CONSTITUTIONAL LAW — FREE EXERCISE CLAUSE — TEXAS SUPREME COURT HOLDS THAT TRIAL COURT LACKS SUBJECT MATTER JURISDICTION OVER PROFESSIONAL NEGLIGENCE CLAIM AGAINST PROFESSIONAL COUNSELOR/CHURCH PASTOR. — *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007).

Courts around the country have struggled to determine when the First Amendment's Free Exercise Clause bars certain kinds of civil claims against religious ministers.[1] Often, the claims themselves relate to hot-button issues, such as the abuse of minors[2] and sexual harassment.[3] Recently, in *Westbrook v. Penley*,[4] the Texas Supreme Court held that a civil court lacked subject matter jurisdiction over a claim against a pastor and state-licensed professional counselor who released information he learned in a counseling session to church elders for the purpose of disciplining a congregant-counselee. Although the court was right to emphasize the importance of protecting internal church matters from outside interference, it failed to recognize that the pastor had relinquished some of his free exercise rights when he chose to be certified as a professional counselor by the state. Instead, the court should have followed an analogous line of free speech cases culminating in *Boehner v. McDermott*[5] and ruled that the First Amendment right to free exercise does not protect a counselor who is certified by the state and holds himself out as such from liability for disclosing confidential information he learns in his sessions.

In August 1998, Peggy Lee Penley engaged the services of C.L. "Buddy" Westbrook, Jr., a licensed professional marriage counselor and a parishioner at the church she was then attending.[6] In October 1999, Westbrook, Penley, and others left their church and formed CrossLand Community Bible Church, in which Westbrook came to serve as pastor and as a church elder.[7] The new church's constitution, by which Penley agreed to abide, contained a disciplinary policy which provided that if a member engaged in acts violating Biblical standards and re-

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[1] *See, e.g.*, Paul v. Watchtower Bible and Tract Soc'y of N.Y., Inc., 819 F.2d 875, 883–84 (9th Cir. 1987) (barring claims arising from church's requirement that members shun a former member); Destefano v. Grabrian, 763 P.2d 275, 284–89 (Colo. 1988) (allowing some claims against priest who allegedly induced a woman to engage in sexual relations with him during a marriage counseling session); Tran v. Fiorenza, 934 S.W.2d 740, 744 (Tex. App. 1996) (barring claim by priest that bishop defamed him).

[2] *See* Roman Catholic Archbishop of L.A. v. Superior Court, 32 Cal. Rptr. 3d 209 (Ct. App. 2005).

[3] *See* Sanders v. Casa View Baptist Church, 134 F.3d 331 (5th Cir. 1998).

[4] 231 S.W.3d 389 (Tex. 2007).

[5] 484 F.3d 573 (D.C. Cir. 2007) (en banc).

[6] *Westbrook*, 231 S.W.3d at 393.

[7] *Id.*

fused to repent or resign, the elders would not only remove the member, but also announce this removal to the congregation.[8]

In July 2000, Penley and her husband separated.[9] Afterwards, they attended free weekly counseling sessions in Westbrook's home with other couples from CrossLand.[10] Penley believed these sessions were a continuation of her previous professional counseling meetings with Westbrook and claimed the Bible was not discussed.[11] During a break at a session attended only by Penley, Westbrook, and their respective spouses, Penley told Westbrook privately that she had been having an extramarital affair and that she intended to divorce her husband.[12] Penley claimed that Westbrook then met with the other church elders and, together with them, composed a letter to the congregation explaining that Penley had had an affair and that she intended to divorce her husband.[13]

In November 2001, Penley filed suit against Westbrook, CrossLand, and the other church elders, alleging various causes of action.[14] She later added a professional negligence claim against Westbrook, which became the focus of later appeals.[15] With regard to her negligence claim, she alleged that Westbrook's secular counseling had failed to meet the standard of care set forth in the Texas Licensed Professional Counselor Act[16] (TLPCA) and in other regulations.[17] The regulations required counselors to keep communications between themselves and patients confidential,[18] but recognized religious practitioners were not covered unless they represented themselves as licensed professional counselors.[19] In response, Westbrook and the other defendants filed motions challenging the trial court's jurisdiction, arguing

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* According to Penley, Westbrook then provided counseling and suggested she speak with a family law attorney. *Id.*

[13] Penley v. Westbrook, 146 S.W.3d 220, 224–25 (Tex. App. 2004).

[14] *Id.* at 225. The claims were for defamation, breach of fiduciary duty, and intentional infliction of emotional distress. *Id.*

[15] *Id.* She also added an invasion of privacy cause of action. *Id.*

[16] TEX. OCC. CODE ANN. § 503 (Vernon 2004).

[17] *Penley*, 146 S.W.3d at 232. For the other regulations, see 22 TEX. ADMIN. CODE § 681.41 (2007); and TEX. HEALTH & SAFETY CODE ANN. § 611.002 (Vernon 2004).

[18] *See* TEX. HEALTH & SAFETY CODE ANN. § 611.002 ("Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential."); 22 TEX. ADMIN. CODE § 681.41(x) (requiring licensees to "comply with the requirements of Texas Health and Safety Code, Chapter 611, concerning the release of mental health records and confidential information").

[19] *See Penley*, 146 S.W.3d at 232 n.4. Penley claimed that Westbrook had so represented himself. *Id.* at 232.

that "the suit involved an 'ecclesiastical dispute' concerning a church disciplinary matter, which the First and Fourteenth Amendments to the United States Constitution precluded the trial court from adjudicating."[20] The court agreed and dismissed the case.[21]

A unanimous court of appeals overturned the trial court's dismissal of Penley's professional negligence claim.[22] In the parties' briefs, there was a major dispute over the nature of Penley's claim. Penley argued that her negligence claim arose from secular counseling as opposed to clerical malpractice,[23] whereas Westbrook contended that it was based on the drafting and publication of the letter — a solely ecclesiastical act.[24] The court concluded that Penley had "allege[d] facts and conduct independent of [CrossLand's] disciplinary process, which if taken as true, support[ed] Penley's complaints that Westbrook was negligent in providing her *secular* professional counseling."[25] It thus held that the trial court did have subject matter jurisdiction over the professional negligence claim.[26]

The Texas Supreme Court unanimously reversed.[27] Writing for the court, Justice O'Neill dismissed the case for want of subject matter jurisdiction, holding that attempting to parse Westbrook's dual roles as minister and marriage counselor "would unconstitutionally entangle the court in matters of church governance and impinge on the core religious function of church discipline."[28] Although the court acknowledged that it might theoretically be able to decide whether Westbrook breached his secular duty of confidentiality without delving into theological questions,[29] it found that it was impossible to isolate the disclosure from the church disciplinary process in which it occurred.[30] Imposing liability on Westbrook, the court ruled, would have a "chilling effect" on churches' disciplinary processes, thereby threatening churches' autonomy.[31] In making its decision, the court focused on the fact that "Westbrook could not adhere to the standards of one [profession] without violating the requirements of the other."[32]

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[20] *Westbrook*, 231 S.W.3d at 394.

[21] *Id.*

[22] *Penley*, 146 S.W.3d at 233. Penley failed to argue her other claims against Westbrook in her original brief to the court of appeals. Although she raised them in her reply brief, the court ruled that she had waived those claims. *Id.* at 226–27.

[23] *Id.* at 227.

[24] *Id.* at 229.

[25] *Id.* at 231.

[26] *Id.* at 233.

[27] *Westbrook*, 231 S.W.3d at 405.

[28] *Id.* at 391–92.

[29] *Id.* at 397.

[30] *Id.* at 400.

[31] *Id.* at 402.

[32] *Id.*

Although the court was appropriately concerned about the effect liability would have on internal church disciplinary procedures, it inadequately protected Penley's confidences and set a precedent that allows the improper disclosure of private information. Instead, the court should have recognized that Westbrook himself decided what set of standards should prevail when he chose to accept state certification as a professional counselor.[33] By accepting state certification, Westbrook voluntarily assumed a duty of confidentiality and therefore should have faced liability notwithstanding the Free Exercise Clause, just as others assuming similar duties may face reduced protection of their free speech rights.

If *Westbrook* had been a case about free speech instead of free exercise, it would likely have been decided differently. In a line of cases stemming from the Supreme Court's decision in *United States v. Aguilar*[34] and culminating in the D.C. Circuit's recent decision in *Boehner*, courts have consistently held that "those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment [free speech] right to disclose that information."[35] *Aguilar* involved a federal judge's challenge to his conviction for illegally disclosing the existence of a wiretap that he had learned about from a fellow judge. The Court rejected the challenge, reasoning that "[g]overnment officials in sensitive confidential positions may have special duties of nondisclosure."[36] *Boehner* involved a member of the House Ethics Committee who was subject to a committee rule mandating nondisclosure of any evidence relating to an investigation,[37] but nonetheless played an audio tape he received as part of such an investigation for several newspaper reporters.[38] The D.C. Circuit upheld the imposition of liability on the committee member, because he had accepted the nondisclosure duty as a member of the Ethics Committee and "therefore had no First Amendment right to disclose the tape to the media."[39]

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[33] *See* Charles Flores, *Marital Jam Sessions on Trial: Ecclesiastical Abstention and* Employment Division, Department of Human Resources v. Smith *in the Supreme Court of Texas*, 9 SCHOLAR 409, 418–19 (2007) (suggesting, after the court of appeals decision, that the supreme court resolve the case according to neutral principles of professional negligence).

[34] 515 U.S. 593 (1995).

[35] Boehner v. McDermott, 484 F.3d 573, 579 (D.C. Cir. 2007) (en banc) (describing *Aguilar* as standing for this principle).

[36] *Aguilar*, 515 U.S. at 606 ("As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public.").

[37] *See Boehner*, 484 F.3d at 579 (describing Ethics Committee Rule 9).

[38] *Id.* at 576–77.

[39] *Id.* at 581; *see also id.* (Griffith, J., concurring) ("Representative McDermott cannot here wield the First Amendment shield that he voluntarily relinquished as a member of the Ethics Committee . . . .").

Like the defendants in *Aguilar* and *Boehner*, Westbrook voluntarily accepted a duty of confidentiality when he chose to be certified by the state. It is therefore difficult to imagine that Westbrook could have prevailed merely by asserting a free speech defense. If he could have succeeded with such a defense, the duty imposed by Texas law would be unenforceable.

If Westbrook could not have escaped liability under state law by asserting a free speech interest, should he be able to do so merely because he asserted a free exercise interest instead? The two rights track each other sufficiently closely that the answer should be no.[40] Both rights are enumerated in the First Amendment and neither is absolute; with regard to each right, the Supreme Court has upheld neutral laws that indirectly burden its exercise.[41] The two rights are not entirely coextensive, but analogizing the two clauses is useful because they "both deal with a conceptually similar problem."[42] Courts have used free speech precedent in the past to guide their understanding of the Free Exercise Clause. For example, two circuit courts have applied the Supreme Court's test from *Pickering v. Board of Education*,[43] a free speech case involving a public school teacher fired for writing a letter to the editor, in cases involving public employees' free exercise rights.[44] In one of those cases, the Eighth Circuit explained that "the analogy [between free speech and free exercise] is such a close one" that the court saw "no essential relevant differences between those rights,"[45] at least in the context of public employment cases.

If the Texas courts had followed this logic and applied the *Boehner* doctrine to Westbrook's free exercise defense, he would not have escaped liability. When Westbrook chose to become a certified professional counselor, he voluntarily relinquished the shield of the Free Exercise Clause. As a religious practitioner, he would not have fallen under the state statute if he had not described himself as a professional

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[40] Some commentators go so far as to construe "free exercise as a subspecies of expression." William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 546 (1983). *See generally* Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925 (2000).

[41] *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990) (upholding law prohibiting ingestion of peyote against free exercise challenge); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (upholding noise regulations against free speech challenge).

[42] Gedicks, *supra* note 40, at 931 ("The Free Exercise Clause extends constitutional protection to those whose religious beliefs constrain them to *act* in opposition to government; the Speech Clause extends constitutional protection to those whose personal beliefs constrain them to *speak* in opposition to government."). Westbrook acted in opposition to government by ignoring the government's requirement of confidentiality.

[43] 391 U.S. 563 (1968).

[44] *See* Daniels v. City of Arlington, 246 F.3d 500, 503 (5th Cir. 2001); Brown v. Polk County, Iowa, 61 F.3d 650, 658 (8th Cir. 1995) (en banc).

[45] *Brown*, 61 F.3d at 658.

counselor.[46] But according to Penley, he "held himself out and represented that he was qualified by education, training, and experience to provide professional marriage and family counseling."[47] Just as Judge Aguilar learned about the wiretap only because he was a federal judge[48] and Representative McDermott received the tape only because he was a member of the Ethics Committee,[49] Westbrook might have never "gained Penley's trust and confidence"[50] and learned about the affair had he not held himself out as a certified counselor. Once he sought licensing and, upon receiving it, represented himself as a licensed professional counselor, he had no First Amendment right to disclose information he learned in his counseling sessions — including the information Penley told him about her extramarital affair — even for the purpose of conducting church disciplinary procedures. The Free Exercise Clause therefore should have presented no bar to Penley's claim of professional misconduct.

In fact, the case for Westbrook's relinquishment of his free exercise rights is stronger than the case for McDermott's relinquishment of his free speech rights. The dissenting judges in *Boehner*, who rejected the majority's application of *Aguilar*, nonetheless seemed to leave the door open to applying its logic in the type of factual situation arising in *Westbrook*. In his dissent, Judge Sentelle noted that the statute McDermott was accused of violating was unrelated to McDermott's special duty of nondisclosure.[51] *Aguilar* would have been relevant, he said, only "[i]f the House Committee rules created a private right of action."[52] In contrast, the professional misconduct claim in *Westbrook* was essentially a private right of action to enforce the state's ethical rules for professional counselors. Moreover, Penley's claim was directly related to Westbrook's duty of nondisclosure — Westbrook's alleged misconduct was releasing the information in violation of his duty.

Using *Boehner* as a model for cases like *Westbrook* would have a number of advantages. First, it would better ensure the confidentiality

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46 *See* TEX. OCC. CODE ANN. § 503.054 (Vernon 2004).

47 Penley v. Westbrook, 146 S.W.3d 220, 229–30 (Tex. App. 2004) (quoting Penley's petition) (internal quotation mark omitted).

48 *See* United States v. Aguilar, 515 U.S. 593, 606 (1995). The judge who authorized the interception told Aguilar about it because he wanted to preserve the integrity of the court. *See id.*

49 *See* Boehner v. McDermott, 484 F.3d 573, 576 (D.C. Cir. 2007) (en banc).

50 *Penley,* 146 S.W.3d at 230.

51 *See Boehner*, 484 F.3d at 589 (Sentelle, J., dissenting). Specifically, McDermott was accused of violating 18 U.S.C. § 2511(c). *Id.* at 575 (majority opinion). The statute makes a person liable for civil damages for "intentionally disclos[ing] . . . to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication." 18 U.S.C. § 2511(c) (2000).

52 *Boehner*, 484 F.3d at 589 (Sentelle, J., dissenting).

of information clients reveal in sessions with their private counselors, which is an important value for the law to protect.[53] Under a *Boehner*-like rule, counselees could feel secure that what they say when they visit a counselor licensed by the state of Texas would remain in the room, with no exception for religious disclosures. Second, it would avoid setting a precedent that would allow the release of other kinds of confidential information. The Texas Supreme Court's decision risks allowing other people with duties of confidentiality to avoid civil liability for disclosure of such information by citing their religious beliefs as justification. As the appellate court pointed out, one would not want lawyers or doctors to be able to skirt their professional responsibilities by citing religious imperatives.[54] In addition, many federal laws impose civil liability on individuals for disclosing confidential information.[55] *Westbrook* would seemingly allow those individuals to disclose confidential information if they feel compelled to do so by their faiths, without fear of civil suits. Had the court followed *Boehner* instead, no one who voluntarily accepted a duty of confidentiality would have reason to believe they could disclose confidential information with impunity.

Defenders of the court's approach could argue that these advantages are outweighed by the impact on minister-counselors' rights to freely exercise their religious beliefs. However, imposing liability here would be a fairly minimal interference with free exercise. Each minister licensed by the state as a professional counselor and holding himself out as such would only give up the right to disclose information he obtains in his counseling sessions.[56] Just as Aguilar was free to discuss everything but confidential information he received in his role as a judge, and just as McDermott could disseminate anything he learned

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[53] Even the *Westbrook* court noted that "preserving client confidences revealed in the context of a professional counseling relationship serves an important public interest . . . . Maintaining patient confidentiality ensures that individuals receive effective and competent counseling when they need it." *Westbrook*, 231 S.W.3d at 402 (citation omitted).

[54] *Penley*, 146 S.W.3d at 233 n.5 (quoting Dausch v. Rykse, 52 F.3d 1425, 1433 (7th Cir. 1994) (Ripple, J., concurring in part and dissenting in part in the judgment)).

[55] *See Boehner*, 484 F.3d at 578 ("The validity of these provisions has long been assumed."). To take just one example, under the Videotape Privacy Protection Act, "video tape service provider[s]" may not disclose "personally identifiable information" about their customers, including titles or descriptions of videos rented. 18 U.S.C. § 2710 (2000). Imagine if a video store clerk were also an elder at a church that disapproved of pornography and had a constitution like that of CrossLand. Under *Westbrook*, the employee could likely disclose a congregant's rental history if such information showed "a pattern of conduct which visibly violates Biblical standards, or which is detrimental to the ministry, unity, peace, or purity of the church." *See Penley*, 146 S.W.3d at 224 (quoting CrossLand's constitution).

[56] Westbrook might have seen this as a large interference, since he believed he was required to report all sins he learned about. But this is no better reason for an exception than if McDermott felt he was obligated to report everything he knew about the subject of the investigation to the American people.

outside of his role as a committee member, a minister-counselor could still freely report any infractions he discovered outside of his role as a professional counselor and impose disciplinary measures for such infractions. Furthermore, a minister-counselor could avoid the problem of conflicting responsibilities completely by either ceasing to treat members of his congregation in his professional counseling practice or ceasing to hold himself out to them as a licensed counselor.

Finally, this approach would not seriously interfere with churches' ability to implement their disciplinary procedures. Analogizing to *Boehner* would avoid any potential chilling effect created by allowing Penley to sue Westbrook. As the concurring opinion in *Boehner* emphasized, but for the special position McDermott held, he would have had a First Amendment right to distribute the recording.[57] In addition, a majority of the court noted that an initial wrongful disclosure did not prevent others who learned the information from further distributing it.[58] Extended to the free exercise context and the case at hand, this reasoning would have allowed the church elders, having not voluntarily accepted any position requiring confidentiality, to use information they obtained from Westbrook to determine what punishment was appropriate for Penley and to inform their congregation about her transgressions. Only Westbrook would be liable for the disclosure.

By following the example of *Boehner* and treating Westbrook's decision to become a professional counselor as a voluntary decision to yield some of his free exercise rights, the Texas Supreme Court could have protected Penley's private, confidential information without interfering in CrossLand's internal affairs. By instead dismissing Penley's suit for lack of subject matter jurisdiction, the court favored religiously motivated disclosures over disclosures made for other reasons. Westbrook should not have been protected by a shield he had voluntarily discarded.

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[57] *See Boehner*, 484 F.3d at 581 (Griffith, J., concurring) (citing Bartnicki v. Vopper, 532 U.S. 514 (2001)).

[58] *Id.* at 586 (Sentelle, J., dissenting) (noting that the First Amendment did not permit the "interdiction of public information either at the stage of the newspaper-reading public[or] of the newspaper-publishing communicators"). Although this analysis appeared in a dissenting opinion, it was joined by a majority of the court. *See id.* at 581 (Griffith, J., concurring).