IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,450

JANE DOE

Petitioner,

v.

WILLIAM DUNBAR EVANS, III, et al.,

Respondents.
_____/

BRIEF AMICI CURIAE OF ARCHBISHOP JOHN C. FAVALORA, AS ARCHBISHOP OF THE ARCHDIOCESE OF MIAMI AND AS PRESIDENT OF THE FLORIDA CATHOLIC CONFERENCE AND J. LLOYD KNOX, PRESIDING BISHOP OF THE FLORIDA ANNUAL CONFERENCE OF THE UNITED METHODIST CHURCH

James F. Gilbride, Esq.
Hetal H. Desai, Esq.
Gilbride, Heller & Brown, P.A.
and
J. Patrick Fitzgerald, Esq.
J. Patrick Fitzgerald, P.A.

Counsel For John C. Favalora
As Archbishop Of The
Archdiocese Of Miami and As
President of the Florida
Catholic Conference

George Meros, Esq.
Rumberger, Kirk & Caldwell
Counsel for J. Lloyd Knox,
Presiding Bishop of the Florida
Annual Conference of United
Methodist Church

Of Counsel:
Mark E. Chopko, Esq.
General Counsel for
The United States Catholic
Conference

Counsel and Amici Parties

JAMES F. GILBRIDE, ESQ.
HETAL H. DESAI, ESQ.
GILBRIDE, HELLER & BROWN, P.A.
Representing Archbishop John C. Favalora
as Archbishop of the Archdiocese of Miami
and as President of the Florida Catholic Conference
One Biscayne Tower - Suite 1570
2 South Biscayne Boulevard
Miami, Florida 33131
Phone: (305) 358-3580
Fax: (305) 374-1756

J. PATRICK FITZGERALD, ESQ.
General Counsel for Archbishop John C. Favalora
110 Merrick Way - Suite 3B
Coral Gables, Florida 33134
Phone: (305) 443-9162
Fax: (305) 443-6613

GEORGE MEROS, ESQ.
RUMBERGER, KIRK & CALDWELL
General Counsel for J. Lloyd Knox, Presiding Bishop of The Florida Annual Conference of the United Methodist Church
301 S. Bronough Street
Suite 600
Tallahassee, Florida 32301
Phone: (850) 222-6550

Of Counsel:
MARK E. CHOPKO, ESQ.
General Counsel of the United States Catholic Conference
3211 4th Street, N.E.
Washington, D.C. 20017
Phone: (202) 541-3300

CERTIFICATE OF TYPE SIZE & STYLE

Amici, the Archbishop John C. Favalora, as Archbishop of the Archdiocese of Miami and as President of the Florida Catholic Conference, and J. Lloyd Knox, Presiding Bishop of The Florida Annual Conference of the United Methodist Church, hereby certify that the type size and style of this Brief is Arial 14 pt.

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Constitutional Provisions

Cases

Statutes

INTRODUCTION

Amici, Archbishop, John C. Favalora, as Archbishop of the Archdiocese of Miami and as the President of the Florida Catholic Conference (hereinafter referred to as "Archdiocese of Miami"), and J. Lloyd Knox, Presiding Bishop of the Florida Annual Conference of the United Methodist Church, file this brief in support of the Respondents' (also referred to as "church defendants") position that this Court affirm the Fourth District Court's opinion in Doe v. Evans, 718 So. 2d 286 (Fla. 4th DCA 1998). Amici adopt the Respondents' statement of the case, facts, procedural history of the case and issues cited in its brief on the merits.

The Archdiocese of Miami is an unincorporated religious association representing followers of the Roman Catholic Church in the Miami-Dade, Monroe and Broward County Areas. Church Membership in the Archdiocese of Miami exceeds 780,000 in 108 parishes and seven missions. There are over two million Catholics in the State of Florida. The Florida Catholic Conference is a religious agency of the Catholic Bishops in the State of Florida. The Florida Catholic Conference's purpose is to speak for the church in matters of public policy.

This brief is also filed on behalf of J. Lloyd Knox, Presiding Bishop of The Florida Annual Conference of the United Methodist Church. The Florida Annual Conference is a regional organizational unit of the United Methodist Church. There are 68 Annual Conferences in the United States. The Florida Annual Conference has 747 local churches located throughout Florida and East of the Apalachicola River. There are 338,000 United Methodists in this area over whom Bishop Knox presides.

Amici and its members would be profoundly affected by any decision to reverse the Fourth District Court's decision dismissing Petitioner's claims against the Church defendants on the basis of the religious freedoms guaranteed by the First Amendment of the U.S. Constitution and the Florida Constitution.

SUMMARY OF ARGUMENT

The United States and Florida Constitutions prohibit secular civil courts from adjudicating disputes that would necessarily require them to interpret or apply religious doctrine or principles in their resolution. As Thomas Jefferson wrote in 1808, the Government is "interdicted by the Constitution from intermedling with religious institutions, their doctrines, discipline or exercises"[1]. This freedom from judicial scrutiny, the concept of "religious autonomy," acts not only as a barrier between governmental meddling in internal disputes, but also extends to prevent courts from evaluating religious doctrine and principles in the context of tort law as is alleged in this case.

Petitioner has complained about an extramarital affair with her priest whom she alleges was counseling her. Her complaints against Respondents sound in the law of ordinary negligence and fiduciary duty, but their reach is far more insidious. She would have a civil court assess the reasonableness of a religious institution's ecclesiastical relationship with its priest and demands that the institution be held liable for civil damages for alleged failures of religious leaders in that relationship. The nature of that relationship and the

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[1] James T. O'Reilly & Joann M. Strasser, Clergy Sexual Misconduct: Confronting the Difficult Constitutional Institutional Liability Issues, 7 St. Thomas L. Rev. 31, 37 (1994). (Quoting letter of Thomas Jefferson to Reverend Samuel Miller, January 3, 1980).

nature of the relationships formed within a religious community are such that secular terminology, especially legal terminology, is inapposite.

It is the function of church authorities to determine what the essential qualifications of the clergy person are and whether a candidate or minister possesses them. The process for selection, seminary training, rigorous formation by spiritual standards, ordination for a life commitment of service to a church or temple, assessment of suitability for assignment, ongoing formation in relations to spiritual direction, all are directed by the tenets of each individual faith. This process is vital to the life of a religious institution because the cleric (whether priest, rabbi, shaman, guru, or minister) is the person responsible for the transmission of the faith and evangelization of his or her religious community. Moreover, the ongoing ecclesiastical relationship between religious leader and minster is rooted in the church's concepts of what ministers should aspire to. Discipline reflects concepts of penance, admonition, and reconciliation. This is not the same as secular employment and this Court should not establish a legal fiction that it could be evaluated as such.

Based on the principle of religious autonomy, and following the reasoning from other federal and state courts, the Fourth District Court of

Appeal was sensitive to avoid the reflexive use of secular employment and negligence concepts to describe these relationships. It would be both inappropriate and unconstitutional for a court to determine, after the fact, that ecclesiastical authorities negligently supervised or retained a member of the clergy. To permit such an intrusion would have a chilling effect on the prospective actions of religious institutions on a core religious function, the preparation and ongoing formation of ministers, by the grafting of secular employment concepts foreign to the ecclesiastical relationship. Once begun, religious leaders would be forced to advert to these concepts, deferring to state control of the internal affairs of religious denominations, a result violative of the text and history of our Constitutions.

There is no dispute as to petitioner's ability to hold an individual clergy member liable for his own conduct; this issue is not before this court. In fact, not only does the Archdiocese of Miami and the Florida Annual Conference condemn abuse in whatever form it takes, but such activity is antithetical to the very principles of love of God and one's neighbor upon which they are predicated. However liability of religious institutions depends on the application of secular law only, and not the interpretation or assessment of the reasonableness of religious action. Therefore, Amici urges this court to affirm

the Fourth District's decision and hold that the claims based in negligence and fiduciary duty against religious institution for acts of their clergy are not actionable in Florida. Both the Florida Constitution and the Free Exercise Clause and Establishment Clause of the First Amendment of the Federal Constitution would be violated if Petitioner's claims against Respondents were allowed to proceed.

LEGAL ANALYSIS

I. The United States and Florida Constitutions Prohibit Secular Courts From Exercising Jurisdiction Over The Claims Asserted by Petitioner in this Case.

Petitioner's claims implicate and involve core religious issues: (1) How a church chooses, trains, and supervises its clergy; (2) What is the relationship between clergy and church member? Her complaint attempts to impose duties on the church based on religious doctrine. Her expectations do not arise out of secular concepts, but rather out of her religious beliefs and those espoused by her church. The procedures regulating the standards for formation, selection, and supervision of clergy and the relationship between parishioners, clergy, religious leaders, and their church are set forth by the ecclesiastical tenets of that individual church. Indeed, the formation,

selection, and supervision of clergy is central to the mission of every religious body. Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16-17 (1929). Therefore, any determination of the reasonableness of these procedures necessitates an inquiry in violation of the section 3, article I of the Florida Constitution and the First Amendment of the Federal Constitution.[2]

As explained below, any court imposed duty to select and supervise clergy or act as a fiduciary not only implicates the First Amendment, but also is barred by it. If this Court allows Petitioner to proceed on such claims, "any

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[2] Florida has enacted its own religion clause in the Florida Constitution which states:

> § 3. Religious freedom
> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Florida Constitution s. 3, Art. I.

The First Amendment of the U.S. Constitution's states in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

U.S. Const. amend. I

award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious domination, a result violative of the text and history of the establishment clause." Schmidt v. Bishop, 779 F. Supp. 321, 331 (S.D.N.Y. 1991) (citing U.S. Const. amend. I).

The First Amendment has two distinct but complementary protections for religious liberty: the Establishment Clause and the Free Exercise Clause. The first clause is prophylactic in nature in that it bars governmental intrusion or entanglement into religious matters. Lemon v. Kurtzman, 402 U.S. 602, 614, 91 S.Ct. 2105, 29 L.Ed. 2d 749 (1971)(principal objective of the Establishment Clause is to prevent "as far as possible, the intrusion of either [religion or government] into the precincts of the other."). It acts as a structural restraint on the government, including the courts from scrutinizing the internal affairs of religious bodies.

The second clause guarantees that each individual may practice his or her faith freely, without governmental intrusion or scrutiny. Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojebich, 426 U.S. 696, 711 (1976). Cf. Hadnot v. Shaw, 826 P.2d 978 (Okl. 1992) ("The First Amendment will protect and shield the religious body from liability for the activities carried on pursuant to the exercise of church

discipline. Within the context of ecclesiastical discipline, churches enjoy an absolute privilege from scrutiny by the secular authority."). Based on this fundamental freedom, civil courts must take every precaution so that they do not tread on these responsibilities at the behest of civil litigants. Both protections are implicated by the claims here.

If, as Petitioner urges, a secular court were to delve into the decisions and inner workings of a religious institution's decisions regarding its clergy or question the religious relationship between a parishioner and his or her church, the government would violate the prohibition against religious entanglement and at the same time hinder the free practice of religion by that religious institution. Petitioner argues that the Fourth District Court erred in finding that her claims were barred by the First Amendment. She states that there can be no constitutional violation of religious autonomy unless a religious institution somehow "canonized" the misconduct being litigated. Moreover, she argues that the tort law is neutral and generally applicable so as not to trigger the First Amendment and that the U.S. Supreme Court has mitigated its concern about excessive entanglement.

Petitioner is wrong as a matter of law. The constitutional principles that undergird the principle of religious autonomy do not simply bar the civil courts

to litigants in internal church disputes. Rather the courts must be concerned that the "very process of inquiry..." not violate this principle. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979). Petitioner invites this Court to violate key constitutional protections for religion. This Court should decline the invitation.

A. The First Amendment Will Be Infringed If Petitioner Is Allowed to Proceed.

The principle of religious autonomy protects churches from the exercise of governmental power in an area of traditional religious authority. It operates as a barrier to judicial inquiry into matters that necessarily involve the assessment (as a basis for decision), application, and interpretation of religious doctrine or policy. Petitioner urges this Court to adopt the narrow view that, only if the matter underlying the controversy, in this case, sexual misconduct, is reflected in church doctrine is the constitution implicated. That result is unsupportable in the rulings of the U.S. Supreme Court and other courts. Most recently, in Klagsbrun v. Va'ad Harabonim of Greater Monsey, 1999 WL 427338 (D.N.J. 1999), the District Court rejected the same argument as made by Petitioner, holding that "the Establishment Clause is implicated whenever courts must interpret, evaluate, or apply underlying religious doctrine to resolve disputes involving religious organizations." Id. at *10. See

Schmidt v. Bishop, supra (finding any inquiry into the policies and practices of the Presbyterian Church in hiring or supervising the clergy raised First Amendment dilemmas of entanglement); Dausch v. Ryske, 52 F.3rd 1425 (7th Cir. 1994) (holding that inquiry into whether church owed reasonable duty to parishioner would be invalid under the Free Exercise Clause).

Petitioner attempts to impose a duty on the church and establish a special relationship based on the religious doctrine of her faith. Her expectations do not arise out of secular concepts, but rather out of religious beliefs. For instance if this matter were to proceed, the trier of fact would be asked to make judgments on religious issues such as: What is a reasonable way to select, train, supervise and retain clergy? What kind of relationship is reasonable between clergy and parishioner? Are the tenets of a religious institution reasonable? These questions cannot be answered without evaluating church doctrine and dogma. Moreover, it may lead to a finding that certain denominations are "more reasonable" than others in these areas. Such determinations are clearly barred by the First Amendment. Gray v. Ward, 950 S.W.2d 232 (Mo. 1997) (finding any judicial inquiry which could result in an unconstitutional endorsement of religion by approving one model for a church's clerical decisions was constitutionally barred).

The United States Supreme Court has long held that the Free Exercise Clause of the First Amendment requires civil courts to refrain from interfering with determinations of the ecclesiastical rule, custom, and law. Serbian Orthodox Church, supra. The First Amendment applies to any application of state power, including the exercise of judicial jurisdiction over claims against religious institutions. Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190, 191, 80 S.Ct. 1037, 1038, 4 L.Ed.2d 1140 (1960). Based on Serbian Eastern Orthodox and its progeny, in Doe v. Evans, 718 So. 2d 286 (Fla. 4th DCA 1998), the Fourth District Court of Appeal concluded: **"When a secular court interprets church law, policies, and practices it becomes excessively entangled in religion."** Id. at 293. Clearly, the first amendment is implicated in this matter.

Petitioner also relies on the revision of procedure for review of Free Exercise claims in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed. 2d 876 (1990). In that case, the U.S. Supreme Court asserted that religious claims and claimants are no longer entitled to strict scrutiny when they attack laws that are neutral on their face and generally applicable. It should be clear to this Court that the amici here disagree with that conclusion as unsound.

However, this Court need not reject Smith in order to reject Petitioner's assertion. Rather, when the U.S. Supreme Court was revising its procedural standards, it distinguished the very principles of religious autonomy from the new standards and cited with approval the line of cases above protecting church autonomy that control here. Id. at 877. No clearer answer could be given.

Moreover, the rules about when a law is neutral and generally applicable would not preclude a strict scrutiny analysis in this case. In a decision three years after Smith, the Supreme Court found that an ordinance that enacted a limited ban that seemed to apply to religious activity was not neutral and not generally applicable. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed. 2d 472 (1993) (invalidating city ordinances which prevented Santeria followers from sacrificing animals; finding ordinances were not "neutral" and government lacked compelling interest). There, the United States Supreme Court stated that where a law is not neutral or not of general application, it must undergo the most "rigorous of scrutiny", stating:

> Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified

> by a **compelling governmental interest** and must be **narrowly tailored** to advance that interest.

Id. at 2226. See generally Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1357 (D.C.Cir.1990) ("The Supreme Court has consistently recognized that the religion clauses are subject to a balancing of interests test [and] that certain civil rights protected in secular settings are not sufficiently compelling to overcome certain religious interests.").

Here it is also important to note that the religious claims are implicated by very nature of the tort system, whereby the particular conduct of a religious institution would be assessed as to its reasonableness compared to other conduct. Such judicial action is not neutral but specifically geared to making individualized assessments.[3] The Smith Court noted that a strict

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[3] This Court must recognize that in Smith, the United States Supreme Court did not address the general tort liability theories alleged in the instant case. In fact, such theories do not lend themselves to the category of "valid and neutral law[s] of general applicability" described by the Smith court. Id. at 879. Instead, the Smith case involved an unambiguous statutory prohibition on the possession of a specific controlled substance, peyote, which directly conflicted with the use of

scrutiny First Amendment analysis is triggered by a system of individualized decision making, which is the essence of civil litigation. Smith, 494 U.S. at 884.

Finally, Petitioner asserts that the U.S. Supreme Court has substantially abandoned emphasis on "excessive entanglement" as an element of its Establishment Clause jurisprudence. As is apparent from the case law, changes in the Supreme Court's interpretation of the Establishment Clause have not undermined the protection available to religious organizations under the religious autonomy principle. As noted above, in Lemon v. Kurtzman, supra, the Supreme Court expressed concern about conduct that could either advance or inhibit religious. 403 U.S. at 619-20. Either effect would violate the Establishment Clause. Two years ago, in Agostini v. Felton, 117 S.Ct. 1997, 2015 (1997), the Court revised its "Lemon" test, by folding "excessive

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this substance as a religious sacrament. Moreover, to apply a "neutrality" analysis, it is not sufficient, as Petitioner claims, to merely identify or apply relevant secular law. Rather, neutral facts which apply to the secular law must exist. Langford v. Roman Catholic Diocese of Brooklyn, 677 N.Y.S.2d 436 (Sup. Ct. 1998) (dismissing claims of fiduciary duty because they would involve constitutionally impermissible inquiry into doctrines of a particular religion). Although Amici cannot address the specific allegations in that case, the issues and facts clearly implicate religion and spiritual duties of both the individual clergy and church.

entanglement" into its effect analysis. In so doing, however, the Court specifically related its concern to governmental conduct that could inhibit religion, if the government should become, in the Court's words, "excessively entangled" in religious matters. Id. More to the point, the Court has barred the exercise of regulatory jurisdiction into religious institutions based on a concern that such jurisdiction inevitably would entangle the courts in religious matters. Indeed, as noted above, in NLRB v. Catholic Bishop, supra, the Court was concerned that the very process of regulatory inquiry could violate the Constitution. How much more so would that inquiry be in a case like the one at bar? It is plain that the Constitution is implicated through the resolution of these claims.

B. Petitioner's Claims Do Not Satisfy the "Compelling Interest" Test.

The essence of tort litigation in negligence is to assess fact specific circumstances. The claims brought by Petitioner are not based on violation of criminal or regulatory statutes by the defendant churches, but rather arise out of allegations that the church defendants should have acted in a particular manner. Such determinations cannot be considered "neutral" or generally applicable. Therefore, before allowing assertion of jurisdiction over

Petitioner's claims, those claims must pass strict scrutiny and be tested by a "compelling interest" analysis. They fail.

This Court is not required to determine whether the church defendants in the instant case have violated a generally applicable criminal or regulatory statute. Unlike the enforcement of a contract, statutory prohibition or general application of tax, which may be applied objectively, the claims brought by Petitioner by their very nature require substantially more subjective scrutiny into the reasonableness of a religious establishment's conduct.

Moreover, even if the federal constitutional rule did not require strict scrutiny or a compelling interest, it is clear that § 3., Art. I of the Florida Constitution and recently enacted legislation does dictate the use of such an analysis. Florida Constitution s. 3, Art. I.; Florida Statutes Chapter 761 (1999).

The Florida Legislature has taken steps to protect Florida citizens' right to free exercise of their religious belief. It recently codified this protection by enacting the Florida Religious Freedom Restoration Act of 1998. This Act essentially clarifies and establishes the test requiring a compelling state interest for governmental entanglement or burden on religion.

761.03. Free exercise of religion protected

> (1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:
>
> > (a) Is in furtherance of a **compelling governmental interest**; and
> > (b) Is the **least restrictive** means of furthering that compelling governmental interest.
>
> (2) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

Section 761.03, Florida Statutes (1999) (Emphasis supplied). Based on Florida's constitutional religious freedoms clause and section 761.03, Florida Statutes, clearly the compelling interest test is applicable in Florida.

A simple assertion of an interest is not enough to make it compelling. As the U.S. Supreme Court said in Cantwell v. Connecticut, the kind of interest should be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state...." 310 U.S. 296, 311 (1940); see also West Virginia v. Barnette, 319 U.S. 624, 639 (1943). Any interest in providing a particular cause of action to the Petitioner does not rise to the level necessary to overcome the entanglement and effect on religious liberties found elsewhere in the caselaw of the

Supreme Court, such as laws against polygamy, illegal drug use, or tax evasion. Moreover, Petitioner has adequate remedies: claims for monetary damages against the individual who directly caused the alleged harm. Asserting jurisdiction over the claims against Respondents, therefore, is not compelling nor is it the least restrictive means for ascertaining this interest.

In addition, the rule in Florida as expressed by the Florida courts and the legislature is to the same effect. This Court has refused to allow interference with the free practice of religion absent a compelling interest, even in life and death situations. In Public Health Trust of Dade County v. Wons, 541 So. 2d 96 (Fla. 1989), the government wanted to force a mother to receive a necessary blood transfusion even though such a procedure was contrary to her religious beliefs. The government argued it had an interest in protecting the rights of the mother's children who could be orphaned if the mother was not required to take the transfusion. This Court noted:

> [We are faced with] the difficult decision of when a **compelling state interest** may override the basic constitutional rights of privacy and religious freedom. . . . It is difficult to overstate this right because it is, without exaggeration, the very bedrock on which this country was founded.

Id. at 97 - 98 (Emphasis supplied). This Court concluded that the burden of the state's interest in maintaining life was not compelling enough to interfere with the right to practice religion. Id.

Nor does the state have a compelling interest in awarding damages in a civil context to those allegedly wronged by a religious decision. Goodman v. Temple Shri Ami, 712 So. 2d 775 (Fla. 3rd DCA 1998), appeal dismissed as improvidently granted, 1999 WL 45972 (Fla. July 8, 1999)[4]. The Third District Court of Appeal recently held that a claim for damages arising out of an "employment" dispute did not rise to the necessary level of a compelling interest. It affirmed the dismissal of a Rabbi's claims against a Temple for its decision to terminate him as his religious leader because of disputes over the way he observed tradition and his religious style. The Third District agreed with the trial court that the rabbi's employment and common-law tort claims were constitutionally barred. It stated:

> We conclude that the trial court correctly dismissed the claims. . . . In order for the trial court to have resolved these disputes, it would have had to immerse itself in religious doctrines and concepts and "determine" whether the religious disagreements were a "valid" basis for termination of Rabbi Goodman's services. . . . Inquiring into the adequacy of the

[4] After hearing oral arguments and being briefed on the merits, this Court dismissed the appeal from the Third District based on jurisdictional grounds.

> religious reasoning behind the dismissal of a spiritual leader is not a proper task for a civil court.

Goodman, 712 So. 2d at 777. This same reasoning is applicable to the claims set forth by Petitioner for damages arising from alleged negligent retention and supervision and a breach of fiduciary duty. Negligence and breach of fiduciary duty claims are no more compelling than employment or other torts.

Despite case law to the contrary, Petitioner takes the extreme view that courts can assert jurisdiction over **any** claims against a religious institution without showing any level of State interest. Petitioner reconciles this proposition with the opinion in Doe v. Dorsey, 683 So. 2d 614 (Fla. 5th DCA 1996), by stating that Dorsey was decided incorrectly as a matter of law. There, the Fifth District Court of Appeal refused to address the issue of whether the First Amendment bars an action against the church based on the alleged negligent 'hiring' or retention of clergy who had allegedly committed sexual misconduct. The court affirmed dismissal on the basis of the statute of limitations and failure to state a cause of action. However, in dicta it stated:

> [B]ecause we hold that the action against the church and the bishop in this case for the negligent retention of the priest, insofar as the abuse of plaintiff which occurred while he was a minor is concerned, is time-barred, the issue of whether the First Amendment protects the church when its clergy commits criminal acts is not before us. In any event,

> we are persuaded that just as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly (including should know) creates a situation in which such injuries are likely to occur. **We recognize that the State's interest must be compelling indeed in order to interfere in the church's selection, training and assignment of its clerics.** We would draw the line at criminal conduct.

Id. at 617 (Emphasis supplied).

It is unclear whether the Fifth District was requiring criminal conduct by the church defendants before asserting jurisdiction or if it would allow jurisdiction if the independent act by the clergy was criminal. Regardless, the dicta indicates that secular courts should only allow civil damages against a church which knowingly created a harmful situation or in which the action of the church defendants, not just the clergy, were criminal. This interpretation of Dorsey is consistent with other dicta in that opinion establishing there was no misconduct by the religious institutional defendants alleged in that case:

> Even though the priest's abusive conduct prompted this action **against the church and the bishop, the alleged cause of action against them is a negligence action based on the alleged** improper selection or retention policies and **practices of the church in relation to its priests, not any active abuse by the appellees [the bishop and diocese].**

Id. at 616.

Perhaps the Dorsey court was attempting to agree with the conclusions of other states. Faced with the same situation, some courts have refused to assert jurisdiction simply because the plaintiff had alleged that the church defendants "should have known". In Pritzlaff v. Archdiocese of Milwaukee, 533 N.W. 780 (Wis. 1995), cert. denied, __ US __, 116 S.Ct. 920 (1996), the court noted:

> We are aware of the fact that several courts have recently held that a religious governing body could be held liable for negligent supervision where the plaintiff alleges that the body knew that the individual clergyman was potentially dangerous [citing collection of cases from New York, Colorado and Ohio]. However, we find these cases unpersuasive, at least given the facts of this case.

Pritzlaff, 533 N.W. 2d at 791.

Similarly, in Byrd v. Faber, 565 N.E. 2d 584 (Ohio 1991) relied upon by Petitioner, the Ohio Supreme Court held that in order to ensure that any assertion of jurisdiction was limited to the least restrictive means any claims against church defendants must be pled with specificity. Id. at 584-589.

Moreover, other courts have required active abuse or intentional acts by the church defendants. For example, the Missouri Supreme Court in Gibson v. Brewer, 952 S.W. 2d 239 (Mo. 1997) refused to assert jurisdiction over claims of negligence, but did assert jurisdiction over intentional torts noting:

"Religious conduct intended or certain to cause harm need not be tolerated under the First Amendment." Id. at 247. However, the court dismissed the intentional tort because there was no allegation that the religious institution intended to harm the plaintiff. The court explained:

> Intentional infliction of emotional distress requires not only intentional conduct, but conduct that is intended only to cause severe emotional harm. The Gibsons' allegations do not support the inference that the Diocese's sole purpose in its conduct was to invade the Gibsons' interest in freedom from emotional distress. The trial court did not err in dismissing the Gibsons' claim.

Id. at 249. (citations omitted).

Amici urge this Court to take the approach in Pritzlaff that all claims against a religious institution including those claims that the church defendant "should have known" about a clergy member's propensity for misconduct, are barred by the First Amendment. However, if this Court finds that such claims do not violate the First Amendment, it cannot allow Complaints that involve the guesswork inherent in determining what a church "should have known". Rather, it should require specific facts demonstrating actual knowledge of the church defendant.

C. The Fourth District Court of Appeal Correctly Rejected the Cases Cited by Petitioner.

Petitioner relies on decisions from states which have taken an expansive, and we submit erroneous, view of the claims allowed against religious organizations. Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993)[5]; Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988); See also F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997) (not involving church defendants); Smith v. O'Connell, 986 F. Supp. 73 (D. R. I. 1997) (finding dismissal of complaint was premature because pleading was inadequate to establish excessive entanglement or that religious doctrine would have prevented them from exercising reasonable care precluding sexual abuse of children); Byrd v. Faber, (allowing jurisdiction, but dismissing counts where plaintiff failed to allege particularized proof of wrongdoing to assure against unconstitutional scrutiny of church hiring); Erickson v. Christenson, 781 P.2d 383 (Ore. 1989) (no First Amendment analysis).

Curiously, the federal district courts in some of these states do not always follow the reasoning of the state courts. For example, the federal court in Colorado has not followed the views enunciated by the highest state courts

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[5] Based on the questionable constitutional reasoning, Amici disagree with the result reached by the Moses court. However, a careful reading of the facts in that case reveal that the Colorado court may have allowed the claims against the church defendants for a failure of a direct undertaking by a bishop for a communicant or as a breach of oral contract.

in those states. See Ayon v. Gourley, 47 F.Supp. 2d 1246 (D. Colo. 1998), aff'd --- F.3d ---- (unpublished disposition), 1999 WL 516088, 1999 CJ C.A.R. 4052 (10th Cir. June 25, 1999)(aff'd on nonconstitutional grounds). In Ayon, the Federal District Court of Colorado granted dismissal of the church defendants on summary judgment in a case alleging liability for sexual abuse of a child by a priest. Rejecting Moses and Destefano, the court held, "The fact that the Colorado state courts have taken an extremely expansive view of the claims allowed against religious organizations is not even particularly persuasive in light of the analysis by federal courts on this issue." Id. at 1248.

The Fourth District Court in Evans clearly acknowledged the Destefano line of case law relied upon by Petitioner, analyzed these decisions and correctly rejected them. See also Gibson v. Brewer, 952 S.W. 2d 239 (Mo. 1997). Following the reasoning of Serbian Orthodox Church, the Fourth District Court in Evans stated:

> [I]mposing liability and secular duties on the church as a "principle" would infringe on the church's right to determine the standards governing the relationship between the church, its bishop, and the parish priest.

Id. at 290. Amici respectfully requests for the reasons set forth that this Court affirm the Fourth District's decision finding Plaintiff's claim are barred by the First Amendment.

II. Petitioner's Negligent Hiring, Retention and Supervision Claims Are Constitutionally Barred.

The United States Supreme Court has held that the ordination of clergy is a "quintessentially religious" matter, "whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church." Serbian Eastern Orthodox, 426 U.S. at 714. In affirming this decision, the Fourth District Court in Evans stated:

> Our examination of case law presenting both sides of this question leads us to conclude the reasoning of those courts holding **the First Amendment bars a claim for negligent hiring, retention, and supervision** is more compelling. In a church defendant's determination to hire or retain a minister, or in its capacity as supervisor of that minister, a church defendant's conduct is guided by religious doctrine and/or practice. Thus, **a court's determination regarding whether the church defendant's conduct was "reasonable" would necessarily entangle the court in issues of the church's religious law, practices, and policies**. "Hiring" in a traditional sense does not occur in some religions, where a person is ordained into a particular position in the church, and assigned to one parish or another. A court faced with the task of determining a claim of negligent hiring, retention, and supervision would measure the church defendants' conduct against that of a reasonable employer; a proscribed comparison.

Id. at 290-91. (Emphasis supplied, citations omitted).

The Fourth District Court correctly relied on the reasoning of federal and various state opinions that establish that secular courts are prohibited from evaluating a religious organization's performance of duties, including the retention and formation of its clergy, self-imposed by ecclesiastic doctrines. Serbian Eastern Orthodox, 426 U.S. at 696. See also Sharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F. 2d 360 (8th Cir. 1991); Minker, supra.

Opinions from Florida Courts on this subject area support the Fourth District Court's finding that government intrusion into the inner workings of a religious organization is not warranted in the context of civil proceedings. Goodman, supra. In Mills v. Baldwin, 362 So. 2d 2 (Fla. 1978), this Court held that the First Amendment barred a trial court from overruling, as a matter of law, determinations made by religious organization based on its ecclesiastical rules and procedures. In Franzen v. Poulos, 604 So. 2d 1260 (Fla. 3d DCA 1992), the court dismissed plaintiff's cause of action against the church because it would require the court to inquire into a dispute regarding the internal procedures of the church. There, the plaintiffs sought to prevent church officials from making retention decisions regarding the church minister. Quoting the United States Supreme Court's decision in Serbian Orthodox Diocese, supra, the court held that the First Amendment requires that civil

courts are obliged to defer to a hierarchical church's internal decisional processes on matters of internal church disciplining government. Id. at 1263.

Applying Florida case law, any exercise of jurisdiction by secular courts of the instant action would violate the First Amendment. As with the above cited case law, ruling on the issues presented in the instant complaint would require a secular Court to determine whether a religious institution complied with internal ecclesiastical doctrines in deciding to retain and supervise a member of its clergy. Further, secular courts would also have to pass judgment on whether the procedures for selecting, retaining, and supervising clergy as required by the canons of that Church were reasonable. Such a review is unquestionably proscribed. See Archdiocese of Miami v. Sama, 519 So. 2d 28 (Fla. 3d DCA 1988). Townsend v. Tekel, 467 So. 2d 772 (Fla. 1st DCA 1985).[6]

The weight of authority from other states supports the conclusion that civil trial courts cannot entertain negligent selection and supervision claims

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[6] Whatever standard was created would have to be generally applicable to all churches to avoid the charge that the standard itself was discriminatory. How such a standard would be applied, for example, in a congregational setting is difficult to imagine. One would not simply be interfering with the operation of a church, but rewriting its polity. Indeed, a legitimate question would be the identity of a defendant in a case where the entire church membership is involved in “calling” or “ordaining” a minister.

because this would entail passing judgment on the performance of duties imposed on a religious institution by ecclesiastical law. The trial court and Fourth District Court both cited to Pritzlaff v. Archdiocese of Milwaukee, supra:

> To establish a claim for negligent hiring or retention, Ms. Pritzlaff would have to establish that the Archdiocese was negligent in hiring or retaining Fr. Donovan because he was incompetent or otherwise unfit. But, we conclude that the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices. Therefore, Ms. Pritzlaff's claim against the Archdiocese is not capable of enforcement by the courts.
>
> The rationale for this rule [is] as follows:
> Examining the ministerial selection policy, which is 'infused with the religious tenets of the particular sect,' entangles the court in qualitative evaluation of religious norms. Negligence requires the court to create a 'reasonable bishop' norm. Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to probe the tort-law reasonableness of the church's mercy toward the offender. . . . If negligent selection of a potential pedophile for the religious office of priest, minister or rabbi is a tort as to future child victims, will civil courts also hear Title VII challenges by the non-selected seminarian against the theological seminary that declines to ordain a plaintiff into ministry because of

> his psychological profile? How far shall the courts' qualitative entanglement with religious selectivity extend?

Pritzlaff, 533 N.W. 2d at 790 (citations and quotations omitted). See also Heroux v. Roman Catholic Bishop of Providence, 1998 WL 388298 (R.I. 1998); Isely v. Capuchin Province, 880 F.Supp. 1138, 1150 (E.D.Mich.1995) (applying "religious autonomy" cases rebuking a secular court from deciding "religious matters."). These courts have specifically refused to entertain claims similar to those posed by Petitioner against a religious institution even when the underlying actions were based on improper sexual conduct. The Fourth District Court surely recognized that to allow Petitioner's claims, could lead to the "slippery slope" alluded to by the Wisconsin Supreme Court.

In Heroux, the Rhode Island Supreme Court found that if it were to impose due care standards on the regulation and supervision of Roman Catholic priests by their bishops, it would be exercising unconstitutional jurisdiction over the internal ecclesiastical decisions of the church. The plaintiffs claimed that they were sexually molested as children and pleaded various counts framed in negligent selection, supervision, retention, and assignment; premise liability; breach of special duty; and intentional conduct. The well-reasoned Heroux court answered the question of whether the First

Amendment would be violated if the Court exercised its common law jurisdiction to impose a duty on hierarchical defendants (Roman Catholic bishops and others who allegedly had religious authority to exercise supervision over priests) in the following way:

> This Court is satisfied that in order for it to determine whether or not the relation between a bishop and his priests is sufficiently agent-like to give rise to a common law duty to exercise reasonable care in the exercise of whatever supervisory authority the bishop has the Court is required to examine and analyze the rules, policies and doctrine of the Roman Catholic Church. That examination and analysis is prohibited by the First Amendment. The same prohibition will prevent this Court from analyzing those rules, doctrines and policies of the Roman Catholic religion to determine what the hierarchical defendants should have known, as distinguished from what they actually knew.
>
> * * *
>
> This Court concludes from its analysis of the authorities . . . that this Court lacks jurisdiction to adjudicate claims that the hierarchical defendants negligently hired, retained, disciplined or counseled their subordinate priests. Inquiry into such matters would plainly take this Court into religious questions beyond its jurisdiction. **Claims arising out of allegations of negligent supervision based on what the hierarchical defendants should have known . . . require the same invasion into religious rules and policy. . . .** It does not matter whether the legal theory under which the claims are brought is ordinary negligence, premises liability, breach of fiduciary relations, misrepresentation by concealment, or breach of parental responsibility by one in loco

> parentis. So long as the asserted cause of the injury alleged to be compensable by damages is a failure merely to exercise reasonable care to control the conduct of a religious subordinate, this Court will lack jurisdiction to adjudicate the claim.

Heroux at *9.[7] (Citations omitted).

In Gibson, the Missouri Supreme Court affirmed a trial court's decision that the First Amendment barred claims for negligent hiring, ordination and retention, negligent failure to supervise, negligent infliction of emotional distress, and independent negligence of the church defendant based on allegations of child sexual abuse. That court concluded that such claims would require a judicial inquiry which could result in an unconstitutional endorsement of religion by approving one model for a church's clerical decisions. See also Gray v. Ward, (affirming trial court's dismissal of plaintiff's counts of negligent hiring/ordination/retention of clergy, negligent failure to supervise clergy, and independent acts of negligence).

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[7] The Rhode Island Court did find that the church defendants could be liable to the extent the plaintiffs alleged intentional and deliberate conduct by the church of knowingly placing dangerous priests in positions where innocent child victims might encounter dangers. Id. at 10. However, in the instant case, no allegation of intentional misconduct was made and therefore is not before this Court.

The Wisconsin Supreme Court has held that the tort of negligent hiring and retention of a priest cannot be maintained against a religious governing body due to the concerns of excessive entanglement into the church's laws, practices and policies. In Pritzlaff, the court stated:

> Examining the ministerial selection policy, which is infused with religious tenants of the particular sect, **entangles the court in qualitative evaluation of religion norms. Negligence requires the court to create a reasonable bishop' norm.**

Id. (Emphasis supplied; quotations and citations omitted).

In Pritzlaff, the court went on to hold that:

> The First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices.

Id. at 790. See also L.L.N. v. Clauder, 563 N.W. 2d 434 (Wis. 1997) (granting summary judgment for an archdiocese on a negligent supervision claim finding the First Amendment prohibited claim because it could not be resolved on secular principles, but rather required inquiry into church Canons, policies and practices).

In Swanson v. Roman Catholic Bishop of Portland, 692 A. 2d 441 (Me. 1997), the Supreme Court of Maine held that the First Amendment barred the Petitioner's claims against the Roman Catholic Church and explained:

> It would . . . be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant. . . . Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination. . .Pastoral supervision is an ecclesiastical prerogative.
>
> We conclude that, on the facts of this case, imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy in the manner deemed proper by ecclesiastical authorities and would not serve a societal interest sufficient to overcome the religious freedoms inhibited.

Id. at 445.

Similarly, in the instant case Petitioner's claims for negligent hiring, selection, retention, and supervision would require secular courts and fact - finders to judge the reasonableness of a core religious decision of who should serve as clergy. Such scrutiny and judgment is clearly proscribed by the Constitution.

III. Petitioner's Breach of Fiduciary Duty Claim Is Constitutionally Barred.

Petitioner, and Amici on behalf of Petitioner, assert that a fiduciary relationship exists between parishioners and their church and clergy. However, rejecting the settled law of this state, Petitioner's claim rests not on some express undertaking for her benefit by a specific person creating a relationship of mutual trust, but only because of religious ideology. Any fiduciary duty alleged to exist and control this case can only be related to the status of Petitioner as a parishioner in the church. Therefore, this Court cannot evaluate this relationship or breach of the expectations that arise from it without delving into proscribed religious matters. Rather, Petitioner's status and its effects can only be evaluated by reference to religious principles and doctrine.

The United States Supreme Court has long held that "[m]an's relations to his God was made no concern of the State". United States v. Ballard, 322 U.S. 78, 86 (1944).[8] Numerous courts have refused to entertain civil claims

[8]Civil courts may not premise liability on conduct alleged to enforce or violate religious norms. For this reason, courts have rejected claims by those alleging harm from violation of a religious duty. Roman Catholic Bishop of San Diego v. Superior Court, 50 Cal.Rptr.2d 399 (Cal. App. 1996) (rejecting claim alleging violation of religious duty of chastity); O'Connor v. Diocese of Honolulu, 885 P.2d 361 (Haw. 1994) (rejecting claim to overturn excommunication); Grunwald v. Bornfreund, 696 F.Supp. 838, 840 (E.D.N.Y. 1988) (same). Courts recognize that the creation or recognition of a religious responsibility is an expression of a church's own tradition, doctrine, and Scripture, even if that duty is described in church law. See EEOC v. Catholic

against church defendants based on breach of special or "fiduciary" duties. In H.R.B v. J.L.G., 913 S.W. 2d 92 (Mo. Ct. App. 1995), the court concluded that religion was not merely incidental to the plaintiff's relationship with defendant church, but rather that it was the foundation of the relationship. It concluded that any duty owed by Catholic priests and or the diocese to its parishioners was a religious question beyond the jurisdiction of secular courts. In the instant case, because Petitioner has not and cannot allege that the Respondents owed her a duty without implicating religious practice, this Court must affirm the dismissal of the breach of fiduciary claims. See also Schmidt; Roppolo v. Moore, 644 So. 2d 206 (La. App. 1994).

In Gibson v. Brewer, the court dismissed the count of breach of fiduciary duty because plaintiff could not allege secular facts that the diocese supporting her general allegations that the diocese "stood in a fiduciary relationship with the plaintiffs as recipients of services controlled, directed and/or monitored" by diocese, and that diocese "held a fiduciary relationship of trust and confidence".

University, 83 F.3d 455, 463-65 (D.C. Cir. 1996) (canon law an expression of church doctrine). Thus, civil litigants may not use the civil courts as a way to enforce or seek relief from religious duties.

In Langford, supra the court held that a parishioner could not maintain a civil action against the defendant for breach of fiduciary duty which allegedly occurred when a priest seduced her. That court held that it could not evaluate such claims framed in terms of fiduciary duty, without violating the First Amendment because:

> [I]n order for plaintiff's cause of action to meet constitutional muster, the jury would have to be able to determine that a fiduciary relationship existed and premise this finding on neutral facts. The insurmountable difficulty facing plaintiff, this court holds, lies in the fact that **it is impossible to show the existence of a fiduciary relationship without resort to religious facts**. In order to consider the validity of plaintiff's claims of dependency and vulnerability, the jury would have to weigh and evaluate, inter alia, the legitimacy of plaintiff's beliefs, the tenets of the faith insofar as they reflect upon a priest's ability to act as God's emissary. . . .To instruct a jury on such matters is to venture into forbidden ecclesiastical terrain.

Langford, 677 N.Y.S. 2d at 901.[9]

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[9]Even the court of Smith v. O'Connell, relied upon by Petitioner, distinguished a breach of fiduciary claims from other claims. The O'Connell court held that when a claim rests on a breach of fiduciary duty theory, an examination of church doctrine might be required in order to ascertain the nature of any fiduciary relationship between the church officials and the victim. O'Connell, 986 F.Supp. at 81.

Moreover, the case of F.G. v. MacDonell, relied upon by Petitioner is inapplicable to the instant case. F.G., did not involve claims of fiduciary duty of church defendants, but rather addressed claims against the individual member of clergy with whom the Petitioner had a sexual relationship. This

In the instant case, and other cases involving sexual relations between religious leaders and adult parishioners, any special trust awarded to the clergy is derived from the parishioner's religious beliefs. If the clergy were not clergy or absent this religious relationship, the Petitioner's claims would be no different than one against a friend, neighbor or total stranger with whom she had such a relationship. See Langford, (noting once the religious aspect of the complaint was stripped away, plaintiff's only claim would be for seduction which was barred in that state).

In Doe v. Dorsey, the Fifth District Court held that similar allegations of misconduct were not actionable simply because the conduct occurred between an adult parishioner and priest. The court noted:

> It is his position that his consent should be considered invalid because the priest "deliberately and calculatingly caused a relationship whereby [the priest] was able to exert undue influence, dominion and control over the Plaintiff." We do not believe that [a crime] has been committed when a person of normal intelligence submits to a sexual relationship due to the "emotional attachment" to another person.

Court is not faced with the issue of whether an individual member of clergy can have a fiduciary duty to a parishioner.

Id. at 683 So. 2d at 617-618. Similarly, no breach of duty can arise when a person of normal intelligence submits to such a relationship, even if it is with a member of clergy.

Amici for Petitioner also assert that sexual relationships between any professionals and their clients are considered by law breaches of "mutual trust" and point to the enactment of several statutes.[10] Ironically, this argument actually supports Respondents argument that government entanglement in church matters is not tolerated by the Constitution in these situations. Had the Legislature wanted to prohibit sexual relations between a parishioner and clergy it could have enacted similar legislation. Instead, the

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[10] For example, Section 459.0141 states:

> Sexual misconduct in the practice of osteopathic medicine.
>
> > The osteopathic physician-patient relationship is founded on mutual trust. Sexual misconduct in the practice of osteopathic medicine means violation of the osteopathic physician-patient relationship through which the osteopathic physician uses the relationship to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient. Sexual misconduct in the practice of osteopathic medicine is prohibited.

Similar prohibitions have been enacted for dentists, Section 466.027, Florida Statutes; paramedics, Section 401.411, Florida Statutes (1998); doctors and others practicing medicine, Section 458.329, Florida Statutes (1998); and talent agents, Section 468.415, Florida Statutes (1998).

Legislature created exceptions for those regulations cited by Petitioner's Amici which could possibly be construed as applicable to clergy. Chapter 491, Florida Statutes, exempts clergy from the statutory regulations applying to psychotherapists.

491.014 Exemptions.--

> (3) **No provision of this chapter shall be construed** to limit the performance of activities of a rabbi, priest, minister, or clergyman of any religious denomination or sect, or use of the terms ``Christian counselor'' or ``Christian clinical counselor'' when the activities are within the scope of the performance of his regular or specialized ministerial duties and no compensation is received by him, or when such activities are performed, with or without compensation, by a person for or under the auspices or sponsorship, individually or in conjunction with others, of an established and legally cognizable church, denomination, or sect, and when the person rendering service remains accountable to the established authority thereof.

Section 491.014 (3), Florida Statutes. (Emphasis supplied). The statute unambiguously states that "no provision" of chapter 491 applies to a member of clergy acting as a member of clergy. The Legislature must have realized that any such enactment imposing a trust or "fiduciary" relationship between priest and parishioner would not withstand constitutionally scrutiny.

Petitioner's imposition of a fiduciary duty is by its very nature a result of the religious relationship she had with her church and clergy. This

relationship cannot be scrutinized without also looking at church doctrine or Plaintiff's expectations regarding the church. As such, any claims for breach of fiduciary duty by Respondents are barred by the First Amendment.

IV. Any Application of Agency Principles to Religious Institutions and Their Clergy Is Constitutionally Barred.

As explained above, it is clear that Petitioner cannot allege a breach of fiduciary duty by the Respondents in this case. However, even if she could assert such a claim against the individual priest, she could not impose vicarious liability on Respondents based on the priest's conduct.

In Swanson, the Supreme Court of Maine addressed the issue of whether it could constitutionally impose liability from secular agency principles against a religious organization. Swanson, 692 A. 2d at 442. That court held that the First Amendment barred the Plaintiff's claims against the Catholic Church and explained :

> When a civil court undertakes to compare a relationship between a religious institution and its clergy with the agency relationship of the business world, secular duties are necessarily introduced into the ecclesiastical relationship and **the risk of constitutional violation is evident**. . . . to permit civil courts to probe deeply enough into the allocation of power within a church so as to decide . . . religious law . . . would violate the First Amendment in much

> the same manner as civil determination of religious doctrine.
>
> Even assuming that the trial court could discern the existence of actual authority without determining questions of church doctrine or polity or could base the requisite agency relationship on apparent authority, constitutional obstacles remain. **The imposition of secular duties and liability on the church as a "principal" will infringe upon its right to determine the standards governing the relationship between the church, its bishop, and the parish priest**.
>
> * * *
>
> **Because of the existence of these constitutionally protected beliefs** governing ecclesiastical relationships, **clergy members cannot be treated in the law as though they were common law employees.** The traditional denominations each have their own intricate principles of governance, as to which the state has no rights of visitation. . . . **To import agency principles wholesale into church governance and to impose liability for any deviation from the secular standard is to impair the free exercise of religion and to control denominational governance**.

Swanson, 692 A.2d at 443-445.(Emphasis supplied, footnotes and citations omitted).

Even if a secular court had jurisdiction over a claim of vicarious liability of a church for breach of fiduciary duty of its clergy, Petitioner cannot allege secular facts which would establish that the church was vicariously liable.

Under Florida law, in order to find vicarious liability, the agent must have acted within the course and scope of his or her duties. Garcia v. Duffy, 492 So. 2d 435 (Fla. 2d DCA 1986); Friedman v. Mutual Broadcasting System, Inc., 380 So. 2d 1313 (Fla. 3d DCA 1980). Whether a member of clergy was acting within the course and scope of his or her duties for purposes of vicarious liability can be decided by a Court as a matter of law. See e.g. Perez v. Zazo, 498 So. 2d 463 (Fla. 3d DCA 1986); Reina v. Metropolitan Dade County, 285 So. 2d 648 (Fla. 3d DCA 1973). A Florida court would have to consider the following factors when determining whether a clergy member's alleged conduct was within his or her duties as a spiritual leader:

> (1) Whether the alleged conduct was the kind the church or establishment gave to the clergy authority to perform (i.e., religious in nature);
>
> (2) Did the conduct occur within the time and space limits of the clergy's canonical or religious duties; and
>
> (3) Was the conduct activated at least in part by a desire to serve the religious establishment or church.

Sussman v. Florida East Coast Properties Inc., 557 So. 2d 74, 75-76 (Fla. 3d DCA 1990). Problems of excessive entanglement are unavoidable if the court is asked to determine whether a priest, minister or rabbi was on or off duty when he engaged in conduct or whether that the conduct was against the

laws of the religious denomination and beyond the scope of his employment. Pritzlaff, 533 N.W. 2d at 791.

Other states, including those relied upon by Petitioner, have refused to hold religious institutions vicariously liable for conduct of their clergy. For example, in Destefano v. Grabrian, the court addressed a situation similar to the instant case. The court refused to hold the diocese vicariously liable for the claims against a priest who engaged in a sexual relationship with a woman who sought marital counseling. The court explained:

> A priest's violation of his vow of celibacy is contrary to the instructions and doctrines of the Catholic church . . . When a priest has sexual intercourse with a parishioner it is not part of the priest's duties nor customary within the business of the church. Such conduct is contrary to the principles of Catholicism and is not incidental to the tasks assigned a priest by the diocese. Under the facts of this case there is no basis for imputing vicarious liability to the diocese for the alleged conduct of Grabrian.

Id. at 287. See also Sanders v. Casa View Baptist Church, 134 F. 3d 331 (5th Cir. 1998) (affirming district court's decision to grant summary judgment for church on vicarious liability, breach of fiduciary duty, and negligence claims arising out of alleged conduct of its minister in engaging in sexual relations with a parishioner who sought marital counseling, where there was no

evidence that such conduct fell within the scope of minister's actual or apparent authority or that church should have known that minister was likely to engage in sexual misconduct); Moses (holding Episcopal priest was not acting within the scope of his church duties when he engaged in sexual relations and thus there could be no vicarious liability imputed to the diocese or bishop); Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66 (D. Conn. 1995) (granting summary judgment on counts relating to vicarious liability of Diocese and bishop finding nothing in the record indicating that defendant priest's sexual abuse of minor children was motivated by any purpose that would serve Church).

Based on the overwhelming case law in this area, it is clear that the secular agency-principal concepts of law cannot be applied in this case without delving into the religious and canonical relationships between clergy and religious institutions. Additionally, if this Court allowed jurisdiction, sexual misconduct by clergy would never fall into the realm of their religious duties. Therefore, any claims for vicarious liability of a religious institution for the independent acts of its clergy must be barred by the First Amendment.

CONCLUSION

For the reasons set forth above and in Respondents' Brief on the Merits, Amici urge this Court to affirm the Fourth District Court and the trial court's decision finding that the First Amendment bars Petitioner's claims against Respondents.

Respectfully Submitted, this _____ day of _____, 1999.

GILBRIDE, HELLER & BROWN, P.A.
Attorneys for Archdiocese of Miami
One Biscayne Tower - Suite 1570
Two South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 358-3580

By:_____
JAMES F. GILBRIDE
Florida Bar No. 137168
HETAL H. DESAI
Florida Bar No. 050938

J. PATRICK FITZGERALD, ESQ.
General Counsel for Archdiocese of Miami
110 Merrick Way, Suite, 3-B
Coral Gables, Florida 33134

GEORGE MEROS, ESQ.
RUMBERGER, KIRK & CALDWELL
General Counsel for J. Lloyd Knox, Presiding Bishop of The Florida Annual Conference of the United Methodist Church
301 S. Bronough Street, Suite 600
Tallahassee, Florida 32301
Phone: (850) 222-6550

Of Counsel:
MARK E. CHOPKO, ESQ.
General Counsel of the United States Catholic Conference
3211 4th Street, N.E.
Washington, D.C. 20017
Phone: (202) 541-3300

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail to the following on this ___ day of August, 1999:

GILBRIDE, HELLER & BROWN, P.A.
Attorneys for Archbishop John C. Favalora
One Biscayne Tower - Suite 1570
Two South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 358-3580

By:_____
JAMES F. GILBRIDE
Florida Bar No. 137168
HETAL H. DESAI
Florida Bar No. 050938

CO-COUNSEL:

J. PATRICK FITZGERALD, ESQ.
110 Merrick Way, Suite 3-B
Coral Gables, Florida 33134

SERVICE LIST

Randy D. Ellison, Esq.,
1645 Palm Beach Lakes Boulevard
Suite 350
West Palm Beach, Florida 33401-2289

Edward Campbell, Esq.
1675 Palm Beach Lakes Boulevard
7th Floor, West Palm Beach
Florida 33401

Thomas E. Ice, Esq.
BARWICK, DILLIAN, LAMBERT & ICE
999 Brickell Avenue
Suite 555
Miami, Florida 33131

Christopher Renzulli, Esq.
RENZULLI & RUTHERFORD
300 E. 42 Street
New York, NY 10017

William R. King, Esq.
P.O. Box 12277
Lake Park, FL 33403-0277

Philip M. Burlington, Esq.
CARUSO, BURLINGTON, BOHN & COMPIANI, P.A.
1615 Forum Place
Suite 3A
West Palm Beach, FL 33401

George Meros, Esq.
RUMBERGER, KIRK & CALDWELL
301 Bronough Street
Suite 600
Tallahassee, FL 32301

May Cain, Esq.
CAIN & SNIHUR
Skylake State Bank Building
1550 N.E. Miami Gardens Drive #304
North Miami Beach, FL 33179