

The amicus brief, State of Washington v. Martin, Appellant Hamlin, 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 Supreme Court in the State of Washington on February 16, 1999.

No. 67254-7
IN THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
SCOTT ANTHONY MARTIN,
Defendant,
and
RICH HAMLIN,
Appellant.

BRIEF OF AMICI CURIAE CHRISTIAN LEGAL SOCIETY,
WASHINGTON STATE CATHOLIC CONFERENCE,
ASSOCIATED MINISTRIES OF TACOMA,
NATIONAL ASSOCIATION OF EVANGELICALS,
CLIFTON KIRKPATRICK AS STATED CLERK OF THE GENERAL
ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.),
CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
AMERICAN JEWISH CONGRESS, COUNCIL ON RELIGIOUS
FREEDOM, FAMILY RESEARCH COUNCIL, FOCUS ON THE
FAMILY, AND EVANGELICAL COVENANT CHURCH
IN SUPPORT OF APPELLANT

Petition for Review of Court Appeals No. 22790-8-II

Steven T. McFarland, WSBA #11111
Counsel of Record

Kimberlee W. Colby
CHRISTIAN LEGAL SOCIETY
Center for Law & Religious Freedom
4208 Evergreen Lane, Suite 222
Annandale, Virginia 22003
(703) 642-1070

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Statement of Interest of Amici Curiae 1

Statement of the Case 1

Summary of Argument 1

I. The Court of Appeals Applied
the Correct Interpretation to
the Plain Language of the
Washington State Clergy Privilege
Statute. 2

II. The Court of Appeals Avoided the
Unnecessary Conflict with the
Establishment Clause Created
By the Trial Court's Mistaken
Interpretation of RCW 5.60.060(3) 8

A. For the Government to Imprison
Ordained Clergy of Some Faiths
for Refusal to Testify while
According the Privilege Not to
Testify to Ordained Clergy of
Other Faiths Violates the
Establishment Clause Prohibition
on Preference among Religious
Denominations. 9

B.	The Process of Government Officials Sifting through Religious Doctrine of Various Denominations in Order to Determine Which Ordained Clergy Are Protected by the Privilege Creates an Excessive Entanglement between Government and Religion that Violates the Establishment Clause.	12
III.	Forcing Pastor Hamlin to Choose Between Fulfilling His Religious Duties or Serving Time in Jail Violates Both the Federal and Washington State Constitutional Protections of Free Exercise of Religion.	15
	Conclusion	20
	Statements of Interest of Amici Curiae	1a

TABLE OF AUTHORITIES

Cases

Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987)	13
Employment Division v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)	13, 17

First Covenant Church v. City of Seattle (II), 120 Wash.2d 203, 840 P.2d 174 (1992)	14, 15, 16, 17, 18, 20
First United Methodist Church of Seattle v. Seattle Landmarks Preservation Board 129 Wash.2d 238, 916 P.2d 374 (1996)	14
Fowler v. Rhode Island, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953)	13
Frazer v. Ill. Dept. of Empl. Secur., 489 U.S. 829, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989)	5
Hobbie v. Unemployment Appeals Commission, 480 U.S. 136, 107 S. Ct. 1046, 94 L.Ed.2d 190 (1987)	5
In re Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990)	11
In re Swenson, 183 Minn. 602, 237 N.W. 589 (Minn. 1931)	4, 5, 6, 11
Larson v. Valente, 456 U.S. 228, 102 S. Ct. 1673, 72 L.Ed.2d 33 (1982)	9
Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed 467 (1992)	13
Mockaitis v. Harcleroad, 104 F.3d 1522 (9th Cir. 1997)	10, 18, 19, 20
Munns v. Martin, 131 Wash.2d 192, 930 P.2d 318 (1997)	14
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 99 S.Ct. 1313,	

59 L.Ed.2d 533 (1979)	8
Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969)	12
Presbytery of Seattle v. Rohrbaugh, 79 Wash.2d 367, 485 P.2d 615 (1971)	14
Rosenberger v. University of Virginia, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)	13
Scott v. Hammock, 133 F.R.D. 610 (D. Utah 1990), certified state law question aff'd, 870 P.2d 947 (Utah 1994)	4, 6, 9, 10, 11, 12
State v. Martin, 91 Wn. App. 621, 959 P.2d 152 (1998)	8
State of Montana v. MacKinnon, 1998 Mont. 78, 957 P.2d 23 (Mont. 1998)	11, 12
State of Washington v. Buss, 76 Wn. App. 780, 887 P.2d 920 (App. Ct. (Div. I) 1995).	3, 4, 6, 7, 8, 10, 11, 12
State of Washington v. Motherwell, 114 Wash. 2d 353, 788 P.2d 1066 (1990)	7, 12, 19
Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981)	13

Constitutions and Statutes

U.S. Constitution, Amend. 1 passim

Washington State Constitution, Art. 1, Secpa§§im

RCW 5.60.060(3) passim

RCW 9.73.095 18

Statement of Interest of Amici Curiae

The statements of interest of the amici curiae are set forth in the Appendix.

Statement of the Case

Amici adopt by reference the statement of the case in Appellant's Answer to the Petition for Review.

Summary of Argument

American governments generally seek to avoid the confrontation between church and state that has occurred in this case. Wisdom, tradition, public policy, and constitutional protections all counsel against the government compelling a clergyperson to choose between jail and his or her duty to protect the confidentiality of communications made to him or her as a clergyperson.

The conflict between church and state in this case is avoided by the proper interpretation of the Washington State clergy privilege statute, RCW 5.60.060(3), set forth by the Court of Appeals below. The trial court wrongly interpreted the plain language of RCW 5.60.060(3) to require that the penitent be acting in the course of discipline enjoined by the church to which he or she belongs.

As the court of appeals ruled, however, the plain language clearly indicates that it is the clergyperson who is to be acting in the course of discipline enjoined by his or her church, not the penitent. As the Court of Appeals correctly concluded, the statute protects a pastor in precisely the position Pastor Rich Hamlin finds himself.

Both the United States and the Washington State Constitutions provide broad protection of free exercise of religion, including strong protection against government officials interfering in religious functions of clergypersons. The court of appeals' correct reading of the privilege statute avoids the need to decide upon these constitutional protections. The court of appeals' decision is buttressed by the vital state and federal constitutional protections that prohibit the government from forcing a pastor to choose between fulfilling his or her religious duties and prison.

Argument

I. The Court of Appeals Applied the Correct Interpretation to the Plain Language of the Washington State Clergy Privilege Statute.

The clergy privilege statute, RCW 5.60.060(3), states:

A member of the clergy or a priest shall not, without the consent of a person making the confession, be examined as to any confession made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

Under the plain language of RCW 5.60.060(3), the privilege applies to this case. As the trial court found, Pastor Hamlin is an ordained minister (CP22) and considered the statements made to him by the

defendant to be confessional in nature. (CP24). Pastor Hamlin was acting in his professional character in the course of discipline enjoined by the church to which he belongs. (CP54-55). The defendant has not consented to Pastor Hamlin's being examined. (CP17).

The trial court issued two rulings rejecting the claim of privilege in this case. In its Findings of Fact and Conclusions of Law After Hearing dated November 13, 1997, it ruled that the privilege did not apply because "there was no showing through testimony presented that defendant felt he was constrained by any religious obligation to make the statement he made to Pastor Hamlin." (CP24). In its Findings of Fact and Conclusions of Law After Hearing Regarding Pastor Rich Hamlin, dated January 8, 1998, the trial court ruled that the "statute regarding a priest-penitent privilege protects the interests of and is held by the penitent," and, therefore, did not protect Pastor Hamlin. (CP67).

The court based its decision upon the only previous Washington appellate decision interpreting RCW 5.60.060(3), *State of Washington v. Buss*, 76 Wn. App. 780, 887 P.2d 920 (App. Ct. (Div. 1) 1995). The trial court interpreted *Buss* as setting this test: 1) whether the clergyperson was ordained; 2) whether the clergyperson considered the statement to be confessional in nature; and 3) whether the penitent felt "constrained by religious doctrine to make such a confession." (CP23-24). The trial court found the first two prongs were met; however, it ruled that the third prong was not met because there was no showing that the defendant felt "constrained by any religious obligation to make the statement he made to Pastor Hamlin." (Id.)

The trial court's third prong is a critical misreading of the actual language of RCW 5.60.060(3). The statute clearly is referring to the clergyperson's, not the penitent's, acting "in his or her professional character, in the course of

discipline enjoined by the church to which he or she belongs." The statute's pronouns "him or her," "his or her," and "he or she" plainly refer to "a member of the clergy or a priest" not to "a person making the confession." See, e.g., *Scott v. Hammock*, 133 F.R.D. 610 (D. Utah 1990), certified state law question aff'd, 870 P.2d 947, 950-951 (Utah 1994); *In re Swenson*, 183 Minn. 602, 605, 237 N.W. 589, 591 (Minn. 1931).

The trial court simply asked the wrong question. As the court of appeals correctly ruled, the correct question is whether the member of the clergy is acting in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs. As the record makes clear, Pastor Hamlin was acting in his professional character when he met with the defendant and was following a discipline enjoined by his church. (CP54-55). Indeed, the fact that the defendant had not met Pastor Hamlin prior to communicating with him actually reinforces the fact that Pastor Hamlin was acting in his professional capacity. The sole reason the defendant communicated with Pastor Hamlin was because Pastor Hamlin was a clergyperson. (CP16).¹

¹The emphasis of the court below on the fact that the defendant did not have a prior relationship with Pastor Hamlin is troubling. The Supreme Court has determined that the free exercise of religion protects the right of persons to change their religious beliefs, including conversion to religious beliefs. In *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144, 107 S. Ct. 1046, 1051, 94 L.Ed.2d 190, 199 (1987), the Supreme Court refused to "single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment." Furthermore, a person may "claim the protection of the Free Exercise Clause" even if one is not "responding to the commands of a particular religious organization." *Frazee v. Ill. Dept. of Empl. Secur.*, 489 U.S. 829, 834, 109 S.Ct. 1514, 1517-18, 103 L.Ed.2d

The language "in the course of discipline enjoined" by the church is traditional language common to many state laws protecting the clergy privilege. In the leading case interpreting the language, *In re Swenson*, 183 Minn. at 605, 237 N.W. at 591, the Minnesota Supreme Court wrote in a passage particularly applicable to this case:

The statute has a direct reference to the church's "discipline" of and for the clergyman and as to his duties as enjoined by its rules or practice. It is a matter of common knowledge, and we take judicial notice of the fact, that such "discipline" is traditionally enjoined upon all clergymen by the practice of their respective churches. Under such "discipline" enjoined by such practice all faithful clergymen render such help to the spiritually sick and cheerfully offer consolation to suplicants who come in response to the call of conscience....

It is important that the communication be made in such spirit and within the course of "discipline," and it is sufficient whether such "discipline" enjoins the clergyman to receive the communication or whether it enjoins the other party, if a member of the church, to deliver the communication. Such practice makes the communication privileged, when accompanied by the essential characteristics, though made by a person not a member of the particular church or of any church. (Emphasis added.)

See also, *Hammock(I)*, 133 F.R.D. at 617-618; *Hammock(II)*, 870 P.2d at 955n.4.

The Buss decision, upon which the trial court placed total reliance, can be distinguished from the case before this Court. The Buss court ruled that

RCW 5.60.060(3) did not apply to its factual context because, in that case, the defendant's communication was with a "family minister" who was not an ordained member of the clergy. Because the "family minister" was not ordained, she did not meet the requirement of RCW 5.60.060(3), which protects a "member of the clergy or a priest." According to the Buss court, the lack of ordination was "[t]he dispositive issue." 76 Wn. App. at 784, 887 P.2d at 923.

The distinction between ordained clergy and non-ordained church counselors was also critical in *State of Washington v. Motherwell*, 114 Wash. 2d 353, 788 P.2d 1066 (1990). In *Motherwell*, the Washington Supreme Court found that a child abuse reporting statute applied to non-ordained religious counselors but did not apply to ordained clergy counseling in their role as clergy. 114 Wash. at 360, 788 P.2d at 1069. Indeed, the Buss Court insisted that the definition of "clergy" should be "coextensive" for both the reporting statute at issue in *Motherwell* and the clergy privilege under RCW 5.60.060(3). 76 Wn. App. at 785, 887 P.2d at 923. The Buss court reasoned:

Both schemes regulate the clergy's rights and obligations to maintain the confidences of their penitents' confessions. We see no reason to adopt inconsistent definitions of "clergy" for such similar purposes.

Id. Thus, the Buss decision does not control the factual context of this case, in which an ordained clergyperson claims the privilege.

To the extent the Buss court based its decision on its belief that the privilege did not apply because the defendant in that case was not "constrained by her religious doctrines to disclose her criminal actions," 76 Wn. App. at 786, 887 P.2d at 924, it read the "course of discipline" language incorrectly as already explained above. The court of appeals below "disagree[d] with the Buss court's

interpretation of the clergy member privilege, and decline[d] to follow its reasoning." State v. Martin, 91 Wn. App. 621, 627, 959 P.2d 152, 156 (1998).

The Buss reading of the privilege statute is contrary to the plain language of the statute, which refers to the clergyperson's discipline not the penitent's, as well as the traditionally accepted understanding of the language. Importantly, as the Buss court itself noted, such an interpretation of RCW 5.60.060(3) creates unnecessary constitutional problems by creating a scheme of preference among different religions that violates the Establishment Clause. 76 Wn. App. at 786, 887 P.2d at 924.

II. The Court of Appeals Avoided the Unnecessary Conflict with the Establishment Clause Created by the Trial Court's Mistaken Interpretation of RCW 5.60.060(3).

A statute "ought not be construed to violate the Constitution if any other possible construction remains available." NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500, 99 S.Ct. 1313, 1318, 59 L.Ed.2d 533, 541 (1979)(construing federal statute to avoid free exercise and establishment clause problems). See Hammock(I), 133 F.R.D. at 619 (clergy privilege statute essentially identical to RCW 5.60.060(3) construed to avoid free exercise and establishment conflicts). The court of appeals' proper reading of RCW 5.60.060(3) avoided two distinct Establishment Clause violations created by the trial court's mistaken construction.²

²In its Response to Amicus Curiae Brief in the court below, the State misunderstood the amici's argument regarding the constitutionality of RCW 5.60.060(3). Amici fully appreciate that RCW 5.60.060(3) is a constitutionally permissible, if not mandatory, accommodation of religious liberty. The Establishment Clause problems are caused not

A. For the Government to Imprison Ordained

Clergy of Some Faiths for Refusal to Testify while According the Privilege Not to Testify to Ordained Clergy of Other Faiths Violates the Establishment Clause Prohibition on Preference among Religious Denominations.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S. Ct. 1673, 1683, 72 L.Ed.2d 33, 47 (1982). Any preference among religions requires strict scrutiny of the government's action. 456 U.S. at 246, 102 S. Ct. at 1684, 72 L.Ed.2d at 49.

Thus, the State's proposed interpretation of RCW 5.60.060(3) must be subjected to strict scrutiny for violation of the Establishment Clause because the State aims to protect the ordained clergy of some denominations from testifying while allowing ordained clergy of other denominations to be jailed for refusal to testify. As the Buss court itself conceded, this interpretation of RCW 5.60.060(3) could be "characterized as...perhaps unconstitutionally preferential to certain religions," that is, favoring the relatively few "denominations with formal confession requirements." 76 Wn. App. at 786-787, 887 P.2d at 924 (quotation marks and citation omitted).

Similarly, in its recent decision in *Mockaitis*

by the plain language of RCW 5.60.060(3) but by the State's mistaken construction of the statute, which would give preferential treatment to clergypersons of a few religions while leaving clergypersons of many other religions vulnerable to imprisonment. Therefore, the proper remedy is not to strike down RCW 5.60.060(3) but to accord it the proper interpretation that avoids constitutional problems.

v. Harclerod, 104 F.3d 1522 (9th Cir. 1997), the Ninth Circuit rejected a stipulation by government officials that they would not tape conversations between Catholic clergy and inmates at a jail as "far from satisfactory," in part, because the stipulation "appears to accord a blanket immunity to conversations with Catholic clergy not extended to clergy of other faiths." Id. at 1531.

As both the federal district court and the Utah Supreme Court ruled in Hammock, narrowly construing the terms of a clergy privilege statute would raise Establishment Clause denominational preference problems:

If the statute were construed [narrowly] it would respect some religious establishments but exclude others from its protection without any demonstrable justification. This construction would raise a distinct concern about respecting an establishment of religion by advancing one religion and inhibiting another.

133 F.R.D. at 619. See Hammock(II), 870 P.2d at 954. See also, In re Grand Jury Investigation, 918 F.2d 374, 385 n.14 (3d Cir. 1990)("restricting the privilege to Roman Catholic penitential communications raises serious first amendment concerns"); In re Swenson, 183 Minn. at 604, 237 N.W. at 590 (interpreting clergy privilege statute broadly because the legislature could not have intended the privilege to apply only to the Roman Catholic Church).

Recently, the Montana Supreme Court specifically rejected the narrow Buss interpretation in favor of the broader Hammock interpretation. The Montana Supreme Court explained:

[I]n order to minimize the risk that Sec. 26-1-804, MCA [the Montana clergy privilege statute], might be discriminatorily applied because of differing judicial perceptions of a

given church's practices or religious doctrine, and in order to least interfere with the federal and Montana constitutional protections of religious freedom referred to above, we conclude that Utah's broader interpretation of the clergy-penitent privilege as set forth in Scott [v. Hammock], 870 P.2d 947, is the better view [than Buss], and we adopt that approach. State of Montana v. MacKinnon, 1998 Mont. 78, 957 P.2d 23, 28 (Mont. 1998).

The plain language of RCW 5.60.060(3) specifies "a member of the clergy or a priest," which in itself indicates that the privilege extends beyond protecting only faiths requiring sacramental confessions to a priest. See, e.g., Hammock(II), 870 P.2d at 951; In re Swenson, 183 Minn. at 604, 237 N.W. at 590. Amici respectfully suggest that the line drawn in Motherwell and Buss between ordained and unordained clergy sufficiently protects against abuse of the privilege, while avoiding preferentialism among religious sects that would violate the Establishment Clause.

B. The Process of Government Officials Sifting through Religious Doctrine of Various Denominations in Order to Determine Which Ordained Clergy Are Protected by the Privilege Creates an Excessive Entanglement between Government and Religion that Violates the Establishment Clause.

Government officials, including prosecutors and even judges, are not to be sifting through religious doctrine to determine the degree to which formal confession is required by a denomination. In Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 450, 89 S.Ct. 601, 607, 21 L.Ed.2d 658, 666 (1969), the Supreme Court stated that "the First Amendment forbids civil courts" from "determin[ing] matters at the very core of a religion--the interpretation of particular church doctrines and the importance of

those doctrines to the religion." Again, in *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), the Supreme Court condemned government officials' delving into religious doctrine, stating:

Merely to draw the distinction [between religious worship and other religious speech] would require the university--and ultimately the courts--to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

454 U.S. at 269-270n.6, 102 S. Ct. at 274n.6, 70 L.Ed.2d at 447n.6 (citations omitted). See also, *Rosenberger v. University of Virginia*, 515 U.S. 819, 845, 115 S.Ct. 2510, 2524, 132 L.Ed.2d 700, 726 (1995); *Lee v. Weisman*, 505 U.S. 577, 616-617, 112 S.Ct. 2649, 2671, 120 L.Ed.2d 467, 500 (1992)(Souter, J., concurring); *Employment Division v. Smith*, 494 U.S. 872, 889-890 n.5, 110 S.Ct. 1595, 1606n.5, 108 L.Ed.2d 876, 892n.5 (1990); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336, 107 S.Ct. 2862, 2868, 97 L.Ed.2d 273, 283 (1987); *Fowler v. Rhode Island*, 345 U.S. 67, 70, 73 S.Ct. 526, 527, 97 L.Ed. 828, 831 (1953).

Similarly, the Washington Supreme Court has also refused to allow government officials to sift through and interpret religious doctrine. See *First Covenant Church v. City of Seattle (II)*, 120 Wash.2d 203, 221-222, 840 P.2d 174, 184-185 (1992)(condemning ordinance that permitted government officials "to oversee and challenge...what is liturgy and what is a valid religious purpose" as "foster[ing] exactly the kind of religious entanglement the constitution seeks to avoid"). See also, *Munns v. Martin*, 131 Wash.2d 192, 207, 930 P.2d 318, 324-325 (1997)(condemning "unjustified governmental interference in religious matters of the Church"), quoting *First United*

Methodist Church of Seattle v. Seattle Landmarks Preservation Board, 129 Wash.2d 238, 247, 916 P.2d 374, 378 (1996)(citation omitted);id., 129 Wash.2d at 250-251, 916 P.2d at 380; Presbytery of Seattle v. Rohrbaugh, 79 Wash.2d 367, 373, 485 P.2d 615, 619 (1971)(courts not to decide intrachurch disputes involving doctrinal issues).

III. Forcing Pastor Hamlin to Choose Between Fulfilling His Religious Duties or Serving Time in Jail Violates Both the Federal and Washington State Constitutional Protections of Free Exercise of Religion.

While the free exercise analyses under the United States Constitution and the Washington State Constitution at times intersect, they are quite distinct analyses and must be approached separately under Washington Supreme Court precedent. First Covenant Church v. City of Seattle (II), 120 Wash.2d at 223-226, 840 P.2d at 185-187. Amici will focus on the independent protection of free exercise under the Washington State Constitution; however, amici fully agree with the Brief of Appellant Rich Hamlin in the court of appeals and Pastor Hamlin's Supplemental Response in this Court that both the federal and state constitutional protections of free exercise of religion protect Pastor Hamlin from being forced to testify as to the communications made to him by the defendant.

The Washington State Constitution provides even broader protection for the free exercise of religion than does the federal free exercise clause. As the Washington Supreme Court explained in First Covenant Church(II), 120 Wash.2d at 224, 840 P.2d at 186 (1992):

The language of our state constitution is significantly different and stronger than the federal constitution. The First Amendment limits government action that "prohibits" free exercise. Our state provision "absolutely" protects freedom of

worship and bars conduct that merely "disturbs" another on the basis of religion. Any action that is not licentious or inconsistent with the "peace and safety" of the state is "guaranteed" protection. (Emphasis added.)

As the Washington Supreme Court explained in First Covenant (II), the state constitutional protection of free exercise of religion is stronger than its federal counterpart in several important, practical ways. First, "art. I, sec. 11 grants Washington citizens affirmative rights that are absolute." 120 Wash.2d at 235-36, 840 P.2d at 192 (Utter, J., concurring). Therefore, a court "should start with the assumption that government may not interfere with sincerely held religious belief and religious practice." Id.

Secondly, and particularly germane to this case, a "facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate article 1, section 11, if it indirectly burdens the exercise of religion." 120 Wash.2d at 226, 840 P.2d at 187 (emphasis added). Thus, determining whether the prosecutor's decision to compel Pastor Hamlin to testify is a neutral or generally applicable law is unnecessary. Even if the government action were neutral and generally applicable for purposes of federal free exercise analysis under Employment Division v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990), the action nonetheless violates the state constitutional protection of free exercise of religion under First Covenant (II) because it at least indirectly burdens Pastor Hamlin's free exercise of religion. It is hard to imagine a more direct, let alone indirect, burden on Pastor Hamlin's free exercise of religion than forcing him to choose between fulfilling his religious duties or being imprisoned. Strict scrutiny of the government's attempt to coerce his testimony, therefore, is required under Washington

State constitutional analysis.

Thirdly, the standard the State must meet to demonstrate a compelling state interest to justify infringement of free exercise of religion is higher under the state constitution than it often is in federal free exercise cases. As Justice Utter noted in his concurring opinion, Art. 1, sec. 11 "expressly limits the governmental interests that may outweigh the otherwise absolute right to religious liberty," contrasting the federal free exercise clause as having "been interpreted to allow varied government interests to justify such an imposition." 120 Wash.2d at 236, 840 P.2d at 192 (Utter, J., concurring)(citation and quotation marks omitted).

The Washington Supreme Court has defined a compelling interest as "prevent[ing] a clear and present, grave and immediate danger to public health, peace, and welfare." 120 Wash.2d at 226-227, 840 P.2d at 187 (quotation marks and citations omitted). The protection is quite broad, safeguarding "[a]ny action that is not licentious or inconsistent with the 'peace and safety' of the state." 120 Wash.2d at 224, 840 P.2d at 186.

Although at first it might seem that compelling testimony in a criminal proceeding would qualify as a compelling state interest, upon further reflection it seems clear that the prosecutor cannot demonstrate the degree of "compellingness" required by the Washington Supreme Court precedent. Through its legislation, the State itself has subordinated important interests to protecting communications with ordained clergy from disclosure. For example, RCW 9.73.095 permits the department of corrections to record inmate conversations under certain circumstances but requires the department to "recognize the privileged nature of confessions made by an offender to a member of the clergy or a priest in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs as provided in RCW 5.60.060(3)." RCW

9.73.095(4). Cf., *Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997)(prison officials prohibited from taping prisoner's confession to priest).

Furthermore, the State has exempted ordained clergy from the statutory requirement to report suspected cases of child abuse to the state authorities. *State of Washington v. Motherwell*, 114 Wash. 2d 353, 788 P.2d 1066 (1990). The State itself, therefore, has determined that protecting clergy from compelled disclosure of child abuse situations outweighs the State's important interest in receiving reports of child abuse even when further harm to the child arguably could be prevented.

The fact that the clergy privilege is but one of several privileges exempting various professions from testifying undermines the State's claim that it must have, in all situations except compulsory sacramental confessionals, a clergy person's testimony. If the State frequently exempts testimony from several other professions, as delineated in RCW 5.60.060, then surely it can forego the testimony of ordained clergy fulfilling their religious duties pursuant to their constitutional right of free exercise of religion.

Finally, "[t]he State also must demonstrate that the means chosen to achieve its compelling interest are necessary and the least restrictive available." *First Covenant(II)*, 120 Wash.2d at 227, 840 P.2d at 187. Indeed, the Washington Supreme Court has emphasized that the government should "make every effort to accommodate religious freedom, rather than uncompromisingly enforce" its policies. 120 Wash.2d at 227, 840 P.2d at 188. As in *Mockaitis*, the prosecutors can gather evidence by the least restrictive means of "good police work" rather than forcing a clergy person to violate his religious obligations. 104 F.3d at 1530.

Conclusion

For the above reasons, amici urge this Court to affirm the Court of Appeals.

Respectfully submitted this February 16, 1999,

Steven T. McFarland, WSBA #11111
Counsel of Record

Kimberlee Wood Colby
CHRISTIAN LEGAL SOCIETY
Center for Law & Religious Freedom
4208 Evergreen Lane, Suite 222
Annandale, Virginia 22003
(703) 642-1070 ext. 3501

APPENDIX

STATEMENTS OF INTEREST OF AMICI CURIAE

Amicus the Christian Legal Society ("CLS"), through the Center for Law and Religious Freedom (the "Center"), its legal advocacy and information arm, has since 1975 argued in state and federal courts throughout the nation for the protection of religious speech, association and exercise. Founded in 1961, CLS is an ecumenical professional association of 4,500 Christian attorneys, judges, law students, and law professors, with chapters in every state and at 85 law schools.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise and the autonomy of religious institutions. In addition, the CLS Center has filed briefs amici curiae on behalf of many religious denominations and civil liberties groups in virtually every case before

the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . ."

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious liberty.

The Washington State Catholic Conference ("WSCC") is the common voice of the Archbishop of Seattle, the Bishop of Spokane, and the Bishop of Yakima.

The mission of the Washington State Catholic Conference is to advocate for the Church's public

policy agenda statewide and to facilitate pastoral efforts in the Catholic community, which consists of over 500,000 Catholics in the State of Washington. The Conference also enables ecumenical and interfaith dialogue and action.

Associated Ministries of Tacoma, Washington, is an association of over 200 churches, organizations, groups and interfaith partners in Pierce County. It serves a broader constituency of over 600 congregations and well in excess of 1000 clergy. While it does not wish to involve itself in the details of the case, it is very much concerned about the ramifications of requiring the pastor to testify regarding the contents of a sacrosanct conversation. The determination of what is "sacrosanct conversation", "confession" or an act of "reconciliation" is the role of the church, not the state. Forcing a pastor to either go to jail or violate his religious vocation is not appropriate.

Denominations of Member Congregations of Associated Ministries:

African Methodist Episcopal
American Baptist
Apostolic Pentecostal
Assemblies of God
Christian--Disciples of Christ
Christian--Independent
Christian Methodist Episcopal
Church of the Brethren
Church of God in Christ
Congregational--NACCC
Episcopal
Evangelical Friends
Evangelical Lutheran Church in America
Korean Presbyterian

Lutheran Church-Missouri Synod
National Baptist Convention of America
National Baptist Convention, USA Inc.
Pentecostal
Presbyterian Church (U.S.A.)
Religious Society of Friends
Reorganized Church of Jesus Christ--LDS
Roman Catholic
Southern Baptist Convention
United Church of Christ
United Methodist
Universal Fellowship of MCC

The National Association of Evangelicals is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 43,500 churches from 74 denominations and serves a constituency of approximately 27 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

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 174 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 Rev. Hamlin, 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.

Amicus does not believe that RCW 5.60.060(3) requires ordination before the act's protection will apply, since a great many religious faiths do not bestow ecclesiastical authority by way of ordination. Surely the legislature did not mean to so limit the provisions of RCW 5.60.060(3). For to have done so would surely violate the provisions of the Establishment Clause of the First Amendment of the United States Constitution. However, since the trial court has based its decision upon the reasoning of Buss and Motherwell, Amicus has elected to address the issue and demonstrate that both cases are distinguishable from the present case.

The Church of Jesus Christ of Latter-day Saints is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 10 million with more than 24,000 congregations located throughout the world. Church membership in Washington exceeds 211,000.

Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshipping Almighty God according to the dictates of our own conscience and allow all men the same privilege let them worship how, where, or what they may." Article of Faith, No. 11.

Central to the Church's teachings is the atonement of Christ for forgiveness of sin.

Confidential religious counseling is often a crucial component of this forgiveness, and Church doctrine absolutely requires that clergy "keep confidential all information members give to them in confessions and interviews." General Handbook of Instruction, Page 10-2.

American Jewish Congress is an organization of American Jews founded in 1918. It has a longstanding position against statutes which favor one faith over another, as does the interpretation of the priest-penitent privilege advanced by the court below.

The Evangelical Covenant Church is a denomination of approximately 90,000 adult members in the United States and Canada, with approximately 6,200 adult members in the State of Washington. It operates 41 churches, two retirement homes, a conference center and a youth camp in the State of Washington. Like many Protestant churches, it does not impose on its members specific rules concerning confessional communications. However, in 1975, the annual meeting of the church adopted a resolution, which states in pertinent part:

Whereas, it has long been recognized that one of the ministries of pastors in our churches is to counsel with persons, and give advice, comfort, and guidance; and

Whereas, Christian ministers can be singularly effective in witnessing to the gospel of Christ by assisting people with anxieties, guilts, fears, doubts, and despair; and

Whereas, the performance of these ministries both to individuals and groups often requires a sense of complete trust that what is said will be kept private and a confidential communication; be it

Resolved, that it is the policy of The Evangelical Covenant Church that their pastors shall not divulge any information disclosed to them in confidence during counseling or while giving any person advice, comfort, or guidance in their capacity as ministers;

The Evangelical Covenant Church has an interest in protecting the rights and expectations of residents of the State of Washington to seek confidential counsel from clergy, and to protect clergy who receive confidential communications.

Focus on the Family is a California religious non-profit corporation committed to strengthening the family in the United States and abroad. Focus on the Family distributes a radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and other Western countries. Focus on the Family publishes and distributes Focus on the Family magazine and other literature that is received by more than 2 million households each month. From its widespread network of listeners and subscribers, Focus on the Family receives an average of more than 33,000 letters each week and represents Americans numbering in the hundreds of thousands.

Family Research Council, Inc. (FRC), is a non-profit research and educational organization dedicated to preserve and support traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians.

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principle of religious liberty. The organization's

objectives and purposes include promoting constitutional and statutory protections for the free exercise of religion and opposing any encroachment by the government which would inhibit the free exercise of religion. The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in church affairs, some in official church positions, and some as lay leaders, but all recognize the importance of the mission and role played by churches and their pastors.

Members of the Council on Religious Freedom include a number of ordained church ministers, and the Council has a high regard for the need to respect and protect, as a religious matter, the communications that take place between a pastor and a penitent. To accord this privilege to only a certain category of religious leader, and to deny it to others whose theology of confession and repentance differs from that first group, is to unconstitutionally discriminate among religions. The Council is made up of Christians who generally do not have a doctrine of "formal confession requirements." Thus, the Council has a strong interest in having the Washington Statute regarding clergy privilege read broadly enough to include its tradition of pastoral counseling and confession.

CERTIFICATE OF SERVICE

I certify that I caused to be delivered, by United Parcel Service, next-day delivery, postage pre-paid, a copy of the foregoing Brief Amici Curiae, on February 16, 1999, to the following:
Ms. Kathleen Proctor
Office of Prosecuting Attorney
930 Tacoma Avenue South
Room 946
County-City Building
Tacoma, Washington 98402-2171
(253) 798-7400

Mr. Gary Hood
Gordon, Thomas, Honeywell, Malanca
Peterson & Daheim PLLC
1201 Pacific Avenue
Suite 2200
Tacoma, Washington 98401
(253) 572-5050

Mr. Steven T. O'Ban
Ellis, Li & McKinstry
3700 First Interstate Center
999 Third Avenue
Seattle, Washington 98104-4006
(206) 682-0565

222

Kimberlee Wood Colby
CHRISTIAN LEGAL SOCIETY
Center for Law & Religious
Freedom
4208 Evergreen Lane, Suite
Annandale, Virginia 22003
(703) 642-1070 ext. 3501
Counsel for Amici Curiae