's determination of its duty to defend as it has advanced here. GCFA has a strong interest in informing this Court of the error of Atlantic Mutual's position.

The Evangelical Covenant Church is a denomination of evangelical Christian churches, with congregations throughout the United States including Texas. It has 630 churches in ten regions with an average attendance of 114,000. It grants clergy credentials to 1700 ministers. It operates schools, hospitals, children's homes, retirement communities, shelters, and social services in the United States and in foreign countries. It has an interest in the adequacy of liability insurance for donor supported not-for-profit ministries. It also has an interest in preventing sexual misconduct by persons in helping professions and in providing victims adequate care.

The First Church of Christ, Scientist, in Boston, Massachusetts, is "The Mother Church" of one of the major indigenous American religious denominations-Christian Science. *Christian Science* is the name given by Mary Baker Eddy to her

discovery of the laws of God, including rules for Christian spiritual healing through prayer, as illustrated by the words and works of Christ Jesus as recorded in the Bible. Following this discovery, Mrs. Eddy established a church in 1879, which she reorganized in 1892 as The First Church of Christ, Scientist. The Church and its branch Christian Science churches and societies are collectively referred to as the *Church of Christ, Scientist*. Local Christian Science congregations exist in over sixty-five countries and in all fifty states and the District of Columbia. There are eighty such congregations in Texas.

The Church of Christ, Scientist, has no clergy; but claims could be imagined that certain roles carry the imprimatur of the Church. Christian Science practitioners are individuals who make themselves available to provide Christian Science treatment through prayer for those who call on them. Christian Science nurses are available to provide practical wisdom necessary in the sickroom for those relying on Christian Science treatment for healing. The Church publishes a monthly magazine, *The Christian Science Journal,* in which Christian Science practitioners and nurses who qualify are able to advertise as such. All Christian Science churches have Sunday school teachers; and individual Christian Scientists serve as chaplains in the military and represent the religion in prisons and hospitals and in various other capacities

throughout the world. The First Church of Christ, Scientist, supports the preservation of religious rights for all.

The General Assembly of the Presbyterian Church (U.S.A.). Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), 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 approximately 11,500 congregations organized into 173 presbyteries under the jurisdiction of 16 synods. There are currently 564 Presbyterian congregations within the confines of the State of Texas with 145,175 members.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverance and policy and policy statements binding on the membership of the Presbyterian Church. 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 the respect and prayerful consideration of all the denomination's members.

The Stated Clerk, Clifton Kirkpatrick, joins in Point I of this brief, but takes no position as to the issues addressed in Point II of this brief.

The theology of the Presbyterian Church (U.S.A.) has historically espoused careful stewardship of resources entrusted to its membership by our Creator. This

theology was codified in the *Book of Order*, the constitution of the denomination, when in 1993 all governing bodies (which includes local congregations) were required to ". . . obtain property and liability coverage to protect facilities, programs, and officers, including members of the session, staff, board of trustees, and deacons." The theories proposed by the Appellant in the case at bar would, if adopted by this court, make that theologically based constitutional requirement largely moot.

The Stated Clerk urges this Court to affirm the district court's ruling and to continue to protect religious organizations from such destructive legal theories which would so clearly have negative consequences on the carrying out of ministry. Such theories also violate the strong public policy interest that civil governments have in preserving religious organizations.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 41,000 congregations with more than nine million members worldwide. The North American Division of the General Conference administers the work of the church in the United States, Canada, and Bermuda, and represents more than 4,300 congregations in the United States with nearly 800,000 members. The church's local congregations, administrative offices, and its educational, medical, and publishing institutions all have an interest in the insurance issues involved in this case.

The Reorganized Church of Jesus Christ of Latter Day Saints is organized as an unincorporated religious association on a world-wide basis. The Church has its major concentration in North America, but is officially established in over 35 countries. Church membership is approximately 245,000 with over 1,500 congregations and with the vast majority of its members in North America. The church has had members and congregations in the State of Texas for well over 125 years. The church currently has 48 congregational facilities in the State of Texas, one campground in Bandera, Texas and one educational facility in Houston, Texas. Membership in the State of Texas, at present, is in excess of 4,775.

The United States Catholic Conference ("USCC" or "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 USCC is a vehicle through which the Bishops speak cooperatively and collegially on matters affecting the Catholic Church and its people. Roman Catholicism is the largest religious denomination in the United States, with over 60 million members in this country. The Conference advocates and promotes the pastoral teachings of the Church on diverse issues, including the protection of human rights, the sanctity and dignity of human life, and the importance of religious communities, and has an interest

in the existence of adequate liability insurance to protect its' and other churches' ministries.

The Wisconsin Evangelical Lutheran Synod ("WELS") is a worldwide religious denomination organized and existing as a Wisconsin religious corporation. WELS has approximately 314,000 communicant members and 1,250 congregations in the United States. In Texas, WELS has over 30 local congregations, 2,000 communicant members and 65 ordained teachers and ministers.

Pursuant to its Bylaws, WELS, through its Synodical Council, is the legal representative of the Synod and is authorized to represent the Synod in all legal matters. As a part of its risk management program, WELS has purchased and maintains various liability insurance contracts. WELS has an interest in this litigation because of its duty and obligation to protect the rights and interests of the Synod in all pertinent matters.

The Worldwide Church of God, a California corporation, began in the early 1930's in Eugene, Oregon. Subsequently, it was incorporated in California in 1947 where it maintains its worldwide headquarters.

As of July 2, 1998, the Church had more than 844 local church congregations throughout the world. As of that date, the Church had approximately 45,000 adult baptized members, co-workers and donors, and approximately 409 ordained and

commissioned ministers, a large portion of whom had studied at the Church's School of Theology, Ambassador University.

The governance of the Church is hierarchical with ecclesiastical government from the top down, in accord with what it deems to be the biblical example.

The Church purchases multiple types of insurance (including policies covering torts committed by persons who have some nexus to the Church in their activities) to protect itself against liability from numerous risks that it is exposed to by virtue of undertaking its charitable activities. It pays substantial premiums for such insurance coverage and might be unable to successfully defend itself against an unmeritorious suit if insurance companies are able to arbitrarily deny coverage. Further, the Church may find itself financially unable to pursue litigation against its insurers for wrongfully refusing to defend the claim. Thus, clarification of the insurance company's duties and responsibilities is of crucial importance, not only to the action taken by the Church to protect itself against risk, but perhaps to the Church's very survival.

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ARGUMENT

It is an unfortunate reality of the modern world that an explosion of litigation has exposed religious organizations and other charities to potentially massive liabilities. In the past, many states afforded tort immunity to charities, but charitable immunity is now virtually a thing of the past. Amici are religious bodies who have purchased liability insurance as a prudent measure to protect against the cost of litigation and the risk of loss due to their own unforseen acts of negligence, or alleged negligence.

It is also an unfortunate reality that a significant amount of churches' potential liability arises from claims that clergy and others have engaged in some form of intentional misconduct. These may be claims of sexual misconduct with children or adults, but they may also be claims of non-sexual battery or even financial misconduct. Courts in virtually all jurisdictions have held that religious groups are not liable under the doctrine of *respondeat superior* in these circumstances because such torts are outside the scope of the perpetrator's duties. Many tort plaintiffs therefore allege a direct cause of action against religious groups for failing to act reasonably to prevent perpetrators from causing harm. These allegations may be based on charges that the group failed to implement policies to anticipate these problems, or that their attempts

to prevent and respond to misconduct were inadequate. Thus, religious groups face possible liability for their unintentional, albeit negligent conduct. Indeed, they face burdensome litigation even when they are not negligent, for plaintiffs routinely will sue religious entities on a variety of creative theories in the hope of establishing negligence after discovery.

On the pleadings, the claim underlying the case at bar is no different. Eula Faye Clark alleges that her daughter was sexually abused because the Evangelical Lutheran Church in America ("ELCA") and its Texas-Louisiana Gulf Coast Synod (the "Synod") were negligent in their decision to credential, and failure to supervise, Richard Baker, a Lutheran minister working as a chaplain at a state institution. Thus, according to Clark, ELCA and the Synod directly caused her daughter's injuries by failing to prevent Baker from serving as chaplain. ELCA and the Synod deny that they owed any duty to Clark because Baker was not their employee or agent. They also deny that they were negligent in credentialing Baker as a Lutheran minister and deny that they had any duty to supervise him as a chaplain.

Having purchased insurance to cover negligence claims, ELCA and the Synod fully expected their insurer, Atlantic Mutual Insurance Company ("Atlantic Mutual"), to provide them with a defense and coverage for the *Clark* suit, as it had in similar cases in other states. Instead, Atlantic Mutual refused tender, asserting that there was

no coverage or even a duty to defend because Baker's alleged actions were intentional acts on his part, and therefore not covered "occurrences" within the policies at issue. In this litigation, Atlantic Mutual has taken the position that its insurance policies do not cover negligence claims against the insured religious entities if the underlying injury was caused by an "intentional" act, from the standpoint of the perpetrator, without any regard to whether the act was alleged to be "intentional" from the standpoint of the insureds.

Atlantic Mutual ignores the distinction between the allegations of negligence against ELCA and the Synod, and the allegations of intentional misconduct against Baker. ELCA and the Synod have never taken the position that Baker is covered under their policies. He is not an insured and, in any event, his intentional acts deprive him of coverage since the injury at issue was "expected" and "intended" from his standpoint. In contrast, ELCA and the Synod are named as "the insureds" under the policies, and neither the tort plaintiffs nor Atlantic Mutual allege that they acted intentionally. They neither expected nor intended Clark's injuries. They are entitled to a defense and coverage because the negligence that is alleged against them is precisely the type of risk for which they bought, and Atlantic Mutual sold, insurance. The purpose of this brief is to demonstrate that the law, public policy and common sense support a defense and coverage for ELCA and the Synod.

Atlantic Mutual also advances the troubling argument that its policies should be interpreted under the law of the state where the underlying injury happens to occur. This effectively leaves insureds with 50 separate policies, each with uncertain meaning until an underlying claim happens to be brought and the policy is litigated in each respective state. This approach is not only incorrect under the choice of law rules which govern this dispute, but also is against public policy, which favors a rational, predictable insurance system and which supports the efforts of religious groups and charities to manage the risks inherent in their service to the public.

I. NEGLIGENCE CLAIMS AGAINST RELIGIOUS INSTITUTIONS ARISING OUT OF CLERGY MISCONDUCT ARE COVERED "OCCURRENCES" WHEN THEY ARE NOT "EXPECTED OR INTENDED FROM THE STANDPOINT OF THE [RELIGIOUS INSTITUTIONS]"

A. The Policies Provide A Defense And Coverage Under Texas Law

An insurance coverage dispute is a contract case. The rights of the parties are determined, in the first instance, by the language of the insurance policy -- the binding contract. Since the purpose of an insurance policy is to provide insurance coverage, where the policy language is at all ambiguous, it must be construed liberally in favor of the insured. *See Gonzales v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990). Moreover, where, as here, the dispute concerns the duty to defend, as opposed to the duty to indemnify, the insured is entitled to a defense if the allegations

of the underlying claim give rise to any possibility of coverage, as the duty to defend is universally recognized to be broader than the duty to indemnify. *E.g., Cluett v. Medical Protective Co.*, 829 S.W.2d 822, 829-30 (Tex. App. Dallas 1992, writ den'd).

The Atlantic Mutual policies at issue provide coverage for damages due to a "bodily injury" that is "caused by an occurrence." (See Appellee's Br. at 6) There is no dispute that sexual abuse constitutes bodily injury of the underlying claimant. The issue is whether the claim constitutes an occurrence. The definition of an occurrence in the Atlantic Mutual policies at issue is not substantially different from that in most policies: "an accident, including continuous or repeated exposure to substantially the same general conditions." (Appellees' Appendix at 95.)[2]

The claim against ELCA and the Synod is that their alleged negligent training or supervision of Baker somehow caused the injuries alleged in *Clark*. Thus, they are accused of causing a "bodily injury" (an act of sexual abuse) by "accident" (through negligence). The claim would appear to fit squarely within the policy language, and thus ought to be covered. It should at least be subject to the insurer's duty to defend until or unless there is evidence that the church entities themselves somehow acted intentionally.

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[2] Amici do not intend to interpret any particular policy other than the Atlantic Mutual policies at issue here.

Like most policies, the policies at bar also contain exclusions, including an exclusion for bodily injuries "expected or intended *from the standpoint of the insured*." (Appellees' Appendix at 87.) (Emphasis added.) This exclusion works in tandem with the definition of an occurrence to prevent the insurance policy from becoming a license to commit intentional torts, and to prevent the insured from intentionally causing a covered event to "occur."

As the emphasis in the above quotation indicates, the focus is on "the standpoint of the insured," not anyone else. If the insured expected or intended to cause a bodily injury, then it is not covered. If the insured did not expect or intend harm, then there is coverage, even if the insured caused the harm.

These principles are easy to apply in a clergy misconduct case. Religious organizations do not dispute the insurers' contention that perpetrators of sexual abuse intend the consequences of their acts. Indeed, Amici believe that this is one reason that such acts are considered in virtually all jurisdictions to be outside the scope of employment as a matter of law. Thus, perpetrators generally will have no coverage.

But the governing standard is to view the bodily injury from "the standpoint of the insured," not the perpetrator. In most cases, perpetrators are not only excluded from coverage by their intentional conduct, they are often not even named insureds under the policy. That is the case here, where ELCA's policies cover only the

organization and its officers and directors, not the Lutheran clergy at large (see Appellees' Appendix at A-84, A-86, A-90-91), and the Synod's policies cover only the organization and "officially appointed . . . pastors," not all ordained ministers (see Appellees' Appendix at A-105). Thus, Baker is neither "*the* insured," nor "*an* insured." Whether conduct is intentional from his "standpoint" is thus immaterial.

On the other hand, as Atlantic Mutual appears to concede, from the standpoint of ELCA and the Synod, Clark's bodily injury was not expected or intended. At worst, taking the underlying complaint as true, these church groups were negligent, unintentionally causing the underlying plaintiff harm. Accordingly, the negligence claim is an "occurrence" because it was "accidental" as far as the insureds were concerned, and is not excluded as "expected or intended."

Atlantic Mutual argues that there can be no negligence coverage when the perpetrator acts intentionally because the act causing injury is an inherently intentional act, and thus is not covered (or is excluded from coverage) for all purposes. In support, Atlantic Mutual cites a number of Texas intermediate appellate cases and a number of decisions of this Court. The Court should reject Atlantic Mutual's argument for a variety of reasons.

First, every contract case is governed by the contract at issue. The policy in this case explicitly affords coverage. None of the Texas authorities cited in Atlantic

Mutual's brief deal with the language of ELCA and the Synod's policies. Thus, the district court, which examined the policies in detail, was entitled to hold that the negligence claims at issue were "accidents" that fell within the definition of an occurrence in these policies, and were not excluded by the "expected and intended" clause of these policies.

Second, none of the contrary authorities is controlling here. Assuming that Texas law applies to this case (and, as argued by Appellees below, it does not), it is the duty of this Court to apply the law of Texas as interpreted by the Texas Supreme Court. Since the Texas Supreme Court has not addressed the issue, it is the duty of this Court to predict how the Texas Supreme Court would hold if this case were before it.

Presumably, the Texas Supreme Court would look first to the decisions of other Texas courts. The recent decision in *State Farm General Insurance Co. v. White*, 955 S.W.2d 474 (Tex. App. Austin 1997, no writ), is directly on point. In *White*, the insureds were accused in an underlying lawsuit of negligence for failing to report the sexual abuse of children at a day care center. The policy contained a clause excluding coverage for bodily injury "caused intentionally by or at the direction of the Insured." *Id*. at 476. The insurer attempted to avoid providing a defense on the ground that the

insureds' failure to report the abuse was intentional, and on the ground that coverage was excluded because the abuse acts themselves were intentional.

The court rejected the first argument out of hand, holding that negligence and intentional wrongdoing were fundamentally different:

> The pleadings do not allege an intent to harm, as the factual recitations contained in the petition do not allege any intentional acts by [insureds]. Instead, the [victims] have presented facts constituting and expressly accusing the [insureds] of negligence in failing to report the abuse; thus, the language of the petition does not trigger the intentional injury exclusion.

Id. *See also State Farm Fire & Casualty Co. v. S.S.*, 858 S.W.2d 374, 378 (Tex. 1993) (negligence is not an intentional wrong).

Turning to the insurer's argument that "the claims are excluded from coverage because intent to injure may be inferred as a matter of law in sexual molestation cases" (*White*, 955 S.W.2d at 477), the Court observed the obvious:

> here the actual molester is not the actor seeking a defense under [the] policy. [The insureds] are not the ones who physically molested the . . . children. Rather they were bystanders to the abuse of other children and failed to report the abuse. Since [the insurer's cited authorities] all involve the actual molesters, these cases are distinguishable and, therefore, not controlling.

Id. The Court thus explicitly rejects Atlantic Mutual's argument here that an exclusion of intentional conduct bars coverage even if the insured did not act intentionally.[3]

The Texas Supreme Court is likely to follow *White* and hold that the requirement that an occurrence be an "accident" not "expected and intended" is to be analyzed "from the standpoint of the insured." As such, negligence claims against a religious group for the acts of its personnel are covered claims which insurers have a duty to defend.

Atlantic Mutual fails to cite any Texas authority contrary to *White*, which is the Texas case most similar to the situation at bar. The Texas authorities cited in Atlantic Mutual's brief either state the obvious point acknowledged in *White* that the *perpetrator* will be presumed to intend the consequences of his criminal acts, or involve denials of coverage pursuant to exclusions that applied to *all* claims "arising out of" the excluded matter. *E.g. Burlington Insurance Co. v. Mexican American Unity Council*, 905 S.W.2d 359 (Tex. App. San Antonio 1995, no writ) (excluding all claims for bodily injury arising out of assault and battery); *Centennial Insurance Co. v. Hartford Accident and Indemnity Co.*, 821 S.W.2d 192 (Tex. App. Houston 1991, no writ) (excluding all claims for bodily injury arising out of any automobile). These

[3] The *White* Court's refusal in construing an exclusion to equate the sex abuser's acts with those of the negligent "bystanders" is unequivocal. The same analysis would apply to the word "accident" in the definition of an occurrence in Atlantic Mutual's policies.

blanket clauses are understood to exclude an entire class of claims, regardless of the role the insured played in causing the injury. Such exclusions are completely different from the definition of an occurrence, or the "expected and intended" exclusion, which both focus explicitly on the conduct and the mental state of the insured.

Amici acknowledge that recent decisions of this Court have held that "where a third-party's liability is related to and interdependent on other tortious activities, the ultimate issue is whether the underlying tortious activities are encompassed within the definition of 'occurrence.'" *American States Ins. Co. v. Bailey*, 133 F.3d 363 (5th Cir. 1998) (citing *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 87 (5th Cir. 1997); *New York Life Ins. Co. v. Travelers Ins. Co.*, 92 F.3d 336, 339 (5th Cir. 1996)). *See also Canutillo Independent School District v. National Union Fire Ins. Co. of Pittsburgh*, 99 F.3d 695 (5th Cir. 1996). These opinions, which all involve employees, appear to focus either on blanket exclusions or the fact that vicarious liability is alleged, through which it may be plausible to argue for insurance purposes that the insured's conduct was, by imputation, intentional. *But see American Home Assurance Co. v. Stephens*, 130 F.3d 123 (5th Cir. 1997) (it is against Texas public policy to exclude coverage for nonsexual misconduct merely because excluded sexual misconduct also occurred), *pet. for reh'g granted, Op. withdrawn, certification to Tex. Sup. Ct. granted*, 140 F.3d 617 (5th Cir. 1998). To the extent this Court

intended to hold that even innocent negligent parties like the insureds in *White* lose coverage when a *third party* acts intentionally, we respectfully request that the Court reconsider this position in light of *White*, which is not addressed in this Court's precedents.

Amici suggest that the Texas Supreme Court will adhere to this State's overriding policy affording coverage to insureds wherever the language of a policy will permit it. The policies at issue here explicitly cover negligence by the insured; they do not cover intentional wrongdoing by anyone. The allegations against ELCA and the Synod are that they were negligent in selecting, credentialing and overseeing the work of a minister. These acts fall squarely within the language of the policies. The allegations against the minister are that he engaged in intentional wrongdoing. These acts fall outside the language of the policies. If the policies are held not to cover ELCA and the Synod's negligence, then they were sold a worthless piece of paper by Atlantic Mutual. Accordingly, we believe that the Texas Supreme Court will follow the reasoning of *White* and hold that negligence claims against religious organizations for failure to prevent the intentional acts of individuals are covered occurrences, not excluded as expected or intended from the standpoint of the insured.

B. Public Policy Supports Finding A Duty to Defend and Coverage Because Religious Organizations Should Not Be Forced To Withdraw From Serving The People

Religious organizations, their clergy and their adherents are on the front line of society, ministering to the poor, feeding the hungry, teaching the young and comforting the old. Religious groups, and charities in general, thus perform a vital social function; one that government could never fulfill completely on its own. Society would suffer immeasurable harm if religious groups and other charities withdrew from this role.

Amici do not exist to make a profit, or even to collect assets. They acquire and use their assets in fulfillment of their respective missions and ministries. Nonetheless, they have a duty to be responsible stewards of their assets, since their ability to serve their respective faiths depends, to some extent, on financial solvency. Therefore, Amici rely on insurance to permit them to engage in interactions with others and to expose themselves, within reason, to the risks of the secular marketplace. They do not seek a license to commit torts; they simply seek insurance for the same risk that most insureds protect against: unintentional mistakes and accidents-- that is, negligence.

If, as a matter of law, negligent hiring and retention claims against churches are excluded from (or not covered by) comprehensive general liability insurance whenever a perpetrator acts intentionally, then churches will have no way to protect against negligence claims. After paying premiums, they will have to hire lawyers to defend negligence cases, and will be exposed to potentially catastrophic judgments in those

cases, even where there is no allegation that they did anything more than make a mistake.

Such exposure would undoubtedly cause religious groups to be more circumspect about their dealings with the public. Rather than take on challenging missions, religious organizations might be forced to make decisions based principally on economic factors, rather than on the religious values that previously have motivated their actions. In the past, religious groups were protected from this dilemma by charitable immunity, which shielded them from liability for unintentional torts. Charitable immunity served public policy by protecting charitable assets and encouraging charitable activities, but it troubled courts and legislatures because it left injured parties uncompensated. With the advent of a reliable insurance system for negligence claims, almost all jurisdictions abolished charitable immunity because, in their view, it was no longer needed. By placing the burden on charities to purchase insurance, policy makers sought to create a more equitable system without forfeiting the essential protection for charities that immunity formerly provided. The irony of Atlantic Mutual's argument is that, if it is adopted by this Court, charities will have neither immunity nor insurance. This would leave charities only the alternatives of risking charitable assets or curtailing charitable activities, the very dilemma that gave rise to the immunity doctrine in the first place.

The risk of loss, or even ruin, may be a valid deterrent to intentional wrongdoing, and it would violate public policy to offer insurance for the insured's own intentional acts. In contrast, negligence may result from a church's legitimate religious activities. Rather than curtail their exercise of religion and diminish their vital social contribution, religious organizations buy insurance for negligence, voluntarily undertaking the risk of loss in a rational, financially responsible way. If there can be no negligence coverage as the insurers maintain, then there can be no risk management. More importantly, religious groups will be forced to restrict their activities. Public policy strongly favors affording religious organizations coverage for negligence, especially where insurance policies on their face appear to provide such coverage. Any other outcome would chill the valuable activities of religious and charitable organizations.

II. POLICIES COVERING RELIGIOUS ORGANIZATIONS THAT OPERATE IN MULTIPLE STATES, OR COVERING A GROUP OF ORGANIZATIONS LOCATED IN DIFFERENT STATES MUST BE SUBJECT TO UNIFORM INTERPRETATION UNDER A SINGLE STATE'S LAWS

Insurance policies that do not contain choice of law provisions are subject to a choice of law analysis like any other contracts. As ELCA and the Synod make clear in their brief, their policies with Atlantic Mutual were negotiated, agreed to, executed, delivered and paid for primarily in Illinois and New York. Accordingly, as contracts,

the policies should be governed by the law of one of those states and not Texas. Amici do not favor one jurisdiction or another. Rather, we urge the Court to adopt an approach that will offer predictability and uniformity to insurance contracts.

The contrary position, advocated by Atlantic Mutual, is that the location of the underlying claim is the most important factor in deciding choice of law. Thus, ELCA, which operates in all 50 states, must anticipate 50 different interpretations of its insurance policies. The Synod's policy, which was purchased for a large group of synods, would have as many interpretations as there are synod locations.[4] In short, no matter what bargain they struck in contract negotiations, ELCA and the synods must hold their breath every time a coverage issue arises because they can never know for certain how their policies will be interpreted.

Appellees aptly demonstrate that this absurd approach is contrary to the Illinois choice of law rules that govern this case. (See Appellees' Br. at 11-20.) Amici write separately to emphasize that Atlantic Mutual's position would defeat the very purpose of insurance -- effective risk management. National religious organizations have tried to protect the charitable assets entrusted to them by insuring against reasonably foreseeable risks, including negligence actions. Insurance is expensive, but it is worth the price in relation to the risk of catastrophic loss. Unfortunately, this expense is

[4] There are 65 synods affiliated with ELCA throughout the United States and the Caribbean.

much harder to justify if, notwithstanding the language of the policy and the law of the jurisdiction in which the contract is entered into, the policy will be reinterpreted every time a new claim is presented in a different state.[5] In short, such a rule leaves Amici effectively uninsured.

This Court should reject the notion that a single insurance policy can have a different meaning every time a new claim arises, subject only to the fortuitous location of the underlying injury. We therefore urge the Court to hold that this dispute is not governed by Texas law.

CONCLUSION

Amici respectfully request that the Court affirm the order of the district court granting summary judgment to Plaintiffs-Appellees.

Respectfully submitted,

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[5] Indeed, as Appellees note, this is precisely what has happened. (See Appellees' Br. at 9.) While Atlantic Mutual has agreed to defend several lawsuits against ELCA and several United Methodist insureds in other parts of the country, it has chosen to deny coverage for any claims that happen to be filed in Texas.

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ATTORNEYS FOR AMICI CURIAE

Dated: July 3, 1998

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Amici Curiae The General Council on Finance and Administration of the United Methodist Church, The Evangelical Covenant Church, The First Church of Christ, Scientist, The General Assembly of the Presbyterian Church (U.S.A.), The General Conference of Seventh-Day Adventists, The Reorganized Church of Jesus Christ of Latter Day Saints, The United States Catholic Conference, The Wisconsin Evangelical Lutheran Synod and The Worldwide Church of God in Support of Plaintiffs-Appellees, along with Amici's Motion for Leave to File have been served upon counsel of record for Plaintiffs-Appellees and Defendant-Appellant by overnight courier delivery, this 3rd day of July, 1998.

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James C. Geoly

CIRCUIT RULE 32.2.7(c) CERTIFICATE

Pursuant to Fifth Circuit Court Rule 32.3.7(c), the undersigned counsel for Amici Curiae The General Council on Finance and Administration of the United Methodist Church, The Evangelical Covenant Church, The First Church of Christ, Scientist, The General Assembly of the Presbyterian Church (U.S.A.), The General Conference of Seventh-Day Adventists, The Reorganized Church of Jesus Christ of Latter Day Saints, The United States Catholic Conference, The Wisconsin Evangelical Lutheran Synod and The Worldwide Church of God certifies that this brief complies with the type-volume limitations of Fifth Circuit Rule 32.3.7(b):

1. Exclusive of the exempted portions specified in Circuit Rule 32.2.7(b)(3), the brief contains 4,283 words.

2. The brief has been prepared in proportionally-spaced typeface using WordPerfect 6.1 with a CG Times 14 point font.

3. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word-count printout.

4. The undersigned understands that a material misrepresentation in completing this Certificate, or circumvention of the type-volume limits specified in the Circuit Rules, may result in this Court striking the brief and imposing sanctions against the person signing the brief.

Dated: July 24, 1998

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James C. Geoly