

NO. 06-0527

IN THE
SUPREME COURT OF TEXAS

THE LOCAL CHURCH, LIVING STREAM MINISTRY, ET AL.
Petitioners,

v.

**HARVEST HOUSE PUBLISHERS,
JOHN ANKERBERG, AND JOHN WELDON**
Respondents.

On Petition for Review from the
First Court of Appeals at Houston, Texas
Cause No. 01-04-00231-CV

MOTION FOR REHEARING

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TO THE HONORABLE SUPREME COURT OF TEXAS:

We are acutely aware of the practical realities of the discretionary review system. We know that as advocates we are particularly sensitive to the injustices suffered by our clients, and that we know very little about the other cases that are competing for the Court's time and attention. And we know that this Court works very hard at the challenging task of making hard choices every day.

Nevertheless, it is hard to imagine circumstances under which this case would not be considered worthy of at least allowing briefs on the merits. As demonstrated below, this case merits review for important jurisprudential and practical reasons. These issues are of such importance that this case has already attracted the interest of 33 prominent amici who have joined in seven separate amicus submissions, on both sides of the case. We are not aware of any other case that has attracted this level of amicus attention, yet has not even warranted a call for briefs on the merits. Moreover, the arguments raised by Harvest House and its amici for summarily denying review are unfounded. Because of the substantial concerns associated with this case, which have national and potential international ramifications, the Local Church urges this Court to consider this rehearing motion.

I. This case bears all the hallmarks of being grant-worthy.

A. This case presents important jurisprudential issues.

This case involves an important constitutional issue regarding the Establishment Clause that is not presented in either of the other two First Amendment religious liberty cases

pending before this Court¹: What is the line between expressions of religious opinion, which are protected by the Establishment Clause, and defamatory non-religious statements, which are not protected? More particularly, this case raises important and unresolved jurisprudential questions of first impression about: (1) whether publishers of defamatory statements that combine *theological* and *secular* criticisms can hide behind the Establishment Clause to avoid liability for the *secular* criticisms when they rise to the level of being libelous; and (2) whether the “of and concerning” doctrine from “group libel” cases where the plaintiff is not named should be applied to cases where the plaintiff is named.

B. This case also involves practical concerns of substantial importance.

In addition to these jurisprudential issues that have attracted national attention,² this case raises practical international concerns. The Local Church complains of being defamed in a *secular* sense by allegations of abhorrent conduct, having nothing to do with religion *per se*, ascribed to it as a “cult.” These allegations not only have tarred the Local Church’s good name, but also provide pretext for governments in religiously intolerant societies to persecute Christian believers under the guise of suppressing “evil cults” that endanger society. *See Ambassador Lord Amicus Bf.* (Appendix 1) That this is not some fanciful or radical assertion is attested by the fact that 3 of the 33 amici who have already expressed interest in

¹ *See* Cause No. 04-0838; *Westbrook v. Penley* (CA Op., 146 S.W.3d 220); Cause No. 03-0995; *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.* (CA Op., 114 S.W.3d 617).

² This case was scheduled as a topic for discussion at the Practising Law Institute’s Annual Communications Law Conference in New York. *See* PFR Reply, at 1 n.2.

this petition for review proceeding are former ambassadors and China experts³ who describe this concern with authority.⁴

To determine which “evil cults” may be operating within its borders, the Chinese government need look no further than to a reference book on “cults” like the one at issue in this case—the *Encyclopedia of Cults and New Religions*. That publication represents that the Local Church is a “cult,” *Encyclopedia*, pp. xxi; that it is a “cult” in a “secular sense,” *id.*;

³ **Ambassador Winston Lord**: U.S. ambassador to the People’s Republic of China, 1985-1989, under Presidents Reagan and Bush; Special Assistant to National Security Advisor Henry Kissinger; Assistant Secretary of State, East Asian Policy, 1993-1997; **Ambassador Nicolas Platt**: U.S. Ambassador to the Philippines, 1987-1991, and Pakistan, 1991-1992, under Presidents Reagan and Bush; Foreign Service assignments in Hong Kong, Beijing and Tokyo; China Analyst at the State Department; Member of National Security Council, Asian Affairs; Deputy Assistant Secretary of Defense, Asian Affairs; Assistant Secretary of State for United Nations Affairs; Executive Secretary, Department of State; President of the Asia Society for twelve years; **Ambassador Burton Levin**: U.S. Ambassador to Myanmar, 1987-1990, under President Reagan; U.S. Counsel General in Hong Kong, 1981-1986, and former top China expert at the State Department.

⁴ The Ambassador Lord amicus brief (Appendix 1) states in pertinent part:

Beginning with its first annual report in September 1999, the State Department has designated China a “country of particular concern” under the International Religious Freedom Act for “particularly severe violations of religious freedom.” That report and subsequent reports detail the Chinese government’s actions against Christians and other religious minorities who seek to worship according to their conscience and not within official government procedures. In recent years, this practice has increasingly fallen upon those religious groups that have not officially registered with the Chinese government. Such groups are broadly labeled as “evil cults,” thereby offering a pretext for the actions taken by the government. The Chinese government looks abroad to help form their definition of a “cult,” focusing not on theological but societal threats, such as that posed by Jim Jones and the People’s Temple. In a report on cults in the United States issued by China’s official *Xinhua News Agency*, cults are said to “not obey the law, they upset social order, and they create a menace to freedom of religion and social stability. Under the pretense of religion, kindness, and being non-political, they participate in political activities. Some of them practice criminal activities such as tax evasion, fraud, drug dealing, smuggling, assassination, and kidnapping.” By adopting a non-theological working definition of the term “cult,” and by raising the possibility of damage to their society, the Chinese government has been able to utilize this term as an effective means of classifying groups of concern.

and that, as a *secular* cult, it engages in the criminal activities that the Chinese government says “evil cults” do—activities such as prostitution, rape, child molestation, drug smuggling, and murder. *Id.* at xxv.

Such allegations may not be a concern to other groups identified in the *Encyclopedia*. But they are of great concern to the Local Church, as well as the array of amici who support its petition, because of the Local Church’s substantial association with China. Some scholars have suggested that the Local Church was the originator of the “house church” movement in China—a movement comprised of an estimated 60 to 105 million Christians. *See* ALAN HUNTER & KIM-KWONG CHAN, *PROTESTANTISM IN CONTEMPORARY CHINA* 3, n.3 (Cambridge University Press 1993) (“The term ‘house church’ (*jiating jiaohui*) may have originated from the movement founded by Watchman Nee (Ni Tuosheng) in the 1930’s, which prompted meetings in private homes led by lay persons.”). Watchman Nee is widely recognized as the principal founder of the Local Church. For “house church” Christians to be even loosely associated with a group identified as a “cult” in a *secular* sense, given the panoply of “evils” attributed to cults by the *Encyclopedia* and the Chinese government alike, is a matter of grave concern. The Local Church knows that concern first-hand: its founder, third-generation Christian Watchman Nee, was imprisoned by the Chinese government for his faith in 1952, and died in prison 20 years later.

In sum, this case presents important legal issues that implicate extraordinarily important practical concerns that deserve to be addressed on the merits.

II. Harvest House offers no argument that negates the compelling reasons for this Court to grant review.

In the face of the numerous reasons that this case satisfies the criteria of a grant-worthy case, Harvest House offers no tenable ground for this Court to deny review, much less for doing so without considering briefs on the merits.

A. Harvest House and its “consulting expert” misconstrue the scope of the protections afforded by the Establishment Clause.

In his amicus brief, Harvest House’s “consulting expert,”⁵ Dr. Geisler, makes three statements with which the Local Church agrees. Although these statements have nothing to do with the actual legal issues before the Court in this case—which concern whether the Establishment Clause protects *secular* defamation from liability—they nonetheless help illustrate how Harvest House and its supporters misconstrue the scope of the protections afforded by the Establishment Clause.

The Local Church agrees with Dr. Geisler and Harvest House that (1) courts should not “engage in determining what is or is not orthodox theology”; (2) groups should be allowed “to define the limits of their own orthodox beliefs by distinguishing them from groups that do not in their opinion meet the standards for orthodoxy”; and, (3) as regards any expression of opinion that the Local Church is unorthodox in a *theological* sense, this Court

⁵ In correspondence dated October 22, 2003, Harvest House’s counsel Thomas J. Williams made clear that Dr. Geisler is one of its “consulting experts”: “It is our position that the correspondence between [Respondent] Dr. Ankerberg on the one hand and Geisler, et al. on the other hand is privileged because those gentlemen are consulting experts.” (Appendix 2) Harvest House did not hesitate to protect from discovery communications between it and Dr. Geisler on the ground that he was a “consulting expert,” but neither does it hesitate to use Dr. Geisler as a surrogate to discredit the Local Church in the proceeding before this Court. This shield and sword use of Dr. Geisler should not be lost on this Court.

should not “forbid such freedom of expression in the Harvest House/Local Church case” as doing so “would have a chilling effect on freedom of religious expression for any group desiring to define the boundaries of its own beliefs.” *Geisler Amicus Bf.*

But these are straw-man arguments—they assert nothing more than that, under the Establishment Clause, courts are precluded from deciding matters of religious belief. The Local Church has never disputed this point. To the contrary, it conceded the point in the very first sentence of the Argument section in its petition for review:

The court of appeals correctly describes the protections afforded by the Establishment Clause in suits involving matters of religious belief:

Under the Establishment Clause of the First Amendment, civil courts are prohibited from deciding theological matters, or interpreting religious doctrine, or making matters of religious belief the subject of tort liability.

Harvest House Publishers v. Local Church, 190 S.W.3d 204, 211 (Tex. App.—Houston [1st Dist.] 2006, pet. filed).

PFR at 3. The issue in this case is *not* whether the Establishment Clause precludes courts from “deciding theological matters,” or “interpreting religious doctrine,” or “making matters of religious belief the subject of tort liability.” All agree that courts have no authority to do those things. The issue is whether a religious publication can invoke the Establishment Clause as a shield from suit for defamation, when it falsely alleges abhorrent *secular* conduct having nothing to do with religion *per se*. That is an important constitutional issue that merits review by this Court.

The Local Church is not the only one who contends this issue is important. Consider what *Bible Answer Man* and cult-expert, Hank Hanegraaff, and *Answers in Action* Director

and 30-year counter-cult apologetics veteran, Gretchen Passantino, have to say on this subject in their recent statement defending their decisions to support the Local Church's petition:

After much prayer and consideration, the Christian Research Institute (CRI) and Answers in Action (AIA) have lent support to the appeal to the Texas Supreme Court because it is our belief that a significant legal mistake has been made that can and will have serious repercussions on First Amendment Rights, apologetics ministry, and religious publication standards. * * * Although our letters are deliberately very short and focused on our standing in the apologetic community rather than the particulars of the case, our support is prompted by the foundational argument that the *Encyclopedia of Cults and New Religious (ECNR)* has gone *outside* the bounds of both responsible theological analysis and responsible public accusation by using the term cult as *pretext* for otherwise legally libelous language. * * * Finally, after reviewing the actual materials, including the text of *ECNR*, relevant correspondence, and the court records, we concluded that the appellate court's dismissal concerning which this appeal is being made was a dangerous, precedent-setting decision that has seriously negative implications for First Amendment rights, both of free speech and for free exercise of religion. Moreover, we believe the dismissal created a ghetto category for religious publications that demeans our Christian commitment to truth-telling and against bearing false witness. This issue is particularly urgent in that the consequences are life- and liberty-threatening to Christians living under repressive regimes who look for pretexts (*e.g.*, the label "cult") to persecute unauthorized religions.

Statement of CRI and AIA (Appendix 3) (emphasis in original).

The statement accurately articulates the fundamental distinction between *theological* criticism, which is not actionable, and libelous *secular* criticism, which is actionable. Moreover, this articulated distinction comes from two people who have devoted much of their lives' work to the study of cults.

ECNR defines "cult" in *not merely* religious or theological terms, *but crucially* in *secular* emotive, psychological, and social terms. It is not in those areas where their definition *agrees* with standard theological definitions that we take issue, but in those areas where their definition *transcends* those agreements (the theological) to those areas that are properly under the jurisdiction of our legal protections against *libel and slander*—the secular aspects of their definition.

While our courts quite rightly are prevented by our Constitution from deciding the truth or falsity of *theological or religious* claims, our courts are expressly charged with deciding whether or not *secular* claims are upheld or libelous in issues such as fraud, sexual abuse, false imprisonment, larceny, bioterrorism, pedophilia, and so forth (the kinds of characteristics *ECNR* uses for cults). When *ECNR* attributes those kinds of actions to the groups they term cults, they are placing themselves in a position to be challenged legally in the realm of libel if they cannot substantiate their charges.

Id. (emphasis added). The full statement by CRI and AIA, attached as Appendix 3, makes a compelling argument regarding the jurisprudential and practical importance of this case.

B. The Local Church is not a “cult” in either a *secular* or a *theological* sense.

This case is about whether the Local Church is a “cult” in a *secular* sense. It is the allegation of *secular* cultism, coupled with allegations of abhorrent conduct, that exposes the Local Church to calumny in this country and “house church” Christians to potential persecution in China. With full briefing on the merits, the Local Church will demonstrate that the Establishment Clause provides no shield to a publication that falsely charges a group with being a cult in a *secular* sense, when it ascribes to the group abhorrent conduct having nothing to do with religion *per se*.

In defense of this lawsuit, Harvest House does not contend that the Local Church is, in truth, a cult in a *secular* sense. No one in this case contends that the Local Church is a cult in a *secular* sense, or that any of the abhorrent conduct ascribed to “cults” in the *Encyclopedia* is true as regards the Local Church. Unlike, for example, the plaintiff in *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002), Harvest House’s defense is not “verifiable truth,” *id.* at 584, but, rather, that the abhorrent conduct ascribed to “cults” in the *Encyclopedia* is not “of and concerning” the Local Church and that the Establishment Clause

shields Harvest House from liability. It is those defenses that the Local Church can demonstrate fail as a matter of law when and if this Court grants briefing on the merits.

Given that the Local Church's lawsuit complains only about allegations of *secular* cultism, it is curious that Harvest House's "consulting expert," Dr. Geisler, made a focal point of his amicus brief to assert that the Local Church is a "cult" in a *theological* sense:

In over fifty years of research on doctrinal matters, it is my professional opinion that: 1) It is doctrinally appropriate to label some groups by the terms unorthodox, heretical, or a cult. 2) It is appropriate to use these labels of the Local Church. * * * My reasons in support of the second point are two-fold. First, in every list of essential orthodox Christian Doctrine of which I am aware, including the doctrines used by CRI, the doctrine of the Trinity is an essential Christian Doctrine, and deviations from it are considered unorthodox, heretical, or cultic. Second, after carefully reviewing the unretracted material published by The Local Church, I find numerous statements that are not in accord with the orthodox doctrine of the Trinity.

Geisler Amicus Bf. This statement by Dr. Geisler in no way suggests that the Local Church is a "cult" in a *secular* sense. It is nothing more than an expression of *religious opinion* that the Local Church is a "cult" in a *theological* sense. It is the type of religious opinion that is undisputedly protected by the Establishment Clause, but it is also an opinion that has nothing to do with any issue before this Court in this case.

Although Dr. Geisler's assertion that the Local Church is a "cult" in a *theological* sense is legally immaterial, it nonetheless is a powder-keg assertion plainly calculated to prejudice this Court. Because this assertion is so explosive, the Local Church feels constrained to address it in this motion for rehearing, even though this is *not* an issue that this or any other court is called upon to decide in this case.

1. **Unlike Harvest House’s “consulting expert” Dr. Geisler, one of the largest and most respected evangelically-focused seminaries in the country found the Local Church to be “unequivocally orthodox.”**

By its lawsuit, the Local Church does not ask the courts to clear it of the charges that it is “unorthodox,” “heretical,” and “cultic” in a *theological* sense. The Local Church understands that the Establishment Clause precludes any court from deciding such issues because these are *ecclesiastical* questions. But the Local Church does not take lightly the *Encyclopedia’s* charge that it is a “cult” not only in a *secular* sense (for which it seeks judicial relief) but also in a *theological* sense (for which it does *not* seek judicial relief). With respect to the latter charge, the teachings and practices of the Local Church were examined extensively by an *ecclesiastical* authority—Fuller Theological Seminary, one the largest and most respected evangelically-focused seminaries in this country.

On January 5, 2006, the same day that the court of appeals issued its opinion *denying* the Local Church *judicial* relief, Fuller issued its statement *granting* the Local Church *ecclesiastical* relief. (Appendix 4) In its statement, Fuller explained that it reached its conclusions only after completing “two years of extensive dialog” with Local Church representatives, and after conducting “a thorough review and examination of the major teachings and practices of the local churches” *Id.* At the conclusion of this process, Fuller found the Local Church to be “unequivocally orthodox”:

It is the conclusion of Fuller Theologically Seminary that the teachings and practices of **the local churches and its members represent the genuine, historical, biblical faith in every essential aspect.** * * * In regard to their teaching and testimony concerning God, the Trinity, the person and work of

Christ, the Bible, salvation, and the oneness and unity of the Church, the Body of Christ, we found them to be **unequivocally orthodox**.

Fuller Statement, Jan. 5, 2006 (App. 2) (emphasis added). Fuller further found “with certainty” that the Local Church did not evidence any “cult-like” attributes:

[W]e found their profession of faith to be consistent with the major creeds, even though their profession is not creedal in format. Moreover, **we also can say with certainty that no evidence of cultic or cult-like attributes have been found by us among the leaders of the ministry or the members of the local churches who adhere to the teachings represented in the publications of Living Stream Ministry**. Consequently, we are easily and comfortably able to receive them as genuine believers and fellow members of the Body of Christ, and we unreservedly recommend that all Christian believers likewise extend to them the right hand of fellowship.

Id. (emphasis added).

2. Another Harvest House amicus brief illustrates how the writings of Local Church leaders have been “grossly misrepresented.”

In an effort to punctuate the “heretical” nature of the Local Church, another amicus brief submitted in support of Harvest House seeks to create the impression that the Local Church is “hostile” to the body of Christian believers:

The Local Church promotes the teachings of Witness Lee (founder of petitioners Local Church and Living Stream Ministry, the Local Church’s publishing arm), who wrote that “Christianity is . . . a human religion saturated with demonic and satanic things.” That surely sounds like hostility to Christianity.

Assoc. of Amer. Publishers Amicus Bf. (quoting WITNESS LEE, THE GOD-ORDAINED WAY TO PRACTICE THE NEW TESTAMENT ECONOMY 29 (Living Stream Ministry 1987)). Under the Establishment Clause, anyone is privileged to express the *religious opinion* that the Local Church is hostile to the body of Christian believers, but such an opinion has nothing to do

with any of the legal issues in this case. But again, because the charge is a powder keg, calculated to prejudice the Court, the Local Church feels constrained to address it.

AAP quotes the above statement by Witness Lee out of context. In so doing, it creates a *perception* of Witness Lee's teachings that is disparate from his *actual teachings*. Fuller found this sort of "gross misrepresentation" to be typical of the Local Church's critics:

One of the initial tasks facing Fuller was to determine if the portrayal of the ministry typically presented by its critics accurately reflects the teachings of the ministry. On this point we have found a great disparity between the perceptions that have been generated in some circles concerning the teachings of Watchman Nee and Witness Lee and the actual teachings found in their writings. **Particularly, the teachings of Witness Lee have been grossly misrepresented and therefore most frequently misunderstood in the general Christian community, especially among those who classify themselves as evangelicals.**

App. 4 (emphasis added).

In the out-of-context quote, Witness Lee is criticizing the organized system of non-biblical teachings, organizations and rituals that have developed over the last 2,000 years, which he describes as antithetical to the historical New Testament faith and church. Witness Lee is saying that Christians should set aside non-biblical rituals, practices, and organizational structures—matters of human creation that he calls "demonic and satanic things"—because they tend to divert focus from the "Christ" portion of "Christianity." He is not expressing hostility to *Christians*, but merely to the modern religious *system* developed in the name of Christianity. See WITNESS LEE, *supra*, at 28 ("We love all our Christian brothers and respect them, yet we cannot agree with the religious system they are in.").

The full text of the chapter in which the sentence quoted by AAP appears is attached as Appendix 5. Whether one agrees with Witness Lee's teachings in this chapter, he is *not* saying what AAP suggests that he is saying. As Fuller concludes, the teachings of Witness Lee, far from meriting unfair criticism, "deserve attention and consideration" because they have "significant biblical and historical credence":

We consistently discovered that when examined fairly in the light of scripture and church history, the actual teachings in question have significant biblical and historical credence. Therefore, we believe that they deserve the attention and consideration of the entire Body of Christ.

App. 4.

In sum, these immaterial, yet explosive, efforts by critics of the Local Church to discredit it as *theologically* "cultic" are based on "gross misrepresentations" of the Local Church's actual teachings. Moreover, this a false debate. This Court need not interpret Witness Lee's teachings to resolve this case because this *theological* debate is *not* the issue presented for review. This Court should not permit diversionary tactics to prevent the Court from deciding the important legal issues that are presented for review.

C. Harvest House's "of and concerning" argument is based on the "group libel" doctrine, which is inapplicable in this case.

Under a correct understanding of this requisite element of a defamation cause of action, the defamatory statements in the *Encyclopedia* are "of and concerning" the Local Church. Contrary to Harvest House's argument and the court of appeals' conclusion, the "group libel" doctrine is inapplicable in this case because it pertains to cases where, unlike here, the plaintiff is not named in the publication alleged to be libelous. *See* PFR at 9-15.

By including the Local Church in a reference book where it does not belong, Harvest House has tarred the Local Church with one of the darkest labels imaginable in contemporary society—a label that, combined with allegations of abhorrent conduct, not only damages the Local Church and its members in this country, but also provides pretext for the persecution of Christians in religiously intolerant societies. *See* App. 1.

Decisions from other jurisdictions support the proposition that falsely tarring a group with the label of “cult” in a *secular* sense—by listing the group by name among others labeled “cults”—is actionably defamatory. *See, e.g., Landmark Educ. Corp. v. Conde Nast Publ’ns, Inc.*, 1994 WL 836356, 23 Media L. Rep. (BNA) 1283 (N.Y. Sup. Ct. 1994) (holding that an article that listed plaintiff organization among “America’s most-wanted cults” was defamatory: “The interspersed facts and opinions throughout the article herein concerning cults ‘tars all the groups covered by the [article] with the same brush with language that appears to be libelous *per se* as it addresses the office, profession or trade of plaintiff.’ Thus, the Court finds the article is ‘of and concerning’ plaintiff.”). By the same token, courts elsewhere have recognized that calling a religious organization a “cult” in a *theological* sense is not defamatory. *See, e.g., Sands v. Living Word Fellowship*, 34 P.3d 955, 959-60 (Alaska 2001). This Court should afford the Local Church an opportunity to fully brief the “of and concerning” question, particularly as it relates to the protections provided by the Constitution, so that the Court can define the line of demarcation between the law of defamation and the protections afforded by the Establishment Clause. This question is jurisprudentially important both here and in other jurisdictions.

The central inquiry adopted by this Court for determining whether a publication is defamatory as regards a defamation plaintiff is “based upon how a person of ordinary intelligence would perceive it.” *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000). In this case, “person[s] of ordinary intelligence,” with extraordinary backgrounds in the study of cults, have perceived the *Encyclopedia* to be libelous as regards the Local Church. *See* App. 3.

PRAYER

At this the final stage in the appellate review process in Texas, the Local Church requests this Court to grant rehearing and afford it the opportunity to fully brief the important constitutional issues involved in this case. That the Local Church has already received a clean doctrinal bill health as regards its *theology* is not enough. The Local Church seeks a judicial hearing of its complaints of being defamed as a “cult” in a *secular* sense. That charge, coupled with allegations of abhorrent conduct, not only harms the Local Church and its members in this country, but also furnishes religiously intolerant governments with pretext for persecution elsewhere. Only the courts can clear the Local Church’s name with respect to the charge of being a cult in a *secular* sense. Thus, the Local Church respectfully prays that this Court grant this motion for rehearing of the denial of its petition for review.

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I hereby certify that a true and correct copy of the foregoing document was served in accordance with the Texas Rules of Appellate Procedure to the following parties on December 18, 2006 via U.S. mail:

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