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Forgive Me, Your Honor, for I Have Sinned: Limiting the Ecclesiastical Abstention Doctrine to Allow Suits for Defamation and Negligent Employment Practices

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FORGIVE ME, YOUR HONOR, FOR I HAVE SINNED: LIMITING THE ECCLESIASTICAL ABSTENTION DOCTRINE TO ALLOW SUITS FOR DEFAMATION AND NEGLIGENT EMPLOYMENT PRACTICES

Alexander J. Lindvall*

"For all who have sinned without the Law will also perish without the Law, and all who have sinned under the Law will be judged by the Law."
–Romans 2:12

I. INTRODUCTION

The First Amendment's religion clauses read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] These sixteen vague words have spawned volumes upon volumes of scholarly work and countless court battles.[2] The debates surrounding these clauses tend to revolve around religious exemptions from generally applicable laws,[3] religious symbols on government property,[4] prayer in schools and other government-run institutions,[5] and government subsidies given to religious organizations.[6]

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1. U.S. CONST. amend. I. Although, by its terms, the First Amendment purports to limit only "Congress," the Supreme Court has long held that the First Amendment applies to the States and local governments as well. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

2. For the definitive history of the Supreme Court's development of these clauses, see generally Jesse H. Choper, *A Century of Religious Freedom*, 88 CALIF. L. REV 1709 (2000).

3. *See, e.g.*, Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Sherbert v. Verner, 374 U.S. 398 (1963); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Megan Gibson, Note, *Competing Concerns: Can Religious Exemptions to Mandatory Childhood Vaccinations and Public Health Successfully Coexist?*, 54 U. LOUISVILLE L. REV. 527 (2016).

4. *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2090 (2019) (allowing a 40-foot "peace cross" to remain on government-owned property); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 881 (2005) (removing the Ten Commandments from a Kentucky county courthouse); Van Orden v. Perry, 545 U.S. 677, 691–92 (2005) (allowing the Ten Commandments to remain outside the Texas State Capitol); Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 621 (1989) (removing a nativity scene from government-owned property, but allowing a menorah and a Christmas tree to remain on government-owned property); Norman Dorsen & Charles Sims, *The Nativity Scene Case: An Error in Judgment*, 1985 U. ILL. L. REV. 837.

5. *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014) (allowing chaplain-led prayers before town board meetings); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000) (disallowing student-led prayers before high school football games); Lee v. Weisman, 505 U.S. 577, 599 (1992) (disallowing a rabbi-led prayer at a graduation ceremony); Marsh v. Chambers, 463 U.S. 783, 795 (1983) (allowing chaplain-led prayer before the Nebraska Legislature's sessions); Engel v. Vitale, 370 U.S. 421, 436 (1962) (disallowing teacher-led prayer in school); Jonathan C. Drimmer, *Hear No Evil, Speak No Evil: The Duty of Public Schools to Limit Student-Proposed Graduation Prayers*, 74 NEB. L. REV. 411 (1995); Paul G. Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031 (1963).

6. *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 129 (2011) (challenging an Arizona program that gave tax credits to parents who sent their children to sectarian schools); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 845–46 (1995) (requiring public universities to fund religious student groups in the same way they would fund secular student groups); Lemon v. Kurtzman, 403 U.S. 602, 624–25 (1971) (preventing the

But there is an important First Amendment doctrine that has received surprisingly little attention from scholars: the ecclesiastical abstention doctrine. Under this doctrine, civil courts cannot delve into matters that focus on "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of a church to the standard of morals required of them."[7] More specifically, courts generally agree that they cannot (a) consider employment disputes between a religious institution and its clergy,[8] (b) resolve conflicts between different factions within a religious organization,[9] (c) resolve property disputes that would require the court to interpret religious doctrine,[10] or (d) resolve contract disputes that involve membership in a religious institution.[11] Inserting the court's secular values into religious affairs, the rationale goes, would inject the "power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment."[12]

Courts, however, have split on two important issues concerning the ecclesiastical abstention doctrine: (1) whether the doctrine provides religious officials with immunity from defamation suits when the allegedly defamatory statement was made during a religious proceeding[13] and (2) whether the

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government from too heavily subsidizing or entangling itself with religious schools); Flast v. Cohen, 392 U.S. 83, 106 (1968) (allowing taxpayers to challenge government programs that devoted federal funds to parochial schools); Rebecca E. Lawrence, Comment, *The Future of School Vouchers in Light of the Past Chaos of the Establishment Clause Jurisprudence*, 55 U. MIA. L. REV. 419 (2001).

7. Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 714 (1976) (quoting Watson v. Jones, 80 U.S. 679, 733 (1871)).

8. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–92 (2012); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952); Gonzalez v. Roman Cath. Archbishop of Manila, 280 U.S. 1, 16 (1929), *abrogated by Milivojevich*, 426 U.S. 696 (1976); Lewis v. Seventh Day Adventists Lake Region Conf., 978 F.2d 940, 941–42 (6th Cir. 1992).

9. *See Milivojevich*, 426 U.S. at 709, 715–16; *Watson*, 80 U.S. at 726–27; Crowder v. S. Baptist Convention, 828 F.2d 718, 726 (11th Cir. 1987).

10. *See Milivojevich*, 426 U.S. at 709, 716; Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445–47 (1969).

11. *Milivojevich*, 426 U.S. at 716; *In re* St. Thomas High Sch., 495 S.W.3d 500, 508–14 (Tex. App. 2016) (holding that the ecclesiastical abstention doctrine applied to a contract dispute between a Catholic school and an expelled student).

12. *Kedroff*, 344 U.S. at 119.

13. *Compare* Hutchison v. Thomas, 789 F.2d 392, 392–93, 396 (6th Cir. 1986) (dismissing a Methodist minister's defamation claim against a Methodist bishop and his three subordinates), *and* O'Connor v. Diocese of Honolulu, 885 P.2d 361, 371 (Haw. 1994) (dismissing excommunicated publisher's defamation claim against The Diocese of Honolulu, its bishop, and its judicial vicar), *and* Hiles v. Episcopal Diocese of Mass., 773 N.E.2d 929, 935–38 (Mass. 2002) (dismissing Episcopal priest's defamation suit against diocese, diocesan officials, and author of letter accusing him of adultery), *and* Pfeil v. St. Matthews Evangelical Lutheran Church of the Unaltered Augsburg Confession, 877 N.W.2d 528, 530 (Minn. 2016)

doctrine prevents religious institutions from being sued for negligently hiring, retaining, or supervising members of their clergy.[14]

On the former issue, at least three state supreme courts and the Sixth Circuit have held that religious officials cannot be sued for defamation if the statement at issue was made during a religious proceeding,[15] while five other state supreme courts (including the District of Columbia) and the Eighth Circuit have reached the opposite conclusion.[16] On the latter issue, several state and federal courts have also reached diverging conclusions.[17] The Supreme Courts of Missouri and Wisconsin, for example, have held that religious institutions cannot be sued for the negligent hiring and retention of a clergy member because the tort would necessarily require courts to evaluate whether the institution's practices were "reasonable."[18] The Supreme Courts of Florida and Colorado, on the other hand, have held that religious institutions can be sued for the negligent hiring and retention of clergy

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(dismissing parishioners' defamation suit against church and its pastors), *with* Drevlow v. Lutheran Church, 991 F.2d 468, 471–72 (8th Cir. 1993) (holding First Amendment did not bar a minister's libel claim against church where church offered no religious explanation for its actions which might entangle district court in religious controversy), *and* McAdoo v. Diaz, 884 P.2d 1385, 1390–91 (Alaska 1994) (holding there was no constitutional bar to church volunteer's defamation claim against pastor because it did not implicate religious questions), *and* Lipscombe v. Crudup, 888 A.2d 1171, 1173–74 (D.C. 2005) (holding constitutional guarantee of religious freedom did not shield pastor from allegations of tortious secular behavior), *and* Connor v. Archdiocese of Phila., 975 A.2d 1084, 1113 (Pa. 2009) (holding that the judicial deference rule did not apply at the pleading stage to defamation claims brought by parents of parochial elementary school student against school and school officials), *and* Banks v. St. Matthew Baptist Church, 406 S.C. 156, 158, 750 S.E.2d 605, 606 (2013) (holding allegedly defamatory statements of pastor at congregational meeting were independent of religious doctrine or governance), *and* Bowie v. Murphy, 624 S.E.2d 74, 79–80 (Va. 2006) (holding deacon's defamation claims did not involve matters of church governance).

14. *Compare* Gibson v. Brewer, 952 S.W.2d 239, 246–47 (Mo. 1997) (refusing to adjudicate son and parents' claims of negligent hiring, retention, and failure to supervise priest), *and* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 782 (Wis. 1995) (holding First Amendment barred action against archdiocese for negligent hiring, retention, training, or supervising priest), *with* Moses v. Diocese of Colo., 863 P.2d 310, 320–21 (Colo. 1993) (holding First Amendment did not bar claims of negligent hiring supervision against Episcopal dioceses and bishop), *and* Malicki v. Doe, 814 So. 2d 347, 360–61 (Fla. 2002) (holding claims of negligent hiring and supervision asserted by parishioners against church and archdiocese were not barred by Free Exercise Clause because claim was based on neutral application of principles of tort law).

15. *See Hutchison*, 789 F.2d at 395; *O'Connor*, 885 P.2d at 371; *Hiles*, 773 N.E.2d at 937; *Pfeil*, 877 N.W.2d at 542.

16. *See Drevlow*, 991 F.2d at 4471; *McAdoo*, 884 P.2d at 1390; *Lipscombe*, 888 A.2d at 1174; *Connor*, 975 A.2d at 1113; *Banks*, 406 S.C. at 158, 750 S.E.2d at 606; *Bowie*, 624 S.E.2d at 79.

17. *Compare Gibson*, 952 S.W.2d at 246–47, *and Pritzlaff*, 533 N.W.2d at 782, *with Moses*, 863 P.2d at 320–21, *and Malicki*, 814 So. 2d at 360–61.

18. *Gibson*, 952 S.W.2d at 247–50; *Pritzlaff*, 533 N.W.2d at 790–91.

members because these issues can be decided through a neutral application of tort principles.[19]

This Article argues that the ecclesiastical abstention doctrine should not immunize religious institutions or their officials from the torts of defamation or negligent hiring, retention, or supervision. Part II of the Article summarizes the history of the ecclesiastical abstention doctrine—with particular emphasis on lower courts' application of this doctrine to the torts of defamation and negligent employment practices. Part III argues that this doctrine does not prevent religious institutions from being sued for defamation, especially where the defamatory statement is demonstrably false and harmful. Part IV argues that this doctrine does not prevent religious institutions from being sued for negligently hiring, retaining, or supervising their clergy, especially in cases involving child molestation. Finally, Part V addresses likely counterarguments to this Article.

Religious freedom is undoubtedly a bedrock principle in our constitutional democracy. But a religious affiliation is not a license to sin. "The mere possession of religious convictions," after all, "does not relieve the citizen from the discharge of political responsibilities."[20] My hope is that this Article will provide a solid rationale for treating religious institutions and religious officials equally under the law.

II. THE HISTORY OF THE ECCLESIASTICAL ABSTENTION DOCTRINE

This Section proceeds in two subsections. Section II.A provides a history of the ecclesiastical abstention doctrine as announced by the Supreme Court, beginning with 1871's *Watson v. Jones* and ending with 2020's *Our Lady of Guadalupe School v. Morrissey-Berru*. Section II.B discusses the current jurisdictional split among the lower courts on whether the doctrine prohibits suits against religious institutions for defamation and negligent employment practices.

A. Supreme Court Precedent

The ecclesiastical abstention rule, of course, cannot be found in the First Amendment's text; it is a court-created doctrine meant to prevent the judiciary from inserting itself into religious affairs.[21] The Supreme Court first laid the foundations for this doctrine in 1871 in *Watson v. Jones*.[22] There, the Court

19. *Malicki*, 814 So. 2d at 360–61; *Moses*, 863 P.2d at 320–21.

20. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 879 (1990) (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–95 (1940)).

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

22. *See id.*

was presented with a dispute between the pro-slavery and anti-slavery factions in Louisville's Walnut Street Presbyterian Church.[23] Each faction claimed it had the right to the "exclusive use" of the church and its property.[24] The church's general assembly formally recognized the anti-slavery faction as the rightful owners of the church property, at which point the pro-slavery faction filed suit to reclaim its property rights.[25]

Citing the "broad and sound view of the relations of church and state under our system of laws," the *Watson* Court refused to rule on the case and instead deferred to the judgment of the church's general assembly.[26] The Court held that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them . . . ."[27]

The *Watson* Court did not root this doctrine in the First Amendment.[28] Rather, the Court's opinion focused on public policy, the common law, and the "preponderating weight of judicial authority" that existed at the time.[29] It was not until 1952, in *Kedroff v. St. Nicholas Cathedral*, that the Court constitutionalized the ecclesiastical abstention doctrine.[30] *Kedroff* also concerned a church-related property dispute—this time revolving around the right to use a Russian Orthodox cathedral in New York City.[31] New York's Religious Corporations Law sought to transfer the cathedral's ownership from the Moscow-based patriarchy to the American-based patriarchy.[32] The *Kedroff* Court struck down this statute because it sought to transfer church property to a group that was not entitled to that property under the church's interpretation of canonical law.[33]

Kedroff reaffirmed *Watson*, noting that religious institutions enjoy "independence from secular control or manipulation," specifically "[the] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[34] But, unlike the *Watson* Court, the *Kedroff* Court rooted its decision in the First and Fourteenth Amendments.[35] "Freedom to select . . . clergy," the Court held,

23. *See id.* at 684.
24. *Id.* at 681.
25. *Id.* at 685.
26. *Id.* at 727.
27. *Id.*
28. *See id.*
29. *Id.*
30. 344 U.S. 94, 115–16 (1952).
31. *Id.* at 95–96.
32. *Id.* at 107.
33. *Id.* at 107, 119.
34. *Id.* at 116.
35. *See id.* at 107, 115–16.

"must . . . have federal constitutional protection as a part of the free exercise of religion against state interference."[36]

Similarly, in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, the Court noted that "[s]pecial problems arise . . . when [property] disputes implicate controversies over church doctrine and practice."[37] Although the states have a legitimate interest in resolving church-based property disputes and though the civil courts are the proper venue for that resolution, the *Blue Hull* Court noted that the First Amendment is "plainly jeopardized" when litigation turns on religious doctrine and practice.[38] As such, the Court blocked the lower courts from determining whether a church's decision "depart[ed] . . . from [its] doctrine."[39]

The Court next addressed the ecclesiastical abstention doctrine in *Serbian Eastern Orthodox Diocese v. Milivojevich*,[40] the most frequently cited case in this area of law.[41] There, the Serbian Orthodox Church stripped Dionisije Milivojevich of his title of bishop and excommunicated him from the church, largely due to his defiance of the church hierarchy.[42] Following his removal, Milivojevich brought suit in Illinois state court seeking reinstatement.[43] The Illinois Supreme Court eventually reinstated Milivojevich, finding that his removal violated church laws and regulations.[44]

The Supreme Court reversed, holding that the First Amendment "permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters."[45] The Court went on to note that when church tribunals resolve an ecclesiastical dispute, "the Constitution requires that civil courts accept their decisions as binding upon them."[46] In *Milivojevich*, because the state court probed into whether the church had followed its own procedures, it had "unconstitutionally undertaken the

36. *Id.* at 116.
37. 393 U.S. 440, 445 (1969).
38. *Id.* at 449.
39. *Id.* at 449–50.
40. 426 U.S. 696 (1976).
41. *See, e.g.*, Drevlow v. Lutheran Church, 991 F.2d 468, 470–71 (8th Cir. 1993); Hutchison v. Thomas, 789 F.2d 392, 394 (6th Cir. 1986); Moses v. Diocese of Colo., 863 P.2d 310, 320 (Colo. 1993); Lipscombe v. Crudup, 888 A.2d 1171, 1172 (D.C. 2005); Malicki v. Doe, 814 So. 2d 347, 355–56 (Fla. 2002); O'Connor v. Diocese of Honolulu, 885 P.2d 361, 384 (Haw. 1994); Pfeil v. St. Matthews Evangelical Lutheran Church of the Unaltered Augsburg Confession, 877 N.W.2d 528, 533 (Minn. 2016); Gibson v. Brewer, 952 S.W.2d 239, 247 (Mo. 1997); Connor v. Archdiocese of Phila., 975 A.2d 1084, 1094 (Pa. 2009); Westbrook v. Penley, 231 S.W.3d 389, 398 (Tex. 2007).
42. *Milivojevich*, 426 U.S. at 706.
43. *Id.* at 706–07.
44. *Id.* at 708.
45. *Id.* at 724.
46. *Id.* at 724–25.

resolution of [a] quintessentially religious controvers[y] whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals. . . ."[47]

Justice Rehnquist, joined by Justice Stevens, dissented in *Milivojevich*.[48] Justice Rehnquist argued that the Court's "rubber-stamp" approach to deciding ecclesiastical issues conflicted with the Establishment Clause.[49] If the judiciary is always required to side with a church's decision, he argued, it is unconstitutionally "placing its weight behind a particular religious belief, tenet, or sect."[50] As long as courts apply "neutral principles of law" when deciding religious controversies, Justice Rehnquist argued, the First Amendment is not offended.[51]

Three years later, in *Jones v. Wolf*, the Supreme Court bent toward Justice Rehnquist's rationale.[52] In *Jones*, the Court remanded a church-based property dispute to the lower court to determine whether the case could be decided without reference to religious doctrine.[53] Courts may hear church-related disputes, the *Jones* Court held, so long as they rely upon "neutral principles of law" when deciding the case and "take special care to scrutinize [church] document[s] in purely secular terms . . . ."[54] Though courts are forbidden from answering "questions of religious doctrine, polity, and practice" that are outside their judicial expertise, if the case turns on "objective, well-established" legal principles that have long been "familiar to lawyers and judges," courts are free to hear the case.[55]

After *Jones*, the Court largely refrained from hearing ecclesiastical immunity cases. In 2012, however, the Court stepped back into the fray in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[56] There, the Supreme Court unanimously held that the Americans with Disabilities Act (ADA) contains a "ministerial exception," whereby religious organizations

47. *Id.* at 720.

48. *Id.* at 725–35 (Rehnquist, J., dissenting).

49. *Id.* at 734 ("To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the free exercise problems petitioners envision, itself create more serious problems under the Establishment Clause.").

50. *Id.* at 733.

51. *Id.*

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

53. *Id.* at 608–10.

54. *Id.* at 604.

55. *Id.* at 603.

56. 565 U.S. 171 (2012). Although this decision does not address the "ecclesiastical abstention doctrine" per se, it falls within the same ideological framework. *See* Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 853 (2012) ("The Court's opinion in *Hosanna-Tabor* is a sweeping and unanimous reaffirmation of the earlier [ecclesiastical abstention] cases, particularly *Watson*, *Kedroff*, and *Milivojevich*.").

cannot be held liable for terminating a clergy member because of an ADA-protected disability.[57] In *Hosanna-Tabor*, a Lutheran elementary school fired one of its minster-teachers after she was diagnosed with narcolepsy.[58] The minister-teacher filed a charge with the EEOC, alleging she was terminated because of an ADA-protected disability.[59]

On appeal, the Court held that the First Amendment carves out a "ministerial exception" to the ADA that "precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers."[60] In reaching its decision, the Court noted:

> The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[61]

In this passage, the Court, for the first time, rooted the ecclesiastical abstention doctrine in *both* the Free Exercise Clause and the Establishment Clause.[62] Prior to *Hosanna-Tabor*, it was unclear whether this doctrine was derived from the Establishment Clause, the Free Exercise Clause, or some

57. *Hosanna-Tabor*, 565 U.S. at 188–92.

58. *Id.* at 178–79.

59. *Id.* at 179.

60. *Id.* at 188. Critics of the ministerial exception argue that virtually no religious sect teaches or sincerely believes that disabled individuals should not be ministers or clerics; therefore, it makes no sense to exempt them from an anti-discrimination law that is consistent with their beliefs. *See, e.g.*, Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 2031 (2007) ("Religious organizations whose beliefs are consistent with the goals of [an anti-discrimination law], or even silent on the issue of discrimination, cannot complain that compliance interferes with their expression."). Proponents of the ministerial exception, on the other hand, argue that a church's ability to select its clergy should be robustly protected and that a church's decision to hire, retain, or terminate a cleric should not be reviewable by the civil courts. *See, e.g.*, Laycock, *supra* note 56, at 850–51.

61. *Hosanna-Tabor*, 565 U.S. at 188–89.

62. *See id.*

combination thereof.[63] When invoking the doctrine, the Court often spoke in terms of free exercise—which is unsurprising given that the doctrine is meant to allow religious institutions to organize and govern themselves as they see fit.[64] But the Court also made numerous references to the "entanglement" of church and state, a classic Establishment Clause buzzword.[65] After 140 years, the Court finally (sort of) cleared up the confusion.[66]

In *Hosanna-Tabor*, the plaintiff was a minister as well as a teacher, making the ministerial exception clearly applicable.[67] In December 2019, however, the Court granted certiorari in a pair of Ninth Circuit cases, *Biel v. St. James School* and *Morrissey-Berru v. Our Lady of Guadalupe School*, to determine whether this ministerial exception applies to religious school teachers who are not ministers.[68] In both cases, the Ninth Circuit concluded the plaintiffs' lawsuits could proceed because they were simply "teachers" and not "minister-teachers," as seen in *Hosanna-Tabor*.[69]

In *Biel*, Kristen Biel was fired from her job as a fifth-grade teacher "after she told her employer that she had breast cancer and would need to miss work to undergo chemotherapy."[70] Biel subsequently filed an ADA suit against her employer, St. James Catholic School.[71] The district court granted the school's motion for summary judgment, finding that Biel's suit was barred by the ministerial exception announced in *Hosanna-Tabor*.[72] On appeal, the Ninth Circuit reversed and found that the ADA's ministerial exception did not apply to Biel because (1) she did not have any religious credentials, religious training, or a ministerial background; (2) she was not held out to the public as a religious minister or leader; and (3) her employment title was "teacher," not "minister."[73]

In July 2020, in *Morrissey-Berru*, the Court reversed these rulings and held that the ministerial exception extends to all church employees who further the church's mission or inculcate its religious values—as each of these teachers did.[74] "What matters, at bottom, is what an employee does," the Court

63. *See* Christopher R. Farrell, Note, *Ecclesiastical Abstention and the Crisis in the Catholic Church*, 19 J.L. & POL. 109, 116 (2003).

64. *Id.*

65. *Id.*

66. *See Hosanna-Tabor*, 565 U.S. at 188–89.

67. *Id.* at 192.

68. Biel v. St. James Sch., 911 F.3d 603, 607 (9th Cir. 2018), *cert. granted*, 140 S. Ct. 680 (2019); Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460, 460 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 679 (2019).

69. *Biel*, 911 F.3d at 605; *Morrissey-Berru*, 769 F. App'x at 461.

70. *Biel*, 911 F.3d at 605.

71. *Id.* at 606.

72. *Id.*

73. *Id.* at 608.

74. 140 S. Ct. 2049, 2066–69 (2020).

reasoned.[75] And in these cases, the teachers educated youth in line with their church's teachings, inculcated religious values in their students, and trained students to live their lives in accordance with a particular faith.[76] Although these teachers were not "ministers," as seen in *Hosanna-Tabor*, they still fell into the category of religious employees who were subject to the ministerial exception and thus not protected by anti-discrimination laws.[77]

Justices Thomas and Gorsuch would have gone a step further.[78] In addition to exempting these teachers from the ADA's protections, they also maintained that "the Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'"[79] In other words, if a religious organization claims that an aggrieved employee is a "minister" of its faith, courts should presume this employee falls into the ministerial exception.[80] "This deference is necessary," Justice Thomas argued, "because . . . judges lack the requisite 'understanding and appreciation of the role played by every person who performs a particular role in every religious tradition.'"[81] "What qualifies as 'ministerial' is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis."[82]

Justices Sotomayor and Ginsburg, on the other hand, dissented, arguing that the majority's "simplistic approach ha[d] no basis in law and strip[ped] thousands of schoolteachers of their legal protections,"[83] not to mention "the rights of countless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel, and many others who work in religious institutions."[84] "[B]ecause the Court's new standard . . . appears to deem churches in the best position to explain [whether the plaintiff is a 'minister'], one cannot help but conclude that the Court has just traded legal analysis for a rubber stamp."[85] "[T]he Court's apparent deference here threatens to make nearly anyone whom [religious] schools might hire 'ministers' unprotected from discrimination in the hiring process. That cannot be right."[86]

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75. *Id.* at 2064.
76. *Id.* at 2066.
77. *Id.*
78. *See id.* at 2070 (Thomas, J., concurring).
79. *Id.* at 2069–70.
80. *Id.*
81. *Id.* at 2070.
82. *Id.*
83. *Id.* at 2072 (Sotomayor, J., dissenting).
84. *Id.* at 2082.
85. *Id.* at 2076.
86. *Id.*

B. Other State Court and Lower Federal Court Decisions

Watson, *Kedroff*, and *Milivojevich* illustrate that "[t]he ecclesiastical abstention doctrine's practical application requires a court to either *abstain* from fact-finding issues that are based on religious doctrine or church governance, or *defer* to the decisions handed down by the church leadership or hierarchical authority."[87] The Supreme Court's decisions in this area, for the most part, have all involved church-related employment or property disputes.[88] The lower courts, however, have applied this doctrine to many other situations—most significantly, to defamation and negligent employment practices.[89]

1. Defamation

Courts are sharply divided on whether the ecclesiastical abstention doctrine immunizes religious officials from defamation suits when the allegedly defamatory statement was made during a religious proceeding. The concern is that if defamation suits are allowed to proceed, the judiciary will be getting itself into the business of determining whether the declarant's religious beliefs are true or false.[90]

In *O'Connor v. Diocese of Honolulu*, for example, the Hawaii Supreme Court held that religious officials have a general immunity from defamation suits if their allegedly defamatory statement was made during a religious proceeding.[91] In *O'Connor*, the plaintiff ran a private newspaper that often criticized his diocese's bishop.[92] In response to several of the plaintiff's publications, the bishop wrote the plaintiff a letter threatening to excommunicate him from the church unless he ceased publication.[93] The plaintiff continued to print his paper and was, as promised,

87. Dan Knudsen, Note, *Wrestling with the Ecclesiastical Abstention Doctrine: How* Puskar v. Krco *Further Complicated the Heavily Litigated History of the Serbian Orthodox Church in America*, 36 N. ILL. U. L. REV. 139, 139 (2015) (emphasis altered).

88. *See, e.g.*, *Morrissey-Berru*, 140 S. Ct. at 2069 (majority opinion); Jones v. Wolf, 443 U.S. 595 (1979).

89. *See* Constance Frisby Fain, Annotation, *Defamation of Church Member by Church or Church Official,* 109 A.L.R. 5th 541 (2003); Marjorie A. Shields, Annotation, *Liability of Church or Religious Organization for Negligent Hiring, Retention, or Supervision of Priest, Minister, or Other Clergy Based on Sexual Misconduct*, 101 A.L.R. 5th 1 (2002).

90. *See* RESTATEMENT (SECOND) OF TORTS § 558(a) (AM. L. INST. 1977) (stating that to succeed on a defamation claim, the plaintiff must show, among other things, that the defendant's statement was false).

91. 885 P.2d 361, 368 (Haw. 1994).

92. *See id.* at 362.

93. *Id.*

excommunicated.[94] The plaintiff subsequently filed a complaint in Hawaii state court alleging that he was defamed during his excommunication process.[95]

On appeal, the Hawaii Supreme Court held that courts cannot entertain defamation suits against religious institutions or officials if the allegedly defamatory statements were made during a religious proceeding.[96] "[T]o determine the truth or falsity of the statements," the court reasoned, "a state court would have to inquire into church teachings and doctrine."[97] Because church-related defamation suits often turn on "determining doctrinal correctness" or "analyzing church law," the court held that the "adjudication of [these types of cases] is clearly beyond the purview of civil courts."[98]

Similarly, in *Ausley v. Shaw*, the Tennessee Court of Appeals held that church officials cannot be sued for statements made "during the course of an ecclesiastical undertaking."[99] To the *Ausley* court, statements made during inherently religious proceedings—such as proceedings regarding the discipline or removal of a church member—are "too close to the peculiarly religious aspects of the [church]" and cannot be treated as "simple civil wrongs."[100]

Other jurisdictions, however, have reached the opposite conclusion.[101] In *Banks v. St. Matthew Baptist Church*, for example, the South Carolina Supreme Court held that courts can hear defamation suits against church officials if the case can be "resolved entirely by neutral principles of law."[102] When a defamation suit revolves around "simple declarative statements," the court reasoned, "[t]he truth or falsity of such statements can easily be ascertained by a court without any consideration of religious issues or doctrines."[103] Accordingly, courts can hear these cases because they do not involve "issues of religious law, principle, doctrine, discipline, custom, or

94. *Id.*
95. *See id.*
96. *See id.* at 368.
97. *Id.* (footnote omitted).
98. *Id.*
99. Ausley v. Shaw, 193 S.W.3d 892, 895 (Tenn. Ct. App. 2005).
100. *Id.* (internal quotation marks omitted) (quoting Tidman v. Salvation Army, No. 01-A-01-9708-CV00380, 1998 WL 391765, at *6 (Tenn. Ct. App. July 15, 1998)).
101. *See, e.g.*, Drevlow v. Lutheran Church, Mo. Synod, 991 F.2d 468, 471–72 (8th Cir. 1993); Kavanagh v. Zwilling, 997 F. Supp. 2d 241, 254 (S.D.N.Y. 2014) (holding defrocked Catholic priest's libel *per se* claim was barred by the First Amendment, but also holding that his claims of libel by implication and libel *per quod* were not barred); Banks v. St. Matthew Baptist Church, 406 S.C. 156, 158, 750 S.E.2d 605, 606 (2013) (holding trial court had jurisdiction to resolve defamation claim against pastor).
102. 406 S.C. at 160, 750 S.E.2d at 607.
103. *Id.* at 161, 750 S.E.2d at 607.

administration."[104] "To find otherwise," the *Banks* court concluded, "would be to grant tort law immunity to religious practitioners, enabling them to make any statement regardless of its falsity and harmfulness provided the statement is made in a religious setting."[105]

The rationales in these cases accurately illustrate the current divide among courts on this issue. Courts that disallow defamation suits arising out of church proceedings are concerned that opening the door to such suits would give courts license to examine the truth or falsity of religious beliefs. Courts that allow defamation suits, on the other hand, highlight that these cases can almost always be resolved through neutral and generally applicable tort principles.

The following jurisdictions have disallowed defamation suits concerning statements made during a religious proceeding:

- *Hutchinson v. Thomas*, 789 F.2d 392 (6th Cir. 1986).
- *Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America*, 860 F. Supp. 1194 (W.D. Ky. 1994).
- *Higgins v. Maher*, 258 Cal. Rptr. 757 (Cal. Ct. App. 1989).
- *O'Connor v. Diocese of Honolulu*, 885 P.2d 361 (Haw. 1994).
- *Stepek v. Doe*, 910 N.E.2d 655 (Ill. App. Ct. 2009).
- *Purdum v. Purdum*, 301 P.3d 718 (Kan. Ct. App. 2013).
- *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808 (Md. Ct. Spec. App. 1996).
- *Hiles v. Episcopal Diocese of Massachusetts*, 773 N.E.2d 929 (Mass. 2002).
- *Pfeil v. St. Matthews Evangelical Lutheran Church of the Unaltered Augsburg Confession*, 877 N.W.2d 528 (Minn. 2016).
- *Brady v. Pace*, 108 S.W.3d 54 (Mo. Ct. App. 2003).
- *Howard v. Covenant Apostolic Church, Inc.*, 705 N.E.2d 385 (Ohio Ct. App. 1997).
- *Ausley v. Shaw*, 193 S.W.3d 892 (Tenn. Ct. App. 2005).

The following jurisdictions have allowed defamation suits concerning statements made during a religious proceeding:

- *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468 (8th Cir. 1993).
- *McAdoo v. Diaz*, 884 P.2d 1385 (Alaska 1994).
- *Lipscombe v. Crudup*, 888 A.2d 1171 (D.C. 2005).
- *Connor v. Archdiocese of Philadelphia*, 975 A.2d 1084 (Pa. 2009).
- *Banks v. St. Matthew Baptist Church*, 406 S.C. 156, 750 S.E.2d 605 (2013).

104. *Id.*
105. *Id.* at 163, 750 S.E.2d at 608.

- *Bowie v. Murphy*, 624 S.E.2d 74 (Va. 2006).

There is a sharp divide among courts on this issue. Given this obvious confusion and lack of guidance, the Supreme Court should step in and clarify whether the First Amendment immunizes church officials from defamation suits when the allegedly defamatory statement was made during a church proceeding. Part II of this Article argues that when the Court (finally) decides to hear this issue, it should hold that the First Amendment does not immunize these officials in most cases.

2. *Negligent Hiring, Retention, and Supervision of Clergy*

In the wake of the Catholic Church's sexual abuse scandals, a tidal wave of deserved litigation followed.[106] The most common claims of institutional liability focused on the Church's employment relationship with its clergymen.[107] Plaintiffs typically argued that the Church should be held institutionally liable because (1) it hired these clergymen without performing proper background checks; (2) once the Church learned that one of its clergymen was a dangerous pedophile, it often allowed him to remain in the clergy; and (3) it often left these known pedophiles unsupervised around young children.[108] These arguments encapsulate the torts of negligent hiring, retention, and supervision.

By relying on these torts, the plaintiffs in these cases are asking courts to declare that the Church's clergy-hiring practices were unreasonable and punish the Church for improperly selecting its clergy.[109] Unsurprisingly, given the "delicate balance between religious freedom and the protection of

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106. *See* Alana Bartley, Note, *The Liability Insurance Regulation of Religious Institutions After the Catholic Church Sexual Abuse Scandal,* 16 CONN. INS. L.J. 505, 514 (2010); Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1792–93.

107. Lupu & Tuttle, *supra* note 106, at 1847.

108. *See, e.g.*, Roman Cath. Diocese v. Morrison, 905 So. 2d 1213, 1241 (Miss. 2005) (discussing that to hold the church liable for negligently hiring and retaining its clergy, a plaintiff must prove (1) that the church knew or should have known that the clergyman was dangerous; (2) the church, despite this danger, unreasonably employed this clergyman; and (3) the church's hiring or retaining of this clergyman caused the plaintiff harm); Malicki v. Doe, 814 So. 2d 347, 361–62 (Fla. 2002); Di Cosala v. Kay, 450 A.2d 508, 515–16 (N.J. 1982).

To hold the Church liable for negligent supervision, a plaintiff must prove (1) that the Church knew or should have known of its clergyman's dangerous propensities; (2) the Church placed this clergyman in a position where he could do harm; (3) the Church unreasonably failed to supervise the clergyman; and (4) this lack of supervision caused the plaintiff harm. *See, e.g.*, *Morrison*, 905 So. 2d at 1241; Moses v. Diocese of Colo., 863 P.2d 310, 329 (Colo. 1993); Novare Grp., Inc. v. Sarif, 718 S.E.2d 304, 309 (Ga. 2011); RESTATEMENT (SECOND) OF AGENCY § 213 cmt. d (AM. L. INST. 1958).

109. Lupu & Tuttle, *supra* note 106, at 1847–48.

the public safety, there is considerable diversity in the judicial analysis employed by the . . . courts" on this issue.[110]

In *Gibson v. Brewer*, for example, the Supreme Court of Missouri held that the ecclesiastical abstention doctrine prevents courts from assessing whether a church's clergy-hiring processes are "reasonable."[111] "Questions of hiring, ordaining, and retaining clergy," the court reasoned, "necessarily involve interpretation of religious doctrine, policy, and administration."[112] Delving into a church's clergy-hiring processes, the court continued, would create an "excessive entanglement between church and state" and have "the effect of inhibiting religion."[113] Because the "ordination of a priest is 'quintessentially [a] religious matter,'" courts are not allowed to second-guess the church's decision in this regard.[114] The *Gibson* court, in other words, believed that the State could not—consistent with the First Amendment—tell a church who it could and could not hire as a priest.[115]

Similarly, in *Swanson v. Roman Catholic Bishop of Portland*, the Supreme Court of Maine held that churches are immune from suits involving their clergy-hiring practices because imposing such "secular dut[ies]" would "restrict [the church's] 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."[116] "[C]lergy members cannot be treated in the law as though they were common law employees," the court held.[117] "To import agency principles . . . 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."[118]

In *Malicki v. Doe*, however, the Florida Supreme Court reached the opposite conclusion, holding that suits against religious institutions for negligently hiring, retaining, and supervising their clergy may proceed because these issues can be decided through the neutral application of tort principles.[119] The *Malicki* court noted there was nothing to suggest that "committing sexual assault and battery was governed by [the defendant's] sincerely held religious beliefs or practices."[120] Rather, the church's

110. Jane Doe I v. Malicki, 771 So. 2d 545, 546 (Fla. Dist. Ct. App. 2000).
111. Gibson v. Brewer, 952 S.W.2d 239, 246–47 (Mo. 1997).
112. *Id.*
113. *Id.* at 247.
114. *Id.* (quoting Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 720 (1976)).
115. *See id.*
116. 692 A.2d 441, 445 (Me. 1997).
117. *Id.*
118. *Id.*
119. 814 So. 2d 347, 361–62 (Fla. 2002).
120. *Id.* at 360–61.

challenged conduct related to employment practices that were not related to its religious tenets or doctrine.[121] Accordingly, the court reasoned that cases of negligent employment practices can be decided "[t]hrough neutral application of principles of tort law" and do not require courts to delve into or question the defendant's religious convictions.[122]

Similarly, in *Rashedi v. General Board of Church of Nazarene*, the Arizona Court of Appeals held that a church can be sued for its negligent employment practices because the underlying issues can be determined through "neutral and generally applicable" tort principles.[123] The *Rashedi* court noted that the only real issues in a suit for negligent hiring, retention, and supervision are (1) whether the church knew its priest was dangerous and (2) whether the church placed this priest in a position where he could harm others.[124] Resolving these issues "does not require the interpretation of religious doctrine or ecclesiastical law."[125] Rather, "it requires application of tort law principles that are neutral and generally applicable."[126]

The rationales in these cases accurately illustrate the current divide among courts on this issue. Courts that disallow suits regarding a church's clergy-hiring practices typically focus on the relationship between church and priest. They argue that the First Amendment "severely circumscribe[s] the role that civil courts may play in resolving disputes involving religious organizations or doctrine,"[127] and courts that reach a contrary conclusion have "failed to maintain the appropriate degree of neutrality" when dealing with religious institutions.[128] Courts that allow suits regarding a church's clergy-hiring practices, on the other hand, typically focus on the neutrality and general applicability of these torts.[129]

The following jurisdictions have disallowed suits that challenge a church's clergy-hiring practices:

- *Dausch v. Ryske*, 52 F.3d 1425 (7th Cir. 1994).
- *Isely v. Capuchin Province*, 880 F. Supp. 1138 (E.D. Mich. 1995).
- *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991).

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121. *See id.* at 361.

122. *Id.*

123. 54 P.3d 349, 354 (Ariz. Ct. App. 2002).

124. *See id.* 354–55.

125. *Id.* at 354.

126. *Id.*

127. Swanson v. Roman Cath. Bishop, 692 A.2d 441, 443 (Me. 1997) (internal quotation marks omitted) (citing Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969)).

128. *Id.* at 445.

129. *See, e.g.*, Malicki v. Doe, 814 So. 2d 347, 361–62 (Fla. 2002); Moses v. Diocese of Colo., 863 P.2d 310, 320–21 (Colo. 1993); *Rashedi*, 54 P.3d at 354.

- *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441 (Me. 1997).
- *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997).
- *Erdman v. Chapel Hill Presbyterian Church*, 286 P.3d 357 (Wash. 2012).
- *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780 (Wis. 1995).

The following jurisdictions have allowed suits that challenge a church's clergy-hiring practices:

- *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409 (2d Cir. 1999).
- *Doe v. Norwich Roman Catholic Diocesan Corp.*, 268 F. Supp. 2d 139 (D. Conn. 2003).
- *Smith v. O'Connell*, 986 F. Supp. 73 (D.R.I. 1997).
- *Rashedi v. General Board of Church of Nazarene*, 54 P.3d 349 (Ariz. Ct. App. 2002).
- *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002).
- *Amato v. Greenquist*, 679 N.E.2d 446 (Ill. App. Ct. 1997).
- *Knonkle v. Henson*, 672 N.E.2d 450 (Ind. Ct. App. 1996).
- *Olson v. First Church of Nazarene*, 661 N.W.2d 254 (Minn. Ct. App. 2003).
- *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213 (Miss. 2005).
- *F.G. v. MacDonell*, 696 A.2d 697 (N.J. 1997).
- *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 654 N.Y.S.2d 791 (N.Y. App. Div. 1997).
- *Smith v. Privette*, 495 S.E.2d 395 (N.C. Ct. App. 1998).
- *Turner v. Roman Catholic Diocese of Burlington, Vermont*, 987 A.2d 960 (Vt. 2009).

There is a sharp divide among courts on this issue. Given this obvious confusion and lack of guidance, the Supreme Court should step in and clarify whether the First Amendment prevents courts from hearing cases that challenge a religious institution's clergy-hiring practices. Part III of this Article argues that when the Court (finally) decides to hear this issue, it should hold that the First Amendment allows such suits to proceed.

III. THE ECCLESIASTICAL ABSTENTION DOCTRINE DOES NOT SHIELD RELIGIOUS OFFICIALS FROM DEFAMATION LIABILITY

"*But I tell you that every careless word that people speak, they shall give an accounting for it in the day of judgment.*"

–*Matthew 12:36*

The Court has consistently held that courts may hear suits against religious institutions and their officials as long as they apply "neutral principles of law" when deciding the case and "take special care to scrutinize [church] document[s] in purely secular terms."[130] For example, a church—like any other employer—can be held vicariously liable if its pastor causes a car accident while working for the church.[131] Churches can also be sued for basic slip-and-fall accidents.[132] And church officials can be held liable for intentionally inflicting emotional distress on their congregants.[133] As shown in Part I of this Article, however, several jurisdictions have immunized church officials from defamation suits when their allegedly defamatory statement was made during a religious proceeding. These courts are seriously misguided.

In most defamation cases, courts will not be required to delve into "questions of religious doctrine, polity, and practice" that are outside the areas of judicial expertise.[134] Rather, whether a declarant uttered a false, harmful statement will almost always turn on "objective, well-established" tort principles that are "familiar to lawyers and judges" and can be determined without reference to religious doctrine.[135]

Take the case of *Gaydos v. Blauer*,[136] for example. In *Gaydos*, a priest and nun spread a rumor about the local Catholic school's elementary principal, implying to multiple people that she "was having a sexual affair

130. Jones v. Wolf, 443 U.S. 595, 604 (1979); *see* Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring); Bowie v. Murphy, 624 S.E.2d 74, 78–79 (Va. 2006).

131. *See, e.g.*, Whetstone v. Dixon, 616 So. 2d 764, 772 (La. Ct. App. 1993); Garber v. Scott, 525 S.W.2d 114, 119–20 (Mo. Ct. App. 1975).

132. *See, e.g.*, Cox v. Thee Evergreen Church, 836 S.W.2d 167, 168–69 (Tex. 1992); Garnier v. St. Andrew Presbyterian Church, 446 S.W.2d 607, 607–08 (Mo. 1969); Heath v. First Baptist Church, 341 So. 2d 265, 266, 268 (Fla. Dist. Ct. App. 1977).

133. *See, e.g.*, Gulbraa v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints, 159 P.3d 392, 396 (Utah Ct. App. 2007). It is important to note, however, that IIED claims against a church and its clergy cannot proceed if the court would be required to declare that the institution's religious beliefs or practices are "extreme" or "outrageous." *See* Williams v. Kingdom Hall of Jehovah's Witnesses, 440 P.3d 820, 824–25 (Utah Ct. App. 2019).

134. *Jones*, 443 U.S. at 603.

135. *See id.*; Banks v. St. Matthew Baptist Church, 406 S.C. 156, 161, 750 S.E.2d 605, 607–08 (2013).

136. 81 S.W.3d 186 (Mo. Ct. App. 2002).

with Father Ed Doyle."[137] This affair, the priest often said, left "a cloud hanging over the school."[138] The principal, of course, denied these allegations.[139] But not long after these rumors were spread, the principal was terminated from her position at the school.[140] After being sued for defamation, the priest and nun argued the ecclesiastical abstention doctrine "prohibit[ed] the exercise of jurisdiction by a secular court over these [defamation] claims because the adjudication of such claims by a secular court [would] necessarily submit[] the practice of their religion to the judgment of others outside their religion."[141]

Perplexingly, the Missouri Court of Appeals agreed.[142] "[T]o allow the defamation claims to be litigated," the *Gaydos* court held, "would be to allow civil court jurisdiction to enter the back door of the religious entity in question and allow judicial probing of procedure and church polity."[143] Because the allegedly defamatory statements (1) were "generally made in connection with . . . decisions of the church officials" and (2) "were made by, to, and about people who were part of the religious organization in question," the statements "relate[d] to matters within the religious cognizance of the diocese" and thus could not be examined by the courts.[144]

This decision makes absolutely no sense. In what world does the statement "person X is having a sexual affair with person Y" have anything to do with religious doctrine? Whether someone is having a sexual affair is a non-religious statement of fact: either there is an affair or there is not. And just because the declarant was wearing a priest's collar or a nun's habit when they made this statement does not transform it into a religious statement. By the *Gaydos* court's logic, the statements "person X murdered their spouse" or "person X is a child molester" would be religious statements so long as they were made by cleric near a church.

This sort of knee-jerk, formalistic, partisan reasoning has no place in a secular democracy—let alone in an American courtroom. The ecclesiastical abstention doctrine was meant to prevent courts from interpreting ambiguous religious canons because such texts are outside most judges' judicial expertise.[145] The doctrine was *not* meant to give religious adherents free license to spread malicious, damaging, and demonstrably false rumors about others without consequence. In short, religious adherents should be held to the

137. *Id.* at 189–90.
138. *Id.* at 189.
139. *See id.* at 188.
140. *Id.* at 188–89.
141. *Id.* at 190.
142. *Id.* at 196.
143. *Id.*
144. *Id.* at 196–97.
145. Watson v. Jones, 80 U.S. 679, 729 (1871).

same standards as everyone else; "[t]o find otherwise would be to grant tort law immunity to religious practitioners, enabling them to make any statement regardless of its falsity and harmfulness provided the statement [was] made in a religious setting."[146]

IV. THE ECCLESIASTICAL ABSTENTION DOCTRINE DOES NOT SHIELD RELIGIOUS INSTITUTIONS FROM LIABILITY FOR NEGLIGENTLY HIRING, RETAINING, OR SUPERVISING THEIR CLERGY

"*"[B]oth prophet and priest are polluted; [e]ven in My house I have found their wickedness,' declared the* LORD."

–Jeremiah 23:11

In the wake of the Catholic Church's sexual abuse scandals, a tidal wave of litigation followed.[147] In addition to making claims against their abusers, many of these victims attempted to hold the Church institutionally liable as well.[148] The most common claims of institutional liability revolved around the Church's negligent employment practices.[149] As shown in Part II of this Article, however, several jurisdictions have immunized churches from claims of negligent hiring, retention, and supervision of their clergy. This is baffling. The American justice system should not allow any institution—regardless of its religious affiliation—to leave unsupervised pedophiles near children without the specter of civil liability.

The main argument running throughout this Article is that religious institutions should not be given special treatment simply because of their religious nature. Religion is not a trump card that allows groups to do grievous harms without consequences. In fact, the opposite is typically true: granting special privileges to religious tortfeasors improperly favors religion over non-religion in violation of the Establishment Clause.[150] Although the government

146. Banks v. St. Matthew Baptist Church, 406 S.C. 156, 163, 750 S.E.2d 605, 608 (2013).

147. Bartley, *supra* note 106, at 514.

148. Janna Satz Nugent, Note, *A Higher Authority: The Viability of Third Party Tort Actions Against a Religious Institution Grounded on Sexual Misconduct by a Member of the Clergy*, 30 FLA. ST. U. L. REV. 957, 960 (2003).

149. Lupu & Tuttle, *supra* note 106, at 1845 ("Most of the cases brought against religious organizations assert that such institutions are obliged to act with reasonable care in their employment practices, especially when their employees will have significant interaction with children or other vulnerable people.").

150. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 593 (1989) (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)) (noting that the Establishment Clause prevents the government from favoring one religion over others and from favoring religion over non-religion); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect

is allowed to bestow "indirect" or "incidental" benefits to religious organizations,[151] it is not allowed to directly bestow a benefit that has the primary effect of advancing religion.[152] By granting religious institutions immunity from several torts when such immunity is not available to non-religious organizations, the government has improperly placed its stamp-of-approval on the actions of religious organizations.

In her frequently cited concurrence in *Lynch v. Donnelly*, Justice O'Connor noted that "[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[153] In other words, a person's religion, much like their race or sex, should not be a part of the government's calculus when it decides what treatment that person should receive.[154] Lower court decisions that prevent lawsuits against religious institutions solely because of their religious affiliation run counter to this principle.

When the government gives an organization preferential treatment because of its religious affiliation, it tells members of that religion that they are "insiders"—"favored members of the political community" entitled to special treatment because they believe the correct dogma.[155] And, at the same time, it tells non-members that they are "not full members of the political community" who must play by a different set of rules because they do not follow the correct dogma.[156] These decisions allow similarly situated groups to receive vastly different treatment simply because of their religious affiliations, or lack thereof. This sort of reasoning conflicts with the most basic notions of fairness and equality enshrined in our Constitution.[157]

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no favoritism . . . between religion and non-religion . . . ."); *see also* Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190, 191 (1960) (per curiam) (noting protections against all forms of governmental action, including both statutory law and court action through civil lawsuits); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1187–88 (2d ed. 1988) (noting that the Establishment Clause plays a central role in guaranteeing religious freedom "by forbidding official actions that signify official endorsement [of] . . . religious beliefs"); Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45, 68 (2001) (arguing that the "non-application of tort principles where they might otherwise apply" could give rise to Establishment Clause concerns).

151. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973).

152. Bowen v. Kendrick, 487 U.S. 589, 609–10 (1988); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

153. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

154. *Id.* at 687, 693–94.

155. *Id.* at 688.

156. *Id.*

157. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (noting that the constitutional promise of equal protection "is essentially a direction that all persons similarly situated should be treated alike" (citing Plyler v. Doe, 457 U.S. 202, 216 (1982))); Ross v. Moffitt, 417 U.S. 600, 609 (1974) (noting that equal protection principles are offended when the

Imagine, for example, if a public school and a parochial school each systematically employed pedophiles, placed them near children, and covered up decades of abuse. Under some courts' interpretation of the ecclesiastical abstention doctrine, the public school could rightfully be sued into oblivion, but the parochial school would remain immune from suit. Why? Because the parochial school had "Saint" in its name? Or because the abuser wore a special collar? Give me a break. Such formalistic reasoning has no place in a judicial opinion.

Moreover, allowing plaintiffs to challenge a church's clergy-hiring practices is consistent with the Court's free exercise jurisprudence. The Free Exercise Clause was drafted primarily to prevent the persecution of religious minorities[158] and to prevent the states from coercing their citizens into practicing a particular religion.[159] When a church is sued for hiring pedophiles and placing them near children without supervision, it is not being persecuted for its religious beliefs; it is being sued for being objectively negligent and irresponsible.[160]

As Professor Marci Hamilton observed, the justifications underlying the ecclesiastical abstention doctrine are "at their lowest ebb" in circumstances where church officials "harm innocent and unconsenting third parties."[161] Holding a religious institution civilly liable for child endangerment will not discourage participation in the organization, belittle the organization's beliefs, or require the court to delve into religious doctrine. To the contrary, holding religious institutions to the same standard as everyone else shows that the government is "remain[ing] neutral in the marketplace of ideas"[162] and is not

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State treats "arguably indistinguishable" groups differently); Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (plurality opinion) (noting that "dissimilar treatment" between groups that are "similarly situated" is the prototypical example of unconstitutional state action (quoting Reed v. Reed, 404 U.S. 71, 77 (1971))); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("[T]he equal protection of the laws is a pledge of the protection of equal laws."); *see also* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949) (noting that the Constitution requires the government to afford substantially equal treatment to similarly situated groups).

158. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–33 (1993) (collecting historical sources).

159. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)); Cnty. of Allegheny v. ACLU, 492 U.S. 573, 659–61 (1989) (Kennedy, J., concurring in part).

160. *See* Malicki v. Doe, 814 So. 2d 347, 360–61 (Fla. 2002) (noting that sexual assault and battery are not related to sincerely held religious beliefs or practices).

161. Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1114 (2004).

162. FCC v. Pacifica Foundation, 438 U.S. 726, 745–46 (1978) (noting that it is a "central tenant" of the First Amendment that the government must "remain neutral in the marketplace of ideas").

favoring religion over non-religion.[163] Churches and their officials should not be able to hide behind the First Amendment to avoid accountability for conduct that is clearly unreasonable and harmful.

As a final note, in 2019, the Supreme Court readjusted its Establishment Clause analysis in *American Legion v. American Humanist Association* by adopting a more holistic, fact-specific approach that is meant to (1) assure religious liberty, tolerance, and inclusivity; (2) avoid religiously based social conflict; and (3) maintain an appropriate separation of church and state so that each can flourish in their own separate spheres.[164] Immunizing churches from neutral, secular tort laws undermines these principles.

These churches, in many instances, knowingly employed pedophiles and placed them around children without supervision.[165] But, by the grace of the courts, these abuse victims cannot hold the church liable simply because the church played its religion trump card.[166] This preferential treatment is bound to create more religious intolerance and breed religiously based social conflict. Imagine a community devastated by a church's child sex abuse scandal. Imagine these victims courageously coming forward, banding together, and turning to the courts for justice. Then, imagine the courts holding that the church cannot be held liable simply because it is a church. Such a superficial, unthinking, one-sided rationale has no place in our justice system, and decisions like these breed only social strife and contempt for religion and the judiciary.

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163. *See* Van Orden v. Perry, 545 U.S. 677, 702 (2005) (Breyer, J., concurring) (noting that the First Amendment forbids the government from "favor[ing] a particular religious sect" or "promot[ing] religion over nonreligion"); Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 694 (1970) ("[T]he Government must neither . . . favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion.").

164. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2082–85, 2089 (2019); *id.* at 2090–91 (Breyer, J., concurring) (quoting Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring)). The Court placed particular emphasis on avoiding the appearance of government hostility toward religion. *Id.* at 2084–85 (majority opinion) ("A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion.").

165. Bartley, *supra* note 106, at 509–10, 513.

166. John S. Brennan, *The First Amendment is Not the 8th Sacrament: Exorcising the Ecclesiastical Abstention Doctrine Defense from Legal and Equitable Claims for Sexual Abuse Based on Negligent Supervision or Hiring of Clergy*, 5 T.M. COOLEY J. PRAC. & CLINICAL L. 243, 254 (2002) (collecting cases).

V. COUNTERARGUMENTS CONSIDERED

A. Counterargument 1: By Becoming a Member of a Religious Organization, an Individual Submits to the Organization's Ecclesiastical Jurisdiction and Forfeits Their Legal Right to Invoke the Supervisory Power of the Civil Courts

Admittedly, members of religious organizations cannot turn to the civil courts to address inherently ecclesiastical matters.[167] For example, if a church's bylaws provided that a congregant could be excommunicated only by a two-thirds vote, a congregant expelled by a mere majority vote would likely not be able to turn to the civil courts for reinstatement.[168] The Supreme Court has made clear that the civil courts must keep their noses out of a religious organization's rules, regulations, doctrine, structure, and inner-workings.[169] If the issue touches upon church governance, in other words, the court must abstain and leave the issue to the church's leadership.[170]

However, the Supreme Court has never surrendered issues of civil rights to ecclesiastical tribunals.[171] To the contrary, the Court has explicitly held that the civil courts retain jurisdiction over cases that involve "neutral principles of law" and do not touch upon church governance.[172] The purpose of the ecclesiastical abstention doctrine is to prevent courts from entangling themselves in "questions of religious doctrine, polity, and practice."[173] It is not meant to immunize religious organizations from neutral, generally applicable tort principles.[174]

In its landmark decision in *Employment Division v. Smith*, the Supreme Court held that the First Amendment does not exempt religious persons or groups from neutral, generally applicable laws, even if enforcing the law

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167. *Id.* at 253.

168. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724–25 (1976) (refusing to reinstate a wrongfully terminated bishop because the controversy touched upon the "rules and regulations for internal [church] discipline and government").

169. *See, e.g.*, *id.*

170. *See, e.g.*, *id.*

171. *See* Watson v. Jones, 80 U.S. 679, 731 (1871) ("When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them."). *But see* Gonzalez v. Roman Cath. Archbishop, 280 U.S. 1, 16 (1929) ("In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.").

172. Jones v. Wolf, 443 U.S. 595, 599 (1979).

173. *Id.* at 603.

174. *See id.* at 599–600.

would incidentally burden their religion.[175] Allowing religious groups to excuse themselves from complying with valid laws, the *Smith* Court reasoned, would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself."[176]

Take an extreme case, for example. Suppose there was a radical sect of Christianity in the United States that took the Bible's verses on stoning literally.[177] If the congregants stoned a man for "gathering wood on the sabbath day,"[178] could the stonee sue for battery? I would hope so. In a case like this, the court would not be infringing on the group's religious practices; it would be enforcing a general rule that all civil societies have adopted: you can't throw rocks at people.

In the same vein, if courts held religious institutions liable for defamation and negligent employment practices, they would not be infringing on their religious practices; they would simply be enforcing two rules that all civil societies have adopted: (1) you can't spread falsehoods about someone if it would cause them to suffer serious harm and (2) you can't employ pedophiles and leave them around children unsupervised. This is common sense.

B. Counterargument 2: Allowing Defamation Suits Against Religious Officials Would Require Courts to Declare that Certain Religious Beliefs Are True or False

In a defamation case, the truth or falsity of a religious belief would arise only in a rare case where the statement at issue is an assertion about religious doctrine—in which case the court should abstain. Most defamation suits revolve around declaratory statements that can be shown by a preponderance

175. 494 U.S. 872, 877–79 (1990).

176. *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878) (internal quotation marks omitted)).

177. *See, e.g.*, *Leviticus* 24:13–14 ("Then the LORD spoke to Moses, saying, 'Bring the one who has cursed outside the camp, and let all who heard him lay their hands on his head; then let all the congregation stone him.'"); *Deuteronomy* 22:23–24 ("If there is a girl who is a virgin engaged to a man, and another man finds her in the city and lies with her, then you shall bring them both out to the gate of that city and you shall stone them to death . . . ."); *Deuteronomy* 17:2–7 ("If there is found in your midst, in any of your towns, which the LORD your God is giving you, a man or a woman who does what is evil in the sight of the LORD your God . . . then you shall bring out that man or that woman who has done this evil deed to your gates . . . and you shall stone them to death.").

178. *Numbers* 15:32–36 ("[W]hile the sons of Israel were in the wilderness, they found a man gathering wood on the sabbath day. Those who found him gathering wood brought him to Moses . . . and to all the congregation . . . Then the LORD said to Moses, 'The man shall surely be put to death; all the congregation shall stone him with stones outside the camp.' So all the congregation brought him outside the camp and stoned him to death with stones, just as the LORD had commanded Moses.").

of the evidence to be true or false.[179] This, of course, is true even in cases where the defendant is a religious official. Take the case of *Downs v. Roman Catholic Archbishop of Baltimore*,[180] for example. There, a seminarian sued a priest for defamation after the priest accused the seminarian of "sexually motivated [mis]conduct."[181] These accusations, which the seminarian insisted were false, caused the seminarian to be expelled from the diocese and prevented him from ever being considered for the priesthood.[182]

The *Downs* court dismissed the seminarian's defamation suit because the statement was made by a priest in a setting concerning the priesthood.[183] A case of this sort, the court reasoned, would require the court to address "the forbidden inquiry" of whether a person is worthy of being a member of the clergy.[184] But this framing of the issue completely misses the mark (and provides immunity to church officials without due regard to the harms their words can cause). The relevant inquiry in *Downs* was not whether the plaintiff was suited to be a priest—that decision, of course, is left to the church council. The relevant inquiry was whether the plaintiff engaged in sexual misconduct, as the defendant claimed. This was a serious accusation made by the defendant—an accusation that was either true or false—and the plaintiff should have been allowed to hold the defendant accountable if his harmful statement was demonstrably false.

Although certain statements may have a religious ring to them, this piety may often be used to cloak the statement's secular purpose: to injure another. "Joe violated God's Fourth Commandment," after all, is just a fancy way of saying "Joe is a murderer." This is not a religious statement; it is a declarative statement, which is either true or false, and courts should treat it as such. And if these statements are demonstrably false and harmful, the declarant can (and should) be held liable for uttering them.

Of course, courts cannot adjudicate the truth or falsity of all church-related statements. Contrast the statement "Father Jones stole $5,000 from the church and should be removed from the priesthood" with "Father Jones is untrustworthy and should be removed from the priesthood." Both statements undoubtedly deal with Father Jones's fitness to serve as a priest and touch on important ecclesiastical concerns; but the former statement is objective, and the latter statement is subjective. The touchstone in a church-related defamation case—like all defamation cases—should be whether the contested

179. *See* Andrew K. Craig, Note, *The Rise in Press Criticism of the Athlete and the Future of Libel Litigation Involving Athletes and the Press*, 4 SETON HALL J. SPORT L. 527, 542 (1994).

180. 683 A.2d 808, 809 (Md. Ct. Spec. App. 1996).

181. *Id.* at 813.

182. *Id.* at 810.

183. *Id.* at 813.

184. *Id.* at 812.

statement can be proven to be demonstrably true or false in a court of law, not whether it was uttered by a church official during a church proceeding.

C. *Counterargument 3: Ecclesiastical Tribunals Are Sufficient Forums to Adjudicate Church-Related Disputes*

Although ecclesiastical tribunals may be able to properly adjudicate *some* church-related suits, in most cases they are woefully inadequate. Harvard law professor Laurence Tribe has argued that by giving religious groups carte blanche authority over church-based disputes, courts have committed the fallacy of assuming "internal fairness."[185] Courts have "assum[ed], without any real inquiry, that the internal processes of the groups to which litigants are remitted will give fair consideration to the interests and rights of such litigants."[186] In other words, when someone feels wronged by an institution, it does not make much sense to require them to turn to that same institution for justice.[187] And when these tribunals prove to be insufficient—either because of impartiality, incompetence, or poor judicial structure—the civil courts should remain open to wronged individuals. To quote Professor Tribe:

> Even when . . . dealing with religious freedom, where the argument for deferring to the internal autonomy of private groups is perhaps strongest, there remains a clear need . . . for a neutral judicial forum to protect persons against the complete disregard of their rights by an organization in whose internal structure they have not received a fair opportunity to make their case.[188]

This is especially true in cases concerning a cleric's defamation or a church's negligent employment practices. To remit a claimant to the church's tribunals, the claimant is faced with the uphill battle of asking the church to either (1) declare that one of its clerics is a liar or (2) admit that it was negligent in hiring its clergy member. This is very unlikely to happen. Churches should not be allowed to police themselves, as "the adversar[ial] process is needed . . . to maintain the delicate balance between undue intrusion into the internal lives of various autonomous groups and undue delegation to those groups of potentially tyrannical authority over their members."[189]

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185. Laurence H. Tribe, *Seven Pluralist Fallacies: In Defense of the Adversary Process—A Reply to Justice Rehnquist*, 33 U. MIAMI L. REV. 43, 47, 49–50 (1978).

186. *Id.* at 47.

187. *See id.* at 47, 50.

188. *Id.* at 50.

189. *Id.*

VI. CONCLUSION

In 1998, Diane Witthaus was slandered and, as a result, lost her job as an elementary school principal.[190] Throughout the 1980s, Paul Isley was routinely sexually abused by the teachers at his school.[191] These two turned to the courts for justice, but they were both turned away.[192] Their victimizers could not be held accountable, the courts told them.[193] Why? Because they were priests.[194] These courts held that the ecclesiastical abstention doctrine (1) prevents religious organizations from being held liable for their negligent clergy-hiring practices and (2) immunizes religious officials from many defamation suits.[195] These courts reached their conclusions despite the fact that the Supreme Court has never ruled on—or even hinted at—these issues.

And these courts are not alone. Multiple jurisdictions have ruled that religious institutions cannot be held liable for the negligent hiring, retention, or supervision of their clergy because these institutions are shielded from liability under the ecclesiastical abstention doctrine.[196] And even more jurisdictions have held that this doctrine prevents religious officials from being sued for defamation if the defamatory statement was made during a religious proceeding.[197] These decisions are horribly misguided. An institution should not be shielded from legitimate, generally applicable tort laws simply because it has a religious affiliation. In fact, giving such an obvious benefit solely to religious institutions conflicts with the Supreme Court's Establishment Clause and equal protection jurisprudence.

The Supreme Court's current lack of clarity in this area has allowed multiple courts to rule that religious institutions cannot be held liable for knowingly placing pedophiles near children without supervision.[198] This is head-spinning. The Supreme Court should revisit the ecclesiastical abstention doctrine and make clear that (1) it allows religious officials to be sued for defamation, even if the defamatory statement was made during a religious proceeding and (2) it allows religious institutions to be held liable for their negligent employment practices, especially when they allow dangerous

190. *See* State *ex rel.* Gaydos v. Blaeuer, 81 S.W.3d 186, 189–90 (Mo. Ct. App. 2002).

191. *See* Isley v. Capuchin Province, 880 F. Supp. 1138, 1142 (E.D. Mich. 1995).

192. *See id.* at 1150–51; *Gaydos*, 81 S.W.3d at 198.

193. *Isley*, 880 F. Supp at 1150–51; *Gaydos*, 81 S.W.3d at 198.

194. *See Isley*, 880 F. Supp at 1150; *Gaydos*, 81 S.W.3d at 196–97.

195. *Isley*, 880 F. Supp at 1150–51; *see Gaydos*, 81 S.W.3d at 196–97.

196. Brennan, *supra* note 166, at 254.

197. *See supra* Section II.B.1; *see also* Carl H. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1, 92–94 (1986).

198. *See* Brennan, *supra* note 166, at 253–54.

members of their clergy to be around children unsupervised. To find otherwise would be to grant religious institutions a license to sin without consequence.