IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-179

JAN MALICKI,

PETITIONER,

VS.

JANE DOE I, ET AL.,

RESPONDENTS.

AMICUS BRIEF OF MIAMI SHORES PRESBYTERIAN CHURCH

ON DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

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INTEREST OF AMICUS

Miami Shores Presbyterian Church is a church in Miami-Dade County. The issue in this case concerns liability of religious institutions for employment-related conduct. This issue is of importance to Miami Shores Presbyterian Church.

STATEMENT OF THE CASE AND FACTS

We rely upon the opinion of the district court, and the briefs of the parties.

SUMMARY OF THE ARGUMENT

Because the lawsuit against the Church Defendants at its heart concerns a religious institution's selection of its spiritual leader, the suit should be dismissed. The application of tort notions of reasonableness to the selection of clergy will unconstitutionally interfere with religious freedom.

Two of Florida's district courts of appeal have stated—but not applied—an exception to the rule of nonjusticiability, in situations where the clergy's conduct was criminal. The distinction should not be recognized. If a negligent hiring lawsuit intrudes into core constitutionally-protected areas, then the lawsuit is barred regardless of the age of the plaintiff. Furthermore, the proposed exception is undefined and will be difficult to apply.

ARGUMENT

THE COURTS SHOULD NOT EXERCISE JURISDICTION OVER THIS LAWSUIT, WHICH AT ITS CORE CONCERNS A RELIGIOUS INSTITUTION'S SELECTION OF ITS SPIRITUAL LEADER

The Plaintiffs' lawsuit at its core second-guesses a religious institution's selection of its spiritual leader. This issue is beyond the jurisdiction of the civil courts. The lawsuit should be dismissed.

A. The Church Defendants are guaranteed autonomy on internal matters, including the selection of clergy, in order to safeguard their faith

Under the First Amendment, our law "knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 80 U.S. 679, 728 (1871). Accordingly, courts are required to "defer to any decision rendered by the church authorities in matters of 'discipline or of faith, or ecclesiastical rule, custom or law.'" *Townsend v. Teagle*, 467 So. 2d 772, 775 (Fla. 1st DCA 1985).

It is impossible to explore the relationship between a church and its clergy without judging decisions made by church authorities in matters of discipline, ecclesiastical rule, or religious customs and laws. "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship

must necessarily be recognized as of prime ecclesiastical concern." *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972). Therefore, a church's relationship with its clergy is entitled to extraordinary protection from governmental regulation, and the judiciary is "obliged to defer to the hierarchical church's internal decisional processes on matters of internal church discipline and government." *Franzen v. Poulos*, 604 So.2d 1260, 1263 (Fla. 3d DCA 1992).

Where the lawsuit is against a religious institution and concerns the relationship between the religious institution and its clergy, the First Amendment requires a policy of ecclesiastical abstention. This policy of non-involvement exists even where a plaintiff argues that the claim is based on non-religious grounds; where the selection of clergy is involved, *any* government entanglement is unacceptable. "The interaction between a church and its pastor is not only an integral part of church government, but also all matters touching this relationship are of ecclesiastical concern." *Yaggie v. Indiana-Kentucky Synod*, 64 F.3d 664 (6th Cir. 1995) (unpublished decision, available on Westlaw, 1995 WL 499468).

Following these principles, the courts have refused to interfere in internal church matters, and particularly in the churches' selection of clergy. For example, the courts have held that "civil court review of ecclesiastical decisions of church tribunals, particularly those pertaining to the hiring or firing of clergy, are *in themselves* an

'extensive inquiry' into religious law and practice, and hence forbidden by the First Amendment." *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) (emphasis in original). The Eleventh Circuit recently stated that "[a]n attempt by the government to regulate the relationship between a church and its clergy would infringe upon the church's right to be the sole governing body of its ecclesiastical rules and religious doctrine." *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000). The Fifth Circuit similarly stated that it "cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church." *Combs v. Central Texas Annual Conference*, 173 F.3d 343, 350 (5th Cir. 1999). "[W]e cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the 'gifts and graces' of a minister must be left to ecclesiastical institutions." *Equal Employment Opportunity Commission v. Catholic University*, 83 F.3d 455, 463 (D.C. Cir. 1996) (citations omitted).

The courts have refused to second-guess the selection of clergy, even when there are compelling interests involved. For example, the courts will not review a claim that a clergy member was fired in violation of the civil rights laws, even though

there is a compelling governmental interest behind the enforcement of those laws. *See Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985). This is the "ministerial exception" to the civil rights laws. *Equal Employment Opportunity Commission v. Catholic University*, 83 F.3d at 462.

B. Tort law standards of "reasonableness" cannot constitutionally be applied to the church-clergy relationship

Based on these principles, courts have declined to create an exception to the ecclesiastical abstention doctrine for claims alleging the negligent hiring and retention of clergy. They reason that secular standards for determining negligence cannot be applied to the church-clergy relationship without also examining church doctrine. If a court accepts jurisdiction and then ignores church doctrine, then it impermissibly imposes secular notions of conduct on the church. If the court accepts jurisdiction and considers church doctrine, then it is put in the position of judging the validity of religious beliefs. Either approach is unconstitutional. It is this bind that has led many courts to conclude, sometimes reluctantly but of necessity, that civil courts may not decide claims against religious institutions for negligent hiring and supervision of clergy.[1]

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[1]*See Roppolo v. Moore*, 644 So. 2d 206 (La. Ct. App. 1994); *Swanson v. Roman Catholic Bishop*, 692 A.2d 441 (Ma. 1997); *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997); *Germain v. Pullman Baptist Church*, 980 P.2d 809 (Wash. Ct. App. 1999);

The courts have recognized that the hiring of clergy is "a 'quintessentially religious' matter, 'whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church.'" *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. 1997**)** (citations omitted). Review of a religious institution's selection of clergy will inevitably require the consideration of religious doctrine.

A religious institution's standards for selecting clergy may be far different than the standards imposed by a civil court claim for negligent hiring. The tort of negligent hiring, as administered by a jury, counsels great caution in hiring employees who have misbehaved. But a religious institution may consider other factors that are based in faith. "'Mercy and forgiveness of sin may be concepts familiar to bankers but they have no place in the discipline of bank tellers. For clergy, they are interwoven in the institution's norms and practices.'" *L.L.N. v. Clauder*, 563 N.W.2d 434, 441 (Wisc. 1997) (quoting James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 St.

L.L.N. v. Clauder, 563 N.W.2d 434 (Wisc. 1997); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780 (Wisc. 1995); *Miriam T. v. Church Mutual Insurance Co.*, 578 N.W.2d 208 (Wisc. Ct. App. 1998) (text available on Westlaw); *Isely v. Capuchin Province*, 880 F. Supp. 1138 (E.D. Mich. 1995); *Dausch v. Rykse*, 1993 U.S. Dist. Lexis 1448 (E.D. Ill. Feb. 10, 1993), *affirmed in part, reversed in part on other grounds*, 52 F.3d 1425 (7th Cir. 1994); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991); *Heroux v. Roman Catholic Bishop*, 1998 WL 388298 (R.I. Super. 1998). *See generally N.H. v. Presbyterian Church (U.S.A.)*, 998 P.2d 592, 602 n.47 (Okla. 1999) (noting split of authority, and collecting cases).

Thomas L. Rev. 31, 47 (1994)).

If a religious institution is forced to defend a claim for negligent hiring or retention of clergy, then it may assert a defense based on its own religious beliefs, such as the importance of forgiveness and mercy. The sincerity and wisdom of such considerations will then be at issue. "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." *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 790 (Wisc. 1995) (quoting O'Reilly & Strasser, 7 St. Thomas L. Rev. at 47). *Accord Swanson v. Roman Catholic Bishop*, 692 A.2d 441, 445 (Ma. 1997).

Accordingly, the Wisconsin Supreme Court has held that the Constitution prevents the courts from determining what makes one competent to serve as clergy, since "[e]xamining the ministerial selection policy, which is 'infused with the religious tenets of the particular sect,' entangles the court in qualitative evaluation of religious norms." *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d at 790 (quoting O'Reilly & Strasser, 7 St. Thomas L. Rev. at 47). The Missouri Supreme Court has held that "Questions of hiring, ordaining, and retaining clergy. . . necessarily involve interpretation of religious doctrine, policy, and administration. Such excessive entanglement between church and state has the effect of inhibiting religion, in

violation of the First Amendment." *Gibson v. Brewer*, 952 S.W.2d 239, 246-47 (Mo. 1997). *See also Swanson v. Roman Catholic Bishop*, 692 A.2d 441 (Maine 1997).

The specter of lawsuits that evaluate a church's selection and retention of clergy will have a chilling effect on religious freedom. Churches, under the threat of potentially crippling damage awards, will have no choice but to institute hiring standards with an eye toward possible future lawsuits. Merely the threat of litigation will thus have the constitutionally-impermissible effect of having the government set the standards for selection of clergy. *See Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991); *Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America*, 860 F. Supp. 1194, 1199 (W.D. Ky. 1994), *aff'd*, 64 F.3d 664 (6th Cir. 1995).

C. Florida's conflicting law on constitutional limitations on a lawsuit against a church for negligent selection of clergy

Three Florida district courts of appeal have addressed the question of liability for negligent selection of clergy. The districts have gone off into different directions. Two of the courts have shied away from the logical result of their analyses. Another court has, we submit, failed to recognize the importance of the constitutional rights involved.

In *Doe v. Dorsey*, 683 So. 2d 614 (Fla. 5th DCA 1996), the plaintiff had a

sexual relationship with a priest. The relationship began when the plaintiff was 13, and continued until he was 25. Two years later, at age 27, he filed suit. The Fifth District held that the claims based on the sexual contact when the plaintiff was a minor were barred by the statute of limitation. The court was thus not confronted with the question of whether there was a constitutional bar to the claims arising from the sexual contact with the minor. "[T]he issue of whether the First Amendment protects the church when its clergy commits criminal acts is not before us." 683 So. 2d at 617. Although the issue was not before the Court, it nevertheless expressed its view: "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.*

The case of *Doe v. Evans*, 718 So. 2d 286 (Fla. 4th DCA 1998), involved a claim by an adult women that her pastor had engaged in a sexual relationship with her while the pastor was providing pastoral counseling. The court found that the claims were constitutionally barred, and extensively reviewed the reasons.

The court stated that "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 the more compelling." *Id*. at 291. The court explained that "'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.*

The Fourth District's logic for the most part was not limited to claims brought by adults. It spoke broadly of the constitutional problems with second-guessing a religious institution's selection of its clergy. But the court also noted that the case did not involve a plaintiff who was a minor at the time of the abuse. The court stated that "Those courts that find no First Amendment bar to claims of negligent hiring, retention, and supervision generally do so in the context of allegations involving sexual assault on a child." 718 So. 2d at 289. However, of the next four cases cited by the Fourth District in support of its ruling that the plaintiff's claims were constitutionally barred, three involved claims by minors. *Id*. at 290 (citing *Swanson v. Roman Catholic Bishop*, 692 So. 2d 441 (Me. 1997); *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997); *Pritzlaff v. Archdiocese*, 533 N.W.2d 780 (Wisc. 1995); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991)).

In these two DCA opinions—*Doe v. Dorsey* and *Doe v. Evans*—the courts found that the plaintiffs' claims were barred. Yet together, the two cases arguably

stated a rule: claims against religious institutions for negligent selection of clergy are barred if the underlying conduct was not criminal, but such claims could proceed if the conduct was criminal. This criminality distinction appears in practically no law outside of Florida.

In the case under review, *Doe v. Malicki*, 771 So. 2d 545 (Fla. 3d DCA 2000), two plaintiffs sued a church and a priest based on sexual molestation, assault, and battery by a priest. One of the plaintiffs was a minor at the time of the incident, and the other was an adult. The trial court dismissed the claims on constitutional grounds, but the Third District reversed.

After reviewing the diverging authorities and under the facts of the case, the Third District found to be "more persuasive" the authorities holding that there was no constitutional bar. The court suggested that there was nothing religious about the selection of clergy: "The issue to be determined by the court . . . is whether the defendants had reason to know of Father Malicki's misconduct and did nothing to prevent reasonably foreseeable harm from being inflicted upon the plaintiffs. This determination is one governed by tort law and does not require inquiry into the religious doctrines and practices of the Catholic church." Although the court noted that the complaint alleged "sexual assaults and/or batteries," it did not state a rule that the constitutional bar turns on the criminality of the conduct.

The case provided a good opportunity for the Third District to comprehensively address the issue, as the case involved one adult plaintiff and one minor plaintiff. But the court did not focus on these facts, and instead broadly suggested that *all* claims against churches for negligent selection of clergy could proceed. According to the court, a claim that a church negligently selected its clergy could be decided based on "neutral principles," without considering the religious doctrines and practices of the church. The court stated that "It is well settled that applying neutral principles of law to the secular conduct of a religious institution does not violate the First Amendment. *Jones v. Wolf*, 443 U.S. 595, 99 S. Ct. 3020, 61 L.Ed.2d 775 (1979)."

D. The flawed attempts of Florida courts to create exceptions to the rule against judicial review of clergy employment decisions

Florida law in this area is in disarray. We submit that the *Dorsey* and *Evans* courts understood the importance of the issues involved, but shied away from the inevitable result of their analysis. The *Malicki* court, on the other hand, failed to understand the importance of the issues involved.

The fundamental principle—understood by the *Dorsey* and *Evans* courts—is that a lawsuit challenging a church's decision to hire clergy inevitably intrudes into constitutionally-protected areas. As the Fourth District noted, "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." *Doe v. Evans*, 718 So. 2d at 291. When the question before the court is whether the church properly hired its spiritual leader, there is no way to avoid core religious issues.

The *Dorsey* and *Evans* courts tried to avoid the necessary conclusion of their analysis. Confronted with appalling facts—clergy alleged to have molested children—the courts have created an exception to their analysis. But they have yet to apply this exception, and their analysis permits no exceptions. If a negligent hiring of clergy lawsuit intrudes into core constitutionally-protected areas, then the lawsuit is barred regardless of the age of the plaintiff. The abuser can be sued, the abuser can be punished. But the church's constitutionally-protected decision about who should serve as its religious leader retains its constitutional protection.

E. The Plaintiffs' attempt to find an exception to the rule against judicial resolution of clergy selection disputes

The Plaintiffs and some courts have attempted to avoid the rule against judicial determination of lawsuits which have at their core the second-guessing of a church's selection of clergy. These attempts should be rejected.

Criminal conduct exception. Two Florida courts have in *dicta* suggested that there is a "criminal conduct" exception to the general rule that courts will not adjudicate lawsuits which second-guess a religious institution's selection of its spiritual leader. *Doe v. Evans*, 718 So. 2d 286 (Fla. 4th DCA 1998); *Doe v. Dorsey*, 683 So. 2d 614 (Fla. 5th DCA 1996). But these Courts never had to apply this purported exception, since those cases did not involve claims by minors. In the first Florida appellate case involving a minor, the Court did *not* recognize any distinction based on the criminality of the conduct. *Doe v. Malicki*, 771 So. 2d 545 (Fla. 3d DCA 2000).

Since the criminality distinction has been approved only in *dicta*, no court has had to apply it. If a court ever has to apply it, its problems will become apparent.

The elements of claims for negligent hiring and retention are well-established. *See Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744 (Fla. 1st DCA 1991). The criminality distinction would add an additional element: was the minister's conduct criminal? This new element will raise many questions.

Does the criminality exception apply when the crime alleged is a misdemeanor? Does the exception apply even if the alleged molester was acquitted of the criminal charges? For example, what if the minister is acquitted of felony sexual battery upon a child, but is found guilty of a misdemeanor of simple battery? Does the exception

apply then? Who decides whether the criminal exception applies? Does the judge make a factual determination whether the acts were in fact criminal? Or is that issue decided by a jury? May the outcome of the criminal action be considered in determining whether the exception applies? None of these issues have been addressed, much less decided, by the courts approving the criminality exception. And trial courts will have to devote considerable time to these issues in determining whether they have jurisdiction. This inquiry (including the necessary discovery) will itself interfere with the religious freedom of the church. *See Hadnot v. Shaw*, 826 P.2d 978, 989 (Okla. 1992).[2]

Neutral principles of law. Courts exercising jurisdiction over claims for negligent hiring and supervision of clergy have asserted that the cases can be decided without delving into church doctrine, by simply applying "neutral principles of law." The Third District, in relying upon the doctrine in *Malicki*, stated that "It is well settled that applying neutral principles of law to the secular conduct of a religious institution does not violate the First Amendment." But the "neutral principles"

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[2]Indeed, if the level of culpability is to be considered, it makes more sense that it be the culpability of the *church*, rather the perpetrator. One court has held that if the church defendant had intentionally failed to supervise the clergy, then the church could be held liable. *Gibson v. Brewer*, 952 S.W.2d 239, 248 (Mo. 1997). The basis of the court's ruling was that if a church is to lose its constitutional right to select and retain its clergy, it should be because of the church's *own* intentional misconduct in supervising clergy, not because of the intentional misconduct of its clergy.

doctrine does not apply to clergy hiring cases.

The Third District relied on *Jones v. Wolf*, 443 U.S. 595 (1979), but in that case the Supreme Court held that "There are neutral principles of law, *developed for use in all property disputes,* which can be applied without 'establishing' churches to which property is awarded." *Jones v. Wolf*, 443 U.S. 595, 611 (1979) (emphasis added).

Courts since then have held that the doctrine is limited to church property disputes. A federal court of appeals stated that "the 'neutral principles' exception to the usual rule of deference applies only to cases involving disputes over church property." *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986). The court continued:

> The "neutral principles" doctrine has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be. The claim here relates to appellant's status and employment as a minister of the church. It therefore concerns internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law. The neutral principles doctrine relating to church property is simply not applicable in the instant case.

Id. (citation omitted). A state court reached the same conclusion: "The present case does not involve a property dispute or a membership dispute. As a result, neutral principles of law analysis is inappropriate." *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606, 611 (Minn. Ct. App. 1996). *Accord*

Burgess v. Rock Creek Baptist Church, 734 F. Supp. 30, 32 (D. D.C. 1990).

If the present case involved only church property, then the "neutral principles" doctrine might allow the court to exercise jurisdiction. But this case involves the Church Defendants' selection of clergy. The "neutral principles" doctrine does not apply.

CONCLUSION

At its core, this lawsuit concerns the selection of clergy, a matter immune to civil court review. None of the exceptions proposed justifies violating the principle of non-interference in the selection of clergy. For these reasons, the Court should reverse the opinion of the district court, and order that the trial court dismiss the lawsuit against the Church Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND TYPE SIZE

WE HEREBY CERTIFY that true and correct copies of the foregoing were mailed this 18th day of June, 2001, to: Douglas M. McIntosh, Esq., McIntosh, Sawran, Peltz and Cartaya, 1776 E. Sunrise Boulevard, Ft. Lauderdale, FL 33304-3046; James F. Gilbride, Esq., and Adam D. Horowitz, Esq., Gilbride, Heller & Brown, P.A., One Biscayne Tower, Suite 1570, 2 S. Biscayne Boulevard, Miami, FL 33131; J. Patrick Fitzgerald, Esq., 110 Merrick Way, Suite 3B, Coral Gables, FL 33134; William J. Snihur, Esq., and May Cain, Esq., Cain & Snihur, 1550 N.E. Miami Gardens Drive, Suite 304, North Miami Beach, FL 33179-4836.

We certify that this brief is in Times Roman, 14 point, proportional type.

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