

The amicus brief, Frank Martinelli v. Bridgeport Roman Catholic Diocesan Corporation, was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed in the United States Court of Appeals for the Second Circuit on August 28, 1998.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANK MARTINELLI,

PLAINTIFF-APPELLEE,

v.

BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION,

DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE REV. CLIFTON KIRKPATRICK AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, THE FIRST CHURCH OF CHRIST, SCIENTIST, AND THE EVANGELICAL LUTHERAN CHURCH IN AMERICA. As AMICI CURIAE IN SUPPORT OF APPELLANT BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION.

MARK E. CHOPKO

MICHAEL L. COLTELLO*

GENERAL COUNSEL

JEFFREY MOON
SOLICITOR

UNITED STATES
CATHOLIC CONFERENCE
3211 4TH STREET, N.E.
WASHINGTON, DC 20017
202-541-3300

33 ELK STREET
ALBANY, NY 12207
518-463-1177

*COUNSEL OF RECORD

INTEREST OF AMICI

The rights of religious institutions to define themselves and their relationships to the community of believers without the interference of the government are guaranteed in the Constitution. The court below used religious concepts to establish and enforce secular liability standards for a Catholic diocese in violation of the Religion Clauses of the First Amendment. In so doing, the court recreated religious concepts as old as the Bible - among other things, what it means to "shepherd" a "flock" - and allowed all adherents to a set of religious beliefs to seek relief for their alleged violations in the civil courts. No one doubts that persons are sometimes injured by others in a religious institution. Although divinely ordained, the institutions act through human persons. In joining to file this brief, amici in no way condone the abusive behavior of the priest involved in the instant case. All amici condemn sexual abuse in whatever form it may take and have acted in the ways that they deem best, consistent with their own organizational structures and polity, to respond to this form of misconduct. But when injuries result from criminal actions, as is the case here, liability, if any, should turn on the application of traditional tort principles and not on a court's search to give redress without regard to the Constitution, the law, or the future.

The trial court has greatly increased the risk of potential exposure to which all religious groups and communities are subject, and based this expanded liability virtually exclusively on religious teachings and doctrine. The amici write to draw this Court's attention directly and vividly to the practical, legal and constitutional dangers posed by the decision below.

The United States Catholic Conference ("USCC") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCC advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity, the rights of parents and children, the sanctity of life, and the importance of religious communities. Values of particular importance

to the Conference are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

The Church of Jesus Christ of Latter-Day Saints ("LDS") is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 10 million, with more than 24,000 congregations throughout the world. Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where or what they may." Article of Faith, No. 11.

The Rev. Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States with approximately 2,750,000 members in 11,500 congregations organized into 173 presbyteries under the jurisdiction of 16 synods. The General Assembly does not claim to speak for all Presbyterians, nor are its policy statements binding upon the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination and the final point of decisions in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members. The Presbyterian Church has consistently condemned sexual abuse of all kinds. In 1991 and 1993, General Assemblies adopted recommended policies and procedures to prevent and respond to sexual misconduct within the Church. In joining this brief, the Stated Clerk does not in any way condone the abusive behavior of Father Laurence Brett perpetrated against the plaintiff in the 1960's. The Stated Clerk joins this brief to continue the General Assembly's longstanding position that secular courts lack the legal competence and constitutional authority to decide matters of ecclesiastical law or religious faith. This has been the position of Presbyterian Church General Assemblies even prior to *Watson v. Jones*, 80 U.S. 679, in 1871. In the instant case, the district court allowed a civil jury to determine what Roman Catholic doctrine and teaching means and, from that religious determination, what civil duties could be imposed upon diocesan officers and the diocese itself. This a civil court cannot and must not do. The Stated Clerk acknowledges that religious bodies and officials are not immune from liability for their own misconduct; they can be found liable for that misconduct under traditional tort theories. The enforcement of obligations arising out of ecclesiastical polity and religious faith, however, must be vested solely with religious bodies and officers, not civil juries.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 41,000 congregations with more than nine million members

worldwide. The North American Division of the General Conference administers the work of the church in the United States, Canada, and Bermuda, and represents more than 4,300 congregations in the United States with nearly 800,000 members. The Seventh-day Adventist Church strongly supports the twin concepts of free exercise of religion and the separation of church and state and actively promotes those ideals through its bi-monthly Liberty magazine. The Working Policy in North America points out "that religious liberty is best achieved, guaranteed and preserved when church and government respect each other's proper areas of activity and concern" and that "in matters where secular and religious interests overlap, government, in the best interest of both church and government, must observe strict neutrality in religious matters, neither promoting nor restricting individuals or the Church in the legitimate exercise of their rights."

The General Council on Finance and Administration ("GCFA") of the United Methodist Church is the financial and administrative arm of the United Methodist Church. The United Methodist Church is a worldwide religious denomination with approximately nine million members in the United States, and it has approximately 36,000 local churches in the United States. There are approximately 42,000 United Methodist members and 131 United Methodist churches in the State of Connecticut. The denomination is embedded not only in the tradition and the teachings of religious tolerance but also seeks to provide for the maintenance of worship, the edification of behavior, and the redemption of the world. The United Methodist Church is known as a connectional denomination, and under this structure the "annual conference" is the fundamental body of the denomination, which "connects" the local churches of a geographical region together for a common purpose. There are 68 annual conferences in the United States. The State of Connecticut is part of the New York and New England Annual Conferences of the United Methodist Church. GCFA has an interest in this litigation because it is officially assigned under *The Book of Discipline* to safeguard and protect the legal rights and interests of the denomination. GCFA strongly opposes the ability of secular courts to create and proceed to enforce civil duties against religious institutions out of the court's own interpretation of religious text.

The First Church of Christ, Scientist, in Boston, Massachusetts, is "The Mother Church" of one of the major indigenous American religious denominations, *Christian Science*. *Christian Science* is the name given by Mary Baker Eddy to her discovery of the laws of God, including rules for Christian spiritual healing through prayer, as illustrated by the words and works of Christ Jesus as recorded in the Bible. Following this discovery, Mrs. Eddy established a church in 1879, which she reorganized in 1892 as The First Church of Christ, Scientist. The Church and its branch Churches of Christ, Scientist and Christian Science societies are collectively referred to as the *Church of Christ, Scientist*. These local congregations exist in over sixty-five countries and in all fifty states and the District of

Columbia. There are twenty-five such congregations in Connecticut. The Church of Christ, Scientist, has no clergy; but Christian Science practitioners, although not employees or agents of the Church, are sometimes treated as clergy under certain state and federal laws, as are the elected, lay readers in the churches. Christian Science practitioners are individuals who make themselves available to provide Christian Science treatment through prayer for those who call on them. All Churches of Christ, Scientist have Sunday school teachers; and individual Christian Scientists serve as chaplains in the military, as Christian Science nurses, and represent the religion in prisons and hospitals and in various other capacities throughout the world. Sexual abuse by any person under any circumstances is absolutely inconsistent with Christian Science. Sexual abuse is not the issue in this case. The First Church of Christ, Scientist has joined this brief because it feels strongly that courts may not "declare" the meaning of religious duties as a means of imposing civil liability on religious organizations for any damage caused by the private and unauthorized act of any individual said to carry in some fashion the imprimatur of the denomination. The Church is committed to the preservation of religious rights for all.

The Evangelical Lutheran Church in America ("ELCA") is the largest Lutheran denomination in North America and the fifth largest Protestant church body in the United States. The ELCA has approximately 11,000 member congregations, which in turn have approximately 5.2 million individual members. The state of Connecticut is located within the New England Synod of the ELCA. The New England Synod has 190 congregations, including 74 in Connecticut, and over 75,000 individual members.

STATEMENT OF JURISDICTION

Amici adopt the appellant's statement of jurisdiction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Amici adopt the appellant's statement of issues presented for review.

STATEMENT OF THE CASE

Amici adopt the appellant's statement of the case.

STATEMENT OF FACTS

Amici adopt appellant's statement of facts.

PROCEDURAL HISTORY AND THE DECISIONS BELOW

Amici adopt appellant's statement of procedural history and the

decision below.

STATEMENT OF THE STANDARD FOR REVIEW

Amici adopt appellant's statement of the standard for review.

SUMMARY OF ARGUMENT

The court below concluded that a religious institution had liability to one of its members on a novel but unconstitutional basis. It found that the Diocese of Bridgeport, though unaware that plaintiff had been a victim of clergy sexual abuse, nonetheless violated a fiduciary duty to the plaintiff to seek him out after it later learned that others had been abused. Had this conclusion been based on real evidence of neglect and indifference directed at the plaintiff in violation of obligations owed to plaintiff by the Diocese, based on a mutual and personal relationship, this case would not seem so extraordinary. The case presents the issue whether secular civil duties for liability purposes may be premised exclusively on application and enforcement of religious doctrine and teaching. The amici, national religious organizations, submit the Constitution bars that possibility. The rights of religious institutions to define themselves and their relationships to their communities of believers without the interference of the government is a bedrock constitutional guarantee.

Trust, faith, commitment, response, transformation, reconciliation, salvation - all of these are religious concepts laden with centuries of interpretation for our diverse religious communities. It is the nature of religion to extend an invitation to each person to enter into a relationship of worship. It is an invitation to trust in faith to the Word of God. We describe these concepts differently, and they sometimes do not translate well beyond our particular congregations and communities. In this case, the district court has taken testimony about the religious imagery and language used to explain how a bishop is to pastor or shepherd his diocese, how a diocese exists as a faith community, and other matter revealed in the catechism, teaching documents, and Scripture itself. Based only on this kind of evidence, the court enforced that relationship between the plaintiff and the diocese as a civil fiduciary duty. In so doing, the court moved the law in a radical and unconstitutional direction.

In a line of precedent beginning with *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), and applied routinely today, the Supreme Court and other courts have made it plain that civil courts enforce secular, not religious, obligations. Religious institutions have the constitutional autonomy to describe their own internal religious relationships. What is proscribed is not simply the definition of religious beliefs by a secular court, but any conduct that "would require courts to identify and apply the teachings of a particular

faith, thereby making the judiciary responsible for determining what conduct and beliefs are part of a particular religion." *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 337 (5th Cir. 1998). It is plain that the district court violated this teaching and the constitutional rights of the diocese in the process.

The implications for all religious institutions are what bring the amici to this court. The only evidence on which the fiduciary duty is based is religious teaching and matters of religious doctrine and faith common to all Catholics. By analogy, any institution that urges its congregants to respect and obey clergy and others who minister for the institution and those in leadership are at risk in exactly the same way as the Catholic diocese is here. Much of the metaphorical use of language to describe religious relationships would now be subject to enforcement in a civil court at the behest of anyone who felt betrayed or injured.

There are no inherent jurisprudential limits on this sweeping proposition, which closely approximates two liability theories regularly rejected on constitutional and other grounds - clergy malpractice and denominational liability. In so doing the court below abandons a key facet of fiduciary liability theory, the requirement for a direct and personal link between the claimant and another person acting in a position of trust for the institution. Even then, courts generally have been reluctant, for sound constitutional reasons, to allow institutional liability even if it found a personal fiduciary duty to have been violated.

Those principles should govern this case. The judgment below on fiduciary duty must be reversed. In taking this position, amici are aware of the shameful, abhorrent, and abusive behavior of the individual cleric involved. We condemn sexual misconduct and have worked strenuously to prevent it and to heal its effects. But the issue joined here is about the proper construction of the law and its consonance with our constitutional system. The error in the decision below must be corrected.

ARGUMENT

I. Secular Courts May Not Constitutionally Premise Civil Liability on Whether Religious Organizations Have Met Their Religious Duties.

Fiduciary duties are intensely personal, based on close relationships mutually entered into by both parties. They invite, indeed rest ultimately on, trust. Certain kinds of relationships model that trust - doctor-patient, attorney-client, guardian-ward, counselor-

counselee, to note but four examples. They are relationships in which one person is vulnerable because of illness, need, or dependency, and relies on the skill or expertise of another, who accepts that responsibility. Once such a relationship is created by the mutual actions of both parties, the law protects the more vulnerable person by holding the other to a higher standard of care.

Such relationships can, from time to time, be entered into by congregants and their clergy. A couple may seek marriage counseling from a priest, a troubled young person may seek solace from her rabbi, and the religious leader may respond personally, thereby creating a fiduciary relationship. The responsibilities of the religious leader in those circumstances are markedly different from his or her responsibility to all married couples or to all members of a youth group. They are different, yet again, from the institutional responsibilities owed to all congregants.

In its Ruling on Defendant's Motions for Judgment as a Matter of Law (hereinafter, "Ruling"), reported as *Martinelli v. Bridgeport Roman Catholic Diocesan Corporation*, _____ F. Supp. _____, 1998 WL 338213 (D. Conn. 1998), the district court treated mere membership in an institutional setting, residence within a diocese, as requiring fiduciary care of individuals on the part of institutional leaders.¹ To reach this conclusion, the district court relied on purely religious

¹ Citation to the Ruling, which is now part of the Appendix before this court, will be made to "A. at _____."

concepts, teachings and doctrine of the Roman Catholic faith. By its own words, the court used "religious doctrine or canon law," "official church documents," "evidence of the shepherd-flock symbols and teachings," teachings from the Catholic Catechism and "ecclesiastical materials," A. at 366-368, 374, 375, 379, 382, 384-386, to decide that a fiduciary relationship existed. The court did not use, and did not have, any evidence of the creation of a relationship with plaintiff by diocesan leaders. The only evidence involved a cleric who violated the law, the teaching of his religion, and his vows when he abused the plaintiff. If this decision is not overturned, all baptized Catholics will be able to argue that the diocese in which they happen to live, and the diocesan bishop, are fiduciaries for them personally, and are financial guarantors to them for any loss incurred at the hands of another member or church leader.

The amici want to be very clear that they reject and abhor the sexual abuse of minors. Such misconduct violates the abused and the community. Any liability for that or any other misconduct, however, should be resolved based upon traditional tort principles. The Constitution does not permit the courts to "declare" the substance and extent of religious duties, and then impose civil liability for their breach. Such a rule would open the door to liability for all religious denominations to all present and former adherents who need only say they heard the words of scripture and responded in trust and faith.

A. Civil Courts May Not Apply and Enforce Religious Doctrines and Teachings.

It is the nature of religion to invite trust and a faith-filled response to the Word of God. A person responding in faith to a call by God necessarily is open and vulnerable to transformation of his or her very soul. But these are religious concepts and ideas that are explained differently by our varying traditions and do not translate well even beyond a particular congregation or community of faith. To say that it is now the business of the civil courts to determine the scope of religious duties, as has occurred in the instant case, has moved the law in a radical and unconstitutional direction.

It has always been the exclusive business of religion to define and enforce the religious obligations that exist between and among its members. The Constitution, as reflected in Supreme Court decisions, guarantees this autonomy. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). The court below, however, would grant remedies in civil courts for court-perceived failures of religious institutions to fulfill their religious duties, based upon those secular courts' understandings or misunderstandings of the religious teachings, doctrines and writings in question.² *Cf. Watson*

² In this regard the court's attention is invited to Justice Miller's cogent warning that "each of these [religious bodies] has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should

v. Jones, 80 U.S. (13 Wall.) 679 (1871). Yet, for more than a hundred years it has been recognized by the Supreme Court that, under our Constitution, "the law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Id.* at 728. The Constitution therefore allows religious institutions the freedom to define and enforce religious duties without reference to civil authority. In *United States v. Ballard*, 322 U.S. 78, 86 (1944), Justice Douglas wrote for the Supreme Court that "Man's relation to his God was made no concern of the State." In the instant case, plaintiff's relationship to his diocese, as distinct from the cleric who abused him or even some other person in whom plaintiff was personally invited to trust, is determined by a civil court to give rise to secular legal duties in contravention of settled principles of constitutional law and the overwhelming weight of authority. *Dausch v. Ryske*, 52 F.3d 1425 (7th Cir. 1994).

The Supreme Court in *Serbian Eastern Orthodox* made plain that civil courts are not to take part in "the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power . . . so as to decide . . . religious law . . . [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.'" *Serbian Eastern Orthodox*, 426 U.S. at 708-9, quoting *Maryland and*

decide the case, to one which is less so." *Watson*, 80 U.S. at 729.

Virginia Churches v. Sharpsburg Church, 396 U.S. 367 (1970). Questions that "entail inquiry into . . . canon or ecclesiastical law," are "exactly the inquir[ies] that the First Amendment prohibits." *Serbian Eastern Orthodox*, 426 U.S. at 713. Phrasing the rule broadly, that Court decided that civil courts have no power to resolve issues of "discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Id.* What is proscribed by the Religion Clauses, then, is not only the narrow, simple, matter of a secular court determining what a religious belief should be, but also any conduct that "would require courts to identify and apply the teachings of a particular faith, thereby making the judiciary responsible for determining what conduct and beliefs are part of a particular religion." *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 337 (5th Cir. 1998). See also *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952);³ *Watson v. Jones*, *supra*.

Sanders v. Casa View Baptist Church, *supra*, provides an instructive analysis, in a similar factual situation, of when a claim for breach of fiduciary duty can be stated as against a member of the clergy. *Sanders* arose when two women came to Baucum, their minister at

³ In *Kedroff*, the Supreme Court defended religious organizations' freedom to "decide for themselves, free from State interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. In *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960), the Court made it clear that the judiciary could not violate the First Amendment any more legitimately than the legislature could.

Casa View Baptist Church, for marriage counseling, the minister accepted the plaintiffs for such counseling, and then took advantage of that relationship by pursuing sexual relationships with them under the guise of furthering marriage-counseling goals. *Sanders* is particularly significant for three reasons.

First, while it found that a fiduciary relationship could have existed between the plaintiffs and the clergyman individually, it based that decision only on the actual relationship created by and between the individuals involved, resulting in the conclusion that "Baucum owed Plaintiffs a fiduciary duty *as a marriage counselor* to Plaintiffs." *Id.* at 337. The *Sanders* court therefore found that the minister's duty was created by his own undertaking to counsel plaintiffs, *id.*, but did not find any legal duty or relationship, fiduciary or otherwise, to arise out of religious teachings or doctrine of either the specific church or the denomination involved. *Id.* Indeed, the Court of Appeals held that the "First Amendment difficulties posed by a claim for clergy malpractice are not . . . present in this case because the *duties* underlying the plaintiffs' claims for malpractice by a marriage counselor and breach of fiduciary duties *are not derived from religious doctrine.*" *Id.* at 337 (emphasis added). As is clear from the trial court's opinion below, quite the opposite is the case here. See, for example, Ruling at 22, 24, basing the court's finding of a fiduciary relationship on "Shepherd-flock symbols," religious "teachings," "fundamental precept[s] of Church hierarchy" and "ecclesiastical

materials.”

Second, the court in *Sanders* recognized that the *Schmidt/Dausch* line of cases, discussed herein and controlling in these circumstances, stands for the proposition that the religious position held by a clergyperson does *not* carry with it a fiduciary duty or establish a fiduciary relationship, and that to attempt to determine the scope of a fiduciary duty owed to parishioners by their clergy raises the same constitutional difficulties that would be encountered in attempting to pursue a clergy malpractice claim. *Id.*

Third, the trial court in *Sanders* granted summary judgment to the church on plaintiffs’ claims of breach of fiduciary duty against the church directly, and found that the same analysis applied to the church as applied to the clergyman, with respect to the viability of plaintiffs’ claims for breach of fiduciary duty. *Sanders*, 898 F. Supp. 1169, 1179 (N.D. Tex. 1995). Thus, the fiduciary duty that the minister was found to have breached, was not and could not be established by reference to the teachings or doctrine of the Baptist Church.

The Seventh Circuit in *Dausch v. Ryske*, *supra*, also dealt properly with the problems presented by recognition of a fiduciary duty claim in the context of parishioner/clergy relationships. In *Dausch*, the plaintiff argued that the source of the fiduciary relationship she asserted had been violated, was the pastor-parishioner relationship itself. “[Plaintiff] claimed a special relationship existed between

herself, as a member of the congregation of Knox [Presbyterian] Church seeking counseling, and Ryske as its pastor and counselor; it also existed between herself and the church defendants [Knox Presbyterian Church and the Chicago Presbytery], who were guiding and controlling Ryske." *Dausch*, 52 F.3d at 1438. The Seventh Circuit affirmed the dismissal of the fiduciary duty claims against the church defendants. Judge Ripple, concurring in relevant part in that decision, wrote that "the district court also was of the view that alleging a breach of fiduciary obligation under these circumstances was simply an elliptical way of alleging clergy malpractice," a cause of action virtually uniformly rejected by American courts. *Id.* at 1438. "Indeed, the court pointed out, because it would require the court to define the scope of a fiduciary duty owed persons by their clergy, a matter deeply rooted in the tenets and internal organization of a religion, it raises the same constitutional difficulties encountered when defining the standard of care under negligence. I believe that the decision of the district court is correct." *Id.* at 1438 (emphasis supplied). The instant case demonstrates compellingly the accuracy of the Seventh Circuit's opinion in this regard.⁴

⁴ To similar effect is *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 99 (Mo. Ct. App. 1995) (Establishment Clause bars fiduciary duty claim against church, because it would require court to inquire into religious aspects of relationship between church authorities, dioceses and parishioners). In the instant case, not only did the trial court find the existence of a fiduciary relationship based on "the tenets and internal organization of a religion," as the Seventh Circuit had feared in *Dausch*; virtually the *only* evidence upon which

In *Phillips v. Marist Society of Washington Province*, 80 F.3d 274 (8th Cir. 1996), the Eighth Circuit affirmed a District Court's grant of summary judgment to a religious Society, in a case in which a victim of a Society priest's misconduct claimed that she was a third party beneficiary of an implied contract between the priest and the Society to pay the priest's just debts. The plaintiff premised these claims upon her interpretations of the religious and canonical relationships between the priest and the Marist Society, much as plaintiff has done in the instant case. Because resolution of the claim would have drawn the court into analysis of canon law and religious teachings and doctrine, the District Court granted summary judgment to the Society, writing (as quoted by the Eighth Circuit) that the plaintiff's efforts to "concoct a parallel secular contract [to the priest's religious duties and obligations] . . . cannot exist outside of the framework, interpretation and application of Canon Law and the laws of the Marist [Society] which evaluation violates the First Amendment." *Phillips*, 80 F.3d at 275. While the Eighth Circuit affirmed on other grounds, properly obviating the need to resolve this constitutional issue, it cited the District Court's holdings on the issue at some length and approvingly. The language the Eighth Circuit quoted, above, applies with equal force in the instant case; the trial court here may not be permitted to "concoct" "parallel" secular duties enforcing its views of

that finding was based, was the belief and teachings of the Roman Catholic Church. See A. at 366-368, 374-386.

the diocese's religious obligations.⁵

Thus, the controlling precedent makes plain that it is no business of the civil courts to determine and enforce religious duties. Had that standard been properly understood and used here, the result would have been very different.

B. The District Court Violated This Constitutional Standard When It Applied and Enforced Religious Doctrine and Teaching as a Civil Duty.

Here, the District Court's Ruling and the trial transcript themselves demonstrate that the very existence of the fiduciary relationship, and its duties, were established because of, and indeed were created by, Catholic teachings, doctrine and polity. Examples are legion. The District Court in its Ruling states that it considered as evidence the "religious doctrine or canon law" of the Church, and other "official church documents, such as excerpts from canon law." A. at 366. The court pointed repeatedly to the use of Christian religious

⁵ In *F.G. v. MacDonell*, 696 A.2d 697 (N.J. 1997), plaintiff claimed she had been damaged when an Episcopal priest who was providing her with marriage counseling began a sexual relationship with her, and sued that priest. She also sued another Episcopal priest, Harper, who wrote a letter and delivered a sermon to his congregation about plaintiff's relationship with the counselor/priest. The New Jersey Supreme Court recognized the constitutional problems that would be created if a court were to attempt to determine civil liability by reference to religious beliefs, *id.* at 702-4, and decided that a secular court could adjudicate plaintiff's claims against the marriage counselor, but only insofar as the nature of that relationship and its duties could be proven without using religious standards, or adopting a theory of clergy malpractice and "requir[ing] the courts to identify the beliefs and practices of the relevant religion and then. . .determin[ing] whether the clergyman had acted in accordance with them." *Id.* That standard was violated in this case.

imagery in Church teachings, specifically the "shepherd-flock symbol," as representing the relationship between the diocese and Bishop and the plaintiff, A. at 366, and it heard and admitted testimony, and permitted argument, concerning what that religious symbolism meant. A. at 1288-1291, 1801-1802.⁶ It also took testimony as to the meaning of several sections of the Code of Canon Law of the Roman Catholic Church, and differing views thereof.⁷ A. at 778-781, 990-1003, 1099-1100.

The trial court below seemed to recognize it was tilling new ground because it tried to root its review of the evidence in traditional tort principles, especially the idea that a fiduciary duty comes from a personal relationship built on trust. In the court's view, the Catholic Church invited the plaintiff to put his trust in the diocese and bishop through its "religious teachings," "doctrinal invitations and training," and "church teaching, traditions, rituals and experience." A. at 366, 374, 375, 379. It heard evidence concerning the meaning and interpretation of those teachings, including the then-current "Baltimore Catechism." A. at 479-91, 1286-1295. Regarding the role of the Bishop and diocese in relation to the plaintiff, the court quoted Church teaching that the faithful, including plaintiff, should defer to the wisdom of the Church and its

⁶ Citations to the trial transcript, which is now part of the Appendix before this court, will be made to "A. at _____."

⁷ The fact that the court permitted testimony offering differing opinions about church law is itself a gross violation of the constitutional precept that the courts are to avoid entangling themselves in such disputes.

clergy, and in particular that the Church taught respect and trust for the priests and the Bishop of the diocese, A. at 382, 384, 386, and held out the Bishop of the diocese as the leader of the Catholic faithful in matters of faith and morals. And it heard and admitted testimony concerning the meaning of a bishop's religious obligations to parishioners, as well. A. at 479-491, 608-612 619, 815, 1099-1101, 1104-1113, 1288, 1611. The court, in its Ruling, also put emphasis on the fact that the Bishop's powers were described in Church teachings as being divinely derived. A. at 386.

As is perfectly clear from each of these examples, the court below established the existence of a fiduciary relationship precisely and exclusively on evidence from religious belief and faith. By using these faith concepts as the basis for, and as its way of limning the boundaries of, the diocese's secular legal duties to one particular parishioner, the court not only becomes an "arbiter of scriptural interpretation" in violation of the Supreme Court's injunction in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981), but also makes the secular courts the implementer and enforcer of these religious responsibilities, rules and duties. This is a role from which the civil courts of this country are constitutionally prohibited to take.

As noted at the outset, clergy and others who minister in the name of religious institutions have a variety of relationships with congregants depending on the setting, the purpose, and the intimacy of

the communication. Preaching about trust in God to an entire congregation is different from taking on the role of individual counselor. To treat them as the same for purposes of the civil law is erroneous and, if there is reliance on religious concepts, unconstitutional. *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988)(*en banc*).

In *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991), the court found that it could not adjudicate a claim for breach of fiduciary duty in a clergy sexual abuse context, without intruding into constitutionally-prohibited areas. The *Schmidt* court was presented with claims that a Presbyterian minister to whom plaintiff had come for counseling, had sexually abused her. Plaintiff made claims of negligence, malpractice, fraud and breach of fiduciary duty against the minister. In rejecting plaintiff's fiduciary duty claims, the court held that "in analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence." *Id.* at 326.⁸

⁸ To the same effect are *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907 (Neb. 1993) (rejecting fiduciary duty claims against clergy, agreeing with the analysis in *Schmidt*), *Strock v. Pressnell*, 527 N.E.2d 1235, 1243-44 (Ohio 1988) (claim against clergy for breach of fiduciary duty is "basically a claim of negligence," and defective for the same reasons), and *Bladen v. First Presbyterian Church*, 857 P.2d 789 (Okla. 1993).

It is immediately apparent from the opinion below that the court-created fiduciary relationship itself, from which the breached duty was alleged to flow, is solely based upon the religious teachings of the Roman Catholic Church, particularly as they relate to the "intricate principles of governance" of a Catholic diocese by a bishop, *Schmidt*, 779 F. Supp. at 332, and on the relationships of a diocese and bishop to the parishioners of parishes who are part of that diocese.

The instant case also presents a far more attenuated relationship between the plaintiff and defendant than the *Schmidt* case did. *Schmidt* involved claims by a plaintiff against her minister directly, alleging that he personally had taken on a fiduciary relationship to her. Here, the defendant is *not* the individual clergyperson, who creates the relationship with the members of his or her faith, but the diocese itself which does not have, and did not enter into, any direct relationship with the plaintiff that would be remotely analogous to that of the individual's own clergy. "A diocese is a portion of the *people of God* which is *entrusted for pastoral care* to a bishop with the cooperation of the *presbyterate* so that, *adhering to its pastor* and gathered by Him in the *Holy Spirit* through the gospel and the *Eucharist*, it constitutes a *particular church* in which the *one, holy, catholic, and apostolic Church of Christ* is truly present and operative." Canon 369, Code of Canon Law (1983) (Canon Law Society of America translation from Latin text). By itself, this definition shows the fallacy of trying to establish civil judicial concepts

through Church law. The italicized terms are each subject to further explanation in the Code of Canon Law and in other teaching documents of the Catholic Church. Without further necessary elaboration, a diocese is a geographic territory in which members of the faithful happen to live, under the ecclesial and pastoral responsibility of a bishop appointed by the Pope in Rome.⁹ The difference in the relationships as illustrated in these examples is critical for liability and constitutional purposes.

Claims that a priest-parishioner relationship in and of itself constituted or created a "special relationship" of "trust and confidence" because of the Church's religious teachings and beliefs, were firmly rejected in *Roman Catholic Bishop of San Diego, v. Superior Court of San Diego County*, 42 Cal. App. 4th 1556, 50 Cal. Rptr.2d 399 (Cal. Ct. App.1996). In that case, plaintiff was a teenager who had been the victim of sexual abuse by her priest, and sued the church, bishop and diocese as well as the priest involved. She argued that because Roman Catholic teachings place priests "in a unique position of trust and confidence" with respect to the faithful, and other religious

⁹ Assuming that the individual cleric may be an agent of a diocese for some purposes, liability of the diocese is tested on traditional "scope of duty" grounds. The diocese is not vicariously liable in clergy sexual misconduct cases because the activity in question is both criminal and sinful and is far outside the bounds of the cleric's scope of employment or "agency." *Tichenor v. Roman Catholic Archdiocese*, 32 F.3d 953, 959-60 (5th Cir. 1994). Amici fully recognize that in cases where traditional tort concepts, unalloyed by efforts to hold religious entities liable based upon their beliefs, would impose liability, religious entities are not immune from liability for their own misconduct.

teachings and beliefs contribute to the priest's "spiritual power and authority," the church had a heightened duty of care to her and to all the faithful, based on this "special relationship." *Id.* at 1567-68.

The Court of Appeal rejected this theory. It held that the religious relationship of priest to parishioner, in itself, created no "special relationship" with the plaintiff or other parishioners. *Id.* More broadly, it held that even if the Church's religious teachings about the power, authority and trustworthiness of priests were as plaintiff posited, the church could be held to have "no greater civil duty based upon its religious tenets," because to impose such duties would be violative of the Religion Clauses of the First Amendment. *Id.* at 1568. The court wrote that the decision to follow religious precepts "is a religious decision based upon religious belief; it does not create a civil duty." *Id.* To hold otherwise would be for a civil court to impose secular legal requirements based upon religion, which is constitutionally proscribed. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). Because a church's religious beliefs themselves cannot create secular civil duties, the District Court here was clearly in error in finding that the Diocese had a fiduciary relationship with the plaintiff in this case.

The plaintiff's theory of liability was asserted and rejected very recently by the United States District Court for the Southern District of New York in *Wilson v. Diocese of New York of the Episcopal Church*, 1998 WL 82921 (S.D.N.Y., February 26, 1998). In *Wilson*, a plaintiff

who had allegedly been sexually abused by a priest of the Episcopal Church sued the priest's diocese and bishop on a fiduciary duty theory, among others, claiming that "as a member of a 'universal church' he was entitled to place his trust and confidence in the defendants," and was entitled to a civil remedy when defendants breached that trust. *Wilson*, at *11. The District Court rejected this theory, first because the plaintiff could not demonstrate any more direct connection between himself and the priest, bishop and diocese, than would flow simply from their statuses and roles as priest, bishop or diocese. The *Wilson* court found both that the priest himself owed plaintiff no fiduciary duty, and that the case against the bishop and diocese "must fail as well since it is based upon a more tenuous connection than that alleged between [the priest] and the plaintiff." *Id.*

The court correctly noted that in "those cases in which a fiduciary relationship has been found to have existed in the clerical context, far more than a simple priest-parishioner relationship was involved." *Wilson* at *11. "Rather, the priest had taken some *affirmative* action to *establish* the fiduciary relationship, most often by counseling the plaintiff, and then allegedly abused that ongoing relationship of trust and confidence." *Id.*, (emphasis supplied). The *Wilson* court then cited *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169 (N.D. Tex. 1995), *aff'd* 134 F.3d 331 (5th Cir.1998), *F.G. v. MacDonell*, *supra*, *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), *Erickson v. Christenson*, 781 P.2d 383 (Or. Ct. App.), *appeal*

dismissed, 817 P.2d 758 (Ore. 1991), and *Jones v. Trane*, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. Onondaga Cty. 1992), in support, all cases which involved *affirmative* actions on a cleric's part to take on a special relationship of trust and confidence in regard to the particular plaintiff in question, and in *none* of which were the religious teachings or doctrine of the denomination seen as legitimate factual bases for any successful theory of recovery. A plaintiff's relationship to a denomination or church, and its teachings and doctrines, in and of themselves, are no basis upon which secular legal responsibility may be grounded.¹⁰ *Sanders, F.G., Wilson and Roman Catholic Bishop of San Diego* reject precisely this concept.¹¹

¹⁰ Any attempt to reconcile the trial court's opinion below with the District Court's opinion in *Wilson* will demonstrate precisely the First Amendment morass into which this trial court has ventured. By reading Roman Catholic teachings and doctrine to create a fiduciary relationship between a Catholic diocese and a believer, the lower court has created a denominational distinction, given the fact that the church in *Wilson*, which is described by plaintiff as a "universal church" holding itself out as entitled to the special trust and confidence of Episcopal adherents, was not held to stand in a fiduciary relationship with its adherents. The prospect is obvious that in cases where Episcopal dioceses are alleged to have a fiduciary relationship with a plaintiff, the law that is applied will differ from that which is applied when a Catholic diocese is said to stand in a fiduciary relationship with a plaintiff. This means that different standards for fiduciary duty would exist as between different religious denominations, and that they would require judicial inquiry into, and civil enforcement of, specifically religious doctrine and polity. This the Religion Clauses manifestly proscribe.

¹¹ The trial court also discussed *Brown v. Pearson*, 483 S.E.2d 477 (S.C. 1997), in its Ruling, but ignored its fundamental point. The *Brown* decision turned not only on the fact that there was no proof of acceptance of, or inducement to enter into, a fiduciary relationship with the plaintiffs, on the part of the South Carolina

The trial court's mistaken view of the inquiries permitted to it by the Establishment Clause is demonstrated vividly by its own discussion of *L.C. v. R.P.*, 563 N.W.2d 799 (N.D. 1997). It suggests in its discussion of *L.C.* that the *L.C.* court had not found a fiduciary relationship to exist between a plaintiff alleging sexual misconduct by a minister, and a Methodist Bishop and Conference, because the Methodist Book of Discipline was "not deemed part of the record before the Supreme Court of North Dakota." A. at 374. This clearly suggests that, in the view of the court below, an analysis and examination of the substantive requirements of the Methodist Book of Discipline would have been a perfectly appropriate avenue for a civil court to pursue, in order to determine what *civil* responsibilities to enforce on behalf of the plaintiff based on Methodist religious teachings.

This reasoning is faulty because the analysis, use, and enforcement of the teachings of a religious denomination as the basis for a secular claim of civil liability for failure to meet those standards, whatever they are, violate constitutional principle. It involves the court in "identify[ing] and apply[ing] the teachings of a

Conference of the United Methodist Church ("Conference"). It also stands for the more fundamental proposition that the Superintendent of the Conference district in which plaintiffs' church was located had no fiduciary relationship with the plaintiffs merely by virtue of occupying that official position in the United Methodist Church. *Id.* at 485. Clearly, nothing in the *Brown* opinion supports the notion that a trial court could examine and then civilly enforce the religious teachings of the United Methodist Church, and find therein a fiduciary duty on the part of the Conference (or any other Methodist entity) to the plaintiffs.

particular faith." *Sanders*, 134 F.3d at 337. *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991). The fact that the District Court saw consideration of the United Methodist Church's "constitution, doctrine and general rules" as a legitimate source for establishment of a secular duty and determining its requirements, *L.C.*, 563 N.W.2d at 803, shows that the District Court's error runs very deep indeed.¹²

The trial court frankly admitted that the fiduciary relationship it found to exist here arises from the civil enforcement of religious language and concepts used by the Catholic Church, not on any independent secular evidence of a relationship between plaintiff and the Bishop or diocese. In situations similar to *Martinelli*, courts have refused to permit breach of *fiduciary duty* claims to proceed even against the individual clergy claimed to be involved, for Establishment Clause reasons. In *Langford v. Roman Catholic Diocese of Brooklyn*, N.Y.L.J., July 8, 1998, the court wrote that civil controversies involving religious entities could be decided by secular courts only as long as proofs other than religious facts could be utilized in their resolution, citing *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1968). This exclusive

¹² The *L.C.* court did not decide that it was constitutionally capable of identifying or applying the teachings of that faith, or that if the Methodist Book of Discipline had been in the appellate record, it would have held that a fiduciary relationship was created by it. The court merely found that the Book of Discipline was *not* in the record in the first place, so that the plaintiff's arguments arising from it lacked a sufficient factual basis. *L.C.*, 563 N.W.2d at 802-3.

resort to what the *Langford* court described aptly as "religious facts" dooms the trial court's decision from a Religion Clauses perspective.

Similarly, in *Smith v. O'Connell*, 997 F. Supp. 226 (D.R.I. 1998), plaintiffs who at relevant times were parishioners of a Roman Catholic church in the Diocese of Providence, Rhode Island, and asserted that they were molested as children and teenagers by priests of that diocese, argued that the diocese and their churches had a fiduciary relationship to them based on their religious and diocesan affiliations, and that the church defendants breached their fiduciary duties to them by failing to disclose knowledge regarding the priests' propensities toward sexual offenses. As in the instant case, plaintiffs argued that the statute of limitations was tolled due to defendants' fraudulent concealment of his cause of plaintiffs' action against them, an argument predicated on defendants' supposed fiduciary relationship to plaintiff. Although the District Court declined to infer the existence of a fiduciary relationship premised on diocesan and church affiliations, *id.* at 239-40, it noted that to follow and enforce that relationship would create serious constitutional concerns. *Id.* at 240.

To the best of amici's knowledge, the only case to affirmatively hold that a diocese itself and its "members"¹³ stand in a fiduciary

¹³ The *Koenig* court's use of the phrase "members of the diocese" demonstrates that court's confused thinking about this issue. It appears, from the *Koenig* opinion, to have been used to mean officials of the Roman Catholic Church hierarchy responsible for the running of the diocese. If the court below intended, as it implied,

relationship to parishioner, is *Koenig v. Lambert*, 527 N.W.2d 903 (S.D. 1995), which was subsequently overturned in *Stratmeyer v. Stratmeyer*, 567 N.W.2d 220 (S.D. 1997), and has no precedential effect even in South Dakota. In regard to the Religion Clauses concerns discussed above, *Koenig* is of no significance, most importantly because it says nothing at all about these constitutional questions. The *Koenig* court appears either to have been unaware of them, or to have intentionally failed to treat them. Secondly, the *Koenig* court's complete discussion of the question whether the diocese had a fiduciary relationship to the plaintiff is the unsupported assertion that there "must" be a fiduciary relationship between the diocese and the people it purports to serve. This bare conclusion is contrary to all precedent and the Constitution, is entitled to no persuasive weight, and has no precedential effect in this Circuit.¹⁴

to apply *Koenig's* reasoning to those Roman Catholic faithful who live within the diocese and so are members of it, then the Ruling means that each of those 300,000 people is a fiduciary for all of the other 300,000 people, and vice versa. This probably goes beyond what even the trial court intended.

¹⁴ The trial court's misconstruction of *Erickson v. Christenson*, 781 P.2d 383 (Or. Ct. App. 1989), *appeal dismissed*, 817 P.2d 758 (Or. 1991), is egregious but instructive. The District Court cited *Erickson* for the proposition that the "First Amendment is not a bar to the adjudication of a church's status as a fiduciary," A. at 364, but this proposition is precisely what *Erickson* does not stand for. The court in *Erickson* spoke only to the question of whether an individual clergyman could be held liable for the breach of a fiduciary duty to the plaintiff, and found that because the clergyman took on the responsibility of acting as "pastor, counselor, confessor, advisor, teacher and surrogate father," *Erickson* at 106, the Complaint was sufficient to state a claim for breach of fiduciary

As the Supreme Court of Maine recognized in *Swanson v. Roman Catholic Diocese of Portland*, 692 A.2d 441 (Me. 1997), courts must avoid any consideration of religious or doctrinal matters. *Id.* at 443. Only when "the court is not required to rely on religious precepts in determining the question before it" can a constitutionally-proper approach to civil liability questions be applied. *Id.* at 445, n.7. Here, virtually the *only* facts the court relies upon to ascertain the existence of a fiduciary relationship are "religious precepts," as described above. *See A.* at 366, 367, 370, 374, 375, 375, 382-386. In so doing, the court discards traditional tort principles and the constitutional rights of religious bodies as it searches for a remedy in this case.

II. The Radical Transformation of the Law on Fiduciary Duty Unconstitutionally Impacts All Religious Institutions.

The trial court's mode of analysis in this matter is fatally flawed because it applies with equal strength to every single Catholic

duty as against the clergyman.

As to the institutional defendants in *Erickson*, Luther Memorial Church and the American Lutheran Church, North Pacific District, there was *no* such holding. Nothing in the *Erickson* decision supports the argument that this particular church, or the American Lutheran Church, North Pacific District, were themselves in a fiduciary relationship with the plaintiff, or had any fiduciary duty as to her. *Erickson* simply does not say that the First Amendment is not a bar to the "adjudication of a church's status as a fiduciary," as the trial court asserted, A. at 364, and it certainly does not say that that relationship may be proven by reference to religious teachings and doctrine, as the trial court has done in the instant case.

person in the Diocese of Bridgeport, more than 300,000 people. A. at 1545. This flows from the fact that the only evidence of the existence of this fiduciary relationship, and thus of the fiduciary duty found to exist here (over and above the plaintiff's unilateral and subjective feelings of trust and confidence in the diocese and bishop, A. at 1315, 1365, are religious teachings and matters of religious doctrine and faith that are common to all Catholics. For example, the transcript demonstrates that at trial, testimony and other evidence was received that in religious training classes Catholic children in the Diocese of Bridgeport, as in all dioceses, were taught general principles of obedience to Bishops and priests, A. at 479, 491, 494, that as a matter of Roman Catholic teaching the Bishop of a diocese has a "pastoral relationship" with the faithful in his diocese, A. at 608-612, 1288-1291, that the Code of Canon Law of the Roman Catholic Church describes the relationship between a bishop and his parishioners as one of a "shepherd" to a "flock," A. at 778-781, and that the Catholic Catechism in use at that time stressed the obligation of the faithful to obey priests and Bishops. A. at 1286-91.

Plaintiff alleged that on three occasions between 1962 and 1964 Father Brett, a priest of the Diocese, sexually abused him. Plaintiff argued that the Diocese knew of Father Brett's propensities and was obliged in 1966 to tell plaintiff that he *might* have been a victim of Brett. While plaintiff did not file suit until 1993, he says he did not remember the incidents until 1991, and argues that the statute of

limitations period on his claim was tolled by the defendant's "fraudulent concealment" of the cause of action he allegedly had against the diocese. The District Court found fraudulent concealment and allowed the underlying claim to proceed against the Diocese, based on a breach of fiduciary duty (and that basis alone).

By analogy, any religious denomination that can be said to promote trust in any denominational representative is at risk in exactly the same way as Catholic dioceses and organizations are. For all denominations, the implications of permitting a secular court to determine the dimensions of religious duties, and then impose civil liability for their breach, are equally offensive.¹⁵

The sweeping implications of this reasoning would re-make theories of civil liability in this country, and extend liability based on religious teaching alone. The extension of liability reaches in two equally untenable and unconstitutional directions, towards a cause of action for "clergy malpractice," and towards denominational liability premised upon religious beliefs alone. This should be enough to convince this Court of the extraordinary need to reverse the decision below.

A. Clergy Malpractice.

¹⁵ Obviously, the court's analysis in this case would ensure that different religions will be treated differently, in relation to the fiduciary duty analysis, based on differences in their religious teachings. Clearly, this raises several separate sets of Religion Clauses concerns arising out of the differential secular treatment of religious denominations, which are beyond the scope of the present brief.

The expansive liability claims urged by the plaintiff and adopted by the court below in fact would lead to a finding of civil responsibility because the diocese did not act as the court believes a diocese is supposed to act as a *religious* matter, under the court's application of canon law and religious teachings. That kind of claim elsewhere is styled "clergy malpractice," the substantive equivalent of the fiduciary duty theories adopted here, and has been "rejected uniformly" by both federal and state courts. *Dausch*, 52 F.3d at 1432. *See, e.g., Sanders v. Casa View Baptist Church, supra; Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) (*en banc*); *F.G. v. MacDonell, supra*. In *Schmidt v. Bishop, supra*, the court arrived at that conclusion, explaining that "in analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergymen required by the law of negligence." *Schmidt*, 779 F. Supp. at 326.

Plaintiff prevailed below because, in essence, he convinced the trial court that the Bishop and diocese did not do a "good enough" job of fulfilling the obligations and responsibilities that a Bishop and diocese bear, as embodied in canon law and Catholic religious teachings, and so plaintiff's fiduciary duty claims are nothing but renamed clergy malpractice claims. The trial court frankly acknowledged as much when it declared in its Ruling that its decision was based on its reading of "religious doctrine or canon law," A. at 366, church

teachings regarding the special religious status of priests and the diocesan Bishop, A. at 366, 382, the fact that plaintiff's trust in the Church overall, and in the diocese in particular, had been nurtured by church teachings, A. at 374, 375, 379-382, that plaintiff had been encouraged by the church to trust priests and Bishops, A. at 382, 384-386, and that the Bishop was held out by Church teachings as the leader of parishioners in his diocese in matters of faith and morals, A. at 384. But the very process of the civil government establishing what those standards of conduct are for a bishop and a diocese violates the Religion Clauses.¹⁶

In fact, in the few cases in which a fiduciary duty has been found to exist in a clergy misconduct situation, this has occurred precisely because the facts and circumstances of the cases have permitted the courts involved to draw clear distinctions between the fiduciary duty claims plaintiffs were permitted to proceed with, and the "clergy malpractice" claims that were typically dismissed.

In *Nally v. Grace Community Church*, 763 P.2d 948 (Cal. 1988), *cert. denied*, 490 U.S. 1007 (1989), the Supreme Court of California described the constitutional reason why it refused to recognize the tort of clergy malpractice. For a secular court to establish the

¹⁶ Included among a fiduciary's duties is the obligation to exercise reasonable skill and care. See *Bailey v. Allstate Ins. Co.*, 844 P.2d 1336 (Colo. Ct. App. 1992). Ascertaining whether a Bishop or diocese has exercised reasonable skill and care in meeting their obligations clearly puts the civil court in the position of determining what those quintessentially-religious obligations are, which is constitutionally prohibited.

existence and dimensions of the applicable duty of care in such a case "would necessarily be intertwined with the religious philosophy of a particular denomination or ecclesiastical teachings of the religious entity," an enterprise which the court described as "certainly . . . impractical and quite possibly unconstitutional." *Id.* at 960. Here the situation is far more extreme - in the trial court's view the fiduciary relationship itself exists *only* because of the religious teachings of the denomination in question, and its breach is a function of the degree to which the Bishop and diocese are found to have failed to fulfill those teachings as measured by the trial court's understanding of those religious ideas. The importance of this distinction was emphasized in *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993) (*en banc*). *Moses* involved a plaintiff who sought counseling from an Episcopal priest, who misused the counseling context to conduct a sexual relationship with her. When that relationship ended, plaintiff brought the matter to the attention of the Episcopal diocese and the diocesan Bishop personally. The court found that the bishop took upon himself the responsibility for counseling the plaintiff personally and acting as her advisor in relation to the abusing priest, and persuaded plaintiff to allow him to decide "whatever needed to happen" in regard to the priest in question.¹⁷

¹⁷ Amici note that there are questions about the process the *Moses* court used to evaluate the propriety of the pastoral response to Moses's claims by her Bishop, some of which raise constitutional concerns similar to those the amici have here. The analysis here accepts *arguendo* the adequacy of the process and the facts as noted.

Thus, the court based its decision on its factual holding that the Bishop took on personal responsibility, independent of his religious duties, to resolve the matter in plaintiff's best interest. *Moses*, at 317-8, 323.

In *Moses*, the court found that it could set standards for the Bishop's and diocese's conduct, consistent with the First Amendment, because "the facts of the case do not require interpreting or weighing church doctrine" or require "a reading of the Constitution and Canons of the Protestant Episcopal Church or other documents of church governance," *id.* at 321, but the District Court's decision here ignores all of these distinctions. It found a fiduciary relationship to exist where, from the evidence, there was absolutely no indication that the Bishop or diocese had ever affirmatively took on the obligation to act in the plaintiff's best interests.¹⁸

This is manifestly the sort of "rel[iance] upon canon law" and upon purported violations of specific religious principles and teachings, in order to prove plaintiff's claims, that the court in

¹⁸ Indeed, even courts in Colorado have limited *Moses*' applicability only to those cases where a church entity has "asked plaintiff to refrain from discussing the matter with anyone or asked plaintiff to let the [church] alone supervise whatever needed to happen...." *Bohrer v. DeHart*, 943 P.2d 1220 (Colo. App. 1996), *reaffirmed after remand*, 944 P.2d 633 (Colo. App. 1997); *Ayon v. Gourley*, No. 97-S-1936 (D. Colo. July 15, 1998). Since no evidence of either of these key points was presented in the instant case, *Moses* is inapplicable in the first instance. See also *Brown v. Pearson*, 483 S.E.2d 477 (S.C. 1997) (unilateral expectation that church officials would take action on complaints, and religious roles of church officials, held insufficient to create fiduciary duty).

Isely, supra, rejected. It demonstrates exactly the "extensive inquiry by civil courts into religious law and polity" that the Supreme Court held contravenes the First Amendment. *Serbian Eastern Orthodox*, 426 U.S. at 709. This was reiterated most recently by the federal District Court in *Ayon v. Gourley*, No. 97-S-1936 (D. Colo. July 15, 1998) (for court to examine church policy and doctrine, in context of a tort suit against Roman Catholic Bishop and diocese, would violate Establishment Clause).

B. Denominational Liability.

The trial court's conclusions here are so radical that, to the best of the amici's knowledge, in no decision currently in force has a religious institution ever been found to have a fiduciary relationship to a congregant by virtue of membership, as is presented here.¹⁹ The implication of such a holding is that courts may search the religious writings, doctrines and traditions of virtually every religious

¹⁹ The only apparent case holding to the contrary was *Koenig v. Lambert*, 527 N.W.2d 903 (S.D. 1995), *overruled on other grounds* in *Stratmeyer v. Stratmeyer*, 567 N.W.2d 220 (S.D. 1997), discussed more fully above. In fact, in the *Koenig* opinion the court says that a fiduciary relationship exists between the plaintiff and the diocese because "the Diocese and its members were not only acting as members of the church, they were also acting as agents or representatives of God" and so had a particular, fiduciary, relationship to the plaintiff because he participated in the religious relationship. *Koenig*, 527 N.W.2d at 906. Amici submit that all religious denominations exist in order to bring people closer to God, however the Supreme Being is conceived of (although the court's mixed civil and religious metaphor of "acting as agents and representatives of God" is not language that any of the amici would have adopted for themselves), and all clergy and some other religious leaders may be seen as instrumental in creating or furthering that relationship. The court's decision would extend fiduciary duties to all such persons.

denomination to find fiduciary duties to every member or adherent simultaneously. This would be an enormous infringement upon the free exercise of religion.

Courts have uniformly refused to give civil effect to religious polity and teachings. *Eckler v. General Council of Assemblies of God*, 784 S.W.2d 935, 940 (Tex. Ct. App. 1990) (tort context); *Folwell v. Bernard*, 477 So.2d 1060 (Fla. Dist. Ct. App. 1985) (personal injury context); *Hope Lutheran Church v. Chellew*, 460 N.E.2d 1244 (Ind. Ct. App. 1984) (contract law context); *Roman Catholic Archbishop v. Superior Court*, 15 Cal.App.3d. 405, 93 Cal. Rptr. 338 (Cal. 1971) ("alter ego" context). The only apparent exception is *Barr v. United Methodist Church*, 90 Cal.App.3d 259, 153 Cal. Rptr. 322, cert. denied, 444 U.S. 973 (1979) in which the court did improperly read and apply the Methodist Book of Discipline, and examine church structure and teachings, in holding the United Methodist Church civilly liable for the financial collapse of a series of retirement homes. *Barr* has been roundly criticized by commentators, see, Mark E. Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 Am. J. Trial Advocacy 289, 337-341 (1993), has never even been cited for its core holding, and must be viewed as an unconstitutional aberration.

The alternatives are virtually impossible to imagine, under our system of constitutional governance. For example, the Supreme Judicial Court of Massachusetts in *Weaver v. Wood*, 680 N.E.2d 918 (Mass.), cert. denied, 118 S. Ct. 694 (1998), held that members of The First Church of

Christ, Scientist lacked standing to challenge the decision of the church's directors and publishing arm to enter the medium of television, because they had no enforceable legal interest in the administration of the charitable trusts created to pursue the church's goals. But if they had been found to have standing, could they have been heard to challenge in the secular courts the conduct of the church's Committee on Finance on the basis that it had not acted "in a Christian spirit and manner," as directed by The Manual of the Mother Church? *Id.* at 921. Or would the court have presumed to decide for itself the question whether plaintiffs were actually "members in good standing" of the church, as plaintiffs asserted? *Id.* Under the Religion Clauses the civil courts are prohibited from deciding what "a Christian spirit" is and whether it has been followed, or whether a person is a "member in good standing" of a church. These questions, like the meaning of Catholic Church teachings regarding the religious roles and responsibilities of a diocese, or the divine derivation of the powers of a Bishop, are not questions that secular courts are competent to decide.

In the context of the Church of Jesus Christ of Latter-Day Saints the Bishops of the church, who are lay religious leaders (rather than professional clergy ordained in the same fashion as in the Roman Catholic Church), are "judges in Israel," meaning they hold the ecclesiastical authority to judge another's conduct and to impose church discipline. See Doctrine and Covenants 107:72; General Handbook

of Instructions 10-1 (1989). This includes the authority to hear confessions of misconduct and to waive or impose penalties affecting membership status such as excommunications or disfellowshipments. If a court were asked to impose and enforce secular legal duties upon an LDS Bishop acting as a "judge in Israel," it would be expressly prohibited from doing so by the Religion Clauses.

Amici respectfully suggest that any court that attempts to establish secular legal duties, as the trial court effectively did here, arising out of an organization's religious role, has not only approached the line where the Religion Clauses of the First Amendment are violated - it has long since erased those boundaries.²⁰

CONCLUSION

Because of the District Court's violation of the Religion Clauses

²⁰ An article in *The National Law Journal* (July 20, 1998) describing the increasing use of fiduciary duty theory to sue clergy and religious institutions set forth the views of a number of plaintiffs' counsel who advocate the use of the theory. One is quoted as taking the following view of the law: "You just have to establish an unequal power relationship. The person with greater power has a duty to act in your own best interests." The fiduciary duty is violated "if a priest or rabbi or minister takes an action that is in his own best interests. . . ." *National Law Journal*, July 20, 1998, at A16. The broader implications of this view are absolutely extraordinary. It suggests that all persons with greater power, without regard for the source of that power, have legally enforceable duties to all those with less power. This would work a fundamental revolution in American tort law, and clearly premises liability only on a clergyman's religious role. In fact, it posits that clergy have a fiduciary duty not only to all of their co-religionists, but to all persons having "less power," which would also include many who do not even subscribe to the religious beliefs of the clergy in question. Unfortunately, this is consistent with the decision of the trial court below.

of the First Amendment to the Constitution, the decision and judgment herein should be reversed, the jury verdict set aside, and the complaint dismissed with prejudice.

Respectfully submitted,

Mark E. Chopko
General Counsel

Jeffrey Hunter Moon
Solicitor

United States Catholic Conference
3211 4th Street, N.E.
Washington, D.C. 20017
(202) 541-3300

Michael L. Costello*
Tobin and Dempf
33 Elk Street
Albany, New York 12207
(518) 463-1177

August 31, 1998
*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of the United States Catholic Conference, the Church of Jesus Christ of Later-Day Saints, the Rev. Clifton Kirkpatrick as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), the General Conference of Seventh-Day Adventists, The General Council on Finance and Administration of the United Methodist Church, The First Church of Christ, Scientist, and The Evangelical Lutheran Church in America, as Amicus Curiae in Support of Appellant Bridgeport Roman Catholic Diocesan Corporation, were mailed, postage prepaid, this 28th day of August 1998, to each of the following:

Gary Naftalis
Kramer, Levin, Naftalis & Frankel
919 Third Avenue
New York, NY 10022
Attorney for Defendant-Appellee
Bridgeport Roman Catholic Diocesan
Corporation

John R. Williams
Williams, Polan & Pattis, L.L.C.
51 Elm Street
New Haven, CT 06510
Attorney for Plaintiff-Appellee
Frank Martinelli

Jeffrey Hunter Moon
Solicitor
United States Catholic Conference
3211 4th Street, N.E.
Washington, D.C. 20017
(202) 541-3300

