IN THE UTAH SUPREME COURT

RIA WILLIAMS, Plaintiff/Appellant/Petitioner, v. **KINGDOM HALL OF JEHOVAH'S WITNESSES, ROY, UTAH; WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; HARRY DIAMANTI; ERIC STOCKER; RAULON HICKS; AND DAN HARPER**, Defendants/Appellees/Respondents.	PUBLIC Supreme Court No. 20190422-SC Appeal No. 20170783-CA District Court No. 160906025

On Writ of Certiorari to the Utah Court of Appeals

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Other Authorities

INTRODUCTION

Defendants do not dispute that Ria's claim for intentional infliction of emotional distress depends on a neutral principle of law. The question at the heart of this appeal, then, is whether the Establishment Clause precludes Utah courts from applying that neutral principle to the intentionally tortious conduct that injured Ria: the Elders repeatedly subjecting 15-year-old Ria to a recording of her rape, over her objection. The answer is no.

Tortious conduct, even if religiously motivated, "remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). When, as here, a claim depends on a neutral principle, the Establishment Clause precludes relief only when the proof in a given case requires the factfinder to resolve a dispute over religious doctrine or the "truth" of a religious belief. Those are ecclesiastical matters that, if resolved, risk unconstitutionally excessive government entanglement in religion, but they are absent here. Ria's claim depends on the Elders' conduct, not on whether they correctly followed Jehovah's Witness doctrine or whether their belief that Ria sinned was "true."

Although that should be sufficient to resolve this appeal, Defendants ask this Court to extend the Establishment Clause's reach by endorsing the court of appeals' sweeping rule that courts cannot "review" or "evaluate"

conduct that "occurs as part of religious 'policies or practices'" or in a religious "context." *See* Respondents' Br. 15, 22, 25, 33; *Williams v. Kingdom Hall of Jehovah's Witnesses*, 2019 UT App 40, ¶ 16, 440 P.3d 820, 824. This rule is based on a misreading of this Court's decision in *Franco v. The Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, 21 P.3d 198, and disregards the century's worth of U.S. Supreme Court case law on which *Franco* rested.

The rule also has no limiting principle and would, if adopted, immunize intentionally tortious conduct simply because it is religiously motivated. Defendants have no valid answer to the charge that their rule would give religious authorities free rein to trespass or inflict physical violence to obtain evidence for a religious proceeding. They likewise ignore that, under their test, religious authorities could hand down any punishment they see fit—physical or psychological—for sin. Nor do Defendants address, or even cite, the decisions that have held religious authorities accountable for the very type of misconduct that their rule would allow. *See, e.g.*, *Ondrisek v. Hoffman*, 698 F.3d 1020, 1024-25 (8th Cir. 2012); *Alberts v. Devine*, 395 Mass. 59, 73-74 (1985).

Most fundamentally, Defendants have no explanation for how, as a matter of first principles, precluding Ria's claim would advance the First Amendment's guarantee against laws "respecting an establishment of

religion." Because it would not and because none of Defendants' other arguments—including those outside the question presented—have merit, Ria should not be deprived of the remedy that Utah law guarantees her, and her claim should be reinstated.

ARGUMENT

I. Ria Has Adequately Alleged Outrageous Conduct

Although relegated to the end of their brief, Defendants challenge the threshold issue of whether the Elders' conduct was sufficiently "outrageous" to state a claim. Notwithstanding that Defendants at times mischaracterize Ria's claim as attacking Jehovah's Witness disciplinary policies, handbooks, and trainings, *see* Respondents' Br. 14, what is at issue is in fact much narrower: whether the Elders engaged in outrageous conduct when they repeatedly subjected Ria to a recording of her rape, despite her protests.[1] As the district court concluded in expressing "revulsion" at the Elders' "reprehensible" conduct (R. 261-62), they did.

[1] Defendants attempt to draw attention to two recordings—which consist of Collin Williams unsuccessfully pressuring 14-year-old Ria to take nude photos—that they claim are the recordings that the Elders played to Ria. Respondents' Br. 25 n.7. But as Defendants acknowledge, *see id.*, Ria has repeatedly denied that these recordings (though also disturbing) are the correct ones.

In arguing otherwise, Defendants primarily rely on their unsettling—and, unsurprisingly, unsupported—assertion that the challenged conduct is so "common" that it cannot be outrageous. Respondents' Br. 47. This claim does not simply lack any affirmative support; Defendants also do not address any of the cases Ria cited that demonstrate that courts have found analogous abusive conduct to be "outrageous" when aimed at vulnerable individuals, including sexual assault victims like Ria. *See* Petitioner's Br. 16-17; *see also* Br. of Amici 7-10. Nor do Defendants address the striking similarity between the Restatement's illustration of archetypal outrageous conduct and what Ria has alleged. *See* Restatement (Second) of Torts § 46 cmt. e, ex. 6 (principal accusing "schoolgirl" of "immoral conduct with various men," "bull[ying]" her, and threatening "public disgrace . . . unless she confesses").

Instead, Defendants cite two inapposite cases. In one, the court of appeals concluded that it was not outrageous for an employer to question an adult employee about a stolen wallet in a manner neither "abusive" nor "unprofessional." *Nelson v. Target Corp.*, 2014 UT App 205, ¶ 21, 334 P.3d 1010, 1018. In the other, a New York intermediate appellate court held that the estate of a deceased individual failed to state a claim based on the individual "voluntarily" participating in "fasting, chanting, physical

exercises, cloistered living, confessions, lectures, and a highly structured work and study schedule." *Meroni v. Holy Spirit Ass'n for Unification of World Christianity*, 506 N.Y.S.2d 174, 177 (1986). The conduct in *Nelson* and *Meroni*, to the extent it bears any resemblance to Ria's allegations, pales in comparison.[2]

Defendants also assert that the Elders' conduct was not outrageous because Ria and her parents voluntarily attended the meeting with the Elders. But Ria's initial decision to appear in no way constituted consent to the subsequent tortious conduct challenged here: the repeated playing of the recording. Far from consenting to that conduct, Ria "protest[ed]" that the Elders stop. (R. 84.) Her parents' presence neither transforms Ria's objection into consent nor undermines the outrageousness of what the Elders did *to Ria*.[3] *Cf. Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children."); *Ondrisek*, 698 F.3d at 1024 (where children were, among other things,

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[2] Defendants fault Ria for not alleging they "physically harmed her, [or] deprived her of food, water, rest, or parental guidance." Respondents' Br. 46. Ria is aware of no authority that IIED claims require such allegations, and Defendants cite none.

[3] Ria's mother "did not believe her family was free to leave" or even to speak. (R. 209.) To the extent Ria's parents' conduct matters—and it does not—Ria should not be faulted for their mistake.

subjected to religious discipline in front of parents, jury found the conduct "outrageous").

It likewise does not matter that Ria did not physically leave. She made her objection unmistakably clear verbally and by crying and quivering. *Cf. State v. Tripp*, 2010 UT 9, ¶ 32, 227 P.3d 1251, 1258 (adult defendant's failure to pull arm away did not manifest consent to blood draw where she had previously refused and "looked upset and terrified" and was "crying"). If anything, Ria's inability to physically remove herself—under the questioning of four adult men—demonstrates the severe impact of the Elders "forc[ing] her to relive the experience of being raped." (R. 84.) Indeed, Ria's reaction strongly resembles the "frozen fright" of sexual assault victims who do not physically resist but by no means consent. *See, e.g.*, *People v. Barnes*, 42 Cal. 3d 284, 299-300 (1986) ("lack of physical resistance may reflect a 'profound primal terror' rather than consent"). That response from a 15-year-old child demonstrates the absence of consent and the outrageousness of Defendants' conduct.

II. Defendants Fail to Offer a Coherent Theory of the Establishment Clause

Ria explained in her opening brief that over a century of U.S. Supreme Court case law—which this Court applied in *Franco*—establishes a two-part test for whether the Establishment Clause permits a cause of action. First,

the claim must depend on a neutral principle of law, not a religion-specific standard. *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595, 602-03 (1979); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 441, 449-50 (1969). Second, even when a neutral principle of law governs, case-specific allegations must not require a court to decide a dispute over religious doctrine or declare the truth of religious belief. *See, e.g.*, *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). Both of these steps—each satisfied here—advance the Establishment Clause's purpose of preventing government "sponsorship" of one side in a religious dispute and "active involvement" in religious affairs. *See* Petitioner's Br. 23-24. But neither prevents the government from regulating harmful religious *conduct* through generally applicable secular standards.

Defendants ignore this test, the binding case law that establishes it, and its relationship to the Establishment Clause's purposes. In its place, Defendants ask this Court to adopt the court of appeals' expansive rule that courts cannot "review" conduct, even under neutral principles, if it "occurs as part of religious 'policies or practices'" or in a religious "context." *See* Respondents' Br. 15, 22, 25, 33; *Williams*, 2019 UT App 40, ¶ 16, 440 P.3d at 824.

This rule, as Ria's opening brief made clear, would shield from liability numerous harmful acts and conflict with free exercise jurisprudence. *See* Petitioner's Br. 37. Recognizing these unacceptable consequences, Defendants purport to disclaim that their rule would provide absolute immunity to religiously motivated conduct. Respondents' Br. 31. In the very next sentence, however, they admit that it would preclude review of religious "practices" (i.e., conduct) without limitation. *Id.*

Defendants' other attempts to downplay the consequences of their rule are equally unpersuasive. Defendants claim it will not result in exemptions from "civic obligations of almost every conceivable kind" because the cases Ria cited to illustrate what type of conduct would be lawful under their rule arose under criminal and property laws. Respondents' Br. 33. But that is the point: the absence of a limiting principle in Defendants' prohibition renders that subject-matter distinction immaterial. Similarly, Defendants accuse Ria of failing to cite any "church-discipline cases" or IIED cases that would be decided differently; but they acknowledge in the same paragraph that Ria cited cases about "corporal punishment," a form of religious discipline, and there are numerous cases

cited in both Ria's and Defendants' briefs that apply IIED to religious conduct. *See id.* at 26-27; Petitioner's Br. 26; *infra* at 16.[4]

In addition to having disruptive consequences, Defendants' argument lacks a legal foundation beyond a mistaken interpretation of *Franco.* Defendants read *Franco* to have held that the clergy malpractice claim in that case was "based on neutral principles" but was nevertheless forbidden because it was employed to "review" religious "practices." Respondents' Br. 15, 20. From this mistaken premise, Defendants draw the erroneous conclusion that *Franco*'s statement that courts cannot "review and interpret church law, policies, or practices," 2001 UT 25, ¶ 15, 21 P.3d at 203, enacted a broad ban on the application of neutral principles to religious "practices," i.e., conduct.

[4] Defendants also appear to argue that the negative consequences of their rule are permissible because "[i]t is difficult to comprehend" how the ministerial exception to anti-discrimination liability recognized in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), does not apply "equally" in this case. Respondents' Br. 32. But as Ria already explained—without a response from Defendants—central to such anti-discrimination claims is the inherently religious question of who will serve as a minister, which the Establishment Clause forbids the government from deciding. Petitioner's Br. 43-45. The presence of that question is the limiting principle in *Hosanna-Tabor* (and of Ria's argument) that prevents the case from having the sweeping implications of Defendants' far broader rule. *See also Hosanna-Tabor*, 565 U.S. at 196 (explaining that the holding does not automatically extend to "tortious conduct").

In reality, as Ria explained, the clergy malpractice claim in *Franco* depended on a non-neutral, religion-specific principle: a standard of care applicable only to clergy. Petitioner's Br. 28-29. This Court refused to entertain the claim because clergy malpractice depended on "the level of expertise expected of a . . . *cleric*." *Franco*, 2001 UT 25, ¶ 23, 21 P.3d at 205 (emphasis added). This contrasts with generally applicable standards, which, this Court made clear, can be applied *even when* an injury stems from "a form of religious expression." *Franco*, 2001 UT 25, ¶ 14, 21 P.3d at 203 (discussing *Bass v. Aetna Ins. Co.*, 370 So. 2d 511 (La. 1979), which applied premises liability to injury sustained while "running in the Spirit").

This difference is critical. A core constitutional problem with applying the religion-specific standard at issue in *Franco* is the very act of creating the standard. To do so requires one of two equally impermissible acts: interpreting religious doctrine to determine what is "proper" for a specific religion or a court devising its own religious standard from whole cloth. Even if the court eventually concludes that a defendant complied with the standard in a particular case, the court has still placed its authority behind one religious view—and thus violated the Establishment Clause—by setting the standard.

Defendants further err in relying on *Franco* to argue that Ria's claim poses the same problems as clergy malpractice claims. *See* Respondents' Br. 13-15. Unlike such claims, however, Ria's does not require this Court to "create a standard" specific to religious authorities. Respondents' Br. 13.[5] The applicable standard—outrageousness—already exists and applies to everyone. The question, in other words, is not whether the conduct that injured Ria was outrageous for Jehovah's Witness Elders, which would resemble the claim in *Franco*. Rather, it is whether it was outrageous for a "civilized community." Restatement (Second) § 46, cmt. d.

These differences are what makes IIED, as the court of appeals acknowledged, "neutral and generally applicable." *Williams*, 2019 UT App 40, ¶ 16, 440 P.3d at 824. That neutrality is also what allowed this Court to decide the IIED claim in *Franco* on the merits *without* determining what was outrageous for an LDS church stake president. *Franco*, 2001 UT 25, ¶ 25, 21 P.3d at 206; *cf. also Jeffs v. Stubbs*, 970 P.2d 1234, 1248 (Utah 1998) (no constitutional violation where claim "measure[d] religious expression against secular standards of fairness"). It is why IIED is no different from numerous other tort principles—such as nuisance or battery—that apply to

[5] Of course, Defendants' recognition that *Franco* necessitated the creation of a standard specific to clergy contradicts their claim that *Franco* simply involved the application of a neutral principle.

religiously motivated conduct, *see* Petitioner's Br. 32, and that Defendants have failed to distinguish. And it demonstrates that Defendants' scare tactic argument that entertaining Ria's claim would result in courts setting guidelines to govern Jehovah's Witnesses' definition of sin, Catholic confessionals, and LDS temple recommends rings hollow.

III. Ria's Claim Involves No Religious Question

Defendants also attempt to establish that proof of Ria's specific claim would require the resolution of disputed issues of religious doctrine or the declaration of the truth of a religious belief. These arguments lack merit as well.

A. Determining Outrageousness Would Not Adjudge the Truth of Religious Beliefs

1. Ria's Claim Does Not Depend on Whether She Sinned

Defendants first argue that determining whether the Elders' conduct was "outrageous" would require a factfinder to determine the veracity of the Elders' belief that Ria had sinned.[6] Respondents' Br. 25. That is

[6] Defendants incorrectly assert that "almost" all IIED claims result in judging the truth of religious belief. Respondents' Br. 23. The case they cite for the proposition, *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996), however, held only that IIED claims based on allegedly *false* "religious representations" and "promises" to pray would yield such a result. Even assuming the correctness of *Tilton*, it does not apply here, as Ria's claim does not depend on harm caused by the alleged falsity of a statement.

incorrect. A determination that repeatedly subjecting a 15-year-old child to a recording of her rape is outrageous under Utah law would require no evaluation of the truth of the Elders' views that, as a matter of Jehovah's Witness faith, the tape establishes that Ria had sinned. Indeed, Defendants have insisted throughout this litigation that Jehovah's Witnesses draw their own conclusions from facts that others may view differently—as illustrated by Defendants' insistence that they have their own definition of consent. A verdict that the Elders engaged in outrageous conduct is not a determination that their conclusion that Ria sinned was "false," just as a verdict that religious authorities engaged in battery does not make their determination that corporal punishment was religiously appropriate "false."

Indeed, Defendants' assertion that this Court can determine whether the Elders' alleged conduct was "outrageous" to *avoid* applying the Establishment Clause demonstrates that Ria's claim involves no evaluation of religious belief. Defendants' argument that the conduct was not outrageous at no point asks this Court to conclude that the Elders' beliefs were true. Nor does Ria's argument—or the district court's conclusion—that the conduct alleged was outrageous depend on a determination that the

beliefs were false. *See supra* Section I. The Elders' beliefs are simply irrelevant to outrageousness.

Anderson v. Watchtower Bible & Tract Society of New York, Inc., 2007 WL 161035 (Tenn. Ct. App. Jan. 19, 2007), is not to the contrary. In *Anderson*, the plaintiffs alleged that the defendants engaged in outrageous conduct by *improperly* expelling them as Jehovah's Witnesses. *Id.* at *8. Determining whether a person was appropriately expelled, of course, requires choosing sides in a dispute over the "true" criteria for membership. *See id.* at *20 ("[T]o resolve this claim a court would need to examine the correctness of the disfellowshipping. This we cannot do."). Unlike the claim in *Anderson*, Ria's involves no allegation that the Elders did anything improper as a matter of Jehovah's Witness doctrine.

2. IIED Does Not Grant Juries Unbridled Discretion

Defendants attempt to bolster their argument that adjudication of Ria's claim would violate the Establishment Clause by casting the outrageousness standard as so meaningless that it leaves juries with unfettered "discretion" to punish disfavored religions. Respondents' Br. 26-27. Defendants' alarmist concern depends on a misunderstanding of the outrageousness standard.

Contrary to Defendants' claim, this Court has set an exceptionally strict bar for outrageousness. *See generally Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 37, 56 P.3d 524, 535; *see also Chard v. Chard*, 2019 UT App 209, ¶ 57 (outrageousness requires "extraordinarily vile conduct, conduct that is atrocious, and utterly intolerable in a civilized community" (citation omitted)). It did so, moreover, specifically to ensure that juries cannot wield the limitless discretion Defendants fear. *See Franco*, 2001 UT 25, ¶ 25, 21 P.3d at 206 (explaining that the stringent standard was crafted in light of "historical[]" recognition of the "danger[]" of a lax standard). And, further eliminating any potential for abuse, as Defendants recognize, "[c]ourts are charged with screening IIED claims 'to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery.'" Respondents' Br. 45 (quoting *Prince*, 2002 UT 68, ¶ 38, 56 P.3d at 536)).

The other elements of the tort serve as additional safeguards. IIED demands that the challenged conduct "proximately" cause an actual injury and that the injury be "severe." *Cf. Cantwell*, 310 U.S. at 308, 311 (crime of incitement of breach of the peace allowed excessive discretion where it covered conduct that did not actually impair, or cause a clear threat to, a "substantial interest of the State"). In short, IIED in Utah imposes a

particularly rigid standard, not a malleable one that juries can apply at their whim. *See also George v. Int'l Soc'y for Krishna Consciousness of Cal.*, 4 Cal. Rptr. 2d 473, 498 (Cal. App. 1992) (explaining that proper jury instructions can eliminate the risk that a jury considering an IIED claim would punish a defendant for religious beliefs, as opposed to harmful religious conduct).

In arguing that outrageousness is flexible and easily abused, Defendants rely primarily on a law review article, not on any Utah case law. Respondents' Br. 26-27 (quoting Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 Nw. U. L. Rev. 1183 (2014)). But the cases on which the article depends for purported proof of the lax nature of IIED in fact demonstrate that courts reserve the tort for only the most extreme conduct. *See* Lund, *Free Exercise Reconceived*, *supra*, at 1213 & n.171.

Wollersheim v. Church of Scientology, which found religiously motivated indoctrination and disciplinary practices "outrageous," provides a useful example. *See* 212 Cal. App. 3d 872, 891 (1989), *vacated on other grounds*, 499 U.S. 914 (1991). The indoctrination included requiring the plaintiff to sleep in a "ship's hole" with 30 people "stacked 9 high" and "without proper ventilation"; keeping the plaintiff in conditions that resulted in him losing 15 pounds; and holding the plaintiff "captive" when

he attempted to "escape." *Id.* at 894-95. The disciplinary practices included efforts to bankrupt the plaintiff's business. *Id.* at 890. Other cases on which the article relies involved similarly extreme misconduct. *See Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 769 (Okla. 1989) (clergy publicized former member's sexual relationship over her objection); *George*, 4 Cal. Rptr. 2d at 497 (religious actors enticed 15-year-old to run away from home and concealed her location from her mother); *see also Gulbraa v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*, 2007 UT App 126, ¶ 22, 159 P.3d 392, 396 (church leaders concealed location of child from parent). Defendants' argument would shield this conduct from liability.

The article also invokes cases that illustrate that courts have successfully *constrained* IIED claims to only the most outrageous conduct and protected the freedom of religious belief. *See Murphy v. I.S.K. Con. of New England, Inc.*, 409 Mass. 842, 851-52 (1991) (reversing verdict where jury was allowed to find that defendants' religious *beliefs* about the role of women, rather than defendants' religiously motivated *conduct*, harmed plaintiff); *Christofferson v. Church of Scientology of Portland*, 57 Or. App. 203, 223 (1982) (finding indoctrination practices not outrageous).

Taken together, these cases disprove Defendants' characterization of the outrageousness standard as uniquely susceptible to abuse.

B. Determining the Elders' Intent Would Not Violate the Establishment Clause

Defendants next contend that concluding whether the Elders "intended" to cause Ria harm would "entangle" courts in a "religious question." Respondents' Br. 27. Not so. Ria's claim presents a factual question about the Elders' state of mind: did they intend to cause Ria distress? Answering that question does not involve resolving any disputes over religious doctrine.

Tellingly, Defendants do not actually identify any religious question to be resolved. Instead, they argue that Ria's claim involves determining whether the Elders "believed" that Ria had sinned or repented. Respondents' Br. 29. Whether the Elders held such beliefs is, in fact, irrelevant to whether they intended to cause harm. *Cf. Dawson v. Entek Int'l*, 630 F.3d 928, 941 (9th Cir. 2011) ("The intent element of [IIED] does not require a malicious motive." (citation omitted)). But even if it were relevant, the First Amendment does not preclude inquiry into whether an individual actually holds a religious belief as a matter of fact. *See, e.g.*, *Hernandez v. Comm'r*, 490 U.S. 680, 693 (1989) ("Under the First Amendment, the IRS can reject . . . claims . . . on the ground that a taxpayer's alleged beliefs are not sincerely held."). It prohibits only declaring that belief true or false. *See Ballard*, 322 U.S. at 86-87.

Neither of the cases Defendants cite casts doubt on this conclusion. *Ex parte Bole* held (consistent with *Hosanna-Tabor*) that the First Amendment barred the plaintiff's claim because his injuries were caused by his removal as a minister. 103 So. 3d 40, 72 (Ala. 2012). The court did not address whether—let alone hold that—determining intent would entangle the judiciary in a religious question. And *Thibodeau v. Am. Baptist Churches of Conn.*, 994 A.2d 212, 225 (Conn. App. 2010), involved a claim of *negligent* infliction of emotional distress. Intent was therefore not even considered.

C. Determining Proximate Causation Would Not Entangle the Court in Religion

Defendants argue that it would be "difficult" for "a jury to untangle" whether Ria's injuries are attributable, permissibly, to the Elders' conduct in playing the recording or, impermissibly, to her disfellowship. Respondents' Br. 29. This argument is premature. Defendants do not dispute that Ria has alleged in her complaint that the Elders' conduct caused her injury. It is, of course, Ria's burden to make that showing at trial, but it would stand the motion-to-dismiss standard on its head to assume, at this stage, that the plaintiff cannot prove what she has alleged.

The only case Defendants cite in support of the theoretical difficulty of identifying the proximate cause of a plaintiff's injuries—a standard task for juries—was decided *after* a trial at which the plaintiff had a full

opportunity to prove her claim. *See Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 9 (Tex. 2008) (relying on plaintiff's expert's inability to "separate the damages" resulting from plaintiff's "physical restraint" and that from "trauma" related to a "discussion of demons"). It offers no support for Defendants' position that dismissal is warranted a matter of law. *See also George*, 4 Cal. Rptr. 2d at 498 (holding that jury properly avoided awarding damages attributable to "constitutionally protected activity").

Defendants also argue, without support, that the process of evaluating proximate causation would unconstitutionally "entangle" a jury in religion. They assert, for example, that their defense that the proximate cause of Ria's injuries was really "repentance" would unconstitutionally require the factfinder to decide a dispute over "what is meant by 'repentance.'" Respondents' Br. 30. That is wrong. The relevant question would not be how Jehovah's Witnesses define "repentance"; rather, it would be whether "repentance," however Defendants choose to define it, was the sole proximate cause of Ria's injuries.[7] The mere act of explaining a religious concept—routinely undertaken when, for example, a court evaluates whether a burden on a religious practice exists—does not

[7] Ria's response, in other words, would not be that Defendants improperly defined "repentance" but that the alternative cause they identified did not lead to her injuries.

unconstitutionally entangle a court in religion. *See, e.g.*, *Hernandez*, 490 U.S. at 684-85 (describing Scientology).

Problematically, Defendants' theory also would allow non-religious actors to weaponize a plaintiff's religion. Consider, for example, if Ria's classmates, rather than the Elders, had played the recordings. They, too, would be allowed to argue that the true cause of Ria's injuries was distress she felt from repenting. Yet under Defendants' theory, because even evaluating that defense would unconstitutionally entangle the court in religion, dismissal would be necessary. The Establishment Clause does not require that nonsensical result.

D. Ria Did Not Consent to the Elders' Misconduct

Finally, Defendants argue that adjudicating Ria's claim would be "problematic under the First Amendment" because she voluntarily appeared at the meeting with the Elders. Respondents' Br. 30. As explained above, however, the complaint makes clear that Ria did not in any way consent to the conduct that caused her harm—the playing of the recording. *See supra* at 5.

To the extent that Defendants argue that the religious context makes consent automatic as a matter of law, that fails too. To be sure, an individual who submits to a religious tribunal must accept as binding that tribunal's

determination of doctrinal matters. *Watson v. Jones*, 80 U.S. 679, 729 (1871) (a contrary rule would allow "an appeal from the more learned tribunal in the law which should decide the case, to one which is less so"). That comports with the ordinary rule that civil courts will not resolve questions of religious doctrine.

But consent to the resolution of doctrinal matters does not equate, as Defendants suggest, to consent to whatever tortious *conduct* religious authorities decide their doctrine requires. If it did, religious authorities could sexually assault a congregant as part of a disciplinary proceeding, and she would be powerless to seek a remedy—civilly or criminally—because she would be deemed to have consented. None of the cases Defendants cite require that dangerous result, as the plaintiff in each had consented as a matter of *fact* to the injurious conduct. *See Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 658 (10th Cir. 2002) (plaintiff who alleged harassment "voluntarily attended the four meetings" where she knew her sexuality would be discussed); *Guinn*, 775 P.2d at 774 ("Parishioner testified she was aware of the withdrawal-of-fellowship procedure and knew what it would entail."); *Smith v. Calvary Christian Church*, 462 Mich. 679, 685-86 (2000) (holding—as a matter of tort, not First Amendment, law—that plaintiff had "explicitly consented in writing" to discipline).

IV. No Church Autonomy Doctrine Protects Defendants' Conduct

Defendants also ask this Court to adopt a church autonomy doctrine that would confer additional protection to conduct related to an "internal church proceeding" beyond what the Establishment Clause provides. Respondents' Br. 17. As Ria explained, however, the U.S. Supreme Court has rejected a rule of "compulsory deference to religious authority . . . where no issue of doctrinal controversy is involved." *Jones*, 443 U.S. at 605; Petitioner's Br. 41. Defendants have no answer to (and do not even cite) *Jones*, which is fatal to their theory.

Defendants nonetheless attempt to ground their autonomy doctrine in the supposed principle that "neutral laws of general applicability" cannot be applied to religious conduct when such laws "violate multiple constitutional protections," here, the Free Exercise and Establishment Clauses. Respondents' Br. 17. This is mistaken on multiple levels: neither U.S. Supreme Court case that Defendants cite recognizes a church autonomy doctrine, let alone defines it in this manner; the argument ignores *Jones*; and the actual legal principle the case law recognizes (though it has been characterized as "dicta" and "controversial") is that laws that implicate two constitutional rights are subject to strict scrutiny, not *per se* invalid, *see Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006).

But even setting all of that aside, the doctrine Defendants' advocate—triggered by the infringement of "multiple" constitutional rights—would have no application here because, as explained above, adjudicating Ria's claim would not violate the Establishment Clause.

There is another dispositive flaw in Defendants' argument. Granting special privileged status to religiously motivated conduct that relates to "internal proceedings" would violate the U.S. Supreme Court's directive that courts not assess the "centrality" of a religion's practices. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 886-87 (1990). Such judicial ordering of importance is "akin to the unacceptable business of evaluating the relative merits of differing religious claims." *Id.* (citation omitted). Yet Defendants' theory would do exactly that. It would declare religious conduct related to internal proceedings more important than other religious conduct and, by definition, deny equivalent protection to religions that resolve disputes through other means or view other practices as more important.

Collins v. African Methodist Episcopal Zion Church, 2006 WL 1579828 (Del. Super. Ct. Mar. 29, 2006), on which Defendants rely, does not compel a different conclusion. The plaintiff there claimed that the defendant violated a duty allegedly "set forth in *The Book of Discipline*" by failing to fire

a minister. *Id.* at *2. Resolving that claim would have required deciding which party had the "correct" understanding of church doctrine. *Id.* at *8. *Collins* thus accords with existing Establishment Clause jurisprudence and does not support Defendants' expansive theory.

V. Defendants' Alternative Arguments Are Not Before This Court and Lack Merit

A. Review Is Confined to the Question Presented

Defendants also contend that Ria's claim violates the federal Free Exercise Clause and the Utah Constitution. Because these arguments are outside the scope of the question on which this Court granted certiorari, the Court should decline to reach them.

"Only the questions set forth in the petition or fairly included therein will be considered by the Supreme Court." Utah R. App. P. 49(a)(4). Thus, an issue not mentioned in the question presented will be entertained only if it is a "subsidiary" issue to be decided prior to reaching the ultimate issue. *Id.*; *see, e.g.*, *Willardson v. Indus. Comm'n of Utah*, 904 P.2d 671, 674 (Utah 1995) ("medical causation" of workplace injury is "subsidiary" to "degree of impairment"). This Court routinely refuses to consider arguments on issues outside the scope of the grant of certiorari. *See, e.g.*, *State v. Chapman*, 921 P.2d 446, 455 (Utah 1996); *DeBry v. Noble*, 889 P.2d 428, 443 (Utah 1995).

Here, the Court agreed to decide whether Ria's claim was "precluded by the Establishment Clause of the First Amendment." Defendants do not claim that their alternative arguments are "fairly included" within this question. Instead, they invoke *Bailey v. Bayles*, 2002 UT 58, ¶¶ 10, 52 P.3d 1158, 1161, for the proposition that "an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record." Respondents' Br. 36. But *Bailey* merely held that the *court of appeals* may affirm on any ground in the record. 2002 UT 58, ¶¶ 11-12, 52 P.3d at 1162. This Court already has rejected that the same rule applies in the Supreme Court. *See Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 856 & n.1 (Utah 1998); *DeBry*, 889 P.2d at 443.

B. The Federal Free Exercise Clause Does Not Bar Ria's Claim

Defendants' argument under the federal Free Exercise Clause fails on the merits as well. Defendants acknowledge that neutral and generally applicable laws that burden religious conduct are ordinarily constitutional. But they assert that, because IIED purportedly "involve[s] an 'individualized assessment' and discretion regarding whether a particular religious practice should be regulated," strict scrutiny applies and IIED fails that test. Respondents' Br. 39 (quoting *Smith*, 494 U.S. at 884). Defendants are wrong at each step.

1. IIED Does Not Allow Individualized Exemptions

The "individualized assessment" principle stems from three U.S. Supreme Court cases addressing exemptions to the denial of unemployment benefits. *Smith*, 494 U.S. at 883-84. In each case, the state scheme under consideration denied benefits to the plaintiff unless the plaintiff made a showing of good cause for their unemployment; that determination turned on a case-by-case evaluation of the individual's reasons for unemployment (e.g., refusing to work on the Sabbath). Synthesizing these cases, the U.S. Supreme Court explained that, when a law allows exemptions based on such "individualized assessments," a state "may not refuse to extend [exemptions] to cases of 'religious hardship' without compelling reason," *i.e.*, without satisfying strict scrutiny. *Id.* at 884.

The "individualized assessment" principle is an application of the rule that the government may not deny benefits solely based on religion. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019, 2022 (2017) ("refusal to allow [a] Church—*solely because it is a church*—to compete with secular organizations for a grant" is unconstitutional) (emphasis added). Consistent with that understanding, courts decline to apply strict scrutiny unless an exemption depends on "subjective" criteria applied in a discriminatory fashion; exemptions dependent on "objective" criteria, even

if "broad," do not trigger strict scrutiny. *Grace*, 451 F.3d at 653-55. And if "a law remains exemptionless, it is considered generally applicable[,] religious groups cannot claim a right to exemption," and strict scrutiny is unwarranted. *Id.* at 654.

In this case, there is *no exemption* available at all, let alone one that Defendants have shown has subjective criteria and a history of discriminatory application. *Cf.* Restatement (Second) § 46 cmt. f (describing outrageousness as an objective standard). Under Utah law, when proof of the IIED elements exist, the jury must find the tortfeasor liable. It has no "discretion," as Defendants claim, to "exempt" the tortfeasor and return a no-liability verdict. *See* Utah Pattern Jury Instructions, CV1501–01, *available at* https://perma.cc/7FQV-J6A8. Strict scrutiny is therefore unwarranted.

2. IIED Survives Strict Scrutiny

Even if strict scrutiny applies, Ria's claim survives. To be constitutional, a law subject to strict scrutiny must advance a compelling government interest and be narrowly tailored to further than interest. *State v. Green*, 2004 UT 76, ¶ 33, 99 P.3d 820, 829.

IIED advances two compelling interests. First, by prohibiting conduct that causes "severe" emotional injuries, IIED advances Utah's "compelling interest [in] protect[ing] children from actual or potential harm." *Magazu v.*

Dep't of Children & Families, 473 Mass. 430, 445 (2016); *see also Prince*, 321 U.S. at 168 (states have especially "broad[]" authority to protect children); *Barbe v. McBride*, 521 F.3d 443, 459 n.21 (4th Cir. 2008) ("[A] state's interest in protecting sexual abuse victims from harassment, humiliation, and invasions of privacy is especially compelling when the testifying victim is a child, in that questioning about sexual conduct is potentially more psychologically damaging to children." (citation omitted)).

Second, the tort advances Utah's "compelling interest in ensuring that all parties are able to resolve legal disputes before a neutral tribunal." *Jeffs*, 970 P.2d at 1250. In *Jeffs*, this Court considered a similar argument that a common law claim—specifically, unjust enrichment—could not be applied to religiously motivated conduct. Assuming that strict scrutiny applied, this Court held that unjust enrichment advanced the State's "paramount" interest—recognized in the Open Courts Clause, *see* Utah Const. art I, § 11—in ensuring that courts remain open to people whose legal rights have been violated. *Id.*

Defendants claim that no compelling interest exists here because Ria would have been subjected to the same conduct in civil litigation. Respondents' Br. 39-40. This conflates whether Ria has alleged outrageous conduct with whether the tort itself advances a compelling interest. It is also

obviously incorrect. In civil litigation, Ria would have had a lawyer to protect her interests and a neutral judge to enforce her rights. A simple objection—"badgering the witness"—would have put an end to the Elders' abuse. There is no place in orderly litigation for playing a recording to a quivering and crying 15-year-old girl, over and over, despite her objections. *Cf. State v. Hamblin*, 2010 UT App 239, ¶ 22, 239 P.3d 300, 306 (recognizing judges' authority to limit questioning to prevent "harassment").

Defendants also rely on *Paul v. Watchtower*, 819 F.2d 875 (9th Cir. 1987), for the callous proposition that, because emotional distress is not a "tangible" harm, it is not worthy of protection from religiously motivated conduct. Respondents' Br. 26, 41. As Defendants acknowledge, *Paul* found such harms only "ordinarily" insufficient to justify burdening religious conduct. *Id.* at 26; 819 F.2d at 883. That caveat exists for cases like this, where the victim is a child and the State's interest is thus at its highest.

Paul's belittling of emotional distress as undeserving of protection also reflects an anachronistic view of the seriousness of emotional injuries. This derision is at odds with current thinking, as reflected in multiple Utah laws addressing emotional distress. *See, e.g.*, Utah Code § 76-5b-203 (2014 law punishing distribution of sexual images that cause "emotional distress"); *id.* § 53B-17-1202 (2019 law providing resources for university

students suffering "emotional distress"); *id.* § 76-5-106.5 (defining criminal stalking to prohibit conduct that causes "emotional distress"). Accordingly, to the extent that *Paul* applies—and given Ria's minor status, it does not—this Court should decline to follow it, as the Pennsylvania Supreme Court has. *See Connor v. Archdiocese of Phila.*, 601 Pa. 577, 624 (2009).

Finally, IIED is narrowly tailored to address the State's interests. Defendants do not seriously claim otherwise, offering nothing more than the unexplained conclusion that the tort is "[o]n its face" too broad. Respondents' Br. 40. In fact, as explained above, the tort establishes a rigorous standard that allows for recovery only in the most extreme circumstances. *See supra* at 14-15. Defendants have not identified any narrower alternative remedy for Ria's injuries. *Cf. Jeffs*, 970 P.2d at 1251 (claim was narrowly tailored because "[t]he remedy provided the claimants redress for their injuries in a manner that minimizes the burden upon free exercise").

C. The Utah Constitution Does Not Bar Ria's Claim

Defendants' final argument—that adjudicating Ria's claim violates the Utah Constitution—likewise lacks merit. As an initial matter, it is unclear clear what the argument is. Defendants invoke a mix of Article I, § 1, the Establishment and Free Exercise Clauses of Article I, § 4, and Article

III of the Utah Constitution, *see* Respondents' Br. 10, 41, 42, without specifying on which provisions their argument actually relies. This Court should decline to entertain Defendants' scattershot attempt to extract protection from the Utah Constitution.

In any event, the Court can reject Defendants' novel contention—that laws that burden religious activity are lawful under Utah's Constitution only if *criminal*—without definitively resolving the full scope of the Constitution's protections.[8] Respondents' Br. 44. *Jeffs* forecloses Defendants' theory. As noted, *Jeffs* held that an unjust enrichment claim survived scrutiny under the Utah Constitution, even though it was based on a non-statutory civil cause of action (like IIED), not a criminal or other statute. 970 P.2d at 1250.

Two other flaws infect Defendants' argument. First, it is based on the erroneous premise that, unlike criminal law, tort law is concerned only with "injury to an individual" and not with "harm to society." Respondents' Br. 10, 44. It is axiomatic, however, that tort law advances the public interest. *See, e.g.*, *Peterson v. Browning*, 832 P.2d 1280, 1284 (Utah 1992). Second, forcing the State to impose criminal penalties, the most onerous response,

[8] Because this Court "presume[s] [a] law is valid" "[w]hen presented with a constitutional challenge," *Jeffs*, 970 P.2d at 1248, it is Defendants' burden to demonstrate a violation.

would "impose a greater burden on religion than would civil tort liability." *See Molko v. Holy Spirit Ass'n*, 46 Cal. 3d 1092, 1119 (1988). This Court should reject that illogical result.

CONCLUSION

This Court should reverse the decision below.

DATED this 19th day of February, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Appellate Procedure 24(a)(11)(A), the undersigned counsel for Petitioner certifies that the foregoing brief complies with the type-volume limitation of Rule of Appellate Procedure 11(g) and contains 6,992 words, excluding the list of all parties, table of contents, table of authorities, certificates of counsel, and addendum. Pursuant to Rule of Appellate Procedure 24(a)(11)(B), the undersigned counsel for Petitioner further certifies that the foregoing brief contains no non-public information prohibited by Rule of Appellate Procedure 21.

/s/ Robert Friedman
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CERTIFICATE OF SERVICE

This is to certify that on the 19th day of February, 2020, I caused two true and correct copies of the foregoing Brief of Petitioner to be served via first-class mail, with a copy by email, on:

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