Predator in the Primary: Applying the Tort of Negligent Hiring to Volunteers in Religious Organizations

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Predator in the Primary: Applying the Tort of Negligent Hiring to Volunteers in Religious Organizations

I. INTRODUCTION

With family members weeping audibly in the audience, a Utah jury found Aaron Marcos Montoya guilty of four counts of aggravated sexual abuse of a child.1 Montoya is a former bailiff at the Matheson Courthouse in Salt Lake City, Utah and served as a volunteer Sunday School teacher in his local congregation of The Church of Jesus Christ of Latter-day Saints (LDS Church).2 Most Sundays he taught a small group of five- and six-year-old children in his Sunday School class with his wife. However, one Sunday when his wife was unable to attend the class with him, Montoya molested several children, including one girl while she drew a picture of Jesus and then again while she prayed.3

As an individual, Montoya has been criminally prosecuted and faces potential civil liabilities for his actions. But as in many cases, his victims might look beyond the individual who committed the crime and seek damages from additional parties, including the church that utilized Montoya as a volunteer. Significantly, the context in which Montoya abused his victims raises important questions concerning whether the church he belongs to can be liable for his actions, whether the fact that he was acting in a volunteer capacity affects the church’s potential liability, and whether the First Amendment limits a church’s liability for the harms caused by volunteers.

One potential source of recourse that victims of molestation and other tortious actions and their guardians may pursue is the tort of

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3. Id.
negligent hiring. This quickly expanding area of tort law consists of actions in which victims seek to impose liability on third-party employers for an employee’s tortious or criminal acts; in this way, the tort of negligent hiring is similar to respondeat superior. However, in contrast with respondeat superior, an employer potentially may face liability for acts outside the scope of an employee’s employment if, among other things, the employer had either actual or constructive knowledge that the employee was unfit for the employment.

In spite of potential First Amendment bars concerning religious liberty and excessive entanglement, some courts have allowed victims of various offenses to pursue religious organizations for negligent hiring. This trend has become especially apparent in the wake of the clergy sexual abuse scandals that have rocked the

5. Id.
7. Jamie Darin Prenkert explains the following concerning the Establishment Clause of the First Amendment and the concept of excessive entanglement:
   The specific concern under the Establishment Clause is that the government will “involve itself too deeply in [a religious organization’s] affairs” and become entangled in the church’s role of defining acceptable religious beliefs and practices. Such entanglement concerns stem from the three-prong Establishment Clause inquiry announced by the Supreme Court in Lemon v. Kurtzman, which prohibits an “excessive government entanglement with religion.” The Court, in Lemon, explained that the determination of whether there is excessive entanglement is determined by three factors: the character and purpose of the institution affected, the nature of the aid to or burden upon the religious organization’s affairs, and the resulting relationship between the state and the religious organization.
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Catholic Church in the United States over the past few years. As a result of these scandals, some courts have scrutinized churches’ decisions concerning employment of clergy and nonclergy in church activities at unprecedented levels. In many cases, those courts have scrutinized the decisions of churches concerning employment in the context of the tort of negligent hiring, along with its sister actions of negligent retention and negligent supervision.

In addition to issues arising in the context of the First Amendment, it is important to examine the circumstances under which institutions using volunteers may face liability as a result of the tortious activities of volunteers acting outside of the scope of their duties. Volunteers play an essential role in providing and performing services within American society. As former President Bill Clinton explained, “Service to one’s community is an integral part of what it means to be an American.” Individuals acting in volunteer

The legal fallout from the scandal of the Catholic Church may be even more widespread and enduring than the religious consequences. Priests have gone to prison for lengthy terms. Many courts have upheld tort claims against dioceses and their officers, and First Amendment defenses once thought likely to insulate defendants against such claims have been aggressively advanced and explicitly rejected. Id. at 1792. Lupu and Tuttle further explain:
At the beginning of the twentieth century, a person sexually molested by someone acting on behalf of a religious organization would not have contemplated legal action against the religious organization and would not have been successful in such an action had she tried. By the beginning of the twenty-first century, however, a person who had suffered such an injury might well be a successful plaintiff in a suit against the wrongdoer, the ecclesiastical officials, and the religious entity in which the individual defendants served. Id. at 1797–98.

10. See id. at 1847–54.


Volunteers enrich our lives every day with their generosity and compassion. They cut across the fabric of society—from government on all levels to the educational sector, from the religious community to health care. They respond to myriad unforeseen developments and critical persistent needs. They react to the plight of those who suffer from severe weather hazards—in communities devastated by mud slides, ice storms, flash floods or tornadoes. Volunteers open their hearts and homes
capacities spend innumerable hours each year teaching, tutoring, and mentoring. However, some offenders have taken advantage of relaxed supervision within organizations utilizing volunteers to commit terrible offenses against children and others. In light of the essential role that volunteers play in American civil society and the potential that exists for harm to those that volunteer organizations seek to serve, it becomes very important to determine the duty that organizations employing volunteers owe to those receiving their services. Unless the duty owed in hiring volunteers is clear, those organizations using volunteers could face potentially smothering liability, which could derail their efforts to enrich lives.

This Comment examines in depth the potential liability of religious organizations due to volunteers acting outside the scope of their responsibilities, using the case of the LDS Church and Aaron Marcos Montoya as a framework. It argues that in terms of the tort of negligent hiring, the LDS Church likely exercises sufficient control over its volunteers for liability purposes. However, in the specific case of Montoya, the lack of actual or constructive knowledge of Montoya’s pedophilia at the time he served as a volunteer would likely protect the LDS Church from liability based upon the tort of negligent hiring. Furthermore, this Comment argues that the First Amendment should bar such an action against the LDS Church based on the excessive entanglement of church and state that could result from a court’s examination of the church’s policies and procedures and its analysis of a reasonable bishop.

Part II of the Comment provides a brief description of the LDS Church, its policies, and its organization. It also briefly recounts the facts of the Montoya crimes and trial. Part III provides a brief history of the tort of negligent hiring and examines the elements of the tort. Part IV analyzes the potential questions that arise in applying the tort to institutions utilizing volunteers and to religious institutions to offer not only shelter and food, but, most important, the hope and support people desperately need to begin putting their lives back together. This spirit of citizen service has deep and strong roots in America’s past. By nurturing this spirit we can help ensure a better future for our nation.


generally. In terms of applying the tort of negligent hiring to organizations utilizing volunteers, this Part demonstrates that courts have generally found that organizations may be liable for volunteers’ tortious actions if the organizations have a right to control their volunteers. Furthermore, this Part shows that a split in authority exists concerning whether the First Amendment would bar the application of the tort of negligent hiring to religious institutions. Part V analyzes the Montoya case under the negligent hiring elements and under the conflicting First Amendment jurisprudence on negligent hiring by religious institutions, concluding that the LDS Church would not be liable for the molestation because it likely had neither actual nor constructive knowledge that Montoya was a pedophile at the time he was asked to serve as a primary teacher. This Part also finds that the First Amendment should bar a claim of negligent hiring against the LDS Church for the actions of Montoya because the requisite judicial examination of internal church polices and procedures and the creation of a reasonable bishop standard would result in excessive entanglement in church and state. Finally, Part VI provides a brief conclusion.

II. FACTUAL BACKGROUND: THE LDS CHURCH AND AARON MARCOS MONTOYA

Similar to other churches in the United States, the LDS Church faces the challenge of providing meaningful religious services to its members while protecting them from individuals who take advantage of volunteer and religious organizations to perpetrate terrible crimes on children and others. The Aaron Marcos Montoya case is illustrative of the difficulties modern churches confront. This Part provides a general description of the organization of the LDS Church and some of its practices and procedures. Furthermore, it provides a background for the crimes committed by Montoya in his Syracuse, Utah LDS Church congregation.
A. The LDS Church

The LDS Church, headquartered in Salt Lake City, Utah, has a worldwide membership of well over twelve million members. The church has established congregations in all fifty states and in many countries across the world. Those congregations are called wards and branches and numbered 26,670 as of April 2005.

Church meetings are generally held in a three-hour block of time. During that block, congregants meet together for an hour in what is known as “sacrament meeting.” In the remaining two hours, children, young adults, and adults meet separately. Additional special activities and meetings are sometimes held during the week.

Children participate in an organization called Primary and spend time both in individual classes, divided up by age, and in a general meeting, in which all of the children participate regardless of age. The Primary is an organized program of religious instruction in which children learn basic church beliefs. It also serves to occupy the children during the course of the adult meetings.

The LDS Church has a lay clergy in which its leaders render services to the church and their congregations while maintaining secular employment and caring for their families. The leader of a ward is referred to as a “bishop” and the leader of a branch is referred to as the “branch president.” Within the wards and branches of the LDS Church, church leaders, usually a bishop or branch president, ask members to serve in certain positions that range from teaching classes to providing janitorial services for the buildings that house the congregations. This invitation to serve is referred to as a “calling,” and each congregant is free to accept or decline the calling when the church leader presents it.

Among the positions in which LDS Church members serve are various positions working with children in the Primary. Those positions include leaders, teachers, choristers, pianists, and other support positions. Each position works directly with the children in

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15. Much of the information below is taken from the author’s firsthand experience. However, descriptions of the LDS Church’s organization, membership, beliefs, and other information can be found at http://mormon.org/learn/0,8672,968-1,00.html. Additional general information can be found at www.mormon.org and www.lds.org.


17. Id.

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the congregation, and teachers can be alone with children for as long as forty-five minutes to an hour at a time. Primary teachers often teach in pairs, but this is not always possible.

As explained by the LDS Church’s General Handbook of Instructions, “Primary leaders and teachers have the sacred responsibility to help parents teach their children the gospel of Jesus Christ.” In addition, Primary teachers are instructed by the LDS Church “to seek inspiration from the Holy Ghost in fulfilling [their] important callings,” to “love each child and develop a caring relationship with him or her,” and to “help open the way for each child to receive a testimony of the gospel and the blessing of the Lord.” The LDS Church cites scripture as the foundation of these responsibilities.

The ward and branch leadership plays an important part in the supervision and administration of the Primary. The LDS Church’s central leadership instructs, “The bishopric watches over and nurtures children in the ward, working closely with parents and primary leaders to help each child ‘come unto Christ.’” Furthermore, the bishopric, which consists of the bishop and two counselors, is instructed to prepare and interview children for baptism, interview children for movement from Primary to the general Sunday School, and oversee the ward Primary organization as a whole.

An essential part of the bishopric’s duties in overseeing the ward Primary is the calling of leaders and teachers. The General Handbook of Instructions charges the ward leadership as follows:

The bishop calls and sets apart a woman to be the ward Primary president. The bishop or an assigned counselor calls and sets apart women to serve (1) as first and second counselor to the ward Primary president and (2) as secretary. A member of the bishopric also calls and sets apart men or women to serve as Primary teachers.

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19. The Church of Jesus Christ of Latter-day Saints, 2 Church Handbook of Instructions 229 (1998) [hereinafter Handbook of Instructions].
20. Id.
21. Id. (citing Mark 10:14 (“Suffer the little children to come unto me, and forbid them not: for of such is the kingdom of God.”); Nephi 22:13 (“All thy children shall be taught of the Lord; and great shall be the peace of thy children.”); Moroni 6:4).
22. Id. at 230–31 (citing Moroni 10:32).
23. Id. at 231.
24. Id.
and in other ward Primary callings as needed. The Primary president makes recommendations for these callings, but they are subject to the bishopric’s approval.25

As a practical matter, the bishop and his counselors stand as gatekeepers to the Primary organization and its potential volunteers.

B. The Case of Aaron Marcos Montoya

In late 2003, Aaron Marcos Montoya and his wife began teaching a Primary class of five-year olds together in their Syracuse, Utah LDS ward.26 Initially, Mrs. Montoya taught most of the classes alone because Aaron Montoya worked full time as a bailiff at the Matheson Courthouse while working towards completing a degree at Weber State University and was therefore often unable to attend Sunday meetings.27 After his graduation from Weber State University, Montoya became more involved in the class and taught his first lesson in July 2004.28

On December 12, 2004, Montoya taught the Primary class alone because his wife was at home with their baby.29 During the course of the class, Montoya molested a five-year old girl twice: first while she was drawing a picture of Jesus and then while she was praying at the end of the class.30 Montoya also molested two other girls in the Primary class.31 An eight-person jury found Aaron Marcos Montoya guilty of four counts of aggravated sexual abuse of a child.32 Montoya has subsequently pled guilty to additional charges involving the sexual molestation of six different victims ranging in age from three to eleven.33

25. Id.
27. Id.
28. Id.
29. Id.
30. Id.
32. Id.
III. THE TORT OF NEGLIGENT HIRING

As it exists today, the tort of negligent hiring provides plaintiffs with a mechanism for holding employers liable for the tortious actions of their employees that fall outside of the scope of their employment. This is legally significant because employers may be held liable in situations in which no liability would exist under respondeat superior. The following briefly describes the origins and development of the tort and then examines the elements of a prima facie negligent hiring claim.

A. The History of the Tort of Negligent Hiring

The tort of negligent hiring emerged initially as an exception to the common law fellow servant rule. The fellow servant rule traditionally absolved employers from the liability they would otherwise face for torts committed among employees. For example, early employers often escaped liability for workplace violence and unlawful harassment among their employees. To ameliorate the harshness of the fellow servant rule, courts began allowing causes of actions for the negligent hiring of employees in the early 1900s. Where employees were previously unable to pursue an action against their employers for the actions of fellow employees, negligent hiring now allowed them to seek such recourse.

Courts first recognized the cause of action of negligent hiring in this initial form in Ballard’s Administratrix v. Louisville & Nashville Railroad Co. in 1908. In this case, the Kentucky Supreme Court held that “an employer could be liable for negligently hiring an employee who caused injury to a fellow employee if the act that

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38. See North, supra note 6, at 720.
39. 110 S.W. 296 (Ky. 1908).
caused the injury was within the employee’s scope of employment."^{40} Courts subsequently expanded the tort to include employee actions outside the scope of employment.\^{41}

The exception to the fellow servant rule resulting from \textit{Ballard} and other decisions was a logical extension of a widely recognized common law doctrine requiring employers to ensure the safety of the workplace for their employees.\^{42} Subsequently, this duty progressed from a duty to maintain a safe work place to “providing safe employees because a dangerous fellow employee was seen as being equally as dangerous as a defective machine.”\^{43}

With time, courts also began to extend the cause of action beyond the realm of employees “to create a duty between employers and third parties based upon the third party’s relationship with the employer.”\^{44} For example, where a department store employee pushed and injured a store patron, a Missouri court held that

[a] merchant owes to his customer, who comes upon his premises by invitation, the positive duty of using ordinary care to keep the premises in a reasonably safe condition for use by the customer in the usual way; and this doubtless includes the duty of using ordinary care to employ competent and law-abiding servants.\^{45}

Thus, because of the relationship between the plaintiff-customer and the defendant-department store, the court held that the department store had a duty to exercise ordinary care when hiring employees.\^{46} Courts further expanded the doctrine in subsequent cases to

\begin{footnotesize}
\begin{enumerate}
\item Minuti, \textit{supra} note 34, at 503.
\item \textit{See}, e.g., Mo., Kan. & Tex. Ry. Co. v. Day, 136 S.W. 435 (Tex. 1911) (holding a company liable for negligently hiring an employee who committed an assault on another employee); \textit{see also} North, \textit{supra} note 6, at 720.
\item North, \textit{supra} note 6, at 719.
\item Id.
\item Priest v. F.W. Woolworth Five & Ten Cent Store, 62 S.W.2d 926, 927 (Mo. 1933) (internal quotation marks omitted) (citing Smothers v. Welch & Co. House Furnishing, 274 S.W. 678, 679 (Mo. 1925)).
\item \textit{See id.}; \textit{see also} Prague v. Monley, 28 P.3d 1046, 1050 (Kan. Ct. App. 2001) (citing Schmidt v. HTG, Inc., 961 P.2d 677 (Kan. 1998) (“[T]he existence of a duty to the injured party was based on actions against a customer or co-worker which took place on the working premises during the time employment services were normally rendered.”).
\end{enumerate}
\end{footnotesize}
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landlords and their employees\textsuperscript{47} and to actions by employees beyond the immediate area of the employer’s control.\textsuperscript{48} Finally, courts have extended the tort to situations where volunteers, rather than traditional employees, committed tortious actions.\textsuperscript{49} Today, the tort of negligent hiring remains one of the fastest growing areas of tort litigation.\textsuperscript{50} As it exists today, an employer will be found liable for “negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others,”\textsuperscript{51} regardless of whether the injured person is an employee or a customer, or whether the person is injured by an employee or a volunteer.

\textbf{B. Elements}

Most jurisdictions today require a plaintiff asserting a claim of negligent hiring to prove (1) that the employer owed the third party a duty; (2) that the employee was incompetent; (3) that the employer knew or should have known that the employee was incompetent for the position; and (4) that the employer’s negligence was both the actual and the proximate cause of the third party’s injury.\textsuperscript{52} In addition, it is necessary to show that an employment


\textsuperscript{49} See Broderick v. King’s Way Assembly of God Church, 808 P.2d 1211, 1221 n.25 (Alaska 1991) (rejecting as “without merit” the argument that the negligent hiring doctrine does not require screening of an unpaid volunteer); Big Brother/Big Sister, Inc. v. Terrell, 359 S.E.2d 241, 243 (Ga. Ct. App. 1987) (observing negligent hiring principles by noting that plaintiffs must prove that the defendant knew or should have known of a volunteer’s criminal propensities before the defendant could be found liable for negligent selection). See also Golden Spread Council, Inc. v. Akins, 926 S.W.2d 287, 290 (Tex. 1996) (finding that the negligent hiring doctrine did not apply to impose a duty on the Boy Scouts of America or its local council to screen a volunteer scoutmaster because the council did not hire the volunteer).

\textsuperscript{50} See Negligent Hiring and Retention, supra note 4, § 1.


\textsuperscript{52} See Barbara A. O’Connell, Hiring and Interviewing in EMP. L. E-DESK REFERENCE, ch. 32 (2004). O’Connell explained,

In order to prove that a cause of action for negligent hiring exists, a plaintiff is usually required to prove the following: the existence of an employment relationship; the employee’s incompetence; the employer’s actual or constructive
relationship exists. This last element will be discussed in the next Section in the context of volunteers as employees while addressing the issues surrounding employer control of volunteers. The following discussion briefly describes each of the first four elements.

1. The employer’s duty

One legal writer explained, “[T]he connection between the employment relationship in question and the plaintiff is the critical fact upon which a defendant employer’s duty is based in a negligent hiring or negligent retention case.” In addition, the duty of an employer is greater when employees deal with children in some capacity. Generally, three elements are common to a court’s finding that an employer had a duty to use due care in hiring employees on its behalf. First, at the time of the tortious action, both the offending employee and plaintiff were in places where each rightfully could be. Second, the offending employee and plaintiff met “as a direct result of the employment.” Third, “the employer would receive [or did receive] some benefit, even if only a potential or indirect benefit, from the meeting and the plaintiff had the wrongful act not occurred.”

When the above three elements are satisfied, an employer owes a duty to exercise reasonable care in employing individuals who may pose a threat of injury to their customers and employees specifically,

Id.

knowledge of such incompetence; the employee’s act or omission caused the plaintiffs injuries; and the employer’s negligence in hiring or retaining the employee was the proximate cause of the injury. Many states require additionally that a “special relationship” exist between the injured party and the employer before any liability for negligent hiring may attach.

53. Id.

54. Negligent Hiring and Retention, supra note 4, § 6. Duty, as explained by Prosser, is a court’s “expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” Prosser, supra note 35, at 325–26.

55. See, e.g., Machin v. Walgreen Co., 835 So. 2d 284, 284 (Fla. Dist. Ct. App. 2003) (“Persons chargeable with a duty of care and caution toward children must take the precautions which are available to them.”).

56. North, supra note 6, at 724.

57. Id.

58. Id.

59. Id.
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and to the community generally. As part of this duty, some courts have imputed to employers an additional obligation to investigate an applicant’s background. Importantly, the nature of the employer’s duty to investigate an applicant’s background depends largely “on the position for which an employee is being hired and the likelihood that the work will subject third persons to risk of great harm.” Consequently, if the employer is aware that the applicant may be unfit or if the offered employment is sensitive in nature and involves the “health, safety, and welfare” of another party, the duty of the employer to investigate is greater.

In the case of organizations retaining volunteers to work with children, the question of duty is a balancing act between the welfare of children and the concomitant costs of an increased duty for nonprofit organizations operating with already scarce resources. Especially important in this balancing act is the vulnerability of children. Courts in most jurisdictions have held that children are entitled to a greater degree of care. As explained by Jean Baldwin

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60. Rodolfo A. Camacho, *How To Avoid Negligent Hiring Litigation*, 14 WHITTIER L. REV. 787, 796 (quoting Ponticas v. K.M.S. Inv., 331 N.W.2d 907, 911 (Minn. 1983)).


63. Camacho, supra note 60, at 796. To determine if the imposition of a duty in a given set of circumstances is justified, courts look to “the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall.” Prosser, supra note 35, at 325–26. Other factors include the risk involved, the foreseeability of the risk, and the likelihood of the injury. Doe v. Boys Club of Greater Dallas, Inc., 868 S.W.2d 942, 948 (Tex. App. 1994). As explained by the Texas Court of Appeals, “These factors are then weighed against the social utility of the actor’s conduct and the magnitude of the burden on the defendant.” Id. (citing Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990)).

64. See generally Lear, supra note 14, at 172–80.

65. See, e.g., Juarez v. Boy Scouts of Am., Inc., 97 Cal. Rptr. 2d 12, 36 (Cal. Ct. App. 2000) (“Generally, a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger.”); Machin v. Walgreen Co., 835 So. 2d 284, 284 (Fla. Dist. Ct. App. 2003) (“Persons chargeable with a duty of care and caution toward children must take the precautions which are available to them.”); Atlanta Affordable Hous. Fund Ltd. P’ship v. Brown, 588 S.E.2d 827, 833 (Ga. Ct. App. 2002) (“Children of tender years and youthful persons generally are entitled to care proportioned to their inability to foresee and avoid the perils that they may encounter, as well as to the superior knowledge of persons who come into contact with them.”); Cook v. Smith, 33 S.W.3d 548, 554 (Mo. Ct. App. 2000) (“Ordinary care may require more vigilance and caution when a child is involved if there is a potentially dangerous situation of which a supervisor is or should be aware.” (quoting Rogger
Grossman and Kathryn Furano, when selecting volunteers, “the safety of those receiving services must be taken into account. This is especially true for volunteers who work with vulnerable populations such as children, the mentally retarded, and the fragile elderly.”

2. Employee’s incompetence

The ways in which an employee may be incompetent are limited only by the imagination of the employee. For example, courts have found incompetency due to “habitual drinking of liquors; habitual carelessness, forgetfulness, inattentiveness, inexperience, a physical or mental defect; or a propensity for horseplay, recklessness, maliciousness, or viciousness.” More specifically, employees are incompetent when they possess qualities and/or characteristics that a reasonable employer would recognize while hiring an employee as qualities and/or characteristics that would likely result in injury to someone whom the employer has a duty to protect.

Importantly, incompetence in this context is not limited to the ability of the applicant or employee to perform the tasks of his employment. Even the most gifted mathematician with multiple graduate degrees in accounting would be incompetent to work for an accounting firm that audited outside companies onsite if he was a danger to those with whom he would have contact. Incompetence extends to the reliability of the employee and “all that is essential to make up a ‘reasonably’ safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment.”

66. See Grossman & Furano, supra note 13, at 199. One example of this principle is the Ohio Court of Appeals decision in Peyer v. Ohio Water Service Co., 720 N.E.2d 195 (Ohio Ct. App. 1998). In Peyer, the Court said, “[C]hildren are entitled to a higher degree of care than adults and . . . the amount of care required to discharge a duty to a child is greater than that required to discharge a similar duty owed to an adult.” Id. at 200.


68. Id. at 99 (footnotes omitted).

69. Negligent Hiring and Retention, supra note 4, § 8.

70. Id. (citing 53 AM. JUR. 2d Master and Servant § 310).
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For example, the Florida Court of Appeals held that a furniture company negligently hired a furniture deliveryman because the furniture company failed to require the deliveryman to fill out an application or to ask any questions about his background even though the employee’s duties would require him to enter customers’ private homes. If the furniture company had investigated the employee, it likely would have discovered that the employee had an extensive juvenile and criminal record, had been diagnosed with paranoid schizophrenia, and had used drugs and alcohol heavily. However, because it did not investigate the employee prior to hiring and retaining him, the employee was permitted to enter into the home of a customer where he caused extensive personal injuries to that customer. While the employee was likely completely able to perform the job, his background manifested that he was incompetent to perform the job where he might endanger others. Given the nature of the employment—entering into the homes of customers—the employer should have taken reasonable steps to assure itself of the competence of the employee. Thus, an employee’s competence in the negligent hiring context includes not only the employee’s ability to perform the employment but also whether the employee is a reasonably safe person given the nature of the work.

3. Employer’s knowledge of employee’s incompetence

After establishing an employer’s duty and the employee’s incompetence, the plaintiff must prove that the employer had actual or constructive knowledge of an employee’s incompetence. To prove constructive knowledge in this situation, if a plaintiff demonstrates

that an employer hired or retained an employee that it knew or, in the exercise of reasonable care, should have known was incompetent for the job position assigned, then the employer may

72. Id. at 749.
73. Id. at 747.
be liable for any injury to the plaintiff caused by the employee’s incompetence.75

A plaintiff establishes an employer’s actual knowledge of an employee’s incompetence by demonstrating that the employer either possessed evidence of the incompetence or had witnessed evidence of such.76 Of course, a plaintiff need not prove that the employer had actual knowledge of an employee’s incompetence;77 the employer will be equally liable if the plaintiff can show that the employer had constructive knowledge of the employee’s incompetence.78 A plaintiff demonstrates constructive knowledge on the part of the employer where “information indicating that the employee was incompetent was available to the employer and that the employer would have known of this information had it exercised reasonable care in hiring or retaining the incompetent employee.”79

The furniture company in the previous section provides an excellent example of a defendant held to have had constructive knowledge of an employee’s incompetence.80 In that case, the court held that if the furniture company had investigated the applicant for the deliveryman position, it likely would have discovered that the employee had an extensive juvenile and criminal record, had been diagnosed with paranoid schizophrenia, and had used drugs and alcohol heavily.81 Thus, where an investigation would have revealed a potential employee’s incompetence, an employer’s lack of actual knowledge concerning the incompetence does not relieve it of liability.82

4. Causation and proximate cause

As in other causes of action based upon a party’s negligence, plaintiffs asserting the tort of negligent hiring must prove that their injuries were “actually and proximately caused” by the employer’s

75. Negligent Hiring and Retention, supra note 4, § 9.
76. Camacho, supra note 60, at 803.
77. Id.
78. See Negligent Hiring and Retention, supra note 4, § 9.
79. Id.
81. Id. at 749.
82. Id.
failure to exercise reasonable care in hiring.\textsuperscript{83} In other words, plaintiffs must demonstrate that their injuries resulted as a logical consequence of an employee’s incompetence that was actually or constructively known to the employer.\textsuperscript{84}

The principles of causation and proximate cause in the context of negligent hiring are set forth in the following examples that demonstrate the need for a relationship between the employee’s incompetence and the tortious conduct resulting in the plaintiff’s injuries.

1. D employs A as a maintenance employee. D knows that A has two prior convictions for assault and battery, that he is a heavy drinker and that he is frequently in trouble. D sends A to P’s apartment to fix an appliance. While in P’s apartment, A assaults and beats P causing serious injuries.

2. D employs A as a maintenance employee. D knows that A has a prior conviction for embezzlement but has no other negative aspects in his character or background. A becomes a model employee for D. One day, D sends A to P’s apartment to fix an appliance. A fixes the appliances and sexually assaults P.\textsuperscript{85}

It is clear in the first example that a casual link exists because P’s injuries resulted from those attributes that would render A incompetent to work in the apartment complex: A’s convictions for assault and battery, his heavy drinking, and his proclivity for trouble.\textsuperscript{86} However, in the second example, given that A’s prior conviction was for embezzlement, it is much more difficult to establish a causal link between A’s attributes and the sexual assault. While previous crimes of any sort may serve as an indicator of potential criminal activity, A’s attributes in the second example are too attenuated for proximate cause to exist.\textsuperscript{87}

The facts in \textit{Strickland v. Communications and Cable of Chicago, Inc.}\textsuperscript{88} demonstrate the lack of causal link. In \textit{Strickland}, the court held that a cable company’s failure to perform a prehiring

\textsuperscript{83} Camacho, \textit{supra} note 60, at 802.
\textsuperscript{84} \textit{Negligent Hiring and Retention, supra} note 4, § 10 (citing Bensman v. Reed, 20 N.E.2d 910 (Ill. App. Ct. 1939); Halsan v. Johnson, 65 P.2d 661 (Or. 1937)).
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
investigation of a cable installer’s background was not the proximate cause of a customer’s injuries from the installer’s sexual assault on the customer. The court explained that the failure to examine was not the proximate cause because an investigation would have revealed only that the installer tended to commit traffic infractions and that the installer had lied about those infractions on the applications. Because the investigation would not have revealed any information that would have even hinted to the employer that the installer would commit sexual assault, no causal link could exist between the plaintiff’s injuries and the employer’s failure to investigate the employee’s background. It is generally not enough that the potential act is conceivable; rather, a plaintiff must allege facts that show the injuries were foreseeable.

In summary, plaintiffs asserting a claim of negligent hiring must prove (1) that the employer owed the third party a duty, (2) that the employee was incompetent, (3) that the employer knew or should have known that the employee was incompetent for the position, and (4) that the employer’s negligence was both the actual and the proximate cause of the third party’s injury. Also, as explained above, plaintiffs must demonstrate that an employment relationship existed between the employer and the party that caused the plaintiff’s injuries, a finding that is especially significant in the context of volunteers.

89. Id. at 59; see also Giraldi v. Cnty. Consol. Sch. Dist. No. 62, 665 N.E.2d 332 (Ill. App. Ct. 1996). In Giraldi, the Plaintiff sued the bus company and the school district for negligently hiring the bus driver after the bus driver sexually molested the Plaintiff on a bus. Id. at 334–35. The driver had a history of arriving late to work. Id. at 335. The trial court refused to submit the negligent hiring count to the jury. Id. On appeal, the appellate court affirmed the trial court’s refusal to submit the negligent hiring claim to the jury, holding that the only conduct the bus company could have been warned of, had it investigated the driver’s past conduct, was a tendency to be late. Id. at 341. The court concluded that there was no factual or logical relationship between that knowledge and the attack on plaintiff. Id.

90. Strickland, 710 N.E.2d at 58.

91. See also Island City Flying Serv. v. Gen. Elec. Credit Corp., 585 So. 2d 274 (Fla. 1991) (finding that an employee’s tardiness, missing work, and allowing persons to ride on refueling truck did not make it foreseeable that employee would steal and crash plane); Ford v. Gildin, 613 N.Y.S.2d 139 (N.Y. App. Div. 1991) (finding that the landlord could not anticipate that doorman and tenants would form close relationship in which doorman became godfather of tenants’ child, and later molested the child in his own personal time).


93. See O’Connell, supra note 52.
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IV. SPECIAL CONSIDERATIONS IN THE CASES OF VOLUNTEERS AND RELIGIOUS INSTITUTIONS

When applied to volunteers and to religious institutions, additional considerations are pertinent to the negligent hiring examination. For example, where organizations use volunteers, a court must determine whether the organization exercised sufficient control over the volunteer to merit the application of the tort of negligent hiring for tortious actions on the part of the volunteer.94 Furthermore, in the case of religious institutions, attempts by a court to apply the tort of negligent hiring naturally implicate the First Amendment.95 This Part examines the tort of negligent hiring in the context of volunteers and finds that the employer must control the volunteer for an employment relationship to exist. In addition, it examines the tort of negligent hiring as applied to religious institutions and identifies the First Amendment questions that arise, including a split in authority concerning application of the tort of negligent hiring to religious institutions.

A. Control and the Existence of an Employment Relationship

Volunteers fill an essential role within American civil society and provide important services, especially to nonprofit organizations.96 During the course of one year, more than ninety million Americans will give in excess of twenty billion hours of their personal time to schools, churches, nonprofit organizations, and to the community in general.97 Nonprofit organizations are increasingly dependent upon volunteers for delivering services to the communities in which they are located.98 However, in spite of the gratuitous manner in which

94. See Broderick v. King’s Way Assembly of God Church, 808 P.2d 1211, 1221 n.25 (Alaska 1991) (rejecting as “without merit” the argument that the negligent hiring doctrine does not require screening of an unpaid volunteer). Whether an employment relationship existed is an element of the negligent hiring action, but it takes on special significance in a volunteer situation given that a traditional employment relationship with consideration does not usually exist.

95. See, e.g., Ayon v. Gourley, 47 F. Supp. 2d 1246 (D. Colo. 1998); Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997).

96. See Grossman & Furano, supra note 13, at 199.


98. Grossman & Furano, supra note 13, at 199 (“These volunteers serve on nonprofit boards, sing in their church choirs, participate in neighborhood clean-ups, deliver meals to the
volunteers render service, organizations may still be liable for untoward actions committed by volunteers.99 Indeed, where organizations exercise rights of control over volunteers similar to those rights of control associated with traditional employment, a court will treat a volunteer as an employee for liability purposes.

1. Volunteers as employees and the question of control

While an employment relationship is essential for any finding of negligent hiring,100 it takes on special significance where volunteers are involved because the right to control in a volunteer situation often varies from a traditional employment relationship.101 For the most part, courts have treated volunteers as employees of the organizations for whom they are engaged.102 This principle is embodied in the Restatement (Second) of Agency, which states, “One who volunteers services without an agreement for or expectation of reward may be a servant of the one accepting such services.”103 Furthermore, the comment to this section adds,

elderly, and provide countless other services. Without this donated labor, organizations dependent on volunteers would not reach nearly the number of people or provide the level of service they do.”).


100. See O’Connell, supra note 52 (listing elements of negligent hiring cause of action, including “the existence of an employment relationship”). The Colorado Supreme Court explained, “It is axiomatic that a prerequisite to establishing negligent hiring is an employment or agency relationship.” Moses v. Diocese of Colo., 863 P.2d 310, 324 (Colo. 1993) (citing Stortroen v. Beneficial Fin. Co., 736 P.2d 391 (Colo. 1987)); see also Philip M. Berkowitz, Challenges of Workplace Safety and Security, 681 PRAC. L. INST./LIT. 219, 249 (Sept. 2002) (“The existence of an employment relationship is a fundamental requirement of a claim for negligent hiring or retention. Under Maine law, the test for determining the existence of an employment relationship is whether the employer has a right to control the employee.”).

101. Given the need for the existence of an employment relationship in establishing negligent hiring, control theoretically would be an essential finding in any case. However, it is usually not considered where a traditional employment (master-servant) relationship exists. Rather, it is assumed that the proper amount of control exists. The real significance of an employment relationship arises in the volunteer setting because of the varying degrees of control an organization may exercise over a volunteer.


103. Restatement (Second) of Agency § 225 (1958) (internal citations omitted). See also id. § 213, which states that 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: . . . in the employment of improper persons or instrumentalities in work involving risk of harm to others.”
Consideration is not necessary to create the relation of principal and agent, and it is not necessary in the case of master and servant. One who has no contractual capacity may be a servant, or a master. One may be a servant without having promised to give or to continue the service.\textsuperscript{104}

Thus, the organization utilizing volunteer services will generally be liable for negligent hiring if the organization can exercise control over the volunteer.\textsuperscript{105} This principle is demonstrated in the \textit{Restatement (Second) of Torts}, which further emphasizes the necessity of the element of control in determining whether the tort of negligent hiring has occurred.\textsuperscript{106} It explains that

\cite{107} [I]t is negligence to permit a third person . . . to engage in an activity which is \textit{under the control of the actor}, if the actor knows or should know that such person intends . . . to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.\textsuperscript{107}

Many states have emphasized control as a factor in determining whether a volunteer is an employee in the negligent hiring context similar to the above statements by the Restatement. For example, the Colorado Supreme Court explained that the “right to control” is the key factor in deciding whether the organization can be liable for the actions of a volunteer.\textsuperscript{108} In addition, the Ohio Court of Appeals held in \textit{Evans v. Ohio State University}, “The determination of whether an unpaid volunteer is a servant ‘generally depends on the charitable organization’s right to control the activities of the volunteer.’”\textsuperscript{109}

Some states have even developed specific criteria to determine whether an organization controls a volunteer in such a way that the

\textsuperscript{104} Id. § 225 cmt. a.


\textsuperscript{106} See \textit{RESTATEMENT (SECOND) OF TORTS} § 308 (1965).

\textsuperscript{107} Id. (emphasis added).

\textsuperscript{108} Moses v. Diocese of Colo., 863 P.2d 310, 324 (Colo. 1993) (“The most important factor in determining whether a person is an agent is ‘the right to control, not the fact of control.’” (quoting Dana’s Housekeeping v. Butterfield, 807 P.2d 1218, 1210 (Colo. Ct. App. 1990))).

\textsuperscript{109} Evans, 680 N.E.2d at 174 (citing \textit{Roman Catholic Church}, 602 So. 2d at 133).
volunteer is an employee for liability purposes. Specifically, Texas courts look to four criteria to determine whether an organization has control over volunteers for liability purposes, namely, “whether the employer: 1. [h]as a right to direct the duties of the volunteer; 2. [h]as an interest in the work to be accomplished; 3. [a]ccepts direct or incidental benefit derived from the volunteer’s work; and 4. [h]as a right to fire or replace the volunteer.”

In contrast with other right-to-control tests, the Texas test does not occupy itself with mode of payment, questions concerning profit, or other factors not necessary for control over a volunteer. Furthermore, the Texas test succinctly provides a framework through which an examination can be made while still accurately demonstrating whether the employer possessed the right to control the volunteer. Once a court does determine that an employer possesses the right to control a volunteer, then the employer may be

110. The Texas test set forth in Doe v. Boys Club of Greater Dallas, Inc., 868 S.W.2d 942, 950 (Tex. App. 1994) (citing Smith v. Univ. of Texas, 664 S.W.2d 180, 190 (Tex. App. 1984)) is primarily used in this Comment on account of its applicability to volunteers and the ease with which it is applied to the facts of the Montoya case. In contrast with other tests, the Texas test does not preoccupy itself with mode of payment, questions concerning profit, or other factors not necessary for control over a volunteer. While Utah law would be controlling in the case of Montoya, Utah has not clearly spelled out the factors of its right to control test in either its negligent hiring or respondeat superior cases. See Glover ex rel. Dyson v. Boy Scouts of Am., 923 P.2d 1383, 1385–86 (Utah 1996). Furthermore, the Texas test succinctly provides a framework through which an examination can be made while still accurately demonstrating whether the employer possessed the right to control the volunteer.

111. Boys Club of Greater Dallas, 868 S.W.2d at 950 (citing Smith 664 S.W.2d at190).

112. Other “right to control” tests exist throughout the states. However, in contrast with the Texas test, several of the factors are irrelevant in the volunteer context. For example, in Indiana the test for determining whether an employer-employee relationship exists consists of seven factors: “(1) the right to discharge; (2) mode of payment; (3) supplying tools or equipment; (4) belief by the parties in the existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; and (7) establishment of the work boundaries.” Southport Little League v. Vaughn, 734 N.E.2d 261, 268 n.6 (Ind. Ct. App. 2000) (determining employment relationship in respondeat superior matter). The Colorado test consists of the following six factors: (1) the degree of control over the manner in which the work is performed; (2) the worker’s opportunity for profit or loss depending on his managerial skill; (3) the worker’s investment in equipment or materials, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the employer’s business. John R. Paddock, Jr., Employer Liability to Third Parties, 16 COLO. PRAC., EMP. L. & PRAC. § 14.2 (2d ed.). The federal right to control test for independent contractors consists of ten factors, while the IRS has twenty factors it uses to determine control. Myra H. Barron, Who’s an Independent Contractor? Who’s an Employee?, 14 LAB. LAW. 457, 459–62 (1999).

113. Boys Club of Greater Dallas, 868 S.W.2d at 950.
liable for its volunteer’s tortious actions regardless of whether the employer pays the volunteer or not.

B. Applying Negligent Hiring to Religious Institutions

In the wake of the decline of charitable immunity and an increased willingness on the part of parishioners to bring suit against religious institutions for the inappropriate actions of clergy and employees, there is an ever-increasing number of tort actions against churches and other religious organizations that are based on claims of negligent hiring. While actions based upon respondeat superior seldom survive a motion to dismiss in third party claims against religious institutions for misconduct on the part of their servants, churches are increasingly found liable for negligent hiring. However, “tort claims based on a religious institution’s negligent hiring . . . of a member of its clergy are highly contentious because the inquiry requires a court to evaluate the reasonableness of a Church’s employment decisions,” raising several First Amendment concerns. For those reasons, splits exist among both state and federal courts concerning whether the First Amendment bars negligent hiring suits against religious institutions.

The First Amendment to the United States Constitution provides that “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.”

\[\text{114. See Lupu & Tuttle, supra note 9, at 1797–805.}\]


\[\text{116. See Marjorie A. Shields, Annotation, Liability of Church or Religious Organization for Negligent Hiring, Retention, or Supervision of Priest, Minister, or Other Clergy Based on Sexual Misconduct, 101 A.L.R. 5th 1, 1 (2002).}\]

\[\text{117. Janna Satz Nugent, A Higher Authority: The Viability of Third Party Tort Actions Against a Religious Institution Grounded on Sexual Misconduct by a Member of the Clergy, 30 FLA. ST. U. L. REV. 957, 969 (2003).}\]

\[\text{118. Id. at 971.}\]

\[\text{119. See Berry v. Watchtower Bible and Tract Soc. of N.Y., Inc., 879 A.2d 1124, 1135 (N.H. 2005) (speaking of breach of fiduciary duty, common law negligence, negligent supervision and hiring, and negligent counseling); see also Malicki v. Doe, 814 So. 2d 347, 357–58 (Fla. 2002) (summarizing litigation across the country); Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1256–62 (Miss. 2005) (listing federal and state court decisions on either side of the issue).}\]

\[\text{120. U.S. CONST. amend. I.}\]
As a matter of practical application, “[t]he First Amendment ‘permits hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters.”’

In addition, “[t]he assessment of an individual’s fitness to serve as a priest is a particular ecclesiastical matter entitled to this constitutional protection.” If a court becomes involved in or is called upon to examine a religious institution’s discipline of its clergy, then that examination implicates the First Amendment.

While the First Amendment is implicated by a court of law’s examination of a religious institution, it does not provide a defense to child abuse or other crimes. However, it does “clearly bar[] government from involving itself in purely ecclesiastic matters, including, but not limited to church doctrine, hiring, firing and retention of church employees and or ministers.” Accordingly, the First Amendment may serve as a defense to negligent hiring on the part of ecclesiastical leaders that fail to dismiss clergy or to reassign them without proper supervision or discipline.

It is, however, important to note that difficulty arises in the actual application of the First Amendment to questions of negligent hiring in the ecclesiastical arena given the split in authority that exists both among state and federal courts. Some courts that have

121. Aylward, supra note 115, at 197 (quoting Wheeler v. Roman Catholic Archdiocese of Boston, 389 N.E.2d 966, 968 (Mass. 1979)).

122. Id. (citing Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)).

123. Id. at 197–98 (citing Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1577 (1st Cir. 1988); Dowd v. Soc’y of St. Colombans, 861 F.2d 761, 763 (1st Cir. 1988)).

124. Id. at 198.

125. Id.

126. Id.

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disallowed actions against religious institutions based on negligent hiring have held that that the First Amendment bars a claim of negligent hiring because the inquiry “might involve the Court in making sensitive judgments about the propriety of the church Defendants’ supervision in light of their religious beliefs.”

In addition, the courts have found that “imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy.”

On the other hand, some courts that have permitted negligent hiring actions against religious institutions have found that the First Amendment does not bar a negligent supervision claim because the court’s analysis would “not require interpreting or weighing church doctrine and neutral principles of law can be applied.”


Employment Division, Department of Human Resources v. Smith, and Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah. In the case of the Church of the Lukumi Babalu Aye, the Supreme Court explained that “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” Therefore, courts that have permitted an action for negligent hiring to proceed in spite of the First Amendment have done so based upon the argument that the courts were merely applying neutral principles of tort law. While the above discussion addresses both Establishment Clause and Free Exercise Clause considerations, the following subsections will provide additional considerations for the respective clauses.

1. The Establishment Clause

The Supreme Court’s decision in Lemon v. Kurtzman is the “current guidance for application of the Establishment Clause to claims of governmental intrusion into religious territory.” As the Supreme Court explained in Lemon, the Establishment Clause of the First Amendment serves to guard against three evils: “sponsorship, financial support, and active involvement of the sovereign in religious activity.” In Lemon, the Court said that government action is constitutional under the Establishment Clause if it satisfies the following three requirements: (1) it has a secular purpose, (2) its primary effect is neither to enhance nor inhibit religion, and (3) the action does not foster an excessive government entanglement with religion.

The third and final prong, excessive entanglement, has played an important role in negligent hiring cases. To determine if excessive
entanglement exists, a court “examine[s] the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority.” Furthermore, the Supreme Court has interpreted excessive entanglement to mean that “routine regulatory interaction that involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no ‘detailed monitoring and close administrative contact’ between secular and religious bodies, [will] not itself violate the nonentanglement command.” Therefore, “if the inverse of any of the preceding three statements are true, . . . excessive entanglement between church and state may result.”

2. The Free Exercise Clause

The Free Exercise Clause, in contrast with the Establishment Clause, “guarantees ‘first and foremost, the right to believe and profess whatever religious doctrine one desires.’” Among its functions, the Free Exercise Clause shelters individuals “against laws that discriminate based on religious beliefs, as well as ordinances that regulate or prohibit conduct undertaken for religious reasons.” This shelter from government regulation, however, is not an absolute protection from all regulation. The Supreme Court, to ensure that governments still have some power to regulate, has explained that regulation and infringement are not synonymous; however, “any attempt to infringe on the free exercise of religion, beyond mere regulations to keep peace and order in society, must be justified by a compelling state interest.”

When determining whether conduct is constitutionally protected under the Free Exercise Clause, “the first inquiry . . . is whether the

140. Kelty, supra note 115, at 1127 (quoting Lemon, 403 U.S. at 615).
141. Id. at 1128 (quoting Hernandez v. Comm’r, 490 U.S. 680, 696–97 (1989)).
142. Id.
143. Id. at 1130 (quoting Malicki v. Doe, 814 So. 2d 347, 354 (Fla. 2002)).
144. Id.
145. Id. at 1131 (citing Donald T. Kramer, Annotation, Supreme Court Cases Involving Establishment and Freedom of Religion Clauses of Federal Constitution, 37 L. Ed. 2d 1147, 1158 (1999)).
conduct being regulated ‘is rooted in religious belief.’” If the court determines that the conduct is rooted in religious belief, then it must determine whether the law “regulating the religious belief is neutral ‘both on its face and in its purpose.’” If the court then determines that the primary purpose of a law is to infringe upon or restrict practices on account of the practices’ religious motivation, the law is not neutral, and it is valid only if justified by a compelling interest narrowly tailored to advance that interest. However, if the court determines that the law is “a neutral law of general applicability [that] only incidentally burdens religious practices,” then the government need not justify it by a compelling interest.

C. Conclusion

As has been demonstrated, when the tort of negligent hiring occurs where an organization is employing a volunteer or where the organization is a religious institution, the court is forced to make additional considerations. In the context of applying the tort of negligent hiring to an organization utilizing volunteers, the plaintiff’s burden of establishing an employment relationship becomes much more pertinent than in cases involving traditional employment relationships. However, where the organization has a right to control the volunteer, an employment relationship exists for purposes of the tort.

Furthermore, the First Amendment is implicated where a plaintiff brings suit against a religious institution for the tort of negligent hiring. And as explained above, a split in authority currently exists with regards to the constitutionality of applying the principles of negligent hiring to decisions and practices of churches. Both the First Amendment considerations and the additional examination necessary for volunteers complicate the application of the tort of negligent hiring to religious institutions employing volunteers, such as the LDS Church.

146. Id. (quoting Malicki, 814 So. 2d at 354).
147. Id. (quoting Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993)).
148. Id. (citing Church of the Lukumi Babalu Aye, 508 U.S. at 533).
149. Id. (citing Church of the Lukumi Babalu Aye, 508 U.S. at 531).
V. THE LDS CHURCH AND THE TORT OF NEGLIGENT HIRING

The following applies the tort of negligent hiring to the LDS Church based upon the legal principles explored above. First, this Part will apply the elements of negligent hiring to the known facts of the Aaron Marcos Montoya case and general LDS Church policies and practices. Following the application of the tort of negligent hiring to the LDS Church, this Part will consider whether the First Amendment should bar an action based upon negligent hiring against the LDS Church. As a result of the discussion found herein, this Comment concludes that not all of the elements of the tort of negligent hiring were present in the LDS Church’s utilization of Montoya as a Primary teacher given that the LDS Church likely did not have either actual or constructive knowledge of his pedophilia. Furthermore, it concludes that even if each of the elements of the tort were satisfied, actions against religious institutions based on the tort of negligent hiring should be barred by the First Amendment given the excessive entanglement that would occur by a judicial examination of church policies and practices.

A. Applying the Tort of Negligent Hiring to Volunteers in the LDS Church

Because the LDS Church likely had neither actual nor constructive knowledge that Montoya was incompetent to care for children, not all of the elements of tort of negligent hiring are satisfied. As explained above, an action for negligent hiring as applied to volunteers in religious organizations has five elements that must be proven by the plaintiff: (1) the employer exercised control over the volunteer, (2) that the employer owed the third party a duty, (3) that the employee was incompetent, (4) that the employer knew or should have known that the employee was incompetent for the position, and (5) that the employee’s negligence was both the actual and proximate cause of the third party’s injury.150

This Section will first examine whether each of the elements of the tort of negligent hiring is present in the case of Aaron Marcos Montoya. As part of that examination, emphasis is placed on whether the LDS Church has a right to control its volunteers, which would establish an employment relationship. In addition, special attention is

150. See Camacho, supra note 60, at 795; O’Connell, supra note 52.
paid to the degree of care governing organizations caring for children. This Section concludes that each of the elements was likely present in the Montoya case except for the element requiring actual or constructive knowledge.

1. The LDS Church's control over Primary teachers

Because of the control that the LDS Church exercises over Primary teachers, it is likely that a court would establish that an employment relationship exists between the church and its volunteer teachers. As explained above, a right to control, not consideration, is the key test for determining whether an organization will be liable for the conduct of its volunteers.\(^{151}\) The test as applied by Texas courts illustrates well those aspects of control especially pertinent to this examination.\(^{152}\) In contrast with other right-to-control tests, the Texas test does not occupy itself with mode of payment, questions concerning profit, or other factors not necessary for control over a volunteer.\(^{153}\) Furthermore, the Texas test succinctly provides a framework through which an examination can be made while still accurately demonstrating whether the employer possessed the right to control the volunteer.\(^{154}\) In Texas, a volunteer is an employee when the employer (1) has a right to direct the duties of the volunteer, (2) has an interest in the work to be accomplished, (3) accepts direct or incidental benefit derived from the volunteer’s work, and (4) has a right to fire or replace the volunteer.\(^{155}\)

Under the Texas right-to-control test, an employment relationship likely exists between the LDS Church and volunteers working with children as teachers in the Primary. First of all, the LDS Church defines and actively directs the duties of Primary teachers. The church has created a specific organization and structure to be used in conjunction with the Primary and defined its purposes and objectives. The Church also writes and provides the

\(^{151}\) See supra Part IV.A; see also RESTATEMENT (SECOND) OF AGENCY § 225 cmt. a (1958).

\(^{152}\) See, e.g., Doe v. Boys Club of Greater Dallas, Inc., 868 S.W.2d 942, 950 (Tex. App. 1994) (citing Smith v. Univ. of Tex., 664 S.W.2d 180, 190 (Tex. App. 1984)).

\(^{153}\) See supra Part IV.A.1.

\(^{154}\) Boys Club of Greater Dallas, 868 S.W.2d at 950.

\(^{155}\) Id.
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curriculum to be taught by the Primary teachers.156 Furthermore, the LDS Church, where available, trains the teachers through teacher development courses.157

The second inquiry in the Texas control test is whether the employer has an interest in the work to be accomplished. In the case of the work provided by Primary teachers, the LDS Church most definitely has an interest in the work. The Primary children are not only the future members and leaders of the church, but are also viewed as precious and of great intrinsic worth.158 Primary serves as a means of preparing children to take the reins of the church in the future and insure that it continues to fulfill its missions.

Third, the LDS Church receives both direct and incidental benefit from the work of Primary teachers. The work of Primary teachers facilitates the other meetings in which adults are involved by freeing parents from their parental demands. In addition, Primary teachers serve to inculcate in children the values and beliefs of the church.

Finally, LDS Church leaders are at complete liberty to remove Primary teachers from their positions within the Primary. While church members are free to decline callings extended to them from leaders or to retire from a position once they have accepted it, the Church has an absolute right to remove or replace a member as a teacher in the Primary at any time. Under the Texas four-prong control test, the LDS Church exercises sufficient control over its


Church leaders call and set apart lay officers and teachers to oversee the Primary; and Primary general officers and Church curriculum committees prepare handbooks, teaching guides, visual aids, lesson manuals, and a variety of training videos for their use. Monthly in-service lessons help teachers improve their teaching skills and relate appropriately to children. Periodically, the Primary general presidency and board members conduct multistake or regional training sessions. Leaders and teachers seek and receive inspiration in their Primary service.

Id.

157. Id.

158. See HANDBOOK OF INSTRUCTIONS, supra note 19, at 229 (citing Mark 10:14); see also Matthew 18:5–6, which states,

And whoso shall receive one such little child in my name receiveth me. But whoso shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea.

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Primary teachers to create an employer-employee relationship, which gives rise to a duty of care under the negligent hiring tort.

2. Duty of the LDS Church in screening potential Primary teachers

After establishing that a Primary teacher is indeed an employee for purposes of negligent hiring, a determination of liability under that tort requires that the employee owe a duty to the third-party victim. This analysis now examines the three preliminary questions for determining whether a duty is owed and the arguments for both a greater and lesser duty of care. It concludes that the LDS Church likely did not exercise sufficient care in inviting Montoya’s to serve as a Primary teacher because LDS Church leaders generally do not investigate the background of potential teachers.

a. Preliminary questions. As explained above, prior to applying a duty to the volunteer organization, in this case the LDS Church, a court first determines whether the following three elements are present: (1) “the incompetent employee and plaintiff are in places where each [has] a right to be at the time that the plaintiff sustains injury”;160 (2) “the incompetent employee and the plaintiff come into contact as a direct result of the employment”;161 and (3) “the employer has received or would have received some benefit, either direct, indirect, or potential, from the meeting of the employee and the plaintiff.”162

With regard to the first element in determining whether a duty exists, it is likely that a court would find that Montoya and the individuals he molested were both in a place where they had a right to be at the time of the molestation. Because Montoya and his wife were the Primary teachers called by the LDS Church to teach the five-year-old class, Montoya had not only a right to be at the location of the molestation, but a responsibility to be there. In addition, each of the five-year old girls he molested had the right to

159. See supra Part III.A.
160. Negligent Hiring and Retention, supra note 4, § 6 (citing North, supra note 10, at 720).
161. Id.
162. Id.
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be in the classroom since the LDS Church provides the rooms and the teachers for the benefit of the children.163

As to the second element in determining the existence of a duty, Montoya came into contact with his victims on account of his calling as a Primary teacher. In his position as a Primary teacher, Montoya was placed in a position of trust and care and charged with the education of his victims.164 The very purpose of the calling requires contact with the children.165 While it is possible that Montoya would have come in contact with his victims without the calling, his contact with them in this case is undeniably the result of his service in the Primary.

Finally, as explained in the consideration of whether the LDS Church controlled Montoya for liability purposes, the church would have received both direct and indirect benefits from Montoya's service as a Primary teacher.166

b. Determining the proper duty to investigate volunteers. Because the three elements for determining duty are each satisfied, it is proper to apply a duty of care to the LDS Church for its Primary children. Nonetheless, the extent of that duty is unclear. While the safety and welfare of individual children from potential abuse mandates a greater duty on the part of a volunteer organization in its hiring of volunteers, an elevated duty including the performance of background checks on all volunteers working with children is not currently required of most volunteer organizations. The following weighs the arguments for an elevated duty of care for organizations employing volunteers with policy considerations and determines that while an elevated duty exists, the highest possible duty is not currently required of organizations employing volunteers.

(1) The vulnerability of children and the potential harm of abuse. As previously explained, if the employment offered is of a sensitive nature in which the health, safety, or welfare of a party is involved, then the duty of the employer to investigate potential

163. See HANDBOOK OF INSTRUCTIONS, supra note 19, at 229 (“Primary Enrollment: Children ages 3 through 11 are enrolled in Primary.”); see also id. at 235 (describing Primary enrollment and advancement).
164. See id. at 229.
165. Id. (“Primary leaders and teachers should love each child and develop a caring relationship with him or her.”).
166. See supra Part V.A.1.
volunteers is greater than in situations where the health, safety, or welfare of a party is not involved.\textsuperscript{167} Furthermore, tort law recognizes the vulnerability of children\textsuperscript{168} and requires a greater degree of care on the part of individuals and organizations working with them.\textsuperscript{169} Children are potentially even more vulnerable in their interactions with volunteer organizations than in other relationships given the positions of authority and trust that volunteers occupy.\textsuperscript{170} For example, scoutmasters in the Boy Scouts occupy positions of authority over young men under circumstances in which discipline, order, and obedience are values the organization teaches and honors.\textsuperscript{171} In addition, volunteers serving in Big Brothers/Big Sisters of America serve in positions of great confidence and trust and often find themselves in one-on-one situations with their charges.\textsuperscript{172} The authority and confidence associated with these types of volunteer positions put children in an especially vulnerable situation if a leader is a potential perpetrator.

An even more compelling reason for establishing a duty of care that adequately protects children is the “gravity of the harm” perpetrated on children on account of abuse.\textsuperscript{173} In addition to the horrific experience of the abuse itself, the harm of the abuse can extend far into the future. As explained by Dr. Julia Whealin, “If child sexual abuse is not effectively treated, long-term symptoms may persist into adulthood.”\textsuperscript{174} She further explained that the long-term results of child abuse include post-traumatic stress disorder, anxiety, depression and thoughts of suicide, sexual anxiety and disorders, poor body image and low self-esteem, increased likelihood of drug

\textsuperscript{167} Camacho, \textit{supra} note 60, at 796.
\textsuperscript{168} Lear, \textit{supra} note 14, at 173 (citing Tex. Util. Elec. Co. v. Timmons, 947 S.W.2d 191, 193 (Tex. 1997) (adopting Banker v. McLaughlin, 208 S.W.2d 843, 847 (Tex. 1948), and RESTATEMENT (SECOND) OF TORTS § 339 (1965))).
\textsuperscript{169} See Peyer v. Ohio Water Serv. Co., 720 N.E.2d 195, 200 (Ohio Ct. App. 1998) (citing Di Gioldo v. Caponi, 247 N.E.2d 732, 733–34 (Ohio 1969)) (“[C]hildren are entitled to a higher degree of care than adults and that the amount of care required to discharge a duty to a child is greater than that required to discharge a similar duty owed to an adult.”).
\textsuperscript{170} Lear, \textit{supra} note 14, at 173.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id. (citing Rob Lusk & Jill Waterman, \textit{Effects of Sexual Abuse on Children, in Sexual Abuse of Young Children} 101 (Kee MacFarlane et al. eds., 1986)).
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and alcohol abuse, self-mutilation, and eating disorders. The horrendous experience that is child abuse and the terrible and often permanent results of child abuse provide poignant reasons to impose a greater degree of care on organizations utilizing volunteers to work with children.

(2) Additional policy considerations. Weighed against the effects of child abuse are the social utility of volunteer organizations and the magnitude of the burden that would be placed on these organizations if extensive screening were required of them. Volunteer organizations that work with children perform a vital function in society by “providing educational, recreational, and developmental activities for millions of youths each year.” The vast majority of volunteers that render their time and efforts to children and further the missions of volunteer organizations serve without any malevolent ulterior motive. This service not only benefits the children but also society as a whole by inculcating values in children and helping reduce the breadth and quantity of services that government would otherwise have to provide to youth.

The decreased cost to government provided by volunteer organizations translates to lower costs for communities nationwide, but the imposition of a greater duty on volunteer organizations would likely result in greater costs, siphoning limited resources away from the organizations. Some authors have argued that because of increased accessibility there is a duty to perform criminal background checks where volunteers will work with children. Others have argued that a minimum reasonable background screening for a

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175. Id.
176. The balance between protecting a small group of children from a terrible, life-scarring experience with providing a much larger group with positive, but much less life-changing, experiences is very difficult to do without coming out in favor of greater protections for children from potential perpetrators. However, the majority of states have done just that by not expressly mandating that all individuals that work with children pass through rigorous screening tests which include mandatory background checks. See Noy Davis & Susan Wells, Effective Screening of Child Care and Youth Service Workers, CHILD. LEGAL RTS. J. 22, 24 (Winter/Spring 1994–95). Given that the majority of states do not require the highest degree of care from private organizations in hiring individuals to work with children, this analysis will apply an intermediate duty of care. In other words, a duty of care that requires some inquiry concerning the suitability of the volunteer, but does not require references or a background check.
177. Lear, supra note 14, at 180–81.
178. See id. at 174–75.
volunteer that will work with children “entails a formal application, a personal interview, and thorough reference checks.”\(^{179}\) Despite the fact that both state and federal governments have statutorily mandated background checks for many positions that have direct contact with children in either a supervisory or disciplinary capacity, no state currently statutorily mandates the screening of all volunteers that work in similar capacities with children.\(^{180}\)

As explained by Mark Lear, “The main reason for the reluctance to impose [stricter screening duties], of course, is the fear that the costs entailed would drive the charitable organizations out of business.”\(^{181}\) While it is unlikely that a duty to perform criminal background checks would bankrupt the majority of volunteer organizations, it might force them to shift scarce resources to other purposes outside of the mission of the organization.

Finally, an increased duty to screen does not necessarily translate into increased protection for children. Criminal background checks find people only if they have criminal histories. Given the fact that child abuse is one of the most underreported crimes—with as much as ninety percent of child abuse cases going unreported—the likelihood that criminal background checks would reveal many of the potential abusers is small.\(^{182}\) Because no state currently mandates the screening of all volunteers that will potentially work with children, this analysis will apply an intermediate duty of care in which the party should take greater care in hiring volunteers to work with children by interviewing potential candidates, receiving references from the potential candidates, and verifying the candidates’ past by inquiring of the references,\(^{183}\) but will not be required to perform formal criminal or civil background checks.

d. Applying the duty of care to the LDS Church. A court applying an intermediate duty would likely find that the LDS Church did not comply with its duty in the case of Montoya. While courts could

\(^{179}\) See, e.g., id. at 173–74.

\(^{180}\) See Davis & Wells, supra note 176, at 24.

\(^{181}\) Id. at 177.


\(^{183}\) See Peyer v. Ohio Water Serv. Co., 720 N.E.2d 195, 200 (Ohio Ct. App. 1998) (citing DiGildo v. Caponi, 247 N.E.2d 732, 733–34 (Ohio 1969)) (“[C]hildren are entitled to a higher degree of care than adults and . . . the amount of care required to discharge a duty to a child is greater than that required to discharge a similar duty owed to an adult.”).
potentially articulate multiple degrees of care, this analysis will examine the situation of Aaron Montoya according to an intermediate degree of care.\textsuperscript{184} However, the selection process for Primary teachers likely would not satisfy even a less stringent duty of care. An intermediate standard would require that the LDS Church interview potential candidates, receive references from the potential candidates, and verify the candidates’ past by inquiring of the references.\textsuperscript{185}

As briefly explained above, Primary teachers in the LDS Church are usually asked to serve through a bishop or one of his counselors based on the recommendations of the woman presiding over the Primary.\textsuperscript{186} Each call is subject to the bishop’s approval.\textsuperscript{187} For the most part, it is unlikely that a bishop, one of his counselors, or the Primary president would make extensive inquiries into the suitability of a candidate to volunteer in the Primary beyond speaking with the individual, speaking with the leaders in the ward concerning their suitability, and praying concerning that individual.

The lack of research into the past of potential candidates would likely constitute a breach of the church’s duty of care to Montoya’s victims. At a minimum, courts have imputed to employers with similar hiring standards a duty to interview candidates and examine their references before hiring or accepting them as volunteers. While an informal interview likely occurred in the case of Aaron Montoya, it is unlikely that it was of the rigor demanded by this duty. Furthermore, it is highly unlikely that Montoya’s bishop either asked for or received references for Montoya prior to extending to him the calling. Given these failures, the LDS Church likely breached its duty to Montoya’s victims.

\textsuperscript{184} Among the articles available concerning Aaron Montoya and the events surrounding his arrest, none of the articles indicate the specific manner in which Montoya was called as a Primary teacher.

\textsuperscript{185} See Peyer, 720 N.E.2d at 200.

\textsuperscript{186} HANDBOOK OF INSTRUCTIONS, \textit{supra} note 19, at 231 (“The bishop calls and sets apart a woman to be the ward Primary president. The bishop of an assigned counselor calls and sets apart women to serve (1) as first and second counselor to the ward Primary president and (2) as secretary. A member of the bishopric also calls and sets apart men or women to serve as Primary teachers and in other ward Primary callings as needed. The Primary president makes recommendations for these callings, but they are subject to the bishopric’s approval.”).

\textsuperscript{187} Id.
3. Montoya’s incompetence to serve as a Primary teacher

Following the determination of the LDS Church’s duty, the next inquiry is whether Montoya was incompetent to serve as a Primary teacher. The Montoya facts discussed earlier demonstrate Montoya’s undeniable incompetence as a Primary teacher.\textsuperscript{188}

With regard to the tort of negligent hiring, “[i]ncompetence . . . is manifested by those qualities and characteristics that alert an employer that the hiring or retaining of an employee with such qualities or characteristics will or may imperil the safety of others.”\textsuperscript{189} Furthermore, as explained above,\textsuperscript{190} negligence also extends to the reliability of the employee and “all that is essential to make up a ‘reasonably’ safe person considering the nature of the work and the general safety of those who are required to associate with such person in the general employment.”\textsuperscript{191}

While Montoya may have been competent in his employ as a bailiff at the Matheson Courthouse in Salt Lake City, Utah, he was undeniably incompetent to work with children in any capacity. Considering the fact that Montoya had previously molested other children, he was unquestionably unsafe as a volunteer that was to work with very young children in an often private setting. In the four years prior to his service as a Primary teacher, Montoya had sexually molested six different victims ranging in ages three to eleven.\textsuperscript{192}

4. The LDS Church’s knowledge of Montoya’s incompetence

Given these previous offenses, Montoya was incompetent to serve near or around children and could not fairly be described as a “reasonably” safe person to work with children. However, important questions remain concerning the LDS Church’s actual or constructive knowledge and the foreseeability of the molestation. His lack of a criminal record at the time the LDS Church called Montoya to be a Primary teacher and the fact that his previous victims had not spoken openly about Montoya’s abuse makes it doubtful that the LDS Church had either the actual or constructive knowledge of the

\textsuperscript{188} See supra notes 26–33 and accompanying text.
\textsuperscript{189} Negligent Hiring and Retention, supra note 4, § 8.
\textsuperscript{190} See supra Part III.B.3.
\textsuperscript{191} Negligent Hiring and Retention, supra note 4, § 8 (quoting 53 AM. JUR. 2D Master and Servant § 310).
\textsuperscript{192} See Another Sentence, supra note 33, at B5.
threat Montoya posed to his class of Primary children that is required for liability. As explained above, actual knowledge of Montoya’s incompetence may be proved by demonstrating that the LDS Church possessed evidence of Montoya’s incompetence or that one of the church’s agents had personally witnessed Montoya’s incompetence. On the other hand, the LDS Church would have had constructive knowledge of Montoya’s incompetence if information indicating that Montoya was incompetent was available to the church and that the church would have known of this information if it had exercised reasonable care in hiring or retaining the incompetent.

In the case of Aaron Montoya, it is unlikely that the LDS Church had either actual or constructive notice of his pedophilia. Given general church policy, if the bishop in Montoya’s ward had been aware of the prior offenses, he would not have placed Montoya in a position where Montoya could potentially reoffend. In addition, on account of the law in most states, including Utah, if a bishop were aware of Montoya’s previous offenses, he would be required to report them to the state. Given the fact that Montoya had no criminal record at the time of his arrest, it can be assumed that no such reporting took place. Furthermore, the absence of a criminal record would support the conclusion that Montoya’s ecclesiastical leaders did not have constructive knowledge of Montoya’s pedophilia, and that further inquiry on the part of the LDS Church would likely not have resulted in any indication that Montoya was a danger to the children in his class. Finally, Montoya’s prior victims had not made public Montoya’s molestation, so information was not available from his victims or their families at the time Montoya’s bishop called him as a Primary teacher.

193. See Negligent Hiring and Retention, supra note 4, § 9.
194. See id.
195. See id.
196. This is, of course, an assumption. Montoya’s bishop could have placed him in the Primary to serve with children with either actual or constructive knowledge of Montoya’s pedophilia. In addition, such a violation of general church policy would support a claim on the part of one of the children Montoya molested that there was both knowledge of his pedophilia and a breach of duty on the part of the bishop.
199. See Another Sentence, supra note 33, at B5.
However, the preceding argument is contingent upon several assumptions, including, but not limited to, that an examination of references would not have uncovered Montoya’s pedophilia, that none of Montoya’s traits or characteristics would have hinted at his pedophilia, and that the bishop did not have actual knowledge of Montoya’s propensities. If any of the above assumptions is faulty, the LDS Church likely would have had actual or constructive knowledge of the danger Montoya posed to children. However, assuming that the above assumptions are correct, the LDS Church would not have had either actual or constructive knowledge, and, therefore, would not be liable for his tortious and criminal actions.

5. The actual and proximate cause of the molestation

Because it is unlikely that the LDS Church either actually or constructively knew of Montoya’s previous offenses or his pedophilia problem, questions surrounding causation are moot in his case; however, an examination regarding causation is still valuable for purposes of the general discussion.

To prevail against the LDS Church, a potential plaintiff would have to demonstrate that “his or her injuries were a logical consequence of a specific act of negligence or intentional act by the employee and that this act was a natural and logical consequence of the employee’s incompetence that was known, either actually or constructively, by the employer.” As in the example of the maintenance employee with prior convictions for assault and battery who was sent to the home of a client to fix an appliance and subsequently assaulted the client, placing a known child abuser in a private room with children would establish more than a sufficient causal link to satisfy this requirement. However, if Montoya had previous convictions at the time of his calling for nonviolent or white collar crimes, and the LDS Church subsequently placed him in the Primary as a teacher, it is doubtful that an act of pedophilia would

200. As explained above, the limited information provided through the news media did not provide information concerning the actual or constructive knowledge of Montoya’s ecclesiastical leaders. Therefore, the above facts are based partly on assumption.

201. Negligent Hiring and Retention, supra note 4, § 10 (citing Bensman v. Reed, 20 N.E.2d 910 (Ill. App. Ct. 1939); Halsan v. Johnson, 65 P.2d 661 (Or. 1937)).

202. See supra notes 73–75 and accompanying text.
have been sufficiently foreseeable as the proximate cause of the molestation.\footnote{See Negligent Hiring and Retention, supra note 4, § 10 (illustrative examples).}

In summary, four of the five requirements for liability under the tort of negligent hiring would likely be satisfied under the currently known facts of the Montoya case given that (1) the LDS Church maintains sufficient control over its volunteer Primary teachers to create an employment relationship, (2) the LDS Church has a duty to the children within the Primary that was likely breached by the bishop’s failure to sufficiently investigate Montoya’s background prior to inviting him to serve as a teacher, (3) Montoya was clearly incompetent to work with children, and (4) his employment was the proximate and actual cause of the victims’ injuries. However, based on the assumptions stated above, the LDS Church would not be liable in this case for the tort of negligent hiring because the bishop had neither actual nor constructive knowledge of Montoya’s pedophilia.

\textbf{B. The First Amendment and the Tort of Negligent Hiring}

An action for negligent hiring against the LDS Church would also likely fail on First Amendment grounds. Federal and state jurisdictions throughout the United States disagree concerning the applicability of the tort of negligent hiring to religious institutions.\footnote{See supra notes 126–33 and accompanying text.} However, an honest application of precedent to the Montoya case would likely result in the First Amendment barring such an action given the unavoidable entanglement of church and state that would result in a court’s examination of internal church policies and decisions. Extensive case law exists concerning the applicability of the First Amendment; however, “[t]he United States Supreme Court has not yet resolved the issue of whether the First Amendment protects a religious institution from liability when a church employee engages in tortious conduct against a third-party.”\footnote{Malicki v. Doe, 814 So. 2d 347, 357 (Fla. 2002). As explained by a judge on the Wisconsin Supreme Court with regard to the applicability of third-party tort actions to religious institutions, “It is generally acknowledged that this area of the First Amendment law is in flux and the United States Supreme Court cases offer very limited guidance.” Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 794 (Wis. 1995) (Abrahamson, J., dissenting).} As a result, a
tremendous split among state and federal courts exists with regard to actions for negligent hiring against a religious institution.\textsuperscript{206}

In determining whether the First Amendment will bar negligent hiring actions against religious institutions, the key determination in reported case law has been whether the action would result in an excessive entanglement of church and state.\textsuperscript{207} As explained above, a Lemon Establishment Clause inquiry has three separate prongs: (1) whether the governmental action had a secular purpose, (2) whether the action’s primary effect is neither to enhance nor inhibit religion, and (3) whether the action does not foster an excessive government entanglement with religion.\textsuperscript{208} To determine whether the entanglement is excessive a court must “examine the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority.”\textsuperscript{209}

In the case of Montoya and the LDS Church, the application of tort principles to the LDS Church would likely be barred by the First Amendment because it would require judicial examination of the church’s internal policies and procedures. In an action for negligent hiring against the LDS Church, an examining court would have to examine the procedure for extending assignments within the church, the role of the bishop in extending assignments, whether the bishop acted reasonably within his responsibilities, and other internal policies and procedures. As one court explained, “It is well-settled that when a court is required to interpret Canon Law or internal church policies and practices, the First Amendment is violated because such judicial inquiry would constitute excessive government

\textsuperscript{206} See Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1256–61 (Miss. 2005) (Appendices A and B provide cases from the individual states and circuits that have either held that the First Amendment is or is not a bar to an action for negligent hiring). See generally Joseph B. Conder, Annotation, Liability of Church or Religious Society for Sexual Misconduct of Clergy, 5 A.L.R. 5th 530 (1993).

\textsuperscript{207} See, e.g., Ayon v. Gourley, 47 F. Supp. 2d 1246 (D. Colo. 1998) (holding that determination involved excessive entanglement between church and state, and thus was precluded under the Establishment Clause of First Amendment); Malicki, 814 So. 2d at 347 (finding that under these facts excessive entanglement would not result, and if it would result it was excused by the application of neutral principles of law).

\textsuperscript{208} Kelty, supra note 115, at 1127 (citing Lemon v. Kurtzman, 403 U.S. 602, 612–613, 615 (1971)).

\textsuperscript{209} Id.
entanglement with religion.”210 The court further explained that “[a]ny inquiry into the policies and practices of the Church Defendants in hiring and supervising their clergy raises the same kind of First Amendment problems . . . , which might involve the Court in making sensitive judgments about the propriety of the Church Defendants’ supervision in light of their religious beliefs.”211 Consequently, the court held that applying the standards of care necessary in a negligent hiring cause of action “would violate both the Free Exercise Clause and Establishment Clauses” because it “would inevitably require examination of church policy and doctrine . . . with an intent to pass on their reasonableness.”212

In Gibson v. Brewer, the Missouri State Supreme Court provided a similar rationale for disallowing actions against churches for the tort of negligent hiring.213 While the court affirmed that churches may be held civilly liable,214 it conditioned that potential liability on the application of neutral principles of law “without determining questions of religious doctrine, polity, and practice.”215 The Missouri Supreme Court then held that judicial inquiry into a religious institution’s practices of hiring, retaining, and ordaining necessarily involve an impermissible judicial interpretation of constitutionally protected religious activities that would inhibit religion.216 Furthermore, the court held that “judicial inquiry into hiring, ordaining, and retaining clergy would result in an endorsement of


211. Id. (citing Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y. 1991)). The court also cited Doe v. Hartz, 970 F. Supp. 1375, 1431 (N.D. Iowa 1997), which held that “who may become or remain a priest must, almost inevitably involve an inquiry into church doctrine or policies, barring a negligent hiring or retention claim on First Amendment grounds.” Ayon, 47 F. Supp. 2d at 1249.

212. Ayon, 47 F. Supp. 2d at 1250. The court held that it would violate the Free Exercise Clause because “[t]he choice of individuals to serve as ministers is one of the most fundamental rights belonging to a religious institution. It is one of the most important exercises of a church’s freedom from government control.” Id. Furthermore, the court held that the Establishment Clause would be violated because “[t]he application of even general tort law principles to church procedures on the choice of priests would require an inquiry into present practices with an intent to pass on their reasonableness.” Id.

213. 952 S.W.2d 239, 246–48 (Mo. 1997).

214. Id. (citing H.R.B. v. J.L.G., 913 S.W.2d 92, 98 (Mo. Ct. App. 1995)).

215. Id. at 246 (citing Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 449 (1969)).

216. Id. at 246–47.
religion, by approving one model for church hiring, ordination, and retention of clergy.”

On similar constitutional grounds the Wisconsin State Supreme Court in *Pritzlaff v. Archdiocese of Milwaukee* barred an action for negligent hiring and retention. After determining that such an action would necessarily require a court to interpret “church canons and internal church policies and procedures,” the court continued by explaining that an examination for negligent hiring and retention would require “the court to create a ‘reasonable bishop’ norm.” It then explained that determining the reasonableness of a bishop is complicated by “beliefs in penance, admonition and reconciliation,” as well as other beliefs such as mercy towards an offender.

While the case of Montoya differs from the above-cited cases in that Montoya was not a member of a full-time clergy such as is found in the Catholic Church, a court examining this case for the negligent hiring of Montoya would still be excessively entangled with the LDS Church because the court would have to examine the bishop’s actions and corresponding church policies. To determine if Montoya’s bishop was negligent in calling him to serve as a Primary teacher, a court would likely have to examine, at a minimum, the process by which the bishop decided to call Montoya and his wife, the interview in which the calling was extended, any information that emerged through the interview, LDS policy concerning the process in which individuals are extended callings to work with children, LDS policy concerning who is qualified to serve with children, and other questions surrounding internal policy. Not only would the court have to ask if the bishop acted as a reasonable bishop given the circumstances and what he knew or could have discovered concerning Montoya, it would also have to examine LDS policies to determine whether they are reasonable and whether they provide a proper standard of care with regard to children. Since bishops are encouraged to call individuals by and through spiritual manifestation, an examination of church policy and bishops’ actions

217. *Id.* at 247 (citing *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997)).
218. 533 N.W.2d 780 (Wis. 1995).
220. *Id.*
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calls into question the very heart of LDS doctrine. Consequently, efforts on the part of a court in determining the reasonableness of the actions of an LDS bishop in calling an individual such as Montoya could potentially result in the creation of judicially imposed standards of care that both curtail the religious freedom of and impose governmental control over religious institutions.

In the face of these inherent challenges, several courts have permitted actions of negligent hiring based upon the idea that the courts are merely applying neutral principles of law. However, this application of the neutral principles of law exception should be rejected given the excessive entanglement that results from an examination of internal church policies and procedures and the problems surrounding a reasonable bishop norm. For instance, in Ayon v. Gourley, the plaintiffs encouraged the court to allow an action for negligent hiring to go forward against an archdiocese based on Employment Division of Human Resources v. Smith in which the Supreme Court held that a court may apply “neutral principles” of law to religious institutions. However, the district court held that Smith’s neutral principles exception, while valid, was “not very helpful under the facts as alleged . . . [because] Plaintiff’s claims rely on general tort liability theories, which do not fit the description of ‘valid and neutral law[s] of general applicability.’” As explained by the district court, “[t]he law at issue in Smith was a straightforward prohibition on the possession of certain specified controlled substances. Consequently, the law in that case does not translate well to a situation in which the Defendants are charged with . . . negligent hiring and/or supervision.”

221. In response to an inquiry by President Martin Van Buren concerning how the LDS Church differed from all other churches, Joseph Smith, the LDS Church’s founder, responded that “we differ[] in mode of baptism, and the gift of the Holy Ghost by the laying on of hands.” Joseph Smith, 4 History of the Church of Jesus Christ of Latter-day Saints 42 (2d ed., rev. 1980). The LDS Church’s reliance on the Holy Ghost as a revelatory tool also has a doctrinal basis outside of basic church policy. See, e.g., Moroni 6:9 (“And their meetings were conducted by the church after the manner of the workings of the Spirit, and by the power of the Holy Ghost . . . .”).


224. Id. at 1248–49 (quoting Smith, 494 U.S. at 879).

225. Id. at 1249.
However, many courts have accepted and applied the neutral principles of law exception in the case of religious institutions and third-party tort liability.\textsuperscript{226} For example, the Florida Supreme Court explained,

Substantial authority in both the state and federal courts concludes that the right to religious freedom and autonomy protected by the First Amendment is not violated by permitting the courts to adjudicate tort liability against a religious institution based on a claim that a clergy member engaged in tortious conduct such as sexual assault and battery in the course of his or her relationship with a parishioner.\textsuperscript{227}

The Florida Supreme Court further stated that “[t]hese courts conclude that there is no impermissible interpretation of religious doctrine because the courts are applying a neutral principle of generally applicable tort law.”\textsuperscript{228}

The Florida Supreme Court’s justification in part was that neutral principles may be applied to the church because the actions of the clergy member were outside the scope of employment and well outside church practices and beliefs.\textsuperscript{229} Other courts have also applied tort principles to and examined church policies and actions on the basis that the offender’s actions were outside accepted church beliefs.\textsuperscript{230} However, such a conclusion would logically justify the examination only of the offender’s actions, not those of the church. While the actions of the offending employee or volunteer would clearly be outside of the scope of almost all religious doctrine, the examination that would result for the tort of negligent hiring is not of the offender’s actions but of the actions of the church and its representatives in engaging the offender. Rather than being outside the scope of the church’s doctrine and internal policies and procedures, such an examination unavoidably passes judgment on

\begin{itemize}
  \item \textsuperscript{226} See, e.g., Malicki v. Doc, 814 So. 2d 347, 358 (Fla. 2002).
  \item \textsuperscript{227} Id.
  \item \textsuperscript{228} Id. Furthermore, the court explained that “[t]his is especially so where the religious institution does not allege that the conduct was undertaken in furtherance of a sincerely held religious belief.” Id.
  \item \textsuperscript{229} Id.; see also Bear Valley Church of Christ v. DeRose, 928 P.2d 1315 (Colo. 1996); Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993); Doc v. Evans, 814 So. 2d 370 (Fla. 2002); Konkle v. Henson, 672 N.E.2d 450 (Ind. Ct. App. 1996).
  \item \textsuperscript{230} See, e.g., Martinez v. Primera Asemblea de Dios, No. 05-96-01458-CV, 1998 WL 242412 (Tex. App. 1998) (holding that First Amendment grants no immunity to church or clergy for secular based torts such as sexual assault).
\end{itemize}
the propriety of such, and, therefore, results in the excessive entanglement of church and state.

In addition, as explained by the Supreme Court of Maine, those courts that have ruled that resolution of negligent supervision claims against churches is possible by applying neutral principles of law without determining questions of church law and policy “have not fully addressed the fundamental issue.”\(^{231}\) The court explained that even assuming a court could determine a religious institution’s control over an individual without determining questions of “church doctrine or polity,” additional constitutional obstacles remain.\(^{232}\) The court noted the unavoidable result of such an examination:

> The imposition of secular duties and liability on the church as a “principal” will infringe upon its right to determine the standards governing the relationship between the church, its bishop, and the parish priest. “Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attach by a challenger who wants a court to probe the tort-law reasonableness of the church’s mercy toward the offender. . . .”\(^{233}\)

The court further explained that because constitutionally protected beliefs govern the relationship between a church and its clergy, members of the clergy constitutionally cannot be treated as any other common law employee.\(^{234}\) Because different denominations have “their own intricate principles of governance as to which the state has no rights of visitation, . . . [i]t would . . . be inappropriate and unconstitutional” for a court to attempt to determine, after the fact, whether ecclesiastical authorities acted negligently in hiring an individual.\(^{235}\) Furthermore, the Maine State Supreme Court argued that the ultimate danger in determining the reasonability of the actions of religious institutions in hiring an individual was that an award of damages “would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination.”\(^{236}\) In other words, the result of imposing liability upon religious institutions for deviations “from the

\(^{231}\) Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441, 444 (Me. 1997).
\(^{232}\) Id. at 444–45.
\(^{233}\) Id. at 445 (citations omitted).
\(^{234}\) Id.
\(^{235}\) Id.
\(^{236}\) Id.
secular standard is to impair the free exercise of religion and to control denominational governance. 237

The application of tort principles to religious institutions in third-party tort actions results in tangible impairments to the free exercise of religion and governmental control of churches. Given the excessive entanglement that would result in a court’s examination of the LDS Church’s internal policies and procedures surrounding the extending of callings, and the governmental control that would result from such an examination, the First Amendment should bar an action against the LDS Church for the negligent hiring of Montoya as a Primary teacher.

In summary, in the case of Montoya and the LDS Church, there are two independent grounds on which the church should not be liable under the tort of negligent hiring. First, the church likely had neither actual nor constructive knowledge of Montoya’s pedophilia. Furthermore, as is shown above, if not for the First Amendment, the tort of negligent hiring would apply to the LDS Church and its volunteer Primary teachers because a right to control the teachers exists on the part of the LDS Church. However, given the excessive entanglement that would result from judicial inquiry into the reasonableness of LDS leaders in calling individuals to different capacities, the First Amendment should block an action for negligent hiring.

VI. CONCLUSION

Without question, the offenses committed by Aaron Marcos Montoya against the young members of his Primary class were horrendous and appalling. Montoya deservedly will spend a substantial part of his life in prison because of his pedophilia. However, to impute Montoya’s crimes to the LDS Church is improper. While Montoya was undoubtedly incompetent to serve as a Primary teacher, the LDS Church likely did not have either actual or constructive knowledge of Montoya’s pedophilia, and, therefore, cannot be held liable for negligently hiring and retaining him. More importantly, the First Amendment would likely preclude such an action against the LDS Church since the Establishment Clause prohibits excessive entanglement between church and state that would unavoidably occur if a court were to examine the church’s

237. Id.
internal policies and procedures in extending callings to church members. This outcome is supported by the impairment of free exercise and the governmental control that would result from a court’s examination of church policies and the actions of a church’s leaders in fulfilling doctrinally based roles within the church.

*Morgan Fife*