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Religious Organizations in Missouri Continue to Escape Liability in Negligence Actions Involving Abuse of Children Under the Guise of the First Amendment

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NOTE

Religious Organizations in Missouri Continue to Escape Liability in Negligence Actions Involving Abuse of Children Under the Guise of the First Amendment

Doe 122 v. Marianist Province of the U.S., 620 S.W.3d 73 (Mo. 2021) (en banc).

Rachel M. Taylor[*]

I. INTRODUCTION

"Church allowed abuse by priest for years" was the headline of the Boston Globe on Sunday, January 6, 2002.[1] Reporters at the Boston Globe exposed the truth about the horrendous decades of child sexual abuse at the hands of Catholic priests in the Boston area.[2] This story launched the Catholic Church's secrets into public view and helped unravel the pattern of abuse perpetuated by its leaders for decades.[3] The abuse, however, was not limited to the city of Boston—or even just the United States.[4] Claims

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[1] *Church allowed abuse by priest for years*, BOSTON GLOBE (Jan. 6, 2002 5:50 PM), https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html [https://perma.cc/B8UU-6KMQ].

[2] *Id.*

[3] *Id.*

[4] Agustin Geist, *In pope's homeland of Argentina, court jails powerful bishop for sex abuse*, REUTERS (Mar. 4, 2022 2:50 PM), https://www.reuters.com/world/americas/argentine-catholic-bishop-sentenced-4-12-years-jail-sex-abuse-trial-2022-03-04/ [https://perma.cc/K64Y-H85G] (Argentina); '*Now or never': Victims of Italy's predator priests urge inquiry*, FRANCE 24 (Feb. 15, 2022), https://www.france24.com/en/live-news/20220215-now-or-never-victims-of-italy-s-predator-priests-urge-inquiry-1 [https://perma.cc/D59U-CTWR] (Italy); *Spain's Ombudsman Set to Lead Probe Into Catholic Church Abuses*, U.S. NEWS & WORLD REPORT (Mar. 10, 2022),

of sexual abuse spanned the globe.[5] Thousands of priests have been accused, and the Catholic Church has paid almost $4 billion in lawsuits stemming from sexual abuse allegations.[6] Church officials often swept these abuse allegations under the rug and effectively allowed priests to continue abusing children for decades.[7] This represents a deeply-rooted systemic problem—church leaders protected priests and the image of the Catholic Church at the expense of children.[8] When allegations came to light, rather than hold abusers accountable for their actions, church leaders would simply move the abusers to another diocese where they could continue harming children.[9]

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https://www.usnews.com/news/world/articles/2022-03-10/spains-ombudsman-set-to-lead-probe-into-catholic-church-abuses (Spain); Claire Giangravé, *Munich report on sex abuse heightens Catholic Church divide over sexuality*, RELIGION NEWS SERV. (Feb. 15, 2022), https://religionnews.com/2022/02/15/munich-report-on-sex-abuse-heightens-catholic-church-divide-over-sexuality/ [https://perma.cc/G3K3-8CGX] (Germany); Jamey Keaton, *Swiss Catholic church orders study of past sexual abuse*, ABC NEWS (Dec. 6, 2021 2:07 PM), https://abcnews.go.com/International/wireStory/swiss-catholic-church-orders-study-past-sexual-abuse-81589788 [https://perma.cc/GH7C-DPHP] (Switzerland); Monika Scislowska, *Polish church report lists sex abuse of over 300 children*, ABC NEWS (June 28, 2021 11:05 AM), https://abcnews.go.com/International/wireStory/polish-church-reports-recent-clergy-abuse-368-children-78532446 [https://perma.cc/FNM9-GP3R] (Poland); Rachel Martin, *A report finds French clergy sexually abused over 300,000 children since 1950*, NPR (Oct. 6, 2021 5:03 AM), https://www.npr.org/2021/10/06/1043600164/a-report-finds-french-clergy-sexually-abused-over-300-000-children-since-1950 [https://perma.cc/5D7D-6YMJ] (France); *Portugal: Church sex abuse panel unearths more than 200 cases*, ALJAZEERA (Feb. 10, 2022), https://www.aljazeera.com/news/2022/2/10/portugal-church-sex-abuse-panel-unearths-over-200-cases [https://perma.cc/GB9S-W2UP] (Portugal).

[5] *See About 333,000 children were abused within France's Catholic Church, a report finds*, NPR (Oct. 5, 2021 8:23 AM), https://www.npr.org/2021/10/05/1043302348/france-catholic-church-sexual-abuse-report-children [https://perma.cc/SY96-G5HZ]; Eva Corlett, *New Zealand's Catholic church admits 14% of clergy have been accused of abuse since 1950*, THE GUARDIAN (Feb. 1, 2022 12:51 AM), https://www.theguardian.com/world/2022/feb/01/new-zealands-catholic-church-admits-14-of-clergy-have-been-accused-of-abuse-since-1950 [https://perma.cc/T8L4-HBYL].

[6] Emily Zogbi, *The Catholic Church Has Paid Nearly $4 Billion Over Sexual Abuse Claims, Group says*, NEWSWEEK (Aug. 25, 2018 1:27 PM), https://www.newsweek.com/over-3-billion-paid-lawsuits-catholic-church-over-sex-abuse-claims-1090753 [https://perma.cc/84QC-HFU8].

[7] Tara I. Burton, *The decades-long Catholic priest child sex abuse crisis, explained*, VOX (Sep. 4, 2018 7:10 AM), https://www.vox.com/2018/9/4/17767744/catholic-child-clerical-sex-abuse-priest-pope-francis-crisis-explained [https://perma.cc/H79W-BDGH].

[8] *Id.*

[9] *Id.*

The Supreme Court of Missouri confronted the atrocities of the Catholic Church in *Doe 122 v. Marianist Province of the U.S.*[10] A former student of Chaminade College Preparatory School ("the High School") in St. Louis, Missouri was sexually abused by a priest who worked at the High School.[11] The student filed suit against the High School and the Marianist Province of the United States ("the Marianist Province") claiming six counts including negligent supervision and negligent failure to supervise children.[12] In a previous case—*Gibson v. Brewer*—the Supreme Court of Missouri held that claims of negligent supervision, hiring, ordination, and retention against religious entities were barred by the First Amendment due to excessive entanglement between church and state.[13] The *Doe 122* court refused to overturn this precedent and upheld the dismissal of Doe's claims.[14]

Not all victims of abuse share their experience. And those who do come forward must relive their trauma while seeking redress. This trauma is exacerbated when, like in *Doe 122*, victims are denied the right to confront their perpetrators on the basis of First Amendment violations. This Note will address the Supreme Court of Missouri's decision in *Doe 122 v. Marianist Province of the U.S.* and argue that it is time for Missouri to allow plaintiffs' recovery for negligence-based claims against religious organizations.

II. FACTS AND HOLDING

While Doe was a senior at Chaminade College Preparatory School in 1971, he was sexually abused by Brother John Woulfe ("Brother Woulfe").[15] Brother Woulfe was a Marianist brother and also Doe's counselor at the school.[16] During Doe's senior year, Brother Woulfe and Doe met eight to ten times.[17] These meetings, however, were not typical meetings between a counselor and student.[18] Brother Woulfe gave Doe Playboy magazines and cigarettes and encouraged Doe to masturbate while viewing the magazines.[19] At times, Brother Woulfe would also

[10] Doe 122 v. Marianist Province of the U.S., 620 S.W.3d 73, 76 (Mo. 2021) (en banc).

[11] *Id.*

[12] *Id.*

[13] Gibson v. Brewer, 952 S.W.2d 239, 246–47 (Mo. 1997).

[14] *Doe 122*, 620 S.W.3d at 79.

[15] *Id.* at 75.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

masturbate in front of Doe.[20] Eventually, Brother Woulfe touched Doe's penis, and in their last meeting, put his mouth on Doe's penis.[21]

Doe graduated from the High School and attempted to put the abuse behind him.[22] After 1973, Doe had no further memories of the abuse he endured at the hands of Brother Woulfe.[23] This lasted until 2012 when Doe received a letter from Father Solma, a priest at the Marianist Provincial.[24] The letter said the High School and the Marianist Province (together, "Chaminade") had received an allegation of sexual abuse against Brother Woulfe, and this revelation brought back the memories of Doe's abuse.[25]

Doe filed suit against Chaminade in November 2015 alleging six counts of tortious action.[26] Among the claims, Doe alleged negligent supervision and negligent failure to supervise children.[27] Following a period of discovery, Chaminade moved for summary judgment.[28] In March 2019, the circuit court granted the motion, finding that the Supreme Court of Missouri's decision in *Gibson v. Brewer* barred Doe's negligence-based claims.[29] Doe appealed, and the court of appeals transferred the case to the Supreme Court of Missouri pursuant to Missouri Rule of Civil Procedure 83.02.[30]

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[20] *Id.*

[21] *Id.* at 76.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* The statute of limitations for Doe's claims is five years. MO. REV. STAT. § 516.120 (2016). Under section 516.120 RSMo, the statute of limitations was tolled until Doe reached the age of 21. *Id.* Brief of Appellant at 49, Doe 122 v. Marianist Province of the U.S., 620 S.W.3d 73 (Mo. 2021) (en banc) (No. ED 107767). Once Doe turned 21, he did not have any memory of the sexual abuse. *Doe 122*, 620 S.W.3d at 79. And under section 516.100, "the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is *capable of ascertainment*." MO. REV. STAT. § 516.100 (emphasis added). Here, Doe argued he remembered the abuse for a couple of years but lost all memory of the abuse before he turned 21. *Doe 122 v. Marianist Province of U.S*, No. ED 107767, 2019 WL 7341484, at *2 (Mo. Ct. App. 2019). Doe asserted he had no memory of the abuse until 2021 when he received a letter from the Marianists about Woulfe's abuse of another student. *Id.*

[27] *Doe 122*, 620 S.W.3d at 76.

[28] *Id.*

[29] *Id.* In *Gibson*, the Supreme Court of Missouri held claims of negligent hiring/ordination/retention against a religious entity violated the First Amendment's prohibition against state interference in religion. Gibson v. Brewer, 952 S.W.3d 239, 247 (Mo. 1997).

[30] *Id.* Missouri Supreme Court Rule 83.02 allows the court of appeals to order transfer to the Missouri Supreme Court for the purpose of reexamining existing law. MO. SUP. CT. R. 83.02.

On appeal, Doe argued that the circuit court erred in dismissing his negligence-based claims "because *Gibson* was wrongly decided."[31] Doe contended the *Gibson* decision was wrong because: (1) the duty to exercise reasonable care to supervise employees who work with children to prevent sexual abuse was a neutral principle of law regulating conduct rather than beliefs, which would not violate the First Amendment's Free Exercise Clause; and (2) the court's decision in *Gibson* created a "privileged class of religious employers," and as such, *Gibson* violated the First Amendment's Establishment Clause.[32]

After expressing the importance of honoring precedent and the absence of guidance from the United States Supreme Court, the *Doe 122* court refused to overturn its decision in *Gibson*.[33] Thus, it held that the First Amendment barred Doe's negligent supervision and negligent failure to supervise children claims.[34]

III. LEGAL BACKGROUND

The Free Exercise and Establishment Clauses of the First Amendment state, "Congress shall make no law *respecting an establishment of religion, or prohibiting the free exercise thereof*."[35] Generally, victims of sexual abuse may pursue remedies under theories of negligent hiring, retaining, and supervising.[36] However, various interpretations of the Free Exercise and Establishment Clauses often prevent plaintiffs from pursuing those claims against religious officials.[37] In some jurisdictions—as held in *Gibson v. Brewer*—courts allow religious organizations to use this language to shield themselves from liability in sexual abuse cases.[38] Because negligence claims against a religious entity or its clergy require courts to determine whether the

[31] *Doe 122*, 620 S.W.3d at 78.

[32] *Id.* at 79.

[33] *Id.*

[34] *Id.* at 80–81.

[35] U.S. CONST. amend. I (emphasis added).

[36] Morgan Fife, *Predator in the Primary: Applying the Tort of Negligent Hiring to Volunteers in Religious Organizations*, 2006 B.Y.U. L. REV. 569, 569–70 (2006).

[37] *See* L.L.N. v. Clauder, 563 N.W.2d 434, 445 (1997). *But see* Turner v. Roman Catholic Diocese of Burlington, 987 A.2d 960, 973–74 (2009); Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1229–34 (Miss. 2005); Malicki v. Doe, 814 So. 2d 347, 360 (Fla. 2002); Bear Valley Church of Christ v. Debose, 928 P.2d 1315, 1323 (Colo. 1996) (en banc).

[38] *See* L.L.N. v. Clauder, 563 N.W.2d 434, 445 (1997). *But see* Turner v. Roman Catholic Diocese of Burlington, 987 A.2d 960, 973–74 (2009); Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1229–34 (Miss. 2005); Malicki v. Doe, 814 So. 2d 347, 360 (Fla. 2002); Bear Valley Church of Christ v. Debose, 928 P.2d 1315, 1323 (Colo. 1996) (en banc).

defendant's actions were reasonable, there is concern that such analysis is effectively a conclusion about the reasonableness of a religious activity itself.[39] Thus, the Free Exercise and Establishment Clauses prohibit many negligence-based legal claims because they necessitate the resolution of religious questions.[40]

A. The Evolution of United States Supreme Court Case Law

The United States Supreme Court has held that the Free Exercise Clause prohibits government interference with religious beliefs and opinions.[41] The language of this clause, however, still requires compliance with valid and neutral laws.[42] Thus, to raise a free exercise claim, religious defendants must show that the conduct sought to be regulated is "rooted in religious belief."[43]

In *United States v. Reynolds*, the Court applied the Free Exercise Clause for the first time.[44] The Court was tasked with determining whether a law prohibiting polygamy in the Utah territory was unconstitutional when the practice of polygamy was part of religious belief in the Mormon Church.[45] The Court held that though the law "cannot interfere with mere religious belief and opinions," it may interfere with religious *practices*.[46] Thus, an individual could not avoid prosecution under the anti-polygamy statute merely by claiming a religious exemption.[47] Consequently, the Court recognized that the Free Exercise Clause contains two independent concepts: (1) the freedom to believe; and (2) the freedom to act.[48]

In *Employment Division, Department of Human Services of Oregon v. Smith*, the Court reiterated that the Free Exercise Clause does not insulate an individual from compliance 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)."[49] In *Smith*, plaintiffs

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[39] Jeffrey R. Anderson, et al., *The First Amendment: Churches Seeking Sanctuary for the Sins of the Fathers*, 31 FORDHAM URB. L.J. 617, 630 (2004).

[40] Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 219 (2000).

[41] Reynolds v. United States, 98 U.S. 145, 166 (1878).

[42] Emp. Div., Dep't. of Hum. Res. v. Smith, 494 U.S. 972, 879 (1990).

[43] Anderson, et al., *supra* note 39, at 620.

[44] *Id.*

[45] *Reynolds*, 98 U.S. at 166.

[46] *Id.*

[47] *Id*. at 166–67.

[48] Anderson, et al., *supra* note 39 at 620 (quoting Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940)).

[49] Emp. Div., Dep't. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 & n.3 (1982) (Stevens, J., concurring in judgment)).

were fired from their jobs because they ingested peyote for religious purposes as part of the Native American Church.[50] Oregon law prohibited the knowing or intentional possession of a controlled substance, and peyote fell under this classification.[51] The state of Oregon was permitted to deny unemployment benefits to people discharged from their jobs because of peyote use.[52] The Court held that the Oregon law did not violate the Free Exercise Clause because it was not an attempt to regulate religious beliefs.[53] Rather, the Court concluded the law was a neutral regulation of certain drug use that applied to all citizens equally, and therefore, it was constitutional under the First Amendment.[54]

Thirty years later in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court held that "requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision."[55] Thus, such state action violates the Free Exercise Clause by interfering with the "internal governance of the church" and depriving the church of control over the choice of those who will exemplify its beliefs.[56]

The Establishment Clause prevents the government from enacting laws that have the purpose or effect of promoting or restricting religion.[57] In *Lemon v. Kurtzman*, the Supreme Court held that a government cannot become excessively entangled with religion.[58] The Court explained that the Establishment Clause was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity."[59] However, since the Supreme Court of Missouri decided *Doe 122*, the United States Supreme Court handed down a decision—*Kennedy v. Bremerton School District*—expressing that the Court had abandoned *Lemon* long ago.[60] Instead, the Court reasoned, it had previously

[50] *Id.* at 874.

[51] *Id*.

[52] *Id*.

[53] *Id*. at 882.

[54] *Id*. at 880–82.

[55] Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171, 188 (2012).

[56] *Id*.

[57] Zelman v. Simmons-Harris, 536 U.S. 639, 648 (2002).

[58] Doe 122 v. Marianist Province of the U.S., 620 S.W.3d 73, 79 (Mo. 2021) (en banc) (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).

[59] *Lemon*, 403 U.S. at 612.

[60] 142 S. Ct. 2407, 2427 (2022). In *Kennedy*, a high school football coach was disciplined by the school district for praying at midfield after games. *Id*. at 2416–19. The coach sued, arguing the school district had violated his First Amendment rights. *Id.* at 2421. The Court ultimately held the coach's actions—engaging in quiet, brief, and personal religious observance—was protected by the First Amendment. *Id.* at 2433.

instructed that the Establishment Clause be interpreted through "reference to historical practices and understandings."[61] Consequently, lower courts must now evaluate Establishment Clause issues under the reasoning set forth in *Kennedy*—an analysis centered on "original meaning and history."[62]

B. The Influential Supreme Court of Missouri Precedent of Gibson v. Brewer

In *Gibson*, Catholic priest Father Brewer asked Michael Gibson and a friend to sleepover at the church rectory and watch movies.[63] Gibson claimed that Brewer "touched or fondled him in a sexual, offensive, and unwelcome manner" early in the morning.[64] Gibson's parents learned of the incident and reported Father Brewer's inappropriate actions to the diocese.[65] Diocese officials told Gibson's parents "this happens to young men all the time," and their son "would get over it."[66] The officials encouraged Gibson's parents to meet with Father Brewer to deal with the incident, but after the Gibsons learned of similar occurrences involving Brewer and other young boys, the Gibsons raised further concerns to the diocese.[67] The diocese ignored the Gibsons' complaints and told them they should "forgive and forget."[68] Ultimately, Brewer was removed from the diocese.[69] The Gibsons then filed suit against the diocese alleging nine counts including negligence-based claims for negligent hiring/ordination/retention and negligent failure to supervise.[70] The circuit court dismissed all claims against the diocese on two grounds: (1) failure to state a claim upon which relief could be granted; and (2) infringement of the defendant's First Amendment rights.[71]

On appeal, the Supreme Court of Missouri held that the Gibsons' negligence-based claims were barred by the Free Exercise Clause of the First Amendment.[72] The court stated, "[i]f neutral principles of law can

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[61] *Id.* at 2428.

[62] *Id.*

[63] Gibson v. Brewer, 952 S.W.2d 239, 243 (Mo. 1997).

[64] *Id.*

[65] *Id*. In the Catholic Church, a diocese is a territorial area supervised by a bishop. Dioceses are divided into parishes, which each have its own church. BRITANNICA, https://www.brittanica.com/topic/diocese [https://perma.cc/Z4V8-GF26] (last visited Apr. 14, 2022).

[66] *Gibson*, 952 S.W.2d at 243.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 243–44.

[71] *Id.* at 244.

[72] *Id.* at 247.

be applied without determining questions of religious doctrine, polity, and practice, then a court may impose liability."[73] However, with respect to negligent hiring claims, the court reasoned that "[q]uestions of hiring, ordaining, and retaining clergy . . . necessarily involve interpretation of religious doctrine, policy, and administration."[74] According to the court, inquiring into these practices would be "excessive entanglement" between church and state, which would inhibit religion and violate the First Amendment.[75] Thus, under this approach, if the judiciary were to examine the hiring, ordaining, and retaining of clergy, it would run the risk of approving one model for such practices over another—essentially, a judicial endorsement of religion.[76]

The Gibsons' claim of negligent failure to supervise was similarly barred to avoid the judicial enforcement of a religion.[77] The Gibsons argued the diocese "knew or reasonably should have known of prior sexual misconduct and/or a propensity to such conduct" by Brewer.[78] A negligent supervision claim requires a plaintiff to prove a master was under the duty to exercise reasonable care "so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them."[79] According to the court, a "reasonableness" analysis necessarily requires inquiry into what the church "should know," which consequently requires inquiry into religious doctrine.[80] As with the negligent hiring claim, this would constitute "excessive entanglement" of the judiciary and the church and effectively would cause the judiciary to endorse one model of supervision.[81]

C. Other Jurisdictions' Approach to Negligent Supervision in the Religious Sector

The Supreme Court of the United States has not yet addressed whether the First Amendment protects religious institutions from liability when a church agent or employee engages in tortious action against a

[73] *Id.* at 246.
[74] *Id.* at 246–47.
[75] *Id.* at 247.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*

third-party.[82] Without uniform guidance, states are divided on whether to recognize these types of claims.[83]

Many states allow recovery for negligent supervision, hiring, and retention claims against religious entities.[84] In *Malicki v. Doe*, the Florida Supreme Court addressed whether religious institutions could use the First Amendment to shield themselves from otherwise cognizable tort claims caused by the institution's agents and employees.[85] The specific issue before the court was whether the First Amendment barred the court's consideration of plaintiffs' claims of negligent hiring and negligent supervision against the church defendants based on the allegation that a Catholic priest had "fondled, molested, touched, abused, sexually assaulted and/or battered" a child and adult parishioners.[86]

The court rejected the argument that evaluating the "reasonableness" of a religious institution's hiring or supervision would "excessively entangle the civil courts in the internal workings of the church."[87] Rather, the court found that the church defendants had not claimed that the priest's actions were guided by sincerely held religious beliefs or practices.[88] Thus, the court reasoned the Free Exercise Clause was not involved because the behavior sought to be regulated was not grounded in religious belief.[89] The court neutrally applied principles of tort law to the religious organization the same way it would apply such principles to a non-religious entity.[90]

Similarly, the Supreme Court of Colorado held that the First Amendment was not a defense when a Catholic priest, serving as a marriage counselor, had an intimate relationship with one of his clients, which led to the dissolution of the clients' marriage.[91] Plaintiff alleged the diocese breached its duty to supervise the priest.[92] The court declared that the First Amendment did not preclude liability for negligent supervision because the priest's conduct did not fall within the practices or beliefs of

[82] Doe 122 v. Marianist Province of the U.S., 620 S.W.3d 73, 79 (Mo. 2021) (en banc).

[83] *See* Malicki v. Doe, 814 So. 2d 347, 361 (Fla. 2002).

[84] *See e.g.*, Turner v. Roman Cath. Diocese of Burlington, Vt., 186 Vt. 396 (2009); Roman Cath. Diocese of Jackson v. Morrison, 905 So. 2d 1213 (Miss. 2005) (en banc); Malicki v. Doe, 814 So. 2d 347 (Fla. 2002); Bear Valley Church of Christ v. Debose, 928 P.2d 1315 (Colo. 1996) (en banc).

[85] *Malicki*, 814 So. 2d at 353.

[86] *Id.* at 352.

[87] *Id.* at 360.

[88] *Id.* at 360–61.

[89] *Id.* at 361.

[90] *Id.*

[91] Destefano v. Grabrian, 763 P.2d 275, 283 (Colo. 1988) (en banc).

[92] *Id.* at 286.

the Catholic Church.[93] The court reiterated that the First Amendment cannot be used as protection and a basis for immunity from civil suit in all circumstances, and here, the alleged wrongdoing was clearly beyond the scope of the beliefs and doctrine of his religion.[94]

In *Roman Catholic Diocese of Jackson v. Morrison*, the Supreme Court of Mississippi refused to allow a similar First Amendment defense raised by a Catholic diocese.[95] In *Morrison*, the Morrisons learned their three children were abused by a Catholic priest.[96] When the Morrisons brought the allegations to diocese officials, they were told the priest was receiving treatment for his illness.[97] The diocese did not inform other parishioners about the allegations and permitted the priest to remain at the church for more than a year with unregulated access to the children.[98] During that time, the priest continued to abuse the Morrison children.[99] The priest was later moved to a different parish where he continued to abuse children until he left the priesthood about a year later.[100]

The Mississippi Supreme Court stated that plaintiffs' claim of negligent hiring, retention and supervision merely required a finding of duty, breach of duty, causation, and damage.[101] In declining to accept the diocese's First Amendment defense, the court reasoned that ecclesiastical principles could not dictate or propose "different requirements for the protection of children from sexual molestation[] than the requirements generally imposed by society."[102]

D. Stare Decisis

Historically, the United States Supreme Court has not often overturned its precedent. However, there are times when prior decisions no longer reflect good policy or have proved unworkable and, in those cases, the Supreme Court has overturned its decision. For example, in *Brown v. Board of Education*, the Supreme Court overturned *Plessy v. Ferguson* and held that racial segregation and the "separate but equal standard" gleaned from *Plessy* was unconstitutional.[103]

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[93] *Id.* at 284–88.

[94] *Id.* at 284.

[95] Roman Cath. Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1229–30 (Miss. 2005).

[96] *Id.* at 1220.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 1229.

[102] *Id.* at 1229–30.

[103] Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954).

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court considered whether to overturn *Roe v. Wade*.[104] The Court ultimately chose to uphold *Roe*, but in its analysis, the Court described four factors to consider when determining whether to overturn precedent:

> [W]hether *Roe's* central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe's* central rule a doctrinal anachronism discounted by society; and whether *Roe's* premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.[105]

Most recently, in *Dobbs v. Jackson Women's Health Organization*, the Court overturned *Roe v. Wade*.[106] The five factors the Court considered were: (1) the nature of the *Roe* Court's error; (2) the quality of the reasoning; (3) workability; (4) effect on other areas of law; and (5) reliance interests.[107]

The Supreme Court has utilized the factors discussed in *Casey* outside the abortion realm. In *Montejo v. Louisiana*, the Court applied these factors when it overruled a previous case which held that evidence obtained through interrogation after a defendant had invoked his or her right to counsel was inadmissible.[108] Justice Scalia, writing for the majority, stated, "[b]eyond workability, the relevant factors in deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake, and whether the decision was well reasoned."[109] The Court determined that overturning its prior caselaw would not "upset expectations" because the precedent was "only two decades old."[110]

IV. INSTANT DECISION

In *Doe 122 v. Marianist Province of the U.S.*, the Supreme Court of Missouri refused to overturn *Gibson v. Brewer* to allow Doe's negligence-

[104] Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 833–34 (1992).
[105] *Id.* at 855.
[106] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).
[107] *Id.* at 2265.
[108] Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009).
[109] *Id.*
[110] *Id.*

based claims against Chaminade to go forward.[111] Doe argued that under United States Supreme Court doctrine, the decision in *Gibson v. Brewe*r could not control.[112] Doe also claimed that the Free Exercise Clause did not apply in this case because Chaminade's actions were not based on religious belief.[113] Additionally, Doe contended this was an employment tort law case, and thus the law should "simply" be applied to Chaminade's conduct in endangering children just as the law would be applied to any other employer.[114]

In a footnote, the court stated that, "[u]nder the doctrine of stare decisis, a decision of this court should not be lightly overruled, particularly where, as here, the opinion has remained unchanged for many years."[115] However, the court also noted that stare decisis is not meant to prevent repudiation of a decision that is "clearly erroneous and manifestly wrong."[116] In cases with issues involving the United States Constitution, the court contended that it should not depart from a previous decision "simply because it disagrees with it," unless intervening United States Supreme Court precedent suggests the Supreme Court of Missouri was "clearly erroneous or manifestly wrong."[117]

The court acknowledged that "Doe's arguments [were] not without some persuasive force, as indicated by the weight of precedents from other states reaching the conclusion for which he advocate[d]."[118] The court even asserted that if it were "writing on a blank slate in this case," the result may be different than the one reached in *Gibson*.[119] However, the court expressed it was bound by its own decisions and the decisions of the United States Supreme Court—which the court urged did not repudiate *Gibson* or endorse a different result.[120] If anything, the court argued that subsequent United States Supreme Court decisions were *consistent with* the decision in *Gibson*.[121] The court reasoned that the decision in

[111] Doe 122 v. Marianist Province of the U.S., 620 S.W.3d 73, 80 (Mo. 2021) (en banc).

[112] Brief of Appellant at 14, Doe 122 v. Marianist Province of the U.S., 620 S.W.3d 73 (Mo. 2021) (en banc) (No. ED107767).

[113] *Id.* at 18–19.

[114] *Id.* at 21.

[115] Doe 122 v. Marianist Province of the U.S., 620 S.W.3d 73, 80 n.8 (Mo. 2021) (en banc) (quoting S.W. Bell Yellow Pages, Inc. v. Dir. of Revenue, 94 S.W.3d 388, 390 (Mo. 2002) (en banc)).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id*. at 79.

[121] *Id.* The court also discarded the examples from other state supreme courts allowing recovery from religious institutions for negligent hiring, retaining, and ordaining. *Id.* at 79–80.

Hosanna-Tabor—where the United States Supreme Court held that requiring a church to accept or retain an unwanted minister interfered with "internal governance of the church" and thus violated the Free Exercise Clause—aligned with the judgment in *Gibson*.[122] The court stated that overruling *Gibson* "simply because it might have been decided differently – or because decisions from other state courts have decided similar cases differently – reduces the principles of stare decisis to a doctrine of *mere convenience*."[123]

V. COMMENT

There are drastic public policy implications in barring claims against religious institutions for negligent hiring, ordaining, retaining, and supervising. The Supreme Court of Missouri could have addressed many of these public policy concerns with one correction: overturning *Gibson*. Not only was the decision to uphold *Gibson* not necessitated by United States Supreme Court precedent, but stare decisis factors speak in favor of overturning *Gibson*. Thus, this Note will argue that allowing negligence-based claims against religious organizations is in the best interest of protecting children and adjudication of such claims does not violate United States Supreme Court precedent.

A. Allowing Negligence-Based Claims is in the Best Interest of Public Policy to Protect Children

By barring plaintiffs from pursuing negligence-based claims against religious institutions, Missouri gives religious institutions privileges that are not available to similarly-situated entities.[124] Doe argued that *Gibson* effectively grants immunity to religious organizations.[125] The Supreme Court of Missouri contended that this argument was inaccurate because religious organizations *may* still be liable for claims based on intentional conduct—which does not require "impermissible examination of ecclesiastical decisions."[126] However, by limiting victims' recovery to intentional conduct, the court effectively grants at least partial immunity to religious institutions.

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[122] *Id.*

[123] *Id.* (emphasis added).

[124] Emma, *School Liability: Negligent Supervision in Schools*, LEARNSAFE (Apr. 29, 2021), https://learnsafe.com/school-liability-negligent-supervision-in-schools/ [https://perma.cc/SA2V-KJBD].

[125] *Doe 122*, 620 S.W.3d at 80.

[126] *Id.*

Many cases of sexual abuse by church officials and clergy involve repeated instances of child molestation.[127] In *Gibson*, the diocese's response to allegations of child sexual abuse was to "forgive and forget."[128] The diocese did not become outraged.[129] It did not immediately fire Father Brewer.[130] Instead, it allowed a sexual predator to continue working with children, knowing repeated acts of sexual abuse were likely to occur in the future.[131] Similarly, in the present case, Father Thomas Doyle—Doe's expert witness—testified in a deposition that Marianist leadership had notice of Brother Woulfe's sexual contact with children dating as far back as 1968.[132] This is clearly a systemic issue that the Catholic Church has allowed to persist for decades.[133]

B. United States Supreme Court Precedent Does Not Necessitate the Decision in Doe

In *Agostini v. Felton*, the United States Supreme Court held that a federally funded program in which public school teachers went to parochial schools to provide remedial education to disadvantaged children did not violate the Establishment Cause.[134] In *Gibson*, the Supreme Court of Missouri relied in part on *Agostini* when it asserted that "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."[135] However, the Mississippi Supreme Court pointed out in *Roman Catholic Diocese of Jackson v. Morrison* that the *Agostini* decision contains no mention of hiring, ordaining, or retaining clergy.[136] In fact, the *Agostini* Court said, "[i]nteraction between church and state is inevitable . . . and we have always tolerated some level of involvement between the two."[137] For this reason, the Mississippi Supreme Court

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[127] *See supra* Parts I and III.

[128] Gibson v. Brewer, 952 S.W.2d 239, 243–44 (Mo. 1997) (en banc).

[129] *Id.*

[130] *Id.*

[131] *Id.* at 248.

[132] Brief of Appellant at 8–9, Doe 122 v. Marianist Province of the U.S., 620 S.W.3d 73 (Mo. 2021) (en banc) (No. ED107767).

[133] Richard Gonzales, *Missouri AG Refers 12 Ex-Priests for Prosecution of Suspected Sexual Abuse*, NPR (Sep. 13, 2019), https://www.npr.org/2019/09/13/760737876/missouri-ag-refers-12-ex-priests-for-prosecution-of-suspected-sexual-abuse [https://perma.cc/7VBT-7GHZ].

[134] Agostini v. Felton, 521 U.S. 203, 234–35 (1997).

[135] *Gibson*, 952 S.W.2d at 247 (citing Agostini v. Felton, 521 U.S. 203, 232 (1997)).

[136] Roman Cath. Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1227 (Miss. 2005).

[137] *Agostini*, 512 U.S. at 233.

described the *Gibson* court's reliance on *Agostini* as "puzzling" and expressed that *Agostini* cast doubt on *Gibson's* holding.[138]

Other United States Supreme Court cases also weigh in favor of overturning *Gibson*. In *Bowen v. Kendrick*, the Court held that there was no excessive entanglement between church and state when a government reviewed an adolescent counseling program set up by grantee religious institutions, reviewed the materials used by the religious institutions, and monitored the program through occasional visits.[139] In *Roemer v. Board of Public Works of Maryland*, the Court concluded there was no excessive entanglement when a state conducted annual audits to ensure that religious colleges receiving state grants were not using such funds to teach religion.[140]

By contrast, the Court held in *Hosanna-Tabor* that forcing a church to accept or retain an unwanted minister or punishing a church for failing to retain a minister involves more than an employment decision and thus interferes with the internal governance of the church.[141] Therefore, by requiring a church to retain an unwanted minister, a state violates the Free Exercise Clause because the clause protects a religious institution's right to "shape its own faith and mission through its appointments."[142]

In *Doe 122*, the court cited *Hosanna-Tabor* to assert that relevant, post-*Gibson* United States Supreme Court decisions support the proposition that "[a] church's freedom to select clergy is protected 'as part of the free exercise of religion against state interference.'"[143] However, *Hosanna-Tabor* does not speak to the issue relevant in *Doe 122*.[144] The legal question involved in claims of negligent hiring, ordaining, retaining, and supervising asks whether the religious organization exposed potential

[138] *Morrison*, 905 So. 2d at 1227.

[139] Bowen v. Kendrick, 487 U.S. 589, 616–17 (1988).

[140] Roemer v. Bd. of Public Works of Md., 426 U.S. 736, 764–65 (1976). Establishment Clause analysis could be complicated by the Supreme Court's recent decision in *Kennedy*, overturning 50-year-old precedent. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022). The Establishment Clause cases prior to *Kennedy* reflect *Lemon's* "excessive entanglement" test, which the *Kennedy* Court abandoned. *Id.* at 2427. However, the waters have since been muddied, and it is unclear if these cases would turn out the same way under *Kennedy*.

[141] Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC., 565 U.S. 171 (2012).

[142] *Id.*

[143] Doe 122 v. Marianist Province of the U.S., 620 S.W.3d 73, 79–80 (Mo. 2021) (en banc) (quoting Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952)); The Missouri Supreme Court relied on *Kedroff* in *Gibson*. Gibson v. Brewer, 952 S.W.2d 239, 247 (Mo. 1997).

[144] *Hosanna-Tabor*, 565 U.S. at 179–81.

victims to known or foreseeable risks of harm.[145] These claims do not require the judiciary to question whether a person is fit for ministry or force a religious institution to retain an unwanted individual.[146] Doe did not request that the Missouri Supreme Court deem Brother Woulfe unfit to be a priest or require his removal from the Catholic Church.[147] Such a request *would be prohibited* by the First Amendment.[148] Rather, Doe merely asked the court to reverse the dismissal of his claim, which alleged that Chaminade allowed Brother Woulfe to continue working with children despite numerous credible allegations that Woulfe sexually abused children.[149]

Additionally, *Bowen* and *Roemer* are examples of how the government can review religious programs or conduct audits on religious organizations without violating the First Amendment.[150] Those cases speak in favor of allowing negligence-based claims against religious entities to proceed. States have an interest in protecting children and other potential victims from predators, and the concept of "freedom of religion" should not act as any kind of shield to prevent states from protecting innocent children.

C. Factors Considered When Overturning Precedent Speak to Overturning Gibson

In *Doe*, the Supreme Court of Missouri stated that it would not overturn a prior case absent guidance from the United States Supreme Court that the decision was "clearly erroneous or manifestly wrong."[151] Thus, the Supreme Court of Missouri suggested it is going to wait for the United States Supreme Court to address an issue directly before reevaluating its own precedent. However, as an alternative, the court could consider using the factors the United States Supreme Court uses when analyzing cases concerning the United States Constitution to resolve these issues.

As in *Montejo*, both the factors of "antiquity of the precedent" and "the reliance interests at stake" weigh in favor of overturning *Gibson*.[152]

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[145] Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1286–87 (2017).

[146] *Id.*

[147] *Doe 122*, 620 S.W.3d at 88.

[148] Lupu & Tuttle, *supra* note 145, at 1287.

[149] *Doe 122*, 620 S.W.3d at 81.

[150] *See supra* notes 139–40 and accompanying text.

[151] *Doe 122*, 620 S.W.3d at 80 n.8 (citing S.W. Bell Yellow Pages, Inc. v. Dir. of Revenue, 94 S.W.3d 388, 390–91 (Mo. 2002) (en banc)).

[152] Montejo v. Louisiana, 556 U.S. 778, 792 (2009) (citing Pearson v. Callahan, 555 U.S. 223, 234–35 (2009)).

Gibson was decided twenty-four years before *Doe*.[153] In *Montejo*, Justice Scalia found that a two-decade old decision was not too old to be overturned.[154] And because the case was relatively new at the time, Justice Scalia found there were no significant reliance interests at stake.[155] The Court's reasoning on those two factors alone are squarely in line with the facts of *Doe 122*. Even if one argues that religious entities have significant reliance interests in *Gibson*, in the context of negligence claims based on sexual abuse by church members, the strong public policy interests of protecting children from abuse should outweigh those reliance interests.

Another factor to consider is changed circumstances.[156] Since *Gibson*, the number of sexual abuse instances and the lengths to which Catholic officials have gone to protect priests and clergy members has come to light.[157] And this problem is not isolated to only a few priests or parishes.[158] In 2019, Missouri Attorney General Eric Schmitt referred twelve former Missouri priests for criminal prosecution on charges of child sexual abuse.[159] The state conducted an investigation of church personnel records dating back nearly seventy-five years.[160] The investigation found "credible allegations of 163 instances of sexual abuse or misconduct by Catholic diocesan priests and deacons against minors."[161] Of the 163 church members accused, eighty-three had died, and the statute of limitations had run on forty-six of the alleged crimes committed by the remaining eighty church members who were still alive.[162] The investigation found evidence of focused efforts by church officials to protect priests—namely by refusing to notify law enforcement of the priests' actions and ignoring victims who came forward to report the abuse.[163] The investigation also noted that "the clergy abuse crisis persists in Missouri."[164] Thus, the changed circumstances certainly weigh heavily in favor of revisiting the decision that grants churches protection to perpetuate the abuse.

Often these sexual abuse claims involve society's most vulnerable population—children.[165] If Doe were sexually abused by a teacher or

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[153] *Gibson*, 952 S.W.2d at 239.

[154] *Montejo*, 556 U.S. at 793.

[155] *Id.*

[156] Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 864 (1992).

[157] Gonzalez, *supra* note 133.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *See* Michelle Boorstein, *Scandals, compensation programs lead Catholic clergy sex abuse complains to quadruple in 2019*, THE WASH. POST (June 26, 2020),

counselor while attending public school, he would be able to sue the school for negligent supervision and other negligence claims.[166] Because the sexual abuse occurred at a Catholic high school, however, Doe is barred from recovering for the traumatic harm under such claims.[167] In 2015, 5.8 million elementary and secondary students were enrolled in private schools across the country.[168] Of those 5.8 million, thirty-six percent attended Catholic schools, thirteen percent were enrolled in conservative Christian schools, ten percent were enrolled in affiliated religious schools, and sixteen percent were enrolled in unaffiliated religious schools.[169] In Missouri alone, 55,230 students attended Catholic schools last year.[170] This means that thousands of children are in the hands of organizations that can skirt liability for allowing predators to work with children by hiding behind the auspices of the First Amendment's Free Exercise and Establishment Clauses.

Thus, today's circumstances are much different than the state of sexual abuse in the Catholic Church in 1997 when *Gibson* was decided. The world now knows the horrors that have persisted for decades and the association of the Catholic Church with child molestation is well-established. The changed circumstances, the lack of antiquity, and, consequently, the low risk of disturbing reliance interests at stake favor abandoning *Gibson*.

VI. CONCLUSION

Since the Missouri Supreme Court handed down its opinion in *Gibson* in 1997, the world has become aware of the widespread, perpetual sexual molestation of children by Catholic Church leaders. *Doe 122 v. Marianist Province of the U.S*. was an opportunity for Missouri's highest court to follow the growing number of states recognizing claims for

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https://www.washingtonpost.com/religion/2020/06/26/scandals-compensation-programs-lead-catholic-clergy-sex-abuse-complaints-quadruple-2019/ [https://perma.cc/C9KA-EGAK].

[166] MARK A. LIES II, *Public School Immunity to Claims of Negligent Retention and Hiring*, AMERICAN BAR ASSOCIATION (2005).

[167] Emma, *School Liability: Negligent Supervision in Schools*, LEARN SAFE (Apr. 29, 2021), https://learnsafe.com/school-liability-negligent-supervision-in-schools/.

[168] *School Choice in the United States: 2019*, NATIONAL CENTER FOR EDUCATION STATISTICS, https://nces.ed.gov/programs/schoolchoice/ind_03.asp [https://perma.cc/3R9C-WVAR] (last visited Apr. 14, 2022).

[169] *Id.*

[170] *Top 20 Best Missouri Catholic Schools (2022-2023)*, PRIV. SCH. REV., https://www.privateschoolreview.com/missouri/catholic-religious-affiliation [https://perma.cc/AT75-TZ8B] (last visited Apr. 14, 2022).

negligent hiring, ordaining, retaining, and supervising against religious organizations.

Respecting precedent is an important tenet of the judiciary. However, the cases handed down from the United States Supreme Court since the Missouri Supreme Court decided *Gibson* do not necessitate the same conclusion in this case as was found in *Gibson*. The separation of church and state should never come at the cost of protecting children.