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BY THE RESPONDENTS, HAVE ALL APPLIED THE EXCESSIVE ENTANGLEMENT, THIRD PRONG, FROM THE DECISION IN LEMON V KIRKMAN, OF THE UNITED STATES -- KIRKMAN, OF THE UNITED STATES SUPREME COURT. THAT EXCESSIVE ENTANGLEMENT PRONG WAS UNDERSTOOD IN GENERALIZED TERMS, PRIOR TO THE LAST IT UP COUPLE OF -- THE LAST COUPLE OF YEARS, IS NO LONGER -- COUPLE OF YEARS, IS NO LONGER LAW. THAT HELD THE AGUILAR DECISION, WHICH HELD THE COMBINATION OF THE EFFECTS INQUIRY OF PRONG TWO OF THAT LEMON VERSUS KIRKMAN TEST.

LET'S FOCUS ON YOUR NEGATIVE HIRING ALLEGATION.

YES, YOUR HONOR.

AND WE ARE DEALING WITH YOUR SECOND AMENDED COMPLAINT. RIGHT?

THAT'S CORRECT.

AND THE GIST OF THAT CAUSE OF ACTION IS THAT, DURING THAT PERIOD OF TIME, THE DEFENDANT BREACHED THE DUTY ALLEGED ABOVE, BY BECOMING INVOLVED WITH HER IN A ROMANTIC MANNER, IN A WAY WHICH MADE IT IMPOSSIBLE FOR HIM TO ADEQUATELY KEEP THE PLAINTIFF'S INTEREST PARAMOUNT. YOU ARE ALLEGING THIS IS A TORT ACTION, NOT ANY TYPE OF SEXUAL DISCRIMINATION, CORRECT?

CORRECT. IT IS A TORT ACTION.

AND WHAT IS THE BASIS, UNDER FLORIDA LAW, FORGETTING THIS IS A CHURCH THAT IS NEGLIGENTLY HIRING, JUST FOR THAT BASIC CAUSE OF ACTION?

THE NEGLIGENCE IS PARALLEL TO THE NEGLIGENCE THAT HAS BEEN RECOGNIZED IN THE CONTEXT OF PSYCHOTHERAPISTS OR PSYCHOLOGISTS WHO ENGAGE IN COUNSELING AND THEN HAVE SEX WITH THEIR PATIENTS. IT IS THAT PARALLEL. I AM NOT CERTAIN THAT THERE IS ANY DECISION OF THIS COURT OR EVEN OF THE DISTRICT COURTS WHICH HAVE DIRECTLY APPLIED THAT, EVEN IN THAT COUNSELING CONTEXT, ALTHOUGH THERE IS A DECISION WHICH WE CITED IN THE FOURTH DISTRICT, AND I HAVE THE CITATION HERE, AND I CAN GIVE IT TO YOU ON REPLY, IF YOU WANT IT, WHERE THE DISTRICT COURT OF APPEALS, I BELIEVE IT WAS THE FIFTH DCA, CITED A WHOLE NUMBER, A WHOLE STRING OF THOSE CASES THAT WERE CITED --

YOU ARE ALLEGING NEGATIVE HIRING BUT WITHOUT ANY PHYSICAL INJURY?

WE HAVE ALLEGED PSYCHOLOGICAL INJURES.

BUT NO PHYSICAL.

NO PHYSICAL INJURES.

YOU HAVE TO AVOID THE IMPACT RULE SOMEHOW, RIGHT?

WELL, I DON'T THINK WE HAVE TO AVOID THE IMPACT RULE, IN THE CONTEXT OF WHAT ESSENTIALLY IS A TORT OF INFLICTION OF EMOTIONAL HARM, JUST AS IS IN THE PSYCHIATRIST OR PSYCHOLOGIST'S CONTEXT.

LET ME ASK YOU THIS. IS YOUR NEGATIVE HIRING DIFFERENT -- WOULD IT BE DIFFERENT BY REASON OF THE SEXUAL COMPONENT THAN IF YOU WERE ALLEGING THAT THERE WAS AN AUTOMOBILE COMPONENT OF THIS EMPLOYEE, CHURCH EMPLOYEE'S WORK, WHERE HE HAD TO GO OUT AND PICK UP PARISHIONERS, CENTER CITIZENS, AND BRING THEM TO THE CHURCH, AND EVERYONE KNEW THAT, AND YET HE HAD FOUR DUI'S. WOULD THERE BE A DIFFERENCE IN THAT TYPE OF NEGATIVE HIRING AGAINST A CHURCH THAN THIS ALLEGATION?

I THINK THAT THE NEGATIVE HIRING IS ESSENTIALLY THE SAME AS THE NEGATIVE HIRING OF A BUS DRIVER WITH A LONG HISTORY OF DWI'S. I THINK THEY ARE VERY PARALLEL, AND THE ENTIRE THRUST OF OUR ARGUMENT IS NEITHER IS PROTECTED BY THE FIRST AN AMENDMENT.

JUST TO FOLLOW UP ON THE QUESTION, IS IT YOUR CONTENTION THAT THE NEGATIVE HIRING WOULD BE THE SAME ONE OF INTENT AS IF THERE WERE AN ADULT PARISHIONER AND A MINISTER? IT WAS A CHILD, AND THE UNDERLYING CLAIM WAS CHILD ABUSE. WOULD THE ESSENTIAL INQUIRY AS TO THE NEGLIGENCE OF THE CHURCH BE THE SAME?

I BELIEVE IT WOULD BE IDENTICAL.

DO YOU READ THE FOURTH DISTRICT CASE AS SAYING THAT THEY WOULD ALLOW A NEGATIVE HIRING CASE, IF THE UNDERLYING TORT WAS CHILD SEX ABUSE?

THAT IS THE IMPLICATION OF THE DECISION.

BUT YOUR ARGUMENT WOULD BE -- IF IT IS THE SAME ANALYSIS, THEN THE DISTINCTION, REALLY, AS FAR AS THE ENTANGLE MEANT, IT IS THE SAME EXACT ENTANGLE MEANT THAT IS GOING ON, IF THERE IS ONE.

EXACTLY. I AM SORRY. I DIDN'T MEAN TO INTERRUPT YOU.

THE CRIMINAL NATURAL SDITION IS REALLY -- THE CRIMINALITY DISTINCTION IS REALLY NOT THE APPROPRIATE PLACES TO DRAW THE DISTINCTION FOR THE ANALYSIS?

I JUST WANT TO UNDERSTAND HERE. THE UNDERLYING TORT HERE, SO WE MAKE SURE WE HAVE AN UNDERLYING TORT. WHAT IS THE UNDERLYING TORT, IF THE PARISHIONER IS JUST SUING THE MINISTER? WHAT IS SHE SUING FOR?

THE MINISTER HAS COMMITTED BREACHES OF FIDUCIARY DUTY, AND THOSE ARE ALLEGED AGAINST THE MINISTER AND AGAINST THE CHURCH. THE BREACH OF FIDUCIARY DUTY AND ENGAGING IN SEXUAL CONDUCT WITH HER, IN THE CONTEXT OF THIS COUNSELING RELATIONSHIP.

ALL RIGHT. THAT -- THAT IS A RECOGNIZED TORT?

BREACH OF FIDUCIARY DUTY? IT IS. WHETHER THE USE OF IT, THE BREACH OF FIDUCIARY DUTY CONCEPT, IN THIS CONTEXT, HAS BEEN RECOGNIZED, FOR EXAMPLE, BY THE COLORADO SUPREME COURT, IN THE MOSES CASE, WHICH WE CITED IN OUR BRIEF, AND SOME OTHER COURTS. FG VERSUS McDONALD, NEW JERSEY, ALSO, WAS A BREACH OF FIDUCIARY DUTY CASE, WHERE THEY HELD THAT THERE WAS BREACH OF FIDUCIARY DUTY. ALSO THERE WAS NEGLIGENCE INVOLVED HERE, NEGLIGENCE ON THE PART OF THE PASTOR, IN HIS, IN ALLOWING HIMSELF TO BECOME INVOLVED WITH THIS PERSON WHO HE WAS COUNSELING.

WE ARE NOT DEALING WITH AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, THEN. WE ARE TALKING ABOUT NEGATIVE HIRE SOMETHING.

WE ALONG THAT IT WAS INTENTIONAL IN OUR THIRD CAUSE OF ACTION, THE OUTRAGE CAUSE OF ACTION, BUT THE COURT FOUND THAT THAT DIDN'T STATE THE CAUSE OF ACTION FOR THE HIGH

STANDARD OF WHAT REALLY WAS INFLICTION OF EMOTIONAL DISTRESS.

INTENTIONAL. YOU SAY YOU CAN GET AROUND THE IMPACT RULE?

WELL, THE SAME WAY THAT A CAUSE OF ACTION FOR NEGLIGENCE OR BREACH OF FIDUCIARY DUTY AGAINST A PSYCHOLOGIST OR A PSYCHIATRIST WHO HAS A PATIENT GETS AROUND THE IMPACT RULE.

ARE THERE ANY FLORIDA CASES ON THAT?

AS I SAID, I CAN GIVE YOU A CITATION, WHEN I COME BACK FOR REBUTTAL, THAT CITES A WHOLE LINE OF APPROVAL FOR THE JURISDICTION EFFECT.

DO THAT SO YOUR OPPONENT HAS A CHANCE TO SEE THAT, BUT YOU SEE WE ARE ALL CONCERNED WITH SORT OF THE SAME THING, AND THAT IS THAT THERE SHOULD BE A PARALLEL TRACK OVER HERE, WITH REFERENCE TO THE LAW, FOR NONRELIGIOUS ORGANIZATIONS, ALL RIGHT, AND SO YOU ARE SAYING THE LAW IS THAT, IF YOU HAD A COUNSELOR THAT SET UP BUSINESS AS A COUNSELOR, AND THERE IS A BUSINESS THAT HIRES COUNSELORS AND DOES THIS, THAT, IF THE INDIVIDUAL COUNSELOR ENDED UP IN A SEXUAL RELATIONSHIP WITH THE PATIENT, THAT THAT WOULD CONSTITUTE A TORT. THE TORT, AND YOU SAY IT IS BROADLY CLASSIFIED AS BREACH OF A FIDUCIARY DUTY. -- OF A FIDUCIARY DUTY. THAT IS A BROAD CONCEPT HERE. BUT YOU SAY THAT THERE HIS CASE LAW OUT THERE THAT FLORIDA RECOGNIZES THIS TORT, AND THAT IN ADDITION TO THAT, THAT IF IT OCCURRED IN THE PRIVATE CONTEXT, THAT IF THE BUSINESS THAT HIRED THE COUNSELOR, ALSO, KNEW THAT THE COUNSELOR, IN A PREVIOUS JOB HAD HAD A SEXUAL RELATIONSHIP WITH A PATIENT OR A CLIENT, THAT THAT, THEN, WOULD CONSTITUTE NEGATIVE HIRING.

THAT'S RIGHT.

SO THAT -- HAVE YOU CITED THESE CASES IN YOUR BRIEF? IN OTHER WORDS FOR THIS PARALLEL TRACK, ESTABLISHING THAT, IF THIS OCCURRED WITH A PRIVATE ENTITY, THAT THERE WOULD BE A TORT AGAINST THE INDIVIDUAL AND THERE WOULD BE THE TORT AGAINST THE COMPANY?

OKAY. THE CASE WHICH I CAN CITE TO THE COURT, I BELIEVE, IS A FIFTH DCA CASE, WAS CITED AT THE FOURTH DISTRICT LEVEL, BUT NOBODY HAS EVER THOUGHT IT WAS CONTROVERSIAL THAT WE STATED A CAUSE OF ACTION.

IS THE FIFTH DISTRICT CASE THE ONE THAT TALKS ABOUT IF IT RISES TO THE LEVEL OF CRIMINAL CONDUCT?

NO. NO. THIS IS A DIFFERENT CASE. A CASE THAT REALLY DID INVOLVE A SUIT, I BELIEVE, AGAINST PSYCHOTHERAPISTS FOR ENGAGING IN SEXUAL MISCONDUCT. AT LEAST IT CITES IT IN DICTA, THIS LINE OF CASES, AND I OMITTED IT FROM MY BRIEF HERE, BECAUSE NOBODY STATED THAT THEY THOUGHT IT WAS CONTROVERSIAL. THIS CASE HAS ALWAYS BEEN, AT EVERY LEVEL AND IF YOU LOOK AT THE BRIEFS, ABOUT WHETHER THIS AMENDMENT BARS IT, BARS THE CAUSE OF ACTION WHICH EXISTS.

LET'S MOVE OVER TO THE INVOLVEMENT WITH RELIGION THEN.

ALL RIGHT.

AND SO WHY DOESN'T THIS INVOLVE, IF WE ARE GOING TO EVALUATE AND DETERMINE WHETHER OR NOT THERE IS LIABILITY, WITH REFERENCE TO FIRST OF ALL THE INDIVIDUAL MINISTER BUT, ALSO, WITH REFERENCE TO THE CHURCH, ITSELF, IN TERMS OF ITS SELECTION OF MINISTERS AND ASSIGNMENTS OF MINISTERS, THAT HOW CAN YOU NOT, THEN, GET INVOLVED WITH THE

RELIGIOUS PART OF THIS, IN TERMS OF THEIR DECISION-MAKING OF WHO THEY ARE GOING TO SELECT AS THEIR MINISTER, AND WHAT DUTIES THAT MINISTER IS GOING TO HAVE? AREN'T THE TWO IN SEPARABLE, IN TERMS OF THEIR DECISION-MAKING AND JUDGMENTS THAT THEY HAVE TO MAKE, ABOUT SELECTION OF MINISTERS, AND THEN ASSIGNMENTS OF THEM?

WELL, THE ARGUMENT IS FIRST OF ALL LET'S LOOK AT WHAT THE TEST REALLY IS. THE TEST, UNDER THE AGOSTINI VERSUS FELT ONE CASE, IS WHETHER THE PRIMARY PURPOSE OF THIS OR PRINCIPLE EFFECT OF WHATEVER LAW WE ARE TALKING ABOUT IS RELIGION. CLEARLY THAT IS NOT THE CASE HERE, AND THERE IS NO PRIOR ENDANGHE WILL MEANT, AND THAT IS UNDERSTOOD -- THE ENTANGLE MEANT, AND THAT IS UNDERSTOOD PRIOR TO AGOSTINI. THAT RESTS THE ENTANGLE MEANT OPINION UPON WHICH THIS RESTS.

CERTAINLY IF YOU TAKE THIS TO A SOFTER LEVEL, IT WOULD CERTAINLY BECOME INVOLVED WITH THE ANALYSIS OF THE DECISION-MAKING OF THE PARTICULAR DENOMINATION. FOR EXAMPLE, IF WE SAY YOU HAVE A CAUSE OF ACTION FOR NEGATIVE COUNSELING, THEN, FOR EXAMPLE, IF YOU HAVE A SITUATION WHERE ONE SEEKS COUNSELING THROUGH A CHURCH AND THE ADVICE IS MAYBE YOU SHOULD LEAVE THAT MARRIAGE, AND THERE IS A DIVORCE, AND THEN SOMEONE WANTS TO FILE AN ACTION AGAINST THE MINISTER, BECAUSE THAT IS THE ADVICE GIVEN, IS THAT DIFFERENT FROM WHAT WE ARE TALKING ABOUT HERE? BECAUSE THEN YOU GET INTO THE VALUES OF THE INSTITUTION, ITSELF, SO IS THERE A LINE SOMEPLACE THAT NEEDS TO BE DRAWN?

YEAH. I THINK THERE IS A LINE THAT NEEDS TO BE DRAWN, SIMPLY BETWEEN BAD SPIRITUAL ADVICE ON THE ONE HAND AND SEXUAL MISCONDUCT ON THE OTHER, AND THAT IS THE LINE THAT THE COURTS HAVE DRAWN. THEY HAVE SAID THAT, IN THE CONTEXT OF OF SEXUAL MISCONDUCT, WE ARE NOT GOING TO LET YOU HIDE BEHIND THE ARGUMENT THAT, WELL, THIS IS JUST A CLERGY MALPRACTICE CASE IN SHEEP'S CLOTHING. THAT IS THE LINE. I SHOULD BRING TO THIS COURT'S --

WHAT IS THE LINE?

WELL, THE LINE IS THAT SEXUAL MISCONDUCT IS DIFFERENT THAN SPIRITUAL ADVICE.

SO THE LINE HAS TO DO WITH SEXUAL CONDUCT?

MISCONDUCT, YES.

SO IF THE CHURCH, FOR INSTANCE, CONSIDERED WHETHER OR NOT THEY ARE GOING TO HAVE A POLICY WITH REFERENCE TO WHETHER THEY KNEW THAT A PARTICULAR MINISTER WAS ALLEGED TO BE A HOMOSEXUAL, AND THEY SAID, WELL, ARE WE TAKING A RISK, NOW, UNDER THIS LAW FROM THE FLORIDA SUPREME COURT, IF WE HIRE THIS MINISTER TO SERVE OUR PARISH? IS THAT MINISTER GOING TO END UP GETTING INVOLVED IN HOMOSEXUAL RELATIONSHIPS WITH THE PARISHIONERS, AND ARE WE, THEN, IF THERE IS A FALLING OUT IN THAT RELATIONSHIP, IS THE PARISHIONER GOING TO BE ABLE TO COME BACK, NOW, AND SAY WE SHOULD BE LIABLE, BECAUSE OF THIS BROKEN LOVE AFFAIR OR WHATEVER? AND THAT THIS CAUSED GREAT GRIEF TO THE PARISHIONER?

BUT IS THAT ANY DIFFERENT THAN THE CONTEXT OF, SAY, A PRIVATE KINDERGARTEN THAT HIRED SOMEBODY WHO HAD A HOMOSEXUAL BACKGROUND?

SO WHAT IS YOUR ANSWER TO THAT HYPOTHETICAL THAT I HAVE GIVEN YOU? YES, THE CHURCH WOULD BE RESPONSIBLE, IF THE MINISTER HAD A LOVE AFFAIR WITH ONE OF THE PARISHIONERS AND THE LOVE AFFAIR TURNED OUT TO BE A BROKEN AFFAIR, AND THE PARISHIONER HAD A NERVOUS BREAKDOWN?

THERE ARE TWO CONTEXTS IN WHICH I BELIEVE THAT THE CHURCH WOULD BE RESPONSIBLE. ONE, A MINISTER ENGAGING IN SEXUAL RELATIONSHIPS WITH AN ADULT, IN THE CONTEXT OF A COUNSELING, A FORMAL COUNSELING RELATIONSHIP, LIKE WE HAVE HERE, MARITAL COUNSELING, LET'S SAY, AND SECONDLY IF THE MINISTER ENGAGES IN SEX WITH A MINOR, WHO IS A MEMBER OF THE CHURCH AND MAY NOT BE --

DON'T MINISTERS ENGAGE IN INFORMAL COUNSELING CONSTANTLY? I MEAN, ISN'T THAT IN ESSENCE THEIR ROLE? THAT IS AS OPPOSED TO SORT OF A FORMAL? ISN'T THAT WHAT THEY ARE DOING, WHEN THEY STAND OUTSIDE THE CHURCH AND TALK TO THE PARISHIONERS AS THEY COME OUT?

THAT IS WHY I DRAW THE FORM ALAN INFORMAL DISTINCTION. THIS WAS H.AL COUNSELING. WE - - THIS WAS INFORMAL COUNSELING. WE MEET EVERY TUESDAY.

WAS THERE A FEE PAID FOR THIS?

THERE WAS NO SEPARATE FEE PAID. AT LEAST THERE IS NO ALLEGATION TO THAT EFFECT, YOUR HONOR. IT WAS FORMAL COUNSELING, WHERE THE MINISTER CONTROLS THE ENVIRONMENT, WHERE THERE IS AN UNILATERAL SELF REVELATION, AS IS TYPICAL OF COUNSELING RELATIONSHIPS, WHERE YOU HAVE THE SAME ELEMENTS OF CONFIDENTIALITY, WHERE THERE ARE ELEMENTS IN MARITAL COUNSELING THAT A SECULAR COUNSELOR WOULD PROVIDE.

SO THERE WOULD BE NO LIABILITY IN THIS SITUATION, IF THERE HAD JUST BEEN AN AFFAIR BETWEEN THE MINISTER AND THE PARISHIONER.

I AGREE.

EVEN THOUGH THE CHURCH KNEW THAT THIS PARTICULAR MINISTER, IN PREVIOUS ASSIGNMENTS, HAD HAD UNHAPPY AFFAIRS? THERE WOULD BE NO --

I AGREE. IF THIS WAS, AS I SAID, IF THIS WAS JUST SOMETHING THAT AROSE OVER A POT LUCK SUPER, THAT IS NOT ACTIONABLE, AND NOBODY HAS CLAIMED THAT IT IS.

CAN WE REMOVE IT FROM THE SEXUAL CONTEXT FOR A MINUTE, AND LET'S SAY IT WAS KNOWN THAT THIS MINISTER HAD A VIOLENT TEMPER AND HAD ATTACKED SEVERAL PARISHIONERS AT HIS PREVIOUS CHURCH. IS YOUR PRINCIPLE THE SAME THERE?

I BELIEVE IT IS. MAYBE HE SHOT A BUNCH OF PEOPLE, YOU KNOW, AND THEY SAID WE THOUGHT HE WOULD NEVER DO THAT AGAIN AND SO WE WENT AHEAD AND HIRED HIM. ARGUABLY, TO BE FAIR TO THE FOURTH DISTRICT, THEY DRAW THIS CRIMINAL NATURAL DISTINCTION, BUT AS JUDGE PARIENTE SUGGESTED, THAT IS THE FIRST --

YOU ARE NOT SAYING THAT THE ONLY REASON THAT YOUR PRINCIPLE APPLIES IS BECAUSE OF THE DISCREET SEXUAL NATURE OF IT.

NO. I AM NOT SAYING IT IS DISCREET BECAUSE IT IS SEXUAL BUT BECAUSE IT IS INDEPENDENTLY ACTIONABLE, AS IT WOULD BE IN THE CONTEXT OF COUNSELING, AND THERE IS NO IMMUNITY, BECAUSE YOU ARE NOT DEALING, HERE, WITH THE TYPE OF THING WHICH JUDGE ANSTEAD WAS SUGGESTING, AT THE END OF THE DAVE I SEE I AM IN REBUTTAL, SO I WILL RESERVE THE BALANCE OF MY TIME. THANK YOU.

MAY IT PLEASE THE SUPREME COURT. MY NAME IS DAVID RUTHERFORD, AND I AM HERE TODAY ON BEHALF OF THE CHURCH OF THE HOLY REDEEMER, THE DIOCESE OF SOUTH FLORIDA,.

DO YOU AGREE THAT, IF THE PERSON HAD BEEN A MINOR, THAT THERE WOULD NOBODY

IMMUNITY FOR THE CHURCH, IF THE ULTIMATE DECISION WAS THAT THERE WAS NEGLIGENCE IN THE HIRING AND PLACEMENT OF THAT PERSON?

WELL, WHAT WE ARE REALLY HERE TALKING ABOUT TODAY IS NOT THE CAUSE OF ACTION AGAINST THE INDIVIDUAL PRIEST, WHO MAY HAVE DONE THIS OR THAT. WHAT WE ARE TALKING ABOUT IS THE HIRING PROCESS.

I UNDERSTAND. BUT I AM ASKING YOU IF THE UNDERLYING MISCONDUCT WAS, RATHER THAN SEXUAL, INAPPROPRIATE SEXUAL CONDUCT WITH AN ADULT, IN THE COURSE OF A COUNSELING RELATIONSHIP, WAS INAPPROPRIATE ABUSE, CRIMINAL CHILD ABUSE, AND THE CHURCH WAS BEING SUED FOR NEGLIGENCE OF THAT PERSON, DOES THE FIRST -- IS IT YOUR CONTENTION THE FIRST AMENDMENT WOULD SHIELD THE CHURCH FROM LIABILITY FOR NEGLIGENCE?

YES, I DO, BECAUSE I THINK THE CONCERNS ARE THE SAME.

SO YOU DON'T -- SO YOU DON'T BUY THIS CRIMINAL NATURAL DISTINCTION, EITHER.

WELL, I DON'T THINK THAT IT DOES APPLY. I KNOW THE FIFTH DISTRICT COURT OF APPEAL HAS DRAWN THAT DISTINCTION, AND YOU CAN MAKE THE ARGUMENT THAT THAT IS, IF YOU WILL, A COMPELLING INTEREST THAT MIGHT OVERRIDE SOME OF THE RELIGIOUS CONCERNS, BUT I THINK THAT WHAT WE ARE DOING, WHEN WE TRY AND TELL A CHURCH HOW TO HIRE SOMEONE IS REALLY ESTABLISH A STANDARD OF CARE.

WELL, SO, THEN, WOULD THE SAME APPLY, IF WE HAD THIS PERSON WHO IS TAKING CHILDREN ON AN OUTING AND, AGAIN, WHO WAS SOMEBODY THAT HAD BEEN KNOWN TO DRINK IN THE PAST AND HE WAS DRINKING AND HAD A TERRIBLE ACCIDENT AND THESE CHILDREN WERE KILLED, AND THE CHURCH KNEW THAT HE HAD PREVIOUSLY HAD THIS HISTORY, THE SAME THING AS THE FIRST AMENDMENT SHIELDS THE CHURCH FROM IMMUNITY FOR ANY KIND OF NEGLIGENCE OF OR PLACEMENT OF ITS PERSONNEL?

OF ITS CLERGY. YES.

-- OF ITS CLERGY. YES.

OF ITS CLERGY. SO WE DON'T HAVE TO WORRY ABOUT IF IT IS CHURCH ACTIVITY OR TRADITIONAL SECULAR ACTIVITY THAT IS GOING ON. THE IDEA IS THAT ANY INQUIRY INTO THE DECISION TO HIRE AND PLACE THAT PERSON DOES WHAT? IT ENTANGLES THE COURTS IN RELIGION? IS THAT IT? IS IT DECIDING AN ECCLESIASTIC DISPUTE? WHAT IS THE PRINCIPLE OF FOURTH AMENDMENT LAW THAT WOULD PLACE IMMUNITY ON CHURCHES FOR TORTIOUS CONDUCT AND, IN SOME CASES, GROSS MISCONDUCT THAT NO OTHER ENTITY WOULD ENJOY?

IT DOES ENTANGLE THE COURT IN RELIGION. WHAT IT DOES, AS I STARTED TO SAY BEFORE, IS SET A STANDARD. THIS IS WHAT THE REASONABLE CHURCH IS GOING TO DO. THIS IS WHAT THE REASONABLE BISHOP IS GOING TO DO, WHEN HE HIRES SOMEONE OR SUPERVISES SOMEONE, AND EVEN BEYOND THAT, IT MAY LEAD TO CHOOSING CERTAIN RELIGIONS OVER ANOTHER. FOR INSTANCE YOU MAY GET TO STANDARDS WHERE THE METHOD IS DO THIS BETTER THAN ANYONE. AND THAT IS THE STANDARD THAT THE EPISCOPALIANS OR CATH -- EPISCOPALIANS OR CATHOLICS SHOULD FOLLOW.

WHAT ABOUT THE COLORADO DECISION THAT SAID, BASICALLY, OF COURSE, WE ARE NOT HERE. WE DIDN'T GO THROUGH A TRIAL, SO WE DON'T KNOW HOW EXCESSIVELY THE COURTS GOT INVOLVED IN LOOKING AT THIS, BUT WHAT THE COLORADO SUPREME COURT SAYS IS, LOOK, LET'S CUT TO THE CHASE HERE. WHAT YOU ARE REALLY LOOKING AT IS A VERY DISCREET QUESTION. DID YOU KNOW THAT THIS PERSON HAD A HISTORY OF EITHER SEXUAL PREDILECTION WITH PARISHIONERS OR IN THE CASE AFTER MINISTER THAT ABUSED CHILDREN, DID YOU KNOW THAT

HE HAD DONE THAT IN THE PAST? OR IN THE CASE OF SOMEBODY WHO IS DRIVE AGO VEHICLE, DID YOU CHECK THAT? HOW DOES THAT GET INTO RELIGIOUS DOCTRINE IN ANY, OTHER THAN A SUPERFICIAL WAY?

I DON'T BELIEVE IT IS SUPERFICIAL, BUT OBVIOUSLY THERE IS A SPLIT OF AUTHORITY AROUND THE COUNTRY, AND COLORADO IS AT THE FAR EXTREME. AND WHAT HAS HAPPENED IN THE TRIALS IN COLORADO IS YOU HAVE HAD EXPERTS COME IN, AND EVALUATE THE ENTIRE HIRING PROCESS, AND SAY THIS PRIEST, YOU DIDN'T LOOK CLOSELY ENOUGH AT HIS PSYCHOLOGICALS, OR YOU DIDN'T CHECK THIS OR THAT, AND WHAT YOU HAVE HAD IS A STANDARD OF CARE FOR THE REASONABLE BISHOP OR THE REASONABLE CHURCH, HAS BEEN ESTABLISHED, AND THAT IS EXACTLY WHAT WE ARE TALKING ABOUT, IS ENTANGLING YOURSELF.

HOW DOES THAT DIFFER FROM WHAT YOU WOULD DO IN ANY OTHER NEGATIVE HIRING SITUATION? I AM HAVING A PROBLEM TRYING TO SEE HOW YOU HAVE TO DEAL WITH ANY RELIGIOUS TENET OF THE CHURCH, IN ORDER TO DETERMINE WHETHER OR NOT THERE WAS NEGATIVE HIRING.

THE CALLING -- YOU DON'T HIRE A MINISTER. MINISTERS ARE ORDAINED. THEY ARE CALLED.

YOU MEAN MINISTERS DON'T HAVE CONTRACTS, AND PEOPLE DON'T ADVERTISE AND HAVE THREE OR FOUR OR FIVE PEOPLE APPLY? THAT DOESN'T MANY IN A MINISTERIAL SET SOMETHING.

CERTAINLY I AM TALKING ABOUT THE ORDINATION PROCESS AFTER PRIEST. CERTAINLY AN INDIVIDUAL CHURCH MAY INTERVIEW FOUR OR FIVE PRIESTS AND CHOOSE AMONG ONE OF THOSE AS THE PERSON THEY HIRE, BUT WHAT YOU ARE, WHEN YOU ARE TALKING ABOUT IF YOU STEP BACK, YOU ARE TALKING ABOUT WHETHER THAT PERSON, PROBABLY, SHOULD HAVE BEEN ORDAINED AS A MINISTER.

I DON'T EVEN WANT TO TALK ABOUT WHETHER OR NOT THE PERSON SHOULD HAVE BEEN ORDAINED AS A MINISTER. WE ARE TALKING ABOUT WHETHER OR NOT THE CHURCH HAD ANY KNOWLEDGE OF PRIOR CONDUCT OF THIS PARTICULAR PERSON, BEFORE THEY WERE ALLOWED TO BE A PASTOR OR THE PRIEST OR WHATEVER, OF A PARTICULAR CHURCH.

UM-HUM.

AND HOW DOES THAT, JUST THAT NARROW QUESTION, ENTANGLE THE COURT IN RELIGION?

WELL, BECAUSE THERE IS MANY FACTORS THAT GO INTO HIRING A MINISTER, WHICH DON'T REALLY --

WOULD IT MAKE ANY DIFFERENCE, IF THE MINISTER HAD A CONTRACTOR NOT?

NO. I DON'T THINK SO, WHETHER THERE IS ACTUALLY A CONTRACTOR NOT, WOULD MATTER. RELIGIOUS COMMUNITY IS DIFFERENT THAN THE PRIVATE SECTOR. WHAT YOU ARE TRYING TO DO IS TAKE PRIVATE SECTOR IDEALS AND STANDARDS AND BRING THEM OVER TO THE RELIGIOUS COMMUNITY.

SO THE RELIGIOUS COMMUNITY SHARES AN ABSOLUTE IMMUNITY ON WHO IS THE PASTOR OR PRIEST OR WHOMEVER, THE HEAD OF THEIR CHURCH.

THE CHOOSING OF A MINISTER, I THINK, IS UNIQUELY RELIGIOUS, AND THE CASE LAW, I BELIEVE WE HAVE CITED IN OUR BRIEF, SHOWS THAT THAT IS A PROTECTED AREA.

BUT DON'T WE GET INTO THAT ENTANGLE MENT, BECAUSE WHO IS THE CHURCH? WE ARE GOING TO HAVE TO, THEN, ANSWER THE QUESTION. IT IS OBVIOUSLY NOT JUST CATHOLIC CHURCH THAT

WOULD GET THE BENEFIT OF SUCH A RULE. WE ARE GOING TO HAVE TO DEFINE WHO IS THE CHURCH. ISN'T THAT CORRECT? WHO IS A RELIGIOUS BODY? I MEAN ANYBODY THAT PRO CLAIMS THAT THEY ARE DOING SOMETHING IN THE NAME OF RELIGION, IS THAT WHO IS GOING TO GET THE BENEFIT OF THIS IMMUNITY?

THERE ARE MANY RELIGIONS. YEAH. IT IS NOT JUST MAINSTREAM RELIGIONS THAT HAVE THAT PROTECTION.

WELL, SO, WE JUST SAY ANYBODY THAT CLAIMS THAT THEY ARE A CHURCH, THEN THEY GET IMMUNITY.

NO. I THINK THERE IS A FUNDAMENTAL ANALYSIS OF WHETHER IT IS A RELIGIOUS ENTITY, AND IF IT IS A RELIGIOUS ENTITY AND YOU HAVE ESTABLISHED THAT, THEN I THINK THE COURT HAS TO GIVE DEFERENCE TO THAT.

WELL, HOW ABOUT A SITUATION, IF THIS WERE -- I DO HAVE TROUBLE WITH THE WAY THIS IS ALLEGED, BUT IF THIS WERE ALLEGED AS A MALPRACTICE CASE, ON BEHALF OF A PSYCHOLOGIST, AND IT WAS AT BAPTIST HOSPITAL, AS OPPOSED TO BAPTIST CHURCH, THAT THE HIGHERING OF SOMEONE THAT HAD A PROPENSITY FOR CHILD ABUSE OR SEXUAL MISCONDUCT, WOULD IT MAKE A DIFFERENCE THAT IT WAS AT THE HOSPITAL, RATHER THAN AT THE CHURCH?

CERTAINLY. PSYCHOTHERAPISTS, PSYCHOLOGISTS, ARE SUBJECT TO MALPRACTICE STANDARDS. THERE IS STANDARDS OF CARE. THE ISSUE OF CLERGY MALPRACTICE, BECAUSE THAT IS ESSENTIALLY IF YOU APPLY IT TO THE CHERGE I, WHAT YOU ARE ESSENTIALLY DOING IS GETTING A CLERGY MALPRACTICE ACTION IN EVERY COURT THAT HAS LOOKED AT THAT, AND SAID WE CANNOT DO. THAT WE CAN ESTABLISH STANDARDS OF CARE ON WHAT A REASONABLE CLERGYMAN SHOULD OR SHOULD NOT DO. THOSE STANDARDS OF CARE, HOWEVER, ARE IN SOCIETY FOR PSYCHOTHERAPISTS, FOR PSYCHIATRISTS, MENTAL HEALTH CARE PROVIDERS, AND THAT IS THE FUNDAMENTAL DIFFERENCE BETWEEN THOSE TWO.

SO NOT ONLY DOES THE CHURCH HAVE, THE CHURCH BODY HAVE AN IMMUNITY, BUT THE PERSON WHO IS DESIGNATED AS A PASTOR OR A PRIEST OR WHOMEVER, ALSO, ENJOYS IMMUNITY.

WELL, IN SOME RESPECTS. I MEAN FROM A CLERGY MALPRACTICE ACTION, YES. THERE ARE COURTS WHO HAVE FOUND, IN A STRICT --

WHAT DO YOU MEAN WHEN YOU SAY CLERGY MALPRACTICE?

I MEAN SOMEONE WHO ESTABLISH ES A REASONABLE STANDARD OF CARE ON WHAT A REASONABLE CLERGYMAN WOULD BE DOING?

ARE WE TALKING ABOUT WHAT A REASONABLE CLERGYMAN WOULD DO, OR ARE WE TALKING ABOUT WHAT A REASONABLE PERSON WOULD DO?

WHEN YOU ARE TALKING ABOUT CLERGY MALPRACTICE.

I AM NOT TALKING ABOUT CHRERMING I MALPRACTICE. IN THIS CONTEXT, IN THE CASE WE ARE TALKING ABOUT, WE ARE REALLY TALKING ABOUT IF YOU NATURAL JOOIS IT TO A COUNSELOR. - IN AN ANALAGIZE A COUNSELOR, AS TO WHAT A REASONABLE COUNSELOR WOULD DO.

MY POINT IS YOU CAN'T ANALAGIZE TO WHAT A REASONABLE PERSON WOULD DO OR A REASONABLE CLERGYMAN.

AND THAT IS BECAUSE?



IN THE BEGINNING, IF YOU HAD A DIVORCE SITUATION AND ONE SPOUSE CAME IN AND WANTED COUNSELING OR EVEN IN A LAW FIRM SITUATION, THEY CAME IN AND WANTED TO RETAIN YOU AS A LAWYER. YOU COULDN'T TAKE ON THE OTHER SPOUSE, BECAUSE YOU WOULD BE WORRIED ABOUT FIDUCIARY DUTIES AND WHERE YOUR LOYALTY WENT. IN A RELIGIOUS COMMUNITY, YOU HAVE GOT TO MINISTER TO EVERYBODY. YOU HAVE GOT TO MINISTER TO BOTH SIDES, CHILDREN, THE PARENTS, THE GRANDPARENTS. A RELIGIOUS COMMUNITY IS FUNDAMENTALLY DIFFERENT THAN A PRIVATE SETTING, AND YOU CAN'T TAKE RULES, YOU CAN'T TAKE STANDARDS THAT APPLY IN THE PRIVATE SETTING AND THEN TAKE IT OVER TO THE RELIGIOUS SECTOR.

BUT WHY CAN'T YOU, AS TO THIS VERY DISCREET AREA THAT WE ARE TALKING ABOUT, WHICH IS YOU DO NOT CONTEND, THE CHURCH DOES NOT CONTEND THAT HAVING SEXUAL RELATIONS WITH ITS PARISHIONERS WAS WITHIN THE RELIGIOUS DOCTRINE ESPOUSED BY THE CHURCH. CORRECT?

OF COURSE NOT.

I MEAN EVERYONE AGREES THIS WAS NOT SOMETHING THAT THEY WANTED TO HAVE HAPPEN IN A RELIGIOUS SETTING. IN FACT IT IS AS BAD, IF NOT WORSE, TO HAPPEN IN A RELIGIOUS SETTING THAN ANY OTHER SETTING.

CORRECT.

ALL RIGHT. SO WHAT IS THE TERMS OF THAT VALUE, IN TERMS OF LOOKING AT THAT RESPONSIBILITY AND LOADING THE CHURCH LIABILITY, IF THEY ARE NEGATIVE IN WHAT THEY DO, WHERE IS IT THAT THE TENETS THAT PUT THE FIRST AMENDMENT INTO THE CONSTITUTION, ARE COMPROMISED IN ANY REAL WAY? I AM NOT TALKING ABOUT A THEATRICAL WAY BUT IN ANY REAL WAY, AND ON THE FLIP SIDE, TO ALLOW THIS IMMUNITY, DOESN'T IT REALLY PROTECT RELIGION AND ELEVATE THOSE IN RELIGIOUS STATUS TO, REALLY, AN IMMUNITY FROM TORT US CONDUCT THAT -- TORTOUS CONDUCT THAT REALLY CAUSES HARM TO PEOPLE, ESPECIALLY IN THE SEX ABUSE SITUATION.

TO ANSWER THE SECOND PART OF YOUR QUESTION, I THINK IF THIS WAS TWO DULTHS IN SOCIETY, THERE WOULD BE NO CAUSE OF ACTION. IF THIS WAS TWO PEOPLE WHO WORKED TOGETHER IN THE WORKPLACE, THERE WOULD BE NO CAUSE OF ACTION.

NOW WE ARE TALKING ABOUT WHETHER -- NOW YOU ARE GOING TO WHETHER THERE IS AN UNDERLYING TORT ACTION.

BUT THAT IS WHERE IT STARTS.

BUT YOU HAVEN'T CHALLENGED THAT QUESTION, THAT THERE IS NOT -- THAT THERE IS A VALID TORT UNDERLYING THIS, AND SO WE HAVE GOT TO START WITH THAT ASSUMPTION, AND LET'S ASSUME IT IS SEX ABUSE AGAINST A CHILD, SO THAT WE DON'T HAVE ANY PROBLEM.

WHAT YOU ARE ESSENTIALLY TALKING ABOUT, WHEN YOU TALK ABOUT THE BAD PARTS OF SEXUAL ABUSE, IT WOULD BE ONE THING IF YOU WERE TRYING TO HOLD THEM VICARIOUSLY LIABLE FOR THOSE ACTS, BUT WHAT WE ARE REALLY FOCUSING ON, WHEN YOU SUE THE CHURCH OR THE DIOCESE FOR NEGATIVE HIRING, SUPERVISION, IT IS NOT THE ACTS, ITSELF. IT IS THE BEFORE THAT. IT IS THE HIGHERING PROCESS. IT IS THE SUPERVISION PROCESS. AND THOSE ARE THE THINGS THAT WE ARE SAYING ARE PROTECTED BY THE FIRST AMENDMENT, NOT THE ABILITY TO COMMIT SEXUAL ABUSE OR SOMETHING LIKE THAT. THAT IS TERRIBLE. THAT IS -- WE ARE NOT HERE, TODAY, FOR THAT. FATHER EVANS IS NOT AT ISSUE IN THIS APPEAL, SO WE ARE NOT LOOKING AT THAT CONDUCT. WHAT WE ARE LOOKING AT IS CONDUCT WHICH TAKES PLACE WAY BEFORE THAT, WHICH IS HIRING AND SUPERVISION. THOSE ARE THE AREAS, WHEN YOU LOOK AT

HIRING AND YOU ARE GOING TO TELL A CHURCH WHAT IT HAS TO DO TO HIRE AND WHAT IT HAS TO LOOK AT, THERE IS CONCEPTS THAT COME IN RELIGIOUS CONCEPTS THAT A CHURCH MAY THINK IS IMPORTANT BUT THE PRIVATE SECTOR MAY NOT THINK IS IMPORTANT, LIKE RECONCILIATION. THERE MAY BE MANY REASONS WHY A CHURCH WOULD HIRE SOMEONE OR THINK THAT THEY WOULD BE A GOOD MINISTER THAT THE PRIVATE SECTOR MAY NOT THINK THAT, SO I THINK IT IS ALMOST APPLES AND ORANGES. AND THAT IS AN IMPORTANT POINT, IS THAT WE ARE NOT HERE, TODAY, TALKING ABOUT THE LIABILITY OF THE OFFENDING PRIEST, FATHER EVANS, AND WE ARE NOT HERE, TODAY, TALKING ABOUT A SITUATION WHERE YOU HAVE CHILD ABUSE. THIS CASE IS NOT ABOUT CHILD ABUSE, AND WHETHER THERE IS A COMPELLING INTEREST OR THERE IS SOMETHING THAT THE FIFTH DISTRICT COURT OF APPEAL FELT A LINE COULD BE DRAWN THERE, THAT IS NOT THE CASE BEFORE THIS COURT TODAY. THAT CASE MAY ARISE SOMETIME IN THE FUTURE. THIS IS A CASE ABOUT ADULT --

ARE YOU SAYING THAT THE CHURCH COULD HIRE A PERSON, KNOWING THAT THEY HAVE A CERTAIN PROPENSITY FOR MOLESTING PEOPLE, MOLESTING CHILDREN, LET'S SAY, AND PLACE THEM IN A POSITION WHERE THEY ARE GOING TO BE THROWN IN CONTACT WITH THE YOUTH, IN A -- ON A DAILY BASIS, AND IN TIMES OF SECLUSION, WHEN THE TWO OF THEM WOULD JUST BE TOGETHER, AND THE CHURCH WOULD ENJOY AN ABSOLUTE IMMUNITY, DOING THAT? IS THAT YOUR POSITION? WELL, IN THEORY, OF COURSE, THAT SOUNDS TERRIBLE, BUT THE REALITY IS HOW DO YOU GO ABOUT DOING THAT? HOW DO YOU SET STANDARDS? HOW DO YOU DECIDE WHAT IS IMPORTANT IN HIRING AND NOT IMPORTANT IN HIRING? IF YOU HAVE A BRIGHT-LINE CASE, WHERE THERE WAS ACTUAL KNOWLEDGE BEFORE THEN, THAT MIGHT BE A SITUATION THAT THE COURT NEEDS TO ADDRESS AT SOME POINT. THAT IS NOT THE CASE WE HAVE HERE.

WELL, A CONGREGATION CAN GET TOGETHER, I WOULD ASSUME, AND HIRE ANY MINISTER THEY WANT TO, AND THEY COULD, ANY TYPE OF WORSHIP THEY WANT TO HAVE. BUT AREN'T YOU GOING INTO ANOTHER ARENA, WHEN YOU PUT THIS PERSON IN A POSITION WHERE HE CAN HARM? KNOWINGLY PUT THIS PERSON IN A POSITION WHERE HE CAN HARM OTHER PEOPLE? ISN'T THIS ANOTHER OVERLAY THAT HAS MOVED IT AWAY FROM STRICTLY THE RELIGIOUS CONTEXT AT THAT POINT?

EXCEPT THERE IS THE BRIGHT-LINE PROBLEM, THE SLIPPERY SLOPE. WHILE YOU CAN GIVE A BRIGHT-LINE CASE, WHERE IT IS CONCEDED EVERYBODY KNEW, WHAT ABOUT THE CASE WHERE IT IS CONTESTED THAT THEY KNEW OR DIDN'T KNOW. THEN WE ARE GOING TO GET INTO QUALIFICATIONS COURSES THEY WERE TAUGHT IN SEMINARY, ALL KINDS OF -- WHERE DO YOU DRAW THAT LINE? AND I DON'T THINK IT IS AN EASY LINE TO DRAW. I DON'T THINK YOU CAN DRAW THE LINE, OTHER THAN TO SAY THAT THE COURTS CAN'T BE INVOLVED IN THE HIGHERING PROCESS FOR MINISTERS. THEY CAN'T BE INVOLVED IN THE SUPERVISION, TELL THE BISHOP HOW TO DO HIS JOB.

EVEN THOUGH THE CONDUCT, LET'S SAY IT IS INTENTIONAL. LET'S TAKE THE FAR POSITION, THE CHURCH KNOWS THAT THIS PERSON IS GOING TO HARM CHILDREN, AND MOLEST CHILDREN.

WELL, THEN, I THINK YOU GET INTO THE --

AND THIS IS SOME KIND OF CHURCH THAT BELIEVES INDEFINITE ILL WORSHIP AND HARMING -- IN DEVIL WORSHIP AND HARMING CHILDREN, AND THEY PUT THIS PERSON IN THE POSITION WHERE HE CAN HARM THE CHILDREN. THE CHURCH WOULD, THEN, STILL BE IMMUNE?

THEN YOU GET INTO THE CONCERNS THAT THE FIFTH DISTRICT COURT OF APPEAL HAD, WHICH IS THERE A COMPELLING INTEREST, SUCH AS PROTECTING CHILDREN FROM SOMETHING LIKE THAT, AND THE FIFTH DISTRICT COURT OF APPEAL HAS COME DOWN TO SAY THAT IS SOMETHING WHERE THEY WOULD DRAW THE LINE. THAT ISSUE WASN'T BEFORE THE FOURTH DISTRICT.

WELL, DO YOU THINK, IN YOUR POSITION, DO YOU FEEL THAT THE CHURCH WOULD BE IMMUNE

UNDER THAT LAST HYPOTHETICAL?

I THINK THAT, IF YOU HAVE A BRIGHT-LINE CERTAINTY LIKE YOU ARE TALKING ABOUT, IT IS HARD TO SAY THAT THEY SHOULD ENJOY IMMUNITY FOR THAT, BUT THE PROBLEM IS ONCE YOU SAY THAT, YOU HAVE ALREADY STARTED GOING DOWN THE SLIPPERY SLOPE.

SOMEBODY HAS TO SAY IT, DON'T THEY, AT A CERTAIN POINT, OR THE CHURCH WOULD ENJOY THE IMMUNITY?

WELL, AGAIN, WHERE IS THE LINE DRAWN THEN? I DON'T THINK YOU CAN DRAW A LINE, OTHER THAN TO SAY YOU CAN'T BE INVOLVED IN IT.

THE COURTS HAVE THAT DISTASTEFUL DUTY.

AGAIN, IT IS A SLIPPERY SLOPE, AND I THINK THAT WHAT YOU WILL END UP DOING IS ESTABLISHING A STANDARD OF CARE.

ARE THESE COURTS ABOUT EQUALLY DIVIDED AROUND THE COUNTRY ON THE SLIPPERY SLOPE? SOME COURTS HAVE, I MEAN, HAVE THEY ALL SAID THAT THE CHURCH IS NOT IMMUNE, IF THE UNDERLYING CONDUCT IS FOR SEX ABUSE, OR ARE THEY ALSO DIVIDED ON THATISH QLU?

THEY ARE DIVIDED ON THAT.

IS THERE A MINORITY, MAJORITY VIEW? IS ANY OF THIS HEADED UP TO THE SUPREME COURT? WHAT IS THE STAT NEWS IS.

I DON'T THINK THAT VERY ISSUE IS HEADED UP YET, BUT THERE IS A CLEAR SPLIT OF AUTHORITY, AND THERE IS, ALSO, THE SPLIT OF AUTHORITY ON WHAT CAUSES OF ACTION YOU COULD BE INVOLVED IN, BECAUSE THERE HAVE BEEN SOME COURTS WHO HAVE SAID WE CAN'T LOOK AT NEGATIVE HIRING BUT WE CAN LOOK AT ANOTHER CAUSE OF ACTION. SOME COURTS HAVE LOOKED AT BREACH OF FIDUCIARY DUTY, BUT ONLY IN THE STRICT BREACH OF FIDUCIARY CONTEXT, WHICH IS WAS THERE A TRUST ESTABLISHED, AND WAS --

AND THAT IS WHAT MR. ELLISON IS SAYING AS TO THIS CASE. HE IS SAYING THAT THERE WOULD BE HAVE TO BE THE RELATIONSHIP OF COUNSELING ESTABLISHED, BEFORE THIS PARTICULAR SITUATION WOULD GIVE RISE TO A NEGATIVE HIRING. SO HE IS SUGGESTING A LIMIT FOR THIS TYPE OF SITUATION.

WELL, I THINK HE IS TAKING FIDUCIARY DUTY TO ANOTHER LEVEL. WE ARE NOT LOOKING AT THE FIDUCIARY RELATIONSHIP BETWEEN THE COUNSELOR AND THE COUNSEL'. WE ARE TRYING TO PLACE THIS -- AND THE COUNSELEE. WE ARE TRYING TO PLACE THIS RELATIONSHIP IN THE WHOLE CHURCH ASPECT AND TRUST IN THE ONE-ON-ONE RELATIONSHIP. I SEE MY TIME IS UP. THANK YOU.

THANK YOU. JUST TO FOLLOW UP ON JUSTICE PARIENTE'S QUESTION REGARDING THE UNITED STATES SUPREME COURT, I DO WANT TO POINT OUT THAT LAST WEDNESDAY THE UNITED STATES SUPREME COURT HEARD ORAL ARGUMENT IN MITCHELL VERSUS HOLMES, WHICH IS ANOTHER PAROCHIAL SCHOOL CASE, WHICH IS EXPECTED TO BE DEVELOPMENTAL ON WHAT LEMON VERSUS KIRKSMAN MEANS AFTER AGOSTINI, SO WE HAVE A DECISION IN THIS AREA IN THE SPRING.

DO YOU SEE THESE KINDS OF CASES -- I SEE THESE AS BEING VERY DIFFERENT THAN THE PAROCHIAL SCHOOL OR THE QUESTION OF FUNDING OF SCHOOLS. I GUESS THE STATEMENT THAT CAUGHT ME AS BEING SIMPLE IS HOW DOES THE FIRST AMENDMENT PROTECT RELIGIOUS ORGANIZATIONS' DECISIONS OF SOMEONE WHO IS LIKELY TO COMMIT A NEGATIVE OR TORTOUS

ACT, AND, REALLY, TO ME THAT IS JUST A SEPARATE INQUIRY AS TO HOW ENTANGLED YOU GET, THAT THESE OTHER -- AND THAT REALLY IS WHERE THE LINE IS. IF IT IS A TORTOUS ACT, AND IF IT IS A FORESEEABILITY TEST IS WHAT YOU ARE APPLYING.

I AGREE ENTIRELY. THE WHOLE REASON WE ARE EVEN TALKING ABOUT IT IS BECAUSE THEY HAD TO REACH OUT TO THIS VAGUE ENTANGLE MEANT CONCEPT AS IT EXISTED IN THE PAROCHIAL SCHOOL VERSUS KIRKSMAN TEST, BECAUSE THERE WAS CLEARLY NO EXERCISE TYPE RIGHT TO DO THIS. WHETHER YOU ARE TALKING ABOUT A FREE EXERCISE RIGHT TO COMMIT THE SEXUAL ABUSE OR A FREE EXERCISE RIGHT TO RECKLESSLY HIRE CLERICS. IT IS THE SAME, WHICHEVER WAY YOU LOOK AT IT. WHETHER YOU LOOK AT THE FREE EXERCISE CLAUSE OR YOU LOOK AT THE ESTABLISHMENT CLAUSE, NEUTRALITY IS THE BOTTOM LINE, AND SO I APPRECIATE JUSTICE ANSTEAD'S CONCERN ABOUT MAKING SURE THERE IS THAT DUAL TRACK OUT THERE, BECAUSE THAT REALLY IS THE QUESTION. APPLY THE LAW NEUTRALLY. THE FIRST AMENDMENT WAS INTENDED TO BE A SHIELD, NOT A SWORD. THEY WERE CONCERNED, THE FOUNDERS WERE, WITH MAKING SURE THAT WE DIDN'T DISCRIMINATE AGAINST THESE FOLKS BECAUSE THEY ARE RELIGIOUS, NOT ALLOWING THEM SOME SPECIAL IMMUNITY THAT THE REST OF US IN SOCIETY DO NOT ENJOY. I THINK ITCH USED -- I THINK I HAVE USED UP MY TIME. I WILL FILE THE SUPPLEMENTAL AUTHORITY, JUSTICE.

THANK YOU.