

The Amicus Brief, Monical L. McDowell Elvig, v. Calvin Presbyterian Church, Will Ackles and North Puget Sound Presbytery, by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed with the United States Court of Appeals for the Ninth Circuit on March 24, 2003.

No. 02-35805

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONICA L. MCDOWELL ELVIG
Plaintiff-Appellant

v.

CALVIN PRESBYTERIAN CHURCH,
WILL ACKLES and NORTH PUGET SOUND PRESBYTERY,
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
THE HONORABLE BARBARA JACOBS ROTHSTEIN,
UNITED STATES DISTRICT JUDGE
NO. CV02-0626 R

BRIEF OF *AMICI CURIAE*
PRESBYTERIAN CHURCH (U.S.A.)
SYNOD OF ALASKA NORTHWEST
IN SUPPORT OF APPELLEES CALVIN PRESBYTERIAN CHURCH &
NORTH PUGET SOUND PRESBYTERY

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I INTEREST OF AMICI CURIAE

The Presbyterian Church (U.S.A.) has approximately 2.5 million members, 11,200 congregations and 21,000 ordained ministers. It is organized through an ascending series of organizations known as church sessions, presbyteries, synods, and, ultimately, a general assembly. Presbyterians trace their history to the 16th century and the Protestant Reformation. The first American Presbytery was organized at Philadelphia in 1706. The first General Assembly was held in Philadelphia in 1789. The Synod of Alaska Northwest is the ecclesiastical council with religious authority over Appellees Calvin Presbyterian Church and the North Puget Sound Presbytery.

The Presbyterian Church (U.S.A.) and the Synod of Alaska Northwest have an interest in maintaining the autonomy of all of their affiliated churches and presbyteries to determine who shall act as “ministers of the Word and Sacrament.” The Presbyterian Church (U.S.A.) and the Synod of Alaska Northwest also have an interest in preserving and defending the adjudicatory mechanisms codified in the Book of Order.

II STATEMENT OF FACTS

Both Plaintiff/Appellant Reverend Elvig and Defendant/Appellee Reverend Ackles are ordained ministers in the Presbyterian Church. Both served as pastors to the members of Calvin Presbyterian Church (Church), and both were under the

jurisdiction and authority of the North Puget Sound Presbytery (Presbytery). See Constitution of the Presbyterian Church, Book of Order (BOO), Form of Government § G-6.0201 (presbytery “shall designate [ministers] to such work as may be helpful to the church in mission, in the performance of which they shall be accountable to the presbytery”); § G-14.0601 (“pastoral relationship between a pastor . . . and a church may be dissolved only by presbytery”).¹

As ordained “ministers of the Word and Sacrament,” Reverends Elvig and Ackles were “responsible for studying, teaching and preaching the Word, for administering Baptism and the Lord’s Supper, for praying with and for the congregation.” They were also obliged to “participat[e] in governing responsibilities” within the congregation and the church hierarchy. Id. § G-6.0202b. In sum, as ordained ministers, the parties to this action played leadership roles in both the ecclesiastical and governmental functions of the church.

¹The Presbyterian Church is governed by the Book of Order. SER (Supplemental Excerpts of Record) 5, ¶ 3. The Book of Order is mailed each year to the stated clerks and executives of the Synod and Presbytery. It is also accessible on-line at <http://www.pcusa.org/oga/publications/02-03-boo.pdf>. Portions of the BOO have been introduced into the record and the remaining provisions of the BOO are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). Thus, *Amici* request that the court take judicial notice of the BOO. See United States v. Esquivel, 88 F.3d 722, 727 (9th Cir. 1996) (appellate court may take judicial notice of information that is of the “same type and taken from the same source” as evidence introduced at trial).

The excerpts from the BOO referenced in this brief are attached, for the court’s convenience, as Appendix A.

Before assuming this leadership role, a pastoral candidate must satisfy the requirements and procedures established by the Presbyterian Church (U.S.A.) and codified in the Book of Order. See BOO, §§ G-14.0300-14.0400. The final step in the ordination process is an Ordination Service where the pastoral candidate must affirmatively answer nine specific inquiries. Id. § G-14.0405a-b.(1-9). These ‘vows’ test the candidate’s acceptance of the critical beliefs and responsibilities of a Presbyterian pastor. Among the vows required of every Presbyterian pastor is an agreement to “be governed by our church’s polity, and . . . abide by its discipline.” Id. § G-14.0405b.(5).

The Book of Order also provides procedures for meting out church discipline. The “Rules of Discipline” are based on “the traditional biblical obligation to conciliate, mediate, and adjust differences without strife.” BOO, Rules of Discipline § D-1.0103. Thus, formal disciplinary procedures are appropriate only after the party seeking redress fulfills his or her “duty to try (prayerfully and seriously) to bring about an adjustment or settlement of the quarrel [or] complaint” Id.

On June 25, 2001, Reverend Elvig filed a formal accusation against Reverend Ackles with the Presbytery. The accusation alleged sexual misconduct. Consistent with the procedures outlined in the BOO, Reverend Elvig’s accusation was referred to an investigating committee authorized to examine relevant

documents and witnesses and otherwise “make a thorough inquiry into the facts and circumstances of the alleged offense.” Id. § D-10.0201, § D-10.0202(b-d). On October 3, 2001, the investigating committee assigned to Reverend Elvig’s complaint unanimously concluded that no charges should be filed against Reverend Ackles. Supplemental Excerpts of Record (SER) 5 ¶ 10. Reverend Elvig petitioned the Permanent Judicial Commission (PJC) for review of the investigating committee’s determination. Id. ¶ 11. The PJC considered whether the investigating committee had properly carried out its duties and further considered “whether the principle of church discipline [would] be preserved by the decision of the investigating committee” Id. § D-10.0303c. On December 4, 2001, the PJC affirmed the decision of the investigating committee. SER 5 ¶ 11.

While the investigating committee’s decision not to bring charges against Reverend Ackles was on appeal before the PJC, Reverend Elvig filed a charge against Reverend Ackles with the EEOC. On March 18, 2002, she filed the complaint at issue here alleging sexual harassment and retaliation, and naming Reverend Ackles, Calvin Presbyterian Church and North Puget Sound Presbytery as defendants.

Reverend Elvig’s Title VII claim against the Church and Presbytery rests on four factual allegations. Specifically, Reverend Elvig alleges that the Church and Presbytery

- 1) “failed and refused to take appropriate remedial action” against Reverend Ackles, ER (Excerpts of Record) 1 (Complaint) ¶ 4.3;
- 2) “failed properly to supervise or prevent” Reverend Ackles from retaliating against Reverend Elvig, ER 1 ¶ 4.4;
- 3) “placed Plaintiff on unpaid leave” and “voted to dissolve the employment relationship . . . thereby discharging her from employment,” ER 1 ¶ 4.6;
- 4) “refused to give . . . permission to circulate her ‘personal information form,’ effectively precluding her from acquiring other pastoral employment,” ER 1 ¶ 4.7.

On August 8, 2002, the district court dismissed Reverend Elvig’s Title VII claim and declined to exercise jurisdiction over her supplemental state law claims.

ER 6 at 11

III SUMMARY OF ARGUMENT

The First Amendment to the United States Constitution grants to religious organizations a unique position in our society. The free exercise clause prohibits congress from making any law that restricts the freedom of religious unions to establish, follow or advocate their own vision of spiritual truth. The establishment clause similarly limits the power of the state to intrude into the religious sphere even where its purpose is benign.

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to

aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 226 (1963). These fundamental First Amendment principles are inherently implicated when a minister – the spiritual representative of the church – objects to church policies and church decisions. Courts have consequently resisted entanglement in such disputes.

Here, the plaintiff, an Ordained Minister of the Word in the Presbyterian faith, objects to her church's decision to sever her employment. She also objects to her Presbytery's handling of her employment-related complaint. The court cannot determine the validity of her claims without assessing whether the Church and Presbytery's actions were consistent with the procedures and underlying rationale of the Constitution of the Presbyterian Church (U.S.A.), the Book of Order. Such an inquiry, however, would directly ensnare this court in an inherently religious determination. Thus, the relief requested by the plaintiff, and the process required to secure it, is directly prohibited by both the free exercise and establishment clauses of the First Amendment.

IV ARGUMENT

- A The Free Exercise Clause of the First Amendment Precludes the Court from Inquiring into the Church's Reasons for Suspending Reverend Elvig, Terminating Her Ministerial Employment or Refusing to Approve the Dissemination of Her PIF.

The First Amendment to the United States Constitution provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” The Ninth Circuit, and every other court that has addressed the question, has concluded that in order to comply with the religion clauses of the First Amendment, the anti-discrimination provisions of Title VII may not be applied to the church-clergy employment relationship. Bollard v. Cal. Province of the Soc’y of Jesus, 196 F.3d 940, 946-47 (9th Cir. 1999) (“Because the plain language of Title VII purports to reach a church’s employment decisions regarding its ministers, courts have had to carve a ministerial exception out of Title VII to reconcile the statute with the Constitution.”); McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (“the application of the provisions of Title VII to the employment relationship existing between . . . a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment”); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) (“Any attempt by government to restrict a church’s free choice of its leaders thus constitutes a burden on the church’s free exercise rights.”).

The “ministerial exception” to Title VII inevitably results from the application of a core free exercise principle to the employment context: secular

courts are neither authorized nor qualified to adjudicate ecclesiastical questions. Secular review of either the procedures followed by or the substantive criteria underlying ecclesiastical law “is exactly the inquiry that the First Amendment prohibits.” Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 712 (1976). Secular courts must, therefore, respect the separate authority of religious institutions to apply religious law and “accept the ecclesiastical decisions of church tribunals as it finds them.” Id. To do otherwise – to review religious decisions under secular procedural and substantive law – would “lead to the total subversion of . . . religious bodies.” Kedroff v. St. Nicholas of Russian Orthodox Church in North America, 344 U.S. 94, 114 (1952).

Courts have long recognized that clergy are inextricably intertwined with the institutional religious bodies they represent. Clergy serve as “liaison between the church as an institution and those whom it would touch with its message.” Rayburn, 772 F.2d at 1168. The pastor is the public face of the church – the individual identified by the church as “a worthy spiritual leader to whom members may look for consultation, example and guidance in their own lives and the life of the congregation as a corporate body.” Id. Thus, “the relationship between an organized church and its ministers is its lifeblood . . . [and] matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.” McClure, 460 F.2d at 558; see also Milivojevich, 426 U.S. at 717 (“questions of

church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern”). Consequently, “a church’s selection of its own clergy is [a] core matter of ecclesiastical self-government with which the state may not constitutionally interfere.” Bollard, 196 F.3d at 946.

Reverend Elvig’s complaint plainly implicates this core ecclesiastical matter. Reverend Elvig seeks a finding by a secular court that the Presbytery acted with a retaliatory motive when it allegedly suspended and, subsequently, terminated her employment, and when it withheld approval of her resume (hindering her ability to secure a pastoral position with another church). See ER 1 ¶¶ 4.6-4.7, 6.3. As noted above, however, a civil court lacks the authority to assess the motivation underlying a religious institution’s employment decisions with respect to its ministers. See E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 801 (4th Cir. 2000) (“church need not . . . proffer any religious justification for its decision” because “[t]he exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision”).

Reverend Elvig contends that adjudicating her claim will not violate the First Amendment because she seeks only damages and not reinstatement to her pastoral position. Appellant’s Brief at 10, 12, 17. The remedy sought by the plaintiff is simply not relevant to the application of the free exercise clause to ministerial employment. The Constitution prohibits this court from inquiring into either the

procedures for selecting (or removing) clergy and the substantive reasons underlying the Presbytery's employment decisions. Bollard, 196 F.3d at 947 (court will "simply defer without further inquiry" to church's choice of representative); Young v. N. Il. Conference of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994) ("the Free Exercise Clause of the First Amendment forbids a review of a church's procedures when it makes employment decisions affecting its clergy"); Rayburn, 772 F.2d at 1169 ("we may not . . . inquire whether the reasons for Rayburn's rejection had some explicit grounding in theological belief").

A secular court's inquiry into this quintessentially ecclesiastical decision is, alone, sufficient to infringe the free exercise rights of the Church and Presbytery. Consequently, an award of damages for a "wrongful" employment decision regarding an ordained minister would be as destructive of free exercise rights as equitable relief, or even criminal penalties. Cf. New York Times Co. v. Sullivan, 376 U.S. 254, 278 (1964) ("Whether or not a [church] can survive a succession of such judgments, the pall of fear and timidity . . . is an atmosphere in which the First Amendment freedoms cannot survive.").²

² Reverend Elvig also contends that the court may adjudicate the Presbytery's employment related actions because those actions were not "discipline," see Appellant's Brief at 15, and/or because the Presbytery was not involved in "selecting" a minister. Id. at 16 n.14. Reverend Elvig fundamentally misunderstands the nature of the Presbytery's free exercise rights. Pursuant to the

B The Free Exercise Clause Precludes This Court From Reviewing the Church's Adjudication of Reverend Elvig's Complaint.

Amicus Curiae Northwest Women's Law Center (Northwest) attempts to separate the Presbytery's decision to suspend Reverend Elvig, terminate her employment, and withhold approval of her PIF from its alleged role in failing to alleviate the allegedly hostile work environment. Northwest contends that the plaintiff has stated a Title VII claim against the Church and Presbytery based solely on the alleged failure to prevent Reverend Ackles from engaging in conduct, which Plaintiff has characterized as harassing and retaliatory. The approach advocated by Northwest, however, would improperly intrude this court into an internal church dispute in contravention of the free exercise rights guaranteed by the First Amendment.

1 A Religious Institution May Create Its Own Procedures for Resolving Internal Disputes Implicating Doctrinal, Administrative, and Organizational Matters

The free exercise clause of the First Amendment stands as the principal bulwark against government interference in the internal operations of religious

Book of Order, a Presbyterian minister may not transfer to another church or presbytery without the permission of his or her current presbytery. BOO §§ G-14.0507b, D-10.0105. Reverend Elvig seeks to have this court review the Presbytery's decision not to approve the posting of her PIF. This is a preliminary step incident to a transfer. The Presbytery's decision, like the decision to hire, fire, demote, transfer or refuse to do any of the above -- and the procedures provided to effectuate these decisions -- is vested solely with the Presbytery and may not be

organizations. The core concern underlying the First Amendment’s application in this context is preventing “a civil court [from] pass[ing] on questions of religious doctrine.” Jones v. Wolf, 443 U.S. 595, 609 (1979). Doctrinal questions, however, may arise in a variety of facially secular disputes. See e.g. Milivojevich, 426 U.S. at 709 (church property dispute raised “substantial danger that state will become entangled in essentially religious controversies”); National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979) (application of National Labor Relations Act to religious schools would “present a significant risk that the First Amendment will be infringed”).

Thus, courts have consistently held that there is an inviolable zone of autonomy in which a religious institution may act completely “free from state interference.” Kedroff, 344 U.S. at 116; see also Simpson v. Wells Lamont Corp., 494 F.2d 490, 493 (5th Cir. 1974) (rejecting the plaintiff’s contention that the First Amendment only prohibits a secular court from adjudicating “differences in church doctrine”); Bollard, 196 F.3d at 946 (“Some religious interests under the Free Exercise Clause are so strong that no compelling state interest justifies government intrusion into the ecclesiastical sphere.”). To preserve the core freedom of the free exercise clause, the zone of freedom for religious organizations extends beyond facially doctrinal disputes to “matters of discipline, faith, internal organization, or

challenged in this court. Bollard, 196 F.3d at 947 (church may “choose its

ecclesiastical rule, custom, or law.” Milivojevich, 426 U.S. at 713; id. at 710 (“This principle applies with equal force to church disputes over church polity and church administration.”). Thus, a secular court may not interfere with the “internal management of a church,” Combs v. Cent. Texas Annual Conference of the United Methodist Church, 173 F.3d 343, 350 (5th Cir. 1999), and may not “disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity” which has exclusive jurisdiction over internal sectarian conflicts.³ Milivojevich, 426 U.S. at 709.

2 Disputes Between Ordained Ministers Concerning Conditions of Employment are Inherently Matters of Internal Governance and Administration and Subject to the Church’s Exclusive Jurisdiction.

As noted above, a religious organization’s ministers play a unique and critical role in the spiritual and administrative life of a church. They are the organization’s voice in its dealings with its members and they are the foundation of its internal governing structure. These dual roles, long recognized by the courts, are explicitly imposed upon Presbyterian ministers by the Book of Order. See § G-6.0202b (enumerating minister’s ecumenical and administrative responsibilities). Because ordained pastors represent the religious organization to the members, they

representatives using whatever criteria it deems relevant”).

³ Courts have long recognized that the Presbyterian Church is a hierarchical church and its internal ecclesiastical determinations entitled to deference in secular courts.

are subject to the authority from which their legitimacy is derived. This is more than a moral obligation; it is an explicit condition of ordination to the ministry. § G-14.0405b.(5) (“Will you be governed by our church’s polity and will you abide by its discipline?”). Thus, based on their consent and based on the critical role ordained ministers play in the life of the religious organization, both Reverend Elvig and Reverend Ackles are subject to the jurisdiction of the Presbytery.

The Presbytery does not purport to have authority to adjudicate all disputes that may implicate its clergy. Where, for example, criminal conduct has been alleged against a clergy member, the Book of Order does not substitute for the State’s penal code. Similarly, the presbytery’s adjudicatory procedures do not extend to claims brought by lay employees against clergy or the religious institutions they represent. EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1368 (9th Cir. 1986) (equal pay provisions of Title VII apply to lay employees of religious school). This case, however, involves a dispute between two members of the church hierarchy over the conditions of employment at the Calvin Presbyterian Church. Such a dispute is inherently a matter of church governance and internal administration and, consequently, ill-suited to adjudication in a secular court. The Presbyterian Church (U.S.A.) Book of Order establishes the exclusive procedures for resolving such a dispute, and those procedures were followed in this case.

Watson v. Jones, 80 U.S 679 (1871). Appellant does not dispute the fact that the

An independent investigating committee unanimously concluded that charges should not be filed against Reverend Ackles. SER 5 ¶ 10. The Permanent Judicial Commission, after carrying out the ecclesiastical equivalent of *de novo* review, reached the same conclusion. SER 5 ¶ 11; BOO, § D-10.0303c (PJC may overturn investigating committee decision if the PJC determines that the decision would not “preserve . . . the principles of church discipline”).

Reverend Elvig, in contravention of her vow to abide by the church’s discipline, seeks review of that decision in federal court. To adjudicate this claim, however, would thrust a secular court into the midst of an internal church dispute. The danger of treading on forbidden questions of faith and doctrine is manifest. “It is the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.” Milivojevich, 428 U.S. at 711 (citing Watson v. Jones, 13 Wall. 679, 728-29 (1872)).

In sum, the principal parties to this dispute are members of the church’s governmental structure and subject to the church’s authority. The issues raised by Reverend Elvig’s complaint directly implicate the work environment at a religious facility. To grant the relief sought by Reverend Elvig, a federal court would have

Church and Presbytery are part of a hierarchical church.

to, in effect, overrule the highest court of the Presbytery. In doing so, the court would impose the government's procedures and values on a religious question.

3 The Presbytery's Adjudication of Reverend Elvig's Complaint
Should Be Entitled to the Same Deference as State Court
Orders and Administrative Proceedings.

The question of when and to what extent a federal court should defer to a decision rendered by an ecclesiastical court is analogous to claim preclusion questions that frequently arise in federal court.

In Miller v. County of Santa Cruz, 39 F.3d 1030 (9th Cir. 1994), for example, the court granted summary judgment to the defendants in a civil rights action, holding that an administrative ruling, which sustained the plaintiff's dismissal from employment, had preclusive effect in the action he subsequently brought in federal court. The court noted that administrative proceedings are entitled to preclusive effect when three "fairness requirements" are satisfied. First, the administrative agency must act in a judicial capacity. Second, the agency must resolve disputed issues of fact properly before it. And, third, the parties must have had an adequate opportunity to litigate. Id. at 1033 (citing United States v. Utah Constr. & Mining, 384 U.S. 394 (1966)).

If the Utah Construction criteria were applied here, the decision of the Presbytery would be entitled to preclusive effect and bar Reverend Elvig's federal action. The investigating committee and PJC acted as judicial bodies, examining

evidentiary presentations and resolving disputed questions of fact. See BOO, §§ D-10.0202c-e. Reverend Elvig, moreover, was provided multiple opportunities to present evidence in support of her accusation. Id. §§ D-10.0102, D-10.0202(c-d), D-10-0303a.⁴ It would be anomalous for this court to provide less deference to the Presbytery’s highest adjudicatory body than it provides to the lowest governmental agency. See e.g. Mischia v. Pirie, 60 F.3d 626, 629 (9th Cir.1995) (affirming grant of summary judgment for defendants because determination by Hawaii Dental Board precluded separate federal action). It would also contravene the Supreme Court’s repeated admonitions to defer to conclusions reached “by the highest of these church judicatories.” Kedroff, 344 U.S. at 113 (citing Watson, 13 Wall at 727).

Similarly, under the Rooker/Feldman doctrine, federal courts lack jurisdiction to review state court judgments. Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 276 (1983); Rooker v. Fid. Trust Co., 263 U.S. 413, 415 (1923). If “the relief requested in the federal court action would effectively reverse the state court decision or void its ruling,” the federal court may not adjudicate the claim. Fontana Empire Ctr. LLC v. City of Fontana, 307 F.3d 987, 992 (9th Cir. 2002) (quoting Charchenko v. City of Stillwater, 47 F.3d 981, 983 (8th Cir. 1995)).

⁴ In contrast, Bollard’s claim may not have satisfied the “fairness requirements” of Utah Construction because of the defendants’ failure to undertake any disciplinary procedures.

Reverend Elvig here seeks this court's review of an ecclesiastical body's adjudicated determination. Under the First Amendment, the Presbytery's courts are entitled to the same autonomy and respect possessed by State courts. Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648, 655 (10th Cir. 2002) ("church autonomy doctrine prohibits civil court review of internal church disputes").

In sum, in numerous circumstances, this court has refused to exercise jurisdiction over claims that, on their face, raise federal questions. Principles of federalism and comity may divest this court of its jurisdiction. In this context – a claim by one ordained minister against another concerning conditions of employment at a religious institution – the free exercise clause of the First Amendment compels a similar level of deference and restraint.

4 Bollard is Not to the Contrary

Reverend Elvig and *Amicus* Northwest's reliance on this court's decision in Bollard is misplaced. The plaintiff in Bollard was a Jesuit novice training for the priesthood. 196 F.3d at 944. He alleged that his superiors at the St. Ignatius College Preparatory School and the Jesuit School of Theology sexually harassed him. Id. He further alleged that he reported the harassment, but that the defendants took no action in response to his complaints. Id. The court reversed the dismissal of his Title VII sexual harassment claim against the Jesuits.

In reversing the district court, this court noted that Bollard “was not a case about the Jesuit order’s choice of representative, a decision to which we would simply defer without further inquiry.” Id. at 947. Because the plaintiff in Bollard had not been ordained and did not seek the court’s assistance in securing a position with the church – or damages related to a church determination that he was not suitable for the priesthood – the case did not present the issues raised here by Reverend Elvig’s accusations of retaliation. Id. (“[A]ccording to the allegations in Bollard’s complaint, the Jesuit order has enthusiastically encouraged Bollard’s pursuit of the priesthood.”).

In addition, in Bollard, this court characterized the issue as whether “the Free Exercise Clause . . . extend[s] constitutional protection to this sort of disciplinary inaction.” Id. Here, however, the Presbytery’s response to Reverend Elvig’s complaint was active and comprehensive. The Presbytery followed its internal, religiously-based, procedures and convened an independent investigating committee with full authority to examine documents and witnesses and resolve discrepancies in testimony. The investigating committee unanimously concluded that Reverend Elvig’s allegations against Reverend Ackles lacked merit. Pursuant to the procedures of the BOO, the investigating committee’s determination was reviewed by the Permanent Judicial Commission, which upheld the committee’s conclusions. This is a far cry from the “disciplinary inaction” alleged in Bollard.

As the district court noted, “The decision of the highest body of the Presbyterian Church simply cannot be equated with the complete lack of internal review and disciplinary action taken by the Jesuits in Bollard.” ER 6 at 8.

C The District Court Correctly Concluded that the Free Exercise Clause Requires Dismissal of Reverend Elvig’s Title VII Claim.

Reverend Elvig has not stated a Title VII claim for which relief can be granted. The alleged retaliatory acts of suspending, terminating and preventing the circulation of her PIF fall squarely within the “ministerial exception” to Title VII and may not be reviewed by a secular court. Similarly, in order to adjudicate Reverend Elvig’s allegations that the Church and Presbytery failed to properly supervise Reverend Ackles and failed to prevent Reverend Ackles’ allegedly wrongful conduct, the court would be required to second-guess the decision reached by the Presbytery’s highest adjudicatory body on a matter of internal governance and administration. The free exercise clause of the First Amendment precludes this inquiry.

Because the free exercise clause of the First Amendment prohibits inquiry into each of the allegations that form the basis of Reverend Elvig’s complaint, the complaint must be dismissed.

D Adjudicating Reverend Elvig’s Title VII Claim Would Entangle the Court in the Judicial Procedures of the Presbyterian Church in Violation of the Establishment Clause.

As this court noted in Bollard, “[t]he Establishment Clause serves as a separate constitutional basis for the ministerial exception to Title VII.” 196 F.3d at 948. In Bollard, this court applied the three-part test from Lemon v. Kurtzman, 403 U.S. 602 (1971) to determine whether allowing the plaintiff’s Title VII claim to proceed would violate the establishment clause. “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion.” Bollard, 196 F.3d at 948 (quoting Lemon, 403 U.S. at 612-13). As was the case in Bollard, “the only open question is whether applying Title VII in the circumstances of this case would foster an impermissible government entanglement with religion.” Id.

This court in Bollard divided its analysis of entanglement into “substantive and procedural dimensions.” Id. “On a substantive level, applying the statute to the clergy-church employment relationship creates a constitutionally impermissible entanglement with religion if the church’s freedom to choose its ministers is at stake.” Id. at 948-49. As noted above, Reverend Elvig alleges that the Presbytery and the Church made various employment related decisions with an impermissible retaliatory motive. In order to adjudicate these allegations, the court would be

required to assess the reasons underlying the church's choice not to keep Reverend Elvig as its representative. "We cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the 'gifts and graces' of a minister must be left to ecclesiastical institutions." Id. (quoting Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1356-57 (D.C. Cir. 1990)). The inquiry into a pastor's professional qualifications does not become more suited to judicial review simply because a court's conclusion that a discharge was wrongful would result in a damage award rather than reinstatement. Regardless of the remedy sought, the danger remains "that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members." Rayburn, 772 F.2d at 1171.

"In a Title VII case, the dangers of procedural entanglement are most acute where there is also a substantive entanglement at issue." Bollard, 196 F.3d at 949. The substantive entanglement created by Reverend Elvig's accusations of retaliatory personnel actions is compounded by the procedural entanglement required to adjudicate her hostile work environment claim. The resolution of the hostile work environment claim against the Church and Presbytery would require a determination of whether these defendants "exercised reasonable care to prevent

and correct” the alleged harassment. See Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998). This inquiry, in turn, would require an assessment of the procedures used and the conclusions reached by the investigating committee and the PJC when they adjudicated Reverend Elvig’s complaint.

In this case, unlike Bollard, such an inquiry would not be “limited.” 196 F.3d at 950. Rather, it would directly implicate the Church’s disciplinary procedures, the substantive criteria relied on by the disciplinary committee, and the basis of the conclusions it reached. Because the defendants are religious institutions, the procedures and substantive criteria underlying their disciplinary decisions are “per se religious matters [and] to review such decisions would require courts to determine the meaning of religious doctrine and canonical law.” Scharon v. St. Luke’s Episcopal Presbyterian Hospitals, 929 F.2d 360, 363 (8th Cir. 1991). The establishment clause is offended not only by the fact that judicial review of the Presbytery’s disciplinary procedures could lead a court to reach a conclusion contrary to that reached by internal tribunals. The process of inquiring into the good faith of the Presbytery’s religious tribunal is, alone, a procedural entanglement proscribed by the First Amendment. See Catholic Bishop of Chicago, 440 U.S. at 502.

Because adjudication of Plaintiff’s Title VII claim would result in both the procedural and substantive entanglement of a federal court with a religious

organization, the establishment clause of the First Amendment compels the dismissal of Reverend Elvig's Title VII claim.

V CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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March 24, 2003

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C), I certify that this brief is proportionally spaced with typeface of 14 points and contains 5421 words.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Amici Curiae* Presbyterian Church (U.S.A.) and Synod of Alaska Northwest's Brief in Support of Appellees Calvin Presbyterian Church and North Puget Sound Presbytery was served on March 24, 2003, via **First Class Mail**, upon the following:

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