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Jeffrey R. Anderson
Jeff Anderson & Associates, P.A.

Mark A. Wendorf
Reinhardt, Wendorf & Blanchfield

Frances E. Baillon

Brant D. Penney

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*Jeffrey R. Anderson**
*Mark A. Wendorf***
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PROLOGUE

Imagine you are ten years old. You are proud and honored that one of the most revered, respected, and loved men in your community pays you special attention—he gives you gifts, and invites you to go on special trips. A man who, in your eyes, your friends' eyes, and the eyes of your parents, is the embodiment of God. He is your local parish priest. But he is the furthest thing from God. He has betrayed you, the parish, the community, his vows, and God—he has repeatedly sexually molested you.

Now suppose that your trusted bishop knew this priest was a pedophile. Suppose the bishop not only knew the priest had sexually molested parish youth, but had hidden that fact, both from members of the church and the laity. Rather, the bishop clandestinely placed the priest in the parish without any precautions. Reading this, it would seem obvious that the diocese or any

* Nationally known trial lawyer advocating for the rights of children and vulnerable adults, Jeffrey R. Anderson has handled over eight hundred cases against various religious organizations, most notably the Roman Catholic church, in over twenty-five states. Anderson's law firm, Jeff Anderson & Associates, P.A., is located in St. Paul, Minnesota, and he can be reached at andersonadvocates.com.

** Since the mid-1980s, Mark Wendorf has successfully represented sexual abuse victims across the country. Many times he has overcome First Amendment attacks by churches in state, federal and appellate courts. Wendorf's law firm, Reinhardt, Wendorf & Blanchfield is located in St. Paul, Minnesota, and he can be reached at m.wendorf@rwblawfirm.com.

*** As an attorney practicing in St. Paul, Minnesota, Frances Baillon represents victims and survivors of sexual abuse by members of the clergy, teachers, and other authority figures. Ms. Baillon received her B.A from Drake University in 1995 and her J.D. from William Mitchell College of Law in 1998.

**** Mr. Penney graduated from the University of Wisconsin-Eau Claire in 1997 with a B.S. in Political Science and received his J.D. from William Mitchell College of Law in 2002. Mr. Penney's practice focuses primarily on representing survivors of childhood sexual abuse by members of the clergy.

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other church defendant, like any other employer, would be held legally responsible for the harm caused by its reckless conduct. Even the most fertile imagination cannot create or divine a lawful, just, or defensible reason why any church defendant should be treated differently than any other entity that places children in harm's way. Especially, when the church defendant does not dispute that the abuse occurred, that it knew about the priest's "problem," or that it played a significant part in allowing it to happen. How, then, does a church demur in a situation as described above?

In an act of unparalleled audacity and brazen legal maneuvering, the church often argues that the First Amendment of the United States Constitution provides it unfettered immunity and insulation from any accountability to its parishioners or society at large. In so doing, the church perverts our nation's constitution into a form of unholy absolution for the most unholy of acts. This argument, however, is of no avail to the church—it has sought refuge in a legal illusion.

The First Amendment contains two clauses addressing religion—the Free Exercise Clause and the Establishment Clause.[1] First Amendment jurisprudence also addresses religion through the judicial abstention doctrine.[2] While these rights are firmly established, their limits and boundaries continue to be defined today.

The nation's highest court has yet to address the issue of whether, in the name of the First Amendment, religious institutions can be shielded from otherwise cognizable tort claims caused by their agents and employees.[3] In cases of sexual abuse that involve church defendants, tort claims usually allege negligence, negligent supervision, negligent retention, breach of fiduciary duty, and vicarious liability.[4] Most state courts have held that the First Amendment does not provide any protection from these claims.[5] As the

1. U.S. CONST. amend. I. These guarantees enumerated in the Constitution have been made applicable to the states through the Fourteenth Amendment. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

2. *See* discussion *infra* Part II.

3. *See* Malicki v. Doe, 814 So. 2d 347, 353 (Fla. 2002).

4. *See generally* Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 28-31 (1996).

5. *See, e.g.*, Rashedi v. Gen. Bd. of Church of Nazarene, 54 P.3d 349 (Ariz. App. 2002); Bear Valley Church of Christ v. DeBose, 928 P.2d 1315 (Colo. 1996); Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993); Destafano v. Grabrian, 763 P.2d 275 (Colo. 1988); Malicki v. Doe, 814 So. 2d 347 (Fla. 2002); Bivin v. Wright, 656 N.E.2d 1121 (Ill. App. Ct. 1995); Konkle v. Henson, 672 N.E.2d 450 (Ind. Ct. App. 1996); Alberts v. Devine, 479 N.E.2d 113 (Mass. 1985); Mrozka v. Archdiocese of St. Paul & Minneapolis, 482 N.W.2d 806 (Minn. Ct. App. 1992); F.G. v. MacDonell, 696 A.2d 697

Florida Supreme Court recently stated, "to hold otherwise and immunize the Church Defendants from suit could risk placing religious institutions in a preferred position over secular institutions, a concept both foreign and hostile to the First Amendment."[6]

As this Article will explain, the Constitution does not provide a religious institution the right or privilege to operate as a law unto itself—the institution must comply with the law of civil government. Part I will provide a brief introduction and background on the First Amendment. Parts II, III, and IV will analyze the Free Exercise Clause, judicial abstention doctrine, and the Establishment Clause, respectively, and how each operates in relation to sexual abuse claims against clergy.

INTRODUCTION

> I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other.[7]

The need to distinguish between government and religion was as clear and salient to John Locke in 1687 as it is to our nation today. Written over three centuries ago, his words indicate that the struggle between protecting the freedom to practice religion while maintaining a civil government had formed long before the Constitution and Bill of Rights were enacted. As history has shown, establishing a line separating the secular from the sectarian in American life has

(N.J. 1997); Kenneth R. v. Roman Catholic Diocese, 654 N.Y.S.2d 791 (App. Div. 1997); Smith v. Privette, 495 S.E.2d 395 (N.C. Ct. App. 1998); Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991); Erickson v. Christenson, 781 P.2d 383 (Or. Ct. App. 1989); Martinez v. Primera Asemblea de Dios, Inc., No. 05-96-01458, 1998 WL 242412 (Tex. Ct. App. May 15, 1998); C.J.C. v. Corp. of Catholic Bishop of Yakima, 985 P.2d 262 (Wash. 1999). *But see* Roppolo v. Moore, 644 So.2d 206 (La. Ct. App. 1994); Bryan R. v. Watchtower Bible & Tract Soc'y, 738 A.2d 839 (Me. 1999); Teadt v. Lutheran Church Mo. Synod, 603 N.W.2d 816 (Mich. Ct. App. 1999); Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997); Schieffer v. Catholic Archdiocese, 508 N.W.2d 907 (Neb. 1993); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995). Most federal courts have also found that the First Amendment does not insulate the Church from liability. *See, e.g.*, Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 431 (2d Cir. 1999) (holding that evidence of religious teachings and tenets, submitted not to determine their validity, but to establish the factual predicates of a civil cause of action is properly allowed and does not violate the First Amendment); Smith v. O'Connell, 986 F. Supp. 73 (D.R.I. 1997); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997); Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66 (D. Conn. 1995); Sanders v. Casa View Baptist Church, 898 F. Supp. 1169 (N.D. Tex. 1995); Isely v. Capuchin Province, 880 F. Supp. 1138 (E.D. Mich. 1995).

6. *Malicki*, 814 So. 2d at 365.

7. JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), *reprinted in* 35 GREAT BOOKS OF THE WESTERN WORLD 2-24 (Robert Maynard Hutchins ed., 1952).

been elusive.[8] Nevertheless, through the First Amendment, the "just bounds" required between government and religion emerged: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[9] By these sixteen words, the Framers of the Constitution pronounced one of our most important, but elusive rights.

I. THE FREE EXERCISE CLAUSE

A. Actions Speak Louder (and Mean More) Than Words

The Supreme Court first applied the principles behind the First Amendment nearly 125 years ago, in *Reynolds v. United States*.[10] In *Reynolds*, the Court held that a statute prohibiting polygamy could be applied constitutionally to those whose religious beliefs commanded the practice.[11] In so doing, the Court recognized that while the law may not govern beliefs, it can, and must, govern actions:

> Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[12]

Thus, the formation and development of First Amendment jurisprudence began. While phrased or emphasized differently, the same core principle holds as true today as it did over one-hundred years ago when enacted; the Free Exercise clause "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[13] As the Supreme Court more recently explained:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence

8. *See* Sch. Dist. v. Schempp, 374 U.S. 203, 231 (1963) (Brennan, J., concurring).
9. U.S. CONST. amend. I.
10. 98 U.S. 145 (1878).
11. *Id.* at 166.
12. *Id.* at 166-67.
13. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); *see* Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (stating that the First Amendment protects "first and foremost, the right to believe and profess whatever religious doctrine one desires.").

> contradicts that proposition . . . . We first had occasion to assert that principle in *Reynolds v. United States*, where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . ."[14]

Therefore, while the freedom to follow a religion is unqualified, the freedom to act pursuant to that religion is not. Indeed, it is hard to imagine a more compelling reason for limiting the right to act when the action or conduct includes unleashing a known pedophile into a community.

B. The Eleventh Commandment: Thou Cannot Commit a Tort with Impunity

In cases involving allegations of sexual abuse against a priest or religious institution, the Free Exercise analysis must start with the basic and universal premise that religious organizations are liable for their torts.[15] In order to raise a Free Exercise claim, the church defendant must show coercion of a sincerely held religious belief.[16] Put another way, the issue is whether the conduct sought to be regulated is "rooted in religious belief."[17] Generally, negligent employment claims in these cases involve the limited issue of whether the church defendant's decision to place a known child abuser in an unsupervised position, where he was allowed to counsel, teach, or administer to parish youth, is conduct based upon a sincerely-held religious belief.[18] The church defendant, therefore, must argue that its religious beliefs, disciplines, and government truly required, encouraged, or even authorized the church defendant to place a vulnerable child in the hands of a known pedophile.[19] It defies

14. *Employment Div.*, 494 U.S. at 879 (quoting *Reynolds*, 98 U.S. at 166-67).

15. *See, e.g.*, Rayburn v. Gen. Conference of Seventh Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985); Moses v. Diocese of Colo., 863 P.2d 310, 319 (Colo. 1993); Gibson v. Brewer, 952 S.W.2d 239, 246 (Mo. 1997); Strock v. Pressnell, 527 N.E.2d 1235, 1237-38 (Ohio 1988); Erickson v. Christenson, 781 P.2d 383, 386 (Or. Ct. App. 1989).

16. *See* Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963).

17. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

18. *See, e.g.*, Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286, 287-88 (Ky. 1998).

19. The recent well publicized statements by the National Conference of Catholic Bishops in Dallas stands in stark contrast to any such claim. *See PBS Online NewsHour: Catholic Panel Recommends Defrocking Abusive Priests* (June 4, 2002), *available at* http://www.pbs.org/newshour/updates/catholic_06_04_02.html (last visited May 15, 2003); *see also* United States Conference of Catholic Bishops, *Bishops' President*

credulity, and the furthest stretch of the imagination, that such a decision could be made based on a sincerely held religious belief.[20]

Church defendants cannot claim that such conduct is mandated, authorized, or even supported by church law, or that it is in any way based upon a sincerely held religious belief. Thus, church defendants have no standing to even challenge the negligent employment claims based upon the free exercise of religion.[21]

Even if a church defendant could assert a burden on some religious conduct, it is well established that the "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[22] Negligent employment tort law is a valid and neutral law of general applicability to all employers.[23] In these cases, plaintiffs simply seek that this law be applied to the church defendants in the same manner it is applied to all employers.

Accordingly, a church defendant does not have the right, under the guise of the Free Exercise clause, to place priests it knew were sexual predators in positions of authority where they can victimize parishioners. A religious institution does not have the right to break the law under the Free Exercise clause, or any other First Amendment principle.

II. THE DOCTRINE OF JUDICIAL ABSTENTION

The Supreme Court has developed a limited doctrine of judicial abstention, based upon the Free Exercise clause, which precludes

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Issues Statement on Sexual Abuse of Minors by Priests (Feb. 19, 2002), *available at* http://www.usccb.org/comm/archives/2002/02-027.htm (last visited May 15, 2003).

20. *See* Sanders v. Casa View Baptist Church, 134 F.3d 331, 338 n.7 (5th Cir. 1998); Destafano v. Grabrian, 763 P.2d 275, 283-84 (Colo. 1988); Malicki v. Doe, 814 So. 2d 347, 358 (Fla. 2002); F.G. v. MacDonell, 696 A.2d 697, 702 (N.J. 1997).

21. *See* EEOC v. S.W. Baptist Theological Seminary, 651 F.2d 277, 286 (5th Cir. 1981) ("[S]ince the Seminary does not hold any religious tenet that requires discrimination on the basis of sex, race, color, or national origin, the application of Title VII reporting requirements to it does not directly burden the exercise of any sincerely held religious belief.").

22. Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

23. "If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993). Rarely is this the situation in these cases.

civil courts from interfering in certain intra-church disputes.[24] Church defendants sometimes attempt to draw sexual abuse cases under the umbrella of judicial abstention doctrine by broadly claiming that *any* inquiry or entanglement by a secular judiciary into the internal policy, doctrine, and organization of a church is prohibited.[25]

The Supreme Court, however, has established clear parameters for the abstention doctrine, which only bars judicial review of church decisions addressing *purely ecclesiastical matters*, in disputes *between factions of the church that have agreed to be governed by church law*.[26] The Court has refused to extend judicial abstention doctrine to cases that may be resolved through "neutral principles of law."[27] Moreover, the doctrine does not have any application to *purely secular disputes* governed by civil law between third parties and a particular defendant, albeit a religious organization, because these cases do not require the state to become entangled in essentially religious controversies, or intervene on behalf of groups espousing particular doctrinal beliefs.[28]

The Supreme Court first established the doctrine of judicial abstention in *Watson v. Jones*, a case involving a dispute between the National Presbyterian Church and a local church over possession of church property.[29] The Supreme Court, upholding the decision of the national church, stated:

> In this country the full and free right to entartain [sic] any religious belief, to practice any religious principle and to teach any religious doctrine *which does not violate the laws of morality and property, and which does not infringe personal rights*, is conceded to all . . . . The right to organize voluntary religious associations to assist in the expression and dissemination of *any religious doctrine*, and to create tribunals for the decision of *controverted questions of faith within the association*, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an *implied consent to this government*, and are bound to submit to it. But it would be a vain consent and would lead to the total

24. *See* Watson v. Jones, 80 U.S. 679, 727 (1871).

25. *See generally* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 228-31 (2000).

26. *See Watson*, 80 U.S. at 728-29.

27. Jones v. Wolf, 443 U.S. 595, 604 (1979).

28. Gen. Council on Fin. & Admin., United Methodist Church v. Cal. Superior Court, 439 U.S. 1369, 1372-73 (1978).

29. *Watson*, 80 U.S. at 727.

> subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of *questions arising among themselves*, that those decisions should be binding in all *cases of ecclesiastical cognizance* . . . .[30]

Under *Watson*, churches are free to decide for themselves and civil courts will not interfere with disputes: 1) that are between internal factions of the church body; 2) where the parties have impliedly consented to be bound by the church governance; 3) where the dispute is governed by controverted questions of faith; and 4) where the church does not "violate the laws of morality and property and . . . does not infringe personal rights."[31]

Watson, however, clearly limited the judicial abstention doctrine. When a civil right hinges upon an ecclesiastical matter, it is the civil court, not the ecclesiastical court, which adjudicates the civil right. But the civil tribunal tries only the civil right, and refrains from addressing any issues out of which the dispute arises.[32] The Supreme Court further noted that:

> [I]t may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up.[33]

Thus, under *Watson*, the church may govern itself any way it chooses; if church action violates a plaintiff's civil rights, however, civil law, not church law, controls.

The Judicial abstention doctrine, as established in *Watson*, has been applied by the Supreme Court on several occasions.[34] In each

30. *Id.* at 728-29 (emphasis added).

31. *Id.* at 728.

32. *Id.* at 730 (citing Harmon v. Dreher, 17 S.C. Eq. 87 (Speers Eq. 1843)).

33. *Id.* at 733.

34. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976) (applying abstention doctrine to internal dispute over internal church power struggle); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451-52 (1969) (applying abstention doctrine to intra-church schism resulting in dispute over ownership of church property); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) (applying abstention doctrine to internal

instance, the case met the criteria established in *Watson*: 1) the disputes were between internal factions of the church; 2) resolution of the disputes were governed by controverted issues involving the interpretation and application of church law; 3) the parties had impliedly or expressly agreed to be bound by the church's decision; and 4) the church action did not violate civil law property or personal rights.[35] In cases meeting these criteria, the Supreme Court has adopted and applied the constitutional mandate that "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity *on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.*"[36]

Generally, plaintiffs do not argue that a church does not have the right to govern itself, and to determine and apply church rules, customs, or law as it sees fit *in the internal governance of the church.* Rather, plaintiffs allege that a church's actions caused secular harm in violation of the plaintiff's civil rights—a harm to which the civil law applies.

The limited scope of the judicial abstention doctrine, even in intra-church dispute cases, has been firmly established by the Supreme Court. In *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, the Supreme Court was again asked to determine which of the factions of the church should control the local churches and their property.[37] The trial court decided in favor of the local church and the regional church appealed, claiming that this decision was contrary to the position of the hierarchical church, and, therefore, violated the judicial abstention doctrine of the First Amendment.[38] The Supreme Court refused to apply the judicial abstention doctrine because resolution of the dispute was not based upon "inquiry into religious doctrine," but upon civil law property rights principles.[39] The Court affirmed that the judicial abstention doctrine was not applicable where the

church dispute between mother church in Russia and United States faction over control of St. Nicholas Cathedral); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929) (applying abstention doctrine to internal church dispute over whether member was entitled to appointment of a chaplaincy).

35. *See Watson*, 80 U.S. at 728; *see also supra* text accompanying note 31.

36. *Milivojevich*, 426 U.S. at 713 (emphasis added).

37. Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970).

38. *Id.* at 367-68.

39. *Id.* at 368.

dispute may be decided by application of "neutral principles of law."[40]

Similarly, plaintiffs' negligence claims are not governed by the church law, but by the civil law applicable to all employers. Even if some inquiry into the customs and practices of a church were involved, the abstention doctrine still would not grant the church immunity.

This limitation is authoritatively illustrated in *General Council on Finance and Administration of the United Methodist Church v. Superior Court of California*, where the Methodist Church challenged a California state court's jurisdiction to hear a dispute arising out of damage claims for breach of contract, fraud, and violations of state security laws.[41] The Methodist Church claimed that:

> [T]he Superior Court violated the First and Fourteenth Amendments in basing its assertion of jurisdiction on respondents' characterization of applicant's role in the structure of the Methodist Church and rejecting contrary testimony of church officials and experts and statements set forth in the Book of Discipline, which contains the constitution and by-laws of the Methodist Church.[42]

Justice Rehnquist, later Chief Justice, summarily rejected this argument, stating, in accordance with established precedent:

> There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating *intrachurch disputes*. But this Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases

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40. *See id.* at 370 (Brennan, Marshall, J., concurring); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) (holding that civil courts are the proper tribunals for resolving internal church property disputes where those disputes may be resolved by "neutral principals" of civil law.); *see also* Jones v. Wolf, 443 U.S. 595, 605-06 (1979). The Court stated:

> We cannot agree . . . that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved. . . . The neutral-principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods.

Id. (emphasis added).

41. Gen. Council on Fin. . & Admin., United Methodist Church v. Superior Court of Cal., 439 U.S. 1355, 1369 (1978).

42. *Id.* at 1370.

> cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.[43]

When applying Supreme Court precedent concerning limited judicial abstention doctrine, it becomes clear that the doctrine is inapplicable in church sex abuse cases. Unlike the cases holding that judicial abstention applies, church sex abuse cases: 1) do not involve a plaintiff who has agreed to be bound by church law or a negligent church decision on this issue; 2) do not require courts to "become entangled in essentially religious controversies"; 3) do not require courts to "intervene on behalf of groups espousing particular doctrinal beliefs"; 4) do not involve allegations that the church violated church law, policy or practice, only allegations that the church violated the civil law; and 5) involve church action in violation of a plaintiff's civil rights that resulted in secular harm. Thus, none of the essential requisites for application of the judicial abstention doctrine are applicable in church sex abuse cases.

Moreover, the Supreme Court has uniformly concluded that the First Amendment was never intended to prohibit state action for the punishment of acts inimical to the peace, good order, and morals of society.[44] The abstention doctrine, as consistently interpreted by the Supreme Court, simply does not grant constitutional immunity to churches for the harm caused by their secular torts.

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43. *Id.* at 1372-73 (citations omitted) (emphasis added). Federal circuit courts of appeal are in accord. *See, e.g.*, Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947-48 (9th Cir. 1999). In *Bollard*, the court stated:

> Because there is no protected-choice rationale at issue, we intrude no further on church autonomy in allowing this [sexual harassment] case to proceed than we do, for example, in allowing parishioners' civil suits against a church for the negligent supervision of ministers who have subjected them to inappropriate sexual behavior.

Id.; *see* Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409 (2d Cir. 1999); Sander v. Casa View Baptist Church, 134 F.3d 331 (5th Cir. 1998).

44. Bob Jones Univ. v. United States, 461 U.S. 574, 603-05 (1983); United States v. Lee, 455 U.S. 252 (1982); Cantwell v. Connecticut, 310 U.S. 296 (1940); Davis v. Beason, 133 U.S. 333 (1890).

III. The Establishment Clause

The Establishment Clause states, "Congress shall make no law respecting an establishment of religion . . . ."[45] This simple recitation of an important ideal governing our society has been the source of extensive legal battles. The case law addressing the issue of sexual abuse by clergy, however, is quite clear, that like the Free Exercise Clause, the Establishment Clause provides no shelter for the church.

The parameters of the Establishment Clause are well defined. The Supreme Court has held that a state action does not violate the Establishment Clause if such action: 1) has a secular purpose; 2) has a primary effect which neither advances nor inhibits religion; and 3) does not foster excessive state entanglement with religion.[46] The first two prongs of the test are rarely implicated in abuse cases. Enforcing one's common law rights is purely secular. Furthermore, the primary effect of abuse cases neither advances, nor inhibits religion, because the church is simply held to the same standard as any other entity. Rather, the primary focus in abuse cases is placed on whether or not the case involves excessive governmental entanglement with religion. Nevertheless, a brief analysis of the first two prongs is necessary in order to fully explain their purpose and to make clear that neither apply.

A. Is the Law Secular in Purpose and What Is Its Primary Effect?

In applying the secular purpose test, it is appropriate to ask if the government's actual purpose is to endorse or disapprove of religion.[47] Moreover, a law needs only to have *a* secular purpose.[48] In other words, a law is invalid under the secular purpose prong when "there [is] *no question* that the statute or activity was motivated *wholly* by religious considerations."[49] Even if a law is motivated in part by a religious purpose, it may still be valid, as long as it is not entirely motivated to advance religion.[50] Thus, if a law has some minute secular purpose, it cannot fail the secular purpose prong.

For a law to be declared unconstitutional under the "effects" prong, "it must be fair to say that the *government itself* has ad-

45. U.S. Const. amend. I.
46. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
47. Wallace v. Jaffree, 472 U.S. 38, 55 (1985).
48. Edwards v. Aguillard, 482 U.S. 578, 614-15 (1987).
49. *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 680 (1984)).
50. *Wallace*, 472 U.S. at 55.

vanced religion through its own activities and influence."[51] "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[52]

Some of the most common claims in sex abuse cases are battery, negligent supervision, negligent retention, and breach of fiduciary duty. These are causes of action that exist due to common law. They doubtlessly have a clear secular purpose—the protection of children from abusive church leaders. This in no way results in governmental advancement of religion. Rather, the law simply holds the church to the same civil law standards as any other entity. In abuse cases, there can be no claim that the law is non-secular in purpose, or that its effect is to advance religion. Similarly, there is no claim that the law requires excessive entanglement with religion.

B. Is There Excessive Entanglement with Religion?

Church sex abuse cases do not involve "excessive entanglement" with religion. In *Lemon*, the Supreme Court was concerned that the state action may result in administrative and political entanglement.[53] Administrative entanglement typically involves comprehensive, discriminating, and continual state surveillance of religion.[54] Of particular concern is the danger that government action may have "self-perpetuating and self-expanding propensities."[55] This generally occurs when the state grants regulated aid to groups affiliated with religious institutions, thus requiring ongoing monitoring.[56]

Generally, sex abuse cases require a single inquiry, under neutral principles of law, into whether the church negligently supervised a priest. There is no threat or necessity of the state's on going moni-

51. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987).

52. *Id.* (citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

53. Lemon v. Kurtzman, 403 U.S. 602, 619-22 (1971).

54. *Id.* at 619.

55. *Id.* at 624.

56. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 412-14 (1985) (holding program that funded public employees teaching in parochial schools required on-site monitoring by public authorities and coordinated planning by public and religious authorities).

toring of the church's employment decisions. Thus, no excessive entanglement is at issue.[57]

Unfortunately, this is often the point where state court analysis under the First Amendment goes awry. In *Gibson v. Brewer*, for example, the Missouri Supreme Court ruled that the Establishment Clause precluded church liability for negligent supervision of a priest.[58] In so ruling, the court stated:

> Adjudicating the reasonableness of a church's supervision of a cleric—what the church "should know"—requires inquiry into religious doctrine . . . [T]his would create an excessive entanglement, inhibit religion, and result in the endorsement of one model of supervision.[59]

By so ruling, the *Gibson* court failed to perform the single inquiry versus comprehensive, discriminating, and continual inquiries described in *Lemon*.[60] This is especially critical because the Establishment Clause has always tolerated some level of entanglement between churches and secular law.[61] Only "excessive" entanglements, those that are comprehensive, discriminating, and continual, are prohibited.[62] Had the *Gibson* court completed its analysis, it would have concluded that the single inquiry, under neutral principles of employment law regarding negligent supervision, did not pose an excessive entanglement under *Lemon* and its progeny.[63]

Additionally, when a church asserts a First Amendment defense, it is essentially advocating for blanket immunity. A good argument can be made that granting such immunity from common law responsibility to church employers, but not to secular employers, would itself raise grave Establishment Clause issues. Such a law would have no secular purpose, and would certainly have the primary effect of advancing religion by immunizing churches from

57. *Id.*; *see* NLRB v. Hanna Boys Ctr., 940 F.2d 1295, 1304 (9th Cir. 1991) (finding no entanglement where the NLRB's jurisdiction over a church-owned school required government involvement only with respect to specific claims filed on behalf of specific employees); United States v. Freedom Church, 613 F.2d 316, 324 (1st Cir. 1979) (holding that IRS investigation into a church's tax exempt status did not constitute governmental entanglement); Odenthal v. Minn. Conference of Seventh-Day Adventists, 649 N.W.2d 426, 434-36 (Minn. 2002) (holding that a claim of negligent counseling against a member of the clergy did not require any entanglement; rather it was a dispute that could be resolved according to neutral principles of tort law).

58. Gibson v. Brewer, 952 S.W.2d 239, 247 (Mo. 1997).

59. *Id.*

60. 403 U.S. at 619-24.

61. *See* Agostini v. Felton, 521 U.S. 203, 233 (1997).

62. *Lemon*, 403 U.S. at 619-20.

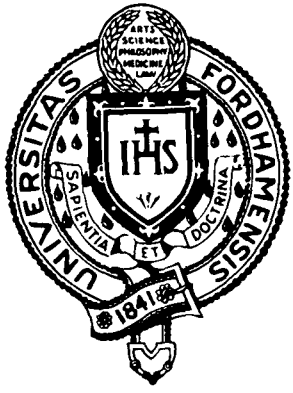
63. Unfortunately, similar reasoning can be found in other states. *See, e.g.*, Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 791-92 (Wis. 1995).

tort liability for the public harm that they have caused, in violation of the first two prongs of the *Lemon* test.

CONCLUSION

Interpreting the First Amendment to provide church defendants complete immunity from sexual abuse claims not only perverts its plain language and ignores Supreme Court jurisprudence, but also places the safety of religious institutions above the safety of all citizens. It would make the children in our society, the most innocent and unsuspecting among us, a less precious commodity than the theology of a church. This cannot be so. Religious entities should not receive special treatment, nor be held to a lower standard under the law. They, like any other corporation, must not be placed above the law. Indeed, our nation's history and manner of government leaves no doubt that a state has the power and is free to regulate actions and practices, especially those actions which harm innocent children. This necessarily includes the power to punish and deter subversive action, such as sexual abuse, if such action should be attempted by a cleric.[64] For neither a cleric's robe, nor a pulpit is a defense.

64. Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 109 (1952).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