

The amicus brief, Children of Iskcon et al. v. Iskcon et al., 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 District Court for the Northern District of Texas, Dallas Division on May 29, 2001.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
TEXAS, DALLAS DIVISION

Children of ISKCON, et al.,  
Plaintiffs,

v.

ISKCON, D/B/A THE INTERNATIONAL  
SOCIETY FOR KRISHNA CONSCIOUSNESS,  
et al., Defendants

Civil Action No. 3-00-CVI254-L  
Hon. Sam A. Lindsay, Judge

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae on Behalf of American Jewish Congress, Baptist Joint Committee on Public Affairs, Christian Legal Society, Christian Life Commission of the Baptist General Convention of Texas, The Church of Jesus Christ of Latter-Day Saints, The Evangelical Covenant Church, The First Church of Christ, Scientist, General Conference of Seventh-day Adventists, Clifton Kirkpatrick as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A) National Council of Churches of Christ in the United States, and United States Catholic Conference, in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Of Counsel:  
Douglas Laycock -  
727 E. 26th Street  
Austin, TX 78705 512-232-1341

Victor G. Rosenblum

Northwestern University School of Law  
357 East Chicago Avenue  
Chicago, IL 60611  
312-503-8443

Counsel of Record:  
Edward McGlynn Gaffney, Jr .  
Valparaiso University School of Law  
656 Greenwich Street  
Valparaiso, IN 46383  
219-465-7860  
FAX: 219-465-7872  
edward.gaffney@valpo.edu

#### MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Local Rule 7.2 of this court, Amici curiae respectfully move for leave to file the attached brief amicus curiae. This motion contains the statement of interest of the amici curiae. We are religious communities or legal entities representing the interests of our respective faith communities. Each community has different structures and roles, reflecting differences in the polity (internal structure and allocation of responsibility) of our denominations. These governance structures - congregational, connectional, hierarchical, or some other model - reflect the self-understandings of each particular group of believers about our relations with each other, our leaders, and God. These beliefs are rooted in our diverse interpretations of our Scriptures over centuries. That we call ourselves Jews or Christians, Baptists or Roman Catholics, or members of any other religion reflects a personal choice to be in a covenantal or communal relationship with others who share our respective beliefs and commitments.

We have filed amicus briefs in litigation affecting religious freedom frequently in the past. We do so in this case because it represents a novel attack upon religious communities. No federal court has ever applied the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Section 1961 et seq., to a religious community. As we argue in the attached brief, nothing in the text of the statute or the legislative history surrounding the adoption of this law suggests that Congress intended to confer jurisdiction upon federal courts in order to eliminate a vulnerable and unpopular religious minority.

This case originally involved allegations of sexual abuse by some members of the International Society For Krishna Consciousness (ISKCON) entrusted with the education of children. Amici do not have any knowledge of the truth of these allegations, nor are we speaking to any factual issues in this case. We all unequivocally condemn all forms of sexual, physical, and emotional abuse whenever such abuse occurs. All of the amici with pastoral responsibilities have, in our own ways, sought to deal with it, and to heal its devastating effects. Amici file this brief because proper resolution of the serious threat to religious freedom posed by

the RICO claim in the Amended Complaint is critical to the autonomy of churches, synagogues, mosques, and other religious organizations.

Religious freedom is fragile enough without adding the threat of destruction by lawsuit under a statute designed to eliminate organized crime, not organized religion. The attempted use of RICO to target an entire religious community is an outrage against the First Amendment. all national organizations representing the interests of their respective faith communities.

James Madison wisely counselled in his famous Memorial and Remonstrance against the proposal to support ministers through a general assessment or tax to be laid upon all Virginians: "it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle." James Madison, Memorial and Remonstrance, as cited in *Everson v. Board of Education*, 330 U.S. 1, 64 (1947) (Appendix to Opinion of Rutledge, J., dissenting). In filing this brief at this stage of the proceedings in this case, we follow Madison's urging not to wait "till usurped power had strengthened itself by exercise, and entangled the question in precedents," but to recognize the consequences of applying RICO to religious communities as an unprincipled violation of religious freedom that should be opposed at the outset.

In matters of religious freedom, amici seek for all faiths the same constitutional protections we seek for ourselves. The particular statement of interest of each amicus is included in Appendix A to the attached brief.

Respectfully submitted,

Of Counsel :

Douglas Laycock  
727 E. 26th Street  
Austin, TX 78705  
512-232-1341

Victor G. Rosenblum  
Northwestern University School of Law  
357 East Chicago Avenue  
Chicago, IL 60611  
312-503-8443

Edward McGlynn Gaffney, Jr.

Valparaiso University School of Law  
656 Greenwich Street  
Valparaiso, IN 46383  
219-465-7860  
FAX: 219-465-7872

BRIEF AMICUS CURIAE OF AMERICAN JEWISH CONGRESS et al.  
IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER  
JURISDICTION

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BRIEF AMICUS CURIAE OF AMERICAN JEWISH CONGRESS et al.  
IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER  
JURISDICTION

Questions Presented

1. Whether the court may impose broad enterprise liability upon an entire religious community under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Section 1961 et seq.
2. Whether the religious practice of seeking charitable contributions may be construed as a component of a predicate crime under RICO.
3. Whether Congress clearly expressed an affirmative intention to allow the application of RICO to religious communities.

Interests of Amici Curiae

Amici curiae are religious communities or legal entities representing the interests of our respective faith communities. The general interests of the amici are set forth in the attached motion for leave to file a brief amicus curiae. The particular interests of each amicus are set forth in Appendix B of this brief.

Summary of Argument

The defendants have offered several reasons in support of their motion to dismiss for want of subject matter jurisdiction. Amici do not repeat those arguments in this brief, but urge two additional reasons for granting this motion. First, the assertion of subject matter jurisdiction under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. sections 1961 et seq., invites the court down a path into two grave constitutional errors:

(a) the imposition of enterprise liability on an entire religious community , based solely upon allegations against individual members of this community, and (b) characterizing the venerable religious practice of charitable solicitation as though it were a criminal "racket." Both of these results are emphatically prohibited by the First Amendment. Under NAACP v. Claiborne Hardware Co.,458 U.S. 886 (1982), the court may not impose enterprise liability upon an entire religious movement for all torts and crimes alleged to have been committed decades ago by members of this religious community. Under Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, Florida,508 U.S. 520 (1993), the court may not permit the plaintiffs to target an

unpopular religious movement for destruction. Under *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Larson v. Valente*, 456 U.S. 228 (1982), the court may not permit the plaintiffs to characterize the protected activity of charitable solicitation as though it were a criminal "racket" for purposes of RICO jurisdiction.

Second, the court need not embark upon the mischievous adventure to which the plaintiffs invite the court, for traditional methods of statutory interpretation would also avoid this result. At the very least, the theory advanced by the plaintiffs "would give rise to serious constitutional questions." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). Under *Catholic Bishop of Chicago*, this court may not expand the application of RICO to a religious community unless there is an "affirmative intention of Congress clearly expressed" to do so. *Id.* Far from authorizing the use of RICO in this way, the proponents of RICO emphatically declared that the new statute would have to be applied in a judicious, careful way that did not interfere with precious and delicate rights secured under the First Amendment.

The theory of RICO is that organized crime could be diminished by taking away its profitability. To achieve this goal, Congress imposed vicarious liability upon all members of a criminal conspiracy broadly defined as a "criminal enterprise." To understand RICO well is also to understand why Congress never intended this statute to be used as a weapon to destroy whole religious communities, and why no court - consistently with the First Amendment - may allow the use of this statute in the manner contemplated by the plaintiffs.

#### ARGUMENT

I. The application of the federal racketeering statute to a bona fide religious community would entail serious violations of the First Amendment.

This case represents a novel attack upon religious communities. What plaintiffs seek from this court - the application of RICO to a religious community - is completely unprecedented. The only federal court that ever expressed an opinion on a similar complaint carefully construed RICO, and rejected claims brought under the statute against the Church of Scientology. *Van Schaick v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125 (D.Mass. 1982) (if RICO claim is brought against a religious group, the statute should be construed narrowly).

Amici urge that the court grant the motion to dismiss for want of subject matter jurisdiction. As this court has ruled, the procedural effect of this motion is that the burden shifts to the plaintiff to demonstrate that the court possesses subject matter jurisdiction to regulate religious communities with the severity contemplated by the federal racketeering statute. *Rogers v. United States Postal Service*, 1999 U.S. Dist. LEXIS 1122, \*4 (ND. Tex. 1999); see also *McDaniel v. United States*, 899 F. Supp. 305, 307 (ED. Tex. 1995), *aff'd*, 102 F.3d 551 (5th Cir. 1996); *Paterson v. Weinberger*, 644 F.2d 521 (5th Cir. 1981); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980); *Bryce v. Episcopal Church in the Diocese of Colorado*, 121 F. Supp. 2d 1327 (D. Colo. 2000). A federal court,

moreover, is obliged to ascertain whether it has subject matter jurisdiction and must on its own motion dismiss an action at any point during the proceeding when the court appears to lack subject matter jurisdiction. See, e.g., *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988); on remand, 885 F.2d 1020 (2d Cir. 1989) (dismissing for lack of standing).

The unconstitutionality of the plaintiffs' attempt to have this court impose enterprise liability upon a religious community becomes clear when focus is placed both on the defendants they have sued and the on the activity that the plaintiffs imagine to constitute a predicate offense under RICO. We focus on the collective character of the defendants in Part I.A, and on the venerable practice of charitable solicitation in Part I.B.

A. The court may not impose enterprise liability upon a religious movement or upon its members simply by virtue of their fellowship with other member of the religion.

By invoking RICO, plaintiffs seek to impose severe sanctions - including treble damages and attorneys fees - upon all members of ISKCON, a form of ancient Hindu religion whose bonafides is well established in the case law and is expressly acknowledged by the plaintiffs. The broad sweep of the remedy they seek would, if allowed by this court, fall on those whose connection to the alleged wrongdoing comes only by virtue of their membership in the church.

A religious community is not organized to commit wrongs on its children or anyone else. Whether there are wrongdoers in the institution itself - a point on which the amici take no position- does not trigger liability under RICO in every part of the institution and every member simply by virtue of their religious affiliation. Enterprise liability and religious freedom are concepts on a collision course. They cannot be harmonized without destroying one or the other. See, e.g., Mark E. Chopko, "Ascending Liability of Religious Entities for the Actions of Others," 17 *American J. Trial Adv.* 289, 300-09 (1993); William W. Bassett, II *Religious Organizations and the Law* 7:50-51 (1997).

In RICO terms, the ISKCON entities sued here did not authorize, aid, abet, or ratify any of the conduct that the plaintiffs complain of. In short, there is no basis for holding them vicariously liable under RICO for acts they did not commit. Vicarious liability cannot be created merely by calling a church a "criminal enterprise" or by calling ancient and hallowed religious practices "racketeering. "

Religious communities have a variety of ways of governing themselves and of allocating the responsibility of their communal life. This is called the polity of a religious community, and is typically grounded in deep religious convictions beliefs beyond the ken of the government. For that very reason, the Supreme Court has repeatedly held that federal courts lack jurisdiction to adjudicate, let alone alter, the polity of a religious community. See, e.g., *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S.

440 (1969); and *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). The term of art in constitutional doctrine for this teaching is "church autonomy ." See, e.g., Douglas Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," 81 *Colum. L. Rev.* 1373 (1981).

No religious community may fairly be described as amenable to the "enterprise liability" concept that lies at the heart of RICO. For example, all synagogues and churches organized under the congregational polity confine the liability of a congregation to that congregation. It is equally true that churches that believe in some other form of connection between and among congregations (such as the presbyterial or the episcopal form) likewise maintain canonical rules or orders in their respective books of discipline that allocate responsibility and ecclesiastical supervision in a variety of ways. The courts must defer to those religious choices lest the government become involved through the liability system in setting and enforcing polity for America's religions. *Watson v. Jones*, *supra*. To apply enterprise liability under RICO to religious communities would, in effect, sweep aside centuries of traditional beliefs about how religious communities understand themselves and would entail the judicial revision of the polity of religious communities to fit the shifting theories of liability invented by plaintiffs' lawyers according to the circumstances of litigation. For that reason alone, the application of RICO to religious communities would be a grave constitutional error.

Even if the purpose of the application of RICO to religious communities could be deemed permissible as a legitimate undertaking of a secular government, its devastating effect in the circumstances of this case - the annihilation of an entire religious movement - is most emphatically forbidden by both of the mutually reinforcing provisions (nonestablishment and free exercise) of the Religion Clause. To assume even for a moment that the plaintiffs were able to achieve the result they seek - damages in excess of \$400 million imposed upon the entire religious community - is likewise to understand why that result is impermissible. It would require the forced sale of all assets of the community in all of its corporate forms throughout the nation, including the temples and monasteries of ISKCON, thus depriving all members of this movement of the opportunity to worship together according to their religious convictions. It is no part of the business of government to determine whether a religious community will survive.

The proposed application of RICO to a religious community would not only interfere impermissibly with the autonomy of ISKCON in determining who has responsibility for the schools that it administers. Allowing judicial interference with the polity of a religious community would also represent a severe threat to religious freedom generally. Every religious community that supports or operates religious schools gives the responsibility for the supervision of these schools to specific persons and entities. These supervisory persons and entities typically bear the risk of their own negligence. By the same token, other individuals and entities, or more generally the entire church-wide body and all of its members, do not typically bear that risk. Whether or not that allocation of responsibility seems wise or appropriate, a civil court is bound to accept the determinations by a religious community that assign a responsibility to a specific

judicatory or body. *Watson, supra*; *Milivojevich, supra*. The court may not look behind that choice, or say that it was wrong or erroneous, or follow the plaintiffs' theory and rewrite the polity to assign the responsibility elsewhere or to the entire church-wide body. In short, to follow the plaintiffs' path would inevitably lead to serious constitutional error.

There is an easy way for courts to avoid such error. By staying within the narrow confines of the design of the religious community's own polity and risk assessment, courts can dispose of extravagant claims such as the one presented here on traditional tort grounds that do not assign a duty of care where none exists.

This safer path, mandated by *Watson* and its progeny, is also supported by *NAACP v. Claiborne Hardware Co.*, 458 U.S. 88 (1982). Although *Claiborne Hardware* was not a case about the jurisdiction of a court, its holding relates directly to the "serious constitutional questions," *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979), discussed below in this section of the brief, and thus supports the motion to dismiss. In order to secure the associational freedom of the NAACP and the group's right and duty to protest against racist practices, the Court in *Claiborne Hardware* reversed a judgment imposing damages upon the civil rights organization for an economic boycott of white-owned businesses who refused to hire blacks. Without the knowledge or approval of the national NAACP, a local organizer of the boycott used threatening language to enforce the boycott, and some members of the local chapter of the NAACP occasionally crossed the line between vigorous speech and acts of violence against the persons and property of black patrons of the boycotted stores. Even though some members of the NAACP engaged in conduct that was not protected by the First Amendment, the Court refused to allow liability to be imposed either on the local chapter of the NAACP or on the national organization. *Claiborne Hardware*, 458 U.S., at 931.

*Claiborne Hardware* thus set clear limits on the imposition of vicarious or enterprise liability. The Court held that nonviolent boycott activity is constitutionally protected; that persons who participated in the boycott but who were not shown to have participated in violent activity or to have ratified it could not be held liable; that, absent a showing that violent activity followed the speeches, an organizer who made impassioned speeches containing references to violence against those who did not participate could not be held liable; that, liability could be imposed only for the damages resulting from the violent activity, not for all imaginable damages resulting from the associated boycott; and that there was no basis for imposing liability on the civil rights organization. 458 U.S., at 924.

*Claiborne Hardware* has direct application to this case. RICO may not be applied to the ISKCON entities and all of their devotees without imposing a crushing blow on an entire religious movement. As Justice Stevens noted, "To impose liability for presence at weekly meetings of the NAACP would - ironically - not even constitute 'guilt by association,' since there is no evidence that the association possessed unlawful aims. Rather, liability could only be imposed on a 'guilt/or association' theory. Neither is permissible under the First Amendment."

Claiborne Hardware Co., 458 U.S. at 925, cited with approval in *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J., concurring). No district court should allow RICO to become the vehicle for imposing enterprise liability upon an entire religious community.

Both under *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) and under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb, when the autonomy of a religious community is at issue, federal courts must search for the alternative to regulation of the community that is least restrictive of the religious freedom imperiled by the proposed regulation. Applied to this case, the imposition of the federal racketeering statute is by no means the least restrictive alternative. For example, the several states have ample means for punishing activity that offends against the peace and dignity of their communities that are less restrictive of religious freedom. Under applicable state law, both civil and criminal consequences may flow from any violations of the law of the sort alleged in the Amended Complaint. Hence there is no need for the federal judiciary to become the normal forum for disposing - at very high stakes -of sensational allegations against a vulnerable and small religious community.

RICO should not be allowed to replace or to compound appropriate sanctions for misconduct by a member of the clergy with disproportionate, draconian sanctions originally designed for reviled and truly dangerous activities of organized crime. In short, the plaintiffs seek to "up the ante" for alleged behavior that - if proven - is already prohibited and is punishable under state law, RICO does not supplant state jurisdiction over tort and crime. It would allow a state to treat as a local tort or crime, subject to garden variety civil and criminal sanctions, persons who assault or injure children committed to their care. In the view of the plaintiffs, however, the heavy arm of the federal anti-racketeering statute should be used to transform a religious community into a "criminal enterprise" because of the misconduct of a few members of the community and to impose sanctions upon the entire community, even when the community at large and the vast majority of its membership had nothing to do with the conduct complained of. Unless the court dismisses the complaint, it will become open season for ideological adversaries of religious communities to take their grievances into federal court merely by painting these communities as "criminal enterprises."

This is not a very healthy view of "Our Federalism." In *Younger v. Harris*, 401 U.S. 37(1971), and its progeny, the Court has repeatedly taught that the federal courts should normally stay their hand to allow state courts to exercise appropriate jurisdiction over matters of concern to the several states. The effect of accepting the plaintiffs' theory would be to march in an opposite direction, allowing exponential expansion of the jurisdiction of federal courts over matters that traditionally have been thought to be well within the province of state and local law. In a healthier view of federalism, federal courts should be wary of construing federal laws as impinging on the proper role of the states in punishing activity that offends against the peace and dignity of their communities. Various state laws such as the laws against assault address unlawful acts that may be committed by a member of a religious community. As the Court has suggested in another First Amendment context, there must be "room for play in the joints."

Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 669 (1970). There must be more to the law than the simplistic and stark choice that the plaintiffs urge here, between fully protected conduct on the one hand, or conduct subject to the severe penalties of civil RICO on the other. This is especially true since RICO was never intended by Congress to wreak vengeance against religious communities. See Part II below.

The applicability of *Claiborne Hardware* to RICO cases such as this one was explicitly discussed by two members of the Supreme Court. In his concurring opinion in *Scheidler*, supra, Joined by Justice Kennedy, Justice Souter noted that the very reason why an economic-motive requirement for RICO was unnecessary was that "legitimate free-speech claims may be raised and addressed in individual RICO cases as they arise.... Conduct alleged to amount to Hobbs Act extortion, for example, or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis." *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249t 264 (1994) (Souter, J.,concurring) (emphasis added). As Justice Souter put it, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *Id.* All the more so is dismissal appropriate in a case like this where plaintiffs have not made a serious attempt to establish a prima face case of commission of predicate acts for a RICO violation, and where - for the reasons stated above - the application of RICO would wreak havoc upon the First Amendment.

The judiciary is ever under a sworn duty of upholding fundamental constitutional values when they are imperiled by those who would attack religious communities by using a chain saw rather than a scalpel. The court should end the efforts of the plaintiffs to transform a statute written to put the Mafia out of business into a blunt weapon capable of destroying vulnerable, unpopular religious communities. The court should grant the motion to dismiss because it is the only feasible way of protecting the members of ISKCON throughout the country who are truly innocent of any of the injuries that the plaintiffs allege.

B. The religious practice of seeking charitable contributions may not be confused with a predicate crime under RICO.

This court should be especially sensitive to the unwarranted extension of RICO to target a vulnerable religious minority. See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, Florida*, 508 U.S. 520 (1993) (impermissible to single out an unpopular religious movement for a burden since the First Amendment forbids an official purpose to disapprove of a particular religion).

In *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court expressly ruled that the law governing charitable solicitation may not be used in a way that disadvantages the members of an unpopular religious movement. Justice Brennan wrote: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. Since this is so, there can be no legitimate governmental interest -let alone

the compelling governmental interest required both under *Employment Division v. Smith*, 494 U.S. 872,877 (1990) and under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb- in allowing a broad construction of RICO to effectuate a death sentence upon a religious community targeted for destruction.

Charitable solicitation is a form of religious exercise protected by the First Amendment and that protection is not diminished because charitable solicitation is associated with the distribution of sacred literature. See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). This court, moreover, has expressly ruled that the particular form of charitable solicitation practiced by devotees of ISKCON - the centuries-old practice of Sankirtan - is constitutionally protected conduct. *ISKCON v. State Fair*, 461 F. Supp. 719, 721 (N.D. Tex. 1978). So has every court, federal and state that has had occasion to consider this practice. *ISKCON v. Lee*, 505 U.S. 672, 677 (1992). *Heffron v. ISKCON*; 452 U.S. 640 (1981); *ISKCON v. Barber*, 650 F. 2nd 430, 443 (2nd Cir. 1981); *ISKCON v. Schmidt*, 523 F. Supp. 1303, 1308 (D.Md. 1981); *United States v. Silberman* 464 F. Supp 866,872 (M.D. Fla., 1979); *ISKCON; Inc., et al v. Evans*, 440 F. Supp. 414,420 (S.D. Ohio 1977); *ISKCON v. Conlisk*, 374 F: Supp. 1010 (N.D. III. 1973); *ISKCON v. City of New Orleans* 347 F. Supp. 945, 948 (E.D.La.1972); *ISKCON v. Commonwealth of Kentucky*, 610 S.W.2d 910,912 (Ky. Ct.App.1980); *Murphy v. ISKCON of New England Inc.*, and 571 N.E.2d 340 (Mass. 1991).

This ancient sacred practice may not be transformed into evidence of a predicate crime under RICO merely because the statute sought to remove the profitability of criminal enterprises. For example, one of these predicate crimes, extortion, has a precise legal meaning both in the common law and under the Hobbs Act, 18 U.S.C. §1951, and most emphatically cannot be read to mean the same thing as charitable solicitation. Neither should this court allow such a wildly expanded definition of predicate crimes to turn RICO into the weapon of choice for disgruntled former members of a religious community to clobber a vulnerable religious minority, saddling them with enormous litigation costs at the outset, and - if the plaintiffs were to prevail - with crippling treble damages and attorneys' fees.

II. Congress has never expressed any intention -let alone a clear, affirmative one - to allow the use of RICO to regulate religious communities.

The court can avoid the unconstitutional results implicated in the plaintiffs' deeply flawed theory by following a well established principle governing the prudent exercise of federal court jurisdiction. Normally a federal court will not decide a constitutional question if there is some other ground upon which to dispose of the case. Under this approach, it is unnecessary to decide all the questions raised by the parties if the courts resolution of these other issues would decide constitutional questions in advance of the necessity of doing so. See, e.g., *Kolender v. Larson*, 461 U.S. 352, 362, n. 10 (1983); *Burton v. United States*, 196 U.S. 283, 295 (1905); *Liverpool, N:Y: & P.S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33,39 (1885); see also *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936) (Brandeis, J.,concurring). At the very least, the theory advanced by the plaintiffs "would give rise to serious

constitutional questions." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490,501 (1979). Under *Catholic Bishop of Chicago*, this court may not expand the application of RICO to a religious community unless there is an "affirmative intention of Congress clearly expressed" to do so. *Id.* Far from authorizing the use of RICO in this way, the proponents of RICO emphatically declared that the new statute would have to be applied in a judicious, careful way that did not interfere with precious and delicate rights secured under the First Amendment.

The theory of RICO is that organized crime could be diminished by taking away its profitability. To achieve this goal, Congress imposed vicarious liability upon all members of a criminal conspiracy broadly defined as a "criminal enterprise." To understand RICO well is also to understand why Congress never intended this statute to be used as a weapon to destroy whole religious communities, and why no court - consistently with the First Amendment - may allow the use of this statute in the manner contemplated by the plaintiffs.

RICO is often spoken of in expansive terms. See, e.g., *United States v. Elliott*, 571 F. 2d 880 (5th Cir. 1978). One court has suggested that "the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise." *Schact v. Brown*, 711 F. 2d 1343,1360 (7th Cir. 1983). But *Schact* and two other cases citing this dictum, *United States v. Yonan*,800 F. 2d 164, 167 (7th Cir. 1986) and *United States v. Starnes*, 644 F. 2d 673t 679 (7th Cir.1981), are inapposite precisely because they did not involve any First Amendment activity, but are classic illustrations of criminal acts that Congress intended as predicate acts under RICO: bribing assistant state's attorney to influence disposition of cases, arson, and insurance fraud. None of these acts - bribery, arson, or fraud - is involved in this case, which is squarely governed by *Claiborne Hardware*, *supra*.

*Catholic Bishop of Chicago* directly addressed the issue of federal court jurisdiction. The case arose out of the National Labor Relations Board's exercise of jurisdiction over lay faculty members at two groups of Catholic high schools. The Court granted certiorari to consider two questions: (a) Whether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act; and (b)if the Act authorizes such jurisdiction, does its exercise violate the guarantees of the Religion Clauses of the First Amendment? 440 U.S., at 491t see also at 494-95.

Before *Catholic Bishop of Chicago*, the Board's policy had been to decline jurisdiction over institutions only when they were "completely religious, not just religiously associated. *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools*, 216 N.L.R.B. 249 (1975). The Board held to the view that it had jurisdiction over Catholic schools on the curious view that they were not "religious institutions intimately involved with the Catholic Church." *Cardinal Timothy Maling, Roman Catholic Archbishop of the Archdiocese of Los Angeles*, 223N.L.R.B. 1218 (1976). The Board justified its jurisdiction under the NLRA on the view that Catholic schools "perform in part the secular function of educating children, and in part concern themselves with religious instruction." *Id.*

It is precisely this view of the Board's jurisdiction that the Court corrected in *Catholic Bishop of Chicago*. The Board assumed that it had power to determine whether a Catholic school was "intimately involved with the Catholic Church" and other issues that go to the heart of the self-understanding of the religious community and are left for religious communities to decide. See *Corp. of Presiding Bishop v. Amos*, 487 U.S. 327 (1987). As Chief Justice Burger put it in *Catholic Bishop of Chicago*, the jurisdictional theory advanced by the Board "would give rise to serious constitutional questions." *Catholic Bishop of Chicago*, 440 U.S., at 501. To avoid a ruling of unconstitutionality, the Court took the sensible step of requiring an "affirmative intention of Congress clearly expressed" to confer jurisdiction over religious communities and their schools. *Id.* Finding no such expression of congressional will, the Court held that the Board lacked jurisdiction over these schools.

It is this methodology of *Catholic Bishop of Chicago* that matters in this case. This court may not expand the application of RICO to a religious community unless there is an "affirmative intention of Congress clearly expressed" to do so. In their Briefs opposing the Motion to Dismiss, the plaintiffs espouse the broadest possible interpretation of RICO, including its application to a religious community. Plaintiffs have not, however, cited to a single reference in the text or the legislative history of the Hobbs Act or of RICO that supports the proposition that Congress intended these statutes to be applied to religious communities. See *United States v. Enmons*, 410 U.S. 396, 411 (1973): "Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change..."

The only case of which amici are aware in which plaintiffs attempted to invoke the federal racketeering statute against a religious community is *Van Schaick v. Church of Scientology of Cal., Inc.* 535 F. Supp. 1125 (D. Mass. 1982). The district court offered several statutory grounds for dismissing the RICO claims in that suit. Judge Garrity then added in dictum that it would be objectionable to apply RICO to the Church of Scientology if it were established that this organization is entitled to the protections of the First Amendment. 535 F. Supp. at 1138-39. That dictum in 1982 must now become a solid holding, for the plaintiffs themselves concede - as they must, see cases cited in Part I.B above - that ISKCON is protected by the First Amendment.

Judge Garrity noted in *Van Schaick*: "In order not to risk abridging rights which the First Amendment protects, courts generally interpret regulatory statutes narrowly to prevent their application to religious organizations." *Id.* at 1139. Judge Garrity expressly invoked *Catholic Bishop of Chicago*, 440 U.S. 490, 507, noting the duty of the plaintiffs to establish "a clear expression of Congress' intent" before subjecting religious organizations to regulatory laws pertaining to other entities. *Id.* Citing *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972), cert. denied, 409 U.S. 896 (1972), Judge Garrity added: "Even where clear proof of such intent exists, courts have sometimes construed statutes to exclude religious groups from coverage to avoid an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First

Amendment." Id.

Plaintiffs have not even attempted to meet their burden of demonstrating a clearly expressed intent by Congress to confer jurisdiction on federal courts to regulate religious communities under the guise of regulating criminal enterprises that were the targets of the federal jeopardy First Amendment, the proponents of RICO in the 91st Congress emphatically declared racketeering statute. There is no such congressional intent. Far from authorizing that RICO might that the new statute would have to be applied in a judicious, careful way that did not interfere with precious and delicate rights secured under the First Amendment. The use of civil RICO as a blunderbuss against unpopular religious movements or political adversaries is even more clearly proscribed by the language and history of RICO than in the case of the Hobbs Act. The first draft of Senate Bill 1861 defined racketeering activity as "any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year." S. 1861, 91st Cong. Section 2(a); see also 115 Cong. Rec. 9569 (1969). Two Senators, Philip Hart and Edward Kennedy, objected that "the reach of this bill goes beyond organized criminal activity." S. Rep. No.91-617, at 215 (1969). Similarly, the American Civil Liberties Union opposed S. 1861 in its initial form, finding its broad scope "particularly troublesome" in view of the contemporaneous demonstrations against the Vietnam War at the Pentagon and the sit-ins at Columbia University. Measures Relating to Organized Crime: Hearings on S. 30, 91st Cong., 475-76 (1969) (statement of Lawrence Speiser, director of Washington office of ACLU). The Department of Justice also objected on the ground that the definition of "racketeering activity" in the bill was "too broad and would result in a large number of unintended applications." Senate Rep. No.91-617 121-22 (statement of Deputy Attorney General Richard Kleindienst) (1969). In response to these objections, the Senate Judiciary Committee eliminated the broad definition of racketeering activity and substituted the list of designated federal and state offenses known as "predicate acts. "

If Congress wants to move back to the position put forward in 1969 and rejected in the drafting process that led up to the adoption of RICO in 1970, it can easily achieve this result by amending the statute. All the signs on the horizon, however, are in fact to the contrary . Congress now appears to be deeply troubled that RICO has grown out of control and needs statutory reforms that would curb many of the excesses that this case typifies. For example, over the past decade Congress has conducted hearings investigating the scope of civil RICO. See, e.g. Hearings on the Civil RICO Clarification Act of 1990 before the Subcommittee on Crime of the House Committee on the Judiciary, 105th Cong., 2d Sess. (1998).

Thirty years after the adoption of RICO, it seems plain that this statute has come to be applied to a host of situations other than "organized crime" narrowly construed. We may, however, be witnessing the beginning of the end of such expansive construction of this statute. See, e.g., *Beck v. Prupis*, 529 U.S. 494 (2000) (dismissing RICO complaint for lack of standing). In any event, there is no basis in the text or the history surrounding RICO or in its construction by the courts for concluding that Congress ever intended the federal courts to become an unseemly

partner in a lethal process that threatens to erode fundamental civil liberties in our republic.

Without the First Amendment to limit the scope of litigation, prosecutors and civil plaintiffs hostile to a religious community would have in RICO an awesome new weapon to crush unpopular religions and to stifle all but the most powerful communities that have the means to withstand such frontal attacks. Hostility against religion is expressly prohibited under both provisions of the Religion Clause of the First Amendment. See, e.g., Edward McGlynn Gaffney, Jr., "Hostility to Religion, American Style," 40 De Paul L. Rev. 263, 266-68 (1992)(collecting cases).

In urging appropriate constitutional limits on RICO, amici do not maintain that charitable immunity is constitutionally compelled. Nor do we seek to evade legal responsibility for violations of the law that might be committed by a leader of a religious community or other charitable organization. For example, state laws that impose fines and/or imprisonment for physical abuse of minors address the gravity of such serious misconduct. Neither a federal prosecutor nor a civil plaintiff in federal court, however, should be able to invoke federal legislation - especially legislation not clearly intended to regulate religious communities - simply by characterizing allegedly tortious or criminal activities as predicate acts under RICO. See, e.g., *Annulli v. Panikkar*, 200 F. 3d 189, 192, 198-99 (3d Cir. 1999) ("it should be obvious that torts, breaches of contract, and state law crimes not enumerated in RICO are not predicate acts of racketeering upon which a plaintiff can base a civil RICO claim"). That is especially true when the "predicate act" of charitable solicitation is not only not mentioned in the RICO statute, but is expressly protected as a matter of constitutional law. See Part I.B above.

If RICO is to serve as a weapon in the arsenal of those who sue churches, let Congress say so clearly. Thus far it most emphatically has not done so. The courts should not undertake the statutory revision of RICO by expanding the reach of the statute in a direction that Congress did not clearly express as its affirmative intention. *Catholic Bishop of Chicago*, 440 U.S. at 501.

Finally, the assumption that RICO can be used as a weapon to sue religious communities is completely at odds with the general pattern and practice of Congress over recent years when it comes to protecting religious freedom. If anything, the response of Congress to recent judicial dispositions of case law, while recognizing the independent power of the judiciary to decide cases, has been more protective of religious freedom than the Court has deemed necessary in its interpretation of the free exercise provision of the Religion Clause. Compare, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) with National Defense Authorization Act for Fiscal Year 1988 and 1989, 101 Stat. 1019, 1086-87, 10 U.S.C. Section 774; *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) with Amendments to Department of the Interior and Related Agencies Appropriations Act, Pub. L. 100-446, 102 Stat. 1826 (Sept. 27, 1988); *Employment Division v. Smith*, 494 U.S. 872 (1990) with Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. Section 2000bb et seq.; *City of Boerne v. Flores*, 521 U.S. 507 (1997), with Religious Land Use and Institutionalized Persons Act of 2000, P~b. L. 106-274, 114 Stat.803.

In short, none of the tools for discerning legislative intent - the plain meaning of the RICO statute, the legislative history surrounding the adoption of RICO, or the general disposition of Congress relating to religious freedom - supports the view that Congress intended RICO to unleash the bludgeoning of civil liberties of religious communities, or to subject these communities to federal jurisdiction under this statute.

#### Conclusion

The court should grant the Motion to Dismiss for Want of Subject Matter Jurisdiction instanter. Each day that a religious community is subjected to the enormous cost of defending itself against charges brought under a federal statute that Congress never intended to regulate religious communities is a dangerous experiment upon the liberties of all religious communities. As Madison urged long ago, it is proper to take alarm now. And it is proper for this Court to dismiss the Amended Complaint immediately.

Respectfully submitted,

Of Counsel :

Douglas Laycock  
727 E. 26th Street  
Austin, TX 78705  
512-232-1341

Victor G. Rosenblum  
Northwestern University School of Law  
357 East Chicago Avenue  
Chicago, IL 60611  
312-503-8443

Edward McGlynn Gaffney, Jr.  
Valparaiso University School of Law  
656 Greenwich Street  
Valparaiso, IN 46383  
219-465-7860  
FAX: 219-465-7872  
edward.gaffney@valoo.edu

Note: Counsel of Record wishes to acknowledge the research assistance of Anita K. Brainard-Gloyeski, J.D. 2001, Valparaiso University School of Law, who undertook this work to fulfill her requirement to perform pro

bono service in her third year of law school.

## APPENDIX A

### PARTICULAR STATEMENTS OF INTEREST OF AMICI CURIAE

The American Jewish Congress is an organization of American Jews dedicated to the preservation of the political, civil, economic and religious rights of American Jews and, indeed, all Americans. To this end, it has filed numerous briefs in this and other courts in cases implicating the religion clauses of the First Amendment.

The Baptist Joint Committee on Public Affairs (BJCPA) 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 religious liberty for all Americans. The bodies supporting the BJCPA include: Alliance of Baptists, American Baptist Churches in the U.S.A., Baptist General Association of Virginia, Baptist General Conference, Baptist General Convention of Texas, Baptist State Convention of North Carolina, Cooperative Baptist Fellowship, National Baptist Convention of America, National Baptist Convention U.S.A., Inc., National Missionary Baptist Convention, North American Baptist Conference, Progressive National Baptist Convention, Inc., Religious Liberty Council, and Seventh Day Baptist General Conference. Because of the congregational autonomy of individual Baptist churches, the BJCPA does not purport to speak for all Baptists.

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975 the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation. The Center strives to preserve religious freedom in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs amicus curiae in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations. This nation's Declaration of Independence "instituted a new government" by first announcing that it was "laying its foundations on [immutable] principles." One of these "self-evident truths" was that all persons are divinely endowed with rights that no citizen may divest nor government abridge. Among such inalienable rights are those enumerated in - but not conferred by - the First Amendment, the foremost of which is religious freedom. Because the source of religious freedom, as acknowledged in the Declaration of Independence, 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 federal, state, or local government. This nation has no higher duty than to protect inviolate its full and unimpaired enjoyment. Hence, the unequivocal and non-negotiable prohibition attached to this our First Freedom is "Congress shall make no law...." The Christian Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this court.

The Christian Life Commission of the Baptist General Convention of Texas is the public policy agency of the Baptist General Convention of Texas, which has over 5,000 member churches in the State of Texas. This application of RICO deeply concerns us, and we gladly join others in this amicus brief to express our opposition to the potential threat to religious freedom posed by using RICO in this manner.

The Church of Jesus Christ of Latter-Day Saints is headquartered in Salt Lake City, Utah. Church membership exceeds 11 million with more than 26,000 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 let them worship how, where, or what they may." Article of Faith, No.11.

The Evangelical Covenant Church is a congregationally based church with more than 100,000 members and with denominational offices in Chicago, Illinois. The church joins this brief to express its alarm at the prospect of the application of the federal racketeering statute to churches and other religious communities.

The First Church of Christ, Scientist, in Boston, Massachusetts is "The Mother Church" of one of the major indigenous American religious denominations - Christian Science. There are more than 2,000 local Christian Science congregations existing in over sixty-five countries and in all fifty states and the District of Columbia. The First Church of Christ, Scientist has established, as part of its Mission Statement, a focus on advancing and preserving religious rights for all.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church, representing 11 million members worldwide. The Church joins the accompanying brief because it believes that freedom of conscience must include the right not only to believe, but also the right to advocate belief to others, and the right to solicit charitable contributions to further such advocacy.

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 2,650,000 active members in 11,500 congregations organized into 173 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 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. As with all fellow amici curiae, the Presbyterian Church (U.S.A.) unequivocally condemns all forms of sexual, physical, and emotional abuse. It is always sinful and sometimes a basis for individual liability. By joining this brief we do not claim immunity on behalf of our pastors for their criminal acts. As with many fellow amici, we have sought to deal with abuse within the polity and practices of our church. It is in no manner, however, proper to apply the Racketeer Influenced and Corrupt Organizations Act (RICO) to the religious community. Congress never intended an act designed to fight organized crime to reach the religious community of believers. No court has ever applied RICO in a lawsuit against a religious body. Moreover, applying RICO against faith groups will violate the First Amendment to the United States Constitution. The free exercise clause guarantees churches and other religious bodies the right to organize and order themselves as their own theology and polity dictate. Application of RICO to religious bodies takes their polity and religiously-dictated structure and makes it a civil weapon against the church and its membership. The First Amendment forbids such a result and this court must reject it. However, even without RICO, these plaintiffs are not without recourse. They may surely pursue criminal and civil penalties against those, even in religious communities who abuse children. That is as it should be.

The National Council of Churches of Christ in the United States ("NCC") is the cooperative agency of 32 national Protestant and Eastern Orthodox religious bodies in the United States, having an aggregate membership of over 40 million. This brief does not purport to represent the views of all of those persons, but is based on policy determined by their representatives sitting as the governing board of the NCC, a deliberative body of about 250 persons chosen by the member denominations in proportion to their size and support of the NCC.

The United States Catholic Conference ("USCC") is a nonprofit organization, the members of which are the active Catholic Bishops in the United States. The USCC is a vehicle through which the Bishops can speak cooperatively and collegially on matters affecting the Catholic Church, its people and society in general. The USCC advocates and promotes the pastoral teachings of the Bishops in such diverse areas of the Nation's life as the free expression of ideas, religious liberty and the rights of religious communities. The USCC is particularly concerned about the protection of the First Amendment rights of religious and associated organizations and their adherents, and the proper development of jurisprudence in this regard.

#### CERTIFICATE OF SERVICE

I, Edward McGlynn Gaffney, Jr., counsel of record for amici curiae American Jewish Congress, et

al., certify that I complied with the requirements of the Federal Rules of Civil Procedure with respect to service of the attached Motion for Leave to File a Brief Amicus Curiae and the Brief Amicus Curiae of the American Jewish Congress, et al., by depositing the original in the United States Mail, First-Class postage prepaid, addressed to the Clerk of the Court of the United States District Court for the Northern District of Texas, and by mailing a copy of these documents to the following attorneys:

R. Brent Cooper Susan B. Heygood  
COOPER & SCULLY  
Founders Square  
900 Jackson Street, Suite 100  
Dallas, TX 75202

Rebecca Comia  
R.D. 1, Box 295  
Moundsville, WV 26041

Joseph Fedorowsky  
Oxford Law Firm  
5757 W. Century Blvd., Suite 700  
Los Angeles, CA 90045

John R. Henderson  
John F. O'Donnell  
Blake A. Bailey  
BROWN MCCARROLL & OAKS HARTLINE, L.L.P .  
300 Crescent Court, Suite 1400  
Dallas, TX 75201-6929  
214.999.6104

Michael w. Huddleston  
Richard A. Harwell  
MCCAULEY, MACDONALD, DEVIN & HUDDLESTON  
3800 Renaissance Tower  
1201 Elm Street  
Dallas, TX 75270

Thomas Kurth  
Jason R. Augustine  
HAYNES AND BOONE  
901 Main Street, Suite 3100  
Dallas, TX 75270

David M. Liberman

1888 Century Park East Ste 1750  
Los Angeles, CA 90034

Randal Mathis  
Ross Parker  
MUNSCH HARDT KOPF HARR & DINAN, PC  
4000 Fountain Place  
1445 Ross Avenue  
Dallas, TX 75202

Michael I. O'Neill  
ROBIE & MATTHAI  
500 South Grand Avenue,  
15th Floor  
Los Angeles, CA 90071

Steven R. Pierret, Esq.  
Hill GILSTRAP  
1400 West Abram Street  
Arlington, Texas 76013

Windle Turley, Esq.  
John T. Kirtley, III  
Thomas B. Cowart  
6440 N. Central Expressway  
1000 University Tower  
Dallas, TX 75206

Respectfully submitted,

Edward McGlynn Gaffney Jr.  
Valparaiso University School of Law  
Valparaiso, IN 46383  
219-465-7860

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