THE "NONMINISTERIAL" EXCEPTION

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INTRODUCTION

In 2014, Charlotte Catholic High School declined to continue Lonnie Billard's employment as a substitute drama teacher after he publicly announced, via Facebook, that he and his same-sex partner were getting civilly married.[1] Billard sued the school in the Western District of North Carolina for unlawful employment discrimination under Title VII of the Civil Rights Act due to his sexual orientation.[2] The district court granted summary judgment in favor of Billard.[3] The court first held that the high school's actions could constitute unlawful sex discrimination in light of the Supreme Court's ruling in *Bostock v. Clayton County*.[4] The district court then rejected the high school's argument that it qualifies under Title VII's coreligionist exemptions in sections 702 and 703.[5] Finally, the court turned to the "ministerial exception" doctrine.[6] This doctrine states that courts are barred from adjudicating employment disputes between religious organizations

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1 *See* Dominic Holden, *Fired Gay Catholic School Teacher Says He Is Quitting "Bigoted" Church*, BUZZFEED NEWS (Jan. 14, 2015, 3:08 PM), https://www.buzzfeednews.com/article/dominicholden/fired-gay-catholic-school-teacher-says-he-is-quitting-bigote [https://perma.cc/PY4X-4EXM].

2 *See* 42 U.S.C. § 2000e-2 (2018); Billard v. Charlotte Cath. High Sch., No. 17-cv-00011, 2021 WL 4037431, at *1 (W.D.N.C. Sept. 3, 2021), *appeal filed*, No. 22-1440 (4th Cir. argued Sept. 20, 2023).

3 *Billard*, 2021 WL 4037431, at *25.

4 *Id.* at *7 ("This is a classic example of sex discrimination under the but-for causation standard of *Bostock*."); *see* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

5 42 U.S.C. §§ 2000e-1, 2000e-2 (2018); *see Billard*, 2021 WL 4037431, at *8. The court cited various federal appellate and district court cases for its reasoning that "[a]lthough Sections 702 and 703 give religious institutions and schools more leeway for engaging in religious discrimination, they do not permit sex discrimination." *See id.* (citing Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 413 (6th Cir. 1996)).

6 *Billard*, 2021 WL 4037431, at *11.

and ministerial employees.[7] In this case, the court noted that "very few facts weigh in favor of finding that [Billard] is a minister."[8] He was not held out by the school as a minister, he did not teach religion, and he was not responsible for the religious upbringing of the students.[9] But the school had one final argument: that the ministerial exception is grounded in a broader "church autonomy doctrine" that generally protects religious institutions from governmental interference in their internal affairs, including in employment decisions.[10] Because Charlotte Catholic High School let go of Billard for primarily religious reasons, the argument goes, even if Billard is not a minister, the school should be immune from Title VII discrimination suits.[11]

This case illustrates a very important question left unanswered by the Supreme Court following its landmark decisions in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[12] and *Our Lady of Guadalupe School v. Morrissey-Berru*[13]: Do religious institutions have any First Amendment protection in employment cases outside the ministerial exception? This Note seeks to answer that question. Part I gives an outline of the church autonomy doctrine. It considers the doctrine's historical roots, its development in several landmark Supreme Court cases, and its recent relevance in the Court's ministerial exception cases. Underlying the church autonomy doctrine is the idea that it is not the role of civil courts to adjudicate primarily religious disputes among members of a religious institution. As the Court famously said in *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, under the First Amendment, churches have the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[14]

Part II argues that, as currently applied, the church autonomy doctrine does not give religious organizations the autonomy they need in employment cases. It begins by looking at the limits of the ministerial exception. While the Court's recognition of the ministerial exception was a huge step forward in recognizing the rights of religious groups to be free from government interference, it does not go far enough. Drawing on Professor Helen Alvaré's work applying the social

7 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

8 *Billard*, 2021 WL 4037431, at *14.

9 *See id.*

10 *See id.* at *12.

11 The court rejected that argument, too. *See id.* Charlotte Catholic is appealing to the Fourth Circuit. *See* Billard v. Charlotte Cath. High Sch., No. 22-1440 (4th Cir. argued Sept. 20, 2023).

12 565 U.S. 171 (2012).

13 140 S. Ct. 2049 (2020).

14 344 U.S. 94, 116 (1952).

science of religious group psychology to the church autonomy doctrine, this Note will argue that it is just as important for religious groups to be able to decide for themselves who is a member of their organization. Ministers are not the only members of a religious group who influence the transmission and preservation of key religious teachings. The presence of even a few vocal dissenters can be disastrous for a religious group's continued existence. Part II concludes by explaining why the government should care about protecting the rights of religious groups. As our Founders recognized, religious groups play a crucial role in forming and maintaining public morals in American democracy—a role they cannot play without a robust church autonomy doctrine.

Part III outlines what a "nonministerial exception" test would look like. Unlike the ministerial exception, this new test looks to the reasons behind the action of a religious group, instead of the role played by the employee. Because the church autonomy doctrine is concerned with avoiding government adjudication of religious questions, courts ought to be barred from adjudicating employment disputes that arise for primarily religious reasons. Part III then discusses two key inquiries a court must undertake to apply the test: whether an organization counts as "religious," and whether the organization is sincere in claiming its actions are motivated by religious reasons. The sincerity inquiry is especially important to prevent abuses under this new system.

This Note concludes by refocusing the "nonministerial exception" within the larger framework of church autonomy. It explains why, even under an expanded church autonomy doctrine, the ministerial exception is still necessary. Today, more than ever, the rights of religious groups are under attack for adhering to centuries-old beliefs. To maintain the American ideals of a society in which people are free to exercise religion in accord with their sincerely held beliefs, the Court should recognize a church autonomy doctrine that preserves the ability of religious institutions to make religiously motivated employment decisions free from government interference.

I. CHURCH AUTONOMY DOCTRINE

Although the church autonomy doctrine has roots in the American Founding and the crafting of the two Religion Clauses, it was not explicitly recognized until the mid-nineteenth-century church-property case *Watson v. Jones*.[15] There, the Court first recognized that civil courts should not get involved in adjudicating religious questions.[16]

15 80 U.S. (13 Wall.) 679 (1872).

16 *See id.* at 727, 733.

The Court did not see many church autonomy cases after *Watson* until the early twentieth century. It was in the early to mid-twentieth century that the Court began to refine its doctrine and highlight that the doctrine's main concern was to avoid having courts answer religious questions. This concern should drive the jurisprudence surrounding greater protections for religious institutions in employment cases concerning nonministers.

A. Roots of the Church Autonomy Doctrine

While there was no legal concept of the church autonomy doctrine until the mid-nineteenth century, and no explicit name until even later, the doctrine has its origin in the Founding.[17] The American Founders were greatly influenced by the church-state separation ideals of Enlightenment-era thinkers such as John Locke. Locke, in his famous *Letter Concerning Toleration*, wrote that it is "necessary to distinguish exactly the Business of Civil Government from that of Religion, and to settle the just Bounds that lie between the one and the other."[18] Locke defined the church as a "voluntary Society of Men, joining themselves together of their own accord, in order to the publick worshipping of God, in such manner as they judge acceptable to him."[19] As a voluntary society directed toward the end of worshipping God, Locke wrote that it is important for a church to be able to expel or "[e]xcommunicat[e]" members who "continue[] obstinately to offend against the Laws of the [church]. For these being the Condition of Communion, and the Bond of the Society, if the Breach of them were permitted without any Animadversion, the Society would immediately be thereby dissolved."[20] Thus, Locke believed in a church-state separation that went both ways: the state could not force its citizens to belong to a specific church, and the state ought not to be unduly influenced or controlled by church officials.[21] Locke's view captured the minds of many American Founders, including Thomas Jefferson and James Madison. Virginia's Act for Establishing Religious Freedom, written by Jefferson, instantiates into law the core principles of Locke's

17 In the Supreme Court's first-ever ministerial exception case, Chief Justice Roberts traced the doctrine's roots back to the original colonists' hesitation at establishing churches in the various colonies. *See Hosanna-Tabor*, 565 U.S. at 182–85.

18 JOHN LOCKE, A LETTER CONCERNING TOLERATION 26 (James H. Tully ed., Hackett Publ'g Co. 1983) (1689); *see also* JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 76–78 (5th ed. 2022) (briefly explaining the principle of church-state separation in the Western tradition).

19 LOCKE, *supra* note 18, at 28.

20 *Id.* at 30.

21 *See id.* at 31.

church-state philosophy.[22] It began by stating, "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations . . . are a departure from the plan of the Holy author of our religion . . . ."[23] The idea of church-state separation was also endorsed by American Founders coming from a distinctly religious perspective, as opposed to a purely Enlightenment-based perspective, such as Puritan theologian Elisha Williams.[24] In *The Essential Rights and Liberties of Protestants*, Williams wrote: "[E]very Church has [the] Right to judge in what Manner God is to be worshipped by them, and what Form of Discipline ought to be observed by them, and the Right also of electing their own Officers."[25]

In our nation's early days, the Founders put their ideas of church-state separation into practice. While people most commonly associate church-state separation with the protection of the free exercise of religion and avoidance of a national religious establishment, the Founders understood church-state separation to entail a robust principle of church autonomy as well. The respect shown by the Founders toward this religious autonomy is best demonstrated by letters from Jefferson and Madison just after the Louisiana Purchase. In 1804, a group of Ursuline nuns in New Orleans wrote to President Thomas Jefferson, expressing concern that the new owners of the territory would not be as accommodating toward religious practice as the French.[26] Jefferson wrote to reassure the sisters:

> [T]he principles of the constitution and government of the United states are a sure guarantee to you that [your property] will be preserved to you sacred and inviolate, and that your institution will be

22 *See* WITTE ET AL., *supra* note 18, at 52.

23 Act for Establishing Religious Freedom (1786), *reprinted in* 12 THE STATUTES AT LARGE 84, 84 (William Waller Hening ed., Richmond, William Waller Hening 1823).

24 *See* J. DAVID HOEVELER, CREATING THE AMERICAN MIND: INTELLECT AND POLITICS IN THE COLONIAL COLLEGES 61–64 (2002) (noting Williams's opposition to Enlightenment influence at Yale during his time as rector and calling him a "polemicist for orthodoxy"). For more on the distinctly religious roots of the separation of church and state regarding the First Amendment, see generally NICHOLAS P. MILLER, THE RELIGIOUS ROOTS OF THE FIRST AMENDMENT: DISSENTING PROTESTANTS AND THE SEPARATION OF CHURCH AND STATE (2012).

25 ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS 46 (Boston, S. Kneeland & T. Green 1744) (emphasis omitted).

26 *See* Letter from the Ursuline Nuns of New Orleans to Thomas Jefferson, President, U.S. (Apr. 23, 1804), *in* 43 THE PAPERS OF THOMAS JEFFERSON 297, 297 (James P. McClure ed., 2017).

> permitted to govern itself according to it's own voluntary rules, without interference from the civil authority.[27]

He assured them "all the protection which my office can give."[28] Two years later, in 1806, Bishop John Carroll of Baltimore wrote to then Secretary of State James Madison, asking for Madison's advice on whom Carroll should appoint to direct the operations of the Catholic Church in the new Louisiana Territory.[29] Madison wrote back to Carroll that "as the case is entirely ecclesiastical," it would go against the "scrupulous policy of the Constitution in guarding against a political interference with religious affairs" for Madison to give his input on the matter.[30] Through their actions, Madison and Jefferson laid the groundwork of a powerful church autonomy doctrine that would later be recognized by several significant Supreme Court decisions.

B. Court Precedent

The Court's first church autonomy case did not arise until nearly seventy years after the Louisiana Purchase. The case, *Watson v. Jones*, arose out of a church-property dispute in the late 1860s between two factions of a Presbyterian church in Louisville, Kentucky.[31] The two factions were divided over the issue of slavery, and both claimed to be the true church.[32] Justice Miller, writing for the Court, recognized the "essentially ecclesiastical" nature of the dispute,[33] and held that it would be improper for the Supreme Court to adjudicate it: "[R]eligious unions [have the] right to establish tribunals for the decision of questions arising among themselves, [and] those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."[34] Essentially ecclesiastical disputes include "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[35]

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27 Letter from Thomas Jefferson, President, U.S., to the Ursuline Nuns of New Orleans (July 13, 1804), *in* 44 THE PAPERS OF THOMAS JEFFERSON 78, 78–79 (James P. McClure ed., 2019).

28 *Id.*, *in* THE PAPERS OF THOMAS JEFFERSON, *supra* note 27, at 79.

29 Letter from John Carroll to James Madison (Nov. 17, 1806), https://founders.archives.gov/documents/Madison/99-01-02-1087 [https://perma.cc/943S-UF6C].

30 Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *in* 20 RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY OF PHILADELPHIA 63, 63 (1909).

31 *See* 80 U.S. (13 Wall.) 679, 681 (1872).

32 *Id.* at 690–700.

33 *See id.* at 713.

34 *Id.* at 729.

35 *Id.* at 733.

The Court, drawing on federal common law,[36] reasoned that it would violate both the principle that individuals and institutions have freedom of belief and practice and the principle that the government should not be in the business of establishing religious orthodoxy, to adjudicate the dispute. Justice Miller famously wrote:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.[37]

The seeds of three key church autonomy concepts are present in this initial church autonomy case: that church autonomy is rooted in both Religion Clauses; that religious questions are the doctrine's focus; and that religious questions cannot be adjudicated by civil courts.

The same year, the Court was faced with another dispute between arguing factions within a church. The Court was asked to decide which faction of a Baptist church in Washington, D.C., held title to church property.[38] The Court reaffirmed the central holding of *Watson*, stating clearly that it is not the job of the courts to interfere with matters of internal church governance as such.

> It is not to be overlooked that we are not now called upon to decide who were church officers. The case involves no such question. . . .
>
> . . . .
>
> This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership.[39]

Ultimately, however, the Court concluded that the dispute at hand was fundamentally secular, because it involved some members of the church fraudulently representing themselves as officers to obtain the property.[40]

The Court did not decide another church autonomy question for fifty years. In 1929, the Court applied church autonomy principles to

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36 This was before *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), had been decided. *See* Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 522 n.151 (2013).

37 *Watson*, 80 U.S. (13 Wall.) at 728.

38 *See* Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 132–35 (1872).

39 *Id.* at 137–39.

40 *See id.* at 138; *see also* Carl H. Esbeck, *An Extended Essay on Church Autonomy*, 22 FEDERALIST SOC'Y REV. 244, 258 n.132 (2021) (calling *Bouldin* a "rare instance where church property has fallen into the possession of parties falsely representing themselves as officers of the church so as to obtain control of valuable property").

a dispute over a chaplaincy in the Philippines, a U.S. territory at the time.[41] A little over twenty years later, in *Kedroff v. Saint Nicholas Cathedral*, the Court recognized that not only was the church autonomy rule required by federal common law and precedent, but it was required by the Religion Clauses of the Constitution as well.[42] *Kedroff* was an interesting case in its own right—it involved a dispute between American members of the Russian Orthodox Church and the church hierarchy in Moscow right at the start of the Cold War.[43] At a time when Senator Joseph McCarthy was leading the American public into the height of the "Red Scare,"[44] the Supreme Court took a case to decide whether the New York legislature could enact a law handing over church property to the local church and out of the possession of the likely Soviet-controlled church hierarchy.[45] Based on principles of church autonomy, the Court answered no.[46] Considering the political realities at the time of the decision, the fact that the Court invalidated a law that would have effectively reduced Soviet power over an Orthodox diocese in the United States was very surprising.[47] The majority wrote that *Watson* "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation,"[48] and that religious institutions have the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[49]

Two cases decided in the 1970s underscored the power of the religious questions doctrine. In *Serbian Eastern Orthodox Diocese for the*

41 *See* Gonzalez v. Roman Cath. Archbishop of Manila, 280 U.S. 1, 10, 16 (1929) (holding that the court could not adjudicate what qualified someone to be a chaplain because "[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive").

42 *See* Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952) ("Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." (footnote omitted) (citing *Gonzalez*, 280 U.S. at 16–17)); Helfand, *supra* note 36, at 523 (noting that *Kedroff* "elevated [the Court's] holding in *Watson* to constitutional status").

43 *See Kedroff*, 344 U.S. at 96–97.

44 *See McCarthyism and the Red Scare*, MILLER CTR., https://millercenter.org/the-presidency/educational-resources/age-of-eisenhower/mcarthyism-red-scare [https://perma.cc/N825-G3G5].

45 *See Kedroff*, 344 U.S. at 95–97.

46 *See id.* at 120.

47 *See* Richard W. Garnett, *"Things That Are Not Caesar's": The Story of* Kedroff v. St. Nicholas Cathedral, *in* FIRST AMENDMENT STORIES 171, 181 (Richard W. Garnett & Andrew Koppelman eds., 2012).

48 *Kedroff*, 344 U.S. at 116.

49 *Id.*

United States of America & Canada v. Milivojevich, the question before the Court was whether the Serbian Orthodox Church had arbitrarily and invalidly split the North American diocese into three smaller ones and defrocked Milivojevich.[50] The Illinois Supreme Court used the "narrowest kind of review" to examine the church's application of its own laws.[51] Ultimately, the court held that the reorganization of the diocese was impermissible but the defrocking and investigation of Milivojevich were permissible.[52] Granting certiorari, the Supreme Court held that even this type of review violated church autonomy.[53] Justice Brennan, writing for the Court, applied the church autonomy doctrine in invalidating the lower court decision. "The fallacy fatal to the judgment of the Illinois Supreme Court," he wrote, "is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes."[54] This is the case even when hierarchical churches pronounce judgments that are not in line with their own laws.

NLRB v. Catholic Bishop of Chicago is the other key case from the 1970s. It held that the National Labor Relations Act did not apply to lay teachers at Catholic schools.[55] The National Labor Relations Board had initially concluded that lay teachers working in Catholic schools were eligible to use unions as bargaining agents against their employers.[56] When the respondents' schools—minor seminaries in Chicago and Catholic high schools in the Diocese of Fort Wayne-South Bend, Indiana—refused to negotiate with these unions, the unions filed unfair-labor-practice complaints with the Board.[57] The Board concluded that the respondents had indeed violated fair labor practices and ordered them to cease and desist.[58] The Supreme Court granted certiorari to answer the question of whether or not the Board even had jurisdiction over lay teachers in Catholic schools that taught both religious and nonreligious subjects, and whether or not such jurisdiction violated the First Amendment.[59] The Court examined the National

50 426 U.S. 696, 697–98 (1976).

51 *See* Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 328 N.E.2d 268, 281 (Ill. 1975).

52 *Id.* at 284.

53 *See Milivojevich*, 426 U.S. at 698.

54 *Id.* at 708.

55 *See* NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 507 (1979).

56 *See id.* at 493.

57 *See id.* at 492–94.

58 *Id.* at 494–95 (first citing Cath. Bishop of Chicago, 224 N.L.R.B. 1221 (1976); and then citing Diocese of Fort Wayne-S. Bend, Inc., 224 N.L.R.B. 1226 (1976)).

59 *Id.* at 491.

Labor Relations Act of 1935 and concluded that the Board had no such jurisdiction, and that there would be a significant risk of entanglement under the Religion Clauses if it did.[60] The Court in its holding adopted a rule of statutory construction that carefully avoids even potential conflicts with church autonomy and church-state entanglement in the absence of clear statutory language.[61] As Alexander MacDonald points out, "[h]ad the Board been given jurisdiction over the schools, it would have been . . . forced . . . to question the schools' motivations in various contexts, which would have led it into disputes often grounded in religion."[62] By holding that the Board did not have jurisdiction, the Court avoided the risk of the Board "colliding with core First Amendment activity."[63] Simply put, even allowing lay employees at religious schools to organize under unions for labor negotiations runs afoul of the religious questions doctrine.

Examining the factual circumstances that led to this case is instructive for understanding the church autonomy issues present. The respondents' schools in *Catholic Bishop* had fired teachers for religious reasons—including for violating the Church's teaching on matters of sexuality in and outside of the classroom.[64] The Board's initial ruling second-guessed the school's motivations and ordered them to reinstate the teachers they had fired. The Supreme Court held that it was exactly this type of second-guessing and evaluation of religious belief that the church autonomy doctrine precludes.[65]

The Court has not decided any major religious questions doctrine cases in the twenty-first century, but it has continued to reaffirm the church autonomy doctrine through ministerial exception cases, as will be discussed below. While the Court held that the rights of individuals to free exercise are limited by generally and neutrally applicable laws

60 *See id.* at 507.

61 *See* Esbeck, *supra* note 40, at 256 (noting that the Court "adopt[ed] a rule of statutory construction that presumes religious organizations are exempt from congressional regulatory statutes that would otherwise entangle the government in matters of internal religious governance").

62 Alexander MacDonald, *Religious Schools, Collective Bargaining, & the Constitutional Legacy of* NLRB v. Catholic Bishop, 22 FEDERALIST SOC'Y REV. 134, 134 (2021).

63 *Id.*

64 *See id.* at 136 ("[O]ne teacher had exposed biology students to unapproved sexual theories; another had married a divorced Catholic; and a third had refused to restructure a course according to instructions from the religion department.").

65 *See Cath. Bishop*, 440 U.S. at 504 ("The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.").

in *Employment Division v. Smith*,[66] the Court has clearly and consistently upheld the rights of churches to self-governance.[67]

C. The Ministerial Exception

The ministerial exception has been in place in the federal circuit courts since at least the 1970s,[68] but until just a few years ago the Supreme Court had never taken a case dealing with the doctrine. The basic concept is that religious organizations have complete autonomy in deciding who their "ministers" (broadly construed) are.[69] For example, regardless of how compelling an interest gender equality is, the government cannot force the Catholic Church to ordain women to be priests. While lower courts did not always agree on the exact contours of the doctrine, by the time the Supreme Court took a look at the question, nearly every single U.S. court of appeals had some version of the ministerial exception enshrined into law.[70]

In 2012, for the first time, the United States Supreme Court decided a case on the ministerial exception.[71] The case, *Hosanna-Tabor*

66 494 U.S. 872, 881–82 (1990).

67 *See, e.g.*, Michael A. Helfand, *What Is a "Church"?: Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401, 413–14 (2013) (explaining that many courts and scholars recognize the distinction between *Smith* free-exercise claims and church autonomy); EEOC v. Cath. Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996) ("[T]he burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in *Smith* . . . ."); *see also* Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. REV. 1593, 1606 ("The Supreme Court, in [*Smith*], ruled that individuals are not entitled to . . . exemptions under the Free Exercise Clause in most cases. But other decisions suggest that religious organizations may enjoy some rights to exemption . . . ." (footnotes omitted)). Even those who think that the church autonomy doctrine has gone too far at least recognize that church autonomy jurisprudence is a different category from the religious-freedom rights of individuals. *See, e.g.*, Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981, 983 (2013) (writing that the Supreme Court, in validating the lower court line of ministerial exception cases, "aggrandized" the religious liberty of institutions but "lost sight of individual religious freedom").

68 *See* McClure v. Salvation Army, 460 F.2d 553, 558–60 (5th Cir. 1972).

69 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

70 *See, e.g.*, Natal v. Christian & Missionary All., 878 F.2d 1575, 1577 (1st Cir. 1989); Rweyemamu v. Cote, 520 F.3d 198, 207 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 305 (3d Cir. 2006); EEOC v. Roman Cath. Diocese of Raleigh, 213 F.3d 795, 800 (4th Cir. 2000); *McClure*, 460 F.2d at 558–60; Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 226 (6th Cir. 2007); Tomic v. Cath. Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2006); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991); Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 955–56 (9th Cir. 2004); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656–57 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1303 (11th Cir. 2000); *EEOC v. Cath. Univ. of Am.*, 83 F.3d at 461–62.

71 *Hosanna-Tabor*, 565 U.S. at 190.

Evangelical Lutheran Church & School v. EEOC, was a 9–0 decision in favor of the school over an employee who sued under the Americans with Disabilities Act.[72] Cheryl Perich, the employee, was hired by the church to teach religion classes to elementary school students. While on the job, she developed narcolepsy, which greatly impaired her ability to fulfill her duties. Although she sought treatment for her condition and still wanted to work, the church refused to let her continue.[73] Perich sued, and the Sixth Circuit sided with her.[74] The Supreme Court, in officially recognizing the ministerial exception as a constitutional issue, reversed.[75] The majority opinion, written by Chief Justice Roberts, examined four factors that heavily indicated that Perich was indeed a minister for purposes of the exception: her formal title, her religious training, her use of her religious title, and her religious job duties.[76] Because Perich was a minister, the Court could not adjudicate the dispute at all—it was up to the ecclesiastical authorities to make the call.[77] In concurrence, Justice Alito (joined by Justice Kagan) emphasized that the ministerial exception question is one of function,[78] and that the religious group—not the court—is the one who decides whether the spiritual function is important.[79] Nonetheless, it was clear after *Hosanna-Tabor* both that the church autonomy doctrine was about the rights of churches to govern themselves, and that it acted as a complete bar to adjudication.[80]

Hosanna-Tabor also was the first Supreme Court case to explicitly locate the church autonomy doctrine in both Religion Clauses of the First Amendment: "The First Amendment provides, in part, that 'Congress shall make no law respecting an establishment of religion, or

72 *See id.* at 175, 179, 196 (citing 42 U.S.C. §§ 12101–12213 (2006 & Supp. IV 2011)).

73 *See id.* at 178–79.

74 *See* EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 779–81 (6th Cir. 2010), *rev'd*, 565 U.S. 171.

75 565 U.S. at 190, 196.

76 *See id.* at 190–92.

77 *See id.* at 194.

78 *See id.* at 202–04 (Alito, J., concurring).

79 *See id.* at 206 ("What matters in the present case is that Hosanna-Tabor believes that the religious function that [Perich] performed made it essential that she abide by the doctrine of internal dispute resolution; and the civil courts are in no position to second-guess that assessment.").

80 The precise nature of *how* the ministerial exception acts as a bar to adjudication (e.g., can it be appealed via the collateral order doctrine) is the subject of ongoing discussion and litigation. *See, e.g.*, Tucker v. Faith Bible Chapel Int'l, 36 F.4th 1021, 1048 (10th Cir. 2022) (holding that a denial of a school's summary judgment motion on the ministerial exception defense is not an immediately appealable final order), *cert. denied*, 143 S. Ct. 2608 (2023) (mem.). For purposes of this Note, though, it is enough to note that if the ministerial exception applies, courts cannot adjudicate employment disputes between ministers and their employers.

prohibiting the free exercise thereof.' . . . Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."[81] As shown above, the previous Supreme Court church autonomy cases had taken differing views on where exactly the doctrine came from. Cases before *Kedroff* had located it in federal common law with passing references to free exercise and the concept of separation of church and state. *Kedroff* located the doctrine in the Constitution but seemed to focus more on Free Exercise Clause rather than Establishment Clause issues. *Hosanna-Tabor* settled, once and for all, that church autonomy is neither one nor the other, but both clauses working together.

Eight years later, the Court took on its second ministerial exception case in *Our Lady of Guadalupe School v. Morrissey-Berru*.[82] *Our Lady* was really a combination of two cases involving teachers at Catholic grade schools, both suing their former employers for discrimination.[83] Unlike Perich in *Hosanna-Tabor*, the teachers in these cases did not hold the formal title of "minister."[84] One of the plaintiffs, working at a Catholic school, had explicitly stated that she was no longer a practicing Catholic at all.[85] This time, the Court was split 7–2 in its decision, with the majority taking a relatively broad and expansive reading of its holding in *Hosanna-Tabor*. The factors outlined in that case, the *Our Lady* majority held, were not supposed to be a four-part checklist for courts to use to determine ministerial status; rather, "[w]hat matters, at bottom, is what an employee does."[86] In other words, the Court was concerned that churches and religious organizations were able to have full control over the positions that played the most vital role in their organizations (such as passing on the faith to future generations). Whether or not the employee has the title of "minister" is not a requirement to fulfill this role. And whether or not employees are "practicing" the religion of the institution is not for the courts to decide. Adjudicating that question, Justice Alito wrote, "would require courts to delve into the sensitive question of what it means to be a 'practicing' member of a faith."[87] Furthermore, "religious employers would be put in an impossible position. . . . [I]t is not clear how religious groups could monitor whether an employee is abiding by all religious obligations when away from the job."[88]

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81 *See Hosanna-Tabor*, 565 U.S. at 181 (quoting U.S. CONST. amend. I).
82 140 S. Ct. 2049 (2020).
83 *See id.* at 2055.
84 *Id.* at 2058–59.
85 *Id.* at 2069.
86 *Id.* at 2064, 2063–64.
87 *Id.* at 2069.
88 *Id.*

Between *Hosanna-Tabor* and *Our Lady of Guadalupe School*, the Court has continued to uphold the church autonomy doctrine in the context of the ministerial exception, highlighting the need for churches to decide matters of internal governance free from government interference in religious questions.

II. THE NEED FOR GREATER PROTECTION

From *Watson* to *Our Lady of Guadalupe School*, the Court has recognized the church autonomy principle that the Founders enshrined in the First Amendment. However, recent litigation shows that there are still unanswered questions in the religious-employment context. What happens in cases where the ministerial exception does not apply? The Court has not explicitly addressed the question of whether there are First Amendment protections for religious organizations when the ministerial exception runs out. There are, however, good reasons to give religious institutions greater autonomy in employment decisions made for religious reasons. The social science of religious psychology shows that even "ordinary" members of a church (as opposed to "ministers" specifically) play a crucial role in the communication and preservation of the beliefs of the organization.[89] It is just as important for the long-term existence of religious organizations that they employ people who will adhere to their religious teachings as it is for them to choose for themselves who will carry out ministerial functions. Furthermore, it is in the best interests of the government to give strong protection to the group rights of religious organizations. Religion plays a unique and important role in liberal democracies, helping to ensure the preservation of a pluralistic society and to avoid a tyranny of the majority. The Court ought to work within the bounds of the church autonomy doctrine to outline exactly how this protection would work.

A. Limits of the Ministerial Exception

While the ministerial exception is a crucial and high-profile aspect of the church autonomy doctrine, it is not without its limits. After *Hosanna-Tabor* was argued, Douglas Laycock, who had argued the case on behalf of the school, was asked if a college professor at a Catholic university would be covered by the exception. Laycock reportedly said, "If he teaches theology, he's covered. If he teaches English or physics or some clearly secular subjects, he is clearly not covered."[90] Even the

89 *See infra* Section II.B.

90 Adam Liptak, *Religious Groups Given 'Exception' to Work Bias Law*, N.Y. TIMES, Jan. 12, 2012, at A1.

Court in *Our Lady*, while expanding the doctrine, emphasized that the fact that the employees in question were *religious* teachers was of the utmost importance.[91] Although the test for whether an employee is a minister is not formalistic, it is clear that not every employee of every religious organization is a "minister." The formal recognition of the ministerial exception as a First Amendment principle has afforded robust church autonomy protection to all religious employers in the United States. But the broad, function-based definition of "minister" outlined in those opinions—especially in *Our Lady*—has brought up a new issue to be resolved: What happens in edge cases, or even cases where the ministerial exception does not apply but the employment decision was clearly made for religious reasons? *Hosanna-Tabor* dealt with an elementary school teacher who taught religion and was explicitly referred to as a "minister." *Our Lady* dealt with teachers who also taught religion at elementary schools, even if their roles were less explicitly religious than Perich's in *Hosanna-Tabor*. What about Lonnie Billard, who was a substitute drama teacher at Charlotte Catholic High School when his employment was terminated? Or what about teachers at postsecondary schools, like a social work professor at a Christian college?[92] Or, what about employees who serve no teaching function whatsoever? Courts are already beginning to see cases dealing with these and other employment issues. Some of the cases stretch the meaning of "minister," even under the Court's forgiving test. And these cases deal with issues even more controversial than teachers being fired for disabilities—many of them arise due to the conflict between Christianity's teaching on same-sex marriage and the sexual orientation of the teachers.

In a recent certiorari denial in *Gordon College v. DeWeese-Boyd*, Justice Alito, joined by three other justices,[93] expressed interest in further clarifying the outer limits of the application of the ministerial exception. Gordon College is a nondenominational Christian college in Wenham, Massachusetts.[94] The college requires all its faculty members to sign a statement of faith that affirms basic tenets of Christianity, such as the existence of God and the divine inspiration and inerrancy of Scripture.[95] In 1998, Margaret DeWeese-Boyd was hired as a faculty member in the department of social work.[96] DeWeese-Boyd acknowledged and personally affirmed the college's statement of faith in her

91 *See Our Lady*, 140 S. Ct. at 2066.

92 *See* Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952 (2022) (mem.) (statement of Alito, J., respecting denial of certiorari).

93 Justices Thomas, Kavanaugh, and Barrett. *Id.* at 952.

94 *See id.* at 953.

95 *See id.*

96 *Id.*

initial application, when she applied for tenure in 2009, and when she applied for promotion to full professor in 2016.[97] The college did not promote her to full professor, citing her lack of scholarly production; DeWeese-Boyd alleged that the real reason was her vocal opposition to Gordon College's policies regarding the LGBT community.[98] The parties then cross-moved for summary judgment on the question of whether DeWeese-Boyd was a minister, which would bar her claim.[99] Under *Our Lady*'s function-based test, is DeWeese-Boyd a minister? At best, the question is a close one. Unlike Perich and the teachers in *Our Lady*, DeWeese-Boyd taught at a religious college, not at an elementary school. She was not held out as a minister, nor did she actively engage in religious activities with her students.[100] DeWeese-Boyd did not teach theology. The Supreme Judicial Court of Massachusetts held that DeWeese-Boyd was not a minister because she did not "undergo formal religious training, pray with her students, participate in or lead religious services, take her students to chapel services, or teach a religious curriculum."[101] Justice Alito expressed "doubt[]" in the Supreme Judicial Court's analysis of DeWeese-Boyd's role, and indicated that he would be open to reconsidering the state court's holding.[102] Although the college eventually settled the case rather than prolong the litigation,[103] it highlights a problem for courts in current church autonomy jurisprudence. If the Court had held that DeWeese-Boyd was a minister, further expanding the term's definition, it would have risked jeopardizing religious-group rights by exposing them to judicial backlash. Professor Esbeck warned about this in the wake of *Hosanna-Tabor*: "An overly-eager embrace [of the ministerial exception] will yield a series of lower court opinions seeming to cut back on *Hosanna-Tabor*, with all the attendant rhetoric about a 'clear and present danger' of religion unregulated and out of control."[104] On the other hand, if the Court had decided she was not a minister, the message to religious groups would be that they only have the legal right to

97 *See id.*

98 *Id.*

99 *Id.* at 953–94.

100 *See id.* at 954.

101 DeWeese-Boyd v. Gordon Coll., 163 N.E.3d 1000, 1017 (Mass. 2021), *cert. denied*, 142 S. Ct. 952.

102 *See Gordon Coll.*, 142 S. Ct. at 955, 954–55 (statement of Alito, J., respecting denial of certiorari).

103 Julie Manganis, *Gordon College Reports Settlement Reached in Long-Running Lawsuit by Former Professor*, SALEM NEWS (Dec. 15, 2022), https://www.salemnews.com/news/gordon-college-reports-settlement-reached-in-long-running-lawsuit-by-former-professor/article_91a51466-7bd9-11ed-a645-63028091d214.html [https://perma.cc/Z79G-YFJX].

104 Carl H. Esbeck, *A Religious Organization's Autonomy in Matters of Self-Governance:* Hosanna-Tabor *and the First Amendment*, ENGAGE, Mar. 2012, at 114, 118.

hire employees who fully adhere to their religiously motivated codes of conduct if the employees perform some ministerial function.

As a practical matter, the current doctrine puts religious groups like Gordon College in a difficult position. They need to argue that every single one of their employees is a minister, even ones that do not perform any obvious ministerial functions, if they want a workplace culture informed by religious belief. But this tactic will fail when the positions clearly aren't ministerial.[105] Moreover, some religious groups may not want to designate every position as ministerial because it simply is not true. For instance, Catholic Relief Services (CRS) is an international Catholic aid organization that states that it "neither facilitates, endorses nor enables any violation of [Catholic] teachings" on its website.[106] However, following news of a CRS employee who left his job after it was made public that he was in a same-sex relationship, a spokesperson for CRS stated that an employee in an overseas finance position was not in a mission-related position.[107] Ultimately, if protecting religious-group rights is the goal of the church autonomy doctrine, it needs to be clarified to avoid forcing religious organizations to label all their employees as "ministers" in an attempt to vindicate their constitutional rights.

B. Why Religious Organizations Need More First Amendment Protection

Conflicts between religious groups and their members over core teachings are increasingly becoming issues of litigation. In 2020, a group of students at the Orthodox Jewish Yeshiva University petitioned the school to start a new club, the "YU Pride Alliance."[108] The mission of the group is to "provide a supportive space on campus for all students, of all sexual orientations and gender identities."[109] The school determined that it could not officially recognize the club because doing so would violate principles of the Torah.[110] Yeshiva, like many

105 *See* Richard W. Garnett, *Religious Schools and the Freedom of the Church*, LAW & LIBERTY (July 10, 2020), https://lawliberty.org/religious-schools-and-the-freedom-of-the-church [https://perma.cc/B2WR-PX4F] ("Some school employees' duties might be obviously unconnected to the schools' religious missions . . . .").

106 *Our Catholic Identity*, CATH. RELIEF SERVS., https://www.crs.org/about/catholic-identity [https://perma.cc/QDX4-PLQX].

107 Dennis Sadowski, *CRS Official Resigns Weeks After Report He Was in Same-Sex Marriage*, NAT'L CATH. REP. (June 3, 2015), https://www.ncronline.org/news/people/crs-official-resigns-weeks-after-report-he-was-same-sex-marriage [https://perma.cc/WC66-57TT].

108 *See* YU Pride Alliance v. Yeshiva University, BECKET, https://www.becketlaw.org/case/yu-pride-alliance-v-yeshiva-university/ [https://perma.cc/9AHT-6PKV].

109 *About*, YU PRIDE ALL., https://www.yuprideallliance.org/about [https://perma.cc/BT27-R28V].

110 YU Pride Alliance v. Yeshiva University, *supra* note 108.

other universities and other religious institutions, doesn't allow student groups that undermine the mission of the university in large part because doing so would have a seriously negative impact on their ability to teach and transmit the 3,000-year-old Torah values that underlie Yeshiva's reason for existence.[111] This is the case even if none of the members of the proposed Pride Alliance are "ministers" of the Jewish faith. Of course, it is true that ministers play a vital role in preserving and passing on the teachings of a faith. But the "ordinary" members of the faith community—not only the students, but the cafeteria workers and janitors—play a vital role in doing this as well. Churches, religious schools, and other faith-based organizations should not be forced to admit members that actively work to undermine the doctrinal integrity of their organizations. This is especially true in today's United States, where there are more varying types of religious institutions—and more threats to the existence of these institutions—than ever before. The crucial role that even ordinary members of a religious group play in the continued existence of the core values of the group is borne out by social-science research into the psychology of religion since the mid-twentieth century. In her article *Church Autonomy After* Our Lady of Guadalupe School*: Too Broad? Or Broad as it Needs to Be?*, Professor Helen Alvaré applies "Social Influence Theory" to religious institutions to show why a robust church autonomy doctrine is necessary.[112] The analysis yields two conclusions that underscore the need for religious groups to have autonomy in membership decisions: the important role that personal relationships play in affirming church doctrine, and the extreme negative effect of vocal dissent.

Social science of human interaction confirms the obvious fact that people influence, and are influenced by, those with whom they associate often.[113] This does not change in the context of relationships among members of a religious group. As Alvaré observes, "Belonging to a religious community influences people's religious beliefs and commitment, in part because socializing leads to mutual influence."[114] This influence does not only come from clergy members, ministers, and educators, but also from family and friends. A qualitative study of twenty-eight highly religious adolescents between the ages of twelve and twenty-one found that the types of relationships most commonly cited as having an impact on their religious and spiritual development

111 *See id.*

112 *See* Helen M. Alvaré, *Church Autonomy After* Our Lady of Guadalupe School*: Too Broad? Or Broad as It Needs to Be?*, 25 TEX. REV. L. & POL. 319, 355–70 (2021).

113 *See id.* at 354–55.

114 *Id.* at 357 (citing Marie Cornwall, *The Social Bases of Religion: A Study of Factors Influencing Religious Belief and Commitment*, 29 REV. RELIGIOUS RSCH. 44 (1987)).

were those with parents and friends.[115] Fewer than half of the subjects cited "religious leaders" as having a primary influence in their religious and spiritual development.[116] Alvaré notes, "Family regularly appears in studies to be the most important agent of religious socialization, but the degree of influence of peers and religious communities—including those who are not denoted religious leaders—remains notable."[117] When it comes to the transmission of the faith to future generations, parents are not the complete picture. A study by sociologist Dr. Christian Smith and Justin Bartkus at the University of Notre Dame observed that "[i]t is unimaginable that parents could transmit a religious worldview without exposing their children to outside persons, communities, and experiences which constitute the cultural 'world' in which Catholic belief makes sense."[118]

On the other hand, just as ordinary members of religious groups can have an especially positive influence on the transmission and preservation of religious belief, the presence of a small but vocal number of dissenters can have severely negative consequences. This is most notably true if those who disagree with the teachings are very confident, even if they do not hold actual positions of authority. Alvaré cites an experiment conducted by Mehdi Moussaid and colleagues that discovered that "if even 15% of a group confidently declare themselves 'experts' on a subject, they can change what many members had previously claimed to believe."[119] What should institutions do to combat the potential negative influence of dissenters? Alvaré recommends that "institutions should attempt to employ a critical mass of convinced, confident believers and *also* take continual steps to boost members' confidence in their beliefs if they wish individuals and the community to retain widespread support for their faith, doctrine, and mission."[120]

The implication that these social-science findings have for church autonomy is that religious groups need a great degree of autonomy in employment decisions if they are to preserve their fundamental

115 Pamela Ebstyne King, Mona M. Abo-Zena & Jonathan D. Weber, *Varieties of Social Experience: The Religious Cultural Context of Diverse Spiritual Exemplars*, 35 BRIT. J. DEVELOPMENTAL PSYCH. 127, 132 (2017).

116 *Id.*

117 Alvaré, *supra* note 112, at 359.

118 JUSTIN BARTKUS & CHRISTIAN SMITH, A REPORT ON AMERICAN CATHOLIC RELIGIOUS PARENTING 67 (2017).

119 Alvaré, *supra* note 112, at 366 (citing Mehdi Moussaïd, Juliane E. Kämmer, Pantelis P. Analytis & Hansjörg Neth, *Social Influence and the Collective Dynamics of Opinion Formation*, PLOS ONE, art. no. e78433, Nov. 2013, at 1, 2).

120 *Id.* at 367.

beliefs.[121] This is true whether or not the employee is in a position of authority or plays a designated role as a "minister" in a given community. Restricting protections to just ministers is not enough to give these groups the ability to preserve and transmit their faith.

C. Why the Government Should Care

It is in the best interests of religious groups to have a strong church autonomy doctrine to shield their employment decisions from second-guessing by the government. But is it in the best interests of the government to give them this protection? If the law is to protect the ideal of diversity of thought and religious pluralism that America's Founders thought important, then the answer is yes. Writing about the ministerial exception, Professor Richard Garnett observed: "It is . . . a staple of liberal constitutionalism that powers and authorities are multiplied, divided, checked, and limited. The freedom of religious institutions to decide internal, religious matters for themselves should be seen as an important illustration of this constitutional principle."[122] The classical-liberal idea of church-state separation outlined above in Section I.A is not without its critics, however. Some have argued that liberalism by its nature seeks to minimize or even eliminate the role of religion in public life.[123] This Note does not weigh in on the debate surrounding liberalism. Instead, it presumes America is a liberal democracy and asks to what extent religious groups ought to be given autonomy in such a society.

Religion is crucial to the success of a liberal society because it provides a framework for morality and virtue that the liberal state per se cannot. On its own terms, American liberal democracy is pluralistic and agnostic about which religion is correct (think back to *Watson*'s "no orthodoxy" principle from Section I.B). While even today's America is replete with religious references in public life—from speeches by politicians to our quarter dollars—the Supreme Court has identified

121 *See id.* at 361 ("If personal relationships influence group members as much as the above materials indicate, this matters for purposes of an institution's ability to claim church autonomy respecting personnel.").

122 *See* Garnett, *supra* note 105.

123 *See, e.g.*, PATRICK J. DENEEN, WHY LIBERALISM FAILED (2018). Deneen writes, "The loosening of social bonds in nearly every aspect of life—familial, neighborly, communal, religious, even national—reflects the advancing logic of liberalism and is the source of its deepest instability." *Id.* at 30; *see also* James Kalb, *The Tyranny of Liberalism*, 42 MOD. AGE 239, 241 (2000) (arguing that "[c]ontemporary liberalism expresses and supports" the "secularist" idea that "[r]eligion is to be banished from public life"); *cf.* BENJAMIN WIKER, WORSHIPPING THE STATE: HOW LIBERALISM BECAME OUR STATE RELIGION 4 (2013) ("Christianity is being deliberately pushed out of our culture—so that secular liberalism can be established in its place.").

such references as a sort of "ceremonial deism" used to "solemnize" an occasion rather than express actual belief in a creator.[124] Even if one were to argue that the caution of the twentieth-century Supreme Court in enforcing the Establishment Clause was excessive, it is still a fundamental principle of American liberal democracy that it is not the job of the state to tell its citizens which god to worship or which religious practices to observe. Nevertheless, a religious and moral citizenry is an absolute necessity for our democracy to flourish. The Founders of our nation recognized this. George Washington, in his farewell address, wrote that "religion and morality are indispensable supports" to the "dispositions and habits which lead to political prosperity."[125] He continued: "[R]eason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle. It is substantially true that virtue or morality is a necessary spring of popular government."[126] John Adams famously wrote: "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[127] Others who were influential at the Founding, such as James Madison and Isaac Backus, similarly spoke of the need for a virtuous populace.[128]

Several decades later, Alexis de Tocqueville highlighted the important role that religion plays in a democratic society in his famous

124 *E.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 36–37 (2004) (O'Connor, J., concurring in judgment) ("For centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. Such references can serve to solemnize an occasion instead of to invoke divine provenance."); *see also* Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (applying the phrase "ceremonial deism" to our national motto and the Pledge of Allegiance).

125 G. Washington, *To the People of the United States*, CLAYPOOLE'S AM. DAILY ADVERTISER, Sept. 19, 1796, at 2, *reprinted in* WASHINGTON'S FAREWELL ADDRESS, S. Doc. No. 106-21, at 20 (2000).

126 *Id.*

127 Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), *in* 9 THE WORKS OF JOHN ADAMS 228, 229 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1854).

128 *See, e.g.*, James Madison, Speech at the Virginia Convention (June 20, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1412, 1417 (John P. Kaminski & Gaspare J. Saladino eds., 1993) ("Is there no virtue among us? . . . . To suppose that any form of Government will secure liberty or happiness without any virtue in the people, is a chimerical idea."); ISAAC BACKUS, GOVERNMENT AND LIBERTY DESCRIBED (Boston, Phillip Freeman 1778), *reprinted in* ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754–1789, at 345, 358 (William G. McLoughlin ed., 1968) ("I am as sensible of the importance of religion and of the utility of it to human society . . . [a]nd I concur with [them] that the fear and reverence of God and the terrors of eternity are the most powerful restraints upon the minds of men.").

work *Democracy in America*.[129] While Tocqueville thought that modern democracy came from Christian roots, he recognized that democracies foster a dangerous tendency toward a tyranny of the majority.[130] The solution, in his mind, was morality cultivated by religion:

> When [men] attack religious beliefs, they follow their passions and not their interests. Despotism can do without faith, but freedom cannot. Religion is much more necessary . . . in democratic republics more than all others. How could society fail to perish if, while the political bond is relaxed, the moral bond were not tightened? And what makes a people master of itself if it has not submitted to God?[131]

For Tocqueville, religion helps citizens to become upright, virtuous, and moral so that they understand that power is not unlimited license but must be used to protect the rights of all.[132] In addition to forming citizens properly, religious associations (in addition to other civil associations) are vital to the American system of representative government. Writing about political, civic, and religious associations, Tocqueville observed that "freedom of association has become a necessary guarantee against the tyranny of the majority."[133]

The benefits of religion cannot be realized, however, without strong protections for the rights of religious groups. Defining the conditions and limits of membership is one of the most important of these rights. As stated previously, if the government merely protects the rights of the group to choose its ministers, it fails to protect against the danger of the influence of nonministers who do not adhere to the beliefs of the group. There must be some greater level of protection for society to enjoy the benefits of a liberal society. In his 1989 article *Toward a Constitutional Jurisprudence of Religious Group Rights*, Professor Frederick Mark Gedicks argued that, to protect our liberal democracy, the government must legally uphold the rights of religious groups to choose their members, even at the expense of upholding government antidiscrimination laws in all circumstances.[134] Gedicks explained: "According to conventional pluralist wisdom, these groups serve to

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129 *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835, 1840); Carson Holloway, *Tocqueville on Christianity and American Democracy*, FIRST PRINCIPLES, Mar. 7, 2016, at 1.

130 Holloway, *supra* note 129.

131 TOCQUEVILLE, *supra* note 129, at 282.

132 *See id.* at 279–80.

133 *Id.* at 183.

134 *See* Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 105 ("I will argue that . . . the individual-government-religious group tension should be resolved by deferring to the group, even at the cost of infringing upon important individual and government anti-discrimination interests.").

insulate the otherwise powerless individual against the bureaucracy and coercion of the powerful modern state."[135] He highlighted the role the Roman Catholic Church played in the 1980s in the Philippines and Poland as an example of the power of religious groups in totalitarian regimes.[136] The power of religious groups in those countries during difficult times of government oppression speaks volumes of the ability of religious groups to help safeguard the rights of individuals in a more free liberal democracy.

III. THE "NONMINISTERIAL EXCEPTION" PRINCIPLE

Religious institutions and society as a whole would benefit greatly from enhanced First Amendment protection for religious institutions. The First Amendment principles the Founders intended to enshrine in our Constitution protect religious institutions as well as the religious exercise of individuals, and this has been explicated by church autonomy cases over the past century. This Note argues that the best way to advance First Amendment protection for religious groups in employment cases while remaining faithful to the principles of the church autonomy doctrine is to recognize a "nonministerial exception principle." This principle is already implicit in the Court's religious questions doctrine. Rather than invent a new principle, the Court needs simply to recognize the ways in which the nonministerial exception is implied by its past precedent.[137]

A. The Principle

The proposed principle is simple: in employment cases involving religious institutions, courts are barred from adjudicating disputes that arise primarily from the institution's sincerely held religious beliefs. The principle stems from the fact that, in order for a court to adjudicate an employment decision rooted in the organization's religious beliefs, the court needs to impermissibly entangle itself in the religious practices of the group. In essence, the court either needs to determine whether or not the religion actually entails the practice at issue or how the practice ought to be lived out.

Take the *Billard* example from the Introduction. There, since Lonnie Billard is not a minister, the district court held that the school

135 *Id.* at 115.

136 *Id.* at 116.

137 For a more complete and nuanced application of church autonomy to employment cases, see Lael Weinberger, *The Limits of Church Autonomy*, 98 NOTRE DAME L. REV. 1253, 1307–13 (2023).

does not enjoy immunity from Title VII suit.[138] But is the court really avoiding entanglement in the internal affairs of the school? Or is it establishing an "orthodoxy" that the school needs to abide by? Charlotte Catholic High School holds all its employees to the same standard: the moral teachings of the Catholic Church.[139] The reason why the school does not hire or retain employees who violate the Church's teaching on matters of sexuality is because they believe that teachers are "role models to students."[140] By not permitting the school to make its internal governance decisions based on this framework, the government is sending the message that, if the stakes are considered high enough, it is able to dictate to religious groups how they ought to practice their faith. This is mistakenly importing a "compelling reason" balancing test from the Free Exercise Clause context to a church autonomy context.[141] Church autonomy, which as stated above flows from both Religion Clauses, acts as a complete bar to adjudication. No matter how many people strongly feel that the Catholic Church is engaging in impermissible sex-based discrimination by refusing to ordain women, the government cannot tell the Church that it must stop ordaining only men. The religious questions doctrine works the same way. Once a court determines that an employment decision was made based on a sincerely held religious conviction, the court is completely barred from adjudicating the claim.

With this new principle comes a new test for determining when religious organizations can take advantage of it. But first, a quick recap of the ministerial exception: When courts adjudicate ministerial exception cases, they first need to make sure the institution is a religious institution, then they determine whether the employee in question performs the functions of a "minister."[142] If so, the religious employer

138 Billard v. Charlotte Cath. High Sch., No. 17-cv-00011, 2021 WL 4037431, at *14 (W.D.N.C. Sept. 3, 2021), *appeal filed*, No. 22-1440 (4th Cir. argued Sept. 20, 2023).

139 *See id.* at *3.

140 *See id.*

141 Emp. Div v. Smith, 494 U.S. 872, 884 (1990). In the Free Exercise Clause context, cases such as *Bob Jones University v. United States* establish that there are certain government interests, such as eradicating racial discrimination in education, that are so compelling that they "allow even regulations prohibiting religiously based conduct." *See* Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983). Gedicks argues that church autonomy cases, however, are different:

> The [Court] clearly assumes that the physical existence of Bob Jones University is not seriously implicated by the decision to revoke its federal tax exemption on race discrimination grounds, even though it may be economically coerced to abandon a core concern. Other government action that pressures religious group existence, however, would yield to the group's interest in its own autonomy.

Gedicks, *supra* note 134, at 136–37 (footnote omitted).

142 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020). For a few of the many cases that look to whether an organization is sufficiently religious,

enjoys complete freedom to decide whether to keep or fire the minister; the court cannot look to the reasons the institution gave for its decision. In nonministerial exception cases, the inquiry is different. Like ministerial exception cases, the court must still determine that the institution is primarily a religious one. But instead of looking to the function of the employee and not the reason for firing him or her, the court should do the opposite. If the religious employer fired the employee for a religious reason, then the "religious questions" doctrine is implicated, and courts should avoid excessively entangling themselves by adjudicating the dispute. In these "nonministerial exception" cases, adjudicating sincerity becomes incredibly important. If a court has to decide if the reasons for firing an employee were religious but is barred by the "no orthodoxy" principle from saying whether or not these reasons are acceptable, it becomes crucial that the religious employer actually believes these reasons to come from its religious doctrine.

Courts cannot avoid entangling themselves in religious questions when they adjudicate employment disputes that arise out of the codes of conduct or terms of employment created by religious institutions or organizations. If a religious institution says that an employee must adhere to and live out the faith of that organization and then determines that a particular employee has not upheld their end of the bargain, the only way a court could adjudicate such a dispute is to say whether or not the employee actually was living out the faith of the organization—an inherently religious question.

B. Which Organizations Count as Religious

The first question courts must answer when adjudicating these sorts of employment disputes is whether the institution trying to enforce its beliefs counts as "religious" for the purposes of the church autonomy doctrine and the First Amendment. This question has come up many times before. Notably, a vast array of plaintiffs, from educational institutions to television networks to manufacturing companies to a property-management company, challenged the contraception mandate of the Affordable Care Act a few years ago.[143] The Department of Health and Human Services provided exemptions from the Act for certain types of "religious employers," but the question was

see, for example, Penn v. N.Y. Methodist Hosp., 884 F.3d 416, 424–26 (2d Cir. 2018) (finding a hospital's department of pastoral care sufficiently religious to take advantage of the ministerial exception); and Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309–11 (4th Cir. 2004) (holding the same for a Jewish nursing home).

143 *See* Helfand, *supra* note 67, at 404–06 (listing out the many types of institutions that filed lawsuits against the government).

what kinds of employers count as "religious."[144] And, of course, this is also essential to adjudicating ministerial exception cases, where the stakes of identifying the employee of a religious employer as a "minister" are incredibly high. The Court has not given a single test to determine what sorts of organizations are "religious" for church autonomy purposes.[145] The "implied consent" model of religious organizations as put forth by Professor Michael Helfand is the best model to determine which organizations qualify as religious.[146]

Professor Michael Helfand has proposed that a proper definition of "religious employer" should avoid being overall formalistic or centered around an idea of what a "church" ought to look like.[147] The best definition, and the one most in line with the Supreme Court's early church autonomy cases, is an "implied consent" model. Implied consent as a theory for church organization essentially states that churches derive their legal and institutional character and rights from the consent of their members, and this consent does not have to be explicit.[148] This theory stems from the thought of political philosophers such as John Locke in *A Letter Concerning Toleration*.[149] The concept was present from the very first Supreme Court cases regarding the church autonomy doctrine. The Court in *Watson* explained its rationale for deference to religious institutions in property disputes by noting that "[a]ll who unite themselves to such a body do so with an *implied consent* to this government, and are bound to submit to it."[150]

An implied-consent model determines which organizations are religious employers from the perspective of the employee. When determining if a group should be protected by church autonomy, a court should ask if the employee would have thought the employer was a primarily religious employer when he or she began the job.[151] "Instead of focusing on some list of factors," Helfand explained, "an implied consent model focuses our attention on whether members of

144 *See id.* at 408 (citing Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pts. 147, 148, 156)).

145 *See* Michael A. Helfand, *Implied Consent to Religious Institutions: A Primer and a Defense*, 50 CONN. L. REV. 877, 884 (2018) (noting that, in a variety of religious-accommodation contexts, "courts have struggled somewhat to provide a framework to analyze these questions").

146 For Helfand's view, see Helfand, *supra* note 67; and Helfand, *supra* note 145.

147 *See* Helfand, *supra* note 67, at 410.

148 *See id.* at 410–11.

149 *See* Helfand, *supra* note 145, at 898–99, 901 (citing JOHN LOCKE, *A Letter Concerning Toleration*, *in* A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 1, 15–16 (Mark Goldie ed., 2010)).

150 Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1872) (emphasis added).

151 *See* Helfand, *supra* note 67, at 410.

the institution would have encountered sufficient indicia of religion to justify the presumption of implied consent."[152] Courts must determine whether an employee was on notice that the institution was a religious one. Helfand wrote: "[W]here religion is integrated into the day-to-day operations of an institution—through pervasive religious symbols, organized religious prayer, or other concrete manifestations of a religious mission—employees are alerted to the importance of religious objectives to the institution."[153] If an organization has a strong preference—or a standard of practice—of only hiring coreligionists, employees are almost certainly on notice that the organization is a religious one.

The advantage of an implied-consent model for defining religious institutions is that it provides courts with a judicially manageable standard that recognizes the rights of institutions for the very reason why their members joined them.

C. Determining Religious Sincerity

The church autonomy doctrine is limited to actions religious institutions take for religious reasons. As the Tenth Circuit explained: "The church autonomy doctrine is not without limits, however, and does not apply to purely secular decisions, even when made by churches. Before the church autonomy doctrine is implicated, a threshold inquiry is whether the alleged misconduct is 'rooted in religious belief.'"[154] At the same time, when religious individuals or institutions claim that they are motivated by religious belief, the court is not allowed to inquire into the "orthodoxy" of the belief.[155] Thus, whether or not a claimed religious belief is sincerely held is a key inquiry in these church autonomy cases.

This is both a necessity and completely permissible under First Amendment jurisprudence. Under the old *Sherbert-Yoder* Free Exercise Clause framework, and even under the current Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act frameworks, courts are regularly asked to adjudicate whether an individual has a sincerely held religious belief.[156] Courts have been

152 *Id.* at 418.

153 *Id.* at 423.

154 Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 657 (10th Cir. 2002) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

155 *See* Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 715–16 (1981); *see also* Ramirez v. Collier, 142 S. Ct. 1264, 1298 (2022) (Thomas, J., dissenting) ("[T]he protection of the First Amendment[,] is not restricted to orthodox religious practices." (second alteration in original) (quoting Follett v. Town of McCormick, 321 U.S. 573, 577 (1944))).

156 *See* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1213, 1240, 1248–49 (2017).

adjudicating sincerity for a long time, and the rules for doing so are clear.[157] In his article *Adjudicating Religious Sincerity*, Professor Nathan Chapman points out that courts adjudicate sincerity regularly in fraud, immigration, employment discrimination, and prisoner religious-accommodations cases.[158] The Supreme Court referenced the sincerity requirement in the prisoner religious-accommodations context just a few years ago in *Holt v. Hobbs*.[159] The question isn't whether adjudicating sincerity is possible, but what it would look like in these sorts of employment cases. Unlike the prisoner in *Hobbs*, who was asking for a prison to accommodate his religious belief of growing a beard,[160] employers are asking courts to believe they are sincere in enforcing an entire standard of action and code of conduct against their employees. But while the scope and impact of religious belief in these cases may be greater than in the prison context, the basic inquiry of sincerity is the same, and just as workable for courts.

In adjudicating religious sincerity, courts are barred from making a determination of the plausibility or rationality of the underlying religious beliefs. The prohibition on determining orthodoxy creates a difficulty in the sincerity inquiry. In a famous dissent in *United States v. Ballard*,[161] Justice Jackson argued that it is impossible to limit an inquiry to sincerity because plausibility is what people most often use to determine sincerity in the first place:

> The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.[162]

Professor Nathan Chapman, in rebutting Justice Jackson's argument, makes a crucial distinction between a claimant's *accuracy* and his *sincerity*. "[A]ccuracy depends on the statement's correspondence to observable reality external to the speaker. Sincerity depends on the

157 *See* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 59–60 (2014) ("There is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity.").

158 Chapman, *supra* note 156, at 1188.

159 574 U.S. 352, 360–63 (2015).

160 *Id.* at 355–56.

161 322 U.S. 78 (1944).

162 *Id.* at 92–93 (Jackson, J., dissenting).

statement's correspondence to the speaker's subjective belief."[163] To illustrate, he gives examples of a belief that is inaccurate but sincere and one that is accurate but insincere.[164] Say a man tells his friend that he just bought a blue car, but the man is colorblind and doesn't know that the car is in fact green. The man really believed his new car was blue, so his statement was sincere, but since the car was green it was inaccurate. On the other hand, suppose the man's friend told him she really likes green cars, so to impress her the man told her that he bought a green car, although he really thought it was blue. If the car was in fact green (contrary to his belief), then his statement would be accurate but insincere. This accurate-sincere distinction is key for inquiries into religious belief. Under the no-orthodoxy principle, courts are permitted to adjudicate the *sincerity*, but not the *accuracy*, of a religious belief. To bring the distinction more clearly to the concrete reality of religious exemptions, imagine a Christian woman who sought an exemption to a COVID-19 vaccine requirement because of a religious belief that told her she was unable to take the vaccine due to its connection to abortion. When adjudicating the question of religious exemptions, the no-orthodoxy principle means a court is not able to inquire into the accuracy of the woman's belief on two levels. First, the court is generally prohibited from inquiring whether or not Christianity itself is true, and whether or not the precepts of morality prevent the woman from taking the vaccine. Second, the court is also prohibited from inquiring into whether or not *her specific sect of Christianity* holds the belief that the vaccines are prohibited. The only inquiry the court can make is whether or not the woman is sincere in her belief that her religion dictates that she not take the vaccine. As Chapman says, "With respect to religious accuracy—including accuracy about what the claimant's religion requires—each person is an island."[165]

What is true in the sincerity inquiry for individuals is true for religious organizations as well.[166] When applying the sincerity inquiry to religious institutions, courts should look at all evidence relevant to whether the institution actually believes what it believes, with two caveats. The first is that, as stated earlier, courts cannot inquire into whether the religious beliefs are plausible or rational to determine sincerity.[167] Second, courts ought not look to other institutions that claim

163 Chapman, *supra* note 156, at 1226.

164 *Id.*

165 *Id.* at 1227 (citing Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 715–16 (1981)).

166 *Id.* at 1240 ("[T]here seems to be no reason why institutions should be treated differently for purposes of a sincerity analysis.").

167 *See Ballard*, 322 U.S. at 87 ("The religious views espoused by respondents might seem incredible, if not preposterous . . . . But if those doctrines are subject to [evaluations

to have the same faith to see if they are sincere. This inquiry was also explicitly barred in *Thomas v. Review Board*. "[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."[168] Just because one Jewish university decides that having an LGBT student club is completely in line with the teachings of the Torah does not mean that a court can use that fact to determine that a different Jewish university is insincere in taking a different view. As Professor Alvaré observed, "[E]ven separate institutions within a single religious tradition may not agree [on matters of doctrine]."[169]

Among other things, two important considerations are whether the institution has other incentives for its actions, and whether the institution has acted in a consistent manner with regard to this particular belief. Concerning the latter, of course it is relevant whether the institution recently changed ownership or management to a group that holds more closely to certain teachings of the faith. Above all, besides the two caveats mentioned above, courts should consider all other relevant evidence in adjudicating sincerity. Adjudicating religious sincerity may not be a very popular view among judges and scholars today,[170] but it is a crucial step in "nonministerial exception" cases so courts can avoid misapplying the church autonomy doctrine to groups that should not receive its protection.

CONCLUSION

The church autonomy doctrine needs to be developed further to protect religious groups in the United States today. A development that is focused on avoiding judicial entanglement in religious questions is directly in line with the thought of the Founders, the Supreme Court cases dealing with church autonomy, and the very principles of liberal democracy. Doing so will not render the ministerial exception irrelevant. In rejecting Charlotte Catholic High School's argument, the court in *Billard* wrote, "If the church autonomy doctrine was so expansive as to create in all religious employers a First Amendment right to engage in employment discrimination, then there would be

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of] truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.").

168 *Thomas*, 450 U.S. at 716.

169 Alvaré, *supra* note 112, at 372, 372–73 (giving the example of the University of Notre Dame, a Catholic institution that hired Pete Buttigieg, who is in a same-sex marriage and supports legal abortion throughout pregnancy).

170 *See* Chapman, *supra* note 156, at 1189–91 (listing examples of prominent scholars and judges who think courts should not adjudicate religious sincerity).

no need to have a ministerial exception because Title VII would not protect any employee of a religious organization."[171] This statement is not entirely correct. This Note attempts to show that the church autonomy doctrine specifically covers cases in which a religious organization's employment decision is made on *religious* grounds. Not every single employment decision made by a religious organization is made for specifically religious reasons. The district court's error in dismissing Charlotte Catholic High School's claim comes from conflating the reason why the ministerial exception doctrine exists with its implementation. The ministerial exception exists because the church autonomy doctrine protects religious groups from government "interfere[nce] with the internal governance of the church."[172] As applied in the ministerial exception context, church autonomy gives blanket protection for religious groups to make decisions about who will be their ministers for *any* reason. As applied in the nonministerial context, church autonomy ought to still protect the right of groups to make employment decisions for *religious* reasons. Admittedly, there are instances of overlap. If a Catholic school were to fire a nun for teaching what it considered heresy in religion class, a suit for wrongful termination by the nun would be barred both because she would be considered a "minister" and because the school had religious reasons (provided they were sincere). But just because there is overlap does not mean that an expanded church autonomy doctrine would render the ministerial exception unnecessary. Both are very much needed aspects of a church autonomy doctrine that will fully give religious institutions the protections they need to thrive.

171 Billard v. Charlotte Cath. High Sch., No. 17-cv-00011, 2021 WL 4037431, at *12 (W.D.N.C. Sept. 3, 2021), *appeal filed*, No. 22-1440 (4th Cir. argued Sept. 20, 2023).

172 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).