APPENDIX A

United States Court of Appeals
for the Second Circuit

RAMON K. JUSINO,
Plaintiff-Appellant,

v.

FEDERATION OF CATHOLIC TEACHERS, INC.,
Defendant-Appellee.

21-2081

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of November, two thousand twenty-two,

Before: Guido Calabresi,
Gerard E. Lynch,
Richard J. Sullivan,
Circuit Judges.

JUDGMENT

The appeal in the above captioned case from a judgment of the United States District Court for the

Eastern District of New York was submitted on the district court's record and the parties' briefs. Upon consideration thereof, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the dismissal of Jusino's federal claims with prejudice and the dismissal of his state and municipal law claims without prejudice to their repleading in a state court of appropriate jurisdiction is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX B

United States Court of Appeals
for the Second Circuit

RAMON K. JUSINO,
Plaintiff-Appellant,

v.

FEDERATION OF CATHOLIC TEACHERS, INC.,
Defendant-Appellee.

21-2081

Decided: November 23, 2022

Appeal from the United States District Court
for the Eastern District of New York
No. 19-cv-6387, Ann M. Donnelly, *Judge.*

Before: CALABRESI, LYNCH, and SULLIVAN,
Circuit Judges.

Ramon K. Jusino, formerly a tenured theology teacher at a Roman Catholic high school in Staten Island, appeals from the dismissal of his complaint against his labor union, the Federation of Catholic Teachers (the "FCT"), for allegedly breaching its duty

of fair representation under the National Labor Relations Act (the "NLRA") as amended by the Labor Management Relations Act (the "LMRA"), and for assorted violations under the New York State and New York City human rights laws. The district court (Donnelly, J.) dismissed Jusino's duty-of-fair-representation claim with prejudice for lack of subject-matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(l), reasoning that the NLRA and LMRA are inapplicable to disputes between parochial-school teachers and their labor unions under *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979). The district court then declined to exercise supplemental jurisdiction over Jusino's state- and municipal-law claims, which it dismissed without prejudice. We conclude, as a matter of first impression, that *Catholic Bishop* does preclude Jusino's duty-of-fair-representation claim, but that dismissal was warranted under Rule 12(b)(6) for failure to state a claim on which relief could be granted, rather than for lack of federal subject-matter jurisdiction under Rule 12(b)(1). We also conclude that Jusino has abandoned any challenge to the dismissal of his state and municipal-law claims. As a result, we **AFFIRM** the judgment of the district court.

Judge Calabresi concurs in a separate opinion.

AFFIRMED.

Ramon K. Jusino, pro se, Staten Island, NY, *for Plaintiff-Appellant.*

Jane Lauer Barker, Andrew D. Midgen, Pitta LLP, New York, NY, *for Defendant-Appellee.*

RICHARD J. SULLIVAN, *Circuit Judge:*

Ramon K. Jusino was suspended from his position as a tenured theology teacher at Notre Dame Academy, a Roman Catholic high school in Staten Island, after giving a controversial lecture on racism and human sin. Jusino's labor union, the Federation of Catholic Teachers (the "FCT"), initiated a formal grievance on his behalf and commenced arbitration proceedings against Notre Dame, asserting that his suspension constituted a breach of the applicable collective bargaining agreement. But when Jusino asked the FCT to raise additional allegations of discrimination and retaliation at the arbitration, it refused. Jusino then sued the FCT for this alleged breach of its duty of fair representation under the National Labor Relations Act of 1935 (the "NLRA"), 29 U.S.C. § 151 *et seq.*, as amended in relevant part by section 301 of the Taft-Hartley Act of 1947 (commonly known as the Labor Management Relations Act, or the "LMRA"), *id.* § 185. He also sued the union under the New York State Human Rights Law (the "NYSHRL"), N.Y. Exec. Law § 290 *et seq.*, and the New York City Human Rights Law (the "NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq.* Relying on the Supreme Court's holding in *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979), the district court (Donnelly, J.) dismissed the duty-of-fair-representation claim with prejudice for lack of subject-matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(l), reasoning that the NLRA and LMRA are inapplicable to disputes between parochial-school teachers and their labor unions. The district court then declined to exercise supplemental jurisdiction over the state- and

municipal-law claims, which it dismissed without prejudice.

On appeal, we are tasked with deciding four questions: *first,* whether the district court properly concluded that *Catholic Bishop* precludes a parochial-school teacher's duty-of-fair-representation claim against his labor union under the NLRA as amended by the LMRA; *second,* if so, whether the inapplicability of the NLRA and LMRA is jurisdictional in character such that Jusino's duty-of-fair representation claim was properly dismissed under Rule 12(b)(l) as opposed to Rule 12(b)(6); *third,* if the latter, whether the appropriate appellate remedy is to vacate the dismissal order with instructions to re-dismiss or simply to affirm such order on different grounds; and *fourth,* whether the district court properly declined to exercise supplemental jurisdiction over Jusino's state- and municipal-law claims. We conclude, as a matter of first impression, that *Catholic Bishop* does preclude Jusino's duty-of-fair-representation claim here, but that its application requires dismissal under Rule 12(b)(6) for failure to state a claim on which relief could be granted, rather than for lack of federal subject-matter jurisdiction under Rule 12(b)(1). We also conclude, as compelled by our precedents, that affirmance is the proper appellate remedy in this scenario. Finally, we find that Jusino has abandoned any challenge to the dismissal of his state- and municipal-law claims. As a result, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. Facts

The FCT is the labor union that serves as the exclusive bargaining agent and labor representative for lay teachers in Catholic schools in New York City and several surrounding counties. Until August of 2018, Jusino was a tenured theology teacher at Notre Dame Academy of Staten Island ("Notre Dame"), a Catholic all-girls high school located within the Roman Catholic Archdiocese of New York. The terms of Jusino's employment at Notre Dame were governed from September 1, 2014 through August 31, 2018 by a collective bargaining agreement (the "CBA") between the FCT and Notre Dame (through its membership in the Association of Catholic Schools). The CBA provided that tenured teachers, such as Jusino, could only be terminated for just cause. It also provided that "the Employer ... shall [not] discriminate against teachers on the basis of ... race, color, national origin[,] or sex" and explicitly incorporated into "the terms of employment of teachers in the member schools . . . all . . . statutes governing non-discrimination in employment ... and all other applicable legislation, governmental regulations[,] or judicial determinations [thereupon]." J. App'x at 9 ¶¶ 14-15.

In May of 2018, Jusino taught a theology class on the sinfulness of racism, the centerpiece of which was a lecture titled "Racism as Sin." While the record below is somewhat muddy,[1] it appears that the "fallout" of the lecture entailed heated arguments

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[1] *N.b.*, Jusino provides more detailed factual allegations regarding the circumstances leading up to his termination in the pro se complaint filed in his separate suit against Notre Dame, *see generally* Complaint, *Jusino v. Notre Dame Acad. High Sch.*, No. 18-cv-6027 (MKB) (E.D.N.Y. Oct. 29, 2018), ECF No. 1, which he has incorporated by reference into the operative complaint in *this* case.

between Jusino and Notre Dame students, parents, and administrators, Dist. Ct. Doc. No. 14 at 2-3, and ultimately resulted in Notre Dame's "suspend[ing]" Jusino "without pay" and "with intent to discharge" as of August 2018, J. App'x at 9, 11 ¶¶ 16, 26 (emphasis omitted).

In September of 2018, FCT informed Notre Dame that it "was instituting formal grievance arbitration procedures on [Jusino's] behalf" to challenge his termination as a tenured teacher. *Id.* at 8 ¶ 9. In connection with that grievance, Jusino "alleged to [FCT] that [he] had been explicitly suspended" (and ultimately "discharge[d]") by Notre Dame "for complaining about sex, race, and age discrimination against [him] by [Notre Dame], and [about] race discrimination by [Notre Dame] against one of its students." *Id.* at 9 ¶ 16. A month later, Jusino asserted the same factual allegations in a federal lawsuit against Notre Dame, bringing claims for discrimination and retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, the NYSHRL, and the NYCHRL. *See* Complaint, *Jusino v. Notre Dame Acad. High Sch.*, No. 18-cv-6027 (MKB) (E.D.N.Y. Oct. 29, 2018), ECF No. 1. Shortly thereafter, Jusino informed the FCT of his lawsuit against Notre Dame and reiterated to the FCT his position that Notre Dame had breached the CBA by violating various employment discrimination laws incorporated therein by reference.

The FCT, however, responded in a December 2018 email to Jusino that it "was not in favor of making any Title VII discrimination/retaliation claims on [his] behalf" at the upcoming union arbitration with Notre Dame. J. App'x at 10 ¶ 20. Likewise, the FCT's counsel declined to respond to Jusino's suggestion

that the FCT might arbitrate the NYCHRL claim on his behalf. Between then and May 17, 2019, when it ultimately commenced formal union arbitration proceedings between Jusino and Notre Dame, the FCT repeatedly reiterated to Jusino that "we are not arbitrating your Title VII claims." *Id.* at 11 ¶ 24. Indeed, the FCT declined to present Jusino's discrimination claims in either its presentation of his grievances at the pre-hearing conference with the arbitrator in January 2019 or its opening statements at the arbitration hearing itself in May 2019.

At the close of the May 2019 initial arbitration hearing, Notre Dame and the FCT then agreed to adjourn the arbitration to November 2019. In the meantime, Jusino and Notre Dame settled their lawsuit after participating in the Eastern District of New York's pro se mediation program; as part of that settlement, Jusino voluntarily dismissed his discrimination and retaliation claims. *See* Settlement Letter, *Jusino,* No. 18-cv-6027 (E.D.N.Y. Aug. 21, 2019), ECF No. 28; Stipulated Order of Dismissal, *Jusino,* No. 18-cv-6027 (E.D.N.Y. Sept. 27, 2019), ECF No. 33.

B. Procedural History

On November 12, 2019, Jusino commenced this action against the FCT in the Eastern District of New York. In his underlying pro se complaint, Jusino alleged that the FCT had "willful[ly] refus[ed] to investigate [his] Title VII discrimination/retaliation [claims] or any of [his] other [available discrimination claims against Notre Dame] under the CBA," and likewise "refus[ed] to ... meaningfully assert" such claims on his behalf at the union arbitration proceedings with Notre Dame. J. App'x at 18-19 ¶¶ 62, 64, 66. Based on

these allegations, Jusino claimed principally that the FCT had breached its duty of fair representation under the NLRA and LMRA. Based on the same allegations, Jusino also claimed that the FCT had discriminated against him in its own right, thereby violating the provisions of the NYSHRL and NYCHRL that apply to "labor organizations." *See* N.Y. Exec. Law § 296(1)(e); N.Y.C. Admin. Code § 8-107(1)(c). For the duty-of-fair-representation claim, Jusino invoked the district court's federal-question and civil-rights jurisdiction under 28 U.S.C. §§ 1331 and 1343, and for the NYSHRL and NYCHRL claims, he invoked the district court's supplemental jurisdiction under 28 U.S.C. § 1367.

The FCT moved to dismiss Jusino's complaint in its entirety. As to Jusino's federal duty-of-fair-representation claim, the FCT sought dismissal principally under Rule 12(b)(1), arguing that labor disputes involving parochial-school teachers are excluded from the NLRA's and LMRA's grants of federal subject-matter jurisdiction under *Catholic Bishop*. In the alternative, the FCT sought dismissal of the duty-of-fair-representation claim under Rule 12(b)(6), arguing that it was time-barred and/or that Jusino had failed to adequately plead the elements of such a claim. As to Jusino's NYSHRL and NYCHRL claims, the FCT argued that the district court should either find that it lacked supplemental jurisdiction under 28 U.S.C. § 1367(a) (in the event that the duty-of-fair-representation claim was dismissed for lack of subject-matter jurisdiction), or decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3) (in the event the duty-of-fair-representation claim was dismissed on Rule 12(b)(6) grounds).

The magistrate judge (Tiscione, *Mag.* J.) recommended dismissing Jusino's duty-of-fair-representation claim pursuant to Rule 12(b)(l), reasoning that Jusino had "failed [to] meet his burden [to] show that subject[-]matter jurisdiction exists" under *Catholic Bishop.* J. App'x at 33. In light of this recommendation, the magistrate judge did not reach either of FCT's alternative arguments for Rule 12(b)(6) dismissal, but he did recommend "declining to exercise supplemental jurisdiction [over,] and granting FCT's [m]otion [to dismiss,] Jusino's state[-] [and municipal-] law claims." *Id.* at 33-34. Jusino objected to the magistrate judge's report and recommendation with respect to the duty-of-fair representation claim, but did not address the state- or municipal-law claims. The district court then adopted the report and recommendation "in its entirety," dismissed Jusino's federal duty-of-fair-representation claim with prejudice under Rule 12(b)(l), and dismissed his NYSHRL and NYCHRL claims "without prejudice to their repleading in a state court of appropriate jurisdiction." *Id.* at 35, 42.

Jusino timely appealed.

II. STANDARD OF REVIEW

We review de novo a district court's dismissal for lack of subject-matter jurisdiction, construing the complaint liberally and accepting all factual allegations in the complaint as true. *Green v. Dep't of Educ.,* 16 F.4th 1070, 1074 (2d Cir. 2021). We may "affirm on any ground with support in the record," *Cox v. Onondaga Cnty. Sheriff's Dep't,* 760 F.3d 139, 145 (2d Cir. 2014), "including grounds upon which the district court did not rely," *Leon v. Murphy,* 988 F .2d 303, 308

(2d Cir. 1993).

III. DISCUSSION

A. Duty-of-Fair-Representation Claim

1. The district court properly concluded that the NLRA and LMRA are inapplicable to Jusino's claim against his parochial-school teachers' union.

In *Catholic Bishop,* the Supreme Court held that the NLRA does not "bring teachers in church-operated schools within" its "cover[age]." 440 U.S. at 504,507. The Court so held in the context of an administrative enforcement action brought by the National Labor Relations Board (the "NLRB") against two Roman Catholic dioceses, asserting unfair-labor-practices claims under the NLRA on behalf of teachers employed in schools operated by the dioceses. *See id.* at 492-95. We must now decide, as a matter of first impression, whether *Catholic Bishop* likewise precludes a former parochial-school teacher's duty-of-fair-representation claim against his parochial-school teachers' union. We hold that it does.

An employee's duty-of-fair-representation claim against his labor union is derivative of – that is, "inextricably interdependent" with – his claim against his employer under section 301 of the LMRA. *DelCostello v. Int'l Bhd. of Teamsters,* 462 U.S. 151, 164 (1983); *see also Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers,* 415 F.3d 279, 282 (2d Cir. 2005) ("To prevail on a hybrid [section] 301/duty[-]of[-]fair[-]representation claim, [a plaintiff] must demonstrate *both* (1) that [the employer] breached its

collective bargaining agreement *and* (2) that [the union] breached its duty of fair representation." (emphasis added)). Thus, Jusino can only assert a viable duty-of-fair-representation claim against the FCT if he *also* has a viable section 301 claim against Notre Dame. But the holding of *Catholic Bishop* – again, that "teachers in church-operated schools" are not "covered by the [NLRA as amended by the LMRA]" – squarely forecloses any section 301 claim that Jusino might bring against Notre Dame. 440 U.S. at 504.

While the NLRA action at issue in *Catholic Bishop* was commenced by the NLRB on behalf of parochial-school teachers, rather than by parochial-school teachers on their own behalf, *see id.* at 494, that distinction is of no moment here.

In *Catholic Bishop,* the crux of the analysis was the canon of constitutional avoidance, i.e., the longstanding principle that acts of Congress "ought not be construed to violate the Constitution if any other possible construction remains available." *Id.* at 500 (citing *Murray v. The Charming Betsy,* 6 U.S (2 Cranch) 64, 118 (1804)). Recognizing "the critical and unique role of the teacher in fulfilling the mission of a church-operated school," the Supreme Court therefore reasoned that "construe[ing] the [NLRA] in a manner" that "covered" labor relations between parochial schools and their teachers would "call upon *the Court* to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 501,504,507 (emphasis added).

Critically, the Court drew no distinction between the "First Amendment problems" that would be created for "courts *or* agencies" called upon to apply the NLRA in ways that might "impinge upon the freedom of church authorities to shape and direct

teaching in accord with the requirements of their religion." *Id.* at 496 (emphasis added; citation omitted). Indeed, even within the context of the administrative enforcement proceedings under review in *Catholic Bishop,* the Court focused on the constitutional "problems" posed for the NLRB administrative law judges ("ALJs") "called upon" to *"resolve"* claims involving parochial-school labor relations – rather than for the NLRB officials *bringing* such claims. *Id.* at 496, 502 (emphasis added). That is, since NLRA claims brought on behalf of parochial school teachers would "in many instances" prompt their parochial-school employers to "respond[] that their challenged actions were mandated by their religious creeds," the ALJs' "resolution" of such claims would "necessarily involve [their] inquiry into the good faith of the position asserted by the clergy administrators and its relationship to the school's religious mission." *Id.* at 502-03. That reasoning applies with no less force where – as here – an Article III court (rather than an ALJ) is "called upon" to "resolve" an NLRA claim brought directly by a parochial-school teacher (rather than by the NLRB on behalf of such teachers). *Id.* at 502, 507.

Unable to distinguish *Catholic Bishop,* Jusino instead asserts that it is no longer good law. We disagree. Principally, Jusino argues that the "entire rationale" of *Catholic Bishop* "has been overruled" by the Supreme Court's decision in *Arbaugh v. Y&H Corp,* 546 U.S. 500 (2006). Jusino Br. at 16. But *Arbaugh* did no such thing. It said nothing about *Catholic Bishop,* the canon of constitutional avoidance, the NLRA, or its applicability to labor disputes involving parochial school teachers. Rather, the Supreme Court in *Arbaugh* merely criticized a "genre" of "[j]udicial opinions," including a few of its own, that had

"erroneously conflated" subject-matter jurisdiction with the "merits issue" of "a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief." *Id.* at 511,513 n.7 (citation omitted). The Court thus decreed that where judicial opinions "obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject-matter jurisdiction or for failure to state a claim," their "'drive-by jurisdictional rulings' ... should be accorded 'no precedential effect.'" *Id.* (first quoting *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358,361 (2d Cir. 2000); then quoting *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 91 (1998)).

Clearly, *Arbaugh* bears upon *Catholic Bishop* only in a limited way. To the extent that *Catholic Bishop* purported to answer "[w]hether teachers in schools operated by a church . . . are within the *jurisdiction* granted by the [NLRA]," 440 U.S. at 491 (emphasis added), it might be argued to have announced a "driveby *jurisdictional* ruling[]" of the sort that *Arbaugh* cautions us to discount, 546 U.S. at 511 (emphasis added; citation omitted). But that argument would merely go to "whether the dismissal should [have] be[en] for lack of subject-matter jurisdiction or for failure to state a claim," *id.* (citation omitted) – a question we will address in just a moment, *see infra* Section III.A.2 - not whether *Catholic Bishop* requires dismissal of Jusino's duty-of-fair-representation claim *at all.* It certainly does not provide grounds to suggest that the "entire rationale" of *Catholic Bishop* was "overruled," or even called into question, by *Arbaugh.* Jusino Br. at 16.

Catholic Bishop also remains good law notwithstanding its reliance, *see* 440 U.S. at 496, 501-03, on *Lemon v. Kurtzman,* 403 U.S. 602 (1971), which was overruled by the Supreme Court – depending on whom you ask – either "long ago," *Kennedy v. Bremerton Sch. Dist.,* 142 S. Ct. 2407, 2427 (2022), or about two weeks after Jusino's appeal was submitted for our decision, *see id.* at 2434 (Sotomayor, J., dissenting) *("Today's* [June 27, 2022] decision .... overrules *Lemon v. Kurtzman* . ..." (emphasis added)). But regardless of whether *Kennedy* actively overruled *Lemon* or simply recognized that *Lemon* was already a dead letter, one thing it indisputably did *not* do was overrule – or even mention – *Catholic Bishop.* Thus, unless and until the Supreme Court sees fit to overrule *Catholic Bishop* directly, it remains binding on this Court. *See, e.g., Bosse v. Oklahoma,* 137 S. Ct. 1, 2 (2016) ("It is [the Supreme] Court's prerogative alone to overrule one of its precedents .... [Its] decisions remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether [its] subsequent cases have raised doubts about their continuing vitality.") (citations and alteration omitted).

Accordingly, we agree with the district court that *Catholic Bishop* was applicable here and required the dismissal of Jusino's duty-of-fair-representation claim against the FCT.

2. The inapplicability of the NLRA and LMRA to parochial-school teachers' duty-of-fair-representation claims created a defect in Jusino's pleading, not in the federal courts' subject-matter jurisdiction.

While the district court correctly stated that dismissal of this action "is compelled by ... *Catholic Bishop,*" it erred in stating that *Catholic Bishop's* effect is to "deprive[] the [federal] [c]ourt[s] of [subject-matter] jurisdiction" over this case. J. App'x at 39 (citation omitted). Rather, the application of *Catholic Bishop* in this case goes to Jusino's *failure to state a claim.* It was therefore improper for the district court "to dismiss pursuant to Rule 12(b)(l)," as opposed to Rule 12(b)(6). *Id.* at 42.

Such confusion is understandable, given *Catholic Bishop's* repeated references to "jurisdiction." *See* 440 U.S. at 491, 493-502, 504-06, 507. But the word "'[j]urisdiction,' it has been observed, 'is a word of many, too many meanings,' and it has been 'commonplace for the term to be used' imprecisely to refer to statutory limitations that are not strictly jurisdictional." *Green,* 16 F.4th at 1076 (quoting *Steel Co.,* 523 U.S at 90). Thus, as alluded to above, the Supreme Court has repeatedly instructed lower courts over the past two decades to "be especially careful to distinguish 'between two sometimes confused or conflated concepts: federal-court "subject-matter" jurisdiction over a controversy; and the essential ingredients of a federal claim for relief.'" *Id.* (quoting *Arbaugh,* 546 U.S. at 503); *see also Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.,* 821 F.3d 352, 359 (2d Cir. 2016) ("The question whether a federal statute creates a claim for relief is not jurisdictional." (quoting *Nw. Airlines, Inc. v. County of Kent,* 510 U.S. 355, 365 (1994))). To that end, the Supreme Court has "adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional": courts are to "inquire whether Congress has 'clearly stated' that the rule is jurisdictional," and

"absent such a clear statement, ... the restriction [is] nonjurisdictional in character." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (quoting *Arbaugh*, 546 U.S. at 515-16) (alteration omitted).

Here, Congress has never clearly stated a rule that labor claims involving parochial schools are excepted from any of the NLRA's jurisdiction-conferring provisions (such as the LMRA). The NLRA's definitions do not explicitly exempt parochial schools or labor unions representing parochial-school teachers from the statute's substantive provisions. *See* 29 U.S.C. § 152. Even if they did – as they explicitly do, e.g., for "State[s] or political subdivision[s] thereof," *id.* § 152(2) – that would not exempt the parochial school or labor organization representing teachers employed at a parochial school from subject-matter jurisdiction, *see Green*, 16 F.4th at 1075-76 (explaining that although section 152's definition of "employer" exempts a "state or a political subdivision of a state" from coverage by substantive provisions concerning "employers," that does not limit subject-matter jurisdiction). Thus, insofar as *Catholic Bishop* might be read to have found a lack of subject-matter jurisdiction over NLRA claims involving parochial schools (or their teachers, or those teachers' labor unions), that was a "drive-by jurisdictional ruling" that has "no precedential effect." *Id.* at 1076 n.1 (quoting *Steel Co.*, 523 U.S. at 91). Rather, we interpret *Catholic Bishop* to have spoken only to the "question of whether the particular plaintiff 'has a cause of action under the statute,'" which "does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional *power* to adjudicate the case." *Am. Psychiatric Ass'n*, 821 F.3d at 359 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118,

128 & n.4 (2014)) (emphasis in original; alterations omitted).

Confusion on this point has, if anything, been compounded by the fact that the particular constitutional principle at the heart of *Catholic Bishop's* reading of the NLRA – the "ministerial exception," *see generally Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 565 U.S. 171 (2012)[2] – has itself often been characterized in terms that may *sound* jurisdictional.[3] Indeed, prior to *Hosanna-Tabor,* several circuits (including our own) had expressly held that the ministerial exception *is* jurisdictional. *See, e.g., Rweyemanu v. Cote,* 520 F.3d 198, 209 (2d Cir. 2008)

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[2] The ministerial exception "precludes application of [labor and employment-discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor,* 565 U.S. at 188. The Supreme Court has found it "apparent that [parochial-school teachers] qualify for the exemption ... recognized in *Hosanna-Tabor* [where their job responsibilities include] perform[ing] vital religious duties" such as teaching theology. *Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 140 S. Ct. 2049, 2066 (2020).

[3] 3 *See, e.g., Watson v. Jones,* 80 U.S. (13 Wall) 679, 709, 727 (1871) (questioning "the *power* of the civil Courts" to decide cases involving "questions of ... ecclesiastical rule" (emphasis added)), *cited in Hosanna-Tabor,* 565 U.S. at 185; *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.,* 344 U.S. 94, 114-16 (1952) (using similar language), *cited in Hosanna-Tabor,* 565 U.S. at 186; *see also McCarthy v. Fuller,* 714 F.3d 971, 975 (7th Cir. 2013) (characterizing the ministerial exception as providing "immunity from the travails of a trial and not just from an adverse judgment"); *Dayner v. Archdiocese of Hartford,* 301 Conn. 759, 769 (2011) ("When the ministerial exception applies, it provides the defendant with immunity from suit [as opposed to mere immunity from liability] and deprives the court of subject matter jurisdiction.").

(affirming dismissal, for lack of subject-matter jurisdiction, of a Roman Catholic priest's Title VII action against his diocese for allegedly failing to promote him on the basis of race); *see also Hosanna-Tabor,* 565 U.S. at 195 n.4 (collecting cases on both sides of this former circuit split). But in *Hosanna-Tabor,* the Supreme Court unequivocally rejected that view, holding "that the [ministerial] exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar[,] .... because [it concerns] 'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has 'power to hear the case.'" 565 U.S. at 195 n.4 (quoting *Morrison v. Nat'l Australia Bank Ltd.,* 561 U.S. 247, 254 (2010)) (alteration omitted).

Thus, while the holding of *Catholic Bishop* does extend to preclude Jusino's duty-of-fair-representation claim against the FCT, it speaks to "the absence of a valid ... cause of action" on Jusino's part - not an absence of "subject-matter jurisdiction" on the district court's part. *Lexmark,* 572 U.S. at 128 n.4 (citation omitted). Jusino's complaint therefore "fails to state a claim for a violation of the statute and should have been dismissed pursuant to Rule 12(b)(6)." *Green,* 16 F.4th at 1075.

3. The concurrence misapprehends our precedent and offers no basis for avoiding the straightforward application of *Catholic Bishop* to Jusino's claims.

The concurrence suggests that instead of reaching the merits of Jusino's failure to state a claim, we should decide this appeal on the ground that "all of [Jusino's] claims against [the FCT] are time-barred."

Concurrence at 1. We respectfully disagree. For starters, the issue of timeliness was never addressed below, in either the magistrate judge's report and recommendation or the district court's final order. And while we may be *"free* to affirm on any ground that finds support in the record, even if it was not the ground upon which the district court relied," we have made clear that "we *prefer* not to speculate in the first instance as to" issues not passed upon below. *Brown Media Corp. v. K&L Gates, LLP,* 854 F.3d 150, 160 n.6 (2d Cir. 2017) (emphasis added; citation and alterations omitted). Indeed, it is a fundamental principle of "our adversarial system of adjudication" that "courts normally decide only questions presented by the parties," *United States v. Sineneng-Smith,* 140 S. Ct. 1575, 1579 (2020) (citation and alteration omitted), and here, neither party addressed the timeliness of Jusino's claims in its appellate briefs.

The concurrence also contends that our merits analysis "require[s] some new law and some new applications of old law," and that it is "[in]advisable" as a "general matter" to address novel legal questions in "pro se case[s]" such as this. Concurrence at 1 (citing *Fitzgerald v. First E. Seventh St. Tenants Corp.,* 221 F.3d 362, 364 n.2 (2d Cir. 2000)). To be sure, there may often be sound reasons to avoid resolving novel legal questions in cases where we have briefing only from a pro se litigant. In *Fitzgerald,* however, the case upon which the concurrence relies for this contention, we did not suggest such a "general" policy against resolving novel legal questions simply because they happen to be raised in cases involving pro se litigants. To the contrary, we have published many precedential opinions – something courts typically do precisely for the purpose of "establish[ing] a new, or chang[ing]

an existing, rule of law," *Hughes v. Rowe,* 449 U.S. 5, 7 n.3 (1980) (citation omitted) – in cases involving pro se litigants, *see, e.g., Schlosser v. Kwak,* 16 F.4th 1078, 1079, 1081-82 (2d Cir. 2021) (resolving, in such a case, a question of first impression for our Circuit); *Meadows v. United Servs., Inc.,* 963 F.3d 240, 242, 244 (2d Cir. 2020) (same); *United States v. Pilcher,* 950 F.3d 39, 40-41 (2d Cir. 2020) (same). All we said in *Fitzgerald* was that we did not "need [to] decide" whether "dismissals under [a then-recently amended statute] are reviewed de novo or for abuse of discretion" – a question that was "no longer clear" in light of said amendments – "because the [d]istrict [c]ourt's decision" in that case would "easily pass[] muster under" either standard. 221 F .3d at 364 n.2. In other words, we simply refrained from announcing unnecessary dicta on a substantively difficult question of law.

Here, by contrast, we find nothing substantively difficult or "[un]clear," *id.,* in the merits question that the concurrence urges us to avoid. Our answer to that question is dictated by a simple syllogism of labor law: because the validity of Jusino's duty-of-fair-representation claim against the FCT is "inextricably []dependent" on his having a valid underlying LMRA claim against Notre Dame, *DelCostello,* 462 U.S. at 164, and *Catholic Bishop* unambiguously precludes him from asserting such a claim against Notre Dame, *see* 440 U.S. at 504, 507, his duty-of-fair-representation claim against the FCT must fail. That conclusion is hardly dicta, *cf Fitzgerald,* 221 F.3d at 364 n.2; it is dispositive of the federal claim at the heart of Jusino's case. Moreover, Jusino's pro se briefs are intelligently composed and present a colorable – though ultimately unavailing – argument on the merits. Under these circumstances, we think it wiser and

fairer to resolve the merits issue as framed by the parties than to decide the appeal on technical grounds that were neither passed on below nor briefed here.

4. Affirmance is proper, notwithstanding the district court's mischaracterization of a dismissal for failure to state a claim as a dismissal for lack of subject-matter jurisdiction.

As explained above, *see supra* Section III.A.2, we conclude that while the holding of *Catholic Bishop* does extend to preclude Jusino's duty-of-fair-representation claim against the FCT, it speaks to "the absence of a valid ... cause of action" on Jusino's part – not an absence of "subject-matter jurisdiction" on the district court's part. *Lexmark,* 572 U.S. at 128 n.4 (citation omitted). In other words, the district court erred in casting its judgment as a dismissal under Rule 12(b)(1); because the fatal flaw of Jusino's claim was its "fail[ure] to state a claim for a violation of the" NLRA as amended by the LMRA, it "should have been dismissed pursuant to Rule 12(b)(6)." *Green,* 16 F.4th at 1075.

This conclusion prompts an issue of appellate remedies that might otherwise be quite difficult, if not for the fact that our Court squarely answered it just last Fall in *Green.* There, as here, the district court had dismissed with prejudice, for putative lack of jurisdiction, a duty-of-fair-representation claim brought by a plaintiff who lacked a valid cause of action under the NLRA and LMRA. *See Green,* 16 F.4th at 1074. We found error both insofar as "dismissals for lack of subject[-]matter jurisdiction 'must be without prejudice, rather than with prejudice,'" *and* insofar as "the claim should have been dismissed for failure to state

a claim rather than for lack of subject matter jurisdiction." *Id.* (quoting *Carter v. HealthPort Techs., LLC,* 822 F.3d 47, 54 (2d Cir. 2016)). But rather than vacating the district court's improper Rule 12(b)(1) dismissal with prejudice and remanding with instructions to re-dismiss with prejudice under Rule 12(b)(6), we found it appropriate to simply "affirm the district court's dismissal with prejudice." *Id.*

Thus, following *Green,* we affirm the district court's dismissal of Jusino's federal claim with prejudice, in light of our holding that such dismissal should have been pursuant to Rule 12(b)(6) rather than 12(b)(l). That the district court did not itself dismiss Jusino's duty-of-fair-representation claim for failure to state a claim is no obstacle to this disposition, since we may "affirm on any ground with support in the record," *Cox,* 760 F.3d at 145, "including grounds upon which the district court did not rely," *Leon,* 988 F .2d at 308.

B. State- and Municipal-Law Claims

That leaves Jusino's claims under the laws of New York State and New York City, which the district court "dismissed without prejudice to their repleading in a state court of appropriate jurisdiction." J. App'x at 42. Jusino has forfeited any challenge to such dismissal twice over. *See United States v. Graham,* 51 F.4th 67, 80 (2d Cir. 2022) ("Forfeiture, a ... 'failure to make the timely assertion of a right' when procedurally appropriate, allows a court ... to disregard an argument at its discretion (in civil cases) ...." (quoting *United States v. Olano,* 507 U.S. 725, 733 (1993))). First, after the magistrate judge recommended "declining to exercise supplemental jurisdiction [over]

Jusino's state[-] [and municipal-] law claims," J. App'x at 33-34, Jusino's "failure to object ... to [that portion of the] magistrate's report operate[d] as a [forfeiture] of any further judicial review of the magistrate's decision," *FDIC v. Hillcrest Assocs.*, 66 F.3d 566, 569 (2d Cir. 1995) (internal quotation marks omitted). Second, Jusino does not challenge the dismissal of his state- and municipal-law claims anywhere in his appellate briefs. *See, e.g., Weinstein v. Albright,* 261 F.3d 127, 133 n.3 (2d Cir. 2001) (applying our general rule that where a district court's ruling is not challenged in an appellant's briefs on appeal, we consider any appeal of that ruling to be forfeited). In any event, the district court's dismissal of such claims was affirmatively proper. *See Marcus v. AT&T Corp.,* 138 F.3d 46, 57 (2d Cir. 1998) ("[I]n general, where the federal claims are dismissed before trial, the state claims should be dismissed as well." (citing 28 U.S.C. § 1367(c)(3))); *Baylis v. Marriott Corp.,* 843 F.2d 658,665 (2d Cir. 1988) ("When all bases for federal jurisdiction have been eliminated from a case so that only pendent state claims remain, the federal court should ordinarily dismiss the state claims ... without prejudice ....").

IV. CONCLUSION

For the foregoing reasons, we conclude that Jusino, as a parochial-school teacher, lacks a cause of action under the NLRA and LMRA for FCT's alleged breach of its duty of fair representation; that his lack of a valid cause of action under the NLRA and LMRA resulted in his failing to state a claim but did not deprive the federal courts of subject-matter jurisdiction; that the district court's dismissal with prejudice under Rule

12(b)(l) may be affirmed on the alternative ground that such a dismissal would have been proper under Rule 12(b)(6); and that Jusino has forfeited any challenge to the district court's decision to decline jurisdiction over his state- and municipal-law claims in light of its dismissal of his federal claim. Accordingly, we **AFFIRM** the district court's dismissal of Jusino's federal claims with prejudice and its dismissal of his state- and municipal-law claims without prejudice to their repleading in a state court of appropriate jurisdiction.

CALABRESI, *Circuit Judge,* concurring:

The majority opinion treats a series of federal issues that require some new law and some new applications of old law to the appeal in this case. But none of these issues need to be reached because all of plaintiff's claims against defendant union are time-barred. Plaintiff is *pro se,* and, as a general matter, it is advisable, when a *pro se* case can be decided in way that makes no new law, to decide it on the basis. *See, e.g., Fitzgerald v. First E. Seventh St. Tenants Corp.,* 221 F.3d 362, 364 n.2 (2d Cir. 2000) (per curiam) (declining to address a novel legal question raised by a *pro se* litigant where not necessary to adjudicate the claim).

As the majority states, the timelines questions have not been addressed by the parties and, other things being equal we prefer not to decide what has not been argued. Maj. Op. at 22. But as the majority recognizes, we are free to do so. *Id.* And we have done so when the record is sufficiently clear on the issue.

As the majority also states, we do make new law in *pro se* cases, and do so regularly when there is

no other way of deciding a case. Maj. Op. at 23. We are free to do so even when there is another way of deciding the case, but it is preferable to avoid it if the "new law" is in any way problematic. The case I cite above is just one of many suggesting this.

The question then becomes is the "new law" in this case so non-problematic that it is preferable to make it, even though plaintiff is *pro se,* or does it raise questions so that it is better to decide the case on a ground – timelines – that is on the record but was not argued. The majority clearly believes the former. I believe that, at this time, any new law touching on the intersection between religious rights and freedom from discrimination - both are fundamental – is best made extremely cautiously. And for that reason, I respectfully concur separately.

I join the majority's treatment of plaintiff's state law claims in full.

APPENDIX C

United States District Court
Eastern District of New York

RAMON K. JUSINO,
Plaintiff,

v.

FEDERATION OF CATHOLIC TEACHERS, INC.,
Defendant.

19-CV-6387

Decided: August 6, 2021

Memorandum and Order

ANN M. DONNELLY, United States District Judge:

The plaintiff commenced this action on November 12, 2019 alleging claims under the National Labor Relations Act ("NLRA"), New York State Human Rights Law ("NYSHRL"), and New York City Human Rights Law ("NYCHRL"). (ECF No. 1.) The defendant moved to dismiss the complaint on April 10, 2020 (ECF No.

12), and the Honorable Eric N. Vitaliano referred the motion to the Honorable Steven Tiscione for a Report and Recommendation ("R&R").[1]

Judge Tiscione issued a thoughtful R&R on March 26, 2021, recommending that the Court grant the defendant's motion to dismiss for lack of subject matter jurisdiction, and decline to exercise jurisdiction over the plaintiff's remaining state law claims. (ECF No. 15.) The plaintiff filed a timely objection on April 1, 2021. (ECF No. 17.) The defendant replied on April 16, 2021. (ECF No. 18.) For the reasons set forth below, I adopt the R&R in its entirety.

BACKGROUND[2]

The plaintiff was a teacher at a New York Catholic school until August of 2018. (ECF No. 1 at ¶ 5.) The defendant, a labor organization with exclusive bargaining authority for "thousands of teachers and other professionals employed at Roman Catholic elementary and high schools," represented the plaintiff in a collective bargaining agreement. (*Id.* at ¶ 6.) Through the Association of Catholic Schools, the plaintiff's school was party to a collective bargaining agreement ("CBA") with the defendant. (ECF No. 12-2.) As relevant here, the CBA included anti-discrimination provisions protecting teachers from discrimination on the basis of race, sex, and disability, among

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[1] This case was transferred to me on July 21, 2021 pursuant to Judge Vitaliano's Order of Recusal. (ECF No. 19.)

[2] The facts are taken from the complaint, assumed to be true for purposes of this motion, and are read in the light most favorable to the plaintiffs. *See Kleinman v. Elan Corp.*, 706 F.3d 145, 152 (2d Cir. 2013). Certain factual references are drawn from the R&R. (ECF No. 15 at 1–4.)

other characteristics. (ECF No. 1 at ¶¶ 14-15.) The CBA also provided for a grievance procedure whereby a formal hearing would be held within twenty days of a request, or as soon as a hearing officer was available. (*Id.* at ¶ 45.)

In July and August of 2018, the plaintiff's employer sent him two letters of suspension with intent to discharge. (ECF No. 1 at ¶ 8.) The plaintiff contacted the defendant and claimed that his employer was retaliating against him for complaining about sex, race, and age discrimination against himself and race discrimination against a student. (*Id.* at ¶ 16.) On September 5, 2018, the defendant notified the plaintiff's employer that it was initiating formal grievance procedures on his behalf. (*Id.* at ¶ 9.) However, the defendant did not pursue a discrimination claim, believing that the arbitrator would be willing to hear only contractual claims, not federal or state discrimination claims. (*Id.* at ¶¶ 17, 21–24.) The plaintiff subsequently filed a discrimination lawsuit against his employer in federal court, which has since settled. (*Id.* at ¶¶ 18, 37.)

The plaintiff cites a number of perceived inadequacies in the defendant's arbitration strategy that he believes amount to a failure to provide him with adequate representation. First, the plaintiff takes issue with the defendant's choice not to raise discrimination claims at the arbitration, which he believes weakened his case. (*Id.* at ¶¶ 31–32.) Additionally, he claims that the defendant committed a "grossly negligent" error by failing to follow the precise protocols in the CBA for requesting an arbitration, particularly by neglecting to mention the word "hearing" in its September 5, 2018 letter to his employer. (*Id.* at ¶¶ 28-29.) This, he argues, allowed the 20-day limitation

period in the CBA to lapse, jeopardizing his case when the matter was eventually heard by an arbitrator in May 2019. (*Id.* at ¶ 29-30.) Relatedly, the plaintiff alleges that the defendant's missteps deprived him of the right to a speedy resolution of his grievance that is guaranteed in the CBA. (*Id.* at ¶¶ 34-36.) He also alleges that the defendant discriminated against him. (*Id.* at ¶ 38.)

STANDARD OF REVIEW

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005). Although a court "must accept as true all material factual allegations in the complaint[,]" it must not draw inferences favorable to the party asserting jurisdiction, *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004), and it may consider evidence outside the pleadings, *Makarova*, 201 F.3d at 113. Subject matter jurisdiction is a threshold issue, and when a defendant moves to dismiss under both Rules 12(b)(1) and 12(b)(6), the court must address the 12(b)(1) motion first. *See Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 481 (2d Cir. 2002). Because the plaintiff is proceeding *pro se*, his pleadings are held "to less stringent standards than formal pleadings drafted by lawyers." *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *accord Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

A district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). A party's objections must be specific; where a party "makes only conclusory or general objections, or simply reiterates [the] original arguments, the Court reviews the Report and Recommendation only for clear error." *Pall Corp. v. Entegris, Inc.*, 249 F.R.D. 48, 51 (E.D.N.Y. 2008) (quoting *Barratt v. Joie*, No. 96-CV-324, 2002 WL 335014, at *1 (S.D.N.Y. Mar. 4, 2002) (internal quotation marks omitted)). The district judge must evaluate proper objections *de novo* and "may accept, reject, or modify the recommended disposition." Fed. R. Civ. P. 72(b)(3).

"[E]ven in a *de novo* review of a party's specific objections," however, "the court will not consider 'arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first instance.'" *Brown v. Smith*, No. 09-CV-4522, 2012 WL 511581, at *1 (E.D.N.Y. Feb. 15, 2012) (quoting *Kennedy v. Adamo*, No. 02-CV-1776, 2006 WL 3704784, at *1 (E.D.N.Y. Sept. 1, 2006)) (alterations omitted). Moreover, "the district court is 'permitted to adopt those sections of a magistrate judge's report to which no specific objection is made, so long as those sections are not facially erroneous.'" *Sasmor v. Powell*, No. 11-CV-4645, 2015 WL 5458020, at *2 (E.D.N.Y. Sept. 17, 2015) (quoting *Batista v. Walker*, No. 94-CV-2826, 1995 WL 453299, at *1 (S.D.N.Y. July 31, 1995)).

DISCUSSION

The plaintiff objects to Judge Tiscione's recommendation that his claims be dismissed for lack of subject

matter jurisdiction, rehashing the same arguments made in his briefing in opposition to defendant's motion to dismiss. (ECF No. 13-1.) As a result, the R&R need only be reviewed for clear error. *Sanders v. City of New York*, No. 12-CV-113, 2015 WL 1469506, at *1 (E.D.N.Y. Mar. 30, 2015). However, given the purely legal nature of the jurisdictional issue, I review the issue *de novo*. *See Rapid Anesthesia Sols., P.C. v. Hajjar*, No. 17-CV-4705, 2019 WL 263943, at *2 (E.D.N.Y. Jan. 18, 2019).

The Court's subject matter jurisdiction over the plaintiff's fair representation claim is predicated upon the National Labor Relations Act ("NLRA" or the "Act") § 301, which establishes the jurisdiction of federal courts over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations." 29 U.S.C. § 185(a).[3] While a fair representation claim might normally suffice to invoke the Court's broad jurisdiction over labor disputes, the plaintiff's former employer's status as a religious school alters the analysis and deprives the Court of jurisdiction. This conclusion is compelled by *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), in which the Supreme Court held that, absent "clear

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[3] Congress amended NLRA in 1947 with the Labor Management Relations Act ("LMRA"), which, among other things, "provide[d] a mechanism by which an employee may sue in federal court to enforce a collective bargaining agreement negotiated pursuant to the practices and procedures set out in the NLRA." *Vlaskamp v. Eldridge*, No. 01-CV-7348, 2001 WL 1607065, at *2 (S.D.N.Y. Dec. 17, 2001). Unless otherwise specified, references in this Order to NLRA include the amendments made by LMRA.

expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act," the grant of jurisdiction in § 301 should be read to avoid the "significant risk that the First Amendment will be infringed" by labor law intrusion into parochial education. *Id.* at 502–06. Based on this straightforward reading of *Catholic Bishop* and subsequent cases applying that decision, Judge Tiscione concluded that the plaintiff, whose NLRA claims are based upon his employment as a Catholic school teacher, are beyond the scope of the Court's jurisdiction. (ECF No. 15 at 6–7.)

Citing the jurisdictional language in NLRA § 301, the plaintiff claims that Judge Tiscione conflated the issue of jurisdiction with the merits of his claim. (ECF No. 17 at 2.) He focuses in particular on subsection (c) (entitled "Jurisdiction"), which provides that "district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members." 29 U.S.C. § 185(c).[4] In *Catholic Bishop*, the Supreme Court did not base its decision on a purely textual reading of § 301, but rather on the canon of constitutional avoidance. *Catholic Bishop*, 440 U.S. at 500. This principle, combined with a review of NLRA's legislative history, led the Court to

[4] This provision defines the geographic location of courts in which a given NLRA claim may be brought. As mentioned above, the statute grants federal courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations." 29 U.S.C. § 185(a).

conclude that parochial school teachers are excluded from the scope of the Act. *Id.* at 507.

Catholic High School Association of Archdiocese of New York v. Culvert, 753 F.2d 1161, 1164 (2d Cir. 1985) is not to the contrary. In *Culvert*, the Second Circuit considered whether New York's own State Labor Relations Board ("SLRB") could, consistent with the First Amendment, exercise jurisdiction over labor disputes involving teachers at parochial schools. *Id.* Unlike the NLRA, the New York statute at issue in *Culvert* explicitly covered parochial school teachers.[5] Based on that statutory language, the Second Circuit held that "even if the exercise of [SLRB] jurisdiction has an indirect and incidental effect on employment decisions in parochial schools involving religious issues, this minimal intrusion is justified by the State's compelling interest in collective bargaining." *Id.*

In *Ferro v. Association of Catholic Schools*, 623 F. Supp. 1161 (S.D.N.Y. 1985), the court held that a plaintiff's state labor law claims were not preempted because *Catholic Bishop* and *Culvert* made it clear "that the NLRA does not cover parochial school teachers." *Id.* at 1165. *See also, e.g.*, *Vlaskamp v. Eldridge*, No. 01-CV-7348, 2001 WL 1607065, at *2 (S.D.N.Y. Dec. 17, 2001) ("If we do not have jurisdiction under the NLRA over church-operated schools then we cannot have jurisdiction over them under the LMRA. For

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[5] Indeed, the Second Circuit distinguished *Catholic Bishop*, which addressed whether "the National Labor Relations Board (NLRB) lacked jurisdiction over lay teachers because Congress had not affirmatively indicated that it intended them to be covered by the National Labor Relations Act (NLRA)." *Culvert*, 753 F.2d at 1164. The SLRB, on the other hand, had a clear legislative directive.

this reason, we follow the holding in *Ferro* and find that we do not have jurisdiction to hear this case.").

The only possible ground on which to distinguish the above cases from the plaintiff's claim is that the plaintiff is not suing a religious school or association of religious schools; he is suing the labor union that represents teachers at Catholic schools. As Judge Tiscione noted, however, the language in *Catholic Bishop* and subsequent cases focuses on claims brought by teachers, and does not suggest that there is a distinction between suits against labor unions that represent Catholic school teachers and the schools themselves. (*See* ECF No. 15 at 7–8); *Catholic Bishop*, 440 U.S. at 507 ("[I]n the absence of a clear expression of Congress' intent to bring *teachers* in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." (emphasis added)). As a result, the nature of the plaintiff's fair representation claim does not alter the jurisdictional outcome under § 301.

CONCLUSION

For the reasons stated above, I adopt the Report & Recommendation in its entirety. The defendant's motion to dismiss pursuant to Rule 12(b)(1) is granted, and the plaintiff's NLRA fair representation claim is dismissed with prejudice. The plaintiff's state law claims are dismissed without prejudice to their repleading in a state court of appropriate jurisdiction. The Clerk of Court is respectfully directed to mail a

copy of this Order to the plaintiff, enter judgment in favor of the defendant and close this case.

SO ORDERED.

/s/
ANN M. DONNELLY
United States District Judge
Eastern District of New York
Dated: Brooklyn, New York
August 5, 2021

APPENDIX D

United States District Court
Eastern District of New York

RAMON K. JUSINO,
Plaintiff,

v.

FEDERATION OF CATHOLIC TEACHERS, INC.,
Defendant.

19-CV-6387

Decided: March 26, 2021

Report and Recommendation

STEVEN L. TISCIONE, United States Magistrate Judge:

Plaintiff Ramon K. Jusino ("Jusino"), *pro se,* commenced this action against Defendant Federation of Catholic Teachers, Inc. ("FCT") on November 12, 2019, alleging claims under the National Labor Relations Act ("NLRA"), New York State Human Rights Law ("NYSHRL"), and New York City Human Rights

Law ("NYCHRL"). FCT filed a Motion to Dismiss Jusino's Complaint. The Honorable Eric N. Vitaliano referred FCT's Motion to the undersigned to issue a Report and Recommendation. For the reasons set forth below, this Court respectfully recommends that FCT's Motion be GRANTED.

I. BACKGROUND

a. Factual Background

Unless otherwise indicated, all statements in this section are based on allegations in the Complaint. The relevant facts are as follows. Jusino is an individual who resides in Staten Island, New York. Compl. ¶ 5, Dkt. No. 1. Jusino was a tenured teacher at a Catholic school in New York City (the "School"). *Id.* FCT is a labor organization located in Staten Island, New York. *Id.* ¶ 6. FCT represents teachers and other professionals employed at Roman Catholic elementary and high schools in the boroughs of Manhattan, the Bronx, Staten Island, and the counties of Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester. *Id.* FCT is the exclusive bargaining agent for these employees. *Id.* FCT is a party to a collective bargaining agreement ("CBA") with the Association of Catholic Schools (the "Association"). *See* Declaration of Jane Lauer Barker ("Barker Decl."), Ex. A, Dkt. No. 12-2; Declaration of Jusino ("Jusino Decl."), Ex. A, Dkt. No. 13.[1] The terms of Jusino's

[1] When assessing a 12(b)(l) motion, a court may consider evidence outside of a complaint. *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000). When assessing a 12(b)(6) motion, a Court may consider documents incorporated by reference in a complaint. *DiFalco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d

employment were governed by the CBA. Compl. ¶ 5. As a tenured teacher, Jusino could only be terminated for just cause. *Id.*

The CBA contained two non-discrimination provisions. *See id.* ¶¶ 14-15. These provisions state an agreement that teachers shall not be discriminated against on the bases of, among other characteristics, race and sex, and an agreement subjecting the terms of teachers' employment to "the Americans with Disabilities Act and all other statutes governing nondiscrimination in employment." *Id.* The CBA also provides that a formal hearing "shall be held before a Hearing Officer within twenty days of receipt of [a] request or as soon thereafter as the Hearing Officer may schedule a Formal Hearing." *Id.* ¶ 45.

FCT, the School, and, as a third-party beneficiary, Jusino were parties to the CBA effective September 1, 2014 through August 31, 2018. *Id.* ¶ 7. Jusino received from the School two letters of suspension with intent to discharge. *Id.* ¶ 8. The letters were dated July 23, 2018 and August 20, 2018. *Id.* The first letter indicated Jusino was suspended with pay and the second letter indicated Jusino was suspended without pay. *Id.* ¶ 26. FCT sent a letter to the School on September 5, 2018. *Id.* ¶¶ 9, 28. In the letter, FCT informed the School that FCT was instituting formal grievance arbitration procedures on Jusino's behalf *Id.*

In connection with his grievance, Jusino alleged to FCT that Jusino had been suspended for complaining about sex, race, and age discrimination by the School against Jusino and race discrimination by

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Cir. 2010). The CBA, submitted by the parties in full and in an excerpted version, is quoted directly and otherwise referenced throughout the Complaint.

the School against one of the School's students. *Id.* ¶ 16. The September 5, 2018 letter did not mention any Title VII claims on Jusino's behalf *Id.* ¶ 28. On October 29, 2018, Jusino filed a discrimination lawsuit against the School in the Eastern District of New York, alleging Title VII, NYSHRL, and NYCHRL claims. *Id.* ¶ 18. Shortly thereafter, Jusino informed FCT of the federal lawsuit. *Id.* ¶ 19. In an email dated December 14, 2018, FCT informed Jusino that FCT was not in favor of making Title VII discrimination or retaliation claims on Jusino's behalf *Id.* ¶ 20. In the same email, FCT noted it was considering bringing claims under Title VI or Title IX. *Id.* In an email dated January 14, 2019, Jusino asked FCT about provisions of NYCHRL that Jusino thought may apply. *Id.* ¶ 21. FCT did not address Jusino's questions. *Id.* In subsequent emails to Jusino, FCT indicated that it would not pursue a Title VII claim in arbitration. *See id.* ¶¶ 23-24. Jusino also complained in an email to FCT that it was taking more than twenty days for the arbitration hearing to be held. *Id.* ¶ 34.

In its opening statement during the May 17, 2019 arbitration hearing, FCT did not reference discrimination, retaliation, or protected activity. *Id.* ¶ 31. FCT did not object when the School offered into evidence a news article concerning Jusino's discrimination lawsuit against the School. *Id.* ¶ 32. At the hearing, the School argued that the hearing should not be taking place because of FCT failed to properly request a formal hearing, a point on which the arbitrator reserved judgment. *Id.* ¶ 30; *see id.* ¶ 29. The School also indicated that it would require three or four days of hearings to make its case. *Id.* ¶ 35. The School and FCT agreed that the next hearing should take place in November 2019. *Id.*

On June 18, 2019, a settlement was reached in Jusino's suit against the School, and that case was dismissed on September 27, 2019. *Id.* 37.

b. Procedural Posture

Jusino commenced this action against FCT on November 12, 2019, bringing causes of action for breach of duty of fair representation, under NLRA, and unlawful discrimination, under NYSHRL and NYCHRL. *See generally id.* FCT filed the instant Motion pursuant to Federal Rules of Civil Procedure 12(b)(l) and 12(b)(6), seeking dismissal on the grounds that: this Court lacks subject matter jurisdiction over Jusino's fair representation claim; that the same claim is time barred; that Jusino fails to allege facts establishing FCT's breach of its duty of fair representation; that the Court lacks supplemental jurisdiction over Jusino's NYSHRL and NYCHRL claims; and that Jusino fails to plead facts to establish those state law claims. *See* Notice of Mot. Dismiss Compl., Dkt. No. 12; Mem. Supp. Mot. Dismiss ("Mot."), Dkt. No. 12-4. The Motion has been fully briefed. *See generally* Mem. Opp. Mot. Dismiss ("Opp."), Dkt. No. 13-1; Reply Supp. Mot. Dismiss ("Reply"), Dkt. No. 14. Both parties submitted, either in full or an excerpted version of, the CBA covering September 1, 2014 through August 31, 2018, and FCT submitted an excerpt of the CBA between FCT and the Association that is effective from September 1, 2018 through August 31, 2022. *See* Barker Decl., Ex. A; Barker Decl., Ex. B, Dkt. No. 12-3; Jusino Decl., Ex. A.

II. LEGAL STANDARDS

a. Rule 12(b)(l) Motion to Dismiss

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova,* 201 F.3d at 113. "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.* (citing *Malik v. Meissner,* 82 F.3d 560, 562 (2d Cir. 1996)). "Courts must accept as true all material factual allegations in the complaint and refrain from drawing from the pleadings inferences favorable to the party asserting jurisdiction." *Clarke v. US.,* 107 F. Supp. 3d 238, 243 (E.D.N.Y. 2015) (internal quotation marks and brackets omitted) (citing *Fox v. Worldwide Chauffeured Transp. of NY, LLC,* No. 08-CV-1686, 2009 WL 1813230, at *1 (E.D.N.Y. June 25, 2009)). "In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court ... may refer to evidence outside the pleadings." *Makarova,* 201 F.3d at 113.

b. Rule 12(b)(6) Motion to Dismiss

When assessing a Rule 12(b)(6) motion to dismiss, a court must determine whether the complaint states a legally cognizable claim by making allegations that, if proven, would show that the plaintiff is entitled to relief *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 557 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)

(quoting *Twombly,* 550 U.S. at 570). A complaint successfully states a claim when there is "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly,* 550 U.S. at 556).

There are "[t]wo working principles" that guide this analysis: "First, the court must accept all factual allegations as true and draw all reasonable inferences in favor of the nonmoving party," and "[s]econd, only a complaint that states a plausible claim for relief survives a motion to dismiss, and this determination is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Giambrone v. Meritplan Ins. Co.,* 13-CV-7377 (MKB) (ST), 2017 WL 2303980, at *3 (E.D.N.Y. Feb. 28, 2017) (internal quotation marks, citation omitted), *adopted by* 2017 WL 2303507 (E.D.N.Y. May 24, 2017). Although this Court is limited to facts as stated in the complaint, it may consider exhibits or documents incorporated by reference. *See Int'l Audiotext Network, Inc. v. AT&T,* 62 F.3d 69, 72 (2d Cir. 1995).

III. DISCUSSION

a. Jusino's Fair Representation Claim

Jusino's first cause of action alleges FCT violated its duty of fair representation, which it owes to Jusino under NLRA. Compl. ¶¶ 61-62. Specifically, Jusino avers FCT's "refusal to investigate and defend [Jusino's] Title VII discrimination/retaliation allegations, or meaningfully assert any of [Jusino's] other rights under the CBA" amount to a breach of FCT's duty. *Id.* ¶ 62. Jusino asserts that, because his claim arises under NLRA, subject matter jurisdiction exists

pursuant to 28 U.S.C. §§ 1331 and 1343. *Id.* ¶ 2. Among its other arguments, FCT contends that the Court lacks subject matter jurisdiction over this claim because Jusino's former employer is a church-operated school. Mot. at 5-7.

In *N.L.R.B. v. Catholic Bishop of Chicago,* the United States Supreme Court indicated that "[t]here is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by [NLRA]." *N.L.R.B. v. Catholic Bishop of Chicago,* 440 U.S. 490, 504 (1979). Accordingly, the Court declined to find that NLRA gave the National Labor Relations Board jurisdiction over teachers in church-operated schools. *Id.* at 507. Construing NLRA to provide the National Labor Relations Board with such jurisdiction "could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.*[2] Based on *Catholic Bishop,* the Second Circuit held that NLRA did not preempt the New York State Labor Relations Board from exercising jurisdiction over a dispute between an association of church-operated high schools and the union that represented the teachers in eleven schools managed and operated by the association. *Catholic High School Ass'n of Archdiocese of NY v. Culvert,* 753

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[2] The *Catholic Bishop* Court affirmed the Seventh Circuit, which reasoned that in "certifying a union as the bargaining agent for lay teachers the Board's action would impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion" and that a "factual inquiry by courts or agencies into such matters [separating secular from religious training] would almost necessarily raise First Amendment problems." *Id.* at 496. Under the circumstances, "interference with management prerogatives" is "not acceptable." *Id.*

F.2d 1161, 1165 n.2 (2d Cir. 1985). Applying *Catholic Bishop* and *Culvert,* the Southern District of New York remanded to state court an action brought by a former teacher alleging wrongful discharge against the church-operated school that had employed him, in violation of his contract with the school. *Ferro v. Ass'n of Catholic Schools,* 623 F. Supp. 1161, 1167 (S.D.N.Y. 1985). The school in *Ferro* was also a member of the Association, which was then party to a collective bargaining agreement with FCT. *Id.* at 1162. In *Ferro,* the court found that the Labor Management Relations Act ("LMRA"), which amended NLRA, did not provide grounds for removal as "NLRA does not cover parochial school teachers." *Id.* at 1165.

Jusino indicates that FCT is not a religious institution. *See* Opp. at 4. In this way, the instant matter differs from *Catholic Bishop, Culvert,* and *Ferro,* which involved associations of church-operated schools as parties. However, these cases also considered whether the relevant statutes reached *teachers at* church-operated schools. *See Culvert,* 753 F.2d at 1165 n.2 ("[t]he *Catholic Bishop* Court stated that absent such affirmative indication [of Congress' intent to cover parochial school teachers], the NLRB had no jurisdiction because of the 'difficult and sensitive' issues that would be raised in light of a teacher's critical role in the religious mission of the school"); *Ferro,* 623 F. Supp. at 1165 ("the holding in *Catholic Bishop – that* the NLRA does not cover parochial school teachers – applies to the instant case; therefore, whatever claims plaintiff asserts under New York contract or New York labor law are neither covered nor preempted by federal law"). The cases thus demonstrate that the status of a teacher as an employee of a

church-operated school places that teacher beyond Congress' intended reach of NLRA or LMRA. Accordingly, that teacher cannot assert federal subject matter jurisdiction by bringing claims under NLRA or LMRA. The CBA notes that the schools it covers are "Roman Catholic schools committed to providing exemplary academic education that integrates Catholic teachings." Barker Decl., Ex. A at 1; Jusino Decl., Ex. A at 1. Jusino states that the School is a Catholic school. Compl. ¶ 5.

Further, FCT argues that the "duty of fair representation analysis necessitates review of the employment relationship," that Jusino's claim "potentially involves an analysis of whether his Title VII claim against [the School] was meritorious," and that the "Complaint provokes exactly the kind of 'difficult and sensitive' First Amendment questions that the Supreme Court deliberately sought to avoid." Reply at 2-3. In assessing FCT's argument, fair representation matters that do not involve teachers at church-operated schools are instructive. A claim that concerns both an employer's underlying alleged violation of a collective bargaining agreement and a union's alleged failure to adequately represent the employee with regard to the employer's violation can be properly characterized as a LMRA § 301/duty of fair representation hybrid claim. *See McCleodv. Verizon NY, Inc.*, 995 F. Supp.2d 134, 141-42 (E.D.N.Y. 2014) (treating matter as a hybrid suit where "[employee] challenges the termination of his employment by the [employer] for being without just cause and alleges his Union failed to adequately represent him during the grievance process," noting, "[t]o resolve both of these claims will require the interpretation of the governing CBA"). In a

discussion of hybrid claims, the Supreme Court has explained:

> Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. Yet the two claims are inextricably interdependent. To prevail against either the company or the Union, ... employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164-65 (1983) (internal citation, quotation marks, brackets omitted). Relatedly, "the duty of fair representation arises when the union, employee and employer are involved." *Greenberg v. Int'l Union of Operating Eng'rs, Local 14-14B,* 588 F. App'x 5, 7 (2d Cir. 2014).

Given this framework, Jusino's suit against FCT implicates the merits of Jusino's claim that the School violated the CBA when it suspended him. Jusino does not avoid this by choosing not to name the School as a defendant in the instant action. Thus, this matter will likely give rise to the sort of "difficult and

sensitive issues" that led the *Catholic Bishop* Court to decline to construe NLRA as furnishing jurisdiction over claims by teachers at church-operated schools. *Catholic Bishop,* 440 U.S. at 507.

Jusino's other arguments are unavailing. Jusino cites several cases that articulate a union's duty of fair representation. *See* Opp. at 4-5 (citing *Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31,* 138 S. Ct. 2448, 2469 (2018); *Humphrey v. Moore,* 375 U.S. 335, 342 (1964); *Steele v. Louisville & Nashville R. Co.* (1944)). None of these cases, however, address whether NLRA or LMRA confer federal jurisdiction over claims by teachers at church-operated schools. Jusino also cites *Reich v. Federation of Catholic Teachers, Inc.,* 853 F. Supp. 710 (S.D.N.Y. 1994), in which FCT was a party. *See* Opp. at 4. As FCT contends, *Reich* concerns the Labor-Management Reporting and Disclosure Act, not NLRA. *See* Reply at 4. *Reich* does not otherwise consider *Catholic Bishop, Culvert,* or *Ferro.* It is inapposite.

Next, Jusino argues that the *Catholic Bishop* Court "did not hold that the unionizing of lay teachers in church-operated schools, through union certification by the National Labor Relations Board, violates the First Amendment rights of the religious schools." *See* Opp. at 5 (emphasis omitted). Citing *Culvert,* Jusino notes that the New York State Labor Relations Board is not barred on constitutional grounds from exercising jurisdiction over labor relations between church-operated schools and their lay teachers. *See id.* at 5-6. Again, these arguments do not bear on whether NLRA or LMRA reach Jusino so that this Court can exercise jurisdiction over Jusino's claims brought pursuant to those federal statutes.

Jusino also avers that *Ferro* suggests FCT owes Jusino a duty of fair representation. *See* Opp. at 6 (citing *Ferro,* 623 F. Supp. at 1166). In response, FCT clarifies that it is asserting Jusino's fair representation claim "would have to sound in state rather than federal law." Reply at 5 n.4. Additionally, FCT notes that the *Ferro* Court concluded the plaintiff could not bring his claim under LMRA § 301 as "the NLRA does not cover parochial school teachers." Reply at 4-5 (quoting *Ferro,* 623 F. Supp. at 1165).

The portion of *Ferro* to which Jusino refers is separate from the court's discussion of the applicability of LMRA to parochial school teachers. Rather, it concerns the defendant's alternative argument that removal to federal court is proper because the Federal Arbitration Act covered the contract at issue. *See Ferro,* 623 F. Supp. at 1166-67. In response, the plaintiff asserted "that although his employment contract made reference to the collective bargaining agreement containing the arbitration clause," he did not join the union until after he was discharged so the agreement "should not be binding on him." *Id.* at 1166. The *Ferro* Court rejected the plaintiff's disavowal of the collective bargaining agreement and explained, "he was a member of the collective bargaining unit on whose behalf [FCT] engaged in collective bargaining." *Id.* Thus, reasoned the court, FCT owed the plaintiff, as a member of the unit, a duty of fair representation when it comes to "enforcement of the contract for the employees' benefit." *Id.* The *Ferro* Court's findings that concern the application of the arbitration clause to union enforcement of the contract do not undermine its conclusion that the plaintiff could not bring his claim under LMRA.

Jusino further contends that FCT "is not exempt from NLRA," as FCT is a labor organization. Opp. at 7 (emphasis omitted). In connection with this argument, Jusino suggests that LMRA § 301 applies to FCT and thus confers subject matter jurisdiction. LMRA § 301 states:

> For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

29 U.S.C. § 185(c); *see* Opp. at 7-8. However, as previously discussed, case precedent indicates that LMRA does not reach teachers at church-operated schools. *See Ferro,* 623 F. Supp. At 1164-65 (finding LMRA, as extension of NLRA, does not cover parochial school teacher's wrongful discharge claim). Jusino thus cannot invoke LMRA's jurisdictional provision for his claim against FCT concerning his termination as a teacher at a church-operated school.

Finally, Jusino indicates that, under a provision of the CBA, the School and FCT "acknowledge and agree that the terms of employment of teachers in the member schools are subject to the Americans with Disabilities Act and all other statutes governing nondiscrimination in employment." Opp. at 8 (emphasis omitted); *see* Compl. ¶ 15. Based upon this provision, Jusino argues that NLRA applies in this matter and that the New York State Employment Relations

Act does not. Opp. at 8 (citing N.Y. Labor Law § 715). This argument, too, has no bearing on whether the Court has subject matter jurisdiction over the instant matter. As discussed, precedent has established that NLRA does not reach parochial school teachers so as to bring their labor claims within the subject matter jurisdiction of the federal courts. The Court need not decide whether the CBA provision incorporates NLRA and whether, if incorporated, the New York State Employment Relations Act does not apply; "[t]he law is well established that a party's consent cannot by itself confer subject matter jurisdiction upon a court." *Woods v. Roundout Valley Cent. School Dist. Bd. of Educ.* 466 F.3d 232, 238 (2d Cir. 2006).

Given the foregoing, Jusino has failed to meet his burden and show that subject matter jurisdiction exists. The Court therefore respectfully recommends that FCT's Motion be granted as to Jusino's fair representation claim.

b. Jusino's NYSHRL and NYCHRL Claims

Jusino brings his second cause of action under NYSHRL and his third cause of action under NYCHRL. Compl. ¶¶ 63-66. FCT argues these claims should be dismissed, as the Court lacks subject matter jurisdiction over Jusino's fair representation claim. Mot. at 18.

Per 28 U.S.C. § 1367(a), "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." However, "in general, where the federal claims are

dismissed before trial, the state claims should be dismissed as well." *Marcus v. AT&T Corp.*, 138 F.3d 46, 57 (2d Cir.1998); *see also* 28 U.S.C. § 1367(c)(3). Accordingly, as this Court recommends dismissal of Jusino's fair representation claim, it also recommends declining to exercise supplemental jurisdiction and granting FCT's Motion as to Jusino's state law claims.

IV. CONCLUSION

For the foregoing reasons, the Court respectfully recommends that FCT's Motion be GRANTED.

V. OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(l) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Frydman v. Experian Info. Sols., Inc.*, 743 F. App'x 486,487 (2d Cir. 2018); *McConnell v. ABC-Amega, Inc.*, 338 F. App'x 24, 26 (2d Cir. 2009); *Tavarez v. Berryhill*, No. 15-CV-5141 (CS) (LMS), 2019 WL 1965832, at *30 (S.D.N.Y. May 1, 2019); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

SO ORDERED.

/s/
Steven L. Tiscione

United States Magistrate Judge
Dated: Central Islip, New York
Eastern District of New York
March 26, 2021

APPENDIX E

Religious Schools, Collective Bargaining, & the Constitutional Legacy of *NLRB v. Catholic Bishop*

By Alexander MacDonald

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About the Author

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It would be difficult to find a corner of American labor law more anomalous than the one covering religious schools. Nearly half a century ago, in *National Labor Relations Board v. Catholic Bishop*,[1] the Supreme Court excluded those schools from the Board's jurisdiction. It did that by reading the National Labor Relations Act narrowly: it reasoned that because the Act never mentioned religious schools, Congress must have meant to exclude them. In other words, the

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[1] 440 U.S. 490 (1979).

Court anticipated Justice Neil Gorsuch's Canon of Donut Holes.[2]

That logic was, to put it generously, unorthodox. But the Court had its reasons. It paid little attention to the statutory language, focusing instead on the effect any other interpretation would have had on the schools' constitutional rights. Had the Board been given jurisdiction over the schools, it would have been responsible for policing collective bargaining and investigating alleged unfair labor practices in religious schools. Both activities would have forced it to question the schools' motivations in various contexts, which would have led it into disputes often grounded in religion. And in that way, the Board risked colliding with core First Amendment activity. Unwilling to stomach that risk, the Court avoided it by reading an exception into the law.

The Court's decision, however, was hardly the last word. In the decades that followed, the Board launched effort after effort to reassert jurisdiction over the schools. It formulated multiple tests and theories, each of which aimed to bring the schools back under its purview. Perhaps predictably, those theories were rebuffed by lower courts. The courts saw the theories for what they were: post hoc attempts to limit *Catholic Bishop*'s scope. And the courts proved more than willing to defend *Catholic Bishop*'s core holding, despite its counterintuitive rationale.

They proved less willing, however, to apply the same rigor to similar efforts by the states. Even as the

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[2] *See* Bostock v. Clayton Cnty., No. 17-1618, slip op. at 19 (June 15, 2020) ("Nor is there any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.").

Board was trying and failing to reassert jurisdiction, states were rushing to fill the gap. New York, New Jersey, and Minnesota applied their own labor relations laws to religious schools. They reasoned that *Catholic Bishop* addressed only the scope of federal statutory law; it had nothing to say about state law. And courts gave that logic their stamp of approval. They held *Catholic Bishop*'s black-letter holding dealt only with the NLRA. It had no import for questions of state law.

That approach presents us with a puzzle. It is well accepted that one should not read a decision only for its core holding.[3]

The rationale producing that holding is at least as important.[4] And *Catholic Bishop*'s rationale should have led courts to reject the application of state labor-relations laws to religious schools. At *Catholic Bishop*'s core was the doctrine of constitutional avoidance: the Court strained to read the Act as it did because a different reading would have produced an unacceptable risk to First Amendment rights. And courts have long recognized that the First Amendment applies with the same force to the states as it does to the federal government. The same analysis, then, should have applied whether jurisdiction was being asserted by the Board or by a state agency. In either case, *Catholic Bishop* should have led lower courts to avoid a conflict by denying states regulatory jurisdiction.

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[3] *See* Bryan A. Garner et al., The Law of Judicial Precedent 89 (2016) ("Courts must therefore deduce legal rules not only from the language of opinions, but from their underlying logic as well.").

[4] *See id.*

Yet for whatever reason, they failed to approach the question that way. And so a dichotomy has persisted in the law. Even today, after the Board has given up any hope of reinserting itself into religious schools, state agencies continue to regulate them. That is, states continue to do exactly what *Catholic Bishop* said the Board could not. And with each passing year, the dichotomy grows harder to defend. The Supreme Court has repeatedly emphasized that the First Amendment protects religious schools' control over their internal affairs – including their relationships with their employees. Meanwhile, scholars, lower courts, and the Supreme Court itself have questioned one of the key precedents used to justify state involvement in religious schools – *Employment Division v. Smith.*[5]

This tension cannot hold. At some point, courts will recognize the illogic of allowing states to do what the Board cannot in this context. The Board cannot require religious schools to bargain with a union because to do so would put constitutional rights at risk. That risk is no less present when the regulator is a state agency. And though courts currently distinguish between the two situations, that distinction is untenable. It has no principled undergirding. It appears to be no more than an unnoticed inconsistency – a wrinkle in the law yet to be ironed out.

In an ideal world, the states would wield the iron themselves. They would recognize the potential damage to First Amendment rights and would withdraw from religious schools. But in the real world, they have shown no inclination to do so. More likely, they will back out only when they face the coercive force of a court order. Courts perpetuated this

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[5] 494 U.S. 872, 887–88 (1990).

inconsistency by failing to give *Catholic Bishop* its full effect. It will be up to courts to set things right.

I. *Catholic Bishop* and Its Aftermath: The Board Moves Out, and States Move In

The story of the Board's jurisdiction is one of slow mission creep. Technically, the Board has jurisdiction over nearly all private employers.[6] Its reach extends to the full scope of Congress's power under the Commerce Clause, which means that the Board can regulate any employer whose activity has a substantial effect on interstate commerce.[7] But the Board has always exercised less than that full power. It has adopted voluntary jurisdictional limits, stated in terms of annual revenue.[8] Depending on the type of employer, these revenue floors can go as high as $500,000 a year.[9] If an employer generates less than that, it falls outside the Board's jurisdiction.[10]

Besides these revenue limits, the Board has sometimes declined jurisdiction over certain industries or activities on an ad hoc basis. For example, it has excluded horse-racing tracks from its scope by regulation.[11] And at various points in its history, it has declined jurisdiction over student athletes,

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[6] *See* 29 U.S.C. § 151 (declaring Congress's intent to reduce labor unrest affecting commerce).

[7] *See id.*

[8] *See Jurisdictional Standards*, Nat'l Labor Relations Bd., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/jurisdictional-standards (last visited April 23, 2021).

[9] *Id.*

[10] *See id.*

[11] 29 C.F.R. § 103.3.

explaining that its involvement in their relationship with schools wouldn't advance the NLRA's goals.[12]

For years, that was the approach the Board took toward nonprofit schools.[13] The schools, it reasoned, had only a limited effect on interstate commerce, and it made little sense to dedicate resources to policing their labor relations. So the Board declined jurisdiction over them, effectively carving out an ad hoc exception.[14]

But in the 1970s, it abandoned that approach.[15] Instead, it decided that some schools had a large enough effect on commerce to justify regulation.[16] So it started asserting jurisdiction.[17] But even then, it continued to impose some limits. In particular, with religious schools, it drew a line between "completely religious" institutions and those that were merely "religiously associated."[18] It declined jurisdiction over the former, but claimed full authority over the latter.[19]

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[12] *See* Brown Univ., 342 N.L.R.B. No. 42 (July 13, 2004); *but see* Columbia Univ., 364 N.L.R.B. No. 90 (Aug. 23, 2016) (reversing course and allowing student workers to unionize). The Board recently withdrew a rule that would have reversed *Columbia* and declined jurisdiction over student workers. *See Student Assistants*, Nat'l Labor Relations Bd. (March 15, 2021), https://www.nlrb.gov/about-nlrb/what-wedo/ *Id.* (citing 29 C.F.R. § 103.1). (announcing withdrawal of proposed rule).

[13] *See Catholic Bishop*, 440 U.S. at 497 (citing Trustees of Columbia University, 97 N.L.R.B. 424 (1950)).

[14] *See id.* (describing Board's historical approach to church-run schools).

[15] *See id.* (citing Cornell University, 183 N.L.R.B. 329 (1970)).

[16] *Id.* (citing 29 C.F.R. § 103.1).

[17] *Id.*

[18] *See* Roman Catholic Archdiocese, 216 N.L.R.B. 249, 250 (1975).

[19] *See id.*

Catholic Bishop brought that approach to the Supreme Court. The case involved two sets of high schools: one operated by the Catholic Church in Chicago, the other by the Diocese of Ft. Wayne – South Bend.[20] Both sets of schools offered secular and religious instruction, using both lay and religiously trained teachers.[21] In the mid-70s, two unions petitioned to represent the teachers. The Board accepted the petitions and certified election units comprising all full- and part-time teachers. It excluded, however, all "religious faculty," a term it did not define.[22] Despite this carveout, the schools resisted the petitions. They argued that government-mandated bargaining – even limited to lay teachers – would violate their First Amendment rights. As religious institutions, they enjoyed a protected sphere of autonomy over their internal affairs. And bargaining, they said, would drain their discretion over those affairs and invade their autonomy.[23]

The Board disagreed. Applying its "completely religious" test, it found that the schools were too secular to qualify for an exemption. For example, they had sought and received accreditation from a secular regional authority.[24] They had also admitted non-Catholic students, employed non-Catholic teachers, and offered a mix of religious and secular instruction.[25] Indeed, their secular instruction looked much like the instruction found in any secular college-prep

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[20] *Catholic Bishop*, 440 U.S. at 493.
[21] *Id.*
[22] *Id.* at 493 n.5 (describing unit certified by Board).
[23] *See id.* at 493–95.
[24] *Id.* at 492.
[25] *Id.*

course.[26] So the schools could not claim to be "completely religious"; they were merely associated with a religious institution, which would not justify an exemption.[27]

On review, the Seventh Circuit rejected the Board's reasoning.[28] The court saw no proper way to distinguish between "completely religious" and "religiously associated" schools. To draw that distinction, the Board would have to measure an institution's "degree of religiosity," and such an inquiry "would perforce involve [the Board] in answering the sensitive question as to how far religion pervades that institution."[29] That was a question the Board, as a government agency, had no constitutional competence to answer.[30]

But the Board's test wasn't the only problem. The court reasoned that even had the Board developed a more workable test, government-mandated bargaining would still have interfered with the schools' internal affairs. By definition, collective bargaining takes some control from management and gives it to a union.[31] Management and the union effectively share control over key decisions affecting wages and working conditions. And in a religious institution, control over management can have doctrinal significance. For example, canon law gave the

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[26] *Id.*

[27] *Id.*

[28] Catholic Bishop of Chicago v. N.L.R.B, 559 F.2d 1112 (7th Cir. 1977).

[29] *Id.* at 1120.

[30] *Id.*

[31] *Id.* at 1125–26.

bishop complete control over parochial schools.[32] His discretion over their activities was a matter of doctrine.[33] But mandatory bargaining would have forced him to share his discretion with a third party.[34] Important institutional decisions would no longer be his to make: they would instead require consultation and negotiation.[35] That kind of shared control could not be squared with the church's internal law.[36]

Nor did the problem stop with bargaining itself. To ensure bargaining proceeded apace, the Board would have to investigate alleged unfair labor practices.[37] And those investigations would inevitably draw the Board into religious disputes. For example, in *Catholic Bishop*, the schools had terminated three teachers. The schools offered religious reasons for the terminations: one teacher had exposed biology students to unapproved sexual theories; another had married a divorced Catholic; and a third had refused to restructure a course according to instructions from the religion department. The Board admitted that had these been the schools' true motivations, it would have owed them some kind of "reasonable accommodation."[38] Yet it still ordered the schools to put the teachers back to work. In the Board's view, the schools

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[32] *Id.* at 1123–24 (observing that mandatory bargaining would have forced the bishop to surrender authority over subjects that ecclesiastical law assigned to him in his sole discretion).
[33] *Id.*
[34] *Id.* at 1124 (observing that it is "unrealistic" to say that an employer who has to comply with a bargaining order is "not substantially inhibited in the manner in which it conducts its operations").
[35] *Id.*
[36] *Id.*
[37] *See Id.* at 1125–28 (describing problems attendant with investigating unfair labor practices in church-run schools).
[38] *Id.* at 1127–28.

had acted not for their purported religious motivations, but for unlawful discriminatory ones – they had retaliated against the teachers for union activity.[39] For the court, that kind of second-guessing was inappropriate when dealing with religious schools. The Board could not properly assess the schools' motivations when those motivations implicated religious doctrine.[40] Government officials have no competence in religious matters; they cannot inquire into the veracity or sincerity of an asserted religious belief. Yet under the Board's approach, that kind of inquiry would occur whenever the Board investigated an action the school took for ostensibly religious reasons.[41] To decide whether those reasons were sufficient, the Board would have to make a judgment call about the veracity or importance of the school's beliefs.[42] And that was a course barred to the government by the First Amendment.[43]

The court saw no way through this constitutional thicket.[44] There was no way to command the school to bargain while still respecting its autonomy. There was no way to evaluate unfair labor practices without digging into the school's beliefs. And so there

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[39] *See id.* at 1124 (noting that investigations would inherently lead the Board to question the legitimacy of purported religious motives).

[40] *See id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 1125 (noting that when investigating unfair labor practices, the Board's inquiry "would necessarily include the validity as a part of church doctrine of the reason given for the discharge").

[44] *See id.* at 1130.

was no way for the Board to properly supervise bargaining in religious schools.[45]

The Supreme Court affirmed that decision, but on different grounds.[46] Like the Seventh Circuit, it saw serious constitutional problems with extending the Board's jurisdiction to religious schools. The schools were religious institutions: they existed only because the church wanted to offer a religious alternative to secular education.[47] Their main purpose was to help the church pass its faith on to the next generation. Religious authority, then, "necessarily pervade[d]" their operations.[48]

The Board would deeply entangle itself in those operations by enforcing mandatory bargaining. Bargaining would touch on all manner of school policies. To resolve disputes over those policies, the Board would often have to ask questions about religious doctrine.[49] And though it might try to answer those questions in a way respectful to the schools' beliefs, merely asking the questions would draw it onto shaky constitutional ground.[50]

The Court saw no clean way around this problem. There was "no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in

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[45] *See id.* (seeing no possibility of compromise without "someone's constitutional rights being violated").

[46] *Catholic Bishop*, 440 U.S. 490.

[47] *See Catholic Bishop*, 559 F.2d at 1118 (observing that Roman Catholics established an alternative school system for religious reasons and continued to maintain them as integral parts of the church's mission).

[48] *See Catholic Bishop*, 440 U.S. at 550.

[49] *Id.* at 503.

[50] *See id.* ("Inevitably the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy–administrators and the Board, or conflicts with negotiators for unions.").

church-operated schools and the consequent serious First Amendment questions that would follow."[51] The Board's presence in religious schools, no matter how limited or tailored, would repeatedly cause constitutional conflicts.[52]

But rather than address those constitutional questions directly, as the Seventh Circuit had, the Court avoided them through statutory interpretation. It observed that although the NLRA applied to "employers" generally, nothing in the text directly addressed religious schools.[53] Nor had Congress addressed those schools at any point in the legislative process.[54] In other words, there was no evidence that Congress wanted the Board to wade into such a constitutionally fraught workplace.[55] And absent strong evidence on that point, the Court refused to assume that the Board's authority reached so far. So it read an exception into the Act and denied the Board jurisdiction over religious schools.[56]

A. The Board Tinkers with the Regulation of Religion

On its face, *Catholic Bishop*'s conclusion was absolute: the Board had no jurisdiction over religious schools. And while its holding was statutory, its analysis was constitutional. Whenever the Board exercised jurisdiction over religious schools, it risked violating the First Amendment. It therefore had no business regulating those schools. There was no gray area.

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[51] *Id.* at 504.
[52] *Id.*
[53] *Id.* at 504–05.
[54] *Id.*
[55] *See id.* at 505–506.
[56] *Id.* at 507.

But not everyone read the decision that way. The Board, for one, thought *Catholic Bishop* left open a gap – a gap the Board would spend the next fifty years trying to pry open.

At first, the Board tried to limit *Catholic Bishop* to primary and secondary schools. It distinguished those schools from colleges and universities, where the students were less impressionable and the faculty more independent.[57] Indeed, the teachers there enjoyed "academic freedom," further insulating them from the school's institutional (i.e., religious) views.[58] So, the reasoning went, the teachers were less entwined in the institution's religious mission, and their relationship with the institution was more grounded in mundane workplace realities. That meant the Board could assert jurisdiction over them without bumping up against the First Amendment.[59]

But that approach ran aground in the courts. In *Universidad Central de Bayamon v. NLRB*,[60] the First Circuit rejected the Board's distinction between high schools and universities.[61] In an opinion by then-Judge Stephen Breyer, the court reasoned that even in a university, religion could still permeate an educational environment. Religion could still inform the university's instruction, course offerings, and academic decisions. And in such an environment, the Board would still have to draw knotty lines between religious and secular matters. These lines would present themselves whenever the Board certified a bargaining unit, enforced bargaining obligations, or

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[57] *See* Barber-Scotia Coll., 245 N.L.R.B. 406, 406 (1979).
[58] *See id.*
[59] *See id.*
[60] 793 F.2d 383 (1st Cir. 1985).
[61] *Id.*

investigated unfair labor practices. Nothing about the nature of higher education suggested that the lines would disappear. They had nothing to do with how advanced the students were, or whether the teachers enjoyed academic freedom. But they had everything to do with the school's religious mission – a mission that could pervade a university just as much as a high school.[62]

Undeterred, the Board changed tack.[63] While the courts continued to block it from asserting jurisdiction over religious schools, it still had to decide whether a school was religious in the first place. This, it thought, gave it another opening. So it started asking whether the school in question had a "substantial religious character."[64] If so, the Board would decline jurisdiction. But if not, it would regulate at will.[65]

That approach fared no better in court. In *Great Falls University v. NLRB*,[66] the D.C. Circuit held that even this new approach veered too far into forbidden territory. The court took it as a given that the government has no competence in religious affairs: no public official can evaluate a person's or institution's beliefs, let alone decide whether those beliefs are "substantial."[67] Yet the Board's new test called for just that kind of distinction. To apply its new standard, it would have to comb through a school's practices and draw a conclusion about the school's fundamental character. That kind of

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[62] *See id.*
[63] Great Falls Univ., 331 N.L.R.B. 1663 (2000).
[64] *Id.* at 1663.
[65] *See id.*
[66] 278 F.3d 1335 (D.C. Cir. 2002).
[67] *Id.* at 1343.

evaluation was exactly what *Catholic Bishop* meant to avoid.[68]

To cut off any more maneuvering, the court announced a bright-line test. A school would be beyond the Board's jurisdiction if it (1) held itself out as providing a religious educational environment; (2) was organized as a nonprofit; and (3) was affiliated with a religious institution.[69] Those three criteria comprised the entire inquiry. If all three were present, the Board could ask no more questions.[70]

Yet ask the Board did. Several years later, the Board shifted its focus again, this time from the schools to the employees. In *Pacific Lutheran University*,[71] it held that to avoid regulation, a school would have to show that the individual employees played a role in the school's religious mission. If they didn't, the Board would assert jurisdiction regardless of the school's overall character. That is, rather than focus on the institution's mission, the Board would evaluate the employees' duties.[72]

The D.C. Circuit swiftly rejected that approach as well. In *Duquesne University v. NLRB*,[73] the court reiterated that *Catholic Bishop* and *Great Falls* left no loopholes. *Catholic Bishop* meant what it said: the Board had no business in religious schools.[74] And the *Great Falls* test was absolute: if a school satisfied its

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[68] *See id.* (explaining that "[j]udging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims'" (quoting *Smith*, 494 U.S. at 887–88)).

[69] *Id.*

[70] *Id.*

[71] 361 N.L.R.B. 1404, 1404 (2014).

[72] *See id.*

[73] No. 18-1063 (D.C. Cir. Jan. 28, 2020).

[74] *See id.* at 7.

three criteria, the Board lacked jurisdiction.[75] The Board could not evade that result by shifting its focus. It was no less invasive to ask about the religiosity of individual jobs than it was to ask about the religiosity of whole institutions.[76] In either case, the Board would have to wade into questions about religious belief and doctrine – questions it had no competence to answer.[77]

Finally, after more than five decades of resistance, the Board accepted defeat. In a 2020 decision, *Bethany College*,[78] it recognized that *Catholic Bishop* stripped it of all jurisdiction over religious schools. Going forward, it would follow the bright-line test from *Great Falls*.[79] It would no longer try to police the relationship between religious schools and their teachers.[80] Instead, it would leave the schools to manage their own internal affairs.[81]

B. States Step into the Breach

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[75] *See id.* at 22–23.

[76] *See id.* at 22.

[77] *See id* (observing that the Board's approach would inevitably require it to ask which job duties were religious and which were not—exactly what the First Amendment and decades of caselaw said it could not do).

[78] 369 N.L.R.B. No. 98, slip op. at 1 (June 10, 2020).

[79] *Id.*

[80] *Id.* at 5.

[81] *See id.* at 4–5 (overruling *Pacific Lutheran* as inconsistent with *Catholic Bishop* and rejecting any further balancing tests). *But see* Ross Slaughter, *The NLRB's Unjustified Expansion of* Catholic Bishop *Is a Threat to All Employees at Religious Institutions*, On Labor (May 24, 2021), https://onlabor.org/the-nlrbs-unjustified-expansion-of-catholic-bishop-is-athreat-to-all-employees-at-religious-institutions/ (arguing that the courts and the Board have overread *Catholic Bishop* and thus undermined the collective-bargaining rights of non-ministerial employees in religious institutions).

As Aristotle famously (and perhaps apocryphally) said, nature abhors a vacuum. That is no truer in nature than it is in law. For even as the Board was struggling to find a foothold in religious schools, states recognized an opening, and they rushed in to fill it.

In most workplaces, states have no authority to regulate collective bargaining. The NLRA is a comprehensive regulatory system, and so it preempts state efforts to regulate the same subjects.[82] A state cannot, for example, provide additional remedies for federal unfair labor practices.[83] Nor can it require bargaining over subjects federal law leaves to the interplay of free-market forces (for example, strikes).[84] In fact, some courts have held that states cannot even encourage collective bargaining, as any effort to rebalance the incentives set by Congress would interfere with the federal scheme.[85] This principle is quite broad, and it leaves states with little if anything to say about labor relations in most workplaces.[86]

The principle does, however, admit a few exceptions. For one, states are free to regulate workplaces over which the Board has declined jurisdiction – or over which it lacked jurisdiction in the first place.[87]

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[82] *See, e.g.*, Bldg. & Trades Council v. Garmon, 359 U.S. 236, 245 (1958); Machinists Lodge 76 v. Wis. Emp. Relations Comm'n, 427 U.S. 132, 150–51 (1976).

[83] *See* Teamsters Local 20 v. Morton, 377 U.S. 252, 260 (1964).

[84] *Machinists*, 427 U.S. at 150–51.

[85] *See* Ass'n of Car Wash Owners v. City of New York., No. 15 C.V. 8157 (S.D.N.Y. May 26, 2017), *rev'd on other grounds*, 911 F.3d 74 (2d Cir. 2018).

[86] *See, e.g.*, S. Jersey Catholic School Teachers v. St. Teresa, 150 N.J. 575, 584
(N.J. 1997) (observing that states are preempted from acting on subjects regulated by the NLRA).

[87] *See id.* (stating that when the NLRB lacks jurisdiction, states must decide whether to assert jurisdiction for themselves).

So for example, states can create collective-bargaining systems for their own employees.[88] They can also create systems for agricultural workplaces or businesses too small to qualify for federal jurisdiction.[89] In these cases, federal law either does not reach the workplace or the Board has decided, as a matter of policy, to leave the workplace unregulated. That regulatory gap leaves a space for states to act.[90]

Some states saw just such a gap in the wake of *Catholic Bishop*. They reasoned that the Court denied the Board jurisdiction not because of any constitutional problem, but because Congress had provided no statutory authority.[91] In other words, they argued, the only problem was that Congress had not been

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[88] *See, e.g.*, Holman v. City of Flint, Bd. of Educ., 388 F. Supp. 792, 798–99 (E.D. Mich. 1975).

[89] *See, e.g.*, Willmar Poultry Co. v. Jones, 430 F. Supp. 573, 577 (D. Minn. 1977).

[90] *See, e.g.*, United Farm Workers of Am. v. Ariz. Agric. Emp't Relations Bd., 669 F.2d 1249, 1257 (9th Cir. 1982) ("[W]here, as here, Congress has chosen not to create a national labor policy in a particular field, the states remain free to legislate as they see fit, and may apply their own views of proper public policy to the collective bargaining process insofar as it is subject to their jurisdiction."); Greene v. Dayton, No. 14-3195, 2014 BL 373724, at *2 (D. Minn. Aug. 25, 2014) (holding that the state could regulate homecare providers because they fell outside the NLRA's coverage); Rachel Homer, *An Explainer: What's Happening with Domestic Workers' Rights?*, On Labor (Nov. 6, 2013), https://onlabor.org/an-explainer-whats-happening-with-domestic-workers-rights/ (surveying state efforts to regulate domestic workers, who are not covered by the NLRA).

[91] *See, e.g.*, *St. Teresa*, 150 N.J. at 584 (emphasizing that *Catholic Bishop* was "decided strictly on statutory interpretation grounds"); Nyserb v. Christ King Sch., 90 N.Y.2d 244, 251 (N.Y. 1997) (calling the Supreme Court's decision an affirmance of the Seventh Circuit's opinion "on other grounds"); Hill-Murray Federation v. Hill-Murray H.S., 487 N.W.2d 857, 862 (Minn. 1992).

clearer about its intent to regulate religious schools. And in that sense, religious schools were really no different than agricultural or public workplaces. The schools may have been outside the Board's remit, but they were fair game for states.

1. New York

The first state to act was New York. When the state originally adopted its labor-relations law in the 1930s, it exempted charitable, educational, and religious employers.[92] But in the late 1960s, it amended the law to cover those institutions.[93] That amendment gave the state's agencies a statutory hook for regulating the schools – exactly the hook the Board lacked in *Catholic Bishop*. That is, whereas federal law withheld authority implicitly, state law supplied it explicitly.[94]

Unions wasted no time in taking advantage of New York's more explicit coverage – an effort that eventually brought the issue to the U.S. Court of Appeals for the Second Circuit. In *Catholic High School Ass'n of Archdiocese v. Culvert*,[95] the court considered whether the state could apply its law to a group of Catholic high schools. The schools had a history of voluntarily bargaining with a union representing their lay teachers. Over the years, they had signed several collective-bargaining agreements with the union. But in 1980, they adopted a new substitution policy without bargaining about it first. Some of the teachers went on strike in protest. The schools suspended

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[92] Catholic High School Ass'n of Archdiocese v. Culvert, 753 F.2d 1161, 1163 (2d Cir. 1985).
[93] *Id.*
[94] *See id.* (discussing evolution of New York State Labor Relations Act).
[95] *Id.* at 1165.

those teachers, prompting the union to file unfair-labor-practice charges for the first time.[96] In response, the schools argued that despite the state statute, New York had no jurisdiction over their internal affairs. Exercising jurisdiction, they said, would run afoul of *Catholic Bishop* and the First Amendment.[97]

The Second Circuit disagreed. It saw *Catholic Bishop* as addressing only a statutory question.[98] It thought the Court had declined to answer the constitutional question – whether mandatory collective bargaining in religious schools violated the First Amendment.[99] And on that question, the Second Circuit saw no conflict between the First Amendment and state labor law. Neither mandatory bargaining nor unfair-labor-practice investigations infringed on religious exercise.[100] Bargaining, for one, caused no excessive entanglement or interference with religious affairs. The state dictated no particular outcome in bargaining; it had no say in the terms the parties reached. Instead, it merely brought them to the table and left them to their negotiations.[101] And as for unfair labor practices, the court viewed them as inherently secular.[102] A state could forbid anti-union practices without interfering with religious exercise. True, there would be cases presenting conflicting motivations: the union would say the school acted out of anti-union

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[96] *Id.* at 1163–64.
[97] *Id.* at 1164.
[98] *Id.* at 1165 n.2 (discussing and dismissing *Catholic Bishop*) ("In this case the State Board has validly asserted jurisdiction because Congress did not indicate that the NLRB had jurisdiction.").
[99] *Id.*
[100] *See id.* at 1166–69.
[101] *Id.* at 1167.
[102] *Id.*

animus, and the school would say it acted out of religious conviction. But the state could resolve that kind of conflict by applying a mixed-motives analysis. That is, the state could decide whether the alleged unlawful motivation would have led the school to act even without the religious one. And if the school would have done the same thing, the state could grant relief.[103]

The same reasoning prevailed in New York's state courts. A decade later, in *Nyserb v. Christ King School*,[104] the New York Court of Appeals took up the constitutional question and reached the same answer. The court relied not only on the Second Circuit's opinion in *Culvert*, but also the Supreme Court's intervening opinion in *Employment Division v. Smith*.[105] Decided in 1990, *Smith* had given constitutional approval to neutral, generally applicable laws, even those laws burdening religious practices.[106] Drawing on that principle, the Court of Appeals found that New York's labor law passed constitutional muster. The law applied neutrally and generally across all employers. It did not target religious practice.[107] It aimed instead at promoting collective bargaining across the state's economy.[108] And so whatever incidental burdens it placed on religious exercise were of no constitutional significance.[109]

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[103] *Id.* at 1168 (explaining that to avoid conflicts with religious tenets, the state could order reinstatement only if the teacher "would not have been fired otherwise for asserted religious reasons").

[104] 90 N.Y.2d 244.

[105] 494 U.S. 872.

[106] *See id.* at 887–88.

[107] *Id.*

[108] *Id.*

[109] *See id.*

That view prevailed over the following decades. Though the state shifted regulatory responsibility among various agencies,[110] it held firmly to its view that collective bargaining could be mandated in religious schools.[111]

2. New Jersey

The same year *Nyserb* came down, the New Jersey Supreme Court reached a similar result. In *South Jersey Catholic School Teachers v. St. Teresa*, it held that religious-school teachers had a right to bargain collectively under the state constitution.[112] It also held that the federal constitution presented no bar or competing mandate.[113]

St. Teresa involved a group of elementary schools run by the Diocese of Camden. When teachers at these schools formed a union, the Diocese refused to bargain, and the teachers sued for recognition. The teachers pointed to a provision of the state constitution guaranteeing the right to collective bargaining.[114] They argued that the provision applied to all "private employment," including employment in

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[110] *See Researching Issues Under New York's Private Sector Law*, N.Y. Pub. Emp. Relations Bd. (July 11, 2018), https://perb.ny.gov/researching-issuesunder-new-yorks-private-sector-law/ (discussing shift from State Labor Relations Board to State Employment Relations Board, then to Public Employee Relations Board).

[111] *See, e.g.*, Emp. Bd. v. Christian Bros., 238 A.D.2d 28, 30–32 (N.Y. App. Div. 1998) (relying on *Culvert* and *Nyserb* to deny Christian school's defense based on *Catholic Bishop*).

[112] 150 N.J. at 580.

[113] *Id.*

[114] *See* N.J. Const. art. I § 19 ("Persons in private employment shall have the right to organize and bargain collectively.").

religious schools.[115] In response, the Diocese argued that forcing it to bargain under the state constitution would violate its rights under the federal one. That is, according to the Diocese, *Catholic Bishop* barred the state from asserting jurisdiction.[116]

Although a trial court sided with the schools, the New Jersey Supreme Court reversed.[117] Like its sister court in New York, the New Jersey court saw *Catholic Bishop* as no barrier. *Catholic Bishop*, the court reasoned, dealt only with statutory interpretation.[118] The U.S. Supreme Court had been able to avoid the constitutional question because Congress had failed to clearly signal its intent.[119] That type of constitutional avoidance, however, was unavailable in New Jersey, where the state's constitution explicitly guaranteed the right to bargain in all "private employment."[120] So the court had no choice but to answer the First Amendment question itself.[121]

Relying largely on *Smith*, the court found no free exercise problem.[122] The state constitutional guarantee applied to religious and non-religious employers alike. It in no way targeted religion.[123] And its goals were obviously secular: it aimed to promote collective bargaining in all employment, and thus to

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[115] *St. Teresa*, 150 N.J. at 582.

[116] *See id.*

[117] *Id.* at 582–83.

[118] *Id.* at 584.

[119] *See id.* ("Defendants' reliance on *Catholic Bishop* is misplaced. That case was decided strictly on statutory interpretation grounds.").

[120] N.J. Const. art. I § 19.

[121] *St. Teresa*, 150 N.J. at 585.

[122] *See id.* at 597–98.

[123] *Id.* at 584 (observing that state constitutional provision was intended to "protect workers who are not covered by the NLRA").

strengthen all workers' positions vis-à-vis their employers. It was, in other words, neutral and generally applicable.[124] It therefore passed the *Smith* test and raised no concerns under the Free Exercise Clause.[125]

Even so, the court recognized that the scheme, if pursued too far, could raise constitutional concerns. For example, the state probably could not force a school to negotiate over overtly religious topics, such as a teacher's moral qualifications.[126] That kind of mandate would drag the state directly into religious disputes. So the court drew a line between religious and secular subjects. The latter could be the subject of mandatory bargaining, while the former could not.[127]

Separating secular from religious subjects was, of course, no easy task. But the court still concluded that it could be done. As evidence, it pointed to a collective-bargaining agreement the Diocese had voluntarily negotiated for some of its high schools.[128] That agreement dealt only with financial terms, such as salaries and benefits.[129] It explicitly reserved the Diocese's authority over potentially religious subjects, such as educational policies, discipline, assignments, accountability, class ratios, and other canonical or religious matters.[130] The court reasoned that if the

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[124] *Id.* at 597–98.

[125] *See id.* ("Because the state constitutional provision is neutral and of general application, the fact that it incidentally burdens the free exercise of religion does not violate the Free Exercise Clause." (citing *Smith*, 494 U.S. at 878–79)).

[126] *See id.* at 589 (discussing items excluded from Diocese's prior contract with high schools).

[127] *See id.* at 592.

[128] *Id.* at 589–92.

[129] *See id.*

[130] *Id.*

Diocese could negotiate such an agreement with its high-school teachers, it could surely negotiate a similar one with its elementary teachers.[131] It therefore ordered the Diocese to bargain over the same subjects with the union.[132]

3. Minnesota

This mode of reasoning prevailed outside the Northeast as well. In *Hill-Murray Federation v. Hill-Murray High School*,[133] the Minnesota Supreme Court likewise held that the state could constitutionally mandate bargaining between a religious school and its teachers. And like its northeastern counterparts, it relied heavily on *Smith*. *Hill-Murray* involved a high school run by a nonprofit corporation associated with the St. Paul Priory. About eighty-five percent of the school's students were Catholic.[134] Along with secular instruction, the school offered religion courses and monthly mass services.[135] Many of its teachers, however, were of different faiths.[136] Unless they worked in the religion department, they could practice any faith they chose. They could also use an internal grievance procedure, which the school had voluntarily adopted. (Teachers in the religion department, by contrast, could be fired at the Archbishop's discretion.)[137]

Seeking to represent the teachers, a union petitioned the Minnesota Bureau of Mediation Services.

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[131] *See id.*
[132] *Id.*
[133] 487 N.W.2d 857.
[134] *Id.* at 860.
[135] *Id.*
[136] *Id.*
[137] *Id.*

The school resisted the petition, making the now-familiar argument that *Catholic Bishop* barred the state from asserting jurisdiction.[138] The Bureau disagreed and certified an election unit of teachers outside the religion department.[139] A court of appeals refused to enforce the Bureau's judgment, but the Minnesota Supreme Court reversed.[140]

Like the New York and New Jersey courts before it, the Minnesota court saw the question largely as a free exercise issue. Relying on *Smith*, it characterized Minnesota's labor-relations law as a neutral law of general applicability.[141] The law on its face applied to all employers, religious and non-religious. It targeted no religious practice. And were the court to let the school opt out, it would, in *Smith*'s words, make the school a "law unto itself."[142] That result was unacceptable to the court, and so it enforced mandatory bargaining.[143]

II. An Unstable Dichotomy: State Jurisdiction over Religious Schools

And so, a half century of litigation has brought us to the unstable status quo. Time and time again, religious schools have beaten back the Board's efforts to insert itself into their internal affairs. The schools

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[138] *Id.* at 861.

[139] *See id.* at 861 n.1 (describing certified unit).

[140] *Id.* at 863.

[141] *See id.* ("In accordance with *Smith*, we hold that the right to free exercise of religion does not include the right to be free from neutral regulatory laws which regulate only secular activities within a church affiliated institution.").

[142] *Id.*

[143] *See id.*

Yet find an exception the Court did. It reasoned that because Congress hadn't expressly mentioned religious schools, it must have meant to exclude them.[148] In other words, it reversed the normal presumption against implied exceptions. Such an approach turns statutory interpretation on its head, and in most other contexts would have been laughable – another *Holy Trinity*[149] destined for the historical dustbin. But instead, *Catholic Bishop* has survived, and it has survived because there were other considerations at play. As the Court spelled out plainly in its opinion, it took pains to read the statute as it did because the more natural reading – one giving the Board jurisdiction over religious schools – would have risked violating the First Amendment. In other words, the Court engaged in "constitutional avoidance."[150] To treat its decision as merely a statutory

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[148] *Catholic Bishop*, 440 U.S. at 507.

[149] *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 458–59
(1892) (reciting the now debunked rule that even when a thing falls within the letter of a statute, it may fall outside the intent of its drafters, and so should not be included); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1551 (2007) (Scalia, J., dissenting) (criticizing *Holy Trinity*); George Conway, *Why Scalia Should Have Loved the Supreme Court's Title VII Decision*, Washington Post (June 16, 2020), https://www.washingtonpost.com/opinions/2020/06/16/why-scalia-would-
have-loved-supreme-courts-title-vii-decision/ (writing that the Court's decision in *Bostock* "effectively inters" *Holy Trinity*).

[150] *Id. See also Great Falls*, 278 F.3d at 1341 (characterizing *Catholic Bishop* as a constitutional-avoidance decision); Mich. Edu. Ass'n v. Christian Bros. Inst., 267 Mich. App. 660, 663 (Mich. Ct. App. 2005) (observing that although the Court in *Catholic Bishop* based its holding on the NLRA, "the reasoning underlying its holding is universal").

one is thus to ignore the major thrust of its reasoning – to deprive it of its central force, its rational glue.

Yet that is just what courts have done in cases involving state jurisdiction over labor relations in religious schools. They have minimized *Catholic Bishop* by giving it only its literal force, treating it as if it had nothing to say about the Constitution. That is the wrong approach, one that smacks of willful ignorance, or even malicious compliance.

But put that point aside. Even if these courts were right – even if *Catholic Bishop* had said nothing about the Constitution – the constitutional question would still remain. And it is by now beyond serious debate that the First Amendment applies equally to the federal government and the states.[151] The states are no freer to invade religious autonomy than the Board is.[152] So if states want to regulate the schools, courts must, at a minimum, confront the constitutional question themselves.[153] And their answer should be the same one that produced *Catholic Bishop*: there is no way, consistent with the First Amendment, to mandate collective bargaining in religious schools.

As the Seventh Circuit recognized, the state's involvement in mandatory bargaining threatens the First Amendment in two ways: through mandating bargaining itself, and through investigating alleged

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[151] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying First Amendment to state action). One notable exception is Justice Clarence Thomas, who has suggested that the Establishment Clause was wrongly incorporated against the states. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring).

[152] *See Nyserb*, 150 N.J. at 586 (recognizing that the federal First Amendment limits state action).

[153] *See id.*

unfair labor practices.[154] In the former case, the state interferes by requiring the school to share authority over the terms and conditions of teachers' employment with a third party, even when those terms and conditions potentially raise religious questions. And in the latter, the state interferes by probing the school's motives for a particular action, even when the school justifies its action on religious grounds. By reading *Catholic Bishop* narrowly, courts considering state regulations have ignored both of these problems, but they haven't resolved the constitutional questions.

A. Policing Collective Bargaining

To understand why bargaining interferes with religious autonomy, we first have to understand what bargaining entails. Like the NLRA, most state labor-relations laws require employers to bargain over three topics: wages, hours, and working conditions.[155] The first two topics include a relatively limited universe of subjects. They're about when employees show up to work and how much employees get paid. The third topic, however, is more expansive. It includes, of course, things central to the employment relationship, such as workloads, promotions, and

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[154] *See Catholic Bishop*, 559 F.2d at 1118.

[155] *See, e.g.*, N.Y. Labor Law § 705(1) (specifying that a certified union represents employees with respect to "rates of pay, wages, hours of employment, or other conditions of employment"); Minn. Stat. § 179.16 (stating that a certified union represents employees "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment").

discipline.[156] But it also includes more attenuated items, such as parking spots and prices in the office cafeteria.[157] Nearly any decision affecting an employee's work life is fair game.[158]

That can lead to especially expansive bargaining in a school, where nearly all managerial decisions affect a teacher's work.[159] For example, consider the choice of which courses to offer. If a school decides to offer a wide range of courses, there will be more classes, and so more teaching work. The school can address the additional workload in a few ways: it can hire more permanent staff, hire more adjuncts, or assign more work to its current teachers. Any of these choices will affect the teachers' experience at work, and so will require bargaining.[160] But in a religious

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[156] *See* The Developing Labor Law § 16.IV.C.1 (7th ed. 2017) (surveying caselaw).

[157] *See id.* (listing such items as workloads, parking, dress codes, and use of employee bulletin boards).

[158] *See, e.g.*, Pub. Serv. Co. of N.M., 364 N.L.R.B. No. 86 (2016) (holding that clean-shaven policy was a mandatory subject of bargaining); United Parcel Serv., 336 N.L.R.B. 1134, 1135 (2001) (holding that location of employee parking spaces had a "substantial impact upon the terms and conditions of employment").

[159] *See Duquesne*, No. 18-1063, slip op. at 8 ("Furthermore, exercising jurisdiction would entangle the Board in the 'terms and conditions of employment,' which would involve the Board in 'nearly everything that goes on' in religious schools." (quoting *Catholic Bishop*, 440 U.S. at 502–03)).

[160] *See* Pac. Beach Hotel, 356 N.L.R.B. 1397, 1398 (2011) (finding that increased workloads were a mandatory subject of bargaining). *See also* W. Ottawa Educ. Ass'n v. W. Ottawa Pub. Sch. Bd. of Educ., 126 Mich. App. 306, 326 (Ct. App. 1983) (holding that while school's initial decision to discontinue dance course was within its managerial discretion, it still had a duty to bargain with union over the effects of the decision on unit employees).

school, the same choice may also take on a religious character. Assume the school decides to offer a new divinity course. Most people would say that the decision to offer such a course is, on some level, religious. Yet as we've just seen, the decision also affects the teachers' working conditions. So in any other workplace, the decision would be a mandatory bargaining subject.[161] But in the religious workplace, is this a decision about working conditions, or is it about the school's religious mission?

The answer, of course, is that it's both – and therein lies the problem. To avoid a conflict with the First Amendment, the state has to avoid inserting itself into religious decisions. And to do that, it has to draw clear lines between subjects affecting religion and subjects affecting working conditions.[162] But in practice, it can't draw that distinction, because the distinction is illusory. Just as nearly everything a school does affects teachers' working conditions, nearly everything a religious school does involves

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[161] *Cf.* Webster Ctr. Sch. Dist. v. Pub. Emp. Relations Bd., 75 N.Y.2d 619, 627–28 (1990) (holding that school's decision to outsource portions of its summer school curriculum was excluded as a mandatory subject only because legislature clearly carved out an exception; otherwise, the decision would have been subject to bargaining).

[162] *See Nyserb*, 90 N.Y.2d at 253–54 (holding that the First Amendment allowed the state to regulate "the secular aspects of a religious school's labor relations operations"); *St. Teresa*, 150 N.J. at 580 (holding that the state could compel religious schools to bargain about "wages, certain benefit plans, and any other secular terms and conditions of employment"); *Hill-Murray*, 487 N.W.2d at 863 (holding that state law compelled religious schools to bargain about "hours, wages, and working conditions," which it characterized as "purely secular aspects of a church school's operations").

religion.[163] The subjects blend together in ways that make them impossible to disentangle.

Consider a few more examples. Suppose a school decides to offer a course in humanist moral theory. Whereas the choice about the divinity course looked religious on its face, this one looks "secular." The humanist course will involve teachings from outside the church's doctrines – maybe even antithetical to those doctrines.[164] So a government official might initially react by considering it an appropriate subject of bargaining. But that initial reaction would minimize the potential religious significance of teaching even apparently non-religious ideas. Maybe, in fact, the school wants to teach humanist theory because it sees the theory as compatible with its own beliefs. Or maybe it wants to illustrate a contrast between its own views and those of the secular world. Or maybe one of its central tenets is tolerance of other worldviews. Any of these goals could be characterized as religious. And because the goals are potentially religious, so is the decision to offer the course. You

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[163] *See Catholic Bishop*, 440 U.S. at 502–03 (observing that terms and conditions of employment for teachers involve almost everything a school does); *Duquesne*, No. 18-1063, slip op. at 18 (observing that mandatory bargaining would draw Board into disputes over terms and conditions in religious school, which would inevitably draw it into disputes about religion); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1408–09 (1981) (explaining that one way of exercising religion is forming a church; and so, everything church does is an extension of that exercise).

[164] *See Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 387–88 (1st Cir. 1985) (panel decision) (describing university's course offerings, along with other practices, and concluding that religion did not "pervade" university's operations).

cannot put the course neatly into a "secular" box even when its subject is facially secular.[165]

You can find the same issue with many common workplace decisions. Dress codes, weekly schedules, codes of conduct – all of these can take on a religious character in some settings. A dress code may carry religious significance when it requires the wearing (or not wearing) of a hijab. A schedule may change its character when it forbids work on the Sabbath. A code of conduct may mix with doctrine when it requires good moral behavior. There is no way to sort these subjects neatly into secular and religious buckets. They are not working conditions or religious matters; they are both.[166]

You might think these examples are outliers, cherry-picked to prove a point. For the moment, let's assume that's right. Let's say that there are actually three categories of potential bargaining subjects: The first includes subjects that are clearly secular, the second those that are clearly religious, and the third those that are a mix of the two. The state cannot order bargaining over the second category because doing so would insert it directly into religious decision-

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[165] *See id.* at 402 (en banc opinion) (concluding that despite secular course offerings, university had a religious character within the meaning of *Catholic Bishop*, and that character made entanglement in religious affairs especially likely even when dealing with ostensibly secular subjects).

[166] *Cf.* ACLU v. Ziyad, Civ. No. 09-138, slip op. at 23 (D. Minn. July 21, 2009) (explaining that whether a dress code involves religious entanglement "requires a factual inquiry into the particulars and reasons for the dress code"); Cooper v. Oak Rubber Co., 15 F.3d 1375, 1379 (6th Cir. 1994) (finding that district court erred by concluding that Seventh Day Adventists' complaint over schedule was not based on a sincerely held religious belief).

making.[167] And the third category will at minimum present the same knotty line-drawing problems we just explored.[168] But couldn't the state simply put those two aside? Without wading into the difficult line-drawing questions, couldn't it limit its own authority and order bargaining only over items in the clearly secular category?[169]

While that approach may be tempting, the answer is still no. The problems pile up as soon as you start the analysis. To even create the three categories, a government official has to comb through the school's practices and label them accordingly.[170] And to do that, the official has to make some initial judgment about their substance.[171] Even a "clearly" religious subject requires her to recognize it as religious, and even a "clearly" secular one requires the opposite judgment. The problem isn't the ease or accuracy with which the official can make the distinction; it's that she is making the distinction in the first place.[172] She is telling the school which of its practices are religious

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[167] *See St. Teresa*, 150 N.J. at 592–93 (recognizing that state could not compel school to "negotiate terms that would affect religious matters").

[168] *See Bayamon*, 793 F.2d at 402 (observing difficulty in untangling religious from secular subjects in a religious institution). *Cf. also* Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987) (noting, in the Title VII context, that the line between religious and secular subjects is "hardly a bright one").

[169] *See St. Teresa*, 150 N.J. at 592–93 (ordering bargaining over secular subjects, but not religious ones).

[170] *See Great Falls*, 278 F.3d at 1341 (stating that government agencies cannot troll through institutional practices and decide which are religious and which are not).

[171] *See id.*

[172] *See id.* at 1343 (observing that judging the centrality of religious beliefs is akin to evaluating the merits of competing religious claims – an evaluation the government has no authority to make).

and which are not. Even if she is fairhanded, careful, and even correct, she is still evaluating the substance of the school's beliefs.[173]

The official might try to avoid that problem by deferring to the school. For example, she might order bargaining only on subjects the school itself labels secular. Of course, that might not work, as most institutions don't make lists of all the secular things they do. So maybe more realistically, the official might require the school to object to bargaining when it sees a subject as religious. And whenever the school objects, the official might take the school at its word and set the subject aside. That approach would require her to make no judgment for herself; the school, not the official, would sort subjects into secular and religious buckets.

But even that solution would be hollow. If the official always defers, she effectively leaves the school in control. The school can decide which subjects are fit for bargaining and which are not. And at that point, we could reasonably ask why the official is involved at all. Schools can already bargain over the things they want to; the whole point of government intervention is to make them bargain over the things they don't want to discuss.[174]

You might think that the official could solve the problem by deferring only when the school makes a *reasonable* objection. But of course, to decide what's reasonable, the official still has to make some decision

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[173] *See* Laycock, *supra* note 163, at 1400 (observing that government enforcement of bargaining obligations not only interferes with freedom of conscience, but it also deprives a church of autonomy over its internal management).

[174] *Cf. Hill-Murray*, 487 N.W.2d at 863 (expressing fear that creating an exemption for church-run schools would make the schools "a law unto [themselves]").

about the merits. And that kind of decision brings us back to the original problem. Again, government officials have no competence in religious affairs; they cannot evaluate the merits of a religious belief, reasonable or unreasonable.[175] Deference avoids that kind of evaluation only when it is universal. It works only when the official defers every time – in which case it is worthless.

Some courts have looked for a third way around the problem. In *St. Teresa*, the New Jersey Supreme Court used the Diocese of Camden's prior agreements as a kind of crib sheet. The court ordered the Diocese to bargain with its elementary-school teachers, but only about subjects contained in a prior agreement with its high-school teachers.[176] The court reasoned that if the Diocese could bargain about those subjects for its high schools, then surely it could do the same for its elementary schools.[177]

Admittedly, the *St. Teresa* approach has a superficial appeal. After all, why can't a state require a school to bargain about terms it already agreed to bargain over? The school can hardly complain that those terms are categorically off-limits. It can't say that its religious beliefs prevent it from discussing the terms with its employees or a union. It is being asked to do only what it has already done. And that, it seems, is about as modest a burden as the school could hope for.

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[175] *See Catholic Bishop*, 440 U.S. at 502 ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.").

[176] 150 N.J. at 580.

[177] *See id.* (ordering bargaining over terms "similar to those that are currently negotiable under an existing agreement with high school lay teachers employed by the Diocese of Camden").

But in fact, as a general policy, the *St. Teresa* approach is inadequate in almost every way. For one, not every religious school will have a prior agreement to crib from. And even if every school did, *St. Teresa* would still approach the problem from the wrong direction. The court assumed that mandatory bargaining is a problem only when it interferes with some specific religious practice or belief.[178] But that's wrong. In many cases, bargaining and belief are completely consistent. The Catholic Church, for one, has vocally supported collective bargaining.[179] No, mandatory bargaining is a problem only because it's mandatory.[180] The problem comes not from some specific term in a collective-bargaining agreement, but from the government-backed interference the term implies. The command to bargain interferes with a religious school's autonomy to control its own internal affairs.[181] And it is that autonomy, not some specific religious practice, that the First Amendment protects in this context.

And let's be clear: constitutional protection for this kind of autonomy is not a new concept. More than half a century ago, the Supreme Court recognized

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[178] *See id.* at 593 ("By limiting the scope of collective bargaining to secular issues such as wages and benefit plans, neutral criteria are used to [e]nsure that religion is neither advances nor inhibited.").

[179] *See* Laycock, *supra* note 163, at 1398 (noting that while the Catholic Church long supported workers' right to bargain collectively, it at the same time resisted the NLRB's jurisdiction).

[180] *See id.*

[181] *See id.* (observing that contrasting positions in Catholic Church stance toward workers' rights and forced bargaining cannot be dismissed as mere hypocrisy; the NLRA gives the church no choice over whether to bargain, and once a union is certified, the law strips the church of the right to make unilateral decisions over internal affairs).

that the government has no business telling religious institutions how to manage their internal affairs. In *Kedroff v. St. Nicolas Cathedral of the Russian Orthodox Church*, the Court held that New York could not insert itself into a dispute between the Orthodox Church in Moscow and a North American religious corporation.[182] The dispute concerned control of the St. Nicholas Cathedral. Because the matter related to internal church hierarchy, any attempt by the state to weigh in interfered with the church's right of self-determination. The First Amendment, the Court said, "radiates . . . 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."[183]

This sphere of independence comes from the very nature of a church. Churches embody the religious beliefs of their members.[184] So every time the government interferes in a church's internal organization, it to some extent interferes with religious practice.[185] That is true regardless of the nature of the interference. Interference occurs when the government tells the church whom to hire, whom to promote,

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[182] 344 U.S. 94, 116 (1952).

[183] *Id.*

[184] *See* Laycock, *supra* note 163, at 1389 ("Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the clause.").

[185] *See id.* at 1391 ("When the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future.").

or how to allocate its resources.[186] The problem isn't that the government is telling the church to act inconsistently with some specific belief; it's that the government is telling the church how to organize itself at all.

To think about it in another way, imagine if the government ordered a religious school *not* to bargain with its teachers. The government would still be interfering with internal school affairs. And that kind of interference would be no less unconstitutional than the opposite command.[187] It is the existence, not the substance, of the command that offends the First Amendment.

It follows, then, that *St. Teresa* was wrong to conflate mandatory bargaining with the voluntary kind. Without government involvement, a school can bargain about any subject it wants, even overtly religious subjects. It can bargain about the curriculums in divinity courses, qualifications for ministers, or even the admission of nonbelievers. When discussed voluntarily, none of these subjects causes a First Amendment problem. The First Amendment puts no limits on a church's decisions about its own affairs.[188]

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[186] *See id.* at 1408 (arguing that the Court's caselaw shows that the right to free exercise includes the right to run a religious institution and manage its internal affairs).

[187] *See id.* at 1392 (explaining that the risk of undue interference can be mitigated only by a strong rule of internal autonomy); *id.* at 1391 ("When the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future."). *See also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, No. 19-267, slip op. at 12 (July 8, 2020) (observing that church autonomy over internal affairs has strong support in the Court's caselaw).

[188] *See* Laycock, *supra* note 163, at 1394 (observing that union rules have the same limiting effect on churches as government

The subjects become constitutionally problematic only when the government gets involved.[189] And for that reason, voluntary bargaining is an unreliable guide for mandatory bargaining. The government cannot simply order a religious school to bargain about any subject it has bargained about on its own initiative.[190] The same bargaining subject might be perfectly fine when voluntary, but constitutionally suspect when mandatory.[191]

The *St. Teresa* approach, then, offers us no way around the constitutional problem. Any government order to bargain interferes with a school's autonomy. And that is true whether the order comes from the federal government or a state.

B. Investigating and Remedying Unfair Labor Practices

No less problematic is the state's involvement in unfair-labor-practice investigations. Like the federal government, most states run their investigations through an administrative agency.[192] If the agency

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regulations: "both interfere with church control of church institutions").

[189] *See Culvert*, 753 F.2d at 1165 ("If we allow the camel to stick its nose into the constitutionally protected tent of religion, what will follow may not always be controlled.").

[190] *See Great Falls*, 278 F.3d at 1345 ("That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the latter any less religious.").

[191] *See id.* at 1344 (observing that *Catholic Bishop* made plain that decisions about religious teachings and doctrine belong to the schools, not government officials).

[192] *See, e.g.*, N.Y. Labor Law § 706 (describing powers of New York Public Employment Relations Board to prevent unfair labor practices); Cal. Govt. Code § 3514.5 (empowering Public

finds evidence of an unfair labor practice, it brings the case before a hearing officer or a judge.[193] This judge is responsible for weighing evidence and evaluating credibility. She reviews documents, hears testimony, and resolves disputes between differing narratives. These narratives often conflict when they describe why the employer took some action. The employer will offer a business motive, the agency an unlawful one. It's up to the judge to decide which is true.[194]

To do that, the judge sometimes has to decide whether the employer's motives are pretextual – whether it made its decision for a reason different from the one it offers.[195] In a normal case, that kind of judgment call causes no constitutional problems. The judge can simply conclude that the employer is lying.[196] But the same judgment presents real problems in cases involving religious schools. Suppose the agency alleges that the school fired an employee for union activity. In response, the school says it fired the employee for violating certain religious tenets. To side

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Employment Relations Board to investigate unfair labor practices). *But see* Minn. Stat. § 179.02 (describing power and duties of Bureau of Mediation Services, which has no power to investigate ULPs).

[193] *See* N.Y. Labor Law § 706(2) (providing for a hearing before a board agent).

[194] *See PERC and Its Jurisdiction*, N.J. Pub. Emp. Relations Comm., https://www.perc.state.nj.us/PERCFAQ.nsf/905c89adfe2e5bc085256324006d4a57/99a48e9c24ee9feb852570ab00722b5b#NT000008FE (last visited May 8, 2021) (describing hearing process).

[195] *See Catholic Bishop*, 559 F.2d at 1131 (describing NLRB process).

[196] *See Wright Line*, 251 N.L.R.B. 1083, 1089 (1980) (describing burden-shifting process applied by NLRB administrative law judges); John Higgins et al., How to Take a Case Before the NLRB 16-7 (9th ed. 2016) (describing operation of pretext analysis in NLRB hearing process).

with the agency, the judge has to conclude that the school's justification is pretextual. And to do that, the judge has to decide either that the school's reason wasn't sufficient to justify the firing or that the school doesn't believe its own reasons. Either way, she has to make some determination about the substance of the school's asserted religious beliefs.[197]

This is rocky constitutional territory. Again, government officials have no competence in religious affairs. The government cannot tell someone what she believes, much less whether her beliefs justify some specific action. And calling her asserted belief "pretext" comes quite close to that.[198]

Recognizing the problem, some courts have looked to "mixed-motives" analysis. That analysis asks whether, even without the asserted religious element, the school would have taken the challenged action anyway. If the school would have acted differently without the religious element, the official leaves things where they lie. But if the school would have done the same thing regardless of the religious element, then the unlawful motive was the true cause, and the official can order the school to reverse itself. So in our example, the judge can take the school at its word; she can accept that the school was motivated,

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[197] *See Catholic Bishop*, 559 F.2d at 1125 ("The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. This scope of examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge.").

[198] *See id.* (rejecting Board's assertion of jurisdiction in part because unfair-labor-practice investigations would inevitably draw it into religious disputes like this one).

at least in part, by religion. But she can then hypothetically remove that motive and reevaluate the situation. If, without the religious motive, the school would have fired the teacher, the official can put the teacher back to work. She doesn't have to call the school's religious beliefs into question.[199]

It's easy to see why courts are attracted to this kind of solution. Ostensibly, it lets the government have its cake and eat it too. The government can avoid questioning religious beliefs while also remedying unlawful discrimination. The school gets to keep its religious autonomy, and the employee gets her job back.

But of course, nothing is quite that easy in real workplaces. Let's assume now that the school suspends a biology teacher for a semester. The school says it suspended her because she taught a theory of evolution inconsistent with the school's religious beliefs. The agency, by contrast, alleges that the school suspended the teacher because she attended a union meeting. Under a mixed-motives approach, a judge can accept both motives as true.[200] The school may have been upset by the teacher's course materials, but also by her union activities. The judge would then apply mixed-motives analysis to decide whether the school would have suspended the teacher even if she hadn't attended the meeting.[201] That is, the judge still has to decide whether the discussion of evolution was important enough to justify the suspension on its own. That means the judge still has to weigh the school's

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[199] *See Culvert*, 753 F.2d at 1168 (reasoning that it is possible to evaluate school's motives without questioning its faith or asserted beliefs).

[200] *See id.* (describing "dual motives" analysis).

[201] *See id.* (stating that the Board could reinstate the teacher "only if he or she would not have been fired otherwise for asserted religious reasons").

religious motivations; she still has to make some judgment about the strength of the school's beliefs.[202] Mixed-motives analysis can't get us around this problem.[203]

In fact, the example we just considered offers an unusually clean scenario. In most real scenarios, the motivations won't be so easy to segregate. For example, suppose a Catholic school decides not to renew the contracts of several teachers. It does that, it says, because the teachers engaged in "un-Christian" behavior: they went out on strike. How is the judge to apply a mixed-motives analysis here? The alleged religious and unlawful motives are not discrete; they are the same. The strike was protected, but also, according to the school, "un-Christian." So to reverse the school's action and put the teachers back to work, the judge has to conclude either that the school is being disingenuous or that labor law overrides the religious concern. In other words, the judge has to balance the school's religious beliefs against government policy.[204]

It's tempting to dismiss this scenario as unlikely, even fanciful. But we know it happens in real schools. In fact, it was exactly the scenario presented in *Nyserb*.[205] The *Nyserb* court dealt with it by endorsing a mixed-motives analysis.[206] But as we now see,

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[202] *See Catholic Bishop*, 559 F.2d at 1125 (reasoning that mixed-motives analysis still forces the government to decide whether the asserted reason was pretextual).

[203] *See id.* ("This scope of examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge.").

[204] *Cf. Culvert*, 753 F.2d at 1168 (conceding that the First Amendment bars the government from inquiring into whether an asserted religious motive is pretextual).

[205] *See Nyserb*, 90 N.Y.2d at 252–53.

[206] *See id.* at 253 ("Support exists in the record that the conclusory characterization of the religious motive for the discharge

that solution was too facile. It failed to recognize, much less resolve, the conflict between religious beliefs and union activity. Mixed-motives analysis couldn't resolve that conflict because the school's motives were never really mixed. There was only one motive, both religious and prohibited.[207]

Now, we could imagine a rule resolving the conflict by prioritizing legal compliance over religious exercise. Indeed, such a rule prevails in most of American life. Under *Smith*, neutral and generally applicable laws often override religious practices.[208] And the same rule could play out in the halls of religious institutions, including religious schools. General laws could govern the internal affairs of those institutions just as they govern the affairs of so many others. Such a rule might even fit better with neutrality-centered views of the First Amendment, which tend to prioritize equal treatment over accommodation.[209]

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enjoys no record support or even effort by the School to present evidence that Gaglione's reinstatement implicates or engenders a religious entanglement.").

[207] *See id.* (concluding that state board could order reinstatement despite asserted religious motivations).

[208] *See Smith*, 494 U.S. at 887–88. *See also* Lyle Denniston, *A Bold New Plea on Religious Rights*, Constitution Daily (April 25, 2019), https://constitutioncenter.org/blog/a-bold-new-plea-on-religious-rights (discussing post-*Smith* litigation attempting to develop an approach more accommodating to religious practice); Kathryn Evans, *Supreme Court Considers Religious Exemptions to Nondiscrimination Laws*, Nat'l L. Rev. (Nov. 17, 2020), https://www.natlawreview.com/article/supreme-court-considers-religious-exemptions-to-nondiscrimination-laws (same).

[209] *See* Howard Gillman & Erwin Chemerinsky, The Religion Clauses: The Case for Separating Church and State 49–51, 134 (2020) (distinguishing between accommodationist and separationist views of the First Amendment and arguing that the former is inconsistent with a pluralist, democratic society).

But for better or worse, that has never been the rule when it comes to a religious institution's internal affairs. The Supreme Court has long recognized that at least in their internal governance, religious institutions enjoy a sphere of autonomy unlike anything enjoyed by the public at large.[210] State courts have consistently missed this distinction.[211] Yes, *Smith* allows some types of interference with religion. But not all interference is the same. And when it comes to interference with internal institutional autonomy, *Smith* has almost nothing to say.

C. Three Types of Interference: The Irrelevancy of Smith

Decided in 1990, *Smith* revolutionized free exercise jurisprudence. For decades, the Court had analyzed laws burdening the free exercise of religion under a compelling-interest standard. That is, whenever a state burdened religious exercise, it had to provide a sufficiently compelling reason for doing so.[212] But that standard had drawn withering criticism. Many, including some of the Justices, thought it offered too

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[210] *See Kedroff*, 344 U.S. at 116 (recognizing "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").

[211] *See, e.g.*, *Nyserb*, 90 N.Y.2d at 248–49 (relying on *Smith* and analyzing interference with internal affairs for interference with specific religious practices); *Hill-Murray*, 487 N.W.2d at 862 (same).

[212] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (asking whether a "compelling interest" justified incidental burdens on religious exercise).

little guidance to lower courts and state officials.[213] There was no way for these officials to decide, objectively, whether a particular interest was sufficiently compelling. And without guidance, they were left to their own devices; they were free to decide how important the government's interests were based on their own intuitions.[214] The Court took those criticisms to heart and, in *Smith*, discarded the compelling-interest approach.[215] It instead announced that it would uphold laws burdening religious exercise as long as they were neutral and generally applicable.[216] Discriminatory laws would fail that test, but most others would pass.[217]

This revolution came just as states were considering whether to extend their labor laws to religious schools. When these laws were challenged, courts in Minnesota, New Jersey, and New York all looked to *Smith* to help them resolve the constitutional question.[218] And in each case, they upheld the laws. The laws, they reasoned, were neutral and generally applicable. They applied to religious and non-

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[213] *See Smith*, 494 U.S. at 883–84 (recounting failings and gradual erosion of *Sherbert* standard).

[214] *See id.* at 886–87 (rejecting the notion that judges can decide which religious tenets are "central" to a person's faith and which are not).

[215] *See id.* at 494 U.S. at 887–89 (considering and rejecting even more limited forms of the compelling-interest test).

[216] *Id.* at 891.

[217] *See id.* at 894 (explaining that the Court's standard would not permit a state to target a particular religious practice); *see also* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018) (explaining that even under *Smith*, government cannot target religious practices out of "animosity").

[218] *Nyserb*, 90 N.Y.2d at 248–49; *Hill-Murray*, 487 N.W.2d at 862; *St. Teresa*, 150 N.J. at 595.

religious employers alike. They singled out no religious practice or belief. And their purpose was self-evidently secular: they promoted collective bargaining to improve the wages and working conditions of all employees. As a result, they passed muster under *Smith*, and whatever incidental interference they caused was of no constitutional significance.[219]

This analysis, however, elided a distinction between different kinds of interference. In a classic article on employment law in religious schools, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, Professor Douglas Laycock divided interference with religion into three categories.[220] The first was government interference with religious belief: the government tells the believer what he or she can or cannot think.[221] The second category was state interference with specific religious practices: the government tells the believer she cannot sacrifice animals, cannot use certain drugs, cannot dodge the draft, etc.[222] The third was state interference in the operation of religious institutions: the government tells believers how to administer the entities through

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[219] *See St. Teresa*, 150 N.J. at 597 (upholding application of state constitutional provision to church-run school because the provision was "a generally applicable civil law" and was "neutral in that it is not intended to regulate religious conduct or belief"); *Nyserb*, 90 N.Y.2d at 249 (upholding application of state labor-relations law because the law was a "facially neutral, universally applicable and secular regulatory regime"); *Hill-Murray*, 487 N.W.2d at 863 (upholding application of state labor-relations law because it was "a valid law of general applicability" and did not "intend to regulate religious conduct or beliefs").

[220] *Supra* note 163, at 1393.

[221] *Id.*

[222] *Id.*

which they practice their faith.[223]

The first type of interference is rare in this country. We seldom see examples of the government proscribing beliefs or dictating matters of faith.[224] The second, however, occurs almost daily. The government tells people when and where they can gather, what substances they can consume, whom they can marry. It was this type of interference that the Court dealt with in *Smith*. There, the Court held that the state could deny unemployment benefits to believers who lost their jobs for smoking peyote, even though peyote was part of their religious faith.[225] State law thus clashed with a specific religious practice.[226]

Catholic Bishop, however, involved the third kind of interference.[227] The schools never argued that collective bargaining itself violated any particular religious practice or tenet. Indeed, the Catholic Church enthusiastically supported collective bargaining.[228] Instead, the schools objected to the state's interference in their internal affairs. By commanding them to bargain over conditions of employment, the state sapped their authority over their internal governance. In other words, it wasn't bargaining that violated the schools' rights; it was the government's command to bargain.[229]

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[223] *Id.*

[224] *See id.*

[225] *Smith*, 494 U.S. at 874.

[226] *See id.*

[227] Laycock, *supra* note 163, at 1401 (explaining that the problem recognized in *Catholic Bishop* was an autonomy problem, not an interference-with-specific-practice problem).

[228] *Id.* at 1398.

[229] *See Catholic Bishop*, 440 U.S. at 503 (observing that government mandated collective bargaining would necessarily infringe on management prerogatives and lead to clashes

Smith, then, has little to say about whether a state can dictate the terms of a religious school's relationship with its employees. *Smith* dealt with a different kind of interference – state interference with individuals' religious practice. It never suggested that a state could insert itself into a religious institution's internal administration, even if the state did so in a neutral and generally applicable way. *Smith* tells us, in short, almost nothing about the debate over mandatory collective bargaining in religious schools.

This conclusion will, no doubt, raise some eyebrows. After all, if *Smith* doesn't allow states to regulate religious schools, does anything? Surely the school must comport itself according to normal commercial and regulatory laws. It must, for example, pay its vendors on time, comply with local zoning laws, and observe general building codes.[230] We cannot let a school flout those laws simply because it associates with a religious institution. So some will ask: Can a state do anything to rein in a religious school, or is the school "a law unto itself"?[231]

But so stated, the question presents a false choice. Not even churches claim that they can ignore all laws simply by virtue of their religious affiliation. Society can – and does – recognize a church's general duty to comply with the law while still respecting its

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between the church and the unions over "sensitive" issues that could have religious implications).

[230] *See* Laycock, *supra* note 163, at 1406–08 (observing that few dispute that churches must comply with general laws governing their relationship with third parties, such as building codes).

[231] *See Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145 (1879)).

sphere of internal autonomy.[232] The real question, then, is where autonomy ends and general obligation begins.

To draw the line, we have to distinguish between a church's behavior toward those outside its community and its behavior toward those within it. When the church complies with contracts, zoning laws, and building codes, it is acting externally: it is operating in the market just like any other person, business, or other entity.[233] But when it acts internally, its governance is its own, and the members of its community voluntarily submit to its authority.[234] That is no less true of employees than it is of congregants. Like congregants, employees in a religious school voluntarily join the community and accept the church's leadership.[235] They are no longer pure outsiders dealing with the school at arm's length, as a member of the public might.[236] They have taken up a role – a vital one – in the school's religious mission.[237]

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[232] *See Our Lady of Guadalupe*, No. 19-267, slip op. at 12 (recognizing that respect for church autonomy does not mean churches are immune from all secular laws; it only "protect[s] their autonomy with respect to internal management decisions that are essential to the institution's central mission").

[233] *Cf. Catholic Bishop*, 559 F.2d at 1124–25 (observing that bargaining orders are different from fire codes or compulsory attendance laws; the former inevitably draw the government into disputes over religious doctrine, while the latter do not).

[234] *See* Laycock, *supra* note 163, at 1408.

[235] *See id.* at 1409 (distinguishing between external and internal relationships for purposes of church's religious exercise) ("When an employee agrees to do the work of the church, he must be held to submit to church authority in much the same way as a member.").

[236] *Id.*

[237] *See id.*

This last point is, of course, not uncontroversial. There are no doubt some who think teachers are more like vendors than congregants, more like arm's-length contracting parties than members of the religious community. But that view overlooks the teachers' role in carrying out a school's religious mission.[238] Religious schools exist only when a community decides to offer an alternative to secular education.[239] Religious schools, then, owe their existence to a community's desire to project its religious message, and in particular, to hand that message down to the next generation.[240] The community's primary agents in that mission are its teachers. Teachers stand at the front lines, speaking for the whole group. They may not always embrace the community's teachings, but they do serve as its voice.[241]

That special role has been recognized for decades. For example, in *Lemon v. Kurtzman*, the Supreme Court held that a state could not subsidize teacher salaries at religious schools even when the teachers taught only secular subjects.[242] The Court reasoned that even lay teachers would inevitably be affected by the school's religious mission and character.[243] The teachers were products of their

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[238] *See Our Lady of Guadalupe*, No. 19-267, slip op. at 23 ("The concept of a teacher is loaded with religious significance.").

[239] *See Catholic Bishop*, 559 F.2d at 1118 (observing that Catholic Church established schools as alternatives to secular public school system).

[240] *See* Laycock, *supra* note 163, at 1411 (describing multiple roles played by religious schools, including as agents of transmitting religious beliefs to next generation).

[241] *Cf. Catholic Bishop*, 559 F.2d at 1127 (observing that failure by a lay teacher to carry out the bishop-employer's policy would "directly interfere with the exercise of religion").

[242] 403 U.S. 602, 618–19, 625 (1971).

[243] *Id.* at 619.

environment, and the state could not legitimately expect them to expel religion from their classrooms.[244] That is, they were religious agents even when teaching subjects other than religion.

Similarly, in a pair of recent cases, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[245] and *Our Lady of Guadalupe School v. Morrissey-Berru*,[246] the Court held that the First Amendment protects religious institutions from interference with their relationship with "ministerial" employees – i.e., employees who play important religious roles. Both cases involved attempts to apply antidiscrimination laws to teachers in religious schools. In rejecting those attempts, the Court reemphasized that religious schools enjoy a sphere of autonomy over their internal affairs, including their relationships with their teachers.[247] Laws regulating those relationships sapped the schools of their internal authority and entangled the state in school administration: "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."[248]

Teachers, then, are more than just ordinary employees. They are part of the school's internal religious community. In fact, they are often the school's most important agents in its religious mission. Their relationship with the school is a matter of internal

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[244] *See id.*

[245] 565 U.S. 171, 181–90 (2012).

[246] No. 19-267.

[247] *See id.* at 23 (observing that the "concept of a teacher is loaded with religious significance").

[248] *Id.* at 26–27.

governance, over which the school enjoys constitutionally protected autonomy.[249]

That being the case, when a state regulates the teachers' relationship with a school, it necessarily interferes with the school's internal authority.[250] And that is true even when the regulation is neutral and generally applicable, and even when these laws interfere with no specific religious practice. Again, *Hosanna-Tabor* and *Our Lady of Guadalupe* offer prime examples. There, the schools never argued that their religious practices required them to discriminate on the basis of some protected characteristic. No one claimed that antidiscrimination laws failed the *Smith* test. Instead, the only question was whether the state could apply neutral, generally applicable employment laws to the schools' internal affairs. The answer was no.[251] That was the answer not because the schools had a First Amendment right to discriminate, but because they had a First Amendment freedom to manage their own internal relationships.[252]

The same, then, must be true for mandatory-bargaining laws. Those laws interfere with a school's autonomy at least as much as antidiscrimination laws, probably more. Antidiscrimination laws have only a moderate effect on management's decision making: they limit the bases on which management can make certain employment decisions, but still

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[249] *See* Laycock, *supra* note 163, at 1401.

[250] *See Our Lady of Guadalupe*, No. 19-267, slip op. at 10.

[251] *See id.*; *Hosanna Tabor*, 565 U.S. at 189.

[252] *See Our Lady of Guadalupe*, No. 19-267, slip op. at 10 ("State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion.").

leave those decisions in management's hands. Bargaining laws, by contrast, limit management's authority across an array of subjects. They require bargaining over every term and condition of employment.[253] And again, when it comes to teachers, those terms and conditions encompass nearly everything the school does.[254] Class sizes, course offerings, curriculums—they all affect teachers' work environments, and so are proper subjects for bargaining.[255] Mandatory bargaining thus represents a far greater loss of autonomy for religious schools.[256]

If *Smith* meant to limit that longstanding sphere of autonomy, you might have expected the Court to at least mention it. But it never did. Nor has the Court suggested at any point since that *Smith* gave the state an entryway into church administration. To the contrary, the Court has affirmed and reaffirmed the importance of church autonomy over internal affairs, including employment relationships. On that subject, *Smith* has nothing to teach us.

III. Conclusion: All Roads Lead to Consistency

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[253] *See* Laycock, *supra* note 163, at 1401 (recognizing that collective bargaining necessarily deprives management of some of its autonomy and control over internal affairs).

[254] *See supra* note 163 (citing sources).

[255] *See Duquesne*, No. 18-1063, slip op. at 8 ("Furthermore, exercising jurisdiction would entangle the Board in the 'terms and conditions of employment,' which would involve the Board in 'nearly everything that goes on' in religious schools." (quoting *Catholic Bishop*, 440 U.S. at 502–03)).

[256] *See* Laycock, *supra* note 163, at 1409 ("Modern labor legislation may have deprived secular employers of the fiduciary duty once owed them by their rank and file employees, but to deprive churches of that duty would be to interfere with an interest protected by the free exercise clause.").

As we've now seen at length, a dichotomy persists in the law governing religious schools. While the courts have recognized that the First Amendment denies the Board jurisdiction over church-run schools, they have failed to apply that same rule to state agencies. Worse, they have done so without making any serious effort to explain the difference. Instead, they have swept *Catholic Bishop* into a jurisdictional corner, dismissing it as a decision only about statutory interpretation. And they have justified the states' own actions with logic that fails to address *Catholic Bishop*'s core concern: protecting the autonomy of religious schools over their internal affairs, as required by the First Amendment.

There is no way to square *Catholic Bishop* with that result. Nor is there any way to justify the distinction based on the Court's later precedents. The First Amendment protects religious schools' autonomy over their relationships with their employees, and that protection extends just as much to state agencies as it does to the Board. There is no constitutionally coherent way to deny the Board jurisdiction over the schools while allowing it to the states.

To paraphrase Abraham Lincoln, the law divided cannot stand. It must become all one thing, or all the other. Ideally, states would recognize the illogic of the existing divide and withdraw on their own accord. But more likely, the courts will have to make them. Courts will have to recognize the dichotomy and order states to stand down. With such an obvious imbalance, we might expect that decision to come sooner rather than later. We are now entering our fifth decade since *Catholic Bishop*, and the Supreme Court appears more solicitous of religious autonomy

than ever. If ever there were a time to give *Catholic Bishop* its full force, it is now.

APPENDIX F

The Federation of Catholic Teachers A Brief History

By Harold J. T. Isenberg

The author served as
President of the Federation of Catholic Teachers
from 1976 to 1986.

Written *circa* 1985.
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Teacher associations have long been an accepted part of the school scene. Organizations like the National Education Association (NEA) and the American Federation of Teachers (AFT) have had active teacher memberships from the earliest days of the twentieth century. Then in the 1960's a new type of teacher organization – the teacher union – began to make itself known in a number of large cities.

In Catholic schools there was little immediate response to the efforts of public-school teachers to unionize. However, as the number of lay teachers in some dioceses reached close to the halfway mark, it became obvious to them that their public-school counterparts had made significant gains through unionization.

The first major public-school strike took place in New York in November of 1960. Catholic school teachers, however, were not part of any advocate organization, although a number of them belonged to the Teachers Group of the Walter Farrell Guild.

The Guild met Sunday afternoon in the basement of the old chancery building, now the Helmsley Palace Hotel on Madison Avenue, in back of St. Patrick's Cathedral. The topic for discussion at these sessions was whether social or spiritual aspirations were most important to the membership. Nonetheless, the Guild did have a speaking relationship with the superintendent of schools and was able to successfully lobby the archdiocese for a pension plan which took effect in July of 1962.

By April of 1963 when members of the Guild met at the Cathedral High School on Lexington Avenue in Manhattan, it was clear that a more forceful organization was needed to meet teachers' needs. This was the birth of the Catholic Lay Teachers Group (CLTG), under the leadership of Eileen McLoughlin. The primary goal of CLTG was to organize all teachers within the New York Archdiocese into a strong, active association.

While the Archdiocese did "meet and confer" with the CLTG leadership, it did not grant CLTG "exclusive bargaining rights." Therefore, any agreements reached were merely "recommended" to the local schools which were under no obligation to implement them. Nonetheless, the fledging union was able to achieve improvements in salary, medical coverage, insurance, and begin work on a "personnel practices" manual.

The salary issue, of course, was never adequately addressed by the Archdiocese. At a meeting

with the superintendent of schools in February of 1965, then CLTG President Vera Monaco, questioned the employer's commitment to its teachers. Somewhat missing the point, the superintendent responded that the archdiocese was making "advancements in salary. It was now possible for a teacher with a degree and five years of experience to make $4,200 per year. "All the employer asked was "more time" and it would – unilaterally – make further improvements in salaries and working conditions (maybe).

The lay teacher frustration level was particularly high by the Spring of 1967. CLTG had called a general membership meeting for May, at which time a course of action would be decided. Then a month before this gathering, a CLTG delegation, along with its Chaplin, Fr. Harry Brown, met with Auxiliary Bishop Terence Cooke, who was representing Cardinal Francis Spellman. Future union president, Barry Ryan (1969-72), who was at that meeting, remembers Fr. Brown banging his fist on the table and telling Bishop Cooke that "these teachers eat hot dogs while priests eat roast beef."

Soon after that session, but before the scheduled union meeting, the Archdiocese issued a new salary scale. Teachers received a 40% raise; salaries went from $3,600 to $5,000 for the upcoming 1967-68 school year. Nonetheless, the May meeting drew a standing-room-only crowd of almost 800 teachers. Instead of "buying out" the lay staff, the employer had just proven how effective organized action could be.

During the presidential tenures of Sal Marro and Jim Harrington, the organization continued to grow and press the Archdiocese for formal recognition. This, however, did not come until the New York

State Labor Law was amended in April of 1969 to include teachers employed by Catholic schools.

The Archdiocese threw every legal roadblock it could think of in the way of CLTG's request for recognition. Its most ingenious argument was that it was not part of the proceedings. They argued that the schools, except for the archdiocesan high schools, were really operated by the individual parishes and religious orders. Therefore, if the union wanted bargaining rights, it would have to petition in each of the approximately three hundred schools and bargain a separate contract with each pastor and principal. Obviously, such an arrangement would work an undue hardship on the union and neglected the real role and authority of the superintendent and the ordinary of the diocese in the operation of the schools and their responsibilities under canon law.

The Labor Board, without commenting on the employer's arguments, ordered them to form as large an association of schools as possible and then report back on their efforts. Virtually all parish elementary and secondary schools became part of the employer association. A number of high schools run by religious orders also joined. Some schools refused to join the "archdiocesan association," but their teachers showed little interest in forcing the issue. It was later learned that some of these people were "bought off" with promises of higher salaries. Of course, once the crisis passed, these teachers never saw any of the items they were promised.

With the legal issues resolved, an election was ordered. It was one of two in September of 1969. The New York Lay Faculty Association, formerly part of CLTG, won bargaining rights for teachers in the twelve archdiocesan high schools, three days before

CLTG, (which) with 65% of the vote, became the "exclusive bargaining agent" of the parish elementary and secondary schools.

The first round of negotiations was a long, difficult, drawn-out affair. On December 8, 1969, teachers marched from a meeting at a nearby hotel to the chancery office and formed an informational picket line. The media coverage was overwhelming. By the time teachers next met on January 19, 1970, it was either a vote on a strike or accept a new offer from the Archdiocese. A strike was avoided and for the first time anywhere in the nation, both Catholic elementary and secondary school teachers were covered by the same agreement. It was an historic agreement and teachers were finally granted tenure, a grievance and arbitration procedure, sick and personal leave, a significant raise in salary and many other benefits.

The contract was retroactive to September of 1969 and would run two years until the end of August of 1971. On the surface it appeared that we had won two years of labor peace. Unfortunately, that was not to be. In December of 1970, the CLTG moved to affiliate with the American Federation of Teachers under the name of the Federation of Catholic Teachers (FCT).

Although the contract was clear that the agreement "shall bind, apply and inure to the parties hereto" and "their successors, transferees, lessees assigns," the Archdiocese seized upon this opportunity to challenge the union's bargaining status.

Catholic high school teachers in Philadelphia and Chicago had been the first to win collective bargaining agreements in 1966 and the first to affiliate with AFT. The national union was the only one

offering assistance and technical help to parochial school teachers.

The Archdiocese was successful in challenging the affiliation and the New York State Labor Board called for another representation election in May of 1971. The employer mounted an ambitious, costly and vicious attack on CLTG/FCT during the weeks leading up to the election. Every one of the 3,000 lay teachers in the system were bombarded with management's propaganda. The schools had the great advantage of having access to every voter. Principals handed literature to teachers. The union had to scramble to get at least one delegate in each school to do the same. On election day, we were vindicated by an overwhelming vote of support and confidence from the teachers.

The Archdiocesan re-recognition of the union was followed by months of delay on their part in beginning the second round of negotiations. It was obvious that they did not want to bargain with the teachers and were simply "going through the motions" to avoid any unfair labor practice charges by the FCT. Meanwhile, President Richard Nixon had imposed a three-month wage-price freeze that made most strikes illegal.

The freeze ended in mid-November and negotiations suddenly became very intense. The teachers met and took a strike authorization vote. Unfortunately, when the membership again met on November 21, the Archdiocesan position had not changed and over a thousand members voted to strike. It was the longest job action in Catholic school history, up until that time. It lasted twenty-one school days. When it was over, the union had survived and a contract had been won. The employer could not break the FCT and

begrudgingly recognized it would have to deal with the union.

Although the new agreement ran for two years, it contained a salary re-opener provision for the 1972-73 school year. This matter and subsequent contracts for the periods of 1973-75 and 1975-77 would be dealt with during the presidency of Jack O'Neil. The negotiations process was difficult, but the union achieved its settlements without the need of a strike or job action. Teachers however, were forced to work without a contract for a brief time while negotiations were in progress. The union was successful because members engaged in a number of demonstrations that focused public attention on our plight.

In July of 1976, Harold Isenberg became FCT president. In October of that year, he led a picket line of Catholic Teacher leaders who had been "locked out" of a National Catholic Educational Association meeting in Bethesda, Maryland on "Unionism in Catholic Schools." The Catholic school unionists demanded to be heard and asked the NCEA to sponsor a symposium that would bring both Catholic school labor and management together to discuss their problems and seek solutions.

When NCEA refused to act, FCT held a national workshop for Catholic school teachers in New York in February of 1977. Much to our surprise and delight, Msgr. Olin Murdick, then the secretary for education of the U.S. Catholic Conference (USCC) agreed to participate in our conference. He was sent to represent the USCC's recently formed subcommittee on lay teacher unionization and had come "to listen and to learn and to let the unionists know that the USCC was interested in their problems." For the first time, lay teacher leaders say "an opening and

opportunity for dialogue" between themselves, the USCC and hopefully, their dioceses.

The dialogue that followed involved the broadest possible consultation with lay teacher leaders across the nation. All were invited to a meeting in Chicago with the full membership of the USCC subcommittee on teacher unionization. The unionists' response and input were being sought on a draft statement of principles related to collective bargaining in Catholic schools. The subcommittee described their efforts as an attempt "to reassert in a forceful manner the traditional Catholic social principles involved" in the unionization issue. Subsequently approved by the USCC's Administrative Board, the three basic principles enunciated were that Catholic school teachers had a right to organize and bargain collectively with their employers, that it was up to the teachers to determine what agency or group would represent them in the process, and that teachers had a right to free elections, full negotiations, mediation, conciliation and similar services under the auspices of a neutral body.

Regretfully, the USCC guidelines were soon to be overshadowed by the controversy surrounding the role of the National Labor Relations Board (NLRB) in Catholic schools. In March of 1979, by a vote of 5 to 4, the U.S. Supreme Court held that schools operated by a church were not under the jurisdiction of the NLRB. The high court ruled against teachers on the technicality that the National Labor Relations Act (NLRA) did not specifically include parochial schools. The unionization efforts of a number of lay teacher organizations throughout the nation came to an abrupt halt. However, teachers in states, like New York, with equivalent labor laws were still protected. Although

the New York Archdiocese is currently in Federal court trying remove the Long Island and New York Lay Faculty Associations, as well as FCT, from the jurisdiction of the present state labor laws. It is doubtful that they will be successful, but even if they were – our strength, as always, is in our unity and numbers.

In April of 1981, the FCT voted to end its eleven years of affiliation with the AFT and its state organization. Isenberg said that "despite our best efforts to the contrary, there is an inherent conflict of interest between public and private school teachers over the issue of governmental assistance to our schools and parents." Although AFT had promised to downplay its opposition to legislation, like tuition tax credits, it did not or could not honor that commitment. Once several other Catholic locals had disaffiliated, AFT made it clear that it also would not pursue the NLRB issue or seek amendment of the NLRA to reinclude parochial school teachers. The executive council concluded, and the membership agreed, that we could no longer "in good conscience" continue to support an organization that vehemently opposed legislation vital to the long-term survival of our schools and refused to render necessary help.

FCT has been active in the fight for federal and state assistance to our schools and parents since the establishment of the CLTG. In 1970, our Save Our Schools (SOS) campaign helped win passage of a state bill granting funds to parochial schools. Since 1976, we have been at the forefront of the fight for a constitutional form of federal assistance to our schools and the parents of children attending these institutions.

The last three collective bargaining agreements have covered the periods of 1977-80, 1980-83, and now 1983-86. All were hard fought for victories.

All involved months of difficult negotiations, mass picketing, and a one-day strike in October of 1980. And all proved the absolute need for teacher solidarity.

Each of the recent agreements contained a parity offer of new money for teachers at both the elementary and secondary levels. And each has had a progressively better salary schedule than any previous agreements. A number of significant improvements were also won in the area of contract language in these contracts. The last one, the seventh in the series, resulted in raises of from 8% to 11% in the salary scales. Nonetheless, in the next agreement, the union wants a true percentage raise, not the usual flat across-the-board offer, an end to the disparity between elementary and secondary school salaries, longevity increments for senior teachers, and a number of additional changes in contract language affecting benefits, medical coverage, and working conditions.

The preface to our current contract reminds all that less than 10% of the lay teachers in this nation enjoy the protection of a union contract with its standardized salary scales, health benefits, provisions covering working conditions, job security and grievance and arbitration. It is time that all teachers in this Archdiocese realize how far they have come and join together through their union to further improve their conditions of employment.

APPENDIX G

The Federation of Catholic Teachers

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by
The Federation of Catholic Teachers
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Teaching is a calling. Making the commitment to spend your life helping children develop intellectually, socially and civically requires a willingness to invest in the future and believe in students from all walks of life. Being a Catholic school teacher is an even more profound calling, because it adds the responsibility, among all the other responsibilities that teachers commit to, of helping students with their spiritual development.

"Catholic school teachers are incredibly dedicated," says Julia Pignataro, president of the Federation of Catholic Teachers. "It's a culture of service, they participate in extra activities for the students, from sports to the arts. The Federation of Catholic Teachers proudly represents Catholic school teachers."

The Federation of Catholic Teachers, OPEIU Local 153 AFL-CIO, is the collective bargaining representative for the lay faculty in 137 elementary schools and 14 high schools in the Archdiocese of

New York. Just like teachers in public schools, Catholic school teachers need support advocating for their wages and benefits, especially considering that their salaries are lower than public school teachers in New York City.

For Pignataro, representing Catholic school teachers is a privilege. She attended Catholic school and so did her children, and she herself taught in Catholic schools in the Archdiocese of New York until 2007, starting in Bushwick, Brooklyn in the 1970s. "I'm very pro-Catholic school," she says. "I went to Catholic school, my kids went to Catholic School, I make sure the teachers have the benefits and salaries that they need to live – it's what any union would want. I proudly represent teachers, they're extremely dedicated. Catholic schools offer education that combines Catholic faith and teachings with academic excellence."

The Federation of Catholic Teachers was founded in 1970, when the Catholic Lay Teachers Group, a collective bargaining group that had been representing Catholic teachers in New York City since 1963, decided to become affiliated with the National Federation of Teachers. In 1966, Catholic teachers in Philadelphia and Chicago were the first to win collective bargaining agreements and the first to affiliate with NFT, which was the only union offering to work with Catholic teachers at the time.

During the 1960s and 1970s, public school teachers in New York City and around the country actively advocated for themselves through teachers unions, for better benefits and higher pay. Catholic school teachers arguably had an even greater need for representation, as Catholic schools began to hire a greater percentage of lay teachers, instructors who

are not clergy, and who required a higher wage to live than a priest or a nun who had taken a vow of poverty.

Since that time the Federation of Catholic Teachers have supported, advocated for and worked with lay teachers in many schools in the Archdiocese of New York. Nationwide, about 10 percent of Catholic lay teachers have union representation, so teachers in Catholic schools in the Archdiocese of New York are better represented than almost anywhere else in the country, with 2768 teachers in the bargaining unit.

Pignataro says that at the end of the day her work is all about supporting teachers so they can follow their calling to educating children and fostering the Catholic faith. "In a Catholic education students are taught by example," she says. "Teachers are a constant example for students in their own lives. They provide good discipline, and are good role models for the future. The hope is that after graduation students will go out and continue that work, whether it's through volunteering, or just by setting their own good example."

In honor of Catholic Schools Week, the Federation of Catholic Teachers offers this prayer to Catholic teachers, for their dedication.

> Lord Bless the teachers who give their hearts to teaching. Thank You for giving them the special gift that You have given them and for giving them the spirit of grace and compassion. May they have the strength and endurance to perform their many tasks, and may they know and feel the gratitude of those whom they teach. Amen.

Teaching, says Pignataro, may be a difficult job, but it is also incredibly fulfilling. "You go home every day and feel that you did something positive today, you did something to help your students," she says. "It gives purpose to life." To learn more about the work the Federation of Catholic Teachers does, visit www.fct153.com.