ALLIANCE DEFENSE FUND
Defending Our First Liberty

CHURCH AUTONOMY

Protecting Churches From Government Interference

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. AMEND I. These words from the First Amendment – often referred to as the Establishment and Free Exercise Clauses – have generated much debate and litigation over the years. But one thing is clear – they were designed by the Founding Fathers to protect the freedom of religious individuals and their places of worship.[1] A vital aspect of this protection is the legal principle of church autonomy. It is the term that describes the Constitution's safeguards against governmental intrusion into religious organizations' doctrine, polity, relationship with ministers, and interaction with members. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952).

This protection must be vigorously defended because it preserves the very foundation of our society. As George Washington said in his Farewell Address, "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. …And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar

[1] *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

structure, reason and experience both forbid us to expect, that national morality can prevail in exclusion of religious principle."[2]

I. CHURCH AUTONOMY IS ROOTED IN THE FREE EXERCISE AND ESTABLISHMENT CLAUSES.

The Supreme Court utilizes the church autonomy principle when resolving disputes between the Church and State under the First Amendment. *Watson v. Jones* 80 U.S. (13 Wall.) 679 (1872), is the first opinion addressing a civil court's jurisdiction over matters involving religious organizations. It involved a schism in beliefs about slavery between a local Presbyterian Church and the national General Assembly, which led to a dispute over ownership and use of the church property. *Id.* at 684-700. The government of the Church was exercised in a series of hierarchical ecclesiastical tribunals known as Church Sessions (the local churches), Presbyteries, Synods, and a General Assembly (the highest governing authority). *Id.* at 727. The Court of Appeals of Kentucky overruled a decision of the Presbyterian General Assembly in holding that certain ruling elders of the local church were not elders and did not need to be recognized as such by the congregation. *Id.* at 699-700. But the Supreme Court reversed the Court of Appeals, articulating the rule of law that is recognized as the basis for church autonomy:

> [W]here a subject-matter of dispute, strictly and purely ecclesiastical in its character, - a matter over which the civil courts exercise no jurisdiction, - a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them . . . [i]t may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it . . . .

Id. at 733.

[2] http://en.wikiquote.org/wiki/George_Washington#Farewell_Address_.281796.29.

Church autonomy limits the powers of every branch of government. As applied to the judiciary, church autonomy is a lack of subject matter jurisdiction that prevents courts from resolving disputes that are strictly and purely ecclesiastical in character. *Watson*, 80 U.S. at 733. When applied to the legislative and executive branches, church autonomy strikes down laws as unlawful prohibitions or burdens on the free exercise of religion. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. at 107. At its core, church autonomy gives religious organizations independence from secular control or manipulation and the power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. at 116.[3]

II. THE SCOPE OF CHURCH AUTONOMY

The most important issue regarding church autonomy is whether government action fits within the scope of the doctrine. If it does, courts do not have the subject matter jurisdiction to resolve a dispute. If it does not (or is within an exception), courts are free to resolve a dispute.

The scope of church autonomy can be categorized into four separate areas: (i) questions of doctrine, the resolution of doctrinal disputes, and weighing the religious importance of a church's words and events;[4] (ii) ecclesiastical polity and its administration (including matters

[3] More modern Supreme Court cases often integrate church autonomy indirectly in answering constitutional questions. For instance, in *Thomas v. Review Board*, 450 U.S. 707 (1981), the Supreme Court ruled against the government which argued that an employee who sought worker's compensation benefits did not correctly understand the teachings of his church. *Id.* at 715. The Court stated that it is not within the judicial function or judicial competence to inquire whether a person correctly perceives the commands of their faith and that courts are not arbiters of scriptural interpretation. *Id.* at 716.

[4] *See Maryland & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367, 368 (1970)(per curiam); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449-51 (1969); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 725-33 (1872); *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981); *Order of St. Benedict v. Steinhauser*, 234 U.S. 640, 647-51 (1914).

concerning the interpretation of a religious organization's organic documents);[5] (iii) the selection, credentialing, promotion, discipline, and conditions of appointment of clergy and other ministers;[6] and (iv) the admission, guidance, expected moral behavior, and discipline of church parishioners.[7] These per se rules have been derived from a handful of Supreme Court Cases interpreting the scope of the Religion Clauses in the First Amendment and are better understood by examining them each independently.

A. MATTERS OF CHURCH DOCTRINE

Presbyterian Church v. Hull Church holds that matters of church doctrine such as the resolution of doctrinal disputes and weighing the religious importance of a church's words and events are protected by the church autonomy doctrine. 393 U.S. 440 (1969). In that case, the Supreme Court overturned a Georgia law implying a trust of local church property for the benefit of the general church on the condition that the general church adheres to tenets of faith in place when the local church becomes affiliated with the general church. *Id.* at 449-51. The law required civil courts to determine whether actions of the general church constituted a "substantial departure" from the original tenets of faith and practice. *Id.* The Court held the law to be unconstitutional because it required civil courts to interpret particular church doctrines and the significance of those doctrines to the religion at issue. *Id.* This interpretation of church doctrine is forbidden by the First Amendment. *Id.*

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[5] *See Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-24 (1976); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 451 (1969); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (per curiam); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952); *Shepard v. Barkley*, 247 U.S. 1, 2 (1918) (aff'd mem.).

[6] *See Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-24 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952); *Gonzales v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929); *See also NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979); *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 472 (1892); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

[7] *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139-40 (1872); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872); *cf. Order of St. Benedict v. Steinhauser*, 234 U.S. 640, 647-51 (1914).

This holding was confirmed by implication in *Ma. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367 (1970)(per curiam). In this property dispute between a regional church body and two local churches attempting to secede, the Maryland Court of Appeals analyzed language in deeds conveying the property to a church corporation, the terms in the charter of the corporation, and state corporation law applying to religious corporations. *Id.* On appeal, the Supreme Court held that there was no federal question jurisdiction to resolve a First Amendment claim by the regional church because the resolution of the dispute did not inquire into religious doctrine. *Id.* at 368. The implication from this opinion is that if the Maryland Court had inquired into religious doctrine, the Supreme Court would have reversed. This implication was expanded upon in a concurring opinion written by Justice Brennan and joined by Justices Douglas and Marshall, which stated that any resolution of church property disputes can "involve[ ] no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Id.* at 368.

Thus, whenever the decision of a case turns on matters of religious doctrine or the significance of church doctrine to issues of faith, the church autonomy doctrine prohibits courts from exercising jurisdiction to hear the case.

B. CHURCH POLITY AND ITS ADMINISTRATION

Church autonomy also includes ecclesiastical polity and its administration, and matters concerning the interpretation of a religious organization's organic documents. Church autonomy bars a civil court's interference with a church's governance system and bars interpreting or applying a church's written constitution or ecclesiastical law.

This rule of law comes from *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) and *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960). *Kedroff* and *Kreshik* both arose out of the same underlying controversy. Canon law for the Russian Orthodox Greek Catholic Church conferred upon the Archbishop of the North American Archdiocese, as the appointee of the Patriarch of Moscow, the use and occupancy of the St. Nicholas Cathedral in New York City. *Id.* at 95-97. But New York's Religious Corporations Law purported to bestow that right to authorities selected by a convention of North American churches. *Id.* at 97-100. In no uncertain terms, *Kedroff* held that the New York Statute was unconstitutional. *Id.* at 119. *Kedroff* made it clear that the controversy concerning the right to use St. Nicholas Cathedral was a matter of ecclesiastical government – the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America. *Id.* at 115.

The Court stated that the New York statute was invalid because it displaced one church administrator with another, and passed control of matters that were strictly ecclesiastical from one church to another. *Id.* at 119. The First Amendment includes "a spirit of freedom for religious organizations, 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 (emphasis added).

Kreshik v. St. Nicholas Cathedral applied the same principle articulated for legislation in *Kedroff* to judicial interference with church polity and its administration. Upon remand from the first opinion, the New York courts held that there was domination of the Russian Patriarch by the secular authority in the U.S.S.R. and that his appointee, the Archbishop of the North American Archdiocese, could not under New York common law validly occupy the Cathedral. 363 U.S. at 191. The Supreme Court reversed, holding that when the government acts through its legislative

or judicial branch the same rule applies. *Id.* New York common law could not determine who was to occupy the Cathedral because the matter was one of church polity. *Id.*

Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), reinforces the application of church autonomy to church governance and its administration. The Illinois Court impermissibly rejected the decision of the highest ecclesiastical tribunals of the Orthodox Church, and inquired into church polity when it reinstated a defrocked and suspended Bishop. *Id.* at 708. The Supreme Court reversed, stating:

> For 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, but must accept the decisions as binding on them, in their application to the religious issues of doctrine or polity before them.[8]

Id. at 709 (citing *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)). *Milivojevich* also held that courts cannot construe or interpret various church constitutional provisions or organic documents. *Id.* at 721. The Court's only legitimate role was to ensure that an issue in the case was a matter of internal church government, the core of ecclesiastical affairs, or that the questions of church polity were committed to an ecclesiastical authority. *Id.* If any of those situations were present, the court lacked jurisdiction to decide the case.

Therefore, courts are prohibited from interfering in matters of internal church governance or from interpreting a church's written constitution or ecclesiastical law.

[8] The Court also stated that consistent with the First and Fourteenth Amendments "civil courts do not inquire whether the relevant [hierarchical] church governing body has power under religious law [to decide such disputes] . . . Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine." *Id.* at 708-09 (citing *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970)(Brennan, J., concurring)).

C. APPOINTMENT OF CLERGY AND OTHER MINISTERS

The church autonomy doctrine also protects a church's selection, credentialing, promotion, discipline, and conditions of appointment of clergy and other ministers. *See Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929). This area of church autonomy is rather piecemeal, because each rule – selection, credentialing, discipline, and conditions of appointment – comes from a different Supreme Court opinion. And there are a variety of Circuit Court opinions that apply church autonomy to ministers in the context of employment discrimination cases. *See infra* Part III(B). Yet, at minimum, the church autonomy doctrine prohibits a court from second-guessing a church's hiring and conditions of employment of clergy and other ministers. While there are some nuances, as described more fully below, the basic rule that a church has the right to select and promulgate conditions of employment for its clergy and other ministers has never been questioned

Selection of clergy is protected by church autonomy. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). In resolving a dispute over who constituted the proper archbishop in the Russian Orthodox Church, *Kedroff* holds in part that "[f]reedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." *Id.* at 116.

The credentialing and conditions of appointment of clergy and other ministers are also protected by church autonomy. *See Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929). *Gonzales* involved a plaintiff who claimed a right to be appointed to a chaplaincy in the

Roman Catholic Church under a will providing that a member of his family receive the appointment. *Id.* at 11-12. The Archbishop of Manila refused to appoint Gonzales on the ground that he did not satisfy the qualifications established by Canon Law. *Id.* at 12-13. The trial court entered an order directing the Archbishop to appoint him chaplain. *Id.* at 15. The Supreme Court of the United States upheld the Archbishop's refusal to appoint Gonzales. *Id.* at 15-19.

Gonzales holds that a religious organization's determination of the qualifications, credentialing, and conditions of appointment are binding on a civil court. The Court stated that "[b]ecause the appointment [of the chaplaincy] is 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.* at 16. The Court resolved the dispute by stating that canon law in force at the time that Gonzales was presented to the chaplaincy governed, and that Gonzales admitted to not qualifying for the chaplaincy under this version of canon law. *Id.* at 17.

The discipline of clergy and ministers is also protected by church autonomy. *See Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). *Milivojevich*, as described earlier, involved the removal and defrocking of a Bishop in the Serbian Eastern Orthodox Diocese for the United States. *Id.* The Court held that 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 (emphasis added). *Milivojevich*, therefore, stands for the proposition that the discipline of ministers and clergy, when done in a hierarchical polity using internal church tribunals, is protected by church autonomy.[9]

[9] *See also Watson v. Jones* 80 U.S. (13 Wall.) 679, 733 (1872).

Lower courts might not even reach this part of the church autonomy doctrine because the Supreme Court has long applied a statutory canon of construction to avoid a conflict with the First Amendment. In *Rector of Holy Trinity Church v. United States*, 143 U.S. 457 (1892), a citizen of England came to New York to enter service as rector and pastor pursuant to a contract with a religious organization. *Id.* at 457-58. The Circuit Court found that the act was forbidden by a federal statute prohibiting importing aliens into the United States to perform labor or service of any kind in the States. *Id.* at 458. The Supreme Court reversed. The Court held that while the act fell within the letter of the statute, it was not within Congress's intent to regulate it, and therefore was not an illegal act. *Id.* at 472. The Court avoided a constitutional issue regarding the selection of clergy or other ministers by construing the statute to not to apply to them. This approach to the construction of statutes that might conflict with the First Amendment is now a required canon of construction for all parts of church autonomy. *See infra* Part III(A).

Despite the somewhat piecemeal approach of the Court in this area of the church autonomy doctrine, it is plain that the church autonomy doctrine extends to protect a church's selection, conditions, credentialing, and discipline of clergy or other ministers.

D. QUESTIONS RELATED TO CHURCH PARISHIONERS

The final part of church autonomy involves the admission, guidance, expected moral behavior, and discipline of church parishioners. This part of the church autonomy doctrine originates with *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131 (1872), which involved a dispute over church property between two differing factions within a church. The Court characterized the issue as the mere legal ownership of property, specifically, who constituted the legal trustees of the Third Baptist Church of Washington. *Id.* at 137-38.

Bouldin is important to church autonomy not for its holding, but for what the Court stated about church membership. The Supreme Court held that an action by the minority of members to remove a large number of members and four legal trustees was invalid. *Id.* at 140. Therefore, it affirmed the lower court's decree for an accounting and the surrender of church property. *Id.* In so holding, the Court addressed the contention that the real issue was one of church membership:

> This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off. We must take the fact of excommunication as conclusive proof that the persons exscinded are not members.

Id. at 139-40 (citing *Shannon v. Frost*, 3 B. Monroe 253). *Bouldin* indicates that while a court can inquire into whether an act was an action of the church (or of persons who were not the church), courts cannot directly address issues involving church membership such as expulsion.

Watson v. Jones also holds that the church autonomy doctrine covers church membership. 80 U.S. (13 Wall.) 679 (1872). There the Court cited to *Shannon v. Frost* as support for the proposition that civil courts do not have ecclesiastical jurisdiction and cannot revise or question ordinary acts of church discipline. *Id.* at 730.[10] Further, the Court approved of the following language, stating that courts have no jurisdiction over matters involving the discipline or admission of church members:

> [T]he judicial eye cannot penetrate the veil of the church for the forbidden purpose of vindicating the alleged wrongs of excised members; when they became members they did so upon the condition of continuing or not as they and their churches might determine, and they thereby submit to ecclesiastical power and cannot now invoke the supervisory power of the civil tribunals.

[10] The Court also cited *Gibson v. Armstrong*, 7 B. Monroe 481 for this same proposition.

Id. at 731 (citing *Ferraria v. Vasconcelles*, 23 Ill. 456 (1860)). A court has no jurisdiction to decide whether the discipline or guidance of church members by a church was proper.

III. LEGISLATION AND CHURCH AUTONOMY

Two important subsets of church autonomy play a different but essential role in determining whether the First Amendment has been violated. Courts are first required to apply a special statutory canon of construction whenever church autonomy is implicated by a statute. If this canon of construction fails to resolve the conflict with religious freedom, then lower courts can create judicial exemptions to avoid the conflicts.

A. CONSTRUCTING LEGISLATION AFFECTING CHURCHES

In *NLRB v. Catholic Bishop of Chicago* the Supreme Court articulated a particular canon of construction when applying legislation to a religious organization. 440 U.S. 490, 501-02 (1979).[11] When there is a significant risk that religious freedom would be infringed, Courts should proceed only where there is a clear, affirmative expression of congressional intent that legislation applies to a religious organization. *Id.* If there is no clear affirmative expression of congressional intent, courts should construe a statute so that it does not conflict with the First Amendment. *Id.* at 507. Therefore, *Catholic Bishop* sets forth a two-step process of first looking to determine whether Congress intended the act to apply to religious organizations and, if so, attempting to construe the act so that it does not conflict with the First Amendment.

This canon of construction is often implicated in the same context as the ministerial exception (described below). There is an important difference though. The canon applied in *Catholic Bishop* instructs lower courts to try and interpret a statute, for example the Civil Rights

[11] In the case the Court held that teachers in schools operated by a church to teach both religious and secular subjects were not within the jurisdiction of the National Labor Relations Act.

Act of 1964, in a manner that will not conflict with the Constitution. That is all that the test requires lower courts to do. But, if there is clear congressional intent that legislation applies to a religious organization, then a court must grapple with whether the statute conflicts with the First Amendment.

A good example of how this construction operates is the ministerial exception to Title VII of the Civil Rights Act of 1964. The Circuit Courts have uniformly held that there is clear congressional intent that Title VII of the Civil Rights Act of 1964 applies to religious organizations. Under *Catholic Bishop,* because the courts have found that the law applies to religious organizations, courts have been required to undertake the second step and most have held that Title VII conflicts with the First Amendment.[12] But lower courts have created the ministerial exception to resolve this conflict.

B. MINISTERIAL EXCEPTION

The ministerial exception is properly considered as a subset of the church autonomy doctrine. The seminal case on the exception is *McClure v. Salvation Army,* 460 F.2d 553 (5th Cir. 1972). In *McClure* the Fifth Circuit held that, while Title VII applies to religious organizations and churches generally, Congress did not intend to regulate the unique employment relationship between the church and its employees who are ministers. Specifically, the application of Title VII to this employment relationship would result in a violation of the Free Exercise Clause and therefore the court interpreted Title VII to avoid this conflict.[13] The

[12] *See, e.g., Rayburn v. Gen. Conf. of Seventh-Day Adventists,* 772 F.2d 1164, 1171 (4th Cir. 1985).
[13] This part of the court's opinion only applies the same canon of construction as found in *NLRB v. Catholic Bishop of Chicago.* Later opinions in the Fifth Circuit make it clear that the Free Exercise Clause bars an employment discrimination claim filed by a church's minister. *See Combs v. Central Texas Annual Conference of the United Methodist Church,* 173 F.3d 343 (5th Cir. 1999).

Fifth Circuit based its holding on Supreme Court precedent applying the church autonomy doctrine.[14]

Nine federal circuits currently recognize the ministerial exception, based on either the Free Exercise or Establishment Clauses (or both).[15] The circuits differ on whether or not the ministerial exception should be raised in a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) or for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[16] But, the majority of Circuits addressing the issue agree that the ministerial exception has survived the Supreme Court's decision of *Employment Division v. Smith*, 494 U.S. 872 (1990). *See, e.g., Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996); *Combs v. Central Texas Annual Conf. of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999).

As articulated by most of the Circuits, the ministerial exception bars any claim, the resolution of which would limit a religious institution's right to select who will perform

[14] *See Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Gonzales v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960); *United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

[15] *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989)(Free Exercise Clause and Establishment Clause); *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006)(Free Exercise Clause); *E.E.O.C. v. Roman Catholic Dioceses of Raleigh*, 213 F.3d 795 (4th Cir. 2000)(Free Exercise Clause); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985)(Free Exercise Clause and Establishment Clause); *McClure*, 460 F.2d 553 (5th Cir. 1972)(Free Exercise Clause); *Aliciea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003)(Free Exercise Clause); *Young v. Northern Illinois Conf. of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994)(Free Exercise Clause); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991)(Establishment Clause); *Werft v. Desert Southwest Annual Conf. of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004)(Free Exercise Clause); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000)(Free Exercise Clause and Establishment Clause); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996)(Free Exercise Clause and Establishment Clause).

[16] *See, e.g., Alicea-Hernandez*, 320 F.3d at 701 (lack of subject matter jurisdiction); *Young*, 21 F.3d at 185 (same); *Werft*, 377 F.3d at 1100 (failure to state a claim); *Minker v. Baltimore Annual Conf. of United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990) (same).

particular spiritual functions. When a claimant is a "minister" it is inherent in the nature of the job that litigation will entangle the church and state.[17]

There is conflict among the circuits as to how to determine if an employee is a "minister" for purposes of the ministerial exception. For instance, the Fourth and Sixth Circuits use the "Primary Duties" test. This test states that "if an employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy." *E.E.O.C. v. Roman Catholic Dioceses of Raleigh*, 213 F.3d 795 (4th Cir. 2000). The Fourth Circuit also requires a court to "determine whether a position is important to the spiritual and pastoral mission of the church" in order to determine whether the exception applies. *Id. See also EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769, 780 (6th Cir. 2010).

Other courts have rightly recognized that it is difficult to determine exactly which of a minister's duties are religious, and have rejected the primary duties test. The Ninth Circuit determined that a seminarian who spent his time "mostly cleaning sinks" fell within the ministerial exception because "secular duties are often important to a ministry." *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668, 676 (9th Cir. 2010). And in *Coulee Catholic Schools v. Labor and Industry Review Commission*, 768 N.W.2d 868, 882 (Wis. 2009), the Wisconsin Supreme Court rejected the sacred/secular distinction because it "serves to

[17] *McClure* stated the reasoning as follows: "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church." 460 F.2d at 558-59 (5th Cir. 1972).

minimize or privatize religion" by calling a subject of study "'secular' because it does not involve worship and prayer."[18]

The Circuit Courts do agree, however, on the strength of the ministerial exception. When it applies, the exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. *Id.* And a church need not proffer any religious justification for an employment decision because the Free Exercise Clause protects the act of the decision rather than motivation behind it. *Id.*

IV. EXCEPTIONS TO CHURCH AUTONOMY

Despite the broad language of the Religion Clauses, church autonomy has limitations. In the discrete areas where it applies, church autonomy applies absolutely. To other subject areas, however, the doctrine may not apply.

A. FRAUD OR COLLUSION

The Supreme Court has indicated that marginal civil court review of ecclesiastical determinations might be appropriate to avoid fraud. *See Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929). This review can be characterized as an exception to church autonomy for "fraud" or "collusion."

Gonzales involved a plaintiff who claimed a right to be appointed to a chaplaincy in the Roman Catholic Church under a will providing that a member of his family receive the appointment. *Id.* at 11-12. The Archbishop of Manila refused to appoint Gonzales on the ground that he did not satisfy the qualifications established by Canon Law for the chaplaincy. *Id.* at 12-

[18] *See* ADF's Amicus Brief filed in *EEOC v. Hosanna-Tabor* for a more thorough analysis of these conflicting views. It can be accessed at:
http://adfwebadmin.com/userfiles/file/EEOC%20v%20Hosanna%20Amicus%20Brief.pdf

13. The trial court entered an order directing the Archbishop to appoint him chaplain. *Id.* at 15. The Supreme Court of the United States upheld the Archbishop's refusal to appoint Gonzales. *Id.* at 15-19.

The Supreme Court defined the role of civil courts as follows: "In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." *Id.* at 16. This statement has led some to argue that there is an exception to church autonomy if there is either "fraud" or "collusion" or "arbitrariness" present in the decision of a church tribunal.

But the Supreme Court cast doubt upon this "exception" in its decision in *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717 (1976). In *Milivojevich*, the Illinois Supreme Court overturned the defrocking and suspension of an Orthodox bishop by his own church. *Id.* at 708-09. The Illinois Supreme Court held that the proceedings of the Mother Church were procedurally and substantively defective under the internal laws and procedures of the Mother Church and were therefore arbitrary and invalid. *Id.* at 712-13. In doing so, the court used the dicta in *Gonzales v. Archbishop* to justify its decision. *Id.* at 708.

In reversing, the Supreme Court noted that the "arbitrariness" exception was dicta with no force because in *Gonzales* there was no suggestion that the Archbishop's decision to exercise his authority was done arbitrarily. *Id.* at 712. Moreover, the Court in *Milivojevich* pointed to binding precedent from *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872), as determinative of the issue. *Milivojevich* then explicitly rejected an "arbitrariness" exception stating:

> No "arbitrariness exception" – in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church

> laws and regulations – is consistent with the 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.

Milivojevich still left the door open for an exception based on fraud or collusion. But the Supreme Court laid down a clear constitutional principle that seems to limit such an exception:

> [T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Id. at 724-25.

Milivojevich is not the final word on an exception to church autonomy based on "fraud" or "collusion." Even with the doubt cast by *Milivojevich*, the Supreme Court in *Jones v. Wolf* seemed to revive the exception. The Court indicated in passing that where the decision of a church authority was the product of "fraud" or "collusion" it might be reviewable by a civil court. *See Jones v. Wolf*, 443 U.S. 595, 609 n.8 (1979).

B. PROPERTY DISPUTES RESOLVED BY NEUTRAL PRINCIPLES OF PROPERTY LAW

The Supreme Court has also made an exception to the church autonomy doctrine when general principles of property law can be applied to resolve church property disputes. In *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969), the Court first described the boundaries of this exception. The dispute arose between the general church and two local churches over control of the property used by the local churches. *Id.* at 442. The local churches voted to withdraw from the general church on the belief that certain actions violated the

organization's constitution and were departures from church doctrine. *Id.* The general church proceeded to take over the local churches' property on behalf of the general church, while the local churchmen filed suit in civil court to enjoin the general church from trespassing. *Id.* at 443. The general church moved to dismiss the action on the ground that the civil court was without the power to determine whether the general church had departed from its tenets of faith and practice. *Id.* The case was submitted to the jury on the theory that Georgia law implies a trust of local church property for the benefit of the general church on the sole condition that the general church adheres to its tenets of faith and practice existing at the time of affiliation by the local churches. *Id.* at 443-44.[19]

The jury returned a verdict for the local church on the ground that the actions of the general church amounted to a fundamental or substantial abandonment of the original tenets and doctrines of the general church. *Id.* at 444. The Supreme Court of Georgia affirmed the jury verdict. *Id.* The United State Supreme Court reversed, relying in part on *Watson v. Jones*, (13 Wall.) 679 (1872). *Id.* The Court stated that the "departure from doctrine" element of the implied trust theory violated the First Amendment because it required the judiciary to determine whether the actions of the church constituted a substantial departure from the tenets of faith and practice. This determination violated the First Amendment because civil courts were required to interpret particular church doctrines and the importance of those doctrines to the religion. *Id.* at 449-50.

[19] The Court held that the standard itself was unconstitutional. The lower courts could not apply the standard, and they also could not review a decision even if the general church had attempted to apply the standard. Either method would violate the Constitution.

The Supreme Court articulated the proper role for civil courts in resolving church property disputes. Civil courts can resolve certain church property disputes as long as neutral property laws are applied. *Id.* at 449.[20] As the Court stated:

> Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded . . . [T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.

Id.

Soon afterwards, the Supreme Court determined that the neutral principles of law approach it mentioned in *Presbyterian Church* were constitutionally permissible. In *Jones v. Wolf*, 443 U.S. 595 (1979), the Supreme Court held that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute. *Id.* at 604.[21]

Jones involved a dispute over property of a local Presbyterian church that was held in the local church's name or as trustees for the local church. *Id.* at 597. That church, however, was an established member of the Presbyterian Church in the United States ("PCUS"), a hierarchical

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[20] *See also Bouldin v. Alexander*, 82 U.S. 131 (1872); *Ma. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367 (1970)(per curiam). In *Bouldin*, the Court resolved a church property dispute by affirming the lower court's holding that legal title to the property was vested in four trustees listed in a deed to the church property at the time the suit was commenced. In *Sharpsburg*, the Court dismissed an appeal for want of federal question jurisdiction. But in doing so, the Court stated that the State court's resolution of property dispute between church bodies was made on the basis of state law that did not involve inquiry into religious doctrine. Because there was no jurisdiction, therefore the State court's disposition was constitutional.

[21] *Jones* noted that the neutral principles approach is still difficult for courts to apply. 443 U.S. at 604. As applied in Georgia, it involved a civil court examining certain religious documents, such as a church constitution, for language of a trust in favor of the general church. The Court stated that lower courts must examine these in secular terms. Other cases may involve interpreting the deed, the corporate charter, or the constitution of the general church that incorporate religious concepts in the provisions relating to the ownership of property. The Court noted that if the interpretation of these instruments was needed to resolve a controversy, a court must defer to the resolution by the authoritative ecclesiastical body.

organization. *Id.* At a congregational meeting the majority of a quorum voted to separate from the PCUS. *Id.* at 598. A commission was appointed to investigate the dispute and ruled that the minority faction was the "true congregation" of the local church. *Id.* The Georgia trial court applied Georgia's "neutral principles of law" approach to church property and granted judgment to the majority. *Id.* at 599. The Georgia Supreme Court affirmed. *Id.*

In upholding Georgia's approach to resolving disputes, the Supreme Court noted that the First Amendment does not dictate a particular method of resolving church property disputes. *Id.* at 603. As long as the State's approach does not involve consideration of doctrinal matters, the ritual and liturgy of worship, or the tenets of faith, any approach can be used. *Id.*

For its reasoning, the Court approvingly pointed to its earlier decision of *Ma. & Va. Churches*, where the state court settled a church property dispute on the basis of the language of the deeds, the terms of the local church charters, and the state statutes governing the ownership and control of church property. *Id.* at 603 (citing *Ma. & Va. Churches v. Sharpsburg Ch.*, 396 U.S. 367 (1970)(per curiam)). In *Ma. & Va. Churches*, the Court found the analysis did not entail an "inquiry into religious doctrine," and therefore there was no federal question jurisdiction. According to *Jones*, this shows that the "neutral principles of law" approach is consistent with the Constitution.[22]

C. RELIGIOUS BELIEFS THAT INFRINGE UPON OTHER'S RIGHTS

Another exception or limitation to the church autonomy doctrine applies when a religious doctrine or practice violates or infringes upon the personal rights of others. For instance, a court

[22] The Supreme Court remanded the case to determine whether the "neutral principles of law" approach was constitutionally applied on the facts of the case. The Court was troubled by the fact that the local congregation was divided among itself and there was no clear ruling that Georgia law was a presumptive rule of majority representation for local congregations.

has determined that a church member can sue a church for defamation if she withdraws her membership, and the church still subjects her to church discipline for engaging in an affair. *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989) ("Only those 'who unite themselves' in a religious association impliedly consent to its authority over them and are 'bound to submit to it.'"). But the Court did say the church was not liable for any discipline that occurred before the member withdrew.

D. GOVERNMENT INTEREST IS COMPELLING

Finally, church autonomy does not protect churches and other religious organizations from governmental interference when there is a narrowly tailored compelling interest furthered by that interference. For instance, statutes criminalizing bigamy and polygamy have been upheld as constitutional even though certain Mormons held these practices as central religious beliefs or doctrines. *Reynolds v. U.S.*, 98 U.S. 145 (1878)(upholding a federal statute criminalizing polygamy as constitutional). And in dicta the Court stated that practices such as human sacrifice or suicide can also be prevented or interfered with by the government even if they are central religious beliefs. *Id.* The government has compelling interests in preserving the family and life. So it can act to protect those interests even though it may interfere with a religious organization's autonomy.

V. CONCLUSION

Church autonomy is the guarantee encompassed in the Bill of Rights that protects religious organizations from governmental interference in ecclesiastical affairs. While there are some exceptions, this legal principle offers a strong and broad shield for churches and para-church

organizations when government officials, courts, or laws attempt to dictate a church's doctrine, polity, relationship with its ministers, or interaction with its members.