

STAYING NEUTRAL: HOW WASHINGTON STATE COURTS SHOULD APPROACH NEGLIGENT SUPERVISION CLAIMS AGAINST RELIGIOUS ORGANIZATIONS

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Abstract: The torts of negligent hiring, supervision, and retention place a duty on employers to prevent their employees from using the places, things, or tasks entrusted to them to harm foreseeable victims. The negligent employment torts create an independent duty under which plaintiffs may pursue an action when suits brought under a vicarious liability or breach of fiduciary duty theory would fail. For victims of sexual misconduct by religious leaders, negligent supervision claims against religious organizations are a crucial means of remedying serious and lasting injuries. Washington state law recognizes negligent supervision, and Washington courts have applied it to religious organizations, but these claims typically implicate First Amendment religious freedom concerns. A short series of Washington appellate cases affirming grants of summary judgment to religious organization defendants on First Amendment grounds has made it more difficult for plaintiffs to assert negligent supervision claims against religious entities. This Comment argues that Washington courts have granted religious organizations an impermissibly broad level of First Amendment protection from claims of negligent supervision, and suggests a more deliberate analytical framework for evaluating the constitutionality of such claims.

INTRODUCTION

Despite increased public awareness following the child molestation scandals that plagued the Catholic Church during the 1990s, incidence of sexual misconduct by religious leaders is still shockingly widespread.¹ This misconduct is a prominent problem in American society, and the tort of negligent supervision is an essential mechanism both for preventing it and for remedying the harm it causes. When individuals file negligent supervision suits against religious organizations, state courts are forced to navigate a distinct pair of directives: the dual

1. See Executive Summary, Diana R. Garland, The Prevalence of Clergy Sexual Misconduct with Adults: A Research Study Executive Summary (Oct. 7, 2009), <http://www.baylor.edu/clergysexualmisconduct/index.php?id=67406> (discussing comprehensive 2009 study finding that one in thirty-three American adult women who go to church regularly has been the victim of a sexual advance by her religious leader). Many such cases appear far more egregious than the illicit tryst at issue in *S.H.C. v. Lu*, *infra* Part IV.C., with some religious leaders molesting legions of vulnerable minors and religious organizations engaging in elaborate suppression campaigns. See, e.g., Laurie Goodstein, *Vatican Declined to Defrock U.S. Priest Who Abused Boys*, N.Y. TIMES, Mar. 25, 2010, at A1.

mandates of the First Amendment's religion clauses and the general right of the aggrieved to seek recourse through the court system.² What are courts to do if the elements of a plaintiff's claim require them to make sensitive interpretive judgments about a religion's doctrine or practice?

In the 1979 case *Jones v. Wolf*,³ the Supreme Court articulated a framework for courts to use when analyzing whether they can adjudicate common-law claims against religious organizations without violating the First Amendment.⁴ State courts have applied this framework in a variety of ways, including a categorical bar against such claims, a categorical allowance of such claims, and a case-by-case inquiry into whether the elements of the claims would require interpretation of the relevant religious doctrine.⁵ In the context of common-law negligent supervision claims, the Washington State Supreme Court has expressed approval of the latter case-by-case inquiry.⁶ Several recent Washington State Court of Appeals decisions, however, have employed broad language in rejecting negligent supervision suits on First Amendment grounds, creating strong precedent against such claims.⁷

This Comment begins in Part I by examining the tort of negligent supervision under Washington law. Part II contains a general exposition of recent First Amendment jurisprudence, giving special attention to the landmark Supreme Court case of *Jones v. Wolf*. Part III examines the various approaches state courts employ in analyzing whether tort claims against religious organizations can be permissibly adjudicated within the constraints of the First Amendment. Part IV discusses how Washington courts have previously handled this issue, and examines in detail two recent appellate cases rejecting negligent supervision suits against religious organizations on First Amendment grounds. Finally, in Part V, this Comment argues that Washington courts should read this line of cases narrowly and apply the neutral principles approach articulated in *Jones v. Wolf* when analyzing tort claims against religious organizations.

2. See *infra* Part II.

3. 443 U.S. 595 (1979).

4. *Id.* at 604–07.

5. See *infra* Part III.

6. See *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wash. 2d 699, 729, 985 P.2d 262, 277 (1999).

7. See *infra* Parts IV.B. and C.

I. THE TORT OF NEGLIGENT SUPERVISION IMPOSES AN INDEPENDENT DUTY ON EMPLOYERS TO PREVENT EMPLOYEES FROM ENDANGERING OTHERS

The torts of negligent hiring, supervision, and retention (“negligent employment torts”) place an affirmative duty on employers to prevent their employees from causing foreseeable harm to third persons using the tasks, premises, or instrumentalities entrusted to them.⁸ This duty applies regardless of whether employees are acting within the scope of their prescribed duties, which distinguishes negligent employment claims from vicarious liability in both concept and application.⁹ For injured parties whose claims would fail under a vicarious liability theory, the negligent supervision action is an indispensable means to recovery.

A. *Negligent Supervision Imposes a Limited Duty on Employers to Prevent Employees from Causing Foreseeable Harm to Third Persons*

The negligent employment torts impose a duty on employers to exercise reasonable care to prevent employees from harming others, even where the employee is acting outside of the scope of employment.¹⁰ Claims for negligent hiring, supervision, and retention share similar elements, and are distinguishable only by the stage of employment in which the tortious conduct arises.¹¹ Washington courts did not begin to recognize negligent supervision as a cause of action until the latter half of the twentieth century,¹² and have been hesitant to assign liability to the schools, group homes, and medical clinics that are typically the

8. See *Niece v. Elmview Group Home*, 131 Wash. 2d 39, 48, 929 P.2d 420, 425–26 (1997); see also RESTATEMENT (SECOND) OF TORTS § 317 (1965).

9. See *Niece*, 131 Wash. 2d at 48, 929 P.2d at 425–26.

10. See *Peck v. Siau*, 65 Wash. App. 285, 294, 827 P.2d 1108, 1113, *review denied*, 120 Wash. 2d 1005, 838 P.2d 1142 (1992) (citing RESTATEMENT (SECOND) OF TORTS § 317 (1965)); see also *Niece*, 131 Wash. 2d at 51, 929 P.2d at 420 (“The theory of negligent supervision creates a limited duty to control an employee for the protection of third parties, even where the employee is acting outside the scope of employment.”).

11. See *Peck*, 65 Wash. App. at 288, 827 P.2d at 1110 (“The difference between negligent hiring and negligent retention is the time at which the employer’s negligence occurs. With negligent hiring, it occurs at the time of hiring; with negligent retention, it occurs in the course of employment.”).

12. See, e.g., *La Lone v. Smith*, 39 Wash. 2d 167, 172, 234 P.2d 893, 896 (1951) (affirming employer liability for negligently retaining employee “because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment” (quoting RESTATEMENT (FIRST) OF AGENCY § 213 (1933))).

target of such claims.¹³ Washington courts, however, have definitively acknowledged the viability of these suits as a means of seeking redress where other methods of recovering for employee misconduct fail for scope of employment or statute of limitations reasons.¹⁴ Plaintiffs have successfully asserted that religious organizations may be liable under the negligent supervision theory,¹⁵ but such claims typically evoke strong First Amendment defenses.¹⁶

Liability for negligent supervision arises out of the employment relationship and is predicated on the employer's furnishing of places, things, or duties later used to commit negligent or intentional wrongs.¹⁷ For an employer to be liable for negligent supervision, the employer must know or have reason to know of both (1) its ability to control the employee and (2) the necessity of exercising such control to prevent harm to third persons.¹⁸ Washington courts have interpreted the second element to require a showing that the employer knew or had reason to know that the particular employee presented a risk of harm to others.¹⁹ Furthermore, the employee must be on the employer's premises or using an employer's chattel when the harm occurs.²⁰ To establish that the employer's negligence was the proximate cause of their injury, plaintiffs must demonstrate that the negligent or intentional act of the employee was foreseeable.²¹ Imposing liability for negligent supervision supports the public policy goals of providing a fallback remedy for injured

13. *See, e.g., Niece*, 131 Wash. 2d at 53, 929 P.2d at 428 (rejecting negligent supervision claim against nursing home); *Thompson v. Everett Clinic*, 71 Wash. App. 548, 556, 860 P.2d 1054, 1059 (1993) (refusing to hold medical clinic liable for doctor's sexual assault); *Scott v. Blanchet High School*, 50 Wash. App. 37, 45, 747 P.2d 1124, 1128 (1987) (refusing to hold school liable for negligent supervision of teacher).

14. *See, e.g., Scott*, 50 Wash. App. at 44, 747 P.2d at 1128 ("Negligent supervision of an employee is a recognized cause of action.").

15. *See C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wash. 2d 699, 727, 985 P.2d 262, 276 (1999).

16. *See infra* Part III.

17. *See Peck v. Siau*, 65 Wash. App. 285, 294, 827 P.2d 1108, 1113, *review denied*, 120 Wash. 2d 1005, 838 P.2d 1142 (1992) (citing RESTATEMENT (SECOND) OF TORTS § 317 (1965)).

18. *See id.*

19. *Niece v. Elmview Group Home*, 131 Wash. 2d 39, 52, 929 P.2d 420, 427–28 (1997) ("Washington cases have generally interpreted the knowledge element to require a showing of knowledge of the dangerous tendencies of the particular employee.").

20. *See Peck*, 65 Wash. App. at 294, 827 P.2d at 1113 (citing RESTATEMENT (SECOND) OF TORTS § 317 (1965)).

21. *See Niece*, 131 Wash. 2d at 51, 929 P.2d at 427.

persons and encouraging employers to take affirmative steps to prevent the foreseeable torts of their employees.²²

B. The Tort of Negligent Supervision Is Functionally Distinct from Other Employment-Related Torts

Negligent supervision imposes a duty that is “analytically distinct and separate”²³ from the vicarious liability theory, which imposes liability on an employer for the torts of an employee who is acting on the employer’s behalf.²⁴ Unlike the agency theory of the common-law doctrine of respondeat superior, which requires employers to answer for the wrongs of their employees, negligent supervision claims attach liability directly to the employer for a breach of the employer’s own independent duty of due care.²⁵ Thus, claims of negligent employment can be a viable means of redress even when claims against the principal tortfeasor do not succeed due to failure of proof or statute of limitations restrictions.²⁶ Furthermore, while an employer’s vicarious liability is limited to the employee’s actions within the scope of that employee’s employment and on the employer’s behalf,²⁷ the scope of employer liability under a negligent supervision theory is limited only by the foreseeability that the employee presented a risk of harm to others.²⁸ In the context of claims based on sexual misconduct, negligent supervision is a critical means of recovery because sexual acts typically occur in contexts outside of the scope of employment.

22. See Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1858 (2004).

23. *Niece*, 131 Wash. 2d at 48, 929 P.2d at 426.

24. *Id.*

25. *Id.* (citing *Scott v. Blanchet High School*, 50 Wash. App. 37, 45, 747 P.2d 1124, 1128 (1987)).

26. See *Ohler v. Tacoma Gen. Hosp.*, 92 Wash. 2d 507, 511, 598 P.2d 1358, 1360 (1979) (holding that tort claims do not accrue for statute of limitations purposes “until [the defendant] discovered or reasonably should have discovered all of the essential elements of her possible cause of action”). Under the discovery rule, if the plaintiff learns of the employer’s knowledge that the employee presented a risk of harm *after* the conduct occurs, they can potentially recover from the employer for negligent supervision even after the statute of limitations period for claims against the employee has expired; under a vicarious liability theory, claims against the employer expire along with claims against the employee. *But cf.* *Germain v. Pullman Baptist Church*, 96 Wash. App. 826, 835, 980 P.2d 809, 814 (1999) (affirming trial court’s ruling that discovery rule did not apply in negligent supervision suit against church because plaintiffs had constructive knowledge that deacons concealed pastor’s misconduct).

27. See *Kuehn v. White*, 24 Wash. App. 274, 277, 600 P.2d 679, 681 (1979).

28. See *Niece*, 131 Wash. 2d at 48, 929 P.2d at 426 (“[T]he scope of employment is not a limit on an employer’s liability for a breach of its own duty of care.”).

II. FIRST AMENDMENT DOCTRINE ALLOWS COURTS TO APPLY NEUTRAL PRINCIPLES OF LAW IN TORT CASES AGAINST RELIGIOUS ORGANIZATIONS

The First Amendment's guarantee of religious freedom represents an outer constraint on the ability of federal, state, and local governments to pass or enforce laws pertaining to religious exercise. The trajectory of the United States Supreme Court's application of this principle reflects a general shift from an early paradigm of separationism to a modern paradigm of neutrality.²⁹ This trend is reflected in the Court's decisions in both the Establishment Clause and the Free Exercise Clause contexts. The shift from separationism to neutrality is exemplified by the Court's 1979 decision in *Jones v. Wolf*,³⁰ which held that courts may adjudicate common-law claims against religious organizations within the confines of the First Amendment if those claims can be decided solely on neutral principles of law.³¹

A. *First Amendment Doctrine Predominantly Requires Government Neutrality with Respect to Religion*

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."³² Read together, these two clauses provide dual boundaries on government action that relates to religion: protection and establishment. Courts applying laws that impact religious organizations must walk a "tight rope" between these two priorities.³³ In order to afford religious bodies sufficient autonomy and freedom of belief without contravening the constitutional prohibition on established religion, courts interpreting the First Amendment have attempted to "preserv[e] doctrinal flexibility and recogniz[e] the need for a sensible and realistic application of the religion clauses."³⁴ While the religion clauses refer specifically to

29. See generally Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1071 (2002) (describing Establishment Clause doctrine as historically informed by the "mutually antagonistic values" of separation and neutrality).

30. 443 U.S. 595 (1979).

31. See *Jones*, 443 U.S. at 602–03.

32. U.S. CONST. amend. I.

33. See *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("[W]e have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed." (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 672 (1970))).

actions taken by the federal government, both the first (“Establishment Clause”) and second (“Free Exercise Clause”) clauses of the First Amendment apply to the states through incorporation into the Fourteenth Amendment.³⁵

1. First Amendment Jurisprudence Has Shifted from Outright Separationism to Neutrality

Application of the two principles of the religion clauses has taken a trajectory commonly described as a move from a separationist to a neutrality-based conception of the First Amendment.³⁶ Separationism evokes the strict “wall of separation between Church & State” historically associated with the First Amendment,³⁷ requiring that “[n]either a state nor the Federal Government can . . . participate in the affairs of any religious organizations or groups and vice versa.”³⁸ Neutrality, on the other hand, does not presume that incidental government involvement in religious matters is illegitimate, as long as such involvement is generally applicable and neutral both “between religion and religion, and between religion and non-religion.”³⁹ While the rise of a neutrality-based conception of the religion clauses has profoundly affected First Amendment doctrine in several important areas,⁴⁰ it has not completely displaced separationist thinking, and both paradigms remain prominent undercurrents throughout Free Exercise and Establishment Clause doctrine.⁴¹ Separationist thinking remains an important force in the contexts of government sponsorship of religious

34. *Id.*

35. See *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947) (incorporating Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating Free Exercise Clause).

36. See, e.g., Gedicks, *supra* note 29, at 1071–72; see also Lupu & Tuttle, *supra* note 22, at 1802 (“By the turn of the millennium, several of the building blocks in the edifice of Separationism had crumbled, and a competing paradigm of Neutrality or evenhandedness between religion and secularity had taken center stage.”).

37. Letter from Thomas Jefferson to the Danbury Baptist Ass’n (Jan. 1, 1802), available at <http://www.loc.gov/loc/lcib/9806/danpre.html>.

38. *Everson*, 330 U.S. at 16.

39. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

40. See Lupu & Tuttle, *supra* note 22, at 1802–03 (describing the neutrality paradigm’s effect on the adjudication of internal church disputes and on the right of religiously oriented speakers to access forums of public speech).

41. See *id.* at 1803 (“This movement toward Neutrality, though sweeping, has remained incomplete.”); see also Gedicks, *supra* note 29, at 1089 (“[F]or a time it seemed that neutrality analysis would wholly displace separation analysis under the Establishment Clause. But complete displacement never occurred.”).

speech⁴² and direct government aid to religious organizations.⁴³ But Supreme Court cases such as *Lemon v. Kurtzman*,⁴⁴ *Employment Division v. Smith*,⁴⁵ and *Jones v. Wolf*⁴⁶ exemplify a marked departure from the separationist regime and signify the Court's increased willingness to interpret the First Amendment's mandates flexibly in the context of generally applicable laws that incidentally affect religious organizations.⁴⁷ Recognizing this modern shift towards neutrality is essential to understanding the appropriate role for courts hearing common-law claims against religious organizations.

2. *The Establishment Clause Prohibits States from Endorsing or Inhibiting Religion in Either Purpose or Effect and from Becoming Excessively Entangled with Religion*

The first clause of the First Amendment prohibits government from passing laws "respecting an establishment of religion."⁴⁸ In addition to prohibiting the outright establishment of a state church or state religion, the Establishment Clause prohibits the "sponsorship, financial support, and active involvement of the sovereign in religious activity,"⁴⁹ which "history shows [the founders] regarded as very important and fraught with great dangers."⁵⁰ In accord with this separationist principle, the Supreme Court has traditionally taken a skeptical view of government activity that tends to endorse, favor, or promote religion.⁵¹ The Supreme Court's landmark 1971 decision in *Lemon v. Kurtzman* introduced the

42. See, e.g., *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 301–10 (2000) (addressing school-sponsored student prayer at public school athletic events); *Lee v. Weisman*, 505 U.S. 577, 586–99 (1992) (addressing prayer at public school commencement); *Wallace v. Jaffree*, 472 U.S. 38, 55–61 (1985) (addressing moments of silence at public schools).

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

44. 403 U.S. 602 (1971).

45. 494 U.S. 872 (1990).

46. 443 U.S. 595 (1979).

47. See, e.g., *Smith*, 494 U.S. at 878 ("It is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

48. U.S. CONST. amend. I.

49. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668 (1970).

50. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

51. See, e.g., *Everson v. Bd. of Ed. Of Ewing Twp.*, 330 U.S. 1, 15–16 (1947) ("Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions . . .").

rhetoric of neutrality to Establishment Clause jurisprudence, requiring only that state and federal laws have a secular legislative purpose, a “principal or primary effect that neither advances nor inhibits religion,”⁵² and that they not foster “an excessive government entanglement with religion.”⁵³ Determining whether a state’s entanglement with religion is excessive requires examination of “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”⁵⁴ This nuanced determination depends heavily on the factual circumstances and interests involved in the particular case.⁵⁵ Though *Lemon v. Kurtzman* has been criticized by members of the Court for its uncertainty,⁵⁶ its neutrality-oriented analysis continues to provide the dominant framework that courts use to determine whether government has ventured into religious territory in violation of the First Amendment.⁵⁷

3. *The Free Exercise Clause Prohibits States from Regulating Religious Beliefs, but Does Not Prohibit Neutral and Generally Applicable Laws That Incidentally Affect Religious Conduct*

The second clause of the First Amendment prohibits government from “prohibiting the free exercise” of religion.⁵⁸ The Free Exercise Clause protects the right to “believe and profess whatever religious doctrine one desires,”⁵⁹ and thus serves to bar “any governmental regulation of religious *beliefs* as such.”⁶⁰ The Free Exercise Clause also

52. *Lemon*, 403 U.S. at 612 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

53. *Id.* at 613 (quoting *Walz*, 397 U.S. at 674).

54. *Id.* at 615.

55. *See id.* at 614 (“[T]he line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”).

56. *See, e.g.*, *Tangipahoa Parish Bd. Of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000) (Scalia, J., dissenting from denial of certiorari) (“Like a majority of the Members of this Court, I have previously expressed my disapproval of the *Lemon* test. I would grant certiorari in this case if only to take the opportunity to inter the *Lemon* test once for all.” (internal citations omitted)).

57. *See, e.g.*, *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859–65 (2005) (applying *Lemon* analysis in challenge to posting of Ten Commandments in Kentucky courtrooms); *Zelman v. Simmons-Harris*, 536 U.S. 639, 669–71 (2002) (applying *Lemon* analysis in challenge to Ohio scholarship program); *Agostini v. Felton*, 521 U.S. 203, 233–34 (1997) (applying *Lemon* framework in Establishment Clause challenge to Title I of New York Elementary and Secondary Education Act).

58. U.S. CONST. amend. I.

59. *Employment Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990).

60. *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (emphasis in original).

imposes additional limits on government's ability to enact laws that incidentally burden religious conduct.⁶¹ The precise extent of these limits have fluctuated over time and have historically been the locus of prominent Free Exercise disputes.⁶²

The Supreme Court first examined the issue of state burdens on religious conduct in *Reynolds v. United States*,⁶³ which held that territorial governments could constitutionally apply laws against polygamy to individuals whose religious beliefs required the practice.⁶⁴ The Court reasoned that to permit religious beliefs to trump criminal laws "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."⁶⁵ Under *Reynolds*, federal and state governments were free to pass laws that incidentally impacted religious beliefs and practices, provided that such laws were generally applicable and not targeted at a specific religious group.⁶⁶

Under the Warren Court's rights-expanding view of constitutional interpretation during the mid-twentieth century, the Court began to take a more critical view of government's ability to create laws impacting religion. The noteworthy 1963 case of *Sherbert v. Verner*⁶⁷ established a strict scrutiny approach to laws that negatively affected the exercise of religion.⁶⁸ Under the *Sherbert* test, laws imposing an incidental burden on the free exercise of an individual's religion are constitutionally permissible only if they are "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"⁶⁹ During the decades when the *Sherbert* test dominated Free Exercise Clause jurisprudence,⁷⁰ it was not enough that a law or

61. *See id.* at 403.

62. *See generally* *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 595 (1940) (collecting early Free Exercise Clause cases addressing incidental impacts on religiously motivated conduct).

63. 98 U.S. 145 (1878).

64. *Id.* at 166-67.

65. *Id.* at 167.

66. *See id.* at 166-67.

67. 374 U.S. 398 (1963).

68. *See id.* at 403; *see also* *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (under *Sherbert*, state laws burdening religion "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest").

69. *Sherbert*, 374 U.S. at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)); *see also* *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

70. *See* *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 873-84 (1990) (discussing history and application of the *Sherbert* test).

regulation be facially neutral for it to be constitutionally permissible.⁷¹ A law could still violate the Free Exercise Clause if the level of adverse religious impact it caused outweighed the state's interest in passing it.⁷²

The Supreme Court's 1990 decision in *Employment Division v. Smith* rejected the "compelling interest" standard of the *Sherbert* test, embracing instead what is essentially a return to the *Reynolds* approach of refusing to exempt religious exercise from "valid and neutral laws of general applicability."⁷³ Writing for the majority, Justice Scalia read the *Sherbert* test as limited to the narrow context of unemployment compensation,⁷⁴ and distinguished cases employing the *Sherbert* test as "hybrid" cases involving additional constitutional rights such as the freedom of speech.⁷⁵ The *Smith* majority discarded *Sherbert*'s strict scrutiny approach⁷⁶ and rejected the dissent's proposal to retain the *Sherbert* test in limited circumstances where the prohibited conduct is "central" to the individual's religion.⁷⁷ According to the concurrence, the *Smith* decision marked a "dramatic[] depart[ure] from well-settled First Amendment jurisprudence" that is "incompatible with our Nation's fundamental commitment to individual religious liberty."⁷⁸

71. See *Yoder*, 406 U.S. at 221 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." (citing *Sherbert*, 374 U.S. at 398)).

72. See *id.*

73. *Smith*, 494 U.S. at 879 (quoting *U.S. v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring)); see also *id.* at 878 ("It is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the *object* of the [law] but merely the *incidental effect* of a generally applicable and otherwise valid provision, the First Amendment has not been offended." (emphasis added)).

74. See *id.* at 883–84.

75. *Id.* at 881–82.

76. *Id.* at 884–86.

77. *Id.* at 886–87.

78. *Id.* at 892 (O'Connor, J., concurring). In direct response to *Smith*, Congress passed the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993) ("RFRA"). See *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997) ("Congress enacted RFRA in direct response to our decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*"). Employing language from the *Sherbert* majority opinion, RFRA was a legislative attempt to reinstate the compelling interest test for laws incidentally burdening the free exercise of religion. See 42 U.S.C. § 2000bb (1)(a) and (b) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . [unless] it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that . . . interest."). The attack on RFRA was "quick and decisive." *Trinity Assembly of God of Balt. City v. People's Counsel for Balt. County*, 962 A.2d 404, 425 (Md. 2008). Four years after *Smith*, the Supreme Court invalidated RFRA as applied to state governments in *City of Boerne v. Flores*. *City of Boerne*, 521 U.S. at 536; see also *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1236 (11th Cir. 2004) ("[B]y enacting RFRA, Congress had exceeded [its] authority

B. *Jones v. Wolf Establishes That Courts May Hear Common-Law Suits Against Religious Organizations If They Can Be Adjudicated Based on Neutral Principles of Law*

While the First Amendment doctrine discussed above involves statutory laws that impact religiously grounded conduct, an analogous line of First Amendment cases, culminating with the Supreme Court's 1979 decision in *Jones v. Wolf*, addresses the constitutionality of common-law suits against religious organizations. In *Serbian Eastern Orthodox Diocese v. Milivojevich*,⁷⁹ the United States Supreme Court reviewed a decision of the Illinois State Supreme Court enjoining a hierarchical church from defrocking a bishop during the course of a protracted internal dispute within the church.⁸⁰ The Court reversed the Illinois court's detailed review of the church tribunal's decision on the grounds that "[t]o permit civil courts to probe deeply enough into the allocation of power . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine."⁸¹ Because resolving the ecclesiastical dispute would necessarily require interpretation of church doctrine, First Amendment principles prohibited the state court's review of the church tribunal's decision.⁸² *Serbian Orthodox Diocese* affirms a broad "ecclesiastical immunity" precluding review of internal church disputes,⁸³ and is the source of related doctrines like the "ministerial exception" to Title VII sexual harassment claims.⁸⁴

by defining rights instead of simply enforcing them." (citing *City of Boerne*, 521 U.S. at 532) (emphasis in original)). RFRA remains valid in application to federal statutes, see *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–34 (2006) (applying RFRA's "compelling interest" standard to Free Exercise challenge to federal Controlled Substances Act), but after *City of Boerne*, state laws that burden religious exercise have been evaluated under *Smith's* permissive "neutral laws of general applicability" test. See *City of Boerne*, 521 U.S. at 536 ("[A]s the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.").

79. 426 U.S. 696 (1976).

80. *Id.* at 698.

81. *Id.* at 709 (Brennan, J., concurring) (quoting *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970)).

82. *Id.* ("[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them . . ." (citing *Md. & Va. Churches*, 396 U.S. at 369)).

83. See, e.g., *Watson v. Jones*, 80 U.S. 679, 726–27 (1871).

84. See, e.g., *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 955 (9th Cir. 2004) ("[C]ourts have crafted a 'ministerial exception' to Title VII 'in order to insulate the relationship between a

The Supreme Court refined the rule of *Serbian Orthodox Diocese* several years later in *Jones v. Wolf*. While reaffirming *Serbian Orthodox Diocese*'s mandate that civil courts may not resolve internal church disputes by examining religious doctrine and practice, the *Jones* Court held that states were free to apply "neutral principles of law" in adjudicating church property disputes.⁸⁵ Under this neutral principles analysis, courts asked to hear common-law claims against religious organizations are not required to adopt a "rule of compulsory deference" to religious autonomy,⁸⁶ but can examine church documents such as constitutions or trust instruments so long as they "take special care to scrutinize the document in purely secular terms."⁸⁷ After *Jones v. Wolf*, the First Amendment does not provide religious organizations with a blanket defense to lawsuits brought under neutral laws of general applicability.⁸⁸

The *Jones* Court's "neutral principles of law" approach suggests that civil courts can permissibly adjudicate religious disputes by adopting principles that are "completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity."⁸⁹ The rise of neutral principles analysis illustrates the general shift from separationism to neutrality,⁹⁰ and parallels the *Sherbert-Smith* shift in Free Exercise Clause doctrine.⁹¹ *Jones v. Wolf*'s general holding that courts may apply "neutral principles of law" in adjudicating church property disputes remains the dominant framework employed in analyzing First Amendment challenges to common-law actions and has

religious organization and its ministers from constitutionally impermissible interference by the government." (quoting *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 945 (9th Cir. 1999)); see also *Equal Employment Opportunity Comm'n v. Catholic Univ. of Az.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that the ministerial exception survives *Smith*).

85. *Jones v. Wolf*, 443 U.S. 595, 602–03 (1979).

86. *Id.* at 605.

87. *Id.* at 604.

88. See *id.* at 606 ("The neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law . . .").

89. *Id.* at 603. The term "neutral principles of law" was coined by Herbert Wechsler in his 1959 Holmes Lecture at Harvard Law School. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Though Professor Wechsler's view was premised on the anachronistic view that Article III's jurisdictional grants imposed a mandatory duty on courts to hear certain claims, it has continued to be extremely influential in both the derivation and application of constitutional principles. See generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (discussing the influence and application of Wechsler's neutral principles concept).

90. See *supra* Part II.A.i.

91. See *supra* notes 67–78 and accompanying text.

permitted courts to hear negligent supervision claims against religious organizations.⁹²

III. STATE COURTS APPLY THREE DISTINCT APPROACHES TO FIRST AMENDMENT CHALLENGES TO NEGLIGENT SUPERVISION CLAIMS

The tension between the ecclesiastical immunity doctrine of *Serbian Orthodox Diocese* and the neutral principles analysis of *Jones v. Wolf* represents the major First Amendment conflict for courts hearing negligent supervision claims against religious organizations.⁹³ Because the United States Supreme Court has not directly addressed whether the First Amendment protects religious organizations from tort liability when a religious leader engages in sexual misconduct towards a third person,⁹⁴ state courts attempting to reconcile these conflicting approaches in the context of negligent supervision claims have reached a variety of outcomes.⁹⁵

92. See, e.g., *Moses v. Diocese of Colo.*, 863 P.2d 310, 320–21 (Colo. 1993) (applying *Jones v. Wolf* analysis in negligent supervision claim against Colorado church); see also *Doe v. Hartz*, 970 F. Supp. 1375, 1431–32 (N.D. Iowa 1997) (applying neutral principles analysis in negligent supervision claim against Iowa diocese); *Isely v. Capuchin Province*, 880 F. Supp. 1138, 1151 (E.D. Mich. 1995) (applying neutral principles analysis in negligent supervision claim against Michigan and Wisconsin churches).

93. See *supra* Part II.B. While states are constitutionally permitted to provide differing levels of rights and protections in their own constitutions, the First Amendment represents an outer limit on state governments' ability to create laws "respecting" religion. See, e.g., *Florida v. Casal*, 462 U.S. 637, 639 (1983) (per curiam) (Burger, J., concurring) ("With our dual system of state and federal laws, administered by parallel state and federal courts, different standards may arise in various areas. But when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement." (emphasis in original)). Furthermore, because the First Amendment's religion clauses impose two competing imperatives, states' freedom to provide differing levels of protection are pinioned by the dual boundaries of protection and establishment. See *supra* note 33 and accompanying text.

94. See *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 794 (Wis. 1995) (Abrahamson, J., dissenting) ("It is generally acknowledged that this area of First Amendment law is in flux and the United States Supreme Court cases offer very limited guidance."); see also *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 446–47 (Me. 1997) (Lipez, J., dissenting) (noting that negligent supervision claims against religious organizations are "an area of the law in which the U.S. Supreme Court cases offer limited guidance and there remains significant doctrinal uncertainty").

95. See *Doe v. Malicki*, 771 So. 2d 545, 546 (Fla. Dist. Ct. App. 2000) ("[G]iven the delicate balance between religious freedom and the protection of the public safety, there is considerable diversity in the judicial analysis employed by the different courts."); see also Joseph B. Conder, Annotation, *Liability of Church or Religious Society for Sexual Misconduct of Clergy*, 5 A.L.R. 5TH 530 (1992) (describing various approaches to religious organization liability for clergy sexual misconduct).

The simplest approaches to determining whether civil courts may entertain negligent supervision claims against religious entities are categorical.⁹⁶ states either recognize a complete bar on such claims or adopt a permissive regime allowing all negligent supervision claims to reach a jury.⁹⁷ Courts that find religious organizations categorically immune from negligent employment torts justify such a bar in two main ways. One group holds that these claims contravene *Jones v. Wolf* because reaching findings on the elements of such claims would necessarily require examination of religious doctrine, policy, and administration.⁹⁸ A second group finds these claims would violate the Establishment Clause because judicial inquiry would result in state endorsement of one model of clergy supervision, excessively entangling the court with religion.⁹⁹ Courts adopting a categorical bar overlook the fact that claims against religious organizations are appropriate for judicial resolution if they can be resolved on “neutral principles of law.”¹⁰⁰ Furthermore, such a bar affords religious organizations an over-inclusive penumbra of immunity from the legitimate claims of profoundly injured plaintiffs who often lack any other viable cause of action.¹⁰¹

Conversely, some state courts have categorically rejected any concept of First Amendment immunity from generally applicable norms of tort law.¹⁰² This approach rests on a broad interpretation of the neutral principles framework and the premise that religious organizations should be treated identically to secular organizations for the purpose of

96. See Lupu & Tuttle, *supra* note 22, at 1850 (“When faced with claims that a religious institution has failed to exercise due care in the employment of a religious leader, courts tend to proceed on an all-or-nothing basis.”).

97. See *id.* at 1849–58 (discussing the “categorical approaches” to the negligent employment torts in detail).

98. See, e.g., *Swanson*, 692 A.2d at 444 (“To determine the existence of an agency relationship based on actual authority, the trial court will most likely have to examine church doctrine governing the church’s authority over [the priest].”).

99. See, e.g., *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. 1997) (“[J]udicial inquiry into hiring, ordaining, and retaining clergy would result in an endorsement of religion, by approving one model for church hiring, ordination, and retention of clergy.” (citing *Agostini v. Felton*, 521 U.S. 203, 232 (1997))).

100. See Lupu & Tuttle, *supra* note 22, at 1871 & nn.306–28 (discussing the use of “neutral principles” of law to guide construction of religious texts).

101. See *id.* at 1858 (“At the most basic level, plaintiffs often have experienced profound, lasting injuries from sexual molestation, and the religious institution frequently represents the only viable source of remedy for the harm they have suffered.”).

102. See, e.g., *Moses v. Diocese of Colo.*, 863 P.2d 310, 320–21 (Colo. 1993) (“Application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution.”); see also *Endler v. Trautman*, No. CIV.13-01-22, 2001 WL 1820145, at *8–10 (D.N.D. 2001).

adjudicating negligent supervision claims.¹⁰³ Courts that apply this approach focus on the distinction between external and internal religious disputes highlighted in *Serbian Eastern Orthodox*,¹⁰⁴ and find that negligent supervision claims are always “external” disputes appropriate for judicial review.¹⁰⁵ Like the categorical bar approach, however, this approach is problematic.¹⁰⁶ By treating requisite elemental inquiries—such as an organization’s structure—as if they were ordinary questions of fact,¹⁰⁷ the categorical “no immunity” approach ignores the Supreme Court’s evidentiary mandate in *Jones v. Wolf*.¹⁰⁸ Commentators argue that this over-inclusive approach both creates incentives for religious organizations to reconfigure their internal structure so as to defeat liability, and leads to imposition of special ecclesiastical liability by juries.¹⁰⁹

Courts that reject these two categorical approaches generally examine negligent supervision claims under a more deliberate neutral principles analysis, focusing on whether determining the tort’s elements would necessarily require interpretation of religious doctrine.¹¹⁰ A prominent example of this is the Supreme Court of Florida’s decision in *Malicki v. Doe*,¹¹¹ which held that negligence claims against a Florida church were not barred because they could be adjudicated through the application of neutral principles of tort law.¹¹² Under this “true neutral principles”

103. See *Konkle v. Henson*, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996) (justifying adjudication on the basis that “[t]he court is simply applying secular standards to secular conduct which is permissible under First Amendment standards” (citing *Moses*, 863 P.2d at 321)).

104. See *supra* notes 79–83 and accompanying text.

105. See *Smith v. O’Connell*, 986 F. Supp. 73, 77 (D.R.I. 1997) (“[A] dispute between church officials and third persons who allege that they were seriously injured by the negligence of the church officials . . . hardly can be characterized as a dispute involving an *internal* church matter.” (emphasis in original)).

106. See *Lupu & Tuttle, supra* note 22, at 1856 (describing the role of juries under the categorical no-immunity approach as “constitutionally troublesome”).

107. See, e.g., *Enderle*, 2001 WL 1820145, at *9 (“[W]hether [the religious leader] was an employee of the [religious organization] is a question of fact properly resolved by a jury.”).

108. See *supra* notes 85–88 and accompanying text; see also *Lupu & Tuttle, supra* note 22, at 1854–56 (discussing the over-inclusive effect of the categorical no-immunity approach).

109. See *Lupu & Tuttle, supra* note 22, at 1856 (“A legal rule that provides religious organizations with no constitutional immunity from liability for negligent employment of clergy may thus lead, with some predictable frequency, to the imposition of undeserved liability for failure to act as a ‘reasonable religious organization’ should.”).

110. See *id.* at 1877–78.

111. 814 So.2d 347 (Fla. 2002).

112. See *id.* at 361 (“Through neutral application of principles of tort law, we thus give no greater or lesser deference to tortious conduct committed on third parties by religious organizations than we do to tortious conduct committed on third parties by non-religious entities.”).

approach, the court makes an initial inquiry to determine whether the claim can be adjudicated on the basis of generally applicable, secular norms, or whether the organization's religious tenets must be examined.¹¹³ This approach is highly fact-specific and requires a preliminary case-by-case inquiry into whether the claim's elements necessarily implicate the religious doctrine at issue.¹¹⁴ The "true neutral principles" approach is faithful to the Supreme Court's directive in *Jones v. Wolf* that courts refuse to "adopt a rule of compulsory deference." State courts adopting either categorical approach risk neglecting the Court's mandate of careful and reasoned First Amendment analysis.

IV. WASHINGTON COURTS DECIDING NEGLIGENT SUPERVISION CLAIMS AGAINST RELIGIOUS ORGANIZATIONS HAVE RECOGNIZED A BROAD LEVEL OF FIRST AMENDMENT IMMUNITY

In *C.J.C. v. Corporation of the Catholic Bishop of Yakima*,¹¹⁵ the Washington State Supreme Court recognized the viability of negligent supervision claims against religious organizations, holding that the hierarchical church had a duty to prevent its employees from causing harm to foreseeable victims.¹¹⁶ However, two subsequent court of appeals cases have rejected similar claims on First Amendment grounds.¹¹⁷ This pair of cases, decided in close temporal proximity with the state supreme court's decision in *C.J.C.*, establishes precedent instructing lower courts to reject negligent supervision claims against religious organizations.

113. *See, e.g.*, *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315, 1323 (Colo. 1996) (finding no First Amendment bar to a negligent hiring claim because "the court does not inquire into the employer's broad reasons for choosing this particular employee for the position, but instead looks to whether the specific danger which ultimately manifested itself could have reasonably been foreseen at the time of hiring" (quoting *Van Osdol v. Vogt*, 908 P.2d 1122, 1132-33 n.17 (1996))).

114. *See, e.g.*, *Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1213, 1242 (Miss. 2005) (allowing negligent supervision claim against religious organization with the caveat that "our holding today is not to be blindly applied, allowing in all cases the exercise of jurisdiction over a particular cause of action. Rather, each cause of action asserted against a religious organization claiming First Amendment protection, must be evaluated according to its particular facts.").

115. 138 Wash. 2d 699, 985 P.2d 262 (1999).

116. *Id.* at 728, 985 P.2d at 277.

117. *See infra* Parts IV.B. and C.

A. *The Washington State Supreme Court Adopted the “True Neutral Principles” Approach in C.J.C., Allowing a Negligent Supervision Claim Against a Religious Organization*

In *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, the Washington State Supreme Court heard three consolidated appeals of plaintiffs alleging claims against religious organizations.¹¹⁸ In discussing issues specific to one of these cases, *Funkhouser v. Wilson*, the *C.J.C.* Court held that religious organizations owe a duty of due care to foreseeable victims of sexual misconduct by church officials.¹¹⁹ Citing the presence of special relationships between the church, the deacon performing the alleged acts, and the plaintiffs,¹²⁰ the state supreme court rejected the notion of a categorical bar to the adjudication of negligent supervision claims against religious entities.¹²¹ Analogizing negligent supervision claims against religious organizations to those against school districts,¹²² the Court rejected the church’s First Amendment defense on the basis that “to hold otherwise would impermissibly place a religious leader in a preferred position in our society.”¹²³ The *C.J.C.* court also referred to the Washington State Constitution in rejecting the church’s religious freedom argument, but focused its analysis on federal First Amendment principles.¹²⁴

C.J.C. establishes that religious organizations owe a duty under Washington law to prevent harm to foreseeable victims of their employees’ torts.¹²⁵ In rejecting the two categorical approaches to First Amendment analysis discussed above,¹²⁶ *C.J.C.* represents the Court’s

118. *C.J.C.*, 138 Wash. 2d at 705–07, 985 P.2d at 265–66.

119. *Id.* at 727, 985 P.2d at 276 (“We, therefore, conclude [the defendants] owed a duty of reasonable care to affirmatively act to prevent the harm, in view of their relationship to the plaintiffs, their relationship to [the deacon], and given the knowledge they allegedly possessed.”).

120. *Id.*

121. *Id.* at 727–28, 985 P.2d at 277 (“The First Amendment does not provide churches with absolute immunity to engage in tortious conduct.”).

122. *See id.* at 723, 985 P.2d at 274 (citing *Marquay v. Eno*, 662 A.2d 272 (N.H. 1995)).

123. *Id.* at 728, 985 P.2d at 277 (quoting *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336 (5th Cir. 1998)); *see also id.* at 724, 985 P.2d at 275 (“[W]e simply do not agree with the Church that its duty to take protective action was arbitrarily relieved at the church door.”).

124. *See id.* at 728, 985 P.2d at 277 (“Similarly, while art. I, § 11 of our state constitution protects ‘[a]bsolute freedom of conscience in all matters of religious sentiment,’ that protection ‘shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.’ Thus, the specific language of art. I, § 11 defeats the Church’s state constitutional claims.”).

125. *Id.* at 727, 985 P.2d at 276.

126. *See supra* Part III.

adoption of the “true neutral principles” approach.¹²⁷ Provided that the employment and control elements of negligent supervision claims can be determined without reference to church doctrine, the elements of knowledge and proximate cause are questions of fact properly decided by a jury.¹²⁸ A parallel line of Washington appellate cases, however, has employed broad language in affirming grants of summary judgment to religious organizations, such that Washington law arguably now recognizes a de facto First Amendment bar to negligent supervision claims against religious entities, in direct conflict with *C.J.C.*

B. In Germain v. Pullman Baptist Church, the Washington Court of Appeals Applied Establishment Clause Language in Finding a Negligent Supervision Claim Barred by the First Amendment

In *Germain v. Pullman Baptist Church*,¹²⁹ the Washington Court of Appeals considered the claims of three female parishioners against Pullman Baptist Church and its former pastor David Leach.¹³⁰ The three women were members of the church who had received counseling from Pastor Leach during the 1980s, and each alleged that he had engaged in improper sexual conduct during the course of the counseling relationship.¹³¹ In addition to claims for breach of fiduciary duty against the pastor, the women asserted a negligent supervision claim against the church, alleging that the church had been negligent in retaining the pastor after having notice that he posed a risk of harm to parishioners.¹³²

The *Germain* trial court granted summary judgment to the church for two reasons.¹³³ First, it found the plaintiffs’ claim against the church to be time-barred.¹³⁴ Second, the court held that by asserting a negligent supervision claim against a religious organization, the plaintiffs had not

127. *See supra* notes 110–114 and accompanying text.

128. *See C.J.C.*, 138 Wash. 2d at 727, 985 P.2d at 276 (“Whether there was a causal connection between the harm and the fact of Wilson’s position in the Church, or whether the risk of harm was or should have been reasonably foreseen at the time the harm occurred, are questions of fact to be determined by the jury.”).

129. 96 Wash. App. 826, 980 P.2d 809 (1999), *review denied*, 139 Wash. 2d 1026, 994 P.2d 844 (2000).

130. *Id.* at 828, 980 P.2d at 810.

131. *Id.*

132. *Id.*

133. *See id.* at 829, 980 P.2d at 810–11. The trial court also found the breach of fiduciary duty claim against the pastor barred by the statute of limitations, and granted him summary judgment. *Id.*

134. *Id.*

stated a claim upon which relief could be granted.¹³⁵ Despite evidence that church authorities had knowledge of Pastor Leach's predatory conduct,¹³⁶ the trial court held that both fashioning a standard of care for the pastor's work (duty element) and determining whether the church was responsible for supervising the pastor (employment element) would violate the First Amendment.¹³⁷

The court of appeals issued its judgment just two days before the Washington State Supreme Court decided *C.J.C.*¹³⁸ Framing its inquiry as whether the court should “*recognize* a cause of action for a church's negligent supervision of a pastor,” the court affirmed both of the trial court's holdings.¹³⁹ Because the church constitution provided that the pastor was to be hired or fired by a majority vote of the congregation, the court found that determining whether the church had authority over Pastor Leach would require the impermissible interpretation of church doctrine.¹⁴⁰ In reaching this determination, the court discussed the religious doctrine implicated by the employment element, concluding that

[i]n this case, the authority, as the pastor's employer, belongs to all of the Church's members, who must act by majority rule if they are to discharge him or otherwise control his conduct. The determination of whether to impose liability on a church where the authority is so diffused would require the court to consider and interpret the church's laws and constitution.¹⁴¹

By discussing the relevant religious doctrine implicated by the elements of the plaintiff's claim, the court seemed to make a preliminary determination regarding whether the case could be adjudicated based on neutral principles of law.¹⁴² But in explaining its refusal to subject the church to tort liability, the court refers not to the United States Supreme Court's decision in *Jones v. Wolf* or to neutral principles analysis, but instead to cases from Wisconsin and Maine for the proposition that “[t]o

135. *Id.*

136. *See id.* at 835–36, 980 P.2d at 814.

137. *Id.* at 829, 980 P.2d at 811.

138. *Germain* was decided on July 27, 1999, and *C.J.C.* was decided on July 29, 1999 and amended September 8, 1999. *See Germain*, 96 Wash. App. 826, 980 P.2d 809; *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wash. 2d 699, 729, 985 P.2d 262, 277 (1999).

139. *Germain*, 96 Wash. App. at 835, 980 P.2d at 814 (emphasis added).

140. *See id.* at 836, 980 P.2d at 814 (“The congregation chooses the pastor at a meeting called by the board of deacons” and the church “constitution also provides that the congregation, by a vote of at least 51 percent, may terminate the pastor.”).

141. *Id.* at 837, 980 P.2d at 815.

142. *See supra* Part II.B.

do so would violate the First Amendment by *entangling* the judiciary with religion.”¹⁴³ The *Germain* court’s use of the word “entanglement” suggests that it is analyzing the claim under Establishment Clause doctrine¹⁴⁴—language that is wholly absent from the state supreme court’s decision in *C.J.C.* Though *Germain* was decided prior to the Washington State Supreme Court’s decision in *C.J.C.*, and seems at odds with *C.J.C.*’s holding, it remains “good law” and was discussed in the next Washington Court of Appeals negligent supervision case involving a religious organization.¹⁴⁵

C. *In S.H.C. v. Lu, the Washington Court of Appeals Again Employed Broad Establishment Clause Language in Refusing to Hear a Negligent Supervision Claim*

The Washington Court of Appeals again considered the interaction of negligent supervision claims and the First Amendment three years later in *S.H.C. v. Lu*.¹⁴⁶ S.H.C., an adult woman, asserted various claims against the Ling Shen Ching Tze Temple, Inc. (“Temple”) based on sexual acts committed by the temple’s leader, Grandmaster Sheng-Yen Lu (“Grandmaster Lu”).¹⁴⁷ After several years as a parishioner at the Temple, S.H.C. visited Grandmaster Lu to receive healing blessings for her chronic headaches.¹⁴⁸ Grandmaster Lu informed S.H.C. that not only did she suffer from headaches, but that she was also “near death,” a fate he could deter with his special “Twin Body Blessing.”¹⁴⁹ Grandmaster Lu’s “‘blessing’ was, in fact, sexual intercourse,” a ruse he successfully perpetrated for over two years.¹⁵⁰

The trial court granted the Temple summary judgment on all claims against it,¹⁵¹ and the court of appeals affirmed, holding that the First Amendment barred S.H.C.’s negligent supervision claim.¹⁵² Just as in

143. *Germain*, 96 Wash. App. at 837, 980 P.2d at 815 (emphasis added) (citing *L.L.N. v. Clauder*, 563 N.W.2d 434, 441 (Wis. 1997); *Swanson v. Roman Catholic Bishop*, 692 A.2d 441 (Me. 1997)).

144. *See supra* Part II.A.ii.

145. *See S.H.C. v. Lu*, 113 Wash. App. 511, 520, 54 P.3d 174, 178 (2002) (describing *Germain* as decided “at about the same time as the *C.J.C.* decision.”).

146. *Id.*

147. *Id.* at 515, 54 P.3d at 175.

148. *Id.* at 515, 54 P.3d at 175.

149. *Id.*

150. *Id.* at 515, 54 P.3d at 176.

151. *Id.* at 516, 54 P.3d at 176.

152. *Id.* at 518, 54 P.3d at 177.

Germain, the record contained considerable evidence that Temple leaders were aware of Grandmaster Lu's sexual relationship with S.H.C.,¹⁵³ and that Temple officials had a sufficient degree of authority over Grandmaster Lu to create genuine issues of fact regarding the presence of an employment relationship.¹⁵⁴ Distinguishing *C.J.C.*, the court explained that to determine whether the Temple was negligent in its supervision of Grandmaster Lu would require the interpretation of religious doctrine, which would "excessively entangle the court with religion."¹⁵⁵ The *S.H.C.* court also distinguished *C.J.C.* on the basis of the age of the plaintiffs, citing the *C.J.C.* court's reference to the state legislature's "strong public policies" in support of preventing the sexual abuse of children.¹⁵⁶

In addition to this broad Establishment Clause justification, the court ostensibly performed a *Jones v. Wolf* analysis, finding that there were "no neutral principles of law governing this case that would permit a civil court to resolve the question of liability against the Temple."¹⁵⁷ In describing why the case necessarily required interpretation of religious doctrine, the court discussed the religious principles of Grandmaster Lu's True Buddha School in detail.¹⁵⁸ Followers of the Temple "regard Grandmaster Lu as a Living Buddha—one to whom they have an obligation of obedience."¹⁵⁹ Furthermore, Temple doctrine requires followers to "'see only good qualities in [Grandmaster Lu], and never any faults,'" and dictates that "'one should not criticize or slander the former Guru.'"¹⁶⁰ The court reasoned that because of the extreme obedience and deference required of Temple followers, adjudicating the plaintiff's claim would necessarily require rulings on matters beyond the scope of proper judicial inquiry.¹⁶¹

In making its neutral principles finding, however, the court framed the

153. *See id.* at 518, 54 P.3d at 177 ("S.H.C. testified that Temple officials were aware that her interactions with Grandmaster Lu were 'out of the ordinary or unacceptable for interactions by followers This evidence is sufficient to create a factual issue that the Temple was on notice of Grandmaster Lu's activities, subject only to the question of whether the factual issue is material for summary judgment purposes.'").

154. *See id.* ("S.H.C. did introduce evidence that the Temple officials had the authority to exclude Grandmaster Lu from the Temple grounds.").

155. *Id.* at 522, 54 P.3d at 179.

156. *Id.* at 521, 54 P.3d at 178–79.

157. *Id.* at 523, 54 P.3d at 179.

158. *Id.* at 522, 54 P.3d at 179.

159. *Id.*

160. *Id.* (emphasis in original).

161. *Id.* at 522–23, 54 P.3d at 179.

negligence standard as requiring the court to develop an impermissible “reasonable religious organization standard”¹⁶² and evaluate “the truth of the above beliefs.”¹⁶³ The court stated that “there is danger that the standard would vary, for example, from a ‘reasonable Protestant’ standard, a ‘reasonable Catholic’ standard, or a ‘reasonable Islamic’ standard.”¹⁶⁴ In performing its neutral principles analysis, the *S.H.C.* court focused on whether the relevant *religious doctrine* would necessarily “entangle” it with religion; under a “true neutral principles” analysis, the court would focus on whether the *elements of the claim* necessarily implicate religious doctrine.¹⁶⁵

V. WHEN NEGLIGENT SUPERVISION CLAIMS CAN BE
DECIDED ON NEUTRAL PRINCIPLES OF LAW,
WASHINGTON COURTS SHOULD ADJUDICATE THEM

The *Germain* and *S.H.C.* courts’ use of Establishment Clause language and focus on religious doctrine creates broad First Amendment protection for religious organizations defending negligent supervision claims. These cases should be read as limited to their factual circumstances both (1) to avoid violating the Establishment Clause and (2) to preserve an essential legal mechanism for the remedy and prevention of sexual misconduct. To this end, Washington courts should also articulate a clear statement of the appropriate neutral principles analysis, refrain from discussing Establishment Clause principles, and focus the preliminary inquiry solely on the elements of the plaintiff’s claim.

A. *Germain* and *S.H.C.* Create an Overbroad Level of First
Amendment Protection for Religious Entities and Should Be Read
Narrowly

Taken together, *Germain* and *S.H.C.* create an overbroad First Amendment protection for religious entities defending negligent supervision claims. By cloaking its analysis in the mantle of “excessive entanglement,”¹⁶⁶ the *Germain* court gives credence to the notion that

162. *Id.* at 523, 54 P.3d at 179.

163. *Id.* at 522, 54 P.3d at 179.

164. *Id.* at 523, 54 P.3d at 179.

165. *See supra* Part II.B (discussing the United States Supreme Court’s neutral principles analysis in *Jones v. Wolf*).

166. *Germain v. Pullman Baptist Church*, 96 Wash. App. 826, 835, 980 P.2d 809, 814 (1999).

the Establishment Clause categorically bars negligent supervision claims against religious entities. This doctrinal signal discourages lower courts from applying tort principles against religious organizations because, unlike the case-by-case neutral principles analysis of *Jones v. Wolf*, the Establishment Clause functions to categorically prohibit certain types of government action.¹⁶⁷ Though the *Germain* court claimed to refrain from deciding “whether the First Amendment forecloses *all* negligent supervision claims against churches based on the conduct of their ministers,”¹⁶⁸ its ruling may have effectively done so. The *S.H.C.* court also employed Establishment Clause language in rejecting the plaintiff’s negligent supervision claim, creating further precedent that suggests such claims are categorically barred. This is precisely the type of First Amendment shield denounced in *Jones v. Wolf*.¹⁶⁹ By employing the rhetoric both of the Establishment Clause and of *Jones v. Wolf* only to summarily declare *S.H.C.*’s claim “barred by the First Amendment,”¹⁷⁰ the *S.H.C.* court expedited Washington courts’ drift towards a categorical immunity regime.

The *S.H.C.* court took this immunity one step further by focusing its inquiry on the nature of the Temple’s doctrine and framing the negligence standard as that of the “reasonable religious organization.”¹⁷¹ The proper *Jones v. Wolf* analysis focuses on the elements of the cause of action instead of the doctrine of the affected religion;¹⁷² consequently, the proper standard of care for the duty owed to foreseeable victims recognized under *C.J.C.* should be that of the “reasonable employer.”¹⁷³ By phrasing the inquiry in *S.H.C.* as pertaining to the truth or conviction behind the Temple’s belief, and not simply as whether the officials should have reasonably known of Grandmaster Lu’s misconduct,¹⁷⁴ the court decided the case within an analytical framework that will prevent civil courts from hearing such claims.¹⁷⁵ In essence, the *S.H.C.* court

167. See *supra* Part II.A.ii.

168. *Germain*, 96 Wash. App. at 836–37, 980 P.2d at 815 (emphasis in original).

169. See *Jones v. Wolf*, 443 U.S. 595, 605 (1979) (“We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.”).

170. *S.H.C. v. Lu*, 113 Wash. App. 511, 523, 54 P.3d 174, 179 (2002).

171. *Id.*

172. See *supra* notes 112–115 and accompanying text.

173. See *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wash. 2d 699, 727, 985 P.2d 262, 276 (1999).

174. *S.H.C.*, 113 Wash. App. at 522, 54 P.3d at 179.

175. The *S.H.C.* court’s concern that applying this “reasonable religious organization” standard to

found that the case could not be decided on neutral principles of law because it looked only at religious principles.¹⁷⁶

Similarly, the court's attempt to distinguish *C.J.C.* on the basis of the plaintiff's age is unfounded.¹⁷⁷ The court in *C.J.C.* identified the policy of protecting children from sexual abuse as one supporting its decision,¹⁷⁸ but did not state that its holding was limited to cases of child sexual abuse.¹⁷⁹ Courts applying *S.H.C.* have seized upon this distinction, characterizing *S.H.C.* as "conclud[ing] there was no similar special relationship between a church leader and an adult."¹⁸⁰ This artificial distinction creates a broad religious immunity from negligent supervision claims made by adults, and greatly expands the First Amendment protection that *Germain* and *S.H.C.* create.

Several cases following *S.H.C.* have embraced this broad immunity and cursorily dismissed negligent supervision claims against religious organizations on First Amendment grounds.¹⁸¹ Because the Washington State Supreme Court has not reviewed this line of cases,¹⁸² it is now more difficult for a plaintiff to recover on a negligent supervision theory

religious organizations might result in impermissible variation is well-founded, *see* *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (stating that "[t]he First Amendment mandates governmental neutrality between religion and religion . . ."), but this problem stems from the court's framing of the negligence standard, and not from the underlying facts of the case.

176. This is not to say that the *Germain* and *S.H.C.* courts necessarily reached the wrong result. In *Germain*, the congregation's "majority rules" approach to control of the pastor indicates that determination of the authority issue might have required interpretation of church doctrine. *See supra* notes 140–141 and accompanying text. Similarly, in *S.H.C.*, allowing a jury to decide whether the Temple leaders had knowledge of Grandmaster Lu's misconduct might in essence have required them to evaluate the verity of the officials' professed belief in Lu's infallibility. *See supra* notes 159–161 and accompanying text. However, paired with its repeated use of Establishment Clause language, the court's ultimate disposition of the issue creates the impression that such claims are categorically barred. In this respect, *S.H.C.* and *Germain* may be examples of the adage "hard cases make bad law."

177. *S.H.C.*, 113 Wash. App. at 521, 54 P.3d at 178–79.

178. *C.J.C.*, 138 Wash. 2d at 726, 985 P.2d at 276.

179. *Id.* at 727, 985 P.2d at 276–77 ("We caution that our holding is limited . . . [We] do hold that where a special protective relationship exists, a principal may not turn a blind eye to a known or reasonably foreseeable risk of harm posed by its agents toward those it would otherwise be required to protect simply because the injury is arbitrarily perpetrated off premises or after-hours.")

180. *Rose v. Seventh Day Adventists*, No. 53424-6-I, 2005 WL 1300805, at *7 n.13 (2005).

181. *See, e.g., id.* at *5 (citing *S.H.C.* in dismissing claims against church for negligently retaining and supervising pastor who failed to warn victim of murder conspiracy); *Elvig v. Ackles*, 123 Wash. App. 491, 98 P.3d 524 (2004) (rejecting negligent supervision claim on First Amendment grounds).

182. *See S.H.C. v. Lu*, 149 Wash. 2d 1011, 69 P.3d 874 (2003) (denying review); *Germain v. Pullman Baptist Church*, 139 Wash. 2d 1026, 994 P.2d 844 (2000) (denying review).

against a religious organization in Washington State.¹⁸³ Courts asked to hear negligent supervision claims against religious organizations should read *Germain* and *S.H.C.* as examples of cases barred because of their unique factual circumstances, and not as representing the proposition that all such claims contravene the First Amendment.

B. Religious Organizations Should Not Have Broad Immunity Against Negligent Supervision Claims

There are two prominent reasons why *Germain* and *S.H.C.* should be read as limited to their particular facts. First, providing religious organizations with an overbroad level of protection risks violating the Establishment Clause. Second, negligent supervision is an essential mechanism for providing remedy to victims of clergy sexual misconduct and incentivizing religious organizations to prevent such conduct.

1. Providing Religious Organizations with an Overbroad Level of Protection Violates the Establishment Clause of the First Amendment

The competing nature of the First Amendment's two religion clauses¹⁸⁴ requires courts hearing claims against religious organizations to apply a careful, reasoned approach when determining whether a First Amendment bar exists. Such analyses typically focus on Free Exercise Clause principles and question whether placing liability on the religious entity will unduly restrict the organization's constitutionally protected religious freedom. The Establishment Clause, however, requires an equally important consideration; courts focusing only on Free Exercise Clause principles may go to such lengths to avoid impinging on the organization's religious freedom that they impermissibly favor religion over secular interests.¹⁸⁵

The notion that courts can impermissibly "establish" religion through overprotection can be traced back to the Supreme Court's discussion in *Reynolds v. U.S.*, where Justice Waite observed that to permit religious beliefs to trump generally applicable legal norms "would be to make the

183. See, e.g., *Rose*, 2005 WL 1300805, at *5 (describing *S.H.C.* as "controlling" and holding that "[i]n order to find liability of the Defendants, I would have to 'entangle {myself} in the religious percepts and beliefs' of the Seventh Day Adventist religion and its practices"); *Elvig*, 123 Wash. App. at 498–99, 98 P.3d at 528.

184. See *supra* notes 32–34 and accompanying text.

185. See *supra* Part II.A.ii (demonstrating that the Establishment Clause prohibits state laws that either inhibit or advance religious practice).

professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”¹⁸⁶ The Supreme Court reaffirmed this principle in *Employment Division v. Smith*¹⁸⁷ and *City of Boerne*,¹⁸⁸ noting that recognizing overbroad First Amendment protection for religiously based conduct would create an “anomaly in the law, a constitutional right to ignore neutral laws of general applicability.”¹⁸⁹ The perils of such an approach are manifold, as individuals could potentially concoct religious doctrines shielding them from any conceivable type of liability.¹⁹⁰ Similarly, the Washington State Supreme Court has recognized that overbroad Free Exercise Clause protections would “impermissibly place a religious leader in a preferred position in our society.”¹⁹¹ Regardless of whether the Pullman Baptist Church or Ling Shen Chin Tze Temple should have received First Amendment protection, the *Germain* and *S.H.C.* courts’ imprecise neutral principles analyses create precedent for lower courts to exempt religious organizations from claims of negligent supervision. This precedent is at odds with the general First Amendment shift towards neutrality¹⁹² and risks creating an impermissible “law respecting an establishment of religion” by placing religious organizations on a higher plane than nonreligious entities.

2. *Negligent Supervision Is an Essential Mechanism for Remediating and Preventing Sexual Misconduct by Religious Leaders*

Victims of clergy sexual misconduct can seek redress for the lasting psychological and emotional injuries they incur by filing tort claims against religious leaders, or against the religious organizations employing those leaders. Powerful reasons exist for holding religious organizations liable for the torts of their employees. First, while religious leaders typically have modest incomes and reside in homes owned by

186. *Reynolds v. U.S.*, 98 U.S. 145, 166–67 (1878); *see also supra* note 65 and accompanying text.

187. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

188. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

189. *Id.* at 513.

190. *See, e.g., Smith v. O’Connell*, 986 F. Supp. 73, 80 (D.R.I. 1997) (“It is easy to envision the kinds of ‘anomalies’ that could result from such an absolutist interpretation of the free exercise clause. For example, laws prohibiting murder would have no application to human sacrifices performed pursuant to some religious practice.”).

191. *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wash. 2d 699, 728, 985 P.2d 262, 277 (1999) (quoting *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336 (5th Cir. 1998)).

192. *See supra* Part II.A.i.

the organization,¹⁹³ making them immune from significant judgments, religious organizations are frequently more capable of fulfilling a judgment debt. Allowing successful plaintiffs to collect from religious entities' "deeper pockets" offers victims of sexual misconduct a clear remedial advantage. Furthermore, because religious organizations are often in the best position to prevent sexual misconduct by their leaders,¹⁹⁴ placing liability for clergy sexual misconduct on the organization itself incentivizes the entity to take affirmative steps to protect its members.

Those injured by clergy sexual misconduct can seek redress against religious organizations through three main legal theories: breach of fiduciary duty, vicarious liability, and negligent employment. Of these options, negligent employment actions often represent the only viable remedy because courts are extremely reluctant to hear breach of fiduciary duty claims against religious organizations,¹⁹⁵ and vicarious liability actions almost always fail because sexual misconduct rarely arises in contexts within the scope of an employee's duties.¹⁹⁶ Within the negligent employment torts, negligent hiring actions are similarly doomed because they equate to "negligent ordination" suits requiring the court to examine the "internal" religious policies of the organization.¹⁹⁷ Thus, negligent supervision becomes an essential remedial mechanism for victims of sexual misconduct by religious leaders, providing a broader background duty that plaintiffs can fall back on when breach of fiduciary duty or respondeat superior claims fail. In order for Washington courts to effectively remedy and prevent the sexual misconduct of religious leaders, they should not reject negligent supervision claims based on an overbroad conception of First Amendment protection.

193. See United States Census Bureau, *Earnings By Occupation and Education*, Sep. 21, 2009, <http://www.census.gov/hhes/www/income/earnings/call2usboth.html> (listing 1999 median full-time year-round clergy income as \$31,285).

194. See, e.g., Garland, *supra* note 1 (citing lack of oversight as a cause of sexual misconduct by religious leaders).

195. See Lupu & Tuttle, *supra* note 22, at 1835–36 ("A number of courts have dismissed on the pleadings such claims against religious institutions on the theory that the defendant religious organization and its representatives have not undertaken any special duties with respect to each and every adherent of the faith.").

196. See *supra* notes 23–28 and accompanying text.

197. See Lupu & Tuttle, *supra* note 22, at 1846 ("As far as we can tell, no court has permitted a plaintiff to proceed on a claim that an institution negligently prepared or ordained a candidate for ministry.").

C. *Washington Courts Should Clarify Their Neutral Principles Analysis and Reaffirm the Viability of Negligent Supervision Claims Against Religious Organizations*

In order to avoid granting an overbroad level of protection to religious organizations through an expansive reading of *Germain* and *S.H.C.*, Washington courts should articulate an explicit statement of the appropriate First Amendment analysis. This articulation should be consistent with the duty to prevent foreseeable harms recognized by the state supreme court in *C.J.C.* Current case law gives imprecise direction to lower courts asked to evaluate the viability of such claims, and creates little incentive for religious organizations to prevent sexual misconduct by their leaders. The correct analytical framework would discard any mention of Establishment Clause doctrine and focus solely on the question of whether it would be possible to determine the specific elements of the claim based solely on neutral principles of law.

Under the “true neutral principles” analysis exemplified by cases like Florida’s *Malicki v. Doe*¹⁹⁸ and *C.J.C.*, courts must make a preliminary determination of whether adjudicating the *specific elements* of the plaintiff’s claim would require the interpretation of religious doctrine. This analysis should not be phrased as an examination of the verity of religious doctrine, as in *S.H.C.*,¹⁹⁹ because such inquiries will always contravene the First Amendment. Rather, courts should look only at the elements of the tort and determine whether an organization’s conduct can be evaluated without reference to religious doctrine. In many instances, courts will be able to evaluate an organization’s conduct in purely secular terms, and the Free Exercise Clause will not bar a plaintiff’s negligent supervision claim. The muddled analyses of *Germain* and *S.H.C.* form confusing precedent for lower courts asked to hear these claims, and create a significant risk that these claims will be unjustifiably rejected.

CONCLUSION

Sexual misconduct by religious leaders is a prominent problem in American society, and the tort of negligent supervision is an essential mechanism both for preventing it and for remedying the harm it causes.

198. *Doe v. Malicki*, 771 So. 2d 545 (Fla. Dist. Ct. App. 2000); *see also supra* notes 111–114 and accompanying text.

199. *S.H.C. v. Lu*, 113 Wash. App. 511, 523, 54 P.3d 174, 179 (2002); *see also supra* notes 171–176 and accompanying text.

In *C.J.C.*, the Washington State Supreme Court acknowledged the viability of negligent supervision claims against religious organizations. However, two subsequent Washington Court of Appeals cases have rejected similar claims on vague First Amendment grounds, leaving the status of the state's law unclear and prone to overprotection of religious entities. To remedy this overbroad level of First Amendment protection, Washington courts should adopt a clear statement of the criteria through which they evaluate First Amendment defenses to neutral laws of general applicability. The appropriate analysis requires a preliminary examination of whether elements of the particular case can be decided solely on neutral principles of law, or whether the elements themselves necessarily implicate religious doctrine. By articulating the proper analytical framework for evaluating whether courts can permissibly adjudicate negligent supervision claims against religious organizations, Washington courts will both provide a remedy for the serious and lasting injuries of plaintiffs, and create an incentive for religious organizations to prevent the foreseeable harms perpetrated by their leaders.