

The Amicus Brief, *Bollard v. The California Province of the Society of Jesus, the Jesuit Conference*, was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed in the United States Court of Appeals for the Ninth Circuit on December 20, 1999.

No. 98-16194

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**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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JOHN BOLLARD,

)

)

Plaintiff/Appellant,

)

)

v.

)

District Court

)

Case

THE CALIFORNIA PROVINCE OF THE SOCIETY

)

No. C97-3006 SI

OF JESUS, THE MARYLAND PROVINCE OF THE

)

SOCIETY OF JESUS, THE OREGON PROVINCE )

OF THE SOCIETY OF JESUS, THE JESUIT

)

CONFERENCE, FATHER JOHN PRIVETT, S.J.,

)

FATHER ANDREW SOTELO, S.J.,	)	
FATHER THOMAS GLEESON, S.J. AND	)	
FATHER ANTON HARRIS, S.J., and DOES	)	Honorable
	)	Susan Illston,
1 through 100, inclusive,	)	Presiding
	)	
_____ Defendants/Appellees. _____	)	

**BRIEF AMICUS CURIAE OF THE UNITED STATES CATHOLIC CONFERENCE, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, THE GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE LUTHERAN CHURCH-MISSOURI SYNOD, THE WORLDWIDE CHURCH OF GOD, THE REVEREND CLIFTON KIRKPATRICK AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A) AND THE SALVATION ARMY NATIONAL CORPORATION IN SUPPORT OF DEFENDANTS/APPELLEES' PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC.**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed.R.App.P. 26.1, amici state that they have no parent companies, subsidiaries or affiliates that have issued shares to the public.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	i
ARGUMENT .....	1

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>Bell v. Presbyterian Church,</i> 126 F.3d 328 (4th Cir. 1997) .....	3
<i>Bender v. Williamsport Area School District,</i> 475 U.S. 534 (1986) .....	4
<i>Catholic Bishop of Chicago v. NLRB,</i> 559 F.2d 1112 (7th Cir.) <i>affirmed</i> 440 U.S. 490 (1979) .....	5

<i>Combs v. Central Texas Annual Conference of The United States Methodist Church, 173 F.3d 343 (5th Cir. 1999)</i>	5
<i>Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244 (9th Cir. 1999)</i>	5
<i>McClure v. Salvation Army, 460 F.2d 553(5th Cir. 1972)</i>	1
<i>McElroy v. Guilfoyle, 589 A.2d 1082 (N.J. App. 1990)</i>	8
<i>NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)</i>	3, 6
<i>Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir.) cert. denied, 478 U.S. 1020 (1986)</i>	5

*Scharon v. St. Luke’s Episcopal Presbyterian Hospital,*

929 F.2d 360 (8th Cir. 1991) ..... 6

Page(s)

*Swanson v. Roman Catholic Bishop of Portland,*

692 A.2d 441 (Me. 1997) ..... 3

*Trentacosta v. Frontier Pac. Aircraft Industries,*

813 F.2d 553 (9th Cir. 1987) ..... 4

*United States Catholic Conference*

*v. Abortion Rights Mobilization Inc., et al.,*

487 U.S. 72 (1988) ..... 4

Amici curiae are representatives of faith communities in the United States. Our individual statements of interest are contained in the motion for leave to file this brief. Aware of the case when it was filed, we did not file a brief in the proceedings below because we thought it absolutely clear that the Constitution, properly interpreted, precluded a civil remedy. We support the requests for rehearing and for en banc consideration of the panel opinion in *Bollard v. California Province of the Society of Jesus, et al.* for three reasons.

**First**, the Panel assumes that the nature of the relationship between a religion and those in preparation for a call or ordination is one of simple “employment,” subject to the labor and employment laws of the United States. Amici reject that premise as entirely inconsistent with the nature of a religious calling, the process of evaluation, the rigorous pursuit of that calling in our varying structures, and the culmination of that process in ordination and other clergy selection processes. It is also an unconstitutional assertion.

The caselaw reflects, and the Panel acknowledges, that the relationship between a religion and its ministers is its “lifeblood.” Panel op. at 14068, *citing McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972). Any claim that arises out of the process of selection, evaluation, assignment, discipline, or removal of ministers has routinely been barred by the courts. Panel op. at 14065-68 (citing cases). These claims are barred, not because any religious communities necessarily tolerate or

require certain behaviors as an expression of faith, but because the adjudication of claims arising in those circumstances requires the courts to scrutinize the decision making processes and policies of religious communities, and insinuates the secular courts into exclusively ecclesiastical relationships. We also submit that the relationship itself is not a secular employment relationship, so as to invoke the protections of the labor and employment statutes.

Ordination works an essential change in the person called by God, and offered for service to a religious community. For many faith communities, the selection process is long and rigorous. It starts with the person who says he (or she) hears God's call to serve and wants to respond. The religious community must evaluate that person and the call, and must be as certain as it can be that the person would be suitable for ministry. A religious community expects that the person selected will have the proper training, maturity, attitude, and outlook for service. While the leaders of the religious community look to whether theological training and pastoral in-service have been completed, in the last analysis, they (or for some, the whole congregation) must evaluate, or in religious terms "discern," whether the person presented for ordination has indeed been called by God.

This process is so far removed from the ways of the world that it is simply inapposite to refer to it as "employment." See *Bell v. Presbyterian Church*, 126 F.3d 328, 332 (4th Cir. 1997). "[C]lergy members cannot be treated in the law as though they were common law employees." *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 445 (Me. 1997). To assert, as the panel did, that the Congress must have intended this process to be subject to the full panoply of legal remedies as secular employment, whether correct or not, begs the interpretational and constitutional question. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499 (1979).

Title VII is the only basis on which the jurisdiction of a federal court is claimed, and the central error in that assertion is enough to trigger a motion to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1). It appears, however, that both the district court and the Panel assumed the claims of the plaintiff to be true for all purposes, Op. at 14065, including the claimed “facts” that Title VII applied and that the Jesuit provinces and superiors were Bollard’s “employers.” Although it is plain to us that the relationship between Bollard and the Jesuits is not employment and that the complaint should have been swiftly dismissed, where jurisdictional “facts” on which the court’s Article III powers rest are in dispute or doubt, they need not be taken as true for purposes of resolving a Rule 12(b)(1) motion. The District Court could conduct a limited evidentiary proceeding to determine jurisdiction, as is the law in this Circuit. Where subject matter jurisdiction is challenged, the plaintiff must provide sufficient factual evidence, *outside the assertions made in his pleadings*, to demonstrate that jurisdiction actually exists. *Trentacosta v. Frontier Pac. Aircraft Industries*, 813 F.2d 1553, 1558-59 (9th Cir. 1987). Here, Bollard must prove his priestly formation relationships, not the conduct he complains about, were not “ministry.”

The requirement that the assertion of federal judicial power be correct is not “a mere nicety of legal metaphysics,” but a core concern for the courts. *United States Catholic Conference v. Abortion Rights Mobilization Inc.*, 487 U.S. 72, 77 (1988). That concern is so fundamental that it may be evaluated at any time at the suggestion of anyone in a proceeding (including a witness), *id.*, or by the court *sua sponte*. *Bender v. Williamsport School District*, 475 U.S. 534, 541, 547 (1986). Although amici believe that Title VII is clearly inapplicable, if the Court concludes this is in dispute, the proper course is to vacate the Panel opinion and remand for a limited proceeding, for Bollard to prove

jurisdiction. *Trentacosta*, 813 F.2d at 1558-59.

**Second**, the Panel tests the constitutional implications by assessing the conduct complained of, not the conduct that must be evaluated. Of course, religious institutions are against sexual misconduct in all of its forms. Amici acknowledge that they each have policies against sexual harassment, but that does not end the inquiry. The constitutional problem is created, not by the nature of the claimed wrong, but by the very process of evaluating and potentially “remedying” the internal processes of religious institutions. It is irrelevant whether the asserted conduct, here alleged sexual harassment, is or is not required by the religious tenets of the defendant. *Combs v. Central Texas Annual Conf.*, 173 F.3d 343, 345, 350 (5th Cir. 1999). A court “may not... inquire whether the reason for [plaintiff’s] rejection had some explicit grounding in theological belief.... [T]he free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content.” *Rayburn v. General Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).

A constitutional issue may be created by the interposition of a defense just as it may by assertions made in a complaint. *Makteb Tarighe v. Kianfar*, 179 F.3d 1244, 1249 n.5 (9th Cir. 1999). That is precisely the situation here for Free Exercise purposes. In analogous circumstances, the Seventh Circuit rejected the assertion of NLRB authority on the grounds that, once unleashed, it could not be narrowly circumscribed to avoid constitutional issues. *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1123-25 (7th Cir. 1979). Although the Supreme Court avoided that constitutional thicket to save the statute, its reconstruction of the statute acknowledged the same difficulties. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. at 499-500. Those same problems exist in allowing a Title VII

inquiry into the actions and activities of the Jesuits in relation to the priestly formation process, testing their bases, examining internal policies for their reasonableness, and scrutinizing asserted inaction for evidence of misconduct.

The Establishment Clause works in much the same way. There is no *de minimis* exception to the protection afforded the autonomous rights of religious communities against government intrusion. *Scharon v. St. Luke's Hosp.*, 929 F.2d 360, 363 (7th Cir. 1991). It is absurd to deprive religious communities of their rights of self-governance on the excuse that the intrusion is minor. More to the point, there is no constitutional rule that permits it.

**Third**, the Panel decision encourages the expansion of dubious litigation against church bodies by those in ministry. Americans are a people who express their displeasure through litigation. FRCP 11 notwithstanding, those displeasures are displayed daily in actions claiming real and imagined violations of the laws. As religious communities, amici are not immune from this trend. Amici note that in the last several years the number and variety of claims against them by those in and seeking ministry are increasing. Amici must defend these claims lacking a constitutional basis. The Panel decision encourages more of the same, and indeed writes a script for it.

The Panel asserts that, because the seminarian was not dismissed but resigned, and he is not seeking reinstatement but money damages, there is no unconstitutional intrusion. The Panel effectively invites all clerics who experience or anticipate problems to resign (before they are removed) from ministry, and seek money damages only. Sweeping more broadly, the rationale provides a basis, albeit a constitutionally suspect one, for clerics who were allowed to resign (even as an expression of charity) from seminaries or other ministry to sue years later for asserted “constructive discharge,” whereas

persons removed from ministry have no such right. Op. at 14074-76. This blueprint obscures the reality that Title VII damages are a way to make former employees whole, and there is no difference for Title VII purposes between damages and other remedies. Both assume plaintiff's legal entitlement to a particular job and the secular court's power to direct it. Similarly, there is no bright legal line protecting one who tenders a resignation rather than be terminated, except for the one created by the Panel. The decision should be reversed.

The religious community condemns sexual misconduct whenever and wherever it occurs, but we also guard against the intrusion of governmental authority into the internal operation of our communities. For amici, *Bollard* is not about whether the former Jesuit seminarian has a remedy, but constitutionally where it lies. Because of his status as seminarian or former seminarian, and because his lawsuit arises out of the relationship between him and his Jesuit superiors during the priestly formation process, his remedy does not lie in the civil courts, but within the religious community. *McElroy v. Guilfoyle*, 589 A.2d 1082, 1085 (N.J. App. 1990). The Panel was in error to conclude otherwise.

Respectfully submitted,

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