Carl H. Esbeck, R.B. Price Professor of Law Emeritus
University of Missouri
September 03, 2024

CHURCH AUTONOMY DOCTRINE
On foundational matters:
1. Claims for church autonomy, the Free Exercise Clause, and the Establishment Clause are separate and distinct. Church autonomy is based on both Religion Clauses and has its own unique line of caselaw authority.

2. There are five subject matters comprising the zones of church autonomy: (i) religious questions and disputes; (ii) polity; (iii) sacred spaces and rituals; (iv) employment of ministers and other religious functionaries; and (v) issues over membership and member discipline.

3. Key to church autonomy doctrine are the five subject-matter zones, not different writs. Thus, church autonomy blocks tort and breach of contract claims that arise out of the same set of operative facts as an employment discrimination claim brought by a minister. There is no resort to "neutral principles" to evade a church autonomy defense.

4. While modest in scope, when the church autonomy defense applies it provides a powerful categorical immunity. It is about autonomy in decision making, not lifting a religious burden. Hence, it is not a personal right but structural in its nature. It is most often an affirmative defense, but church autonomy can also give be asserted by a religious organization as plaintiff. That said, it is not jurisdictional (*Hosanna-Tabor* n.4) in the sense of federal court subject-matter jurisdiction as constrained by Art. III of the U.S. Const.

5. Government need not be a named party to the dispute for a church autonomy defense to apply. It is enough that the government has set the offending rule. See, e.g., *Our Lady of Guadalupe*.

On a few recent developments:
1. Section 6(b) of the Respect for Marriage Act (codified as a note to 1 U.S.C. § 7) grants the ability to churches and other religious nonprofits to refuse the use of its sanctuary or similar sacred property for the solemnization or celebration of a same-sex marriage. The RMA was bipartisan legislation (P. L. 117-228, 136 Stat. 2305) enacted on Dec. 13, 2022. The congressional authority to enact § 6(b), binding on state and local governments, is sec. 5 of the Fourteenth Amendment incorporating the First Amendment with its safeguards to church autonomy. Laycock, Berg, Esbeck & Fretwell, *The Respect for Marriage Act: Living Together Despite Our Deepest Differences*, 2024 U. OF ILL. L. REV. 511, 537-42 (2024).

2. Recent DOEd Title IX regulations, 89 Fed. Reg. 33474, 33534-36 (April 29, 2024),[1] provide that the prohibition on sex discrimination in the operations and programs of educational institutions of higher education extend to off-campus facilities of university-recognized student organizations, including religious organizations. *See* 34 CFR 106.11. This includes the organization's student meeting spaces,

[1] On its emergency docket, a 5-4 U.S. Supreme Court declined to stay Fifth and Sixth Circuit Court of Appeals' denials of stays to district court preliminary injunctions issued against the entirety of the Biden Administration's expansive Title IX regulations. The dissenting justices would have declined to stay the preliminary injunctions only against the expanded definitions of "sex" to include sexual orientation and gender identity discrimination and the broadened of the meaning of "hostile environment." Dept. of Education v. Louisiana, U.S. Sup. Ct. No. 24A78 (Aug. 16, 2024); Cardona v. Tennessee, U.S. Sup. Ct. No. 24A79 (Aug. 16, 2024).

student housing, locker rooms, and restrooms. "Sex" as a protected class now includes sexual orientation and gender identity, and sex discrimination includes LGBTQ harassment and hostile environment. The DOEd does not recognize any of these religious meeting spaces as protected by church autonomy.[2]

3. Wage & Hour requirements in the Fair Labor Standards Act (minimum salaries for exempt employees; time and a half for hourly employees) are binding on religious employers. However, the requirements do not apply to employees who are functionally ministers because of the church autonomy doctrine. An Opinion Letter by the Wage & Hour Division, U.S. Department of Labor, had little trouble applying the ministerial exception to teachers at a religious preschool thereby shielding the school from the minimum salary strictures of the FLSA. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2021-2 (Jan. 8, 2021), *available at* https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2021_01_08_02_FLSA.pdf.

This commonsense approach to who is functionally a "minister" suggests asking questions about: (i) whether the employee must perform duties that further the employer's theological beliefs, standards, or practices; (ii) if staff duties entail conveying the employer's message or carrying out its mission; (iii) if the job entails selecting or creating religious content, including music; or (iv) if one job task is leading others toward greater maturity in the employer's religion.

4. Two federal court of appeals decisions of interest with respect to who is a "minister" or other religious functionary:

(a) Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 940 (7th Cir. 2022) (school guidance counselor was a minister for purposes of the ministerial exception because she participated in students' spiritual formation, led public prayer, and her "employment agreements" required her "to carry out [the school's] religious mission").

(b) Billard v. Charlotte Cath. High School, 101 F.4th 316 (4th Cir. 2024) (while not jurisdictional, the ministerial exception defense is structural; hence, a 2 to 1 panel exercised its discretion and rejected school's waiver of church autonomy defense; substitute drama and English teacher was "minister" for purposes of ministerial exception because he was directed to teach in accord with Christian thought and maintain classroom environment consistent with the Catholic faith).

[2] State universities have sometimes sought to tell student religious organizations that they cannot require religious criteria in selecting their student leaders. In the opinion of DOEd, the "ministerial exception" does not apply in such situations because there is no employment relationship. 89 Fed. Reg. at 33534 n.22. The DOEd is mistaken, however, to regard the church autonomy defense in such cases as one entailing employment. Rather, the dispute with the university is over organizational polity. Every religious organization gets to organize itself as it wants, including naming the organization's officers and specifying their qualifications.