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Losing My Religion: How Ministerial Exception Expansion May Negatively Impact Interpretation of C.R.O.W.N. Act Laws

Ashley Corbin Rice
Cleveland State University College of Law, a.rice4@cmlaw.csuohio.edu

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ASHLEY CORBIN RICE*

ABSTRACT

Across the country, black students are policed in schools for their natural hair and protective hairstyles. As a result of this, students who do not conform to their school's grooming policy or dress code may suffer stiff consequences including being suspended or expelled. The most notable federal piece of legislation in response to this issue was introduced in December 2019. The CROWN Act prohibits race-based hair discrimination on the federal level. The bill passed the House but the Senate blocked it in December 2021.

Despite this recent development, states and municipalities are enacting the CROWN Act across the country. Over twenty states have versions of the race-based hair discrimination law. Even in states where the CROWN Act is not law, municipalities are enacting their own versions, as well. Nevertheless, these local laws contain a loophole which exempts religious schools from having to adhere to it.

This Note argues the loophole grants religious schools the ability to penalize black students for their natural hair and protective hairstyles via grooming policies and dress codes. This, in turn, may perpetuate serious ramifications like introducing students to the school-to-prison pipeline and impacting their educational opportunities. I argue that in order to ensure black students are not negatively targeted for their hair, the loophole needs to be closed, or maybe more practical, made smaller. This Note details how this can be accomplished by having courts apply the "genuine religious principle test." Such test would be used to analyze whether grooming policies implemented by religious schools are truly following genuine religious principles from their faith. If not, the grooming policy should be found in violation of the CROWN Act.

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I. INTRODUCTION

Imagine this: in 2019, a mother decides to enroll her eight-year-old son in a Catholic school located in Jamaica, Queens.[1] The mother does what she can to prepare her son for his first day at the new school. She purchases school uniforms, and ensures her son, who is black, has his hair neatly styled in cornrows.[2] Even at a young age, the son equates his hair as part of his identity and is proud to wear cornrows.[3]

On the first day of school, the young boy is dropped off by his grandmother. When she returns at the end of the day to pick him up, she sees her grandson separated from the other children with the principal.[4] "We don't accept this[,]" the principal says to the grandmother while rubbing the boy's head.[5] Confused, the grandmother asks for clarification by the principal.

"[W]e don't allow braids of any kind[,]" explained the principal.[6] Both the mother and grandmother discover the Catholic school has an explicit ban on natural hairstyles in its grooming policy.[7] The school decides to give the mother a week to change the boy's hair, but instead, she enrolls her son into a different school.[8]

Unfortunately, this "story" is an *actual*, lived experience—one that is not a new phenomenon across the country. In 2018, a referee forced a high school student in New Jersey to cut his dreadlocks or forfeit his wrestling match.[9] The same year, a Catholic school sent an eleven-year-old girl home for having braids.[10] In 2020, a high

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[1] Complaint at 3, 5, Batts v. Immaculate Conception Cath. Acad., No. 718357/19, 2020 N.Y. Misc. LEXIS 8392 (N.Y. Sup. Oct. 28, 2019); *Mom Sues NYC Catholic School After Son Told He Can't Wear Braids*, NBC N.Y. (Oct. 31, 2019), https://www.nbcnewyork.com/news/local/mom-sues-nyc-catholic-school-after-son-told-he-cant-wear-braids/2081642/.

[2] Complaint at 4, *Batts*, 2020 N.Y. Misc. LEXIS 8392.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Sarah Salvadore, *Catholic Schools Slow to Accept Cultural Significance of Black Hair*, NAT'L CATH. REP. (Feb. 20, 2020), https://www.ncronline.org/news/catholic-schools-slow-accept-cultural-significance-black-hair.

[8] *Id.*

[9] Doha Madani, *Wrestling Referee Benched After Forcing High School Athlete to Cut Dreadlocks Before Match*, NBC NEWS (Dec. 21, 2018), https://www.nbcnews.com/news/us-news/wrestling-referee-benched-after-forcing-high-school-athlete-cut-dreadlocks-n951146.

[10] Julia Jacobs & Dan Levin, *Black Girl Sent Home From School Over Hair Extensions*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/us/black-student-extensions-louisiana.html.

school student was suspended because her braids did not comply with the school dress code.[11]

Schools have restricted natural hairstyles across the United States for many decades.[12] As a result, those who do not conform to their school's grooming policy or dress code may suffer stiff consequences, such as being suspended or expelled. The implication of this is quite evident: protective hairstyles[13] are unprofessional and there is no space for them in the schools they attend.[14]

With news of schools disciplining black students for their natural hair, legislatures have responded by enacting hair discrimination laws.[15] The most notable federal piece of legislation that targets this issue was introduced in December 2019.[16] The House of Representatives ("House") introduced the Creating a Respectful and Open World for Natural Hair Act ("CROWN Act") to prohibit discrimination of natural hair textures and hairstyles at the federal level.[17] The law passed in the House but has experienced severe opposition since its original debut on the House floor.[18]

However, states and municipalities are enacting the CROWN Act across the country.[19] Twenty-three states have versions of the race-based hair discrimination

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[11] Dawn Onley, *Catholic High School in California Suspends Boy for Wearing His Hair Braided, Then Does About Face Under Pressure*, THE GRIO (Jan. 15, 2020), https://thegrio.com/2020/01/15/suspends-boy-wearing-hair-braided-pressure/.

[12] Chastity Henry, *Knot Today: A Look at Hair Discrimination in the Workplace and Schools*, 46 T. MARSHALL L. REV. 29, 29 (2021).

[13] *What Are Protective Hairstyles?*, BEAUTYCON, https://www.beautycon.com/article/what-are-protective-styles (last visited Jun. 3, 2024).

[14] Henry, *supra* note 12, at 47.

[15] Alesha Hamilton, *Untangling Discrimination: The CROWN Act and Protecting Black Hair*, 89 U. CIN. L. REV. 483, 485 (2021).

[16] *Id.*; *see also* Elliot Hoste, *Republicans Block Bill to Ban Black Hair Discrimination*, DAZED DIGIT. (Dec. 19, 2022), https://www.dazeddigital.com/beauty/article/57813/1/republican-blocked-crown-bill-ban-black-hair-discrimination (noting The CROWN Act was first introduced to the House of Representatives in December 2019 by Representatives Cedric Richmond, Ayanna Pressley, Marcia Fudge and Barbara Lee).

[17] Hamilton, *supra* note 15; *see also* Hoste, *supra* note 16 ("It was initially passed by the House in September 2020, however later stalled in the GOP-controlled Senate. The bill was reintroduced to the House in March 2021 and successfully passed a second time in March 2022, despite staunch opposition from Republican representatives. However, on December 14, 2022, the bill was brought to the Senate floor and, once again, blocked by Republican Senators.").

[18] Veronica Stracqualursi, *US House Passes CROWN Act That Would Ban Race-Based Hair Discrimination*, CNN (Mar. 18, 2022), https://www.cnn.com/2022/03/18/politics/house-vote-crown-act/index.html.

[19] *About the CROWN Act*, THE CROWN COAL., https://www.thecrownact.com/about [https://web.archive.org/web/20221118170920/https://www.thecrownact.com/about].

law.[20] Even in states where the CROWN Act is not law, municipalities are enacting their own local versions.[21] Nevertheless, such laws contain a religious exception that exempts religious schools.

This Note argues religious schools may continue to target black students' hair and hairstyles with suspensions and expulsions via this religious exception, which in turn, may perpetuate serious ramifications, including introducing students to the school-to-prison pipeline and impacting their educational opportunities. To ensure black students are not negatively targeted for their hair, the religious exception needs to be erased, or even more practically, the religious exception must be interpreted narrowly to prevent abuse.

One instructive way to accomplish this is by instructing courts to strike down grooming policies that do not reflect observance of a genuine religious principle. Doing so would constrain religious schools from discriminating against an individual's hair texture or protective hairstyle commonly associated with a particular race.

Part II of this Note focuses on the history of African-Americans attending religious schools and the negative impact of baseless suspensions and expulsions on black and brown students. Part III discusses the federal bill, the CROWN Act, and the concerning religious exception in state and municipal versions of this law. Finally, Part IV offers a possible solution to ensure the exception is not abused by religious schools.

II. BACKGROUND

First, this Part explains the history of African-Americans attending religious schools. Second, this Part discusses how excessive expulsions and suspensions introduce black and brown students to the school-to-prison pipeline. Finally, this Part examines how the school-to-prison pipeline may divest black and brown students of educational opportunities.

A. Religious Schools, the School-to-Prison Pipeline and the Negative Impact of Unequal Education

1. The Draw of Religious Schools' Affordable and Quality Education

An increasing number of black parents sought solutions to the dismal state of their children's education by enrolling them in private, religious schools.[22] In the realm of urban education, underachieving schools, budget cuts, school closures, and low teacher retention rates are the norm.[23] Since the mid-twentieth century, black parents

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[20] *Id.*

[21] *Id.* (noting that Ohio municipalities which have enacted the law include Columbus, Cincinnati and Newburgh Heights).

[22] David J. Dent, *African-Americans Turning to Christian Academies*, N.Y. TIMES (Aug. 4, 1996), https://www.nytimes.com/1996/08/04/education/african-americans-turning-to-christian-academies.html.

[23] Shakyra Greene, *Transforming Awareness Into Action: An Examination of the Lack of Resources in the Urban Education Crisis and What Stops Us From Moving Forward*, 5 THE INT'L UNDERGRAD. J. FOR SERVICE-LEARNING, LEADERSHIP, AND SOC. CHANGE 9, 10 (2016).

searched for alternative options and enrolled their children in Catholic schools.[24] Christian schools, however, resisted integration.[25]

There are various reasons why black parents favored religious schools. First, Catholic schools are ideal institutions to educate students from diverse cultures;[26] this learning experience has the means to lead children to strong academic results.[27] Second, Catholic schools keep relatively low tuition by means of careful financial management.[28]

Christian schools appear attractive as well because of the way they teach students. Black parents liked Christian schools because they emulated an educative style that is reminiscent of their childhood.[29] Emory Professor Jacqueline Jordan Irvine noted that Christian schools resonate with African-American tradition because of their adherence to discipline, structure, and teaching religion and values.[30]

Recent data shows black students continue to attend religious schools at an impressive number. In Fall 2015, the National Center for Education Statistics released a percentage distribution of students enrolled K-12 by school type, orientation, and race.[31] Black students consisted of the second-largest group enrolled at conservative Christian schools (11%), affiliated religious schools (8%), and unaffiliated religious schools (12%).[32] This exemplifies a continual strong preference of black parents for sending their children to religious schools.

Looking to the past and present, religious schools exercise their right to implement dress codes at their discretion.[33] But that discretion is balanced against several competing factors.[34] Indeed, "disputes regarding the enforcement of grooming

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[24] Vernon C. Polite, *Getting the Job Done Well: African American Students and Catholic Schools*, 61 J. NEGRO EDUC. 211, 211–12 (1992).

[25] Dent, *supra* note 22.

[26] Polite, *supra* note 24, at 213.

[27] *Id.*

[28] *Id.*

[29] Dent, *supra* note 22.

[30] *Id.*

[31] *Private School Enrollment*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/schoolchoice/ind_03.asp [https://web.archive.org/web/20221207112205/https://nces.ed.gov/programs/schoolchoice/ind_03.asp].

[32] *Id.*

[33] Sulema Carreón-Sánchez & Phoebe Schlanger, *Religion Equity and School Dress Codes*, INTERCULTURAL DEV. RES. ASSOC. (Aug. 2018), https://www.idra.org/resource-center/religion-equity-and-school-dress-codes/.

[34] *Id.*

standards at religious schools . . . require application of fundamental church-and-state principles that are unique to the United States."[35]

Religious schools appear to be steadfast in utilizing grooming policies and dress codes to target black students' hair pre- and post-CROWN Act. In New York, where the CROWN Act is law, Catholic schools continue to adhere to grooming policies that target black hairstyles.[36] At least eleven Catholic schools in Queens assert that natural hairstyles are prohibited for being "distracting" or "attention-seeking."[37] These schools can effectively continue doing so utilizing the exception.[38]

Beyond regulating hair viewed as distracting or attention-seeking, some school policies explicitly ban hairstyles worn by black people, like long braids.[39] In fact, a Pittsburgh Catholic high school expressly forbade these types of hairstyles only a few years ago. The school's handbook stated, "Hair must be its natural color, clean, neatly combed, not totally covering the ears or eyes, or falling below the shirt collar . . . . Shaved heads or hairstyles with designs, patterns, lines, weaves, spikes, braids, locks, twists, or ponytails are not permitted."[40] Only after the school received national attention did it barely change its stance, keeping the language, 'hairstyles with designs, patterns, and lines are not permitted.[41] Furthermore, a Columbus Catholic school (where the CROWN Act is law) currently forbids braids in its grooming policy and gives its principal the power to have the final say in such matters.[42]

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35 Ellen K. Boggle, *Can Catholic School Hair Grooming Standards Be Discriminatory?*, AM. MAG. (Jan. 16, 2020), https://www.americamagazine.org/faith/2020/01/16/can-catholic-school-hair-grooming-standards-be-discriminatory.

36 Salvadore, *supra* note 7.

37 *Id.*

38 Michael Elsen-Rooney, *NYC Catholic Schools Hold Fast on Boys' Braid Bans Despite Laws Banning Hair Discrimination*, DAILY NEWS (Dec. 2, 2019), https://www.nydailynews.com/new-york/education/ny-hair-discrimination-catholic-school-20191202-4qqxjrvxtnd4poqa62jbnqlrme-story.html.

39 Veronica Craig, *"Does My Sassiness Upset You?" An Analysis Challenging Workplace and School Regulation of Hair and Its Connection to Racial Discrimination*, 64 HOW. L.J. 239, 256 (2020).

40 *Student/Parent Handbook*, CENT. CATH. HIGH SCH., https://www.centralcatholichs.org/parentstudenthandbook (last visited Jun. 3, 2024).

41 Dani Benavides, *Not "Just Hair": Central Catholic High School Hair Policy*, NA EYE (Jan. 17, 2020), https://naeye.net/10512/opinion/not-just-hair-central-catholic-high-school-hair-policy/.

42 *Dress Code*, IMMACULATE CONCEPTION SCH., https://www.ic-school.org/dress-code/ (last visited Jun. 3, 2024).

2. Suspensions and Expulsions and their Contribution Toward the School-to-Prison Pipeline

The school-to-prison pipeline is a manifestation of punitive school practices, which negatively impacts students' well-being.[43] Integral contributing factors of the school-to-prison pipeline include suspensions and expulsions.[44]

> Overly harsh disciplinary policies push students down the pipeline and into the juvenile justice system. Suspended and expelled children are often left unsupervised and without constructive activities; they also can easily fall behind in their coursework, leading to a greater likelihood of disengagement and drop-outs. All of these factors increase the likelihood of court involvement.[45]

Grooming policies exploited by religious schools is also a stealth contributor of warrantless suspensions and expulsions, thereby introducing students to the school-to-prison pipeline.[46] The ACLU notes grooming policies may be excessively enforced against students who are more likely to be policed or seen as deviant by school officials.[47] "One study shows that [b]lack . . . students experience suspension and expulsion at much higher rates than white students . . . ."[48] Moreover, as adults, there is an extreme overrepresentation of black individuals in the U.S. prison system.[49]

Working together, several universities intended to uncover whether there is a causal link between students who receive strict school discipline and are later incarcerated as an adult. Another research goal was to pinpoint whether attending a stricter school influences criminal activity in adulthood. Ultimately, the study confirmed the existence of the school-to-prison pipeline, with the report stating, "[A]ny effort to maintain safe and orderly school climates must take into account the clear and negative consequences of exclusionary discipline practices for young

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[43] Abigail Novak & Abigail Fagan, *Expanding Research on the School-to-Prison Pipeline: Examining the Relationships between Suspension, Expulsion, and Recidivism among Justice-Involved Youth*, 68 CRIME & DELINQUENCY 3, 4 (2022).

[44] *Id.*

[45] *School-to-Prison Pipeline*, ACLU, https://www.aclu.org/issues/juvenile-justice/juvenile-justice-school-prison-pipeline (last visited Jun. 3, 2024).

[46] Essence Kimes, Esq., *School to Prison Pipeline*, EDUC. L. CTR., https://fisafoundation.org/wp-content/uploads/2021/06/ELC-slides-School-to-prison-pipeline-June-11-2021.pdf (last visited Jun. 3, 2024).

[47] Galen Sherwin et al., *4 Things Public Schools Can and Can't Do When It Comes to Dress Codes*, ACLU (Sept. 21, 2022), https://www.aclu.org/news/womens-rights/4-things-public-schools-can-and-cant-do-dress-codes.

[48] Lauren Camera, *Study Confirms School-to-Prison Pipeline*, U.S. NEWS (July 27, 2021), https://www.usnews.com/news/education-news/articles/2021-07-27/study-confirms-school-to-prison-pipeline.

[49] *Id.*

students, and especially young students of color, which last well into adulthood."[50] The study uncovered the following:

> Students assigned to stricter middle schools are 3.2 percentage points more likely to have been arrested, 2.5 percentage points more likely to have been incarcerated as adults. They were also 1.7 percentage points more likely to drop out of high school and 2.4 percentage points less likely to attend a four-year college.[51]

The study concluded this data is more predictive in black boys who attend middle school.[52]

Although research is limited in school suspensions/expulsions and its relationship with criminal offending, another study "[confirmed] that expulsion and more frequent suspension[s] also increase [the] risk of recidivism among youth previously adjudicated for delinquency."[53] Most notably, "[t]hese results indicate that, among youth with a history of negative labeling experiences, school exclusion may compound disadvantage, contribute to persistence in antisocial behaviors, and lead to more frequent and quicker rates of recidivism."[54]

The nexus of hair discrimination and school discipline is undeniable when examining the data. Schools discipline black students at a rate four times higher than any other racial group.[55] "Specifically, Black students are more likely to be suspended for discretionary reasons such as dress code or long hair violations, neither of which have been found to be predictive of student misconduct."[56] In fact, "[d]iscretionary suspensions are not 'required' by law, yet they pose dire consequences to students of color."[57] Moreover, students are set on a downward trajectory that includes poor academic performance and high rates of dropping out and getting arrested before reaching twenty-one years old.[58]

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[50] Andrew Bacher-Hicks et al., *Proving the School-to-Prison Pipeline*, EDUC. NEXT (July 27, 2021), https://www.educationnext.org/proving-school-to-prison-pipeline-stricter-middle-schools-raise-risk-of-adult-arrests/.

[51] Camera, *supra* note 48.

[52] *Id.*

[53] Novak & Fagan, *supra* note 43, at 19.

[54] *Id.*

[55] Howard Henderson & Jennifer Wyatt Bourgeois, *Penalizing Black Hair in the Name of Academic Success is Undeniably Racist, Unfounded, and Against the Law*, BROOKINGS (Feb. 23, 2021), https://www.brookings.edu/blog/how-we-rise/2021/02/23/penalizing-black-hair-in-the-name-of-academic-success-is-undeniably-racist-unfounded-and-against-the-law/.

[56] *Id.*

[57] *Id.*

[58] *Id.*

Initially, these zero-tolerance policies focused only on the most serious infractions, including violence.[59] Now, school officials appear to justify their actions with unsubstantiated ideals based on social norms which are inherently discriminative.[60] However, "schools have broadened the scope to include dress code and hairstyle violations." [61]

3. Black and Brown Students Facing Insurmountable Mountain of Educational Inequality

Access to strong school systems with proper resources is integral to creating equity within our education systems. Nevertheless, school choice may be effectively taken away from parents if religious schools choose to exploit the exception in the CROWN Act.[62] The ramifications of such choice are dire because racial inequity in the educational system continues to perpetuate unequal opportunities of educational success.[63] It is no secret that some of the most critical factors promoting educational equity consists of "quality teachers, smaller class sizes, access to high quality after-school programs, advanced curricula, and modern learning facilities."[64] Furthermore, the implications of black students who do not achieve educational success like that of their white colleagues is serious and includes poverty and incarceration.[65]

"Systematic policies, practices, and stereotypes work against children and youth of color to affect their opportunity for achieving educational success."[66] Obstacles to opportunity include continual racial segregation of schools, unequal resources and academic opportunities, differential teacher quality, and differential punishment.[67] Recent analyses of data for school finances in states, including New York, show "on every tangible measure—from qualified teachers to curriculum offerings—schools

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59 *Id.*

60 *Id.*

61 *Id.*

62 Max Londberg, *'Supposed to be Accepting': Ohio Private School Forces out Black Children With Locks, Parents Say*, USA TODAY (Aug. 18, 2020), https://www.usatoday.com/story/news/nation/2020/08/18/ohio-private-school-discriminates-against-black-hair-styles-family-says/3389838001/; *see* Jennifer Wyatt Bourgeois & Howard Henderson, *The CROWN Act Hasn't Ended Hair Discrimination in Texas*, BROOKINGS (Nov. 28, 2023), https://www.brookings.edu/articles/the-crown-act-hasnt-ended-hair-discrimination-in-texas/ (noting that the crown exception exempts religious groups).

63 *Unequal Opportunities in Education*, ANNIE E. CASEY FOUND., https://assets.aecf.org/m/resourcedoc/aecf-racemattersEDUCATION-2006.pdf (last visited Jun. 3, 2024).

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

serving greater numbers of students of color had significantly fewer resources than schools serving mostly white students."[68]

Based on this data, the importance of school choice is evident. In a poignant article advocating parochial schools as an alternative route for educational equity, scholar Vernon C. Polite wrote that, "[w]hile [urban] public schools [struggle] for value education . . . local school-based management, community-building among staff and students, parental involvement, and volunteer support . . . are typical operating realities in most Catholic schools."[69] Although this may be true, Polite's utopic view of parochial schools is flawed because religious schools may use strict dress code and grooming policies to target black students for their hair.

B. History of Hair Discrimination and the CROWN Act

1. The History of Race-Based Hair Discrimination Against African-Americans

Hair discrimination against African-Americans starts with the United States' involvement in the African Slave Trade. About 12 million men, women, and children were sold into slavery.[70] Scholars noted that slave traders shaved the heads of those captured.[71] Although some presume this process was meant for sanitary reasons, the effect of this act was excruciatingly insidious.[72]

> [W]ithin these cultures, hair was an integral part of a complex language system. Ever since African civilizations bloomed, hairstyles have been used to indicate a person's marital status, age, religion, ethnic identity, wealth and rank within the community. In some cultures, a person's surname could be ascertained simply by examining the hair because each clan had its own unique hairstyle. The hairstyle also served as an indicator of a person's geographic origins.[73]

Thus, slavers essentially were eradicating the captured Africans' culture, background, and status by shaving off their hair.[74] Therefore, they arrived to a strange new world like anonymous chattel, just as their slavers intended them to be.[75]

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68 Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1996), https://www.brookings.edu/articles/unequal-opportunity-race-and-education/.

69 Polite, *supra* note 24, at 219–30.

70 *What Everyone Needs to Know About Black Hair History*, THE WELL (Feb. 10, 2022), https://www.the-well.com/editorial/what-everyone-needs-to-know-about-black-hair-history.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

A legacy of the African slave trade is that it propagated the ideal in which emulating Eurocentric features created social and economic opportunities.[76] In the 1700s, enslaved Africans who worked in the house of their enslaver mimicked their hairstyles by wearing wigs.[77] Enslaved Africans who worked the fields put their hair up in wraps.[78] This happening can be explained by "texturism," which is a phenomenon that grew as the African diaspora did.[79] Texturism supports a belief that certain curl patterns were more desirable and attractive to others.[80] This belief spread within the slave communities and perpetuated European beauty standards.[81] This perception manifested itself in that slaves with light skin and straighter hair had more desirable positions within the estate.[82]

This anti-black hair mentality did not just cease with slavery. Rather, it continued through the nineteenth and twentieth centuries. After the Reconstruction Era, Madam C.J. Walker created a hot hair-straightening comb for the purpose of "taming" black hair.[83] Walker's invention became so popular that she became the first female African-American millionaire.[84] In addition, another inventor, Garrett Morgan, created chemical relaxers for a more permanent solution to textured hair.[85] The inventors' successes signaled that black people continued to fashion themselves after whites for societal acceptance.[86]

Nonetheless, a faction of African-Americans arose who resisted straightening their hair for purposes of assimilating into white American society.[87] This mentality dominated communities in the 1960s, where African-Americans chose to embrace

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76 Tabora A. Johnson & Teiahsha Bankhead, *Hair It Is: Examining the Experiences of Black Women with Natural Hair*, 2 OPEN J. SOC. SCI. 86, 88 (2014).

77 Shane White & Graham White, *Slave Hair and African American Culture in the Eighteenth and Nineteenth Centuries*, 61 J.S. HIST. 45, 62 (1995).

78 Chante Griffin, *How Natural Black Hair at Work Became a Civil Rights Issue*, JSTOR DAILY (July 3, 2019), https://daily.jstor.org/how-natural-black-hair-at-work-became-a-civil-rights-issue/.

79 THE WELL, supra note 70.

80 *Id.*

81 *Id.*

82 *Id.*

83 Griffin, *supra* note 78.

84 Sandra E. Garcia, *The Joy of Black Hair*, N.Y. TIMES, https://www.nytimes.com/2021/05/10/t-magazine/black-hair-weaves-wigs.html (last updated May 12, 2021).

85 *Id.*

86 *Id.*

87 Johnson & Bankhead, *supra* note 76, at 90.

their natural selves by removing oppressive thinking *and* chemicals from their hair.[88] Coined the "Black is Beautiful" movement, black men and women accepted the color of their skin—their distinct facial features and textured hair.[89] As a recent article poignantly remarked:

> During the 1950s and 1960s, natural Black hairstyles such as the Afro, became a pivotal part of the Black liberation movement and a symbol of the growing resistance in a racist America. As Tharp told CBC, "It wasn't about a style, it was a form of protest to say, I am not going to straighten my hair anymore. So the Black Afros that we associate with people such as Angela Davis and the Black Panthers of the civil rights movement really became a symbol of resistance."[90]

The transformative movement was bolstered by an Appellate Court decision in 1976, affirming the unconstitutionality of *some* hair discrimination.[91] In *Jenkins v. Blue Cross Mutual Hospital Insurance*, the Seventh Circuit held that "workers were entitled to wear afros as protected under Title VII of the Civil Rights Act."[92] However, this is as far as courts wanted to go in granting protections against hair discrimination.[93] Black men and women had been fighting over 600 years of conditioning that their hair is unprofessional, unmanageable, and dirty. These associations with black hair perpetuate a continual pressure to emulate Eurocentric hair standards.[94]

More recently, the 2000s ushered a new wave in support of natural hair. In 2010, a study found twenty-six percent of women eliminated chemical hair relaxers use.[95] The following year, the rate increased by ten points.[96] There is a shift in natural hair-care practices. But the debate of what hairstyles are appropriate, presentable, and professional still persists in the twenty-first century.[97]

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88 *Id.*

89 Griffin, *supra* note 78.

90 THE WELL, *supra* note 70.

91 Griffin, *supra* note 78.

92 *Id.*

93 Title VII of the Civil Rights Act of 1964 prohibits racial discrimination, but federal courts have said that only Afros, not other natural hairstyles, are protected under the law. Marsha Mercer, *Banning Hair Discrimination Emerges as Racial Justice Issue*, STATELINE (Nov. 29, 2021), https://stateline.org/2021/11/29/banning-hair-discrimination-emerges-as-racial-justice-issue.

94 Henry, *supra* note 12, at 31.

95 Johnson & Bankhead, *supra* note 76, at 93.

96 *Id.*

97 Griffin, *supra* note 78.

2. The CROWN Act

The CROWN Act House Bill provides blanket protection to all races that may be affected by race-based hair discrimination, with a particular nod to black hair texture and hairstyles.[98] The Bill features no language exempting religious organizations and schools.[99] Additionally, it prohibits race-based hair discrimination in federally-assisted programs. Nevertheless, the Bill has not been addressed in the Senate.[100]

Despite this, states and municipalities are passing their own versions of the CROWN Act across the country.[101] New York and California are just some of the states on this list.[102] Although Ohio has not enacted the law, municipalities in the state that have include Columbus, Cincinnati, and Akron.[103]

In 2019, New York became the second state to sign the CROWN Act into law.[104] The measure amended the preexisting Dignity for All Students Act, which updates the definition of race used in existing law, adding "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles."[105] Civil rights advocates hoped the law would effectively prohibit grooming policies that perpetuate an undue burden on people of color.[106] Nevertheless, stories of schools exploiting the exception within the New York legislation began materializing the same year it became law.[107]

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98 *Creating a Respectful and Open World for Natural Hair Act of 2022*, CONG., https://www.congress.gov/bill/117th-congress/house-bill/2116/text (last visited Jun. 3, 2024).

99 *Id.*

100 THE CROWN COAL., *supra* note 19 (noting that the bill failed the Senate's unanimous consent requirement to be addressed).

101 *Id.*

102 *Id.*

103 Olivia Hancock, *Everything You Need to Know About the CROWN Act*, BYRDIE, https://www.byrdie.com/the-crown-act-guide-5111864 (last updated Mar. 31, 2022).

104 Janelle Griffith, *New York is Second State to Ban Discrimination Based on Natural Hairstyles*, NBC NEWS (July 15, 2019), https://www.nbcnews.com/news/nbcblk/new-york-second-state-ban-discrimination-based-natural-hairstyles-n1029931.

105 *Id.*

106 *Id.*

107 Angela Onwuachi-Willing & Sean Kealy, *Make Schools Play Fair on Hair: Stop Allowing Religious Schools to Discriminate Against Cornrows and Locs*, N.Y. DAILY NEWS, https://www.nydailynews.com/2019/12/16/make-schools-play-fair-on-hair-stop-allowing-religious-schools-to-discriminate-against-cornrows-and-locs/ (last updated Dec. 17, 2019).

3. Religious Exceptions for State and Municipal CROWN Act Laws

New York prohibits educational institutions from permitting harassment of students and/or applicants based on race.[108] Moreover, the state's Human Rights Law defines race to include "traits historically associated with race, including but not limited to, hair texture and protective hairstyles."[109] Despite this strong language, New York exempted religious educational institutions, thereby creating a loophole:

> Nothing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization . . . from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.[110]

In Columbus, Ohio, councilmember Priscilla Tyson spearheaded the campaign to bring the CROWN Act to the city.[111] The law went into effect in January 2021 and created statutory protections for natural hair textures and styles including braids, cornrows, dreadlocks, and twists.[112] Columbus, Ohio Code Chapter 2331.01 includes two distinct provisions.[113] First, the statute incorporates race to mean "inclusive of traits historically associated with race, including, but not limited to, hair textures and protective and cultural hairstyles."[114] Second, the Code details protective and cultural hairstyles to include "braids, locs, dreadlocks, cornrows, bantu knots, afros, and twists," much like the New York law.[115]

While this protection appears thorough, there is similar language to New York's law that exempts religious schools from adhering to this law. The next subdivision clearly states the following:

> Nothing in Columbus City Code Sections 2331.01-2331.04 shall be construed to bar any religious or denominational institution or organization or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rentals of housing accommodations or

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[108] N.Y. EXEC. § 296(4).

[109] *Id.* § 292(37).

[110] *Id.* § 296(iii)(11).

[111] *What Are Protective Hairstyles?*, BEAUTYCON, https://www.beautycon.com/article/what-are-protective-styles (last visited Jun. 3, 2024).

[112] *Id.*

[113] *Id.*

[114] COLUMBUS, OH., REV. ORDINANCES ch. 2331.01.

[115] *Id.*

> admission to or giving preference to persons of the same religion or denomination or from engaging in the free exercise of religion.[116]

This means religious schools may continue utilizing strict grooming policies in the name of engaging in free exercise of their religion. But the ultimate concern is that the exception could be abused. Religious schools, under the protection of the exception language, may implement grooming policies that discriminate against protected classes and are not tied to genuine religious principles. Similar language can be found in Cincinnati and Akron's Codes of Ordinances, as well.[117] In the same vein, California's statute only covers public schools.[118]

Unfortunately, religious schools use both implicit language and deference to administration as another type of "loophole" to target natural hair and protective hairstyles. This is evidenced by religious schools leaving discretion to the school/administration to decide a dress code violation.[119] Such schools in New York and Ohio often use rhetoric that hairstyles must be "neat and well groomed" and, for boys, the hair must be "no longer than 2 inches in height."[120] This language is a pathway of discrimination against natural hairstyles where dreadlocks, twists, and cornrows tend to drape past a uniform's shirt collar.

The ultimate solution to ensure hair discrimination laws implement their purpose is to remove the exception language. But that is a simplistic resolution that requires a means to such end. Indeed, while municipal and state versions made the CROWN Act law in their respective jurisdictions,[121] the religious exception grants religious schools the means to continue implementing restrictive and racist grooming policies.[122]

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116 *Id.*

117 *See* Hancock, *supra* note 103; *see also* CINCINNATI, OH. MUNICIPAL CODE ch. 914, §§ 914-1-D1, 15 ("This chapter does not apply to a religious corporation, association, educational institution . . . ."); AKRON, OH. MUNICIPAL CODE TITLE 3 ch. 38.04, 38.01 (A)(11)(b) ("For purposes of this chapter 'educational institution' shall not include any religious institution or school operated by a religious institution.").

118 *CROWN Act - California Legislative*, CAL. LEGIS. INFO, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB188 (last visited Jun. 3, 2024).

119 *Compare Parent-Student Handbook 2022-2023*, HEARTLAND CHRISTIAN SCH. 21, https://irp.cdn-website.com/56f9eace/files/uploaded/22-23%20Handbook%20%20%281%29.pdf (last visited Jun. 3, 2024), *with 2022-2023 Family Handbook*, OUR LADY OF THE LAKE SCH. 54, http://olleuclidschool.org/wp-content/uploads/2022/08/SchoolHandbook22-23.pdf (last visited Jun. 3, 2024).

120 *See Handbook*, IMMACULATE CONCEPTION CATH. SCH. 19, https://iccaastoria.org/system/resources/W1siZiIsIjIwMjIvMTIvMjQvM2lmcGUzaGVkcV9JQ0NBX1BhcmVudF9TdHVkZW50X0hhbmRib29rXzIwMjIuMjMuZG9jeC5wZGYiXV0/ICA%20ParentStudent%20Handbook%202022.23.docx.pdf (last visited Jun. 3, 2024); *see also Parent Handbook*, ZION TEMPLE CHRISTIAN ACAD. 13, https://www.ztca.org/elementary/handbook.cfm (last visited Jun. 3, 2024).

121 THE CROWN COAL., *supra* note 19.

122 Onwuachi-Willig & Kealy, *supra* note 107.

Copious amounts of articles, both national and local, and the negative publicity it brings, may encourage religious schools to update these policies.[123] For example, a Pittsburgh Catholic School changed their grooming policy after a viral petition on Change.org got attention. In fact, several articles covered the discrimination of the Pittsburgh student due to his twists hairstyle.[124] Similarly, in Cincinnati, a school sanctioned a student wearing dreadlocks.[125] USA Today reported the incident and noted the student had worn the hairstyle the previous academic year with no issue.[126]

There definitely is merit in that even though the religious exception of the CROWN Act exists, public shame of these schools may motivate them not to exploit it. But this "shame" may come weeks, months, or even years after these traumatizing events.[127] What's more, youth exposed to such negative labeling events may contribute to seriously impactful disadvantages.[128] Ultimately, the nation should not be reactive, but proactive in ensuring this exception does not negatively impact black students.

III. ANALYSIS

The chief suggestion in ensuring the exception is not abused is a matter of interpretation. Schools should only restrict hairstyles that actually violate genuine religious principles. Courts that encounter a suit regarding a religious school's alleged discriminatory grooming policy should interpret the exception language narrowly to see whether the policy actually reflects a religious principle of their faith. Therefore, a tighter interpretation of state and municipal CROWN Act laws would encourage religious schools to implement dress codes and grooming policies that truly reflect the tenets of their faith.

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123 *Id.*; *see also* Charley Locke, *6 Kids Speak Out Against Hair Discrimination*, N.Y. TIMES (Apr. 22, 2022), https://www.nytimes.com/2022/04/22/magazine/kids-hair-discrimination.html.

124 *Central Catholic Student Who Says School's Hair Policy Unfairly Targets Black Students Creates Viral Petition*, CBS NEWS (Jan. 16, 2020), https://www.cbsnews.com/pittsburgh/news/central-catholic-biased-hairstyle-ban-petition/; *see also Pittsburgh High School Students Fighting 'Outdated' Hair Policy, Claim it's Racially Biased*, WPXI NEWS (Jan. 14, 2020), https://www.wpxi.com/news/top-stories/pittsburgh-high-school-students-fighting-outdated-hair-policy-claim-its-racially-biased/E67WTJS6ABFBDISOERAQNVGTYU/.

125 Londberg, *supra* note 62.

126 *Id.*

127 *See* Cheyanne Mumphrey & Juan Lozano, *A Black Student Was Suspended for His Hairstyle. The School Says It Wasn't Discrimination*, ASSOCIATED PRESS (Sept. 18, 2023), https://apnews.com/article/hairstyles-dreadlocks-racial-discrimination-crown-act-034a59b9f2652881470dc606b39e5243 (discussing a situation where a proficient student athlete fell behind greatly because of the shame brought on by his school's hair policy).

128 Novak & Fagan, *supra* note 43, at 19.

A. Hair and Religion

Hair is a physiological and social phenomenon that conveys powerful messages of a person's beliefs, lifestyle, morality, gender identity, and even political leanings.[129] Moreover, the relation of religion and hair is unmistakable as hair practices can be found in six major religious traditions: Judaism, Christianity, Islam, Hinduism, Buddhism, and Sikhism.[130] Although this Note will not cover grooming and hair practices tied to all six of these major traditions, it will discuss the first three. Indeed, hair's representation in religion is so prevalent because it can signal

> [A] visible means for achieving an elevated religious state. It has created boundaries between those who have, or have not yet, achieved it. And all of these connect to human feelings about power, which reflects issues from psychology, culture, and relationships.[131]

A recent example of religion's impact on hair occurred in Ohio. A splinter Amish group caused an uproar in their community in Bergholz for their "invasive cutting of some Amish men's beards."[132] Their shaving of beards was a form of punishing critics of the community's bishop in how he handled church matters.[133] The act was considered so heinous that the perpetrators were charged with a hate crime.[134]

1. Judaism

Undoubtedly, there is no faith that has a comparable rich history of hair observances like Judaism.[135] The origins of its hair practices span back three millennia with biblical figures such as Esau and Samson.[136]

Two major hair observances of the Jewish faith include shaved and unshaved hair. For the former, shaving one's hair served many important purposes. In the Torah, it could be seen as a cleansing ritual when taking a foreign woman as a wife, signaling

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129 Deborah Pergament, *It's Not Just Hair: Historical and Cultural Considerations for an Emerging Technology*, 75 CHI.-KENT L. REV. 41, 43–44 (1999).

130 WILLIAM C. INNES, JR., RELIGIOUS HAIR DISPLAY AND ITS MEANING 1 (2021) (ebook).

131 *Id.* at 48.

132 Paul R. Kopenkoskey, *Theology of Hair: How Many World Religions See It as a Sacred Part of Identity*, MLIVE (Nov. 26, 2011), https://www.mlive.com/living/grand-rapids/2011/11/theology_of_hair_how_many_worl.html.

133 *Id.*

134 Eric Heisig, *Amish Beard-Cutting Leader Sam Mullet to Serve Rest of Sentence at Home After He Raises Concerns About Coronavirus*, CLEVELAND.COM (Mar. 24, 2020), https://www.cleveland.com/court-justice/2020/03/amish-beard-cutting-leader-sam-mullet-to-serve-rest-of-sentence-at-home-after-he-raises-concerns-about-coronavirus.html.

135 *See* INNES, *supra* note 130, at 57.

136 *Id.*

their occupation of a new identity.[137] For the latter, not shaving also holds significant meaning. Sides of the beard and sides of the head were not to be shaved to avoid association with pagan hairstyles.[138] Moreover, unkempt hair and excessive hairiness convey an undesired, wild appearance, while kempt hair is "consonant with an indoor or scholarly life."[139] These general ideas in Judaism, which is a faith foundational to Christianity and Islam, also show up in the other two Abrahamic faiths.[140]

2. Christianity

Christianity, with its numerous denominations, has connection to various hair observances. Nevertheless, a modern Christian today would probably disagree with that assertion.[141] However, such a belief is erroneous when you consider denominations of Christianity followed by the Mennonites and the Amish.[142] In regards to the Amish, men grow out and maintain distinctive beards, while women style their hair with a clean center part that is then rolled and covered in a neat white prayer bonnet.[143] Notably, Christian practices of hair display have been a combination of tradition, local culture and scriptural recommendations.[144] However, scholars have noted that hair practices in the Christian faith have lost their meaning, save for groups like the Amish and Mennonites.[145]

3. Islam

Undoubtedly, hair occupies a prominent place in Islam under the prophet Mohammed's teachings.[146] Islam began in the seventh century BCE.[147] In present, Muslims fashion their lifestyles after a range of prophets including Mohammed, Jesus, Moses, and David.[148] These teachings included growing and maintaining full beards and thin mustaches, and practicing body shaving, which is associated with puberty and marriage rituals. Thus, in Islam, much of the hair observances vary by gender.

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137 *Id.* at 62.

138 *Id.* at 65.

139 *Id.* at 85.

140 *Id.*

141 *Id.* at 89.

142 *Id.*; *see also Why Do Amish Women Wear Head Coverings?*, AMISH HERITAGE (Feb. 19, 2022), https://amish-heritage.org/why-do-amish-women-wear-head-coverings/.

143 INNES, *supra* note 130, at 89.

144 *Id.* at 90.

145 *Id.* at 114.

146 *Id.* at 119.

147 *Id.*

148 Kopenkoskey, *supra* note 132.

For Muslim men, emulating a life closely matching the prophet Mohammed is a way to show him respect and signal spirituality.[149] This means copying aspects of Mohammed's dress, personal grooming, and appearance, which includes sporting a beard and a thin mustache to exemplify cleanliness.[150]

For Muslim women, the Koran instructs that they be well covered.[151] This instruction stems from exposed hair taking on sexual significance and that female hair is dangerous and must be controlled for the well-being of religious and social order.[152] Therefore, women who practice Islam typically wear head coverings such as the burqa, niqab, or hijab.[153]

B. The Evolution of the Ministerial Exception and Religious Clauses of the First Amendment

The First Amendment contains two important components: the Establishment Clause and Free Exercise Clause, which both center on religion.[154] The Establishment Clause states there should be no nationally-established church.[155] This widespread agreement was reflected when all states took action in de-establishing religion by 1833, and then the Supreme Court held such de-establishment is applicable to state governments via the Fourteenth Amendment.[156] Hence, state-sponsored churches that implement a creation of a religious institution, such as the Church of England, would be a violation of the Establishment Clause.[157]

Nevertheless, a modern framework was created to determine what constitutes an "establishment of religion."[158] This framework was developed by the Supreme Court in *Lemon v. Kurtzman*, and thereby dubbed the "Lemon Test."[159] The Supreme Court's Lemon Test was developed in 1971 as a means to identify three factors of whether or not a government action violated the Establishment Clause.[160] These factors are 1) if the primary purpose of the assistance is secular, 2) the assistance must

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149 INNES, *supra* note 130, at 124.

150 *Id.*

151 *Id.* at 128.

152 *Id.*

153 *Id.* at 126.

154 *First Amendment and Religion*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion (last visited Jun. 3, 2024).

155 *The Establishment Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/264 (last visited Jun. 3, 2024).

156 *Id.*

157 U.S. CTS., *supra* note 154.

158 *Id.*

159 *Id.*

160 NAT'L CONST. CTR., *supra* note 155.

neither promote nor inhibit religion, and 3) there is no excessive entanglement between church and state.[161]

The Free Exercise Clause does not constitute a multi-factor test and, thus, can be solely interpreted from the words of the Constitution.[162] Moreover, this clause is meant to protect U.S. citizens' right to practice religion as they see fit, so long as it does not violate "public morals" or some compelling government interest.[163] Despite the clear language of the clause and intention of the Drafters, courts have struggled to balance religious liberty of individuals who often "claim the right to be excused or 'exempted' from laws that interfere with their religious practices" and the country's interests in such laws.[164]

Such struggle to allow "religious exemption," despite society's laws, has been evident through the past seventy years. In *Cantwell v. Connecticut*, the Supreme Court expanded the clause's power by constraining states' ability in limiting religious liberty.[165] In addition, *Wisconsin v. Yoder*'s holding strengthened protection of religious conduct by interpreting the clause to protect religious believers' rights "to exemption from generally applicable laws which burden religious exercise."[166]

The Supreme Court recently acknowledged both the Free Exercise Clause and Establishment Clause necessitate a "religious exemption from a neutral and general federal antidiscrimination law that interfered with a church's freedom to select its own ministers."[167] In *Our Lady of Guadalupe School v. Morrissey-Berru* ("*Our Lady*"), the Court expanded the First Amendment protection called the "ministerial exception," effectively barring courts from reviewing employment decisions by religious entities about their ministers.[168] This case is discussed at length later in this Note, as well as the ramifications of broadening religious exemptions and the ministerial exception.[169]

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161 *Id.*

162 U.S. CONST. amend. I.

163 *See* U.S. CTS., *supra* note 154.

164 Frederick Gedicks & Michael McConnell, *The Free Exercise Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/265#the-free-exercise-clause (last visited Jun. 3, 2024).

165 *Id.*

166 *Id.*

167 *Id.*

168 Kalvis Golde, *Christian School Renews Effort to Expand Religious Freedom over Employment*, SCOTUSBLOG (Mar. 17, 2023), https://www.scotusblog.com/2023/03/christian-school-renews-effort-to-expand-religious-freedom-over-employment/.

169 *See supra* text accompanying notes 157–68; *infra* text accompanying notes 170–97.

The ministerial exception permits religious institutions to conduct their employment decisions without government interference.[170] Such an exception blocks religious entities' employees from suing their employer under antidiscrimination laws.[171] This exception stems from the religious clauses of the First Amendment.[172] Moreover, the Supreme Court has acknowledged and prohibited governments from meddling with "ecclesiastical" decision-making by religious institutions.[173] Therefore, the ministerial exception is often applicable to "houses of worship and their ability to select religious leaders without government involvement."[174]

Despite religious exceptions often being imbedded within antidiscrimination laws for employees, extensive debate continues regarding when government can interfere in religious institutions' employment decisions.[175] Moreover, arguments amongst the lower courts concerning the ministerial exception go as far back as its identified origin in 1972 within *McClure v. Salvation Army*. In *McClure*, the Fifth Circuit held that meddling in the "employment relationship existing between . . . a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."[176]

The Supreme Court immortalized the ministerial exception in 2012's *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C* ("*Hosana-Tabor*" or "*Hosana*"). In *Hosana*, the Court recognized the religious clauses in the First Amendment effectively "bar the government from interfering with the decision of a religious group to fire one of its ministers."[177] The Court's positioning in *Hosana* is clear: allowing government interference in religious employment decisions would

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[170] Neal Hardin, *How the Ministerial Exception Protects Religious Institutions from Government Interference*, ALL. DEFENDING FREEDOM (Feb. 16, 2022), https://adflegal.org/article/how-ministerial-exception-protects-religious-institutions-government-interference.

[171] Geoffrey A. Mort, *Freedom to Discriminate: The Ministerial Exception Is Not for Everyone – or Is it?*, NYSBA (Oct. 31, 2022), https://nysba.org/freedom-to-discriminate-the-ministerial-exception-is-not-for-everyone-or-is-it/.

[172] Sunu P. Chandy & Laura Narefsky, *Exception Swallowing the Rule? The Expanding Ministerial Exception Puts Workers at Religious Employers at Risk of Losing Civil Rights Protections*, ABA (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/exception-swallowing-the-rule/.

[173] *Id.*

[174] *Id.*

[175] *See* Hardin, *supra* note 170.

[176] McClure v. Salvation Army, 460 F.2d 553, 560 (1972).

[177] Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 181 (2012).

"depriv[e] the church of control over the selection of those who will personify its beliefs."[178]

Ultimately, the trend of deferential treatment to the ministerial exception and religious clauses within the First Amendment has alarmed legal scholars.[179] The exception's expansion has gone largely unchecked, and few courts have raised questions about the loss of basic workplace protections.[180] Courts also appear to neglect the very real potential for the exception and the religious clauses to dangerously encroach on additional, basic civil rights, such as race-based hair discrimination in religious schools.[181]

C. Ramifications of Broadening the Ministerial Exception

When it comes to possible, future judicial interpretations of race-based hair discrimination laws, such as the CROWN Act, it is important to understand the nuances and ramifications of how judges may interpret a statute at issue. In particular, the Supreme Court exercises its constitutionally-vested power of judicial review to resolve disputes.[182] In exercising such power, competing views have arisen.[183]

The broad view stems from Justice Antonin Scalia, who believed Justices should develop broad rules that enhance the predictability in the law and provide clear guidance to policymakers, lower courts, and individuals in related circumstances. On the other hand, there is the narrow view which was championed by Justice Sandra Day O'Conner and Chief Justice John Roberts. This view signals judges should rule narrowly because "they lack the knowledge required to make general rules to govern unknown future circumstances."[184]

An example of broad interpretation is seen in *Employment Division v. Smith*.[185] In this case, the Supreme Court held that the denial of unemployment benefits from individuals who consumed a controlled substance during a Native American religious ceremony was not a violation of their First Amendment rights.[186] In coming to this decision, Justice Scalia crafted a broad rule that employers are "generally free to impose restrictions that affect religious practice if there exists a legitimate (non-religious) reason for regulating the behavior."[187] This rule was to be used as clear

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178 *Id.* at 188.

179 *See* Mort, *supra* note 171.

180 *Id.*

181 *Id.*

182 Justin Fox & Georg Vanberg, *Narrow Versus Broad Judicial Decisions*, 26 J. THEORETICAL POL. 355, 355 (2014).

183 *Id.*

184 *Id.*

185 Emp't Div. v. Smith, 494 U.S. 872, 875–79, 890 (1990).

186 Fox & Vanberg, *supra* note 182, at 356.

187 *Id.*

instruction to lower courts, governments, and citizens regarding the "constitutionality of a wide range of potential restrictions on religious behavior."[188]

In contrast, the narrow view can be exemplified in *City of Ontario v. Quon*.[189] The Supreme Court held that an audit of a police officer's city-issued pager was not a Fourth Amendment violation.[190] Justice Kennedy's opinion reinforced a narrow decision that explained there was a valid, work-related reason behind the audit of the pager.[191] In addition, the Justice "explicitly rejected the notion of devising a more general rule to govern searches of the electronic communications of government employees."[192]

1. Justice Alito's Broad Approach

Although on the federal level, the Supreme Court has vacillated between both the broad and narrow view concerning ministerial exceptions, as exemplified in both *Hosana-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* and *Our Lady of Guadalupe School v. Morissey-Berru*, it appears the former won out in a recent 2020 case which ultimately bolstered the rights of religious schools and institutions to fire employees—free from government intrusion or discrimination suits.[193]

In *Hosana-Tabor*, the EEOC brought a suit on behalf of Cheryl Perich.[194] Perich was titled a "called teacher" and alleged the school fired her in retaliation for threatening to file an Americans with Disabilities Act ("ADA") lawsuit.[195] Summary judgment was granted to the school, and the EEOC appealed.[196] The Sixth Circuit vacated and remanded (as the court decided Perich did not qualify as a minister) and the Supreme Court granted certiorari.[197]

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188 *Id.*

189 *Id.*

190 *Id.*

191 City of Ontario v. Quon, 560 U.S. 746, 760–61 (2010).

192 Fox & Vanberg, *supra* note 182, at 356.

193 *See* Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049, 2068 (2020); *see also* Melissa Legault, *U.S. Supreme Court Adopts Broad Interpretation of the "Ministerial Exception," Protecting Religious Schools Against Employment Discrimination Claims (US)*, SQUIRE PATTON BOGGS (July 8, 2020), https://www.employmentlawworldview.com/u-s-supreme-court-adopts-broad-interpretation-of-the-ministerial-exception-protecting-religious-schools-against-employment-discrimination-claims-us/.

194 Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 179–80 (2012).

195 *Id.* at 178, 180.

196 *Id.* at 180–81.

197 *Id.* at 181.

The Hosana-Tabor Church and School is a Lutheran Church institution.[198] The school in which Perich was employed had two distinctions of teachers—"called" or "lay."[199] The difference between the two types is that called teachers were identified as being called to their vocation by God.[200] Such teachers must complete certain academic requirements, including a theology course.[201] Once called, the teacher receives the formal title of "Minister of Religion, Commissioned."[202] On the other hand, layteachers do not receive such title or formal training.[203]

Perich completed her training as a called teacher and received the formal title of Minister of Religion, Commissioned.[204] After substantial health issues causing prolonged time on disability leave, Perich attempted to return back to work.[205] The school had informed her that they had already contracted a lay teacher to fill in for Perich for the remainder of the school year.[206] The disagreement between the church and Perich led the congregation to terminate Perich and strip her of her title.[207] Perich filed a charge with the EEOC, and the church invoked the ministerial exception, claiming that the suit was barred by the First Amendment because the claims involved employment between a religious institution and its minister.[208]

Ultimately, the Supreme Court majority held that the church was correct in its positioning and that Perich was a minister within the meaning of the ministerial exception.[209] In coming to their decision, the Court clarified that they were not adapting a rigid formula—despite analyzing Perich's position using four clear factors.[210] Since the Court reasoned that Perich was a "minister within the meaning of the ministerial exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer."[211]

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198 *Id.* at 177.

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.* at 178.

205 *Id.*

206 *Id.*

207 *Id.* at 179.

208 *Id.* at 179–80.

209 *Id.* at 194.

210 *Id.* at 190–92.

211 *Id.* at 194.

Consequently, the four factors the Supreme Court used to analyze whether Perich's role fits within the meaning of minister function like a narrow approach of interpretating the ministerial exception. The factors, as applied in this case, include 1) Hosana-Tabor held Perich to be a minister; 2) Perich had religious training after being commissioned a minister; 3) Perich held herself out to be a minister; and 4) Perich's job duties reflected a role in conveying the church's message.[212]

In the concurring opinion, Justice Thomas agreed with the majority's end result that Perich was a minister, ultimately siding with the church.[213] But his means of getting to such a result are quite concerning. Justice Thomas notes that the evidence signals that Hosana-Tabor sincerely considered Perich to be a minister.[214] Hence, the church's *belief alone* was sufficient for Justice Thomas to conclude that her suit was properly barred by the ministerial exception.[215]

Ultimately, Justice Thomas' concurrence is a problematic gateway to the broad approach undertaken in the later decision of *Our Lady*. Justice Thomas signaled that in ministerial exception cases—a religious institution's *belief alone* will suffice.[216] The ramifications mean that the Court may be open for a broader approach that is deferential to a religious institution's interpretation, thereby opening the gates to widespread, unchecked discrimination by these institutions.

Petitioner Ms. Morrissey-Berru stated that her employer demoted her and replaced her with a younger teacher in violation of the Age Discrimination in Employment Act of 1967.[217] Second petitioner, Ms. Biel, alleged her employer fired her because she asked for a leave of absence to obtain breast cancer treatment.[218] Both schools invoked the ministerial exception and won on summary judgment at the district court level.[219] Before reaching the Supreme Court, the Ninth Circuit reversed based on "reasoning that the teachers did not have the credentials, religious training, or ministerial background to qualify under the ministerial exception."[220]

In the *Our Lady* decision, the Court relied heavily on judicial precedent set in the 2012 decision of *Hosanna-Tabor*.[221] Ultimately, the Supreme Court believed the

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212 *Id.* at 191–92.

213 *Id.* at 196 (Thomas, J., concurring).

214 *Id.* at 198.

215 *Id.*

216 *Id.*

217 Legault, *supra* note 193.

218 *Id.*

219 *Id.*

220 *Id.*

221 *Id.*; *see also Hosanna-Tabor Evangelical Lutheran Church*, 565 U.S. 171.

Hosanna-Tabor framework was never intended to create a rigid test.[222] Rather, the Court adopted a broader view, instructing that courts should "take all relevant circumstances into account to determine whether each particular position implicated the fundamental purpose of the exception."[223] The *Our Lady* Court followed such instruction by pointing out several relevant circumstances:

> Both teachers' employment agreements and faculty handbooks specified that they were expected to carry out the school's mission of developing and promoting a Catholic faith community and imposed commitments regarding religious instruction, worship, and personal modeling of the faith and explained that their performance would be reviewed on those bases. Additionally, the teachers taught religion in the classroom and worshipped and prayed with the students. The Court was not concerned with the fact that the teachers' title did not include the term "minister." Given these circumstances, the Court held that Ms. Biel and Ms. Morrisey-Berru fell squarely within the ministerial exception, and therefore, their discrimination claims were barred.[224]

The potential ramifications of broad interpretation of the ministerial exception are dire. Due to the *Our Lady* decision being so expansive and deferential in nature, "religious institutions of varying types will now have a strong argument for protection against discrimination claims brought by their employees."[225] Another identifiable concern is that it will encourage religious schools and institutions to interpret and apply the ministerial exception more broadly and push the limits of the exception well beyond its current reach.[226]

It is quite evident that the Our Lady decision favors the broad approach. The Court emphasized that the Religious Clauses preserve the rights of a church to make decisions without government intrusion.[227] Further, this notion was supported in the *Hosana-Tabor* holding, where the majority points to the constitutional foundation in church autonomy.[228]

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[222] James R. Hays & Jamie Moelis, *U.S. Supreme Court Backs Broad Interpretation Of The "Ministerial Exception," Shielding Religious Employers From Employment Discrimination Claims*, MONDAQ (July 15, 2020), https://www.mondaq.com/unitedstates/employee-rights-labour-relations/965502/us-supreme-court-backs-broad-interpretation-of-the-ministerial-exception-shielding-religious-employers-from-employment-discrimination-claims-.

[223] Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049, 2067 (2020); Hays & Moelis, *supra* note 222.

[224] Hays & Moelis, *supra* note 222.

[225] *Id.*

[226] Mort, *supra* note 171.

[227] *Morrissey-Berru*, 140 S. Ct. at 2060 (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 186 (2012)).

[228] *Id.* at 2061.

2. Justice Sotomayor's Narrow Approach

Justice Sotomayor's dissenting opinion in *Our Lady* calls out the majority for its problematic shift toward deference to the ministerial exception, stating the "court skews the facts, ignores the applicable standard of review, and collapses *Hosana-Tabor*'s careful analysis into a single consideration: whether a church thinks its employees are play[ing] an important religious role."[229] The ramifications of giving the church broad deference would mean religious institutions could freely discriminate based on race, sex, pregnancy, age, disability, et cetera.[230]

Justice Sotomayor accurately calls *Hosana-Tabor*'s analysis of the ministerial exception well-rounded.[231] Its four-factor framework used discernable markers to differentiate individuals who embody the church's beliefs or minister to the faithful from those who communicate religious tenets.[232] This narrow framework, in turn, distinguished teachers at a religious school who relayed tenets of the faith from teachers who actually were trained to minister. The broad framework of *Our Lady* does the exact opposite. Without the discernable markers of the *Hosana-Tabor* framework, anyone in the Archdiocese of Los Angeles could be rendered a "minister," like the average Catholic parishioner or parent, simply because they relay religious messages.[233]

Justice Sotomayor's narrow approach of using "discernable markers" in *Our Lady* is a sound means to ensure that religious schools are implementing grooming policies that are not racially discriminatory in nature. Unlike Justice Thomas' concurrence in *Hosana-Tabor*, the church's "belief alone" that their grooming policy reflects a genuine religious principle would not be enough in Justice Sotomayor's narrow approach.[234] Moreover, a deferential stance on state and municipal CROWN Act laws means that any policy could stand, so long as the church believed it connects to practicing its faith.

3. The Genuine Religious Principle Test

To ensure that the CROWN Act's religious exception is effective in preventing race-based hair discrimination, it is prudent that we apply Justice Sotomayor's narrow approach. Per Justice Sotomayor's suggestion, courts should use discernable markers to determine whether the school's grooming policy is tied to genuine religious principles of its faith. Such "markers" that could be considered are 1) is it taken from religious text?; 2) is it meant to reflect the faith's historical approach to gendered grooming practices?; and 3) is it targeting hairstyles often worn for certain hair textures? These three factors could aid in preventing baseless discrimination of protective hairstyles often worn by black and brown students.

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229 *Id.* at 2072 (Sotomayor, J., dissenting).

230 *Id.*

231 *Id.* at 2075.

232 *Id.*

233 *Id.* at 2076.

234 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 198 (2012).

D. Case Studies Utilizing the Genuine Religious Principle Test

Using Justice Sotomayor's narrow approach, we can analyze religious schools' grooming policies utilizing the discernable markers—or the three factors—to determine whether it reflects a genuine religious principle.

As previously discussed, there were varying degrees of hair observances that the three Abrahamic religions followed.[235] Take Bible at Cornerstone University as a chief example. Back in the 1970s, when the institution was called Grand Rapids Bible College, male students were prohibited from having hair grow over their ears or collar.[236] Male students were also forbidden from sporting facial hair.[237]

The grooming policy at Grand Rapids Bible College is an acceptable policy that should survive the narrow interpretation of genuine religious principle. First, it is tied to religious text[238] and is not targeting particular protective hairstyles. An Associate Professor of the college explained:

> It was all meant to convey students were "set apart" from worldly temptations. . . Cornerstone's roots is in Baptist fundamentalism, and it associated long hair with the hippy movement and rock and roll bands . . . . In the eyes of some people, those were questionable lifestyle issues. The emphasis was we want to be Christian and not like the world.[239]

The Professor's explanation behind the male student grooming policy is not frivolous—as opposed to hiding behind negative labels of natural hairstyles like the Catholic schools in Queens.[240] Rather, the college's policy was rooted in Baptist fundamentalism, where short hair equates to resisting worldly temptations.[241]

Another example of grooming policies and dress codes rising to the narrow interpretation of genuine religious principle is exemplified by the IDA Crown Jewish Academy.[242] The school has a rather strict dress code which requires that students wear a *tzitzit* and *kippah* at all times.[243] Additionally, hair must be neat, of appropriate

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235 *See supra* Part III.A.

236 Kopenkoskey, *supra* note 132.

237 *Id.*

238 *Matthew* 6:20.

239 Kopenkoskey, *supra* note 132.

240 Salvadore, *supra* note 7.

241 Kopenkoskey, *supra* note 132.

242 *Dress Code Policy*, IDA CROWN JEWISH ACADEM., https://www.icja.org/student-life/student-expectations/dress-code-policy/ (last visited Jun. 3, 2024).

243 *Id.*

length, and in consonance with *halacha*.[244] *Halacha* requires that boys' sideburns extend below the upper juncture of the ear to the head.[245] In this instance, IDA Crown Jewish Academy's dress code and grooming policy adequately reflect genuine religious principles of the Jewish faith. It is not frivolous in that it is not targeting any type of hair texture. Rather, its dress code and grooming policy stems from Jewish law, meaning that it should survive any narrow interpretation brought before the courts.[246]

Finally, it would be prudent to display possible dress codes and grooming policies from a religious school that may not rise to the level of following genuine religious principle. Shalhevet High School, a co-educational Jewish High School in Los Angeles, revealed that for the 2021–2022 school year, students cannot have unnaturally colored hair, nor can its male students display piercings of any kind.[247]

First, in regard to Shalhavet's dress code, is the matter of the unnaturally colored hair. The handbook for the 2021–2022 school year stated that "[w]hile we allow for flexibility and expression in hairstyle, length, and color, it must not become a distraction . . . [d]yed hair can only be of a shade that can be considered a natural color. All of this is to be determined at the discretion of the administration."[248] Interestingly, Shalhavet is targeting hairstyles and hair colors that may be seen as a distraction, but there appears to be no religious merit behind this policy—much like the Catholic grooming policies that have labeled natural hairstyles as "attention-seeking" and "distracting."[249] Although this policy could be banned by the school, it would not reasonably be justified as following religious principles.

Second is Shalhavet's dress code, which prohibits male students from displaying ear piercings. Judaic Studies teacher Rabbi Abraham Lieberman expressed the *halachic* issue with male students displaying piercings: that they could contradict the Jewish law of not mutilating one's body.[250] The Rabbi further explained that gendered prohibition of piercings is related to societal understandings to the *ancient* world.[251]

The confusion regarding the school's dress code and grooming policy was met with valid arguments from students. In regard to Rabbi Lieberman's perception on piercings and male students, one user commented:

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[244] *Id.*

[245] *Id.*; *see also* Menachem Posner, *What Is Halakhah (Halachah)? Jewish Law*, CHABAD.ORG, https://www.chabad.org/library/article_cdo/aid/4165687/jewish/What-Is-Halakhah-Halachah-Jewish-Law.htm (last visited Jun. 3, 2024) ("[Halacha] refers to Jewish law. Per its literal translation, 'the way,' *halachah* guides the day-to-day life of a Jew.").

[246] Posner, *supra* note 245; IDA CROWN JEWISH ACADEM., *supra* note 242.

[247] Tali Liebenthal, *Students Respond to New Policies on Appearance*, THE BOILING POINT (Jan. 25, 2022), https://shalhevetboilingpoint.com/top-stories/2022/01/25/students-respond-to-new-policies-on-appearance/.

[248] *Id.*

[249] Salvadore, *supra* note 7.

[250] Liebenthal, *supra* note 247.

[251] *Id.*

> If the halacha [says] that a Jew may not mutilate their body is as important as it is, why are girls allowed to wear earrings when boys are not? What is the deciding factor to separates how girls and boys listen to *halacha*? I understand that there are many laws regarding only women or only men – for example covering your hair or wearing *tzizit*, but how come the administration chose to take this law that applies to both women and men and apply it only to men?[252]

The answer to whether these Shalhevet grooming policies rise to the level of adhering to genuine religious principles is not clearcut. Rabbi Lieberman linked piercings to the ancient world, but not the Jewish faith. However, if a religious school can point to a true doctrine of their faith that ties to their policies, the courts should allow it to stand.

Head of School Rabbi David Block remarks that there are religious principles tied to their stance on male students displaying piercings.[253] Interestingly, Rabbi David Block explained that appearance is an opportunity to express Jewish values, including modesty and conforming to Orthodox Jewish practice.[254] The Head of School further opined that "[t]he newly prohibited kinds of appearance . . . were banned because they were a 'distraction.' . . . I don't mean a distraction as in people can't learn otherwise . . . but in the sense that it moves from the element of self-expression to something that is, you know, 'look at me.'"[255] Ultimately, to Rabbi David Block, "[a]ttracting attention is not *tzanua*," which is the Hebrew word for modesty.[256]

IV. CONCLUSION

The purpose of state and municipal versions of the CROWN Act is to prevent race-based hair discrimination. Nevertheless, these laws contain a troubling exception which exempts religious schools. The ramifications of these schools being allowed to discriminate against black students for their textured hair and hairstyles is dire. Black students may be targeted via suspensions and expulsions, which subjects them to the school-to-prison pipeline and impacts their educational opportunities.

For CROWN Act laws to be effective and truly serve their purpose, the exception must be effectively erased. However, amending these laws would be an arduous process. A more realistic way to effect change is to approach this by utilizing the "Genuine Religious Principle Test." Courts should interpret the exception language narrowly, meaning grooming policies must reflect genuine religious principle. This can be done by examining pertinent factors, including whether the school's grooming policy stems from religious text. Doing so will help restore balance to preventing

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252 Abby Krause, Comment to *Students Respond to New Policies on Appearance*, THE BOILING POINT (Jan. 25, 2022, 1:16 PM), https://shalhevetboilingpoint.com/top-stories/2022/01/25/students-respond-to-new-policies-on-appearance/.

253 Liebenthal, *supra* note 247.

254 *Id.*

255 *Id.*

256 *Id.*

wanton and unnecessary race-based hair discrimination, while also allowing religious schools to implement grooming policies that reflect authentic tenets of their faith.