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A06-1782

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs.

JOHN JOSEPH BUSSMANN,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).

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LEGAL ISSUE(S)

- I. Does Minn. Stat. 609.344(1)(ii), which punishes sexual penetration between clergy and individuals seeking religious or spiritual advice, aid or comfort”, violate the Establishment Clause?

- II. Is the statute void for vagueness?

STATEMENT OF FACTS

At the time of the offenses in this matter, the Appellant, John Joseph Bussmann, was a Roman Catholic priest serving as pastor at two adjacent Catholic churches, Saint Martin's and Saint Walburga. The churches consolidated into a single congregation, Mary Queen of Peace Church in Rogers, Minnesota. The charges against Appellant, which related to three female parishioners, were severed for two, separate trials.

The first trial related to theft from and sexual offenses against L.E., a secretary working at Saint Walburga. The second trial, the subject of this appeal, related to sexual offenses against S.J. and D.I., who were active members in Appellant's congregation. The Minnesota Court of Appeals affirmed Appellant's convictions in *State v. Bussmann*, 2006 WL 2673294 (Minn. Ct. App. 2006) (unreported decision filed September 19, 2006).

The Minnesota Supreme Court has granted review to consider only the constitutionality of the statute underlying Appellant's convictions in the second trial.

...the petition of John Joseph Bussmann for further review of the decision of the Court of Appeals ...is...granted on issues related to the constitutionality of Minn. Stat. 609.344(1)(ii) (2004). The petition is denied on all remaining issues.

(Order of December 12, 2006).

The second jury convicted Appellant of two counts of Third Degree Criminal Sexual Conduct under a Minn. Stat. § 609.344 (1)(1)(ii) for conduct his

conduct with parishioners S.J. and D.I. The statute punishes sexual penetration between a clergyman and someone meeting with the clergyman in private on an ongoing basis for the purpose of receiving religious or spiritual advice, aid, or comfort. Consent is not a defense to this offense.

S.J. Offense

S.J., a licensed home childcare provider, was a parishioner at Saint Martin's parish in Rogers whose practice of religion had always been markedly influenced by other individuals. As a child in Littleton, Colorado, S.J. attended mass at the Catholic church and church social and fund-raising functions, her father was an usher, and her mother helped with CCD classes (religious training classes). When S.J. was nine years old, this ended. S.J.'s mother, suffering from bi-polar disease, began seeing demons in church. She forbade her children to attend services. (T. 818) Thereafter on rare occasions, S.J.'s father would sneak the children out of the house and S.J.'s older brother would drive the children to Sunday Mass. (T. 819)

S.J. met her husband T.J. while working at a Chili's restaurant in Dallas, Texas. They dated and broke up. S.J. moved back to Colorado. T.J., a traveling salesman, took a job in Minnesota. T.J.'s territory included Denver, and he eventually looked up S.J. and renewed the relationship. (T. 823-4) A firm Catholic, T.J. brought S.J. back to church. During required pre-marital counseling, S.J. found that "there was a lot in the church that I could become active with, so that started it." (T. 824) She joined a women's discussion and

religious study group at a Catholic church in Edina and still belongs to that group.
(T. 825-6)

When S.J. moved to Rogers and Saint Martin's parish, she volunteered at events like bake sales and became a member of the Home and School Board for the parish school her son attended. (T. 827) S.J. joined a women's group, first called MOMS and later called Bridget's Circle, that was devoted to enriching the members' spiritual and personal journeys. (T. 864-67) The group often sent one of its members to Appellant with spiritual issues. S.J. and T.J. also participated in perpetual adoration, a devotion in which individuals contemplate the exposed Blessed Sacrament.

While Appellant served as pastor at Saint Martin's parish, S.J. obtained spiritual advice, counseling and aid in private from Appellant. Over a year and a half period beginning well before their sexual relationship, S.J. sought Appellant's advice either in person or over the telephone on "very many" occasions. (T. 916-917) She sought Appellant's advice:

Because I trusted him. He was my priest. He was somebody I could take anything to. I grew up knowing that if you couldn't tell mom, or you couldn't tell your dad, or you couldn't tell your sister, you couldn't tell your best friend, the one person you could tell anything to was a priest...

(T. 927) At various times, Appellant counseled or assisted S.J. in dealing with sorrow at a sister's diagnosis of cancer (T. 834-35), theological disputes with a fallen-away Catholic sibling (T. 1021), concerns about alcohol abuse (T. 924),

religious issues studied by Bridget's Circle (T. 935, 1032-33), and the impending loss of her father. (T. 922-23, 1017). Both before their sexual relationship and during their sexual relationship, Appellant was S.J.'s confessor. (T. 924-25)

In June 2001 at a wine and cheese social, the Appellant and S.J. spoke briefly. The Appellant was quite complimentary to S.J.

Well, first he told me it was good to see me and that I'm always so vibrant and he sees Jesus in my eyes. And I said, "Oh really, and I mean really?" And he said, "Yes," and I said, "Oh, my gosh, it hasn't always been that way."

(T. 856) The Appellant replied, "Really?" and asked what S.J. meant. S.J. told Appellant, "Well, basically in a nutshell, sex, drugs and rock and roll, and you know what it's like when you don't have Jesus in your life..." (T. 857) Appellant replied that he did know, but he wanted to hear more.

...He just said, "You'll have to tell me about that sometime." And I replied, "That would be difficult to do because it would take up a lot of your time." And he said he would like to hear my story someday.

(T. 857)

In December 2001, S.J. was troubled by uncharitable Christmas thoughts. Her large family exchanged Christmas presents by picking names out of a hat, and S.J. drew the name of a sister who had stiffed S.J. on a loan S.J. had extended when the sister was hard up. (T. 831)

...First I was mad, stomping around, and then I thought, you know what, [S.J.'s first name], you're working so hard to be a better Christian. Now really, what would Jesus do? If you want to, and I thought,

I'm not going to be like this. Let me call Father John and see if I'm being petty or if maybe he can guide me as to what is a better way.

(T. 832) S.J. met with Appellant at his office to discuss the issue. Appellant counseled S.J. that gifts did not need to be materialistic. S.J.'s Christmas gift, Appellant advised, could be a letter to her sister promising that S.J. would be "praying for her all year long and maybe God would bring her out of the darkness and into the light..." (T. 833) This seemed like good advice to S.J., but it fell flat with the sister. (T. 832-33)

When S.J. came for this Christmas advice, the Appellant asked for more information about S.J.'s sex, drugs and rock and roll period. He also inquired about how many men S.J. had had. (T. 859)

In August 2002 S.J. came to Appellant with questions about a religious dispute she was having with a lapsed Catholic sister. The Appellant advised S.J. not to discuss religion with her sister and inquired about S.J.'s personal life. "How's your marriage?" he asked. (T. 860) She said it was good. And he asked her what she did to keep it good. After S.J. responded by describing picnics and the like, the Appellant "asked me right out, 'Do you like oral sex?'" (T. 861) S.J. said that she didn't really like oral sex. The Appellant recommended it, saying that it helped keep husbands from straying. (T. 861-862) After the conversation, S.J. started questioning her own adequacy as a wife. (T. 862)

In September S.J. helped all day in a fund-raising auction for the school. The Appellant typically gave parishioners a hug or a kiss on the cheek, but Appellant's comments and glances toward S.J. that day bespoke more.

Okay, because the auction was all verbal other than a hug and a kiss exchange on the cheek. But comments that, you know, I would hear periodically were, you are so vibrant, you are so hot. I didn't speak to him a whole lot there, but I was in the bleachers at one point he was auctioning off a dinner to the crowd. And when he got done auctioning it off, he was bringing a certificate up the bleachers to the person who had the highest bid. And as he came up the bleachers, he tripped right in front of me and he looked at me and he said, see, I am still falling for you. And I kind of chuckled.

(T. 936) Late in the afternoon as Appellant was leaving, he passed S.J. on the sidewalk and told her to call him. When she called him a few minutes later, he invited her to the rectory. (T. 874-75) Inside the rectory he leaped onto the couch where she sat, and the two began kissing. "This can't be right," S.J. said, pulling back sometime after the kissing started. "It's okay. It's okay," Appellant replied. "I'm lonely. You're a gift from God." (T. 876) The kissing continued and S.J. asked if Appellant had done this before because "he was a good kisser for someone of celibacy." (T. 876) Appellant said he would take that as a compliment. (T. 877) The incident did not progress beyond kissing. It was followed by sexually charged phone conversations. (T. 938, 1028, 1030)

In early October S.J. invited Appellant to her house on a day when her husband was gone. The two engaged in kissing and touching under the clothing.

(T. 877-81) The encounter culminated in S.J. performing oral sex on Appellant. (T. 958, 960) When Appellant left, S.J. felt “so special that he would be so attracted to me that I felt really, really good.” (T. 881) Feeling special like that was something that S.J. had found lacking in her marriage for several months. (T. 881)

In late October it was S.J.’s turn to take unresolved questions or issues from the Bridget’s Circle discussions to get Appellant’s advice or explanation. One of the questions involved annulment of marriages with children and “how all of a sudden can you get an annulment that said that never took place.” (T. 868) Appellant deferred discussing the group’s questions. “I brought the questions and he said not now, and we began kissing and kissing.” (T. 1052) The sexual encounter escalated and S.J. performed oral sex on the Appellant. (T. 1052)

Over a period from October 2002 to February 2003, S.J. and Appellant had ten sexual encounters. (T. 976) Two of these involved sexual intercourse. The rest involved S.J. performing oral sex on Appellant. (T. 942) S.J. kept a calendar on which she marked the dates of their encounters with little hearts. (T. 957) Over the same time period Appellant gave S.J. spiritual aid relating to the impending death of her father (T. 1017), advice about her marriage and family issues (T. 959) and, of course, advice about the morality of her conduct with him. S.J. estimated that she obtained advice as well as sex during Appellant on six of the ten encounters. (T. 976-977) S.J. had frequently telephoned the Appellant for advice before their sexual relationship started. (T. 916-917) She continued

calling Appellant for advice and during the period of sexual relations obtained advice from Appellant "many, many times" (T. 976) Once during this period, Appellant heard S.J.'s confession. (T. 925)

In December jealousy ignited from two directions. On December 5, S.J., intending to make another call, clicked off of telephone conversation with Appellant and then clicked right back on. Instead of getting a dial tone she heard Appellant talking with a woman who had been on hold while Appellant answered S.J.'s call. "I can't wait to see you come over and suck my hard cock," Appellant told the other woman. (T. 941) S.J. called Appellant right back and then met him later in the day. She was furious, telling Appellant:

I asked you over and over if there were any other women, if you had ever done this before. You swore up and down, no, no, this is the only thing. You are special to me; you are special to me.

(T. 942-3) Appellant identified the woman as another member of Bridget's Circle and led S.J. to believe that he was ending the other relationship. (T. 954, 994) The woman on the other line was not D.I., the other victim in this case. (T. 983) D.I. was likewise a member of Bridget's Circle and likewise having a sexual relationship with Appellant in December of 2002.

On the same day that S.J. overheard Appellant, her husband T.J., who had grown suspicious, listened to telephone calls between S.J. and Appellant. T.J. obtained tapes of the calls by tapping his own phone. T.J. confronted S.J. and, later on, Appellant. S.J. offered to try to make a fresh start, but at Appellant's

insistence S.J. claimed that making a fresh start required destroying the tapes. (T. 987-88) Instead of ending their relationship, S.J. and Appellant took further steps to conceal it. At Appellant's suggestion, S.J. purchased a prepaid cell phone which she hid from T.J. and used to call Appellant. (T. 1036) Appellant told S.J. they would run away to get married at some point but that they couldn't do it yet. "All the little old ladies, it would look too suspicious, you know. But in time." (T. 990)

In January S.J.'s suspicions were renewed when Appellant suggested they meet at the same restaurant where they had met before. He named a restaurant where S.J. had never dined with Appellant. (T. 981-82) In a restaurant bar on January 31 S.J. questioned Appellant again about his fidelity and said she felt like she wanted to go back to the way things were before, *i.e.*, just pastor and parishioner. She asked whether sex had been so available to Appellant at other churches. (T. 994) Appellant recounted that upon arriving at Saint Martin's/Saint Walburga a couple of years earlier, he made of twenty women parishioners. Appellant claimed that "out of those 20 women, 14 of them have hit on me." (T. 994) S.J. said that she shouldn't be included because she didn't hit on Appellant. Appellant's response was to chuckle. (T. 995)

In February T.J. knew his wife had continued her relationship with Appellant. T.J. gave his wife divorce papers. (T. 996, 1328) S.J.'s responses between December and February seemed to T.J. to be coming from someone he didn't know, someone "like an alien". (T. 1342, 1339) Her defense of Appellant

despite Appellant's infidelity was out of character for the woman T.J. knew. (T. 1342) "Again, after being together married eight and a half years and together eleven years, it just wasn't in her character at all." (T. 1340) T.J. had found the cell phone and the calendar with hearts and hidden presents and a card from Appellant talking about "rocking each other into incredible orgasms, and how he praises Jesus for giving him the gift of her love." (T. 996, 1325-28) When confronted with divorce, S.J.'s character seemed to change back. She agreed to seek counseling. She agreed to report the matter to the archdiocese.

T.J. had several confrontations with Appellant between the beginning of December and the end of February. Initially Appellant denied any wrongdoing. (T. 1343) Eventually he blamed alcohol and claimed to be discussing his problem with a spiritual advisor. (T. 1344-5) Appellant also claimed he was simply comforting the other woman S.J. overheard. (T. 1337) In the last confrontation T.J. pushed Appellant into a door, punched him in the face and put his hands behind his back, daring Appellant to hit him. (T. 1352)

Appellant was removed from Our Lady of Peace within a week of S.J.'s report to the archdiocese. S.J. and T.J. met with Father Kevin McDonough, the vicar general for the archdiocese, and Phyllis Willerscheidt, an advocate employed by the archdiocese to assist victims of abuse. In 2001 before these events started, Father McDonough had given the Appellant training on the extent and limits of pastoral care and the requirement of maintaining boundaries between priest and parishioner. (T. 725-727, 1422-24) Willerscheidt testified both about S.J.'s report

of abuse to the archdiocese (T. 793-94) and about recognized patterns of clerical abuse, including “grooming” of victims by religious authority figures. (T. 795-96) After meeting with S.J., Father McDonough met with Appellant and offered Appellant various alternatives for dealing with S.J.’s report. (T. 757-58, 264) Appellant elected a course in which he resigned from his assignment with a public order from the church removing Appellant and a public statement from Appellant to the parish about his departures. Both the public statements from the archdiocese and from the Appellant were admitted into evidence.

D.I. Offense

During execution of a search warrant at Appellant’s home for evidence in S.J.’s case, Hennepin County Sheriff’s Office Detective Mike Risvold found letters from D.I. to Appellant. Risvold recognized D.I.’s name as a member of Bridget’s Circle and contacted D.I. At first D.I. gave limited information because her husband did not know about her relationship with Appellant. After informing her husband, D.I. gave a fuller account of what happened. (T. 1182, 1185)

D.I. was a human resource project coordinator whose father died when she was eight years old. For two years after that she was afraid to sleep in her own bed, and she remained in an extremely close relationship with her mother for as long as her mother lived. When D.I.’s mother and stepfather moved from a house near D.I.’s to a house in Rogers, D.I.’s mother convinced her daughter to move to Rogers as well because Brooklyn Park was too far away. (T. 1071-75)

Both D.I. and her mother were active in the Church, participating in fund-raising and special charitable needs like food shelves. D.I. had attended Catholic grade school and participated in Bible study/peer ministry groups in high school and college. After she moved to Rogers, D.I. was a lector and Eucharistic minister at Mass, taught religious education to seventh graders at Saint Martin's school, and joined the group that became Bridget's Circle. She was a perpetual adorer, one of a group of people who took turns keeping constant meditation (*i.e.*, twenty-four hours a day, seven days a week) of the exposed Blessed Sacrament in a private chapel in the church. (T. 1081-84)

At a retreat in February 2002 D.I. experienced what she perceived to be a divine intervention calling her to drop her human resource project coordinator job in order to teach. (T. 1088-90) D.I. went to her parish priest, the Appellant, to ask whether such things really happened. The Appellant told her that such things really do happen, "that the Holy Spirit has left a gift on your doorstep, and now it is up to you to open it and find out exactly what that gift is." (T. 1093) The Appellant told D.I. that this really was divine intervention because there two positions opening at the parish that D.I. could apply for. In July 2002, the Appellant hired D.I. to the position of director of youth ministries for three parishes, Saint Walburga, Saint Martin's and a third parish in Dayton. (T. 1093-94)

D.I.'s mother died of ovarian cancer in October of 2002. (T. 1102) This is about the same time frame that Appellant and S.J.'s relationship advanced to include sexual penetration.

The Appellant provided spiritual aid and comfort to D.I. at the time of her mother's death. The family brought Appellant to the hospital to perform the last rites. At the hospital Appellant gave D.I. "a really big, very supportive hug" (T. 1109) and held both D.I.'s and her husband's hands. Appellant counseled D.I. and her family at the hospital on issues surrounding use of a respirator and continued life support. (T. 1110) Appellant co-celebrated the funeral Mass.

Her mother's death left D.I. numb. The Appellant tried to help by giving D.I. a book on grief. (T. 1115) Depression and fear of death troubled D.I. After several weeks, D.I. found that her emotional state was continuing to spiral down. At a friend's suggestion, D.I. made an appointment to meet Appellant for help. (T. 1116-20)

D.I. and Appellant met at the rectory and then drove to her mother's gravesite. (T. 1120) On the way to the cemetery Appellant talked with D.I. about her fear of death and told her it was very normal. (T. 1121) At the cemetery they discussed angels and then at the gravesite Appellant announced that D.I. was his angel and he was there to protect her.

When we were at the grave site, he held my hand and he told me that – or he was talking to my mother and he told her that I was his angel that he was going to protect me, that he promised to protect me.

(T. 1122) On the way back from the cemetery Appellant explained that D.I.'s mother had called him before her death to extract a promise.

He told me that my mother had called him prior to her dying, and she told him to promise her that he would take care of me, that he would protect me.

(T. 1123) At the time, D.I. believed this story because Appellant was "a holy person...the priest...my boss and I always looked up to him." (T.1123) Eventually D.I. stopped believing that her mother ever called Appellant to make such a request. (T. 1187) The Appellant suggested that D.I. return to see him for further discussions because he thought that she "wasn't handling it very well and that he wanted to be there for her in any way, shape or form." (T. 1124)

D.I. returned to work three weeks after her mother's death. She made appointments to see Appellant. Some meetings were to discuss her work; others were to discuss her grief and depression. The Appellant provided support and spiritual advice.

...[H]e provided a lot of support as far as, you know, just basically comfort. You know, you are going through the grieving process. You will get through this. And it is a tough place to be right now. And, you know, just very comforting words. I mean, he was a priest. He used very faith-filled words. You know, talked about prayer, how everybody that I worked with and around they are all there for you; we will get through this.

(T. 1128) D.I. had a cell phone and Appellant called her on a regular basis. (T. 1128)

The Appellant's advice on practices to protect D.I.'s emotional well-being strayed from prayer to other topics.

He told me – I mean, the advice ranged – you know once again he would refer to prayer. You know, I was a perpetual adorer. He would talk about that time a little bit, because I would journal in there. So writing down my thoughts, you know, giving it to God basically. He specifically told me one time that – he asked me if I masturbated, and I was really kind of taken aback and I told him I didn't think he needed to know that, and why he brought that up. He said that is a release, that sometimes that helps deal with our emotional problems that we are having at the time.

(T. 1130) Appellant reported that he masturbated, sometimes often. (T. 1131)

The Appellant almost always told D.I. that her mother was in heaven looking down on them and that her mother was happy they were together. (T. 1131)

In November the Appellant asked D.I. to come to his living quarters in the evening after she taught religion class. He gave her a big, comforting hug when she arrived, and he wanted to know how she was doing. (T. 1133-34) D.I. was discouraged about her performance as director of youth ministries, and Appellant told D.I. how proud her mom in heaven was of her. (T. 1135) The Appellant asked about D.I.'s family, discussed the hardship of grief and was "very comforting and supporting". Before D.I. left Appellant kissed her on the lips.

I was a little taken aback. And then that was the first time that he assured me that he always gets what he wants, and I was really taken aback by that comment.

(T. 1136) D.I. did not sleep at all that night. She called Appellant the next day to tell him that she didn't think this was right.

And he told me at that time that he was very disappointed and that he still very strongly believed that we were meant to be together, that God wanted us to be together, and that he wanted to hold me; he wanted to hold all of me. You know, you are so beautiful. I wish I could be there to hold you right now. I would say that is how it started.

(T. 1138) The Appellant's language, which had always been complimentary about D.I.'s appearance, began to get more graphic, commenting upon how her sweaters made D.I. look "fucking hot" and how she had a "nice ass". (T. 1137-39)

In late November or early December D.I. called Appellant because she was having a bad day.

...a bad day meaning that I was very emotionally unstable again. I had been drinking during the time after my mother's death. And so I one, wasn't feeling very good the next morning, and I was once again emotionally having a hard time with this job that I had that I felt like I was doing terrible at, and I was letting God down and my mom down. I still was very -- I missed my mom a lot. And I was still trying to -- I wanted her to come to me in some way, shape or form.

(T. 1142-3) The Appellant told D.I. that she should come to the rectory and that he needed to hug her. (T. 1143) At the rectory, Appellant sat D.I. on the couch.

Well, it was during the day. And like I said, it was not a very long meeting. It was very urgent. So he basically at that point was -- you know, we were sitting on the couch, he was holding me. He proceeded to unbutton his pants and then he took my hand down to his penis, and then I proceeded to give him oral sex.

(T. 1144-45) Deacon Dominic was working not too far away. So fairly quickly Appellant stood up, pulled up his pants and started working while D.I. went home.

(T. 1145)

The sexual relationship between D.I. and Appellant continued from late November/early December 2002 until shortly after Appellant was forced to leave Our Lady of Peace in March 2003. Sexual episodes occurred at the rectory, at D.I.'s home and at Appellant's condominium in Saint Paul. (T. 1147, 1272, 1157) The Appellant and D.I. exchanged gifts at Christmas and spoke frequently. Throughout the relationship, the Appellant described it as intended by both God and D.I.'s mother with "angels watching over us". (T. 1156, 1150, 1165) "He explained that he – that God and your mother wanted this, that we were meant to be together." (T. 1151) Appellant claimed that he told D.I.'s mother that if he weren't a priest and D.I. weren't married, he would have married D.I. (T. 1150) D.I. told Appellant that she loved him. (T. 1151)

...[H]e was everything to me. I mean, he was my support. He was my comfort. He was – I was attracted to him as a person. He was very charismatic. He was very – I felt very secure with him.

(T. 1151) In February Appellant returned from a pilgrimage site in Yugoslavia. He brought D.I. presents, a rosary and a gold necklace with a cross, and claimed that "he had a revelation while he was there and being so close to the Blessed Mary." Appellant told D.I. the revelation was that "he knew for a fact that he and I were meant to be together, that God was calling us to do this. And he also told

me that they could sense my mother there and she was very happy for us.” (T. 1164)

During the sexual relationship, D.I. continued to seek advice from Appellant about her feelings of inadequacy in her calling and about her grief at the loss of her mother. (T. 1148) Appellant continued to advise prayer and sex.

You know, his advice was, you know, a lot of it was faith-based, you know. Just prayer and, you know, once again that, you know, God is with us and around us. And any form of prayer is good. Just talk to him and, you know, also get a – you know, sex is a good or a great tool to use to let your emotions out.

(T. 1149) During advice about family issues, Appellant pointed out that when he came to the hospital as D.I.’s mother was dying, he physically “took [D.I.’s husband’s] hand and took my hand and put them together.” (T 1157)

I understood that to mean that [D.I.’s husband] was not being supportive of me during my grieving process and that he was not a good enough husband for me.

(T. 1158) Appellant heard D.I.’s confessions before their relationship started, and he continued to hear her confessions throughout the relationship. (T. 1282)

Appellant’s relationship with D.I. ended because of S.J.’s complaint to the archdiocese. One day at work in March, the church secretary passed by. She was extremely distraught and refused to explain her distress. So D.I. called Appellant. He said they needed to meet and asked to meet D.I. at her home, not the office. “I am gone,” Appellant told D.I. He was “under stress”. When D.I. eventually got an explanation from Appellant, she was told that because of a prior relationship

with S.J., he was being forced out. (T. 1168-69) “[T]he fucking bitch is ousting me.” (T. 1170) Appellant claimed that because the two relationships were not contemporaneous, the relationship with S.J. had nothing to do with Appellant’s relationship with D.I. “It had nothing to do with you. It was before you. It wasn’t during the time that you and I were together.” (T. 1169)

When the staff received instructions after Appellant’s departure, D.I. reported events back to Appellant. He asked her to meet him at his condominium in Saint Paul. She found him distraught and saying that he “felt like Christ crucified.” So she hugged him and gave him support. (T. 1174) D.I. assisted Appellant in forwarding his resume. In late March or early April at Appellant’s urging, D.I. came to his condo again. The two walked to where Appellant’s boat was docked. D.I. told Appellant she couldn’t do this anymore. “...I have a husband I love very much and who loves me very much, and we have a family, and that is where God wants me to be is with my family.” (T. 1177)

Like S.J., D.I. ultimately sought counseling for problems stemming from these events. (T. 1184)

ARGUMENT

I. MINN. STAT. 609.344(l)(ii) DOES NOT VIOLATE THE CONSTITUTION'S ESTABLISHMENT CLAUSE.

A. Legal Standard.

The First Amendment of the Constitution prohibits Congress and, by way of the Fourteenth Amendment, the states from making any law “respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend. I. While these clauses are not precisely drawn, the “basic purpose is to insure that no religion be sponsored or favored, none commanded, and none inhibited.” *Walz v. Tax Comm’n of New York*, 397 U.S. 644, 668 (1970).

The Establishment Clause involves the separation of church and state and prevents the government from passing laws that “aid one religion, aid all religions, or prefer one religion over another.” *School District Of Abington Township v. Schempp*, 374 U.S. 203, 216 (1963). The Establishment Clause is intended to prevent “sponsorship, financial support, and active involvement of the sovereign in religious activity.” *Walz at 668*.

An establishment clause analysis “depends ... on the nature of the regulation’s intrusion into religious administration, and the resulting relationship between the government and the religious authority.” *Lemon v. Kurtzman*, 403 U.S. 602, 614-15 (1971). *Lemon* states a three-part analysis that controls Establishment Clause issues: (1) the state action must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor

inhibits religion; and (3) it must not foster an excessive government entanglement with religion. *Lemon at 612-13*

Under the third prong of this test, a court a court “may not inquire into or review the internal decision-making or governance of a religious institution.” *Id.* (citing *Jones v. Wolf*, 443 U.S. 595, 601 (1979)). But “total separation [between church and state] is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.” *Id. at 615* Whether the state has become impermissibly entangled in religion depends on the nature of the intrusion into the religious organization, the character and purpose of the institutions involved in the controversy, and the resulting relationship between the religious authority and the government. *Id.*

A defendant challenging the constitutionality of a statute bears the burden of proving beyond a reasonable doubt that it fails constitutional standards. *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990). The “power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary.” *Id.*

B. Minn. Stat. 609.344(I)(ii)’s Purpose and Legislative History.

Minnesota Statute 609.344(I), adopted in 1993, outlaws sexual misconduct by clergy. The statute defines sexual penetration as Criminal Sexual Conduct in the Third Degree when:

- (1) the actor is or purports to be a member of the clergy, the complainant is not married to the actor, and:

(i) the sexual penetration occurred during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private; or

(ii) the sexual penetration occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private. Consent by the complainant is not a defense.

This subdivision¹ is one of a series of similar subdivisions outlawing sexual conduct stemming from the use or abuse of a position of power. Other similar provisions outlaw sexual conduct based upon a patient/psychotherapist relationship, mental impairment of the complainant, a significant (*e.g.* family) relationship or position of authority, a medical misrepresentation, or immaturity and disparities in age. *See generally*, Minn. Stat. 609.344.

Minnesota Statute 609.344(1) was clearly intended to protect victims of clergy abuse by treating the clergy/counselee relationship in a manner similar to the other protected situations. The current law was adopted in 1993 as part of an omnibus crime bill. Previous law included clergy in the definition of psychotherapist Minn. Stat. 609.341 subd. 17. The other professions in this list, psychologists, nurses, chemical dependency workers, social workers and licensed professional counselors, provided counseling services based on secular training. The 1993 change moved “clergy” from the laundry list of persons identified as

¹ A parallel provision in Minn. Stat. 609.345 outlaws sexual contact, as opposed to penetration.

psychotherapists to a parallel subdivision of 609.344. See Laws of Minnesota 1993, Ch. 326, Art. 4 Sec. 17-20 (reprinted in Appendix).

The change expressly included non-secular counseling by clergy among prohibited relationships in order to correct an implication in the term “psychotherapist” and the secular nature of all the other listed professions. These suggested that the law’s prohibition might be limited to instances of individuals meeting with clergy for counseling based on lay principles or training². The changes relating to clergy began as H.F. 873 (subsequently included in the omnibus crime bill). The author, Representative Stephanie Klinzing, described the purpose of the changes in testimony on H.F. 873 before the House Subcommittee on Criminal Justice and Family Law on March 24, 1993³.

This bill adds spiritual counseling to the definition of psychotherapy as it relates to the criminal sexual conduct statute. This would be consistent with the original intent of the law which included clergy in the definition of psychotherapist. It also broadens the law to include conduct that occurs outside the psychotherapy sessions. Current law limits the conduct to during the therapy session.

² A clergyman practicing psychotherapy would still be subject to the psychotherapy provision, which apply to “any other person, whether licensed or not, who performs or purports to perform psychotherapy.” Minn. Stat. 609.341 Subd. 17.

³ In addition to the legislative records of this hearing, a transcript of the hearing was filed with the Appendices/Supplemental Record for the Appellant’s brief in *Doe v. F.P.*, 667 N.W. 493 (Minn. Ct. App. 2003) (Court file CX-03-333). The transcription is approximately 26 pages and is found at pages 142-167 of the supplemental record. The remarks quoted in this brief appear at pages 3-4, 11-12, and 15-16 of the transcription. The Court of Appeals decision in this case relied in part upon the *Doe v. F.P.* decision.

Hearing on H.F. 873 before the House Subcommittee on Criminal Justice and Family Law Testimony, 78th Legis., 1st Reg. Sess., (Testimony of Rep. Klinzing) (hearing date March 23, 1993) (hereinafter, “*Hearing*”) Additional testimony indicated that the legislature needed to close a “loophole” for wrongdoers who claim, “Well, I wasn’t doing emotional counseling. I was doing spiritual counseling even though the person was very depressed”. *Id.* (Testimony of Gary Schonner) Any distinction between these two kinds of counseling is in practice very hard to draw. Testimony of Gary Schooner. *Id.*

With regard to clergy, who often provide free advice or counsel in a less clinical setting than the listed psychotherapy providers, the legislature set the parameters for its prohibition by adopting a legal standard – meeting “to seek or receive religious or spiritual advice, aid, or comfort in private” – that already had an established meaning. This standard had been used for decades to define the evidentiary privilege for communications with clergy. *See* Minn. Stat. 595.02(c). Removing the express prohibition regarding clergy from the psychotherapy subdivision appears to address concerns by churches that the definition of psychotherapist, which includes “any other person” performing or purporting to perform the described services, would be so broad that it would cover volunteer Sunday school teachers, ushers, home visitors and other non-clergy. *Hearing, supra.* (Testimony of Fr. Kevin McDonough). These humbler roles don’t present the same danger of abusing power of a clerical position to negate consent. Although Minn. Stat. 609.344 prohibits conduct by individuals who are or purport

to be clergy, it does not include the broader language prohibiting conduct by “any other person” performing the services clergy perform.

C. Minn. Stat. 609.344(l)(ii) Meets Establishment Clause Requirements and Does Not Result in Church/State Entanglement.

Minnesota Statute 609.344(l) meets the requirements of the *Lemon* analysis because the statute has a secular purpose, its principle or primary effect neither advances nor inhibits religion, and its application does not foster an excessive government entanglement with religion.

Minnesota Statute 609.344(l) clearly has a secular purpose. Like the prohibition for psychologists, the prohibition for clergy is “meant to protect vulnerable persons and allow them to repose their trust in those who can help them.” *State v. Dutton*, 450 N.W.2d 189, 193-94 (Minn. Ct. App. 1990) (affirming pastor’s conviction arising out of a “religious counseling relationship” under preceding statute). Protecting vulnerable persons and fostering their trust in individuals who can help them is a proper and a secular purpose.

Minnesota Statute 609.344(l) does not have a primary effect of advancing or inhibiting religion. The statute regulates an actor’s sexual conduct⁴ and requires an inquiry into the victim’s purpose for meeting with the actor. The

⁴ There are no Free Exercise implications to the statute because the Free Exercise Clause while protecting belief, does not prevent the government from regulating conduct. This is especially clear in matters involving sex. *See Reynolds v. United States*, 98 U.S. 146, 166 (1878) (polygamy case); *see also, Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990) (sacramental peyote case). Appellant has not claimed a Free Exercise violation.

statute does not, however, inquire into the theological merit or value of any religious or spiritual advice, aid or counseling that the actor imparts. Appellant concedes that the statute's primary effect is neither to advance nor inhibit religion. (Appellant's brief at p. 23).

The statute does not require excessive government entanglement with religion. "Under the entanglement doctrine, a state may not inquire into or review the internal decision making of a religious institution." *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 435 (Minn. 2002). The statute requires only two determinations: 1) whether the actor was or purported to be a member of the clergy, and 2) whether the victim was seeking or receiving "religious or spiritual advice, aid or comfort" in private. Neither of these determinations requires inquiry into the internal governance of any sect.

Finders of fact and courts have for decades routinely made determinations required by Minn. Stat. 609.344(1) without impinging on constitutional rights. An individual asserting the clergy/counselee privilege must show that the potential witness is a member of the clergy, the communicant intended the communication to be private and that the communicant was seeking "religious or spiritual advice, aid or comfort". Minn. Stat. 595.02, subd 1(c). Determining the existence of the privilege requires a factual inquiry into the circumstances leading up to communication. *State v. Lender*, 266 Minn. 561, 564, 124 N.W.2d 355, 358 (1963); *State v. Orfi*, 511 N.W.2d 464, 469, 470 (Minn. Ct. App. 1994). Courts examine the nature of the communications with clergy, and communications

unrelated to counseling are not privileged. *State v. Black*, 291 N.W.2d 208, 216 (Minn. 1980). The spiritual or therapeutic merits of the communication, however, is not examined. “The question is not the truth or merits of any religious persuasion to which a party belongs nor whether the particular creed or denomination exacts, requires or permits sacred communication, but the sole question is ... whether the party who bona fide seeks advice should be allowed it freely.” *In re Swenson*, 183 Minn. 602, 606, 237 N.W. 589, 591 (1931). The focus of the inquiry is on the intent of the communicant, *i.e.*, whether the communicant is seeking counsel or advice. *Id.* at 605-06, 237 N.W. at 591; *Orfi* at 469. Respondent is unaware of any jurisdiction holding that such an inquiry violates the Establishment Clause.

Minnesota Statute 609.344(1) does not impermissibly entangle because, like the evidentiary privilege, the criminal statute requires a determination of (1) whether the actor is or purports to be a clergyman, and (2) the purpose or nature of the meetings without regard to their actual merit. This does not require an inquiry into or review of the internal decision-making of a church.

D. Appellant’s Arguments.

Appellant advances several erroneous arguments in support of his claim that Minn. Stat. 609.344(1) violates the Establishment Clause.

First, Appellant erroneously claims that the statute violates the Establishment Clause because it expressly prohibits conduct by clergy. “... Minn. Stat. 609.344(1)(ii) singles out the clergy or those purporting to be clergy.”

(Appellant's brief at p. 25). This claim ignores the context of subdivision (l) in order to falsely suggest that the statute has a religious purpose. In parallel subsections, Minn. Stat. 609.344 identifies other relationships that are likewise predicates for criminal prosecution. Taken as a whole, the various subsections apply a consistent rule of forbidding sexual penetration where an imbalance of power negates consent. Minnesota Statute 609.344's prohibition of similar conduct by non-clergy actors in parallel subdivisions rebuts Appellant's claim that subdivision (l) of that statute improperly singles out clergy.

In addition to clergy, subdivision (l) prohibits conduct by non-clergy imposters. The statute clearly relates to a power imbalance negating consent and therefore, in addition to clergy, regulates conduct by individuals who conforming to no religious sect or doctrine whatsoever.

The premise of Appellant's argument, *i.e.*, that the Establishment Clause prohibits even identifying religious institutions or parties in a statute, has been rejected by the United States Supreme Court in various of contexts. *See, for example, Bowen v. Kendrick*, 487 U.S. 589, 606-07 (1988) (upholding the express inclusion of religious institutions in a program intended to fight teen pregnancy); *Walz, supra* (upholding tax exemptions for religious property).

Second, Appellant's brief erroneously claims that Minn. Stat. 609.344(l) entangles government and religion because "judges and juries must establish and apply criteria to evaluate the nature and religious content of the relationship... and determine if it was in fact religious or spiritual." (Appellant's brief at p. 26) This

is erroneous. The statute requires fact finders to identify conduct but not to evaluate it. The same determination – identifying whether an individual sought “religious or spiritual advice, aid or comfort” – has been used for decades to determine evidentiary rights without unnecessarily entangling religion and government. Simply identifying religious beliefs or practice, as opposed to evaluating their merits, does not constitute an entanglement.⁵

While the district court cannot constitutionally decide the validity of [religious] beliefs, *see United States v. Ballard*, 322 U.S. 78, 86-88, 64 S.Ct. 882, 886-87, 88 L.Ed. 1148 (1944), the court may properly determine their existence.

Drevlow v. Missouri Synod, 991 F.2d 468, 472n (8th Cir. 1993). In *Odenthal v. Seventh Day Adventists*, *supra*, the Minnesota Supreme Court found no entanglement in Minnesota statutes permitting civil suit against a minister for negligent counseling because the statutes were based on neutral standards of conduct. Minnesota Statute 609.344(1) does not present even the risks of entanglement present in *Odenthal*. The cause of action in *Odenthal*, a negligent counseling claim, inherently required an evaluation of the merits of counseling received. Minn. Stat. 609.344(1), on the other hand, requires no such inquiry.

Third, Appellant erroneously claims that in the instant case the State impermissibly entangled government and religion by calling two witnesses, the Reverend Kevin McDonough and Phyllis Willerscheidt. Both were employees of

⁵ Indeed, it is difficult to understand how this court could determine the issues in this case if state actors are forbidden to identify, as a factual matter, religious

the Archdiocese of Minneapolis and Saint Paul, and this appears to be the primary basis of Appellant's argument. Contrary to the claims of Appellant's brief, the State did not adopt Catholic law as the definition of "religious or spiritual advice, aid or comfort." Instead the prosecutor told the jury precisely the opposite in final argument.

And we would concede that the laws of the Catholic Church have no application in this case. The law to be applied is the law of the State of Minnesota and Judge Eagan will instruct you on that.

(Prosecutor's final argument, T. 1509). Descriptive information on Catholic practice, however, was relevant, however, to the jury's decision. For example, Appellant heard the victim's confessions before and during the offenses. Going to confession is perhaps the prototype for conduct that is "seeking religious or spiritual advice, aid or comfort in private". Although there was no testimony explaining or describing the Catholic practice of confession⁶, testimony describing confession for the benefit of non-Catholic jurors unfamiliar with the practice would not have unduly entangled the government and religion because determining the existence of religious beliefs or practices, as opposed to judging their merits, does result in entanglement. *Drevlow, supra*.

Both Willerscheidt and McDonough were witnesses testifying about the facts of these events, not the legal standard to be applied. McDonough testified

beliefs or practice.

⁶ Perhaps the prosecutor believed the jurors or at least enough of them understood the nature of the practice so that an explanation of it was unnecessary.

about the nature and limits of Appellant's official duties at Our Lady of Peace and about Appellant's training on how to perform his duties, including training on avoiding sexual impropriety. The defense at trial denied that Appellant gave religious or spiritual advice, aid or counseling in private to the victims. According to the defense, Appellant merely gave friendly advice. Appellant's acceptance and retention of the pastorate at Our Lady of Peace and his understanding of the duties of his post were evidence that he in fact performed the functions that he undertook and the Church expected. This evidence corroborated the testimony of the victims. Father McDonough also testified regarding an agreement between Appellant and the archdiocese that was admitted into evidence as an admission by Appellant relevant to an element, *i.e.*, whether he had engaged in sexual penetration. McDonough's testimony was in many ways similar to testimony in an embezzlement case in which an employer identifies an accountant's duties and company accounting practices and states that the accountant, upon being confronted, admitted that he failed to follow some procedures. Identifying the employer's expectations for an employee is relevant to factual determinations of what actually occurred, but such expectations are not, unless the case is improperly argued and the jury improperly instructed, the standard that the jury applies in determining guilt.

Willerscheidt testified about prior statements she received from the complainants and, after being qualified as an expert, about patterns of clerical

abuse (e.g., “grooming”) helpful to understanding the evidence. Her testimony did not entangle Catholic doctrine or governance in the case.

There was no doctrinal content in the testimony of either Willerscheidt or McDonough. The testimony did not require the jury to evaluate the merits of Catholic belief or the propriety of Catholic Church governance. And the jury was not asked to do so.

Citing Justice O’Connor’s concurring opinion in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Appellant’s brief erroneously claims that upon review of a criminal statute, the court must apply a “heightened judicial scrutiny”. (Appellant’s brief at p. 28). The majority in *Smith* rejected applying a heightened scrutiny standard. *Id at* 883-86. Moreover, *Smith* is a Free Exercise case, not an Establishment Clause case. Strict or heightened scrutiny is permitted in rare cases relating to protection of personal freedoms such as free speech. Rather than defining personal freedoms, the Establishment Clause limits government action to “aid one religion, aid all religions, or prefer one religion over another.” *Schempp, supra*. *Smith* related to the sacramental use of peyote, which was criminalized in by the State of Oregon. There is no claim in this case that sexual penetration occurred for a religious purpose.

Minnesota Statute 609.344(1)(ii) does not violate the Establishment Clause or impermissibly entangle government and religion. Nor was the jury required by the evidence in this case to perform judgments forbidden by the First Amendment.

II. MINN. STAT. 609.344(I)(ii) IS NOT UNCONSTITUTIONALLY VAGUE.

A. Legal Standard.

Statutes challenged for vagueness are presumed to meet constitutional standards. “[A] statute is presumptively constitutional.” *State v. Target Stores*, 279 Minn. 447, 467, 156 N.W.2d 908 921 (1967); *State v. Hamm*, 423 N.W.2d 379, 380 (Minn. 1988); A party seeking to invalidate a statute must show beyond a reasonable doubt that the statute fails constitutional standards. “[T]o challenge successfully the constitutional validity of a statute, the challenger bears the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional.” *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990); *State v. Kimmons*, 502 N.W.2d 391, 394 (Minn. Ct. App. 1993). A defendant who engages in conduct that is “clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.” *State v. Reha*, 483 N.W.2d 688, 691 (Minn. 1992).

Criminal statutes “must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties.” *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952). Statutes of general application must therefore be sufficiently definite for ordinary people to understand.

[T]he void-for-vagueness doctrine requires that penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Kolender v. Lawson, 461 U.S. 352, 357 (1983). Statutes with more limited application, e.g., business regulations, must be sufficiently definite to be understood by the groups they regulate. *Reha, supra*; *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982). Preventing arbitrary enforcement is one of the concerns in vagueness cases, but “the speculative danger of arbitrary enforcement does not render the [law] void for vagueness.” *Reha* at 692. An absence of evidence showing arbitrary enforcement is relevant to this issue. *Id.*

A law need not and normally can not be drawn with mathematical precision. *Reha, supra*. As long as the statute gives fair warning that certain kinds of conduct are prohibited, general language in a language does not render it unconstitutionally vague.

The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Kimmons, supra (quoting *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)). A law that is “flexible and reasonably broad” will be upheld so long as it is clear “as a whole” what it prohibits. *Reha, supra*.

The requirement of clarity does not forbid laws in areas where there are no “bright line” distinctions and the actor must determine an issue of degree. As Justice Oliver Wendell Holmes observed:

The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment, as here; he may incur the penalty of death.

Nash v. United States, 229 U.S. 373, 377 (1913). Consequently the fact that a penal law requires conduct to be "reasonable" or "non-negligent" does not make a law unconstitutionally vague. *United States v. Ragen*, 314 U.S. 513, 523 (1942)(upholding criminal prosecution for claiming tax deductions in excess of "reasonable compensation" for services); *Nash, supra* (negligence standard); *State v. Grover*, 437 N.W.2d 60, 63-64 (Minn. 1989) (upholding criminal reporting law for failing to report child abuse when the reporter knows or has reason to know of abuse). Requiring such judgments is inevitable and does not impose an undue hardship on citizens.

Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk.' As a matter of fact, law-abiding and prudent men do not calculate how close they can come to violating the law without doing so. Knowing the risk of criminality, they keep on the safe side.

State v. Bolsinger, 221 Minn. 154, 167, 21 N.W.2d 480, 489 (1946) (quoting *United States v. Wurtzer*, 280 U.S. 196, 199 (1930)).

In evaluating a law for vagueness, the court considers the context of the challenged language and the language's use in other contexts. *Grover, supra at*

62-63. “The requirements of due process are satisfied by specifying standards of conduct in terms that have acquired meaning involving reasonably definite standards either according to the common law or by long and general usage.” *Bolsinger, supra*. When necessary, the Minnesota Supreme Court will construe a statute narrowly to ensure that it meets constitutional standards. *Grover, supra; In Re the Welfare of S.L.J.*, 263 N.W.2d 412, 419 (Minn. 1978) (construing disorderly conduct statute); *State v. Hipp*, 298 Minn. 81, 87, 213 N.W.2d 610, 614 (1973).

B. Minnesota Statute 609.344(l).

The text and history of this subdivision were reviewed in the preceding argument. One aspect of the subdivision relevant to the vagueness argument in this case is that Minn. Stat. 609.344(l) contains two further subsections. The first subsection penalizes sexual penetration by a clergyman in any meeting, even the first meeting, where the complainant is seeking religious or spiritual advice, aid or comfort in private. Minn. Stat. 609.344(l)(i). The second subsection penalizes such sexual penetration “during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private”. Minn. Stat. 609.344(l)(ii).

C. Minn. Stat. 609.344(l)(ii) Is Not Unconstitutionally Vague and Clearly and Unambiguously Applied To Appellant’s Conduct.

Minnesota Statute 609.344(l) is not vague, and the statute clearly and unambiguously applies to the conduct in this case. Indeed, the facts of this case

exemplify the abuse the legislature prohibited. The Appellant used his position as a religious counselor to overcome his victims' scruples at betraying their spouses and violating the sixth of ten commandments recognized by their religion. S.J.'s concerns that "This can't be right" drew repeated responses from Appellant, who counseled that God intended S.J. and Appellant to have a sexual relationship in order to help Appellant maintain his ministry. (T. 876, 927) When D.I. was depressed and drinking and seeking help from her pastor after the death of her mother, the Appellant repeatedly advised her that both God and her mother wanted them together (T. 1138, 1123, 1150, 1156) and that "God was calling us to do this." (T. 1164) Appellant further used his role as a counselor to D.I. to create a perception that "he was everything to me" (T. 1151) and to suggest that D.I.'s husband was "unsupportive" and "not a good enough husband for me." (T. 1158) Such abuses of a religious counseling relationship are exactly what the legislature targeted, and with good reason⁷.

The statute prohibits conduct by persons who are or purport to be clergy. The Appellant is a Roman Catholic priest.

The statute prohibits sexual penetration. The victims testified to engaging in oral sex and sexual intercourse.

⁷ The legislative judgment that the role of spiritual or religious advisor is a dangerous one requiring protections from counselors who are also predators is supported by evidence in this case, including evidence of another contemporaneous victim (T. 941-42, 954, 994) to whom Appellant claimed that he was giving "comfort" (T. 1337) and evidence that, from Appellant's perspective,

The statute prohibits sexual penetration “during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private.” Both victims went to Appellant to confess their sins first before and then during the period of sexual activity. (T. 924-25, 1282) Confession is a continuing obligation for Catholics. The practice occurs in private and seeks or provides religious or spiritual advice, aid or comfort. The victims were active members of the church where Appellant was pastor. This was a continuing or on-going relationship. Both victims testified that before any sexual penetration occurred, the nature of their relationship with their pastor, the Appellant, included frequent telephone calls for advice and visits in private seeking advice, aid or comfort. These issues included dealing with anger at a sister at Christmastime and trying to figure out “what Jesus would do” (T. 832), theological disputes with relatives (T. 1021), concerns about alcohol abuse and a spouse’s perception of it (T. 924), the perception of a sudden religious calling (T. 1088-90, 1093), and grief over the illness or death of a parent. (T. 1109-10, 1115) The victims continued to seek and receive such counseling after sexual activity started, they took the same kinds of issues to Appellant. (T. 922, 1017, 959, 977, 925, 1148-49, 1282).

out of twenty women he identified upon arriving at the parish “fourteen of them have hit on me”. (T. 994)

There is no vagueness in either the statute or its application to the facts of this case. The statute is presumed to meet constitutional standard, *Hamm, supra*, and in fact gives fair warning of the conduct it prohibits.

D. Appellant's Arguments.

The Appellant brief raises a series of erroneous claims regarding the statute. These claims simply argue that the statute fails to draw bright line distinctions requiring no exercise of judgment. The vagueness standard does not require that laws create bright line distinctions demanding no exercise of judgment. *Grover, supra*.

More importantly, Appellant's vagueness arguments relate to hypothetical situations, not to the facts of Appellant's own case. Speculation about other cases is irrelevant because a defendant who engages in conduct that is "clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Reha, supra*. Facial challenges are to be discouraged. *Sabri v. United States*, 541 U.S. 600, 609, 610 (2004)⁸ The Appellant has not claimed that the statute touches the kind of constitutional claims *e.g.* free speech or even free

⁸ "Facial challenges of this sort are especially to be discouraged. Not only do they invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts: over breadth challenges call for relaxing familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand. See, *e.g.*, *Chicago v. Morales*, 527 U.S. 41, 55-56, n. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (plurality opinion). Accordingly, we have recognized the validity of facial attacks alleging over breadth (though not necessarily using that term) in relatively few settings, and, generally, on the

exercise of religion⁹, that permit facial challenges. *Id.* Even in free speech cases, the courts will not indulge facial challenges when the statute “is clearly valid in the vast majority of its intended applications.” *Hill v. Colorado*, 530 U.S. 703, 733 (2000). Appellant concedes that “the primary effect of Minn. Stat. 609.344, subd. (1)(ii) is neither to advance nor to inhibit religion.” (Appellant’s brief at p. 23). Appellant’s conviction should be affirmed because the statute clearly is not vague as applied to his conduct.

Appellant erroneously claims that Minn. Stat. 609.344(1) is void for vagueness because it lacks further definition of the word “on-going”. The meaning of this word is quite clear from its context in the statute. The first subsection of Minn. Stat. 609.344(1) penalizes sexual penetration during the course of a meeting in which the complainant sought religious or spiritual advice, aid or comfort in private. Consequently it is very clear that even a single meeting suffices to establish the kind of relationship that the statute governs. The second subsection penalizes sexual penetration “during a period of time in which the complainant was meeting on an on-going basis with the actor to seek or receive religious or spiritual advice, aid or comfort.” “On-going” in this context simply

strength of specific reasons weighty enough to overcome our well-founded reticence. “ *Sabri v. United States*, 541 U.S. 600, 609, 610 (2004).

⁹ Respondent does not concede that the Free Exercise claims support facial challenges. See *Gospel Missions of America v. City of Los Angeles*, 419 F. 3rd 1042, 1051 (9th Cir. 2005). The basis of Appellant’s claims, however, is the Establishment Clause, which is a First Amendment restriction on government, not a First Amendment freedom granted to individuals. Facial challenges are

means the clergy/counselee relationship¹⁰ established at one such meeting had continued during the period specified in the complaint. Whether counseling was a one-time event or a continuing or on-going relationship is a factual question, much the same as the level of negligent conduct resulting in a death, *See* Minn. Stat. 609.205, Manslaughter in the Second Degree, or the reasonableness of force used in a confrontation, *See* Minn. Stat. 609.06, Authorized Use of Force. Requiring an exercise of judgment does not make Minn. Stat. 609.344(I) unconstitutionally vague. *Grover, supra; Nash, supra*. The Appellant argued to the jury that his counseling relationship in this case had ended during the period of sexual penetration and that any advice he gave to the victims was in the nature of a friend's or lover's advice¹¹. (T. 1495) That was a fair argument to make to the jury, but the statute required no further elucidation for the jury to decide whether Appellant was continuing to give the advice, aid or support as he had previously done in his role of pastor or was only giving the advice of a friend or companion.

Appellant erroneously claims that the phrase "spiritual or religious advice, aid or comfort" requires further definition from the legislature. In fact, however,

permitted in a limited number of First Amendment freedom cases. *Sabri, supra; Flipside* at 494.

¹⁰ Although Appellant's brief argues that including the word "relationship" to this definition would add clarity, the reverse is in fact true. The statutory text is more clearly defined by identifying concrete conduct triggering the statute's operation than by adding speculation about a "relationship", a word that has a wealth of meanings.

¹¹ "We all get comfort from our loved ones. We all get comfort from our lovers. We don't necessarily get spiritual or religious comfort from them. We get comfort..." (T. 1495) (from defense final argument).

the legislature in selecting this phrase adopted language that had a longstanding history and interpretation. See Minn. Stat. 595.02(c). Adopting standards that “have acquired meaning... through by long and general usage” suffices to meet constitutional requirements. *Grover, supra* at 63; *Bolsinger* at 167, 21 N.W.2d at 489-90. The language in question has been in use since at least the 1930’s, *See In re Swenson*, 183 Minn. 602, 606, 237 N.W. 589, 591 (Minn. 1931), and needs no further definition.

Appellant speculates erroneously that the phrase “religious or spiritual advice, aid or comfort” is so broad that it “could encompass almost any question that an individual asked a member of the clergy”. (Appellant’s brief at p. 20) Case law interpreting this phrase rebuts Appellant’s claim and shows that the phrase applies to communications or requests made in clergymen in their professional capacity. *See, for example, State v. Black*, 291 N.W.2d 208, 216 (Minn. 1980) (request from inmate to jail chaplain to pass information to co-conspirator not privileged because not made in professional capacity); *Christenson v. Pestorious*, 189 Minn. 548, 2250 N.W. 363 (1933) (recitation about auto accident to pastor not privileged because not made in pursuit of spiritual advice or consolation). Appellant’s argument essentially asks the court to (1) impose a new and an absurd interpretation on statutory language with a longstanding and reasonable meaning and then (2) strike the language down because of the new, absurd interpretation. The court should not do this.

Minnesota Statute 609.344(1)(ii) is not unconstitutionally vague, and there is no vagueness about the statute as it applies to Appellant's conduct.

CONCLUSION

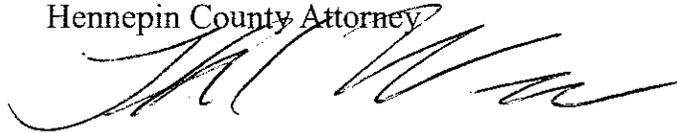
For the above-stated reasons, the Respondent respectfully requests this Court to affirm the decision of the Minnesota Court of Appeals in this matter.

DATED: February 6, 2007

Respectfully submitted,

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A06-1782
STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

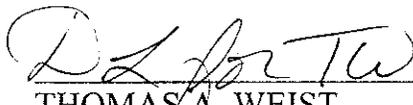
John Joseph Bussmann,

Appellant.

**CERTIFICATION OF BRIEF
LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 11,301 words. This brief was prepared using Microsoft Word 2003, Times New Roman font face size 13.

Dated: February 6, 2007



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