

Kristen K. Waggoner

WA Bar No.27790

AZ Bar. No. 32382

Katherine Anderson

WA Bar No. 41707

AZ Bar No. 29490

Ryan Tucker*

AZ Bar No. 034382

Mark Lippelmann*

AZ Bar No. 036553

ALLIANCE DEFENDING FREEDOM

15100 N. 90th Street

Scottsdale, AZ 85260

Telephone: (480) 444-0020

kwaggoner@ADFlegal.org

kanderson@ADFlegal.org

rtucker@ADFlegal.org

mlippelmann@ADFlegal.org

Eric Kniffin*

CO Bar 48016

KNIFFIN LAW

102 S. Tejon St., Suite 1100

Colorado Springs, CO 80903

Telephone: (719) 212-4391

George M. Ahrend

WA Bar No. 25160

AHREND LAW FIRM

421 W. Riverside Ave., Suite

1060

Spokane, WA 99201

Telephone: (206) 467-6090

George@luveralawfirm.com

Counsel for Plaintiffs

*Motion for *Pro Hac Vice*

admission pending

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

ORTHODOX CHURCH IN AMERICA, *ET AL.*,

Plaintiffs,

v.

ROBERT FERGUSON, *ET AL.*,

Defendants.

Case No.: 2:25-cv-00209-RLP

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

**HEARING DATE REQUESTED
JULY 22-25, 2025**

TABLE OF CONTENTS

Table Of Authorities	iii
Introduction	1
Facts	3
A. Plaintiffs have a sacred duty to preserve the confidentiality of confession and protect those entrusted to their care.....	3
B. Washington passes the <i>Clergy Discrimination Clause</i> to force clergy to violate the confidentiality of confession.	6
C. Plaintiffs face the choice of jail or violating their religious convictions.	9
Legal Standard	11
Argument	12
I. Plaintiffs are likely to succeed on their claims.	12
A. The <i>Clergy Discrimination Clause</i> triggers at least strict scrutiny.	12
1. The <i>Clergy Discrimination Clause</i> likely violates the Free Exercise Clause.....	13
2. The <i>Clergy Discrimination Clause</i> likely violates the Equal Protection Clause.....	16
B. The Clergy Discrimination Clause fails strict scrutiny.....	16
1. The <i>Clergy Discrimination Clause</i> is not the least restrictive means.	17
2. The Clergy Discrimination Clause does not advance a compelling government interest.	19
C. The <i>Clergy Discrimination Clause</i> likely violates Plaintiffs’ church autonomy.	20

1	II. The other preliminary injunction factors weigh heavily in favor of	
2	granting injunctive relief.	21
3	Conclusion.....	22
4	Certificate of Service	25

TABLE OF AUTHORITIES

Cases

<i>American Beverage Ass'n v. City & County of San Francisco,</i>	
916 F.3d 749 (9th Cir. 2019)	21
<i>Anchor Stone Christian Church v. City of Santa Ana,</i>	
2025 WL 1086360 (C.D. Cal. Apr. 7, 2025)	1
<i>Bacon v. Woodward,</i>	
104 F.4th 744 (9th Cir. 2024)	17
<i>Brown v. Entertainment Merchants Ass'n,</i>	
564 U.S. 786 (2011)	17, 18
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,</i>	
508 U.S. 520 (1993)	13, 17
<i>City of Boerne v. Flores,</i>	
521 U.S. 507 (1997)	7, 16
<i>Davis v. Powell,</i>	
901 F. Supp. 2d 1196 (S.D. Cal. 2012)	16
<i>Evans v. Tacoma School District No. 10,</i>	
380 P.3d 553 (Wash. Ct. App. 2016)	10
<i>Fellowship of Christian Athletes v. San Jose Unified School District</i>	
<i>Board of Education,</i>	
82 F.4th 664 (9th Cir. 2023)	11, 14, 15, 16, 21, 22
<i>Fulton v. City of Philadelphia,</i>	
593 U.S. 522 (2021)	15, 16, 17, 19
<i>Holt v. Hobbs,</i>	
574 U.S. 352 (2015)	19

1	<i>Hunter v. U.S. Department of Education,</i>	
2	115 F.4th 955 (9th Cir. 2024).....	20
3	<i>Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North</i>	
4	<i>America,</i>	
5	344 U.S. 94 (1952)	20
6	<i>Kennedy v. Bremerton School District,</i>	
7	597 U.S. 507 (2022)	14
8	<i>Masterpiece Cakeshop v. Colorado Civil Rights Commission,</i>	
9	584 U.S. 617 (2018)	14
10	<i>Mockaitis v. Harceroad,</i>	
11	104 F.3d 1522 (9th Cir. 1997)	6
12	<i>Our Lady of Guadalupe School v. Morrissey-Berru,</i>	
13	591 U.S. 732 (2020)	20
14	<i>People v. Phillips,</i>	
15	N.Y. Ct. Gen. Sess. (N.Y. 1813).....	13
16	<i>Serbian Eastern Orthodox Diocese for U.S. of America & Canada v.</i>	
17	<i>Milivojevich,</i>	
18	426 U.S. 696 (1976)	20
19	<i>State v. Martin,</i>	
20	959 P.2d 152 (Wash. Ct. App. 1998)	6
21	<i>Tandon v. Newsom,</i>	
22	141 S. Ct. 1294 (2021)	15
23	<i>Washington v. Trump,</i>	
	847 F.3d 1151 (9th Cir. 2017)	16
	Statutes	
	Wash. Rev. Code Ann. § 26.44.020	8

1	Wash. Rev. Code Ann. § 26.44.080	9
2	Wash. Rev. Code Ann. § 5.60.060	6, 7, 8, 14
3	Wash. Rev. Code Ann. § 9.92.020	9
4	Wash. Rev. Code Ann. § 26.44.030	1, 2, 6, 7, 9, 12

Other Authorities

5	Michael W. McConnell, <i>The Origins and Historical Understanding of</i>	
6	<i>Free Exercise of Religion</i> ,	
7	103 Harv. L. Rev. 1409 (1990)	11

1 Plaintiffs move this Court, pursuant to Fed. R. Civ. P. 65, to issue
2 a preliminary injunction enjoining Defendants from enforcing the
3 *Clergy Discrimination Clause* found in RCW § 26.44.030(1)(b), as
4 amended by SB 5375, both facially and as applied to Plaintiffs. The
5 *Clause* grants an exemption to Washington’s mandatory reporting
6 duties for information learned from privileged communications “[e]xcept
7 for members of the clergy.”

8 Plaintiffs request this Court issue the preliminary injunction
9 without bond or other security because the injunction will cause
10 Defendants no monetary harm, will serve the public interest, and will
11 vindicate Plaintiffs’ constitutional rights. *See Anchor Stone Christian*
12 *Church v. City of Santa Ana*, 2025 WL 1086360, at *17 (C.D. Cal. Apr.
13 7, 2025).

14 INTRODUCTION

15 Washington has long exempted information learned from
16 privileged communications with clergy from its mandatory reporting
17 law. The clergy-penitent privilege recognizes the inherent sensitivity of
18 communications made between the faithful and their ministers. For
19 centuries, Plaintiff Churches have protected the absolute confidentiality
20 of the Sacrament of Confession, when the faithful confess and receive
21 absolution from their sins before God with the priest serving as
22 intermediary. That confidentiality both conveys God’s forgiveness and
23 reflects the pastoral reality that people will not confess and be

1 reconciled with God if they fear that their personal failings will become
2 public.

3 But this May, Washington passed its *Clergy Discrimination*
4 *Clause* (“*Clause*”), which strips clergy—and only clergy—of their
5 privilege exemptions to the mandatory reporting law. The *Clause* allows
6 exemptions “[e]xcept for members of the clergy.” RCW § 26.44.030(1)(b).
7 Washington now demands that Plaintiffs revise their centuries-old
8 religious obligations. The legislation’s primary sponsor told churches to
9 “change their rules,” “not insist that we change our state laws.” Yet
10 Washington retained a host of secular exemptions—and even
11 simultaneously expanded the attorney-client privilege exemption. In
12 addition to attorneys, Washington still allows peer supporters, sexual
13 assault advocates, and drug and alcohol recovery sponsors privilege
14 exemptions to their mandatory reporting duties.

15 The *Clause* cannot pass constitutional muster. It facially
16 discriminates against religion while leaving comparable secular conduct
17 untouched. And it prevents Plaintiff Churches from managing their
18 internal affairs. Should the *Clause* become effective, it will put
19 Plaintiffs to the test of obeying their religious obligations and suffering
20 criminal prosecution or violating their core convictions and jeopardizing
21 their souls. It will also deter the faithful from receiving the Sacrament
22 and thus reconciling themselves to God.

1 Plaintiffs also have a religious obligation to protect all those
2 entrusted to their care. They have implemented robust policies to
3 protect youth. They don't object to being mandatory reporters for
4 information learned outside the Sacrament—indeed they already are
5 required to report under their Churches' policies. But they do object to
6 Washington's attempt to rescind the narrow privilege protecting the
7 Sacrament. This Court should issue a preliminary injunction to return
8 to the status quo and halt Washington's infringement on fundamental
9 freedoms.

10 FACTS

11 **A. Plaintiffs have a sacred duty to preserve the**
12 **confidentiality of confession and protect those entrusted to**
13 **their care.**

14 The Orthodox Church is a communion of self-governing Christian
15 Churches united in faith, doctrine, and sacramental life and rooted in
16 the apostolic tradition and the teachings of the Holy Scriptures. Many
17 Orthodox Churches have jurisdictions in the United States, including
18 Plaintiff Orthodox Churches.

19 Plaintiff Orthodox Churches share the same religious beliefs
20 about the Sacrament of Confession. *See, e.g.,* Sokolov (Orthodox Church
21 in America (OCA)) Decl. ¶¶ 15–40; Zane (Antiochian Orthodox
22 Christian Archdiocese of North America (Antiochian)) Decl. ¶¶ 16–40.
23 Plaintiffs believe that Jesus charged his church with the mission to

1 preach “repentance and forgiveness of sins ... in his name to all
2 nations.” *E.g.*, Karakozoff (Western American Diocese of the Russian
3 Orthodox Church Outside of Russia (ROCOR)) Decl. ¶ 15. Plaintiffs live
4 out this mission through the Sacrament of Confession, during which the
5 Orthodox faithful, before God and in the presence of a priest, confess
6 their sins and receive absolution from God ministering through the
7 priest. *E.g.*, Condrea (Romanian Orthodox Metropolia of the Americas
8 (Romanian)) Decl. ¶¶ 24–27. Plaintiffs believe that everyone is a sinner,
9 but that everyone can receive absolution from God through Confession.
10 *E.g.*, ROCOR Decl. ¶ 18. Only absolution in the Sacrament can repair
11 the rupture sin causes in the relationship with God. *E.g.*, OCA Decl.
12 ¶¶ 28–29. During Confession, priests also may offer spiritual advice to
13 help guide the penitent to virtue and holiness. *E.g.*, ROCOR Decl.
14 ¶¶ 29–30. Orthodox priests thus have a religious obligation to offer the
15 Sacrament, and Plaintiffs encourage the faithful to receive the
16 Sacrament regularly. *E.g.*, Wilkinson Decl. ¶ 16; Antiochian Decl. ¶ 23.

17 Consistent with the sensitive nature of the confession of sins,
18 Plaintiffs have a religious obligation never to reveal what is told to
19 them in confession. *E.g.*, Romanian Decl. ¶ 28. This obligation, called
20 the “confidentiality of confession,” has two main purposes. *E.g.*, OCA
21 Decl. ¶ 32. First, it manifests God’s promise of forgiveness for past sins.
22 *Id.* ¶ 33. Second, without a guarantee of confidentiality, Plaintiffs know
23

1 that penitents will refuse to confess certain sins—or avoid confession
2 altogether. *Id.* ¶ 34; Phelps Decl. ¶¶ 12–13. That would prevent priests
3 from ministering to them and deprive sinners of God’s needed mercy.
4 *E.g.*, ROCOR Decl. ¶¶ 40–41.

5 Plaintiffs believe that violating the confidentiality of confession is
6 a grave sin that jeopardizes both the priest’s salvation and canonical
7 standing. *E.g.*, Antiochian Decl. ¶ 38. If a priest breaks confidentiality
8 and does not receive absolution, he risks eternal damnation. *E.g.*,
9 ROCOR Decl. ¶ 35. On earth, canonical punishment includes
10 suspending the priest’s faculties (for example, by barring him from
11 hearing confessions) and laicizing the priest. *E.g.*, Romanian Decl. ¶ 36.
12 Plaintiffs believe that “it is better for the spiritual father to accept
13 temporary death from people who kill his body but who cannot kill his
14 soul than to be executed by God with a permanent death for the
15 exposure.” *E.g.*, OCA Decl. ¶ 35. Through the centuries, numerous
16 priests have submitted to torture and death rather than violate this
17 sacred confidentiality. *Id.* ¶ 36.

18 As Plaintiffs have a duty to help the souls of the faithful through
19 Confession, so do they have an obligation to otherwise protect all those
20 entrusted to their care. *E.g.*, ROCOR Decl. ¶ 50. Each Plaintiff Church
21 has a policy detailing how clergy, administrators, staff, and volunteers
22 must protect children. *E.g.*, Antiochian Decl. ¶¶ 51–61. Those policies
23

1 require Church personnel, including clergy, and volunteers to report
2 any reasonable suspicion of child abuse or neglect to law enforcement or
3 church authorities. *E.g.*, ROCOR Decl. ¶¶ 52–54. Failing to report
4 results in discipline, including termination from employment or
5 volunteer positions. *E.g.*, Antiochian Decl. ¶ 57. The only exception is
6 for information priests learn during the Sacrament of Confession. *E.g.*,
7 ROCOR Decl. ¶ 54.

8 Plaintiffs also believe that ministering to sinners includes
9 encouraging the penitent to address damage related to a confessed sin.
10 *E.g.*, OCA Decl. ¶¶ 58–61. In certain circumstances based on the priest’s
11 pastoral judgment, the priest may withhold absolution during the
12 Sacrament for a short time for the penitent to make amends, including
13 by asking the penitent to contact legal authorities. *E.g.*, Wilkinson Decl.
14 ¶¶ 20–21; Antiochian Decl. ¶ 67.

15 **B. Washington passes the *Clergy Discrimination Clause***
16 **to force clergy to violate the confidentiality of confession.**

17 Since 1870, Washington has recognized the clergy-penitent
18 privilege (just as every other state currently does). RCW § 5.60.060(3);
19 *State v. Martin*, 959 P.2d 152, 157 (Wash. Ct. App. 1998). As the Ninth
20 Circuit has said, “the inviolability of religious confession to the clergy”
21 is “the law of the land, the expectation of every repentant sinner, and
22 the assured confidence of every minister of God’s grace.” *Mockaitis v.*
23 *Harceroad*, 104 F.3d 1522, 1533 (9th Cir. 1997), *overruled on other*

1 *grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997). So to preserve
2 the trust and confidence inherent in these—and other—confidential
3 communications, Washington has long explicitly exempted privileged
4 communications from its mandatory reporting law for suspected child
5 abuse or neglect. *See* RCW § 26.44.030(1)(b) (2024). That law requires
6 certain people, including law enforcement officers, professional school
7 personnel, registered or licensed nurses, social service counselors,
8 psychologists, and supervisors in a nonprofit organization, to file a
9 report when they have “reasonable cause to believe that a child has
10 suffered abuse or neglect.” RCW § 26.44.030(1).

11 This May, Washington did a 180 on protections for sacramental
12 communications. It revised its mandatory reporting law to add clergy as
13 mandatory reporters while excluding clergy—and *only* clergy—from
14 receiving any kind of privilege that others would receive. The law’s
15 *Clergy Discrimination Clause* says, “[e]xcept for members of the clergy,
16 no one” must make a mandatory report from information learned solely
17 from an otherwise privileged communication. RCW § 26.44.030(1)(b).

18 The law retains two large categories of secular exemptions. First,
19 any layperson may claim any otherwise available privilege. For
20 example, Washington exempts a lay nonprofit supervisor who learns
21 from counsel about suspected child neglect from a duty to report. *See*
22 RCW § 5.60.060(2)(a). But if that nonprofit supervisor were an
23

1 Orthodox priest or deacon (both qualify as “clergy” under Washington’s
2 mandatory reporter law), he cannot claim any available privileged
3 communication exemption and must report. *See* RCW § 26.44.030(1)(b).

4 Second, Washington still allows at least four lay privileges—but
5 not the clergy-penitent privilege—to override the duty to report. First is
6 the attorney-client privilege, discussed above. Second, Washington
7 recognizes a privilege for a “peer supporter” that prohibits him or her
8 from being “compelled to testify about any communication made to the
9 peer supporter by the peer support services recipient while receiving
10 individual or group services.” RCW § 5.60.060(6)(a). A “peer supporter”
11 includes a “law enforcement officer”; such an officer is a mandatory
12 reporter. RCW §§ 5.60.060(6)(b)(1)(A), 26.44.030(1)(a). Third, “sexual
13 assault advocate[s],” who are mandatory reporters, cannot be
14 “examined as to any communication made between the victim and the
15 sexual assault advocate” without the victim’s consent. RCW
16 §§ 5.60.060(7), 26.44.020(28). Fourth, Washington also recognizes a
17 privilege for an “individual who acts as a sponsor providing guidance,
18 emotional support, and counseling in an individualized manner to a
19 person participating in an alcohol or drug addiction recovery
20 fellowship”; these individuals qualify as mandatory reporters. RCW
21 §§ 5.60.060(10), 26.44.020(28).

1 Religious hostility infected the legislative process. Washington
2 legislators emphasized that the *Clause* targets clergy—and only
3 clergy—and rejected amendment after amendment that would have
4 placed the clergy-penitent privilege on equal footing with secular
5 privileges. Kniffin Decl. ¶¶ 5–8. The *Clause*’s primary sponsor said that
6 churches “can change their rules, not insist that we change our state
7 laws.” *Id.* ¶ 17.¹ And at the same time the legislature considered and
8 passed the *Clergy Discrimination Clause*, it also considered and passed
9 a law confirming and expanding the attorney-client privilege exception
10 to the mandatory reporting law, with a legislator recognizing the
11 privilege was still “narrow.” See Kniffin Decl. ¶¶ 9, 18.

12 Washington has made itself an outlier. It is now the *only* state to
13 have explicitly removed all privileges for clergy while retaining the
14 secular attorney-client privilege. *Id.* ¶ 23 & Ex. K at 27.

15 **C. Plaintiffs face the choice of jail or violating their**
16 **religious convictions.**

17 Washington imposes severe penalties on Plaintiffs’ religious duty to
18 preserve the confidentiality of confession and offer the Sacrament of
19 Confession consistent with their laws and traditions. Failing to make a
20 mandatory report is a gross misdemeanor, a criminal offense punishable
21 with up to 364 days imprisonment, up to a \$5,000 fine, or both. RCW

22 ¹ Washington State Legislature, House Early Learning & Human Services
23 Committee 13:04–:50 (Mar. 14, 2025, 8:00 AM), <https://tvw.org/video/house-early-learninghuman-services-2025031189/?eventID=2025031189>.

1 §§ 26.44.080, 9.92.020. Failure to report may also expose a mandatory
2 reporter to civil tort liability. *See Evans v. Tacoma Sch. Dist. No. 10*, 380
3 P.3d 553, 561 (Wash. Ct. App. 2016).

4 The *Clergy Discrimination Clause* also discourages penitents from
5 confessing sins that may not even come remotely close to Washington’s
6 expansive interpretation of “child abuse or neglect.” According to
7 Washington’s guidance, signs of child abuse or neglect include “sudden
8 changes in behavior or school performance,” “learning problems (or
9 difficulty concentrating) that cannot be attributed to specific physical or
10 psychological causes,” and being “overly compliant, passive, or
11 withdrawn.” Kniffin Decl. Ex. I at 5. Signs also include a parent that
12 “denies the existence of—or blames the child for—the child’s problems
13 in school or at home,” a parent that sees his or her child as
14 “burdensome,” or a child who lacks “needed” immunizations. *Id.* So a
15 penitent mother may reasonably fear that confessing her fears that her
16 anxiety has caused her child’s poor school performance could trigger the
17 legal duty to file a mandatory report and attendant inquiry from the
18 state. *See* RCW § 26.44.030(12)(a) (state may start “[i]nvestigation” or
19 “[f]amily assessment” upon receiving report). Fear of public disclosure of
20 intensely personal matters and burdensome investigations will cause
21 penitents to avoid confessing certain sins and thus prevent them from
22 receiving absolution for them. *See, e.g.,* OCA Decl. ¶¶ 47–48.

1 Plaintiffs cannot make such a mandatory report because their
2 religious beliefs require them to keep what they hear in Confession
3 confidential and to help penitents receive absolution for their sins. *E.g.*,
4 ROCOR Decl. ¶¶ 31–34. Should they break the confidentiality, they
5 commit a grave sin jeopardizing their salvation and subject themselves
6 to canonical punishment, including removal from the priesthood. *E.g.*,
7 Antiochian Decl. ¶¶ 38–40. And should the law become effective, it will
8 discourage penitents from confessing certain sins or from going to
9 confession altogether, which similarly burdens Plaintiffs’ religious
10 exercise. *E.g.*, Wilkinson Decl. ¶¶ 12–13; OCA Decl. ¶ 47.

11 LEGAL STANDARD

12 Plaintiffs must show that (1) they are “likely to succeed on the
13 merits”; (2) they are “likely to suffer irreparable harm in the absence of
14 preliminary relief”; (3) the balance of equities tips in [their] favor”; and
15 (4) “an injunction is in the public interest.” *Fellowship of Christian*
16 *Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 683
17 (9th Cir. 2023) (en banc) (*FCA*). “When the balance of equities tips
18 sharply in the plaintiff’s favor, the plaintiff must raise only serious
19 questions on the merits—a lesser showing than likelihood of success.”
20 *Id.* (citation modified).

ARGUMENT

I. Plaintiffs are likely to succeed on their claims.

The First and Fourteenth Amendments bar the *Clause*'s religious discrimination. The *Clause* facially targets clergy by abolishing any privilege for them, while retaining many secular exemptions, such as the attorney-client and sexual assault advocate privileges. Eliminating the relevant clergy-penitent privilege is inconsistent with the text, history, and tradition of the First Amendment. But it at least subjects the *Clause* to strict scrutiny, which it cannot meet. Washington has no evidence that selectively denying clergy the right to invoke the privileged communications law or selectively targeting the only specifically religious privilege will achieve a compelling government interest. And the *Clause* targets Plaintiffs' protected freedom to decide matters of church discipline and ecclesiastical government.

A. The *Clergy Discrimination Clause* triggers at least strict scrutiny.

The *Clergy Discrimination Clause*'s facial religious discrimination conflicts with our nation's longstanding protection for the clergy-penitent privilege. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1504 (1990) ("To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman Catholic religion would be thus

1 annihilated.” (citation omitted)). The clergy-penitent privilege poses no
2 threat to “the well being of the state.” *People v. Phillips*, N.Y. Ct. Gen.
3 Sess. (N.Y. 1813). History and tradition thus show that the *Clause* is
4 invalid independent of any scrutiny analysis. But it at least triggers
5 (and fails) strict scrutiny because it discriminates based on religion.

6 **1. The *Clergy Discrimination Clause* likely violates the**
7 **Free Exercise Clause.**

8 The First Amendment requires laws to be both neutral and
9 generally applicable. See *Church of the Lukumi Babalu Aye, Inc. v. City*
10 *of Hialeah*, 508 U.S. 520, 531 (1993). “Neutrality and general
11 applicability are interrelated” and “failure to satisfy one requirement is
12 a likely indication that the other has not been satisfied.” *Id.* The *Clergy*
13 *Discrimination Clause* flunks both.

14 The *Clergy Discrimination Clause* lacks neutrality because it
15 facially discriminates against religion and because religious animus
16 motivated its passage. “[A] law targeting religious beliefs as such is
17 never permissible.” *Id.* at 533. But that’s just what the *Clause* does. It
18 removes the benefit of *any* privilege exception to the mandatory
19 reporting law from “clergy”—and only clergy. RCW § 26.44.030(1)(b).
20 And it facially targets the clergy-penitent privilege by removing it—and
21 only it categorically—as an exception from the mandatory reporting
22 law. That means that the *Clause* violates the First Amendment and at
23 least needs to meet strict scrutiny.

1 The *Clause*’s legislative history shows Washington acted “in a
2 manner that passes judgment upon or presupposes the illegitimacy of
3 religious beliefs and practices.” *FCA*, 82 F.4th at 685. Washington had
4 “a clear and impermissible hostility toward [Plaintiffs] sincere religious
5 beliefs.” *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 584 U.S. 617, 634
6 (2018). The *Clause*’s primary legislative sponsor told churches that
7 Washington wouldn’t change its new law, but that they’d have to
8 change their centuries-old teaching. Kniffin Decl. ¶ 17. That legislator
9 also told a bishop that it was “traumatizing” that he sought continued
10 protection for “religious freedom.” *Id.* ¶ 11.² Another legislator said that
11 “religious freedom” posed the “risk of hurting others.” *Id.* ¶ 15.³ And the
12 legislature considered and rejected four proposed amendments that
13 would have retained the relevant clergy-penitent privilege. *Id.* ¶¶ 5–8.
14 That hostility means this Court should “set aside” the *Clause* “without
15 further inquiry.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 n.1
16 (2022). But it at least means the *Clause* triggers strict scrutiny.

17 The *Clause* also fails general applicability in at least two ways. A
18 law “lacks general applicability if it prohibits religious conduct while
19 permitting secular conduct that undermines the government’s asserted
20

21 ² Washington State Legislature, Senate Human Services Committee 1:43:35 (Jan.
22 28, 2025, 1:30 PM), <https://www.tvw.org/watch/?eventID=2025011502>.

23 ³ Washington State Legislature, House Early Learning & Human Services
Committee 13:34–14:35 (Feb. 7, 2025, 8:00 AM), <https://tvw.org/video/house-early-learninghuman-services-2025021153/?eventID=2025021153>.

1 interests in a similar way.” *Fulton v. City of Philadelphia*, 593 U.S. 522,
2 534 (2021). One exemption is enough: “government regulations are not
3 ... generally applicable ... whenever they treat *any* comparable secular
4 activity more favorably than religious exercise.” *FCA*, 82 F.4th at 688
5 (quoting *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam)).

6 First, the *Clause* removes every applicable privilege from clergy,
7 while allowing lay people to receive the same privilege. For example,
8 clergy must report suspected child abuse or neglect learned from a
9 privileged attorney-client communication. *See supra* Facts Part B. But a
10 lay mandatory reporter who learns the same thing from the same
11 communication does not.

12 Second, the law elevates secular privileges above the clergy-
13 penitent privilege. It exempts attorneys, peer supporters, sexual assault
14 advocates, and drug and alcohol recovery sponsors from their
15 mandatory reporting duties for information learned in privileged
16 communications. *See* RCW § 5.60.060. But it doesn’t recognize the
17 similarly-situated clergy-penitent privilege as an exemption, even
18 though those privileges “pose an identical risk” to Washington’s
19 purported interest in protecting children. *FCA*, 82 F.4th at 689. Legal
20 aid clinics, the impetus behind this year’s bill expanding the attorney-
21 client privilege exemption, often offer family law services that involve
22 issues relating to children. *See, e.g.*, RCW § 26.09.270 (discussing child
23

1 custody orders). And Defendant Brown advertises resources, including
2 sexual assault advocates, for “child victims of sexual assault and their
3 loved ones.”⁴ The *Clause* thus creates an impermissible “religious
4 gerrymander[].” *FCA*, 82 F.4th at 689.

5 **2. The *Clergy Discrimination Clause* likely violates the**
6 **Equal Protection Clause.**

7 “The Equal Protection Clause ... prohibits the Government from
8 impermissibly discriminating among persons based on religion.”
9 *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017). Intentional
10 religious discrimination triggers “strict scrutiny.” *Davis v. Powell*, 901
11 F. Supp. 2d 1196, 1220 (S.D. Cal. 2012). The *Clause* intentionally
12 discriminates against religion by facially targeting clergy and by
13 treating the clergy-penitent privilege less favorably than comparable
14 secular privileges. *Supra* Section I.A.1. It therefore must withstand
15 strict scrutiny.

16 **B. The *Clergy Discrimination Clause* fails strict scrutiny.**

17 Defendants bear the burden of meeting strict scrutiny—the “most
18 demanding test known to constitutional law.” *City of Boerne*, 521 U.S.
19 at 534. They must prove enforcement of the *Clergy Discrimination*
20 *Clause* specifically against Plaintiffs serves a compelling interest and is
21 narrowly tailored to achieve that interest. *Fulton*, 593 U.S. at 541. And
22

23 ⁴ Washington State Office of the Attorney General, *Survivor Resources*,
<https://perma.cc/Z2PT-NKRL>.

1 they cannot “justify an inroad on religious liberty” without first
2 “showing that it is the least restrictive means of achieving some
3 compelling state interest.” *Bacon v. Woodward*, 104 F.4th 744, 751 (9th
4 Cir. 2024) (citation modified). The *Clause* fails both narrow tailoring
5 and compelling interest.

6 **1. The *Clergy Discrimination Clause* is not the least**
7 **restrictive means.**

8 If the government “can achieve its interests in a manner that does
9 not burden religion, it must do so.” *Fulton*, 593 U.S. at 541. A law fails
10 narrow tailoring “[w]here government restricts only conduct protected
11 by the First Amendment and fails to enact feasible measures to restrict
12 other conduct producing substantial harm or alleged harm of the same
13 sort.” *Lukumi*, 505 U.S. at 546–47. Laws “overbroad or underinclusive
14 in substantial respects” also cannot meet Washington’s burden. *Id.* at
15 546. The *Clause* targets clergy while leaving a host of other potentially
16 damaging conduct untouched.

17 As a legislator conceded in a related debate, the similar attorney-
18 client privilege is a “narrow” exception. Kniffin Decl. ¶ 18. Washington
19 had no proof when it enacted the *Clause* that “narrow” privileges for
20 clergy have caused injury. Washington “cannot show a direct causal link
21 between” retaining privileges for clergy “and harm to minors.” *Brown v.*
22 *Ent. Merch. Ass’n*, 564 U.S. 786, 799 (2011). The Legislature had no
23 proof that clergy or the clergy-penitent privilege pose a unique threat

1 that justified singling out religion as the *Clergy Discrimination Clause*
2 does. Yet it still ran roughshod over centuries of church and
3 constitutional law.

4 Washington still allows other privileges to trump mandatory
5 reporting duties, showing how “wildly underinclusive” the *Clause* is.
6 *Brown*, 564 U.S. at 802. “Underinclusiveness raises serious doubts
7 about whether the government is in fact pursuing the interest it
8 invokes.” *Id.* The attorney-client, peer supporter, sexual assault
9 advocate, and drug and alcohol recovery sponsor privileges (when
10 asserted by lay people) all still serve as exemptions to the mandatory
11 reporting law. They would undermine Washington’s asserted interest at
12 least as much as retaining privileges for clergy. What’s more,
13 Washington did not make its mandatory reporter statute *universal* and
14 require everyone to report, as some states have done. Kniffin Decl. Ex.
15 K at 25–26. It still only imposes reporting duties on specific categories
16 of people.

17 Washington has chosen to infringe on religious liberty as no other
18 state has. All 50 states have mandatory reporter laws and recognize the
19 clergy-penitent privilege. *See id.* at 24–25. Many states have made
20 clergy mandatory reporters. *Id.* at 24–27. But Washington is now the
21 only state to retain the lay attorney-client privilege while knowingly
22 and explicitly removing all privileges for clergy. *Id.* at 27. Of the 49
23

1 other states, only Texas has explicitly revoked the clergy-penitent
2 privilege, but it also revoked *all* other privileges. *Id.* That so many other
3 states have mandatory reporter laws that respect the confidentiality of
4 confession shows that Washington, too, can “satisfy” its “concerns
5 through a means less restrictive.” *Holt v. Hobbs*, 574 U.S. 352, 368–69
6 (2015).

7 **2. The Clergy Discrimination Clause does not advance a**
8 **compelling government interest.**

9 A compelling interest cannot be “broadly formulated” or based on
10 speculation. *Fulton*, 593 U.S. at 541. So Washington cannot assert “a
11 compelling interest in enforcing” the *Clause* generally; instead, it must
12 give a compelling reason to deny an exception to Plaintiffs. *Id.*
13 Washington can’t meet its burden. As discussed above, it has no
14 evidence that retaining clergy’s “narrow” privilege harms any asserted
15 interest. Plaintiffs already make their priests mandatory reporters for
16 information learned outside the Sacrament. *E.g.*, ROCOR Decl. ¶ 54.
17 They have implemented extensive policies and practices to protect all
18 those entrusted to their care. *E.g.*, OCA Decl. ¶¶ 51–57. And their
19 priests can use their pastoral judgment to ask those who confess crimes
20 to report such information to authorities as a condition for receiving
21 absolution during the Sacrament. *E.g.*, Antiochian Decl. ¶¶ 63–67;
22 Phelps Decl. ¶¶ 20–22. What’s more, the *Clause* will discourage people
23 from confessing a wide variety of behavior and prevent them from

1 receiving spiritual and temporal help for that behavior. *E.g.*, OCA Decl.
2 ¶¶ 47–48. All of which would undermine Washington’s purported
3 interest. Washington can’t meet its strict scrutiny burden.

4 **C. The *Clergy Discrimination Clause* likely violates**
5 **Plaintiffs’ church autonomy.**

6 The First Amendment protects the right of religious organizations
7 “to decide matters of faith and doctrine” and assures “independence” in
8 “matters of church government.” *Our Lady of Guadalupe Sch. v.*
9 *Morrissey-Berru*, 591 U.S. 732, 746 (2020) (citation modified). This
10 autonomy includes the freedom to decide matters of “church discipline”
11 and “ecclesiastical government.” *Serbian E. Orthodox Diocese for U.S. of*
12 *Am. & Can. v. Milivojevich*, 426 U.S. 696, 714 (1976) (citation modified).
13 And it protects religious organizations from “secular control or
14 manipulation” and “state interference.” *Kedroff v. St. Nicholas*
15 *Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116
16 (1952). In sum, Washington “must accept the ecclesiastical decisions of
17 church tribunals as it finds them.” *Hunter v. U.S. Dep’t of Educ.*, 115
18 F.4th 955, 967 (9th Cir. 2024).

19 It does anything but. As the *Clause*’s primary legislative sponsor
20 proclaimed, Plaintiff churches “can change their rules, not insist that
21 we change our state laws.” Kniffin Decl. ¶ 17. Thus, concededly, the
22 *Clause* interferes with both church discipline and government. As a
23 matter of church law, clergy must retain the sacramental

1 confidentiality. Yet the *Clause* threatens jail time if they do. The *Clause*
2 also discourages penitents from confessing certain sins or even going to
3 confession at all. But penitents have a moral duty to confess their sins,
4 just as clergy have a corresponding duty to hear confession. *E.g.*, OCA
5 Decl. ¶¶ 18–23. Finally, the *Clause* attempts to modify Plaintiffs’
6 church government by abolishing sacramental confidentiality. All the
7 above violates the First Amendment.

8 **II. The other preliminary injunction factors weigh heavily in**
9 **favor of granting injunctive relief.**

10 In First Amendment cases, the preliminary injunction analysis
11 essentially reduces to a single question: whether the plaintiff is likely to
12 succeed on the merits. *See Am. Beverage Ass’n v. City & Cnty. of S.F.*,
13 916 F.3d 749, 758 (9th Cir. 2019). “[I]rreparable harm is relatively easy
14 to establish in a First Amendment case because” Plaintiffs “need only
15 demonstrate the existence of a colorable First Amendment claim.” *FCA*,
16 82 F.4th at 694–95. Plaintiffs have more here. Their noncompliance
17 with the *Clergy Discrimination Clause* subjects them to jail time, fines,
18 and civil liability. But complying with the *Clause* jeopardizes their
19 salvation. And the mere existence of the *Clause* chills penitents from
20 confessing their sins as required by their religion or even from going to
21 confession at all. The *Clause* will cause ongoing harm to numerous
22 Orthodox faithful across Washington.

23 In cases involving the government, like this one, the third and

1 fourth factors “merge.” *Id.* at 695. Because Plaintiffs have “(at a
2 minimum) raised serious First Amendment questions, that alone
3 “compels a finding that the balance of hardships tips sharply in [their]
4 favor.” *Id.* (citation modified). Finally, “it is always in the public interest
5 to prevent the violation of a party’s constitutional rights.” *Id.*

6 The requested injunction—just like the relevant privilege for
7 clergy—is narrow. It merely seeks to enjoin the portion of the law that
8 targets the confidentiality of confession. Plaintiffs will remain
9 mandatory reporters under the law and their own church rules. They
10 will continue to hear confessions and counsel sinners to make amends.
11 And they will retain the “narrow” privileges to their mandatory
12 reporting duties—privileges that Washington has explicitly recognized
13 for decades. *See id.* at 695 (“minimal” “harm” from preliminary
14 injunction when the plaintiff “existed as a recognized club for nearly
15 two decades without any objection”). Washington has no justification or
16 evidence for its brash infringement on a centuries-old religious
17 obligation.

18 CONCLUSION

19 The Court should preliminarily enjoin the *Clergy Discrimination*
20 *Clause* in RCW 26.44.030(1)(b) facially and as applied to Plaintiffs.
21
22
23

Respectfully submitted this 20th day of June 2025,

/s/ Katherine Anderson

Eric Kniffin*
CO Bar 48016
KNIFFIN LAW
102 S. Tejon St., Suite 1100
Colorado Springs, CO 80903
(719) 212-4391
eric@kniffin.law

Kristen K. Waggoner
WA Bar No.27790
AZ Bar. No. 32382
Katherine Anderson
WA Bar No. 41707
AZ Bar No. 29490
Ryan Tucker*
AZ Bar No. 034382
Mark Lippelmann*
AZ Bar No. 036553
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
kanderson@ADFlegal.org
rtucker@ADFlegal.org
mlippelmann@ADFlegal.org

George M Ahrend
WA Bar No. 25160
AHREND LAW FIRM PLLC
421 W. Riverside Ave.
Suite 1060
Spokane, WA 99201
Telephone: (206) 467-6090
George@luveralawfirm.com

John J. Bursch*
MI Bar No. P57679
Mathew W. Hoffmann*
VA Bar No. 100102
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, VA 20176
Telephone: (571) 707-4655
mhoffmann@ADFlegal.org

Counsel for Plaintiffs

David A. Cortman
GA Bar No. 188810*
ALLIANCE DEFENDING FREEDOM 1000
Hurricane Shoals Rd. NE Suite D-
1100

Lawrenceville, GA 30043
Telephone: (770) 339-0774
dcortman@adflegal.org

*Motion for admission *Pro Hac Vice*
pending

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2025, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record.

s/ Katherine Anderson

Katherine Anderson