IN THE SUPREME COURT OF MISSISSIPPI

IN RE: CATHOLIC DIOCESE OF JACKSON, MISSISSIPPI	Cause No. 2003-M-00743
Consolidated with	
KENNETH MORRISON, ET AL.	Appellees
V.	Cause No. 2003-M-00744
ROMAN CATHOLIC DIOCESE OF JACKSON, MISSISSIPPI, ET AL.	Appellants

INTERLOCUTORY APPEAL AND PETITION FOR WRIT OF PROHIBITION FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Catholic Diocese of Jackson	Appellant/Defendant
The Most Rev. William Russell Houck	Appellant/Defendant
Bishop Joseph Latino	Appellant/Defendant
Kenneth Morrison	Plaintiff/Appellee
Francis Morrison	Plaintiff/Appellee
Thomas Morrison	Plaintiff/Appellee
Dorothy Morrison	Plaintiff/Appellee
Adams and Reese LLP	Counsel for Appellants
Baria, Fyke, Hawkins & Stracener	Counsel for Plaintiffs/Appellees
Richmond, Simon & Abston	Counsel for Plaintiffs/Appellees
George Broussard	Defendant
Bernard Law	Defendant
Copeland, Cook, Taylor, & Bush, PA	Counsel for George Broussard
Watkins & Eager	Counsel for Bernard Law

The Honorable Winston Kidd Circuit Court Judge

So certified this the 4th day of May, 2004.

J. Jeffrey Trotter
Attorney of Record for Appellants

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STATEMENT OF THE ISSUES

1. Does the First Amendment Doctrine of Church Autonomy preclude the Circuit Court from asserting jurisdiction over claims arising from the manner in which the Catholic Diocese selected, appointed, disciplined, and supervised its clergy?

2. Is discovery of certain documents and the identities of non-party victims/accusers and/or non-party priests precluded by: (a) the First Amendment Doctrine of Church Autonomy, canon law and common law privacy rights of victims and priests, and/or (b) clergy, medical, mental health, attorney, work product, and self-critical analysis privileges?

STATEMENT OF THE CASE

On June 12, 2002, Kenneth, Thomas and Francis Morrison filed a Complaint against the Diocese, alleging they were sexually abused as minors by George Broussard, a former Catholic priest, on several occasions between 1970 and 1974.[1] R. 6-11. When the Complaint was filed Kenneth was 38, Thomas was 40 and Francis was 42 years of age. Now three decades after the alleged abuse occurred, the Plaintiffs assert that the Appellants, the Diocese and Bishop Houck (or his predecessors): (1) conspired to conceal sexual abuse by priests against children from the public, (2) breached fiduciary duties, (3) intentionally or negligently inflicted emotional distress, (4) committed fraud and fraudulent concealment, (5) negligently hired, assigned and retained Broussard, and (6) negligently misrepresented Broussard's fitness to be a priest. Plaintiff Dorothy Morrison, their mother, asserts a claim for loss of consortium and all Plaintiffs assert a claim of "loss of faith."

As explained in Part One of the Argument below, the gist of Plaintiffs' claims are that the Bishop of the Diocese negligently assigned, supervised, and retained Broussard and tortiously spoke or failed to speak about him, thereby allowing him to molest the brothers. Accordingly, Plaintiffs are requesting that a civil court assert its state power to regulate how a Catholic bishop selects, assigns, supervises and disciplines his priest as well as what he says or does not say about the priest to parishioners. Plaintiffs' allegations raise a fundamental issue of church-state relations: whether a civil court may assert state power

[1] Citations to the Record on Appeal will be designated "R. __".

to adjudicate claims that are grounded in the manner by which a church selects, appoints, disciplines, and supervises its ministers. As explained below, the First Amendment Doctrine of Church Autonomy precludes a civil court from entangling itself in such an intrinsically religious matter. In cases throughout the country involving claims of sexual misconduct by clergy, courts mindful of the proper constitutional restraint on state power over religious bodies have held that there is no subject matter jurisdiction over claims identical to those asserted by Plaintiffs. See *supra* Sec. III, nn. 12-23. Likewise, Mississippi courts have long and repeatedly held that the separation of church and state deprives a civil court of jurisdiction over claims grounded in such ecclesiastical subject matters.[2]

As explained in Part Two of the Argument, the Circuit Court erred in ordering production of certain church documents and other information. Just as the Doctrine of Church Autonomy prohibits jurisdiction cover Plaintiffs' claims, it also prohibits inquiry into church communications because the very process of discovery can violate a church's institutional autonomy. Moreover, numerous privileges immunize those documents and information from discovery.

COURSE AND DISPOSITION OF PROCEEDINGS BELOW

The Complaint was filed June 12, 2002. The Diocese and Bishop Houck filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, supported by three affidavits and a brief, on March 14, 2003. Plaintiffs did not file a response to that Motion. During the March 24, 2003 oral argument, the Circuit Court indicated that it had read the Complaint and the Motion, Tr. at 29, 88, but never mentioned whether it had read and considered the thirty-four page Brief in Support of the Motion or the three attached affidavits. That uncontested evidence demonstrated that adjudication of plaintiffs' claims will require the civil court to assert jurisdiction over the relationship between a bishop and his priest and unconstitutionally inquire into issues of faith, church polity and theological doctrine defining that relationship. These are

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[2] *See e.g.*, Mallette v. Church of God Int'l, 789 So.2d 120, 123 (Miss. App. 2001) ("A civil court is forbidden . . . from becoming involved in ecclesiastical disputes"); Sustar v. Williams, 263 So.2d 537, 540 (Miss. 1972) (Mississippi "courts . . . accept the highest ecclesiastical authority in each church as being the faith and practice of that church"); Grantham v. Humphries, 188 So.2d 313, 313 (Miss. 1939) (Ecclesiastical questions are not "for the civil courts. The church authorities. . . are supreme in such matters. Their decision is final as to who shall be the pastor and other officers. Such disputes are ecclesiastical in their nature and the courts have no control over them.").

subject matters which the First Amendment places beyond the court's power. The Circuit Court did not carefully consider this important, threshold issue. Instead, it denied the Motion to Dismiss from the bench without explanation. As a result, neither this Court nor the parties have the benefit of the Circuit Court's analysis.

With respect to the discovery issue, the following proceedings are relevant. On October 11, 2002, the Diocese filed responses to Plaintiffs' written discovery requests, objecting to production of its files and objecting to responding to certain interrogatories because, in part, the Doctrine of Church Autonomy protects church records from discovery. The Diocese also objected to the identification of non-party victims and priests and production of their files, based on the privacy interests of both the alleged victims and alleged abusers. The Diocese objected to production of many of those individual documents contained within the requested files because they are protected by one or more privileges. R. 99 - 143; 149 - 155.

The Circuit Court ordered the Diocese to produce all documents for which it claimed a privilege for *in camera* review. R. 295-96. On March 7, 2003, the Diocese produced the documents for *in camera* review and filed under seal answers to interrogatories revealing the requested names. On April 1, 2003, the Circuit Court entered its Order directing the Diocese to produce to Plaintiffs ***all*** documents produced *in camera.* That Order made no finding with respect to individual documents, stating only that "the specific privileges asserted by the Defendant Diocese do not apply to the documents submitted to the Court for an *in camera* review." R. 332 - 33. Of the hundreds of documents produced, the Circuit Court did not find a single document protected by the Doctrine of Church Autonomy or by any privilege. It also directed the Diocese to respond to Interrogatories requesting the disclosure of *all* alleged victims' and priests' identities, ignoring both the privacy rights of these individuals and the priest/penitent privilege. R. 332-33.

On April 8, 2003, the Diocese filed two separate petitions for interlocutory appeal – one seeking a review of the Circuit Court's denial of the Motion to Dismiss and one seeking review of its discovery order. On May 15, 2003, this Court granted both petitions and consolidated the actions for appeal. R. 363 - 64.

STATEMENT OF FACTS

Francis, Thomas, and Kenneth Morrison each allege that George Broussard, a former priest, sexually abused them thirty years ago, from 1970 to 1974, R. 6, 9 - 12, 14 (Complaint ¶¶ 16-39, 51). Their father, Dr. Morrison, learned of the abuse in 1973, promptly confronted Broussard and reported the abuse to the Vicar General of the Diocese R. 12 (Complaint ¶ 38) and to Diocesan officials.[3] R. 11, 12 (Id. ¶ 12, 33, 38). Two years later, in about 1975, Broussard left the priesthood. R. 13 (Id.¶ 42). Bishop Joseph B. Brunini, now deceased, was Bishop of the Diocese of Jackson during the entire period from 1970 through 1974. R.7 (Complaint ¶ 7).

Based upon these and related allegations, Plaintiffs assert seven different causes of action against the Diocese and its bishops, ranging from negligent assignment, hiring, retention, and supervision to civil conspiracy and loss of consortium. The crux of each claim is that Bishop Brunini should have known more about Broussard, should have supervised him differently and should have spoken about him differently to parishioners of the Diocese.[4] Mrs. Morrison's loss of consortium claim is derived from these same allegations. R. 27 (Complaint ¶ 98).

Plaintiffs assert that civil courts have jurisdiction over claims arising from what a bishop says about his priest and from how he supervises or disciplines a priest, just as a court would have jurisdiction over claims arising from a car dealer's supervision of a salesman. The undisputed evidence of record, however, shows that the relationship between a bishop and priest bears little resemblance to a secular

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[3] Obviously, since Plaintiffs' father had actual notice in 1973 of the abuse, their claims are barred by the statute of limitations. Likewise, Plaintiffs' claims of fraud and fraudulent concealment are of no avail as the whole point of a fraudulent concealment and false representation claim is to toll a statute of limitations when the *existence of the injury* was actively concealed by the wrongdoer's affirmative misconduct. Plaintiffs' actual notice of their injury defeats such claims. *See* Belenchia et al. v. St. Mary's Catholic Church/School et al., Civil Action No. 251-02-915, Hinds County Circuit Court, First Judicial District (Sept. 24, 2003). The trial proceedings were stayed before the Circuit Court heard argument on the statute of limitations.

[4] (*See, e.g.*, R. Complaint at ¶¶ 61 and 63 (in support of the conspiracy claim); ¶¶ 70, 72, and 73 (in support of the fiduciary duty claim); ¶ 77 (in support of the infliction of emotional distress claim); ¶ 81 (in support of the fraud claim); ¶¶ 83-87 (in support of the negligent supervision claim); ¶¶ 89 and 90 (in support of the negligent misrepresentation claim)).

employer/employee relationship. Instead, it is a relationship entirely created and defined by ordination vows, sacramental theology and canon law.

The record evidence on this point are the affidavits of Bishops Houck and Latino. R. 190 and 277. Bishop Houck explains that a bishop's ministry includes the governance of the Diocese and its priests:

> Bishops are "constituted pastors in the Church, so that they are teachers of doctrine, priests of sacred worship, and the ministers of governance." Canon 375 § 1. . . . A bishop's ministry of governance is an important part of his pastoral care of his diocese. Bishops have been established by Christ the Lord as "shepherds of the People of God" and are "endowed by Christ with a special outpouring of the Holy Spirit" to act as "vicars and legates of Christ," governing the diocese assigned to them . . . . R. 193.

From a secular point of view, it could be said that "supervision" of priests is an important portion of a bishop's *work*. But from the Catholic Church's vantage, such supervision is an important portion of a bishop's *ministry*--a ministry informed by Scripture, faith, teaching, and tradition. Bishop Houck continues:

> As a minister of governance, the decisions of a bishop are to be both informed and circumscribed by the promptings of the Holy Spirit, and the requirements of Sacred Scripture, Tradition, Magisterial Teaching, and The Code of Canon Law. Bishops strive to imitate Christ, the Good Shepherd, by taking time apart to pray and to be filled with God's wisdom. A bishop's decisions regarding ordination, appointments, assignments, re-assignments, discipline, and laicization of priests are likewise made prayerfully and in this full context of striving to imitate the Good Shepherd, as that vocation is understood within the Roman Catholic Church. Accordingly, a bishop's interactions with the priests under his care are only properly understood as part of the bishop's ministry as Christ to the Church. R. 193 (Id. at ¶ 12 (emphasis added)).

Bishop Houck explains that because the Roman Catholic Church is hierarchical "a bishop's decisions with regard to his priests--including . . . their calling, formation, assignment, and discipline--are decisions by the highest Diocesan legislator, judicatory, and executive." R. 194 (Id. at ¶ 13). Moreover, the Catholic Church is not like secular institutions which generally attempt to rely exclusively upon rational knowledge in conducting their affairs. The Catholic Church seeks to order itself and conduct its mission in accordance with revealed truth. Bishop Houck elaborates:

> The Code of Canon Law . . . is the universal law of the Roman Catholic Church . . . . It binds me and all those for whom it was enacted, including the past and present Church Officers who have been named in the present civil litigation. Canon 12 § 1. . . . [T]he first source of the Code was "the books of the Old and

> New Testament from which is derived the whole juridical-legislative tradition of the Church . . ."[5]

In the Catholic Church, priests are ordained ministers called by God to serve the Church. R. 192, 194 (Id. at ¶¶ 6, 16). "The duties of a priest are defined by the Sacred Scripture, Tradition, Magisterial Teaching, and The Code of Canon Law." R. 192 (Id. at ¶ 7). Under canon law, bishops must respect and foster the priest's calling to ministry: "The bishop is required to provide the priest with the opportunity to carry out his ministry for life. A bishop cannot lightly forsake this requirement . . ." R. 196 (Id. at ¶ 21).

> When a bishop assesses whether to discipline or remove a priest from the office assigned to him, he must determine and obey the wisdom and demands of the Scriptures, the teachings of the Church, and the requirements of the Code. He must also consider and weigh his pastoral duties and all of the factors described herein. R. 196 (Id. at ¶ 22).

Bishop Brunini, who died January 7, 1996, was the incumbent bishop during the time period relevant to the Complaint. R. 7 (Complaint ¶ 7). Bishop Houck served as Auxiliary Bishop to Bishop Brunini from 1979 to 1984, when the latter retired. R. 194 (Id.). As Auxiliary Bishop, Bishop Houck closely observed Bishop Brunini's ministry:

> I personally witnessed Bishop Brunini govern the diocese, striving to imitate Christ, the Good Shepherd, in all he did. Bishop Brunini's decisions as Bishop were informed and circumscribed by the promptings of the Holy Spirit, and the requirements of Sacred Scripture, Tradition, Magisterial Teaching, and The Code of Canon Law. Following Christ's example, he would take time apart to pray, asking to be filled with God's wisdom. His decisions regarding governance of the Diocese were likewise made prayerfully . . . R. 194 (Id. at ¶ 14).

The record evidence demonstrates that adjudication of plaintiffs' claims will deeply entangle a civil court in the relationship between a bishop and his priest. It is a relationship informed by vows of ordination, sacramental theology, the canonical rights of the priest, and the canonical responsibilities of the bishop. These are subject matters which the First Amendment places beyond the Court's power.

SUMMARY OF ARGUMENT

The First Amendment Doctrine of Church Autonomy (sometimes called the ecclesiastical abstention doctrine) structurally restrains government power over churches and other religious institutions.

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[5] R. 191-192 (Id. at ¶¶ 3-4. *See also* id. at ¶ 5 (Pope John Paul II's teachings on The Code of Canon Law)).

It bars civil courts from asserting jurisdiction over disputes touching upon faith, doctrine, canon law, polity, or ecclesiastical relationships. Civil courts must, instead, defer to the decisions of the ecclesiastical authority when those subjects are implicated.

To adjudicate Plaintiffs' claims, a court would have to evaluate the relationship between a bishop and his priest; the theological doctrines informing and defining that relationship; and the pronouncements that a bishop made or failed to make about that relationship. And the civil jury would either have to immerse itself in theological criteria to determine the duties of a "reasonable bishop," or in the alternative, define a bishop's duties without regard to whether those duties ran afoul of Church teachings, solemn vows, religious tradition, or canon law. Both options are unacceptable because the First Amendment places consideration of the duties of a bishop, his relationship with his clergy, and his statements about his clergy beyond civil court jurisdiction.

Civil courts have repeatedly rejected jurisdiction over claims that church officials negligently hired, assigned, supervised, or retained clergy or other ministers. *See* cases collected at n. 11, *infra*. The U.S. District Court in Colorado, for example, rejected such claims by reasoning:

> Like the majority of the cases cited, this Court finds that consideration of hiring policies of the Archdiocese Defendants would inevitably require examination of church policy and doctrine. The choice of individuals to serve as ministers is one of the most fundamental rights belonging to a religious institution. It is one [of] the most important exercises of a church's freedom from government control. For this Court to insert itself into the process by which priests are chosen would substantially burden these Defendants' free exercise of a crucial power to control the future of the church and therefore constitute interference with the practice of their religion.
>
> It would also cause excessive entanglement in church operations by fostering inappropriate government involvement. The application of even general tort principles of law would require an inquiry into present practices with an intent to pass on their reasonableness.
>
> Ayon v. Gourley, 47 F.Supp. 2d 1246, 1250 (D. Colo. 1998).

Other branches of Church Autonomy law are closely analogous to those cases rejecting claims of negligent ecclesiastical administration, including church-minister disputes, clergy malpractice claims, and claims related to church communications. Appellate courts have consistently dismissed church-minister disputes even when the churches have violated civil rights laws or engaged in tortious conduct. *See, e.g.*,

Mallette v. Church of God Int'l, 789 So. 2d 120 (Miss. App. 2001); and cases collected at nns. 9 and 28 – 31. This is because the church-minister relationship is "intrinsically religious," Williams v. Episcopal Diocese of Massachusetts, 766 N.E.2d 820, 823 (Mass. 2002), and because the assignment of a minister "is per se a religious matter." Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354, 1355 (D.C. Cir. 1990). The religious character of the church-minister relationship is implicated regardless whether the minister sues the church for discrimination or a parishioner sues the church for negligent supervision of the minister.

Courts everywhere have rejected jurisdiction over claims of clergy malpractice even when the underlying tortious conduct involves intentional sexual acts by clergy defendants. *See* cases collected at n. 10, *infra*. This is because the First Amendment structurally restrains civil courts from defining the standard of care for a reasonably prudent clergyperson. The affidavits in the record establish that the defendant bishop's ministries include the discipline and governance of the alleged offender. Adjudication of Plaintiffs' claims, therefore, would involve determining a reasonable standard of care for a Catholic bishop in exercising his ministry of discipline and governance. This is precisely what is not permitted by those many precedents rejecting jurisdiction over claims of clergy malpractice.

In addition, Plaintiffs are asking the Court to impose liability for what the defendant bishops said or did not say regarding one of their priests. The church communications branch of Church Autonomy cases--including Mallette and Conic v. Cobbins, 44 So. 2d 52, 57 (Miss. 1950)--establish that civil courts simply have no power to assess the reasonableness of pronouncements by church officials regarding their clergy.

Abundant precedent from the U.S. Supreme Court, this and other Mississippi courts, the Fifth Circuit, and other jurisdictions requires this Court to reverse the Circuit Court's ruling and direct it to grant defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Finally, subject matter jurisdiction is a threshold matter. When, as here, defendants' opposition to subject matter jurisdiction is supported by affidavits related to ecclesiastical matters, plaintiffs must prove, by a preponderance of the evidence, that the assertion of civil jurisdiction will not entangle the court in

subject matters reserved to the church. Significantly, the record contains no evidence in opposition to the affidavits provided by Bishops Houck and Latino. Plaintiffs, therefore, have not carried their burden.

ARGUMENT

PART ONE: THE FIRST AMENDMENT DOCTRINE OF CHURCH AUTONOMY PRECLUDES JURISDICTION OVER CLAIMS RELATED TO THE ECCLESIASTICAL ADMINISTRATION OF A CATHOLIC PRIEST.

I. The Doctrine of Church Autonomy is a Structural Restraint on Government Power.

Three branches of religious liberty jurisprudence grow from the trunk of the First Amendment: Free Exercise Clause, Establishment Clause, and the Doctrine of Church Autonomy. Professor Carl H. Esbeck reasons, in his thoughtful synthesis of a wide range of Establishment Clause cases, that Church Autonomy is an Establishment Clause value, acting not as a conferral of a right but rather as a structural restraint on governmental power. Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 IOWA L. REV. 1 (1998) ("Esbeck"). Although the purpose of the Free Exercise Clause is to "safeguard individual rights" by providing individualized remedies to redress "personal harm to an individual's religious belief or practice," id. at 97 and 101, the "task [of the Establishment Clause is to serve as a] structural clause [in order] to manage sovereign power." Id. at 8.

> An important consequence of attributing structural characteristics to the Establishment Clause is that it acknowledges the existence of a competency centered in religion that is on a plane with that of the civil government. Stated differently, the Establishment Clause presupposes a constitutional model consisting of two spheres of competence: government and religion. The subject matters that the Clause sets apart from the sphere of civil government – and thereby leaves to the sphere of religion – are those topics "respecting an establishment of religion," e.g., ecclesiastical governance, the resolution of doctrine, the composing of prayers, and the teaching of religion.

Id. at 10. Thomas Jefferson similarly observed: "I consider the government of the U.S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, and exercise. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. Thomas Jefferson Letter to Rev. Samuel Miller (1808) from Thomas Jefferson: Writings, 1186-87 (Merrill D. Peterson ed. 1984) (republished in the RJ&L Religious Liberty Archive at www.churchstatelaw.com).

Professor Esbeck, quoting Professor Max Stackhouse, further observes that "[The First A]mendment to the Constitution acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself . . . ." Esbeck at 10, n.34 (*quoting* Max L. Stackhouse, "Religion, Rights, and the Constitution," An Unsettled Arena: Religion and the Bill of Rights 92, 111 (1990)).

Church autonomy was established as a constitutional structural restraint on government power over a century ago by the U. S. Supreme Court in the seminal case of Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). The following sections summarize the development of that doctrine, the various contexts in which it has been applied, and demonstrates that the First Amendment forbids claims like those asserted by Plaintiffs here against churches.

II. The Doctrine of Church Autonomy Reserves Adjudication of Disputes Touching Upon Ecclesiastical Subject Matters to the Highest Authority Within a Church.

A. The Fountainhead of the Doctrine--Watson v. Jones.

Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) is the fountainhead of the Doctrine of Church Autonomy. Carothers v. Moseley, 55 So. 881, 881 (Miss. 1911) (recognizing Watson as the "leading case" regarding church autonomy). Watson involved a post-Civil War intra-church property dispute between the pro- and anti-slavery factions of the Walnut Street Presbyterian Church in Louisville, Kentucky. Watson reversed the Kentucky Court of Appeals which had "overrule[d] the decision of the highest judicatory of [the Presbyterian C]hurch . . . and, substitute[d] its own judgment for that of the ecclesiastical court." Watson, 80 U.S. (13 Wall.) at 734. Watson held that disputes within hierarchical churches should be decided, not by testing which faction departed from the traditional doctrine, but by a rule of deference.

> [W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and as binding on them, in their application to the case before them.

Id. at 727. *See also* Sustar v. Williams, 263 So.2d 537, 540 (Miss. 1972) ("[Mississippi] courts accept the highest ecclesiastical authority in each church as being the faith and practice of that church."); Mt. Helm Baptist Church v. Jones, 30 So. 714, 716 (Miss. 1901) ("This court exercises no ecclesiastical jurisdiction. It accepts what the highest ecclesiastical authority in each church promulgates as the faith and practice of that church.").

Watson reached this result by reasoning, first, that the civil courts are not allowed to invade the church's sphere of authority. Thus, Watson rejected Lord Eldon's Rule, adopted in England, whereby a civil court would resolve such disputes by discerning which faction followed traditional doctrine and which departed from such doctrine. Watson, 80 U.S. (13 Wall.) at 727. This "departure from doctrine" methodology may have been appropriate in England, with its established church, but it was not appropriate in the United States. Id. at 728.

Second, Watson recognized that the dispute was not ultimately about property, but rather about the manner in which the church would select pastoral leaders to preach the Gospel and inculcate the faith. Such a dispute was essentially a request for the civil court to side with one theological faction over another. Watson reasoned that, because civil courts are "incompetent judges of matters of faith, discipline, and doctrine," they must decline jurisdiction over such cases. Id. at 732.

> Each of these [religious institutions] has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own.

Id. at 729.

Watson next recognized that civil adjudication of most church-related disputes would inevitably entangle the judicial branch in ecclesiastical matters.

> [I]t is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court.

Id. at 733 (emphasis in original).

Finally, the court reasoned that there was a certain fairness to the rule, which required the court to defer to the highest church judicatory, because "[a]ll who unite themselves to [a church] do so with an implied consent to this government, and are bound to submit to it." Id. at 729. *See also* Dees v. Moss Point Baptist Church, 17 So. 1, 1 (Miss. 1895) ("Every person uniting with the Baptist church impliedly or expressly covenants obedience to its laws, and by that covenant this appellant is bound.").

The Watson court recognized that the principles it pronounced had "intrinsic importance and far-reaching consequences." Id. at 734. Just as argued by Professor Eckbeck, the Watson court stated that it had pronounced a doctrine which functioned as a structural restraint on the power of the government and, therefore, limited subject matter jurisdiction. Id. at 733. ("[N]o jurisdiction has been conferred on the [civil] tribunal to try the particular case before it.") "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference [and] it has secured religious liberty from the invasion of the civil authority." Id. at 733. Subsequent decisions have constitutionalized the Watson principles. Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America, 344 U.S. 94, 116 (1952):

> [Watson] . . . radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy . . . must now be said to have federal constitutional protection . . . against state interference.

B. Ecclesiastical Subject Matters Implicated by the Doctrine. Watson's holding and rationale, as the Court intended, has indeed had "far-reaching consequences." Because of Watson, courts decline jurisdiction when the resolution of a dispute would touch upon "church-related questions of discipline, faith, rule, custom, or law," Mallette, 789 So. 2d 120, 123-24 (Miss. App. 2001) (*quoting* Milivojevich, *infra*), or when the dispute would touch upon "the doctrine, discipline, ecclesiastical law, rule, and custom" of a church. Conic v. Cobbins, 44 So. 2d 52, 57 (Miss. 1950). There are at least six types of cases in which courts have consistently declined jurisdiction due to Church Autonomy considerations:

1. Church splits and the resulting church property and ministry assignment disputes,[8] Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 U.S. 696 (1976); Sustar v. Williams, 263 So.2d 537 (Miss. 1972); and Blue v. Jones, 230 So.2d 569 (Miss. 1970);

2. Disputes concerning the discipline of church members, Conic v. Cobbins, 44 So.2d 52 (Miss. 1950); Dees v. Moss Point Baptist Church, 17 So. 1 (Miss. 1895); and O'Connor v. Diocese of Honolulu, 885 P.2d 261 (Hawaii 1994);

3. Disputes between ministers and churches,[9] Mallette v. Church of God Int'l, 789 So.2d 120 (Miss. App. 2001); Conic v. Cobbins, 44 So.2d 52 (Miss. 1950); McClure v. The Salvation Army, 460 F.2d 553 (5th Cir. 1972); Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999); and Combs v. Central Texas Annual Conf. of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999);

4. Claims arising from or related to church communications, Mallette, 789 So.2d 120 (Miss. App. 2001) (First Amendment bars defamation claim arising from church disciplinary process regarding pastor's alleged sexual misconduct); United States v. Ballard, 322 U.S. 78 (1944); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 284 (5th Cir. 1981); and Bryce *supra*; *see also* Conic v. Cobbins, 44 So.2d 52, 57 (Miss. 1950) ("courts will not take jurisdiction of any and all acts of a church that may affect the reputation of its pastor or some of its members.");

5. Claims against clergy for malpractice or breach of fiduciary duty,[10] Schmidt v. Bishop, 779 F.Supp. 321 (S.D.N.Y. 1991) and Nally v. Grace Community Church of the Valley, 47 Cal.3d 278, 253 Ca. Rptr. 97, 763 P.2d 948 (Cal. 1988);

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[8] Every United States Supreme Court decision has declined jurisdiction over disputes between church factions over which faction gets to keep church property and select the minister who would preach from the pulpit of the disputed property. Watson, *supra;* Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church of North America, 363 U.S. 190 (1960); Presbyterian Church of the U.S. v. Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Serbian, *supra*; Jones v. Wolf, 443 U.S. 595 (1979); and Shepard v. Barkley, 62 L. Ed. 939 (1917).

[9] In addition to the important Fifth Circuit precedents cited in the text, virtually every United States Circuit Court of Appeals has held that courts must decline jurisdiction rather than come between a church and its ministers even when the ministers have alleged otherwise viable claims arising from their employment relationships. Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648 (10th Cir. 2002) (10th Cir. 2002); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991); Rayburn v. Gen'l Conf. of Seventh-day Adventists, 772 F.2d 1164 (4th Cir. 1985) *cert. denied* 478 U.S. 1020 (1986); Kaufmann v. Sheehan, 707 F.2d 355 (8th Cir. 1983); Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986) *cert. denied*, 479 U.S. 885 (1986); Natal v. Christian and Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989); Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991); Lewis v. Seventh-day Adventists Lake Region Conf., 978 F.2d 940 (6th Cir. 1992); Young v. Northern Ill. Conf. of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); EEOC v. Catholic University of America, 82 F.3d 455 (D.C. Cir. 1996); Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328 (4th Cir. 1997); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir.2000); and EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000).

[10] Every American court to consider the issue has refused to adjudicate claims of clergy malpractice. Baumgartner v. First Church of Christ, Scientist, 490 N.E.2d 1319 (1986); Hester v. Barnett, 723 S.W.2d 544 (Mo. App. 1987); Handley v. Richards, 518 So. 2d 682 (Ala. 1987); Destefano

6. Claims against churches or church officials for negligent hiring, assignment, and supervision,[11] Ehrens v. The Lutheran Church-Missouri Synod, 269 F.Supp.2d 328 (S.D.N.Y. 2003); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995); Ayon v. Gourley, 47 Supp.2d 1246 (D. Colo. 1998); Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me. 1997); L.L.N. v. Clauder, 563 N.W.2d 434 (Wis. 1997) (negligent management claims necessarily involve evaluating religious doctrine because "church doctrines and practices are intertwined with the supervision and discipline of clergy"); and Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997).

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v. Grabrian, 763 P.2d 275 (Colo. 1988); Nally v. Grace Community Church of the Valley, 763 P.2d 948 (1988); White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990); Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991); Schmidt v. Bishop, 779 F. Supp. 321, 324-28 (S.D.N.Y. 1991); Jones v. Trane, 153 Misc. 2d 822, 591 N.Y.S.2d 927, 929-30 (N.Y. S. Ct. 1992); Bladen v. First Presbyterian Church, 857 P.2d 789, 795 (Okla. 1993); Schieffer v. Catholic Archdiocese of Omaha, 508 N.W.2d 907, 911 (Neb. 1993) (clergy malpractice recognized no where); O'Connor, 885 P.2d at 369-70 (Haw. 1994); Roppolo v. Moore, 644 So.2d 206 (La. Ct. App., 4th Cir. 1994); Joshua S. v. Casey, 206 A.D.2d 839, 615 N.Y.S.2d 200, 200-01 (N.Y. 1994) ("we are unaware of any authority supporting the proposition that sexual abuse by a member of the clergy is cognizable as 'clergy malpractice'"); Podolinski v. Episcopal Diocese of Pittsburgh, 23 D. & C. 4th 385 (Pa. Ct. of Common Pleas) (1995); Cherepski v. Walker, 913 S.W.2d 761 (1996); F.G. v. MacDonell, 696 A.2d 697 (1997); Amato v. Greenquist, 679 N.E.2d 446 (Ill. Ct. App. 1997); Mulinix v. Mulinix, 1997 WL 585775 (Minn. Ct. App. 1997); Teadt v. Lutheran Church, Missouri Synod, 603 N.W.2d 816, 822 (Mich. Ct. App. 1999) (citing courts rejecting clergy malpractice claims); Borchers v. Hrychuk, 126 Md. App. 10, 727A.2d 388 (1999); Langford v. Roman Catholic Diocese, 705 N.Y.S.2d 661 (N.Y. App. Div. 2000); Hawkins v. Trinity Baptist Church, 30 S.W.3d 446 (Tex. Ct. App. 2000); and Lann v. Davis, 793 So.2d 463 (La. Ct. App. 2001). *See* Strock v. Pressnell, 38 Ohio St.3d 207, 527 N.E.2d 1235 (Ohio 1988); and Greene v. Roy, 604 So. 2d 1359 (La. Ct. App. 1992).

[11] Civil courts have again and again held that the First Amendment prevents them adjudicating whether church leadership negligently hired, supervised, trained, or retained clergy or other ministers. Schmidt, 779 F.Supp. at 332 (S.D.N.Y. 1991); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995); Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me. 1997); Ehrens v. Lutheran Church-Missouri Synod, 269 F.Supp.2d 328 (S.D. N.Y. 2003); S.H.C. v. Lu, 54 P.3d 174 (Wash. App. 2002); Germain v. Pullman Baptist Church, 980 P.2d 809 (Wash. App. 1999); Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997) ("Questions of hiring, ordaining, and retaining clergy, however, necessarily involve interpretation of religious doctrine, policy, and administration. Such excessive entanglement between church and state has the effect of inhibiting religion, in violation of the First Amendment"); Ayon v. Gourley, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998), *aff'd on other grounds*, 185 F.3d 873 (10th Cir. 1999);Roppolo v. Moore, 644 So.2d 206 (La. App. 1995); L.L.N. v. Clauder, 563 N.W.2d 434 (Wis. 1997) (negligent management claims necessarily involve evaluating religious doctrine because "church doctrines and practices are intertwined with the supervision and discipline of clergy"); Isely v. Capuchin Province, 880 F. Supp. 1138, 1150 (E.D.Mich. 1995); Olson v. Luther Memorial Church, 1996 WL 70102 (Minn. App. 1996); Dausch v. Rykes, 52 F.3d 1425 (7th Cir. 1994); Hodges, 2000 WL 994337 (Tex. App.--Hous. (1st Dist.) 2000); and Turner v. The Church of Jesus Christ Latter-day Saints, 18 S.W.3d 877, 886 (Tex. App. — Dallas 2000, review denied) (First Amendment bars negligent training claim). *See also* Bryan R. V. Watchtower Bible & Tract Soc'y, 738 A.2d 839, 848 (Me. 1999) (stating in *dicta* that "[a]llowing a secular court or jury to determine whether a church and its clergy have sufficiently disciplined, sanctioned, or counseled a church member would insert the State into church matters in a fashion wholly forbidden" by the First Amendment.").

In over 1,000 published opinions, courts have repeatedly affirmed the Watson principle that disputes touching upon ecclesiastical subject matters must be resolved exclusively by the church and that civil courts must defer to ecclesiastical authorities in such matters. In most of these circumstances, just as here, the claims and issues raised by the plaintiffs touch upon the church-minister relationship which is universally recognized as intrinsically religious. Minker, 894 F.2d at 1356-57 (D.C.Cir. 1990) ("[D]etermination of 'whose voice speaks for the church' is *per se* a religious matter. . . . We cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the 'gifts and graces' of a minister must be left to ecclesiastical institutions.").

> The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.

McClure, 460 F.2d at 558-59 (5th Cir. 1972). By claiming that Bishop Brunini or his successors negligently oversaw their relationship with Broussard by wrongfully assigning him, retaining him, or failing to warn about him, plaintiffs are asking this Court to become entangled in ecclesiastical subject matters which Mississippi, the Fifth Circuit, and numerous other jurisdictions have held to be constitutionally off-limits.

III. Adjudication of Plaintiffs' Claims Will Entangle the Court in Numerous Ecclesiastical Subject Matters Protected by the Doctrine of Church Autonomy Including: the Standards of Care for a Catholic Bishop and for a Catholic Priest; Church-Clergy Relationships, Church Communications; Negligent Ecclesiastical Administration; and Evaluation of Spiritual Damages .

Even when claims, like those here, arise from injuries due to sexual misconduct by clergy, courts have repeatedly dismissed those cases due to the structural restraint placed on their jurisdiction by the First Amendment Doctrine of Church Autonomy. These courts have consistently recognized that adjudication of such claims would lead to excessive and unconstitutional entanglement with, and inquiry into, issues of faith, church polity and doctrine, sacramental relationships and canon law, in violation of the First Amendment Doctrine of Church Autonomy. Consequently, courts in many different states – e.g.,

Missouri,[12] Wisconsin,[13] Louisiana,[14] Maine,[15] Rhode Island,[16] Minnesota,[17] Washington,[18] New York,[19] Texas,[20] Michigan,[21] Nebraska,[22] and Utah[23] – have held that the First Amendment Doctrine of Church

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[12] Gray v. Ward, 950 S.W.2d 232 (Mo. 1997), (No subject matter jurisdiction over parishioner's claims against diocese for negligence, negligent hiring or ordination of, and negligent retention and failure to supervise priest even though claims arose from priest's sexual relationship with minor); Gibson v. Brewer, 952 S.W.2d 239 (Mo.1997) (Where Catholic priest fondled minor, no subject matter jurisdiction over claims against diocese for negligence, negligent hiring, ordination, retention and supervision, and negligent infliction of emotional distress because inquiry into same would necessarily involve interpretation of religious doctrine, church polity, and ecclesiastical administration, and resulting in excessive entanglement between church and state); H.R.B. v. J.L.G.,913 S.W.2d 92, 98-99 (Mo.Ct.App.1995) (Catholic priest sexually abused minor in 1964-65; suit filed in 1994; held, no subject matter jurisdiction over breach of fiduciary duty claim against priest, church official, and church); *see also* A.B. v. Liberty United Methodist Church, 2002 WL 31890054 (Mo. App. W.D. Dec. 31, 2002) ("Assessing the reasonableness of a response to the risk [of child molestation by youth minister] necessarily includes assessing the reasonableness of the supervision. Adjudicating the reasonableness of a church's supervision of a cleric "requires inquiry into religious doctrine" and "would create an excessive entanglement, inhibit religion, and result in the endorsement of one model of supervision." (quoting Gibson, 952 S.W.2d at 247)).

[13] Pritzlaff v. Archdiocese of Milwaukee, 533 N.!.2d 780 (Wis. 1995) (First Amendment bars claims that Catholic archdiocese negligently hired, trained, supervised, and retained a priest who, during this priesthood, had sexual relations with a high school student).

[14] Roppolo v. Moore, 644 So.2d 206 (La.Ct.App.1994) (no subject matter jurisdiction over claims against clergy member and religious organization for alleged sexual relationship during course of counseling relationship).

[15] Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me.1997) (no subject matter jurisdiction over negligent supervision claim against church based on sexual relationship between parishioner and priest during course of marital counseling); *see also* Bryan R. v. Watchtower Bible & Tract Soc'y, 738 A.2d 839 (Me.1999) ("[a]llowing a secular court or jury to determine whether a church and its clergy have sufficiently disciplined, sanctioned, or counseled a church member would insert the State into church matters in a fashion wholly forbidden by the Free Exercise Clause of the First Amendment").

[16] Heroux v. Carpentier, 1998 WL 388298 (R.I. Super. Ct. 1998) (no subject matter jurisdiction over claims of negligence in hiring, training, disciplining and retaining offender priests brought by numerous plaintiffs, allegedly sexually molested by priests, against hierarchical church defendants because inquiry into such matters would invade religious rules and polity in violation of First Amendment).

[17] Mulinix v. Mulinix, 1997 WL 585775 (Minn. Ct. App. 1997), (no subject matter jurisdiction over claims by former wife of pastor against church administrative officials based on their negligent retention and supervision of pastor who engaged in extramarital affairs with female church members since claims were fundamentally connected to issues of church governance, and adjudication of those claims would necessitate inquiry into church's motives for not discharging pastor, as well as how church investigated and resolved complaints concerning clergy misconduct).

Autonomy deprives the trial court of subject matter jurisdiction in cases involving facts and claims virtually identical to those asserted by Plaintiffs. The federal courts in New York, Colorado, Michigan and the Seventh Circuit have ruled likewise.[24] These and other authorities apply to Plaintiffs' specific claims more precisely as discussed below.

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[18] S.H.C. v. Lu, 54 P.3d 174 (Wash. App. 2002) (First Amendment bars claims arising from situation in which grand master in monastery convinces adherent that her health depends upon her participation in the "Twin Body Blessing," a form of ritualized sex); Germain v. Pullman Baptist Church, 980 P.2d 809 (Wash. App. 1999), review denied, 994 P.2d 844 (Wash. 2000), (no subject matter jurisdiction over negligent supervision claim arising from sexual misconduct by pastor during course of counseling, because adjudication of claim would excessively entangle court with religion and require interpretation of church's laws and constitution).

[19] Langford v. Roman Catholic Diocese, 705 N.Y.S.2d 661 (N.Y.App.Div.2000) (no subject matter jurisdiction over parishioner's claims of negligence, negligent infliction of emotional distress and breach of fiduciary duty against diocese arising from sexual misconduct of priest during course of spiritual counseling).

[20] Hawkins v. Trinity Baptist Church, 30 S.W.3d 446 (Texas Ct.App.2000) (declining to recognize breach of fiduciary duty claim against pastor for sexual relationship with adult parishioner during the course of marital counseling because of "concerns towards treading upon the Free Exercise Clause").

[21] Teadt v. Lutheran Church Missouri Synod, 603 N.W.2d 816 (Mich.App. 1999) (breach of fiduciary duty claim against pastor for sexual relationship with parishioner during the course of pastoral counseling not cognizable because impossible to show evidence of fiduciary relationship without resort to religious facts).

[22] Schieffer v. Catholic Archdiocese of Omaha, 508 N.W.2d 907, (Neb. 1993) (no subject matter jurisdiction over parishioner's breach of fiduciary duty claim arising from her sexual relationship with priest).

[23] Franco v. Church of Jesus Christ of Latter-Day Saints, 21 P.3d 198 (Utah 2001) (no subject matter jurisdiction over parishioner's claims of breach of fiduciary duty, gross negligence, intentional and negligent infliction of emotional distress arising from ecclesiastical counseling regarding sexual abuse).

[24] Ehrens v. Lutheran Church-Missouri Synod, 269 F.Supp.2d 328 (S.D.N.Y. 2003) (First Amendment bars negligent supervision claims even when minister who caused injury committed a "series of sexual assaults" against a minor); Ayon v. Gourley, 47 F.Supp.2d 1246, 1250 (D.Colo.1998) (Catholic priest allegedly sexually abused minor; held, no subject matter jurisdiction under First Amendment of negligent hiring, negligent supervision and outrageous conduct claims against archdiocese), *aff'd on other grounds* 185 F.3d 873 (10th Cir.1999); Isely v. Capuchin Province, 880 F. Supp. 1138, (E.D. Mich. 1995) (no subject matter jurisdiction over claims brought by student against seminary over priests who allegedly sexually abused student since inquiry into church decisions regarding who should be permitted to become or remain priest would have involved excessive entanglement with religion, which is prohibited by the First Amendment, since such inquiry would have required interpretation of church canons and internal church policies and practices); Schmidt v. Bishop, 779 F. Supp. 321 (S.D. N.Y. 1991) (no subject matter jurisdiction over claim for negligent retention and supervision against ecclesiastical authorities arising out

A. Clergy Malpractice and Breach of Fiduciary Obligation. Plaintiffs allege that Bishop Brunini should have conducted his sacramental duties and ministry of governance differently--that he should have better determined Broussard's fitness for ordination and assignment, R. 14 (Complaint at ¶ 50), that he should not have ordained Broussard, R. 13 (Complaint at ¶ 45), that he should not have given Broussard priestly duties, R. 13 (Complaint at ¶ 46), that he should have given Broussard different priestly assignments, R. 13 (Complaint at ¶ 52) and that he should have spoken differently and more critically of Broussard. R. 17-21 24 (Complaint at ¶¶ 61, 63-65, 67, 70, 72 and 84). However one formally denominates such allegations, each claim requires a civil court to establish a standard of care for a Catholic bishop as regards his episcopal duties. They are, therefore, essentially claims of a clergy malpractice or--more precisely here--claims of episcopal malpractice. Indeed, Plaintiffs have repeatedly and expressly alleged that the bishop of the Diocese committed professional "negligence"[25] which, of course, is nothing more than a clergy malpractice claim.

There is no more uniform body of Church Autonomy law than the rejection of jurisdiction over claims of clergy malpractice. Every American court to have considered the issue agrees.[26] Courts reject jurisdiction over claims of clergy malpractice without regard to whether the clergyman engaging in the injurious activity is a pastor of a congregation or a bishop or other church official with administrative authority. O'Connor v. Diocese of Honolulu, 885 P.2d 261 (Hawaii 1994) (First Amendment bars claims against Catholic bishop for the tortious administration of church affairs).

The Doctrine of Church Autonomy mandates dismissal of clergy malpractice claims because their adjudication would necessarily require a court to define the "reasonable" duties of a clergy person. Few courts have better described the problem than Schmidt v. Bishop, 779 F.Supp. 321, 327-28 (S.D.N.Y.

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of church pastor's alleged sexual contact with plaintiff beginning when she was 12, since inquiry into policies and practices of church in supervising clergy might involve court in making sensitive judgments about propriety of church's supervision in light of its religious beliefs); Dausch v. Rykse, 52 F.3d 1425, 1429 (7th Cir.1994) (no subject matter jurisdiction under First Amendment of parishioner's negligent hiring and supervision and breach of fiduciary duty claims against pastor and church for sexual contact that occurred between pastor and parishioner during course of counseling relationship).

[25] R. 18-19, 21-22, 24-25 (Complaint at ¶¶ 64, 65, 74, 78, 83, and 87-91).

[26] *See* cases collected, *supra,* at n. 10.

1991), where the court held there was no subject matter jurisdiction over claims arising from a pastor's sexual relationship with a 12-year old girl:

> Claims of malpractice stand on a different footing. . . . It would be impossible for a court or jury to adjudicate a typical case of clergy malpractice, without first ascertaining whether the cleric, in this case a Presbyterian pastor, performed within the level of expertise expected of a similar professional (the hypothetical "reasonably prudent Presbyterian pastor"), following his calling, or practicing his profession within the community. *See* Restatement (Second) of Torts § 299A. As the California Supreme Court has held in Nally v. Grace Community Church of the Valley:
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> > "Because of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, and quite possibly unconstitutional to impose a duty of care on pastoral counselors. Such a duty would necessarily be intertwined with the religious philosophy of a particular denomination or ecclesiastical teachings of the religious entity." Nally, 253 Cal.Rptr. at 109, 763 P.2d at 960.
>
> . . . Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion.
>
> It may be argued that it requires no excessive entanglement with religion to decide that reasonably prudent clergy of any sect do not molest children. The difficulty is that this Court, and the New York courts whose authority we exercise here, must consider not only this case, but the next case to follow, and the ones after that, before we embrace the newly invented tort of clergy malpractice. This places us clearly on the slippery slope and is an unnecessary venture, since existing laws against battery, and the criminal statute against sexual abuse if timely invoked, provide adequate protection for society's interests. Where could we stop? Assume a severely depressed person consults a storefront preacher, unaffiliated with any of the mainstream denominations, but with them, equally protected by the First Amendment. The cleric consults with our hypothetical citizen, reminds him of his slothful life, and that he is a miserable sinner; recommends prayer and fasting and warns of the Day of Judgment. Our depressed person becomes more so, and kills himself and a few more people. These deaths are followed by lawsuits. As to a licensed psychiatrist or social worker, our lay courts should have no trouble adjudicating a claim of professional malpractice on these facts. As to a clergyman, it would be both impossible and unconstitutional to attempt to do so.

Plaintiffs seek to avoid the First Amendment bar applicable to clergy malpractice claims by asserting other claims, including breach of fiduciary duty, as surrogates to accomplish the same objective. Like clergy malpractice, a claim of breach of fiduciary duty, in which the fiduciary obligation arises from the alleged position of trust held by a clergyperson, necessarily requires a civil court to define a

clergyperson's professional obligations and inevitably entangles the court in matters of faith, doctrine, canon law, and ecclesiastical relationships.

> If the Court were to recognize such a breach of fiduciary duty, it would be required to define a reasonable duty standard and evaluate [the pastor's] conduct against that standard, an inquiry identical to that which Illinois has declined to undertake in the context of a clergy malpractice claim and one that is of doubtful validity under the free exercise clause. It is clear that Illinois would not entertain a claim for breach of fiduciary obligation under the circumstances alleged here.

Dausch v. Ryske, 52 F.3d 1425, 1438-39 (7th Cir. 1994) (rejecting subject matter jurisdiction over claims against church arising from pastor's sexual relationship with parishioner). Accordingly, civil courts consistently reject such clergy fiduciary duty claims.[27]

B. Church-Minister Disputes.

Every aspect of plaintiffs' allegations against the Diocese and its bishop involves the relationship between the Catholic Diocese and one of its priests. The First Amendment Doctrine of Church Autonomy bars such claims because they involve the church-minister relationship, a relationship which the Mississippi Supreme Court, the Fifth Circuit, and numerous other courts have consistently found to be intrinsically religious and, therefore, beyond a civil court's jurisdiction.

Over 200 published decisions--including Mallette v. Church of God Int'l, 789 So.2d 120 (Miss. App. 2001), and Conic v. Cobbins, 44 So.2d 52 (Miss. 1950)--apply the Doctrine of Church Autonomy to hold that church-minister disputes fall outside the subject matter proper to civil courts.[28] Serbian, 426 U.S.

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[27] *See e.g.,* Dausch v. Ryske, 52 F.3d 1425, 1438 (7th Cir. 1994); Schmidt v. Bishop, 779 F.Supp. 321, 325-26 (S.D.N.Y. 1991); Amato v. Greenquist, 679 N.E.2d 446 (Ill. Ct. App. 1997); H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. Ct. App. 1995); Schieffer v. Catholic Archdiocese of Omaha, 508 N.W.2d 907, 911 (Neb. 1993); and Hawkins v. Trinity Baptist Church, 30 S.W.3d 446 (Tex. Ct. App. 2000)--all rejecting clergy fiduciary duty claims on constitutional grounds. *See also* Dushkin v. Desai, 18 F.Supp. 117, 121-122 (D. Mass.1998); Smith v. O'Connell, 986 F.Supp. 73, 81 (D. R.I. 1997); Cherepski v. Walker, 913 S.W.2d 761 (Ark. 1996); Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., 738 A.2d 839 (Me. 1999); Teadt v. Lutheran Church Missouri Synod, 603 N.W.2d 816 (Mich. Ct. App. 1999); R.E.R. v. J.G., 552 N.W.2d 27, 30 (Minn. Ct. App. 1996); Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997); Gray v. Ward, 950 S.W.2d 232 (Mo. 1997); L.C. v. R.P., 563 N.W.2d 799, 801-02 (N.D. 1997); Strock v. Pressnell, 527 N.E.2d 1235, 1243-44 (Ohio 1988); Bladen v. First Presbyterian Church, 857 P.2d 789 (Okla. 1993); and Brown v. Pearson, 483 S.E.2d 477, 484-85 (S.C. Ct. App. 1997), all rejecting clergy fiduciary duty claims on other grounds.

[28] *See e.g.,* McClure v. The Salvation Army, 460 F.2d 553 (5th Cir. 1972); Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974); Combs v. Central Texas Annual Conf. of the United

696 (1976). These cases comprise a special application of church autonomy jurisprudence, the distinguishing feature of which is that, because the church-minister relationship is intrinsically religious, defendants are required to show only that the claim arose from a church-minister relationship. Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354, 1355 (D.C. Cir. 1990) (the appointment of a minister "is *per se* a religious matter"). When, as here, civil litigation involves the church-minister relationship, defendants are not even required to make a specific showing that adjudication of such claims necessarily touches upon matters of faith, discipline, canon law, or polity.

> We need not consider the precise contours of church policy, however, to reject [the minister's] claim that lay courts have jurisdiction. [D]etermination of "whose voice speaks for the church" is *per se* a religious matter. . . . We cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the "gifts and graces" of a minister must be left to ecclesiastical institutions. This is the view of every court that has been confronted with this genre of dispute.

Id. at 1356-57.

The leading case for the church-minister dispute branch of Church Autonomy law is the Fifth Circuit decision, McClure v. The Salvation Army, 460 F.2d 553 558-59 (5th Cir. 1972), which held that the First Amendment bars civil adjudication of a minister's Title VII discrimination claim because the relationship between a church and its minister is intrinsically religious:

> The relationship between an organized church and its ministers is its life blood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.

Methodist Church, 173 F.3d 343 (5th Cir. 1999); Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648 (10th Cir. 2002); Natal v. Christian and Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989); Dowd v. Society of St. Columbans, 861 F.2d 761 (1st Cir. 1988); Kaufmann v. Sheehan, 707 F.2d 355 (8th Cir. 1983); Rayburn v. Gen'l Conf. of Seventh-day Adventists, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991); Lewis v. Seventh-day Adventists Lake Region Conf., 978 F.2d 940 (6th Cir. 1992); Young v. Northern Ill. Conf. of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); EEOC v. Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996); Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328 (4th Cir. 1997); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000); and EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000).

The Fourth Circuit elaborates: "The right to choose ministers without government restriction underlies the well-being of religious community . . . for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its messages, and interpret its doctrines . . . ." Rayburn, 772 F.2d at 1167-68 (4th Cir. 1985).

Courts apply the Doctrine of Church Autonomy to church-minister disputes to avoid entangling themselves in such intrinsically religious relationships. Minker, 894 F.2d at 1355 (D.C. Cir. 1990). Because every aspect of the church-minister relationship touches upon doctrine, canon law, and church polity, civil courts have repeatedly declined jurisdiction over all claims arising from such relationships including every species of contract claim,[29] statutory claim,[30] and tort claim.[31]

C. Church Communications. Plaintiffs repeatedly allege that the Diocese and its bishop failed to communicate properly with them and other members of the Diocesan church regarding the character and moral fitness of Broussard. R. 20, 23, 25 (Complaint ¶¶ 69-70, 80-81, 89-91) They contend

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[29] The Doctrine of Church Autonomy bars ministers' contract claims, implied contract claims, promissory estoppel claims, and claims for breach of covenant of good faith. Bell v. Presbyterian Church, 126 F.3d 328 (4th Cir. 1997) (contract and covenant of good faith and fair dealing); Lewis v. Seventh-day Adventists Lake Region Conference, 978 F.2d 940, 942-43 (6th Cir. 1992)(contract and promissory estoppel); Minker, 894 F.2d at 1358-60 (D.C. Cir. 1990)(contract); and United Methodist Church, Baltimore Annual Conf. v. White, 571 A.2d 790 (D.C. 1990) (implied contract and implied covenant of good faith and fair dealing).

[30] The Doctrine of Church Autonomy bars ministers' statutory claims. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974) (§ 1981, 1983, 1985, and 1986 claims); Rayburn, 772 F.2d at 1167-71 (4th Cir. 1985) (gender and race discrimination); McClure, 460 F.2d 553 (5th Cir. 1972) (1972) (Title VII); Clapper v. Chesapeake Conf. of Seventh-day Adventists, 166 F.3d 1208 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 2021 (1999) (unpublished) (age and race discrimination); Starkman v. Evans, 18 F.Supp.2d 630 (E.D. La. 1998) (disability discrimination); Himaka v. Buddhist Churches of Am., 917 F.Supp. 698 (N.D.Cal. 1995), (retaliation); and Bryce, 289 F.3d 648 (10th Cir. 2002) (discrimination, retaliation, and § 1985 and 1986 claims).

[31] The Doctrine of Church Autonomy bars ministers' tort claims. Hutchison v. Thomas, 789 F.2d 392, 395-96 (6th Cir.1986), *cert. denied*, 479 U.S. 885, 107 S.Ct. 277 (1986) (intentional infliction of emotional distress); Korean Presbyterian Church v. Lee, 880 P.2d 565 (Wash.App. 1994) (outrage); Bell, *supra* (intentional infliction of emotional distress, interference with contract and prospective advantage, and wrongful termination); Natal, *supra* (wrongful discharge and injury to reputation); Dowd, 861 F.2d 761 (1st Cir. 1988) (defamation); and United Kosher Butchers Ass'n v. Associated Synagogues of Greater Boston, Inc., 349 Mass. 595, 211 N.E.2d 332 (1965) (defamation of kosher butcher's livelihood by synagogue association's alleged wrongful denial of kosher certification and subsequent publication to butcher's customers).

that this Court should impose a duty upon the Catholic Diocese of Jackson to inform parishioners if its priests are not men "of good moral character, fit to be a priest . . ." R. 21 (Complaint at ¶ 72). Without proffering any evidence indicating that Bishop Brunini and/or the Diocese had any prior knowledge that Broussard was unfit to perform his priestly duties, the Plaintiffs ask this Court to impose, as a matter of civil law, an affirmative duty upon churches to announce the moral failings of their ministers.

First Amendment Church Autonomy law is clear. Government may not regulate church communications. Many precedents, in Mississippi and elsewhere, establish that government courts have no power to determine how or when a church speaks or chooses to remain silent on a great variety of ecclesiastical subjects including anything touching upon the church-minister relationship. The precedents articulating the scope of the Watson doctrine include many which remove church communications from judicial oversight. *See e.g.*, EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 284 (5th Cir. 1981) (EEOC cannot force seminary to produce statistical report regarding its faculty or administrators); United States v. Ballard, 322 U.S. 78 (1944) (jury may not evaluate truth of preacher's statements in criminal mail fraud case); Tran v. Fiorenza, 934 S.W.2d 740 (Tex. App. --Hous. [1st Dist.] 1996), reh'g overruled) (First Amendment bars consideration of priest's defamation claims against his bishop); and Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996) (First Amendment bars fraudulent preaching claim).

Likewise, the Mississippi Court of Appeals invoked the "ecclesiastical abstention doctrine" to decline jurisdiction over a pastor's defamation claim arising from the church's decision to publish the allegation that the pastor had raped a parishioner. Mallette, 789 So.2d 120 (Miss. 2001).[32] Just eighteen months ago, the Massachusetts Supreme Judicial Court held that civil courts lack subject matter jurisdiction to determine what the Episcopal Bishop of Massachusetts may or may not say regarding a priest accused of sexual misconduct. Hiles v. Episcopal Diocese of Massachusetts, 437 Mass. 505, 773 N.E.2d 929 (2002). In Hiles, the court rejected an Episcopal priest's claim that his bishop defamed him by publishing statements about his sexual history, reasoning:

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[32] See text discussing Mallette, *infra*, at 33.

> The assessment of an individual's fitness to serve as a priest is a particular ecclesiastical matter entitled to this constitutional protection [because t]he relationship is considered 'intrinsically religious.' . . . Once a court is called on to probe into a religious organization's discipline of its clergy, the First Amendment is implicated. When that occurs, principles of church autonomy deprive the court of subject matter jurisdiction.

Id. at 510-11 (internal citations omitted). The Fifth Circuit, also recognizing the constitutional protection given to church communications, rejected a variety of claims brought by a lay pastor who was terminated after a sermon upset his congregation.

> No matter how one may look at this dispute, it had to do with the substance and content of the very words uttered within the church itself, going right to the heart of the doctrine and beliefs and type of sermons that are delivered in churches. Now, the church is a sanctuary, if one exists anywhere, immune from the rule or subjection to the authority of the civil courts, either state or federal, by virtue of the First Amendment.

Simpson v. Wells Lamont Corp., 494 F.2d 490, 492-93 (5th Cir. 1974).

In Conic v. Cobbins, 44 So.2d 52 (Miss., 1950), the Mississippi Supreme Court refused to adjudicate, on First Amendment grounds, a dispute arising from the Church of Christ's discipline of one of its ministers. The Court recognized that the church communications required to undertake a church disciplinary process would impact the minister's reputation. It then observed: "[m]ost assuredly, the courts will not take jurisdiction of any and all acts of a church that may affect the reputation of its pastor or some of its members." Id. at 57. Plaintiffs are asking this Court to impose an affirmative duty upon the Diocese of Jackson and its bishop to destroy the reputation and ministry of any priest accused of wrongdoing. Conic does not permit this.

Under the Doctrine of Church Autonomy, it is unquestioned that church communications reside outside the scope of civil court review. The Doctrine precludes government jurisdiction over claims relating to church pronouncements regarding a minister's alleged sexual misconduct, Hiles, *supra*, and Conic, *supra*; congregational dialogues, Bryce, 289 F.3d 648 (10th Cir. 2002) (Doctrine of Church Autonomy bars claims arising from parish dialogue regarding youth minister's sexual orientation); defamatory statements about parishioners, O'Connor v. Diocese of Honolulu, 889 P.2d 261 (Hawaii 1994);

and defamatory statements made before an ecclesiastical marriage tribunal, Cimijotti v. Paulsen, 230 F. Supp. 39, 41 (N.D. Iowa 1964).[33]

D. Negligent Ecclesiastical Administration. The crux of all of plaintiffs' claims is that the Diocese and its bishop were negligent in the manner in which they assigned, hired, supervised, and retained Broussard. R. 12-25 (Complaint ¶¶ 38-41, 43-46, 50-53, 56-57, 59-67, 69-74, 77-79, 82-91). Each of plaintiffs' seven claims are variations on this central theme. It is difficult to imagine claims more intrusive to the autonomy of a religious institution. These claims particularly violate the First Amendment Doctrine of Church Autonomy because they simultaneously involve a church-minister relationship, the professional standard of care for a Catholic bishop exercising his ministry of governance, and the decisions of the ecclesiastical authority within a hierarchical church regarding an individual serving in ordained ministry.

The Catholic Church is hierarchical, and the bishop is the highest ecclesiastical official within the Diocese of Jackson. Bishop Houck testified:

> The church is hierarchical. The legislative, executive, and judicial powers of the Diocese of Jackson are entrusted to the Bishop of the Diocese. *See* Canon 391 § 1. Accordingly, a bishop's decisions with regard to Diocesan priests–including, but not limited to, their calling, formation, assignment, and discipline–are decisions by the highest Diocesan legislator, judicatory, and executive. R. 194 (Bishop Houck Affidavit at ¶ 13).

Bishop Houck also testifies that he, as bishop, is a particular type of clergyman whose divine calling is not only to be a "Pastor . . . in the Church, [a] teacher . . . of doctrine, [a] priest . . . of sacred worship [but also a] *minister . . . of governance.*" R. 193 (Id. ¶ 10). It is in his "ministry of governance"

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[33] The Doctrine of Church Autonomy also protects, from civil adjudication or government inquiry, matters related to non-defamatory church tribunal documents, Ryan v. Ryan, 419 Mass. 86, 642 N.E.2d 1028 (1994) (children of decedent in will contest may not discover tribunal records) and church membership files, Turner v. The Church of Jesus Christ Latter-day Saints, 18 S.W.3d 877, 896 (Tex. App. — Dallas 2000, no writ) ("First Amendment bars government regulation of the information a church chooses to record concerning its members"). The Doctrine of Church Autonomy even protects the church communications of criminals convicted of crime. Griffin v. Coughlin, 743 F. Supp. 1006 (N.D.N.Y. 1990) (prisoners have constitutional right to "truly private meeting with pastoral counselor"); Mokaitis v. Harcleroad, 104 F.3d 1522 (9th Cir. 1997) (court suppresses district attorney's surreptitious recording of jailhouse confession to priest); and People v. Phillips (N.Y. Ct. of Gen'l Sessions 1813) (reprinted in the RJ&L Religious Liberty Archive at www.churchstatelaw.com) (even in the absence of a statutory priest-penitent privilege, the First Amendment precludes a court from compelling a priest to divulge penitential confidences in a criminal case).

that a bishop, informed by the teaching of the Church and the moving of the Holy Spirit, assesses who is ordained and who is not, and determines the assignments, supervision, discipline, and even removal of such individuals. R. 193 (Id. ¶ 12). It is, to use secular language, a bishop's professional work–the work of calling to a vocation of ministry. Finding such work "negligent" is finding that the bishop is liable for professional malpractice or, more precisely, for episcopal malpractice–a subset of the clergy malpractice claim which no American court has ever recognized. *See* text, *supra, at* 18 - 20 and Schmidt v. Bishop, 779 F.Supp 321 (S.D.N.Y. 1991) (the same First Amendment analysis requires rejection both of a clergy malpractice claim arising from a pastor's sexual misconduct and of the claim that the denomination negligently supervised him).

The only evidence before the court is that the decisions of the bishops of the Diocese of Jackson regarding priests of that diocese were informed by the deposit of faith:

> In my capacity as Auxiliary Bishop, I worked extremely closely with Bishop Brunini. I personally witnessed Bishop Brunini govern the diocese, striving to imitate Christ, the Good Shepherd, in all he did. Bishop Brunini's decisions as Bishop were informed and circumscribed by the promptings of the Holy Spirit, and the requirements of Sacred Scripture, Tradition, Magisterial Teaching, and The Code of Canon Law. Following Christ's example, he would take time apart to pray, asking to be filled with God's wisdom. His decisions regarding governance of the Diocese were likewise made prayerfully and in the full context of his office as Roman Catholic Bishop of the Diocese of Jackson. As bishop, I always sought to do likewise. Accordingly, his decisions and my own regarding ordination, appointment, assignment, discipline, and laicization of priests of the Diocese were informed and circumscribed by the promptings of the Holy Spirit, and the requirements of Sacred Scripture, Tradition, Magisterial Teaching, and The Code of Canon Law. R. 194 (Id. ¶ 14).

The secular law of negligent hiring or supervision encourages a court or jury to find that relevant prior failings disqualify servants from future assignments. But in Catholic teachings, such assessments are much more complicated and guided by theological and doctrinal principles:

> One of the difficulties in ascertaining whether a man has been called as a priest is that, for the Church, a prior failing, while a cause for inquiry and concern, is not necessarily a disqualification for ministry. The Church believes that genuine conversion can occur. Thus, depending upon the circumstances, a prior failing may have taught a spiritual lesson which the individual can share with others in his ministry, as for example in the lives of Moses and King David. *See, e.g,* Exodus 2:11-15 (Moses' murder of the Egyptian, hiding the body, and fleeing as a fugitive), II Samuel 11:2-12:15 (David's adultery with Bathsheba and coverup by killing her husband) . . . . Church history is replete with examples of saints who sinned greatly

> and learned from such experiences through the grace of redemption so that they could better teach others how to avoid sin and live Godly lives. The examples of St. Peter, St. Paul, St. Augustine, and others come to mind. *See, e.g*, John 18:10-11 (Peter's assault of Malchus), Matthew 26:69-75 (Peter's perjury and denial of Jesus); Acts 7:58-8:1 (Paul's assistance in the stoning of Stephen), Acts 8:3 (Paul's persecution and imprisonment of Christians), The Confessions of St. Augustine, bk 6, ch. 15 (c. 397) (St. Augustine's fornication).R. 196 (Id. at ¶ 24).

See also L.L.N. v. Clauder, 209 Wis.2d 674; 563 N.W.2d 434 (Wisc. 1997), where the Wisconsin Supreme Court held that the First Amendment bars a civil court from evaluating a claim that a Catholic hospital negligently supervised a hospital chaplain, reasoning:

> The reconciliation and counseling of the errant clergy person involves more than a civil employer's file reprimand or three day suspension without pay for misconduct. Mercy and forgiveness of sin may be concepts familiar to bankers but they have no place in the discipline of bank tellers. For clergy, they are interwoven in the institution's norms and practices.

Plaintiffs' various claims are, in their essence, claims of negligent ecclesiastical administration. It is abundantly evident that a civil court cannot adjudicate these claims without repeatedly becoming entangled with matters of ecclesiastical cognizance including: whether the relationship between a bishop and a priest is properly understood as that of "pastor, spiritual adviser, pastoral counselor, spiritual mentor, ecclesiastical authority, father, and brother," as Bishop Houck testifies, or as that of an employer, as plaintiffs allege,[34] whether a bishop is properly understood as the "supervisor" of the priests attached to him, R. 195 (Houck affidavit at ¶ 19); whether a Catholic bishop may take into account the perpetual character of a priest's ordination when making assignment decisions, R. 196 (Id. at ¶ 21); whether a bishop may undertake theological and spiritual considerations when determining when to remove or discipline a priest; R. 196 (id. at ¶ 21); whether a bishop may give weight to the canonical presumption that Catholic priests must have assignments; R. 196 (id. at ¶ 21); and whether a bishop may govern his diocese within the canonical limitations on his prerogatives as regards the discipline of a priest. R. 19 (Id. at ¶ 23). Thus, it was inevitable that the Circuit Court heard argument about the relationship of a bishop and his priests at the hearing on the motion to dismiss. Tr. at 46-47. In fact, at the hearing, counsel for Plaintiffs admitted

[34] Compare R. 194-195 (Id. at ¶¶ 17-18 and 20) with R. 13 and 20 (Complaint at ¶¶ 46 and 71).

that **"inquiry into Canon law and into the policies of the church is certainly critical** and it certainly provides us with very important evidence in this matter." Tr. at 54 (emphasis added).

It is precisely because civil adjudication of a claim that a bishop negligently ordained, assigned, supervised, or retained a priest is so intrusive into a bishop's "ministry of governance," into the church's relationship with its clergy, and into both the duties and the rights of its clergy, that so many courts hold that the Doctrine of Church Autonomy precludes civil court adjudication of such claims. *See* the cases collected at n. 11, *supra*.

For example, just last year the United States District Court in New York dismissed claims against the Lutheran Church-Missouri Synod contending that the denomination so negligently supervised and retained a pastor that he was able to commit "a series of sexual assaults" upon a minor child in a New York congregation. Ehrens v. The Lutheran Church-Missouri Synod, 269 F.Supp.2d 328 (S.D.N.Y. 2003). Invoking Watson v. Jones and its progeny, the court reasoned:

> "[A]ny inquiry into the policies and practices of the Church Defendants in hiring or supervising their clergy raises the same kind of First Amendment problems of entanglement [as claims of clergy malpractice] which might involve the Court in making sensitive judgments about the propriety of the Church Defendants' supervision in light of their religious beliefs. Insofar as concerns retention or supervision, the pastor of a Presbyterian Church is not analogous to a common law employee. He may not demit his charge nor be removed by the session, without the consent of the presbytery, functioning essentially as an ecclesiastical court. The traditional denominations each have their own intricate principles of governance, as to which the state has no rights of visitation. Church governance is founded in scripture, modified by reformers over almost two millenia."
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> . . .
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> Any effort of this Court to instruct the trial jury as to the duty of care by which a denomination keeps its "roster" of those priests (and others) authorized to accept canonical employment by a parish church would of necessity require the court and jury to consider the fundamental perspective and approach to ordination and supervision of clergy and constituent churches inherent in the beliefs and practices of the particular denomination. The selection and deployment of clergy is about as central to the life and purpose of a group of affiliated churches as anything we can imagine. The mainstream denominations differ greatly in their rules and policies for "calling" and removing clergy. For a court to intervene to set standards of care for the performance of this work, which is founded in scripture and in history, implicating apostolic succession in some denominations, is as unconstitutional as it is impossible. When such intervention is directed to retention, the problem becomes worse . . .

269 F.Supp. 2d at 332-33 (*quoting* Schmidt, 779 F.Supp. 321, 332 (S.D.N.Y. 1991) (emphasis added).

In S.H.C. v. Lu, 54 P.2d 174 (Wash. App. 2002), the Washington Court of Appeals affirmed the trial court's dismissal of negligent supervision and retention claims against a Buddhist temple where its founder, Grandmaster Sheng-Yen Lu, who was regarded "as a Living Buddha," was accused of enticing an adherent to participate in the "Twin Body Blessing" (a ritualized form of sexual intercourse) to "save her life and cure her illness." The court considered the testimony from leaders of the Ling Shen Ching Tze Temple regarding their beliefs and polity and determined:

> If a civil court were to review the conduct of the Temple to determine whether it should have exercised more or better supervision of Grandmaster Lu, that court would necessarily entangle itself in the religious precepts and beliefs set forth above. The truth of the above beliefs is not open to question by civil courts. Should the Temple have been other than "obedient" to Grandmaster Lu under the circumstances of this case? Should the Temple have seen faults in or "criticized' him? Should the Temple have slandered him by calling into question the activities of which it had knowledge? We can see no way that a civil court could avoid interpreting the above religious doctrine in determining whether the Temple was liable for negligent supervision and retention.

Id. at 179.

The Wisconsin Supreme Court similarly affirmed a trial court's dismissal of a claim that a Catholic archdiocese negligently hired, trained, supervised, and retained a priest who, during his priesthood, had sexual relations with a high school student which continued for years. It reasoned, that the First Amendment "prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices." Pritzlaff, 533 N.W.2d at 790 (Wis. 1995).

Two years later in Gibson v. Brewer, 952 S.W.2d 239, 246-47 (Mo. 1997) the Missouri Supreme Court, also invoking Watson, held that civil courts must dismiss claims that a church negligently hired, ordained, or retained a clergyman.

> Questions of hiring, ordaining, and retaining clergy, however, necessarily involve interpretation of religious doctrine, policy, and administration. Such excessive entanglement between church and state has the effect of inhibiting religion, in violation of the First Amendment.... By the same token, judicial 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.

See also Byrd v. Faber, 565 N.E.2d 584, 590 (Ohio 1991) (determining whether a church exercised due care in hiring a minister requires examination of the church's "employment policies and practices" which "[i]n all probability will be infused with the religious tenets of the particular sect involved"); and Ayon v. Gourley, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998) ("[A] negligent hiring claim would violate both the Free Exercise and Establishment Clauses. Like the majority of the cases cited, this Court finds that consideration of the hiring policies of the Archdiocese defendants would inevitably require examination of church policy and doctrine."). Accordingly, the Doctrine of Church Autonomy requires reversal of the Circuit Court's oral ruling and an order directing it to dismiss plaintiffs' claims of negligent assignment, hiring, supervision, and retention.[35]

E. Damages for Spiritual Injuries. Plaintiffs' interrogatory responses disclose that they seek damages for "spiritual injuries."[36] Mrs. Morrison states, "My faith in the catholic church is now completely destroyed." R. 291. Francis relates that his injury is that he cannot attend adult religious education classes. R. 283. Thomas explains his injury arises out of his claim that "I have lost all respect and belief in anything having to do with [the] Holy Roman Catholic Church. . . . Walking into any church triggers great sadness and pain for me. I have a great distrust in any organized religion." R. 286. Kenneth describes his injury as: "My faith was utterly destroyed by the church itself." R. 279. In addition, when further asked to describe all manifestations of "emotional trauma, anguish, loss of respect for authority, loss of earnings and earning capacity" as mentioned in the complaint, both Thomas and Kenneth

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[35] Plaintiffs' claims of intentional infliction of emotional distress, negligent infliction of emotional distress, and loss of consortium contain no new factual allegations and derive entirely from their other allegations. Accordingly, they, too, fall outside the subject matter jurisdiction of the civil courts. *See* Gibson, 952 S.W.2d at 248-49 (First Amendment bars negligent infliction of emotional distress claim arising from church's relationship with and supervision of its minister); and Ayon, 47 F. Supp. 2d at 1250 (First Amendment bars consideration of outrageous conduct claim arising from church-minister relationship).

[36] *See* R. 280 (Interrogatory Response No. 20 (referring to Response No. 19, in which such injuries are described)). The Circuit Court also heard argument during the hearing on the motion to dismiss on the difficulty of adjudicating claims for "spiritual injuries." Tr. at 25-28, 51-53.

reference their "spiritual injuries."[37] These responses underscore how this case is suffused with matters of faith and religion and, therefore, is improper for civil court adjudication. The undersigned's comprehensive search of all state and federal cases disclosed not one case in which damages for "spiritual" or "religious" injuries were awarded. In the only case which even addressed the issue, the United States District Court for the District of Columbia remarked that the plaintiffs' complaint of "spiritual injury" was not a "legally cognizable harm." Fordyce v. Frohnmayer, 763 F.Supp. 654, 657 n.4 (D.D.C. 1991).

IV. Mississippi And Fifth Circuit Courts Have Repeatedly Endorsed Watson, its Progeny, and its Principles.

For over a century, Mississippi courts have acknowledged that the separation of church and state requires that certain religious subject matters fall outside the jurisdiction of a civil court. *See, e.g.,* Dees v. Moss Point Baptist Church, 17 So. 1 (Miss. 1895) (because a Baptist church's "determination of questions of doctrine and discipline is exclusive and final;" a civil court must dismiss for lack of subject matter jurisdiction, a church member's claim for wrongful excommunication even when the church's actions are a "petty, unfair, and unjust exhibition of religious tyranny"). Mississippi courts decline jurisdiction over disputes touching upon ecclesiastical subject matters, including church-related questions of discipline, faith, rule, custom, or law," Mallette, 789 So. 2d 124 (Miss. App. 2001); and also including matters of "ecclesiastical law, rule, and custom." Conic, 44 So. 2d at 57 (Miss. 1950). Accordingly, in Grantham v. Humphries, 188 So.2d 313, 323 (Miss. 1939), the Mississippi Supreme Court dismissed a case which required it to choose between two warring factions of a Baptist Church by reasoning:

> The question involved is ecclesiastical and not one for the civil courts. The church authorities and such tribunals as they may set up for themselves are supreme in such matters. Their decision is final as to who shall be the pastor and other officers. Such disputes are ecclesiastical in nature and the courts have no control over them.

Likewise, in Edwards v. De Vance, 103 So. 194, 195 (Miss. 1925), the Mississippi Supreme Court held that civil courts have no jurisdiction over "a controversy as to who are the deacons of a church" by recognizing:

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[37] R. 280-281, 286 (Interrogatory Response No. 21 (for Thomas and Kenneth) (referencing Response No. 19)).

> The office of deacon is purely ecclesiastical, and the incumbent thereof is subject at all times to the control of the church; the only persons entitled thereto being those the church recognizes as such. Over the office and elections to it the courts have no control, and it is here wholly immaterial whether the election of any of the parties hereto was illegal; that being for the determination of the church, and those of the parties hereto who are recognized by the church as such have the right to discharge the duties of deacon thereof.

Because of such decisions, the Mississippi Supreme Court wrote in 1972 that "[l]ong before the Federal Government began to draw the rights of states into its centralized jurisdiction by the 'process of absorption,' this Court had a rich heritage in the protection of religious freedom. [Mississippi] courts refuse to interpret ecclesiastical dogma and . . . [they] accept the highest ecclesiastical authority in each church as being the faith and practice of that church." Sustar v. Williams, 263 So.2d 537, 540 (Miss. 1972). *See also* Blue v. Jones, 230 So.2d 569, 570 (Miss. 1970) (citing a "long line of decisions" from Mississippi courts holding that they "will not interfere to determine questions involving the government of a congregational type of church").

The Mississippi Court of Appeals recently reaffirmed Mississippi's long history of respecting the boundaries between church and state when it declined a plaintiff's invitation to find jurisdiction over a defamation claim arising out of a religious context. In Mallette v. Church of God Int'l, 789 So.2d 120 (Miss. App. 2001), Reverend Milburn Mallette sued the Church of God International for defamation after a letter was read aloud during a Church disciplinary meeting, leading to the revocation of his ministerial license. The letter was written by a parishioner confessing that she and Rev. Mallette had engaged in an extramarital sexual relationship and accused Rev. Mallette of rape. Id. at 122. The Mississippi Court of Appeals rejected Rev. Mallette's request to distinguish between intentional and other types of torts, explaining:

> A civil court is forbidden, under the First and Fourteenth Amendments to the United States Constitution, from becoming involved in ecclesiastical disputes. In Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976), the United States Supreme Court held that in accordance with the doctrine of ecclesiastical abstention, "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." This abstention doctrine includes church-related questions of discipline, faith, rule, custom, or law. Milivojevich, 426 U.S. at 710.

789 So.2d at 123-24 (emphasis added). The Mallette court concluded: "The disciplining of a minister is church-related and the doctrine of ecclesiastical abstention requires us to abstain from questioning the manner of Mallette's discipline." Id. at 124. Likewise, whether the Diocese of Jackson and Bishop Brunini should have done something different to discover Broussard's deviancies or whether they should have dealt with him differently after Dr. Morrison allegedly reported them in 1973 directly involve the Diocese's discipline, faith, rules, customs, and canon law. As such, they are improper subject matters for a civil court and, under the Doctrine of Church Autonomy (or the "ecclesiastical abstention doctrine," as the Mallette court calls it), this Court should reverse the perfunctory denial by the Circuit Court and instruct it to dismiss for lack of subject matter jurisdiction.

Exactly one hundred years before Mallette, this Court began its decision in Mt. Helm Baptist Church v. Jones, 30 So. 714 (Miss. 1901) with these words: "This court exercises no ecclesiastical jurisdiction. It accepts what the highest ecclesiastical authority in each church promulgates as the faith and practice of that church." Id. at 716. Bishop Houck's affidavit explains (1) that at the time of the alleged abuse Bishop Brunini was the highest ecclesiastical authority for the Diocese of Jackson,[38] and (2) that the "faith and practice" of Bishop Brunini regarding governance and discipline of priests, like Broussard, was central to Bishop Brunini's ministry and was "informed and circumscribed by the promptings of the Holy Spirit, and the requirements of Sacred Scripture, Tradition, Magisterial Teaching, and The Code of Canon Law." R. 194 (Bishop Houck Affidavit ¶ 14). To permit plaintiffs' request for a court or jury to second-guess Bishop Brunini's decisions about how he governed the Diocese thirty years ago is to ignore Mississippi's century-old jurisprudence regarding the right relationship between church and state.[39] *See*

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[38] R. 194 (Bishop Houck Affidavit ¶¶ 13 and 14). Plaintiffs agree with this proposition. *See* R. 7 (Complaint ¶ 7).

[39] *Cf.* Sustar, 263 So.2d at 546 (J. Robertson, specially concurring) (explaining that two sections of a Mississippi statute held unconstitutional by the Court "would allow the chancery courts of Mississippi on the vote of a two-thirds majority of the local congregation to take over the administration and government of a local church. **This law would violate that fundamental principle that we have held inviolate since the founding of this country, the principle of the separation of church and state.**") (Emphasis added.).

also Grantham v. Humphries, 188 So.2d 313, 313 (Miss. 1939) (the decision of "church authorities . . . is final as to who shall be the pastor and other officers . . . and the courts have no control over them.").

The United States Court of Appeals for the Fifth Circuit has also repeatedly declined jurisdiction over disputes touching upon ecclesiastical subject matters. Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999) (First Amendment bars minister's claims of disability discrimination); Combs v. Central Texas Annul Conf. of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999) (First Amendment bars minister's claims of Title VII gender discrimination); Nayak v. MCA, Inc., 911 F.2d 1082 (5th Cir. 1990) (First Amendment prevents court from adjudicating whether movie constituted a defamatory interpretation of the life of Jesus Christ); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 284 (5th Cir. 1981) (First Amendment bars EEOC and civil court from requiring Baptist seminary to provide demographic information regarding its faculty and administrative staff); Church of God in Christ, Inc. v. Cawthon, 507 F.2d 599 (5th Cir. 1975) (invoking Watson, court defers to national hierarchy of hierarchical church in church split case); McClure v. The Salvation Army, 460 F.2d 553 (5th Cir. 1972) (First Amendment bars minister's claims of Title VII gender discrimination); and Northside Bible Church v. Goodson, 387 F.2d 534, 537 (5th Cir. 1967) (First Amendment precludes state legislature from modifying church's polity. "Judicial tribunals, as arms of the government, must avoid interference with established church policies and government.").

In Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974), for example, the Fifth Circuit held that civil courts have no jurisdiction over "who will preach from the pulpit of a church, and who will occupy the church parsonage." Id. at 492. "The answer[s] to [those] question[s] must come from the church." Id. The Fifth Circuit recognized the "long history of separation of ecclesiastical courts and civil courts prior to and since the founding of this country" and that "[t]he people of the United States conveyed no power to Congress to vest its courts with jurisdiction to settle purely ecclesiastical disputes." Id. As a result, the court held that "the District Court was correct in dismissing the church defendants for lack of subject matter jurisdiction" on the ground that "civil courts are not an appropriate forum for review of internal ecclesiastical decisions." Id. at 494.

V. Because the Defendants Have Factually Challenged Subject Matter Jurisdiction, Plaintiffs Have the Burden of Establishing Such Jurisdiction by a Preponderance of the Evidence.

Subject matter jurisdiction is a threshold issue which the trial "court must determine . . . first, before determining the merits of the case." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998); 2 Moores Federal Practice, § 12.30[1] (Matthew Bender, 3d ed. 2001). Subject matter jurisdiction must always be proper and can never be waived.[40]

> Challenges to subject matter jurisdiction through a Rule 12(b)(1) motion to dismiss come in two different forms – facial and factual attacks. A facial attack questions the sufficiency of the pleading. . . . when a court reviews a complaint under a factual attack, the allegations have no presumptive truthfulness, and the court that must weigh the evidence has discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts. . . .
>
> When the attack is factual . . . "the trial court may proceed as it never could under [Rule] 12(b)(6) or [Rule] 56." Because a factual Rule 12(b)(1) motion involves the court's "very power to hear the case," the court may weigh the evidence to confirm its jurisdiction. "No presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts does not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Unlike a motion to dismiss under Rule 12(b)(6) however, considering matters outside the pleadings does not convert the Rule 12(b)(1) motion to one for summary judgment.

2 Moore's Federal Practice, § 12.30[4] (Matthew Bender, 3d ed. 2001). *See also* Ronsonet v. Carroll, 113 F.Supp.2d 1009, 1017 (S.D. Miss. 2000) ("matters outside the pleading do not convert a motion to dismiss for lack of subject matter jurisdiction into a motion for summary judgment.").

When defendants support a motion to dismiss for lack of subject matter jurisdiction by affidavits and other evidence, as they did in this case, plaintiffs have the burden of establishing by a preponderance of the evidence that jurisdiction exists. Kizer v. Fin. Am. Credit Corp., 454 F.Supp. 937, 938 (N.D. Miss. 1978); Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co., 469 F.2d 416, 418 (5th Cir. 1972); and 5A Wright & Miller, Federal Practice & Procedure, § 1350 (1990).

Defendants have factually challenged the Court's subject matter jurisdiction by providing affidavits showing that the adjudication of this case will entangle the court in matters of faith, doctrine, canon law, polity, and ecclesiastical relationships. Because the Plaintiffs have provided no contrary

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[40] *See* Miss. R. Civ. Proc. 12(h)(3). "[L]ack of subject matter jurisdiction challenges [to] the court's statutory or constitutional power to adjudicate the case . . . may not be waived." 2 Moore's Federal Practice, § 12.30[1] (Matthew Bender, 3d ed., 2001).

evidence, much less a preponderance of such evidence, the Court can only conclude that the assertion of jurisdiction will entangle the Court in subject matters reserved to the church.

PART TWO: DISCOVERY OF CERTAIN DOCUMENTS IS PRECLUDED BY THE FIRST AMENDMENT DOCTRINE OF CHURCH AUTONOMY, BY CANON LAW AND BY SPECIFIED PRIVILEGES.

The Circuit Court erred in ordering the production of certain documents and information protected from discovery by the Doctrine of Church Autonomy, by canon law, and by various privileges. If the Court finds that it may constitutionally adjudicate Plaintiffs' claims and remands this case, then Appellants respectfully request the Circuit Court be directed to make a document by document factual finding with respect to the privileges asserted, or in the alternative that this Court appoint a special master to make such findings. As this Court stated in Hewes v. Langston, 853 So.2d 1237, 1250 (Miss. 2003):

> We reiterate that when objections to discovery of specific documents are made, the trial court should deal with each on an item-by-item basis, carefully considering each objection, deciding whether to allow discovery, and stating the rule or exception which provides the basis for the decision.

The Circuit Court did not follow this Court's directive in Hewes, and on that basis alone, the discovery order should be reversed with directions that the Circuit Court, or a special master, make a document by document findings with respect to the privileges asserted by Appellants.

I. The First Amendment Doctrine of Church Autonomy Precludes Discovery of Certain Ecclesiastical Communications. As explained in Part One of the Argument, the First Amendment Doctrine of Church Autonomy deprives the court of subject matter jurisdiction over the Plaintiffs' claims. Woven throughout the body of Church Autonomy law is a repeated recognition that government has no subject matter jurisdiction over church communications, regardless of the nature or form of those communications. In recognition of that, the United States Supreme Court has repeatedly stated that even the process of government inquiry into matters of ecclesiastical cognizance is not to be permitted:

> [I]t is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court.

Watson, 80 U.S. (13 Wall.) at 733. *See also* Serbian, 426 U.S. at 718 (a court's "detailed review" of a cleric's ecclesiastical disciplinary proceeding is "impermissible under the First and Fourteenth Amendments").

The United States Supreme Court has recognized that the very process of discovery can violate a church's institutional autonomy. "It is not only the conclusions which may be reached by the [National Labor Relations] Board which may impinge on rights guaranteed by the Religion Clauses, *but also the very process of inquiry leading to findings and conclusions.*" National Labor Relations Bd. v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979) (emphasis added).

The Fourth Circuit, rejecting a minister's suit against a denomination, reasoned that:

> It is not only the conclusions that may be reached by the Board which may infringe on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." . . . There is the danger that churches, wary of EEOC or judicial review of their decisions, might make [church-minister employment decisions] with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members.

Rayburn v. General Conference of Seventh-day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985). The First Amendment "prohibits civil courts from inquiring into any phase of ecclesiastical decision making--its merits as well as procedure." Williams v. Gleason, 26 S.W.3d 54, 59 (Tex.App.--Fort Worth 1993, no writ) (*quoting* Hadnot v. Shaw, 826 P.2d 978, 987-88 (Okla. 1992)).

As explained in Part One of the Argument, the First Amendment's protection of church communications is broad. It precludes government jurisdiction over claims *and related discovery* that relates to preaching, Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974), congregational dialogues, Bryce, 289 F.3d 648 (10th Cir. 2002), defamatory or disciplinary statements about a priest, Hiles, 773 N.E.2d 929 (Mass. 2002), defamatory statements about parishioners, O'Connor, 889 P.2d 261 (Hawaii 1994), and defamatory statements made before an ecclesiastical tribunal. Cimijotti v. Paulsen, 230 F.Supp. 39, 41 (N.D. Iowa, 1964). It also protects, from civil adjudication or government inquiry, matters related to non-defamatory church tribunal documents, Ryan v. Ryan, 642 N.E. 2d 1028 (1994) (in will contest, children of decedent may not discover tribunal records), and membership files. Turner, 18

S.W. 3d at 896 (Tex. App.--Dallas 2000, no writ) ("the First Amendment bars government regulation of the information a religious organization chooses to record concerning its members"). It protects from government inquiry confidential pastoral counseling and advice, penitential communications, and confidential clergy-communicant communications. Mullen v. United States, 263 F.2d 275, 280 (D.C. Cir.1958). It even protects the church communications of people in prison. *See* Griffin v. Coughlin, 743 F.Supp. 1006 (N.D.N.Y. 1990) (prisoners have constitutional right to "truly private meeting with pastoral counselor"); and Mokaitis v. Harcleroad, 104 F.3d 1522 (9th Cir. 1997) (court suppressed district attorney's surreptitious recording of jailhouse confession to priest).

Given the judicial deference to church communications, it is not surprising that courts have repeatedly applied the First Amendment to protect written, church communications as well. Accordingly, the Tenth Circuit declined jurisdiction over claims arising from an Episcopal priest's distribution of allegedly scandalous and defamatory documents related to a youth minister's sexual orientation. Bryce, 289 F.3d 648 (10th Cir. 2002). The Arkansas Supreme Court refused church members' claims to compel a church to disclose its financial records. Gipson v. Brown, 295 Ark. 371, 749 S.W.2d 297 (1988). The Fifth Circuit refused the United States government's demand for a Baptist seminary in Dallas to produce EEO-1 reports regarding the demographics of seminary faculty and administration, reasoning that the principles established by Watson and McClure "would be violated by the EEOC's demand to reveal the details of the employment relationship between a church and its ministers." Southwestern Baptist Theological Seminary, 651 F.2d 277, 282 (5th Cir. 1981).

In this case, compliance with Plaintiffs' discovery requests and the Circuit Court's order compelling disclosure of documents and identities of non-party victims and non-party priests would not only violate the First Amendment prohibition of inquiry into church communications, it would specifically violate non-party's rights to privacy under canon law. Invasion of these canonically required confidences is precisely the type of intrusion into church communications that is not permitted by the First Amendment.

The Code of Canon Law is the universal law of the Roman Catholic Church. It binds all those for whom it was enacted, including the past and present Bishops and other Church officers. Canon 12 § 1. Pursuant to Canon Law, "**No one is permitted to** damage unlawfully the good reputation which another person enjoys nor to **violate the right of another person to protect his or her own privacy**." Canon 220. Compliance with the Circuit Court's order to identify non-party victims and non-party alleged offender priests, without their consent, would force the Diocese to violate those persons' rights to privacy and expose their reputations to great risk of ruinous damage. The following commentary is particularly instructive:

> The right to a good reputation is at risk as the Church confronts the issue of sexual misconduct by clerics. The media often accuse ecclesiastical authorities of proceeding too slowly when accusations of sexual abuse, particularly of minors, arise. Church authorities have a responsibility to move expeditiously yet must exercise great caution to protect both the accuser and the cleric involved. **At times, a cleric is judged guilty simply due to an accusation; his reputation is damaged and he may experience difficulties in exercising his ministry, even if the accusation is later withdrawn or proven false.**

New Commentary on the Code of Canon Law, p.278. Production of such files and documents in this matter would be in direct violation of Canon law, specifically Canon 220.

In addition, numerous victims or parents of victims have expressly requested that information or communications regarding their particular situation be kept confidential by the Diocese. Disclosing such painful personal information would violate the rights of privacy of these non-parties. While the Diocese is willing to disclose, pursuant to the terms of an agreed protective order and subject to the First Amendment challenges stated above, the identities of any victims or priests who consent to having their identities disclosed, the Diocese should not be required to disclose the identities of victims or priests who have not given their consent.

Under the First Amendment Doctrine of Church Autonomy, the Diocese should not be required to produce the documents requested or reveal the identities of the non-party victims, family members, or priests sought by Plaintiffs.

II. Privileged Documents Are Not Discoverable.

The files produced for *in camera* review contain hundreds of documents that are subject to privilege as reflected by the privilege log. A representative sample of the documents was attached for this Court's *in camera* review under seal as Exhibits 6 - 16 to the Diocese's Petition filed with this Court on April 8, 2003. All documents that were submitted to the Circuit Court for *in camera* review were likewise submitted separately, under seal. Unfortunately, the Circuit Court simply ordered all of the documents produced to the Plaintiffs without any finding of fact or statement with respect to the individual privileges raised to individual documents. *See* Hewes v. Langston, 853 So.2d 1237, 1250 (Miss. 2003) (court should provide basis for ordering document to which party claims privilege). Here, a review of a sampling of the documents reveals that the Circuit Court ordered the production of clearly protected documents and information, without providing a basis for its ruling.

A. The Priest-Penitent Privilege Articulated in Rnle 505 and M.C.A. § 13-1-22 Precludes Identification and Disclosure of Files of Non-Party Victims and of Non-Party Priests. Plaintiffs' discovery requests sought the names of all alleged victims and alleged priest offenders known to the Diocese, documents collected and maintained by the Diocese relating to reports of abuse, and the Diocese's investigation of those reports. The request was not limited to the Morrisons' reports or the Diocese's investigation of the Morrisons' claims. Rather, the requests sought the names of all persons who reported abuse by any priest for at least the past forty years, and sought all documents which reflected an investigation of any priest. Not only do these files contain the names of victims and information acquired from victims or their parents by the Diocese under the expectation of confidentiality and privacy, but the files also contain confidential information related by the accused priests.

Under Mississippi Rule Evidence 505, the priest-penitent privilege shields from discovery the contents of confidential communications made by a parishioner to his priest, as well as those communications passed on within the church's hierarchy. *See, e.g.,* Scott v. Hammock, 133 F.R.D. 610, 616, 619 (D.C. Utah 1990) (confidential, but non-confessional, communication for "religious counseling"

transmitted "vertically from one religious authority up to another within church hierarchy" falls within privilege). This privilege may not be waived by the Diocese, but belongs to the parishioner. These names are privileged in that the Diocese would not have learned of the alleged offenders but for the reporting by either the victim or his or her parents to the Diocese. As such, these names are shielded by the priest-penitent privilege absent waiver by either the victim, if the victim has reached adulthood, or his or her parents or guardians if the victim has not reached adulthood.

Likewise, the files containing records of confidential communications are privileged. In Corsie v. Campanalonga, 721 A.2d 733, 317 N.J. Super. 177 (1998), *rev'd in irrelevant part,* 734 A.2d 788, 160 N.J. 473 (1999), the plaintiffs were suing a priest and the archdiocese for sexual molestation. Plaintiffs were seeking the bishop's Confidential File concerning the priest. The bishop submitted an affidavit that the Vicar's files are of a confidential nature of the highest order because they relate to priests in distress seeking counsel and support in their ministry. The court held that the communications between a Vicar for Priests and a priest about the priest's alleged sexual assaults was undisputedly a situation where the Vicar was acting in his professional character, or as a spiritual advisor, and the communications were made by the priest in confidence. Accordingly, the privilege applied.

Under 505 and M.C.A. § 13-1-22, the priest-penitent privilege applies to any communication made with a priest or other functionary of a church or religious organization so long as the communication was made "privately and not intended for further disclosure except in furtherance of purpose of the communication." Rule 505(a)(2). The clergyman–in this case the Diocese–is required to claim the privilege on behalf of the person making the communication (i.e., alleged victims or alleged priest offenders) unless the privilege is affirmatively waived. Rule 505(c); M.C.A. § 13-1-22(3). Because the privilege belongs to the reporter, the Diocese cannot disclose the names, if any, requested by the Morrisons without violating the privilege. Absent an express waiver of one's right to confidential clergy communications under Rule 505 and M.C.A. § 13-1-22, the Diocese may not make such a disclosure, and is required by both Canon law and common law to keep the information confidential. In many cases the

records received were delivered to the Diocese by the penitents with the expressed understanding that they would not be re-produced or divulged to any third parties, even the victims themselves.

Exhibits 6 and 7 typify the documents that are protected by this privilege which the Circuit Court ordered disclosed. Exhibit 6 is a 5 page handwritten document from a parishioner to a priest detailing events in his life and seeking the guidance of the Church. Review of this document reveals that it was intended to be kept confidential, and is precisely the type communication that the privilege was designed to protect. Exhibit 7 reflects the communication from a mother to a priest about her son, with a specific request that her visit be held in confidence, even from her son.

B. Rule 503's Medical and Mental Health Privileges Precludes Discovery of Certain Documents. The Diocese referred and paid for the medical treatment of priests, and received reports from the treating doctors and therapists. The files produced for *in camera* review contain medical and psychological records that fall under this privilege because these documents were provided to the Diocese "to further the interest of the patient;" because the Diocese was "reasonably necessary for the transmission of the communication" as it was integrally related to the spiritual, medical and psychological ministry of the Diocese to its parishioners and priests; and/or because the Diocese was "participating in the diagnosis and treatment under the direction of the physician or psychotherapist" of such parishioners or priests when such documents were provided to the Diocese. Under 503(c), the privilege belongs to the patient, and only the patient can waive it. Scott v. Flynt, 704 So. 2d 998 (Miss. 1996). Similarly, under Miss. Code Ann. § 13-1-21(1) a physician may not disclose confidential communications in a legal proceeding unless requested to do so by the patient.

Exhibits 8 and 10 are illustrative. Exhibit 8 is a November 16, 1991 letter from Saint Luke Institute to a Diocesan official. It reflects that the Diocese sent one of its priests who is not a party to this litigation to the facility for evaluation and provides a detailed psychological evaluation. This document cannot be shared with third parties without the permission of that priest. Exhibit 9 is also a letter from Saint Luke Institute dated November 25, 1997 to the Diocese, reflecting a priest's ongoing therapy. And Exhibit 10 is a medical report provided the Diocese which is stamped as confidential under 42 CFR, Part 2.

Section 2.1 of this regulation prohibits disclosure of treatment records without written consent of the patient.

C. The Attorney-Client and Work Product Privileges Articulated in Rule 502 and M.R.C.P. 26(b)(3) Preclude Discovery of Certain Documents. Numerous documents in the files submitted for *in camera* review are protected from discovery by the attorney-client or work-product privileges. The attorney-client privilege relates to and covers all information regarding the client (in this case, the Diocese or the Bishop) received by the attorney in his professional capacity and in the course of his representation of the client. Included are communications made by the client to the attorney and by the attorney to the client. Hewes v. Langston, 853 So. 2d 123, 1244 (Miss. 2003); Barnes v. State, 460 So.2d 126, (Miss. 1984); M.R.E. 502.

Typical of the documents ordered produced is Exhibit 11, a memo from Jack Welsch, an attorney for the Diocese, to Steve Carmody, the Diocesan general counsel, dated June 13, 2003 which discusses his review of the Morrison Complaint. Here, the Circuit Court has ordered the Diocese to turn over its own attorney's discussion of the very lawsuit it is defending.

Similarly, Exhibit 12 memorializes a conversation between Chuck Adams, an attorney at Adams and Reese which serves as Diocesan litigation counsel, with Bishop Houck, Father Flannery, and the Diocese insurers, related to claims made against the Diocese.

The work-product privilege also protects those documents which were prepared in anticipation of litigation. Mississippi recognizes that such documents may be prepared before a complaint is actually filed. Given the nature of the allegations, files generated by the Diocese when or after the allegations were received are unquestionably prepared in anticipation of litigation. Absent a showing of substantial need, the plaintiffs are not entitled to discover such documents. Haynes v. Anderson, 597 So.2d 615 (Miss. 1992); M.R.C.P. 26(b)(3).

Exhibit 13 is a memo to the file of a priest dated November 11, 1991, from a priest stating "I am writing this memo for the files in preparation for any possible litigation," and then detailing his

conversation with a parishioner. Likewise, Exhibit 14 memorializes a conversation in which a priest discusses a parishioner's statement that she was going to file suit with a Diocese official.

D. The Self-Critical Analysis Privilege Precludes Discovery of Certain Documents. The Diocese also asserts a privilege with respect to information developed during its own investigations as reflected in the documents and files submitted for *in camera* review under the "self critical analysis" privilege. Although not yet adopted in Mississippi, Mississippi follows the general rule that it can adopt new privileges upon a showing that the privilege has become generally acceptable in American jurisprudence, or serves the ends of justice. Pursuant to the self critical analysis privilege, a party is permitted to conduct an investigation of its own procedures as well as claims made against it. The purpose of the privilege is to encourage frank internal review. See Kneeland v NCAA, 650 F. Supp. 1076, 1087 (W.D. Texas 1986). Under the privilege, information which is sought is protected if:

1. The information comes from the self critical analysis undertaken by the party;
2. The public has a strong interest in the free flow of this type of information; and
3. The information is of the type whose free flow would be curtailed if discovery were allowed. See also Dowling v American Hawaii Cruises, Inc., 971 F.2d 423, 425-26 (9th Cir. 1992) (following Kneeland but also requiring that the information was prepared with the expectation that it be kept confidential).

Courts adopting the self-critical analysis privilege point out that the public has a strong policy in favor of a party reviewing its actions and determining what efforts if any can be made to decrease the potential for harm in the future. Analogizing the self-critical analysis privilege to Rule of Evidence 407, excluding evidence of subsequent remedial measures, these courts reason that by punishing the party for attempting to make its procedures safer does not advance the interest of society and has a chilling effect on such investigations. Accordingly, these courts have adopted the privilege allowing a party to conduct an internal review and keep the review confidential. Roberts v. Carrier Corp, 107 F.R.D. 678, 684 (N. D. Ind. 1985); Reichold Chemicals Inc v. Textron Inc., 157 F.R.D. 522 (N. D. Fla. 1994).

Many of the documents submitted by the Diocese to *in camera* review fall under this privilege, including all of the Minutes of the Investigative Review Committee No IRC Bates DIO IRC 37-37, 40-41 and 58-77. In addition, Exhibits 15 and 16 typify those documents which should be protected. Each details investigation into allegations of abuse.

CONCLUSION:
THE COURT SHOULD DENY SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS AND DISMISS THIS ACTION WITH PREJUDICE

The First Amendment guarantees churches the autonomy to order and govern their ecclesiastical affairs free from government interference. Therefore, it prohibits courts from exercising jurisdiction over claims against churches like those asserted by the Plaintiffs that are grounded in the manner in which a church selects, appoints, disciplines, speaks about, and/or supervises its clergy. Adjudication of such claims would unconstitutionally impose on churches a secular standard of reasonableness in religious affairs, entangle civil courts in purely ecclesiastical matters, and upset the delicate process that generates and renews religious belief itself.

The uncontested evidence before the Court is that the adjudication of Plaintiffs' allegations would repeatedly touch upon and cause the Court to become entangled with a church-minister relationship, with the theological and spiritual consideration of a Catholic bishop conducting his ministry of governance, and with the communications of a church about one of its ordained clergy. The adjudication of Plaintiffs' claims would require unconstitutional inquiry into the issues of faith, church polity and theological doctrine that define the bishop/priest relationship. Indeed, Plaintiffs' counsel admitted at oral argument that "inquiry into Canon law and into the policies of the church is certainly critical" to adjudication of their claims.

Moreover, adjudication of these claims would require a jury to unconstitutionally establish a professional standard of care for a Catholic bishop. It would require a court to provide instructions regarding how a jury might convert "spiritual damages" into a monetary award. These are subjects that are outside a civil court's power. Mississippi courts have long followed the First Amendment Doctrine depriving them of subject matter jurisdiction over such disputes.

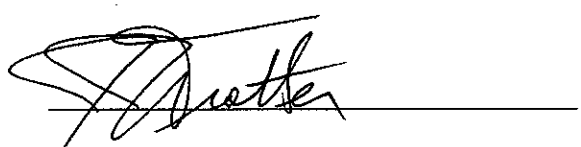
In response to the Motion to Dismiss for Lack of Subject Matter Jurisdiction, the plaintiffs filed no responsive pleading or brief. In fact, they offered no evidence showing that the Circuit Court might try this case without becoming unconstitutionally entangled in the issues of faith, doctrine, canon law, polity, or ecclesiastical relationships that are necessary to adjudicate their claims. It was their burden, and they failed to carry it.

Accordingly, the Diocese and Bishop Houck respectfully request the Court reverse and render the Circuit Court's order denying the Diocese's Motion to Dismiss for Lack of Subject Matter Jurisdiction and dismiss this action with prejudice.

Finally, and only in the event the Court finds a basis for subject matter jurisdiction of any of Plaintiffs' claims, the Circuit Court's order requiring production of documents and other information protected from discovery by the Doctrine of Church Autonomy, by canon law and/or by numerous privileges should be reversed and the Circuit Court should be directed to make a document by document factual finding with respect to the privileges asserted, or in the alternative this Court should appoint a special master to make such findings.

Respectfully submitted, this the 4th day of May, 2004.

ADAMS AND REESE LLP



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CERTIFICATE OF SERVICE

I, J. Jeffrey Trotter, do hereby certify that I have this date mailed, by United States Mail, postage prepaid, a true and correct copy of this document to the following:

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This the 4th day of May, 2004.

J. Jeffrey Trotter