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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION NO. 1296

JAMES HOGAN et al.,
Plaintiffs

vs.

THE ROMAN CATHOLIC ARCHBISHOP OF BOSTON, A CORPORATION SOLE[1], et al.
Defendants

2-19-03

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' OMNIBUS MOTION TO DISMISS

The approximately four hundred plaintiffs in these consolidated cases seek monetary damages from various church representatives.[2] With a few exceptions, each plaintiff claims that he or she was sexually molested by a priest.[3] Most of the plaintiffs were children when the alleged sexual abuses occurred.[4] Each plaintiff claims that one or more of the church representatives breached a legal duty to take reasonable measures to prevent the alleged sexual assault(s) and as a consequence the plaintiff was injured.

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[1]See St.1897, c. 506.

[2]The term "church representatives" is used to describe the defendants who have brought this motion. Until recently, all parties seemed comfortable referring to the church representatives as the "supervisory defendants" in order to distinguish them from various other priest who allegedly sexually molested the plaintiffs. However, as the defendants' counsel pointed out, the use of that phrase may erroneously be interpreted to suggest that the defendants acknowledge they had supervisory authority over the alleged offending priests.

[3]In some of the complaints, parents sue for the loss of the consortium of a child.

[4] One of the plaintiffs is a lady who worked in a parish rectory and claims she was sexually abused by a parish priest. A few plaintiffs claim they were sexually abused by priests during counseling sessions. These plaintiffs were adults at the time of the alleged abuses.

For purpose of the motion before the court, it is not necessary to describe the plaintiffs' specific factual assertions of the details of the alleged sexual acts or the settings in which they supposedly occurred. Suffice it to say, most of the complaints contain allegations of rape and indecent assault and battery. The priests who allegedly committed these acts included some parish priests and some priests who were involved in youth ministry.

The defendants move to dismiss all of the plaintiffs' complaints on the basis that the court lacks subject matter jurisdiction. For the reasons set forth herein, the defendants motion to dismiss is allowed as to any plaintiff's claim of "canonical agency" and is allowed as to all of the plaintiffs' claims for negligent supervision, to the extent relief is sought for negligent ordination of a priest or negligent failure to laicize a priest. Otherwise the motion is denied.

RULE 12(b)(1) STANDARD

The church representatives have moved pursuant to Mass. R. Civ. P. 12(b)(1) to dismiss the claims against them, on the grounds that the First Amendment precludes this court from exercising subject matter jurisdiction over the plaintiffs' core claims of negligent supervision. Attached to the motion are numerous affidavits which describe how the relationships between the church representatives and priests assigned by or to them are guided, informed or controlled by canon law, theological beliefs, scripture, church doctrine and church policies. The affidavits filed by the church representatives do not reveal any disputed jurisdictional facts, as they contain no evidence of a relevant conflict between their religious obligations and beliefs, on one hand, and, on the other, secular tort principles which impose a duty to exercise care to prevent persons in their control from committing reasonably foreseeable sexual assaults upon children. Specifically, nothing in the affidavits by St. John's Seminary adjunct theology professor Father Oliver or other religious affiants

state or even suggests that religious beliefs or principles in any way prohibited church representatives from exercising a duty of care under secular tort law to prevent the alleged abuse.[5]

Rule 12(b)(1) "is a large umbrella, overspreading a variety of different types of challenges to subject matter jurisdiction." *Valentin* v. *Hospital Bella Vista*, 254 F.3d 358, 362-363 (1st Cir. 2001) (describing Federal Rule of Civil Procedure 12(b)(1)). Because the motion to dismiss presents a legal question, and does not require the court to resolve a dispute as to accuracy of jurisdictional facts asserted by the plaintiffs, the court treats all of the well-pleaded facts alleged in the complaints as true and indulges all reasonable inferences in favor of the plaintiffs. See *Aversa* v. *United States*, 99 F.3d 1200, 1209-1210 (1st Cir. 1996). In assessing whether it has subject matter jurisdiction, the court may consider affidavits and other matters outside the face of the complaint. *Ginther* v. *Commissioner of Insurance*, 427 Mass. 319, 322 & n.6 (1998); *Valentin* v. *Hospital Bella Vista*, 254 F.3d at 363 (in assessing the sufficiency of the plaintiff's basis for subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), "the court must credit the plaintiff's well-pleaded factual allegations (usually taken from the complaint, but sometimes augmented by an explanatory affidavit or other repository of uncontested facts), draw all reasonable inference from them in her favor, and dispose of the challenge accordingly"); *Smith* v. *O'Connell*, 986 F. Supp. 73, 75 (D. R.I. 1997) (in adjudicating Rule 12(b)(1) motion supported by affidavits, court treated all of plaintiffs' well-pleaded factual allegations in the complaint as true and considered evidence challenging and/or supplementing the jurisdictional allegations). The threshold to withstand a motion to dismiss under

[5] Nor do the defendants argue that any other facts, apart from those set forth in their affidavits, are pertinent to the resolution of the motion. For example, the defendants argued at hearing that the plaintiffs' membership or lack thereof in the Roman Catholic Church was not at issue, but rather the character of any intrusion by civil courts into church matters.

Rule 12(b)(1) is extremely low. 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure § 1350*, at 150 (Supp. 2002), citing *Lunderstadt* v. *Colafella*, 885 F.2d 66, 70 (3d Cir. 1989) (threshold to withstand motion under Fed. R. Civ. P. 12(b)(1) is lower than that required to withstand a Rule 12(b)(6) motion).

Analysis of First Amendment principles, as set forth below, compels the conclusion that the complaints here allege sufficient facts to establish this court's subject matter jurisdiction over all of the complaints and most of the individual counts or causes of action set forth in each complaints.

NEGLIGENT SUPERVISION CLAIMS

While many of the plaintiffs' complaints include claims in addition to negligent supervision,[6] the defendants choose to mount their jurisdictional challenge within the framework of the common law tort of negligent supervision and whether that type of claim can withstand constitutional scrutiny under First Amendment Religious Freedom principles[7]. Because the defendants motion is directed at the issue of subject matter jurisdiction, rather than on Rule 12(b)(6) grounds, there is no need for the court to undertake a full dissertation of negligent supervision tort law. Yet, the parameters of negligent supervision law must be discussed in order to understand the respective parties varying

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[6]For example, various plaintiffs' complaints contain counts for vicarious liability, negligent infliction of emotional distress, premises liability, "canonical agency." Some complaints contain counts for intentional torts; e.g. invasion of privacy, violations of civil rights, intentional infliction of emotional distress, invasion of privacy rights, civil conspiracy. Some complaints contain hybrid claims, such as, breach of fiduciary duty,"ratification."

[7]"It is the intention of this motion to show that the gist of Plaintiffs' Claims, although denominated otherwise, are claims of negligent supervision or negligent management masquerading under various aliases, and that they are barred by the Doctrine of Church Autonomy because the adjudication of them necessarily touches upon ecclesiastical matters." (Defendants' Brief in Support of Omnibus Motion to Dismiss For Lack of Subject Matter Jurisdiction, pages 8-9).

positions on whether the gravamen of the tort claims before the court violates the defendants' freedom of religion rights. With that understood, the court turns to the concept of duty under the law of negligence.

"There can be negligence only where there is a duty to be careful . . . and whether there is a duty to be careful is a question of law." *Yakubowicz* v. *Paramount Pictures Corp.*, 404 Mass. 624, 629 (1989). Within the context of the cases at bar, a defendant owes a duty to a plaintiff if the "defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so." *Irwin* v. *Ware*, 392 Mass. at 745, 756 (1984). Whether it is reasonably foreseeable that a third party will cause harm to a plaintiff is determined by examining all of the circumstances. *Whittaker* v. *Saraceno*, 418 Mass. 196, 199 (1994). See also *Schofield* v. *Merrill*, 386 Mass.244, 246-254 (1982) (reasoning that in determining whether the law ought to provide that a duty of care is owed by one to another, the court must look to existing social values and customs, and to appropriate social policy).

In negligent employment cases, it is recognized that an employer whose employees are brought in contact with members of the public in the course of the employer's business have a duty to exercise reasonable care in the selection and retention[8] of its employees. *Foster* v. *The Loft, Inc.*, 26 Mass. App. Ct. 289, 290 (1988).

> "These principles have been explained in the following manner: 'An employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer. The employer's knowledge of

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[8] In the cases at bar, the terms "selection" and "retention" cannot include within their respective meaning the ordination or laicization of priests but can include assignments and transfers of allegedly offending priests to particular positions. The reasons for this are fully discussed in the First Amendment Freedom of Religion section of the decision.

past acts of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to forewarn the employer who selects or retains such employee in his service that he may eventually commit an assault, although not every infirmity of character, such for example, as dishonesty or querulousness, will lead to such result.'"

Id. at 290-291, quoting Annotation, Liability of Employer, Other Than Carrier, For a Personal Assault Upon Customer, Patron, or Other Invitee, 34 A.L.R.2d 272, 390 (1954).

The Restatement [Second] of Torts and Agency also outlines when liability may be imposed on an employer for the acts of its employees. It states in relevant part that:

"A master is under a 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, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control."

Restatement [Second] of Torts § 317 (1965), Comment c.

"A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

. . .

(b) in the employment of improper persons or instrumentalities in work involving risk of harm to others:

(c) in the supervision of the activity; or

(d) in permitting, or failing to prevent, negligent or otherwise tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control."

Restatement [Second] of Agency § 213.[9]

As applied to the cases before the court, the task is to determine whether the general principles of negligent supervision law violate the church representatives' rights to freedom of religion.

FIRST AMENDMENT RELIGIOUS FREEDOM

The First Amendment to the United States Constitution provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

These guarantees are made applicable to the states through the Fourteenth Amendment to the Constitution. *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290, 301 (2000); *Everson* v. *Board of Educ.*, 330 U.S. 1, 15 (1947). "The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). The Supreme Court in *Cantwell* generally described the liberties protected by the First Amendment's Free Exercise Clause and the restrictions on government intrusion into those liberties.

> "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any

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[9] "The rule stated in this Section is not based upon any rule of the law of principal and agent or of master and servant. It is a special application of the general rules stated in the Restatement of Torts and is not intended to exhaust the ways in which a master or other principal may be negligent in the conduct of his business." Comment a.

"The principal may be negligent because he has reason to know that the servant or other agent, because of his qualities, it likely to harm others in view of the work or instrumentalities entrusted to him. If the dangerous quality of the agent causes harm, the principal may be liable under the rule that one initiating conduct having an undue tendency to cause harm is liable therefor. . . If liability results it is because, under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person for the business in hand" Comment d.

> creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection."

Id. at 303-304.

In their motion to dismiss, the defendants contend the First Amendment prohibits civil courts from considering and adjudicating the plaintiffs' tort claims against hierarchical church representatives who allegedly failed to take reasonable actions to prevent certain archdiocesan priests from sexually molesting individuals (mostly children) who were in their care. The defendants rely on the assertion of a "church autonomy doctrine" which, in their view, prevents the application of secular law, here tort law, to church representatives.[10] Recasting the principle of church autonomy as a legal "doctrine" of such sweeping proportions, the defendants would have the court find that officials of a hierarchical church are immune from tort liability, irrespective of whether the law and its application are neutral and regardless of how grave the harm that will likely occur if the law is violated. The defendants' central argument is that whenever a church official, having authority over a clergy member or church employee, takes an action or makes a decision with respect to the cleric or employee which breaches secular law and results in foreseeable harm to a third party, for whom the law is designed to protect, that official cannot be held legally responsible if his relationship to

[10]Civil law refers to both statutory and common law. See *Kreshik* v. *Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960); *Alberts* v. *Devine*, 395 Mass. 59, 73 (1985) ("A law, legislatively or judicially created, that would regulate or prevent religiously motivated conduct does not violate the First Amendment if the State's interest in the law's enforcement outweighs the burden that the law imposes on the free exercise of religion.").

the offending cleric or employee is in anyway addressed by church law or its theological underpinnings. In *Minersville School Dist. Bd. Of Ed.* v. *Gobitis*, 310 U.S. 586, 594-595 (1940), Justice Frankfurter, writing within the context of the Free Exercise Clause, addressed the inherent danger of such an extreme legal position: "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs . . . ." For over a century, The United States Supreme Court has warned against that danger:

> " 'Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.' "

Department of Human Resources v. *Smith*, 494 U.S. 872, 879 (1990), quoting *Reynolds* v. *United States*, 98 U.S. 145, 166-167 (1879):

The defendants advance the argument that the court does not have subject matter jurisdiction over tort actions against church representatives arising from their alleged negligent oversight of priests who supposedly sexually assaulted children who were under their care, because the relationship between a church official and cleric is a subject "touching" on matters of doctrine, church law and polity. In *Williams* v. *Episcopal Diocese of Massachusetts*, 436 Mass. 574 (2002), the Supreme Judicial Court addressed whether the Superior Court had subject matter jurisdiction over an intra-church employment dispute between an Episcopal priest and his bishop. The Court held that the First Amendment prevents civil courts from becoming engaged in ". . .church disputes touching on matters of doctrine, canon law, polity, discipline and ministerial relationships. . ." *Id.* at 579. The cases before the court are not church disputes. They are tort claims against church

representatives primarily for negligent supervision of clerics and employees who allegedly sexually molested various plaintiffs. As is noted throughout this decision, some plaintiffs' complaints include causes of action which run afoul of both the Free Exercise Clause and the Establishment Clause. But the offending claims appear in only a small number of the hundreds of cases before the court and even where a complaint contains an offending claim, the other causes of actions do not implicate the First Amendment's freedom of religion guarantee.[11]

By labeling First Amendment church autonomy considerations as an impregnable legal "doctrine," the defendants would have the court apply an overarching rule that would render traditional jurisdictional analyses of the Establishment Clause and the Free Exercise Clause meaningless and have the practical effect of granting to hierarchical church representatives unqualified immunity from secular legal redress, regardless of how negligent, reckless or intentional the representatives' supervision over their subordinates might be and regardless of the severity of the injuries suffered by claimants.

This is not to say that an analysis of church autonomy principles or inquiry about whether the civil resolution of tort cases results in excessive entanglement by courts into church law and polity should not be undertaken in determining whether subject matter jurisdiction is present in the cases at bar. See *Serbian E. Orthodox Diocese for United States and Canada* v. *Milovojevich*,

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[11] This decision is limited to the defendants' First Amendment jurisdictional challenge. Although a particular cause of action in a complaint does not violate the First Amendment, that does not mean it necessarily asserts a claim upon which relief can be granted. For example, many complaints contain causes of actions against various church representatives under a vicarious liability theory. The issue is not before me at this time, but at some point the court will have to determine whether legal authority supports a claim that a supervisor is strictly liable for the alleged criminal or intentional acts of his subordinate that are not committed within the scope of the subordinate's duties.

426 U.S. 696 (1976), enunciating prohibition against civil courts violating the First Amendment by impermissibly intruding into ecclesiastical decisions, and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), for "excessive entanglement" analysis as applied to the Establishment Clause. The impenetrable wall of a so-called church autonomy "doctrine" does not lend itself to careful legal analysis and inquiry into First Amendment subject matter jurisdiction issues. Instead the court looks to the First Amendment's Establishment Clause and Free Exercise Clause and the body of case law decided thereunder for guidance in its resolution of the jurisdictional challenge. 901

A. *Establishment Clause*: "Congress shall make no law respecting an establishment of religion."

The broad principles of the Establishment Clause were stated in *Everson* v. *Board of Education*, 330 U. S. 1, 15-16 (1947), quoting *Reynolds* v. *United States*, *supra* at 164.

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state not the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and State.'"

On this principled foundation, the United States Supreme Court in *Lemon* v. *Kurtzman*, *supra* at 607, held that certain statutes in Pennsylvania and Rhode Island which provided state financial aid to parochial schools were unconstitutional because the statutes ran afoul of both the Establishment and Free Exercise clauses. Chief Justice Burger, writing for the Court, observed that

in light of the broad and thus imprecise prohibitive language of the Establishment Clause it is incumbent upon courts deciding whether a civil law violates the Clause to ". . . draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " *Id.* at 612, quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970). To protect against these evils, the *Lemon* Court recognized that a part three part test must be met for a civil law to pass constitutional scrutiny under the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally the statute must not foster 'an excessive government entanglement with religion.' "(Citation omitted.) *Id.* at 612-613. In the later case of *Agostini* v. *Felton*, 521 U.S. 203, 222-223 (1997), the Supreme Court somewhat modified the *Lemon* test, at least within the context of school aid cases. The *Agostini* Court refined the *Lemon* test by recognizing that the third factor of the *Lemon* test, i.e., the excessive entanglement analysis, actually should be one of the considerations in applying the test's second factor, which is whether the principal or primary effect of the challenged law advances or inhibits religion. *Id.* In yet a later school aid case, *Mitchell* v. *Helms*, 530 U.S. 793 (2000), the Supreme Court applied the revised test and stated,

> " . . . in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors . . . We acknowledged that our cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon's* entanglement inquiry as simply one criterion relevant to determining a statute's effect."

(Citation omitted.) *Mitchell, supra* at 807-808.

The Supreme Court has not yet stated whether the three-part *Lemon* test still exists for

Establishment Clause analysis of disputes where the subject matter does not concern governmental aid to education or whether *Agostini* is applicable to all Establishment Clause cases. In the cases at bar it doesn't really matter because the plaintiffs' core claims pass muster under either test. Using the more modern *Agostini* test, the first part of it requires a determination of whether the common law of tort as it applies to negligent hiring, supervision and retention has a secular purpose. None of the parties genuinely dispute this. The subject tort law is devoid of any religious purpose.

The second factor of the *Agostini* Establishment Clause analysis is whether the principal or primary effect of the challenged law advances or inhibits religion. In resolving that question within the context of the cases at bar, the court must decide whether or not application of relevant tort law would result in excessive governmental entanglement in church affairs. While entanglement questions are considered under an Establishment Clause analysis, they also implicate the Free Exercise Clause. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976); *Malicki* v. *Doe*, 814 So.2d 347, 357 (2002).

Many of the cases discussing excessive entanglement arise from intra-church disputes. See *Presbyterian Church in the United States* v. *Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Hiles* v. *Episcopal Diocese of Massachusetts*, 437 Mass. 505 (2002). While such cases give much guidance, it is important to recognize that the cases before this court are not intra-church disputes. The vast majority of the cases at bar arise from alleged sexual assaults or molestations of children by priests and or other archdiocesan personnel. A number of plaintiffs have never belonged to the Roman Catholic Church.

In *Bollard* v. *California Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999), the United States Court of Appeals for the Ninth Circuit held that the First Amendment did not

preclude a former Jesuit novice from pursuing a Title VII[12] claim against church superiors who allegedly had sexually harassed him.[13] The Court in *Bollard* stated that the question of excessive entanglement has "both substantive and procedural dimensions." *Id.* at 949. Governmental involvement in intra-church employment disputes,

> "creates a constitutionally impermissible entanglement with religion if the church's freedom to choose its ministers is at stake. A religious organization's decision to employ or to terminate employment of a minister is at the heart of its religious mission . . . We cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the 'gifts and graces' of a minister must be left to ecclesiastical institutions."

Id., citing *Minker v. Baltimore Annual Conf. Of United Methodist Church*, 894 F.2d 1354, 1356-1357 (D.C.Cir. 1990). See *Carroll* v. *Alberts*, 474 U.S. 1013 (1985) ("It is clear that the assessment of an individual's qualifications to be a minister, and the appointment and retirement of ministers, are ecclesiastical matters entitled to constitutional protection against judicial or other state interference").

Massachusetts law holds fast to this principle. The Supreme Judicial Court in *Alberts* v. *Devine*, 395 Mass. 59, 72-73 (1985), said that "the assessment of an individual's qualifications to be a minister, and the appointment and retirement of ministers, are ecclesiastical matters entitled to constitutional protection against judicial or other State interference." Nonetheless, the Court held that subject matter jurisdiction was not precluded over the claim of a Methodist minister brought against clerical officials of the United Methodist Church for wrongfully inducing the minister's

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[12] Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[13] In *Williams* v. *Episcopal Diocese of Massachusetts*, 436 Mass. 574, 582 (2002), the Supreme Judicial Court referenced *Bollard, supra*, but stated that since the record in *Williams* did not support a sexual harassment claim, the Court need not resolve the issue presented in *Bollard.*

physician to disclose confidential information to the church representatives upon which they allegedly based their decision not to reappoint the minister.

At hearing, the plaintiffs conceded, as they must, that claims against church representatives for wrongful ordination of particular priests, whether explicitly averred or implicitly contained within the plaintiffs' claims of negligent hiring, supervision and retention, could not survive First Amendment scrutiny. Likewise, claims that church representatives should have recommended that certain priests be removed from the priesthood and that the Archbishop should have laicized these priests, also run afoul of the First Amendment. The ordination of a man into the priesthood and his removal from it are purely ecclesiastical matters that are not subject to judicial scrutiny. *Carroll* v. *Alberts*, *supra*; *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 729 (1871); *McClure* v. *Salvation Army*, 460 F.2d 553, 558-559 (5th Cir. 1972). It is important to note that *Alberts* v. *Devine*, *supra*, did not contradict this basic tenet. Indeed in *Alberts*, the Supreme Judicial Court specially noted that the selection and removal of a minister was within the exclusive province of church representatives but that exclusivity did not permit church representatives, in considering whether to reappoint the minister, to interfere illegally with the minister's confidential relationship with his physician. 395 Mass. at 74.

Thus, in the few instances where some plaintiffs specifically claim wrongful ordination, those claims will be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction. Likewise a limited number of the complaints contain a count against church representatives for "canonical agency."[14] Where such a count appears in a complaint, it seems to be based on a factual averment

[14] For example see, Count XI of Suffolk County Civil Action 00-5435, *Pagliuca* v. *Geoghan & Roman Catholic Archbishop of Boston, a Corporation Sole*.

that since a priest is a priest "twenty-four hours a day, seven days a week," anything he does must be imputed to church representatives. A "canonical agency" claim on its face violates both the Establishment and Free Exercise Clauses and must be dismissed.

The gravamen of most of the plaintiffs' complaints are for wrongful hiring, supervision and retention. The court does not have subject matter jurisdiction over so much of the hiring and retention claims which implicitly allege wrongful ordination and laicization. However, the "hiring" language in the complaints is fairly read to include appointments and assignments of priests to particular parishes, youth ministries, youth camps and the like by church representatives who allegedly knew or should have known that those priests were likely to sexually molest children. The "retention" language in the complaints is fairly read to include decisions by church representatives to keep priests in certain assignments despite the representatives supposedly knowing that such priests, under the guise of their clerical status, had sexually assaulted children and were likely to do so in the future if they remained in their assignments or if warnings about their proclivities were not given to persons who were likely to come into contact with them in their priestly role. Thus, to the extent wrongful "hiring" and "retention" are read as not including ordination or laicization, the First Amendment ban against judicial review of church representatives decisions to appoint a person into the ministry or remove him from it is not implicated.[15]

[15]In addition to the cases cited herein, the court has reviewed the case law from Federal and other State Courts on the issue of whether the First Amendment bars civil courts from adjudicating negligent supervision claims arising out of priests' alleged sexual molestation of children. Some courts have found that civil courts lack subject matter jurisdiction over such claims, see, e.g., *Gibson* v. *Brewer*, 952 S.W.2d 239 (Mo. 1997); *Ayon* v. *Gourley*, 47 F. Supp.2d 1246 (D. Colo. 1998); *Schmidt* v. *Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991), while others have reached the opposite conclusion, see, e.g., *Bear Valley Church of Christ* v. *DeBose*, 928 P.2d 1315 (Colo. 1996); *Isely* v. *Capuchin Province*, 880 F. Supp. 1138 (E.D. Mich. 1995).

Aside from the claims for wrongful ordination or laicization, the defendants posit that the court lacks subject matter jurisdiction over the plaintiffs' other claims since their resolution would require secular judicial resolution of religious doctrine. In the seminal First Amendment case of *Watson* v. *Jones*, *supra*, a diversity case which was decided before the First Amendment was made applicable to the states by the Fourteenth Amendment, the Supreme Court stated:

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

Id. at 733. In *Gonzalez* v. *Archbishop*, 280 U.S. 1, 16-17 (1929), the Supreme Court held that "[I]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." Also see *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 428 U.S. at 708-709.

The Roman Catholic Church is a hierarchical church. "Hierarchical churches may be defined as those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 110 (1952). When a dispute involves a hierarchical church, "civil courts must tread more cautiously, for the First Amendment 'permits hierarchical churches to establish their own rules for internal discipline and government, and to create tribunals for adjudicating disputes over those matters.'" *Fortin* v. *Roman Catholic Archbishop of Worcester*, 416 Mass. 781, 786-787 (1994), quoting *Antioch Temple, Inc.* v. *Parekh*, 383 Mass. 854, 861 (1981) and *Wheeler* v. *Roman Catholic*

Archdiocese of Boson, 378 Mass. 58, 61 (1979), cert, denied, 444 U.S. 899 (1979). Thus a claim, particularly an intra-church dispute, is left to ecclesiastical, not secular, determination where its resolution requires the application of church law and church policy. *Hiles* v. *Episcopal Diocese of Massachusetts*, 437 Mass. at 515. The defendants insist that resolution of all the cases at bar rest on the interpretation and application of church doctrine and canon law. In support of their argument, the defendants submitted several affidavits and extracts from the Code of Canon Law (Vatican Library 1989). They also provide *The Essential Norms for Diocesan/ Eparchial Policies Dealing With Allegations of Sexual Abuse of Minors by Priests or Deacons* (Approved by the Congregation for Bishops, December 8, 2002). The *Essential Norms* "constitute particular law for all the dioceses/eparchies of the United States of America."*Id.* The norms establish church procedures for investigating and determining claims of child sexual abuse allegedly committed by priests or deacons.

The Reverend Robert W. Oliver, Jr.'s affidavit is part of the defendants' submissions. Father Oliver is an Adjunct Professor of Theology at St. John's Seminary in Boston. He provides the court with a thoughtful and instructive explanation of the Scriptural foundation of a priest's obligations and how tradition, "Magisterial Teaching," and the Code of Canon Law address those obligations. The role of a bishop and his relationship to parishioners and priests within his diocese is also explained by Father Oliver and that explanation is incorporated into the respective affidavits of Bishop Richard G. Lennon, the Apostolic Administrator of the Archdiocese of Boston, and Bernard Cardinal Law, the former Archbishop of the Archdiocese of Boston. The defendants provided excerpts of the Code of Canon Law to demonstrate that the Roman Catholic Church has detailed policies and procedures for the appointment, transfer and removal of priests to or from diocesan

assignments.

The other church representatives who are named as defendants also submitted affidavits.[16] Of these defendants, the ones who were sued in their supervisory capacity as parish pastors uniformly state in their respective affidavits that they had "oversight responsibility" of other priests assigned to a particular parish. Each of them says that his position as pastor was "incident to [his] priestly ministry" and his oversight responsibilities for other priests "were governed by the teachings of the Roman Catholic Church." Many defendants were, and some remain as, archdiocesan administrators. Several of these defendants state in their respective affidavits that "to the extent" they had oversight responsibility for priests of the Archdiocese of Boston, that responsibility was "governed by the teachings of the Roman Catholic Church including Sacred Scripture and Canon Law."

Other defendants who served in archdiocesan administrative capacities, including the Director of the Clergy Personnel Office, state in their affidavits that their respective responsibilities were incident to their priestly ministries but did not include supervision or oversight of other priests. The defendant who is the Director of the Office of Youth Ministry of the Archdiocese of Boston states that while he has no general responsibility for any priests or youth ministers, he does have "some degree of oversight responsibility for priests and youth ministers to the extent a priest o(r) youth minister participates in a program sponsored by the Office of Youth Ministry."

The defendants offer all of the affidavits and other submissions to support their contention

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[16] A few of the moving-party defendants were not pastors or archdiocesan administrators. They include two nuns who are parochial school teachers and an assistant pastor. In their respective affidavits, they state that they had no supervisory or oversight responsibility for any priests.

that the court would necessarily be drawn into establishing or interpreting church policy if it were to entertain the plaintiffs' complaints. The core claims before the court do not invite such a result. The cases at bar do not lure the court into involving itself in church doctrine, faith, internal organization or discipline. See *Alberts* v. *Devine*, 359 Mass. at 72. Instead the court has before it disputes between third parties and the defendants; these are not intra-church disputes. See *Malicki* v. *Doe*, 814 So.2d 347, 360 (Fla. 2002). There is nothing in the defendants' submissions that supports the contention that the application of civil law will interfere with or intrude into church polity and governance. The Church remains free within the confines of its own beliefs, traditions and laws, to discipline or not to discipline priests without secular interference. See *Hiles*, *supra* at 516; *Williams* v. *Episcopal Diocese of Massachusetts*, 436 Mass. 674 (2002).

The defendants explain that the relationship between a bishop and a priest is not the same as between an employer and employee and thus matters of assignment to parishes or removal from them are subject to Canon Law not secular law. According to Father Oliver,

> "there are many dimensions to the relationship between the Archbishop of Boston and the priests of the archdiocese. He serves as their pastor, spiritual adviser, pastoral counselor, spiritual mentor, ecclesiastical authority, father and brother. . Stability is an important value in the appointment of a parish priest. Canon 522. Thus, the removal of a priest from an ecclesiastical office is subject to precise ecclesiastical judicial norms and procedures. Canons 192-196, 1740-1747."

However, the affidavits and other submissions offered by the defendants do not indicate that the Archbishop does not have the "power to determine a priest's assignment or to closely

monitor and supervise the priest's activity." *Smith* v. *O'Connell*, 986 F. Supp. 73, 78 (D.R.I. 1997).[17]

Church doctrine and canon law do not conflict with the civil law on the subject of sexual abuse, particularly the sexual abuse of children. *Smith*, *supra* at 78. Father Oliver states in his affidavit:

> "A priest is a man, who after seminary training designed to inculcate proper spiritual, intellectual, and pastoral formation, is ordained, for life, to the priesthood. Among other solemn promises, a priest promises 'perfect and perpetual continence for the sake of the kingdom of heaven' or life-long celibacy. Canon 277. Accordingly, there can never be a circumstance in which a priest's sexual contact with another would constitute activity within the course or scope of his ministry, his work, or his service to the Church."

In the absence of a substantive entanglement, the procedural aspect of the entanglement analysis as set forth in *Bollard* v. *California Province of Soc. Of Jesus*, *supra*, is narrowed to resolving "the constitutional propriety of subjecting a church to the expense and indignity of the civil legal process." 196 F.3d at 949. Here, as in *Bollard*, the court (which ultimately includes a jury) will not evaluate the reasonableness of church doctrine or law nor will it interpret them. *Id.* at 950. Subjecting the defendants to the neutral application of secular tort law does not excessively entangle the court "in internal church matters or in interpretation of religious doctrine or ecclesiastical law." *Malicki*, *supra* at 364.

[17] In *Smith*, the Federal court denied the defendants' motion to dismiss brought pursuant to Fed.R.Civ.P. 12(b)(1). The defendants included various officials of the Roman Catholic Diocese of Providence. The core claims and jurisdictional issues in *Smith* are identical to the cases at bar. It also appears from reading the case that many of the defendants' affidavits and motion attachments were substantially similar to what has been proffered here.

B. *Free Exercise Clause*: Congress shall make no law prohibiting the free exercise of religion.

The United States Supreme Court, in *Employment Division* v. *Smith*, 494 U.S. 872, 877 (1990), stated:

> "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'...The government may not compel affirmation of religious belief...punish the expression of religious doctrines it believes to be false,...impose special disabilities on the basis of religious views or religious status,...or lend its power to one or the other side in controversies over religious authority or dogma...."

The Free Exercise Clause protects against laws which discriminate on their face or in their purpose. *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533-534 (1993). "Ours is a government which by the 'law of its being' allows no statute, state or national, that prohibits the free exercise of religion." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. at 120. In determining whether the constitutional right to free exercise of religion is implicated, it is necessary to show that the conduct sought to be regulated is "rooted in religious belief" and that the civil law has a coercive effect on an individual's religious practice. *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972); *School District* v. *Schempp*, 374 U.S. 203, 223 (1963). It is important to recognize that the free exercise of religion includes the power of members of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff, supra* at 116. The Supreme Judicial Court explains this principle in *The Parish of the Advent* v. *The Protestant Episcopal Diocese of Massachusetts*, 426 Mass. 268, 286 (1997): "we note that 'religious organizations as spiritual bodies have rights which require distinct constitutional protection.' L.H. Tribe, American Constitutional Law 1236 (2d ed. 1988). It is for this

reason that the Supreme Court consistently has maintained that matters of church government must be as independent from secular control as matters of faith and doctrine." As discussed earlier in this memorandum, there is no showing of a conflict between applicable civil tort law and the RCAB's freedom to govern itself nor does the law interfere with church governance and polity.[18] The plaintiffs' core claims do not "turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church* v. *Hull Memorial Presbyterian Church*, 393 U.S. at 449; *Martinelli* v. *Bridgeport Roman Catholic Archdiocesan Corporation*, 196 F.3d 409, 431 (2d Cir.1999).

The tort law at issue here is neutral on its face and has general application. See *Church of Lukumi* v. *Hialeah, supra* at 531. Neither in purpose or application does it" infringe upon or restrict practices because of their religious motivation . . ." *Id.* at 533. In *Nutt* v. *Norwich Roman Catholic Archdiocese*, 921 F. Supp. 66 (D.Conn. 1995), the Federal court held that negligent supervision claims, based on allegations similar to those here, did not violate the Free Exercise Clause. The Court in *Nutt* said "(t)he common law doctrine of negligence does not intrude upon the free exercise of religion, as it does not 'discriminate against [a] religious belief or regulate or prohibit conduct because it is undertaken for religious reasons.'" *Id.* at 74, quoting *Church of Lukumi,* 508 U.S. at 532.

The plaintiffs are correct when they state they do not need to demonstrate a compelling state interest to overcome the defendants' free exercise jurisdictional challenge. "Neutrality and general

[18] As stated earlier, claims based on unreasonable ordination or laicization will not be recognized nor will counts for "canonical agency."

applicability are interrelated, and...failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 532. Here the requirements of neutrality and general applicability are satisfied. Assuming arguendo that the requirements were not met and keeping in mind that most of the plaintiffs were children when allegedly they were sexually abused by priests, there can be no doubt that the state has a compelling governmental interest in protecting children from rape and other sexual abuses by adults. Further elaboration on this obvious point is not necessary since the defendants do not address the issue of compelling interest.

C. ***Neutral Principles under Jones v. Wolf.***

In their legal memoranda, some parties incorrectly suggest that the court does not have to engage in an excessive entanglement analysis because the "neutral-principle approach" announced in *Jones* v. *Wolf*, 443 U.S. 595 (1979), does not require an entanglement analysis. The *Jones* case arose from a property dispute between a local Presbyterian church in Georgia and the Presbyterian Church of the United States (PCUS). The local church was a member of the PCUS, which has a hierarchical form of church governance. *Id.* at 597-598.

In *Jones*, the Supreme Court held that a civil court did not have to defer to a decision made by the highest tribunal in a hierarchical church. Instead, a civil court could elect to resolve the property dispute by applying the neutral principles of law approach while taking care not to delve into religious doctrine or polity. *Id.* at 602-603. The holding was based on the Supreme Court's recognition that "the state has an obvious and legitimate interest in the peaceful resolution of

property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." *Id.* at 602, citing *Presbyterian Church* v. *Hull Memorial Presbyterian Church, 393 U.S. 440, 445* (1969).

In *Fortin* v. *Roman Catholic Bishop of Worcester*, 416 Mass at 787, the Supreme Judicial Court held that the trial court could not eschew analyzing whether a church was hierarchical or congregational by simply applying a neutral principle approach in resolving a property dispute. The Court stated "our decision in *Antioch Temple. Inc.*, *supra*, makes it clear that this court has not chosen to adopt the 'neutral principles' approach exclusively." *Id.* at 787. Instead, the Court held that in order to exercise subject matter jurisdiction over a church property dispute, thus allowing application of *Jones* neutral principles approach, a trial court must first determine whether the church was hierarchical and, if so, whether the dispute could be resolved " . . . without entangling ourselves in questions of religious doctrine, polity, and practice, and rely instead on well-established concepts of . . . property law." *Id.* at 787-788.

Further, it should be noted that the neutral principles approach under *Jones* is applicable only to property disputes.

CONCLUSION

The church representatives' general proposition that all of the plaintiffs' complaints must be dismissed for want of subject matter jurisdiction is not accepted by this court. If the court were to recognize the defendants' sweeping church autonomy doctrine, which would grant absolute civil immunity to church representatives, the result would be that church representatives could exercise all the rights and privileges the secular law affords yet not be burdened by any of the essential civil laws that protect the safety of all members of society, particularly children.

ORDER

It is **ORDERED** that the defendants' Omnibus Motion to Dismiss is allowed as to any plaintiff's claim of "canonical agency." The motion to dismiss is allowed as to all of the plaintiffs' claims for negligent supervision, to the extent relief is sought for negligent ordination of a priest or negligent failure to laicize a priest; otherwise the motion is denied. The clerk will enter this order on the lead case, Suffolk County Civil Action 02-1296. A reference to the order entered in the lead case will be made on the separate dockets of the cases consolidated thereunder.

Dated: February 18, 2003

Constance M. Sweeney
Associate Justice of the Superior Court