
**IN THE
COURT OF APPEALS OF MARYLAND**

September Term, 2009
No. 66

PRINCE OF PEACE ET. AL.,

Petitioners/Cross-Respondents,

v.

MARY LINKLATER,

Respondent/Cross-Petitioner.

**ON APPEAL FROM THE CIRCUIT COURT
FOR MONTGOMERY COUNTY**
(The Honorable Nelson W. Rupp, Jr., Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

**BRIEF OF *AMICUS CURIAE* PEOPLE FOR THE AMERICAN WAY
FOUNDATION IN SUPPORT OF RESPONDENT**

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SUMMARY OF ARGUMENT

This case involves the serious and documented problem of clergy misconduct against adult women in the form of sexual harassment and discrimination. Although studies have shown that clergy sexual misconduct occurs both in the employment context and within the pastor-parishioner relationship, in neither case can the misconduct credibly be justified as rooted in religious beliefs and thereby shielded from liability on the basis of the Free Exercise Clause of the First Amendment. When a victim has suffered harm and has proven the misconduct in court, the ministerial exception should not be applied to relieve religious employers of their obligation to comply with valid and neutral laws of general applicability.

Amicus People For the American Way Foundation (“PFAWF”) urges this Court to conclude that the ministerial exception has no place in circumstances where the actions taken are not based on religious belief. In those scenarios, the courts can apply neutral and secular principles to proven conduct without inquiry into the church’s religious practices that would result in excessive government entanglement with religion. To conclude otherwise would extend blanket immunity to religious entities in violation of the Establishment Clause, thereby permitting them to engage in discrimination and conduct that would otherwise be unlawful – the exact scenario present in this case. Below, the court correctly decided that Respondent’s hostile work environment and gender discrimination claims in this case are not barred by the First Amendment simply because the employer in question is a religious entity. This Court should reject Petitioners’ urging to reverse that decision.

The court below, however, incorrectly rejected Respondent's negligent supervision and retention claims, on the ground that there was no evidence of a prior victim – a clear misunderstanding of the law. An employer is liable for retaining and failing to supervise a badly behaving employee once it has actual knowledge of the employee's sexual harassment of another employee. The court's failure to hold Petitioners liable for these claims was error and created an unconstitutional preference for religious actors in violation of the Establishment Clause.

Similarly, the court's failure to find the church liable for Respondent's retaliation claim also created an unconstitutional preference for religious actors. It also contravened clear public policy to encourage the reporting of unlawful sex discrimination and harassment in the workplace.

Finally, *Amicus* argues that the constitutional issues implicated in this case are similar to those arising in cases involving sexual molestation by clergy. There is no meaningful distinction between these two lines of cases that would justify different treatment under the First Amendment – in neither situation can the improper conduct credibly be claimed to have been religiously motivated. Accordingly, this Court must permit cases like Respondent's to go forward despite a religious employer's invocation of the First Amendment as a defense.

INTEREST OF AMICUS CURIAE

People For the American Way Foundation is a nationwide, non-profit, non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members and activists across the country, including 16,733 in Maryland. PFAWF is firmly committed to the principles of religious liberty and freedom of conscience protected by the Constitution and has frequently represented parties and filed *amicus curiae* briefs in cases involving the Establishment and the Free Exercise Clauses of the First Amendment. The resolution of this case is of extreme interest to our organization and its members.

This case implicates important constitutional questions about the application of the "ministerial exception" to valid and neutral laws of general applicability, including laws prohibiting sexual harassment and employment discrimination on the basis of gender. The First Amendment does not mandate immunity for hostile work environment and gender discrimination claims simply because the employer is religious. In addition, protecting the church in this case from liability for negligent supervision and retention despite the church's actual knowledge of its pastor's harassment of the music director violates the Establishment Clause by creating an unconstitutional preference for religious actors. The underlying conduct in this case cannot credibly be justified as religious conduct deserving of First Amendment protection from liability.

**STATEMENT OF THE CASE, QUESTIONS PRESENTED
AND STATEMENT OF FACTS**

Amicus joins in and adopts the statement of the case, questions presented, and the statement of facts in Respondent/Cross-Petitioner’s brief.

INTRODUCTION

The harm caused by a religious organization that permits sexual harassment or abuse is no different from the harm generated by a secular entity. In both situations, the harm arises from socially abhorrent and legally proscribed conduct and the victim is seriously injured. As in the secular scenario, the behavior in this case was not religiously motivated. Other, more base motivations were at work, and, therefore, the First Amendment does not pose a barrier to the application of the laws protecting the Respondent.

Even when conduct is religiously motivated, it may be regulated by neutral, generally applicable laws. “[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes.’” *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982)). This case is one further step away from the First Amendment as it involves conduct that is not motivated by religious belief. Therefore, the relevant law should be permitted to deter and punish the behavior despite its situs in a religious organization and without reference to the First Amendment. *Petruska v. Gannon Univ.*, 462 F.3d 294, 309 n.11 (3d Cir. 2006); *Elvig v. Calvin Presbyterian*

Church, 375 F.3d 951 (9th Cir. 2004). *See also Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1990) (holding religious school's failure to provide female teachers pay equivalent to male counterparts violated Fair Labor Standards Act without violating First or Fifth Amendments); *McLean v. Patten Cmty., Inc.*, 332 F.3d 714, 720 (4th Cir. 2003)); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (“While religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such a designation does not control their extra-religious legal status.”).

Religious organizations have proven themselves incapable of ending cycles of abuse by themselves, and, therefore, the law is the only effective means of deterring this inappropriate behavior, which is not religiously motivated. *See* Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225 (2007).

Title VII of the Civil Rights Act of 1964 prohibits those employers who employ fifteen or more persons from discriminating against employees on the basis of race, color, religion, sex, or national origin and further prohibits retaliation for engaging in protected activity. 42 U.S.C. § 2000e-2. During Title VII’s enactment, the members of Congress considered exempting religious employers completely from the anti-discrimination laws, but decided against such a wholesale exemption. 110 Cong. Rec. 12818 (1964) (statement of Sen. Humphrey). Instead, Title VII, as enacted, exempts religious employers only from the prohibition on discrimination according to religion. 42 U.S.C. § 2000e-1(a).

While the exemption originally applied solely to clergy, Congress later expanded the scope of the exemption beyond clergy to permit religious discrimination against any employee, Pub L. 92-261, 86 Stat. 104, which was upheld in the United States Supreme Court's decision in *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329-30 (1987). But Congress never expanded the exemption to protect religious employers from discrimination on the basis of gender or sexual harassment. Thus, from the inception of Title VII, Congress intentionally left religious entities subject to the compelling interest in deterring and punishing racial, gender, and national origin discrimination.

A significant number of federal appellate and state supreme courts have concluded in the interim, however, that Congress's legislative accommodation can, in certain circumstances, run afoul of the First Amendment when the employee is a member of the clergy. *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (emphasizing religious nature of decisions protected by First Amendment in Title VII context). In the Fourth Circuit's first explanation of the doctrine, it emphasized that the First Amendment, however, does not wholly relieve a church of its legal obligations: "Of course churches are not -- and should not be -- above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions" *Id.* at 1171; *Archdiocese v. Moersen*, 399 Md. 637 (2007). *Downs v. Roman Catholic Archbishop of Baltimore*, 111 Md. App. 616, 621

(1996). This doctrine, which has not yet been addressed by the United States Supreme Court, has been called the “ministerial exception.”

This exception to liability for discrimination by clergy in certain circumstances rests on the United States Supreme Court’s interpretation of the First Amendment as prohibiting courts from interfering in “matters of church government as well as those of faith and doctrine.” *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). This doctrine should not be read too broadly, as the Supreme Court also has approved the application of “neutral principles of law” to religious organizations. *See Jones v. Wolf*, 443 U.S. 595, 604 (1979). As the Supreme Court has made clear: “Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.”

When the conduct is not based on religious belief, there is no excuse for failing to apply neutral principles of law. The ministerial exception simply has no place in circumstances where the actions taken are not based on religious belief. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief.”); *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 795 (9th Cir. 2005) (Fletcher, J., concurring in denial of petition for en banc rehearing) (“No court has ever held that sexual harassment by a minister is protected by the First Amendment.”); *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999) (“The Free Exercise Clause rationale for protecting a church’s personnel decisions concerning its ministers is the necessity of allowing the church to choose its representatives using whatever criteria it deems relevant. That rationale does

not apply here, for the Jesuits most certainly do not claim that allowing harassment to continue unrectified is a method of choosing their clergy.”); *McKelvey v. Pierce*, 800 A.2d 840, 857-58 (N.J. 2002) (“The critical factor in the application of the ministerial exception to a given cause of action must be that resolution of the claim requires an impermissible inquiry into the propriety of a *decision* of core ecclesiastical concern, a decision, in other words, where the *dispute* truly is *religious*.”); *see also Longo v. Regis Jesuit High Sch. Corp.*, 2006 U.S. Dist. LEXIS 4142, at *18-19 (D. Colo. Jan. 25, 2006) (analogizing from Title VII cases, ministerial exception does not apply to disabled teacher’s claim for discriminatory discharge under Americans with Disabilities Act, which can go forward in part because no religious justification was offered for the termination); *Melanie H. v. Defendant Doe*, No. 04-1596-WQH-(WMc) (S.D. Cal., Dec. 20, 2005) ((holding that church could be liable for tort involving childhood sexual abuse where the church had no belief in child sex abuse).

The ministerial exception, like all religious exemptions, also must be applied carefully so as not to provide a windfall to the religious, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989), to engage in illegal conduct at will. Under the First Amendment, it is settled doctrine that religious belief is absolutely protected, but conduct can be regulated. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). *See also Employment Div. v. Smith*, 494 U.S. 872, 894 (1990); *Hopkins v. State*, 193 Md. 489, 496 (1949); *State v. Clay*, 182 Md. 639, 645 (1944). Nor has the First Amendment been an impregnable barrier permitting religious entities to engage in discrimination. *See Bob Jones University v. United States*, 461 U.S. 574 (1983).

For an exemption to be permissible, it must satisfy the standards set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster “an excessive government entanglement with religion.”

Id. at 612-13. Far from benignly accommodating religious conduct, a decision to exempt the Petitioners in this case crosses the Establishment Clause barrier by granting a church and minister legal immunity for conduct unrelated to religious conduct.

I. The Decision Below Correctly Concluded that the First Amendment Does Not Mandate Immunity for Hostile Work Environment and Gender Discrimination Claims Simply Because the Employer Is Religious

The decision below concluded that Respondent’s hostile work environment and gender discrimination claims in this case should be permitted to go forward. This decision correctly interpreted the Supreme Court’s First Amendment religion doctrine at its most basic level: free exercise claims must rest on conduct that is religiously motivated. When there is no religious belief underlying the conduct, the Religion Clauses do not apply.

“[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief.” *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). *See also Zelman v. Simmons-Harris*, 536 U.S. 639, 680 n.4 (2002); *Employment Div. v. Smith*, 494 U.S. 872, 886-87 & n.4 (1990); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167 (4th Cir.

1985); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 969 (9th Cir. 2004); *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999); *McKelvey v. Pierce*, 800 A.2d 840, 857-58 (N.J. 2002); *see also Longo v. Regis Jesuit High Sch. Corp.*, 2006 U.S. Dist. LEXIS 4142, at *18-19 (D. Colo. Jan. 25, 2006); *Melanie H. v. Defendant Doe*, No. 04-1596-WQH-(WMc) (S.D. Cal., Dec. 20, 2005).

As the court below noted, the actions undergirding the Respondent's hostile work environment and gender discrimination claims in this case do not rest on religious belief. Therefore, these claims should be permitted to go forward.

The court irrationally concluded, however, that the retaliation claims arising from the Respondent's hostile work environment and sexual harassment reports are barred by the ministerial exception. *Linklater v. Prince of Peace Lutheran Church*, No. 505, slip op. at 25 (Md. Ct. Spec. App. Mar. 16, 2009) (referring to retaliation claims arising out of "disciplinary actions for petty or invented infractions" and "frequent angry denunciations for non-existent violations." (quoting Complaint at 37 ¶ 209, *Linklater v. Prince of Peace Lutheran Church*, No. 237453V (Md. Cir. Ct. Oct. 16, 2002)). The court thereby created immunity for religious entities in a circumstance where it is unlikely the First Amendment will be violated.

This reasoning deters victims who are victims of sexual harassment in religious settings from bringing their claims and ignores the fact-specific inquiry required in the application of the ministerial exception. The facts a court must consider involving whether employment infractions were "petty or invented" and whether denunciations responded to "non-existent violations" do not require the court to determine religious

belief or alter church governance. Nor would the court have to investigate the motivation behind such decisions. Rather, these retaliation claims involve proof of the Respondent's conduct, which can then be compared against the disciplinary actions and statements made. Moreover, the complaint, in the same paragraph as the "petty or invented" infractions, denotes a string of other adverse actions which do not involve any inquiry into church governance and can wholly be disposed of by application of neutral principles of law. Among other things, the Respondent asserted that the Petitioners also took actions including "a refusal to pay Respondent her housing bonus; [and] a refusal to process [Respondent's] papers for permanent residency, as promised[.]" Complaint at 37 ¶ 209, *Linklater v. Prince of Peace Lutheran Church*, No. 237453V (Md. Cir. Ct. Oct. 16, 2002)). Such actions, among others, can be resolved as a matter of fact and contract without reference to any matter of religious governance or any doctrinal position.

The decision below relied upon decisions that did not involve sexual harassment. *EEOC v. Roman Catholic Diocese*, 213 F.3d 801 (4th Cir. 2000), involved no allegations of sexual harassment or hostile work environment. Rather, the plaintiff challenged dismissal from her Director position after a negative parish survey, a refusal to rehire for a redesigned position after forty other applicants including her vied for the position, and her demotion in her part-time teaching position, which led to loss of benefits. The court could not have separated out the religious motivation for such actions from the non-religious motivation. Nor is the holding in *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) to the contrary. There was no issue of sexual harassment or assault in *Rayburn*.

The court below cites *Combs v. Central Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999), for the proposition that the ministerial exception establishes blanket immunization for liability in all employment decisions by religious employers. That case, also, did not involve sexual harassment, but rather a female minister who was replaced as minister of a church, which is precisely the sort of employment decision intended to be protected by the ministerial exception. Sexual harassment, in contrast, is not a practice that the ministerial exception is designed to protect from legal liability. The court's decision below makes the First Amendment a refuge for scoundrels rather than a protector of legitimately religious activity.

II. The Decision Below Misinterpreted the Law of Negligent Retention and Supervision and thus Violated the Establishment Clause

It is well-settled that churches and religious entities may not hide behind the First Amendment to avoid liability for tortious actions that they knew or should have known were occurring. *Young v. Gelineau*, 2007 WL 3236736 (R.I. Super. Sept. 20, 2007) (negligent supervision and retention brought by male parishioner allegedly molested as minor); *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213 (Miss. 2005) (negligent hiring, assignment, and retention brought on behalf of three minor children); *Olson v. First Church of Nazarene*, 661 N.W.2d 254 (Minn. Ct. App. 2003) (vicarious liability brought by adult female and her husband); *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426 (Minn. 2002) (negligent counseling brought by adult male); *Rashedi v. General Bd. of Church of Nazarene*, 54 P.3d 349 (Ariz. Ct. App. 2002) (negligent hiring and supervision brought by adult female); *Doe v. Evans*, 814

So.2d 370, 371 (Fla. 2002) (allowing adult female to bring negligent hiring, negligent supervision, and breach of fiduciary duty claims for sexual misconduct by priest during marriage counseling); *Malicki v. Doe*, 814 So.2d 347, 361 (Fla. 2002) (First Amendment no bar to negligent hiring, retention, and supervision claims by adult female and minor for sexual assault); *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 985 P.2d 262 (Wash. 1999) (negligence and failure to warn brought on behalf of minor sex abuse victims); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 716 A.2d 967 (Conn. Super. Ct. 1998) (negligent supervision brought by parishioners alleging abuse as minors); *Smith v. Privette*, 495 S.E.2d 395 (N.C. Ct. App. 1998) (negligent supervision and retention brought by adult employees alleging sexual harassment and inappropriate sexual advances); *Martinez v. Primera Asamblea de Dios, Inc.*, 1998 WL 242412 (Tex. Ct. App. May 15, 1998) (negligent hiring, supervision, training, retention and other general negligence claims brought by adult female); *Amato v. Greenquist*, 679 N.E.2d 446 (Ill. App. Ct. 1997) (negligent supervision brought by adult male); *F.G. v. MacDonell*, 696 A.2d 697 (N.J. 1997) (breach of fiduciary duty brought by adult female); *Kenneth R. v. Roman Catholic Diocese*, 654 N.Y.S.2d 791 (N.Y. App. Div. 1997) (negligent supervision and retention brought by parishioners abused as children); *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996) (negligent hiring brought on behalf of male child); *Winkler v. Rocky Mountain Conference of the United Methodist Church*, 923 P.2d 152 (Colo. Ct. App. 1996) (breach of fiduciary duty and negligent hiring and supervision brought by adult female); *Konkle v. Henson*, 672 N.E.2d 450 (Ind. Ct. App. 1996) (negligent hiring and supervision brought by parishioner alleging abuse as

child); *Roman Catholic Bishop of San Diego v. Superior Court of San Diego County*, 50 Cal. Rptr. 2d 399 (Cal. Ct. App. 1996) (negligent hiring, supervision, and retention brought on behalf of female minor); *Bivin v. Wright*, 656 N.E.2d 1121 (Ill. App. Ct. 1995) (negligent supervision, training, retention, and failure to warn brought by married couple); *Sanders v. Casa View Baptist Church*, 898 F.Supp. 1169, 1171 (N.D. Tex. 1995) (holding First Amendment no bar to claims of professional negligence and breach of fiduciary duty brought by church employee who had counseling relationship with minister); *Mirick v. McClellan*, 1994 WL 156303 (Ohio Ct. App. Apr. 27, 1994) (negligent hiring and breach of fiduciary duty alleged by abused minors); *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993) (breach of fiduciary duty and negligent hiring and supervision alleged by adult female); *Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992) (upholding punitive damages award for child abuse brought by adults abused as children); *Jones by Jones v. Trane*, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992) (negligent hiring brought on behalf of child); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991) (negligent hiring brought by adult female); *Erickson v. Christenson*, 781 P.2d 383 (Or. Ct. App. 1989) (negligent supervision brought by adult female); *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) (negligent supervision and breach of fiduciary duty brought by married couple).

The rule that makes religious entities accountable in tort in these cases has just as much force here. Where the Respondent seeks to apply neutral, generally applicable laws to conduct and there is neither any claim nor evidence that the actions taken by the Petitioners were motivated or required by religious belief, the law must apply.

A. Misapplication of Negligent Supervision and Retention Law

Direct liability of an employer, unlike the *respondeat superior* doctrine of indirect liability, is premised on the acts of the employer itself in selecting, overseeing, and retaining an employee – respectively, negligent hiring, supervision, and retention.¹ In this case, only negligent supervision and retention are alleged. Complaint at 46 ¶¶ 246-51, *Linklater v. Prince of Peace Lutheran Church*, No. 237453V (Md. Cir. Ct. Oct. 16, 2002) (Count X, Negligent Retention and Supervision).

Maryland has long recognized the imposition of liability upon employers for negligence in retaining and supervising its employees. *Evans v. Morsell*, 284 Md. 160, 165 (1978) (“[A master or entity] owes to each of his servants the duty of using reasonable care and caution in the selection of competent fellow-servants, and in the retention in his service of none but those who are. If he does not perform this duty, and an injury is occasioned by the negligence of an incompetent or careless servant, the master is responsible to the injured employe [sic], not for the mere negligent act or omission of the incompetent or careless servant, but for his own negligence in not discharging his own

¹ “[A] master may be bound to control acts of his servants that they do entirely *on their own account* but that are closely enough connected with the employment in time and space to *give the master a special opportunity to control the servant’s conduct*. It must be shown, however, that the likelihood of such acts by the servant had been brought home to the master, for example, by a showing that the acts had occurred so persistently that the master knew or should have known of them.” 3 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 18.7, at 907-09 (3d ed. 2007) (emphases added). In other words, the act of the employee does not have to be within the scope of employment so long as such acts and the injury were reasonably foreseeable to the employer. *See also*, RESTATEMENT (THIRD) OF AGENCY § 7.05(1) (2006) (“A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.”).

duty towards the injured servant.” (quoting *Norfolk & W. R. Co. v. Hoover*, 79 Md. 253, 262 (1894)). See also *Henley v. Prince George's County*, 305 Md. 320, 336 (1986) (“The duty of an employer...is to use reasonable care to select employees competent and fit for the work assigned to them and to refrain from retaining the services of an unfit employee. The class of persons intended to be protected by the imposition of this duty necessarily includes those members of the public who would reasonably be expected to come into contact [with an employee]... That such persons could not be identified in advance does not mean that they are not included in the class.”); *Cramer v. Housing Opportunities Comm’n*, 304 Md. 705, 711 (1985) (finding no liability of employer on the facts but citing conclusively *Evans v. Morsell*, 284 Md. 160 (1978) and holding that employers owe a duty of care in both hiring and retaining employees).

Negligent retention is premised on the idea that the

duty of an employer does not end when the employee is hired. Rather, the duty extends to retaining safe, fit, and competent help. An employer has a continuing duty to retain only those employees who are fit and competent. Thus, an employer who knew or should have known of problems with an employee that indicated unfitness and who failed to take further action such as investigation, discharge, or reassignment is liable for torts committed by that employee against a third person.

FELIU & JOHNSON, NEGLIGENCE IN EMPLOYMENT LAW at 31. See also 27 AM. JUR. 2D *Employment Relationship* § 396 (West, Westlaw through 2009). It proceeds from the theory that the employer should not have retained the employer once the employer knew or should have known of the employee’s inappropriate behavior.² When an employer

² See, e.g., RESTATEMENT (SECOND) OF TORTS § 317 cmt. c (1965) (West, Westlaw through 2009) (“There may be circumstances in which the only effective control which

chooses to ignore his knowledge of the employee's unfitness under the law, and fails to take the appropriate steps, a negligent retention claim has merit. FELIU & JOHNSON, NEGLIGENCE IN EMPLOYMENT LAW at 10; *see also Id.* at 11 (noting obligations of employer, including "further investigating the complaints or information obtained; warning or reprimanding the employee; or training, reassigning, or discharging the employee"). Furthermore, even if an entity creates a policy against sexual harassment or hostile work, the entity may not avoid liability if it improperly or fails to implement its provisions. *See Smith v. First Union Nat'l Bank*, 202 F.3d 234, 244 (4th Cir. 2000) ("An employer's adoption of an effective anti-harassment policy is an important factor in determining whether it exercised reasonable care to prevent any sexually harassing behavior."). *See also Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (U.S. 1998) (noting that an employer's reasonableness may be measured in part if an employer "provide[s] a *proven, effective mechanism* for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense.") (emphasis added).

Once an employer has notice of the employee's inclination to sexually harass another employee, there is a duty not to retain the employee. FELIU & JOHNSON, NEGLIGENCE IN EMPLOYMENT LAW at 11 (citing *Hogan v. Forsyth Country Club Co.*,

the master can exercise over the conduct of his servant is to discharge the servant. Therefore the master may subject himself to liability under the rule stated in this Section by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others. This is true although he has without success made every other effort to prevent their misconduct by the exercise of his authority as master.").

340 S.E.2d 116, 124 (N.C. Ct. App. 1986)). *See e.g., Henley v. Prince George's County*, 305 Md. 320, 339 (1986) (dealing with question of negligent retention by stating that notice to employer was issue for trial and remanding for consideration). Ms. Linklater, in the case at bar, told multiple individuals within church management about the harassment and, despite notice and actual knowledge of the harassment, nothing was done. *See* Complaint at 9 ¶¶ 43-44 & 13 ¶¶ 67, 69, *Linklater v. Prince of Peace Lutheran Church*, No. 237453V (Md. Cir. Ct. Oct. 16, 2002).

Liability under a theory of negligent supervision, on the other hand, proceeds from the special relationship between the employer and the employee and the unique ability of the employer to constrain the behavior of the employee within the employment relationship. “The focus here is on the employer’s failure to adequately train or supervise an employee in the basic responsibilities of the position, resulting in an injury to the public.” FELIU & JOHNSON, *NEGLIGENCE IN EMPLOYMENT LAW* at 9. In short, negligent supervision goes not to the selection or retention of the employee but to actions that could have been taken by the employer in more closely supervising an employee without having to resort to discharging him or her.³ “Liability for negligent supervision is

³ *See* 27 AM. JUR. 2D *Employment Relationship* § 397 (West, Westlaw through 2009) (Negligent supervision, training, or entrustment) (“A person conducting an activity through employees is subject to liability for harm resulting from such conduct if he or she is negligent or reckless in the supervision of the activity. *An employer may be liable for negligent supervision if its employee intentionally harms another* when the employee: (1) *is upon the premises in possession of the employer* or upon which the employee is privileged to enter only as an employee; or (2) *is using a chattel of the employer and the employer: (i) knows or has reason to know that the employer has the ability to control its employee; and (ii) knows or should know of the necessity and opportunity for exercising such control.*”) (emphases added).

premised on the idea that an employee's behavior, either pre- or post-hire, should have prompted the employer to supervise him more closely." FELIU & JOHNSON, NEGLIGENCE IN EMPLOYMENT LAW at 53.

The decision below rejected Respondent's negligent supervision and retention claims, on the grounds that there was no evidence of a prior victim. This is a misunderstanding of the negligent retention and supervision case law. The purpose of direct liability claims such as negligent retention and supervision is to instill in employer's the obligation to preserve a safe workplace for both employees and those who do business with the organization. FELIU & JOHNSON, NEGLIGENCE IN EMPLOYMENT LAW at 8. Moreover, the legal purpose of these claims is to provide "a remedy to third parties who otherwise would not be able to recover under respondeat superior because of the scope of employment requirements." 27 AM. JUR. 2D *Employment Relationship* § 391 (West, Westlaw through 2009) (scope of employment not a factor in liability for claims of negligent hiring, retention, or supervision). The fact that there was no prior victim, if in fact there was no prior victim, is irrelevant to the causes of action for either negligent supervision or retention. It is well-settled that under these theories of liability, as noted above, the only inquiry is what the employer knew or should have known about the behavior of its employee. In this case, the employer had actual knowledge of the continual and long-running sexual harassment of Ms. Linklater.

The court's reasoning is also illogical; the negligent retention and supervision tort is intended to deter employers from retaining employees they know or should know are harming others. *Evans v. Morsell*, 284 Md. 160, 164 (1978) (employer is "bound to use

reasonable care . . . to refrain from retaining the services of an unfit employee. When an employer neglects this duty and as a result injury is occasioned to a third person, the employer may be liable even though the injury was brought about by the willful act of the employee beyond the scope of his employment.” (quoting *Fleming v. Bronfin*, 80 A.2d 915, 917 (D.C. 1951))). See also *Horridge v. St. Mary's County Dep't of Soc. Servs.*, 382 Md. 170, 180-182 (2004) (noting that Court has long provided for claims of negligent supervision in order to prevent harms to fellow employees and the public generally). It should make no difference whether the employer knew that its employee was continuing to harm a single employee or whether the employee found a new victim. Either way, the retention and failure to supervise have resulted in harm that is properly subject to legal regulation.

As the court below formulated the rule, a church that had notice of the sexual abuse of a single child and then permitted that abuse to continue is immune from liability unless the plaintiff can prove knowledge of a previous victim. In other words, the court crafted a rule that gives all religious entities a pass on the first victim, regardless of what the employer knows or what is done to the victim over time. Thus, the guiding question should not be whether the church knew of another victim, but rather when the church knew of harm being perpetrated by one of its clergy employees. *Horridge v. St. Mary's County Dep't of Soc. Servs.*, 382 Md. 170, 179 (2004); *Evans v. Morsell*, 284 Md. 160, 164-165 (1978). See also *Schovanec v. Archdiocese of Oklahoma City*, 188 P.3d 158 (Okla. 2008); *Doe v. Liberatore*, 478 F.Supp.2d 742 (M.D. Pa. 2007); *Poole v. North Ga. Conf. of the Methodist Church, Inc.*, 615 S.E.2d 604 (Ga. Ct. App. 2005); *Malicki v. Doe*,

814 So.2d 347 (Fla. 2002); *Doe v. Redeemer Lutheran Church*, 531 N.W.2d 897 (Minn. Ct. App. 1995); *Jones v. Trane*, 153 Misc.2d 822 (N.Y. Sup. Ct. 1992); *Fleming v. Bronfin*, 80 A.2d 915, 917 (D.C. 1951).

B. Violation of Establishment Clause Arising from Application of Negligent Supervision and Retention Law

By protecting the church in this case from liability for negligent supervision and retention despite the church's knowledge, the court violated the Establishment Clause by creating an unconstitutional preference for religious actors. There is no justification for the special treatment accorded the Petitioners other than their religious status and that is not a permissible reason. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989); *First Baptist Church of Friendly v. Beeson*, 154 Md. App. 650, 662 (2004). *See also, Lee v. Weisman*, 505 U.S. 577, 609-10 (1992); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990); *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216 (1963); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15 (1947). Since their conduct was not religiously motivated, the court's application of the ministerial exception created legal immunity solely because the actors are religious.

Immunizing the employment decisions in this case from legal challenge violates the principle that government is required to act toward religion with a "wholesome 'neutrality.'" *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963); *Wallace v. Jaffree*, 472 U.S. 38, 82-83 (1985) ("A government that confers a benefit on an

explicitly religious basis is not neutral toward religion.”). No government entity, including the courts, may “aid all religions as against non-believers.” *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). By carving out an exception for the religious employer in this case from the force and effect of the negligent retention and supervision torts, the court created a universe in which secular businesses are liable for the sexual harassment of their employees, but religious groups can avoid liability, even when their actions are not motivated by religious belief. That is an undeniable benefit that not only reduces litigation risks and costs for the religious organization, but also provides a financial benefit to the religious groups, which are consequently immunized from paying damages in cases where they have acted tortiously.

Nor is there an argument that application of the anti-discrimination law in this case results in excessive entanglement between church and state. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 394 (1990) (finding no excessive entanglement from application of neutral, generally applicable sales tax to sale of goods by religious organization); *Lemon v. Kurtzman*, 403 U.S. at 620 (1971) (finding excessive entanglement when the Rhode Island state government had to examine records of school to determine what expenditures would have been secular and which were related to religious activity). Here, there would be no excessive entanglement to determine if the anti-discrimination law was violated. The evidence requires no inquiry into religious doctrine or into the religious entity’s hiring decisions.

The courts can apply neutral and secular principles to proven conduct without inquiry into the religious practices of the church. Nor would ongoing monitoring of the

church's employment decisions be needed. This is in distinction from a situation where the government would be in the position of inquiring into theological matters or examining the records or books of the church. Moreover, the Petitioners have not and could not assert that sexual harassment is in any way motivated by religious belief and, therefore, judicial examination of this non-religiously motivated behavior poses no risk of putting courts in the position of second-guessing religious doctrine, ecclesiology, or governance.

III. Retaliation for Ms. Linklater's Report of the Sexual Harassment and Hostile Work Environment

It is settled in Maryland that retaliatory discharge for reporting gender or sexual discrimination and harassment contravenes a clear public policy. *Watson v. Peoples Sec. Life Ins. Co.*, 322 Md. 467, 480-481 (1991) (reversing summary judgment for the employer when employee had been allegedly discharged for seeking redress against sexual harassment by a co-worker). Even in the absence of the statutory availability of Title VII, Maryland has recognized the tort of abusive discharge to encompass the strong public policy against allowing sex discrimination and harassment within the workplace. *Adler v. American Standard Corp.*, 291 Md. 31, 47 (1981) ("Maryland does recognize a cause of action for abusive discharge by an employer of an at will employee when the motivation for the discharge contravenes some clear mandate of public policy."); *Makovi v. Sherwin-Williams Co.*, 316 Md. 603 (1989) (policy against sex discrimination or retaliatory discharges is encompassed within the statutory remedy provided by Title VII).

See also Owen v. Carpenters' Dist. Council, 161 F.3d 767, 774 (4th Cir. 1998) (allowing claim for wrongful discharge when employee rebuffed and reported sexual harassment).

Allowing a church to circumvent the long-announced public policy is not only a violation of the Establishment Clause under *Lemon*, as above, but also thwarts the continuing need to uphold a policy of preventing both sexual harassment in the workplace and retaliatory actions on the part of supervisors for the reporting of such harassment or discrimination.

IV. The Decision Below Correctly Concluded that the First Amendment Should Be No Bar to the Claims in This Case, Which Are Incapable of Being Distinguished from Cases Involving Sexual Molestation

Sexual advances toward women in religious organizations are not uncommon. These issues are just starting to be studied, but according to a recent academic study, “More than 3% of women who had attended a congregation in the past month reported that they had been the object of CSM [Clergy Sexual Misconduct] at some time in their adult lives; 92% of these sexual advances had been made in secret, not in open dating relationships; and 67% of the offenders were married to someone else at the time of the advance.” *See, e.g.*, Mark Chaves & Diana R. Garland, *Executive Summary: The Prevalence of Clergy Sexual Misconduct with Adults: A Research Study*, Baylor University School of Social Work, Clergy Sexual Misconduct (2009), <http://www.baylor.edu/clergysexualmisconduct/index.php?id=67406> (full study forthcoming in the *J. OF THE SCIENTIFIC STUDY OF RELIGION*).⁴ Another report has

⁴ Mounting evidence demonstrates that abuse by clergy impacts individuals of any age and any sex with women being a large proportion of the victims. *See, e.g.*, Loren Stein,

documented that “[f]our times as many priests involve themselves sexually with adult women than with children . . . ‘ These relationships range from dating to harassment to exploitation.’” Thomas Farragher & Matt Carroll, *Boston church review board dismissed accusations by females*, BOSTON GLOBE, Feb. 7, 2003, at A1. This case is just one example of this larger problem that should be treated in the same manner as another group of cases involving religious entities.

The majority of state courts has permitted cases involving child sex abuse by clergy to go forward despite defendants raising the First Amendment as a defense. See *Malicki v. Doe*, 814 So.2d 347, 351 n.2 (Fla. 2002) (listing states); *State v. Young*, 974 So. 2d 601, 613 (Fla. Dist. Ct. App. 2008); *Melanie H. v. Defendant Doe*, No. 04-1596-WQH-(WMc), slip op. at 8 (S.D. Cal., Dec. 20, 2005); *Perry v. Johnston*, 2009 U.S. Dist. LEXIS 74706, at *11 (E.D. Mo. Aug. 24, 2009); *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 431 (2d Cir. 1999); *N.H. v. Presbyterian Church*, 998 P.2d 592, 602 (Okla. 1999). As the Court below noted, *Linklater v. Prince of Peace Lutheran Church*, No. 505, slip op. at 21-22 (Md. Ct. Spec. App. Mar. 16, 2009), there is no meaningful distinction between this case and the clergy sex abuse cases

Father Figure: In the controversy over child abuse by Catholic priests, one group is being overlooked--adult women, METRO (Silicon Valley), June 27-July 3, 2002, <http://www.metroactive.com/papers/metro/06.27.02/priests-0226.html>; Sacha Pfeiffer, *Women face stigma of clergy abuse*, BOSTON GLOBE, Dec. 27, 2002, at A1, http://www.boston.com/globe/spotlight/abuse/stories4/122702_women.htm (“[V]ictim advocates say they believe the church has sometimes treated priests more leniently when their sexual misbehavior involves teenage girls or women. . . Among clergy of all denominations, [an expert] said, ‘Far more clergy offend against women than against men,’ and more often against adults and late adolescents than children.”).

that would justify different treatment under the First Amendment. In both scenarios, clergy have engaged in inappropriate sexual conduct, serious harm has been inflicted on the victim, and there is no argument that the behavior is religiously motivated. Thus, any decision to absolve the Church and pastor of liability for discrimination in this case operates as a forbidden special privilege. *Lemon v. Kurtzman*, 403 U.S. at 624-25 (1971); *Larkin v. Grendel's Den*, 459 U.S. 116, 125-26 (1982).

V. ENDORSEMENT OF AMICI CURIAE POSITIONS

Amicus hereby adopts and endorses the positions taken by Respondent Linklater with respect to the arguments addressed therein, in particular the argument with respect to the Ministerial Exception.

Amicus also hereby adopts and endorses the positions taken by *amici* Metropolitan Washington Employment Lawyers Association and Maryland Employment Lawyers Association, as well as *amicus* Public Justice Center.

CONCLUSION

For the foregoing reasons, *Amicus* People For the American Way Foundation respectfully requests that this Court affirm the decision below with respect to Respondent's hostile work environment and gender discrimination claims and reverse with respect to Respondent's negligent retention and supervision claims.

Respectfully submitted,

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October 16, 2009

Pursuant to Md. Rule 8-504(a)(8), this brief has been printed with proportionally spaced type: Times New Roman – 13 point.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October 2009, I mailed first class, postage prepaid, one copy of the foregoing Brief of *Amicus Curiae* People For the American Way Foundation in Support of Respondent/Cross-Petitioner to:

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