

NO. A14-0605

State of Minnesota
In Supreme Court

La Vonne Pfeil, et al.,

Appellants,

vs.

St. Matthew Evangelical Lutheran Church
of the Unaltered Augsburg Confession of Worthington,
Nobles County, Minnesota, et al.,

Respondents.

**BRIEF AND ADDENDUM OF AMICUS CURIAE
THE LUTHERAN CHURCH-MISSOURI SYNOD**

BASSFORD REMELE

A Professional Association

Mark R. Bradford (#335940)

Steven P. Aggergaard (#336270)

33 South Sixth Street, Suite 3800

Minneapolis, MN 55402-3707

(612) 333-3000

Of Counsel:

THOMPSON COBURN LLP

Sherri C. Strand, Esq.

Mark Sableman, Esq.

Anthony F. Blum, Esq.

One US Bank Plaza

St. Louis, MO 63101

(314) 552-6000

Attorneys for Amicus Curiae

The Lutheran Church-Missouri Synod

(Counsel for Appellants listed on following page)

DUNLAP & SEEGER, P.A.

Ken D. Schueler (#190378)

Jennifer M. Peterson (#392956)

206 South Broadway, Suite 505

P.O. Box 549

Rochester, MN 55903

(507) 288-9111

LIND, JENSEN, SULLIVAN
& PETERSON, P.A.

Timothy J. O'Connor (#216483)

William L. Davidson (#201777)

1300 AT&T Tower

901 Marquette Avenue South

Minneapolis, MN 55402

(612) 333-3637

Attorneys for Respondents

THE LAW OFFICE OF
ZORISLAV R. LEYDERMAN
Zorislav R. Leyderman (#391286)
222 South Ninth Street, Suite 1600
Minneapolis, MN 55402
(612) 876-6626

Attorney for Appellants

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INTERESTS OF AMICUS CURIAE

The Lutheran Church—Missouri Synod is a Missouri nonprofit corporation with voting members (member congregations) and nonvoting members (ordained and commissioned ministers).¹ It is the second-largest Lutheran denomination in America with over 2.3 million baptized members and 9,000 pastors in more than 6,100 congregations, including St. Matthew.² The Synod's hallmark is its steadfast adherence to orthodox Lutheran theology and practice.

This case raises important concerns about potential government entanglement in issues of church discipline and of membership within the Synod's member congregations. The Synod's procedures for discipline derive from its evangelical, Gospel-centered and Gospel-oriented ministry, going back centuries, and are deeply grounded in theological understandings of God's will, as revealed by Scripture and as traditionally understood by the church. The Synod submits this amicus curiae brief to make the Court better aware of its relevant and sincerely held religious beliefs and practices, its theological and historical roots, and the dangers of civil intervention into those religious beliefs and practices.

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or its counsel, made a monetary contribution intended to fund its preparation or submission.

² The Synod is divided into 35 Districts, all separately incorporated. Congregations, also separate corporations, are self-governing, own their own property, and call their own ministers. The District Presidents have exclusive ecclesiastical supervision over member congregations in their districts and ministers serving within it.

ARGUMENT

Reversal of the rulings below could allow parties to circumvent the ecclesiastical abstention doctrine and invade religious provinces through the back door of defamation claims, thus chilling the free exercise of religion and the free expression of religious beliefs. It could also seriously entangle civil courts into religious matters. Internal church discipline proceedings cannot be judged through a non-religious lens, even under the pretense of “neutrality,” because of the many judgments that secular civil decision-makers would necessarily have to make about religious conduct, statements, and understandings.

Civil adjudication of disputes about discipline, faith and internal organization, all of which are governed by ecclesiastical rule, custom and law, would unnecessarily entangle the courts in religious matters, in violation of the First Amendment and Article I, Section 16 of the Minnesota Constitution. This is particularly true when the dispute stems from religious expression, protection of which is at the core of both the First Amendment and the state constitution, which affords even “greater protection for religious liberties” than under the federal constitution. *See State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990).

To provide context, the Synod begins by discussing some of its core beliefs and the beliefs of its members with respect to church discipline. This is not intended as a substitute for a seminary education, but is merely provided to show the futility of Appellants’ solution of treating these religious matters as if they were no more than secular business dealings. Next, the Synod sets forth how defamation claims should not

be used to circumvent and undercut independent decisions on religious matters by the proper religious authorities, including examples demonstrating the Pandora's box of issues that civil courts would be bound to open, entangling them into religious issues and practices, if this Court were to reverse the Court of Appeals' well-reasoned opinion.

I. MATTERS OF CHURCH DISCIPLINE AND EXCOMMUNICATION ARE GOVERNED BY AND BASED UPON RELIGIOUS BELIEFS AND PRACTICES WITHIN THE SYNOD

A. Church Discipline Is Important Within The Synod's Beliefs

Laypersons, judges and juries may view church discipline and excommunication in the Synod's congregations as unkind and unjustly punitive. Those from different Judeo-Christian persuasions may even view it as "not befitting a community which has experienced the love of Christ" and argue that it is scripturally unsound. *See Church Discipline in the Christian Congregation, A Report of the Commission on Theology and Church Relations of the Lutheran Church—Missouri Synod* (Nov. 1985) (Add. 11).³ ("Church Discipline"). But under the beliefs of the Synod, this view would be in error.

On the contrary, in the Synod, "[c]hurch discipline is one of the ways in which Christians, clergy and laity alike, show the love of Christ to those who have lapsed into some sin or error that might pull them from the side of the Savior." (Add. 2.) In pursuing discipline, the church "seeks not the damnation but the salvation of the sinner." (Add. 8); *see also* Add. 2 (emphasizing that the purpose of discipline is to "gain the brother"). In

³ The *Amicus Curiae's* Addendum is cited as "Add. _"

fact, according to the Synod, “[a]t times the highest act of love is to say, ‘Unless you repent, you will perish.’” (Add. 12.) Thus, excommunication proceedings, which may appear adversarial to outside secular eyes, are viewed much differently within the Synod and indeed as part of the church’s outreach of Christian love to the subjects of those proceedings.

B. Church Discipline Is A God-Given Duty Based On The Scriptures And Lutheran Authorities

The beliefs of the Synod and its members with respect to church discipline are founded in the Scriptures, which every member of the Synod (congregation and rostered church worker) willingly and formally “accepts without reservation . . . as the written Word of God and the only rule and norm of faith and of practice.” Constitution, The Lutheran Church—Missouri Synod, at 9 (Article II Confession) (2013) (Add. 23). *See also* Add. 24-25 (Articles V and VI) (stating that members must “confess and accept the confessional basis of Article II”).

And the Synod sees the Scriptures as calling on the Christian congregation to exercise church discipline, including when necessary the ultimate step of excommunication. *See* Church Discipline (Add. 4). This duty of Christians is explained throughout the Bible, including the Gospels, but perhaps most closely associated with church discipline is Matthew 18:15-18, where Jesus tells his followers what to do “if your brother sins against you.” The text reads:

If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother. But if he does not listen, take one or two others along with you, that every word may be confirmed by the evidence of two or three witnesses. If he refuses to listen

to them, tell it to the church; and if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector. Truly, I say to you, whatever you bind on earth shall be bound in heaven, and whatever you loose on earth shall be loosed in heaven.

(Add. 4 (quoting Matthew 18:15-18).) Further relevant teachings are also found in the Gospel of Luke, the First Epistle to the Corinthians, the Book of Samuel, and the Book of Revelation. (Add. 4-6.)

To understand the Synod's views on discipline within the church one must also understand the Lutheran Confessions as articulated in the Symbolical Books of the Evangelical Lutheran Church, which every member of the Synod willingly and formally "accepts without reservation . . . as a true and unadulterated statement and exposition of the Word of God." Constitution (Add. 23). This includes the Smalcald Articles, the Apology of the Augsburg Confession, and Martin Luther's Small and Large Catechisms. *See also* Add. 25 (Article VI) (stating that the constitution of a congregation must contain "nothing contrary to the Scriptures or the Confessions").

As an example, in the Smalcald Articles, Martin Luther explained that excommunication which "excludes those who are manifest and impenitent sinners from the sacrament and other fellowship of the church until they mend their ways and avoid sin" is "truly Christian." *See* Church Discipline (Add. 6) (quoting Smalcald Articles of Martin Luther at III, ix (1537)). And in the Apology of the Augsburg Confession, Philipp Melanchthon stated "[t]he openly wicked and the despisers of the sacraments are excommunicated." (Add. 6 (quoting Apology of the Augsburg Confession, at XI, 4 (1530)).) "In other words, not only those who were living in scandalous sin but also those

who saw no need for the continual refreshment offered by the Savior in the sacraments were excommunicated. . . .” (Add. 6-7.)

The Lutheran Confessions also explain that Matthew 18, while setting forth some of the guiding principles for church discipline within the Synod, is not always applicable or binding. In fact, Martin Luther observed in his Large Catechism that “a Christian is not obligated to follow the steps outlined in Matthew 18” in “the case of public sin.” *See Public Rebuke of Public Sin: Considerations in Light of the Large Catechism – Explanation of the Eighth Commandment, A Report of the Commission on Theology and Church Relations of The Lutheran Church—Missouri Synod* (May 2006) (Add. 37) (“Public Rebuke”). Thus, in some cases that “should not be undertaken lightly but only after much prayer, deliberation, and consultation with others who know of the sin,” public rebuke can be appropriate for public sin, as opposed to the confidential procedure set forth in Matthew 18. (Add. 40.) The purpose, however, is still not to embarrass or harm the individual, but that “[b]y God’s grace, the Holy Spirit will lead the offender to repentance, whereupon he or she should receive God’s absolving and restorative grace in Word and sacraments.” (Add. 40.)

C. The Synod Provides Guidelines To Its Congregations With Respect to Church Discipline

The Synod provides guidelines to congregations but does not dictate particular specific procedures for a congregation to excommunicate a member. The Synod’s Bylaws require member congregations to submit their constitutions and bylaws for review when applying for membership in the Synod, and additionally to submit changes in order to

remain a member in good standing. *See* Guidelines For Constitutions and Bylaws of Lutheran Congregations, The Lutheran Church—Missouri Synod (“Guidelines”) (Add. 42).

In its Guidelines, the Synod provides several exemplary provisions for congregations to use in their constitutions and bylaws, including the following for excommunication:

Communicant members who conduct themselves in an un-Christian manner shall be admonished according to Matthew 18:15.20 and the congregation’s stated and adopted guidelines. If they remain impenitent after proper admonition, they shall be excommunicated. Each case of excommunication or self-exclusion shall be presented to the voters assembly for a decision. A two-thirds majority vote of the voters assembly shall be required.

(Add. 47.) The Guidelines also explain that “[t]he matter of termination of membership is of great importance since it involves the larger subject of church discipline. It is therefore advisable that congregations prepare and adopt separate guidelines to address this topic, especially keeping in mind the following”:

1. Be consistent in applying discipline.
2. Carefully follow disciplinary guidelines.
3. Do not allow unsubstantiated charges to be circulated by the church.
4. Base decisions on clearly stated biblical grounds.
5. Guidelines should state the desired outcome of church discipline, to call a fellow Christian to repentance.

(Add. 47 n.17.)

D. Excommunication Is Saved For the Impenitent Under The Beliefs Of The Synod

The Synod’s Guidelines emphasize that excommunication is for those who “remain impenitent after proper admonition.” (Add. 47.) This is because under the

Synod's beliefs, "[i]t is the peculiar church power which Christ has given to His Church on earth to forgive the sins of penitent sinners, but to retain the sins of the impenitent as long as they do not repent." Church Discipline (Add. 3). The purpose of church discipline in the Synod is not punishment, but to bring the sinner to repentance, so as to "receive again with joy the Savior's forgiveness and absolution." (Add. 8-9.) Thus, it is "not the sin but the impenitence regarding the sin that damns" and results in a member's excommunication from one of the Synod's congregations. (Add. 3.)

Because of this purpose, church discipline within the Synod, unlike civil court proceedings, does not focus merely on objectively ascertainable matters, but rather on the religious objective of "repentance." Thus, such discipline proceedings include prayer, deliberation and public discussions focused on the targeted party's attitudes, specifically including those with respect to his or her penitence.

II. COURTS SHOULD NOT ALLOW PARTIES TO CIRCUMVENT THE ECCLESIASTICAL ABSTENTION DOCTRINE AND INVADE RELIGIOUS PROVINCES THROUGH THE BACK DOOR OF DEFAMATION CLAIMS

A. Defamation Claims Like Those Asserted By The Pfeils Can Circumvent And Undercut Independent Decisions On Religious Matters By The Proper Religious Authorities

1. Allowing Defamation Claims In Religious Disputes Would Effectively Permit Dissatisfied Members of Religions To Retry Religious Membership And Leadership Determinations In Civil Courts

The circumstances of this case demonstrate the inappropriateness of defamation cases focused on church discipline proceedings. The Pfeils were excommunicated from St. Matthew. Then they sued St. Matthew and its pastors, who were moving forces in the

excommunication, for defamation based on statements made in connection with the excommunication. Although they did not ask the civil courts to retry the excommunication proceeding, they did ask the civil courts to try claims related to *what was said* that led to their excommunication. By doing so, the Pfeils attempted to circumvent the well-established ecclesiastical abstention doctrine by focusing not on the excommunication decision itself, but the testimonial basis for it. This is a facile and dangerous distinction, for putting the testimony on trial is akin to retrying the case.

Consider how a defamation theory could readily be adapted to question in civil courts almost any religious community's decision about its members, their positions in the community, and the community's leadership:

- A bishop is passed over for a promotion to archbishop, and he sues the denominational superior or committee that made recommendations for the new archbishop. The civil courts clearly cannot and would not entertain a suit under civil employment law. Nor would they or should they entertain the same grievances framed in defamation law, for example, if the bishop alleged that the superior or committee made false statements regarding his character in making the decision.
- A family seeks to join a particular religious entity's outreach or evangelism project, but it is not permitted to join. Civil courts would never directly adjudicate such a membership dispute. The same principle of protecting religious autonomy from government control should apply if the disgruntled applicants used the expedience of a defamation suit, alleging false statements by those who refused to accept them into their religious activity.
- A monk is given a particular assignment in his monastery (say, chopping wood), and despite his protests his superior refuses to change the assignment. Clearly civil courts will not intervene to adjudicate that dispute, as to the station of one particular member within a religious order. That position of non-intervention should remain even if the monk frames his dispute as one of defamation, on the theory that the superior misstated the monk's skills and background, or intentional infliction of emotional distress, on the ground that sending him off to chop wood will deprive him of the spiritual quietude that he sought in the monastery.

All of these examples are, like the situation here, cases where a religious community has made decisions, following its own religious rules and objectives, concerning its members and their positions within the community. Such decisions are core religious decisions. The First Amendment and Minnesota Constitution ensure that a religious community can determine who is permitted to join the community or one of its religious activities without civil interference. Promotions and leadership within a church or religious organization are not matters for civil law, under any legal theory.

The boundary between religious and civil matters is set by the nature of the intrusion, not the legal theory employed to make that intrusion. In the examples above, the unconstitutional intrusion would occur whether the legal challenge is denominated as employment discrimination, as defamation (*e.g.*, false statements made in connection with the archbishop search process), or under some other creative tort theory (*e.g.*, intentional infliction of emotional distress to the monk who sought quietude).

In all of the examples above, as in the case at hand, it would be clearly improper for civil courts to intervene within those religious community affairs, and adjudicate the membership or leadership decisions. Because civil intervention in such core religious matters is improper, any claim that seeks to accomplish such intervention should be barred. Common-law torts like libel, slander, and intentional infliction of emotional distress, well-known for their pliability, should be especially suspect in these sensitive areas. Setting tort law loose in religious disputes would be a terrible and dangerous

decision, and very harmful to the nation's cherished religious freedoms that receive even greater protection in Minnesota under the state constitution.

2. Defamation Claims Are Inherently Chilling To Speakers, Especially So In The Religious Context, Involving Sensitive Matters Of Belief, Morality, And Spirituality

If the Pfeils' defamation case were to proceed, the pastors of St. Matthew and everyone else in the congregation who had been, and continued to be, involved in the excommunication proceedings, would have to proceed with the threat of a civil suit hanging over their heads. Such a suit would inherently chill expression related to religious excommunication and therefore the excommunication process itself, a religious process that our law has always treated as solely committed to the religious authorities. *See, e.g., C.L. Westbrook, Jr. v. Penley*, 231 S.W.3d 389, 400 (Tex. 2007) (discussing the "chilling effect" subjecting a pastor to tort liability for engaging in a disciplinary process would have on a church's ability to discipline members).

When libel or slander suits are brought, the defendants necessarily feel pressure to stay silent to avoid triggering more defamation claims, even if baseless. A defamation suit conveys a message to the ordinary person not unlike the disturbing opening of the *Miranda* warning – *Anything you say can and will be used against you*. Libel suits cast a pall over discussions. That is why Minnesota and many other states have enacted anti-SLAPP laws designed to prevent such chills on ordinary discourse. *See* Minn. Stat. § 554.01 *et seq.* Otherwise, as here, defamation suits are used as "a simple but effective weapon against freedom of expression," *i.e.*, as "protracted litigation to harass, intimidate and punish press and private citizen alike for views and reports that [they] do not like."

Donald M. Gillmor, Power, Publicity, and the Abuse of Libel Law 41 (1992) (quoting Eugene Roberts, former executive editor of the *Philadelphia Inquirer*).

The instant case derives from the same playbook, since the Pfeils sued the church that excommunicated them and its pastors for defamation and seek a money judgment, presumably for hundreds of thousands, if not millions, of dollars. But such intimidation cannot be countenanced, particularly in this suit, which is targeted at a constitutionally protected internal church matter of religious discipline. *See also generally* Judge Lois G. Forer, A Chilling Effect: The Mounting Threat of Libel and Invasion of Privacy Actions to the First Amendment (1987).

By nature, religious beliefs and understandings, which relate to morality and spirituality and are understood through prayer, the Scriptures, and tradition, are personal and sensitive. Allowing defamation suits to test and pry into such matters would inevitably chill what is said. And the chilled expression would include expression at the core of the First Amendment's protection. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (holding "religious worship and discussion ... are forms of speech and association protected by the First Amendment").

If the congregation or its targeted members or leaders lacked insurance or there were a question as to coverage, a financial burden would be added to the threat, and would further lead participants to choose silence rather than full assertion of their beliefs. *See, e.g., Paul v. Watchtower Bible & Tract Soc'y of New York*, 819 F.2d 875, 881 (9th Cir. 1987) (stating "the burden of tort damages is direct . . . [w]ere we to permit recovery, 'the pressure to . . . forego that practice [would be] unmistakeable'" (quoting *Thomas v.*

Review Bd., 450 U.S. 707, 717 (1981)). If the Pfeils' suit were to proceed in parallel with the excommunication proceedings, anyone at St. Matthew who says things critical of the Pfeils in the excommunication proceedings—a quite natural occurrence in such a proceeding—would understand that he or she may soon become a defendant. How could this not chill the participants in the proceeding? How could it not make them feel the heavy hand of the civil law pressing down on their religious proceeding?

B. Defamation Claims Based On Statements Made In The Course of Church Discipline Proceedings Would Inherently Entangle Courts In Religious Matters

Because every aspect of a Lutheran congregation's discipline or excommunication of its members involves matters of religious belief and understanding, putting any part of that process under the scrutiny and judgment of secular authorities is inherently troublesome. This is particularly so in the Synod, considering its views on discipline as a method of addressing sin, its understandings of the scriptural basis for discipline, its view of slander and gossip as sins, and its focus on whether the disciplined party has been properly penitent for his or her actions.

For almost every issue raised by a defamation case—whether the language in issue was defamatory in context, how it was meant and understood, whether it was relevant to the discipline proceeding, and whether the plaintiffs sustained secular reputational damage—a court or jury would have to dive deeply into those religious issues. Such a deep dive would violate the wall that the United States and Minnesota Constitutions have wisely erected between civil authorities and internal religious practices.

1. Courts Cannot Judge The Meaning And Falsity Of Statements Made At An Internal Church Proceeding Without Entangling Themselves In Religion

“In Minnesota, the elements of defamation ‘require the plaintiff to prove that a statement was false. . . .’” *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25 (Minn. 1996) (quoting *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 410 (Minn. 1994)). However, “[c]ontext is critical to meaning because a false statement that is defamatory on its face may not be defamatory when read in context, and a statement that is not defamatory on its face may, in fact be defamatory when read in context.” *Schlieman v. Gannett Minn. Broad., Inc.*, 637 N.W.2d 297, 304 (Minn. Ct. App. 2001); accord *Greenbelt Cooperative Pub. Ass’n v. Bresler*, 398 U.S. 6, 14 (1970) (holding First Amendment bars defamation claim where allegation of criminal wrongdoing was “rhetorical hyperbole”). And in judging statements made at an internal church proceeding regarding discipline, faith, internal organization, or ecclesiastical rule, custom or law, that context includes the church’s religious beliefs and theological understandings.

Using the present case as an example, Appellants claim that Pastor Braun made “false, disparaging, and defamatory” statements, including that the Pfeils were engaged in “slander” and “gossip,” and that other members of the congregation reported behavior by the Pfeils that Pastor Braun understood to be “slander” or “gossip.” Appellants’ Br. at 4-6. But a Lutheran pastor does not use and understand the words “slander” and “gossip” in a

legal sense, as a civil judge or jury may.⁴ These are Lutheran theological terms and concepts that have a longstanding history within the church. In fact, they are founded in the Eighth Commandment, first set forth in Exodus 20:1-17.

Martin Luther wrote extensively about these concepts. For example, in his Large Catechism (to which, again, all member congregations and rostered church works of the Synod formally and unconditionally subscribe as a theological and ecclesiastical guide and authority for faith and life), he wrote about “the *third* aspect of this commandment which applies to all of us”: “sins of the tongue by which we may injure or offend our neighbor.” See Public Rebuke (Add. 31) (quoting Large Catechism at 263). Luther explained that the Eighth Commandment “forbids ‘the detestable, shameless vice of backbiting or slander’ and gossip, the tragedy of which is that ‘honor and good name are easily taken away but not easily restored.’” (Add. 31) (quoting Large Catechism at 264, 273).

As another example, Jesus’s Sermon on the Mount in Matthew 5 demonstrates well the obvious entanglement into internal church religious beliefs and practices that would occur if a civil court were to judge the meaning of an ecclesiastical statement in an excommunication proceeding. In the sermon, Jesus equates murder with anger (Matthew 5:21-22), adultery with lust (Matthew 5:27-28), and divorce with sexual immorality

⁴ Moreover, “gossip” is an opinion, not a fact. Whether something is “gossip” in ordinary discourse is in the eye of the beholder, and constitutes constitutionally protected opinion under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990).

(Matthew 5:31-32). Jesus also condemns oaths and retaliation (Matthew 5:33-42), and commands the believer to “love your enemy” (Matthew 5:43-48). How can a civil court apply “neutral principles” in judging the meaning of statements made under the guidance of Jesus in Matthew 5? Any involvement by a secular court in judging the meaning of a statement made in an excommunication process in one of the Synod’s congregations necessarily involves judging the meaning of Scripture, as explained by the pastor and decided by the congregation. It also necessarily involves second-guessing whether the pastor and congregation followed the words of Jesus in Matthew 18:15-20 when carrying out the excommunication.

To judge the meaning of statements made at an internal church meeting regarding matters of discipline, and how they were reasonably understood by the religious audience to which they were addressed, one must understand this theological context. In addition to the impracticality of a civil judge gaining such an understanding, civil judgments in this area would excessively entangle the courts with religion. Courts cannot and should not arbitrate whether a violation of the Eighth Commandment or other sin was committed. This is exactly the type of excessive entanglement that the Supreme Court of the United States warned against in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

2. Courts Cannot Decide Qualified Privilege Without Undue Entanglement

Defamation claims are routinely subject to the defense of qualified privilege. But this issue cannot be decided with respect to statements made at a church discipline proceeding without going deeply into church discipline procedures and their purposes.

Under the doctrine of qualified privilege, “[e]ven though an untrue defamatory statement has been published, the originator of the statement will not be held liable if the statement is published under circumstances that make it conditionally privileged and if privilege is not abused.” *Lewis v. Equitable Life Assurance Soc’y*, 389 N.W.2d 876, 889 (Minn. 1986) (citing Restatement (Second) of Torts § 593 (1977)). The law in Minnesota is:

[A] communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved, before there can be a recovery, and in the absence of such proof the plaintiff cannot recover.

Id. (quoting *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 256-57 (Minn. 1980)).

Thus, if the Appellants’ defamation case proceeds, the District Court will need to confront: (1) whether excommunication proceedings are “a proper occasion”; (2) whether Pastor Braun made the alleged communications about the Pfeils, former church members, “from a proper motive” and “in good faith”; and (3) whether confidential communications between church members and pastors gave pastors “reasonable or probable cause” to believe that the Pfeils acted with impenitence. It is impossible to analyze these issues without delving into religious issues, practices and expression.

Even on the threshold issue of whether a church discipline proceeding is “a proper occasion,” one must consult scriptural understandings and theological authorities, which, for example, describe church discipline as “one of the ways in which Christians, clergy and laity alike, show the love of Christ to those who have lapsed into some sin or error

that might pull them from the side of the Savior.” Church Discipline (Add. 2). In addition, the “proper motive” and “good faith” of a pastor acting within a discipline proceeding should not be for the civil courts to judge. If courts were to inject themselves into such determinations, they would need to look at the Synod’s beliefs on the need to be frank and open at such proceedings, with a religious motive to “gain the brother” and to seek “the salvation of the sinner,” “not the damnation.” (Add. 2, 8.) In analyzing whether statements made were relevant to the religious proceeding, courts would have to understand the importance of “penitence” and make judgments about the relevance of the statements to the religious issue of penitence.

Civil courts are not well-suited for making judgments on such religious issues. And the First Amendment and Minnesota Constitution cannot and should not allow them to rule upon scriptural debates, as would be required here in the case of a reversal. *See also Purdum v. Purdum*, 301 P.3d 718, 727-28 (Kan. Ct. App. 2013) (discussing qualified privilege as a reason to preclude subject-matter jurisdiction over a defamation case involving communications made at a tribunal deciding whether to annul a sacramental marriage).

3. Courts Should Not Pry Into The Mind Of A Pastor With Respect To His Judgment That A Member of His Congregation Sinned

Because qualified privilege and other constitutional privileges apply, if the case were allowed to proceed, Appellants could overcome the privilege only by showing that it was abused, *i.e.*, that Respondents acted with “actual malice.” *See, e.g., Lewis*, 389 N.W.2d at 889, 90 (“the question of whether the privilege was abused is a jury question”).

That is, Appellants would be required to show that Respondents acted “with knowledge that [the statements were] false or with reckless disregard of whether [they were] false or not.” *Chafoulias v. Peterson*, 668 N.W.2d 642, 654 (Minn. 2003) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)). “Actual malice,” a particular legal standard different from the normal meaning of “malice,” sets a subjective standard, looking into the understanding of the speaker at the time of the statements. “There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication,” and yet nonetheless published or engaged in the speech “with such doubts.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

In this case, as an example, Pastor Braun is accused of defamation for allegedly falsely stating that Mrs. Pfeil sinned or engaged in conduct (gossip and slander) that is viewed within the Synod as a sin. The “actual malice” standard is an inquiry into the state of mind of the speaker. Effectively, this means a jury would need to look into the mind of Pastor Braun with respect to statements about sin or sinful conduct and repentance by members of his congregation. The court would need to decide whether Pastor Braun “entertained serious doubts” as to whether the Pfeils actually engaged in sin and whether they were repentant. *Id.* In essence, the jury would need to examine Pastor Braun’s religious beliefs and then judge the extent to which he remained faithful to those beliefs. Such inquiries fall well outside a jury’s expertise and competence, and raise innumerable constitutional concerns.

How can a court or jury judge whether a pastor knew or did not know whether members of his congregation were sinning? How can a court or jury decide by clear and convincing evidence whether a pastor acted with “reckless disregard” of the truth when he mentioned in a church discipline proceeding information that suggested to him that Mrs. Pfeil had engaged in gossip and slander, and thus had displayed what he considered sinful impenitence? Courts and juries cannot and should not judge the hearts and minds of clergy members with respect to whether they are acting in accordance with their religion’s doctrines and beliefs. Holding otherwise would create a constitutional minefield.

4. Courts Cannot Determine Reputational Damage Without Reference To The Values and Understandings Of The Religious Community

Even assessing damages in a defamation case like this, arising from church discipline proceedings, would entangle a court into religious issues.

Under Minnesota law, to establish defamation, a plaintiff must also prove that the false statement “tended to harm the plaintiff’s reputation and to lower him in the estimation of the community.” *Richie*, 544 N.W.2d at 25. But where the alleged statements were made at internal church proceedings, that “community” is the church. How can a court decide whether false statements lowered Appellants in the estimation of the church without delving into the core beliefs of the church and the religious understandings of its members?

In the present case, moreover, a court would need to distinguish between harm caused by the alleged false statements from harm caused by the fact that Appellants were

ultimately excommunicated by the congregation. Certainly, Minnesota courts cannot award damages caused by the Pfeils' excommunication. Just as government may not interfere in a church's choice of its minister, *see Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S.Ct. 694 (2012), "[t]he decision of who is or is not a member of a religious organization is, like minister choice, fundamentally a purely religious decision and enjoys the same protection from court review or intervention." *Anderson v. Watchtower Bible and Tract Soc'y of New York, Inc.*, No. M2004-01066, 2007 WL 161035, at *26 (Tenn. Ct. App. Jan. 19, 2007). This is particularly true given that under Lutheran doctrine "excommunication is only a ratification of the prior verdict of God." *See Church Discipline* (Add. 18).

5. Reversal Also Threatens The Clergy-Communicant Privilege

Appellants' request also threatens to place serious strains on the clergy-communicant privilege codified by Minn. Stat. § 595.02(c). In particular, Appellants allege defamation based on statements by Pastor Braun that he received "reports" accusing Appellants of slander. *See Appellants' Br.* at 5-6. If this Court were to reverse and remand the present case, Appellants may seek discovery concerning those who made these reports. But Respondents may not be at liberty to disclose this information.

Section 595.02(c) expressly prohibits "[a] member of the clergy or other minister of any religion" from being examined "as to any communication made to the member of the clergy or other minister by any person seeking religious or spiritual advice, aid, or comfort or advice given thereon in the course of the member of the clergy's or other minister's professional character, without the consent of the person." That appears at

issue here. The communications of members of a congregation with their pastor regarding church discipline are privileged communications that cannot be discovered.

Further, regardless of any civil interpretation of Minn. Stat. § 595.02(c), pastors are required to respect confidentiality and privilege. Under the Synod's doctrine, even a communication made outside the context of a traditional confession if "by a person who recognizes the sinfulness of the conduct communicated and who is not likely to put others in danger by repeating it, is not to be divulged." *See The Pastor-Penitent Relationship: Privileged Communications*, A Report of the Commission on Theology and Church Relations of The Lutheran Church—Missouri Synod (Sept. 1999) (Add. 50). In fact, the Synod recognizes that in certain circumstances, a pastor may have to refuse disclosure even if ordered to do so by a civil judge and the refusal leads to criminal prosecution. (Add. 50.)

C. The Court Should Affirm Past Minnesota Decisions And Follow Courts Throughout The Nation In Interpreting The Ecclesiastical Abstention Doctrine

As demonstrated throughout this brief, principles of legal neutrality intrinsically cannot be applied to speech at internal church proceedings in the area of church discipline, faith and internal organization, all of which are governed by ecclesiastical rule, custom and law. To hold otherwise would inextricably intertwine and entangle the courts in express and application of religious beliefs and tenets, in violation of both the First Amendment and the Minnesota Constitution, and threaten the clergy-communicant privilege.

For these and many other reasons, the Supreme Court should affirm the Court of Appeals, the prior opinion in *Schoenhals v. Mains*, 504 N.W.2d 233 (Minn. Ct. App. 1993), and numerous Minnesota decisions that have reached the same result under the ecclesiastical abstention doctrine. *See, e.g., Olson v. Luther Memorial Church*, No. C0-95-1623, 1996 WL 70102 (Minn. Ct. App. Feb. 20, 1996).⁵ In doing so, it should reaffirm Minnesota's respect for freedom of religion, under both the First Amendment and its state Constitution. And it should reject application of the "neutral principles" doctrine to controversies in the areas of church government, order and discipline, as courts throughout the country have done.⁶

⁵ *See also, e.g., Jeambey v. Synod of Lakes & Prairies, Presbyterian Church (U.S.A.)*, No. CX-95-902, 1995 WL 619814 (Minn. Ct. App. Oct. 24, 1995); *Molberg v. Apostolic Bible Inst.*, No. C9-91-1448, 1992 WL 67518 (Minn. Ct. App. Apr. 7, 1992); *see also Farley v. Wis. Evangelical Lutheran Synod*, 821 F. Supp. 1286 (D. Minn. 1993).

⁶ *See, e.g., Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986) ("The 'neutral principles' doctrine has never been extended to religious controversies in the areas of church government, order and discipline, nor should it. . . . The neutral principles doctrine relating to church property is simply not applicable in the instant case."); *C.L. Westbrook, Jr. v. Penley*, 231 S.W.3d 389, 400 (Tex. 2007) ("Subjecting CrossLand's pastor to tort liability for engaging in the disciplinary process that the church requires would clearly have a 'chilling effect' on churches' ability to discipline members . . . and deprive churches of their right to construe and administer church laws"); *see also Purdum v. Purdum*, 301 P.3d 718, 727, 30-31 (Kan. Ct. App. 2013); *Anderson v. Watchtower Bible & Tract Soc. Of New York, Inc.*, M2004-01066, 2007 WL 161035, at *10, *25-*27 (Tenn. Ct. App. Jan. 19, 2007); *Stepek v. Doe*, 910 N.E.2d 655, 668 (Ill. Ct. App. 2009).

CONCLUSION

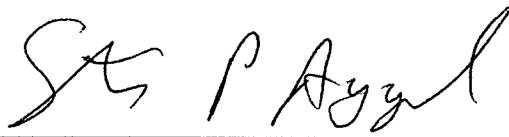
For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

BASSFORD REMELE
A Professional Association

Dated: June 3, 2015

By



Mark R. Bradford (MN #335940)
Steven P. Aggergaard (MN #336270)
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707
Telephone: (612) 333-3000
Facsimile: (612) 333-8829
mbradford@bassford.com
saggergaard@bassford.com

Of Counsel:

Sherri C. Strand, Esq.
Mark Sableman, Esq.
Anthony F. Blum, Esq.
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, Missouri 63101
Telephone: (314) 552-6000
Facsimile: (314) 552-7000
sstrand@thompsoncoburn.com
msableman@thomponcoburn.com
ablum@thompsoncoburn.com

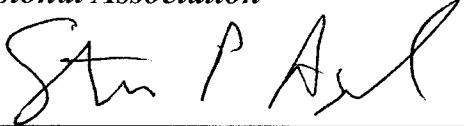
*Attorneys for Amicus Curiae The Lutheran
Church—Missouri Synod*

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with the typeface requirements of Minn. R. Civ. App. P. 132.01, subd. 3, in that it was prepared in 13-point, proportionately spaced typeface, using Microsoft Word 2010 software, and contains 6,324 words, excluding the Table of Contents and Table of Authorities, based on a word processing count obtained from the Microsoft Word 2010 software.

BASSFORD REMELE
A Professional Association

Dated: June 3, 2015

By: 

Steven P. Aggergaard (MN #336270)
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707
Phone: 612-333-3000
Facsimile: 612-333-8829

*Attorneys for Amicus Curiae The Lutheran
Church—Missouri Synod*

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Church Discipline in the Christian Congregation

A Report of the
Commission on Theology and Church Relations
of the Lutheran Church--Missouri Synod
November 1985

Citations from the Lutheran Confessions are taken from The Book of Concord edited by T. G. Tappert (Philadelphia: Fortress Press, 1959). The following abbreviations have been used:

- AC- Augsburg Confession
- Ap- Apology of the Augsburg Confession
- Ep- Epitome of the Formula of Concord
- FC- Formula of Concord
- LC- Large Catechism
- SA- Smalcald Articles

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Introduction

Little has been said or written in recent years concerning church discipline in the Christian congregation, despite the fact that it is a topic about which both the Holy Scriptures and the Lutheran Confessions have much to say. [1] There is no question that the early church practiced church discipline, including excommunication when necessary, and rigorously observed what we today call "close communion." [2] Excommunication, of course, carried with it exclusion from the Lord's Supper, and some church fathers even urged exclusion from all participation in the worship service. [3]

What about our own age? Is church discipline, as it is urged in the Scriptures and the Confessions, passe at this point in the history of the church? Is it perhaps inconsistent with an evangelical ministry whose primary word must always be absolution and forgiveness? A survey of some thirty denominations conducted already several years ago indicated that little or no church discipline was being exercised within Christendom. More than ten years ago a Lutheran theologian concluded a study of church discipline by saying, "In a curious way the decline in traditional discipline signifies a more proper approach to the church. When all is said and done, the fact that discipline has declined is a blessing, and it ought to remain a peripheral concern." [4] Such judgments are occasioned no doubt by the fact that the very term "church discipline" seems to connote a law-oriented topic. Any talk of admonition, rebuke, "jurisdiction" (a term used frequently in the Lutheran Confessions), excommunication or exclusion is heavily weighted with a law emphasis.

Nevertheless, while church discipline unquestionably includes the use of stern law, it is part of the evangelical, Gospel-centered, Gospel-oriented ministry of the church. Church discipline is one of the ways in which Christians, clergy and laity alike, show the love of Christ to those who have lapsed into some sin or error that might pull them from the side of the Savior. Of course, if God's will is to be done, more is necessary than that church discipline be acknowledged as part of the evangelical ministry of the church. It must be carried on in a manner which indicates that the purpose of discipline is to "gain the brother." To do less involves separation that, while giving the appearance of purifying the church, cannot be pleasing to God. Assuming that church discipline is incumbent upon the Christian congregation today, many practical questions still arise: Should church members be "dropped from the rolls"? Must excommunication be unanimous? Is it proper for a Christian to "resign" from membership? These and several other questions are discussed at the conclusion of this study.

Church discipline is part of "the office of the keys." The term "the office of the keys" is not found in the Scriptures, yet "keys" are referred to in both testaments as symbols of power. Of Eliakim God says in Is. 22:22, "And I will place on his shoulder the

key of the house of David; he shall open, and none shall shut; and he shall shut, and none shall open." Jesus said to Peter, "I will give you the keys of the kingdom of heaven" (Matt. 16:19). The glorified Savior says of Himself in Rev. 1:17-18, "I am . . . the living one; I died, and behold I am alive forevermore, and I have the keys of Death and Hades." The metaphor refers to loosing or locking with keys the chains of sin. The Small Catechism speaks of what this power involves in its answer to the question, "What is the Office of the Keys?" It states: "It is the peculiar church power which Christ has given to His Church on earth to forgive the sins of penitent sinners, but to retain the sins of the impenitent as long as they do not repent."

Of course, church discipline is only one part of the office of the keys. This office includes all the powers which the risen Christ has given to His church for the extension of His kingdom—preaching, teaching, administering the sacraments, as well as exercising church discipline. What then specifically do we mean by church discipline? We sometimes use the term in a very broad sense to include everything from simply admonition directed to one who is cursing, eyeing, telling a dirty joke, slandering, gossiping or doing anything that is not in harmony with God's pattern of life for disciples of Jesus, to excommunication or the exclusion of someone from the fellowship of Christ's church on earth. [5] Usually we narrow the definition and speak of church discipline as the activity of a Christian and/or the Christian congregation in dealing with someone who is involved in what can be either a faith-destroying sin or a faith-destroying error. It is in this narrower sense that we speak of church discipline in this study. Regarding faith-destroying error, we should note that where Christian admonition has been administered because of doctrinal error, only those are ultimately to be excluded from the congregation who persistently adhere to an error which threatens the very foundation of faith. When we speak of faith-destroying sin or faith-destroying error, we must bear in mind that any persistent sin can lead to exclusion from the fellowship of God's family, for it is not the sin but the impenitence regarding the sin that damns. Judas, whose sin was no "greater" than that of Peter, lost his soul because he despaired of God's mercy and died without repentance. [6] On the other hand, David,

guilty of the heinous sins of adultery and murder, acknowledged his sin, sought pardon and immediately heard God's word of absolution through the prophet Nathan.

I

Church Discipline Is a God-given Duty

A. Church Discipline in the Scriptures

In the Scriptures the Lord calls on the Christian congregation to exercise church discipline, including the ultimate step of excommunication. But He makes it clear that the congregation is to carry out such discipline evangelically and with its Gospel purpose ever in mind, namely, the repentance and salvation of the sinner. The passage of Holy Scripture most closely associated with church discipline is Matt. 18:15-18, where the Lord Jesus tells us what to do "if your brother sins against you." The text reads: "If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother. But if he does not listen, take one or two others along with you, that every word may be confirmed by the evidence of two or three witnesses. If he refuses to listen to them, tell it to the church; and if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector. Truly, I say to you, whatever you bind on earth shall be bound in heaven, and whatever you loose on earth shall be loosed in heaven."

This passage will be examined later in our study in connection with the manner in which church discipline is to be carried out. It should be emphasized at the outset, however, that the obvious intent of the entire procedure is reconciliation, gaining the fellow Christian. This passage is preceded by the parable of the lost sheep, and the Savior says in verse 14, "So it is not the will of my Father who is in heaven that one of these little ones should perish." Immediately following His words of instruction on church discipline the Savior reminds Peter of his obligation to forgive his brother "seventy times seven" and then goes on to tell the parable of the merciless servant.

Other passages in the Scriptures and many Scriptural examples teach that church discipline is to be exercised in an evangelical manner. This evangelical emphasis is evident in Luke 17:3-4: "Take heed to yourselves; if your brother sins, rebuke him, and if he repents, forgive him; and if he sins against you seven times in the day, and turns to you seven times, and says, 'I repent,' you must forgive him." The

apostle Paul severely rebukes those in the church at Thessalonica who were idle busybodies, not doing any work. "Now such persons we command and exhort in the Lord Jesus Christ to do their work in quietness and to earn their own living" (2 Thess. 3:12). The apostle then continues, "If any one refuses to obey what we say in this letter, note that man, and have nothing to do with him, that he may be ashamed" (v. 14). However, the apostle adds this fraternal and evangelical word: "Do not look on him as an enemy, but warn him as a brother." (v. 15)

The situation in Corinth was more serious. "It is actually reported that there is immorality among you, and of a kind that is not found even among pagans; for a man is living with his father's wife. And you are arrogant! Ought you not rather to mourn? Let him who has done this be removed from among you" (1 Cor. 5:1-2). At the end of this brief chapter Paul repeats the order, "Drive out the wicked person from among you" (v. 13). He castigates the church in Corinth for closing its collective eyes to this immorality. With such neglect they have done damage not only to the soul of the one who had fallen in sin but also to the cause of edifying the Christian congregation itself. Perhaps the most prominent case of church discipline recorded in Scripture is that of the prophet Nathan's dealing with King David after he had fallen into the sins of adultery and murder. The confrontation is recorded in 2 Samuel 12. The prophet told David the parable about a lamb of a poor man that was taken by a rich man for use at his own banquet. David, thinking that this was an account of an actual incident, was incensed and ordered that the offender be put to death. Nathan's response was devastating: "You are the man" (2 Sam. 12:7). The prophet applied the parable to David's theft of Uriah's Bathsheba and to the senseless killing of the innocent husband. Upon David's confession, Nathan brings this word of absolution, "The Lord also has put away your sin; you shall not die." (v. 13)

In the Revelation to John the glorified Lord Jesus chastises Pergamum and Thyatira for their failure to exercise church discipline. They have among them those who are teaching faith-destroying error. They have among them those who are living immoral lives. "I have a few things against you" (Rev. 2:14). You permit these things to go on without decisive action. "Repent then" (v. 16). Such a rebuke reminds us of the

stern word given to Ezekiel: "If I say to the wicked, 'You shall surely die,' and you give him no warning, nor speak to warn the wicked from his wicked way, in order to save his life, that wicked man shall die in his iniquity; but his blood I will require at your hand." (3:18, cf. Is. 58:1-2, 1 Thess. 5:14) Those who oppose all forms of church discipline, and particularly excommunication, point to Jesus' words in Matt. 7:1-2: "Judge not, that you be not judged. For with the judgment you pronounce you will be judged, and the measure you give will be the measure you get." From the Scriptural record elsewhere it is obvious that the Lord is not hereby excluding all judging. Not only the church but also the state has the duty and right to judge and to punish (Rom. 13:1ff). The context makes it plain that the Lord was condemning a spirit of self-righteousness and/or judging on the basis of external appearance, something that he speaks to also in John 7:24: "Do not judge by appearances, but judge with right judgment."

B. Church Discipline in the Lutheran Confessions

The Lutheran Confessions have much to say not only regarding the office of the keys in general but also regarding church discipline in particular. In the Smalcald Articles Dr. Martin Luther distinguishes excommunication, which "excludes those who are manifest and impenitent sinners from the sacrament and other fellowship of the church until they mend their ways and avoid sin," from that "greater excommunications of the pope which imposed civil penalties in addition to the spiritual." The former Luther calls "truly Christian." (SA III, ix)

Who is to be disciplined and ultimately, if necessary, excommunicated? "The openly wicked and the despisers of the sacraments are excommunicated" (Ap XI, 4). [7] What is significant here is not only that excommunication is carried out when necessary but also that "the despisers of the sacraments" are specifically mentioned as those who ultimately must be separated from the fellowship of the church. The statement is made in connection with the discussion on confession and after the statement that the Lutheran clergy instructed the people "about the worth and fruits of the sacrament in such a way as to invite them to use the sacraments often." In other words, not only those who were living in scandalous sin but also those who saw no need for the

continual refreshment offered by the Savior in the sacraments were excommunicated by the church of the Reformation.

Indeed, Melancthon states in the Treatise on the Power and Primacy of the Pope that "the Gospel requires of those who preside over the churches that they preach the Gospel, remit sins, administer the sacraments, and, in addition, exercise jurisdiction, that is, excommunicate those who are guilty of notorious crimes and absolve those who repent." (Treatise, 60)

In the Apology of the Augsburg Confession this power is designated as the power of bishops: ". . . a bishop has the power of the order, namely, the ministry of the Word and sacraments. He also has the power of jurisdiction, namely, the authority to excommunicate those who are guilty of public offenses or to absolve them if they are converted and ask for absolution." Of course, a bishop is not to behave like a tyrant. "But he has a definite command, a definite Word of God, which he ought to teach and according to which he ought to exercise his jurisdiction." (Ap XXVIII. 13-14)

In specifying that bishops have the right of jurisdiction, the confessors hasten to add that this is not a power given to bishops alone. "It is certain that the common jurisdiction of excommunicating those who are guilty of manifest crimes belongs to all pastors. This the bishops have tyrannically reserved for themselves alone and have employed for gain" (Treatise, 74). Furthermore, when speaking of the power of bishops, the Confessions warn against "violent use of the ban" (AC XXVIII, 2) and complain about the "unjust excommunication" of kings and "especially of the emperors of Germany." (Treatise, 35)

We ought not interpret these confessional statements regarding the power of bishops and pastors as teaching that those who have been given authority over the churches thereby have the right to excommunicate unilaterally. True, the call of the Christian pastor confers the authority Jesus gave in John 20:23: ". . . if you retain the sins of any, they are retained." Yet, as the Lutheran Confessors make clear, the entire congregation is involved, for "the keys do not belong to the person of one particular individual but to the whole church, as is shown by many clear and powerful arguments, for after speaking of the keys in Matt. 18:19, Christ said, 'If two or three of you agree on

earth,' etc." (Treatise 24) [8] Though both the Holy Scriptures and the Lutheran Confessions indicate that church discipline is a duty of the Christian congregation, church discipline dare not be made one of the marks of the church. The marks of the church remain the pure preaching of the Gospel and the proper administration of the holy sacraments (AC VII, 1). Therefore, among the erroneous teachings of the Schwenkfelders rejected and condemned by the Formula of Concord is the proposition "that it is no true Christian congregation in which public expulsion and the orderly process of excommunication do not take place" (FC Ep XII, 26). It is one thing to describe church discipline as a duty of every Christian congregation. It is quite another to deny the existence of the church where through ignorance or other deficiency Christian discipline is not exercised by Scriptural standards or is not exercised at all. Thus the Confessions, too, call for the full exercise of the keys, which belong to the whole church, but warn against unjust excommunication, and reject any notion that the lack of church discipline of itself indicates the absence of a true Christian congregation.

II

Church Discipline Has Evangelical Purposes

Church discipline seeks not the damnation but the salvation of the sinner. This is evident in the classic example of the incestuous man in the congregation at Corinth. The apostle calls upon the church "to deliver this man to Satan for the destruction of the flesh, that his spirit may be saved in the day of the Lord Jesus" (1 Cor. 5:5). Whatever the implications of "the destruction of the flesh," the congregation was to exclude this person from fellowship, thus turning him over to Satan, but in the hope that through such a frightful action he might see the horror of his sin, repent and thus be saved "in the day of the Lord Jesus." The same apostle uses similar language when he speaks of Hymenaeus and Alexander who "made shipwreck of their faith" (1 Tim. 1:19). Both of them "I have delivered to Satan that they may learn not to blaspheme" (v. 20). It is obvious that much more is involved here than a relationship with an outward, visible congregation. At stake is the relationship with the Lord Jesus Christ. The purpose of church discipline is that by this extreme action the sinner might be led to repent and

say, "God be merciful to me, a sinner" and receive again with joy the Savior's forgiveness and absolution.

A second evangelical purpose of church discipline is that it serves as a warning to others. St. Paul has this purpose in mind when he says, "As for those who persist in sin, rebuke them in the presence of all, so that the rest may stand in fear" (1 Tim. 5:20). What happens in congregations where "the openly wicked" are not rebuked? Another member of the congregation, noting that the sins of others go unrebuked and uncondemned is tempted to the same sin. "A little leaven leavens the whole lump" (1 Cor. 5:6). It is then not just for the benefit of the unrepentant that church discipline is exercised. It also is to be carried out so that others within the Christian congregation may realize that if they fall into the same sin and continue to live without repentance, they will also fall into the same condemnation and judgment. Indeed, it is a frightful thing to contemplate that those whom we fail to warn will be consigned to the fires of hell. God's Word in Ez. 3:18 is plain, "If I say to the wicked, 'You shall surely die,' and you give him no warning, nor speak to warn the wicked from his wicked way, in order to save his life, that wicked man shall die in his iniquity; but his blood I will require at your hand." The command to admonish and even to excommunicate is as necessary, so Luther frequently reminds, as the commands not to kill or to steal, if for any reason the duty to admonish is neglected, then not life or property but the salvation of the soul is in danger. Hand in hand with this evangelical purpose of church discipline is a third, namely, the purifying of the church to the glory of God. On many occasions in the Old Testament the Lord reminded His people to "purge the evil from the midst of you" (Deut. 13:5; 17:12). To practice abominable customs and to neglect discipline was for them to forget the message of Jahweh, "I am the Lord your God." (Lev. 18:30) These evangelical purposes are reminders of the duty and joy of receiving the repentant sinner back into communion with the congregation. The apostle Paul says to the same congregation in Corinth which he has chided for lack of discipline that they are not to forget to forgive the one who returns: But if any one has caused pain, he has caused it not to me, but in some measure not to put it too severely to you all. For such a one this punishment by the majority is enough; so you should rather turn to forgive and comfort

him, or he may be overwhelmed by excessive sorrow. So I beg you to reaffirm your love for him. For this is why I wrote, that I might test you and know whether you are obedient in everything. Any one whom you forgive, I also forgive. What I have forgiven, if I have forgiven anything, has been for your sake in the presence of Christ, to keep Satan from gaining the advantage over us; for we are not ignorant of his designs." (2 Cor. 2:5-11) Whether the apostle is here referring to the repentance of the incestuous man of whom he wrote in the fifth chapter of his first letter or not, it is obvious that he is urging the congregation to exercise firm discipline toward the unrepentant but also forgiving love toward the repentant. Any Christian congregation that has the privilege of welcoming back such a repentant sinner into its fellowship will never question the value of church discipline and even of excommunication. It will have seen the blessed purposes of church discipline fulfilled in the lapsed sinner who has returned to the Lord and to the fellowship of the Christian congregation.

To speak of the evangelical purposes of church discipline is to repeat once again the importance of carrying out this discipline evangelically. People are not to be forced to go to communion, as though the very act of communing is sufficient to keep them "on the rolls." They dare not be neglected by simply sending them letters to indicate that their names have been dropped from the membership rolls. Evangelical discipline requires that any communication by letter be done in the context of personal visitation. Letters notifying members of impending action may even be personally delivered, thereby affording another opportunity to restore another to the fellowship of the congregation. Dr. Luther's words from the Large Catechism are most appropriate: ". . . no one should under any circumstances be coerced or compelled, lest we institute a new slaughter of souls. Nevertheless, let it be understood that people who abstain and absent themselves from the sacrament over a long period of time are not to be considered Christians. Christ did not institute it to be treated merely as a spectacle, but commanded his Christians to eat and drink and thereby remember him." (LC V, 42)

III The Decline of Church Discipline

There is evidence that the proper exercise of church discipline has declined within congregations of The Lutheran Church-Missouri Synod in the last decades. At a time when the number of divorces is escalating also within the community of believers, when many reject any objective moral code, and when back door losses continue to plague the church [9], little if anything is being done in many Christian congregations to provide responsible Christian care and counsel. Pastors do not want to be the "dumb dogs" (Is. 56:10) of which the Old Testament prophets spoke. In many instances they are completely unaware of marital problems, for example, until the announcement of a divorce is made. They are swamped with a counseling load that claims so much of their time and energies. "Delinquent" lists grow. Members who have not attended public worship and the Lord's Supper, or have not given any other evidence of real discipleship, remain on the roster of the congregation year after year. In other instances such members are simply "dropped" with little or no individual counseling and without real evangelical concern.

Why? Several reasons might be advanced. In some instances there is a complete lack of knowledge and instruction regarding church discipline. Members of the congregation do not understand why church discipline is to be exercised or how it is to be done in a responsible manner. They look upon church discipline as something unkind, not befitting a community which has experienced the love of Christ and which is to reflect that love in relationships with others. They think that to exercise church discipline means simply to "throw them out." "Don't we love them?" "Didn't Jesus forgive?" "Didn't He forgive the woman taken in adultery and pronounce absolution on the publican?" "Why do we act in such an unkindly way?" These kinds of responses to the responsible efforts of pastors and others to bring Law and Gospel to bear on the hearts of the Lord's people represent a complete misunderstanding of what church discipline is all about and why it is to be done. Pastors therefore do well before instituting any procedure of church discipline to use the pulpit, Bible classes, and other forums in order to present in a clear way the Scriptural and confessional principles regarding church discipline that are responsible and caring. When God's people are properly instructed they will not be turned off by the term Church discipline." They will

come to see that when it is exercised rightly for the sake of the Gospel and for the salvation of the sheep of Christ, it is an act of Christian love. At times the highest act of love is to say, "Unless you repent, you will perish."

In addition to widespread ignorance of the subject, the spirit of our times is no doubt a factor contributing to the decline in the exercise of church discipline. Christians today are bombarded with the philosophy of pleasure seeking which says, "If it feels good, do it." This way of thinking comes to them via mass media and over the casual cup of coffee with friends and co-workers. Such a philosophy looks upon any use of the Law as legalism. But such viewpoints are based on a complete misunderstanding of the purpose and use of the Law. (It is not using the Law that is to be counted as legalism. Legalism is the wrong use of the Law. Legalism refers to the use of the Law when the Gospel ought to be applied.)

Pastors may be just as guilty of neglect in this area as the laity. They may hesitate as they reflect on their own sins and are accused by their own conscience. "Who am I to take action against another when I have such a burden of my own faults?" Still another reason for the decline of church discipline is to be found in a fear of criticism or in the fear of the loss of members. "What will people think of us" if we really begin to get serious also in this aspect of our life together? How can we attract people to the Gospel of the Lord Jesus Christ when we appear loveless in our attitude even toward those who are members of the church? Won't people go elsewhere if their doctrine or morals are questioned by the church? Isn't it better for the sake of our ministry to them to forget about church discipline? At least then we will have some chance of gaining them for Christ. A few minutes' reflection should reveal the fallacy of such points of view. We dare never base our course of action on what others may think rather than on a genuine concern both for the will of the Lord and for those whose souls are, by virtue of their sins, in jeopardy.

IV

The Proper Conduct of Church Discipline

The proper conduct of church discipline begins with each individual Christian. It ought to begin with prayer and self-examination. The apostle Paul reminds us in Gal.

6:1, "Brethren, if a man is overtaken in any trespass, you who are spiritual should restore him in a spirit of gentleness. Look to yourself, lest you too be tempted. Bear one another's burdens, and so fulfill the law of Christ." Matt. 7:1-5, referred to earlier in this study, warns against the danger of self-righteous and uncharitable judging. It is imperative that we first of all search our motives and seek prayerfully only the good of the brother or sister who is "overtaken in a fault."

Pastors especially must be free of uncharitable judging. It is not the duty of the pastor to root out the sins of the members of his flock. Nor dare he follow up ugly rumors and gossip that are brought to his attention by others. Gossip which parades the alleged sins of others before the pastor is in itself a sin and is to be dealt with as such. Those who peddle such reports are to be challenged to face the one whom they have accused, and their allegations should be ignored if the challenge is refused. Many souls have been damaged and the witness of the church soiled by such irresponsible behavior on the part of those who claim the name of Christ. Luther sharply censures such gossip, whether by pastor or laity, in the Large Catechism: "Those are called backbiters who are not content just to know but rush ahead and judge. Learning a bit of gossip about someone else, they spread it into every corner, relishing and delighting in it like pigs that roll in the mud and root around in it with their snouts. This is nothing else than usurping the judgment and office of God, pronouncing the severest kind of verdict and sentence, or the harshest verdict a judge can pronounce is to declare somebody a thief, a murderer, a traitor, etc. Whoever therefore ventures to accuse his neighbor of such guilt assumes as much authority as the emperor and all magistrates. For though you do not wield the sword, you use your venomous tongue to the disgrace and harm of your neighbor. " (LC I, 267-68)

Any legalistic action by pastor or congregation does violence to the soul of another, causes offense in the congregation, disdain in the community, and therefore harm to the cause of the kingdom of God. Examples of such legalism include "dropping" members from the church rolls without fraternal exhortation, arbitrary use of constitutional requirements for membership without consideration of individual circumstances, unnecessary publicity given to the sins of members (see comments later

on legal ramifications), and in general a disregard or abuse of the steps of church discipline mandated by the Lord of the church.

A word is in order regarding each of the three steps of church discipline outlined in Matt. 18:15-17. The first step prescribed by our Lord is, "If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother" (Matt. 18:15). Each Christian is hereby reminded, "Remember, this is a fellow sinner for whom Christ died. No concern of yours? Of course he is. He is just as much concern of yours as is the person who has never heard of Jesus Christ, His love, His cross, and His salvation." All people are our concern, and especially "those who are of the household of faith" (Gal. 6:10). That concern may mean that we confront the one who has fallen on many occasions with regard to his sin. Nowhere does the Savior hint that this procedure is to be followed only once. It is only when the Christian is convinced that nothing more can be done in the one-on-one confrontation that is he at liberty to reveal the matter to others.

The reason for the second step, "But if he does not listen, take one or two others along with you, that every word may be confirmed by the evidence of two or three witnesses" (Matt. 18:16), is evident from the last part of the verse. There is to be no doubt about what was said or done. More than one person is required if ultimately charges are to be brought. This precept goes back to the days of the Old Testament when the Lord instructed His people, "A single witness shall not prevail against a man for any crime or for any wrong in connection with any offense that he has committed; only on the evidence of two witnesses, or of three witnesses, shall a charge be sustained" (Deut. 19:15). Similar expressions are found elsewhere in the Old Testament. In addition, the presence of others indicates that the original visit by a fellow Christian to the one who has sinned was prompted neither by malice nor caprice but by the genuine desire to reclaim the brother or sister.

Ordinarily the third step, "If he refuses to listen to them, tell it to the church; and if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector" (Matt. 18:17) takes place in our modern day voters' assembly, the group usually charged with administering the spiritual and temporal affairs of the congregation.

It is important that the person who is being dealt with has indeed been informed that the matter is being brought to the attention of the congregation and that a proper invitation to that person has been issued and received. This is why it is customary to send such a notice and invitation by way of registered mail. Furthermore, accurate minutes are essential in the event that anything that transpires in the meeting with the offender is called into question. The advice of the fathers to review the minutes of the meeting prior to adjournment is a wise one. This gives all the opportunity to make sure that a faithful record has been maintained and to do this while the matter is still clearly in mind. It should be added that, if the offender has indeed been "gained," the church has a right to expect "fruit that befits repentance" (Matt. 3:8). Those who confess wrongdoing and express repentance are called upon "to make right the evil" to the best of their ability. The repentant thief vows to return that which was stolen. The person who has obtained an unscriptural divorce has the obligation to do everything possible to restore the marriage. The member who has in the past neglected the means of grace shows repentance by faithful attendance at God's house and in the support of the work of the church.

Any "repentance" that expects forgiveness without corresponding change in life is a sham repentance and hypocrisy. The Apology of the Augsburg Confession says in this connection, "Christ frequently connects the promise of forgiveness of sins with good works. He does not mean that good works are a propitiation for they follow reconciliation but he does so for two reasons. One is that good fruits ought to follow of necessity, and so he warns that penitence is hypocritical and false if they do not follow" (Ap IV, 275). The Apology says elsewhere: "There can be no true conversion or contrition where mortifying the flesh and good fruits do not follow. True terrors and sorrows of the soul do not permit the indulgence of the body in lusts, and true faith is not ungrateful to God or contemptuous of his commandments. In a word, there is no penitence inwardly which does not produce outwardly the punishing of the flesh. This, we say, is what John means when he says (Matt. 3:8), "Bear fruit that befits penitence," and Paul when he says (Rom. 6:19), "Yield your members to righteousness, " and elsewhere (Rom. 12:1), "Present your bodies as a living sacrifice, holy," etc. When Christ says (Matt. 4:17), "Be

penitent," he is surely talking about total penitence and total newness of life and fruits." (Ap XII, 131-32) A final word is in order regarding the exercise of church discipline. Quite obviously, if the sin is one that is known throughout the community, for example, listed even in the newspaper, it may be not necessary for the first two steps outlined in Matthew 18 to be followed. The matter can perhaps be brought immediately to the attention of the congregation. (LCI, 284) Nevertheless, Dr. Walther reminds us in his Pastoral that "as always, so here, too, love is the highest law. If love to the offender demands first of all a private admonition, even though the offense be public, the practice of acting in a public manner would constitute a grave injustice." [10]

V

Specific Questions Regarding Church Discipline in the Christian Congregation

1. What is the role of the pastor in church discipline? The pastor's role varies. Members will approach him with problems, reports, or gossip. What course should they pursue with one who has grieved them? What, if anything, should be done with gossip about themselves or others? In answering these and similar questions, the pastor serves as counselor to his flock, directing them on the basis of Holy Scripture in their dealings with fellow Christians.

In some cases, for example, when a member of the congregation has been guilty of sin against him personally, when one despises the means of grace, or persists in seeking an unscriptural divorce, the pastor may be involved from the very first step of discipline.

Officially, the pastor is more frequently a part of church discipline at the time when the problem and/or sin is reported to him, God's undershepherd, for transmission "to the church."

2. May a pastor suspend a person from communion? Although a pastor may not himself excommunicate without the congregation, he may, in the interest of a person's spiritual welfare, refuse to commune one whose presence at the altar would be a source of offense to other members of the congregation, or one living in unrepentant sin who is still being dealt with on a personal basis by himself or others. If, for example, a member has embezzled church funds and the matter is known but the problem has not been

resolved (there has been neither absolution on the one hand nor excommunication on the other), the pastor may insist that the party involved absent himself from the table of the Lord. This suspension must always be temporary, however until the matter has been resolved in one way or the other. Any appeal from such suspension must be acted on properly by the congregation, with the party involved, by virtue of the appeal thereby forfeiting any privacy that may have previously been his. Obviously the pastor has no right to suspend a member simply because the member has disagreed with him, for example in some matter of church polity where the Word of God has not spoken.

3. Does excommunication have to be unanimous? Our synodical fathers argued in the affirmative, pointing out that since such a verdict, reached on the basis of a clear Word of God and representing God's own judgment on the sinner, must be accepted by every Christian and that any who might vote against such action be dealt with (if necessary, excommunicated themselves) before the matter in question is resolved. [11]

Although ideally all members will see the justice of what has been resolved (assuming that the congregation has acted on the basis of the Word of God, and the lack of repentance on the part of the one being dealt with is evident), we believe that excommunication may be carried out without unanimous vote. Shall the ignorance and/or weakness of any dissenting member invalidate either the verdict of the Lord through His church or their own eternal salvation? In all such instances, of course, those not in agreement should be dealt with evangelically in the hope of persuading them that the action of the congregation was truly Scriptural. And if it is evident that a congregation is not sufficiently instructed, with the result that a considerable number would at the time not be ready to favor excommunication in any case, the action should be postponed until such instruction can have its good effect.

4. Is it proper to speak of "self-excommunication"? This term is sometimes used by congregations to describe the refusal of those who are being dealt with in Christian discipline to receive further admonition and who sever their connection voluntarily with the church. Strictly speaking, only the congregation can excommunicate an unrepentant sinner. "Self-exclusion" is perhaps a better term. In any event, although the congregation should not be informed of the specific sin in such cases, it should be

informed that such self-exclusion has taken place and should be advised of the seriousness of such action for the spiritual lives of those involved.

5. What is the difference between removal from office (in the case of called workers in the church) and excommunication? There is a substantial difference. Pastors, teachers, and others engaged in the work of the ministry may, for unbecoming conduct, be removed from office. If repentant, they are joyfully forgiven and welcomed at the table of the Lord, even though they may have necessarily forfeited their office. Adherence to false doctrine is cause for severing fellowship with the offender but does not necessarily involve excommunication, unless such adherence and false doctrine should involve faith-destroying error.

6. May excommunication be looked upon as God's verdict upon the sinner? Yes, assuming that the excommunication was resolved on the basis of the Word of God. Jesus' words to His disciples, "If you forgive the sins of any, they are forgiven; if you retain the sins of any, they are retained" (John 20:23), obviously apply to both keys. Therefore the binding word is as sure as the absolving word. Of course, considered temporally, excommunication is only a ratification of the prior verdict of God.

7. What is the proper course of action for a congregation which receives an application for membership from one who has been excommunicated elsewhere? The prospective member should be directed to his/her former congregation for proper resolution of the matter. A congregation should not act unilaterally in instances where fellow Christians elsewhere have previously acted. If there is repentance, the former congregation acts to receive the person with Christian joy and then transfers him/her to the congregation where application has been made.

If there is evidence that another congregation in fellowship has acted without Scriptural warrant or has not followed proper procedure, the matter should be resolved by the two congregations involved after consultation with church officials.

8. Is the statement "Public offense must be publicly removed" valid? Christian kindness and forbearance are always the firm orders for God's people. No more publicity than is necessary should be given to either the offense or its removal. To the extent that the sin was known by the congregation, the removal of the offense should also be revealed so

that God's people, who were wounded by the action, may rejoice at a God-pleasing solution. It is self-evident that any "pound of flesh" mentality is to be avoided and condemned.

Above all, any activities dealing with excommunication or its removal are the business of the church and are not to be publicized to the unbelieving world.

9. Is there appeal from an unjust excommunication? Yes. Provisions for such an appeal, which should be made first to the circuit counselor, are provided in the bylaws of the Synod (Section VIII of the 1983 Handbook, pp. 187-199).

10. What legal considerations should be taken into account by the congregation in its exercise of church discipline?

- a. The courts will normally not interfere in church discipline matters. This is not only because of the strong emphasis on the separation of the church and state in the United States, for instance, but also because the courts have generally held that members of a church have voluntarily submitted themselves to the authority of the church, including the authority of the church to discipline its members.
- b. However, the courts may interfere if a church does not follow the procedures for discipline that the church itself has established. For example, if the congregation's constitution requires the voters' action for acceptance or expulsion of members, then expulsion cannot occur simply because the pastor or board of elders desires a member to be disciplined.
- c. The courts may interfere if, in the process of exercising church discipline, members of the congregation slander or libel the member disciplined. Slander or libel can occur if untrue statements about the individual under discipline are made, particularly where the statements are made outside of the church disciplinary process. (Of course, Christians should not engage in such gossip or slander wholly aside from whether it might result in court action.)
- d. Following the exercise of church discipline the congregation should simply make an announcement of a member's expulsion. It is improper to make statements describing in detail the conduct for which a member was expelled or

to attempt to hurt the former member in connection with his occupation or job. Such activities could result in legal action.

In summary, the individuals and the congregation involved in church discipline would be well advised to forego discussions of the person under discipline except as may be essential to the disciplinary process itself. While the courts grant the individuals exercising disciplinary authority the right or privilege to speak to the individual involved and to discuss the matter as needed, the courts will not tolerate malicious or frivolous discussion of a person's character or activities outside of proper congregational channels.

11. What is the Christian's responsibility to the person(s) excommunicated? Because the ultimate purpose of all church discipline is the reclamation and salvation of the sinner, the Christian dare not "wash his hands" when one is excluded. St. Paul's admonition in Gal. 6:1 applies: "If a man is overtaken in any trespass, you who are spiritual should restore him in a spirit of gentleness." And although the context of this verse indicates that the reference is to a fellow member of the congregation, our obligation is no less toward one excluded from the fellowship. We should continue to pray for him/her and to witness to this person as occasion permits. Obviously such continued concern should reflect the spirit of the last words of Gal. 6:1, "Look to yourself, lest you too be tempted."

12. Is it proper for a congregation to delegate to the elders, to the church council, and/or to the pastor the authority to excommunicate? The question is probably prompted by the desire to give as little publicity to the sin or error as possible (see question 10 on legal considerations). It should be noted that a kind of delegation has already taken place when the voters' assembly, as is generally the case, is authorized to act in the name of "the church." It is no doubt within the power of the congregation to ask the Board of Elders and/or pastor act in its behalf. Whether it is wise to delegate authority in such a serious matter may well depend on the circumstances, but in general this is a questionable practice.

[1] in September 1980 the President of The Lutheran Church-Missouri Synod asked the Commission on Theology and Church Relations to prepare a report on church discipline

HANDBOOK

**CONSTITUTION
BYLAWS
ARTICLES OF INCORPORATION**

**THE LUTHERAN CHURCH
MISSOURI SYNOD
2013**

UPDATED: NOVEMBER 19–20, 2014

2013
Constitution, Bylaws,
and
Articles of Incorporation
as amended by the
2013 LCMS Convention
20–25 July 2013

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1333 S. Kirkwood Road, St. Louis, MO 63122

Telephone: (314) 965-9000

Manufactured in the United States of America

CONSTITUTION OF THE LUTHERAN CHURCH— MISSOURI SYNOD

Preamble

Reason for the Forming of a Synodical Union

1. The example of the apostolic church. Acts 15:1–31.
2. Our Lord's will that the diversities of gifts should be for the common profit. 1 Cor. 12:4–31.

Article I Name

The name of the synod organized under this constitution shall be: The Lutheran Church—Missouri Synod.

Article II Confession

The Synod, and every member of the Synod, accepts without reservation:

1. The Scriptures of the Old and the New Testament as the written Word of God and the only rule and norm of faith and of practice;
2. All the Symbolical Books of the Evangelical Lutheran Church as a true and unadulterated statement and exposition of the Word of God, to wit: the three Ecumenical Creeds (the Apostles' Creed, the Nicene Creed, the Athanasian Creed), the Unaltered Augsburg Confession, the Apology of the Augsburg Confession, the Smalcald Articles, the Large Catechism of Luther, the Small Catechism of Luther, and the Formula of Concord.

Article III Objectives

The Synod, under Scripture and the Lutheran Confessions, shall—

1. Conserve and promote the unity of the true faith (Eph. 4:3–6; 1 Cor. 1:10), work through its official structure toward fellowship with other Christian church bodies, and provide a united defense against schism, sectarianism (Rom. 16:17), and heresy;
2. Strengthen congregations and their members in giving bold witness by word and deed to the love and work of God, the Father, Son, and Holy Spirit, and extend that Gospel witness into all the world;
3. Recruit and train pastors, teachers, and other professional church workers and provide opportunity for their continuing growth;
4. Provide opportunities through which its members may express their Christian concern, love, and compassion in meeting human needs;
5. Aid congregations to develop processes of thorough Christian education and nurture and to establish agencies of Christian education such as elementary and secondary schools and to support synodical colleges, universities, and seminaries;
6. Aid congregations by providing a variety of resources and opportunities for recognizing, promoting, expressing, conserving, and defending their confessional unity in the true faith;

7. Encourage congregations to strive for uniformity in church practice, but also to develop an appreciation of a variety of responsible practices and customs which are in harmony with our common profession of faith;
8. Provide evangelical supervision, counsel, and care for pastors, teachers, and other professional church workers of the Synod in the performance of their official duties;
9. Provide protection for congregations, pastors, teachers, and other church workers in the performance of their official duties and the maintenance of their rights;
10. Aid in providing for the welfare of pastors, teachers, and other church workers, and their families in the event of illness, disability, retirement, special need, or death.

Article IV Powers

The Synod shall have legal powers:

1. To purchase, hold, administer, and sell property of every description in the interest of the Synod;
2. To accept, hold, administer, and, if deemed advisable, dispose of legacies, donations, commercial papers, and legal documents of every description in the interest of its work.

Article V Membership

Membership in the Synod is held and may be acquired by congregations, ministers of religion—ordained and ministers of religion—commissioned, such as teachers, directors of Christian education, directors of Christian outreach, directors of family life ministry, directors of parish music, deaconesses, parish assistants, and certified lay ministers of the Evangelical Lutheran Church who confess and accept the confessional basis of Article II.

A. Voting Members

All organized congregations that have joined the Synod hold voting membership. At the meetings of the districts of the Synod every congregation or parish is entitled to two votes, one of which is to be cast by the pastor and the other by the lay delegate. At the meetings of the Synod a number of congregations shall form a group which shall be represented by two voting delegates, one a pastor and one a lay delegate.

B. Advisory Members

Advisory members only are the following:

1. Pastors whose congregations do not hold membership in the Synod
2. Assistant pastors
3. Ministers not in charge of congregations
4. Professors at the Synod's educational institutions
5. Teachers of the Evangelical Lutheran Church
6. Directors of Christian education
7. Directors of Christian outreach
8. Directors of family life ministry
9. Directors of parish music
10. Deaconesses
11. Parish assistants
12. Certified lay ministers

13. Candidates for the office of the ministry, for that of a teacher of the Evangelical Lutheran Church, for director of Christian education, for director of Christian outreach, for director of family life ministry, for director of parish music, for deaconess, for certified lay minister, or for parish assistant

Article VI Conditions of Membership

Conditions for acquiring and holding membership in the Synod are the following:

1. Acceptance of the confessional basis of Article II.
2. Renunciation of unionism and syncretism of every description, such as:
 - a. Serving congregations of mixed confession, as such, by ministers of the church;
 - b. Taking part in the services and sacramental rites of heterodox congregations or of congregations of mixed confession;
 - c. Participating in heterodox tract and missionary activities.
3. Regular call of pastors, teachers, directors of Christian education, directors of Christian outreach, directors of family life ministry, directors of parish music, deaconesses, certified lay ministers, and parish assistants and regular election of lay delegates by the congregations, as also the blamelessness of the life of such.
4. Exclusive use of doctrinally pure agenda, hymnbooks, and catechisms in church and school.
5. A congregation shall be received into membership only after the Synod has convinced itself that the constitution of the congregation, which must be submitted for examination, contains nothing contrary to the Scriptures or the Confessions.
6. Pastors, teachers, directors of Christian education, directors of Christian outreach, directors of family life ministry, directors of parish music, deaconesses, certified lay ministers, or candidates for these offices not coming from recognized orthodox church bodies must submit to a colloquium before being received.
7. Congregations and individuals shall be received into membership at such time and manner, and according to such procedures, as shall be set forth in the bylaws to this Constitution.

Article VII Relation of the Synod to Its Members

1. In its relation to its members the Synod is not an ecclesiastical government exercising legislative or coercive powers, and with respect to the individual congregation's right of self-government it is but an advisory body. Accordingly, no resolution of the Synod imposing anything upon the individual congregation is of binding force if it is not in accordance with the Word of God or if it appears to be inexpedient as far as the condition of a congregation is concerned.
2. Membership of a congregation in the Synod gives the Synod no equity in the property of the congregation.

Article VIII Synodical Meetings

A. Time and Legality of Meetings

1. The Synod convenes every three years for its regular meeting.
2. For a legal convention a constitutional convocation of the meeting and the presence of at least one-fourth of the constitutionally elected voting representatives are necessary.

B. Special Sessions of the Synod

PUBLIC REBUKE OF PUBLIC SIN

Considerations in Light of the Large Catechism

Explanation of the Eighth Commandment



A Report of the Commission on Theology and Church Relations
of The Lutheran Church—Missouri Synod

May 2006

Abbreviations:

AC = Augsburg Confession
Ap = Apology of the Augsburg Confession
FC SD = Formula of Concord, Solid Declaration
LC = Large Catechism
SA = Smalcald Articles

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Public Rebuke of Public Sin

Considerations in Light of the Large Catechism Explanation of the Eighth Commandment¹

Introduction

Although the idea of public rebuke of public sin often becomes an issue in conflicted and volatile situations, it is rooted in a positive tenet of Lutheran theology, namely, the obligation of all Christians to evaluate doctrine and life on the basis of Scripture.² The Lutheran reformers refused to subject the clear teaching of Scripture to human authority. They did not believe that any special power to interpret God's Word had been granted to priests, bishops, or pope by virtue of their office. Luther himself argued, in fact, that any Christian, by virtue of the priesthood given in Baptism, could pass judgment on an issue of faith or morals. Such matters could not be solved simply by an appeal to human authority or human tradition.

Public rebuke of public sin has often been an issue in our walk together in The Lutheran Church—Missouri Synod (LCMS). The most frequently quoted text relating to public rebuke of public sin is from the Large Catechism of Martin Luther in his explanation of the Eighth Commandment:

¹This report has been prepared in response to an October 28, 2002, request from President Gerald Kieschnick that the Commission on Theology and Church Relations "prepare a study on the explanation to the Eighth Commandment found in Luther's Large Catechism" and that the Commission "give special attention to the notion of public rebuke being given to public sin." In preparing this report the Commission notes that former Vice President Robert Kuhn requested the two seminaries of The Lutheran Church—Missouri Synod to prepare a response to how Matthew 18 and the Eighth Commandment relate to public error in the church. The Department of Systematics of Concordia Theological Seminary, Ft. Wayne, prepared a brief response (March 9, 2000), which is available at: www.lifeoftheworld.com/believe/statements/sept2000report.php.

²Martin Luther, "That a Christian Assembly or Congregation Has the Right and Power to Judge All Teaching and to Call, Appoint, and Dismiss Teachers, Established and Proven by Scripture" (1523), *Luther's Works [LW]*, American Edition (Philadelphia: Fortress Press, 1970), 39:306–308. C. F. W. Walther, *The Form of a Christian Congregation*, trans. J. T. Mueller (St. Louis: Concordia Publishing House, 1987 [Concordia Heritage Series Reprint]), 31–34. *A Brief Statement of the Doctrinal Position of the Missouri Synod* (1932), par. 30: "Naturally all Christians have also the right and the duty to judge and decide matters of doctrine, not according to their own notions, of course, but according to the Word of God, 1 John 4:1; 1 Pet. 4:11."

“But where the sin is so public that the judge and everyone else are aware of it . . . you may also testify publicly against them” (LC I, 284).³ The fact that books on pastoral theology going back to C. F. W. Walther have quoted this excerpt and have dealt specifically with public rebuke suggests that our more recent experiences with this issue are nothing new in the life of the church. Nevertheless, it is certainly appropriate for the Synod to revisit the question of interpreting this text and thus appropriately to apply Luther’s words to our present circumstances.

This document on public rebuke of public sin is an attempt to read Luther’s comment in its context both within the text of the Catechism and in light of historical events. Because Luther in faithfulness to the witness of Scripture seeks to understand how Matthew 18 relates to the Eighth Commandment, it is appropriate that we first examine this text briefly. Other biblical texts are pertinent as well, and for this reason we will discuss some that appear to have a direct bearing on the matter of public rebuke of public sin. The method of rebuke modeled in the Lutheran confessions other than the Large Catechism is also considered. Potential application to our present circumstances begins with a consideration of key words in the debate: public, rebuke, and sin. We must consider seriously how ideas associated with these terms or how the terms themselves have changed in meaning and application from Luther’s day to our own. We must also clearly differentiate between what Scripture might allow in such matters and what might be required for proper order in the church. All of this is then summarized in a number of statements offering counsel concerning public rebuke of public sin.

³*The Book of Concord*, ed. Robert Kolb and Timothy J. Wengert (Minneapolis: Augsburg Fortress, 2000), 424. Luther’s explanation of the Eighth Commandment extends from paragraphs 222–291. Hereafter references from this section will be cited by paragraph.

I. Explanation of the Eighth Commandment: Luther's Large Catechism

A. Context of Luther's Paragraph on Public Rebuke

The full text of Luther's paragraph on public rebuke of public sin that has become the focus in recent discussions reads as follows:

All of this refers to secret sins. But where the sin is so public that the judge and everyone else are aware of it, you can without sin shun and avoid those who have brought disgrace upon themselves, and you may also testify publicly against them. For when something is exposed to the light of day, there can be no question of slander or injustice or false witness. For example, we now censure the pope and his teaching, which is publicly set forth in books and shouted throughout the world. Where the sin is public, appropriate public punishment should follow so that everyone may know how to guard against it (284).

A proper understanding of this paragraph and its application requires that it be viewed within the context of Luther's overall discussion of the Eighth Commandment, including especially its immediate context. As we consider the paragraph, we need especially to bear in mind that Luther's explanation of the Commandment in the Large Catechism originated in a series of sermons. We may presume, therefore, that much of his treatment deals with the problem of gossip common to life in a relatively small town like Wittenberg. Luther expands the definition of gossip beyond a false or misleading statement about someone else. And so, he says, even something that is true about a neighbor that is not public knowledge should not be made public by anyone who happens to know it. Presumably, anything that is criminal in nature and that could be proven should be taken to a judge rather than to a neighbor. Anything else should be kept secret or spoken of with the guilty party as in Matthew 18.

Luther begins his explanation with the theological foundation that undergirds the Commandment and therefore informs everything he says in the ensuing discussion: "Besides our own body, our spouse, and our temporal property, we have one more treasure that is indispensable to us, namely, our honor and good reputation...God does not want our neighbors to be deprived of their reputation, honor, and character...." (255-56).

With this principle in mind throughout, Luther divides his exposition of “You shall not bear false witness” into three sections. First, he briefly sets forth the “first and simplest meaning” (*zum ersten ist der gröbste Verstand*), according to which the Commandment forbids false testimony in “public courts of justice” (*auf öffentlich Gericht*) (257) and applies “to all that takes place in court” (261). Second, the application of the Commandment extends “to spiritual jurisdiction or administration.” That is to say, “upright preachers and Christians” and the Word of God itself become the objects of false witness and are maligned (262).

In the twenty paragraphs that follow—which comprise the bulk of his exposition and which were no doubt occasioned by the local situation—Luther turns to “the *third* aspect of this commandment which applies to all of us”: “sins of the tongue by which we may injure or offend our neighbor” (263). The Commandment forbids “the detestable, shameless vice of backbiting or slander” and gossip, the tragedy of which is that “honor and good name are easily taken away but not easily restored” (264; 273). “We are absolutely forbidden to speak evil of our neighbor,” says Luther. Luther specifically exempts “civil magistrates, preachers and fathers and mothers” from that prohibition because their vocation requires their active intervention in the lives of those entrusted to their care (274).⁴ For those who do not have such a relationship of vocation with the wrongdoer, Luther suggests that “the right way to deal with this matter would be to follow the rule laid down by the Gospel, Matthew 18” (276). This “fine, precious precept for governing the tongue” (276) not only avoids the spread of gossip and slander but also provides “the right and proper way of dealing with and improving a wicked person” (280).

Luther’s “public rebuke of public sin” paragraph comes at the very end of the third section noted above and just before a concluding paragraph—which is followed, in turn, by a concluding pastoral word based on 1 Corinthians 12. Within Luther’s overall discussion, therefore, the paragraph is not elevated to function as a new “fourth” application of the Commandment. Rather, it functions as a qualification of the previous application regarding gossip and slander. Luther introduces here the exceptional case of public rebuke of sin that is clearly no longer secret. Given his underlying concern for protecting the good name of our neighbor, Luther certainly did not intend to override his previous concerns that the vocation for judging public sin be honored and that every effort be

⁴ As his mention of the judge suggests, Luther maintains a distinction between those who have a vocation to reprove wrong and punish evil and those who do not: “So you see that we are absolutely forbidden to speak evil of our neighbor. Exception is made, however, of civil magistrates, preachers, and fathers and mothers in order that we may interpret this commandment in such a way that evil does not go unpunished...Likewise, although no one personally has the right to judge and condemn anyone, yet if they are commanded to do so and fail to do it, they sin as much as those who take the law into their own hands apart from any office” (274).

made to protect the honor of our neighbor by avoiding all slander and gossip. Nor did Luther lose sight of the larger purpose of admonishing the neighbor who sins, namely, that he “may improve” (276, 278, 280, 281, 285).

B. Summary of the Paragraph

Several points emerge from a close reading of Luther’s “public rebuke” paragraph: 1) the occasion of public rebuke is sin; 2) all, including authorities, are aware of the sin; it is very public (*ganz öffentlich*); 3) given the demonstrably public nature of the sin, there is no question of slander, injustice, or false witness; 4) the result should be public punishment; and 5) the goal of such punishment is the instruction of the community.

The example that Luther cites, which presumably conforms to his criteria, is how the reformers “now censure the pope and his teaching.” A consideration of the conflict between Luther and the papacy, which by the time of the Large Catechism was more than a decade old, will demonstrate the magnitude of the fault that might lead to public rebuke. A review of the historical context will also show that in this situation Luther followed the general principles that he set forth in his explanation of the Eighth Commandment, particularly the role of vocation in dealing with public sin.

C. Historical Issues

1. *Luther’s Conflict with the Popes*

In posting for debate the Ninety-five Theses, Martin Luther began what would become a lifelong conflict with the papacy in a way perfectly consonant with his office and within the bounds of accepted procedure.⁵ As a Doctor of Theology he had every right to debate matters such as the sale of indulgences and also, as he considered it, the duty to warn the faithful. At the same time he posted the theses, Luther sent letters about the matter to Archbishop Albrecht of Mainz, in whose name the indulgences were being proclaimed, and to his diocesan bishop Jerome Schulze of Brandenburg. (These letters did not ask permission to hold the debate but simply informed the recipients that it would be held.) The discussion of indulgences almost immediately widened beyond what Luther intended when printers distributed translated copies of the theses without his authorization. In this atmosphere Luther continued to defend his ideas about indulgences, assuming that the pope would agree with his criticisms.

⁵A much fuller description of the events narrated here can be found in Martin Brecht, *Martin Luther: His Road to Reformation, 1483–1521*, trans. by James L. Schaaf (Philadelphia: Fortress Press, 1985), 239–73, 299–348, 389–476.

Pope Leo X did not, of course, agree with Luther about indulgences. As Luther later reflected in 1545, he had been naïve about this issue that touched the pope's purse. When Luther was denounced to Rome, the papal court began its investigative process. As part of this process, Luther dutifully met with the papal representative Cardinal Cajetan in Augsburg in 1518. In the years following, Luther received the papal emissary Karl von Miltitz in Wittenberg as he attempted to stave off a break between the reformer and the pope. During this time, Luther also filed formal appeals: first to the pope himself to look at the matter more closely and then two separate appeals beyond the pope for a general council.

During the discussion with Cardinal Cajetan, Luther had questioned the authority of the pope, but he did not publicly declare that only Scripture was authoritative until the Leipzig Debate in July 1519. There Johann Eck forced Luther to admit that popes and councils could and had erred and that Scripture alone was authoritative for the Christian. The public announcement was new, but the idea had been there for some time. Luther's frustration in discussions with papal representatives had been that they could not refute his position from Scripture but only from papal authority. The treatises Luther penned in the year following Leipzig show that his first allegiance was to the authority of Scripture and not to papal authority. Nevertheless, he was still concerned for proper authority, which is demonstrated in the fact that Staupitz released him from his monastic vows so that there could be no compulsion from Augustinian superiors to recant.

Pope Leo's excommunication of Luther, which became official in January 1521, came after three years of debate between Luther and his colleagues and representatives of Rome. The debate was carried on in person and in writing. Thus Luther was constantly informed about the papal position on the issues he had raised, and had this position confirmed over and over again. Luther also participated in debate with the conviction that his office compelled him to do so. He often emphasized that it was his duty as a doctor of the church to promote and defend the Gospel, for example in this passage from "Infiltrating and Clandestine Preachers" (1532).

I have often said and still say, I would not exchange my doctor's degree for all the world's gold. For I would surely in the long run lose courage and fall into despair if, as these infiltrators, I had undertaken these great and serious matters without call or commission. But God and the whole world bears [sic] me testimony that I entered into this work publicly and by virtue of my office as teacher and preacher, and have carried it on hitherto by the grace and help of God.⁶

⁶ Martin Luther, "Infiltrating and Clandestine Preachers" (1532), *LW* 40:387–88.

Moreover, Luther's ultimate concern was not proper authority or abuses in the church, as important as those issues might have been, but the pastoral care and proper teaching of God's people.

2. *Luther's Pastoral Concern*

Luther's criticism of the papacy was not only, or even primarily, a question of authority. At the heart of his criticism from his earliest years at Wittenberg to his final denunciations against Rome was the conviction that the pope was not fulfilling his pastoral duties. Simply put, the popes not only failed to proclaim the Gospel themselves but also actively prevented others from doing so. As Scott Hendrix has demonstrated, Luther's understanding of his own pastoral duty in light of the pope's failure to do his duty pastorally lends a unity to the reformer's works.

The motivation which inspired Luther's rejection of the papacy from beginning to end was summed up by Philipp Melancthon in 1521, when he attributed the *Ninety-five Theses* to Luther's intention to "exercise the duty of a good pastor." That duty was to protect the people from the deception fostered by the indulgence practice and, later, by the accumulated traditions of the papacy. The devotion to that duty caused Luther to persist in his rejection of the papacy to the end of his life and accounted for his amazing single-mindedness in other matters as well. What appears as inconsistency or stubbornness often falls into a sensible pattern if one views it from the angle of what Luther regarded as necessary for the people's instruction.⁷

Luther's desire to protect the people was clear in the beginning of the indulgence controversy. It was only after Wittenbergers had heard Johann Tetzel's preaching and purchased indulgences in neighboring territories that Luther spoke out on the matter. As the conflict with the papacy intensified, Luther's concern broadened to embrace the proper teaching of the flock in the basics of the Christian faith.

Luther was convinced that all Christians should be *theodidacti* ("taught of God"). Theology was not a matter only for the learned but a matter of life and death for all God's people.

Besides, if we are all priests, as was said above, and all have one faith, one gospel, one sacrament, why should we not also have the power to test and judge what is right or wrong in matters of faith? What becomes of Paul's words in I Corinthians 2[:15], "A spiritual man judges all things, yet he is judged by no one"? And II Corin-

⁷ Scott H. Hendrix, *Luther and the Papacy: Stages in a Reformation Conflict* (Philadelphia: Fortress Press, 1981), 156.

thians 4 [:13], “We all have one spirit of faith”? Why, then, should not we perceive what is consistent with faith and what is not, just as well as an unbelieving pope does?⁸

Papal false teaching had to be publicly opposed precisely because it had been “shouted throughout the world” and was widely believed. Many of Luther’s opponents criticized him for making theological matters public and thus opening them to the laity. Erasmus, for example, in a letter addressed to Luther’s colleague Justus Jonas but intended for wider circulation, blamed Luther for “making everything public and giving even cobblers a share in what is normally handled by scholars as mysteries reserved for the initiated.”⁹ Luther may well have had such criticism in mind when he broached the matter of his conflict with the papacy in explaining the Eighth Commandment.

The concern for the Gospel as a motive for criticism of the papacy was clearly shared by other reformers and is reflected in numerous other texts. For example, the issue of papal authority was critical as the Lutheran princes decided how to respond to the pope’s call for a general council in 1536. Luther penned the Smalcald Articles for the occasion of this meeting. There he addressed issues surrounding the papacy at great length and, as usual, tied his criticism to the proclamation of the Gospel.

This business shows overwhelmingly that [the pope] is the true end-times Antichrist, who has raised himself over and set himself against Christ, because the pope will not let Christians be saved without his authority (which amounts to nothing, since it is not ordered or commanded by God). This is precisely what St. Paul calls “setting oneself over God and against God.” Neither the Turks nor the Tartars, despite being great enemies of the Christians, do any such thing. They allow whoever desires it to have faith in Christ The pope, however, will not allow faith, but asserts instead that anyone who is obedient to him will be saved. We are unwilling to do this, even if we have to die in God’s name on account of it (SA II, The Fourth Article, 10–12).¹⁰

Although Luther’s text was not formally adopted at the meeting, similar concerns were addressed in the text commissioned by the princes from his colleague Philip Melanchthon, the *Treatise on the Power and Primacy of the Pope*.

⁸ “To the Christian Nobility,” LW 44:135.

⁹ “Epistle 1202” in *Collected Works of Erasmus* (Toronto: University of Toronto Press, 1988), 8:203.

¹⁰ *The Book of Concord*, Kolb-Wengert, 309.

Even if the Roman bishop possessed primacy and superiority by divine right, one would still not owe obedience to those pontiffs who defend ungodly forms of worship, idolatry, and teaching inimical to the gospel. On the contrary, one should regard such pontiffs and such rule as anathema (Treatise, 38).¹¹

Later in the same text Melanchthon summed up his accusation against the popes by saying, "Thus they have transferred the benefit of Christ to human traditions and have completely destroyed the doctrine of faith" (Treatise, 48).¹² His concern, too, was for pastoral care. "These errors are not to be taken lightly. Truly they do harm to the glory of Christ and bring souls to ruin" (Treatise, 48).¹³ This was not hyperbole. Melanchthon's portrayal of papal claims and behavior was in deadly earnest. As such, it bears witness to the scope and magnitude of the sin that provoked Luther's comment in his explanation of the Eighth Commandment.

¹¹ *Ibid.*, 336.

¹² *Ibid.*, 338.

¹³ *Ibid.*

II. The Scriptures

Both Jesus and His apostles gave instructions to the church for the preservation of its communal life and for the restoration of those who sin against God and their fellow Christians. The New Testament has much to say about how believers should deal with one another generally and about the burden of spiritual care laid upon all Christians for each other—those “for whom Christ died” (Rom. 14:15; 1 Cor. 8:11). Such spiritual care conscientiously undertaken also includes the necessity of public rebuke of public sin in certain circumstances, which is amply illustrated by the examples of Jesus and Paul. While the focus here is on public rebuke of public sin within the Christian community, examples can also be given from the Scriptures to illustrate the general principle that public censure of false teaching that stands in opposition to the Gospel is not only appropriate but necessary.

In addition to brief commentary on Matthew 18, and in keeping with the specific purpose of this document, we include in what follows discussion of texts that illustrate public rebuke of public sin.

A. Matthew 18

In the case of public sin, as Luther observed, a Christian is not obligated to follow the steps outlined in Matthew 18. Referring to these steps in his previous discussion of Matthew 18 in the Large Catechism, Luther is quite clear: “All of this refers to secret sins. But....” (284). Because Matthew 18 has been invoked so often in the life of the church and has been applied to so many different situations, even though the text itself does not support a wide application, Luther’s restrained approach deserves notice, and even emphasis. C. F. W. Walther agreed with Luther’s assessment, though he provided a slightly different rationale. Walther concluded that the steps of Matthew 18 did not apply in the case of a sin that was known to the entire congregation because “in this case the congregation is a single person.” Thus a public rebuke would not violate the first step but would represent the response of that single person, the congregation.¹⁴

In a recent detailed examination of the context and application of Matthew 18, LCMS professors Jeffrey Gibbs and Jeffrey Kloha have cautioned against misuse of this text and have appealed for its contextual

¹⁴C. F. W. Walther, *Amerikanisch-Lutherische Pastoraltheologie* (St. Louis, Mo.: Druckerei der Synode von Missouri, Ohio u. a. Staaten, 1872), 325.

application. They state: “[T]he situation envisioned in Jesus’ teaching involves a sin directly committed against a fellow Christian. The context in which the sin occurs is that of the ἐκκλησία (*ecclesia*), that is, a local community of the disciples of Jesus.”¹⁵ The point of Jesus’ teaching is to exert every effort to gain an offending fellow believer. The reason for a confrontation is the welfare of the offender rather than the welfare of the one who was offended.¹⁶

That there may be cases where the procedure outlined in Matthew 18 does not directly apply and public rebuke is deemed necessary does not mean that concern for the spiritual welfare of the offender can be set aside. Following Walther, J. H. C. Fritz, for example, wrote in his *Pastoral Theology* under the heading “Procedure if Public Offense has been Given”:

The highest law, however, is under all circumstances the law of Christian charity (love). If Christian charity therefore demands that a public offender be spoken to privately, it would be unjust to proceed at once against him publicly; for the purpose of church discipline is to bring a sinner to a knowledge of his sins and to true repentance.¹⁷

Thus, while there is no requirement to follow the steps outlined in Matthew 18 in cases where the text does not apply, this does not mean that steps outlined by Jesus in this text are *prohibited* in any case. Following the steps of Matthew 18 in cases beyond their direct application may in fact be beneficial to the church and its administrative structures and therefore advisable in the given case. But the church should neither assume nor insist that *Scripture requires* the procedure in every instance of public sin.

B. Matthew 23

The most sustained public rebuke of religious teachers and their erroneous doctrines contained in the Gospels appears in Matthew 23. In this chapter Jesus directs “seven woes” against the scribes and Pharisees. While the chapter begins with Jesus speaking to the crowds and His disciples

¹⁵ Jeffery A. Gibbs and Jeffrey J. Kloha, “‘Following’ Matthew 18: Interpreting Matthew 18:15–20 in Its Context,” *Concordia Journal* 29 (January 2003): 15. See also David Scaer’s section on “Warning, Discipline, and Restoration” in *Discourses in Matthew: Jesus Teaches the Church* (St. Louis: Concordia Publishing House, 2004), 329–38.

¹⁶ Gibbs and Kloha make the added point that Matt. 18:15–18 “does not apply equally to every situation that needs to be corrected in the church.” In the case of one who has publicly taught false doctrine, “unless the false teaching is of such a nature that one fears that the person teaching it might be lost and in need of being gained, it is hard to see how ‘Matthew 18’ can be used as a sort of legal requirement for dealing with situations of that sort.” *Ibid.*, 19.

¹⁷ John H. C. Fritz, *Pastoral Theology: A Handbook of Scriptural Principles Written Especially for Pastors of the Lutheran Church* (St. Louis: Concordia Publishing House, 1932; 1977 reprint edition), 232.

V. Conclusion

As we in the LCMS have sought to be faithful to the apostle's admonition, two errors seem to have beset us with regard to the understanding of public rebuke of public sin. The first, and perhaps the most obvious, is the proliferation of public rebuke. In print, e-mail, and chat rooms, many LCMS clergy do not hesitate to name names and make public what they deem to be the sins of fellow pastors and congregations. The second error, however, is that of refusing on principle to consider or sanction public rebuke of public sin in any case. While this position may cite the procedure outlined in Matthew 18 as its justification, such a view owes far more to modern America's therapeutic culture in which there is no sin, only personal conflict.³² To treat every instance of disagreement among members of the Synod as a clash of personalities is, ultimately, to downplay what the Scriptures teach concerning Law and Gospel and unity in doctrine that has been the foundation of the LCMS. Properly understood, public rebuke of public sin must have a place in a church that values the clear teachings of Scripture. At the same time such rebuke ought to maintain its evangelical purpose, namely, the restoration of the sinner through confession and absolution.

Public rebuke of public sin must be carefully considered and properly applied so that it conforms to the principles articulated in Scripture that have guided the practice of the church. On the basis of the foregoing discussion in this document, we offer the following statements as guidance and counsel:³³

1. Public rebuke should not be the first response to a first offense. A rapid rush to judgment should be avoided.³⁴ The response to a first offense should certainly be one of pastoral concern for the erring brother or

³² In the course of the twentieth century, many historians would argue, the dominant culture in America has shifted from a Protestant to a therapeutic world view. Much of American culture has traded sin and salvation for self-realization. See T. J. Jackson Lears, *No Place of Grace: Antimodernism and the Transformation of American Culture 1880–1920* (New York: Pantheon Books, 1981).

³³ The list that follows presumes that a sin (which may or may not be public) has been committed. There are instances where public rebuke is undertaken when, in fact, no sin or offense has occurred, when the sin is not public, or when a public rebuke is not otherwise appropriate. It may well be, therefore, that the one intending to make a public rebuke is in fact the one in error.

³⁴ Kloha and Gibbs rightly caution in this regard, "...one would hope that in cases where one Christian (lay or clergy) believes that another has taught something that contradicts sound Biblical teaching, the concerned Christian would have the common sense and the Christian decency not to rush to judgment but to make every effort to speak directly, patiently, and lovingly to the other party in question" (19).

sister (cf. Gal. 6:1–3). “Public sin” suggests a pattern of behavior or lack of appropriate recognition of sin and repentance when correction takes place.

2. Public rebuke should be pursued first by those who have the office of correction in the church in their assigned areas of responsibility. In the case of public sin, those affected should consult with each other and with those having responsibility for ecclesiastical supervision (cf. 1 Pet. 5:2).
3. If those charged with ecclesiastical supervision fail to carry out their duties and responsibilities, public rebuke may be pursued by any Christian.
4. Matthew 18 does not speak specifically to cases of public sin, as Luther declares in his explanation of the Eighth Commandment. The steps outlined in Matthew 18, therefore, are not to be considered absolute requirements mandated by Scripture or the Confessions in cases of public sin. These steps may, however, be part of synodical processes that would lead to specific consequences of public sin (e.g., removal from the clergy roster of the Synod). Public rebuke is not the same as the filing of formal charges.
5. One who decides to offer a public rebuke should be certain that he himself properly understands the nature of the sin so that the rebuke offered may have the appropriate effect.
6. Public rebuke should not be undertaken lightly but only after much prayer, deliberation, and consultation with others who know of the sin.
7. In cases where sin is not apparent to all (and perhaps, for that reason, not truly public), a call for discussion rather than a rebuke might best serve the needs of the church. Debate (in forums that may be provided for this purpose), rather than rebuke, may well be a more appropriate initial response in some cases.
8. Public rebuke, if it is to be effective, should be rare and used primarily in cases of notorious or scandalous teaching or conduct in which the Gospel is at stake.
9. The purposes of public rebuke are both to warn and instruct the church, and to offer spiritual care to the offender. Public rebuke is intended to enlist the aid of fellow Christians in correcting the offender and to help them avoid the same offense. By God’s grace, the Holy Spirit will lead the offender to repentance, whereupon he or she should receive God’s absolving and restorative grace in Word and sacraments.

The Commission offers this brief report with the earnest prayer that it will be a blessing to the church as we live and work together in the spirit of St. Paul's charge that we be "eager to maintain the unity of the Spirit in the bond of peace" (Eph. 4:3).

GUIDELINES FOR CONSTITUTIONS AND BYLAWS OF LUTHERAN CONGREGATIONS

PREFACE

Congregations, the basic units of The Lutheran Church—Missouri Synod, join together to form the Synod and relate to one another through it (Bylaw 1.3.1)¹. Together they establish the requirements of membership in the Synod (Constitution Art. VI)². Thus, while congregations of the Synod are self-governing (Art. VII), they commit themselves to fulfill not only membership requirements but to act in accordance with the entire Constitution and Bylaws of the Synod, under which they have agreed to live and work and which the congregations alone have the authority to amend through conventions (Bylaws 1.3.4 and 1.3.4.1)³.

In order to assist congregations in the development and preparation of their constitutions and bylaws by the inclusion of the requirements necessary for membership in The Lutheran Church—Missouri Synod, the Commission on Constitutional Matters has from time to time issued guidelines for the preparation and review of such documents. This sixth revised edition of the guidelines has been prompted by recurring questions and issues raised by district constitution committees and by recent convention actions.

The Holy Scriptures do not prescribe a form of polity for a local congregation. Congregations are free to structure themselves in such manner that they believe will be most effective for carrying out the Great Commission of our Lord in a manner that is in harmony with Holy Scripture, the Confessions, and the teachings and practices of the Synod. In determining a congregation's polity, much will depend upon its size, ethnic background, sociological setting—whether rural, urban, or suburban—and other pertinent factors.

Because of its unique needs or setting, a congregation may decide to consider alternate forms of organization. However, in those cases in which a congregation decides to adopt a different type of organization than that described in the following guidelines, the topics that are referenced should still be given serious consideration.

¹ "Individual Christians are joined together in a worshiping and serving community, the congregation. Congregations, the basic units of the Synod, have joined together to form the Synod and relate to one another through it" (Bylaw 1.3.1).

² "Conditions for acquiring and holding membership in the Synod are the following:

1. Acceptance of the confessional basis of Article II.
2. Renunciation of unionism and syncretism of every description, such as:
 - a. Serving congregations of mixed confession, as such, by ministers of the church;
 - b. Taking part in the services and sacramental rites of heterodox congregations or of congregations of mixed confession.
 - c. Participating in heterodox tract and missionary activities.
3. Regular call of pastors, teachers, directors of Christian education, directors of Christian outreach, directors of family life ministry, directors of parish music, deaconesses, certified lay ministers, and parish assistants and regular election of lay delegates by the congregations, as also the blamelessness of the life of such.
4. Exclusive use of doctrinally pure agenda, hymnbooks, and catechisms in church and school.
5. A congregation shall be received into membership only after the Synod has convinced itself that the constitution of the congregation, which must be submitted for examination, contains nothing contrary to the Scriptures or the Confessions.
6. Pastors, teachers, directors of Christian education, directors of Christian outreach, directors of family life ministry, directors of parish music, deaconesses, certified lay ministers, or candidates for these offices not coming from recognized orthodox church bodies must submit to a colloquium before being received.
7. Congregations and individuals shall be received into membership at such time and manner, and according to such procedures, as shall be set forth in the Bylaws to this Constitution" (Constitution, Art. VI).

³ "Congregations together establish the requirements of membership in the Synod Constitution, Art. VI). In joining the Synod, congregations and other members obligate themselves to fulfill such requirements and to diligently and earnestly promote the purposes of the Synod by word and deed. Members agree to uphold the confessional position of the Synod (Constitution, Art. II) and to assist in carrying out the objectives of the Synod (Constitution, Art. III), which are the objectives of the members themselves. Thus, while congregations of the Synod are self-governing (Constitution, Art. VII), they, and also individual members, commit themselves as members of the Synod to act in accordance with the Constitution and Bylaws of the Synod under which they have agreed to live and work together and which the congregations alone have the authority to adopt or amend through conventions" (Bylaws 1.3.4 & 1.3.4.1).

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I. GENERAL PRINCIPLES

A. Because member congregations share in the mission of the Synod articulated in its mission statement, *“In grateful response to God’s grace and empowered by the Holy Spirit through Word and Sacraments, the mission of The Lutheran Church—Missouri Synod is vigorously to make known the love of Christ by word and deed within our churches, communities, and world,”* it is beneficial that congregations organize themselves and their ministries in an effective manner as provided in their constitutions and bylaws.

B. Among the responsibilities of membership, the Constitution (VI 5)⁴ and Bylaws of the Synod require member congregations to submit their constitutions and bylaws for review by their district’s constitution committee when applying for membership in the Synod (Bylaw 2.2.1)⁵. Congregations which revise their constitutions and bylaws must also submit these proposed changes for review by their district’s constitution committee (Bylaw 2.4.1)⁶. Upon favorable action by the district board of directors, the congregation shall be

⁴ “A congregation shall be received into membership only after the Synod has convinced itself that the constitution of the congregation, which must be submitted for examination, contains nothing contrary to the Scriptures or the Confessions\” (Constitution, Art. VI 5).

⁵ “To apply for membership in the Synod a congregation shall have an approved constitution and bylaws.

(a) The congregation shall submit its constitution and bylaws to the appropriate district president, who shall refer such to the standing committee of the district....

(b) The Constitution Committee shall examine the constitution and bylaws to ascertain that they are in harmony with Holy Scriptures, the Confessions, and the teachings and practices of the Synod in order that any necessary changes may be made by the congregation before the application is acted upon” (Bylaw 2.2.1).

⁶ “A congregation desiring to retain membership in The Lutheran Church—Missouri Synod shall continue to have a constitution and bylaws approved by the Synod. (a) A member congregation which revises its constitution or bylaws or adopts a new

notified that the changes are acceptable to the Synod, and the congregation may proceed with formal adoption of the revised constitution and/or bylaws, and remain a member in good standing of the Synod.

C. While the requirements for membership in the Synod are established by the Synod for all congregations, differences exist between the congregations of the Synod in size, opportunity, location, and other factors that any attempt to formulate a single example of a constitution and bylaws to suit the needs of every congregation would be ill-advised. As long as the constitution and bylaws of a congregation do not contradict the Constitution, Bylaws, and Resolutions of the Synod, the congregation is free to organize as it wishes. Therefore, in general the organization of a congregation is a matter of self-determination, so long as its constitution and bylaws are in harmony with Holy Scripture, the Confessions, and the teachings and practices of the Synod and are not in violation of governmental laws for not-for-profit charitable organizations.

D. When examining constitutions and bylaws, district constitution committees will ascertain whether the documents honor those basic principles for constitutions and bylaws that are enumerated in these guidelines. When appropriate, the wording of the Constitution and Bylaws of the Synod should be advocated for the sake of promoting unity and harmony in the Synod. Congregations may note that under Bylaw 2.3.1 (a)⁷, constitutions of member congregations are not to deny membership or other congregational privileges to any Christian because of race or ethnic origin. It may also be wise to include a statement prohibiting sexual harassment.

E. While these guidelines intend to foster unity in the Synod, it is understood that such unity is grounded primarily in the common confession and mission of the Synod (Constitution Art. II; Bylaw 1.1.1)⁸ and in the mutually agreed-upon conditions of membership and objectives of the Synod (Constitution, Art. VI; Bylaw 1.3.4)⁹.

II. FORMAT OF THESE GUIDELINES

A. No section regarding the articles of incorporation of member congregations is included in these guidelines. Suffice it to say that these articles should be brief, including only the essential subjects required by the laws of the state in which a congregation is located. An attorney familiar with such matters should be consulted. If necessary, names of attorneys can be obtained from district officials.

B. In the third section of these guidelines, subjects are identified that ordinarily should be addressed in the constitutions of member congregations of The Lutheran Church—Missouri Synod. Instructive comments are offered under each subject, followed by one or more sample paragraphs.

C. In the fourth section of these guidelines, subjects are identified that may be addressed in the bylaws of member congregations of The Lutheran Church—Missouri Synod. Instructive comments are offered under each subject, followed by one or more sample paragraphs. More latitude is granted to congregations in their bylaws to allow for differences in size, location, and other circumstances.

D. “Brief but adequate” should be the watchword when congregations develop or amend their constitutions and bylaws. Brevity enables congregations later to develop additional structures and programs (e.g., ad hoc committees) to meet specific needs and goals without the need repeatedly to go through the time-consuming process of amending their governing instruments.

E. It is the goal of this process and the hope of the Commission in providing these guidelines that congregations of our beloved Synod will be assisted in carrying out ever more effectively the great mission which our Lord

constitution or bylaws shall, as a condition to continued eligibility as a member of the Synod, submit such revised or new constitution and/or bylaws to the district president....(d) Upon favorable action by the district board of directors, the congregation shall be notified that the changes are acceptable to the Synod and that the congregation is entitled to continue to function as a member of the Synod in good standing under the new or changed constitution or bylaws” (Bylaw 2.4.1).

⁷ “(a) It shall be the policy of the Synod to decline membership to congregations whose constitutions deny membership or other congregational privileges to any Christian because of race or ethnic origin” (Bylaw 2.3.1).

⁸ “Committed to a common confession and mission, congregations of The Lutheran Church—Missouri Synod join with one another in the Synod to support one another and to work together in carrying out their commonly adopted objectives....” (Bylaw 1.1.1).

⁹ See footnote 5.

Jesus Christ has given to His church on earth: to make disciples of all nations, sharing with their communities and the world the good news of salvation and to nurture the faith of those who already believe, by teaching them to observe all that He has commanded.

III. GUIDELINES FOR CONSTITUTIONS

The following are subjects that ordinarily should be addressed in a congregation's constitution. Instructive comments are provided together with sample paragraphs. For ease of reference, a numeral and decimal numbering system is also recommended.

1.0 NAME

Legal counsel should be consulted to make certain that this paragraph follows the requirements for ecclesiastical corporations established by the state in which the congregation is located. In addition, 1995 Synod convention Res. 3-13A resolved that “all congregations and mission stations in our Synod boldly profess in their official title and/or name that they are ‘Lutheran.’”¹⁰

Example:

“The name of this congregation shall be [Name] Lutheran Church of [City,] [County,] [State].”

2.0 MISSION

In the constitution of a Christian congregation it is desirable to state the mission or purpose for which it exists. Such a paragraph should contain the fundamental purposes included in the following example.

Example:

“The purpose of this congregation shall be to give honor and glory to the Triune God, to carry out His will, to proclaim the Gospel of Jesus Christ to all the world, to nurture the faith of its members, to manifest the unity of our faith in Jesus Christ as God and Savior, to foster Christian fellowship and love, to extend a helping hand to human need, and to achieve its objectives by the preaching of the Word of God, by the administration of the sacraments, and by the religious instruction of all its members according to the confessional standard of the Evangelical Lutheran Church.”

3.0 CONFESSIONAL STANDARD

The Lutheran Church—Missouri Synod requires that its member congregations accept the confessional standard of the Synod. It is recommended that Article II of the Synod's Constitution be adapted for inclusion in congregations' constitutions. A congregation's confessional standard cannot go beyond that of the Synod.¹¹

¹⁰ “WHEREAS, We have been called Lutheran since the formation of our Synod (and since reformation times) and are thankful for our doctrinal background and heritage; and
WHEREAS, The name Lutheran clearly identifies what the member congregations and The Lutheran Church—Missouri Synod believe, teach and confess; and
WHEREAS, Basic Christian honesty and integrity require that no deception of any sort be used in declaring the truth of the Gospel before all the world, as St. Paul declares: ‘Rather we have renounced secret and shameful ways; we do not use deception, nor do we distort the Word of God. On the contrary, by setting forth the truth plainly we commend ourselves to every man’s conscience in the sight of God’ (2 Cor. 4:2); therefore be it
Resolved, That all congregations and mission stations in our Synod boldly profess in their official title and/or name that they are ‘Lutheran’; and be it further
Resolved, That all congregations and mission stations of our Synod state in their materials (bulletins, newsletters, etc.) that they belong to The Lutheran Church—Missouri Synod; and be it finally
Resolved, That all LCMS congregations gladly proclaim our great doctrinal heritage to a world that needs the clear proclamation of the truth.” (1995 Res. 3-13A, “To Use the Name Lutheran”)

¹¹ Historically, The Treatise on the Power and Primacy of the Pope is not listed in Article II of Synod's constitution, but it is included in the Book of Concord of 1580, and is therefore one of the confessional writings of the Synod. Because it is not listed separately in Synod's constitution, it does not have to be listed separately by a congregation, but a congregation may choose to do so.

Example:

“This congregation accepts without reservation:

- 3.1 The Scriptures of the Old and the New Testament as the written Word of God and the only rule and norm of faith and practice.
- 3.2 All the Symbolical Books of the Evangelical Lutheran Church as a true and unadulterated statement and exposition of the Word of God, to wit: the three Ecumenical Creeds (the Apostles’ Creed, the Nicene Creed, the Athanasian Creed), the Unaltered Augsburg Confession, the Apology of the Augsburg Confession, the Smalcald Articles, the Large Catechism of Luther, the Small Catechism of Luther, and the Formula of Concord.”

4.0 SYNODICAL MEMBERSHIP

Although not essential, since membership in the Synod is not determined by a statement in a congregation’s constitution, congregations may wish to include mention of their membership in the Synod. If a congregation wishes to include mention of membership in the Synod the following may be used.

Example:

“This congregation shall be a member of The Lutheran Church—Missouri Synod as long as the Synod conforms to the congregation’s confessional standards as set forth in this constitution.”

5.0 MEMBERSHIP

Synod congregations often distinguish between three types of congregational membership¹²: baptized, communicant, and voting¹³. Voting membership may be open to all communicant members but may also be limited to males only¹⁴. Care should be taken that the age at which individuals may hold voting membership conforms to any requirements of state law. Many congregations restrict voting membership to persons who have reached the age of legal majority. This is especially important when decisions involving contracts and other legal matters are made. Again, membership in organizations whose principles and conduct conflict with the Word of God shall be prohibited (Bylaw 3.9.6.3.1 [a])¹⁵. Also, congregations are not to deny membership or other congregational privileges to any Christian because of race or ethnic origin (Bylaw 2.3.1 [a])¹⁶.

Example:

“This congregation distinguishes between three types of congregational membership.

5.1 The membership of this congregation includes the following:

- 5.1.1 Baptized members are all who have been baptized in the name of the Triune God and who are under the spiritual care of the pastor of this congregation, including the children who have not yet been confirmed into communicant membership.
- 5.1.2 Communicant members are those baptized members who have been instructed and are familiar with the contents of Luther’s Small Catechism, have been confirmed in the Lutheran faith, and accept the confessional standard of Section _____ of this Constitution.

¹² Some congregations include a fourth category: “Guest Members.” 1989 Res. 5-19 encouraged such a category for congregations with many seasonal members, “which could include such basic rights and privileges as reception of the sacraments, pastoral care, congregational concern, use of their time, talents, and treasures in the service of the Lord, and attendance and participation in voters’ assemblies as advisory or associate members” (1989 Convention Proceedings, p. 140).

¹³ Variations often occur in the last two categories. Some congregations distinguish between communicant and confirmed members due to the practice of early communion, in which case further definitions will be necessary.

¹⁴ 1969 Res. 2-17 concluded that “Scripture does not prohibit women from exercising the franchise in congregational and synodical assemblies,” at the same time concluding that “the Synod itself and the congregations of the Synod are at liberty to alter their policies and practices in regard to women’s involvement in the work of the church” (1969 *Convention Proceedings*, p. 88).

¹⁵ “(a) Pastors and congregations alike must avoid membership or participation in any organization that in its objectives, ceremonies, or practices is inimical to the Gospel of Jesus Christ or the faith and life of the Christian church....” (Bylaw 3.9.5.3.1).

¹⁶ “(a) It shall be the policy of the Synod to decline membership to congregations whose constitutions deny membership or other congregational privileges to any Christian because of race or ethnic origin” (Bylaw 2.3.1 [a]).

- 5.1.3. Voting members are communicant members who have reached the age of _____ years.
- 5.2 The members of this congregation are received in the following manner:
 - 5.2.1 Baptized members are received through the Sacrament of Holy Baptism or through the consent of one or both parents in the case of children who have been baptized in another Christian congregation.
 - 5.2.2 Adult members are received through the rite of confirmation and Sacrament of Holy Baptism as appropriate, through transfer from a sister congregation, or through profession of faith or reaffirmation of faith.
 - 5.2.3 Eligible communicant members may be received as voting members upon application for such privilege upon approval of the voters assembly.
 - 5.2.3 (Alternate) All communicant members who have reached the age of _____ are voting members.
- 5.3 Members of this congregation shall conform their entire lives to the authority of God's Word and to that end shall make diligent use of the means of grace, exercise faithful stewardship of God's many gifts and talents, impart and accept fraternal admonition as the need of such admonition becomes apparent, and be readily available for service in the kingdom of Christ within and beyond the congregation. Membership in organizations whose principles and conduct conflict with the Word of God is prohibited.
- 5.4 Membership in this congregation shall be terminated as follows:
 - 5.4.1 Membership shall be terminated by transfer to a sister congregation, by joining a congregation outside the fellowship of this congregation, by excommunication or self-exclusion, or by death.
 - 5.4.2 Communicant members who conduct themselves in an un-Christian manner shall be admonished according to Matthew 18:15,20 and the congregation's stated and adopted guidelines¹⁷. If they remain impenitent after proper admonition, they shall be excommunicated. Each case of excommunication or self-exclusion shall be presented to the voters assembly for a decision. A two-thirds majority vote of the voters assembly shall be required."

6.0 CALLED CHURCH WORKERS

Member congregations of the Synod are required to call and be served only by ordained ministers who are members of the Synod, candidates for the pastoral ministry who have satisfied the qualifications and requirements for assignment of first calls by Synod, or ordained ministers who are members in good standing of church bodies that have been formally recognized to be in altar and pulpit fellowship with the Synod when agreements for such calls are in place (Bylaw 2.5.2)¹⁸. They may also only call commissioned workers who are members of the Synod, candidates of LCMS colleges and universities who have satisfied the qualifications and requirements for assignment of first calls by the Council of Presidents, commissioned ministers who are members in good standing of church bodies that have been formally recognized to be in altar and pulpit fellowship with the Synod when agreements for such calls are in place¹⁹ (Bylaw 2.5.3)²⁰. This article

¹⁷ The matter of termination of membership is of great importance since it involves the larger subject of church discipline. It is therefore advisable that congregations prepare and adopt separate guidelines to address this topic, especially keeping in mind the following:

- 1. Be consistent in applying discipline.
- 2. Carefully follow disciplinary guidelines.
- 3. Do not allow unsubstantiated charges to be circulated by the church.
- 4. Base decisions on clearly stated biblical grounds.
- 5. Guidelines should state the desired outcome of church discipline, to call a fellow Christian to repentance.

¹⁸ "Congregations that are members of the Synod shall call and be served only by (1) ordained ministers who have been admitted to their respective ministries in accordance with the rules and regulations set forth in these Bylaws and have thereby become members of the Synod; (2) candidates for the pastoral ministry who have satisfied the qualifications and requirements for assignment of first calls by the Council of Presidents acting as the Board of Assignments; or (3) ordained ministers who are members in good standing of church bodies that have been formally recognized to be in altar and pulpit fellowship with the Synod when agreements for such calls are in place." (Bylaw 2.5.2)

¹⁹ Ordained and commissioned ministers include pastors and all other church workers rostered by The Lutheran Church—Missouri Synod. Commissioned ministers include teachers, directors of Christian education, directors of Christian outreach, directors of family life ministry, directors of parish music, deaconesses, parish assistants, and certified lay ministers.

The Pastor-



Penitent
Relationship

Privileged Communications

A Report of the Commission on Theology and Church Relations
of The Lutheran Church—Missouri Synod

September 1999

Summary Principles and Practical Guidelines

Before we provide a set of guidelines, it may be helpful to summarize the *general principles* upon which they are based and that govern the pastor-penitent privilege.

1. The Lutheran Church—Missouri Synod practices and encourages individual confession and absolution which is a significant function of the pastoral office.
2. Historically, the Lutheran church has consistently and resolutely maintained the seal of the confessional, that is, the confidential nature of confessional communications. The Lutheran church expects its pastors to maintain this position.²⁷
3. Scriptural teaching regarding the pastoral office and its responsibilities supports the principle that communications made to a pastor by a person confessing his or her sin(s) are not to be disclosed.
4. Although there may be a distinction between communications to a pastor that are confessional in nature (made for the purpose of receiving forgiveness) and those that are not (offered for other reasons), communications to a pastor as pastor—except in the most extraordinary circumstances—are to be held in strict confidence as privileged communications.
5. Although certainly to be respected, the status of the civil law as it relates to confidential communications to a pastor does not dictate a pastor's decision as to whether and to what extent a communication is to be divulged.²⁸

²⁷ It is interesting to note that provision 7.45 in the *Constitution, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America* declares: "In keeping with the historic discipline and practice of the Lutheran church and to be true to a sacred trust inherent in the nature of the pastoral office, no ordained minister of this church shall divulge any confidential disclosure received in the course of the care of souls or otherwise in a professional capacity, nor testify concerning conduct observed by the ordained minister while working in a pastoral capacity, except with the express permission of the person who has given confidential information to the ordained minister or who was observed by the ordained minister, or if the person intends great harm to self or others."

²⁸ The Synod should consider offering through its legal counsel or the legal counsel of its Districts appropriate legal representation to pastors facing difficult questions or dilemmas in this area.

Therefore, the Commission on Theology and Church Relations offers the following *guidelines* for a pastor regarding confidential communications²⁹ received by him in his capacity as pastor:³⁰

1. A communication made by a penitent seeking absolution for a particular act must not be divulged, even if the act was criminal and even if the law may compel its disclosure.³¹ We recognize that in such an instance, the pastor's refusal may lead to criminal prosecution while his disclosure may lead to church discipline.
2. A communication made outside the context of a confession by a person who recognizes the sinfulness of the conduct communicated and who is not likely to put others in danger by repeating it, is not to be divulged.³²
3. Where a communication made to a pastor is confidential, it should not be disclosed solely because the penitent shared the communication in the presence of a third person.³³
4. Where a communication is made (whether in or outside the context of a confession) suggestive of an intended and/or imminent harmful act such that the person's or someone else's safety would be jeopardized if steps were not taken to hinder the penitent, a pastor must exercise his judgment in protecting the interests of those in danger.³⁴

Certainly situations may arise that are difficult to place within these guidelines. In such circumstances a pastor should seek the counsel of his

²⁹ Confidential communications may also be in written form.

³⁰ These guidelines should be read and considered as a whole.

³¹ Cf. footnote 24.

³² Such a communication may, for example, be made by a spouse and consist of an acknowledgment that he or she is susceptible to pornography, gambling, or had committed adultery years earlier. Certainly a pastor may encourage the person to share with or "confess" this to his or her spouse and others harmed by the sin, but the pastor should not divulge it.

Such a communication may also refer to a past sin or crime (such as income tax evasion) that the person uses as an example of his or her conduct in life prior to coming to faith in Christ as Savior.

³³ We are mindful of guidelines followed by some of our pastors who will only counsel with members of the opposite sex in the presence of a third person. We also recognize that in such instances the applicable law may not protect the pastor from being compelled to disclose the communication. See footnote 28.

³⁴ Of course, in such circumstances a pastor should first spend the available time with the penitent urging and admonishing that person against any such threatened harmful acts. Also, the person in the greatest danger of harm may be the penitent himself or herself (e.g., where the penitent may be under the influence of alcohol or drugs).

Generally, a pastor should seek that course of action which least impacts on the confidentiality of communications made to him as pastor.

State of Minnesota)
) SS.SS.
County of Hennepin)

Affidavit

Stephen M. West, being first duly sworn, states that he is an employee of Bachman Legal Printing, located at 733 Marquette Avenue, Suite 109, Minneapolis, MN 55402. That on **June 3, 2015**, he prepared the **Brief and Addendum of Amicus Curiae The Lutheran Church-Missouri Synod**, case number **A14-0605**, and served **2** copies of same upon the following attorney(s) or responsible person(s) by **First Class Mail postage prepaid**.

DUNLAP & SEEGER, P.A.
Ken D. Schueler
Jennifer M. Peterson
206 South Broadway, Suite 505
P.O. Box 549
Rochester, MN 55903

LIND, JENSEN, SULLIVAN
& PETERSON, P.A.
Timothy J. O'Connor
William L. Davidson
1300 AT&T Tower
901 Marquette Avenue South
Minneapolis, MN 55402

THE LAW OFFICE OF
ZORISLAV R. LEYDERMAN
Zorislav R. Leyderman
222 South Ninth Street, Suite 1600
Minneapolis, MN 55402

Subscribed and sworn to before me on
June 3, 2015

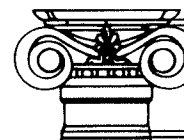
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NOTARY PUBLIC - MINNESOTA
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