No. 06-1520

In the Supreme Court of the United States

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

Petitioners,

v.

HARVEST HOUSE PUBLISHERS, JOHN ANKERBERG AND JOHN WELDON,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

BRIEF OF VARIOUS PUBLISHERS, BROADCASTERS AND RELIGIOUS ORGANIZATIONS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

SEALY YATES
Counsel of Record
Yates and Yates LLP
1100 Town & Country Rd., Suite 1300
Orange, CA 92868
(714) 835-3742

Counsel for the Amicus Curiae

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INTERESTS OF THE *AMICUS CURIAE*

Under Rule 37 of the United State Supreme Court Rules of Appellate Procedure, Amici file this brief in support of Petitioners The Local Church, et al.'s Petition for Certiorari. Amici[1] are various religious organizations, scholars and denominations with an interest in maintaining the proper balance between the Establishment Clause and other constitutional doctrines that recognize religious immunities for our organizations.

Amici:

1. Methodist Federation for Social Action, Washington D.C.;
2. John Van Diest is senior editor with Tyndale Publishing;
3. J. Gordon Melton, Ph.D., Author, Ordained United Methodist Minister, Founder and Director of Institute for the Study of American Religion, Santa Barbara, California;
4. Peter Kerridge is Chief Executive of Premier Media Group;
5. Robert Oppedisano, Director, Fordham Press;
6. Jon Yinger is President of Midwest Christian Broadcasting.

This balance must be maintained while protecting and enabling our organizations to enjoy equal treatment and equal protection on par with similarly situated secular organizations through the appropriate application of neutral principles of law to our legal claims in the courts. Amici are concerned with overbroad readings of the Establishment Clause that threaten these rights for all religious organizations whether large or small.

Amici urge this Court to grant review.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission

INTRODUCTION AND SUMMARY OF ARGUMENT

Overbroad readings of the Establishment Clause by various federal and state courts who duck legal disputes involving religious organizations because of purportedly doctrinal premises or because the suits involve mixed allegations of doctrinal heresy juxtaposed with criminal or non-theological contentions can have the deleterious effect of placing religious organizations on a lower rung of protection than similarly situated secular organizations. This result effectively deprives religious organizations of an equal opportunity to enforce their properly litigable claims in courts depriving them of equal protection of the law for claims that in any other context outside of religion would be actionable. Amici implore this Court to address the ruling below and provide guidance to lower courts in dealing with the perplexing conflicts that arise when adjudicating disputes involving religious organizations in the context of the Establishment Clause as it intersects with other clauses of the First Amendment – particularly free speech. Otherwise religious organizations will face the two-fold insolubility of being disadvantaged in the courts when attempting to enforce their legal rights while secondly, having the unintended and detrimental effect of having their religious freedom impinged upon through overbroad readings of the Establishment Clause.

ARGUMENT

I. The two jurisprudential extremes under which causes of action are permitted under the auspices of the Establishment Clause serve as the guideposts from which this Court must strike an appropriate balance recognizing the rights of religious organizations to properly assert their legal interests in harmony with the Establishment Clause while preserving the free speech rights of others.

At the outset, it should be noted that amici are not advocating for a change from the long established principle that 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. *See Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 707, 96 S.Ct. 2372, 2379, 49 L.Ed.2d 151 (1976).[2] In fact, amici also share an unwavering commitment to this crucial legal tenet and acknowledge the immunities and implications that arise out of this sacred bedrock principle of constitutional jurisprudence first outlined back in 1872 by this Court.[3] This is because courts that entwine themselves in such disputes unwittingly bring the power of the state to bear in determining the veracity of specific religious faiths thus 'establishing' religion and eliminating the constitutionally mandated divide of separation of church and state. As this Court ruled in a previous case, the Establishment Clause's prohibition emanates from the concern that powerful religious sects 'might bring about a fusion of governmental and religious functions … to the end that official support of the state or federal government would be placed behind the tenets of one or all orthodoxies.' *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

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[2] *See also United States v. Ballard,* 322 U.S. 78, 86, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944): 'The First and Fourteenth Amendments of the United States Constitution prohibit civil courts from deciding such ecclesiastical matters.'

[3] *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872).

Conversely, lawsuits between religious organizations are not simply automatically non-justiciable under the Establishment Clause. To wit, courts do not 'establish,' promote or work to the deterrence of religion by deciding non-theological questions that arise in religious or quasi-religious contexts. If controversies between church members or disparate religious factions can be resolved through the application of *'neutral principles of law,'* courts may hear them without offending the First Amendment. *See, e.g., Gonzalez v. Archbishop*, 280 U.S. 1 (1929). The mandate of neutrality is respected when the government, following neutral criteria and evenhanded policies, extends benefits to religious adherents on the same terms as non-religious adherents. Religious groups are as much entitled to the protections of the neutral principles of defamation as non-religious groups. *See Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947). It is well settled, for example, that controversies among church members/religious bodies over the ownership of church property may be resolved by the courts if the resolution does not entail inquiry into ecclesiastical doctrine, rules or practices.[4] The courts may also resolve disputes concerning contractual entitlements of church employees.[5]

However, the bright line principles that serve as the touchstone for so many landmark decisions by this Court over the years are harder to apply in the context of disputes

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[4] *See, e.g.*, *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

[5] *See Waters v. Hargest*, 593 S.W.2d 364, 365 (Tex.Civ.App.-Texarkana 1979) ('The first amendment to the United States Constitution prohibits the civil courts from exercising jurisdiction over purely ecclesiastical matters involved in church related disputes, but it does not forbid those courts from adjudicating property rights of the church or of the members, so long as such rights can be determined by the application of neutral principles of law . . . Contractual rights are 'property rights' within the meaning of the rule.') (citations omitted); *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980), *cert denied*, 453 U.S. 912, 69 L. Ed. 2d 994, 101 S. Ct. 3143 (1981) ('That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern.')

involving allegations of *both* theological and non-theological matters (*i.e.*, doctrine and conduct). In fact, inconsistent and faulty application of the Establishment Clause principles denoted above actually tilt the balance of religious freedom *against* religious organizations by cutting off properly filed causes of action simply *because* the dispute involves religious organizations or has some *doctrinal* component to it.

For example, a vulnerable area of the law where this danger exists is sublimely illustrated by the case at bar — how should courts resolve religious disputes in the defamation arena when charges of heresy and doctrine are interspersed with allegations of criminal conduct and practices? This confusing context led the Court below to automatically assume that the case was a routine Establishment Clause case holding that the term 'cult' as defined in the publication was the end all and be all of the case in ultimately deciding that the case should be terminated the first Establishment Clause principle noted above regarding doctrine. Insight into the reasoning of the lower court is gleaned from the following excerpt from the Opinion below and is fairly typical of courts that have reasoned this way in the face of charges imputing untoward doctrinal beliefs *and* criminal or immoral conduct towards persons or entities in the religious milieu:

> In their motion, the publisher and authors claim that the Introduction 'centers on doctrinal and apologetic issues.' We agree. 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. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 707, 96 S.Ct. 2372, 2379, 49 L.Ed.2d 151 (1976)…. As such, no jury can be allowed to determine [the truth or falsity of one's religious beliefs] for '[w]hen triers of fact undertake that task, they enter a forbidden domain.' *Id*. at 680 (quoting *United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944)…. The First and Fourteenth Amendments of the United

> States Constitution prohibit civil courts from deciding such ecclesiastical matters. *Id*. at 743.
>
> Therefore, we conclude that being labeled a 'cult' is not actionable because the truth or falsity of the statement depends upon one's religious beliefs, an ecclesiastical matter which cannot and should not be tried in a court of law. *See Sands v. Living Word Fellowship*, 34 P.3d 955, 960 (Alas.2001) (holding that reference to church as 'cult' and church member as 'cult recruiter' not actionable as defamation because statements convey religious belief and opinion and are not capable of being proven true or false). *Local Church, et. al vs. Harvest House*, 190 S.W.3d 204, 211 (2006).

Amici vehemently disagree with the key underpinning of the Court's reasoning provided above — based on an assumption that the publication was 'religious' or 'doctrinal,' the Establishment Clause operated to cut off any defamation liability on the part of the defendant religious publisher.

Instead, a closer examination of the written publication that was the subject of this litigation unveils that this case rests at the vexing intersection of an often beguiling area of Establishment Clause jurisprudence and an often misunderstood set of common-law defamation principles. While the present case may appear to be a straightforward example of protecting the freedom of a religious entity to criticize another, closer examination of the accusations painted in the book text against the so-called religious groups listed therein reveal otherwise.

The Court of Appeals reacted in a knee-jerk fashion to the Establishment Clause issues implicated by this litigation, reaching the erroneous judgment that the Establishment Clause eviscerated the plaintiffs case without any consideration of whether the non-theological attributions and criminal characterizations made by the authors concerning the word 'cult' in their Encyclopedia of cults could be defamatory of the groups listed and included in the book.

Determining whether a defamatory statement may serve as the predicate for an action in damages depends on balancing the First Amendment's vital guarantee of free and uninhibited discussion of public issues with the important social values that underlie defamation law and society's pervasive and strong interest in preventing and redressing attacks upon reputation. *Milkovich v. Lorain Journal Co.*, 497 US 13. Actually, as noted in *Milkovich*, '[S]tatements that contain or imply assertions of provably false facts [even if given under the guise of opinion] will likely be actionable.' *Id*.

For instance, a glance at the back cover of the publication at issue in this case *Encyclopedia of Cults and New Religions* ("ECNR") clearly indicates the book is not mere religious opinion – the book advertises itself as having: 'up-to-date facts'; is a 'valuable reference book'; an 'Encyclopedia' authored by a 'highly respected research team' with 'advanced degrees.' ECNR, in its Introduction, attributes to 'cults' doctrinal errata but then goes beyond this to define objectively verifiable characteristics of cults which 'beat' their disciples, cause 'physical' harm, and practice 'financial fraud in fundraising and financial costs.' Indeed, it goes even further listing criminal and immoral practices that are found in even the most 'respectable cults' including murder, human sacrifice, child molestation, rape, drug smuggling, and prostitution without attributing any of these practices to any specific group.

Obviously, if the book only addressed 'doctrinal and apologetics' issues, the authors would not have needed to acknowledge concerns about potential 'legal problems' with the publication.[6] But herein lies the conundrum faced by this Court — when publications like ECNR imbibe its groups with doctrinal and apologetics issues *and* contentions of criminal conduct — which in this case purport to be the 57 groups with the most 'social influence' in society, should the Establishment Clause operate to bar such actions which in any other legal construct would be actionable? We think not. Unsupported criminal accusations aimed at individuals or

[6] ECNR, pp. XXVI-XXVII.

identified groups[7] constitute defamation per se irrespective of the kind of book it appears in.[8]

By glossing over and ignoring the non-theological characterization of the term 'cult' in ECNR, and ruling that 'cult' — a sociological word defined to include attributions of criminal behavior — is solely 'ecclesiastical' and not capable of defamatory meaning, the Court of Appeals' decision raises serious concerns about enhancing free speech for certain groups at the expense of others. This extravagant over-reading of Establishment Clause principles led the lower court to a devalued under-reading of ordinary defamation law principles. Once the Court of Appeals erred with the Establishment Clause, it erred on the entire ruling. The ruling is, consequently, excessive and reflects a fundamental misunderstanding of why civil courts stay out of doctrinal issues. Furthermore, it functions to deprive religious organizations of protections civil law affords to other organizations such as provably false statements of fact that would in any other context be actionable.

II. The appellate ruling below and other cases like it raise the disturbing specter of adverse effects on religious freedom in this country through: religious groups not having full access to the justice system and disparate treatment of defamatory statements depending on whether they occur in a religious or secular medium.

The expansive treatment of the Establishment Clause engaged in by the court below and other courts[9] will do genu-

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[7] Lloyd J. Jassin and Steven C. Schechter, *The Copyright Permission and Libel Handbook: A Step-by-Step Guide for Writers, Editors, and Publishers* (New York: John Wiley & Sons, Inc., 1998), p. 136.

[8] *Id.*, p. 130.

[9] *Cha v. Korean Presbyterian Church of Washington*, 262 Va. 604, 615, 553 S.E.2d 511, 516 (2001); *Rasmussen v. Bennett*, 228 Mont. 106, 741 P.2d 755, 758-59 (1987); *Hadnot v. Shaw*, 826 P.2d 978 (Okla.1992) the Supreme Court of Oklah. *See also O'Connor v. Diocese of Honolulu*, 885 P.2d 361, 368 (Haw. 1994); *Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America*, 64 F.3d 664 (6th Cir. 1995);

ine damage to religious freedom in this country in at least two ways:

First, for religious freedom to flourish, religious groups must have full and complete access to all the rights and remedies of ordinary litigants. Religious freedom is dependent on the rule of law, and neither religious freedom nor the rule of law is served by understandings of the First Amendment that disqualify religious groups from resort to the courts for redress for ordinary libels. If a religious group is defamed by factual allegations that would be actionable when brought by any other 'non-religious' plaintiff—if a religious group is accused, for example, of murder or kidnapping or financial fraud—then the rule of law and the neutrality required by the First Amendment mandate that the religious group have the benefit of the same legal rights and privileges that would apply to any other plaintiff. These are precisely the issues posed by this case. Their thoughtful and thorough exploration and resolution require more than the rushed analysis of the Court below.

One may understand why this Court would not feel compelled to fine-tune every nuance of the complex law of defamation by granting review each time a lower court interprets or applies some difficult defamation concept. But here, any fair reading of what happened below makes it clear that the lower court's compound errors in its application of defamation principles emanated from its over-arching error in its understanding of First Amendment law. The Establishment Clause of the First Amendment does not supersede the care-

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Paul v. Watchtower Bible and Tract Society of New York, Inc., 819 F.2d 875, 881-83 (9th Cir. 1987). Compare, *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404 (Iowa 2003), *cert. denied*, 540 U.S. 977 (2003);*Madsen v. Erwin*, 395 Mass. 715, 481 N.E.2d 1160 (1985); *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (Pa. 1975); *Lipscombe v. Crudup*, 888 A.2d 1171 (D.C. 2005). As can be seen from the stark divergence of decisions on both sides of the issue, this Court's guidance is much-needed. The Court's intervention will serve the national interest in sound application of the First Amendment, and serve the interests of churches and religious organizations in supporting access to fairly applied application of defamation laws in a religious context.

ful balance between the protection of reputation and the encouragement of free expression that has been struck under the Free Speech Clause of the First Amendment.

Secondly, this Court is encouraged to grant review because of its impact beyond this case-specific error. By holding*, as a matter of law*, that when the word 'cult' appears in a text that is primarily religious in content, it is *never* susceptible to a defamatory interpretation — regardless of the specific context in which it appears and regardless of the objective caricature assigned to it — the Court of Appeals created a precedent that *violates* the Establishment Clause by favoring publishers of religious texts over publishers of secular material. *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947). This precedent could result in a different (lower) standard of defamation for religious publishers and broadcasters than for secular media, when commenting on Christian churches and ministries based on a shortsighted analysis which effectively holds that, under the rubric of 'cult as a religious term,' (or any other allegedly religious code word) religious authors and their publishers can paint[10] churches and ministries with accusations of secular criminal conduct – accusations that would in any nonreligious context be actionably defamatory.[11] In essence, the court held that the

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[10] Undeniably, ECNR itself asserts, '**a far darker picture could have been painted**.' ECNR, p. IX.

[11] Consider the Texas (and other states courts') confusion with the actionability of the word cult. Compare *Hooper v. Pitney Bowes, Inc.,* 895 S.W.2d 773 (Tex.App. – Texarkana 1995) (implicating the potential actionability of the term 'cultist' vis a vis the case at bar here. *See also*, *Landmark Education v. Conde Naste,* 1994 WL 836356 (N.Y.Sup.) (1994**) (term 'cult' is actionable if defined in terms of conduct);** *NT Missionary Fellowship, v. E.P. Dutton & Co., Inc.,* 112 A.D. 2d 55 (1985) ('tarring groups with the term 'cult' can give rise to a defamation action); and *Kennedy v. Children's Service Society of Wisconsin*, 17 F. 3d 980 (1994) (adoptive parents identified as being in a 'cult' could bring suit for defamation); *Tuman v. Genesis Associates*, 935 F. Supp. 1375 (1996) (Plaintiffs sued for slander based on being identified as members of a satanic cult); *Pratt v. Nelson*, 127 P.3d 1256 (2005) (dismissed on other grounds but not based on the term 'cult' being one of 'religious opinion'). But *see also*, *Sands vs. Living Word Fellowship,* 34 P. 3d. 955 (2001) (dispute between religious groups over recruitment of an individ-

'neutral principles' of defamation law which apply to speech that occurs outside a religious context are inapplicable to statements of fact that appear in religious texts — even when those statements do not implicate religious matters. By this reasoning, the publisher of a primarily 'religious' text can choose a code-word like cult — define the word in terms of abhorrent characteristics and tar any disfavored group or person by referring to the group with the code-word. Then, regardless of the falsity of the characteristic, the publisher could claim 'religious immunity' because its publication 'centers on doctrinal and apologetic issues' and the reasoning that courts may not consider the customary defamation[12] but must find the speech 'non-defamatory,' based on Establishment Clause grounds. This reasoning is without precedent and extends the protection of the Establishment Clause to non-religious speech in religious texts – a result that is unprecedented from all of the leading cases that addressed religious questions. *See, e.g., Serbian Eastern Orthodox Diocese v. Milivojevich, et al*., 426 U.S. 696 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

Finally, amici are concerned about critics who can now paint groups with whom they disagree theologically with the secular attributes associated with 'cults' without accountability to libel laws. The court has, in effect, provided a legal 'assist' to religious authors and publishers not presently enjoyed by secular ones. Under the Free Speech Clause, there is no question that this case would appropriately be sent to a jury if the plaintiff was *not* a religious group. It is an offense to the First Amendment to disqualify a plaintiff from the shelter of the rule of law that it would otherwise enjoy merely because it *is* a religious group. The potential long-term effect will be for defamation to become acceptable prac-

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ual – action for slander would not lie for use of the term cult based on religious belief).

[12] The challenged statements must be construed in the context of the work as a whole, their diction and syntax must be considered and they must be tested to determine their susceptibility to being proved true or false *Milkovich v. Lorain Journal Co*. 497 U.S. 1 (1990).

tice in the normal discourse of religious speech and for the delicate balance between free speech and the reputations of others to be sloped in favor of powerful majority voices who can potentially denigrate their competition in the marketplace of ideas by vilifying them under the guise of 'religious' doctrine thereby inhibiting genuine religious discourse.

As in secular publishing, the greatest power in religious publishing is wielded by large, well-established, resource-rich entities. Almost by definition, major publishers tend to advance the views of the mainstream and promote like-minded, majority views over minority or religious organizations. *Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310, 1325, 89 L. Ed. 2d 478 (1986) (Brennan, J., dissenting), *superseded by statute*, 10 U.S.C. § 774(a)-(b), as recognized in *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) ('A critical function of the Religion Clause of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant because unfamiliar. It is the constitutional role of [the courts] to ensure that this purpose is realized.'); *Engel v. Vitale*, 370 U.S. 421, 431, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962) ('When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.'); *Torcaso v. Watkins*, 367 U.S. 488, 495, 81 S. Ct. 1680; 6 L. Ed. 2d 982 (1961) ('Neither [a State or the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.').

Armed with the special insulation from defamation liability that the lower court's ruling affords to religious publishers, these entities are enabled to wage devastating misinformation campaigns against religious groups with whom they disagree. Such campaigns would have a severely damaging effect on emergent religions that have neither the numbers nor the resources to defend against them. In this

way, the ruling below and others like it actually inhibit the *free exercise* of religion. Both religious and secular organizations should be afforded the opportunity to have their justiciable causes of action adjudicated under neutral principles of law, both organizations should be subject to the same legal standard of defamation and both organizations should enjoy the same protections from defamation when falsely accused of criminal or abhorrent conduct.

It should be noted, also, that reversing the lower court ruling and other rulings like it will not have a chilling effect on the First Amendment rights of any publishers or broadcasters because reversal would merely conform to existing defamation law, properly balancing one's freedom of speech with one's right to retain their reputation, regardless of religious persuasion or lack thereof. If these types of decisions are not reversed, churches and ministries, but not secular organizations, can be stained with libelous accusations as long as they occur within a purportedly religious context as a cloak for defamation. This will damage the free practice of religion in our country and abroad, allowing accusations to be made in the religious sphere that would not be tolerated by the courts outside of a purported religious context and making the courts an ally of those who seek to limit the freedoms of others. While we are understandably concerned about any unnecessary restriction of freedom of speech, we are also concerned about irresponsible practices by religious publishers and broadcasters. Merely because a publication or broadcast is made in the 'religious' context, does not mean that a publication or broadcast should enjoy blanket immunity from the laws of libel. An appropriate balance is necessary. This case provides an ideal vehicle to define that balance. For the sake of minority religious voices that deserve to be heard, we pray the Court will grant review and strike the appropriate balance between the important competing interests at stake in this case. As Justice Stewart noted in *Rosenblatt v. Baer,* 383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1966):

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential

> dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.

We, as religious organizations unaffiliated with either party in this suit and with no stake in the outcome of this litigation per se, are gravely concerned about this decision because it has consequences not just for the litigants but for the practice of religion in this Country and beyond. It is not just a localized or politicized problem in Texas but a national (and international) difficulty that must be addressed for a fitting balance to be struck between religious practice and religious freedom in this country. As such, we ask this Court to grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SEALY YATES
Counsel of Record
Yates and Yates LLP
1100 Town & Country Rd, Suite 1300
Orange CA 92868
(714) 835-3742

Counsel for the Amicus Curiae

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