

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 THERESSA “ZISSA” JANETTA RAMANI,
3 INDIVIDUALLY AND AS THE
4 NATURAL MOTHER AND GUARDIAN
 OF MARIO SAMUEL RAHMANI,
 Plaintiff and Appellant,

Case No.: 49341

5 vs.

6 MICHAEL SEGELSTEIN, SHOSHANA
7 SEGELSTEIN, CHABAD OF SOUTHERN
 NEVADA, INC., YEHOASHUA HARLIG
 A/K/A SHEA HARLIG,
8 DINA HARLIG A/K/A DEBORAH
 HARLIG, CHABAD OF SUMMERLIN,
9 INC., AND YISROEL SCHANOWITZ,
 Defendants and Respondents.

10
11 **Appeal from the Eighth Judicial District Court**
12 **The Honorable Timothy C. Williams, District Court Judge**
 District Court Case No. A466121

13 **BRIEF AMICUS CURIAE OF THE JEWISH BOARD OF ADVOCATES FOR CHILDREN, INC.,**
14 **SURVIVORS FOR JUSTICE, THE NATIONAL BLACK CHURCH INITIATIVE, SURVIVORS**
15 **NETWORK OF THOSE ABUSED BY PRIESTS, THE NATIONAL ASSOCIATION TO PREVENT**
16 **SEXUAL ABUSE OF CHILDREN, CHILD PROTECTION PROJECT, THE FOUNDATION TO**
17 **ABOLISH CHILD SEX ABUSE, THE CARDOZO ADVOCATES FOR KIDS, SEXUAL VIOLENCE**
18 **LEGAL NEWS, CHILDREN’S HEALTHCARE IS A LEGAL DUTY, AMERICANS AGAINST**
19 **ABUSES OF POLYGAMY, AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND**
20 **STATE**

21 SHERI ANN FORBES
22 Nevada Bar No. 7337
23 FORBES LAW OFFICE, PC
24 317 South 6th Street
25 Las Vegas, NV 89101
 (702) 726-2815

 MARCI A. HAMILTON
 36 Timber Knoll Drive
 Washington Crossing, PA 18977
 (215) 353-8984
 (215) 493-1094 (fax)

26 *Pro Bono Attorneys for Amicus Curiae The Jewish Board of Advocates for Children, Inc.,*
27 *Survivors for Justice, The National Black Church Initiative, Survivors Network of those*
28 *Abused by Priests, The National Association to Prevent Sexual Abuse of Children, Child*
29 *Protection Project, The Foundation to Abolish Child Sex Abuse, The Cardozo Advocates for*
30 *Kids, Sexual Violence Legal News, Children’s Healthcare Is a Legal Duty, Americans*
31 *Against Abuses of Polygamy, and Americans United for Separation of Church and State.*

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Table of Authorities.	ii
Statement of Amicus Curiae.	viii
I. Introduction.	1
II. Argument.	4
A. Courts Routinely and Appropriately Apply the Law of Negligent Hiring, Supervision, and Retention to Religious Entities and Individuals.	4
i. Negligent Hiring and Background Checks.	6
ii. Negligent Retention and Supervision.	7
B. Religious Organizations Are Not Immune from Fiduciary Duty Laws—The Majority of Courts Distinguish Claims of Breach of Fiduciary Duty From Clergy Malpractice And Allow the Former to Go Forward Consistent with the First Amendment.	8
C. Volunteers May Be Considered Agents of a Principal Under Well-Settled Principles of Agency Law For the Purpose of Imposing Liability Upon the Principal.	10
D. There Is No Constitutional Right of Religious Organizations to Punish Crime Victims for Reporting Crimes Committed by Employees or Volunteers to the Authorities.	12
III. Conclusion.	14
Certificate of Compliance.	15
Certificate of Service.	16

TABLE OF AUTHORITIES

NEVADA CASE LAW

Blandino v. State, 112 Nev. 392, 914 P.2d 624 (1996), cert. denied, 522 U.S. 1003 (1997). 3

Burnett v. C.B.A. Sec. Serv., 107 Nev. 787, 820 P.2d 750 (1991). 5, 6

Chastain v. Clark County Sch. Dist., 109 Nev. 1172, 866 P.2d 286 (1993). 7

Foster v. Washoe County, 114 Nev. 936, 964 P.2d 788 (1998). 11

Hall v. SSF, Inc., 112 Nev. 1384, 930 P.2d 94 (1996). 5, 6, 7

Johnson v. Fong, 62 Nev. 249, 147 P.2d 884 (1944). 10-11

National Convenience Stores, Inc. v. Fantuzzi, 94 Nev. 655, 584 P.2d 689 (1978). 11

Rockwell v. Sun Harbor Budget Suites, 925 P.2d 1175 (1996). 8

Wells, Inc. v. Shoemaker, 64 Nev. 57, 177 P.2d 451 (1947)). 11

FEDERAL CASE LAW

Bollard v. California Province of the Society of Jesus, 196 F.3d 940 (9th Cir. 1999). 6, 13

Carlton v. Fearneyhough, No. 07-10676, 2008 U.S. App. LEXIS 5410 (5th Cir. Mar. 12, 2008). 8

Cox v. Keystone Carbon Co., 861 F.2d 390 (3d Cir. 1988). 8

Craig v. M&O Agencies, Inc., 496 F.3d 1047 (9th Cir. 2007). 8

Doe v. Hartz, 52 F. Supp. 2d 1027 (N.D. Iowa 1999). 5, 9

Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990). 3

EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981). 3

Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004). 3, 13

Employment Div. v. Smith, 494 U.S. 872 (1990). 3

Enderle v. Trautman, No. A3-01-22, 2001 U.S. Dist. LEXIS 20181 (D.N.D. 2001). 5

Estate of Thornton v. Caldor, 472 U.S. 703 (1985) 10

1	<u>Gillette v. United States</u> , 401 U.S. 437 (1971).	6
2	<u>Isely v. Capuchin Province</u> , 880 F. Supp. 1138 (E.D. Mich. 1995).	5
3	<u>Jane Doe A v. Green</u> , 298 F. Supp. 2d 1025 (D. Nev. 2004).	7
4	<u>Jespersen v. Harrah's Operating Co.</u> , 280 F. Supp. 2d 1189 (D. Nev. 2002).	7
5	<u>Jimmy Swaggart Ministries v. Board of Equalization</u> , 493 U.S. 378 (1990).	9-10
6	<u>Jones v. Wolf</u> , 443 U.S. 595 (1979).	6
7	<u>Kedroff v. St. Nicholas Cathedral</u> , 344 U.S. 94 (1952).	6, 13
8	<u>Lemon v. Kurtzman</u> , 403 U.S. 602 (1971).	10
9	<u>Martinelli v. Bridgeport Roman Catholic Diocesan Corp.</u> , 196 F.3d 409 (2d Cir. 1999).	1, 3, 9
10	<u>McClure v. Salvation Army</u> , 460 F.2d 553 (5 th Cir. 1972).	6
11	<u>McLean v. Patten Cmty., Inc.</u> , 332 F.3d 714 (4 th Cir. 2003).	3
12	<u>Melanie H. v. Defendant Doe</u> , No. 04-1596-WQH-(WMc), slip op. (S.D. Cal. Dec. 20, 2005).	1
13		
14	<u>Perry v. Johnston</u> , No. 4:09-CV-105, 2009 U.S. Dist. LEXIS 74706 (E.D. Mo. Aug. 24, 2009).	1
15	<u>Petruska v. Gannon Univ.</u> , 462 F.3d 294 n.11 (3d Cir. 2006).	3
16	<u>Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church</u> , 393 U.S. 440 (1969).	13
17		
18	<u>Rayburn v. General Conference of Seventh-Day Adventists</u> , 772 F.2d 1164 (4 th Cir. 1985).	6
19	<u>Reyes v. Southwest Gas Corp.</u> , 2007 U.S. Dist. LEXIS 57421 (D. Nev. Aug. 2, 2007).	7
20	<u>Sanders v. Casa View Baptist Church</u> , 898 F. Supp. 1169 (N.D. Tex. 1995), aff'd 134 F.3d 331 (5 th Cir. 1998).	9
21	<u>Serbian Orthodox Diocese v. Milivojevich</u> , 426 U.S. 696 (1976).	13
22	<u>Smith v. O'Connell</u> , 986 F. Supp. 73 (D.R.I. 1997).	9
23	<u>Snyder v. Phelps</u> , 580 F.3d 206 (4 th Cir. 2009).	8
24	<u>Texas Monthly, Inc. v. Bullock</u> , 489 U.S. 1 (1989).	10

1	<u>United States v. Lee</u> , 455 U.S. 252 (1982).	3
2	<u>Westbrook v. DTG Operations, Inc.</u> , No. 2:09-CV-00789, 2007 U.S. Dist. LEXIS 14653 (D. Nev. Feb. 28, 2007).	8
3		
4	OTHER STATE CASE LAW	
5	<u>Adams v. Moore</u> , 385 S.E.2d 799 (N.C. Ct. App. 1989).	9
6	<u>Amato v. Greenquist</u> , 679 N.E.2d 446 (Ill. App. Ct. 1997).	5
7	<u>Beal v. Broadard</u> , No. SUCV2002-05765-C, 2005 Mass. Super. LEXIS 125 (Mass. Super. Ct. 2005).	5, 9
8		
9	<u>Byrd v. Faber</u> , 565 N.E.2d 584 (Ohio 1991).	5
10	<u>C.J.C. v. Corp. of the Catholic Bishop of Yakima</u> , 985 P.2d 262 (Wash. 1999).	5, 9
11	<u>Destefano v. Grabrian</u> , 763 P.2d 275 (Colo. 1988).	5, 9
12	<u>Doe v. Evans</u> , 814 So. 2d 370 (Fla. 2002).	1, 9
13	<u>Erickson v. Christenson</u> , 781 P.2d 383 (Or. Ct. App. 1989).	5, 9
14	<u>F.G. v. MacDonell</u> , 696 A.2d 697 (N.J. 1997).	5, 9
15	<u>Flores v. Brown</u> , 248 P.2d 922 (Cal. 1952).	12
16	<u>Fortin v. Roman Catholic Bishop of Portland</u> , 871 A.2d 1208 (Me. 2005).	5, 9
17	<u>Gibson v. Brewer</u> , 952 S.W.2d 239 (Mo. 1997).	1-2
18	<u>Kenneth R. v. Roman Catholic Diocese</u> , 654 N.Y.S.2d 791 (N.Y. App. Div. 1997).	5
19	<u>Konkle v. Henson</u> , 672 N.E.2d 450 (Ind. Ct. App. 1996).	5
20	<u>Malicki v. Doe</u> , 814 So. 2d 347 (Fla. 2002).	1, 3, 5
21	<u>Marshall v. Munro</u> , 845 P.2d 424 (Alaska 1993).	5
22	<u>Martinez v. Primera Asamblea de Dios, Inc.</u> , No. 05-96-01458, 1998 WL 242412 (Tex. Ct. App. May 15, 1998).	5
23	<u>McCauley v. Ray</u> , 453 P.2d 192 (N.M. 1968).	12
24	<u>McKelvey v. Pierce</u> , 800 A.2d 840 (N.J. 2002).	13

1	<u>Morrison v. Diocese of Altoona-Johnstown</u> , No. 1236 of 2004, 2004 WL 3141330 (Pa. Com. Pl. Oct. 20, 2004).	5, 9
2		
3	<u>Moses v. Diocese of Colorado</u> , 863 P.2d 310 (Colo. 1993), <u>cert. denied</u> , 511 U.S. 1137 (1994).	5, 9
4	<u>N.H. v. Presbyterian Church</u> , 998 P.2d 592 (Okla. 1999).	1, 3, 5
5	<u>Odenthal v. Minnesota Conference of Seventh-Day Adventists</u> , 649 N.W.2d 426 (Minn. 2002).	1, 5
6		
7	<u>Olson v. First Church of Nazarene</u> , 661 N.W.2d 254 (Minn. Ct. App. 2003).	1
8	<u>Pritzlaff v. Archdiocese of Milwaukee</u> , 533 N.W.2d 780 (Wis. 1995).	1
9	<u>Rashedi v. General Bd. of Church of Nazarene</u> , 54 P.3d 349 (Ariz. Ct. App. 2002).	1, 5, 9
10	<u>Richelle L. v. Roman Catholic Archbishop</u> , 106 Cal. App. 4th 257 (Cal. App. 1st Dist. 2003).	9
11	<u>Roman Catholic Bishop of San Diego v. Superior Court of San Diego County</u> , 50 Cal. Rptr. 2d 399 (Cal. Ct. App. 1996).	1, 5, 9
12		
13	<u>Roman Catholic Diocese of Jackson v. Morrison</u> , 905 So. 2d 1213 (Miss. 2005).	1, 5, 9
14	<u>Rosado v. Bridgeport Roman Catholic Diocesan Corp.</u> , 716 A.2d 967 (Conn. Super. Ct. 1998).	5
15	<u>Smith v. Privette</u> , 495 S.E.2d 395 (N.C. Ct. App. 1998).	5
16	<u>State v. Young</u> , 974 So. 2d 601 (Fla. Dist. Ct. App. 2008).	1
17	<u>Turner v. Roman Catholic Diocese of Burlington</u> , No. 08-003, 2009 Vt. LEXIS 118 (Vt. 2009).	5
18		
19	<u>Young v. Gelineau</u> , No. 03-1302, 2007 WL 3236736 (R.I. Super. Sept. 20, 2007).	1, 5
20	NEVADA ATTORNEY GENERAL OPINIONS	
21	2002-14 Op. Att’y Gen. 65 (2002).	10
22	91-7 Op. Att’y Gen. 24 (1991).	11
23	85-15 Op. Att’y Gen. 54 (1985).	10, 11
24	80-15 Op. Att’y Gen. 64 (1980).	11-12

1	80-39 Op. Att’y Gen. 149 (1980).	11
2		
3	NEVADA REVISED STATUTES	
4	NRS 391.033	6
5	NRS 424.039	6
6	NRS 450B.800	7
7	NRS 630.167	7
8	NRS 640B.310	7
9	NRS 641B.202	7
10		
11	OTHER STATE STATUTES	
12	IDAHO CODE ANN. § 33-130 (LEXIS through 2009).	7
13	MO. REV. STAT. § 168.133 (LEXIS through 2009).	7
14	24 PA. CONS. STAT. § 1-111 (LEXIS through 2009).	7
15		
16	SECONDARY SOURCES	
17	BishopAccountability.org, Database of Publicly Accused Priests in the United States, http://bishop-accountability.org/member/index.jsp (last visited Nov. 20, 2009).	4
18		
19	Diana R. Garland & Christen Argueta, <u>How Clergy Sexual Misconduct Happens: A Qualitative Study of First-Hand Accounts</u> , SOCIAL WORK & CHRISTIANITY.	2
20	Diana R. Garland, <u>When Wolves Wear Shepherds’ Clothing: Helping Women Survive Clergy Sexual Abuse</u> , 33(1) SOCIAL WORK & CHRISTIANITY 1, 17 (2006).	2
21		
22	Marci A. Hamilton, <u>Religious Institutions, the No-Harm Doctrine, and the Public Good</u> , 2004 BYU L. Rev. 1099 (2004).	2
23	Marci A. Hamilton, <u>The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up</u> , 29 CARDOZO L. REV. 225 (2007).	4
24		

1	Mark Chaves & Diana R. Garland, Executive Summary: The Prevalence of Clergy Sexual Misconduct with Adults: A Research Study, Baylor University School of Social Work, Clergy Sexual Misconduct (2009), J. OF THE SCIENTIFIC STUDY OF RELIGION.	2, 3-4
2		
3	Restatement (Third) of Agency § 7.05.	4, 10
4	Restatement (Third) of Agency § 7.07(3)(b).	10, 12
5	Restatement (Second) of Agency § 219(2)(d).	10
6	Restatement (Second) of Agency § 225.	10, 12
7	Thomas Farragher & Matt Carroll, <u>Boston church review board dismissed accusations by females</u> , BOSTON GLOBE, Feb. 7, 2003, at A1.	2
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		

1 STATEMENT OF INTEREST OF AMICUS CURIAE

2 **The Jewish Board of Advocates for Children, Inc.** (“JBAC”), is a New York
3 nonprofit corporation, founded in 2008, whose primary goals include the protection of
4 children from sexual, physical, verbal, and all forms of abuse, particularly in religious
5 institutions, such as schools and houses of worship. Among its activities, JBAC advocates
6 before legislatures and courts, seeking new laws and judicial decisions that will provide
7 religious community children with the highest legal protection possible. The members of
8 JBAC are primarily drawn from the American orthodox Jewish community, and include
9 rabbis, attorneys, physicians, psychologists, and other community leaders who are greatly
10 anguished and agitated at the clergy sex abuse scandal in our Nation. JBAC’s interest in this
11 case is that it believes religious institutions should be held accountable for tortious conduct.
12 Such a pronouncement will be entirely consistent with core American and Jewish values.
13 The Declaration of Independence declares, “We hold these truths to be self-evident, that all
14 men are created equal, that they are endowed by their Creator with certain unalienable
15 Rights...” The Torah, or Bible, declares at Genesis 1:26-27, that all people are created in the
16 image of God. Granting special status, rights, or immunities to clergy, by exempting them
17 from tort law liability, would be antithetical to these core values.

18 **Survivors for Justice** (“SFJ”), is a not-for profit organization founded by advocates
19 from within the ultra-Orthodox Jewish community. Our goal is to ensure that within our
20 insular Community abuse is dealt with in a manner that complies with civil laws. Indeed,
21 *halacha* (Jewish law) mandates compliance with civil law under the principle of *dina*
22 *demalchusa dina*, literally, the “law of the land is binding.” Many SFJ participants reported
23 their abuse to rabbis and administrators of religious schools and institutions only to see *bet*
24 *dins* (religious tribunals) convened resulting in the abusers being protected. A serious issue

1 confronting victims of abuse in the ultra-Orthodox Jewish community is the pressure placed
2 by the community's religious leaders upon its members to keep all matters within. SFJ's
3 interest in this case is that it stands for the belief that only adjudication by the civil justice
4 system can protect our children from the abuse of power that allows predators to operate
5 freely within our schools and religious institutions.

6 **The National Black Church Initiative** ("NBCI") is a coalition of 34,000 African-
7 American and Latino churches working to eradicate racial disparities in health care,
8 education, housing, and the environment. In addition to our member churches, NBCI is a
9 faith-based health organization dedicated to providing critical wellness information to all of
10 its members. NBCI also runs the Baby Fund in a response to the rising tide of abuse, neglect,
11 and death among infants and young children in our society. The Fund will be both a source of
12 assistance and advocacy to meet the needs of children who have little or no voices of their
13 own. The Church's interest is in the moral obligation to protect children. The philosophical
14 and theological underpinnings of the Fund can be understood by all faith communities,
15 noting the supreme value place upon children in scripture when God said, "Suffer the little
16 children to come unto me, and forbid them not: for such is the kingdom of God."

17 **Survivors Network of those Abused by Priests** ("SNAP") is a not-for-profit agency
18 providing support, healing and information to survivors of abuse and their loved ones. SNAP
19 is the oldest and largest self-help support group run by and for survivors. The mission of the
20 organization is to promote healing for the wounded and protection for the vulnerable.
21 Services are provided through support groups and peer counseling and are provided in
22 person, on the telephone, by regular mail and email. SNAP also hosts conferences and
23 gatherings and provides education and advocacy regarding clergy sexual abuse and related
24 topics. SNAP members seek to ensure the protection of children today as well as future

1 generations by working to change structures within the churches and society that have failed
2 to stop and prevent clergy abuse. Founded in 1988, the organization now has groups meeting
3 in 65 cities in the United States with over 9,000 members. SNAP has an interest in this case
4 as many perpetrators of abuse against its members still pose a risk to future potential victims
5 and the ruling in this case may impact the ability to expose and civilly prosecute those
6 perpetrators.

7 **The National Association to Prevent Sexual Abuse of Children** (“NAPSAC”) is a
8 501C(4) non-profit organization dedicated to ending childhood sexual abuse through
9 awareness, education and advocacy. NAPSAC works throughout the United States to
10 increase awareness of the prevalence of childhood sexual abuse, to educate families and
11 professionals to recognize, report and respond to abuse; and to advocate for laws that better
12 protect children. NAPSAC has an interest in this case because it will impact survivors of
13 sexual abuse not only in Nevada but throughout the United States.

14 **Child Protection Project** (“CPP”) recognizes that many heinous abuses occur when
15 religious organizations seek and hide behind specific religious exemptions under the law.
16 Religions must be good corporate citizens and follow the same laws as secular organizations.
17 These exemptions allow religions to hire people to work with children without performing
18 character background checks routinely required of secular groups, with disastrous results for
19 the children and families in their care. Often religions will provide faith healing only,
20 allowing children and others to suffer or die from preventable illnesses. CPP has an interest
21 in this case because it is often contacted by people seeking justice who are victims of crimes
22 by religious leaders. Often these crimes go unreported to secular authorities as religious
23 leaders advise members that they will take care of them; consequently, the criminal leaders
24 perpetrate their crimes on many others before finally becoming known to legal authorities.

1 The people reporting these crimes are often retaliated against and lose both their emotional
2 and faith-based support systems when they need them most. Civil law is one of the few paths
3 to justice for these victims, and sadly it is the only remedy that sends a message to the
4 religious organizations that civilized society will not tolerate behavior that harms their
5 members.

6 **The Foundation to Abolish Child Sex Abuse** (“FACSA”) has a mission to influence
7 state and federal governments, courts, the criminal justice system and the media to (1) protect
8 children from sexual abuse; (2) hold those who sexually abuse children accountable; (3) hold
9 institutions which condone and enable the sexual abuse of children accountable; and (4) help
10 child sex abuse victims find justice. Its interests in this case are directly correlated with its
11 mission.

12 **The Cardozo Advocates for Kids** (“CAKids”) was founded in 2008 at the Benjamin
13 N. Cardozo School of Law in New York City. The student-led organization aims to facilitate
14 social, political and institutional change in order to bring justice for victims of childhood
15 sexual abuse. Through lobbying representatives, hosting academic events, fostering relations
16 between scholars and the community, and initiating grassroots action, the organization hopes
17 to bring about awareness and results. CAKids also maintains a website, sol-reform.com,
18 which provides information and resources about reforming state statutes of limitations for
19 victims of sexual abuse. CAKids has an interest in this case due to the organization’s efforts
20 in pursuing justice and concrete policy changes for the benefit of abuse victims, including
21 both children and vulnerable adults.

22 **Sexual Violence Legal News** (“SVLN”) is a project of the Center for Law and Social
23 Responsibility (CLSR) at the New England School of Law. SVLN provides to legal and
24 non-legal professionals summaries of important new decisions that relate to sexual violence

1 and reflect new or evolving doctrines or suggest trends in the law that impact the lives of
2 people threatened and affected by sexual violence. The Judicial Language Project utilizes
3 socio-linguistic research to critique the language used by appellate courts in describing
4 interpersonal violence. The Victim Advocacy and Research Group has provided pro bono
5 legal services to crime victims since 1992. SVLN’s interest is in ensuring that victims and
6 other interested third-parties should be aware of, and can have a voice in preventing,
7 potential limitations on institutional liability, which can inhibit access to justice and the
8 deterrent value of law as a mechanism of crime prevention.

9 **The National Association to Prevent Sexual Abuse of Children** (“NAPSAC”) is a
10 501C(4) non-profit organization dedicated to ending childhood sexual abuse through
11 awareness, education and advocacy. NAPSAC works throughout the United States to
12 increase awareness of the prevalence of childhood sexual abuse, to educate families and
13 professionals to recognize, report and respond to abuse; and to advocate for laws that better
14 protect children. Because the pending case before the Nevada Supreme Court may impact
15 survivors of sexual abuse not only in Nevada but throughout the United States, NAPSAC has
16 an interest in this case.

17 **Children’s Healthcare Is a Legal Duty** (“CHILD”) is a national membership
18 organization working to stop child abuse and neglect related to religious, cultural, and secular
19 belief systems. CHILD opposes religious exemptions from child health and safety laws and
20 claims of religious privilege in cases of harm to children. The claim of religious immunity
21 from tort liability in the case at bar has been made in several cases of abuse and neglect of
22 children.

23 **Americans Against Abuses of Polygamy** (“AAAP”) is a non-profit, conservative
24 feminist, human rights organization dedicated to educating the public on the human rights

1 abuses inherent within the cultural practice of polygamy worldwide and within the United
2 States, and the potential dangers of decriminalization of the felony practice. AAAP believes
3 that for too long predators have hidden behind a cloak of spiritual authority, and religious
4 institutions have avoided legal responsibility for acts of violence or sexual assault committed
5 by their officeholders. AAAP believes the institutions that harbor these malefactors must be
6 held financially responsible for damages inflicted on their victims.

7 **Americans United for Separation of Church and State** (“Americans United”) is a
8 national, nonsectarian public interest organization based in Washington, D.C., that is
9 committed to the preservation of the constitutional principles of religious liberty and
10 separation of church and state. Since its founding in 1947, Americans United has regularly
11 been involved – as a party, as counsel, or as an *amicus curiae* – in many of the leading
12 church-state cases in federal and state courts throughout the nation. Americans United has
13 more than 120,000 members and supporters nationwide, including many within the
14 jurisdiction of this Court.

15
16
17
18
19
20
21
22
23
24

1 **I. INTRODUCTION.**

2 The Church of Jesus Christ of Latter-Day Saints (“LDS”) and the Roman Catholic
3 Bishops of Las Vegas and Reno (“Bishops”) ask this Court to craft a rule of legal immunity
4 for religious organizations involved with sexual assault and abuse.¹ These are not new
5 arguments for the Bishops and the LDS; they have been making them in courts across the
6 country to avoid liability for abuse of children and adults. But these attempts to twist the
7 First Amendment into a refuge for harmful behavior have not been widely successful. Most
8 state courts have rejected the notion that the First Amendment creates immunity from the tort
9 laws deterring and redressing sexual assault or abuse. See Malicki v. Doe, 814 So. 2d 347,
10 351 n.2 (Fla. 2002) (listing states); State v. Young, 974 So. 2d 601, 613 (Fla. Dist. Ct. App.
11 2008); Melanie H. v. Defendant Doe, No. 04-1596-WQH-(WMc), slip op. at 8 (S.D. Cal.
12 Dec. 20, 2005); Perry v. Johnston, No. 4:09-CV-105, 2009 U.S. Dist. LEXIS 74706, at *11
13 (E.D. Mo. Aug. 24, 2009); Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196
14 F.3d 409, 431 (2d Cir. 1999); N.H. v. Presbyterian Church, 998 P.2d 592, 602 (Okla. 1999);
15 Young v. Gelineau, No. 03-1302, 2007 WL 3236736 (R.I. Super. Sept. 20, 2007); Roman
16 Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213 (Miss. 2005); Olson v. First
17 Church of Nazarene, 661 N.W.2d 254 (Minn. Ct. App. 2003); Odenthal v. Minnesota
18 Conference of Seventh-Day Adventists, 649 N.W.2d 426 (Minn. 2002); Rashedi v. General
19 Bd. of Church of Nazarene, 54 P.3d 349 (Ariz. Ct. App. 2002); Doe v. Evans, 814 So. 2d
20 370, 371 (Fla. 2002).

21 The LDS and the Bishops principally rely on the most extreme cases in the country,
22 Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995), and Gibson v. Brewer.

23 ¹ See Brief Amicus Curiae of the Church of Jesus Christ of Latter-Day Saints, Ramani v.
24 Segelstein, No. 49341 (Nev. Oct. 5, 2009) [hereinafter “LDS Amicus”]; Joinder of the
Roman Catholic Bishop of Las Vegas and of the Roman Catholic Bishop of Reno, Ramani v.
Segelstein, No. 49341 (Nev. Oct. 12, 2009) [hereinafter “Bishops’ Amicus”].

1 952 S.W.2d 239 (Mo. 1997), to construct their argument that they have a constitutional
2 entitlement to so-called “autonomy” from tort law. They also fail to acknowledge that the
3 trend in the law has moved away from their position. Their arguments are built on
4 exaggerations and distortions of existing United States Supreme Court doctrine. See Marci
5 A. Hamilton, Religious Institutions, the No-Harm Doctrine, and the Public Good, 2004 BYU
6 L. Rev. 1099 (2004). And they are dangerous for children and vulnerable adults.²

7 The harm caused by a religious organization that negligently or recklessly permits
8 sexual assault, harassment, or abuse is no different from the harm generated by a secular
9 entity, and it can be worse. Diana R. Garland, When Wolves Wear Shepherds’ Clothing:
10 Helping Women Survive Clergy Sexual Abuse, 33(1) SOCIAL WORK & CHRISTIANITY 1, 17
11 (2006), available at <http://www.nacsw.org/Publications/GarlandArticle.pdf>; Diana R.
12 Garland & Christen Argueta, How Clergy Sexual Misconduct Happens: A Qualitative Study
13 of First-Hand Accounts, SOCIAL WORK & CHRISTIANITY (forthcoming with final edits)
14 (manuscript, at 5, available at
15 <http://www.baylor.edu/clergysexualmisconduct/index.php?id=62357>). In either situation,
16 the injury arises from socially abhorrent and legally proscribed conduct. When the employer

17
18 ² Sexual advances toward women in religious organizations are not uncommon. These issues
19 are just starting to be studied, but according to one recent academic study, “More than 3% of
20 women who had attended a congregation in the past month reported that they had been the
21 object of CSM [Clergy Sexual Misconduct] at some time in their adult lives; 92% of these
22 sexual advances had been made in secret, not in open dating relationships; and 67% of the
23 offenders were married to someone else at the time of the advance.” Mark Chaves & Diana
24 R. Garland, Executive Summary: The Prevalence of Clergy Sexual Misconduct with Adults:
A Research Study, Baylor University School of Social Work, Clergy Sexual Misconduct
(2009), available at <http://www.baylor.edu/clergysexualmisconduct/index.php?id=67406> (full
study forthcoming in the J. OF THE SCIENTIFIC STUDY OF RELIGION) [hereinafter Chaves &
Garland]. Another report has documented that “[f]our times as many priests involve
themselves sexually with adult women than with children . . . ‘These relationships range
from dating to harassment to exploitation.’” Thomas Farragher & Matt Carroll, Boston
church review board dismissed accusations by females, BOSTON GLOBE, Feb. 7, 2003, at A1.
This case is just one example of this larger problem.

1 negligently or recklessly permits such harm, the victim is protected by tried and true tort
2 principles. The public policy behind such negligence claims is no different whether the
3 defendant is secular or religious. As in the secular scenario, it is important that institutions
4 be controlled by the law in order to protect the vulnerable.

5 Even when conduct is religiously motivated, it may be regulated by neutral, generally
6 applicable laws like those invoked by the Plaintiff in this case. “[T]he right of free exercise
7 does not relieve an individual of the obligation to comply with a ‘valid and neutral law of
8 general applicability on the ground that the law proscribes (or prescribes) conduct that his
9 religion prescribes (or proscribes).’” Employment Div. v. Smith, 494 U.S. 872, 879 (1990)
10 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)). Blandino v. State, 112 Nev.
11 352, 355, 914 P.2d 624, 626 (1996), cert. denied, 522 U.S. 1003 (1997). There is no question
12 that the tort laws at issue in this case do not target religious entities or individuals and are
13 generally applicable. Therefore, the First Amendment erects no barrier to the application of
14 the law in this case. See, e.g., Malicki v. Doe, 814 So. 2d 347, 351 n.2 (Fla. 2002) (listing
15 states); Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 431 (2d Cir.
16 1999); N.H. v. Presbyterian Church, 998 P.2d 592, 602 (Okla. 1999); Petruska v. Gannon
17 Univ., 462 F.3d 294, 309 n.11 (3d Cir. 2006); Elvig v. Calvin Presbyterian Church, 375 F.3d
18 951 (9th Cir. 2004). See also Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1396 (4th
19 Cir. 1990); McLean v. Patten Cmty., Inc., 332 F.3d 714, 720 (4th Cir. 2003); EEOC v.
20 Southwestern Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. 1981) .

21 A number of religious organizations have proven themselves incapable of ending cycles
22 of abuse by themselves.³ Therefore, civil and criminal laws are the only effective means of
23

24 ³ Chaves & Garland, supra note 2 (documenting lack of accountability arising from the following factors: “Religious leaders often answer to no one about their daily activities and are free to move about the community and to maintain an office that is isolated from

1 protecting the vulnerable. See Marci A. Hamilton, The Waterloo for the So-Called Church
2 Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up, 29 CARDOZO L.
3 REV. 225 (2007); see also BishopAccountability.org, Database of Publicly Accused Priests in
4 the United States, <http://bishop-accountability.org/member/index.jsp> (last visited Nov. 20,
5 2009).

6 **II. ARGUMENT.**

7 **A. Courts Routinely and Appropriately Apply the Law of Negligent**
8 **Hiring, Supervision, and Retention to Religious Entities and Individuals.**

9 Direct liability of an employer—unlike the *respondeat superior* doctrine of indirect
10 liability—is premised on the acts of the employer itself in selecting, overseeing, and retaining
11 an employee; respectively, negligent hiring, supervision, and retention. Restatement (Third)
12 of Agency § 7.05(1) (2006). The LDS and Bishops try to create the impression that the only
13 relevant reference point is the religious identity of the Defendant in such cases and then
14 assert that the First Amendment is an impregnable barrier around the church despite its
15 actions. Under the tort law, though, the more appropriate focus is on the protection of those
16 who are being harmed, the victims.

17 The central question is whether the organization has violated a duty of care, with the
18 duties set by the basic standards of decency and accountability. The alternative theory
19 posited by the LDS and the Bishops is that religious entities can harm others without
20 accountability and that somehow the First Amendment operates to create a special, religious

21
22 observation. ...”; “Religious leaders engage in multiple roles with congregants in addition to
23 their role as leader, including counselor and personal friend. They obtain knowledge about
24 congregants' personal lives and struggles that can make the congregant vulnerable and
dependent. ...”; “Congregations are considered sanctuaries—safe places—where normal
attentiveness to self-protection is not considered necessary. Because of this perceived
sanctuary, congregants share life experiences and private information with religious leaders
that they would not share with others.”).

1 enclave of those who must be permitted as a constitutional matter to be unaccountable for the
2 harm they inflict.

3 It is well-settled in most states that churches and religious entities may not hide behind
4 the First Amendment to avoid liability for tortious actions that they knew or should have
5 known were occurring.⁴

6 Under Nevada law, claims of negligent hiring, supervision and retention are intended to
7 protect other employees, patrons, and the public at large. Hall v. SSF, Inc., 112 Nev. 1384,
8 930 P.2d 94 (1996); Burnett v. C.B.A. Sec. Serv., 107 Nev. 787, 820 P.2d 750 (1991). While
9 recognizing that there are differences between theories of negligent hiring and negligent
10 supervision, training, or retention, this Court has recognized that the underlying function of
11 these claims is the same. See Hall, 112 Nev. at 1393, 930 P.2d at 99.

12
13
14 ⁴ Turner v. Roman Catholic Diocese of Burlington, No. 08-003, 2009 Vt. LEXIS 118,
15 at **23-24 (Vt. 2009); Young v. Gelineau, No. 03-1302, 2007 WL 3236736 (R.I. Super.
16 Sept. 20, 2007); Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213 (Miss.
17 2005); Fortin v. Roman Catholic Bishop of Portland, 871 A.2d 1208 (Me. 2005); Beal v.
18 Broadard, No. SUCV2002-05765-C, 2005 Mass. Super. LEXIS 125 (Mass. Super. Ct. 2005);
19 Morrison v. Diocese of Altoona-Johnstown, No. 1236 of 2004, 2004 WL 3141330 (Pa. Com.
20 Pl. Oct. 20, 2004); Odenthal v. Minnesota Conference of Seventh-Day Adventists, 649
21 N.W.2d 426 (Minn. 2002); Rashedi v. General Bd. of Church of Nazarene, 54 P.3d 349
22 (Ariz. Ct. App. 2002); Malicki v. Doe, 814 So. 2d 347, 361 (Fla. 2002); Enderle v. Trautman,
23 No. A3-01-22, 2001 U.S. Dist. LEXIS 20181, at *24-27 (D.N.D. 2001); C.J.C. v. Corp. of
24 the Catholic Bishop of Yakima, 985 P.2d 262 (Wash. 1999); Doc v. Hartz, 52 F. Supp. 2d
1027 (N.D. Iowa 1999); N.H. v. Presbyterian Church, 998 P.2d 592, 602-03 (Okla. 1999);
Rosado v. Bridgeport Roman Catholic Diocesan Corp., 716 A.2d 967 (Conn. Super. Ct.
1998); Smith v. Privette, 495 S.E.2d 395 (N.C. Ct. App. 1998); Martinez v. Primera
Asemblea de Dios, Inc., No. 05-96-01458, 1998 WL 242412 (Tex. Ct. App. May 15, 1998);
Amato v. Greenquist, 679 N.E.2d 446 (Ill. App. Ct. 1997); F.G. v. MacDonell, 696 A.2d 697
(N.J. 1997); Kenneth R. v. Roman Catholic Diocese, 654 N.Y.S.2d 791 (N.Y. App. Div.
1997); Konkle v. Henson, 672 N.E.2d 450 (Ind. Ct. App. 1996); Roman Catholic Bishop of
San Diego v. Superior Court of San Diego County, 50 Cal. Rptr. 2d 399 (Cal. Ct. App.
1996); Isely v. Capuchin Province, 880 F. Supp. 1138, 1151 (E.D. Mich. 1995); Moses v.
Diocese of Colorado, 863 P.2d 310 (Colo. 1993); Marshall v. Munro, 845 P.2d 424, 428
(Alaska 1993); Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991); Erickson v. Christenson, 781
P.2d 383 (Or. Ct. App. 1989); Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988).

1 **i. Negligent Hiring and Background Checks.**

2 Negligent hiring, obviously, is predicated on the actions of the employer in the very act
3 of choosing an employee. Hall, 112 Nev. at 1392, 930 P.2d at 99. While no state can tell a
4 church what religious criteria to use in the selection of clergy, there are basic requirements
5 needed for public safety that states can impose on religious entities even when they are hiring
6 clergy.⁵ In a remarkable section, the LDS and Bishops argue that the First Amendment is a
7 bar to requiring churches to do background checks on those working for them, whether
8 employees or volunteers. LDS Amicus, at 18-19. In Nevada, though, the duty of an
9 employer can extend to conducting reasonable investigations of a potential employee's
10 background up to a formal background check. Burnett v. C.B.A. Sec. Serv., 107 Nev. 787,
11 820 P.2d 750, 752 (1991). There is no burden on religious belief when a religious employer
12 is required to check into the criminal background of a potential employee. All that would be
13 required is fingerprinting of the potential hire and a state criminal background check.⁶ One
14

15 ⁵ A number of lower courts have recognized the so-called "ministerial exception,"
16 which creates a First Amendment defense for religious institutions on certain issues
17 involving clergy, but certainly not all. McClure v. Salvation Army, 460 F.2d 553, 560 (5th
18 Cir. 1972); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th
19 Cir. 1985) (emphasizing religious nature of decisions protected by First Amendment in Title
20 VII context). This principle does not establish the blanket immunity for religious institutions
21 facing tort claims that is being proposed by the LDS and the Bishops. See Bollard v.
22 California Province of the Society of Jesus, 196 F.3d 940, 948 (9th Cir. 1999).

23 The amici rely upon and then exaggerate the effect of Kedroff v. St. Nicholas
24 Cathedral, 344 U.S. 94, 116 (1952), which held that courts may not interfere in intrachurch
disputes over "church government as well as those of faith and doctrine." This doctrine
should not be read broadly, though, as the Supreme Court also has approved the application
of "neutral principles of law" to religious organizations. See Jones v. Wolf, 443 U.S. 595,
604 (1979). As the Supreme Court has made clear: "Our cases do not at their farthest reach
support the proposition that a stance of conscientious opposition relieves an objector from
any colliding duty fixed by a democratic government." Gillette v. United States, 401 U.S.
437, 461 (1971).

⁶ Typically, a background check includes a set (or two) of fingerprints to be forwarded to
both the state agency required to maintain criminal history records as well as the Federal
Bureau of Investigation (F.B.I.). See NRS 391.033 (requiring fingerprints and a state and
federal background check to receive teachers' license); NRS 424.039 (same requirements for

1 would think the LDS and the Bishops would welcome this information to protect their
2 flocks, rather than demand First Amendment protection to dodge such information.

3 **ii. Negligent Retention and Supervision.**

4 Negligent supervision or retention, on the other hand, are predicated upon the
5 employer's action after it should have or did become aware of facts that indicate the
6 employee is not fit for employment and poses a risk to other employees, patrons, and the
7 public. Hall, 112 Nev. 1384, 930 P.2d 94; Chastain v. Clark County Sch. Dist., 109 Nev.
8 1172, 866 P.2d 286 (1993); Reyes v. Southwest Gas Corp., 2007 U.S. Dist. LEXIS 57421 (D.
9 Nev. Aug. 2, 2007); Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189 (D. Nev.
10 2002).

11 When an employer becomes aware (or should be aware) of behavior that may be
12 harmful and does nothing – or exacerbates the harm as in the case at bar, the organization
13 should be held liable for the injury that it had the unique ability to avoid through control of
14 the employee or servant. Hall, 112 Nev. 1384, 930 P.2d 94; Jane Doe A v. Green, 298 F.
15 Supp. 2d 1025 (D. Nev. 2004).

16 Nor does it matter whether the act of the employee was within the scope of employment
17 or designed to further the interests of the employer. While this may be relevant in a question
18 of indirect liability (vicarious liability/respondeat superior), under Nevada law, such an

19
20
21
22
23
24

foster home providers); NRS 450B.800 (for emergency medical services); NRS 630.167 (for
physicians); NRS 640B.310 (for athletic trainers); NRS 641B.202 (for social workers); see
also 24 PA. CONS. STAT. § 1-111 (LEXIS through 2009) (similar requirements for teachers in
Pennsylvania); IDAHO CODE ANN. § 33-130 (LEXIS through 2009) (same); MO. REV. STAT. §
168.133 (LEXIS through 2009) (same). As above, employers are generally placed under a
duty to conduct a reasonable background check, especially in cases where the employees will
be dealing with individuals in a vulnerable position or one in which they require care.
Courts, moreover, are able to determine what is “reasonable” for an employer in these and
similar positions when hiring, supervising, or retaining an employee. See Hall, 112 Nev.
1384, 930 P.2d 94.

1 inquiry is irrelevant to a direct liability claim of negligent hiring, supervision, training, or
2 retention. Rockwell v. Sun Harbor Budget Suites, 112 Nev. 1217, 925 P.2d 1175 (1996).⁷

3 **B. Religious Organizations Are Not Immune from Fiduciary Duty Laws—The**
4 **Majority of Courts Distinguish Claims of Breach of Fiduciary Duty From**
5 **Clergy Malpractice And Allow the Former to Go Forward Consistent with the**
6 **First Amendment.**

7 The Roman Catholic Bishops attempt to convince this court that policy demands the
8 rejection, per se, of a breach of fiduciary duty claim because it would destroy the ability of
9 the church to provide volunteer services. Bishops' Amicus at 3. Such an argument is a red
10 herring. It is also a dangerous position to take. Many religious organizations are at the front
11 line of social services dealing with the vulnerable, whether they are children, emotionally and
12 physically disabled adults, or poverty-stricken. To shield them from the consequences of
13 their bad tortious acts is to create a legal regime that will make it more likely that such
14 individuals will be injured.

15 The LDS and Bishops suggest that a breach of fiduciary duty claim is *per se* a claim for
16 clergy malpractice and, therefore, automatically barred by the First Amendment. Such a
17 position is unsupported by the bulk of law across American jurisdictions. The majority of
18 courts confronted with the issue have not only distinguished between a claim of clergy
19 malpractice and a breach of fiduciary duty but, more importantly, have found that the First

20 ⁷ The LDS and Bishops further claim that they should be liable only in circumstances where
21 they have knowledge of a “known risk of harm” by one of their employees or volunteers, as
22 opposed to liability for their negligence or recklessness. LDS Amicus, at 22-24. This is an
23 approach taken by a small minority of courts, which leaves children and vulnerable adults
24 unprotected by the law. They also try to aggressively minimize liability for their negligent
and reckless acts, suggesting this Court relegate victims to claims of “intentional infliction of
emotional distress.” *Id.* at 13-14. As they know, this is a theory that is rarely successful.
See Craig v. M&O Agencies, Inc., 496 F.3d 1047, 1059 (9th Cir. 2007); Westbrook v. DTG
Operations, Inc., No. 2:09-CV-00789, 2007 U.S. Dist. LEXIS 14653, at *20 (D. Nev. Feb.
28, 2007); see also Snyder v. Phelps, 580 F.3d 206, 231 (4th Cir. 2009); Carlton v.
Fearneyhough, No. 07-10676, 2008 U.S. App. LEXIS 5410, at *12 (5th Cir. Mar. 12, 2008);
Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988).

1 Amendment does not categorically bar the imposition of a fiduciary duty. See Moses v.
2 Diocese of Colorado, 863 P.2d 310, 319 (Colo. 1993), cert. denied, 511 U.S. 1137 (1994);
3 Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988); Doe v. Evans, 814 So. 2d 370, 371 (Fla.
4 2002); see also Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 430-
5 32 (2d Cir. 1999); Sanders v. Casa View Baptist Church, 898 F. Supp. 1169, 1171 (N.D. Tex.
6 1995), aff'd, 134 F.3d 331 (5th Cir. 1998); Doe v. Hartz, 52 F. Supp. 2d 1027, 1062 (N.D.
7 Iowa 1999); Smith v. O'Connell, 986 F. Supp. 73, 81-82 (D.R.I. 1997); Roman Catholic
8 Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1239-40 (Miss. 2005); Fortin v. Roman
9 Catholic Bishop of Portland, 871 A.2d 1208, 1232 (Me. 2005); Beal v. Broadard, No.
10 SUCV2002-05765-C, 2005 Mass. Super. LEXIS 125, at *18-20 (Mass. Super. Ct. 2005);
11 Morrison v. Diocese of Altoona-Johnstown, No. 1236 of 2004, 2004 WL 3141330, at *486,
12 *491 (Pa. Com. Pl. Oct. 20, 2004); Richelle L. v. Roman Catholic Archbishop, 106 Cal. App.
13 4th 257, 276 (Cal. App. 1st Dist. 2003); Rashedi v. General Bd. of Church of the Nazarene,
14 54 P.3d 349, 354 (Ariz. Ct. App. 2002); C.J.C. v. Corp. of the Catholic Bishop of Yakima,
15 985 P.2d 262, 277 (Wash. 1999); E.G. v. MacDonell, 696 A.2d 697 (N.J. 1997); Adams v.
16 Moore, 385 S.E.2d 799, 801 (N.C. Ct. App. 1989); Erickson v. Christenson, 781 P.2d 383,
17 386 (Or. Ct. App. 1989).

18 The imposition of a fiduciary duty when based on secular standards does not, contrary
19 to the LDS and Bishops, “unconstitutionally force the cleric to abandon his or her most
20 sacred obligations to avoid civil liability.” LDS Brief at 10. A fiduciary duty only requires
21 that entities uphold their civil obligations without reference to their situs in a religious
22 organization. Moreover, the exclusion of an actor from neutral and generally applicable
23 standards of conduct necessary to deter acts repugnant to civil society purely on the grounds
24 that the actor is religious raises serious issues under the Establishment Clause. See Jimmy

FORBES LAW OFFICE, PC
317 South 6th Street, Las Vegas, NV 89101
Tel (702) 726-2815 Fax (702) 878-9995

1 Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990); Texas Monthly, Inc. v.
2 Bullock, 489 U.S. 1 (1989); Estate of Thornton v. Caldor, 472 U.S. 703 (1985); Lemon v.
3 Kurtzman, 403 U.S. 602 (1971); 2002-14 Op. Att’y Gen. 65, __ (2002), Opinion No. 2002-
4 14, 2002 Nev. AG LEXIS 11, at *10-11 (applying Lemon v. Kurtzman to determine whether
5 the Establishment Clause of the First Amendment had been violated); 85-15 Op. Att’y Gen.
6 54, 55-57 (1985); (same).

7 **C. Volunteers May Be Considered Agents of a Principal Under Well-Settled**
8 **Principles of Agency Law For the Purpose of Imposing Liability Upon the**
9 **Principal.**

9 It is unnecessary for this Court to adopt the position seemingly advocated by Amici
10 Catholic Bishops and Church of Jesus Christ of Latter-Day Saints that volunteers are per se
11 excluded from any agency/employment relationship that may give rise to liability to an
12 employer or supervisory entity. In fact, this position flies in the face of the settled law of
13 liability within the agency relationship. See Restatement (Third) of Agency § 7.05 (principal
14 liable for harm to third party by agent if negligent in controlling conduct); Restatement
15 (Second) of Agency § 219(2)(d) (“A master is not subject to liability for the torts of his
16 servants acting outside the scope of their employment, *unless*: ... (d) the servant purported to
17 act or to speak on behalf of the principal and there was reliance upon apparent authority, or
18 he was aided in accomplishing the tort by the existence of the agency relation.”).

19 It is moreover irrelevant that individuals are volunteers so long as an “employment”
20 relationship exists as a matter of law. Restatement (Second) of Agency § 225 (“One who
21 volunteers services without an agreement for or expectation of reward may be a servant of
22 the one accepting such services.”); Restatement (Third) of Agency § 7.07(3)(b) (“[T]he fact
23 that work is performed gratuitously does not relieve a principal of liability.”).

FORBES LAW OFFICE, PC
317 South 6th Street, Las Vegas, NV 89101
Tel (702) 726-2815 Fax (702) 878-9995

1 886 (1944) (“[A] principal may be held liable to a third person where his agent, acting within
2 the scope of his real *or apparent authority*, is guilty of an assault and battery.”) (emphasis
3 added). Nevada has subjected volunteers to the same test as any other individual in
4 determining whether an agency relationship exists such that liability may be imposed upon a
5 principal. National Convenience Stores, Inc. v. Fantuzzi, 94 Nev. 655, 657-58, 584 P.2d
6 689, 691 (1978) (““The relation between parties to which responsibility attaches to one, for
7 the acts of negligence of the other, must be that of superior and subordinate, or, as it is
8 generally expressed, of master and servant, in which the latter is subject to the control of the
9 former. The responsibility is placed where the power exists. Having power to control, the
10 superior or master is bound to exercise it to the prevention of injuries to third parties, or he
11 will be held liable.”” (quoting Wells, Inc. v. Shoemake, 64 Nev. 57, 64, 177 P.2d 451, 455
12 (1947)); Foster v. Washoe County, 114 Nev. 936, 944, 964 P.2d 788, 793 (1998) (relying 91-
13 7 Op. Att’y Gen. 24, 26 (1991), to find volunteers to be categorized as “employees” of
14 CASA); see also 91-7 Op. Att’y Gen. 24, 26 (1991) (“[W]here a county or city had sufficient
15 supervision and control over volunteer workers, an employer/employee relationship could be
16 established so as to impose liability on the part of the county or city for the tortious actions of
17 the volunteers.”); 80-39 Op. Att’y Gen. 149, 159 (1980) (“[O]nce it is found that an
18 employer has exercised sufficient control over a person, who would not otherwise be deemed
19 an ‘employee,’ that person will be deemed an ‘employee’ or servant for vicarious liability
20 purposes under the doctrine of respondeat superior. ‘One who volunteers services without an
21 agreement for or expectation of reward *may be* a servant of the one accepting such services.’
22 ... [I]f a person volunteers his services to the State and the State manifests consent to receive
23 the services... the volunteer may be deemed a servant and the State a master.”); 80-15 Op.
24 Att’y Gen. 64, 69 (1980) (“[U]nder the circumstances...the master would be liable for the

1 negligent acts of a volunteer who inflicts injuries on third parties. A master not only has
2 control and supervision of the individual, but also has the choice of allowing the volunteer to
3 serve or not.”).

4 Amici’s parade of horribles is not based on fact. Holding that volunteers *may* be
5 considered agents of a principal under the circumstances is not only in accordance with the
6 law in Nevada but also comports with the law of a majority of jurisdictions. See Restatement
7 (Second) of Agency § 225; Restatement (Third) of Agency § 7.07(3)(b); McCauley v. Ray,
8 453 P.2d 192, 201 (N.M. 1968); Flores v. Brown, 248 P.2d 922, 925 (Cal. 1952).

9 Exempting volunteers from normal agency law simply does not comport with well-
10 settled agency doctrine, or the protection of the vulnerable. The contention that charitable
11 organizations will lose their volunteers if subjected to settled agency law is untenable. It is
12 apparent that many volunteers will clearly fall outside the application of agency principles:
13 many if not most simply will not be clothed with the apparent authority of an entity as exists
14 in the case at bar.

15 **D. There Is No Constitutional Right of Religious Organizations to Punish Crime**
16 **Victims for Reporting Crimes Committed by Employees or Volunteers to the**
Authorities.

17 There is no First Amendment bar to imposing liability on a religious organization when
18 it punishes someone for reporting a crime that occurred within the organization to the
19 authorities. When criminal acts are committed by full-time employees, part-time employees,
20 or volunteers of any organization, the organization has a duty of care, in particular, not to
21 punish the victim for telling the authorities. In this case, the victim was punished because
22 she went to the police with threats of exclusion and the leveraging of sexual favors.

23 Appellant’s Opening Brief at 10-12, Ramani v. Segelstein, No. 49341 (Nev. June 25, 2009).

24 ///

1 The LDS and Bishops argue that they have a constitutional right to punish victims for
2 going to the authorities, because judicial inquiry into the issue would lead to impermissible
3 entanglement. LDS Amicus at 22-24. Yet, fact-finding with respect to this issue does not
4 entail excessive entanglement with belief or governance. Kedroff v. St. Nicholas Cathedral,
5 344 U.S. 94 (1952); Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); see
6 also Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial
7 Presbyterian Church, 393 U.S. 440 (1969). The question is whether the actors engaged in
8 conduct that punishes the victim for going to the authorities. The conduct that must be
9 proved is (1) whether the plaintiff was a crime victim harmed by someone in the
10 organization; (2) whether the plaintiff told the authorities about the crime; and (3) whether
11 the defendant(s) punished the victim because she went to the authorities.

12 Even if First Amendment concerns were implicated by tort liability for punishing a
13 victim for going to the police, the public policy in favor of protecting crime victims from
14 being forced by organizations to cover up crimes far outweighs any First Amendment
15 concerns. There is an extraordinary interest in encouraging victims to report illegal behavior,
16 in particular when an organization is inclined to protect its image and reduce its liability
17 rather than protect the victim. The doctrine of retaliation, which protects employees who
18 report discrimination and harassment is not barred by the First Amendment. Elvig v. Calvin
19 Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Bollard v. California Province of the
20 Society of Jesus, 196 F.3d 940 (9th Cir. 1999); McKelvey v. Pierce, 800 A.2d 840 (N.J.
21 2002). If the First Amendment poses no barrier in those circumstances, it certainly should
22 not operate as a barrier when the victim is reporting criminal behavior.


23 ///

24 ///

1 **III. CONCLUSION.**

2 For the foregoing reasons, *amici* respectfully request that this Court hold that the First
3 Amendment does not immunize religious entities from liability under tort laws that protect
4 vulnerable children and adults.

5 DATED: This 11th day of December 2009.

7 By: 
8 Sheri Ann Forbes,
9 FORBES LAW OFFICE, PC
10 Nevada Bar No. 7337
11 317 South 6th Street
12 Las Vegas, Nevada 89101
13 Telephone: (702) 678-5070
14 Facsimile: (702) 878-9995

15 Marci A. Hamilton, Esq.
16 36 Timber Knoll Drive
17 Washington Crossing, PA 18977
18 Telephone: (215) 353-8984
19 Facsimile: (215) 493-1094

20 *Pro Bono* Attorneys for *Amicus Curiae*
21 The Jewish Board of Advocates for
22 Children, Inc., Survivors for Justice,
23 The National Black Church Initiative,
24 Survivors Network of those Abused by
Priests, The National Association to
Prevent Sexual Abuse of Children,
Child Protection Project, The
Foundation to Abolish Child Sex
Abuse, The Cardozo Advocates for
Kids, Sexual Violence Legal News,
Children's Healthcare Is a Legal Duty,
Americans Against Abuses of
Separation of Church and State.

1 CERTIFICATE OF COMPLIANCE

2 I hereby certify that I have read this appellate brief, and to the best of my knowledge,
3 information, and belief, it is not frivolous or interposed for any improper purpose. I further
4 certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in
5 particular NRAP 28(e), which requires every assertion in the brief regarding matters in the
6 record to be supported by a reference to the page of the transcript or appendix where the
7 matter relied on is to be found. I understand that I may be subject to sanctions in the event
8 that the accompanying brief is not in conformity with the requirements of the Nevada Rules
9 of Appellate Procedure.

10 DATED: This 11th day of December 2009.

FORBES LAW OFFICE, PC

11
12 By: *Sheri Ann Forbes*
13 Sheri Ann Forbes,
14 Nevada Bar No. 7337
15 317 South 6th Street
16 Las Vegas, Nevada 89101
17 Telephone: (702) 678-5070
18 Facsimile: (702) 878-9995
19
20
21
22
23
24

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), the undersigned hereby certifies that a true and correct copy of the foregoing Amici Brief was sent via first class mail, postage prepaid, on this 14th day of December, 2009 to:

Samuel S. Lionel, Esq.
David N. Frederick, Esq.
LIONEL SAWYER & COLLINS
1700 Bank of America Plaza
300 South Fourth Street
Las Vegas, NV 89101

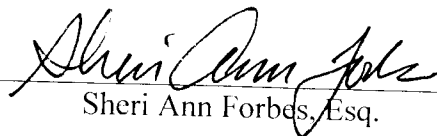
Mark A. Solomon, Esq.
SOLOMON SWIGGINS & FREER, LTD.
7881 W. Charleston Blvd., Suite 240
Las Vegas, NV 89117

Roger P. Croteau, Esq.
ROGER P. CROTEAU & ASSOC., LTD.
720 S. Fourth Street, Ste. 202
Las Vegas, NV 89101

Ryan L. Dennett, Esq.
DENNETT WINSPEAR, LLP
3321 N. Buffalo Drive, Suite 100
Las Vegas, NV 89129

Daniel Polsenberg, Esq.
Joel D. Henriod, Esq.
LEWIS & ROCA, LLP
3993 Howard Huges Pkwy, Ste. 600
Las Vegas, NV 89169

Michael L. Reitzell
DUANE MORRIS LLP
1114 Brockway Road, Suite 100
Truckee, CA 96161-2213


Sheri Ann Forbes, Esq.