



2019

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

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Recommended Citation

Lupu, Ira C. and Tuttle, Robert W., #Metoo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment's Religion Clauses (March 29, 2018). Forthcoming 2019, *William & Mary Journal of Race, Gender, & Social Justice* (formerly *Journal of Women and the Law*).; GWU Law School Public Law Research Paper; GWU Legal Studies Research Paper. Available at SSRN: <https://ssrn.com/abstract=3152640>

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#METOO MEETS THE MINISTERIAL EXCEPTION: SEXUAL
HARASSMENT CLAIMS BY CLERGY AND THE FIRST
AMENDMENT'S RELIGION CLAUSES

IRA C. LUPU & ROBERT W. TUTTLE*

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INTRODUCTION

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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.¹

In addition to the abuse of minors and its attendant concealment, however, the experience of religious institutions includes other stories of sex related misbehavior.² 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.³ In this context, perhaps less frequent and certainly less visible, the law both supports and impedes members of the clergy seeking to remedy such mistreatment. This Article offers a normatively compelling and constitutionally appropriate way of reconciling these competing legal forces.

We start with law's apparent disregard for claims by clergy who allege sexual victimization in the workplace, through harassment or otherwise. The Religion Clauses of the First Amendment bar most lawsuits, including claims of discrimination, by clergy against their employers.⁴ Suits claiming unlawful discrimination in employment, in particular, are generally precluded by a doctrine known as the "ministerial exception."⁵ After forty years of recognition of the ministerial exception in the lower courts, a

1. We explore a variety of legal issues raised by suits arising from sexual abuse by clergy. See Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789 (2004) [hereinafter Lupu & Tuttle, *Ecclesiastical Immunity*].

2. See Lupu & Tuttle, *Ecclesiastical Immunity*, *supra* note 1, at 1794.

3. See *id.* at 1795.

4. In earlier work, we analyzed a broad variety of such cases. See Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 121 (2009) [hereinafter Lupu & Tuttle, *Courts, Clergy, and Congregations*]. We note but do not explore in that article the sexual harassment issues discussed at length in this article. *Id.* at 134 n.84. We also touch on sexual harassment cases. 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 (2017) [hereinafter Lupu & Tuttle, *The Mystery of Unanimity*].

5. *Id.* at 1278–79.

unanimous Supreme Court in 2012 affirmed the constitutional provenance and the broad reach of that exception.⁶ As explicated in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,⁷ 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.⁸

A close inspection of the law that has developed under the ministerial exception, however, reveals that claims of sexual harassment based on a pervasive, hostile environment are not subject to that limitation on suits by clergy.⁹ The earliest such decision came from the Minnesota Court of Appeals in 1991,¹⁰ and a pair of prominent and controversial decisions emerged from the Ninth Circuit in 1999 and 2004.¹¹ Moreover, the U.S. Supreme Court's broad 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.¹²

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 law¹³ or the Religion Clauses of the First

6. *Id.* at 1274.

7. 565 U.S. 171, 196 (2012).

8. *Id.* at 173.

9. *See, e.g.*, *Black v. Snyder*, 471 N.W.2d 715, 715–16 (Minn. Ct. App. 1991).

10. *Id.* at 721.

11. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 969 (9th Cir. 2004), *reh'g denied*, 397 F.3d 790 (9th Cir. 2005); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999). In *Elvig*, the Ninth 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, 854 (N.J. 2002). The highest level decision rejecting the sexual harassment exception to the ministerial exception is *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1246 (10th Cir. 2010), noted in Part IV.

12. Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1287–92.

13. The leading practitioner guide on workplace harassment law, BARBARA T. LINDEMANN & DAVID D. KADUE, *WORKPLACE HARASSMENT LAW* (2d ed., BNA 2012), 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 by Rosalie Berger Levinson and Ryan Jaziri. *See* Rosalie Berger Levinson, *Gender Equality vs. Religious Autonomy: Suing Religious Employers for Sexual Harassment After Hosanna-Tabor*, 11 *Stan. J. C.R. & C.L.* 89, 92 (2015); *see also* Ryan W. Jaziri, Note, *Fixing a Crack in the Wall of Separation: Why the Religion Clauses Preclude Adjudication of Sexual Harassment Claims Brought by*

Amendment.¹⁴ 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 illuminates both. *Hosanna-Tabor* has thrown Free Exercise law into considerable doubt,¹⁵ and unpacking the harassment question will help clarify the changes, if any, to free exercise norms worked by *Hosanna-Tabor*.

This Article is thus designed to fill a long-standing gap—made conspicuous by recent developments—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 Catharine MacKinnon,¹⁶ through and including the Supreme Court’s crucial decisions in *Meritor Savings Bank, FSB v. Vinson*,¹⁷ *Harris v. Forklift Systems, Inc.*,¹⁸ *Burlington Industries, Inc. v. Ellerth*,¹⁹ and *Faragher v. City of Boca Raton*.²⁰ 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,

Ministers, 45 NEW ENG. L. REV. 719, 719 (2011).

14. We are among the very few Religion Clause scholars who have ever focused on these questions. See Lupu & Tuttle, *Ecclesiastical Immunity*, *supra* note 1, at 1794 n.16; see also Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORD. L. REV. 1965, 2015 n.338 (2007) [hereinafter Corbin, *Above the Law*].

15. In recent work, we cited the broad range of scholarly views on the ministerial exception and discussed each of them at length. See Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1292–1314. Within those pages, see in particular the sources cited in n.157 (the “institutionalists”); n.171 (the “implied consent” theorists), n.197 (the associational freedom theorists); and n.225 (the feminist critics). Professor Nelson Tebbe’s recent book places the ministerial exception squarely within a generic concept of associational freedom to choose leaders, available without regard to the association’s religious character. See generally NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 80–97 (Harv. Univ. Press 2017). The Court in *Hosanna-Tabor* explicitly rejected this as the basis for the ministerial exception. See *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 189 (2012).

16. See generally CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (Yale Univ. Press 1979).

17. 477 U.S. 57 (1986).

18. 510 U.S. 17 (1993).

19. 542 U.S. 742, 763 (1998).

20. 524 U.S. 775, 807–08 (1998).

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*²¹ and *McKelvey v. Pierce*,²² and the path breaking Ninth Circuit decisions in *Bollard v. California Province of the Society of Jesus*,²³ and *Elvig v. Calvin Presbyterian Church*.²⁴ In the law that has emerged, the ministerial exception bars adverse job action claims but does not bar hostile environment claims.²⁵ 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.

Part IV applies our theoretical and doctrinal insights to the major questions raised by this interplay. In our view, the ministerial exception arises from government's constitutionally mandated disability to decide ecclesiastical questions.²⁶ Fitness for ministry—of a class of persons, or a particular person—is such a question. Accordingly, we argue that the First Amendment should 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. In contrast, we contend that the

21. 471 N.W.2d 715, 720–21 (Minn. Ct. App. 1991).

22. 800 A.2d 840, 858 (N.J. 2002).

23. 196 F.3d 940, 950 (9th Cir. 1999).

24. 375 F.3d 951, 969 (9th Cir. 2004). *Elvig* offers the added bonus of an opinion by now retired Judge Kozinski. See *id.* at 790 (Kozinski, J., concurring in denial of rehearing en banc). Kozinski, now retired, is no stranger to issues of a sexually hostile environment. See Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> [<https://perma.cc/3VQP-S7KQ>].

25. See *Elvig*, 375 F.3d at 953, *reh'g denied*, *Elvig*, 397 F.3d at 790.

26. The concepts of Establishment Clause disability, and corresponding immunity of religious entities, build on a Hohfeldian conception of legal relationships. See Lupu & Tuttle, *Courts, Clergy, and Congregations*, *supra* note 4, at 122 n.20; see also Frederick M. Gedicks, *The Religious-Question Doctrine: Free-Exercise Right or Anti-Establishment Immunity?* 7 (Robert Schuman Ctr. for Advanced Stud. Research Paper No. RSCAS 2016/10), <https://ssrn.com/abstract=2746593>.

First Amendment's Religion Clauses should *not* bar either compensatory or punitive damage claims for pervasive, hostile environments based on sex. These are claims from which religious institutions are not immune. 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 theoretically refined consideration of the relevant questions.

We expect that our conclusions will not satisfy ardent proponents of church autonomy,²⁷ 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.²⁸ Our analysis represents 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*,²⁹ 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 religious schoolteacher, Cheryl Perich, who had complained to the EEOC about alleged discrimination based

27. See Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1296 n.157.

28. See Joanne C. Brant, "Our Shield Belongs to the Lord": *Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CON. L.Q. 275, 281 (1994); Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 983 (2013); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORN. L. REV. 1049, 1059–60 (1996); Robin West, *Freedom of the Church and Our Endangered Civil Rights: Exiting the Social Contract*, in MICAH SCHWARTZMAN, CHAD FLANDERS & ZOË ROBINSON, *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 399, 399–418 (2016); see also Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405, 434–35 (2013). See generally Corbin, *Above the Law*, *supra* note 14.

29. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012).

on disability.³⁰ In response to that complaint, her employer had fired her.³¹

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 about her fitness for ministry.³² Ms. Perich's pedagogical duties, combined with her status as an ordained teacher, rendered her a ministerial employee as a matter of law.³³ In the eyes of her employer, her complaint to the EEOC had rendered her unfit for that position.³⁴

Hosanna-Tabor was unsurprising in some very basic respects. The proposition that the Religion Clauses immunize religious employers with respect to adverse employment actions against employees in clergy roles was hardly new in 2012.³⁵ 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.³⁶ Indeed, no court in the United States ever disputed the basic constitutional idea behind what had come to be known as the "ministerial exception" to employment laws.³⁷ 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.³⁸ 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.³⁹ It extended to all claims of discrimination, whether overt or covert.⁴⁰

The issue most likely to be controverted in ministerial exception cases is whether the complainant's duties fall under the exception.⁴¹ This must be litigated case by case, and actual duties,

30. *See id.* at 172.

31. *See id.*

32. *See id.* at 184.

33. *See id.* at 191–94.

34. *See id.*

35. *See Hosanna-Tabor*, 565 U.S. at 173.

36. *See* Lupu & Tuttle, *Courts, Clergy, and Congregations*, *supra* note 4, at 121.

37. *Id.* at 122.

38. *Id.* at 127–28.

39. *Id.* at 123.

40. The litigated cases *all* involved claims of covert discrimination. *See id.* at 128.

41. If the court finds the exception does not apply in the particular case, then other

not job titles or even ordained status, control the outcome.⁴² *Hosanna-Tabor*, in its close analysis of Cheryl Perich's job responsibilities, confirmed that long-standing judicial approach.⁴³

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.⁴⁴ The case thus did not involve a paradigm situation of formal gender exclusion from the relevant job.⁴⁵ 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 significant critiques of the ministerial exception,⁴⁶ and no one expected every Justice to accept the exception's full sweep.

Moreover, in addition to allegations of discrimination, *Hosanna-Tabor* involved retaliation for a complaint to public authorities.⁴⁷ The policies behind protecting such complaints extend to protecting others beyond the complainants themselves.⁴⁸ And yet these policies quite literally received no weight in the Court's analysis.⁴⁹

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*,⁵⁰ and the operation of the ministerial exception.

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. See Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1278–80.

42. *Id.* at 1278.

43. See *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 191–94 (2012).

44. See *id.* at 171.

45. See *id.* at 179.

46. Caroline Corbin has the most extensive critique. See generally Corbin, *Above the Law*, *supra* note 14. In *Hosanna-Tabor*, Professor Corbin presented her views to the Court in an amicus brief, co-authored by Professor Leslie Griffin. See Brief for Prof. Leslie C. Griffin et al. as Amici Curiae Supporting Respondents, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) (No. 10-533).

47. See 565 U.S. at 172.

48. See Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1305.

49. 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. See Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1275–78.

50. 494 U.S. 872, 906–07 (1990).

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 was at issue.⁵¹ The ministerial exception operates precisely to create a defense to generally applicable regulations of the employment relationship.⁵² Chief Justice Roberts’s effort to distinguish *Hosanna-Tabor* from *Smith* on the ground that the former involved an “internal church decision . . . affect[ing] the faith and mission of the church itself” while the latter involved outward “physical acts” is not coherent.⁵³ 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.⁵⁴

In an article published in early 2017, we set out to solve the mysteries of *Hosanna-Tabor*, including its unanimous character.⁵⁵ We cannot concisely summarize our 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) is constitutionally disabled from deciding purely ecclesiastical questions.⁵⁶ That broader principle has been applied in numerous decisions involving church property⁵⁷ or personnel.⁵⁸ It rests on both the Establishment Clause, which bars the state from exercising ecclesiastical functions, and the Free Exercise Clause, which reserves those func-

51. *See id.* at 904–05.

52. *See Hosanna-Tabor*, 565 U.S. at 190.

53. *Id.* 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 177–210 (2014) [hereinafter LUPU & TUTTLE, SECULAR GOVERNMENT]; Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 55 (2015).

54. *Hosanna-Tabor*, 565 U.S. at 173.

55. *See generally* Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4.

56. *Id.* at 1280–84. *See* LUPU & TUTTLE, SECULAR GOVERNMENT, *supra* note 53, at 43–73; *see also* Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1280–85. *See generally* Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORD. L. REV. 1847 (2017).

57. *See, e.g.*, *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 441, 451 (1969).

58. *See generally* *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

tions for private decision makers.⁵⁹ The *Hosanna-Tabor* opinion appropriately cites both Clauses in support of the ministerial exception,⁶⁰ though its explicit avoidance of interest balancing as a methodology demonstrates its tilt toward the Establishment Clause.⁶¹

Hosanna-Tabor emphatically supports our 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 state’s disability to decide ecclesiastical questions translates into a bar on state evaluation of whether any particular person is fit for ministry.⁶² 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?).⁶³ If faith communities are immune from liability under anti-discrimination laws when these communities impose a categorical bar, they are equally immune when they impose 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 might not render a man unfit?). The ministerial exception sits comfortably within the category of ecclesiastical questions, off limits to the state.⁶⁴ 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 a constitutional boundary.⁶⁵ This proposition, long settled in First Amendment law, completely explains the unanimity in *Hosanna-Tabor*.⁶⁶

The immunity of religious employers that is triggered by the ministerial exception does not signify that actions shielded by the exception operate under a halo of moral right. The exception may protect decisions about fitness for ministry—for example, on racial grounds—that most people in our society would find repre-

59. See, e.g., *Hosanna-Tabor*, 565 U.S. at 184.

60. *Id.* at 184.

61. See Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1275–78.

62. See *id.* at 1280.

63. See *id.* at 1283.

64. See *id.* at 1280.

65. We cite virtually all the relevant post *Hosanna-Tabor* decisions (2012–2017). See Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1287–92.

66. See *id.* at 1291–92.

hensible.⁶⁷ The exception is grounded on the constitutionally salutary policy of removing the state from decision of distinctively religious questions, and is obviously no guarantee that religious institutions will decide these questions wisely or virtuously.⁶⁸

In ways that resonate directly with the topic of this Article, *Hosanna-Tabor* hints suggestively at the boundaries of the ministerial exception. The EEOC, in opposing recognition of a constitutionally based ministerial exception to anti-discrimination norms, had argued in the Supreme Court that:

[S]uch 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. . . . [T]he logic of the exception would confer on religious employers ‘unfettered discretion’ to violate employment laws by, for example, hiring children or aliens not authorized to work in the United States.⁶⁹

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.⁷⁰

As we explore in further detail in Part III, sexual harassment claims present a mixture of concerns sounding in both tort and contract.⁷¹ Unlike the typical ministerial exception case, which involves an adverse job action by the employer against a person in ministry, the questions raised by claims of pervasive and hostile work environment are not about the complainant’s fitness for

67. See *id.* at 1282.

68. *Id.*

69. *Hosanna-Tabor*, 565 U.S. at 195.

70. *Id.* at 196.

71. See *infra* Part III.

the position.⁷² *Hosanna-Tabor* thus leaves wide open the questions we are considering.⁷³

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.⁷⁴

This move is easily misunderstood. It filters the argument about the quality of a church's reasons through the prism of "strictly ecclesiastical" matters, constitutionally off limits from state decision.⁷⁵ But it does not suggest that "religious reasons" are always irrelevant to application of the law to religious organizations.⁷⁶ As we explain in Parts III–IV, the relationship between "religious reasons" and claims of a pervasive, hostile environment based on sex reverberates through the case law in ways that deserve deeper exploration.

II. THE RELEVANT LAW OF SEXUAL HARASSMENT

The law of sexual harassment has developed considerably from Professor Catharine MacKinnon's path-breaking work,⁷⁷ 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.⁷⁸ In some of

72. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

73. *Hosanna-Tabor*, 565 U.S. at 171, 196.

74. *Id.* at 194–95 (citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952)).

75. *Id.*

76. *Id.* at 194–96.

77. MACKINNON, *supra* note 16, at vii.

78. Men as well as women can be harassed, and the harasser may be of the same sex as the target. See *generally* *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998). Two of the decisions we highlight in Part III involve sexual harassment of males by other males.

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.⁷⁹ In other iterations, the harm is neither criminal nor 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.⁸⁰ Sexual attention may begin with a veneer of positivity, as in the case of flirtation, flattery, and expression of sexual and/or romantic interest.⁸¹ 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.⁸² When supervisors—as distinguished from coworkers—harass, the sexual attention may be associated with threats of job-related punishment or promises of job-related reward.⁸³

A different kind of harassment involves no sexual attention or interest at all. Instead, the harassment may involve gender-based belittling or denigration.⁸⁴ This form of harassment, analogous to race-based harassment,⁸⁵ is also emotionally debilitating and destructive of employment opportunity. Whether sexual in content or not, sex-based harassment operates to reinforce socially defined gender stereotypes and roles.⁸⁶

As the narrative below explains, all claims of sexual harassment on the job take one of two legal forms—they either (1) lead

79. MACKINNON, *supra* note 16, at 158–59.

80. Nicole Spector, *The Hidden Health Effects of Sexual Harassment*, NBC (Oct. 13, 2017, 11:14 AM), <https://www.nbcnews.com/better/health/hidden-health-effects-sexual-harassment-ncna810416> [<https://perma.cc/LZS5-X3K2>].

81. Marie Jackson, *When Does Flirting Become Sexual Harassment?*, BBC (Oct. 19, 2017), <https://www.bbc.com/news/uk-41665049> [<https://perma.cc/8J5J-PSFY>].

82. MACKINNON, *supra* note 16, at 33.

83. *Id.*

84. LINDEMANN & KADUE, *supra* note 13, at 16 (“In one common situation . . . women employees experience . . . scorn, ridicule, and verbal abuse from males who resent their presence.”).

85. *Id.* at 3–4 (citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 400 U.S. 957 (1972)). The Supreme Court approvingly cited *Rogers* in its germinal decision on sexual harassment. *See Meritor Sav. Bank, FSB v. Vinson et al.*, 477 U.S. 57, 65–66 (1986) (“Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.”).

86. For elaboration of these themes, see generally Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 696 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687 (1998). This perspective suggests important questions about theologically grounded conceptions of gender roles. See discussion *infra* Part IV.

to some kind of adverse job action, such as dismissal, demotion, unwanted transfer, denial of promotion, pay cut, etc.,⁸⁷ or (2) create a persistent, hostile environment on the basis of sex.⁸⁸ Some cases involve both persistent, hostile environment and adverse job action.⁸⁹ When the law of sexual harassment meets the ministerial exception, however, the distinction between persistent, hostile environment and adverse job action takes center stage. As Part III demonstrates, all adverse job action claims are barred by the ministerial exception, while at least some persistent, hostile environment claims are not.⁹⁰

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-1970s.⁹¹ Building on those decisions, Professor MacKinnon authored her pioneering work on the subject.⁹² 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;⁹³ and hostile environment harassment, in which women are subject to persistent insulting or degrading treatment that effectively alters their conditions of employment.⁹⁴

In 1980, the EEOC issued guidelines that built on these early decisions and scholarship.⁹⁵ 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,”⁹⁶ as well as quid pro quo harass-

87. See cases collected in LINDEMANN & KADUE, *supra* note 13, at chap. 18.

88. *Id.* at chap. 19 and cases collected.

89. *Eleventh Circuit Recognizes Retaliatory Hostile Work Environment Claim*, ABA, https://www.americanbar.org/newsletter/groups/labor_law/11_flash/1208_aball_flash/lel_flash_78-2012hostile.html [<https://perma.cc/BH44-YR2N>].

90. See *infra* Part III.

91. Both involved quid pro quo harassment. See generally *Barnes v. Costle*, 561 F.2d 983, 985 (D.C. Cir. 1977) (holding that threat of discharge of a woman for refusal to have sex with supervisor violates Title VII); *Williams v. Saxbe*, 413 F. Supp. 654, 655–57 (D.D.C. 1976) (holding that 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).

92. MACKINNON, *supra* note 16, at vii.

93. *Id.* at 32–33.

94. *Id.* at 40.

95. LINDEMANN & KADUE, *supra* note 13, at 1-11 to 1-13.

96. *Id.* at 1–13 (citing various sections of 29 C.F.R. § 1604.11).

ment. 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.”⁹⁷

The foundational efforts in support of a theory of sexual harassment, as actionable under Title VII, bore fruit in *Meritor Savings Bank, FSB v. Vinson*.⁹⁸ 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.⁹⁹ She also asserted that the supervisor had harassed her both physically and verbally over a period of several years.¹⁰⁰ The supervisor denied all of these assertions.¹⁰¹ On appeal from a D.C. 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.¹⁰² 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;¹⁰³ (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;¹⁰⁴ and (3) that vicarious employer liability in such a hostile environment case was not automatic, but rather would turn on the relevant “agency principles.”¹⁰⁵ The case was remanded for identification and application of those agency principles.¹⁰⁶

Meritor Savings 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

97. 29 C.F.R. § 1604.11(a)(3). The sexual harassment guidelines built upon analogous guidelines and concerns with respect to harassment based on race or national origin. See LINDEMANN & KADUE, *supra* note 13, at 1-11 to 1-13.

98. 477 U.S. 57, 66 (1986).

99. *Id.* at 60.

100. *Id.*

101. *Id.* at 61.

102. *Id.* at 73.

103. *Id.* at 66.

104. *Meritor Sav. Bank*, 477 U.S. at 68.

105. *Id.* at 72.

106. *Id.* at 73.

absence of economic detriment from an adverse job action.¹⁰⁷ In keeping with the importance of that distinction, the Court emphasized that standards of employer liability in adverse job action cases would be different from pure hostile environment cases. In the former, the employer's legal responsibility for adverse job actions taken by its agents is vicarious and automatic.¹⁰⁸ In contrast, hostile environment cases present a different set of questions of employer responsibility.¹⁰⁹ 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, Inc.*¹¹⁰ Teresa Harris was a manager at Forklift Systems, an equipment rental company.¹¹¹ 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."¹¹² The Court of Appeals had ruled against her sexual harassment claim on the ground that she had not demonstrated psychological injury from the mistreatment.¹¹³ In an opinion by Justice O'Connor, a unanimous Supreme Court rejected the requirement of psychological injury.¹¹⁴ 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.¹¹⁵ 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

107. *Id.* at 64.

108. *Id.* at 70–71.

109. *Id.* at 71–72.

110. 510 U.S. 17, 22 (1993).

111. *Id.* at 19.

112. *Id.*

113. *Id.* at 20.

114. *Id.* at 23.

115. *Id.* at 21–22.

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.¹¹⁶

The *Harris* opinion thus reaffirmed the holding of *Meritor Savings Bank* that pervasive hostile environments are actionable as sex discrimination under Title VII, even in the absence of an adverse job action. Moreover, it specified the considerations that lawyers, the EEOC, and lower courts should apply in appraising such claims—the frequency and severity of the discriminatory conduct, understood both objectively (to a reasonable person) and subjectively by the complainant.¹¹⁷

After *Meritor Savings Bank* and *Harris*, there remained crucial questions of employer liability for the pervasive, hostile environment form of sexual harassment.¹¹⁸ As the Court explained in *Meritor Savings Bank*, employers face 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 produce material detriment to the target.¹¹⁹ But *Meritor Savings Bank* had left open the question of employer liability for a pervasive, hostile environment.¹²⁰ The Court had offered only the limited guidance that such liability should depend on “agency principles,”¹²¹ and *Harris* did not put such principles to any test, because the decision involved the company President, who clearly spoke for the firm.¹²²

That guidance expanded dramatically in *Burlington Industries, Inc. v. Ellerth*¹²³ and *Faragher v. City of Boca Raton*,¹²⁴ decided on the same day in 1998. In these companion decisions, the

116. *Harris*, 510 U.S. at 23.

117. *Id.* at 21–22.

118. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

119. *Id.* at 70–71.

120. *See id.* at 73.

121. *Id.* at 72.

122. Because *Harris* involved the company President, the case presented no issues of vicarious liability. The President clearly spoke for the company. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998) (“[Harris] was indisputably within that class of an employer organization’s officials who may be treated as the organization’s proxy.”).

123. 524 U.S. 742, 765 (1998).

124. 524 U.S. 775, 780 (1998).

Court explained the content and operation of the relevant agency principles in the context of claims of a pervasive hostile environment based on sex.¹²⁵ 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.¹²⁶

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.¹²⁷

In an opinion for seven Justices in *Ellerth*,¹²⁸ 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.¹²⁹ When such a threat is not carried out, however, the case involves a hostile environment, of which the quid pro quo threat is perhaps only a part.¹³⁰ In such cases, the question of em

125. *Ellerth*, 524 U.S. at 758–59; *Faragher*, 524 U.S. at 801–02.

126. *Ellerth*, 524 U.S. at 748.

127. *Id.* at 750–51.

128. Justice Thomas, joined by Justice Scalia, filed a dissenting opinion, asserting that employer liability for hostile environment harassment should depend on proof of employer negligence. *Id.* at 766–67 (Thomas, J., dissenting).

129. *Id.* at 760–61 (citing *Meritor Savings Bank* and “[e]very 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 proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury.

Id. at 761–62.

130. *Id.* 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

ployer 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.¹³¹ Beth Ann Faragher had worked part-time over five years as an ocean lifeguard.¹³² She and other female lifeguards had been subjected to repeated unwanted touching and persistent lewd comments by several of their on-site supervisors.¹³³ Their complaints to the senior on-site supervisor had not been passed on to higher-up city officials or discussed with the offenders.¹³⁴

Justice Souter wrote for the same seven-Justice majority in *Faragher*.¹³⁵ Unsurprisingly, on the question of employer liability for a pervasive, hostile environment based on sex, the opinions in *Faragher* and *Ellerth* presented a unified viewpoint on the relevant principles of agency.¹³⁶ The Court began 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.”¹³⁷ Because most sexual harassment of employees is not in the service of the employer’s business,¹³⁸ 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).¹³⁹ 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.”¹⁴⁰

As Justice Souter notes in *Faragher* and Justice Kennedy likewise in *Ellerth*, every act of supervisor harassment is aided by

environment claim which requires a showing of severe or pervasive conduct.

131. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

132. *Id.*

133. *Id.*

134. *Id.* at 782–83.

135. Justices Thomas and Scalia again dissented. *Id.* at 810–11 (Thomas, J., dissenting).

136. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998); *Faragher*, 524 U.S. at 802.

137. *Faragher*, 524 U.S. at 793 (quoting Restatement of Agency, § 219(1)).

138. *Id.* at 793–94.

139. *See id.* at 789.

140. *Id.* at 801 (citing Restatement of Agency, § 219(2)(d)); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 758 (1998) (same).

the agency relationship.¹⁴¹ 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 any of the employees under his watch.¹⁴² 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.¹⁴³

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.¹⁴⁴ 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.*¹⁴⁵

141. *Ellerth*, 524 U.S. at 760; *Faragher*, 524 U.S. at 802.

142. *Ellerth*, 524 U.S. at 760.

143. See generally *Ellerth*, 524 U.S. at 748–55; *Faragher*, 524 U.S. at 793–805.

144. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

145. 524 U.S. at 807–08 (emphasis added) (citations omitted). Justice Souter added:

While proof that an employer had promulgated an antiharassment 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

The affirmative defense reflects foundational tort law principles as well as the anti-discrimination concerns of Title VII.¹⁴⁶ 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.¹⁴⁷ The availability of this defense creates strong incentives for employers to announce specific policies against sexual harassment by coworkers or supervisors; to train employees in the meaning and significance of sexual harassment; to have in place mechanisms of quick response to complaints; and to take swift action to discipline or dismiss perpetrators of harassment.¹⁴⁸

The requirement of reasonable care does not, of course, mean perfectly adequate 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.¹⁴⁹ 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.¹⁵⁰ Fear of reprisals will discourage the reporting necessary to make a cor-

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.

Id. at 807–08. For a comparable excerpt from *Ellerth*, see 524 U.S. at 758–60.

146. *Faragher*, 524 U.S. at 806.

147. *Id.* at 807–08.

148. 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, 482, 489–90 (2001).

149. See Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth & Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 198 (2004); see also Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AMER. J. SOC. 888, 903 (2011).

150. Lisa Krupicka, *5 Mistakes to Avoid in Implementing a Harassment Policy*, HR PROF. MAG., <http://hrprofessionalsmagazine.com/5-mistakes-to-avoid-in-implementing-a-harassment-policy> [<https://perma.cc/CQ3E-JSW5>].

rective policy effective.¹⁵¹

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.¹⁵² As with step one, however, the notion of reasonableness is doing substantial work.¹⁵³ As noted above, fear of reprisal may be a significant impediment to reporting harassment.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶

Judicial evaluation of the reasonableness of employer processes raises significant constitutional questions in the analysis of potential liability 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 wrongful dismissal.¹⁵⁷ When #MeToo meets the ministerial exception, reinstatement is constitutionally barred, as is front pay as a remedy in lieu of rein-

151. Lawton, *supra* note 149, at 257.

152. *Id.* at 261.

153. *Id.* at 257.

154. *Id.*

155. *Id.* at 242–57.

156. *Id.* at 253–54 (citing cases).

157. The statutory provisions and case law that undergird the remedial regime in harassment cases are succinctly summarized in LINDEMANN & KADUE, *supra* note 13, at 33-1 to 33-37.

statement.¹⁵⁸ As we will explain, compensatory damages may be available in cases of a pervasive hostile environment, as are punitive damages in appropriate cases.¹⁵⁹ Because claims for punitive damages are subject to a defense that the employer has made “good faith efforts to enforce an antidiscrimination policy,”¹⁶⁰ 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*¹⁶¹ (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 respecting Title VII.¹⁶² *Rayburn v. General Conference of Seventh-Day Adventists*¹⁶³ (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.¹⁶⁴ 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.¹⁶⁵ The second and

158. *Id.* at 33-17.

159. *See infra* Part IV.

160. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 546 (1999). *Kolstad* appeared just one year after the decisions in *Ellerth* and *Faragher*.

161. *See generally* 460 F.2d 553, 560 (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).

162. *See The History of Sexual Harassment Law*, NOLO, <https://www.employmentlawfirms.com/resources/employment/workplace-safety-and-health/sexual-harassment-law.htm> [<https://perma.cc/E4MG-JTLT>] (explaining that sexual harassment was not recognized by the Supreme Court as a form of sex discrimination until the 1980s).

163. *See* 772 F.2d 1164, 1165, 1168–69 (4th Cir. 1985).

164. *See* discussion *infra* Part III.

165. *See Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 953–54 (9th Cir. 2004); *Black v. Snyder*, 471 N.W.2d 715, 717–18 (Minn. Ct. App. 1991).

third were decided close in time to one another, and both involved claims by a male student for the priesthood that he was sexually harassed by male supervisors in a Catholic seminary.¹⁶⁶ 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*.¹⁶⁷

A. *The Opening Round: Black v. Snyder*

*Black v. Snyder*¹⁶⁸ was the first appellate decision to find that the ministerial exception does not bar a sexual harassment claim by a member of the clergy.¹⁶⁹ In 1989, Susan Black was hired as Associate Pastor at St. John's Lutheran Church¹⁷⁰ 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 Rights against her supervisor, Pastor William Snyder.¹⁷¹ 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.¹⁷² 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.¹⁷³ The congregation and synod investigated but took no action.¹⁷⁴

In the summer of 1990, the St. John's congregation voted to dismiss Black.¹⁷⁵ She then sued the congregation, synod, and Snyder on a variety of state law claims, including breach of con-

166. See *McKelvey v. Pierce*, 800 A.2d 840, 842, 853–54 (N.J. 2002).

167. See *Ellerth v. Burlington Indus., Inc.*, 524 U.S. 742, 745 (1998). *Ellerth* was decided in 1998, *Bollard* was decided in 1999, *McKelvey* was decided in 2002, and *Elvig* was decided in 2003.

168. See generally 471 N.W.2d at 715.

169. *Id.* at 717.

170. St. John's Lutheran Church is a congregation of the Evangelical Lutheran Church in America. *Id.* at 717.

171. *Id.* at 717–18.

172. *Id.*

173. See *id.* at 718.

174. The report of the allegations, church response, and procedural posture can be found in *Black*, 471 N.W.2d at 718.

175. *Id.* at 717–18.

tract, retaliation, wrongful termination, and sexual harassment in employment.¹⁷⁶ The lower court dismissed all the claims against the institutional defendants on First Amendment grounds.¹⁷⁷

On appeal, the Minnesota Court of Appeals reversed with respect to the sexual harassment claim alone.¹⁷⁸ Noting the U.S. Supreme Court's then-recent decision in *Employment Division v. Smith*,¹⁷⁹ 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.¹⁸⁰

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.¹⁸¹ As the court summarized the relevant principle, "[w]hen claims involve 'core' questions of church discipline and internal governance, . . . the inevitable danger of governmental entanglement precludes judicial review."¹⁸² 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 discharging Black, an essentially ecclesiastical concern."¹⁸³ Accordingly, the Establishment Clause barred those claims.¹⁸⁴

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 predischarge conduct and was "unrelated to pastoral qualifications or issues of church doctrine."¹⁸⁵ Moreover, Black sought money damages only, and was not asking for an order of reinstatement to her posi-

176. *Id.* at 718.

177. *Id.*

178. *Id.* at 721.

179. *Id.* at 719 (citing *Emp't Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990)).

180. *Black*, 471 N.W.2d at 719.

181. *See id.* at 718–20.

182. *Id.* at 720 (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717, 721 (1976)).

183. *Id.* at 720.

184. *See id.*

185. *Id.* at 721.

tion.¹⁸⁶ Accordingly, the court remanded the case to allow Ms. Black to proceed against the church with her hostile environment claim.¹⁸⁷

In his dissent, Judge Randall highlighted an issue that would later become central to the tension in sexual harassment cases against religious organizations.¹⁸⁸ 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.¹⁸⁹ 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.¹⁹⁰ "[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."¹⁹¹

Black v. Snyder foreshadows perfectly the key issues in later cases involving sexual harassment claims by clergy.¹⁹² 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 past harms imposed by the hostile environment (allowed); and the permissibility of judging the legal adequacy of corrective mechanisms within the religious organization.¹⁹³ The rest of the decisions in this quartet play out those themes.¹⁹⁴

186. *Black*, 421 N.W.2d at 721.

187. *Id.* (citing cases allowing enforcement against religious entities of laws concerning the abuse of children and the regulation of buildings). The court also rejected the Church's state constitutional claim. Minnesota has a proexemption regime of religious liberty, but the Church's own antiharassment policy undermined any claim that the harassment lawsuit burdened the Church's exercise of religion. *Id.*

188. *Id.* at 721–23 (Randall, J., dissenting).

189. *Id.* at 722.

190. *Id.* at 723.

191. *Black*, 421 N.W.2d at 723. The majority in *Black* did not directly answer this assertion.

192. See discussion *infra* Part III.B.

193. See *Black*, 471 N.W.2d at 718–21.

194. See discussion *supra* Part III; *infra* Part III.B.

B. The Seminary Cases: Bollard v. California Province of the Society of Jesus and McKelvey v. Pierce

*Bollard v. California Province of the Society of Jesus*¹⁹⁵ and *McKelvey v. Pierce*¹⁹⁶ involved former seminarians (in both cases male) 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[] similar[ities]” in both the facts and the constitutional defenses offered by the defendant religious institutions.¹⁹⁷ 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.¹⁹⁸

John Bollard became a Jesuit novice in 1988.¹⁹⁹ He spent four years at a Jesuit high school,²⁰⁰ 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.²⁰¹

195. See 196 F.3d 940, 944 (9th Cir. 1999).

196. See 800 A.2d 840, 844–45 (N.J. 2002).

197. See *McKelvey*, 800 A.2d at 853–54. For a set of thoughtful suggestions concerning the reform of Catholic seminaries, see The Rev. Thomas V. Berg, *Want to Address Priest Sexual Abuse? The Catholic Church Needs to Overhaul its Seminaries*, WASH. POST, (Oct. 18, 2018), https://www.washingtonpost.com/religion/2018/10/18/want-address-priest-sex-abuse-catholic-church-needs-overhaul-its-seminaries/?utm_term=.ba51fe708c4f [<https://perma.cc/2NW5-XEYJ>].

198. See *Bollard*, 196 F.3d at 944; *McKelvey*, 800 A.2d at 842, 858.

199. *Bollard*, 196 F.3d at 944.

200. St. Ignatius College Preparatory School, see *id.* at 944. Governor Jerry Brown is an alumnus. See also *Keeping in Touch*, ST. IGNATIUS COLL. PREPARATORY (Apr. 17, 2015), <https://www.siprep.org/alumni/genesis-magazine/genesis/keeping-in-touch/~board/keeping-in-touch/post/keeping-in-touch-spring-2015> [<https://perma.cc/WA9R-GJXZ>].

201. *Bollard*, 196 F.3d at 944.

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.²⁰² The district court dismissed the suit on the ground that it was barred by the ministerial exception.²⁰³ 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.²⁰⁴

The opinion analyzed what it perceived as the Free Exercise and Establishment Clause components of the ministerial exception.²⁰⁵ Unlike the Minnesota Court of Appeals in *Black v. Snyder*, the Ninth Circuit panel did not treat *Employment Division v. Smith* as having erased the doctrine of free exercise exemptions in this context.²⁰⁶ 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.²⁰⁷ 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.²⁰⁸ The Order wanted Bollard to remain, and he left of his own volition because of the harassment.²⁰⁹ 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.²¹⁰ 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,

202. *Id.*

203. *Id.*

204. *Id.* at 950–51.

205. *Id.* at 945–47.

206. Compare *Black v. Snyder*, 471 N.W.2d 715, 719 (Minn. Ct. App. 1991) (citing *Emp’t Div. Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 872 (1990)), with *Bollard*, 196 F.3d at 947.

207. *Bollard*, 196 F.3d at 946, 948 (citing *Sherbert v. Verner*, 374 U. S. 398, 403–07 (1963)). *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*, *supra* note 4, at 1278.

208. *Bollard*, 196 F.3d at 947.

209. *Id.*

210. *Id.*

thus, did not bar the lawsuit.²¹¹

Judge Fletcher then turned to the Establishment Clause justifications for the ministerial exception.²¹² 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.²¹³ 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.²¹⁴

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.²¹⁵ 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.²¹⁶

Moreover, Bollard was not seeking equitable Title VII remedies, including reinstatement or any form of judicial monitoring of future employer conduct.²¹⁷ Those remedies would unconstitutionally entangle the courts with a religious institution.²¹⁸ Instead, he sought only the remedy of money damages for prior wrongdoing.²¹⁹ If he prevailed on the merits, courts could provide that remedy without constitutional problems.²²⁰

211. *Id.* at 948.

212. *Id.*

213. *Id.* at 948–49.

214. *Bollard*, 196 F.3d 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. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 184 (2012).

215. *Bollard*, 196 F.3d at 949.

216. *Id.* at 950. In addition, the district court could control discovery to avoid constitutionally sensitive questions. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Bollard*, 196 F.3d at 950. The panel thus remanded the case, including Bollard's state law claims, for resolution in the district court. *Id.* at 950–51. 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

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.²²¹ Two years later, in *McKelvey v. Pierce*,²²² 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.²²³ 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.²²⁴ Based on theories of contract and tort, McKelvey sued the Diocese of Camden and various individual defendants.²²⁵ He alleged that the defendants and their employees “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.”²²⁶ 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.²²⁷

A unanimous New Jersey Supreme Court reversed.²²⁸ The Court noted that “[t]he First Amendment clearly ‘bars government from involving itself in purely ecclesiastic[al] matters, in-

focused on the hostile sexual environment in their workplace.

221. *See id.* at 947–48.

222. *See* 800 A.2d 840, 853–54 (N.J. 2002).

223. *Id.* at 845.

224. *Id.* at 846.

225. *Id.* at 842.

226. *Id.* at 845. The opinion includes 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 \$69,000. *See McKelvey*, 800 A.2d 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. *Id.*

227. *Id.* at 846–47.

228. *Id.* at 842.

cluding . . . retention of . . . ministers.”²²⁹ After a lengthy and careful review of the leading decisions, including *Bollard*, under both the Free Exercise Clause and the Establishment Clause,²³⁰ the Court synthesized the relevant legal principles.²³¹ “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.²³²

The court must also examine the requested remedies to see if they involve similar constitutional defects²³³:

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.²³⁴

Applying these principles to McKelvey’s lawsuit against the Diocese of Camden, the Court reversed and remanded the case for further proceedings.²³⁵ 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 interpreta-

229. *Id.* at 847 (quoting *Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575, 580 (Mo. Ct. App. 2001)).

230. *McKelvey*, 800 A.2d at 847–56. 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 examined what it referred to as the “church autonomy” doctrine and concluded that there is no such doctrine independent of the more particular dictates of the Free Exercise and Establishment Clauses. *Id.* at 850–51. For a more detailed discussion of why the law recognizes no general concept of church autonomy, see Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1296–99.

231. *McKelvey*, 800 A.2d at 856.

232. *Id.* at 856.

233. *Id.*

234. *Id.*

235. *Id.* at 860.

tion of religious principles, such as the meaning of a vow of celibacy.²³⁶ “McKelvey can attempt to prove that he was sexually harassed by defendants,” the Court wrote, “resulting in his leaving the seminary before he could be considered for ordination.”²³⁷

McKelvey and *Bollard*, the two seminary cases in this quartet, thus line up perfectly on both facts and constitutional analysis.²³⁸ Both involve seminarians harassed by their supervisors, leading to suits against religious entities.²³⁹ 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.²⁴⁰ 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 the selection of clergy or conflict with religious teaching.²⁴¹ Finally, both decisions echo *Black v. Snyder*’s analysis of available remedies.²⁴²

C. Elvig v. Calvin Presbyterian Church

Elvig v. Calvin Presbyterian Church.²⁴³ *Elvig*, which factually resembles *Black v. Snyder*, is the final and most provocative decision in this quartet.²⁴⁴ By the time the Ninth Circuit’s processes in *Elvig* had concluded, several judges had expressed serious disagreement about the soundness of the harassment exception to

236. *Id.* at 858.

237. *McKelvey*, 800 A.2d 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 relevant statute of limitations.

238. See *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 944–45 (9th Cir. 1999); See also *McKelvey*, 800 A.2d at 853–54.

239. See *supra* note 238 and accompanying cases.

240. See *id.*

241. See *id.*

242. Compare *Bollard*, 196 F.3d at 950 and *McKelvey*, 800 A.2d at 856–57, with *Black v. Snyder*, 471 N.W.2d 715, 721 (Minn. Ct. App. 1991) (holding that monetary damages would not violate the ministerial exception).

243. See *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 951 (9th Cir. 2004), *reh’g denied*; 397 F.3d 790, 790 (9th Cir. 2005).

244. See *Elvig*, 375 F.3d at 953–54; *Black*, 471 N.W.2d at 717–18.

the ministerial exception.²⁴⁵ Because the affirmative defense in *Ellerth* and *Faragher* had emerged shortly before *Elvig*, the case offered the Ninth Circuit an important opportunity to explore the constitutional implications of that defense.²⁴⁶ Is it possible for courts to evaluate the reasonableness of mechanisms for prevention and correction of harassment without intruding on the internal governance of a religious institution? Moreover, several judges identified a potential constitutional problem if the alleged harassment involved persistent discussion of religious attitudes about sexual relationships and the role of women.²⁴⁷

The facts of *Elvig* appear to be simple. Monica McDowell Elvig was an ordained Presbyterian minister.²⁴⁸ 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 2001.²⁴⁹ Elvig's complaint in federal district court alleged the following: Senior Pastor William Ackles harassed her sexually and created a hostile environment.²⁵⁰ When Elvig sought assistance from church authorities, they investigated but did nothing to stop the harassment.²⁵¹ When Elvig complained in October 2001 to the EEOC, Ackles allegedly retaliated by stepping up the harassment.²⁵² In December 2001, the church first put her on unpaid leave, and then terminated her employment.²⁵³ Later that month, the Presbytery decided that she was not qualified to seek employment as a Presbyterian minister anywhere in the United States.²⁵⁴

245. See *Elvig*, 397 F.3d at 790.

246. See *Elvig*, 375 F.3d at 957.

247. *Id.* at 970 (Trott, J., dissenting).

248. *Id.* at 953.

249. *Id.*

250. *Id.* at 953–54. 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 [sic] alleged harassment, and she has not offered any allegation that somehow her job was in jeopardy if she did not do so.

Elvig, 375 F.3d at 971 (Trott, J., dissenting).

251. *Id.* at 953–54.

252. *Id.* at 954.

253. *Id.*

254. *Id.* (“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

Her complaint asserted violations of Title VII in the form of sexual harassment and retaliatory harassment, as well as related state law claims.²⁵⁵ 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.²⁵⁶ The district court dismissed the complaint as barred by the ministerial exception.²⁵⁷

In an opinion for a divided panel of the Ninth Circuit, Judge Fisher reversed with respect to the claims for damages arising from a hostile environment and from retaliatory harassment.²⁵⁸ The opinion invokes *Bollard* and proceeds identically.²⁵⁹ The court may not review any adverse job action taken by the church against Elvig.²⁶⁰ Accordingly, the church's decisions to suspend her without pay, terminate her employment, and ultimately strike her from the roster of Presbyterian ministers were all protected by the ministerial exception.²⁶¹ 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.²⁶² The court ruled that her remedies must be limited to tort-type damages arising from those past wrongs, and may not include reinstatement or any damages for lost pay after the date of termination.²⁶³

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.²⁶⁴ *Bollard* said likewise, but *Bollard* involved homosexual harassment in a seminary, where an avowed atmosphere of celibacy made such a defense completely unlikely.²⁶⁵ The context of *Elvig* at least raised the possibility of

in any Presbyterian church in the United States.”).

255. *Id.*

256. *Elvig*, 375 F.3d at 954.

257. *Id.*

258. *Id.* at 953.

259. *Id.* at 955–57.

260. *Id.* at 962.

261. *Id.* at 958.

262. *Elvig*, 375 F.3d at 960.

263. *Id.* at 966–67.

264. *Id.* at 963.

265. *Id.* at 957 (citing *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 949–50 (9th Cir. 1999)).

some religious justification.²⁶⁶ Second, the church may assert the *Ellerth-Faragher* affirmative defense that it had in place reasonable mechanisms to prevent and correct the harassment, and that Pastor Elvig unreasonably failed to avail herself of those mechanisms.²⁶⁷ The inquiry into this defense, says the panel opinion, must be limited to secular concerns.²⁶⁸

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* suit.²⁶⁹ Dissenting from the panel opinion,²⁷⁰ Judge Trott expressed his concern that *Bollard* had been wrongly decided.²⁷¹ The dissent noted that Pastor Elvig had taken a vow to be “governed by our Church’s polity, and to abide by its discipline.”²⁷² 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 that congregation was associated.²⁷³ 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.²⁷⁴ 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.²⁷⁵

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.²⁷⁶ Judge Trott noted that Elvig’s lawsuit was itself a

266. *See id.* at 963.

267. *Id.* at 957–58.

268. *Elvig*, 375 F.3d at 963.

269. *See id.* at 961 and accompanying cases.

270. 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).

271. *See id.* (Trott, J., dissenting).

272. *Id.* (citing *Book of Order*, G-14.0405b.(5), in CONSTITUTION OF THE PRESBYTERIAN CHURCH (U.S.A.) (Office Gen. Assembly 2017–2019)).

273. *Id.* at 970–72.

274. *Elvig*, 375 F.3d at 971–72.

275. *Id.* at 971. Judge Trott also wrote that the church had offered repeatedly to mediate between Elvig and Ackles, but that Elvig had refused. *Id.* at 972.

276. *See id.* at 975.

breach of her vows.²⁷⁷ And it would be impossible, he argued, for courts to evaluate the secular reasonableness of the responsive mechanisms.²⁷⁸ To him, the case presented deep risks of substantive and procedural entanglement between the court and the church.²⁷⁹ *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.²⁸⁰ If *Bollard* was not distinguishable, Trott concluded, it was wrong.²⁸¹

The Church defendants petitioned for *en banc* review in the Ninth Circuit.²⁸² The Circuit denied the petition, but the denial produced three dissents, representing the views of six judges.²⁸³ In the most prominent dissent, Judge Kleinfeld²⁸⁴ 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.²⁸⁵ He argued that the constitution

277. *Id.*

278. *Id.* at 974–75.

279. *Elvig*, 375 F.3d at 974–75. 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. *See Elvig v. Ackles*, 98 P.3d 524, 525 (Wash. Ct. App. 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. *See id.* at 525–26.

280. *See Elvig*, 375 F.3d at 980 (Trott, J., dissenting).

281. *Id.*

282. *See Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 790 (9th Cir. 2005).

283. *Id.*

284. *Id.* at 798–806 (Kleinfeld, J., dissenting).

285. *Id.* at 799. At least one post-*Hosanna-Tabor* decision seems to agree with Judge Kleinfeld's concerns. *See Preece v. Covenant Presbyterian Church*, No. 8:13CV188, 2015 U.S. Dist. LEXIS 52751, at *17–19 (D. Neb. Apr. 22, 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, 247 (Mo. 1997) (holding that plaintiff in tort action for failure to supervise clergy must prove that the religious institution "intentionally" failed to provide appropriate supervision); *see also Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575, 575 (Mo. Ct. App. 2001) (applying *Gibson* to a claim of sexual abuse brought by a ministerial employee).

barred evaluation of internal church procedures offered to satisfy the affirmative defense in hostile environment cases.²⁸⁶ Pastor Elvig had taken vows to be bound by church procedures.²⁸⁷ Kleinfeld argued that courts should not aid the pastor's attempt to circumvent her vows.²⁸⁸ In addition, he wrote, many religions teach particular views on sexuality and the role of women. Accordingly, the content of the harassment may have included condemnation of what Pastor Ackles saw as sinful conduct.²⁸⁹

Judges Fletcher and Kozinski filed concurrences in the denial of rehearing.²⁹⁰ Both responded directly to the dissenters' concerns. Judge Fletcher,²⁹¹ who had authored *Bollard*, insisted that *Elvig* was not materially different, and that both decisions were correct. Both decisions had taken pains to confine the courts to secular inquiries into harassment and affirmative defenses, and to restrict remedies and discovery in light of the ministerial exception.²⁹² Judge Fletcher explained that hostile environment cases are essentially tort suits about the injury from harassment itself.²⁹³ The constitution does not bar tort suits against the negligent employers of clergy who sexually abuse minors; hostile sexual environment suits should be similarly allowed.²⁹⁴

Judge Kozinski's concurrence elaborated on these themes.²⁹⁵ Judge Kleinfeld's concern about potential interference with church governance proves too much, Kozinski wrote.²⁹⁶ A sexual harassment claim under Title VII by a non-minister, alleging ha-

286. See *Elvig*, 397 F.3d at 799 (Kleinfeld, J., dissenting). 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. *Id.* at 806–07 (Gould, J., dissenting). 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 808–10 (Bea, J., dissenting).

287. *Elvig*, 375 F.3d at 970 (Trott, J., dissenting).

288. See *Elvig* 397 F.3d at 801 (Kleinfeld, J. dissenting).

289. *Id.* at 805. Nothing in the record supported this speculation.

290. *Id.* at 790 (Fletcher, J., concurring) (Kozinski, J., concurring).

291. See *id.* at 790–95 (Fletcher, J., concurring).

292. *Id.* at 791–92.

293. *Id.* at 790, 793.

294. *Elvig*, 397 F.3d at 792, 795.

295. *Id.* at 795–98 (Kozinski, J., concurring). 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 (Kleinfeld, J., dissenting), with *id.* at 796–97 (Kozinski, J., concurring).

296. *Id.* at 798 (Kozinski, J., concurring).

rassment by a minister, would frequently require inquiry into the reasonableness of the church's discipline and response mechanisms.²⁹⁷ Yet such a suit would not be barred by the ministerial exception, because the plaintiff was not a minister.²⁹⁸

Since *Elvig*, one federal appellate court²⁹⁹ and one federal district court³⁰⁰ 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.³⁰¹ The district court similarly asserts, without explanation, that the harassment claim is barred because it is "factually entwined" with other claims in the litigation.³⁰² Of course, the same could be said of both *Black* and *Elvig*, so this concern alone cannot explain why those decisions are wrong.

In all other cases we have found, the principles announced in the quartet have been explicitly followed.³⁰³ *Elvig* thus represents the last significant judicial engagement with the tension between sexual harassment claims and the constitutionally based ministe-

297. *Id.* at 797.

298. *Elvig*, 397 F.3d at 797.

299. See *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1244–46 (10th Cir. 2010). Ms. Skrzypczak was the Director of Religious Formation for the Diocese. *Id.* at 1240. The court ruled that her position was indeed ministerial, and that the Constitution barred her claims for age and sex discrimination. *Id.* at 1244–46. The causes of action included an assertion of hostile environment, though the court mentions no details of that claim. *Id.* at 1244. Without engaging the issues that separate the judges in the Ninth Circuit, the Tenth Circuit panel cast its lot with Judge Kleinfeld's *Elvig* opinion, in which he dissented from the denial of rehearing en banc. *Id.* at 1244–45.

300. See *Preece v. Covenant Presbyterian Church*, No. 8:13CV188, 2015 U.S. Dist. LEXIS 52751, at *17–19 (D. Neb. Apr. 22, 2015) (holding that a ministerial employee may not bring a Title VII claim for sexual harassment because judicial inquiry into investigation of alleged conduct necessarily implicates ecclesiastical judgments).

301. See *Skrzypczak*, 611 F.3d at 1244–45.

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].'

Id. at 1245 (quoting *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 803–04 (9th Cir. 2005)). The argument proves far too much. The imposition of liability for negligent hiring of clergy who abuse minors produces the same effect.

302. *Preece*, 2015 U.S. Dist. LEXIS 52751, at *19.

303. See *Demkovich v. St. Andrew the Apostle Parish*, 2018 U.S. Dist. Lexis 168584, at *13–*18 (N.D. Ill., Sept. 30, 2018); *Bohnert v. Roman Catholic Archbishop of S.F.*, 136 F. Supp. 3d 1094, 1114–16 (N.D. Cal. 2015); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1003–07 (D. Kan. 2004); *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171, 1176, 1184–85, 1192 (Md. 2011), *cert. denied*, 566 U.S. 937 (2012).

rial exception. 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 long-standing defense of the ministerial exception rests on the constitutional impermissibility of adjudication of ecclesiastical questions.³⁰⁴ We reject any wider claim of church autonomy. The principles enunciated in the controlling opinions in the hostile environment quartet fit 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 action claims are constitutionally different from those involving severe and pervasive hostile environments; (2) whether a hostile environment can be legally justified by religious teaching on matters of gender or sexuality; (3) whether adjudication of the *Ellerth-Faragher* affirmative defense to hostile environment actions leads, at least in some cases, to constitutionally forbidden 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.³⁰⁵ We consider these in turn.

A. The Distinction Between Adverse Job Action Claims and Hostile Environment Claims

In agreement with the quartet, we believe that the distinction between claims of adverse job action and claims of a hostile

304. See Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1280–84.

305. See *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 791–93, 799, 805–08 (9th Cir. 2005) (Kleinfeld, J., dissenting).

environment is constitutionally necessary.³⁰⁶ It is useful to begin the analysis by focusing on the harms from the varieties of sexual harassment.³⁰⁷ 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.³⁰⁸

At work, if the unwanted attention is from a co-worker, the target is captive to the stress, sometimes throughout the work-day.³⁰⁹ If the harassment is from a supervisor, the stress is aggravated further by the danger of an adverse job action—dismissal, denial or promotion, reduction in hours or pay, etc.³¹⁰ When that is added to the mix, the anxiety of unwanted sexual attention is compounded by economic anxiety, which may extend beyond immediate job loss to the prospect of serious career derailment.³¹¹

306. 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. See Levinson, *supra* note 13, at 92, 119.

307. The #MeToo movement has produced an outpouring of impressive and powerful writing by individuals about the harms of sexual harassment. See, e.g., Tom Bartlett & Nell Gluckman, *She Left Harvard. He Got to Stay*, CHRON. HIGHER EDUC. (Feb. 27, 2018), <https://www.chronicle.com/interactives/harvard-harassment> [<https://perma.cc/GQX4-WSFA>]; Rebecca Carroll, *My Experience at Charlie Rose Went Beyond Sexism*, ESQUIRE (Dec. 4, 2017), <https://www.esquire.com/entertainment/tv/a13978884/charlie-rose-sexual-harassment-accuser-story/> [<https://perma.cc/NBA2-ACPK>]; Lupita Nyong'o, *Lupita Nyong'o: Speaking Out About Harvey Weinstein*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/opinion/lupita-nyong'o-harvey-weinstein.html> [<https://perma.cc/5QHT-JUK8>]; Rebecca Solnit, *Rebecca Solnit On the #MeToo Backlash: Stop Telling Us How to Confront an Epidemic of Violence and Abuse*, LITERARY HUB (Feb. 12, 2018), <https://lithub.com/rebecca-solnit-on-the-metoo-backlash/> [<https://perma.cc/VQN6-T8K7>]; Jia Tolentino, *How Men Like Harvey Weinstein Implicate Their Victims in Their Acts*, NEW YORKER (Oct. 11, 2017), <https://www.newyorker.com/culture/jia-tolentino/how-men-like-harvey-weinstein-implicate-their-victims-in-their-acts> [<https://perma.cc/2TFN-Q77U>]; Rebecca Traister, *This Moment Isn't (Just) About Sex. It's Really About Work*, CUT (Dec. 10, 2017), <https://www.thecut.com/2017/12/rebecca-traister-this-moment-isnt-just-about-sex.html> [<https://perma.cc/R9PV-PAWY>].

308. See Bartlett & Gluckman, *supra* note 307.

309. See *id.*; see also Carroll, *supra* note 307.

310. See Traister, *supra* note 307.

311. The story of Judge Alex Kozinski's former clerk, Heidi Bond, is a powerful example. See Matt Zapposky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017, 3:11 PM), 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=.b2bb85cab423 [<https://perma.cc/F5F7-ZVZ6>]. For a first-person account of Kozinski's treatment of women, see Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/12/judge_alex_kozinski_made_us_all_victims_and_accomplices.html [<https://perma.cc/GD9A-HPLP>]. For

When the harassment takes the form of gender-based denigration, even without sexual content, the harms may be equally severe. This kind of harassment is aimed at breaking the confidence and self-esteem of its targets, and can also do long-term damage to the target's psychological well-being and career.³¹²

In a legal context without countervailing constitutional concerns, all of these harms from sexual harassment are fully cognizable and may lead to a complete set of legal remedies.³¹³ Feminist critics of the ministerial exception quite understandably point to this full set of harms.³¹⁴ They argue that the exception protects religious entities against appropriate imposition of liability, and thereby facilitates these harms to victims of discrimination, including harassment victims.³¹⁵

As we have explained elsewhere, however, the critics have rarely come to grips with the chasm at the center of their critique.³¹⁶ Some faith traditions completely exclude women from the ranks of clergy.³¹⁷ Complete exclusion stigmatizes all women as unworthy of these prestigious and socially significant positions, robs them of the opportunity to compete and excel as ministers, and denies the possible fulfillment associated with successful ministry.³¹⁸ In order to completely remedy the full set of harms

an eloquent comment on the type of career long 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), https://www.nytimes.com/2017/12/14/us/how-one-harasser-can-rob-a-generation-of-women.html?_r=0 [<https://perma.cc/8Q82-XXVJ>].

312. See Schultz, *supra* note 86, at 1750–54 (illustrating how nonsexual gender-based denigration impacts women's feelings of competence in work and career advancement).

313. See *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 949–50 (9th Cir. 1999) (noting how the remedies generally available under Title VII are not all available under the ministerial exception).

314. See Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1310.

315. Corbin, *Above the Law*, *supra* note 14, at 2015; Levinson, *supra* note 13, at 114–15.

316. Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1310–14.

317. Similarly, some communities completely exclude openly LGBT persons from ministerial positions. Where LGBT discrimination is prohibited, the ministerial exception operates to nullify the prohibition as applied to such positions. As demonstrated by *Bollard* and *McKelvey*, involving harassment of male seminary students by males in supervisory positions, same sex harassment can be a form of actionable sex discrimination. See *Bollard v. Cal. Province of Soc'y of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999); *McKelvey v. Pierce*, 800 A.2d 840, 842 (N.J. 2002).

318. For a brief analysis of recent arguments for and against women being ordained as Catholic priests, see Brooke Bobb, *Keeping the Faith*, VOGUE (May 4, 2018), <https://www.vogue.com/projects/13543313/roman-catholic-women-priest-movement-giulia-bianchi> [<https://perma.cc/F43U-7T38>]; Delia Gallagher, *Why Has the Pope Said No to Women Priests?*, CNN (Nov. 2, 2016, 11:22 AM),

that gender discrimination may produce, courts would have to eliminate the ministerial exception altogether. Those faiths with overt, theologically grounded exclusion of women from ministry would be effectively forced to open the ranks of clergy. Yet even the most ardent opponents of the ministerial exception seem to shrink at the prospect of this degree of coercion of faith communities.³¹⁹

If the ministerial exception retains its legal status and force—and a unanimous Supreme Court decision in 2012 makes that extremely likely—, constitutionally sensitive decision-making must find the best way to reconcile it with the law of sexual harassment.³²⁰ The principles reflected in the quartet represent a good start in that direction.³²¹ 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. So measured, the sexual harassment exception—allowing for hostile environment claims—to the ministerial exception serves laudable purposes in a constitutionally sound way.³²²

As Judge Fletcher suggested in *Bollard*, the harms of harassment fall into more than one traditional legal category.³²³ The

<https://www.cnn.com/2016/11/02/europe/analysis-pope-female-priests/index.html> [<https://perma.cc/M8XF-BRAG>]; Judith Levitt, *Women as Priests*, N.Y. TIMES (Sept. 29, 2012), <https://www.nytimes.com/2012/09/30/opinion/sunday/women-as-priests.html> [<https://perma.cc/AT83-JCFL>].

319. Professor Corbin steers around the question. See Corbin, *Above the Law*, *supra* note 14, at 2014, 2030–31. So does Professor Griffin. See Griffin, *supra* note 28, at 1016–17. We engage pointedly with this and other aspects of the anti-ministerial exception position in Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1283–84, 1310–14.

320. See Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1287 (describing how sexual harassment cases can still be constitutionally adjudicated in light of *Hosanna-Tabor*).

321. See *id.* at 1291.

322. To be sure, barring adverse job action claims means that sexual harassment law cannot fully achieve its laudable goal of combating gender stereotypes and reinforcement of traditional gender roles. This is the price of the constitutional good of disabling the state from policing the hiring of clergy, and we understand why some critics believe that price is too high. Moral suasion and evolution of social norms may push faith communities to work on their own, in the direction of ending gender discrimination, as many have done.

323. See *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 947, 950 (9th Cir. 1999) (noting the different types of remedies available for harms from sexual harassment).

harms of adverse job actions involve primarily lost opportunity.³²⁴ The principles and remedies of contract law seem most appropriate to dealing with such losses.³²⁵ In contrast, the harms arising from a severe and pervasive hostile environment involve interests in dignity, psychic well-being, and physical security typically protected by the law of torts.³²⁶

The appeal to tort law principles reflects long-standing constitutional norms about the limits of religious freedom.³²⁷ Religious communities are free to define their own criteria for ministry, in the same way that 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 well-being of their members and employees.³²⁸

This is the line that the decisions in the quartet have drawn, reflected in the distinction between adverse employment action claims—barred by the Religion Clauses of the First Amendment—and hostile environment claims.³²⁹ It fits precisely with our constitutional explication of the ministerial exception.³³⁰ We have argued our basic position at length elsewhere,³³¹ but it seems appropriate to reassert its basic 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. They must answer, as secular entities

324. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761–62 (1998); *Harris v. Forklift Sys.*, 510 U.S. 17, 22 (1993).

325. See *Bollard*, 196 F.3d at 950 (suggesting that, while barred by the ministerial exception, the appropriate causes of action for remedies such as reinstatement are state contract law claims).

326. See *Ellerth*, 524 U.S. at 756 (analyzing Title VII liability through the lens of tort law); *Harris*, 510 U.S. at 23 (noting the potential impacts of a hostile work environment on an employee’s psychological well-being).

327. See *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 795 (9th Cir. 2005) (Fletcher, J., concurring).

328. See *id.* at 792–93.

329. See *id.* at 795 (delineating that a church’s decision to “hire, fire, promote, refuse to promote, and prescribe the duties of its ministers” is protected under the ministerial exception, while sexual harassment by a minister is not protected).

330. See Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1280–84.

331. See LUPU & TUTTLE, *SECULAR GOVERNMENT*, *supra* note 53, at 43–45; Lupu & Tuttle, *Courts, Clergy, and Congregations*, *supra* note 4, at 122–23; See also Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 92 (2002) [hereinafter Lupu & Tuttle, *Distinctive Place*]; Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1280–84.

do, for torts committed by their agents.³³²

What appropriately separates church from state are the set of activities and concerns that are religiously distinctive. Faith communities develop principles about the relationship with a transcendent order and practices associated with those principles. In sharp contrast, our constitutional arrangements bar the government from promoting worship of a divine entity or teaching a world-view that is explicitly grounded in theology.³³³

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.³³⁴ The ministerial exception does not rest upon any general immunity of religious employers from civil law governing the employment relationship.³³⁵ These employers must comply with wage and hour laws, workplace safety rules, and—in most circumstances—prohibitions on employment discrimination based on race, national origin, or sex.³³⁶ The ministerial exception applies only when such prohibitions conflict with the authority to decide who is fit to communicate the faith.³³⁷

In the context of sexual harassment, the distinction between adverse job action claims and hostile environment claims 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, inability to get along with a sexually aggressive senior pastor, or some other reason, rational or not. Of course, within a well functioning faith

332. *See, e.g.*, *Guinn v. Church of Christ of Collinsville*, 775 P.2d 778–85 (Okla. 1989) (holding that a church and its leaders may be held liable for defamatory statements about a former member; any qualified privilege they may have held to speak in church about the former member's conduct ended when the member gave notice of withdrawal from the church).

333. LUPU & TUTTLE, *SECULAR GOVERNMENT*, *supra* note 53, at 3–4.

334. *See id.* at 46–48. For examples of judicial abstention in cases involving strictly ecclesiastical questions, *see Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976) (church personnel); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451–52 (1969) (church property).

335. *See* Lupu & Tuttle, *Courts, Clergy, and Congregations*, *supra* note 4, at 132.

336. *See* *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 792 (9th Cir. 2005) (Fletcher, J., concurring).

337. *See* Lupu & Tuttle, *Courts, Clergy, and Congregations*, *supra* note 4, at 132.

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 intervene in this supervision by reviewing a religious community's decision about the hiring, firing, or assignment of a minister.³³⁸

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 limits on mistreatment of employees, and corresponding liability for the tortious harms that religious communities may inflict on those within their employ.³³⁹

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.³⁴⁰ Breaches of that duty of care can lead to imposition of substantial damages, both compensatory and punitive.³⁴¹ Courts may not order the expulsion of persons from ministry,³⁴² but they can and do impose liability on religious employers that fail to protect victims from misbehaving clergy.

B. May Religious Teaching Justify a Severe and Pervasive Hostile Environment?

This is a question initially raised by Judge Fletcher in *Bollard*, when he suggested that religious doctrine may be relevant to a sexual harassment suit. His opinion pointed out that:

338. *Elvig*, 397 F.3d at 795 (Fletcher, J., concurring).

339. *See id.* at 796 (Kozinski, J., concurring).

340. In *Bollard*, Judge Fletcher cites several of the leading decisions imposing such liability. *See* *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999). There are many more such decisions. *See* *Lupu & Tuttle, Ecclesiastical Immunity*, *supra* note 1, at 1884.

341. *See, e.g., Doe v. Archdiocese of Portland*, 717 F. Supp. 2d 1120, 1140–41 (D. Or. 2010) (denying defendants' motion to dismiss Jane Doe's request for punitive damages, finding that "a reasonable finder of fact could conclude on the basis of [] Jane's allegations that the archdiocesan defendants' conduct met the appropriate standard for award of *punitive damages . . .*").

342. Courts do not permit suits for negligent ordination. We cite the leading decisions on this point in *Lupu & Tuttle, Ecclesiastical Immunity*, *supra* note 1, at 1846 n.224–27.

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.³⁴³

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:

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.³⁴⁴

Judge Kleinfeld's concerns are serious, but not nearly so well taken as he thinks. First, cases in which the allegations of sexual harassment involve the propagation of religious teaching are extremely rare.³⁴⁵ As the cases in the quartet reflect, the allegations

343. 196 F.3d at 947.

344. See 397 F.3d at 805 (Kleinfeld, J., dissenting).

345. See Lupu & Tuttle, *Courts, Clergy, and Congregations*, *supra* note 4, at 150 (analyzing why congregations would be reluctant to argue that sexual harassment constitutes part of accepted religious teachings); see also Lupu & Tuttle, *Ecclesiastical Immunity*, *supra* note 1, at 1818. To our knowledge, the sole harassment case in which religious teachings have been offered as a defense is *Demkovich v. St. Andrew the Apostle Parish*, 2018 U.S. Dist. LEXIS 168584 (N.D. Ill. Sept. 30, 2018), in which some of the alleged harassment involved denigration within a Catholic parish of a music minister's upcoming same sex marriage. See *id.* at *3–*5, *25–*30. We discuss

of harassment typically involve unwanted sexual attention—staring, commenting, touching, propositioning, threatening, etc.³⁴⁶ 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.³⁴⁷

Second, note that Judge Kleinfeld subtly slides “his church” behind the harassing pastor’s sexist views.³⁴⁸ It is only in faith communities that are open to female clergy however that such faith-based harassment might occur. In those communities, the harassing supervisor will be speaking for himself, not for his faith’s current commitments.³⁴⁹ If he denigrates, even in theological terms, a female employee, the employer will be highly unlikely to offer the defense of religious teaching.³⁵⁰ Intrachurch impediments, rather than legal norms, will block the emergence of such a defense.

No doubt, faith traditions that make a transition toward openness to women or LGBT pastors may face a transition problem. Their male cadre of clergy or other religious leaders may be uncomfortable with or even openly hostile to the change.³⁵¹ In those circumstances, the religious community may well have a problem with discipline of those clergy or leaders who resist, subtly or otherwise, the church’s new teaching. In such cases, however, the conflict over religious teaching is between the harasser and the church, not between the victim and the church. How faith groups deal with dissenting leaders through periods of transition

Demkovich *infra* note 361.

346. See *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 791 (9th Cir. 2005) (Fletcher, J., concurring); *Bollard*, 196 F.3d at 944; *McKelvey v. Pierce*, 800 A.2d 840, 842 (N.J. 2002); *Black v. Snyder*, 471 N.W. 715, 717–18 (Minn. Ct. App. 1991).

347. For a discussion on why some men might be uncomfortable or threatened by female clergy, see Jennie Rothenberg Gritz & Eleanor Barkhorn, *Why Are People Still Uncomfortable with Female Rabbis and Pastors?*, ATLANTIC (Dec. 21, 2012), <https://www.theatlantic.com/sexes/archive/2012/12/why-are-people-still-uncomfortable-with-female-rabbis-and-pastors/266542/> [<https://perma.cc/P9QL-XGGF>].

348. *Elvig*, 397 F.3d at 805 (Kleinfeld, J., dissenting).

349. See *Bollard*, 196 F.3d at 947 (discussing that the Jesuits “condemn[ed] [the harassment] as inconsistent with their values and beliefs”).

350. See *id.*

351. See Lupu & Tuttle, *Courts, Clergy, and Congregations*, *supra* note 4, at 129 n.65 (suggesting that “[i]n the case of those faiths that openly exclude females from roles in the clergy . . . the impact on the tradition and experience of the faith” would be significant and potentially difficult).

is indeed a solely ecclesiastical matter.³⁵² It is the concern of the state only if these leaders behave abusively toward clergy (or others) under their supervision.³⁵³ If that kind of behavior develops, the religious employer incurs legal responsibility to intervene and faces liability if it fails to do so.³⁵⁴

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.³⁵⁵ That defense would be consent—explicit, not implied from general circumstances of discipline and control in clergy employment.³⁵⁶ Becoming a minister in such a religious group would mean the sexual attention was welcome.³⁵⁷ If the attention becomes unwelcome, it is time to 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.³⁵⁸ The ministerial exception would bar neither of those measures.³⁵⁹

One very recent decision concerning sexual harassment of clergy does involve the interaction of religious teaching with a pervasive hostile environment. *Demkovich v. St. Andrew the Apostle Parish*,³⁶⁰ involves a suit by Sandor Demkovich against

352. See *Elvig*, 397 F.3d at 790–91 (Fletcher, J., concurring).

353. See Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1290–91.

354. See Lupu & Tuttle, *Ecclesiastical Immunity*, *supra* note 1, at 1847–49 (analyzing how some courts impose liability on religious institutions for negligent employment of tortious ministers).

355. See *Elvig*, 397 F.3d at 805 (Kleinfeld, J., dissenting) (noting his lengthy example of a minister whose church had misogynistic religious traditions).

356. See *id.* at 804–05.

357. 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 Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 *YALE J. L. & FEMINISM* 65, 90–92 (2006). But see Lua Kamál Yuille, *Sex in the Sexy Workplace*, 9 *NW. J. L. & SOC. POL'Y* 88, 91 (2013) (arguing that some jobs in sexualized industries may include certain forms of sexual harassment under the “bona fide occupational qualification” standard).

358. See *Molko v. Holy Spirit Ass'n*, 762 P.2d 46, 57–58 (Cal. 1988) (explaining that although plaintiffs' own false imprisonment claims were constitutionally barred, the court recognized that there were other instances in which false imprisonment claims were successfully brought against religious figures).

359. See *id.*

360. 2018 U.S. Dist. LEXIS 168584 (N.D. Ill., Sept. 30, 2018).

the Parish, which had employed him as a music director, choir director, and organist between 2012 and 2014.³⁶¹ The original complaint in the lawsuit alleged that Demkovich had been unlawfully terminated on account of his sex, sexual orientation, marital status, and disability.³⁶² The federal district court dismissed the suit on the ground that Demkovich's position fell under the ministerial exception.³⁶³

Demkovich then filed an amended complaint alleging that he had been subjected to a pervasively hostile work environment on the same grounds of sex, sexual orientation, marital status, and disability.³⁶⁴ In particular, Demkovich alleged that his supervisor, Reverend Jacek Dada, repeatedly and viciously harassed him about being gay and about his upcoming wedding to his same sex partner.³⁶⁵ Dada dismissed Demkovich from his position four days after the wedding.³⁶⁶ In addition, the complaint further alleged that Dada harassed Demkovich about his weight, which Demkovich attributed to the disabling conditions of diabetes and a metabolic problem.³⁶⁷

In an opinion that tracks the principles enunciated in the quartet of cases in Part III, the district court dismissed the portion of the complaint pertaining to Demkovich's sexual orientation but refused to dismiss the portion alleging a hostile work environment based on disability.³⁶⁸ The court recognized that the First Amendment does not presumptively bar a suit for damages arising from a pervasively hostile work environment.³⁶⁹ Based on the allegations in the complaint, however, the court found that Reverend Dada's harassment of Demkovich reflected Catholic teaching with respect to his planned wedding, and thus was constitutionally protected.³⁷⁰ In contrast, the harassment with respect to Demkovich's weight did not reflect such teaching and

361. *Id.* at *3. The complaint also named the Archdiocese of Chicago as Demkovich's employer and a co-defendant. *Id.*

362. *Id.* at *1.

363. *Id.*

364. *Id.* at *2–3.

365. *Demkovich*, 2018 U.S. Dist. LEXIS 168584, at *3–5. According to the complaint, Dada referred to Demkovich and his partner as “bitches,” *id.* at *3, and described the planned wedding to other employees as a “fag wedding,” *id.* at *4.

366. *Demkovich*, 2018 U.S. Dist. LEXIS 168584, at *5.

367. *Id.* at *5–6.

368. *Id.* at *34.

369. *See id.* at *19–25.

370. *See id.* at *25–30.

therefore was actionable.³⁷¹

Demkovich presents a subtle question about a hostile work environment that is defended by the employer on the ground that it reflects an undisputed religious teaching. Reverend Dada, acting for the Parish, had several nonharassing options. Because Demkovich was a ministerial employee, Dada could have lawfully dismissed Demkovich as soon as Dada learned of the employee's plan to marry a same sex partner. Alternatively, Dada could have chosen to retain Demkovich as a Music Director while encouraging him—in a respectful or loving way, rather than a harsh and degrading way—to bring his conduct into conformity with church teaching. But the existence of nonharassing options does not liberate the judiciary from the constitutional restriction on resolving exclusively ecclesiastical questions. The appropriate way of communicating that religious teaching presents such a question. Attempting to draw a line between mild and severe methods of communication, or between officially approved methods and an agent's discretionary choice of methods, would involve courts in impermissible questions concerning the transmission of religious lessons within the church.³⁷²

Because the claim that religious teaching supports the hostile environment would be a defense to otherwise actionable harassment, the employer should have to assert that the employee had violated the community's religious principles. The employer similarly should have to assert that the supervisor's mode of expression of those principles was in keeping with the faith. These requirements of accountability would validate the First Amendment defense without involving the court in a forbidden adjudication of the faith's norms, or its means of communicating those norms.

C. Consequences of the Distinction Between Adverse Job Action Claims and Hostile Environment Claims

371. *Id.* at *30–31.

372. We think the court perceived an appropriate line between chastisement by speech alone and that which involves physical assault or similar offenses. *See id.* at *18 (citing *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039–40 (7th Cir. 2006) (noting that the “internal-affairs exception [to employment laws] is limited,” for instance, “[a] church could not subject its clergy to corporal punishment or require them to commit criminal acts.”)).

By barring adverse job action claims while allowing hostile environment claims in actions by clergy, our approach does have one unfortunate consequence. In non-clergy cases, firing the complainant is an adverse job action that can give rise to a variety of remedies, including punitive damages and orders of reinstatement.³⁷³ 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.³⁷⁴ Moreover, the *Ellerth-Faragher* defense is not available with respect to the harm caused by adverse job actions.³⁷⁵

In cases involving clergy, however, religious employers are liable only for the harm done by the hostile environment, not for the separate harms of any adverse job action.³⁷⁶ This partial 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 additional liability.³⁷⁷

This is a tragic side effect of the operation of constitutional norms. We might fix the situation by permitting all claims and remedies for sexual harassment, which the Constitution forbids, or by permitting none, which is a cure far worse than the disease. Moreover, religious entities that welcome female clergy would be highly unlikely to 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 both *Black* and *Elvig*, the respective churches investigated the complaints and tried to work with the female pastor until she took

373. See *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999) (recognizing that the ministerial exception bars the “state law claim for breach of contract with an associated remedy of reinstatement”).

374. See *id.*

375. See *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 793 (9th Cir. 2005) (Fletcher, J., concurring) (“[The *Ellerth* inquiry] is a restricted inquiry.”).

376. See *id.* at 796 (Kozinski, J., concurring).

377. See *id.*

her complaint to a government agency.³⁷⁸

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, maintaining employer liability for hostile environment claims, while immunizing religious employers against liability for adverse job action claims, should incentivize the creation of policies and precautions against sexual harassment.³⁷⁹ These incentives are strongly reinforced, moreover, by the imposition of full liability for sexual harassment of non-ministerial employees.³⁸⁰

D. Applying the Ellerth-Faragher Affirmative Defense in Hostile Environment Actions by Clergy

We think the most difficult questions about the sexual harassment exception arise from application of the *Ellerth-Faragher* affirmative defense to religious bodies.³⁸¹ This was the centerpiece of the brief dissent in *Black v. Snyder* and of several opinions in *Elvig*.³⁸²

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

378. See generally *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 953–54 (9th Cir. 2004); *Black v. Snyder*, 471 N.W.2d 715, 718 (Minn. Ct. App. 1991). *Hosanna-Tabor*, which involved disability rather than harassment, revealed a similar pattern, in which negotiations broke off only when the plaintiff minister complained to a government agency. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 180 (2012).

379. These policies should include protection of clergy from sexual harassment by lay members of the congregation—including those who are not involved in governance of the congregation or supervision of the affected cleric. In this respect, religious employers should be subject to the same norms as other employers who are required to protect employees against sexual harassment by customers. See, e.g., *EEOC v. Love's Travel Stops & Country Stores*, 677 F. Supp. 2d 1176, 1177 (D. Ariz. 2009); *Menchaca v. Rose Records*, No. 94-C-1376, 1995 U.S. Dist. LEXIS 4149, at *1 (N.D. Ill. Mar. 31, 1995); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025 (D. Nev. 1992).

380. *Love's Travel Stops*, 677 F. Supp. 2d at 1185.

381. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

382. See *Black v. Snyder*, 471 N.W.2d 715, 722 (Minn. Ct. App. 1991) (Randall, J., dissenting).

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.*³⁸³

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.”³⁸⁴ Let us start with prevention. The most common steps that employers take to prevent harassment are (1) development and articulation of a policy about sexual harassment, including gender-based denigration and unwanted sexual attention in the workplace; (2) training of employees in the purposes, operation, and meaning of such a policy; and (3) taking care in the employment of supervisors.³⁸⁵ None of these steps are likely to invite judicial evaluation of theological understandings. 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 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.³⁸⁶ Preferring secular to religious understandings of the wrong would raise a constitutional problem of discrimination against religion.³⁸⁷ Employers, secular or religious, are required to provide good faith and effective communica-

383. *Faragher*, 524 U.S. at 807 (emphasis added).

384. *Id.*

385. See, e.g., U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *Best Practices for Employers and Human Resources/EEO Professionals*, <https://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm> [<https://perma.cc/FRJ2-P8JK>] [hereinafter *EEOC Best Practices*].

386. *Id.*

387. Lupu & Tuttle, *Ecclesiastical Immunity*, *supra* note 1, at 1844.

tion, in any terms that supervisors and other employees can reasonably understand.³⁸⁸

Prevention of harassment through diligence 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 (1) in a position to sexually abuse vulnerable people; or (2) likely to ignore reports of workplace sexual harassment of those under their supervision.³⁸⁹ 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 or to be indifferent to such harassment.³⁹⁰ Once complaints have been made and verified against particular religious leaders, however, their employers will be on notice of the risk.³⁹¹ If employers return these supervisors to a position from which they can continue the same conduct, employers will face the prospect that courts will find them to have failed to use reasonable means of prevention.³⁹²

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.³⁹³ Compared to prevention, mechanisms for correction are more complex to evaluate because (1) religious organizations are likely to vary widely in their methods of investigation and discipline, and (2) those methods are frequently tied to a faith group's religious understanding of church order.³⁹⁴ 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.³⁹⁵

In both *Black* and *Elvig*, the inquiries into the alleged harassment were made initially by committees of the respective

388. See *EEOC Best Practices*, *supra* note 385.

389. See Lupu & Tuttle, *Ecclesiastical Immunity*, *supra* note 1, at 1848 n.234 and accompanying cases.

390. *Id.* at 1795.

391. *Id.* at 1866.

392. *Id.* at 1843.

393. *Id.* at 1821.

394. *Id.* at 1854.

395. See *supra* notes 91–103, 121–41 and accompanying text.

congregations, and—when those groups did not find harassment—then on appeal to denominational bodies that governed a number of congregations in a particular geographic region.³⁹⁶ In more purely congregational arrangements, corrective measures will be made only at the congregational level. In an interconnected or strictly hierarchical religious polity, the corrections are likely to be undertaken by an office that is organizationally upstream from the place of offense—for example, in a Roman Catholic Diocese or a Methodist Conference.

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. The fact-finding inquiry must provide the accuser 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 complainant or perpetrator to a different position. The particular form of these steps is up to the reasonable discretion of the employer. Corrective mechanisms in religious organizations do not have to line up perfectly with their counterparts in secular organizations.³⁹⁷

Judge Kleinfeld’s opinion in *Elvig* emphasizes that Pastor Elvig “[had] vowed ‘to be governed by . . . [] Church’s polity, and to abide by its discipline.’”³⁹⁸ No one disputes that. The question

396. See *Black v. Snyder*, 471 N.W.2d 715, 722 (Minn. Ct. App. 1991); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 971 (9th Cir. 2004), *reh’g denied*, 397 F.3d 790 (9th Cir. 2005).

397. 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.

Bollard v. Cal. Province of the Soc’y of Jesus, 196 F.3d 940, 950 (9th Cir. 1999).

398. 397 F.3d at 801 (Kleinfeld, J., dissenting) (quoting *Elvig*, 375 F.3d at 970 n.9 (Trott, J., dissenting)).

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.³⁹⁹ When, as a result of Ms. Elvig's complaint to the EEOC or her suit in civil court, leaders of the Presbyterian Church chose to end Ms. Elvig's ministerial eligibility, the Ninth Circuit panel correctly decided that it could not review that decision.⁴⁰⁰

The institutional consequences of her vows, however, can be fully separated from their legal consequences. If a pastor had been forcibly raped by a fellow church employee, the church could not rely on the pastor's vows to prevent her from making a criminal complaint or bringing a civil suit.⁴⁰¹ 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 decision.⁴⁰²

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.⁴⁰³ On this question, religious organizations are no more likely than secular ones to be the locus of special problems.⁴⁰⁴ In any organization, the channels for complaint and correction must be accessible and safe.⁴⁰⁵ Telling an assistant pastor that she may complain only to her harasser is not sufficient.⁴⁰⁶ 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. There should always be a person or group—for example, a governing Board of a congregation—that can be sensibly empowered to hear

399. *See Elvig*, 375 F.3d at 973.

400. 375 F.3d at 975. Indeed, this is similar to the course that Ms. Perich's case took in *Hosanna-Tabor*. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 179 (2012) (reciting that the school rescinded Ms. Perich's "call" as a response to her insubordination).

401. *Elvig*, 375 F.3d at 963.

402. *Id.* at 953.

403. *Id.* at 959.

404. *Id.* at 963.

405. Lawton, *supra* note 149, at 257–58 (explaining that rational fear of retribution can, at times, lead to reasonable delay in reporting harassment).

406. *Id.* at 202.

the complaints and begin the inquiry.⁴⁰⁷

E. The Scope of Discovery

The ministerial exception often invites questions related to discovery. A particular problem arises when the parties dispute whether the plaintiff is a ministerial employee.⁴⁰⁸ 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.⁴⁰⁹ As one of the authors of this piece has recently argued,⁴¹⁰ when a defendant has raised the ministerial exception in a motion for summary judgment, courts should exercise their discretion to limit discovery to factual questions related to disposition of that issue. If the court finds that the plaintiff is not a ministerial employee, discovery on other issues related to quality of employee performance can properly proceed.⁴¹¹

Sexual harassment cases brought by those who, without question, fall into the ministerial exception do not raise the same sort of sequencing issues.⁴¹² 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.⁴¹³ Because the ministerial exception bars inquiry into evaluation of the plaintiff's job performance, discovery into such matters is constitutionally out of bounds.⁴¹⁴ Of course, the plaintiff may dispute the applicability of the ministerial exception in a harassment case challenging an adverse job action.⁴¹⁵ In such circumstances, discovery into the applicability of the exception should precede discovery into job performance.⁴¹⁶ There is no reason to delay discovery into a hostile environment, because that

407. *Id.* at 231 n.157.

408. Smith & Tuttle, *supra* note 56, at 23.

409. *Id.* at 1.

410. *Id.* at 34.

411. *Id.* at 35.

412. *Id.* at 19.

413. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 967–68 (9th Cir. 2004), *reh'g denied*, 397 F.3d 790 (9th Cir. 2005); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999) (“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.”).

414. *Elvig*, 375 F.3d at 967.

415. *Bollard*, 196 F.3d at 947.

416. Smith & Tuttle, *supra* note 56, at 1.

claim may proceed whether or not the ministerial exception applies.⁴¹⁷

F. Remedies in Hostile Environment Cases

In every decision in the sexual harassment quartet, the court addressed the question of available remedies.⁴¹⁸ As we noted 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.⁴¹⁹

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.⁴²⁰ This conclusion follows logically from the initial move that adverse job action claims are barred by the ministerial exception.⁴²¹ 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.⁴²²

Limiting the substance of harassment claims to those that arise from the workplace environment 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.⁴²³ In a case like *McKelvey*, where the Diocese communicated an intent to recover a subsidy for payment of educational expenses,⁴²⁴ remedies may also include an order of setoff in favor of the plaintiff.⁴²⁵

417. *Id.* at 42.

418. *Bollard*, 196 F.3d at 950; *Elvig*, 375 F.3d at 966; *McKelvey v. Pierce*, 800 A.2d 840, 858–59; *Black v. Snyder*, 471 N.W.2d 715, 720–21 (Minn. Ct. App. 1991).

419. *See supra* Part II.

420. *Bollard*, 196 F.3d at 950.

421. *Elvig*, 375 F.3d at 953.

422. *Bollard*, 196 F.3d at 948–49.

423. *McKelvey*, 800 A.2d at 846.

424. *Id.*

425. *Bollard* alluded to a theory of “constructive discharge” when the harassment

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.”⁴²⁶ 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.⁴²⁷ 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.⁴²⁸

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 principle that religious entities, like all other employers, must protect their employees from certain kinds of indignity and disrespect.⁴²⁹ 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 to enforce its antiharassment policy bears responsibility for the harms done in its workplace.⁴³⁰ Consciously ignoring reports of a severe and pervasive hostile environment invites punishment. Courts face no constitutional impediment to applying this notion of good faith effort to religious organizations, precisely as it applies to secular employers.⁴³¹

G. A Closing Note on Other Theories of the Ministerial Exception and Their Relationship to Sexual 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.

426. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 546 (D.D.C. 1999). Note that *Kolstad* appeared just one year after *Ellerth* and *Faragher*.

427. Compare *Faragher v. City of Boca Raton*, 524 U.S. 775, 775 (1998), with *Kolstad*, 527 U.S. at 528.

428. *Kolstad*, 527 U.S. at 544.

429. Smith & Tuttle, *supra* note 56, at 8.

430. *Kolstad*, 527 U.S. at 544.

431. *Faragher*, 24 U.S. at 805.

We believe it would be illuminating to compare our theory of the ministerial exception, including the vital distinction between hostile environment claims and adverse job action claims in sexual harassment 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.⁴³²

The scholars who defend the ministerial exception fall into three primary categories: (1) those who defend a very broad concept of church autonomy or sovereignty (the “institutionalists”); (2) 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 (3) those who defend the exception as an incident of freedom of association, available to secular as well as religious entities (“associational freedom theorists”).⁴³³

For reasons we explain at length in earlier work, all three approaches are badly flawed.⁴³⁴ Almost none of their proponents, however, have responded to our general critique,⁴³⁵ or to our focused challenge that they consider the case of sexual harassment of clergy.⁴³⁶ We imagine scholars in each of these camps might have more to say in response to both our general critique and our

432. See Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4 and accompanying texts.

433. Michael Helfand, *Implied Consent: A Primer and a Defense*, 50 CONN. L. REV. 1, 3–4, 10, 16 (forthcoming, 2018) [hereinafter Helfand, *Implied Consent*].

434. Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1297–1310.

435. Professor Michael Helfand is a notable exception. He has in several recent articles analyzed problems of sexual misconduct—including abuse of minors—within religious institutions. In both pieces, Professor Helfand argues that such problems should be analyzed exclusively under the Free Exercise Clause, and that “strict scrutiny” is the appropriate methodology for courts to use. See Helfand, *Implied Consent*, *supra* note 433, at 19–24 nn. 83–96; Michael Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S.CAL. L. REV. 539, 552 n.64 (2015). Professor Helfand has not applied his preferred test to questions of sexual harassment of employees. As we have explained above, the Court’s treatment of the ministerial exception in *Hosanna-Tabor* relies considerably on the Establishment Clause as a bar to judicial decision of ecclesiastical questions. Accordingly and wisely, the Court avoids “strict scrutiny” or any other method of interest balancing in such cases. It is not at all obvious to us that *Hosanna-Tabor* would be decided the same way under Helfand’s approach. The government has a compelling interest in encouraging reports of unlawful conduct to the EEOC. Prohibiting retaliation against employees who report (such as Cheryl Perich) is narrowly tailored to that interest.

436. Lupu & Tuttle, *The Mystery of Unanimity*, *supra* note 4, at 1303–04 (challenging “freedom of the church” theorists and “implied consent” theorists to apply their ideas to cases involving sexual harassment of clergy).

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.⁴³⁷ 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 and defended, claims by clergy that their work environment is severely and pervasively hostile fall perfectly into that opening. In a time when many women are bravely chronicling their experiences in hostile workplaces, this reassurance that religious entities are not entirely immune from suit, just as they are not immune from criticism, should be most welcome.

437. See Helfand, *Implied Consent*, *supra* note 433, at 12.