IN THE SUPREME COURT OF TEXAS

NO. 05-0916

PLEASANT GLADE ASSEMBLY OF GOD, REVEREND LLOYD A. MCCUTCHEN, ROD LINZAY, HOLLY LINZAY, SANDRA SMITH, BECKY BICKEL, AND PAUL PATTERSON, PETITIONERS,

v.

LAURA SCHUBERT, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued April 12, 2007

CHIEF JUSTICE JEFFERSON, joined by JUSTICE GREEN, and by JUSTICE JOHNSON as to Parts II-A, III, and IV, dissenting.

After today, a tortfeasor need merely allege a religious motive to deprive a Texas court of jurisdiction to compensate his fellow congregant for emotional damages. This sweeping immunity is inconsistent with United States Supreme Court precedent and extends far beyond the protections our Constitution affords religious conduct. The First Amendment guards religious liberty; it does not sanction intentional abuse in religion's name. Because the Court's holding precludes recovery of emotional damages—even for assault and other serious torts—where the defendant alleges that the underlying assault was religious in nature, I respectfully dissent.

I

Ironically, much of my analysis mirrors that found in Pleasant Glade's earlier plea to the court of appeals. *See, e.g., infra* note 9. In its successful petition for a writ of mandamus, Pleasant Glade conceded that Schubert's claim for assault, battery, and false imprisonment presented a "'secular controversy' and does not come within the protection of the First Amendment. That is, no church or pastor can use the First Amendment as an excuse to cause bodily injury to any person." In the subsequent appeal, the court of appeals held that Pleasant Glade, having received mandamus relief to exclude religious references at trial, was precluded from raising a First Amendment defense that it had quite purposefully abandoned. 174 S.W.3d 388, 407. The Court holds that it is not. In light of the Court's ultimate dismissal for want of jurisdiction, however, I find the Court's protracted discussion of judicial estoppel puzzling. Subject-matter jurisdiction cannot be conferred by estoppel, *Van Indep. Sch. Dist. v. McCarty*, 165 S.W.3d 351, 354 (Tex. 2005), or waiver, *Tellez v. City of Socorro*, 226 S.W.3d 413, 414 (Tex. 2007), so the estoppel issue would seem, technically, beyond the Court's reach.[1] The Court has nevertheless expounded on this question, and because the Court errs in its analysis, I offer a brief rejoinder.

The Court states that Pleasant Glade is not judicially estopped from making its First Amendment arguments because, among other reasons, "the asserted inconsistency did not arise in a prior proceeding, but in this same case," __ S.W.3d __, __, and "[c]ontradictory positions taken in the same proceeding . . . do not invoke the doctrine of judicial estoppel," *id.* at __. That

[1] The fact that "[judicial estoppel] is not strictly speaking estoppel but rather is a rule of procedure", __ S.W.3d __, does not affect this analysis. *See Wilmer-Hutchins Indep. Sch. Dist. v. Sullivan*, 51 S.W.3d 293, 294–95 (Tex. 2001) ("A party cannot by his own conduct confer jurisdiction on a court when none exists otherwise.").

characterization misses the mark. The United States Supreme Court recently discussed the policy considerations underlying judicial estoppel and the rationale behind the requirement that parties succeed in a prior proceeding:

> [C]ourts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create *the perception that either the first or the second court was misled*. Absent success in a prior proceeding, a party's later inconsistent position introduces *no risk of inconsistent court determinations*, and thus poses little threat to judicial integrity.

New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001) (citations omitted) (emphasis added). This Court's formalistic conception of "prior proceedings" will fail to capture many situations that implicate these concerns. If a party obtains mandamus relief from this Court by taking one position and then wins a judgment, also from this Court, as part of the same suit and based on the opposite contention, this no less creates the "perception that either the first or the second court was misled" and presents the "risk of inconsistent court determinations" than if the mandamus proceeding had originated from a different action. *Id*. The appropriate test to determine if there has been a prior proceeding for the purposes of judicial estoppel is whether the court has made a ruling—or "determination"—on the issue. *Id.* Thus, parties would be able to reverse course before the court has ruled, but could be bound by their previous position once successful (and if the other elements of judicial estoppel are present).[2]

[2] Courts have the option of reversing their previous determination rather than invoking judicial estoppel, thus holding the party to the second of its inconsistent arguments rather than the first. *See New Hampshire*, 532 U.S. at 750 ("Because the rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion.") (citations omitted).

Although I agree, for the reasons discussed below, *see infra* n. 12, that Pleasant Glade is not estopped under these facts, the Court arrives at the estoppel question improvidently and reaches a conclusion that will limit Texas courts' ability to preserve judicial integrity.

II

A

The rights contained in the Free Exercise and Establishment Clauses are among our most cherished constitutional freedoms. As broad as these protections are, I agree with the Court that "'under the cloak of religion, persons may [not], with impunity,' commit intentional torts upon their religious adherents." __ S.W.3d at __ (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940)). Unfortunately, this is precisely what the Court's holding allows. Here, assuming all facts favorable to the verdict, members of Pleasant Glade restrained Schubert on two separate occasions against her will. During the first encounter, seven members pinned her to the floor for *two hours* while she cried, screamed, kicked, flailed, and demanded to be released. This violent act caused Schubert multiple bruises, carpet burns, scrapes, and injuries to her wrists, shoulders, and back. As she testified, "I was being grabbed by my wrists, on my ankles, on my shoulders, everywhere. I was fighting with everything I had to get up, I was telling them, no. I was telling them, let go, leave me alone. They did not respond at all." After Schubert "complied with what they wanted [her] to do," she was temporarily released. Fifteen minutes later, at the direction of Pleasant Glade's youth pastor, a different group of seven church members physically restrained her for an hour longer. After this experience, Schubert was "weak from exhaustion" and could hardly stand.

Three days later, a male church member approached Schubert after a service and put his arm around her shoulders. At this point, Schubert was still trying to figure out "what had happened" at the previous incident, "wasn't interested in being touched," and resisted him. As Schubert testified, "I tried to scoot away from him. He scooted closer. He was more persistent. Finally, his grasp on me just got hard . . . before I knew it, I was being grabbed again." Eight members of Pleasant Glade then proceeded to hold the crying, screaming, seventeen year-old Schubert spread-eagle on the floor as she thrashed, attempting to break free. After this attack, Schubert was unable to stand without assistance and has no recollection of events immediately afterward. On both occasions, Schubert was scared and in pain, feeling that she could not breathe and that "somebody was going to break [her] leg," not knowing "what was going to happen next."

The jury found that petitioners assaulted and falsely imprisoned Schubert, and the trial court rendered judgment for her on the false imprisonment claim. Although this case presents an unusual set of facts, involving physical restraint not proven to be part of any established church practice, at its core the case is about secular, intentional tort claims squarely within our jurisdiction, and I believe the Court errs in dismissing for want thereof. I will address each of the Court's arguments in turn. First, the Court states that because Schubert's "proof at trial related solely to her subsequent emotional or psychological injuries," her "case at trial then was not significantly different from what she would have presented under her claim of intentional infliction of emotional distress . . . [a] type of claim [that] would necessarily require an inquiry into the truth or falsity of religious beliefs that is forbidden by the Constitution." __ S.W.3d at __ (citations omitted). As an initial matter, this is factually inaccurate. Schubert testified that she suffered *physical* as well as emotional injuries from

the assaults. Furthermore, the jury awarded damages for unsegregated past "physical pain and mental anguish." Pleasant Glade did not request that the damages be segregated, and so waived any complaint that her physical injuries were not compensable. TEX. R. CIV. P. 274.

More importantly, the Court's allusion to intentional infliction of emotional distress fails to explain how submitting Schubert's emotional damages claim would "require an inquiry into the truth or falsity of religious beliefs," "embroil this Court in an assessment of the propriety of . . . religious beliefs," or "decid[e] issues of religious doctrine." __ S.W.3d at __, __, __ (citations omitted). In *Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996), we held that intentional infliction of emotional distress claims based on insincere religious representations and breached promises to read, touch, and pray over tithes and prayer requests were barred by the First Amendment. We explained:

> One of the elements that a plaintiff must prove to establish intentional infliction of emotional distress is that the conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." With regard to religious representations, we conclude that no conscientious fact finder would make such a determination without at least considering the objective truth or falsity of the defendants' beliefs, regardless of what evidentiary exclusions or limiting instructions were attempted. After all, the outrageousness and extremity of a representation is, under almost any circumstance, aggravated by being false or mitigated by being true.

925 S.W.2d at 681. This case is not like *Tilton*. False imprisonment does not require a showing of outrageous conduct.[3] Evaluating whether Pleasant Glade falsely imprisoned Schubert does not

[3] The elements of intentional infliction of emotional distress are: "(1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the emotional distress that the plaintiff suffered was severe." *City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000). The elements of false imprisonment, on the other hand, are "(1) willful detention; (2) without

require the factfinder to determine "the objective truth or falsity of the defendants' belief," *id.,* and neither does awarding her emotional damages. It is a basic tenet of tort law that emotional damages may be recovered for intentional torts involving physical invasions, such as assault, battery, and false imprisonment. *See*, *e.g., Dillard Dep't Stores, Inc. v. Silva*, 148 S.W.3d 370, 374 (Tex. 2004) (affirming award of mental anguish damages for false imprisonment); *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 630 (Tex. 1967) ("Personal indignity is the essence of an action for battery."); *Davidson v. Lee*, 139 S.W. 904, 907 (Tex. Civ. App.—Galveston 1911, writ ref'd) ("The rule that damages cannot be recovered for mental suffering unaccompanied by physical injury is not applicable when the wrong complained of is a willful one intended by the wrongdoer to wound the feelings and produce mental anguish and suffering, or from which such result should be reasonably anticipated, as a natural consequence."); RESTATEMENT (SECOND) OF TORTS, § 905 cmt. c (1965) ("The principal element of damages in actions for battery, assault or false imprisonment . . . is frequently the disagreeable emotion experienced by the plaintiff."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 11 (5th ed. 1984) ("Since the injury [resulting from false imprisonment] is in large part a mental one, the plaintiff is entitled to damages for mental suffering, humiliation, and the like."); 20 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 331.06 (2007) ("Mental suffering caused by a false imprisonment, including humiliation, shame, fright, and anguish, is also compensable, regardless of whether any physical harm was inflicted on the plaintiff."); *cf. Boyles v. Kerr*, 855 S.W.2d 593, 597–98 (Tex. 1993) ("Our decision [that there is no

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consent; and (3) without authority of law." *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002).

general duty not to negligently inflict emotional distress] does not affect a claimant's right to recover mental anguish damages caused by defendant's breach of some other legal duty . . . . *We also are not imposing a requirement that emotional distress manifest itself physically to be compensable*.") (emphasis added) (citations omitted). This is common sense: many experiences—including some sexual assaults and certain forms of torture—are extremely traumatic yet result in no serious physical injury.

Given this, it is not surprising that the Court cites no case holding that the First Amendment bars claims for emotional damages arising from assault, battery, false imprisonment, or similar torts. I can cite a case, heavily relied upon by the Court, for the opposite proposition: *Tilton*. There we held that "[t]he Free Exercise Clause never has immunized clergy or churches from all causes of action alleging tortious conduct," and cited *Meroni v. Holy Spirit Association for the Unification of World Christianity,* 119 A.D.2d 200 (N.Y. App. Div. 1986), with the parenthetical "'[A] church may be held liable for intentional tortious conduct on behalf of its officers or members, even if that conduct is carried out as part of the Church's religious practices.'" *Tilton*, 925 S.W.2d at 677. The Court cites *Cantwell v. Connecticut*, 310 U.S.at 310, for the proposition that "intangible harms" are "insufficient to impose civil or criminal liability." __ S.W.3d at __. The *Cantwell* Court, however, found in that case "no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse," and made clear that "violence and breaches of the peace," such as occurred in this case, may be punished. *Cantwell,* 310 U.S. at 310. The Court also discusses *Paul v. Watchtower Bible & Tract Society of New York, Inc.*, 819 F.2d 875 (9th Cir. 1987), but that case rested on the fact that "[n]o physical assault or battery occurred." *Paul*, 819 F.2d at 883. Similarly,

in *Westbrook v. Penley*, we cited the "[n]o physical assault" language from *Paul* and stated that the act at issue was not "an intentional tort that endangered Penley's or the public's health or safety." 231 S.W.3d 389, 404 (Tex. 2007).[4]

I agree with the Court that certain claims for emotional damages are barred by the First Amendment—if Schubert were merely complaining of being expelled from the church, she would have no claim in the civil courts. But again, this case, as it was tried, is not about beliefs or "intangible harms"—it is about violent action—specifically, twice pinning a screaming, crying teenage girl to the floor for extended periods of time. That was how it was presented to the jury, which *heard almost nothing about religion during the trial* due to the trial court's diligent attempt to circumvent First Amendment problems and to honor the court of appeals' mandamus ruling that neither side introduce religion as a reason for Laura's restraint.[5] Indeed, the trial court told the jury at the beginning of the case that "the Court of Appeals, the appellate courts, have instructed us that we don't get into spiritual matters because it would violate the [E]stablishment [C]lause of the First

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[4] In contrast, the tort of intentional infliction of emotional distress was developed because it was thought that extreme and outrageous conduct should be actionable *despite* the lack of a physical invasion or another otherwise tortious act, and is sometimes criticized *because* it compensates plaintiffs for mental anguish not naturally flowing from such an act, which may be mere speech. *See* RESTATEMENT (SECOND) OF TORTS, § 46 cmt. b (1965) ("[E]motional distress may be an element of damages in many cases where other interests have been invaded, and tort liability has arisen apart from the emotional distress. Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone. It is only within recent years that the rule stated in this Section has been fully recognized as a separate and distinct basis of tort liability, without the presence of the elements necessary to any other tort, *such as assault, battery, false imprisonment*, trespass to land, or the like.") (emphasis added).

[5] In order to reach the conclusion that "the religious practice of 'laying hands' and church beliefs about demons are [] closely intertwined with Laura's tort claim," the Court quotes testimony on Pleasant Glade's religious beliefs and practices that the jury did not hear, and references claims made in Schubert's original, unamended petition, __ S.W.3d at __, which was filed before Pleasant Glade's successful mandamus petition, *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85, 87-88 (Tex. App.—Fort Worth 1998, orig. proceeding). Schubert subsequently amended her petition, and the live pleading in this case makes reference to neither "exorcism" nor "the Devil."

Amendment of the Constitution," and later repeated this instruction. That the Court looks to a dictionary for evidence of Pleasant Glade's beliefs and practices is proof of the trial court's success in keeping religion out of the courtroom. *See* __ S.W.3d at __, n. 2. Thus, the Court's assertion that assessing emotional damages against Pleasant Glade for engaging in these religious practices "would . . . embroil this Court in an assessment of the propriety of those religious beliefs" is belied by the conduct of this very case: Schubert testified that she was "grabbed" after collapsing due to illness; Pleasant Glade contested that version of events without reference to demons, "laying of hands," or other religious subjects, __ S.W.3d at __; and the jury was able to award damages without considering—or even being informed of—Pleasant Glade's beliefs.[6]

Further, although the Court chooses to conduct its own inquiry into the role of "laying hands" in Pleasant Glade's religion,[7] and attempts to limit its holding by stating that "religious practices that threaten the public's health, safety, or general welfare cannot be tolerated," and thus that there may be some cases in which emotional damages are available as a consequence of religiously motivated conduct, __ S.W.3d at __, any religious motivation Pleasant Glade may have had is irrelevant to our consideration. The tort of false imprisonment is a religiously neutral law of general applicability, and the First Amendment provides no protection against it. *Employment Div. v. Smith*, 494 U.S. 872,

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[6] As discussed below, I think it possible that some of Schubert's emotional damages stemmed from protected religious speech and should not have been awarded. Pleasant Glade failed to preserve error on this point, however, and the Court errs in holding *all* of Schubert's damages—some of which certainly resulted from the restraint itself—barred. *See infra* Part II.B.

[7] In reaching the conclusion that "the act of 'laying hands' is infused in Pleasant Glade's religious belief system," __ S.W. 3d at __, the Court engages in the unconstitutional conduct it purports to avoid: "deciding issues of religious doctrine." *Id.* at __; *see Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).") (citations omitted); *Moses v. Diocese of Colo.*, 863 P.2d 310, 320 (Colo. 1993) ("Application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution."). The *Smith* Court emphatically rejected the proposition that the First Amendment alone—without being coupled to another constitutional protection, such as the freedom of speech, the press, or to direct the education of one's children, 494 U.S. at 881—"could excuse [an individual] from compliance," *id.* at 879, with a general applicable law:

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

Id. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)).[8]

To be clear, even if it had been proven at trial that Pleasant Glade's religion demanded that Schubert be restrained, the First Amendment would provide no defense—we simply need not evaluate the validity of Pleasant Glade's religious beliefs, or even inquire into the assailants'

[8] The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4, purported to overrule *Smith* by requiring a compelling state interest to substantially burden a person's religious practice. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). Although the Court cites *Tilton* for support, *Tilton* did not consider the application of *Smith* because *Tilton* was decided before RFRA was held to be beyond Congress's legislative authority to enact with respect to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See Tilton*, 925 S.W.2d at 676 n.5 (noting that various courts had held RFRA constitutional). Thus, insofar as statements in *Tilton* conflict with *Smith*, they should no longer be considered authoritative.

motives, to hold Pleasant Glade liable for its intentionally tortious conduct.[9] And while the Court suggests that imposing this liability would have a "chilling effect" on the church's beliefs, __ S.W.3d at __, constitutional protection for illegal or tortious conduct cannot be bootstrapped from the protection of beliefs where it does not otherwise exist. Further, the Court's threat to "health, safety, or general welfare" test for liability for religiously motivated acts is almost identical to the "substantial threat to public safety, peace or order" language from *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). In *Smith*, however, the Court expressly rejected the application of *Sherbert*, which developed out of an unemployment compensation case, to "generally applicable prohibitions of socially harmful conduct." *Smith*, 494 U.S. at 885.[10]

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[9] Even Pleasant Glade realizes this fundamental principle of First Amendment law. Its petition for writ of mandamus stated:

> [Schubert] alleges that she was physically grasped, taken and held on the floor of the church against her will. This was allegedly done as part of an "exorcism" in an alleged attempt to exorcise a demon from her. However, this religious context is actually irrelevant. Since Laura Schubert alleges she was held on the floor against her will, she brings claims for assault, battery, and false imprisonment. This is a "bodily injury" claim . . . Relators, the church and the pastors, concede that this is a "secular controversy" and does not come within the protection of the First Amendment. That is, no church or pastor can use the First Amendment as an excuse to cause bodily injury to any person . . . .
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> If this were the sum total of this dispute, Relators would not be here before this Court . . . No religious beliefs would be implicated. The First Amendment and the free exercise of religion would simply not be an issue.

__ S.W.3d at __. Although the Court somehow concludes from this statement that "Pleasant Glade viewed the Schuberts' claims of emotional damages as religious in nature," it is plain from the text that the Church made no such distinction. And Pleasant Glade was correct not to do so: no religious beliefs are implicated by awarding Schubert mental anguish damages suffered as a result of her false imprisonment. *But cf. infra* note 12.

[10] The Court cites *Sands v. Living Word Fellowship*, 34 P.3d 955, 958 (Alaska 2001), for the proposition that "religious conduct must not pose 'some substantial threat to public safety, peace or order.'" __ S.W.3d at __. This language is taken from *Sherbert* by way of *Frank v. State*, 604 P.2d 1068, 1070 (Alaska 1979), and the *Sands* court did

And even under the Court's erroneous standard, it is hard to see why this case would not qualify. The torts of false imprisonment and assault both have substantially similar criminal analogs, *see* TEX. PENAL CODE §§ 20.02 ("Unlawful Restraint"), 22.01 ("Assault"), and it cannot be seriously argued from this record that Pleasant Glade's conduct did not threaten Schubert's welfare. It is difficult to determine what *would* meet the Court's standard, not least because the Court offers no analysis beyond its declaration that "this is not such a case." Finally, the Court hints that it might have found liability here if Schubert had been a passerby, but that "religious practices that might offend the rights or sensibilities of a non-believer outside the church are entitled to greater latitude when applied to an adherent within the church." __ S.W.3d at __. There is a kernel of truth in this statement, but the Court's formulation is imprecise and overbroad. Members of religious groups routinely and impliedly consent to a variety of faith-based practices. Accordingly, implied consent could, in many circumstances, extend to physical encounters like baptisms and to other practices congregants embrace as part of their faith. And perhaps this type of implied consent could, in some circumstances, extend to being pinned to the floor for hours at a time despite the member's explicit, contemporaneous withdrawal of consent. That question is not before us today, however. Consent is a question of fact—indeed, lack of consent is an element of false imprisonment on which we have an affirmative jury finding in this case. Pleasant Glade did not challenge that finding at the court of appeals, and does not raise it here. Nevertheless, the Court treats church membership as an across

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not analyze the effect of *Smith* on its precedent.

the board buffer to tort liability.[11] The problems with this approach are obvious. It is impossible to apply the Court's standard in the absence of factual development or determination in the trial court. We are in no position to decide that the ordeal to which Schubert was subjected was so "expected" and "accepted by those in the church" as to overcome Schubert's vehement denial of consent at the time of the incidents. __ S.W.3d at __. Further, the scant evidence does not support the Court's conclusion. Senior Pastor McCutchen, in his affidavit quoted by the Court, speaks of "lay[ing] hands" and of church members "faint[ing] into semi-consciousness, and sometimes l[ying] down on the floor of our church." *Id.* at __. This is far removed from the incident described by Schubert, which we must take as true even if Pleasant Glade had properly raised this issue, *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005) ("[L]egal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not."), and lends no credence to the Court's consent theory.

B

To the extent that this case presents any First Amendment problems, I believe they lie in the fact that Schubert was traumatized not only by the false imprisonment viewed in isolation, but also by the religious content of that experience. Thus, because one of Schubert's experts, Dr. Helge, testified as to the whole of Schubert's mental anguish, the jury may have awarded damages stemming in part from the religious nature of the events in question. __ S.W.3d at __. This is

[11] While the Court cites *Smith v. Calvary Christian Church*, 614 N.W.2d 590, 593 (Mich. 2000), that case is clearly inapposite. There, the plaintiff "explicitly consented in writing to obey the church's law," *id.*, and, in any case, the court specifically reserved the question of whether its reasoning would extend to church discipline "in violation of the Michigan Penal Code," *id.* at 595.

prohibited by the First Amendment. *Paul*, 819 F.2d at 883. As discussed above, however, the general rule in Texas is that plaintiffs may recover mental anguish damages resulting directly from certain types of intentional torts, including false imprisonment. Thus, the difficulty in this type of hybrid case lies in separating the wheat from the chaff.

The Court solves this dilemma not by extracting the religious from the secular, but by binding them together and then dismissing the case for lack of jurisdiction. I would, instead, treat Pleasant Glade's First Amendment argument as an affirmative defense that must be raised at trial. *See* TEX. R. CIV. P. 94; *cf. Tilton*, 925 S.W.2d at 677 ("[W]hen a plaintiff's suit implicates a defendant's free exercise rights, the defendant may assert the First Amendment as an affirmative defense to the claims against him."). A jury could then be instructed to award damages only for the mental anguish the plaintiff would have suffered had the tort been committed by a secular actor in a secular setting. Juries are frequently asked to exclude certain sources of injury—in this case religious sources—when calculating damages, and this procedure would allow plaintiffs' secular claims to go forward while protecting defendants' First Amendment rights. *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS PJC 8.7 (2006) Personal Injury Damages—Exclusionary Instruction for Other Condition ("Do not include any amount for any condition *not resulting from* the occurrence in question") (emphasis original), & cmt. ("If it would add clarity in the individual case, an instruction not to consider specific, named . . . conditions would be proper, if requested."); *see also id.* at PJC 8.8 Personal Injury Damages—Exclusionary Instruction for Preexisting Condition That Is Aggravated, 8.9 Personal Injury Damages—Exclusionary Instruction for Failure to Mitigate. Further, if the case is

tried without reference to religion, making an exclusionary instruction potentially confusing or prejudicial, the trial court could in these situations include a proximate cause question, which includes an element of foreseeability. *See id.* at PJC 2.4 Proximate Cause ("[T]he act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom.") (emphasis omitted). Thus, the jury (not being aware of any religious aspect of the case) would find only damages reasonably connected to the secular assault.

Pleasant Glade, however, did not request any such instruction, and this omission bars relief.[12] *See* TEX. R. CIV. P. 278 ("Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment."). Further, while the Court points to Dr. Helge's testimony as proof that Schubert's religious and secular damages are inextricably intertwined, another expert, Dr. Millie Astin, specifically stated that she *could* separate the two. And Schubert testified that while she was being restrained she was afraid she "was being injured" and that she "might die"—trauma clearly associated with the act of restraint itself. Although segregating the religious from the secular may sometimes be difficult, it can and should be done. *See Jones v. Wolf*, 443 U.S. 595, 604 (1979).

III

[12] Even under my view of judicial estoppel, Pleasant Glade would not be estopped from arguing that the jury improperly awarded mental anguish damages stemming from the religious implications of the incident, which I interpret to be consistent with the position it took in its mandamus petition.

Because I would not dismiss for lack of jurisdiction, I would address Pleasant Glade's argument that the trial court erred in allowing expert testimony on, and recovery for, Schubert's diagnosis of posttraumatic stress disorder. However, because the other evidence of Schubert's mental anguish, including "angry outbursts, weight loss, sleeplessness, nightmares, hallucinations, self-mutilation, fear of abandonment, and agoraphobia," 174 S.W.3d at 393, is sufficient to support the jury's award, I cannot say that the error, if any, "probably caused the rendition of an improper judgment." TEX. R. APP. P. 61.1(a); *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004). It is therefore not necessary to consider Pleasant Glade's claims in any detail.

IV

Pleasant Glade also contends that the trial court erred in refusing to submit their *in loco parentis* defense to the jury, and that the First Amendment required a finding of actual malice to support the jury's award of mental anguish damages. In a cross petition for review, Schubert argues that the court of appeals erred in concluding there was no evidence to support a finding that Laura's loss of earning capacity was foreseeable and proximately caused by Pleasant Glade's conduct. I agree with the court of appeals' conclusions on these issues.

V

The Court today essentially bars all recovery for mental anguish damages stemming from allegedly religiously motivated, intentional invasions of bodily integrity committed against members of a religious group. This overly broad holding not only conflicts with well-settled legal and constitutional principles, it will also prove to be dangerous in practice. Texas courts have been and will continue to be confronted with cases in which a congregant suffers physical or psychological

injury as a result of violent or unlawful, but religiously sanctioned, acts. In these cases, the Court's holding today will force the lower courts to deny the plaintiff recovery of emotional damages if the defendant alleges that some portion thereof stemmed from the religious content of the experience—unless the trial court is able to anticipate that the case will fall under the Court's rather vague exception. *See* __ S.W.3d at __ ("[W]e can imagine circumstances under which an adherent might have a claim for compensable emotional damages as a consequence of religiously motivated conduct.").

I would affirm the court of appeals' judgment. Because the Court instead dismisses the case for lack of jurisdiction, I respectfully dissent.

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 27, 2008