Kenneth Morrison, et al. v. Roman Catholic Diocese of Jackson, Mississippi, et al.

IN THE SUPREME COURT
OF MISSISSIPPI

No. 2003-M-00743

In re: Catholic Diocese of Jackson, Mississippi

Consolidated with

No. 2003-M-00744

Kenneth Morrison, et al.,
Appellee,

v.

Roman Catholic Diocese of Jackson, Mississippi, et al.,
Appellants.

Brief for *Amici Curiae* In Support of Appellant

Filed By

THE GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH,
THE NATIONAL ASSOCIATION OF EVANGELICALS,
THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,
THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL,
THE WORLDWIDE CHURCH OF GOD,
THE MISSISSIPPI DISTRICT OF THE CHURCH OF THE NAZARENE,
THE MISSISSIPPI DISTRICT OF THE UNITED PENTECOSTAL CHURCH INTERNATIONAL, and
REV. BARBARA E. JONES, EXECUTIVE REGIONAL MINISTER, AND REV. LARRY METZGER, REGIONAL MODERATOR, OF THE GREAT RIVER REGION OF THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST) and SOUTHEASTERN SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA

SUMMARY OF ARGUMENT

This case arises out of the alleged sexual molestation of three brothers by a close family friend, a former Catholic priest, three decades ago. Sexual abuse of children is a heinous crime and grave evil. The *amici* condemn such conduct whenever and wherever it occurs. The larger issue raised here from the amici's perspective is not whether a claimed child abuser is criminally

and civilly responsible for the harm he causes, but how theories of liability against a religious denomination and its leaders for the acts of a disobedient minister can be squared with the constitutional command that civil courts not judge matters of religious governance.

On the record presented here, this case should be dismissed for lack of subject matter jurisdiction.1 Plaintiffs' claims, if allowed to proceed, would inevitably entangle the court in decisions that religious denominations make about how to govern and minister in violation of the Constitutions of the United States and Mississippi.

There are at least four constitutional problems. First, Plaintiffs seek to make the Catholic Diocese of Jackson and its religious leaders liable for conduct of a former priest and alleged child abuser whenever and wherever that conduct occurs, thus placing special disabilities upon religious organizations and leaders that are inapplicable to their secular counterparts. Second, Plaintiffs seek to make the defendant bishops and diocese liable as fiduciaries based solely on their religious status, a theory of recovery that would make religious organizations and leaders fiduciaries of <u>everyone</u> in their denomination. Third, Plaintiffs seek to make Defendants liable for ordination and religious speech claims, theories of recovery that no court in the country has allowed because they are quintessentially religious and therefore nonjusticiable. Fourth, Plaintiffs bring causes of action for negligent assignment, supervision and retention, claims which superimpose a single secular standard of governance that runs roughshod over the rights of the country's diverse religious denominations to govern themselves on matters of religious leadership, ministry, and church polity.

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1 If this Court looks beyond the affidavits, the case should still be dismissed because, as the Complaint discloses on its face, all the claims are barred by the statute of limitations, and virtually all the causes of action pleaded fall outside the bounds of Mississippi common law.

As *amici*, we do not seek an "exception" to the rule of law. Nor do we argue for "blanket immunity." We do conclude, however, that the specific claims pleaded by plaintiffs should be dismissed consistent with the rule of law.

Argument

Plaintiffs argue far beyond the contours of the common law to avoid explicit substantive and procedural barriers to their case on the merits.2 Followed to their logical conclusion, however, Plaintiffs' arguments would inevitably entangle this Court in a constitutional thicket. This case therefore creates a number of serious problems for religious organizations and opens the door to excessive involvement by government in the internal affairs of churches, a door closed by the Framers of the Constitution. The *amici* write not to urge blanket immunity for churches, for we do not believe that is the constitutional norm, but to urge this Court to dispose of the various claims in accord with settled law, including the constitutional rule that religion may not be singled out for special legal disabilities. This case presents four discrete problems, each of constitutional dimension, which we take up *seriatim*. These problems can be avoided by applying the common law,3 but if pressed by Plaintiffs, the constitutional problems are inevitable and dispositive of this appeal.

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2 Because Defendants supported their motion to dismiss with affidavits, the burden shifts to Plaintiff to show by a preponderance of evidence that jurisdiction exists. *Kizer v. Fina. Am. Credit Corp.*, 454 F.Supp. 937, 938 (N.D.Miss. 1978). Defendants' affidavits are, however, undisputed. An assertion of jurisdiction would therefore be improper for the reasons stated in the original motion and unrebutted affidavits. See Brief of Appellants at 35. Plaintiff's claims are also barred under the statute of limitations. Id. at n.3.

3 *See, e.g., N.H. v. Presbyterian Church*, 998 P.2d 592 (Oklahoma 1999) (affirming on non-constitutional grounds the judgment of a lower court which had dismissed various claims in sexual misconduct case on constitutional grounds).

I. The United States and Mississippi Constitutions Prevent the Imposition of Special Obligations and Disabilities Upon Clergy

Among the theories woven into the Complaint is the claim that the Diocese and bishop exercised an "authority" over the abuser priest that "exceeds the customary employer-employee relationship," thereby making the Defendant Diocese "vicariously liable for all actions of the priest, wherever and whenever those acts occurred, Complaint ¶ 71 (emphasis added), even for conduct that occurred when, as a family friend, household dinner companion, and "fixture" around the Plaintiffs' household, the priest socialized with the family at their home and lake house. The Complaint includes no allegation that the priest was engaged in the work of the Diocese during these numerous personal and social visits.4

No theory of liability recognized by this Court would support the notion that a master is liable for all acts of its servants. More importantly, allowing such a claim singularly against ministers runs headlong into the Free Exercise and Establishment Clauses of the First Amendment, which forbid the imposition of special duties and disabilities upon clergy and churches.5 Ministers and religious denominations cannot constitutionally be singled out for disadvantageous treatment under the law.6

4As a matter of law, an employer is not liable for conduct that occurs when its employees are away socializing. For a particular application of this idea to ministers, *see, e.g., Ambrosio v. Price*, 495 F.Supp. 381 (D. Neb. 1979), holding that there is no tort liability for negligence arising out of priest's trip to see social acquaintances.

5 *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993) (striking down on free exercise grounds a Florida ordinance that effectively singled out religious denomination for prohibition against animal slaughter); *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down on free exercise grounds a Tennessee law that barred ministers, and no one else, from serving as legislators); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (noting that the objective of the Establishment Clause is "to prevent, as far as possible, the intrusion of either [state or religious organizations] into the precincts of the other").

Indeed, a rule of law that made churches and church officers, in contradistinction to their secular counterparts, absolute guarantors of the conduct of their ministers, whenever and wherever that conduct occurs, would not survive scrutiny under the Equal Protection Clause. Religion itself is a prohibited basis for governmental classifications, one which triggers strict scrutiny. *Employment Division v. Smith*, 494 U.S. 872, 882 (1990); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1970) (religion is an "inherent suspect classification"). There is no reason, let alone a compelling one, to single out religious organizations and religious leaders for the sort of special liability that Plaintiffs seek. Moreover, the positive protections for religion that are guaranteed under the First Amendment and its Mississippi counterpart positively foreclose such attempts.

No court in the Nation has accepted the theory that religious denominations can be held liable for special duties that are inapplicable to secular entities. Plaintiffs' attempt to hold the Diocese and Bishop liable, not because of an employment relationship, but because of a religious or canonical relationship with the priest, confuses religious and canonical duties with civil ones. Such a theory, if permitted, exposes churches to civil liability simply because they are churches, which, for the above reasons, is patently unconstitutional.

II. Plaintiffs' Fiduciary Duty Claim Fails as a Matter of Law and Otherwise Infringes Upon the Constitution

Plaintiffs assert that each Defendant owed each Plaintiff a fiduciary duty. Complaint ¶ 55 (alleging a legal conclusion that "All Defendants are in a confidential or fiduciary relationship with the Plaintiffs") (emphasis added). There is no allegation that any Defendant Diocese or Bishop had any personal or distinctive relationship of any kind with, or engaged in any

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6 *Id.*

undertaking on behalf of, any of the Plaintiffs. Thus, Plaintiffs' fiduciary duty theory is based entirely on Defendants' ecclesial status or office. Complaint, ¶ 73. No court has accepted such a theory, which would have the effect of subjecting churches to a special civil responsibility simply because they are churches, which is constitutionally forbidden. *Church of Lukumi Babalu Aye*, 508 U.S., at 531-32 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue … prohibits conduct because it is undertaken for religious reasons").

It is axiomatic that the existence of a fiduciary duty must be established before a breach of that duty can arise. *Merchants & Planters Bank v. Williamson*, 691 So.2d 398, 403 (Miss. 1997). A fiduciary relationship generally involves "an overmastering influence or, in the other, weakness, dependence, or trust, justifiably reposed." *Id*. at 403; *accord Madden v. Rhodes*, 626 So.2d 608, 617 (Miss. 1993) ("[I]n determining whether or not a fiduciary or confidential relationship existed between two persons, we have looked to see if one person depends upon another," quoting *In re Will and Estate of Varvaris*, 477 So.2d 273, 278 (Miss. 1985)). A classification of a relationship as fiduciary as a matter of law "is properly reserved for certain relationships such as that between a guardian and ward or between a trustee and a beneficiary of a trust." *Id*. at 404.

It is obvious from their Complaint that Plaintiffs do not allege that any Defendant other than the perpetrator priest had any relationship with the Plaintiffs whatsoever, let alone a relationship that this Court has recognized as fiduciary.7 Plaintiffs' only remaining escape hatch

7 Courts often cite non-constitutional reasons for rejecting breach of fiduciary duty claims against churches, making it unnecessary to reach constitutional issues. *See, e.g., Bryan R. v. Watchtower Bible and Tract Society*, 738 A.2d 839, 845 (Maine 1999) (rejecting fiduciary duty claim because it was not fact-specific enough and the church had no "generalized fiduciary duty … to protect members of its congregation from other members"); *Gray v. Ward*, 950 S.W.2d 232 (Mo. 1997) (rejecting fiduciary duty claim as a recharacterization of other, barred claims); *L.C. v. R.P.*, 563 N.W.2d 799 (N.D. 1997) (rejecting fiduciary duty claim as lacking factual basis);

is to claim that the defendant bishop and diocese are fiduciaries by virtue of their ecclesial status or office, and not because of any special relationship or undertaking on behalf of any of the Plaintiffs. That theory, as we explained at the outset, is constitutionally forbidden. *Franco v. Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198 (Utah 2001); *Langford v. Roman Catholic Diocese of Brooklyn*, 705 N.Y.S.2d 661 (N.Y. S.Ct. App. Div. 2000); *Teadt v. Lutheran Church*, 603 N.W.2d 816 (Mich. App. 1999); *Amato v. Greenquist*, 679 N.E.2d 446 (Ill. App. 1997); *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994); *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907 (Neb. 1993); *Schmidt v. Bishop*, 779 F.Supp. 321, 328 (S.D. N.Y. 1991). Hearing and deciding such a claim would require judges and juries to define, and in turn measure a minister's conduct against, a standard of care for ministers as such, something the Constitution positively forbids. *Langford*, 705 N.Y.S.2d at 662; *Teadt*, 603 N.W.2d at 823; *Schmidt*, 779 F.Supp.2d at 326; *Schieffer*, 508 N.W.2d at 912; *Dausch*, 52 F.3d at 1429, 1438. As well put in *Amato*, 679 N.E.2d at 932, breach of fiduciary duty claims against ministers and churches are constitutionally barred because in such cases religion is not merely incidental to a plaintiff's relationship with the wrongdoer, it is the foundation for it. To impose a fiduciary duty upon church leaders or clergy based on church office or ministerial status would be no different from imposing liability for "clergy malpractice," a cause of action that has been universally rejected.[8]

Cherepski v. Walker, 913 S.W.2d 761, 766-67 (Ark. 1996) (rejecting fiduciary duty claim because plaintiff did not allege entrusting any matter to the alleged wrongdoer).

[8] *Franco*, 21 P.3d at 205 (holding that a fiduciary duty claim against a church or church leader is "merely an elliptical way of alleging clergy malpractice"); *Roppolo v. Moore*, 644 So.2d 206 (La. App. 1994) ("To date, no court has acknowledged the existence of a separate cause of action for the malpractice of a clergy member"); *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 911 (Neb. 1993) ("no jurisdiction to date has recognized a claim for clergy malpractice").

The contrary notion – that ministers and religious leaders are fiduciaries for everyone in their denominational fold – is not only contrary to the law of fiduciaries, associations, and constitutional law, but absurd. Ministers and religious leaders generally do not *choose* the people who worship in their churches. People are free to associate with and belong to any religious denomination they choose. There is no proposition of law that would make a minister a fiduciary of everyone who enters or becomes a member of his church, just as there is no law that would make the head of any secular association a fiduciary of each and every member of the association.

III. Liability Cannot Constitutionally Be Based on Ordination or on Religious Speech About a Person's Fitness to be a Minister

Plaintiffs claim that the Defendants are liable to the Plaintiffs for ordaining the perpetrator as a Catholic priest. Complaint ¶ 45 (asserting liability based on the priest's "position as a priest ordained" by the Diocese); *id.* ¶ 55 (asserting that Plaintiff's were injured as a "direct result of [his] status" as a Catholic cleric). Plaintiffs also allege that Defendants are liable to them because of speech on a related religious subject, to wit, that the Defendants "false[ly]" represented that the abuser was "fit to be a priest," and they invited the court below to decide the question whether speech concerning his "fit[ness] to be a priest" was in fact "false and untrue." Complaint ¶ 72.

Questions pertaining to "fitness" for religious office or ministry are quintessentially religious and therefore nonjusticiable. More than a century of precedent holds that the government may not decide the qualifications for religious office or ministry. *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16-17 (1929); *Watson v. Jones*, 13 Wall. 679, 728 (1871). Courts may not do so – any more than a legislature could create a State Board of Clergy

Licensing, which would be essentially the same thing.[9] As the Fifth Circuit wrote in a frequently cited passage –

> 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 of prime ecclesiastical concern.

McClure v. Salvation Army, 460 F.2d 55 (5th Cir. 1972). Not surprisingly, a Westlaw search of all cases discloses not a single published decision permitting (or even referencing) a cause of action for "negligent ordination."[10] For constitutional if not for other reasons, no such claim can be allowed here.[11]

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[9] *See* John H. Mansfield, "Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty," 44 Boston College L. Rev. 1167, 1167-68 (July/September 2003) ("the outcome of a tort suit against a church may not be based upon a governmental answer – whether given by a legislature, administrative official, court or jury – to a religious questions"). It is well settled that constitutional constraints with respect to church autonomy apply to all branches of government. *E.g.*, *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960) (state court and legislature are equally constitutionally forbidden to impair freedom of church governance and church appointments).

[10] The only unpublished decision on "wrongful ordination" of which we are aware rejected that claim on constitutional grounds. *Hogan v. Roman Catholic Archbishop*, No. 02-1296, slip op. at 15-16 (Mass. Super. Ct. Feb. 18, 2003) (Sweeney, Associate Justice). As Justice Sweeney writes, the "ordination of a man into the priesthood and his removal from it are purely ecclesiastical matters that are not subject to judicial scrutiny." Id. at 15. The claim was dismissed for lack of subject matter jurisdiction. *Id*.

[11] The constitutional right of church autonomy, recognized in the line of cases beginning with *Watson* and *Gonzalez*, is in no sense diluted by *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* held that the Free Exercise Clause generally does not require religious exemptions from neutral, generally applicable laws. *Smith*, however, cites the church autonomy cases as an exception. *Id*. at 877. *Smith* also recognizes an exception for cases involving individualized assessments of hardship by government. *Id*. at 884. A negligence suit is "an excellent candidate" for the sort of individualized assessment category that *Smith* left intact. Mansfield, "Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty," 1167, 1175. *See also Bryce v. Episcopal Church*, 289 F.3d 648, 656 (10th Cir. 2002) (holding that *Smith* does not undermine the church autonomy doctrine); *E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 460-463 (D.C. Cir. 1996)(same).

IV. Assignment, Supervision and Retention Claims Present Unique Constitutional Problems When Applied to Churches and Ministers

Plaintiffs claim that Defendants are liable for negligent assignment, supervision and retention of the abuser priest. While such claims do have a secular equivalent, courts are divided over whether such claims are constitutionally barred as applied to churches. If not barred altogether, such claims are subject to serious constitutional limitations as applied to churches and church officials because they go to the very heart of the settled constitutional right of religious denominations to organize and govern themselves.

Amici wish to be clear. They condemn and deplore all forms of sexual, physical and emotional abuse. Such abuses are sinful and criminal. Because they are abhorrent, there is a temptation to create remedies against "deep pocket" defendants. But there are a number of reasons why negligent assignment, retention and supervision claims against church entities and officials, whether predicated on sexual or some other type of misconduct, often raise constitutional problems.12

Religious communities are voluntary associations undertaken for spiritual purposes. Often the denominations which are sued lack the authority to "fire," impose discipline, or take the corrective action that might be proposed for a secular employer. To impose an employer-employee or supervisor-subordinate relationship upon churches can do violence to their ecclesial structure and faith.13 When, for example, a denomination teaches that it does not have the

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12 Mark Chopko, "Stating Claims Against Religious Institutions," 44 B.C.L. Rev. 1089, 1117 (2003). Amici would not foreclose liability in every case where there is sexual perpetration by a minister upon a child. *See, e.g., Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997) (disallowing claims of negligent supervision, but allowing claims of intentional failure to supervise). This case, however, does not include allegations that could avoid the First Amendment bar.

13 *See, e.g.*, Affidavit of Most Rev. William Russell Houck, ¶¶ 17-25 (describing the

authority to hire, fire, discipline or control the day-to-day activities of its ministers, a teaching often based on an interpretation of Scripture, then for a court to disagree and impose liability as if such authority existed would exert pressure on every denomination to revise its teachings to comply with a court-imposed model of authority.

A few examples illustrate the problem. Baptists, for example, believe that authority for church governance should reside with the congregation. "Baptists teach that the local congregation should have the authority to choose and ordain its own ministers, to decide the basis for membership, and to discipline members." William H. Brackney, "Doing Church Baptist Style: Documents for Faith and Witness."14 Similarly, under the Constitution and Bylaws of the United Church of Christ, each local congregation makes its own determination as to whether or not it wishes to call a particular person to be its minister.15 In the Quaker faith, the local congregation is called a "meeting," and responsibility for decisions made and actions taken rests with its members. The participants select one of their members for any special service needed.16 Decisions, even in business meetings, are not made by engaging in debate as in a business setting; they are made by expectant waiting together upon the Spirit to reveal the

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complex relationship between a bishop and his priests in the Roman Catholic tradition, and explaining why it cannot properly be likened to the relationship of employer-employee or supervisor-subordinate).

14 Available at www.baptisthistory.org/pamphlets/congregationalism.htm.

15 "The autonomy of the Local Church is inherent and modifiable only by its own action. Nothin in this Constitution … shall be construed as giving the General Synod … the power to abridge or impair the autonomy of any Local Church in the management of its affairs, which affairs include … the right to … call or dismiss its pastor or pastors by such procedure as it shall determine." The Constitution and By-Laws of the United Church of Christ, art 4., ¶ 15.

16 *See, e.g.*, FAITH AND PRACTICE OF NEW ENGLAND YEARLY MEETING OF FRIENDS (New England Yearly Meeting of Friends 1986).

will of God until a consensus develops.17 In the Christian Science Church, "each branch church is democratic and autonomous," with "[e]very important decision" being "made by the membership directly."18 In the Mormon faith, all offices within the church, such as Sunday School teachers and other positions of religious leadership, including selection of the bishops of the local congregation, are determined by majority vote of the members.19

Other denominations, like the Defendants in the instant case, have bishops, pastors, vicars, and others whose canonical responsibilities are defined by church law. An exact description of an ecclesial office varies from denomination to denomination, but a common thread is that they are typically spiritual leaders rather than "employers" or "supervisors" as those terms are used in the commercial, secular sense. Within the Methodist Church, for example, while there is a bishop, ministers themselves are ordained by a vote of a Board of Ordained Ministry made up of clergy in the area and removal from ordination is made by the same body. The Bishop has no authority for day-to-day supervision over clergy, who are deemed to be independent ministers under Methodist theology.20 The "qualifications and duties of local pastors … are set forth in the Book of Discipline … and [Methodists] believe they flow from the gospel as taught by Jesus the Christ and proclaimed by his Apostles. By contrast, in the Episcopal faith, while there is a Bishop, the local congregation selects its own pastor. Formal

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17 *Id*. at 221.

18 John DeWitt, THE CHRISTIAN SCIENCE WAY OF LIFE, at 62-63, 69 (Prentice-Hall Inc. 1962).

19CHURCH HANDBOOK OF INSTRUCTIONS, Church of Jesus Christ of Latter Days Saints, 1997, at 37.

20 THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH, ¶¶ 270-534 (United Methodist Publishing House 1992).

disciplining and removal of clergy is determined by an ecclesiastical court in which the Bishop has the burden of proof.21

In the Roman Catholic faith, a Bishop cannot impose penalties upon deacons, priests and other ecclesiastical office holders unless all lesser methods, such as fraternal correction, rebuke, or other means of pastoral care have been tried and failed.22 No one holding an ecclesiastical office, whether priest or lay person, can be removed based merely upon suspicion of wrongdoing, and to remove a person permanently requires the action of an ecclesiastical court in which the bishop has the burden or proving the charges to a moral certainty and the accused enjoys certain rights, including the right to a lawyer and the right to appeal to Rome.23

The choices made by a particular denomination about how exactly their association will be structured are not business decisions. Rather, they are typically articles of faith.24 It may be acceptable for courts to find that a business entity should have structured its business to provide more supervision or different supervision over its employees. It is another thing entirely for courts to hold that a group of people who have voluntarily associated with each other to exercise their common faith must adopt a supervisory model selected by a jury or be found liable for failing to do so.

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21 CONSTITUTION AND CANONS FOR THE GOVERNMENT OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA OTHERWISE KNOWN AS THE EPISCOPAL CHURCH, Title IV (1997).

22 *See* THE CODE OF CANON LAW: TEXT AND COMMENTARY, Canon 1341 (J. Coriden, T. Green, and D. Heintschel, eds. 1985).

23 *Id*., Canons 192-95, 221, 1321, 1342, 1608, 1628-40, 1717-31, 1740-47.

24*See*, *e.g*., Houck Affidavit, ¶¶ 8-25 (discussing the religious responsibilities of a bishop and the proper theological framework for understanding his relationship with priests).

Even to permit a jury to decide the extent of a defendant's authority presents serious constitutional problems. Such a determination would require a jury to evaluate conflicting testimony about the relationships within the church in question and require a jury to decide how the church should interpret or apply its own teachings.

Any legal theory that seeks to impose liability for negligent supervision or retention must face these differences in practice without favoring or disfavoring any particular denomination, without disfavoring religion generally given the differences between they way churches and secular entities structure their decision making, and without making it impossible for churches to select and discipline their own ministers by substituting some uniform secular model for that of the religious denomination itself.

Negligent supervision and retention traditionally requires a claimaint to show that an employer knew or should have known of a risk that an employee could cause harm in the conduct of the employer's work, and should have fired or better supervised the employee to avoid the risk. Given the differences in faith, polity, and church discipline, the constitutional problems with applying these principles to church leaders and church entities is manifold. Furthermore, allowing such claims essentially places the courts in the position of monitoring through the tort liability system who churches select as their ministers and how their ministry is exercised and overseen. Allowing such claims thus runs the serious risk of forcing churches to abandon what in many cases are centuries-old (indeed, many would say divinely ordained) ecclesial structures to be replaced by some secular model. Such a radical attempt by courts to rewrite how churches govern themselves, select ministers, and exercise their ministry must be avoided and cannot constitutionally be required.

Conclusion

Plaintiff's theories of liability enter constitutionally forbidden territory because, if accepted, they would turn religious denominations and church officials into absolute insurers or guarantors for the conduct of any minister, whenever and wherever it occurs. Indeed, the theories Plaintiffs advance would, if accepted, subject religious institutions to judicial regulation and resulting liability at every conceivable stage of church and ministerial life – from vocational and ministerial assessment and training, to ordination, to assignment, to supervision – with no apparent limitation as to time, place, or circumstance. Such an approach is flawed as a matter of law and would run afoul of federal and state constitutional guarantees of religious freedom, speech, and association. The case should be dismissed.

Respectfully submitted, this the 11th day of May, 2004.

THE GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, THE NATIONAL ASSOCIATION OF EVANGELICALS, THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, THE WORLDWIDE CHURCH OF GOD, THE MISSISSIPPI DISTRICT OF THE CHURCH OF THE NAZARENE, THE MISSISSIPPI DISTRICT OF THE UNITED PENTECOSTAL CHURCH INTERNATIONAL, and REV. BARBARA E. JONES, EXECUTIVE REGIONAL MINISTER, AND REV. LARRY METZGER, REGIONAL MODERATOR, OF THE GREAT RIVER REGION OF THE CHRISTIAN CHURCH; AND SOUTHEASTERN SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA

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