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Ira C. Lupu

*George Washington University Law School*

Robert W. Tuttle

*George Washington University Law School*

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# #MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment's Religion Clauses

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Ira C. Lupu & Robert W. Tuttle<sup>1</sup>

## *Abstract*

*In Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC (2012), the Supreme Court unanimously held that the Religion Clauses of the First Amendment create a “ministerial exception” to certain employment laws. The ministerial exception bars claims by clergy of wrongful dismissal by religious institutions. In the years before Hosanna-Tabor, however, courts had ruled in four prominent decisions – two state, and two federal – that suits by clergy for sexual harassment based on a pervasively hostile environment could go forward, notwithstanding the ministerial exception. The rise of the #MeToo movement invites new and more detailed consideration of the tension between the policies behind sexual harassment law and the constitutional values protected by the ministerial exception.*

*Part I describes the contours of the ministerial exception, explains its constitutional provenance, and highlights the issues left open by Hosanna-Tabor. Part II addresses relevant developments in the law of sexual harassment, from the pioneering work of Professor Catherine MacKinnon, through and including the Supreme Court's decisions in Burlington Industries v. Ellerth and Faragher v. City of Boca Raton.*

*Part III explores the leading judicial opinions on the relationship between sexual harassment law and the ministerial exception. These include the germinal state court decisions in Black v. Snyder (Minnesota) and McKelvey v. Pierce (New Jersey), and the path breaking 9<sup>th</sup> Circuit decisions in Bollard v. California Province of the Society of Jesus, and Elvig v. Calvin Presbyterian Church. In the law that has emerged, the ministerial exception bars adverse job action claims by clergy but does not bar hostile environment claims. That brief statement, however, masks the analytical complexities and constitutional concerns arising from the interplay between harassment law and the ministerial exception. The sources of tension include the affirmative defenses, requiring employer-created mechanisms for reasonable prevention and correction in sexual harassment cases, as well as matters of discovery and choice of remedies.*

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<sup>1</sup> The authors are both affiliated with the George Washington University. Ira C. Lupu is the F. Elwood & Eleanor Davis Professor Emeritus of Law; Robert W. Tuttle is the David R. and Sherry Kirschner Berz Research Professor of Law and Religion. We are grateful to Stephanie Barclay, Liz Sepper and [OTHERS] for their insightful comments on the manuscript, and to Carla Graff for her excellent assistance in the research for this article. The mistakes are ours.

*Part IV applies our theoretical and doctrinal insights to the major questions raised by this interplay. We explain why the ministerial exception is constitutionally sound, but nevertheless should not bar damage claims for pervasive, hostile environments based on sex. We offer a tort-based theory of harm as the underpinning of hostile environment doctrine; analyze the connection (if any) between religious belief and sexual harassment of clergy; and unpack constitutional questions of entanglement between church and state that may arise when religious institutions face hostile environment lawsuits. Our analysis should be of interest to scholars of employment law and the Religion Clauses, lawyers litigating such cases, and judges who must decide them.*

## INTRODUCTION

Tragically, faith communities and their houses of worship are all too familiar with problems of sexual misconduct by members of the clergy. For the past several decades, the law courts and the news have been thick with stories of sexual abuse of minors by people with religious authority – stories that involve damaged lives, and tarnished images of institutions that hold themselves out as existing only for spiritual and social good.<sup>2</sup>

In addition to the abuse of minors and its attendant concealment, however, the experience of religious institutions includes other stories of sex related misbehavior. These involve women and men, serving or training as clergy in a variety of religious denominations, who have suffered sexual harassment by their supervisors – usually, though not always, clergy themselves. In this context, perhaps less notorious and less frequent, the law both supports and impedes members of the clergy seeking to remedy such mistreatment. This Article explores those competing legal forces.

We start with law’s role in opposition to claims by clergy who allege sexual victimization, through harassment or otherwise. The Religion Clauses of the First Amendment bar most lawsuits, including claims of discrimination, by clergy against their employers.<sup>3</sup> Suits claiming unlawful discrimination in employment, in particular, are generally barred by a doctrine known as the “ministerial exception.” After forty years of recognition of the ministerial exception in the lower courts, a

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<sup>2</sup> We explore a variety of legal issues raised by suits arising from sexual abuse by clergy in Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 *Brigham Young University Law Review* 1789. See also Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice, and Sexual Abuse by Clergy*, 8 *Mich. J. Gender & Law* 45 (2001).

<sup>3</sup> We canvass and analyze a broad variety of such cases in Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and their Leaders*, 7 *Georgetown J. L. & Pub. Pol’y* 119 (2009). We note but do not explore in that article the sexual harassment issues discussed at length in this one, *id.* at 134, note 84. We also touch on the sexual harassment cases in Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 *Lewis & Clark L. Rev.* 1265, 1287, 1303 (2012) (hereafter cited as Lupu & Tuttle, *The Mystery of Unanimity*).

unanimous Supreme Court in 2012 affirmed the constitutional provenance and the broad reach of that exception. As explicated in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*<sup>4</sup> (hereafter “*Hosanna-Tabor*”), the exception applies to a sweeping range of anti-discrimination norms, and it extends to a broad category of employees whose job includes responsibilities to teach the faith.

A close inspection of the law that has developed under the ministerial exception, however, reveals that state and federal courts have held claims of sexual harassment based on a pervasive, hostile environment to be outside that limitation on suits by clergy. The earliest such decision came from the Minnesota Supreme Court in 1991,<sup>5</sup> and a pair of prominent and controversial decisions emerged from the 9<sup>th</sup> Circuit in 1999 and 2004.<sup>6</sup> Moreover, the U.S. Supreme Court’s apparently sweeping decision in *Hosanna-Tabor* has not produced any change in the law governing sexual harassment claims, based on a pervasive hostile environment, by clergy against their employers.<sup>7</sup>

Both before and after *Hosanna-Tabor*, the question presented by the apparent tension between sexual harassment claims and the ministerial exception has received little attention from scholars of employment law<sup>8</sup> or the Religion Clauses of the First Amendment.<sup>9</sup> The employment law concerns are complex, and the constitutional issues raised by the interaction of sexual harassment law and the ministerial exception are even more so. Moreover, analyzing this intersection of employment law and the First Amendment sheds considerable light on both.

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<sup>4</sup> 565 U.S. 171 (2012)

<sup>5</sup> *Black v. Snyder*, 471 N.W. 2d 715 (Minn. 1991).

<sup>6</sup> *Bollard v. California Province of Society of Jesus*, 196 F.3d 940 (9<sup>th</sup> Cir. 1999); *Elvig v. Calvin Presbyterian Church*, 375 F. 3d 951 (9<sup>th</sup> Cir. 2004), reh’g en banc denied, 397 F. 3d 790 (9<sup>th</sup> Cir. 2005). In *Elvig*, the 9<sup>th</sup> Circuit produced a cluster of opinions related to the denial of *en banc* review. In Part III, below, we will explore the themes in these opinions, including one from Judge Kozinski, who recently retired from the bench in the wake of his own harassment scandal. In accord with *Bollard* is *McKelvey v. Pierce*, 800 A. 2d 840 (N.J. 2002). The most prominent decision rejecting the notion of a sexual harassment exception to the ministerial exception is *Skrzypczak v. Roman Catholic Diocese*, 611 F. 3d 1238 (10<sup>th</sup> Cir. 2010), noted in Part IV below.

<sup>7</sup> Lupu & Tuttle, *The Mystery of Unanimity*, note \_\_ supra, at 1287-1292.

<sup>8</sup> The leading practitioner guide on workplace harassment law, Barbara T. Lindemann & David D. Kadue, *Workplace Harassment Law* (2011) does not even mention the ministerial exception, or the sexual harassment decisions that either follow or refuse to follow the exception. The only published works we have found that are primarily devoted to the tension between harassment law and the religion clauses of the First Amendment are Rosalie Berger Levinson, *Gender Equality vs. Religious Autonomy: Suing Religious Employers for Sexual Harassment after Hosanna-Tabor*, XI Stan. J. C.R. C.L. 89 (2015), and Ryan Jaziri, *Fixing a Crack in the Wall of Separation: Why the Religion Clauses Preclude Adjudication of Sexual Harassment Claims Brought by Ministers*, 45 N. Eng. L. Rev. 719 (2011) (student Note).

<sup>9</sup> We are among the very few Religion Clause scholars who have ever focused on these questions. In addition to the articles cited in note \_\_, supra, see Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 Brigham Young University Law Review 1789, 1794 n. 16. See also Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 Fordham L. Rev. 1965, 2015 (2007) (hereafter “Corbin, Above the Law”)

*Hosanna-Tabor* has thrown Free Exercise law into some doubt,<sup>10</sup> and unpacking the harassment exception problem will help clarify the changes, if any, to free exercise norms worked by *Hosanna-Tabor*.

This paper is thus designed to fill a longstanding gap in the relevant literature. Part I describes the contours of the ministerial exception, explains its constitutional provenance, and highlights the issues left open by the Supreme Court's sole encounter with the exception in *Hosanna-Tabor*. Part II addresses relevant developments in the law of sexual harassment, from the pioneering work of Professor Catherine MacKinnon,<sup>11</sup> through and including the Supreme Court's crucial decisions in *Meritor Bank FSB v. Vinson*,<sup>12</sup> *Harris v. Forklift Systems*,<sup>13</sup> *Burlington Industries v. Ellerth*,<sup>14</sup> and *Faragher v. City of Boca Raton*.<sup>15</sup> A central theme – crucial to the intersection between sexual harassment law and the ministerial exception -- in that development is the distinction between 1) claims of adverse job actions (firing, demotion, etc.) resulting from a legally wrongful attention to sex in the workplace, and 2) claims that involve a severe and pervasive hostile environment, independent of any adverse job action.

In Part III, #MeToo meets the ministerial exception. Part III explores the leading judicial opinions on the relationship between sexual harassment law and the exception. These include the germinal state court decisions in *Black v. Snyder*<sup>16</sup> and *McKelvey v. Pierce*,<sup>17</sup> and the path breaking 9<sup>th</sup> Circuit decisions in *Bollard v. California Province of the Society of Jesus*,<sup>18</sup> and *Elvig v. Calvin Presbyterian Church*.<sup>19</sup> In the law that has emerged, the ministerial exception bars adverse job action claims but does not bar hostile environment claims. That brief statement, however, masks the analytical complexities and constitutional concerns arising from the interplay between harassment law and the ministerial exception. These concerns include matters of discovery, remedies, and the substance of affirmative defenses to hostile environment claims.

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<sup>10</sup> In recent work, we discuss and cite the broad range of scholarly views on the ministerial exception. See Lupu & Tuttle, *Mysteries of Unanimity*, note \_\_\_ *supra*, at 1292-1314. Within those pages, see in particular the sources cited in note 157 (the “institutionalists”); note 171 (the “implied consent” theorists); note 197 (the associational freedom theorists); and note 225 (the feminist critics). Professor Nelson Tebbe’s recent book, *Religious Freedom in an Egalitarian Age* (Harv. U. Press 2017), places the ministerial exception squarely within a generic concept of associational freedom to choose leaders, available without regard to the association’s religious character. *Id.* at 80-97. The Court in *Hosanna-Tabor* explicitly rejected this as the basis for the ministerial exception. 565 U.S. at 189.

<sup>11</sup> Catherine MacKinnon, *Sexual Harassment of Working Women* (1979).

<sup>12</sup> 477 U.S. 57 (1986).

<sup>13</sup> 510 U.S. 17 (1993).

<sup>14</sup> 542 U.S. 742 (1998).

<sup>15</sup> 524 U.S. 775 (1998).

<sup>16</sup> 471 N.W. 2d 715 (Minn. 1991).

<sup>17</sup> 800 A. 2d 840 (N.J. 2002).

<sup>18</sup> 196 F.3d 940 (9<sup>th</sup> Cir. 1999).

<sup>19</sup> 375 F. 3d 951 (9<sup>th</sup> Cir. 2004), rehearing en banc denied, 397 F. 3d 790 (9<sup>th</sup> Cir. 2005).

Part IV applies our theoretical and doctrinal insights to the major questions raised by this interplay. We argue that the First Amendment should continue to bar adjudications that sexual harassment played an unlawful part in adverse job actions against clergy, and should bar remedial orders of reinstatement and compensatory front pay awards in all harassment cases. And we contend that the First Amendment's Religion Clauses should *not* bar either punitive or compensatory damage claims for pervasive, hostile environments based on sex. We unpack the particular constitutional questions that arise when religious institutions invoke the affirmative defenses available to employers in hostile environment cases. In short, we think that courts have made the correct opening moves in these cases, but that *Hosanna-Tabor* and the rise of the #MeToo movement invite new and more detailed consideration of the relevant questions.

We expect that our conclusions will not satisfy ardent proponents of church autonomy,<sup>20</sup> who would like full immunity for houses of worship in all litigation by clergy. Nor will our approach give much comfort to those who would eliminate or significantly confine the ministerial exception.<sup>21</sup> But our analysis should be a challenge – made explicit in Part IV -- to anyone who offers a robust theory, different from our own, in support of the ministerial exception. Whether the law should recognize a sexual harassment exception to the ministerial exception turns entirely on the deeper, often unstated premises underlying each.

## I. The Ministerial Exception

In *Hosanna-Tabor*,<sup>22</sup> decided in 2012, a unanimous Supreme Court held that the Religion Clauses of the First Amendment insulate religious institutions from liability for employment discrimination against members of the clergy. The case involved retaliation against a schoolteacher, Cheryl Perich, who had complained to the EEOC about alleged discrimination based on disability. In response to that complaint, her employer had fired her.

As the Court viewed the case, the Establishment Clause and the Free Exercise Clause operate together to create an affirmative defense to employment discrimination claims by a ministerial employee in a case that involved a judgment

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<sup>20</sup> For a long list of the scholars in this category, see Lupu & Tuttle, *Mystery of Unanimity*, note \_\_ *supra*, at 1296, note 157.

<sup>21</sup> See, e.g., Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *Fordham L. Rev.* 1965 (2007) (hereafter “Corbin, *Above the Law*”); Leslie Griffin, *The Sins of Hosanna-Tabor*, 88 *Ind. L.J.* 981 (2013); Joanne C. Brant, “Our Shield Belongs to the Lord”: Religious Employers and a Constitutional Right to Discriminate, 21 *Hastings Con. L. Q.* 275 (1994); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 *Corn. L. Rev.* 1049 (1966); Robin West, “Freedom of the Church and our Endangered Civil Rights: Exiting the Social Contract,” in Micah Schwartzman, Chad Flanders, & Zoe Robinson, *The Rise of Corporate Religious Liberty* (2016), at 399-418. See also Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 *Mercer L. Rev.* 405 (2013).

<sup>22</sup> 565 U.S. 171 (2012).

about her fitness for ministry.<sup>23</sup> Ms. Perich’s pedagogical duties, combined with her status as an ordained teacher, rendered her a ministerial employee as a matter of law.<sup>24</sup> And, in the eyes of her employer, her complaint to the EEOC had rendered her unfit for that position.

*Hosanna-Tabor* was unsurprising in some very basic respects. The proposition that the Religion Clauses insulate religious employers with respect to adverse employment actions against employees in clergy roles was hardly new in 2012. The Fifth Circuit started down this path in 1972, and over the next forty years every federal circuit Court of Appeals and many state Supreme Courts followed suit.<sup>25</sup> Indeed, no court in the U.S. ever disputed the basic constitutional idea behind what had come to be known as the “ministerial exception” to employment laws. Courts had applied the exception to every form of job discrimination forbidden by federal or state law, including that based on race, sex, national origin, age, disability, and sexual orientation, along with related employee protections such as wage and hour laws.<sup>26</sup> Moreover, the exception had not been limited to cases of overt exclusion from ministry, for example in the Roman Catholic Church, Islam, or Orthodox Judaism. It extended to all claims of discrimination, whether overt or covert.<sup>27</sup>

The issue most likely to be controverted in ministerial exception cases is whether the complainant’s duties fell under the exception.<sup>28</sup> This has been litigated case by case, and actual duties, not job titles or even ordained status, control the outcome. *Hosanna-Tabor*, in its close analysis of Cheryl Perich’s job responsibilities, confirmed that longstanding judicial approach.<sup>29</sup>

In other ways, however, *Hosanna-Tabor* was unsettling. The Court’s unanimity seemed difficult to explain. This was not a lawsuit by a woman seeking to be ordained as a Catholic priest, Orthodox Jewish rabbi, or Muslim imam. The case thus did not involve a paradigm situation of formal gender exclusion from the relevant job. Why should the ministerial exception protect houses of worship, holding themselves out as equal opportunity employers, from liability for failure to act accordingly? Along these lines, a number of feminist legal scholars had authored

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<sup>23</sup> Id. at 184.

<sup>24</sup> Id. at 191-94.

<sup>25</sup> We comprehensively cite the cases in Ira C. Lupu & Robert W. Tuttle, Courts, Clergy, and Congregations: Disputes Between Religious Institutions and their Leaders, 7 Georgetown J. I. & Pub. Pol’y 119 (2009).

<sup>26</sup> Id. at 127-128 and notes thereto.

<sup>27</sup> The litigated cases *all* involve claims of covert discrimination. Id. at 128.

<sup>28</sup> If the court finds the exception does not apply in the particular case, then other issues open up. This article does not explore questions involving whether particular jobs qualify for the exception. We discuss why such issues must remain open to adjudication in Lupu & Tuttle, The Mystery of Unanimity, note \_\_ *supra*, at 1278-1280.

<sup>29</sup> 565 U.S. at 191-94.

significant critiques of the ministerial exception,<sup>30</sup> and no one expected Justices Ginsburg, Sotomayor, or Kagan to embrace the exception's full sweep.

Moreover, in addition to allegations of discrimination, *Hosanna-Tabor* involved retaliation for a complaint to public authorities. The policies behind protecting such complaints extend to protecting others beyond the complainants themselves. And yet these policies quite literally received no weight in the Court's analysis.<sup>31</sup>

The mystery of unanimity was compounded further by the considerable tension between prevailing doctrines of the Free Exercise Clause, as generated by the decision in *Employment Division v. Smith*,<sup>32</sup> and the operation of the ministerial exception. *Smith* held that the Free Exercise Clause does not support exemptions to religion-neutral, generally applicable regulation of conduct – in *Smith*, the regulation of use and possession of peyote. The ministerial exception operates precisely to create a defense to generally applicable regulations of the employment relationship. Chief Justice Roberts' effort to distinguish *Hosanna-Tabor* from *Smith* on the ground that the former involved an “internal church decision affecting the faith and mission of the church itself” while the latter involved “outward physical acts” is not coherent.<sup>33</sup> Using peyote in sacraments is a decision about faith and mission, and a dismissal of an employee is an outward act with physical manifestations and consequences.

In an article published in early 2017, we set out to solve the mysteries of *Hosanna-Tabor*, including its unanimous character.<sup>34</sup> We cannot here summarize the entirety of a complex argument and its supporting authority, but its essence will be central to understanding our analysis of the sexual harassment questions considered in this article.

Building on an elaborate body of prior work, we argue that the ministerial exception is an application of a broader principle that the state (including its judges) may not decide purely ecclesiastical questions.<sup>35</sup> That broader principle has been

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<sup>30</sup> Caroline Corbin has the most extensive critique. Corbin, *Above the Law*, note \_\_ supra.

<sup>31</sup> The Court refused to balance interests in *Hosanna-Tabor*. See 565 U.S. at 196 (“When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.”). We discuss the constitutional significance of the refusal to balance interests in Lupu & Tuttle, *The Mystery of Unanimity*, note \_\_ supra, at 1275-78.

<sup>32</sup> 494 U.S. 872 (1990).

<sup>33</sup> 565 U.S. at 190. Although we think the ministerial exception is constitutionally sound, we are deep skeptics with respect to any general doctrine of Free Exercise exemptions from general law. See Ira C. Lupu & Robert W. Tuttle, *Secular Government, Religious People* (Eerdmans Pub. Co. 2014), at 177-210 (hereafter, Lupu & Tuttle, “*Secular Government*”); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 *Harv. J. L. & Gender* 35 (2015).

<sup>34</sup> Lupu & Tuttle, *The Mystery of Unanimity*, note \_\_ supra.

<sup>35</sup> *Id.* at 1280-1284. We develop this theory most fully in Lupu & Tuttle, *Secular Government*, note \_\_ supra, at 43-73. See also Lupu & Tuttle, *The Mystery of Unanimity*, note \_\_ supra, at 1280-1284;



applied in numerous decisions involving church property<sup>36</sup> or personnel.<sup>37</sup> It rests on both the Establishment Clause, which bars the state from exercising ecclesiastical functions, and the Free Exercise Clause, which reserves those functions for private decision makers. The *Hosanna-Tabor* opinion appropriately cites both Clauses in support of the ministerial exception,<sup>38</sup> though its explicit avoidance of interest balancing as a methodology demonstrates its tilt toward the Establishment Clause.<sup>39</sup>

*Hosanna-Tabor* deeply supports this approach in every relevant respect. In the context of claims that an employer has unlawfully discriminated against a person with ministerial responsibilities – that is, a person whose duties include teaching and communicating the faith – the prohibition on state decision of ecclesiastical questions translates into a bar on state evaluation of whether any particular person is fit for ministry. The bar operates both categorically (e.g., are women or men as a class fit for ministry?) and individually (i.e., is this particular person fit for ministry?). If faith communities have the constitutional right to impose a categorical bar, application of a weaker version of it in individual cases (i.e., does this conduct by a woman pastor render her unfit for ministry, even if it would not render a man unfit) is likewise constitutionally protected.

So understood, the ministerial exception fits comfortably within the category of ecclesiastical questions, off limits to the state. Decisions in the lower courts before *Hosanna-Tabor*, and continuing unbroken after *Hosanna-Tabor*, are thoroughly consistent with this understanding, and frequently confirm in explicit terms that ecclesiastical questions present the relevant constitutional boundary.<sup>40</sup> This proposition, long settled in First Amendment law, completely explains the unanimity in *Hosanna-Tabor*.

*Hosanna-Tabor* hints suggestively at an additional body of unsettled questions, quite connected to our topic in this paper. The EEOC, in opposing recognition of a constitutionally based ministerial exception to anti-discrimination norms, had argued in the Supreme Court that

“such an exception could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial . . . [and that] . . . the logic of the exception would confer on religious employers ‘unfettered discretion’ to violate employment

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Peter J. Smith & Robert W. Tuttle, Civil Procedure and the Ministerial Exception, 86 Ford. L. Rev \_\_\_, \_\_ (2018).

<sup>36</sup> See, e.g., *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

<sup>37</sup> See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)

<sup>38</sup> 565 U.S. at 184..

<sup>39</sup> Lupu & Tuttle, *The Mystery of Unanimity*, note \_\_ supra, at 1275-1278.

<sup>40</sup> We cite virtually all the relevant post *Hosanna-Tabor* decisions (2012-2017) in Lupu & Tuttle, *The Mystery of Unanimity*, note 4 supra, at 1287-1292.

laws by, for example, hiring children or aliens not authorized to work in the United States.”<sup>41</sup>

To this quite reasonable set of concerns about the ministerial exception’s slippery slope, the Court replied:

“The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.”<sup>42</sup>

As we explore in further detail in Part II, sexual harassment claims present a mixture of legal concerns. Unlike the typical ministerial exception case, which involves an adverse job action against a person in ministry, the questions raised by claims of pervasive and hostile work environment are not about the complainant’s fitness for the position. Instead, such claims focus on wrongful treatment of the complainant while in the job. *Hosanna-Tabor* thus leaves wide open the questions we are considering.

The *Hosanna-Tabor* opinion emphasized one additional point that runs through the decisions, canvassed in Part III, in which #MeToo meets the ministerial exception. To the argument that the church lacked religious justification for firing Ms. Perich, the Court replied:

“That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter “strictly ecclesiastical,” — . . . is the church’s alone. <sup>43</sup>

This focus on the “authority to select and control who will minister to the faithful” is central to the ministerial exception. In the context of an adverse job action, how outsiders to the religious community may perceive the reasons for the exercise of such “strictly ecclesiastical” authority is constitutionally irrelevant. When an employee complains of severe and persistent harassment, however, “strictly ecclesiastical” matters are rarely if ever presented. Parts III-IV take up in detail this distinction between types of harassment claims, and explore the potential relationship between “religious reasons” and claims of a pervasive, hostile environment based on sex.

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<sup>41</sup> 565 U.S. at 195.

<sup>42</sup> *Id.* at 196.

<sup>43</sup> *Id.* at 194-95 (citing *Kedroff*, 344 U. S., at 119).

## II. The Relevant Law of Sexual Harassment

The law of sexual harassment has developed considerably from Professor Catherine MacKinnon's path breaking work,<sup>44</sup> published in 1979, to its more recent refinements in the Supreme Court. The conduct that falls under the legal label of sexual harassment involves a variety of harms to its victims.<sup>45</sup> In some of its variations, the harm is strongly or entirely akin to that of physical sexual assault, prohibited in the criminal law and actionable in the law of torts. In other iterations, the harm is not criminal and perhaps not tortious in the common law sense, but it nevertheless involves the quite serious upset, demoralization, and interference with employment opportunity that follows from persistent and unwelcome sexual attention.<sup>46</sup> Sexual attention may begin with a veneer of positivity, as in the case of flirtation, flattery, and expression of sexual and/or romantic interest. But once a person shows unresponsiveness to that interest, the attention becomes objectively and subjectively unwelcome, and may transform into ridicule, shaming, and other forms of personal attack. When supervisors – as distinguished from co-workers – harass, the sexual attention may be associated with threats of job-related punishment or promises of job-related reward.

As the narrative below explains, all claims of sexual harassment on the job take one or both of two legal forms – they 1) lead to some kind of “adverse job action,” such as dismissal, demotion, unwanted transfer, denial of promotion, pay cut, etc.,<sup>47</sup> and/or 2) create a “persistent, hostile environment” on the basis of sex.<sup>48</sup> When the law of sexual harassment meets the ministerial exception, however, the distinction between hostile environment claims and adverse job action claims takes center stage. As Part III demonstrates, all adverse job action claims are barred by the ministerial exception, but persistent, hostile environment claims are not.

The Civil Rights Act of 1964 prohibits sex discrimination in employment, but sexual harassment was not recognized as a form of discrimination until several federal court decisions in the District of Columbia in the mid-1970's.<sup>49</sup> Building on

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<sup>44</sup> Catherine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale Univ. Press 1979) (hereafter cited as MacKinnon, *Sexual Harassment*).

<sup>45</sup> Men as well as women can be harassed, and the harasser may be of the same sex as the target. See *Oncale v/ Sundowner Offshore Services, Inc.*, 523 U.S. 775 (1998). Two of the decisions we highlight in Part III, *supra*, involve sexual harassment of males by other males.

<sup>46</sup> The harms may, but need not, align with those associated with the tort of intentional infliction of emotional distress. See *Harris v. Forklift Systems*, 510 U.S. 17, 21-23 (1993).

<sup>47</sup> See Barbara T. Lindemann & David D. Kadue, *Workplace Harassment Law* (2<sup>nd</sup> ed., BNA, 2012) (hereafter cited as *Lindemann & Kadue*), chap. 18, and cases collected.

<sup>48</sup> *Id.* at chap. 19 and cases collected.

<sup>49</sup> Both involved quid pro quo harassment. *Barnes v. Costle*, 561 F.2d 983 (D.C. Circuit 1977) (threat of discharge of a woman for refusal to have sex with supervisor violates Title VII); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) (refusal of promotion of woman for refusal to have sex with supervisor violates Title VII), *rev'd on other grounds*, 587 F.2d 1240 (D.C. Cir. 1978).

those decisions, Professor MacKinnon authored her pioneering work on the subject. She identified two primary forms of harassment. These include quid pro quo harassment, in which a supervisor makes sexual demands on an employee and conditions continued employment and/or its benefits on compliance with those demands;<sup>50</sup> and hostile environment harassment, in which women are subject to persistent insulting or degrading treatment that effectively alters their conditions of employment.<sup>51</sup>

In 1980, the EEOC issued guidelines that built on these early decisions and scholarship. The original guidelines, as summarized in the leading treatise on the subject, extended the concept of harassment to include “a sexually hostile environment, involving no tangible job detriment,”<sup>52</sup> as well as quid pro quo harassment. The Guidelines offered the view that unwelcome sexual conduct is actionable when it “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”<sup>53</sup>

The foundational efforts in support of a theory of sexual harassment as actionable under Title VII bore fruit in *Meritor Savings Bank v. Vinson*.<sup>54</sup> Mechelle Vinson allegedly had been subjected by her supervisor to demands for sex, and she testified that she had acceded to these demands on occasion. She also asserted that the supervisor had harassed her both physically and verbally over a period of several years. The supervisor denied all of these assertions. On appeal from a DC Circuit ruling in Vinson’s favor on several points, the Supreme Court affirmed the Circuit in some respects while reversing and remanding the case on a key question of employer liability for sexual harassment.<sup>55</sup> The Court agreed with the D.C. Circuit that 1) a plaintiff can demonstrate a violation of Title VII by showing a hostile and abusive environment based on sex, even if the employer has not taken an adverse job action against her;<sup>56</sup> 2) that her acceding to sex voluntarily is not a defense if she can show that the sexual attention from her supervisor was unwelcome, and that she acceded for fear of losing her job;<sup>57</sup> and 3) that vicarious employer liability in such a hostile environment case was not automatic, but rather would turn on the relevant “agency principles.”<sup>58</sup> The case was remanded for identification and application of those agency principles.

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<sup>50</sup> MacKinnon, *Sexual Harassment*, at 32-40.

<sup>51</sup> *Id.* at 40-47.

<sup>52</sup> Lindemann & Kadue, note \_\_ supra, at 1-13 (citing various sections of 29 C.F.R. sec. 1604.11).

<sup>53</sup> 29 C.F.R. sec. 1604.11(a)(3). The sexual harassment guidelines built upon analogous guidelines and concerns with respect to harassment based on race or national origin. Lindemann & Kadue, supra note \_\_, at 1-11 – 1-13.

<sup>54</sup> 477 U.S. 57 (1986).

<sup>55</sup> *Id.* at 73.

<sup>56</sup> *Id.* at 66-67.

<sup>57</sup> *Id.* at 68.

<sup>58</sup> *Id.* at 72.

*Meritor Bank* was a breakthrough decision in several respects. First, it affirmed the EEOC's articulation of the concept of a "pervasive, hostile environment" as actionable even in the absence of economic detriment from an adverse job action. In keeping with the importance of that distinction, the Court emphasized that standards of employer liability would be different in adverse job action cases than in pure hostile environment cases. In the former, the employer's legal responsibility for adverse job actions taken by its agents is vicarious and automatic.<sup>59</sup> In contrast, hostile environment cases present a different set of questions of employer responsibility.<sup>60</sup> As we will explain below, this distinction and the law that has emerged from it are of crucial importance in the cases that are the primary concern of this article.

Seven years later, the Supreme Court offered further definition of the elements of a sexual harassment claim in *Harris v. Forklift Systems*.<sup>61</sup> Teresa Harris was a manager at Forklift Systems, an equipment rental company. The record included findings that her supervisor, the company President, "often insulted her because of her gender and often made her the target of unwanted sexual innuendos."<sup>62</sup> The Court of Appeals had ruled against her sexual harassment claim on the ground that she had not demonstrated psychological injury from the mistreatment. In an opinion by Justice O'Connor, a unanimous Supreme Court rejected the requirement of psychological injury. Instead, the Court emphasized that a hostile environment is actionable if a reasonable person would find the environment hostile and the plaintiff herself experienced it that way.<sup>63</sup> The opinion further explained that:

whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.<sup>64</sup>

The *Harris* opinion thus reaffirmed the holding of *Meritor Bank* that pervasive hostile environments are actionable as sex discrimination under Title VII, even in the absence of an adverse job action. And it specified the considerations that lawyers, the EEOC, and lower courts should apply in appraising such claims –

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<sup>59</sup> *Id.* at 70-71.

<sup>60</sup> *Id.* at 71-72.

<sup>61</sup> 510 U.S. 17 (1993).

<sup>62</sup> *Id.* at 19.

<sup>63</sup> *Id.* at 21-22.

<sup>64</sup> *Id.* at 23.

the frequency and severity of the discriminatory conduct, understood both objectively (to a reasonable person) and subjectively by the complainant.<sup>65</sup>

After *Meritor Savings Bank* and *Harris*, there remained crucial questions of employer liability for the “pervasive, hostile environment” form of sexual harassment. As the Court explained in *Meritor Bank*, employers faced vicarious liability whenever harassment produces an adverse job action – the harasser and/or his allies within the firm without question act with the company’s authority in taking actions that produced material detriment to the target.<sup>66</sup> But *Meritor Bank* had left open the question of employer liability for a pervasive, hostile environment. The Court had offered only the limited guidance that such liability should depend on “agency principles,”<sup>67</sup> and *Harris* did not put such principles to any test, because the decision involved the company President, who clearly spoke for the firm.<sup>68</sup>

That guidance expanded dramatically in *Burlington Industries v. Ellerth*<sup>69</sup> and *Faragher v. City of Boca Raton*,<sup>70</sup> decided on the same day in 1998. In these companion decisions, the Court explained the content and operation of the relevant agency principles in the context of claims of a pervasive hostile environment based on sex. Kimberly Ellerth had been employed by Burlington Industries as a salesperson and had quit her job in the wake of unwelcome sexual attention from her supervisor. Ellerth brought her claim under the rubric of hostile environment, but the lower courts had identified a strain of quid pro quo harassment in the facts, and the Seventh Circuit (sitting en banc) had split widely on the relevant principles of employer liability.<sup>71</sup>

In an opinion for seven Justices in *Ellerth*,<sup>72</sup> Justice Kennedy clarified that the concept of quid pro quo harassment was useful as a way of characterizing certain sex discrimination claims, but was not dispositive on the relevant standard of employer liability. When a supervisor carries out a threat to dismiss or punish an employee who refuses sexual demands, the case involves an adverse job action for which the employer has vicarious liability.<sup>73</sup> When such a threat is not carried out,

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<sup>65</sup> *Id.* at 21-22.

<sup>66</sup> 477 U.S. at 70-71.

<sup>67</sup> *Id.* at 72.

<sup>68</sup> See *Faragher v. City of Boca Raton*, 524 U.S. 775, at 789-90 (“[Harris] was indisputably within that class of an employer organization’s officials who may be treated as the organization’s proxy.”)

<sup>69</sup> 524 U.S. 742 (1998).

<sup>70</sup> 524 U.S. 775 (1998).

<sup>71</sup> *Ellerth*, 524 U.S. at 750-51.

<sup>72</sup> Justices Thomas, joined by Justice Scalia, filed a dissenting opinion, asserting that employer liability for hostile environment harassment should depend on proof of employer negligence. 524 U.S. at 766-774.

<sup>73</sup> *Ellerth*, 524 U.S. at 760-61 (citing *Meritor* and “every Federal Court of Appeals to have considered the question . . .”). The Court in *Ellerth* explained further: “When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. A tangible employment action in most cases inflicts direct economic harm. As a general

however, the case involves a hostile environment, of which the quid pro quo threat is perhaps only a part.<sup>74</sup> In such cases, the question of employer liability is more complex.

The Court thus treated *Ellerth* as a hostile environment case, which assimilated it completely with *Faragher*, a straightforward hostile environment case involving a female lifeguard employed by the City. Beth Ann Faragher had worked part-time over five years as an ocean lifeguard. She and other female lifeguards had been subjected to repeated unwanted touching and persistent lewd comments by several of their on-site supervisors. Their complaints to the senior on-site supervisor had not been passed on to higher-up city officials or discussed with the offenders.

Justice Souter wrote for the same seven Justice majority in *Faragher*.<sup>75</sup> Unsurprisingly, on the question of employer liability for a pervasive, hostile environment based on sex, the opinions in *Faragher* and *Ellerth* present a unified viewpoint on the relevant principles of agency. The Court begins with the principle of agency law that a "master is subject to liability for the torts of his servants committed while acting in the scope of their employment."<sup>76</sup> Because most sexual harassment of employees is not in the service of the employer's business,<sup>77</sup> that principle does not support employer liability. In hostile environment cases, liability may rest on employer negligence (as in the obvious case where an employer hires a known serial harasser and gives him supervisory authority over female employees). More typically, however, as explained in both *Faragher* and *Ellerth*, the relevant agency principle imposes liability when the harasser is "aided in accomplishing the tort by the existence of the agency relation."<sup>78</sup>

As Justice Souter notes in *Faragher* and Justice Kennedy likewise in *Ellerth*, every act of supervisor harassment is aided by the agency relationship. The relationship provides the harasser with a pool of supervisees, and a mantle of authority under which he can threaten, belittle, humiliate, and proposition for sex

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proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury." *Id.* at 761-62.

<sup>74</sup> *Ellerth*, 524 U.S. at 753-54: "To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms [quid pro quo and hostile environment] are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. Because *Ellerth*'s claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct. "

<sup>75</sup> Justices Thomas and Scalia dissented. 524 U.S. at \_\_\_.

<sup>76</sup> *Faragher*, 524 U.S. at 793 (quoting Restatement of Agency, sec. 219(d)(1)).

<sup>77</sup> 524 U.S. at 793-94.

<sup>78</sup> *Id.* at \_\_\_ (citing Restatement of Agency, sec. 219(d)(2)); *Ellerth*, 524 U.S. at \_\_\_ (same).

any of the employees under his watch. Both opinions thus recognize, and discuss at considerable length, the tension between 1) the principle of no vicarious liability for torts outside the scope of employment and 2) a competing principle of employer liability for all torts committed by supervisors against supervisees.<sup>79</sup>

Both opinions resolve this tension with the creation of an affirmative defense, designed to facilitate the policies of Title VII as well as to reflect the relevant agency principles. Because this move in the law of sexual harassment is central to our analysis in Parts III-IV, it is worth quoting the entirety of the relevant passage from *Faragher*:

“In order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Burlington Industries, Inc. v. Ellerth*, . . . also decided today. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. **When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.**”<sup>80</sup>

The affirmative defense reflects foundational tort law principles as well as the antidiscrimination concerns of Title VII. Through the first portion of the defense – that the employer exercise reasonable care both to prevent, and to correct promptly, any sexually harassing behavior, the defense emphasizes the reduction of harm through precautions and amelioration. The availability of this defense creates strong incentives for employers to announce specific policies against sexual harassment by co-workers or supervisors; to train employees in the meaning and significance of sexual harassment; to have in place mechanisms of quick response to

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<sup>79</sup> *Faragher* at 793-805; *Ellerth* at 648-655.

<sup>80</sup> 524 U.S. at 807-808. For a comparable excerpt from *Ellerth*, see 524 U.S. at 655. In *Faragher*, Justice Souter added the following: “While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.” 524 U.S. at 807-808.



complaints; and to take swift action to discipline or dismiss perpetrators of harassment.<sup>81</sup>

The requirement of reasonable care does not, of course, require optimum steps to prevent and correct sexual harassment. As one commentator has noted, in the wake of *Ellerth* and *Faragher* the lower courts have been strongly inclined to find that employers have satisfied the defense when their policies on paper measure up, even though the operation of the policies leave room for real doubt about their efficacy.<sup>82</sup> One key concern about these complaint and correction policies is whether they permit harassment victims to safely report the offense through channels that do not involve the perpetrator. Fear of reprisals will discourage the reporting necessary to make a corrective policy effective.

The second step in the *Ellerth-Faragher* defense-- that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise – is an application of the basic tort law principle that potential victims should take reasonable steps to avoid or minimize harm. As with step one, however, the notion of reasonableness is doing substantial work. Fear of reprisal may be a significant impediment to reporting harassment. Although step two, as part of an affirmative defense, appears to place the burden of proof on an employer on the question of “unreasonab[e] fail[ure] to take advantage of any preventive or corrective opportunities provided by the employer,” in operation this step is likely to put the burden on an employee to explain exactly why she did not pursue those opportunities -- that is, if the employer’s response mechanisms are found to be reasonable, failure to pursue them will appear presumptively unreasonable.<sup>83</sup> In particular, courts will sometimes find a delay in reporting harassment, however understandable from the victim’s perspective in light of discomfort and fear of reprisal, to constitute unreasonable failure to take advantage of corrective mechanisms.<sup>84</sup>

Judicial evaluation of the reasonableness of employer processes raises significant constitutional questions when we turn to the analysis of religious organizations in Parts III-IV. The law of remedies for sexual harassment also plays an important part in the issues we analyze in the remainder of the article. The remedial law under Title VII includes compensatory damages, punitive damages in appropriate cases, and the equitable remedy of reinstatement in some cases of

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<sup>81</sup> For a detailed development of the connection between the affirmative defense and measures in the workplace that spur constructive engagement with role of women and minorities in the work force, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Colum. L. Rev.* 458 (2001).

<sup>82</sup> Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth & Faragher Affirmative Defense*, 13 *Colum. J. of Gender & Law* 197 (2004).

<sup>83</sup> Lawton, note \_\_ *supra*, at 242-257.

<sup>84</sup> *Id.* at 253-257 (citing cases).

wrongful dismissal.<sup>85</sup> When #MeToo meets the ministerial exception, reinstatement is constitutionally barred, as is front pay as a remedy in lieu of reinstatement. As we will explain, compensatory damages may be available in cases of a pervasive hostile environment, as are punitive damages in appropriate cases. Because claims for punitive damages are subject to a defense that the employer has made “good faith efforts to enforce an antidiscrimination policy,”<sup>86</sup> the constitutional questions raised by judicial evaluation of the personnel policies and practices of religious entities may at this stage too be put into play.

### III. #MeToo Meets the Ministerial Exception

The collision between harassment claims and the ministerial exception took some time to develop. Courts first applied the ministerial exception to anti-discrimination law in *McClure v. Salvation Army*<sup>87</sup> (1972), a ruling based on statutory grounds. At that time, the theory of sexual harassment as discrimination had not yet appeared in the law or commentary on Title VII. *Rayburn v. General Conference of Seventh Day Adventists*<sup>88</sup> (1985) represents the first square holding that the Religion Clauses of the First Amendment require a ministerial exception from non-discrimination law.

Over the next twenty years, state and federal courts decided a quartet of cases in which sexual harassment law collided with assertions of the ministerial exception. As the analysis below reveals, the first and fourth in the quartet both involve female assistant pastors who complained about sexual harassment by their immediate supervisor, a male pastor. The second and third were decided close in time to one another, and both involve claims by a male student for the priesthood that he was sexually harassed in a Catholic seminary. The last three in this quartet were decided soon after the Supreme Court’s creation of an affirmative defense to hostile environment claims in *Ellerth-Faragher*.

*The opening round.* *Black v. Snyder*<sup>89</sup> is the first appellate decision to find that the ministerial exception does not bar a sexual harassment claim by a member of the clergy. In 1989, Susan Black was hired as Associate Pastor at St. John’s Lutheran Church<sup>90</sup> in a suburb of Minneapolis. While still working at St. John’s in April 1990, Black filed a discrimination charge with the state Department of Human

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<sup>85</sup> The statutory provisions and case law that undergird the remedial regime in harassment cases are succinctly summarized in Lindemann & Kadue, note \_\_ supra, at pp. 33-1 – 33-37.

<sup>86</sup> *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 646 (1999). *Kolstad* appeared just one year after the decisions in *Ellerth* and *Faragher*.

<sup>87</sup> 460 F.2d 553 (5th Cir. 1972) (construing Title VII of the 1964 Civil Rights Act to exclude religious bodies, hiring for positions of religious significance, from the statutory prohibition on gender discrimination).

<sup>88</sup> 772 F.2d 1164 (4th Cir. 1985).

<sup>89</sup> 471 N.W. 2d 715 (Minn. 1991).

<sup>90</sup> St. John’s Lutheran Church is a congregation of the Evangelical Lutheran Church in America. *Id.* at XX.

Rights against her supervisor, Pastor William Snyder. Black alleged that Snyder had made unwelcome sexual advances, including 1) unwanted physical and sexual contact; 2) remarks by Snyder to third parties that he and Black were “lovers;” and 3) demands from Snyder that Black engage in companionship with him outside the workplace. Before complaining to the state agency, Black told members of the St. John’s Church council, the relevant church personnel committees, and representatives of the regional Lutheran Synod of her complaints against Snyder. The congregation and synod investigated but had taken no action.<sup>91</sup>

In the summer of 1990, the St. John’s congregation voted to dismiss Black. She then sued the congregation, synod, and Snyder on a variety of state law claims, including breach of contract, retaliation, wrongful termination, and sexual harassment in employment. The lower court dismissed all the claims against the institutional defendants on First Amendment grounds.

On appeal, the Minnesota Court of Appeals reversed with respect to the sexual harassment claim alone. Noting the U.S. Supreme Court’s then-recent decision in *Employment Division v. Smith*, the Minnesota Court rejected the church’s free exercise argument, because the state laws on which Black’s claims rested were generally applicable to employers, without regard to their religious character.<sup>92</sup>

The Court took far more seriously the church’s Establishment Clause-based argument that adjudicating Black’s claims would lead to excessive entanglement between the church and the state. As the Court summarized the relevant principle, “When claims involve “core” questions of church discipline and internal governance, . . . the inevitable danger of governmental entanglement precludes judicial review.”<sup>93</sup> Applying this principle, the Court concluded that most of Black’s claims against the Church, including defamation, wrongful discharge, and retaliation for filing a complaint with a government agency, would “require a review of the Church’s reasons for firing Black, an essentially ecclesiastical concern.”<sup>94</sup> Accordingly, the Establishment Clause barred those claims.

In sharp contrast, however, the Minnesota appellate court noted that Black’s claim of sex discrimination based on persistent, unwelcome sexual attention was based on pre-discharge conduct and was “unrelated to pastoral qualifications or issues of church doctrine.”<sup>95</sup> Moreover, Black sought money damages only, and was not asking for an order of reinstatement to her position. Accordingly, the court

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<sup>91</sup> The report of the allegations, church response, and procedural posture is at 471 N.W.2d at 717-718.

<sup>92</sup> *Id.* at 719.

<sup>93</sup> *Id.* at 720 (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)).

<sup>94</sup> *Id.* at 720.

<sup>95</sup> *Id.* at 721.

remanded the case to allow Ms. Black to proceed against the church with her hostile environment claim.<sup>96</sup>

In dissent, Judge Randall highlighted an issue that would later become central to the tension in sexual harassment cases against religious organizations.<sup>97</sup> In this dispute, he wrote, both the congregation and the synod had investigated Black's harassment claim and had decided not to exercise their powers of supervision and discipline.<sup>98</sup> Letting the case proceed would thus interfere with the church's freedom to decide whether to continue Snyder's service at St. John's, and if so, whether to transfer or dismiss Black.<sup>99</sup> "[W]e are restrained," he concluded, "by the establishment clause from interjecting government oversight into the ecclesiastical decision process on whether to discipline or remove a pastoral member."<sup>100</sup>

*Black v. Snyder* foreshadows perfectly the key issues in later cases involving sexual harassment claims by clergy. The opinion addresses the distinction between free exercise approaches (barely relevant) and establishment clause-based entanglement concerns (central); the distinction between adjudicating the wrongfulness of the discharge (forbidden) versus adjudicating the wrongfulness of the hostile environment (allowed); the distinction between equitable remedies like reinstatement or substitutes for it (forbidden) and damage remedies for the harms imposed by the hostile environment (allowed); and the permissibility of judging the legal adequacy of corrective mechanisms within the religious organization. The rest of the decisions in this quartet play out those themes.

*The seminary cases.* *Bollard v. California Province of Society of Jesus*<sup>101</sup> and *McKelvey v. Pierce*<sup>102</sup> involved former seminarians who had prepared for the Catholic priesthood over eight years and had abandoned their efforts shortly before the time of ordination. Decided just two years apart, the decisions present what *McKelvey* described as "striking similarities" in both the facts and the constitutional defenses offered by the defendant religious institutions. Both followed the trail blazed by *Black v. Snyder*, and recognized that compensatory damage claims for a sexually hostile environment are not barred by the First Amendment.

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<sup>96</sup> Id. (citing cases allowing enforcement against religious entities of laws concerning the regulation of buildings and child abuse). The Court also rejected the Church's state constitutional claim. Minnesota has a state constitutional regime that recognizes religious exemptions, but the Church's own anti-harassment policy undermined any claim that the harassment lawsuit burdened the Church's religious exercise. Id. at 721.

<sup>97</sup> Id. at 721-23.

<sup>98</sup> Id. at 722.

<sup>99</sup> Id. at 723.

<sup>100</sup> Id. The majority in *Black* did not directly answer this assertion.

<sup>101</sup> 196 F.3d 940 (9<sup>th</sup> Cir. 1999).

<sup>102</sup> 800 A. 2d 840 (N.J. 2002).

John Bollard became a Jesuit novice in 1988. He spent four years at a Jesuit high school,<sup>103</sup> and the next four years at the Jesuit School of Theology in Berkeley, California. His complaint alleged that beginning in 1990, and continuing through 1996,

“... various [Jesuit] superiors at these two institutions sent him pornographic material, made unwelcome sexual advances, and engaged him in inappropriate and unwelcome sexual discussions. Between mid-1995 and 1996, Bollard reported the harassment to superiors within the Jesuit order, but, so far as he knows, his reports prompted no corrective action. He alleges that the harassing conduct was so severe that he was forced to leave the Jesuit order in December 1996 before taking vows to become a priest.”<sup>104</sup>

Bollard filed federal and state administrative complaints, and eventually filed suit in federal court, where he brought claims against the California Province of the Society of Jesus (“the Jesuit Order”) under Title VII as well as various state law theories. The district court dismissed the suit on the ground that it was barred by the ministerial exception. On appeal, Judge Fletcher’s opinion for the panel reversed in part, and remanded in light of its conclusion that the First Amendment does not bar claims for damages based on a hostile environment.

The opinion analyzed what it perceived as the Free Exercise and Establishment Clause components of the ministerial exception. Unlike the Minnesota Court of Appeals in *Black v. Snyder*, the 9<sup>th</sup> Circuit panel did not treat *Employment Division v. Smith* as having erased the doctrine of free exercise exemptions in this context. Judge Fletcher, invoking the balancing test of *Sherbert v. Verner*, treated the Supreme Court’s line of cases on church authority over personnel as consistent with a doctrine of free exercise balancing.<sup>105</sup> For several reasons, however, he found the Jesuit Order’s arguments wanting. First, the suit did not interfere with the Order’s choice of priests. The Order wanted Bollard to remain, and he left of his own volition because of the harassment. Second, the Order did not embrace sexual harassment of seminarians as a method of training, nor did they justify on religious grounds their disciplinary inaction in response to Bollard’s complaints.<sup>106</sup> Accordingly, the Jesuit Order’s exercise of religion was not burdened by allowing civil actions in response to hostile environment harassment, and the Free Exercise Clause thus did not bar the lawsuit.

Judge Fletcher then turned to the Establishment Clause justifications for the

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<sup>103</sup> St. Ignatius College Preparatory School, see 196 F.3d at 944. Governor Jerry Brown is an alumnus. <https://www.siprep.org/page.cfm?p=5117>.

<sup>104</sup> Id. at 944.

<sup>105</sup> *Hosanna-Tabor* later clarified that the interest balancing mode of analysis under the free exercise clause is inapposite in ministerial exception cases. See Lupu & Tuttle, *The Mystery of Unanimity*, note \_\_\_ supra, at 1275-1278.

<sup>106</sup> 196 F. 3d at 947-48.

ministerial exception.<sup>107</sup> His opinion focused on the question of excessive entanglement between the state and a religious institution, and he divided that question into substantive and procedural components. Judge Fletcher rejected the argument that this case presented issues of substantive entanglement for precisely the same reason that he rejected the Jesuit Order's free exercise claim – that is, because the litigation did not implicate the Order's freedom to choose its priests.<sup>108</sup>

In its turn to procedural entanglement, the opinion focused on the central problems presented by the case. As the panel noted, without a substantive conflict about Bollard's fitness for the priesthood, the remaining statutory questions were whether Bollard had been exposed to a severe and pervasive hostile environment, and whether the Order could satisfy the elements of the *Ellerth-Faragher* affirmative defense. Both inquiries, the panel concluded, involved secular judgments about the content of the harassment and whether the Order had taken reasonable steps to prevent and correct it.<sup>109</sup>

Moreover, Bollard was not seeking equitable Title VII remedies, including reinstatement or any form of judicial monitoring of future employer conduct. Those remedies would unconstitutionally entangle the courts with a religious institution. Instead, he sought only the remedy of money damages for prior wrongdoing. If he prevailed on the merits, courts could provide that remedy without constitutional problems.<sup>110</sup>

*Bollard* very precisely extended the *Black v. Snyder* template – on substance, defenses, remedies, and the overarching constitutional questions -- into the context of harassment of seminarians in training for the clergy. Two years later, in *McKelvey v. Pierce*,<sup>111</sup> the New Jersey Supreme Court confronted a similar dispute, and proceeded in quite the same way.

After being accepted in 1985 as a candidate for the priesthood by the Diocese of Camden (N.J.). Christopher McKelvey began an eight-year journey through St. Pius X Seminary (1985-89) and St. Charles Borromeo Seminary (1989-93) near Philadelphia. McKelvey interned at various New Jersey parishes during his years at St. Charles, but he dropped out of the program in 1993, before being ordained. Based on theories of contract and tort, McKelvey sued the Diocese of Camden and

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<sup>107</sup> *Id.* at 948.

<sup>108</sup> *Id.* at 948-49. That the Order's free exercise and establishment clause arguments coincided in this way foreshadowed *Hosanna-Tabor's* analysis of the ministerial exception, which involves both clauses operating together. 565 U.S. at 184.

<sup>109</sup> In addition, the district court could control discovery to avoid constitutionally sensitive questions. 196 F.3d at 950.

<sup>110</sup> *Id.* at 950. The panel thus remanded the case, including Bollard's state law claims, for resolution in the district court. *Id.* To the best of our knowledge, the case then settled, as did all the cases in the quartet we are discussing in this part. Religious institutions, like most others, do not want to have public trials focused on the hostile sexual environment in their workplace.

<sup>111</sup> 800 A. 2d 840 (N.J. 2002).

various individual defendants. He alleged that the defendants and their employees:<sup>112</sup>

"fostered, tolerated, permitted and encouraged inappropriate sexual conduct which included, but was not limited to, persistent and frequent demands whereby plaintiff was subjected and exposed to unreasonable, unlawful, immoral homosexual and other deviant discussions and/or contact." The lower courts in New Jersey dismissed McKelvey's claims on the ground that they required a constitutionally impermissible inquiry into the existence and content of an implied contract between McKelvey and the Diocese.<sup>113</sup>

A unanimous New Jersey Supreme Court reversed. The Court noted that "the First Amendment 'clearly bars government from involving itself in purely ecclesiastic[al] questions, including . . . retention of . . . ministers.'"<sup>114</sup> After a lengthy and careful review of the leading decisions, including *Bollard*, under both the Free Exercise Clause and the Establishment Clause,<sup>115</sup> the Court synthesized the relevant legal principles. "Before barring a specific cause of action," the Court wrote, "a court first must analyze each element of every claim and determine whether adjudication would require the court to choose between 'competing religious visions,' or cause interference with a church's administrative prerogatives, including its core right to select, and govern the duties of, its ministers."<sup>116</sup> The court must also examine the requested remedies to see if they involve similar constitutional defects.<sup>117</sup> "If . . . the dispute can be resolved by the application of purely neutral principles of law and without impermissible government intrusion (e.g., where the church offers no religious-based justification for its actions and points to no internal governance rights that would actually be affected), there is no First Amendment shield to litigation."<sup>118</sup>

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<sup>112</sup> Id. at 845. The opinion includes considerably more detail about the persistent and hostile environment, which McKelvey alleged was inconsistent with various representations made by the Diocese about the atmosphere in an educational program aimed at training priests who would take a vow of celibacy. Id. at 845-46. McKelvey might never have brought this lawsuit but for a rather misguided letter from the Diocese, alerting him that his withdrawal from the training program rendered McKelvey indebted to the Diocese for over \$69K. Id. at 846. At that point, he filed his suit, asserting that the Diocese was in breach of an implied contract with him and that he therefore owed nothing.

<sup>113</sup> Id. at 845-47.

<sup>114</sup> Id. at 847, quoting *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, at 708-711 (1976).

<sup>115</sup> 800 A. 2d at 847-856. The Diocese relied only on the Establishment Clause, perhaps because church lawyers had learned from *Bollard* that Free Exercise defenses were likely to be met with an inquiry into whether sexual harassment was an intended part of the training of priests. The New Jersey Supreme Court also spent some time on what it referred to as the "Church Autonomy" doctrine, id. at though a close look at its analysis and the cases it discusses reveals that there is no such doctrine independent of the free exercise and establishment clauses. For more detailed discussion of why law recognizes no general concept of church autonomy, see Lupu & Tuttle, *The Mystery of Unanimity*, note \_\_supra, at 1296-1299.

<sup>116</sup> 800 A. 2d at 856.

<sup>117</sup> Id.

<sup>118</sup> Id.

Applying these principles to McKelvey's lawsuit against the Diocese of Camden, the Court reversed and remanded the case for further proceedings. It instructed the lower court to review each claim – including implied contract, intentional infliction of emotional distress, and breach of fiduciary duty – to see if adjudication would interfere with church administration or interpretation of religious principles, such as the meaning of a vow of celibacy.<sup>119</sup> “McKelvey can attempt to prove that he was sexually harassed by defendants, resulting in his leaving the seminary before he could be considered for ordination.”<sup>120</sup>

*McKelvey* and *Bollard* thus line up almost perfectly on both facts and constitutional analysis. Both involve seminarians, harassed by their supervisors, leading to suits against religious entities. Both decisions reason that religious entities have no blanket immunity from litigation arising from a sexually hostile environment, whether the suit is based on Title VII or a mix of state common law claims. Instead, church immunities must be evaluated in light of the relevant elements of the cause of action, and the potential in each case for interference with selection of clergy or conflict with religious teaching. Finally, both decisions echo *Black v. Snyder* in its analysis of available remedies.

3. *Elvig v. Calvin Presbyterian Church*.<sup>121</sup> *Elvig*, which factually resembles *Black v. Snyder*, is the final and most provocative decision in the quartet. By the time the 9<sup>th</sup> Circuit's processes in *Elvig* had concluded, several judges had expressed serious disagreement about the soundness of the harassment exception to the ministerial exception. Because the affirmative defense in *Ellerth* and *Faragher* had emerged shortly before *Elvig*, the case offered the 9<sup>th</sup> Circuit an important opportunity to explore the constitutional implications of that defense. Is it possible for courts to evaluate the reasonableness of mechanisms for prevention and correction of harassment without intruding on internal governance of a religious institution? Moreover, several judges identified a potential constitutional problem if the alleged harassment involved persistent mention of religious attitudes about sexual relationships and the role of women.

The facts of *Elvig* appear to be simple. Monica McDowell Elvig was an ordained Presbyterian minister. Calvin Presbyterian Church (located in a Seattle suburb) hired her as an Associate Pastor, a position in which she served from December 2000 until December 2001. Elvig's complaint in federal district court alleged the following: Senior Pastor William Ackles harassed her sexually and

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<sup>119</sup> Id. at 859.

<sup>120</sup> Id. at 858. McKelvey could not seek ordination as a remedy, but he “might, without offending First Amendment principles, seek money damages for the benefit defendants received from his free or reduced cost labor as an ‘intern’ in various diocesan churches and, based on Auxiliary Bishop Schad's letter, seek an order prohibiting defendants from attempting to recoup the \$ 69,000 tuition, book and fee costs.” Id. at 859. This case did not arise under Title VII, probably because of the statute of limitations.

<sup>121</sup> 375 F. 3d 951 (9<sup>th</sup> Cir. 2004), *reh'g en banc denied*, 397 F. 3d 790 (9<sup>th</sup> Cir. 2005).



created a hostile environment.<sup>122</sup> When Elvig sought assistance from church authorities, they investigated but did nothing to stop the harassment. When Elvig complained in October 2001 to the EEOC, Ackles retaliated by stepping up the harassment. In December 2001, the church first put her on unpaid leave, and then terminated her employment. Later that month, the Presbytery decided that she was not qualified to seek employment as a Presbyterian minister anywhere in the United States.<sup>123</sup>

Her complaint asserted violations of Title VII in the form of sexual harassment and retaliatory harassment, as well as related state law claims. She sought damages for the harassment as well as equitable remedies, including an order granting her the right to seek pastoral employment at other Presbyterian churches. The district court dismissed the complaint as barred by the ministerial exception.

In an opinion for a divided panel of the 9<sup>th</sup> Circuit, Judge Fisher reversed with respect to the claims for damages arising from a hostile environment and from retaliatory harassment. The opinion invokes *Bollard* and proceeds identically.<sup>124</sup> The court may not review any adverse job action taken by the church against Elvig. Accordingly, the church's decision to suspend her without pay, terminate her employment, and ultimately strike her from the roster of Presbyterian ministers are all protected by the ministerial exception.<sup>125</sup> In contrast, she may on remand attempt to prove that Pastor Ackles sexually harassed her, and that the harassment increased in retaliation for her complaints to church authorities and the EEOC. The court ruled that her remedies must be limited to tort-type damages arising from those wrongs, and may not include reinstatement or any damages for lost pay after the date of termination.<sup>126</sup>

The most controversial elements of *Elvig* arise from the defenses the church may offer to harassment claims. First, the church may assert that the harassment was a product of its religious teaching. *Bollard* said likewise, but *Bollard* involved homosexual harassment in a seminary, where an avowed atmosphere of celibacy made such a defense completely unlikely. The context of *Elvig* seems quite different, and at least raised the possibility – however remote -- of some religious justification. Second, the church may assert the *Ellerth-Faragher* affirmative defense that it had in

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<sup>122</sup> The particulars of the complaint are thin. As recited in the dissent to the panel decision, “[t]he conduct claimed to be actionable involved winking, allegedly undressing Elvig with his eyes, and other forms of unwelcome verbal attention which she interpreted as harassing. Elvig did not succumb to Rev. Ackles alleged harassment, and she has not offered any allegation that somehow her job was in jeopardy if she did not do so.” 375 F. 3d at 971 (Trott, J., dissenting).

<sup>123</sup> “The Presbytery subsequently notified Elvig that its Committee on Ministry had decided against permitting Elvig to circulate her church resume, or ‘personal information form,’ effectively preventing her from acquiring other pastoral employment in any Presbyterian church in the United States.” 375 F.3d at 954.

<sup>124</sup> 375 F.3d at 955-57.

<sup>125</sup> 375 F.3d at 958.

<sup>126</sup> Id. at 966-967.

place reasonable mechanisms to prevent and correct the harassment, and that Pastor Elvig unreasonably failed to avail herself of those mechanisms. The inquiry into this defense, says the panel opinion, must be limited to secular concerns.

The possibility of judicial intrusion on the substance of religious teaching, and on the internal governance of religious institutions, plays out in other opinions that make up the *Elvig* suite. Dissenting from the panel opinion,<sup>127</sup> Judge Trott expressed his concern that *Bollard* had been wrongly decided.<sup>128</sup> The dissent noted that Pastor Elvig had taken a vow to be “governed by our Church’s polity, and to be guided by its discipline.”<sup>129</sup> Digging more deeply than Judge Fisher into the record of proceedings in the district court, Judge Trott described Elvig’s internal complaint, and the responsive mechanisms provided by the Calvin Presbyterian Church and the Presbytery with which Calvin is associated. These included a response team from within the church, followed by the appointment of an Investigating Committee, all as prescribed by the Church’s Book of Order. The final step in her review process involved a petition to the Permanent Judicial Commission of the Presbytery, which (after *de novo* review) affirmed the decision of the church’s Investigating Committee to take no action against Pastor Ackles.<sup>130</sup>

This inquiry into Elvig’s pastoral vows and the church’s responsive mechanism led Judge Trott to conclude that the ministerial exception should bar all aspects of her sexual harassment claims. Judge Trott noted that Elvig’s lawsuit was itself a breach of her vows. And it would be impossible, he argued, for courts to evaluate the secular reasonableness of the responsive mechanisms. The case thus presented deep risks of substantive and procedural entanglement between the court and the church.<sup>131</sup> *Bollard*, he wrote, was distinguishable because the plaintiff was a novitiate and not an ordained priest, had not taken his final vows to accept church discipline and order, and been offered no internal procedure. If *Bollard* was not distinguishable, Trott concluded, it was wrong.

The Church defendants petitioned for *en banc* review in the 9<sup>th</sup> Circuit. The Circuit denied the petition, but the denial produced three dissents, representing the

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<sup>127</sup> Judge Gould concurred briefly in the panel opinion, but asserted that he did so in light of *Bollard*, about which he entertained “misgivings.” *Id.* at 970 (Gould, J., concurring).

<sup>128</sup> *Id.* (Trott, J., dissenting).

<sup>129</sup> *Id.* (Trott, J., dissenting, citing the Presbyterian *Book of Order*).

<sup>130</sup> *Id.* at 971. Judge Trott also wrote that the church had offered repeatedly to mediate between Elvig and Ackles, but that Elvig had refused.

<sup>131</sup> In a separate action by Elvig against Ackles and the institutional religious defendants, the state courts in Washington gave summary judgment for the defendants on the ground that the case could not be adjudicated without second guessing church doctrine and governance. *Elvig v. Ackles*, 123 Wn. App. 491, 98 P.3d 524 (Wa. 2004). Although the issues in the state court proceeding were similar, they involved state law claims and did not involve the *Ellerth-Faragher* affirmative defense. Moreover, the state proceeding had reached the summary judgment stage, while the federal case had proceeded entirely on motions to dismiss, in which allegations had to be taken as true.

views of six judges. In the most prominent dissent, Judge Kleinfeld<sup>132</sup> rejected the distinction between adverse job action claims and hostile environment claims. Building on Judge Trott's panel dissent, Kleinfeld insisted that supervision of clergy was as important to the church's constitutional freedom as hiring and firing, and that adjudication of hostile environment claims could affect the structure of ecclesiastical supervision.<sup>133</sup> He argued that the constitution barred evaluation of internal church procedures offered to satisfy the affirmative defense in hostile environment cases.<sup>134</sup> Pastor Elvig had taken vows to be bound by church procedures, and Kleinfeld argued, courts should not aid the pastor's attempt to circumvent her vows. In addition, Kleinfeld wrote, many religions teach particular views on sexuality and the role of women, so the content of the harassment may have included condemnation of what Pastor Ackles saw as sinful conduct.<sup>135</sup>

Judges Fletcher and Kozinski filed concurrences in the denial of rehearing. Both responded directly to the dissenters' concerns. Judge Fletcher,<sup>136</sup> who had authored *Bollard*, insisted that *Elvig* was not materially different, and that both decisions were correct. Both decisions had taken pains to restrict the courts to secular inquiries into harassment and affirmative defenses, and to restrict remedies and discovery in light of the ministerial exception. Judge Fletcher explained that hostile environment cases are essentially tort suits about the injury from harassment itself. The constitution does not bar tort suits against the negligent employers of clergy who sexually abuse minors, so hostile sexual environment suits should be similarly allowed.<sup>137</sup>

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<sup>132</sup> 397 F.3d at 798–806 (Kleinfeld, joined by O'Scannlain, Callahan, and Bea, JJ., dissenting from denial of rehearing).

<sup>133</sup> At least one post-*Hosanna Tabor* decision seems to agree with Judge Kleinfeld's concerns. See *Preece v. Covenant Presbyterian Church*, 2015 U.S. Dist. LEXIS 52751, \*17-\*19 (D. Neb. 2015) (holding that ministerial employee may not bring Title VII claim for sexual harassment because judicial inquiry into investigation of alleged conduct necessarily implicates ecclesiastical judgments). Kleinfeld's concerns are also reflected in the Missouri Supreme Court's approach to sexual misconduct claims against churches. See *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997) (plaintiff in tort action for failure to supervise clergy must prove that religious institution "intentionally" failed to provide appropriate supervision); *Weaver v. African Methodist Episcopal Church, Inc., et al.*, 54 S.W.3d 575 (Mo. App. 2001) (applying *Gibson* to claim of sexual abuse brought by ministerial employee).

<sup>134</sup> Two separate dissents were filed. Judge Gould agreed in a separate dissent that the affirmative defenses were constitutionally problematic in cases involving religious institutions as employers. 397 F.3d at 806-07. In yet a third dissent, Judge Bea elaborated on that theme, arguing that adjudication of the affirmative defense would require intrusive discovery of prior cases within the church, inquiry into the composition of the Investigating Committee, and the reasonableness of the Committee's conclusion about whether Ackles had harassed Elvig. *Id.* at 807-810.

<sup>135</sup> Nothing in the record supported this speculation.

<sup>136</sup> *Id.* at 790-95.

<sup>137</sup> *Id.* at 792, 795.

Judge Kozinski's concurrence elaborated on these themes.<sup>138</sup> Judge Kleinfeld's concern about potential interference with church governance proves too much, Kozinski wrote. A sexual harassment claim under Title VII by a non-minister, alleging harassment by a minister, would frequently require inquiry into the reasonableness of the church's discipline and response mechanisms. Yet such a suit would not be barred by the ministerial exception, because the plaintiff was not a minister.

Since *Elvig*, one federal appellate court<sup>139</sup> and one federal district court<sup>140</sup> have adopted the view, contrary to the quartet, that the ministerial exception bars hostile sexual environment lawsuits. The appellate opinion asserts, without analysis, that Judge Kleinfeld's concerns in *Elvig* are well-taken.<sup>141</sup> In all other cases we have found, the principles announced in the quartet have been explicitly followed.<sup>142</sup> *Elvig* thus represents the last major word on the tension between statutory sexual harassment claims and the constitutionally based ministerial exception, but the fundamental questions remain unsettled. The clashing opinions in *Elvig* throw into sharp relief all of the issues raised by that tension, and *Hosanna-Tabor* invites a fresh look at them. The #MeToo moment seems a most appropriate time to take that look.

#### **IV. Reconciling the Law of Sexual Harassment with the Ministerial Exception**

As noted in Part I, our longstanding defense of the ministerial exception focuses on the constitutional impermissibility of adjudication of ecclesiastical questions, rather than any wider claim of church autonomy. The principles enunciated in the controlling opinions in the hostile environment quartet fit

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<sup>138</sup> Id. at 795-98. We ignore here the colloquy, ultimately more tiresome than clever, between Kozinski and Kleinfeld over the aptness of the analogy to "Murder in the Cathedral." Compare id. at 798-99 (Kleinfeld) id. at 795-96 (Kozinski).

<sup>139</sup> *Skycrczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (8<sup>th</sup> Cir. 2010). Ms. Skycrczak was the Director of Religious Formation for the Diocese. The court ruled that her position was indeed ministerial, and that the Constitution barred her claims for age and sex discrimination. The causes of action included an assertion of hostile environment, though the court mentions no details of that claim. Without engaging the issues that separate the judges in the 9<sup>th</sup> Circuit, the 8<sup>th</sup> Circuit panel cast its lot with Judge Kleinfeld's *Elvig* opinion, in which he dissented from the denial of rehearing en banc. Id. at 1244-1245.

<sup>140</sup> *Preece v. Covenant Presbyterian Church*, 2015 U.S. Dist. LEXIS 52751, \*17-\*19 (D. Neb. 2015) (holding that ministerial employee may not bring Title VII claim for sexual harassment because judicial inquiry into investigation of alleged conduct necessarily implicates ecclesiastical judgments).

<sup>141</sup> *Skycrczak*, 611 F.3d at 1244-1245 ("We are . . . persuaded that [the Bollard-Elvig] . . . approach could, as Judge Kleinfeld argued . . . , infringe on a church's "right to select, manage, and discipline [its] clergy free from government control and scrutiny" by influencing it to employ ministers that lower its exposure to liability rather than those that best "further [its] religious objective[s].")

<sup>142</sup> See *Bohnert v. Roman Catholic Archbishop of San Francisco*, 136 F. Supp. 3d 1094, 1114-1116 (ND Cal. 2015); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1003-1007 (D. Kansas 2004); *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171 (Md. 2011), *cert denied*, 566 U.S. 937 (2012).

perfectly with our account. The constitutional concerns raised in some of the dissenting opinions in the quartet, however, deserve deeper exploration.

The issues highlighted in the quartet include 1) whether, for purposes of the ministerial exception, adverse job actions cases are constitutionally different from cases involving severe and pervasive hostile environments; 2) whether a hostile environment can be legally excused by religious teaching, on matters of sexuality or otherwise; 3) whether adjudication of the *Ellerth-Faragher* affirmative defense to hostile environment actions leads, at least in some cases, to excessive entanglement with the governance of religious institutions; 4) whether the scope of discovery must be limited in hostile environment cases against religious entities; and 5) whether remedies in hostile environment cases against religious entities must be limited to tort-type damages arising from the harassment itself. We consider these in turn.

*The distinction between adverse job action cases and hostile environment cases.* In agreement with the quartet, we believe that the distinction between adverse job action cases and hostile environment cases reflects a constitutionally necessary approach.<sup>143</sup> It is useful to begin the analysis by focusing on the harms from the varieties of sexual harassment.<sup>144</sup> Unwelcome and persistent sexual attention will always be stressful, sometimes extremely so. In some circumstances, that stress is aggravated by threats of violence, emotional or physical.

At work, if the unwanted attention is from a co-worker, the target is captive to the stress, sometimes throughout the workday. If the harassment is from a supervisor, the stress is aggravated by the danger of an adverse job action – outright dismissal, denial of promotion, transfer of location, reduction in hours or pay, loss of significant responsibility, among others. When those threats are added to the mix,

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<sup>143</sup> Professor Levinson's work concurs with the results in the quartet, but her work takes *Hosanna-Tabor* as a starting point and advocates limiting it, without probing deeply into its constitutional underpinnings. Rosalie Berger Levinson, *Gender Equality vs. Religious Autonomy: Suing Religious Employers for Sexual Harassment after Hosanna-Tabor*, XI Stan. J. C.R. C.L. 89 (2015) (hereafter Levinson).

<sup>144</sup> The #MeToo movement has produced an outpouring of impressive and powerful writing by women about the harms of sexual harassment. See, e.g., Jia Tolentino *How Men like Harvey Weinstein Implicate their Victims in Their Acts*, available at <https://www.newyorker.com/culture/jia-tolentino/how-men-like-harvey-weinstein-implicate-their-victims-in-their-acts>; Rebecca Traister, *This Moment Isn't (Just) About Sex. It's Really About Work*, *The Cut*, Dec. 10, 2017, available at <https://www.thecut.com/2017/12/rebecca-traister-this-moment-isnt-just-about-sex.html>; Lupita Nyong'o, "Speaking Out About Harvey Weinstein," *N.Y. Times*, Oct. 19, 2017, available here: <https://www.nytimes.com/2017/10/19/opinion/lupita-nyongo-harvey-weinstein.html>; Rebecca Carroll, *My Experience at Charlie Rose Went Beyond Sexism*, *Esquire*, Dec. 4, 2017, available here: <https://www.esquire.com/entertainment/tv/a13978884/charlie-rose-sexual-harassment-accuser-story/>; Tom Bartlett & Nell Gluckman, "She Left Harvard. He Got to Stay," *Chronicle of Higher Ed.*, Feb. 27, 2018, available here: <https://www.chronicle.com/interactives/harvard-harassment>; Rebecca Solnit on the #MeToo Backlash, Feb. 12, 2018, available here: <https://lithub.com/rebecca-solnit-on-the-metoo-backlash/>.

the stress of unwanted sexual attention is compounded by economic anxiety, which may extend beyond immediate job loss to the prospect of serious career derailment.<sup>145</sup>

In a context without countervailing constitutional concerns, legal redress for all of these harms would be available. Feminist critics of the ministerial exception argue that the exception protects religious entities against appropriate imposition of liability, and thereby facilitates harm to victims of discrimination, including harassment victims.<sup>146</sup>

As we have explained elsewhere, however, the critics have rarely come to grips with the chasm at the center of their critique. If courts eliminated the ministerial exception, those faiths with overt, theologically grounded exclusion of women from ministry would be forced by law to open the ranks of clergy. Even the most ardent opponents of the exception seem to shrink at the prospect of this degree of state coercion of faith communities.<sup>147</sup>

If the ministerial exception retains its legal status and force – and a unanimous Supreme Court decision in 2012 makes that highly likely – sensitive constitutional decision-making must find the best way to reconcile it with the law of sexual harassment. The principles reflected in the quartet represent a good start in that direction. The baseline for measuring the adequacy of sexual harassment law in cases brought by clergy should not be the law with the ministerial exception removed. Rather, the baseline should be the otherwise robust scope of the exception as delineated in *Hosanna-Tabor*. Against that backdrop, the sexual harassment exception – allowing for hostile environment claims -- to the ministerial exception reinforces the limited scope of ecclesiastical immunity.

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<sup>145</sup> The story of Judge Alex Kozinski's former clerk, Heidi Bond, is a powerful example. After her year in Kozinski's chambers, Ms. Bond experienced emotional difficulties that ultimately led her to abandon a highly promising career in the law. See Matt Zapotosky, Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct, Washington Post, Dec. 8, 2017, available here: [https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef\\_story.html?utm\\_term=.15a2b5f39d53](https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.15a2b5f39d53). For a first person account of Kozinski's treatment of women, see Dahlia Lithwick, "He Made Us All Victims and Accomplices," Slate, Dec. 2017, available at: [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/12/judge\\_alex\\_kozinski\\_made\\_us\\_all\\_victims\\_and\\_accomplices.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/12/judge_alex_kozinski_made_us_all_victims_and_accomplices.html). For an eloquent comment on the type of career-shattering harm suffered by Ms. Bond, see Amanda Taub, "The #MeToo Moment: How One Harasser can Rob a Generation of Women," N.Y. Times, Dec. 14, 2017, available at: [https://www.nytimes.com/2017/12/14/us/how-one-harasser-can-rob-a-generation-of-women.html?\\_r=0](https://www.nytimes.com/2017/12/14/us/how-one-harasser-can-rob-a-generation-of-women.html?_r=0).

<sup>146</sup> Corbin, *Above the Law*, note \_\_ supra, at 2015; Levinson, note \_\_ supra, at 114-115.

<sup>147</sup> Professor Corbin steers around the question, see Corbin, *Above the Law*, note \_\_ supra at 2014; 2029-31, as does Professor Griffin, see *The Sins of Hosanna-Tabor*, note \_\_ supra, at 1015-16. We engage pointedly with this and other aspects of the anti-ministerial exception position in Lupu & Tuttle, *The Mystery of Unanimity*, note \_\_ supra, at 1283-84; and 1310-1314.

As Judge Fletcher suggested in *Bollard*, the harms of harassment fall into more than one traditional legal category. The harms of adverse job actions involve primarily lost opportunity. The principles and remedies of contract law seem most appropriate to dealing with such losses. In contrast, the harms arising from a severe and pervasive hostile environment involve interests in dignity, psychic wellbeing, and physical security typically protected by the law of torts.

The point is not that the tort-style harms are somehow worse than the contract-style harms. Instead, the appeal to tort law principles reflects longstanding constitutional norms about the limits of religious freedom. Religious communities are free to define their own criteria for ministry, in the same way they are free to define the appropriate recipients of their blessings and sacraments. But they are not similarly free, without explicit consent, to act criminally or tortiously in ways that violate the bodies, dignity, and psychic wellbeing of their members and employees.

This is the line that the decisions in the quartet have drawn, reflected in the distinction between adverse employment action cases – barred by the Religion Clauses of the First Amendment – and hostile environment cases. It fits precisely with our constitutional explication of the ministerial exception. We have argued our basic position at length elsewhere,<sup>148</sup> but it seems appropriate here to reassert its central premises. Religious institutions are subject to law. When they act in ways that are fully analogous to secular entities, they are subject to regulation by the state. Accordingly, they must answer as secular entities do for torts committed by their agents.<sup>149</sup>

What appropriately separates church from state are the set of activities and concerns that are religiously distinctive. Faith communities develop principles about the relationship between humans and a divine order, and practices associated with those principles. In sharp contrast, our constitutional norms bar the government from promoting worship of a divine entity, or teaching a theological view of the world.<sup>150</sup>

This cleavage between secular and sacred explains a great deal of the law of the Religion Clauses in general, including a long line of decisions about church property and ecclesiastical personnel.<sup>151</sup> The ministerial exception does not derive

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<sup>148</sup> Ira C. Lupu & Robert W. Tuttle, *Secular Government*, note \_\_ supra; Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and their Leaders*, 7 *Georgetown J. l. & Pub. Pol'y* 119 (2009); Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 *Vill. L. Rev.* 37 (2002); Lupu & Tuttle, *The Mystery of Unanimity*, note \_\_ supra, at 1280-1284.

<sup>149</sup> See, e.g., *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 777-785 (Okla. 1989) (church and its leaders may be held liable for defamatory statements about former member, because any qualified privilege they may have held to speak in church about her conduct ended when the member gave notice of her withdrawal from the church.)

<sup>150</sup> Lupu & Tuttle, *Secular Government, Religious People*, note \_\_ supra, chap. 1

<sup>151</sup> *Id.* at chap. 2. For examples of judicial abstention in cases involving strictly ecclesiastical questions, see *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (church personnel);

from any general immunity of religious employers from civil law governing the employment relationship. These employers must comply with workplace safety laws, ordinary contract principles, and, with respect to non-ministerial employees, prohibitions on employment discrimination based on race, national origin, or sex. The ministerial exception applies only when such prohibitions conflict with the authority to decide who is fit to communicate the faith.

In the context of sexual harassment, the distinction between adverse job action cases and hostile environment cases maps perfectly onto the distinction between ecclesiastical questions and secular questions. When religious entities transfer, demote, fire, or otherwise alter the assignment of a minister, they are expressing an institutional view of whether that person is suited to a particular clerical role. It is constitutionally irrelevant whether the unsuitability is a product of substandard skills, or inability to get along with a sexually aggressive senior pastor. Of course, within a well functioning faith community, complaints of sexual harassment and discrimination will be taken seriously, and obnoxious behavior by supervising clergy will be dealt with quickly and appropriately. However, the state may not second guess a religious community's decision about the hiring, firing, or reassignment of a minister.

In contrast, the presence of a persistent hostile environment -- whether it affects clergy, lay employees, or both -- can be remedied through recognition of a right of action for the environmental harms. This does not involve the state in dictating the status of particular members of the clergy. It does involve imposing liability for the tortious harms that religious communities may inflict on those within their employ.

In an analogous context, courts have long recognized that religious entities may be liable for negligent supervision of clergy who abuse children or other vulnerable persons.<sup>152</sup> Breaches of that duty of care can lead to imposition of substantial damages, both compensatory and punitive. Courts may not order the expulsion of persons from ministry,<sup>153</sup> but they can and do impose liability on religious employers that fail to protect future victims from misbehaving clergy.

*Religious doctrine and sexual harassment.* May religious teaching justify a severe and pervasive hostile environment? This is a question initially raised by

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Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (church property). With respect to the property cases, see generally Kent Greenawalt, Hands Off! Civil Court Involvement in Conflicts Over Religious Property, 98 Colum. L. Rev. 1843 (1998).

<sup>152</sup> In *Bollard*, Judge Fletcher cites several of the leading decisions imposing such liability. 196 F. 3d at 948. There are many more such decisions. See generally Ira C. Lupu & Robert W. Tuttle, Sexual Misconduct and Ecclesiastical Immunity, 2004 Brigham Young University Law Review 1789.

<sup>153</sup> Courts do not permit suits for negligent ordination. We cite the leading decisions on this point in *id.* at 1846, nn. 224-227.



Judge Fletcher in *Bollard*, when he suggested that religious doctrine may be relevant to a sexual harassment suit. His opinion pointed out that:<sup>154</sup>

“The Jesuits do not offer a religious justification for the harassment Bollard alleges; indeed, they condemn it as inconsistent with their values and beliefs. There is thus no danger that, by allowing this suit to proceed, we will thrust the secular courts into the constitutionally untenable position of passing judgment on questions of religious faith or doctrine. The Jesuits' disavowal of the harassment also reassures us that application of Title VII in this context will have no significant impact on their religious beliefs or doctrines.”

Along the same lines, Judge Kleinfeld's *Elvig* opinion asserted the possibility that pervasive and severe harassment might in some instances be the product of religious teaching:<sup>155</sup>

“Suppose a minister in his daily morning prayer were to thank God for making him a man and not a woman, as he would in at least one religious tradition. . . . Or suppose a minister takes the view . . . that the Bible requires women to occupy a subordinate position in the family, and that only men should be permitted to preach. If he repeatedly, in his public prayers, asks God to bring about such a world, and repeatedly tells his female associate pastor that the Bible compels these views, she will no doubt sense that the environment is hostile to her work and denies her equality because of her sex. Yet the pastor (and his church) are entitled to the free exercise of religion by spreading this view, which he and perhaps his sect understand to be God's word. These opinions and prayers are political heresy. But in matters of religion, churches get to define heresy, not the government.”

The concerns of Judges Fletcher and Kleinfeld may at first glance seem misplaced. We have never seen a case, in court or out, in which the allegations of sexual harassment involve the propagation of religious teaching. As the quartet reflects, the allegations involve unwanted sexual attention – staring, commenting, touching, propositioning, threatening, etc. It may be that this sort of sexualizing of the relationship between supervisor and the affected minister is a response to the supervisor feeling threatened by the presence of women in the clerical profession, but its outward manifestation is always sexual and personal, not general and theological.

Nevertheless, the relationship between religious doctrine and the workplace environment for women deserves serious attention. If the faith tradition holds a consistent view that only men may occupy the highest positions of authority, a female employee – even one in a ministerial position, such as a teacher – may not validly claim that the mere fact of patriarchal structure constitutes a pervasive hostile environment. A woman who accepts a subordinate ministerial position in

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<sup>154</sup> 196 F. 3d at 947.

<sup>155</sup> 397 F.3d at 805 (Kleinfeld, J., dissenting from denial of rehearing en banc).

such an organization has at least formally consented to the ecclesiastical structure of that body. By extension, that female employee may face express daily reminders of her subordination in the hierarchy, and may be disciplined if she challenges or criticizes its patriarchal structure. As a practical matter, recognizing a sexual harassment claim arising from these circumstances would unravel the ministerial exception altogether. If the gender exclusion itself is constitutionally protected, then enforcements or regular reminders of the exclusion should similarly be lawful.

Notice, however, that Judge Kleinfeld conflates the views of a particular minister with those of his religious body. No doubt, faith traditions that decide to ordain women typically face a serious transition problem.<sup>156</sup> Some of their congregations, clergy, or lay leaders will be hostile to the change. Imagine a denomination that assigns a female pastor to a conservative congregation led by a senior pastor and Board that shares the congregation's opposition to ordination of women.<sup>157</sup> In those circumstances, the religious denomination may well have a problem with discipline of those congregations, clergy, or other leaders who resist, subtly or otherwise, the church's new teaching. How and whether faith groups enforce uniformity through such periods of transition is a solely ecclesiastical matter.

But what about the employment relationship between the newly assigned minister and her employer? Assume that the opposition to her status and assignment takes the form of persistent disparaging remarks about the place of women in ministry. In a secular employment environment, such disparagement would be actionable as sexual harassment. In the case under discussion, however, the disparagement reflects a disagreement within the faith with respect to sincerely held religious views about qualifications for ministry. This suggests the possibility of divergence between the law of hostile environment harassment in religious as contrasted with secular settings.

On the one hand, the denigration in this case is no longer supported by the teachings of the denomination to which the congregation and its pastor belong. That sharply distinguishes this case from that of the overtly patriarchal faith tradition. The newly hired minister cannot plausibly be said to have consented to such treatment. Nor does this treatment reflect the denomination's view of her fitness for ministry. Accordingly, if the disparagement rises to the level of a severe and pervasively hostile work environment, the female pastor may have a viable claim against her employer.

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<sup>156</sup> See, e.g., *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969) (congregation complaints about denomination included "ordaining of women as ministers and ruling elders" among the grounds for separating from the denomination. *Id.* at 442 n.1)

<sup>157</sup> In jurisdictions where discrimination based on sexual orientation is unlawful, everything we write about the case of a female minister applies with equal force to a case of an LGBT minister.

On the other hand, the disparagement does arise out of the sincerely held beliefs of the congregation and its leaders. Even if the hostile comments take the form of persistent questioning of her fitness for ministry, the employer – notwithstanding the denomination’s beliefs -- may have a valid First Amendment defense to her claim. In the congregation’s view, the female pastor is not qualified for ministry.<sup>158</sup> Having placed the female pastor in that situation, however, the denomination has a legal duty to protect her from this sort of sexual harassment. In other words, a religious tradition that invites women into its ministry cannot avoid the legal obligation to protect them against a sex-based, pervasively hostile working environment of any sort.

If a faith community’s religious teaching ever included an explicit and fully disclosed policy of persistent sexual attention by leaders towards clergy under their supervision, the denomination would have a straightforward and effective defense to a sexual harassment suit. That defense would be consent – explicit, not implied from general circumstances of discipline and control in clergy employment. Accepting a ministerial role in such a religious group would mean the sexual attention was welcome.<sup>159</sup> If the employee no longer consents to that type of attention, the employee should leave. And if the religious community coercively prevents exit, the law can indeed remedy that, through civil suit for false imprisonment, or criminal complaint for kidnapping.

Permitting hostile environment claims is thus highly unlikely to disturb the religious teaching of faith traditions. By barring adverse job action claims while allowing hostile environment claims in actions by clergy, however, our approach does have one unfortunate consequence. In non-clergy cases involving any employer, firing the complainant is an adverse job action that can give rise to a variety of remedies, including punitive damages and orders of reinstatement. Firing as a response to a harassment complaint thus expands the potential liability of the employer, who may be already facing the imposition of damages for the hostile environment. Moreover, the *Ellerth-Faragher* defense is not available with respect to the harm caused by adverse job actions.

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<sup>158</sup> If the congregation fully accepts the denomination’s teaching about the ordination of women, but a supervising pastor does not and harasses his female supervisee in a severe and persistent way, the congregation as employer should face liability even if the supervising pastor is speaking from sincere religious belief. He has no greater right to harass his female subordinate than a secular supervisor, who may similarly be motivated by sincere religious belief, and the liability of the employer should be the same in both cases.

<sup>159</sup> It is far from clear whether employees should be free to consent to working in a severe and hostile work environment. For arguments that women working in highly sexualized occupations, such as strippers or prostitutes, should be protected from sexual harassment notwithstanding their consent to such work, see generally Ann C. McGinley, Symposium: Sex for Sale: Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries, 18 Yale J. L. & Feminism, 65 (2006). But see Lua Kamál Yuille, Sex in the Sexy Workplace, 9 Nw. J. L. & Soc. Pol’y 88 (2013) (arguing that some jobs in sexualized industries may include certain forms of sexual harassment under the “bona fide occupational qualification” standard).

In contrast, religious employers are liable for the harm done by the hostile environment, but not liable for any adverse job action. This immunity may give religious employers the incentive to dismiss a complaining minister rather than retain the complainant and attempt to resolve the conflict. Firing a clergy employee will cut off the period for environmental damage assessment at the effective date of the firing, and will expose the employer to no further liability.

This is a tragic side effect of the operation of constitutional norms. We might fix the situation by permitting all actions for sexual harassment, which the Constitution forbids, or by permitting none, which is a cure far worse than the disease. Moreover, we think it highly unlikely that most religious entities would simply fire a complaining member of the clergy at the moment she speaks out. She may be far more valuable than her harasser. The religious entity may be deeply committed to finding peaceful and productive means of internal dispute resolution. A wise lawyer advising a religious entity in these circumstances may flag the point about limiting damages without insisting that this is the only or most sensible course. For example, in *Black v. Snyder* and *Elvig*, the churches investigated the complaints, and tried to work with the aggrieved female pastor until she took her complaint to a government agency.

The employer's institutional response to a hostile environment complaint is a matter of prudent employment relations. No sensible employer wants to simply cut loose a professional employee in whom the institution has invested resources for education and training. Nor will a religious entity be eager to explain (or lie) to worshippers about why a church leader has suddenly disappeared from the pulpit. Accordingly, we do not believe that religious institutions will be quick to dismiss anyone in a clergy role who complains about sexual harassment.

*Applying the Ellerth-Faragher affirmative defense in hostile environment actions by clergy.* The most difficult questions about the sexual harassment exception are likely to arise from application of the *Ellerth-Faragher* affirmative defense to religious bodies. This was the centerpiece of the brief dissent in *Black v. Snyder*, and of several opinions in *Elvig*.

Recall the Supreme Court's formulation of the affirmative defense, applicable to hostile environment claims alone:

"When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, . . . **The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or**

**corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>160</sup>**

The defense has two prongs, and the first is likely to invite assertions by religious employers that adjudication involves judicial second-guessing of the reasonableness of their steps “to prevent and correct any sexually harassing behavior.” Let’s start with prevention. The most common steps that employers take to prevent harassment is 1) development and articulation of a policy about unwanted sexual or romantic attention in the workplace; 2) training of employees in the purposes, operation, and meaning of that policy; and 3) taking care in the employment of supervisors.<sup>161</sup> None of these steps are likely to invite judicial evaluation of theological commitments. Of course, a religious denomination may express its concern about harassment of employees, clergy included, in religious terms. With respect to policies and training, we can imagine the deployment of language about respecting the inherent dignity of the person, in addition to or instead of more conventional phrasing about the physical and emotional integrity of employees. All that matters for purposes of the defense, however, is that the policy and training be reasonable steps to prevent the wrong. Preferring secular to religious understandings of the wrong would raise a constitutional problem of discrimination against religion. Employers, secular or religious, must communicate effectively and in good faith, but remain free to do so in any terms that employees can reasonably understand.

Prevention of harassment through care in selecting supervisors can be understood similarly. Religious organizations understand that they risk liability if they fail to use reasonable care in screening clergy who are in a position to sexually abuse vulnerable people.<sup>162</sup> This has manifested itself most substantially in cases of sexual abuse of minors, but sexual harassment presents analogous risks. Of course, it may be that ordinary practices of screening do not disclose a propensity to sexually harass. Once complaints have been made and verified against particular religious leaders, however, the institution’s leaders will be on notice of the risk. If institutions return these supervisors to a position from which they can sexually harass others, those institutions assume the risk that courts will find them to have failed to use reasonable means of prevention.

The overarching question in evaluating a religious entity’s mechanisms for prevention and correction of sexual harassment is whether they reasonably satisfy the specified secular goals. Compared to prevention, mechanisms for correction are harder to evaluate because 1) religious organizations are likely to vary widely in their methods of investigation and discipline, and 2) those methods are frequently

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<sup>160</sup> *Faragher*, 524 U.S. at 807-808 (emphasis added).

<sup>161</sup> See, e.g. U.S. Equal Employment Opportunity Commission, “Best Practices for Employers,” <https://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm>

<sup>162</sup> See cases cited in Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 Brigham Young University Law Review 1789, 1848, n. 234.

tied to a faith group's religious understanding of church order. Recall that in *Black v. Snyder* and *Elvig v. Calvin Presbyterian Church*, dissenting judges expressed concern that applying the affirmative defenses to harassment cases would unconstitutionally entangle the courts in the evaluation of church governance.<sup>163</sup>

In both *Black* and *Elvig*, committees of the respective religious institutions made initial inquiries into the alleged harassment. After those committees did not find harassment, denominational bodies that governed a number of congregations in a particular geographic region considered the allegations further. In more purely congregational arrangements, corrective measures will be made only at the congregational level. In an interconnected or strictly hierarchical religious polity, such as a Roman Catholic Diocese or a Methodist Conference, the corrections are likely to be undertaken by an office that is organizationally upstream from the place of offense,

It is impossible for us to evaluate the broad range of possibilities for corrective mechanisms across religious communities. What we can confidently say, however, is that such mechanisms must be measured by secular criteria of design and effectiveness. The employer must find a safe way for employees, including clergy, to report harassment. The line of reporting cannot begin with the harasser himself, or with any other person who has obvious loyalties to the accused over the accuser. Thereafter, the fact-finding inquiry must provide the accuser (as well as the accused) a respectful and meaningful opportunity to be heard. And the response to any findings of harassment should include recommendations for correction, including when appropriate the transfer of the complainant or perpetrator to a different position. But the relevant considerations of safe reporting and due process are no different for religious employers as compared to their secular counterparts. In each case, the particular form of these steps is up to the reasonable discretion of the employer.<sup>164</sup>

Judge Kleinfeld's opinion in *Elvig* emphasizes that Pastor Elvig "had vowed 'to be governed by . . . Church polity and to abide by its discipline.'"<sup>165</sup> No one disputes that. The question is the legal significance of such vows and commitments. With respect to her status as a pastor in the church, the scope of these promises – and the consequence of their breach – present exclusively ecclesiastical questions. When, as a result of Ms. Elvig's complaint to the EEOC or her suit in civil court,

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<sup>163</sup> See (in Part III) text at notes \_\_\_-\_\_\_, and notes \_\_\_.

<sup>164</sup> As Judge Fletcher wrote in *Bollard*, "[The *Ellerth* inquiry] is a restricted inquiry. Nothing in the character of this defense will require a jury to evaluate religious doctrine or the "reasonableness" of the religious practices followed within the Jesuit order. Instead, the jury must make secular judgments about the nature and severity of the harassment and what measures, if any, were taken by the Jesuits to prevent or correct it. The limited nature of the inquiry, combined with the ability of the district court to control discovery, can prevent a wide-ranging intrusion into sensitive religious matters." 196 F.3d at 950.

<sup>165</sup> 397 F.3d at 801 (Kleinfeld, J., dissenting from denial of rehearing en banc), quoting 375 F.3d at 970 (Trott, J., dissenting).

leaders of the Presbyterian Church chose to end Ms. Elvig's ministerial eligibility, the 9<sup>th</sup> Circuit panel correctly decided that it could not review that decision.<sup>166</sup>

The question of religious institutional consequences of her vows, however, can be fully separated from their legal consequences. The church could not rely on a pastor's vows to prevent her from making a criminal complaint, or bringing a civil suit, if she had been forcibly raped by a fellow church employee. That civil suit might name the employer as a defendant if it had negligently hired or supervised the perpetrator. The ministerial exception is designed to protect a religious entity's choice of minister, not to insulate it from all legal consequences of that choice.

The second prong of the *Ellerth-Faragher* affirmative defense is whether the complainant unreasonably failed to avail herself of corrective opportunities, or to otherwise avoid the harm. On this question, religious organizations are no more likely than secular ones to be the locus of special problems. In any organization, the channels for complaint and correction must be accessible and reasonably safe.<sup>167</sup> Telling an assistant pastor that she may complain only to her harasser is not sufficient; such a procedure – in a religious or secular entity -- will seem dangerous and unreliable. Of course, the smaller the entity, the more difficult it will be to fully bypass the alleged harasser in the complaint process. This is true with respect to all employers. But there is always a person or group – for example, a governing Board of a congregation – that can be sensibly empowered to hear the complaints and begin the inquiry. And there is no way to completely eliminate the tension that such complaints will produce for both accuser and accused.

*The scope of discovery.* The ministerial exception often invites questions related to discovery. A particular problem arises when the parties dispute whether or not the plaintiff is a ministerial employee. In such a case, the defendant is asserting that the merits of the challenged job action against the plaintiff are constitutionally off-limits to inquiry. As one of the authors of this piece has recently argued,<sup>168</sup> when a defendant has raised the ministerial exception in a motion for summary judgment, courts should exercise their discretion to limit discovery to issues related to disposition of that issue. Of course, the plaintiff may dispute the applicability of the ministerial exception in a harassment case challenging an adverse job action. In such circumstances, discovery into the applicability of the exception should precede discovery into job performance. If the court finds that the plaintiff is not a ministerial employee, discovery on other issues related to discrimination and quality of employee performance can properly proceed.

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<sup>166</sup> 375 F.3d at 960-62. Indeed, this is similar to the course that Ms. Perich's case took in *Hosanna-Tabor*. 565 U.S. at 179 (reciting that the school rescinded Ms. Perich's "call" as a response to her insubordination).

<sup>167</sup> Anne Lawton, Operating in an Empirical Vacuum: The *Ellerth & Faragher* Affirmative Defense, 13 Colum. J. of Gender & Law 197, 257-58 (2004) (rational fear of retribution at times leads to reasonable delay in reporting harassment).

<sup>168</sup> Peter J. Smith & Robert W. Tuttle, Civil Procedure and the Ministerial Exception, 86 Ford. L. Rev. \_\_\_, \_\_\_ (2018).

Sexual harassment cases brought by those who without question fall into the ministerial exception do not raise the same sort of sequencing issues. As the panel opinions in both *Bollard* and *Elvig* explain, discovery in hostile environment cases can be limited to factual questions related to the workplace relationship.<sup>169</sup> Because the ministerial exception bars inquiry into evaluation of the plaintiff's job performance, discovery into such matters is constitutionally out of bounds. But there is no reason to delay or deny discovery into a hostile environment, because that claim may proceed whether or not the ministerial exception applies.

*Remedies in hostile environment cases.* In every decision in the sexual harassment quartet, the court addressed the question of available remedies.<sup>170</sup> As we note at the end of Part II, in a sexual harassment case unconstrained by the ministerial exception, remedies may include compensatory and punitive damages for the environmental harassment; orders of reinstatement; and forward-looking compensatory damages in cases of a wrongful job action – that is, a remedy designed to put the plaintiff in the financial place she would have been without the discriminatory job action.

In the harassment quartet, every judge who addressed remedial questions agreed that the forward looking remedies of reinstatement, and lost pay in consequence of an adverse job action, were off limits. This conclusion follows logically from the initial move that adverse job action claims are barred by the ministerial exception. Because the defendant religious entity has unfettered discretion to terminate its relationship with a cleric, the court may neither inquire into the reasons for that action nor provide the relief that ordinarily accompanies an unlawful termination.

Limiting the substance of harassment claims to those that arise from the environment itself has sharp and obvious remedial consequences. In the vast majority of cases that involve a severe and pervasive hostile environment, damages will include those that arose from the infliction of emotional distress. In a case like *McKelvey*, where the Diocese communicated an intent to recover a subsidy for payment of educational expenses,<sup>171</sup> remedies may also include an order of setoff in favor of the plaintiff.<sup>172</sup>

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<sup>169</sup> *Elvig*, 375 F.3d at 967-68; *Bollard*, 196 F.3d at 950 (“The limited nature of the inquiry, combined with the ability of the district court to control discovery, can prevent a wide-ranging intrusion into sensitive religious matters.”).

<sup>170</sup> *Bollard*, 196 F. 3d at 947, 950; *Elvig*, 375 F.3d at 966; *Black*, 471 N.W, 2d at 720-21; *McKelvey*, 800 A. 2d at 858-59.

<sup>171</sup> 800 A. 2d at 846.

<sup>172</sup> *Bollard* alluded to a theory of “constructive discharge” when the harassment leads the complainant to abandon the position. 196 F.3d at 947: “[C]onstructive discharge in the context of *Bollard*'s Title VII sexual harassment claim functions only to signal his estimation of the severity of the harassment and to lay the foundation for including lost wages in a calculation of damages.” When the plaintiff leaves the job without experiencing any adverse job action, a damage award for lost back pay does not interfere with a religious entity's judgment about whom it wants in ministry.



In harassment cases, an employer may defend against requests for punitive damages by showing that it has made “good faith efforts to enforce an antidiscrimination policy.”<sup>173</sup> We have found no cases about sexual harassment of clergy in which this defense has been put into play. It resonates with the terms of the *Ellerth-Faragher* affirmative defense, although it is obviously more lenient. This defense allows escape from punitive damages, through a showing of good faith, even if a policy against harassment is legally insufficient to satisfy the requirements of the affirmative defense.

We see no reason to believe that a demand for a good faith effort will involve any intrusion into the authority of religious entities to choose their leaders. The sexual harassment carve out from the ministerial exception has at its base the concept that religious entities, like all other employers, must protect their employees from certain kinds of indignity and disrespect. Once we recognize the substantive justice and constitutional acceptability of that principle, it seems completely appropriate to conclude that an entity that has not even made a good faith effort (however feeble) to enforce its anti-harassment policy (however weak) bears responsibility for the harms done in its workplace. Consciously ignoring reports of a severe and pervasive hostile environment invites punishment. Courts should have no difficulty in applying this notion of good faith effort to religious organizations precisely as it applies to secular employers.

*A closing note on other theories of the ministerial exception, and their relationship to sexual harassment.* It might be illuminating to compare our approach to sexual harassment of clergy – including the vital distinction between hostile environment cases and adverse job action cases – to the approaches taken by other scholars. We have already noted our disagreement with some feminist scholars, who would eliminate or severely circumscribe the ministerial exception.<sup>174</sup>

The scholars who defend the ministerial exception fall into three primary categories – those who defend a very broad concept of church autonomy or sovereignty (the “institutionalists”); those who argue that the ministerial exception arises from a concept of religious voluntarism, which in turn supports a doctrine of implied consent to discrimination (“implied consent theorists”); and those who defend the exception as an incident of freedom of association, available to secular as well as religious entities (“associational freedom theorists”).

For reasons we explain at length in earlier work, all three approaches are badly flawed.<sup>175</sup> None of their proponents, however, have responded to our general critique, or to our focused challenge that they consider the case of sexual

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<sup>173</sup> *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 646 (1999). Note that *Kolstad* appeared just one year after *Ellerth* and *Faragher*.

<sup>174</sup> See text at note \_\_\_ supra.

<sup>175</sup> Lupu & Tuttle, *The Mystery of Unanimity*, note \_\_\_ supra, at 1296-1310.

harassment of clergy.<sup>176</sup> We imagine scholars in each of these camps might have more to say in response to both our general critique and our specific challenge.

## CONCLUSION

The Supreme Court's 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* surprised many observers in its breadth, precise grounds of decision, and unanimity. The decision left open, however, the distinct possibility that some legal claims involving clergy and their employers might still be open to legal redress. As this article has demonstrated, claims by clergy that their work environment is severely, pervasively, and discriminatorily hostile fall perfectly into that opening. At a time when many women are bravely chronicling their experiences in hostile workplaces, this reassurance that religious entities are not immune from suit, just as they are not immune from criticism, should be most welcome. When #MeToo meets the ministerial exception, the targets of persistent and unwanted sexual attention can claim their voices in law as well as in life.

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<sup>176</sup> *Id.* at 1303-04 (challenging “freedom of the church” theorists and “implied consent” theorists to apply their ideas to cases involving sexual harassment of clergy).