PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 25-1569

JOHN DOE,

Plaintiff - Appellee,

v.

CATHOLIC RELIEF SERVICES,

Defendant - Appellant,

and

STATE OF MARYLAND; UNITED STATES OF AMERICA,

Intervenors.

GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; CARDINAL NEWMAN SOCIETY; ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS; ASSOCIATION OF CLASSICAL CHRISTIAN SCHOOLS; ASSOCIATION FOR BIBLICAL HIGHER EDUCATION; INTERNATIONAL ALLIANCE FOR CHRISTIAN EDUCATION; UNITED STATES CONFERENCE OF CATHOLIC BISHOPS; PROFESSOR HELEN M. ALVARE; MARYLAND CATHOLIC CONFERENCE; CATHOLIC BENEFITS ASSOCIATION,

Amici Supporting Appellant.

RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS; METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; NATIONAL WOMEN'S LAW CENTER AND FOURTEEN ADDITIONAL ORGANIZATIONS; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; THE PUBLIC JUSTICE

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

CENTER; FREESTATE JUSTICE; EQUALITY CALIFORNIA; JUSTICE IN AGING; LEGAL AID AT WORK; NATIONAL EMPLOYMENT LAW PROJECT; NATIONAL LGBTQ+ BAR ASSOCIATION; SERVICES AND ADVOCACY FOR GAY, LESBIAN, BISEXUAL, AND TRANSGENDER ELDERS, INC.; SILVER SPRING UNITED METHODIST CHURCH; CURRENT AND FORMER EMPLOYEES OF CATHOLIC RELIEF SERVICE,

Amici Supporting Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Julie R. Rubin, District Judge. (1:20-cv-01815-JRR)

Argued: March 17, 2026 Decided: October 16, 2026

Before WYNN and QUATTLEBAUM, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed in part and dismissed in part by published opinion. Judge Floyd wrote the majority opinion, in which Judge Wynn joined. Judge Wynn wrote a separate concurring opinion. Judge Quattlebaum wrote a dissenting opinion.

ARGUED: Joseph Christian Dugan, GALLAGHER LLP, Baltimore, Maryland, for Appellant. Anthony Jovi May, NUSINOV SMITH, LLP, Baltimore, Maryland, for Appellee. Joshua Morris Segal, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland; Lowell Vernon Sturgill, Jr., UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenors. **ON BRIEF:** Brandon K. Wharton, GALLAGHER EVELIUS & JONES LLP, Baltimore, Maryland, for Appellant. Eve L. Hill, Lauren DiMartino, BROWN, GOLDSTEIN, LLP, Baltimore, Maryland; Shannon C. Leary, James A. Hill, GILBERT EMPLOYMENT LAW, P.C., Silver Spring, Maryland, for Appellee. Todd McFarland, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, Silver Spring, Maryland; Christopher Mills, SPERO LAW LLC, Charleston, South Carolina, for Amicus General Conference of Seventh-Day Adventists. John J. Bursch, Washington, D.C., Rory T. Gray, Lawrenceville, Georgia, Daniel J. Grabowski, ALLIANCE DEFENDING FREEDOM, Lansdowne, Virginia, for Amici Cardinal Newman Society, Association of Christian Schools International, American Association of Christian Schools, Association of Classical Christian Schools, Association for Biblical Higher Education, and International Alliance for Christian Education. Gene C. Schaerr, James C. Phillips, SCHAERR | JAFFE

LLP, Washington, D.C., for Amicus United States Conference of Catholic Bishops. Andrew Nussbaum, FIRST & FOURTEENTH PLLC, Colorado Springs, Colorado; Helen M. Alvaré, The Robert A. Levy Professor of Law, Antonin Scalia Law School, GEORGE MASON UNIVERSITY, Arlington, Virginia, for Amicus Helen M. Alvaré. Andrew Nussbaum, Martin Nussbaum, Colorado Springs, Colorado, James Compton, FIRST & FOURTEENTH PLLC, Washington, D.C., for Amici Maryland Catholic Conference and Catholic Benefits Association. Aditi Fruitwala, Daniel Mach, Washington, D.C., Louise Melling, Arijeet Sensharma, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Jenny Samuels, Alex J. Luchenitser, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., for Amici Religious and Civil-Rights Organizations. Carolyn L. Wheeler, Jessica Westerman, Susanna Barron, KATZ BANKS KUMIN LLP, Washington, D.C., for Amici Metropolitan Washington Employment Lawyers Association and National Employment Lawyers Association. Auden Perino, Rachel Smith, Elizabeth E. Theran, Brian Diettmeier, NATIONAL WOMEN'S LAW CENTER, Washington, D.C.; Elizabeth J. Bower, Erica L. Ross, Serena Lau, Washington, D.C., Jill K. Grant, Ciara Sisco, Dylan Evans, Rachel Pester, WILLKIE FARR & GALLAGHER LLP, New York, New York, for Amici National Women's Law Center and Fourteen Additional Organizations. Gregory R. Nevins, LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC., Decatur, Georgia, for Amicus Lambda Legal Defense & Education Fund, Inc. Sarah Miller, Murnaghan Appellate Advocacy Fellow, PUBLIC JUSTICE CENTER, Baltimore, Maryland; Lauren Pruitt, Legal Director, FREESTATE JUSTICE, Baltimore, Maryland, for Amici Public Justice Center; FreeState Justice; Equality California; Justice in Aging; Legal Aid at Work; National Employment Law Project; National LGBTQ+ Bar Association; Services and Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders, Inc.; and Silver Spring United Methodist Church. Robin B. Wagner, ROBIN B. WAGNER, PLLC, Ann Arbor, Michigan; Adam Farra, FARRA & WANG PLLC, Washington, D.C., for Amici Current and Former Employees of Catholic Relief Services.

FLOYD, Senior Circuit Judge:

This appeal represents the collision of employment nondiscrimination statutes with statutory and constitutional protections for religiously affiliated employers. Appellee John Doe[1] initiated this suit for damages, claiming he received unequal compensation because of sex when his employer, Appellant Catholic Relief Services (CRS), terminated his dependent health insurance benefits. There is no dispute at this point that CRS compensated Doe unequally based on sex or that Title VII, the Equal Pay Act, and the Maryland Fair Employment Practices Act apply to his claims. A straightforward application of each statute Doe invokes establishes his prima facie case—Doe is gay, and because he is married to a man, CRS refused to provide equal compensation via its employee benefits program. The issues presented on appeal are questions of law regarding CRS's affirmative defenses. CRS asks that we create a rule, sounding either in statute or in the First Amendment's Religion Clauses, that it may be shielded from liability because its discriminatory action is rooted in its sincerely held religious beliefs. But we find that neither the statutes at issue nor the First Amendment provide such broad immunity, and therefore we affirm the judgment of the district court.

[1] Upon filing his complaint, Doe filed a motion to proceed pseudonymously, which the district court granted.

I.

A.

The district court enumerated all facts relevant to this case in its factual findings following a bench trial. *See generally Doe v. Cath. Relief Servs.* (*Doe IV*), 779 F. Supp. 3d 545, 549–56 (D. Md. 2025). Specifically relevant to this appeal, we discuss CRS's mission and operations as well as information relevant to Doe's employment relationship with the organization and his various roles.

1. CRS Mission and Operations

Catholic Relief Services is a nonprofit social services agency affiliated with the Catholic Church and governed by the United States Conference of Catholic Bishops. Its mission is "to assist the poor and vulnerable overseas." *Id.* at 549. CRS has over 8,000 employees, and the organization does not require its employees to "adhere to the Catholic faith" except for "representational" positions. *Id.* at 550. CRS works with overseas local partners where available but "also provides services that local partners are unable to provide." *Id.* at 551. This work is undertaken by CRS's Overseas Operations Department.

Like any large organization, CRS relies on IT infrastructure to go about its work. One part of this infrastructure is Gateway, CRS's "agency-wide business pipeline and project portfolio system." *Id.* at 552. Gateway's pipeline and projects application "houses the agency's data relating to funding awards, solicitations, and trends, as well as project-level data and information relevant to program compliance and monitoring." Opening Br. at 7.

All of CRS's overseas projects utilize a management strategy called Monitoring, Evaluation, Accountability, and Learning (MEAL). MEAL creates a "standardized monitoring and evaluation framework" for CRS's projects. *Doe IV*, 779 F. Supp. 3d at 554.

2. Doe's Relationship with and Roles at CRS

John Doe, an IT analyst, encountered CRS at a job fair in 2016. CRS needed a data analyst and Doe fit the bill. At this first meeting, Doe told the CRS recruiter that he is gay, that he is married, and asked if his husband would be covered by CRS's dependent health benefits. The recruiter said unequivocally that he would.

Doe joined CRS and enrolled his husband in CRS's dependent benefits program. But five months later, CRS informed Doe that his husband's enrollment was a mistake, because providing dependent benefits to Doe's husband is contrary to its religious values. Doe declined to accept an alternative compensation arrangement, and CRS eventually terminated his husband's benefits.

Doe worked at CRS from 2016 until he resigned in 2024. For most of his time at CRS, Doe worked with the Gateway application—managing a team, advising on strategy, and hiring and onboarding employees. Doe also served as a MEAL advisor with one of CRS's programs focused on ending youth institutionalization and promoting family-based care. In this role, Doe was responsible for managing data and databases he created to facilitate decision making and analysis. Finally, Doe held several temporary positions in which he worked overseas in Nigeria for up to six weeks.

B.

In his complaint, Doe brought ten causes of action under state and federal law. Relevant to this appeal, following dispositive motions, the district court granted summary judgment to Doe for liability only on his discrimination claims under Title VII and the Equal Pay Act and certified to the Maryland Supreme Court several questions related to Doe's claim under the Maryland Fair Employment Practices Act (MFEPA). *See Doe v. Cath. Relief Servs.* (*Doe I*), 529 F. Supp. 3d 440 (D. Md. 2021); *Doe v. Cath. Relief Servs.* (*Doe II*), 618 F. Supp. 3d 244 (D. Md. 2022), *vacated in part*, No. CCB-20-1815, 2023 WL 155243 (D. Md. Jan. 11, 2023). The Maryland Supreme Court issued a decision on the certified questions, *Doe v. Cath. Relief Servs.* (*Doe III*), 300 A.3d 116 (Md. 2023), after which the parties resolved two outstanding claims and proceeded to trial on the final claim, sexual-orientation discrimination under MFEPA, *Doe IV*, 779 F. Supp. 3d at 549, 567. After the bench trial, the district court entered judgment on the MFEPA claim in favor of Doe. *Id.* at 548. The parties stipulated to $60,000 compensatory damages in the event CRS was found liable for any claims, subject to its reservation of rights to seek appellate review on liability. *Id.* at 549. CRS now appeals the district court's judgments on Doe's Title VII, Equal Pay Act, and MFEPA claims.

II.

CRS appeals both the summary judgment granted to Doe and the district court's entry of judgment in Doe's favor following bench trial. We review the summary judgment *de novo*, interpreting facts and making inferences in the light most favorable to the

nonmovant. *Plyler v. Cox*, 145 F.4th 501, 508 (4th Cir. 2025). As to judgment after bench trial, we review conclusions of law *de novo*, but we may only reverse factual findings if clearly erroneous. *Nat'l Fed. of the Blind v. Lamone*, 813 F.3d 494, 502 (4th Cir. 2016).

III.

CRS raises defenses grounded in various statutes as well as under the First Amendment's Religion Clauses. CRS challenges the district court's interpretation of the exemption for religious employers in both Title VII and MFEPA, and it argues that the Religious Freedom Restoration Act bars enforcement of the federal statutes here. On constitutional grounds, CRS raises the church autonomy doctrine as an immunity to liability[2] and argues that the Free Exercise Clause renders the three statutes unconstitutional as applied in this case.

[2] In its brief, CRS attempts to invoke the church autonomy doctrine as a jurisdictional issue, contending that we "cannot wade into this dispute, as civil courts may 'exercise no jurisdiction' over the subject matter of a 'dispute, strictly and purely ecclesiastical in its character,' including 'a matter which concerns theological controversy.'" Opening Br. at 17 (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872)). The Supreme Court has concluded that the ministerial exception—a component of the church autonomy doctrine—is an affirmative defense rather than a question of subject-matter jurisdiction. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n.4 (2012). But the church autonomy doctrine may still be jurisdictional in a "broad, colloquial sense," in that "matters falling within its ambit are beyond the power and cognizance of civil courts." *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 157 F.4th 627, 644 (5th Cir. 2025), *cert. denied*, 146 S. Ct. 1674, 224 L. Ed. 2d 16 (2026). We can imagine possible cases where church autonomy may create a jurisdictional issue in that sense—for example if Doe asked us to require the Catholic Church to recognize his marriage—but in our view this case does not present such a question. CRS fails to show how this case raises *strictly and purely* ecclesiastical questions such that we cannot even consider it, and thus it does not sufficiently develop

Before we address each issue independently, we pause to observe the full landscape of statutory anti-discrimination laws, statutory exemptions for religious employers, and the Religion Clauses of the First Amendment. Generally speaking, Title VII and MFEPA prohibit employment decisions based on, *inter alia*, race, sex, religion, and national origin. Both statutes exempt some employment decisions made by religiously affiliated employers. For example, the decision of a Catholic nursing home to terminate a nurse because her religiously motivated attire did not conform to the employer's religious doctrine is immune from liability for religious discrimination under Title VII, which exempts "religious organizations . . . from [plaintiffs'] claims of religious discrimination." *See Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 190–91, 196 (4th Cir. 2011). The ministerial exception under the Religion Clauses separately shields an employment decision from scrutiny on any basis—including race, sex, religion, and national origin—when the affected employee performs a function that qualifies as "ministerial" under the case law.[3] *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181 (2012). And even for non-ministerial employees, the Religion Clauses, through the broader church autonomy doctrine, effectively bar certain other actions that require resolution of questions "about discipline, faith, internal organization, or ecclesiastical rule,

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the argument that church autonomy has jurisdictional implications here. Accordingly, we will address these arguments as possible affirmative defenses after considering CRS's statutory defenses.

[3] The ministerial exception is not limited to cases "involv[ing] 'ministers' or even members of the clergy." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 747 (2020). Instead, "[w]hat matters, at bottom, is what an employee does." *Id.* at 753.

custom or law." *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976).

Here, CRS asks us to expand both statutory and constitutional protections for religious employers. CRS argues that either Title VII's exemption or the Religion Clauses should immunize *all* employment decisions by religious organizations so long as the decision is based on the employer's religious belief, regardless of whether race, sex, or national origin is a but-for cause of the decision or whether the employee plays a ministerial role. We will not. The extremely broad and nearly unbounded immunity CRS seeks is not required by any statute or constitutional provision. Title VII and MFEPA provide significant statutory exemptions above and beyond the constitutional minimum: that government cannot "interfer[e] with the decision of a religious group to fire one of its ministers," *Hosanna-Tabor*, 565 U.S. at 181, and courts cannot otherwise resolve disputes that hinge on the correctness "of faith and doctrine," *see infra* Section V.B. That none of these defenses applies in this case is not a reason for this Court to invent new protections for religious employers over what Congress and the Constitution require.

IV.

We begin with CRS's defenses grounded in statutes. First, as to Doe's Title VII claim, CRS contends that the exemption for religious employers in section 702 shields it from liability for the employment decision at issue. Second, as to Doe's MFEPA claim, CRS argues that the district court imposed too narrow an interpretation of that statute's religious-employer exemption. Third, CRS urges us to find that the Religious Freedom

Restoration Act bars enforcement of the federal statutes because such enforcement would substantially burden its religious exercise. We address each argument in turn.

A.

CRS says that its employment decision here follows from its sincerely held religious beliefs. Therefore, CRS argues it is protected by Title VII's exemption for religiously affiliated employers. The specific application of the exemption that CRS seeks in this case presents a question of first impression for our Court. We begin by reviewing the statutory text and our prior cases applying the exemption before concluding that our precedent does not answer the question at hand. We proceed to interpret the statute to discern whether the exemption applies here and we find that Title VII, considering its remedial purpose, does not shield religious employers from liability for discrimination based on race, sex, or national origin even if the employment decision is also motivated by religious belief. Finally, we address CRS's specific arguments for its proposed rule.

1.

Under Title VII, it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). CRS's discriminatory decision based on Doe's sexual orientation "is discrimination 'on the basis of sex,'" because "it is impossible to discriminate against a person for being [gay] or transgender without discriminating against

that individual based on sex." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (quoting *Bostock v. Clayton County*, 590 U.S. 644, 660 (2020)). Nevertheless, Title VII "has long included an exemption for religious organizations in certain circumstances." *Kennedy*, 657 F.3d at 192. Specifically, section 702 of Title VII, as amended and codified at § 2000e-1(a), provides in relevant part as follows:

> This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

CRS seeks to invoke this exemption to excuse its discriminatory employment decision in this case. Specifically, CRS argues that section 702 applies "when a religious employer takes an adverse employment action because an employee's conduct is incompatible with some aspect of the employer's religion" such that "the employer is exempt from liability that might otherwise attach under Title VII." Opening Br. at 21. Doe responds that this reading is overly broad and not supported by our case law, which provides that section 702 "does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin." Resp. Br. at 21 (quoting *Kennedy*, 657 F.3d at 192).

Section 702 "exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 329 (1987). We have previously found that the reach of section 702 is limited "to one particular reason for employment decision—that based upon religious preference," and that it "does not confer

upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin." *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985). But we have not previously addressed whether the exemption applies to a decision based on race *and* religion, sex *and* religion, or national origin *and* religion. In considering that question here, we conclude that Title VII's proscription of employment decisions based on race, sex, or national origin applies to religious organizations even when the decision is also motivated by religion.[4]

We have twice addressed cases involving sex discrimination claims against religious employers. In *Rayburn*, the plaintiff alleged she was passed over for two pastoral positions for race- and sex-based reasons. *Id.* at 1165. Though we ultimately found that the ministerial exception prohibited enforcement of Title VII, we first employed the canon of constitutional avoidance and sought to find a plausible reading that shielded the employer from liability. *Id.* at 1166. But after considering "the wording of the statute and the history behind it," we held "that Title VII, by 'the affirmative intention of the Congress, clearly expressed,' applies to the employment decision [at issue]." *Id.* at 1167 (quoting *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 501 (1979)). In other words, section 702 did not reflect a congressional intent that religious organizations be exempt from Title VII claims based on anything other than religion. *See id.* at 1166–67 ("It was open to

[4] We are using the term "religion" as defined in Title VII, encompassing "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j).

Congress to exempt from Title VII the religious employer, not simply one basis of employment, and Congress plainly did not.").

Nearly forty years passed before we next considered a similar claim, in which case a Catholic school argued that section 702 should shield it from liability for terminating a teacher when the school learned he planned to marry his same-sex partner. *Billard v. Charlotte Cath. High Sch.*, 101 F.4th 316, 320, 322 (4th Cir. 2024). The school argued "that if religion motivates an employment decision—even one that also discriminates based on sex—then Title VII no longer applies." *Id.* at 323. We referenced *Rayburn* in noting that "we have understood [section 702] to operate as a defense only to claims of *religious* discrimination—allowing religious institutions to favor co-religionists in hiring—and not to claims of race or sex discrimination." *Id.* at 322. We further expressed concern that adopting an interpretation of section 702 that shielded the school from liability for sex discrimination claims "would entail a reworking of Fourth Circuit precedent to leave all employees of religious institutions subject to forms of discrimination previously . . . prohibited by Title VII." *Id.* at 328 n.6. However, rather than decide the statutory question, for practical reasons, the Court opted to forego the typical protocol of exhausting non-constitutional grounds before addressing constitutional issues, ultimately finding that the ministerial exception applied. *Id.* at 327, 333.

In sum, our Circuit has not definitively answered how Title VII applies to an employment decision based on race, sex, or national origin *and* motivated by religious belief. Accordingly, we must interpret the statute to determine its reach.

2.

Our endeavor to interpret Title VII to answer the question presented in this case must "begin[] with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). To discern the proper interpretation, we "read the words in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 576 U.S. 473, 486 (2015) (citation modified). In so doing, we "disfavor interpretations of statutes that render language superfluous." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Only "if the text of a statute is ambiguous[may] we look to other indicia of congressional intent such as the legislative history to interpret the statute." *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015) (citation modified).

In *Rayburn*, this Court undertook a thorough analysis of the statutory text and legislative history to conclude that section 702 did not immunize the religious employer from sex and race discrimination claims. *See* 772 F.2d at 1166–67. We held that the text reflected a single basis for exemption from Title VII, employment decisions "based upon religious preference," and that the language represented Congress's choice *not* to entirely immunize religious employers from enforcement of the statute. *See id.* Further, our review of the legislative history in *Rayburn* confirmed that Congress considered and rejected this wholesale exemption. *Id.*

As for the question before us today, we start with the plain text: the statute provides in relevant part that "[t]his subchapter," meaning Title VII, "shall not apply" to religious employers "with respect to the employment of individuals of a particular religion." § 2000e-1(a). This is susceptible to at least two different interpretations: for religious

employers, (1) Title VII liability cannot be premised on religious discrimination, or (2) any employment decision based on a religious motivation is exempt from Title VII liability. We conclude that the first is the most plausible interpretation of the statute as a whole, considering the structure and purpose of the statutory scheme. Our Circuit "recognize[s] the general rule of construction that exemptions from remedial statutes are to be construed narrowly." *Olsen v. Lake Country, Inc.*, 955 F.2d 203, 206 (4th Cir. 1991); *see also A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress."); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (observing "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes"). "The primary purpose of the Civil Rights Act, and Title VII in particular, is remedial. Its aim is to eliminate employment discrimination by creating a federal cause of action to promote and effectuate its goals." *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983). Interpreting limitations to Title VII narrowly "honor[s] the remedial purpose of the legislation as a whole," which is appropriate so long as the "particular purpose" of the limitation is not negated. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982).

In sum, based on the statutory text, including a broad interpretation of the protective provisions of Title VII and narrow interpretation of its limitations, we hold that even when an employment decision is motivated by religious belief, section 702 does not apply to claims of discrimination based on sex, race, or national origin. The opposite

interpretation—that section 702 permits religious organizations to discriminate on *any* basis so long as a religious reason attended—would allow the exemption to swallow the rule, which would undermine rather than respect the remedial goals of Title VII.[5] And though we limit the reach of the exemption, our holding does not negate its purpose—religious institutions may continue to "favor co-religionists in hiring," *Billard*, 101 F.4th at 322, or "terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer," *Kennedy*, 657 F.3d at 192 (citation modified), so long as the employment decision is not based on the employee's race, sex, or national origin. This interpretation also remains faithful to our familiar mixed-motive framework for Title VII cases. "[T]he plaintiff's sex need not be the sole or primary cause of the employer's adverse action"; the action remains prohibited under Title VII even if the employer "point[s] to some other, nonprotected trait and insist[s] it was the more important factor in the adverse employment outcome." *Bostock*, 590 U.S. at 665. Here, section 702 renders religion a nonprotected trait, but so long as race, sex, or national origin is a but-for cause of the employment decision, "it has no significance here if [religion] . . . might also be at

[5] The dissent criticizes this widely accepted canon of statutory interpretation as an unacceptable "policy argument." Diss. Op. at 172. It is uncontroversial that, generally, courts interpret statutory exceptions so as not to let an exception swallow the rule. *See, e.g.*, *EPA v. Calumet Shreveport Ref., L.L.C.*, 145 S. Ct. 1735, 1751 (2025) ("Congress, after all, is unlikely to intend for an exception to swallow the rule."); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring) (explaining that the 1964 Civil Rights Act's "exception for a 'bona fide occupational qualification' was not intended to swallow the rule"). Certainly, employing the tools of statutory interpretation is an appropriate judicial task.

work, or even play a more important role in the employer's decision." *See id.* We break no new ground with this rule.[6]

[6] The Sixth Circuit, in considering claims made by unmarried pregnant teachers at Catholic schools, articulated that Title VII tolerates employment decisions based on religious doctrine only insofar as the decision is not based on pregnancy status—a protected characteristic. *See Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996); *Cline v. Cath. Diocese of Toledo*, 206 F.3d 651, 657 (6th Cir. 2000). And the Ninth Circuit refused to allow a religious school to justify an unequal compensation scheme—excluding married women from the employer-sponsored health insurance program—by reference to its religious belief. *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364–66 (9th Cir. 1986). Recently, the Ninth Circuit reaffirmed that a religious employer that made an employment decision based on sexual orientation "generally remains bound by state and federal laws prohibiting employment discrimination based on race, color, sex, national origin, or other protected grounds for all *non*-ministerial positions." *McMahon v. World Vision, Inc.*, 147 F.4th 959, 973 n.7 (9th Cir. 2025). The court ultimately found that the ministerial exception applied. *Id.* at 977. Even more recently, however, the Ninth Circuit suggested that Title VII's religious exemption protects employment decisions for non-ministerial positions that are rooted in sincerely held religious belief. *See Union Gospel Mission of Yakima v. Brown*, 162 F.4th 1190, 1205, 1210 (9th Cir. 2026), *vacated*, No. 24-7246 (9th Cir. June 18, 2026) (finding for the religious employer under the church autonomy doctrine and commenting that the protections it identified for the employer are the same as what the employer "otherwise would receive under Title VII and various state analogs"). We address this case further *infra* Section V.B.2.

The Third Circuit, too, has suggested that employment decisions based on religious belief may not be applied disparately based on sex. *See Curay-Cramer v. Ursuline Acad. of Wilmington*, 450 F.3d 130, 140 (3d Cir. 2006). In that case, the plaintiff was terminated after signing a pro-choice advertisement in the local newspaper, and she sued for sex discrimination under a disparate treatment theory. *Id.* at 132–33, 139. She pointed to male coworkers who were not punished for being Jewish or opposing the war in Iraq. *Id.* at 139. The court said in that case that it could not weigh in on whether the characteristics of the male employees pose "as serious a challenge to Church doctrine as is promoting a woman's right to abortion," but suggested that requiring an explanation from the employer for different treatment in a future case where the comparators were "truly comparable" and had "committed essentially the same offense" would not pose the same threat to the First Amendment. *Id.* at 140–41.

The dissent fails to acknowledge that section 702 is susceptible to more than one interpretation. It asserts that the text insists that the exemption decisively applies to "all of [Title VII], not merely one protected category." Diss. Op. at 167. But this is directly contradicted by the Supreme Court's interpretation of section 702, which it says "exempts religious organizations from Title VII's prohibition against discrimination in employment *on the basis of religion*." *Amos*, 483 U.S. at 329 (emphasis added). The Supreme Court's framing is consistent with our view: claims of religious discrimination, failure to accommodate, religious harassment, or retaliation related to religion are not cognizable against religious organizations, but claims of discrimination based on sex, race, or national origin are. *See Biel v. St. James Sch.*, 911 F.3d 603, 611 n.5 (9th Cir. 2018) ("Congress has specified that nothing in the ADA or Title VII prohibits a religious organization from favoring members of a particular religion in its hiring decisions. But Congress did not exempt religious organizations from the ADA's or Title VII's prohibitions on discriminating on the basis of disability, race, color, sex, or national origin." (citations omitted)), *rev'd and remanded on other grounds sub nom. Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732 (2020). Even more, if an organization is choosing between two candidates, one a co-religionist and one not, a claim for discrimination based on sex, race, or national origin may fail where the organization can show it exercised a preference based solely on religion. *Cf. Miss. Coll.*, 626 F.2d at 485 (holding that section 702 would shield a religious college from liability upon finding "that the College applied its policy of preferring Baptists over non-Baptists in granting the faculty position"); *E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 777 (6th

Cir. 2010) (observing that the ADA's religious-employer exemption is "narrowly drawn" to allow an organization to preference a co-religionist over another candidate who is disabled but not a co-religionist, but not allow discrimination on the basis of disability if deciding between two co-religionists), *rev'd on other grounds*, 565 U.S. 171 (2012).

Finally, the dissent disingenuously claims that "*Rayburn* presents no obstacle" to the dissent's interpretation of section 702. Diss. Op. at 169. After hastily conceding that in *Billard*, "we expressed concern about the effect of applying [section 702]," the dissent overemphasizes *Billard*'s acknowledgement of the existence of other positions. *Id.* But the dissent ignores *Billard*'s warning that applying section 702 in that case "would entail a *reworking of Fourth Circuit precedent*," 101 F.4th at 328 n.6 (emphasis added)—this is far from a confirmation that such precedent "presents no obstacle" to adopting the dissent's interpretation of the exemption here. But *Billard*'s central concern about applying section 702 holds true today: "*No federal appellate court in the country* has embraced the school's argument that Title VII permits religiously motivated sex discrimination by religious organizations."[7] *Id.* at 328 (emphasis added). The dissent is

[7] Although the dissent cites two cases from the Third Circuit, claiming that "other courts have reached the same conclusion" it does, Diss. Op. at 167, these cases do not support the contention that section 702 allows "religiously motivated sex discrimination by religious organizations," *Billard*, 101 F.4th at 328. In *Curay-Cramer v. Ursuline Acad.*, 450 F.3d 130, 140 (3d Cir. 2006), adjudication of the plaintiff's disparate impact claims would have required the court to reach ecclesiastical questions about whether the conduct of the plaintiff and her peers was equally offensive to the church. In *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991), the plaintiff brought a religious discrimination claim, not a sex discrimination claim.

wrong that its interpretation is the only plausible one and wrong that the road is clear for this court to adopt it.

3.

At this point, we address the non-binding authority CRS cites in urging us to adopt its interpretation of the exemption.[8] We find that none of its arguments is persuasive.

CRS points us to the interpretations raised by the dissenting opinion in *Billard* and two concurring opinions in separate Seventh Circuit cases. All three cases contend with sexual-orientation discrimination claims against Catholic schools, and all three cases were resolved by reference to the ministerial exception. *See Billard*, 101 F.4th at 320, 333; *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 935–38, 942 (7th Cir. 2022); *Fitzgerald v. Roncalli High Sch., Inc.*, 73 F.4th 529, 530 (7th Cir. 2023). In *Starkey*, Judge Easterbrook wrote separately to state that he would have resolved the case by applying section 702. 41 F.4th at 945–46 (Easterbrook, J., concurring) ("A straightforward reading of § 2000e-1(a), coupled with § 2000e(j), shows that the Diocese was entitled to fire Starkey without regard to any of the substantive rules in Title VII."). In his view, "when [an employment] decision is founded on religious beliefs, then all of Title VII drops out." *Id.* at 946. Indeed, Judge Easterbrook specifically takes issue with our decisions in *Kennedy* and *Rayburn*, which he says fail to "explain why 'this

[8] In its briefs, CRS also argues that the district court incorrectly limited section 702 "to circumstances in which religious employers show preference to co-religionists," and argues that the exemption goes further. Opening Br. at 21. This issue is now irrelevant following our interpretation of the exemption, so we do not address it.

subchapter' means something less than all of Title VII." *Id.* (quoting § 2000(e)-1(a)). But in our view, Judge Easterbrook's interpretation construes section 702 too broadly in light of the statute's remedial purpose. Accordingly, we do not find persuasive Judge Easterbrook's interpretation—which the *Billard* dissent and the *Fitzgerald* concurrence adopt.

CRS also attempts to rebut the concern of the district court that CRS's interpretation of section 702 would "effectively exempt[] religious organizations wholesale." Opening Br. at 25 (quoting *Doe II*, 618 F. Supp. 3d at 253). It says that under its proposed approach, an employer would remain liable under Title VII for decisions "without a religious justification" or if the religious rationale is shown to be pretextual. *Id.* Of course, we come to a different understanding of section 702 than does CRS, but still we note our agreement with the lower court that "the reading urged by CRS would cause a relatively narrowly written exception to swallow all of Title VII." *Doe II*, 618 F. Supp. 3d at 253. Though CRS insists that the requirement to articulate a sincere religious belief is a meaningful check on potential discrimination, courts' inquiry into such asserted beliefs is restricted, necessarily, by the prohibition on delving into the validity of such beliefs or whether their application to the employment decision is rational. *See Milivojevich*, 426 U.S. at 713 (finding that the First Amendment prohibits courts from deciding whether religious organizations' doctrinal decisions are arbitrary). Similarly, the pretext inquiry is not without constitutional concern. *See Curay-Cramer v. Ursuline Acad. of Wilmington*, 450 F.3d 130, 140 (3d Cir. 2006) (finding that comparing offenses to determine their relative religious import is constitutionally suspect); *cf. EEOC v. Miss.*

Coll., 626 F.2d 477, 485 (5th Cir. 1980) (holding that "if a religious institution of the kind described in [section] 702 presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, [section] 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination"). Accordingly, neither of these contentions persuades us that CRS's proposed rule is the correct result.

Furthermore, CRS's interpretation of section 702 lacks a limiting principle. What if instead of a same-sex spouse, a future case concerned a religious organization's sincere religious belief that it could not cooperate with interracial marriage by extending dependent benefits to any spouse of a different race than the employee? *See Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983) (noting that because the sponsors of the university "genuinely believe that the Bible forbids interracial dating and marriage," the school excluded Black applicants entirely for a time and then limited acceptance only to Black applicants "married within their race"). What if a religious organization raised a religious belief against racial integration? *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (addressing a business owner's objection to the Civil Rights Act's prohibition on racial discrimination in places of public accommodation that it "contravenes the will of God"). Or a compensation scheme paying women less based on a religious belief that only men may be the head of household? *See Fremont Christian Sch.*, 781 F.2d at 1364. We see no principled distinction between those cases and this one,

and we will not adopt a rule that would so deeply undermine the purpose of Title VII and the entire Civil Rights Act.[9]

* * *

In sum, section 702 provides no safe harbor in this case because the employment decision was based on sex as well as religion. Accordingly, we find that district court did not err in its application of Title VII.

B.

Next we turn to MFEPA, Maryland's employment antidiscrimination statute. CRS contends that the district court erred in its application of the statute's exemption for religiously affiliated employers. CRS says the court applied the exemption too narrowly in concluding that CRS is not protected by it. We disagree. We first discuss the relevant legislative and procedural history before turning to CRS's arguments on appeal.

The legislature amended MFEPA in 2021 to prohibit employment discrimination based on sexual orientation or gender identity and contemporaneously added an exemption for religious entities against claims on those bases. Relevant to this case, the

[9] In other cases, parties have suggested that laws prohibiting discrimination based on race are uniquely supported by the Constitution, such that race-related provisions would survive even if burdening religious exercise. *See, e.g.*, Oral Argument at 43:40, *Zinski v. Liberty Univ., Inc.*, No. 25-1228 (4th Cir. Mar. 17, 2026); Transcript of Oral Argument at 31–32, 38–40, *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (No. 19-123). If there exists a special constitutional solicitude for race (but not sex), that does not answer the statutory interpretation question here. We see no way that section 702 could be interpreted to permit religious organizations to discriminate on other protected bases that overlap with religious belief *except* if the discrimination is based on race.

amended statute provides that an employer may not "fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment" based on an employee's sexual orientation. Md. Code Ann., State Gov't § 20-606(a)(1)(i). The prohibition does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular . . . sexual orientation[] . . . to perform work connected with the activities of the religious entity." *Id.* § 20-604(2).

Regarding the exemption for religious organizations, the district court certified a question to the Maryland Supreme Court: whether the exemption applies with respect to individuals of a particular sexual orientation "to perform work connected with all activities of the religious entity or only those that are religious in nature." *Doe III*, 300 A.3d at 121. The Maryland Supreme Court held that "for the exemption to apply, the employee's duties must directly further the core mission(s)—religious or secular, or both—of the religious entity." *Id.* at 136. It elaborated that such duties "are not one or more steps removed from taking the actions that effect the goals of the entity," and provided an illustrative example:

> [C]onsider a janitor who cleans the headquarters office of a religious entity which has as its core mission supplying housing to low-income communities. The janitor's work allows other staff members to work in a clean environment and better focus on their duties in helping to provide low-cost housing to the needy. In this case, the janitor's work indirectly furthers the core mission of the religious entity.
>
> Contrast that example with the executive director of a medium-sized religious charity, which has as its core mission the raising of funds to build new schools in underserved communities. Assume that this person's job duties include managing other staff members to ensure that all fundraising events are scheduled, advertised, and ultimately successful. The entity uses the proceeds collected from the fundraisers to help pay for the construction

> of new schools. In this case, the executive director's duties directly further the entity's core mission.

Id. Applying this understanding of the statute, the district court determined that the sorts of duties that further CRS's mission include "providing humanitarian aid, securing funding, and decision making," as well as managing or supervising employees with those kinds of responsibilities. *See Doe IV*, 779 F. Supp. 3d at 559 & n.9. After assessing Doe's various Gateway and MEAL positions,[10] the court concluded that none of those positions "directly furthered a CRS mission" as "each of his positions was one or more steps removed from taking the actions that effect CRS goals." *Id.* at 561. Thus, the district court held that Doe's positions at CRS did not qualify for the exemption.

On appeal, CRS does not take issue with the district court's findings of fact, but it argues that the court "applied the facts it found to an unduly restrictive understanding of the *Doe III* test." Opening Br. at 47. First, CRS takes issue with the district court's approach to the question of job duties. Next, it puts forward an alternate framework for applying the Maryland Supreme Court's interpretation of the statute. Finally, it argues that the illustrative examples in *Doe III* support CRS's framework, and that the district court's application leads to an absurd result.

CRS takes issue with the court's "focus[] on those tasks that Mr. Doe did not perform." Opening Br. at 44 (emphasis omitted). But the court did consider the specific

[10] The parties agreed that the relevant positions for this inquiry are Doe's roles related to Gateway and as a MEAL advisor, but not his temporary overseas assignments. *See Doe IV*, 779 F. Supp. at 561 n.10.

duties of each of Doe's five relevant positions with CRS (three on the Gateway team and two as a MEAL advisor). *See Doe IV*, 779 F. Supp. 3d at 559–61. After identifying what Doe's duties were for each position, the court determined that those "duties did not include serving the poor and vulnerable overseas; soliciting, selecting, or securing funding; or making decisions about CRS's programmatic goals and its efforts to fulfill its mission," nor did he "manage, supervise, or train employees as to same." *E.g.*, *id.* at 559. The court's comparison of Doe's duties to those the court found to effect the mission of the organization is not an error.

CRS says that the correct application of the *Doe III* test "places no express limit on any covered employees" and "is flexible enough to capture not just an organization's standard-bearers and fieldworkers but also many other employees who are less visible to the outside world, yet whose duties relate directly to the 'actions that effect the goals of the entity.'" Opening Br. at 45 (quoting *Doe III*, 300 A.3d at 136). We agree that an employee's public visibility or lack thereof is not the relevant inquiry. But CRS's inclusion of all employees whose duties *relate directly* to the entity's core mission misapprehends and inappropriately expands the Maryland Supreme Court's holding. *Doe III* provided the applicable standard: the exemption applies to "employees who perform *duties that directly further* the core mission (or missions) of the religious entity," and the employees' duties must *not* be "one or more steps removed from taking the actions that effect the goals of the entity." 300 A.3d at 132, 136 (emphasis added). That test, not CRS's interpretation, is what we must apply.

CRS proceeds to over-extend *Doe III*'s janitor–executive director example offered as guidance to support its proposed framework for the test. It says this example shows that the kind of workers who do not further an organization's mission are "mostly entry-level, lower-paid employees" who "may have little or no insight about the purpose and goals of an organization or its operations" and whose "job is to make life comfortable and safe for the workers who are on-mission." Opening Br. at 43. Thus, because Doe is "a highly paid professional with a graduate degree who would be challenging to replace," CRS says he "is far more like the hypothetical executive director than the hypothetical janitor." *Id.* at 45. CRS further finds it "impractical" that "an employee with a high school degree working to pass out bags of rice in Cambodia would be covered by the MFEPA religious employer exemption, but a Baltimore-based middle-manager with an advanced degree would not." *Id.* at 47. It asks, "Why would the legislature have excluded sexual orientation discrimination claims by the fieldworker but not the middle manager?" *Id.*

The Maryland Supreme Court answered this question. The court specifically rejected the notion that the legislature's intent was "to allow religious entities to discriminate on the basis of sexual orientation or gender identity against employees whose duties are materially indistinguishable from those performed by individuals at secular organizations." *Doe III*, 300 A.3d at 136. This perspective illustrates that an employee's rank, pay, and educational accomplishments are not particularly relevant to the exemption inquiry. Rather, a position that serves a religious organization's mission is distinguishable because its duties are unlike those at an organization *not* oriented towards that same mission.

So we may ask, could we easily find an employee with duties similar to Doe at an organization that does not aim to serve the poor and vulnerable overseas? As found by the district court, in his Gateway roles Doe "provided training and support to end users of the Pipeline and Project application"; he "helped to expand and modify the systems to assist with business needs, acted as a liaison between IT and business owners, and conducted occasional trainings"; he "supervised direct reports, worked with business owners in their use of the Pipeline and Projects application, liaised with IT to improve functionality, and helped troubleshoot data integration across systems." *Doe IV*, 779 F. Supp. at 559–60. As a MEAL advisor, "Doe collected data from MEAL leads in each project, compiled data into a quantitative portion of the quarterly report provided to donors, and coordinated monthly webinars," and he supervised a "position focused on collecting indicator results[] and provid[ed] troubleshooting assistance to MEAL project staff." *Id.* at 560–61. These duties "are materially indistinguishable from those performed by individuals at secular organizations" without the same mission as CRS, which supports our conclusion that Doe's roles did not directly further CRS's mission. *See Doe III*, 300 A.3d at 136.[11]

[11] In addition to its primary argument that the district court's application of the *Doe III* test was too narrow, CRS also takes a direct shot at *Doe III*'s interpretation of the exemption, saying that "the Maryland Supreme Court's narrower reading renders the statute constitutionally defective, since it now discriminates between religious denominations that preferentially hire coreligionists at all levels of an organization . . . and those that do not maintain this requirement." Opening Br. at 41–42. This perfunctory and underdeveloped argument is waived. *See Penegar v. Liberty Mut. Ins. Co.*, 115 F.4th 294, 301 n.7 (4th Cir. 2024). Even if it were not, we are not convinced that denominational discrimination is at play here. Certainly, if "eligibility for the exemption ultimately

C.

CRS finds its final statutory defense in the Religious Freedom Restoration Act (RFRA). CRS argues that the federal antidiscrimination statutes at issue in this case substantially burden its religious exercise and therefore RFRA requires that the application of these statutes further a compelling interest, a standard CRS says is not met here. Because we find that RFRA does not apply in cases between private parties, we conclude that RFRA is not an available defense in this case.

Congress passed RFRA following the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). There, the Court held that incidental burdens on religious exercise from neutral and generally applicable laws do not offend the First Amendment. *Id.* at 878. Prior to *Smith*, the Free Exercise test typically required that "governmental actions that substantially burden a religious practice . . . be justified by a compelling governmental interest." *Id.* at 883. Congress passed RFRA "to restore the compelling interest test . . . and to guarantee its application in all cases where the free exercise of religion is substantially burdened." Religious Freedom Restoration Act of

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turn[ed] on inherently religious choices," that would be a "paradigmatic form of denominational discrimination." *See Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 249–50 (2025). But in our view, the *Doe III* test at most imposes "'secular criteria' that [may] 'happen to have a disparate impact upon different religious organizations,'" which does not rise to the level of denominational discrimination. *Id.* at 250 (quoting *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982)); *see also Larson*, 456 U.S. at 231–32, 246 n.23 (finding that a religious exemption requirement that an organization achieve more than 50% of its funding from members or affiliates is not a "secular criteria," but rather "makes explicit and deliberate distinctions between religious organizations" in favoring churches achieving strong financial support from members against churches which may prefer other means of financial support).

1993, Pub. L. No. 103-141, 107 Stat. 1488, 1488 (1993) (codified at 42 U.S.C. § 2000bb). The statute provides,

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial relief
>
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

§ 2000bb-1.

"Neither the Supreme Court nor this court has applied RFRA, which by its terms purports to limit government action, to a suit between private parties." *Billard*, 101 F.4th at 323. CRS now urges us to do so here. We decline.

Though this Court did not decide RFRA's applicability in *Billard*, we noted that imposing the defense "would require us to resolve novel and complex statutory questions," and observed that "only one federal court of appeals has held that RFRA applies to a lawsuit between private parties, while all others to consider the question

disagree." *Id.* at 328 (citation modified); *see also Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 737 (7th Cir. 2015) (surveying circuit approaches and noting that the Sixth and Ninth Circuits "have found RFRA does not apply in suits where the government is not a party," but that the Second Circuit did the opposite "in the limited situation when the government *could* have been a party"). But the Second Circuit's decision "has proven controversial even within its own court." *Billard*, 101 F.4th at 328 n.7. Then-Judge Sotomayor issued a forceful dissent from the majority's opinion, *see Hankins v. Lyght*, 441 F.3d 96, 109 (2d Cir. 2006) (Sotomayor, J., dissenting); and a later panel explained its "doubts about *Hankins*'s determination that RFRA applies to actions between private parties," *Rweyemamu v. Cote*, 520 F.3d 198, 203 (2d Cir. 2008). Specifically, the *Rweyemamu* court commented that because the plain text of the statute "requires *the government* to demonstrate that application of a burden to a person is justified by a compelling governmental interest," the panel "[did] not understand how it can apply to a suit between private parties." *Id.* at 203 n.2.

We hold that a plain reading of the text limits the statute's applications to governmental action, and in the context of litigation, governmental action can only be challenged under RFRA when the government is a party to the suit. Paragraphs (a) and (b) make direct commands to the government. *See* § 2000bb-1(a) ("*Government* shall not substantially burden a person's exercise of religion . . . ." (emphasis added)); § 2000bb-1(b) ("*Government* may substantially burden a person's exercise of religion only if *it* demonstrates . . . ." (emphasis added)). Paragraph (c) provides that the judicial remedy available to "[a] person whose religious exercise has been burdened in violation of this

section" is "appropriate relief *against a government*." § 2000bb-1(c) (emphasis added). "It is self-evident that the government cannot meet its burden if it is not party to the suit." *Listecki*, 780 F.3d at 736. Likewise, "[a] private party cannot step into the shoes of the 'government' and demonstrate a compelling governmental interest and that it is the least restrictive means of furthering that compelling governmental interest because the statute explicitly says that the 'government' must make this showing." *Id.* Furthermore, the opposite conclusion renders entirely superfluous the words "against a government" in paragraph (c)—a party invoking RFRA against a private party would seek "appropriate relief" generally, but not "against a government." *See* § 2000bb-1(c); *Germain*, 503 U.S. at 253 (noting that "courts should disfavor interpretations of statutes that render language superfluous"). The legislative history reinforces this conclusion: as noted above, Congress enacted RFRA to restore the compelling interest test—a test which only applied to actions taken by the government, *not* private parties. *See* Religious Freedom Restoration Act of 1993, 107 Stat. at 1488.

Beyond the straightforward statutory interpretation, we reiterate that "what exactly it would mean to expand RFRA's scope so dramatically is largely untested and difficult to anticipate." *Billard*, 101 F.4th at 328. Unlike section 702 of Title VII, RFRA is not limited to religiously affiliated organizations. If it applied to suits between private parties,

any employer with sincerely held religious beliefs could claim that complying with Title VII substantially burdened its religious exercise.[12]

The government (as intervenor here) argues that the statutory text does contemplate RFRA as an available defense in suits between private parties. It points to the statute's definitions section, noting that "[t]he term 'government' in RFRA includes 'a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States.'" Br. for Intervenor the United States at 12 (hereinafter U.S.-Intervenor Br.) (quoting § 2000bb-2(1)). It then argues that in cases like this one, both the Congress and the Judiciary are the governmental actors triggering RFRA: the former "burdens the employer's religious exercise through its statutes regulating the employer's conduct," and the latter "burdens the employer's religious exercise by applying those statutes to the employer." *Id.* As to the statute's requirement that the "[g]overnment" "demonstrate[]" that the burden alleged furthers a compelling interest via the least

[12] In considering whether "person" as used in RFRA applies to for-profit corporations, the Supreme Court remarked that "no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707–08 (2014). The Court also rejected the notion that a corporation cannot exercise religion. *Id.* at 709–12 ("For-profit corporations, with ownership approval, support a wide variety of charitable causes, [and] . . . there is no apparent reason why they may not further religious objectives as well."). Though the majority opinion applies specifically to closely held corporations, "'[c]losely held' is not synonymous with 'small.'" *Id.* at 757 n.19 (Ginsburg, J., dissenting). At the time of the decision, respondent Hobby Lobby had over 13,000 employees, *id.* at 702, and as observed by the dissent, it was "hardly the only enterprise of sizable scale that is family owned or closely held," *id.* at 757 n.19 (Ginsburg, J., dissenting) (noting that "the family-owned candy giant Mars, Inc." employed about 72,000 people and "closely held Cargill, Inc." about 140,000).

restrictive means, § 2000bb-1, the government-intervenor argues that this "can be fairly read as requiring the *court* to conclude that enforcing the statute against that defendant would be the least restrictive means to further a compelling government interest." U.S.-Intervenor Br. at 18.

This argument borders on the absurd. First, allowing the court, as arbiter of the dispute, to stand in the shoes of the "government" would disrupt the fundamental role of the Judiciary. It is the role of the court "to say what the law is," *Marbury v. Madison*, 1 Cranch (5. U.S.) 137, 177 (1803), and in so doing, "due process requires a 'neutral and detached judge in the first instance,'" *Concrete Pipe & Prods. of Ca., Inc. v. Constr. Labs. Pension Tr. for S. Cal.*, 508 U.S. 602, 617 (1993) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972)). The court cannot fulfill this command if it must filter its own actions through the lens of RFRA. Second, we disagree that what the government-intervenor offers *is* a fair reading: the statute defines "demonstrates" as "meets the burdens of *going forward with the evidence* and of persuasion." § 2000bb-2 (emphasis added). In a case like this one, neither Congress nor the Judiciary may appropriately present evidence or make persuasive arguments as to whether the burden on religious exercise "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." *See* § 2000bb-1. The government-intervenor here clearly "wants to cherry pick from the material covered by the [definition section]," relying on one paragraph and writing out another. *See Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 428 (2018). But "Congress does not hide elephants in mouseholes," and we will not adopt an expansive interpretation of RFRA not evident

from a plain reading of the main statutory text based solely on an "ancillary provision[]."[13] *See id.* at 431 (citation modified).

V.

Having disposed of CRS's statutory bases for reversal, we now turn to its two constitutional arguments. CRS argues that enforcement of any of the statutes at issue in this case violates its First Amendment rights under the Free Exercise Clause. It also raises the church autonomy doctrine as providing immunity as to decisions rooted in religious belief. We begin with the Free Exercise Clause.

A.

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. But this command is not

[13] A hypothetical scenario in which the religious exercise of the employee is burdened further demonstrates the problems with the government-intervenor's position. In *Kennedy*, section 702 shielded the religious employer from the requirement to provide a reasonable accommodation for an employee's religious practice, wearing conservative attire. 657 F.3d at 191, 196. But how would the government's rule apply if the *employee* said that section 702 substantially burdened her religious exercise? Before (and after) *Smith*, we understood this kind of claim to represent "a burden on religious practice that is imposed by *private* employers, and hence it is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause." *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring). But if we interpret RFRA to suggest that a government actor is present in *every* case by virtue of the Judiciary's role as arbiter, then we would need to determine whose substantial burden prevails if either the employee *or* the employer would be burdened by one outcome or another. We certainly will not open this can of worms without a clearer indication that this was truly Congress's intent.

"violated whenever a generally applicable law requires [an individual] to perform an act that his religious beliefs forbid"; indeed, "such a rule would 'permit every citizen to become a land unto himself' by making 'religious belief superior to the law of the land.'" *Perry v. Marteney*, 172 F.4th 315, 321 (4th Cir. 2026) (quoting *Smith*, 494 U.S. at 879). Thus, "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 593 U.S. 522, 532 (2021) (citing *Smith*, 494 U.S. at 878–82).

The Supreme Court's recent Free Exercise decisions have critically examined whether a law is truly generally applicable. *See, e.g.*, *id.*; *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam); *Mahmoud v. Taylor*, 606 U.S. 522 (2025). *Fulton* articulated two ways in which a law is not considered generally applicable: (1) "if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions," or (2) "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." 593 U.S. at 533–34 (citation modified).

CRS contends that the statutes at issue here are not generally applicable under both theories. First, CRS says that because of the Maryland Supreme Court's decision in *Doe III*, MFEPA's religious exemption operates like a "mechanism for individualized exemptions." Opening Br. at 53 (quoting *Fulton*, 593 U.S. at 533). Second, CRS argues that "exemptions that benefit secular employers" attend all three statutes at issue—Title VII, the Equal Pay Act, and MFEPA—undermining general applicability. *Id.* at 50. We

will address CRS's argument as to individualized exemptions and then turn to its secular-conduct-exemption argument.

1. Individualized Exemptions

A law is not generally applicable when there are individualized exemptions for some, but not for those who say the action burdens religious exercise. *Fulton*, 593 U.S. at 533. We recently discussed *Fulton*'s concerns regarding individualized-exemption regimes. *See Perry*, 172 F.4th at 323–24. We described two examples of problematic exemptions. The first was "a provision in South Carolina's Unemployment Compensation Act that deemed claimants ineligible for unemployment benefits if they refused to accept work '*without good cause*.'" *Id.* at 323 (quoting *Sherbert v. Verner*, 374 U.S. 398, 400–01 (1963)). There, "the 'good cause' standard operated as a mechanism for granting individualized exemptions because it 'permitted the government to grant exemptions based on the circumstances underlying each application.'" *Id.* (quoting *Fulton*, 593 U.S. at 534). "The facts in *Fulton* provide [the second] example. That case concerned a provision in Philadelphia's standard foster care contract that prohibited discrimination on the basis of sexual orientation 'unless an exception is granted by the Commissioner . . . in his/her *sole discretion*.'" *Id.* at 323–24 (quoting *Fulton*, 593 U.S. at 535). We then considered West Virginia's mandatory school vaccination law, which provides for medical exemptions but not religious ones. *Id.* at 324. We distinguished that vaccination rule from *Sherbert*'s "good cause" standard and *Fulton*'s "sole discretion" standard, observing that West Virginia's law does not give state officials "any discretion 'to decide

which reasons' for refusing vaccination 'are worthy of solicitude.'" *Id.* (quoting *Fulton*, 593 U.S. at 537). Furthermore, we were reassured that "[t]o the extent state officials must exercise discretion when deciding whether sufficient medical evidence exists in a particular case, it is cabined by judicial review." *Id.*

All three cases—*Sherbert*, *Fulton*, and *Perry*—show that "[w]hat we're looking for is unconstrained discretion to make essentially ad-hoc decisions about what circumstances warrant an exception." *See Canaan Christian Church v. Montgomery County*, 29 F.4th 182, 203 (4th Cir. 2022) (Richardson, J., concurring). This sort of discretion is not present in MFEPA.

CRS contends that MFEPA is not generally applicable under *Fulton* because of the fact-based inquiry courts must undertake to determine whether the exemption applies. Opening Br. at 53–54. But this is not the kind of discretion that the Supreme Court was concerned about. The *Fulton* Court found that Philadelphia's "formal system of entirely discretionary exceptions . . . renders the contractual non-discrimination requirements not generally applicable." *Id.* at 536. But the mere existence of an exemption cannot alone undermine general applicability:

> Determining whether an individual qualifies for an exemption will often require some individualized assessment. But as the Tenth Circuit has explained, "that kind of limited yes-or-no inquiry is qualitatively different from the kind of case-by-case system envisioned by the *Smith* Court in its discussion of *Sherbert* and related cases." If it were otherwise, then there would be no limiting principle. Every legal standard or criterion that required some degree of professional judgment in its application would suddenly run afoul of the Free Exercise Clause. This cannot be.

Perry, 172 F.4th at 324 (quoting *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004)). And the *Doe III* test does not look to "overly flexible and discretionary standards like 'good cause' or 'necessity' or 'reasonableness,'" which have been problematic in other cases. *See Canaan Christian Church*, 29 F.4th at 203 (Richardson, J., concurring). Even if it did, CRS cites no authority for the idea that discretion *in the hands of the court* is constitutionally problematic.

Under CRS's theory, it is not clear to us what differentiates MFEPA from any statute with religion-related exemptions, all of which at some point require either a state official or a court to determine whether an organization or individual qualifies for the exemption. *See, e.g.*, *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (noting that Title VII's religious-employer exemption does not specifically define covered religious organizations and listing nine factors courts typically consider to determine whether the exemption applies); *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 242 (2025) (observing that the Federal Unemployment Tax Act exempts religious organizations from unemployment compensation taxes, requiring that organizations be "operated primarily for religious purposes" to qualify, and noting that following the enactment of the federal law, "over 40 States have adopted similar exemptions"). The necessity of a "fact-intensive inquiry that requires consideration of the totality of the pertinent circumstances," *Doe III*, 300 A.3d at 136, cannot itself be constitutionally suspect—a similarly fact-intensive inquiry into an employee's job duties is required by the Supreme Court's ministerial exception cases, *see Our Lady of Guadalupe*, 591 U.S. at 753–54.

Accordingly, we find that the *Doe III* test does not "invite[] the government to consider the particular reasons for a person's conduct by providing a mechanism of individualized exemptions." *See Fulton*, 593 U.S. at 533 (citation modified). Indeed, it strains credulity that any reference to facts to determine whether an employee falls under an exemption intended to *benefit* religious organizations could render a law not generally applicable vis-à-vis religion. We will not make such a counterintuitive conclusion here.

2. Secular Exception Rule

"A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 534. For example, the Supreme Court has held that city ordinances enacted to prohibit animal sacrifice—"a practice of the Santeria faith"—were not generally applicable because the ordinances allowed secular conduct like "hunters' disposal of their kills or improper garbage disposal by restaurants." *Id.* (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 524–28, 544–45 (1993)). The city said the ordinances were meant to protect public health and prevent animal cruelty, but the permitted secular activity posed a similar hazard to the city's purported interest in prohibiting religious animal sacrifice. *Lukumi*, 508 U.S. at 543. In other cases, COVID-19 regulations that restricted how many people or households could gather also failed the general applicability requirement when they treated secular activities more favorably than similar religious activities by imposing lower thresholds to religious gatherings compared to secular gatherings. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17

(2020); *Tandon*, 593 U.S. at 64. Essentially, "[t]he State cannot assume the worst when people go to worship but assume the best when people go to work." *Tandon*, 593 U.S. at 64 (citation modified).

CRS argues that because all three statutes at issue—Title VII, MFEPA, and the Equal Pay Act—"include exemptions that benefit secular employers," enforcement here "trigger[s] strict scrutiny when applied in a manner that burdens religious exercise." Opening Br. at 50. CRS points to Title VII and MFEPA's exemptions for small businesses with fewer than 15 employees and the EPA's industry-specific exemptions. We first address the general small business exemptions, then consider the EPA's specific exceptions.

i. Small Business Exception

Both Title VII and MFEPA exempt small businesses with fewer than fifteen employees. *See* 42 U.S.C. § 2000e(b); Md. Code Ann., State Gov't § 20-601(d)(1)(i). CRS says the district court erred by failing to assess comparability "against the asserted government interest that justifies the regulation at issue." Opening Br. at 51 (quoting *Tandon*, 593 U.S. at 62). CRS points us to Judge Richardson's concurring opinion in *Canaan Christian Church*, in which he says our analysis requires us to "look to the asserted interests of a rule and consider whether exempted secular conduct undermines those asserted interests in a similar way to religious conduct." 29 F.4th at 204 (Richardson, J., concurring) (citation modified). Because Title VII and MFEPA are concerned with eliminating workplace discrimination, and because "[t]he government

does not have a stronger or more particularized interest in rooting out discrimination by religious employers" compared to small businesses, CRS says the statutes fail the comparable-secular-activity test. Opening Br. at 52. We disagree.

Unlike the problematic exceptions in *Lukumi* or the COVID cases, in these statutes the small business exception equally exempts small secular *and* small religious organizations. CRS cannot point to an exempted thirteen-employee secular business and claim general applicability is absent when a thirteen-employee religious organization enjoys the same exemption. When the government regulates *identical* secular and religious conduct in different ways, the differential treatment can only be justified by reference to the state's interest. *Compare Roman Cath. Diocese*, 592 U.S. at 16–18 (holding that COVID restrictions are not generally applicable when secular gatherings "contributed to the spread of COVID-19" but "are treated less harshly" than are houses of worship), *with Perry*, 172 F.4th at 324–26 (holding that school vaccination statute allowing medical but not religious exemptions is generally applicable because "permitting medical exceptions while refusing religious exemptions 'does, in both instances, advance the State's interest in promoting health and safety'" (quoting *We the Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, 76 F.4th 130, 153 (2d Cir. 2023))). At the same time, the Court's emphasis in the COVID cases on the different thresholds applicable to religious versus secular conduct leads us to believe that if the states had acted even-handedly—enforcing identical limits on gathering for all purposes, religious and secular—the regulations would not raise Free Exercise concerns. *See Roman Cath. Diocese*, 592 U.S. at 17 (noting that "in an orange zone[,] . . . attendance at houses of worship is limited

to 25 persons," but businesses had complete discretion to "decide for themselves how many persons to admit"); *Tandon*, 593 U.S. at 63–64 (comparing California's enforcement of its three-household limit on gathering for in-home religious worship to the exceptions "permitting hair salons, retail stores, personal cares services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together *more* than three households at a time" (emphasis added)). Thus, we conclude that when the government treats identical secular and religious conduct *alike*, there is no further inquiry to be made.

Furthermore, though we are careful to avoid collapsing the distinct inquiries into neutrality and general applicability, "[n]eutrality and general applicability are interrelated." *Lukumi*, 508 U.S. at 531. Indeed, the two inquiries represent different approaches to the same question: whether a law *targets* religion. In considering neutrality, "we search for anti-religious animus on the face of the policy itself and in the circumstances of its enactment." *Spivack v. City of Philadelphia*, 109 F.4th 158, 167 (3d. Cir. 2024). And in assessing general applicability, we "look for subtler signs that policymakers targeted religion. For instance, arbitrary distinctions between religious and secular conduct suggest anti-religious bias." *Id.*

The dissent takes CRS's view that these statutes "permit secular discriminatory conduct to a greater degree than religious discriminatory conduct" and "favor secular interests over religious ones." Diss. Op. at 159, 160. Under the dissent's framework, religious organizations could challenge any labor and employment regulation with a small

business exemption.[14] The federal prohibition on child labor exempts children under sixteen employed by a parent in most occupations, 29 U.S.C. § 203(*l*); does this exemption undermine the general applicability of anti-child-labor protections? Or consider a corporate income tax scheme like in Alaska, where both secular and religious for-profit corporations are subject to an income tax, but corporations earning less than $25,000 of taxable income are exempt. Alaska Stat. § 43.20.011(e). Would this statute fail review under *Fulton* because religious corporations earning over $25,000 must pay a tax while secular corporations earning less do not? As these examples demonstrate, such a regime would be entirely unworkable and would "permit every citizen to become a land unto himself." *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878).

Here, Title VII and MFEPA apply the same exemption threshold to both secular and religious conduct. Because the statutes do not impose harsher restrictions on religious conduct than secular conduct, the concerns from the COVID-19 cases do not apply. And there are no distinctions between secular and religious conduct, arbitrary or otherwise, that suggest anti-religious bias from Congress or the Maryland legislature. CRS and its amici do not cite any cases decided by the Supreme Court or the Courts of Appeals concluding that an exemption applying equally to religious and secular conduct undermines general

[14] This would include the Americans with Disabilities Act (15 employee threshold), 42 U.S.C. § 12111(5)(A); Age Discrimination in Employment Act (20 employee threshold), 29 U.S.C. § 630(b); Family and Medical Leave Act (50 employee threshold), *id.* § 2611(2)(B); Occupational Safety and Health Act (10 employee threshold for recordkeeping), *id.* § 2611; and Affordable Care Act (50 employee threshold), 26 U.S.C. § 4980H(c)(2)(A).

applicability merely because not all religious conduct is exempted, and neither are we aware of any.[15] Because this rule would extend the concept of general applicability beyond what is reasonable, we decline to be the first to do so.

ii. The Equal Pay Act's Categorical Exemptions

The Equal Pay Act (EPA) includes numerous categorical exemptions. *See* 29 U.S.C. § 213(a)(3)–(19) (exempting specific employees from the provisions of § 206, which includes the EPA). These exemptions create a much closer and more difficult question than those for small businesses. Because of the novelty and difficulty of this question, we ultimately find that the most prudent resolution here is to avoid the issue. In this case, the parties stipulated as to damages such that "Doe is entitled to $60,000 in compensatory damages corresponding to any and all claims for which CRS has been found liable." *Doe IV*, 779 F. Supp. 3d at 549 (citation modified). Accordingly, a decision here as to whether the EPA violates CRS's right to freely exercise its religion has no practical effect—both parties will be in the same place either way because we affirm the district court's judgment on Doe's Title VII and MFEPA claims. So out of respect for the

[15] CRS cites only to a single district court case, also considering a small business exemption, which held that it was "insufficient" to compare "a religious employer with five employees and a secular employer with five employees," holding that the statute was not generally applicable because it treated the plaintiff religious organization differently than exempted secular employers. Opening Br. at 53 (quoting *Union Gospel Mission of Yakima v. Ferguson*, No. 23-CV-3027, 2024 WL 4660918, at *4 (E.D. Wash. Nov. 1, 2024)). Though the Ninth Circuit initially affirmed this decision on other grounds, the court vacated the panel's decision upon granting a petition for rehearing en banc. *Union Gospel*, 162 F.4th at 1209–10; *Union Gospel Mission of Yakima v. Brown*, No. 24-7246, 2026 WL 1758172, at *1 (9th Cir. June 18, 2026).

complexity of this issue, in the absence of clear authority, and in recognition of the lack of practical effect our decision would have, we deem this question moot on appeal. *See Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 161 (4th Cir. 2010) (declining the parties' request that the court rule on multiple alternative bases because after deciding the case on one basis, deciding the other basis "could not have any practical effect on the outcome of the case").

B.

This brings us to the church autonomy doctrine. Our Circuit has not had occasion to consider the doctrine in the way CRS presents it to us. Our prior cases mentioning it primarily address the ministerial exception, which CRS does not press in this case. Thus, we must explore the reach of the church autonomy doctrine beyond the ministerial exception to determine whether it applies here.

Though we didn't use the term, we discussed the principles underlying this doctrine in *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir. 1997): "In keeping with the First Amendment's proscription against the 'establishment of religion' or prohibiting the 'free exercise thereof,' civil courts have long taken care not to intermeddle in internal ecclesiastical disputes." *Id.* at 330. We distilled the essential question as

> whether the dispute . . . is an ecclesiastical one about "discipline, faith, internal organization, or ecclesiastical rule, custom or law," or whether it is a case in which we should hold religious organizations liable in civil courts for "purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization."

Id. at 331 (first quoting *Milivojevich*, 426 U.S. at 713; and then quoting *Gen. Council on Fin. & Admin. of the United Methodist Church v. Cal. Superior Ct.*, 439 U.S. 1369, 1379 (1978) (Rehnquist, C.J., in chambers)). Today, we find it helpful to further examine the question about the "ecclesiastical" nature of a dispute in two separate threads: doctrinal autonomy (implicating "ecclesiastical rule, custom or law") and self-governance (questions of "discipline, faith, internal organization").[16] *See id.*; *see generally* Lael Weinberger, *The Limits of Church Autonomy*, 98 Notre Dame L. Rev. 1253, 1260–62 (2023) (defining the "two main applications" of the church autonomy doctrine as doctrinal autonomy and self-governance). We will discuss each separately and then respond to the dissent.

1. Doctrinal Autonomy

The principle of doctrinal autonomy requires us to abstain from weighing in on questions "of faith and doctrine." *See Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952). This idea, also known as ecclesiastical abstention, first arose from church property disputes, which can "implicate controversies over church doctrine and practice." *Presbyterian Church v. Mary Elizabeth Blue Hull*

[16] Perplexingly, the dissent says we "confuse[] two distinct forms of prohibited interference," first "when a court decides a theological question for itself," and second "when the government penalizes a religious institution for implementing its theological judgment in an area of its protected internal governance." Diss. Op. at 141. We may use different language, but we have painstakingly segregated these two threads of protected church autonomy. The dissent's first form we discuss as doctrinal autonomy, *see infra* Section V.B.1, and what the dissent calls the "stay away zone" we discuss as self-governance, *see infra* Section V.B.II.

Mem'l Presbyterian Church, 393 U.S. 440, 445 (1969). The Supreme Court first articulated the approach to such cases in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872). There, "civil courts were asked to resolve a property dispute between a national Presbyterian organization and local churches of that organization," which "arose out of a controversy over church doctrine." *Blue Hull*, 393 U.S. at 445. The Court refused to weigh in on the legal impact of "departures from doctrine by the national organization." *Id.* *Watson* did not expressly reference the First Amendment, notwithstanding the "clear constitutional ring" of the Court's language. *Id.* at 446. In a later church property case, the Supreme Court clarified that "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice" but observed that such disputes are appropriately resolved when the court can apply "neutral principles of law . . . without 'establishing' churches to which property is awarded." *Id.* at 449; *see also Jones v. Wolf*, 443 U.S. 595, 604 (1979) (holding "that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute").

The Supreme Court said in *Milivojevich* that "where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity." 426 U.S. at 709. Furthermore, we may not question whether ecclesiastical decisions are "rational or measurable by objective criteria." *Id.* at 714–15. Thus, we understand that to respect the doctrinal autonomy of churches, we must abstain from entertaining questions which

"*cannot* be [resolved] without extensive inquiry by civil courts into religious law and polity," *see id.* at 709 (emphasis added), but we may appropriately resolve questions where "neutral principles of law" are available, *see Blue Hull*, 393 U.S. at 449.

CRS presses two arguments related to doctrinal autonomy. First, it claims that the existence of ecclesiastical themes raised by the parties, including that the employment decision here was based on religious belief,[17] creates an affirmative defense. Second, it contends that we would squarely face "a religious question that [we] lack[] constitutional authority to resolve" if we reverse the district court's decision on either CRS's defense under the Religious Freedom Restoration Act or the Free Exercise Clause. Opening Br. at 19. Neither argument has merit.

CRS's first argument fails to establish either that the district court resolved or that this Court *necessarily* must resolve an ecclesiastical question beyond our ken, and it cites no authority for the idea that ephemeral ecclesiastical questions require judgment in CRS's favor. For example, CRS notes that "the lines [it] has drawn in its benefits programming are supported by authoritative Catholic teaching." *Id.* at 17. We have no reason to debate the veracity of this point, and our resolution of this appeal does not consider why, doctrinally, CRS denied Doe spousal benefits, only that its decision to do so was based on sex. *See supra* Part IV (resolving statutory defenses without reference to religious doctrine).

[17] This argument also sounds in self-governance, and we consider it again *infra* Section V.B.2.

CRS cites a recent Tenth Circuit case for the idea that the church autonomy doctrine is a valid affirmative defense when the action at issue is based on religious belief. Opening Br. at 18 (citing *Gaddy v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 148 F.4th 1202, 1212 (10th Cir. 2025)). In *Gaddy*, the Tenth Circuit stated, "If the alleged misconduct is rooted in religious belief, then the conduct has 'the protection of the Religion Clauses.' The church autonomy doctrine then kicks in as an affirmative defense to such a religiously rooted claim, and the claim fails." 148 F.4th at 1212 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). But this rule sweeps far more broadly than necessary to resolve the relevant question before the circuit in that case: whether the court could decide a claim "alleg[ing] fraudulent misrepresentations about [church] history that its leaders allegedly do not sincerely believe." *Id.* at 1207. The claim "hinge[d] on the favorable resolution of questions concerning the truth or falsity of religious beliefs, questions which civil courts and juries are incapable of, and precluded from, answering." *Id.* at 1213 (citation modified). Thus, it was the fact that the court *could not* address the claim without reference to "the truth or falsity of religious beliefs" that implicated doctrinal autonomy, not merely an assertion by the defendant that "the alleged misconduct is rooted in religious belief." *See id.* at 1212–13. We decline to immunize all misconduct by religious entities following from religious belief. *See Smith*, 494 U.S. at 882 ("Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.").

CRS next argues that the RFRA and Free Exercise questions in this case implicate doctrinal autonomy, because "to adjudicate the substantial burden on [its] religious exercise, the Court would have to decide whether it agrees with Catholic Relief Services' understanding of Catholic doctrines such as the 'principle of cooperation' and the doctrine of 'scandal.'" Opening Br. at 19. Given our resolution of the RFRA and Free Exercise questions without determining whether a substantial burden exists, that point is now irrelevant. Still, we think it prudent to disclaim the idea that addressing substantial burden in this case would require a court to agree or disagree with CRS's understanding of its religious doctrine. It is foundational First Amendment law that courts cannot question the correctness or importance of religious beliefs. *See Hobby Lobby*, 573 U.S. at 724 (addressing substantial burden in RFRA analysis and affirming that "it is not for us to say that [plaintiffs'] religious beliefs are mistaken or insubstantial[; i]nstead, our narrow function in this context is to determine whether the line drawn reflects an honest conviction" (citation modified)). Though courts can (and do) mistakenly cross this line on occasion, CRS does not say that the lower court *did* improperly rule on the correctness of its beliefs, only that it hypothetically would if it reached the question of substantial burden. Given the countless times courts at all levels have undertaken the substantial burden inquiry for RFRA and Free Exercise claims without adjudicating doctrinal validity, this argument is entirely meritless.[18]

[18] CRS also points to a "counter-theologian" disclosed as an expert witness for Doe as an example of how "Doe ran headlong into this theological debate." Opening Br. at 19. We decline to find that the mere retention of a theological expert whose opinion was

2. Self-Governance

The self-governance principle of church autonomy applies to "matters of discipline, faith, [and] internal organization." *Bell*, 126 F.3d at 331. But this command proves tricky in practice: "intermediate appellate courts are tacitly struggling with where to fix the boundary that marks off matters of internal church governance to the exclusion of the government's general regulatory powers." Carl H. Esbeck, *Church Autonomy, Textualism, and Originalism: SCOTUS's Use of History to Give Definitions to Church Autonomy Doctrine*, 108 Marq. L. Rev. 705, 709 (2025). Our task is to balance respect for religious institutions' "independence in . . . matters of church government" without creating "a general immunity from secular laws." *See Our Lady of Guadalupe*, 591 U.S. at 746.

Certain issues are clearly and uncontroversially related to church self-governance upon which the courts may not opine: (1) employment of ministers;[19] (2) church

never entered into the record could implicate doctrinal autonomy. Whether evidence from such an expert is appropriate will be a question for another case.

[19] The ministerial exception is related to churches' "autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe*, 591 U.S. at 746.

membership and hierarchy;[20] and (3) church discipline.[21] When a religious organization establishes that a dispute centers around any of these subjects, we should presumptively apply the church autonomy doctrine. But if it does not, we should proceed with caution before breaking new ground under the doctrine.

Once church autonomy doctrine attaches, there is no "inquiry whatsoever into the reasons behind [the] decision," and we do no balancing of the church's decision against the relevant state interests. *See EEOC v. Roman Cath. Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000). This rule has a crucial place in our constitutional regime, allowing religious groups to flourish free of governmental interference with their most central internal affairs. But to turn this limited shield into an essentially indiscriminate sword, excusing churches from compliance with secular laws, threatens "to make the professed doctrines of religious belief superior to the law of the land, and in effect permit [the church] to become a law unto [it]self." *See Smith*, 494 U.S. at 879 (citation modified). In our view, the Religion Clauses do not confer upon a religious institution the right to act as

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[20] In *Watson*, the Court observed that followers of a religion impliedly consent to submit to the religious association, and that "it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by" the body's decisions on questions of faith "could appeal to the secular courts and have them reversed." 80 U.S. (13 Wall.) at 729.

[21] The *Milivojevich* Court held that there is no "dispute that questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern." 426 U.S. at 717. The specific question before the Court was the church's "decisions to suspend and defrock [the] respondent." *Id.* at 717–18. We interpret "questions of church discipline" for the purpose of the church autonomy doctrine to be limited to similar forms of "discipline," and not including, for example, physical punishment for disobedience.

a kind of self-referee regarding conduct that causes harm outside the ecclesiastical sphere; nor do the Clauses require the government to forfeit its role in drawing lines between prohibited harmful conduct and permissible conduct. Rather, outside of those few areas that clearly implicate church autonomy, cases like this where a religious entity protests the application of secular law should be resolved by reference to the Free Exercise Clause.[22]

CRS and its amici urge us to find that employment decisions based on religious belief are a matter of internal church governance and shielded from review by the church autonomy doctrine.[23] In briefing, CRS and amici pointed to a Ninth Circuit decision in support of this broad immunity, which panel decision has now been vacated pending rehearing en banc. *Union Gospel of Yakima v. Brown*, 162 F.4th 1190 (9th Cir. 2026), *vacated*, No. 24-7246 (9th Cir. June 18, 2026). Notwithstanding the vacatur, we note our strong disagreement with the reasoning and conclusion of the panel decision.

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[22] "In such an instance, the contest is over a church's religious practice or observance being materially burdened by a law or government official[, which] is just a conventional claim arising under the Free Exercise Clause." Esbeck, *supra*, at 715.

[23] *See* Reply Br. at 5–6 (opposing Doe's position "that the church autonomy doctrine is cabined in the employment context to the ministerial exception" and claiming application of the doctrine "where the record shows that Catholic Relief Services terminated [Doe]'s spousal health benefits because of [its] beliefs [regarding marriage]"); Br. of Gen. Conference of Seventh-day Adventists as Amicus Curiae Supporting Appellant at 9 ("[W]hen a religious organization makes an employment decision for a religious reason, judicial interference with that internal religious decision necessarily affects the organization's faith and mission." (citation modified)); Br. of Cardinal Newman Soc'y et al. as Amici Curiae Supporting Appellant at 22 (arguing that the church autonomy doctrine "protects a religious organization's right to fire *any* employee without government interference but *only* when the decision is based on religion").

The panel held that "internal management decisions" subject to the church autonomy doctrine "may include a religious organization's policy of hiring co-religionists for non-ministerial roles." *Id.* at 1203. The court elaborated:

> If a religious institution sincerely believes that its non-ministerial employees must adhere to and live according to its religious principles to accomplish its religious mission, the only way a court could adjudicate a dispute for a plaintiff would be to rule that the religious institution cannot seek that "mission" or that the hiring policy isn't necessary to that "mission"—inherently religious questions.

Id. at 1204. But in our view, the court's conclusion follows from a flawed premise: that the government has no authority to limit conduct by a religious entity when it "sincerely believes" such conduct is necessary "to accomplish its religious mission." *See id.* This idea is squarely at odds with well-established Free Exercise doctrine, dating back to at least 1878: despite acknowledging that the doctrine of the Church of Jesus Christ of Latter-day Saints, at that time, provided "that it was the duty of male members of said church, circumstances permitting, to practise polygamy," the Supreme Court held that it does not violate the Free Exercise Clause for the government to prohibit polygamy, nor does the right to free exercise require that "those who make polygamy a part of their religion are excepted from the operation of the statute." *Reynolds*, 98 U.S. at 161, 166. The Court went on:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

Id. at 166. Neither does the Free Exercise Clause allow religious employers to opt out of "collection and payment of Social Security taxes on the ground that [their] . . . faith prohibited participation in governmental support programs." *Smith*, 494 U.S. at 880 (citing *United States v. Lee*, 455 U.S. 252 (1982)). "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Lee*, 455 U.S. at 260; *see also Hernandez v. Comm'r*, 490 U.S. 680 (1989) (rejecting Free Exercise Clause challenge to payment of income taxes alleged to make religious activities more difficult). We cannot reconcile these cases with the Ninth Circuit's decision to exempt from the law conduct by a religious entity solely because the entity believes the conduct is necessary to accomplish its mission. *See Smith*, 494 U.S. at 878–79 (noting that "the record of more than a century of our free exercise jurisprudence contradicts" the proposition "that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"). Thus, we decline to follow it.

Here, we emphasize that our precedent reveals that the ministerial exception is the form of the church autonomy doctrine that most often applies to questions of employment because those roles are related to "spiritual function."[24] *See Diocese of Raleigh*, 213 F.3d

[24] CRS contends that "[i]t is perilous for a civil court to decide what does or does not constitute the 'spiritual' functions of a religious organization." Opening Br. at 18. It draws from *Catholic Charities Bureau*, in which case the Supreme Court held that the criteria used by government officials (and courts) in determining exemption eligibility cannot "establish[] a preference for certain religions based on the commands of their religious doctrine." 605 U.S. at 250. CRS's contention that this case warns lower courts against inquiry into religious organizations' spiritual functions is not supported. The

at 801; *see also id.* ("For instance, the exception would not apply to employment decisions concerning purely custodial or administrative personnel."); *Rayburn*, 772 F.2d at 1171 ("Of course churches are not—and should not be—above the law. . . . Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions."); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1990) (declining to find that lay teachers at a religiously affiliated school are subject to the ministerial exception where they "perform no sacerdotal functions"). Here, we hold that for lay employees like Doe—those not performing a spiritual function, not involved in carrying out the mission of the organization, and not even a member of the church implicitly consenting to its authority—the church autonomy doctrine does not require that courts extend some lesser protection compared to employees of secular organizations. *Accord Cath. Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67, 77–78 (Cal. 2004) (holding that a church's objection to a state requirement that employers who offer prescription drug coverage cover contraceptives "does not implicate internal church governance; it implicates the relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church"); *see*

Court did not express any concern *that* the Wisconsin courts assessed whether the petitioner was operated primarily for religious purposes. Rather, it concluded that *how* the Wisconsin Supreme Court interpreted its state's exemption was problematic because it "facially differentiates among religions based on theological choices." *Id.* at 251. Furthermore, the Supreme Court mandates that lower courts inquire into such spiritual functions in determining whether the ministerial exception applies. *See Our Lady of Guadalupe*, 591 U.S. at 751–56 (noting that "a variety of factors may be important" to determine whether the ministerial exception applies beyond merely a position's title or religious training requirements).

also id. ("Only those who join a church impliedly consent to its religious governance on matters of faith and discipline."[25]).

Regarding lay employees, a religious organization enters into the same commercial employment relationship as every other employer. We analogize to the limit Justice O'Connor proposed on the protection of the First Amendment on expressive associations engaging in commercial endeavors. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring). In such a commercial relationship, she emphasized "the power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society." *Id.* "[T]he State is free to impose any rational regulation on the commercial transaction itself. The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." *Id.* at 634. We agree that "there is only minimal constitutional protection of the freedom of *commercial* association," even for entities otherwise entitled to First Amendment protection, and adapt her framing to the context of religious organizations: "Once [a religious organization] enters the marketplace of commerce in any substantial degree it loses the complete control over its [conduct] that it would otherwise enjoy if it confined its affairs to the marketplace of [faith]." *See id.* at 633–34, 636 (emphasis added). Many religious organizations choose to enter the "marketplace of commerce" in employment of

[25] Of course, we do not suggest that a different outcome would be required in this case if Doe were a member of the Catholic Church.

individuals for lay roles (as opposed to, for instance, relying on the volunteer labor of church members), and in this choice the organization receives numerous benefits: it can set employee hours based on the entity's needs, it can demand that employees maintain satisfactory job performance, and it can require professional skills and accreditations it might not find amongst its members. In exchange, for non-ministerial positions, religious organizations must submit to the government's "important goal of ensuring nondiscriminatory access" to employment opportunities, *see id.* at 632, subject to rational basis review so long as the government does not target or disfavor religious entities, *see Fulton*, 593 U.S. at 532–34.

The dissent takes great offense at our analogy to Justice O'Connor's perspective. Diss. Op. at 147 ("It's hard to imagine a more disrespectful view of religious freedom."). The dissent says "there's no reason to think Justice O'Connor's analysis and discussion of private membership associations has anything to do with churches or other religious organizations setting terms of employment to comply with their sincerely held religious tenets." *Id.* We can agree with the dissent that "[r]eligious expression is nothing like commercial expression," *id.*, but that is not the comparison we draw above. Rather, protection for both religious and expressive values is enshrined in the First Amendment. Justice O'Connor's point is that notwithstanding the importance of free expression, an expressive association entering the commercial marketplace *transforms* from a purely expressive enterprise into a commercial one. *Roberts*, 468 U.S. at 633–34, 636. In our view, this is comparable to a church's decision to turn to the marketplace to fill lay positions, in that either an expressive or a religious organization entering a commercial

employment transaction must accept the terms: compliance with federal and state employment regulations. CRS's choice to enter the commercial marketplace has undoubtedly contributed to its ability to effectuate its mission on such a large scale. We mean no disrespect in our conclusion that if CRS wishes to reap the benefits of employing highly skilled IT analysts like Doe, it must participate in the surrounding regulatory scheme just like every other employer. Because while laws "cannot interfere with mere religious belief and opinions, they may with practices." *Smith*, 494 U.S. at 879 (citation modified).

* * *

The dissent writes extensively on its view of church autonomy, taking us on a fascinating journey from ancient Rome to the present. But ultimately, none of the dissent's historical or legal analysis provides actual support for its contemplation of church autonomy. The dissent's conclusion is, in fact, a tremendous expansion of church autonomy from the contours outlined by our precedents. Furthermore, at times the dissent's own framework contradicts its conclusion, revealing that the dissent's purported foundation for this exceedingly broad church immunity is anything but solid.

The dissent begins with a survey of historical power struggles between the leadership of various Christian sects and the heads of government. The examples discussed concern primarily political authorities attempting to control the selection of church leaders, as well as persecution of advocates for religious freedom, exclusion of religious minorities, and denominational discrimination in regulatory schemes. But in nearly 2,000 years of different visions of religious freedom, the dissent cites not a single

example of a religious entity seeking exemption from generally applicable laws. In fact, the dissent fails to note that in the early days of our republic, courts regularly denied requests for religious exemption from such laws.[26]

As we discuss above, our precedents uniformly repeat the principle that churches are entitled to autonomy as to internal organization or church government. *See, e.g.*, *Our Lady of Guadalupe*, 591 U.S. at 746; *Bell*, 126 F.3d at 331. But outside of the few cases where the Supreme Court deems ministerial employment, church hierarchy, and church discipline to be within the sphere of internal organization or church government, we have little guidance as to how far these arenas extend. The dissent protests our holding limiting the self-governance arm of church autonomy to these areas, likening our conclusion to an "after-work beer." Diss. Op. at 141. But happy hour etiquette provides no authority for the dissent's extension of the so-called "stay away zone" so much further than any prior application of church autonomy doctrine. The dissent further complains that we are doing constitutional law backwards, inappropriately fitting our interpretation of constitutional requirements to an existing statutory regime. We strenuously resist that characterization—a faithful reading of our reasoning reveals that we ground our contemplation of the church autonomy doctrine in firmly rooted constitutional law, and that our caution in further extending the doctrine follows from the Supreme Court's

[26] *See* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. L. Rev. 1106, 1122–24 & nn.71–76 (1994) (collecting cases). *But see id.* at 1124 n.77 (describing one case granting a religious exemption).

command that there is no "general immunity from secular laws" for religious institutions. *See Our Lady of Guadalupe*, 591 U.S. at 746.

The dissent attempts to ground its contemplation of church autonomy in comments by only two Justices "signal[ing] support for the application of the church autonomy doctrine to employment decisions by religious organizations outside of ministers." Diss. Op. at 135–36. But obviously, these "signals" have no precedential value. The dissent goes on to claim that this view "has had broad support from the courts of appeals." *Id.* at 136. But the dissent finds this "broad support" in only two cases, both of which are easily distinguishable. The dissent first invokes *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002), where the court applied the church autonomy doctrine but not the ministerial exception. *Id.* at 658 & n.2. But there, the Title VII claims concerned statements made about the plaintiff at parish meetings. *Id.* at 653. The court there specifically said it would not intervene "when a church makes a personnel decision based on religious doctrine, *and holds meetings to discuss that decision and the ecclesiastical doctrine underlying it*." *Id.* at 660 (emphasis added). This is fundamentally different than the employment decision at issue here, and may very well fall within the realm of church disciplinary decisions presumptively covered by the church autonomy doctrine.[27] The dissent then invokes *Bell*, which addressed breach of contract and tort claims, but as the dissent concedes, did not raise employment discrimination issues. 126

[27] *See* Weinberger, *supra*, at 1260–61 (noting that church autonomy "has long been understood to protect churches from defamation lawsuits challenging church discipline proceedings").

F.3d at 329. But this case concerned ministerial employment specifically, and thus we fail to grasp how it shows "broad support" for the proposition that church autonomy applies "to employment decisions by religious organizations outside of ministers." Diss. Op. at 135–36.

Furthermore, the dissent's reasoning is itself susceptible to problematic inconsistencies in its application of constitutional law. The dissent says we ignore limits on application of church autonomy doctrine. First, the dissent says that "there is good historical evidence that the church autonomy doctrine does not apply to laws that protect the public peace and safety." Diss. Op. at 144–45 (citing Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1461 (1990); Stephanie H. Barclay, *Replacing Smith*, 133 Yale L.J. Forum 436, 457–58 (2023)). But public welfare, referring to "society's well-being in matters of health, safety, order, morality, economics, and politics," *Welfare*, *Black's Law Dictionary* (12th ed. 2024), is undoubtedly the foundation of the Civil Rights Act and state analogs like MFEPA. Maryland made this abundantly clear in the text:

> It is the policy of the State, in the exercise of its police power for the protection of the public safety, public health, and general welfare, for the maintenance of business and good government, and for the promotion of the State's trade, commerce, and manufacturers:
>
> (1) to assure all persons equal opportunity in receiving employment and in all labor management–union relations, regardless of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, military status, or disability unrelated in nature and extent so as to reasonably preclude the performance of the employment; and

> (2) to that end, to prohibit discrimination in employment by any person.

Md. Code Ann., State Gov't § 20–602. Second, the dissent says the doctrine "only applies to non-pretextual religious decisions," not "insincere or pretextual" ones. Diss. Op. at 132 n.15, 143. But as we commented above, the pretext inquiry can easily lead courts into a constitutional quagmire. Imagine, for instance, if Doe had been terminated when CRS learned of his marriage to a man. Could Doe point to divorced peers as evidence of pretext? Employees using contraception? Of course not, as determining pretext would require "assess[ing] the relative severity of offenses." *Curay-Cramer*, 450 F.3d at 139. The dissent acknowledges that this would require "a light touch" because courts "must defer to religious organizations" when assessing pretext, Diss. Op. at 144, but in reality, we doubt that pretext provides any practical limit whatsoever.

We fear the dissent's reasoning alludes to normative perspectives we ought to avoid. The dissent appears unconcerned by the prospect of immunizing race-based discrimination rooted in religious motivation. It says that "to the extent the possibility exists for perverse but sincere religiously based racial discrimination, there is a debate as to how to resolve competing protections for religious freedom and racial equality," and notes that "we should not undertake to resolve" the debate. Diss. Op. at 144–45 n.19. But herein lies the problem: we may all agree that race-based discrimination is repugnant, but if the dissent is unconcerned that the church autonomy doctrine would permit such discrimination, it seems like the doctrine's application is conditioned on how tolerable the shielded conduct is. This cannot be, and indeed, such a decision would defy the court's

counter-majoritarian mandate. *Cf.* Diss. Op. at 173 (commenting that the Constitution is "counter-majoritarian at its core").

The dissent goes on to criticize the practical effect of our decision here. Apparently, our holding means that "churches and other religious organizations in the Fourth Circuit cannot choose to condition employment on compliance with their sacred beliefs." Diss. Op. at 147. But here we remind the dissent that ensuring equal access to employment opportunities is an effort to protect public welfare. Most Americans rely on work to support themselves and their families. And as this case exemplifies, work is often the means for many to receive health insurance. In many places, large churches or religiously affiliated medical systems may employ significant proportions of the population. Following today's decision, religious organizations maintain complete autonomy in the employment of those who communicate the organization's religious teachings. And religious organizations may require employees to adhere to religious doctrine so long as such requirements do not discriminate on the basis of race, sex, or national origin. But for those employees who do not perform spiritual functions, the state may act to ensure equal opportunities to work free from discrimination.

VI.

For the foregoing reasons, we affirm the district court's judgment as to Doe's claims under Title VII and MFEPA. Because we find that CRS's dispute as to Doe's Equal Pay Act claim is moot on appeal, we dismiss the appeal as to that claim.

AFFIRMED IN PART AND DISMISSED IN PART

WYNN, Circuit Judge, concurring:

I join the well-reasoned majority opinion in full. I write separately to respond to the lengthy—and, in my view, quite troubling—dissenting opinion, which embarks on a stunningly misleading sojourn through history that ends by declaring the supremacy of religious law over secular law.[1]

I.

As a threshold matter, I harbor serious reservations about the recent tendency to cast judges in the role of historians—a function neither assigned to them by the Constitution nor well suited to the judicial office. We are ill-equipped for such erratic spelunking. *See United States v. Hemani*, 146 S. Ct. 1677, 1698 (2026) (Jackson, J., concurring) (warning that such ventures are "vulnerable to inconsistent and arbitrary application, as judges draw different conclusions from the same historical evidence and reach divergent assessments of the same laws"); Hon. James A. Wynn, *How Do Judges Decide Which History Counts?*, Marq. L. Sch. Fac. Blog (Sep. 21, 2026),

[1] The dissenting opinion suggests that its statement that the First Amendment "does not allow courts to interfere with, much less declare illegal, decisions based on a church or religious organization's theological beliefs," Diss. Op. at 87–88, asserts the supremacy of "the Constitution over statutes" rather than of religious law over secular law, *id.* at 153. Yet our disagreement is about the meaning and scope of the Constitution, not whether statutory text supplants it. The dissenting opinion asserts that the First Amendment means that secular law cannot interfere with any decisions based on a religious organization's religious beliefs. I disagree with that interpretation because it too broadly places religious law above secular law.

Invoking *Marbury* therefore does not advance the analysis. No one disputes constitutional supremacy; the disputed question is whether the Constitution contains the sweeping immunity from otherwise applicable civil law that the dissent attributes to it.

https://law.marquette.edu/facultyblog/2026/09/how-do-judges-decide-which-history-counts/ [https://perma.cc/7ACK-7HVH].

The dissenting opinion acknowledges that "history can be hard" but insists that it is nevertheless necessary to uncover "important information about the meaning of the Constitution." Diss. Op. at 149. Perhaps so. But history is particularly perilous when it arrives in a case without the benefit of adversarial presentation. No party briefed the history of the Roman Empire, much less the dissenting opinion's sweeping summarization of a multi-thousand-year period leading up to the present day. That account has therefore escaped the testing that ordinarily gives courts some confidence that the history upon which they rely is both accurate and relevant.

The Supreme Court has cautioned against this sort of judicial activism. "'[W]e follow the principle of party presentation,'" and so, should a historical record be necessary, we "decide a case based on the historical record compiled by the parties." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 25 n.6 (2022) (quoting *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020)). That principle reflects more than procedural fastidiousness. Judges are judges, not historians, and the adversarial process supplies an indispensable safeguard against selecting from the vast expanse of history only those episodes that happen to support a preferred constitutional conclusion.[2]

[2] The dissenting opinion states that "while [Doe] does not claim the antidiscrimination laws at issue here fall within the peace and safety exception, the majority does." Diss. Op. at 145. If the dissenting opinion intends to reprimand the majority for stepping beyond the issues briefed, that is an ironic critique. The majority opinion only addresses the "peace and safety exception" because the *dissenting opinion*

Nor does the dissenting opinion's claim to follow the Supreme Court's consideration of history in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732 (2020), answer the point. Diss. Op. at 149. Those cases do not establish that whenever history bears upon a constitutional question, an appellate judge may construct an extensive historical record never developed by the parties. The principle of party presentation identified in *Bruen* remains—when historical evidence matters to constitutional adjudication, courts ordinarily decide on the historical record the parties presented. The objection here is therefore not to consulting history; it is to treating an untested historical narrative assembled by a judge as though it were an adversarially established constitutional record.

If, however, this precarious trend is to be perpetuated—particularly by judges who profess adherence to an originalist approach to constitutional interpretation—then intellectual and jurisprudential consistency requires that judges should consult history with equal rigor, without regard to whether that history supports a desired result. In other words, history ought not be invoked when convenient and disregarded when it proves inconvenient. To be sure, judges should be restrained by an interpretative methodology that yields to consistency.

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raises it; the parties did not brief it. The dissenting opinion also ignores the burden. Doe is the appellee. It was not his job to address, in his response brief, historical arguments that CRS did not make.

The dissenting opinion does not do that. Its historical account manages simultaneously to elevate religious belief above neutral and generally applicable secular law and to largely absolve religion of any role in race-based discrimination in the United States. History is too complicated, and constitutional adjudication too consequential, to permit so selective an accounting.

A.

The dissenting opinion first invokes history as a limiting principle on what is otherwise an extraordinarily expansive view of church autonomy. But history does not supply the limitation that the dissenting opinion claims for it.

According to the dissenting opinion, "there is good historical evidence that the church autonomy doctrine does not apply to laws that protect the public peace and safety." Diss. Op. at 144–45 (citing Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1461 (1990); Stephanie H. Barclay, *Replacing* Smith, 133 Yale L.J. Forum 436, 457–58 (2023)). The difficulty is not merely that this formulation is vague. It is that the dissent gives us no workable account of what "public peace and safety" means or where its boundaries lie.

Consider the authority from which the formulation is drawn. The law review literature on which the dissent relies invokes cases like *Reynolds v. United States*, 98 U.S. 145, 166 (1878), in which the Supreme Court upheld Congress's prohibition of polygamous marriage and rejected the contention that religious "practices to the contrary" could not be exempted under the First Amendment. The Court explained that to hold otherwise "would be to make the professed doctrines of religious belief superior to the

law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 167.

That principle is straightforward enough. Its application under the dissenting opinion's proposed "public peace and safety" exception is anything but. Why the criminal prohibition of polygamy qualifies as a measure protecting the public peace and safety—while a generally applicable requirement that an employer provide health insurance to a same-sex spouse does not—defies understanding. That distinction is not self-evident, and constitutional doctrine cannot rest upon labels whose operative meaning disappears upon examination.

Faced with the difficulty, the dissenting opinion retreats from its own analogy. It tells us that *Reynolds* "is not a church autonomy case," and that "[c]riminal bans on individuals' actions are not comparable to government regulation of internal church decisions." Diss. Op. at 154–55, 155 n.24. But it was the dissenting opinion that invoked this body of authority to establish its "public peace and safety" limitation. One cannot enlist individual-rights cases to define the boundaries of a constitutional doctrine and then dismiss those same cases as inapposite when their implications become inconvenient. Nor, indeed, did the government's regulation of polygamy stop at the doors of the church. Barely a decade after *Reynolds*, the Supreme Court upheld federal legislation revoking a church's charter and confiscated its property under legislation styled as "[a]n act to punish and prevent the practice of polygamy." *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 19 (1890).

Furthermore, the dissenting opinion's response only restates the disputed premise. The question is whether CRS's provision of employment benefits to a nonministerial employee is itself an "internal church decision" of the constitutionally protected kind. *Hosanna-Tabor* does not answer that question merely because CRS characterizes the benefits decision as religiously motivated. If religious motivation alone transformed an otherwise regulated employment practice into protected internal governance, the limiting inquiry would collapse into the organization's own characterization of its conduct.

The larger difficulty is thus not simply that the dissenting opinion's proposed exception is uncertain at its margins. It is that the exception lacks an intelligible center. "Public peace and safety" may sound reassuring as an abstraction, but constitutional limitations must do more than sound reassuring. They must supply principles capable of constraining courts in cases that follow.

The dissenting opinion's proposed "public peace and safety" limitation does not. Once its historical premises are examined and its asserted comparators placed alongside one another, the dissenting opinion's limitation offers little guidance as to which laws bind religious institutions, which do not, and why. Indeed, a doctrine of church autonomy capacious enough to displace neutral and generally applicable laws requires a limiting principle commensurate with its reach. The dissenting opinion has not supplied one.

B.

History, of course, teaches something rather different. Religious employers have long sought exemptions from secular employment laws on the basis of sincerely held

religious beliefs. But the sincerity of a religious belief does not mean that civil law must yield to it.

United States v. Lee is instructive. 455 U.S. 252 (1982). There, an Amish employer asserted a sincere religious belief that it is "sinful not to provide for their own elderly and needy" and thus stated that it was "religiously opposed to the national social security system," which meant that religious belief barred "all contributions by Amish to the social security system." *Id.* at 255. Congress provided a limited statutory accommodation for self-employed individuals with such beliefs, but the accommodation did not extend to the plaintiff-employer in that case. *Id.* at 255–56. Though the Court recognized that it could not inquire into the doctrinal correctness of Amish belief, *id.* at 257, it affirmed the obligation of nonexempt Amish employers to pay social security taxes, *id.* at 261.

The reason bears emphasis. When "followers of a particular sect enter into commercial activity as a matter of choice," the Supreme Court explained, they cannot impose "the limits they accept on their own conduct as a matter of conscience and faith" onto statutes that bind "others in that activity." *Id.* Religious conviction was respected. But the civil law remained the civil law.

Lee thus illustrates a proposition that should by now be familiar: Religious employers, just like religious individuals, must at times comply with "neutral, generally applicable regulatory law[s]." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 880 (1990). The ministerial exception, to be sure, protects a sphere of religious independence that has no precise analogue for an individual believer. Within that sphere, the Constitution affords religious institutions substantial protection in selecting those

entrusted with carrying out their religious mission. But it does not follow that religious employers inhabit an entirely separate constitutional universe whenever they make an employment decision.

The dissenting opinion relies on *Hosanna-Tabor*'s statement that minister selection differs from the peyote regulation in *Smith*, calling this the constitutionally recognized "second track." Diss. Op. at 153. It then claims that the ministerial exception is merely "a component" of church autonomy. *Id.*

But *Hosanna-Tabor* does not establish the proposition for which the dissent invokes it. It held that *Smith* did not control because a church's selection of its ministers is unlike ordinary religiously motivated conduct—it involves "government interference with an internal church decision that affects the faith and mission of the church itself." 565 U.S. at 190. *Our Lady of Guadalupe* likewise involved employees whose religious duties brought them within the ministerial exception. 591 U.S. at 756–57. Neither case holds that a religious employer's doctrinal motivation places every employment decision—including compensation or benefits for a concededly nonministerial employee—beyond the reach of a neutral and generally applicable employment law. Nor does describing the ministerial exception as a "component" of church autonomy define the scope of any broader autonomy principle. In this matter, scope is the question presented. And that is the very question the dissenting opinion assumes rather than answers.

Contrary to the dissenting opinion's view, outside the ministerial sphere, the ordinary principles of the Free Exercise Clause continue to do their work. There is no two-

track system for Free Exercise claims—one for religious individuals and another, more capacious one for religious employers. Neutral and generally applicable laws may therefore reach employment-related conduct by religious employers just as other regulatory laws may reach their commercial conduct. *Lee* itself supplies the example: Religious conviction did not relieve a religious employer of the secular obligation to pay its share of social security taxes.

The dissenting opinion would distinguish *Lee* because it didn't "involve[] a church" or "a religious organization's governance of its doctrine or mission." Diss. Op. at 151. But this distinction raises more questions than it answers. The dissenting opinion fails to tell us precisely what counts as a religious organization for purposes of its own rule.[3] *See id.* at 155 n.25. And without such a definition, it is difficult to understand why an Amish employer, employing members of the Amish community and seeking to conduct its business in line with Amish belief, would not qualify. Certainly, other scholars disagree

[3] In reality, the definitional scope of "religious organization" seems quite broad. For example, the Eighth Circuit has explained that Catholic hospitals are religious organizations, even though they "generate[] revenue" and employ "a predominantly non-Catholic workforce." *Conway v. Mercy Hosp. St. Louis*, 146 F.4th 704, 708–09 (8th Cir. 2025). According to the United States Conference of Catholic Bishops, Catholic hospitals care for "one in six patients" in the United States and employ nearly 750,000 employees. Catholic Health Care, Social Services, and Humanitarian Aid, *United States Conference of Catholic Bishops*, https://www.usccb.org/offices/public-affairs/catholic-health-care-social-services-and-humanitarian-aid [https://perma.cc/7VBS-VJT4]. Under the dissenting opinion's proposed regime, these hospitals and similar institutions could decide to withhold benefits from all of their LGBTQ+ staff, to pay women less than men, or to fire all of their Black employees, and—so long as the organization asserted a sincere religious belief—they would simply be exercising their constitutional right to do so.

with the dissenting opinion.[4] *See* Mark E. Chopko, Constitutional Protection for Church Autonomy: A Practitioner's View, *Church Autonomy: A Comparative Survey* (Gerhard Robbers, ed., Frankfurt am Main: Peter Lang, 2001) (citing *Lee* as "one of the series of regulatory battles fought by the Amish churches with the taxing authorities").[5] But perhaps the dissenting opinion suggests that the Amish church should have more carefully structured its community businesses.

The larger point is the more important one. To the extent the dissenting opinion suggests that subjecting religious employers to secular law is somehow a novel concept, history and our own case law says otherwise. *See infra* Section I.C. These disputes are difficult precisely because important interests stand on both sides. Religious institutions possess constitutional freedoms of the highest order. At the same time, government possesses legitimate authority to enact neutral laws governing the civic and commercial spheres in which believers and nonbelievers alike participate.

The Supreme Court in *Smith* and *Hosanna-Tabor* addressed that tension by supplying us with a general rule. We should therefore hesitate before erecting a freestanding doctrine of "church autonomy" whose boundaries remain uncertain and

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[4] Moreover, the Supreme Court seemed to assume that an Amish employer who employed Amish workers and asserted an Amish objection to legal compliance was a religious organization, explaining that the employer's claim was not "too bizarre" because "[a]t least one other religious organization" had similarly sought an exemption. *Lee*, 455 U.S. at 257 n.6.

[5] This book chapter can be found online at https://original.religlaw.org/content/blurb/files/Chapter%206.%20Chopko.pdf [https://perma.cc/ZU8W-DH4P].

whose implications may reach far beyond the controversy before us. The existing law has sought to respect both religious independence and the legitimate operation of neutral civil law.

In sum, there is no need—and certainly no precedent—for a newfangled church autonomy doctrine that blows up the careful balance already struck by the Supreme Court with *Smith* and the ministerial exception.

C.

There is another difficulty with the dissenting opinion's account, and it is a historical one. The dissenting opinion selectively uses history to claim that conflicts between religious belief and antidiscrimination laws are somehow a recent development. Yet, in doing so, it overlooks a far less comfortable history: Religious conviction has itself long been invoked in defense of discrimination.

The dissenting opinion tells us that "[e]ven efforts to enforce landmark anti-discrimination laws like Title VII did not, until recently, target churches or religious organizations for decisions that map onto sincerely held religious beliefs. But after the Supreme Court held Title VII applied to discrimination on the basis of sexual orientation and gender identity, *Bostock v. Clayton County*, 590 U.S. 644, 683 (2020), anti-discrimination laws can correlate one to one with certain religious doctrine." Diss. Op. at 138–39.

That is an astonishing claim—quite simply, history cannot bear the weight that the dissenting opinion places on it.

Religious belief and antidiscrimination principles have collided before, and on matters that today lie at the very heart of our constitutional tradition. For much of American history, Christian theology was invoked to defend slavery and, later, racial segregation. Among the rationales offered was a racist interpretation of the biblical "curse of Ham." Daniel Gordon, *Gender, Race and Limiting the Constitutional Privilege of Religion as a Haven for Bias: The Bridge Back to the Twentieth Century*, 31 Women's Rts. L. Rep. 369, 378 (2010). These views were not only held by individual believers, but also promoted by some churches themselves. *E.g.*, *id.* at 378–79.

And these arguments were not confined to distant centuries or forgotten controversies. Not so long ago, the trial court in *Loving v. Virginia* defended Virginia's prohibition on interracial marriage in explicitly theological terms:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

388 U.S. 1, 3 (1967) (quoting the trial court).

Nor was this merely the rhetoric of government officials. Bob Jones University infamously relied upon religious doctrine in maintaining racial restrictions, refusing to admit Black students until 1971 and even prohibited interracial dating until 2000. *See* Bob Jones University, *Statement about Race at BJU*, https://www.bju.edu/about/what-we-believe/race-statement.php [https://perma.cc/VKR3-PYF7]. We may now regard such beliefs as "perverse," Diss. Op. at 144 n.19, and rightly recoil from the discrimination they were used to defend. But our present judgment of those beliefs does not establish that

those who professed them did so insincerely. Quite frankly, the First Amendment does not protect only religious convictions that later generations find admirable.

The history of sex discrimination demonstrates the same point. Some religious believers and churches sincerely maintain that women should not be employed outside the home at all, should not serve in leadership positions over men, or should not be the primary breadwinners of their households. These beliefs have clashed with the protections afforded by Title VII, the Equal Pay Act, and their state analogues again and again. *E.g.*, *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986) (religious employer expressed religious belief that it should compensate female employees less than head-of-household male employees); *Dayton Christian Schs. v. Ohio C.R. Comm'n*, 578 F. Supp. 1004, 1011–12 (S.D. Ohio 1984) (religious employer expressed religious belief that it should not employ women who had young children).

The dissenting opinion's statement that *Bostock* ushered in some unprecedented collision between "landmark anti-discrimination laws like Title VII" and "sincerely held religious beliefs," Diss. Op. at 138–39, cannot be reconciled with our history. The conflict is not new. What has changed over time are the groups protected by law and the particular religious objections asserted against those protections.

And herein lies the deeper problem with the dissenting opinion's proposed rule. Constitutional doctrines require boundaries. The dissenting opinion offers none that can

reliably confine its principle to the circumstances it evidently has in mind.[6] If a religious employer possesses constitutional immunity whenever an adverse employment decision confronts sincerely held religious doctrine, it is difficult to see why the principle would stop with objections concerning sexual orientation or gender identity. A sincere religious belief might likewise be asserted for an employment decision based on sex, race, national origin, or some other characteristic protected by law.

Recognizing the problem, the dissenting opinion simply asserts that employers would not do such a thing—at least when it comes to race.[7] *See* Diss. Op. at 144 n.19. Of

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[6] For example, the dissenting opinion asserts that "[t]his appeal involves the use of secular laws to regulate churches and religious organizations, not the general use of religion to justify discriminatory conduct." Diss. Op. at 152. Of course, CRS admits that the conduct in this case is discriminatory under the applicable law. Left unaddressed is how the dissenting opinion's favored rule would prevent churches and religious organizations from engaging in discriminatory conduct that the dissenting opinion would find less palatable. *Compare id.* at 144 n.19, 152, 154 (terming religiously based racial discrimination "perverse" and a "misuse of religion"), *with id.* at 148 (contending that religiously based discrimination related to "same-sex marriage and gender transition" is related to "matters of eternal truth"). The inconvenient fact is that sincere religious beliefs that compel discrimination the dissenting opinion abhors relate to "matters of eternal truth" in just the same way as those that compel discrimination it apparently does not find so troubling.

The dissenting opinion waves away the concerns I raise herein about racial discrimination as not at issue in this case. *Id.* at 144–45 n.19. *But see id.* at 139, 147–48 (raising discrimination based on gender identity, which is also not at issue in this case). Respectfully, I think it important to be transparent about the clear ramifications of a constitutional holding that will echo well beyond the facts at issue here.

[7] The dissent also suggests that we could limit religiously motivated decisions based on race by employing a pretext analysis. Diss. Op. at 143–44. Of course, that does not at all limit *sincerely* religious-and-racist beliefs. But even that feeble limitation presupposes that we are entitled to evaluate pretext in such scenarios. We are not. *See* Maj. Op. at 65. Indeed, the dissent admits as much: "To be fair, courts have limited capacity to evaluate the sincerity of religious beliefs. As a result, courts examining religious pretext

course, there are other protected classes besides race. And, regardless, constitutional law cannot rest so comfortably upon assurances of self-restraint.

The dissenting opinion goes further by platforming as one possible solution simply accepting that "our commitment to racial equality must sometimes yield to other values." *Id.* (quotation omitted). But the consequences of its reasoning should give us considerable pause. Taken to its logical conclusion, the dissenting opinion's analysis suggests that the constitutional defect in the arguments of past segregationists was not their effort to subordinate equality to racial discrimination, but their failure to frame that discrimination in sufficiently religious terms.

In essence, the dissenting opinion suggests that segregationists simply made the wrong legal arguments during the Civil Rights Movement. If only they had been clever enough to argue that their racist views were rooted in religious belief that was protected by the First Amendment, they could have successfully argued that the government could not "interfere with, much less declare illegal" *any* race-based decisions by a religious organization. *Id.* at 87–88.

Our law took another course. Only a few years after the enactment of the Civil Rights Act of 1964, the Supreme Court found a religious objection to Title II of that Act "patently frivolous." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam) (addressing the "defendants' contention that the Act was invalid because it

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must defer to religious organizations." Diss. Op. at 143–44 (citation omitted). What it would look like to "examine" whether an organization's claim of a religious motivation is pretextual while "deferring" to that very organization on that very question eludes me.

'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion'").

II.

Finally, the dissenting opinion suggests that this concurring opinion speaks with unusual passion. Diss. Op. at 156. Surely, it does. There are subjects on which judicial candor is not a defect, and clarity is not an excess.

The principles implicated here are not abstractions. Even the best revisers of history cannot whitewash the historical fact that religious faith and racial discrimination have occupied consequential, and conflicting, places in the American experience. For example, even today, there are those who were reared in the rural South and educated in a system that remained segregated for many years in defiance of *Brown v. Board of Education*. The consequences of discrimination for them require no historical imagination. They are living witnesses that constitutional promises do not execute themselves. And they know well how discrimination can shelter institutions, customs, and convictions that seem impregnable in their own time, and how difficult the work of vindicating equal citizenship can be even when the courthouse doors remain open.

Nor does religious faith require abstraction. These are they who have given a lifetime of devotion to the church by shepherding generations of new believers. Their own religious experiences teach something equally important: Religious liberty is among our Nation's most precious inheritances. Faith sustains communities, orders lives, comforts the afflicted, and calls believers to obligations that transcend the commands of the State.

Both truths deserve respect. Neither requires the sacrifice of the other. Those experiences give urgency to refute any attempts to place categories of discriminatory conduct beyond meaningful judicial scrutiny merely because religious conviction is invoked as a defense. American history teaches, with painful clarity, how difficult it is to uproot discrimination even when the Constitution and the courts stand firmly against it.

For that reason, selective appeals to history provide no reason to make that task harder by withdrawing judicial scrutiny. They provide no warrant for sanitizing the experience of those whom discrimination has burdened. Nor can they erase the role that religious conviction has sometimes played in defending practices that the Constitution and our laws ultimately rejected. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 627 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (Wynn, J., concurring) ("Discrimination like that faced [here] has reared its ugly head throughout American history. Yet, for most Americans, time has rendered it an embarrassment to the legacies of the individuals inflicting it.").

And to be clear, judges do not arrive at the courthouse stripped of memory, experience, faith, or judgment. Justice Scalia recognized as much when he proclaimed that no judge ascends to the bench as a "*tabula rasa*." *Republican Party of Minn. v. White*, 536 U.S. 765, 778 (2002). Candidly, he observed that if even such a thing were possible, "it would hardly be desirable to do so." *Id.* Judicial impartiality requires fidelity to law. It does not require amnesia.

Thus, the judicial obligation is not to pretend that experience does not exist. It is to ensure that experience does not displace law. A judge may know from faith the profound

importance of religious liberty and know from lived experience the indignity and injury of discrimination. Those understandings do not dictate the legal answer. But neither must be forgotten when the law itself requires courts to reconcile two enduring constitutional commitments.

And that is precisely what is at stake here.

On one side stands religious liberty—the right of religious institutions to preserve their faith, proclaim their doctrine, and select those entrusted with carrying out their spiritual mission. On the other stands an equally fundamental promise: that the law will not consign some Americans to lesser citizenship because of who they are. The Constitution does not permit courts to treat either commitment casually.

This conflict is not new. It did not begin with *Bostock*, nor with the Nation's more recent recognition of the rights of LGBTQ+ Americans. From the earliest antidiscrimination laws, courts have confronted claims that sincere religious conviction should excuse conduct otherwise prohibited by laws protecting equal citizenship. The difficult task has always been to respect religious freedom without converting that freedom into an unlimited license to impose legally cognizable harm upon others.

The Supreme Court has supplied the governing framework for performing that task here. Title VII contains an exemption for religious organizations. The Constitution, as interpreted by the Supreme Court, recognizes the ministerial exception. Those protections are substantial because religious autonomy is substantial. But they are not boundless merely because the beliefs asserted are sincere. No, their boundaries are determined by law, not by judicial preference and not by a selective account of history.

History deserves better than that. So does religious liberty. And so does the constitutional promise of equality.

The dissenting opinion's approach falters because it offers neither a persuasive historical foundation nor a workable limiting principle. Its selective history cannot bear the doctrinal weight placed upon it. And its reasoning threatens to transform carefully defined protections for religious autonomy into something broader: a principle under which the invocation of religious belief itself substantially diminishes the force of generally applicable protections against discrimination.

Neither precedent nor history commands that result.

The law instead requires the more disciplined course reflected in the majority opinion: respect religious liberty fully, enforce the protections that the Constitution and Congress have provided, and at the same time refuse to diminish the law's protections against discrimination beyond the boundaries those protections establish.

That course honors faith without subordinating equality. And it protects equality without denigrating faith. Most importantly, it follows the law.

With respect to my good friend in dissent, I believe that the dissenting opinion's historical premise is mistaken and that its proposed approach supplies no satisfactory limiting principle. Accordingly, I join the well-reasoned majority opinion in full.

QUATTLEBAUM, Circuit Judge, dissenting:

Rooted in the text, history and tradition of the First Amendment, the church autonomy doctrine prevents courts from reviewing a religious organization's conduct based on its faith, doctrine or governance. John Doe's lawsuit against Catholic Relief Services (CRS) asks the federal courts to do just that.

CRS, which everyone agrees is a religious organization, believes same-sex marriage is wrong. Doe, who is married to a man, worked for CRS. Because endorsing Doe's same-sex marriage offends its deeply held religious beliefs, CRS was unwilling to provide him the spousal benefits that it would provide if he were married to a woman. Doe does not dispute the sincerity or religious character of that decision. But he nevertheless claims CRS discriminated against him on the basis of sex in violation of Title VII, Maryland's Fair Employment Practices Act (MFEPA) and the Equal Pay Act (EPA). Under those statutes, Doe asks the courts to declare illegal what CRS believes to be compelled by God.

CRS insists that the church autonomy doctrine requires courts to abstain from interfering with employment decisions based on religion. It also argues that if courts do not abstain, the application of these statutes to religion-based decisions violates the First Amendment because their exceptions favor secular interests over religious ones. And CRS maintains that in addition to its constitutional arguments, employment decisions based on religion are statutorily exempted from Title VII.

In a decision stunningly restrictive of religious freedom, the majority sides with Doe. As to the church autonomy doctrine, it contends that Doe's case does not require

deciding whether Catholic doctrine is true, important or correctly applied. To resolve Doe's claim, the majority insists we must only decide if CRS's position discriminates on the basis of sex. But that ignores the reality of its decision. Shrouding a claim or a judicial analysis in a secular label does not change the fact that the majority declares an employment decision based on a sincerely held religious belief illegal. Make no mistake, the majority greenlights the authority of federal courts to prioritize secular law over religious freedom. To put a finer point on it, under the majority's view, a church cannot set its terms of employment based on its religious tenets if those tenets conflict with the latest judicial interpretation of anti-discrimination laws. And by the same token, a church cannot hire only those who accept its sacred doctrine if the government has passed a law declaring, or the courts have interpreted a law to declare, that the doctrine is discriminatory. Worse than that, the majority announces a rule today that means churches cannot decide to hire only their own members to ensure that their mission and beliefs will be articulated with one voice. Instead, if they need to hire employees, churches can be required to hire or retain employees who reject their teaching.

This turns the First Amendment on its head. The text of the Constitution prohibits the government from making laws that limit the free exercise of religion. Taking the opposite approach, the majority permits the freedom to exercise religion only to the extent it does not conflict with the laws the government makes.

In an increasingly secular American society, that may not seem like a big deal. But to the Founders, it would have been unthinkable. That's because the original public meaning of the First Amendment's Religion Clauses does not allow courts to interfere

with, much less declare illegal, decisions based on a church or religious organization's theological beliefs. And that meaning was fixed at the Founding. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 479 (2023). It does not, indeed, cannot, change with cultural drift. Absent amendment, judges must enforce the Constitution's original meaning.

The majority's view of Title VII, the MFEPA and the EPA also violates the First Amendment in another way. Recent Supreme Court precedent makes clear that regulations that burden the exercise of religion must satisfy strict scrutiny if their exceptions favor secular interests over religious ones. The majority interprets the statutes to do just that, and none are narrowly tailored to a compelling governmental interest.

Finally, the majority misinterprets Title VII. The statute expressly excludes employment decisions based on religion. In determining that provision does not apply to Doe's claims, the majority judicially rewrites the words Congress passed.

Respectfully, I dissent.

I. Factual and Procedural Background

CRS is a humanitarian agency founded and governed by the United States Conference of Catholic Bishops. Its mission is to assist the poor and vulnerable overseas. To aid in this work, CRS launched a computer system known as "Gateway" to improve the administrative management of CRS's operations. J.A. 2792.

In 2016, after meeting at a job fair, a CRS recruiter contacted John Doe about a potential opportunity with the agency to work with the developing program. After an

interview process, the recruiter offered Doe an entry-level Gateway program data analyst position. The recruiter presented him with several documents regarding employment benefits. One of the documents was an insurance plan summary, which outlined health coverage for CRS employees and their spouses. The plan stated that dependents were covered for health insurance purposes. It listed a dependent as a "wife or husband," without any reference to gender. J.A.14, 352. During a call with the recruiter, Doe asked if his husband would be covered by CRS's spousal health insurance package. The recruiter said yes— "all dependents are covered." J.A. 14, 3037. Doe accepted the position and enrolled his husband in CRS's spousal benefits program.

At first, Doe and his husband were both covered by the health insurance policy and even used their coverage from time to time. But about five months after he was hired, CRS discovered that Doe's spouse had been erroneously enrolled in the benefits program. That's because, despite what Doe had been told, CRS does not provide benefits to spouses of same-sex marriages. CRS adheres to the Catholic Church's religious teaching that marriage is the union of one man and one woman. Consistent with that teaching, CRS holds the religious conviction that extending spousal benefits to an employee in a same-sex marriage would constitute formal cooperation with conduct that Catholic doctrine condemns. As a result, CRS informed Doe that it would have to terminate his spousal benefits.

Even so, CRS officials and Doe discussed ways to resolve the situation. Ultimately, CRS offered Doe a three-part solution to address the error—transitioning Doe's spouse to CRS's COBRA-like insurance alternative, extending the COBRA window for additional

coverage and giving Doe a raise to cover most of his out-of-pocket costs for obtaining alternative coverage. Doe declined this offer. CRS then terminated his spousal benefits but still increased his salary.

In response, Doe sued in federal district court asserting a variety of federal and state law claims. Ultimately, the case was narrowed to three legal theories—sex discrimination in violation of Title VII, and sexual orientation discrimination in violation of both the MFEPA and the EPA. The district court denied CRS's motions to dismiss those claims, rejecting its arguments about the church autonomy doctrine, the exemption for religious organizations under Title VII and the MFEPA, and the First Amendment's Free Exercise Clause. Later, after discovery, the district court denied CRS's motion for summary judgment on those same grounds.[1] And it granted Doe's motion for summary judgment on liability as to the Title VII and EPA claims.

With respect to the MFEPA claim, the district court certified to the Supreme Court of Maryland the question of whether the religious employer exemption in the statute applied to any work being done for the employer or only to religious activities. The Maryland court held that for the exemption to apply, "the employee's duties must directly further the core mission(s)—religious or secular, or both—of the religious entity." *Doe v. Cath. Relief Servs.*, 300 A.3d 116, 136 (Md. 2023).[2]

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[1] CRS's motions to dismiss and for summary judgment asserted other issues but, since they are not pertinent to this appeal, I do not discuss them in this opinion.

[2] "This [discrimination in employment subtitle] does not apply to . . . (2) a religious corporation, association, educational institution, or society with respect to the employment

The district court then conducted a bench trial to determine whether Doe's duties furthered CRS's core mission. Doe held several positions while employed at CRS. By the time he voluntarily resigned, Doe was managing the Gateway team. The court concluded that none of Doe's roles were ministerial or explicitly religious in nature. It also concluded that Doe's work did not directly further CRS's core mission. In reaching this conclusion, the court reasoned that Doe never provided direct humanitarian relief in his roles, never worked directly with donors and never pursued funding opportunities. *Id.* As a result, the district court ruled that the MFEPA's exemption for religious employers did not apply to Doe's claim against CRS.

The district court then entered a final judgment in Doe's favor and awarded him $60,000 in compensatory damages, based on the parties' stipulation. CRS appeals from the final judgment as well as the earlier entry of summary judgment in Doe's favor on his Title VII and EPA claims.

II. Church Autonomy Doctrine

CRS first contends that Doe's claims should be dismissed because the church autonomy doctrine requires us to stay out of Doe's dispute with CRS over spousal benefits.[3] Before getting to the merits of that argument, understanding the history of

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of individuals of a particular religion, sexual orientation, gender identity, or military status to perform work connected with the activities of the religious entity." Md. Code Ann., State Gov't § 20-604(2).

[3] Normally, it'd be prudent to address statutory challenges before constitutional ones. That's because when possible, we avoid constitutional questions if answering statutory ones would resolve the disputes before us. *Billard v. Charlotte Cath. High Sch.*,

disputes between church and state over the role of the government in religious affairs provides important background.

A. Historical Battle Over Church Autonomy

"From time immemorial," the church and the state have disputed "[t]he line between religious and secular authority—between the 'two kingdoms,' 'two swords,' or 'two spheres.'" Branton J. Nestor, *Judicial Power and Church Autonomy*, 100 NOTRE DAME L. REV. 1899, 1907 (2025). Certainly, it is a concern at least as old as the church itself. *See Luke* 20:25 (King James) ("And he said unto them, Render therefore unto Caesar the things which be Caesar's, and unto God the things which be God's.").[4]

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101 F.4th 316, 327 (4th Cir. 2024). But here, the Maryland Supreme Court interpreted MFEPA's religious employer exception to only apply if "the employee's duties must directly further the core mission(s)—religious or secular, or both—of the religious entity." *Doe*, 300 A.3d at 136. While I find that interpretation tough to square with the text of the statute, federal courts should adhere to state court interpretations of state statutes. *Moshoures v. City of N. Myrtle Beach*, 131 F.4th 158, 162 (4th Cir. 2025). As a result, regardless of how we resolve CRS's challenge to the district court's decision on Doe's Title VII and EPA claims, that interpretation by the Maryland court, which I think renders the MFEPA unconstitutional under the First Amendment, will remain. And since we have to review that constitutional question, it makes sense to tackle the constitutional issues first.

[4] References here and elsewhere in this opinion to conflicts between the Christian church and governments should not be construed to suggest that the church autonomy applies only to the Christian faith. The church autonomy doctrine is not limited to those of any particular religion. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 547 (1993) (finding that city's ordinances dealing with killing animals, animal cruelty and sacrifice violated the First Amendment in a challenge brought by church congregation practicing the Santeria religion and a ritual of animal sacrifice).

Since then, rulers have sought to select the church's clergy, determine its doctrine, restrict its form of worship and even police its internal discipline. At times, the church has resisted. And when it has, at times it has been successful. But even then, the success has been fleeting. The Founders inherited this historical record. Some had read it. More of their ancestors had lived it. And in the colonies, they did too. So, when they came to draft the Bill of Rights, the Founders sought to protect a right to exercise religious freedom—a right they believed was established by their Creator—and to keep government out of the religious realm.

1. Roman Empire

During the Roman Empire, the state persecuted early Christians. *Church and State through the Centuries: A Collection of Historic Documents with Commentaries* 1 (Sidney Z. Ehler & John B. Morrall ed. & trans., 1967). That changed, however, when Constantine was emperor. In 313 A.D., he issued the Edict of Milan, which allowed Christians and practitioners of other religions to observe their religious preferences. *Galerius and Constantine: Edicts of Toleration 311/313 AD,* Fordham Univ., https://perma.cc/VJ9F-QUG8; Chad Marzen, *The Holy See's Worldwide Role and International Human Rights: Solely Symbolic?*, 86 U. DET. MERCY L. REV. 659, 662–63 (2009); *see also* J. Marcellus Kik, *Church and State: The Story of Two Kingdoms* 40 (1963) (noting that the edict intended that all religions were to be tolerated within the Empire with a special preference granted to Christianity; although at that time, Christianity was not established as the state religion). Religious freedom became the policy in the Empire. Karen Jordan, *Church and*

State: The Origins and Implications of Separate Jurisdictional Spheres, 11 RUTGERS J. L. & RELIGION 61, 77 (2009).

But the edict's policy of religious toleration was short-lived. Persecution gave way to toleration which gave way to establishment. By 380, Emperor Theodosius I and his co-rulers established Christianity as the official religion in the Roman Empire. Kik, *supra*, at 45; Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. Rev. 1385, 1391 (2004) ("Emperor Constantine's directive to tolerate Christianity, which was soon followed by instances of official favoritism, eventually gave way to Emperor Theodosius I's edicts in 380-381 establishing the Christian church to the exclusion of all other religions."). Predictably, this "[c]ommingling of [k]ingdoms," opened the door to state officials "employing State power to gain ascendancy within the Church." Kik, *supra*, at 47.

2. European Middle Ages

Despite its favored status, the church resisted. Ecclesiastical leaders spoke out to maintain independence. *Id.* at 48. Notably, in 494, shortly after the fall of the Western Empire, Pope Gelasius I wrote to the Byzantine Emperor Anastasius I in words that have been called the "Magna Carta of the whole freedom of the Church in medieval times." Richard W. Garnett & John M. Robinson, Hosanna-Tabor*, Religious Freedom, and the Constitutional Structure*, 2012 CATO SUP. CT. REV. 307, 311 (2012) (citation modified). "There are two powers, august Emperor," wrote Gelasius, "by which this world is chiefly ruled, namely, the sacred authority of the priests and the royal power." *Gelasius I on Spiritual and Temporal Power*, *494*, Fordham Univ., https://perma.cc/6CAB-69QQ. The

Pope continued, "[y]ou are also aware, dear son, that while you are permitted honorably to rule over human kind, yet in things divine you bow your head humbly before the leaders of the clergy and await from their hands the means of your salvation." *Id.* Pope Gelasius reminded the emperor that "he [was] just a member of the Church, like any other layman, and, therefore, that he ha[d] to obey priests in matters divine," while the church would "be obedient . . . to secular legislation in material affairs." Sidney Z. Ehler, *Twenty Centuries of Church and State: A Survey of Their Relations in Past and Present* 16 (1957); Paul Horwitz, *Freedom of the Church Without Romance*, 21 J. CONTEMP. LEGAL ISSUES 59, 68 (2013) ("Gelasius, in short, appeared to argue for a dualist approach to church-state relations.").

Gelasius' letter did not convince Middle Age political leaders to protect religious liberty. Throughout the Middle Ages, "church and state struggled for dominance" in conflicts over land and power. Michael W. McConnell, *Non-State Governance*, 2010 UTAH L. REV. 7, 8 (2010); Ehler, *supra,* 23–25. And even after Gelasius' letter, "political, civil, royal, and secular authorities, such as there were, continued to assert and exercise control over matters of church governance, including the appointment of ministers." Garnett & Robinson, *supra*, at 311.

This conflict between civic governing authorities and the church came to a head in 11th and 12th centuries during the Investiture Crisis. *Id.*; William Y. Elliott & Neil A. McDonald, *Western Political Heritage* 322 (1949). The question was who would appoint Catholic bishops—monarchs or popes? Thomas C. Berg, *Freedom in Serving Others: Arguments and Sources for Religious Institutional Freedom*, 19 U. ST. THOMAS L.J. 33,

38 (2023). Here, the church flexed its muscles. In 1076, Pope Gregory VII dethroned and excommunicated German king and emperor-to-be Henry IV. 5 *The Great Events by Famous Historians: A Comprehensive and Readable Account of the World's History, Emphasizing the More Important Events, and Presenting These as Complete Narratives in the Master-Words of the Most Eminent Historians* 236 (Rossiter Johnson et al. eds. 1905); Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 179 (2011). Desperate for papal support, the King trekked through the Alps to reach the fortress of Canossa, seeking an audience with the Pope. Berg, *supra,* at 179. Even then, the Pope made the King wait three days before seeing him. 5 *The Great Events by Famous Historians*, *supra*, at 239. Ultimately, the Pope suspended the King's sentence, but later conflict broke out again, resulting in a second sentence in 1080. *Church and State through the Centuries*, *supra*, at 39–40.

The Concordat of Worms, issued in 1122 between Pope Calixtus II and Emperor Henry V, resolved this conflict. This extended power to the Catholic Church to decide its officials and canonical principles. *Id.* at 48–49.[5] A period of religious independence followed.

[5] The Concordat provided, "In the name of the holy and indivisible Trinity, I, Henry, by the grace of God august emperor of the Romans, for the love of God and of the holy Roman church and of our master pope Calixtus, and for the healing of my soul, do remit to God, and to the holy apostles of God, Peter and Paul, and to the holy catholic church, all investiture through ring and staff; and do grant that in all the churches that are in my kingdom or empire there may be canonical election and free consecration." Documents Relating to the War of the Investitures Concordat of Worms; September 23,

3. Protestant Reformation

But to the extent the various states of Western Europe accepted the independence of the Catholic Church in its own sphere of influence, Martin Luther turned the relationship of the church and state upside down when he nailed his ninety-five theses to the door of Castle Church in Wittenberg, Germany in 1517. Esbeck, *supra*, at 1401. The Protestant Reformation that followed eventually broke up Rome's "ecclesiastical monopoly" over Europe. *Id.* at 1402. It also ushered in a series of wars between Catholics and various Protestant groups. *See id.* at 1402–04. In 1555, the conflict between Lutherans and Catholics temporarily subsided under the Peace of Augsburg, which established the principle of *cuius regio, eius religio*—meaning "whose rule, his religion." *Id.* at 1402. In other words, after the Peace of Augsburg, each prince within the Holy Roman Empire had authority to elect between Lutheranism and Catholicism as the official faith of his realm. *Id.;* John W. Burgess, *The Sanctity of Law: In What Does It Consist? The Story of Man's Attainment of Law and Order from Roman Times to the Present* 102 (1928).

As the Reformation and the resulting religious wars continued, new Protestant movements challenged the existing relationship between church and state. *See* Esbeck, *supra*, at 1402–04. Reformer John Calvin envisioned a system in which church and state each had separate responsibilities and could not claim supremacy over each other. *Id.* at 1402. And in 1527, a group of Anabaptists proposed their conception of "the true church

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1122, https://perma.cc/325P-TRSC; *see also* Thomas C. Berg et. al., Religious Freedom, Church-State Separation, and the Ministerial Exception, 106 NW. U.L. REV. COLLOQUY 175, 179–80 (2011).

[being] a free association of believers, faith [being] a free gift of God, and that civil authorities exceed rightful authority when they champion the word of God (or their version of it) by use of force." *Id.* at 1402. Eventually, these religious wars came to a close with the Treaty of Westphalia in 1648, which recognized not only Catholicism but also Lutheranism and Calvinism. Marcílio Toscano Franca Filho, *Westphalia: A Paradigm? A Dialogue Between Law, Art and Philosophy of Science*, 8 GERMAN L. J. 955, 964 (2007). Even so, after Westphalia, the state still maintained authority over religion, despite the presence of religious dissenters within each state. *See* Esbeck, *supra*, at 1403.

4. England

Like western continental Europe, England had originally been Christianized by Rome. Rome's withdrawal from England around 410 ushered in the Anglo-Saxon period. Goldwin Albert Smith, *A Constitutional and Legal History of England* 1 (1955). During that approximately six-century period, multiple kingdoms and Germanic tribes (Angles, Saxons and Jutes) migrated and settled in the Roman British province. *Id.* at 1–2. Before the pagan settlers invaded, the Roman British province was essentially Christian. *Id*. at 2. After the invasion, Anglo-Saxon kings emerged, formally selected from particular families *Id.* at 6. These kings were viewed as "hedged with divinity, first in a pagan and then in a Christian sense." *Id*. Indeed, Rome had sought to convert and evangelize the pagan Anglo-Saxons through mission trips sent under the direction of Pope Gregory I. Felix Makower, *The Constitutional History and Constitution of the Church of England* 2 (1895). And while several Saxon kings converted to Christianity, "Christianity in England . . . again had to struggle for existence" into the ninth century. *Id*. at 6.

But there were brief moments of religious independence in England during this historical era. "[D]uring the reign of King Edgar the Peaceful (959–975), the Church required all disputes between clergymen to be addressed before bishops and not secular courts." *McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc.*, 980 F.3d 1066, 1076 (5th Cir. 2020) (Oldham, J., dissenting) (noting that spiritual supervisors retained the competence to discipline clergy and that civil courts could not intervene in church matters). The church insisted that "the clergy should be wholly freed from secular jurisdiction." Makower, *supra*, at 390. But "[h]ow far th[at] claim was in practice made good, [was] no longer with certainty to be ascertained." *Id.*

The Norman Conquest of 1066 also produced some religious independence in England, at least on paper. Between 1072 and 1076, William the Conqueror issued an ordinance that created separate ecclesiastical courts and removed bishops from the secular courts. Leonard W. Levy, *Origins of the Fifth Amendment* 43 (1968); Colin Morris, *William I and the Church Courts*, 82 THE ENG. HIST. REV. 449, 449 (1967).[6]

[6] The text of the ordinance said in relevant part:

> Wherefore I command, and by royal authority decree, that no bishop or archdeacon shall any longer hold, in the hundred court, pleas pertaining to the episcopal laws, nor shall they bring before the judgment of secular men any case which pertains to the rule of souls; but whoever shall be summoned, according to the episcopal laws, in any case or for any fault, shall come to the place which the bishop shall choose or name for this purpose, and shall there answer in his case or for his fault, and shall perform his law before God and his bishop not according to the hundred court, but according to the canons and the episcopal laws.

But in the centuries that followed, the crown backtracked. What was written in the ordinance didn't match what happened in real life. Makower, *supra*, at 392–94. King William I granted clergy in England relief from the Pope's celibacy commands. E.F. Churchill, *The Dispensing Power of the Crown in Ecclesiastical Affairs*, 38 L.Q. REV. 297, 298 (1922). And while King Henry I begrudgingly consented to the papal decree on celibacy, he also granted licenses to non-compliant married clergy who were willing to pay for his protection. *Id.*

When the church resisted the crown's control, the crown responded with force. A famous example involved Thomas Becket, once King Henry II's close friend and advisor. After the king appointed Becket the Archbishop of Canterbury, Becket publicly rejected the crown's power to elect bishops and the jurisdiction of the royal courts to criminally punish church leaders. Esbeck, *supra*, at 1406; John Noonan & Edward Gaffney, *Religious Freedom: History, Cases and Other Materials on the Interaction of Religion and Government* 68 (2001); Leo Pfeffer, *Church State and Freedom* 18 (rev. ed. 1967). Angered by Becket, Henry allegedly responded, "Of the cowards who eat my bread, is there not one who will free me from this turbulent priest." 6 *The Great Events by Famous Historians: A Comprehensive and Readable Account of the World's History, Emphasizing the More Important Events, and Presenting These as Complete Narratives in the Master-*

Ordinance of William I, Separating the Spiritual and Temporal Courts, https://perma.cc/Y8U7-QVFR. And by the same token, no "sheriff, or provost, or minister of the king, or any layman concern himself in the matter of laws which pertain to the bishop, nor shall any layman summon another man to judgment apart from the jurisdiction of the bishop." *Id.*

Words of the Most Eminent Historians 25 (Rossiter Johnson et al. eds. 1905). In 1170, King Henry's knights murdered Becket. Esbeck, *supra*, at 1406.

After his death, Becket was considered a martyr "to what he deemed to be his duty, the preservation of the immunities of the Church," 6 *The Great Events by Famous Historians* 27, so much so that Becket's name has been "invoked through the ages whenever the church's autonomy is threatened by the state," Esbeck, *supra*, at 1407.

While it cost him his life, Becket inspired future efforts to preserve church independence. In 1199, Henry II's last surviving son was crowned King John. 2 C. H. S. Stephenson & E. A. Marples, *Law in the Light of History* 112 (1940). Like his predecessor, John fought with the papacy. After he and Pope Innocent III disagreed on who should be the next Archbishop of Canterbury, King John sequestered the church's property. *Id.* at 114. The Pope, in turn, excommunicated King John. *Id.* That dispute, along with other abuses of power, led a "group of rebellious barons" to present the king with demands at Runnymede in 1215. Thomas J. McSweeney, *Appealing Magna Carta*, 2023 U. Chi. L. Rev. Online *1, *4 (2023), https://perma.cc/CQ8U-Z5K8; John Lackland (r. 1199-1216), The Royal Family, https://perma.cc/WW3Q-EXHY. Unable to resist reformers, King John agreed, culminating in Magna Carta. *Id.*

Magna Carta—or in English, Great Charter—generally acknowledged that the king was not above the law and established a number of rights, including the right to religious liberty.[7] J. C. Holt, *Magna Carta,* at 317 (1965).

But once again, words endorsing religious freedom did not result in changes on the ground. Despite Magna Carta's lofty language, the struggle between the crown and the church continued after it was signed. Steven K. Green, *The Mixed Legacy of Magna Carta for American Religious Freedom*, 32 J. L. & RELIGION 207,14 (2017).

The conflicts between church and crown came to a head under the reign of Henry VIII, during a period known as the English Reformation. Henry was married to Catherine of Aragon, his brother's widow. Henry VIII (r.1509-1547), The Royal Family, https://perma.cc/C9SK-HTJL. They had just one surviving child—a girl. *Id.* Henry wanted a male heir. He also wanted to marry Anne Boleyn, the sister of one of his mistresses. *Id.* So, Henry sought an annulment, but the Pope denied his request. *Id.*

[7] "While still celebrated as a fountainhead of limited government and due process of law, it is little appreciated that the Great Charter was the direct result of the church intervening to check the pretensions of state absolutism." Esbeck, *supra*, at 1408. The first clause reads: "1. In the first place have granted to God and by this our present Charter have confirmed, for us and our heirs in perpetuity, that the English church shall be free, and shall have its rights undiminished and its liberties unimpaired; and we wish it thus observed, which is evident from the fact that of our own free will before the quarrel between us and our barons began, we conceded and confirmed by our charter, freedom of elections, which is thought to be of the greatest necessity and importance to the English church, and obtained confirmation of this from the lord pope Innocent III, which we shall observe and wish our heirs to observe in good faith in perpetuity. We have also granted to all the free men of our realm for ourselves and for our heirs for ever, all the liberties written below, to have and hold, them and their heirs from us and our heirs." J. Holt, *Magna Carta*, at 317 (1965).

In response, Henry pressed Parliament to pass a number of acts cutting back on papal power and influence. *Id.*; *see also* W. Cole Durham & Robert Smith, 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 2:5 (2d ed. 2025). These events led to Thomas Cranmer, who had been consecrated as the Archbishop of Canterbury with Henry VIII's support, annulling the King's marriage to Catherine of Aragon in 1533. Esbeck, *supra*, at 1409. The next year, Parliament passed the Act of Supremacy, which abolished papal authority and established the king as the sole head of the Church of England.[8] Bernard Schwartz, *Roots of Freedom: A Constitutional History of England* 96 (1967). Parliament also required "all subjects to disavow papal authority and swear an oath of allegiance to the new queen or be charged with treason." Esbeck, *supra*, at 1409–10. When one of the King's former advisors, Sir Thomas More, refused to repudiate papal authority over the church, he was tried for treason and executed. *Id.* at 1410. Parliament also passed the Acts in Restraint of Annates, which gave the king the power to appoint church officials. Schwartz, *supra*, at 96; Henry Gee & William John Hardy, *Documents Illustrative of English Church History* 201 (1896).

When Henry VIII died, having been married six times, the crown passed to his son from his third wife. This son became King Edward VI in 1547 at the age of nine. *Crown*

[8] Here is part of the actual language: "[T]he king our sovereign lord, his heirs and successors, kings of this realm, shall be taken, accepted, and reputed the only supreme head in earth of the Church of England, called Anglicana Ecclesia; and shall have and enjoy, annexed and united to the imperial crown of this realm, as well the title and style thereof. . . ." Henry Gee & William John Hardy, *Documents Illustrative of English Church History* 244 (1896).

and Parliament in Tudor-Stuart England: A *Documentary Constitutional History, 1485-1714* 71 (Paul L Hughes & Robert F. Fries eds., 1959). Though Edward VI's reign was short, he used his authority to move the Church of England further away from Catholic doctrine and more toward Protestantism. *Id.* at 78. Still, Parliament's First Act of Uniformity of 1549 "established a precedent for denying that the Monarch had a constitutional right to establish a permanent religious settlement" and "thereby perhaps contributed to the eventual destruction of Edward's church by succeeding governments." *Id*. at 78.

After Edward VI's death, his eldest half-sister Mary, the daughter of Henry VIII and Catherine of Aragon, became queen. Esbeck, *supra*, at 1410. Mary, a Catholic, "was determined to lead England back into the Roman fold." *Id.* In a sharp reversal of her father and brother's policies, and earning her "Bloody Mary" nickname, Mary had nearly 300 Protestants burned at the stake, including Cranmer. *Id.;*10 *Great Events by Famous Historians* 8 (Rossiter Johnson et al. eds. 1905) ("Queen Mary was devoted to her religion. . . . [t]he fires which had burned in Henry's time were rekindled again, but now for the torture of Protestants, bishops, and men of mark."). She also abandoned the title of Supreme Head of the Church, reintroducing both Roman Catholic bishops and monastic orders. Mary I (r. 1553-1558), The Royal Family, https://perma.cc/93UP-AYSF.

England's violent rejection of Protestantism would not last long. After Mary's death in 1558, her half-sister, Elizabeth I, daughter of Henry VIII and Anne Boleyn, succeeded her as Queen. Esbeck, *supra,* at 1411. Parliament soon passed a second Act of Supremacy to re-sever ties with papal authority and to, once again, declare the queen as

supreme governor of the church. *Id.*; Stephen J. Greenblatt, *Elizabeth I*, Britannica (May 22, 2026), https://perma.cc/7XJL-B6E6.

But, unlike her half-brother Edward VI, and to the dismay of a growing Protestant group known as the Puritans, Elizabeth I did not fully embrace Reformed Protestantism. Esbeck, *supra*, at 1411. During her reign, the Church of England was established. Elizabeth I (r.1558-1603), The Royal Family, https://perma.cc/PPF8-5BHT. Its Anglican tradition embraced aspects of both Roman Catholicism and Protestantism. *Id*.

While Elizabeth I believed the church should be governed by bishops she appointed, the Puritans believed the church should be governed independently from the crown by the people assembled as a body of believers. Esbeck, *supra*, at 1411. This disagreement led many Puritans to leave the Church of England. *Id.*

When Elizabeth I died in 1603, the crown passed from the Tudor line to the House of Stuart. Esbeck, *supra*, at 1412. Specifically, the English crown passed to King James VI of Scotland, who became, in turn, King James I of England. *See id.* The Stuarts claimed authority through the divine right concept. Puritans encouraged Parliament to reject this claim "of divinely inspired sovereignty and demanded equality with the Crown in matters of national policy and control of the realm." *Crown and Parliament*, *supra*, at 145.

After Charles I—James I's son—became king, he attempted to reign as an absolute monarch believing in the "immutable quality of his divine right to rule." *Id.* at 189. He also attempted to rule without Parliament and to impose Anglican worship in Scotland. Esbeck, supra, at 1412; *see also Crown and Parliament*, *supra*, at 193–94. Charles I's conflicts with Parliament, especially with the Puritans, led to the English Civil Wars and,

eventually, the king's execution. 11 *Great Events by Famous Historians: A Comprehensive and Readable Account of the World's History, Emphasizing the More Important Events, and Presenting These as Complete Narratives in the Master-Words of the Most Eminent Historians* 311 (Rossiter Johnson et al. eds. 1905).

The brief period after Charles I's execution was known as the Interregnum—meaning between the reigns. During that time England was led by Oliver Cromwell, a Puritan, as Lord Protector. Jesse Franklin Brumbaugh, *Legal and Public Speaking: A Treatise on the Art of Public Speaking, with Copious Illustrations and Models of Public Utterances and Jury Speeches* 349 (1932) (recounting Cromwell's speech at the opening of the First Protective Parliament after the beheading of the King).

In 1660, the Interregnum ended with the Restoration of the Stuarts, in which Charles I's son, Charles II, returned as king. Esbeck, *supra*, at 1412–13. Schwartz, *supra*, at 178–79. Charles II promoted "policies of royal absolutism in both church and state," Charles II (r. 1660-1685), The Royal Family, https://perma.cc/MG4Q-UXT7, and Parliament gave him what he wanted. In 1662, Parliament approved the Book of Common Prayer "standardizing liturgical doctrine." Green, *supra*, at 214. It passed another Act of Uniformity that same year which required ministers to read openly from the Book of Common Prayer and declare assent to its "words and no other." William Keatinge Clay, *The Book of Common Prayer Illustrated* 228 (1841). Failure to comply resulted in a minister being "deprived of all his spiritual promotions." *Id*. Beyond that, some non-conformists were put in jail. One was John Bunyan, the Puritan preacher who refused to conform to the Church of England. While in jail, he wrote parts of the famous novel *The*

Pilgrim's Progress. Esbeck, *supra* at 1413. During this time "the state control[led] the church by determining doctrine and assigning offices." Green, *supra*, at 214; John Coffey, *Persecution and Toleration in Protestant England, 1558-1689* 11 (2000) ("For most of the period between 1558 and 1689, the English state can be described as a persecuting state . . . .It was committed to securing religious uniformity, and to achieve that end it was prepared to employ coercive measures.").

After Charles II died, he was succeeded by his younger brother, James II. Esbeck, *supra* at 1413. James II, unlike his brother and his father, was a devout Catholic convert. James II (r.1685-1688), The Royal Family https://perma.cc/JQ3A-UGTK. In 1688, his Catholic wife birthed a son, and fear spread about a possible Roman Catholic dynasty. Esbeck, *supra*, at 1413. To prevent this from happening and to bolster the growing authority of Parliament, opponents deposed James II igniting the Glorious Revolution. *Id.* James II was replaced by his daughter, Mary, and her husband, William of Orange. *Id.*; Alice Ristroph, *The Second Amendment in A Carceral State*, 116 NW. U. L. REV. 203, 228 (2021); William III (r. 1689-1702) and Mary II (r. 1689-1694), The Royal Family, https://perma.cc/K7YV-TS2J.

In taking the throne, William and Mary accepted the Declaration of Rights. William III (r. 1689-1702) and Mary II (r. 1689-1694), The Royal Family, https://perma.cc/K7YV-TS2J. After that, Parliament passed the Act of Toleration in 1689, which exempted non-conforming Protestants from penalties for dissenting from the Church of England, so long as they pledged loyalty to the crown. Toleration Act 1688, The Nat'l Archives, https://perma.cc/6CE9-9EGX; Goldwin Smith, *A Constitutional and Legal History of*

England 368 (1955) ("The Toleration Act of 1689 allowed all but Roman Catholics and Unitarians to worship in their own way."); *see also* Richard Dunn, *The Age of Religious Wars, 1559-1689* 171 (1970) ("In religion, the Toleration Act of 1689 permitted nonconformists to worship publicly, though in comparison, with the Anglicans they remained second-class citizens."); Esbeck, *supra*, at 1413. Under that act, nonconformist churches "who could not bring themselves to accept the doctrine, discipline, and ritual accepted by the majority of the nation were allowed to form separate churches, protected by the law." F. C. Montague, *The Elements of English Constitutional History from the Earliest Times* 151 (1938).

5. American Colonies

As the conflict between the church and crown raged in England, many colonists sought religious freedom across the Atlantic. Cong. Rsch. Serv., *The Constitution of the United States of America: Analysis and Interpretation* 1309 (Jeanne M. Dennis ed., 2023) (recognizing that "the colonists left a European society in which church and state were closely interconnected"). In 1620, the pilgrims, "trusting in God and in themselves, made ready for their departure" to America. 1 George Bancroft, *History of the United States of America, from the Discovery of the Continent* (rev.) 205 (1891). Likewise, the puritans fled to New England to escape the control of the national church and decide for themselves who their ministers would be and how they would worship. Mark G. Valencia, *Take Care of Me When I Am Dead: An Examination of American Church-State Development and the Future of American Religious Liberty*, 49 SMU L. REV. 1579, 1585 (1996).

Even so, in America, these colonists' opposition to the religious persecution in England did not always translate into tolerance for different faiths. While many early colonists rejected the Church of England, they privileged their faith over others. The New England Puritans, for example, had a "vision [that] allowed no room for religious pluralism or even for toleration." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1422 (1990); *see also* Esbeck, *supra*, at 1415 ("The primary reason [the Puritans] had left England was to worship free of high-church Anglicanism. . . .Their aim was not religious freedom for all, but freedom to follow God as they understood Him.").

As more colonists came to America, the approach to religion varied from colony to colony. New England colonies generally followed Congregationalist establishments steeped in the Puritan beliefs, and the laws in those colonies preferred those churches over others. Sanford Cobb, *The Rise of Religious Liberty in America: A History* 70 (1902); 1 Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* 1–2 (2d ed., 1994). Virginia, the Carolinas and other southern colonies followed the Church of England. Cobb, *supra*, at 71. And in those colonies, the Church of England "enjoyed the privileges of an exclusive legal union with the state," Levy, *The Establishment Clause*, *supra*, at 1, and state aid was initially given to religion, *id.* at 53.

Other colonies provided more religious freedom. New York and New Jersey contained colonists of a variety of beliefs, including those who followed the Church of England. *See* Cobb, *supra*, at 71, 338, 408. This diversity of beliefs eventually led to more religious toleration. *See* Esbeck, *supra*, at 1468 ("Religious freedom in New Jersey was

forged by a diverse array of religious traditions . . . [such that its] 'melting pot' environment had produced a spirit of toleration and liberty by the time independence was declared."). Quaker William Penn established Pennsylvania and Delaware with a "devot[ion] to the cause of religious liberty and [a] desire[] to make for it a secure abiding place." Cobb, *supra*, at 440. To that end, the charter of those colonies contained no clause of church establishment. *Id*. at 441. Rhode Island from the very beginning "imposed no religious restrictions whatever upon its citizenship." Cobb, *supra*, at 71; *see also Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 166 (Richard L. Perry ed., 1959). And for its part, Maryland embraced tolerance for Roman Catholicism, Cobb, *supra*, at 73, although the crown later established the Church of England there, Esbeck, *supra*, at 1415.

In sum, without a uniform church, the "American colonies surely served as laboratories for the exploration of different approaches to religion and government," with a range of church-state relations emerging across the new states. McConnell, *The Origins*, *supra*, at 1421. But even with those varied approaches to religion, for most early colonists, the "choice of religious practice remained narrow." Patrick N. Leduc, *Christianity and the Framers: The True Intent of the Establishment Clause*, 5 LIBERTY U. L. REV. 201, 215 (2011).

Things began to change with the First Great Awakening. Peaking in the 1740s, evangelical preachers like Jonathan Edwards and George Whitefield led a period of religious revival. Esbeck, *supra*, at 1417. Religious conversions sparked church growth. *Id.* at 1416–17. What's more, new denominations emerged. Congregationalists, Anglicans

and Quakers began to lose membership, and influence, to Baptists, Methodists and Presbyterians. Leduc, *supra*, at 216; Glenn A. Moots, *Religious Exercise and Establishment in Early America, in The Cambridge Companion to the First Amendment and Religious Liberty* 101, 136 (Michael D. Breidenbach & Owen Anderson, eds. 2020).

But the impact of the Great Awakening wasn't just that the colonies became more religious, although that certainly occurred. Instead, the revivals of the Great Awakening "gave colonial piety a distinctive American cast." Mark A. Noll, *A History of Christianity in the United States and Canada* 73 (2d ed.2019). Consider Whitefield. During the fall of 1740, Whitefield preached outdoors instead of in traditional churches, addressing "crowds of up to eight thousand people nearly every day for over a month." *Id.* at 81. In doing so, he reached the "common people neglected by the established churches." *Id.* His message was one of "heartfelt conversion" of a personal nature, *id.* at 84, leaving less of a role for "ecclesiastical organization." *Id.* at 76. "The very message of Whitefield's preaching was itself inclined toward the idea of liberty and self-government." Eric Metaxas, *7 More Men* 67 (2020). "Because his preaching led each person to see that God wished to have a direct relationship with every one of his children, no matter their social standing, [state-endorsed] church authorities were effectively cut out of the equation." *Id.*[9]

[9] One might question how much impact one preacher could have. To wonder that is to not know about George Whitefield. From 1738 to 1770, Whitefield made seven trips from England to preach. Steven T. Voigt, *Early American Public Commitment to Faith and Religious Freedom, including an Inquiry into Sermons of the Era, as Evidence for a Strong Free Exercise Clause*, 18 RUTGERS J. L. & RELIGION 49, 64 (2016). It is estimated that he "preached fifteen thousand times during" his career. Noll, *supra*, at 83. Somewhat skeptical about the accounts of the crowds that he drew, Benjamin Franklin set up an

At times, established churches responded with repression. In New England, some towns excluded the new religious communities. Peter J. Smith & Robert W. Tuttle, *Establishment Clause Mythology*, 75 CASE W. RES. L. REV. 573, 645–46 (2024). And some did not extend the same taxpayer support the established churches received. *Id.* In Virginia, the Presbyterians and Baptists faced additional licensing requirements and limits on where they could preach. Moots, *supra*, at 135. Some Baptist preachers were jailed for failing to obtain licenses. H.J. Eckenrode, *Separation of Church and State in Virginia: A Study in the Development of the Revolution* 37 (1910). And some Anglicans executed mob violence against adherents to newer beliefs. Moots, *supra*, at 135.

While this resistance resembled the lack of toleration in England, it was not as severe. Smith & Tuttle, *supra* at 645–46. And, despite these conflicts, a sense of unity somehow emerged. The Great Awakening and the periods of revival that followed drew "Americans together as a common people, a people that stood apart from Great Britain." Esbeck, *supra,* at 1419. Amidst their differences, the colonists began to develop a sense of "intercolonial unity" amid fear that the British government would use church leadership to exert control. *Id.*; *see also* Smith & Tuttle, *supra*, at 645.

And, along with that, disentanglement of religion from government began, "unfold[ing] more gradually, state by state, and somewhat differently in each state." Esbeck, *supra*, at 1393. "Fixing an exact date for 'disestablishment' is almost impossible,

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experiment during one of Whitefield's outdoor sermons in Philadelphia. *Id.* In the end, Franklin was "convinced that Whitefield could in fact be heard by up to thirty thousand people at one time." *Id.*

since the process was piecemeal." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 43 n.33 (1947) (Rutledge, J., dissenting). But its seeds were sown long before the American Revolution. *Disestablishment and Religious Dissent: Church-State Relations in the New American States 1776-1883* 4 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019) (recognizing that there "was never a national disestablishment"). The Great Awakening emboldened Presbyterians and Baptists in several colonies. Moots, *supra*, at 135. Key Independents, Congregationalists, Quakers, Presbyterians and Roman Catholics joined them in making key contributions in others. *Id.* Anne Hutchinson, Thomas Hooker, Cecil Calvert, Roger Williams, John Clarke, William Penn and Samuel Davies all advanced the cause of religious liberty prior to the Revolution. Anson Stokes & Leo Pfeffer, *Church and State in the United States* 9 (1964). For example, in 1748, Davies, a Presbyterian minister, argued for religious liberty before the King's attorney in Virginia and other groups. Stokes & Pfeffer, *supra*, at 19–20; Moots, *supra*, at 135.

Eventually, the law began to change. Thomas Jefferson began drafting Virginia's Statute for Establishing Religious Freedom in 1777. Willibald M. Plochl, *Thomas Jefferson, Author of the Statute of Virginia for Religious Freedom*, 3 JURIST 182, 201 (1943). Enacted in 1786, it "acknowledge[d] the necessary natural rights and duties of man in his relations to God and to his neighbors" and the security of freedom of worship. *Id.* at 183. The Act provided that "no man shall be compelled to frequent or support any worship or ministry, or to suffer on account of any religious belief." Charles Ramsdell Lingley, *Transition in Virginia from Colony to Commonwealth* 208 (1910).

In 1785, James Madison, the architect of the First Amendment's religion clauses, wrote his famous Memorial and Remonstrance Against Religious Assessments opposing a bill that proposed funding Christian religious teachers. *The Complete Madison: His Basic Writings* 299 (Saul K. Padover ed., 1971). He emphasized that every man had the right to exercise his own personal religious convictions and conscience. *Id*. More than that, Madison identified the source of that right—"what is here a right towards men, is a duty towards the Creator." 2 *The Writings of James Madison* 184 (Gaillard Hunt ed., 1901). That duty, he emphasized, "is precedent, both in order of time and degree of obligation, to the claims of Civil Society." *Id.* at 184–85.

Virginia was not the only colony to move toward religious liberty. In 1787, when the Founders gathered in Philadelphia for the Constitutional Convention, other states had begun loosening their connection to their respective former established churches. Stokes & Pfeffer, *supra*, at 37. For example, Reverend William Tennent of the Congregational Church in Charleston presented a petition on behalf of dissenters to the Common House of Assembly in 1777 pushing for the disestablishment of the Church of England as the state's favored church and advocating for a "firm right of free exercise of religion." James Lowell Underwood, *The Dawn of Religious Freedom in South Carolina: The Journey from Limited Tolerance to Constitutional Right*, 54 S.C. L. REV. 111, 155 (2002); *see also Writings of the Reverend William Tennent, 1740-1777*, 61 S.C. Hist. Mag. 189, 196, 202 (Newton B. Jones ed., 1960).

Despite this momentum, several points need to be understood. First, there were limits on religious freedom after the passage of the First Amendment. Those limits applied

to "particular, defined state interests." McConnell, *The Origins, supra,* at 1461. With respect to states' free exercise provisions, Professor McConnell explained,

> Nine of the states limited the free exercise right to actions that were 'peaceable' or that would not disturb the 'peace' or 'safety' of the state. Four of these also expressly disallowed acts of licentiousness or immorality; two forbade acts that would interfere with the religious practices of others; one forbade the 'civil injury or outward disturbance of others'; one added acts contrary to 'good order'; and one disallowed acts contrary to the 'happiness,' as well as the peace and safety, of society.

Id. at 1461-62; *see also* Stephanie H. Barclay, *Replacing Smith*, 133 Yale L.J. Forum 436, 457–58 (2023).

Second, disestablishment "was by no means a sudden, abrupt event occasioned by revolutionary events." Esbeck & Hartog, *supra*, at 13. Instead, while the tide had turned towards church autonomy at the Founding, "the last traces of a full-on state church were not erased in New England until 1833—fifty years after the revolution ended." *Id.*

And third, the Constitution itself addressed religion in only a few areas. Levy, *The Establishment Clause*, *supra*, at 79. First, the oaths of office permit an affirmation instead of a prescribed oath, an effort to accommodate Quakers and other small Protestant sects who maintained they could not swear or take an oath. Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 496–97 (2011); *see, e.g.*, U.S. Const. art. I, § 3, cl. 6; *id.* art. II, § 1, cl. 8; *id.* art. VI, cl. 3. Second, the so called "Sunday Clause permits the president, contemplating a veto" to a bill a full ten days, Sundays excepted, to make that decision while honoring the Christian Sunday sabbath. Esbeck, 2011 UTAH L. REV. at 497; *see, e.g.,* U.S. Const. art. I, § 7, cl. 2. And third, the "Religious Test Clause" explains that federal officials will

never be required to take a religious test as a qualification for office, something that was common in most statewide offices at the time. Esbeck, 2011 UTAH L. REV. at 497; U.S. Const. art. VI, cl. 3.

Antifederalists protested the Constitution's lack of specific protection for religion. *See* Bernard Schwartz, *The Bill of Rights: A Documentary History* 473 (1971). For example, the Federal Farmer, wrote, "[i]t is true, we are not disposed to differ much, at present, about religion; but when we are making a constitution, it is to be hoped, for ages and millions yet unborn, why not establish the free exercise of religion, as a part of the national compact." *Id.*; *see also* Esbeck, 2011 UTAH L. REV. at 513 ("The overriding concern of the Antifederalists with respect to religion, therefore, had to do with wanting to explicitly preserve jurisdiction over church-government relations as a power vested in the states, as well as to disable any implied national power to invade religious conscience.").

Not only did antifederalists object to the lack of religious protection; in expressing that disagreement, they described the freedom of religion—like Madison and Jefferson had just a few years earlier—as a pre-existing, natural right established not by the government but by their Creator. This understanding of freedom of religion is also apparent from constitutional amendments proposed by state ratifying conventions. The Sacred Rights of Conscience 415 (Daniel L. Dreisbach & Mark David Hall eds., 2009). For example, the Virginia ratifying convention proposed an amendment providing "[t]hat religion or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence, and therefore all men

have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others." *Id.* at 416. And the New York ratifying convention proposed an amendment providing, "That the People have an equal, natural and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience, and that no Religious Sect or Society ought to be favoured or established by Law in preference of others." *Id.* at 417.

The Founders responded to these concerns. Madison, who had doubted the need for a bill of rights, took up the cause anyway. In June 1789, then-Representative Madison reminded the House of Representatives of his proposed amendments to the Constitution, including one to address religion. *Wallace v. Jaffree*, 472 U.S. 38, 93 (1985) (Rehnquist, J., dissenting); 1 Annals of Cong. 424 (1789) (Joseph Gales ed., 1834). A House committee settled on the following language of the proposed amendment: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." 1 Annals of Cong. 729 (1789). Madison explained that he "apprehended the meaning of the [Religion Clauses] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.* at 730; *see Flast v. Cohen*, 392 U.S. 83, 103 (1968).

Among the ten amendments approved and ratified was what we call the First Amendment.[10] In words we should be able to recite from memory, the Constitution proclaims that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

The historical background leading to the First Amendment helps explain the meaning of these words. The Founders knew the history of the government asserting control over the religious realm. Some had read about this age old struggle. Others knew it from their relatives who had fled from it in England to form colonies in America. And they experienced firsthand the colonies' interference with religious doctrine, worship and activities. What's more, the Founders, along with "other intelligent and informed people of the time," understood that the freedom of religion to be a natural right to believe, worship and engage in religious activities that came not from the government, but from their Creator. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38 (1997). And importantly, in drafting these words, the Founders were responding to objections that the Constitution as originally ratified, did not do enough to protect this religious freedom.

[10] On September 24, 1789, the House proposed 12 amendments to the Constitution including the third article, which addressed religion. 1 Annals of Cong. 913 (1789). The Senate agreed on September 25, 1789. 1 Annals of Cong. 88 (1789). The amendments were then passed onto the states for ratification. By December 1791, the necessary three-quarters of the states had ratified 10 of the 12 proposed amendments, thus enshrining those 10 amendments in our Constitution as the Bill of Rights. *See generally* Vincent Muñoz, *Religious Liberty and the American Founding* 125–197 (2022); The Bill of Rights: A Transcription, https://perma.cc/879Q-L9R8.

So, they included two religion clauses in the First Amendment. The Establishment Clause—which provides that "Congress shall make no law respecting an establishment of religion"—and the Free Exercise Clause—which provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. These clauses work in tandem to protect the pre-existing right to religious freedom. The Establishment Clause prohibited the establishment of a state religion. But it did more than that. It created a "stay away zone," commanding that the government stay out of the affairs of the church. *See generally* Chris Beneke, *The Historical Context of the Religion Clauses of the First Amendment*, *in The Cambridge Companion To The First Amendment and Religious Liberty* 140, 141 (Michael D. Breidenbach & Owen Anderson, eds. 2020).

The Free Exercise Clause then describes the right to religious freedom. "[T]he free exercise thereof" was understood to mean individuals were free to believe according to their conscious, to form churches, to establish doctrine and to conduct religious activity so long as it did not impair public health and safety. It was also understood, as just explained, to be a right that already existed. And since the right did not come from the government, the government could not take it away.[11]

[11] An important note here. The importance of this history is not that it reveals the intent of drafters that we declare to be the law. To the contrary, it shows how not only the drafters but others—even others who disagreed with the drafters—understood the meaning of the words of the First Amendment. In other words, history reveals how the words were understood in the time period when they were written. It does not—as legislative history is at times used—give force of law to the intentions of a particular legislator, much less a staffer or a lobbying group. *See* Scalia, *supra*, *at* 38.

B. Text

To be fair, the First Amendment's language does not explicitly define the contours of the religion clauses. But the ordinary meaning of their terms at the Founding confirms the understanding that history provides. Founding-era dictionaries, for example, clarify the meaning of the free exercise of religion. Starting with exercise, one meaning of that word was an "Act of divine worship whether publick or private." *Exercise*, A Complete Dictionary of the English Language (2d ed. 1789) [12]; *see also Exercise*, A Dictionary of the English Language (Vol. 1 1755) (defining exercise as, among other things[13], an "act of divine worship, whether publick or private"). As for religion, Samuel Johnson's Dictionary of the English Language of 1755 defined it as "[a] system of divine faith and worship as opposite to others." Religion, A Dictionary of the English Language (Vol. 1 1755). Also, Noah Webster's American Dictionary of the English Language of 1828 defined religion not just as a set of beliefs but also as "the practice of moral duties." Religion, An American Dictionary of the English Language (Vol. 2 1828). These definitions indicate the exercise of religion involves more than individual, private worship; it involves public worship, including the formation of churches.

[12] Others, less relevant here, were "labour of the body for health or amusement; preparatory practice in order to skill; practice, outward performance; task, that which one is appointed to perform." *Id.*

[13] These other definitions of exercise, again less pertinent to this appeal, include "labour of the body," "use," "habitual action," "employment" and, when used as a verb, meant to "use" or "practice." *Id.*

Thus, the ordinary meaning of the Free Exercise Clause, when combined with the historical context leading up to its enactment, indicates that part of religious exercise is forming religious institutions. And part of forming religious institutions is establishing the doctrines a religious organization holds sacred. *See generally Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188–89 (2012); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 709–10 (2014). And part of establishing those doctrines is deciding how that doctrine applies to those who wish to be members of a church or work for a church or other religious organization. *Id.; see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." (citing *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988))). If the government restricts religious organizations from making those determinations, it prohibits the free exercise of religion.

C. History and Tradition

History and tradition in the earliest days of the Republic confirm what the text suggests. Two events, among others, illustrate how the Founders understood the Religion Clauses.

First, during Jefferson's presidency, Catholic Archbishop John Carroll wrote to then-Secretary of State James Madison seeking his views on who might be a good clergy selection for the newly acquired Louisiana territory. Letter from John Carroll to James Madison (Nov. 17, 1806), Nat'l Archives, https://perma.cc/8R89-9RYH; Barclay, *supra,*

at 444. Madison informed Carroll that the government would not become involved in offering such an opinion. Letter from James Madison to John Carroll (Nov. 20, 1806), Nat'l Archives, https://perma.cc/P839-99T6 ("But as the case is entirely ecclesiastical, it is deemed most congenial with the scrupulous policy of the Constitution in guarding against a political interference with religious affairs, to decline the explanations which you have thought might enable you to accommodate the better, the execution of your trust, to the public advantage."). Reflecting the underlying principles of church autonomy, Madison insisted early on that the government should stay out of religious matters.

Second, Madison when he was President, vetoed a bill passed by Congress to incorporate the Protestant Episcopal Church in the town of Alexandria, in what was then the District of Columbia. 22 Annals of Cong. 982–83 (1811). The bill, Madison insisted, "excee[ded] the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates, in particular, the article of the Constitution of the United States, which declares, that 'Congress shall make no law respecting a religious establishment.'" *Id.* Madison "continued to believe the federal government lacked authority over religious matters" and was one of the "American officials [who] refused to tread into the forbidden sphere of church faith and doctrine." *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 127 F.4th 784, 809 (9th Cir. 2025) (Bumatay, J., concurring) ("They understood such questions—settling feuds between priests, enforcing church-discipline, or appointing religious leaders—were exclusively committed to the church.").

To wrap up, the freedom against an establishment of religion and the freedom to exercise one's religion were understood to prevent government officials from interfering with matters of religion. In other words, the Founders understood the church had autonomy over questions of faith, doctrine or church governance.

D. Precedent

And if there was any question about what the free exercise of religion meant, a review of over two centuries of jurisprudence in this area, and especially that of the Supreme Court, largely follows that original understanding of the religion clauses. Under what is now referred to as the church autonomy doctrine, courts have consistently refrained from reviewing disputes about matters of faith, doctrine and church governance.

Interestingly, state courts were the first to develop the contours of the church autonomy doctrine. In Kentucky, expelled church members sued a church for the right to use a house as a place of public worship. *See Shannon v. Frost*, 42 Ky. 253 (1842). The state court of appeals explained that "[t]he judicial eye of the civil authority of this land of religious liberty, cannot penetrate the veil of the Church, nor can the arm of this Court either rend or touch that veil for the forbidden purpose of vindicating the alleged [rights] of the excinded members." *Id.* at 259. It added that "having no ecclesiastical jurisdiction, [it could not] revise or question ordinary acts of church discipline or excision." *Id.* at 258. Against that backdrop, the court noted that it only had the power to address "the conflicting claims of the parties to the church property and the use of it," with no ability to "decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church." *Id.*

Around the same time, South Carolina courts also steered clear of ecclesiastical disputes. In *Harmon v. Dreher*, 17 S.C. Eq. 87 (S.C. App. Eq. 1843), two church factions claimed to be the real congregation of St. Peter's Church in Lexington County following the expulsion of a minister. The South Carolina Court of Appeals of Equity emphasized:

> It belongs not to the civil power to enter into or review the proceedings of a Spiritual Court. The structure of our government has, for the preservation of Civil Liberty, rescued the Temporal Institutions from religious interference. On the other hand, it has secured Religious liberty from the invasion of the Civil Authority.

Id. at 120.

These state court decisions generally considered church autonomy '"jurisdictional" in its nature. Nestor, *supra*, at 1927–28. This protected religious institutions from undue civil court influence and prevented civil courts from becoming entangled in ecclesiastical matters and offering ecclesiastical answers. *Id.* at 1928.

The first United States Supreme Court decision to address church autonomy was *Watson v. Jones,* 80 U.S. (13 Wall.) 679, 727 (1872). There, two factions of church members, trustees and elders, "each claiming to be the true Walnut Street Presbyterian Church" of Louisville, Kentucky, asserted entitlement to the church's property. *Id*. at 717. The Supreme Court stated that the only issues in the dispute that it had authority to address were those involving property law. *Id*. at 730. Relying on principles of general common law, the Court made it clear that civil courts must steer clear "where a subject-matter of dispute, strictly and purely ecclesiastical in its character . . . becomes the subject of its action." *Id.* at 733. It explained that *"*whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church

judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727.

Watson's reasoning is consistent with *Shannon* and *Harmon*. In refusing to address matters of religion, the Court framed its reluctance in jurisdictional terms. *Watson* explained that the Court's "jurisdictional limits protected religious institutions from improper interference by civil courts." Nestor, *supra*, at 1924.

The next year, in *Bouldin v. Alexander*, 82 U.S. 131 (1872), the Supreme Court considered another church property issue, this time involving the removal of appointed trustees. *Id.* at 137. Following *Watson*, the Court only decided "the legal ownership of the property." *Id.* It emphasized that "we have no power to revise or question ordinary acts of church discipline, or of excision from membership . . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off." *Id.* at 139–40.

About 50 years later, the Supreme Court again addressed issues of church autonomy in *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929). There, a petitioner sought a court order appointing him to the vacant chaplaincy in the Roman Catholic Archdiocese of Manila. *Id*. at 11. The Supreme Court held that it should abstain from deciding the issue. *Id.* at 16. Because the appointment decision was a "canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Id.* This reasoning largely tracks *Watson* and *Bouldin*. But reflecting less restraint, the Court

suggested that courts might have a role in deciding such matters in the event of "fraud, collusion, or arbitrariness." *Id*. Despite this brief opening to more judicial power, however, the Court later slammed the door on an expanded role.

In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), the Supreme Court began to explain the doctrinal underpinnings of the church autonomy doctrine. There, the Court held that a New York law that required property belonging to the Russian Orthodox Church to be transferred to the Russian Church in America unconstitutionally intruded on ecclesiastical issues. *Id*. at 108, 119. The Court explained:

> Ours is a government which by the 'law of its being' allows no statute, state or national, that prohibits the free exercise of religion. There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion.

Id. at 120–21 (footnotes omitted).

Aside from its holding, *Kedroff* clarified the underlying doctrinal basis for church autonomy. While *Watson* relied on the common law, the Court made clear that it is the First Amendment that requires restraint. *See id.* at 115–16. Churches, the Court emphasized, have "an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116. Thus, by the middle of the 20th century,

the Supreme Court anchored the church autonomy doctrine in the First Amendment's religion clauses.

The Supreme Court reiterated that understanding in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). There, two local churches withdrew from a hierarchical church organization and claimed the local church property belonged to them, not the church organization. *Id*. at 441–42. The Supreme Court recognized that while a state "has a legitimate interest in resolving property disputes" in civil courts, "special problems" can arise when the "disputes implicate controversies over church doctrine and practice." *Id.* at 445. The Court held that asking a jury to determine whether the actions of the general church amounted to an abandonment or a departure of the fundamental tenets and doctrine of the church violated the First Amendment. *Id*. at 450. It explained that the instruction required "the civil court to determine matters at the very core of a religion" and concluded that "[p]lainly, the First Amendment forbids civil courts from playing such a role." *Id*. Again, the Court observed that judicial power exists for resolving church property law issues. *Id*. at 449. But under the church autonomy doctrine, courts could not go further. *Id*. Matters of faith, doctrine and church discipline were out of bounds.

In *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevich*, 426 U.S. 696 (1976), the Court continued to refine the contours of the church autonomy doctrine. There, in addition to a church property dispute, a bishop claimed that the church removed him arbitrarily and in conflict with church procedures. *Id*. at 698. The Court overruled *Gonzalez*'s suggestion that there might be a "fraud,

collusion, or arbitrariness exception" to *Watson*. *Id.* at 712 (citation modified). It explained there is a "constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Id.* at 713. Emphasizing the problems with *Gonzalez*, the Court added that the very act of "analyz[ing] whether the ecclesiastical actions of a church judicatory are in that sense 'arbitrary' must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow . . . ." *Id.* These matters, the Court stressed, "are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." *Id.*

More recently, the Supreme Court addressed the church autonomy doctrine in the employment context in *Hosanna-Tabor*. There, a teacher at a religious school, who was also a commissioned minister, sued the school for retaliation under the Americans with Disabilities Act after being terminated. In concluding that she was covered under the ministerial exception component of the church autonomy doctrine, the Court once again anchored the constitutional basis of the church autonomy doctrine to the First Amendment. *Id.* at 190. The Court stated, "[b]y forbidding the 'establishment of religion' and guaranteeing 'the free exercise thereof,' the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices." *Id.* at 184. Indeed, "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.* The Court then

held that the First Amendment contains a "ministerial exception" that "precludes application of [Title VII and other employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers." *Id.* at 188. In explaining its decision, the Court emphasized that the church has "control over the selection of those who will personify its beliefs." *Id.* It added that the "text of First Amendment itself . . . gives special solicitude to the rights of religious organizations." *Id.* at 189. "The church must be free to choose those who will guide it on its way." *Id*. at 196.

Hosanna-Tabor also clarifies the relationship between the church autonomy doctrine and *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* did not involve a church or religious organization and thus did not implicate the church autonomy doctrine. Instead, it held that a non-religious employer's termination of two members of the Native American Church because they ingested peyote, a crime under Oregon law and the state's denial of unemployment benefits, did not violate the Free Exercise clause. *Id.* at 879. That is because an individual's religious beliefs do not excuse one from complying with an otherwise valid law prohibiting conduct a state can regulate. *Id.* That holding, the Court clarified in *Hosanna-Tabor*, applied to government regulation of outward physical acts. *Hosanna-Tabor*, 565 U.S. at 190. The church autonomy doctrine, in contrast, applies to "governmental interference with an internal church decision that affects the faith and mission of the church." *Id*.

A few years later, in *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732 (2020), the Supreme Court expanded on *Hosanna-Tabor*. *Id.* at 747–48. It reiterated the ministerial exception in a case involving teachers at religious schools who asserted

employment discrimination claims. *Id*. at 736–37. Although these teachers did not have the formal title of "minister" like the teacher in *Hosanna-Tabor*, the Court concluded that they qualified for the exemption based on the religious duties they performed. *Id*. at 756–61.

The Court also explained "the general principle of church autonomy." *Id.* at 747. Under this "broad principle," the Court said religious organizations enjoy "independence in matters of faith and doctrine and in closely linked matters of internal government." *Id*. The Court explained the expansive scope of the church autonomy doctrine—"the Religion Clauses protect the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion." *Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 186). Continuing its broad construction, the Court emphasized that "[s]tate interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Id.* at 746.

E. The Church Autonomy Doctrine Applies to Doe's Claims

With that extensive but important background in mind, I finally come to the first issue presented by this appeal. Recall that Doe claims CRS's refusal to provide spousal benefits to employees in same sex marriages violated Title VII, the MFEPA and the EPA. So, we must decide whether the church autonomy doctrine requires that we abstain from reviewing CRS's employment decision based on sincerely held religious beliefs even if it

might otherwise violate Title VII, the MFEPA or the EPA. As I explain below, the answer is yes. [14]

1.The Church Autonomy Doctrine Applies to Setting the Terms of Employment Based on Religion for Individuals who are not Ministers

The Supreme Court has not yet held that church autonomy categorically bars review of religiously motivated employment decisions involving nonministerial employees. So far, its employment cases instead involve decisions concerning employees who perform key religious functions. *See Hosanna-Tabor*, 565 U.S. at 188–89; *Our Lady of Guadalupe*, 591 U.S. at 746–47. But these do not define the outer contours of the church

[14] A question the parties do not brief here is whether questions of church autonomy are jurisdictional or affirmative defenses. The majority calls them affirmative defenses but doesn't grapple with whether they are jurisdictional in nature or otherwise subject to an immediate appeal. Maj. Op. at 4. Some courts have used jurisdictional language or at least language relating to the power of courts to act. *See Watson*, 80 U.S. at 733 (providing that "no jurisdiction has been conferred on the [judicial] tribunal" to try a case "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")); *Dixon v. Edwards*, 290 F.3d 699, 714 (4th Cir. 2002) (a civil court's "proper[] exercise [of] jurisdiction" is dependent on whether it has been asked to "resolv[e] an ecclesiastical controversy). Others have used affirmative defense language. *Hosanna-Tabor*, 565 U.S. at 195, n.4 (holding that the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar"). And still others have likened the doctrine to immunity which, though not truly an issue of subject matter jurisdiction, requires resolution at the earliest possible stage of litigation. *See e.g.*, *McRaney*, 157 F.4th at 641 ("Where the church autonomy doctrine applies, its protection is total. That is because the doctrine is a constitutional immunity from suit. Like other immunities from suit, church autonomy must be resolved at the threshold of litigation. Like other immunities, church autonomy can be raised at any stage of litigation. Abridgement of the church autonomy immunity imposes irreparable injury on the religious organization, so its denial is subject to an immediate interlocutory appeal"). While I am persuaded by the reasoning in *McRaney*, we need not decide this issue in this appeal.

autonomy doctrine.[15] The ministerial exception is only one part of the broader principle. *Our Lady of Guadalupe*, 591 U.S. at 746 ("a *component* of this autonomy is the selection of the individuals who play certain key roles" (emphasis added)). Indeed, the Supreme Court recognized that the rule that "courts are bound to stay out of employment disputes involving those holding certain important positions" appears to have "acquired the label 'ministerial exception' because the individuals involved in pioneering cases were described as 'ministers.'" *Id*. But that recognition was never intended to limit the broader church autonomy principles. The Religion Clauses, and the church autonomy doctrine that flows from them, also protect a religious institution's autonomy over "internal management decisions that are essential to the institution's central mission." *Id*. And that is what a religious organization's decision to set employment terms based on the tenets of its faith is.

[15] One might claim that my view of the church autonomy doctrine renders the ministerial exception surplusage. Why do you need the ministerial exception if the church autonomy doctrine requires abstention even for a non-minister? While that is a fair question, the answer lies in the nature of the protection. The church autonomy doctrine is not a one size fits all principle. When the ministerial exception applies, the protection is total. *See Palmer v. Liberty Univ., Inc*., 72 F.4th 52, 77 (4th Cir. 2023) (Richardson, J., concurring)) ("Once a court decides that the ministerial exception applies, its inquiry ends. . . .The employer need not show that it had a 'religious reason' for firing the minister. . . . Instead, the employer may fire the minister for *any* reason—including one that, on its face, has no connection to religion and would otherwise be illegal."). It is not limited to decisions about religion. Any employment decision pertaining to ministers is out-of-bounds. *Id.*; *Hosanna-Tabor*, 565 U.S. at 194 ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason"). In contrast, when the employment decision does not involve ministers, church autonomy only applies to non-pretextual religious decisions.

True, religious institutions enjoy no "general immunity from secular laws." *Id.* at 746. But no one claims one. The question is whether a religious organization's decision to require conduct consistent with its doctrine—as a condition of employment within the organization—is essential to its mission. Almost always, it is. Most religious organizations exist to profess, practice and propagate their faith. Whether such an organization may insist that those it employs live consistently with that faith determines whether the organization speaks its doctrine with one voice or is compelled to contradict that doctrine. And requiring the organization to litigate, employee by employee and benefit by benefit, which of its employment terms a secular court will deem sufficiently "religious" imposes exactly the burden the Supreme Court has condemned. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) ("[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. Fear of potential liability might affect the way an organization carrie[s] out what it underst[ands] to be its religious mission.").

Consistent with this view, the Court has described the doctrine in broad strokes. *Watson,* 80 U.S. at 727 ("[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."); *Kedroff*, 344 U.S. at 116 (noting that churches have "an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference,

matters of church government as well as those of faith and doctrine"); *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 450 (noting that under a legal theory, "the civil court [had] to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion" but that "[p]lainly, the First Amendment forbids civil courts from playing such a role"); *Hosanna-Tabor*, 565 U.S. at 190 (explaining that the church autonomy doctrine applies to "government interference with an internal church decision that affects the faith and mission of the church"); *Our Lady of Guadalupe*, 591 U.S. at 746–47 (observing that under the church autonomy doctrine, religious organizations enjoy "independence in matters of faith and doctrine and in closely linked matters of internal government," "the Religion Clauses protect the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion" and "[s]tate interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion").[16]

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[16] *Bob Jones University v. United States*, 461 U.S. 574 (1983) is no obstacle to applying the church autonomy doctrine here. There, the schools didn't ask the courts to abstain under the church autonomy doctrine, and the Court never mentioned it. Instead, the schools argued that revoking their tax exemptions burdened their free exercise rights. 461 U.S. at 604. And the Court held that the government's "fundamental, overriding interest in eradicating racial discrimination in education" satisfied the compelling-interest test. *Id*. Thus, while *Bob Jones* may have some relevance in applying scrutiny, it says nothing about the antecedent question presented here—whether courts may review an internal religious decision at all. And the subject matter confirms the difference. Besides, *Bob Jones* interpreted the word "charitable" in § 501(c)(3) of the Internal Revenue Code—

The CRS decision Doe challenges fits comfortably within the Supreme Court's description of the church autonomy doctrine. CRS is a religious organization. Doe doesn't dispute that. Also, its decision is not "outside the ecclesiastical sphere," Maj. Op. at 55—it involves sincerely held issues of faith and doctrine that affect CRS's mission. As a matter of the Catholic Church's doctrine, CRS believes the Bible does not permit same-sex marriages. By marrying another man, Doe contravened CRS's deeply held religious beliefs. J.A. 3492. And CRS believes that providing spousal benefits to a male employee's male spouse would be cooperating with conduct that it believes violates Catholic Church's teaching that marriage is the union of one man and one woman. J.A. 3493. Thus, its decision embodies an organization-wide judgment about how CRS may administer its own employment relationships without contradicting Catholic teaching. *Kedroff*, 344 U.S. at 116; *Our Lady of Guadalupe*, 591 U.S. at 747. So, under the church autonomy doctrine, courts have no power to review it.

And while the Supreme Court may not have ruled on this precise question, at least two Justices have signaled support for the application of the church autonomy doctrine to

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the terms of a government-conferred tax benefit. It did not require the schools to change their practices. In fact, the Court took pains to say that the "[d]enial of tax benefits . . . will not prevent those schools from observing their religious tenets." *Id.* at 603–04. They simply could not collect a public subsidy while doing so. Withholding a government benefit is quite different than "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. In contrast, that is exactly what Doe's suit seeks to do. He does not ask the government to withhold a benefit from CRS. He asks a federal court to declare CRS's application of Catholic doctrine unlawful and to award damages for it. The schools in *Bob Jones* could keep their beliefs and lose only their exemption. Under the majority's decision, CRS cannot keep its beliefs at all.

employment decisions by religious organizations outside of ministers. In a statement respecting the denial of certiorari as to a state supreme court's holding that the church autonomy doctrine only applies to the hiring of ministers, Justice Alito, joined by Justice Thomas, expressed disagreement. *Seattle's Union Gospel Mission v. Woods*, 142 S. Ct. 1094 (2022) (Alito, J., respecting the denial of cert.). "Our precedents," he pointed out, "suggest that the guarantee of church autonomy is not so narrowly confined." *Id*. at 1096. He continued, "[t]o force religious organizations to hire messengers and other personnel who do not share their religious views would undermine not only the autonomy of many religious organizations but also their continued viability. If States could compel religious organizations to hire employees who fundamentally disagree with them, many religious non-profits would be extinguished from participation in public life—perhaps by those who disagree with their theological views most vigorously." *Id*.; *see also Cath. Charities Bureau, Inc. v. Wisconsin Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 268 (2025) (Thomas, J., concurring) ("[T]he church autonomy doctrine leaves it to religious institutions to define their internal structure for themselves.").

Beyond that, until today, Justice Alito's view has had broad support from the courts of appeals. In *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002), a church fired a female youth leader after she married another female. *Id*. at 652. She alleged Title VII violations based on statements the church made about her and her same-sex marriage at parish meetings which she claimed were offensive and harassing. *Id*. at 653. The Tenth Circuit affirmed the district court's grant of summary judgment on church autonomy grounds. *Id.* at 655, 659. The statements, the court ruled, were part of

an ecclesiastical dispute and dialogue that fell "squarely within the areas of church governance and doctrine protected by the First Amendment." *Id.* at 658. The court did not apply the ministerial exception. Instead, it relied on the "broader church autonomy doctrine." *Id.* at 658 n.2. Under it, "when a church makes a personnel decision based on religious doctrine, and holds meetings to discuss that decision and the ecclesiastical doctrine underlying it, the courts will not intervene." *Id.* at 660.

And our decision in *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir. 1997) follows this reasoning. There, a church denomination terminated Reverend James Bell, the executive director of a multi-denomination outreach program, due to a reduction in the program, not his job performance. *Id.* at 329. Bell sued for breach of contract and various torts stemming from the termination. *Id*. The district court dismissed the complaint because of a lack of subject matter jurisdiction. *Id.* And we affirmed its conclusion that under "the First Amendment, a civil court has no jurisdiction over ecclesiastical decisions by churches 'as to how they are going to expend their funds.'" *Id*. at 329. "Such a decision about the nature, extent, administration, and termination of a religious ministry falls within the ecclesiastical sphere that the First Amendment protects from civil court intervention." *Id.* at 333. To be sure, *Bell* is not exactly like this case because the claims against the religious organization did not allege discrimination. But *Bell* makes clear that, under the

church autonomy doctrine, courts must not meddle in ecclesiastical disputes about faith, discipline and custom.[17]

These decisions confirm the application of the church autonomy doctrine to Doe's claims. Following their example, the decision we now face is straightforward. Doe doesn't question the sincerity of CRS's beliefs. He doesn't deny his conduct violates them. And he doesn't argue that CRS's application of its beliefs to his same sex marriage are not religiously based. Doe instead claims that Title VII and the MFEPA prohibit CRS from carrying out their beliefs in employment decisions. In other words, Doe believes CRS must make employment decisions that conflict with its beliefs. That's exactly what the church autonomy doctrine forbids. We should refrain from reviewing CRS's decisions about Doe.

2.The Lack of Supreme Court Precedent Applying the Church Autonomy Doctrine to terms of Employment for Nonministerial Employees is Not Surprising

It is hardly surprising that the Supreme Court has not yet extended the church autonomy doctrine beyond the ministerial context. For most of our nation's history, governmental attempts to intrude into religious affairs were uncommon. Even efforts to enforce landmark anti-discrimination laws like Title VII did not, until recently, target churches or religious organizations for decisions that map onto sincerely held religious

[17] The Ninth Circuit adopted a similar view in *Union Gospel Mission of Yakima Washington v. Brown* when considering the effect of the Washington Law Against Discrimination on nonministerial hiring. However, that circuit's court voted to hear the case en banc and recently vacated the panel decision. *Union Gospel Mission of Yakima Wash. v. Brown*, No. 24-7246, 2026 WL 1758172, at *1 (9th Cir. June 18, 2026).

beliefs. But after the Supreme Court held Title VII applied to discrimination on the basis of sexual orientation and gender identity, *Bostock v. Clayton County*, 590 U.S. 644, 683 (2020), anti-discrimination laws can correlate one to one with certain religious doctrine. Of course, *Bostock* made clear that it was not deciding whether Title VII applied to employment decisions of religious organizations. *Id*. at 682 ("So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way."). To the contrary, it expressed a "deep[] concern[] with preserving the promise of the free exercise of religion enshrined in our Constitution." *Id*. at 681. Even so, plaintiffs have attempted to use it to subject religious freedom to secular laws. *See Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n*, 70 F.4th 914 (5th Cir. 2023); *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc*., 157 F.4th 627 (5th Cir. 2025); *Union Gospel Mission of Yakima Wash. v. Brown*, 162 F.4th 1190 (9th Cir.), *reh'g en banc granted, opinion vacated*, No. 24-7246, 2026 WL 1758172 (9th Cir. June 18, 2026).

Perhaps relatedly, the country has become increasingly secular over the last 50 years. Illustrating that trend, "43% of respondents [to a recent Pew Research survey] say they attend religious services at least monthly, down from 47% in the early 2000s and 50% in the early 1990s." In U.S., Decline of Christianity Continues at Rapid Pace: An Update on America's Changing Religious Landscape (Pew Rsch. Ctr., Oct. 17, 2019), https://perma.cc/4FUR-XDQH. "Meanwhile, the share of U.S. adults who say they 'never' attend religious services now stands at 27%, up from 18% in the early 2000s and

roughly double the share who said this in the early 1990s (14%)." *Id.* With fewer citizens prioritizing faith, it's no surprise that society now privileges secular ideals over protecting the church from interference from the state.

But while this information may explain why the Supreme Court has yet to apply the church autonomy doctrine to non-ministerial hiring decisions, or why litigants are now more prone to seek to prioritize secular laws over church autonomy than in the past, it's not relevant to our responsibility, which is to discern the law. The law, from the First Amendment and the Supreme Court cases interpreting it, guarantees religious organizations autonomy to decide issues of doctrine, including employment decisions, without governmental interference. That guarantee was fixed in 1791 when the First Amendment was ratified. Barnett & Solum, *supra*, at 468. And it can only be changed by amending the Constitution. Cultural shifts, like the recent one towards secularization, cannot change the meaning of the First Amendment.

3.The Majority's Reasoning

In affirming the district court's denial of CRS's motion to dismiss, the majority holds that the church autonomy doctrine does not apply to Doe's claims. In reaching that conclusion, it makes several points. In my view, all are wrong.

i.The Majority Minimizes the Church Autonomy Doctrine

The majority reads the church autonomy doctrine as a "limited shield," Maj. Op. at 54, reserved only for "strictly and purely ecclesiastical questions." Maj. Op. at 8 n.2. To the majority, that includes only the hiring of ministers, church membership and hierarchy

and church discipline. Nothing else. This construction treats religious freedom like getting an after-work beer—a little bit is okay, but not too much.

It also confuses two distinct forms of prohibited interference. The first occurs when a court decides a theological question for itself. The second occurs when the government penalizes a religious institution for implementing its theological judgment in an area of its protected internal governance. *Hosanna-Tabor* illustrates the distinction. The constitutional injury was not that a court would have to decide Lutheran doctrine; it was that application of employment law would transfer control over a protected institutional decision from the church to the State. 565 U.S. at 188–89, 194. When that occurs, the government has invaded the "stay away zone" recognized in the Religion Clauses. And just as applying those employment laws in *Hosanna-Tabor* invaded the protected sphere of a religious organization's internal governance in accord with its religious beliefs, Doe's claim does here.

That's not just my view. If the majority were right, *Kedroff*, *Elizabeth Blue Hull Memorial Presbyterian Church*, *Hosanna-Tabor* and *Our Lady of Guadalupe School* would all be wrongly decided. None of those decisions got into the business of second guessing the underlying decisions on religious grounds. In fact, the Supreme Court has called the church autonomy doctrine a broad principle. *See e.g.*, *Our Lady of Guadalupe*,

591 U.S. at 747. And its language explicitly applies to faith, doctrine and church governance. *See, e.g.*, *Milivojevich*, 426 U.S. at 713.[18]

ii.The Majority Turns the First Amendment Upside Down

The majority's primary justification for construing the church autonomy doctrine so narrowly is particularly problematic. To the majority, a broad reading would limit the reach of Title VII, the MFEPA and the EPA. If not narrowly construed, the majority worries the church autonomy doctrine will reduce the application of those laws. But that's backwards. Statutes must yield to the Constitution, not the other way around. Going in the opposite direction, the majority restricts the freedom of religion so that it does not conflict with secular laws.

[18] Other courts of appeal agree. *See e.g.*, *Demkovich v. St. Andrew the Apostle Par. Calumet City*, 3 F.4th 968, 975 (7th Cir. 2021) (en banc) ("This well-established principle [of church autonomy] means what it says: churches must have 'independence in matters of faith and doctrine and in closely linked matters of internal government.'"(citation modified)); *Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021, 1028–29 (10th Cir. 2022) ("The 'ministerial exception' is a narrower offshoot of the broader church autonomy doctrine; it only precludes employment discrimination claims brought by a 'minister' against his religious employer."); *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 127 F.4th 784, 796 (9th Cir. 2025) ("This doctrine is longstanding, a logically necessary feature of the Constitution's protections for religious freedom. As the Supreme Court explained over 150 years ago, courts may not decide a matter that is 'ecclesiastical in its character.'"(citation modified)); *McRaney*, 157 F.4th at 639 ("The church autonomy doctrine also forbids courts from adjudicating matters of church governance, including church discipline and the church's understanding of its own membership."); *see also Palmer v. Liberty Univ., Inc*., 72 F.4th 52, 76 (4th Cir. 2023) (Richardson, J., concurring) (recognizing the "ministerial exception is a specific facet of the church-autonomy doctrine that guards a religious institution's authority to select certain personnel").

iii. The Majority Ignores the Limits of the Church Autonomy Doctrine

The majority also argues that applying the church autonomy doctrine here essentially seeks blanket immunity for religious organizations. That's not correct. Precedent established three limits. First, as a threshold matter, the doctrine only applies to churches and religious organizations. Second, it does not apply to "purely secular decisions, even when made by churches." *Bryce*, 289 F.3d at 657. Instead, the church autonomy doctrine applies to "governmental interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. Third, the doctrine does not apply to pure property law disputes that don't implicate church doctrine and faith. *Watson*, 80 U.S. 679, 733 (1872); *see also Bouldin v. Alexander*, 82 U.S. 131, 139 (1872) ("[I]t may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. We have only to do with rights of property. . .we cannot decide who ought to be members of the church. . . ." *Id.* at 139-140. Doe does not argue that any of these limitations apply.

There is also good reason to believe other limits exist. For one, the church autonomy doctrine likely does not apply to insincere or pretextual religious decisions. Stated differently, pretextually claiming a decision is religious when it's not doesn't implicate church autonomy. *See United States v. Seeger*, 380 U.S. 163, 184–85 (1965) (explaining that the validity of one's beliefs cannot be questioned but the "threshold question of sincerity which must be resolved in every case" is a different issue); *see also* Barclay, *supra*, at 446 (noting that "courts could adjudicate the sincerity, but not the accuracy, of religious beliefs"). To be fair, courts have limited capacity to evaluate the

sincerity of religious beliefs. *See generally Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. at 771 (Ginsburg, J., dissenting) ("There is an overriding interest, I believe, in keeping the courts 'out of the business of evaluating the relative merits of differing religious claims,'. . . .or the sincerity with which an asserted religious belief is held." (citation modified)). As a result, courts examining religious pretext must defer to religious organizations. In other words, the pretext inquiry necessarily involves a light touch. But it still provides a limiting principle.[19] For another, there is good historical evidence that the

[19] This limitation mitigates the concern that my view of the church autonomy doctrine might be used to permit racial discrimination. Pretextual uses of the doctrine to advance racial discrimination do not require abstention. And fortunately, "[a]lmost no religion outside of prison entertains racial superiority or separationism as a religiously significant concept." R. Shawn Gunnarson et al., *Religious Employment and the Tensions Between Liberty and Equality*, 51 BYU L. REV. 279, 342–43 (2025). "[R]acial discrimination has earned condemnation as immoral by faith communities of every stripe." *Id.* at 342. My colleagues suggest that by pointing this out, I am insisting that we need not worry about the implications of the church autonomy doctrine because it will not be used to defend racial discrimination. Plainly, that is not what I said or implied. I simply commented on the current state of affairs. But to the extent the possibility exists for perverse but sincere religiously based racial discrimination, there is a debate as to how to resolve competing protections for religious freedom and racial equality. Some suggest the idea that racial discrimination would be permitted in religious employment "totally ignores the historically rooted reason why discrimination on the basis of an interracial relationship constitutes race discrimination." *Bostock*, 590 U.S. at 701 (Alito, J., dissenting). Others disagree. *See, e.g.*, Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD J.L. & RELIGION 368, 372 (2015) (arguing that a religious exemption like one in Title VII would also require proof that the "employment decision was motivated by the employer's religious beliefs or practices"); Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259, 277 (1982) (recognizing that "[s]ome churches may exercise their religion by discriminating on the basis of race" such that the "proper resolution of our conflicting constitutional commitments to racial equality and freedom of religion is to allow each to predominate within its own sphere" because "[e]ven our commitment to racial equality must sometimes yield to other values"). The concurring opinion says I am "platforming as one possible

church autonomy doctrine does not apply to laws that protect the public peace and safety. *See* McConnell, *The Origins*, *supra*, at 1461; Barclay, *supra*, at 457–58.

None of these potential limits apply here. Doe does not contend CRS's decision was pretextual. And while he does not claim the antidiscrimination laws at issue here fall within the peace and safety exception, the majority does. It insists that "the foundation of the Civil Rights Act and state analogs like MFEPA" involve "society's well-being, in matters of health, safety, order, morality, economics, and politics." Maj. Op. at 64 (citation modified). But that standard bears no resemblance to the historic limits of church autonomy. Recall that these limits primarily involved the exercise of religion that disturbed the peace or endangered others.[20] In contrast, Doe's claim for spousal benefits does not. What's more, under the majority's standard, virtually any such law would be excepted. After all, most federal and state laws purport to benefit society. That would transform the limited exception that existed at the Founding to a sweeping one that

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solution simply accepting" Professor Laycock's view. Conc. Op. at 81. That's incorrect. What I'm actually doing is pointing out how scholars have discussed the application of the church autonomy doctrine to race. That aside, this scholarly disagreement indicates that the prospect of applying the church autonomy doctrine to claims of racial discrimination is a fair question to raise. But since it is not an issue in this case, we should not undertake to resolve it here.

[20] Rather than the squishier public welfare the majority employs, my comments here on limitations of church autonomy focus on the historically grounded exception for conduct that endangers the peace and safety of others.

hollows the First Amendment's Religion Clauses to a whisper of what they were understood to mean when enacted.[21]

iv. The Majority Incorrectly Treats CRS's decision as if it were a Commercial Endeavor

The majority suggests that CRS's decision to set employment terms based on its sincerely held religious beliefs should be treated as if it were simply a commercial transaction, relationship or endeavor because it chose to employ individuals to do its work, as opposed to relying on the volunteer labor of church members. Maj. Op. at 59–60. This is remarkable. The majority strains to analogize Justice O'Connor's concurrence in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), a case about membership in a private organization and the constitutional freedom of association. *Id*. at 612. In her concurrence in part, Justice O'Connor expressed concern about the power of states to "pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society." *Id.* at 632 (O'Connor, J., concurring in part). She recognized the more limited "constitutional protection of the freedom of commercial association" in contrast to protection for expressive activity, noting that it may be difficult to determine

[21] The majority contends that *Smith* and *Reynolds v. United States*, 98 U.S. 145 (1878) supports its position. They do not. I've already discussed *Smith*. As for *Reynolds*, it held that while religious freedom is guaranteed in the United States, a man cannot excuse practices contrary to the "law of the organization of society" because "[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id*. at 166-67. But like *Smith*, *Reynolds* did not involve a church or religious organization. As such, it was not a church autonomy case.

when some associations "enter[] the marketplace of commerce in any substantial degree." *Id.* at 636.

But there's no reason to think Justice O'Connor's analysis and discussion of private membership associations has anything to do with churches or other religious organizations setting terms of employment to comply with their sincerely held religious tenets. Religious expression is nothing like commercial expression. To suggest that beliefs about what matters are compelled by God should be treated like commercial activity misunderstands what religion is and what the First Amendment's religion clauses protect. It's hard to imagine a more disrespectful view of religious freedom.

No authority proposes that a church receives the full protection of the Religion Clauses only if every person it employs is a minister. The Supreme Court's decisions point the other way. The First Amendment gives "special solicitude to the rights of religious organizations," *Hosanna-Tabor*, 565 U.S. at 189, and protects their "autonomy with respect to internal management decisions that are essential to the institution's central mission," *Our Lady of Guadalupe*, 591 U.S. at 746. Those protections do not depend on a church's headcount or disappear when it hires lay employees.

v. The Implications of the Majority's Reasoning

Not only is the majority wrong; the implications of its decision are staggering. While here the employment terms that Doe challenges relate to spousal benefits, the majority's logic would apply to all employment terms. After today's decision, churches and other religious organizations in the Fourth Circuit cannot choose to condition employment on compliance with their sacred beliefs. Churches and religious

organizations that believe same-sex marriage and gender transition are sins will not be able to insist that in order to work for us, employees must comply with our beliefs on those issues. Said differently, they will be required to hire employees who reject their beliefs.

This cannot be right. To believers, doctrinal beliefs are not choices about whether something is a good or bad idea. For example, reasonable minds may disagree about issues such as what a particular tax rate should be, whether a particular public benefit should be provided or whether certain military action should be taken. In contrast, religious doctrine involves matters of eternal truth. So, preventing a church from setting employment terms based on its religious doctrine in effect requires it to hire someone who rejects that doctrine. The result is a governmental mandate that it compensate and be associated with one who believes and acts contrary to what the church believes is compelled by God. Of course, a church or religious organization is free to do that. Some may believe there is benefit in diversity of ideas on matters of doctrine. But others may believe that hiring those who reject the church's beliefs undermines its very purpose. Keep in mind, most churches believe they are called by God not just to believe things and not just to do things but to convince others about eternal truths. How, they might naturally ask, can a church insist that a sacred doctrine is true and should be followed when church members, other employees or those exposed to it see that it employs individuals whose beliefs and conduct contradict the church's teaching? The majority's view provides no solace for that concern. It essentially explains that it's not our problem—modern laws enacted by Congress and the states take precedence over religious freedom.

To wrap up, none of Doe's or the majority's arguments against the application of the church autonomy doctrine are persuasive. The doctrine applies to Doe's claims and requires that we abstain. We should, therefore, reverse the district court's denial of CRS's motion to dismiss.

4. The Concurring Opinion

While joining the majority opinion, my concurring colleague makes several additional points. Some warrant a response.

First, calling it "erratic spelunking," my colleague objects to the use of history in resolving the scope of the church autonomy doctrine or seemingly in any legal decision-making. Conc. Op. at 67. I disagree. While history can be hard, that's no reason to cast it aside. This case involves a doctrine the Supreme Court has anchored in the Founding era. In such a case, history provides important information about the meaning of the Constitution. That doesn't mean it's the only tool judges have. Text, precedent and legal reasoning remain critical in judicial decision-making. But history belongs in the judicial toolbox. And regardless of what I think, the Supreme Court has made clear that history should be considered. *Hosanna-Tabor* traced the quarrel between church and state over religious offices from Magna Carta through the Acts of Uniformity to fix the meaning of the Religion Clauses. 565 U.S. at 182. *Our Lady of Guadalupe* did the same. 591 U.S. at 748. My colleague's authority for a different course is a separate opinion in the Second Amendment context. *See* Conc. Op. at 67 (citing *United States v. Hemani*, 146 S. Ct. 1677, 1698 (2026) (Jackson, J., concurring)). I chose to follow the Supreme Court.

Second, the concurring opinion says I'm inaccurately portraying history. In criticizing my description of the historical conflict over church autonomy, the colleague labels it "a stunningly misleading sojourn through history." Conc. Op. at 67. He also implies that I have revised and even whitewashed history. Conc. Op. at 82. What's more, the concurring opinion contends that my historical analysis lacks "rigor" and is employed to "support[] a desired result." Conc. Op. at 69.[22] Let me be clear—when judges use history, we need to do it well. Using history, or any legal tool, in a way that misleads, is selective, is incorrect or that is contrived to achieve a preferred outcome is unacceptable. So, let's have the debate about whether these criticisms are valid.

[22] Continuing, my colleague labels my opinion "judicial activism" because not all of the history I recount was briefed by the parties. Conc. Op. at 68. But the briefing in this case did, in fact, address some of the history I considered which is simply the history of the First Amendment. See, e.g., Brief for Intervenor the United States of America; Br. of Religious and Civil-Rights Organizations as Amici Curiae Supporting Appellee and Affirmance; Brief of Cardinal Newman Society, Association of Christian Schools International, American Association of Christian Schools, Association of Classical Christian Schools, Association for Biblical Higher Education, and International Alliance for Christian Education as Amici Curiae Supporting Appellant and Reversal; Brief of Amici Curiae Maryland Catholic Conference and Catholic Benefits Association in Support of Defendant-Appellant Catholic Relief Services, for Reversal. Also, to the extent I went beyond the briefing in my research, my colleague's suggestion that *N.Y. State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S.1 (2022) prevents that misconstrues that decision. Citing *Bruen*, he says "should a historical record be necessary, we 'decide a case based on the historical record compiled by the parties.'" Conc. Op. at 68 (*Bruen*, 597 U.S. at 25 n.6). *Bruen*, however, did not say that courts *should* use only the history provided by the parties. It said that "[c]ourts *are thus entitled to* decide a case based on the historical record compiled by the parties." *Bruen*, 597 U.S. at 25 n.6 (emphasis added). While I prefer robust presentation of historical information through the adversarial process, the Court has not restricted judges from engaging in their own research analysis and expressing views.

The concurring opinion's primary charge is that I have incorrectly suggested that both subjecting religious employers to secular laws and that conflicts between religious beliefs and secular employment laws are recent developments. My colleague insists that religious employers have long sought exemptions from secular employment laws based on sincerely held religious beliefs. Conc. Op. at 72–73. But that is not inconsistent with the history I describe. The church autonomy doctrine is not about employers in general, even employers who purport to be religious or operate under religious principles. Instead, it is about churches and religious organizations. That's why the *United States v. Lee*, 455 U.S. 252 (1982) and *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) decisions the concurring opinion cites are not helpful. *Lee* involved an Amish farmer and carpenter's claim that he did not have to withhold social security taxes for his workers based on his religious views. *Piggie Park Enterprises* involved a chain of barbecue restaurants whose owner protested that the Civil Rights Act "contravene[d] the will of God." 390 U.S. at 402 n.5 (citation modified). Neither involved a church. Neither involved a religious organization's governance of its doctrine or mission. The church autonomy doctrine prevents courts from interfering with the internal decisions of churches and religious organizations about matters of doctrine, discipline and governance that affect their mission. It does not apply to any use of religion or personal religious beliefs to justify secular policy, including discrimination.

Relatedly, the concurring opinion points out that history tells us that religion has been to justify discrimination. Conc. Op. at 78. My colleague is certainly correct that religion has been used for ill in the past, including rationalizing racial discrimination. And

I lament that misuse of religion. But with respect, that history does not conflict with what I have described either. This appeal involves the use of secular laws to regulate churches and religious organizations, not the general use of religion to justify discriminatory conduct. That's why I attempted to describe the history of conflict between governments and the church on the church's autonomy. On that point, it's accurate that until recently, the government's use of antidiscrimination laws to interfere with the internal doctrinal decisions of churches and religious organizations on issues that relate to their mission was uncommon. It's also accurate that until recently, religious employers have not commonly faced claims under antidiscrimination laws for setting employment terms that require compliance with their sincerely held beliefs. Said differently, this case involves a new kind of collision—antidiscrimination rules that map one-to-one onto the doctrine of churches and religious organizations, so that forcing compliance of such organizations itself contradicts their faith. The Supreme Court saw that collision coming and reserved it—"how these doctrines protecting religious liberty interact with Title VII are questions for future cases." *Bostock*, 590 U.S. at 682. This is one of those future cases.

Resisting this, the concurring opinion declares that "[t]here is no two-track system for Free Exercise claims—one for religious individuals and another, more capacious one for religious employers." Conc. Op. at 74–75. My colleague insists that *Smith* tells us how to resolve conflicts between claims of religious freedom and secular laws. That's wrong. *Hosanna-Tabor* confronted this very argument—that *Employment Division v. Smith* subjects a church to any neutral, generally applicable law—and rejected it. There, the Court explained, "a church's selection of its ministers is unlike an individual's ingestion

of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." 565 U.S. at 190. *Smith* drew the same line, counting among the things the Free Exercise Clause forbids any attempt by government to "lend its power to one or the other side in controversies over religious authority or dogma." 494 U.S. at 877. The second track is not my invention. It is the law.

And contrary to my colleague's arguments, the Supreme Court has not limited the church autonomy doctrine to the ministerial exception. To the contrary, it has referred to the ministerial exception as "a component" of church autonomy. *Our Lady of Guadalupe*, 591 U.S. at 746. As I have explained, CRS's decision to set its terms of employment based on its religious tenets falls within the scope of that broader doctrine.[23]

Fourth, the concurring opinion contends that I use history to "declar[e] the supremacy of religious law over secular law." Conc. Op. at 67. Again, that misconstrues the issue. The supremacy I declare is the Constitution over statutes. If that sounds familiar, *see Marbury v. Madison*, 5 U.S. 137, 180 (1803) ("It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution

[23] The concurring opinion claims that I "assume[]" the church autonomy doctrine covers CRS's decision. Conc. Op. at 74. That's perplexing. After detailing the text, history, tradition and precedent concerning the church autonomy doctrine, I spend eight pages explaining why CRS's decision fits within the scope of the doctrine. Disagreeing with my analysis is fine. But saying that I've assumed CRS's decision is covered by the church autonomy doctrine is another of the concurring opinion's unsupported assertions that, when examined, proves incorrect.

itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.").

Fifth, my colleague claims that my use of history attempts to "largely absolve religion of any role in race-based discrimination in the United States." Conc. Op. at 70. To repeat, it is beyond dispute that religion has been used to justify grave wrongs throughout history. Nothing in my opinion says or suggests I am trying to absolve any misuse of religion. Likewise, I am not trying to credit religion with anything. Both endeavors are outside my job description. Instead, I'm describing how the Constitution, not me, insists churches and religious organizations have autonomy over their doctrine, faith and mission.

Sixth, the concurring opinion takes issue with my assertion that history suggests limiting the church autonomy doctrine to conduct that endangers peace and safety. My colleague says that the scholarship I cite relies on cases like *Reynolds*, which, as he points out, upheld criminal laws against polygamy. Conc. Op. at 70–71. And he sees no difference between laws criminalizing polygamy—which is the basis for *Reynolds* and the *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890) decision he cites—and requiring an employer to provide spousal benefits to a same-sex spouse. Conc. Op. at 71. To me, the difference is clear. Criminal bans on individuals' actions are not comparable to government regulation of internal church

decisions. And the Supreme Court recognizes this distinction as well. *See Hosanna-Tabor*, 565 U.S. at 190. [24]

Seventh, my colleague argues that my view of the church autonomy doctrine would have allowed "past segregationists" to have avoided the dismantling of segregation by explaining "that their racist views were rooted in religious belief that was protected by the First Amendment." Conc. Op. at 81. That assessment of my view is incorrect. The church autonomy doctrine prevents courts from interfering with the internal decisions of churches and religious organizations about matters of doctrine, discipline and governance that affect their mission. It does not apply to any use of religion or personal religious beliefs to justify secular policy, including discrimination.[25]

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[24] Two more points about *Reynolds*. First, it is not a church autonomy case. So, it does not engage with the parameters of the church autonomy doctrine and its limitations. Pointing that out is not, as my colleague suggests, retreating from the analogy. Conc. Op. at 71. It's just accurately describing how that case fits into the church autonomy analysis. Second, besides *Reynolds*, Professor McConnell provides additional support for this limitation. He describes how nine states limited religious conduct that disturbed public peace and safety. McConnell, *Origins, supra* at 1461.

[25] The concurring opinion also says that I should more thoroughly define what it means to be a religious organization and the parameters of the peace and safety limitation to the church autonomy doctrine. Conc. Op. at 75. It's fair to say that I have not attempted to lay out the boundaries of either of those two issues. But in my view, it'd be imprudent to resolve all of those issues with finality here. That's because it is not necessary to decide this case. While the insurance coverage Doe seeks for his spouse is undoubtedly important to their family, no one could seriously claim it involves a matter of peace and safety. And Doe does not contend that the church autonomy doctrine should not apply to Catholic Relief Services because it is not a religious organization. In my view, we should wait until these issues are in dispute before issuing advisory opinions on each and every one of their contours. I'm surprised my colleague, who purports concern about "judicial activism," has a different view.

In sum, the concurring opinion's rhetoric runs high.[26] But when closely considered, each argument falls short. My colleague identifies no credible defects in my analysis. To me, his view that I should have included history that, as I explain above, involves issues distinct from church autonomy is unwise. And these sorts of criticisms are not new. The Supreme Court heard a similar "parade of horribles" in *Hosanna-Tabor* and answered it unanimously—when government reaches into a church's own affairs, "the First Amendment has struck the balance for us." 565 U.S. at 195, 196. Regrettably, my colleagues restrike it.

III. First Amendment Free Exercise

Beyond the church autonomy doctrine, CRS argues the district court's order violates the First Amendment's Free Exercise Clause in other ways. According to CRS, Doe's Title VII, MFEPA and EPA claims burden its sincerely held religious beliefs by requiring it to endorse a practice contrary to its views on same-sex marriage. It claims those laws, as prosecuted by Doe and as interpreted by the district court, are neither neutral nor generally applicable because they favor secular interests over religious ones.

As I have noted, the Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend I. If a state burdens a sincerely held religious belief, other than incidentally through laws that are neutral and

[26] In pointing this out, I intend no disrespect. My good colleagues in the majority are friends that I respect as jurists. We just disagree sharply about this case. Friends can fight hard about their views on important issues while maintaining collegiality and respect.

generally applicable, it must survive strict scrutiny. *Fulton v. City of Philadelphia,* 593 U.S. 522, 532–33 (2021); *Smith*, 494 U.S. at 878–82.

In this case, there is no real dispute that Doe's prosecution of his claims burdens CRS's sincerely held religious beliefs. The issue is whether Title VII, the MFEPA and the EPA are neutral and generally applicable. *Fulton* describes several ways laws are not neutral or generally applicable. 593 U.S. at 533. Relevant here, this occurs when a law prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests. *Id.* at 534. Expanding on this, the Court held, in *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam), that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 62 (emphasis in original).

Title VII, the MFEPA and the EPA, as interpreted by the district court and the majority, treat secular conduct more favorably than religious exercise. They prevent CRS from refusing to provide spousal benefits to an employee whose beliefs and conduct conflict with CRS's sincerely held religious beliefs about same-sex marriage. But through exceptions, those statutes allow secular employers to engage in that same conduct.

Starting with Title VII, it does not apply to employers with less than fifteen employees. 42 U.S.C. § 2000e(b). It excludes bona fide private membership clubs, certain government entities, *id*., Alaska Native Corporations, 43 U.S.C. § 1626(g), and Native

American tribes, § 2000e(b).[27] And it permits discrimination in hiring decisions if the discrimination on the basis of "religion, sex, or national origin, is a bona fide occupational qualification," or a BFOQ, that is "reasonably necessary to the normal operation of that particular business or enterprise." § 2000e-2(e).[28]

Maryland's MFEPA likewise contains exceptions. It exempts employers with less than fifteen employees, Md. Code Ann., State Gov't § 20-601(d)(1)(i)(2), and "bona fide private membership club[s] . . . exempt from taxation under § 501(c) of the Internal Revenue Code," *id*. at § 20-601(d)(3). It also allows an employer to discriminate for BFOQ reasons, as well as appearance and grooming standards. Md. Code Ann., State Gov't § 20-605(a)(1)–(2). And it allows religious "school[s], college[s], and universit[ies]" controlled by a religious entity or "directed toward the propagation of a particular religion" to employ only "employees of a particular religion." *Id.* at § 20-

[27] Title VII contains two provisions specifically addressing Native American tribes. First, it provides that the term "employer" does not include "an Indian tribe," thus excluding tribal governments entirely from coverage under Title VII. 42 U.S.C. § 2000e(b). Second, Section 703(i), known as the "Indian Preference exemption," expressly permits preferential hiring of Native Americans living on or near reservations. *E.E.O.C. v. Peabody W. Coal Co.*, 773 F.3d 977, 984 (9th Cir. 2014).

[28] Courts have used the BFOQ exception to allow for sex-based employment discrimination. *See e.g., Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133 (3d Cir. 1996) (allowing a psychiatric hospital to make staffing decisions based on shift-leaders gender in order to meet the therapeutic and privacy needs of a mixed-gender patient population); *see also* Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 Cal. L. Rev. 147, 149 (2004) ("Strip clubs, however, can discriminate when hiring strippers, and the Playboy Clubs, before they went out of business, were permitted to discriminate based on sex in hiring Playboy Bunnies.").

605(a)(3). Finally, the MFEPA exempts employers if they are "observing the terms of a bona fide seniority system or any bona fide employee benefit plan." *Id.* § 20-605(a)(4).

The EPA, which is part of the Fair Labor Standards Act, prohibits sex discrimination. 29 U.S.C. § 206(d)(1). But it allows pay differences based on the existence of a seniority system, a merit system, a system that measures earning based on quality or quantity of production or based on a factor other than sex. *Id.* And the EPA contains secular exceptions from its wage and hour regulations for various businesses like certain amusement establishments, fishing enterprises, newspaper publications and professional baseball players. *Id.* § 213(a)(3), (5), (8), (19).

To determine whether these Title VII, MFEPA and EPA exemptions permit secular discriminatory conduct to a greater degree than religious discriminatory conduct, we look at the "asserted government interest that justifies the regulation at issue." *Tandon*, 593 U.S. at 62; *see also Fulton*, 593 U.S. at 610 (Alito, J., concurring) ("To determine whether a law provides equal treatment for secular and religious conduct, two steps are required. First, a court must identify the secular conduct with which the religious conduct is to be compared. Second, the court must determine whether the State's reasons for regulating the religious conduct apply with equal force to the secular conduct with which it is compared."); *Canaan Christian Church v. Montgomery Cnty.,* 29 F.4th 182, 204 (4th Cir. 2022) (Richardson, J., concurring) (explaining that an otherwise generally applicable law is still subjected to heightened scrutiny if its secular exemptions undermine the

government's asserted rationale).[29] "Once you have even a single exception that cuts against the justification of a regulation, religious exercise must get that same treatment." *Canaan Christian Church*, 29 F.4th at 205.

Properly interpreted, the way to evaluate whether Title VII, the MFEPA and the EPA favor secular interests over religious ones is to ask whether the excepted secular conduct undermines the government's interest in prohibiting discrimination. If it does, but the statute regulates religious activity, it favors secular interests over religious ones. In that case, the regulation must survive strict scrutiny.

Here, the secular activity exempted from Title VII, the MFEPA and the EPA undermines the purported interest in prohibiting discrimination because it allows such discrimination in the many situations covered by the exemptions. Take for example, just one of the exceptions—Title VII and the MFEPA's exemption for BFOQ's. They permit discrimination for secular business reasons but not for religious reasons. That means the statutes favor secular interests over religious ones. And that means they are not neutral or

[29] *Fulton*'s reference to *Church of the Lukumi Babalu Aye* is helpful. In *Church of Lukumi Babalu Aye,* the Court made clear that the government cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices if it is to constitutionally protect religion. 508 U.S. at 534. So it was a problem for the City ordinance in that case to forbid only the killings "occasioned by religious sacrifice" while other "types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision." *Id. at* 543. The asserted purpose of the regulation, public health and safety and the protection of animals, was undercut by its under inclusiveness and its secular exceptions. That was cause enough for the ordinance to fail under general applicability.

generally applicable. As a result, they violate the First Amendment unless they satisfy strict scrutiny.[30]

The majority responds that these exemptions are evenhanded. Largely ignoring that discussion of BFOQs, it contends that because a thirteen-employee parish is exempt alongside a thirteen-employee soda shop, no secular conduct is treated more favorably. Maj. Op. at 43. And even as to the small business exception, that misconceives the comparison. *Tandon* does not ask whether religious *entities* can invoke an exemption; it asks whether the State tolerates *conduct* that undermines its asserted interest when the reason is secular while refusing the same tolerance when the reason is religious. 593 U.S. at 62. The medical exemption at issue in *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.), was religion-neutral as to its beneficiaries too—any officer with a skin condition could grow a beard. The policy still failed, because the department made "a value judgment that secular (*i.e.*, medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.* at 366. So too here. Title VII and the MFEPA tolerate

[30] This is not to suggest that the BFOQ exception is the only one that violates the First Amendment. For example, both Title VII and the MFEPA also exempt private clubs but, under the majority's reasoning, not religious organizations. And the EPA exempts a host of secular employers. But one is enough. Strict scrutiny is triggered "whenever [the law] treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62 (emphasis in original). Also, the MFEPA faces another neutrality and general applicability problem. Under *Fulton*, regulations that invite the government to "consider the particular reasons for a person's conduct" through a "mechanism for individualized exemptions" are not neutral and generally applicable. *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 844).

discriminatory harm when the reason is economic—small payrolls, club membership, favored industries—but not when the reason is religious conviction. And our decision in *Perry v. Marteney* confirms the distinction rather than undermining it: the medical vaccine exemption there survived because exempting for medical reasons *advances* the State's health interest. 172 F.4th 315, 324–26 (4th Cir. 2026). Exempting small employers and private clubs does not advance the interest in eradicating discrimination. It sacrifices that interest for convenience—which is exactly the "value judgment in favor of secular motivations" that triggers strict scrutiny. *Fraternal Order of Police Newark Lodge No. 12*, 170 F.3d at 366.

Once strict scrutiny is triggered, the result here is easy. There is a First Amendment violation unless the government satisfies strict scrutiny by demonstrating its actions were justified by a compelling state interest of "the highest order" and are narrowly tailored to achieve those interests. *Fulton*, 593 U.S. at 541. The analysis is not one based on broadly formulated interests because the "First Amendment demands a more precise analysis"—in other words, whether the government has a compelling interest in enforcing non-discrimination policies against CRS specifically. *Id.* If "the government can achieve its interests in a manner that does not burden religion, it must do so." *Id.*

The number of exemptions at play with respect to Title VII, MFEPA, and the EPA dooms any chance of those statutes satisfying strict scrutiny, particularly as applied to CRS. *Lukumi Babalu Aye*, 508 U.S. at 547. Only the "conduct motivated by religious conviction [] bears the weight of the governmental restrictions" while other sorts of businesses, agencies, and organizations of various sizes and assorted purposes benefit

from shelter. *Id*. But a law "cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Id.* (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in judgment)).

Strict scrutiny requires more than invoking a general interest in eliminating employment discrimination. The government must justify application of these statutes to this claimant and this religious practice. *See Fulton*, 593 U.S. at 541. The proper question is therefore whether imposing liability on a Catholic humanitarian organization for declining to provide spousal benefits contrary to its teaching on marriage is necessary to advance a compelling governmental interest.

The statutes' underinclusiveness bears directly on that question. Title VII and MFEPA permit employers below the statutory threshold to inflict the same compensatory injury, and the EPA excludes multiple categories of employment from its coverage. Those exemptions do not automatically defeat strict scrutiny. But they require the government to explain why leaving those injuries unremedied is consistent with its asserted interest while denying a religious accommodation to CRS is indispensable. The present record supplies no adequate explanation.

What's more, here CRS provided an alternative compensation proposal that included an increased salary and transitional coverage. J.A. 926, 3425–27. True, a salary increase is not necessarily interchangeable with employer-sponsored health coverage. But the proposal at least demonstrates that an accommodation less burdensome to CRS may have been available and should be addressed in the narrow-tailoring analysis.

For all these reasons, Doe has not come close to establishing that applying these anti-discrimination laws to CRS would withstand strict scrutiny. So, I would reverse the district court.

IV. Title VII

CRS next argues that, even without the church autonomy doctrine or the Free Exercise Clause's prohibition against laws that burden religion and are not neutral and generally applicable, the district court should have dismissed Doe's Title VII claims. It points out that Title VII expressly exempts employment decision based on religion. Since CRS's decision to not provide spousal benefits was just that, it maintains that the exception applied to its decision to deny Doe spousal benefits. Therefore, according to CRS, Title VII does not apply and Doe's claim under that statute must be dismissed.

Under Title VII, the decision to discharge "or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" is "unlawful." 42 U.S.C. § 2000e-2(a)(1). And the Supreme Court's decision in *Bostock* held that Title VII's ban on "sex" discrimination in employment extends to "discriminat[ion] against employees for being homosexual or transgender." *Bostock*, 590 U.S. at 662. Since CRS denied Doe's application for spousal benefits because of his same-sex marriage, Doe's Title VII claim might at first blush seem plausible.

But Section 702 of the Civil Rights Act of 1964 provides that "[t]his subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect

to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a). Under this exemption—the Section 702 exemption—Title VII does not apply to religious organizations that make employment decisions based on religion. And importantly, *Bostock* did not address the application of this exemption. The Court pointed out that "none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way." *Bostock*, 590 U.S. at 682. So then, does the exemption apply here?[31]

The answer is yes. Section 702's application turns on the relationship between two phrases—"this subchapter shall not apply" and "with respect to the employment of individuals of a particular religion." 42 U.S.C. § 2000e-1(a).

First, Section 702 says that "this subchapter shall not apply" when the exemption is triggered. 42 U.S.C. § 2000e-1(a). The referenced "subchapter" is Title 42, Chapter 21,

[31] In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987), the Supreme Court upheld the constitutionality of § 702. It explained the statute was "neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion." *Id.* ("It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case."). The majority claims *Amos*'s statement that Section 702 "exempts religious organizations from Title VII's prohibition against discrimination in employment *on the basis of religion*" supports its position. Maj. Op. at 19. (citing *Amos*, 483 U.S. at 329 (emphasis added)). It actually undermines it. Under the standard the majority concedes applies, CRS's decision about Doe's spousal benefits was made on the basis of religion.

Subchapter VI, which is all of Title VII. Congress did not say that only Title VII's prohibition on religious discrimination shall not apply.

Next, the text of Section 702 makes clear who can claim the exemption. Religious corporations, associations, educational institutions and societies can. *Id.* Everyone agrees CRS fits within this category.

Section 702 also provides the type of work an employee performs that falls within the exemption. It applies to "work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *Id.* That broad description is not limited to ministerial work or other explicitly religious work. It covers work connected with the religious organization's activities. Again, no one disputes that the work Doe did for CRS qualified.

Last, Section 702 applies "with respect to the employment of individuals of a particular religion." *Id.* Title VII defines "religion" to include "all aspects of religious observance and practice, as well as belief . . . ." 42 U.S.C.§2000e(j). Thus, "individuals of a particular religion" cannot be confined to denominational labels. It includes the majority's view—that the exemption applies to employment decisions based on one's identification with a certain denomination or faith. But contrary to the majority's view, it also includes employment decisions based on whether an individual's observance and practice conform to the religious employer's requirements. For example, an employee may identify as Catholic—CRS's denomination—and still fail to satisfy the employer's particular religious standards of observance or conduct.

CRS's position is that Doe's marriage placed him outside the religious standard governing the employment relationship. That brings the decision within § 702. As a result, Congress's command is that "this subchapter"—all of it, not merely one protected category—"shall not apply."[32]

This view is not only mandated by the text; other courts have reached the same conclusion. *See Curay-Cramer v. Ursuline Acad.*, 450 F.3d 130, 141 (3d Cir. 2006) (holding that Title VII did not apply to claims of a former teacher at a Catholic school who was fired after she signed her name to a pro-choice newspaper advertisement because the "explicit exemptions of Title VII" were for the purpose of allowing "religious organizations to create and maintain communities comprised solely of individuals faithful to their doctrinal practices" and that the organization's ability to do so would be "jeopardized by a plaintiff's claim of gender discrimination" (citation modified)); *Little v. Wuerl,* 929 F.2d 944, 951 (3d Cir. 1991) ("We recognize that Congress intended Title VII to free individual workers from religious prejudice. But we are also persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations

[32] Section 703, a separate but similarly worded exemption for employment of co-religionists by schools, colleges and educational institutions affiliated with religious groups, works the same way. Section 703, in relevant part, provides, "it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees *of a particular religion* if such school, college, university, or other educational institution or institution of learning is . . . owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion." 42 U.S.C. § 2000e-2(e)(2)(emphasis added).

to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'"); *see also Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 945–47 (7th Cir. 2022) (Easterbrook, J., concurring) (concluding that Section 702(a) permits a religious employer to abide by religious rules and that religious schools are entitled to limit staff to persons that live a life prescribed by the faith); *Fitzgerald*, 73 F.4th at 536 (Brennan, J., concurring) (positing that "when a covered employer demonstrates that an adverse employment decision was made because the relevant individual's beliefs, observances, or practices did not conform with the employer's religious expectations, the exemption would apply and bar a Title VII claim on that employment decision").

Our court has not addressed this precise question. We have, however, addressed the exemption for religious employers more generally. In *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189 (4th Cir. 2011), we held that Section 702's exemption applied to Title VII claims brought by a former employee who claimed a religious organization employer terminated her after she would not change the clothing she wore to work as a matter of her personal religious principle. *Id*. at 196. We recognized that even discrimination with respect to the employee's religion, otherwise protected by Title VII, was outweighed by the rights of the religious organization. *Id.* at 194. We explained that "Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's

'religious activities.'" *Id.* (quoting *Little*, 929 F.2d at 951). This reasoning is consistent with my textual review of the Section 702 exemption.

True, in *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), we stated that "[w]hile the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin." *Id.* at 1166. But in that case, the employment decision at issue was not based on religious beliefs. *Id.* at 1171. Therefore, the Section 702 exemption did not even apply. As a result, comments about the scope of the exemption are dicta. Besides that, *Rayburn* was entirely different. There, we were not confronted with a situation like we face here where the alleged discrimination was based on an employment decision undeniably based on religious beliefs. So, *Rayburn* presents no obstacle to our following the text of Section 702.

In fact, we recently confirmed that in *Billard v. Charlotte Catholic High School*, 101 F.4th 316 (4th Cir. 2024), a case quite similar to this one. There, a teacher at Charlotte Catholic High School sued the school under Title VII after the school fired him for his plans to marry his same-sex partner because such conduct was contrary to the teachings of the Catholic Church. *Id.* at 322. We reversed a grant of summary judgment for the former teacher because he "played a vital role as a messenger of CCHS's faith, he falls under the ministerial exception to Title VII." *Id.* at 320. So, we did not decide whether the Section 702 exemption applied. In fact, while we expressed concern about the effect of applying it, we made clear "that does not mean that the claim is easily dismissed, as

demonstrated by separate writings from judges who would adopt it and its endorsement by our dissenting colleague today." *Id.* at 328. Judge King, dissenting in part and concurring in the judgment, concluded that the Section 702 exemption barred the claim. That conclusion was right.

The majority disagrees with that interpretation of Section 702. It concedes that the Section 702 exemption applies not only to claims of religious discrimination—in other words, if a religious employer is refusing to hire Catholics or Muslims or adherents to some other religion—but also to failure to conform to the employer's religious tenets. Even so, to the majority, there is a catch. The Section 702 exemption evaporates if the employment decision is also based on another protected characteristic.

The problem with this view is that it is totally at odds with the text of Title VII. As already explained, Section 702 says that "this subchapter shall not apply" when the exemption is triggered. 42 U.S.C. § 2000e-1(a). The referenced "subchapter," is Title 42, Chapter 21, Subchapter VI. That covers all of Title VII, including the antidiscrimination provisions.

The majority's mixed-motive response fails for the same reason. The majority reasons that so long as sex is a but-for cause, a religious motive changes nothing. Maj. Op. at 17–18 (citing *Bostock*, 590 U.S. at 665). But the but-for rule is a rule *of* the subchapter. When Section 702 is triggered, "this subchapter shall not apply"—so there is no statute left under which to run the but-for test. *See Starkey*, 41 F.4th at 946 (Easterbrook, J., concurring) ("[W]hen [an employment] decision is founded on religious

beliefs, then all of Title VII drops out."). The majority cannot use Title VII's causation standard to defeat an exemption *from* Title VII.

While it does no textual analysis, the majority says the text supports its interpretation and CRS's. Then, of those two potential interpretations, it picks its view because of caselaw in our circuit that says we interpret exceptions to remedial statutes narrowly.

But that rule of construction is at best a tiebreaker. According to the majority, just as the tie goes to the runner in baseball, the tie goes to a narrow interpretation of a remedial statute. A tiebreaker only applies, however, if there is a tie. Here, there's nothing close to that. Maybe the question is a bit tougher if you ignore Title VII's definition of religion. When that definition is considered, the majority's interpretation is out by a mile. The definition includes not just beliefs but conduct. And CRS's rejected Doe's spousal benefits based on his conduct—his marriage to a man. So, that decision falls within the exemption.

Besides that, the decisions the majority cites about construing exceptions to remedial statutes narrowly do not apply when constitutional rights are at stake. Not one of those case examples had to deal with a constitutional challenge.

The majority's next mistake is worse. It relies on policy. According to the majority, we should not interpret the text of Title VII in a way that limits the force and effect of the anti-discrimination provisions of Title VII. It says doing so would "swallow the rule." Maj. Op. at 17. That's doubly wrong. First, the Section 702 exception only applies to religious-based employment decisions by religious employers. It has no application to most employers. So, applying the Section 702 exception as it is written wouldn't swallow

anything. Second, this is really just a policy argument. And policy judgments are outside our job descriptions. We apply the law wherever it takes us, regardless of outcome.[33]

V.

Regrettably, in its decision today, the majority narrows the church autonomy doctrine in contravention of Supreme Court precedent; it interprets Title VII, the MFEPA and the EPA in a way that violates the First Amendment by favoring secular interests over religious ones; and it judicially excises Title VII's exemption for religious employers from the text of the statute. Left in the ashes is a version of freedom of religion that would be unrecognizable to the Founders. The majority tries to minimize its decision, claiming it "break[s] no new ground." Maj. Op. at 18. The opposite is true. No appellate court in our country has issued a decision so dismissive of religious freedom.

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[33] The majority rejects CRS's argument that Doe's claims fail under the Religious Freedom Restoration Act. RFRA prohibits the "[g]overnment" from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." 42 U.S.C. § 2000bb-1. Subsection (b) sets forth an exception such that the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* Finally, subsection (c) explains that a person whose religious exercise has been burdened "may assert the violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." *Id.* To the majority, subsection (c) only applies to actions by the government, not to ones by private parties, like this one. Others reject such a narrow reading, arguing, among other things, that *Bostock* characterizes RFRA as "operat[ing] as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases." *Bostock*, 590 U.S. at 682. The outcome of that tough question though doesn't affect this appeal because even if RFRA applies to these claims, it means strict scrutiny applies. And as already discussed, strict scrutiny applies based on the way the majority interprets Title VII, the MFEPA and the EPA.

Perhaps it doesn't feel so bad to trample on the First Amendment rights at stake here because the governmental action that does the trampling seeks to prevent discrimination. But the Constitution—counter-majoritarian at its core—permits no such ends-justifies-the-means selectivity. We must protect the rights the Constitution guarantees whether we agree with their application in a particular case or not. Because the majority fails to do this, with respect, but with deep sadness, I dissent.